

ESMA Consultation Paper
**Guidelines on certain aspects of the MiFID
compliance function requirements**
Comments by AMAFI

1. **Association française des marchés financiers (AMAFI)** has more than 120 members representing over 10,000 professionals who operate in the cash and derivatives markets for equities, fixed-income products and commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions.

2. The Association welcomes the opportunity to comment on the Consultation paper on “*Guidelines on certain aspects of the MiFID compliance function requirements*” (hereafter referred to as the CP) issued by the European Securities and Market Authority. Before answering the questions of the CP (B.) and proposing some amendments to the guidelines, some more general comments are set out (A.). Please note that the proposed amendments are evidenced as follows: additions are in bold underlined and suppressions are crossed out in bold.

A. General Comments

- **AMAFI welcomes the publication of ESMA’s guidelines on the compliance function**

3. The compliance function plays a critical role in an environment where regulation is evolving and expanding significantly to respond to the shortcomings unearthed by the financial crisis of 2008. The role of compliance officers in investment firms is a matter of attention for AMAFI: it regularly looks into specific issues related to the function (positioning within and outside the firm, remuneration, training, outsourcing, advisory and control roles, etc.), especially through its Compliance Committee composed of 25 members, each of them a designated compliance officer in its member firm. Therefore, AMAFI supports wholeheartedly any initiative that helps strengthening the function and clarifying its role and positioning within investment firms.

- **The primary responsibility for complying with laws and regulations rests with senior management of the firm**

4. The role of the compliance function within the firm is undoubtedly one of monitoring, assessing and advising on compliance with applicable laws and regulations. However, this role is not carried out autonomously from senior management, even though it benefits from a certain degree of independence. Senior management and, where appropriate the supervisory function, have primary responsibility in

ensuring compliance of the firm with laws and regulations¹. In several paragraphs of the guidelines this hierarchy of responsibility and a distinction between autonomy and independence should be made clearer.

This principle needs to be introduced as a reminder in the guidelines on the responsibilities of the compliance function, for e.g. in paragraph 8:

8. Senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the firm complies with its obligations. To this end, they establish and maintain a permanent and effective compliance function with appropriate resources. The responsibilities of the compliance function are set out in Article 6(2) and 9(2) of the MiFID Implementing Directive. They include requirements for monitoring and assessment of the level of the compliance risk the investment firm faces, reporting on material compliance matters, and advising and assisting investment firm staff. This section III sets out guidelines for the effective fulfillment of these responsibilities.

- **The advisory role of the compliance function is key**

5. The guidelines put a particular emphasis on the compliance function's monitoring and reporting obligations, while limiting its advisory role to paragraphs 26 to 33. Yet this advisory role is of particular importance (i.e. compliance is not uniquely a "control function" as referred to several times in the CP). The guidelines should also expand on this advisory role, which is absolutely key to prevent any regulatory breach, ensure clients' interests are properly considered and create staff's adherence to the compliance principles. If compliance was uniquely a control function, it is likely that dialogue with the business would be more difficult and that the function's capacity to reach its objectives would be reduced.

This advisory role is not only important in terms of training (one could consider by the way that training is not part of the advisory role and instead constitutes a third aspect of the function, which is the prevention of regulatory risk), it is also critical in complex or unusual situations requiring knowledge of the regulation but also judgment as to how it should apply to particular circumstances.

¹ "Member States shall require investment firms, when allocating functions internally, to ensure that senior management, and, where appropriate, the supervisory function, are responsible for ensuring that the firm complies with its obligations under Directive 2004/39/EC" (*Dir. 2006/73/EC, art. 9 § 1*).

B. Questions

III. I. 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.

6. Yes, we agree.

III. II. 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.

7. Paragraph 13 deals with the linkage between compliance departments within a group. It is stated that the compliance function within each investment firm should take into account the group it belongs to but that it should ensure that the investment firm remains responsible for monitoring its own compliance risk.

8. First, AMAFI would like to stress that, on a formal basis, it is not the compliance function of the entity that should ensure that the investment firm remains responsible for monitoring its own compliance risk, but rather senior management of that entity (see above our general comment in § 4).

9. Besides, on the content of the guideline itself, it seems to us that it is actually aiming at situations where one entity relies on another entity of its group to perform some of its compliance monitoring activities. In this respect, it is not entirely clear how it interacts with section IV. VI. of the CP on outsourcing.

We understand that this statement allows for the delegation of compliance activity and mutualisation of compliance resources (human and IT) within a group, as long as the delegating entity remains responsible for the delegated activity. Such set up is indeed widely used within large groups for efficiency purpose, as it enables them to create hubs of compliance expertise that can be used widely within the group and to ensure consistency in an array of compliance matters (such is often the case for example with the monitoring of conflicts of interest, insider lists, etc.). The statement that the delegating entity should remain responsible for “*monitoring*” its own compliance risk is therefore in our view not adequate. The entity’s responsibility for compliance should indeed remain whole, but the means to achieve it should be at its discretion, i.e. via direct monitoring of the risk or via the monitoring of the delegated tasks (for e.g. an exchange of information/KPIs between the delegating entity and the delegated entity is a way to remain in charge rather than an actual monitoring) (on this matter, see also our comment § 24).

10. AMAFI therefore suggests amending paragraph 13 as follows:

13. Where an investment firm is part of a group (national or international), responsibility for the compliance function rests with each investment firm in that group. While the compliance function within each investment firm should take the group of which it is a part into account - for example, by working closely with or even delegating tasks to audit, legal, regulatory and compliance staff in other parts of the group – it should nevertheless ensure that the investment firm (as distinct from the group) remains fully responsible for ~~monitoring its own~~ compliance risk with its own obligations.

11. Paragraph 18 gives to the compliance function the role to oversee the operation of the complaints process. However, MiFID implementing directive states that this role is the one of the investment firm and not of a specific function within it² (*see also above our general comment in § 4*). The role of the compliance function in this matter is to verify that such a process exists and works efficiently, to assist when needed, not to oversee its operation itself.

As a consequence, AMAFI suggests amending paragraph 18 as follows:

18. While the compliance function should not ~~to~~ have a role in determining the outcome of complaints, it should ~~have a role in overseeing~~ monitor the compliance of the firm's complaints' process with its obligations and provide advice and assistance when needed. ~~the operation of the complaints process~~. In this regard, investment firms should grant the compliance function access to customer complaints received by the firm, and the complaints process should ensure that the compliance function can access any complaint.

III.III. 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.

12. AMAFI has no specific comment.

III. IV. Advisory obligations of the compliance function

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

13. Paragraph 26 states that the compliance function should support other units in performing “any training”. However, the compliance function has a valuable input only in compliance related matters. For example, for an IT training not related to compliance issues, the compliance function would not be useful.

² “Member States shall require investment firms to establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints received from retail clients or potential retail clients, and to keep a record of each complaint and the measures taken for its resolution” (*Dir. 2006/73/CE, art. 10*).

As a consequence, AMAFI considers that paragraph 26 should be clarified in the following way:

26. The investment firm needs to ensure that its staff are adequately trained. For compliance-related matters this, the compliance function should arrange training and/or other support for staff. Where training on compliance-related matters is performed by other units, the compliance function should support these units in performing any this training. Such Ttraining and/or other support should focus particularly, but not exclusively, on:

- (a) the internal policies and procedures of the investment firm and its organisational structure; and
- (b) MiFID, the relevant national laws, the applicable standards and guidelines set out by ESMA and competent authorities, and other supervisory and regulatory requirements that may be relevant, as well as any changes to these.

14. In addition, one should stress that the compliance function has a key role to play in the approval process of new business lines and financial products. Compliance's opinion should be sought on these matters. The compliance function does not hold the final decision but only senior management should be in a position to overturn its opinion.

As a consequence, AMAFI considers that paragraph 32 should be amended as follows:

32. Furthermore, the compliance function should be involved in all significant modifications of the organisation of the investment firm in the area of investment services, activities and ancillary services. This includes the decision-making process when new business lines or new financial products are being approved. In this context, the opinion of the compliance function should be sought given the right to in the approval process for all financial instruments to be taken up in the distribution process new activities and products. The compliance function's opinion should be taken into consideration by senior management to found its decision. More generally, senior management should therefore encourage business units to consult with the compliance function regarding their operations besides significant modifications in activities,

IV. I. 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.

15. AMAFI supports the requirement to allocate a proper budget to the function but finds that documenting in writing significant cuts is very administrative while not allowing for a proper exercise of governance. Compliance being a responsibility for the firm, its budget should be presented to the firm's board for comment on an annual basis irrespective of it being reduced or not. The board should have a view on whether or not it is proportionate to the level of compliance risk the firm is exposed to. AMAFI suggests amending paragraph 37 as follows :

37. Adequate resources also include the allocation of an appropriate budget for the compliance function. The compliance officer should be consulted before the budget is determined. All decisions for significant cuts in the budget should be documented in writing and contain detailed explanations. The budget shall be consistent with the level of compliance risk the firm is exposed to and shall be presented by senior management to the board on an annual basis.

16. Throughout the CP, the following terms are used: “*compliance staff*”, “*compliance officer*” “*designated compliance officer*” and “*nominated compliance officer*”, of which the latter two are not defined in section II of the draft guidelines. We understand though that these are identical to “*compliance officer*”, which is defined according to Art. 6.3 b) of the MiFID implementing Directive. We therefore suggest replacing “*designated compliance officer*” and “*nominated compliance officer*” by “*compliance officer*” in paragraphs 40 and 65.

40. The necessary expertise of all compliance staff requires knowledge of MiFID and the respective national laws as well as the applicable standards and guidelines set out by ESMA and competent authorities on these provisions, as far as these are relevant for the provision of their tasks. A higher level of expertise is necessary for the ~~designated~~ compliance officer.

65. Some competent authorities license or approve the ~~nominated~~ compliance officer following an assessment of the qualifications of the compliance officer. This assessment may include an analysis of the compliance officer’s curriculum vitae, as well as an interview with the designated person. This sort of licensing process may help to strengthen the position of the compliance function within the investment firm and in relation to third parties.

IV. II. 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.

17. AMAFI has no comment on this question (except for the one stated above in § 0), except that this guideline exemplifies the comment made in § 4 that responsibility for compliance lies with the investment firm and its senior management.

IV. III. Independence of the compliance function

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

18. Questions 7 and 8 deal with the independence of the compliance function. Although the compliance function has to be independent, one should note that :

- Final decisions involving compliance matters belong to the investment firm, hence senior management, especially in case of disagreement with the business involving escalation. Senior management may thus be involved with operational matters relating to the compliance function (i.e. “*day-to-day activities*”). AMAFI therefore suggests qualifying the drafting in this respect.
- The compliance function needs to work closely with the business and senior management on an ongoing basis to be legitimate and effective. It is therefore not immune to any other influence of the business. This permanent dialogue is necessary for the compliance function to comply with its obligations, in particular to “*advise and assist the relevant persons responsible for carrying out investment services and activities to comply with the firm's obligations under MiFID³*” and, as stated in paragraph 30 of the CP, to “*also provide assistance to staff from the operative units in their day-to-day business and be available to answer questions arising out of daily business activity*”. AMAFI is therefore concerned that the wording “*other business units may not (...) otherwise influence compliance staff and their activities*” (AMAFI underlines) goes too far. Compliance staff should make decisions independently, but these decisions cannot be made without considering the information provided by the business: the influence of the business is therefore inherent to the nature of the compliance staff’s job. AMAFI suggest amending the wording of the CP in this respect.

19. Besides, the general principle that the tasks performed by the compliance function “*should be carried out independently from senior management and other units of the investment firm*” is irrefutable. Nevertheless, it should be somewhat qualified by the proportionality principle that is reminded in the section IV.IV of the CP, as this general principle may be difficult to comply with for smaller firms that do not have a separate headcount dedicated to compliance. As a reminder, Art.6.3 of MiFID implementing Directive states that the obligation for compliance staff not to be involved in the performance of services or activities they monitor does not apply for proportionality matters if certain conditions are complied with⁴.

20. The CP states that only senior management or the supervisory function should take the decision to appoint or replace the compliance officer. AMAFI believes that this is indeed adequate and natural since the responsibility for the compliance function is the one of the investment firm. However, it is also important that the decision to replace the compliance officer may not be made without proper consultation within the firm. A policy should be in place within the firm to ensure that key stakeholders within it are identified and their opinion considered by senior management or the supervisory function for them to make an informed decision when the dismissal of the compliance officer is at stake.

21. As a result of these comments, AMAFI suggests to amend paragraph 45 as follows:

³ Dir. 2006/73/EC, art. 6.

⁴ “*However, an investment firm shall not be required to comply with point (c) or point (d) if it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of investment services and activities, the requirement under that point is not proportionate and that its compliance function continues to be effective.*” (Directive 2006/73/EC, Art. 6.3, last paragraph).

“(c) the relevant persons involved in the compliance function must not be involved in the performance of services or activities they monitor” (Directive 2006/73/EC, Art. 6.3, c)

45. While senior management is responsible for establishing an appropriate compliance organisation and for monitoring the effectiveness of the organisation that has been implemented, the tasks 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, except when the investment firm falls under the exemption mentioned in section IV. In particular, the investment firm's organisation should ensure that other business units may not issue instructions or ~~otherwise~~ unduly 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 except for the decisions that fall within senior management's responsibility. 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 after consulting internally with persons formally identified as important stakeholders for the compliance function.

IV. IV. Exemptions and IV. V. Combining the compliance function with other functions

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

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

22. For consistency purpose, paragraph 50 that recommends that the compliance function should not be combined with the legal unit or be subordinated to internal control functions should be shifted from section IV.IV on exemptions to section IV.V. "*Combining the compliance function with other functions*". For smaller firms making use of the exemption and not allocating a full headcount to the compliance function, the matter of combining it with legal or control functions is not the issue since the independence of the function is infringed upon anyway. As a reminder, MiFID implementing Directive states that, for the purpose of proportionality, the requirement that "*the relevant persons involved in the compliance function must not be involved in the performance of services or activities they monitor*" does not apply under certain conditions (*Directive 2006/73/EC, Art. 6.3, last paragraph*).

23. In addition, one should note that the combination of the compliance function with the legal unit does not necessarily undermine the independence of the compliance function. This is so for example when the legal unit concerned is one that is in charge of regulatory watch or when the combination exists at higher reporting levels only.

As a consequence, AMAFI suggests amending the general guideline of section IV.V and inserting a new paragraph (§ 56):

With the exception of the internal audit function, the independence of the compliance function is not necessarily compromised by compliance staff overlapping with other control functions. The overlap of the compliance function with other control functions should be documented, including the reasons for any overlap. In certain circumstances, the independence of the compliance function could be undermined when it is subordinate to other internal control functions or combined with the legal unit.

56. With the exception of situations where the investment firm falls under the exemption mentioned in section IV, the compliance function should generally not be combined with the legal unit, or be subordinate to **other** internal control functions, where this could undermine the compliance function's independence.

IV. VI. 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.

24. Paragraph 60 deals with the outsourcing of the compliance function and the expectation that the investment firm should "*appoint*" a person to be responsible for supervising and monitoring the outsourced function. AMAFI agrees that supervision and monitoring of the outsourced function is important and that someone within the firm should be responsible for it. It is concerned however that this guideline could be interpreted as a requirement to have a dedicated headcount for this purpose. For proportionality reasons, this should not be the case.

25. The statement that centralised group compliance may lead to greater efficiency is one that AMAFI agrees upon but it is strange that this should be especially the case "*if the entities share the same premises*". So considering casts a shadow on centralised function in cross-border circumstances. Instead, shouldn't it be considered that this is especially the case when proper exchange of information and data reporting are in place?

V. I. 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 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?

26. AMAFI has no comment on these questions.

