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European Union

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New EBA Guidelines – Management Body and AML/CFT Compliance Officer

The fight against anti-money laundering and the financing of terrorism is important. The role of the AML/CFT or compliance officer has been more specified in guidelines from the European Banking Authority (EBA). The EBA Guidelines clarify the role of the board and the compliance function and give more detailed guidance on the role, tasks and performance of the compliance function in a financial institution. This article gives an overview of new requirements and the results of these guidelines in France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom.

1. Introduction

1.1. Background

Money laundering and the financing of terrorism is an important topic for financial institutions. Credit and financial institutions in all EU Member States must implement effective systems and controls against money laundering and the financing of terrorism (AML/CFT) to protect the EU financial sector from financial crime.

Over the past few years, the European Commission has asked various EU authorities for assistance in defining the role of the AML/CFT compliance officer. In 2017, the Commission asked the European Banking Authority (EBA) – for the first time – to develop guidance that clarifies the role of the AML/CFT compliance officer in credit and financial institutions. In 2019, the European Commission went on to ask the European Supervisory Authorities (ESA) to develop guidance on the role of the AML/CFT compliance officer. The ESA responded by pointing to existing guidelines on internal governance such as stating that these were sufficient in clarifying the role of the AML/CFT compliance officer. The guidelines included a description (in general terms) of the compliance function and the responsibilities of a compliance officer. In 2019,^[1] the European Commission in its Supra-National Risk Assessment, again requested more guidance, pointing to 4th Anti-Money Laundering Directive (2015/849) (AMLD4)^[2] requirements being unevenly implemented across different sectors and EU Member States – and not always effective.^[3]

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1. Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019SC0650> (accessed 7 Nov. 2023).
2. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849> (accessed 7 Nov. 2023) [hereinafter *AMLD4*].
3. Guidelines, Background and rationale, nr. 8.

In the meantime, the EBA published guidelines for banks and other financial institutions on different topics, such as internal governance,^[4] outsourcing arrangements^[5] and suitability requirements for management body members and key function holders.^[6]

A common understanding is necessary to strengthen the AML/CFT defences at the European level. The EBA's most recent guidelines – published in June 2022 – specify the role and responsibilities of the AML/CFT compliance officer and of the management body of credit or financial institutions.^[7] In this article, the authors will refer to these guidelines as the “2022 Guidelines”. The EBA developed these guidelines to ensure the common interpretation and appropriate implementation of the internal governance arrangements for AML/CFT throughout the European Union in line with the requirements of the [5th Anti-Money Laundering Directive \(2018/843\)](#) (AMLD5).^[8] The 2022 Guidelines apply to credit or financial institutions as defined in article 3(1) and 3(2) of AMLD5, and complement, but do not replace, the guidance issued by the ESA on wider governance arrangements and suitability.^[9]

Competent authorities must report on their compliance with the 2022 Guidelines within two months after the translated guidelines are placed on the EBA website. The EBA guidelines apply as from 1 December 2022.

1.2. Goals

The 2022 Guidelines aim to ensure the common interpretation and adequate implementation of AML/CFT internal governance measures throughout the European Union in line with the AMLD5 requirements. The aim is to ensure the integrity of the financial system, while creating a more uniform approach across EU Member States.

1.3. Rationale

The EBA has a mandate to lead, monitor and coordinate the EU financial sectors' fight against AML/CFT.^[10] The 2022 Guidelines give guidance on the role, tasks and responsibilities of the management body, the AML/CFT compliance officer, and related financial institutions, as described below.

1.3.1. Management body – role, tasks and responsibilities^[11]

The management body includes the management body in its management function, as well as the management body in its supervisory function. Most financial institutions have a management body in a supervisory function. If this is not the case, the 2022 Guidelines that refer to the management body in its supervisory function will generally apply to the management body in its management function.

One member of the management body is ultimately responsible for the implementation of the AML/CFT obligations. This is in addition to the responsibility of the management body as a whole (as set, for example, in the Dutch Civil Code^[12]). The task, role and responsibilities of this board member of the management body must also be specified.

1.3.2. AML compliance officer – role, tasks and responsibilities^[13]

An AML/CFT compliance officer must be appointed on the basis of proportionality criteria. In practice, if a financial institution does not meet those criteria, the AML/CFT compliance officer of that financial institution will also cover AML/CFT issues.

1.3.3. Financial institution as part of the group^[14]

In addition to local AML compliance officers forming part of the financial institution group, a group AML compliance officer may also be appointed and have specified tasks, roles and responsibilities.

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4. European Banking Authority, *EBA publishes its final Guidelines on internal governance* (2 July 2021), available at <https://www.eba.europa.eu/eba-publishes-its-final-guidelines-internal-governance> (accessed 7 Nov. 2023).
 5. European Banking Authority, *Final Report on EBA Guidelines on outsourcing arrangements* (25 Feb. 2019), available at <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2551996/38c80601-f5d7-4855-8ba3-702423665479/EBA%20revised%20Guidelines%20on%20outsourcing%20arrangements.pdf?retry=1> (accessed 7 Nov. 2023).
 6. European Banking Authority, *Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body*, available at <https://www.eba.europa.eu/regulation-and-policy/internal-governance/joint-esma-and-eba-guidelines-on-the-assessment-of-the-suitability-of-members-of-the-management-body> (accessed 7 Nov. 2023).
 7. European Banking Authority, *EBA publishes Guidelines on role and responsibilities of the AML/CFT compliance officer* (14 June 2022), available at <https://www.eba.europa.eu/eba-publishes-guidelines-role-and-responsibilities-amlcft-compliance-officer> (accessed 7 Nov. 2023) [hereinafter *2022 Guidelines*].
 8. Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0843> (accessed 7 Nov. 2023) [hereinafter *AMLD5*].
 9. Manuals and guidelines issued by ESA, available at <https://ec.europa.eu/eurostat/web/esa-2010/manuals-guidelines> (accessed 16 Nov. 2023).
 10. 2022 Guidelines, Background and rationale, nr. 10.
 11. Para. 4.1 *2022 Guidelines*.
 12. Art. 2:9 Dutch Civil Code.
 13. Para. 4.2 *2022 Guidelines*.
 14. Para. 4.3 *2022 Guidelines*.

2. Compliance Management

2.1. Management body in its management function and in its supervisory function

The management body is responsible for AML/CFT, and must appoint a board member responsible for AML/CFT. The 2022 Guidelines apply to all board structures, such as a sole management board, a one-tier management board, a management board and supervisory board (two-tier board) or any other structure. The 2022 Guidelines relating to the management body consist of three topics:

- (1) the role of the management body in its supervisory function;
- (2) the role of the management body in its management function; and
- (3) the role of the AML/CFT board member.

2.1.1. Management body

The management body has an overall and collective responsibility for AML/CFT. The management body is referred to as the management body in its management function^[15] and as the management body in its supervisory function.^[16] The supervisory function in the AML/CFT framework focuses on the responsibility of overseeing and monitoring the implementation of the internal governance and internal framework to ensure compliance with AML/CFT legislation. This is also reflected in the EBA guidelines on internal governance.^[17]

The management body has three responsibilities in its supervisory role:

- (1) to be informed, and oversee and monitor AML/CFT procedures and policies;
- (2) to ensure that the AML/CFT board member is suitable (has the necessary skills, knowledge, experience) to perform this function adequately; and
- (3) to have access to the latest AML/CFT-related information.

The policies, controls and procedures as referred to in AMLD4^[18] are further detailed in the 2022 Guidelines.^[19] The management body in its management role should implement the appropriate and effective organizational and operational structure, ensure implementation of AML/CFT policies and procedures, review the AML/CFT compliance officer's activity report and reporting to the national authority, and ensure compliance when outsourcing activities.

2.1.2. AML/CFT board member

Most provisions relating to the management board refer to the AML/CFT board member.^[20] There are two options. A credit or financial institution has a dedicated AML/CFT board member or, if there is no management body, a responsible senior manager.^[21] In practice, there will be an AML/CFT board member in place.

The management body must appoint an AML/CFT board member. This AML/CFT board member must have sufficient knowledge, skills and experience about ML/TF risks and the implementation of policies controls and procedures, with a good understanding of the business model of the credit or financial institution. AML/CFT is part of the business of the credit or financial institution.^[22] This means that the AML/CFT board member must have enough time and resources to perform this role adequately and effectively.

The AML/CFT board member is the link between the management body and the AML/CFT compliance officer. The AML/CFT board member is responsible for:

- ensuring that AML/CFT policies, procedures and controls are adequate and proportionate;
- assisting the management body with the staffing of the AML/CFT team;
- ensuring regular reporting to the management body;
- informing the management body of serious AML/CFT issues; and

15. Para. 4.1.1 2022 Guidelines.

16. Para. 4.1.2 2022 Guidelines.

17. European Banking Authority, *EBA publishes its final Guidelines on internal governance* (2 July 2021), available at <https://www.eba.europa.eu/eba-publishes-its-final-guidelines-internal-governance> (accessed 7 Nov. 2023).

18. Art. 8(3-4) AMLD4.

19. Para. 4.1.1.16 2022 Guidelines.

20. Paras. 4.1.3-4.1.5 2022 Guidelines.

21. See para. 4.1.4 2022 Guidelines.

22. Para. 4.1.3 2022 Guidelines.

- ensuring that the AML/CFT compliance officer has direct access to the necessary information and sufficient resources to adequately perform this function.

Please note the following important procedural requirement (emphasis added):

If the management body in its management function or senior management where applicable decide *not to follow* the recommendation of the AML/CFT compliance officer, they should *duly justify and record* their decision in light of the risks and concerns raised by the AML/CFT compliance officer. In the case of a *significant incident*, the AML/CFT compliance officer should have *direct access* to the management body in its supervisory function.^[23]

2.2. AML/CFT compliance officer

The role of the AML/CFT compliance officer is central to credit and financial institutions. AMLD4 requires the appointment of an AML/CFT compliance officer at the senior management level. The AML/CFT compliance officer must ensure that compliance and effectiveness of the internal AML/CFT measures are being observed, and report this to the management body.

Most provisions in the 2022 Guidelines relate to the AML/CFT compliance officer.

2.2.1. Requirement to appoint an AML/CFT compliance officer

The size and complexity of the credit or financial institution, together with its exposure to money laundering/terrorism financing, must be taken into account when deciding on the need for an AML/CFT compliance officer. National legislation may contain specific provisions on when an AML/CFT compliance officer is required. The AML/CFT compliance officer is part of the second line of defence. The first line is the business. The AML/CFT compliance officer is the contact person for the national financial intelligence unit.

An AML/CFT compliance officer is not required for a sole trader or an institution with a very limited number of employees. However, if no AML/CFT compliance officer has been appointed, this must be adequately documented, including the legal form and nature of the institution, the size of its operations, and the number of customers and employees.^[24]

If no AML/CFT compliance officer is required, the tasks as set out in the 2022 Guidelines must be performed by a member of the management body, the AML/CFT board member, or by outsourcing these tasks.^[25]

The suitability, skills and expertise of the AML/CFT compliance officer relates to integrity. The AML/CFT compliance officer must be able to perform the function effectively, independently and autonomously. This means that a sufficient mandate from the management body is required.

2.2.2. AML/CFT compliance officer role

The role and responsibilities of the AML/CFT compliance officer must be documented. The 2022 Guidelines contain detailed provisions on the documentation required for these responsibilities.^[26] These are divided into the development of a risk assessment framework, the development of policies and procedures, decision making on high-risk customers, compliance monitoring, reporting to the management body (an annual detailed activity report is required), suspicious-transactions reporting, and training and awareness.

The AM/CFTL compliance officer must have a direct line to various bodies or functions:

- the management body and the AML board member;
- the independent audit function;
- the risk management function or risk committee; and
- the head of risk management.

In addition to ESA guidelines on outsourcing, specific requirements apply when operational functions of the AML/CFT compliance officer are outsourced.^[27] Outsourcing must never result in the delegation of the management body's responsibilities.

2.3. AML/CFT compliance officer

It is important at the group level to ensure that there are reporting lines from the local AML/CFT compliance officers to the group AML/CFT compliance officer. When dealing with different EU Member States with varied local legislation, clarifying the mandate and position

23. Para. 4.1.5.23 2022 Guidelines.

24. See, for all required details, para. 4.2.1.33 2022 Guidelines.

25. Para. 4.2.1.34 2022 Guidelines.

26. Para. 4.2.4 2022 Guidelines.

27. Para. 4.2.6 2022 Guidelines.

of the group AML/CFT compliance officer is important. This will ensure that shortcomings in the AML/CFT framework that affect the group (or a part of the group) are effectively addressed.

2.3.1. Role of parent company

The parent company is responsible for organizing a group AML/CFT compliance officer (AML/CFT group compliance officer).^[28] EBA guidelines on money laundering/terrorism financing risk factors also apply.^[29] Information sharing is important. Adequate information exchange must be ensured between the business lines and the AML/CFT compliance function at the group level, and between the various heads of the internal control functions.

Each national AML/CFT-regulated institution must perform its own business-wide money laundering/terrorism financing risk assessment. Any remedial action must be performed at the subsidiary or branch level within the group.

2.3.2. Organization

Group-wide policies and procedures must be prepared in accordance with specific regulations that apply to AML/CFT-regulated credit or financial institutions.^[30] There are requirements for the parent company (for example, regarding coordination and evaluation) and for the AML/CFT group compliance officer. It is important that the AML/CFT group compliance officer cooperates with the national AML/CFT compliance officer to ensure monitoring within the group. The AML/CFT group compliance officer must also prepare an activity report, including statistics on risk exposure and suspicious activities, monitoring of risks, regulatory reviews (including internal and external audits) and information from subsidiaries and branches.

The AML/CFT compliance officer of a subsidiary or a branch should have a direct reporting line with the group AML/CFT compliance officer.

3. National Level

3.1. Introduction

In this section the authors provide an overview of the implementation of the 2022 Guidelines in France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom, since a lot of large financial institutions are located in these countries.

3.2. France

French supervisory authorities do not currently have specific guidelines on the role and responsibilities of compliance officers and managers, but specific guidelines on different topics have been issued:

- the French Prudential Supervision and Resolution Authority (ACPR)^[31] has issued thematic guidelines on AML/CFT for company groups headquartered in France, and on identification, identity verification and customer knowledge;
- both ACPR and TRACFIN^[32] have issued guidelines on reporting and providing information to TRACFIN;^[33] and
- the French Financial Markets Authority (AMF) has issued guidelines on the vigilance obligations regarding clients and their ultimate beneficial owners, on the notion of politically exposed persons, and regarding the obligations of reporting to TRACFIN.^[34]

Overall, the 2022 Guidelines mainly result in adjustments of the French systems, without calling into question the fundamental structure of the AML organization as provided for by the existing normative framework.

For instance, with respect to the governing body's commitment, the 2022 Guidelines do not substantially modify the obligations that already weigh on French entities insofar as the French Monetary and Financial Code already provides that the regulated entities must

28. Para. 4.3.2 2022 Guidelines.

29. European Banking Authority, Final Report Guidelines on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions ("The ML/TF Risk Factors Guidelines") under articles 17 and 18(4) of Directive (EU) 2015/849 (1 Mar. 2021), available at https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2021/963637/Final%20Report%20on%20Guidelines%20on%20revised%20ML%20TF%20Risk%20Factors.pdf (accessed 7 Nov. 2023).

30. Para. 4.3.3 2022 Guidelines.

31. See <https://acpr.banque-france.fr/en/page-sommaire/about-acpr> (accessed 9 Nov. 2023).

32. TRACFIN is an intelligence service under the authority of the Ministry of the Economy, Finance and Industrial and Digital Sovereignty. It contributes to the development of a healthy economy by combating clandestine financial circuits, money laundering and the financing of terrorism, see <https://www.economie.gouv.fr> (accessed 9 Nov. 2023).

33. *Joint guidelines of the Autorité de contrôle prudentiel et prudentiel et de résolution and Tracfin on reporting and information and information to Tracfin*, available at <https://acpr.banque-france.fr/sites/default/files/medias/documents/201512-lignes-directrices-acpr-tracfin-obligations-declaration.pdf> (accessed 23 Nov. 2023).

34. *AMF Guidelines On Due Diligence Concerning Customers And Their Beneficial Owners Their Beneficial Owners*, available at https://www.amf-france.org/sites/institutionnel/files/private/2021-01/doc-2019-16_vf2_Id-clients-et-beneficiaires-effectifs_1.pdf (accessed 23 Nov. 2023).

appoint an AML/CFT correspondent with the necessary authority to ensure the supervision and effective monitoring of the AML/CFT system.^[35] These persons must also have the appropriate experience, qualifications and seniority to perform their duties.

The 2022 Guidelines describe these criteria and minimum standards in more detail than as provided under French law.

The 2022 Guidelines also reaffirm the need for the compliance function to be independent, with the freedom to operate with sufficient authority. Here again, the EBA gives a concrete description of existing criteria that does not really exist in domestic law.

In addition, where the organization of AML/CFT functions in groups is concerned, France already has a legislative and regulatory framework provided by article L. 561(33) of the Monetary and Financial Code. The ACPR also issued specific guidelines for banking and insurance institutions in 2020.^[36] This organization and these procedures are implemented by the group's branches and subsidiaries because it is not the parent company's responsibility to take the place of the group's subsidiaries and branches in fulfilling the due diligence obligations to which they are subject, but only to ensure that the system is effectively implemented.

The obligation to appoint an AML/CFT group compliance officer to lead and coordinate this function within the group will allow for the internal and external consistency of the AML/CFT systems of various French groups. It will also lead to a more efficient incorporation of European provisions into the operational activity of the AML/CFT function.

Finally, regarding the AML/CFT functions, a cornerstone of the French AML/CFT landscape is that the persons mentioned in article L. 561(2) of the Monetary and Financial Code must ensure that the organization of the system for combating money laundering/terrorism financing is adapted to their size, to the nature of their activities and to identified risks. In that respect, the 2022 Guidelines are in line with the recommendations of the French Orientation Council^[37] on the fight against money laundering/terrorism financing (COLB) in the training of employees. This governmental entity recommends^[38] that the initial training of the members of the regulated professions be improved, giving them a minimum base of skills to participate effectively in the fight against money laundering.

3.3. Germany

While the German financial regulator *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin)^[39] has not fully endorsed all guidelines published by the EBA, BaFin has fully enforced the 2022 Guidelines.

In Germany, financial institutions are generally supervised by BaFin on AML/CFT matters. This includes credit institutions and financial institutions captured by the 2022 Guidelines, but also other financial institutions, such as insurers and asset management companies. BaFin has documented its interpretation of statutory AML/CFT requirements in a comprehensive interpretative guidance document (*Auslegungs- und Anwendungshinweise zum Geldwäschegesetz*)^[40] (AuA), which were last updated in October 2021 and available in English (*Interpretation and Application Guidance on the German Anti-Money Laundering Act*).^[41]

Irrespective of the endorsement of the 2022 Guidelines, BaFin has so far not updated the AuA since autumn 2021. The current AuA, however, already contains detailed guidance on organizational AML requirements, including on the role of the supervisory body, the management body, individual members of the management body and especially the member responsible for AML/CFT, as well as the AML compliance function and the AML compliance officer. There is thus a significant overlap between the AuA and the 2022 Guidelines and many requirements set out in the 2022 Guidelines have already been addressed in the AuA. However, in many respects, the 2022 Guidelines are more detailed than the AuA, so that credit and financial institutions are well advised to perform a gap analysis of their existing AML/CFT compliance arrangements.

For example, with respect to the supervisory body, paragraph 4(1)(1) of the 2022 Guidelines provide for the information of that body on the results of the risk analysis.^[42] Also, the supervisory body must perform an annual assessment of the efficacy of the AML/CFT compliance function. With respect to the AML/CFT compliance officer, the 2022 Guidelines, when compared to the AuA, provide additional guidance, among other things, on reporting requirements, the equipment of the AML/CFT compliance organization in terms of personnel and technology as well as training plans, and the assessment of the efficacy of training measures. In line with the EBA guidance^[43] on reporting at the entity level, the EBA guidance relating to reporting at the group level is also more detailed than the AuA. From a corporate governance perspective, it is interesting to note that the responsible member of the management body at the group level is regarded as responsible for the swift remediation of deficiencies at local entities.

35. Arts. R561-23 and R561-38-1 of the Monetary and Financial Code.

36. See https://www.bafin.de/EN/RechtRegelungen/Leitlinien_und_Q_and_A_der_ESAs/Leitlinien_und_Q_and_A_der_ESAs_node_en.html (accessed 11 Nov. 2023).

37. The coordinating body primarily responsible for carrying out the national anti-money laundering and terrorist financing risk analysis required by the FATF recommendations.

38. See *Action plan to combat money laundering and the financing of terrorism and proliferation*, available at <https://www.tresor.economie.gouv.fr/Institutionnel/Niveau2/Pages/58b72725-da59-4fc3-a355-40cea35befab/files/55cb8aa6-3490-46ae-b492-0732b8babc7e> (accessed 23 Nov. 2023).

39. See https://www.bafin.de/DE/Startseite/startseite_node.html;jsessionid=89A07BCF1634C96B78966DCA79771322.internet952, accessed 9. Nov. 2023.

40. See https://www.bafin.de/SharedDocs/Downloads/DE/Auslegungentscheidung/dl_ae_auas_gw_aenderungsfassung.html (accessed 23 Nov. 2023).

41. See https://www.bafin.de/SharedDocs/Downloads/EN/Auslegungentscheidung/dl_ae_auas_gw2021_en.html (accessed 23 Nov. 2023).

42. Para. 4.1.1.13.a 2022 Guidelines.

43. Para. 4.2.4 2022 Guidelines.

3.4. Italy

In November 2022, the Bank of Italy notified the EBA of its intention to comply with the 2022 Guidelines and to amend the Italian 2019 Provisions on AML organization, procedures and internal controls aimed at preventing the use of intermediaries for the purpose of money laundering/terrorism financing (“Provisions”), which already largely complied with the 2022 Guidelines.^[44]

The Bank of Italy amended the Provisions with its regulations dated 1 August 2023, which will come into effect on 14 November 2023. The amended Provisions mainly state that:

- (1) the supervised entities appoint the member of the management body responsible for AML/CFT (“Member”) in the occasion of the first appointment/renewal of their corporate bodies which takes place after 14 November 2023 or, in any case, by 30 June 2026. The Member must be a director of the entity – which, in this case, becomes an executive director – or, subject to certain conditions, the general manager (*direttore generale*);
- (2) in addition to the Member, a supervised group identifies, in turn, a “Member group” (i.e. a Member of the parent company in charge of supervising the group’s AML/CFT measures and coordinating AML matters at the group’s level) and an AML/CFT group compliance officer; and
- (3) the body with strategic supervision function (i.e. the board of directors or the equivalent body), the body with management function (i.e. the managing director), the AML/CFT function, and the AML/CFT compliance officer satisfy additional AML/CFT duties and responsibilities.

It is likely that the Bank of Italy issues frequently asked questions addressing the contents of the amended Provisions and the queries raised by the entities and banking associations after their publication in the next few months.

3.5. The Netherlands

The 2022 Guidelines apply to credit and financial institutions as defined in article 1a(2)-(3) of the Dutch AML/CFT Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*). The tasks and responsibilities of the management body are included in the risk management paragraph.^[45]

The management body, in its supervisory function, has to take two concrete actions in relation to the AML/CFT framework. At least once a year, the activity report of the AML/CFT compliance officer must be reviewed.^[46] In addition, the AML/CFT compliance function must be assessed. This includes assessing the functioning of the AML/CFT compliance officer and the AML/CFT compliance officer’s team, and the conclusions of internal and external audits.

In order to ensure the performance of the AML/CFT board member, it is advisable to prepare an appropriate profile, including references to knowledge, skills, expertise and understanding of the sector in which the credit or financial institution operates. Attention should be paid to access to information for the management body in its management function and for the management body in its supervisory function.

It is important to note that the management body in its supervisory function must be able to perform its AML/CFT functions effectively.^[47] This means that there must be direct access to the AML/CFT compliance officer’s documentation.

As part of its management role, the management body must, among other things, ensure compliance with outsourcing legislation. In the Netherlands, the outsourcing of transaction monitoring is not permitted.^[48] However, the Authority for the Financial Markets (AFM)^[49] has stated in its guideline^[50] that outsourcing of transaction monitoring within a group is permitted.^[51] The same is included in the present guideline^[52] of the Dutch Central Bank (DNB)^[53] but is not included in the revised draft policy of DNB.^[54]

The authors recommend that the management board rules will be updated on the basis of the 2022 Guidelines, particularly with regard to the profile of the management board and the AML/CFT board member, and the reporting lines.

44. Bank of Italy statement of 25 Nov. 2022.

45. Art. 1f-2d Dutch AML Act.

46. Para. 4.1.1.13.c 2022 Guidelines.

47. Para. 4.1.1.15 2022 Guidelines.

48. Art. 10 Dutch AML/CFT Act.

49. The national supervisor for investment institutions.

50. AFM Guidelines 19 Oct. 2020, p. 23, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjAij6emoeDAXU7hf0HHb9eDFkQFnoECBIQAQ&url=https%3A%2F%2Fwww.afm.nl%2F-%2Fprofmedia%2Ffiles%2Fwet-regelgeving%2Fbeleidsuitingen%2Fleidraden%2Fguidelines-wwft-sw.pdf%3Fila%3Den&usg=AOvVaw3aHT4fZUTGejfdYYzXUrh&opi=89978449> (accessed 16 Nov. 2023).

51. Art. 10c Dutch AML/CFT Act.

52. DNB Guidelines Dec. 2020 (*Leidraad Wwft en Sw*), note 66, p. 54, see <https://www.dnb.nl/media/chqnfjjh/leidraad-wwft-sw-eng.pdf> (accessed 16 Nov. 2023).

53. The national supervisor for credit institutions.

54. DNB published on 18 October 2023 a new policy document, available at <https://www.dnb.nl/en/publications/supervision-publications/consultation-2023/consultation-dnb-wwft-q-as-and-good-practices/> (accessed 16 Nov. 2023), see para. 2.2.

The AML/CFT board member must ensure that the AML/CFT compliance officer has direct access to all the information necessary to perform their duties.^[55] It is advisable to determine how this requirement will be met, and to include the relevant provisions in the AML/CFT compliance officer's profile document.

To enable the AML/CFT compliance officer to perform their role effectively, independently and autonomously, it is necessary to document reporting lines, provide access to relevant information, and evaluate performance in line with the mandate.^[56]

The AML/CFT compliance officer's responsibilities include the reporting of suspicious transactions. In the Netherlands, a lower threshold applies than provided by AMLD4. Based on Dutch laws unusual transactions must be reported to the Dutch Financial Intelligence Unit (FIU).^[57] According to the 2022 Guidelines, the AML/CFT compliance officer is also responsible for training while the Dutch AML/CFT Act provides for a general provision on training.^[58] The 2022 Guidelines require specific training programmes based on the characteristics of the individual credit or financial institution.

The AML/CFT group compliance officer's provisions are limited under Dutch law.^[59] Where applicable, the reporting lines must be clear, and specific national AML/CFT requirements must be taken into account. Under Dutch law, a credit or financial institution may share within the group (for example, a subsidiary of a bank may share information with its shareholder, being the bank) information on the reporting of an unusual transaction to the Dutch FIU, unless the Dutch FIU provides otherwise.^[60] This means that the Dutch FIU must be consulted before the reporting of an unusual transaction is communicated within the group. It is advisable to document the direct reporting line from the local AML/CFT compliance officer to the AML/CFT group compliance officer.

3.6. Portugal

In Portugal, credit and financial institutions are subject to the 2022 Guidelines pursuant to the general rule established by articles 13(4) and 16 of Law 83/2017, of 18 August (2017) (*Medidas de combate ao branqueamento de capitais e ao financiamento do terrorismo*) and pursuant to specific provisions of the Bank of Portugal's Regulation 1/2022 and 1/2023.

Credit and financial institutions must ensure compliance with the outsourcing legislation and define and ensure the applicability of their AML/CFT policies in such a way that the risks of AML/CFT are mitigated. To do so, an AML/CFT board member must be appointed.

The AML/CFT board member is responsible for, among other things:

- (1) supervising AML/CFT compliance office activity and reporting to the management board;
- (2) making any necessary or recommended amendment to the AML/CFT policy and ensuring that it is quickly and efficiently implemented; and
- (3) informing the board about the relevant contacts established with the Financial Information Unit (*Unidade de Informação Financeira*) of the Bank of Portugal, which includes the reporting of suspicious transactions.

To be appointed as an AML/CFT board member and duly perform tasks, credit and financial institutions must confirm the knowledge and expertise of potential candidates and allow direct and complete access to the AML/CFT compliance officer's documentation. Credit and financial institutions must also be prepared to resolve any potential conflicts of interest between the AML/CFT duties and the supervisory duties. As part of their role, the AML/CFT board member is responsible for ensuring that the AML/CFT policies are reviewed at least once a year. In addition to the AML/CFT board member, when outsourcing the AML/CFT compliance officer's operational functions, credit and financial institutions must also appoint a regulatory compliance officer. This officer must be appointed from among the institution's senior managers and is responsible for, among other things, ensuring that the AML/CFT policies are up to date, accurate and accessible by the institution's employees, and for coordinating the information to be reported to the Bank of Portugal.

Regulation 1/2023 of the Bank of Portugal has extended all these provisions to credit and financial institutions dealing with virtual assets.

3.7. Spain

The 2022 Guidelines apply to credit and financial institutions as defined in article 2(1)(a)-(i) and (z) of the Spanish AML/CFT Law (Law 10/2010 of 28 April 2010 on prevention of money laundering and terrorist financing). In this regard, the Spanish AML/CFT Law had already created certain compliance measures that partially cover the ones set out by the 2022 Guidelines.

In particular, article 26ter of the Spanish AML/CFT Law requires all obliged entities to appoint a representative to the Spanish FIU (*Representante ante el SEPBLAC*).^[61] Candidate names must be sent to the Spanish FIU, which can submit its own observations.

55. Para. 4.1.5.23 2022 Guidelines.

56. See art. 2d Dutch AML/FCT Act for the tasks and responsibilities of the AML/FCT Compliance Officer and AML/FCT auditor.

57. Art. 16 Dutch AML/FCT Act.

58. Art. 35 Dutch AML/FCT Act. This provision also includes employee screening.

59. Art. 2e-2f Dutch AML/FCT Act.

60. Art. 23a Dutch AML/FCT Act.

61. The Spanish Financial Intelligence Unit is called *Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias* (SEPBLAC); see <https://www.sepblac.es/en/> (accessed 9 Nov. 2023).

Candidates should be directors or senior managers, but the outlined tasks are more similar to the compliance officer guidelines than to the AML/CFT board member guidelines included in the 2022 Guidelines. In sum, the Spanish market's understanding is that the compliance officer guidelines are the same as those referred to in the *Representante ante el Sepblac*. Consequently, the main effect of the 2022 Guidelines is the need to appoint a member of the board responsible for AML/CFT.

The *Representante ante el Sepblac* is responsible for fulfilling the reporting obligations set out in the Spanish AML/CFT Law (such as reporting of suspicious transactions). For these purposes, this person has unlimited access to all information held by the obliged entity or, where applicable, by any company in a group. Additionally, this person is generally responsible for ensuring the compliance with anti-money laundering internal procedures, and is usually the head of the internal body for control.

Obligated entities managed centrally from another EU Member State which operate in Spain through agents or other forms of permanent establishment other than a branch must appoint a representative resident in Spain, who will be the central contact point. Obligated entities operating in Spain under the freedom to provide services must also designate a representative to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences. This representative does not have to be a resident of Spain.

Finally, article 28 of the Spanish AML/CFT Law sets out the obligation to submit the internal AML/CFT procedures to an external audit review, which also looks at the actions taken by the *Representante ante el SEPBLAC*.

3.8. United Kingdom

The 2022 Guidelines do not apply in the United Kingdom as a result of Brexit. Similar requirements stem, however, from a confluence of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs)^[62] and, where applicable, the Senior Managers and Certification Regime (SM&CR).^[63]

The SM&CR applies to most regulated firms, but notably does not yet apply to payment institutions and e-money firms (discussed in further detail below). The overarching aim of the SM&CR, in the words of the Financial Conduct Authority (FCA), is to “reduce harm to consumers and strengthen market integrity by creating a system that enables firms and regulators to hold people to account”.^[64]

Under this regime, anyone who performs a senior management function must be approved by the relevant regulator (FCA or Prudential Regulation Authority) before commencing their role, and is subject to fitness and propriety requirements.^[65] Regulated firms within scope of the SM&CR and the MLRs will require FCA approval for a Money Laundering Reporting Officer or MLRO (SMF17),^[66] whose job is to act as the focal point for all activity within the firm relating to anti-money laundering and who is responsible for oversight of a firm's compliance with the FCA's rules on systems and controls against money laundering.^[67] The MLRO may also be allocated responsibility (known as a “prescribed responsibility”) for the firm's policies and procedures for countering the risk that the firm might be used to further financial crime,^[68] which encompasses overall responsibility within the firm for the establishment and maintenance of effective AML/CFT systems and controls.^[69] Where this responsibility is allocated to a separate individual, this individual will be responsible for supervision of the MLRO.^[70]

Complementing these obligations, Regulation 21(1)(a) of the MLRs mandates the appointment of an individual who is a member of the board of directors (or equivalent management body), or of its senior management, as the officer responsible for compliance with the MLRs. The MLRs further require that firms appoint an individual as the officer nominated to receive disclosures under Part 3 (terrorist property) of the Terrorism Act 2000 or Part 7 (money laundering) of the Proceeds of Crime Act 2002.^[71] The FCA expects that these roles will be undertaken by the MLRO.^[72]

The MLRO – expected to be UK based, have a sufficient level of seniority and experience and the authority to act independently^[73] – must ensure that appropriate monitoring processes and procedures across the firm are established and maintained,^[74] and must report on the operation and effectiveness of the firm's systems and controls to combat money laundering on at least an annual basis.^[75] The MLRO also has a statutory duty of responsibility to take reasonable steps to avoid a breach of regulatory rules within their area of responsibility.^[76] Further information on what the role of the MLRO entails, and how this is addressed within a group arrangement, can be found in guidance

62. See <https://www.legislation.gov.uk/uksi/2017/692/contents/made> (accessed 9. Nov. 2023).

63. See <https://www.fca.org.uk/firms/senior-managers-certification-regime> (accessed 9 Nov. 2023).

64. Id.

65. See the FCA's Fit and Proper Test for Employees and Senior Personnel Handbook (FIT).

66. FCA, Supervision manual (SUP) 10C.6.2R.

67. SYSC 6.3.9(1)R, 6.3.10G or SYSC 3.2.6I(1)R and SYSC 3.2.6JG.

68. SYSC 24.2.6(3)R.

69. SYSC 6.3.8R or SYSC 3.2.6HR.

70. SYSC 24.2.6(3)R.

71. Regulation 21(3) MLRs.

72. FCG 3.2.1G.

73. SYSC 6.3.9R, 6.3.10G or SYSC 3.2.6I(1)R, 3.2.6JG.

74. See Regulation 21(8) MLRs, SYSC 6.3, SYSC 3.2, and the Joint Money Laundering Steering Group (JMLSG) Prevention of money laundering/combating terrorist financing guidance for the UK financial sector (June 2023), Part I.

75. SYSC 6.3.7(2)G or SYSC 3.2.6GG.

76. Sec. 66A(5) Financial Services and Markets Act 2000.

from the Joint Money Laundering Steering Group,^[77] the FCA's Senior Management Arrangements, Systems and Controls handbook,^[78] the FCA's Supervision manual, the FCA's Financial Crime Guide and the FCA's Code of Conduct handbook.

Payment institutions and e-money firms are regulated under the Electronic Money Regulations 2011 and the Payment Services Regulations 2017 as opposed to the Financial Services and Markets Act 2000. As a result, they are subject to the MLRs, including those provisions mandating the appointment of an individual responsible for compliance with the MLRs and a nominated officer, in addition to a specific requirement to appoint an individual to monitor and manage compliance with, and the internal communication of, the policies, procedures and adopted under the MLRs.^[79] They are not, however, subject to most of the FCA's Handbook rules, and instead look to the Electronic Money Regulations 2011 and Payment Services Regulations 2017 on requirements relating to so-called "PSD and EMD Individuals", alongside associated guidelines and guidance.^[80] The FCA is currently exploring options with HM Treasury to extend the SM&CR to payments and e-money firms.^[81]

4. Conclusion

The position of the AML/CFT compliance officer in relation to the management board and the responsible AML/CFT board member is set out in more detail in the 2022 Guidelines. Some requirements were already implemented in certain Member States and questions raised on concrete implementation. The 2022 Guidelines implemented more detailed reporting requirements and a more specific mandate to the AML/CFT compliance officer.

77. See <https://www.jmlsg.org.uk/> (accessed 9 Nov. 2023).

78. See <https://www.handbook.fca.org.uk/handbook/SYSC/3/1.html> (accessed 23 Nov. 2023).

79. Regulation 21(7) MLRs.

80. See the FCA's approach document to Payment Services and E-money for further information: FCA, *Payment Services and Electronic Money – Our Approach* (Nov. 2021), available at <https://www.fca.org.uk/publication/finalised-guidance/fca-approach-payment-services-electronic-money-2017.pdf> (accessed 7 Nov. 2023).

81. See the updated FCA Perimeter Report, available at <https://www.fca.org.uk/publications/annual-reports/perimeter-report#f-chapter-id-what-we-regulate> (accessed 7 Nov. 2023).



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