Consultation Response

Consultation Response on draft Guidelines under Article 10(4)

Submission date: 15 July

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the AMLA Consultation on the draft Guidelines prepared as per the mandate given by Article 10(4) of Regulation (EU) 2024/1624. The Association for Financial Markets in Europe (AFME) is the voice of the leading banks in Europe's financial markets, providing expertise across a broad range of regulatory and capital markets issues. We represent over 150 leading global and European banks and other significant market players. Our members play a vital role in Europe's financial ecosystem, underwriting around 90% of European corporate and sovereign debt, and 85% of European listed equity capital issuances. Importantly, AFME members are market makers, providing liquidity, which is essential for ensuring financial markets can function efficiently. We also represent law firms and other associate members which advise market participants and support AFME's legal and regulatory initiatives.

AFME is registered on the EU Transparency Register, registration number 65110063986-76. We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Please find attached AFME's response to AMLA's consultation on the draft Guidelines prepared as per the mandate given by Article 10(4) of Regulation (EU) 2024/1624.

Questions

Question 1: Do you agree that the proposals set out in these draft GLs can be applied across all obliged entities and allow for an effective application of a risk-based and proportionate approach towards compliance with AML/CFT requirements?
If not, please:
(i) specify the provision concerned with clear reference to the paragraph; and
(ii) provide concrete drafting proposals and explain why the specific measures you propose would be more appropriate.

We welcome AMLA's efforts to produce draft GLs for all obliged entities which we agree should enable an effective application of a risk-based and proportionate approach towards compliance with AML/CFT requirements. We have reviewed the draft GLs carefully and considered how our members can effectively operationalise them within their firms and have a series of observations set out below:

We note that there are several areas where the minimum requirements will be operationally challenging which creates the risk of divergent approaches in interpretation. In large and complex groups, the BWRA does not operate in isolation but forms part of a broader risk assessment and management framework, including entity-level and group wide assessments.

Requirements should therefore be framed in a manner that supports scalability and comparability across large group structures, while avoiding an interpretation that all data points must be available or fully tailored at every level where this would not materially improve risk insight.

Responsibility for BWRA drafting

Regarding the provision of 'Ensure that the BWRA is drawn up by the Compliance Officer…' within paragraph 5c), to support operational compliance and implementation of the provisions, we either seek clarity on the term 'drawn up' as also mentioned in AMLR Article 10 (2) and what this means in practice, or as an alternative, we suggest that responsibility for drafting the BWRA remains flexible whilst retaining ultimate accountability. This will typically be done in either the First or Second line (depending on individual firms' models) and should reflect that the BWRA may be approved by an individual Compliance Officer or by the Compliance function. We propose alignment with the approach taken in the existing EBA GLs on restrictive measures.

Training

For paragraph 5d), we would welcome clarity that the intention is to focus training not on the entirety of the BWRA, but on relevant parameters within the risk assessment as appropriate, for example on specific amendments or risk factors. We also suggest clarifying that training on the BWRA should be proportionate to the relevant target audience and to the aspects of the BWRA that are relevant to their role or activities. This is particularly important where the audience extends beyond employees to agents, distributors or other persons acting on behalf of the obliged entity. This would align with Article 12 AMLR, which requires training to be appropriate to individuals' functions or activities, and would support proportionate implementation. The wording below is proposed by AFME:

'Take steps, including ongoing training, to ensure that their employees or persons in comparable positions whose function so requires , including agents and distributors, are aware of and understand the BWRA and how it affects their daily work ***to the extent that is relevant and proportionate to their role,*** *in line with Article 12 of the AMLR;'*

Responsibility for conducting subsidiary and branch BWRAs

On paragraph 11, it is our view that the parent undertaking should be able to decide on a proportionate and risk-based approach, if branches should conduct their own BWRA or if they should contribute at the parent undertaking level. A common group methodology should act as a baseline and allow adaptation to different entity types and business models. This can be calibrated to include scenarios where branches are for example operating at a reduced level of activity or where they have no clients and a different risk profile. We also note the creation of the term '*fictional groups'* by AMLA and suggest that this should be understood to mean 'established groups'.

The Guidelines should also clarify what constitutes an obliged entity within the reference to '*branches and subsidiaries'*, as not all such entities perform regulated activities or fall within the scope of the AMLR.

AFME make the following drafting suggestions:
Where the OE acts as the parent undertaking of a group, it should carry out a group-wide risk assessment pursuant to Article 16(1) of the AMLR. The parent undertaking should determine, on a risk-based and proportionate basis, the relevant inputs from branches and subsidiaries, including whether their risk profile should be reflected through standalone BWRAs or within the group-wide BWRA. This determination should take into account the size, complexity, activities and risk profile of the relevant branch or subsidiary, including whether it serves clients directly or primarily performs supporting or back-office functions. The group-wide BWRA should provide a holistic view of the group's ML/TF and non-implementation and evasion of TFS risk exposure and support consistent, risk-based decision-making across the group.'

Risks associated with non-implementation and evasion of targeted financial sanctions
On paragraph 12, and 13, we request that this aligns with the EBA GLs on restrictive measures.

Question 2: Do you agree with the proposed minimum requirements for the content of the BWRA set out in these draft GLs?
If you do not agree, please specify:
(i) the provision(s) concerned, with clear reference to the paragraph; and
(ii) the rationale for your position.
Please provide concrete drafting proposals to resolving the issue and explain why the measure you propose would be more appropriate.

AFME members agree with the intention underpinning the proposed minimum requirements for the content of the BWRA as set out in the draft GLs, However, in line with our comments under Question 4, we have specific observations relating to several specific paragraph. In order to ensure consistency in interpretation and to facilitate practical and operational compliance with the purpose of the BWRA in a proportionate manner. We note that in particular, paragraphs 21, 23, 26 and 30 require amendments to ensure consistent and proportionate application and have provided suggested drafting on that basis.

Remedial measures
AFME agrees that the BWRA should lead to timely remediation of identified weaknesses. However, paragraph 32 would benefit from clarifying that the BWRA should identify remediation priorities, while the detailed implementation of mitigating measures may be reflected in the obliged entity's policies, procedures and controls. This would help avoid unnecessary duplication between the BWRA and the broader internal control framework.

We propose the following wording for paragraph 32:
'Upon completion of the BWRA, OEs should determine the priority areas for action and ensure timely implementation of the necessary remediation measures. The BWRA should identify the resulting remediation priorities, while the detailed implementation of those measures may be reflected in the OE's policies, procedures, systems and controls.'

Question 3: Do you agree with the proposals for additional sources of information to be taken into
account when carrying out the BWRA set out in these draft GLs?
If you do not agree, please specify:
(i) the sources you disagree with; and
(ii) the rationale for your position;
(ii) the sources that should be included.

Sources of Information
AFME agree in principle that a comprehensive BWRA should leverage various sources of information but wish to highlight the importance of ensuring that there is sufficient flexibility to determine sources of information using a proportionate and risk-based approach in addition to the sources of information in article 10(1) of the AMLR. We also note that the additional sources of information as set out on the existing EBA GLs are additional and not mandatory.

On the basis of proportionality, as currently drafted this introduces an unduly prescriptive requirement. As a result, we make a series of concrete drafting proposals for paragraph 17, set out below.

'To identify ML/TF/non-implementation and evasion of TFS risks, OEs should refer to information from a variety of sources and take into account at least those listed in Article 10(1) of the AMLR. To gather this information, OEs may use public or private databases, or

*commercially available tools. OEs should appropriately document the sources consulted in the conduct of their BWRA and the ~~manner in which such sources were used.~~ OEs should **take reasonable steps, on a risk-based basis, to ensure that the information relied upon remains sufficiently current and relevant for the purposes of BWRA.***
~~*also ensure that all sources relied upon are kept up-to-date'.*~~

Additional sources

We propose draft wording for paragraph 18 as follows:
*'OEs should refer to any other relevant and credible sources that apply to their activity, sector and jurisdiction. **OEs should determine on a risk-based and proportionate approach the sources of information considered'**.*

On paragraph 19, we propose that this is redrafted to reflect that OEs should consider the sources, where relevant and on a risk-based approach:
*'In this regard, **obliged entities may take into account the following non-exhaustive list of additional sources of information** when preparing their BWRA:'*

We also request that the sources are aligned with the list of sources listed in Level 1, Article 10(1) AMLR and therefore **propose the removal** of:

- *'Information from public authorities and official authorities such as fraud observatories, central banks, statistical organisations and academia. o Information from sanctions and watchlists maintained by competent authorities to identify persons, entities, jurisdictions or patterns relevant to ML/TF and TFS evasion risks.*
- *Industry-level and professional sources of information shared by relevant industry bodies, professional associations or SRBs, including public-private partnerships and inter-agency cooperation forums.*
- *Information from civil society, such as corruption indices and country reports.*
- *Information from credible and reliable commercial organisations, such as risk and intelligence reports'*

Question 4: Do you foresee any operational challenges in implementing these GLs?
If so, please specify:
(i) the provision(s) concerned with clear reference to the paragraph; and
(ii) the rationale for your position.

We note a series of significant operational challenges which we have identified and provided proposed drafting for set out below.

Methodology

On paragraph 15, we note that OEs should apply 'evidence-based judgement' this assessment should include that expert judgement is acceptable where it follows a defined methodology and is properly documented. The final sentence of the paragraph should read as follows:

'For this purpose, OEs should make informed, reasoned and appropriately documented judgements, supported by defined methodology and governance ~~evidence-based and judgements about the relevance of each risk factor in the context of their business model'.~~

The sources referenced in paragraph 16 contains indicative risk factors rather than prescribed risk rating outcomes, so the language should be amended to reflect the indicative nature of these sources and not an 'expectation' of particular risk rating outcomes. This ensures proportionality and alignment with the risk-based approach.

Additional information sources

On paragraph 20, we propose the below amended language on the basis that the original language introduces operationally complex obligations and firms will already make use of such findings via other measures.

20. When conducting their BWRA, OEs should also consider ***where relevant and appropriate***

- *their own knowledge and professional expertise derived from Suspicious Transaction Reports or Suspicious Activity Reports submitted to the FIU, as well as requests for information or feedback received from FIUs, law enforcement or judicial authorities.*
- *internal insights, including findings such as from compliance, internal audit reviews and relevant supervisory actions ~~and lessons learned from supervisory actions.~~*

The language of '*where relevant and appropriate'* also aligns with the approach taken in EBA GLs.

<u>Business and operational overview</u>
We propose drafting amendments to paragraph 21 to strengthen the interpretation that OEs should provide a '*concise and descriptive overview'*. For large and complex institutions, this detailed description would result in an excessively lengthy and burdensome product, not suited for a proportionate and risk-based approach to the BWRA. Moreover, not all arrangements or technologies are material from an AML/CFT perspective.

'OEs BWRA's should include a concise and descriptive overview of their business and operations, outlining key elements such as their legal and operational setup, group structure (if applicable), customer base, products and services within scope of the AMLR, delivery channels, geographical exposure, AML/CFT function organisation, outsourcing arrangements and any use of new or emerging technologies ***to the extent deemed relevant and material , as well as proportionate, by the OE.'***

<u>Risk identification, assessment and categorisation</u>
On paragraph 23, in order to avoid any ambiguity, we suggest changing the drafting as follows: *'....... For this purpose, OEs ~~should at least~~* ***may*** *refer where* ***relevant and appropriate*** *to the data points listed in the RTS on Article 40(2) of the AMLD, supplemented by any additional relevant quantitative and qualitative indicators such as strategic plan modifications, mergers or regulatory changes* ***with a focus on their aggregated impact at the business wide level****.'*

<u>Assessment of control quality</u>
On Paragraph 25, we note that practically and operationally, linking them together and explaining as provided for in the current draft could be a burdensome expectation. We suggest that this should be focused on the effectiveness of the framework rather than a mapping exercise.

On Paragraph 26, to ensure transparency and objectivity towards assessing control effectiveness, we suggest that there needs to be a clear and adequate framework, processes and governance.

'OEs should be able to demonstrate a clear ***process and governance to conclude on whether****, ~~evidence-based view of how effectively~~ current policies, procedures and controls mitigate inherent risks and where gaps or weaknesses remain'*

Original AMLA draft wording for paragraphs 29 and 30
On paragraphs 29 and 30, we suggest that residual risk should be understood as the outcome of an aggregated assessment, whereby, inherent risks are assessed across multiple risk drivers, and the effectiveness of the control environment is considered collectively, taking into account the combined and often interdependent effect of multiple controls and mitigating measures. In this context, the notion of '*remaining residual risks'* should be clarified to refer to

the overall residual risk exposure at the level of the OE, rather than implying a separate or additional layer of analysis beyond the assessment of ‘*residual risk per inherent risk’*. Without such clarification, there is a risk that the GLs could be interpreted in a way that leads to overly prescriptive and operationally burdensome methodologies (e.g., forced one-to-one mappings between risks and controls). More generally, we consider that apart from assessing the residual risks associated with each inherent risk, OEs should consider the remaining residual risks to determine their overall residual risk exposure.

Paragraph 29 proposed wording: *‘Considering the inherent risk level in light* ***of the collective effectiveness of the control environment*** *~~, of the quality of the controls,~~ OEs should determine the residual risk exposures to which that they remain exposed ~~to.~~* ***The methodology should recognise that residual risk may result from the combined and interdependent effect of multiple controls and mitigating measures and does not necessarily require a one-to-one mapping between individual inherent risks and individual controls*** *OEs’ methodology should recognise that inherently high-risk factors by their nature cannot be completely mitigated by control measures.’*

<u>Assessment and classification of residual risk</u>

For fictional groups where there is no corporate structure to support the collection of information or data it will be very challenging to implement the GLs and for those in the fictional group to undertake the risk assessment and aggregate it with the parent undertaking.

The parent undertaking should be able to determine, on a risk-based basis, the appropriate inputs to the group-wide risk assessment, including where a standalone BWRA by each branch or subsidiary would not be proportionate or meaningful.

Paragraph 30 proposed wording:

~~30. Apart from assessing the residual risks associated with each inherent risk, OEs should consider the remaining residual risks to determine their overall residual risk exposure.~~ ***‘OEs should consider the residual risk exposure determined under paragraph 29 at an appropriate level of aggregation in order to determine their overall residual risk exposure, taking into account the nature, size and complexity of their business.’***

On paragraph 31, we propose that the drafting in the GLs should align with that in paragraph 11, and propose the following wording:

‘When performing the group-wide risk assessment pursuant to Article 16(1) of the AMLR, a parent undertaking ***should determine, on a risk-based and proportionate basis, the relevant inputs from branches and subsidiaries, including whether their risk profile should be reflected through a standalone BWRA or within the group-wide BWRA. This should support the assessment of the group’s overall residual risk exposure****.’*

Question 5: Within the boundaries of the mandate as defined in Article 10(4) AMLR, do you identify any need to introduce additional provisions? If so, provide concrete drafting proposals

Broadly, we consider that no further additional provisions are necessary and refer to the comments we have provided in our responses to Questions 1-4. We do wish to emphasise that provisions relating to parent undertakings need to be expanded to include that a parent undertaking can undertake subsidiary assessments themselves or require subsidiaries to conduct risk assessments.

We welcome the opportunity to respond to this consultation and would be happy to meet with the AMLA team to talk through any aspect of our response

AFME Contacts

Louise Rodger
Louise.rodger@afme.eu
Managing Director

Hanna Sowemimo
Hanna.sowemimo@afme.eu
Associate Director

Ria Mehta
Ria.mehta@afme.eu
Associate

Stefano Mazzocchi
Stefano.mazzocchi@afme.eu
Managing Director and Deputy Head - Advocacy