

EBA CONSULTATION PAPER

Draft Guidelines on ML/TF risk factors

AMAFI comments

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It mainly acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 150 members operating for their own account or for clients in equities, fixed-income products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI welcomes the opportunity to comment on the European Banking Authority (EBA)'s consultation paper regarding the "Risk Factors Guidelines", amending Guidelines JC/2017/37¹.

Nowadays, considering the importance taken by anti-money laundering and countering financing of terrorism ("AML/CFT") issues, investment firms are legitimately subject to many requirements on this topic. Those are time and resource consuming at a time when the financial sector faces numerous challenges notably in terms of regulation. In that context, the implementation of the risk-based approach is particularly important as it allows actors to concentrate their resources where their analysis shows that they are especially necessary, which enables to be more effective and efficient. Those draft Guidelines contributes actively to the above-said as they set out factors firms should consider when assessing the ML/TF risks associated with a business relationship. Furthermore, they also explain how firms can adjust the extent of their CDD measures in a way that is commensurate to the ML/TF risks they have identified.

Before responding to the specific questions of EBA's consultation paper, AMAFI would like to point out the following general comments:

- AMAFI particularly welcomes proposed amendments made to Guideline 15 as they contribute to a major improvement compared with the previous version. Though AMAFI suggests slight amendments to improve even more the quality of the drafting (*see Question 15 below*).
- AMAFI suggests EBA to consider the addition of a Guideline on "crypto-currencies" as they have been considerably expanding into an international powerful payment method. The Financial Action Task Force (FATF) provided in that sense different preliminary key elements of assessment. Considering AML/CFT risks and the cross-border dimension of these activities, AMAFI strongly supports the necessity of a European harmonisation on this matter. A new guideline on crypto-currencies would thus participate in the first steps of European harmonisation.

Finally, regarding Title III 'Sector specific guidelines', AMAFI wishes to outline that it only answers to questions entering within the scope of the Association (*i.e.* Guidelines 12, 15 and 20).

¹ ESAs' Joint Guidelines on risk factors and simplified and enhanced customer due diligence – "Joint Guidelines under Articles 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced 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" ([JC 2017 37](#)).

RESPONSES TO EBA QUESTIONS

Amendments to title I: 'Subject matter, scope and definitions'

Question 1 Do you have any comments with the proposed changes to the Definitions section of the Guidelines?

AMAFI partially agrees with the proposed changes made to the Definitions section of the Guidelines in relation to "risk".

Nevertheless, AMAFI is opposed to add a definition of "Jurisdictions associated with higher ML/TF risk". Indeed, the proposed definition excludes 'high-risk third countries' while they are the only ones precisely defined (by Article 9 of the 4th AML Directive²) and identified (by the Delegated Regulation (EU) 2016/1675³). Thus, all European obliged entities under AML Directives⁴ should apply enhanced due diligence (EDD) measures to their relationship linked with those high-risk third countries. Conversely, there is no harmonised definition of 'Jurisdictions associated with higher ML/TF risk' as it is a new concept developed by the EBA without any justification.

If EBA wants to keep this definition, AMAFI considers it should also be added a definition of 'Jurisdictions associated with lower ML/TF risk' as there is no reason for having one without the other. The main principle of the risk-based approach is to simplify the due diligences for some clients to have more time to reinforce the due diligences for some other clients.

Therefore, AMAFI would like to propose the following change in the Definitions section of the Guidelines:

Proposed amendments

12. For the purpose of these guidelines, the following definitions shall apply:

[...]

d) '~~Jurisdictions associated with higher ML/TF risk~~' means countries that, based on an assessment of the risk factors set out in Title I of these guidelines, present a higher ML/TF risk. This excludes 'high risk third countries' identified as having strategic deficiencies in their AML/CFT regime, which pose a significant threat to the Union's financial system (Article 9 of Directive (EU) 2015/849).

[...]

Amendments to title II: 'Assessing and managing risk: general'

Question 2 Do you have any comments on the proposed amendments to Guideline 1 on risk assessment?

AMAFI partially agrees with the changes made within Guideline 1. Nevertheless, AMAFI considers that some amendments should be made to improve the quality of the drafting.

Firstly, AMAFI considers that some proposed amendments made to the Guidelines can be confusing for the reader, in particular the structural and presentational proposed amendments made in § 1.2.

² Directive (EU) 2015/849 of the European Parliament and of the 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 ([link](#)).

³ Commission delegated regulation (EU) 2016/1675 of 14 July 2016 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies ([link](#)).

⁴ See 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 ([link](#) - hereafter "5th AML Directive").

Thus, AMAFI considers the current redaction of § 1.7.a) is too much detailed as it requires to define a date rather than a period or a frequency for the next review. AMAFI wishes to underline that usually, in practice, obliged entities define within their policies the frequency of review and not a precise date. Thus, AMAFI would rather suggest EBA to propose to set up a “frequency”, or at least a “period” for more flexibility.

AMAFI would therefore like to propose the following changes in Guideline 1:

Proposed amendments

- 1.2. To comply with their obligations set out in Directive (EU) 2015/849, firms should assess:
- a) the ML/TF risk to which they are exposed as a result of the nature and complexity of their business (the business-wide risk assessment); and
 - b) the ML/TF risk to which they are exposed as a result of entering into a business relationship or carrying out an occasional transaction (individual risk assessments). ~~Each risk assessment should consist of two distinct but related steps:~~

Each risk assessment should consist of two distinct but related steps:

- ⇒ ~~- / (i)~~ the identification of ML/TF risk factors; and
- ⇒ ~~- / (ii)~~ the assessment of ML/TF risk.

[...]

- 1.7. The systems and controls firms should put in place to ensure their individual and business-wide risk assessments remain up to date include:
- a) Setting a ~~date~~**frequency** for each calendar year on which the next business-wide risk assessment update will take place, and setting a ~~date~~**frequency** on a risk sensitive basis for the individual risk assessment to ensure new or emerging risks are included.

[...]

Question 3 Do you have any comments on the proposed amendments to Guideline 2 on identifying ML/TF risk factors?

AMAFI generally agrees with the proposed amendments to Guideline 2 but wishes to propose some amendments.

Regarding § 2.4.f), AMAFI considers as important to also take into account the jurisdiction where the customer with high public profile operates to appreciate the risk associated with its position.

Moreover, § 2.5.c) requires obliged entities to take into account, without limitation, potential suspicious transaction reports linked to the client / beneficial owner when identifying the risk. In practice, due to the extreme confidentiality of such reports, there is no way obliged firms can be aware of reports made by other entities. However, AMAFI notes that this could be eventually possible, in practice, when the customer or the beneficial owner whose reputation is assessed, was client of the firm in the past.

Finally, regarding § 2.6.k), in AMAFI's view, the AML-CFT risks of the client should only be increased if the client cannot justify the changes related to the products and services used.

Consequently, AMAFI wishes to propose the following change in Guideline 2:

Proposed amendments

2.4. Risk factors that may be relevant when identifying the risk associated with a customer's or a customer's beneficial owner's business or professional activity include:

[...]

f) Does the customer or beneficial owner hold another prominent position or enjoy a high public profile that might enable them to abuse this position for private gain? For example, are they senior local or regional public officials with the ability to influence the awarding of public contracts, decision-making members of high-profile sporting bodies or individuals who are known to influence the government and other senior decision-makers?

What is the level of corruption of the jurisdiction in which he/she operates?

2.5. The following risk factors may be relevant when identifying the risk associated with a customer's or beneficial owners' reputation:

[...]

c) ~~Does~~ **Has** the firm know ~~already made a suspicious transactions report linked with~~ if the customer or beneficial owner ~~has been the subject of a suspicious transactions report in the past?~~

[...]

2.6. The following risk factors may be relevant when identifying the risk associated with a customer's or beneficial owner's nature and behaviour; firms should note that not all of these risk factors will be apparent at the outset; they may emerge only once a business relationship has been established:

[...]

k) Does the customer use the products and services they have taken out as expected when the business relationship was first established? **If not, could he/she justify the changes?**

[...]

Question 4 Do you have any comments on the proposed amendments and additions in Guideline 4 on CCD measures to be applied by all firms?

AMAFI has no comment on the proposed amendments and additions made by EBA in Guideline 4.

Question 5 Do you have any comments on the amendments to Guideline 5 on record keeping?

AMAFI welcomes EBA amendments made to Guideline 5 on record keeping.

Question 6 Do you have any comments on Guideline 6 on training?

AMAFI strongly welcomes the inclusion of Guideline 6 on training.

Question 7 Do you have any comments on the amendments to Guideline 7 on reviewing effectiveness?

AMAFI agrees with that Guideline 7 on reviewing effectiveness.

Amendments to title III: 'Sector specific guidelines'

Question 8 Do you have any comments on the proposed amendments to Guideline 8 for correspondent banks?

Not applicable.

Question 9 Do you have any comments on the proposed amendments to Guideline 9 for retail banks?

Not applicable.

Question 10 Do you have any comments on the proposed amendments to Guideline 10 for electronic money issuers?

Not applicable.

Question 11 Do you have any comments on the proposed amendments to Guideline 11 for money remitters?

Not applicable.

Question 12 Do you have any comments on the proposed amendments to Guideline 12 for wealth management?

AMAFI partially agrees with the proposed amendments made to Guideline 12.

Regarding § 12.8.b), in AMAFI's point of view, the source of funds can also be verified using a recent tax return statement.

Finally, AMAFI considers it is important to bring to the EBA's attention the proposed amendments made to the Guidelines which can lead to some confusion for the readers. In that sense, AMAFI noticed the structural and presentational proposed amendments made in § 12.8.b) can lead to some misunderstandings. Indeed, points viii. and ix. of § 12.8.b) should, according to AMAFI, be subject to two different subsections of § 12.8 in line with new Article 18bis introduced by the 5th AML Directive. Moreover, the obligation to "establish the destination of funds" is not required by the 5th AML Directive. Thus, AMAFI proposes to use the exact wording of the Directive: "*obtaining information on the reasons for the intended or performed transactions;*" instead of adding a new requirement.

Thus, AMAFI would like to propose the following changes to § 12.8:

Proposed amendments

12.8. To comply with Article 18a in respect of relationships or transactions involving high-risk third countries, firms should apply the EDD measures set out in this regard in Title I.

a) Obtaining and verifying more information about clients than in standard risk situations and reviewing and updating this information both on a regular basis and when prompted by material changes to a client's profile. Firms should perform reviews on a risk-sensitive basis, reviewing higher risk clients at least annually but more frequently if risk dictates. These procedures may include those for recording any visits to clients' premises, whether at their home or business, including any changes to client profile or other information that may affect risk assessment that these visits prompt.

b) Establishing the source of wealth and funds; where the risk is particularly high and/or where the firm has doubts about the legitimate origin of the funds, verifying the source of wealth and funds may be the only adequate risk mitigation tool. The source of funds or wealth can be verified, by reference to, inter alia:

- i. an original or certified copy of a recent pay slip;
- ii. written confirmation of annual salary signed by an employer;
- iii. **an original or certified copy of a recent tax return statement;**

[...]

viii. ~~c) Establishing the destination of funds.~~ **obtaining information on the reasons for the intended or performed transactions;**

ix. ~~d) Performing greater levels of scrutiny and due diligence on business relationships than would be typical in mainstream financial service provision, such as in retail banking or investment management.~~

Question 13 Do you have any comments on the proposed amendments to Guideline 13 for trade finance providers?

Not applicable.

Question 14 Do you have any comments on the proposed amendments to Guideline 14 for life insurance undertakings?

Not applicable.

Question 15 Do you have any comments on the proposed amendments to Guideline 15 for investment firms?

AMAFI welcomes the proposed amendments made to Guideline 15 as they contribute to a major improvement compared with the previous version. However, AMAFI is of the opinion that few amendments may be done in order to improve slightly the drafting.

Firstly, in light of the other specific sector guidelines⁵ and in the same way, AMAFI would suggest EBA to add a more precise definition of what are “investment firms” in order “to provide more clarity” as stated in § 28 of the consultation paper. Thus, AMAFI would suggest referring to MiFID II definition of an “investment firm” in the introduction of this Guideline.

Otherwise, in the “Customer risk factors” sub-section of Guideline 15, and more specifically in § 15.6 regarding factors which may contribute to reducing risk, AMAFI wishes to remind the EBA that the 4th AML Directive considers “listed companies” as potential “low risk client” (*4th AML Directive, Annex II*). AMAFI suggests therefore to add this factor to the list of § 15.6 (which may become § 15.7).

Furthermore, AMAFI considers it is also important to take into account that some jurisdictions are providing strong AML/CFT regimes, or equivalent to the European requirements in combating ML/FT, fact that may also contribute to lower the risk.

⁵ See for examples Guideline 8 (§ 8.1.), Guideline 9 (§ 9.1.), Guideline 10 (§ 10.1.), and more specifically Guideline 11 (§ 11.1.), Guideline 12 (§ 12.1.), Guideline 13 (§ 13.1.), Guideline 14 (§ 14.1.).

Finally, AMAFI wishes to bring to the EBA's attention the not yet amended mention to "MiFID I"⁶ in § 15.9.

Consequently, AMAFI would suggest the following addition in Guideline 15:

Proposed amendments

15.1. Investment firms are defined by Directive (EU) 2014/65 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II) as any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis. Therefore, investment firms are defined by their activities, which are listed in Section A of Annex II of MiFID II: reception and transmission of orders (RTO), execution of orders on behalf of clients, dealing on own account, portfolio management, investment advice, underwriting and placing of financial instruments without a firm commitment basis, placing of financial instruments with a firm commitment basis and operation of a multilateral trading venue (MTF) or an organised trading facility (OTF).

15.2. ~~15.4.~~ Investment firms should consider when providing or executing investment services or activities as defined in point (2) of Article 4(1) of Directive (EU) 2014/65 the following risk factors and measures alongside those set out in Title I of these guidelines. The sectoral guideline 12 may also be relevant in this context.

[...]

15.7. ~~15.6.~~ The following factors may contribute to reducing risk:

- a) The customer is an institutional investor whose status has been verified by an EEA government agency, for example a government-approved pensions scheme.
- b) The customer is a government body from an EEA jurisdiction **or a jurisdiction with strong AML/CFT requirements.**
- c) The customer is a financial institution established in an EEA jurisdiction **or in a jurisdiction with strong AML/CFT requirements.**
- d) The customer is a listed company subject to disclosure requirements.**

[...]

15.10. ~~15.9.~~ When developing their AML/CFT policies and procedures to comply with their obligations under Directive (EU) 2015/849, firms in this sector should consider that depending on the type of activity they perform, they will be subject to rules under which they have to gather extensive information about their customers. Where this is the case, they should consider the extent to which information obtained for MiFID II and EMIR compliance purposes can be used also to meet their CDD obligations in standard situations.

Question 16 Do you have any comments on the proposed amendments to Guideline 16 for providers of investment funds and the definition of customer in this Guideline?

Not applicable.

⁶ "MiFID" or "Markets in Financial Instruments Directive" or Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC ([lien](#)).

Additional sector-specific guidelines

Question 17 Do you have any comments on the additional sector-specific Guideline 17 on crowdfunding platforms?

Not applicable.

Question 18 Do you have any comments on the additional sector-specific Guideline 18 on account information and payment initiation service providers?

Not applicable.

Question 19 Do you have any comments on the additional sector-specific Guideline 19 on currency exchanges?

Not applicable.

Question 20 Do you have any comments on the additional sector-specific Guideline 20 on corporate finance?

AMAFI agrees with the addition of sector specific Guideline 20 on corporate finance. Nevertheless, AMAFI noticed that in order to assess the risk associated with a business relationship, the draft Guideline, § 20.7. f) mentions the “[u]se of non-documentary forms of evidence, such as meetings with credible persons who know the individuals in question; such as bankers, auditors or legal advisors” while, in practice, except using public reports, there is no firm using such “non-documentary forms of evidence” as listed firms (bankers, auditors, legal advisors) are usually subject to professional secrecy.

More anecdotally, AMAFI has noted that there are two paragraphs 20.5 in this Guideline.

Consequently, AMAFI would suggest EBA to suppress § 20.7.f).

Proposed amendments

20.7. Where the risk associated with a business relationship or an occasional transaction is increased, firms should apply EDD measures such as beneficial ownership, and in particular any links the customer might have with politically exposed persons, and the extent to which these links affect the ML/TF risk associated with the business relationship;

[...]

~~f) Use of non-documentary forms of evidence, such as meetings with credible persons who know the individuals in question; such as bankers, auditors or legal advisors. Firms should consider if this evidence is sufficient to demonstrate that the customer has correctly represented their personal and financial circumstances. Where non-documentary evidence of this sort is used, a record setting out the basis on which decisions were reached should be kept;~~

[...]