

Money laundering - Recent cases from a EU banking supervisory perspective

This briefing (1) provides some insight into recent cases of breaches or alleged breaches of anti-money laundering (AML) rules by SSM supervised banks and (2) identifies some common prudential features. The briefing also outlines (3) the respective roles of European and national authorities in applying AML legislation that have been further specified in the 5th AML Directive adopted by the EP Plenary on 19 April, and (4) ways that have been proposed to further improve the AML supervisory framework, including the 12 September Commission's [communication](#) and the changes to the European Supervisory Authority (ESA) Regulation proposed by the [Commission](#). The Commission suggests a three-pronged approach to reinforce AML supervision: (i) further guidelines and best practices developed by EBA; (ii) stronger powers - including an obligation to act - for the European Banking Authority ('EBA') as part of the ESA review being negotiated at Council and Parliament; (iii) establishing, where appropriate, an EU body, at a later stage, as part of the review clause of the 5th AML Directive in 2022. This briefing is an updated version of the April 2018 EGOV briefing.

1. Recent cases of breaches or alleged breaches of AML rule

A significant number of cases of breaches or alleged breaches of AML rules have been uncovered recently, relating to both banks under centralised and decentralised supervision. This section outlines 5 cases. While ABLV Bank AS (case 1) was directly supervised by the ECB as a "significant institution", Verso Bank in Estonia (case 2) and Pilatus Bank in Malta (case 3) are "less significant institutions" supervised by national competent authorities (Malta Financial Services Authority and Finantsinspektsioon in Estonia) as part of the Single Supervisory Mechanism (SSM). The branch of Danske Bank in Estonia (case 4) is prudentially supervised by the Danish Supervisor, which is not part of the Banking Union. Other cases of alleged breaches include ING (case 5) that is directly supervised by the SSM.

Case 1: Liquidation of directly supervised ABLV in Latvia

The Latvian ABLV Bank, with a balance sheet size of EUR 3.6 billion ([ABLV facts & Figures](#) of Q3 2017) way below the ECB's size-related threshold for direct supervision of EUR 30 billion, was still directly supervised since it was one of the three largest credit institutions in Latvia in terms of asset base. Though the published financial information indicates that the bank was well capitalized and profitable, the shareholders of ABLV decided at an extraordinary meeting on 26 February 2018 to [voluntarily liquidate the bank](#) as a result of the following events:



- On 12 February 2018, the Financial Crimes Enforcement Network (FinCEN) at the US Treasury proposed to ban ABLV from having a correspondence account in the United States due to money laundering concerns (see Box 1 below with excerpts taken from the proposal's reasoning), raising severe doubts about the soundness of the bank's business model. FinCEN invited comments on all aspects of the proposed rule to be made within 60 days. After the FinCEN statement, clients started pulling out deposits from ABLV, which eventually resulted in an acute liquidity shortage;
- On 18 February 2018, the Latvian banking supervisor - the Financial and Capital Market Commission (FCMC) - imposed a [temporary restriction on payments](#), following the ECB's respective instruction, in order to allow for a stabilisation of ABLV's financial situation. On 23 February 2018, the ECB determined that ABLV Bank – as well as its subsidiary in Luxembourg – was [failing or likely to fail](#) due to the significant deterioration of its liquidity situation, and was to be wound up under the insolvency laws of Latvia and Luxembourg;
- On 24 February 2018, the Single Resolution Board (SRB) decided that it would not take [resolution action](#);
- On 9 March 2018, the Luxembourg Commercial Court, however, decided to [refuse the request](#) to place the subsidiary in Luxembourg – ABLV Bank Luxembourg, S.A. – in liquidation. That entity shall now be sold to new investors.
- On 12 June 2018, the FCMC permitted ABLV Bank to [implement](#) voluntary liquidation plans under the control of FCMC. On 12 July 2018, the ECB [withdrew](#) the banking license of ABLV Bank, AS (in liquidation).

In May, ABLV [filed](#) lawsuits against the ECB and the SRB. In accordance with BBRD, the lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision. Decisions of resolution authorities are immediately enforceable.

Further to a visit in Latvia in August 2018, the EP [TAX3](#) Committee Chair stressed that *“Latvian authorities have clearly realised that the situation which the country's banking sector was in was not sustainable. We were also pleased to note that efforts are being carried out to redress the situation and these are already bearing fruit, such as the reduction of non-resident deposits and of shell companies, and the increase in criminal proceedings against entities involved in money laundering”*.

Case 2: Liquidation of Versobank in Estonia

The Estonian Versobank AS - a less significant bank within the meaning of the SSM Regulation - was not directly supervised by the ECB, but by the national supervisor Finantsinspeksioon. Founded in 1999, Versobank AS had a balance sheet of 294 million EUR by end 2017. Its main shareholder is UKRSELHOSPROM PCF LLC (offices in Dnipropetrovsk in Ukraine), with ownership of 85.26% of shares. Its [Public Interim Report](#) (IV Quarter 2017) disclosed good financial performances.

- On 8 February 2018, [Finantsinspeksioon](#) submitted an application to the ECB to withdraw the authorisation of Versobank AS due to *“serious and long-lasting breaches of legal requirements, particularly concerning the prevention of money laundering and combating the financing of terrorism”* according to Finantsinspeksioon's statements. These breaches were uncovered by Finantsinspeksioon as part of on-site inspections carried out in 2015-2017. The *“breaches were systemic and long-lasting, and the bank did not fully eliminate them even after the intervention of Finantsinspeksioon”*;
- On 26 March 2018, the ECB decided to withdraw the authorisation of Versobank, as proposed by Finantsinspeksioon;
- On the same date, following the withdrawal of the authorisation, all transactions and operations of Versobank AS and all payouts to depositors and other creditors were immediately [suspended](#).

Finantsinspeksioon filed an application to the court for compulsory dissolution and the appointment of liquidators.

Box 1: [Excerpts](#) from the Department of the Treasury’s Proposal of Special Measure Against ‘ABLV Bank, AS’ as a Financial Institution of Primary Money Laundering Concern

II. Summary of Notice of Proposed Rulemaking

This NPRM [notice of proposed rulemaking] sets forth (i) FinCEN’s finding that ABLV Bank, AS (ABLV), a commercial bank located in Riga, Latvia, is a foreign financial institution of primary money laundering concern pursuant to Section 311, and (ii) FinCEN’s proposal of a prohibition under the fifth special measure on the opening or maintaining in the United States of a correspondent account for, or on behalf of, ABLV. As described more fully below, FinCEN has reasonable grounds to believe that ABLV executives, shareholders, and employees have institutionalized money laundering as a pillar of the bank’s business practices. [...] ABLV management permits the bank and its employees to orchestrate and engage in money laundering schemes; solicits the high-risk shell company activity that enables the bank and its customers to launder funds; maintains inadequate controls over high-risk shell company accounts; and seeks to obstruct enforcement of Latvian anti-money laundering and combating the financing of terrorism (AML/CFT) rules in order to protect these business practices.

III. Background on Latvia’s Non-Resident Deposit Sector and ABLV Bank

1. Latvia’s Non-Resident Deposit Banking Sector

Due to geography, linguistic profile, and a stable and developed banking system, Latvia serves as a financial bridge between the Commonwealth of Independent States (CIS),⁷ European Union (EU) and U.S. financial systems. While it lacks a legal framework that formally separates domestic banking business and non-resident banking, most Latvian banks conduct the majority of their business in either domestic retail/commercial banking or non-resident banking services, not both. Non-resident banking in Latvia allows offshore companies, including shell companies, to hold accounts and transact through Latvian banks. CIS-based actors often transfer their capital via Latvia, frequently through complex and interconnected legal structures, to various banking locales in order to reduce scrutiny of transactions and lower the transactions’ risk rating. [...] The Latvian banking system’s reliance on NRD funds for capital exposes it to increased illicit finance risk.

Case 3: Pilatus Bank in Malta

Pilatus Bank is a less significant institution prudentially supervised by the Malta Financial Services Authority. Pilatus Bank is authorised since 2014 as a credit institution providing private and corporate banking services to high net-worth individuals and financial institutions. In 2016 its total [assets](#) amounted to 309 million EUR.

On 20 March 2018, Mr Ali Sadr Hasheminejad Pilatus Bank’s former Chairman (and more recently non-Executive Director) has been [indicted](#) in the United States of America “for his alleged involvement in a scheme to evade U.S. economic sanctions against Iran, to defraud the U.S., and to commit money laundering and bank fraud”. Further to this indictment, the Malta Financial Services Authority (MFSA) took the following steps:

- On 21 March 2018, the MFSA issued an [order](#) to remove Mr Ali Sadr Hasheminejad, with immediate effect, from the position of director of the Bank and any executive roles that he holds within the Bank and suspend the exercise of his voting rights as shareholder of the Bank;
- On 22 March, the MFSA [appointed](#) Mr Lawrence Connell as a ‘Competent Person’ to take charge of all the assets of Pilatus Bank Limited and assume control of the Bank’s banking and investment services business. The MFSA also issued a Directive directing the Bank not to dispose, liquidate, transfer or otherwise deal with clients’ assets and monies;
- In its [public statement](#) on 2 April in relation to Pilatus Bank, the MFSA stressed that “it has undertaken various supervisory steps as required, closely reviewing and monitoring the Bank, in accordance with its

supervisory responsibilities and subjecting it to numerous examinations including on-site inspections regarding prudential issues related to the Bank and on-site anti-money laundering and combating the financing of terrorism (AML/CFT) examinations conducted jointly with the FIAU [...] A comprehensive and in-depth compliance examination of the bank's operations has been and continues to be underway";

- The Maltese [FSA](#) asked the ECB to withdraw Pilatus Bank's license in June 2018.

In its [mission report](#) following the joint ad-hoc Delegation to Malta (30 November - 1 December 2017), the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Committee of inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion (PANA) summarised the findings of AML breaches in relation to Pilatus Bank as follows:

- *"FIAU carried out an onsite-visit to Pilatus Bank between 15-22 March 2016, which resulted in a compliance report in April 2016 raising many concerns including alleged breaches of the Maltese legislation against money laundering";*
- *"Pilatus Bank contested the content of the compliance report and hired KPMG to do an audit of the Bank's compliance with money laundering obligations";*
- A second visit was conducted on 8 and 10 August; the result was that *"all was clarified with some concerns";*
- *"In September 2016, the FIAU certified in a letter to Pilatus Bank its compliance with anti-money laundering obligations".*

The European Banking Authority ('EBA') conducted two preliminary enquiry in relation to (i) the Maltese FIAU and to (ii) the Maltese FSA:

- The [EBA](#) issued in July 2018 a recommendation addressed to the Maltese Financial Intelligence Analysis Unit (FIAU) after establishing it had breached Union law in relation to its supervision of Pilatus Bank. In particular, the EBA asked *"the FIAU to take actions to systematically assess the ML/TF risk associated with the Maltese financial sector; to supervise the effectiveness of the AML/CFT policies and procedures put in place by the obliged entities; to ensure enough resources are available and robust procedures are in place to supervise its obliged entities"*. In November 2018, the [Commission](#) adopted an opinion requiring the Maltese Financial Intelligence Analysis Unit to continue taking additional measures to fully comply with its obligations under the fourth Anti-Money Laundering Directive;
- In relation to the Maltese FSA, while the preliminary enquiries have raised "significant concerns concerning the MFSA's authorisation and supervisory practices in relation to Pilatus Bank, the [EBA](#) has decided in September 2018 to close the case without opening a breach of Union law investigation. While recognising the "significant supervisory actions taken by the Maltese FSA", EBA emphasised that the "requirements set out in Union law for prudential supervisors [make] it difficult to conclude that there have been breaches of clear and unconditional obligations established in Union law". EBA will be conducting a further on-site visit to the Maltese FSA in mid-2019.

The [EBA](#) assessed in September 2018 that the withdrawal of Pilatus Bank' licence "is the appropriate step to take" [...] given the current circumstances of the bank's ultimate beneficial owner. As disclosed by the Maltese [authorities](#), the ECB decided to withdraw Pilatus Bank's license on 5 November 2018.

Case 4: Danske Bank's branch in Estonia

Danske Bank is a Danish Bank which is not supervised by the SSM as Denmark is not part of the Banking Union. Its branch in Estonia is supervised by Estonia's Financial Supervisory Authority (Finantsinspektorat) as a "host" supervisor in accordance with the Capital Requirements Directive (CRD). Pursuant to the CRD,

responsibility for prudential supervision, including internal control systems, lies with the home supervisor¹. For money laundering purposes, the competent authorities of a host Member State retains full responsibility, as explained in box 2 below. Further to allegations from the [press](#) on 26 February 2018 that lax controls in Danske Bank's Estonian operations led to potential money laundering, the Finantsinspektsioon explained the following:

- On 27 February 2018, Finantsinspektsioon [stated](#) that it would look at whether Danske knowingly withheld information during a series of on-site inspections it conducted at its Estonian branch in 2014 and emphasised that *"possibly misleading the financial supervisory institution in supervision proceedings is a serious violation, if Danske bank had additional information on this client but did not disclose it during the on-site inspection"*;
- As part of the investigations [carried out](#) in 2014, Finantsinspektsioon found *"large-scale, long-lasting systemic violations of anti-money laundering rules in the Estonian branch of the Danish credit institution"*. In 2015, Finantsinspektsioon required the bank to target these violations more effectively. *"As a result, the bank stopped providing services to non-residents in the volumes and format seen previously"*;
- Estonia's Finantsinspektsioon informed the Danish Finanstilsynet about intention to carry out on-site inspection and the results of the inspection;
- On 21 March 2016, the Danish Finanstilsynet published a [report](#) on the results of the inspection carried out in the Danske Bank Group regarding the implementation of money laundering and terrorist financing prevention measures;
- On 3 May 2018, the Danish Finanstilsynet took a [decision](#) concerning Danske Bank's management and control in the Estonian money laundering case, comprising orders and reprimands, and indicating the need for an increase in the bank's capital requirement by DKK 5bn due to increased compliance and reputational risk.

[Danske Bank](#) commissioned a law firm to carry out an independent investigation in its Estonian branch, summarising its findings in a [report](#) (Report on the Non-Resident Portfolio at Danske Bank's Estonian branch). The examination included 95 million transactions 15,000 customers in the period 2007-2015. According to that report, the investigation analysed a total of some 6,200 customers, selected by using risk indicators, and found that the vast majority of them was suspicious. In contrast, *"according to some of the internal audit report [performed before] in Danske Bank Estonia, the whole non-resident was actually considered to be rather low-risk in some reports"*. This has been confirmed by the interim CEO of Danske Bank at the EP Tax 3 [hearing](#) in November 2018 who mentioned that even though they were aware that servicing such customers involved high level of risk, they were equally convinced that strong AML-procedures mitigated those risks.

[Danske Bank](#) has recognised *"a series of major deficiencies in the bank's governance and control systems made it possible to use Danske Bank's branch in Estonia for suspicious transactions"*. Key findings of that report inter alia include that:

- a series of major deficiencies in the bank's governance and control systems made it possible to use Danske Bank's branch in Estonia for suspicious transactions,
- Danske Bank's branch had a large number of non-resident customers in Estonia that carried out large volumes of transactions that should have never happened,
- only part of the suspicious customers and transactions were historically reported to the authorities as they should have been,
- the Estonian control functions did not have a satisfactory degree of independence from the Estonian organisation,

¹ Nevertheless, the "competent authorities of the host Member State has the power to carry out, on a case-by-case basis, on the spot checks and inspections of the activities carried out by branches of institutions on their territory [...] where they consider it relevant for reasons of stability of the financial system in the host Member State" (CRD Article 52). Findings of those investigations shall be sent to the home competent authorities.

² According to Danske Bank's whistle-blower at his audition at the November 2018 Tax 3 [hearing](#).

- the branch operated too independently from the rest of the Group with its own culture and systems without adequate control and management focus from the Group,
- and that as a result, the Group was slow to realise the problems and rectify the shortcomings.

According to Danske Bank's [whistle-blower](#), *"insufficient understanding of the risks meant that the issues were generally reported internally with assurances that things were under control"*. In addition, it was stressed that *"there was possible collusion between customers and employees at the Estonian branch"*.

Reacting to this report, the [Danish FSA](#) explained that it is *"continually considering whether new information will make us reconsider the decision made in May. [It] will now examine the bank's investigation carefully in this respect"*.

Regarding the cooperation with the Danish Authorities, [Finanstilsynet](#) emphasised the limits of the supervisory framework as follows: *"Under European Union law, supervision of Danish credit institutions, including their internal control systems as whole, is the responsibility of respective Danish authorities. The Estonian financial supervisory institution has limited responsibility concerning incoming branches of European Union credit institutions operating in Estonia. Finantsinspeksiioon exercised its responsibilities and by its actions terminated the significant money-laundering risks stemming from the Estonian branch of Danske Bank in 2014/2015. The Danish financial supervisory institution has been informed of this"*.

The [Commission](#) requested in September 2018 the EBA to investigate a possible breach of Union law or non-application of Union law both by the Estonian as well as the Danish supervisors. In that letter, the Commission took the view that *"the actions of the Danish supervisor, as the one responsible for the compliance with group-wide AML/CFT policies and procedures remain unclear and raise questions as to whether the Danish supervisor carried out effective supervision of the Danske Bank group"*. In addition, the Commission noted that *"It is also questionable whether the exchange of information between the two supervisors was adequate and relevant"*.

In a response to the report on the Danish FSA's supervision of Danske Bank, [Finantsinspeksiioon](#) of Estonia has welcomed in January 2019 *"the clear indication now given by our Danish colleague that Finantsinspeksiioon of Estonia should firmly take the lead in supervising the Danske Bank in Estonia, clarity that we have been waiting for some years"*.

Danske Bank's case also lays bare how interconnected across countries money laundering is. According to Danske Bank's [whistle-blower](#), AML at Danske involved *"at least 10 banks" active in different countries, including large American banks, 8 Member States and the United States: "80% to 90% of the money that went through Danske Bank ended up in dollars, leaving through US correspondent banks, into the financial system. The banks in the US, including the US subsidiary of a European bank, were basically the last check"*. At the February 2019 Tax 3 [hearing](#) on Deutsche Bank, Deutsche Bank explained that it stopped its corresponding banking activity for Danske Bank in 2015 due to *"increased concerns"*.

Case 5: ING - settlement with Dutch authorities regarding AML shortcomings

On 4 September 2018, ING, the largest Dutch bank that is directly supervised by the ECB, [announced](#) that it had settled an agreement with the Dutch Public Prosecution Service, agreeing to pay a fine of EUR 675 million and EUR 100 million for disgorgement. The press statement discloses that the fine relates to the authorities' investigations at ING Netherlands for the period from 2010 to 2016 regarding serious shortcomings to prevent money laundering and financial economic crime. At the November 2018 EP Tax3 [hearing](#), ING "acknowledged serious shortcomings in the execution of customer due diligence and transaction monitoring to prevent financial economic crime [from 2010 to 2016].

Box 2: Responsibilities of host and home supervisor under the 4th AML Directive

Responsibilities of the competent authorities of the home Member State

"Where an obliged entity operates establishments in another Member State [...], the competent authority of the home Member State should be responsible for supervising the obliged entity's application of group-wide AML/CFT policies and procedures. This could involve on-site visits in establishments based in another Member State. The competent authority of the home Member State should cooperate closely with the competent authority of the host Member State and should inform the latter of any issues that could affect their assessment of the establishment's compliance with the host AML/CFT rules".

Responsibilities of the competent authorities of the host Member State

"Where an obliged entity operates establishments in another Member State [...], the competent authority of the host Member State retains responsibility for enforcing the establishment's compliance with AML/CFT rules, including, where appropriate, by carrying out onsite inspections and offsite monitoring and by taking appropriate and proportionate measures to address serious infringements of those requirements. The competent authority of the host Member State should cooperate closely with the competent authority of the home Member State and should inform the latter of any issues that could affect its assessment of the obliged entity's application of group AML/CFT policies and procedures. In order to remove serious infringements of AML/CFT rules that require immediate remedies, the competent authority of the host Member State should be able to apply appropriate and proportionate temporary remedial measures, applicable under similar circumstances to obliged entities under their competence, to address such serious failings, where appropriate, with the assistance of, or in cooperation with, the competent authority of the home Member State"

Source: Recitals 52 and 53 of [Directive 2015/849](#)

2. Are supervisory financial indicators sufficient?

A robust assessment whether a bank might systematically be involved in some kind of money laundering activity can only be based on detailed information at transaction level; it is exactly that sort of information that supervisory or law enforcement authorities will seek to obtain in the course of targeted on-site inspections. In some instances, supervisors are informed by whistle blowers or alerts (suspicious communication transactions) issued by other market agents.

In general, the public will therefore only learn about the involvement of a bank in money laundering activities once a supervisory statement or warning is published, following a proper analysis of detailed information.

Supervisory key indicators

When it comes to the identification of money laundering activities, the financial key indicators that are usually gauged at bank entity level to assess its financial soundness and compliance with regulatory requirements are not very telling. In fact, those two banks that have recently been officially accused of money laundering, ABLV and Versobank, would have both indicated to be in good financial health when assessed against those key financial indicators (see Table 1).

Table 1: Supervisory key financial indicators, in comparison

Key financial indicator	ABLV (at 31/12/2017)	Versobank (at 31/12/2017)	Average of directly supervised banks (as 30/09/2017)
CET1 ratio	16.3%	17.6%	13.7%
Total capital ratio	21.1%	26.5%	17.2%
NPL ratio	3.4%*	0.5% **	6.5%
Leverage ratio	7.9%	7.8%	5.3%
Loan-to-Deposit ratio	39.4%	19%	122.3%

Sources, if not explicitly indicated otherwise: [ABLV Public Quarterly Report Jan-Dec 2017](#), [Versobank Public Interim Report IV Quarter 2017](#), [ECB Supervisory Banking Statistics](#); leverage ratio and loan-to-deposit ratio for ABLV based on own calculation; leverage ratio for Versobank based on transitional definition; * Amounts past due for more than 90 days and impaired loans, as percentage of the loan portfolio, according to the [ABLV annual report 2016](#), at group level;

** Share of non-performing loans, with 90 days past due, of the gross loan portfolio, according to the [Public Interim Report for the second Quarter 2017](#).

Other indicators

Other indicators (based on the cases in question) could therefore be more telling, even though they are by no means sufficient - neither isolated nor combined - to reliably spot systematic money laundering activities³. The first feature that ABLV and Versobank had in common is the very **high ownership concentration**:

- In case of ABLV, the bank's controlling interest was held by the bank's Chief Executive Officer and the bank's Chairman of the Council (combined they held 87% of the shares with voting rights), the rest was held by other closely related shareholders (management and employees), but there was no free float of shares or outside shareholders;
- In case of Versobank, the main share of the bank was owned by Cyprus Popular Bank until March 2012, thereafter Ukrainian investors became the main shareholders, and more than 85% of the shares were then held by the Ukrainian agro-industrial company UKRSELHOSPROM.

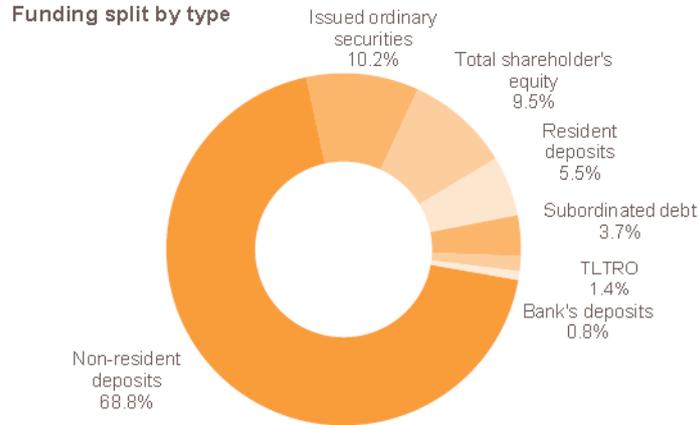
A second common feature of those two banks was that a very large part of their deposit base came from by **non-resident clients**.

- In case of Versobank, the interim financial report shows the geographical concentration of financial liabilities: At the end of 2017, 83% of the bank's liabilities to customers were owed to non-resident clients outside of Estonia;
- In case of ABLV, that information is not disclosed in the bank's quarterly report but in a presentation to investors, according to which 69% of the bank's total funding - including equity - stemmed from deposits of non-residential clients (see figure 1). That figure is even higher when compared only to

³ Indicators that banks can use at the transaction level are of course different and go into much more detail; the Belgian authority in charge of AML (CTIF) has, for example, published an interesting guidance/list with [related indicators](#) at transaction level in that respect.

the deposit base: At the end of June 2017, 84% of the total deposits placed at ABLV came from clients whose beneficiaries are residents in the Russian Commonwealth CIS.

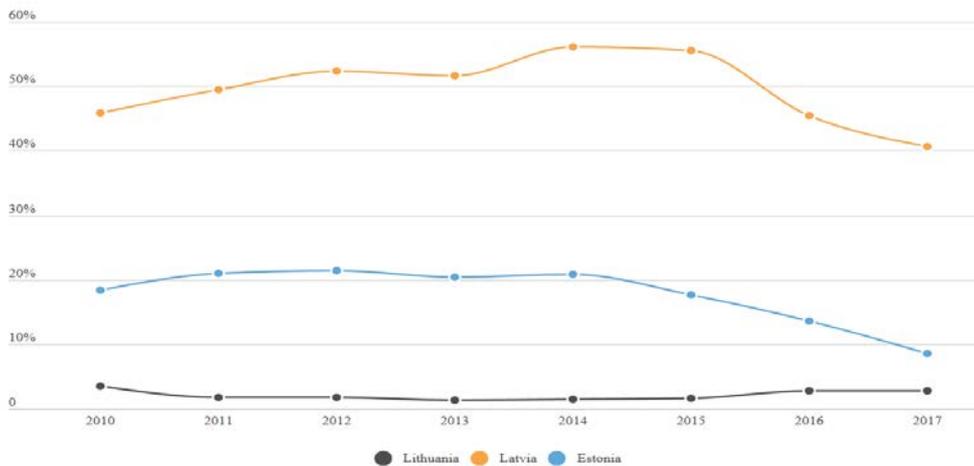
Figure 1: ABLV Bank Funding split by type (at 30 Sept. 2017)



Source: [ABLV Facts & Figures of September 30, 2017](#), p. 10

The Estonian banking supervisor analysed the share of deposits by non-resident companies and household clients in the three Baltic States. In Lithuania, the share of non-resident deposits in bank deposits only accounts for 2.8% and is hence rather negligible, whereas it plays on average a bigger role in Estonia and in particular in Latvia. At the peak in 2014, 56% of all the deposits in Latvian banks were deposits of non-residents, that share had fallen to 41% by 2017. The share of deposits in Estonia held by foreign non-financial sector companies and households has been declining steadily, and it fell from a peak of 21% in 2012 to 8.5% by 2017 (see chart 1). Compared to the averages at national level, the share of non-resident deposits was still higher in case of ABLV and much higher in case of Versobank. The share of non-resident deposits has been assessed by the EBA as an indicator of potential AML breaches. As part of its preliminary enquiry conducted at the Maltese FSA, the European Banking Authority ([EBA](#)) expressed concerns about the lack of “resources and risk prioritisation given to credit institutions pursuing a private banking business model with predominantly non-resident customers”.

Chart 1: The share of non-resident deposits from households and non-financial sector corporates in the Baltic States (2010-2017)



Source: [Eesti Pank](#)

The third common feature of ABLV and Versobank finally was the large share of **deposits made in non-euro currencies**:

- in case of Versobank, more than one third of its deposits was made in US dollars (see display of the currency position at 31/12/2017 in the interim report);
- in case of ABLV, deposits made in USD apparently exceeded even 60% of the total deposit base at the end of 2016, according to the latest full annual report available (on average, the share of US dollar deposits in Latvian banks amounted to just over 30% at the end of 2016, according to the [statistical information](#) provided by the Latvian supervisor; according to the [statistics](#) of the Estonian supervisor, the share of US dollar deposits was on average amounting to just 11% in Estonian banks at that time).

Hence, both ABLV and Versobank had a much higher share of deposits made in non-euro currencies than their competitors on their home markets.

3. Allocation of supervisory responsibilities

Compliance with AML rules involves (i) national competent authorities that may include the prudential supervisor, the (ii) ECB (SSM) as a prudential supervisor along the lines described below and iii) the European Supervisory Authorities (ESAs)⁴ tasked with supervisory convergence.

National competent authorities

Responsibilities for anti-money laundering primarily fall with national competent authorities that are designated by Member States when transposing AML Directives. By way of example, in [Malta](#), supervisory cooperation between the FIAU (Financial Intelligence Analysis Unit) and the Malta Financial Services Authorities is organised by law along the following lines:

- (FIAU) is the national agency with responsibility for prevention of money laundering and financing of terrorism and is also responsible for ensuring compliance by all subject persons,
- The MFSA, as the financial services supervisory Authority has a vested regulatory interest to prevent the use and involvement of authorized persons in such crimes. The MFSA is considered to be an agent of the FIAU and is required to extend assistance and cooperation to the FIAU in the fulfilment of its responsibilities. The MFSA also carries out on behalf of the FIAU, on-site examinations on subject persons falling under its supervisory competence with the aim of establishing that person's compliance with the requirements of the PMLA or regulations and reports to the FIAU accordingly
- The FIAU may request the MFSA to provide it with information of which it may become aware during the course of its supervisory functions, including that a subject person may not be in compliance with the requirements of the PMLA or regulations made thereunder.
- The MFSA is also required by law to disclose to the FIAU any facts or information that could be related to money laundering or the funding of terrorism, discovered or obtained in the course of its supervisory work or in any other manner.

The November 2016 European Supervisory Authorities' [guidelines](#)⁵ on risk-based supervision place particular emphasis on information collected by prudential supervisors, including the Single Supervisory Mechanism (SSM) in the Banking Union, which is nevertheless scattered across authorities:

⁴ The European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

⁵ These guidelines set out the characteristics of a risk-based approach to anti-money laundering and countering the financing of terrorism (AML/CFT) supervision and the steps competent authorities should take when conducting supervision on a risk-sensitive basis as required by Article 48(10) of Directive (EU) 2015/849.

- *“Where relevant information is held by other competent authorities either at home or abroad, competent authorities should take steps to ensure that gateways make possible the exchange of that information, and that this information can be exchanged in a timely manner. This also applies to information held by the European Central Bank through the Single Supervisory Mechanism”;*
- *“This information may originate from the overall prudential and/or conduct supervision and take into account, where relevant, prudential information obtained in the context of the Single Supervisory Mechanism. However, it may be appropriate to collect such information specifically if it is not already held on the competent authorities’ records”.*

For information to be more efficiently channelled from one competent authority to another, the Commission has suggested amendments to the ESA review in September 2018. It is suggested that EBA acts as “hub” to collect information. EBA will be required to ensure that information is analysed and made available to competent authorities on a “need-to-know basis” (See Part 4).

At the 26 March 2018 [ECON hearing](#), Danièle Nouy very much welcomed the “5th Anti Money Laundering Directive that will clarify the fact that there can be exchanges of information between national competent authorities and the SSM”, which is “*not explicit so far*”. Danièle Nouy stressed that the SSM depends on “*the goodwill of national authorities*”. In terms of information sharing from the SSM to the AML competent authorities, when the “*SSM finds what could be a criminal offence*”, it makes sure that this information is sent to national competent authorities. The 5th anti-money laundering Directive (see box 3) requires the conclusion of an agreement on the practical modalities for exchange of information between AML authorities and prudential supervisors. This [MoU](#) between the ECB and all relevant AML authorities was concluded in January 2019⁶.

Nevertheless, while providing gateways for exchanging information, such new framework would not, as explained by the Chair of SSM in a [letter](#) dated 3 May 2018, “*guarantee that national AML authorities would share all relevant information with bank supervisors in a timely manner*”. In that respect, the EP has proposed an amendment to the CRD, as part of the Banking Package that requires cooperation between prudential authorities and AML authorities, including in terms of information exchange (Article 117). That amendment has been adopted by the co-legislator (See Part 4).

The ECB (Single Supervisory Mechanism)

In a [public statement](#) dated 22 February 2018, Danièle Nouy, chair of the Supervisory Board of the Single Supervisory Mechanism mentioned that: “*Breaches of anti-money laundering can be symptomatic of more deeply rooted governance deficiencies within a bank but the ECB does not have the investigative powers to uncover such deficiencies. This is the task of national anti-money laundering authorities. Only when such breaches have been established by the relevant national authority can the ECB take these facts into consideration for the purposes of its own tasks*”. In that respect, Recital 28 of the [SSM Regulation](#) makes it clear that the prevention of the use of the financial system for the purpose of money laundering and terrorist financing lies with national authorities. In that respect, the SSM supervisory [guide](#) to on-site inspection of July 2018 explicitly scopes out AML supervision.

At the same time, in her [letter](#) dated 13 July 2017, Danièle Nouy stressed that “*the ECB has identified conduct risk - which includes compliance with anti-money laundering laws - as one of the key risks for the area banking system. At bank-specific level, identifying such risks feeds into the ECB’s annual Supervisory Review and Evaluation Process (SREP), which may result in additional capital or liquidity requirements, or supervisory measures, as appropriate*”.

⁶ The ESAs, together with the ECB and CAs, have developed a Multilateral Agreement, which contains provisions on the type of information and underlying process for exchanging it; confidentiality and data protection provisions.

In addition to supervisory powers under SREP, this letter identified other supervisory tools:

- For significant institutions in particular, assessment of the influence that qualified shareholders may have on the prudent and sound management of the institution;
- Withdrawal of the authorisation of all credit institutions in the euro area (both significant and less significant institutions in accordance with Article 14(5) of the [SSM Regulation](#)), inter alia, for anti-money laundering and anti-terrorist financing reasons, subject to the safeguards of European Union law, including the principle of proportionality⁷;
- fit and proper assessment of board members and key function holders of significant institutions under its supervision.

At the 26 March 2018 [ECON hearing](#), Danièle Nouy further explained, during the exchange of views with MEP that the “*ECB takes the breaches [of anti-money laundering rules] as a given*” and uses those breaches for action under Pillar 2 or to withdraw an authorisation, but “*supervisory tools are not fit for tracking money laundering practices*”.

When it comes to the **integration of AML consideration into prudential supervision**, the Chair of the SSM in a [letter](#) dated 3 May 2018 confirmed that “*the SSM Supervisory Review and Evaluation Process (SREP) includes the components necessary for a comprehensive prudential treatment of AML risk, within the limits of its competence and in the light of information available*” [our emphasis], as part of the assessment of banks’ internal governance, operational risk and business models. Put it another way, AML consideration are already integrated into prudential supervision, provided that information is made available to the SSM by national authorities responsible for AML supervision. In that respect, the Chair of the SSM has repeatedly explained that the supervisory framework does not guarantee that the SSM would receive information in a timely manner. Against this background, the Commission [communication](#) on AML has asked the ECB to clarify the “practical arrangements that concern incorporation of anti-money laundering related aspects into prudential supervision”.

Box 3: The 5th Anti Money Laundering Directive

Commission adopted a [proposal](#) to amend [Directive \(EU\) 2015/849](#) on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing on 5 July 2016. Pursuant to the inter-institutional [agreement](#) reached on 20 December 2017, the European Parliament adopted the 5th AML Directive on 19 April. In terms of information exchange, the 5th AML Directive lays down the following framework:

- National prudential competent authorities and the European Central Bank (as banking supervisor in the Banking Union) shall conclude, with the support of the European Supervisory Authorities, an agreement on the practical modalities for exchange of information. That [agreement](#) has been agreed upon in January 2019.
- For information exchange from banking supervisor to AML authorities, professional secrecy obligations under CRD Article 56 shall not preclude the exchange of information with AML competent authorities;
- For information exchanges from AML competent authorities to banking supervisor, Article 57a of the 5th AML Directive makes a distinction between information exchange between i) authorities in the same Member State and ii) across Member States including the SSM. For the former (i.e. across Member State), that exchange of information shall be subject to the conditions of professional secrecy, i.e. “*confidential information which [AML competent authorities] receive in the course of their duties under this Directive may be disclosed only in summary or aggregate form, such that individual credit and financial institutions cannot be identified, without prejudice to cases covered by criminal law*”.

⁷ According to the CRD Article 18(1), an authorisation may be withdrawn where a credit institution commits one of the breaches referred to in Article 67(1), which includes the circumstance whereby « an institution is found liable for a serious breach of the national provisions adopted pursuant to Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

In terms of an **enhanced coordination and exchange of information**, the Chair of the SSM identified in a [letter](#) dated 3 May 2018 the following limits to the exchange of information: i) allowing the exchange of confidential information as provided for in the 5th AML Directive (See Part 3) does not mean that AML authorities will share all relevant information with bank supervisor in a timely manner; ii) the cooperation framework foreseen in the 5th AML Directive would not be swiftly set up. In that respect, the chair of SSM called for the establishment of a new Authority as a way to improve and strengthen the cooperation framework (see below). Against this background, Commission suggests that EBA becomes the 'new' authority in charge of AML supervision. It should work as a 'hub' to collect and disseminate information across authorities (See Part 4). In addition, authorities should not only have the ability to share information but shall be required to cooperate and exchange information⁸.

The European Supervisory Authorities (ESAs)

The ESAs Founding Regulations scope in *"to the extent that those acts apply to [financial institutions and financial market participants] the relevant parts of Directive 2005/60/EC⁹"* and involve the authorities competent for ensuring compliance with those Directives. This means that the ESAs may act within the powers conferred by the ESA Founding Regulations (i.e. guidelines, breach of Union law, action in emergency situations, settlement of disagreements, college of supervisors, peer review, coordination function, collection of information, common supervisory culture) within the scope of AML Directives.

EBA has already used some of its powers to enforce AML standards. As explained by [EBA](#), *"following communications from a number of members of the [European Parliament](#), [the EBA] conducted a preliminary enquiry into a potential breach of Union law in Portugal and made a number of suggestions based on [its] findings"*. The EBA is also conducting preliminary enquiries in Malta and Latvia.

The [ESAs](#) are particularly involved in *"facilitating and fostering the co-operation of competent AML/CFT authorities across the EU"* and developing guidelines and opinions. Article 6(5) of Directive (EU) 2015/849 requires the ESAs to issue a joint opinion on the risks of money laundering and terrorist financing affecting the Union's financial sector. In its February 2017 joint opinion, the ESAs have emphasised that *"more has to be done to ensure that the Union's AML/CFT defences are effective. This is particularly important as Member States move towards a more risk-based AML/CFT regime that presupposes a level of ML/TF risk awareness and management expertise that this Opinion suggests does not yet exist in all firms and all sectors"*. In its September 2018 [communication](#), the Commission invites the ESA to highlight in its next opinion the "financial sector strategic aspects of AML and the related findings, including possible ways to address identified shortcomings, if any".

[EBA](#) pointed out at the EP TAX3 [hearing](#) that its powers to enforce standards and guidelines are limited: *"we do not supervise individual financial institutions and we do not currently have the legal tools to enforce compliance in a way that would compel a competent authority to change its approach"*. EBA may investigate a breach of Union law, and issue recommendations, but *"they cannot make up [...] for weak or ineffective supervisory practices"*. As explained at the EP TAX3 hearing, EBA would in any case lack resources to perform all the tasks referred to in the EBA Founding Regulation (See Part 3 above). EBA staff involved in AML has been recently reinforced from 1 to 2 persons. The EBA asked for *"sufficient powers and resources to enable the EBA to take action where necessary to support the correct and consistent application of EU AML standards and guidelines"*.

⁸ ECON Committee report proposal on the Banking Package (CRD Article 117) that is being negotiated at Parliament and Council.

⁹ The ESA review adopted by Commission in September 2017 updates this reference and replaces Directive 2005/60/EC repealed by Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

4. Enhancing the existing AML supervisory framework

At the March 2018 ECON hearing with the Chair of the SSM and the subsequent April 2018 TAX3 [hearing](#)¹⁰, the European Parliament has launched a debate as to whether and how the supervisory architecture should be better designed to ensure an effective application of the AML framework.

The [Commission](#)¹¹ set up a Joint Working Group in May 2018 involving the Commission services, the SSM and the three European Supervisory Authorities (EBA, ESMA and EIOPA) to “*identify specific actions to be taken by the respective authorities, in order to improve the practical coordination of AML supervision of financial institutions, in the short term and beyond*”. On 31 August 2018, the Joint Working Group presented a [reflection paper](#) to Member States and the European Parliament with a list of potential actions, seeking views on possible next steps. Based on the Joint Working Group’s report, the Commission has proposed in its [communication](#) an array of different actions that are summarised below. At the same time, the [Eurogroup](#) agreed to identify further measures to enhance the monitoring of the implementation of AML measures possibly as part of an action plan, by end 2018.

The Commission has proposed a three-pronged approach to reinforce the AML supervisory framework:

- Commitment to further develop guidelines and best practices in terms of AML supervision, which do not need any legislative changes;
- Strengthening the AML supervisory framework by entrusting the European Banking Authority (‘EBA’) with new powers and importantly by requiring the EBA to act in certain domains;
- Conducting a more fundamental review of the AML supervisory framework (i.e. possible need for a new EU body) at a later stage, in accordance with the review clause of the 5th AML Directive (i.e. January 2022) - See Part 5

In addition to this action plan, the [EBA](#) has identified a number of areas where additional changes to the Capital Requirements Directive (‘CRD’) would be instrumental in addressing deficiencies in Union law.

Action plan to enhance the AML supervisory framework

The proposed actions fall into three broad categories, namely (i) better incorporation of AML into supervisory actions and (ii) better cooperation of AML authorities and prudential supervisors, which are supported by (iii) institutional changes. Most of the actions outlined in Commission’s action plan and Joint Working Group report do not require legislative changes and could have already been conducted under the existing supervisory framework.

Commission’s action plan very much focuses on the prudential supervisory approach to AML in terms of both anchoring AML in prudential supervision and enhancing cooperation between AML supervisor and prudential supervisor (see Table 2 below for the list of actions). The EBA is requested to develop new guidelines and analysis in terms of effective cooperation, identification of risks, and prudential supervision of AML risks, including the withdrawal of authorisation. In that respect, the [Joint Committee](#) of the three European Supervisory Authorities (EBA, EIOPA and ESMA - ESAs) has launched in November 2018 a public consultation on draft Guidelines on the cooperation and information exchange between competent authorities. To address the inefficiencies of cross-border cooperation (See in particular Danske Bank case in Part 1), the Guidelines propose in particular the creation of AML/CFT colleges of supervisors for the AML supervision.

¹⁰ Public hearing ‘Combat of Money Laundering in the EU Banking Sector’ organised by the European Parliament’s Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance (TAX3) on 26 April 2018.

¹¹ Letter from F. Timmermans, First Vice-President of the European Commission, V. Dombrovskis, Vice-President of the European Commission and V. Jourova, Commissioner, to Danièle Nouy, chair of the SSM, A. Enria, chair of EBA, G. Bernardino, chair of EIOPA and S. Maijoor, chair of ESMA.

With respect to the withdrawal of licence for a “serious breach” of AML rules, the Joint working Group suggests clarifying the criteria guiding the discretion of prudential supervisors. In that respect, the [SSM](#) pointed out in a letter dated 3 May 2018 that there is “*always a need for supervisory discretion on a case-by-case basis*”.

While focussing on the prudential supervisory approach to AML, the action plan only contains a few recommendations with respect to AML supervision. EBA has been asked to enhance its Risk-Based Supervision Guidelines that would be extended to common procedures and methodologies. In terms of going forward, the Joint Working Group report notes that ‘to ensure consistent and clear interactions between the prudential and AML/CTF framework, EU legislation could be adjusted in the long term’, but does not further specify which specific adjustment may be needed.

Additional regulatory changes proposed by EBA

In its September 2018 letter to the EP in relation to Pilatus Bank, the [EBA](#) identified additional areas in the CRD where legislative changes would be needed to address the deficiencies of the EU framework:

- In relation to banks’ authorisation process, the EBA suggests that the CRD requires AML supervisors to “contribute their expertise to authorisation assessments”;
- When it comes to the assessment of qualifying holdings (‘fit and proper’), the EBA points to significant difficulties arising from the obligation under some national law to take into account definitive judicial and administrative findings. This would call for directly applicable law requirement in that area (See also below Part 5, section on “maximum harmonisation”). In addition, the EBA calls for clearer assessment criteria in CRD Article 23(1)(e) when assessing whether an acquisition of a qualifying holding could increase the risk of AML;
- In terms of prudential supervision of AML, EBA emphasises that the CRD does not specifically set out the risk of financial crime as a risk to be assessed by institutions and their prudential supervisors. In that respect, the EBA suggests including an Article on ML/TF in the CRD¹² to ensure clarity over the role of prudential supervisor.

Those proposals have been addressed as part of the finalisation of the CRD5/CRR2 (“banking package”).

Enhancing EBA’s power

For EBA’s powers to be more effective in addressing AML, the Commission proposes (i) new powers, (ii) strengthening existing powers; (iii) an obligation for EBA to act in certain domains. Changes to the EBA Regulation are outlined in Table 3 overleaf. In terms of AML supervision, EBA would take over from the 3 ESA (EIOPA, EBA and ESMA) Joint Committee’s subcommittee. Commission suggests, as part of the ESA Review, the establishment of a new EBA ‘Standing Committee’ on AML. Trilogue negotiations are ongoing as part of the ESA review. The [Council](#) reached a general approach on 16 January 2019 and the EP adopted its [report](#) on 14 January.

¹² In Section II (“Arrangements, processes and mechanisms of institutions”) of Chapter 2 of Title VII of CRD.

Table 2: Key measures of Commission’s action plan and Joint Working Group Report

Item		Existing framework	Suggested measure	Timeline
Institutional changes	Cooperation	No obligation to cooperate between prudential and AML authorities	Proposed <u>legislative obligation</u> for prudential supervisor and AML competent authorities to cooperate and provide each other with information (amendment to CRD Article 117 proposed by EP as part of the Banking Package)	Adopted by the co-legislator as part of Banking Package (CRD2/CRR5) being negotiated at the Council and Parliament
	European Supervisory Authority	all existing convergence instruments implicitly apply to AML	Proposed <u>legislative change</u> to endow EBA with a clear responsibility for AML <u>Changes to the ESA Regulation</u> proposed by Commission to strengthen convergence instruments in relation to AML and add new powers (see Table 3)	Adoption by the co-legislator of the ESA review being negotiated at the Council and Parliament
Incorporation of AML into prudential supervision	Stock taking exercise	Possible under existing framework	<u>Commitment</u> to undertake a stock-taking exercise identifying various AML issues relevant from a prudential perspective	H1 2019 according to the Joint Working Group report
	Common guidance on prudential activities	Possible under existing framework	<u>Commitment</u> to adopt common guidance on how AML should be factored in in the prudential supervisory process	End 2019 according to the Joint Working Group report
	Effective cooperation across authorities	Possible under existing framework	<u>Commitment</u> to enhance the cooperation framework throughout the various phases of the supervisory processes	End 2019 according to the Joint Working Group report
	Clarification of aspects related to withdrawal of authorisation	Possible under existing framework	<u>Commitment</u> to clarify the process governing the withdrawal of licences ('serious breach', consequence of the licence withdrawal, criteria...)	Mid 2019 according to the Joint Working Group report
	Division of tasks within the SSM	Possible under existing framework	Clarification of tasks between the ECB and national competent authorities Clarification of aspects related to the withdraw of authorisation	Mid 2019 according to the Joint Working Group report
Cooperation	Guidance on improving AML supervision	Possible under existing framework	<u>Commitment</u> to enhance and rigorously implement the Risk-Based Supervision Joint Guidelines, including common procedures and methodologies	End 2019 according to the Joint Working Group report
	MoU	Already required under the 5th AMLD	MoU between the ECB and AML supervisors	Adopted on 10 January 2019

Source: EGOV

New powers

In terms of new powers, EBA is tasked with requesting national authorities to investigate alleged breaches of AML (Article 9b of the EBA Regulation). In that respect, EBA does not substitute national authorities, but it may request a competent authority to consider adopting an individual decision. The national authority shall inform EBA within 10 days of the steps it has taken or intends to take to comply with that request¹³. Nevertheless, in case of breaches of Union law, EBA has the power to adopt an individual decision addressed to the financial institution. This power - Breach of Union law - already existed under Article 17 of the EBA Regulation, but was constrained by the very legal nature of AML Directive. The power of EBA to address individual decisions to firms only applied with respect to “directly applicable Union law” (which is not the case of Directives). Amendments to the ESA review extend the EBA power under Article 17 to all Union act legislation, including national legislation transposing EU directives¹⁴.

In addition, Commission’s communication suggests that all relevant authorities should have the possibility to refer a disagreement on cooperation and exchange of information to the EBA. Nevertheless, it does not seem that this proposal be substantiated in Commission’s legislative proposal. EBA has the power to settle disagreement (binding mediation) between authorities only in cases referred to in sectorial legislation. The Commission has not proposed amendment to CRD or AML Directive as part of the review of the ESA Regulation that would allow for binding mediation. For that power to be effective, an amendment to the CRD, where appropriate, would be needed.

Strengthening existing powers

In addition, Commission proposes to strengthen existing powers by making “explicit” certain tasks that EBA already has (e.g. convergence powers, independent review) and reinforcing convergence mechanisms together with an increased coordination role of EBA vis-à-vis national competent authorities. In that respect, EBA would become a data-hub” on AML supervision. It would not only be able to collect information (as this is possible under the existing ESA Regulation), but national authorities shall on an ongoing basis provide EBA with all information relating to “weaknesses identified in the process and procedures, governance arrangements, fit and proper, business models and activities of financial sector operators”.

This power would be particularly effective in cross-border situation (e.g. Danske Bank case outlined in Part 1) as EBA would be expected to receive information from national authorities across different Member States and coordinate, where appropriate, supervisory actions. As ING emphasised it at the November 2018 EP Tax 3 [hearing](#) “as financial crimes are often cross-institution and cross-border, we should be able to exchange inter-bank information - for instance to make ensure that a client banned by one institution will not be able to do business with another”.

Efficiency of “independent reviews” conducted by EBA is also significantly enhanced. Commission proposes that where national competent authorities do not take actions further to a review related to AML, Commission proposes that EBA informs thereof the EP, Commission and Council.

Obligation to act

The existing ESA Regulation entrusts the Authorities with powers, but does not provide for an obligation to perform any specific supervisory actions. Commission’s proposal on AML supervision goes a step further and mandates the EBA to act in certain domains:

¹³ This mechanism is akin to the coordination function EBA has under Article 31a of the EBA Regulation (as proposed by Commission in its ESA [review](#) proposal) to monitor outsourcing and delegation arrangements.

¹⁴ Application by an EU Authority of “national law” (and not only directly applicable law) has a precedent in EU banking legislation. The SSM Regulation entrusts the ECB with the power of applying national law (See Article 4(3) of the SSM Regulation).

- EBA's role in managing AML-related information is not 'passive' but 'pro-active': EBA shall make sure that information collected is analysed and made available on a "need-to-know" basis (Article 9a(2));
- EBA is not only able to carry out independent review of AML authorities (see above), but also has the obligation to "regularly perform risk assessment" of authorities (Article 9a(4))

Staffing

In terms of staffing, the financial statements accompanying Commission's proposal plan 4 FTE in 2019 and to 7.8 FTE from 2010 onwards. This would bring EBA staff in charge of AML from 2 to 10 people. Reacting to the Commission's proposal, EBA officials [stressed](#) that the power to encourage national watchdogs to implement stricter supervisory practices will have the biggest impact.

5 Towards a more fundamental shift in terms of AML supervisory arrangements?

While Commission's action plan to strengthen AML supervision is supposed to be completed and implemented in 2019 (see Table 2), longer term actions, including a possible new EU authority and a single rule book (i.e. Regulation for AML), would be presented as part of a report due by January 2022 in accordance with the 5th AML Directive. In that respect, EBA at the November 2018 EP Tax 3 [hearing](#) considered "*the current steps to address AML in the EU as evolutionary rather than revolutionary [...]: minimum harmonisation directives mean that national differences will continue to limit how much convergence our guidelines and standards can achieve. Nonetheless, the current proposals to strengthen consistency of implementation, cooperation and information sharing would, if backed by adequate resources, mark a modest but important step forward in improving AML supervision across the EU*".

A new European body?

The SSM has called for the **establishment of a European Authority** that will be distinct from the ECB/SSM (see box 5 below). The Chair of the SSM further explained in a [letter](#) dated 3 May 2018 the limits of what the existing supervisory and coordination framework may achieve: "*as anti-money laundering concerns both the supervisory and criminal/judicial spheres, reviewing the [AML] Directive may not suffice to ensure cooperation is smooth and all-encompassing. Establishing a European AML authority could bring about such a degree of improved cooperation*".

That question has been put off until Commission's report on AML due by January 2022 in accordance with the 5th AMLD. As part of this report, the Commission's communication makes it clear that: "*Different alternatives could [...] be envisaged in order to ensure high quality and consistent AML supervision, seamless information exchange and optimal cooperation between all relevant authorities in the Union. This may require conferring specific AML supervisory tasks to a Union body*".

Further to the publication of Commission's communication and legislative proposal on EBA, the President of the ECB, at the EP ECON Committee September [monetary dialogue](#) reiterated the need for the EU to establish an EU Authority for AML supervision.

Table 3: What do the amendment to the ESA review bring to the existing Regulation?

	Item	Existing ESA Regulation and AML Directive	Suggested changes
New powers	Breach of Union law (Article 17 of EBA Regulation)	Direct supervisory powers over institutions (for directly applicable law) in case of breach of Union law. Nevertheless, AML Directives are not directly applicable (as opposed to Regulations)	Direct supervisory powers over institutions to enforce <u>all relevant Union law</u> (including national law transposing Directives). This amendment will reinforce EBA’s Breach of Union law tool.
	Settlement of disagreement (Article 19 of EBA Regulation)	Direct supervisory powers over institutions (for directly applicable law) to settle disagreement, where necessary	Direct supervisory powers over institutions to enforce <u>all relevant Union law</u> (including national law transposing Directives)
	(Article 19 of EBA Regulation)	Settlement of disagreement only possible when AML Directive allows for it, which is not the case under the CRD and the 4th and 5th AML Directive	No changes in sectoral legislation although Commission’s communication calls for disagreement in terms of information exchange to be settled by EBA.
	Request for investigation	This power does not exist	<u>National authorities shall investigate alleged AML case at EBA’s request (Article 9b). EBA may request national authority to consider adopting a decision</u>
Strengthening of EBA role	AML task for the ESAs	Not specified, but implicit as AML falls within the scope of the ESA Regulation (Article 1(2))	Make AML a special task for EBA (new Article 9(a))
	Convergence	Not specified, but all convergence instruments implicitly apply to AML	Make convergence instruments in relation to AML explicit (Article 9(a))
	(Peers) review	Possible, but not explicit	Explicit - periodic independent review with expert input from the proposed AML Standing Committee at EBA. Where national competent authorities do not take actions further to a review related to AML, <u>EBA needs to inform the EP, Commission and Council</u>
	Collection of information	Possible under Article 35 at the Authority’s request	<u>Obligation to transmit information</u> on identified weaknesses (Article 9a)
Obligations for EBA to act	Analysis of information	No obligation to analyse collected information	Obligation for EBA to maintain a central base (Article 9a) <u>Obligation for EBA to make sure that the information is analysed</u> and made available (Article 9a)
	Assessment of authorities’ performance	Only possible under the “peer review” mechanism	<u>Obligation to perform risk assessment of AML authorities</u> and inform Commission thereof.

Source: EGOV

Box 5: ECB's public statements in relation to a possible new EU supervisory architecture

In an [interview](#) in March 2017, Danièle Nouy emphasized that whether money laundering and financing of terrorism should be supervised centrally, is a “decision for politicians and legislators to make”, but the Single Supervisory Mechanism cannot take on such responsibility for the following reason: “we already have many tasks which require our full attention. Moreover, we already work closely with the 19 national competent authorities that undertake banking supervision for the countries of the euro area. [...] As anti-money laundering is not necessarily located in the NCAs or NCBs, it would mean having additional “partners” within the SSM, which would add complexity”.

In addition, at the April 2018 TAX3 [hearing](#) on AML, the ECB explained that there may be legal impediments to entrusting ECB with further responsibilities in the field of AML given the legal basis (Article 127(6)) on which the SSM has been established. AML regulation applies to all financial sector while Article 127(6) explicitly rules out ECB supervisory tasks for insurance.

At the 26 March ECON Committee [hearing](#), reacting at the ABLV case, Danièle Nouy called for an EU agency to be set up to police anti-money laundering rules: “we need an European institution that is implementing in a thorough, deep, consistent fashion this legislation in the Euro area [...] We need to change the situation. It's not sustainable to stay in that situation”. Of particular concern were “countries that are not equipped with enough staff and enough expertise”.

In a [paper](#) commissioned by the ECON Committee (‘The supervisory approach to anti-money laundering: an analysis of the Joint Working Group’s reflection paper’), H. Huizinga takes the view that “*suggestions for better cooperation and information sharing among AML and prudential supervisors risk being ineffective as long as the underlying incentives to engage in international regulatory competition towards low enforcement of AML standards are not addressed*”. For Huizinga, only a more radical reform that would bring about an EU-level AML/CFT supervisor would be effective in obviating national AML/CFT regulatory competition. In that respect, at the November 2018 EP Tax 3 [hearing](#), Danske Bank’s whistle-blower emphasised that AML centralisation will take away the home-country bias that was portrayed as an “affectionate caress” regulation or regulation capture.

In the same vein, in a Bruegel policy [contribution](#) dated October 2018 (‘A better European Union architecture to fight money laundering’) Kirschenbaum and Véron concur that the crux of the issue lies in the disconnect between EU integrated financial markets and national AML supervision. As J. Kirschenbaum and N. Véron put it: “*As long as at least one weak link exists, the entire AML system is at risk of failure*”. In that respect, Bruegel recommends a “*unitary architecture centred on a new European AML Authority that would work on the basis of deep relationships with national authorities such as financial intelligence units and law enforcement agencies*”.

International cooperation

National authorities involved in recent alleged breaches of AML requirements that attended the April 2018 TAX3 [hearing](#) - the Financial and Capital Market Commission in Latvia and the Malta Financial Services Authority (MFSA) also positioned themselves in favour of an EU Authority. In particular, the MFSA explained that networks to exchange information would be greatly beneficial, but would be difficult to implement in practice. As an alternative to cooperation arrangements, the MFSA suggested the “*establishment of a centralised EU-wide due diligence/intelligence team which could be a point of liaison with the US and other key authorities around the world and with which national competent authorities could liaise with as part of their due diligence checks at authorisation as well as on an on-going basis*”.

At this stage, Commission’s communication only suggests that EBA takes a ‘leading role’ in supervisory cooperation with third countries under ESA Regulation Article 33, but does not propose further institutional changes. In the same vein, the Joint Working Group report proposed a framework MoU to be developed by

EBA. The need for a more centralised AML supervision in relation to 3d countries would be examined by Commission in a report on FIUs' cooperation under Article 65(2) of AMLD due by June 2019¹⁵.

A maximum harmonisation framework?

The AML Directive is a minimum harmonisation directive which may lead to national differences when Member States transpose the EU framework into national law. At the April 2018 EP TAX3 hearing, the [EBA](#) has stressed that minimum harmonisation limits *"how much convergence our guidelines and standards can achieve: competent authorities and financial institutions will not be able to comply with our guidelines if national law stands in the way"*. The same holds true for rules on authorisation and fit and proper that are governed by the Capital Requirements Directive (CRD) and not by the directly applicable Capital Requirements Regulation (CRR). Despite [EBA guidelines](#) [and [ECB guidelines](#)] on fit and proper assessments, some national law transposing the CRD prevents, according to EBA, competent authorities from addressing money laundering concerns, unless they can find evidence of criminal convictions. This issue has been flagged in the Joint Working Group report as a key impediment to efficient coordination and monitoring of AML supervision.

[Commission](#) plans to further address that question in the context of its report on the implementation of the ALMD due by January 2022. In its December 2018 AML conclusions, the [Council](#) invited *"the Commission to propose, as necessary and in respect for the interinstitutional agreement on better law-making, longer-term actions to bring about further improvements in the prudential and AML frameworks identified on the basis of a thorough assessment, including inter alia a rigorous post-mortem exercise, in due consultation with Member States"*. The Council requested the Commission to come up with that assessment at the latest in Q3 2019.

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¹⁵ "By 1 June 2019, the Commission shall assess the framework for FIUs' cooperation with third countries and obstacles and opportunities enhance cooperation between FIUs in the Union including the possibility of establishing a coordination and support mechanism"