IN-DEPTH ANALYSIS

European Parliament

Preventing money laundering in the banking sector - reinforcing the supervisory and regulatory framework

This paper provides an overview of current initiatives and actions aiming at reinforcing the anti-money laundering (AML) supervisory and regulatory framework in the EU, in particular from a Banking Union perspective. This briefing first outlines the EU framework for fighting money laundering, which includes legislation (most notably the 5th AML Directive) and a number of Commission and Council Action Plans. Secondly, an overview of AML prevention relevant authorities, at both the EU and national level, is provided. This section also explains the 2019 review of the founding regulations of the European Supervisory Authorities, through which competences relating to preventing AML in the financial sector were consolidated within the European Banking Authority. Lastly, the paper highlights expected upcoming changes to the AML framework, largely based on the Commission's May 2020 Action plan for a comprehensive Union policy on preventing money laundering and terrorism financing, and associated legislative initiatives expected in July 2021. It is relevant to note that this briefing focuses on AML concerns in the banking sector. While financial and non-financial intermediaries have an important role to play, these are not the focus of this briefing. Nevertheless, reference is made to closely related areas (notably, to Financial Intelligence Units, the work of markets and insurance supervisors on preventing AML and related matters) when relevant to a better understanding of its impacts on the banking sector. This paper builds on and updates a previous EGOV briefing on the same topic.

1. The EU framework for anti-money laundering over time

The EU's framework on anti-money laundering (AML) and countering the financing of terrorism (CFT) has evolved in line with the work and recommendations of the Financial Action Task Force (FATF), the main international body responsible for combating money laundering (ML), terrorist financing (TF) and other threats to the integrity of the international financial system (see Annex 1). Starting in 1991, the EU has adopted and revised its AML framework on the basis of the 1st AML Directive (Council Directive 91/308/EEC), which first introduced requirements on costumer identification (i.e. identify and verify the identity of clients, monitor transactions and report suspicious transactions). The current regime (see below) rests on the 5th AML Directive (Directive EU 2018/843).

Landmark in the evolution of the framework was also the 4th AML Directive, adopted in 2015, which *"considerably broadened the previous ones and emphasised 'tax crimes' as a predicate for money laundering. It paid more attention to the matters of supervision and sanctioning than the preceding directives"* (CEPS-ECRI,

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2021). The 4th AML Directive was to be implemented by Member States by 16 June 2017 (the Commission tracker of Member States' implementation still notes four pending infringement procedures).[1][2]

Under this Directive, the European Commission was required to identify high-risk third countries, which have deficiencies in their AML and CFT regimes.[3] Moreover, the Commission was tasked with publishing, biannually, a Supranational Risk Assessment Report, to identify, analyse and evaluate ML and TF risks at the EU level. The first Report was published in 2017, while the second and most recent one is dated of 2019. In this Report, the Commission identifies 47 products and services vulnerable to ML and TF risks - an increase of 7 from 2017. The Report further makes a number of recommendations to Member States, European Supervisory Authorities (ESAs) and non-financial supervisors.

On 2 February 2016, the Commission presented an Action Plan for strengthening the fight against TF, which called for a revision of the 4th AML Directive to better respond to present challenges. The Commission adopted a proposal[4] to amend the 4th AML Directive on 5 July 2016. The 5th AML Directive entered into force on 19 June 2018, and had to be transposed by Member States by 10 January 2020[5]. According to the Commission, these amendments were introduced to:

- *"enhance transparency by setting up publicly available registers for companies, trusts and other legal arrangements;*
- *enhance the powers of EU Financial Intelligence Units, and provide them with access to broad information for the carrying out of their tasks;*
- *limit the anonymity related to virtual currencies and wallet providers, but also for pre-paid cards;*
- *broaden the criteria for the assessment of high-risk third countries and improve the safeguards for financial transactions to and from such countries;*
- *set up central bank account registries or retrieval systems in all Member States;*
- *improve the cooperation and enhance of information between anti-money laundering supervisors between them and between them and prudential supervisors and the European Central Bank".*

After passing the 5th AML Directive and the Directive on combating ML by criminal law on 4 December 2018, the Council (ECOFIN) adopted an AML Action Plan, which set out a number of short-term initiatives aimed at further strengthening the EU AML framework. The Action Plan underlined *"that money laundering and terrorist financing will not be tolerated and that the fight against it is a high priority for the European Union"* and comprised of eight short-term objectives. These actions include efforts to identify supervisory best practices, enhance cooperation between prudential and AML supervisors, and improve the exchange of information, amongst others.

In response to the Council's Action Plan, on 24 of July 2019, the Commission adopted a Communication addressed to the European Parliament and the Council on better implementation of AML/CFT framework[6].

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1 Along with the 4th AML Directive, the EU adopted Regulation (EU) 2015/847 (aiming to increase transparency on the transfers of fund). Moreover, the work of financial intelligence units (FIU) - independent agencies tasked with monitoring suspicious transactions - was further elaborated upon in Council Decision 2000/642/JHA, now replaced and extended by Directive 2019/1153.

2 See here for an overview of the 4th AML Directive.

3 See Delegated Regulation (EU) 2020/855 of 7 May 2020 amending Delegated Regulation (EU) 2016/1675 supplementing Directive (EU) 2015/849, the 4th AML Directive. For further information on EU policies regarding high risk third countries, see here.

4 Accompanying this proposal was a Commission Impact Assessment, identifying targeted amendments to (i) strengthen the EU's existing AML and CFT framework, and (ii) enhance transparency of beneficial owners of corporate entities and trusts.

5 The Commission tracker of Member States' implementation notes infringements proceedings pending against 22 Member States.

6 This Communication was accompanied by an additional five documents, notably: (i) a Report on the assessment of the risk of ML and TF affecting the internal market and relating to cross-border activities; as well as (ii) the Staff Working Document accompanying it; (iii) a Report assessing the framework for cooperation between FIU; (iv) a Report on the interconnection of national centralised automated mechanisms of the Member States on bank accounts; and (v) a Report on the assessment of recent alleged ML cases involving EU credit institutions. The report assessing the FIU follows an earlier, 2017 Commission Staff Working Document that identifies obstacles to the access, exchange and use of information and operational cooperation between FIUs. The report identified *"a significant number of obstacles relating particularly to diverging FIU powers, organisation, function, access to and sharing of information that could be addressed"*, but did not provide recommendations on how these obstacles could be remedied.

In this Communication, the Commission sets out the measures needed to ensure a comprehensive EU policy on preventing ML and countering the financing of terrorism notably, a better implementation of existing rules, a more detailed and harmonised rulebook, high-quality and consistent supervision, including by conferring specific supervisory tasks to an EU body, interconnection of centralised bank account registries and a stronger mechanism to coordinate and support the work of the Financial Intelligence Units (FIUs). During the press conference, Commission Vice-President Dombrovskis remarked that the underlying analysis *"gives more proof that our strong AML rules have not been equally applied in all banks and all EU countries.* ***So we have a structural problem in the Union's capacity to prevent that the financial system is used for illegitimate purposes****. This problem has to be addressed and solved sooner rather than later"* (own emphasis).

Moreover, the above mentioned Communication specified that even though *"most recommendations of the first supranational risk assessment have been implemented by the various actors ... some horizontal vulnerabilities remain, particularly on anonymous products, on identification of beneficial owners and on new unregulated products like virtual assets"*. The underlying analysis revealed substantial incidents of failures to comply with core requirements of the 5th AML Directive[7], failure of supervisors to intervene on a timely basis, deficient group supervision from an AML/CFT perspective, as well as a number of shortcomings related to FIUs, such as a lack of engagement and quality feedback, insufficient exchange of information with other FIU.

On 7 May 2020, the Commission adopted its latest Action Plan with legislative action to follow in early 2021 (see Section 3 for more information). The action plan builds on the findings of the 2019 Communication (*"which highlighted fragmentation of rules, uneven supervision and limitations in the cooperation among financial intelligence units across the EU"*) and focuses on six key pillars:

- "*effective implementation of existing rules;*
- *a single EU rulebook;*
- *EU-level supervision;*
- *a support and cooperation mechanism for FIU;*
- *better use of information to enforce criminal law; and*
- *a stronger EU in the world*".

At the EU level, the Commission is responsible for proposing the AML/CFT legislative framework, which is then adopted by the Parliament and Council as co-legislators. However, supervision and implementation are the domain of a number of other actors, which is discussed in the following Section 2.

The EU AML legislative framework also comprises a number of complementary acts, notably regulatory technical standards[8] and guidelines. Central to these are the ESAs' Joint Committee guidelines on cooperation and information exchange for AML/CFT supervision purposes and the revised guidelines on ML/TF risk factors. Additional ones can be found here.

2. AML-relevant authorities

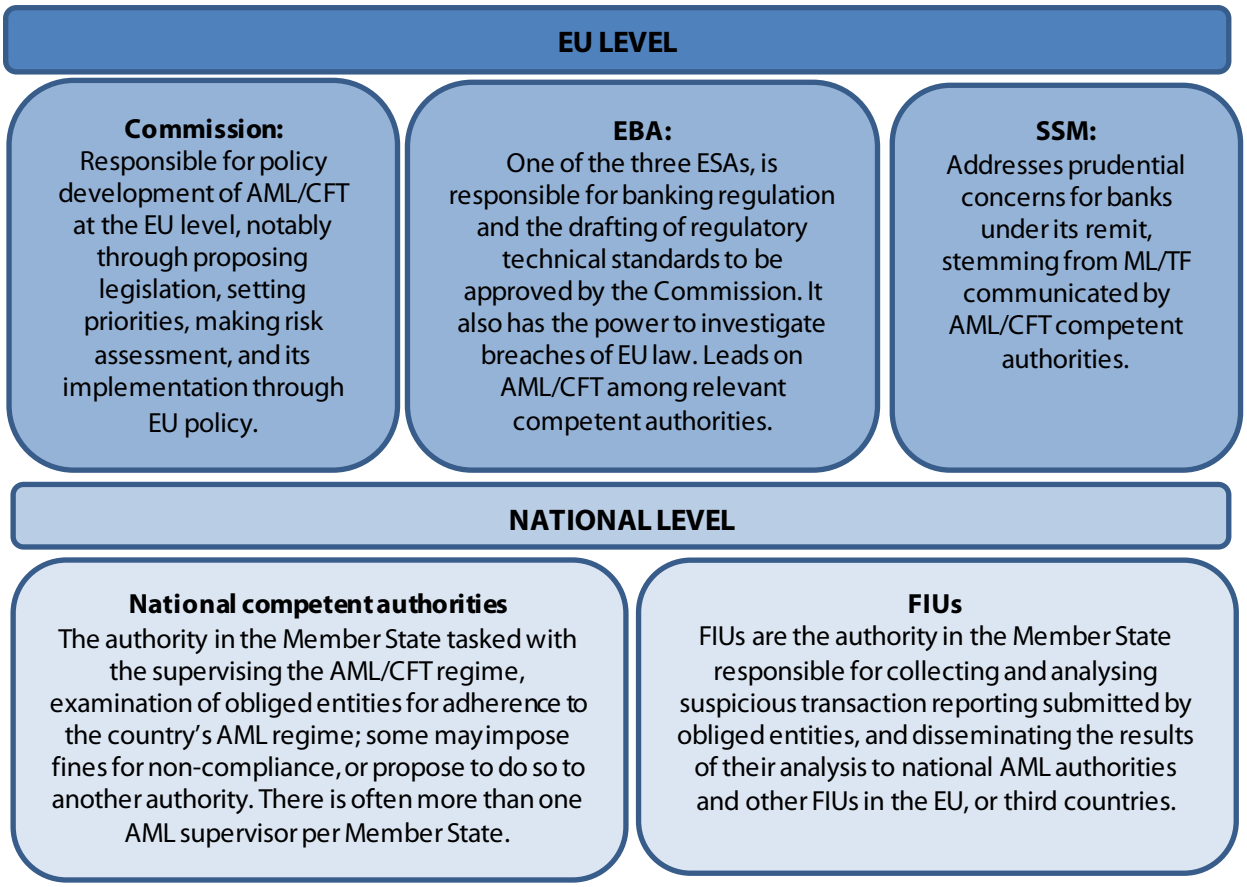
At the national level, compliance with the AML framework involves national competent authorities, and FIUs (see section 2.1.1). Moreover, this may include national banking and financial market supervisors, notably the prudential supervisor, see section 2.1.2). At the EU level, and regarding the banking sector, the European Banking Authority (EBA) and European Central Bank (ECB) Banking supervisor (SSM) play a role as regulator

[7] Such as "risk assessment, customer due diligence, and reporting of suspicious transactions and activities to Financial Intelligence Units".

[8] Notably, regulatory technical standards for the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries and regulatory technical standards on the criteria for the appointment of central contact points for electronic money issuers and payment service providers and with rules on their functions. The EBA is currently preparing regulatory technical standards on a central database on AML/CFT in the EU.

and supervisor, respectively (see sections 2.2 and 2.4). The leading role played by the EBA in this policy area follows a 2019 review of the ESAs' mandate (see section 2.3). Previously, within their respective competences and through the Joint Committee (which gathers the three ESAs), the European Securities Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) also played a role in their respective areas of competence (see section 2.2).

Figure 1: Key actors relevant to AML/CFT prevention in the EU



Source: EGOV, based on ECA, 2020. Note that law enforcement and judicial authorities (including Europol and the European Public Prosecutors Office at the EU level) have a role to play in the investigation, prosecution and convictions on AML/CFT.

2.1. National Competent Authorities

Responsibility for enforcing AML legislation primarily falls with national competent authorities as designated by Member States when transposing AML Directives. The nature of these authorities varies across Member States.[9] Enforcement of AML rules may imply, therefore, cooperation and exchange of relevant information among authorities with different mandates and characteristics, including FIUs and financial (mostly prudential) supervisors[10].

[9] See Table 6, CEPS-ECRI Task Force Report, 2021.

[10] At national level, competences may be split depending on the nature of the supervised entity. Capital markets and insurance supervisors - in additional to banking supervisors - may also have competences in enforcing AML provisions in their respective areas of competence.

2.1.1 Financial Intelligence Units

Article 32 of the AML Directive obliges Member States to set up a national FIU[11] mandated to prevent, detect and effectively combat ML/TF. These FIUs are the central and focal points for the exchange of AML-related information both at national level and across the EU, and are integrated in FIU.net, an information system connecting decentralised databases. From 2016 to 2020, FIU.net was embedded within Europol; following a decision from the European Data Protection Supervisor (EDPS), it has been transferred to the European Commission as a short term solution. FIUs are considered the "hubs of financial intelligence", receiving and analysing suspicious transaction reports and all the relevant information to prevent, detect and fight ML. The 5th AML Directive strengthened the powers and access to information for FIUs, and promoted the exchange of information amongst FIUs.

2.1.2 Banking supervisors

National banking prudential supervisors are being called to contribute to preventing AML/CFT as part of their supervisory mandate. The existing mandate of banking supervisors, allowing for extensive access to information, intrusive reporting requirements and access to the banks' overall activities, may have justified such approach. Under the banking framework, prudential banking supervisors play a key role in the licencing and authorisation process; fit and proper tests for managers and shareholders; as well as governance and internal control system, thus making them the natural choice of institution to whom mandate assessing and preventing AML risks, thus reinforcing all the AML/CFT defence line.

In 2020, the EBA conducted reviews on a selected sample of seven competent authorities' (from five Member States) regarding their approaches to the AML/CFT supervision of banks, and in particular, how competent authorities apply the AML Directive, Guidelines issued by the ESAs and the risk-based approach that is set out in the FATF international standards. The concluding Report highlighted that *"all competent authorities in the EBA's sample had undertaken significant work to apply the risk-based approach to AML/CFT including in many cases a significant expansion of supervisory teams ... supervisory staff in all competent authorities had a good, high-level understanding of international and EU AML/CFT standards and were committed to the fight against financial crime ... Nevertheless, most competent authorities experienced challenges in operationalising the risk-based approach to AML/CFT"*.

Despite a number of unique country specific AML/CFT challenges, there were a number of challenges that were common to all the competent authorities. Among the **common challenges** that all competent authorities are facing, the following issues were listed: *"translating theoretical knowledge of ML/TF risks into supervisory practice and risk-based supervisory strategies; shifting from a focus on testing compliance with a prescriptive set of AML/CFT requirements to assessing whether banks' AML/CFT systems and controls are effective, and taking proportionate and sufficiently dissuasive corrective measures if they are not; and cooperating effectively with domestic and international stakeholders to draw on synergies and to position AML/CFT in the wider national and international supervisory frameworks"*.

[11] The institutional setup of FIUs within the government structure varies from country to country, typically taking one of four different forms (administrative model, law enforcement model, judicial model, or hybrid model) that all have their pros and cons; for a related short overview, please see Marcus (2019).

2.2. European Supervisory Authorities

The founding Regulations of the ESAs[12], adopted in 2010, allow for the EBA, ESMA and EIOPA to act within their powers and within the scope of AML Directives.[13] Under the founding regulations, the ESAs have *"been responsible for fostering the consistent and effective implementation, by national competent authorities, of the EU's AML/CFT legislation. Together, [they] have led the development of AML/CFT policy, supported its implementation and fostered cooperation between competent authorities across the single market"* (EBA, 2020).

The ESAs have been particularly involved in facilitating and fostering the co-operation of competent AML/CFT authorities across the EU and developing guidelines and opinions through their Joint Committee. Article 6(5) of Directive (EU) 2015/849 requires the ESAs to issue a joint opinion on the risks of ML and TF affecting the Union's financial sector. The Joint Committee published its opinion in February 2017, and again in October 2019. The Joint Committee has also issued, inter alia, Guidelines on the Characteristics of a Risk-based Approach to AML and CFT Supervision in April 2017, to ensure that the allocation of supervisory resources is proportionate to the level of risk in the sector, and Joint Guidelines on risks factors in January 2018. The Joint Guidelines on risk factors are currently being revised to take into account the new EU framework and risks.

The EBA has moreover taken steps in an attempt 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 also undertook an investigation into the Malta AML procedures[14]. It further undertook an investigation into the Danish and Estonian AML procedures relating to Danske Bank (see also Annex 2) but concluded without finding any breach of Union law in this case. Following a call from the European Parliament to the EBA and the ESMA, both launched an inquiry into arbitrage trading schemes, in particular, the "Cum-ex" scandal. The EBA subsequently published its findings and an action plan in April 2020.

Nevertheless, as the EBA pointed out at the EP TAX3[15] hearing, its powers to enforce standards and guidelines were 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, even with the most recent staff increases. The EBA therefore 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"*. Given these constraints, the European Commission also identified possible limits to the EBA governance and its breach of Union procedure in remedying past issues.

2.3. ESAs mandate review

The review of the ESAs' mandate, proposed by the Commission in September 2018 and agreed upon by the co-legislators in April 2019, aimed at addressing some of the above mentioned deficiencies. With that

[12] Regulation (EU) No 1093/2010 establishing the EBA, Regulation (EU) No 1094/2010 establishing the EIOPA, Regulation (EU) No 1095/2010 establishing the ESMA.

[13] The Founding Regulations scope is "to the extent that those acts apply to [financial institutions and financial market participants] the relevant parts of Directive 2005/60/EC" and involve the authorities competent for ensuring compliance with those Directives. Note that 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 ML or TF.

[14] The EBA issued recommendations to the competent AML supervisor, the FIU Malta, as part of the Breach of Union Law procedure. However regarding the prudential supervisor, the Maltese FSA, EBA decided to close the case without opening a breach of Union law investigation.

[15] The European Parliament's Special Committee on financial crimes, tax evasion and tax avoidance (TAX3) was set up in March 2018 to build on and complement the work carried out in the EP since 2014 on such issues.

review, the mandate for AML/CFT was consolidated within the EBA.[16] These new powers came into effect on 1 January 2020. Under the amended regulation, the EBA has been given a clear mandate to prevent AML in the financial system, through both new and strengthened existing powers.[17] Amendments to the ESA regulation extend the EBA's powers under Article 17, regarding breaches of Union law, to all Union act legislation, including national legislation transposing EU directives[18], with particular reference to AML legislation.[19] Figure 2 summarises the role of the EBA in AML/CFT following the ESA review.

Figure 2: EBA strategic objectives on AML/CFT

Source: EBA, 2020.

In terms of **new powers**, the EBA is allowed *"to carry out analysis of the information collected and, if necessary, pursue investigations on allegations brought to its attention concerning material breaches or non application of Union law ... to request competent authorities to investigate any possible breaches of the relevant rules, to consider taking decisions and imposing sanctions addressed to financial institutions requiring them to comply with their legal obligations"* (recital 22). Article 9a of the regulation further specifies the range of powers to be granted to EBA, notably, aggregating all information and making it available to competent authorities. Article 9b establish the procedure allowing the EBA to collect information and request competent authorities to conduct investigations.

As part of its **"leading" mandate**, the EBA took over from the Joint Committee in being responsible for the biennial Opinion on AML/CFT risks affecting the EU's financial sector (see article 6(5)). Nevertheless, the ESAs Joint Committee has gained a new mandate to assist the Commission in assessing the conditions and the technical specifications and procedures for ensuring secure and efficient interconnection of the centralised automated mechanisms as well as in the effective interconnection of the national registers under Directive (EU) 2015/849 (revised article 49a).

[16] See Regulation (EU) 2019/2175 of 18 December 2019 amending Regulation (EU) No 1093/2010

[17] See also previous EGOV briefing for a comparison of powers under the original and amended regulation.

[18] 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).

[19] See recital 22, for example.

In specified and limited circumstances, the EBA is also able to issue "no action letters" (see article 9c) which could further contribute to supervisory convergence and harmonisation.

Another new mandate for the EBA is its authority to act in certain domains:

- The EBA's role in managing AML-related information is not ''passive'' but ''pro-active'': the EBA shall make sure that information collected is analysed and made available on a "need-to-know" basis (article 9a(2));
- The EBA shall act as a facilitator in AML cases involving third countries' authorities (article 9a(6));
- The 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(5)). On 16 December 2020, the EBA outlined its methodology and process for this risk assessment.

Box 1: Some examples of recent EBA's work and opinions on AMF/CFT topics

Following the European Council's request that the EBA set out how prudential supervisors' factor in ML/TF risks in the supervisory process, including the Supervisory Review and Evaluation Process (SREP), the EBA published its Opinion on the topic on 4 November 2020. The EBA reminds prudential supervisors that ML/TF risks are *"not necessarily linked to an institution's size or financial soundness"*. The Opinion outlines the EBA's expectation that prudential supervisors consider ML/TF risks in the following components of the SREP: the monitoring of key indicators; business model analysis; assessment of internal governance and internal controls; assessment of risks to capital; assessment of risks to liquidity and funding. More generally, the Opinion calls for cooperation and exchange of information between prudential and AML supervisors, facilitated through the Memorandum of Understanding (MoU) signed between the ECB and national AML authorities. The EBA has indicated that more detailed guidance that supervisors should follow while incorporating ML/TF risks in the SREP process will be detailed in the revised SREP Guidelines, to be completed by end-2021.

As it was already mentioned, as part of EBA's "leading" mandate, it took over the responsibility for the biennial Opinion on AML/CFT risks affecting the EU's financial sector from the Joint Committee. The first report under this new legal framework was published in March 2021. The EBA notes that, looking at credit institutions, the majority of survey respondents consider the sector *"as presenting a significant or very significant level of ML/TF inherent risks. This is an increase compared with the Joint Opinion 2019. This increase may be attributed to an intensification of supervisory activities in the sector"*. The EBA goes on to note that *"the possibility of regulatory arbitrage between Member States, due to the uneven application of EU regulation and the different approaches to AML/CFT supervision by national authorities, is of concern to several [Competent Authorities]."* The EBA also notes that despite supervisory efforts and the improving trend in the adequacy and quality of overall controls, further improvement is still required to address certain deficiencies. The EBA proposes that competent authorities engage in more intrusive and broader range supervision of firms with the highest risk profiles.

In addition, the amended regulation **strengthens existing powers** by making "explicit" certain tasks that the EBA already had (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, the EBA would become a "data-hub" on AML supervision. It would not only be able to collect information (as this was possible under the existing ESA Regulation), but national authorities shall on an ongoing basis provide EBA with all information relating to, *inter alia, "weaknesses identified during ongoing supervision and authorisation procedures in the processes and procedures, governance arrangements, fitness and propriety, acquisition of qualifying holdings, business models and activities of financial sector operators"* (article 9a). In order to fulfil this new mandate, the EBA has launched a public consultation for establishing a central database for AML/CFT information sharing. As the EBA had highlighted, the database will contain *"information on AML/CFT weaknesses that competent authorities (CAs) across the EU have identified in respect of individual financial institutions. The database will also contain information on the measures competent authorities have taken to rectify those material AML/CFT weaknesses. Information from this database will be used by individual competent authorities and the EBA to make the fight against ML/TF in the EU more targeted and effective in the future"*.

The EBA is also, in particular, tasked with assessing "*the strategies, capacities and resources of the competent authorities to address emerging risks related to money laundering and terrorist financing*" (recital 25). This power would be particularly effective in cross-border situation as the EBA would be expected to receive information from national authorities across different Member States and coordinate, where appropriate, supervisory actions.

The EBA has set up an internal committee tasked with preparing decisions on AML matters (article 9a(5) to (8)), to replace the existing AML subcommittee of the ESAs Joint Committee. That internal committee will comprise *"high-level representatives of the authorities and bodies of all Member States competent to ensure the compliance of financial sector operators ... who have expertise and decision-making powers in the area of the prevention of the use of the financial system for the purpose of money laundering or terrorist financing as well as high-level representatives who have expertise in the different business models and sectoral specificities of the [ESAs]*" (article 9a(8)) which can put forward substantiated observations to the proposed decisions. Representatives of the EBA, ESMA and EIOPA have no voting rights. The Commission, the ESRB and ECB Supervisory Board will attend the meetings as observers.

As part of its **enhanced monitoring role**, the EBA is tasked with promoting the *"efficient, effective and consistent functioning of the colleges of supervisors"* (see article 21(1))[20].

Despite these strengthened powers, the EBA warns that *"although important, these changes constitute an evolutionary, not revolutionary, step in the EU's approach to AML/CFT, which remains based on a minimum harmonisation directive and an associated strong focus on national law and direct supervision of financial institutions by national competent authorities. This reduces the degree of convergence and consistency the EBA's work can achieve."* Moreover, the Commission is required to *"conduct a comprehensive assessment of the implementation, functioning and effectiveness of the specific tasks conferred on EBA under this Regulation related to preventing and countering money laundering"*, and submit such report along with any necessary legislative amendments by 11 January 2022 (recital 37). The ESA review did also not fundamentally address the governance aspects and limitations that subsequently materialised in the breach of union procedure relating to Danske Bank. Moreover, the European Parliament expressed *"deep concern regarding the EBA's ability to carry out an independent assessment owing to its governance structure"*.

2.4. The Single Supervisory Mechanism

Recital 28 of the SSM Regulation makes it clear that the prevention of the use of the financial system for the purpose of ML/TF lies with national authorities. However, according to Recital 29, the ECB has a duty to cooperate with national AML authorities. In that respect, the SSM supervisory guide to on-site inspection of July 2018 explicitly scopes out AML supervision. Insofar as AML breaches interact with the ECB competences, such as governance and internal control risks, the ECB has stated that *"the ECB cannot determine whether breaches of AML legislation have taken place. The competence for investigating such breaches, and determining whether AML legislation has indeed been breached, lies solely with the AML authority ... Once such breaches have been established by the AML authority, the ECB can take the facts thus identified as given and use its Pillar 2 powers ... Any measures adopted by the ECB would, however, always be applied from a prudential perspective and not from a crime avoidance perspective."* In particular, the ECB identifies the following areas in which AML concerns will be considered:

1. *"at authorisation, the extent to which the applicant's business model, the proposed risk management systems and controls, and the suitability of its shareholders, members, management body, senior management and key function holders give rise to ML/TF risks*

[20] In December 2019, the Joint Committee published guidelines on cooperation and information exchange for AML/CFT supervision purposes, which provided a two year transition period for setting up colleges with all necessary element in place. In December 2020, the EBA published a report on the functioning of AML/CFT colleges, identifying some best practices among the 10 colleges that had been established in the past year, as well as challenges that need to be addressed (namely the timely invitation of some observers).

2. *as part of ongoing supervision, in the assessment of acquisitions of qualifying holdings and in the fit and proper assessment of the management body*

3. *in the context of the supervisory review and evaluation process (SREP), as part of the review of risks, business models, credit operations, governance and internal risk management*

4. *in the context of taking any prudential administrative measures, and particularly, imposing penalties or proceeding to a withdrawal of authorisation process, thus ensuring that AML/CFT-related weaknesses with a prudential impact are taken into account in applying prudential supervisory measures and powers to alleviate prudential concerns".*

The link between prudential supervision and AML risks was further clarified by the amended Capital Requirements Directive (CRD V), adopted in May 2019. Recital 20 of the CRD V states that *"[Together with the authorities responsible for AML/CFT], the competent authorities in charge of authorisation and prudential supervision have an important role to play in identifying and disciplining [AML-related] weaknesses. Therefore, such competent authorities should consistently factor money laundering and terrorist financing concerns into their relevant supervisory activities*".

In terms of information exchange between national AML and prudential authorities and the ECB Banking Supervisor, the 5th AML Directive[21] lays down the following framework:

- National prudential competent authorities and the ECB (as banking supervisor in the Banking Union) shall conclude, with the support of the ESAs, an agreement on the practical modalities for exchange of information;
- For information exchange from banking supervisors 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 supervisors, 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".*

A Memorandum of Understanding between the ECB and all relevant AML authorities was concluded in January 2019, with provisions on the type of information exchanged and the underlying processes for doing so; confidentiality and data protection provisions. Nevertheless, as underlined by the European Parliament in its resolution on the 2019 Banking Union Annual Report, *"for AML/CFT efforts to be effective, the competent authorities and financial institutions must act in a coordinated manner; highlights that prudential and anti-money laundering supervision need to be better aligned; recalls its serious concerns about regulatory and supervisory fragmentation in the field of AML/CFT"*. The exchange of information therefore needs to be timely, coordinated and comprehensive in order to be effective. On 27 May, the EBA launched a public consultation on new Guidelines that set out how prudential supervisors, AML/CFT supervisors and FIUs should cooperate and exchange information in relation to AML/CFT (will close in August 2021).

The 2020 ECB Annual Report points out that the ECB created an internal AML coordination function at the end of 2018, and has incorporated ML and TF risks into their Banking Supervision framework that help them perform supervisory processes related to off-site and on-site supervision, authorisation procedures and fit

[21] See Subsection IIIa.

and proper assessments better. Also, the Annual Report highlights that the Joint Supervisory Teams were focusing heavily on *"AML/CFT-related findings in the 2020 SREP, particularly in relation to the assessment of banks' internal governance and risk management, operational risk, business models and liquidity risk"*. Going forward, the ECB explained that *"its methodologies are reviewed and updated after the relevant EBA Guidelines have been agreed. In this respect, the ECB has been actively involved in enhancing the policy framework at European level in its capacity as prudential supervisor"*.

3. Looking ahead: Developments in the policy framework

In accordance with the 5th AML Directive, longer term actions, including a possible new EU authority and a single rule book (i.e. Regulation for AML), were foreseen as part of a report due by January 2022. However, a growing number of cases with potential AML implications (see annex 2 and references above, notably section 2.2) and increasing public pressure may have accelerated plans for a deeper reform of the AML regime.[22] In her political guidelines, President Van den Leyen stressed the need for further action: *"The complexity and sophistication of our financial system has opened the door to new risks of money laundering and terrorist financing. We need better supervision and a comprehensive policy to prevent loopholes."* This was echoed by the European Parliament resolution on the 2019 Banking Union, where it noted that *"prudential and anti-money laundering supervision need to be better aligned; recalls its serious concerns about regulatory and supervisory fragmentation in the field of AML/CFT, which has led to a failure to provide adequate oversight and responses to the deficiencies of national supervisory authorities and undermines their ability to supervise the increasing cross-border activity in the EU"*.

Moreover, in a September 2019 resolution on the state of implementation of AML legislation, the Parliament reiterated its call for a reinforced AML regime. Echoing many of the same concerns, the Council outlined its Conclusions on strategic priorities on AML/CFT in December 2019. The Commission was invited, *inter alia*, to propose legislation needed to enhance the current AML framework; to consider ways of enhancing the work of FIUs; to consider how to enhance supervision throughout the Union; and to consider the feasibility and desirability of a Union-level body responsible for AML supervision.

In response, and following up on its work programme for 2020, the Commission put forward a Communication on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing on 7 May 2020 and launched a public consultation (which closed on 26 August 2020) (see annex 3). Many of the proposed initiatives have been a part of the public debate for a number of years (see annex 4). This Action Plan builds upon the 5th AML directive; the Commission Communication of July 2019 and upgraded mandate for the EBA (see section 2.3); new provisions on cash controls and on access to financial information by law enforcement authorities; a harmonised definition in criminal law of offences and sanctions related to money laundering and a reinforced whistle blower protection regime.

The May 2020 Action Plan[23] builds on the aforementioned six pillars:

- **Ensuring the effective implementation of the existing EU AML/CFT framework:** As part of this, the Commission aims to ensure effective transposition and implementation of the AML Directive; and to continue to monitor the capacity of Member States to respond to AML/CFT concerns. As part of this, the Commission proposed Country Specific Recommendations on AML/CFT in Q2, 2020 to a number of Member States (also see a dedicated EGOV briefing).

[22] In June 2020, the European Court of Auditors announced that it would undertake an audit of the effectiveness of the EU's efforts to combat ML in the banking sector. More specifically, the audit will examine whether: *"the Commission assesses the transposition of EU legislation into Member State law; known AML risks are assessed and communicated to banks and national authorities involved in fighting money laundering; the available AML information for supervisory activities is shared among the stakeholders at EU and Member State level; effective and timely action is taken in response to suspected breaches of EU AML law in Member States"*. The results are expected to be published in the first half of 2021.

[23] See also EPRS briefing Anti-money-laundering package 2021 - Strengthening the framework.

- **Establishing an EU single rule book on AML/CFT:** The Commission believes that legislation needs to become *"more granular, more precise and less subject to divergent implementation"* and to address the opportunities and challenges posed by technological innovations. Moreover, the need for clarifying how AML/CFT rules relate to other legislation in the financial sector in particular is noted. On this front, the Commission aimed to deliver a single rulebook on AML/CFT in Q1, 2021.
- **Bringing about EU level AML/CFT supervision:** The Commission endeavours itself to conduct a thorough impact assessment of the function, scope and structure of an EU-level AML/CFT supervisor (either at the EBA or as a new institution). The proposed structure would be a "hub and spoke" model, where the EU supervisor directly supervises some financial institutions, and indirectly others, and playing a coordination role amongst other actors. Such a proposal was expected for Q1, 2021.
- **Establishing a support and cooperation mechanism for FIUs:** A proposal for an EU coordination and support mechanism for FIUs was also envisioned in Q1, 2021. Moreover, in Q4, 2020, the Commission took over the management of FIU.net as a short term solution.
- **Enforcing Union-level criminal law provisions and information exchange**: In order to facilitate information sharing and effective enforcement, in addition to other measures, the Commission committed to issue guidance on public-private partnerships (PPPs) by Q1, 2021.
- **Strengthening the international dimension of the EU AML/CFT framework:** Alongside the Action Plan, the Commission published a new methodology for the assessment of high-risk third countries, and pledged to increase its involvement in FATF.

A Plenary debate on the Commission's Action Plan took place in Parliament on 8 July 2020, with a resolution adopted on 10 July. The resolution welcomed the Action Plan, and regarding the rule book, suggested that the Commission focus on the following areas to be covered by a regulation: "*identification of beneficial owners; a list of obliged entities and their reporting obligations; customer due diligence requirements ..; provisions on beneficial ownership registers and centralised mechanisms on payment accounts and bank accounts; the framework for cooperation between competent authorities and financial intelligence units (FIUs); the standards for supervision of both financial and non-financial obliged entities, and the protection of individuals who report suspicions of money laundering or terrorist financing.*" The Parliament suggested the Commission consider creating an EU FIU, and for the EU AML supervisor and EU FIU to have budgetary and functional independence. The EU AML authority is also called upon to *"cover financial and non-financial obliged entities with direct supervision powers over certain obliged entities depending on their size or the risk they present*", with a clear demarcation of roles between the EU and national authorities. Moreover, regarding enforcement of the current framework, the Parliament expressed *"deep concern regarding the EBA's ability to carry out an independent assessment owing to its governance structure*".

On 5 November 2020, the Council published Conclusions on AML/CFT, in which it welcomed the Commission's Action Plan. Moreover, it invited the Commission to "*prioritise work on the EU single rulebook and, based on the single rulebook, the establishment of an EU level AML/CFT supervision and the coordination and support mechanism for the FIUs, and ... to present, at the same time, a proposal for the single rulebook and for the structure and tasks of an EU AML/CFT supervisor as well as the coordination and support mechanism for FIUs, in order to allow for simultaneous drafting in view of the links between these topics.*" The Council is in agreement with the areas pointed out by the Parliament for inclusion in the regulation, and calls for national supervisors to continue playing a strong role in the system of EU AML/CFT supervision, while supporting the Commission's proposal for an EU level AML authority. This EU supervisor should directly supervise, inter alia, a number of high risk entities, with a focus on the financial sector.

The Commission launched a call for advice to the EBA on *"defining the scope of application and the enacting terms of a regulation to be adopted in the field of preventing money laundering and terrorist financing"* and providing technical advice regarding the second pillar of the action plan, on establishing a single rule book.

On 10 September 2020, the EBA published its response to the Commission.[24] First, it advised the Commission to harmonise certain aspects of the legal framework where there was evidence of a significant, adverse impact on AML/CFT i.e. in customer due diligence, AML/CFT systems and controls, rules governing key supervisory processes. Here, the EBA recommends common rules be set out via directly applicable Union law. Second, aspects of the framework could be strengthened via directives where current provisions are insufficient. As examples, they refer to the powers of supervisors and the reporting requirements for financial institutions.

Moreover, the EBA points to the need of reviewing the scope of the EU's AML/CFT framework to ensure they adequately cover all relevant sectors, such as virtual asset providers, investment firms and investment funds. The reference to virtual asset providers speaks to a broader point regarding the need to mitigate ML risks related to crypto-assets and other FinTechs. In its 2020 Action Plan, the Commission called for an expansion of the scope of EU legislation to *"address the implications of technological innovation and developments in international standards"* and asserts *"a need to expand the scope of sectors or entities covered by AML/CFT rules and to assess how they should apply to virtual assets service providers not covered so far"*. As part of the Financial Stability Board's consultations on global stablecoins arrangements[25], the Blockchain and Virtual Currencies Regulatory Working Group expressed an opinion that *"the only risk currently posed by stablecoins*[26] *is connected to the fact that, in Europe, they do not fall under the scope of the 5th European Anti-Money Laundering Directive (5th AMLD) and, therefore, they can be easily exploited for money laundering and terrorist financing (ML/TF) purposes. For instance, fundamental AML activities, such as [know your client], do not currently apply to stablecoins-related services."* (pp. 2-3). In March 2021, the Parliament called on the Commission to put forward a legislative proposal for crypto-assets, which would *"strengthen the implementation of the anti-money laundering and anti-terrorist financing framework with regard to crypto-assets"*. In the same vein, in March 2021, the FATF launched a public consultation (which closed on 20 of April, 2021) on draft guidance of risk-based approach to virtual assets and virtual asset service providers following its new standards on regulating and supervising virtual asset services providers (Recommendation 15). An interpretive note to Recommendation 15 was adopted in June 2019. This need for broadening the scope of obliged entities covered under the EU framework was reiterated in the November 2020 Council Conclusions and 10 July European Parliament resolution.

Lastly, the EBA recommends that provisions in sectoral financial services legislation be clarified to ensure compatibility with the AML/CFT framework. Regarding this point,[27] the EBA published an Opinion on the interplay between the EU AML Directive and the EU Deposit Guarantee Scheme (DGS) in December 2020. Focusing on the provision of information linked to a DGS payout where there are AML/CFT concerns, the EBA makes 11 proposals aimed at enhancing effective cooperation between authorities prior to and during bank failures, and how to minimise the risk of paying DGS payouts to money launderers. Seven of these are addressed to the Commission, insofar as they require legal changes, while the rest are addressed to NCAs and could be implemented under the current framework. The proposals to the Commission fall under three broad pillars (cooperation and collecting and sharing of information; improving the process of DGS payouts; and depositor information), while those to NCAs focus on information provision by credit institutions to DGSs and depositor information.

Reflecting the commitments made in its 2020 Action Plan, the Commission work plan for 2021, foresaw an AML package, including legislative proposals, for the Q1, 2021. However, the Commission did not meet this

[24] This is in addition to the EBA's response to the Commission's public consultation on the Action Plan. The EBA recommends, inter alia, that the Commission harmonise the EU's legal framework; combine an ongoing role for national AML/CFT authorities with effective EU-level oversight; and leverage on the EU's existing resources and infrastructure on AML/CFT.

[25] See final report here.

[26] Stablecoins are a subcategory of crypto-assets which aim to address the high volatility of "traditional" crypto-assets by tying the stablecoin's value to one or more other assets, such as sovereign currencies. While having a potential for making payments more efficient and enhancing financial inclusion, stablecoins may also generate risks to financial stability.

[27] Also following earlier work on DGS payouts and the interplay with AML/CFT concerns, see here and here.

deadline, and the package is instead expected to be presented on 6 July 2021. In a meeting of the Expert Group on Money Laundering and Terrorist Financing (EGMLTF)[28] on 2 March the Commission presented elements of the forthcoming AML/CFT rule book proposal. This follows a presentation on the forthcoming Regulation establishing a European Anti-Money Laundering Authority (AMLA) on 22 January (clarifying that in both cases, the points raised should not be construed as the official COM position). Box 2 presents the key elements of these presentations.

In a speech on 17 May Commission McGuiness gave some more details on the forthcoming changes to the single rulebook: *"Rules for the private sector will be laid down in a directly-applicable EU regulation. There will be the same rules across the EU in the most substantial areas ... We will also review the list of sectors covered by AML rules in our new proposal. The first step will be to align it with the latest Financial Action Task Force (FATF) standards and cover all types of Virtual Asset Service Providers as Obliged Entities. This also means ensuring the traceability of transfers of virtual assets ... Another part of our plan is to increase the detail in some areas already included in the AML Directive such as Customer Due Diligence and beneficial ownership ... An important component of the rulebook will be legally binding technical standards to be developed by the future AML Authority, which will add more granularity to the top level rules in the regulation and bring about more harmonisation"*.

In the same speech, she outlined the roles for the new EU AML authority: "*(i) It will be the direct supervisor of certain financial sector entities which operate cross-border and are in the highest risk category; (ii) It will act as a coordinator and overseer of national supervisors for other entities, including - with a lighter touch - entities outside the financial sector; (iii) It will coordinate and provide support to Financial Intelligence Units; (iv) It will also have a regulatory role, preparing technical standards and guidelines; (v) And finally, the new Authority will advise the Commission, for example on AML risks outside the EU"*. The COVID-19 pandemic has also brought new challenges for the AML/CFT supervision. According to the FATF, new concerns that have arisen relating to the changes of financial behaviours with more purchases and services transitioning online and the increased financial volatility and economic contraction caused by widespread confinement measures. In its July 2020 resolution, the European Parliament calls on the Commission, in coordination with the EBA to "*conduct consultations with national authorities responsible for AML/[Countering Terrorist Financing (CTF)] in order to assess specific AML/CFT risks and difficulties derived from the COVID-19 outbreak and design, on that basis, concrete guidelines for better resilience and enforcement*". In response to the increased AML/CFT concerns, the FATF has urged its Member States to allocate sufficient resources to *"continue to actively identify, assess, and understand how criminals and terrorists can exploit the COVID-19 pandemic, and apply a risk-based approach to ensure that measures to prevent or mitigate the risks are commensurate with the money laundering and terrorist financing risks identified"*.

Box 2: Commission presentation to the EGMLTF on forthcoming AML/CFT package

According to the minutes of the EGMLTF meeting of 2 March 2021, the Commission discussed a number of elements of the forthcoming AML/CFT rulebook. Firstly, regarding the **list of obliged entities** "*[Commission] explained that the forthcoming AML Regulation proposal will integrate the latest changes to the FATF standards by adding crypto-asset service providers to the list of obliged entities and will follow the approach set out by EBA in its Opinion on the future AML framework"* (see Section 3). Moreover, the Commission "*clarified that the Regulation proposal will seek to align the AML/CFT framework with the Market in Crypto Assets (MICA) proposal. With regard to crowdfunding service providers, COM explained that internal discussions are still taking place"*.

[28] The mission of the EGMLTF is to advise the Commission on AML/CFT issues. This includes assisting the Commission in the preparation of delegated acts, legislative proposals and policy initiatives; coordinating with Member States and exchanging of views; and providing expertise to the Commission in the preparation of implementing measures. For more information and membership, see here. Other Commission expert groups involved in discussing AML/CFT concerns include the EU FIU platform, the Committee on the Prevention of Money Laundering and Terrorist Financing (CPMLTF). See Binder (2021) for more information.

Second, on **customer due diligence**, the Commission indicated that the proposal will aim to harmonise the process, and empowering the proposed EU AML authority with the adoption of risk factor guidelines, with any regulatory technical standards issued by the authority needing to respect the risk-based approach.

Third, the Commission that the legislative proposal will focus on the harmonisation of **beneficial ownership** provision, following feedback from Member States.

Lastly, the Commission indicated that "*the upcoming AMLD proposal will provide **for new rules** on a number of topics, i.e. the supra-national risk assessment, supervision, high-risk third countries and rules on the establishment and roles of FIUs. Furthermore, COM will seek to introduce greater clarity and consistency on sanctions*".

On the **EU AML Authority**, the Commission noted at the meeting on 22 January that "*the forthcoming entity will comprise both an EU-wide supervision authority and a FIU support mechanism. It is envisaged that the Authority will be entrusted with the power to issue binding decisions and with the direct supervision of riskiest financial institutions. With regard to governance, the decision making rules would need to ensure that the Authority can act swiftly: it will feature a General Board with a two-fold composition, representing either the AML supervisory authorities or FIUs. A smaller Executive Board will be empowered to take binding decisions vis-à-vis obliged entities. The governance and functioning of the Authority will respect the FIUs' independence and autonomy, and will seek to enhance cooperation and exchange of information, as well as provide stable hosting of FIU.net*".

Prior to the publication of the Action Plan, in a February 2020 EGMLTF meeting, most Member States indicated that the parts of the AML Directive which should be transferred to a Regulation include "*[customer due diligence] supervisory practices (including an obligation to cooperate), cross-border aspects, internal controls and procedures and policy regarding third countries.*" Regarding the set-up of an EU AML authority, "*it was noted that this cannot follow the prudential model as the identification of risks must be based on qualitative analysis and local knowledge*". Regarding the institution itself, *"most Member States rejected the EBA option and preferred a new body, which would not be necessarily more costly*".

Suggestions for further reading:

- E. Binder (EPRS), "Anti-money-laundering package 2021: Strengthening the framework" (March 2021)
- B. Unger, "Improving Anti-Money Laundering Policy Blacklisting, measures against letterbox companies, AML regulations and a European executive" (May 2020)
- J. Deslandes, M. Magnus, C. Dias (EGOV), "Anti-money laundering - reinforcing the supervisory and regulatory framework" (August 2019)
- H. Huizinga, "The supervisory approach to anti-money laundering: an analysis of the Joint Working Group's reflection paper" (November 2018)

Annex 1: AML/CFT actors at the supranational level

The Financial Action Task Force (FATF) is an intergovernmental body setting international standards, called FATF Recommendations, to combat money laundering and terrorism financing in a global co-ordinated manner. Currently, more than 200 countries and jurisdictions are committed to implementing these Recommendations, including the European Commission, on behalf of the Union, and the EU Member States. The FATF, together with its Associate Members, is responsible for monitoring countries' implementation of the rules in order to ensure their effectiveness, and holds countries accountable if they do not apply them. If a jurisdiction is identified as posing risks to the integrity of the global financial system, FATF's process will result in an issuance of a public warning, putting pressure on the jurisdiction to address its deficiencies in order to maintain its position in the global economy (FATF; several jurisdictions are under increased monitoring, and a few have been subject to a call for action to be taken by countries). After the jurisdiction makes substantial improvements to all components of its action plan, it can be removed from FATF monitoring.

In March 2021, FATF's Executive Secretary David Lewis gave a speech at the Chatham House Illicit Financial Flows Conference on challenges currently facing financial supervisors in relation to AML/CFT. He argued that effective implementation of global standards, although they are minimal, should be given more priority than their enhancement. For this reason, FATF is currently focusing on building the powers, capacity, resources and political and organisational support of supervisors to assist them in gaining a deeper understanding of the risks their regulated businesses face. Lewis emphasised the potential of public-private partnerships in enhancing AML/CFT standards' implementation and the need for breaking down the barriers to more effective information sharing between banks and public authorities. Such an intelligence-led approach needs to be combined with a risk-based one, meaning that ML and TF risks need to be mitigated *"without disrupting essential and legitimate financial services and without driving financial activities towards unregulated service providers"* (FATF, 2020). As outlined in a 2021 Guidance on risk based supervision, FATF endorses supervisory strategies which ensure that *"the risks determine the nature, frequency, intensity, and focus of supervision, setting expectations for engagement with entities across the risk spectrum including higher risk and lower risk entities."*

FATF recently adopted a series of amendments to the FATF standards. Most notably it adopted a new standard to address risks posed by virtual asset services providers (new Recommendation 15 and interpretative note to R15). It further plans to revise the FATF standard on transparency and beneficial ownership of legal persons (Recommendation 24), a review subject to discussions in EGMLTF.

FATF initiated a strategic review in June 2019, with a goal of finalising work by 2021. The review focuses on the mutual evaluation process; the work of the International Co-operation Review Group (who analyses and gives recommendations to high-risk jurisdictions); and FATF's methodology (as regards the progress made, see the Commission's update for the Expert Group on Money Laundering and Terrorist Financing).

In the EU, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism - MONEYVAL - is a permanent monitoring body of the Council of Europe entrusted with these monitoring tasks, as well as with making recommendations to national authorities in regards to necessary improvements to their systems. As explained in this paper by Huizinga (2018), monitoring is performed through periodic mutual evaluations of countries' AML/CFT regimes. The updated results of the fourth and most recent FATF monitoring round can be found here.

Annex 2: Some previous 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 annex 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.

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 voluntary 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 A 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 19 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 was to be sold to a new investor; however, after the hoped-for investor withdrew its purchase offer, ABLV Luxembourg has been declared in judicial liquidation by judgement rendered on 2 July 2019 by the District Court of Luxembourg.

- 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).

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*".

In February 2019, the prime minister of Latvia, Krisjanis Karins, called for the ECB to be given powers to fight ML, alluding to the need for a sea change in supervisory attitudes towards ML, in a Financial Times interview.

Box A: 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), 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 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 Finantsinspektsioon. 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, Finantsinspektsioon 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 Finantsinspektsioon's statements. These breaches were uncovered by Finantsinspektsioon 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 Finantsinspektsioon*";

- On 26 March 2018, the ECB decided to withdraw the authorisation of Versobank, as proposed by Finantsinspektsioon;

- 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.

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

- The bank's former representatives and the bank's shareholders challenged the ECB decision to withdraw the banking licence of Versobank at the European Court of Justice (case number T-584/18); the court decision is still pending. The case entails inter alia the question who can challenge ECB withdrawal decision in court (the bank's representatives, shareholders, or the liquidator), which is also relevant in the context of another Latvian bank that had its banking licence withdrawn, Trasta Komercbanka (see also René Smits for an analysis of the Advocate General's opinion).

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) 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 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 competent AML supervisor, 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"*, the *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"*. The EBA would 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.

In September 2019, the press reported that Malta's financial regulator and FIAU had completed a joint investigation during which all transactions at Pilatus Bank had been reviewed, its findings were handed to the police. The same newspaper reported in March 2020 that Pilatus Bank owner, Ali Sadr Hasheminejad, had been found guilty of breaching US sanctions on Iran in a New York jury trial, while according to an article published in June 2020, the US federal prosecutors were seeking to withdraw the criminal case, considering it not to be in the interest of justice, given the resources that would be required to address all the evidentiary issues. Against that backdrop, in December 2020 Pilatus Bank has reportedly given notice in the American courts that it will sue the ECB for damages after revoking its licence.

Case 4: Danske Bank's branch in Estonia

Danske Bank Group is Denmark's largest bank (approximate balance sheet size in 2018: EUR 480 bn according to its annual report); its branch in Estonia, acquired in 2007 as part of Sampo Bank, and the Baltic banking activities formed only small parts of Danske Bank. The Estonian branch had its own IT platform and was hence not covered by the same risk monitoring procedures as other parts and branches of the group. Danske Bank Group assumed for a long time that the high risk represented by non-resident customers in the Estonian branch was mitigated by appropriate AML procedures, but in early 2014, following a report from a whistleblower and internal audit work, it became clear that AML procedures at the Estonian branch had been manifestly insufficient and inadequate. Subsequent investigations have shown that over the nine years from 2007 through 2015, payment transactions of approximately EUR 200 billion have been processed with approximately 10.000 customers in the Non-Resident Portfolio and 15.000 customers subject to investigation.

Danske Bank is not supervised by the SSM as Denmark is not part of the Banking Union, its branch was supervised by the national competent authority in Estonia, the Financial Supervisory Authority (Finantsinpektsioon), as a "host" supervisor in accordance with the CRD. Pursuant to the CRD, responsibility for prudential supervision, including internal control systems, lies with the home supervisor[29]. For ML purposes, the competent authorities of a host Member State retains full responsibility, as explained in Box B below. Further to allegations from the press on 26 February 2018 that lax controls in Danske Bank's Estonian operations led to potential ML, the Finantsinpektsioon 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*

[29] 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.

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.

Box B: 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

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*[30]". 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.

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

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,
- 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 press release, 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. Finantsinspektsioon 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 that 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 April 2019, the EBA closed its formal investigation into a possible breach of Union law rejecting a proposal for a breach of Union law recommendation, finding (according to the Commission's report of July 2019) that the obligations on supervisors in the relevant directives were not sufficiently clear and unconditional and so could not be used to fund a breach of Union law recommendation.

In a response to the report on the Danish FSA's supervision of Danske Bank, Finantsinspektsioon of Estonia has welcomed in January 2019 "*the clear indication now given by our Danish colleague that Finantsinspektsioon 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". According to a press release of Deutsche Bank of 13 October 2020, the Frankfurt Public Prosecutor's Office have closed its criminal investigation and fined the bank €13.5m for the belated reporting of suspicious transactions it processed for Danske Bank's Estonian branch.

In the aftermath of the money laundering scandal, Danske Bank issued a press release in October 2020 that outlines its "Better Bank plan" with a new simplified structure comprising just two business units, also involving a 7% staff reduction, axing 1.600 jobs.

Annex 3: Public consultation on the Commission's 2020 Action Plan

The Commission published a report summarising the findings of the public consultation on its 2020 Action Plan. The consultation, which took place between 7 May and 26 August 2020, received 209 contributions from 24 EU Member States and 5 non-EU countries. The majority of respondents came from the private sector (58%), followed by EU citizens, NGOs and academia (22%), and public authorities (7%). Most respondents from all stakeholders groups believe that further action, in particular at the supranational level, is needed on AML/CFT. While public authorities are most appreciative of the effectiveness of national action, citizens consider action at the EU level as most likely to be effective. In regards to the six pillars of the Action Plan, the following views prevail:

1) *Enforcement:* **The infringement proceedings are considered the most effective tool** currently available at the EU level, indicating public support for the strict approach taken by the Commission to transposition and application of EU rules. **The opinions on other tools are more split among different stakeholders but many respondents could not assess these tools' effectiveness,** indicating a lower level of awareness of them compared to the infringement proceedings;
2) *Harmonisation of the rulebook:* There is **widespread support for harmonising all rules put forward** by the Commission for consultation among all groups of respondents. In the private sector, financial sector operators are more in favour of further harmonisation than non-financial actors. Both the private sector and public authorities support the departure from the current minimum harmonisation approach, but they **warn of excessive burden being placed on sectors less exposed to risks** if the supervision and tasks and powers of the FIUs go too far. **Broad support for better interaction between AML/CFT rules and other EU rules** is also observed;
3) *EU-level supervision:* Most respondents believe that **an EU-level supervisor should cover all obliged entities,** but most of these respondents prefers for this to occur **gradually**. However, across all groups, there is most support for **"a supervisor of supervisors"** who can intervene in justified cases or for **a mix of powers depending on the sector**. Therefore, **the supervision of national supervisors is preferred to an EU supervisor** that would directly supervise obliged entities. There is low support for the EBA to become this supervisor; **the establishment of a new body is preferred**;
4) *Support and coordination mechanism for Financial Intelligence Units:* All stakeholder groups consider that **the FIU support and coordination mechanism should perform a broad array of tasks** and that FIUs should not only provide technical assistance but also **better financial intelligence**. The answers highlight that such a mechanism should be within the structure of the **EU AML supervisor and that a high level of autonomy for the FIUs should be ensured;**
5) *Public Private Partnerships (PPPs):* The respondents support the Commission's decision **not to regulate PPPs yet** considering their early stage of development and to instead issue guidance and promote good practice. Nonetheless, there is strong **support for clearer rules regarding the FIUs' feedback to obliged entities**. Various respondents also emphasised **concerns over the sharing of personal data** and the potential impact of information sharing on civil liberties;
6) *The EU's global role:* More than half of respondents **support the Commission representing the EU at FATF**. On the other hand, many, and especially respondents in the public sector, believe that **the Commission should not replace the Member States, but work together with them.** Lastly, almost all respondents argue that when EU standards go beyond FATF ones, the EU should push for raising global standards to the EU levels.

In addition to this public consultation, the Commission's has also consulted on: (i) the roadmap announcing the Commission's Action Plan, (ii) on Member States and competent AML/CFT authorities, (iii) advice from the EBA (see section 3 above), (iv) the European Data Protection Supervisor opinion, and (v) a final conference bringing together representatives from the Member States, competent authorities, academia, civil society and the private sector. A summary of these components can be found in the report.

Annex 4: The case for an EU body on AML, a European FIU and a maximum harmonisation framework

As noted by Commissioner McGuinness in her confirmation hearing: *"We need a single EU rulebook, one that's not overseen just by national supervisors but by a very strong, independent EU anti-money-laundering supervisor. And we need enhanced cooperation between financial intelligence units."* These three elements which form a key part of the Commission's 2020 Action Plan, have been debated in the EU context for a number of years.

A new EU body on AML

The 2019 EP TAX 3 report argues in favour of a centralised European authority in charge of monitoring money laundering, calling for "*an assessment of long-term objectives leading to an enhanced AML/CFT framework ... such as the establishment at EU level of a mechanism to better coordinate the activities of AML/CFT supervisors of financial sector entities ... and a* ***possible centralisation of AML supervision via an existing or new Union body empowered to enforce harmonised rules and practices across Members States****; supports further efforts for* ***centralisation of anti-money laundering supervision*** *and considers that if such a mechanism is established, it should be allocated sufficient human and financial resources in order for its functions to be carried out efficiently*" (own emphasis). The EP further considers that "***prudential and anti-money laundering supervision cannot be treated separately***" and that "*ESAs have limited capabilities to take a more substantial role in the fight against money laundering owing to their decision-making structures, a lack of powers and limited resources*;" nevertheless arguing in favour of EBA having a "*leading role*".

In response to the European Parliament requests, the Commission confirms careful consideration of all the measures listed in the Joint Group paper "*including the establishment at EU level of a coordination or support mechanism to guide the activity of AML/CFT supervisors or financial institutions, notably in situations where AML/CFT concerns are likely to have cross-border effects*". The Commission adds that the "*legislative framework currently in force already requires the Commission to assess the necessity, proportionality and feasibility of a Union-level mechanism to support and coordinate the relevant national authorities in their activities under the [4th AML Directive]. Any further measures, including possible legislative proposals, will be developed on this basis*".

The SSM has called for the **establishment of a European Authority** that will be distinct from the ECB/SSM (see Box C 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*".

While the Commission commits to "table proposals to set up an EU-level AML/CFT supervisor in Q1 2021, based on a thorough impact assessment of options regarding its functions, scope and structure" (noting that this is still outstanding), an EU AML authority is unlikely to be finalised before the Commission's report on AML due by January 2022. As part of this report, the 2018 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 the 2018 Commission's communication and legislative proposal on EBA, the President of the ECB, at the European Parliament ECON Committee September monetary dialogue reiterated the need for the EU to establish an EU Authority for AML supervision.

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 European Parliament 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 disconnection between the 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*".

A European FIU

The EP TAX 3 report called for "*a legislative proposal for an EU FIU, which would create a hub for joint investigative work and coordination with its own remit of autonomy and investigatory competences on cross-border financial criminality, as well as an early warning mechanism*". Such an EU FIU "*should have the broad role of coordinating, assisting and supporting Member States' FIUs in cross-border cases in order to extend the exchange of information and ensure joint analysis of cross-border cases and strong coordination of work*". The EP CumEx resolution pleads the same.

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

In an interview in March 2017, then-Chair of the ECB Supervisory Board Danièle Nouy emphasised that whether ML and TF should be supervised centrally, is a *"decision for politicians and legislators to make"*, but the SSM 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 2018 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"*.

More recently, Chair Enria stated in the October 2020 ECON hearing that "*...it is important that the regulatory and supervisory side on the AML issue is more integrated at the European level, ideally with the attribution of responsibilities for monitoring*." Furthermore, in his confirmation hearing, ECB Supervisory Board Member Frank Elderson indicated that he *"welcome[s] the Commission's proposals on a European approach to AML/CFT supervision involving a single supervisor."*

The Commission, in its 2019 response, signalled that "*objective of the current work preparing the Commission Report on the cooperation between FIUs, which is to be delivered later this year, is to identify existing challenges and obstacles to the FIU-to-FIU cooperation and to outline possible policy options for the future, addressing these problems. Any policy decision will be made at a later stage, in line with the priorities of the upcoming*

Commission." It was not clear, though, whether the EU FIU and the centralised authority for AML supervision should be one and the same or two different bodies sharing relevant information and closely interrelated. As stated in the Commission's 2020 Action Plan: *"In keeping with the objective to have a broad role for this coordination and support mechanism that aims at addressing all the elements analysed above, its management could be ensured by an existing EU agency or by a new, dedicated body. In case a new EU body is created for supervisory issues, it could be given the task of administering this mechanism as well. For this purpose, it is worth noting that twelve FIUs in the EU currently have supervisory tasks for at least the non-financial sector, while some of them have supervisory tasks for all sectors*." Again the Commission aimed to present a proposal in this regard in Q1, 2021.

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 CRD and not by the directly applicable Capital Requirements Regulation (CRR). Despite Joint ESMA and EBA guidelines, as well as ECB guidelines, on fit and proper assessments, some national law transposing the CRD prevents, according to EBA, competent authorities from addressing ML 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. The EP TAX 3 report argued in favour of further harmonisation of AML rules, asking the Commission to address the issue in its impact assessment and propose incorporating AML provisions in a regulation "*if the impact assessment so advises*". The Commission, in its reply, noted that in its September 2018 Communication already committed to assessing the issue. Legislative proposals in this regard are expected to be presented in July 2021.