



EBA REPORT ON THE FUTURE AML/CFT FRAMEWORK IN THE EU

RESPONSE TO THE EUROPEAN COMMISSION'S CALL FOR ADVICE 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

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Executive summary

1. This report is the European Banking Authority (EBA)'s response to the call for advice that the European Commission issued 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'. It also provides technical advice on Pillar 2 of the Commission's 2020 'Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing'.
2. In this report, the EBA sets out how the European Union (EU)'s legal framework should be amended to tackle vulnerabilities linked to divergent national approaches and gaps in the EU's anti-money laundering and countering the terrorism of financing (AML/CFT) defenses. It recommends that the Commission establish a single rulebook whereby a robust set of common rules supports the implementation of a proportionate and effective, risk-based EU AML/CFT regime.
3. Specifically, the EBA recommends that the Commission:
 - a. Harmonise aspects of the EU's legal framework where evidence suggests that divergence of national rules and practices has had a significant, adverse impact on the prevention of the use of the EU's financial system for ML/TF purposes. This is the case in particular in respect of customer due diligence (CDD) measures and AML/CFT systems and controls requirements that determine what financial institutions do to tackle ML/TF. It is also the case in relation to rules governing key supervisory processes such as risk assessments, cooperation and enforcement. In the EBA's view, these common rules should be set out in directly applicable Union law.
 - b. Strengthen aspects of the EU's legal framework where current provisions are insufficiently robust and create vulnerabilities in the EU's AML/CFT defences. This is the case particularly in relation to the powers that AML/CFT supervisors have at their disposal to monitor and take the measures necessary to ensure financial institutions' compliance with their AML/CFT obligations, and in relation to financial institutions' reporting requirements, which should include a requirement to identify and report suspicious activity as well as suspicious transactions. The EBA considers that these provisions could remain in a directive.
 - c. Review the scope of the EU's AML/CFT legislation to ensure that the list of obliged entities is sufficiently comprehensive and well-defined, and in line with international AML/CFT standards. Examples of sectors that are not currently included or whose status under the current AML/CFT directive is unclear include virtual asset service providers, investment firms and investment funds.

- d. Clarify provisions in sectoral financial services legislation to ensure that they are compatible with the EU's AML/CFT objectives. This includes making sure that ML/TF risk is addressed consistently across all sectors and throughout the supervisory process. Examples include prudential rules governing market entry, passporting and ongoing supervision, and provisions in Union law relating to, *inter alia*, data protection, payment services, financial sanctions and deposit guarantee schemes.
4. The EBA will continue to provide technical input to support the implementation of the Commission's AML/CFT Action Plan.

1. Background

1.1 Background

5. On 3 March 2020, the European Commission issued 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 money laundering and terrorist financing’.
6. Specifically, the Commission asked the EBA to:
 - a. identify which aspects of Directive (EU) 2015/849 (the Anti-Money Laundering Directive (AMLD)) should be harmonised;
 - b. identify whether some aspects of the AMLD should be strengthened and, if so, outline how this should be done;
 - c. identify whether there are any financial institutions, or activities, products or services, that should be subject to AML/CFT obligations but are not currently within the scope of the EU’s AML/CFT framework; and
 - d. assess the interaction of a future AML/CFT Regulation with the amended AMLD.
7. The Commission also asked the EBA to assess whether other EU legal instruments should be adjusted to ensure greater synergies between these legal instruments and the AML/CFT framework.
8. With this report, the EBA provides its response to the Commission’s call for advice, and to Pillar 2 of the Commission’s 2020 ‘Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing’.¹

1.2 The EBA’s approach

9. The Commission, in its call for advice, was clear that in the light of the tight deadlines, it did not expect the EBA to collect new data or to consult publicly on any recommendations or advice. This meant that, to prepare its response, the EBA drew on existing data and information, as well as active exchanges within its Board of Supervisors and Standing Committee on AML/CFT (AMLSC). The AMLSC brings together senior representatives from 57

¹ Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing’ [C(2020) 2800 final]

competent authorities that, together, are responsible for the AML/CFT supervision of the EU's financial services industry.

10. When preparing its advice to the Commission, the EBA had regard to:

- a. any legal or technical obstacles that could prevent the effective implementation of advice given or proposals made and that would have to be addressed by the co-legislator;
- b. the impact of any proposed measure or provision on the integrity, stability and functioning of the EU's financial sector;
- c. the cost of compliance with, and impact of, any future AML/CFT obligations to the extent that these are known; and
- d. relevant variables, such as the establishment of a future EU-level AML/CFT supervisor, and the powers and competencies that this single supervisor will have.

11. The EBA was guided by the following considerations:

- a. To be effective, the new legal framework must be proportionate and risk-sensitive, and in line with international AML/CFT standards.
- b. New, or more detailed, rules should be introduced only where there is evidence to suggest that the current approach has not led to reliably effective outcomes, and that similar results cannot be achieved through other means.
- c. Legal provisions should be harmonised through provisions in directly applicable Union law where evidence suggests that divergence caused by national transposition and differing national approaches to AML/CFT supervision has a significant, adverse impact on the prevention of the use of the EU's financial system for ML/TF purposes.
- d. Legal provisions that apply to financial institutions and their supervisors in one sector and that are relevant from an AML/CFT perspective should be consistent with, but not necessarily the same as, those that apply to financial institutions and their supervisors in other sectors.
- e. The overall effect of any recommendations made and implemented should be an effective and more robust EU AML/CFT regime. Changes should not lead to a weakening of European or national AML/CFT standards.

12. The EBA is basing its recommendations on the information and evidence available to it. In line with the call for advice, it has not carried out a formal cost-benefit analysis. Instead, the Commission will be carrying out an impact assessment to inform its legislative proposals, which are due to be published in 2021.

2. Directive (EU) 2015/849 (AMLD)

13. The AMLD is a minimum harmonisation directive.
14. A minimum harmonisation framework has been necessary in some cases to accommodate different national approaches, national criminal law and constitutional requirements. It has also been necessary to facilitate a flexible response to specific local ML/TF risks.
15. There are, nevertheless, a number of areas where the EBA considers that, based on the evidence available, full harmonisation through directly applicable Union law would be of benefit and necessary to achieve better outcomes in the fight against ML/TF across the single market and to support the effective functioning of a future EU-level AML/CFT supervisor.
16. In other areas, the EBA considers that the AMLD's provisions need strengthening to achieve a more robust EU AML/CFT regime. Strengthening these provisions can be achieved by setting out relevant requirements in directly applicable Union law, although this will not be the only way to obtain effective and consistent outcomes.

2.1 Aspects of the AMLD that should be harmonised

17. A review of the European Supervisory Authorities (ESAs)' work on AML/CFT over the past five years suggests that harmonisation of the legal framework by means of directly applicable provisions in Union law is necessary in at least the following areas:
 - a. Customer Due Diligence;
 - b. occasional transactions;
 - c. AML/CFT systems and controls;
 - d. supervisory ML/TF risk assessments;
 - e. cooperation; and
 - f. sanctions and other corrective measures.
18. In the EBA's view, making sure that the same rules apply to all financial institutions and competent authorities in these areas will avoid regulatory arbitrage, provide legal certainty and a level playing field for market participants and importantly, strengthen the EU's AML/CFT defences. This is because opting for a regulation rather than a directive will eliminate the

need for national transposition in these areas and ensure a consistent approach to AML/CFT compliance, supervision and enforcement. It is also a prerequisite for effective EU-wide AML/CFT supervision.²

19. At the same time, the EBA recognises that the nature of AML/CFT supervision and compliance requires flexibility and discretion, in particular where this is necessary to address specific ML/TF risks. The EBA notes that the need for flexibility can be combined successfully with setting rules by means of a regulation rather than a directive. This approach has been applied in some areas of capital market supervision, such as the supervision of credit rating agencies and trade repositories, and the supervision of central counterparties under the new European Market Infrastructure Regulation (EMIR), and can serve as a useful precedent also in relation to AML/CFT.

2.1.1 Customer Due Diligence measures

20. CDD is central to AML/CFT efforts. Provisions in the AMLD are high level, to facilitate the adjustment of CDD measures by financial institutions on a risk-sensitive basis. Yet differences in the national transposition of the AMLD's CDD requirements and, as a result, divergent expectations of financial institutions' CDD efforts by national competent authorities (NCAs) have led to regulatory arbitrage, created uneven conditions of competition, and hampered innovation and the cross-border provision of financial services. They have also exposed the EU's financial sector to ML/TF risk.

a. Provisions in Union law

21. Article 13(1) of the AMLD requires obliged entities to:

- a. identify the customer and verify the customer's identity on the basis of documents, data or information obtained from a reliable and independent source, whether this source be paper-based or electronic;
- b. identify the customer's beneficial owner and take reasonable measures to verify the beneficial owner's identity so that the obliged entity is satisfied that it knows who the beneficial owner is;
- c. assess and, as appropriate, obtain information on the purpose and intended nature of the business relationship; and
- d. conduct ongoing monitoring of the business relationship, which includes transaction monitoring and keeping the underlying information up to date.

² EBA (2020): Response by the European Banking Authority to the European Commission's public consultation on an AML/CFT Action Plan and the establishment of an EU-level AML/CFT supervisor

22. Article 13(2) of the AMLD provides that obliged entities can determine the extent of these measures on a risk-sensitive basis. Article 15 of the AMLD provides that, where the risk associated with the business relationship or occasional transaction is reduced, Member States may allow credit and financial institutions to apply 'Simplified Customer Due Diligence (SDD)' measures instead. Conversely, where the risk associated with the business relationship or occasional transaction is increased, Article 18 provides that obliged entities must apply 'Enhanced Customer Due Diligence (EDD)' measures. The AMLD does not set out in detail how obliged entities should assess the risk associated with a business relationship or transaction, nor does it set out exactly what SDD and, with limited exceptions, EDD measures entail.
23. Article 25 of the AMLD includes a national discretion according to which Member States' law may permit credit and financial institutions to rely on a third party for some of its CDD measures, subject to certain conditions. Article 26 of the AMLD defines what 'third party' means for the purposes of this reliance. The relying credit or financial institution remains ultimately responsible for compliance with its CDD obligations.
24. Article 29 of the AMLD makes clear that outsourcing or agency relationships are not affected by third-party reliance requirements but are instead governed by separate provisions in Union law.
25. Article 45 of the AMLD requires Member States to ensure that the sharing of information for AML/CFT purposes within a group is allowed.

b. EBA observations

26. CDD entails more than the identification of the customer and the customer's beneficial owner, and the verification of the identity of both. This is because the information that financial institutions obtain through the application of CDD measures serves to inform their rating of the ML/TF risk of the business relationship and to determine the measures that financial institutions will take to deter and detect ML/TF. The type and nature of the information that institutions need to obtain in this context should vary in line with the risk-based approach enshrined in the AMLD and international AML/CFT standards.
27. Member States have adopted divergent approaches to the transposition of the AMLD's CDD requirements into national law. Many have opted for a prescriptive approach. Consequently, different CDD rules apply in different Member States.
28. Divergent national approaches to CDD have a significant adverse impact on the integrity of the EU's financial system. For example:
 - a. Findings from the EBA's Report on competent authorities' approaches to the AML/CFT supervision of banks highlight that the focus by some Member States on identification and verification has led to the adoption of rules and a focus on compliance with specific processes rather than effective ML/TF risk management. Examples of such rules include catalogues of specific documents that financial institutions must always obtain, a

prohibition of SDD measures and provisions that require all customers to be physically present for identification purposes.

The EBA found that limiting the flexibility embedded in the EU's AML/CFT framework in this way had a significant detrimental effect on the quality of some financial institutions' AML/CFT efforts. The effects of such an approach have also been brought into sharp relief in the context of the Covid-19 pandemic and the associated rapid increase in non-face to face transactions, which financial institutions in some Member States were less well equipped to handle.

- b. Feedback from competent authorities obtained in the context of the ESAs' 2019 Joint Opinion on ML/TF risks affecting the EU's financial sector suggests that some financial institutions have established themselves in Member States whose CDD requirements they perceived to be the most permissive, to make use of the freedom to provide services from that Member State to customers in other Member States. This appears to be of particular concern in the payments and e-money sectors.
29. The impact of divergent approaches to CDD goes beyond the fight against ML/TF and also affects wider financial market, innovation and consumer protection objectives. For example:
- a. Feedback from credit and financial institutions and users of financial services suggests that prescriptive or inflexible CDD provisions in some Member States have contributed to the financial exclusion of vulnerable customers. There is a risk that customers who are denied access to the financial system will use informal or illicit payment channels instead, where transactions are not monitored and therefore not reported if suspicious.
 - b. Feedback to the EBA's 2019 Report on cross-border obstacles suggests that divergent CDD requirements across Member States hamper financial innovation at the EU level and limit the extent to which financial institutions can use innovative solutions to support their AML/CFT compliance efforts. This is because in the absence of a common approach to CDD, and in the light of divergent transpositions of the AMLD's third party provisions into the national laws of Member States, reliance on third parties can sometimes be difficult, in particular in a cross-border context. Furthermore, in some cases, the negative impact of differences in national CDD requirements has been exacerbated by restrictions that some Member States or competent authorities have placed on the ability of financial institutions to outsource aspects of their CDD obligations.
- c. **EBA advice**
30. The EBA recommends that the Commission take steps to harmonise the AMLD's CDD requirements and enshrines these in directly applicable Union law with a view to achieving consistent, and consistently effective, CDD practices. This will strengthen the Union's AML/CFT defences, foster competition and innovation and support access to financial services in Member States and across the single market.

31. The EBA considers that greater harmonisation of CDD measures should not result in a prescriptive approach. Instead, the EBA recommends that the Commission ensures that any future CDD requirements
- a. Focus on outcomes, as well as processes. In line with the approach set out in the ESAs' Risk Factors Guidelines, this entails treating CDD measures holistically by making clear, in Union law, that the purpose of CDD measures currently set out in Article 13 (1)(a)-(d) of the AMLD is to obtain a sufficient understanding of the customer and, where applicable, the beneficial owner, to deter ML/TF and to detect ML/TF should it occur. It also entails a greater focus on financial institutions using CDD measures as a tool to identify and assess the risk associated with each business relationship or occasional transaction.
 - b. Are sufficiently flexible to accommodate a risk-based approach in line with international AML/CFT standards. This could be achieved by setting out, in directly applicable Union law, a non-exhaustive list of criteria that help financial institutions determine the nature and type of CDD measures that are commensurate with different levels of ML/TF risk. The ESAs' Guidelines on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the ML/TF risk associated with individual business relationships and occasional transactions provide useful information in this regard.
 - c. Are technologically neutral while facilitating innovation and the development of a common CDD infrastructure by moving away from a focus on documents and physical presence. For example, a new regulation could achieve a consistent approach to CDD by:
 - i. Setting out basic attributes, identifiers or characteristics that make each customer or beneficial owner unique and distinguishable from others and that must always be obtained, such as a natural person's name and date of birth, and that can be supplemented with additional information on a case-by-case basis as risk dictates.
 - ii. Setting out the criteria that financial institutions should use to determine which sources of information are suitable to be used for verification purposes, taking account of different degrees of reliability or assurance. In this context, consideration could be given to establishing a common EU approach to the use of digital identities and legal entity identifiers for aspects of the CDD process, taking due account of international standards and AML/CFT guidance in this regard.
 - iii. Clarifying how outsourcing and third party reliance provisions apply in the CDD context, and where the ultimate responsibility for compliance with CDD obligations lies. Clarifying the application of outsourcing and third party reliance provisions will be important should digital financial identities that facilitate access to financial services and that are described in the Commission's Digital Finance Strategy be developed. The EBA's Outsourcing guidelines and Risk Factors Guidelines provide a good starting point in this context.

32. Furthermore, to enhance the efficiency of CDD measures, the EBA recommends that the Commission assess the costs and benefits of extending the provisions in Article 45 of the AMLD that govern the sharing of information for AML/CFT purposes within a group to other financial market participants also. The type of information that could be shared includes information on suspicious customers and activities and all shared information should be subject to appropriate safeguards, including the application by all institutions of AML/CFT systems and controls that are equivalent to those required under the EU legal framework and compliance with data protection laws.
33. As is the case currently, the EBA recommends that further details should be set out in EBA guidelines or technical standards.

2.1.2 Occasional transaction CDD threshold

34. In line with international AML/CFT standards, the AMLD sets the CDD threshold for occasional transactions that are not transfers of funds at EUR 15 000. This means that, as long as there is no business relationship, no suspicion of ML/TF and the value of transactions does not exceed the threshold set in the AMLD or national law, financial institutions do not have to apply CDD measures to their customers or their customers' beneficial owners, and do not have to monitor transactions to detect and report suspicious transactions.
35. Some Member States have assessed the ML/TF risk associated with this threshold as significant and made use of their powers under Article 5 of the AMLD to reduce that threshold, at times significantly. This means that there is no single CDD threshold for occasional transactions in the EU.
- a. Provisions in Union law
36. Article 11 of the AMLD requires financial institutions to apply CDD measures where a customer carries out an occasional transactions and:
- a. there is no business relationship; and
 - b. a transaction or series of linked transactions:
 - a. is equal to, or exceeds, EUR 15 000 and is not a transfer of funds as defined in Regulation (EU) 2015/847 (the Wire Transfer Regulation (WTR)), or
 - b. is equal to, or exceeds, EUR 1000 and constitutes a transfer of funds as defined in the WTR.
37. The AMLD does not define the terms 'occasional transaction' or 'linked transaction'.

38. Article 5 of the AMLD empowers Member States to adopt or retain stricter provisions than those set out in the AMLD.

b. EBA observations

39. The current EUR 15 000 threshold has created a number of vulnerabilities. These include:

- a. Financial institutions creating products that take advantage of that threshold to avoid the application of stringent AML/CFT measures foreseen elsewhere in the AMLD. This has been evident in particular in the e-money sector, where some issuers sought to make use of the occasional transactions threshold to circumvent the limitations imposed by Article 12 of the AMLD.
- b. Sectors with business models that rely on occasional transactions being unable to identify and report suspicious activity because, in the absence of a business relationship, their understanding of the ML/TF risk associated with the customer may be limited. Examples of such sectors include money remittance and bureaux de change, which the Commission's Supranational Risk Assessment classifies as higher risk. The Commission, in its 2019 Supranational Risk Assessment, called on Member States to consider waiving or reducing the threshold for bureaux de change and money remitters on account of the significant level of ML/TF risk associated with their operations. Some competent authorities have since reduced the thresholds accordingly.
- c. Terrorist financing going undetected, as the value of funds to support terrorist activity is often small.

40. The ability to impose stricter provisions than those foreseen in Union law where this is important to mitigate ML/TF risks is an important aspect of the AMLD, as ML/TF risks can vary across Member States. The EBA notes that several Member States have taken advantage of this power to reduce or eliminate the threshold for occasional transactions in respect of some or all of their obliged entities. This means that there is no single threshold for occasional transactions across the EU, which creates regulatory arbitrage and increases the cost of compliance for financial institutions that operate on a cross-border basis.

41. The EBA also notes that it is not clear how the current threshold applies to some sectors and payment service providers, such as the new Payment Initiation Service Providers (PISPs) or Account Information Service Providers (AISPs). This is because PISPs do not always enter into a business relationship with the payment service user and like AISPs, do not themselves execute the payment transactions or any transfer of funds or enter into the possession of the payment service user's funds.

42. The EBA further notes that, in the absence of a definition in Union law of 'occasional transactions' and 'linked transactions', there is a risk of divergent interpretations of those terms by financial institutions and AML/CFT supervisors within and across Member States, which means that the same transaction may be treated differently in different Member States

and financial institutions. Feedback from competent authorities suggests that this risk has crystallised in a number of cases.

c. EBA advice

43. The EBA recommends that the Commission introduce, in directly applicable Union law:
 - a. a definition of the terms ‘occasional transaction’ and ‘linked transactions’, using the definitions of those terms in the ESAs’ Risk Factors Guidelines and Guidelines under Article 25 of the WTR on the measures payment service providers should take to detect missing or incomplete information on the payer or the payee, and the procedures that they should put in place to manage a transfer of funds lacking the required information as a basis;
 - b. a single CDD threshold for occasional transactions that applies across the EU to reduce regulatory arbitrage and contribute to strengthening the EU’s AML/CFT defences.
44. The EBA also recommends that the Commission give consideration to lowering or removing the legal CDD threshold for occasional transactions in Union law for obliged entities that are financial institutions, or for those sectors or transactions that are associated with higher ML/TF risk.
45. To ensure a proportionate response, in duly justified cases where the ML/TF risk is demonstrably reduced, the EBA considers that the Commission should envisage limited exemptions from the duty to apply CDD measures.
46. Finally, the EBA considers that the Commission should clarify in directly applicable Union law:
 - a. if the term ‘transaction’ in the AMLD extends to the initiation of a payment as carried out by, for example, PISPs; and
 - b. if, and if so how, the CDD threshold applies in situations where there is no business relationship, and the financial institution does not execute the transfer of funds or transaction.

2.1.3 AML/CFT systems and controls requirements

47. AML/CFT systems and controls encompass more than the processes financial institutions put in place to identify, and verify the identity of their customers and to monitor transactions. To be effective, these processes have to be risk-based and form an integral part of an institution’s wider governance and internal controls framework.
48. In the absence of sufficiently specific provisions in the AMLD, some Member States and competent authorities have taken a narrow view of financial institution’s AML/CFT systems

and controls obligations. This has had a significant, detrimental effect on the adequacy of financial institutions' AML/CFT efforts.

a. Provisions in Union law

49. Article 8 of the AMLD refers in high-level terms to the AML/CFT policies, controls and procedures that financial institutions should have in place to assess, mitigate and manage effectively the ML/TF risks that they have identified.

50. Section 1 of Chapter VI of the AMLD covers group-wide AML/CFT policies and procedures. Article 45 specifies that these group-wide AML/CFT policies and procedures should be implemented across the group's branches and majority-owned subsidiaries established within the EU or in third countries. Article 46, *inter alia*, lays down requirements for employees of obliged entities to undergo AML/CFT training; it also introduces a high-level requirement for a member of the management body to be responsible for AML/CFT 'where applicable'. The provision does not set out how applicability should be assessed.

51. Commission Delegated Regulation (EU) 2019/758 sets out the measures that firms should take in situations where a third country's law does not permit the application of group-wide AML/CFT policies and procedures.

b. EBA observations

52. The level of detail contained in the AMLD stands in marked contrast to equivalent provisions in sectoral legislation, which in many cases have been further specified through mandates for ESA technical standards or guidelines.

53. The AMLD's lack of detail on these points appears to have had a significant, negative impact on the quality and robustness of financial institutions' AML/CFT controls in some Member States. It has also made effective AML/CFT supervision more difficult:

a. Findings from the ESAs' 2017 and 2019 Joint Opinions on ML/TF risks affecting the EU's financial sector suggest that weaknesses in 'internal controls and overall AML/CFT policies and procedures' constitute one of the most common types of breaches across financial institutions in all sectors, even though they were also among the least assessed by competent authorities. Equally, the Commission's 2019 Post Mortem Review found that many financial institutions in the Commission's sample had not established adequate risk management systems and controls, particularly in relation to the identification and reporting of suspicious transactions.

b. Findings from the EBA's implementation reviews, the ESAs' 2019 Joint Opinion on ML/TF risks and breach of Union law (BUL) investigations show that not all AML/CFT supervisors consider a financial institution's internal controls framework when assessing whether that financial institution's AML/CFT policies and procedures are adequate and effective. Limiting AML/CFT supervision to testing a financial institution's compliance with specific

CDD requirements means that important contextual information will be missed. It also means that AML/CFT competent authorities will not seek to identify, and address, the root causes of deep-seated or repeated AML/CFT compliance failures.

- c. There are different expectations in Member States of the steps that parent financial institutions should take to ensure the implementation of group-wide AML/CFT policies and procedures, and the way parent undertakings should identify and manage ML/TF risks emanating from branches and subsidiaries in another Member State or third country at the level of the group. The EBA has found that, as a result of those differences, competent authorities' approaches to the AML/CFT supervision of financial institutions that form part of a group are not consistent, and that competent authorities offer different views of the distribution of responsibilities between home and host AML/CFT competent authorities. This has created gaps in the AML/CFT supervision of financial groups, and the EBA notes that the failure by financial institutions to tackle ML/TF risk at the group level has been a significant, contributing factor to several high-profile AML/CFT cases in recent years.
 - d. The EBA's implementation reviews found that AML/CFT supervisors in some Member States do not interact with financial institutions' senior management. This is because there is no legal or regulatory requirement in those Member States to appoint an AML/CFT compliance officer at a level that is sufficiently senior to report to the financial institution's senior management body. As a result, there is a risk that AML/CFT supervision may not be effective, because supervisory findings and follow-up measures are not shared at board level. Lack of sufficient seniority and buy-in at the level of an institution's management body has also meant that ensuring adequate resources and hiring suitably qualified staff for AML/CFT roles have not been seen as priorities, and this has appeared to affect the quality of financial institution's AML/CFT controls.
- c. **EBA advice**
- 54. A consistent set of rules on AML/CFT systems and controls that applies to all financial institutions wherever they operate in the single market will strengthen AML/CFT compliance and make AML/CFT supervision more effective.
 - 55. The EBA recommends that these rules be comprehensive, risk-sensitive, and proportionate to the nature, complexity and size of a financial institution and include at least the following:
 - a. A requirement for all financial institutions to allocate to a member of the management body ultimate responsibility for the financial institution's AML/CFT systems and controls, including, where applicable, group AML/CFT policies and procedures, and to appoint a compliance officer with oversight of the financial institution's compliance with its AML/CFT obligations. To ensure a proportionate approach, the EBA recommends that the Commission:

- i. provide an option for these roles to be combined with other roles within the financial institution, as long as combining roles is commensurate with the nature and size of the financial institution and the level of ML/TF risk to which it is exposed, and does not stand in the way of these individuals effectively discharging their AML/CFT functions. The European Securities and Markets Authority (ESMA)'s Guidelines on certain aspects of the Markets in Financial Instruments (MiFID) II compliance function requirements set out how the compliance function can be combined with other internal control functions;
 - ii. give consideration to introducing an exemption from the requirement to appoint an AML/CFT compliance officer provided this exemption does not affect the financial institution's duty to comply with its AML/CFT obligations and applies only where both of the following conditions are met:
 - 1. a financial institution has no employees, for example because the financial institution is a sole trader; and
 - 2. the ML/TF risk associated with its business is very limited.
 - b. A requirement for all financial institutions directly to report to the supervisory function of the board cases of significant or material weaknesses in the financial institution's AML/CFT systems and controls;
 - c. The role and responsibilities of parent companies and the steps they must take to put in place, maintain and effectively implement group-wide AML/CFT policies and procedures, including policies and procedures for sharing information within the group for AML/CFT purposes, and the role and responsibilities in this regard of parent companies that are not themselves obliged entities; and
 - d. In more detail than is currently the case, the scope of AML/CFT policies, controls and procedures at the level of the financial institution and at the level of the group to ensure that AML/CFT compliance efforts do not focus on CDD measures alone.
56. The EBA considers that the Commission, when drafting those provisions, should draw on synergies with relevant provisions in sectoral legislation. This will help to ensure that AML/CFT systems and controls are consistent with and embedded in financial institutions' wider governance frameworks. To ensure an effective approach to the supervision of those provisions, the EBA recommends that responsibility for the oversight and enforcement of AML/CFT systems and controls requirements on the one hand, and wider governance requirements, on the other hand, be clearly allocated.
57. In line with the approach taken in sectoral legislation, the EBA recommends that the Commission set out these rules in directly applicable Union law, and complements them with EBA mandates for technical standards and guidelines as necessary and appropriate.

2.1.4 Supervisory ML/TF risk assessments

58. The AMLD puts the risk-based approach at the centre of the EU's AML/CFT regime. It recognises that the risk of ML/TF can vary and that competent authorities have to take steps to identify and assess that risk with a view to deciding how best to manage it. The AMLD does not set out in detail how competent authorities should identify and assess ML/TF risk.

59. The EBA's work on AML/CFT supervision and risk assessments suggests that in the absence of clear legal provisions, there is no consistent approach by competent authorities to assessing ML/TF risk and many competent authorities find it difficult to assess ML/TF risk. This has serious consequences for the adequacy of AML/CFT supervision at the level of Member States. It also undermines efforts to develop a common understanding of ML/TF risks at EU level and creates vulnerabilities in the EU's AML/CFT defences.

a. Provisions in Union law

60. Article 48(6) of the AMLD provides that competent authorities must have a clear understanding of ML/TF risks in their Member State and must assess the ML/TF risk associated with obliged entities so as to adjust the frequency and intensity of their onsite and offsite supervision accordingly.

b. EBA observations

61. Findings from the EBA's implementation reviews and the ESAs' 2017 and 2019 Joint opinions on ML/TF risk suggest that ML/TF risk assessment processes and methodologies vary significantly in quality and scope, which means that there is no consistent or comparable output. This hampers effective AML/CFT supervision at the domestic level and in the cross-border context, for example in relation to the setting up and running of AML/CFT supervisory colleges. It also affects not only EU agencies' ability to assess and manage ML/TF risk across the single market, but also the ability of prudential authorities, including the European Central Bank (ECB), to take ML/TF risk into account consistently in their supervisory processes.

62. The EBA notes that, in addition to supporting AML/CFT supervision efforts, harmonising AML/CFT supervisors' AML/CFT risk assessment processes is likely to reduce the cost of compliance for financial institutions that operate on a cross-border basis. Feedback obtained by the EBA during its AML/CFT implementation reviews suggests that divergent approaches by competent authorities mean that financial institutions that operate on a cross-border basis have to report on the same risks in different Member States using different formats and timelines.

63. The ESAs published Joint Guidelines on the characteristics of a risk-based approach to anti-money laundering and terrorist financing supervision, and the steps to be taken when conducting supervision on a risk-sensitive basis (the Risk-Based Supervision Guidelines), which include guidance on the steps that competent authorities should take to assess the ML/TF risk associated with their sector, and with individual financial institutions within that sector. In line

with Article 16 of the EBA's founding regulation, competent authorities have a legal duty to make every effort to comply with these guidelines.

c. EBA advice

64. The EBA recommends that, given the importance of ML/TF risk assessments for effective AML/CFT supervision and the need to ensure a consistent, and consistently reliable, EU-wide approach that produces comparable outcomes, the Commission enshrine a common approach to ML/TF risk assessments for financial sector supervisors in directly applicable Union law. This common approach, or methodology, should set out minimum standards and processes that are applicable in all Member States and be complemented at the national level by a more flexible assessment by competent authorities of additional, specific ML/TF risks, taking into account, for example, findings from national risk assessments, differences in the population of financial institutions, the complexity of the sector and the availability of data as appropriate.
65. A common methodology will significantly strengthen the understanding of ML/TF risks to which the EU's financial sector is exposed and make risk-based AML/CFT supervision more effective. It will also be essential to support the effective functioning of a future EU-level AML/CFT supervisor.
66. Given the technical nature of ML/TF risk assessments, and the expertise gathered in the context of the EBA's ongoing work on AML/CFT and ML/TF risk assessments in general, the EBA proposes that a mandate for the EBA to develop the technical detail would be the most effective and efficient way to achieve a common methodology for assessing ML/TF risk.
67. The EBA notes that the powers and scope of a proposed future EU-level AML/CFT supervisor will affect the approach proposed above, which may have to be adjusted accordingly.

2.1.5 Cooperation (AML/CFT supervisors)

68. The Financial Action Task Force (FATF)'s Recommendations are clear that cooperation is an essential part of an effective AML/CFT regime. Failure to cooperate, or to cooperate effectively, particularly in respect of the AML/CFT supervision of financial institutions that operate on a cross-border basis, has exacerbated several AML/CFT scandals in the EU over the last few years.

a. Provisions in Union law

69. Article 48 (5) of the AMLD requires Member States to ensure that AML/CFT competent authorities of the home and host Member State cooperate to ensure effective AML/CFT supervision of cross-border financial institutions.

70. Article 49 of the AMLD requires Member States to ensure that policy makers, Financial Intelligence Units (FIUs), AML/CFT supervisors, tax authorities and other competent and public authorities have effective mechanisms in place to cooperate domestically.
71. Article 50a of the AMLD requires Member States to ensure that they do not unreasonably prevent the exchange of information among competent authorities, while Article 57a creates a legal basis for the cooperation between competent authorities supervising the same financial institutions or groups, irrespective of their nature or status.
72. Unlike provisions in sectoral legislation, Articles 49 and 50a of the AMLD do not create an explicit legal duty for all competent authorities to cooperate with each other, and with other stakeholders.
73. There is no mandate in the AMLD for the EBA to set out, in technical standards or in guidance, what competent authorities should do to cooperate, and when they should cooperate. There are also no powers for binding mediation. In addition, as set out below, cooperation with other relevant entities, for example Deposit Guarantee Schemes (DGSs), is not foreseen at all.

b. EBA observations

74. The ESAs' work on AML/CFT supervision, including the EBA's findings set out in its Report on competent authorities' approaches to the AML/CFT supervision of banks, highlights that information exchange between competent authorities, and between competent authorities and FIUs, is often inadequate. This limits what competent authorities know about the financial institutions they supervise, and hampers their ability to ensure that financial institutions' policies and procedures to identify and report suspicious transactions are adequate.
75. The ESAs' Joint Guidelines on cooperation and information exchange for the purpose of Directive (EU) 2015/849 between competent authorities supervising credit and financial institutions (the AML/CFT Colleges Guidelines) and the Multilateral agreement on the practical modalities for exchange of information between competent authorities and the ECB were adopted in 2019 and are currently being implemented. Early indications suggest that they go some way towards redressing this situation but the EBA notes that they do not carry the same degree of enforceability as an EU Regulation or EBA Technical Standards and may therefore not be sufficient to ensure effective and consistent cooperation processes, should a competent authority refuse to comply. What is more, in some cases, failure to transpose relevant provisions in the AMLD in good time has thus far prevented the implementation of these instruments in some Member States and, in those cases, cooperation cannot be ensured.
76. Notwithstanding the ESAs' own initiative work, the EBA finds that bilateral exchanges between FIUs and competent authorities remain very limited in some Member States.

c. EBA advice

77. The EBA recommends that the Commission include the following in directly applicable Union law:

- a. An explicit legal duty for AML/CFT competent authorities, prudential supervisors, FIUs, the EBA and other relevant public authorities to cooperate and exchange information subject to compliance with the requisite confidentiality and data protection standards.

As part of this, the EBA considers that the Commission should also consider including in Union law a provision requiring FIUs and competent authorities to liaise effectively and share information that is strictly relevant for the fulfilment of their respective functions. For example, an assessment, by the FIU, of the quality of individual financial institutions' suspicious transaction reports (STRs) as well as their comparative analysis of STRs by type of financial institutions will help competent authorities to target their supervisory response in respect of those financial institutions whose reporting is out of line with that of their peers or otherwise gives rise to concern. This provision should be without prejudice to data protection and confidentiality rules, and potential impediments to inquiries, investigations and proceedings underway.

- b. A mandate for technical standards on AML/CFT colleges to provide a legal basis for the enforcement of the principles set out in the ESAs' AML/CFT colleges guidelines. In the EBA's view, the mandates for prudential colleges included in the Capital Requirements Directive (CRD) can be a useful precedent in this regard.
- c. Binding mediation powers for the EBA to support the resolution of conflicts between competent authorities in relation to supervisory cooperation in the AML/CFT context, including in situations where a competent authority fails to establish or participate in an AML/CFT college.

78. The EBA notes that the powers and scope of a proposed future EU-level AML/CFT supervisor will affect the scope of some the mandates proposed above, which may have to be adjusted accordingly.

2.1.6 Sanctions and other corrective measures

79. The AMLD requires sanctions imposed or measures taken to correct breaches of financial institutions' AML/CFT obligations to be 'effective, proportionate and dissuasive'.

80. The FATF's guidance on effective supervision and enforcement confirms that, to be effective, corrective measures and sanctions should be proportionate to the breach, change the behaviour of the offending financial institution and its peers, deter non-compliance; and eliminate financial gain.

81. Competent authorities' approaches to determining and imposing sanctions and other corrective measures diverge, and a review of available evidence suggests that in many cases,

the sanctions or measures that competent authorities imposed for breaches of financial institutions' AML/CFT obligations were not proportionate, effective, or dissuasive.

a. Provisions in Union law

82. Section 4 of Chapter VI of the AMLD requires Member States to ensure that financial institutions can be held liable for breaches of national provisions transposing the AMLD.
83. Article 58 of the AMLD specifies that any sanctions or measures imposed for breaches of AML/CFT obligations should be effective, proportionate and dissuasive. It does not set out what 'effective, proportionate and dissuasive' means.
84. Article 59 lays down a list of minimum administrative measures that Member States have to be able to apply, unless they put in place criminal sanctions for the same breaches in line with Article 58.
85. Article 9a of the EBA's founding regulation requires the EBA to collect data on the measures that competent authorities took in response to 'material weaknesses' in financial institutions' AML/CFT controls.

b. EBA observations

86. The EBA's Report on competent authorities' approaches to the AML/CFT supervision of banks, the ESAs' 2017 and 2019 Joint Opinions on ML/TF risk and the Commission's Post Mortem Review show that there is no consistent approach to holding financial institutions to account for breaches of national provisions transposing the AMLD. There is also no common understanding, among competent authorities, of what constitutes a 'serious' breach.
87. Findings suggest that in many cases, and irrespective of whether sanctions or other corrective measures were imposed under Directive 2005/60/EC or the AMLD, measures taken by competent authorities to correct AML/CFT breaches were not proportionate, effective, or dissuasive. For example, according to the EBA's Report on competent authorities' approaches to the AML/CFT supervision of banks, fines, where they were imposed, were often very small, and banks told the EBA's review teams that they factored these fines in as a cost of doing business. In some cases, sanctions for breaches that had not been listed in a competent authority's sanctions tool could not be imposed.
88. As is the case for supervision, the same breach by the same financial institution is therefore likely to trigger the imposition of different sanctions and measures, depending on which competent authority is responsible for taking enforcement action, or no sanctions or measures at all.

c. EBA advice

89. The EBA recommends that the Commission, in its revision of the EU's legal framework, provides for the development of common criteria to determine the seriousness and

materiality of breaches of financial institutions' AML/CFT obligations. This provision would align with aspects of the mandate under Article 9a of the EBA's founding regulation, which requires the EBA to set out in a technical standard the definition of AML/CFT 'weaknesses', and the materiality of weaknesses.

90. The EBA considers that this provision should be complemented with common criteria, possibly in guidance, to support a consistent approach to determining the most appropriate supervisory response to breaches that have been identified. This will include imposing sanctions and other corrective measures that are effective, proportionate and dissuasive, while respecting the specificities of national systems and enforcement set-ups.
91. The EBA notes that a harmonised legal framework that supports a consistent approach to determining and imposing effective, proportionate and dissuasive sanctions and other corrective measures for AML/CFT breaches will be particularly important should a future EU-level AML/CFT supervisor have direct or indirect supervisory powers over individual obliged entities.

2.2 Aspects of the AMLD that should be strengthened

92. In addition to areas that would benefit from harmonised, common rules in directly applicable Union law, there are a number of aspects of the AMLD's current provisions that are insufficiently robust and create vulnerabilities in the EU's AML/CFT defences.
93. The EBA's analysis of the ESAs' work on AML/CFT suggests that there is a demonstrable need to strengthen the AMLD's provisions through the inclusion of greater details or more robust provisions in the directive in the following areas:
 - a. AML/CFT supervision; and
 - b. suspicious transactions reporting.
94. Strengthening provisions in the AMLD is likely to lead to greater harmonisation of national approaches in those areas than is currently the case; however, in these areas, it is the EBA's view that harmonisation, while important, is not the main driver.

2.2.1 AML/CFT supervision

95. The FATF Recommendations require competent authorities to apply the same supervisory measures as prudential authorities to the extent that these are relevant for AML/CFT purposes.

96. In contrast to provisions in sectoral Union law, the AMLD does not set out in detail which powers AML/CFT supervisors should have to monitor, and ensure financial institutions' compliance with, their AML/CFT obligations.

a. Provisions in Union law

97. Article 48 of the AMLD sets out in high-level terms the powers that AML/CFT supervisors should have to monitor, and take the measures necessary to ensure compliance with the AMLD's requirements. It also provides that competent authorities that are responsible for the AML/CFT supervision of credit and financial institutions should have 'enhanced' supervisory powers, but does not set out what these enhanced powers should be.

98. Article 48 of the AMLD contains some provisions on the AML/CFT supervision of groups, or financial institutions that operate on a cross-border basis, but these are insufficiently specific on the powers that home AML/CFT supervisors have to ensure compliance by the group with its group-wide AML/CFT obligations.

b. EBA observations

99. In 2019, competent authorities pointed to supervisory obligations for competent authorities under the AMLD not being sufficiently 'clear and unconditional', and argued that this made it difficult for Member States or competent authorities to know what was expected of them under Union law.³

100. There is further evidence from the ESAs' Joint Opinion on ML/TF risk, the EBA's BUL investigations and AML/CFT implementation reviews, and the Commission's July 2019 Post-Mortem Review that as a result of the AMLD's approach to AML/CFT supervision:

- a. Not all competent authorities have the same powers or duties. This has created gaps in the AML/CFT supervision of financial institutions and groups that in some cases, have contributed to significant AML/CFT breaches continuing unchallenged for a considerable period of time.

The EBA has found in its AML/CFT implementation reviews and in its BUL work that competent authorities continue to express different views on the role of AML/CFT competent authorities, with some considering their role to be limited to testing financial institutions' compliance with CDD processes rather than taking a holistic view of the adequacy of a financial institutions' AML/CFT systems and controls. Different views persist also with regard to the role of home competent authorities in the supervision of group-wide AML/CFT policies and procedures.

³ Letter to DG Justice and Consumers re the request to investigate a possible breach of Union law against the Danish and Estonian Supervisory Authorities

- b. Unlike in the prudential context, the processes that competent authorities follow and the standards they apply when monitoring and enforcing financial institutions' compliance with their AML/CFT obligations differ, at times significantly. This means that competent authorities in different Member States might come to a different conclusion regarding the adequacy and effectiveness of the same financial institution's AML/CFT systems and controls.

c. **EBA advice**

101. The EBA recommends that the Commission clarify and strengthen in the AMLD, using examples in sectoral law as a precedent, the powers and duties that competent authorities that are responsible for the AML/CFT supervision of financial institutions should have with regards to the AML/CFT supervision of financial institutions that operate on their territory, and with regards to cross-border financial institutions or groups that are headquartered on their territory. As part of this, the EBA recommends that the Commission set out the modalities of cooperation between AML/CFT competent authorities responsible for the supervision of cross-border groups, including the possibility for AML/CFT competent authorities that are responsible for the AML/CFT supervision of the group to carry out onsite controls of the group's branches and subsidiaries in other Member States in a way similar to provisions set out in Article 52 of the CRD.
102. These changes should be complemented by common supervisory guidance, including through amendments to the ESAs' Risk-based supervision and Risk Factors Guidelines.
103. A more robust approach to AML/CFT supervision across Member States with clear powers and duties for competent authorities that they apply consistently to achieve reliable and comparable outcomes would significantly strengthen the EU's AML/CFT defences and will be a prerequisite for the effective functioning of a future EU-level AML/CFT supervisor, who the Commission in its 2020 Action Plan envisages will work closely with NCAs.

2.2.2 Suspicious transactions versus suspicious activity

104. The AMLD requires financial institutions to monitor transactions and examine the background or purpose of all transactions that are complex, unusually large or unusually patterned or that lack an apparent economic and lawful purpose. They also have to report suspicious transactions to their FIU.
105. Member States have taken divergent approaches to transposing the AMLD's requirements into national law. In some Member States, financial institutions are expected to focus solely on transactions, whereas in others, financial institutions take a holistic view of the business relationship and report suspicious activity or behaviours, whether or not that relates to a specific transaction.

a. Provisions in Union law

106. Article 13(1)(d) of the AMLD requires financial institutions to conduct ongoing monitoring of the business relationship and, as part of this, to scrutinise transactions to ensure that these transactions are consistent with the financial institution's knowledge of its customer.
107. Article 18 (2) of the AMLD requires financial institutions to examine the background and purpose of all transactions that are complex or unusually large, that follow an unusual pattern or that do not have an apparent economic or lawful purpose to determine whether these transactions give rise to suspicion and should be reported to the FIU.
108. Article 33 of the AMLD requires financial institutions to file a report to their FIU if they know, suspect or have reasonable grounds to suspect that funds are the proceeds from criminal activity or are related to TF. Article 33 goes on to state that all suspicious transactions must be reported.

b. EBA observations

109. The AMLD's focus on transactions rather than broader activity or customer behaviours has had two main consequences:
- a. It has led to significant differences in the nature, substance and content of suspicious transaction reports across Member States: reporting requirements range from a narrow focus on transactions to 'unusual' transactions that may not be suspicious and 'suspicious activity' that extends beyond individual transactions and encompasses broader behaviours.
 - b. Rather than consider all aspects of financial institutions' approaches to AML/CFT, competent authorities in some Member States have made a review of financial institutions' transactions the main, and at times almost exclusive, focus of their supervisory work. As a result, AML/CFT supervision in those Member States is not always effective.
110. The EBA notes that the reporting of suspicious activity, including suspicious transactions, is the norm in some Member States. For example, in some Member States, the term 'suspicious transactions' is defined broadly and includes suspicious activity.

c. EBA advice

111. The EBA considers that the Commission, in consultation with FIUs, should explore the costs and benefits of requiring financial institutions to identify and report suspicious activity in addition to the existing requirement to identify and report suspicious transactions.
112. In the EBA's view, explicitly requiring financial institutions to identify and report suspicious activity, including suspicious transactions, will be conducive to financial institutions and competent authorities moving away from tick-box compliance checks and instead

adopting a holistic view of the ML/TF risks to which they, or their sector, are exposed. This will have a significant positive impact on the quality of financial institution's AML/CFT controls and the EU's AML/CFT defences.

2.3 Review of the nature and type of obliged entities within the scope of the AMLD

113. The list of obliged entities in Article 3 of the AMLD is comprehensive and in line with international standards in place at the time when the AMLD was adopted. There are, however, a number of financial institutions and undertakings that are not included, and others whose status under the AMLD is currently unclear. In addition, concerns have been raised that the inclusion of some financial institutions within the scope of the AMLD is disproportionate and some Member States have proceeded to excluding those obliged entities from the scope of their national AML/CFT regime.

114. Article 4 of the AMLD leaves some room for Member States to designate additional professions and categories of undertakings as obliged entities. While important, and necessary to account for local risks, this is not conducive to a consistent EU-wide approach to AML/CFT. It also means that there is no level playing field for these financial institutions and categories of undertakings in the EU, which in turn gives rise to regulatory arbitrage. For each of those professions or undertakings, consideration should therefore be given to whether an extension of the scope of the AMLD, or a future AML regulation, would be appropriate.

112. The EBA considers that the Commission should review and clarify the application of the EU's AML/CFT obligations to the following entities:

- a. crowdfunding service providers;
- b. investment firms and investment funds;
- c. (non-life) general insurers and general insurance intermediaries;
- d. mortgage credit intermediaries and consumer credit providers;
- e. account information service providers; and
- f. virtual asset service providers.

2.3.1 Crowdfunding service providers

115. The status of crowdfunding service providers under the AMLD is unclear. Financial institutions providing such platforms are subject to AML/CFT obligations but, depending on the business model used, there may be other potential obliged entities that are not consistently identified and treated in all Member States. This creates gaps in the EU's AML/CFT defences.

a. Provisions in Union law

116. Union law does not currently recognise crowdfunding platforms, although some crowdfunding service providers fall under the existing regimes of the Payment Services Directive (PSD), MiFID or Alternative Investment Fund Managers Directive (AIFMD).

117. In March 2020, the Commission, the Council and the European Parliament agreed the text of a draft regulation on European crowdfunding service providers. The draft regulation recognises that crowdfunding service providers can be exposed to ML/TF risks but does not subject all crowdfunding service providers to the requirements of the AMLD. Instead, it restricts the provision of payment services to crowdfunding service providers that are also payment service providers and thus subject to the AMLD, and requires the Commission to assess, within two years of the regulation entering into force, whether crowdfunding service providers should be obliged entities under the AMLD.

118. The draft regulation further sets out in high-level terms that

- a. ML/TF risk associated with crowdfunding service providers should be considered at authorisation, and when assessing the good repute of their management; and
- b. crowdfunding service providers should undertake a minimum level of due diligence on project owners, which consists of, among other things, a criminal record check and obtaining evidence that the project owner is not established in a high risk third country.

119. There is no requirement to carry out basic due diligence on investors, to establish the legitimate origin of funds, or to identify unusual or suspicious behaviours, activities and transactions.

b. EBA observations

120. The draft regulation lays down a harmonised regime for the provision of crowdfunding services that will gradually replace existing regimes at the national and EU levels, including national law. Under this regulation, crowdfunding service providers are not, of themselves, obliged entities under the AMLD and the measures that the draft regulation envisages they take to understand who the project owners are, are insufficient to ensure that crowdfunding service providers identify and manage the ML/TF risk associated with their businesses.

121. This leaves the EU's financial system vulnerable to abuse as ML/TF risks associated with crowdfunding platforms are well documented, for example in ESMA's 2015 Questions and Answers on investment-based crowdfunding: money laundering/terrorist financing crowdfunding platforms; the Commission's 2019 Supranational Risk Assessment; and more recently, the ESAs' proposed revisions to Risk Factors Guidelines, which are currently under consultation.

c. EBA advice

122. The EBA notes that the regulation envisages that the Commission should assess, within 24 months of the regulation entering into force, whether crowdfunding services providers should be obliged entities under the AMLD.

123. In the light of the ML/TF associated with crowdfunding services, the EBA recommends that the Commission anticipate this assessment, and carries it out at the same time as it carries out its review of the EU's legal AML/CFT framework.

2.3.2 Investment firms and investment funds

124. The variety of investment firms and investment fund structures means that it is not always clear who is an obliged entity under the AMLD. Where different views exist, there is a risk that gaps in AML/CFT compliance by those entities, and gaps in the AML/CFT supervision of those entities, open up the entire single market to ML/TF.

a. Provisions in Union law

125. Article 3 of the AMLD lists obliged entities. Obligated entities include investment firms and collective investment undertakings marketing their units or shares.

126. MiFID II defines an investment firm as any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis. Therefore, investment firms are defined by their activities, which are listed in Section A of Annex II of MiFID II.

127. AIFMD and Directive 2009/65/EC relating to undertakings for collective investment in transferable securities (UCITS) distinguish between self-managed collective investment undertakings (UCITS or alternative investment funds (AIFs)) and those managed by external authorised UCITS management companies, authorised alternative investment fund managers (AIFMs), registered (sub-threshold) AIFMs and non-EU AIFMs. Moreover, investment funds of the corporate form may have a separate board of directors, even where they are managed by an external fund manager.

128. Article 4(1)(x) of the AIFMD includes a legal definition of ‘marketing’, whereas the UCITS Directive does not provide for a legal definition of this notion. Moreover, AIFs may also be sold without being ‘marketed’ within the meaning of the AIFMD, namely in the case of reverse solicitation.

b. EBA observations

129. The ESAs’ work on the Risk Factors Guidelines and the 2019 Joint Opinion on ML/TF risks affecting the EU’s financial sector suggest that there are divergent opinions, among competent authorities and financial institutions of the extent to which certain entities are obliged entities under the AMLD.

130. Divergent opinions regarding the scope of the AMLD exist also in relation to collective investment undertakings marketing their units or shares, given the variety of funds structures and relevant actors involved in their distribution. The EBA notes that the reference to ‘collective investment undertakings marketing their units or shares’ in the AMLD was drafted before the harmonisation of EU investment funds legislation was brought forward, notably by the AIFMD and UCITS directives. Consequently, at present, the reference in the AMLD is not in line with Union law and thus, appears to be potentially misleading.

131. The ESAs have sought to provide practical guidance on the range of investment services and activities undertaken by investment firms in the proposed amendments to the Risk Factors Guidelines. In line with Article 16 of the EBA’s founding regulation, competent authorities have a legal duty to make every effort to comply with these guidelines.

c. EBA advice

132. To ensure a consistent approach, the EBA considers that some aspects might need further clarification in the AMLD itself.

133. The EBA recommends that the Commission clarify in Article 3 of the AMLD which of these entities are obliged entities to ensure that they comply with their AML/CFT obligations, and that any gaps in the AML/CFT supervision of those entities are closed. As part of this, the EBA recommends that the definition of obliged entities be amended by making reference to the terms used in relevant EU investment fund legislation, including the AIFMD and UCITS directives.

2.3.3 (Non-life) General insurers and general insurance intermediaries

134. General insurers and general insurance intermediaries are not obliged entities under the AMLD, or within the scope of the FATF’s Recommendations. They are, however, subject to AML/CFT rules in some Member States on account of their exposure to ML/TF risk.

a. Provisions in Union law

135. General insurers and insurance intermediaries are not currently obliged entities under Article 3 of the AMLD.

b. EBA observations

136. The ML/TF risk associated with the activities of general insurers and intermediaries is in most cases limited. There is, nevertheless, evidence from competent authorities, National Risk Assessments, the International Association of Insurance Supervisors and Moneyval that general insurance products can be abused for ML/TF purposes. For example, the Commission, in its 2019 Supranational Risk Assessment, acknowledges the low level of ML risk and assesses the level of both TF threat and vulnerability in this sector as 'moderately significant'.

137. The EBA notes that in the absence of specific provisions in the AMLD for general insurers and insurance intermediaries, firms in this sector do not have to identify and report suspicious transactions and cannot receive instructions from FIUs, unless they are established in those jurisdictions that have included non-life insurance in the scope of their AML/CFT requirements.

c. EBA advice

138. The EBA considers that the Commission should assess whether the scope of the AMLD should be extended to include some or all general insurers and general insurance intermediaries, and if so, how the scope should be extended, taking into account the level of ML/TF risk to which general insurers and general insurance intermediaries are exposed and the principle of proportionality enshrined in Union law.

139. The EBA notes in this regard that general insurers and general insurance intermediaries are subject to the financial sanctions regime and therefore have systems and controls in place to comply with their obligations under the financial sanctions regime. These systems and controls, of themselves, are insufficient to comply with the AMLD but could go some way towards meeting any new AML/CFT requirements.

2.3.4 Mortgage credit intermediaries and consumer credit providers

140. Mortgage credit intermediaries and consumer credit providers that are not financial institutions may not be subject to AML/CFT rules in all Member States.

141. They are, however, subject to AML/CFT rules in some Member States on account of their exposure to ML/TF risk.

a. Provisions in Union law

142. Mortgage credit intermediaries and consumer credit providers that are not financial institutions are not currently obliged entities under Article 3 of the AMLD.

b. EBA observations

143. The ESAs, in their 2019 Opinion on ML/TF risk, point to findings by competent authorities that suggest that the ML risk in the consumer credit sector is limited. Depending on their business model, consumer credit providers are exposed to different risks, including the risk of being abused by money mules and for trade-based ML purposes. There is also evidence of terrorist financing, with the Commission, in its 2019 supranational risk assessment (SNRA), assessing the level of TF threat in this sector as 'significant'.

144. At the same time, the EBA notes that mortgage intermediaries, although not necessarily processing transactions, may be well placed to identify suspicious behaviours and transactions. The EBA also notes that the Commission, in its 2019 SNRA, assessed the level of ML threat associated with mortgage credit as 'significant'.

145. The EBA notes that in the absence of specific provisions in the AMLD for mortgage credit intermediaries and consumer credit providers, firms in this sector that are not financial institutions do not have to identify and report suspicious transactions and cannot receive instructions from FIUs.

c. EBA advice

146. The EBA recommends that the Commission assesses the costs and benefits of extending the scope of the AMLD to include mortgage credit intermediaries and consumer credit providers that are not financial institutions but that are, as a result of their activities, exposed to ML/TF risk.

147. Extending the scope to providers in this sector would ensure a level playing field between these providers and providers that are also financial institutions and thus within the scope of the AMLD.

2.3.5 Account Information Service Providers

148. AISPs are not involved in the payment chain and do not hold customer funds. The inherent ML/TF risk associated with the activity of AISPs is therefore very limited. This has led some Member States to conclude that contrary to provisions in the PSD and AMLD, AISPs should not be obliged entities under the AMLD.

a. Provisions in Union law

149. Article 3 of the AMLD lists obliged entities. Obligated entities include payment service providers that provide payment services as defined in the PSD. Article 113 of the PSD amended the definition of payment services in this directive to include account information services. This means that AISPs are obliged entities under the AMLD. Like other obliged entities, they are therefore required to comply with the AMLD's requirements but can adjust the extent of some of the measures they take to comply on a risk-sensitive basis.
150. Member States cannot exempt obliged entities from the application of the AMLD, unless they engage in a financial activity on an occasional or very limited basis and meet all the conditions set out in points (a) –(f) of Article 2(3) of the AMLD.
151. The nature of the activity carried out by AISPs does not appear to make it practically possible that criteria (a)-(f) of Article 2(3) of the AMLD could be cumulatively met. For example, the nature of AISP activity does not lend itself to be limited in absolute terms or on a transaction basis. This means that Member States are unlikely to be able to exempt AISPs from their AML/CFT obligations.
152. Article 33 of the PSD exempts AISPs from certain requirements that are set out in the PSD, including the requirement to provide a description of its AML/CFT internal control mechanisms at the point of applying for registration. The exemptions in Article 33 of the PSD do not affect the fact that AISPs are obliged entities under the AMLD, and they do not mean that AISPs can be exempted from their obligations under the AMLD. Nevertheless, some Member States have carved AISPs out of their national AML/CFT regimes.

b. EBA observations

153. The ML/TF risk associated with AISPs is very limited because AISPs are not involved in the payment chain. They do not hold their customers' funds, and they do not execute transactions or transfers of funds. Nevertheless, AISPs that enter into a business relationship with their customers may have oversight of transactions to and from payment accounts held by their customers. Like other obliged entities that do not hold client funds, such as accountants and estate agents, AISPs will often be well placed to identify unusual or suspicious behaviours or transactions.
154. Guideline 18 of the revised Risk Factors Guidelines, which are currently under consultation, provides that, as a result of the low level of ML/TF risk, AISPs should normally be able to apply SDD measures.
155. The EBA notes that not all AISPs in the EU will be able to apply SDD measures because permitting the use of SDD measures by obliged entities has thus far been optional under the current EU legal framework. As a result, the application of SDD measures is prohibited or restricted in some Member States.

c. EBA advice

156. The EBA considers that the Commission should assess the costs and benefits of AISPs' continued inclusion in the list of obliged entities, taking due account of the principle of proportionality enshrined in EU law, and the fact that, although ML/TF risks inherent to their activity are very limited, the nature of AISPs' activities means that they are well positioned to identify and report suspicious transactions that are or have been executed by other obliged entities.
157. On balance, and in particular if CDD measures were harmonised across the EU, the EBA considers that AISPs should continue to remain within the scope of the AMLD.

2.3.6 Virtual Asset Service Providers

158. The ESAs, in their 2019 Joint Opinion on the risks of ML/TF affecting the EU's financial sector, found that most competent authorities consider that virtual assets give rise to significant ML/TF risks, in part because many providers continue to operate outside a common EU AML/CFT legal framework.
159. The Commission, in its 2019 Supranational Risk Assessment, points to evidence that perpetrators use unregulated systems to transfer value anonymously and across borders. The Commission consequently assessed the ML/TF risk associated with virtual assets as significant.

a. Provisions in Union law

160. Article 1 of Directive (EU) 2018/843 brings into the scope of the AMLD providers engaged in exchange services between virtual currencies and fiat funds, and providers of virtual currency custodian wallet providers. These providers are now listed among the 'obliged entities' within the scope of the AMLD.
161. The FATF has since adopted a definition of 'virtual asset service providers' (VASPs), which is broader than the AMLD's list of providers and includes any natural or legal person who, as a business, conducts one or more of the following activities or operations for or on behalf of another natural or legal person:
- a. exchange between virtual assets and fiat currencies;
 - b. exchange between one or more other forms of virtual assets;
 - c. transfer of virtual assets;
 - d. safekeeping or administration of virtual assets or instruments enabling control over virtual assets; and

- e. participation in and provision of financial services relating to an issuer's offer and/or sale of a virtual asset.

162. This means that Union law is currently not in line with the FATF's Standards as the AMLD's scope is more limited.

b. EBA observations

163. The EBA, in its 2019 Report with advice for the European Commission on crypto-assets, recommended that the European Commission have regard to the FATF recommendations and any further standards or guidance issued by the FATF as part of a holistic review of the need, if any, for action at the EU level to address issues relating to crypto-assets. In particular, the EBA noted that any wider assessment by the Commission of any extension to the EU regulatory perimeter with regard to crypto-asset activities (e.g. in terms of the establishment of new authorisation or registration requirements from a prudential/conduct of business perspective) should include a consideration of the implementation of the FATF recommendations, which require an authorisation or registration scheme to be in place for the categories of VASP identified above.

164. The EBA has since observed that, in the absence of an EU-wide approach, there are indications that Member States, in anticipation of a forthcoming FATF Mutual Evaluation or to attract VASP business, have adopted their own VASP AML/CFT and wider regulatory regimes. As these regimes are not consistent, this creates confusion for consumers and market participants, undermines the level playing field and may lead to regulatory arbitrage. This exposes the EU's financial sector to ML/TF risk.

165. Furthermore, the FATF's guidance creates an expectation that providers identify whether an entity is an obliged entity for AML/CFT purposes prior to processing a virtual asset transaction. The absence of an EU register of all VASPs for AML/CFT purposes means that this guidance is difficult to put into practice.

c. EBA advice

166. The EBA, in line with its 2019 Report with advice for the European Commission on crypto-assets, recommends that the Commission have regard to recent revisions to the FATF standards and guidance regarding 'virtual assets' and 'VASPs', and changes to the scope of EU AML/CFT legislation to bring activities that are not currently covered, such as crypto-to-crypto exchanges, within the scope of the AMLD in line with the FATF's Recommendations and the FATF's evolving approach.

167. As part of this, the EBA recommends that the Commission

- a. put in place a robust and consistent authorisation or registration regime for VASPs, bearing in mind also the wider need to ensure the consistency of approaches to addressing ML/TF risk; and

- b. establish a mandatory public register of VASPs that will be authorised or registered in the EU to support the identification of VASPs that are obliged entities under the AMLD.

3. Regulation (EU) 2015/847

168. The WTR provides a common legal basis for the implementation of FATF Recommendation 16. It specifies which information on the payer and the payee payment service providers have to attach to fund transfers. It also requires payment service providers to put in place effective procedures to detect transfers of funds that lack this information, and to determine whether to execute, reject or suspend such transfers of funds. Its aim is to prevent the abuse of fund transfers for ML/TF purposes, to detect such abuse should it occur, and to allow relevant authorities promptly to access information on the payer and the payee associated with a particular transfer where necessary.
169. FATF Recommendation 16 and, consequently, the WTR, are drafted with credit transfers in mind. This means that while the aim of the WTR is relevant for credit transfers as it is for other types of transfers of funds or similar assets, the way its provisions are drafted may make it difficult for other service providers to comply. This is the case for fund transfers that are direct debits, and would be the case for transfers involving virtual assets should the Commission opt to extend the scope of the EU's AML/CFT regime to VASPs.

3.1.1 Direct debits

170. Unlike FATF Recommendation 16, the WTR includes direct debits within the definition of transfers of funds. At the same time, the requirements on payment service providers set out in the WTR have been drafted with traditional credit transfers in mind. As a result, in the direct debit context, the payer's PSP may not be able to comply with the requirements set out in the Regulation.
- a. **Provisions in Union law**
171. Point 9(b) of Article 3 of the WTR defines direct debits as transfers of funds.
172. Section 1 of Chapter II of the WTR sets out the obligations on the payment service provider of the payer.
173. Section 2 of Chapter II of the WTR sets out the obligations on the payment service provider of the payee.
- b. **EBA observations**
174. Direct debits are payment instructions sent by the payment service provider of the payee to the payer's payment service provider. Unlike a credit transfer, which is initiated by the payer, a direct debit is transaction initiated by the payee. This means that, in contrast to the situation envisaged in the WTR, the payee's payment service provider holds the information

that the payer's payment service providers would need in order to comply with their obligations under the WTR.

175. Paragraph 9 of the ESAs' Joint Guidelines on the measures that payment service providers should take to detect missing or incomplete information on the payer or the payee, and the procedures they should put in place to manage a transfer of funds lacking the required information provides that, where a transfer of funds is a direct debit, the payment service provider of the payee should send required information on the payer and the payee to the payment service provider of the payer as part of the direct debit collection and assume that the information requirements in point (2) and (4) of Article 4 and points (1) and (2) of Article 5 of the WTR are met.
176. Feedback from industry suggests that the solution provided by the ESAs in their guidelines is helpful but not sufficient to mitigate the risks caused by inconsistencies in Union law.

c. EBA advice

177. The EBA recommends that the Commission consider whether the ongoing treatment by the WTR of direct debits as 'funds transfers' is justified from a cost benefits perspective.
178. Should direct debits remain within the scope of the WTR, the EBA recommends that the Commission make clear, in the WTR, how the obligations in the WTR apply in the direct debit context.
179. The guidance on direct debits in Paragraph 9 of the ESAs' Joint guidelines on the measures payment service providers should take to detect missing or incomplete information on the payer or the payee, and the procedures they should put in place to manage a transfer of funds lacking the required information may be helpful in this regard.

3.1.2 Virtual assets

180. The WTR requires that transfers of funds be accompanied by information about the payer and the payee.
181. In 2018, the FATF adopted a definition of virtual assets and VASPs. It specified in its Interpretative Note to Recommendation 15 that Recommendation 16 applies to financial services providers as it does to VASPs. The FATF does not set out how the rules in Recommendation 16 apply to virtual asset transfers and it is therefore not clear what VASPs will have to do to comply, should the scope of the WTR be extended to include virtual asset transfers.

a. Provisions in Union law

182. The WTR applies only to those VASPs that are included in the definition of payment service providers in Article 3 of the WTR, and only to the extent that the asset transfer involves 'funds' as defined in the same article.

b. EBA observations

183. Virtual asset transfers are different from traditional fund transfers. To ensure a successful extension of the WTR's provisions to virtual asset transfers, the EBA believes that it will be important to consider:

- a. The appropriateness of exemptions for intra-EU wire transfers involving virtual assets, taking account of the upcoming legislative proposal for an EU framework for EU markets in crypto-assets, and the decentralised nature of some VASP business models, which may make it difficult to establish whether all providers involved in the payment chain are established in the EU. The EBA further notes that applying an exemption for intra-EU wire transfers involving virtual assets would not be in line with the FATF Recommendations;
- b. The implications from a data protection perspective of VASPs sending information on the payer or the payee to a privately held wallet, given that VASPs cannot always distinguish between a wallet held with a VASP and a privately held wallet; and
- c. How to ensure that the provisions are drafted in a way that remains technologically neutral, bearing in mind the speed at which new solutions and business models currently emerge.

c. EBA advice

184. The Commission, in its 2019 SNRA, points to evidence that criminals use virtual asset systems to transfer value anonymously. For this reason, the EBA considers it essential that the WTR be amended to accommodate virtual asset transfers in line with the FATF's AML/CFT standards and in conjunction with possible changes to the scope of the list of obliged entities.

185. The EBA notes that industry is working to develop technological solutions that would enable VASPs to comply with at least some aspects of the WTR's travel requirements, for example via an international network that would enable VASPs to send and receive information about virtual asset transactions in a secure, standardised and reliable manner. Consideration should therefore be given to deferring enforcement of the WTR in the VASP context to a later date, which the Commission should determine in consultation with the sector, as this will give the sector sufficient time to develop adequate compliance tools.

4. Other EU legislation

186. Efforts to curb ML/TF in the EU's financial sector cannot be effective in isolation. This is why the AMLD and WTR interact, or should interact, with other EU financial services legislation. However, they do not do so consistently, and in a number of cases, it is not clear how provisions in sectoral legislation are compatible with AML/CFT objectives.

4.1 Addressing ML/TF risk throughout the supervisory process

187. The FATF, in its Recommendations, envisages that supervisors take a comprehensive approach to tackling ML/TF. It recognises that, to be effective, ML/TF risk must be addressed across all stages of a financial institution's life cycle, and throughout the supervisory process.

188. The approach adopted by the European legislator in the financial services sector, which separates authorisation, supervision and resolution from AML/CFT supervision, has not been conducive to a comprehensive tackling of ML/TF risk. It has also contributed to the development of inconsistent approaches to ML/TF risk across different sectors. And while recent amendments to the CRD clarify and strengthen the important link between AML/CFT and prudential supervision, these changes have not always been replicated elsewhere. As a result, existing differences in the supervision and treatment of financial institutions for AML/CFT purposes have been exacerbated.

189. Comprehensively reviewing the EU's financial services legislation to ensure a consistent approach that aligns with international AML/CFT standards and clarifies how AML/CFT considerations apply in the wider financial services supervision context should therefore be a priority and focus on at least:

- a. Authorisation and qualifying holdings;
- b. Passporting;
- c. Ongoing supervision; and
- d. Cooperation between prudential and AML/CFT competent authorities and other public stakeholders.

190. In line with the EBA's recommendations in Section 2, above, responsibility for oversight and enforcement of these provisions should be clearly allocated to ensure efficiency and to avoid overlaps, or the inadvertent creation of gaps in the supervision of these aspects.

4.1.1 Authorisations and qualifying holdings

191. Competent authorities have an important gatekeeping function. They are well placed to prevent criminals and their associates from owning and controlling financial institutions. They also have powers to ensure that authorised financial institutions are equipped to tackle ML/TF risk effectively.

192. Adopting a consistent and robust EU-wide approach to tackling ML/TF risk at market entry is important, because financial crime respects no borders and because once authorised in one Member State, financial institutions can notify their home competent authority of their intention to provide services throughout the EU either through the right of establishment, including through a branch or an establishment other than a branch, or through the freedom to provide services. In spite of this, Union law relating to market access is set out largely in minimum harmonisation directives that leave room for divergent national practices. At the same time, with regard to qualifying holdings, although a maximum harmonisation regime is set out in the CRD, Solvency II, Regulation (EU) 648/2012 on over the counter derivatives, central counterparties and trade repositories, and in MiFID II, it does not cover the whole spectrum of financial institutions that are obliged entities under the AMLD. Consequently EU rules governing authorisations and qualifying holding processes are not consistent across all sectors. This leaves the EU's financial system open to abuse.

a. Provisions in Union law

193. The CRD requires competent authorities to consider ML/TF risks in the context of a proposed acquisition of qualifying holdings and at authorisation. Recent amendments to the CRD have made the link to ML/TF risks more explicit in some cases:

- a. Articles 14 and 23 of the CRD require competent authorities to assess applications for authorisation or proposed acquisitions of qualifying holdings against evidence of ML/TF or reasonable grounds to suspect that the risk thereof could be increased. Competent authorities must refuse authorisation to commence the activity of a credit institution or acquire qualifying holdings if as a result of that assessment, they are not satisfied that the credit institution will be managed soundly and prudently.
- b. Article 10 of the CRD cross-references Article 74 of the CRD and provides that competent authorities should refuse authorisation to commence the activity of a credit institution unless they are satisfied that the arrangements, processes and mechanisms referred to in Article 74(1) of the CRD are sufficient to ensure the sound and effective risk management by that credit institution. Article 74(1) covers governance arrangements and requires credit institutions to identify, manage, monitor and report the risks to which they are exposed. The EBA considers that the reference to risk in Article 74(1) should be interpreted as including ML/TF risk, but the CRD does not elaborate on this point.

In 2017, the EBA issued Draft Technical Standards under Article 8(2) of the CRD on the information to be provided for the authorisation of credit institutions, the requirements

applicable to shareholders and members with qualifying holdings and obstacles which may prevent the effective exercise of supervisory powers that will require applicants to submit information on ML/TF risks and explain how they will tackle those risks. These technical standards have not yet been adopted by the Commission and thus are not yet legally binding in Member States.

194. Article 13 of the MiFID requires competent authorities to have regard to ML/TF risk in the context of a proposed acquisition of qualifying holdings.
195. Article 39 of the MiFID requires competent authorities to assess the extent to which a third country firm that is establishing a branch on their territory is supervised for compliance with its AML/CFT obligations by a competent authority that pays due regard to the FATF recommendations.
196. Article 6 of Commission Delegated Regulation (EU) 2017/1943 obliges an applicant firm to make available information on its AML/CFT systems and controls, while Article 9 requires competent authorities to assess the application against reasonable grounds that ML/TF is being or has been committed or attempted, or that the authorisation of the firm could increase the risk thereof.
197. Article 32 of EMIR and Article 59 of Directive 2009/138/EC (Solvency) mirrors Article 23 of the CRD and Article 13 of the MiFID but contains no further details on ML/TF risk, or AML/CFT systems and controls.
198. Article 5 of the PSD requires competent authorities to review, as part of the authorisations process of a payment institution, the description of the payment institution's internal control mechanisms to comply with its obligations under the AMLD and the WTR. Article 6(2) of the PSD requires competent authorities to assess the suitability of the persons holding qualifying holdings in a payment institution but does not address ML/TF risks. By contrast, where a payment institution from another Member State proposes to provide services or establish itself on a host Member State's territory, Article 28 of the PSD envisages that the host Member State's competent authority will object should it have any reasonable grounds for ML/TF concerns. The same provisions apply to electronic money institutions as they apply to payment institutions.
199. Article 47 of the AMLD contains very limited provisions for the registration of exchange services between virtual currencies and fiat currencies and custodian wallet providers that are obliged entities but not also financial institutions. Article 47 of the AMLD requires competent authorities to ensure that persons who hold a management function in these entities or are their beneficial owners are fit and proper, but it does not define what fit and proper checks entail. It also does not refer to ML/TF risk, and there is therefore no obligation on competent authorities to consider this risk at registration.

b. EBA observations

200. FATF Recommendation 26 requires countries to ensure that competent authorities ‘take the necessary legal or regulatory measures to prevent criminals or their associates from holding, or being the beneficial owner of a significant or controlling interest, or holding a management function in, a financial institution’. It also requires financial institutions to be authorised, licensed or registered ‘having regard to the risk of ML/TF in that sector’. The EBA is of the view that Union law does not provide a common legal basis for the consistent implementation of these recommendations:

- a. Not all sectoral laws contain an explicit legal requirement for competent authorities to assess, and act on, ML/TF risk associated with an application for authorisation or, in the case of VASPs, licensing or registration. Where this requirement is not explicit, the EBA has observed considerable national differences in the extent to which competent authorities consider ML/TF risks at market entry.
- b. Sectoral laws require competent authorities to consider ML/TF risk in the context of a proposed acquisition of qualifying holdings. As set out above, the approaches adopted by other directives or regulations are not always consistent and even where maximum harmonisation is envisaged, these laws’ requirements have been interpreted or transposed differently into the national laws of Member States. There is a risk that this may lead to different supervisory outcomes and an associated risk, which the EBA knows has crystallised in some cases, that a person of questionable integrity who is approved for qualifying holdings in one Member State will be able to acquire qualifying holdings in other financial institutions or other Member States unchallenged.

In the context of its BUL work, the EBA has also found that there is room for strengthening the supervisory instruments for control of qualifying holdings given the difficulties in establishing grounds for opposition to an acquisition in complex cases within the times limits set in sectoral legislation, and for clarifying the criteria for opposing acquisitions as regards an increased level of ML/TF risk.

The ESAs have published Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, though in the absence of clear legal provisions at Level 1 and in light of associated differences in national transposition, the EBA has found that not all competent authorities apply these guidelines’ AML/CFT provisions in a consistent way.

- c. References in sectoral law to ML/TF risk and the need to establish ‘reasonable grounds to suspect’ that ML/TF risk may be increased to act on that risk are insufficiently specific and have been transposed differently into the national law of Member States. As a result, in some Member States, a refusal of an application on ML/TF risk grounds is possible only where the risk has crystallised, for example because an applicant has been convicted of ML/TF offences.

- d. NCAs have limited powers to prevent the provision of services in their jurisdiction by a financial institution that is authorised in another Member State, and provisions for objection or the imposition of additional conditions on ML/TF risk grounds are not clearly or consistently set out in all Union laws. Consequently, as set out in the EBA's report on potential impediments to the cross-border provision of banking and payment services, competent authorities exercise their rights in different ways.

What is more, there is no common view on the treatment, for AML/CFT oversight purposes, of services that are provided exclusively online, nor is there a consistent application of requirements by 'host' jurisdictions.

c. **EBA advice**

201. The EBA's analysis of competent authorities' approaches to assessing ML/TF risk in the context of qualifying holdings and applications for authorisation, and findings from the EBA's AML/CFT implementation review highlight that in the absence of common and sufficiently explicit provisions in Union law, significant differences exist that expose the EU's financial sector to ML/TF risk. The EBA is aware of several cases where this risk has crystallised.
202. The EBA recommends that the Commission review all provisions in sectoral law, including the recently amended CRD, with a view to ensuring that competent authorities, when assessing applications for authorisations or qualifying holdings, adopt a consistent approach that allows them effectively to fulfil their gatekeeping functions and protect the EU's financial market from ML/TF. The Commission should also consider steps to clarify the framework for competent authorities as regards the imposition of requirements in relation to services that are provided in their jurisdiction through the right of establishment, including through a branch or an establishment other than a branch, or through the freedom to provide services.
203. As part of this, the EBA advises the Commission to take steps to amend sectoral laws and possibly mandate the EBA to issue complementary technical standards to ensure that all competent authorities:
 - a. have a common understanding of 'reasonable grounds' to suspect that ML/TF may be committed or that the risk thereof could be increased;
 - b. have powers to act to address ML/TF risk and refuse applications in serious cases where adequate mitigation measures cannot be required or implemented, even if no criminal convictions have been brought;
 - c. have greater flexibility regarding deadlines for decisions on applications for qualifying holdings in cases where the competent authority has reasonable grounds to suspect that the sound and prudent management of the financial institution cannot be ensured due to serious AML/CFT concerns;

- d. approach passporting notifications consistently, taking due account of any concerns that ML/TF may be attempted or that the risk thereof may be increased; and
- e. are required to consult with AML/CFT competent authorities and FIUs as necessary and on a risk-sensitive basis to inform their assessment of applications for authorisation and qualifying holdings.

4.1.2 Passporting (ability to carry out services in more than one Member State)

204. Once authorised in one Member State, financial institutions can notify their home competent authority of their intention to provide services throughout the Union either through the freedom of establishment, including through a branch or an establishment other than a branch, or through the freedom to provide services.
205. The way in which competent authorities have interpreted their rights to impose requirements, and the extent to which competent authorities consider, and act on, ML/TF risks in this context, differs across Member States.
- a. **Provisions in Union law**
206. Article 28(2) of the PSD 2 provides that, in situations where an authorised payment institution communicates to the competent authorities in its home member state its intention to exercise the right of establishment or freedom to provide services for the first time in another Member State, and the competent authority of the home Member State communicates this to the competent authority of the host Member State, the competent authority of the host Member State should alert the competent authorities of the home Member State of 'reasonable grounds for concern in connection with the intended engagement of an agent or establishment of a branch with regard to ML/TF'. If, subsequently, the assessment of the NCA of the home Member State is not favourable, then it must refuse to register the agent or branch, or withdraw the registration if already made.
207. Provisions in other Union laws do not explicitly reference ML/TF risks, or list ML/TF concerns as grounds for rejecting a passporting notification. For example, Article 36(1) of the CRD gives host competent authorities powers to impose requirements for the establishment of a branch based on the protection of the general good, which may include the prevention of ML/TF. It stays silent on the duties of home competent authorities in this regard.

b. EBA observations

208. NCAs have limited powers to prevent the provision of services in their jurisdiction by a financial institution that is authorised in another Member State and benefits from passporting rights, and provisions for objection or the imposition of additional conditions on ML/TF risk grounds are not clearly or consistently set out in all Union laws.

209. Consequently, as set out in the EBA's report on potential impediments to the cross-border provision of banking and payment services, competent authorities exercise their rights in different ways. As set out above, there is a risk, which was highlighted, for example, in the ESAs' 2019 Opinion on ML/TF risks, that financial institutions have made use of regimes that they perceived to be more permissive to obtain authorisation and passport their services into other Member States.

210. What is more, there is no consistent view on the treatment, for AML/CFT oversight purposes, of services that are provided on a free provision of services basis in other Member States, including in situations where such services are provided exclusively online. The EBA notes that some Member States have brought such providers within the scope of their national AML/CFT regime, whereas others rely on the home competent authority to ensure adequate AML/CFT supervision in those cases.

211. The EBA also notes that in some cases, competent authorities come to different conclusions when deciding whether a passporting entity makes use of the freedom to provide services, or the freedom of establishment. The EBA, in its 2019 Opinion on the nature of passport notifications regarding agents and distributors under the PSD, the EMD2 and the AMLD set out criteria to help competent authorities assess whether the provision of services via an agent or distributor located in a host Member State falls under the right of establishment or the free of provisions of services, although similar questions arise in other contexts also.

c. EBA advice

212. The EBA recommends that the Commission

- a. require competent authorities systematically to consider ML/TF risks in the passporting context using provisions in the PSD 2 as a starting point;
- b. set out clearly provisions for objection or the imposition of additional conditions on ML/TF risk grounds in the passporting context;
- c. highlight the need for effective supervisory cooperation and information exchange in this regard; and

- d. set out in relevant Union law consistent criteria for determining whether a cross-border service is provided using the freedom to provide services, or the freedom of establishment, and the implications of that determination from an AML/CFT compliance and oversight perspective.

4.1.3 Ongoing supervision, governance and suitability assessments

213. Most sectoral directives do not explicitly address ML/TF risk in the context of the ongoing supervision of a financial institution's governance arrangements, or fitness and propriety assessments. In the absence of explicit requirements, there is a risk that competent authorities do not consider the impact of ML/TF risk on prudential objectives and as a result, fail to ensure the sound and prudent management of financial institutions.

a. Provisions in Union law

214. The CRD requires prudential supervisors to factor ML/TF concerns into their supervisory activities. It explicitly requires prudential supervisors:
- a. in Article 91 (1), to verify whether members of the management body continue to be fit and proper persons where the institution has been, or is suspected to be, involved with ML/TF or where the risk thereof is increased; and
 - b. in Article 97 (6), immediately to inform the EBA and AML/CFT competent authorities if they become aware during the supervisory evaluation and review process, that ML/TF has been attempted or that the risk thereof has increased.

215. The CRD does not explicitly require prudential supervisors actively to consider ML/TF risk as part of their assessments of the adequacy of institutions' governance arrangements, processes and mechanisms. Nevertheless, Article 74(1) of the CRD covers governance arrangements and requires credit institutions to identify, manage, monitor and report the risks to which they are exposed, which the EBA considers include ML/TF risk.

216. Article 9 of MiFID refers to Article 91 of the CRD. There are no equivalent provisions in other sectoral laws.

b. EBA observations

217. Information available to the EBA suggests that, in the absence of an explicit link in Union law between ongoing supervision and ML/TF risk, not all competent authorities consistently take ML/TF concerns into account. Furthermore, even where competent authorities have considered ML/TF risks, not all act on these risks in a timely and effective manner.

218. Failure by competent authorities to consider and act on ML/TF risk as part of their ongoing supervision of financial institutions can have significant, adverse effects on a financial

institution's safety and soundness and has been a major contributing factor to serious AML/CFT failures in recent years. The Commission's Post Mortem Review has further details in support of this point.

c. EBA advice

219. As is the case for the assessment of applications for authorisations or the acquisition of qualifying holdings, the EBA recommends that the Commission review all provisions in sectoral law, including the recently amended CRD, with a view to ensuring that competent authorities, when assessing the adequacy of financial institutions' governance arrangements and the suitability of members of the management board and key function holders as part of their ongoing supervision practices, adopt a consistent approach that allows them effectively to ensure the sound and prudent management of financial institutions and thereby protect the integrity of the EU's financial market.
220. As part of this, the EBA believes that the Commission should take steps to amend sectoral laws and where appropriate, mandate the EBA to carry out further technical work to ensure that all competent authorities:
- a. consistently factor ML/TF risk into their ongoing supervision programmes;
 - b. have a common understanding, for example by referring to an agreed set of common criteria, of 'reasonable grounds' to suspect that ML/TF may be committed or that the risk thereof could be increased;
 - c. have regard to, and act on, ML/TF risk in a sufficiently robust consistent way that is not limited to evidence of criminal wrongdoing; and
 - d. are required to consult with AML/CFT competent authorities, and FIUs as necessary, if they become aware during the supervisory evaluation and review process, that ML/TF has been attempted or that the risk thereof has increased.
221. The EBA also recommends that the Commission strengthens provisions in sectoral law that relate to financial institutions' governance arrangements, to draw an explicit link between ML/TF risk and financial institutions' wider governance arrangements, including their risk management frameworks.

4.1.4 Cooperation (prudential supervisors)

222. In December 2018, the Council adopted an AML/CFT Action Plan. This Action Plan sets out a number of objectives, with deliverables and timelines, that the Council hopes will strengthen the effectiveness of the current EU AML/CFT framework. In the Council's view, better cooperation and information exchange between AML/CFT and prudential supervisors is central to achieving this objective. The FATF, in its interpretative note to Recommendation 40,

and the Basel Committee on Banking Supervision, in its 2020 guidance on the interaction and cooperation between prudential and AML/CFT supervisors, make a similar point.

223. The Council's Action Plan focuses on removing obstacles to the cooperation of competent authorities that are responsible for the supervision of banks. Similar obstacles to cooperation exist in other sectors.

a. **Provisions in Union law**

224. Recent revisions to the CRD introduce an explicit requirement in Article 117 for prudential supervisors to cooperate with their AML/CFT counterparts and FIUs. Article 117 also contains a mandate for the EBA to specify, in guidelines, how such cooperation and information exchange should be structured.

225. Article 26 of the PSD requires competent authorities to cooperate, and Member States to allow exchanges of information between competent authorities and AML/CFT competent authorities, among other stakeholders. It also makes explicit reference to competent authorities of the home and host Member State cooperating on AML/CFT grounds in the passporting context.

226. Similar provisions are not included in other sectoral laws.

b. **EBA observations**

227. The ESAs have for some time pointed to real or perceived legal obstacles that have stood in the way of cooperation, assessed the effect that this has had on the prevention of ML/TF and taken steps to strengthen supervisory cooperation. For example:

- a. The ESAs facilitated the conclusion of a Multilateral Agreement on the practical modalities for exchange of information between the ECB in its capacity as prudential supervisor and national AML/CFT supervisors.
- b. The EBA, in its 2019 Opinion on communications to supervised entities regarding ML/TF risks in prudential supervision, points to the need for prudential and AML/CFT supervisors to cooperate, because prudential supervisors need information held by AML/CFT authorities in their supervisory processes, and vice versa.
- c. The ESAs' 2019 Joint Guidelines on cooperation and information exchange for the purpose of Directive (EU) 2015/849 between competent authorities supervising credit and financial institutions (the AML/CFT Colleges Guidelines) set out specific provisions to ensure good cooperation between prudential and AML/CFT competent authorities, and other stakeholders, including the FIU.
- d. The EBA, in its 2020 Report on competent authorities' approaches to the AML/CFT supervision of banks, found that cooperation between prudential and AML/CFT

supervisors was not consistent even if both formed part of the same competent authority.

- e. The EBA, in its 2020 Report on competent authorities' approaches to tackling market integrity risks associated with dividend arbitrage trading schemes points to findings that cooperation and information exchange between competent authorities, and between competent authorities and other public authorities such as tax authorities had been attempted in a minority of cases only, and only where risks had crystallised.

228. The EBA notes that in the absence of legal provisions in support of cooperation, information exchange will remain difficult.

c. **EBA advice**

229. Effective cooperation and information exchange between competent authorities and in some cases, between competent authorities and other public agencies, including FIUs and tax authorities, is essential to ensure that competent authorities have access to the information they need to achieve their regulatory objectives and to assess whether financial institutions in their sector comply with their legal obligations. This applies to the cooperation at the national level as it applies to cross-border situations.

230. The EBA therefore recommends that the Commission take steps to ensure that all relevant sectoral laws contain provisions that ensure the effective cooperation between all competent authorities and FIUs, and between competent authorities and tax authorities, and create gateways for the exchange of all information that is necessary for competent authorities to carry out their functions.

231. Article 117 of the CRD constitutes a useful precedent in this regard.

4.2 Clarifying the interaction between AML/CFT rules and specific provisions in sectoral legislation

232. In a number of cases, provisions in sectoral legislation cannot easily be reconciled with AML/CFT rules or objectives. The interaction of between AML/CFT rules and provisions in the following Level 1 texts should be clarified:

- a. The Payment Services Directive and the Electronic Money Directive;
- b. The General Data Protection Regulation;
- c. The Deposit Guarantee Schemes Directive; and

- d. The Payment Accounts Directive.

4.2.1 The Payment Services Directive and the Electronic Money Directives (agents and distributors)

233. The Commission and the ESAs in their 2019 ML/TF risk assessments consider that the ML/TF risk associated with the activities of electronic money issuers and payment institutions is significant. This risk is due at least in part to the widespread use of agents and distributors, who provide services on the appointing institution's behalf.
234. In spite of this risk, significant differences remain in the treatment of activities carried out by payment institutions and electronic money institutions through agents or distributors in another Member States.
- a. **Provisions in Union law**
235. The PSD and Directive 2009/110/EC (the Electronic Money Directive (EMD2)) provide that payment institutions can appoint agents, and electronic money institutions can appoint distributors, in other Member States.
236. The engagement of an agent or distributor in another Member State triggers obligations on the appointing payment institution or electronic money institution under the AMLD, should the agent or distributor qualify as an 'establishment'. Specifically, under Articles 45 and 48 of the AMLD, the payment institution or electronic money institution will have to, in respect of their activities through an establishment on the host Member State's territory:
- a. comply with the AML/CFT rules of the host Member State;
 - b. be supervised for compliance with these requirements by the competent authorities of the host Member State;
 - c. appoint a Central Contact Point under Commission Delegated Regulation (EU) 2018/1108 where the conditions for the establishment of a Central Contact Point are met and the host Member State has made use of the possibility to require the appointment of Central Contact Points.
237. The concept of 'establishment' is used in the EU Treaty provisions on the right of establishment and has been interpreted in the case-law of the European Court of Justice, but there is no definition in the relevant sectorial Union legislation (PSD, EMD2 or the AMLD) of what an establishment is. Where a payment institution or electronic money institution provides services through an agent or distributor in a host Member State, the passport notification sent by the competent authority of the home Member State to the competent authority of the host Member State should indicate whether the agent to distributor is an establishment in line with Commission Delegated Regulation (EU) 2017/2055, but the

delineation between an activity that falls under the right of establishment or the free provision of services is not always clear and may lead to different approaches being taken by competent authorities.

b. EBA observations

238. The EBA, in its 2019 Opinion on the nature of passport notifications regarding agents and distributors under the PSD, the EMD2 and the AMLD, assesses EU Treaty provisions on the right of establishment and the free provisions of services and the case law of the Court of Justice of the European Union on the interpretation of these provisions to set out criteria to help competent authorities assess whether the use of an agent or distributor triggers an establishment of the appointing institution in the host Member State.

239. The Opinion sets a strong expectation of the approach competent authorities should take but it does not carry the same degree of enforceability as Regulations or Technical Standards. It is also based on case law and therefore subject to change as case law develops. This means that it does not create legal certainty for competent authorities, or payment service providers.

c. EBA advice

240. The EBA recommends that the Commission use the opportunity afforded by the revision of the EU's legislative framework to clarify the status of agents and distributors that are established in another Member State than that in which their appointing institution is authorised and, by implication, who is responsible for the AML/CFT supervision of those entities.

241. The consistent treatment by Member States of activities carried out by payment institutions and electronic money institutions through agents or distributors in a cross-border context should form an important part of the Commission's efforts to strengthen the EU's AML/CFT framework but cannot be achieved through EBA guidelines or Opinions alone, as has been the case to-date. Instead, it should be based on clear legal provisions that are both, enforceable and do not change as case law changes.

4.2.2 The Payment Services Directive (availability of funds)

242. The EBA notes that some financial institutions consider that the interaction between the WTR's requirement to suspend a transfer of funds and the obligations in Article 87 of the PSD is unclear.

a. Provisions in Union law

243. Articles 8 and 12 of the WTR gives the payee's payment service provider the option of executing, rejecting or suspending a transfer of funds where information on the payer or the payee is missing or incomplete.

244. Suspending a transfer of funds may lead to a conflict with the payee's payment service provider's obligations, under Article 87 of the PSD, to ensure that the amount of the payment transaction is at the payee's disposal immediately after the amount is credited to the payee payment service provider's account.

b. EBA observations

245. The ESAs, in their Joint Guidelines on the measures payment service providers should take to detect missing or incomplete information on the payer or the payee, and the procedures they should put in place to manage a transfer of funds lacking the required information provide guidance on the way payment service providers should manage situations where a decision to suspend a transfer of funds means that they will be unable to comply with their obligations under Article 87 of the PSD.

c. EBA advice

246. The EBA considers that the interaction between the provisions in Article 87 of the PSD and Articles 8 and 12 of the WTR is clear, as the fight against ML/TF is recognised as an important public interest goal.

247. Nevertheless, to ensure a consistent approach by competent authorities and payment service providers, the EBA recommends that the Commission clarify that the obligation of the payee's payment service provider under Article 87(2) of the PSD to make funds available to the payee immediately after the amount is credited to the payment service provider's account applies only to the extent that the payment service provider can comply with their AML/CFT obligations.

4.2.3 The General Data Protection Regulation

248. The fight against ML/TF is recognised as an important public interest goal by all Member States. This means that the processing of personal data by financial institutions is permitted to the extent that this is necessary to combat ML/TF.

249. However, neither Regulation (EU) 2016/679 (The General Data Protection Regulation (GDPR)) nor the AMLD sets out in detail what this entails. Instead, it falls to Member States to interpret when data processing for AML/CFT purposes ceases to be in the public interest, and different views prevail in different Member States.

a. Union law

250. Point (e) of Article 6 of the GDPR provides that the processing of personal data is lawful if this is necessary for the performance of a task carried out in the public interest. At the same time, Article 6(2) of the GDPR empowers Member States to maintain or to introduce more

specific provisions to adapt the application of the rules of the GDPR with regard to situations when processing is necessary for the performance of a task carried out in the public interest.

251. Article 43 of the AMLD establishes that the processing of personal data for AML/CFT purposes is a matter of public interest under the GDPR, while Article 41 mandates Member States to restrict data subjects' rights to access personal data where this right could interfere with the prohibition of disclosure in Article 39(1) of the AMLD.

252. Article 45 of the AMLD envisages that customer data will be shared among financial institutions that belong to the same group as defined in Article 3 of the AMLD.

b. EBA observations

253. The EBA notes that inconsistent approaches among Member States have created challenges for competent authorities and financial institutions.

254. The EBA has observed in the context of its work on prudential and AML/CFT colleges, and when carrying out its AML/CFT implementation reviews, that some competent authorities are reluctant to exchange information where this information relates to personal data, such as that which would be relevant for fit and proper assessments and the prudential supervision of the compliance framework. A competent authority's inability to access such information can make supervision less effective, and may undermine the ESAs' efforts to establish, in line with Article 31a of the ESAs' founding regulations, a system for the exchange of information relevant to the assessment of the fitness and propriety of owners of qualifying holdings, directors and key function holders of financial institutions. As recent AML/CFT scandals have shown, real or perceived legal obstacles to the exchange of information about an individual's fitness and propriety can have a significant detrimental effect on the integrity of the EU's financial system.

255. There is also a widespread perception in the financial services industry that AML/CFT rules conflict with data protection requirements and that consequently, to comply with one set of rules may put financial institutions in breach of the other. Because breaches of the GDPR and of national measures implementing the GDPR can carry greater fines than those foreseen under the AMLD, there is a risk that financial institutions will opt to comply with what they perceive to be GDPR requirements at the expense of compliance with their AML/CFT obligations. This exposes the Union's financial sector to ML/TF risk.

256. Finally, the EBA notes that questions are being raised about the application of data protection requirements in respect of the group-wide sharing of information on individual customers, in particular in situations where the financial institution has grounds for suspicion of ML/TF.

c. EBA advice

257. To limit the adverse effect of legal uncertainty associated with the processing of personal data in the AML/CFT context, the EBA recommends that the Commission provide clarity on the ability to exchange personal data in situations where financial institutions provide their services through agents and intermediaries that may be excluded from the definition of a 'group' in Article 45 of the AMLD.
258. The EBA also recommends that the Commission explore the best way to achieve a common approach among Member States, competent authorities and financial institutions for processing personal data for the purposes of the AMLD, including in the supervisory cooperation context.
259. In the EBA's opinion, this could be achieved through the transformation of those parts of the AMLD that relate to the processing of personal data into a regulation, and by amending the GDPR to explicitly provide for the processing of personal data for AML/CFT purposes, and to grant powers to the Commission to harmonise the processing of personal data by obliged entities for AML/CFT purposes.

4.2.4 The Deposit Guarantee Schemes Directive

260. There have been a number of high profile cases in recent years where concerns about the adequacy of a credit institution's ML/TF systems and controls directly or indirectly led to depositors losing access to their deposits and in some of these cases, to the determination of unavailability of deposits.
261. The EBA notes that there is currently no common approach across the single market to tackling ML/TF risk in payout situations and that the current framework does not envisage the suspension or exclusion of a payout to depositors that are suspected of ML but have not been charged or convicted. Furthermore, the responsibilities of different authorities in a Deposit Guarantee Scheme (DGS) payout process with regards to AML/CFT are unclear.

a. Union law

262. Directive 2014/49/EU (the DGSD) introduces common rules to protect eligible deposits in the case of a credit institution's failure or inability to pay. It provides that, in the event of a credit institution's failure, depositors be repaid by DGSs using DGS funds. It also provides that deposits be repaid within specific timeframes after deposits are determined unavailable.
263. A depositor is excluded from repayment by a DGS if:
- a. the deposit stems from a transaction in connection with which there has been a criminal conviction for ML (Article 5(1)(c) of the DGSD); or

- b. the depositor has never been identified in line with provisions in the AMLD; or
 - c. the depositor or the person entitled to the deposit has been charged with an offence relating to ML until such time as a court judgement has been obtained (Article 8(8) of the DGSD). A DGS can suspend repayments pending the judgment of the court.
264. The DGSD does not refer explicitly to cases where a suspicion of ML/TF exists, but a depositor or a person associated with the transaction have not been charged with, or convicted of, a ML offence. It is also silent on cases where a credit institution's operations are suspended owing to ML/TF concerns, for example because it is owned or controlled by criminals or because of serious breaches of the credit institution's AML/CFT obligations.
265. Neither the DGSD, nor the AMLD, describe the relationship between DGSs, FIUs and AML/CFT or prudential competent authorities, nor do they set out channels to ensure cooperation or the timely exchange of relevant information.
266. This means that it is not clear who is competent and responsible for, detecting and preventing ML/TF in DGS payout situations. In the absence of charges or convictions for ML/TF offences, and irrespective of suspicions of ML/TF or levels of ML/TF risk, neither the DGSD nor the AMLD prevents DGSs from paying out the depositor.
267. Finally, the DGSD is silent on cases where depositors lose access to their funds for reasons not linked to the credit institution's financial circumstances but stemming from, for example ML/TF concerns.
- b. EBA observations**
268. The EBA, in its 2019 Opinion on deposit guarantee scheme payouts, assesses Member States' approaches and identifies gaps in the EU's legal framework that have contributed to the adoption of divergent approaches by Member States to DGS payouts in situations where ML/TF concerns exist. For example, the EBA found that under the current framework, in the absence of a conviction or formal charge, there is no public authority that can act to stop a payout even if there are indications that the failing credit institution was set up to facilitate ML. This is significant, because the EBA is aware of a number of cases where concerns about the adequacy of a failing credit institution's ML/TF systems and controls directly or indirectly led to depositors losing access to their deposits and in some cases also the determination of unavailability of deposits.
269. In its Opinion on deposit guarantee scheme payouts, the EBA determined that EU would benefit from greater clarity on, inter alia,
- a. who is responsible for carrying out AML/CFT checks and where necessary, report suspicious transactions during payout;

- b. who can instruct a DGS, an insolvency practitioner or a credit institution under bankruptcy proceedings to suspend or defer a payout to a depositor, or request that a payout be suspended or deferred because of ML/TF concerns;
 - c. how the requirement to payout within a specific timeframe interacts with obligations under the AMLD; and
 - d. whether a credit institution supporting a DGSs in the repayment process should be considered a credit institution that is subject to AMLD provisions or as a proxy of the DGS, which is not currently subject to AMLD provisions.
- c. **EBA advice**
270. The EBA considers the ML/TF risk associated with the current DGS framework to be significant and recommends that the Commission consider the proposals outlined in the EBA's 2019 Opinion on DGS payouts (see, in particular, paragraphs 7(i) and (ii)), and the 2019 Opinion on the eligibility of deposits, coverage level and cooperation between DGSs (see, in particular, paragraph 7(v)(d)).
271. The EBA recommends that the Commission clarify in Union law, using these Opinions as a basis, how DGSs should handle payouts where ML/TF concerns exist because of suspicions of ML/TF against a depositor, or because the credit institution was found to be in breach of its AML/CFT obligations. This is important, because in the absence of clear rules, there is a risk that DGSs will reimburse potential money launderers or terrorist financiers unquestioningly, or, conversely, in the event that DGSs delay a payout, that DGSs will be liable for failure to comply with their obligations under the DGSD.
272. The EBA is following up on its 2019 Opinion on DGS payouts by preparing an Opinion on DGS payouts where there are ML/TF concerns. Work on this Opinion is currently underway and due to conclude in Q4, 2020. The EBA will share concrete proposals with the Commission at this point.

4.2.5 The Payment Accounts Directive

273. Directive 2014/92/EU (the Payment Accounts Directive (PAD)) creates a right for all consumers who are legally resident in the EU to open and use a payment account with basic features.
274. The right to open and use a basic payment account applies only to the extent that the credit institution can comply with its AML/CFT obligations.
275. The EBA is aware of allegations that some payment institutions use ML/TF concerns as a pretext to avoid the opening of payment accounts with basic features for customers who are unlikely to be profitable. The EBA is also aware of instances where regulatory expectations or

national law made it difficult for financial institutions to act on ML/TF concerns while still providing payment accounts with basic features.

a. Provisions in Union law

276. Article 16 of the PAD creates a right for customers who are legally resident in the EU to open and use a payment account with basic features with financial institutions located on their territory.
277. Articles 1(7) and 16(4) of the PAD provide that the right for customers to open and use a payment account with basic features applies only to the extent that credit institutions can comply with their AML/CFT obligations. Compliance with AML/CFT obligations is not further defined and has been interpreted differently by financial institutions and competent authorities in Member States.
278. Article 17 of the PAD sets out the characteristics of a payment account with basic features. This Article has been interpreted in some Member States as curtailing credit institutions' ability to mitigate ML/TF risk by, for example, imposing restrictions or limits on the use of some features associated with a payment account with basic features. This means that in those Member States, credit institutions have to provide customers with full access to the services associated with a payment account with basic features, irrespective of ML/TF risk, or not provide access to a payment accounts with basic features at all.

b. EBA observations

279. The EBA's 2016 Opinion on the application of CDD measures to customers who are asylum seekers highlights that in some cases, a narrow focus on compliance with customer identification and verification requirements appears to have contributed to vulnerable customers being excluded from access to and use of payment accounts with basic features.
280. The EBA considers it unlikely that the condition for refusal on AML/CFT grounds in the PAD would be met generally or solely on the basis that a prospective customer cannot provide robust evidence of identity, or that for example their place of residence is temporary; this would also not be in line with the risk-based approach set out in the AMLD. Instead, the EBA recommended in its Opinion that in situations where the ML/TF risk is increased, credit institutions limit the services of a payment account with basic features on a case by case basis where that this is necessary to manage the ML/TF risk that they have identified.
281. However, the EBA is aware that the way Member States have transposed the PAD and the AMLD into their national laws may prevent the application of a risk-based approach in this case.

c. EBA advice

282. The EBA recommends that the Commission assess the extent to which national law prevents the application of risk-based AML/CFT measures that would facilitate the opening of

payment accounts with basic features in situations where ML/TF risks exist and takes steps to clarify the interaction between AML/CFT requirements and the right to open and use a payment account with basic features, for example by including in the PAD a mandate for EBA guidelines.

283. The EBA's recommendation to work towards a greater harmonisation of CDD requirements, as outlined in Section 2, should also be considered in this context.

4.2.6 The financial sanctions (restrictive measures) regime

284. All financial institutions in the EU have to comply with the EU's financial sanctions regime.

285. Union law does not set out how the requirement to comply with the financial sanctions regime interacts with the AMLD.

a. Provisions in Union law

286. The EU imposes financial sanctions by way of regulations. Financial sanctions include a requirement for financial institutions to freeze the funds of designated persons and entities, and a prohibition on making funds and other resources available to such persons and entities.

287. Financial institutions have to report all matches to the authority that is competent to receive such reports at the level of the Member State.

288. There are no provisions in Union law that describe the systems and controls financial institutions have to have in place to comply with their financial sanctions obligations.

b. EBA observations

289. The EBA notes that financial institutions can benefit from exemptions from certain AML/CFT requirements. This is the case, for example, in respect of some occasional transactions, intra-EU fund transfers below EUR 1 000 and in situations where Article 12 of the AMLD applies. There is an apparent conflict between those exemptions, which are risk based, and the requirement to comply with applicable sanctions regimes, which is an absolute requirement.

290. The EBA further notes that different interpretations exist regarding the obligations on payment service providers to screen the payer or the payee against sanctions lists. Although in some Member States, each PSP is expected to screen only its customer, in others, both PSPs have to screen both the payer and the payee.

291. Common EU-wide standards on the measures that financial institutions should take to comply with their financial sanctions obligations would be important to avoid regulatory

arbitrage and possibly, the creation of gaps that could weaken the EU's financial sanctions regime.

c. **EBA advice**

292. The EBA recommends that the Commission clarify in Union law how financial institutions should comply with their obligations under the EU's sanctions regime. In the EBA's view, this is necessary to provide clarity on the approach financial institutions should take, for example in situations where Union law provides for exemptions from some or all CDD measures under the AMLD, and from the obligation to obtain information on the payer or the payee in the context of the WTR.

Conclusion

293. Money laundering and terrorist financing undermine market integrity and can threaten the stability of the financial system. They also make society less safe.
294. High-profile ML/TF cases involving EU financial institutions have highlighted a that the EU's approach to tackling ML/TF, although sophisticated, nevertheless has a number of vulnerabilities. These vulnerabilities stem at least in part from divergent national approaches to transposing the EU's legal framework into the national law of Member States, and they have been exacerbated by differences in the way these rules have been implemented by competent authorities and financial institutions.
295. ML/TF cannot be fought in isolation. Governments, supervisors and other public authorities and the private sector all have a role to play. Furthermore, weaknesses in one area of the EU's single market opens up the entire single market to abuse.
296. The changes that the EBA recommends the Commission make to the EU's legal framework build on aspects of the EU's approach to AML/CFT and financial sector regulation and supervision that have worked well, and target what needs to be improved. If adopted, the EBA considers that these changes would
- a. create the legal foundations for an approach where cooperation and information exchange between relevant stakeholders at the level of Member States and across the single market and internationally is no longer the exception, but the rule;
 - b. lead to more consistent and comparable outcomes in the fight against ML/TF through the establishment of a single rulebook where a robust set of basic common rules provides the ground for the implementation of a proportionate and effective risk-based approach to AML/CFT; and
 - c. make the effective and efficient operation of a future EU-level AML/CFT supervisor possible.
297. The EBA looks forward to continuing to support the Commission as it takes forward its work on implementing its 2020 AML/CFT Action Plan.

Annex: Regulatory products

Topic	Regulatory product
AML/CFT	<p>ESAs (2017): Joint draft regulatory technical standards on the criteria for determining the circumstances in which the appointment of a central contact point pursuant to Article 45(9) of Directive (EU) 2015/849 is appropriate and the functions of the central contact point</p>
	<p>See also: Commission Delegated Regulation (EU) 2018/1108 of 7 May 2018 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council with 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 (Text with EEA relevance.)</p>
	<p>ESAs (2017): Joint draft regulatory technical standards on the measures credit institutions and financial institutions shall take to mitigate the risk of money laundering and terrorist financing where a third country's law does not permit the application of group-wide policies and procedures</p>
	<p>See also: Commission Delegated Regulation (EU) 2019/758 of 31 January 2019 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council with regard to 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 (Text with EEA relevance.)</p>
	<p>ESAs (2017): Joint guidelines on the characteristics of a risk-based approach to anti-money laundering and terrorist financing supervision, and the steps to be taken when conducting supervision on a risk-sensitive basis (The Risk-Based Supervision Guidelines)</p>
	<p>ESAs (2017): Joint guidelines under Articles 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (The Risk Factors Guidelines) *</p>
<p>ESAs (2017): Joint guidelines on the measures payment service providers should take to detect missing or incomplete information on the payer or the payee, and the procedures they should put in place to manage a transfer of funds lacking the required information</p>	

Topic	Regulatory product
	ESAs (2019): Joint guidelines on cooperation and information exchange between competent authorities supervising credit and financial institutions (The AML/CFT Colleges Guidelines)
	EBA (2016): Opinion on the application of CDD measures to customers who are asylum seekers
	ESAs (2017): Joint opinion on the risks of money laundering and terrorist financing affecting the Union's financial sector
	ESAs (2018): Joint opinion on the use of innovative solutions by credit and financial institutions in the customer due diligence process
	ESAs (2019): Joint opinion on the risks of money laundering and terrorist financing affecting the Union's financial sector
	ESAs (2019): Multilateral agreement on the practical modalities for exchange of information
	EBA (2020): Report on competent authorities' approaches to the AML/CFT supervision of banks
	EBA (2020): Report on competent authorities' approaches to tackling market integrity risks associated with dividend arbitrage trading schemes
	EBA (2020): Response by the European Banking Authority to the European Commission's public consultation on an AML/CFT Action Plan and the establishment of an EU-level AML/CFT supervisor
	ESMA (2015): Questions and Answers. Investment-based crowdfunding: money laundering/terrorist financing
Financial innovation	EBA (2019): Report with advice for the European Commission on crypto-assets
	EBA (2019): Report on potential impediments to the cross-border provision of banking and payment services
	ESMA (2019): Advice: Initial Coin Offerings and Crypto-Assets
	EBA (2020): Response to the European Commission's consultation on the Digital Finance Strategy
Governance	EBA (2017): Guidelines on internal governance under Directive 2013/36/EU*
	EBA, ESMA (2017): Joint guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU*

Topic	Regulatory product
Authorisation and qualifying holdings	EBA (2019): Guidelines on outsourcing arrangements
	ESMA (2020): Guidelines on certain aspects of the MiFID II compliance function requirements
	Commission Delegated Regulation (EU) 2017/1943 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards on information and requirements for the authorisation of investment firms
	EBA (2016): Regulatory technical standards on the framework for cooperation and exchange of information between competent authorities for passport notifications under Directive (EU) 2015/2366
	See also: Commission Delegated Regulation (EU) 2017/2055 of 23 June 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for the cooperation and exchange of information between competent authorities relating to the exercise of the right of establishment and the freedom to provide services of payment institutions
	ESAs (2017): Joint guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector EBA (2017): draft technical standards under Article 8(2) of the CRD on the information to be provided for the authorisation of credit institutions, the requirements applicable to shareholders and members with qualifying holdings and obstacles which may prevent the effective exercise of supervisory powers
Ongoing supervision	EBA (2019): Opinion on communications to supervised entities regarding money laundering and terrorist financing risks in prudential supervision
Deposit guarantee schemes	EBA (2019): Opinion on deposit guarantee scheme payouts
	EBA (2019): Opinion on the eligibility of deposits, coverage level and cooperation between DGSs
EBA letters	EBA (2018): Letter to Tiina Astola requesting an investigation on possible BUL under Article 17 of Regulation (EU) No 10932010
	EBA (2019): Letter to DG Justice and Consumers re the request to investigate a possible breach of Union law against the Danish and Estonian Supervisory Authorities

* These guidelines are currently under consultation or a consultation version of these guidelines is being finalised.



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