

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 16 February 2022

on a proposal for a regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism

(CON/2022/4)

(2022/C 210/05)

Introduction and legal basis

On 20 July 2021 the European Commission adopted a proposal for a regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010 ⁽¹⁾ (hereinafter 'AMLAR').

The European Central Bank (ECB) considers that the proposed regulation falls within its scope of competence, although it has not been consulted on the proposed regulation. It is therefore exercising its right as provided for in the second sentence of Article 127(4) of the Treaty on the Functioning of the European Union to submit an opinion to the appropriate Union institutions on matters in its fields of competence. The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty since AMLAR contains provisions affecting the ECB's tasks concerning the prudential supervision of credit institutions under Article 127(6) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations**1. Overview and introductory remarks**

- 1.1. The ECB welcomes the package of four legislative proposals, including AMLAR, published by the Commission on 20 July 2021, with the aim of strengthening the Union's rules concerning anti-money laundering (AML) and countering the financing of terrorism (CFT) (AML/CFT). This opinion focuses on AMLAR. Separate ECB opinions address the remaining three components of the legislative package – (a) the proposal for a regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ⁽²⁾ (hereinafter 'AMLR1'); (b) the proposal for a directive of the European Parliament and the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849 ⁽³⁾ (hereinafter 'AMLD6'); and (iii) the proposal for a regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets (recast) ⁽⁴⁾.

⁽¹⁾ COM(2021) 421 final.

⁽²⁾ COM(2021) 420 final.

⁽³⁾ COM(2021) 423 final.

⁽⁴⁾ COM(2021) 422 final.

- 1.2. As previously noted ⁽⁵⁾, the ECB strongly supports a Union regime which ensures that Member States, Union authorities and bodies, as well as obliged entities within the EU, have effective tools to counter the misuse of the Union financial system for money laundering (ML) or terrorist financing (TF). The ECB expressed its full support for the previous stage of the harmonisation efforts ⁽⁶⁾, where the AML/CFT mandate of the European Banking Authority (EBA) was enhanced, and it welcomes the next iteration of the process in the form of the establishment of the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA).
- 1.3. The task of supervising credit institutions in relation to the prevention of the use of the financial system for ML or TF purposes has not been conferred on the ECB. Article 127(6) of the Treaty would also not allow for the ECB to be endowed with AML/CFT supervisory powers, as it clearly limits the supervisory tasks that can be conferred on the ECB to prudential supervision. However, the outcomes of AML/CFT supervision are important to consider for the discharge of the ECB's prudential supervisory tasks where the ECB factors the information received in the relevant prudential supervisory activities, including in supervisory evaluation and review processes, assessments of the adequacy of institutions' governance arrangements, processes and mechanisms, and assessments of the suitability of members of the management bodies of supervised entities. Further, in line with Directive 2013/36/EU of the European Parliament and of the Council ⁽⁷⁾ AML/CFT supervisors of credit and financial institutions, prudential supervisors and financial intelligence units (FIUs) of the Member States are required to cooperate closely with each other within their respective competences and provide each other with information relevant for their respective tasks.
- 1.4. The ECB stands ready to cooperate with AMLA and contribute to the legislative process, inter alia, by sharing its experience as a Union-level prudential supervisory authority, where this experience may be relevant for building Union-level AML/CFT supervision.
- 1.5. Establishing an AML/CFT Authority at Union level is an important step towards ensuring more harmonised application of Union AML/CFT requirements across the EU. It is the experience of the ECB that, for a Union-level prudential supervisory authority to facilitate the convergence of supervisory practices across a number of Member States, it needs to be granted a sufficient level of responsibility, both for direct supervision and supervisory oversight. These responsibilities should be matched by adequate supervisory powers. AMLAR envisages that, in addition to direct supervisory powers, which will be exercised over a relatively limited group of obliged entities at the outset, AMLA will perform periodic assessments and peer reviews of the financial and non-financial AML/CFT supervisory authorities, respectively. This will help AMLA to identify best practices at national level, both to utilise them in its own direct supervision, and to reflect them in recommendations or other regulatory products addressed to the individual Member State AML/CFT authorities, whose representatives will also participate in the General Board of AMLA. Higher levels of harmonisation and consistency in AML/CFT supervision will also benefit prudential supervision.

⁽⁵⁾ See Opinion CON/2005/2 of the European Central Bank of 4 February 2005 at the request of the Council of the European Union on a proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing (OJ C 40, 17.2.2005, p. 9), Opinion CON/2013/32 of the European Central Bank of 17 May 2013 on a proposal for a directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and on a proposal for a regulation on information accompanying transfers of funds (OJ C 166, 12.6.2013, p. 2), Opinion CON/2016/49 of the European Central Bank of 12 October 2016 on a proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (OJ C 459, 9.12.2016, p. 3) and Opinion CON/2018/55 of the European Central Bank of 7 December 2018 on an amended proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) and related legal acts (OJ C 37, 30.1.2019, p. 1). All ECB opinions are available on EUR-Lex.

⁽⁶⁾ See paragraph 1.1 of ECB Opinion CON/2018/55.

⁽⁷⁾ See Article 117(5) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

Specific observations

2. Scope of AMLA's direct and indirect supervision

- 2.1. The criteria for identifying the selected obliged entities that will be under the direct supervision of AMLA ⁽⁸⁾ are relatively strict, and the documents accompanying the Commission's legislative proposal envisage that only approximately 12 to 20 obliged entities will meet these criteria. It is not estimated how many of these entities are expected to be institutions that fall within the scope of the ECB's direct prudential supervision under Council Regulation (EU) No 1024/2013 ⁽⁹⁾. For significant supervised entities ⁽¹⁰⁾ that are under the ECB's direct supervision and that will meet these criteria, AMLA will become the ECB's counterpart for information exchange and cooperation in day-to-day supervision, suitability assessments and 'common procedures' ⁽¹¹⁾, which include assessments of applications for authorisations to take up the business of a credit institution, withdrawals of such authorisations and the assessment of acquisitions and disposals of qualifying holdings. Where less significant supervised entities ⁽¹²⁾ (LSIs) meet the criteria set out in AMLAR, the cooperation between the ECB and AMLA will be limited to the relevant aspects of the common procedures.
- 2.2. The ECB takes note of the proposed limited scope of direct AMLA supervision, in the light of the budgetary constraints of the proposal. It is the experience of the ECB that it is beneficial to have a broad scope of direct Union-level supervision and to select institutions that become subject to direct supervision on the basis of objective and transparent criteria. The ECB would therefore strongly support amending the criteria for identifying the selected obliged entities, so that the process results in a wider pool of obliged entities to be directly supervised by AMLA that could include obliged entities headquartered in each of the Member States and foster a common supervisory culture and convergence of AML/CFT supervisory practices. This will also decrease the risk of arbitrage. In the case of the Single Supervisory Mechanism (SSM), this objective has been facilitated by the criteria for the selection of significant supervised entities, where Regulation (EU) No 1024/2013 requires the ECB to carry out direct supervisory tasks in respect of the three most significant credit institutions in each of the participating Member States, unless justified by particular circumstances ⁽¹³⁾. Considering the relatively strict and risk-based selection criteria set out in AMLAR, the publication of the list of the selected obliged entities, as is envisaged in AMLAR, would be equivalent to indirectly making public the high ML/TF risk status of the selected supervised entities, which is currently confidential information shared only among relevant authorities on a strict need-to-know basis. Objective risk-based criteria that do not result in the indirect disclosure of such confidential supervisory information could be preferable as they would not send unintended signals to the markets or create reputational risk for the selected obliged entities directly supervised by AMLA. Moreover, a provision should be added to ensure communication between AMLA and the relevant prudential supervisors within the Union during the process of assessment of the obliged entities for selection before the list of selected obliged entities is published. This would allow prudential supervisors to analyse in advance the possible prudential implications of the risks associated with those entities.
- 2.3. With respect to nearly all significant and less significant supervised entities, the ECB's primary counterparts will continue to be the national AML/CFT supervisors of credit and financial institutions and FIUs. The ECB has observed a certain degree of heterogeneity in the input provided to the ECB by the individual AML/CFT supervisory authorities since systematic cooperation between the national AML/CFT supervisory authorities and the ECB started in 2019, following the legislative changes brought about by Directive (EU) 2018/843 of the European Parliament and of the Council ⁽¹⁴⁾. This makes it more difficult to consistently factor the outcomes of AML/CFT supervision into prudential supervisory tasks. In this respect the ECB welcomes the role which AMLA will play in enhancing the harmonisation of ML/TF risk assessments and other AML/CFT supervisory tasks performed by the authorities within the Member States. In particular, with regard to the methodology to be developed by AMLA for classifying the

⁽⁸⁾ See Articles 12 and 13 of AMLAR.

⁽⁹⁾ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

⁽¹⁰⁾ As defined in point (16) of Article 2 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

⁽¹¹⁾ As defined in point (3) of Article 2 of the SSM Framework Regulation.

⁽¹²⁾ As defined in point (7) of Article 2 of the SSM Framework Regulation.

⁽¹³⁾ See Article 6(4) of Regulation (EU) No 1024/2013.

⁽¹⁴⁾ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156, 19.6.2018, p. 43).

inherent risk and the residual risk profiles of obliged entities, it is important to achieve a high level of harmonisation of both methodologies as they will impact the consistency of the input that will be received and factored into prudential supervision.

- 2.4. Looking forward, subject to the Commission's future reviews envisaged under AMLAR ⁽¹⁵⁾, the ECB would welcome an increase in the scope of AMLA's direct supervisory tasks to cover a wider subset of entities that are directly supervised by the ECB. This could have the potential to achieve a higher level of consistency in the AML/CFT supervisory assessments of such institutions, and therefore also help to further support the prudential supervision for which some of those assessments serve as inputs.

3. Cooperation between AMLA and the ECB

- 3.1. AMLAR regulates cooperation between AMLA and non-AML/CFT authorities ⁽¹⁶⁾. The ECB welcomes the fact that the latter term covers four types of authorities, including the ECB in its prudential supervisory role ⁽¹⁷⁾. With respect to facilitating information exchange between AML/CFT and prudential supervisors, a key added value of AMLA could indeed be the possibility to improve current cooperation rather than to become an additional layer in the information exchange between other authorities. In this sense, a general duty should be added for AMLA to ensure a proportionate and efficient use of cooperation tools in order to minimise reporting burdens for authorities involved in the cooperation with AML/CFT supervisors via multiple channels, including but not limited to AML/CFT colleges, the AML/CFT database and cooperation agreements.
- 3.2. AMLAR envisages that AMLA must cooperate with non-AML/CFT authorities where necessary for the fulfilment of AMLA's tasks ⁽¹⁸⁾. This provision should be more general and the reference to AMLA's tasks should be removed. By definition, cooperation needs to consider the tasks of all the participating authorities. Therefore, for example, Regulation (EU) No 1024/2013 ⁽¹⁹⁾ requires the ECB to cooperate with the authorities which form part of the European System of Financial Supervision and Directive 2013/36/EU ⁽²⁰⁾ requires AML/CFT authorities and prudential supervisors to share information which is relevant for the tasks of the receiving authority, without considering whether such information sharing is also necessary for the fulfilment of the tasks of the authority which provides the information. While in many cases such necessity can be identified, this is not always the case. It is therefore more appropriate to replace the reference to AMLA's tasks with a more general reference requiring AMLA to cooperate with non-AML/CFT authorities within the boundaries of its mandate, in order to ensure that only relevant forms of cooperation are requested by the other authorities concerned. This holds particularly true and is of particular relevance for prudential supervisors such as the ECB given their obligation to factor AML/CFT supervisory input into their prudential assessments.
- 3.3. AMLAR refers to the provision of information from the AML/CFT database which AMLA is to establish pursuant to AMLAR ⁽²¹⁾. The ECB understands that this new database will replace the database of AML/CFT-related weaknesses which the EBA was required to build under Regulation (EU) No 1093/2010 of the European Parliament and of the Council ⁽²²⁾. The two databases differ in several respects. While the EBA was required to provide information from the database to prudential supervisors also on its own initiative ⁽²³⁾, AMLA is only required to do so upon a request of the prudential supervisors ⁽²⁴⁾. AMLAR should be amended to ensure that AMLA provides information also on its own initiative, both to AML/CFT and non-AML/CFT supervisors. If a supervisor is unaware of the existence of the relevant information, it will not be in a position to request such information under AMLAR ⁽²⁵⁾.

⁽¹⁵⁾ See Article 88 of AMLAR.

⁽¹⁶⁾ See Article 78 of AMLAR.

⁽¹⁷⁾ See Article 2 of AMLAR.

⁽¹⁸⁾ See Article 78(1) of AMLAR.

⁽¹⁹⁾ See Article 3(1) of Regulation (EU) No 1024/2013.

⁽²⁰⁾ See Article 117(5) of Directive 2013/36/EU.

⁽²¹⁾ See Article 11 and Article 78(3) of AMLAR.

⁽²²⁾ See Article 9a of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

⁽²³⁾ See Article 9a(3) of Regulation (EU) No 1093/2010.

⁽²⁴⁾ See Article 11(1), which only refers to financial AML/CFT supervisors, and Article 11(4) of AMLAR.

⁽²⁵⁾ See Article 11(4) of AMLAR.

- 3.4. As regards the AML/CFT database, AMLAR defines the types of information which AML/CFT supervisors are to transmit to the database ⁽²⁶⁾, most of which overlap with information that AML/CFT supervisors are required to share also with the relevant prudential supervisors in accordance with Article 117(5) of Directive 2013/36/EU. In line with the spirit of the current provisions on the AML/CFT central database under Regulation (EU) No 1093/2010, a more widely accessible data hub could provide a valuable service in enhancing cooperation between prudential supervisors and the AML/CFT supervisory mechanism, for instance by building on digital solutions that are already available to EU supervisors (e.g. for cooperation between the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism). This possibility would minimise the duplication and burden involved for AML/CFT supervisors that would otherwise need to share the same information twice, both with the database under AMLAR and with the relevant prudential supervisors in accordance with Article 117(5) of Directive 2013/36/EU.
- 3.5. AMLAR requires AML/CFT supervisors to transmit to the database advice provided to other 'national' authorities in relation to authorisation procedures, withdrawal of authorisation procedures, and fit and proper assessments of shareholders or members of the management body of individual obliged entities ⁽²⁷⁾. The word 'national' should be deleted, as AML/CFT supervisors will provide information in this respect not only to national authorities, but also to the ECB, in accordance with Directive 2013/36/EU ⁽²⁸⁾ and AMLD6 ⁽²⁹⁾.
- 3.6. AMLAR requires AMLA to conclude memoranda of understanding with non-AML/CFT authorities, where necessary ⁽³⁰⁾. The condition 'where necessary' is helpful, as there are already multiple platforms for cooperation between AML/CFT and prudential supervisors. The ECB cooperates with AML/CFT supervisors of the Member States of the European Economic Area also under an agreement which the ECB signed on 10 January 2019 ⁽³¹⁾, in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council ⁽³²⁾ (the 'AML Agreement'). The AML Agreement has more than 50 signatories, as there is typically more than one AML/CFT supervisor of credit and financial institutions in each of the Member States, and allows for bilateral cooperation between the ECB and each of the signatory AML/CFT supervisors. Due to the bilateral nature of such cooperation, and given that group-wide supervision under Directive (EU) 2015/849 operates using different principles to consolidated supervision under Directive 2013/36/EU, the AML Agreement has not proven as timely and efficient as other tools that allow for multilateral cooperation, such as the AML/CFT colleges. Even though the AML Agreement allows AMLA to join the agreement easily, and AMLAR enables AMLA also to conclude a dedicated agreement between the ECB and AMLA, the ECB welcomes the fact that AMLAR provides the flexibility to explore whether that would be necessary given the availability of other cooperation tools which could enable a more efficient multilateral cooperation, also with a view to AMLA becoming more than just an additional player in the information exchange process with the ECB.
- 3.7. AMLAR further requires AMLA to ensure effective cooperation and information exchange between all financial AML/CFT supervisors in the AML/CFT supervisory system and the relevant non-AML/CFT authorities ⁽³³⁾. The ECB welcomes this provision, as in recent years a multitude of information exchange platforms for AML/CFT and prudential supervisors have been established, the interplay of which is not always clear. For example, the abovementioned supervisory authorities are required to exchange information not only directly with each other, but also via the EBA's AML/CFT database. This provision on ensuring effective cooperation should be extended also to include FIUs and non-financial AML/CFT supervisors. FIUs and prudential supervisors of credit institutions are already required to cooperate in accordance with Directive 2013/36/EU. As AMLA's General Board also includes

⁽²⁶⁾ See Article 11(2) of AMLAR.

⁽²⁷⁾ See Article 11(2)(d) of AMLAR.

⁽²⁸⁾ See Article 117(5) of Directive 2013/36/EU.

⁽²⁹⁾ See Article 48(1) of AMLD6.

⁽³⁰⁾ See Article 78(2) of AMLAR.

⁽³¹⁾ See the Multilateral agreement on the practical modalities for exchange of information pursuant to Article 57a(2) of Directive (EU) 2015/849.

⁽³²⁾ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

⁽³³⁾ See Article 78(3) of AMLAR.

also the FIUs of all the Member States, and as AMLA is required to operate the FIU support and coordination mechanism ⁽³⁴⁾, adding FIUs to the scope of this provision appears warranted. As regards non-financial AML/CFT supervisors, prudential supervisors may need to cooperate with them if non-financial obliged entities, for example crypto-asset service providers, form part of the same group as credit or financial institutions. In the more general context of cooperation with non-financial supervisors, and as suggested by the ECB in a separate opinion addressing AMLR1 and AMLD6, general enhancements to the information sharing permissions for AML/CFT supervisors could be introduced to allow them to share information with a wider range of other authorities. This enhancement would automatically extend, through AMLAR ⁽³⁵⁾, the permissions for AMLA to share confidential information with other authorities.

- 3.8. As there may be regulatory products, such as guidelines or technical standards that are addressed to or affect both AML/CFT supervisors and prudential supervisors or other authorities, it is important that AMLA cooperates with the EBA, the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) in the development of these regulatory products. The general cooperation requirement for AMLA to cooperate with the EBA ⁽³⁶⁾ should be amended to include a specific reference to cooperation in the development of such regulatory products, similar to the cooperation between AMLA and the European Data Protection Board, as proposed by the Commission ⁽³⁷⁾.

4. Processes employed in direct and indirect supervision

- 4.1. Similarly to the ECB's discharge of its prudential supervisory tasks, it is proposed that AMLA will use joint supervisory teams (JSTs) in its direct AML/CFT supervisory tasks. AMLAR specifies that AMLA's JSTs will consist of both staff of AMLA and staff of the national AML/CFT financial supervisors, and that the JST coordinator will be 'delegated' from AMLA to the national AML/CFT financial supervisor in the Member State where a selected obliged entity has its headquarters, upon agreement of the relevant national AML/CFT financial supervisors ⁽³⁸⁾. The accompanying documents to the legislative proposal further mention that almost all AMLA's staff that will be part of the JSTs will be physically based in the Member States. The ECB understands in this context that the term 'delegated' ⁽³⁹⁾ must be understood to mean that the JST coordinator will be a member of AMLA's staff, but that his/her standard place of work will not be in AMLA's headquarters, but in the Member State where the supervised entity has its headquarters. The term 'delegated' thus does not in any way mean a delegation of AMLA's powers to the national AML/CFT financial supervisor or to any other authority within the Member States. Furthermore, the ECB notes that AMLAR entrusts joint supervisory teams with both off-site supervision and on-site inspections.
- 4.2. The ECB welcomes the allocation of supervisory decision-making powers for selected obliged entities to the Executive Board of AMLA as a significant step forward in strengthening AML/CFT supervision in the EU. Furthermore, while fully acknowledging that AML/CFT supervision may require a different set-up compared to prudential supervision, the ECB would like to share its experience with the JST set-up within the SSM. The SSM JSTs are also led by a JST coordinator who is always an ECB staff member. However, the JST coordinator is based at the ECB's seat in Frankfurt am Main, and not at Member State level. As regards other JST members, they include both ECB staff members and members of the staff of the national competent authorities. JST members who are ECB staff are also based at the ECB, and not at Member State level. In the ECB's experience, this facilitates communication across the institution and the sharing of best practices, and positively contributes to building a common supervisory culture. In addition, in order to stimulate dialogue within the JST concerning optimal supervisory procedures for each of the supervised entities, as a general rule, the JST coordinator within the SSM does not come from the country where the supervised bank has its headquarters. Finally, in principle, JST coordinators are appointed for a period of 3 to 5 years and are expected to rotate on a regular basis (bearing in mind that not all JST members can rotate at the same time).

⁽³⁴⁾ See Articles 33 to 37 of AMLAR.

⁽³⁵⁾ See Article 75 of AMLAR.

⁽³⁶⁾ See Article 77(1) of AMLAR.

⁽³⁷⁾ See Article 77(2) of AMLAR.

⁽³⁸⁾ See Article 15 of AMLAR.

⁽³⁹⁾ See Article 15(2) of AMLAR.

- 4.3. As regards the concentration of off-site and on-site tasks in the same team, in the ECB's experience an independent on-site inspection function combined with a regular dialogue between off-site and on-site teams enriches the quality of the ECB's ongoing supervision. This ensures in particular that views of the JST formed on the basis of previously acquired information do not affect the findings of on-site inspections. As clarified in the ECB's Guide to on-site inspections and internal model investigations, on-site inspections complement ongoing supervision. The ECB maintains a permanent in-depth knowledge of the credit institution by performing ongoing off-site supervision, which mainly relies on the information reported by the credit institution, and, through on-site inspections, the ECB checks, among other things, the accuracy of the information used to conduct ongoing supervision. The on-site inspection team, including the Head of Mission, acts independently of, but in cooperation with, the JST. Once the supervisory decision to carry out an inspection has been adopted, its implementation is under the sole responsibility of the Head of Mission, who is responsible for producing a report that includes the findings of the inspection team. Article 144 of the SSM Framework Regulation provides that the ECB is responsible for the establishment and composition of inspection teams with the involvement of the national competent authorities ⁽⁴⁰⁾ (NCAs). The inspection team can be composed of ECB inspectors, supervisors employed by the NCA of the inspected legal entity's Member State, and supervisors from other NCAs, as well as JST members or other persons authorised by the ECB. Regardless of their origin, all team members work on behalf of the ECB under the responsibility of the Head of Mission. A JST member cannot be appointed as Head of Mission. In the ECB's experience, effective resourcing of a team which performs both on-site supervisory tasks and off-site inspections can also be difficult; what might be perceived as sufficient day-to-day resourcing could result in understaffing when parts of the team participate in an on-site inspection ⁽⁴¹⁾. Moreover, involving supervisors of various NCAs in on-site inspection teams has proven key in developing a common approach to on-site activities within the SSM.
- 4.4. AMLAR sets out the supervisory powers of AMLA ⁽⁴²⁾ towards selected obliged entities under AMLA's direct supervision, which are added to the supervisory powers that will be available to all the national AML/CFT supervisors pursuant to AMLD6 ⁽⁴³⁾. AMLA will also be able to require, by way of instructions, national AML/CFT financial supervisory authorities to make use of their powers, under and in accordance with the conditions set out in national law, where AMLAR does not confer such powers on AMLA. These powers partly overlap with the powers of the ECB under Regulation (EU) No 1024/2013 and more generally with the powers of prudential supervisors under Directive 2013/36/EU, for example, the power to restrict or limit the business, operations or network of supervised entities ⁽⁴⁴⁾, or the power to require changes in the management body of the supervised entity ⁽⁴⁵⁾. Certain overlaps in supervisory powers exist already as regards the powers of AML/CFT supervisors under Directive (EU) 2015/849 and the implementing national legislation. This overlap in supervisory powers requires cooperation between prudential and AML/CFT supervisors, to avoid conflicts and unintended consequences, including the uncoordinated cumulation of supervisory measures addressed to the same credit institution. The ECB stands ready to cooperate with AMLA as well as with the national AML/CFT supervisors in this respect. Moreover, it is important to ensure that, prior to imposing administrative sanctions and measures on obliged entities that are subject to supervision also by other authorities, AMLA coordinates its supervisory actions with the other relevant authorities, and in particular with the relevant prudential supervisors of credit institutions where those supervisory actions would affect such institutions. In a separate opinion addressing AMLD6, the ECB therefore suggests that AMLD6 be amended to limit the undesirable effects of the potentially uncoordinated exercise of supervisory powers in relation to the same obliged entity. Having regard to the relevant provisions of AMLR1, AMLD6 and AMLAR ⁽⁴⁶⁾, the ECB understands that this coordination requirement set out in AMLD6 would apply both to the national AML/CFT supervisors and AMLA.

⁽⁴⁰⁾ The term 'national competent authority' is defined in point (2) of Article 2 of Regulation (EU) No 1024/2013.

⁽⁴¹⁾ In the context of the SSM, on-site supervision (i.e. inspections) is a specific function which operates through dedicated structures at the ECB and NCAs, including ad hoc 'missions' for each inspection, with staff requiring specific skills and availability (long periods far from the office/home). To provide an order of magnitude, for significant institutions, the SSM as a whole dedicates to this specific on-site function around 40 % of the full-time equivalent assigned to off-site supervision (through the JSTs).

⁽⁴²⁾ See Article 20 of AMLAR.

⁽⁴³⁾ See Article 41 of AMLD6.

⁽⁴⁴⁾ See Article 20(2)(d) of AMLAR.

⁽⁴⁵⁾ See Article 41(1)(f) of AMLD6.

⁽⁴⁶⁾ See in particular Article 20(3) of AMLAR which provides that AMLA also has the powers and obligations which supervisory authorities have under the relevant Union law.

- 4.5. Regarding AMLA's indirect supervisory role, the ECB welcomes the proposal to entrust AMLA with the task of indirect supervision of non-selected obliged entities, as it will contribute to supervisory convergence, and also allow AMLA to request a national financial AML/CFT supervisor to take supervisory action in exceptional circumstances. In clearly defined cases, AMLAR also allows AMLA to request the Commission to authorise a transfer of supervisory powers over a non-selected obliged entity from a national financial AML/CFT supervisor to AMLA ⁽⁴⁷⁾. AMLA is allowed to make such a request to the Commission only if the national AML/CFT supervisor does not comply with a request by AMLA to adopt a decision addressed to an obliged entity. Although there may be cases in practice where both the national AML/CFT supervisor and AMLA agree on a transfer of supervisory powers, AMLAR does not provide for a procedure for such transfer in the absence of the aforementioned non-compliance by the national AML/CFT supervisor. In this respect, the ECB notes that both Regulation (EU) No 1024/2013 (in the case of the ECB) and Regulation (EU) No 806/2014 of the European Parliament and of the Council ⁽⁴⁸⁾ (in the case of the Single Resolution Board) allow for supervisory powers to be taken over also upon the request of the respective national authority ⁽⁴⁹⁾. This possibility should also be made available within the AML/CFT supervisory system for a period of up to three years. If this option is incorporated into AMLAR, the appropriate involvement of the Commission in this process would need to be analysed, taking into account, inter alia, the limits imposed by the Meroni doctrine ⁽⁵⁰⁾.
- 4.6. The ECB welcomes the wide range of powers and tools envisaged for AMLA to discharge its oversight function and ensure high supervisory standards across the Union. The ECB notes that AMLA's oversight toolkit in the area of information gathering regarding non-selected obliged entities does not include some of the tools available to the ECB with respect to gathering information concerning LSIs.
- 4.7. It is the ECB's experience that effective oversight requires a balance between fostering supervisory convergence and institution-specific oversight. The latter is a powerful tool to assess the effectiveness of the supervisory approaches in place in the different Member States and to allow the indirect supervisor to intervene in a timely manner when needed. The ECB notes that, under AMLAR, financial supervisors are required to provide information on non-selected obliged entities to AMLA in only a very limited number of cases ⁽⁵¹⁾.
- 4.8. The ECB would like to share its experience with the LSI oversight set-up within the SSM. The framework establishes the possibility for the ECB to create categories of LSIs based on their riskiness and impact, and to require different levels of information from the NCAs (e.g. ex-ante notifications for high priority LSIs only, while all LSIs are within the scope of the annual ex-post reporting and the notification of financial deteriorations). This approach allows the oversight function to be proportionate and focus resources on the most critical cases. The annual reporting of a minimum set of information on all LSIs is also useful for discharging oversight responsibilities (e.g. for horizontal reviews, assessing institution-specific situations or having an informed dialogue with NCAs). In addition, the ECB has also participated in several on-site inspections concerning LSIs, to further support the exercise of its oversight function.
- 4.9. Under AMLAR ⁽⁵²⁾, financial supervisors are required to notify AMLA if the situation of any non-selected obliged entity deteriorates rapidly and significantly. As these criteria are relatively narrow and cumulative, a situation of a non-selected obliged entity deteriorating significantly, but not rapidly, or an urgent situation requiring immediate attention but without a rapid and significant deterioration (for example, where substantial long term breaches are identified) would not result in such a notification to AMLA.

⁽⁴⁷⁾ See Article 30 of AMLAR.

⁽⁴⁸⁾ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

⁽⁴⁹⁾ See Article 6(5)(b) of Regulation (EU) No 1024/2013 and Article 7(4)(b) of Regulation (EU) No 806/2014.

⁽⁵⁰⁾ Judgment of the Court of Justice of 13 June 1958, *Meroni v High Authority*, C-9/56, ECLI:EU:C:1958:7; judgment of the Court of Justice of 14 May 1981, *Romano*, C-98/80, ECLI:EU:C:1981:104; judgment of the Court of Justice of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, ECLI:EU:C:2005:449; and judgment of the Court of Justice of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, ECLI:EU:C:2014:18.

⁽⁵¹⁾ See Articles 29 and 30 of AMLAR.

⁽⁵²⁾ See Article 30(1) of AMLAR.

4.10. The Administrative Board of Review of AMLA has been designed in AMLAR ⁽⁵³⁾ similarly to the Administrative Board of Review under Regulation (EU) No 1024/2013. The ECB notes that beside this model, there are also other possible approaches, such as the model used within the EBA, ESMA, EIOPA and the Single Resolution Board where the appeal bodies, inter alia, adopt decisions that are binding for the respective bodies that subsequently adopt the final reviewed decisions. The design of the solution most appropriate for AMLA could therefore benefit from comparing the experiences gathered from the functioning of all the models.

4.11. Where AMLA's supervisory intervention will include instructions or requests to national authorities, the differences in their respective powers and obligations under the national legal frameworks stemming, inter alia, from national administrative laws, may constitute important factors to be considered. In such situations AMLA would benefit from the assistance of the national authorities in analysing the effects and limitations of such instructions, including potential non-contractual liability of the authorities involved in taking the supervisory action. The ECB understands that such assistance would be captured by the general cooperation provisions contained in AMLAR ⁽⁵⁴⁾.

5. Governance structure of AMLA and continuity arrangements

5.1. The General Board of AMLA will have two compositions – the supervisory and the FIU composition ⁽⁵⁵⁾. The General Board in supervisory composition is required to admit, as an observer, also a representative of the ECB nominated by the ECB Supervisory Board and a representative of each of the European Supervisory Authorities, where matters within the scope of their respective mandates are discussed.

5.2. The ECB welcomes this provision, as it will facilitate the necessary interaction between AML/CFT and prudential regulation and supervision. At present, the ECB contributes, from the prudential supervisory perspective, to the work of the AML/CFT Standing Committee within the EBA ⁽⁵⁶⁾. The ECB understands that its observer role in AMLA will, as a practical matter, replace its existing observer role in the AML/CFT Standing Committee, as the latter committee will cease to exist ⁽⁵⁷⁾. In this connection, AMLAR ⁽⁵⁸⁾ should be amended so that it refers to a 'representative of the ECB', rather than a 'representative nominated by the Supervisory Board of the ECB'. The ECB acknowledges that the wording used in this provision is based on the wording already used in Regulation (EU) No 1093/2010 ⁽⁵⁹⁾. However, the involvement of specific ECB bodies in the process of nominating ECB representatives is a matter of the powers of those bodies determined in particular by the Treaties, the Statute of the ESCB and of the ECB and Regulation (EU) No 1024/2013, and thus a matter of the ECB's internal organisation. It does not appear appropriate for AMLAR to interfere in the internal organisation of the ECB by determining which ECB body should be responsible for the nomination of its representative.

5.3. The ECB further welcomes the fact that AMLA's General Board in FIU composition will include also the European Anti-Fraud Office, Europol, Eurojust and the European Public Prosecutor's Office, and that AMLAR includes a requirement for AMLA to cooperate with these Union bodies ⁽⁶⁰⁾. The enhanced cooperation between FIUs and Union bodies with mandates related to criminal law, which AMLA is designed to bring about, is an important step forward for combating organised crime in particular.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

⁽⁵³⁾ See Articles 60 to 63 of AMLAR.

⁽⁵⁴⁾ See Article 7(2) for all situations, and Article 14(2) for supervision of selected obliged entities.

⁽⁵⁵⁾ See Article 46 of AMLAR.

⁽⁵⁶⁾ See Article 9a(7) of Regulation (EU) No 1093/2010.

⁽⁵⁷⁾ See Article 86 of AMLAR (repealing Articles 9a, 9b and several other provisions of Regulation (EU) No 1093/2010).

⁽⁵⁸⁾ See Article 46(4) of AMLAR.

⁽⁵⁹⁾ See Article 9a(8) of Regulation (EU) No 1093/2010.

⁽⁶⁰⁾ See Article 80 of AMLAR.

Done at Frankfurt am Main, 16 February 2022.

The President of the ECB
Christine LAGARDE
