OPINION OF THE EUROPEAN CENTRAL BANK

of 16 February 2022

on a proposal for a directive and a regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

(CON/2022/5)

(2022/C 210/06)

Introduction and legal basis

On 8, 14 and 20 October 2021 the European Central Bank (ECB) received requests from the European Parliament and from the Council, respectively, for an opinion on a 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 ([1]) (hereinafter 'AMLR1') and a 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 ([2]) (hereinafter 'AMLD6').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed regulation and directive contain provisions affecting the basic task of the European System of Central Banks (ESCB) to implement the monetary policy of the Union pursuant to the first indent of Article 127(2) of the Treaty, the ESCB's basic task of promoting the smooth operation of payment systems pursuant to the fourth indent of Article 127(2) of the Treaty, the ECB's tasks concerning the prudential supervision of credit institutions under Article 127(6) of the Treaty, the legal tender status of euro banknotes pursuant to Article 128(1) of the Treaty, and the ESCB's contribution to the stability of the financial system pursuant to Article 127(5) 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. This opinion addresses AMLR1 and AMLD6, which form part of a package of four legislative proposals published by the European 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). Separate ECB Opinions address the remaining two legislative proposals: (a) the 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 ([3]) (hereinafter 'AMLAR'), and (b) 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]).

1.2. The ECB welcomes this initiative. Consistently with previous ECB opinions on AML/CFT-related legislative proposals ([5]), the ECB strongly supports a Union regime that ensures that Member States, Union authorities and bodies, as well as obliged entities within the Union, have effective tools to counter the misuse of the Union financial system for money laundering (ML) and terrorist financing (TF).

([1]) COM(2021) 420 final.
([2]) COM(2021) 423 final.
([3]) COM(2021) 421 final.
([4]) COM(2021) 422 final.
([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 (COM(2004) 448 final) (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.

1.3. The Union AML/CFT framework affects the tasks performed by the ECB in the area of the prudential supervision of credit institutions under Article 127(6) of the Treaty and Council Regulation (EU) No 1024/2013 ([6]), as well as the tasks under Article 127(2) of the Treaty that fall within its central banking mandate. It also concerns the ECB from an institutional perspective.

1.4. First, the task of supervising credit institutions in relation to the prevention of the use of the financial system for the purpose of ML or TF has not been conferred on the ECB. This is excluded by Article 127(6) of the Treaty which clearly limits the tasks that can be conferred on the ECB to prudential supervisory tasks. However, it is important to consider the outcomes of AML/CFT supervision in relation to the discharge of the ECB's prudential supervisory tasks. In particular, the risk of the use of the financial system for ML or TF is relevant for ECB prudential supervisory decisions concerning acquisitions of qualifying holdings in supervised entities, grants and withdrawals of authorisations to credit institutions, and suitability assessments of existing or prospective managers of supervised entities, as well as for day-to-day supervision in the context of the supervisory review and evaluation process. Serious breaches of AML/CFT requirements can negatively affect the reputation of a credit institution and thus pose a risk to its viability. Such breaches may also lead to significant administrative or criminal sanctions being imposed on supervised entities and their staff. In certain cases, serious breaches of AML/CFT requirements can directly trigger a need for a credit institution's authorisation to be withdrawn. Effective AML/CFT supervision as well as information exchange between prudential and AML/CFT supervisory authorities are therefore essential ([7]). Amendments to Directive (EU) 2015/849 of the European Parliament and of the Council ([8]) and to Directive 2013/36/EU of the European Parliament and of the Council ([9]) in recent years as well as the work of the European Supervisory Authorities have led to the establishment of processes to facilitate this information exchange, which has become an integral part of the ECB's work related to the prudential supervision of credit institutions.

1.5. Further, the ECB is in the position of acting as a counterpart to a number of obliged entities when conducting market operations within its central banking mandate. The ECB is therefore subject to the customer due diligence procedures which obliged entities are required to perform in relation to their clients in accordance with the applicable AML/CFT frameworks.

Specific observations

2. **Definition of obliged entities**

2.1. AMLR1 ([10]) contains a list of obliged entities for the purpose of AMLR1, AMLD6, and AMLAR. Consistently with the previous AML Directives ([11]), the list of obliged entities does not include central banks. The ECB notes that central banks do not fall into any of the categories of obliged entities within AMLR1, such as credit institutions or financial institutions, as these terms are used separately from central banks in the Treaty and the Statute of the European System of Central Banks and of the European Central Bank ('the Statute of the ESCB'). Furthermore, the Union legislative acts regulating the activities of credit institutions and other financial market operators, for example Regulation (EU) No 575/2013 of the European Parliament and of the Council ([12]), Directive 2013/36/EU, Directive 2014/65/EU of the European Parliament and of the

([6]) 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).

([7]) See paragraph 1.2 of Opinion CON/2018/55.

([8]) 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).

([9]) 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).

([10]) See Article 3 of AMLR1.

([11]) Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991, p. 77), Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L 344, 28.12.2001, p. 76), Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15), Directive (EU) 2015/849 and 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).

([12]) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

Council ([13]) and Directive (EU) 2015/2366 of the European Parliament and of the Council ([14]) contain explicit provisions clarifying that central banks do not fall within their scope. As the Union AML/CFT framework is, by means of AMLR1, moving towards a regulation that will be directly applicable across Member States, it could be useful if this understanding concerning the status of the ESCB central banks is confirmed by the co-legislators, in particular as regards the tasks performed by ESCB central banks under the Treaties. As regards further activities that may be performed by some ESCB national central banks (NCBs), the ECB understands that where Member States consider that specific activities performed by some NCBs, for example providing current accounts to their staff members, should be subject to the same requirements as set out in AMLR1, or to a relevant subset thereof, they will retain the possibility to achieve this by means of national legislation.

3. **Prudential supervisory aspects**

3.1. *Definitions*

3.1.1. AMLR1 defines the term 'supervisor' as a body entrusted with responsibilities aimed at ensuring compliance by obliged entities with the requirements of AMLR1 ([15]). It also defines the term 'competent authority', which includes, inter alia, a public authority with designated responsibilities for combating money laundering or terrorist financing ([16]). Some prudential supervisory tasks include AML/CFT-related elements where, however, prudential supervisors, including the ECB, need to rely on the ML/TF risks assessments, identification of breaches of AML/CFT requirements or other input provided by AML/CFT supervisory authorities. Accordingly, AMLAR ([17]) classifies both authorities responsible for prudential supervision under Directive 2013/36/EU and the ECB, when it performs its tasks under Regulation (EU) No 1024/2013, as 'non-AML/CFT authorities'. The ECB therefore understands that neither the term 'supervisor' nor the term 'competent authority' in AMLR1 is intended to include the ECB or other prudential supervisory authorities.

3.2. *Compliance function within obliged entities*

3.2.1. AMLR1 ([18]) defines two categories of senior managers as being responsible for AML/CFT compliance of the obliged entities: 'compliance manager' and 'compliance officer'. The compliance manager must be an executive member of the board of directors (or an equivalent governing body) of the obliged entity, and is responsible for implementing the obliged entity's policies, controls and procedures to ensure compliance with AMLR1, and for receiving information on significant or material weaknesses in such policies, controls and procedures. This provision elaborates on the provision currently set out in Directive (EU) 2015/849 ([19]), which contains the term 'management board'. The new provision is proposed within AMLR1, which, as a regulation, will not be transposed into national laws using the corresponding terms existing in those laws. It is accordingly suggested that the more general term 'management body' should be used, instead of the formulation 'board of directors or, if there is no board, equivalent governing body'. The term 'management body' is used in a number of Union acts governing the activities of credit and financial institutions, such as Directive 2013/36/EU, Directive 2009/138/EC of the European Parliament and of the Council ([20]) (which

([13]) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

([14]) Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

([15]) See point (32) of Article 2 of AMLR1.

([16]) See point (31) of Article 2 of AMLR1.

([17]) See point (5) of Article 2(1) of AMLAR.

([18]) See Article 9 of AMLR1.

([19]) See Article 46(4) of Directive (EU) 2015/849.

([20]) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

contains the term 'administrative, management or supervisory body'), Directive 2014/65/EU and Regulation (EU) No 600/2014 ([21]), as well as Directive (EU) 2017/1132 of the European Parliament and of the Council ([22]) (which most commonly uses the term 'administrative or management body'). AMLR1 could therefore be amended to state that the compliance manager should be an executive member of the 'management body'.

3.2.2. AMLR1 provides that the compliance manager must regularly report to the board of directors or equivalent governing body. In parent undertakings, that person is also to be responsible for overseeing group-wide policies, controls and procedures. As regards credit institutions, the management body adopts decisions collectively, and is responsible, inter alia, for approving and reviewing the strategies and policies for taking up, managing, monitoring and mitigating the risks the institution is or might be exposed to ([23]). AMLR1 should therefore clarify that the designation of the compliance manager does not affect the collective responsibility of the management body under other Union acts.

3.2.3. AMLR1 ([24]) requires that the compliance officer is appointed by the board of directors or governing body of the supervised entity, and is to be responsible for the day-to-day operation of the obliged entity's AML/CFT policies, as well as reporting suspicious transactions to the financial intelligence unit. The compliance officer will be a member of the senior management of the obliged entity ([25]). The ECB understands that within credit institutions the compliance officer and the compliance manager will form part of the internal control functions that will need to be exercised in line with Directive 2013/36/EU, interpreted in the light of the applicable guidelines of the European Banking Authority (EBA) ([26]). This implies, inter alia, independence on the part of the compliance manager and compliance officer, limits on the combination of their functions with other functions within the credit institution, sufficient resources for performing their functions, and access to the management body.

3.2.4. AMLR1 further states that in respect of obliged entities subject to checks on their senior management under other Union acts, compliance officers are to be subject to verification that they comply with those requirements. The ECB understands that this provision only refers to the requirements set out in other Union acts and does not establish any additional requirement for a suitability verification of a compliance officer or compliance manager. This implies that only where other Union acts already require the compliance officer or compliance manager to be subject to a suitability verification will that verification be performed, in accordance with those other Union acts. It would be advisable to clarify several practical rules for situations when suitability verification of a compliance officer or compliance manager is performed by an authority other than an AML/CFT supervisor. First, it should be ensured that in such a situation, the respective AML/CFT supervisors provide that authority with any necessary input, within their supervisory competence and engaging with other AML/CFT authorities as necessary. For example, if prudential supervisory authorities are tasked with performing the suitability assessment of a compliance officer or compliance manager, they will typically be capable of assessing some of the suitability criteria, such as the reputation, honesty and integrity of the individual concerned. However, as regards other criteria, such as whether the individual has adequate

([21]) Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).
([22]) Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017, p. 46).
([23]) See Article 76(1) of Directive 2013/36/EU.
([24]) See Article 9(3) of AMLR1.
([25]) As defined in point (28) of Article 2 of AMLR1.
([26]) See in particular the EBA Guidelines on internal governance under Directive 2013/36/EU (EBA/GL/2021/05). Available on the EBA website.

knowledge, skills and experience to perform the function of a compliance officer or compliance manager, AML/CFT supervisors would have the expertise and the necessary information. Second, considering the significance of the input of the AML/CFT supervisors into the suitability verification, and the relevance of the compliance managers and compliance officers for the mandate of AML/CFT supervisors set out in AMLR1 ([27]), AML/CFT supervisors should have the possibility to prevent a person, whom they do not consider as having the necessary knowledge, skills and experience, from exercising the function of a compliance manager or compliance officer, even when the overall suitability verification is performed by another authority. However, as appointees may be nominated to perform multiple functions within the obliged entity, it should be ensured that the negative stance of the AML/CFT supervisor as regards the functions of compliance manager or compliance officer does not affect the possibility of the authority responsible for the overall suitability verification to issue a positive decision with respect to any other functions of the appointees. To this end, it should be also clarified that the tasks of the compliance manager referred to in AMLR1 ([28]) only concern ensuring compliance with AMLR1. Third, as suitability assessments are subject to strict deadlines, it should be spelt out that the input of the AML/CFT supervisor into the overall suitability verification needs to be provided within an appropriate time. In this respect it is also suggested to cater for situations where no assessment is provided by the AML/CFT supervisor within the deadline. Fourth, as the authority responsible for the overall suitability verification will fully rely on the input of the AML/CFT supervisor as regards the knowledge, skills and experience of the appointee, it is suggested that the assessment of the AML/CFT supervisors should become a part of the decision of the authority performing the overall suitability verification. Fifth, it is further recommended that the AML/CFT cooperation guidelines envisaged in AMLD6 ([29]) include also practical modalities of how AML/CFT supervisors will cooperate with the ECB and the national competent authorities as defined in Regulation (EU) No 1024/2013, in the process of suitability verifications of compliance managers and compliance officers, and set out specific deadlines within which the input of the AML/CFT supervisors into the suitability verifications shall be provided.

3.3. *Powers of AML/CFT supervisors to impose administrative sanctions and measures*

3.3.1. AMLD6 defines a wide range of administrative sanctions and measures available to the AML/CFT supervisors ([30]) which can, in some situations, coincide or interfere with sanctions and measures imposed by other supervisory authorities, including the ECB when performing its tasks under Regulation (EU) No 1024/2013. For that reason, it is suggested that an appropriate coordination mechanism as between AML/CFT supervisors and the other authorities concerned, including prudential supervisors, should be created. Such arrangements could support the authorities in the planning and execution of sanctions and measures and avoid any unintended conflicts in their effects. In the longer term, it will be important to clarify further the practical aspects of the coordination processes by means of guidelines (or another regulatory document) to ensure that the authorities concerned are able to take the required actions within deadlines that will often be short and which are clearly set out in legislation. This is also relevant for cooperation in relation to suitability assessments (see paragraph 3.2.4). Further, where AML/CFT and prudential authorities are entrusted with the same or similar supervisory powers, the guidelines should ensure that in each case the powers are exercised by the authority that is best placed to apply them in that specific case. As developing such guidelines may require cooperation between the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and the EBA (and possibly also the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority), the ECB has suggested specific provisions facilitating the cooperation of those authorities on the development of regulatory products in its separate opinion on AMLAR.

([27]) See point (32) of Article 2 of AMLR1.
([28]) See Article 9(1) and (2) of AMLR1.
([29]) See Article 52, letter a) of AMLD6.
([30]) See Articles 39 to 41 of AMLD6.

3.3.2. The powers proposed for AML/CFT supervisors in AMLD6 also include the power to withdraw or suspend authorisations of obliged entities and to impose a temporary ban preventing any person that discharges managerial responsibilities in an obliged entity from exercising managerial functions in obliged entities ([31]). However, in many cases the authority that is competent for granting and withdrawals of authorisations to the various types of obliged entities, or for decisions on the suitability of members of their management bodies or key function holders, is different from the AML/CFT supervisor. Additionally, the competence to grant and withdraw authorisations or make decisions on suitability may be governed by legislative acts other than the AML/CFT legislation. For example, granting authorisations to credit institutions within the Union is regulated primarily under Directive 2013/36/EU and, for credit institutions established in the Member States participating in the Single Supervisory Mechanism, the ECB has been entrusted with the exclusive competence to grant and withdraw authorisations. Further, these legislative acts may not recognise the possibility to suspend authorisation: this is the case, for example, under Directive 2013/36/EU. The ECB notes that these provisions are currently contained in Directive (EU) 2015/849 and that, with respect to some obliged entities, the AML/CFT supervisors may have the power to grant and withdraw authorisations. However, in order to reflect that in some situations the exclusive power to withdraw authorisations of obliged entities is exercised by authorities other than AML/CFT supervisors and to avoid the duplication of supervisory powers in other situations, it should be clarified that where the power to withdraw authorisation, or to take another action with respect to the authorisation of an obliged entity, rests with another authority the AML/CFT supervisors only have the possibility to propose withdrawal or another action with respect to an authorisation to the authority that is competent for taking such action. Similarly, where decisions on the suitability of management body members or key function holders are within the competence of another authority, AMLD6 should specify that AML/CFT supervisors have the power to propose the adoption of the decision to an authority that is competent for taking such action. This formulation would be also more closely aligned with the wording proposed by the Commission in the AMLAR ([32]).

3.3.3. AMLD6 sets out that administrative measures other than sanctions may be imposed in respect of identified breaches which are not deemed sufficiently serious to be punished with an administrative sanction ([33]). However, some of the administrative measures listed in AMLD6 may have a more severe impact on an obliged entity than administrative sanctions. Confining administrative measures other than sanctions to less serious breaches could limit the AML/CFT authorities in their choice of the most appropriate supervisory response to breaches of AMLR1 requirements. It is therefore suggested that this formulation should be removed from AMLD6. Aligning the formulations within Article 41(1) of AMLD6 and Article 20(1) of AMLAR might also be considered. While the former provision requires that the AML/CFT supervisors are to have the powers listed therein when they identify breaches of AMLR1, the latter provision is wider and envisages that AMLA will have supervisory powers also in cases of likely breaches of AMLR1 and in situations where the arrangements implemented by the selected obliged entity do not ensure sound management of its risks. When these provisions are aligned, it should be further ensured that, where AMLD6 and AMLAR link supervisory powers to shortcomings in the management of risks by obliged entities, it is specified that this pertains only to ML/TF risks and not to other risks, in order to minimise potential conflicts with prudential legislation.

3.4. *Cooperation and information exchange between authorities*

3.4.1. AMLD6 defines the professional secrecy obligations of AML/CFT supervisors of credit and financial institutions (hereinafter collectively referred to as 'financial AML/CFT supervisors'), introducing exemptions where financial AML/CFT supervisors will be authorised to provide confidential information to other authorities ([34]). These provisions do not seem to authorise the exchange of confidential information with a number of types of authorities, even though such exchange might be needed in practice. For example, while AMLD6 requires AML/CFT supervisors to cooperate with competent authorities ([35]) and with tax authorities ([36]), the authorisation to provide confidential information to those authorities seems to depend on whether Member States choose to allow such

([31]) See Article 41(1)(e) and (f) of AMLD6.

([32]) See Article 20(2)(i) of AMLAR which states that the Authority for Anti-Money Laundering and Countering the Financing of Terrorism has the power 'to propose the withdrawal of licence of a selected obliged entity to the authority that has granted such license.'

([33]) See Article 41(1) of AMLD6.

([34]) See in particular Articles 50 and 51 of AMLD6.

([35]) The term 'competent authorities' is defined in point (31) of Article 2 of AMLR1 and includes (a) a Financial Intelligence Unit; (b) an AML/CFT supervisory authority which is a public body, or the public authority overseeing self-regulatory bodies; (c) a public authority that has the function of investigating or prosecuting money laundering, its predicate offences or terrorist financing, or that has the function of tracing, seizing or freezing and confiscating criminal assets; (d) a public authority with designated responsibilities for combating money laundering or terrorist financing.

([36]) See Article 45 of AMLD6.

exchange ([37]). In order to make the list of exemptions from the general professional secrecy requirement under AMLD6 ([38]) more comprehensive, a survey of AML/CFT supervisors could be carried out to map the types of authorities with whom they in practice share (or need to share) confidential information. Additionally, possible interactions with other authorities under the proposed regulation on markets in crypto-assets ([39]) (hereinafter the 'proposed MiCA regulation') could be considered. Further, AMLD6 does not seem to establish a professional secrecy requirement for AML/CFT supervisors of obliged entities other than credit or financial institutions (hereinafter collectively referred to as 'non-financial AML/CFT supervisors'). It is unclear whether in such a situation financial and non-financial AML/CFT supervisors can effectively cooperate with each other and with other authorities.

3.4.2. AMLD6 requires the exchange of information between the prudential and financial AML/CFT supervisors to be subject to professional secrecy requirements set out in AMLD6 ([40]). As the professional secrecy regime to which prudential supervisory authorities are subject is regulated in other Union acts, such as Directive 2013/36/EU as regards prudential supervisors of credit institutions, it is suggested that the relevant provisions of AMLD6 should be amended so that they also cover equivalent professional secrecy requirements. Further, it is proposed that this requirement should also apply to information exchanges with other authorities listed in AMLD6 ([41]), to ensure consistent treatment of the information shared, regardless of which authorities are involved in the exchange. These amendments would be compatible with the solution proposed in other provisions of AMLD6 ([42]) and adopted by the legislators in Directive 2013/36/EU ([43]).

3.4.3. AMLD6 does not seem to authorise AML/CFT supervisors to share information with central banks ([44]). Information that an AML/CFT supervisor intends to impose a substantial administrative sanction on a credit institution ([45]), or to propose to withdraw an authorisation in accordance with AMLD6 ([46]), could be important information for a central bank. It is suggested that a corresponding authorisation for information exchange should be added to AMLD6, at least for financial AML/CFT supervisors. It should also be clarified that central banks may use the received information for their tasks.

3.4.4. AMLD6 does not seem to allow non-financial AML/CFT supervisors to share confidential information with prudential supervisors of credit and financial institutions. Such exchange may be justified when obliged entities other than credit or financial institutions, such as mortgage or consumer credit providers ([47]), form part of a group that also includes credit or financial institutions. It is therefore suggested that such an authorisation should be added.

3.5. *Performance of customer due diligence in situations where it is determined that an institution is failing or likely to fail*

3.5.1. AMLR1 requires that, in respect of credit institutions, the performance of customer due diligence must also take place under the oversight of AML/CFT supervisors at the moment that an institution has been determined to be failing or likely to fail pursuant to Directive 2014/59/EU of the European Parliament and of the Council ([48]) or when deposits are unavailable in accordance with Directive 2014/49/EU of the European Parliament and of the

([37]) See Article 51(2) of AMLD6.
([38]) See Chapter V of AMLD6.
([39]) Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937(COM(2020) 593 final).
([40]) See the last subparagraph of Article 50(2) of AMLD6.
([41]) See Article 50(2) of AMLD6.
([42]) See Article 51(1) and 51(2) of AMLD6.
([43]) See, for example, Article 56 of Directive 2013/36/EU.
([44]) See Articles 50 and 51 of AMLD6.
([45]) See Article 40 of AMLD6.
([46]) See Article 41(1)(e) of AMLD6.
([47]) See Article 3(3)(k) of AMLR1.
([48]) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

Council ([49]). In such cases, supervisors are to decide on the intensity and scope of such customer due diligence having regard to the specific circumstances of the credit institution ([50]). Performing such an exercise in respect of all or a substantial part of the institution's clients may be relatively burdensome and take a significant amount of time, particularly if the credit institution has failed to gather the relevant information from its clients. It is therefore suggested that it should be specified that such customer due diligence should only be performed where necessary.

4. **Limit to payments in cash**

4.1. AMLR1 introduces a prohibition on persons trading in goods and providing services accepting or making payments in cash exceeding EUR 10 000 or the equivalent amount in other currencies. It also allows Member States to retain lower limits or, following a consultation of the ECB, adopt lower limits ([51]). The adoption of this provision will exclude the use of euro banknotes for consumer-to-business and business-to-business transactions above the indicated threshold.

4.2. Under the Treaty, the ECB has the exclusive right to authorise the issue of euro banknotes within the Union ([52]). The euro banknotes issued by the ECB and the NCBs of the euro area are the only banknotes with legal tender status within the euro area ([53]). The use of the only means of payment with legal tender status enshrined in primary law would thus be rendered illegal above the indicated threshold by the intended prohibition. It is for the Union legislator to ascertain that this prohibition does not unduly interfere with the fundamental right to property as provided for in Article 17 of the Charter of Fundamental Rights of the European Union ([54]). In this context, the ECB notes that the right to property is not an unfettered right but may be subject to restrictions in the public interest and in the cases and under the conditions provided for by law. In previous opinions, the ECB has recognised combating money laundering as being in the public interest ([55]). It is important that such restrictions are evidence-based and comply with the principle of proportionality, i.e. are appropriate for attaining the legitimate objective and do not go beyond what is necessary ([56]).

4.3. The concept of 'legal tender' has been considered by the Court of Justice of the European Union. In particular, the Court has clarified that the concept of 'legal tender' of a means of payment denominated in a currency unit signifies that this means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, at its full face value, with the effect of discharging the debt ([57]). In clarifying the concept of 'legal tender' under Union law, the Court took into consideration Commission Recommendation 2010/191/EU ([58]), which provides useful guidance for the interpretation of the relevant provisions of Union law. Point 1 of Recommendation 2010/191/EU states that, where a payment obligation exists, the legal tender of euro banknotes and coins should imply (a) mandatory acceptance of those banknotes and coins; (b) their acceptance at full face value; and (c) their power to discharge from payment obligations. According to the Court, this shows that the concept of 'legal tender' encompasses, inter alia, an obligation in principle to accept banknotes and coins denominated in euro for payment purposes ([59]).

([49]) Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).
([50]) See Article 15(4) of AMLR1.
([51]) See Article 59 of AMLR1.
([52]) First sentence of Article 128(1) of the Treaty and first sentence of Article 16 of the Statute of the ESCB.
([53]) Third sentence of Article 128(1) of the Treaty and third sentence of Article 16 of the Statute of the ESCB.
([54]) Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).
([55]) See Opinion CON/2014/37; Opinion CON/2017/18; and Opinion CON/2019/4.
([56]) See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraphs 69-70.
([57]) See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 46.
([58]) Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ L 83, 30.3.2010, p. 70).
([59]) See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraphs 46 to 49.

4.4. However, the Court further clarified that the status of legal tender calls only for acceptance in principle of banknotes denominated in euro as a means of payment, not for absolute acceptance. In particular, the legal tender status of euro banknotes does not prevent a Member State, in the exercise of its own powers, from introducing, on legitimate public interest grounds, a derogation from the general rule of acceptance of euro banknotes for the settlement of payment obligations, subject to compliance with certain conditions ([60]). While the Court's ruling in the particular case at hand concerned a measure introduced by a Member State, the ECB considers that the same reasoning applies to measures that the Union introduces in the exercise of its powers.

4.5. The conditions established by the Court for restrictions on the legal tender status of euro banknotes in particular require (a) that the measure does not have the object or effect of establishing legal rules governing the status of legal tender of euro banknotes; (b) that it does not lead, in law or in fact, to the abolition of those banknotes, in particular by calling into question the possibility, as a general rule, of discharging a payment obligation in cash; (c) that it has been adopted for reasons of public interest; (d) that the limitation on payments in cash which the legislation entails is appropriate for attaining the public interest objective pursued; and (e) that it does not go beyond what is necessary in order to achieve that objective ([61]).

4.6. The ECB notes that Article 59 of AMLR1 neither has the object nor the effect of establishing legal rules governing the status of legal tender of euro banknotes. The ECB furthermore welcomes, despite the fact that an analysis or impact assessment seems to be missing, that the threshold for the intended prohibition of consumer-to-business and business-to-business transactions is to be set sufficiently high to avoid a factual impact leading to the abolition of euro banknotes. The de facto abolition of euro banknotes may occur, inter alia, if thresholds were set so low as to threaten the economic viability of cash as a general and widely accepted means of payment and endanger the functioning of the cash cycle, ultimately also affecting transactions below the threshold. The ECB notes in this context that cash continues to play an important role in society, and that the ECB and the euro area NCBs remain committed to safeguarding its existence, widespread general availability and usability as a means of payment and store of value. Therefore, any such cash payment limitations and their objectives pursued should be carefully explained by Union and competent national authorities to the general public via suitable communication measures to maintain public confidence in euro cash as a valid, legitimate and trusted means of payment. It is recommendable that these communication measures also include considerations regarding less restrictive measures, like a notification obligation for transactions above a certain threshold, and why these were considered less effective.

4.7. The ability to pay in cash remains particularly important for those who, for various legitimate reasons, prefer to use cash rather than other payment instruments or do not have access to the banking system and electronic means of payments. Cash is generally also useful and appreciated as a payment instrument because it enables independent payments and ensures data protection and privacy. Furthermore, it is widely accepted, fast and facilitates control over the payer's spending. Moreover, it is currently the only payment instrument that allows citizens to settle a transaction in central bank money which is also settled instantly ([62]), without an intermediary and at no extra charge. Settling a payment transaction in cash neither requires the use of services provided by one or more third parties, nor the availability of technical equipment to effect the transfer of value from the payer to the payee. Cash therefore also has a back-up function in the event that electronic payment options are temporarily unavailable, for example due to failures in the electronic systems for payment authorisation and processing. Currently, all non-cash payments rely on services provided by commercial entities that levy fees for individual payment transactions. In this context the ECB notes that the Union's new digital finance package was adopted in 2020. This package includes the retail payment strategy, whose aim is to provide safe, fast and reliable home-grown pan-European payment solutions for EU citizens and businesses; and the digital finance strategy, whose aim is to make Europe's financial services more digital-friendly while maintaining very high standards on privacy and data protection in line with the Commission's data strategy. It is for the Union legislator to synchronise cash payment restrictions with the future availability of pan-European payment solutions warranting high levels of privacy and data protection in order to fulfil the condition that other fully equivalent lawful means for the settlement of monetary debts are available.

([60]) See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 67.

([61]) See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 78.

([62]) See paragraph 2.4 of Opinion CON/2017/8, paragraph 2.1 of Opinion CON/2019/41, paragraph 9.2.1 of Opinion CON/2020/13, paragraph 2.3 of Opinion CON/2020/21 and paragraph 7.2.1 of Opinion CON/2021/9.

4.8. Regarding the proportionality of a restriction of the legal tender status of euro banknotes, the Court requires not only that the measure is appropriate for attaining the public interest objective pursued, but also that it must not go beyond what is necessary in order to achieve that objective. The ECB provided additional guidance in its earlier opinions on whether national restrictions of the legal tender status of euro banknotes are proportionate. In particular, the ECB noted that the broader and more general the limitation, the stricter the interpretation of the requirement for the limitation to be proportionate to the objective pursued should be. When considering whether a limitation is proportionate, its adverse impact and whether alternative measures could be adopted that would fulfil the relevant objective while having a less adverse impact should always be considered ([63]).

4.9. In the present context, the ECB notes that the prohibition to be introduced by AMLR1 would be absolute. It does not follow the risk-based approach applied so far in the AML/CFT framework but impacts on all citizens of and travellers to the Union. The Court of Justice, however, highlighted that lawful alternative means of payment need to be readily accessible to everyone liable to pay ([64]), and therefore hinted at a need for exceptions if this were not the case. At this stage, the legislator has not, in particular, proposed the inclusion of exceptions in AMLR1 to cover cases in which alternative means of payment would not be available, for example due to power outages or other failures of the electronic payment systems. The ECB wishes to encourage the inclusion of such amendments in order to enhance the proportionality of the intended measure and to make provision for the exceptions needed in situations where no other means of payment are available to effect direct in-person payments. Such exceptions could be complemented by requiring that the traceability of a payment transaction carried out in euro banknotes should be ascertained in a comparable manner to alternative means of payment, such as by complying with clear documentation and/or reporting obligations.

4.10. AMLR1 requires the Commission to present, three years from its date of application, a report to the European Parliament and to the Council assessing the need for and proportionality of further lowering the limit for large cash payments ([65]). First, it seems useful to align the timelines of Articles 62 and 63 of AMLR1 and to provide for a first review only five years from the date of application of this Regulation to allow for a sufficiently long period when also the report on the application of the Regulation is available. In this context, the ECB underlines that for any planned review, the Commission should provide solid research and empirical evidence about the impact of cash payment limits and their effectiveness in achieving the objectives pursued. Moreover, such empirical evidence would not automatically lead to a need to further lower the cash limits. Therefore, the scope of the review required of the Commission should be revised so that both the need for and the proportionality of *adjusting* the cash limits are assessed, instead of this review being conducted solely from the perspective of lowering them further.

5. **Risk factors for customer due diligence**

5.1. AMLR1 sets out a non-exhaustive list of factors and types of evidence indicating potentially lower risk for the purpose of the customer due diligence procedures performed by obliged entities with respect to their clients ([66]). The list includes also 'public administrations and enterprises'. It is suggested that it should be clarified that the term 'public administrations' also covers public authorities and bodies and includes central banks. Directive 2005/60/EC ([67]), the third AML Directive, used the term 'public authorities'. Commission Directive 2006/70/EC ([68]), which implemented the third AML Directive, used the term 'public authorities and public bodies'. Directive (EU) 2015/849, the fourth AML Directive, used the term 'public administrations or enterprises' ([69]). In the ECB's experience, most of the ECB's counterparties understand these terms to include central banks. Nevertheless, for the avoidance of doubt, a clarification of the formulation is suggested.

([63]) See paragraph 2.7 of Opinion CON/2017/8.
([64]) See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 77.
([65]) See Article 63 (b) of AMLR1.
([66]) See Annex II of AMLR1.
([67]) See Article 11(2)(c) of Directive 2005/60/EC.
([68]) See Article 3 of Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis (OJ L 214, 4.8.2006, p. 29).
([69]) See Annex II, paragraph (1), point (b) of Directive (EU) 2015/849.

6. **Definition of crypto-assets**

6.1. AMLR1 replaces the term 'virtual currencies', which was introduced into Directive (EU) 2015/849 by Directive (EU) 2018/843 ([70]), with the term 'crypto-assets'. The ECB welcomes this change, as the term 'virtual currencies' could lead to misperceptions as to the nature of those types of assets, which are not currencies.

6.2. The ECB also understands that including the category of crypto-asset service providers within the scope of the proposed regulation is intended to align the Union AML/CFT framework with the amended Recommendations of the Financial Action Task Force (FATF). In this respect it is unclear, however, whether all types of virtual assets, as defined in the FATF Recommendations, are covered by the definition of crypto-assets used in AMLR1. The FATF Recommendations define a virtual asset as 'a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations' ([71]). AMLR1 takes over the definition of crypto-asset ([72]), which has been introduced in the proposed MiCA regulation and provides that "crypto-asset" means a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology' ([73]). The FATF definition is therefore technologically neutral, while the AMLR1 definition is limited to virtual assets based on distributed ledger technology or similar technology. It seems at least theoretically possible that virtual assets could also be based on another technology, in which case they would not seem to be covered by AMLR1.

6.3. Should a broader, technology-neutral definition be considered by the co-legislators to ensure compatibility of the Union framework with the FATF Recommendations, policy choices would have to be made also with regard to digital representations of value which might need to be exempted from the scope of AMLR1.

Where the ECB recommends that the proposed directive or 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.

Done at Frankfurt am Main, 16 February 2022.

The President of the ECB
Christine LAGARDE

([70]) See Article 1(2)(d) of Directive (EU) 2018/843.
([71]) See page 130 of the FATF Recommendations. Available on the FATF website at https://www.fatf-gafi.org/
([72]) See Article 2(13) of AMLR1.
([73]) See Article 2(3) of the proposed MiCA regulation.