



RESPONSE BY THE EUROPEAN BANKING AUTHORITY

TO THE EUROPEAN COMMISSION'S PUBLIC
CONSULTATION ON AN AML/CFT ACTION
PLAN AND THE ESTABLISHMENT OF AN EU-
LEVEL AML/CFT SUPERVISOR



EBA

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

Executive Summary

On 7 May 2020, the European Commission published its 'Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing'.¹ In this Action Plan, the Commission sets out its view of a future anti-money laundering and countering the financing of terrorism (AML/CFT) framework that promotes the integrity of the EU's financial system.

The European Banking Authority (EBA) leads, coordinates and monitors the EU financial sector's fight against money laundering and terrorist financing (ML/TF). The EBA supports the Commission's aim, set out in the Commission's Action Plan, to ensure the consistent and effective application of AML/CFT rules throughout the EU. Through this response, the EBA provides technical input to inform the Commission's approach to implementing its Action Plan.

In the EBA's view, a comprehensive assessment of the current EU AML/CFT framework is necessary to ensure that the EU and its component parts are equipped to tackle ML/TF more effectively and efficiently.

Specifically, the EBA recommends that the Commission:

- a. harmonise the EU's legal framework to reduce the risk of gaps created by divergent approaches to incorporating EU AML/CFT law into national law;
- b. combine an ongoing role for national AML/CFT authorities with an EU-level AML/CFT supervisor in a hub and spoke approach that builds on national AML/CFT authorities' expertise and resources, and complement this with effective EU-level oversight for a consistent approach with comparable outcomes; and

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

- c. leverage on the EU's existing AML/CFT infrastructure, including the EBA's policy, data and information technology resources as well as the EBA's European and international supervisory cooperation networks.

The EBA will provide further technical input through its response to the Commission's call for advice, in which the Commission asks the EBA to 'defin[e] the scope of application and the enacting terms of a Regulation to be adopted in the field of preventing anti-money laundering and terrorist financing'.

The EBA stands ready to support the Commission in its implementation of this Action Plan.

1. Introduction

1. On 7 May 2020, the Commission published an ‘Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing’.² In this Action Plan, the Commission sets out its view of a future AML/CFT framework that promotes the integrity of the EU’s financial system.
2. The Commission’s Action Plan builds on six pillars:
 - (1) effective implementation of existing rules;
 - (2) a single EU rulebook;
 - (3) EU-level supervision;
 - (4) a support and cooperation mechanism for financial intelligence units;
 - (5) better use of information to enforce criminal law;
 - (6) a stronger EU in the world.
3. Pillars 1, 2, 3 and 6 relate directly to the EBA’s work to lead, coordinate and monitor the EU financial sector’s fight against money laundering and terrorist financing.
4. On 3 March 2020, the Commission issued a ‘call for advice to the EBA for defining the scope of application and the enacting terms of a Regulation to be adopted in the field of preventing anti-money laundering and terrorist financing’. The EBA will respond to this call for advice by 10 September 2020.
5. Through its response to the Commission’s call for advice, the EBA will provide technical advice on Pillar 2 of the Action Plan. The EBA’s technical advice on Pillars 1, 3 and 6 of the Action Plan is set out in this response. In this response, the EBA considers the advantages and disadvantages of the various options set out in the Commission’s Action Plan from an efficiency, practicality and effectiveness point of view.
6. In preparing this response, the EBA consulted with its Board of Supervisors and its Standing Committee on Anti-Money Laundering and Countering Terrorist Financing (AMLSC). The AMLSC brings together high-level representatives of 57 competent authorities that are responsible for the AML/CFT supervision of credit and financial institutions in the EU.
7. The EBA’s Board of Supervisors and the AMLSC have approved the publication of this response.

² Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing, C(2020) 2800 final

2. Pillar 1: ensuring the effective implementation of the existing EU AML/CFT framework

8. Since its inception, the EBA has been working to foster the consistent and effective implementation, by national competent authorities (NCAs) and financial institutions, of the EU's AML/CFT legislation. Together with the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), the EBA has worked to identify ML/TF risks to the EU's financial system, led the development of a common approach to tackling those ML/TF risks, and sought to foster consistent outcomes through training and facilitating cooperation between competent authorities.
9. In 2019, the European legislature consolidated the AML/CFT mandate of ESMA, EIOPA and the EBA within the EBA. It gave the EBA a clear statutory objective to contribute to preventing the use of the financial system for the purposes of ML/TF. It also gave the EBA a legal duty to lead, coordinate and monitor the AML/CFT efforts of all EU financial institutions and competent authorities.³
10. The law implementing these changes came into effect on 1 January 2020. Building on the foundations it laid in previous years, the EBA is making full use of its powers to do the following:
 - a. Continue to lead the development of EU AML/CFT policy and support its effective implementation to foster an effective, risk-based approach to AML/CFT. As part of this, the EBA carries out assessments of competent authorities' approaches to AML/CFT supervision, and provides targeted feedback to individual competent authorities on the steps they need to take to improve.

The EBA published the findings from its first round of AML/CFT implementation reviews in February 2020.⁴ The EBA is now working to address the challenges it identified through training and targeted updates to its key AML/CFT regulatory instruments, including its guidelines on risk-based AML/CFT supervision.⁵

- b. Coordinate the financial sector's AML/CFT efforts across the EU and beyond by fostering effective cooperation and information exchange between competent authorities and other stakeholders, including financial intelligence units (FIUs).

³ EBA (2020): Factsheet on Anti-Money Laundering and Countering the Financing of Terrorism

⁴ EBA (2020): Report on competent authorities' approaches to the AML/CFT supervision on banks [EBA/Rep/2020/06]

⁵ ESAs (2016): Joint guidelines on the characteristics of a risk-based approach to AML/CFT supervision, and the steps to be taken when conducting supervision on a risk-sensitive basis (the Risk-based Supervision Guidelines) [ESAs 2016 72]

Since 2019, the EBA has been working to support the effective implementation of the European Supervisory Authorities (ESAs)' joint guidelines on cooperation and information exchange for the purpose of the AMLD.⁶ These guidelines lay down the rules that govern the establishment and operation of AML/CFT colleges that bring together EU AML/CFT supervisors of the same financial institution as well as other relevant parties, including prudential supervisors, AML/CFT supervisors from third countries and FIUs. This is to ensure that supervisors have access to comprehensive information about the financial institution and use this to inform their ML/TF risk assessment and supervisory approach.

AML/CFT colleges are unique to the EU. They were conceived by the EBA within the framework of its AML/CFT cooperation guidelines and have the potential to transform the way the supervision of financial institutions that operate on a cross-border basis is ensured. They have already been identified as good practice by international AML/CFT standard-setters, including the Basel Committee on Banking Supervision and the Financial Action Task Force (FATF).

- c. Monitor the implementation of EU AML/CFT requirements to identify vulnerabilities in competent authorities' approaches to AML/CFT supervision and to take steps to mitigate them before ML/TF risks materialise. The EBA has been given a number of new powers to support this objective, including the power to ask competent authorities to take action where it has indications that a financial institution's approach materially breaches EU law, and the power to assess the extent to which competent authorities are equipped effectively to tackle strategic EU ML/TF risks that the EBA has identified.

The EBA's duty to monitor the implementation of AML/CFT requirements will be further supported by a new, central EU AML/CFT database. This database will contain information on AML/CFT weaknesses in individual financial institutions and measures taken by competent authorities to correct those shortcomings. The EBA will use aggregate information from this database to identify, assess and disseminate its findings on Union-wide ML/TF risks and define supervisory priorities as appropriate. The EBA is drawing on its long-standing data, information technology and process infrastructure and expertise in developing this database, while making sure it is sufficiently adaptable to meet the requirements of a future EU-level supervisory architecture and thus contribute to a smooth and speedy start of operations of the future single EU AML supervisor and ensure its ongoing effectiveness and efficiency.

11. The EBA considers that its new mandate and new powers will help it achieve more consistent, and consistently effective, outcomes, but notes that the nature of the current EU AML/CFT

⁶ ESAs (2019): Joint guidelines on cooperation and information exchange for the purpose of Directive (EU) 2015/849 between competent authorities supervising credit and financial institutions (the AML/CFT Colleges Guidelines) [JC 2019 81]

framework limits the degree of convergence it can achieve through its work. This is because EU AML/CFT law is largely set out in a minimum harmonisation directive, which relies on transposition into national law to take effect. Divergent approaches by Member States to transposing the directive's requirements have created gaps in the EU's AML/CFT defences, which the EBA has continuously highlighted.⁷

12. In the EBA's view, harmonisation of the legal framework by means of directly applicable provisions in Union AML/CFT law is necessary in at least some areas. This is to ensure that the same rules apply to all financial institutions and competent authorities, providing greater legal certainty and a consistent approach, while avoiding regulatory arbitrage by eliminating the need for national transposition.
13. The EBA will set out how this can be achieved in its response to Pillar 2 and the Commission's call for advice, which is due to be published on 10 September 2020.

3. Pillar 6: strengthening the international dimension of the AML/CFT framework

14. The Commission in its Action Plan envisages a consolidation of EU representation at international AML/CFT standard-setting bodies to strengthen the EU's influence internationally. It also proposes to continue to use its powers to identify third countries that, due to deficiencies in their AML/CFT framework, pose a strategic threat to the EU ('high-risk third countries').
15. The EBA considers that, to be effective, the Commission's efforts need to be complemented by concrete steps at the levels of the EBA, competent authorities and financial institutions. These steps should be designed to foster a common approach to identifying and tackling ML/TF risks to the single market, and internationally. In the EBA's view, the Commission should consider the following steps an integral part of its future international AML/CFT strategy:

- a. Systematically including AML/CFT as part of a coordinated EU approach to assessing third-country confidentiality and professional secrecy provisions, and assessing the need for broader equivalence provisions to be included in AML/CFT Union law.

A coordinated approach to assessing the equivalence of confidentiality provisions facilitates international cooperation by expediting the negotiation of cooperation arrangements with third-country authorities and facilitates the participation of equivalent third-country authorities in EU AML/CFT colleges as warranted.

⁷ See for example ESAs (2019): Joint Opinion on the risks of ML/TF affecting the EU's financial sector [JC 2019 59]

In this context, the EBA notes that its founding regulation already recognises the EBA's role in the assessment and monitoring of equivalence of third countries and third countries' competent authorities. In line with its new AML/CFT responsibilities, the EBA now assesses confidentiality provisions in all third-country legislation that is relevant to the EBA's remit, and can assist the Commission in all equivalence competencies that the Commission may acquire.

- b. Providing a central point of contact to promote engagement with third-country authorities.

Article 33 of the EBA's founding regulation has recently been amended to enhance the EBA's role in respect of cooperation with third country authorities and administrations. The EBA now acts as a central point of contact for third country authorities and international organisations, and has powers to negotiate and conclude administrative arrangements with 'regulatory, supervisory and, where applicable, resolution authorities, international organisations and third-country administrations', to the extent that these are not based in 'high risk third countries'. Such agreements facilitate close cooperation between EU competent authorities and non-EU authorities, and enable the EBA to exchange information necessary to efficiently monitor the regulatory and supervisory developments in third countries.

The EBA considers that having a central EU point of contact for engagement with third-country authorities and international organisations, in a way that is similar to the EBA's current role, will be important from a pragmatic point of view, given the number of obliged entities and their AML/CFT supervisors in the EU. This is because, in the EBA's experience, a central EU point of contact facilitates the negotiations of common templates for cooperation agreements that in turn promote a common and consistent approach by EU competent authorities to tackling cross-border issues. It will also bolster the Commission's ambition to visibly strengthen the EU's AML/CFT role internationally.

- c. Adopting specific measures financial institutions should take to identify and mitigate the ML/TF risks associated with 'high risk third countries' and countries otherwise associated with higher ML/TF risk.

In the EBA's view, the Commission's efforts to tackle ML/TF internationally have to be complemented by a robust and consistent approach to AML/CFT at the level of financial institutions. In this context, the EBA points to provisions in, inter alia, its Risk Factors Guidelines,⁸ which set out how financial institutions should identify and tackle

⁸ ESAs (2017): Joint guidelines on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the ML/TF risk associated with individual business relationships and

ML/TF risks associated with countries and geographical areas, by providing guidance on determining the effectiveness of a jurisdiction's AML/CFT regime and on the measures financial institutions should take when entering into or maintaining a business relationship involving a high-risk third country.

In line with its advice in relation to Pillars 1 and 2 of the Action Plan, the EBA considers that the common approach set out in the Risk Factors guidelines will be conducive to even more effective and consistent outcomes once the legal framework is harmonised.

4. Pillar 3: EU-level AML/CFT supervision

16. In its May 2020 AML/CFT Action Plan, the Commission proposes that a single EU-level AML/CFT supervisor be set up. The Commission considers that the introduction of an EU-level AML/CFT supervisor will be conducive to:

- a. the harmonised application and effective enforcement of the EU's AML/CFT framework, rather than a fragmented approach;
- b. better information sharing among competent authorities; and
- c. better supervision of financial institutions that operate on a cross-border basis.

17. The EBA considers that the creation of an EU-level AML/CFT supervisor alone is unlikely to achieve the Commission's objectives. This is because in the EBA's experience, and in line with its advice on Pillars 1 and 2 of the Action Plan, the absence of a harmonised set of AML/CFT rules that directly apply to all financial institutions and their supervisors wherever they operate in the single market means that a consistent approach to enforcing the EU's AML/CFT framework cannot be ensured.

18. The EBA notes that significant delays in incorporating the AMLD's cooperation provisions into national law mean that, to this day, some NCAs are unable to exchange information or work with their domestic or EU counterparts. As a result, these competent authorities cannot participate in AML/CFT colleges, or sign the Multilateral Agreement on the Practical Modalities for Exchange of Information pursuant to Article 57a(2) of the AMLD between the European Central Bank and NCAs that are responsible for the AML/CFT supervision of

occasional transactions (the Risk Factors Guidelines) [JC 2017 37]. The EBA consulted on an updated version of these guidelines between February and July 2020.

financial institutions, which the EBA facilitated in 2019.⁹ It also hampers the EBA's efforts to embed a consistent approach to the AML/CFT supervision of financial institutions that operate on a cross-border basis.

19. Greater harmonisation of the EU's legal framework, and the translation of at least some key AML/CFT requirements into directly applicable Union law, is therefore a necessary prerequisite to support the effective functioning of a future EU-level AML/CFT supervisor.
20. In addition to a harmonised legal framework, the EBA considers that an EU-level AML/CFT supervisor needs to build on:
 - a. a clearly defined relationship with NCAs;
 - b. a scope that is defined pragmatically; and
 - c. adequate powers and resources to carry out its functions.

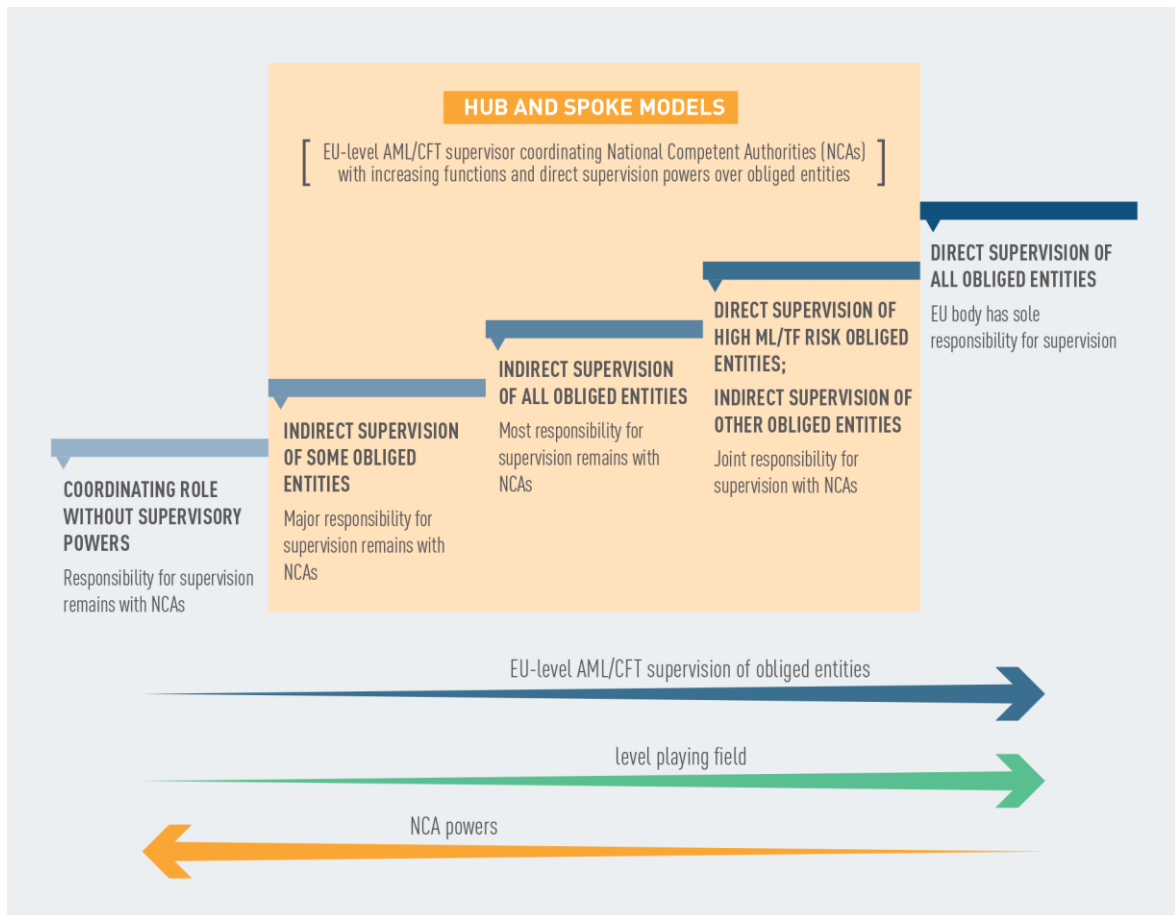
4.1 The EU-level supervisor: links with national competent authorities

21. The Commission, in its Action Plan, proposes to put in place an 'integrated AML/CFT supervisory system'. It does not commit to a particular model; instead, it sets out different ways for structuring the relationship between an EU-level AML/CFT supervisor and its national counterparts.
22. The EBA notes that there are a number of EU-level mechanisms that perform supervisory or coordinating functions, including ESMA and the Single Supervisory Mechanism (SSM) for the financial sector, and the European Public Prosecutor's Office (EPPO) in the area of prosecution. The EBA's assessment of their roles, responsibilities and functioning suggests that, in the EBA's view, the EU-level AML/CFT supervisor is likely to be most efficient and effective if it features a combination of:
 - a. powers to oversee and direct NCAs; and
 - b. powers to intervene in the supervision of obliged entities, either as a matter of course, through direct or indirect supervision, or ad hoc on a needs basis.
23. The weight each of these powers has under different models affects the degree of autonomy NCAs will retain in organising and carrying out their supervisory functions, and the extent to

⁹ Multilateral Agreement on the Practical Modalities for Exchange of Information pursuant to Article 57a(2) of the AMLD (<https://eba.europa.eu/sites/default/documents/files/documents/10180/2545547/e83dd6ee-78f7-46a1-befb-3e91cedeb51d/Agreement%20between%20NCAs%20and%20the%20ECB%20on%20exchange%20of%20information%20on%20AML.pdf>)

which the EU-level AML/CFT supervisor can enforce a level playing field. Consequently, possible outcomes range from a simple coordination mechanism, whereby a central EU agency coordinates competent authorities' work, without, however, taking on supervisory powers, to a standalone single EU AML/CFT supervisor that is solely responsible for the AML/CFT supervision of all obliged entities in the EU.

Figure 1: the Hub and Spoke approach



24. The EBA recommends that the architecture of the EU-level supervisor remain within the limits of a hub and spoke approach (figure 1). In a hub and spoke approach, an EU-level AML/CFT supervisor combines coordination and oversight of the work of competent authorities with powers to supervise at least some obliged entities.
25. In the EBA's view, a comparison with a simple coordination mechanism and standalone AML/CFT supervisor model highlights several advantages that are associated with a hub and spoke approach:
- The hub and spoke approach is likely to be the most effective, as it builds on the respective strengths of both an approach that leverages on competent authorities' expertise and knowledge of local ML/TF risks and the make-up of their sector, and a

supranational approach in which an EU-level supervisor leads, coordinates and monitors competent authorities' efforts to ensure consistent and effective supervisory outcomes.

Specifically, under a hub and spoke approach, an EU-level supervisor can draw on existing relationships between national AML/CFT competent authorities and prudential supervisors, and between national AML/CFT competent authorities and other public bodies at the national level, including FIUs, prosecutors, government agencies and tax authorities, and complement these with measures to ensure a coordinated approach across borders. The EBA notes that recent AML/CFT cases have highlighted that, in the absence of clear provisions in Union law, there is a need for a strong, EU-level lead to bring about greater cooperation between stakeholders at the national level and across EU and international borders in the pursuit of a common goal.

- b. A hub and spoke approach offers the flexibility required to organise the AML/CFT supervision of a large and heterogeneous population of obliged entities across different sectors. As set out in Section 4.2, and unlike the sectors currently overseen at the level of the EU, obliged entities under the AMLD span a diverse range and large number of businesses and professions that are associated with varying levels of ML/TF risk. In the EBA's view, this requires an approach that can be adapted to different supervisory needs and that can accommodate indirect supervision of some sectors with a more hands-on approach to EU-level AML/CFT supervision of other sectors, or individual obliged entities. In this context, the EBA notes that some competent authorities combine direct AML/CFT supervision of financial institutions with the supervision of AML/CFT supervisors of other sectors.
 - c. A hub and spoke approach is also likely to be more efficient: in contrast to a standalone single EU AML/CFT supervisor, which would require significant levels of staffing and resources to carry out its functions, a hub and spoke model can be set up to draw on existing resources at the national level and complement these with a comparatively small number of core EU supervisory staff. The EBA considers that it is therefore the most cost-effective option.
26. The EBA considers that, to avoid conflicts of interests that can arise when an oversight body is governed by representatives of the entities it is tasked to oversee, the EU-level supervisor's governance structure will need to include safeguards to support independent decision-making and accountability processes, in particular towards the EU's co-legislators.
27. Equipping the new EU-level supervisor with a sufficiently independent governance structure may result in the setting up of a new EU agency but can also be accommodated within existing structures in addition to their existing roles and organisational set-up: examples drawn from the EU level, for example ESMA in the context of the European Market

Infrastructure Regulation, suggest that a dedicated, subsidiary governance structure that supports the effective discharge of specific supervisory tasks can be accommodated within an existing governance structure that remains in place for existing responsibilities.

4.2 Scope of supervision of the EU-level supervisor

28. In January 2020, the AML/CFT mandate of all three ESAs was consolidated. The EBA's scope was extended to include all credit and financial institutions that are obliged entities under the AMLD, including investment firms, bureaux de change, investment funds, life insurance providers and life insurance intermediaries, and their AML/CFT supervisors. The extension of the EBA's scope means that the EBA is now solely responsible for leading, coordinating and monitoring competent authorities' and more than 160 000 financial institutions' fight against ML/TF across the single market. Consolidating the ESAs' AML/CFT mandate within the EBA makes sense, because the same fundamental principles of the risk-based approach to AML/CFT apply to all obliged entities and supervisors.
29. The scope of the AMLD is wider than just financial institutions. In line with international AML/CFT standards, the AMLD includes within its scope more than 2 million designated non-financial businesses and professions (DNFBPs), including, but not limited to, accountants, lawyers, tax advisors, trust and company service providers, estate agents, auditors, casinos and high-value goods dealers. The term DNFBPs thus encompasses a wide range of sectors and, within these sectors, a diverse range of participants, business models, professional cultures and compliance practices. Nevertheless, as is the case with financial institutions, the fundamental principles of AML/CFT compliance and supervision set out in the ESAs' Risk-Based Supervision Guidelines remain the same for all obliged entities, whether or not they are part of the financial sector. In short, the same rules apply to DNFBPs as to financial institutions.
30. The EBA notes that the FATF has consistently pointed to significant shortcomings in DNFBP compliance and the way in which the AML/CFT supervision of DNFBPs is organised. This is in spite of the often significant risk associated with DNFBPs' businesses.
31. The EBA further notes that DNFBP supervision at EU level is highly fragmented and not always consistent. While some Member State have opted for consolidated AML/CFT supervision of those sectors, for example by mandating their FIUs or, in some cases, the financial sector AML/CFT supervisor with powers to oversee compliance of some or all DNFBPs with their AML/CFT obligations, other Member States have instead opted for a regime whereby many DNFBPs are self-regulated. This has led to uneven supervisory outcomes, even within the same Member State.
32. Finally, the EBA notes that the way DNFBP professions and businesses are organised at the national level differs, at times significantly. What is more, many of these businesses and

professions are local in outlook, small in size and with limited or no international exposure. This makes centralised EU-level supervision of these entities difficult and, potentially, not cost-effective.

33. The Commission acknowledges some of these complexities in its Action Plan. The Commission set out the option of devising the scope of the AML/CFT supervisor in an incremental way, starting with a narrow scope that focuses on some or all financial institutions and allowing the EU-level AML/CFT supervisor, as it consolidates and proves its effectiveness, to expand to cover all (financial and non-financial) sectors subject to AML/CFT obligations.
34. In view of the above, the EBA takes the view that the inclusion of all DNFBPs, or categories of DNFBPs that are associated with high ML/TF risk, within the scope of the EU-level AML/CFT supervisor should be carefully assessed from a cost-benefit point of view, taking due account of staffing needs, as the inclusion of DNFBPs within the EU-level Supervisor's remit from the outset could delay significantly the set-up of any functioning mechanism. Should the Commission conclude that DNFBPs should be included within the EU-level AML/CFT supervisor's scope, the EBA recommends that the Commission:
- a. start with the financial sector and gradually extend the scope as the supervisor matures and its capacity increases; and
 - b. take advantage of the flexibility afforded by the hub and spoke model to consider the most appropriate way to oversee DNFBPs' compliance with their AML/CFT obligations.

4.3. Powers of the EU-level supervisor

35. The Commission, in its Action Plan, underlines that the EU-level AML/CFT supervisor should be entrusted with clear powers to oversee NCAs and instruct them to carry out different AML/CFT-related tasks. It also envisages that the EU-level AML/CFT supervisor will have powers to oversee some or all obliged entities, either directly or, through its work with NCAs, indirectly.
36. The EBA agrees that, to be effective, the EU-level supervisor needs powers that are clearly defined and sufficient to enable the EU-level AML/CFT supervisor to carry out its functions.
37. In the EBA's view, taking into account different supervisory models described in Section 4.1, and having due regard to the FATF's guidance on effective supervision and enforcement¹⁰ as well as the EBA's findings from peer reviews, AML/CFT implementation reviews and breach of

¹⁰ FATF (2015): Effective supervision and enforcement by AML/CFT supervisors of the financial sector and law enforcement (<https://www.fatf-gafi.org/media/fatf/documents/reports/RBA-Effective-supervision-and-enforcement.pdf>)

Union law investigations, the EU-level AML/CFT supervisor should be entrusted with at least the following powers, although the detail of these powers will vary depending on the responsibilities it will be assigned:

- a. With regard to NCAs:
 - i. Powers to ensure the convergence of AML/CFT supervisory processes, by taking a leading, coordinating and monitoring role in preventing and countering ML/TF. As part of this, the EU-level AML/CFT supervisor should review and assess the quality and effectiveness of competent authorities' approaches to the AML/CFT supervision of relevant obliged entities, and be able to issue binding instructions to competent authorities where this is necessary to preserve the integrity and effective functioning of the EU's single market.
 - ii. Powers to take over direct supervision of individual obliged entities if adequate AML/CFT supervision of an obliged entity by an NCA cannot be ensured. The process for taking over direct supervision of such entities should be set out in Union law and be limited until such time as the EU-level AML/CFT supervisor is satisfied that adequate AML/CFT supervision can be ensured again by the competent authority concerned.

In the EBA's view, this process could be similar to that in place at the European Central Bank (ECB) and the SSM. While the responsibility for the supervision of less significant institutions (LSIs) remains with competent authorities at the national level, the ECB has a number of tools, including the possibility of issuing legal instruments such as guidelines, regulations or general instructions to NCAs, and joining or leading on-site inspections of LSIs. In exceptional cases, where necessary, to ensure a consistent application of high supervisory standards, the ECB may take over the direct supervision of LSIs, at the request of the competent authority or on its own initiative. Article 6(5)(b) of the SSM Regulation sets out the legal criteria to take over the supervision of LSIs.

- b. With regard to obliged entities:
 - i. Powers to carry out ML/TF risk assessments of obliged entities on the basis of objective criteria, and to obtain competent authorities' ML/TF risk assessments of obliged entities.

The EBA notes that, in line with the EBA's advice in Section 4.2, to be fully efficient and to maintain ongoing and up-to-date monitoring of risks associated with obliged entities, the EU-level AML/CFT supervisor needs

to have in place a robust framework for cooperation with FIUs and other relevant public authorities across the EU.

- ii. As applicable, powers to monitor, and take the measures necessary to ensure, compliance of an obliged entity with its AML/CFT obligations, including powers to carry out inspections, to request and have access to all relevant information, and to intervene in the activity of the obliged entity when this is necessary to ensure compliance.

The EBA notes that, irrespective of the extent to which the EU-level AML/CFT supervisor will have direct or indirect supervisory powers and duties, many of these powers require further harmonisation at EU level to be effective. This is particularly the case in the area of sanctions and administrative measures that can be imposed for breaches of an institution's AML/CFT obligations. Similarly, the factors to be taken into account in assessing the level of risks of obliged entities would need to be fully harmonised across the EU to be considered in a consistent manner. The EBA will provide its views on these matters in its response to the Commission's call for advice related to the single rulebook (Pillar 2).

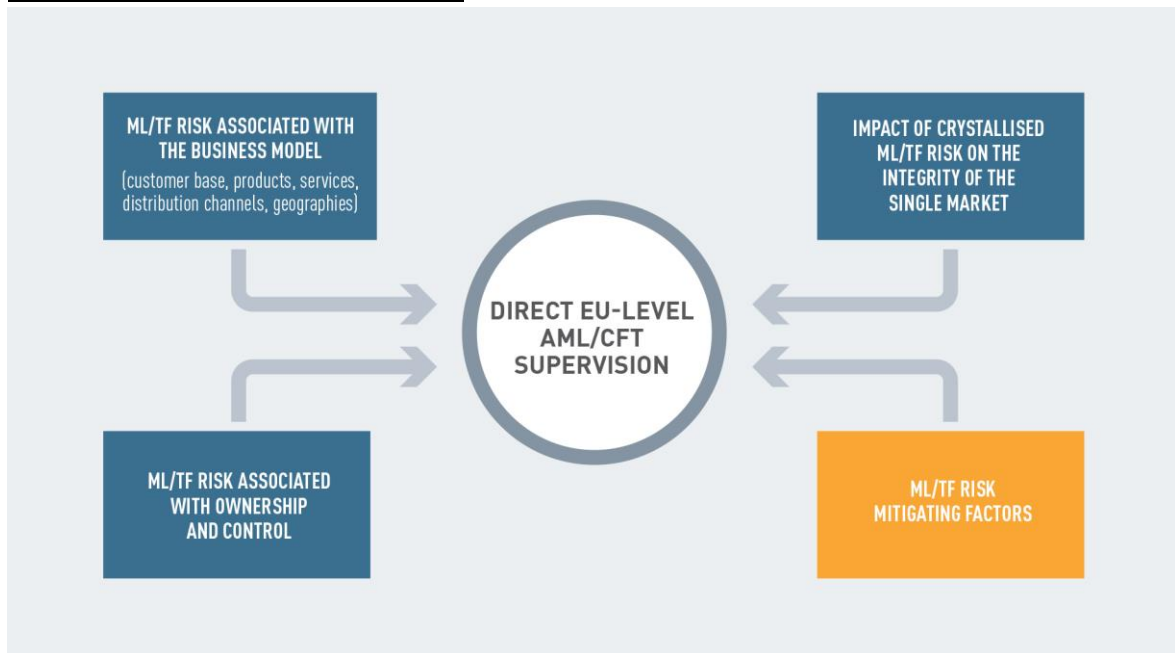
- iii. As applicable, and to the extent that the EU-level AML/CFT supervisor will be granted direct supervision powers over at least some high-risk obliged entities, powers to identify obliged entities that are associated with higher ML/TF risks and should fall under the direct supervision of the EU-level supervisor, both at the outset and on an ongoing basis, in line with the risk-based approach. The process for identifying obliged entities that will be directly supervised by the EU-level AML/CFT supervisor should be set out in law.

The EBA considers that, when determining which entities should always fall under the EU-level AML/CFT supervisor's direct supervision, the EU-level AML/CFT supervisor should have regard to the factors set out in the ESAs' Risk-Based Supervision Guidelines (figure 2) and in particular:

- a) the level of inherent ML/TF risk associated with the obliged entity's business, and in particular its customer base, distribution channels, products and services, and geographical exposure, including the extent to which the obliged entity engages in cross-border business;
- b) ML/TF risks associated with its beneficial ownership and governance structure; and

- c) the impact these ML/TF risks would have on the single market if they materialised, bearing in mind that ML/TF risks are not necessarily related to an obliged entity's size.

Figure 2: Using the ESAs' Risk-based supervision guidelines as a basis to determine which obliged entities should be subject to direct EU-level AML/CFT supervision



In addition, direct supervision on an exceptional basis could be assumed should the quality of the obliged entity's AML/CFT systems and controls, or the extent to which adequate AML/CFT supervision can be assured at the national level, give rise to concern.

The EBA considers that having regard to these factors will ensure adequate centralised AML/CFT supervisory coverage of at least those entities that, as a result of their business model, operations and international exposure, present a significant cross-border ML/TF risk. In the EBA's view, the lessons learnt from past AML/CFT cases that are set out in, for example, the Commission's Post Mortem Review¹¹ suggest that such risks would be mitigated most effectively at the level of the Union.

- iv. Should direct supervision be exercised by the EU-level AML/CFT supervisor on selected obliged entities, the EBA recommends that, in line with the hub and spoke model explained above, the EU-level AML/CFT supervisor should have central decision-making powers but closely involve competent authorities in the related supervisory activities, as leveraging on their national expertise would be key to ensuring adequate

¹¹ European Commission (COM(2019) 373): Report from the Commission to the European Parliament and the Council on the assessment of recent alleged money laundering cases involving EU credit institutions.

supervision. With regard to cross-border issues, powers to ensure cooperation and information exchange between competent authorities, to mediate and settle disagreements, and to engage with third parties on EU competent authorities' behalf, although, in the EBA's view, these powers would have to be clearly defined.

38. Together, the EBA considers that these powers would be conducive to setting a common supervisory strategy and supervisory priorities across the EU, and ensure that the EU-level AML/CTF supervisor, together with national AML/CFT supervisors, effectively implements a consistent, comprehensive and risk-sensitive supervisory framework that prevents the abuse of the single market for ML/TF purposes.

Conclusion

39. The EBA supports the Commission's aim to ensure the consistent and effective application of AML/CFT rules throughout the EU. In the EBA's view, a comprehensive assessment of the current EU AML/CFT framework is needed so that the EU and its component parts are equipped to tackle ML/TF effectively, efficiently and pragmatically.
40. To ensure that the future EU AML/CFT framework is **effective**, the EBA recommends that the Commission:
- a. Harmonise the EU's legal framework to reduce the risk of gaps created by divergent approaches to transposing EU AML/CFT law into national law. In the EBA's view, a more harmonised legal framework that can be enforced consistently across the single market is also a key prerequisite for the effective functioning of an EU-level AML/CFT supervisor. The EBA will provide further information on this point in its response to the Commission's call for advice on 10 September 2020.
 - b. Combine an ongoing role for NCAs with an EU-level AML/CFT supervisor in a hub and spoke approach, in which responsibilities for supervisors at the national and European levels are clearly assigned. This new architecture should build on competent authorities' supervisory expertise and on their long-standing knowledge of obliged institutions within their jurisdictions.
41. To ensure that the future EU AML/CFT framework is **efficient**, the EBA recommends that the Commission, with regard to the EU-level AML/CFT supervisor:
- a. Leverage existing EU-level data, policy and administrative infrastructure to support the swift setting up of operations. The EBA is already working to ensure that any new AML/CFT resources or processes it puts in place can be adapted to be shared with, or made available to, the new supervisor to avoid duplication.

- b. Build on the EBA's existing networks, coordination channels and cooperation mechanisms that bring together AML/CFT supervisors and prudential supervisors as well as payment supervisors and deposit guarantee schemes, at least initially, to ensure that current information flows and knowledge sharing at EU level and between competent authorities in the EU and with third countries are not interrupted unnecessarily.
42. Finally, the EBA calls on the Commission to take a **pragmatic** approach, having due regard to:
- a. The risk that bringing all obliged entities in scope from the outset will delay the operation of the EU-level AML/CFT supervisor, as setting up a new regime for sectors currently outside the scope of any central EU agency will take time. The EBA recommends that, should the Commission conclude that DNFBPs should be within the EU-level AML/CFT supervisor's scope, the Commission consider a gradual approach, starting with financial sector entities, and gradually expand the scope of the EU-level AML/CFT supervisor as the EU-level AML/CFT supervisor matures and its capacity increases.
 - b. The costs and benefits of setting up a new agency, compared to the costs and benefits associated with equipping an existing EU agency with adequate resources, powers and decision-making structures to take on additional tasks. This is particularly relevant in a context in which the EU economies have been heavily affected by the current COVID-19 pandemic.
43. The EBA stands ready to provide technical input and support the Commission in the implementation of its Action Plan, and the move towards a more comprehensive and effective EU AML/CFT system.



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