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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	7 December 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	Technical working document on the Opinion 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) 1093/2010 establishing a European Supervisory Authority (European Banking Authority) and related legal acts (CON/2018/55)

Delegations will find attached the above mentioned document.

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Technical working document

produced in connection with ECB Opinion CON/2018/55[1]

Drafting proposals

Text proposed by the Commission	**Amendments proposed by the ECB[2]**
Amendment 1 Point (6a) of Article 1 of the amended proposal (Article 9a(1) of Regulation (EU) No 1093/2010)	
‘1. The Authority shall take a leading role in promoting integrity, transparency and security in the financial system by means of adopting measures to prevent and combat money laundering and terrorist financing, including by: (a) collecting information from competent authorities relating to weaknesses identified in the processes and procedures, governance arrangements, fit and proper assessments, business models and activities of financial sector operators to prevent money-laundering and terrorist financing as well as measures taken by competent authorities. Competent authorities shall provide all such information to the Authority in addition to any obligations under Article 35. The Authority shall coordinate closely with Financial Intelligence Units; (b) developing common standards for combating money-laundering and terrorist financing in the financial sector and promoting their consistent implementation; (c) monitoring market developments and assessing	‘1. The Authority shall take a leading role in promoting integrity, transparency and security in the financial system by means of adopting measures to prevent **the use of the financial system for** ~~and combat~~ money laundering and terrorist financing, including by: (a) collecting information from competent authorities relating to **material** weaknesses identified in the processes and procedures, governance arrangements, fit and proper assessments, business models and activities of financial sector operators ~~to prevent~~ **that may increase the risk that the financial system might be used for** money-laundering ~~and~~ **or** terrorist financing, as well as measures taken by competent authorities **to address such weaknesses and any such risk identified in authorisation procedures, qualifying holding assessments or other relevant supervisory procedures**. The competent authority **which originally collected or compiled the relevant information** shall provide all such information to the Authority in addition to any **other** obligations under Article 35. **The Authority shall issue guidelines addressed to the competent**

[1] This technical working document is produced in English only and communicated to the consulting Union institution(s) after adoption of the opinion. It is also published in the Legal framework section of the ECB's website alongside the opinion itself.

[2] Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

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Text proposed by the Commission	Amendments proposed by the ECB[2]
vulnerabilities to money laundering and terrorist financing in the financial sector.’	**authorities in accordance with Article 16 to specify the material weaknesses referred to in this point, the criteria to identify the relevant information to be provided, the frequency of its transmission, and any other elements or processes necessary for the efficient and effective functioning of this procedure, including by establishing templates for provision of information by competent authorities. The Authority shall utilise to the extent possible information that it receives through its participation in colleges of supervisors or other channels for information sharing to minimise the need for dedicated reporting by competent authorities.** The Authority shall coordinate closely with Financial Intelligence Units; (b) developing common standards for **the prevention of the use of the financial system for** ~~combating~~ money-laundering and terrorist financing in the financial sector and promoting their consistent implementation; (c) monitoring market developments and assessing vulnerabilities **of the financial system** to money laundering and terrorist financing in the financial sector.’

<u>Explanation</u>

Referring to the prevention of the use of the financial system for the purpose of ML and TF seems to be more appropriate than referring to the prevention and combating of ML and TF. The former approach seems to better correspond to the wording of Directive (EU) 2015/849 of the European Parliament and of the Council[3], and the legal basis of the amended proposal.

The original wording, which refers to collecting information from competent authorities ‘relating to

3 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).

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<table>
<tr><th>Text proposed by the Commission</th><th>Amendments proposed by the ECB[2]</th></tr>
<tr><td colspan="2">weaknesses identified in the processes and procedures, governance arrangements, fit and proper assessments, business models and activities of financial sector operators to prevent money-laundering and terrorist financing as well as measures taken by competent authorities' is not fully clear. The proposed language does not contain any qualification of the kind of weaknesses that should be reported. It is suggested that the regulation should refer to 'material' weaknesses that may increase the risk that the financial system might be used for money-laundering or terrorist financing. It has also been suggested that the European Banking Authority (EBA) should develop guidelines for the competent authorities as to what constitutes such material weaknesses, to further specify any additional elements or processes that might be necessary for the efficient functioning of the information exchange procedure and to establish templates to facilitate reporting. Further, the suggested reformulation aims to avoid multiple reporting of the same information by several authorities, by clarifying that only the competent authority which originally collected or compiled the information should report it to the EBA.

It is suggested to establish a requirement that the EBA should use, to the maximum extent possible, any already existing information exchange structures in which it participates. Such use would limit the additional burden on competent authorities that this new reporting to the EBA would place on them.

In addition, ML/TF risks relevant for the EBA's new role can be identified in other supervisory procedures, such as in granting authorisations or assessments of acquisitions of qualifying holdings in financial market operators. It is suggested to extend the information collected by the EBA to include this type of information.

Furthermore, it is not clear what the EBA should be coordinating with the Financial Intelligence Units (FIUs) under the last sentence of the newly proposed Article 9a(1)(a) in connection with the provision of information to the EBA. It is also not clear whether or how this coordination relates to the collection of information from prudential supervisors, including the ECB, which is regulated in that draft provision. The amended proposal should be further clarified to this end. If the coordination with FIUs relates to the collection of information, the amended proposal should specify the rules that would apply to the FIUs' access to the information that the competent authorities provide to the EBA. If the coordination does not relate to the EBA's collection of information, the requirement for coordination between the EBA and the FIUs should be moved to another provision.

See paragraphs 2.1.1., 2.1.3., 2.1.4, 2.1.5. and 2.1.6. of this Opinion.</td></tr>
<tr><td colspan="2">Amendment 2
Point (6a) of Article 1 of the amended proposal
(Article 9a(2) of Regulation (EU) No 1093/2010)</td></tr>
<tr><td>'2. The Authority shall establish and keep up to date a central database of information collected pursuant to point (a) in paragraph 1. The Authority shall ensure that information is analysed and made</td><td>'2. The Authority shall establish and keep up to date a central database of information collected pursuant to point (a) in paragraph 1. The Authority shall ensure that information is analysed and made</td></tr>
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<tr><td>available to competent authorities on a need-to-know and confidential basis.’</td><td>available to competent authorities on a need-to-know and confidential basis. This procedure shall not replace the direct exchange of information among competent authorities.’</td></tr>
<tr><td colspan="2"><u>Explanation</u>
The proposed amendment clarifies that reporting to the EBA and the subsequent dissemination of the information by the EBA does not replace the direct exchange of information among competent authorities. Introducing the EBA as an intermediary in all information exchanges would put a lot of pressure on the EBA’s resources, while not necessarily improving the efficiency of the information exchange. See paragraph 2.1.2. of this Opinion.</td></tr>
<tr><td colspan="2">Amendment 3
New point (187) of Article 9bis of the amended proposal
(second subparagraph of Article 57a(2) of Directive (EU) 2015/849)</td></tr>
<tr><td>No text</td><td>‘(187) Article 57a is amended as follows:
The second subparagraph is replaced by the following:

“By 10 January 2019, the competent authorities supervising credit and financial institutions in accordance with this Directive and the ECB, acting pursuant to Article 27(2) of Regulation (EU) No 1024/2013 and point (g) of the first subparagraph of Article 56 of Directive 2013/36/EU of the European Parliament and of the Council (*), shall conclude, with the support of the European Supervisory Authorities, an agreement on the practical modalities for exchange of information. The EBA shall have access to any information exchanged under this agreement.”

(*)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</td></tr>
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<tr><td></td><td>2006/49/EC (OJ L 176, 27.6.2013, p. 338).’</td></tr>
<tr><td colspan="2"><u>Explanation</u>
A significant part of the information that will be exchanged under the agreement to be concluded between the ECB and the anti-money laundering and countering finance of terrorism (AML/CFT) supervisors in accordance with Article 57a(2) of Directive (EU) 2015/849 will likely overlap with the information which the EBA shall receive under the newly proposed Article 9a(1)(a) of Regulation (EU) 1093/2010. Direct access to the information exchanged under this agreement therefore seems warranted in order to limit the additional burden that the new reporting to the EBA will place on the competent authorities. See paragraph 2.1.4. of this Opinion.</td></tr>
<tr><td colspan="2">Amendment 4
Point (6a) of Article 1 of the amended proposal
(Article 9a(3) of Regulation (EU) No 1093/2010)</td></tr>
<tr><td>‘3. The Authority shall promote convergence of supervisory processes referred to in Directive (EU) 2015/849, including by conducting periodic reviews, in accordance with Article 30.

Where such a review reveals serious shortcomings in the identification, assessment or addressing of risks of money-laundering and terrorist financing and the competent authority does not take action to address the follow-up measures set out in the report referred to in Article 30(3), the Authority shall inform the European Parliament, the Council and the Commission.’</td><td>‘3. The Authority shall promote the convergence of supervisory processes referred to in Directive (EU) 2015/849 among the competent authorities referred to in point (iia) of Article 4(2), including by conducting periodic reviews, in accordance with Article 30.

Where such a review reveals serious shortcomings in the identification, assessment or addressing of risks of money-laundering and terrorist financing and the competent authority referred to in point (iia) of Article 4(2) does not take action to address the follow-up measures set out in the report referred to in Article 30(3), the Authority shall inform the European Parliament, the Council and the Commission.’</td></tr>
<tr><td colspan="2"><u>Explanation</u>
The ECB understands that the supervisory processes referred to in the proposed new Article 9a(3) of Regulation (EU) No 1093/2010 only concern the AML/CFT supervisors, and not prudential supervisors. A corresponding clarification of the text is therefore suggested. See paragraph 2.2.1. of this Opinion.</td></tr>
<tr><td colspan="2">Amendment 5</td></tr>
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Text proposed by the Commission	Amendments proposed by the ECB[2]
Point (6a) of Article 1 of the amended proposal (Article 9a(5) of Regulation (EU) No 1093/2010)	
'5. In material cases of money-laundering or terrorist financing affecting cross border matters with third countries, the Authority shall have a leading role in facilitating cooperation between competent authorities in the Union and the relevant authorities in third countries.'	'5. In ~~material~~ cases involving **material breaches of requirements put in place to prevent the use of the financial system for** money-laundering or terrorist financing affecting cross border matters with third countries, the Authority ~~shall have a leading role in facilitating~~ **shall support, where relevant,** cooperation between competent authorities in the Union and the relevant authorities in third countries. **The Authority shall issue guidelines addressed to the competent authorities in accordance with Article 16 to specify the material breaches referred to in this paragraph and any other elements or processes necessary for the efficient functioning of this procedure.**'
<u>*Explanation*</u> *Coordination by the EBA should not replace the direct contacts that competent authorities may need to have with the relevant authorities in third countries. Where the direct cooperation of those authorities can work well, it does not seem efficient to add an additional level of coordination through the EBA. Introducing the EBA as an additional authority where there is direct cooperation between a competent authority with a relevant authority of a third country could also be problematic from a legal point of view if the competent authority and the relevant authority of a third country cooperate with each other on the basis of a memorandum of understanding, to which the EBA is not a party. The amended proposal should therefore grant the EBA the power to assist competent authorities in cooperation with relevant authorities in third countries where relevant, but should not require the EBA to automatically assume a leading role in facilitating such cooperation.* *In addition the concept of 'material breaches' should be clarified, so that it is clear in which situations the requirement for EBA support would be triggered. To this end, it seems necessary to specify the criteria that the EBA or national competent authorities should follow in identifying such cases. Additionally, the procedures for interaction between the EBA and national competent authorities in the identification, reporting and treatment of these cases should be set out.* *See paragraph 2.3. of this Opinion.*	
Amendment 6	

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<tr><td colspan="2">New point (58) of Article 1 of the amended proposal
New letter (i) in Article 81(2) of Regulation (EU) No 1093/2010</td></tr>
<tr><td>No text</td><td>‘(58) new point (i) in Article 81(2) is added:
“2. The report referred to in paragraph 1 shall also examine whether:
(a) it is appropriate to continue separate supervision of banking, insurance, occupational pensions, securities and financial markets;
(b) it is appropriate to undertake prudential supervision and supervise the conduct of business separately or by the same supervisor;
(c) it is appropriate to simplify and reinforce the architecture of the ESFS in order to increase the coherence between the macro and the micro levels and between the ESAs;
(d) the evolution of the ESFS is consistent with that of the global evolution;
(e) there is sufficient diversity and excellence within the ESFS;
(f) accountability and transparency in relation to publication requirements are adequate;
(g) the resources of the Authority are adequate to carry out its responsibilities;
(h) it is appropriate for the seat of the Authority to be maintained or to move the ESAs to a single seat to enhance better coordination between them~~.~~**;**
(i) the information collection and dissemination procedure under Article 9a(1)(a) and 9a(2) is proportionate, appropriate and efficient.’</td></tr>
<tr><td colspan="2"><u>Explanation</u>
The data collection and dissemination procedure newly proposed in Article 9a(1)(a) and Article 9a(2) of Regulation (EU) 1093/2010 should be reviewed on the basis of practical experience, with a view to ensuring its efficiency and proportionality. The most appropriate vehicle for such an assessment seems to be the regular three-year review performed by the Commission under Article 81 of Regulation (EU) 1093/2010. See paragraph 2.1.7. of this Opinion.</td></tr>
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