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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	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 document the above mentioned document.

EUROPEAN CENTRAL BANK

EUROSYSTEM

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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) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) and related legal acts

(CON/2018/55)

Introduction and legal basis

On 11 October and 14 November 2018 the European Central Bank (ECB) received requests from the European Parliament and from the Council of the European Union, respectively, for an opinion 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); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) No 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market; and Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money-laundering or terrorist financing[1] (hereinafter the 'amended proposal').

On 23 November 2017 the Council of the European Union and the European Parliament consulted the ECB on the original legislative 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[2] and received an opinion adopted by the ECB on 11 April 2018[3]. The amended proposal contains new elements for which the European Parliament has re-consulted the ECB.

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1 COM(2018) 646 final.

2 COM(2017) 536 final.

3 Opinion CON/2018/19 of the European Central Bank of 11 April 2018 on a 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 255, 20.7.2018, p. 2). All ECB Opinions are published on the ECB website at www.ecb.europa.eu.

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 contains provisions affecting the contribution of the European System of Central Banks (ESCB) to the smooth conduct of policies relating to the prudential supervision of credit institutions and the stability of the financial system, as referred to in Article 127(5) of the Treaty, and the specific tasks conferred on the ECB concerning the prudential supervision of credit institutions in accordance with Article 127(6) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. General observations

1.1 The amended proposal intends to reinforce the mandate of the European Banking Authority (EBA) in the prevention of the use of the financial system for the purpose of money laundering (ML) and terrorism financing (TF), in order to strengthen confidence in the Banking and Capital Market Unions. The ECB fully supports this goal. The amended proposal will contribute to better identification of ML/TF risks at Union level, and to enhancing and harmonising supervisory practices across the Union.

1.2 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 (anti-money laundering and countering the financing of terrorism (AML/CFT) supervision) has not been conferred on the ECB. However, the outcomes of the AML/CFT supervision are important to consider for the discharge of the ECB's tasks concerning the prudential supervision of credit institutions under Article 127(6) of the Treaty and the Council Regulation (EU) No 1024/2013[4]. 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 (including regarding the process of granting authorisations to credit institutions) and fit and proper 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 lead to significant administrative or criminal sanctions imposed on supervised entities or their staff, and can thus pose a risk for the viability of supervised entities. In certain cases, serious breaches of AML/CFT requirements can directly trigger a need for a credit institution's authorisation to be withdrawn. It is therefore of utmost importance that the ECB, as well as other prudential supervisors, receive from AML/CFT supervisors timely and reliable information about ML/TF risks and breaches of AML/CFT requirements by supervised entities.

4 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).

1.3 The Union legal framework for the prevention of the use of the financial system for the purposes of ML or TF has been updated in recent years by several legislative acts[5] on which the ECB has provided its opinion. The ECB strongly supports a Union regime which ensures that Member States and Union resident institutions have effective tools in the fight against ML and TF, in particular against any misuse of the financial system by money launderers and financiers of terrorism and their accomplices[6].

1.4 Since the ECB has already opined, in Opinion CON/2018/19, on the original legislative proposal, the ECB will focus only on the new elements contained in the amended proposal.

2. Specific observations

2.1 *Information to be collected by the EBA*

2.1.1 Under the amended proposal, the EBA would have the task of 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 ML and TF as well as measures taken by competent authorities[7]. The precise information that needs to be reported to the EBA is not clear. For example, it is not clear how a weakness in a business model to prevent ML and TF should be understood. Furthermore, the amended proposal does not contain any qualification of the weaknesses that should be reported, which implies that even very minor weaknesses would need to be reported. It is suggested that the regulation should: (a) clarify that this new reporting requirement captures any material weaknesses that increase the risk that the financial system could be used for ML or TF; and (b) require the EBA to develop guidance for competent authorities as to what constitutes such material weaknesses. Further, the regulation should specify any additional elements or processes that might be necessary for the efficient functioning of the information exchange procedure. In addition, ML/TF risks relevant for the EBA's new role can be identified in supervisory procedures other than those already listed in the amended proposal, 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.

2.1.2 The amended proposal should further clarify that reporting to the EBA and the subsequent dissemination of 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

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5 See 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); 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); Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006 (OJ L 141, 5.6.2015, p. 1).

6 See ECB Opinion CON/2013/32.

7 Proposed new Article 9a(1)(a) of Regulation (EU) No 1093/2010.

would put a lot of pressure on the EBA's resources, while not necessarily improving the efficiency of the information exchange.

2.1.3 Where information or documents about material weaknesses are shared between several competent authorities, multiple reporting of the same material weakness by all competent authorities should be avoided. The amended proposal should thus stipulate that only the competent authority that originally collected the information or produced the document should report to the EBA.

2.1.4 To limit the additional burden on competent authorities that this new reporting to the EBA will cause, competent authorities should only be required to report information that they have not shared with the EBA through other channels. For example, where the EBA participates in colleges of supervisors and receives information about a relevant material weakness through those colleges, competent authorities should not be required to report it again to the EBA. The EBA should thus utilise already existing information channels to the extent possible. In this respect, the agreement on the practical modalities for exchange of information that is to be concluded by 10 January 2019 under Article 57a(2) of Directive (EU) 2015/849 of the European Parliament and of the Council[8] between the ECB and the AML/CFT supervisors of all the Member States will be a significant channel for the exchange of information about relevant breaches of AML/CFT and prudential requirements. The EBA should be granted direct access to the information that is exchanged under this agreement. Direct access would be the most efficient way to ensure timely sharing of the relevant information with the EBA. Such a set-up would allow the EBA to receive information without additional delays, while eliminating the need for the competent authorities that are parties to this agreement to report the same information to the EBA.

2.1.5 For situations where dedicated reports to the EBA will be necessary, it is suggested that the EBA should also develop guidelines, including templates to facilitate reporting.

2.1.6 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 that 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 from prudential supervisors, including the ECB, the amended proposal should specify the rules regarding the FIUs' access to the information that the competent authorities provide to the EBA. If the coordination with FIUs 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.

2.1.7 Based on practical experience with the newly proposed data collection and dissemination procedure described above, it seems appropriate to review this procedure within the regular report prepared by the Commission under Article 81 of Regulation (EU) No 1093/2010. Such a review would verify the efficiency of the procedure and assess whether any changes should be made.

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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).

2.2 *Promoting convergence of supervisory processes and risk assessments on competent authorities*

2.2.1 Under the amended proposal, the EBA would have the task of promoting the convergence of supervisory processes referred to in the Directive (EU) 2015/849, including by conducting periodic reviews[9]. The ECB understands that these supervisory processes only concern AML/CFT supervisors and not prudential supervisors. This fact should be explicitly clarified in the amended proposal.

2.2.2 Under the amended proposal, the EBA would have the task of performing risk assessments on the competent authorities that would be mainly, but not exclusively, focused on AML/CFT supervisors[10]. It is not clear how these risk assessments would differ from the abovementioned periodic reviews. Both the periodic reviews and the risk assessments seem to cover the identification and addressing of ML/TF risks but, while the draft provision governing periodic reviews refers to all ML/TF risks in general, the draft provision governing risk assessments refers only to the 'most important emerging risks'. Thus, the risk assessments seem to be already incorporated into the periodic reviews. The amended proposal should therefore be rephrased to more clearly distinguish the risk assessments from the periodic reviews. At the same time, the notion of the 'most important emerging risks' should be further clarified.

2.3 *Facilitating cooperation with relevant authorities in third countries*

Under the amended proposal, the EBA would have a leading role in facilitating cooperation between competent authorities in the Union and the relevant authorities in third countries in material cases of ML or TF having a cross-border dimension involving third countries[11]. The ECB welcomes any support from the EBA that helps competent authorities interact more efficiently with relevant authorities in third countries. The ECB believes, however, that the EBA's coordination should not replace any direct contacts that competent authorities may need to have with 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 and 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 in 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 the competent authorities in cooperating with relevant authorities in third countries where relevant. However, the amended proposal does not need to require the EBA to automatically assume a leading role in facilitating such cooperation. In addition the concept of 'material breaches' should be further specified, 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. It is

9 Proposed new Article 9a(3) of Regulation (EU) No 1093/2010.

10 Proposed new Article 9a(4) of Regulation (EU) No 1093/2010.

11 Proposed new Article 9a(5) of Regulation (EU) No 1093/2010.

therefore suggested that the EBA should issue guidelines specifying all the necessary elements and processes necessary for the efficient functioning of this procedure.

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

Done at Frankfurt am Main, 7 December 2018.

The President of the ECB

Mario DRAGHI