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Joint ESAs Report

on the withdrawal of authorisation for serious breaches of AML/CFT rules

Contents

Abbreviations

AIFMD	Directive 2011/61/EU on Alternative Investment Fund Managers
AMLD	Directive (EU) 2015/849on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing
AML/CFT	Anti-money laundering/ combating the financing of terrorism
BRRD	Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms
CRD	Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
CJ	Court of Justice of the European Union
CRR	Regulation EU No 575/2013 on capital requirements
DGSD	Directive 2014/49/EU on deposit guarantee scheme
EBA	European Banking Authority
ECB	European Central Bank
EIOPA	European Insurance and Occupational Pensions Authority
ESMA	European Securities and Market Authority
FIU	Financial intelligence unit
FOLTF	Failing or likely to fail
GC	General Court of the European Union
IDD	Directive (EU) 2016/97 on insurance distribution
MiFID II	Directive 2014/65/EU on markets in financial instruments
ML/TF	Money laundering/terrorist financing
NCA	National competent authority
RA	Resolution authority
Solvency II	Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance
UCITSD	Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities

Executive Summary

Recent cases have drawn attention to the significant impact that serious breaches of AML/CFT rules may have on the sound and prudent management of supervised financial entities and their ability to continue meeting the conditions for authorisation (or registration)[1]. Based on findings collected for the purposes of this Report, in the past 10 years competent authorities have withdrawn the authorisation (or registration) from financial entities for serious breaches of AML/CFT rules in 26 cases, alone or in combination with other grounds.

In the wake of such events the EU Council Action Plan on AML of 2018 ("AML Council Action Plan") has requested the ESAs to clarify some aspects of the interaction between serious breaches of AML/CFT rules. This Report examines the four action points articulated in Objective 5 of the AML Council Action Plan and illustrates the findings supervisory practices and national legislation. Depending on the specific action point, it identifies areas where the framework could be improved in relation to some sectoral acts or areas where additional analysis is needed (eg. interaction between resolution and AML/CFT regime). In respect of the notion of serious breach of AML/CFT the elements for a uniform interpretation are put forward.

There is consensus among competent authorities that the withdrawal of authorisation (or registration as the case may be) for serious breach of AML/CFT rules is a last resort measure and that has to respect proportionality requirements. The degree of discretion supporting the decision to withdraw the authorisation (or registration) is thoroughly articulated in respect of the criteria of legitimacy, necessity, reasonableness and proportionality of the measure adopted and having regard that it is a last resort measure.

Only the CRD sets out an express ground to withdraw the authorisation for serious breaches of AML/CFT rules. Based on the findings of the survey, the competent authorities across the financial sector may rely on non-specific grounds based on EU or national law. However, for sake of legal certainty, this Report supports the introduction in the sectoral acts which are not yet covered, of a specific ground empowering competent authorities to withdraw the authorisation (or registration) solely on the ground of serious breaches of AML/CFT rules.

The interaction between prudential and AML/CFT regulation should be improved as at the moment of granting authorisation (or registration). It is therefore opportune that all sectoral acts be amended to provide that - as one of the conditions for granting authorisation - competent authorities expressly consider the applicant's exposure to ML/TF risk, and be satisfied that the envisaged arrangements, processes and mechanisms enable sound and effective ML/TF risk management and compliance with AML/CFT requirements.

[1] Considering the scope of the current Report, covering those obliged entities under the AMLD that are regulated or supervised entities under the jurisdiction of competent authorities within one of the ESAs' remit, both authorisation and registration as the case may be have been considered. It is to be noted that under the AIFMD, whilst authorisation is generally required to take up activities as an AIFM (Article 6, and withdrawal under Article 11), the specific cases of registration are expressly envisaged by Article 3(3).

With regard to the notion of serious breaches of AML/CFT rules, the Report clarifies the criteria of a serious breach of AML/CFT rules that shall be considered and assessed by the AML/CFT supervisor, pointing out that the AML/CFT supervisor needs to take into consideration the context of the breach and therefore that it remains a case-by-case assessment. It is underscored that there is no systematic correlation between a serious breach of AML/CFT rules and withdrawal of authorisation (or registration) which is a last resort measure. Rather, the assessment of the serious breach made by the AML/CFT supervisor will be used by the prudential supervisor for the adoption of the appropriate measures within the supervisory toolkit, in accordance with its discretionary assessment.

In respect of the interaction between serious breach of AML/CFT rules, the preservation of critical functions and the involvement of the resolution authorities, attention is firstly directed at the interaction between withdrawal of authorisation and FOLTF assessment. The importance of cooperation and exchange of information between the competent prudential supervisor and the RA is underscored, as well as the need for the RA to be consulted and to object to the withdrawal of the authorisation to the extent that it affects its prerogatives.

As to the interaction between the resolution regime and the AML/CFT framework, the focus has been placed on aspects that may give rise to operational and legal issues and that need further considerations, such as the identification of the competent authority, the timing and methodology to separate the legitimate from the illicit business, the coordination with the competent prudential supervisor when the bridge bank tool is used having regard to authorisation requirements; the supervisory and resolution remedies that may be used in the case of conversion of liabilities held by persons involved in ML/TF activities etc.

It is acknowledged that the discussion undertaken in this context has been of the essence to bringing such issues to the RAs' attention and to running a preliminary mapping of operational and legislative criticalities. Such analysis will be useful also for other cases of crisis which are not triggered by solvency or liquidity issues but rather by breaches of qualitative rules, or that depend on exogenous rather than on idiosyncratic factors, like for instance sanction-related adverse effects. However, at this stage, it is premature to draw conclusions, or to lay down specific criteria or guidance, prior to an overall examination from an operational and legal perspective. The EBA stands ready to provide additional specific advice to the EU institutions as appropriate.

In respect of the interaction with the DGS framework, the Report supports and reiterates the recommendations laid down in the EBA Opinion on Deposit guarantee scheme payouts.

Lastly, concerning the measures available to prudential authorities to address prudential concerns stemming from money laundering / terrorist financing risks and breaches of AML/CFT rules, an overview of how the assessment of ML/TF risks is embedded in prudential regulation and supervision within the CRD/CRR framework, which has been recently updated and revised to embed AML/CFT requirements is carried out. Such an overview may be a useful blueprint for other sectoral acts, in whole or in part considering the specificities of each framework. In particular, the EBA Guidelines on the cooperation between competent authorities, AML/CFT supervisors provide

a useful example of how cooperation should be improved also in the context of the withdrawal of authorisation. Considering the ongoing work in each relevant sector, it is concluded to defer to such reviews to better envisage which, if any, aspects may be appropriate to embed in each framework.

Background

Objective 5 of the EU Council Action Plan on AML[2] required the EBA, ESMA, EIOPA, the prudential supervisors and the AML supervisors to "clarify aspects related to the withdrawal of authorisation". It is articulated in the following four points:

a. "Clarify the degree of discretion of the prudential supervisors and the criteria for the withdrawal of the authorisation once a serious breach of AML/CFT rules has been ascertained, while taking into account the different practices and legal frameworks in Member States;

b. Ensure a uniform interpretation of the language referring to serious breaches of AML/CFT rules in the Capital Requirements Directive;

c. Ensure a consistent consideration of the consequences of licence withdrawal, particularly in terms of the need to preserve critical functions in the bank, the involvement of resolution authorities, depositor protection and the possibility to suspend payment of deposits by the deposit guarantee scheme;

d. Identify measures available to prudential authorities to address prudential concerns stemming from money laundering / terrorist financing risks and breaches of AML/CFT rules".

Objective 5 envisages that the mandate be carried out by the ESAs via cooperation between prudential and AML supervisors. In light of the EBA's lead role in the coordination and monitoring of the EU financial sector's AML/CFT efforts, the project has been conducted under the EBA's steering and coordination.

Scope of the project

In respect of the scope, and with a view to reflecting the Council's broad mandate, the project covers all financial entities falling within the definition of "obliged entities" under Article 2 AMLD and, at the same time, within the competence of the EBA, ESMA or EIOPA.

However, the project also takes into account that Objective 5 of the Action Plan itself draws specific attention to institutions covered by the CRD. For this reason, this Report examines and illustrates areas common to all entities within the project's perimeter - such as the notion of serious breaches of AML/CFT rules under the AMLD, the statistical information on withdrawal of authorisation (or registration) for serious breaches of AML/CFT rules, the application of discretion and proportionality to the withdrawal decision, the available legal bases under EU and national law to withdraw the authorisation (or registration) for serious breaches of AML/CFT rules and the

[2] https://www.consilium.europa.eu/en/press/press-releases/2018/12/04/money-laundering-council-adopts-conclusions-on-an-action-plan-for-enhanced-monitoring/

distributions of tasks and cooperation between competent prudential authorities and AML/CFT supervisors, and other aspects which are of concern to CRD/CRR and BRRD institutions only (crisis management, resolution and DGS pay out).

Development of the project

The development of the mandate has been articulated in different steps and has entailed the involvement of several competent prudential and conduct authorities (as designated under the CRD, PSD2, MiFID, AIFMD, UCITSD, Solvency II and IDD), of resolution authorities and of AML/CFT supervisors.

To fulfil action point a) of Objective 5, relating to the "degree of discretion of the prudential supervisors and the criteria for the withdrawal of the authorisation once a serious breach of AML/CFT rules has been ascertained" and taking into account the legal frameworks in place in the various Member States, a survey on the available legal basis(es) and the actual practice on withdrawal of authorisation due to serious breaches of AML/CFT rules has been conducted with the relevant competent authorities (prudential supervisors as opposed to AML/CFT supervisors) within the EBA, EIOPA and ESMA's remit.

Specifically, the surveys have been distributed to the competent authorities under the CRD, PSD2-EMD2, MiFID, AIFMD, UCITSD, Solvency II and IDD. To allow comparability of results, surveys distributed to the various competent authorities within scope contained the same questions (slightly adapted to the specific applicable EU legislation).

Considering the exclusive relevance of crisis management, resolution and DGS aspects to institutions under the CRD framework, the survey distributed to the competent authorities under the CRD contained questions relating to these aspects.

In addition, the survey distributed to CRD competent authorities contained also questions on:

a) "providers engaged in exchange services between virtual currencies and fiat currencies" and "custodian wallet providers";

b) undertakings other than a credit institution, which carry out one or more of the activities listed in points (2) to (12), (14) and (15) of Annex I CRD;

c) undertakings other than a credit institution, which carry out activities of currency exchange offices (bureaux de change).

The surveys ran from 1 December 2020 to 22 January 2021. The results of the surveys are summarised in Annexes I-V.

In light of the few recent cases of withdrawal of authorisation due to serious breaches of AML/CFT rules, responses to the survey should be considered on a best effort basis and mostly based on policy rather than on actual experience.

The elaboration of a common understanding of the notion of 'serious breach of AML/CFT rules' has moved from a survey on the meaning of serious AML breaches with impact on prudential supervision addressed to AML/CFT supervisors responsible for the AML/CFT supervision of the entities within scope. The notion of serious breach illustrated in this Report also benefits from further exchange of views with the relevant authorities.

1. Degree of discretion and legal bases to withdraw the authorisation for serious breaches of AML/CFT rules

1.1 Cases of withdrawal of authorisation for serious breaches of AML/CFT rules across the financial sector in the EU

1. In order to fulfil action point a) of Objective 5 of the AML Council Action Plan a survey has been conducted with the competent authorities in charge of the supervision of the entities within scope of the current project, ie those obliged entities identified in Article 2 AMLD subject to the supervision of the competent authorities within the remit of the ESAs.

2. Based on the findings from the survey, there have been a total of 25 cases of withdrawal authorisation or registration in the last ten years, distributed as follows:

    i) seventeen from credit institutions, payment institutions, investment firms, management or investment companies and insurance undertakings;

    ii) four from other entities such as virtual assets providers, financial intermediaries, bureaux de change;

    iii) two orders to terminate the activities of intra-EU branches due to serious breaches of AML/CFT;

    iv) two cases of orders to cease activities carried out via agents or via freedom to provide services under PSD2;

The findings of the surveys show that in a large number of cases the withdrawal decision was based on the serious breach of AML/CFT rules in combination with other legal grounds, such as the breach of prudential requirements, failure to continue meeting the condition for authorisation, or breaches of other laws and regulations.

Table 1: Distribution of cases across the financial sector and MSs.

No of cases	Type of entity	MSs
6	Credit institutions	DK, ECB (EE, LV, MT)
8	Payment and e-money institutions	EE, LT, LV, NO, PT
1	Investment firm	LV
2	Management company or investment company	IT, NL
0	Insurance undertaking	
1	Virtual asset provider	MT
1	Financial intermediary	PT
2	Bureaux de change	FR PT
No of cases	**Type of intra-EU branch**	**MSs**
2	Credit institution (CRD)	EE, IT
2	Activities carried out via agents or via freedom to provide services under PSD2	DK, NO
0	Branches under PSD2, MiFID, AIFMD, UCITSD, Solvency II	
No of cases	**Type of third country branch**	**MSs**
0	Under CRD, MiFID, AIFMD, UCITSD, Solvency II	

1.2 Supervisory assessment underpinning withdrawal of authorisation: discretion and proportionality

3. Based on the findings of the survey, all competent authorities share the view that the withdrawal of authorisation (or registration) is a last resort measure. Such a discretionary and

proportionality nature is also underscored by the use of "may withdraw" in the relevant legislative provisions.

4. There is a general consensus among competent authorities across the financial sector that where – as a result of their discretionary and proportionate assessment – the circumstances to withdraw the authorisation (or registration) for serious breaches of AML/CFT rules are met, the competent authority has to revoke the authorisation (or registration).

5. It is to be noted that in one jurisdiction (ES), the prudential supervisor is not competent to withdraw the authorisation for serious breaches of AML/CFT rules from financial institutions other than credit institutions. For those undertakings the competence to withdraw the authorisation as a consequence of serious breaches of AML/CFT national law lies with the Council of Ministers, following an administrative sanctioning procedure performed by the AML/CFT enforcement authority[3]. Another competent authority (HU) reported that the withdrawal of authorisation from credit institutions by the competent authority is subject to the prior consent of the MoF. The EBA takes note of this internal organisation of the respective competences.

6. The survey enquired about the competent authorities' views on the four most relevant circumstances – among a predetermined list – that support a decision to withdraw the authorisation (or registration) for serious breaches of AML/CFT rules. Responses underscore the relevance placed by competent authorities on proportionality in the decision to withdraw the authorisation (or registration), its nature as a last resort remedy and the importance to strike an appropriate balance of the various circumstances and interests at stake. It was also observed that the decision to withdraw the authorisation (or registration) depends on the facts and circumstances of the individual case and that it is usually supported by a combination of factors, circumstances and considerations.

7. The four criteria – within a predetermined list – receiving the largest support by competent authorities across the financial sector are: i) the absence of supervisory measures to effectively remedy the serious breach of AML/CFT rules; ii) the consideration of the consequences of withdrawal of the authorisation (or registration) on financial stability; iii) the absence of private measures to remedy the serious breach of AML/CFT rules; and iv) the destruction in value of the firm and/or the market. Other listed criteria in the survey were v) the breach of right of the property of shareholders and creditors; and vi) the consequences of the withdrawal for the real economy.

8. The appropriateness of the approach which considers the withdrawal of the authorisation (or registration) as a '*last resort*' measure subject to *discretionary* and *proportionate* assessment

[3] The Commission for the Prevention of Money Laundering and Monetary Offences (Article 44 Spanish AML Law). In particular, the withdrawal of the authorisation is one of the possible sanctions to be imposed in the case of serious breach of the AML/CFT national legislation.

has been recently confirmed by the General Court[4] in two cases relating to the withdrawal of authorisation from credit institutions due to serious breaches of AML/CFT rules. The GC took the view that in both cases at hand that the assessment by the ECB (the competent authority) assessment of the proportionality of the adoption of the measure of withdrawal of authorisation was comprehensive. Such an assessment was structured around the test of the withdrawal decision against the following parameters: i) *legitimacy* – ie pursuance of a legitimate objective –; ii) *appropriateness* – in light of the situation to be remedied –; iii) *necessity* – absence of effective but less onerous alternative measures to remedy the existing breaches –; and iv) *reasonableness* – weighing of public interest to restore legality against the private interest to avoid the withdrawal.

1.3 Legal bases to withdraw the authorisation for serious breaches of AML/CFT rules

9. All relevant sectoral acts (CRD, PSD2, MiFID, AIFMD, UCITSD, Solvency II, IDD) limit the withdrawal of authorisation to the grounds set out in the relevant provision(s) or specified in national law. As a general remark, except for those grounds relating to the breach of quantitative prudential requirements specific to each sectoral regime, provisions on withdrawal of authorisation set out in the EU sectoral acts are similar to each other.

10. Significantly, however, the CRD is the only sectoral act providing for an express ground of withdrawal of the authorisation for serious breaches of AML/CFT rules. This is set out by the combined reading of Articles 18(f) and 67(1), letter (o)[5] CRD, providing that the authorisation may be withdrawn where the institution is found liable for serious breaches of the AMLD. In actual practice, two CAs reported to have used this legal basis to withdraw the authorisation due to serious breaches of AML/CFT rules, also in combination with other legal bases.

11. Absent a specific ground linked to serious breaches of AML/CFT rules in the other sectoral acts, competent authorities have indicated the grounds that could provide a sound support to the decision to withdraw the authorisation (or registration as the case may be).

12. As a general consideration, based on the findings of the survey, all competent authorities have indicated the existence of suitable legal grounds in EU or national law (eg. breach of domestic law implementing the AMLD) alone or in combination with other grounds, empowering them to withdraw the authorisation (or registration) in the case of serious breaches of AML/CFT rules. However, there are variations both between competent authorities under a specific sectoral act, and across the financial sector, as to the application of some legal grounds to withdraw the authorisation for serious breaches of AML/CFT rules.

[4] GC, 6 October 2021, T-351/18 and 584/18, *Ukrselhosprom and Versobank v. ECB (hereinafter 'Versobank')*, ECLI:EU:T:2021:669 in particular, paragraphs 276 ; 314—322; an appeal has been lodged against this ruling, Versobank v ECB, Case C-803/21 P; and GC, 2 February 2022, T-27/19, *Pilatus Bank and Pilatus Holding Ltd v. ECB*, ECLI:EU:T:2022:46.

[5] Article 18(f): "commits one of the breaches referred to in Article 67(1)". Article 67(1), letter (o): "an institution is found liable for a serious breach of the national provisions adopted pursuant to Directive 2005/60/EC".

13. Based on a comparative overview, competent authorities consider it sound to apply the combination of EU provisions that refer to grounds set out in national law – Article 18(e) CRD; Article 13(1)(e) PSD2; Article 8(e) MiFID II; Article 11(f) AIFMD; Articles 7(5)(f) and 29(4)(e) of UCITS; Article 144(c) Solvency II - with the national law provisions implementing the AMLD. Reference to such combination has been upheld also by the GC in *Versobank*[6].

14. Worthy of notice is also Article 59 AMLD requiring Member States – in the case of "serious, repetitive and systematic breaches, or of a combination thereof", of the requirements referred to in that provision – to "ensure that […], the administrative sanctions and measures that can be applied include at least […]: d) […] withdrawal or suspension of the authorisation"[7].

15. Alternatively, or in addition to the reference to national law implementing the AMLD, competent authorities indicated grounds relying on the breach of other rules and regulations set out in national law, including, for investment firms, management companies and investment companies, the breach of capital market laws.

16. Based on the findings of the survey across the financial sector, several competent authorities reported to have used the combination of EU and national legal provisions implementing the AMLD to support the decision to withdraw the authorisation due to serious breaches of AML/CFT rules. Reported breaches are similar across the financial sector and concern shortcomings in operational risk, internal controls, and risk management in relation to Customer Due Diligence (CDD), Enhanced Due Diligence (EDD), transactions reporting and record-keeping.

17. Another ground that several competent authorities have reported to have applied in actual cases of withdrawal of the authorisation for serious beaches of AML/CFT rules is the failure to continue fulfilling the "conditions under which authorisation was granted" (Article 18(c) CRD, Article 13(1)(c) PSD2-EMD2, Article 8(c) MiFID, Article 11(c) AIFMD; Articles 7(5)(c) and 29(4)(c) of UCITS; Article 144(b) Solvency II).

18. The AML/CFT-related conditions for authorisation that had been breached concerned: the suitability of shareholder(s), governance and internal control requirements (relating to CDD and EDD; on-boarding process, record-keeping; transaction monitoring systems) and capital requirements. In respect of the AIFMD, one CA reported that breaches of AML/CFT related to CDD inadequacy.

19. The comparative overview of the suitable legal grounds to support a decision to withdraw the authorisation for serious breaches of AML/CFT rules, also shed light on the relevance in cases of serious breaches of AML/CFT rules, of the ground empowering the competent authority to withdraw the authorisation when it has been obtained "through false statements or any other irregular means", that is envisaged in Article 18(b) CRD, Article 13(1)(b) PSD2, Article 8(b) MiFID II, Article 11(b) AIFMD and Articles 7(5)(b) and 29(4)(b) UCITSD.

[6] See paragraphs 187-189 of the judgment.

[7] Along the same lines, see Article 11(2) and Article (20) AMLA Regulation.

20. As a general conclusion, based on the survey responses and the subsequent comments, competent authorities consider that the current EU and national legal framework provides grounds to withdraw the authorisation in the case of serious breaches of AML/CFT rules. **However, for the sake of legal certainty, several of them consider it opportune that sectoral acts be amended to insert an express legal ground specifically empowering them to withdraw the authorisation or the registration solely for serious breaches of AML/CFT rules.** Conversely, for the sake of clarity, competent authorities under the CRD considers that such an amendment is not required in the CRD where an express legal ground is already envisaged in Article 18(1)(f).

21. The review of the cases and the comments submitted by competent authorities have also stimulated the general consideration of the importance that specific ML/TF risk assessment be carried out at the time of granting authorisation (or registration). One area providing for the refusal of authorisation linked to AML/CFT reasons is the suitability of members or shareholders with qualifying holdings. Article 14(2) CRD provides that "competent authorities shall refuse authorisation to commence the activity if […] they are not satisfied as to the suitability of the shareholders or members in accordance with the criteria set out in Article 23(1)", ie including integrity and the actual or potential risk of involvement in ML/TF activities. Similar provisions are set out in the other sectoral acts, requiring refusal to grant authorisation, "taking into account the need to ensure the sound and prudent management of a management company, they are not satisfied as to the suitability of the shareholders or members […]"[8]. However, the wording is somewhat different, since there is no express reference in the Level 1 text of those acts to the prudential assessment criteria, including the existence of reasonable grounds to suspect that ML/TF is being or has been committed or attempted, or that the related risk could be increased.

22. With specific regard to the CRD, in respect of other areas of assessment of the application for authorisation, Article 10 CRD expressly requires the competent authority to assess the risk management arrangements, processes and mechanisms and that where it is not satisfied that they are sound and effective it has to refuse the authorisation; it is to be noted, however, that no express reference to ML/TF risk is made in that provision. Rather, ML/TF risks are expressly covered by the RTS on information to be submitted with the application[9] and by the EBA Guidelines on a common assessment methodology for granting authorisation as a credit institution[10].

[8] Article 10 MIFID; Article 8 UCITSD; Article 9 AIFMD/ The criteria for the prudential assessment of qualifying holdings are set out in other provisions of these sectoral acts and clarified in Joint ESAs Guidelines on the prudential assessment of acquisition or increase of qualifying holdings in the financial sector (JC/GL/2016/01). Article 11(6) PSD2 (it is to be noted that the EBA GL on authorisation under PSD2 (EBA/GL/2017/19) refer to the criteria "introduced with Directive 2007/44/EC and specified in the joint guidelines for the prudential assessment of acquisitions of qualifying holdings (JC/GL/2016/01)").

[9] EBA/RTS/2017/08, available at https://www.eba.europa.eu/regulation-and-policy/other-topics/rts-and-its-on-the-authorisation-of-credit-institutions.

[10] EBA/GL/2021/12 available at https://www.eba.europa.eu/regulation-and-policy/other-topics/guidelines-authorisation-credit-institutions

23. Several competent authorities across the financial sector have reported that assessments of ML/TF risk are generally performed in practice for purposes of granting the authorisation (or registration), though several competent authorities have expressed their support for an express reference in the sectoral acts.

24. In the light of the above, it is opportune that **all sectoral acts should be amended to provide that – as one of the conditions for granting authorisation – competent authorities expressly consider the applicant's exposure to ML/TF risk, and be satisfied that the envisaged arrangements, processes and mechanisms enable sound and effective ML/TF risk management and compliance with AML/CFT requirements. For this purpose, cooperation and information exchange between prudential supervisors and AML/CFT supervisors should be ensured.**

1.3.1 The case of the Insurance Distribution Directive

25. The specificities of the IDD and the responses provided by competent authorities to the dedicated questions included in the survey, require that separate attention is devoted to such a sectoral act.

26. Several CAs indicated in the survey that the national transposition of Article 10 IDD is only applicable to the (re)insurance distributor's employees, i.e. the natural persons. Considering that the requirement of good repute and a clean criminal report can only be met by natural persons, Article 10 is not deemed applicable as a sufficient ground to withdraw the registration/authorisation of the insurance intermediary/undertaking that is a legal entity.

27. In order to anticipate any potential concerns arising from gaps in the regulatory framework and to harmonise the relevant requirements at EU level, it is **recommended to include in the IDD an express ground for withdrawal of authorisation/registration from the insurance intermediary/undertaking for serious breaches of AML/CFT rules such as the requirement for the insurance intermediary to be of good repute under Article 10(3) IDD.**

28. Considering that the majority of CAs indicated that Article 10(3) (which requires natural persons to be of good repute and have a clean criminal record) and Article 33(1)(d) IDD (which empowers Member States to impose sanctions if an insurance distributor fails to meet the provisions of Article 10) are the most suitable legal grounds within the IDD to withdraw the authorisation/registration in the case of serious breaches of AML/CFT rules, it would make sense to include an express ground for withdrawal of authorisation/registration from the insurance intermediary/undertaking for serious breaches of AML/CFT rules in Articles 10 and/or 33(1)(d) IDD, for example by including AML/CFT crimes amongst those mentioned in the good repute criterion in Article 10(3) IDD.

29. When introducing AML/CFT requirements into the IDD, it is important to have a causal link to the actual "insurance distribution" activity, i.e. the sale of an insurance product or insurance products through the conclusion directly/indirectly of an insurance contract – this can either

be pre-sale, point-of-sale or post-sale activities (see definition of "insurance distribution" under Article 2(1), number 1 IDD).

30. It is also important to further explore the measures which conduct authorities and/or other authorities can take to address conduct concerns stemming out of money laundering.

1.4 Other financial services providers within the AMLD scope

31. The survey addressed to competent authorities under the CRD included some questions on other types of financial services providers which are obliged entities pursuant to the AMLD and which are not subject to EU regulation, but to national regulation (if any).

32. As a general remark, not all competent authorities responded to such questions, since whilst the envisaged entities are subject to AMLD requirements they are not necessarily subject to prudential regulation and supervision in all jurisdictions.

1.4.1 "Providers engaged in exchange services between virtual currencies and fiat currencies" and "custodian wallet providers"

33. Most authorities did not respond to this question, presumably because of their lack of competence. Three Competent authorities which responded to this question reported that they are not competent for the registration/authorisation and supervision of such entities, which rather fall under the jurisdiction of the AML/CFT supervisors, another CA reported that the supervision of these entities falls under FIUs whereas another one reported that it falls under the National Tax and Customs Authority; finally, another CAs reported that the supervision of these entities falls under the Financial Crime Investigation Service under the Ministry of the Interior, or, as required in another MS, they have to register with the body of other agents and mediators and are under the jurisdiction of the Ministry of Economy and Finance.

34. One competent authority reported one case of withdrawal of the authorisation from a virtual financial asset service provider for failure to systematically comply with the relevant AML/CFT legislation.

35. With regard to the grounds for the withdrawal of the authorisation or registration, those competent authorities which responded to the question indicated that grounds for withdrawal of the authorisation/registration are serious breaches of AML/CFT rules, including unsuitability of managers and failure to comply with professional obligations set out in the specific AML/CFT framework.

36. In the light of these findings, it is opportune that competent authorities granting authorisation or registration to the non-bank entities indicated in this paragraph be empowered to withdraw the authorisation/registration for serious breaches of AML/CFT rules. In this regard, the Report

acknowledges the upcoming Market in Crypto-Assets Regulation (MiCAR)[11], and deems opportune to highlight the need for MiCAR to appropriately integrate AML/CFT issues in prudential supervision of entities to be regulated and supervised under the regime that will be envisaged in that EU Regulation.

1.4.2 "Undertakings other than a credit institution, which carry out one or more of the activities listed in points (2) to (12), (14) and (15) of Annex I CRD"

37. Undertakings other than a credit institution, which carry out one or more of the activities listed in points (2) to (12), (14) and (15) of Annex I CRD, may include credit providers regulated under national law, such as financial intermediaries, factoring and leasing firms, and these undertakings are obliged entities under the AMLD. To the extent that they are subject to authorisation or registration, competent authorities were requested to indicate the grounds for the withdrawal of the registration/authorisation.

38. Based on the survey findings, two competent authorities reported the actual withdrawal of the authorisation or registration for serious breaches of AML/CFT rules: in one case in respect of a financial company for breach of preventive obligations such as identification and due diligence duty, and internal controls; in the other case in respect of a micro-credit institution for breaches of AML/CFT and other rules.

39. With regard to the grounds and the legal basis for the withdrawal of the authorisation or registration of such intermediaries, the majority of competent authorities which responded to this question indicated: (i) serious breaches of AML/CFT rules, or (ii) the same or similar grounds applicable to credit institutions as ground for the withdrawal of the authorisation from credit institutions.

40. Three competent authorities indicated that no specific ground for the withdrawal of authorisation or registration for breach of AML/CFT rule are provided in their national law. However, these competent authorities clarified that the authorisation/registration can be withdrawn as a sanction for breach of regulatory rules of supervisory measures. Another competent authority has reported to be empowered to withdraw the authorisation or registration from such undertakings, based on the national implementation of AMLD provisions.

41. Broadly speaking, there is consensus that competent authorities should be empowered to withdraw the authorisation or registration from such undertakings. **It may therefore be concluded that where not already envisaged under domestic law, an express ground to withdraw the authorisation or registration for serious breaches of AML/CFT rules should be introduced.**

1.4.3 Undertakings other than a credit institution, which carry out activities of currency exchange offices (bureaux de change)

[11] COM(2020) 593 final of 24 September 2020.

42. In most MSs the grounds for withdrawal of the authorisation or registration applicable to these entities are the same as are applicable to other entities and the withdrawal of authorisation or registration for serious breaches of AML/CFT rules is envisaged.

43. Two competent authorities reported to have withdrawn the authorisation/registration from such entities based on the combination of grounds, including breach of AML/CFT rules. It is to be noted that in one jurisdiction, although there has not been any withdrawal of a licence so far, since the introduction of the requirement of registration, several applications have been rejected.

44. Based on the responses to the survey and subsequent comments, competent authorities consider it critical that the authorisation or registration may be withdrawn for serious breaches of AML/CFT rules. Some authorities have pointed out that such a power is already envisaged by the AMLD and the related national transposition.

45. **It may therefore be concluded that where not already envisaged under domestic law, an express ground to withdraw the authorisation or registration for serious breaches of AML/CFT rules should be introduced.**

1.5 Robustness of the evidence required and procedural arrangements to establish the serious breach of AML/CFT rules

46. The surveys included questions to gather information on the degree of robustness required to support a decision to withdraw the authorisation for serious breaches of AML/CFT rules and on which authority is in charge of assessing the existence of the serious breach of AML/CFT law based on the available evidence.

47. To that purpose four options of robustness of evidence were included in the survey: i) supervisory findings, ii) compelling evidence, iii) formal decision or iv) judicial ruling. For each of these cases, the survey also asked to specify the authority in charge to make the relevant assessment, whether the competent (prudential) authority, the AML/CFT supervisor or two such competent authorities in cooperation.

48. Several competent (prudential) authorities specified that they are an integrated authority, i.e. prudential and AML/CFT supervisor, so that they are two different departments/units of the same authority and cooperate intensively. The authority's decision-making body ultimately represents both the prudential and the AML/CFT supervisor. In the light of this, responses to the procedural questions do not appear to be conclusive.

49. Few prudential competent authorities responded that the AML/CFT supervisor is separate from the prudential competent authority and that there is an intense cooperation between the two authorities; however, whilst in two cases (ECB and MT) the competence to withdraw the authorisation rests with the prudential competent authority, in another case (ES) the competence to withdraw the authorisation for serious breaches of AML/CFT rules in the case

of financial institutions other than credit institutions rests within the Council of Ministers following an administrative sanctioning procedure performed by the AML/CFT enforcement authority[12].

50. In respect of the required evidence, as a general remark, no option was significantly preferred over the others. Survey responses generally provided support to all alternatives, but reference to "supervisory findings" received more support and the reference to the requirement for a judicial decision received little support.

51. With regard to the competence to establish the serious breach of AML/CFT rules, integrated competent (prudential) authorities generally underscored that internal close cooperation with AML supervisors is in place. At the same time, it was also underscored that whilst the assessment of the breach of AML/CFT rules falls within the competence of the AML/CFT supervisor, the adoption of the decision to withdraw the authorisation rests with the competent (prudential) authority[13].

[12] The Commission for the Prevention of Money Laundering and Monetary Offences. In particular, the withdrawal of the authorisation is one of the possible sanctions to be imposed in the case of a very serious breach of the AML/CFT national legislation

[13] This distribution of competence has been recently upheld by the General Court in *Versobank*, paragraph 190.

2. Notion of serious breach of AML/CFT rules

2.1 Introduction and overview

52. In fulfilment of action point (b) of the Council Action Plan on AML/CFT, this Chapter lays down "a uniform interpretation of the language referring to serious breaches of AML/CFT rules in the Capital Requirements Directive".

53. In line with the overall scope of the Report, covering all obliged entities within the meaning of the AMLD, and at the same time falling within the supervision of the competent authorities within the remit of the ESAs, the development of action point (b) of the Council AML Action Plan aims at laying down a uniform interpretation of serious breach across the whole financial sector, and not limited to the CRD. This approach aims to ensure a consistent interpretation and is in line with the EBA's mandate to lead, coordinate and monitor the EU financial sector's fight against ML/TF.

54. From a process perspective, the proposed notion laid down in this Chapter has been built upon existing views and EU legal provisions referring to serious breaches or to similar concepts, on previous public articulations of the same or a similar concept by the three ESAs and, at a later stage, by the EBA, and finally, on the findings of an ad hoc survey run in 2020 addressed to the AML/CFT supervisors designated under the AMLD.

55. This Report's approach to outlining the notion of serious breach of AML/CFT rules is also aligned with the Final report on the RTS on the AML/CFT central database[14] that deals with "material weaknesses", which may be considered serious breaches.

56. As a preliminary consideration the notion of "serious breach" of AML/CFT rules developed herein is addressed to AML/CFT supervisors, who are in charge of assessing the type and seriousness of breach of the rules set out in the AMLD, and of communicating such assessment to the competent prudential authorities.

57. The latter have to take into account the AML/CFT supervisor's assessment, and remain fully in charge, in the exercise of the supervisory mandate, to appreciate the prudential consequence of such breaches and to adopt the most opportune and adequate measure having regard to the circumstances. This is enshrined in Article 67(1), letter (o) – setting out the expression "serious breach" of national laws implementing the AMLD – and Article 68(2), letter (c) of the CRD, which expressly links serious breaches of national laws implementing the AMLD, to the adoption of

[14] https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2021/1025576/RTS%20on%20AML%20CFT%20central%20data%20base.pdf

administrative penalties and administrative measures "*including* the withdrawal of authorisation"

58. In the light of the above, it is clear – as further illustrated in Chapter 1 of this Report – that not all serious breaches of AML/CFT rules may lead to the withdrawal of authorisation (or registration) and that the latter is a last resort measure, to be adopted respecting the principles of proportionality, necessity, adequacy and reasonableness.

2.2 Uniform interpretation of a serious breach of AML/CFT rules

59. It is acknowledged that not all breaches of AML/CFT rules are considered serious and that both of the following factors matter:

    a. the type of AML/CFT provision that is not complied with;

    b. the features of the breach.

60. Recognising the explanations above, different approaches to assessing the seriousness of a breach have been considered.

61. A qualitative approach rather than a quantitative approach is considered appropriate to outline the notion of serious breach of AML/CFT rules. The qualitative approach is in line with the risk-based approach set out in the AMLD and ensures that competent authorities (AML/CFT supervisors) can consider contextual factors when assessing whether a breach is serious. However, in as much as it relies on supervisory judgement, it leaves greater room for uncertainty and inconsistency (within a jurisdiction and between them) than the quantitative approach, but a certain degree of supervisory judgment is embedded in the assessment.

62. A quantitative approach, whereby quantitative factors would be solely used to develop a common definition of 'serious breaches of AML/CFT rules' is not considered appropriate, since it does not allow to take proportionality or risk-sensitivity into account. In particular, by reducing the assessment of the seriousness of a breach to a mathematical approach, it completely disregards the context where a breach occurs, including the impact that the breach has or could have, and the supervisory judgment. For example, the failure in ten cases by a small cooperative bank to verify the identities of the beneficial owners of local bakeries is likely to be less serious than the failure in five cases by a private bank to identify the beneficial owners of trusts that are registered in a third country tax haven.

2.2.1 Identification of 'AML/CFT rules' that may give rise to a serious breach

63. In order to identify relevant AML/CFT rules that may give rise to a serious breach, reference has to be made in particular to Articles 59(1) and 8 AMLD.

64. Based on such provisions, the term "AML/CFT rule" includes requirements on:

a. customer due diligence measures including customer ML/TF risk assessments, the reliance on third parties and transaction monitoring.

b. suspicious transaction reporting;

c. record-keeping;

d. internal AML/CFT systems and controls, risk management systems, including business-wide ML/TF risk assessments.

2.2.2 Notion of "breach"

65. With a view to providing a notion of the wording "breach", and for purposes of internal consistency, reference should be made to the RTS on the AML/CFT central database[15]. A "breach" should therefore be understood as "any violation of an AML/CFT rule committed by an obliged entity which has been identified by the competent authority (AML/CFT supervisor)".

66. Such a notion therefore differs from that of "weakness", since the latter may or may not entail a breach of AML/CFT rules.

2.2.3 Criteria for determining the seriousness of a breach

67. In order to determine whether a 'breach of AML/CFT rules' is serious, it is opportune that competent authorities (AML/CFT supervisors) consider and assess the following criteria:

a. the breach has persisted over a significant period of time (duration);

b. the breach occurred repeatedly;

c. the breach is egregious;

d. the obliged entity's senior management or compliance staff either appears to have had knowledge of the breach and decided not to remediate it, or they adopted decisions or deliberations directed at generating the breach;

e. there is a structural failure within the obliged entity, with regards to AML/CFT systems and controls;

f. the breach has a significant impact on the integrity, transparency and security of the financial system of a Member State or of the Union as a whole;

g. the breach has a significant impact on the viability of the obliged entity or on the financial stability of a Member State or of the Union as a whole;

[15] EBA/RTS/2021/16 of 20 December 2021, available at https://www.eba.europa.eu/eba-paves-way-setting-central-database-anti-money-laundering-and-countering-financing-terrorism

h. The breach has a significant impact on the orderly functioning of financial markets;

i. Significant financial criminal activity has been facilitated or is otherwise attributable to the breach.

68. A number of breaches, which would not be considered a “serious breach of AML/CFT rules” if they were assessed in isolation, could, together, amount to a ”serious breach of AML/CFT rules”.

69. The choice of the criteria above also clarifies that the seriousness of a breach is not solely determined by evidence that ML and/or TF has materialised *but can also concern the failure, by an obliged entity, to put in place adequate and sufficiently effective AML/CFT systems and controls.*

70. Competent authorities (AML/CFT supervisors) keep records of their assessments.

3. Crisis management and resolution

3.1 Introduction

71. In accordance with action point (c) of the AML Council Action Plan, this section is devoted to the crisis management and resolution aspects linked to the withdrawal of authorisation for serious breaches of AML/CFT rules, as well as to the impact on the DGS.

72. It is worth clarifying that this section only concerns credit institutions and investment firms to which the resolution framework set out in the BRRD (or SRMR) applies.

3.2 Interaction between the CRD and BRRD

3.2.1 Withdrawal of authorisation and FOLTF determination in the case of serious breaches of AML/CFT rules

73. The survey distributed to CRD competent authorities (see Chapter 1) examined the interaction, in cases of serious breaches of AML/CFT rules, between Article 18 CRD on the withdrawal of authorisation and the determination as to whether an institution is failing or likely to fail (FOLTF) pursuant to Article 32(1)(a) BRRD (Article 18 SRMR).

74. The FOLTF determination falls – as a default solution – within the competence of the prudential supervisor but may also be made by the resolution authority under the same conditions. In either case, the FOLTF determination may only be issued after prior consultation with the other authority, i.e. the resolution authority (RA) or the supervisory authority as the case may be.

75. As background, it is worth recalling that, pursuant to Article 32(4)[16] BRRD, an institution is considered FOLTF for the breach, or likely breach in the near future, of solvency or liquidity requirements, or for the infringement or the likely infringement, in the near future, of "the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority including but not limited to because the institution

[16] "For the purposes of point (a) of paragraph 1, an institution shall be deemed to be failing or likely to fail in one or more of the following circumstances:

(a) the institution infringes or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority including but not limited to because the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds;

(b) the assets of the institution are or there are objective elements to support a determination that the assets of the institution will, in the near future, be less than its liabilities;

(c) the institution is or there are objective elements to support a determination that the institution will, in the near future, be unable to pay its debts or other liabilities as they fall due;

(d) extraordinary public financial support is required except when, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, the extraordinary public financial support takes any of the following forms: […]".

has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds" (Article 32(4)(a) BRRD). Such grounds are further explained in Section 4 of the EBA Guidelines on "failing or likely to fail"[17], laying down some examples.

76. Unlike the FOLTF determination, which is forward-looking and considers, alongside current circumstances, also likely developments in the near future, the grounds for the withdrawal of authorisation set out in Article 18 CRD refer to an actual breach of prudential or other requirements and do not cover likely breaches in the near future.

77. The withdrawal of authorisation determines the immediate exit from the market of the credit institution. As clarified by the GC in its order in *Pilatus Bank*[18], once the competent authority has withdrawn the authorisation, the undertaking is no longer a credit institution subject to the jurisdiction of the supervisory authority.

78. The FOLTF determination triggers the resolution process which leads to the decision – to be taken by the resolution authority – whether the other two conditions for resolution (absence of private or supervisory measures to restore the viability of the institution and public interest test) are met and whether the institution has to be subject to resolution.

79. In this regard, recital (41) BRRD (n. (57) of the SRMR) makes a distinction between failing to continue meeting the conditions for authorisation and entry into resolution, indicating that "the fact that an entity does not meet the requirements for authorisation should not justify per se the entry into resolution, especially if the entity remains or is likely to remain viable".

80. The responses to the survey addressed to CRD competent authorities largely reflect the distinction between withdrawal of authorisation and FOLTF. The competent authorities' prevailing view is that the FOLTF assessment is not a necessary condition for the competent authority to withdraw the authorisation.

81. The responses to the survey also reveal that there is a consensus among CRD competent authorities that FOLTF should be declared in all cases of liquidity and solvency-led crisis which may also originate from serious breaches of AML/CFT rules.

82. Diverging views have emerged among CAs as to whether, in order to withdraw the authorisation, the FOLTF assessment should be performed if the serious breach of AML/CFT rules has no impact on solvency and liquidity requirements. The EBA notes that the matter has been recently examined by the GC in two cases. In *Versobank*[19], the GC ruled that the ECB was

[17] EBA Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under 32(6) of Directive 2014/59/EU (EBA/GL/2015/07).

[18] GC, 24 September 2021, *Pilatus Bank* v *ECB*, T-139/19 (Order), not published, EU:T:2021:623.

[19] Paragraph 152 states that "There is no functional equivalence between a failing or likely to fail assessment and a withdrawal of authorisation. While it is true that such an assessment may be based on a finding that the conditions for continuing authorisation are no longer satisfied under Article 18(4)(a) of the SRM Regulation, those two acts are in no way equivalent. In that regard, it is sufficient to note that the conditions for withdrawal of authorisation set out in Article 18 of Directive 2013/36 differ clearly from the considerations underlying the failing or likely to fail assessment, as set out in Article 18(4) of that regulation (order of 6 May

competent to withdraw the authorisation based on Articles 18(e), 18(f) and 67(1)(o) CRD, where following the FOLTF assessment conducted by the NCA in respect of the less significant institution at hand, the NRA determined that the public interest test was not met, and that resolution was not justified. In *Pilatus Bank*[20], the GC has upheld the withdrawal of the authorisation by the ECB in accordance with Article 18(c) CRD for the failure of the bank's sole shareholder to continue meeting the requirement of good repute, considering the negative impact that lack of integrity had on the sound and prudent management of the institution. It should be underscored that in both cases (*Versobank* and *Pilatus Bank*), the NRAs had been consulted and granted the opportunity to oppose the withdrawal based on Articles 83-84 of ECB Regulation (EU) No 468/2014 (SSM Framework Regulation).

83. The EBA further observes that the GC' ruling in *Versobank* is currently subject to appeal before the Court of Justice[21] and that the interaction between withdrawal of authorisation and FOLTF assessment has recently received policy attention. The Commission Proposal for the review of the Capital Requirements Directive (CRDVI Proposal)[22] introduces a new express legal basis for the withdrawal of authorisation. Proposed new letter g) of Article 18 CRD envisages that the authorisation may be withdrawn where, following the FOLTF assessment, the second condition for resolution set out in Article 32(1)(b) BRRD (Article 18(1), point (b) SRMR) –i.e. absence of public or private measures to remedy the distressed situation - is met, but the third condition for resolution set out in Article 32(1)(c) BRRD – (Article 18(1), point (c) SRMR) – i.e. a positive public interest assessment – is not met and therefore the institution is not put into resolution.

84. In these circumstances the EBA takes note of the ongoing developments and deems it appropriate to defer to the upcoming judicial and legislative developments. The EBA limits itself to observing that, on the one hand, the withdrawal of authorisation is part of the supervisory toolkit and may have the colour of a sanction in certain jurisdictions; on the other hand, that Article 32(4) BRRD includes various grounds for a bank to be considered 'failing or likely to fail'. In addition, from a policy perspective, the EBA points out that it is important that when exercising the power to withdraw the authorisation, the competent authority has to ensure that the RA is appropriately consulted and be given the opportunity to oppose the revocation of the authorisation where it interferes with the RA's prerogatives. The consultation process and the NRA's power to object to the withdrawal of authorisation under

2019, ABLV Bank v ECB, T-281/18, EU:T:2019:296, paragraph 46)". In addition, paragraphs 177-179 read: "The measures adopted under the SSM and the SRM could be mutually exclusive, as claimed by the applicants, only where an entity no longer satisfies the conditions for continuing authorisation and, in addition, is no longer solvent. In that case alone, the ECB would have to give priority to a resolution measure adopted by the SRB or by a national resolution authority […]. The coexistence of the SSM and the SRM cannot be understood as precluding the possibility for the competent authority for prudential supervision, namely the ECB, to withdraw authorisation, in the absence of the conditions required for adopting a resolution measure, namely where the credit institution in question is not at risk of becoming unviable. That would amount to exempting credit institutions which are financially sound from the obligation to comply with the other prudential rules imposed on them for the purposes of maintaining their authorisation".

[20] GC, 2 February 2022, T-27/19, *Pilatus Bank and Pilatus Holding Ltd v. ECB*, ECLI:EU:T:2022:46.

[21] *Versobank v ECB*, Case C-803/21 P.

[22] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, and amending Directive 2014/59/EU, COM(2021) 663 final, available at https://ec.europa.eu/finance/docs/law/211027-proposal-crd-5_en.pdf

Articles 83 and 84 SSM Framework Regulation may be considered a pragmatic and balanced solution that could be enacted also by non-participating jurisdictions, where any such coordination and possibility of objection is not expressly envisaged.

3.2.2 Cooperation and exchange of information between prudential competent and resolution authorities

85. The relevance of prior coordination between competent and resolution authorities in the case of withdrawal of the authorisation, including for serious breaches of the AML/CFT rules, has been underscored by the CRD competent authorities in their responses to the survey. In the course of exchanges with the resolution authorities, the latter have also underscored the importance of cooperation and coordination with the CRD competent authorities.

86. Regarding the BRRD, a general obligation of cooperation between competent and resolution authorities is embedded in Article 3(4) BRRD. Prior consultation between the competent and the resolution authority (or vice versa as the case may be) is expressly envisaged by Article 32(1) and 32(2) BRRD for the FOLTF assessment.

87. As mentioned above, under the SSM framework, such cooperation is expressly envisaged by Article 14(6) SSM Regulation and Articles 80 et seq. of ECB Regulation (EU) No 468/2014 providing for the possibility for national RAs to object to an intended withdrawal of authorisation.

88. The findings of the survey distributed to CRD competent authorities indicate that the large majority of respondents agree that prior coordination with RAs is always necessary in the case of withdrawal of authorisation, including for serious breaches of AML/CFT rules[23]. As observed above, the EBA underscores the importance that the RA is given an actual say and is not deprived of its prerogatives where the authorisation is withdrawn.

3.3 Serious breaches of AML/CFT rules and resolution

89. This Section has been developed based on discussions and an exchange of views among RAs within EBA resolution groups and is not based on a survey distributed to RAs. The discussion within the EBA resolution group has brought to the fore that serious breaches of AML/CFT rules may give rise to operational and legal questions relating to resolution actions that require further examination. The interaction between various authorities – namely prudential competent authorities, RAs, AML/CFT supervisors and FIUs as the case may be – is also critical and requires additional analysis. For these reasons, the current Section only purports to summarise the elements of such an initial discussion which has had the merit of raising resolution authorities' attention towards these matters.

[23] Some CRD competent authorities are of the view that cooperation is only necessary where the serious breach of AML/CFT rules entails a solvency and liquidity crisis, since it is only in such circumstances that, in their view, a FOLTF determination has to be issued. On this latter point it should be observed that coordination and cooperation between the relevant authorities should always be a guiding principle, as required by the legal provisions illustrated above.

90. In the light of the above, the observations below are limited to providing an initial mapping of legal and regulatory elements that can be considered by RAs, including in the course of their exchanges with prudential competent authorities, whenever breaches of AML/CFT rules are so serious as to require consideration of the institution's exit from the market or alternatively, its resolution in order to restore long term viability. For the same reasons, these considerations do not purport to lay down any specific Guidelines or Recommendations for the RAs or supervisory competent authorities.

91. Discussions within EBA resolution groups paid particular attention to the non-financial aspects of those crises that are triggered in whole or in part by serious breaches of AML/CFT rules, and to the means available to RAs to tackle them. Reference has been made in particular to internal governance and internal controls shortcomings, and to business models targeted atML/TF high-risk customers and markets. In the discussions relating to the attainment of resolution objectives in cases of crisis related to serious breaches of AML/CFT rules, RAs have drawn attention to such potential cases where the affected institution does not present solvency or liquidity shortfalls, thus questioning whether resolution would be the best line of action and whether it would meet resolution objectives to a better extent than normal insolvency proceedings.

92. As a general consideration, the EBA notes that it is important that, in a similar way to crisis induced by other types of causes, RAs focus on all resolution objectives set out in Article 31 BRRD[24], namely continuity of critical functions, maintenance of financial stability, protection of depositors and protection of clients' funds and money. In assessing whether to attain such objectives is feasible, it is important that RAs consider their full toolkit including the resolution tools, the other powers entrusted to them (Articles 63 and ff) and the general principles governing resolution actions (Article 34 BRRD). A case in point, for instance, is the RA's power to replace – where appropriate – the management body and senior management of the institution under resolution or to retain them – where appropriate – in order to provide the necessary assistance for the achievement of the resolution objectives. Complementary is the RA's power to appoint a special management (Article 35 BRRD) having the powers of the shareholders and of the management body and under the RA's control. The comprehensive range of prerogatives entrusted to the RAs aims to ensure that resolution action is not exhausted in financial measures to restore long-term viability but addresses and redresses the causes that triggered the crisis.

93. The EBA also acknowledges that this is a novel issue, and several aspects deserve further consideration, in order to comprehensively assess the operationalisation of resolution actions and powers, their effectiveness and their limits in the case of crisis triggered in whole or in part by AML/CFT serious breaches. Undisputedly, the exchange of views within the EBA resolution group has been critical in bringing such issues to the authorities' attention. It is therefore

[24] Namely: "(a) to ensure the continuity of critical functions; (b) to avoid significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline; (c) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC; (d) to protect clients funds and clients assets".

premature to draw conclusions, or to lay down specific criteria or guidance, prior to an overall examination from an operational and legal perspective. The EBA stands ready to provide additional specific advice to the EU institutions as appropriate.

3.3.1 Interaction between serious breaches of AML/CFT rules and the implementation of the resolution tools

94. RAs drew attention to potential impacts of serious breaches of AML/CFT rules on the implementation of the resolution tools and to potential obstacles to their operationalisation. Based on experience of past cases, serious breaches of AML/CFT rules usually relate to inadequate internal control systems, such as suspicious transaction monitoring and reporting; onboarding of depositors, CDD and EDD; the business model's exposure to ML/TF high risk markets and customers; the integrity or existence of reasonable grounds to suspect that shareholders with qualifying holdings and/or members of the board of directors are involved in ML/TF activities. RAs have therefore directed their attention to the following operational and legal issues that need additional examination.

95. At the outset the interaction of the resolution framework with the AMLD and the prudential supervisory framework comes to the fore.

96. From an AML/CFT perspective, suffice it here to recall that AMLD obliged entities have to be satisfied with the outcome of the customer due diligence in order to establish or entertain business relationships with a natural or legal person and that, where "an obliged entity is unable to comply with the customer due diligence requirements laid down in points (a), (b) or (c) of the first subparagraph of Article 13(1), it shall not carry out a transaction through a bank account, establish a business relationship or carry out the transaction, and shall terminate the business relationship and consider making a suspicious transaction report to the FIU in relation to the customer in accordance with Article 33" (Article 14 AMLD).

97. Considering the scenario where serious breaches of AML/CFT rules are detected, one issue of concern is the identification and separation of the legitimate from the illicit business in the context of the implementation of the resolution tools. From an operational perspective, topics of attention are the timing and the coordination and cooperation among the authorities best placed to run such an exercise, namely RAs, prudential supervisors and AML/CFT supervisors. From a methodological perspective, the technique to separate the legitimate from the illicit business requires additional thought, in order to examine, having regard to the circumstances, when a loan by loan assessment would be feasible or when a sample review would be adequate, and how that sample should be determined taking into account prudential and AML/CFT risk approaches.

98. In general RAs have expressed the view that they are not best placed for this task and some of them have pointed out the opportunity, where circumstances so allow, that such operations be undertaken when the institution is still a going concern. It has been suggested that the appointment of a temporary administrator (under Article 29 BRRD) may be a suitable solution for the adoption of such preparatory steps – eg. identification of the business areas, of the

assets and liabilities impacted by the AML/CFT serious breaches - before the FOLTF assessment is issued. Some RAs also noted that from an operational perspective the involvement of the institution in illegitimate activities may severely affect the marketability of its assets and liabilities and involve significant risks for potential purchasers. Others observed that where the institution's internal controls are in breach of regulatory requirements such an assessment may be impossible to perform at the moment of the adoption of resolution measures for lack of reliable information.

99. Where, taking into account the circumstances, the identification and separation of activities may only be carried out after the adoption of resolution measures, supervisory consequences and reputational adverse risk effects have to be taken into account and may be an obstacle to the implementation of the sale/transfer. It is therefore important that the adopted measures envisage the appropriate administrative or contractual mechanisms to adjust the transfer perimeter of assets and liabilities based on the results of post-resolution execution due diligence/forensic investigations.

100. As to contractual safeguards, the inclusion in the sale agreements with the third party purchaser of clauses enabling the purchaser to transfer back to the ailing bank assets and liabilities (e.g. deposits) affected by AML/CFT concerns could be further examined. The interaction with AML/CFT rules of the potential solutions referred to herein should be further analysed, as well as the cooperation with the prudential supervisor and the AML/CFT supervisor.

101. As to administrative measures, the RA may consider the use of the power to transfer back such assets to the ailing bank in resolution where available. One RA suggested that where the separation of activities is not possible before resolution due to time constraints, the adoption of the bridge bank tool could be useful to conduct a comprehensive assessment of the bank's AML/CFT material deficiencies and their impact on specific positions. This solution has merit and has already been applied in the past, but further analysis needs to be carried out in respect of the coordination with the prudential authority that is competent to assess whether the requirements for granting authorisation to the bridge bank are fulfilled. Potential exposure to reputational risk by the RA in connection with the control of the bridge bank should also be factored in.

102. In the case of bail-in execution, specific measures may be required in the reorganisation plan to be developed by the management and submitted to the resolution and the competent authorities.

103. The write down and conversion of liabilities has to be executed before the implementation of any of the resolution tools. It may be limited to absorbing losses, or extend – if need be – to recapitalising the institution - if the bail-in tool is adopted – or to providing capital to the bridge bank, where the latter is used. Subject to further consideration, the holding of liabilities by persons exposed to AML/CFT concerns might not be an impediment to their write down and conversion, in order to restore the financial soundness and viability of the institution. AML/CFT

scrutiny would rather occur in connection with the prudential assessment of the acquisition of qualifying holdings by the competent authority.

104. In that context prudential competent authorities will run an assessment, in accordance with Article 23(1) CRD, and in particular the criterion set out in letter (e) therein, relating to the suspicion of money laundering. Where the competent authority – in cooperation with the AML/CFT supervisor as appropriate – considers the existence of ML/TF actual or potential risk associated with the holder of shares deriving from the conversion of liabilities, it is empowered to oppose such an acquisition[25] and adopt the relevant measures to freeze the voting rights attached to such qualifying holdings. As to the RA, it is empowered to order the holder to divest such holdings[26].

105. From a legal perspective, worthy of consideration is the interaction between the determination of the transfer perimeter informed by AML/CFT criteria (ie separation of the legitimate from the illicit source of business, e.g. of deposits or loans) and the resolution and insolvency framework. In particular, the consistency of the separation of the legitimate from the illicit business with the creditors' hierarchy and the principle of NCWO.

106. Based on the analysis of the outlined issues, consideration may need to be given to how to ensure resolution preparedness to tackle AML/CFT matters. Specific approaches in the planning phase, however, should be informed by the operationalisation of the resolution actions. At the current stage of the analysis, the indication of specific resolution planning measures appears to be premature.

107. It is understood that close cooperation and exchange of information between all the relevant authorities involved – competent prudential authority, AML/CFT supervisor and RA - about relevant supervisory findings and any measure that has been adopted remain key to a smooth preparation for crisis management.

108. As explained at the outset of this Section, discussion among RAs has been critical to running this preliminary mapping of operational and legislative issues, opening up the way for additional legal and methodological analysis. The EBA stands ready to undertake additional analysis that may be requested.

3.4 Impact of withdrawal of authorisation for serious breaches of AML/CFT rules on the functioning of DGSs

109. In the case of withdrawal of authorisation from a credit institution, covered deposits, within the meaning of the DGSD, should be paid out within seven working days from the date when

[25] As provided in Article 63(1), letter (m) BRRD, the RA is empowered "to require the competent authority to assess the buyer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in Article 22 of Directive 2013/36/EU and Article 12 of Directive 2014/65/EU".

[26] See Article 38(9), letter (f), n. (ii) BRRD, referred to also by Article 47(5) relating to bail-in.

the relevant authority has made the determination that deposits are unavailable (Article 8(1) DGSD).

110. To make sure that DGS available funds are not used to repay depositors involved in criminal activities, express exceptions are envisaged in the DGSD:

- deposits arising out of transactions in connection with which there has been a criminal conviction for ML as defined in Article 1(3) AMLD, should be excluded from DGS payouts (Article 5(1)(c) DGSD);
- deposits the holder of which has never been identified pursuant to the AMLD should be excluded from payout (Article 5(1)(f) DGSD)
- depositors or any person entitled to, or interested in, sums held in an account who have been charged with an offence arising out of, or in relation to, ML as defined in Article 1(3) AMLD, for which payouts may be suspended (Article 8(8) DGSD); and
- deposits subject to restrictive measures imposed by national governments or international bodies because of which DGS payouts could be deferred (Article 8(5)(b) DGSD).

111. In the context of the EBA's review of the implementation of the DGSD, the EBA assessed the challenges posed by credit institution where there are money-laundering concerns. This assessment resulted in two Opinions with recommendations addressed to the EU Commission[27].

112. In the said Opinions, the EBA recommended, inter alia, that the legislator should clarify the treatment of cases where there is a suspicion of money-laundering. More specifically, the FIU (or any other AML/CFT authority) should have the power to instruct the DGS to defer the payout for certain deposits/depositors because of ML/TF suspicions and until further instructions are received from the FIU or any other AML/CFT authority (within the existing applicable deadline for such authorities to make their decision). The DGSD should include a provision that requires the DGS to act upon such an instruction from the FIU (or any other AML/CFT authority).

113. In the Opinions, the EBA also recommended closer cooperation and exchange of information between relevant authorities, including about significant issues with the quality of the Single Customer View files, in order to ensure an effective preparedness for a DGS payout.

114. The Opinions also described, based on the experience of real-life cases, how the exit of a credit institution from the market for serious breaches of AML/CFT may give rise to other issues within the DGS framework.

115. As illustrated particularly in the Opinion on DGS payouts, the issue arises out of the combination of DGSD provisions envisaging that the DGS payout is triggered by the relevant authorities' determination that "deposits are unavailable" and that unavailability of deposits

[27] EBA Opinion on deposit guarantee scheme payouts, Op-2019-14 of 30 October 2019, available at EBA Opinion on DGS Payouts.pdf (europa.eu); EBA Opinion on the interplay between the EU Anti-Money Laundering Directive and the EU Deposit Guarantee Schemes Directive, Op-2020-19 of 11 December 2020, available at EBA Opinion on the interplay between the AMLD and the DGSD.pdf (Europa.eu)

is linked to the "financial circumstances" of the credit institutions. It follows that if depositors' funds become unavailable not because of reasons related to the financial circumstances of the credit institution but for other reasons – such as serious breaches of AML/CFT rules which do not affect the solvency or liquidity of the entity, or supervisory moratoria – it may be argued that the conditions for the start of the payout are not met.

116. In the light of the above the mentioned EBA Opinion lays down the following recommendations to the European Commission, which are fully supported and reiterated in the current Report:

> "a) More clarity is needed on the treatment of depositors who do not have access to deposits that are due and payable and when the relevant administrative authority has made the decision required under Article2(1)(8)(a) within 5 working days but it has decided that deposits are not unavailable because the conditions set out in that article have not been met. An amendment to the EU legal framework is desirable to ensure that depositors who do not have access to deposits that are due and payable, but whose deposits have not been determined as unavailable, have access to an appropriate daily amount from their deposits. The provision of such an appropriate daily amount should not be executed using DGS funds but should be done using the institution's funds. Furthermore, the main features of such a tool should be considered further if it is to be introduced into the EU legal framework.
>
> b) Finally, such an amendment should: (i) be introduced not in the DGSD but in another part of the EU legal framework; and (ii) mirror the wording in the current Article33(a)(3) of the Bank Recovery and Resolution Directive (BRRD).
>
> c) Further clarity is needed on the interpretation of the term 'current prospect' of a credit institution repaying a deposit in Article2(1)(8)(a) of the DGSD.
>
> d) Further clarity is needed in the EU legislation on the link between the application of national supervisory moratoria and what constitutes a 'current prospect'."

4. Measures available to prudential authorities to address prudential concerns stemming from money laundering / terrorist financing risks and breaches of AML/CFT rules

117. This Chapter focuses on action point d) of the Council Action Plan on AML, relating to the measures available to prudential authorities to address prudential concerns stemming from ML/TF risks and breaches of AML/CFT rules. It draws attention to a) the remedial and sanctioning tools available to the supervisors; and b) on the preventative aspects, notably on the assessments and expectations embedded in the prudential regulatory regime. This Chapter is focused on the framework applicable to credit institutions which has been largely updated and revised - in fulfilment of legislative mandates and AML Council Action Plan Objectives – to expressly take ML/TF risk into account, underscoring the interaction between prudential and AML/CFT risks and supervision. The framework outlined below may work as a blueprint for other sectoral acts in whole or in part, having regard to the specificities of each framework, each undertaking, the activities and the associated risks.

118. With regard to point a) above, measures to address AML/CFT concerns, reference is made to Article 67(2) CRD providing that administrative penalties and other administrative measures specified therein (including a public statement, a cease and desist order, withdrawal of authorisation, temporary ban against a member of the management body or any other natural person, administrative pecuniary penalties) can be applied when “an institution is found liable for a serious breach of the national provisions adopted pursuant to Directive 2005/60/EC”.

119. With regard to shareholders with qualifying holdings, the adoption of specific measures is envisaged for the case where the influence exercised by such shareholders is detrimental to the sound and prudent management of the institution, as well as for the case where the qualifying holdings have been acquired notwithstanding the opposition of the competent authority or by failing to comply with the information and notification obligation set out in Article 22 CRD. The measures envisaged include restrictions and penalties against the members of the management body and the freezing of the voting rights attached to the shares or the annulment of the votes cast.

120. With regard to authorisation, in accordance with Article 10 in combination with Article 74 CRD, the competent authority shall refuse granting the licence where it is not satisfied “that the arrangements, processes and mechanisms referred to in Article 74(1) enable sound and effective risk management by that institution”. These grounds for refusal also include ML/TF risk controls, considering that a) as specified in the EBA Guidelines on a common assessment

methodology for granting authorisation[28], ML/TF risk is part of the risks to be assessed for granting the licence, and b) in keeping with the internal governance framework, risk management covers all risks, including ML/TF risk. In addition, the EBA Guidelines on authorisation make specific reference to ML/TF risk in respect of areas of the business plan analysis, internal governance, ICT and cyber security risk, capital and liquidity and point out the importance of cooperation with AML/CFT supervisors in accordance with the EBA Cooperation Guidelines (see below).

121. In respect of members of the management body and of key function holders, the revised joint EBA and ESMA Guidelines on the assessment of the suitability of members of the management body and key function holders[29] provide for an obligation of reassessment in the case of material changes including suspicion of ML/TF risk.

122. With regard to ongoing supervision, the draft revised EBA Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing[30] expressly embed ML/TF risks and related inputs from AML/CFT supervisors in the relevant SREP components. Hence non-compliance with AML/CFT aspects will impact on the SREP scores in as far as there is a prudential impact and the potential exercise of supervisory powers in accordance with Article 104 CRD.

123. The draft revised EBA Guidelines on SREP expressly incorporate guidance on how to factor in ML/TF risks in the following components of the SREP: a) monitoring of key indicators; b) business model analysis; c) assessment of internal governance and institution-wide controls; d) assessment of risks to capital; and e) assessment of risks to liquidity and funding. Each of these aspects is illustrated in detail in the Guidelines. Additionally, prudential supervisors are expected to monitor indicators based on quantitative or qualitative information from prudential reporting that may point to ML/TF risk where available and to share the outcome of the monitoring of these indicators with AML/CFT supervisors if deemed relevant as it may inform their ML/TF risk assessment of the institution. In respect of the business model analysis, if prudential supervisors identify indications (eg. type of activities, geographical distribution, revenue generating model, etc.) that the business model or changes to the business model could give rise to increased ML/TF risk, they are expected to liaise with AML/CFT supervisors as necessary. In respect of internal governance, prudential supervisors are expected to consider whether the institution's framework encompasses arrangements and mechanisms to comply with applicable AML/CFT requirements. As to risks to capital, prudential supervisors are expected to consider ML/TF-related operational risks, including reputational or legal and conduct risks. In respect of credit risk, prudential supervisors are expected to assess whether ML/TF risks are considered in the context of the credit granting process including whether

[28] Available at https://www.eba.europa.eu/regulation-and-policy/other-topics/guidelines-authorisation-credit-institutions.

[29] Available at, https://www.eba.europa.eu/joint-esma-and-eba-guidelines-assessment-suitability-members-management-body-revised

[30] CP/2021/26 available at https://www.eba.europa.eu/regulation-and-policy/supervisory-review-and-evaluation-srep-and-pillar-2/guidelines-for-common-procedures-and-methodologies-for-the-supervisory-review-and-evaluation-process-srep-and-supervisory-stress-testing

institutions have systems and controls in place to ensure funds used to repay loans are from legitimate sources. As to liquidity and funding, prudential supervisors have to pay attention to indications that could signal ML/TF risks when assessing the liquidity and funding profile of an institution (e.g. deposit taking in high-risk jurisdictions; funding mix that cannot be explained by the business model or strategy of the institution) and liaise with the AML/CFT supervisor accordingly.

124. Similarly, ML/TF risk is expressly embedded in the draft EBA and ESMA Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) under the IFD[31].

125. Other prudential regulatory acts expressly consider ML/TF risk within their scope: (i); the (final draft) RTS and ITS on the authorisation of credit institutions[32]; (ii) the Joint ESAs Guidelines on the prudential assessment of proposed acquisitions and increases of qualifying holdings in the financial sector[33] and the Report on the Peer Review of the application of such Guidelines[34]; the EBA Guidelines on outsourcing arrangements[35]; the EBA Guidelines on internal governance (revised)[36].

126. Finally, the EBA Guidelines on cooperation and information exchange between prudential supervisors, AML/CFT supervisors and financial intelligence units[37] set out the framework for an effective mutual cooperation and exchange of information between competent (prudential) authorities and AML/CFT supervisors and FIUs. The development of these Guidelines fulfils the mandate set out in Article 117(6) CRD and Objective 4 of the AML Council Action Plan.

127. These Guidelines cover a wide range of prudential topics where cooperation is or may be needed, notably: assessment of authorisation applications; assessment of proposed acquisitions or increases of qualifying holdings; assessment of suitability of members of the management body and key function holders; withdrawal of authorisation; merger applications; monitoring of outsourcing arrangements; on-site and off-site supervision and risk assessments; the common assessment of prudential and AML supervisors as set out in Article 97(6) CRD, where, based on the supervisory review, the prudential supervisor has reasonable grounds to suspect ML/TF risk in connection with an institution or increased ML/TF risk. It is to

[31] Available at CP on SREP Guidelines under IFD.pdf (europa.eu)

[32] EBA/RTS/2017/08 and EBA/ITS/2017/05/ of 14 July 2017. Both RTS and ITS are available at https://eba.europa.eu/regulation-and-policy/other-topics/rts-and-its-on-the-authorisation-of-credit-institutions

[33] Available at https://esas-joint-committee.europa.eu/Publications/Guidelines/JC_QH_GLs_EN.pdf

[34] EBA/REP/2021/24 of August 2021, https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2021/1018492/EBA%20Peer%20Review%20Report%20on%20ESAs%20Guidelines%20on%20Qualifying%20Holdings.pdf

[35] Available at https://eba.europa.eu/regulation-and-policy/internal-governance/guidelines-on-outsourcing-arrangements)

[36] Available at https://www.eba.europa.eu/guidelines-internal-governance-second-revision

[37] Guidelines on cooperation and information exchange between prudential supervisors, AML/CFT supervisors and financial intelligence units | European Banking Authority (europa.eu).

be noted that the EBA Cooperation Guidelines also set out the framework for cooperation and information exchange regarding supervisory measures and sanctions.

128. In terms of scope of application, the EBA Cooperation Guidelines are addressed to prudential supervisors[38] and to AML/CFT supervisors[39] to the extent that these authorities are supervising the compliance with AMLD requirements of "institutions as defined in point (3) of Article 3(1) of Directive 2013/36/EU, or […] financial sector operators as defined in point (1a) of Article 4 of Regulation (EU) No 1093/2010[40] where these operators are included in the institution's prudential consolidation, including […] branches established in the Union whether their head office is situated in a Member State or in a third country" (paragraph 8 of the EBA Cooperation Guidelines).

129. In the light of this overview, some prudential competent authorities under other sectoral acts expressed the view that the CRD approach would provide a useful blueprint for regulating how the AML/CFT regime, or parts of it, should be embedded into the area of their competence. Other prudential competent authorities underscored that enhancement of cooperation between the prudential supervisor and the AML/CFT supervisor along the lines of the EBA Guidelines on Cooperation would be useful also in the sector of payment service providers which are not covered by those Guidelines as a standalone institution. Other competent authorities expressed the view that in relation to the sectoral act of their competence there are no such gaps relating to AML/CFT to be filled.

130. At this juncture, this Report acknowledges that the above overview of how the AML requirements are embedded into the CRD/CRR framework may be a useful blueprint, in whole or in part, for other sectoral acts, also considering the specificities of each framework, each undertaking, the activities and the associated risks. However, the Report deems it opportune to defer to ongoing work in each relevant sector to better envisage which, if any, aspects may be embedded in the relevant framework.

[38] As defined in point (36) of Article 3(1) of Directive 2013/36/EU and in point (5) of Article 3(1) of Directive (EU) 2019/2034.

[39] As defined in point (2)(iii) of Article 4 of Regulation (EU) No 1093/2010.

[40] "'financial sector operator' means an 'entity' as referred to in Article 2 of Directive (EU) 2015/849, which is either a financial institution as defined in point (1) of this Article or in point (1) of Article 4 of Regulation (EU) No 1094/2010 or a 'financial market participant' as defined in point (1) of Article 4 of Regulation (EU) No 1095/2010;".

5. Conclusions

131. The Report has examined and developed the four action points of Objective 5 of the AML Actions Plan.

a. Action point a): degree of discretion in the decision to withdraw the authorisation

132. For purposes of developing this action point, the Report has examined: (i) the availability and suitability of the existing legal bases set out in EU and national law to support the decision to withdraw the authorisation (or registration) for serious breaches of AML/CFT rules; and (ii) the discretionary and proportionate reasoning underlying the withdrawal decision.

133. With regard to point (i) the Report acknowledges, based on the findings of the surveys distributed to all competent authorities within scope and the subsequent comments, that all the competent authorities may rely on grounds under EU or national law provisions to withdraw the authorisation for serious breaches of AML/CFT rules.

134. At the same time, the **Report, reflecting the views expressed by several competent authorities considers it opportune that sectoral acts be amended to insert an express legal ground specifically empowering them to withdraw the authorisation or the registration as the case may be, solely for serious breaches of AML/CFT rules.** This recommendation does not apply to the CRD which already includes an express ground to withdraw the authorisation for serious breaches of AML/CFT rules.

135. The review of the cases and the comments submitted by competent authorities has also stimulated the general consideration of the importance that a specific ML/TF risk assessment be carried out at the time of granting authorisation. Such an express requirement is not set out in EU sectoral acts, but several competent authorities across the financial sector have reported that assessments of ML/TF risk are generally performed for purposes of granting the authorisation. This notwithstanding, they have also expressed their support for an express reference in the sectoral acts.

136. In the light of the above, the **ESAs consider it opportune that all sectoral acts be amended to provide that - as one of the conditions for granting authorisation or registration as the case may be - competent authorities expressly consider the applicant's exposure to ML/TF risk, and be satisfied that the envisaged arrangements, processes and mechanisms enable sound and effective ML/TF risk management and compliance with AML/CFT requirements. For this purpose, cooperation and information exchange between prudential supervisors and AML/CFT supervisors should be ensured.**

137. With regard to the IDD, **EIOPA recommends the inclusion of an express ground for withdrawal of authorisation/registration from the insurance intermediary/undertaking for serious breaches of AML/CFT rules such as the requirement for the insurance intermediary to be of good repute under Article 10(3) IDD. Furthermore, when introducing AML/CFT requirements into the IDD, it is important to have a causal link to the actual "insurance distribution" activity.**

138. With regard to "providers engaged in exchange services between virtual currencies and fiat currencies" and "custodian wallet providers", this **Report acknowledges the ongoing law-making process on the proposed Markets in Crypto-Assets Regulation (MiCAR), and deems opportune to highlight the need for the MiCAR to appropriately integrate AML/CFT issues in prudential supervision of entities to be regulated and supervised under the regime that will be envisaged in that EU Regulation.**

139. With regard to undertakings other than a credit institution, which carry out one or more of the activities listed in points (2) to (12), (14) and (15) of Annex I CRD, based on the responses to the survey, there is consensus that competent authorities should be empowered to withdraw the authorisation or registration from such undertakings for serious breaches of AML/CFT rules. It may therefore **be concluded that where not already envisaged under domestic law, an express ground to withdraw the authorisation/registration for serious breaches of AML/CFT rules should be introduced.**

140. As for currency exchange offices, based on the responses received to the survey and subsequent comments, there is support for the view that the authorisation/registration may be withdrawn for serious breaches of AML/CFT rules. However, some authorities have pointed out that such a power is already envisaged by the AMLD and the related national transposition. In the light of this, **it may be concluded that where not already envisaged under national law, an express ground to withdraw the authorisation/registration for serious breaches of AML/CFT should be introduced**.

141. With regard to point (ii), the conclusion of this Report reflects the recent ruling of the GC in *Versobank* and *Pilatus Bank*, that the decision to withdraw the authorisation, also in cases of serious breaches of AML/CFT rules, is a last resort measure, subject to discretionary and proportionality assessment articulated in the test of the legitimacy, adequacy, and reasonableness of the measure.

b. Action point b): uniform interpretation of the language referring to serious breaches of AML/CFT rules in the Capital Requirements Directive

142. For the purpose of developing action point b), the Report firstly clarifies the criteria of a serious breach of AML/CFT rules that shall be considered and assessed by the AML/CFT supervisor, pointing out that the AML/CFT supervisor needs to take into consideration the context of the breach and therefore that it remains a case-by-case assessment. Secondly, the Report clarifies that there is no systematic correlation between a serious breach of AML/CFT rules and

withdrawal of authorisation. It is rather that the assessment of the serious breach made by the AML/CFT supervisor will be used by the prudential supervisor for the adoption of the appropriate measures in accordance with its discretionary assessment. In any case the withdrawal of authorisation is a last resort measure.

c. Action point c): consistent consideration of the consequences of license withdrawal, particularly in terms of the need to preserve critical functions in the bank, the involvement of resolution authorities, depositor protection and the possibility to suspend payment of deposits by the deposit guarantee scheme;

143. The development of this action point has only concerned those credit institutions and investment firms that are subject to the resolution regime and has considered: (i) the interaction between withdrawal of authorisation and FOLTF; (ii) the interaction between serious breaches of AML/CFT rules and the resolution regime and (iii) the impact of the withdrawal of authorisation for serious breaches of AML/CFT rules on DGS payout.

144. As to point (i), on the basis of the responses to the survey addressed to CRD competent authorities, the prevailing view is that the FOLTF assessment is not a necessary condition for the competent authority to withdraw the authorisation in the case of serious breaches of AML/CFT rules. The findings also reveal that there is a consensus among CRD competent authorities that FOLTF should be declared in all cases of liquidity and solvency-led crisis which may also originate from serious breaches of AML/CFT rules.

145. Diverging views have emerged among CAs as to whether, in order to withdraw the authorisation, the FOLTF assessment should be performed if the serious breach of AML/CFT rules has no impact on solvency and liquidity requirements.

146. The EBA takes notes of recent and ongoing judicial and legislative developments on these matters and deems appropriate to defer until their conclusion. The EBA limits itself to observing that, on the one hand, the withdrawal of authorisation is part of the supervisory toolkit and may have the colour of a sanction in certain jurisdictions; on the other hand, that Article 32(4) BRRD includes various grounds for an institution to be considered 'failing or likely to fail', including the failure to continue meeting the conditions for authorisation currently or in the near future. In addition, from a policy perspective, the EBA points out that it is important that, when exercising the power to withdraw the authorisation, the competent authority has to ensure that the RA is appropriately consulted and is given the opportunity to oppose the revocation of the authorisation where it interferes with the RA's prerogatives. The consultation process and the NRA's power to object to the withdrawal of authorisation under Articles 83 and 84 SSM Framework Regulation may be considered a pragmatic and balanced solution that could be enacted also by non-participating jurisdictions, where any such coordination and possibility of objection is not yet expressly envisaged under national law.

147. As to point (ii), the Report summarises the exchanges of views within the EBA resolution group which have brought to the fore potential legal and operational issues stemming from the interaction between the resolution and the AMLD framework. In such a context, cooperation

and coordination between the relevant authorities involved, namely the RA, the competent (prudential) authority and the AML supervisor is considered critical.

148. The Report acknowledges that such exchanges of views have been of the essence to bringing such issues to the RAs' attention and to running a preliminary mapping of operational and legislative criticalities. However, at this stage, it is premature to draw conclusions, or to lay down specific criteria or guidance, prior to an overall examination from an operational and legal perspective. The EBA stands ready to provide additional specific advice to the EU institutions as appropriate.

149. In respect of point (iii), the Report fully supports and reiterates the recommendation laid down in the EBA Opinion on Deposit guarantee scheme payouts.

d. Identification of measures available to prudential authorities to address prudential concerns stemming from money laundering / terrorist financing risks and breaches of AML/CFT rules

150. In order to address action point d), the Report has provided an overview of the supervisory, administrative and sanctioning toolbox available to prudential competent authorities under the CRD to address AML/CFT concerns and serious breaches of AML/CFT breaches.

151. The Report has provided an overview of how the assessment of ML/TF risks is embedded in prudential regulation and supervision within the CRD/CRR framework. It is noted that thanks to recent updates and revisions in fulfilment of mandates set out in the CRDV, the framework is rather comprehensive and is completed by a cooperation framework between prudential supervisors and AML/CFT supervisors and FIUs, covering also the withdrawal of authorisation.

152. The above overview may be a useful blueprint for other sectoral acts, in whole or in part considering the specificities of each framework, each undertaking, the activities and the associated risks. However, the Report deems it opportune to defer to ongoing work in each relevant sector to better envisage which, if any, aspects may be appropriate to embed in the other respective frameworks.

6. Annex I: results of the survey on the withdrawal of authorisation for serious breaches of AML/CFT rules under the CRD

6.1 Introduction

153. The CRD lays down a comprehensive regime for withdrawal of authorisation, which is set out in Article 18 and other connected provisions. Unlike other regimes, the CRD envisages an express ground for withdrawing the authorisation granted to credit institution following the breach of AMLD provisions. In such cases, the withdrawal of the authorisation is one of the administrative measures that can be taken by CAs, pursuant to Article 67.

154. In the light of the above, the survey focused on collecting information on the legal framework in force, on supervisory practices including relating to actual cases of withdrawal of the authorisation from credit institutions, and, from branches of third country credit institutions and closure of intra-EU branches for serious breaches of AML/CFT. The survey also focused on the robustness of the required evidence to support a decision to withdraw the authorisation due to serious breaches of AML/CFT. Interaction between withdrawal of authorisation and FOLTF determination under the BRRD was also included within the scope of the questionnaire.

155. Lastly, a few questions were included in the survey on entities other than credit institutions and which are obliged entities under the AMLD – "providers engaged in exchange services between virtual currencies and fiat currencies" "custodian wallet providers", and undertakings other than a credit institution, which carry out one or more of the activities listed in points (2) to (12), (14) and (15) of Annex I CRD – for those CAs which are designated competent authorities for their registration and/or authorisation under national law, if any.

156. As shown by the data below, only a few CAs have gained actual experience of withdrawal of authorisation due to serious breaches of AML/CFT rules, CAs have therefore responded to the survey on a best effort basis and mainly based on policy rather than on actual experience.

157. The survey ran from 1 December 2020 until 15 January 2021. 22 responses were received – from 22 EU Member States and the ECB and from one an EEA country.

6.2 Overview of cases of withdrawal of authorisation for serious breaches of AML/CFT rules

158. In the past ten years, the authorisation has been withdrawn from credit institutions for serious breaches of AML/CFT rules in several cases..

159. With regard to intra-EU branches, two CAs reported to have ordered the closure of an intra-EU branch due to serious breach of AML/CFT rules in the past ten years; in both cases the order was issued pursuant to national law transposing Article 44 of the CRD.

160. According to these CAs, circumstances leading to the withdrawal consisted in the occurrence of numerous breaches of AML/CFT law, or in the seriousness of breaches and the high risk of repetition of the same breaches.

161. One CA reported that the closure of the intra-EU branch gave rise to specific challenges, as regards depositors' protection, in particular whether full repayment of deposits held by the branch should be ensured prior to closure of the branch or whether their transfer to another bank could also be considered a suitable solution. Ensuring full information and transparency to clients proved burdensome from an operational perspective.

162. In respect of branches of third country credit institutions, no respondent reported to have withdrawn the authorisation to a branch of a third country credit institution because of serious breaches of AML/CFT rules in the last ten years[41]. It is to be noted that third country branches are not established in all jurisdictions.

6.3 Description of supervisory practices based on the survey results

6.3.1 Supervisory assessment underpinning the withdrawal of authorisation

163. All respondents but one reported that the withdrawal of authorisation is always subject to discretionary assessment. The ECB pointed out that it undertakes a thorough assessment, including the identification of legal ground(s) to withdraw, taking into account proportionality considerations of the specific circumstances. In particular, the ECB underscored that three aspects are verified to be met: i) suitability of intended withdrawal, ii) its necessity (absence of other measures) and iii) its reasonableness or proportionality, which requires weighing the public interest in the achievement of the legitimate objective against the private interests affected (eg. shareholders' rights of property), and verifying that private interests are not disproportionately affected in comparison to the public interest pursued.

164. Only one respondent reported that in a few cases the CA decision to withdraw the authorisation is not discretionary but mandatory according to the national law, namely when a credit institution has obtained the license fraudulently or by otherwise breaching laws, or pursues the activities prohibited by laws.

[41] Based on public information, a third country branch was resolved by the Cypriot resolution authority in 2014 as a consequence of the impact of the US FinCen statement that the third country credit institution to which the third country branch belonged was of primary money laundering concern; the authorisation was withdrawn in 2015, see Central Bank of Cyprus - Decree by the Resolution Authority; Central Bank of Cyprus - Revocation of Licence Granted to FBME Bank Ltd for Operating a Branch in Cyprus.

165. The survey requested CAs views on the four most relevant circumstances - among a predetermined list - that support a decision to withdraw the authorisation for serious breaches of AML/CFT rules. Considering the small number of actual cases, responses have to be understood mainly as policy-based rather than experience based; one CA did not respond to this question given its lack of experience. Two CAs specified that the withdrawal of authorisation has always to be determined on a case-by-case basis and depends on various circumstances, and that there is not one circumstance more relevant than others.

166. All ranked circumstances underscore the relevance of proportionality embedded in the decision to withdraw the authorisation and its nature as a last resort remedy.

167. The circumstance which received support from the large majority of CAs is the absence of supervisory measures to effectively remedy the serious breach of AML/CFT rules. A large number of responses provided support to considering the consequences of withdrawal of the authorisation on financial stability. Similarly the absence of private measures to remedy the serious breach of AML/CFT rules received significant support (15 respondents); as well as the consideration of the destruction in value of the credit institution and/or the market (12 respondents). The other circumstances within the predetermined list in the survey were breach of right of property of shareholders and creditors in the case of two CAs and consequences of the withdrawal for the real economy for two other CAs.

168. As regards other circumstances not included in the closed-end list proposed by the survey, one CA indicated that existing legislative grounds relating to fraud, false statements or other irregular means to obtain the authorisation may be relevant in the context of withdrawal for serious breaches of AML/CFT rules; similarly relevant may be the general grounds according to which the credit institution no longer fulfils the conditions under which the licence was granted; or the credit institution fails to comply with provisions of the national banking law. Another CA indicated as potential circumstances to consider for withdrawal the losses or risk of losses to depositors, investors, consumers or other creditors whereas another one indicated that the significant breaches of the internal control system at least three times in the four years. Two CAs further clarified the proportionality approach/last resort measure embedded in the decision to withdraw the authorisation, thus indirectly supporting the (listed) criterion relating to the absence of supervisory measures.

6.4 National legal framework: suitable grounds for withdrawal of authorisation for serious breaches of AML/CFT rules

169. The survey aimed at collecting information on grounds for withdrawal of authorisation envisaged under national law pursuant to Article 18(e) CRD[42] that could be used in the case of serious breaches of AML/CFT rules.

[42] "The competent authorities may only withdraw the authorisation granted to a credit institution where such a credit institution: […] (e) falls within one of the other cases where national law provides for withdrawal of authorisation; […]".

170. The large majority of respondents (16) made reference to the breach of national laws implementing the AMLD as additional grounds justifying the withdrawal of authorisation. Such responses provide reassurance that AML/CFT breaches are considered grounds for withdrawal of authorisation, but it is questionable that they are additional grounds envisaged by national law.

171. One CA referred to the fact that under its national law, the authorisation may also be withdrawn where the credit institution sets up a special mechanism with the aim or effect of promoting tax fraud by third parties. Although the ground for the withdrawal on this basis is in the first place the underlying criminal behaviour (tax fraud) that could eventually lead to ML or TF where proceeds of this fraud are injected into the financial system, this ground is considered to be also relevant for AML/CFT breaches linked to tax fraud.

172. Other responses made reference to cases already covered by the CRD, such as the breach of the other general legal requirements to continue meeting the conditions for authorisation (see Article 18, letter (c) "no longer fulfils the conditions under which authorisation was granted"). One respondent specified that if a supervised entity has seriously failed to comply with prohibition decisions or with a measure imposed by the CA, the main ground for the withdrawal of the authorisation would be both the serious breach of the national AML/CFT law, and the failure to comply with the supervisory decision or measure (see combined reading of Article 18(f) and 67(o) CRD). It is to be noted also that usually breach of AML/CFT rules is just one ground, not the exclusive ground relied upon by CAs to withdraw the authorisation. One CA reported that the national implementing law has not added any further grounds or provisions.

6.5 Interaction between withdrawal of authorisation and FOLTF assessment

173. The survey examined the interaction between Article 18 CRD on the withdrawal of authorisation and Article 32(4) BRRD (Article 18 SRMR)[43] on the determination as to whether an institution is failing or likely to fail (FOLTF). The question asked the CAs' view as to whether the FOLTF assessment, pursuant to the BRRD/SRMR, is always a prior requirement to the

[43] "For the purposes of point (a) of paragraph 1, an institution shall be deemed to be failing or likely to fail in one or more of the following circumstances:

(a) the institution infringes or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority including but not limited to because the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds;

(b) the assets of the institution are or there are objective elements to support a determination that the assets of the institution will, in the near future, be less than its liabilities;

(c) the institution is or there are objective elements to support a determination that the institution will, in the near future, be unable to pay its debts or other liabilities as they fall due;

(d) extraordinary public financial support is required except when, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, the extraordinary public financial support takes any of the following forms: […]".

decision to withdraw the authorisation, also in case the reason for the withdrawal is the serious breach of AML/CFT rules[44].

174. Based on responses received, the prevailing view among the majority of the CAs is that the FOLTF assessment is not a necessary condition for the withdrawal of the authorisation. One CA observed that this is without prejudice to the circumstance that in practice the FOLTF assessment has preceded the withdrawal of authorisation. Another CA noted that the need of prior FOLTF assessment depends on the specific circumstance, e.g. solvency/liquidity concerns of the institution and their ability to fund or operationalise a wind down.

175. With specific regard to AML/CFT aspects, one CA reported that, whilst the FOLTF assessment is not always a legal requirement for the withdrawal of the authorisation (see paragraph 173), if the withdrawal of authorisation depends on serious breaches of AML/CFT rules, the FOLTF assessment is required. Another CA observed that the serious breach of AML/CFT rules is subject to a discretionary assessment as to whether the authorisation should be withdrawn and that a combination or a prioritisation with other processes is not necessary; another CA observed that given that resolution authorities have no competence on AML/CFT issues, they would not be in the position to issue a FOLTF assessment for serious breaches of AML/CFT rules, hence such an assessment should not be required for purposes of withdrawing the authorisation for serious breaches of AML/CFT rules.

176. From a general perspective, three CAs pointed out that the authorisation may be withdrawn in cases that are not related to a crisis, notably for the grounds under Article 18(a) CRD which are not covered by the grounds for FOLTF assessment.

Worth of specific analysis is the interpretation of the relevance of letter a) of Article 32(4) as a ground for the FOLTF assessment. This ground is particularly relevant since the serious breach of AML/CFT rules may lead to the withdrawal of the authorisation irrespective of a solvency and/or liquidity crisis, but for other reasons, such as business model, governance and internal governance arrangements, though, there are different views as to whether compliance with the AML/CFT framework is a condition for granting the authorisation or as to the necessity of the FOLTF assessment in the case of serious breaches of AML/CFT rules that may trigger the withdrawal of the authorisation. Only five CAs expressed the view that the FOLTF assessment is a legal requirement for the decision to withdraw an authorisation also in cases of serious breaches of AML/CFT rules. However, one of these CAs clarified that although the FOLTF assessment is a legal requirement for withdrawing the authorisation, the institution should not be considered as FOLTF where the serious breach of AML/CFT does not impact on the institution's solvency and/or liquidity situation. The same CA notes that the current FOLTF approach does not take these circumstances into consideration.

[44] In the Targeted Consultation Document on the review of the crisis management and deposit framework, European Commission asked whether all supervisors should be "given the power to withdraw the licence in all FOLF cases" (Question 13), January 2021, available at https://ec.europa.eu/info/publications/finance-consultations-2021-crisis-managementdeposit-insurance-review-targeted_en

177. In this latter regard, one CA acknowledged that compliance with AML/CFT rules is part of the authorisation requirements and as a consequence that a serious breach of AML/CFT rules may in principle lead to the withdrawal of authorisation. However, it specified that whilst the credit institution should be deemed – as a matter of law – FOLTF in such a case, it cannot be derived that the FOLTF assessment is a prior legal requirement for the withdrawal.

178. Another CA noted that under the national legal framework the withdrawal of the authorisation follows the entry into insolvency proceedings (compulsory administrative liquidation procedure). Within this framework, serious infringement (or likely infringement) of AML/CFT rules is considered as a breach of conditions for continuing authorisation that may trigger the insolvency procedure, the opening of which rests on a prior FOLTF assessment. As a consequence, the FOLTF assessment for serious breaches of AML/CFT rules is a legal requirement for the withdrawal of the authorisation.

179. Another CA pointed out that under the national framework serious breaches of AML/CFT rules could only be included within the scope of the FOLTF assessment if they lead to solvency and liquidity issues of the institution that are covered by letters b) and c) of Article 32(4) BRRD. This notwithstanding, the authorisation may actually be withdrawn for serious breaches of AML/CFT as a form of disciplinary sanction against the credit institution and it has to be adopted in accordance with the internal process governing sanctions. The authorisation is then withdrawn by the ECB. Where the authorisation is withdrawn as a sanction, the credit institution is put in liquidation without any FOLTF and public interest assessment.

180. Based on the results of the survey as summarised above, it could be concluded that there is a consensus among CAs that FOLTF is a legal requirement for all cases of liquidity and solvency-led crisis which may also originate from serious breaches of AML/CFT rules.

181. Conversely, where the serious breach of AML/CFT rules does not impact solvency and/or liquidity requirements, varied interpretations exist as to whether AML/CFT rules are a condition for authorisation and such is covered by the FOLTF assessment, or whether in these cases the authorisation may only be withdrawn as a sanction by the CA.

182. The survey also focused on the impact of the withdrawal of the authorisation on the implementation of the resolution tools (e.g. the sale of business tool and bridge bank tool as regards the transfer of the depositors' books, the bail-in tool because of the assumption that the bank will remain a going-concern) and asked whether, in the case of the withdrawal of the authorisation due to serious breaches of the AML/CFT rules, prior coordination between the competent authority and the resolution authority is always necessary.

183. The focus of the question was the specific case of withdrawal of authorisation for serious breaches of AML/CFT rules and the interaction with the FOLTF assessment. Therefore, whist it is plain, based on Article 32(1) BRRD, that the CA has to consult the RA and vice versa, for the purpose of delivering the FOLTF assessment, it is less clear whether such cooperation should occur if and when the FOLTF assessment is not conducted.

184. Noteworthy is the regime in force within the SSM, where such cooperation is required by Article 14(6) SSM Regulation, which indicates the possibility for (national) resolution authorities to object to an intended withdrawal of authorisation. To ensure the effectiveness of such power of objection, a requirement of prior consultation of resolution authorities is foreseen by Articles 80 et seq. of ECB Regulation (EU) No 468/2014. In light of this legislation, the ECB observed that prior coordination between competent and resolution authorities is essential to ensure that withdrawal of authorisation does not hamper a possible activation of resolution tools.

185. The large majority of respondents (17) agreed that prior coordination is always necessary; however, two CAs clarified that cooperation is only necessary where the serious breach of AML/CFT rules entails a solvency and liquidity crisis. With specific regard to withdrawal of authorisation due to serious breaches of AML/CFT rules, one CA observed that in light of the applicable national framework, given that withdrawal is considered a sanction in that case, the credit institution is outside of the BRRD's scope because at that moment it is no longer a credit institution. Conversely some CAs are of the view that cooperation is not always necessary.

6.6 Evidence robustness and procedural arrangements to establish the serious breach of AML/CFT rules

186. The survey aimed at gaining an understanding of the practices as to the robustness of evidence necessary to adopt a decision to withdraw the authorisation and the procedure (if any) to establish such evidence. For that purpose four options were presented about the robustness of evidence required: i) supervisory findings, ii) compelling evidence, iii) formal decision or iv) judicial ruling. For each of these cases, it was also asked which authority makes the relevant assessment about the satisfactory evidence, whether the competent (prudential) authority, the AML/CFT competent authority or in cooperation (this option was chosen by several CAs), whether there is internal cooperation and the authority's decision-making body represents both the prudential and the AML/CFT supervisor

187. With regard to the type of evidence, the lowest support was expressed for the need of a judicial or quasi-judicial ruling, indicated by only two CAs.

188. As to the other types of evidence, no option was significantly preferred over the others; CAs generally provided responses to all options, but the option relating to 'supervisory findings' received more responses (22); the option relating to 'compelling evidence' received 20 responses, and the option relating to 'formal decision' received 18 responses.

189. With regard to the authority in charge of producing or establishing such evidence, responses are quite balanced for all three evidence options above. In particular, as regards 'supervisory findings' CAs responses are equally split among assessment by the: competent authority (several CAs chose this option); AML/CFT supervisor (several CAs); competent authority in cooperation with the AML/CFT supervisor(several CAs chose this option). Two CAsclarified that the existence of breaches of AML/CFT legislation is determined by the AML/CFT supervisor and

that they will take these determinations into account as fact findings when deciding on a license withdrawal from a prudential perspective. Another CA specified that a withdrawal of the authorisation should be based on supervisory findings, resulting in compelling evidence that one or more of the withdrawal conditions in national law are met.

190. In respect of the option 'compelling evidence', responses are equally split between the assessment by the competent authority and the assessment by the AML/CFT supervisor, with the process envisaging the competent authority in cooperation with the AML/CFT supervisor supported by few CAs.

191. As to the option relating to the 'formal decision', the cooperation between competent authority and AML/CFT supervisor was reported by the majority of responses, the assessment by the CA was the option chosen by several respondents and the option relating to the AML/CFT supervisor was chosen by a few other respondents. In this respect one CA specified that due to the lack of AML/CFT competences, the determination of AML/CFT findings must be made by the AML/CFT authority, but in their view such determination does not necessarily have to take the form of a formal decision of that authority. The licence withdrawal decision which takes these AML/CFT findings into account, however, is a CA's formal decision.One CA clarified that on top of the evidence consisting in 'supervisory findings' and 'compelling evidence', it is of course also possible that the liability for the serious breach of AML/CFT-rules is assessed by the AML/CFT supervisor on the basis of a formal decision, although such a formal decision is not required as such.

192. The question rest on the assumption that there is a clear separation of roles between the competent authority and AML/CFT supervisor even if they are within the same authority. However, based on responses received, this is often not the case.

193. The views of TF members are welcome on who (prudential supervisor/AML/CFT supervisor) gathers the evidence and conducts the assessment in practice on the breach of AML/CFT rules and whether there should be a sanction or even a withdrawal of authorisation.

194. Also, the survey aimed at understanding the robustness of the required evidence to withdraw the authorisation, although all options received responses. Based on responses received, can it be concluded that the authorisation can be withdrawn simply on the basis of supervisory findings?

6.7 Legal bases for withdrawal of authorisation

6.7.1 Combined application of Articles 18(f) and 67(1)(o) CRD

195. CAs were asked whether – in the last ten years - they had withdrawn the authorisation due to serious breaches of AML/CFT rules in accordance with the combined reading of Article 18(f) and 67(1)(o) CRD. Several CAs reported to have not applied such combination of provisions in the last ten years; some CAs reported to have applied them to impose administrative penalties and administrative measures.

196. Two CAs reported that they withdrew the authorisation in accordance with such a combination of provisions. All but one CA clarified that they were not the only grounds for the withdrawal of the authorisation. Only one of them reported to have withdrawn the authorisation also based on the ground solely of a serious breach of AML/CFT rules.

197. The other grounds supporting the withdrawal of the authorisation, in addition to the serious breaches of AML/CFT rules in the cases referred to, include: breach of the initial capital or prudential requirements (Article 18(c) and (d) CRD); failure to have in place required governance arrangements (Article 67(1) (d) CRD); failure to continue fulfilling the conditions under which authorisation was granted, in particular failure to meet shareholder(s) suitability requirements (Article 18(c) CRD).

198. The following serious breaches of AML/CFT rules leading to the withdrawal of the authorisation have been reported by four CAs:

- significant deficiencies and shortcomings in the supervised entity's AML governance framework;
- failure to have in place an adequate AML/CFT framework (i.e. on-boarding process);
- AML/CFT breaches are systemic and long-lasting in their nature, usually discovered by an on-site inspection;
- supervised entities have been repeatedly sanctioned and fined for breaching AML regulations.

199. One CA specified that for some of the mentioned cases of withdrawal due to a serious breach of the AML/CFT rules, an administrative penalty had been imposed on the supervised entities following the acknowledgement of breaches in the AML/CFT framework by the national competent authority.

200. With regard to the circumstances where breaches of the AML/CFT rules can be considered serious enough to provide sufficient grounds to withdraw the authorisation, the large majority of CAs indicated the failure of previously applied administrative measures/penalties to effectively remedy the ML/TF risk. Several CAs indicated the flawed business strategy where it exclusively aims at providing services for the implementation of ML/TF schemes, and the implication of shareholders with qualifying holdings in ML/TF activities.

201. In one jurisdiction the serious breaches of AML/CFT rules trigger the FOLTF and opening the insolvency proceedings.

202. One CA mentioned that there are additional criteria, one of which is significant internal control breaches at least three times in the last four years. Two respondents said their national frameworks do not contain a definition of "serious breach" of AML/CFT rules and therefore it is not sufficient to withdraw an authorisation based on this alone.

203. One CA in particular indicated elements that would be considered to determine whether the serious breach could be a ground for the withdrawal of the authorisation, being understood that the withdrawal is a last resort remedy. For this purpose, the CA drew attention to the features of the breach to be identified as a serious breach, notably determination of the facts and findings (e.g. deficiencies in the AML control framework or internal governance, lack of available resources for the AML control function); related assessment by the AML supervisor and the seriousness thereof (severe, repeated or systematic); period of time over which the violations were committed (and their identification by the AML supervisor). The CA also considers relevant for its assessment other AML-related findings from the past and information on the supervisory follow-up measures.

204. The ECB noted in its answer that in addition to proportionality and protecting the interests of depositors, the distinction should also be made between circumstances related to the identified breaches (deficiencies and their gravity and period over which they were committed) and the engagement process with the supervised entity (level and actual commitment by credit institution to enhance its AML/CFT control framework, visibility and oversight by senior management etc).

205. In this context, specific regard is given also to the engagement process with the supervised entity, notably: the credit institution's level of shown and actual commitment to enhance its AML control framework and consequently its internal controls framework; the speed at which the credit institution comes up with serious plans to remediate the breaches; the level of timely progress in effectively and sustainably restoring compliance with AML requirements; the degree to which the credit institution takes measures, either imposed or initiated by itself (e.g. dismissal of responsible senior managers, termination of customer relationships, implementation of changes to the business model); the degree to which the credit institution has demonstrated that the improvements were sustainable in the long term. Reference would also be made to the entity's AML culture and "tone at the top", the general visibility and oversight of financial crime at senior management level of the credit institution, the extent to which responsible senior management is or should be aware of the AML risks, the behaviour of the shareholders or whether there is any pressure from the shareholders, etc.). Lastly, consideration would also be paid to the arguments brought up by the credit institution with regard to the intended withdrawal of authorisation.

6.7.2 Application of Article 18(c) CRD

206. With regard to other legal bases, one CA responded to have applied Article 18(c)[45] CRD in two cases in the last ten years to withdraw the authorisation due to serious breaches of AML/CFT rules entailing the breach of prudential requirements to which the authorisation is subject (e.g. failures in internal governance; unsuitability of shareholders/members with qualifying holdings; unsuitability of members of the management body). This CA reported that authorisation conditions that were no longer fulfilled in the relevant cases were the breach of suitability of shareholders, of capital requirements, of governance and internal controls

[45] "no longer fulfils the conditions under which authorisation was granted; […]"

requirements and the breach of or non-compliance with previously applied administrative penalties, measures and investigatory powers. The identified serious breaches consisted in the continuous and long-time failure to ensure the proper functioning of AML/CFT internal controls (violations continued also after the carrying out of onsite inspections), namely inadequacy of risk assessment procedures, of customer due diligence and the on-boarding process; of banks record-keeping; unsatisfactory functioning of the transaction monitoring system; failure to apply enhanced dure diligence (EDD) requirements. In the other case the sole shareholder was arrested for the alleged participation in an ML/TF scheme.

6.8 Non-bank entities which are obliged entities under the AMLD

207. As a general remark, most CAs seem to apply the same AML/CFT rules to all the referred entities because they are obliged entities under the AMLD. It was also mentioned that ML/TF risk is assessed and taken into account in the registration/authorisation process.

6.8.1 "Providers engaged in exchange services between virtual currencies and fiat currencies" and "custodian wallet providers"

208. With regard to entities other than banks that are providers engaged in exchange services between virtual currencies and fiat currencies and custodian wallet providers – which are obliged entities under the AMLD – most CAs responded that they are not competent for their registration/authorisation and supervision. Some clarified that such entities fall under the jurisdiction of the AML/CFT supervisors, one authority reported that these entities fall under the FIUs remit, another one that they fall under the National Tax and Customs Authority remit; finally, another one reported that they fall under the Financial Crime Investigation Service under the Ministry of the Interior, or, as in the case of another CA, they have to register with the body of other agents and mediators under the jurisdiction of the Ministry of Economy and Finance.

209. With regard to the grounds for the withdrawal of the authorisation or registration, those CAs which responded to the question indicated that grounds are serious breaches of AML/CFT rules, including unsuitability of managers and failure to comply with professional obligations set out in the specific AML/CFT framework. One CA reported to have withdrawn the authorisation from a virtual financial asset service provider for failure to systematically comply with the relevant AML/CFT legislation.

210. One CA responded that the grounds for withdrawal of the registration/authorisation are the same for every supervised entity. Another CA reported that the authorisation may be withdrawn as a disciplinary sanction where an obliged entity does not comply with the applicable national AML/CFT requirements, freezing of assets obligations or a desist order. Some CAs also mentioned that registration requirements have been recently introduced and that the AML/CFT framework needs to be thoroughly assessed in the registration process. No practical experience has been referred to.

6.8.2 "Undertakings other than a credit institution, which carry out one or more of the activities listed in points (2) to (12), (14) and (15) of Annex I CRD"

211. With specific regard to "undertakings other than a credit institution, which carry out one or more of the activities listed in points (2) to (12), (14) and (15) of Annex I CRD," including credit providers regulated under national law, such as financial intermediaries, factoring and leasing firms, these are obliged entities under the AMLD. To the extent that they are subject to registration/authorisation, CAs were requested to indicate the grounds for the withdrawal of the registration/authorisation

212. The majority of CAs which responded to this question indicated serious breaches of AML/CFT rules or the same or similar grounds applicable to credit institutions as ground for the withdrawal of the authorisation/registration. One CA reported that a withdrawal decision would have regard for and be based on the manner in which the entity conducts or proposes to conduct its affairs, or on any other reason which would constitute a threat to the integrity of the financial system; one CA specified the need of robust evidence to support such a decision, including deriving from an on-site inspection; three CAs indicated that no specific ground for the withdrawal of authorisation/registration for breach of AML/CFT rules are provided; another CA reported that under its national law, the registration/authorisation may be withdrawn in the case of exceptionally serious deficiencies in the administration, or exceptionally serious breaches of legislative/administrative rules or rules regulating their activity, including serious breaches of AML/CFT rules.

213. In those jurisdictions where no specific ground for the withdrawal of the authorisation/registration for serious breach of AML rules is in force, CAs indicated that the authorisation/registration can be withdrawn as a sanction for breach of regulatory rules or of supervisory measures.

214. One CA reported the actual withdrawal of the registration/authorisation for serious breaches of AML/CFT rules, in respect of a financial company for breach of preventive obligations such as, identification and due diligence duty, internal controls, formation duty; and another CA in respect of a micro credit institution for AML/CFT and other breaches.

6.8.3 Undertakings other than a credit institution, which carry out activities of currency exchange offices (bureaux de change)

215. In most countries the grounds for withdrawal of the authorisation/registration are the same as for other entities and the withdrawal of the licence is possible due to AML/CFT breaches.

216. Two CAs reported to have withdrawn the authorisation/registration from such entities in one case on ground of serious breach of AML/CFT rules and, in the other case on several legal grounds, including breach of AML/CFT.

7. Annex II: results of the survey on withdrawal of authorisation from payment and e-money institutions under the PSD2 and the EMD2

7.1 Introduction

217. Based on the results of the survey, there have been eight cases of withdrawal of authorisation of payment institutions/e-money institutions in the past ten years for serious breaches of AML/CFT rules. Conversely, no case of an order to close an intra-EU branch of a payment institution/e-money institution has been reported. However, two CAs requested to payment institutions/ e-money institutions providing services in one of the EU jurisdictions via an agent, via a distributor of e-money or via free provision of services to cease their activities due to serious breaches of AML/CFT requirements.

7.2 Description of supervisory practices based on the survey results

7.2.1 Supervisory assessment underpinning the withdrawal of authorisation

218. Out of the 22 respondents, 17 CAs reported that the withdrawal of authorisation is always subject to discretionary assessment, whereas five CAs responded that it is not necessarily subject to discretionary assessment, but they did not specify in which case the withdrawal is mandatory.

219. The survey asked CAs for their views on the four most relevant circumstances - among a predetermined list – that support a decision to withdraw the authorisation for serious breaches of AML/CFT rules. Considering the small number of actual cases where the authorisation has been withdrawn for serious breaches of AML/CFT rules, responses were mainly policy-based rather than experience based. It was also noted that the decision to withdraw authorisation depends on the facts and circumstances of the individual case. Whilst the indicated criteria would presumably play an important role in the assessment, it is not possible to establish a hierarchical list.

220. Responses underscore the relevance that CAs place on proportionality in the decision to withdraw the authorisation, its nature as a last resort remedy and the importance to strike an appropriate balance of the interests at stake.

221. The four criteria receiving the largest support by CAs are: the absence of supervisory measures to effectively remedy the serious breach of AML/CFT rules (several CAs); the consideration of

the consequences of withdrawal of the authorisation on financial stability (the majority of CAs); the absence of private measures to remedy the serious breach of AML/CFT rules (several CAs) and the destruction in value of the firm and/or the market (six CAs). The other criteria within the predetermined list in the survey were the breach of right of property of shareholders and creditors (one CA), and consequences of the withdrawal for the real economy (four CAs).

222. The majority of CAs indicated other criteria and/or circumstances that are taken into account for the purposes of withdrawing the authorisation. The most commonly mentioned is the fact that the institution no longer meets the conditions under which the authorisation was granted. Furthermore, several respondents highlighted that the decision for the withdrawal of authorisation stems from the assessment of multiple criteria and not just a single one.

223. One CA specified that the assessment related to the withdrawal of authorisation in its jurisdiction entails the issuance of an administrative act that must be appropriate, necessary and proportionate. The appropriateness, necessity and proportionality need to be substantiated and thoroughly described in the decision. In order to assess the seriousness, the duration of the breach and the degree of responsibility are considered.

7.3 Legal bases to withdraw the authorisation for serious breaches of AML/CFT rules

7.3.1 National legal frameworks

224. Considering the absence of an express ground for withdrawal of authorisation due to serious breaches of AML/CFT rules in PSD2, the survey asked CAs to indicate which of the grounds directly envisaged in Article 13 PSD2 are the most suitable to withdraw the authorisation in the case of serious breaches of AML/CFT rules and whether any other suitable ground is envisaged under national law.

225. As a general consideration, responses confirm that CAs are empowered to withdraw the authorisation for serious breaches of AML/CFT rules based on the implementation of the PSD2 provisions – alone or in combination with other national law provisions (AML/CFT provisions, in particular) – or on other grounds envisaged by national law.

226. With regard to the legal grounds set out in PSD2 which would be suitable to withdraw the authorisation for serious breaches of AML/CFT rules, CAs indications are the following:

(i) no longer meeting “the conditions under which the authorisation was granted or failing to inform the competent authority on major development in this respect” (Article 13(1) letter (c) PSD2) (indicated by several CAs);

(ii) falls within one of the other cases where national law provides for withdrawal of an authorisation (Article 13(1), letter (e)) (indicated by several CAs);

(iii) the payment institution would constitute a threat to the stability of or the trust in the payment system by continuing its payment services business (Article 13(1), letter d) (indicated by few CAs).

227. Some CAs identified more than one legal ground set out in Article 13 PSD2 that could underpin the decision to withdraw the authorisation for serious breaches of AML/CFT rules (in the case of two CAs). Two other CAs responded that the withdrawal of the authorisation for serious breaches of AML/CFT rules is only possible following provisions set out in national law,one CA did not provide any answer to the question. With respect to the actual practices, one CA reported to have withdrawn the authorisation from a payment institutions/e-money institutions in the past ten years for serious breaches of AML/CFT rules, on the basis of Article 13(1), letter (e) PSD2. No CA reported to have withdrawn the authorisation for serious breaches of AML/CFT rules following the provisions set out in article 13(1), letter (c) PSD2; a few CAs responded that they withdrew the authorisation for serious breaches of AML/CFT rules on grounds other than those mentioned in Article 13 PSD2.

7.4 Evidence of robustness and procedural arrangements to establish the serious breach of AML/CFT rules

228. The survey aimed at gaining an understanding of the practices as to the robustness of the evidence necessary to adopt a decision to withdraw the authorisation and the authority in charge of the assessment of the serious breach of AML/CFT rules. For that purpose, the survey presented four options about the required degree of robustness of the evidence: i) supervisory findings, ii) compelling evidence, iii) formal decision or iv) judicial ruling.

229. For each of these options, the survey also asked which authority makes the relevant assessment that a serious breach of AML/CFT rules has been committed: whether a) the competent (prudential) authority, b) the AML/CFT competent authority or c) in cooperation. However, the survey did not distinguish the case where the same authority is in charge of the prudential and of the AML/CFT supervision and the case where these two competences are attributed to two separate authorities. Therefore, it is not possible to draw definitive conclusions from the responses provided.

230. The majority of CAs clarified to be an integrated CA including both prudential and AML/CFT supervision, and that a high degree of internal cooperation generally takes place. This notwithstanding, some CAs clarified that the evidence and the breach of AML/CFT rules are assessed by the competent authority in cooperation with the AML/CFT supervisor and that the decision to withdraw the authorisation is a formal decision taken by the CA which may be based on proven supervisory findings, or on compelling evidence discovered via for example, supervisory findings (in the case of three CAs).

231. Two CAs responded that the AML/CFT supervisor is separate from the CA and that there is an intense cooperation between the two authorities; however, whilst in one case (MT) the competence to withdraw the authorisation rests with the CA, in the other case (ES) it is within the powers of the Council of Ministers after an administrative sanctioning proceeding performed by the AML/CFT enforcement authority[46]..

232. With regard to the type of evidence, the lowest support was expressed for the need of a judicial ruling, indicated by only a few CAs. As to the other types of evidence, no option was significantly preferred over the others, CAs provided responses to all options.

[46] The Commission for the Prevention of Money Laundering and Monetary Offences. In particular, the withdrawal of the authorisation is one of the possible sanctions to be imposed in the case of a very serious breach of the AML/CFT national legislation.

8. Annex III: results of the survey on withdrawal of authorisation for serious beaches of AML/CFT rules under MiFID II

8.1 Introduction

233. Based on the results of the survey, there has been one case in the past ten years, where the authorisation has been withdrawn from investment firms for serious breaches of AML/CFT rules.

234. Conversely, no case of order to close an intra-EU branch of an investment firm has been reported. Similarly, no case of withdrawal of authorisation from a branch of a third country investment firm has been reported[47].

8.2 Description of supervisory practices based on the survey results

8.2.1 Supervisory assessment underpinning the withdrawal of authorisation

235. Out of the 26 respondents, 23 CAs reported that the withdrawal of authorisation is always subject to discretionary assessment. Three CAs responded that it is not necessarily subject to discretionary assessment, but they did not specify in which case the withdrawal is mandatory.

236. The survey asked CAs for their views on the four most relevant circumstances - among a predetermined list - that support a decision to withdraw the authorisation for serious breaches of AML/CFT rules. Considering the small number of actual cases, responses have to be understood mainly as policy-based rather than experience based. One CA did not respond to this question. Two CAs also noted that the decision to withdraw authorisation depends on the facts and circumstances of the individual case. Whilst the indicated criteria would presumably play an important role in the assessment, it is not possible to establish a hierarchical list.

237. Responses underscore the relevance that CAs place on proportionality in the decision to withdraw the authorisation, its nature as a last resort remedy and the importance to strike an appropriate balance of the interests at stake.

238. The four criteria receiving the largest support by CAs are: the absence of supervisory measures to effectively remedy the serious breach of AML/CFT rules (the majority of CAs); the consideration of the consequences of withdrawal of the authorisation on financial stability (the majority of CAs); the absence of private measures to remedy the serious breach of AML/CFT

[47] Some CAs have specified that there is no branch of a third country investment firm is established in the Member State.

rules (several CAs) and the destruction in value of the firm and/or the market (several CAs). The other criteria within the predetermined list in the survey were the breach of the right of property of shareholders and creditors (several CAs), and consequences of the withdrawal on the real economy (some CAs).

239. Several CAs also indicated other criteria and/or circumstances that are taken into account for the purposes of withdrawing the authorisation, the most commonly mentioned being the combination of factors/conditions leading to decision being taken to withdraw the authorisation. Reference has been made to: concealing AML/CFT facts or circumstances that, had they been known to the CA, would have been a ground for refusal of the authorisation (one CA); inadequacy of administrative measures – such as conditional fine, prohibition to conduct business – in light of the seriousness of the breach (one CA); and potential harm to the confidence in the securities market should that business activity continue. One CA specified that in line with AML supervisory guidelines, the assessment relating to the withdrawal of authorisation has to be carried out in the case of breaches of significant internal control system at least three times in the period of four years.

240. Two CAs drew the attention on the elements that have to be taken into account when applying a sanction, namely: the seriousness and duration of the breach; the liability of the entity involved; the financial resources of the entity involved; the extent of the benefits gained or losses avoided; third party losses; willingness to cooperate with the supervisory bodies, and previous infringements.

8.3 Legal bases to withdraw the authorisation for serious breaches of AML/CFT rules

8.3.1 National legal frameworks

241. Considering the absence of an express ground for withdrawal of authorisation due to serious breaches of AML/CFT rules in MiFID II, the survey asked CAs to indicate which of the grounds directly envisaged in Article 8 MiFID II are the most suitable to withdraw the authorisation in the case of serious breaches of AML/CFT rules and whether any suitable ground is envisaged under national law.

242. As a general consideration, responses confirm that CAs are empowered to withdraw the authorisation for serious breaches of AML/CFT rules based on the implementation of the MiFID II provisions – alone or in combination with other national law provisions (AML/CFT provisions, securities market provisions) – or on other grounds envisaged by national law.

243. With regard to the legal grounds set out in MiFID II which would be suitable to withdraw the authorisation for serious breaches of AML/CFT rules, CAs indications are the following:

(i) obtaining “the authorisation by making false statements or by any other irregular means” (Article 8(b) MiFID II) (indicated by three CAs);

(ii) no longer meeting "the conditions under which authorisation was granted, such as compliance with the conditions set out in Regulation (EU) No 575/2013" (Article 8(c) MiFID II) (indicated by several CAs);

(iii) having "seriously or systematically infringed the provisions adopted pursuant to the Directive or Regulation (EU) No 600/2014 governing the operating conditions for investment firms" (Article 8(d)) MiFID II (indicated by two CAs);

(iv) falling "within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal" (Article 8(e)) MiFID II (indicated by several CAs).

244. With regard to the suitable grounds for withdrawal envisaged by national law, some CAs indicated the breach of national laws implementing the AMLD, or the breach of other national laws; others the breach of AMLD provisions only; others the severe and repeated breach by the firm of a combination of financial markets law and national AML/CFT rules.

245. With respect to actual practice, one CA reported to have withdrawn the authorisation from an investment firm in the past ten years, on the basis of national law (as per Article 8(e) of MiFID) .

246. All other respondents reported to have not withdrawn the authorisation for serious breaches of AML/CFT rules from an investment firms under MiFID in the past ten years.

8.4 Evidence robustness and procedural arrangements to establish the serious breach of AML/CFT rules

247. The survey aimed at gaining an understanding of the practices as to the robustness of the evidence necessary to adopt a decision to withdraw the authorisation and the authority in charge of the assessment of the serious breach of AML/CFT rules. For that purpose, the survey presented four options about the required degree of robustness of the evidence: i) supervisory findings, ii) compelling evidence, iii) formal decision or iv) judicial ruling.

248. For each of these options, the survey also asked which authority makes the relevant assessment that a serious breach of AML/CFT rules has been committed: whether a) the competent (prudential) authority, b) the AML/CFT competent authority or c) in cooperation. However, the survey did not distinguish the case where the same authority is in charge of the prudential and of the AML/CFT supervision and the case where these two competences are attributed to two separate authorities. Therefore, it is not possible to draw definitive conclusions from the responses provided.

249. Several CAs clarified to be an integrated CA including both prudential and AML/CFT supervision, and that a high degree of internal cooperation generally takes place. This notwithstanding, threeCAs clarified that the evidence and the breach of AML/CFT rules are

assessed by the AML/CFT supervisor and that the decision to withdraw the authorisation is a formal decision taken by the CA which may be based on proven supervisory findings, or on compelling evidence discovered via for example, supervisory findings.

250. One CA responded that the AML/CFT supervisor is separate from the CA and that there is an intense cooperation between the two authorities; the competence to withdraw the authorisation rests with the CA.

251. Finally, one CA reported that under its national law the decision to withdraw the authorisation is a sanction and that the decision on the imposition of the sanction is formally taken by the sanction committee. Another CA reported two different alternatives to withdraw the authorisation, the first by way of a sanction (administrative decision) applied by the CA on the basis of the breach of the national law implementing the AMLD; the other as sanction on the basis of the national law implementing MiFID II, on the grounds of (i) breach of legal provisions applicable to its operations (in this case: as an obligated entity) or (ii) an investment firm no longer meeting the conditions under which the authorisation was granted. One CA reported that the assessment of the breach is carried out by the CA, then the AML/CFT supervisor is notified about the findings and the assessment. The views, and/or any additional information, clarifications or comments made by the AML/CFT supervisor on the findings/assessment are taken into account.

252. With regard to the type of evidence, the lowest support was expressed for the need of a judicial ruling, indicated by only three CAs. As for the other types of evidence, no option was significantly preferred over the others, CAs provided responses to all options.

9. Annex IV: results of the survey on withdrawal of authorisation for serious breaches of AML/CFT rules under the AIFMD and UCITSD

9.1 Introduction

253. Based on the results of the survey, there have been two cases in the past ten years, where the authorisation has been withdrawn from an AIFM management company or from a UCITS investment company for serious breaches of AML/CFT rules.

254. Conversely, no case of an order to close the intra-EU branch of an AIFM (according to Art. 4(b) AIFMD) and UCITS management company (according to Art 2 (b) UCITSD). has been reported. Similarly, no case of withdrawal of authorisation from a management company or investment company of a third country undertaking has been reported. In some cases it has been specified that there is not third country branch established in the Member State.

9.2 Description of supervisory practices based on the survey results

9.2.1 Supervisory assessment underpinning the withdrawal of authorisation

255. Out of the 28 respondents, 26 CAs reported that the withdrawal of authorisation is always subject to discretionary assessment. The two CAs which reported that it is not necessarily subject to discretionary assessment, made reference to the obligation to withdraw the authorisation where the undertaking pursues illicit activities.

9.2.2 Overview of cases of withdrawal of authorisation for serious breaches of AML/CFT rules

256. The survey asked CAs for their views on the four most relevant circumstances - among a predetermined list - that support a decision to withdraw the authorisation for serious breaches of AML/CFT rules. Considering the small number of actual cases, responses have to be understood mainly as policy-based rather than experience based.

257. All selected criteria underscore the relevance of proportionality embedded in the decision to withdraw the authorisation and its nature as a last resort remedy.

258. The four criteria receiving the largest support by CAs are: the absence of supervisory measures to effectively remedy the serious breach of AML/CFT rules (the majority of CAs); the

consideration of the consequences of withdrawal of the authorisation on financial stability (several CAs); the absence of private measures to remedy the serious breach of AML/CFT rules (several respondents). Several CAs indicated other criteria, in particular a combination of circumstances such as the seriousness and the duration of the breach and whether it has been systematic; other CAs made reference to the consideration of the losses caused to third parties and/or losses suffered compared to the capital requirements of the undertaking (a few CAs); one CA referred to the achievement of the authorisation by fraudulent or other illicit means, including by concealing AML/CFT information or circumstances; the undertaking's willingness to cooperate with the investigators was reported by three CAs as a mitigating factor when adopting the withdrawal decision.

259. The other criteria within the predetermined list in the survey were the consideration of the destruction in value of the institution and/or the market, the breach of the right of property of shareholders and creditors, and consequences of the withdrawal on the real economy.

9.3 Legal bases to withdraw the authorisation for serious breaches of AML/CFT rules

9.3.1 National legal frameworks

260. Considering the absence of an express ground for withdrawal of authorisation due to serious breaches of AML/CFT rules set out in the AIFMD and the UCITSD, the survey asked CAs to indicate which of the grounds directly envisaged in Article 11 AIFMD and in Articles 7(5) and 29(4) of the UCITSD are the most suitable to withdraw the authorisation in case of serious breaches of AML/CFT rules.

261. All CAs but one responded that irrespective of the absence of an express ground of withdrawal of the authorisation, the sectoral acts, alone or in combination with national law, provide sufficient legal bases for the withdrawal of authorisation where a serious breach of AML/CFT rules has been committed. Only one CA responded that Article 11 AIFMD, Articles 7(5) and 29(4) UCITS do not provide sufficient legal grounds to withdraw the authorisation.

262. Identified suitable legal grounds set out in the AIFMD and UCITSD are:

(i) For three CAs, obtaining "the authorisation by making false statements or by any other irregular means (Article 11(b) AIFMD; Article 7(5)(b) and 29(4)(b) UCITSD);

(ii) For some CAs no longer meeting "the conditions under which authorisation was granted" (Article 11(c) AIFMD; Articles 7(5)(c) and 29(4)(c) UCITSD);

(iii) For some CAs having "seriously or systematically infringed the provisions adopted pursuant to the Directive" (Article 11(e) AIFMD; Article 7(5)(e) and 29(4)(d) UCITSD);

(iv) For the majority of CAs, falling within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal (Article 11(f) AIFMD; Article 7(5)(f) and 29(4)(e) UCITSD). In this regard several CAs indicated the application of this provision combined with the national provisions implementing the AMLD; others indicated the breach of AMLD provisions. Two CAs indicated that there is no need of additional grounds based on national law and that the grounds envisaged by the EU Directives are sufficient to withdraw the authorisation for serious breaches of AML/CFT rules. Two CAs did not respond to this question.

263. One CA reported that none of the grounds laid down in Articles 11 AIFMD and in Articles 7(5) and 29(4) UCITSD are suitable and that, should national law not provide suitable legal grounds, they would apply Article 8(c) MIFID II.

264. With respect to actual practice, one CA reported to have withdrawn the authorisation from a AIFM management company in the past five years, on the basis of national law implementing Article 11(c) AIFMD, since the company's CDD no longer met adequate standards. The AIFM management company did not collect any documents suitable for client verification and it did not adequately enhance any procedure for high-risk clients. Since the breach affected the structural organisation of the company it was considered to be serious.

265. Another CA reported to have withdrawn the authorisation from a AIFM (according to Art. 4(b) AIFMD) and UCITS management company (according to Art 2 (b) UCITSD). in the past ten years, on the basis of national law enabling revocation of the licence on grounds other than breach of prudential requirements. It illustrated that in the very few cases where such a decision was taken, AML deficiencies were associated with weaknesses in corporate governance, internal control structure and operational risk management, and breach of capital requirements.

266. All other respondents reported not having withdrawn the authorisation from an AIFM (according to Art. 4(b) AIFMD) and UCITS management company (according to Art 2 (b) UCITSD). in the past ten years.

9.4 Evidence robustness and procedural arrangements to establish the serious breach of AML/CFT rules

267. The survey aimed at gaining an understanding of the practices as to the robustness of the evidence necessary to adopt a decision to withdraw the authorisation and the procedure (if any) to establish such evidence. For that purpose, the survey presented four options about the required degree of robustness of the evidence: i) supervisory findings, ii) compelling evidence, iii) formal decision or iv) judicial ruling.

268. For each of these options, the survey also asked which authority makes the relevant assessment that a serious breach of AML/CFT rules has been committed whether the competent (prudential) authority, the AML/CFT competent authority or in cooperation.

However, the survey did not distinguish the case where the same authority is in charge of the prudential and AML/CFT supervision and the case where these two competences are attributed to two separate authorities. Therefore, it is not possible to draw definitive conclusions. In this regard, one respondent expressly clarified that the assessment as to whether a serious breach of AML/CFT rules has been committed is carried out by the CA which is also the AML/CFT supervisor, and the withdrawal of the authorisation is adopted via formal decision by the CA based on any of the evidence referred to - supervisory findings, compelling evidence, formal decision or judicial ruling – which is suitable to the specific situation according to a case-by-case analysis.

269. With regard to the type of evidence, the lowest support was expressed for the need of a judicial ruling, indicated by only a few CAs. As to the other types of evidence, no option was significantly preferred over the others, CAs provided responses to all options.

10. Annex V: results of the survey on withdrawal of authorisation for serious breaches of AML/CFT rules under Solvency II and the IDD

10.1 Introduction

270. 25 CAs responded to the survey, 23 from Member States and 2 from EEA countries (LI and NO). In the case of one CA, some questions were answered by another CA.

271. With regard to branches, CAs reported no case of an order to close an intra-EU branch of an insurance undertaking or of withdrawal of authorisation from an EU branch of third country (re)insurance undertakings for serious breaches of AML/CFT rules[48].

10.2 Description of supervisory practices based on the survey results

10.2.1 Supervisory assessment underpinning the withdrawal of authorisation

272. Out of the 25 respondents, the majority of CAs reported that the withdrawal of authorisation is always subject to discretionary assessment. Several CAs responded that the decision is not discretionary, for instance where the authorisation has been obtained through false information and other illicit means (in the case of three CAs), or in the case of failure to remedy the minimum capital requirements within a three month period (in the case of three CAs) -OBJ. One CA reported that in the case of an exceptionally serious breach of AML/CFT rules – which is different from those situations where other supervisory or administrative measures can be applied - the competent authority is under the obligation to withdraw the authorisation.

273. The survey asked CAs for their views on the four most relevant circumstances - among a predetermined list – that support a decision to withdraw the authorisation for serious breaches of AML/CFT rules. Considering the small number of cases of actual withdrawal, responses have to be understood mainly as policy-based rather than experience-based. It was also noted that the decision to withdraw authorisation is a case-by-case decision and whilst the indicated criteria would presumably play an important role in the assessment, it is not possible to establish a hierarchical list.

[48] Some CAs have specified that there is no branch of third country insurance undertaking established in the Member State.

274. Responses underscore the relevance that CAs place on proportionality in the decision to withdraw the authorisation, its nature as last resort remedy and the importance to strike an appropriate balance of the interests at stake.

275. The four criteria receiving the largest support by CAs are: the absence of supervisory measures to effectively remedy the serious breach of AML/CFT rules (15 CAs); the consideration of the consequences of withdrawal of the authorisation on financial stability (14 CAs); the absence of private measures to remedy the serious breach of AML/CFT rules (14 respondents) and the destruction in value of the firm and/or the market (8 CAs). The other criteria within the predetermined list in the survey were the breach of the right of property of shareholders and creditors (7 CAs), and consequences of the withdrawal on the real economy (5 CAs).

276. Several CAs indicated other criteria and/or circumstances that are taken into account for the purposes of withdrawing the authorisation, notably the consequences on the policy holders (which is along the lines of the above criterion on the consequences of the withdrawal on creditors or consequences on the real economy). Two CAs indicated the elements that have to be taken into account when applying a sanction, namely: the seriousness and duration of the breach; the liability of the entity involved; the financial resources of the entity involved; the extent of the benefits gained or losses avoided; third party losses; willingness to cooperate with the supervisory bodies, and previous infringements.

10.3 Legal bases to withdraw the authorisation for serious breaches of AML/CFT rules

10.3.1 Solvency II and national legal frameworks

277. Considering the absence of an express ground for withdrawal of authorisation due to serious breaches of AML/CFT rules in Solvency II, the survey asked CAs to indicate which of the grounds directly envisaged in Article 144 Solvency II are the most suitable to withdraw the authorisation in the case of serious breaches of AML/CFT rules and whether any suitable ground is envisaged under national law.

278. As a general consideration, responses confirm that CAs are empowered to withdraw the authorisation for serious breaches of AML/CFT rules based on the transposition of the Solvency II provisions – alone or in combination with other national law provisions (AML/CFT provisions) – or on other grounds envisaged by national law.

279. With regard to the legal grounds set out in Solvency II which would be suitable to withdraw the authorisation for serious breaches of AML/CFT rules, CAs' indications are the following:

(i) seriously failing in its obligations under the regulations to which it is subject pursuant to (Article 144(1)(c) Solvency II) (indicated by the majority of CAs);

(ii) no longer meeting "the conditions under which authorisation was granted," pursuant to (Article 144(b) Solvency II (indicated by several CAs) ;

280. With regard to the suitable grounds for withdrawal envisaged by national law, some CAs expressly mentioned to be empowered to withdraw the authorisation in the case of severe, repeated, or systematic AML/CFT breaches or a combination of such breaches. Another CA specified that supervisory guidelines require a decision to be taken on the withdrawal of authorisation in cases where three supervisory decisions on significant breaches have been taken in the last four-year period. Other CAs indicated as suitable ground for the withdrawal of authorisation the breach of other national laws; another CA indicated that the authorisation may be withdrawn under national law where shareholders of an insurance or reinsurance undertaking use the proceeds deriving from illegal activities, unreported sources or processes that might be linked to financing terrorism. One CA indicated the possibility to withdraw the authorisation where previously imposed sanctions have not remedied the identified shortcomings; another CA indicated as suitable grounds the case where the authorisation has been obtained through false, fraudulent or other illicit means; and the case of failure by the members of the board of directors to continue meeting suitability requirements.

281. Several CAs indicated in the survey that the national transposition of Article 10 IDD is only applicable to the (re)insurance distributor's employees, i.e. the natural persons. Considering that the requirement of good repute and a clean criminal report can only be met by natural persons, Article 10 is not deemed applicable as a sufficient ground to withdraw the registration/authorisation of the insurance intermediary/undertaking that is a legal entity.

282. All other respondents reported to have not withdrawn the authorisation from an insurance undertaking under Article 144(1)(b) in the past ten years for serious breaches of AML/CFT rules, and the large majority of CAs reported to have not withdrawn the authorisation under Article 144(1)(c) Solvency II in the past ten years for serious breaches of AML/CFT rules.

10.3.2 The IDD and national legal frameworks

283. Considering the absence of an express ground for withdrawal of authorisation due to serious breaches of AML/CFT rules in Solvency II, the survey asked CAs to indicate the most suitable legal grounds within the IDD to withdraw the authorisation in the case of serious breaches of AML/CFT rules and whether any suitable ground is envisaged under national law.

284. The majority of CAs indicated Article 33(1)(d) and (3)(b) in combination with Article 10(3) - requiring the insurance distributor to be of good repute and to have a clean criminal record - as the most suitable grounds under the IDD. However, three CAs reported that the IDD does not lay down any legal grounds on which to base a decision to withdraw the authorisation for serious breaches of AML/CFT rules. One CA justified this view by observing that Article 10 IDD regulates mainly the employees of the distributor, in terms of training and criminal record rather than the distributor itself. As a consequence, this cannot be sufficient ground to withdraw the registration of the distributor except for specific cases.

285. One CA reported that whilst it is not responsible for insurance distributors, in the case of serious breaches of AML/CFT rules by credit institutions acting as insurance distributors, it is empowered to question the appropriate due diligence of the directors and to take appropriate actions (require to restore legal compliance, in cases of repeated or continued violations, completely or partly prohibit the directors from managing the institution or company and finally, as *extrema ratio*, revoke the licence).

286. Another CA made reference to the significant and repeated internal control deficiencies where all other measures have not proved effective, and the breaches are material and longstanding.

287. Some CAs reported that the authorisation can be withdrawn under national AML/CFT law in the case of serious and repeated breach of such rules.

288. With regard to national law, some CAs indicated that the authorisation/registration may be withdrawn for serious breaches of AML/CFT rules, other CAs indicated the breach of/non-compliance with applicable laws and regulations. One CA indicated the possibility to rely on the following grounds set out in national law: false, fraudulent documents supporting the application for registration, unsuitability of the registered person, undertaking's failure to continue to be managed in a sound and prudent manner, misappropriation of funds, criminal conviction.

289. Some CAs reported that no additional ground for withdrawal of the authorisation/registration is envisaged by national law.

290. As to actual practice, no CA reported to have withdrawn the authorisation/registration to insurance distributors so far.

10.4 Evidence robustness and procedural arrangements to establish the serious breach of AML/CFT rules

291. The survey aimed at gaining an understanding of the practices as to the robustness of the evidence necessary to adopt a decision to withdraw the authorisation and the authority in charge of the assessment of the serious breach of AML/CFT rules. For that purpose, the survey presented four options about the required degree of robustness of the evidence: i) supervisory findings, ii) compelling evidence, iii) formal decision or iv) judicial ruling.

292. For each of these options, the survey also asked which authority makes the relevant assessment that a serious breach of AML/CFT rules has been committed: whether a) the competent (prudential) authority, b) the AML/CFT competent authority or c) in cooperation. However, the survey did not distinguish the case where the same authority is in charge of the prudential and of the AML/CFT supervision and the case where these two competences are attributed to two separate authorities. Therefore, it is not possible to draw definitive conclusions from the responses provided.

293. Three CAs expressly clarified to be an integrated CA including both prudential and AML/CFT supervision, and that a high degree of internal cooperation generally takes place. This notwithstanding, some CAs clarified that the evidence and the breach of AML/CFT rules are assessed by the AML/CFT supervisor and that the decision to withdraw the authorisation is a formal decision taken by the CA which may be based on proven supervisory findings, or on compelling evidence discovered via for example, supervisory findings.

294. One CA responded that the AML/CFT supervisor is separate from the CA and that there is an intense cooperation between the two authorities. The AML/CFT supervisor carries out the assessment to identify breaches of AML/CFT rules. If the findings are serious and raise prudential concerns, the prudential authority will decide what supervisory action is to be taken. This may lead the CA to consider the withdrawal of the authorisation. This also applies in the same manner when the AML/CFT supervisor shares with the CA findings relating to AML/CFT risks posed by subject persons.

295. Another CA reported that the AML/CFT supervisor is separate from the prudential authority and explained that the determination of AML/CFT findings is made by the AML/CFT supervisor, and that this determination does not necessarily have to take the form of a formal decision. The decision to withdraw the authorisation, which takes these AML/CFT findings into account, however, is a formal decision of the Minister of Economy and Finance.

296. Finally, one CA reported that under its national law the decision to withdraw the authorisation is a sanction and that the decision on the imposition of the sanction is formally taken by the sanction committee.

297. With regard to the type of evidence, the lowest support was expressed for the need of a judicial ruling, indicated by only a few CAs. As to the other types of evidence, no option was significantly preferred over the others, CAs provided responses to all options.