

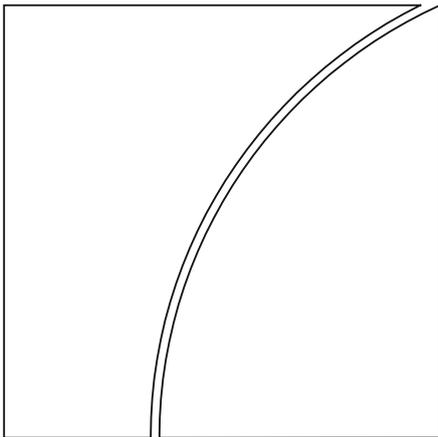
# Basel Committee on Banking Supervision

## Consultative Document

### Introduction of guidelines on interaction and cooperation between prudential and AML/CFT supervision

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## Introduction

The Basel Committee on Banking Supervision (the Committee) published guidelines on the *Sound management of risks related to money laundering and financing of terrorism* in January 2014 (updated in June 2017). The guidelines describe how banks should include money laundering (ML) and financing of terrorism (FT) risks within their overall risk management and how supervisors should consider the ML/FT risks. These guidelines are consistent with and complement the goals and objectives of the standards issued by the Financial Action Task Force (FATF) and principles and guidelines published by the Committee.

To enhance the effectiveness of supervision on banks' ML/FT risk management, the Committee proposes to provide further guidelines on interaction and cooperation between prudential supervision and anti-money laundering and countering financing of terrorism (AML/CFT) supervision. The proposed revisions recommend establishing an effective cooperation system (see paragraph 96) and introduce Annex 5 to provide detailed guidelines on when and how prudential and AML/CFT supervisory functions could exchange information and cooperate with each other.

Considering the jurisdictional diversity in institutional arrangements for allocating prudential and AML/CFT responsibilities and the importance of cooperation between the two supervisory functions regardless of institutional arrangements, for the purpose of these guidelines the supervisory function that is generally responsible for prudential banking supervision is defined as the "prudential supervisor". Conversely, the supervisory function that is responsible for AML/CFT supervision is defined as the "AML/CFT supervisor". Authorisation-related procedures of a bank, ongoing supervision and enforcement actions are identified as representative supervisory activities that require supervisory interaction and cooperation between these functions. The guidelines highlight international banking group structures and cross-border activities as an important risk factor. To ensure effectiveness and efficiency, the guidelines suggest that the information exchange and cooperation systems: (i) should not lead to a duplication of efforts; (ii) must not impair either supervisor's independence; (iii) should limit the scope of information exchange to existing information held by either supervisor; and (iv) should follow the risk-based approach (see Section A in Annex 5).

The proposed guidelines describe principles and recommendations for information exchange and cooperation in conducting representative supervisory functions: authorisation-related procedures of a bank, ongoing supervision and enforcement actions (see Sections B, C and D in Annex 5).

In addition, they present possible mechanisms to facilitate such cooperation. When supervisors are not part of the same supervisory authority, a bilateral or multilateral memorandum of understanding, prudential supervisory colleges and AML/CFT supervisory colleges are presented as examples of such mechanisms. The proposed guidelines also include processes of information exchange, the relationship with third parties (such as financial intelligence units) and confidentiality and data protection issues (see Section E in Annex 5).

A number of examples of potential information types or cooperation processes are included to provide concrete insights for implementing the recommendations. Further, a range of supervisory practices, some of which may not be applicable to all jurisdictions, are presented whenever deemed useful.

The text of the proposed new paragraph and annex is set out in the next section of this consultative document.

The Committee welcomes comments on all aspects of the proposed new guidelines. Comments should be uploaded by 6 February 2020 using the following link: [www.bis.org/bcbs/commentupload.htm](http://www.bis.org/bcbs/commentupload.htm). All comments will be published on the website of the Bank for International Settlements (BIS) unless a respondent specifically requests confidential treatment.

## Proposed revisions to the *Sound management of risks related to money laundering and financing of terrorism*

The following paragraph 96, is proposed to be added to Section IV.

### (IV. The role of supervisors)

96. Prudential and AML/CFT supervisors should establish an effective cooperation mechanism regardless of the institutional setting, as set out in Annex 5 to ensure that ML/FT risks are adequately supervised in the domestic and cross-jurisdictional context for the benefit of the two functions, without unduly duplicating efforts.

## Annex 5

### Interaction and cooperation between prudential and AML/CFT supervision

#### A. General provisions

1. Effective cooperation and exchange of information among prudential supervisors and AML/CFT supervisors that are responsible for banks (hereinafter "supervisors") is essential to lessen ML/FT risk, to maintain the integrity of the banking system and to ensure the prudential soundness and stability of banks.
2. Supervisors should ensure efficient and effective cooperation between the prudential supervisory function and AML/CFT supervisory function (hereinafter "supervision"), regardless of the jurisdictional institutional arrangement for the respective functions. This cooperation may take place within a national authority undertaking multiple functions, between different national authorities responsible for different functions and also between different authorities in the cross-border context. This cooperation must not negatively impact the independence of either supervisory function in fulfilling its mandate.
3. Prudential supervision aims to ensure compliance by banks with prudential requirements, the safety and soundness of banks and the stability of the banking system, including the authorisation of a bank, assessment of qualifying holding of bank shares, fit and proper tests of major shareholders, the board of directors and members of senior management, and on-going assessment of the adequacy of the governance, organisational structure, risk management and internal control systems of a bank. For the purposes of these guidelines, the function that carries out prudential supervision over banks is referred to as the "prudential supervisor".
4. AML/CFT supervision in the banking sector aims to ensure compliance by banks with requirements for combating ML and/or FT and to assess banks' ML/FT risks and processes and internal control systems set up in order to mitigate those risks and to undertake supervisory actions on the basis of such assessments. For the purposes of these guidelines, the function that carries out the AML/CFT supervision over banks is referred to as the "AML/CFT supervisor". As AML/CFT supervisors have specialised expertise and knowledge of AML/CFT related issues, the assessment of banks' ML/FT risk should be carried out by AML/CFT supervisors in the context of their ongoing AML/CFT supervision and considered in prudential supervision. AML/CFT supervisors should conversely consider in their assessment the knowledge and insights of the prudential supervisors in particular on the overall risk management, internal controls and governance of the supervised entities.
5. Supervisors are expected to adopt practices, from applicable Financial Action Task Force (FATF) Recommendations and the Committee's principles and guidelines on the role and powers of supervisors (including their powers to impose sanctions) and information exchange to appropriately consider ML/FT risks.
  - (1) Of the FATF recommendations relevant to supervisors, FATF Recommendation 27 (Powers of supervisors) and FATF Recommendation 40 and its Interpretative Note (Other forms of international cooperation) describe the roles and responsibilities of supervisors, their powers and authorities to enforce AML/CFT requirements that include a range of effective, proportionate and dissuasive sanctions, and the principles of information exchange and international cooperation among different public authorities, including prudential supervisors. Also for AML/CFT supervisors, FATF Recommendation 2 (National cooperation and coordination) is also relevant.
  - (2) Of the Committee's publications, the following are particularly relevant in the context of considering ML/FT risks in prudential banking supervision:

- (a) *Core principles for effective banking supervision*, September 2012<sup>1</sup>
- (b) *Corporate governance principles for banks*, July 2015<sup>2</sup>
- (c) *Principles for effective supervisory colleges*, June 2014<sup>3</sup>

6. Deficiencies in banks' AML/CFT systems could have prudential consequences. For example, AML/CFT deficiencies could result in significant regulatory actions or criminal penalties that may lead to reputational damage affecting the bank's operations such as depositor outflows, loss of counterparties or loss of market access. Additionally failures in AML/CFT may lead to the revocation of a banking license or termination of deposit insurance in some jurisdictions. Supervisors should be aware that such AML/CFT deficiencies could be caused by or indicative of the bank's wider, overall failures in governance, organisational structure, risk management and compliance.

7. Information exchange should be created and maintained, to the extent permitted by applicable laws, in order to ensure that prudential supervisors have access to timely and appropriate information gathered during the AML/CFT supervisors' activities that could be relevant to prudential supervisors in considering ML/FT risks. Similarly, prudential supervisors should share with AML/CFT supervisors any information gathered during their supervisory activities that could be relevant to the supervision of AML/CFT obligations and the assessment of ML/FT risks. This information exchange is limited to information that the requesting supervisor needs but does not have, and that the requested supervisor has available.

8. The cooperation and exchange of information between related functions should occur in conducting activities including, but not limited to:

- (1) authorisation related procedures of a bank, which includes: licence applications for banks, qualifying holding assessments, and fit and proper tests both at the time of authorisation and on a continuing basis thereafter;
- (2) on-going supervision, including assessment of governance, risk management, and internal control systems of a bank, business model and profitability drivers, operational risks and compliance with AML requirements; and,
- (3) enforcement actions<sup>4</sup> and/or revocation of a banking licence.

9. When considering ML/FT risks and assessing risk management for the purpose of activities as described in paragraph 8, prudential supervisors should also carefully consider the potential ML/FT risks identified by the AML/CFT supervisors that could stem from the international banking group structure and other cross-border activities, including the potential impact of a change of shareholders (also see Section A.1 License of a bank and Section A.2 Acquisitions and increases of qualifying holdings). In these guidelines, a bank also generally includes a banking group which is subject to consolidated supervision.

10. This annex provides principles, along with examples intended to provide practical information that supervisors should consider. The examples are not prescriptive and should be regarded as illustrative elements to provide further insight for applying and interpreting such issues. Supervisory practices provided in boxes highlight a range of practices, including some supervisory features specific to certain jurisdictions that may not be applicable to all. All these principles and examples of practices should be considered according to a risk-based approach as set out in paragraphs 86 and 87 of these guidelines.

<sup>1</sup> Accessible at: [www.bis.org/publ/bcbs230.pdf](http://www.bis.org/publ/bcbs230.pdf)

<sup>2</sup> Accessible at: <https://www.bis.org/bcbs/publ/d328.pdf>

<sup>3</sup> Accessible at: <https://www.bis.org/publ/bcbs287.pdf>

<sup>4</sup> See paragraph 22 for the definition of "enforcement actions."

Exchanges of information or other forms of cooperation should be proportionate to the risks and supervisory needs involved in each circumstance.

11. Under the risk-based approach for ML/FT, using the size of operations or profits/losses of a bank as the main or central ML/FT risk indicator would not be appropriate for concluding that a bank is low risk, given that the ML/FT risk could also arise from relatively small parts or activities of a bank or a bank with a smaller asset size.

## B. Cooperation and exchange of information in the authorisation process

12. The prudential supervisor is generally responsible for the authorisation processes of a bank (licence, qualifying holding assessments and fit and proper tests). It receives and assesses authorisation applications and should, as part of its assessment, involve the AML/CFT supervisor among other relevant parties. Therefore, the prudential supervisor should share with the AML/CFT supervisor appropriate information related to the application and receive information gathered or created in the exercise of the AML/CFT supervisor's functions, which is relevant in order to assess the application.

### B.1 Licence of a bank

13. The prudential supervisor that is generally responsible for assessing the licence application of a bank, should obtain information from the AML/CFT supervisor for the following purposes.

- (1) The prudential supervisor should consider the exposure to ML/FT risks in its assessment of soundness of the business model of the bank. Examples include but are not limited to:
  - (a) indications that the business model of a bank (including target customers, sectors, products and services, distribution channels) presents a higher level of ML/FT risks especially within a peer group, and
  - (b) information on the jurisdiction where a bank is established or maintains significant business relationships, such as the nature and level of predicate offences to money laundering and the effectiveness of a jurisdiction's legal and judicial system, the scale and the level of risk of terrorist activities and groups in the jurisdiction, relevant ML/FT typologies identified by the jurisdiction's Financial Intelligence Unit (FIU) and other public authorities and private entities, the overall level of effectiveness of a jurisdiction's AML/CFT regime.
- (2) The prudential supervisor should consider the bank's envisaged risk mitigation system, internal control system and adequacy of governance and organisational structures to properly manage ML/FT risks presented in the authorisation process. Examples include but are not limited to:
  - (a) assessments of the adequacy of AML/CFT policies and procedures of the bank,
  - (b) the organisation of the bank's AML/CFT function, including the adequacy of financial resources, staffing levels, training, and the information technology (IT) supporting the bank's AML/CFT unit, and
  - (c) governance and management oversight of the bank's ML/FT risk exposures and risk management system.

## B.2 Assessment of major shareholders, acquisitions and increases of qualifying holdings

14. The prudential supervisor is generally responsible for assessing major shareholders, proposed acquisitions or increase of a significant ownership<sup>5</sup>. The prudential supervisor should obtain information from the AML/CFT supervisor in order to consider potential effects of major shareholders, the acquisition or increases of holdings that qualify as significant ownership on the ML/FT risks of the bank, in particular in the context of cross-border banking groups, especially where the major shareholder or acquirer itself is subject to AML/CFT supervision.

- (1) Thus, the prudential supervisor should consider whether:
  - (a) the major shareholders or proposed acquirer, which can be a natural person (also see Section B.3 Assessment of natural persons) or a legal person, is or has been involved in or associated with money laundering operations or attempts, whether or not this is directly or indirectly linked to the proposed acquisition,
  - (b) the major shareholders or proposed acquirer has been involved in, associated with or has carried out terrorist activities or terrorist financing, particularly if the proposed shareholder is subject to relevant enforcement actions and sanctions<sup>6</sup>, and
  - (c) the proposed transaction increases the ML/FT risks for the bank or impacts from the AML/CFT perspective on the business plan and the management and organisational structure of the bank.
- (2) For the assessment of the major shareholders, proposed transaction and the acquirer as described in above (1)(a) to (c), examples include but are not limited to:
  - (a) information on whether the major shareholder or proposed acquirer is established in or has significant business relationships with a country or territory identified by the FATF as having ML/FT strategic deficiencies,
  - (b) information regarding the sources of the funds used for the initial capital or proposed acquisition, including both the activity that generated the funds and the means through which they have been transferred, to assess whether this may give rise to an increased risk of ML/FT,
  - (c) information on whether the major shareholder or proposed acquirer itself is subject to AML supervision (eg bank), and
  - (d) information liable to give rise to questions on the increase of ML risk, such as relocations of headquarters to ML/FT high risk countries, including countries that the FATF mutual evaluations identify as having significant deficiencies in their AML/CFT legal regulatory framework.

## B.3 Assessment of natural persons

15. The prudential supervisor is generally responsible for assessing the fitness and properness of shareholders including the ultimate beneficial owners and other persons that may exert significant influence, members of senior management, and members of the board of directors, at the time of authorisation of a bank as well as performing ongoing assessments. It should consult with the AML/CFT supervisor to obtain additional information, in order to ensure that the persons have a record of integrity and good repute, according to the essential criterion 7 of principle 5 in *Core principles for effective banking*

<sup>5</sup> The ultimate beneficial ownership as set out in Core Principle 6 should also be considered in the context of this guideline for assessing the major shareholders.

<sup>6</sup> See paragraph 22 for the definition of enforcement actions and sanctions.

supervision and paragraph 51 in Principle 2 and paragraph 161 in Principle 13 of *Corporate governance principles for banks*, and in particular that a bank is not controlled or owned by persons with links to significant ML/FT risks. Examples of relevant information to assess the suitability of the appointee include but are not limited to:

- (1) past convictions or pending and ongoing prosecutions for a criminal offence and other relevant current or past measures taken by any regulatory or professional body for non-compliance with any relevant provisions. In this context, the stage of the proceedings, the materiality of the alleged noncompliance, the time that has passed since the past regulatory enforcement action or criminal penalty and the appointee's conduct since the misconduct, the personal involvement of the appointee and all other mitigating or aggravating factors, such as repeated infringement, are also relevant,
- (2) any relevant findings from on-site and off-site supervision, from investigations or enforcement actions, to the extent that they relate to the proposed appointee, and
- (3) other adverse information relevant to ML/FT risks regarding the appointee's conduct from credible and reliable sources to the extent possible, in particular when they are persistent.

Box 1

#### Example of practice: Fit and proper assessment

In some jurisdictions, the fact that an individual or legal person is under investigation, indictment, enforcement action, or prosecution for money laundering, sanctions violations, or other similar offences as determined in these jurisdictions, could lead to further actions from the supervisor, requiring information about the underlying facts. Depending on the facts gathered and the legal framework, in some jurisdictions, this could lead to a conditional approval of an application or to preventing an institution, individual or a group of individuals from engaging in certain banking activities (such as establishing or acquiring a bank, serving as executive management, or engaging in new activities outside of the approved business model). In some cases, the underlying facts could lead to a denial of approval without prejudice to the finalisation of the investigations of the other authorities.

### C. Cooperation and exchange of information in ongoing supervision

16. Weaknesses or breaches in a bank's compliance with AML/CFT requirements could have significant legal, regulatory, criminal, reputational and financial impacts. ML/FT risks may affect the prudential analysis in the different components of its assessment of the bank's soundness. Therefore, the prudential supervisor should take into account the impact of the ML/FT risks by collecting and considering all relevant information identified by the AML/CFT supervisors. These prudential assessments should pay particular attention to the potential ML/FT risks that could stem from the cross-border banking group structure.

- (1) ML/FT risks could impact the prudential supervisor's assessment of a bank's risk management, internal controls and governance. Examples include but are not limited to:
  - (a) the level of personnel awareness of AML/CFT issues within the corporate culture as set out in *Corporate governance principles for banks*, particularly related to compliance records, the record of transparency and behaviour in relation with the relevant supervisors and FIUs,

- (b) the quality of the information given to the management and board of directors of the bank on AML/CFT topics, including information on major AML/CFT breaches, criminal or administrative sanctions, risk indicators on AML/CFT activity,
  - (c) the independence and the capacity of the risk management and internal control functions dedicated to the AML/CFT activities, and
  - (d) new adverse facts regarding shareholders (including beneficial owners), members of the management body and qualifying holders.
- (2) ML/FT risks could impact the soundness of the business model. For example, information on transactions, business relationships and establishment in higher-risk countries could be relevant to determine this impact.
- (3) ML/FT risks could impact the operational risk of a bank. For example, information on deficiencies regarding IT systems used by the bank to manage ML/FT risks could be relevant to raising awareness of the prudential supervisor about broader IT issues.
- (4) ML/FT risks could impact the liquidity risk of a bank. For example, information on deposits received from countries with higher ML/FT risks or suspension of access to settlement services due to ML/FT issues could be relevant to the prudential supervisor's assessment of the soundness of the bank.

17. The information held by the AML/CFT supervisors could provide valuable insight for the exercise of prudential supervision. AML/CFT-related information in relation to a bank, its members of senior management, the board, as well as any other information, findings or concerns could indicate weaknesses in the bank's prudential risk components, such as risk management, internal controls and governance. Besides the relevant information that is described in paragraph 16, the following examples of specific information sources held by the AML/CFT supervisor could be relevant for prudential supervision:

- (1) AML/CFT topics identified by AML/CFT supervisors as priorities,
- (2) Assessment of ML/FT risks which could take into account component(s) directly linked to a prudential component,
- (3) scheduled AML/CFT on-site examinations and the outcome of previous examinations,
- (4) relevant AML/CFT reports from internal and external sources,
- (5) AML/CFT supervisory measures. For example, supervisory measures taken against board members or members of senior management of the bank could have an impact on the prudential supervisor's assessment of the bank's governance framework. Supervisory measures that limit the bank's activity could have an impact on the business model. Financial penalties applied to the institution could have an impact on capital requirements or liquidity, and
- (6) alerts related to ML/FT issues reported by whistleblowers <sup>7</sup>.

<sup>7</sup> See paragraph 32 in *Corporate governance principles for banks*, July 2015 for description of whistleblowing principles

## Example of practices

### AML/CFT report

Some jurisdictions have required banks to prepare an AML/CFT risk assessment report and internal control report. This report is transmitted to senior management of the bank and to AML/CFT supervisors. It gives them relevant information regarding the ML/FT risks of the bank and corresponding mitigation measures. Such a document could be shared with prudential supervisors when relevant - that is if a specific AML/CFT issue or an increased AML/CFT risk has been identified for an institution.

### Impact of AML/CFT supervisor's assessment

Some jurisdictions have laws that require prudential supervisors to incorporate an explicit assessment of a bank's AML/CFT programme in making supervisory decisions such as reviewing various applications by banks. In those jurisdictions, AML programmes that are less than satisfactory may affect a bank's ability to expand, merge or acquire. As such, the information exchange on the AML/CFT supervisor's assessment could be useful in the licensing and on-going supervision processes.

18. The information held by the prudential supervisor could be valuable for the exercise of AML/CFT supervision. An analysis of prudential information regarding a bank, its members of senior management and the board, as well as any other information, findings or concerns could be relevant to the AML/CFT supervisory assessment of the bank's ML/FT risk components, such as the bank's internal control systems to identify and manage ML/FT risks.

- (1) Prudential information about a bank's governance and risk management could be relevant for the AML/CFT supervisor. Examples of relevant information include but are not limited to:
  - (a) the ownership and corporate structure of a bank and the level of complexity and transparency of its organisation and structure,
  - (b) deficiencies detected in governance and management oversight of a bank, as it could generally impact the effectiveness of AML/CFT systems at the bank. In particular, a lack of involvement of the risk management, controls and compliance functions in important managerial decisions could signal weaknesses in the AML/CFT function,
  - (c) prudential supervisory measures taken related to the governance framework, rejections of acquisitions of qualified holdings, proposed members of senior management or members of the board on the grounds of operational and reputational risk, and
  - (d) concerns regarding the integrity and good repute of senior managers, members of the management body and significant shareholders (including beneficial owners).
- (2) Prudential information about the business model could be relevant for AML/CFT supervision. This includes information on prudential supervisory measures such as restrictions to operations including the establishment or provision of certain services.

- (3) Prudential information on operational risks such as deficiencies in a bank's IT system or lines of defence<sup>8</sup> could be relevant for the AML/CFT supervisor.
19. Prudential information that could be relevant and provided to the AML/CFT supervisor could be obtained from the following sources:
- (1) information from on-site examinations, off-site surveillance and enforcement actions that is related to ML/FT risks, and
  - (2) information gathered during the authorisation, licensing or passporting process that is related to ML/FT risks.

Box 3

### Example of practices

#### Practice concerning access to sources

In some jurisdictions, where AML/CFT supervision and prudential supervision are conducted by the same authority, AML/CFT examiners have access to current and historical information and documents about examinations conducted by the prudential supervisor.

#### Prudential-AML/CFT coordinated examination processes

In some countries, where prudential supervision and AML supervision are conducted by the same authority, examiners with a range of assignments and specialties, including AML/CFT, can be on-site at the same time. By examining the bank for safety and soundness and AML/CFT compliance at the same time, examiners are able to discuss all aspects of the bank's operations as well as evaluate the bank's policies, procedures and processes together.

A common example of the beneficial synergy between prudential and AML/CFT supervisors would include the review of a merger between two institutions. A concurrent review might highlight dissimilar business models, distinct credit underwriting standards, and different customer types. The acquiring bank may be unfamiliar with certain products and services acquired and may not have the experience or infrastructure (technology or staff) to adequately monitor the different customer types for suspicious activity. Without both disciplines discussing the merger, some of the important details could be overlooked.

## D. Cooperation and exchange of information regarding enforcement actions

20. This section establishes principles for sharing information on enforcement actions or sanctions between prudential and AML/CFT supervisors at domestic and international levels.
21. Prudential and AML/CFT supervisors should share relevant information with domestic and international counterparts, in a timely manner and as appropriate consistent with applicable legal and other requirements, regarding pending or imposed enforcement actions or sanctions on a financial institution that are relevant and necessary for the supervisory function of the counterpart. The sharing of information may depend on the type and severity of the supervisory action, the confidentiality

<sup>8</sup> See *Principles for the sound management of operational risk*, June 2011 (available at <https://www.bis.org/publ/bcbs195.pdf>) for a description of the three lines of defence.

requirements of the investigation, whether the international counterpart provides reciprocal assistance, and whether such sharing would prejudice the interests of the home jurisdiction of the prudential regulator. Communication where appropriate should include sufficient detail regarding the nature of the AML/CFT deficiencies involved to enable each supervisor to assess the impact of those deficiencies on the supervised institution, in the context of the supervisor's mandate and function. It should occur as early and often as possible in order to manage the potential impact of the enforcement action or sanctions on financial stability (eg such as capital adequacy and liquidity concerns, revocation of banking licences or authorisations, termination of deposit insurance, or significant curtailment of activities).

22. For the purpose of this guideline, the term "enforcement action" or "sanctions" refers to the range of civil or administrative actions, often public, imposed on financial institutions by supervisors for significant non-compliance with AML/CFT requirements. The focus of this guideline is on banking supervision, therefore, the terms "enforcement actions" or "sanctions" do not include actions imposed on financial institutions by law enforcement authorities for criminal violations of AML/CFT requirements or actions imposed by other non-bank supervisory government agencies.<sup>9, 10</sup> Moreover, in this guideline, the use of the term "enforcement actions" or "sanctions" is separate and distinct from "asset seizures and freezes" or "targeted financial sanctions," as defined by the FATF."

- (1) In some countries, enforcement actions or sanctions can include civil or administrative money penalties, corrective action, and supervisory actions which may result in the curtailment of certain banking activities due to significant AML/CFT issues.
- (2) Separately, in certain jurisdictions supervisors may have the authority to assess civil or administrative money penalties against bank insiders and may also remove and prohibit individuals from participating in the affairs of a bank (including employment).
- (3) Enforcement actions or sanctions can also impact a financial institution's ability to engage in certain activities and expansion since the effectiveness of a financial institution's AML/CFT efforts may be expressly required to be considered by a jurisdiction's laws and regulations on banking applications and licensing. In some jurisdictions, in addition to a criminal action concerning certain violations for money laundering, supervisors may consider additional actions such as the revocation of an institution's banking charter/licence or termination of the institution's deposit insurance. Additionally, there may be other situations where a supervisor may consider AML/CFT related violations as grounds for the appointment of an administrator or receiver.

<sup>9</sup> Nevertheless, enforcement actions or sanctions by authorities other than AML/CFT supervisors can be relevant for the exercise of prudential supervision, thus a similar information exchange process is in principle beneficial. Such cooperation, should not impinge on on-going inquiries, investigations or proceedings in accordance with the criminal or administrative law.

<sup>10</sup> The term "non-bank supervisory government agencies" refers to authorities with AML/CFT-related enforcement powers but that are not supervisors of banks.

### Example of practice: Enforcement action information exchange in the cross-border context

In some host jurisdictions, prudential supervisors share information with their foreign home supervisors about deficiencies in AML/CFT compliance and the possible consequences. Once imposition is imminent, they then follow up with information about pending enforcement actions. The host prudential supervisors also may share information with the home supervisors, as they are able and as appropriate, about possible non-supervisory (eg criminal) sanctions, as well as relevant information about possible consequences of the enforcement actions (eg the impact of the enforcement actions on possible future expansion and acquisition activities of the bank involved).

## E. Mechanisms for cooperation, information exchange and confidentiality treatment

### E.1 Cooperation and information exchange between prudential and AML/CFT supervisors

23. Supervisors should establish and maintain official channels to facilitate and structure ongoing dialogue, information exchange and cooperation between prudential and AML/CFT supervisors, and use those channels effectively to inform relevant stages of the supervisory process. Examples of such channels between supervisory authorities include bilateral or multilateral exchanges with or without a Memorandum of Understanding (MoU), prudential supervisory colleges, and dedicated AML/CFT colleges. Prudential and AML/CFT supervisors should consider the following items presented as examples below when putting in place mechanisms to ensure the exchange of information and cooperation in a timely and effective manner.

- (1) Where prudential and AML/CFT supervisors are part of the same supervisory authority, internal processes should clearly establish, when the teams in charge are different, the need to work together and exchange information both, proactively and upon request, whilst maintaining the independence of each function.
- (2) Where prudential and AML/CFT supervisors are not part of the same supervisory authority, both supervisors should consider putting in place an Agreement or MoU<sup>11</sup> that sets out, for example:
  - (a) In relation to the exchange of information:
    - i. the type of information that can or should be exchanged,
    - ii. situations where the request for information may be refused,
    - iii. the modalities of information exchange (including means of communication and where applicable, the language used in the information communication),

<sup>11</sup> For example, the ECB and numerous AML/CFT authorities responsible for the AML/CFT supervision of credit and financial institutions in the member states of the European Economic Area have signed an agreement including most of the below listed items which, can be viewed at:

<https://eba.europa.eu/documents/10180/2545547/Agreement+between+CAs+and+the+ECB+on+exchange+of+information+on+AML.pdf/e83dd6ee-78f7-46a1-befb-3e91cedeb51d>

- iv. confidentiality and data protection provisions (including acceptable uses, by the requesting or receiving party, of the information obtained, including the ability for onward transmission of information to a third party at home or abroad), and
  - v. the legal basis for information exchange.
- (b) In relation to cooperation:
- i. areas in which cooperation is possible, and the purpose of such cooperation,
  - ii. a mechanism to agree on the manner to cooperate effectively in cases where several authorities have an interest in investigating the same entity, and where there is a risk that one investigation might prejudice the other. This could also set out which authority will take priority or take the lead in those cases and under which circumstances, and
  - iii. the legal basis for cooperation.
- (c) A mechanism to attempt to resolve any disagreements among supervisory authorities, as necessary.

24. Prudential and AML/CFT supervisors should exchange information periodically and when necessary as relevant for their respective tasks, taking into account the mechanisms described in paragraph 23(1) and 23(2), as appropriate.

25. In the case of a request for information, the requested supervisor should determine whether the requested information is available and can be provided under the applicable regulations and laws.

- (1) Where the request cannot be fulfilled in part or in whole, the supervisor should cooperate to the fullest extent possible and consider whether it can provide other assistance. Also, in such a case, the requested supervisor should inform the requesting party of the decision, explain why it cannot exchange information and consider including advice on how else it might be able to assist.
- (2) Where information can be shared, the supervisor should endeavour to exchange the requested information within the time set in the request. If providing data within the requested time is impossible or excessively burdensome, the supervisor should offer an alternative delivery date on which the requesting and requested parties can agree.

26. In respect of banks operating across borders, supervisory authorities should put in place and maintain mechanisms to ensure the exchange of information and cooperation across borders in a timely and effective manner. To this end, supervisors should consider taking into account the mechanisms described in paragraph 23(2). As part of this, supervisory authorities should consider whether the use of either, or a combination of, prudential colleges, AML/CFT colleges and bilateral relationships effectively meets their supervisory needs.

- (1) Prudential colleges discuss AML/CFT issues from a prudential perspective, as part of the prudential college meetings or in AML/CFT sub-structures that can be set up as part of the prudential college. Addressing AML/CFT issues in the prudential college's context establishes a clear link between prudential and AML/CFT supervisors. However, AML/CFT supervisors that are not also prudential supervisors might not be members of the prudential college and therefore may be excluded from discussions. Moreover, focusing on prudential objectives and considerations, AML/CFT issues may be considered only after ML/FT risks have crystallised. Therefore, prudential colleges should consider inviting AML/CFT supervisors to participate as members or observers of the prudential college meetings to discuss issues relevant for them, or in AML/CFT sub-structures when there is no AML/CFT college, with the appropriate information exchange arrangements.

- (2) AML/CFT colleges are being set up in some jurisdictions to provide a formal framework for cooperation and information exchange amongst supervisors with an AML/CFT remit. Bringing together expert AML/CFT supervisors in this way ensures that ML/FT risks associated with a particular bank or group can be identified and effectively mitigated before they have crystallised. To be effective, AML/CFT colleges nevertheless have to build strong links with prudential supervisors and their prudential colleges counterparts where they exist, to ensure that information regarding ML/FT risks that are relevant from a prudential perspective, and prudential risks that are relevant from an AML/CFT perspective, is exchanged and can be acted upon in a timely fashion. Prudential supervisors could be members of these colleges, or be invited as observers.
- (3) Where no prudential or AML/CFT supervisory college exists, prudential and AML/CFT supervisors should put in place and maintain mechanisms to ensure the bilateral exchange of information and cooperation in a timely and efficient manner. Supervisors should consider referring to the mechanisms described in paragraph 23(2).

Box 5

#### Example of practice: AML/CFT Supervisory colleges

AML/CFT and prudential legislation in the European Union (EU) establishes an obligation for competent authorities to cooperate and exchange information, but it does not set out in detail how this should be achieved. In the absence of a common framework, cooperation and information exchange between prudential and AML/CFT competent authorities for the purposes of AML/CFT supervision can sometimes be difficult.

To address this, the European Supervisory Authorities (ESAs) are preparing Guidelines on the establishment of AML/CFT colleges of supervisors<sup>12</sup>.

AML/CFT supervisory colleges are colleges of supervisors that are responsible for the AML/CFT supervision of the same bank, financial institution or credit or financial institutions belonging to the same group. As with prudential colleges, AML/CFT colleges serve as a forum for collaboration and exchange of information, which will be conducive to the development of a common understanding, by all supervisors, of the ML/FT risks associated with the bank or financial institution, and inform their respective approaches to the AML/CFT supervision of the bank.

Prudential supervisors are expected to participate in AML/CFT supervisory colleges as observers when invited by the lead supervisor to ensure that information from AML/CFT college meetings is available to colleges of prudential supervisors.

27. Prudential and AML/CFT supervisors should consider whether, and if so, in which situations, to cooperate, for example by carrying out joint inspections.
28. When deciding whether to cooperate, supervisors should consider:
  - (1) the nature and level of the ML/FT risk associated with the bank,
  - (2) the focus of the proposed cooperation, including a bank's compliance with specific legal or regulatory provisions, such as legal and regulatory requirements to conduct customer due diligence (CDD) or to report suspicious transactions, or specific ML/FT risks that have been identified, and

<sup>12</sup> The ESAs consultation paper is available at:

<https://eba.europa.eu/documents/10180/2440050/Consultation+Paper+on+JC+GLs+on+cooperation+and+information+exchange+for+AML+CFT+supervisory+purposes+.pdf>

- (3) the availability and planned allocation of supervisory resources.
29. When taking the decision to cooperate, supervisors should consider setting out in writing, at a minimum:
- (1) which supervisory authority is responsible for coordinating actions, if appropriate,
  - (2) an action plan, including the nature and type of actions that can be taken by each participating supervisor, the timing of the work to be undertaken by each participating supervisor and the modalities of information exchange, including the sharing of information gathered during, and as a result of, the cooperation, and
  - (3) the options for coordinated follow-up, if any, including, where applicable, cooperation in relation to an enforcement action.

## E.2 Cooperation and information exchange between supervisors and third parties

30. Information relevant to both prudential and AML/CFT supervisors may be held by third parties, domestically or in another jurisdiction (eg a jurisdiction's FIUs or law enforcement agencies). In line with FATF Recommendation 2, in those cases, supervisors should ensure that they put in place and maintain effective channels to cooperate and exchange information at both operational and policy levels, to the extent that this is relevant, in a risk-based manner.

31. Where enforcement actions are imposed by law enforcement authorities or other public authorities, such as FIUs, supervisors should endeavour to share timely and relevant information with their domestic and international counterparts, within the scope of applicable law and investigative confidentiality requirements. Such cooperation should not impinge on on-going inquiries, investigations or proceedings in accordance with criminal or administrative law.

32. Supervisors should consider signing a MoU or Agreement with all relevant third parties such as the mechanisms described in paragraphs 23 to 26.

## E.3 Confidentiality and data protection provisions

33. When putting in place mechanisms to ensure the exchange of information and cooperation among authorities in line with paragraphs 23 to 26 and 30, supervisors should include, to the extent legally possible, confidentiality and data protection provisions as follows.

- (1) A confidentiality clause, specifying that all the information exchanged under such arrangement can only be used for supervisory purposes or purposes linked to the AML/CFT responsibilities of the party receiving the information. As part of this, authorities should consider specifying in the arrangement that the exchanged information must be classified as "confidential", and that requirements should be adopted in order to ensure the appropriate, high level of security for transmission and storage of information.
- (2) Measures governing the dissemination of information to third parties. Dissemination of information obtained from other authorities should be subject to prior authorisation by the requested authority, unless the requesting authority is under a legal obligation to disclose or report the exchanged information, and vice versa; in such cases, the requesting authority should promptly inform the requested authority of this obligation.
- (3) Data protection provisions. When required by applicable laws, parties to the agreement should be allowed to exchange sanitised data; in case of information related to on-going law enforcement investigations or suspicious transaction reporting, the transmission of sanitised data should be authorised by the originating authorities.

- (4) Safeguards to protect the identity of whistleblowers where the information exchanged is gathered from whistleblowing.