OPINION OF THE EUROPEAN CENTRAL BANK

of 18 December 2020

on the application of money laundering and terrorist financing requirements to virtual currency service providers

(CON/2020/35)

Introduction and legal basis

On 29 October 2020 the European Central Bank (ECB) received a request from the *Ministerio de Asuntos Economicos y Transformación Digital* (the Spanish Ministry of Economic Affairs and Digital Transformation) for an opinion on a draft law amending the Law on the prevention of money laundering and terrorism financing (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third indent of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], as the draft law relates to Banco de España. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The main purpose of the draft law, which amends the current Law on the prevention of money laundering and terrorist financing[2] (hereinafter the Anti-Money Laundering/Combatting the Financing of Terrorism law ('AML/CFT law')), is to implement Directive (EU) 2018/843 of the European Parliament and of the Council[3] into Spanish law. The draft law also introduces some amendments to include additional categories of virtual currency service providers.

1.2 More concretely, and as part of the amendments which implement Directive (EU) 2018/843, the draft law extends the addressees of the AML/CFT law[4] to include the providers of exchange services between virtual currencies and fiat currencies, as well as custodian wallet service providers (defined as those natural or legal persons that provide private cryptographic key safeguarding services on behalf of their clients, for the holding, storing and transferring virtual

1 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

2 Law 10/2010 of 28 April 2010 on the prevention of money laundering and terrorist financing, 'BOE' no. 103 of 29 April 2010.

3 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC (OJ L 156, 19.6.2018, p. 43).

4 See new Article 1(2)(v) of Law 10/2010 (section 2 of the sole Article of the draft law).

currencies in a manner similar to that of the custody of traditional financial funds or assets). Going beyond a transposition of Directive (EU) 2018/843, the draft law also incorporates additional categories of virtual currency service providers, as addressees of the AML/CFT law.

1.3 The draft law requires the providers of: (i) exchange services between virtual currencies; (ii) exchange services between virtual currencies and fiat currencies; and, (iii) custodial wallet service providers, who are located in Spain or provide services to residents in Spain, to be entered in the register established for this purpose by Banco de España[5]. Banco de España will be required under the draft law to supervise the compliance of these service providers with the obligation to register, as well as their compliance with the requirements of good business and professional repute to be determined. According to the draft law, these requirements will be established in an administrative norm[6]. In addition, Banco de España will exercise sanctioning powers, in line with the Spanish banking law[7], in cases of non-compliance with the registration requirement[8].

2. General observations

2.1 This opinion does not address the issue of whether the draft law is compatible with Directive (EU) 2018/843. The ECB has limited its assessment of the provisions of the draft law to the issue of whether the conferral of a new task on the Banco de España complies with the prohibition on monetary financing.

3. Conferral of a new task on the Banco de España

3.1 *New tasks of Banco de España*

3.1.1 It is envisaged that the tasks of operating the register, as well as supervision of compliance by the relevant service providers with the obligation to register subject to the fulfilment of requirements of good business and professional repute, will be conferred on the Banco de España. It should be noted that the primary AML/CFT authority in Spain is the *Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias* (Commission for the Prevention of Money Laundering and Monetary Offences), which is a body under the Ministry of Economic Affairs and Digital Transformation, responsible for developing and coordinating Spain's policies on AML/CFT[9]. In order to carry out its tasks, the Commission is supported by the *Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias* (SEPBLAC, Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences) and the

5 See section 1 of the new Second Additional Disposition of Law 10/2010 (section (52) of the sole Article of the draft law).

6 See section 3 of the new Second Additional Disposition of Law 10/2010 (section (52) of the sole Article of the draft law).

7 Law 10/2014 of 26 June 2014 on the regulation, supervision and solvency of credit institutions, 'BOE' no. 156 of 27 June 2014, page 49412.

8 See section 4 of the new Second Additional Disposition of Law 10/2010 (section (52) of the sole Article of the draft law).

9 Article 44 of Law 10/2010.

Commission's Secretariat[10]. SEPBLAC acts as the Financial Intelligence Unit, and is also responsible for supervision in relation to AML/CFT matters in all financial and non-financial sectors, in cooperation with sectoral supervisors. Accordingly, since Banco de España is the supervisor of credit institutions and other non-credit financial institutions, such as payment institutions and electronic money institutions, Banco de España also cooperates with SEPBLAC in the supervision in relation to AML/CFT matters in financial institutions under an agreement signed for this purpose.[11] In this respect, Banco de España has the power to carry out inquiry measures, formulate recommendations and propose to the Commission's Secretariat the formulation of requirements[12].

3.1.2 The ECB emphasises that a proposed conferral of new tasks on a national central bank (NCB) participating in the European System of Central Banks (ESCB) must be assessed against the prohibition on monetary financing under Article 123 of the Treaty. For the purposes of that prohibition, Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93[13] defines 'other type of credit facility' as, inter alia, 'any financing of the public sector's obligations vis-à-vis third parties'.

3.1.3 Ensuring that Member States implement a sound budgetary policy is one of the key objectives of the prohibition on monetary financing, which may not be circumvented. Therefore, the task of financing measures, which are normally the responsibility of the Member States, and which are financed from their budgetary sources rather than by the NCBs, must not be entrusted to NCBs. To decide what constitutes financing of the public sector's obligations vis-à-vis third parties – which can be translated as the provision of central bank financing outside the scope of central bank tasks – it is necessary to carry out, on a case-by-case basis, an assessment of whether the task to be undertaken by an NCB is a central bank task or a government task, i.e. a task within the responsibility of the Member States. In other words, adequate safeguards must be in place to ensure that circumventions of the objective of the prohibition on monetary financing, which is to maintain sound budgetary policy by Member States, do not take place.

3.1.4 As part of its discretion in the exercise of its duty – on the basis of Article 271(d) of the Treaty and Article 35.6 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') – to ensure that NCBs honour the obligations laid down by the Treaty, the Governing Council has endorsed safeguards in the form of criteria for determining what may be considered as falling within the scope of 'the public sector's obligations vis-à-vis third parties' within the meaning of Article 1(1)(b)(ii) of Regulation (EC) No 3603/93 or, in other words, what constitutes a government task, as follows:

First, central bank tasks are, in particular, those tasks that are related to the tasks that have been conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB. These tasks are mainly defined in Article 127(2), (5) and (6), and Article 128(1) of the Treaty, as well as in Article 22 and Article 25.1 of the Statute of the ESCB.

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10 Article 45 of Law 10/2010.

11 Article 44 and Article 47 of Law 10/2010.

12 Article 44(2)(m) of Law 10/2010.

13 Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty (OJ L 332, 31.12.1993).

Second, as Article 14.4 of the Statute of the ESCB allows NCBs to perform 'functions other than those specified in [the Statute of the ESCB]', new tasks, i.e. tasks that are not related to tasks that have been conferred upon the ECB and the NCBs, are not precluded per se. However, new tasks that are undertaken by an NCB and which are atypical of NCB tasks or which are clearly discharged on behalf of, and in the exclusive interest of the government or of other public sector entities, should be considered government tasks.

Third, an important criterion for qualifying a new task as atypical of an NCB task, or as being clearly discharged on behalf of and in the exclusive interest of the government or other public sector entities, is the impact of the task on the institutional, financial and personal independence of that NCB.

In particular, the following aspects should be taken into account:

(a) whether the performance of the new task creates conflicts of interest with existing central bank tasks which are not adequately addressed, and its performance does not necessarily complement those existing central bank tasks. If a conflict of interest arises between existing and new tasks, sufficient safeguards to mitigate that conflict should be in place. The complementarity between a new task and existing central bank tasks should not be interpreted broadly so that it could lead to the creation of an indefinite chain of ancillary tasks. Such complementarity should be examined in relation to the financing of those tasks;

(b) whether without new financial resources the performance of the new task is disproportionate to the NCB's financial or organisational capacity, and may have a negative impact on the capacity to properly perform the existing central bank tasks;

(c) whether the performance of the new task fits into the institutional set-up of the NCB in the light of central bank independence and accountability considerations;

(d) whether the performance of the new task harbours substantial financial risks;

(e) whether the performance of the new task exposes the members of the NCB decision-making bodies to political risks that are disproportionate and may also have an impact on their personal independence and, in particular, on the guarantee of term of office set out in Article 14.2 of the Statute of the ESCB.

3.2 *Tasks related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB*

The tasks of operating a register and supervising compliance by the relevant virtual currency service providers with the obligation to register subject to the fulfilment of the requirements of good business and professional repute to be determined, are not related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB.

3.3 *Tasks which are atypical of central bank tasks*

The tasks of operating a register and supervising compliance by the relevant virtual currency service providers with the obligation to register subject to the fulfilment of the requirements of good business and professional repute to be determined, are not atypical of central bank tasks insofar as they complement the existing roles of a number of NCBs as supervisors for the financial sector in relation to AML/CFT matters. In this respect, it is noted that the majority of ESCB NCBs are

supervisors in relation to AML/CFT matters, a role which is complementary to their role as supervisors of credit and/or financial institutions. In the implementation of Directive (EU) 2018/843 into national law, Member States have conferred the specific tasks of operating a register (and/or the related supervisory tasks) in respect of virtual currency service providers, on a wide range of public authorities including financial supervisory authorities (some of whom are central banks), financial intelligence units, revenue services and Government ministries. More concretely, the ECB has identified two Member States that have directly conferred these particular tasks on their NCBs[14], five Member States that have conferred these tasks on their national supervisory authorities[15], and three other Member States that have, either directly or indirectly, conferred these tasks, in whole or in part, on their respective NCBs[16]. In addition, the ECB understands that certain Member States which have not yet legislated on this matter are considering conferring these tasks on their respective NCBs.

Banco de España, as the body responsible for the supervision of credit institutions on the basis of Article 7.6 of Law 13/1994 on the autonomy of Banco de España[17] and on the basis of Law

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14 In the **Netherlands**, Article 23(b) of the Law on money laundering and terrorist financing prevention (*Wet ter voorkoming van witwassen en financiering van*) requires anyone who offers professional or commercial services in or from the Netherlands for the exchange between virtual currency and fiduciary currency or custody wallets services to register with De Nederlandsche Bank (DNB). Articles 23(c) to 23(f) of this same Act set out the actions that DNB may undertake in order to ensure compliance with the obligation to register. In **Portugal**, the Law No. 83/2017 on theprevention of money laundering and terrorist financing (*Lei de medidas de combate ao branqueamento de capitais e ao financiamento do terrorismo*) considers virtual asset service providers as obliged entities required to comply with AML/CFT rules, and Banco de Portugal is the authority responsible for the registration and supervision of these entities for AML/CFT purposes.

15 In **Austria**, Article 32(a) of the Law on financial market anti-money-laundering, the Finanzmarkt-Geldwäschegesetz , confers these tasks on the Financial Market Authority (FMA). In **Germany**, pursuant to section 32(1) of the Law on German banking, the *Bundesanstalt für Finanzdienstleistungsaufsicht,* keeps a register of all licensed service providers and is responsible for the respective ongoing supervision. In **Finland**, pursuant section 5 of the Law No. 572/2019 on the providers of virtual currencies (*Laki virtuaalivaluutan tarjoajista*) *Finanssivalvonta* keeps a register of the virtual asset service providers which ensures that these providers comply with their statutory requirements concerning, for instance, the reliability of the provider. In **Luxembourg**, pursuant Articles 1(20c) and 7-1(1) of the Law 12 November 2004 on the fight against money laundering and terrorist financing as amended by the Law of 25 March 2020 on *Loi du 12 novembre 2004 relative à la lutte contre le blanchiment et contre le financement du terrorisme*, entities providing exchanges services between virtual currencies and fiat currencies, or between virtual currencies, as well as custodian wallet providers, need to register with the *Commission de Surveillance du Secteur Financier*. The registration of the above-mentioned services providers shall be subject, as per Article 7-1(3) of the AML/CFT Law, to an assessment of their professional standing. In **Malta**, according to the Law on virtual asset providers of 1 November 2018, the providers of the above-mentioned services need to register in a financial register maintained by the Malta Financial Services Authority. The AML/CFT supervision of such licensed providers is executed by the Financial Intelligence Analysis Unit.

16 In **Italy**, Legislative Decree No. 90/2017 (*Decreto Legislativo 25 maggio 2017, N. 90)*, amending Legislative Decree No. 231/2007 setting out the Italian anti-money laundering rules, virtual asset service providers are required to register with the *Organismo degli Agenti e dei Mediatori*, a body subject to the supervision of Banca d'Italia, which is responsible for maintaining the registers of financial agents and credit brokers. In **Lithuania**, the Law of 3 November 2019 on prevention of money laundering and terrorist financing, amending the Law of 19 June 1997 (*Pinigų plovimo ir teroristų finansavimo prevencijos įstatymas*), requires providers of exchange services between virtual currency and fiduciary currency and custody wallet service providers to notify the Registrar of Legal Entities about their activity no later than within 5 business days from the beginning or termination of such activities. The Financial Crime Investigation Authority (the FIU) supervises the activities of operators in the area of money laundering and/or terrorist financing prevention. The instructions that the FIU may address to these providers shall be approved in coordination with Lietuvos bankas and the Ministry of Finance. In **Slovenia**, according to Article 4(a) of the Law of 19 November 2016 on prevention of money laundering and terrorist financing (*Zakon o preprečevanju pranja denarja in financiranja terorizma*), the register of providers of exchange services between virtual and fiat currencies and custodian wallet providers is maintained and managed by the Office for the prevention of money laundering. However, pursuant to Articles 4(20d) and 151 of the above-mentioned Act, Banka Slovenije supervises compliance with the relevant statutory requirements.

17 Law 13/1994 on the autonomy of Banco de España, "BOE" no. 131 of 2 June 1994.

10/2014 on the regulation, supervision and solvency of credit institutions[18], also cooperates with SEPBLAC as supervisor in relation to AML/CFT matters for credit institutions. Banco de España is also responsible for the supervision of other financial institutions and hence, as sectoral supervisor also cooperates with SEPBLAC in their supervision regarding AML/CFT matters.

Given Banco de España's existing role in the supervision in relation to AML/CFT matters of financial institutions – a role which numerous other ESCB NCBs fulfil in relation to such institutions in their respective Member States – as well as the fact that a number of Member States have conferred on their NCBs the specific tasks of operating a register (and/or the related supervisory tasks) in respect of virtual currency service providers, Banco de España's new tasks under the draft law are not atypical of central bank tasks.

3.4 *Tasks clearly discharged on behalf of and in the exclusive interest of the government*

For the same reasons, the tasks conferred by the draft law, of operating a register and supervising compliance by the relevant virtual currency service providers with the obligation to register subject to the fulfilment of the requirements of good business and professional repute to be determined, are not tasks discharged on behalf of and in the exclusive interest of the government. Banco de España already plays a role in the supervision in relation to AML/CFT matters of credit and certain financial institutions. There is no indication that, in carrying out the new tasks conferred by the draft law, Banco de España would be acting exclusively in the interest of another public authority.

3.5 *Extent to which performance of the new tasks creates conflicts of interest with existing central bank tasks*

Since Banco de España's new tasks under the draft law complement its existing tasks, no conflicts of interest arise with other aspects of Banco de España's mandate.

3.6 *Extent to which the performance of the new tasks is disproportionate to Banco de España's financial or organisational capacity*

The ECB notes that it is essential to ensure that Banco de España has available to it sufficient resources, including personnel, for the performance of assessments and the issuance of directions under the draft law, so that its capacity to perform its ESCB-related tasks is not affected. In this regard, the draft law does not specifically address how the additional expenses that arise from the grant to Banco de España of additional powers will be financed. The ECB understands that the additional resources required by Banco de España to exercise those additional powers will be financed by Banco de España's existing budgetary framework and so there will be no specific cost recovery mechanism designed to ensure the full recovery of the costs incurred in establishing and maintaining the register and the supervision of compliance with the relevant obligations and requirements. However, the performance of the new tasks by Banco de España is not disproportionate to its financial or organisational capacity.

3.7 *Extent to which performance of the new tasks fits into the Banco de España's institutional set-up, in light of central bank independence and accountability considerations*

18 Law 10/2014 of 26 June 2014 on the regulation, supervision and solvency of credit institutions, 'BOE' no. 156 of 27 June 2014.

The performance of the new tasks appears to be aligned with the Banco de España's institutional set-up. As mentioned in paragraph 3.3, Banco de España cooperates with the supervisor in relation to AML/CFT matters in the supervision of credit and financial institutions.

3.8 *Extent to which the performance of tasks harbours substantial financial risks*

The performance of the new tasks does not harbour substantial financial risks for Banco de España. The draft law does not directly address Banco de España's potential liability in the event of any legal action or other legal proceedings for damages in relation to the exercise of its powers under the draft law. In this respect, Article 32 of Law 40/2015 on the legal regime of the public sector[19] establishes the right for natural or legal persons to be compensated by public administration bodies in the exercise of their functions for any damage those natural or legal persons suffer to their property and/or rights, except in cases of force majeure. Banco de España is included as a public administration body for those purposes by virtue of Article 1.2 of Law 13/1994[20]. Further, Article 25 of the internal rules[21] of Banco de España states that Banco de España's direct liability extends to claims for compensation for damages and losses that individuals make against employees of Banco de España in the exercise of their functions, except in cases of gross negligence or bad faith.

3.9 *Extent to which the performance of the new tasks exposes members of Banco de España's decision-making bodies to disproportionate political risks and has an impact on their personal independence*

The performance of the new tasks conferred by the draft law does not expose members of Banco de España's decision-making bodies to any disproportionate political risk or have an impact on their personal independence.

3.10 *Conclusion*

The new tasks conferred by the draft law on Banco de España, of establishing and maintaining a register and supervising compliance by the relevant virtual currency service providers with the obligation to register subject to the fulfilment of the requirements of good business and professional repute to be determined, can be regarded as central bank tasks, as they would complement Banco de España's existing functions in relation to the supervision in relation to AML/CFT matters in financial institutions. The new tasks conferred by the draft law are not atypical of central bank tasks, and have been conferred upon a number of other ESCB NCBs.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 18 December 2020.

19 Law 40/2015 of 1 October 2015 on the legal regime of the public sector, 'BOE' no. 236 of 2 October 2015.

20 Law 13/1994 1 June 1994] on the autonomy of Banco de España, 'BOE' no. 131, of 7 February 1994, p. 17400.

21 Resolution of 28 March 2020, of the Governing Council of Banco de España by virtue of which the Internal Rules of Banco de España are approved.

[signed]

The President of the ECB
Christine LAGARDE