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From:	Presidency
To:	Financial Services Attachés Working Party on Financial Services and the Banking Union (AML)
Subject:	AML Rulebook, 15-16.09.22 - Presidency note on Outsourcing (Article 40 AMLR)

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Outsourcing – Article 40 AMLR

Scope of outsourcing

Note: Legislative proposals included in this note are based on text sent to discussion by French Presidency on 30th June 2022.

Systematic change

During the WP held on July 18th and in written contributions, some Member States mentioned that Article 40 AMLR contains provisions that cover other parts of the AMLR than just the CDD (e.g. internal controls, STR). For the sake of clarity, the Presidency proposes to move whole Article 40 to Chapter I to a new Section 3 – Outsourcing and set general rules for outsourcing under AMLR there. This change also requires splitting Article 41 AMLR to make legal basis for AMLA guidelines. To do so the Presidency proposes new paragraph 5 for the outsourcing article. Article 41 AMLR would be also amended to reflect this change.

Chapter I

GENERAL PROVISIONS

…

Section 3

Outsourcing

Article 6a (former Article 40)

Outsourcing

…

5. By [3 years after the entry into force of this Regulation], AMLA shall issue guidelines addressed to obliged entities on:

(a) the establishment of outsourcing relationships in accordance with this article, their governance and procedures for monitoring the implementation of functions by the outsourced entities, and in particular those functions that are to be regarded as critical;

(b) the roles and responsibility of each actor, whether in a situation of reliance on outsourcing;

(c) supervisory approaches to reliance on outsourcing.

…

Article 41

Guidelines on the performance by third parties

By [3 years after the entry into force of this Regulation], AMLA shall issue guidelines addressed to obliged entities on:

(a) the conditions which are acceptable for obliged entities to rely on information collected by another obliged entity, including in case of remote customer due diligence;

~~(b) the establishment of outsourcing relationships in accordance with Article 40, their governance and procedures for monitoring the implementation of functions by the outsourced entities, and in particular those functions that are to be regarded as critical;~~

*(~~c~~ **b**) the roles and responsibility of each actor, whether in a situation of reliance on another obliged entity ~~or of outsourcing~~;*

*(~~d~~ **c**) supervisory approaches to reliance on other obliged entities ~~and outsourcing~~.*

The Presidency also considered moving Article 40 to Chapter II. However, because of the complexity of the outsourcing, the Presidency decided to move Article 40 to Chapter I – General Provisions instead of Chapter II − Internal Policies, Procedures and Controls of Obliged Entities. The main reason for that was a potential risk of internal consistency conflict within Chapter II with currently proposed sections, mainly conflict with Section 2. It would set uncertainty about outsourcing within group.

Q.1. Do Member States agree with proposed change?

Technical changes

Furthermore, the Presidency proposes amendments to the existing Articles 40(1) and 40(3) AMLR on the basis of written comments from Member States.

The amendments consist of

- deleting the link to CDD,

- replacing the agent and external service provider with term "outsourced entity" for the sake of consistency and clarity of the text,
- clarifying the relationship of liability towards outsourced entities,
- adding a link to the liability of the outsourcing entity for obligations under the GDPR,
- the systematic relocation of an amendment that had been proposed by the Presidency in the previous WP to article 40(2) AMLR.

Article 6a (former Article 40)

Outsourcing

1. Obliged entities may outsource tasks deriving from requirements under this Regulation ~~for the purpose of performing customer due diligence to an agent or external service provider~~ ***to an entity****, whether a natural or legal person, with the exception of natural or legal persons residing or established in third countries identified pursuant to Section 2 of this Chapter. The obliged entity notifies the supervisory authority about the outsourcing before the ~~agent or external service provider~~* ***outsourced entity*** *starts the activities for the obliged entity.*

*The obliged entity shall remain fully liable for any action****, whether an act of commission or omission, connected to the outsourced tasks,*** *of ~~agents or external service providers~~* ***outsourced entity*** *to which activities are outsourced,* ***and remains responsible as controller pursuant Article 4(7) of Regulation (EU) 2016/679 for any personal data processed for the purpose of the outsourced tasks****.*

Whenever tasks are outsourced, the obliged entity shall in all cases ensure that it understands the rationale behind the activities carried out by the outsourced entity and the approach followed in their implementation, and that it is able to demonstrate to supervisors that these activities mitigate the specific risks that the obliged entity is exposed to.

…

3. Where an obliged entity outsources a task pursuant to paragraph 1, it shall ensure that the ~~agent or external service provider~~ ***outsourced entity*** *applies the measures and procedures adopted by the obliged entity. The conditions for the performance of such tasks shall be laid down in a written agreement between the obliged entity and the outsourced entity. The obliged entity shall perform regular controls to ascertain the effective implementation of such measures and procedures by the outsourced entity. The frequency* *of such controls shall be determined on the basis of the critical nature of the tasks outsourced.*

Q.2. Do Member States agree with the proposed change?

Prohibition of outsourcing

The Commission's proposal sets out a list of tasks that cannot be outsourced. The WP meeting held on July 18th and the subsequent responses to the questionnaire showed that Member States' views on whether and which activities should not be outsourced vary considerably. However, the prevailing opinion among Member States is that the strict prohibition as set out in the current proposal should be loosened.

On the basis of the previous working group meeting and contributions sent by Member States, the Presidency has prepared amendments to the proposal consisting of a limitation of the prohibition of outsourcing together with the addition of safeguards consisting of additional requirements for outsourced entity and prohibition of subsequent outsourcing.

The amendments are based on the premise that only tasks, not functions, can be outsourced and that responsibility itself cannot be delegated under Article 40(1) AMLR.

Article 6a (former Article 40)

Outsourcing

…

2. The tasks outsourced pursuant to paragraph 1 shall not be undertaken in such way as to impair materially the quality of the obliged entity's measures and procedures to comply with the requirements of this Regulation and of Regulation [please insert reference – proposal for a recast of Regulation (EU) 2015/847 – COM/2021/422 final]. The following tasks shall not be outsourced under any circumstances:

(a) the approval of the obliged entity's risk assessment ***pursuant to Article 7****;*

(b) the approval of the obliged entity's policies, controls and procedures pursuant to Article 8.

Any subsequent outsourcing of tasks by the outsourced entity to other entity is not allowed.

~~(b) the internal controls in place pursuant to Article 7;~~

~~(c) the drawing up and approval of the obliged entity's policies, controls and procedures to comply with the requirements of this Regulation;~~

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~~(d) the attribution of a risk profile to a prospective client and the entering into a business relationship with that client;~~

~~(e) the identification of criteria for the detection of suspicious or unusual transactions and activities;~~

~~(f) The reporting of suspicious activities or threshold-based declarations to the FIU pursuant to Article 50.~~

3. ***Before*** *~~Where~~ an obliged entity outsources a task pursuant to paragraph 1, it shall* ***assure itself that the outsourced entity is reliable and sufficiently knowledgeable and experienced to fulfil its obligations. Furthermore, it has to*** *ensure that ~~the agent or external service provider~~* ***outsourced entity*** *applies the measures and procedures adopted by the obliged entity. The conditions for the performance of such tasks shall be laid down in a written agreement between the obliged entity and the outsourced entity. The obliged entity shall perform regular controls to ascertain the effective implementation of such measures and procedures by the outsourced entity. The frequency of such controls shall be determined on the basis of the critical nature of the tasks outsourced.*

Q.3. Do Member States agree with the proposed change?