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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Financial Services Attachés Working Party on Financial Services and the Banking Union (AML)
Subject:	AMLR and AMLA - Commission services non-paper on cooperation with EPPO and OLAF

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Non-paper on cooperation with the European Public Prosecutor's Office (EPPO) and the European Anti-Fraud Office (OLAF) in the context of the Anti-money Laundering (AML) legislative package

1) Context and positions

i. Introduction

The cross-border nature of money laundering and, more broadly, serious and organised crime requires robust exchange of information and cooperation at both national and EU level. Several EU Financial Intelligence Units (FIUs) have signed Memoranda of Understanding and/or Cooperation Agreements with the EPPO and OLAF.[1] Those memoranda and agreements provide frameworks for the cooperation related to the sharing of financial analysis and information (e.g., suspicious transaction reports (STRs)) between those FIUs and the EPPO and OLAF.

The establishment of the Anti-money Laundering Authority (AMLA) will bring a fundamental change to the EU crime-fighting architecture. The future Authority will, in particular, support the work of national FIUs by e.g., providing operational support in the context of joint analysis exercises of cross-border cases and hosting and managing the FIU.net system, which is the cornerstone of effective information-sharing among FIUs in the EU. It is important to reflect on how the future Agency will fit into the existing crime-fighting architecture and how would it cooperate and share information with relevant EU bodies and agencies.

This non-paper explores avenues for cooperation between FIUs and AMLA's FIU arm, on the one hand, and the EPPO and OLAF on the other.

ii. What is provided in the Commission's July 2021 legislative package?

Recital 88 of the proposal for a new Anti-money Laundering Regulation (AMLR) states that '*when the notion of competent authorities refers to investigating and prosecuting authorities, it shall be interpreted as including the central and decentralised levels of the EPPO with regard to the Member States that participate in the enhanced cooperation on the establishment of the EPPO'*.

Article 52 of the proposal for a new (6th) Anti-money Laundering Directive (AMLD6) entrusts AMLA to issue guidelines in cooperation with the European Central Bank (ECB), the European Supervisory Authorities (ESAs), Europol, Eurojust and the EPPO on cooperation between all competent authorities.

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[1] For example, the FIUs of Luxembourg and Italy have signed a Memorandum of Understanding with the EPPO (for more information: https://www.eppo.europa.eu/en/news/eppo-signs-memorandum-understanding-financial-intelligence-unit-luxembourg and https://www.eppo.europa.eu/en/news/eppo-and-italian-financial-intelligence-unit-strengthen-cooperation); while FIU Belgium has signed a Cooperation Agreement with OLAF (for more information: https://anti-fraud.ec.europa.eu/media-corner/news/olaf-signs-cooperation-arrangement-belgiums-financial-intelligence-unit-2022-03-23_en).

Recital 14 of the proposal for a Regulation establishing AMLA (the AMLA Regulation) states that pursuant to Article 24 of Council Regulation (EU) 2017/1939 (the EPPO Regulation) AMLA will without undue delay report to the EPPO any criminal conduct in respect of which it could exercise its competence in accordance with Article 22, Article 25(2) and (3) of the EPPO Regulation. Similarly, the recital states that pursuant to Article 8(3) of Regulation (EU, EURATOM) No 883/2013, AMLA will transmit to OLAF without delay any information relating to possible cases of fraud, corruption or any other illegal activity affecting the financial interests of the Union.

Article 46(4) of the proposal for an AMLA Regulation also requires the General Board in FIU composition to admit the EPPO and OLAF observers to its meetings when matters are discussed that fall within their respective mandates. Article 80(2) of the proposal for an AMLA Regulation obliges AMLA to conclude working arrangements with the EPPO and OLAF setting out the details of their cooperation.

iii. What is the Council's position?

In its political agreement, the Council did not introduce any substantive changes compared to the Commission's legislative proposals.

iv. What is the European Parliament's position?

In its negotiating mandate, the European Parliament has included a new Article 27a in the proposal for AMLD6 on the transmission of information to the EPPO, effectively requiring FIUs to disseminate the results of their analyses and other relevant information to the EPPO. Furthermore, a new letter (ca) in Article 51 on the exchange of information among supervisors and other authorities requires Member States to authorise exchanges of information between supervisors and, where relevant, the EPPO as regards criminal conduct falling within the mandate of the EPPO. A similar provision has been inserted with regard to OLAF.

In the proposal for an AMLA Regulation, the European Parliament has inserted new provisions whereby the EPPO can have a liaison officer at AMLA as well as provisions requiring AMLA to inform the EPPO and OLAF of any criminal conduct in respect of which they exercise their competencies.

The European Parliament has not provided explicit procedures whereby AMLA disseminates the results of joint analyses to the EPPO or OLAF.

2) Specific considerations, opportunities and added-value

i. FIU's operational autonomy and independence

The Anti-money Laundering Directive and the international standards in the area of anti-money laundering[2] and combatting the financing of terrorism (AML/CFT) stress that FIUs have to be set up and organised as operationally independent and autonomous units for the purposes of carrying out their core functions of receiving, analysing and disseminating suspicious transaction reports (STRs) and other information related to money laundering, its predicate offences and terrorist financing. The foundational assumption is that the FIU has the authority and capacity to carry out its functions freely, including the autonomous decision to analyse, request and/or disseminate specific information.[3]

[2] Recommendation 29 of the Financial Action Task Force

[3] For further information, the Egmont Group of FIUs' document on 'understanding FIU operational independence and autonomy' available at: https://egmontgroup.org/wp-content/uploads/2021/10/20181019-Understanding-FIU-Operational-Independence-and-Autonomy_FINAL-VERSION.pdf.

The FIUs' dissemination function is of primary relevance when it comes to cooperation between FIUs and the EPPO and OLAF. FIUs should carry out this function autonomously and independently and decide to whom do they wish to disseminate the results of their analysis. However, the categories of authorities that should receive the analysis can be pre-identified on the basis of their specific competences. This is the case for both the EPPO and OLAF which are given specific mandates under Union law and who should be the authorities to whom the results of analysis are disseminated when the analysis concerns matters falling within their respective mandates.

ii. AMLA's role vis-a-vis FIUs

According to Article 33(3) of the Commission's proposal for a Regulation establishing AMLA, upon the explicit consent of the FIUs taking part in the joint analysis exercise, financial analysts working at AMLA shall be granted access to the operational information at the core of the joint analysis.

Thus, the Commission's proposal has included the possibility for AMLA to provide analytical support to the FIUs in the context of the joint analysis exercise. In its political agreement, the Council maintained this role to be played by AMLA.

Neither the Commission's proposal, nor the Council's political agreement provide any role to be played by AMLA when it comes to the receipt of STRs or the dissemination of the results of analysis. The European Parliament, on the other hand, has provided for possibilities to disseminate the results of analysis to Europol, but neither to the EPPO nor to OLAF.

iii. EPPO's and OLAF's mandates

Pursuant to Articles 22 and 25(2) and (3) of the EPPO Regulation, the EPPO is competent for investigating, prosecuting and bringing to judgment crimes against the financial interests of the Union, including several types of fraud, cross-border VAT fraud with damages above €10 million, money laundering, passive and active corruption and misappropriation. Pursuant to the OLAF Regulation, OLAF, on the other hand, carries out administrative investigations into fraud, corruption and other illegal activities affecting the financial interests of the Union.

iv. Opportunities for the dissemination of the results of the performed analysis

It would be useful to specify that pursuant to Article 24 of the EPPO Regulation, AMLA shall disseminate to the EPPO the results of the FIUs' joint analysis when the analysis indicates that a criminal offence that falls within the mandate of the EPPO has been committed. Whenever the EPPO cannot exercise competence on a case in accordance with the EPPO Regulation, but the facts may constitute illegal activity affecting the financial interests of the Union, it should be clarified that AMLA should disseminate the information to OLAF.[4]

The added value of providing for clear cooperation modalities would be a more effective and streamlined dissemination process when it comes to cases that fall within the mandates of either the EPPO or OLAF.

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[4] According to the working arrangements concluded between the EPPO and OLAF (available here: https://www.eppo.europa.eu/sites/default/files/2021-07/Working_arrangement_EPPO_OLAF.pdf), the EPPO itself reports to OLAF information concerning cases of criminal offences provided by the PIF Directive on which the EPPO does not have competence or on which it cannot exercise its competence, cases of criminal offences affecting the financial interests of the EU which do not fall within the scope of the PIF Directive, cases of non-fraudulent irregularities affecting the financial interests of the EU and cases of serious misconduct of EU staff affecting the financial interests of the Union on which the EPPO does not have competence or on which it cannot exercise its competence.

In the case of joint analyses, such an approach would also ensure that their results are not brought back to the national level but are followed-up and, potentially, investigated and prosecuted at the EU level if they fall within the mandate of these EU bodies.

Suggested amendments

Proposal for a new AMLR

CHAPTER VIII

FINAL PROVISIONS

Section 1

Cooperation between FIUs and the EPPO

Article 59a

Cooperation between FIUs and the EPPO

1. Pursuant to Article 24 of Council Regulation (EU) 2017/1939, each FIU shall without undue delay report to the EPPO the results of its analyses and any additional relevant information where there are reasonable grounds to suspect that money laundering and other criminal activity are being or have been committed in respect of which the EPPO could exercise its competence in accordance with Article 22 and Article 25(2) and (3) of Council Regulation (EU) 2017/1939.

By [*2 years after the data of entry into force of this Regulation*], AMLA shall, in consultation with the EPPO, develop draft implementing technical standards and submit them to the Commission for adoption. Those draft implementing technical standards shall specify the format to be used by FIUs for the dissemination of information to the EPPO.

2. FIUs shall respond in a timely manner to requests for information by the EPPO in relation to money laundering and other criminal activity in respect of which the EPPO could exercise its competence in accordance with Article 22 and Article 25(2) and (3) of Council Regulation (EU) 2017/1939.

3. FIUs and the EPPO may exchange the results of strategic analyses, including typologies and risk indicators, where such analyses relate to money laundering and other criminal activity in respect of which the EPPO could exercise its competence in accordance with Article 22 and Article 25(2) and (3) of the EPPO Regulation.

Article 59b

Requests for information to the EPPO

1. The EPPO shall respond without undue delay to reasoned requests for information by an FIU where that information is necessary for the performance of the FIU's functions under Chapter 3 of Directive [*please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final*].

2. The EPPO may postpone or refuse the provision of such information where this is likely to prejudice the proper conduct and confidentiality of an ongoing investigation. The EPPO shall communicate in a timely manner the postponement of or refusal to provide the requested information, including the reasons therefor, to the requesting FIU.

Section 2

PUBLIC

Cooperation between FIUs and the OLAF

New Article 59c

Cooperation between FIUs and OLAF

1. Pursuant to Article 8(3) of Regulation (EU, EURATOM) No 883/2013, each FIU shall transmit without delay the results of its analyses and any additional relevant information to the European Anti-Fraud Office (OLAF) where there are reasonable grounds to suspect that fraud, corruption or any other illegal activity affecting the financial interests of the Union are being or have been committed in respect of which OLAF could exercise its competence in accordance with Article 8 of Regulation (EU, EURATOM) No 883/2013.

2. FIUs shall respond in a timely manner to requests for information by the OLAF in relation to that fraud, corruption or any other illegal activity affecting the financial interests of the Union are being or have been committed in respect of which OLAF could exercise its competence in accordance with Article 8 of Regulation (EU, EURATOM) No 883/2013.

3. FIUs and OLAF may exchange the results of strategic analyses, including typologies and risk indicators, where such analyses relate to fraud, corruption or any other illegal activity affecting the financial interests of the Union are being or have been committed in respect of which OLAF could exercise its competence in accordance with Article 8 of Regulation (EU, EURATOM) No 883/2013.

New Article 59d

Requests for information to OLAF

1. OLAF shall respond in a timely manner to reasoned requests for information by an FIU where that information is necessary for the performance of the FIU's functions under Chapter 3 of Directive [*please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final*].

2. OLAF may postpone or refuse the provision of such information where it is likely to have a negative impact on an ongoing investigation. OLAF shall communicate in a timely manner the postponement of or refusal to provide the requested information, including the reasons therefor, to the requesting FIU.

Proposal for AMLA Regulation

New Article 33a

Dissemination of the results of joint analyses

1. Where the results of the joint analyses indicate that there are reasonable grounds to suspect that money laundering and other criminal activity are being or have been committed in respect of which the EPPO could exercise its competence in accordance with Article 22 and Article 22(2) and (3) of Council Regulation (EU) 2017/1939, the Authority shall report without undue delay the results of the joint analyses and any additional relevant information to the EPPO.

   By [*2 years after the data of entry into force of this Regulation*], AMLA shall, in consultation with the EPPO, develop draft implementing technical standards and submit them to the Commission for adoption. Those draft implementing technical standards shall specify the format to be used by the Authority for the reporting of information to the EPPO.

PUBLIC

2. Where the results of the joint analyses indicate that there are reasonable grounds to suspect that fraud, corruption or any other illegal activity affecting the financial interests of the Union are being or have been committed in respect of which OLAF could exercise its competence in accordance with Article 8 of Regulation (EU, EURATOM) No 883/2013, the Authority shall disseminate the results of the joint analyses and any additional relevant information to the OLAF.

3. The Authority, the EPPO and OLAF may exchange strategic and other non-operational information, such as typologies and risk indicators, in the areas within their competence. The modalities of this type of information-sharing shall be laid down in the working arrangements pursuant to Article 80 of this Regulation.

Recitals

Recital 88 of the AMLR

(88) When the notion of competent authorities refers to investigating and prosecuting authorities, it ~~***shall***~~***should*** *be interpreted as including the European Public Prosecutor's Office (EPPO) with regard to the Member States that participate in the enhanced cooperation on the establishment of the EPPO.*

Recital 14 of AMLAR

(14) Pursuant to Article 24 of Council Regulation (EU) 2017/1939~~***5***~~*, the Authority* ~~***will***~~***is to report*** *without undue delay* ~~***report***~~ *to the EPPO any criminal conduct in respect of which it could exercise its competence in accordance with Article 22 and Article 25(2) and (3) of that Regulation. Pursuant to Article 8 of Regulation 883/20136, the Authority* ~~***will***~~***is to*** *transmit to OLAF without delay any information relating to possible cases of fraud, corruption or any other illegal activity affecting the financial interests of the Union. In accordance with the applicable provisions in their founding legal instruments, the EPPO and OLAF should inform the Authority about the steps taken in relation to the information provided and any relevant outcomes.*

New Recital to cater for dissemination to the EPPO and OLAF (AMLR)

(88a) Disseminations by FIUs play a crucial role in detecting possible criminal activities under the competence of the EPPO and OLAF at an early stage, and can support prompt and effective investigations and prosecutions. Information shared with the EPPO and OLAF by FIUs should include grounds for the suspicion that a crime under the EPPO's and OLAF's respective competencies might be or has been perpetrated, and be accompanied by all relevant information that the FIU holds and which can support action, including relevant financial and administrative information. When the EPPO and OLAF request information from FIUs, it is equally important that FIUs are able to share all the information they hold in relation to the case. In accordance with the applicable provisions in their founding legal instruments, the EPPO and OLAF should inform FIUs about the steps taken in relation to the information that was disseminated and any relevant outcomes.

PUBLIC