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Subject: Anti Money Laundering Package  
- Commission services non-paper - AMLA tasks and powers, thematic reviews,  
AML/CFT database and selection process for direct supervision

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## AML Package

### AML tasks and powers, thematic reviews, AML/CFT database and selection process for direct supervision

#### Commission services non-paper

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This non-paper follows up on comments of delegations in the Council Working Party on Financial Services regarding the provisions of the proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (COM(2021)421) discussed at the last meeting on 28 September 2021 and specifically the provisions covering tasks and powers of AMLA (Articles 5&6), thematic reviews and AML database (Articles 9&11), and the process and criteria of selection of entities for direct supervision (Articles 12,13 and Article 30, insofar as it relates to direct supervision).

The paper aims to recap the explanations provided by the Commission in light of the discussion and requests for further clarifications from the delegations.

#### *1. Tasks and powers of AMLA (Articles 5&6)*

Some delegations pointed out that certain tasks and powers of AMLA are formulated rather broadly, and may leave room for interpretation. These two Articles on Tasks and Powers constitute a backbone of the mandate of AMLA in all areas of its competence, but are further circumscribed in dedicated provisions throughout the Regulation, and should be read in conjunction with such dedicated provisions. Specifically, the tasks and powers differ per area of action and are limited by AMLA's competence in such areas. For example, the power to request and obtain certain data or information from national supervisors or FIUs is provided exclusively in the context of carrying out a specific task in a certain area of AMLA's competence. It is therefore useful to recap these specific areas of competence:

##### **a) Regulation and policy-making**

AMLA will have a mandate to complete the Single Rulebook and is granted the power to draft binding Regulatory and Implementing Technical Standards (RTS/ITS), to be endorsed by the Commission. The legal base for those powers is laid down in the draft AMLD, AMLR and AMLA Regulation. AMLA will also be able to develop policy reflected in the ability to adopt Guidelines, Recommendations or Opinions (Article 6(4)). The process of development of these instruments is described in the dedicated provisions in Section 7 (Common Instruments).

##### **b) Direct supervision of certain financial sector obliged entities (SOEs)**

In order to effectively carry out direct supervision, AMLA has to be entrusted with the full range of powers that are available to national AML supervisors under national law, including taking of binding decisions and imposing of administrative pecuniary sanctions. Supervisory powers are detailed in

Article 20. The list is not identical to the supervisory powers mentioned under the draft AMLD Article 41, because the AMLD powers concern all types of supervisory authorities in all sectors, whereas AMLA powers are specifically geared towards financial sector entities. In addition, national authorities can rely on more detailed national implementation of AMLD provisions, where their powers can be spelled out in more detail. Given the Meroni doctrine that prescribes no power of discretion for EU decentralised agencies, the text has to be as specific as possible with respect to AMLA powers. Additionally, since direct supervision will be carried out jointly with staff from national authorities, the modalities of their interaction and cooperation have to be agreed between AMLA and national authorities. Article 14 lays down the principles for such cooperation, and includes a mandate developing an Implementing Technical Standard (ITS) (Article 14(3)) to be adopted by the Commission, which would set out further details on the conditions under which financial supervisors are to assist AMLA with the preparation and implementation of any acts relating to the tasks referred to in Article 5(2), point (b). This ITS will cover, for example, the question of transition from national to EU level of supervision, including the question of continuity of supervisory procedures that may have started, but not been completed, at national level before the transfer<sup>1</sup>.

#### **c) Indirect supervision of the financial sector (N-SOEs)**

The vast majority of financial sector obliged entities will continue to be directly supervised at national level. In those cases, AMLA will serve as a centre of a more integrated supervisory system, supporting and assisting national authorities where required, and ensuring convergence of supervisory practices and standards. To that end, it will use a set of tools that already exist at Union level (for example, peer reviews, facilitation of colleges etc, as in the case of the European Supervisory Authorities), as well as some novel methods of interaction and cooperation between national authorities. For example, one of the existing tools for the tasks relating to supervisory convergence (Article 5(3)(b) and (c)), is further detailed in Article 28 on Assessment of State of supervisory convergence. It codifies the practice of the EBA work since the broadening of EBA's mandate to cover AML/CFT. Similarly, the AML/CFT database will build on the work and experience of EBA, albeit with important distinctions (further explained below). Thematic reviews and mutual assistance mechanisms are new indirect supervision tools made available to AMLA. For these specific tasks, AMLA requires certain powers, including to request and obtain data and information from relevant national authorities.

#### **d) Coordination of supervision in the non-financial sector**

In relation to the non-financial sector, AMLA will only have tasks and powers that are geared towards completing the single rulebook and introducing common supervisory standards and achieving supervisory convergence. Policy and regulatory work (technical standards, Guidelines and Recommendations) are the tools for completing the Single Rulebook, whereas thematic reviews, AML/CFT database, peer reviews and breach of Union Law (BUL) procedures are tools for measuring and improving supervisory convergence. All these powers granted to AMLA are directed towards public authorities that are entrusted with supervision of non-financial sector entities or oversight of self-regulatory bodies. Interaction between AMLA and self-regulatory bodies is either voluntary (as in the case of thematic reviews), or exceptional (as in case of BUL procedures, and in any case as replacement of the work of the public authority which would be found failing to act upon the recommendations of AMLA). No direct interaction with individual non-financial obliged entities is envisaged. This more limited scope of competence takes into account the current absence of any EU level oversight in the non-financial sector and the specific characteristics of some obliged entities in these sectors. It builds upon the experience of introduction of such Union-level responsibilities in the financial sector.

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<sup>1</sup> the Single Supervisory Mechanism (SSM) Framework Regulation has a dedicated Article 48 entitled "pending procedures", which covers questions of continuity in transition, which may be considered by AMLA as well.

### **e) Support and coordination of the work of national FIUs**

In order to achieve greater effectiveness and efficiency in cooperation between national FIUs, AMLA's tasks and powers aim to ensure or enable: 1) greater harmonisation of regulatory tools used by FIUs (ITSs adopting common reporting standards or common templates for the exchange of information); 2) the conduct of joint analyses of cross-border suspicious reports and transactions; and 3) stable hosting of FIU.net and coordination of mutual assistance between FIUs. Therefore, the powers relating for instance to information requests can be used exclusively to achieve one of these objectives. For example, requesting information and gathering data from strategic analyses would be helpful to identify the trends and risks at EU level, or for introducing Guidelines or Recommendations for obliged entities. Information from operational analyses can only be obtained by AMLA for the work supporting joint analyses, upon authorisation by the relevant FIU. The tasks and powers relating to FIUs in Articles 5 and 6 should therefore be read only in the context of their application for the purposes of activities listed in Section 6 (FIU Support and Coordination Mechanism).

#### **2. Thematic reviews (Article 9)**

Thematic supervision is widely used at national level, enabling national authorities to identify and act upon wider risks and trends that are relevant to a specific type of obliged entities, sector of the economy, or entire jurisdiction. For example, thematic supervisory activities may concern a specific sector, such as crypto-asset service providers (CASPs) or trust and company service providers (TCSPs), or type of risks (risks relating to provision of online-only retail services such as those offered by some online banks). However, the insights and findings from such activities are currently limited to national borders, even where they relate to wider trends common to a number of Member States or the EU as a whole. With the introduction of AMLA, such work can be carried out jointly, or coordinated to a certain extent at EU level, enabling exchange and comparison of outcomes, and drawing of common conclusions resulting in common policy action. Therefore, Article 9 is meant to enable AMLA to identify the need to conduct joint thematic reviews (without interfering in the competence and responsibility of individual authorities), or ensure an appropriate level of coordination of distinct but similar exercises (coordination of thematic reviews carried out at national level). In order to identify both the appropriateness and the need for such joint or coordinated work, AMLA and national competent authorities need to obtain the information about planned supervisory activities upfront. That information is normally contained in supervisory programmes. The idea of upfront submission of supervisory programmes is therefore exclusively limited to the purpose of obtaining relatively reliable information about planned thematic supervisory activities with sufficient advance to plan any potential beneficial common work. AMLA can also develop further guidance on the type of information that can be helpful for the planning of joint or coordinated thematic reviews.

#### **3. Single AML/CFT database (Article 11)**

The proposal builds upon the common supervisory tool entrusted to the European Banking Authority (EBA) with the recent extension of its AML/CFT mandate. The database is meant to enable more effective information exchange and a better level of understanding of supervisory approaches to dealing with risks or weaknesses at obliged entities level across the EU, which in turn can inform supervisory activities and therefore optimise the effectiveness of supervision and the most efficient use of supervisory resources in any EU jurisdiction.

The main purpose of the database is to serve as a common tool, to be utilised by all participants in the supervisory system that require information originating or available in another EU jurisdiction, for the purposes of supervision. The database will be hosted and managed by AMLA, but is meant to be used by any Union AML/CFT supervisory authority.

The differences between EBA and AMLA mandates and their scope of competence had to be taken into account in the legal design of the database. The EBA does not have competence in the non-

financial sector or direct supervision mandate, but on the other hand has the ability to request and collect information directly from prudential authorities. AMLA, on the other hand, has the opportunity to use the database or make the information available for its own direct supervision purposes, or for the purposes of supervision at national level, for both the financial and non-financial sector. The EBA has prepared an RTS clarifying some categories and typology of data and information that can be collected. AMLA can build on the practical experience and legal work of the EBA, whereas another level 2 mandate would significantly delay the start of data collection process.

The main categories of data to be collected relate to supervisory activities, and therefore relevant supervisory outcomes. The description of these categories was kept sufficiently broad and flexible to enable flexible implementation upon agreement between AMLA and national authorities on which type of data would be most useful and practical to collect.

#### **4. Selection process for direct supervision (Article 12, 13 and 30)**

The selection process should result in EU-level supervision that would be more effective and efficient in comparison with the national level supervision. For any given directly supervised entity, AMLA should have the competence and the tools which are more suitable to ensure better compliance with the requirements applicable to that specific entity. The direct supervisory powers of AMLA are designed to replicate the powers already available to national authorities, that is, being able to carry out supervisory activities, and impose binding supervisory measures and sanctions. However, merely substituting a national supervisory authority for an authority established at Union level does not in principle guarantee better supervisory outcomes, and there has to be an advantage related to EU-level supervision, which are examined in more detail below. Moreover, the design of the selection process has to take into account Meroni doctrine constraints related to discretionary powers of EU decentralised agencies (as referred to in I (b)) and the state of development of single rulebook and supervisory convergence.

##### **a) *A priori* judgment of added value of AMLA supervision**

AMLA will have Union-wide competence, and in cases of entities operating across the Single Market, can substitute both the home and host authorities and have a single group-wide (hence often EU-wide) view of risks to take optimal measures that address these risks from an EU perspective. In cases where a group is exposed to high ML/TF risk in multiple Member States, under the current framework, coordination of joint actions becomes critical, but not easy to execute. These are exactly the cases where a single authority with EU-wide jurisdiction able to take decisions and measures in any EU member States has a clear advantage over a multitude of national authorities. That is why the design of the selection process focuses on cases where the risk is not limited to a single Member State nor a limited number of MSs, as appropriate supervisory tools (including cooperation mechanisms) are already provided to deal with those situations in the draft AMLD. Following the SSM Joint Supervisory Teams model would also allow to leverage the national expertise, experience and resources to ensure maximum effectiveness and added value of EU-level supervision.

##### **b) Risk methodology for determination of the need for EU level supervision**

While all obliged entities are exposed to some degree of risk by definition, supervisory activities prioritise the most complicated or high-risk cases. In the same vein, AMLA should also prioritise its direct supervision for cases of the highest complexity and highest predicted risk from a supervisory perspective, at EU level. Different types of OEs are exposed to different types of risk depending on the nature of their activities, and therefore the criteria and benchmarks for the risk bracketing should be done per type of entity. The proposal includes a mandate for an RTS with such a methodology, which relies on judgment of inherent risk. Although residual risk provides for a more accurate indicator for the required intensity of supervision, at the moment of the first selection (planned for 2026), a reliable degree of experience with common approaches to estimating residual risk will not

yet be present. Due to Meroni doctrine constraints, AMLA will not be able to challenge the supervisory judgment of residual risk at national level. Consequently, a selection process based on residual risk judgment by national authorities may result in entities selected based on divergent interpretation of residual risk.

In cases of cross-border groups, the high risk and complexity should not be limited to a single Member State (because the action at Union level may not be needed or be justifiable). Also in cases where obliged entities have establishments or operate through the direct provision of services, the host supervisor can detect high risk and impose high intensity of supervision at national level. Therefore, the judgment for any potential candidate group's level of risk should be made in *each* Member States it operates and is supervised in, by the respective authority and based on a common risk methodology as proposed to be developed in an RTS.

Compounded at EU level, the high risk in multiple jurisdiction would call for EU level supervision. While the judgment of risk and the required intensity of supervision is evident in case of establishment, the direct provision of services is only exceptionally subject to host supervisory powers. In those specific cases, direct provision of services is also relevant for the purposes of selection (as AMLA would be substituting for multiple national authorities). However, the selection process proposal is not meant to change the balance between powers of home and host authorities.

### **c) Cut-off criteria for selection and assessment of entities**

The proposal suggests that only in cases where a credit institution group is in the highest risk bracket in 4 Member States out of 7 where it is established, would it be selected for direct supervision. In addition, in order to be selected, that entity must have been subject to a public investigation in at least 1 of those Member States.

In other words, as regards added value of EU supervision, banking groups that require or have already required the highest intensity of supervision in at least 4 Member States can be more effectively supervised at EU level than at national level. The fact that only groups that are established in 7 Member States are *a priori* assessed only reflects the high probability that any given banking group would not have high risk in every Member State it operates in. The “assessment universe” is thus narrowed down to ensure the speediness and efficiency of the process. Theoretically, in order to eliminate any “size bias”, any banking group that operates in 4 Member States could already be subject to an assessment, and would be put in the highest risk bracket in all 4 countries. However, the risk can be misjudged, and can shift within the group more easily than between groups. Therefore, the remaining 3 establishments are likely to increase their risk profile, making the group even more worth attention from the perspective of complexity of supervision at the Union level. In addition, from a supervisory perspective, even medium or low risk requires attention. A banking group that is in the highest supervisory risk bracket in 4 countries and has low or medium risk activities in other 3 countries is still more risky than a banking group that only operates and is in the highest risk bracket in 4 countries – because there are 3 more EU jurisdictions that require supervisory attention to the remaining risk of the larger group.

A further distinction is made between credit and other financial institutions, because the former have a wider range of activities exposed to MI/TF risk in cases of establishment, requiring a higher intensity of AML supervision than for establishment of other financial institutions or direct provision of services. At EU level, multiple establishments of credit institutions in the highest risk bracket require more complicated coordination of supervisory activities on a group basis.

The criterion of public investigations is an approximation of the residual or materialised risk in the past. To the question of one delegation, it is meant to capture *closed* investigations, and not meant to transfer supervisory procedure to Union level. However, any pending procedures can still be dealt with between AMLA and the relevant national authority as outlined above.

For other financial institutions, the cut-off criterion of high risk is high risk present in 5 Member States (judged per Member State where there is home or host authority) out of 10 Member States of operation. The higher threshold for AMLA supervision reflects the fact that direct provision of services can only be utilised for a limited type of activities, which can be risky, but not always excessively complex from a supervisory perspective. The complexity of supervision at national level, augmented by the need for coordinated supervisory action at EU level, is where the added value of AMLA is most evident.

#### **d) Missing risk in smaller groups and domestic entities – exceptional selection**

Small groups (operating in 2-4 Member States), or even purely domestic obliged entities may let limited or high risks *materialise* (for instance, in cases where they do not comply with applicable requirements), which may cause a disproportionately high negative impact on the resilience of the Union AML framework, given the openness of the Single Market.

Supervision is a tool for preventing risks from materialising, but risks can be misjudged or missed, and some supervisory measures, even if applied, may prove to be ineffective or not dissuasive enough. We have witnessed such cases in the Union, but among thousands of obliged entities that are judged as highly risky across the EU it is practically impossible to predict which exact ones would let the risks materialise, and where appropriate action will not be taken by their supervisory authorities. A judgment of urgency can only be made *a posteriori*, where some indicators of misjudged, disproportionately high, or materialised risk can be made. For example, where there already is clear evidence of incompliance with applicable requirements or supervisory measures, or where supervisory measures already taken fail to address the issues. This points towards a weak obliged entity and high degree of probability that it can be abused by criminals. These are the cases covered by Article 30, which is meant to ensure that AMLA can monitor individual situations of the risks that can materialise and cause damage to the resilience of the Union's financial system. If the measures that can be taken at national level to address the issues are clear and feasible, AMLA can simply instruct the national authority to follow through to remedy a situation. If for some reason, action at national level may not be timely or adequate, AMLA would be able to take over direct supervision of the entity, following a procedure involving a Commission delegated decision.

#### **e) Stable selection process vs staggered approach in direct supervision**

The selection process is designed to be stable and reflects the stable state resource allocation for AMLA's direct supervision as of 2026. The Regulation is accompanied by a legislative Financial Statement with the standard 4 year horizon. However, the Regulation includes a review clause in Article 88, with a comprehensive Commission report covering all AMLA activities, including direct supervision, in 2029. The experiences with the first selection process and the degree of harmonisation and convergence of supervisory practices are meant to be factored into such review.

A number of delegations opined, however, that the level of ambition of the selection process and resource allocation for direct supervision should be adjusted and heightened (by widening of the scope of assessed and regularly selected entities) already now in the legislative process. In that respect, it is still necessary to consider the *status quo* - absence of sufficient degree of experience with harmonised supervisory approaches not only now, but also in 2026 when the single rulebook will be in place and direct supervision is meant to commence. Therefore, any adjustments that would lead to significant expansion of scope of direct supervision of powers of AMLA should take due account of the establishment phase of the authority and the state of supervisory convergence in that phase. Direct supervision tasks, including the first and all subsequent selection processes, should remain efficient, as well as legally and operationally feasible.