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From:	Presidency
To:	Financial Services Attachés Working Party on Financial Services and the Banking Union (AML)
Subject:	AML working party 13.10.23 Presidency note on AMLD issues

Council Working Party on Financial Services and Banking Union

Presidency note on AMLD issues

1) Sanctions in the AML Directive and AMLA Regulation

Context

The sanctioning regime and its alignment with AMLA was thoroughly discussed during the Council negotiations. Although in the General Approach consistency between AMLD and AMLAR was improved, some gaps remain.

During the trilogue negotiations, the Parliament, with the support of the Commission, asked for strengthening the alignment between both files. To do so, he Commission shared some drafting suggestions (see document WK 12860 2023) in order to clarify and align the provisions contained in both texts, aiming for an equivalent treatment regardless of whether the obliged entities are sanctioned by AMLA or national supervisors.

Please take into account that this document WK 12860 2023 was discussed in a horizontal meeting with the Parliament (AMLD &AMLA) on 10 October and some changes to it were provisionally agreed. The main changes will be explained along the note.

General provisions (Article 39)

In Article 39 (7), first subparagraph, both co-legislators set that AMLA shall develop draft Regulatory Technical Standards (RTS) and submit them to the Commission for adoption. Those draft RTSs shall define indicators to classify the level of gravity of breaches and criteria to be taken into account when setting the level of administrative sanctions or taking administrative measures pursuant to this Section.

In addition, Parliament´s mandate foresees that those draft RTSs shall also

1. *Define the consequences in the event of repeated breaches, and*
2. *Include ranges of pecuniary sanctions relative to the turnover of the entity in breach that shall be applied in accordance with the indicators to assess the level of gravity of the breach as references for effective, proportionate and dissuasive sanctions, including in cases of repeated breaches.*

As a compromise that acknowledges the material differences between the content of the RTSs proposed by the Council and Parliament, the Commission suggests the following:

On 1. The Commission builds on the Council's idea, deleting the reference to the consequences of repeated breaches and adding, to support a harmonized approach to periodic penalty payments, that "*those RTSs shall define a methodology for the application of periodic penalty payments pursuant to Article 41a, including their frequency*".

On 2. The Commission proposes to add a new paragraph 8a (to Article 39), which foresees that "*AMLA shall issue guidelines on the base amounts for the application of pecuniary sanctions relative to turnover, broken down per type of breach and category of obliged entities".* Crucially, this means that the Parliament's idea be left to non-binding guidelines and not be a part of the RTS. As explained by the Commission, this would allow for a common understanding as regards a pecuniary sanction's base amount but give Member States flexibility in relation to the ranges to be applied for those sanctions.

In the Presidency's view, it is worth trying to bridge this gap between co-legislators and accept the Commission's compromise proposal.

Q1: Do Member States agree with the new draft proposed by the Commission and the addition of defining a methodology for the application of periodic penalty payments in the RTSs developed by AMLA?

Q2: Do Member States agree with the issuing of guidelines by AMLA on the base amounts for the application of pecuniary sanctions relative to turnover, broken down per type of breach and category of obliged entities?

Pecuniary sanctions

The Commission proposes to align Article 40 in the Directive and Article 21 in AMLA Regulation.

First of all, the titles of both articles were not aligned. In order to achieve that alignment, the Commission has proposed to replace them by pecuniary sanctions instead of administrative sanctions and administrative pecuniary sanctions respectively. That would also allow AMLD to be agnostic on which type of authority (administrative or judiciary) is entrusted the task to sanction.

Article 40 AML Directive

The Commission proposes to redraft the first paragraph:

- By requiring (not allowing) MS to apply sanctions for serious, repeated and systematic breaches, ensuring equal treatment for obliged entities irrespective of the level of supervision, whether national or European.
- By adding the terms intentionally or negligently committed as introduced by the Council to align them with AMLAR.
- By introducing a new subparagraph to incorporate the possibility to "*impose pecuniary sanctions where obliged entities do not comply with administrative measures".*
- *On 10 October meeting it was agreed to include the possibility to impose sanctions to non serious, systemic and repeated breaches (as in the Council mandate).*

Regarding the amounts of the pecuniary sanctions:

1. There is no agreement between co-legislators in the percentage applicable to the annual turnover in order to calculate the sanctions (15% for Parliament vs. 10% for the Council). Moreover, Parliament introduced the term global (total *global* annual turnover). *On 10 October the EP accepted to drop such term*.

2. The Commission proposes to introduce an amendment already present in AMLAR establishing that "*Member States shall ensure that, when determining the amount of the pecuniary sanction, supervisors take into account the ability of the entity to pay [and, where the pecuniary sanction may affect compliance with prudential regulation, consult the authorities competent to supervise compliance by the obliged entities with relevant Union acts*.]"

Q3: What are MS views on the percentage to calculate sanctions (referred to in 1.)?

Q4: Do MS agree to introduce the reference to the ability of the entity to pay in the AMLD? Do MS agree that sanctions are consulted with competent authorities where the pecuniary sanction may affect compliance with prudential regulation?

Article 21 AMLA Regulation

In this Article, the Commission includes the reference to *serious, repeated or systematic breaches*, as proposed by both co-legislators.

However, there is no consensus about the minimum amount of sanctions in point 3 (a), (b), (c) and (d): while Parliament maintains the Commission's proposal and sets the amount in EUR 1.000.000 in (a) and (c) and EUR 500.000 in (b) and (d), the Council lowers it to EUR 500.000 and EUR 100.000 respectively. *However, during the 10 October meeting the EP showed openness to reduce the minimum amount of sanctions (to mirror the Council position).*

Administrative measures and periodic penalty payments

Administrative measures are contemplated in Article 41 of AMLD and Article 20 of AMLAR. In substance, the Commission proposes to align both articles in three ways:

1. It maintains the Council position as regards leaving it up to national authorities to impose sanctions in combination with administrative measures should they wish to do so. As explained by the Commission, the additions in Article 41 (1) (b) and (c) are meant to align this provision with AMLAR and ensure that measures can be imposed also prior to the conclusion that a breach exists.
2. Regarding a supervisor´s powers, the Commission suggests to incorporate all the measures envisaged in AMLD to AMLAR. *Three specific powers are still to be decided (in brackets): (i) public statement, (ii) order to cease and desist, and (iii) restrict or limit de business, operation or network or divestment of activities*.
3. The Council introduced the possibility to impose periodic penalty payments in a new paragraph of Article 41 AMLD. The Commission suggests creating a self-standing article for periodic penalty payments, as it is the case in AMLAR. In terms of content, this compromise introduces two changes: (i) periodic penalty payments cannot be imposed in a deferred way; (ii) periodic penalty payments may be imposed for a maximum of 6 months that can be extended once (for another 6 months).
4. *On 10 October it was provisionally agreed to introduce that administrative measures should respect the principles of efficiency, proportionality and dissuasiveness.*

The Presidency believes this is a balanced compromise and asks delegations to consider accepting it.

Q6: Can MS accepts the changes on administrative measures? In particular, are MS open to incorporate in AMLAR the powers included in AMLD?

Q7: Are MS open to accept the periodic penalty payments Article?

Publication of pecuniary sanctions, administrative measures and periodic penalty payments

Article 42 AMLD and Article 24

Here too the Commission proposes to align both texts. In that regard, it suggests that both articles have a new and identical title.

Secondly, the Commission does not take on board Parliament's proposal to require the publication of an English version in addition to that in the original language.

The main difference in the compromise proposal by the Commission, is that all measures and periodic penalty payments should be published, from the day they are imposed, including those that are subject to appeal. For pecuniary sanctions and periodic penalty payments, the amounts must be included.

Finally, the Council's position is kept by foreseeing the possibility not to publish the measures on grounds of financial stability or proportionality.

Q7: Can MS accepts those changes?

2) Home-host issues

The Commission has produced a non-paper on this issue which was circulated to Member States (WK 12764 2023). A possible summary of the non-paper is the following one.

Based on (historical and recent) case law, the Commission establishes 3 categories of cross-border provision of services:

- Freedom of establishment
- Freedom to provide services is divided into 2 cases:
    - If the freedom to provide services has infrastructure in the host MS (agents, distributors are mentioned in the operative part and crypto ATMs in the recital).
    - If the freedom to provide services has no infrastructure in the host MS

	Freedom of establishment	**FPS with infrastructure**	**FPS without infrastructure**
Applicable law	Host	Host	Home **
Reporting to FIU	Host	Home	Home
Supervision	Host ^	Home / Host * ^	Home **

*For E-money institutions, PSPs and CASPs with a structure or establishment the supervision is done by the host MS unless the host considers that the activities are so limited that they do not merit supervision.

**FPS without infrastructure is always supervised by the home MS except for sectors with specific authorisation on the host.

^For this purpose they can designate a contact point with the host supervisor (the supervisor's competence does not depend on the contact point which only serves to facilitate supervision).

Q1. What are MS views on the Commission proposal? Does it clarify the issue enough?

Q2. Specifically: (i) should the concept of infrastructure be further explained? (ii) Do MS agree with the approach for entities conducting activities through FPS with infrastructure (partially home approach for reporting to FIU and supervision)?