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Subject: Council Conclusions on anti-money laundering and countering the financing of terrorism

Delegations will find enclosed the Council conclusions on anti-money laundering and countering the financing of terrorism, as approved by the Council in a written procedure ended on 5 November 2020.

COUNCIL CONCLUSIONS

on anti-money laundering and countering the financing of terrorism

THE COUNCIL OF THE EUROPEAN UNION:

1. RECALLING the EU Strategic Agenda 2019-2024¹ and the European Council conclusions of June 2016², and further to the Council conclusions of February 2016³, October 2016⁴ and June 2020⁵, and particularly the conclusions exclusively dedicated to AML/CFT adopted by the Council in December 2018⁶ and December 2019⁷ after the most recent amendment of the Anti-Money Laundering Directive (AMLD), Directive (EU) 2018/843,
2. HIGHLIGHTING the fact that the prevention of and fight against money laundering and terrorist financing remains a high priority for the European Union,
3. RECOGNISING the recent progress made in this area, including the recent changes to the legal framework and the work done under the 2018 EU Action Plan⁸, and welcoming, in particular, the Commission's report of July 2019⁹ on the assessment of recent cases of alleged money laundering involving EU credit institutions,

¹ EU Strategic Agenda 2019-2024 (EUCO 9/19), on improving cooperation and information-sharing to fight terrorism and cross-border crime

² European Council of 28 June 2016 (ST 26/16)

³ Council conclusions on the fight against the financing of terrorism of 12 February 2016 (ST 6068/16)

⁴ Council conclusions on the Commission Communication on further measures to enhance transparency and the fight against tax evasion and avoidance (ST 13139/16)

⁵ Council conclusions on enhancing financial investigations to fight serious and organised crime (ST 8927/20)

⁶ Council conclusions on an Anti-Money Laundering Action Plan (ST 15164/18)

⁷ Council conclusions on strategic priorities on anti-money laundering and countering the financing of terrorism (ST 14823/19)

⁸ Council conclusions on an Anti-Money Laundering Action Plan (ST 15164/18)

⁹ Report from the Commission to the European Parliament and the Council on the assessment of recent alleged money laundering cases involving EU credit institutions (COM (2019) 373 final)

4. RECOGNISING the efforts of the Member States to strengthen their anti-money laundering and combating the financing of terrorism (AML/CFT) frameworks,

5. WELCOMING the Commission's communication of 7 May 2020 on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing¹⁰, including an EU single rulebook on AML/CFT and bringing about EU-level AML/CFT supervision as well as establishing a cooperation and support mechanism for Financial Intelligence Units (FIUs). WELCOMING, too, the methodology, published on the same day, to identify high-risk third countries so as to ensure consistency with the FATF process, full transparency with Member States, enhanced engagement with as well as the implementation of a policy towards third countries,

6. RECOGNISING the ongoing work initiated by the Commission in the field of investment migration – namely in relation to national policies on the granting of long-term residence permits and nationality to non-EU citizens in return for investments – with a view to addressing the issue of money laundering,

7. RECOGNISING the importance of ongoing work in inter-governmental bodies, in particular the work of the Financial Action Task Force (FATF), the international standard-setter in the field of anti-money laundering and countering the financing of terrorism and proliferation.

8. RECOGNISING the importance of maintaining an up-to-date understanding of the risks and threats facing the Union and the role of the biennial supranational risk assessment in this regard,

9. RECALLING commitments made at the G20, especially with regard to the implementation of high-level principles on transparency and beneficial ownership, which remain a key priority in the prevention and fight against money laundering and terrorist financing,

¹⁰ Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing (ST 7870/20)

THE COUNCIL:

10. URGES all Member States to swiftly complete the transposition of all relevant Union legislation in this area – especially Directive (EU) 2018/843 amending Directive (EU) 2015/849 (the Fourth Anti-Money Laundering Directive) as well as Directive (EU) 2019/1153 – and to strengthen the effective application and enforcement of their legislation as soon as possible.
11. WELCOMES the Commission's commitment to monitoring on a continuous basis the transposition as well as the effective application of the above Directives and, in this regard, TAKES NOTE of the ongoing assessment process concerning the implementation and effective application of the Anti-Money Laundering Directive currently being carried out by the Council of Europe on behalf of the Commission.
12. WELCOMES the progress already achieved in completing significant parts of the 2018 Council Action Plan and CALLS on all relevant parties to complete as soon as possible the outstanding actions detailed therein.
13. WELCOMES the Commission's aim to present legislative proposals in early 2021, and STRESSES THE FACT that potential reforms should be drawn up in a comprehensive way based on a thorough impact assessment, taking into consideration all elements of the legal framework as well as the non-legislative measures in the 2018 Council Action Plan, while ensuring that legislation is consistent with all Member States' constitutional and legal systems, including those based on the common law tradition.
14. INVITES the Commission to prioritise work on the EU single rulebook and, based on the single rulebook, the establishment of an EU level AML/CFT supervision and the coordination and support mechanism for the FIUs, and INVITES the Commission to present, at the same time, a proposal for the single rulebook and for the structure and tasks of an EU AML/CFT supervisor as well as the coordination and support mechanism for FIUs, in order to allow for simultaneous drafting in view of the links between these topics.

15. WELCOMES the Commission's plan to transfer parts of the Anti-Money Laundering Directive to a directly applicable regulation to allow for a level playing field in the common market and for an even application of the provisions throughout the Union, wherever it is necessary to reduce national divergences in transposition that undermine an effective implementation of the AML/CFT framework, while it should be ensured that the high standard achieved by Member States in their national transpositions is maintained overall.
16. NOTES that the clarification and harmonisation of the AML/CFT legal framework does not necessarily need to result in the imposition of additional obligations on obliged entities.
17. INVITES the Commission to present a legislative proposal for a regulation based on an assessment of the relevant risks and impact with a view to further harmonising substantive law, taking into consideration the following areas: types of obliged entities; customer due diligence requirements – including adequate remote due diligence solutions as well as electronic identification and verification –; provisions on due diligence for domestic and foreign politically exposed persons; record keeping; internal controls; group-wide compliance; third party reliance and outsourcing provisions consistent with sectorial legislation; reporting obligations, including suspicious transactions reports; provisions on determining beneficial ownership; provisions on cooperation and exchange of information; supervisory measures and sanctions, while respecting the specificities of national systems and enforcement set-ups; the respective responsibilities, general tasks and supervisory powers of supervisory authorities at European and national level. STRESSES that these areas might need to be adapted if the Commission's impact assessment identifies other areas for harmonisation or, conversely, areas which are less suitable for harmonisation.

- a. URGES the Commission to expand the list of obliged entities beyond the current EU-framework with regard to virtual asset service providers in accordance with FATF Recommendation 15 and RECALLS that FATF requirements must be fully addressed by Union law, notably the application of Recommendation 16 regarding wire transfers to virtual asset service providers (“travel rule”).
 - b. CALLS on the Commission to review the types of obliged entities paying specific attention to ML/TF risk deriving from entities providing de facto financial services or parts thereof, or services directly related, integrated or built on top of financial services, such as technical financial services and solutions but not having been classified as financial institutions under current legislation.
 - c. CALLS on the Commission to include all substantive requirements in its legislative proposal, only leaving the definition of elements to delegated acts where this is justified by the technical nature of the subject-matter.
18. CALLS on the Commission to focus its work particularly on achieving a uniform and high standard of customer due diligence, especially with regard to the identification of the customer and the verification of the customer’s identity, the nature and purpose of the business relationship, the verification of the customer’s beneficial owner and the ongoing monitoring of the business relationship. Such provisions are crucial as they prevent illegal money from entering the internal market through the weakest link in a chain of safeguards against ML/FT, and prevent unfair competition.
19. CALLS on the Commission, with regard to customer identification and in line with the risk-based approach, to consider the need to define standardised data sets for the identification of customers, be it natural or legal persons – at least determining the minimum required information as well as (remote) identification processes – and to ensure a technologically neutral solution.

20. INVITES the Commission to widen the scope for the use of data within the limits set by data protection provisions, also by making better use of digitalisation. INVITES the Commission, while maintaining the tipping-off ban and providing sufficient safeguards for information protection, to consider the expansion of information-sharing possibilities within groups of companies as well as between other obliged entities not belonging to the same group or the same sector, so as to allow better monitoring and compliance.
21. URGES the Commission and the European Data Protection Board to provide clarification on how to reconcile the AML/CFT framework with the applicable data protection legislations, notably with the General Data Protection Regulation in order to provide more clarity on the data that can be shared between obliged entities, as well as between obliged entities and competent authorities, and to ensure a high level of data protection, and to resolve, for instance, inconsistencies between data protection provisions and the tipping-off ban. Furthermore, all possible synergies with other EU legislative acts should be taken into account.
22. INVITES the Commission to assess the need for amendments to other relevant legislation, particularly in the financial sector, with a view to ensuring coherence in the legal framework, to enhance cooperation and exchange of information among authorities and to present relevant proposals in this regard.

On establishing EU-level AML/CFT supervision:

23. ACKNOWLEDGES and APPRECIATES the expertise of the national competent supervisory authorities and their supervisory activities, which significantly contribute to the prevention and combatting of money laundering and terrorist financing in the European Union.
24. POINTS OUT that the Commission's post mortem analysis outlined that the ML/FT incidents in the EU could derive from organisational and governance failure of obliged entities as well as from the organisational and supervisory shortcomings of national authorities, and therefore ACKNOWLEDGES the added value of an EU AML/CFT supervisor.

25. SUPPORTS the Commission's intention to table a proposal for an EU supervisor with a clear mandate and a precise delineation of the supervisor's tasks and responsibilities, while bearing in mind the subsidiarity principle by ensuring that the scope of the EU AML/CFT supervisor should be tailored to its added value in relation to national AML/CFT supervisors. AFFIRMS that the latter continue to have a strong role in the system of European supervision based on close cooperation between national and EU supervision.
26. REQUESTS that the Commission equips the EU AML/CFT supervisor with competencies triggered on a purely risk-sensitive basis as follows: responsibility for supervising a selected number of obliged entities that have high inherent ML/TF risk and which are chosen on the basis of appropriate risk criteria as specified below; as well as the authority to step in ad hoc and take over supervision from a national supervisor in clearly defined and exceptional situations on the basis of objective and transparent criteria, in cases where the national supervisor is unable to enforce compliance or cannot ensure adequate supervision. In addition, national competent authorities should be entitled to ask for the EU supervisor's support or intervention, for entities under their supervisory remit.
27. CALLS on the Commission to focus, at this stage, on the following scope of supervision for the EU AML/CFT supervisor: credit institutions, payment institutions, bureaux de change, E-money institutions, virtual asset service providers covered by FATF recommendations, amongst others, with the option of assessing an expansion of supervision to other risky obliged entities in the future, but also considering the more homogeneous nature of the financial sector and the high level of harmonisation with regard to prudential requirements compared with the non-financial sector. CALLS ON the Commission to consider a coordinating, advisory or supporting role for the EU supervisor in relation to all types of obliged entities to assist national supervisors and promote supervisory convergence, in order to increase the efficiency of the implementation of AML/CFT measures also in the non-financial sector.

28. CALLS on the Commission to also consider further enhancement to the framework for AML supervision of the non-financial sector, while keeping in mind that the non-financial sector is composed of a wide range of professions, whose scope, professional legal requirements and licensing criteria are not harmonised.
29. CALLS on the Commission to propose a staged approach within the supervisory scope, starting with a relatively small group of high-risk obliged entities from the financial sector at the outset, and gradually expanding the number of obliged entities under its remit. The aim would be to ensure that the EU AML/CFT supervisor is not overburdened and to maintain the risk-based approach of the AML/CFT-framework.
30. INVITES the Commission to equip a potential EU AML/CFT supervisor with the following powers where it will have the right to exercise direct supervision as lined out in paragraph 26 in joint supervisory teams, where appropriate. The responsibilities of the EU AML/CFT supervisor should include the right to general inspections – including requesting information, examining records and conducting on-site and off-site supervision – , as well as the right to impose supervisory measures and administrative sanctions, while respecting the specificities of national systems and enforcement set-ups, including the right to mandate a compliance officer, to require regular reporting, and to issue direct instructions with regard to enhanced due diligence or high-risk transactions. At the same time, the accountability of the EU AML/CFT supervisor needs to be ensured, and a judicial review process for the EU AML/CFT supervisor’s actions needs to be provided. Also INVITES the Commission, to equip the EU AML/CFT supervisor with the right powers to identify the cases where stepping in is necessary.

31. INVITES the Commission to consider the criteria (as indicated below) for the assessment of inherent risks to be carried out when determining whether a risk-based EU supervision could be carried out more effectively than at national level. This needs to take into account the fact that ML/TF risks are not proportional to the size of the supervised entities. The criteria: the risk arising from the nature of the obliged entity's business – in particular its customer base, products, delivery channels, geographical exposure, and taking into account cross border aspects –; emerging risks associated with the evolving distribution methods, especially the challenges to AML/CFT posed by the digitalisation of financial services as well as the consequences if these risks materialised. Because of the evolving nature of risks, obliged entities that fall within the scope of the EU AML/CFT supervisor should be reviewed on a regular basis or when extraordinary and severe events arise, also with a view to assess whether a transfer of supervision back to the national level or EU-level is necessary in view of a corresponding risk level.
32. CALLS on the Commission to ensure that the EU AML/CFT supervisor, as a new competent authority, is integrated fully into cooperation structures between all relevant institutions at EU and national level, such as national competent authorities, the FIUs and their the coordination and support mechanism, law enforcement authorities, other relevant public authorities across the EU as well as EU institutions, including the ECB as prudential supervisor in relevant cases and other authorities and agencies such as the European Supervisory Authorities (ESAs), the European Public Prosecutor's Office (EPPO) and Europol. In particular with regard to the flow of information between home and host supervisory authorities, the EU supervisor should play a mediating role in conflicts.
33. CALLS on the Commission to ensure an independent structure of the body that will be entrusted with EU AML/CFT supervision in line with the 2019 Council Conclusions. CALLS on the Commission to ensure that an autonomous governance structure for AML/CFT supervision is established in any case.

34. URGES the Commission to ensure, if the above tasks are to be transferred to a new authority, that all powers relating to AML/CFT supervision on EU level will be bundled within this authority.
35. CALLS on the Commission to present a comprehensive impact assessment with special focus on feasibility, efficiency, effectiveness, subsidiarity and proportionality as well as the implications of transferring supervisory tasks to either an existing authority or a newly established and autonomous EU supervisory body, including budgetary aspects, cost efficiency and close cooperation with national AML/CFT supervisors.

On other aspects concerning cooperation between AML/CFT authorities:

36. INVITES the Commission to table a proposal for a FIU coordination and support mechanism and NOTES that the form of the mechanism should depend on its functions and build on the activities that are currently carried out by the EU FIU's platform in accordance with its mandate under Article 51 of the AMLD. Invites the Commission to provide permanent staff and a budget for the future mechanism.
37. CALLS on the Commission to derive the features and powers of such a mechanism from its core functions, including in particular its central role in strengthening and facilitating joint analysis between FIUs, supporting in line with Article 32 AMLD the FIUs' operational and strategic analysis as well as the identification of EU-relevant risks and phenomena, promoting exchanges and capacity building among FIUs and improving cooperation with other competent authorities. URGES the Commission to ensure that the coordination and support mechanism is based on a governance that fully involves FIUs and respects FIUs' core roles and responsibilities in operational independence and autonomy as well as security and confidentiality of financial intelligence.

38. NOTES the Decision of the European Data Protection Supervisor (EDPS) imposing a ban on Europol's personal data-processing activities (based on concerns regarding individuals not considered as suspects) for the purposes of the technical administration of FIU.net and WELCOMES the fact that the Commission will temporarily host FIU.net. URGES the Commission to establish a long-term solution for FIU.net to ensure effective cooperation among FIUs.
39. URGES the Commission to equip the coordination and support mechanism with the authority to provide guidance, procedures and adopt binding technical formats and templates as necessary, in close coordination with all European FIUs.
40. CALLS on the Commission to provide clarification regarding appropriate data protection provisions to ensure a high level of data protection in the data exchange between Union FIUs and those of third countries, observing FATF recommendations and the Egmont Group principles.
41. URGES the Commission, in the context of close cooperation within the FATF, to emphasise the supranational nature of the European Union's AML/CFT legal framework while at the same time respecting the individual membership of EU Member States and the role of their delegations in the FATF. URGES the Commission to conduct the process of assessing high-risk jurisdictions in a manner that ensures high quality, transparency and the right to be heard, taking into account FATF work streams and avoiding duplication of processes.
42. WELCOMES the Commission's intention to provide timely guidance, in the light of ongoing reform efforts in Member States and especially with regard to the specific application of data protection rules and their integration into the AML/CFT framework, in relation to information exchange and data sharing within public-private partnerships established between obliged entities, national supervisory authorities and law enforcement agencies as well as FIUs in some Member States.
