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On improving cooperation between EU Financial Intelligence units

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COMMISSION STAFF WORKING DOCUMENT

On improving cooperation between EU Financial Intelligence units

1. Introduction

Preventing and fighting money laundering and the financing of terrorism are top political priorities which the Commission highlighted in the European Agenda on Security¹. The terrorist threat has been growing and evolving over the past few years. Terrorist organisations and individuals need financing to commit their criminal acts. Financial information can therefore play a key role in detecting terrorists and preventing them from committing atrocious attacks such as those that Europe has recently suffered. The fight against money laundering is also essential to combatting criminal activities more generally, not only to deprive criminals from their incentive to commit crimes when profit is their ultimate objective, but also to detect criminals and their associates and bring them to justice. Fighting money laundering contributes to the stability and the integrity of the internal market.

Financial Intelligence Units (hereinafter FIUs) are central players in addressing these challenges. In their key position between the private sector and law enforcement, FIUs steer the work of economic operators to detect transactions suspected of links to money laundering and terrorist financing. FIUs' key sources of information are (i) the Suspicious Transaction Reports (STRs) received from credit and financial institutions and other obliged entities², additional information from obliged entities, and (ii) other sources of information such as the newly introduced beneficial ownership registers. On the basis of STRs, FIUs produce rich financial analysis which is essential for the prevention of money laundering and terrorist financing and for law enforcement to uncover criminal activities, trigger new investigations or complement ongoing ones.

Due to the transnational nature of organised crime and of terrorist activities, the cooperation between FIUs is of paramount importance. Terrorists operate across borders – leaving a financial information trail in different countries – and money launderers and organised crime groups increasingly hide and reinvest assets in Member States other than the one where the crime originating the property was committed.

FIUs are operationally independent and autonomous units³ with the authority and capacity to take autonomous decisions to analyse, request and disseminate their analyses to competent authorities, where there are grounds to suspect money laundering, associated crimes or terrorist financing. In order to carry out this function in an effective manner, it is essential that an FIU is able to exchange any information that may be relevant for the processing or analysis of information with other FIUs within the EU.

The work of the EU to support and promote the cooperation between EU FIUs is not new, and has yielded significant results. Since the early 1990s, the EU has established a robust legal framework aimed at preventing and detecting money laundering and terrorist financing, as a

¹ COM(2015) 185, 28.4.2015

² Designated Non-Financial Businesses and Professions (DNFBPs) such as auditors, consultants, tax advisors, notaries, trusts, estate agents, persons trading in goods above a certain threshold and providers of gambling services.

³ Member States are not asked to subscribe to a specific model or organisation and have developed three main models depending on; police/judicial FIUs, administrative FIUs and hybrid FIUs.

measure to strengthen the internal market and contribute to financial stability by means of protecting the soundness, proper functioning and integrity of the financial system.

The fourth anti-Money Laundering Directive (4AMLD)⁴ increased further the powers of EU FIUs and their capacity to cooperate. These will be further reinforced, if approved, with the targeted amendments to the 4AMLD proposed in July 2016⁵, providing that an FIU can request information from an obliged entity without the need for a prior STR and that FIUs have access to information in Member States' centralised bank and payment account registers and central data retrieval systems, as well as information from virtual currency exchange platforms and custodian wallet providers.

The fruitful collaboration between FIUs has been underpinned by the work of the **EU FIU Platform**⁶ and the establishment of **FIU.Net**⁷, an information system connecting decentralised databases allowing FIUs to exchange information. The embedment of FIU.Net into Europol as of 1 January 2016 is contributing to the creation of synergies between FIU intelligence and law enforcement work.

The Commission Action Plan for strengthening the fight against terrorist financing of 2016⁸ called for a mapping of obstacles to the access to, exchange and use of information and to the operational cooperation between FIUs. In the Action Plan the Commission undertook the commitment to identify what measures, if any, should be taken to address such obstacles by the 2nd quarter of 2017.

This Staff Working Document takes stock of the results of the comprehensive and in-depth analysis made by EU FIUs and identifies measures that would help tackle the difficulties identified in this analysis and other measures to reinforce cooperation between FIUs.

⁴ Directive (EU) 2015/849, OJEU L 141, 05.06.2015 p. 73

⁵ COM (2016) 450, 5.7.2016

⁶ A Commission Expert group established an informal expert group in 2006 - the EU FIUs Platform - composed of representatives from Member States' FIUs. The meetings of the Platform facilitate the cooperation among FIUs by creating a forum for them to exchange views and where advice is provided on implementation issues relevant for FIUs and reporting entities. The role of the Platform has been re-confirmed in article 51 of the 4AMLD. More info: <http://ec.europa.eu/transparency/regexpert/> - EU Financial Intelligence Units' Platform (reference E03251)

⁷ FIU.net became operational in 2002 and was co-financed until 2015 by the European Commission (since 1 January 2016 embedded into Europol.) It is specifically referred to in the 4AMLD as the recommended channel of communication between FIUs and it allows the FIUs to create depersonalised lists that can be used to determine approximation matches (hit/no hit) so as to match data with that of the other FIUs that are connected to the system with the aim of detecting subjects of FIUs' interests in other Member States. This is done through so called "*match filters*" without the need to share or expose personal data beyond its own premises.

⁸ COM(2016)50, 2.2.2016

The Commission has also adopted a report on the assessment of supranational risks of money laundering and terrorist financing which has identified obstacles to cooperation between EU FIUs as one of several horizontal vulnerabilities and proposed measures to address them.⁹

2. Summary of the EU FIUs Platform mapping report

The EU FIUs' Platform mapping¹⁰ report project includes contributions from all EU FIUs based on information collected in 2016. The report identifies several obstacles to the access, exchange and use of information as well as obstacles to the operational cooperation between FIUs. However, it does not take into account the novelties introduced by the 4AMLD or the Commission's proposal of 5 July 2016¹¹.

The report covers the most important areas that affect FIUs' capacity or possibility to carry out their tasks: their domestic statuses and organisational structures, available resources, rules on accountability, operational autonomy and independence. It also describes how information is received, made available and accessible to FIUs, their domestic functions and powers, including the power to obtain information from obliged entities, and their cooperation with other FIUs and with non-FIU counterparts from other EU Member States, notably law enforcement as well as supervisors ("diagonal cooperation"). Finally, it also covers issues relating to data protection, confidentiality and security.

The report identifies problems that primarily follow from the fact that FIUs are organised in different ways and have different domestic powers in accessing, sharing and using information.

(i) FIU status, powers, organisation, level of autonomy

The report shows important differences between Member States in FIUs' **size, powers and organisation**. Such differences concern for instance their role in analysing information, in disseminating information to competent authorities and their capacity for suspending a suspicious transaction that is about to proceed. Similarly FIUs have different powers to transmit information following a request from a domestic competent authority due to *their state of embedment into host organisations with varying arrangements impacting on their governance, resources and their respective powers in access to information*.

⁹ Report from the Commission to the Council and to the European Parliament on the assessment of the risk of money laundering and terrorist financing affecting the Internal Market and relating to cross-border activities, COM (2017)340, 26.6.2017

¹⁰ The Mapping Exercise was carried out by a dedicated Team led by the Italian FIU (Unità di Informazione Finanziaria per l'Italia - UIF) and members from the FIUs of France (Traitement du Renseignement et Action Contre les Circuits Financiers Clandestins (TRACFIN)), Poland (Generalny Inspektor Informacji Finansowej (GIIF)) and Romania (Oficiul National de Prevenire si Combatare a Spalarii Banilor (ONPCSB)). The UK FIU (National Criminal Agency (NCA)) contributed to the Project in its initial phase.

¹¹ The report is drafted for the sole purpose of providing to the Commission a snap-shot of EU FIUs powers and obstacles for obtaining and exchanging information at a certain point in time. It is based on information collected before June 2016 and it should be noted that following the adoption of the 4AMLD there may have been regulatory developments in several Member States that are not reflected in the report. The Commission's support for the production of this report does not constitute endorsement of the contents. The report reflects the views only of members of the Platform, and the Commission cannot be held responsible for any use that may be made of the information contained therein.

In addition, FIUs are required under EU law to be independent and autonomous. Such **independence** means that they receive STRs *directly* from the reporting entities without interposition of third parties, and *exclusively*. In some sectors of several Member States, however, some obliged entities send STRs to their self-regulatory bodies first instead of sending their STRs directly to the FIUs. This is in principle permitted under EU law upon condition that those self-regulatory bodies forward the received information promptly and unfiltered to the FIU; but in practice it entails the risk of filtering information and impeding the FIUs' independence. The report also reveals that obliged entities in some cases are required to simultaneously forward the same information to other domestic authorities *blurring the distinction between financial analysis and investigation*.

(ii) Access of FIUs to relevant information

EU legislation requires that FIUs have access to administrative, financial and law enforcement information. The mapping report highlights that information on bank accounts holders is essential for their work but also notes that FIUs need to have access to financial or administrative information relating to other assets, such as real estate, vehicles and shareholdings in companies. The report notes that the absence of further clarification as to what is included in each of these categories results in FIUs having access to diverging sources of information. Their access to information may also be restricted if they have limited access rights to information held in central databases/registers, for example no or limited access to real estate registers, or that the work to collect the information is cumbersome. The fact that FIUs do not have **access to the same types of information sources** hinders their capacity to share information with other FIUs despite a legal obligation to do so.

Access to law enforcement information varies greatly between FIUs and depends on the organisational structure of the FIU, which according to the report has negative implications for cooperation between FIUs. Analysis in a cross-border context is more cumbersome when there are different national requirements as regards the types of information that should be contained in an STR. Furthermore, the report indicates that FIUs still face limitations in accessing information held by obliged entities.

(iii) Different functions of Financial Intelligence Units

Whilst the FIU should be primarily responsible for the analysis of suspicious activities, the report notes that these bodies commonly carry out additional functions such as supervisory tasks, coordination or policy-making, and law enforcement tasks. The delimitation of the **functions of FIUs is not sufficiently clear since there is often confusion between their intelligence and analytical functions, and their function to support police investigations and prosecutions**. This can have a negative impact on the cross-border cooperation of FIUs. Sometimes, police FIUs may be directly involved in the host organisation's investigation process. Once there is an ongoing investigation, such FIUs can face limitations in cooperating with administrative FIUs, reverting instead to law enforcement / judicial cooperation tools which are unfit for FIUs working in the intelligence phase (i.e. pre-investigation stage).

(iv) Strategic and operational analysis provided by FIUs

Concerning FIUs tasks, the report highlights that there is a lack of common understanding of "**strategic analysis**" as well as "operational analysis" to be provided by FIUs. While both tasks should be carried out by FIUs according to the 4AMLD, the report finds that in practice indeed some FIUs have all the tools and access rights to carry out such tasks, while others just give access to their databases to police and mainly support police investigations rather than carrying out strategic and operational analysis. There is also a lack of a common approach to analysing cross-border cases in the EU internal market both at operational and strategic level. The report also highlights that there is no capacity for carrying out joint analysis of cross border cases at operational level – as well as at strategic level in identifying money laundering and terrorist financing threats, risks and trends.

(v) The sharing of information between EU FIUs

Sharing of information between EU FIUs remains challenging for several reasons, in particular:

- the *lack of access to requested information*. If FIUs do not have access to information domestically, they are de facto prevented from sharing it with another FIU. This may therefore trigger the "reciprocity conditions", i.e. the other FIU may not reply to a request for information if the requesting FIUs cannot share the same type of information for other cases.
- a requirement for many FIUs to *obtain a clearance from a third party* to share information with another FIU for intelligence purposes (often police authority), which may be refused or delayed without a justification of the reasons a lack of clear definitions or a common understanding in relation to the new requirement in the 4AMLD to *spontaneously and promptly share a Suspicious Transaction Report (STR) which concerns another Member State*. The report indicates that more than half of the respondents do not systematically share cross-border reports.

In addition, the report suggests that FIUs still apply unjustified limitations regarding the use and further dissemination of exchanged information for investigation purposes. Such limitations are particularly frequent when they relate to predicate crimes that are not identified in the initial request or not criminalised in the same way in both Member States (conditions of "double criminality" or when the matter relates to tax offences ("fiscal excuse"). Similarly, such disseminations seem to be refused in practice when there is an ongoing investigation or legal proceedings underway (irrespective of any risk of impairing the investigations).

(vi) Other obstacles to cooperation between EU FIUs

Data protection rules and dissemination rules are also uneven between FIUs according to the report. While the 4AMLD obliges Member States to ensure that their implementation of the EU law respects and complies with EU data protection rules, it seems that in practice there is an uneven level of safeguards for data protection, security and confidentiality across Member States.

The report also finds that in some Member States FIUs send the results of their analysis to different types of authorities, whilst the rules regarding the further use by those authorities are

not further regulated. In particular, it is not always clear what use the receiving law enforcement authority can make of the information it receives. Despite specific restrictions set by an FIU that disseminates information, some law enforcement and judicial authorities may consider received information as formal "evidence" according to their judicial system. To avoid such risks, some FIUs may refuse sharing with another FIU or prohibit dissemination to another authority - instead of giving its consent with specific restrictions.

3. Other identified issues

The **future development of FIU.net** was not specifically addressed in the report, although this tool remains a key enabler for efficient FIU cooperation. The FIU.net needs to be **maintained and further upgraded** to allow the application of state-of-the-art technologies required under the 4AMLD. Support for a more efficient application of existing **rules relating to cooperation between FIUs is also an issue to be addressed.**

In addition, the mapping report did not deal with issues relating to how obliged entities report information about suspicious transactions in cross-border cases involving several jurisdictions. The non-**standardisation of reporting formats** from different types of obliged entities raises difficulties in the processing and exchanging information and leads to multiple local reporting requirements. If an obliged entity reports information on a cross-border case in a fragmented way to different FIUs, the latter FIUs will still struggle to identify the cases that they have in common.

It has to be noted that the mapping report only examines obstacles to intra-EU cooperation between FIUs and does not address issues that relate to the cooperation of EU FIUs with EU agencies or with FIUs of third countries. The need to enhance **international cooperation and exchange of financial intelligence between EU FIUs and third countries' FIUs is an important issue to be addressed.**

4. Measures to address the identified difficulties

The mapping report identifies several obstacles to the access, exchange and use of information as well as obstacles to the operational cooperation between FIUs. It highlights core legal issues as well as other issues that are more practical and operational in nature. These are issues that can be resolved through more guidance and enhanced cooperation at the operational level, for example through work at the EU FIU Platform, issues that are expected to be resolved through the transposition of the 4AMLD and its recent proposed amendment and other issues originating from divergent legal landscapes in the Member States which may require regulatory action to be solved.

Any future decision on whether and what operational or legal measures are needed should take account of the fact that the information that fed into the mapping exercise was collected one year before the transposition deadline of the 4AMLD, therefore while the 3AMLD was the applicable legal framework.

4.1 Issues that could be addressed through guidance and enhanced cooperation at the operational level

Some issues identified in the report could be addressed through 'good practices' that can be shared through guidelines at EU level, to be developed within the EU FIU Platform. Such issues are:

- Analytical work (projects) to **identify the information sources** to which FIUs have access. Such project would aim at fostering a better understanding about administrative, financial and law enforcement information to which FIUs should have access to, including Cash Transaction Reports made by a party having an obligation to disclose such information based on a threshold established by national legislation.
- Analysis on **domestic powers** such as postponement transactions/requests in a cross-border context would also be beneficial for fostering more operational convergence.
- Analytical work and **guidance on the "analysis function"** should offer a better understanding of operational practices and its implication for cross-border analysis. Through common guidelines in operational and strategic analysis, FIUs should be able to better leverage their financial intelligence. Such work could also encompass selectivity criteria in FIUs' analytical function, i.e. how FIUs prioritise their work and focus on relevant cases as they receive an increasingly large volume of reports in a cross-border context. In this context, there may be a need to further look at means to support joint analyses of cross-border cases by FIUs and solutions to enhance the level of financial intelligence allowing FIUs to evolve from a suspicions-based disclosure system to a more intelligence-based disclosure system, as requested/stated in the Action Plan against Terrorism Financing. Such work may also include staff-related issues linked to FIUs' analysis function.
- **Guidance on EU provisions** when these are based on general undefined terms, such as *"spontaneously and promptly" forwarding a report*. The 4AMLD still provides for possible exceptions to the obligation of FIU-to-FIU cooperation or regarding the consent for further dissemination to competent authorities in cross-border situations. By their nature, those provisions are principle-based. Guidance on the relevant terms and provisions should be identified and developed jointly with EU FIUs to ensure a common understanding without losing the flexibility of these principle-based provisions. The FIU Platform has already worked on such projects¹² and future operational guidance may include the issue of the definition of suspicious transactions reports that concerns another Member State.
- Guidance on the **standardisation of the STRs for different types of obliged entities** could also be developed which would greatly facilitate both the processing of the information internally within an FIU as well as facilitate the exchange of STRs with other FIUs. The active involvement of reporting entities and sector representatives would be necessary to ensure that good standards and model STRs are developed.

¹² The Hungarian FIU (with the support of FIUs from AT, BE, CY, FR, LU, IT) led a project to identify obstacles for sharing information, dissemination and further use of information through the definition of "use for intelligence purposes" and propose possible solutions. This report was completed in 2016 and the FIU Platform will shortly initiate work to assess the implementation of this report.

The continuation of the active engagement of the members of the FIU Platform is essential to ensure that future analytical work addresses adequately their operational obstacles. Commission staff may lend its assistance to any project team that is established to identify problems or develop guidance that will reinforce the cooperation between FIUs, or arrange additional meetings of the FIU Platform to allow for efficient feedback mechanisms.

Further, the FIU.net should be developed to be able to extract **information and statistics** on flows of information, activities and the outcomes of analysis. Having relevant, reliable, and comparable quantitative data at EU level will contribute to a better understanding of the risks and also help the Commission and the Member States to identify sectors that transmit few reports on suspected activities or transactions and analyse the reasons why. It would help FIUs when providing feedback to reporting entities and contribute to a better dialogue with private stakeholders. More detailed and updated information and statistics will help FIUs to review the efficiency of their systems and to identify trends.

Common mandatory selection criteria that will allow FIUs to retrieve the relevant information from the cross-border STRs could also be developed within the FIU.net system. Filters should be created that will ensure that an FIU that starts working on a specific person or account will know that another Member State has relevant information. Criteria could also be developed to help identify which reports should be shared.

On international cooperation and exchange of financial intelligence between EU FIUs and third countries' FIUs, the Commission's Services have the intention to engage according to their competences and increase their engagement at international fora where cooperation between FIUs and standards are discussed. This concerns both the Financial Action Task Force (FATF), where the Commission has member¹³ status, whose tasks include the development of recommendations that are recognised as international standards for combatting money laundering and terrorism financing, and the Egmont Group¹⁴ that provides an international platform for the secure exchange of expertise and financial intelligence between FIUs across the globe¹⁵.

4.2 Issues that are addressed through the transposition of the 4AMLD and the amending proposal

The 4AMLD enhances substantially the legal framework for the operation and cooperation of FIUs. A number of issues listed in the report are addressed in the 4AMLD which requires that

¹³ The Commission is also, as an observer, engaged in the work of Moneyval (the Committee of Experts on the Evaluation of Anti-Money Laundering Measures - a permanent monitoring mechanism of the Council of Europe)

¹⁴ The Egmont Group consists of 152 FIUs from around the world (including all EU FIUs). It issues the 'Statement of Purpose and its Principles for Information Exchange Between Financial Intelligence Units for Money Laundering and Terrorism Financing Cases and following a Commission decision on 31 January 2017 (Decision C/2017/413), the Commission requested an observer status order to join the Egmont Group of Financial Intelligence Unit and attend the sessions open to observers

¹⁵ Egmont uses the Egmont Secure Web (ESW) to share operational information between its member FIUs. Basic interoperability between the FIU.net and ESW has been accomplished and FIU.net is for example capable of generating Egmont format reports which can be exchanged and understood through the ESW system.

FIUs have operational autonomy and are provided with adequate financial, human and technical resources to fulfil their tasks, thus reducing their dependence from their host organisation and enhancing their capacity. It is also clarified that the powers of FIUs should include the capacity to suspend or withhold consent to a transaction that is about to proceed. **More information should also be available and accessible** following the provisions granting FIUs both timely and unrestricted access to information on beneficial ownership and legal ownership of legal entities as well as legal arrangements and, directly or indirectly, access to information held by obliged entities in accordance with national procedures. Obstacles to sharing information are addressed both by strengthening FIUs' abilities to respond to requests for information by competent authorities in their respective Member States and by the introduction of a specific regime for information exchange and cooperation between EU FIUs.

The Commission's services intend to monitor closely how these rules are transposed into the national laws of Member States and how the FIUs and the obliged entities implement these rules in practice.

In addition to this, the proposals made by the Commission to revise the 4AMLD will, if accepted, further address some of the gaps identified in the mapping report. They will further clarify that FIUs should have the power to obtain information directly from obliged entities even if they have not filed an STR and without an approval from a third party. The provisions should also further specify that the cooperation between FIUs should take place regardless of differences of definitions concerning predicate offences and even if it concerns tax matters. Finally, the introduction of centralised bank account registers or data retrieval systems on holders of bank and payments accounts should increase the FIU's capacity to make more targeted requests to obliged entities.

4.3 Issues that could require regulatory solutions

While operational guidance and enforcement will contribute to better cooperation between FIUs, such actions may not be sufficient to deal with all obstacles identified in the report. This concerns the status, powers, autonomy, access, sharing and use of information between FIUs. In particular the rules concerning the cross-border dissemination of information to law enforcement authorities are not sufficiently clear. FIUs may also, on less objective grounds, refuse to exchange information to ensure control over the relevant data to avoid that this information is used as "evidence" in legal proceedings in another Member State. It may be difficult to address with mere guidance issues of data protection safeguards concerning FIUs, of reporting of obliged entities, as well as issues relating to the international cooperation of FIUs with third countries.

Some of the above obstacles to cooperation seem to be the result of a diverse legal framework in Member States which itself is the result of a minimum level of harmonisation at EU level. Possible rules at EU level that provide for better sharing of information and improved cooperation of FIUs with law enforcement and judicial authorities could be considered. Specific and targeted data protection rules in relation to access rights, retention periods, sharing of data could also be envisaged.

5. Conclusion

Following a thorough and solid analysis by the EU FIU Platform, the report has identified a significant number of obstacles relating particularly to diverging FIU powers, organisation, function, access to and sharing of information that could be addressed.

Through the mapping report, the EU FIUs call on the Commission to respond by providing guidance, ensuring the adequate implementation of existing and upcoming legislation and conducting a thorough analysis of options which could help address remaining obstacles, including through legislative action if necessary. As has been the case with the elaboration of the mapping exercise and the development of a number of projects in the FIU Platform, the Commission's services counts on the continued engagement of EU FIUs to achieve a positive outcome that responds to their needs and facilitates their work in preventing and combatting money laundering and terrorist financing.

In order to address these obstacles, further potential options could be examined in line with the Better Regulation principles, such as the possibility of establishing new mechanisms or initiatives to address issues stemming from the divergent FIUs status and competences, and facilitate coordination and joint analysis of cross-border cases. The Commission will assess the added value and impact of the different options taking into account the operational needs of FIUs, economic and budgetary impact, as well as fundamental rights including data protection.