8. Legal perspectives on money laundering

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1. INTRODUCTION

In Sweden, there are two main laws that regulate anti-money laundering (AML). On the one hand, there is the administrative law framework applying to firms in certain sectors, the Money Laundering and Terrorist Financing (Prevention) Act,[1] obliging such firms to train their staff and to follow certain procedures. They need to know their customers, classify risks and make risk assessments, monitor, and report suspected money laundering or terrorist financing in their operations to the Financial Intelligence Unit (FIU) within the Swedish Police.[2] On the other hand, under the criminal law framework covering money laundering and terrorism financing, the Act on Penalties for Money Laundering Offences,[3] laundering money is a criminal offence.

Thus illustrated by Sweden as an example, on the national level there are two parallel systems, administrative and criminal, where the purpose of the administrative framework is to prevent firms from being used for money laundering and terrorist financing purposes. Supervised by the Swedish authority *Finansinspektionen*, firms monitor, report and prevent the criminal offence of money laundering, under the threat of administrative penalties if they do not follow certain procedures or other administrative law requirements. There are of course national variations concerning details in the functioning of the regulatory frameworks, relevant authorities and applicable procedures,[4] but countries with AML regulation have administrative as well as criminal law provisions in place.

Within the European Union (EU), the administrative and criminal law frameworks in Member States like Sweden stem from EU Directives, which in turn transpose and closely follow complementary activities carried out in international fora, in particular those of the Financial Action Task Force (FATF),[5] the United Nations, and the Council of Europe, as well as banking organisations.[6]

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[1] *Lag (2017:630) om åtgärder mot penningtvätt och finansiering av terrorism* (penningtvättslagen).

[2] Firms can simply email or call the Financial Intelligence Unit: <http://www.fi.se/en/bank/money-laundering> accessed 15 March 2018.

[3] *Lag (2014:307) om straff för penningtvättsbrott.*

[4] See e.g. Valsamis Mitsilegas, *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles* (Kluwer Law International 2003); and Melissa Van den Broek, *Preventing Money Laundering: A Legal Study on the Effectiveness of Supervision in the European Union* (Eleven International Publishing 2015).

[5] FATF is an inter-governmental body that was established in 1989 by the Ministers of its member jurisdictions. FATF home page at <http://www.fatf-gafi.org/about/> accessed 6 March 2018.

[6] See e.g. Maria Bergström, 'EU Anti-Money Laundering Regulation: Multilevel Cooperation of Public and Private Actors' in Christina Eckes and Theodore Konstadinides (eds), *Crime Within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011).

Since money laundering and terrorist financing are frequently transnational, they attract supranational regulation. The European Agenda on Security,[7] published in 2015, called for additional measures in the area of terrorist financing and money laundering, and the 2016 Action Plan to strengthen the fight against terrorist financing highlighted the need to counter money laundering by means of criminal law and the need to ensure that criminals who fund terrorism are deprived of their assets.[8] After the entry into force of the Lisbon Treaty in 2009, money laundering was established as one of the so-called Euro-crimes with a specific legal basis in Article 83(1) TFEU for the EU to establish a common definition and level of sanctions, and the fourth AML Directive includes tax crime as a new predicate offence.[9] A predicate offence refers to criminal actions used to obtain the funds being laundered.

Arguably, the most pressing legal question is not so much whether the EU has the power to regulate within this field, even when it comes to criminal law,[10] nor whether it should, or whether such regulation is effective for its stated purposes, but rather what added value an EU criminal law directive might have, and what might still be missing.

After briefly addressing the abovementioned legal issues, this chapter argues that it is high time to evaluate the legal implications of the regulatory frameworks. Given all the rules in place on different levels, the question this chapter aims to answer is whether there is any need for further regulation, what the added value of legislation based on Article 83(1) TFEU might be, and what might still be missing.

2. FATF – THE INTERNATIONAL STANDARD-SETTER FOR AML

Like the previous directives, the preamble to the fourth AML Directive emphasises the international character of money laundering, terrorist financing and AML measures:

> Money laundering and terrorist financing are frequently carried out in an international context. Measures adopted solely at national or even at Union level, without taking into account international coordination and cooperation, would have very limited effect. The measures adopted by the Union in that field should therefore be compatible with, and at least as stringent as, other actions undertaken in international fora. Union action should continue to take particular account of the FATF Recommendations and instruments of other international bodies active in the fight against money laundering and terrorist financing.[11]

Today the FATF is the most important international standard-setter for AML and combatting terrorism financing (CTF). The FATF currently comprises 35 member jurisdictions and two regional organisations, thus representing most major financial centres in all parts of the

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[7] COM (2015)185 final.

[8] COM (2016)50 final.

[9] Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73 (Fourth AML Directive).

[10] Article 83(1) TFEU.

[11] Directive 2015/849/EU, recital 4.

world.[12] Its membership includes the European Commission and 15 Member States (MSs). The remaining 13 MSs are members of MONEYVAL, which is a FATF-style regional body that conducts self- and mutual assessment of the measures in place in Council of Europe Member States.[13]

In collaboration with other international stakeholders, the FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse. The FATF monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally.[14] The FATF sets standards and promotes the effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF therefore claims to be a 'policy-making body' which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. The FATF's decision-making body, the FATF Plenary, meets three times per year.[15]

The FATF Recommendations were first issued in 1990, and revised most recently in 2012.[16] They affect both the administrative and criminal law systems and were not created in a vacuum. To provide an example, FATF Recommendation 3 calls on countries to criminalise money laundering on the basis of the Vienna Convention of 1988,[17] and the Palermo Convention of 2000.[18] With the first revisions in 1996, the FATF's 40 recommendations on money laundering were widened in scope beyond the laundering of the proceeds of drugs offences, and after 9/11 FATF explicitly extended its recommendations to include the financing of terrorism. According to the eight special recommendations adopted on 30 October 2001,[19] each state should take immediate steps to ratify and implement the 1999 UN International Convention for the Suppression of the Financing of Terrorism,[20] and implement the UN Resolutions on the Prevention and Suppression of the Financing of Terrorist Acts.[21] On 22 October 2004, a ninth special recommendation on cash couriers was developed. As a result, the FATF preventive

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[12] FATF, 'FATF Members and Observers' at <http://www.fatf-gafi.org/about/membersandobservers/> accessed 15 March 2018.

[13] Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL) at <http://www.fatf-gafi.org/pages/moneyval.html, http://www.fatf-gafi.org/about/membersandobservers/> accessed 15 March 2018.

[14] FATF home page at <http://www.fatf-gafi.org/about/> accessed 15 March 2018.

[15] Ibid.

[16] International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: the FATF Recommendations (2012, most recently updated February 2018), available at <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 15 March 2018.

[17] UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (1582 UNTS 95).

[18] UN Convention against Transnational Organized Crime of 2000 (2225 UNTS 209).

[19] Agreed upon at a special meeting after the 11 September attacks.

[20] 1999 International Convention for the Suppression of the Financing of Terrorism (2178 UNTS 197).

[21] FATF Special Recommendation I.

measures now cover not only the use of money derived from crime, but also the collection of money or property for terrorist purposes.[22]

The FATF recommendations are updated regularly to ensure that they remain up-to-date and relevant. Most recently, in February 2018, Recommendation 2 was updated to ensure the compatibility of AML/CTF requirements and data protection and privacy rules, and to promote domestic inter-agency information sharing among competent authorities.[23]

The methodology of mutual evaluations used is that the FATF sets standards or model rules, in particular its recommendations, and then tests Member States against these. The FATF methodology was adopted on 22 February 2013, and most recently updated in February 2018.[24] It works by peer review: panels composed of national experts in law and banking are established which periodically evaluate states' laws and practices. The FATF applies sanctions in the form of warning states which are considered to be failing to comply with the 'non-binding' FATF standards. This results in significantly higher transaction costs for financial institutions in the blacklisted state, as financial institutions in other FATF states apply greater scrutiny when dealing with them. This type of 'blacklisting' partially explains the relatively high degree of compliance with the FATF standards. As far as EU states are concerned, the standards are, in fact, binding, as they have been incorporated into EU legislation.[25]

3. THE TWO-TIER EUROPEAN UNION POWER TO REGULATE

After the entry into force of the Lisbon Treaty in 2009, money laundering became one of a number of serious crimes with a cross-border dimension that has been given particular attention in the Treaty on the Functioning of the European Union (TFEU). Thus, money laundering is one of the so-called Euro-crimes with a specific criminal law legal basis in Article 83(1) TFEU.

Despite the new criminal law competence to adopt EU criminal law measures directly based on Article 83(1) TFEU, the current AML framework consists of two legal instruments both based on Article 114 TFEU on the internal market: the fourth AML Directive[26] and the Transfer of Funds Regulation.[27] In order not to risk annulment by the Court of Justice of the European Union (CJEU), were these instruments to be legally challenged, the predominant purpose of both these instruments is ostensibly to improve the conditions for the establishment and functioning of the internal market, rather than to define criminal law offences and

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[22] FATF IX Special Recommendations <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/ixspecialrecommendations.html> accessed 15 March 2018.

[23] FATF home page <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html#UPDATES> accessed 15 March 2018.

[24] FATF Methodology for assessing compliance with the FATF Recommendations and the effectiveness of AML/CFT systems sets out the evaluation process (2013) <http://www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html> accessed 15 March 2018.

[25] Maria Bergström, 'The Place of Sanctions in the EU System for Combating the Financing of Terrorism' in Iain Cameron (ed), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Intersentia 2013).

[26] Directive 2015/849/EU.

[27] Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) 1781/2006 [2015] OJ L141/1.

sanctions. Yet, their main aim is still the prevention of the use of the financial system for the purposes of money laundering and terrorist financing.[28] This has indirectly been confirmed by the Court of Justice in *Jyske Bank Gibraltar*.[29] In this case, the Court stated that, admittedly, the now repealed third AML Directive[30] was founded on a dual legal basis,[31] and sought therefore also to ensure the proper functioning of the internal market. The Court then went on to state that the Directive's main aim was the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, as was apparent both from its title and the preamble, and from the fact that it was adopted, like its predecessor,[32] in an international context, in order to apply and make binding in the EU the recommendations of the FATF.

In other words, both instruments now in force update existing EU legal instruments on money laundering and the financing of terrorism and aim to implement and extend the newest FATF recommendations issued in February 2012, most recently updated in February 2018.

3.1 The Administrative Law Directive

As clearly stated, the fourth AML Directive aims to prevent the Union's financial system from abuse for the purposes of money laundering and terrorist financing.[33] The risk-based approach introduced by the revised FATF Recommendations and the third AML Directive,[34] has been further developed towards a more targeted and focused risk-based approach using evidence-based decision-making, as well as guidance by European supervisory authorities.[35]

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[28] See further Maria Bergström, 'Money Laundering' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016).

[29] Case C-212/11 *Jyske Bank Gibraltar*, EU:C:2013:270, p. 46.

[30] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L309/15 (Third AML Directive).

[31] Article 47(2) EC [now Article 53(1) TFEU], and Article 95 EC [now Article 114 TFEU].

[32] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, [1991] OJ L166/77 (First AML Directive).

[33] Directive 2015/849/EU, Article 1(1).

[34] See e.g. Ester Herlin-Karnell, 'The EU's Anti-Money Laundering Agenda: Built on Risks?' and Maria Bergström, 'EU Anti-Money Laundering Regulation: Multilevel Cooperation of Public and Private Actors' in Christina Eckes and Theodore Konstadinides (eds), *Crime Within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011); and Bergström, 'Money Laundering' (n 28).

[35] Directive 2015/849/EU, recital 23, for example, states that underpinning the risk-based approach is the need for Member States and the Union to identify, understand and mitigate the risks of money laundering and terrorist financing that they face. The importance of a supranational approach to risk identification has been recognised at the international level, and the European Supervisory Authority (European Banking Authority) (EBA), established by Regulation (EU) 1093/2010 of the European Parliament and of the Council, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) (EIOPA), established by Regulation (EU) 1094/2010 of the European Parliament and of the Council, and the European Supervisory Authority (European Securities and Markets Authority) (ESMA), established by Regulation (EU) 1095/2010 of the European Parliament and of the Council, should be tasked with issuing an opinion, through their Joint Committee, on the risks affecting the Union financial sector. Recital 24 of the Fourth AML Directive then states that national and Union data protection supervisory authorities should be involved only if the assessment of the risk of money laundering and terrorist financing has an impact on the privacy and data protection of individuals.

These changes have the aim of updating the EU rules to implement the newest FATF recommendations, with their increased focus on the effectiveness of regimes to counter money laundering and terrorism financing, as well as addressing the shortcomings of the third AML Directive identified by the European Commission.[36] According to the Council, the Directive's strengthened rules 'reflect the need for the EU to adapt its legislation to take account of the development of technology and other means at the disposal of criminals'.[37]

In general, the Directive's scope is extended by reducing the cash payment threshold that triggers reporting obligations from EUR 15,000 to EUR 10,000, by including providers of gambling services within its scope, and by including tax crimes as a new predicate offence. In addition, the new framework reinforces the sanctioning powers of the competent authorities[38] and clarifies how AML supervisory powers apply in cross-border situations. In addition, the fourth AML Directive incorporates new provisions on data protection. Besides these general changes, a few specific issues are worth mentioning.

First, risk assessments are required at several different levels. At the Union level the Commission is obliged, at least biennially, to assess the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities.[39] The Member States, in turn, shall assess the risks affecting them, including any data protection concerns.[40] Member States shall also ensure that obliged entities make risk assessments relating to their customers, countries or geographic areas, products, services, transactions or delivery channels, all proportionate to the nature and size of the obliged entities.[41]

Second, there are tougher rules on customer due diligence (CDD), which require that banks and other relevant entities have in place adequate controls and procedures so that they know their customers and understand the nature of their customers' businesses. To the benefit of those involved, these rules have been clarified. As under the previous EU Directives, relevant entities can take simplified measures where risks are demonstrated to be lower,[42] but are required to take enhanced measures where the risks are greater,[43] including specific provisions on politically exposed persons (PEPs) at the domestic level, and PEPs working for international organisations.[44] However, the new Directive will prescribe minimum factors to be taken into account before applying simplified measures, and obliged entities need to prove why they have considered the risk to be low.

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[36] See in particular the review of the third AML Directive undertaken by the Commission, with a view to addressing any identified shortcomings: European Commission, Report on the Application of the Third Anti-Money Laundering Directive: Frequently Asked Questions, MEMO/12/246 (Brussels, 11 April 2012) <http://europa.eu/rapid/press-release_MEMO-12-246_en.htm?locale=en> accessed 15 March 2018.

[37] European Council, Press Release, Money Laundering: Council Approves Strengthened Rules (20 April 2015) <www.consilium.europa.eu/en/press/press-releases/2015/04/20-money-laundering-strengthened-rules> accessed 8 April 2017.

[38] Els De Busser and Cornelia Riehle, 'Money Laundering: Fourth Anti Money Laundering Directive Released' [2013] 1 Eucrim 6.

[39] Directive 2015/849/EU, Chapter I, Section 2, Article 6(1).

[40] Ibid, Chapter I, Section 2, Article 7(1).

[41] Ibid, Chapter I, Section 2, Article 8(1).

[42] Ibid, Chapter II, Section 2, Articles 15–17, and Annex II.

[43] Ibid, Chapter II, Section 3, Articles 18–24.

[44] Ibid, Articles 20–23.

Third, in order to enhance transparency, specific provisions on the beneficial ownership of companies have been introduced. Information about beneficial ownership will be stored in a central register accessible to competent authorities, FIUs, entities required to take CDD measures, and other persons with a legitimate interest.[45] Such access to information needs to be in accordance with data protection rules and may be subject to online registration and to the payment of a fee, not exceeding the administrative costs of obtaining the information.[46] According to recital 14, access to accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure. In addition, new rules on traceability of fund transfers have been introduced.

Fourth, with the introduction of the fourth AML Directive, there will be more cooperation between national authorities. Of central importance, the role of national FIUs is to receive, analyse the exchange, and disseminate reports raising suspicions of money laundering or terrorist financing to competent authorities in order to facilitate their cooperation.[47] In this respect, the FIUs have been given strengthened powers to identify and follow suspicious transfers of money and facilitate exchange of information.[48] They now have access to financial, administrative and law enforcement information and are empowered to take early action if requested by the law enforcement authorities.

According to recital 58, Member States should in particular ensure that their FIUs exchange information freely, spontaneously or upon request with third-country FIUs, having regard to Union law and to the principles relating to information exchange developed by the Egmont Group of Financial Intelligence Units.[49]

Fifth, as regards sanctions, the fourth AML Directive stipulates a maximum administrative pecuniary sanction of up to twice the amount of the benefit derived from the breach where such benefit can be determined, or up to EUR 1 million.[50]

The previous Directives were repealed by 26 June 2017, by which date the fourth AML Directive had to be implemented by the Member States.[51] By this date, the new Regulation also came into force.

3.2 The Proposed Amendments and Critique

About one year earlier, on 5 July 2016, the European Commission adopted a proposal to amend the fourth AML Directive and Directive 2009/101, the latter establishing the European Central Platform interconnecting Member States' central registers holding beneficial owner-

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[45] Ibid, Chapter III, Article 30.

[46] Ibid, Chapter III, Article 30(5) second paragraph.

[47] Ibid, Article 32(3).

[48] See also Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between FIUs of the Member States in respect of exchanging information [2000] OJ L271/4, which the Commission also plans to update. European Commission, Report on the Application of the Third Anti-Money Laundering Directive: Frequently Asked Questions, MEMO/12/246 (Brussels, 11 April 2012) <http://europa.eu/rapid/press-release_MEMO-12-246_en.htm?locale=en> accessed 15 March 2018.

[49] Egmont Group of Financial Intelligence Units Charter (July 2013) <https://egmontgroup.org/en/document-library/8> accessed 15 March 2018.

[50] Directive 2015/849/EU, Article 59(2)(e).

[51] Ibid, Articles 66 and 67.

ship information. The idea behind the amendments was to reinforce the preventive framework against money laundering,[52] in particular by addressing emerging risks and increasing the capacity of competent authorities to access and exchange information.

These amendments aim at ensuring a high level of safeguards for financial flows from high-risk third countries, enhancing the access of FIUs to information, including centralised bank account registers, and tackling terrorist financing risks linked to virtual currencies and pre-paid cards. In this respect, the proposal takes a stricter approach to the problem of effectively countering money laundering and terrorism financing, and focuses on new channels and modalities of transferring illegal funds to the legal economy, such as virtual currencies and money exchange platforms.

Set in a broader picture, this initiative was the first action taken to implement the Action Plan for strengthening the fight against terrorism financing.[53] The Action Plan was adopted by the Commission on 2 February 2016 to better counter the financing of terrorism, and to ensure increased transparency of financial transactions following the so-called 'Panama Papers' revelations.[54]

The proposal was a coordinated action with the G20 and the OECD, aiming at tackling tax evasion by both legal and natural persons in order to establish a fairer and more effective tax system. In this respect, it forms part of a wider EU effort to improve tax transparency and tackle tax abuse.[55]

However, the proposed amendments have been criticised by the Data Protection Agency for introducing other policy purposes than countering money laundering and terrorism financing that do not seem clearly identified:

> Processing personal data collected for one purpose for another, completely unrelated purpose infringes the data protection principle of purpose limitation and threatens the implementation of the principle of proportionality. The amendments, in particular, raise questions as to why certain forms of invasive personal data processing, acceptable in relation to anti-money laundering and [the] fight against terrorism, are necessary out of those contexts and on whether they are proportionate.[56]

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[52] The proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, COM(2016) 450 final, that proposed to bring forward the date of transposition of the fourth AML Directive to 1 January 2017, has not been adopted. For the procedure, see <http://eur-lex.europa.eu/procedure/EN/2016_208> accessed 15 March 2018.

[53] Commission's Action Plan to strengthen the fight against terrorist financing of 2 February 2016, COM (2016) 50 final.

[54] Communication from the Commission to the European Parliament and the Council: Communication on Further Measures to Enhance Transparency and the Fight against Tax Evasion and Avoidance, COM (2016) 451 final; see also European Commission, 'Commission Strengthens Transparency Rules to Tackle Terrorism Financing, Tax Avoidance and Money Laundering' (Strasbourg, 5 July 2016) <http://europa.eu/rapid/press-release_IP-16-2380_en.htm> accessed 15 March 2018.

[55] European Commission, 'Fair Taxation: The Commission Sets Out Next Steps to Increase Tax Transparency and Tackle Tax Abuse' (Strasbourg, 5 July 2016) <http://europa.eu/rapid/press-release_IP-16-2354_en.htm>accessed 15 March 2018.

[56] European Data Protection Supervisor, Summary of the Opinion of the European Data Protection Supervisor on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC Access to beneficial ownership information and data protection implications, OJ 2017, C 85/3.

The Data Protection Agency also criticises the proposed amendments due to lack of proportionality, in particular concerning the broadened access to beneficial ownership information by both competent authorities and the public as a policy tool to facilitate and optimise enforcement of tax obligations. The Data Protection Agency sees, 'in the way such solution is implemented, a lack of proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection'.[57]

About five months after the Commission proposal, on 19 December 2016, the Council adopted a compromise text on the proposal aiming at amending only the AML Directive and not Directive 2009/101, focusing mainly on AML and terrorism financing. Although the purpose of fighting tax evasion is no longer explicitly mentioned, tools that were designed to achieve that purpose remain, although somewhat modified.[58]

Eventually, on 14 May 2018, after almost two years of negotiations and counterproposals, the European Parliament and the Council adopted the fifth Anti-Money Laundering Directive. It will enter into force 20 days after publication, and Member States will then have up to 18 months to transpose the new provisions into national legislation.[59]

3.3 Criminal Law Elements and the Fourth AML Directive

The fourth AML Directive provides for an EU-wide definition of money laundering.[60] It might therefore be argued that the current AML framework does establish harmonised rules when it comes to the definition of money laundering, via rules setting out what behaviour is considered to constitute a criminal act, although not stating what type and level of sanctions are applicable for such acts. The Directive further emphasises that sanctions or measures for breaches of national provisions transposing the Directive must be effective, proportionate and dissuasive.[61] In this respect, Member States may decide not to lay down rules for administrative sanctions or measures for breaches which are subject to criminal sanctions in their national law.[62] In that case, Member States must communicate to the Commission the relevant criminal law provisions.

Despite all assumptions and suggestions that the current EU AML framework is mainly administrative in character, there is a floating and not clear line between administrative and criminal law and sanctions, not least since national laws and EU law are intertwined and interrelated. Still, the fourth AML Directive, although harmonising national criminal law on AML measures, does not require the States to have certain criminal law provisions in place with certain specific minimum and maximum sanctions for breaches.[63] Although the Directive

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[57] Ibid.

[58] Council of the European Union, Presidency Compromise text by 13 December 2016, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15468_2016_INIT&from=EN> accessed 8 April 2017. For the procedure, see <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52016PC0450&qid=1491076566465> accessed 15 March 2018.

[59] COM(2018) 213 final.

[60] Directive 2015/849/EU, Article 1(3).

[61] Ibid, Section 4 on Sanctions, Article 58(1).

[62] Directive 2015/849/EU, Article 58(2) second paragraph.

[63] See Ester Herlin-Karnell, 'Is Administrative Law Still Relevant? How the Battle of Sanctions has Shaped EU Criminal Law' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016).

may not establish minimum rules concerning the definition of criminal offences and sanctions within the meaning of Article 83(1) TFEU, the Directive clearly states that Member States shall ensure that money laundering and terrorist financing are prohibited.[64] To provide an example of the interrelationship between criminal and administrative law, according to recital 59, Member States should ensure that the imposition of administrative sanctions and measures in accordance with this Directive, and of criminal sanctions in accordance with national law, does not breach the principle of *ne bis in idem*. In other words, it is the responsibility of the Member States to ensure that parallel systems of administrative and criminal law sanctions do not breach the principle of *ne bis in idem*.

As pointed out by Koen Lenaerts and José Gutiérrez-Fons,[65] the CJEU in *Åkerberg Fransson* recalled that when EU legislation does not specifically provide any penalty for an infringement of EU law or refers for that purpose to national laws, regulations and administrative provisions, the Member States have the freedom to choose the applicable penalties, that is, administrative, criminal or a combination of the two.[66] Yet, the resulting penalties must comply with the Charter of Fundamental Rights of the European Union and be effective, proportionate and dissuasive.[67] Any measure based on Article 83(1) TFEU, however, will leave no such freedom to the Member States.[68]

3.4 The Criminal Law Proposal

Whereas the European Agenda on Security[69] called for additional measures in the area of terrorist financing and money laundering, the Commission, in its Action Plan to strengthen the fight against terrorist financing,[70] highlighted the need to counter money laundering by means of criminal law and the need to ensure that criminals who fund terrorism are deprived of their assets.

On 21 December 2016, two days after the compromise proposal aiming at amending the fourth AML Directive was adopted by the Council,[71] the Commission submitted a proposal for a Directive on countering money laundering by criminal law. This was the first proposal based on Article 83(1) TFEU,[72] which identifies money laundering as one of the so-called 'Euro-crimes' with a particular cross-border dimension.

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[64] Directive 2015/849/EU, Article 1(2).

[65] Koen Lenaerts and José Gutiérrez-Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law', in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016).

[66] C-617/10 *Åkerberg Fransson*, EU:C:2013:105, para 34.

[67] Ibid, para. 36.

[68] This section builds on Maria Bergström, 'The Global AML Regime and the EU AML Directives – Prevention and Control' in Colin King, Clive Walker and Jimmy Gurule (eds), *The Handbook of Criminal and Terrorism Financing Law* (Palgrave 2018).

[69] COM (2015) 185 final.

[70] COM (2016) 50 final.

[71] On 21 December 2016, the Commission submitted two legislative proposals. The proposal for the Criminal Law AML Directive, COM (2016) 826 final, and a proposal for a Regulation on the mutual recognition of freezing and confiscation orders.

[72] Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, COM (2016) 826 final.

As regards the relationship with the fourth AML Directive and the Transfer of Funds Regulation,[73] the Commission emphasises that these legal instruments help prevent money laundering and facilitate investigations into money laundering cases, but they do not address the absence of a uniform definition of the crime of money laundering and the differences in the type and level of sanctions for this crime throughout the Union. Under this present situation, the Member States should ensure that administrative sanctions and measures in accordance with the fourth AML Directive and criminal sanctions in accordance with national law are in place. The AML criminal law directive changed this situation.[74]

The proposal aims to counter money laundering by means of criminal law and enables the European Parliament and the Council to establish the necessary minimum rules on the definition of money laundering by means of directives adopted in accordance with the ordinary legislative procedure. The proposal would complement different pieces of EU legislation that require Member States to criminalise some forms of money laundering. It will partially replace Council Framework Decision 2001/500/JHA as regards the Member States bound by this proposal.[75] This Framework Decision aims at approximating national rules on confiscation and on certain forms of money laundering which Member States were required to adopt in accordance with the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. According to the Commission proposal, the existing instruments at EU level, and in particular the abovementioned Framework Decision, are limited in scope and do not ensure a comprehensive criminalisation of money laundering offences.[76]

In this respect, the Commission claims that 'All Member States criminalise money laundering but there are significant differences in the respective definitions of what constitutes money laundering, on which are the predicate offences – i.e. the underlying criminal activity which generated the property laundered – as well as the level of sanctions.'[77] The Commission further argues that the current legislative framework is neither comprehensive nor sufficiently coherent to be fully effective, and that: 'The differences in legal frameworks can be exploited by criminals and terrorists, who can choose to carry out their financial transactions where they perceive anti-money laundering measures to be weakest.'[78]

According to the Commission proposal, the definitions, scope and sanctions of money laundering offences affect cross-border police and judicial cooperation between national authorities and the exchange of information. As an example, it is stated that differences in the scope of predicate offences make it difficult for FIUs and law enforcement authorities in one Member State to coordinate with other EU jurisdictions to tackle cross-border money laundering.[79] In this respect, the Commission points out that practitioners taking part in the preparatory phase

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[73] Regulation (EU)2015/847 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006, OJ 2015, L 141/1.

[74] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law OJ 2018, L 284/22.

[75] Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ 2001 L 182/1.

[76] Explanatory memorandum, Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, COM(2016) 826 final.

[77] Ibid, 1.

[78] Ibid.

[79] Ibid.

reported that differences in criminalising pose obstacles to effective police cooperation and cross-border investigation.[80]

The proposal further complements Directive 2014/42/EU, which aims at creating a common set of minimum rules for the detection, tracing and confiscation of proceeds of crime across the EU, and Council Framework Decision 2008/841/JHA, which criminalises participation in an organised criminal group and racketeering.[81] In addition, it reinforces and complements the criminal law framework with regard to offences relating to terrorist groups, in particular the proposal for a Directive on combating terrorism,[82] which sets a 'comprehensive definition of the crime of terrorist financing, covering not only terrorist offences, but also terrorist-related offences such as recruitment, training and propaganda'.[83]

As stated in the Explanatory Memorandum of the criminal law proposal, the rationale behind it was that terrorists often resort to criminal proceeds to fund their activities and use money laundering schemes in that process. Thus, the underlying idea is that criminalisation of money laundering would contribute to tackling terrorist financing.[84] Hence, one of the key measures was to consider a possible proposal for a minimum Directive on the definition of the criminal offence of money laundering,[85] applying it to terrorist offences and other serious criminal offences, and to approximate sanctions.

In other words, the proposed EU AML Criminal Law Directive is embedded in the global fight against money laundering and terrorism financing. It implements international obligations in this area including the Warsaw Convention, and Recommendation 3 of the FATF. FATF Recommendation 3 in turn calls on countries to criminalise money laundering on the basis of the Vienna Convention of 1988 and the Palermo Convention of 2000.

According to the Progress Report from the Presidency to the Council, work on the proposal is progressing well in the Working Party on Substantive Criminal Law (DROIPEN).[86] Since January 2017, the Working Party has been working on the proposal with a view to preparing a compromise text as a basis for reaching a general approach at the Council in June 2017. On 30 May 2017, a compromise text was presented by DROIPEN, which will constitute the basis for future negotiations with the European Parliament in the context of the ordinary legislative procedure.[87]

The consolidated compromise text of the proposed Directive, as resulting from these discussions and confirmed at COREPER on 24 May 2017, seeks to reflect the compromise achieved

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[80] Ibid, 2.

[81] Ibid, 5.

[82] COM (2015) 625 final of 2 December 2015.

[83] Explanatory memorandum, Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, COM (2016) 826 final, 5.

[84] Explanatory memorandum, Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, COM (2016) 826 final.

[85] Announced in the Commission's Action Plan to strengthen the fight against terrorist financing of 2 February 2016, COM(2016) 50 final.

[86] Interinstitutional Files: 2016/0414 (COD) 2016/0412 (COD), Progress report from Presidency to Council, concerning Combatting Financial Crime and Terrorism Financing, 20 March 2017.

[87] Interinstitutional File: 2016/0414 (COD), Progress report from Presidency to Council, concerning Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law [First reading] – General approach, 30 May 2017.

on the basis of the positions expressed by delegations.[88] After more than a year of further discussions, the AML Criminal Law Directive was adopted on 23 October 2018.

4. CONCLUSIONS

Whereas the European Agenda on Security called for additional measures in the area of terrorist financing and money laundering, the Commission, in its Action Plan to strengthen the fight against terrorist financing, highlighted the need to counter money laundering by means of criminal law and the need to ensure that criminals who fund terrorism are deprived of their assets.

At the national levels, there are parallel systems of administrative and criminal sanctions. Member States should ensure that administrative sanctions and measures in accordance with the fourth AML Directive and criminal sanctions in accordance with national law are in place. Nevertheless, the fourth AML Directive does not and may not establish minimum rules concerning the definition of criminal offences and sanctions in the meaning of Article 83(1) TFEU.

Since the fourth AML Directive provides for an EU-wide definition of money laundering, it might be argued that the current AML framework establishes harmonised rules when it comes to the definition of money laundering. EU rules stipulate what behaviour is considered to constitute a criminal act, although they do not state what type and level of sanctions are applicable for such acts. Member States may decide not to lay down rules for administrative sanctions or measures for breaches which are subject to criminal sanctions in their national law. Member States must ensure that the resulting penalties comply with the EU Charter of Fundamental Rights and are effective, proportionate and dissuasive.

When EU legislation does not specifically provide any penalty for an infringement of EU law or refers for that purpose to national laws, regulations and administrative provisions, the Member States have the freedom to choose the applicable penalties, that is, administrative, criminal or a combination of the two. Any measure based on Article 83(1) TFEU, however, will leave no such freedom to the Member States.

Given all the rules in place on different levels, the question this chapter aims to answer is whether there is any need for further regulation, what the added value of legislation based on Article 83(1) TFEU might be, and what might still be missing?

4.1 The Added Value of Legislation Based on Article 83(1) TFEU?

The EU AML Criminal Law Directive implements international obligations in this area including the Warsaw Convention, and Recommendation 3 (R3) of the FATF. Recommendation 1 (R1) in turn calls on countries to criminalise money laundering on the basis of the Vienna Convention of 1988, and the Palermo Convention of 2000.

Within the EU, the definitions, scope and sanctions of money laundering offences affect cross-border police and judicial cooperation between national authorities and the exchange of information. Practitioners have reported that differences in criminalising pose obstacles to effective police cooperation and cross-border investigation. According to the Commission,

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[88] Ibid.

there are significant differences in the respective definitions of what constitutes money laundering, the predicate offences and the level of sanctions. Such differences in the scope of predicate offences make it difficult for FIUs and law enforcement authorities in one Member State to coordinate with other EU jurisdictions to tackle cross-border money laundering.

The Commission emphasises that the fourth AML Directive and the Transfer of Funds Regulation help prevent money laundering and facilitate investigations into money laundering cases, but that they do not address the absence of a uniform definition of the crime and the differences in the type and level of sanctions. The Commission further argues that the current legislative framework, and in particular Council Framework Decision 2001/500/JHA aiming at approximating national rules on confiscation and on certain forms of money laundering, is neither comprehensive nor sufficiently coherent to be fully effective, and that the differences in legal frameworks can be exploited by criminals and terrorists, who can choose to carry out their financial transactions where they perceive anti-money laundering measures to be weakest. In total, this signals that there might well be an added value by introducing AML Regulation on the criminal law legal basis.

4.2 What Might Still Be Missing?

Despite all assumptions and suggestions that the current EU AML framework is mainly administrative in character, there is not a clear line between administrative and criminal law and sanctions, not least since national laws and EU law are intertwined and interrelated. This may have detrimental effects concerning procedural safeguards and fundamental rights protection, for example if sanctions are in fact criminal rather than administrative in character, or if the different solutions chosen in different Member States lead to variations in fundamental rights protection throughout the European Union.

So far, it is mainly the responsibility of the Member States to ensure that the parallel systems of administrative and criminal law sanctions do not breach fundamental rights including the principle of *ne bis in idem*, the rules on privacy and data protection, and the principle of proportionality. EU Law measures may however in themselves infringe fundamental rights. Processing personal data collected for one purpose for another, completely unrelated purpose infringes the data protection principle of purpose limitation and threatens the implementation of the principle of proportionality. As pointed out by the Data Protection Supervisor, in particular the proposed amendments to the fourth AML Directive raise questions as to why certain forms of invasive personal data processing, acceptable in relation to anti-money laundering and the fight against terrorism, are necessary out of those contexts and on whether they are proportionate. Such issues need be evaluated against national human rights catalogues, the European Convention of Human Rights, and the EU Charter of Fundamental Rights. This is even more important when dealing with criminal, rather than purely administrative, law provisions and sanctions, which might necessitate further legal analysis.