REPORT ON THE EUROPEAN UNION ANTI-MONEY LAUNDERING REGULATION

DRAFT

Maria Bergström

1. Introduction – the Role of the EU in AML Regulation

2. The Evolution of EU AML Regulation – the Continuous Shift of Context
    a. International Rules and European Regulation
    b. EU Administrative Law Directives
        i. The Internal Market and Compensatory Measures (1 AMLD and 2 AMLD)
        ii. Financing of Terrorism and the Risk-based Approach (3 AMLD)
        iii. The 2015 AML Framework (4 AMLD and 5 AMLD)
    c. EU AML Regulation and the Wider Policy Initiatives
        i. The 2015-2020 European Agenda on Security
        ii. The 2016 Action Plan against Terrorism Financing
    d. EU Criminal Law Competence and the EU Criminal Law Directive
        i. EU Competence and the Choice of Context and Legal Basis
        ii. The 2015 AML Framework and Criminal Law
        iii. The 2018 EU Criminal Law Directive
        iv. Conclusions

3. Existing and Potential AML Challenges
    a. Blurred Divide between Administrative and Criminal Law Provisions and Sanctions
    b. Cooperation and Information Sharing
        i. The Public and Private Collaboration
        ii. Agency to Agency Cooperation
        iii. Police Cooperation and Information Sharing
        iv. Digitalisation and the Free Movement of Information
    c. The Effectiveness of EU AML Regulation

4. Proposals for Future Reform
    a. The European Agenda for Security
    b. Recent Policy Initiatives
        i. European Commission 2019 Communication towards Better Implementation
        ii. European Commission 2020 Action Plan for a Comprehensive Union Policy
    c. Proposed Central AML Authority

5. Conclusions

See in particular: Anti-money laundering and counter terrorist financing | European Commission (europa.eu)

1. Introduction – the Role of the EU in AML Regulation

2. The Evolution of EU AML Regulation – the Continuous Shift of Context

Although money laundering is an international phenomenon and constitutes a major problem around the world, the phenomenon and the term has only come to prominence in the last 30 years. Although in use earlier, the term 'money laundering' seems to have been introduced in legislation in 1986 in the US Money Laundering Control Act of 1986.[1] In the early days, money laundering was recognised mainly as a domestic problem. However, the dirty money that was laundered often came, and still comes today, from the trade in drugs, human trafficking and other transnational criminal activities.[2]

At the same time, money laundering is a crime that hinders the proper workings of financial systems.[3] As pointed out by the International Monetary Fund, possible consequences of money laundering (and the financing of terrorism) include 'risks to the soundness and stability of financial institutions and financial systems, increased volatility of international capital flows, and a dampening effect on foreign direct investment.'[4] In this respect, money laundering is particularly threatening since a sound financial infrastructure is one of the fundamental features of a stable society. With increased economic globalization, national borders became less relevant also for financial transactions.[5] Taken together, the threats of

[1] Kersten, A., 'Financing of Terrorism – A Predicate Offence to Money Laundering?', in Pieth, M., (ed.) *Financing Terrorism*, (Kluwer Academic Publishers, 2002) pp. 49-56, p. 50.
[2] Braithwaite, J. and Drahos, P., *Global Business Regulation*, (Cambridge University Press, 2000), p. 105.
[3] Anon, 'Combating Financial Crime and Money Laundering: Overview' (1997) 2(3) *Trends in Organized Crime* 5-6.
[4] International Monetary Fund, Anti-Money Laundering/Combating the Financing of Terrorism – Topics, available at https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm. (last accessed April 8, 2017). The International Monetary Fund (IMF) is an organization of 189 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.
[5] In this collection, see ch.4 (Talani). See also P. Alldridge, 'Money Laundering and Globalization' (2008) 35(4) Journal of Law and Society 437.

money laundering and the emerging AML Regulation have gradually become transnational and even global, strongly affecting also the regional and national levels.[6]

a. International Rules and European Regulation

Attention to money laundering as a global problem began in 1988 with the prohibition of the laundering of drug proceeds in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention).[7] The Vienna Convention was, however, limited to drugs and did not specifically refer to the term 'money laundering'. That same year, principles dealing with money laundering were also adopted by the Basel Committee on Banking Supervision (BCBS).[8] This body consists of banking supervisory authorities in a number of states and aims to produce common standards of supervision of banking and financial institutions. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the Strasbourg Convention)[9] from 1990 is the first multilateral treaty which deals generally with 'laundering offences'.[10] The Strasbourg Convention also widened the so-called 'predicate offences' beyond drug- trafficking.[11] In 1998, another regional actor intervened when the OECD presented a series of recommendations on harmful tax practices.[12] In 1999 the UN

[6] This section builds upon previous publications: Bergström, M., 'EU Anti-Money Laundering Regulation: Multilevel Cooperation of Public and Private Actors' in Eckes, C. and T. Konstadinides (eds), Crime Within the Area of Freedom, Security and Justice: A European Public Order (Cambridge University Press, 2011; Bergström, M., The Place of Sanctions in the EU System for Combating the Financing of Terrorism, in Cameron, I., (red.) *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Intersentia, 2013; and Bergström, M., Money Laundering. In: Mitsilegas, V., Bergström, M., Konstadinides, T., (eds.) *Research Handbook on EU Criminal Law*, Edward Elgar Publishing; 2016.

[7] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988 (1582 UNTS 95).

[8] Basel Committee on Banking Supervision, Prevention of criminal use of the banking system for the purpose of money-laundering (December 1988). Available at: http://www.bis.org/publ/bcbsc137.htm (last accessed April 8, 2017). The BCBS is a standard-setting body on banking supervision consisting of senior representatives of bank supervisory authorities and central banks. It was created by the central bank Governors of the Group of Ten nations in 1974.

[9] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990.

[10] This section is based on Kersten, A. 'Financing of Terrorism – A Predicate Offence to Money Laundering?', in Pieth, M. (ed.) *Financing Terrorism*, (Kluwer Academic Publishers, 2002) pp. 49-56, p. 50.

[11] The term 'proceeds' in the Strasbourg definition covers 'any economic advantage from criminal offences', whereas the term 'predicate offence' covers 'any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in the 'laundering article'. Article 1 of the Strasbourg Convention.

[12] OECD, *OECD Report on Harmful Tax Competition: An Emerging Global Issue* (1998), available at https://www.oecd.org/tax/transparency/44430243.pdf (last accessed April 8, 2017).

International Convention for the Suppression of the Financing of Terrorism was adopted,[13] and in 2000, the UN General Assembly adopted the United Nations Convention against Transnational Organized Crime.

Building upon and updating the Strasbourg Convention, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005 (the Warsaw Convention),[14] constitutes the most comprehensive international convention on money laundering. It aims to facilitate international co-operation and mutual assistance in investigating crime. The Convention not only includes provisions related to the criminalization of money laundering but also provisions on asset freezing and confiscation. The Warsaw Convention is the first international treaty covering both the prevention and the control of money laundering and terrorism financing. The adoption of the Warsaw Convention reflects the importance of quick access to financial information or information on assets held by criminal organisations.

Today the FATF is the most important international standard setter for AML and Combatting Terrorism Financing. The FATF is not created by treaty; instead it was established in July 1989 as a result of an American initiative by decision of the Paris summit of the G-7. The establishment of the FATF was a response to the G-7's recognition of the threat of drug money laundering to banking and other financial institutions.[15] The FATF is thus a part, albeit autonomous, of the Organisation of Economic Cooperation and Development (OECD).[16] The FATF currently comprises 35 member jurisdictions and two regional organisations, thus representing most major financial centres in all parts of the world.[17] Its membership includes the European Commission and 15 Members States (MSs). The remaining 13 MSs are members of "MONEYVAL", which is an FATF-style regional body

[13] 1999 UN International Convention for the Suppression of the Financing of Terrorism adopted on 9 December 1999.
[14] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005, CETS No 198.
[15] Winer, J.M., 'Globalization, Terrorist Finance, and Global Conflict – Time for a White List?'In Mark Pieth (ed), *Financing Terrorism*, (Kluwer Academic Publishers, 2002). See also O'Neill, M., The Evolving EU Counter-Terrorism Legal Framework, Routledge, 2012.
[16] Bergström, M., The Place of Sanctions in the EU System for Combating the Financing of Terrorism, in Cameron, I., (red.) *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Intersentia, 2013.
[17] FATF, FATF Members and Observers. Available at: http://www.fatf-gafi.org/about/membersandobservers/ (last accessed April 8, 2017).

that conducts self and mutual assessment exercises of the measures in place in Council of Europe Member States.

The FATF sets standards or model rules and then tests member states against these. 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 can apply, and has, applied, 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 demand greater security when dealing with them. This type of "blacklisting" partially explains 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.[18]

b. EU Administrative Law Directives

i. The Internal Market and Compensatory Measures (1 AMLD and 2 AMLD)

1 AMLD

The EU AML Directive from 1991 (1 AMLD) was the first stage in combating money laundering at the European level.[19] Strongly influenced by the international level, the 1 AMLD was based on the 40 original FATF recommendations and influenced by UN Conventions and the recommendations and principles adopted by the Council of Europe and the banking organization BCBS. This included taking the definition of money laundering from the Vienna Convention.

[18] Bergström, M., The Place of Sanctions in the EU System for Combating the Financing of Terrorism, in Cameron, I., (red.) *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Intersentia, 2013
[19] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ 1991, L 166/77.

In the European context, a historical and a contextual analysis reveal that the emergence of the European single market required European rules on financial transactions.[20] The elimination of national borders demanded compensatory measures to delimit financial cross border crimes. Preventive measures to ensure that an open and liberal financial market was not abused by criminal elements were adopted. The preamble of the 1 AMLD stated that money laundering must be combated mainly by penal means and within the framework of international cooperation among judicial and law enforcement authorities. Nevertheless, clearly lacking criminal law competence at the time,[21] the EU adopted the directive employing the legal bases on the right of establishment and the establishment and functioning of the internal market.[22]

The preamble further stated that money laundering has an evident influence on the rise of organized crime in general and drug trafficking in particular. It continued on to say that there is increasing awareness that combating money laundering is one of the most effective means of opposing this form of criminal activity, which constitutes a particular threat to the Member States' societies. Yet, the directive recognised that a penal approach should not be the only way to combat money laundering 'since the financial system can play a highly effective role'.[23] On 1 January 1993, additional rules such as rules on free movement of capital, and the liberalisation of the banking, insurance and investment services were adopted.[24]

2AMLD

In 2001, the second AML directive (2AMLD) was adopted, amending the 1AMLD.[25] The 2AMLD specifically referred to the widened definition of money laundering, beyond that of drugs offences, as reflected in the 1996 revisions of the forty FATF recommendations, which

[20] See further Bergström, M., Money Laundering. In: Mitsilegas, V., Bergström, M., Konstadinides, T., (eds.) *Research Handbook on EU Criminal Law*, Edward Elgar Publishing; 2016.
[21] See, however, the limited third pillar measure, 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.
[22] After the Lisbon Treaty, these articles have been amended and renumbered to Articles 53 and 114 TFEU.
[23] Directive 91/308/EEC (n.18)
[24] Sideek, M. (2002) 'Legal Instruments to Combat Money Laundering in the EU Financial Market'. *Journal of Money Laundering Control*,Vol. 6, No. 1, pp. 66–79; Sideek, M., European Community Law on the Free Movement of Capital and the EMU, Norstedts, 1999.
[25] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ 2001, L 344/76.

were widened in scope to reflect evolving money laundering typologies.[26] The directive further stated that the suppression of organised crime was particularly closely linked to AML measures.[27]

ii. Financing of Terrorism and the Risk-based Approach (3 AMLD)

Post 9/11, the FATF explicitly extended its recommendations to include the financing of terrorism, adopting eight special recommendations for that purpose. This extension, that was soon followed by the EU,[28] and the shift towards the risk-based approach, were both introduced with the 3AMLD at the European level.[29] Even today these remain two of the major changes within this regulatory field. This shift brought the regional EU rules in line with the global standard, revised and expanded FATF recommendations.[30]

According to the eight FATF special recommendations on the financing of terrorism,[31] each country should take immediate steps to ratify and implement the 1999 UN International Convention for the Suppression of the Financing of Terrorism[32] and to implement the UN Resolutions on the Prevention and Suppression of the Financing of Terrorist Acts.[33] Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations, and ensure that such offences are designated as money laundering predicate offences.[34] FATF also agreed upon rules about freezing and confiscating terrorist assets,[35] rules about reporting suspicious transactions related to terrorism,[36] and rules concerning international co-operation, alternative remittance, wire transfers, and non-profit organisations.[37] On 22 October 2004, a

[26] Recital 7 in Directive 2001/97/EC.
[27] Recital 10 in Directive 2001/97/EC.
[28] Third AML Directive, *supra* note 169, recital 8.
[29] *Id.*
[30] FATF, *FATF 40 Recommendations* (Oct. 2004).
[31] Agreed upon at a special meeting after the 11 September attacks.
[32] 1999 UN International Convention for the Suppression of the Financing of Terrorism adopted on 9 December 1999.
[33] FATF Special Recommendation I.
[34] FATF Special Recommendation II.
[35] FATF Special Recommendation III.
[36] FATF Special Recommendation IV.
[37] FATF Special Recommendations V to VIII. Recommendation VI has been covered by Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on Payment Services (PSD) in the internal market, OJ 2007, L 319/1, and Recommendation VII was addressed by Regulation (EC) 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds, OJ 2006, L 345/1.

ninth special recommendation on cash couriers was developed with the objective of ensuring that terrorists and other criminals cannot finance their activities or launder the proceeds of their crimes through the physical cross-border transportation of currency and bearer negotiable instruments.[38]

Accordingly, the 3AMLD[39] brought the regional EU rules into line with the global, revised and expanded, FATF recommendations.[40] As a result, the preventive measures of the directive now cover not only the manipulation of money derived from crime, but also the collection of money or property for terrorist purposes.[41] Besides extending its provisions to any financial transaction which might be linked to terrorist activities, the biggest change in the 3AMLD and the solution to the problem of money laundering was to establish a standard for risk analysis.

The starting point is that risks differ between countries, customers and business areas and over time. The operators themselves are the best analysts of where the risk areas are, or might arise, as they best know their business and their customers.[42] The idea is that resources should be used where needs arise and the framework is supposed to be more flexible and adjustable to risk. Within a risk-based approach, businesses are expected to make risk assessments of their customers and divide them into low and high-risk categories. In order to enable operators to assess whether a situation involves a risk of money laundering and terrorism financing and to then act accordingly, the directive introduced more detailed provisions. For this purpose, the directive specified a number of customer due diligence (CDD) measures that are more extensive and far-reaching for situations of higher risk, such as appropriate procedures to determine whether a person is a politically exposed person (PEP). The risk-based approach further emphasises that the evaluation of who is high or low risk is to be a continuous process. As a result, the concept of "know your customer", as used in the financial sector, in practice became applicable to all covered by the directive. Yet, as mentioned above, AML measures were in place in Europe two decades before the 9/11 attacks, where the rationale for their introduction had nothing to do with terrorist financing.

[38] FATF Special Recommendation IX is covered by Regulation (EC) 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community, OJ 2005, L 309/9.
[39] 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.
[40] FATF 40 Recommendations of 20 June 2003, incorporating the amendments of 22 October 2004.
[41] Recital 8 in Directive 2005/60/EC.
[42] For discussion in the context of banks, see.

Despite the internal market legal basis, the wider regulatory framework can therefore be said to have changed from a predominantly singe market context via criminal law concerns to the fight against organized crime, terrorism financing and an internal security context based on the risk-based approach. The main focus of the global and regional EU measures based on the risk-based approach is however still set on preventive measures, whereas AML control is still a matter for national jurisdictions and the developing framework of international cooperation among judicial and law enforcement authorities. It remains to be seen if the proposal for a criminal law AML Directive will be adopted that would expand the current EU focus from prevention to control of money laundering and terrorist financing. Meanwhile, Member States are obliged to implement the fourth AML Directive (4AMLD), to which changes have already been proposed

iii. The 2015 AML Framework (4AMLD and 5AMLD)

4AMLD

The current AML framework consists of two legal instruments both based on Article 114 TFEU on the internal market: the 4AMLD,[43] as later amended by the 5 AMLR, and the Transfer of Funds Regulation.[44] Both instruments update existing EU legal instruments on money laundering and the financing of terrorism and aim to implement and extend the newest recommendations issued in February 2012 by the Financial Action Task Force (FATF),[45] with their increased focus on the effectiveness of regimes to counter money laundering and terrorism financing, as well as addressing the shortcomings connected with the 3AMLD identified by the European Commission.[46]

[43] Directive 2015/849/EU (n.52).
[44] Regulation (EU) 2015/847 (n.52).
[45] International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations (2012, most recently updated Feb. 2018), http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html.
[46] See in particular the review of the 3AMLD 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), available at http://europa.eu/rapid/press-release_MEMO-12-246_en.htm?locale=en (last accessed April 8, 2017).

Like the previous directives, the preamble to the 4AMLD, scheduled to be in force as from 26 June 2017, emphasizes the international character of money laundering, terrorism 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." [47]

According to the European Commission, the threats associated with money laundering and terrorist financing are constantly evolving, which requires regular updates of the rules. In this context, the previous Commissioner for Internal Market and Services, Michel Barnier, who presented the proposals, warned that: 'Flows of dirty money can damage the stability and reputation of the financial sector, while terrorism shakes the very foundations of our society. In addition to the criminal law approach, a preventive effort via the financial system can help to stop money-laundering.'[48]

According to the previous Home Affairs Commissioner, Cecilia Malmström, to protect the legal economy, 'especially in times of crisis, there must be no legal loopholes for organised crime or terrorists to slip through'.[49] According to the European Commission, the legislative package complements other actions taken or planned by the European Commission with regard to its fight against crime, corruption and tax evasion.

These statements suggest that the current and recently updated AML framework is not criminal in its approach but rather focuses upon preventive measures within the financial system, which is also supported by the fact that both instruments merely update existing EU legal instruments on money laundering and the financing of terrorism, irrespective of the

[47] 4AMLD, recital 4.
[48] European Commission, Press Release, 5 February 2013.
[49] *Ibid.* and European Commission, Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM(2013)44 final.

character of the underlying FATF recommendations. Although the European Commission was the formal initiator of all four AML Directives, these closely follow the FATF 40 recommendations.[50] These cover the criminal justice system and law enforcement, the financial system and its regulation, as well as international cooperation. However, recital 59 of the Fourth AML Directive states that:

> 'The importance of combating money laundering and terrorist financing should result in Member States laying down effective, proportionate and dissuasive administrative sanctions and measures in national law for failure to respect the national provisions transposing this Directive. Member States currently have a diverse range of administrative sanctions and measures for breaches of the key preventative provisions in place. That diversity could be detrimental to the efforts made in combating money laundering and terrorist financing and the Union's response is at risk of being fragmented. This Directive should therefore provide for a range of administrative sanctions and measures by Member States at least for serious, repeated or systematic breaches of the requirements relating to customer due diligence measures, record-keeping, reporting of suspicious transactions and internal controls of obliged entities. The range of sanctions and measures should be sufficiently broad to allow Member States and competent authorities to take account of the differences between obliged entities, in particular between credit institutions and financial institutions and other obliged entities, as regards their size, characteristics and the nature of the business. In transposing this Directive, 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*.'

Although the Directive may not establish minimum rules concerning the definition of criminal offences and sanctions in the meaning of the EU criminal law provision Article 83(1) TFEU, article 1(2) of the Fourth AML Directive clearly states that Member States shall ensure that money laundering and terrorist financing are prohibited, and that parallel systems of administrative and criminal law sanctions do not breach the principle of *ne bis in idem.*

[50] FATF Recommendations, above n. 36.

Article 1(3) of the Fourth AML Directive further provides for an EU-wide definition of money laundering:

> ‘For the purposes of this Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:
>
> (a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;
>
> (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;
>
> (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;
>
> (d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).’

It might therefore be argued that the current AML framework does establish harmonized rules when it comes to the definition of money laundering, i.e., rules setting out which behaviour is considered to constitute a criminal act, although not stating what type and level of sanctions are applicable for such acts. Under Section 4 on Sanctions, article 58(1) of the Fourth AML Directive emphasizes that sanctions or measures for breaches of national provisions transposing the Directive must be effective, proportionate and dissuasive. According to the second paragraph of article 58(2), 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. 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 at all 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 harmonizing national criminal law on AML measures, does not require the Member States to have certain criminal law provisions in place with certain specific minimum and maximum sanctions for breaches.[51]

As pointed out by Koen Lenaerts and José Gutiérrez-Fons,[52] 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, i.e., administrative, criminal or a combination of the two.[53] Yet, the resulting penalties must comply with the Charter of Fundamental Rights and be effective, proportionate and dissuasive.[54] Any measure based on Article 83(1) TFEU, however, will leave no such freedom to the Member States.

Although the first reading of the proposed Fourth Anti-Money Laundering Directive was adopted by the European Parliament on 11 March 2014, the adoption of the Directive has been 'planned, delayed, planned, and delayed yet again'.[55] As pointed out by Melissa van den Broek, this shows 'the sensitivity of the matter and the high (political) interests surrounding the adoption of this instrument'.[56]

As clearly stated, the 4AMLD aims to prevent the Union's financial system from abuse for purposes of money laundering and terrorist financing.[57] The risk-based approach introduced by the revised FATF Recommendations and the third AML Directive,[58] has been further developed towards a more targeted and focused risk-based approach using evidence-based

[51] See Ester Herlin-Karnell, Chapter 11, 'Is Administrative Law Still Relevant? How the Battle of Sanctions has Shaped EU Criminal Law'.
[52] Koen Lenaerts and José Gutiérrez-Fons, Chapter 1, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law'.
[53] C-617/10 *Åkerberg Fransson*, EU:C:2013:105, para. 34.
[54] *Ibid.* para. 36.
[55] M. Van den Broek, *Preventing Money Laundering: A Legal Study on the Effectiveness of Supervision in the European Union* (Eleven International Publishing, 2015), p. 16.
[56] *Ibid*.
[57] Directive 2015/849/EU, Article 1(1).
[58] 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 207).

decision-making to better target risks, as well as guidance by European supervisory authorities.[59] 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.[60] 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'.[61]

The European Commission stated that:

> 'The Report analyses how the different elements of the existing framework have been applied and considers how the framework may need to be changed. It contains an examination of the provisions of the Directive, and in general concludes that although the existing framework appears to work well and that no fundamental shortcomings have been identified which would require substantial changes, some modifications are necessary to adapt to the evolving threats posed.'[62]

The previous Directives were repealed by 26 June 2017, by which date the fourth AML Directive had to be implemented by the Member States.[63] By this date, the new Regulation

[59] 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.
[60] 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.
[61] 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.
[62] European Commission, Press Release, 11 April 2012, above n. 57.
[63] Directive 2015/849/EU, Directive (EU) 2015/849 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 DIRECTIVE (EU) 2015/ 849 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) No 648/ 2012 of the European Parliament and of the Council, and

also came into force. 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,[64] and by including tax crimes as a new predicate offence.[65] In addition, the fourth AML Directive incorporates new provisions on data protection. Further, it clarifies how AML supervisory powers apply in cross-border situations. Recital 24 states that:

> 'The Commission is well placed to review specific cross-border threats that could affect the internal market and that cannot be identified and effectively combated by individual Member States. It should therefore be entrusted with the responsibility for coordinating the assessment of risks relating to cross-border activities. Involvement of the relevant experts, such as the Expert Group on Money Laundering and Terrorist Financing and the representatives from the FIUs [Financial Intelligence Units], as well as, where appropriate, from other Union-level bodies, is essential for the effectiveness of that process. National risk assessments and experience are also an important source of information for the process. Such assessment of the cross-border risks by the Commission should not involve the processing of personal data. In any event, data should be fully anonymised. 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.'

Besides these general changes, a few specific issues are worth mentioning.

First, and in line with the international standards and the report on the application of the 3AMLD,[66] the new framework incorporates more risk-based elements which should allow for

repealing Directive 2005/ 60/ EC of the European Parliament and of the Council and Commission Directive 2006/ 70/ EC (europa.eu) Articles 66 and 67. See also 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 4AMLD to 1 January 2017.

[64] 4AMLD, articles 2, 11, 48 and 49.

[65] This section builds on Bergström, M., Money Laundering. In: Mitsilegas, V., Bergström, M., Konstadinides, T., (eds.) *Research Handbook on EU Criminal Law*, Edward Elgar Publishing; 2016.

[66] See European Commission, Press Release, *Anti-Money Laundering: Creating a Modern EU Framework Capable of Responding to New Threats*, IP/12/357 (11 April 2012), available at http://europa.eu/rapid/press-release_IP-12-357_en.htm?locale=en (last accessed April 8, 2017).

a more targeted and focused approach to assessing risks and applying resources where they are most needed. Additional provisions on politically exposed persons (PEPs) at a domestic level and those working for international organizations are adopted.[67]

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.[68] The Member States in turn, shall assess the risks affecting them, including any data protection concerns.[69] 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.[70]

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 the customers with whom they are dealing and understand the nature of their business.

These rules have been clarified, and relevant entities are required to take enhanced measures where the risks are greater,[71] including specific provisions on politically exposed persons (PEPs) at domestic level, and PEPs working for international organizations.[72] They can take simplified measures where risks are demonstrated to be lower.[73] Simplified procedures should thereby not be wrongly perceived as exemptions from CDD. The new Directive prescribes 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.

According to Statewatch,[74] the draft compromise on money-laundering and terrorism between the Council and the European Parliament[75] does not seem to take into account the criticism made by the Meijers Committee regarding the potential the text provides for indirect

[67] Articles 20–23 of the Fourth Directive.
[68] Directive 2015/849/EU, Chapter I, Section 2, Article 6(1) (not amended by the fifth AML Directive).
[69] Directive 2015/849/EU, Chapter I, Section 2, Article 7(1) (not amended by the fifth AML Directive).
[70] Directive 2015/849/EU, Chapter I, Section 2, Article 8(1) (not amended by the fifth AML Directive).
[71] Section 3 of the Fourth Directive, art. 18–24, (will be partly amended by the fifth AML Directive, including the insertion of the new articles 18a and 20a).
[72] *Id.* art. 20–23 (with a new article 20a inserted by the fifth AML Directive).
[73] Section 2 of the Fourth Directive and art. 15–17 (not amended by the fifth AML Directive); *Id.*, Annex II (slightly amended by the fifth AML Directive).
[74] Statewatch News Online, 29 January 2015 (02/15). See further www.statewatch.org.
[75] Interinstitutional File: 2013/0025 (COD), available at www.statewatch.org/news/2015/jan/eu-council-ep-draft-compromise-money-laundering-terr-5116-add2-14%2C.pdf.

discrimination in relation to the application of CDD and the use of the risk factor related to the country of origin of the client.[76] In this respect, the Committee suggested that the country of origin should not be a decisive factor, but that the factors relating to the *customer* and *product or service* should first and foremost be taken into account.[77] These suggestions did not lead to any changes, however.

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.[78] 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.[79] This section will be replaced by the fifth AML Directive, and in the future, Member States may, under conditions to be determined in national law, provide for access to additional information enabling the identification of the beneficial owner. That additional information shall include at least the date of birth or contact details in accordance with data protection rules. 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 Financial Intelligence Units (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.[80] In this respect, the FIUs have been given strengthened powers to identify and follow suspicious transfers of money and facilitate exchange of information.[81] They now

[76] Meijers Committee (Standing Committee of Experts on International Immigration, Refugees and Criminal Law), *Note on the Proposal for a Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, COM(2013)45 final, CM 1315 (20 August 2013), available at www.statewatch.org/news/2013/aug/eu-meijers-cttee-directive-financial-system-money-laundering-and-terrorist%20financing.pdf.
[77] *Ibid.* 3. Cf. Fourth AML Directive, Art. 18(3) and Annex III.
[78] Directive 2015/849/EU, Chapter III, Article 30 (will be amended by the fifth AML Directive).
[79] Directive 2015/849/EU, Chapter III, Article 30(5) second paragraph (will be amended by the fifth AML Directive).
[80] Directive 2015/849/EU, Article 32(3).) (not amended by the fifth AML Directive).
[81] 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

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.[82] According to Met-Domestici, Member States' FIUs take a variety of forms, from being independent administrative bodies, to being part of departments within a ministry or of national police forces.[83]

Fifth, as regards sanctions, the fourth AML Directive reinforces the sanctioning powers of the competent authorities,[84] and 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.[85]

5AMLD

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 ownership information.[86] The idea behind the amendments was to reinforce the preventive framework against money

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.

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

[83] A. Met-Domestici, 'The Reform of the Fight against Money Laundering in the EU', *Eucrim* 3/2013.

[84] E. De Busser and C. Riehle, 'Money Laundering: Fourth Anti Money Laundering Directive Released' *Eucrim* 1/2013, 6.

[85] Directive 2015/849/EU, Article 59(2)(e).art. 59(2)(e) (not amended by the fifth AML Directive).

[86] Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on Coordination of Safeguards Which, for the Protection of the Interests of Members and Third Parties, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 48 of the Treaty, with a View to Making Such Safeguards Equivalent 2009 O.J. (L 258) 11.

laundering,[87] in particular by addressing emerging risks and increasing the capacity of competent authorities to access and exchange information.[88]

Set in a broader picture, this initiative was the first action taken to implement the Action Plan for strengthening the fight against terrorism financing.[89] 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.[90]

This was a coordinated action with the G20 and the OECD, aiming at tackling tax evasion by both legal and natural persons directly and incisively 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.[91]

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.

---

[87] 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.

[88] 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.

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

[90] 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.

[91] 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.

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.[92]

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.'[93]

About five months after the Commission proposal, on 19 December 2016, the Council adopted a compromise text on the proposal aiming at amending the AML Directive, Directives 2009/138/EC (Solvency II),[94] and 2013/36/EU, but not Directive 2009/101, focusing mainly on AML and terrorist financing.[95] Although the purpose of fighting tax evasion is no longer explicitly mentioned, tools that were designed to achieve that purpose remain, although somewhat modified.[96] According to the proposal, Member States shall bring

---

[92] 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.
[93] Ibid.
[94] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the Taking-up and Pursuit of the Business of Insurance and Reinsurance (Solvency II) (recast), 2009 O.J. (L 335) 1. Solvency II is the new, risk-based supervisory framework for the insurance sector that entered into effect on 1 January 2016.
[95] *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 (Dec. 19, 2016), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15605_2016_INIT&from=EN.
[96] 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.

into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2017 at the latest.

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.[97] By 23 June 2020, well beyond five month after the final date of transposition, all 27 Member States except for Cyprus, Portugal, Romania and Spain, and including the UK, had reported that they had transposed the new provisions.

c. EU AML Regulation and the Wider Policy Initiatives

In its Communication on 'An Open and Secure Europe' adopted on 11 March 2014, the European Commission presented its vision of the future agenda for Home Affairs.[98] In its Communication on 'The EU Justice Agenda for 2020: Strengthening Trust, Mobility and Growth within the Union', adopted on 11 March 2014, the European Commission presented its vision of the future agenda for EU justice policy.[99] As regards justice policy, there are three aspects, i.e., consolidation, codification and complementary measures. As pointed out by Peers, the consolidation of existing measures particularly concerns fundamental rights. However, no specific measures are proposed to this end.[100]

---

[97] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 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 Directives 2009/138/EC and 2013/36/EU, OJ 2018, L 156/43. According to Article 4, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 January 2020. Cf: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA, COM/2018/213 final.

[98] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Open and Secure Europe: Making It Happen* COM(2014)154 final. See also European Commission, Press Release, *Shaping the Future of Home Affairs Policies: the Next Phase*, IP/14/234 (11 March 2014), available at http://europa.eu/rapid/press-release_IP-14-234_en.htm.

[99] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The EU Justice Agenda for 2020: Strengthening Trust, Mobility and Growth within the Union*, COM(2014)144 final. See also European Commission, Press Release, *Towards a True European Area of Justice: Strengthening Trust, Mobility and Growth*, IP/14/233 (11 March 2014), available at http://europa.eu/rapid/press-release_IP-14-233_en.htm.

[100] Peers, *Statewatch Analysis: The Next Multi-year EU Justice and Home Affairs Programme*, above n. 1, at 3.

These strategic guidelines for legislative and operational planning for the coming years within the AFSJ have replaced the more detailed Stockholm programme that was adopted in 2009.[101] In contrast, the current programme mainly sets out some general principles and a few concrete objectives. Although not specifically mentioned, AML measures and procedures are highly relevant. In its last point, the European Council calls on the EU institutions and the Member States to ensure the appropriate legislative and operational follow-up to these guidelines. A mid-term review should be held in 2017.

In the multi-year EU Justice and Home Affairs programme adopted in June 2014,[102] the European Council defined the strategic guidelines for legislative and operational planning for the coming years within the Area of Freedom, Security and Justice (AFSJ). These strategic guidelines set out some general principles and a few concrete objectives replacing the more detailed Stockholm programme that was adopted in 2009.[103] In point 1 of Chapter I, the European Council emphasized that one of the key objectives of the Union is to build an Area of Freedom, Security and Justice without internal frontiers, and with full respect for fundamental rights. The importance of ensuring the protection and promotion of fundamental rights, including data protection, whilst addressing security concerns was further stressed in point 4. In point 3, the European Council stated that building on previous programmes, the overall priority was now to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place. Intensifying operational cooperation 'while using the potential of Information and Communication Technologies innovation, enhancing the role of the different EU agencies and ensuring the strategic use of EU funds will be key'. Although not specifically mentioned, AML measures and procedures are highly relevant.

President Juncker's Political Guidelines identified the security agenda as a priority for the Commission, and the 2015 Commission Work Programme committed to the delivery of the European Agenda on Security.[104] Likewise, further to the Commission's 'European Agenda on Security' and the Council Conclusions of 16 June 2015, the European Council

[101] *The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C115/1.
[102] Included as Chapter 1, European Council 26/27 June 2014 Conclusions, EUCO 79/14 CO EUR 4 CONCL 2, available at www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf (last accessed April 8, 2017).
[103] *The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C115/1.
[104] See also European Commission, Press Release, *Commission Takes Steps to Strengthen EU Cooperation in the Fight against Terrorism, Organised Crime and Cybercrime*, IP/15/4865 (28 April 2015), available at http://europa.eu/rapid/press-release_IP-15-4865_en.htm.

Conclusions from its meeting on 25 and 26 June 2015 underlines that Europe's security environment has changed dramatically, which requires action.[105]

The rules against money laundering and terrorism financing adopted in May 2015 are one of the key actions in the European Security Agenda,[106] as suggested also by the European Parliament Resolution of 17 December 2014.[107] Key actions include effective measures to 'follow the money' and cutting the financing of criminals, where cooperation between competent authorities, in particular national FIUs, which will be connected to Europol, will be strengthened. Cross-border cooperation between national FIUs and national Asset Recovery Offices (AROs) helps to combat money laundering and to access the illicit proceeds of crime.[108] The powers of FIUs will thereby be reinforced to better track the financial dealings of organized crime networks and enhance the powers of competent national authorities to freeze and confiscate illicit assets.

Eurojust could also offer more expertise and assistance to the national authorities when conducting financial investigations. Further, the Commission highlighted its specific expertise in developing risk assessments. This methodology will be applied particularly in assessing the cascading effects of systemic risks.[109] Based on contributions from EU agencies, according to the Commission this specific expertise in developing risk assessments has been developed in close cooperation with Member States. The EU further contributes to preventing the financing of terrorism through legislation against money laundering, the network of EU FIUs and the EU-United States Terrorist Finance Tracking Programme.[110]

---

[105] European Council Meeting, 25 and 26 June Conclusions, EUCO 22/15, available at www.consilium.europa.eu/en/workarea/downloadAsset.aspx?id=40802199898.
[106] European Commission Communication, above n. 66. See also European Commission, Press Release, 28 April 2015, above n. 67.
[107] European Parliament Resolution of 17 December 2014 on renewing the EU Internal Security Strategy, 2014/2918(RSP), available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0102+0+DOC+XML+V0//EN, in which it calls for the new ISS to be forward-looking and strategic, and easily adaptable to evolving situations, by focusing not only on existing security threats but also on emerging ones and taking an integrated, comprehensive and holistic approach to priority areas such as cybersecurity, trafficking in human beings and counter-terrorism, and to interlinked issues such as organized crime, money laundering and corruption.
[108] European Commission Communication, above n. 66.
[109] *Ibid.* 9.
[110] European Commission, *Fact Sheet: European Agenda on Security: Questions and Answers*, MEMO/15/4867 (28 April 2015), available at http://europa.eu/rapid/press-release_MEMO-15-4867_en.htm.

i. The 2015-2020 European Agenda on Security

In April 2015, the European Commission presented the European Agenda on Security for the period of 2015–2020.[111] Highlighting that the primary goal of organized crime is profit and that international criminal networks use legal business structures to conceal the source of their profits, the European Agenda on Security called for a strengthening of the capacity of law enforcement to tackle the finance of organize crime. Besides the fight against organized crime and cybercrime, preventing terrorism and countering radicalization are identified as the most pressing challenges.

The European Agenda on Security will support Member States' cooperation in tackling these security threats. Key actions include effective measures to "follow the money" and cutting the financing of criminals, where cooperation between competent authorities will be strengthened, in particular the national Financial Intelligence Units (FIUs), which will be connected to Europol. In addition, Eurojust could offer more expertise and assistance to national authorities when conducting financial investigations.

The idea is that cross-border cooperation between national FIUs and national Asset Recovery Offices (AROs) will help to combat money laundering and to access the illicit proceeds of crime.[112] The powers of FIUs will thereby be reinforced to better track the financial dealings of organized crime networks and to enhance the powers of competent national authorities to freeze and confiscate illicit assets. The European Agenda on Security thus aims at "tackling the nexus between terrorism and organized crime, highlighting that organized crime feeds terrorism through channels like the supply of weapons, financing through drug smuggling, and the infiltration of financial markets."[113]

The European Agenda on Security for 2015–2020 specifically called for additional measures in the area of terrorist financing and money laundering. Indeed the rules against money

[111] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Agenda on Security*, COM(2015)185 final.
[112] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Agenda on Security*, COM(2015)185 final.
[113] 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.

laundering and terrorist financing adopted in May 2015, such as the fourth AML Directive,[114] and the first AML Criminal Law Directive proposed in December 2016,[115] are key actions.[116] Besides legislation against money laundering, the EU further contributes to preventing the financing of terrorism through the network of EU FIUs and the EU-US Terrorist Finance Tracking Programme.[117]

ii. The 2016 Action Plan against Terrorism Financing

In February 2016, the Commission presented an Action Plan to further step up the fight against the financing of terrorism.[118] In brief, the plan has two main objectives. First, it aims to prevent the movement of funds and identify terrorist funding. In this respect, key actions include: Ensuring virtual currency exchange platforms are covered by the AML Directive; tackling terrorist financing through anonymous pre-paid instruments such as pre-paid cards; improving access to information and cooperation among EU FIUs; ensuring a high level of safeguards for financial flows from high risk third countries; and giving EU FIUs access to centralized bank and payment account registers and central data retrieval systems. Secondly, the plan aims to disrupt sources of revenue for terrorist organizations. Key actions include: Tackling terrorist financing sources—such as the illicit trade in goods, cultural goods, and

---

[114] 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 (4AMLD) [2015] OJ L141/73; and 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.

[115] *See Proposal for a Directive of the European Parliament and of the Council on Countering Money Laundering by Criminal Law*, COM (2016) 826 final (Dec.21, 2016) [hereinafter AML Criminal Law Directive].

[116] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Agenda on Security*, COM(2015)185 final. European Commission, Press Release, *Commission Takes Steps to Strengthen EU Cooperation in the Fight against Terrorism, Organised Crime and Cybercrime*, IP/15/4865 (28 April 2015), available at http://europa.eu/rapid/press-release_IP-15-4865_en.htm (last accessed April 8, 2017). Suggested also by the European Parliament Resolution of 17 December 2014 on renewing the EU Internal Security Strategy, 2014/2918(RSP), available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0102+0+DOC+XML+V0//EN (last accessed April 8, 2017), in which it calls for the new Internal Security Strategy to be forward-looking and strategic, and easily adaptable to evolving situations, by focusing not only on existing security threats but also on emerging ones and taking an integrated, comprehensive and holistic approach to priority areas such as cybersecurity, trafficking in human beings and counter-terrorism, and to interlinked issues such as organized crime, money laundering and corruption.

[117] *See* European Commission, *Fact Sheet: European Agenda on Security: Questions and Answers*, MEMO/15/4867 (28 Apr. 28, 2015), http://europa.eu/rapid/press-release_MEMO-15-4867_en.htm.

[118] Communication from the Commission to the European Parliament and the Council on an Action Plan for Strengthening the Fight against Terrorist Financing, COM(2016) 50/2.

wildlife, and working with third countries to ensure a global response to tackling terrorist financing sources.[119] Accordingly, the EU AML Regime is central also for the Action Plan for Strengthening the Fight Against Terrorist Financing.[120]

Whereas the European Agenda on Security called for additional measures in the area of terrorist financing and money laundering, the Commission's Action Plan[121] 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. The next step is therefore to investigate how these regulatory challenges have been dealt with by the EU legislator.

A historical and a contextual analysis reveals that the emergence of the European single market required European rules on financial transactions. The First AML Directive was the first stage in combating money laundering at the European level,[122] although strongly influenced by the international level. It was based on the 40 original FATF recommendations and influenced by UN Conventions and the recommendations and principles adopted by the Council of Europe and the banking organization BCBS.

During the first revisions in 1996, the 40 FATF recommendations were widened in scope to reflect evolving money laundering typologies. In 1998, another regional actor intervened when the OECD presented a series of recommendations on harmful tax practices.[123] In 2000, the UN General Assembly adopted the United Nations Convention against Transnational Organized Crime. The Second AML Directive specifically referred to the widened definition of money laundering,[124] beyond that of drugs offences, as reflected in the 1996 revisions of the 40 FATF recommendations.[125]

---

[119] *See* European Commission, *Fact Sheet: Action plan to strengthen the Fight Against Terrorist Financing. European Agenda on Security* (Dec. 2016), http://ec.europa.eu/newsroom/document.cfm?doc_id=40720.
[120] *See generally* Bergström 2018b, *supra* note **Error! Bookmark not defined.**.
[121] *See Action Plan for Strengthening the Fight Against Terrorist Financing, COM(2015)185 final.*
[122] 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.
[123] OECD, *OECD Report on Harmful Tax Competition: An Emerging Global Issue* (1998), available at www.oecd.org.
[124] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering [2001] OJ L344/76.
[125] Directive 2001/97/EC, recital 7.

After 9/11 2001, FATF explicitly extended its recommendations to include the financing of terrorism and the Third AML Directive[126] brought the regional EU rules into line with the global, revised and expanded, FATF recommendations.[127] The solution to the problem of money laundering was to establish a standard for risk analysis, 'the risk- based approach',[128] which had a prominent position in the Third AML Directive, as well as in the amended FATF recommendations that it builds upon.[129] In comparison with the Third AML Directive, in force until 25 June 2017, the risk-based approach has been further developed in the Fourth AML Directive.

Despite the internal market legal basis, the wider regulatory framework can therefore be said to have changed from a predominantly single market context via criminal law concerns to the fight against organized crime, terrorism financing and an internal security context.

Besides the public initiatives by FATF, the EU, the Council of Europe, the United Nations and the OECD, which have all had an impact on the developments within this field, banking organizations have also been involved in regulatory activities. The current Basel III is a comprehensive set of reform measures, developed by the Basel Committee on Banking Supervision, to strengthen the regulation, supervision and risk management of the banking sector.[130]

[126] 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.
[127] FATF 40 Recommendations of 20 June 2003, incorporating the amendments of 22 October 2004.
[128] Risk management is expanding in both range and scope across organizations in the public and the private sectors, and has become something of a contemporary standard for dealing with uncertainty in an organized manner. See M. Power, *The Risk Management of Everything* (Demos, 2004), and M. Power, *Organized Uncertainty: Designing a World of Risk Management* (Oxford University Press, 2007). For an integrated analysis of the concepts of risk and securitarization, see M. Bergström, U. Mörth and K. Svedberg Helgesson, 'A New Role for For-Profit Actors? The Case of Anti-Money Laundering and Risk Management' (2011) 5 *Journal of Commons Market Studies* 1043. In this article a linkage is shown between the concepts of risk and securitarization, both emphasizing the structural threats and uncertainties in the case of AML. See also V. Mitsilegas, *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles* (Kluwer Law International, 2003), p. 3, on 'reconceptualising security in the risk society'.
[129] For a critical analysis of the risk-based approach, see E. Herlin-Karnell, 'The EU's Anti Money Laundering Agenda: Built on Risks?' in C. Eckes and T. Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press, 2011).
[130] See further, BCBS, *International Regulatory Framework for Banks* (Basel III), available at www.bis.org/bcbs/basel3.htm?m=3%7C14%7C572; and Bergström, 'EU Anti-Money Laundering Regulation', above n. 4.

d. EU Criminal Law Competence and the EU Criminal Law Directive

i. EU Competence and the Choice of Context and Legal Basis

The case law concerning the choice of legal basis represents an important constitutional development in EU law. The Court of Justice of the European Union (CJEU) has through its case law shaped and defined the boundaries between the European Union and its Member States and between the players involved in the law-making process of the European Union.[131]

The CJEU has repeatedly stated that the choice of legal basis must be based on objective factors which are amenable to judicial review, including, in particular, the *aim* and *content* of the measure.[132] The main rule, the so-called *predominant purpose* rule, is that legislative acts should be based on a sole legal basis:

"It should be noted at the outset that the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a measure reveals that it pursues two aims or that it has two components, and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component. If, on the other hand, a measure simultaneously pursues a number of objectives, or has several components, which are inseparably linked without one being incidental to the other, so that various provisions of the Treaty are applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases (see, to that effect, Case C-130/10 *Parliament* v. *Council* EU:C:2012:472, paragraphs 42 to 44)."[133]

Thus, only exceptionally, if it has been established that the act simultaneously pursues a number of objectives, indissolubly linked, without one being secondary and indirect in

[131] This subsection is developed from M. Bergström, 'Spillover or Activist Leapfrogging? Criminal Competence and the Sensitiveness of the European Court of Justice' (2007) 2 *Sieps European Policy Analysis*, available at www.sieps.se. See also M. Bergström, 'The Dynamic Evolution of EU Criminal Law' in M. Bergström, and A. Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Oxford, Hart Publishing, 2014). For a contribution on EU law competence in general, see e.g., T. Konstadinides, *Division of Powers in European Union Law: the Delimitation of Internal Competence Between the EU and the Member States* (Kluwer Law International, 2009), and on EU criminal law competence in particular, see e.g., P. Asp, *The Substantive Criminal Law Competence of the EU: Towards an Area of Freedom, Security and Justice* (Stockholm, Skrifter utgivna av Stockholms Universitet, 2012), Pt 1.

[132] *Titanium Dioxide*, above n. 5, para. 10, and a number of subsequent cases.

[133] C-658/11 *Parliament* v. *Council*, EU:C:2014:2025, para. 43.

relation to the other, has more than one legal basis been tolerated.[134] Yet, no dual legal basis is possible where the procedures laid down for each provision are incompatible with each other.[135] When the choice lies between legal bases with different levels of influence of the legislative bodies, arguments regarding the correct legal basis cannot be dismissed as concerning formal defects only.[136] On the contrary, in such cases, the choice of legal basis could greatly affect the determination of the content of the proposed measure.[137] Still, after Lisbon, the renamed ordinary legislative procedure became the main legislative procedure of the European Union's decision-making system.

As a result, and where two objectives or components are inseparably linked, a dual legal basis of Articles 114 and 83(1) TFEU will probably not be possible even for the adoption of Directives. Even though both entail recourse to the ordinary legislative procedure, the important difference that Article 114 also requires consultation of the Economic and Social Committee might influence the content of the proposed measure. Nevertheless, even if such a dual legal basis would in principle be possible despite arguments that Article 83 TFEU is *lex specialis*,[138] and even if all the requirements in the Articles are complied with, a dual legal basis consisting of those two Articles would probably not be permitted, either by the law-

[134] 336/00 *Huber* [2002] ECR I-7699, para. 31. See also *Titanium Dioxide*, above n. 5, paras 13 and 17, in which case this rule was not applicable. For an example where the rule was applied, see C-94/03 *Commission* v. *Council* [2006] ECR I-0001, para. 51, in which a decision was annulled since it concerned two indissolubly linked components and therefore should have been based on Art. 133 jointly with Art. 175(1) of the TEC. Likewise, in C-178/03 *Commission* v. *Parliament and Council* [2006] ECR I-107, both the purposes and the terms of the contested Regulation contained commercial and environmental components which were so indissolubly linked that recourse to both Art. 133 TEC and Art. 175(1) TEC was required for the adoption of that measure (para. 44). In contrast to the *Titanium Dioxide* case, where recourse to a dual legal basis was not possible where the procedures laid down for each legal basis were incompatible with each other or where the use of two legal bases was liable to undermine the rights of the Parliament, no such consequences followed from using both Arts 133 and 175(1) TEC (Case 94/03, para. 52 and Case 178/03, para. 57). Within some policy areas, two or more legal bases are still frequently used by the Community legislature. Where there is broad consensus amongst the actors in the law-making process, this practice will hardly be challenged before the CJEU.

[135] C-338/01 *Commission* v. *Council (Recovery of Indirect Taxes)* [2004] ECR I-4829, para. 57.

[136] Cf. 491/01 *Q* v. *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, in particular paras 98 and 103–11. In this case, to have added Art. 133 [now Art. 207 TFEU] to Art. 95 TEC, which was held to be the appropriate legal basis, was only a formal defect and did not give rise to irregularities in the procedure applicable to the adoption of the act. See also Joined Cases C-184/02 and C-223/02 *Spain and Finland* v. *Parliament and Council* [2004] ECR I-7789, in particular paras 41–4.

[137] See e.g., 68/86 *United Kingdom* v. *Council* [1988] ECR 855, para. 6; C-131/87 *Commission* v. *Council* [1989] ECR 3743, para. 8; *Titanium Dioxide*, above n. 5, paras 17–21.

[138] As stated by E. Herlin-Karnell, 'it is not entirely clear to what extent Article 83 TEU is an "exclusive" *lex specialis.* Typically, such a dispute of conflicting legal bases has been resolved by recourse to the centre of gravity test. As regards Article 114 TFEU, there is, however, as stated no real centre-of-gravity test available, the question resting rather on whether the measure at issue contributes to market creation at all'. E. Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon' in A. Biondi, P. Eeckhout and S. Ripley (eds), *EU Law after Lisbon* (Oxford University Press, 2012), p. 343.

making institutions including the Member States acting in the Council, or by the CJEU. Instead, two complementary measures might be used.

Yet, in cases where the Court cannot ascertain the predominant purpose of a measure, the *inextricably associated* rule entails a different test by which it operates a formal hierarchy between the different legal bases,[139] looking to the relationship specified in the Treaties between each.[140] Yet, due to its narrow application and the Lisbon changes, when the ordinary legislative procedure became the main legislative procedure, the *inextricably associated* rule was of rather limited practical importance. Despite this, the Lisbon changes have given rise to new legal battles in particular concerning the EU external competencies.[141]

Within the field of EU criminal law, the various opt-ins and opt-outs make the regulatory landscape even more complex. This might, for example, require a legislative measure to be divided into separate parts.[142] In addition, in relation to the new EU criminal law competencies, the limits between the proper use of the different legal bases needs to be further elaborated. For example, the choice between Article 83(2) TFEU on minimum rules for the enforcement of EU policies, and Article 325(4) TFEU on prevention of and fight against fraud affecting the financial interests of the Union, have given rise to some concern.[143] Both legal bases are discussed in relation to the proposal for a Directive on the fight against fraud to the Union's financial interest by means of criminal law.[144] During the Justice and Home Affairs (JHA) Council of 6 to 7 December 2012, a question was raised by

[139] D. Chalmers *et al.*, *European Union Law* (Cambridge University Press, 2006), p. 143. See, to that effect *Titanium Dioxide*, above n. 5, para. 13: 'It follows that, according to its aim and content, as they appear from its actual wording, the Directive is concerned, indissociably, with both the protection of the environment and the elimination of disparities in conditions of competition'.
[140] For example, in the pre-Lisbon context, the legal basis on agriculture in Art. 37 TEC took precedence over the general provisions relating to the establishment of the common and internal market in Arts 94 and 95 TEC. 68/86 *United Kingdom* v. *Council* [1988] ECR 855, paras 15–16 (common market). The same held true for Art. 93 TEC so far as concerns the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation. *Recovery of Indirect Taxes*, above n. 11, para. 60; C-533/03 *Commission* v. *Council* [2006] ECR I-1, paras 44–6. Before the same legislative procedure was introduced for both legal bases, the general internal market provision took precedence over the environmental legal basis in Art. 175 TEC. Finally, all other legal bases took precedence over the residual powers clause in Art. 308 TEC. See 45/86 *Commission* v. *Council* [1987] ECR 1493, para. 13.
[141] See e.g., *Parliament* v. *Council*, above n. 9.
[142] See e.g., S. Miettinen, *Criminal Law and Policy in the European Union* (Routledge, 2012), p. 55, and M. Miglietti, *The New EU Criminal Law Competence in Action: the Proposal for a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation*, IES Working Paper 5/2013 (2013), p. 21, available at www.ies.be/files/Working%20Paper%20Miglietti.pdf, concerning the possible use of Art. 325 TFEU where the opt-in clause of the United Kingdom and Denmark would not apply.
[143] See e.g., Asp, *The Substantive Criminal Law Competence of the EU*, above n. 7; and Miglietti, *The New EU Criminal Law Competence in Action*, above n. 18, in particular at 20–1. See also Miettinen, above n. 18, at 52.
[144] Miglietti, *The New EU Criminal Law Competence in Action*, above n. 18, at 20.

some Member States regarding the legal basis of the proposal, and a majority of Member States claimed that it should be Article 83(2) TFEU instead of Article 325(4) TFEU as proposed by the Commission.[145] The European Parliament in its first reading in the ordinary legislative procedure included an amendment of the legal basis from Article 325 to Article 83(2) TFEU.[146]

Interesting in this respect is that the Market Abuse Framework Directive 2014/57/EU was adopted on the basis of Article 83(2) TFEU alone,[147] whereas the accompanying Market Abuse Regulation 596/2014 was adopted with reference to Article 114 TFEU.[148] The Directive requires Member States to take the necessary measures to ensure that the criminal offences of insider dealing, unlawful disclosure of information and market manipulation are subject to effective, proportionate and dissuasive criminal sanctions. There will be common definitions of these offences. By 3 July 2016, Member States have to provide for a maximum sanction of at least four years for insider dealing/market manipulation and of at least two years for unlawful disclosure of inside information in their national law. Member States will also be required to impose criminal sanctions for inciting, aiding and abetting market abuse, as well as for attempts to commit such offences. Legal persons will be held liable for market abuse. The Market Abuse Directive thereby complements the Regulation that was adopted on the same day.[149] According to the Commission, the Regulation improves the existing EU legislative framework and reinforces administrative sanctions.[150]

Accordingly, Article 83(2) TFEU can be used to adopt common minimum rules on the definition of criminal offences and sanctions if they are essential for ensuring the

---

[145] *Eucrim* 1/2013, 6, available at http://ec.europa.eu/anti_fraud/documents/eucrim/eucrim_2013_01_en.pdf.
[146] European Parliament legislative resolution of 16 April 2014 on the proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012)0363, C7-0192/2012, 2012/0193(COD) (Ordinary legislative procedure: first reading), available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0427+0+DOC+XML+V0//EN. See also Miglietti, *The New EU Criminal Law Competence in Action*, above n. 18, at 20, with further references e.g. to the Statement by the Committee on Justice 2012/13:JuU8, Annex 2: Reasoned Opinion of the Swedish Parliament, available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/sweden/2012/com20120363/com20120363_riksdag_opinion_en.pdf.
[147] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive) [2014] OJ L173/179.
[148] Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1.
[149] See also Ester Herlin-Karnell, Chapter 11, 'Is Administrative Law Still Relevant? How the Battle of Sanctions has Shaped EU Criminal Law'.
[150] European Commission, *Justice – Building A European Area of Justice: Criminal Law Policy*, available at http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm.

effectiveness of a harmonized EU policy. In this respect, the Commission has argued that minimum rules on criminal offences and on criminal sanctions for market abuse are *essential* for ensuring the effectiveness of the EU policy on market integrity.[151] As argued by Miglietti, the *essential* requirement and thereby the actual usage of the legal basis, and not the choice of it to adopt harmonized criminal sanctions, can be questioned. In particular, to introduce criminal law measures in order to remedy emergency situations such as terrorism or the financial crisis might entail negative consequences for the system.[152]

In comparison, and despite the new criminal law competence to adopt EU criminal law measures directly based on Article 83(1) TFEU and the rhetoric for stronger rules 'to respond to new threats',[153] and 'to combat money laundering and terrorism financing',[154] the legal instruments of the new AML framework both have Article 114 TFEU on approximation within the internal market context as their sole legal basis. In order not to risk annulment by the CJEU were these instruments to be legally challenged, this therefore suggests that the predominant purpose of both these instruments is to improve the conditions for the establishment and functioning of the internal market, rather than to define criminal law offences and sanctions. As stated by the CJEU in the *Tobacco Advertising* case:[155]

"Those provisions, read together, make it clear that the measures referred to in Article 100a(1) of the Treaty [now Article 114 TFEU] are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) [now Article 5 TEU] that the powers of the Community are limited to those specifically conferred on it."

---

[151] European Commission, *Directive on Criminal Sanctions for Market Abuse: Frequently Asked Questions*, MEMO 14/78, available at http://europa.eu/rapid/press-release_MEMO-14-78_en.htm.
[152] Miglietti, *The New EU Criminal Law Competence in Action*, above n. 18, at 33 with further reference to E. Herlin-Karnell, 'Subsidiarity in the Area of EU Justice and Home Affairs Law: A Lost Cause?' (2009) 15(3) *European Law Journal* 351, 355.
[153] European Commission Press Release, *Anti-Money Laundering: Stronger Rules to Respond to New Threats* (Brussels, 5 February 2013), available at http://europa.eu/rapid/press-release_IP-13-87_en.htm.
[154] European Commission Press Release, *European Parliament Backs Stronger Rules to Combat Money Laundering and Terrorism Financing* (Brussels, 20 May 2015), available at http://europa.eu/rapid/press-release_IP-15-5001_en.htm.
[155] C-376/98 *Germany* v. *Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419, para. 83.

Hence, the CJEU has clearly stated that measures adopted on the basis of Article 114 TFEU must genuinely have as their object the improvement of the conditions for the establishment and functioning of the internal market. Although the mere fact of diverging national laws is not enough to justify recourse to Article 114 TFEU, 'differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market', might trigger Article 114 TFEU as a legal basis.[156]

If contested before the CJEU, the Court would turn to verify whether the measures could have been adopted on the basis of this Article as the proper legal basis, thereby considering whether the measures in fact pursued the objectives stated by the legislature. With this as a starting point, the assumption must therefore be that the main aim and content of the new AML framework, almost 25 years after the adoption of the first AML Directive, which was introduced as a compensatory measure for the free movement rules within the internal market,[157] still focuses upon improving the conditions for the establishment and functioning of the internal market. This might include cases where diverging national laws hinder the proper functioning of the internal market. In the next section this assumption will be looked into further.

ii. The 2015 AML Framework and Criminal Law

After the entry into force of the Lisbon Treaty in 2009, TFEU has given particular attention to a number of serious crimes with a cross-border dimension such as money laundering. 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) and the proposal for a first EU AML Criminal Law Directive,[158] the current AML framework mainly consists of two legal instruments, both

[156] C-380/03 *Germany* v. *Parliament and Council* [2006] ECR I-11573, para. 37 with further references to *Tobacco Advertising*, above n. 31, paras 84 and 95; C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, para. 60; C-434/02 *Arnold André* [2004] ECR I-11825, para. 30; C-210/03 *Swedish Match* [2004] ECR I-11893, para. 29; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and others* [2005] ECR I-645, para. 28. See also Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon', above n. 14; and C-58/08 *Vodafone and others,* EU:C:2010:321.
[157] 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.
[158] *See* AML Criminal Law Directive, *supra* note 115.

based on Article 114 TFEU on the internal market: The fourth AML Directive,[159] as later amended by the 5 AMLR,[160] and the Transfer of Funds Regulation.[161]

Article 1(3) of the 4AMLD provides for an EU-wide definition of money laundering.[162] It might therefore be argued that the current AML framework does establish harmonized rules when it comes to the definition of money laundering, via rules setting out which behaviour is considered to constitute a criminal act, although not stating what type and level of sanctions are applicable for such acts. Under Section 4 on Sanctions, article 58(1) of the 4AMLD emphasizes that sanctions or measures for breaches of national provisions transposing the Directive must be effective, proportionate and dissuasive. According to the second paragraph of article 58(2), 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. 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 4AMLD, although harmonizing national criminal law on AML measures, does not require the Member States to have certain criminal law provisions in place with certain specific minimum and maximum sanctions for breaches.[163]

---

[159] *See* Fourth AML Directive, *supra* note **Error! Bookmark not defined.**.

[160] *See* Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 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 Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43.

[161] *See* Regulation (EU) 2015/847, *supra* note **Error! Bookmark not defined.**.

[162] For the purposes of this Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:
(a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;
(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;
(c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;
(d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).

[163] See Herlin-Karnell, E., 'Is Administrative Law Still Relevant? How the Battle of Sanctions has Shaped EU Criminal Law', in: Mitsilegas, V., Bergström, M., Konstadinides, T., (eds.) *Research Handbook on EU Criminal Law*, Edward Elgar Publishing; 2016.

Although the Directive may not establish minimum rules concerning the definition of criminal offences and sanctions in the meaning of Article 83(1) TFEU, article 1(2) of the 4AMLD clearly states that Member States shall ensure that money laundering and terrorist financing are prohibited. 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,[164] 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, i.e., administrative, criminal or a combination of the two.[165] Yet, the resulting penalties must comply with the Charter of Fundamental Rights and be effective, proportionate and dissuasive.[166] Any measure based on Article 83(1) TFEU, however, will leave no such freedom to the Member States.

In order to avoid annulment by the Court of Justice of the European Union (CJEU), the predominant purpose of both instruments is ostensibly to improve the conditions for the establishment and functioning of the internal market, rather than to define criminal law offenses and 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.[167] This has indirectly been confirmed by the Court of Justice in *Jyske Bank Gibraltar*.[168] In this case, the Court stated that, admittedly, the now repealed third AML Directive[169] was founded on a dual legal basis,[170] and it also sought to ensure the proper functioning of the internal market. The Court

[164] Lenaerts, K., and J.Gutiérrez-Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law', in: Mitsilegas, V., Bergström, M., Konstadinides, T., (eds.) *Research Handbook on EU Criminal Law*, Edward Elgar Publishing; 2016.
[165] C-617/10 *Åkerberg Fransson*, EU:C:2013:105, para. 34.
[166] *Ibid*. para. 36.
[167] *See also* Bergström 2016, *supra* note **Error! Bookmark not defined.**.
[168] *See* Case C-212/11, Jyske Bank Gibraltar v. Administración del Estado, ECLI:EU:C:2013:270, para. 46, Judgement of 25 April 2013.
[169] *See* 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 O.J. (L 309) 15 [hereinafter Third AML Directive].
[170] Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326), arts. 53(1) & 114.

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. This was apparent both from its title and the preamble, and from the fact that it was adopted, like its predecessor,[171] 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.[172]

iii. The 2018 EU Criminal Law Directive

The European Agenda on Security[173] called for additional measures in the area of terrorist financing and money laundering. In its communication on an "Action Plan to strengthen the fight against terrorist financing",[174] the Commission 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. As stated in the Explanatory Memorandum of the criminal law proposal, the rationale set out 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.[175] 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,[176] applying it to terrorist offences and other serious criminal offences, and to approximate sanctions.

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,[177] applying it to terrorist

[171] 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 O.J. (L 166) 77 [hereinafter First AML Directive].
[172] Financial Action Task Force, The FATF Recommendations, http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html#UPDATES.
[173] COM (2015)185 final.
[174] COM (2016)50 final.
[175] 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.
[176] Announced in the Commission's Action Plan to strengthen the fight against terrorist financing of 2 February 2016, COM(2016) 50 final, 2 February 2016.
[177] *Action Plan for Strengthening the Fight Against Terrorist Financing*, *supra* note **Error! Bookmark not defined.**.

offences and other serious criminal offences, and to approximate sanctions. In other words, the proposed AML Criminal Law Directive is embedded in the global fight against money laundering and terrorist 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 criminalize money laundering on the basis of the Vienna Convention of 1988 and the Palermo Convention of 2000.[178]

On 21 December 2016,[179] two days after the compromise proposal aiming at amending the 4 AMLD was adopted by the Council,[180] the Commission proposed an AML criminal law directive based on Article 83(1) TFEU,[181] which identifies money laundering as one of the so called 'Euro-crimes' with particular cross-border dimension. It 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. Under the present situation, the Member States should ensure that administrative sanctions and measures in accordance with the 4AMLD, and criminal sanctions in accordance with national law are in place. If adopted, the AML criminal law directive will change this situation. The line between administrative and criminal law and sanctions in the AML regime is however not clear cut.

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 Palermo Convention of 2000.[182]

As regards the relationship with the fourth AML Directive and the Transfer of Funds Regulation, [183] the Commission emphasises that these legal instruments help prevent money

[178] United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 *U.N.T.S.* 209.
[179] 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, doc. 15816/16 + ADD 1 + ADD 2 + ADD 3.
[180] 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.
[181] Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, COM(2016)826 final.
[182] UN Convention Against Transnational Organized Crime of 2000 (2225 *UNTS* 209).
[183] Regulation (EU)2015/847 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006, OJ 2015, L 141/1.

laundering and facilitate investigations into money laundering cases, but that 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.[184]

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.[185] 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.[186]

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.'[187] 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

[184] 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.
[185] 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.
[186] 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.
[187] Ibid 1.

by criminals and terrorists, who can choose to carry out their financial transactions where they perceive anti-money laundering measures to be weakest.'[188]

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.[189] In this respect, the Commission points out that practitioners taking part in the preparatory phase reported that differences in criminalising pose obstacles to effective police co-operation and cross-border investigation.[190]

The proposal further complements Directive 2014/42/EU that 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 the participation in an organised criminal group and racketeering.[191] 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,[192] 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.'[193]

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.[194] Hence, one of the key measures was to consider a possible proposal for a minimum Directive on the definition of

[188] Ibid.
[189] Ibid.
[190] Ibid 2.
[191] Ibid 5.
[192] COM(2015) 625 final of 2 December 2015. See also Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) 6.
[193] 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.
[194] 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.

the criminal offence of money laundering,[195] 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).[196] 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.[197]

Three meetings of the group were held since January 2017. A full examination of the Commission's proposal was carried out during the first meeting. In addition, two complete rounds of discussion on the basis of a revised Presidency text were concluded, including compromise proposals on the definition of criminal activity, self-laundering and penalties. Work at expert level will continue with a view to submitting a compromise text to the Council for obtaining a general approach in June 2017.[198]

The consolidated compromise text of the proposed Directive, as resulting from these discussions and confirmed at COREPER on May 24, 2017, seeks to reflect the compromises achieved on the basis of the positions expressed by delegations.[199] On the one hand, if the latest proposal for an AML Criminal Law Directive is adopted, it would expand the current

[195] Announced in the Commission's Action Plan to strengthen the fight against terrorist financing of 2 February 2016, COM(2016) 50 final.
[196] Interinstitutional Files: 2016/0414 (COD) 2016/0412 (COD), Progress report from Presidency to Council, concerning Combatting Financial Crime and Terrorism Financing, 20 March 2017.
[197] 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.
[198] Interinstitutional Files: 2016/0414 (COD) 2016/0412 (COD), Progress report from Presidency to Council, concerning Combatting Financial Crime and Terrorism Financing, 20 March 2017.
[199] *Id.*

EU focus from prevention to the control of money laundering and terrorist financing. On the other hand, as suggested by the Commission, the proposal, if adopted, will also reinforce the measures in place aimed at detecting, disrupting, and preventing the abuse of the financial system for money laundering and terrorist financing purposes, notably the fourth AML Directive. This Directive, along with the Transfer of Funds Regulation,[200] sets out rules which are designed to prevent the abuse of the financial system for money laundering and terrorist financing purposes.[201]

After more than a year of further discussions, the AML Criminal Law Directive was adopted on 23 October 2018.[202]

iv. Conclusions

Despite the internal market legal basis, the wider regulatory framework can therefore be said to have changed from a predominantly single market context via criminal law concerns to the fight against organized crime, terrorist financing, and an internal security context based on the risk-based approach. The main focus of the global and regional EU measures based on the risk-based approach is, however, still set on preventive measures, whereas AML control is still a matter for national jurisdictions and the developing framework of international cooperation among judicial and law enforcement authorities. It remains to be seen if the proposal for an AML Criminal Law Directive will be adopted that would expand the current EU focus from prevention to control of money laundering and terrorist financing. Meanwhile, Member States are obliged to implement the fourth AML Directive,[203] to which changes have already been adopted by the text of the fifth AML Directive signed on May 30, 2018. It will enter into force twenty days after its publication in the Official Journal (Article 5), and the Member States need to implement its provision eighteen months thereafter (Article 4).[204]

---

[200] Regulation (EU)2015/847, *supra* note **Error! Bookmark not defined.**.
[201] *See also* Bergström 2018b, *supra* note **Error! Bookmark not defined.**; Bergström 2018a, *supra* note **Error! Bookmark not defined.**.
[202] 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.
[203] Fourth AML Directive, *supra* note **Error! Bookmark not defined.**, art. 66–67 (Article 6 will be amended by the fifth AML Directive.).
[204] *See also* Bergström 2018b, *supra* note **Error! Bookmark not defined.**; Bergström 2018a, *supra* note **Error! Bookmark not defined.**.

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 4AMLD,[205] as later amended by the 5 AMLR, and the Transfer of Funds Regulation.[206] 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 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.[207] This has indirectly been confirmed by the Court of Justice in *Jyske Bank Gibraltar*.[208] In this case, the Court stated that, admittedly, the now repealed third AML Directive[209] was founded on a dual legal basis,[210] 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,[211] 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.[212]

[205] Directive 2015/849/EU.
[206] 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.
[207] See further Maria Bergström, 'Money Laundering' in Valsamis Mitsilegas, Maria Bergström, Theodore Konstadinides, (eds.) *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016).
[208] Case CASE C-212/11 *Jyske Bank Gibraltar*, EU:C:2013:270, p. 46.
[209] 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).
[210] Article 47(2) EC [now Article 53(1) TFEU], and Article 95 EC [now Article 114 TFEU].
[211] 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).
[212]