16. Money laundering

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1. INTRODUCTION

The European Commission in its 2014 Communication on Home Affairs stated that:

> Money laundering helps criminal groups hide the proceeds of their crimes. To prevent the misuse of the financial system, the proposal for a fourth Anti-Money Laundering Directive must be adopted, transposed and implemented soon and the need for EU criminal anti-money laundering legislation must be examined.[1]

According to the European Commission:

> money laundering is the conversion of the proceeds of criminal activity into apparently clean funds, usually via the financial system. This is done by disguising the sources of the money, changing its form, or moving the funds to a place where they are less likely to attract attention. 'Criminal activity' includes fraud, corruption, drug dealing and other serious crimes.[2]

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

[1] 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, p. 10. In this Communication on Home Affairs, the Commission gave its views of the possible content of the next Justice and Home Affairs (JHA) programme. See also 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; and S. Peers, *Statewatch Analysis: The Next Multi-year EU Justice and Home Affairs Programme. Views of the Commission and the Member States* (12 March 2014), available at www.statewatch.org/analyses/no-238-new-jha-programme.pdf; as well as E. Herlin-Karnell, 'All Roads Lead to Rome: The New AFSJ Package and the Trajectory to Europe 2020' *Eucrim* 1/2014. For references to further commentaries on Justice and Home Affairs after the Stockholm Programme, see the European Parliamentary Research Service, 'Justice and Home Affairs after the Stockholm Programme', available at http://epthinktank.eu/2014/06/25/justice-and-home-affairs-after-the-stockholm-programme/.

[2] 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.

EU can adopt Directives providing for minimum rules regarding the definition of criminal offences, i.e., rules on which behaviour is considered to constitute a criminal act and which type and level of sanctions are applicable for such acts. Yet, this legal basis was not used when new and stronger rules to combat money laundering and terrorism financing were adopted on 20 May 2015. Instead, the internal market legal basis was used. Similarly, although there was no clear EU competence on anti-money laundering (AML) measures before the Lisbon Treaty, three EU AML Directives were adopted pre-Lisbon.[3] The rationale for doing so was to introduce compensatory measures to the establishment of the internal market and the removal of barriers, which at the same time provided increased opportunities for money laundering and financial crime. Hence, the AML measures were adopted to protect the financial system and other vulnerable professions and activities from being misused for money laundering and later also terrorism financing purposes.[4]

Since the choice of legal basis must be guided by objective factors which are amenable to judicial review, including, in particular, the aim and content of the measure,[5] this suggests that specific proposals for *criminal* AML legislation were not predominant in the now strengthened European AML framework. Possibly, criminal EU AML legislation based on Article 83(1) TFEU might follow to complement the current legislative framework.[6]

With a strict legal basis analysis as a starting point, this chapter analyses the current EU AML framework from both a historical and contextual point of view, thereby aiming to provide a nuanced picture of the current EU AML framework and its particulars. The result includes not only an overview of the current regulatory framework, but also highlights certain specifics such as the involvement of private actors and related potential problems from a procedural and fundamental rights point of view.

2. CHOICE OF 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

[3] Directive 91/308/EEC; Directive 2001/97/EC amending Directive 91/308/EEC; and Directive 2005/60/EC.

[4] See further M. Bergström, 'EU Anti-Money Laundering Regulation: Multilevel Cooperation of Public and Private Actors' in C. Eckes and T. Konstadinides (eds), *Crime Within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press, 2011).

[5] C-300/89 *Commission* v. *Council* (*Titanium Dioxide*) [1991] ECR I-2867, para. 10, and a number of subsequent cases.

[6] See e.g., European Commission Indicative Roadmap, *Proposal to Harmonise the Criminal Offence of Money Laundering in the EU* (October 2012); European Parliament Resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) (2013/2107(INI)).

and its Member States and between the players involved in the law-making process of the European Union.[7]

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.[8] 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).[9]

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 relation to the other, has more than one legal basis been tolerated.[10] Yet, no dual

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[7] 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.

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

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

[10] 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.

legal basis is possible where the procedures laid down for each provision are incompatible with each other.[11] 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.[12] On the contrary, in such cases, the choice of legal basis could greatly affect the determination of the content of the proposed measure.[13] 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*,[14] 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-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,[15] looking to the relationship

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

[12] 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.

[13] 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.

[14] 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.

[15] 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'.

specified in the Treaties between each.[16] 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.[17]

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.[18] 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.[19] 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.[20] During the Justice and Home Affairs (JHA) Council of 6 to 7 December 2012, a question was raised by 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.[21] 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.[22]

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[16] 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.

[17] See e.g., *Parliament* v. *Council*, above n. 9.

[18] 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.

[19] 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.

[20] Miglietti, *The New EU Criminal Law Competence in Action*, above n. 18, at 20.

[21] *Eucrim* 1/2013, 6, available at http://ec.europa.eu/anti_fraud/documents/eucrim/eucrim_2013_01_en.pdf.

[22] 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

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,[23] whereas the accompanying Market Abuse Regulation 596/2014 was adopted with reference to Article 114 TFEU.[24] 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.[25] According to the Commission, the Regulation improves the existing EU legislative framework and reinforces administrative sanctions.[26]

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 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.[27] 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.[28]

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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.

[23] 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.

[24] 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.

[25] See also Ester Herlin-Karnell, Chapter 11, 'Is Administrative Law Still Relevant? How the Battle of Sanctions has Shaped EU Criminal Law'.

[26] 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.

[27] 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.

[28] 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.

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',[29] and 'to combat money laundering and terrorism financing',[30] 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:[31]

> 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.

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.[32]

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

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[29] 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.

[30] 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.

[31] C-376/98 *Germany* v. *Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419, para. 83.

[32] 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.

first AML Directive, which was introduced as a compensatory measure for the free movement rules within the internal market,[33] 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.

3. NEW EU ANTI-MONEY LAUNDERING FRAMEWORK

The new AML framework consists of two legal instruments both based on Article 114 TFEU on the internal market: the Fourth AML Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,[34] and Regulation 2015/847 on information accompanying transfers of funds.[35] 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).[36] FATF currently comprises 36 member jurisdictions and eight FATF-Style Regional Bodies (FSRBs), thus representing most major financial centres in all parts of the world. It is now the global standard-setter for measures to combat money laundering, terrorist financing and the financing of proliferation. The Preamble to the Fourth AML Directive accordingly emphasizes the international character of money-laundering and AML measures:[37]

> 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.

According to the European Commission, the threats associated with money laundering and terrorist financing are constantly evolving, which requires regular updates of the

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[33] 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.

[34] 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 (Fourth AML Directive) [2015] OJ L141/73.

[35] 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.

[36] *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: the FATF Recommendations* (February 2012), available at www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

[37] Fourth AML Directive, recital 4.

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.[38]

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'.[39] 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 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 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.[40] 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 Article 83(1) TFEU, article 1(2) of

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[38] European Commission, Press Release, 5 February 2013.

[39] *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.

[40] FATF Recommendations, above n. 36.

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*. 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:
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> (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.[41]

As pointed out by Koen Lenaerts and José Gutiérrez-Fons, Chapter 1, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law',[42] the CJEU in *Åkerberg Fransson* recalled that, when EU legislation does not specifically provide any

[41] See Ester Herlin-Karnell, Chapter 11, 'Is Administrative Law Still Relevant? How the Battle of Sanctions has Shaped EU Criminal Law'.

[42] Koen Lenaerts and José Gutiérrez-Fons, Chapter 1, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law'.

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.[43] Yet, the resulting penalties must comply with the Charter of Fundamental Rights and be effective, proportionate and dissuasive.[44] 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'.[45] 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'.[46]

Generally, the Fourth Directive's scope would be extended by reducing the cash payment threshold from EUR15,000 to EUR10,000 and including providers of gambling services (Fourth Directive, articles 2, 11, 48 and 49). In addition, tax crimes are now included as a new predicate offence. The new provisions provide for a more targeted and focused risk-based approach using evidence-based decision-making to better target risks, as well as guidance by European supervisory authorities,[47] and reinforce the sanctioning powers of the competent authorities.[48] In this respect, the new framework 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

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

[44] *Ibid*. para. 36.

[45] 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.

[46] *Ibid*.

[47] Fourth AML Directive, recital 23, e.g. 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 recognized at 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.

[48] *Eucrim* 1/2013, 6.

> 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.

Enhancing transparency, specific provisions on the beneficial ownership of companies have been introduced and information about beneficial ownership will be stored in a central register accessible to competent authorities, Financial Intelligence Units (FIUs), entities required to take customer due diligence measures, and other persons with a legitimate interest. According to recital 14, the need for 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.

Generally, there will be more cooperation between the different national FIUs, whose role is to receive, analyse and disseminate to competent authorities reports raising suspicions of money laundering or terrorist financing in order to facilitate their cooperation. In this respect, the FIUs have been given strengthened powers to identify and follow suspicious transfers of money and facilitate the exchange of information.[49] 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.[50] 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.[51]

An additional feature is 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. In particular, these rules have been clarified, and relevant entities are required to take enhanced measures where the risks are greater (Section 3 of the Fourth Directive), and can take simplified measures where risks are demonstrated to be lower (Section 2 of the Fourth Directive and Annex II). Simplified procedures should thereby not be wrongly perceived as exemptions from CDD. According to Statewatch,[52] the draft compromise on money-laundering and terrorism

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[49] See also Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between FIUs of the Member States in respect of exchanging information [2000] OJ L271/4, which the Commission also plans to update. European Commission, *Report on the Application of the Third Anti-Money Laundering Directive*, above n. 2.

[50] Egmont Group of Financial Intelligence Units Charter, Approved by the Egmont Group Heads of Financial Intelligence Units, available at www.egmontgroup.org/library/download/290.

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

[52] Statewatch News Online, 29 January 2015 (02/15). See further www.statewatch.org.

between the Council and the European Parliament[53] does not seem to take into account the criticism made by the Meijers Committee regarding the potential the text provides for indirect discrimination in relation to the application of CDD and the use of the risk factor related to the country of origin of the client.[54] 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.[55] These suggestions did not lead to any changes, however.

According to the Council, the 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'.[56] In comparison with the Third AML Directive, in force until 25 June 2017, the risk-based approach has therefore been further developed. In addition, the Fourth Directive incorporates new provisions on data protection (see further below).

More specifically, and in line with the international standards and the report on the application of the Third AML Directive,[57] the new framework incorporates more risk-based elements which should allow for 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 (articles 20–23 of the Fourth Directive). As regards sanctions, the Directive stipulates a maximum administrative pecuniary sanction of up to twice the amount of the benefit derived from the breach where such benefit can be determined, or up to EUR 1 million.[58]

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 connected with the Third AML Directive identified by the European Commission.[59] 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

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[53] 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.

[54] 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.

[55] *Ibid*. 3. Cf. Fourth AML Directive, Art. 18(3) and Annex III.

[56] European Council, Press Release, *Money Laundering: Council Approves Strengthened Rules* (20 April 2015), available at www.consilium.europa.eu/en/press/press-releases/2015/04/20-money-laundering-strengthened-rules.

[57] 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.

[58] Fourth AML Directive, Art. 59(2)(e).

[59] 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*, above n. 2.

> 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.[60]

According to articles 66 and 67 of the Fourth Directive, the current Directives will be repealed with effect from 26 June 2017, by which date the Fourth Directive would need to be implemented by the Member States. Also by this date, the new Regulation would come into force.

4. BROADER REGULATORY FRAMEWORK

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.[61] 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.[62] 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.[63]

In the current multi-year EU Justice and Home Affairs programme included as Chapter I in the conclusions of the European Council Meeting of 26 and 27 June 2014,[64] 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). 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

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[60] European Commission, Press Release, 11 April 2012, above n. 57.

[61] 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.

[62] 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.

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

[64] 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 and at http://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf.

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'.

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.[65] 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 will be held in 2017.

The European Security Agenda for the period 2015–2020 presented by the European Commission in April 2015[66] will support Member States' cooperation in tackling security threats and in particular three of the most pressing challenges: preventing terrorism and countering radicalization; fighting organized crime; and fighting cybercrime. President Juncker's Political Guidelines identified the security agenda as a priority for the present Commission, and the 2015 Commission Work Programme committed to the delivery of the European Agenda on Security.[67] Likewise, further to the Commission's 'European Agenda on Security' and the Council Conclusions of 16 June 2015, the European Council Conclusions from its meeting on 25 and 26 June 2015 underlines that Europe's security environment has changed dramatically, which requires action.[68]

The rules against money laundering and terrorism financing adopted in May 2015 are one of the key actions in the European Security Agenda,[69] as suggested also by the European Parliament Resolution of 17 December 2014.[70] Key actions include effective

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[65] *The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C115/1.

[66] 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.

[67] 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.

[68] European Council Meeting, 25 and 26 June Conclusions, EUCO 22/15, available at www.consilium.europa.eu/en/workarea/downloadAsset.aspx?id=40802199898.

[69] European Commission Communication, above n. 66. See also European Commission, Press Release, 28 April 2015, above n. 67.

[70] 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.

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.[71] 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.[72] 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.[73]

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,[74] 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.[75] 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,[76] beyond that of drugs offences, as reflected in the 1996 revisions of the 40 FATF recommendations.[77]

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[71] European Commission Communication, above n. 66.

[72] *Ibid*. 9.

[73] 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.

[74] 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.

[75] OECD, *OECD Report on Harmful Tax Competition: An Emerging Global Issue* (1998), available at www.oecd.org.

[76] 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.

[77] 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[78] brought the regional EU rules into line with the global, revised and expanded, FATF recommendations.[79] The solution to the problem of money laundering was to establish a standard for risk analysis, 'the risk- based approach',[80] which had a prominent position in the Third AML Directive, as well as in the amended FATF recommendations that it builds upon.[81] 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.[82]

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[78] 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.

[79] FATF 40 Recommendations of 20 June 2003, incorporating the amendments of 22 October 2004.

[80] 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'.

[81] 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).

[82] 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.

5. COOPERATION WITH THE PRIVATE SECTOR

One of the most striking features of the EU AML framework is the intensified multilevel cooperation of public and private actors. Not only are private parties expected to work against anti-money launderers and to report suspicious transactions under threats of administrative and criminal sanctions, they also take an active part in formulating the underlying rules and procedures on different levels. In short, traditional public tasks are shared by public and private actors.[83] In the early days of AML regulation, the private actors were only loosely part of the public sector in preventing crimes on money laundering. However, the shift towards the risk-based approach entailed several major consequences regarding the relationship between private and public actors. Inherent in this change is that the 'policing' tasks of private actors, which have always played an important role in crime prevention, are expanding.[84] As a result, this regulatory field is extremely complex, involving international, EU and national actors and laws, embracing public, private and penal rules as well as enforcement mechanisms.[85]

6. REPORTING OBLIGATION AND THE PROTECTION OF FUNDAMENTAL RIGHTS

One of the rationales for more actively engaging the private sector in AML is to get better access to knowledge about the activities of actors who may be involved in illicit behaviours. In terms of division of roles in regulation, this implies a shift of responsibility to the private sector. It is the private sector which is to collect the appropriate information, and to decide when to make suspicious transaction reports. This shift of responsibility, enhanced by the introduction of the risk-based approach, raises some issues of particular concern which will be briefly outlined below.

Most obviously, there is a sensitive balancing act between security and the protection of fundamental rights concerning personal data within the anti-money laundering framework. In its Opinion of 4 July 2013, the European Data Protection Supervisor (EDPS) argued that the proposals for the Fourth AML Directive and the Regulation on information accompanying transfers of funds revealed significant deficiencies, listing the perceived shortcomings.[86] Since personal data of customers is used for the purpose of reporting suspicious financial transactions and investigating them, customers should

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[83] For the purposes of this section, private actors are simply defined as for-profit actors whereas public actors are governments, agencies and international organizations.

[84] G. Favarel-Garrigues, T. Godefroy, and P. Lascoumes, 'Sentinels in the Banking Industry: Private Actors and the Fight against Money Laundering in France' (2008) 48(1) *British. Journal of Criminology* 1.

[85] See further Bergström, 'EU Anti-Money Laundering Regulation', above n. 4.

[86] European Data Protection Supervisor, Executive Summary of the Opinion of the European Data Protection Supervisor on a 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, and a proposal for a Regulation of the European Parliament and of the Council on information on the payer accompanying transfers of funds [2014] OJ C32/9.

be assured that the decisions are not based upon data that should not have been collected, or which has been stored without authority or is not or is no longer accurate.[87] The issue of data protection and individual privacy rights is also highly controversial outside the boundaries of AML and is currently an issue in the political as well as the legal arenas in Europe. As pointed out by Met-Domestici, the AML Directives require 'the processing and exchange of personal data in order to detect a criminal who might hide behind the customer of a person subject to the vigilance obligations of the Directive, e.g., financial institutions but also legal professionals like lawyers'.[88]

A similar issue arises with regard to client loyalty and client confidentiality, both core values of the legal profession and essential to effective representation of clients.[89] Despite concern within the legal profession, the CJEU has ruled that the obligations contained in the AML Directives do not infringe the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights (ECHR) and Article 6(2) TEU, and the provisions must therefore be upheld also against lawyers.[90] Similarly, the European Court of Human Rights (ECtHR) has ruled that the obligation for French lawyers to report suspicious transactions of their clients does not disproportionately interfere with the confidential lawyer-client relations or with rights under Article 8 ECHR.[91]

However, if few appeals or complaints about the financial penalties related to AML are being made, possibly due to the 'name and shame' issue related to AML and terrorism financing, this might raise concerns about procedural guarantees,[92] the effectiveness of sanctions, and whether penalties are actually effective in preventing crimes or not. It has also been argued that AML measures have little effect in preventing the financing of terrorism, which in contrast requires comparably little money which need not be the proceeds of crime, but often come from entirely legitimate sources.[93]

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[87] 'Data Protection Fourth AML Directive Lacks Appropriate Data Protection', *Eucrim* 3/2013, 83.

[88] Met-Domestici, 'The Reform of the Fight against Money Laundering in the EU', above n. 51, at 97.

[89] See further Mitsilegas, *Money Laundering Counter-Measures in the European Union*, above n. 80, at 146.

[90] C-305/05 *Ordre des barreaux francophones and others* v. *Conseil des ministres* [2007] ECR I-5305.

[91] *Michaud* v. *France*, Application No 12323/11, ECtHR, Judgment of 6 December 2012. See e.g., *Eucrim* 1/2013, 7; D. Sartori, '*Michaud* v. *France*: A Step Forward into the Bosphorus Doctrine, or a Step Backward into "Subjective" Foreseeability?', *Strasbourg Observers*, 21 December 2012, available at http://strasbourgobservers.com/2012/12/21/michaud-v-france-a-step-forward-into-the-bosphorus-doctrine-or-a-step-backward-into-subjective-foreseeability.

[92] For the issue of fair trial, see further Mitsilegas, *Money Laundering Counter-Measures in the European Union*, above n. 80, at 182 *et seq*.

[93] Z/Yen, *Anti-money Laundering Requirements: Costs, Benefits and Perceptions*, City Research Series No. 6 (Corporation of London, June 2005), p. 14, available at www.zyen.com/PDF/AMLR_FULL.pdf. This argument was supported by the written evidence given by Prof. Iain Cameron to the House of Lords European Union Committee, 'Money Laundering and the Financing of Terrorism: Volume II: Evidence', 19th Report of Session 2008–09 (22 July 2009),

7. CONCLUSION

As confirmed by the case law of the CJEU,[94] the European Union already had, before the Lisbon Treaty changes, certain powers concerning judicial cooperation in criminal matters under the Community pillar. The current AML framework, which was adopted with reference to the legal basis of the internal market, provides a good example. Formally, EU AML law-making does not constitute criminal law competence *sensu stricto*, 'but rather found its expressions in the notion of administrative penalties'.[95] Nevertheless, the AML framework has effects upon both administrative and criminal national rules and procedures and presupposes the involvement of both administrative and criminal law enforcement mechanisms. As a result, it does not leave the national criminal justice systems altogether unaffected, but dictates national administrative penalties and complements national criminal law.

Despite all assumptions and suggestions that the current EU AML framework is mainly administrative in character, there is therefore 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. Nevertheless, 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.

Under the new AML framework, the Member States will still have the freedom to choose the applicable penalties, i.e., administrative, criminal or a combination of the two. In contrast, any measure based on Article 83(1) TFEU will leave no such freedom to the Member States. However, the resulting penalties must all comply with the Charter and be effective, proportionate and dissuasive.

With a strict legal basis analysis as a starting point, this chapter has analysed the current EU AML framework from both a historical and contextual point of view, thereby providing a nuanced picture of the current EU AML framework and its particulars. This has not only included an overview of the current regulatory framework, but also highlighted certain specific issues, such as the involvement of private actors and related potential problems from a procedural and fundamental rights point of view.

HL Paper 132-II, p. 230; and in the presentation by Erik Wennerström, Swedish Foreign Ministry, at the Workshop on Accountability and Anti-Money Laundering, held at Hotel King Carl, Stockholm, 25 April 2009.

[94] C-176/03 *Commission* v. *Council* EU:C:2005:542, C-440/05 *Commission* v. *Council* EU:C:2007:625 and C-301/06 *Ireland* v. *Parliament and Council* EU:C:2009:68. For an analysis and possible explanation of the case law on competencies, see Bergström, 'Spillover or Activist Leapfrogging?', above n. 7.

[95] E. Herlin-Karnell, 'The Lisbon Treaty and the Area of Criminal Law and Justice' (2008) 3 *European Policy Analysis* 1, 9, discussing the Third AML Directive. See further Bergström, 'EU Anti-Money Laundering Regulation', above n. 4.