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## *The Anti-Money Laundering Framework in the EU: Aspirations and Achievements*

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# *The Anti-Money Laundering Framework in the EU: Aspirations and Achievements*

**Abstract**

It is a common finding in the reports of several international organizations, including the European Union, that existing strategies for preveniting illicit financial flows and confiscating illicit proceeds have not yielded the expected and much-desired results. Another common finding is the fact that criminals and criminal organizations are constantly adapting money laundering tools and techniques. Criminals and organized criminal groups are often one step ahead of the actions and initiatives undertaken by national legislatures and law enforcement authorities. In addition to the delays in the transposition of EU directives, there are organizational problems that hinder the effective implementation of the EU rules. Among these problems, we can mention the lack of ressources and staff of the compentent authorities, lack of access to financial information, reluctance to use available legal tools and, finally, the interests of financial institutions that may conflict with the obligations imposed on them for the fight against money laundering.

**Keywords**

*Money Laundering, illicit proceeds, European Union, AML Directives, FATF.*

## 1. Introductory Remarks

This paper aims to examine the evolution of the European Union (EU) framework against money laundering (AML), from the initial 1st EU AML Directive to the recent legislative initatives. The EU initatives are examined as a part of the general international fight against money laundering, which includes traditional international conventions (see Chapter 2), such as the UN Vienna Convention, as well as informal but influential soft-law instruments, such as the Recommendations of the Financial Action Task Force (FATF). This paper aims to provide an overview of the initial initiatives and Directives of the EU (see Chapter 3), as well as of their evolution thought time (see Chapter 4). This analysis concludes with some critical observations on the strengths and weaknesses of the EU AML legal framework (see Chapter 5).

Money laundering is a criminal offense that generally has an international dimension. It is carried out through complex, multifaceted techniques and procedures, in terms of location, time and manner (Reuter and Truman, 2004). Money laundering processes may involve cross-border financial flows between different jurisdictions. Moreover, the predicate offense may have been committed in a different jurisdiction than the money laundering offense itself. Money laundering is a source of risk for the world community, since it allows criminals and especially criminal organizations to continue afflicting the international community and society. It can also endanger the integrity and the stability of the international economic and financial system.

This has given rise to the realization of the need for global joint action against money laundering, which constitutes a common threat for all states (Kroeker, 2014). However, the resourcefulness of criminal groups in combination with technological progress, which led to the emergence and use of new money laundering methods and techniques, have make it difficult for countries to address the problem effectively.

## 2. Origins of the International and European Institutional Framework

### *2.1. Vienna Convention (1988)*

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention) targeted drug trafficking and proceeds connected with drug trafficking offenses, which have often found their way through the banking system and into "tax havens" jurisdictions. The Vienna Convention embraces the principle of "crime does not pay" and attempts to tackle the phenomenon of money laundering with regard to the proceeds of drug trafficking.

In addition to imposing the criminalization of money laundering, the Vienna Convention also deals with the issue of international cooperation between States and it limits banking secrecy as a ground to decline asset-tracing attempts (Brown and Gillespie, 2015). In 2000, United Nations Convention made another step forward by concluding a second important international convention, the UN Convention against Transnational Organized Crime (Palermo Convention), which deals with the problem of money laundering in the context of the fight against organized crime.

### *2.2. Financial Action Task Force (F.A.T.F.)*

In 1989, the G7 set up an informal international forum, the Financial Action Task Force (FATF) [1] and entrusted it with the task of formulating recommendations for tackling money laundering. FATF studies the tools and methods of money laundering, in order to help develop the best strategies to prevent the phenomenon, both nationally and internationally, as well as to implement AML measures effectively. The FATF has established itself as the key international body that sets AML rules and global standards. The FATF currently comprises 37 member countries, as well as 2 regional organisations (European

[1] www.fatf-gafi.org

Union and the Gulf Co-operation Council), including most major financial centres in all parts of the world. The Recommendations of the FATF are a text of reference and they deal with the criminalization of money laundering, the monitoring and reporting of suspicious transactions, the lifting of banking secrecy, etc. In general, the EU takes into consideration and implements the FATF's Recommendations in the AML context.

### *2.3. The 1st EU AML Directive (Directive 91/308/EEC) and the 2nd EU AML Directive (Directive 2001/97/EC)*

In 1991, the European Community adopted Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, known as the 1st AML Directive. Under this Directive, EU Member States were required to introduce measures into their national legislation to combat money laundering. The Directive is influenced by the provisions of the Vienna Convention, the FATF Recommendations and the Council of Europe Convention No 141 of 1990 (Pavlidis, 2012). The 1st EU AML Directive introduces rules for the financial sector, as well as other professions that may be involved in suspicious transactions and are therefore vulnerable to money laundering. For example, under the provisions of the Directive, financial institutions have to conduct a thorough verification of the identity of their customers, for each type of transaction and business relationship.

The 1st EU AML Directive was an important legislative initiative, but it did not address all aspects of the money-laundering phenomenon. For example, there was a trend, evident in the work of the FATF, towards a much wider definition of money laundering and a broader range of predicate or underlying offences. For this reason, in 2001 the EU adopted 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. This legislative initiative is known as the 2nd EU AML Directive. The institutions of the European Community took into account the

recommendations of the FATF and the need to counter the financing of terrorism. The 2nd EU AML Directive covers additional money business, professions and entities, such as currency exchanges. Furthermore, the businesses and persons that were subject to the 2nd AML Directive have to take reasonable measures to obtain information as to the real identity of the persons on whose behalf their customers were acting.

In sum, the adoption of the 1st AML Directive reflects the content of the 40 recommendations of the FATF for dealing with the phenomenon of money laundering, especially through the banking sector (Yeoh, 2019). The 2nd EU AML Directive ahs amended and strengthened the EU AML legal framework in order to adapt it to the revised FATF recommendations of 1996.

### *2.4. The 3rd EU AML Directive (Directive 2005/60/EC)*

In 2005, the EU adopted 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, known as the 3rd EU AML Directive. Once again, the focus of the Directive was mainly on crime prevention, not just crime supression.

The 3rd EU AML Directive brought the EU legal framework in line with the revised recommendations of the FATF. The 1st EU AML Directive was repealed and new provisions were introduced, such as, inter alia, the obligation of institutions and persons covered by the Directive to identify and verify the identity of the beneficial owner and to take additional measures of due diligence in cases of high-risk transactions. Particular emphasis was also given to better coordination and cooperation between Member States, as it was found that most some countries did not exercise effective supervision on domestic financial institutions (Kontodimitropoulou, 2021).

In addition to this, the 3rd EU AML Directive extended the definition of the term "property" to include "assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments

in any form including electronic or digital, evidencing title to or an interest in such assets" (Article 3 par. 3 of the Directive).

With regard to the definition of illicit provenance, the illicit proceeds need not derive directly from a specific criminal activity, i.e. be the direct product of the commission of the predicate offense. The paper-trail begins with the commission of the predicate offense and leads up to the acts of money laundering. In order to increase its chances of success, the money laundering process is usually multifaceted, long, complex and with many stopovers of short or long duration. Therefore, a causal link needs to be established, in other words an indisputable connection between the illicit proceeds and the commission of the predicate offense (Pavlidis, 2012).

## 3. Evolution of the AML Legal Framework at EU level

Undoubtedly, the first three EU AML Directives formed a solid basis for the creation of a European legal framework against money laundering and, indirectly, against the activities of criminal groups at international level. The legal instruments that were adopted at a later stage, such as the 4th and 5th EU AML Directive, managed to further adapt the European legal framework to the circumstances and real needs of the modern era, in light of the evolution and increased sophistication of money laundering methods.

### *3.1. The 4th EU AML Directive (Directive 2015/849/EU)*

In 2015, the EU adopted its 4th EU AML Directive, more specifically 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 repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

The 4th EU AML Directive introduced a more robust system for risk assessment by EU Member States, while it also strengthened due diligence measures. Under the 4th AML Directive, EU Member States were required to establish and maintain a central register, containing sufficient, accurate and up-to-date information on the identity of the beneficial owners behind a corporate structure.

In essence, an attempt was made to establish an integrated European framework for risk assessment. The Directive itself defined specific parameters (in its annexes) to address the problem in a comprehensive and holistic manner, relieving Member States of the obligation to develop their own rules and practices.

It is worth noting that the 4th AML Directive extended the list of obligated entities to cover, among others, the providers of gambling services. Another noteworthy development was the expansion of the Directive's scope, as tax crimes relating to direct taxes and indirect taxes were included in the list of "criminal activities" in the meaning of Article 3 par. 4. The aim of this amendment was to prevent the commission of tax crimes through third countries, the so-called tax havens.

*3.2. The 5th EU AML Directive (Directive 2018/843/EU)*

The proposal for a new 5th AML Directive was put forward even before the deadline for the incorporation of the 4th AML Directive in the domestic law of Member States. This was due to the "Panama Papers" scandal and the revelations that brought to light the shortcomings in the implementation of due diligence measures. Thus, in 2018, the EU adopted 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, known as the 5th EU AML Directive.

The 5th EU AML Directive amended the 4th EU AML Directive and had the following objectives:

- Broadening access to the central registers of beneficial owners;
- Strengthening due diligence with regard to business relations and transactions with high-risk jurisdictions.
- Extending the scope of the EU AML framework, as to include providers engaged in exchange services between virtual currencies and fiat currencies as well as custodian digital wallet providers (FATF, 2020). The definition of cryptocurrencies as assets was deemed necessary, so that the conversion of property into cryptocurrency and vice versa can be considered as a money laundering offense. According to the prevailing view in theory, "virtual currencies" are intangible assets and are defined in the Directive as "digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically" (Article 1(2)(d) of the Directive)
- Extending the scope of the EU AML framework to "persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to EUR 10 000 or more".
- Introducing more strict rules on the use of prepaid cards, in particular anonymous prepaid cards.
- Introducing more strict rules against anonymity, through the strengthening of cooperation and exchange of information between the national Financial Intelligence Units (FIUs), the supervisory authorities and the European Central Bank.
- Strengthening the fight against terrorist financing and preventing terrorists from gaining access to international financial institutions.

*3.3. The latest EU legislative initiative (Directive 2018/1673/EU)*

The most recent EU initiative in the AML area is Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. With this legislative initiative, the EU takes steps to strengthen further the legal AML framework through more practical measures, in particular the criminalization of money laundering. In particular, it clearly identifies the predicate offenses that constitute “criminal activity”. Article 2 of the Directive first makes a general reference - interpretation of the term “criminal activity”, which applies to a wide range of criminal offenses; it then specifically specifies 22 categories of offenses, including participation in an organised criminal group and racketeering, terrorism, trafficking in human beings and migrant smuggling, sexual exploitation, illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, illicit trafficking in stolen goods and other goods, corruption, fraud, counterfeiting environmental crime, etc.

Furthermore, the Directive, in its Article 3, defines the conduct that is punishable as a criminal offence, when committed intentionally. For its part, Article 4 deals with aiding and abetting, inciting and attempting in connection with the offenses of money laundering under Article 3.

It is noteworthy that the Directive requires that Member States introduce effective, proportionate and dissuasive criminal penalties for the commission of the offences referred to in Articles 3 and 4. Penalties have to be provided for offenses committed both by natural persons and legal persons. Indicatively, penalties against legal persons include, among others, the exclusion from access to public funding, including tender procedures, grants and concessions, the disqualification from the practice of commercial activities, the placing under judicial supervision or even the judicial winding-up or closure of the business in question.

It is worth mentioning that the provisions of Article 6 of the Directive introduce aggravating circumstances for money laundering offenses, such as their commission within the framework of a criminal organisation.

## 4. Conclusions

It is a common finding in the reports of several international organizations, including the EU itself, that existing strategies for tracing and confiscating illicit financial flows have not yielded the expected and much-desired results (Pavlidis, 2019). Another common finding is the fact that criminals and criminal organizations are constantly adapting money laundering tools and techniques. Criminals and organized criminal groups are often one-step ahead of the actions and initiatives undertaken by national legislatures and law enforcement authorities.

Within a period of three years, three important Directives have been adopted in the area of AML. This can be viewed as a weakness of the EU and a failure to anticipate the new trends and schemes of money laundering, but also as a capacity of the EU to respond promptly and adapt its legal framework to the evolution of criminal practices. It is the author's view that the most critical factor is the long time that elapses from the adoption of each EU Directive until its transposition into the national law of the Member States. An example is the case of Cyprus, which transposed the 4$^{th}$ EU AML Directive into its domestic law by adopting Law 13(I)/2018 of 3/4/2018, which amended the Law on the Prevention and Suppression of Money Laundering (Law 188 (I)/2007). This is also the case of Greece, which transposed the 4$^{th}$ EU AML Directive by adopting L. 4557/2018 of 30/7/2018. In both cases, three entire years had elapsed since the initial adoption of the 4$^{th}$ AML Directive at EU level.

Even if the EU institutions perceive the risks and react relatively quickly, adapting the institutional and legal framework to the constant evolution of money laundering methods, the EU Member States may be unable or unwilling to keep pace and harmonize their domestic legislation. This, apart from the lost time, has a secondary negative result too, i.e. the delay in the setting up of the national implementation mechanisms for the effective transposition of the EU Directives.

In addition to these problems and delays, there are organizational problems that hinder the effective implementation of the EU rules. These problems include the lack of resources and staff of the competent authorities, lack of access to financial information (Pavlidis, 2020), reluctance to use available legal tools and, finally, the interests of financial institutions that may conflict with the obligations imposed on them for the fight against money laundering.

Furthermore, the evaluations of the AML framework of Member States show that in many cases there is an overlap of national legislation transposing EU directives with other national laws. An example is the clash between the provisions of Law 4557/18 that transposed the 4th EU AML Directive in Greece and the provisions of the Code of Criminal Procedure on the attorney-client privilege.

There is often a reluctance of some Member States to proceed at a faster pace in the harmonization of their national legislation with EU law and to put in place the necessary implementation mechanisms (Koster, 2020). The phenomenon can be explained, if we consider that Member States' reluctance may originate from a fear of possible revenue losses. Therefore, in order for the EU AML legal framework to be effective and to achieve the objectives for which it is set, EU Member States must eliminate similar concerns and consider seriously the purpose for which the EU adopted its AML Directives, i.e. the fight against crime.

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