CONFRONTING MONEY LAUNDERING IN THE EUROPEAN UNION

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Резюме: *Прането на пари е универсално предизвикателство. През 2011 г. Службата на ООН за наркотици и престъпност (UNODC) отчете, че престъпните активи са вероятно около 3,6 % от БВП през 2009 г. Статията представя кратък преглед на международните инициативи за противодействие на прането на пари. Акцентира се на актуализираните препоръки на FATF от 2012 г. През тяхната призма е разгледана правната рамка в ЕС по темата противодействие на прането на пари и вероятните актуализация на рамката. Отразени са и политическите насоки за развитие на правната рамка по темата в ЕС.*

Money laundering (ML) is a universal challenge. The cross-border flow of the global proceeds from criminal activities, corruption, and tax evasion are estimated at between $1 trillion and $1.6 trillion per year.[1]

A 2011 United Nations Office on Drugs and Crime[2] estimate suggest that all criminal proceeds are likely to have amounted to some 3.6% of GDP in 2009. On a global level, in the European Union (EU) and on national level, authorities make efforts to curb ML. Although it has many dimensions, ML is in particular associated with serious organized crime, terrorism and high-level corruption as these have the most harmful effects on society through undermining good governance, financial-sector stability and economic development.

[1] According to the World Bank Financial Market Integrity Program data.
[2] Estimating Illicit Financial Flows resulting from drug trafficking and other transnational organized crimes, UNODC, October 2011.

As ML uses the financial and commercial systems, economic integration and the opening of the national markets, if left unchecked, can have a collateral effect in facilitating the creation of new opportunities for money laundering. Thus, the broadening and deepening of the EU, the establishment of the internal market, along with its numerous advantages, such as the removal of barriers to free movement of capital, people and goods, has created opportunities for ML. International researchers have long established that organised criminal groups and corrupt officials *inter alia* consider that such open systems are conducive to their financial operations and tried to explore their vulnerabilities and misuse them to the detriment of EU citizens.[3] To counter this threat the EU has adopted legislation which builds on the international initiatives in place and strives to strengthen preventive mechanisms, protective measures and minimal standards for effective and dissuasive punishments. Thus, the EU's efforts to combat ML are part of a global legal and policy environment and need to be examined in this context.

International Anti Money Laundering Initiatives

In 1988 United Nations (UN) Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances addressed ML as a global threat. It called for a Global Program against Money-Laundering, Proceeds of Crime and the Financing of Terrorism. The Global Program was established in 1997 focusing on: assisting in the adoption of legislation that gives effect to the universal legal instruments against ML and countering the financing of terrorism in the State parties; equipping States with the necessary knowledge, means and expertise to implement national legislation and the provisions contained in the measures for countering ML adopted by the UN General Assembly; assisting beneficiary States

[3] Solomon, Joel S., Forming a More Secure Union: The Growing Problem of Organized Crime in Europe as a Challenge to National Sovereignty; 13 Dick. J. Int'l L. 623 (1994-1995)

in all regions to increase the specialized expertise and skills of criminal justice officials in the investigation and prosecution of complex financial crimes, particularly with regard to the financing of terrorism; enhancing international and regional cooperation in combating the financing of terrorism through information exchange and mutual legal assistance and strengthening the legal, financial and operational capacities of beneficiary States to deal effectively with ML and the financing of terrorism. The UN anti-ML system was further strengthened and developed in 1998 by the UN General Assembly Special Session Political Declaration and Action Plan against ML which broadened the scope of its ML provisions to all serious crime. The 1999 International Convention for the Suppression of the Financing of Terrorism, the 2000 UN Convention against Transnational Organized Crime and the 2003 UN Convention against Corruption further developed the system adding provisions related to curbing ML.

Coordination of the efforts to achieve the objectives in the Global Program against Money-Laundering, Proceeds of Crime and the Financing of Terrorism became the responsibility of the UN Office of Drugs and Crime (UNODC). UNODC, however, is not the only body focusing on the matter in the anti-ML field. One of the most prominent is the Financial Action Task Force (FATF) established in 1989 by the Ministers of its Member jurisdictions. This inter-governmental body has the objective to set standards and promote effective implementation of legal, regulatory and operational measures for combating ML and other related threats to the financial system. As a policy-making body, FATF has developed the famous Forty-Nine FATF Recommendations that are universally recognised as the international standard for combating ML and terrorist financing. First issued in 1990, the FATF Recommendations were revised in 1996, 2001, 2003 and 2012. In addition, FATF monitors the progress of its

members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally.

As noted, the international community recognises FATF Recommendations as a universal tool in combating ML. The Resolution 1617 (2005) of the UN Security Council states that all Member States are strongly urged " […] to implement the comprehensive, international standards embodied in the FATF Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing.'' In its Resolution 60/288 the UN General Assembly on 20 September 2006 stated that States are encouraged "to implement the comprehensive international standards embodied in the Forty Recommendations on ML and Nine Special Recommendations on Terrorist Financing of the FATF[…]''. More than 150 countries, including the EU Member States, have committed to adherence to the FATF Recommendations on ML.

For the purposes of this study, the 2012 revision of the Recommendations is of special interest. Their importance lies in the fact that the EU is adhering to these recommendations and has stated that the third ML Directive currently in place will be reviewed in light of the 2012 Recommendations. According to FATF, the revision of the 2012 Recommendations aims at achieving a balance - on one hand, they aim to strengthen the requirements in areas which are of higher risk or where implementation could be enhanced and areas which are expanded to deal with new threats. On the other, they strive to be better targeted simplifying measures in low risk areas focusing the efforts in higher risk areas.

The most important change introduced by the new Recommendations is the introduction of a risk-based approach: "The FATF Recommendations contain language that permits countries to some degree to adopt a risk-based approach to combating ML [...]. That language also allows countries to permit financial professions and DNFBPs[4] to use a risk-based approach in applying certain of their AML […] obligations".[5] Explaining the change a Clifford Chance Briefing note dated February 2013 reads that "4th ML Directive will increase the emphasis on the risk based approach […], and moves away from the current system of exemptions from customer due diligence requirements based on third country equivalence. It acknowledges that the levels and types of action required to be taken by member states, supervisors and firms will vary according to the nature and severity of risks in particular jurisdictions and sectors, and clarifies the types of situations in which simplified customer due diligence will be appropriate, as against those where it is necessary for firms to conduct enhanced checks.

The 4th ML Directive will update the current list of circumstances when simplified customer due diligence will be appropriate by removing financial institutions which are themselves subject to AML/CTF regulation, listed companies and domestic public authorities from the categories of clients to be regarded as posing a lower risk. Instead, regulated firms will need to consider guidance issued by member states on lower risk categories and they will then have to decide whether each customer relationship or transaction presents a low risk."[6] FATF recommends improvement of transparency noting a lack with respect to some of the participants in particularly when it comes to electronic transfers. FATF also state that there is a room for improvement in international cooperation

[4] Designated Non Financial Businesses and Professionals
[5] See FATF website for more information at: http://www.fatf-gafi.org/documents/riskbasedapproach/
[6] Available at http://www.cliffordchance.com/publicationviews/publications/2013/02/the_eu_4th_moneylaunderingdirectivethene.html

and calls for enhanced international cooperation between government agencies, between financial groups and more effective exchanges of information, tracing of, freezing of, confiscation of and repatriation of illegal assets. FATF further calls for identification of clear operational standards for Financial Intelligence Units including a range of investigative techniques and powers which should be available to them. The Recommendations extended the list of predicate offences for money laundering to specifically include tax crimes. Last but not least the Recommendations focus on corruption and politically exposed persons, extending the definition of the latter to nationals. FATF has announced that it will start to check that their Recommendations are being implemented from the end of 2013.[7]

On a broader European level, the Council of Europe is also working towards a comprehensive approach against ML through its Conventions, in particular, the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[8] and the 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[9]. In 1997, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) was established. Its functioning was regulated by the general provisions of Resolution Res(2005)47 on committees and subordinate bodies, their terms of reference and working methods. On 13 October 2010, the Committee of Ministers adopted the Resolution CM/Res(2010)12 on the Statute of MONEYVAL which as of 2011 elevates the body to an independent monitoring mechanism within the Council of

[7] In February 2013 FATF issued its new methodology for assessing technical compliance with the new FATF Recommenations and the effectiveness of anti-ML systems sets out. FATF will use this new methodology in the assessments that start at the end of 2013 to determine whether a country is sufficiently compliant with the 2012 FATF standards and whether its anti-ML system is working effectively. In addition to the effective implementation of the Recommendations in the national legal framework the new methodology focuses on systematic assessment of the effectiveness of the systems in place in each country.
[8] CETS No 141
[9] CETS No 198

Europe. MONEYVAL's role is to assess compliance with all relevant international standards and provide recommendations on ways to improve the effectiveness of domestic regimes to combat ML and terrorist financing.

EU Policy Initiatives

The Tampere European Council, in October 1999, asked for further measures to make action against ML more effective, such as the approximation of definitions, incriminations and sanctions or full mutual legal assistance in the investigation and prosecution of this type of crime.

The Hague Program[10] and Council and Commission Action Plan implementing The Hague Programme on strengthening freedom, security and justice in the EU made further progress in developing the discussed field.[11] The Action Plan notes that the EU should join the Council of Europe Convention against money laundering and terrorist financing and notes the need to implement a second review based on Article 6 of the Council Framework Decision (FD) 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.[12]

The Stockholm Program[13] further dealt with the issue of ML noting that there is a need to further develop information exchange between the Financial Intelligence Units (FIUs), in the fight against ML. "*Within the framework of the European Information Management System, their (i.e. FIUs) analyses could feed a database on suspicious transactions, for example, within Europol*". It further noted that the EU "*will cooperate regionally or bilaterally as appropriate. The*

[10] OJ C 236, 24/9/2005.
[11] OJ C 198, 12/08/2005 P. 1-22
[12] OJ L 182, 26/06/2001 P. 1-2
[13] OJ C 115, 4/5/2010 P. 1–38

dialogue with Latin-American and Caribbean countries, on migration, drugs trafficking, ML and other fields of mutual interest should be pursued within the regional framework (EU-LAC) and within the framework of the FATF. Work will have to continue with the Central Asian countries along the trafficking routes to Europe."

The Action Plan implementing the Stockholm Program[14] envisages that the European Commission needs to make a legislative proposal updating the European criminal law framework on ML. On 25 October 2011, the European Parliament called the Commission to provide general framework for criminalisation of ML. In a letter to the European Parliament of 12 September 2012, President Barroso included actions to combat money laundering among the measures to be set out in the Commission's Work Program. He noted that the specific objectives are to "*impose effective and proportionate criminal penalties applied consistently throughout the EU"* and "*facilitate judicial and police cross-border cooperation and investigations."*

This is aligned with the strategic objectives of the Commission in the "Our vision for a coherent and consistent EU Criminal Policy by 2020" section of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law,[15] which reads that *"[i]n fields of EU policy where there is an identified enforcement deficit, the Commission will assess the need for new criminal law measures based on an evaluation of the enforcement practice and in full respect of fundamental Treaty principles such as subsidiarity and*

[14] COM(2010) 171 final, 20/04/2010
[15] COM(2011) 573 final

proportionality. This concerns notably the protection of the functioning of the financial markets, the protection of the financial interests of the EU, the protection of the euro against counterfeiting, serious infringements of road transport rules, serious breaches of data protection rules, customs offences, environmental protection, fisheries policy and internal market policies to fight illegal practices such as counterfeiting and corruption or undeclared conflict of interests in the context of public procurement."

EU Legislative Initiatives

As in many other areas under the Justice, Liberty and Security rubric, in developing its anti-ML policy the EU built on the existing international instruments and Council of Europe conventions, in particular, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. For example, on 3 December 1998, the Council of the EU also adopted a Joint Action 98/699/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime which called on the Member States to ratify the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in a uniform manner.

The EU has also adopted 3 directives in the field of anti-ML. The first Directive to be adopted was Directive 91/308/EEC of 10 June 1991 on the Prevention of the use of the financial system for the purpose of Money Laundering (repealed); followed by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 on the prevention of the use of the financial system for the purpose of money laundering (repealed);[16] and lastly,

[16] The Directive widened the definition of ML by broadening the range of underlying offences.

the Anti-ML Directive currently in force - Directive 2005/60/EC of the European Parliament and of the Council 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist as amended by Directive 2008/20/EC.[17] As a member of FATF, the European Commission will act to incorporate the new standards into existing EU legal framework.

The latest Anti-Money Laundering Directive was also set to incorporate FATF standards. The Directive is applicable to the financial sector and DNFBPs, such as lawyers, notaries, accountants, real estate agents, casinos, precious stone and metal dealers and company service providers.[18] It also covers all providers of goods, if payments are made in cash exceeding €15 000. The Directive obliges them to identify and verify the identity of their customer and of its beneficial owner, to monitor the transactions of and the business relationship with the customer; to report suspicions of money laundering or terrorist financing to the public authorities - usually, the FIU; and to take supporting measures, such as ensuring the proper training of the personnel and the establishment of appropriate internal preventive policies and procedures. The Directive, furthermore, introduces additional requirements and safeguards for situations of higher risk.

The 3rd Anti-Money Laundering Directive already covers some of the recommendations that are found in the 2012 amended FATF Recommendations. Nevertheless, on 5 February 2013, Commissioner Michel Barnier introduced the proposal for the 4th Anti-Money Laundering Directive. The proposal echoes the

[17] OJ L333, 9.12.1998, p.1. The Joint Action was amended by Framework Decision 2001/500/JHA.
[18] European Commission DG Internal Market and Services – Budget commissioned a special study on the Application of the Anti-Money Laundering Directiveprepared by Deloitte (Service Contract ETD/2009/IM/F2/90) (the Deloitte Report) which has as one of its focus areas a specific examination of the impact of the AML Directive on the independent legal professionals and on other legal professionals providing similar services with regard to the corporate sector, the real estate sector and the financial intermediation sector (i.e. DNFBP).

risk-based approach for countries - as part of the process the Commission will ask the European Supervisory Authorities to carry out EU-wide risk assessment for their industries within two years.

In response to the call for transparency of ultimate beneficial owners in the FATF Recommendations, legal persons will have to make available ultimate ownership details to competent authorities and "obliged entities".

The proposed directive will also cover the revised standards on international cooperation between authorities, operational standards for law enforcement and Financial Intelligence Units, and the call for inclusion of serious tax crimes as predicate offense to ML. The 4th Anti-ML Directive intends to broaden the scope of Recommendations 24 and 25 on DNFBPs to "providers of gambling services", instead of only casinos and proposes lower thresholds for reporting and due diligence requirements on goods traders - EUR 7 500 and EUR 2 000 for gambling as opposed to EUR 15 000 and EUR 3 000 for gambling in the FATF guidelines.

The proposed 4th Anti-Money Laundering Directive also introduces some novelties not provided for in the FATF Recommendations. Such are the harmonisation of sanctions for violations of the provisions in the Directive - specific minimum sanctions for breach of Anti-ML requirements have been outlined, - up to EUR 5 million for individuals and up to 10% of annual turnover for legal persons and removal of 3rd country equivalence measure, replacing them with exemptions through the risk-based approach. It also deals with data privacy and transposition. As can be seen from the proposed 4th Directive it addresses the

issue of punishments within a limited scope imposing more stringent rule in comparison with earlier legislation.

In the broader sense, the EU's steps to implement FATF Recommendations and strengthen the regime in the ML field cover several Directives and Regulations, such as:

- The proposed Regulation on information accompanying transfers of funds, Regulation (EC) No 1889/2005 of 26 October 2005 on controls of cash entering or leaving the Community;
- Directive 2007/64/EC of 13 December 2007 on payment services in the internal market;
- The proposed Directive 2012/036/EC on the freezing and confiscation of proceeds of crime. Directive 2006/70 containing a number of implementing measures with respect to Politically Exposed Persons, simplified customer due diligence procedures and limited exemptions;
- Regulation 1781/2006, which ensures traceability of transfers of funds by requiring information on the payer to accompany transfers of funds for the purposes of the prevention, investigation and detection of ML and terrorist financing;
- Regulation 1889/2005 on controls of cash, which requires persons entering or leaving the EU to declare cash sums they are carrying if the value amounts to €10 000 or more;
- EU Council Decision 2000/642 concerning arrangements for cooperation between financial intelligence units of the Member States in respect to exchanging information.

What is at stake – the problem definition

Under Article 6 of the Council FD 2001/500/JHA, the Commission has to establish a written report on the measures taken by the Member States to comply with it. The first assessment by the Commission in 2004 concludes that although all Member States have criminalised money laundering in line with the existing international instruments, there are significant differences in the scope of the crime and the sanctions.[19]

A Deloitte Report[20] states that "in general, we have not detected important issues with regard to the transposition of the [3rd] Directive". The same report notes that with regard to implementation practices, the following horizontal issues were identified by stakeholders: different interpretations as regards certain definitions; practical implementation difficulties due to, amongst others, a lack of public reference databases with information on politically exposed persons or beneficial owners; implementation problems for small practices; cost of compliance. A clear need for additional guidance was formulated, specifically by the non-financial professions (i.e. DNFBP).

In the section of the abovementioned report that reviewed Article 2 of the FD dealing with penalties, the Commission noted that "in a broad sense it can be said that most Member States have succeeded in meeting the obligation imposed by Article 2: money laundering offences to be punishable by terms of imprisonment, the maximum being not less than 4 years. However, the implementation itself is quite heterogeneous, and in this sense, two basic systems can be distinguished: those that fully comply with this requirement, and those that

[19] COM/2004/0230 final

[20] See Deloitte Report to the European Commission, DG Internal Market and Services – Budget, Final Study on the Application of the Anti-Money Laundering Directive, Service Contract ETD/2009/IM/F2/90

comply with the required penalty only in cases of aggravated or serious ML". [21] [22] Although all MS, which provided the Commission with information on implementation, meet the terms of the FD, their approach differs. This, in turn, demonstrates that the system allows for a wide margin of judicial discretion in assessing the seriousness of the offence or in deciding whether to impose deprivation.

A good example supporting the general observation of substantial leeway is the analysis of the transposition of Article 3 of the FD, dealing with value confiscation. There are two main confiscation approaches - property confiscation of the proceeds of an offence and value confiscation, which is based on the assessment of the value of the proceeds. Article 3 of the FD which is based on former Article 1, paragraph 2 of the above mentioned Joint Action, strives to introduce value confiscation as an option. However, Member States are allowed to exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4 000.

Staying on the confiscation subject, the assessment of the Commission demonstrates the diversity of national approaches among EU Member States. The UK, for example, applies the Proceeds of Crime Act 2002, which has a confiscation regime based on the concept of "criminal lifestyle". To fall in that category the offender must have committed acquisitive offences such as drug trafficking, money laundering or counterfeiting. The defendant is also deemed to

[21] Penalties was a matter that was not covered in the 1998 Joint Action and which aimed at ensuring a minimum harmonisation of penalties for some of the ML offences mentioned in the 1990 Council of Europe Convention.

[22] Similarly in the Deloitte Reports which reads that "[m]ost Member States have implemented in one way or another one or more measures that are stricter than required by the Directive. These stricter measures relate to many different topics and mapping is difficult because the qualification of "stricter" differs. The diversity in implementation of stricter measures can complicate cross border compliance.

have a criminal lifestyle if he/she has been convicted of any other offence that forms part of a course of criminal activity, or that was committed over a period of at least 6 months, and has obtained relevant benefit of not less than GBP 5 000. In the Netherlands, in addition to confiscation of objects, forfeiture may be imposed as a separate penalty. In Luxembourg, current legislation provides for value confiscation only and exclusively for drug trafficking and money laundering offences. Spain allows property-based confiscation only.

Considering upcoming Croatian EU membership, one should note that main laws in Croatia in the anti-ML field are the Anti-Money Laundering and Terrorism Financing Act, Penal Code, Liability of Legal Entities for Criminal Offences Act, Criminal Procedure Code and Act on the Office of Suppression of Corruption and Organized Crime. It should be noted that in October 2011 Croatia adopted a new Penal Code that entered into force on January 1, 2013. The new Penal Code states that it is aligned with FD 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property and FD 2001/500/JHA. CR also has an Action Plan on the Fight against ML and Terrorist Financing that it follows and progress is reported to the EC on a regular basis.[23]

Despite the concrete issues put forward regarding the implementation of FD 2001/500/JHA, harmonization of sanctions and definitions remains a contentious issue in the EU and among Member States.

[23] Judicial statistics on confiscated property in ML cases however indicate that the efforts seem to running out of steam – there is approximately 45% decline in the monetary value of confiscated assets in such cases in 2011 in comparison to previous 2 years when the numbers remained approximately the same.

According to the Roadmap proposal to harmonize the criminal offence of money laundering in the EU dated 10/2012[24] "*there is no policy at EU level yet to address the repressive side of money laundering by harmonising this offence. The existing FD 2001/500/JHA leaves a lot of discretion to Member States in this regard*." In the Roadmap it is stated that Europol clearly sees this as an obstacle to international cooperation. However, MS are not unanimous on the matter of harmonization. According to the above mentioned Roadmap, Member States' representatives in the Committee on the Prevention of Money Laundering and Terrorist Financing have been consulted in February 2012. Out of seven Member States that expressed observations on the matter, six countries were against EU harmonisation of the ML offence: ES, LU, SE, UK, DE and CZ. Only FR's position was more open to such a discussion. On a separate note, four other Member States expressed a clear position against a EU harmonisation of the ML offence : UK, DE, FI and HU. Finally, Eurojust could not see any problems in cooperation related to this specific crime.

[24] Available at http://ec.europa.eu/governance/impact/planned_ia/docs/2013_home_006_money_laundering_en.pdf