



universität
wien

MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

“Updating the EU money laundering and terrorist financing
legislation: The ‘fourth’ EU Money Laundering Directive of 20 May
2015”

verfasst von / submitted by

Ognjan Marković

angestrebter akademischer Grad / in partial fulfilment of the requirements for the
degree of

Master of Laws (LL.M.)

Wien, 2016 / Vienna 2016

Studienkennzahl lt. Studienblatt /
Postgraduate programme code as it appears on
the student record sheet:

A 992 548

Universitätslehrgang lt. Studienblatt /
Postgraduate programme as it appears on
the student record sheet:

Europäisches und Internationales Wirtschaftsrecht /
European and International Business Law

Betreut von / Supervisor:

Univ.-Prof. Dr. Dr. h.c. Peter Fischer

Table of Contents

List of Abbreviations.....	4
1. Introduction	7
1.1 Definition of money laundering and terrorist financing.....	7
1.2 The International community and fight against money laundering and terrorist financing.....	11
1.2.1 United Nations	11
1.2.2 FATF	12
1.2.3 Council of Europe.....	13
2. The history of the AML/CTF fight in the EU	15
2.1 Introduction to the AML/CTF measures	15
2.2 The First Directive	16
2.3 The Second Directive	18
2.4 The Third Directive.....	19
2.5 Other relevant measures complementing the AML/CTF regime	23
3. Reasons and goals for the amendment of the Third Directive	27
3.1 Assessment of the EU Commission	27
3.2 Problem drivers identified by the EU Commission.....	29
3.2.1 Inconsistency with the international rules and standards	29
3.2.2 Unequal application of the present AML/CTF measures.....	32
3.2.3 The EU AML/CTF measures: loopholes and inadequacies	34
3.3 Some conclusions of the EU Commission.....	35
4. The Fourth Directive and the most important modifications	37
4.1 Introduction	37
4.2 The main changes introduced by the Fourth Directive	37
4.2.1 Broadening the scope of the Fourth Directive: ratione personae	38
4.2.2 Broadening the scope of the Fourth Directive: ratione materiae.....	39
4.2.3 Risk assessment and customer due diligence	40
4.2.4 Financial intelligence units	46
4.2.5 Sanctions	46
4.2.6 Data protection	48
4.2.7 Beneficial Ownership	49

4.2.8	Proposed amendments of the Fourth Directive	50
5.1	On the effectiveness of AML/CTF legislation	53
5.2	Data protection and AML/CTF: a thin borderline	55
5.3	Increasingly important role of ‘for-profit’ actors in AML/CTF enforcement	57
5.4	Concerns regarding the impact on the rule of law	59
5.	Conclusion	63
6.	Bibliography	66
7.1	Treaties	66
7.2	EU legal acts	66
7.3	Cases	68
7.4	Commission Documents	69
7.5	Books and Contributions in Books	70
7.6	Articles	71
7.7	E-sources	73
7.7.1	Documents	73
7.7.2	Weblogs	74
Annex 1	English Abstract	75
Anhang 2	Deutscher Auszug	76

List of Abbreviations

AML	Anti-Money Laundering
BO	Beneficial Owner
CDD	Customer Due Diligence
CJEU	European Court of Justice
CTF	Counter Terrorist Financing
Cash Control Regulation	Parliament and Council Regulation (EC) No 1889/2005 of 26 October 2005 on controls of cash entering or leaving the Community [2005] OJ L309/9
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedom as amended (signed 4 November 1950, entered into force 3 September 1953) CETS 5
EBA	European Banking Authority
EDD	Enhanced Due Diligence
EU	European Union
FATF	Financial Action Task Force
FATF Recommendations	FATF Recommendations adopted on 16 February 2012
First Directive	Council Directive (EEC) 91/308 of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L 166/77
FIU	Financial Intelligence Unit

Fourth Directive	Parliament and Council Directive (EU) 2015/849 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 [2015] OJ L 141/73
Fourth Directive amendment proposal	Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and amending Directive 2009/101/EC' COM (2016) 450 final
Implementation Directive	Commission Directive (EC) 2006/70/ of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis [2006] OJ L 214/29 (the Implementation Directive)
Information on Transfer of Funds Regulation	Parliament and Council Regulation (EU) 2015/847 of 20 May 2015 on information accompanying transfer of funds and repealing Regulation (EC) No 1781/2006 [2015] OJ L141/1

KYC	Know Your Customer
Payer Information Regulation	Parliament and Council Regulation (EC) No 1781/2006 of 15 November 2006 on information on the payer accompanying transfers of funds [2005] OJ L345/1
PEPs	Politically Exposed Persons
RBA	Risk Based Approach
Second Directive	Parliament and Council Directive (EC) 2001/97 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 L 344/76
SDD	Simplified Due Diligence
TFEU	Treaty on the functioning of the European Union
TEU	Treaty on the functioning of the European Union
Third Directive	Parliament and Council Directive (EC) 2005/60/ 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 L 309/15
UN Drugs Convention	Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances (signed 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95
Wire Transfer Regulation	Parliament and Council Regulation (EU) 2015/847 of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006 OJ L141/1

1. Introduction

1.1 Definition of money laundering and terrorist financing

During the last four decades sophisticated forms of transnational or cross-border crime activity such as international drugs trafficking, illicit migration and illicit arms trafficking have become a major concern and threat for governments and the public.¹ These new forms of transnational crime were facilitated through technological developments such as mass communications, modern banking techniques, but also other factors like enhanced personal mobility and liberalization of markets in general were of importance.²

It became apparent that national legislation was no longer sufficient to tackle these new forms of transnational crime and that international collaboration became essential.³ Secondly, it became obvious that legislation must be enacted to target the financial proceeds (dirty money) of these crimes and ‘which both criminalizes and counters the process known as money laundering’.⁴

Money laundering is the term generally used to describe the process by which illicit or criminal proceeds from e.g. drugs, fraud, illegal arms trafficking or other crimes are being sanitized – in other words bringing these proceeds back to the legal economy- by disguising and hiding their illicit origins and to make these proceeds appear as legitimate.⁵ Money laundering is based on and requires ‘per se’ another crime, which is

¹ W C Gilmore, *Dirty Money: The Evolution of Money Laundering Counter-Measures* (3rd edn, Strasbourg Council of Europe Publishing 2004) 13.

² *ibid.*

³ *ibid.*; Savona Ernesto U and Manzoni Francesca, *European money trails* (Harwood Academic Publishers 1999) 6.

⁴ Gilmore (n 1) 20.

⁵ See for example, B Unger, ‘Money Laundering from Al Capone to Al Qaeda’ in Unger B and van der Linde D E (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013) 19; Gilmore (n 1) 20; Kathleen A Lacey and Barbara Crutchfield George ‘Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms’ (2003) 23 *Northwestern Journal of International Law & Business* 263, 267; Savona and Manzoni (n 3) 2.

commonly referred to as the ‘predicate offense’.⁶ In the money laundering fight, the list of predicate offenses is continuously expanding.⁷

Persons involved in such actions will endeavor to conceal the true nature of their gains and present them as legitimate proceeds. Allowing such ‘dirty money’ to freely flow into and throughout the market can have very detrimental effects on the society in general.⁸ Anyhow, the term ‘money laundering’ is rather misleading as it doesn’t concern solely money, but also illicit property/assets of any type and encompasses a variety of illegal economic activities.⁹

Although, the term ‘money laundering’ is rather recent, the idea behind it namely trying to conceal illicit proceeds from crime is of course much older and has a long standing and tradition¹⁰. Indeed:

from the point of view of the criminal, it is no use making a large profit out of criminal activity if that profit cannot be put to use [...] If this is to be done without running an unacceptable risk of detection, the money which represents the original crime must be ‘laundered’; put into a state in which it appears to have an entirely respectable provenance¹¹

Money laundering is not considered as a single act but rather as a process or as a sequence of different steps or actions in order to hide the criminal origin of capital or other assets.¹² These phases are commonly defined in the literature as (i) placement (the dirty money enters the financial system), (ii) layering (creating different and complex transactions to hide the source and separate the illicit income from its source by disguising the money-trail) and finally (iii) the integration of the dirty money in the

⁶ Esther Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing 2012) 149.

⁷ Norman Mugarura ‘The Institutional Framework Against Money Laundering and its Underlying Predicate Crimes’ (2011) 19 *Journal of Financial Regulation and Compliance* 174, 180-181.

⁸ Commission, ‘Commission staff working document Impact assessment’ (Accompanying the document 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, including terrorist financing and Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfer of funds) SWD (2013) 21 final, 8. (‘Commission Staff Working Paper’).

⁹ K Hinterseer, *Criminal Finance, The Political Economy of Money Laundering in a Comparative Legal Context* (The Hague, Kluwer Law Publishing, 2002) 101.

¹⁰ Gilmore (1) 29 and Unger, ‘Money Laundering from Al Capone to Al Qaeda’ (n 5) 19.

¹¹ J D Mclean, *International Judicial Assistance*, Oxford University Press 1992, 184; Gilmore (n 1) 29.

¹² Gilmore (n 1) 32; Savona and Manzoni (n 3) 3.

clean economy.¹³ The determinants and intricacy of this threefold scheme depend on many factors such as the complexity of the criminal organization, the typology of the crime and its infiltration/connection with the legal economy, volume of the transactions, the technology used e.g. internet and sometimes even ‘collusive relationships between criminal organizations and financial institutions or administrative authorities’.¹⁴

The legislative interest of governments in combatting the money laundering phenomenon is relatively new and is explained by the following two major reasons: firstly, increasing recognition of the vast amounts of dirty money and secondly, the negative impact of these financial streams on the economy and stability of the financial system.¹⁵ There is currently no reliable methodology or calculation method available to make accurate estimates on the amounts of money involved but in the literature estimates can be found going from US\$ 85 billion to 500 billion¹⁶ or even as large as 2-5% of the world’s GDP. According to the former IMF Director Camdessus ‘two to five percent of global [gross domestic product] would probably be a consensus range’.¹⁷

It is obvious and critical that any efficient and effective AML strategy and enforcement thereof, requires close international collaboration: this flows from the ‘international and cross-border nature’ of the crime itself.¹⁸

The EU and its Member States have been from the onset an active promotor and participator in various international and regional anti-money laundering legislative initiatives.¹⁹ The most important ones include the United Nations Convention on drugs trafficking (1988), the anti-money laundering convention of the Council of Europe (1990) and the participation in the FATF, an intergovernmental body formed by the G7

¹³ *ibid*; Demetis Dionysios S, *Technology and Anti-Money Laundering A Systems Theory and Risk-Based Approach* (Edward Elgar Publishing 2010) 10.

¹⁴ Valsamis Mitsilegas, *Money Laundering Counter-measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles* (Kluwer Law International 2003) 25.

¹⁵ Savona and Manzoni (n 3) 6; Gilmore (1) 21-22.

¹⁶ Gilmore (n 1) 21; Unger, ‘Money Laundering from Al Capone to Al Qaeda’ (n 5) 21;

¹⁷ Address at the Plenary Meeting of the Financial Action Task Force, ‘Money Laundering, ‘Money Laundering: The Importance of International Countermeasures’ (Paris, 10 February 1998) <<http://www.imf.org/external/np/speeches/1998/021098.htm>> accessed 17 March 2016.

¹⁸ Gilmore (n 1) 22.

¹⁹ Valsamis Mitsilegas and Bill Gilmore, ‘The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards’ (2007) 56 *International and Comparative Law Quarterly* 119.

to establish international standards and recommendations concerning AML measures.²⁰ The international standards elaborated by the FATF have been very influential for the development of subsequent EU policies and directives in the field of AML and CTF legislation as I will further develop in this master thesis.²¹

The terrible events of 11 September 2001 and its ensuing ‘war on terrorism’ have made clear that there are significant similarities between the dynamics, goals and processes used in money laundering and terrorist financing and that both have become a combined agenda.²² Indeed, terrorist organizations need to finance themselves and at some stage money laundering techniques will be used in order to support and sustain their terrorist actions and plans.²³

In its response to these events the EU adopted the Council Framework Decision 2002/475/JHA on combating terrorism, which explicitly requests Member States to criminalize terrorist acts but also to punish ‘financially’ helping or facilitating terrorist organizations or acts.²⁴ It is fair to say that the fight against terrorist financing has been merged with the anti-money laundering legislation in the EU with the adoption of the Third Money Laundering Directive of 2005²⁵, while on the international level this happened after the 11 September 2001 attacks by Al-Qaeda on the United States.²⁶

Money laundering or terrorist financing are major threats to the soundness and proper operation of the financial system and subsequently to the whole idea of the single market in the EU. As Herlin-Karnell rightly notices, the goal of the suppression of ‘dirty money’ has been motivated by a bigger scale objective, namely to create the single

²⁰ Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances (signed 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95; Convention on laundering, Search, Seizure and Confiscation of the Proceeds of Crime (signed 8 November 1990, entered into force 1 September 1993) CETS 141; Mitsilegas and Gilmore (n 19) 119, 119; Gilmore (n 1) 89-90.

²¹ Mitsilegas and Gilmore (n 19) 119.

²² Gilmore (n 1) 12; Bruce Zagaris ‘The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes after September 11, 2001’(2004) 22 Berkely Journal of International Law 123, 124.

²³ Gilmore (n 1) 22.

²⁴ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L 163/4, art 4 (1).

²⁵ Parliament and Council Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L309/15 (‘Third Directive’)

²⁶ Zagaris (n 22) 123, 124.

market in service of all EU citizens, with the fight against money laundering being one of its ‘walls of protection’.²⁷

1.2 The International community and fight against money laundering and terrorist financing

Several intergovernmental organizations but also non-state actors played a crucial and decisive role in the genesis of AML/ CTF legislation and enforcement regimes through international conventions, recommendations, standards and by establishing a framework for international collaboration, which is essential for addressing these transnational forms of crime.²⁸ The most pertinent of these organizations are the United Nations, the Council of Europe and the FATF. One can qualify the relationship between these international initiatives and the EU’s own AML and CTF legislation as ‘symbiotic’: the EU tries to keep up with these standards and regulatory frameworks and sometimes even wants to go further.²⁹ Nonetheless, it must be noted that one event, more than two decades after the start of the ‘war on drugs’, the September 11 attacks in 2001 by Al-Qaeda on the United States was the turning point in the international fight against money laundering and terrorist financing, resulting in a much stricter set of measures than before.

1.2.1 United Nations

The United Nations played a pioneering role and was the first international organization to deal with the money laundering issue, when it adopted its 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This Convention aimed among others to ‘deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for doing so’.³⁰ The

²⁷ Herlin-Karnell (n 6) 151.

²⁸ Zagari (n 22) 123, 136; Cian C Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012) 84.

²⁹ Mitsilegas and Gilmore (n 19) 119, 135; Murphy (n 28) 84.

³⁰ UN Drugs Convention, Preamble para 6.

Convention also required its signatories to criminalize money laundering and freezing and seizing the assets from individuals involved in this illicit drugs trade.³¹

Since the 11 September 2001 attacks, the UN Security Council and institutions acting under its auspices dominate the UN counter-terrorism actions, particularly the ‘Counter-Terrorism Committee’, which observes the implementation of the 1999 International Convention for the Suppression of the Financing of Terrorism and the ‘1267 Committee’ being entitled to overview the UN targeted asset-freezing sanctions regime.

³² Besides conventions and resolutions, certain bodies of the UN such as the Office on Drugs and Crime are involved in developing model legislation on topics as money laundering, confiscation of proceeds of crime and are delivering all kinds of assistance (technical, drafting legislation) to its member states for e.g. the implementation of the UN Drugs Convention.³³

1.2.2 FATF

At this point the significance and the role of the FATF and its recommendations cannot be emphasized enough.³⁴ The FATF was founded during the G7 summit in 1989 with the objective ‘to set the standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.’³⁵ The FATF issued its first 40 anti-money laundering recommendations in 1990, which were amended in 1996. After the September 11 attacks, the FATF published ‘8 Special Recommendations’. Then, in October 2004, these Recommendations were amended and a ‘Ninth Special Recommendation’ was added to the existing eight. The most recent update of the recommendations dates from 2012

³¹ Zagari (n 22) 123, 137- 138.

³² Murphy (n 28) 85.

³³ UNODC ‘On money-laundering and countering the financing of terrorism’ <<http://www.unodc.org/unodc/en/money-laundering.html>> accessed 20 March 2016; Zagari (n 22) 123, 139.

³⁴ Financial Action Task Force, ‘The 40 Recommendations’ available at <www.fatf-gafi.org> accessed 23 March 2016.

³⁵ Financial Action Task Force, ‘Who We Are’ <<http://www.fatf-gafi.org/about/>> accessed 23 March 2016.

with follow-up amendments in 2013, 2015 and 2016. The FATF uses recommendations as a ‘soft law’ concept to achieve its objectives.³⁶

The FATF regularly assesses the compliance of its members with its AML/CTF recommendations through mutual evaluation reports and also publishes reports of non-cooperating countries and territories (NCCT’s). The publication of these ‘blacklists’ (naming and shaming) can be seen as an enforcement mechanism, which has turned out to be very effective.³⁷ This is illustrated by the following example: from the twenty-three countries, which were listed as non-cooperative, twenty-two have changed their policies in order to be delisted.³⁸ It is fair to say that the FATF is the most powerful and influential ‘soft law’ body in the field of AML/CFT.

Even though the impact of the FATF is enormous, especially on the EU measures in the field of money laundering and terrorist financing, it is sometimes asserted that the FATF lacks transparency on its activities.³⁹

1.2.3 Council of Europe

The Council of Europe too has been productive in this field and has a longstanding commitment and engagement in the anti-money laundering and counter-terrorist financing area. Already in 1980 the Council made a Recommendation concerning Measures Against the Transfer and The Safekeeping of Funds of Criminal Origin.⁴⁰

After the adoption of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990⁴¹ and the Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

³⁶ Murphy (n 28) 89.

³⁷ *ibid* 90.

³⁸ *ibid*.

³⁹ Valsamis Mitsilegas, *EU Criminal Law* (Hart Publishing 2009) 313.

⁴⁰ Recommendation No (R) 80 of the Council of Ministers of the Member States on Measures Against the Transfer and The Safekeeping of Funds of Criminal Origin (27 June 1980)

⁴¹ Convention on laundering, Search, Seizure and Confiscation of the Proceeds of Crime (signed 8 November 1990, entered into force 1 September 1993) CETS 141.

of 2005, the Council became a trendsetter in the AML/CTF field.⁴² On top of that, the importance of MONEYVAL must be stressed, as a permanent monitoring body of the Council of Europe, entrusted with the task of assessing compliance with the principal international standards to counter money laundering, the financing of terrorism and the effectiveness of their implementation.⁴³

⁴² Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (signed 16 May 2005, entered into force 1 May 2008) CETS 98; Gilmore (n 1) 11.

⁴³ The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL).
<http://www.coe.int/t/dghl/monitoring/moneyval/About/About_MONEYVAL_en.asp> last accessed 1 April 2016.

2. The history of the AML/CTF fight in the EU

2.1 Introduction to the AML/CTF measures

The AML fight in the EU began with the First Directive adopted in 1991⁴⁴, which was amended by the Second Directive in 2001⁴⁵ and subsequently both were superseded and repealed by the Third Directive of 2005.⁴⁶

The fight against ‘dirty money’ is based on the ratio of protecting the functioning of the internal market. Consequently, common rules (harmonization) regarding the suppression of money laundering and terrorist financing are necessary to protect the internal market. Moreover, in the absence concerted actions on the EU level, lawbreakers can take advantage and misuse the freedom of movement of persons and capital.⁴⁷

Ever since the adoption of these Directives, there were controversies regarding the definition of ‘money laundering’, especially because ‘money laundering’ is based on another crime, the so called predicate offense (or predicate crime), which functions as a trigger and gives rise to the specific money laundering offense.⁴⁸ The First and the Second Directive did not describe a list of predicate offenses, nor even the definition of a serious crime, which one would expect to be specified in these Directives in order to comply with the legality requirement of criminal law.⁴⁹ However, the Third Directive did include a clarification and defined a serious crime as one for which the potential sentence is an imprisonment penalty of minimum six months, while the exact definition of predicate offenses still remained an enigma.⁵⁰ On the other hand, some international

⁴⁴ Council Directive (EEC)91/308 of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L166/77 (‘First Directive’).

⁴⁵ Parliament and Council Directive (EC) 2001/97/EC of 4 December 2001 amending Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering [2001] OJ L344/76 (‘Second Directive’).

⁴⁶ Parliament and Council Directive (EC) 2005/60/ 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 L 309/15 (‘Third Directive’).

⁴⁷ Third Directive, recital 2; Herlin-Karnell (n 6) 147; Mitsilegas and Gilmore (n 19) 119, 136.

⁴⁸ Herlin-Karnell Ester (n 6) 149.

⁴⁹ *ibid* 149.

⁵⁰ *ibid* 149.

instruments such as the FATF 40 Recommendations comprised a non-exhaustive list of predicate offenses, among others the participation in organized criminal groups, racketeering, terrorism, including financing of terrorism, illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, corruption and bribery, fraud, counterfeiting, piracy of products, environmental crimes, smuggling and forgery.⁵¹

In general, one may state that the EU's legislative actions on money laundering are characterized by a two-pronged approach: the broadening of the criminalization of predicate offenses and the increasing use of regulatory prevention.⁵² It combines the criminalization approach of the UN, the Council of Europe and the more systematic and preventive approach of FATF.⁵³

2.2 The First Directive

The First Directive was correctly described by Murphy Cian as a 'more traditional and concise form of criminal law than the sprawling international and domestic measures that have followed'.⁵⁴ It imposed a set of reporting obligations, focusing solely on credit and financial institutions. Those duties comprised, among others: identifying customers; keeping records necessary for carrying out investigations; special focus on transactions, which may give rise to money laundering; cooperation with the authorities i.e. a duty to report suspicious transactions and non-disclosure to customers that these transactions were reported to the authorities and that an investigation is being conducted.⁵⁵

Nevertheless, the First Directive did not give any clarification as to whom this information had to be provided to by the credit and financial institutions.⁵⁶ It was yet another potential obstacle in the fight against money laundering, since the Member States in their effort to transpose the First Directive formed a variety of national

⁵¹ Magarura (n 7) 174, 180.

⁵² Mitsilegas and Gilmore (n 19) 119; Murphy Cian C (n 28) 103 and Herlin- Karnell (n 6) 150.

⁵³ Mitsilegas and Gilmore (n 19) 119.

⁵⁴ Murphy (n 28) 93.

⁵⁵ Mitsilegas and Gilmore (n 19) 119, 120.

⁵⁶ Murphy (n 28) 95.

authorities to whom these suspicious transactions should be reported. This diversity led to difficulties in the cooperation between national authorities.⁵⁷ These national authorities may be qualified as administrative or belonging to the judicial branch or even the police.⁵⁸ Needless to argue that this national diversity was not favourable for developing cooperation between the Member States: for example, a judicial body in some countries ‘may not be able to work together with an administrative body in another country’.⁵⁹

The EU Member States managed to overcome this issue by adopting the Council Decision 2000/642/JHA of 17 October 2000 on the cooperation between Financial Intelligence Units (‘FIUs’) which facilitated the exchange of information on potential money laundering cases, regardless of the legal status of the FIU.⁶⁰ Parallel to this EU effort to come up with a definition, the FIUs were also defined in the United Nations Convention against Transnational Organized Crime from 2000 as a ‘unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money laundering’.⁶¹ It is worth noting that the definition of FIUs stemmed from the Egmont group, an informal organization of national financial intelligence units formed to enhance the cooperation among its members and to facilitate the flow of information.⁶²

Besides the First Directive, the EU acting under the then third pillar adopted a separate Council Joint Action on Money Laundering⁶³ which was later replaced by a Framework Decision on Money laundering in June 2001.⁶⁴ The purpose of these two measures was to ensure compliance with the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 and

⁵⁷ Mitsilegas and Gilmore (n 19) 119, 120- 121.

⁵⁸ *ibid* 122.

⁵⁹ House of lords European Union Committee Money laundering and the Financing of Terrorism (London, The Stationery office, 2009) 22; Murphy (n 29) 95.

⁶⁰ Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information [2000] OJ L 271; Mitsilegas and Gilmore (n 19) 119, 122.

⁶¹ The United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 entered into force 29 September 2003) 40 ILM 335, art 7(1) (b).

⁶² Mitsilegas and Gilmore (n 19) 119, 122; Murphy (n 29) 96.

⁶³ Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime [1998] OJ L333/1.

⁶⁴ Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime OJ L182/1.

requesting the Member States not to make reservations against the primary articles of this Convention.⁶⁵

2.3 The Second Directive

After the first wave of EU measures in the money laundering fight and the continuous monitoring of the implementation thereof, it became soon obvious that the existing legal framework did not fit the situation anymore, especially when one takes into account the developments in information technology and the global computerization.⁶⁶ This brought along that criminals, as usually inventive and constantly looking to find new ways of committing crimes, had this whole new variety of technological means at their disposal for pursuing illegal activities. As a result, the FATF updated its 40 Recommendations in 1996, triggering the EU Commission, being a member of the FATF, to revise its money laundering legislation.⁶⁷ The adoption of the Second Directive should also be looked at from the time perspective, as it was adopted in December 2001, just three months after the Al Qaeda attacks on the United States.

Similarly to the First Directive, the adoption of the Second Directive was marked already in its drafting phase, with a debate on the scope of the measure. The disagreement among the EU institutions concerned the reporting duty of legal professions, such as but not limited to lawyers and notaries, when engaged in certain financial transactions and which would jeopardize the well-established principle of confidentiality between a lawyer and his/her client(s).⁶⁸ The solution of this issue was found in allowing the Member States, when transposing the Directive, to determine nationally how far-reaching this reporting obligation of the legal profession should be.⁶⁹ As expected, this provision of the Second Directive was subject to litigation for alleged breach of article 6 of European Convention on Human Rights in the case *Ordre des barreaux francophones v Council*.⁷⁰ It is in a way surprising that these provisions were fiercely debated and subjected to litigation, given that the Second Directive stipulated

⁶⁵ Murphy (n 28) 94.

⁶⁶ Mitsilegas and Gilmore (n 19) 119, 123.

⁶⁷ *ibid*; Murphy (n 28) 96.

⁶⁸ Herlin-Karnell Ester (n 6) 153.

⁶⁹ Murphy (n 28) 98.

⁷⁰ Case C-305/05 *Ordre des barreaux francophones and others v Council* [2007] ECR I-5305.

an exemption from this reporting duty for members of the legal profession regarding information received during any stage of judicial proceedings or in connection with legal advice rendered to a client.⁷¹ Of course, this exception was not applicable when a lawyer is participating or connected in any way to money laundering and terrorist financing or when the lawyer knows that the client is seeking advice for money laundering or terrorist financing purposes.⁷² The CJEU ruled in the aforementioned case that the Second Directive did not breach the right to a fair trial as provided for in article 6 of ECHR, stating that the reporting obligation for the legal professions does not exist if there is a direct connection to a judicial proceeding.⁷³

Primarily, the Second Directive amended the First Directive as follows: (i) it broadened the list of institutions, which have reporting duties and other obligations and (ii) it expanded the scope of AML predicate offenses. Predicate offenses now included e.g. fraud, at least serious fraud against the EU, corruption and offenses, which may generate ‘substantial proceeds’ and which are punishable by a ‘severe sentence’ of imprisonment in accordance with the criminal law of the Member State. Regrettably, what was exactly meant by ‘severe sentence’ or ‘substantial proceeds’ was not specified.⁷⁴ The next institutions and professions were subject to reporting duties: credit and financial institutions, auditors, external accountants and tax advisors, real estate agents, notaries and other independent legal professions, when engaged in certain transactions; dealers in high-value goods when the amount of the transaction exceeded EUR 15 000 and casinos.⁷⁵ Moreover, the client identification and customer due diligence procedures were clarified and broadened.⁷⁶

2.4 The Third Directive

⁷¹ Second Directive, recital 20.

⁷² *ibid.*

⁷³ Case C-305/05 *Ordre des barreaux francophones and others v Council* [2007] ECR I-5305, para 23-24; Herlin-Karnell Ester (n 6) 153.

⁷⁴ Second Directive new art 1 (e), Herlin-Karnell (n 6) 150-151; Mitsilegas and Gilmore (n 19) 119, 124.

⁷⁵ Second Directive, new art 2 (a).

⁷⁶ Second Directive, revised art 3.

In view of developments in the AML/CTF field the newly updated and revised FATF recommendations in 2003, there was not a single reason for the EU to stay behind.⁷⁷ In 2005, the EU legislators passed on the next measure: the Third Directive, which essentially merged the money laundering and terrorist financing system. This Directive reflects the changes in the international efforts to fight money laundering/terrorist financing and refers to the updated FATF recommendations and the need to be constantly in line with the evolution in these areas.⁷⁸ The new Directive made a huge shift in terms of how detailed one measure can be and focused more thoroughly on particular questions than its predecessors. Consequently, its provisions are more detailed and broader than before. Interestingly, the Directive gradually started to transfer certain competencies regarding its implementation to the private sector. Competencies which were traditionally attributed to the police or judiciary or more generally speaking to the state as a sovereign authority.⁷⁹

The major changes can be summarized in this way:

- 1) Beneficial ownership ('BO'): The First Directive imposed already customer identification obligations concerning beneficial ownership i.e. the person who ultimately stands behind an account or a transaction. The Third Directive underlines the importance of identifying the beneficial owner and provides further details on how to determine beneficial ownership.⁸⁰
- 2) Scope: The Third Directive obliges the Member States to expand the definition of criminal activity to cover all kinds of involvement in preparing or committing a serious crime, including terrorist financing.⁸¹ What is meant by a serious crime is defined in the Directive itself.⁸²
- 3) Risk-based approach ('RBA'): The most important and critical change of all is the introduction of the RBA, in contrast to the rule-based approach used in the

⁷⁷ Mitsilegas and Gilmore (n 19) 119, 125.

⁷⁸ The Third Directive, recital 5; Mitsilegas and Gilmore (n 19) 119, 125.

⁷⁹ Ganguli Indranil, 'The Third Directive: Some Reflections on Europe's New AML/CFT Regime' (2010) 29 Banking & Financial Services Policy Report 1, 12.

⁸⁰ Third Directive, art 3 (6).

⁸¹ Herlin-Karnell Ester (n 6) 152.

⁸² Third Directive, art 3 (5).

previous Directives. The old rule-based approach has shown to be outdated, stringent and not suitable for the most recent developments in the money laundering and terrorist financing area. Under the old rule-based approach, all transactions above a certain amount had to be reported and the limit was set by the authorities.⁸³ On the other hand, according to the RBA, the addressees of the Third Directive have to determine themselves whether a certain transaction poses a risk or is suspicious and will have to determine themselves whether to report it or not.⁸⁴ This RBA fundamentally recognises that not every transaction carries the same risk level of money laundering and terrorist financing and that consequently appropriate measures should be taken in accordance with the risk level *hic et nunc*.⁸⁵ However, the potential negative effects of such policy change were ‘nicely’ described by Unger when she refers to the fairy tale of the little boy and the wolf.⁸⁶ A boy repeatedly cried that a wolf was coming, which did not happen. When the wolf (a money launderer) actually appeared, no one trusted the little boy. The same can be applied to money laundering situations where financial and credit institutions report too many and unnecessary notifications about potentially suspicious transactions - because they fear penalties if they fail to notice a suspicious transaction- but this ‘strategic over-reporting’ may jeopardize the warning function of the notification system and its efficacy.⁸⁷

- 4) Customer due diligence (‘CDD’): According to the newly introduced RBA, the obliged entities of the Third Directive have to conduct a CDD process. This process must be applied, when establishing a business relation with a client, when carrying out a transaction worth more than EUR 15 000, when there is a suspicion of money laundering or terrorist financing and when in doubt of the truthfulness of information previously obtained from a customer.⁸⁸ The CDD

⁸³ Unger Brigitte, ‘Money Laundering – A Newly Emerging Topic on the International Agenda’ (2009) 5 *Review of Law & Economics* 807, 816.

⁸⁴ *ibid.*

⁸⁵ Ganguli (n 79) 1, 3.

⁸⁶ Unger Brigitte, ‘Money Laundering – A Newly Emerging Topic on the International Agenda’ (2009) 5 *Review of Law & Economics* 807, 816.

⁸⁷ *ibid.*

⁸⁸ Third Directive, art 7.

substantially comprises the following elements: identification of the customer; obligation to have information on the underlying business transaction; identification of the beneficial owners of the customers and measures to update the customer identification and eventually discontinue the business relationship.⁸⁹ Besides this general CCD procedure there are also simplified ('SDD') and enhanced ('EDD') due diligence processes possible. This layering of CDD processes results from the risk-based approach and prevents financial institutions and other involved professionals to become 'overburdened with administrative tasks'.⁹⁰ SDD gives the possibility, unless there is a suspicion of money laundering or terrorist financing, to leave certain legal and natural persons out of the scope of the Third Directive, such as but not limited to credit and financial institutions, when they act as a customer.⁹¹ The EU Member States may allow SDD in certain well defined cases:⁹² (1) listed companies whose securities are being traded on a stock exchange market and (2) owners of pooled accounts held by public notaries and domestic public authorities.⁹³ In other cases, where there is a 'higher risk' EDD must be applied. The Directive mentions the following high risk situations: (1) when the customer is not physically present for identification purposes; (2) in respect of cross-frontier banking transactions with respondent institutions from third countries in order to prevent the usage of 'shell' banks and (3) regarding politically exposed persons (PEPs).⁹⁴

- 5) Reporting obligations: Murphy Cian justly characterized the relationship between the reporting obligations and the customer due diligence as follows 'customer due diligence is one half of the financial surveillance regime. The reporting obligations in Chapter III of the directive are the other'.⁹⁵ The Third Directive imposes reporting obligations on the obliged entities, they must e.g. report suspicious transactions to the FIUs. These units are entitled to maximally

⁸⁹ *ibid*; Third Directive, art 8.

⁹⁰ Mitsilegas and Gilmore (n 19) 119, 127.

⁹¹ Third Directive, art 11(1).

⁹² *ibid* art 11 (2).

⁹³ *ibid*.

⁹⁴ *ibid* art 13 (2), 13 (3) and 13 (4).

⁹⁵ Murphy (n 28) 102.

access national databases, although there are no specific data protection rules set out in the Directive which would accompany these competencies and prevent personal data from being used for other purposes than fighting money laundering and terrorist financing.⁹⁶ The tasks of the FIUs are spelled out in article 21 of the Third Directive and are identical to the ones defined in the already mentioned Council Decision of 2002, the only addition being the coverage of terrorist financing.⁹⁷ Regarding the reporting obligations, persons and institutions covered (obliged entities) shall not disclose to their clients the fact that information on their suspicious transactions has been transferred to the FIU.⁹⁸ Nevertheless, in article 28 (6) of the Third Directive an exemption is made regarding lawyers and other legal professions, when they are engaged in dissuading their clients from being part of an illegal activity.⁹⁹

2.5 Other relevant measures complementing the AML/CTF regime

In conjunction with its core AML/CTF legislation, the EU has adopted other associated or flanking measures, meant to complement the AML/CTF Directives. These measures had or still have a secondary, but very important role in satisfying all the requirements set up by the international community and especially the FATF standards, with which the EU has to comply in order to have the best possible defensive mechanisms.¹⁰⁰ These measures are complementary and hence, they have to be read in correlation with the core AML/CTF regime in the EU as its inseparable part.

⁹⁶ Mitsilegas and Gilmore (n 19) 119, 127.

⁹⁷ Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information [2000] OJ L 271; Murphy (n 28) 102.

⁹⁸ Third Directive, art 28.

⁹⁹ Mitsilegas and Gilmore (n 19) 119, 128.

¹⁰⁰ *ibid* 130.

Firstly, Directive 2006/70/EC ('Implementation Directive') should be discussed ¹⁰¹, which implements specific measures in relation to PEPs, SDD for public authorities and the exemption of becoming an obliged entity under the Directive:

- 1) PEPs: The Third Directive acknowledged already that persons involved in public life and holding prominent public positions, especially those coming from corruption prone countries, may create a risk that justifies a special regime.¹⁰² History thought us -indeed- that PEPs can be involved in fraudulent transactions and businesses, mostly when it comes to managing huge sums of international aid or privatizations.¹⁰³ Moreover, PEPs can be used as a means to transfer illicit funds through their relatives or associates by establishing companies in off-shore jurisdictions¹⁰⁴. This was exactly the way PEPs were defined in the Third Directive: persons holding a prominent public function but also covering close family members and associates.¹⁰⁵ The Implementation Directive defines and clarifies in detail who will be considered as a PEP and makes reference to associates and relatives;¹⁰⁶
- 2) Public Authorities: The Implementation Directive identifies some public bodies and authorities, who represent a low-risk to money laundering or terrorist financing and where SDD may be applied i.e. the European Union institutions, bodies and agencies, which are entrusted with any public function according to the EU legislation;¹⁰⁷
- 3) Occasional activities: The Implementation Directive specifies when financial activities conducted by a natural or legal person are considered as occasional or conducted on a very limited basis and therefore being outside of the scope of the Third Directive.¹⁰⁸

¹⁰¹ Commission Directive (EC) 2006/70 of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis [2006] OJ L 214/29 ('Implementation Directive').

¹⁰² Third Directive, recital 25.

¹⁰³ Ganguli (n 79) 6.

¹⁰⁴ *ibid.*

¹⁰⁵ The Third Money Laundering Directive, art 3 (8).

¹⁰⁶ Implementation Directive, art 2.

¹⁰⁷ *ibid* art 3 (1).

¹⁰⁸ *ibid* art 4.

Secondly, Regulation 1889/2005 on controls of cash entering or leaving the Community is also part of these flanking measures ('Cash Control Regulation').¹⁰⁹ The Cash Control Regulation finds its rationale in the introduction of a money laundering prevention system in the EU, criminals will now try to find other ways to transfer illicit proceeds and cash transfers might be one of them.¹¹⁰ Further, the Regulation recognizes the importance of FATF Recommendations, especially relying on the Special Recommendation IX of 22 October 2004, which deals with physical cash movements.¹¹¹ Therefore, a threshold of EUR 10 000 is set up and every person entering or leaving the Community must declare any amount surpassing it.¹¹² The Cash Control Regulation gives a very broad definition of cash, aiming at covering a vast number of instruments being used as a means of payment.¹¹³

Thirdly, in 2006, the Council and the Parliament adopted another Regulation on information on the payer accompanying transfers of funds ('Payer Information Regulation').¹¹⁴ The Payer Information Regulation in its recitals explicitly stresses the relevance of the FATF Special Recommendation VII on wire transfers and the importance of having information on the identity of the payer because of the possibility that money launderers and terrorist financiers could take advantage of the free movement of capital.¹¹⁵ Evidently, information on the payer (e.g. identity) is a very valuable instrument in tracking down and inquiring into a possible money laundering or terrorist financing case.¹¹⁶ Further, the Regulation admits that certain transactions pose a very low risk of money laundering or terrorist financing and thus should be exempted from the scope of the Regulation, such as but not limited to credit or debit cards, automated teller machine (ATM) withdrawals and direct debits.¹¹⁷ More specifically, the Payer Information Regulation provides that the information about the payer must consist of his name, address and account number, while the address can be substituted with other

¹⁰⁹ Parliament and Council Regulation (EC) No 1889/2005 of 26 October 2005 on controls of cash entering or leaving the Community [2005] OJ L309/9 ('Cash Control Regulation').

¹¹⁰ *ibid* recital 2.

¹¹¹ *ibid* recital 4.

¹¹² *ibid* art 3.

¹¹³ *ibid* art 2.

¹¹⁴ Parliament and Council Regulation (EC) No 1781/2006 of 15 November 2006 on information on the payer accompanying transfers of funds [2006] OJ L345/1 ('Payer Information Regulation').

¹¹⁵ *ibid* recital 2.

¹¹⁶ *ibid* recital 6.

¹¹⁷ *ibid* recital 9.

data as defined in the Regulation.¹¹⁸ As a way to derogate from this provision and to facilitate payments, it is possible that transactions within the Community be only accompanied with the account number of the payer or other information, which identifies the payer without any doubt.¹¹⁹ On the other hand, transactions outside of the Community must be accompanied with the full information on the payer.¹²⁰ Other provisions deal with the situation where there is a lack of information on the payer and where the service provider of the payee shall either reject the transfer or inquire for the additional information in order to identify the payer.¹²¹ The service providers must keep records of all transactions for a period of 5 years.¹²²

¹¹⁸ *ibid* art 4.

¹¹⁹ *ibid* art 6.

¹²⁰ *ibid* art 7.

¹²¹ *ibid* art 9.

¹²² *ibid* art 11.

3. Reasons and goals for the amendment of the Third Directive

3.1 Assessment of the EU Commission

Creating a perfect system or at least attempting to create one, especially in the legislative area, does not only consist of adopting certain measures, but also closely supervising the implementation and effectiveness thereof. Consequently, it seemed as a natural move that the EU Commission was interested in evaluating the effectiveness of its earlier AML/CTF measures. Thus, five years after the adoption of the Third Directive the EU Commission started to pave the way for the next measure. Firstly, in December 2010 the EU Commission published a study, conducted by the Deloitte, on the application of the Third Directive.¹²³ Secondly, the Commission initiated a broad consultation process, involving public authorities, civil society representatives, the business sector, the real estate sector, liberal professions and several other interest groups, all this resulted in a report on the application of the Third Directive.¹²⁴ On the top of that, the FATF, as one of the EU's main role-models updated its recommendations again in February 2012, signaling to the EU Commission that the circumstances have changed and that the Commission should start reviewing its legislation.

As in the previous AML/CTF measures, the EU Commission's proposal for the new Fourth Directive outlined the strong connection between money laundering and terrorist financing with the protection and functioning of the internal market.¹²⁵ The Commission apparently considers the AML/CTF regime as one of defense lines of the internal market, contributing to the protection from criminality and economic development. Even so, the AML/CTF regime established a set of objectives which are meant 'to contribute to financial stability by protecting the soundness, proper functioning and

¹²³ Deloitte, 'Final Study on the Application of the Anti-Money Laundering Directive' (December 2010) <http://ec.europa.eu/internal_market/company/docs/financial-crime/20110124_study_amld_en.pdf> 4> accessed 27 May 2016.

¹²⁴ Commission, 'Report from the Commission to the European Parliament and the Council on the application of the Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing' COM (2012) 168 final.

¹²⁵ 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) 45 final, 2.

integrity of the financial system.’¹²⁶ In order for these objectives not to be only unattainable wishes, the EU Commission masterminded how to achieve the desired result by ‘ensuring consistency between the EU approach and the international one; ensuring consistency between national rules, as well as flexibility in their implementation; ensuring that the rules are risk-focused and adjusted to address new emerging threats.’¹²⁷ Definitely, the EU Commission’s rationale for passing anti-money laundering and counter-terrorist financing measures lays among others in the protection of the internal market: this makes a lot of sense because the four freedoms allow everyone to move freely and to do business all over the Community. There are, however, some dissenting opinions, especially regarding the connection between terrorist financing and the internal market, or to be more precise is there any connection at all between these two?¹²⁸ Herlin-Karnell argues in this context that money laundering is in principle geared to generating profits, whilst for terrorism money is not an end but rather a means to achieve terrorist attacks and thus the connection with the functioning of the internal is at least disputable.¹²⁹

The EU Commission established in its impact assessment on the EU’s AML/CTF framework that financial systems, which are unable to successfully cope with money laundering and terrorist financing are faced with very negative economic repercussions (e.g. reduced investment, which is extremely important for the less developed EU countries) and unstable financial markets, resulting in the loss of reputation of the financial system.¹³⁰ In the same impact assessment study, the Commission distinguished three major problem drivers in the AML/CTF regime.¹³¹ These problem drivers will be discussed under the next point 3.2.

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ Herlin-Karnell (n 6) 158-159.

¹²⁹ *ibid.*

¹³⁰ Commission Staff Working Paper (n 8) 10-11.

¹³¹ *ibid* 32-33.

3.2 Problem drivers identified by the EU Commission

In its Staff Working Paper on the impact and revision of the EU's AML/CTF legal framework, the Commission identified the following three major 'problem drivers' which should be addressed by adequate operational objectives:¹³²

- Inconsistency with the international rules and standards, especially the new FATF Recommendations of 2012. Operational objective set by the EU Commission to resolve this issue: ensuring compliance with the internationally rules and standards;
- Different and unequal application of the present AML/CTF measures by the EU Member States undermines legal certainty. Operational objective set by the EU Commission to address this issue: ensuring more consistency between national rules;
- The current EU's AML/CTF system has several gaps and inadequacies. The EU Commission is of the opinion that this problem should be solved by making sure that the new Directive is more risk-based to address the new threats and to clarify certain requirements.¹³³

The 'operational results' i.e. the new legislation will be discussed under point 4, where the main features of the Fourth Directive will be outlined.

3.2.1 Inconsistency with the international rules and standards

Since the most influential organization in the field of anti-money laundering and counter- terrorist financing, the FATF, updated its recommendations in 2012, members of the FATF were triggered to amend their legislation.¹³⁴ These updates involved a wide span of novelties in many aspects: from the simplest operations like customer

¹³² Commission Staff Working Paper (n 8) 32-33.

¹³³ *ibid.*

¹³⁴ FATF 'Recommendations 2012' <<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>> accessed 3 April 2016.

identification when opening a bank account to complex issues of investigating money laundering crimes and prosecution thereof.¹³⁵

Although the recommendations of the FATF are non-binding and may be qualified as ‘soft law’ it is right to argue that the FATF uses its reputation as the most eminent and competent organization to make others comply with its recommendations and standards. Moreover, complying with the FATF standards sends a signal of a stable country, ready to attract foreign investment and as such a major goal for many countries, while on the other hand no country deliberately wants to be ‘blacklisted’ by the FATF for non-compliance with its standards and thereby suffering a loss of reputation.¹³⁶

Because of the inconsistency with the FATF standards, especially with the emphasis on the risk-based approach, it was necessary to amend the EU’s AML/CTF legislation..¹³⁷ According to the FATF, compliance with its standards and the RBA will help countries to better allocate their resources more effectively for the simple reason that each country will have establish its own national risk assessment and therefore being able to better understand its money laundering and terrorist financing risks. Therefore, countries will adopt adjustable measures and resources, which are commensurate with nature of the risk.¹³⁸ This implies that countries may have different risk assessments. Indeed, some of them are more prone to certain predicate offenses leading to money laundering or terrorist financing and therefore presenting a larger or different risk.

Hereunder I will outline the most critical inconsistencies:

- 1) The FATF included in its standards ‘tax crimes’ as a predicate offense, giving a strong signal that at least serious cases of tax crime and tax evasion, should give rise to money laundering offenses. The Third Directive did not specifically mention tax offenses.¹³⁹
- 2) The FATF Recommendations developed and promoted the RBA in the CDD process and thereby raising the question to amend the Third Directive with

¹³⁵ Commission Staff Working Paper (n 8).

¹³⁶ *ibid* 18.

¹³⁷ *ibid*.

¹³⁸ *ibid*.

¹³⁹ *ibid* 19.

regard to its CDD processes, which were considered to be rather prescriptive and too much ‘rule-based’.¹⁴⁰ Indeed, the Third Directive provided a very detailed and administrative approach to CDD and thus giving little ‘room for manoeuvre’ to the Member States when to apply simplified or enhanced customer due diligence because of the lack of a risk-based approach.

- 3) When it comes to the PEPs, the Third Directive covered only those PEPs who were domiciled in another Member State of the EU or a third country and applied the EDD process on them. The new FATF international standards expanded the scope to cover domestic PEPs also and persons having a prominent function in an international organization.¹⁴¹
- 4) Concerning BO, the Third Directive defined BO as the person(s) who ultimately controls the customer/natural person on whose behalf the transaction or activity is being conducted.¹⁴² However, the EU Commission received several concerns from stakeholders that this provision was in practice too difficult to apply.¹⁴³ The new FATF recommendations gave some specific guidelines for identifying and verifying BO.¹⁴⁴
- 5) Likewise, the Commission was of the opinion that the EU concept of ‘third country equivalence’ needed to be abandoned.¹⁴⁵ This term was used for countries outside of the EU/EEA area, which have equivalent AML/CTF legislation: i.e. equivalent to the Third Directive.¹⁴⁶ The EU’s list of equivalent countries was updated regularly, based on the quality and effectiveness of the AML/CTF system of these countries. Given the importance of the RBA in the updated FATF recommendations and a ‘country risk’ being only one of the risk

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² Third Directive art 3(6).

¹⁴³ Commission Staff Working Paper (n 8) 19.

¹⁴⁴ *ibid.*

¹⁴⁵ Commission Staff Working Paper (n 8) 20.

¹⁴⁶ *ibid.*

indicators, this system was no longer compliant with the new risk-based approach.¹⁴⁷

- 6) The last section pinpointed as inconsistent with the new international rules related to cross-border wire transfers. The EU had already implemented the existing FATF standards with the abovementioned Payer Information Regulation¹⁴⁸, but the new FATF standards of 2012 required also information on the beneficiary in wire transfers and the minimization of exemptions to this requirement.¹⁴⁹ Against this background, a growing interest of the international community is observed with regard to informal fund transfer systems such as e.g. hawala, bearing in mind their vulnerability to misuse.¹⁵⁰ Some countries consider informal fund transfers as a peril to money laundering and terrorist financing and require these transfers to be brought closer to the official financial sector.¹⁵¹

3.2.2 Unequal application of the present AML/CTF measures

The second problem driver pinpointed by the EU Commission in its evaluation of the EU's AML/CTF system was the unequal and different application of the EU measures. Each Member State transposed the Directives in its own way and thus creating differently applied provisions, a practice that only makes the EU AML/CTF system less efficient and creates legal uncertainty. After all, this is not surprisingly since the Third Directive followed a minimum harmonization approach and thus leaves substantial freedom to the EU Member States for adopting adequate national rules.¹⁵²

¹⁴⁷ *ibid.*

¹⁴⁸ Text to n 115; Commission Staff Working Paper (n 8) 20.

¹⁴⁹ Commission Staff Working Paper (n 8) 20.

¹⁵⁰ Zagaris Bruce, 'Problems applying traditional anti-money laundering procedures to non-financial transactions, "parallel banking systems" and Islamic financial systems' (2007) 10 *Journal of Money Laundering Control* 157-158.

¹⁵¹ *ibid.*

¹⁵² 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) 45 final, 3.

Firstly, the EU Commission expressed concerns on the inconsistency of the statistical data collected by the FIUs. Article 33 of the Third Directive imposed the EU Member States to collect several data such as the number of suspicious transactions which were reported to the FIU, follow-up of these transactions, number of cases investigated and persons prosecuted. However, the Member States applied different definitions on when and how should be reported to the FIUs, as well as with regard to the definition of a report itself. Therefore, these reports, which should provide reliable information on the effectiveness of the AML/CTF system, were not really useful.¹⁵³ Every EU Member State developed its own reporting system, which inevitably led to these inconsistencies.

Secondly, another thing that undermined the legal certainty was the issue stipulated in article 3(6) that the beneficial owner is ‘the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted’. The Third Directive clarified in the same article that in case of corporate entities, a 25% of shares or voting rights plus one share shall be deemed to determine the BO, while for legal entities such as foundations or trusts the threshold is defined as follows: ‘the natural person(s) who exercises control over 25% or more of property of these entities.’ The EU Commission concluded that this complicated ownership threshold was differently applied in the EU member states, a practice that could create ‘difficulties and increase costs at group level, when designing customer identification procedures and assessing customer risk’¹⁵⁴

Thirdly, based on Article 37 of the Third Directive, the competent authorities of the EU Member States were allowed to take necessary measures in order to ensure compliance with the obligations established by the Third Directive. Especially, several public stakeholders, mainly supervisory authorities, mentioned the lack of legal certainty in case of payment service providers and the obligation of these supervisory authorities to ensure compliance with the host Member State money laundering regime, when these payment services are provided in the host Member State by branches of payment service

¹⁵³ Commission Staff Working Paper (n 8) 22.

¹⁵⁴ *ibid* 22.

providers licensed in another EU Member State (home state) based on the concept of a single EU passport.¹⁵⁵

Lastly, article 39 of the Third Directive provided that the EU member states must ensure conformity with the provisions stemming from this Directive by adopting a set of sanctions and imposing them on persons and institutions (e.g. obliged entities) in case of an infringement. Unfortunately, the EU Member States transposed these provisions each in their own way, resulting in unequal, chaotic and different sanction systems throughout the EU, which again negatively impacted the effectiveness of the AML/CTF system and caused legal uncertainty.¹⁵⁶

3.2.3 The EU AML/CTF measures: loopholes and inadequacies

The third problem driver identified by the EU Commission were certain loopholes and inadequacies in the EU's AML/CTF system. The first loophole flagged related to the scope of coverage of the gambling sector. As the Third Directive only mentioned casinos -without any further definition- there was a growing demand for a larger inclusion of the gambling sector within the scope of the new Directive, especially because some gambling sectors are quite vulnerable to money laundering risks. The EU Commission pointed to increased risks in sport betting because of corruption in sport(s) and match fixing.¹⁵⁷ What probably poses the largest threat is the inclusion of lower-tier leagues in the offer of sport betting shops, given that these leagues are sometimes played on an amateur level, which significantly increases the probability of match fixing and fraud.

The second loophole recognized by the EU Commission pertained to dealers in high value goods. The Commission suggested to lower the existing threshold of EUR 15 000 as fixed by the Third Directive.¹⁵⁸ In fact, some EU Member States had already transposed the Third Directive in such a way that the threshold was only EUR 5 000, as

¹⁵⁵ *ibid* 23.

¹⁵⁶ *ibid* 23-24.

¹⁵⁷ *ibid* 25.

¹⁵⁸ Commission Staff Working Paper (n 8) 25.

in Belgium.¹⁵⁹ This practice is just one of the examples of inconsistent and different transposition of the Third Directive, which added to the confusion and inefficiency.

The third loophole observed dealt with the FIUs and the cooperation amongst them.¹⁶⁰ It was found by the EU Commission that the FIUs had different competencies and structures (police/judicial or administrative) throughout the EU, which impeded their joint collaboration and the exchange of information amongst them.¹⁶¹

Finally, the EU Commission concluded its assessment with the question on how to balance individual privacy rights and efficient AML/CTF systems, which require per definition a massive collection and storage of personal data by private actors such as banks.¹⁶² The EU Commission wanted to ensure a high level of protection of personal data in the upcoming proposals of the Fourth Directive.

3.3 Some conclusions of the EU Commission

After conducting the extensive impact assessment of the Third Directive and analyzing the relevant problem drivers, as explained under points 3.2, the EU Commission selected certain provisions that needed to be changed in order to have a better performing AML/CFT system. The most relevant proposed amendments are summarized as follows: modifications were projected as the following amendments¹⁶³:

- Broadening of the scope *ratione personae* by expanding the definition of obliged entities (meaning the natural persons, institutions or companies which are subject to the customer due diligence measures of the Directive) by including the following categories: (i) providers of gambling services; (ii) national PEPs and persons working in international organizations and (iii) high-value goods dealers by lowering the cash payment threshold from EUR 15 000 to EUR 7 500;

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.* 26.

¹⁶² *ibid.* 27.

¹⁶³ COM (2013) 45 final, 9-11.

- Broadening the scope *ratione materiae* by including tax crimes as predicate offenses;
- Better clarified relation of the AML/CTF system with data protection and privacy rights, especially with regard to storage and transferring of data;
- Stricter provisions on BO by requiring all companies to have relevant information on their beneficial owners;
- Build up the cooperation and exchange of information between the FIU's;
- Strengthen the RBA by understanding the risks through national, supranational and company level risk assessment;
- Strengthen the provisions on CDD based on a RBA;
- Remove the 'Third Country Equivalence' provisions as they are in contradiction with the RBA;
- Align the different national administrative sanctions in case of breach of the provisions of the new Fourth Directive;

Furthermore, the EU Commission appraised the influence of the new proposed measures with some of the most relevant fundamental human rights as envisaged in the Charter of Fundamental Rights.¹⁶⁴ The Commission concluded that the new legislative proposals (i.e. the new Fourth Directive to be adopted) were fully complying with the fundamental rights, such as protection of personal data, the respect for private life, the freedom to conduct a business and the prohibition of discrimination.¹⁶⁵

¹⁶⁴ Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

¹⁶⁵ COM (2013) 45 final, 8.

4. The Fourth Directive and the most important modifications

4.1 Introduction

On 20 May 2015, the European Parliament and the Council adopted the Fourth Directive, which enacted the new EU AML/CTF legal regime.¹⁶⁶ Prior to that, the most influential organization in the field of anti-money laundering and combatting terrorist financing, the FATF, updated its recommendations in 2012. The FATF is a crucial catalyst in this fight and it is accurately argued that the imposing of new AML/CTF rules, usually begins after the FATF issued its opinion (in the form of recommendations) and thus presents a role-model for others who will then transpose these recommendations in their respective legal systems.¹⁶⁷ The Fourth Directive underlines the importance of coordinated efforts at national and international level in order to successfully cope with AML/CTF threats.¹⁶⁸

In conjunction with the Fourth Directive, the EU also adopted a new flanking Regulation on information accompanying transfer of funds which repealed the old one.¹⁶⁹

4.2 The main changes introduced by the Fourth Directive

The most important modifications of the Fourth Directive to the Third Directive relate to the extension of its scope (*ratione materiae* and *ratione personarum*), the introduction of the risk-based versus the 'prior rule-based approach' and its effects on SDD, EDD, third

¹⁶⁶ Parliament and Council Directive (EU) 2015/849 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 [2015] OJ L 141/73 ('Fourth Directive').

¹⁶⁷ Janos Böszörményi and Erich Schweighofer, 'A review of tools to comply with the Fourth EU anti-money laundering directive' (2015) 29 International review of Law, Computers & Technology 63, 63.

¹⁶⁸ Fourth Directive, recital 4.

¹⁶⁹ Parliament and Council Regulation (EU) 2015/847 of 20 May 2015 on information accompanying transfer of funds and repealing Regulation (EC) No 1781/2006 [2015] OJ L141/1 ('Information on Transfer of Funds Regulation').

country equivalence and PePs, FIUs, beneficial ownership, the sanction regime and the protection of personal data. Hereunder, I will discuss these issues.

4.2.1 Broadening the scope of the Fourth Directive: *ratione personae*

The Fourth Directive enlarges the scope of the obliged entities in article 2(3) (f) -i.e. the natural persons, institutions or companies, which have to carry out customer due diligence measures- to cover all providers of gambling activities, unlike the Third Directive which only covered casinos. Gambling services are broadly defined as to include games of chance (wagering a stake for monetary value) as well as games of skill such as casino or poker games, but also sport betting shops whether online or not.¹⁷⁰ Moreover, the Directive also applies on gambling activities performed on the internet.¹⁷¹ Nevertheless, article 2 (2) of the Fourth Directive provides for an exemption of the due diligence duties imposed on providers of gambling services in case there is a low risk of money laundering and terrorist financing or in view of the small size of the specific gambling business operation. It has been left to the discretion of the EU Member States, when transposing this Directive to evaluate these risks, with the exclusion of casinos which remain always designated as obliged entities with no option of preclusion.¹⁷² Anyhow, this extension of the scope can only be beneficial for regulating online activities. As Tropina justly writes, applying the traditional rules for ‘offline activities’ are only to a limited extent enforceable or irrelevant for the borderless online cyber world.¹⁷³ Therefore, she continues, that preventing online crimes must be regarded as one of the future priorities in combatting e.g. money laundering, especially given all the innovations in information and communication technologies and the opportunities they offer for committing criminal activities.¹⁷⁴ This scope expansion is therefore a move in the right direction.

¹⁷⁰ Fourth Directive, art 3 (14).

¹⁷¹ *ibid* recital 18.

¹⁷² *ibid* art 2 (2).

¹⁷³ Tatiana Tropina, ‘Fighting money laundering in the age of online banking, virtual currencies and internet gambling’ (2014) 15 ERA Forum 69, 70.

¹⁷⁴ *ibid*.

A novelty has been introduced regarding the definition of real estate agents -which were already subject to customer due diligence- but now this term is amended and comprises letting agents as well.¹⁷⁵

More importantly, natural or legal persons exercising their professional activity in trading goods are regarded as obliged entities, if cash payments are made or received above 10 000€ in a single or several related transactions.¹⁷⁶ The adopted text of the Directive diverges from the Commission's original proposal of 7 500€.¹⁷⁷ Nonetheless, the EU Member States are allowed, when transposing the Directive, to apply lower thresholds or even add further restrictions and limitations to cash payments because these are regarded as peculiarly prone to money laundering and terrorist financing.¹⁷⁸

4.2.2 Broadening the scope of the Fourth Directive: *ratione materiae*

The Fourth Directive updates which criminal activities trigger money laundering and terrorist financing and provides a list of predicate offenses in article 3(4). It further clarifies in article 3(4) (f) that under 'criminal activity' or predicate offenses are to be regarded all offenses, including tax crimes, whether related to direct or indirect taxes, if their punishment surpasses a certain threshold of deprivation of liberty or detention (maximum of more than one year or a minimum of six months), according to the law of the Member State and depending on applicable national minimum thresholds. In other words, the Commission has made a 'general reference to tax crimes, but without a precise definition' and has chosen for a 'threshold approach in the Directive (deprivation of liberty)'.¹⁷⁹ The Commission explicitly mentions that agreeing on a precise definition of tax crimes would cause 'significant obstacles'.¹⁸⁰ One can only conclude from this that the 'political consensus' is yet there. Maybe, the Panama Papers and the Luxembourg Leaks will be instrumental in achieving this goal in future AML/CTF legislation.

¹⁷⁵ Fourth Directive, recital 8.

¹⁷⁶ *ibid* article 2(1) (3)(e).

¹⁷⁷ Text to n 163.

¹⁷⁸ Fourth Directive, recital 6.

¹⁷⁹ Commission Staff Working Paper (n 8) 71.

¹⁸⁰ *ibid*

4.2.3 Risk assessment and customer due diligence

4.2.3.1 Risk assessment obligation

The Fourth Directive focuses more than its predecessors on the risk based approach ('RBA') and this is clearly the most significant fundamental change. The risk-based approach essentially means 'that countries, competent authorities, and banks identify, assess, and understand the money laundering and terrorist financing risk to which they are exposed, and take the appropriate mitigation measures in accordance with the level of risk.'¹⁸¹ Thus, the core of the RBA entails the requirement to treat customers differently, depending on the risk level that a customer in each case poses to money laundering and terrorist financing.¹⁸² The RBA implies an imperative request, as rightly explained by Simonova, 'that financial institutions' efforts must be proportionate to the risk of money laundering, by focusing more resources on high-risk transactions and fewer resources on low-risk transactions'.¹⁸³ The RBA achieves its purpose by triggering an alarm whenever a transaction is out of convention.¹⁸⁴

Consequently, the risk assessment and identification thereof on the Community level consists of different layers of obligations for different addressees in order to better determine the risks at each specific level.

Firstly, the EU Commission shall assess money laundering and terrorist financing risks which potentially affect the internal market and cross-border activities. The Commission is given a deadline (27 June 2017) by which it must draw up a report, covering the most vulnerable aspects of the internal market and the most frequent channels used by criminals to import dirty money into the legal flows.¹⁸⁵ The

¹⁸¹ FATF 'Risk-Based Approach for the Banking Sector' <<http://www.fatf-gafi.org/documents/news/risk-based-approach-banking-sector.html>> accessed 29 July 2016.

¹⁸² Böszörményi and Schweighofer (n 167) 63, 67.

¹⁸³ Anna Simonova, 'The risk-based approach to anti-money laundering: problems and solutions' (2011) 14 *Journal of Money Laundering Control* 346, 347.

¹⁸⁴ Maria Bergström, Karin Svedberg Helgesson and Ulrika Mörtz, 'A New Role for For-Profit Actors? The Case of Anti-Money Laundering and Risk Management' (2011) 49 *Journal of common Market Studies* 1043, 1051.

¹⁸⁵ Fourth Directive, art 6 (1).

Commission must biannually update its report.¹⁸⁶ In executing this task, the Commission is not left alone and will take into the account the opinions and recommendations of various stakeholders, such as money laundering and terrorist financing experts and representatives of the FIUs.¹⁸⁷

Secondly, each EU Member State is obliged to perform its own national risk assessment bearing in mind its specific risk situation and relying on the abovementioned report of the EU Commission.¹⁸⁸ In carrying out this task, the EU Member States shall pay amongst other attention to (i) the identification of low and high risk areas to money laundering and terrorist financing; (ii) the allocation and prioritization of national resources for the creation of an optimal and effective AML/CTF system and (iii) the adjustment of the national rules according to the specific risk level.¹⁸⁹

Thirdly, the EU Member States must ensure that the obliged entities assess and detect the risks related to their branch of business and customers, bearing in mind the distinct risks of the country, geographic area, products, services, transactions or delivery channels.¹⁹⁰ This means that the EU Member States will assure that the obliged entities shall have appropriate internal policies, controls, record keeping and compliance procedures in place¹⁹¹ and that they take into the account the risks defined at the EU and Member State level.¹⁹²

Given this complex and layered system of risk-based assessment, the following conclusion can be drawn about the importance of the RBA in the EU: unlike the old rule-based approach, which proved to be outdated and inflexible, the EU legislator, just as the FATF, undoubtedly sees the RBA as one of the focal points in the AML/CTF fight.

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid* art 6 (6).

¹⁸⁸ *Ibid* art 7 (3).

¹⁸⁹ *ibid* 7 (4).

¹⁹⁰ *ibid* art 8 (1).

¹⁹¹ *ibid* art 8 (3) and art 8 (4).

¹⁹² *ibid.*

4.2.3.2 Customer due diligence

Another term often used for the CDD process is ‘Know your Customer’ (‘KYC’).¹⁹³ The concept of KYC changed over the time, originally being enshrined in a ‘trust’ relationship between the bank and its customer, while nowadays their relations are contingent on the ‘suspicion’ of money laundering and terrorist financing.¹⁹⁴ The KYC process consists of two phases: the first one when establishing a relationship with the customer where the identity and BO have to be determined, and the second one, where the relationship with the customer is monitored and scrutinized.¹⁹⁵ The general purpose of the CDD is connected with ‘the explicit purpose of seeing, and reporting, if and when clients’ behavior is out of character’.¹⁹⁶ This process allows the obliged entities to determine the risk level to money laundering and terrorist financing and puts the customer in the proper risk category.

In accordance with this RBA as defined in article 13 (1) of the Fourth Directive, the obliged entities must carry out CDD measures of which the essential ones can be summarized as follows: (i) thorough identification of the customer and beneficial owner on the basis of documents or information from a third, reliable and independent source; (ii) assessing and getting information on the purpose and nature of the transaction and (iii) ongoing monitoring and scrutiny of the relationship.

Article 11 specifies when the CDD needs to be applied by the obliged entities. There are a few relevant novelties compared to the Third Directive: (i) no CDD has to be applied for occasional transactions, if the transfer of funds is in accordance with the Information on Transfer of Funds Regulation and the amounts do not exceed 1 000€;¹⁹⁷ (ii) however, CDD must be carried out in the case of persons trading in goods if they are carrying out occasional cash transactions exceeding the amount 10 000€¹⁹⁸ and (iii)

¹⁹³ Böszörményi and Schweighofer (n 167) 63, 67.

¹⁹⁴ Bergström, Svedberg Helgesson and Mörtz (n 184) 1043, 1050.

¹⁹⁵ Böszörményi and Schweighofer (n 167) 63, 67.

¹⁹⁶ Bergström, Svedberg Helgesson and Mörtz (n 184) 1043, 1051.

¹⁹⁷ Fourth Directive, article 11 (b) (ii).

¹⁹⁸ *ibid* art 11 (c).

CDD must also be applied by providers of gambling services when a customer is wagering a stake or collecting a winning and both amounts exceed 2 000€. ¹⁹⁹

Further, the Fourth Directive provides in article 12 (1) (a) for a general exemption in respect to electronic money, if certain conditions are cumulatively fulfilled e.g. the payment instrument is not reloadable, the maximum electronically stored amount does not exceed EUR 250€ and the payment is used exclusively for the purchase of goods.

As in the previous measures, both SDD and EDD are possible. Nonetheless, the Fourth Directive only permits SDD, if the risks identified, pose a lower probability of money laundering and terrorist financing. ²⁰⁰ The Third Directive prescribed in detail when to apply EDD or SDD and sometimes it was even allowed not to apply any customer due diligence at all. This is no longer permissible under the Fourth Directive by virtue of the risk-based approach.

Article 16 of the Fourth Directive refers to Annex II, which enumerates a list of a non-exhaustive factors that may be considered for determining a lower risk, such as:

- Customer risk factors;
- Product, service, transaction or delivery channel risk factors;
- Geographical risk factors.

Articles 18 to 24 detail when enhanced due diligence ('EDD') must be applied. These situations basically refer to dealings with persons or entities established in countries, which are qualified by the EU Commission, the Member States or obliged entities themselves as high-risk countries. EDD must likewise be applied by the obliged entities when dealing with PEPs and with cross-border correspondent (financial) institutions situated in a third country. Additionally, the EU Member States are entrusted with the duty to ensure that the obliged entities continuously work on identifying and preventing the execution of out of the ordinary or unusual transactions, which do not have an evident economic and permissible purpose. ²⁰¹

¹⁹⁹ *ibid* art 11 (d).

²⁰⁰ *ibid* art 15 (1).

²⁰¹ *ibid* art 18 (2).

In relationships with cross-border correspondent institutions, located in a third country, the EU Member States must assure that the credit and financial institutions take additional EDD measures to those laid down in article 13 of the Fourth Directive, such as but not limited to the obligation to inquire and collect intelligence about the correspondent institution, evaluate the correspondent's AML and CFT procedures and acquire permission from the senior management before commencing the correspondent relationship.²⁰²

Likewise, a set of extra CCD requirements are effective with PEPs. The Member States shall request the obliged entities to establish a proper risk management system to detect if the customer or the BO of a customer is a PEP and to apply additional enhanced due diligence steps.²⁰³ Additionally, article 21 of the Fourth Directive requires the obliged entities to take appropriate measures if a PeP is a beneficiary of a life insurance or the BO of a beneficiary. When a PEP ceases to hold his or her public function, the obliged entity will have to apply 'appropriate risk sensitive measures' for an additional period of at least 12 months.²⁰⁴

4.2.3.3 Third country equivalence

The Third Directive foresaw in article 11 the possibility not to apply CDD for customers who were credit or financial institutions located in a third country, if the latter has similar AML/CTF requirements to the ones defined in that Directive. In that way, the Third Directive was 'de facto' establishing a list of countries having an equivalent AML/CTF with the Third Directive. The list was regularly updated as approved by the Member States. This automatic 'exemption mechanism' was criticized because -rightly so- for not being in line with the risk-based approach, promulgated by the FATF Recommendations.²⁰⁵ Indeed, country risk is just one of the potential risk factors.

²⁰² *ibid* art 19.

²⁰³ *ibid* art 20.

²⁰⁴ *ibid* art 22.

²⁰⁵ Commission Staff Working Paper (n 8) 20.

Hence, the fourth Directive abolishes the ‘third party equivalence’ concept and falls back to the risk-based approach: countries with similar AML and CTF measures present a lower risk than countries which have dysfunctional or questionable AML/CTF measures. The country risk is in other words only one risk factor, amidst many other ones, and must be determined ‘in concreto’. The non-exhaustive list of risk factors, as mentioned in Annexes II and III, can give further guidance (e.g. significant levels of corruption and criminal activity).

Similarly, article 9 (2) of the Fourth Directive allows the EU Commission to adopt ‘acts’ to identify high-risk countries, which are posing a threat to the internal market because they have ‘strategic deficiencies’ or weak enforcement tools in their AML/CTF regime.

4.2.3.4 PePs

Under the Third Directive, EDD was only required for PEPs who were residing in another EU Member State or in a third country.²⁰⁶ The Fourth Directive now defines PEPs as to cover also domestic PEPs and PEPs working in international organizations and provides for a detailed list of who shall be deemed as one.²⁰⁷ It has been explicitly stated that this focus on PEPs does not in any way present an attempt to label them as persons prone to committing crimes, this measure is only of a preventive nature.²⁰⁸ This EDD comprises basically the following elements: (i) obtaining senior management approval before establishing a business relationship with a PEP; (ii) to take adequate measures to establish the source of wealth or funds that are involved in the business relationship or transactions with the PEP and (iii) to conduct enhanced ongoing monitoring of these transactions and business relationship.²⁰⁹

²⁰⁶ Third Directive art 13 (4).

²⁰⁷ Fourth Directive, art 3 (9).

²⁰⁸ *ibid* recital 33.

²⁰⁹ Fourth Directive, art 20.

4.2.4 Financial intelligence units

The Fourth Directive envisages the strengthening and bolstering of the cooperation among the FIUs and between the latter and the EU Commission. Therefore, the EU Commission may convene the FIUs platform, where representatives of all the FIUs can hold meetings on a regular basis, collaborate, exchange information on how to identify suspicious transactions and discuss standard reporting formats and others.²¹⁰

Article 53(1) of the Fourth Directive requires the FIUs to exchange information ‘spontaneously or upon request’. During the legislative procedure, the European Parliament made an attempt to amend this wording and included the term ‘automatically’ instead of ‘spontaneously or upon request’, but this amendment did not make it to the final version of the Directive.²¹¹ Nevertheless, none of these terms, including what is to be understood as the ‘exchange’ is defined in the Fourth Directive nor is it clarified how this information flow will be conducted.²¹²

Notwithstanding, the FIUs are left with only a very narrow ‘maneuvering’ room to reject an information exchange request: an FIU may only reject such request, if the exchange could have adverse effects on the basic tenets of the national law system of the concerned FIU.²¹³

4.2.5 Sanctions

In order to remedy the variety or plethora of national administrative measures and sanctions in case of breach of national AML/CTF provisions, which stem from the Third Directive and which might impede coherent compliance by the obliged entities on e.g. reporting suspicious transactions²¹⁴, the Fourth Directive establishes a set of

²¹⁰ The Fourth Directive, art 51.

²¹¹ Böszörményi and Schweighofer (n 167) 63, 70.

²¹² *ibid.*

²¹³ The Fourth Directive, art 53 (3).

²¹⁴ Third Directive, art 39 (2); Commission Staff Working Paper (n 8) 23.

common ‘principles-based rules’ with the purpose of converging the different national sanctioning regimes and enhancing efficiency, consistency and enforcement thereof.²¹⁵

The Fourth Directive is far more exhaustive than the Third Directive in regulating the sanctions at the disposal of the competent authorities and directed against obliged entities in the event of systematic, serious and repeated breaches with regard to CDD, suspicious transaction reporting, record keeping and internal controls.²¹⁶

Article 59 of the Fourth Directive provides a list of minimum administrative sanctions on obliged entities. These sanctions should be made available under national law by the EU Member States when transposing the Directive:

- Publicly announcing the name of the natural or legal person which breached AML/CTF legislation;
- Cease and desist order;
- Withdrawal or suspension of the authorization of the obliged entity;
- A provisional ban against certain natural persons for executing managerial duties in an obliged entity;
- Maximum administrative monetary sanction is limited to the double amount of the benefit gained or at least EUR 1 000 000.;
- If the obliged entity is a credit or financial institution, the maximum monetary sanction shall be at least EUR 5 000 000 or 10 % of the yearly turnover, while in the case of a natural person the maximum monetary penalty shall be at least EUR 5 000 000;²¹⁷
- Member States may enact additional administrative sanctions.

²¹⁵ Commission Staff Working Paper (n 8) 92-93.

²¹⁶ Fourth Directive, art 59 (1).

²¹⁷ *ibid* art 59 (3).

4.2.6 Data protection

Data protection has a critical place in the Fourth Directive, given the relation between the data protection rules adopted at EU level and the sensitivity of the information used and stored by the obliged entities in their AML/CTF fight.

The Fourth Directive essentially addresses these data protection issues by legislating in the following manner:

- 1) Personal data may only be used and processed for the purpose of the prevention of money laundering and terrorist financing, with the strict prohibition of any other use, such as e.g. commercial use;²¹⁸
- 2) The processing of data under the Fourth Directive shall be deemed to be matter of public interest. Therefore, restrictions to data protection rights and obligations as defined in the data Directive of 1995²¹⁹ are allowed.²²⁰ The latter was recently replaced and repealed by the new data protection Regulation of April 27th 2016;²²¹
- 3) Lastly, the obliged entities belonging to a group of companies must apply group-wide policies and procedures, especially those dealing with data protection and information sharing, on all their branches or subsidiaries established in another EU Member State or a third country.²²² If a third country's AML/CTF regime is less strict than the EU Member State from which the obliged entity originates, then the AML/CTF regime of that EU Member State shall be applied in as far as allowed by the concerned third country.²²³ If this is not possible, the obliged entity has a duty to explore additional options in order to cope successfully with the AML/CTF

²¹⁸ Fourth Directive, art 41 (2).

²¹⁹ Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281

²²⁰ Fourth Directive, art 43.

²²¹ Parliament and Council Regulation (EU) 2016/67 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1.

²²² Fourth Directive, art 45 (1).

²²³ *ibid* art 45 (3).

requirements, therewith that failure to do so might force the obliged entity to terminate its business in that third country.²²⁴

The period during which personal data may be stored, is the same as in the Third Directive: after a business relationship has ended between a customer and the obliged entity, the latter shall store the personal data, obtained during the CDD and the information required to identify a specific transaction during a period of five years.²²⁵ After this 5 year period, the obliged entity must delete the personal data, unless national law provides otherwise.²²⁶ Nevertheless, the EU Member States are left with the option, when transposing the Directive, to allow the obliged entities to keep the personal data for an additional period of up to 5 years, but only if this extra retention is necessary and proportional.²²⁷ In case the information and documents are related to pending proceedings on 25 June 2015 regarding the detection and prosecution of money laundering and terrorist financing, the obliged entities are allowed to keep this information and documents for a period of 5 years starting on 25 June 2015, with the possibility to prolong this deadline with another 5 years, if the requirements of necessity and proportionality are satisfied.²²⁸

4.2.7 Beneficial Ownership

Knowledge of the ultimate beneficial owner (BO) i.e. natural person, who controls or exercises ownership over a legal entity is obviously a key factor in finding and tracing criminals who might hide behind corporate structures.²²⁹ To this extent, the Fourth Directive defines in article 3 (6) (a) (i) an ownership threshold of 25% to identify the BO, but this time solely as an indicator of direct or indirect ownership to be taken into account, when establishing who ultimately controls the customer or on whose behalf a transaction/activity is or was conducted.

²²⁴ *ibid* art 45 (5).

²²⁵ *ibid* art 40 (1) (a) (b).

²²⁶ *ibid* art 40 (1).

²²⁷ *ibid*.

²²⁸ *ibid* art 40 (2).

²²⁹ Fourth Directive, recital 14.

Furthermore, article 3(6) (a) (ii) copes with the situation where no beneficial owner can be identified or if there are suspicions that the identified beneficial owner can actually be regarded as one. In such event, the obliged entities may consider the senior management officials of the natural/legal person in question as the beneficial owner. Article 3(12) of the clarifies that a senior manager does not necessarily means a person who is a member of the board of directors, it could e.g. also be an employee. In order to be able to identify BO, the obliged entities have the European Banking Register at their disposal. This register connects various national business registers and allows obliged entities to gather information on companies established in other EU Member States.²³⁰ The Fourth Directive also sets out in article 30 the obligation for all corporate and other legal entities to hold valid and up-to-date information on their BO and such information must be accessible to the competent authorities, FIUs, obliged entities conducting CDD and any other person holding a legitimate interest. On top that, article 31 requires trusts to hold valid and up-to-date information on their BO and to make it accessible to competent authorities, FIUs and obliged entities but for the latter only in certain well-defined situations.

4.2.8 Proposed amendments of the Fourth Directive

Although the Fourth Directive is not yet transposed in national law -the Member States have to modify their national laws by 26 June 2017 in order to comply with the new measure- the Commission has already issued on the 5 June 2016 a new proposal amending the Fourth Directive.²³¹ This illustrates the dynamics and the continuously adapting of the AML/CTF measures to new threats and reality.

Effectiveness, especially the one in fighting terrorism and ensuring increased financial transparency, induced the EU Commission to come out with this new proposal.²³² The Commission explicitly mentions in its proposal the growing threats of terroristic attacks

²³⁰ Böszörményi and Schweighofer (n 167) 63, 69.

²³¹ Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and amending Directive 2009/101/EC' COM(2016) 450 final, 2. ('The Fourth Directive amendment proposal')

²³² *ibid* 2.

and threats all over the world as well as the usage of off-shore jurisdictions as a means of evading taxes, in order to justify these proposed changes.²³³

The amendments are primarily related to the following matters:

1) Sealing off the existing gaps in the EU's AML/CTF legislation, such as the coverage of virtual currencies exchange platforms (e.g. Bitcoin) and custodian wallet providers, which can be used by the terrorists or money launderers.²³⁴ Therefore, providers of virtual currency exchange platforms and custodian wallet providers will now become 'obliged entities' and will have to apply CDD;

2) Lowering the transaction value of prepaid cards to 150€ instead of 250 € as defined in art 12 of the Fourth Directive. Below this new threshold no CDD is required by the obliged entities. The purpose of this new amendment is obviously to limit the anonymous use of prepaid cards;²³⁵

3) Enhancing the powers of the FIUs by giving them the right to request supplementary information and have direct access to information held by any obliged entities on money laundering or terrorist financing suspicions at any time.²³⁶ Moreover, the FIUs will have access to a central registry of bank and payment accounts, which shall be established in all EU Member States;²³⁷

4) With regard to EDD towards high-risk third countries, no uniform set of CDD measures was available and the Member States were free to determine which due diligence measures had to be applied. For the purpose of avoiding such heterogeneous implementation, the EU Commission proposes a list of due diligence measures which must be used in all Member States.²³⁸

5) The proposal also allows public access to the BO information on corporate and other legal entities, including trusts and other legal arrangements, especially those involved in business activities.²³⁹ Under the Fourth Directive, only persons holding a legal interest

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ *ibid* 13.

²³⁶ *ibid* 14.

²³⁷ *ibid.*

²³⁸ *ibid* 15.

²³⁹ *ibid* 16.

were allowed to access this BO information. The Commission further proposes the interconnection of all national BO registers among the EU Member States.²⁴⁰ Even before this proposal, some EU Member States e.g. Sweden, France and Germany consented to disseminate information on the BO of companies and trusts among themselves, and thus enhancing transparency and bolstering their AML/CTF fight.²⁴¹

Even though not explicitly mentioned, one may say that the EU Commission had the Panama Papers in mind when justifying its proposal with regard to the abuse of off-shore jurisdictions.²⁴² The Panama Papers presented ‘a giant leak of more than 11.5 million financial and legal records exposes a system that enables crime, corruption and wrongdoing, hidden by secretive offshore companies.’²⁴³ This example of investigative journalism showed the need to increase access to BO information in fighting financial crimes²⁴⁴, a process that was already started by including tax crimes on the list of predicate offenses of the Fourth Directive.

²⁴⁰ *ibid* 19.

²⁴¹ Simone Jones, ‘Beneficial ownership: A new era of openness? (Sweden)’ (*International Compliance Association*, 26 May 2016) <<http://www.int-comp.org/insight/2016/may/26/beneficial-ownership-a-new-era-of-openness-sweden/>> accessed 29 May 2016.

²⁴² The International Consortium of Investigative Journalism ‘Panama Papers’ <<https://panamapapers.icij.org/>> accessed 7 July 2016.

²⁴³ *ibid*.

²⁴⁴ The Fourth Directive amendment proposal, 2.

5. Some concerns related to AML/CTF regime

In this chapter, some concerns and questions are discussed such with regard to the effectiveness of AML/CTF legislation, issues regarding data protection, the impact of giving ‘for-profit’ actors such as banks an increasingly important role (risk-based approach) in ‘policing tasks’ and concerns on the impact of the Fourth Directive on the rule of law.

5.1 On the effectiveness of AML/CTF legislation

Presently, there is no precise or exact evaluation available on the effectiveness of AML/CTF measures. This fact, or it can be said problem, stems out of the very vague estimates on the amount of money being laundered in the world²⁴⁵, meaning that many predicate offenses remain undetected, but also from the trivial results of traditional AML/CTF assessment methodologies.²⁴⁶ Indeed, the traditional methodologies primarily focus on quantitative output factors such as the number of suspicious transactions reported, the number of money laundering investigations/prosecutions/convictions and the total value of property seized or frozen but they do not say a lot about the ‘effectiveness’ of the AML/CTF regime.²⁴⁷ Moreover, a lack of reliable data in the EU on the actual frozen assets from terrorists make a thorough assessment of the counter-terrorist fight very difficult.²⁴⁸ On top of that, Bures argues that the public authorities have set up ‘vague’ criteria on how to recognize a terrorist financing case, while requiring the obliged entities to invest in a costly supervision system, which led to ‘defensive compliance (...) by (over-) reporting even marginally suspicious transactions’.²⁴⁹ It is interesting to remark that the amounts of money used to finance the attacks on the WTC and the Pentagon on 11 September

²⁴⁵ Text to n 16.

²⁴⁶ Barbara Vettori, ‘Evaluating anti-money laundering policies: where are we?’ in Unger B and van der Linde D E (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013) 485.

²⁴⁷ *ibid* 474-475 and 485.

²⁴⁸ Oldrich Bures, ‘Ten Years of EU’s Fight against Terrorist Financing: A Critical Assessment’ (2015) 30 *Intelligence and National Security* 207, 222.

²⁴⁹ *ibid* 226.

2001, would probably not have been timely identified, even if all the new CTF measures taken since the attacks would have been applied.²⁵⁰ There are leading opinions such as the one from Zagaris, who is arguing that maybe a mistake was made by ‘merging’ the two systems, AML and CTF, because terrorists only need a ‘small amount’ of money to finance their activities, while the AML system has been ‘developed’ for massively screening huge amounts of financial transactions.²⁵¹

However, some new CTF/AML assessment methodologies were developed, which are referred to as ‘the economics of crime’. They are based on the hypothesis that criminals make a rational choice.²⁵² In his research, Ferwerda applied this methodology in the AML field in order to found out whether AML legislation actually reduces crime. He used the following variables: the probability of a money laundering case being detected and the perpetrator ultimately convicted, prescribed sanctions and the costs to launder money.²⁵³ The tested hypothesis was that if a stricter policy can dissuade criminals from attempting to launder money or finance terrorism, logically it will lower the crime rate.²⁵⁴ The study – very interestingly but not surprisingly – showed that for increasing the effectiveness of the AML/CTF regime and to lower crime rate, it is more meaningful for countries to tackle these issues on the international level, than being focused on their own domestic laws and policies in this field.²⁵⁵ In its Staff Working Paper the Commission explicitly refers to the need for developing new methodologies for assessing the economic and legal effectiveness of its AML/CTF measures.²⁵⁶

At this point, a parallel must be drawn to the implementation of the RBA. The effectiveness of AML and CTF legislation and the risk-based approach are definitely correlated: it has been rightly argued that the regular assessment and updating of the RBA is essential.²⁵⁷ In that way, a country will fight money laundering and terrorist

²⁵⁰ Murphy (n 28) 113.

²⁵¹ Zagaris (n 22) 123, 156.

²⁵² Vettori (246) 482-483.

²⁵³ Unger Brigitte, ‘Money Laundering – A Newly Emerging Topic on the International Agenda’ (2009) 5 Review of Law & Economics 807, 815 and J Ferwerda, ‘The economics of crime and money laundering: does anti-money laundering policy crime?’ (2009) 5 Review of law & Economics 903-928.

²⁵⁴ Unger (261) 807, 815.

²⁵⁵ *ibid*; Vettori B (246) 483.

²⁵⁶ Commission Staff Working Paper (n 8) 122.

²⁵⁷ Paolo Constanzo, ‘The risk based approach to anti-money laundering and counter terrorist financing in international and EU standards: what is it, what it entails’ in Unger B and van der Linde D E (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013) 362-363.

financing more effectively, since its RBA will be regularly adjusted and amended as appropriate and necessary.²⁵⁸ Likewise, the FATF has been calling for the proper and regular evaluation of the AML/CTF regimes and the risk-based approach.²⁵⁹

One of the main problems for the AML/CTF system to remain adequate and up to date is the constant search of criminals for new and unregulated fields of action where money can be laundered e.g. prepaid virtual gold currencies, prepaid automated teller machine cards or on-line payment systems.²⁶⁰ Besides these new ‘action fields’, the always faster development of new technologies obviously offers new possibilities for criminals. Moreover, the discovery of big-scale scandals such as the abovementioned Panama Papers²⁶¹ and Luxembourg Leaks²⁶² brings the efficacy and trustworthiness of the system in question.

It is clear that international collaboration, intense exchange of information and continuous assessment of the risk-based approach method is crucial for a potent and well performing AML/CTF system. The Fourth Directive in strengthening the collaboration and exchange of information between FIUs, by making clearer rules concerning beneficial ownership, by including tax crimes as predicate offenses and by emphasizing the need for continuous evaluation and updating of the risk-based approach, made certainly a decisive and constructive step towards a well performing AML/CTF system.

5.2 Data protection and AML/CTF: a thin borderline

The Fourth Directive imposes many obligations on the obliged entities with regard to the collection and storage of personal data. They may have an impact on the right to protection of personal data as mentioned in article 8 of the European Charter of

²⁵⁸ *ibid.*

²⁵⁹ *ibid.*

²⁶⁰ Brigitte Unger and Johan den Hertog ‘Water always finds its way. New forms of money laundering. Crime’ (2012) 57 *Law and Social Change* 287, 298.

²⁶¹ Text to n 250.

²⁶² The International Consortium of Investigative Journalism ‘Luxembourg Leaks: Global Companies’ Secrets Exposed’ <<https://www.icij.org/project/luxembourg-leaks>> accessed 11 July 2016.

Fundamental Rights.²⁶³ In addition, the merging of anti-money laundering and counter-terrorist finance has also far reaching consequences regarding the protection of personal data as well. In pursuance of tackling counter-terrorist finance, which may be done through licit or illicit funds, one must no longer only try to trace and find the proceeds of crime as in the ‘classical’ anti-money laundering fight but the due diligence effort must be expanded to practically all financial transactions for determining their potential use for terrorist purposes.²⁶⁴ This phenomenon of systematic and broad surveillance - which is to a large extent triggered by the events of 11 September 2001- is known in the literature as ‘dataveillance’.²⁶⁵ It is not a new practice in the EU, in fact, similar wide cross-border data collection and storage existed already prior to 11 September 2001. In particular, reference should be made to the Schengen Information System and the Customs Information System.²⁶⁶ It is argued that data surveillance systems often fail the basic test of the rule of law because of the broad discretionary powers given to the executive branch without any real counterbalances, which may result in every person being scrutinized for something that only a small minority might do.²⁶⁷

Since the decision of the European Court of Justice in the Digital Rights case, it is clear that the retaining of personal data of someone’s private life is already in itself an interference with the rights guaranteed by the Charter of Fundamental Rights of the European Union.²⁶⁸ However, the Court also refers to ‘Article 52(1) of the Charter which provides that any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law, respect their essence and, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others’²⁶⁹ and subsequently the Court states in paragraph 42 ‘It is apparent from the case-law of the Court that the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest’.

²⁶³ Böszörményi and Schweighofer (n 167) 63, 71.

²⁶⁴ Murphy (n 28) 111.

²⁶⁵ *ibid*; Böszörményi and Schweighofer (n 167) 63, 71.

²⁶⁶ Murphy (n 28) 111.

²⁶⁷ Murphy (n 28) 147.

²⁶⁸ Joined Cases C-293/12 and C-594/12 *Digital Rights v Ireland, Kärntner Landesregierung, Seitlinger, Tschohl and others* [2014] OJ C 175/6, para 34; See also Böszörményi and Schweighofer (n 167) 63, 71.

²⁶⁹ Joined Cases C-293/12 and C-594/12, para 38.

The fundamental problem that lays ahead is the potential collision between data protection rules and the fight against money laundering/terrorist financing, meaning that the obliged entities may infringe data protection rules while merely complying with other obligations they have under the Fourth Directive ²⁷⁰ whereby huge amounts of everyday information is being collected (mass surveillance) and analyzed with a weak set of safeguards.²⁷¹

In this context Böszörményi and Schweighofer are accurately arguing that the ultimate ‘data protection test’ of the Fourth Directive will depend on two questions: does the Fourth Directive respects the principle of proportionality and the essence of the fundamental right to protection of personal data. Sooner or later the European Court of Justice will decide on these questions.²⁷²

5.3 Increasingly important role of ‘for-profit’ actors in AML/CTF enforcement

One of the prominent and salient features of the European AML/CTF legislation and the Fourth Directive is the growing number of tasks assigned to private and for-profit actors e.g. banks and other financial institutions in the implementation of this legislation e.g. the continuous monitoring on a RBA of financial transactions, the reporting of suspicious transactions to FIUs and the obligation to refrain from executing suspicious transactions.²⁷³ Naturally, banks have always played a significant role in financial crime prevention but this time their role is significantly broadened and has a new dimension.²⁷⁴ Some legal scholars speak in this context about the apparent need of the EU to require for the implementation of its AML/CTF legislation ‘a broad group of professional service-providers to act as de facto deputies’. ²⁷⁵ Zagaris justly writes that

²⁷⁰ Böszörményi and Schweighofer (n 167) 63, 71.

²⁷¹ Mitsilegas (n 39) 265; See also Böszörményi and Schweighofer (n 167) 63, 71.

²⁷² Böszörményi and Schweighofer (n 167) 63, 72.

²⁷³ Murphy (n 28) 108; Bergström, Svedberg Helgesson and Mörtz (n 184) 1043, 1056.

²⁷⁴ Bergström, Svedberg Helgesson and Mörtz (n 184) 1043, 1044.

²⁷⁵ P Shaughnessy, ‘The new EU Money-laundering Directive: Lawyers as Gate-Keepers and Whistle-Blowers’ 2002-2003 34 Law and Policy in International Business 25, 26; Murphy (n 28) 110.

the expanding due diligence obligations essentially ‘constitute a quasi- privatization of law enforcement’.²⁷⁶

In fact, one may say that the EU has ‘invited’ the private for-profit actors to join the fight against crime.²⁷⁷ They are now ‘on the front line of international efforts to stamp out money laundering, organized crime and terrorism.’ as Zagaris correctly noticed.²⁷⁸ This shifting of authority to private and for-profit actors may imply that the ‘state’ will gradually become a supervisor and regulator of the general AML/CTF regime, thereby giving the private actors a newly empowered role.²⁷⁹ These developments are the result of the switch from the rule-based approach to the risk-based approach, which brings along that private actors will have to evaluate themselves the specific and individual AML/CTF risks, based on general guidelines (risk factors) proclaimed by EU and its Member States. Thus, these private actors are more and more gaining the power to regulate their own rules related to the RBA, because they are the ones who will be applying them and will have to adapt them to the concrete circumstances and associated risks.²⁸⁰ Moreover, the private actors are the ones who have the access to the information that would otherwise not be available to the public authorities.²⁸¹ Indeed, a potential money launderer or a terrorist is more likely going to use a service of a bank than to try to establish any kind of relationship with a public authority.

Obviously, this outsourcing of authority and certain control functions brings into question the accountability issue i.e. how to make the for-profit private actors accountable for their actions.²⁸² The fundamental principle is, however, that ‘public actors are accountable within a democratic system for command and control. The private actors are not’.²⁸³ Consequently, there should be a strict and well delineated division of competences and appropriate checks and balances between both, in order to avoid confusion and dilution of accountability between the different actors, including

²⁷⁶ Zagaris (n 22) 123, 156.

²⁷⁷ Mitsilegas (n 39) 263.

²⁷⁸ Zagaris (n 22) 123, 156.

²⁷⁹ Bergström, Svedberg Helgesson and Mörtz (n 184) 1043, 1046.

²⁸⁰ Constanzo (n 257) 352-353.

²⁸¹ Bergström, Svedberg Helgesson and Mörtz (n 184) 1043, 1056.

²⁸² *ibid.*

²⁸³ *ibid* 1060; See also Murphy (n 28) 110.

the public actors.²⁸⁴ A good example of the ‘operational’ difficulties, that may arise from this outsourcing is illustrated by the following example: on the one hand, the obliged entities have the obligation to report suspicious transactions, while on the other hand competent authorities can impose sanctions on them for failing to do so. This has given rise to ‘over-reporting’: in order to be sure to comply with all the obligations, the obliged entities report every transaction, thereby ‘drowning’ the authorities with data. Thus, to reduce accountability for not reporting a suspicious transaction they ‘over-report’.²⁸⁵

Merely imposing sanctions for non-compliance on the obliged entities will not resolve the ‘accountability problem’. It remains to be seen whether this transfer of power to for-profit actors and withdrawal of the state to the safe position of supervisor brings any changes to the traditional concept of the state. That is to say, the state is formed by the transfer of the sovereignty from the individuals which -among other- implies the duty of protecting its citizens against crime but also preventing crime. In a well-received Swedish empirical study, which compares the collaboration between private and public actors in the UK and Sweden in the AML and CTF area, it became apparent that the operationalization of this collaboration is not ‘specified in any great detail’ which leads to confusion between the different actors, more diversity instead of standardization, fluidity between soft law and hard law and difficulties in accommodating the new police role of for-profit actors.²⁸⁶ The study concludes that the ‘the democratic implications of the empirical findings are quite dramatic’.²⁸⁷ Since the Fourth Directive gives even more assessment duties to the obliged entities by virtue of the RBA, the role of these ‘deputies’ and for-profit actors should be closely monitored and corrected as appropriate.

5.4 Concerns regarding the impact on the rule of law

²⁸⁴ Bergström, Svedberg Helgesson and Mörtz (n 184) 1043, 1060.

²⁸⁵ Brigitte Unger and Frans van Waarden ‘How to dodge drowning in data? Rule- and risk-based anti-money laundering policies compared*’ in Unger B and van der Linde D E (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013) 405; Unger, ‘Money Laundering from Al Capone to Al Qaeda’ (n 5) 24.

²⁸⁶ Bergström, Svedberg Helgesson and Mörtz (n 184) 1043, 1060.

²⁸⁷ *ibid.*

Anti-money laundering and counter-terrorist financing must be qualified as criminal law.²⁸⁸ Undoubtedly, there are critical and substantial differences with private law because of the ‘legitimate violence’ and intrusive investigations in criminal law that may be used against individuals.²⁸⁹ Therefore, it is evident that AML and CTF, as part of criminal law, should be compliant with ‘the higher standard of protection that applies in criminal justice’ as correctly pointed out by Murphy.²⁹⁰

In addition, and as already discussed under point 5.3, because of the pivotal role of private actors in the AML/CTF fight, the state must be engaged in the supervision thereof. Manifestly, this ‘transfer’ should be under the scrutiny of the rule of law²⁹¹ of which safeguarding the protection of fundamental rights is one of the major principles.²⁹²

Regarding the relationship of the AML/CTF regime and the rule of law, there are (or were) a few controversies, which we will discuss hereunder:

- 1) Legal basis for adoption of the AML/CTF measures;
- 2) Issues regarding the principle of legality;
- 3) Fair trial and presumption of innocence;²⁹³
- 4) Role of private actors in AML/CTF enforcement and lack of accountability.²⁹⁴

With regard to the first issue, the legal basis originally used for the First Directive i.e. articles 57 (2) and 100a of the EEC, raised a controversy because these articles were dealing with the harmonization of internal market and the AML/CTF regime was clearly a part of criminal law.²⁹⁵ Back then, the EU did not have any explicit competency in the field of criminal law.²⁹⁶ A solution was found in the “legislative formulation” that money laundering and later terrorist financing were not criminalized i.e. regarded as an offense, but the Directive handsomely used the wording

²⁸⁸ Murphy (n 28) 104; See also Herlin-Karnell (n 6) 2 and 150.

²⁸⁹ Herlin-Karnell (n 6) 150.

²⁹⁰ Murphy (n 28) 104.

²⁹¹ Murphy (n 28) 147.

²⁹² *ibid* 149.

²⁹³ *ibid* 104.

²⁹⁴ *ibid* 108.

²⁹⁵ *ibid*; Mitsilegas and Gilmore (n 19) 136; Murphy (n 28) 104.

²⁹⁶ Herlin-Karnell (n 6) 150; Mitsilegas and Gilmore (n 19) 135-136.

‘prohibited’.²⁹⁷ However, since case C-176/03 the European Court of Justice recognized the legislative competence in criminal law.²⁹⁸ The Lisbon Treaty now explicitly recognizes pursuant to articles 83 and 82 TFEU the competency of the EU to harmonize criminal law in specific crime-fighting areas.

Nonetheless, as one prominent legal scholar -rightly- notices, although the Lisbon Treaty resolves the competence issue with these articles ‘it merely draws up a skeleton for the development of criminal law at the EU level, leaving it largely unexplored’ and whereby the protection of the individual ‘should constitute the main theme in the emergence of EU criminal law’.

Questions concerning the principle of legality, among others, are coping with:

- 1) Restrictions on legal privilege: in certain circumstances lawyers are obliged to disclose the financial situation of their clients to the FIU, obviously this will have an effect on the accessibility of the law by individuals as they may fear that their financial status will be disclosed to the authorities;²⁹⁹
- 2) Identification requirements by lawyers: The Fourth Directive obliges lawyers by virtue of its article 13, although on a risk-based approach, to perform customer due diligence duties on their clients. There are concerns that these duties may interfere with the right to a fair trial and the respect for private life as enshrined in article 8 of the European Convention of Human rights;³⁰⁰

Wirth reference to the presumption of innocence, as enshrined article 6 (2) of the ECHR, a problem was detected since the AML/CTF regime, when dealing with terrorist financing, essentially determines inchoate offenses -meaning that these offenses require at least an intent to commit a crime- nevertheless these acts can be quite ‘removed from the actual act of terrorism’ and ‘this transfer of culpability challenges the presumption of innocence’³⁰¹

²⁹⁷ *ibid.*

²⁹⁸ Case C-176/03 *Commission v Council* [2005] ECRI-7879; Herlin-Karnell (n 6) 150; Mitsilegas and Gilmore (n 19) 137.

²⁹⁹ Murphy (n 28) 105.

³⁰⁰ *ibid* 106; European Convention for the Protection of Human Rights and Fundamental Freedom as amended (signed 4 November 1950, entered into force 3 September 1953) CETS 5.

³⁰¹ Murphy (n 28) 106.

Finally, the fact that private for-profit actors (e.g. banks) are obliged by article 35 of the Fourth Directive to refrain from carrying out transactions, which they suspect to be related to money laundering or terrorist financing, and to report them to the FIUs is quite worrisome and disputable, especially if the suspicion was not founded. This might have a negative and adverse effect on the person involved (e.g. placed on watch lists) but more importantly there is no or little accountability on behalf of the for-profit actors and no real rights to protect the individual against excesses.³⁰² The ‘deputy’ role of private actors in law enforcement questions and challenges, therefore, the rule of law.

The aforementioned examples show the potential impact of the AML/CTF legislation on the concept of the rule of law. Given that the money laundering and terrorist financing field will keep expanding -the terrorist and money laundering will not disappear easily- and will cover other potential areas e.g. virtual currencies, the EU faces the difficult task to safely balance between achieving two crucial objectives: fighting crime and safeguarding the fundamental rights of the individual.

³⁰² *ibid* 108.

5. Conclusion

The Fourth Directive of 20 May 2015 against money laundering and terrorist financing repealed the Third Directive and is already the fourth consecutive directive of the EU in this field. The purpose of Fourth Directive was to bring the existing EU legislation in line with international standards, enhancing uniform implementation by the Member States and removing inadequacies and loopholes in the previous EU measures.

The Fourth Directive does not come out of the blue sky. In fact, the EU's fight against money laundering and terrorist financing is firmly embedded in an international effort by many international players such as the FATF, the UN and the Council of Europe to counter these criminal activities. The EU and its Member States have proactively participated in these international initiatives and tried to keep pace with them.

The timeline of these international efforts starts with the war on drugs in the beginning of the eighties of last century, which became later the war against money launderers, who were trying to bring back the illicit proceeds from their criminal activities to the legal economy. After the terrible events of 11 September 2001, the AML system was being coupled or 'merged' with the fight against terrorism. The involvement of international actors -intergovernmental organizations and non-state actors- in the realization of AML and CTF legislation through international conventions, recommendations and standards does not surprise: national legislation is not able to cope efficiently with these crimes as they are often carried out in a cross-border and international context. Hence, international collaboration and information exchange are essential.

The most fundamental policy change instituted by the Fourth Directive is undoubtedly the RBA, as proposed and supported by the FATF recommendations. This risk-based approach recognises that not every transaction has the same risk level of money laundering and terrorist financing and that measures should be taken in accordance with the risk level at stake, which would then result in a more efficient AML/CTF regime because of a better allocation of resources and prioritization of objectives. On a technical legal side, the most relevant modifications of the Fourth Directive concern the

following points: (i) expansion of the scope *ratione materiae* and *personae* of the previous Third Directive; (ii) the introduction of the risk-based approach and its effect on the due diligences processes; (iii) fostering deeper collaboration and exchange of information between the FIUs; (iv) clarifying the definition of beneficial ownership; (v) introducing a more uniform sanction regime, (vi) addressing the data protection issue and (vii) abolishing the 'third country equivalence' concept because it is in contradiction with the risk-based approach itself.

However, the terrorist financing and money laundering 'scene' has its own dynamics, supported by never-ending technological innovations and by criminals making use of these developments, which instigated the EU to come up already with a proposal amending the Fourth Directive even before the latter has been implemented.

The EU's AML/CTF legislation raises also some critical questions and concerns, especially with regard to effectiveness, fundamental rights and the ever-growing role of private 'for-profit' actors in the implementation of money laundering and terrorist financing legislation.

As to the effectiveness aspect, it is obvious that the risk-based approach and intensive information exchange between the FIUs will be a key factor in determining the overall success rate of the money laundering and counter terrorist financing fight. However, let's not forget that terrorist activities do not always require substantial amounts of money, on the contrary. Even, the most sophisticated risk-based system will not be able to always track and find 'lonely wolves'. In addition, well performing AML/CTF systems will require a thorough screening of offshore activities and their beneficial owners in tax heavens. The Commission's new amendment to the Fourth Directive is fortunately focusing on these offshore constructions.

With regard to fundamental rights, especially the massive storage of data and collection thereof via mass-surveillance techniques might have negative repercussions on the protection of private life without strong and by preference the strongest build-in legal safeguards for the individual.

The growing 'policing role' of 'for-profit' actors such as financial institutions in detecting and reporting suspicious transactions and refraining from carrying out such

transactions causes some concerns too. This may lead to over-reporting by the obliged entities in order to avoid sanctions but there is also accountability question. Fundamentally, private actors are not accountable to the public, whereas public authorities are accountable and will be held responsible in democratic systems. More accountability and a clear distinction between the roles of private and governmental actors will clarify their relationship and enhance trustworthiness.

It is much too early to evaluate the effectiveness of the Fourth Directive as its implementation will only start in June 2017 and because some important changes are now already proposed by the EU Commission. On the other hand, one should keep in mind that a 'crime-free' society is an illusion or it comes at a tremendously high economic cost and an impermissible limitation of personal freedom and fundamental right

The Fourth Directive is a positive step towards a more effective fight against money laundering and terrorist financing. As this will not be the last measure, we are confident that future measures will introduce more checks and balances, adequate assessment methods, more border-less collaboration and exchange of information, as these are crucial success factors in effectively fighting money laundering and terrorist financing.

I sincerely thank all the readers of this thesis.

6. Bibliography

All sources consulted are cited in accordance with the Oxford University Standard for the Citation of Legal Authorities (OSCOLA) 4th edn.

7.1 Treaties

European Convention for the Protection of Human Rights and Fundamental Freedoms as amended (signed 4 November 1950, entered into force 3 September 1953) CETS 5.

Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances (signed 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95.

Convention on laundering, Search, Seizure and Confiscation of the Proceeds of Crime (signed 8 November 1990, entered into force 1 September 1993) CETS 141.

UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

UNGA International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 39 ILM 270.

Convention Against Transnational Organized Crime (adopted 15 November 2000 entered into force 29 September 2003) 40 ILM 335.

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (signed 16 May 2005, entered into force 1 May 2008) CETS 198.

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

Charter of Fundamental Rights of the European Union [2016] OJ C 202.

7.2 EU legal acts

Council Directive (EEC) 91/308 of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L 166/77.

Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281.

Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime [1998] OJ L 333.

Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information [2000] OJ L 271/4.

Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime [2001] OJ L182/5.

Parliament and Council Directive (EC) 2001/97 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 L 344/76.

Parliament and Council Directive (EC) 2005/60/ 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 L 309/15.

Parliament and Council Regulation (EC) 1889/2005 of 26 October 2005 on controls of cash entering or leaving the Community [2005] OJ L 309/9.

Parliament and Council Directive (EC) 2006/24 of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54.

Commission Directive (EC) 2006/70 of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a

financial activity conducted on an occasional or very limited basis [2005] OJ L 214/29.

Parliament and Council Regulation (EC) 1781/2006/EC of 15 November 2006 on information on the payer accompanying transfers of funds [2006] OJ L 345/1.

Parliament and Council Directive (EU) 2015/849 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 [2015] OJ L 141/73.

Parliament and Council Regulation (EU) 2015/847 of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006 [2015] OJ L 141/1.

Parliament and Council Regulation (EU) 2016/67 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1.

7.3 Cases

Case C-176/03 Commission v Council [2005] ECRI-7879.

Case C-305/05 Ordre des barreaux francophones and others v Council [2007] ECR I-5305.

Joined Cases C-293/12 and C-594/12 Digital Rights v Ireland, Kärntner Landesregierung, Seitlinger, Tschohl and others [2014] OJ C 175/6.

7.4 Commission Documents

Commission, 'Staff Working Paper on Compliance with the anti-money laundering directive by cross-border banking groups at group level' SEC (2009) 939 final.

Commission, 'Staff Working Paper on Anti-money laundering supervision of and reporting by payment institutions in various cross-border situations' SEC (2011) 1178 final.

Commission, 'Report from the Commission to the European Parliament on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing' COM (2012) 168 final.

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) 45 final.

Commission, 'Staff Working Document Impact Assessment' SWD (2013) 21 final (Accompanying the document 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, including terrorist financing and Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds).

Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and amending Directive 2009/101/EC' COM(2016) 450 final.

7.5 Books and Contributions in Books

Constanzo Paolo, 'The risk based approach to anti-money laundering and counter terrorist financing in international and EU standards: what is it, what it entails' in Unger B and van der Linde D E (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013).

Demetis Dionysios S, *Technology and Anti-Money Laundering A Systems Theory and Risk-Based Approach* (Edward Elgar Publishing 2010).

Gilmore W C, *Dirty Money: The Evolution of Money Laundering Counter-Measures* (3rd edn, Strasbourg Council of Europe Publishing 2004).

Herlin-Karnell Esther, *The Constitutional Dimension of European Criminal Law* (Hart Publishing 2012).

House of lords European Union Committee, *Money laundering and the Financing of Terrorism* (london, The Stationery office, 2009) 22.

Kersten A, 'Financing of Terrorism – A Predicate Offense to Money Laundering?' in M Pieth (ed), *Financing Terrorism* (Kluwer Law Publishing, 2002) 49.

Mitsilegas Valsamis, *EU Criminal Law* (Hart Publishing 2009).

Mitsilegas Valsamis, *Money Laundering Counter-measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles* (Kluwer Law International 2003).

Murphy Cian C, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012).

Savona Ernesto U and Manzoni Francesca, *European money trails* (Harwood Academic Publishers 1999).

Unger B and van der Linde DE (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013).

Unger B, 'Money Laundering from Al Capone to Al Qaeda' in Unger B and van der Linde D E (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013).

Unger B and van Waarden F 'How to dodge drowning in data? Rule- and risk-based anti-money laundering policies compared' in Unger B and van der Linde D E (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013).

Vettori B, 'Evaluating anti-money laundering policies: where are we?' in Unger B and van der Linde D E (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013).

7.6 Articles

Bergstrom Maria, 'A New Role for For-Profit Actors? The Case of Anti-Money Laundering and Risk Management' (2011) 49 JCMS 1043.

Bures O, 'Ten Years of EU's Fight against Terrorist Financing: A Critical Assessment' (2015) 30 Intelligence and National Security 207.

Böszörmenyi Janos and Schweighofer Erich, 'A review of tools to comply with the Fourth EU anti-money laundering directive' (2015) 29 International review of Law, Computers & Technology 63.

Ferwerda J, 'The economics of crime and money laundering: does anti-money laundering policy crime?' (2009) 5 Review of law & Economics 903.

Ganguli Indranil, 'The Third Directive: Some Reflections on Europe's New AML/CFT Regime' (2010) 29 Banking and Financial Services 1.

Katz Etay, 'Implementation of the Third Money Laundering Directive: an overview' (2007) 1 Law and Financial Markets Review 207.

Kingah Stephen and Zwartjes Marieke, 'Regulating money laundering for terrorism financing: EU-US transnational policy networks and the financial action task force' (2015) 21 *Contemporary Politics* 341.

Lacey Kathleen A and Crutchfield George Barbara, 'Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms' (2003) 23 *Northwestern Journal of International Law & Business* 263.

Mitsilegas Valsamis and Gilmore Bill, 'The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards' (2007) 56 *International and Comparative Law Quarterly* 119.

Mugarura Norman, 'The Institutional Framework Against Money Laundering and its Underlying Predicate Crimes' (2011) 19 *Journal of Financial Regulation and Compliance* 174.

Simonova Anna, 'The risk-based approach to anti-money laundering: problems and solutions' (2011) 14 *Journal of Money Laundering Control* 346.

Shaugnessy P, 'The new EU Money-laundering Directive: Lawyers as Gate-Keepers and Whistle-Blowers' (2002-2003) 34 *Law and Policy in International Business* 25.

Stessens Guy, '2. Money Laundering' (2006) 77 *'Revue internationale de droit pénal'* 201.

Tropina, Tatiana, 'Fighting money laundering in the age of online banking, virtual currencies and internet gambling' (2014) 15 *ERA Forum* 69.

Unger B and den Hertog J A (2012), 'Water always finds its way. New forms of money laundering. Crime' (2012) 57 *Law and Social Change* 287.

van Den Broek Melissa, 'Designing Supervision under the Preventive Anti-Money Laundering Policy in the European Union' (2014) 10 *Utrecht Law Review* 151.

Zagaris Bruce, 'The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes after September 11, 2001' (2004) 22 Berkely Journal of International Law 124.

Zagaris Bruce, 'Problems applying traditional anti-money laundering procedures to non-financial transactions, "parallel banking systems" and Islamic financial systems' (2007) 10 Journal of Money Laundering Control 157.

7.7 E-sources

7.7.1 Documents

Deloitte, 'Final Study on the Application of the Anti-Money Laundering Directive' (December 2010) <http://ec.europa.eu/internal_market/company/docs/financial-crime/20110124_study_amld_en.pdf> 4> accessed 27 February 2016.

Eurostat, 'Working paper Money Laundering in Europà' <http://ec.europa.eu/eurostat/en/web/products-statistical-working-papers/-/KS-RA-10-003> accessed 8 April 2016.

FATF 'IX FATF Special Recommendations' <<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/ixspecialrecommendations.html>> accessed 20 March 2016.

FATF 'The forty recommendations' <<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html>> accessed 20 March 2016.

FATF 'Recommendations 2012' <<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>> accessed 3 April 2016.

FATF 'Risk-Based Approach for the Banking Sector' <<http://www.fatf-gafi.org/documents/news/risk-based-approach-banking-sector.html>> accessed 29 July 2016.

G-7 Summit 'Economic Declaration Paris 1989' <<http://www.g8.utoronto.ca/summit/1989paris/communique/index.html>> accessed 20 March 2016.

International Monetary Fund 'Address at the Plenary Meeting of the Financial Action Task Force Money Laundering' (Paris February 10, 1998) 'Money Laundering: The Importance of International Countermeasures' <<http://www.imf.org/external/np/speeches/1998/021098.html>> Accessed 27 February 2016.

UNODC 'On money-laundering and countering the financing of terrorism' <<http://www.unodc.org/unodc/en/money-laundering.html>> accessed 20 March 2016.

The International Consortium of Investigative Journalism 'Luxembourg Leaks: Global Companies' Secrets Exposed' <<https://www.icij.org/project/luxembourg-leaks>> accessed 11 July 2016.

7.2.2 Weblogs

Delorenzi Dalila 'The new EU Anti-Money Laundering legal framework: the race has started again' (EU Law Analysis, 25 September 2015) <<http://eulawanalysis.blogspot.be/2015/09/the-new-eu-anti-money-laundering-legal.html>> accessed 26 May 2016.

Jones Simone, 'Beneficial ownership: A new era of openness? (Sweden)' (International Compliance Association, 26 May 2016) <<http://www.int-comp.org/insight/2016/may/26/beneficial-ownership-a-new-era-of-openness-sweden/>> accessed 29 May 2016.

Annex 1 English Abstract

The Fourth AML/CTF Directive of the EU was triggered by important developments in the international community and more specifically by the FATF's approach and recommendations in the fight against money laundering and terrorist financing. In addition, it shows the strong commitment of the EU to successfully fight these crimes.

The thesis starts by giving a brief historical overview of anti-money laundering and counter-terrorist financing legislative initiatives, coupled with the role of the most influential stakeholders in this field, being the FATF, the UN, the Council of Europe and continues with discussing the corresponding measures (First, Second and Third Directive) adopted by the EU.

Subsequently, the reasons for adopting the Fourth Directive are discussed: the previous Directives were inconsistent with international standards; they were differently applied by the Member States and there were major loopholes in these measures.

The fundamental policy change introduced by the Fourth Directive in consequently applying the risk-based approach and its repercussions on customer due diligence procedures are examined together with other relevant modifications such as: (i) the expansion of the scope *ratione materiae* and *personae*; (ii) the fostering of intense collaboration and exchange of information between the FIUs; (iii) the clarifying of the definition of beneficial ownership; (iv) the introducing of a more uniform sanction regime, (v) the addressing of the data protection issue and (vi) the abolishment of the 'third country equivalence' concept because it is in contradiction with the risk-based approach itself.

Several concerns are raised concerning the effectiveness of the new AML/CTF system, its impact on the rule of law, the protection of personal data and the increasing role of ‘for-profit’ actors in the implementation of the AML/CTF regime.

The thesis concludes that, although challenges, the Fourth Directive is indeed a positive development in the effective fight against money laundering and terrorist financing but certainly not the last measure in this very dynamic and evolving field.

Anhang 2 Deutscher Auszug

Die vierte AML/CTF Richtlinie wurde von wichtigen Entwicklungen in der internationalen Gemeinschaft und speziell vom Ansatz und den Handlungsempfehlungen der FTA im Kampf gegen Geldwäscherei und Terrorismusfinanzierung ausgelöst. Außerdem zeigt die Richtlinie ein starkes Bekenntnis der Europäischen Union (EU) zur erfolgreichen Bekämpfung dieser Verbrechen.

Die Masterarbeit beginnt mit einer kurzen Zusammenfassung der historischen Entwicklung von Initiativen zur Bekämpfung von Geldwäscherei und Terrorismusfinanzierung in Verbindung mit der Rolle der einflussreichsten Interessenvertreter auf diesem Feld, namentlich der FATF, der Vereinten Nationen (UN) und des Europarates (CoE). Danach bietet die Masterarbeit einen Kommentar zu den entsprechenden Maßnahmen (der ersten, zweiten und dritten Richtlinie) auf EU Ebene.

Im nächsten Schritt werden die Gründe zur Verabschiedung der vierten Richtlinie diskutiert. Die früheren Richtlinien waren inkongruent mit internationalen Regeln, sie wurden unterschiedlich von EU-Mitgliedsländern angewandt und verschiedene Gesetzeslücken in den Maßnahmen waren vorhanden.

Der grundlegende Kurswechsel, der in der vierten Richtlinie durch die ständige Anwendung eines risikobasierten Ansatzes zusammen mit seinen Rückwirkungen auf die Sorgfaltspflicht für die Kunden eingebracht wird, wird zusammen mit anderen relevanten Modifikationen untersucht. Diese Änderungen beinhalten: (i) die Erweiterung des personellen und materiellen Umfangs; (ii) die Förderung einer starken

Zusammenarbeit und eines Informationsaustausches zwischen der zentralen Meldestellen der Mitgliedsstaaten (FIU's); (iii) die Klärung des Begriffes eines wirtschaftlichen Eigentumes; (iv) die Einführung eines einheitlicheren Sanktionsregimes; (v) das Ansprechen von Datenschutzprobleme; (vi) die Abschaffung der Gleichstellung von Drittändern wegen ihres Widerspruches mit dem Kern des risikobasierten Ansatzes.

Einige Bedenken im Bezug auf die Effizienz des neuen AML/CTF Systems, seine Auswirkung auf die Rechtsstaatlichkeit, den Schutz der persönlichen Daten und die wachsende Bedeutung von 'gewinnorientierten' Teilnehmern bei der Umsetzung der AML/CTF Ordnung werden in der Masterarbeit geäußert.

Die Masterarbeit kommt zu der Schlussfolgerung, dass die vierte Richtlinie trotz Herausforderungen eine positive Entwicklung im Kampf gegen Geldwäscherei und Terrorismusfinanzierung darstellt, aber auch sicherlich nicht der letzte Schritt von Maßnahmen in diesem dynamischen und sich weiter entwickelnden Feld ist.