The Fight against Money Laundering in the EU

The Framework Set by the Fourth Directive and Its Proposed Enhancements

Alexandre Met-Domestici

eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

ABSTRACT

The article analyses the EU's anti-money laundering (AML) framework under Directive 2015/849 (the fourth AML Directive) and the Commission's July 2016 proposal for amendments. Met-Domestici explains how the reforms respond to terrorist financing risks and evolving laundering methods by broadening the scope of obliged entities (including virtual currency exchanges and gambling providers), adding tax crimes as predicate offences, tightening rules on prepaid cards, and focusing on politically exposed persons and high-risk third countries. The proposal also strengthens customer due diligence, beneficial ownership transparency, central registers, and cooperation between Financial Intelligence Units. While these measures mark significant progress, the author argues that long-term effectiveness requires further integration, including the possible establishment of a European FIU and extending the EPPO's jurisdiction to money laundering and terrorism.

AUTHOR

Alexandre Met-Domestici

Associate Professor – Maître de Conférences –
Sciences-Po, Aix-en-Provence, France

CITATION SUGGESTION

A. Met-Domestici, "The Fight against Money Laundering in the EU", 2016, Vol. 11(4), eucrim, pp170–179. DOI: https://doi.org/10.30709/eucrim-2016-021

Published in
2016, Vol. 11(4) eucrim pp 170 – 179
ISSN: 1862-6947
https://eucrim.eu

I. Introduction

The recent terrorist attacks that struck France and Germany in the past year unfortunately demonstrated that the EU is far from being immune to the worst criminal threats. As a response, the Union adopted the European Agenda on Security[1] and an Action Plan to strengthen the fight against terrorist financing.[2] In the former, the Commission stressed the need for a new directive on combatting terrorism, while also adopting another Action Plan against the trafficking of firearms and controlling the use of explosives. The latter is part of a comprehensive approach aimed at fighting money laundering and terrorist financing.

The fight against money laundering consists in a three-pronged approach in general: At the international level, the FATF adopts recommendations.[3] The EU adopts directives implementing FATF recommendations and sometimes adding further obligations – the most recent directive having been added in 2015 (the so-called fourth Anti-Money Laundering Directive).[4] EU directives are then transposed into national law by the Member States. The first anti-money laundering (AML) Directive was adopted in 1991[5]. It has been amended by each subsequent directive (the second directive being adopted in 2001[6], the third Directive in 2005[7] and the fourth Directive in 2015[8]), all of them extending its scope and aiming at increasing the effectiveness of the fight against money laundering.

The anti-money laundering (AML) mechanism is greatly decentralized. At the national level, a Financial Intelligence Unit (FIU) can be found in each EU Member State. On the ground, it relies upon professionals (obliged entities) in charge of monitoring transactions. FIUs are small units in charge of receiving Suspicious Transaction Reports (STRs) and investigating alleged money laundering cases.

In keeping with the FATF recommendations, the EU has been implementing a risk-based approach (RBA) since the entry into force of the third AML Directive.[9] This approach departs from the former rule-based approach that lacked flexibility, requiring professionals to report transactions meeting specific quantitative criteria. The RBA further highlights the role played by obliged entities. The latter are required to assess the risk level of money laundering presented by transactions. Professionals are to apply specific kinds of Customer Due Diligence (CDD), depending on the level of risk. Should they determine that the transaction is suspicious, they are required to file an STR with their national FIU. The role played by professionals is therefore paramount to the efficiency of the anti-money laundering mechanism.

In the wake of the adoption of the fourth AML Directive and given the urge to fight terrorism financing, the Commission issued a proposal for a new directive amending Directive 2015/849 in July 2016.[10] This proposal pursues three main goals:

- Fighting terrorist financing;
- Increasing transparency in order to better fight money laundering;
- Strengthening the fight against tax avoidance.[11]

Member States are furthermore required to bring forward the entry into force of the fourth AML Directive.

Which improvements can be expected from the entire reform process? This article will attempt to answer by focusing on the tweaks to the AML framework put forward by the Commission in its July 2016 proposal as well as by describing the changes brought about by the fourth AML Directive 2015/849. The article further focuses on analysing the different aspects that are followed by the objectives of the ongoing reform process: First, responding to specific threats (below II.) and second, improving cooperation in the implementation of the AML mechanism (below III.).

II. Responding to Specific Threats

The current reform – and especially the new Commission proposal of July 2016 – can be considered a response to increased threats of money laundering and terrorist financing. More precisely, the 2015 and 2016 terrorist attacks shed a light on the new ways to launder money and often to channel it to terrorists, thanks especially to the use of online services. The response relies on further broadening the scope of the AML Directive (below 1.) and places a renewed focus on high-risk third countries (below 2.).

1. Broadening the Scope of the Fourth AML Directive

In a meanwhile traditional manner, the reform follows in the footsteps of the previous directives by requiring more obliged entities to fight money laundering, expanding the category of suspected persons (below a)), and adding more predicate offences to the scope of the fourth AML Directive 2015/849 (below b)).

More obliged entities required to fight money laundering

A growing number of professionals are now subject to the decentralized anti-corruption mechanism. Originally, only finance professionals were required to report suspicious transactions.[12] Bankers are indeed obviously needed by money launderers willing to introduce funds stemming from criminal activities into the legal economy. Most importantly, the second AML Directive included legal professionals.[13] The current list of obliged entities therefore includes finance and legal professionals as well as auditors, accountants, real estate agents, insurance agents, money remittance officers, art dealers, and persons trading in goods where payments are made in cash for amounts of €10,000 and more.[14] Furthermore, Directive 2015/849 replaced casinos with "providers of gambling services,"[15] thus encompassing online gambling service providers. Such professionals provide "a service which involves wagering a stake with monetary value in games of chance, including those with an element of skill such as lotteries, casino games, poker games and betting transactions that are provided at a physical location, or by any means at a distance, by electronic means or any other technology for facilitating communication, and at the individual request of a recipient of services."[16]

The exemption for lawyers

A very important issue is the case of lawyers. The reporting duty imposed on them since the entry into force of the second AML Directive may be in breach of their professional obligations. The role of lawyers is indeed to represent and defend their clients in judicial proceedings. Filing STRs against them is probably far from being the best way to defend them. The obligation for them to report may furthermore fail to comply with Art. 6 ECHR – which provides for the right to a fair trial and, more specifically, the rights of the defense – and Art. 8 ECHR– which provides for the right to privacy, thus protecting correspondence exchanged between a lawyer and his client– as well as with the corresponding guarantees of the Charter of Fundamental Rights of the EU.

In order to comply with these fundamental rights, the Directive provides for exceptions. In fact, the obligation to report shall apply to legal professionals "only to the strict extent that those persons ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings."[17]

This exemption also stems from case law. In its famous *Ordre des barreaux* ruling,[18] the ECJ held that the obligation to report imposed on lawyers by the second AML Directive complied with fundamental rights. Hence, "the obligations of information and of cooperation with the authorities responsible for combating money laundering… do not infringe the right to a fair trial."[19] The ECtHR reached a similar conclusion in its *Michaud*

vs. France ruling, asserting that the reporting obligation was in line with both Art. 6 and Art 8 ECHR. Hence, "the obligation for lawyers to report suspicions […] does not constitute disproportionate interference with the professional privilege of lawyers."[20] As a matter of fact, "the obligation to report […] only concerns tasks performed by lawyers which are similar to those performed by the other professions subjected to the same obligation, and not the role they play in defending their clients,"[21] thanks to the exemption provided for in the Directive. It should also be noted that lawyers are not required to report suspicious transactions directly to the FIU. They are required to report to their local bar association, which acts as a filter and may then report to the FIU.

Virtual currencies exchange platforms and electronic money

According to the Commission's proposal of July 2016, virtual currency[22] exchange platforms and custodian virtual wallet providers should be considered as obliged entities. Whereas the former are electronic exchange offices trading virtual currencies for real currencies (dubbed *"fiat"* currencies); the latter are online service providers holding virtual currency accounts on behalf of their customers, by providing virtual wallets from which payments can be performed. In the Commission's proposal, such exchange platforms are defined as "providers engaged primarily and professionally in exchange services between virtual currencies and *fiat* currencies"[23] and wallet providers are defined as those "offering custodial services of credentials necessary to access virtual currencies."[24] Wallet providers can be considered online banks or payment institutions. Both types of entities are gateways to virtual currencies. These entities will therefore be required to apply customer due diligence, especially when performing exchanges between virtual and *fiat* currencies. Such exchanges will therefore no longer benefit from anonymity.

Prepaid instruments

It is further planned that prepaid instruments – such as prepaid credit cards – be more intensively monitored, too. The Commission thus aims at limiting the possibility to carry out anonymous payments. To this end, the threshold above which the use of anonymous prepaid cards is prohibited will be lowered from €250 to €150.[25] Professionals issuing such cards will be required to check their customers' identity and implement due diligence when the amount exceeds the new threshold provided for in the recent proposal.

Politically Exposed Persons

Directive 2015/849 broadens a very specific category of potentially suspect persons, namely politically exposed persons (PEPs). Business relationships with public officials are indeed very sensitive and may harbor increased risks of money laundering. Hence, the directive requires obliged entities to implement a specific kind of enhanced CDD.

According to the fourth AML Directive, a PEP is "a natural person who is or who has been entrusted with prominent public functions. This includes heads of State, heads of government, ministers and deputy or assistant ministers; members of parliament; members of the governing bodies of political parties; members of supreme courts, of constitutional courts or of other high-level judicial bodies; members of courts of auditors or of the boards of central banks; ambassadors, *chargés d'affaires* and high-ranking officers in the armed forces; members of the administrative, management or supervisory bodies of state-owned enterprises; directors, deputy directors and members of the board of an international organization."[26] PEP's family members and close associates are also considered as being politically exposed and therefore fall into the same category.

Quite strikingly, Directive 2015/849 adds national PEPs to the list. This seems to be a welcome addition, with a view to improving the efficiency of the AML mechanism – as can be easily inferred from some recent high-

profile cases.[27] This new obligation may nonetheless be quite tricky to implement, since reporting on a senior public official in a professional's own country might prove very sensitive.

Predicate offences: origin of the funds being laundered

The list of predicate offences has grown with each new AML directive. Under the first anti-money laundering directive, only drug trafficking was considered a predicate offence.[28]

The 2001 directive (second AML Directive) added several serious criminal offences, such as corruption and offences affecting the financial interests of the EU as well as serious crimes.[29] The third AML Directive further expanded the list of predicate offences to encompass terrorism, drug trafficking, activities of criminal organizations, fraud to the EU's financial interests, and corruption and offences punishable by a maximum prison term of at least one year. The latter category of offences provides a partially harmonized definition of serious crimes.[30] Nevertheless, the very definition of the offences themselves and the establishment of the sanctions corresponding to such predicate offences is still up to the Member States.

The inclusion of tax crimes

More recently, the fourth AML Directive of 2015 added tax crimes to the list of predicate offences. Whereas this inclusion is likely to provide a much needed increase in the efficiency of the fight against tax crimes at a time of huge budgetary deficits, its relevance to the fight against money laundering is debatable. It might lead to an increase in the workload of FIUs, thus failing to achieve one of the goals pursued by the risk-based approach, i.e., preventing FIUs from being overwhelmed. Moreover, the very nature of tax crimes is different from that of the other predicate offences. The money may well have originally be earned through a legal activity and therefore not originate from crime. The illegal behavior is, in fact, not paying in taxes the part of this income which is owed to the state.. At any rate, tax crimes have now been included in the scope of the directive. As a consequence however, only serious and organized tax crimes will probably be investigated by FIUs.

The future scenario: further criminalization of money laundering

The July 2016 proposal of the Commission does not provide for new predicate offences. However, on 25 October 2016, the Commission issued the roadmap on criminalization of money laundering[31] in which it advocates the adoption of a specific directive. The Commission thus aims at bolstering harmonization of the definition of money laundering and its predicate offences and at bridging "enforcement gaps and obstacles to information exchange and cooperation between the competent authorities in different countries."[32] To this end, the foreseen directive would further harmonize the definition of money laundering, thus expanding its scope and making it more coherent. It would also probably provide for the criminalization of self-laundering and negligent money laundering throughout the EU. Last but not least, it would offer more thorough and consistent definitions of predicate offences across Member States.

2. Focusing on High-Risk Third Countries

Enhanced CDD has to be performed where transactions involve countries with flaws in their anti-money laundering or their legal counter-terrorism mechanisms. In this respect, the Commission has to implement a requirement put forward in the fourth AML Directive, i.e., harmonizing the checks professionals are required to apply to such transactions.[33] Hence, a delegated regulation providing for a list of such countries was adopted by the Commission on 14 July 2016.[34]

Such high-risk third countries fall into three categories:[35]

- Some countries have presented a written, high-level political commitment to address the identified deficiencies and have designed an AML action plan together with the FATF. These countries are Afghanistan, Bosnia and Herzegovina, Guyana, Lao PDR, Syria, Uganda, Vanuatu, and Yemen.[36]
- One *country* has provided the same type of commitment and decided to seek assistance from the FATF, namely Iran.[37]
- Lastly, one country represents ongoing and substantial money laundering and terrorist financing risks and has repeatedly failed to address deficiencies, namely North Korea.[38]

The list was established by applying criteria concerning the legal AML/CFT framework of each country, the competences, powers and procedures of the country's AML institutions, and the overall effectiveness of the AML mechanism.[39] Once a country has been listed by the Commission, it can submit objections during a one-month period, which can be renewed once.[40] The Commission is to regularly review the list,[41] at least after each FATF plenary meeting.

When dealing with high-risk third countries, professionals are required to implement a specific kind of enhanced CDD comprising supplementary monitoring measures. The latter consists in thorough checks meant to reduce the risk of money laundering as far as possible. Hence, "when dealing with natural persons or legal entities established in high-risk third countries…obliged entities shall apply at least the following enhanced customer due diligence measures:… (a) obtaining additional information on the customer; (b) obtaining additional information on the intended nature of the business relationship; (c) obtaining additional information on the source of funds or source of wealth of the customer; (d) obtaining information on the reasons for the intended or performed transactions; (e) obtaining the approval of senior management for establishing or continuing the business relationship; (f) conducting enhanced monitoring of the business relationship by increasing the number and timing of controls applied, and selecting patterns of transactions that need further examination."[42]

It is striking that this impressive list of measures is not comprehensive; it is, in fact, a minimum requirement.[43] Member States may require professionals to apply additional mitigating measures such as "additional elements of enhanced due diligence," "enhanced relevant reporting mechanisms," and even "systematic reporting of financial transactions" or "limiting business relationships or financial transactions."[44]

III. Improving Cooperation in the Implementation of the AML Mechanism

The need for increased cooperation arising from the new ways to launder money and fund terrorism is highlighted in the current reform process. As a result, the implementation of the AML mechanism is sure to improve, thanks to the enhancement of both beneficial ownership transparency (below 1.) and the role played by FIUs (below 2.).

1. Enhancing Beneficial Ownership Transparency

Each new AML directive has strengthened the obligations imposed on obliged entities in order to increase the efficiency of the AML mechanism. A breakthrough resulted from the entry into force of the third AML Directive, thanks to the shift from the rule-based approach to the risk-based approach.[45] Whereas the rule-based approached required professionals to file STRs whenever pre-defined criteria were met, they enjoy

more leeway under the risk-based approach. Obliged entities are now required to assess the level of risk presented by transactions. Based upon this assessment, they are to implement customer due diligence and to decide when to file STRs, depending on whether they deem transactions suspicious or not.

Building on this approach, the fourth AML Directive 2015/849 reinforces professionals' anti-money laundering duties by streamlining CDD and imposing stricter obligations on them. The Commission's proposal of July 2016 aims at further enhancing this mechanism. The reform process will lead to enhanced beneficial ownership transparency, thanks to improvements regarding the identification of the beneficial owner and cooperation between public authorities. These new issues are addressed in more detail in the following.

Identification of the beneficial owner

When implementing their anti-money laundering obligations, professionals are required to search for the origins of the funds and, most importantly, the identity of the beneficial owner. The latter is defined as "any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted."[46] The criteria meant to help professionals determine who the beneficial owners of legal entities is be streamlined.

Simplified Customer Due Diligence

Simplified CDD applies to situations presenting a low risk of money laundering.[47] Such situations may stem from the customer – regular customers, public authorities, companies listed in regulated markets, or financial institutions licensed in a jurisdiction complying with FATF standards. The transaction itself may be characterized by a low risk of money laundering – common transactions, such as wages or transactions where the origin of the funds is clearly known and the identity of the beneficial owner is established in a transparent manner.

In this respect, an improvement stemming from the fourth AML Directive is that non-face-to-face banking relationships are no longer systematically considered to present a high risk of money laundering. They may therefore be subject to simplified CDD. This is mainly due to the development of online banking, which does not require the client to be physically present and may not be suspicious at all.

Enhanced Customer Due Diligence

In situations presenting a high risk of money laundering, however, obliged entities are required to implement enhanced CDD. They have to perform extra checks and search for two key elements, namely the origin of the funds and the identity of the beneficial owner.

In order to increase transparency, the Commission stresses the need for professionals to obtain their customers' identity from an independent and reliable source and acknowledges the possibility of using electronic means of identification. Obliged entities are thus required to check "the customer's identity on the basis of documents, data or information obtained from a reliable and independent source, including, where available, electronic identification means."[48]

Quite strikingly, in situations presenting a high level of risk of money laundering, the Commission's proposal of July 2016 not only requires professionals to identify such risks, but also to mitigate them. Hence, in cases of "higher risk that are identified by Member States or obliged entities, Member States shall require obliged entities to apply enhanced customer due diligence measures to manage and mitigate those risks."[49]

The fourth AML Directive provides guidance to obliged entities in their search for the beneficial owner.[50] To this end, it distinguishes two types of structures that can be used to conceal the origin of the funds and the

identity of the beneficial owner, and which are therefore subject to enhanced due diligence measures. These are corporate and other legal entities, on the one hand, and trusts and other arrangements, on the other.[51]

If the customer is an incorporated company, the beneficial owner is the person controlling its capital or exercising control over its board or executives. A person who directly or indirectly controls 25% of the shares of a given company is therefore considered to be its beneficial owner. In its proposal, the Commission suggests lowering the beneficial ownership threshold to 10% when professionals are faced with entities that present a specific risk.[52] As far as control over the board or executives is concerned, the fourth AML Directive does not provide for a quantitative criterion. In this case, the beneficial owner is the person who ultimately controls the company, no matter what his/her official position is.

Applying due diligence to existing customers

The improvement brought about by the Commission's proposal is remarkable. It ensures that professionals keep monitoring transactions performed by existing customers. Existing bank accounts as well as new ones will be subject to CDD, should a risk of money laundering arise. According to the proposal, "Member States shall require that obliged entities apply the customer due diligence measures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis, or when the relevant circumstances of a customer change, or when the obliged entity has a duty in the course of the relevant calendar year, to contact the customer for the purpose of reviewing any information related to the beneficial owner(s)."[53] Existing accounts will therefore no longer be able to be used as a stealthy way to perform transactions involving money stemming from illegal activities.

Central registers of beneficial owners

According to Directive 2015/849, legal entities are required to hold detailed information about their beneficial owners. Hence, "corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held."[54] The Directive also creates an obligation for Member States to gather such information in national registers of beneficial ownership. Hence, "Member States shall ensure that the information" about beneficial ownership "is held in a central register in each Member State, for example a commercial register, companies register… or a public register."[55] Such registers will also feature information on beneficial owners having at least 10 % ownership in companies presenting a risk of being used for money laundering.

Building on this requirement, the Commission adds in its proposal that "Member States shall ensure that the information held in the register… is accessible in a timely and unrestricted manner by competent authorities and FIUs, without alerting the parties to the trust concerned. They shall also ensure that obliged entities are allowed timely access to that information." Such authorities also include "tax authorities and authorities that have the function of investigating or prosecuting money laundering, associated predicate offences and terrorist financing and seizing or freezing and confiscating criminal assets."[56]

Further enhancing the requirements of Directive 2015/849, the proposal requires Member States to grant public access to the beneficial ownership registers that legal entities are required to hold. Hence, "Member States should […] allow access to beneficial ownership information in a sufficiently coherent and coordinated way, through central registers in which beneficial ownership information is set out, by establishing a clear rule of public access, so that third parties are able to ascertain…who…the beneficial owners of companies [are]."[57] Such broad access to central registers will provide guarantees to third parties wishing to do business with the relevant entities and allow for greater scrutiny of beneficial ownership information by civil society.

Trusts

Trusts provide a means of transferring assets in a discreet manner, especially when family trusts are concerned. The identity of the beneficiary of the trust may only be revealed when the trust ends. Such structures may therefore be used by money launderers. The Commission now advocates much stricter due diligence rules as regards trusts. All trusts will have to be registered in the country in which the trust is administered.[58] Beneficial ownership information about trusts will be held in national beneficial owner registers. Quite remarkably, this requirement will be binding for all EU Member States, including those that do not recognize trusts in their national law.

The Commission's proposal clearly establishes a distinction between two types of trusts, namely trusts involved in business-like activities and other types of trusts (referring to family trusts). On the one hand, the identity of beneficial owners of "trusts which consist in any property held by or on behalf of a person carrying on a business which consists of or includes the management of trusts, and acting as trustee of a trust in the course of that business with a view to gain profit"[59] should be made public. On the other hand, access to the identity of the beneficial owners of any other trusts should be granted only to "parties holding a legitimate interest."[60] Applicants will therefore have to demonstrate a legitimate interest in order to be granted access to information related to non-profit-making trusts.[61] Obliged entities will, however, be systematically granted access to such information, no matter what type of trust is concerned.[62]

Most interestingly, the proposal adds a provision aimed at protecting the safety of beneficial owners: "in exceptional circumstances laid down in national law, where the access to" information about his/her identity "would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable, Member States may provide for an exemption from such access to all of part of the information on the beneficial ownership on a case-by-case basis."[63]

National registers of bank account holders

Such central registers are to be established: "Member States shall put in place automated centralized mechanisms, such as central registries or centralized mechanisms, which allow the identification, in a timely manner, of any natural or legal persons holding or controlling payment accounts… and bank accounts held by a credit institution within their territory."[64] Moreover, "Member States shall ensure that the information held in the centralized mechanisms…is directly accessible, at national level, to FIUs and competent authorities for fulfilling their obligations under"[65] the fourth Directive. Member States will have to create an automated central mechanism enabling investigators to match an account with the corresponding identity of its holder.

Cooperation between public authorities

The Commission aims at enhancing cooperation both between national authorities and between Member States.

Cooperation between National Authorities

The proposal of July 2016 requires Member States to facilitate cooperation between the various authorities involved in the fight against money laundering, terrorist financing, and tax avoidance. Hence, "Member States shall not prohibit or place unreasonable or unduly restrictive conditions on the exchange of information or assistance between competent authorities. In particular, Member States shall ensure that competent authorities do not refuse a request for assistance on the grounds that

(a) the request is also considered to involve tax matters;

(b) national legislation requires obliged entities to maintain secrecy or confidentiality, except where the relevant information that is sought is held in circumstances where legal privilege or legal professional secrecy applies;

(c) there is an inquiry, investigation or proceeding underway in the requested Member State, unless the assistance would impede this inquiry, investigation or proceeding;

(d) the nature or status of the requesting counterpart authority is different from that of requested competent authority."[66]

The latter is a very welcome addition. It aims at overcoming obstacles to cooperation stemming from the different natures of FIUs. The proposal requires Member States to facilitate such cooperation even though some FIUs are judicial bodies, whereas others are administrative or police FIUs.

Cooperation between national authorities should also apply to sharing the identity of beneficial owners of trusts. Hence, "Member States should ensure that their authority in charge of the register set up for the beneficial ownership information of trusts cooperates with its counterparts in other Member States, sharing information concerning trusts governed by the law of the first Member State and administered in another Member State."[67]

Cooperation between Member States

According to the proposal, cooperation between Member States will be enhanced, thanks to the interconnection of registers. Bank account holder registers and especially beneficial ownership registers held by national authorities will be interconnected, thanks to a designated European platform, thus allowing for the fast and efficient exchange of information between Member States. Hence, "Member States shall ensure that the central registers…are interconnected via the European Central Platform."[68]

2 Enhancing the Role of FIUs

As mentioned above, the central role played by FIUs in implementing the AML mechanism is another important issue in the framework of improving cooperation. The role of the FIUs will be enhanced by the Commission's proposal, thanks to both the strengthening of their powers and their increased cooperation efforts.

Strengthening the powers of FIUs

As a welcome improvement, the units will be granted the power to increase the scope of information available. FIUs will thus be able to request any information, even when no STR has been filed. Hence, "in the context of its functions, each FIU shall be able to obtain from any obliged entity information… even if such obliged entity did not file a prior report."[69] This new power granted to FIUs is worth taking note of. They will thus be allowed to access information directly, without relying exclusively on obliged entities' diligence. The speed and efficiency of investigations should therefore increase. Such a change is a remarkable contribution to strengthening the fight against terrorist financing. The limited amount of money involved and the effort made by terrorists in order to stay undercover sometimes make it hard for professionals to realize the suspicious nature of some transactions.

Most importantly, the units will be granted access to central bank and payment account registers as well as to central data retrieval systems. Member States will be required to establish such mechanisms in order to facilitate sharing the identity of bank account holders. Cooperation between FIUs and other authorities is also to improve. To this end, "Member States shall ensure that policy makers, the FIUs, supervisors and other

competent authorities involved in AML/CFT, such as tax authorities, have effective mechanisms to enable them to cooperate and coordinate domestically."[70]

Increasing cooperation between FIUs

FIUs are to increase their cooperation, which has already been facilitated by the network "FIU.net" and the Egmont group.[71] The latter is an international network of FIUs whose goal is to foster cooperation and share best practices. Such cooperation encompasses areas such as information exchange, training and sharing of expertise.

Moreover, Decision 2000/642 already provides for cooperation between FIUs at the European level.[72] However, the CJEU acknowledged the shortcomings of the mechanism set up by this decision in its famous *Jyske Bank* ruling.[73] Hence, this "mechanism for cooperation between FIUs suffers from certain deficiencies," according to the CJEU.[74] The Court further stated that decision indeed "provides for important exceptions to the requirement for the requested FIU to forward the information requested to the applicant FIU."[75] Moreover, "Decision 2000/642 does not lay down a time-limit for information to be forwarded by the requested FIU, nor does it provide for sanctions in case of unjustified refusal on the part of the requested FIU to forward the requested information."[76]

In its proposal, the Commission aims at further fostering practical cooperation in investigations. As a result, "Member States shall ensure that FIUs exchange, spontaneously or upon request, any information that may be relevant for the processing or analysis of information by the FIU related to money laundering or terrorist financing…, regardless of the type of associated predicate offences and even if the type of associated predicate offences is not identified at the time of the exchange."[77]

Diligence is also expected from FIUs: "the requested FIU's prior consent to disseminate information to competent authorities" shall be "granted promptly and to the largest extent possible…The requested FIU shall not refuse its consent to such dissemination unless it would fall beyond the scope of its AML/CFT provisions, could lead to impairment of a criminal investigation, would be clearly disproportionate…, or would otherwise not be in accordance with fundamental principles of national law…Any such refusal to grant consent shall be appropriately explained."[78] Thanks to this information exchange mechanism, the Commission's proposal also takes a small step towards the harmonization of tax offences. It thus provides that "differences between national definitions of tax crimes shall not impede the ability of FIUs to provide assistance to another FIU and shall not limit the exchange, dissemination and the use of information" pursuant to money laundering investigations.[79]

IV. Conclusions

The current reform provides a response to specific threats of money laundering and terrorist financing as well as means to step up cooperation. In this respect, both the fourth AML Directive 2015/849 and the new Commission's proposal of July 2016 provide for significant changes to the AML framework. The proposal demonstrates a strong emphasis on the cooperation and sharing of information, both at the national and European levels.

These are welcome improvements. However, there is still a need for greater cooperation in order to respond to global criminal threats, especially terrorism. To this end, the creation of a European Financial Intelligence Unit, above and beyond the network of national FIUs, could be a major asset. Such an "EU FIU" would be in charge of receiving STRs, analyzing them, and disseminating the results to the competent national bodies. Its creation nonetheless remains a long-term project, even though it is being discussed in the impact assessment of the proposal.[80]

Another noteworthy project, which is currently being debated at the Council, is the creation of a European Public Prosecutor Office (EPPO).[81] Creating such a European Prosecutor – whose jurisdiction would be limited to offences affecting the EU's financial interests – may well achieve a breakthrough on the road to strengthening criminal justice throughout the Union. Adding money laundering and terrorism to the EEPO's jurisdiction would be an even greater step forward.

---

1. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – the European Agenda on Security, COM (2015) 185 final, 28 April 2015.↩
2. European Commission, Communication from the Commission to the European Parliament and the Council on an Action Plan for Strengthening the Fight against Terrorist Financing, COM (2016) 50/2, 2 February 2016.↩
3. The FATF comprises 37 Member States: all EU Member States, Argentina, Australia, Brazil, Canada, China, Hong Kong, Iceland, India, Japan, Malaysia, Russia, Singapore, South Africa, South Korea, Switzerland, Turkey and the USA. There are also associate members and observer organizations.↩
4. Directive (EU) 2015/849 of the European Parliament and the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 541/73, 5 June 2016.↩
5. Council Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, O.J. L 166, 28 June 1991.↩
6. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, O.J. L 344, 28 December 2001.↩
7. Directive 2005/60 EC of the European Parliament and the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, O.J. L 309/15, 25 November 2005.↩
8. Directive 2015/849.↩
9. Directive 2005/60.↩
10. European 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 Purposes of Money Laundering or Terrorist Financing and amending Directive 2009/101/EC, COM (2016) 450 final, 5 July 2016. See also eucrim 2/2016, p. 73.↩
11. European Commission, Commission strengthens transparency rules to tackle terrorism financing, tax avoidance and money laundering, Press Release, IP/16/2380, Strasbourg, 5 July 2016.↩
12. Directive 91/308/EEC, Art. 1.↩
13. Directive 2001/97/EC, Art. 1, point 2.↩
14. Directive 2015/849, Art. 2, point 1, Par. 3.↩
15. Directive 2015/849, Art. 2, point 1, Par. 3 (f).↩
16. Directive 2015/849, Art. 3, Par. 14.↩
17. Directive, 2015/849, Art. 14, Par. 4.↩
18. ECJ, Grand Chamber, case C-305/05, *Ordre des barreaux francophones et germanophones, Ordre français des avocats du barreau de Bruxelles, Ordre des barreaux flamands, Ordre néerlandais des avocats du barreau de Bruxelles v. Conseil des Ministres,* 26 June 2007.↩
19. ECJ, Grand Chamber, case C-305/05, *Ordre des barreaux…*, § 37.↩
20. ECtHR, appl. no. 12323/11, *Michaud vs. France*, 6 December 2012, § 161.↩
21. ECtHR, *Michaud vs. France*, § 128.↩
22. A virtual currency is "a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a *fiat* currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically," COM (2016) 450, Art. 1, point 2 (c).↩
23. COM (2016) 450, Art. 1, point 1 (g).↩
24. COM (2016) 450, Art. 1, point 1 (h).↩
25. COM (2016) 450, Art. 1, point 3 (a).↩
26. Directive 2015/849, Art. 3, Par. 9.↩
27. For instance, as regards France, read *Fraude fiscale : trois ans de prison ferme requis contre l'ex-ministre Jérôme Cahuzac*, Le Monde, 14 September 2016, http://www.lemonde.fr/police-justice/article/2016/09/14/requisitoires-attendus-au-proces-cahuzac-pour-fraude-fiscale_4997496_1653578.html↩
28. Council Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, O.J. L 166, 28 June 1991, Art. 1.↩
29. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, O.J. L 344, 28 December 2001, Art. 1.↩
30. Actual harmonization is possible on the basis of Art. 83 TFEU, which provides for the possibility for the European Parliament and the Council to adopt harmonized substantial rules of criminal law in order to "establish minimum rules concerning the definition of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis."↩
31. European Commission, Roadmap – Proposal for a Directive on the Criminalization of Money Laundering, 25 October 2016.↩
32. European Commission, Roadmap, 25 October 2016.↩

33. Directive 2015/849, Art. 9.↩
34. European Commission, Delegated Regulation (EU) 2016/1675 supplementing Directive (EU) 2015/849 by identifying High-Risk Third Countries with Strategic Deficiencies, C (2016) 4180 final, 14 July 2016, O.J. L 254 20 September 2016. See also eucrim 2/2016, p. 73.↩
35. Delegated Regulation (EU) 2016/1675, Annex 1.↩
36. Delegated Regulation (EU) 2016/1675, Recital 9.↩
37. Delegated Regulation (EU) 2016/1675, Recital 10.↩
38. Delegated Regulation (EU) 2016/1675, Recital 11.↩
39. Directive 2015/849, Art. 9, point 2 (a), (b) and (c) and Delegated Regulation, Recital 4.↩
40. Directive 2015/849, Art. 9, point 3 and Delegated Regulation, Recital 12.↩
41. Delegated Regulation (EU) 2016/1675, Recital 13.↩
42. COM (2016) 450, Art. 1, point 7.↩
43. COM (2016) 450, Art. 1, point 7.↩
44. COM (2016) 450, Art. 1, point 7.↩
45. Directive 2005/60 EC.↩
46. Directive 2015/849, Art. 3, point 6.↩
47. Directive 2015/849, Art. 15, point 2.↩
48. COM (2016) 450, Art. 1, point 4 (a).↩
49. COM (2016) 450, Art. 1, point 6.↩
50. Directive 2015/849, Art. 3, point 6 (a).↩
51. COM (2016) 450, Art. 1, point 10.↩
52. COM (2016) 450, Art. 1, point 2.↩
53. COM (2016) 450, Art. 1, point 5.↩
54. Directive 2015/849, Art. 30, point 1.↩
55. Directive 2015/849, Art. 30, point 3.↩
56. COM (2016) 450, Art. 1, Par. 10↩
57. COM (2016) 450, Recital 25.↩
58. COM (2016) 450, Art. 1, point 10 (b).↩
59. COM (2016) 450, Recital 34.↩
60. COM (2016) 450, Recital 35.↩
61. COM (2016) 450, Art. 1, point 10 (d).↩
62. COM (2016) 450, Art. 1, point 10 (c).↩
63. COM (2016) 450, Art. 1, point 10.↩
64. COM (2016) 450, Art. 1, Par. 12.↩
65. COM (2016) 450, Art. 1, Par. 12.↩
66. COM (2016) 450, Art. 1, Par. 18.↩
67. COM (2016) 450, Recital 36.↩
68. COM (2016) 450, Art. 1, Par. 10.↩
69. COM (2016) 450, Art. 1, Par. 11.↩
70. COM (2016) 450, Art. 1, Par. 17.↩
71. http://www.egmontgroup.org.↩
72. Commission 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, JOUE N° L 271/4, 24 October 2000.↩
73. CJEU, case N° C-212/11, *Jyske Bank Gibraltar Ltd vs. Administracion del Estato*, 25 April 2013.↩
74. CJEU, case N° C-212/11, *Jyske Bank Gibraltar, §* 73.↩
75. CJEU, case N° C-212/11, *Jyske Bank Gibraltar, §* 74.↩
76. CJEU, case N° C-212/11, *Jyske Bank Gibraltar §* 76.↩
77. COM (2016) 450, Art. 1, Par. 19.↩
78. COM (2016) 450, Art. 1, Par. 20.↩
79. COM (2016) 450, Art. 1, Par. 21.↩
80. COM (2016) 450, Impact Assessment.↩
81. European Commission, Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, COM (2013) 534 final, 17 July 2013.↩

COPYRIGHT/DISCLAIMER
© 2018 The Author(s). Published by the Max Planck Institute for the Study of Crime, Security and Law. This is an open access article published under the terms of the Creative Commons Attribution-NoDerivatives 4.0 International (CC BY-ND 4.0) licence. This permits users to share (copy and redistribute) the material in any medium or format for any purpose,

even commercially, provided that appropriate credit is given, a link to the license is provided, and changes are indicated. If users remix, transform, or build upon the material, they may not distribute the modified material. For details, see https://creativecommons.org/licenses/by-nd/4.0/.
Views and opinions expressed in the material contained in eucrim are those of the author(s) only and do not necessarily reflect those of the editors, the editorial board, the publisher, the European Union, the European Commission, or other contributors. Sole responsibility lies with the author of the contribution. The publisher and the European Commission are not responsible for any use that may be made of the information contained therein.

About eucrim

eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union