The Revision of the EU Framework on the Prevention of Money Laundering

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Article

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On 5 February 2013, the Commission adopted a proposal to update the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.[1] As a complement to the criminal law approach, this directive sets up the basis of a preventive system relying on the vigilance of some private actors (banks, financial institutions, but also lawyers, accountants, or gambling providers) who are requested to analyse the risk of money laundering presented by their client's transactions.[2]

The inventiveness of criminals is without limit. Therefore, the Anti-Money Laundering Framework needs to be constantly updated. The revision of the directive aims at addressing new threats as well as reflecting the latest recommendations that the Financial Action Task Force (FATF, the international standard setter in the area of the fight against money laundering and terrorist financing) adopted last year.

I. Ongoing negotiations in the Council and Parliament on the Commission proposal – Reaching a first step towards political agreement before the European elections in May 2014

Discussions are progressing well in the European Council and Parliament. The Council, under the Irish – and, later, the Lithuanian – Presidency, has devoted its interest to the topic by starting discussions as soon as in April 2013.[3] In times of financial crisis and budgetary constraints, money laundering, together with the fight against tax fraud and tax evasion, is a topic high on the political agenda. The European Council highlighted this priority at its summit on 22 June 2013, when it called for adoption of the revision of the third Anti-Money Laundering Directive before the end of 2013. Although this objective will likely not be achieved, a first important step will have been reached when the Greek Presidency begins its work in January 2014.

The topic has not attracted less attention in the European Parliament. The Committee on Economic and Monetary Affairs (ECON) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) will both share the responsibility of this portfolio. The focus on different angles may enrich the debate. ECON pays attention to the efficiency of EU legislation (with regard, in particular, to the administrative burden on businesses) while LIBE focuses more on the citizen and the proper balance between the fight against crime and the protection of fundamental rights. Rapporteurs have not yet delivered their reports, but debate has already taken place within the Committees. The first reading in the plenary of the Parliament is expected to take place in March 2014, just before the end of this legislative period.

II. Broad support in the Council and Parliament on the general approach proposed by the Commission – Key substantial issues still under discussion

There is broad support in the Council and in the Parliament on the need to revise the Anti-Money laundering framework and on the general approach proposed by the Commission. A number of key substantial issues are nevertheless under discussion, *relating to* the scope of the directive, the right balance between an approach based on real risks and the level of harmonisation across Member States, cooperation between Member States, fundamental rights, and administrative sanctions.

1. The general approach of the directive : a risk-based approach

The Commission's approach follows the new FATF recommendations and focuses on a reinforced risk-based approach, an approach relying on a clear understanding of the risks and adoption of measures tailored to address them rather than dependence on prescriptive rules. This risk-based approach, coupled with a minimum harmonisation principle, triggers some challenges so as not to lead to the fragmentation of the internal market through divergent national rules. Member States will need to agree on a balance between these two objectives and on the level of harmonisation to achieve them.

2. The need to facilitate cooperation between Member States

Another aspect of the Commission's proposal relates to the proposed strengthening of cooperation between the different national Financial Intelligence Units (FIUs). FIUs' tasks are to receive and analyse reported suspicions of money laundering and to disseminate them to other competent national authorities, such as judicial authorities. Good cooperation within Member States, particularly through cooperation between these FIUs, is a key factor in the effectiveness of the fight against money laundering, since money laundering cases often involve several Member States or third countries. The Commission proposes to reinforce their powers and facilitate their cooperation.

3. The extension of the scope of the directive

Another important issue under discussion concerns the scope of the proposed new directive: while all Member States seem to agree on the extension of the obligations of the directive to gambling services beyond the mere casino sector, the exact scope of services to be included remains to be agreed upon (the Commission proposed including all gambling services). A proposed extension of the scope to letting agents has also raised some questions among several Member States. Another issue that has been raised is the proposed inclusion of traders in goods or service providers if they conclude a cash transaction exceeding €7500 (the current threshold is €15,000), which some Member States consider to be an inappropriate limitation of the use of cash.

4. The balance between the need for security and the protection of the fundamental rights

The right balance between security and the protection of fundamental rights is a sensitive issue, in particular with regard to the protection of our personal data. The preventive system of the Anti-Money Laundering Directive indeed requires the processing and exchange of personal data in order to be able to detect a criminal who might hide behind the customer of a person subject to the vigilance obligations of the directive, e.g., financial institutions but also legal professionals like lawyers. Fundamental right issues will have to be scrutinised by the members of the LIBE Committee in the European Parliament.

5. The strengthening of administrative sanctions

The Commission's proposal to strengthen administrative sanctions raises some concerns among some stakeholders who fear that the maximum sanctions would be set at a very high level (up to €5 Million for a natural person), especially when compared to the criminal sanctions imposed on the perpetrators of the primary offence. The Commission proposes to harmonise the maximum range of sanctions since there is currently a huge divergence across Member States (maximum sanctions across Member States currently range from a few thousands euros to tens of Millions of euros).

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III. Feeling the impact of the political context of the fight against tax fraud and evasion on key issues of the revision of the AML directive

There is some complementarity between the fight against money laundering and the fight against tax fraud and tax evasion – in particular because tools designed to combat money laundering can help detect and prevent tax evasion.

1. An explicit reference to tax crimes to specify the scope of the directive

The proposed directive introduces an explicit reference to tax crimes as a predicate offence of money laundering. Although this reference does not, strictly speaking, extend the scope of the directive (since tax crimes are currently already included insofar as they constitute serious crimes punishable by deprivation of liberty of more than one year),[4] this explicit reference reveals a new political impetus in the fight against tax fraud and tax evasion.

Yet, it has to be noted that the directive does not provide for any definition of tax crimes; Member States remain free to determine which offence, in their view, constitutes a tax crime.[5] As a complement to this preventive approach, the Commission is considering action in the area of criminal law. It is currently assessing the need to criminalise and harmonise the definition of money laundering. A definition of what constitutes a tax crime would in any case not be provided.

It is interesting to note that, once again, the protection of the European Union financial interests has played a precursor role. The second protocol to the 1997 Convention on the Protection of the European Communities' Financial Interests (the PIF Convention),[6] which entered into force in May 2009, requires the criminalisation of money laundering of the proceeds of serious fraud or corruption affecting EU financial interests.

2. An increased transparency regarding beneficial owners

The Commission's proposal to reinforce transparency on the real beneficial owners of companies or legal arrangements (such as trusts) can also help to fight tax fraud and tax evasion and is of interest for the protection of EU financial interests. Beneficial owners are the natural persons on whose behalf a transaction or activity is being conducted. Criminals may not hide behind a complex chain of companies or behind legal instruments allowing for anonymity, such as trusts. Therefore, the European Commission proposes to require all EU companies, as well as trusts or foundations, to hold and maintain up-to-date information on their beneficial owners and to make this information available to public authorities and to the private entities subject to vigilance obligations. Voices are calling for more ambition and, in particular, for public registries of beneficial owners. This will also be an important issue for the European Parliament in the context of the fight against tax fraud and tax evasion. In order to be an efficient tool, the information would nevertheless need to be continuously updated and controlled so that it is reliable, a requirement which is not easy to achieve.

In times of economic difficulties, the political impetus given to the fight against tax evasion since 2008 has inevitably had some repercussion on the context of negotiations regarding the revision of the Anti-Money Laundering Directive. The inclusion of tax crimes in the list of predicate offences as well as enhanced transparency, however, follow their own rationale and are essential tools towards increasing the effectiveness of the fight against money laundering. While being ambitious, the reform needs to follow a balanced

course and to carefully define the concepts in order to implement new objectives assigned to the fight against money laundering.[7]

1. 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/2013/045). The Commission also adopted a proposal to revise the Regulation of the European Parliament and of the Council on information accompanying transfers of funds (COM/2013/044 final), which ensures traceability of transfers of funds.↩
2. The Anti-Money Laundering Directive is part of a broader set of legislative measures aimed at the prevention of money laundering and terrorist financing, including Regulation 1781/2006, which ensures traceability of transfers of funds (a proposal for a revised Regulation was also proposed on 5 February 2013 and is being negotiated in the Council together with the AML Directive), Regulation 1889/2005 on cash controls (which requires persons entering or leaving the EU to declare cash sums they are carrying if the value amounts to €10,000 or more), EU Council Decision 2000/642 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, and a number of EU legal instruments imposing sanctions and restrictive measures on governments of third countries or non-state entities and individuals.↩
3. The first working group meeting of the Council, with experts from national administrations, took place on 24 April 2013.↩
4. The Directive follows an "all serious crimes approach," which means that any serious crime must be considered as a predicate offence to money laundering.↩
5. Divergent definitions of tax crimes across Member States make the cooperation between Member States more difficult as regards the fight against tax fraud and tax evasion and the money laundering of the proceeds of these tax crimes. However, harmonisation of this definition would require as a legal basis the use of Art. 113 of the Treaty on the Functioning of the European Union (harmonisation of tax legislation) rather than Art. 114 (harmonisation of internal market legislation) which forms the legal basis for the Anti-Money Laundering Directive.↩
6. Second Protocol to the Convention on the protection of the European Communities' financial interests, O.J. C 221 of 19.07.1997.↩
7. In this respect, it is interesting to note that the development of the fight against money laundering is characterised by a constant broadening of the crimes in which money laundering of their proceeds is tackled as well a constant broadening of the private actors from whom vigilance is requested. When the first legal instrument was put in place in 1988, only drug trafficking was included (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances). Later came the objectives to also fight against the laundering of proceeds of all kinds of organised crime, to fight against the financing of terrorism after 11 September 2001, and, from now on, to fight against the laundering of proceeds of tax fraud.↩

* Author statement

The views expressed in this Article are the personal views of the author and may not be interpreted as stating an official position of the European Commission.

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