# Strengthening the Fight against Economic and Financial Crime within the EU

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## ABSTRACT

EU legislation in the field of financial and organised crime is affected by different issues. The anti-money laundering (and counter-terrorist financing) legislation is dense, but it still lacks effectiveness. Although the approximation between the Member States still presents some concerns, what seems to be desirable is not further legislative intervention from the EU but to foster monitoring activities (on criminal law usage, suspicious transaction reports, and FIU functioning, etc.). In this context, a specialised agency could be of remarkable value, but the corresponding draft needs accurate analysis. With regard to organised crime, FD 2008/841/JHA features too narrow a scope, on the one hand, when it requires the aim of obtaining "financial or other material benefit." On the other hand, the EU definitions on the matter are too broad (e.g., as to what concerns participation in a criminal organisation). A more specific set of autonomous definitions oriented towards the specific forms of crime that criminal organisations aim their activities at would considerably enhance and facilitate judicial cooperation. In this regard, not only a review of the broad EU definitions is encouraged, but the FD itself should be quickly replaced. The current EU legal framework on corruption in both the public and private sectors also seems outdated, notwithstanding the pivotal role of such matters on EU criminal policy. Although EU law already provides for a duty to criminalise corruption in the private sector, it does not sufficiently clarify the object of protection, i.e., "fair competition." This enables possible national transpositions that may thwart the utility of the relevant criminalising provisions. In addition, a definition of EU officials in EU law is desirable as well as the introduction of corruption-related crimes concerning such subjects in the Euro-crimes list.

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# I. General Remarks on the Need for Action

EU action in the field of financial and organised crime has been uneven. On the one hand, there has been a plethora of anti-money laundering (AML)/countering financing of terrorism (CFT) legislation, with new EU standards justified as necessary to align with international developments, in particular the FATF recommendations. Yet notwithstanding these laws, concerns remain regarding both the effectiveness of EU rules to tackle money laundering and their impact on fundamental rights and national criminal law systems. On the other hand, EU standards in the fields of the criminalisation of organised criminal activity and corruption (in particular corruption in the private sector) are limited and dated. Thus, there is a need to examine rigorously and critically the implementation of EU AML measures as well as to consider the development of new EU standards on organised crime and corruption.

# II. Money Laundering

**1.** The starting point regarding AML is that the Expert Group should link its reflections, inasmuch as possible, to the *criminal law dimension* of money laundering (ML). Of course, AML is an integrated policy, composed of the regulatory (preventive) system and the criminal law system, but the fact is that the very definitions of ML are different (both at the EU level as well as in the FATF recommendations), depending on the tier they are meant to apply to. This dual approach to money laundering should be encouraged, because the purpose of the prevention system may well differ (and, in our view, it *actually* does) from the purpose of the criminal law system. Whereas the regulatory framework aims at the sanitisation and the preservation of public trust in the financial system, thereby addressing every form of laundering dirty proceeds from any kind of illegal source (which could theoretically encompass proceeds from purely administrative violations), the criminal law system aims at protecting the State's claim to detect and forfeit the proceeds of serious offences (which means already a selection of some forms of laundering and some kinds of sources).

The double-tiered nature of this policy is clearly reflected in the history of AML in the EU, already in the very first directive (with its unusual "joint declaration" on the criminalisation of ML) as well as in the instruments that followed (the directives and the 2001 Framework Decision). The directives regarding the prevention system were adopted under the competences of the (former) first pillar, whereas Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (the 6th AML Directive)[1] was adopted, as is proper, under Art. 83 TFEU. The rhetoric in the respective preambles is also instructive in respect of the different aims pursued.

We should also bear in mind that there is another Expert Group working alongside the European Commission with a specific mandate to provide expertise on the entire AML policy,[2] which gives leeway for a more limited and specific approach from our side.

**2.** If we look at the most recent documents produced by the Commission in the present context,[3] it seems clear that the existing concerns and shortcomings relate to the regulatory system and, more precisely, to the lack of implementation of the EU instruments on the regulatory system and operational issues. For instance, it is striking that neither the *Report on the assessment of recent alleged money laundering cases involving EU credit institutions*[4] nor the Communication "*Towards better implementation of the EU's anti-money laundering and countering the financing of terrorism framework*"[5] address any deficiencies of the criminal law framework at all in the jurisdictions where the analysed cases took place – and such an assessment, had it been made, might even have served as a (post-factum) justification for the adoption of the 6th AML Directive, or as a call for further amendments thereto. In any case, the diagnosis presented by the Commission basically points at

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the need for improvement of implementation and correct fulfilment of the duties impending on the stakeholders. If this is the case, innovation at the legislative level not only dodges the real issues but also incurs the risk of complicating them further.

**3.** As a consequence, we do not see much room or need for further legislative intervention of the EU on the criminal law dimension of AML/CFT. Some criminal policy concerns in this realm still remain, because there are a number of open questions to which national laws provide differentiated answers (e.g., regarding the protected legal interest, the punishable conduct, the sources of the proceeds, the (non-) punishment of the perpetrators of the predicate offence, the applicable penalties and proportionality to the punishment provided for the predicate offences, the (non-)criminalisation of negligence, etc.). This evidently leads to a variable criminal law framework across the EU. True, the "minimum rules" scheme does not allow for setting uniform laws (for example, limiting the *mens rea* of ML to intent); however, the current suggestions enshrined in the legislation that "Member States may" choose to adopt a certain course of action (see Art. 3 of the 6th AML Directive) do not help to approximate the legislations at all.

**4.** Nevertheless, minor adjustments could be effected. As a matter of fact, there are a number of inconsistencies regarding the definition of ML as an offence between the PIF Directive[6] (which refers to Art. 1(3) of the 4th AML Directive[7]) and the 6th AML Directive, namely concerning the laundering of proceeds from offences committed abroad[8] and the punishability of self-laundering.[9] In this case, the EU could perhaps reach a uniform definition of ML as an offence within EU law.

**5.** If there is not much need to take action at the legislative level, it seems clear that there is a need for better monitoring of effectiveness and implementation, in particular: How is criminal law being used? What is happening with the various regimes of suspicious transaction reports (STR)? What are the current challenges underpinning Financial Intelligence Units (FIUs)? In the latter context, attention should be paid to the significant data protection and privacy implications of FIUs' work and their cross-border cooperation (in view of their different nature and powers). The same goes for their placement within a broader EU interoperability regime – perhaps there is a need for further EU standards in this field. In order to assess the effectiveness of the criminal law in countering ML/FT as well as to detect possible abuses of AML/CTF legislation by national authorities, the EU needs further information on prosecutions in Member States and on the challenges national courts are facing when defining money laundering.

**6.** As far as the creation of a specialised EU coordinating structure is concerned, a specialised agency would ensure a joint approach between the criminal law and the market levels. It might also play an important role in collecting the information gathered by the regulatory and criminal law systems and in integrating it into a meaningful whole. The coexistence of this coordinated structure with Eurojust and the EPPO should be thoroughly examined in order to avoid collisions and complications. The competences of a potential new AML agency should also be carefully drafted so as not to bring more fragmentation to the execution of policies or create new burdens and duties for the private sector in an already over-regulated field.

# III. Organised Crime

**1.** We were asked whether the Framework Decision (FD) 2008/841/JHA on the fight against organised crime[10] should be "further strengthened."

Indeed, the definitions laid down in Arts. 1 and 2 of the FD are not the most fortunate piece of legislation produced by the EU. In the first place, it is open to debate whether the aim of the criminal organisation should be, mandatorily, the obtaining of a "financial or other material benefit." Organised crime aiming at disrupting or sabotaging the social and/or political structures of the EU and the Member States (e.g., through

the hacking of cybersystems that are vital for the functioning of health services, prosecution services and courts, public administration, electoral systems, etc.) should arguably be countered with the same or even more concern. The current restriction of the definition to organisations that pursue financial/material gain – in line, admittedly, with Art. 1(a) of the Palermo Convention – is a constraint that should perhaps be revised, in order to encompass organised crime other than the mafia-oriented type.

**2.** Secondly, the way in which the FD drafted the "offences relating to participation in a criminal organisation" (Art. 2), departing from the definitions provided by the Palermo Convention, does not seem appropriate for a number of reasons. It does not make sufficiently clear that Member States must criminalise participation in a criminal organisation (as suggested by the very heading of Art. 2). The norms providing for the criminalisation do not contain the caveat "offences distinct from those involving the attempt or completion of the criminal activity" present in Art. 5(1) lit. a) of the Palermo Convention. Consequently, Member States will have fulfilled their duties if they only criminalise conspiracy, for instance, or even mere complicity or incitement to the intended offences (entailing an agreement to that purpose). This has little to do with the offence of participating in a criminal organisation, not least because it dispenses with the existence of an actual criminal organisation. Furthermore, such disposition does not tackle any conduct that is not directly connected with the perpetration of a relevant offence, e.g., providing means for the general functioning of the organisation or recruiting new members.

**3.** When reviewing the very broad and general, all-encompassing definitions of EU law involving organised crime, it might be a positive course of action to make them more specific and varied in relation to specific forms of crime, such as those against the EU's financial interests or the very AML.

The use of different concepts of organised crime for specific crimes would indeed improve judicial cooperation, as the current concept is so broad that, instead of favouring the cooperation between national authorities, it risks giving rise to very different interpretations, thus decreasing mutual trust. The advantages would also go beyond judicial cooperation. All legal sectors that rely on such concepts would benefit from more specific definitions. An example is the criminal (or administrative) responsibility of legal entities: the latter are nowadays obliged to establish organisational models ("compliance programmes") in order to prevent the commission of crimes, but they have to use a definition of organised crime that is poorly comprehensible.

**4.** In sum, the 2008 Framework Decision on organised crime seems outdated and it definitely should be quickly replaced, taking into account that participation in a criminal organisation falls under the EPPO's competence.

**5.** The connection between participation in a criminal organisation and confiscation is also an unresolved issue, which is too complex, however, to be addressed within the scope of this article.

# IV. Corruption

**1.** The current EU legal framework on both public and private corruption is outdated. Yet, the criminalisation of corruption plays a central role in the development of EU criminal law. It is expressly included in the list of conduct that the EU is competent to criminalise under Art.83(1) TFEU. It is a money laundering predicate offence under EU law; it is one of the categories of conduct for which the requirement to verify dual criminality has been abolished in the light of mutual recognition; and it forms part of the remit of the PIF Directive – and, as a consequence, of the EPPO. In view of the key elements of corruption in the development and enforcement of EU criminal law, there is a need to revise the EU criminal law framework on corruption in order to update and provide legal certainty with regard to criminalisation at the EU level. Clarity in

criminalisation is essential in view of the growing links between anti-corruption monitoring and rule-of-law monitoring in the EU.

**2.** There is a strong connection between the criminalisation of corruption in the private sector and the internal market, which may need further intervention on the part of EU legislation. Although EU law already provides for duties to criminalise that focus on the protection of "fair competition", it does not prevent from possible national transpositions that do not contemplate such a value as the object of the legal protection. In Italy, for instance, the criminal provision on corruption in the private sector originally attributed to the breach of "fair competition" had the sole effect of changing the rules on prosecution from "on complaint" to "*ex officio*"; once the most recent legislative intervention set the prosecution regime to "*ex officio*" for all the hypothesis of corruption in the private sector, the reference to "fair competition" disappeared. EU legislation should therefore reinforce the reference to fair competition as the true aim of the criminal provision on corruption in the private sector.

**3.** On a different note, it seems clear that the (passive and active) corruption of EU officials should be included among the Euro crimes. There is the 1996 Protocol to the Convention on the protection of the European Communities' financial interests[11] and the definitions laid down in the PIF Directive – but, again, they were drafted from the perspective of damage to the financial interests of the EU. The situation is similar to that of the restriction of the definition of organised crime to the pursuance of financial or material gain (see above). The corruption of EU officials – as such, irrespective of damage to the financial interests of the EU – should be defined by EU standards and not by the Member States. Arguably, this is one of the few cases (together with fraud and misappropriation) where the adoption of directly applicable *regulations*, containing uniform definitions of the offences and penalties, would be fully justified, and the Commission should push for a change in the TFEU to allow it.

# V. Recommendations

## 1. On money laundering:

- There may be a need to revise the EU criminal law provisions on ML in order to have the same definition of the offence in the PIF Directive and in the 6th AML Directive – or at least to justify why they should be different.
- There is a need to monitor the effectiveness of the implementation of EU law in this respect and to gather information on how it is being applied by the national authorities.
- The creation of a central AML agency could help in the implementation of an effective EU policy on ML, especially as a means of building an institutional bridge between the prevention and the criminal law systems.
- FIU legislation should be revised in order to include a detailed legal framework on cross-border exchanges of suspicious transaction reports, underpinned by a clear data protection framework.

## 2. On organised crime:

- EU legislation on organised crime should be modernised and focus on a sound definition of the phenomenon it purports to counter, to be determined at the criminal policy level, taking due account of the existing international law instruments.

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- It is important to determine whether the criminalisation of organised crime should follow a unitary definition or instead a differentiated approach, depending on the type of criminal activity pursued by the organisation.

## 3. On corruption:

- Given the close links of corruption to the rule of law and the internal market, there is a need to modernise EU criminal law on the criminalisation of corruption by establishing clear-cut, binding definitions of the offences.
- The criminalisation of corruption in the private sector should focus on the protection of fair competition.
- The (passive and active) corruption of EU officials (just like fraud to the EU budget) should be defined and punished by (directly applicable) regulations and the Commission should push for an amendment to the TFEU that allows for it.

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1. *O.J.* L 284, 12.11.2018, 22.↩
2. <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2914> accessed 4 November 2020.↩
3. See the communication and several related reports at: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing_en> accessed 4 November 2020.↩
4. COM(2019) 373 final <https://ec.europa.eu/info/sites/info/files/report_assessing_recent_alleged_money-laundering_cases_involving_eu_credit_institutions.pdf> accessed 4 November 2020.↩
5. COM(2019) 360 final <https://ec.europa.eu/info/sites/info/files/communication_from_the_commission_to_the_european_parliament_towards_better_implementation_of_the_eus_anti-money_laundering_and_countering_the_financing_of_terrorism_framework.pdf> accessed 4 November 2020.↩
6. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J.* L 198, 28.7.2017, p. 29–41.↩
7. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, *O.J.* L 141, 5.6.2015, p. 73–117↩
8. Compare Art. 1(4) of the 4th AML Directive and Art. 3(4) of the 6th AML Directive.↩
9. See Art. 3(5) of the 6th AML Directive, which has no correspondence either in the PIF Directive or in the 4th AML Directive.↩
10. *O.J.* L 300, 11.11.2008, 42.↩
11. *O.J.* C 313, 23.10.1996, 2.↩

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