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HARMONIZING CRIMINAL LAW PROVISIONS OF MONEY LAUNDERING IN THE EUROPEAN UNION

Abstract

Beginning with the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention), states agreed to establish anti-money laundering (AML) measures in their domestic law for drug-related offenses.

The criminalization of money laundering was considered a necessary weapon in the fight against money laundering and its predicate offences. In addition, efforts by the FATF and other international instruments for encouraging countries to criminalize money laundering continued to spread across the world. This article focuses on the process of criminalization and the extent to which the anti-money laundering regime concern to the repressive measures in fighting money laundering criminality.

Key words: *money laundering, predicate offences, harmonization, money laundering offences, corruption*

Türkan Nadir qızı Babazadə

Avropa İttifaqında çirkli pulların yuyulmasına dair cinayət qanunu müddəalarının uyğunlaşdırılması

Xülasə

BMT-nin 1988-ci il tarixli "Narkotik vasitələrin və psixotrop maddələrin qanunsuz dövriyyəsinə qarşı mübarizə haqqında" Konvensiyasında (Vyana Konvensiyası) başlayaraq, dövlətlər narkotiklərlə bağlı cinayətlər üçün öz daxili qanunlarında çirkli pulların yuyulmasına qarşı (AML) tədbirləri müəyyən etməyə razılaşdılar. Çirkli pulların yuyulmasının kriminallaşdırılması çirkli pulların yuyulmasına və onun əsas hüquqpozmalarına qarşı mübarizədə zəruri silah hesab edilirdi. Bundan əlavə, FATF və digər beynəlxalq sənədlərin ölkələri çirkli pulların yuyulmasını cinayət hesab etməyə təşviq etmək səyləri bütün dünyaya yayılmağa davam etdi. Bu məqalədə diqqət kriminallaşma prosesinə və çirkli pulların yuyulmasına qarşı mübarizə rejiminin çirkli pulların yuyulmasına qarşı cinayətkarlıqla mübarizədə repressiv tədbirlərə nə dərəcədə diqqət yetirdiyinə yönəlmişdir.

Açar sözlər: *çirkli pulların yuyulması, predikativ cinayətlər, uyğunlaşdırılma, pulların yuyulması əməlləri, korrupsiya*

Introduction

The unification of the criminal area in the EU furthermore strengthened after the introduction of the Maastricht Treaty, and subsequently with its amendments, in which the Maastricht Treaty came into effect in 1993. One of the unified standards in the Forty Recommendations relates to the criminalisation of money laundering offences. Recommendation 3 of the Forty Recommendations states that countries should criminalise money laundering, with a view to include the widest range of predicted offences. The FATF Forty Recommendations can, to some extent, still be considered as soft law as they are per definition recommendations, until Member States or Unions implement them in their legislation. The view to implement criminal hard law with respect to an EU Anti-money laundering legislation can be said to have started long before 1990 (1).

The current criminal law framework against money laundering in the EU is neither comprehensive nor sufficiently coherent to be fully effective. All Member States criminalise money laundering; however, existing differences in the definition, scope and sanctions of money laundering offences affect cross-border police and judicial cooperation between national authorities as well as the exchange of

information. These differences in legal frameworks can also be exploited by criminals and terrorists, who could carry out financial transactions where they perceive anti-money laundering measures to be weakest (2).

The EU was the first regional organization to adopt a comprehensive AML/CTF regulatory framework. However, due to EU member states' significant competence in criminal matters, criminalization turned out to be more problematic than prevention. Under EU law, there is no uniform definition of this criminal offense nor a harmonized sanctions system. In the context of the negotiations of the First AML Directive, the European Commission and the member states agreed to prohibit, instead of criminalize, money laundering at the EU level (3).

As a result, the criminalisation of money laundering has been "lisbonized" and replaces the respective provisions of Framework Decision 2001/500/JHA on money laundering, which had been adopted as a third pillar instrument under the Treaty of Amsterdam.

Main part

With respect to general EU competence, article 5(1) and 5(2) TEU states that the competence of the EU originates from the Member States, i.e., the principle of conferred competence. Thus, meaning that the competence not given to the EU belongs to the Member States. In addition to this, the Treaty of Lisbon, through article 83 TFEU, now gives the EU competence, by the Member States, to legislate and base directives on a strict criminal subject matter, meaning that the EU now has the competence to establish minimum rules on the definition of criminal offences and to legislate sanctions (4). The current 5AMLD, which amends the 4AMLD to some extent and thus must be read together, is nevertheless based on article 114 of the TFEU. As previously stated, article 114 TFEU only refers to the harmonisation of the internal market, and not the criminalisation per se. The EU has been adamant to combat money laundering by slowly but surely legislating in the criminal area as has been demonstrated above. Therefore, questions can arise as to why the EU chose to base the post-Lisbon AMLD's on article 114 TFEU instead. This considering that the EU now has direct criminal legislative competence through article 83 TFEU. Consequently, it can be considered important to examine deeper the relationship between article 83 TFEU and article 114(1) TFEU in the view of legislative measures to be taken to combat money laundering (5).

As has been analysed, adopting an AML legislation, with the basis of article 83(1) TFEU is possible and was introduced by Directive 2018/1673. However, as article 83(1) TFEU refers to harmonisation of minimum rules on criminal sanctions, this Directive aims to combat money laundering through harmonised criminal requirements. Thus, should a potential future AML-legislation be adopted with article 83(1) TFEU as a legal basis, the purpose of that future legislation can only aim to harmonise criminal sanctions and not the harmonisation of national rules on Money Laundering to improve the internal market. Consequently, the content and scope of the future AML-legislation would only be based on such criminal harmonisation and would not include measures which are to be regarded as preventative, such as customer due diligence requirements and supervision of obliged entities, which are included in the present AMLD.205 However, article 83 TFEU gives the Member States greater competence and power through article 83(3) TFEU in which member states could invoke the emergency brake, and thus, suspend the ordinary legislative procedure, something that is not possible through article 114 TFEU. Should the procedure proceed, the Member State which invoked the emergency brake will not be bound by the directive. In addition to this, article 83(1) TFEU allows the EU to adopt legal instruments only in the form of directives. This would thus mean that should the EU want to adopt a potential AMLR, it would be hindered to do so with the basis of article 83(1) TFEU (Handoll, 2007:133, 135).

Article 83 TFEU contains three subsections. Article 83(1) TFEU, i.e., subsection 1, relates to the competence of the European Parliament and the Council to adopt Directives in the area of explicit cross-border criminal law such as terrorism, corruption and money laundering. Such areas are regarded as "particularly serious" crimes and are usually called "Euro-crimes" The list on the criminal area for particularly serious crimes is, as a general rule, exhaustive. However, the Council may adopt decisions to further expand this list according to article 83(1) subsection 1, paragraph 2 TFEU (7).

The main elements of the new Directive are as follows:

- Criminal activities that constitute predicate offences for money laundering have been uniformly defined. The Directive provides for a two-layered system: first, Member States are obliged to consider predicate offences if a certain penalty threshold is met. Second, Member States are obliged to recognize 22 categories of offences listed in the Directive as criminal activity that constitutes predicate offences for money laundering. The Directive here partly refers to offences as set out in other legal acts of the Union;
- Member States are obliged to include virtual currencies under "property" that may be subject to money laundering;
- The conduct (if committed intentionally) that is punishable as money laundering is defined. This includes the conversion or transfer of property; the concealment or disguise of the true nature, source or ownership of property; and the acquisition, possession or use of property that was derived from criminal activity;
- Member States are obliged to make punishable certain types of "self- laundering," i.e., if the money laundering is committed by the perpetrator of the criminal activity that generated the property;
- Certain factors that may hinder conviction have been excluded. In this context, the Directive foresees that conviction should be possible (1) without a prior or simultaneous conviction for the criminal activity from which the property was derived, (2) without it being necessary to establish precisely the factual elements or circumstances relating to that criminal activity, including the identity of the perpetrator, and (3) irrespective of the fact that the criminal activity was committed in another country. (8).

Extension of Criminal Liability.

Legal persons can be held liable for the mandated offences where a person with a leading position within a legal person commits the offence for the benefit of the legal person. Legal persons may also be held liable where the lack of supervision or control by a person referred to above has made possible the commission of the ML offence for the benefit of that legal person by a person under its authority. Sanctions shall include criminal or non-criminal fines and may include other sanctions, such as:

- exclusion from entitlement to public benefits or aid;
- temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions;
- temporary or permanent disqualification from the practice of commercial activities; - placing under judicial supervision;
- a judicial winding-up order;
- temporary or permanent closure of establishments which have been used for committing the offence.

The minimum imprisonment infringement to be penalised with maximum sentence of at least 4 years; Maltese law currently provides for maximum sentence of 18 years for equivalent conduct in terms of the Prevention of Money Laundering Act. Member-state Cooperation:

Where two Member States each have jurisdiction over the prosecution of an offence, they are required to collaborate and agree to prosecute in a single Member State. For this purpose, account shall be taken of the following factors:

- the territory of the Member State on which the offence was committed;
- the nationality or residency of the offender;
- the country of origin of the victim or victims; and - the territory on which the offender was found (9).

The EU AML/CTF framework not only seeks to harmonize national criminal legislation on money laundering, but also seeks to introduce common preventive rules. The "preventive arm" of the EU regulatory framework includes a vast array of administrative and financial measures designed to bar proceeds of crime from entering the legal financial system. The reform of EU AML/CTF legislation was

prompted by the need to comply with new FATF Recommendations on the matter and the need to address the drawbacks of the AML/CTF Directive. Yet, the reform process has been fraught with difficulties. Due to the sensitiveness of the matter, the adoption of the Fourth AML/CTF Directive has been repeatedly delayed.

In particular, the AML/CTF Directive's preamble clearly states: Money laundering and terrorist financing are frequently carried out in an international context. Measures adopted solely at national or even at Union level, without taking into account international coordination and cooperation, would have very limited effect. The measures adopted by the Union in that field should therefore be compatible with, and at least as stringent as, other actions undertaken in international fora. Union action should continue to take particular account of the FATF Recommendations and instruments of other international bodies active in the fight against money laundering and terrorist financing. On the other hand, the ultimate objective of this instrument remains the enhancement of market integration. This is particularly evident if one considers that the EU adopted Article 114 TFEU (approximation of laws) as a legal basis for the Fourth AML/CTF Directive and Regulation 2015/847 on the information concerning fund transfers. To attain these objectives, the reform sought to grant a more significant role to private actors and embrace a risk-based approach. Moreover, it introduced stricter transparency obligations with respect to the ownership of legal persons and arrangements and to improve coordination among the national FIUs. The following analysis aims at assessing the main elements of the current EU AML/CTF preventive framework. Notably, it first takes a bird's eye view of the current regulatory framework. Then, it looks into the involvement of private actors and related problems from a fundamental freedoms and rights perspective (Pol, Ronald, 2020: 73-9).

Conclusion

In addition to this, issues relating to legal certainty may be amended by an AMLR, as a regulation is directly applicable, thus eliminating the risk of different rules which are applicable in different Member States. Thus, the discrepancies found in chapter 4, relating to the Minimum-Directive AMLD's could be amended through an AMLR. However, linguistic and translation issues remain. Nevertheless, the introduction of an AMLR may harmonise the internal market by establishing directly applicable rules, which may mitigate and combat money laundering, as criminals can no longer take advantage of divergent rules, in order to evade supervision. However, in light of legislation with similar purpose, the proposed AMLR might need to be amended in the future in order to incorporate more entities which fall under the subject scope of the proposed AMLR (11). One such entity might be football clubs, which are not included in the proposal for the AMLR, even though the report from the Commission clearly stated the risks of the football sector with respect to money laundering. Furthermore, the report from ESMA has shown that further amendments in the subject scope is required, even in a regulation. Thus, a question can be raised, in light of ESMA's report, whether the introduction of an AMLR, on its own, will be sufficient enough to combat money laundering. This, especially since criminals often are one step ahead of the legislation and often find loopholes, which then are required to be legislated ex post, in order to combat the criminal activity (Skinner, 2016: 1-16).

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