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A European anti-money laundering supervisory authority: perspectives and challenges

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I. Introduction

Money is a prime motivation for crime.[1] Money in itself, however, is of no use.[2] It has value only if it can be used as a means of trade,[3] that is, (re)integrated into the legal economy. To this end, criminals must conceal the illicit origin of the money. Although the scale of this phenomenon is undoubtedly difficult to measure, the estimation of the United Nations Office on Drugs and Crime (UNODC) is from 2 to 5 per cent of global gross domestic product (GDP), in other words, 800 billion to 2 trillion dollars per year.[4]

Bearing this in mind, a meaningful social response to a criminal behaviour must not solely include the privation of the financial gain that was the "why" of the offence, that is, the confiscation of the proceeds from crime. It must also address the problem of the concealment of the ill-gotten gains into the legal economy, as this behaviour enables the offenders to benefit from the fruits of their crime by preventing the authorities from tracing the assets of criminal origin. This is where the anti-money laundering (AML) regime comes in. Over the years, combating money laundering has become a major concern of the international agenda.[5]

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1 James W Coleman, 'Crime and Money: Motivation and Opportunity in a Monetarized Economy' (1992) 35 American Behavioural Scientist 827, 830; Stefan D Cassella, 'Nature and Basic Problems of Non-Conviction-Based Confiscation in the United States' (2019) 90(2) International Review of Penal Law 195, 196.

2 William C Gilmore, *Dirty Money - The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4th edn, Conseil de l'Europe 2011) 31; see also Coleman (n 1) 830.

3 Gilmore (n 2) 31.

4 United Nations Office on Drugs and Crime, 'Money Laundering' (United Nations Office on Drugs and Crime, Overview) <https://www.unodc.org/unodc/en/money-laundering/overview.html> accessed 10 July 2023.

5 Benjamin Vogel, 'Introduction' in Benjamin Vogel and Jean-Baptiste Maillart (eds), *National and International Anti-Money Laundering Law: Developing the Architecture*

The architecture of the AML framework is based on two pillars: repression and prevention. The repressive policy aims at incriminating the phenomenon of money laundering, that is, conduct that seeks to conceal the link between an asset and the offence from which it derives,[6] through the (re)integration of the illicit proceeds into the legal economic system. The preventive policy aims at preventing and detecting the introduction of ill-gotten gains into the legal economy by imposing specific duties on financial institutions and certain other non-financial activities that are considered to be vulnerable to money laundering. As the preventive aspects of the AML regime impose a heavy burden on the private sector, they are much more debated than the repressive ones, including among civil society.

The AML regime is not only tasked with addressing the underlying crime. The objective is also – and maybe even in the first place, as regards the preventive aspect of the AML framework – the protection of the reputation and the stability of the financial sector.[7]

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of Criminal Justice, Regulation and Data Protection (Intersentia 2020) 1; see also Commission, 'Communication from the Commission to the European Parliament and the Council towards Better Implementation of the EU's Anti-Money Laundering and Countering the Financing of Terrorism Framework' (Communication) COM(2019) 360 final, 1 (Commission, Implementation AML framework).

6 Ursula Cassani, 'L'internationalisation du droit pénal économique et la politique criminelle de la Suisse : la lutte contre le blanchiment d'argent' (2008) 2 Revue de droit suisse 227, 233.

7 Valsamis Mitsilegas, 'Countering the Chameleon Threat of Dirty Money: "Hard" and "Soft" Law in the Emergence of a Global Regime Against Money Laundering and Terrorist Finance' in Adam Edwards and Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (Routledge 2003) 195, 197; John A E Vervaele, 'Fondements et objectifs des incriminations et des peines en droit pénal international et en droit pénal européen en matière de blanchiment' in Diane Bernard, Damien Scalia, Christine Guillain and Michel van de Kerchove (eds), *Fondements et objectifs des incriminations et des peines en droit européen et international* (Anthemis 2013) 217, 242; see also Verena Zoppei, *Anti-money Laundering Law: Socio-legal Perspectives on the Effectiveness of German Practices* (Springer 2017) 47; Recital 1 of the Council Directive (EEC) 91/308 of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering [1991] OJ L 166/77 of 28.06.1991 (1st AML Directive); Recital 1 of the 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, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73 of 05.06.2015 (4th AML Directive). Vogel points out, however, that the meaning of the objective "protection of the financial sector" is not clear: Vogel (n 5) 3 f., and similarly, Benjamin Vogel, 'Conclusions and Recommendations' in Benjamin Vogel and Jean-Baptiste Maillart (eds), *National and International Anti-Money Laundering Law: Developing the Architecture of Criminal Justice, Regulation and Data Protection* (Intersentia 2020) 883 f.

Given the often cross-border dimension of money laundering, the fight against the phenomenon cannot be addressed solely with national – and thus disparate – answers.[8] It called for the creation of a supranational AML framework, which dates back about 35 years. Initially aimed at tackling the proceeds of drug trafficking and subsequently those derived from organised crime, the AML system currently applies to any offence or at least any serious offence that generated gains[9] (depending on the countries). In addition, the terrorist attacks of 9/11 and the growing concern about terrorism led to the emergence of the fight against the financing of terrorism through money laundering policies.[10] Thus, the AML regime has become the AML and countering the financing of terrorism (CFT) regime.[11]

The evolution of the legal framework is not only characterised by the constant expansion of the repressive aspect – in particular, the extension of the list of underlying crimes – but also by the ever-increasing "densification" of the preventive one. The texts establishing the duties imposed on the addressees of preventive AML requirements – in the first instance, the financial sector – have been continuously amended, updated, or replaced, setting ever more-exacting standards.[12] What we can probably call "a normative frenzy" continues today in an exponential way. The content of the AML obligations is now well established and the current preoccupations revolve around the effective implementation of the preventive regime by the institutions concerned. In particular, national disparities in the enforcement of the AML framework are highlighted.[13] This led to the topic of this chapter, namely the establishment of a European AML supervisory authority among other measures. To this end, we will first briefly present the evolution of the AML supranational framework that relates

8 Cassani (n 6) 234.

9 For instance, in Switzerland, money laundering implies the commission of a felony as defined by art. 10 § 2 of the Swiss Criminal Code (SCC) or an aggravated tax misdemeanour (art. 305bis (1) and (1bis) SCC). By contrast, the German Criminal Code (GCC) follows an all-crimes approach (§ 261 GCC).

10 Ursula Cassani and Katia Villard, 'The Changing Faces of Money Laundering Regimes' (2019) 90(2) International Review of Penal Law 159, 164.

11 For ease of reading, the acronym "AML" (and not "AML/CFT") will be used in this chapter.

12 Cassani and Villard (n 10) 162.

13 See Commission, 'Communication from the Commission to the European Parliament, The European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions, Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions', (Communication) COM(2018) 645 final (Commission, Strengthening AML supervision) 3; Commission, Implementation AML framework (n 5) 5; Commission Staff Working Document, 'Impact assessment accompanying the Anti-money laundering package', SWD(2021) 190 final, 35 (Commission staff working document, Impact assessment); European Banking Authority, 'Opinion of the European Banking Authority on the future AML/CFT framework in the EU' EBA/OP/2020/14 of 10.09.2020 § 6 f and its annex European Banking Authority (EBA), 'EBA Report on the future *AML/CFT* framework in the *EU*', EBA/OP/2020/25, § 99 f.

to the preventive aspects of the fight against money laundering, that is, the one of the Financial Action Task Force (FATF) on money laundering and the one of the European Union. We will then focus on the (planned) tasks and organisation of this new agency (Section III) and will question the merits of the future institution and the challenges it faces (Section IV). This chapter will present a macro view (i.e., the objectives assigned to the authority) and will not enter into more specific issues[14] such as, *inter alia*, the criteria for the selection of the directly supervised entities[15] or the tasks and organisation of the Joint Supervisory Teams responsible for monitoring the selected entities.[16]

II. Overview of the evolution of the supranational preventive framework

The FATF was established in 1989 to "develop measures to combat money laundering".[17] In 1990, it published the first version of its 40 Recommendations, which were revised three times respectively in 1996, 2003, and 2012.[18] Furthermore the FATF Recommendations are amended on specific points on a regular basis.[19]

At the European level, the first instrument for combating money laundering was the Council Directive/91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering, commonly known as the first AML Directive. The second AML Directive[20] which amends the first one, dates from 2001. In 2005, a third AML Directive replaced the first two.[21] In 2015, a fourth AML Directive

14 See Silvia Allegrezza, *The Proposed Anti-Money Laundering Authority, FIU Cooperation, Powers and Exchanges of Information: A Critical Assessment* (Policy Department for Economic, Scientific and Quality of Life Policies Directorate, European Parliament, 30.06.2022) for an overview of the potential problematics.

15 See Allegrezza (n 14) 23 ff; regarding the publication of the list of the directly supervised entities in relation to the criteria used to select these entities, refer also to European Central Bank (ECB), 'Opinion of the European Central Bank of 16 February 2022 on a proposal for a regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism', (CON/2022/4) OJ C 210/5 of 25.05.2022, 4.

16 See Allegrezza (n 14) 29 ff.

17 The Financial Task Force, 'History of the Financial Action Task Force (FATF)' (FATF) <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html> accessed 12 February 2024.

18 Aside from its Recommendations, the FATF also publishes other documents such as reports or guidance on specific topics.

19 The most recent one regarding the confiscation of assets dates back to November 2023.

20 Council 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 [2001] OJ L 344/76 of 28.12.2001 (2nd AML Directive).

21 Council Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of

was adopted.[22] Only a year later, in response to the terrorist attacks in Europe,[23] the fourth AML Directive was amended by the fifth AML Directive, adopted on 30 May 2018, with a deadline for transposition into national law by January 2020.[24]

The EU AML system is therefore currently as follows: the AML preventive obligations of the private sector are set up in a directive, which is a text addressed to the Member States that have some leeway in the implementation into domestic legislation.[25] Monitoring compliance with these obligations remains the role of national authorities.[26]

Less than four months after the adoption of the fifth AML Directive, the European Commission published a "communication"[27] addressed to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and

money laundering and terrorist financing [2005] OJ L 309/15 of 25.11.2005 (3rd AML Directive).

22 4th AML Directive (n 7).

23 Commission, 'Action Plan for strengthening the fight against terrorist financing' (Communication) COM (2016) 50 final; Council Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 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 Directives 2009/138/EC and 2013/36/EU, [2018] OJ L 156/43 of 19.06.2018, Recital (2) (5th AML Directive).

24 Art. 4 5th AML Directive (n 23). In order to avoid possible confusion, one can moreover specify that a Directive regarding the repressive regime and sometimes (incorrectly) referred to as the "6th AML Directive" was also adopted in 2018 (Council Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, [2018] OJ L 284/22 of 12.11.2018).

25 Art. 288 § 3 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU).

26 See the 4th AML Directive (n 7) Art. 48; for details on the tasks of the supervisory authorities, see Dominik D Schlarb, 'Rethinking Anti-money Laundering Supervision: The Single Supervisory Mechanism - a Model for a European Anti-money Laundering Supervisor?' (2022) 13(1) New Journal of European Criminal Law 69, 70; Joint committee of the European Supervisory Authorities, 'Joint Guidelines on the characteristics of a risk-based approach to anti-money laundering and terrorist financing supervision, and the steps to be taken when conducting supervision on a risk-sensitive basis: The Risk-Bases Supervision Guidelines' (ESAs 2016 72, 16 November 2016) 3. These guidelines have been amended in December 2021, see EBA, 'Final Report: Guidelines on the characteristics of a risk-based approach to anti-money laundering and terrorist financing supervision, and the steps to be taken when conducting supervision on a risk-sensitive basis under Article 48(10) of Directive (EU) 2015/849 (amending the Joint Guidelines ESAs 2016 72) – The Risk Based Supervision Guidelines' (EBA/GL/2021/16, 16 December 2021).

27 The Communication is based on a Reflection Paper established by a joint working group on 31 August 2018, '*Reflection Paper on Possible Elements of a Roadmap for Seamless Cooperation Between Anti Money Laundering and Prudential Supervisors in the European Union*' (Reflection paper cooperation, 31 August 2018), <https://sven

Social Committee, and the Committee of the Regions entitled "Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions".[28] The document observes that although the fourth and the fifth AML Directives "strengthened [the] legislative framework, several recent cases of money laundering in European banks have given rise to concerns that gaps remain in the Union's supervisory framework".[29]

This statement led in 2019 to the granting of certain definite[30] supervisory powers to the EU prudential supervisor, that is, the European Banking Authority (EBA). Such powers pertained to the AML preventive framework applicable to financial entities.[31] The document concludes by evoking the possibility of "conferring specific AML supervisory tasks to a Union body".[32]

On 24 July 2019, the European Commission published a set of reports relating to the EU legal framework for preventing money laundering and terrorist financing and its implementation. A Communication to the European Parliament and the Council on the same day summarised these texts. It found that whilst much has been achieved these past years to improve the legislative framework, the major problem lies in the divergences in the application of the rules, leading to a structural issue in the EU's capacity to prevent the use of the financial system for illegitimate purposes.[33] The

-giegold.de/wp-content/uploads/2018/09/COM-Reflection-paper-on-elements-of-a-Roadmap-for-seamless-cooperation_Sept-2018.pdf> accessed 14 July 2023.

28 Commission, Strengthening AML supervision (n 13).

29 Commission, Strengthening AML supervision (n 13) 2.

30 Needless to say, the EBA already contributed in a general way to the monitoring of AML requirements in the field of its prudential supervision (see Commission, Strengthening AML supervision (n 13) 4 and 6; Reflection paper cooperation (n 27) 2 ff; Harry Huizinga, *The Supervisory Approach to Anti-money Laundering: an Analysis of the Joint Working Group's Reflection Paper* (European Parliament Economic Governance Support Unit, PE 624.424 November 2018) 7 f.).

31 Art. 9a and 9b Council Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds [2019] OJ L 334/1 of 27.12.2019; see also for details, Gianni Lo Schiavo, 'The Single Supervisory Mechanism (SSM) and the EU Anti-Money Laundering Framework Compared: Governance, Rules, Challenges and Opportunities' (2022) 23(1) Journal of Banking Regulation 91, 97 f.

32 Commission, Strengthening AML supervision (n 13) 11.

33 Commission, Implementation AML framework (n 5) 5.

Commission therefore reiterated the idea of harmonising specific AML supervisory tasks at the Union level among other measures.[34] Following the reports of July 2019, the European Commission established on 13 May 2020 an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing.[35] The Action Plan is based on six pillars: 1) ensuring the effective implementation of the existing EU AML framework; 2) establishing an EU single rule book on AML; 3) bringing about EU-level AML supervision; 4) establishing a support and cooperation mechanism for financial intelligence units (FIUs); 5) enforcing Union-level criminal law provisions and information exchange; 6) strengthening the international dimension of the EU AML framework.

Following the Action Plan, the European Commission presented on 20 July 2021 a legislative package[36] aimed at strengthening the EU AML regime and containing four proposals: 1) a regulation establishing a new AML authority;[37] 2) a regulation on AML rules that will be directly applicable to the private sector;[38] 3) a 6th AML Directive replacing the 4th one and containing provisions on areas in which Member States need some leeway, such as rules on national supervisors and FIUs;[39] 4) the revision of the 2015 Regulation on Transfers of Funds to trace transfers of crypto-assets.[40] The creation of the EU-level AML supervisory authority is announced as the masterpiece

34 Commission, Implementation AML framework (n 5) 5.

35 Commission, 'Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing (2020/C 164/06)' (Communication) C/2020/2800, OJ C 164/21 of 13.05.2020 (Commission, Action plan ML).

36 The legislative proposals are based on Art. 114 of the TFEU.

37 Commission, 'Proposal for a regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010' COM (2021) 421 final.

38 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing' COM (2021) 420 final (AML Regulation Proposal).

39 Commission, 'Proposal for a directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849' COM (2021) 423 final.

40 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets (recast)' COM (2021) 422 final.

of the proposed measures.[41] This new European "watchdog" has been described as "a game changer" in the fight against money laundering.[42]

The Council adopted its position on the proposal in June 2022 (with the exception of the location of the new AMLA).[43] In March 2023, the joint competent committee of the European Parliament voted on a draft report amending the Commission proposal.[44] Interinstitutional negotiations between the European Parliament and the Council – with the support of the Commission[45] – followed shortly after.[46] In December 2023,

41 Refer to the following page of the Commission's website about a Proposal for a Directive on Anti-Money Laundering and Countering the Financing of Terrorism legislative package (Directorate-General for Financial Stability, Financial Services and Capital Markets Union, 20 July 2021) <https://finance.ec.europa.eu/publications/anti-money-laundering-and-countering-financing-terrorism-legislative-package_en> accessed 14 July 2023; see also Frank Meyer, 'A New EU Anti-Money Laundering Tsar' in Yvan Jeanneret and Bernhard Sträuli (eds), *Empreinte d'une pionnière sur le droit pénal: Mélanges en l'honneur de Ursula Cassani* (Schulthess 2021) 281, 283.

42 Refer to the quotes of Eva Maria Poptcheva, member of the European Parliament and co-rapporteur, on behalf of the Economic and Monetary Affairs Committee on a Regulation establishing the Anti-Money Laundering Authority, available at <https://multimedia.europarl.europa.eu/en/video/EP148202> accessed 10 July 2023 and to the quotes of Mairead McGuinness, Commissioner for Financial Services, Financial Stability and Capital Markets Union at the European Commission, 'Commission welcomes political agreement on the Regulation to establish the new Anti-Money Laundering Authority (AMLA)' available at <https://finance.ec.europa.eu/news/commission-welcomes-political-agreement-regulation-establish-new-anti-money-laundering-authority-2023-12-13> accessed 13 February 2024.

43 Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010', COM (2021) 421 final (AML Authority Proposal), available at <https://www.consilium.europa.eu/en/press/press-releases/2022/06/29/new-eu-authority-for-anti-money-laundering-council-agrees-its-partial-position/> accessed 14 July 2023.

44 European Parliament Committee on Economic and Monetary Affairs and Committee on Civil Liberties, Justice and Home Affairs, 'Report on the proposal for a regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010' [2023] A9-0128/2023 of 05.04.2023 (joint committee draught report).

45 See Rule 74 § 2 of the Rules of Procedure of the European Parliament <https://www.europarl.europa.eu/olp/en/interinstitutional-negotiations> accessed 14 July 2023.

46 European Parliament, 'Stopping the flow of dirty money: Parliament ready for negotiations' (Press Release, 19.04.2023), <https://www.europarl.europa.eu/news/en/press-room/20230414IPR80123/stopping-the-flow-of-dirty-money-parliament-ready-for-negotiations> accessed 14 July 2023.

the Parliament and the Council reached a provisional agreement.[47] On 22 February 2024, the Council and the Parliament decided that the new AMLA will be based in Frankfurt, will have over 400 staff members, and will be operational mid-2025.[48] The text was formally adopted on 31 May 2024.[49]

One remark should be made at this point. While the first EU directives were implementing the FATF standards, and the FATF is traditionally considered as the global AML standard-setter, one can say that, in recent years, the EU took the lead. The EU wants its standards to go beyond those of the FATF and is willing to take on the key role in the fight against money laundering,[50] as demonstrated by the constant and ever more frequent amendments of the AML EU regulations. EU rules are primarily of concern for Member States; however, they nonetheless cannot be ignored by third countries for three main reasons. First, some EU provisions deal with the relations between EU institutions and third-country entities, obliging *de facto* these institutions to have equivalent standards.[51] Second, EU-based branches of companies situated in third countries are subject to EU legislation.[52] Third, the FATF may be guided by the EU regime while amending or revising its recommendations.

III. The new anti-money laundering supervisory authority

A. The tasks of the new anti-money laundering supervisory authority

The new EU AML supervisory authority (hereafter: EU AMLA) will have three tasks which aim at a more efficient and harmonised implementation of AML regulations:

47 Council of the European Union, 'Anti-money laundering: Council and Parliament agree to create new authority' (Press Release, 13.12.2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/12/13/anti-money-laundering-council-and-parliament-agree-to-create-new-authority/> accessed 12 February 2024; Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010' COM (2021) 421 final 2021/0240 (COD) – Confirmation of the final compromise text with a view to agreement of 12.02.2024.

48 Council of the European Union, 'Frankfurt to host the EU's new anti-money laundering authority (AMLA)' (Press Release, 22 February 2024) <https://www.consilium.europa.eu/fr/press/press-releases/2024/02/22/frankfurt-to-host-the-eus-new-anti-money-laundering-authority-amla/> accessed 23 February 2024.

49 Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 (hereafter: the Regulation).

50 Commission, Action plan ML (n 35) 1.

51 See, for instance, Art. 12 § 3 or 18bis 4th AML Directive (n 7).

52 Art. 3 (2) (f) 4th AML Directive (n 7).

1) direct supervision of selected financial sector obligated entities; 2) indirect supervision of non-selected obliged entities and non-financial obliged entities; 3) coordination and support for FIUs.

1. Direct supervision of selected financial sector obliged entities

According to Article 5 (2) of the Regulation, "direct supervision" means: a) ensuring compliance of the selected entities with anti-money laundering and financing of terrorism (ML/FT) requirements, including obligations related to the implementation of targeted financial sanctions; b) verifying compliance on a risk-based approach and, if appropriate, imposing specific requirements, administrative measures, and pecuniary sanctions; c) participating in group-wide supervision, in particular in colleges of supervisors; d) developing and maintaining a system to assess the risks and vulnerabilities of the selected entities.

The selection of the directly supervised entities is based on two cumulative factors: the ML/FT risk profile and the provision of services in at least six Member States (Article 12, recital 20 and 26). The risk profile will be assessed at the level of the group (Article 12 § 3 and recital 26). The methodology and criteria to select the entities will be detailed in regulatory technical standards developed by the EU AMLA and adopted by the Commission (Article 12 § 3, Article 49, recital 22, and Art. 290 of the Treaty on the Functioning of the European Union (TFEU)).[53] The work carried out by the European Banking Authority should constitute a starting point for the development of the methodology and criteria (recital 22). In an initial selection process, the text provides for the direct supervision of 40 entities (Article 13 § 2 *a contrario* and recital 26). This first selection process is scheduled for July 2027 (Article 13 § 4). In addition, in order to ensure complete coverage of the internal market in the long term, the EU AMLA could then supervise: 1) more than 40 entities if a greater number of entities qualify for direct supervision; and 2) at least one entity per Member State (Article 13 § 2, 3 and recital 26) in the context of subsequent selection processes. Selection processes should occur every three years (Article 13 § 4).

A second category of entities could be subject to direct supervision, but – in principle – for a maximum period of three years: it concerns entities that seriously or systematically violate the AML requirements if the appropriate measures are not implemented at the national level or information of the steps taken is not provided to the EU AMLA (Article 32 recitals 19 and 36 ff).

Article 16 of the Regulation stipulates the creation of a Joint Supervisory Team for each selected entity. Each team shall be composed of staff from the EU AMLA and from each financial regulator responsible for the supervision of the entity at the national

[53] The idea of such a selection process is to leave no discretion to the EU AMLA or the national supervisors in deciding the list of the directly supervised entities, with the objective of warranting a level playing field among the selected companies: recital 18 of the Regulation (n 49).

level. The access to the relevant information by the EU AMLA is regulated in Articles 17 ff of the Regulation.

As supervision must be paired with enforcement mechanisms, the EU AMLA is vested with the power to take measures and pecuniary sanctions in case of breaches of AML requirements (Articles 21 ff).[54] A temporary ban from exercising managerial functions in obliged entities can be pronounced against natural persons (Article 21 § 3 let. (e)).

2. *Indirect supervision of non-selected obliged entities and non-financial obliged entities*

With regard to indirect supervision, the tasks of the EU AMLA will mainly revolve around the performance of periodic assessments of the activities of the financial supervisors (Article 5 § 3 let. (b) and Article 30), respectively the conduct of peer reviews of the activities of supervisory authorities in the non-financial sector (Article 5 § 4 let. (b) to (d) and Article 35), as well as a role of supporter, coordinator, and arbitrator among the national supervisors (Article 5 § 3 let. (d) to (h), Articles 5 § 4 let. (e) to (9), 31, 33 and 36).

Moreover, financial supervisors will have to notify the EU AMLA when the situation of any non-selected obliged entity regarding its compliance with AML requirements and its exposure to money laundering and terrorism financing risks deteriorates significantly. This concerns particularly the case where the deterioration occurs in such a way that it may negatively impact several Member States or the Union as a whole (Article 32 § 1).

If a violation by a non-selected entity of its AML requirements occurs, the EU AMLA could invite the national supervisor to act in relation to the company involved. If the national supervisor does not respond, the EU AMLA may ask the Commission to grant permission to supervise the entity for a limited period (Article 32 § 5 ff). A request for direct supervision of non-compliant entities by the EU AMLA can also come from the national supervisor (recital 19 and Article 5 § 3 let. (c)). Furthermore, the Regulation provides a procedure in case of systematic failures of supervision (Article 34), which can lead to the issuing of a "formal opinion" by the Commission requiring the supervisor to comply with Union law (Article 34 § 6 and recital 35).

With respect to the supervisory authorities in the non-financial sector, the EU AMLA may investigate possible breaches of the AML regulations by non-financial supervisors (Article 32). If the supervisory authority fails to comply, this can lead to a warning detailing the breaches and identifying measures to be implemented (Article 37 § 4).

54 On the sanctioning powers of the Authority, see Laura Katharina Sophia Neumann, 'Das Sanktionenrecht der vorgeschlagenen EU-Agentur für die Bekämpfung von Geldwäsche und Terrorismusfinanzierung (AMLA)' (2021) 12 Neue Zeitschrift für Wirtschafts-, Steuer- u. Unternehmensstrafrecht 449.

The warning is addressed to the counterpart supervisors in other Member States or, where the supervisor is a self-regulatory body, to its public authority (Article 37 § 4).

3. *Coordination and support for financial intelligence units*

The function of FIUs is to receive suspicious transaction reports from obliged entities, to conduct their own analysis about the suspicious nature of the reported case and, where appropriate, to disseminate the results to the competent authorities (e.g., the criminal authorities).[55] FIUs thus play a filter and transmission belt role between obliged entities and criminal authorities.[56] In order to fulfil their tasks, FIUs may collect data, notably from obliged entities; however, they are not intended to have any supervisory or law enforcement powers.[57] FIUs may be part of another authority; however, given that they must be operationally independent, their core functions must be distinct from those of the other authority.[58] They may be considered the information hub.

The European Commission considered the option of creating an EU-level FIU.[59] It did not pursue it, due to the fact that such an option: 1) would require actions in areas going beyond the legal framework of the proposed reform; 2) would be counterproductive since the efficiency of FIUs is based on their access to information at the national level; 3) would be very expensive; and 4) did not have the support of the Member States.[60]

The simpler option of enhancing the efficiency of the national FIUs was therefore preferred. In this respect, the four main tasks of the EU AMLA are as follows: 1) when needed, the conduct of joint analysis with one or several national FIUs (Article 5 § 5 let. (d) and Article 40);[61] 2) the organisation and facilitation of some activities such as training programmes, personnel exchange programmes, expertise sharing, and development of IT tools and services to enhance the analysis methods of FIUs (Article 45 § 1) the hosting, management, maintenance, and development of a common database: the FIU.net (which is currently hosted by the Commission) (Article 47); 4) the conduct of peer reviews regarding the fulfilment by FIUs of their mission (Article 48). Moreover, an individual request for assistance may be submitted by a national FIU (Article 45 § 2) and the EU AMLA may act as a mediator in case of disagreement between FIUs (Article 46).

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55 See Art. 29 of the FATF Recommendations and Interpretative Note; General Glossary of the FATF, Definition of "competent authorities".

56 Cassani Ursula, *Droit pénal économique* (Helbing Lichtenhahn 2020) 267.

57 See Art. 29 of the FATF Recommendation and Interpretative Note.

58 See section E.8 f. of the Interpretative Note of Art. 29 of the FATF Recommendations; see also Art. 39 § 3 of the Regulation, which provides, "where necessary", for an organisational separation within the EU AMLA for the tasks related to the FIUs mechanism.

59 Commission staff working document, Impact assessment (n 13) 35.

60 Commission staff working document, Impact assessment (n 13) 47 and 78.

61 The principle of the joint analyses has been established in the 4th AML Directive (n 7) (Recital 55 and Art. 51).

The communication between FIUs and the EU AMLA will be assumed by the delegation of one or several staff members of the FIUs to the EU AMLA, who will be located at the seat of the EU AMLA (Article 44).

B. The architecture of the new anti-money laundering supervisory authority

As part of its reflection on the creation of an EU-level AML supervisory authority, the European Commission considered the option of extending the mandate of the EBA, which currently already has some indirect supervisory powers in the area of AML regulations,[62] to direct supervisory powers.[63] It abandoned the idea in light of the differences in the tasks that EU AML supervision would require compared to the actual functions of the EBA.[64]

The EU AMLA will be composed of five bodies: 1) a General Board; 2) an Executive Board; 3) a Chair of the EU AMLA; 4) an Executive Director; 5) an Administrative Board of Review (Article 56).

The General Board will be two-headed: it will have a supervisory composition and an FIU composition (Article 57 § 1). In relation to the former, the General Board will be composed of the Chair of the EU AMLA (with a right to vote), the heads of the supervisory authorities of the obliged entities in each Member State (with a right to vote), and one representative of the Commission (without a right to vote) (Article 57 § 2). The functions of the General Board mainly revolve around the development of cooperation and mutual assistance between the EU AMLA and national supervisors (Article 60 § 1 *cum* Articles 7 to 10) and the adoption of draughts of technical standards,[65] recommendations, guidelines, and so on (Article 60 § 4). As to the FIU side, the General Board will be composed of the Chair of the EU AMLA (with a right to vote), the heads of the FIUs (with a right to vote), and one representative of the Commission (without a right to vote) (Article 57 § 3). It will perform the tasks of coordination and support to the national FIUs as summarised under Section A.3 (Article 60 § 3).

The Executive Board will be composed of the Chair of the EU AMLA, five full-time members (including the Vice-Chair), and, in relation to some of its tasks, a representative of the Commission (Article 63). The Executive Board is especially responsible for the execution of the functions of the EU AMLA as summarised under Sections A.1 and 2 (Article 64 § 1).

The Chair of the EU AMLA represents the institution and must prepare the work of the General Board and the Executive Board (Article 69).

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62 See Section II and note 31.

63 Commission staff working document, Impact assessment (n 13) 77.

64 Commission staff working document, Impact assessment (n 13) 77 f.

65 The formal adoption of the standards falls within the competence of the Commission, see Art. 49 and 53 of the Regulation (n 49).

The Executive Director is in charge of the day-to-day management of the EU AMLA (Article 71 § 1). He/she is notably responsible for implementing the decisions adopted by the Executive Board (Article 71 § 1 let. (a)), the EU AMLA's budget (Article 79 § 1 let. (i)), and the annual work programme[66] of the EU AMLA under the control of the Executive Board (Article 79 § 1 let. (k)). The text underlines the independence of the function (Article 70 § 2).

The Administrative Board of Review will be established for the purpose of carrying out an internal administrative review of the supervisory and sanctioning decisions taken by the Executive Board against the selected obliged entities, and the decisions regarding the fees due by the entities (Articles 72 § 1 and 74 § 1) that are a source of funding for the EU AMLA (Article 77). It should be composed of five people and take its decisions based on a simple majority (Article 72 § 2 and 3). The decisions of the Administrative Board of Review regarding the measures and sanctions pronounced against selected obliged entities should be subject to appeal by the European Court of Justice (recital 67 and Article 28).

IV. Perspectives

The creation of an EU AML supervisory authority follows the current trend towards an EU-centralised supervision for the implementation of Union law.[67] Scholars drew the parallel with the prudential supervision of the single supervisory mechanism (SSM) applicable to the banking sector.[68]

The future EU AMLA was born out of one finding and one hypothesis: the observation that there were severe deficiencies in the implementation of AML requirements by the obliged entities and the assumption that the sole national authorities are not able to remedy the situation.

In relation to the (presumed) shortcomings in applying the AML regime, it is very difficult to measure the scale of the phenomenon given the lack of data.[69] It seems,

66 According to Art. 65 of the Regulation (n 49), the annual work programme should comprise detailed objectives and expected results including performance indicators; it shall also contain a description of the actions to be financed and an indication of the financial and human resources allocated to each action in accordance with the principles of activity-based budgeting and management.

67 See Georgios Pavlidis, 'The Birth of the New Anti-Money Laundering Authority: Harnessing the Power of EU-Wide Supervision' (2023) 30 Journal of Financial Crime 3.

68 See Schlarb (n 26); Schiavo (n 31).

69 See Vogel (n 7) 893; Allegrezza (n 14) 14; Joshua Kirschenbaum and Nicolas Véron, 'A better European Union architecture to fight money laundering' (2018) 19 Bruegel Policy Contribution, 14; Commission staff working document, Impact assessment (n 13) 60.

however, that there are enough recent known cases which reveal the deficiencies in implementing the AML duties[70] and therefore demonstrate the need to improve the effective application of the law.

Regarding the (presumed) inadequacies of a national response, several issues were raised. First of all, national disparities in the implementation of the AML regime were highlighted. The potential regulator's lenience towards domestic banks was evoked.[71] There is a recurring and ongoing problem of cooperation between the various actors (national supervisors, FIUs, prudential supervisors, criminal authorities).[72]

In our view, the argument of the uneven implementation of the AML framework has not been correctly formulated: the underlying issue is that the supervision of some national regulators (for various reasons, notably lack of human resources)[73] is not sufficiently effective.[74] More than the question of the different applications of common standards, the issue is the failed application of these standards. One point should be emphasised at this stage. The lack of clarity of the EU current framework and the degree of discretion of the Member States in transposing the AML directive have been identified as causes for the shortcomings in the implementation of the AML regime.[75] This will lead to the transformation of the AML directives into a regulation. This step appears to be coherent with the general evolution of the EU AML regime and resolves the problem of the (non)transposition of the directives.[76] It is, however, our assumption that the main problem lies in the non-implementation of the existing rules. If these rules were observed – following a bona fide interpretation where applicable – then only a "residue" of issues would remain.[77] It seems to us that the argument of a lack of clarity is regularly used to "justify" the non-application of norms whose essence is not so difficult to comprehend. Nonetheless, the hypothesis of the EU AML revision is that a supranational EU Authority will be better positioned to implement the EU AML regime than (at least some) national supervisors.

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70 See, in particular, Commission, 'Report from the Commission to the European Parliament and the Council on the assessment of recent alleged money laundering cases involving EU credit institutions' COM (2019) 373 final.

71 See Huizinga (30) 9; Schlarb (n 26) 76 f.

72 See Commission, Implementation AML framework (n 5) 4 f.; Commission, Action plan ML (n 35) 4 and 8. EBA, Report on the future *AML/CFT* framework in the EU, EBA/OP/2020/25, § 68 ff. One of the objectives of the 5th AML Directive was precisely to enhance cooperation between all relevant authorities (Commission, Strengthening AML supervision (n 13) 1 f., fn. 7); EBA, 'Report on competent authorities' approaches to the supervision of banks with respect to anti-money laundering and Countering the Financing of terrorism (round 3–2022)' EBA/REP/2023/20, 38 ff (EBA Report 2023).

73 See Commission staff working document, Impact assessment (n 13) 19.

74 See also, for the shortcomings observed, EBA Report 2023 (n 72).

75 See Commission staff working document, Impact assessment (n 13) 3 and 8.

76 See Commission staff working document, Impact assessment (n 13) 73; Allegrezza (n 14) 20.

77 In the same direction, Allegrezza (14).

Regarding the issue of the preferential treatment of domestic institutions – should this prove to be the case – it seems a priori clear that a supranational authority appears more likely to guarantee its independence than the national regulators.

As for the shortcomings identified in the cooperation between the authorities involved in the AML regime, it is assumed that the direct supervision of some worldwide entities will solve the difficulties linked to the necessary coordination of the various national regulators in charge of the supervision of these companies. Moreover, the hypothesis is that a centralised AML supervisory system will promote an "efficient cooperation between all relevant competent authorities".[78] Concerning the cooperation between FIUs, it is precisely one of the objectives of the EU AMLA to play the role of coordinator between these units.

V. Challenges

The challenge faced by the EU AMLA clearly is to accomplish the ambitions it has been assigned. This will first depend on the allocated resources and political aspects that influence the organisation and the operation of the institution during and after the legislative process.[79] Aside from these "general" elements, the functioning of the supranational supervisory system will most likely rely on the cooperation and sharing of information with the national authorities. In particular, we think of the types of channels that could be used for this collaboration, considering the need for promptness that is essential for successful collaboration. In this regard, a challenge will be to determine the means for effective cooperation while at the same time respecting the requirements pertaining to fundamental rights of the persons involved – for example, data protection and procedural guarantees in proceedings.

Regarding direct supervision, more importantly than a single cooperation, what should take place is a real understanding within the Joint Supervisory Team and, more broadly, among other people involved in the supervision of the selected entity. It would be counterproductive to have a hierarchical relation between the staff from the Authority and the staff from the national supervisor. Depending on the (effective) functioning of the national supervision, more or less leeway should be provided to the national supervisor to take some (informal) decisions or, at least, make the relevant propositions.

One could moreover argue that mutual trust between the supervised entity and the regulator is an essential prerequisite to effective supervision (whether in the area of prudential supervision or AML supervision) and that such trust exists between the national supervisor and the institution.[80] In our view, however, an (overly) close

78 Recital 16 of the Regulation (n 49); see also Recital 79.
79 See Pavlidis (n 67) 6.
80 See Vogel (n 7) 1012.

relationship between the regulator and the entity can lead to lenience, which was one of the criticisms associated with national supervision. Nevertheless, it provides an additional argument in favour of leaving some flexibility to the (representatives of) the national authority in order to keep the dialogue open with the supervised entity.[81]

Concerns were also raised about the creation of a new authority, due to the geographical distance which complicates communication between the domestic authorities instead of facilitating it.[82] In our opinion, the problem of geographical distance should, however, be put in perspective considering the current means of communication. Moreover, national supervisors could remain the channel of information between the directly obliged entities and the EU AMLA. Concerning cooperation with foreign counterparts, the establishment of a supranational authority does not make collaboration more difficult *per se*. It will be precisely one of the challenges of the new institution, notably through its organisation and structure, to effectively enhance collaboration between the various actors and not represent an obstacle to it.

In relation to the (basic) EU AMLA's tasks pertaining to the supervision of non-financial institutions, it seems to us that it will, in any case, serve to contribute to raising awareness of vulnerable sectors that do not feel adequately involved in the fight against money laundering.

Finally, it seems quite clear that an effective coordination and support mechanism for FIUs, combined with a good database, contributed to the provision of interconnected information that is the "raisons d'être" of FIUs. Nevertheless, FIUs are facing fundamental problems regarding their real objective and, consequently, what happens to the information gathered,[83] excessive information sorting[84] and so on. These issues need to be addressed independently of the creation of the new EU AMLA (even if the development of IT tools will obviously help with information sorting).

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81 Refer also to the comments of Ms Danièle Nouy, Chair of the ECB Supervisory Board from 2014 to 2018, regarding the supranational supervisory mechanism over banks: "the very close cooperation with national authorities helped the system to benefit from the best of both worlds – to have the experience of national supervisors, while also keeping some distance from individual banks in the Supervisory Board" (General Secretariat of the Council, 'Partial summary record of the meeting of the Committee on Economic and Monetary Affairs (ECON) of the European Parliament, held in Brussels on 3 and 4 November 2014', p. 3 available at <http://data.consilium.europa.eu/doc/document/ST-15376-2014-INIT/en/pdf> accessed 31 July 2023).

82 Vogel (n 7) 1011 f.; see also the opinion of the ECB (n 15) § 3.1.

83 See Vogel (n 7) 935 ff.

84 See Katia Villard, 'Art. 9' in Ursula Cassani, Christian Bovet, and Katia Villard (eds), *Commentaire romand: Loi sur le blanchiment d'argent* (Helbing Lichtenhahn 2022) 406 f.

VI. Conclusion

The new European authority has been qualified as a "game changer" in the fight against money laundering. We are a little less optimistic. The failures of the AML supranational policy[85] will not be resolved simply by the establishment of such a new institution, even if it meets all its objectives. It does not mean, however, that the creation of this EU AMLA is not worthwhile.

The EU is already trialling supranational supervision notably with the European Central Bank (ECB) and its direct prudential supervision over some banks. An AML supranational supervision can be inspired by the experience of prudential supranational supervision.[86] To the best of our knowledge, the powers conferred to the ECB are not called into question.

The scale of the phenomenon of money laundering and its cross-border dimension requires a coordinated and supranational fight. It seems that the addition of the "national forces" is not sufficient not only to establish the legislative framework but also to enforce it. It is not insignificant that some representatives of the civil society have also asked for a supranational authority.[87] The creation of such an institution appears to be the logical development of the integrated single financial market in which the laundering of illicit funds takes place[88] and the necessary internationalisation of the fight against money laundering.

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85 For a list of failures, refer to Javier Doz Orrit and Benjamin Rizzo, Opinion of the European Economic and Social Committee on 'Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing' [2021] OJ C 152/89 of 06.04.2022, § 3.6; for the detailed outcomes of an in-depth analysis, see also Vogel (n 7) 881–1025.

86 Refer also to the comparison of Schlarb (n 26) between the two regimes.

87 See Bloomberg Opinion Editorial Board, 'A Latvian Bank Shows the ECB Needs New Powers', *Bloomberg* (19 March 2018) <https://www.bloomberg.com/opinion/articles/2018-03-19/latvia-s-ablv-bank-has-a-lesson-for-the-ecb> accessed 16 July 2024; Roula Khalaf, 'The EU is Losing its Battle Against Money Laundering' *Financial Times* (London, 5 July 2018) <https://www.ft.com/content/92e131da-8047-11e8-bc55-50daf11b720d> accessed 16 July 2024.

88 Refer also to the reasoning of Kirschenbaum and Véron (n 69) 14 ff.