Themis competition 2012
International cooperation in criminal matters

The effectiveness of international cooperation in the fight against money laundering

Pauline FOSSAT, Sarah KAHLA, Fanny REYREAUD
Tutor: Sami BEN-HADJ-YAHIA
FRANCE 1

The construction of the European Union was originally based on the fundamental freedoms: free movement of goods; free movement of persons; free movement of workers and free movement of capital. These principles have greatly favoured the creation of a strong internal market and thus a powerful region internationally. However, they also have contributed to facilitating organised crime which diverts these principles from their original aim and uses them for its own advantage. Among the major forms of organised crime, money laundering is considered as a plague internationally. In fact, according to the International Monetary Fund evaluation, between 600 and 1 800 billion dollars are laundered each year around the world[1].

Money laundering generally refers to a crime which consists of converting illegal funds into legal assets. If most States now agree on this general definition of money laundering, there have been generally many differences between the domestic legal definitions of what money laundering is. The main difficulty with this offence is that it implies that a predicate offence has been committed in order for money laundering to intervene. Therefore, there must not only be an agreement on the legal definition of this offence but also on the list of the predicate offences. In addition to the challenges that States must overcome concerning the definition of money laundering, major efforts must be pursued in the area of law enforcement. Indeed, in order for money laundering to succeed, the predicate offence is not committed in the same country as the other actions that allow the proceeds of crime to be introduced into the legal economy. Therefore, police and judicial cooperation are essential in the fight against the development of money laundering bearing in mind that there is no international law enforcement body. Within the European Union, efforts have been made in this field. There has been an agreement on the fact that no criminal group should benefit from their crime. Therefore, after guaranteeing that a common basis exists between Member States on incriminating money laundering, measures have been taken in order to favour the reports concerning suspicious transactions to public authorities ("*Financial Intelligence Units*") which are able to pursue investigations and, if necessary, transfer cases for prosecution and conviction.

Nevertheless, considering that money laundering is constantly based on new techniques to better hide the different steps of this offence, police and judicial cooperation have to be deepened. This is particularly true now that a strong preventive approach has been put in

[1] TAVARES Cynthia & THOMAS Geoffrey, « Money laundering in Europe ; Report of work carried out by Eurostat and DG Home Affairs », Eurostat European Commission, 2010

place which is based on the obligation that individuals and corporations reveal their suspicions about a client or some likely illegal flows. Indeed, despite the fact that some difficulties must be resolved at the international level, such as the problem of non cooperative countries, an effort at the European level is necessary to influence the other regions to begin or pursue their actions in the fight against money laundering.

After evaluating the extent of money laundering (I), this essay will focus on the efforts made in Europe to fight this offence and the ones that still can be made in the near future (II).

***

I. The extent of the money laundering plague: dynamics and issues

In order to assess the effectiveness of counter-measures taken by the international community, it is important to understand the extent of the fight against money laundering through its legal definition (A) and its multiple schemes (B).

A. Criminalising money laundering: the widening scope of the criminal offence

Criminalising money laundering constitutes the starting point of any anti-money laundering fight. However, it is only very recently that the attempt to launder the proceeds of criminal activities has become a criminal offence in itself. Before, prosecution was limited to the underlying criminal activities from which proceeds resulted. Since the adoption of the Vienna convention in 1988, the scope of the money laundering offence has shifted over time. Initially limited to drug trafficking, money laundering currently includes a wide range of predicate offences. As a result of the adoption of international conventions on this matter, domestic legal definitions of money laundering have almost all been brought into line, even though some differences remain.

1. Widening scope of the money laundering offence framed by the international conventions

International and European conventions put forward a legal definition of money laundering whose aim is to serve as a basis for domestic legislation.

At an international level, the 1988 Vienna Convention against illicit traffic in narcotic drugs and psychotropic substances is the first convention aimed at cracking down on money

laundering. In this perspective, Article 3 of the convention states that "*each party shall [...] establish as criminal offences under its domestic law*" a range of behaviours, including the conversion, transfer of drug substances or concealment of their nature. The Vienna Convention adoption to stem the plague of money laundering has a limited scope, since it urges parties to criminalise proceeds from drug-related offences only. The adoption of the 2000 Palermo Convention against organised transnational crimes illustrates the endeavour of the international community to include the widest possible range of predicate offences to effectively fight money laundering. Under Article 6 of the Palermo Convention, States parties shall at least apply money laundering to all "*serious crimes*", meaning according to Article 2 "*those punishable by a maximum deprivation of liberty of at least four years*".

The European States have played a significant role in the development of regional money-laundering countermeasures. The 1990 Strasbourg Convention, adopted within the framework of the Council of Europe, constituted an important step in the fight against money laundering since it enshrined, well before the Palermo Convention, an extension of criminalisation to further categories of predicate offences. However, under the Strasbourg Convention, the extension of money laundering criminalisation is optional. Article 6 allows the parties, by mere declaration, to limit the implementation of the convention to specific predicate offences.

What is more, the action of the European Union has led member states to bring their legislations into line. Even before the signature of the Maastricht Treaty, which introduced the third pillar granting competence to the European Union to adopt legislation in criminal matters, the European community adapted its legislation to the international framework. The 1991 money laundering directive introduced a definition of money laundering based on the Vienna Convention (Article 1), inviting Member States to prohibit money laundering involving proceeds of drug trafficking. While the Commission originally aimed to criminalise money laundering, Member States opposed the lack of competence of the Europe community in the criminal sphere. A semantic compromise was finally reached: money laundering was not criminalised *per se* but "*prohibited*" by the directive. The coming into force of the Maastricht Treaty introducing the third pillar enabled a more effective action by the European Union. The 1991 directive was amended in 2001, partly in order to extend the scope of predicate offences to all forms of large-scale criminal activity, thus including offences punishable "*by a severe sentence of imprisonment*" (Article 1). In 2005, the 1991 directive was repealed and replaced by a third directive. The 2005 directive specifies the serious crimes that need to serve as predicate offences for money laundering. Article 3 provides that "*serious crimes*" means at least "*all offences which are punishable by a deprivation of liberty or a*

detention order for a maximum of more than one year, or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months".

Thus, both at an international and regional level, conventions have continuingly extended the scope of predicate offences that domestic legislations shall at least include in the criminalisation of money laundering.

2. Money laundering definitions in domestic legislation

Under pressure from international conventions, State parties have implemented legal tools to prosecute money laundering activities. The basis for prosecution strongly depends on the way jurisdictions have criminalised money laundering. Indeed, the broader the basis, the smaller the margins for manoeuvre. If domestic definitions of money laundering are rather homogeneous, differences remain. Some States have chosen to prosecute the laundering of proceeds from certain type of crimes only, often serious crimes or offences connected to organised crime. Other States have defined money laundering very broadly, including any type of criminal offence as a predicate offence. Above all, the inclusion of tax evasion within predicate offences is a contentious topic. Tax evasion is a domestic crime and not a mandatory predicate offence according to international conventions. Many States have taken the decision to exclude tax-related offences from their money laundering legislation, applying only administrative sanctions.

In France, money laundering was criminalised by the law of 31st December 1987, but was initially only limited to proceeds resulting from drug-trafficking. In order to implement the international conventions, the reform of 13th May 1996 has largely widened the definition of money laundering. Exceeding international requirements, Article 324-1 of the French Criminal Code provides that "*Money laundering is facilitating by any means the false justification of the origin of the property or income of the perpetrator of a felony or misdemeanour which has brought him a direct or indirect benefit. Money laundering also comprises assistance in investing, concealing or converting the direct or indirect products of a felony or misdemeanour."*

Under Belgian legislation, money laundering is subject to a wide definition. Article 505 of the Belgian Criminal Code aims the laundering of "*property advantages*" (coming from any predicate offence). However, since the law of 10 May 2007, "*ordinary tax evasion*" may no longer constitute a predicate offence at the basis for prosecution of a person who did not participate in the offence.

In the United Kingdom, the Proceeds of Crime Act 2002 gives en extremely wide definition of money laundering, The three money laundering offences of the POCA are "*concealing, disguising, converting or transferring criminal property*" (section 327), "*entering into, or becoming concerned in an arrangement to facilitate the acquisition, retention, use or control by, or on behalf of another person, of criminal property knowing or suspecting that the property is criminal property*" (section 328) and "*acquiring, using or having possession of criminal property*" (section 329). Under the pre-existing law, there were separate offences for drug money laundering (Drug Trafficking Act 1994) and non-drug offences (Criminal Justice Act 1988). The POCA law has greatly simplified the prosecution; before, the Crown Prosecution Service had to clearly identify the source of the criminal proceeds for the purpose of charging under the appropriate act.

In Luxembourg, money laundering was first criminalised in 1989 by Article 8-1 of the Law on the Sale of Medical Substances and the Fight Against Drug Addiction. This article was then amended to introduce aggravating circumstances. However, the law of 11 August 1998 has led to a broader definition of money laundering under Article 506-1 of the Criminal Code. Luxembourg has chosen a combination approach involving both the threshold method and a list of serious offences. Article 506-1 provides a list of predicate offences and adds that they include any offence punishable by a deprivation of liberty of a minimum superior to 6 months.

Since the law of 15 July 1992, Germany has criminalised money laundering in Section 261 of its Criminal Code. Since then, Section 261 has been subject to many amendments aimed at extending the list of predicate offences for money laundering, particularly to cover offences related to organised crime. Like Luxembourg, Germany has taken a combined approach to define the predicate offences for money laundering. Pursuant to Section 261 of the criminal code, predicate offences cover all "*serious offences*" as well as a number of listed "*less serious offences*". Section 12 of the criminal code provides that "*serious offences*" are unlawful acts punishable by a minimum imprisonment of at least one year, any aggravating circumstances being irrelevant to this classification.

In Italy, the first legislative step to criminalise money laundering dates back to the law of 19 March 1990 which introduced a specific offence for laundering proceeds of drug trafficking to the Criminal Code. In 1993, the scope of the money laundering offence was extended to include any "*malicious crime*" as a predicate offence (article 648bis of the Criminal Code).

Finally, in Spain, whereas initially the money laundering offence could only concern proceeds of terrorism or drug-trafficking, its scope was substantially widened in 1996. Article 301 of

the Spanish Criminal Code now provides that any felony or misdemeanour may constitute a predicate offence.

B. Complexity of the money laundering schemes

Understanding how money laundering works enables governments to put forward the appropriate countermeasures to fight money laundering more effectively. As technology evolves, money launderers have recourse to a widening range of techniques to reach their goals, imposing the obligation upon public authorities to permanently adapt both preventive and crackdown measures.

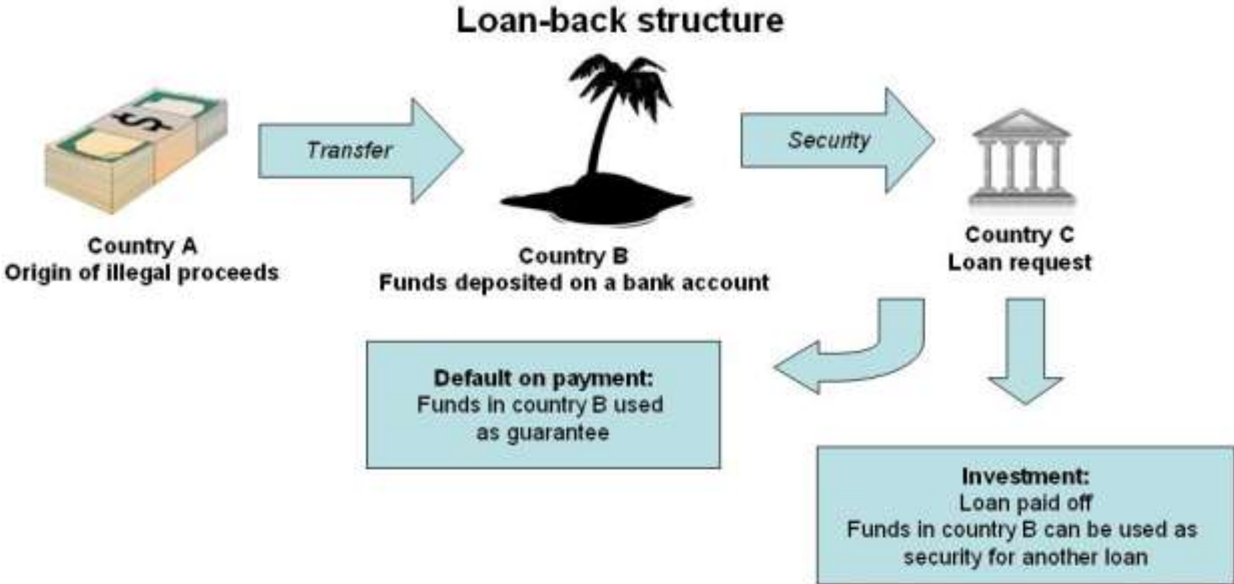
Broadly speaking, money is laundered through a three-step process which consists of placement, layering and integration. The placement stage is the physical disposal of cash into the financial system. The second stage is layering: once cash has been converted into a more manageable form, money launderers have to distance themselves from the illicit proceeds, for instance by creating complex layers of financial transactions. The final step is integration. This occurs when the funds hold an apparent legitimacy and can no longer be identified as illegal proceeds. During each step, launderers may engage in multiple operations to reach their goals. Owing to the complexity of money laundering, these operations are very diverse. They can however be classified into the three following categories:

1. Money laundering through the banking sector

The banking sector is particularly exposed to money laundering activities. This is due to several reasons. Criminals can secure their money in banks' safes and take advantage of the principle of banking secrecy which exists in almost every country, though it is currently becoming more relative following the implementation of money laundering counter-measures. But above all, banks provide a variety of services and instruments for placement, layering and integration. Wire transfers remain a tool at all stages of the laundering process, owing to the speed with which the money is transferred. Cashier's checks and money orders can be used to conceal the source of illicit proceeds.

A commonly used method in the banking sector is the technique known as "*smurfing*", which is aimed at breaking down a large sum of money into smaller amounts below the reporting threshold in order to have accomplices deposit these sums in different bank accounts. The money is then transferred to another account.

Loan structures are widely used to launder criminal funds, these structures being simple and inexpensive to set up. For instance, the loan-back transaction is the best known form of money laundering through loans. In this scheme, illegal proceeds are first transferred to a bank account abroad. Launderers then request a loan in another country and offer the assets held by the foreign bank as security. Two options are available to launderers: they can either default on payments, the money laundered being used as a guarantee to the loan, or if the loan obtained is fruitfully invested, the launderer can pay off the loan and the money deposited in the foreign bank account can be used to guarantee another loan.



Offshore banks have always been cause for great concern in the fight against money laundering. Indeed, instead of having recourse to regulated bank institutions, money launderers try to deposit their illegal proceeds into banks situated offshore. They can thus benefit from very strong banking secrecy and can enjoy total anonymity for their financial operations. Another worrying trend is the use of some legal mechanisms such as trusts which enable the settlor, by a mere statement, to transfer property of some goods or assets, irrevocably or not. The property is managed by a trustee to the benefit of a third person, the beneficiary. In common law states, trusts are strictly regulated and trustees must administer the trust in compliance with legal obligations. But nowadays there is a multiplication of offshore jurisdictions which allow forms of trusts hiding the identity of both the settlor and the beneficiary, facilitating money laundering operations.

Furthermore, the emergence of internet banking and electronic money offers launderers new tools to conceal their illegal proceeds. The access to technologies is indeed less regulated because of the lag that exists between technological innovation and the legal framework. In

recent years, more and more financial institutions have been providing banking services through the Internet, such as opening new accounts and on-line lending. Their features make them very appealing to money launderers: they do not require any physical contact, they are easily accessible and are almost anonymous. What is at stake is not the mere implementation of online banking services but the implementation of such services in breach of banking regulations, especially of the "*know-your-customer*" rule. Traditionally, banks play a key role in detecting laundered funds. With the emergence of e-banking, the role of the bank is even more crucial. In order to crack down on money laundering through Internet banking, the duty of customer identification must make no distinction on whether the start of the business relationship takes place in person or on the Internet.

2. Money laundering through non-banking financial institutions

Following anti-money laundering regulations in the banking sector, money launderers had to find alternative institutions to launder their funds. In recent years, bureaux de change, alternative banking systems and the insurance sector have turned out to be attractive tools for introducing illicit proceeds into regular financial channels.

Bureaux de change constitute a significant money laundering threat, in so far as they offer many services which appeal to launderers: exchange services, wire transfers, money orders and travellers cheques. What is more, bureaux de change are less heavily regulated than other financial institutions, and are not regulated at all in some countries. The mechanism of black market peso exchange arrangements in the 1980s illustrates the use of bureaux de change in money laundering schemes. Illegal Columbian drug sales generated significant earnings which were laundered through peso brokers. In this arrangement, drug cartel arranged to sell US dollars to a peso broker in exchange for Colombian pesos, deposited in Columbia. The peso broker then "*smurfed*" the US dollars into the United-States banking system.

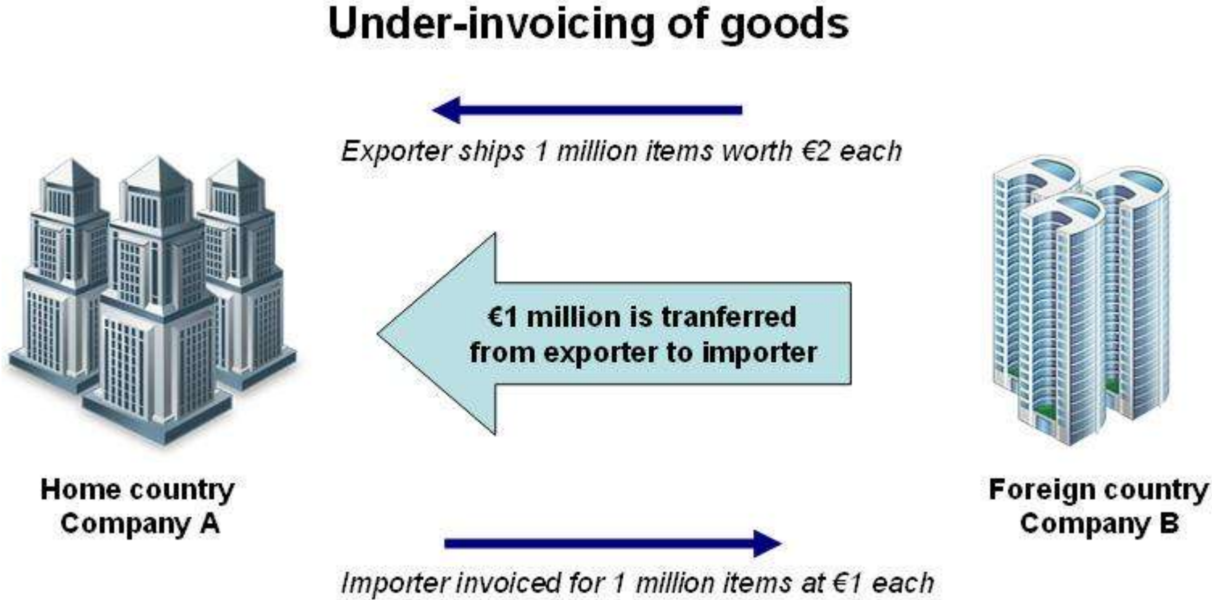
Alternative banking systems known as "*Hawala*" are also being used by money launderers. Originally, these systems were set up to help migrant workers send back their earnings to their families. A person can send funds simply by paying the *Hawala* operator and asking the beneficiary to collect funds from a corresponding *Hawala* operator in another country, after deduction of a commission. Operators may be set up as a remittance company or as an ordinary shop selling goods. The main advantage is that very few records are kept.

A recent trend concerns the use of the insurance sector for money laundering purposes. Various insurance products can be bought by paying cash. For instance, money launderers can

purchase a life insurance with illegal proceeds and then sell the policy by simply paying a commission.

3. Money laundering through non-financial businesses

There is a growing trend for money launderers to move away from financial institutions, as a result of anti-money laundering measures targeting a widening scope of financial institutions.
Gambling remains a convenient method when a limited amount of money is to be laundered. This method relies on obtaining a refund from the casino for unused gambling chips. The gambler can then allege that the casino's cheque represents his winnings. However, this method easily triggers suspicion when used to launder large sums of money.
The international trade system is particularly vulnerable to money launderers because of the tremendous volume of trade flows which provides a great opportunity for criminal organisations to obscure transactions and transfer proceeds across borders. What is more, international trade involves different legal systems and financial mechanisms which confront money-laundering countermeasures with many difficulties (information exchange, communication, etc.). Money laundering through over and under-invoicing goods and services is a common practice. Fakes invoices enable launderers to easily transfer funds from the importer to the exporter, as explained by the scheme below:



Front and shell companies offer opportunities to launder illicit proceeds. Indeed, launderers make use of companies as an excuse to explain the source of illicit money. As a large number of businesses (restaurants, nightclubs) deal mostly in cash, financial institutions are less likely to deem large cash deposits suspicious. Unlike shell companies which do not run any

operations, front companies are real businesses. By inflating sales reports, front companies are able the launder significant amount of money with little risk of detection.
Another technique consists of investing in pieces of artwork, which are poorly regulated. The aim is to exploit the subjective prices of such items. For instance, the launderer sells a hardly assessable piece at auction and transfers money to an accomplice who buys the piece after artificially pushing up its price. The launderer can then claim that the price difference is legitimate earnings.
Finally, a worrying trend is the involvement of certain professional categories, among legal and financial professions. Launderers decide to turn to their expertise to take advantage of the economic services they provide and to minimise suspicion about their activities. Indeed, these professionals have a respectable status and are unlikely to be suspected. This involvement has constituted a great concern, urging many legislators to impose further obligations on professionals.

This overview of the main laundering schemes shows the wide range of possibilities that the modern economic system offers. In most cases, money-laundering is carried out in an international context and involves operations of different kinds, so that the criminal origin of the funds can be better disguised. Therefore, in order to be effective, the fight against money laundering must rely on international cooperation.

*

II. Fighting against money laundering: the importance of constant improvement in criminal cooperation in the European Union

If there are crimes whose mechanisms, scale and consequences easily surpass the national level, money laundering is probably one of them. Indeed, in a world where transfers of flows are extremely quick and difficult to control and where movement of individuals has grown intensively, money laundering has become a challenge to fight against. As an answer to these problems, better judicial cooperation at an international level and even more thorough cooperation at a European level, has been developed (A). However, there is still a need to overcome certain obstacles in order to achieve better success in the fight against what has become a major problem in modern society (B).

A. Current judicial cooperation against money laundering

In the treaty on the functioning of the European Union (article 67), better judicial cooperation implies, on the one hand, that offences and sanctions be harmonised (1) and on the other, more measures given to the police, to the judiciary and to other competent authorities in order to better coordinate and cooperate with one another (2).

1. Harmonising offences and sanctions

The fight against money laundering at the European level implies that anywhere in the Member States' territories any act of money laundering shall be prosecuted and sentenced. Moreover, in order to facilitate judicial cooperation, it is important to have a common definition of what money laundering really means as double criminality is often a prerequisite to authorizing cooperation[2]. Therefore, harmonisation of its definition appeared necessary, and was first carried out at an international level with the Vienna Convention and then within the European Union with three directives adopted in 1991, 2001 and 2005 (*see IA*).

In addition, better cooperation between Member States is very much linked to the coordination of sanctions. Thanks to the *Council Framework of 26 June 2001* a common obligation to punish money laundering of *"deprivation of liberty of a maximum of not less than four years"* was put in place. The will to harmonise prosecution of money laundering has also been particularly significant in terms of measures of confiscation concerning the proceeds of money laundering. In fact, before the Lisbon Treaty which put an end to the three pillars, the criminal judicial cooperation was dealt with in the third pillar with instruments such as joint actions and framework decisions. These instruments aimed at narrowing the differences between the national judicial systems. In the matter of confiscation, the *Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime* adopted in 1998 and the *Council Framework Decisions of 26 June 2001 and of 24 February 2005* have resulted in harmonising the fight against money laundering by obliging the European countries to implement confiscation measures based on common considerations which are mentioned in Article 3(2) of the *Framework Decision of 24 February 2005*. Finally, the *Council Framework decision of 26 June 2001* illustrates a will to better facilitate mutual cooperation in terms of confiscation as Article 4 obliges Member States *"to take the necessary steps to ensure that all requests from*

[2] KOUTOUZIS Michel et THONY Jean-François, *Le blanchiment*, Presses Universitaires de France, Collection « Que sais-je ? », 2005

other Member States which relate to asset identification, tracing, freezing or seizing and confiscation are processed with the same priority as is given to such measures in domestic proceedings". This focus on preventing criminals from using the proceeds of their crimes has appeared to be crucial in order to fight money laundering. It has been reinforced thanks to the principle of mutual recognition to confiscation orders which results from the adoption of the *Council Framework Decision 2006/783/JHA* after the *Council Framework Decision 2003/577/JHA* provided for mutual recognition concerning freezing decisions. Despite this significant normative framework, differences still exist between Member States relating to confiscation matters. For example, whilst some Member States such as Italy allow confiscation without conviction, others are more reluctant due to their national legal tradition. As an answer, the Commission recently used Articles 82 and 83 of the Treaty of the functioning of the EU to propose a directive to facilitate and harmonise freezing and confiscation of the proceeds of crime in the European Union[3].

The will at the European level to prevent criminals from using the proceeds of their crime had an impact at the national level such as can be seen in France. In fact, recent laws adopted in 2010 and 2011 have facilitated seizure and confiscation so that for instance, immaterial seizure has been given legal basis[4].

2. Measures for coordination and cooperation between police and judicial authorities and other competent authorities

Two approaches have been taken regarding the fight against money laundering in the European Union: a preventive and a repressive approach. In order for police and judicial cooperation to succeed, there is a crucial need for all the potential individuals or corporations that receive illegal funds to report such information to the competent authorities. Therefore, the preventive approach has played a key role in the fight against money laundering. In fact, the European Union implemented common obligations in Member States to report likely illegal flows. At the beginning, this obligation was only directed towards the banking system as it plays a major role in the process of money laundering. The duty to report suspicious transactions was then extended to other professionals and institutions such as auditors, casinos, notaries, art dealers, lawyers, etc.[5] In France, reports are made to an authority called

[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:EN:PDF
[4] Cutajar, C. (2012), "Le nouveau droit des saisies pénales", *AJ Pénal*, pp. 124-130
[5] MITSILEGAS Valsamis et GILMORE Bill, "The EU legislative framework against money laundering and terrorist finance: a critical analysis in the light of evolving global standards" in *International & Comparative Law Quarterly* 2007

TRACFIN which receives and analyses the transactions. It has the power to suspend the suspicious transaction for 48 hours to give it more time to gather information about the transaction in order to decide whether to refer to the Prosecutor's Office[6].

If a preventive approach appears to be necessary to cope with money laundering at the very basis, fighting money laundering must also imply that suspicious transactions should lead to a solid investigation. Considering that money laundering rarely stays within the national boundaries of a Member State, better cooperation between the authorities which receive the suspicious transactions on the one hand, and the authorities put in charge of the investigations and the judgement on the other hand, is fundamental. This process has first started with the obligation for each Member state to establish a "*financial intelligence unit*" (FIU). This unit, which is aimed at receiving, analysing and exploiting suspicious transactions, can vary in its legal form. Indeed, it can be an independent body or an administrative body such as TRACFIN in France, a structure linked to the police authorities or the judiciary. This diversity results from the principle of procedural autonomy which is essential in the construction of the European Union but has several flaws. In fact, it is difficult for an independent body to send information to more dependent structures and the vice versa[7]. As better cooperation implies a fast and easy exchange of information between these financial units, this variety can be a source of difficulty. Furthermore, depending on the Member State, the FIU does not have the same powers. Whereas some of them have the possibility to lead a deep investigation before deciding to transfer the file to the authorities responsible for prosecution, others have limited powers. Therefore, they report more suspicious transactions which do not always lead to prosecution.[8] The differences between the Financial Intelligence Units were a difficulty that was raised to be resolved during the European Council when defining the Stockholm programme on justice and home affairs (2010-2014)[9].

Nevertheless, efforts have undoubtedly been made in order to facilitate investigations and prosecution within the European Union and the fight against money laundering has greatly benefited from it. Indeed, as the mechanisms of money laundering often involve different Member States in the sense that the proceeds of the offence tend to be laundered in another

---

[6] The French Ministry of Economy, Finance and Industry's Website : http://www.economie.gouv.fr/tracfin/faqtracfin

[7] MANI Malorie, « La lutte contre le blanchiment d'argent : acteurs et stratégies des politiques publiques de l'Union européenne » Thèse sous la direction de Samy Cohen.

[8] TAVARES Cynthia & THOMAS Geoffrey, « Money laundering in Europe ; Report of work carried out by Eurostat and DG Home Affairs », Eurostat European Commission, 2010 p. 14

[9] European Commission DG Internal Market and Services EU AML Info-Letter December 2009 http://ec.europa.eu/internal_market/company/docs/financial-crime/aml-news-161209_en.pdf (p. 5)

country, the police and judicial cooperation based on Europol and Eurojust plays a key role[10]. For instance, the Europol Criminal Assets Bureau plays a significant role by helping the national police authorities in their investigations when they take a European dimension[11]. As for Eurojust, it makes the link between the national judicial authorities when the investigation involves different Member States. In 2010, for example, three joint investigation teams were put in place for matters involving money laundering[12]. More specifically, the main difficulty concerning money laundering was originally banking secrecy which was a significant obstacle to leading investigations. Several countries used to attract individuals and corporations by promoting banking secrecy. In the European Union, in order to enable an efficient fight against money laundering, coping with banking secrecy was essential. Indeed, in the *16th October 2001 protocol to the Convention of judicial cooperation of the 29th of May 2000*[13], Article 1 states that *"each Member State shall, under the conditions set out in this Article, take the measures necessary to determine, in answer to a request sent by another Member State, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide all the details of the identified accounts."* considering that article 7 prohibits the use of banking secrecy in the refusal of a request for cooperation.

B. A need for further cooperation linked to the current obstacles to the fight against money laundering

1. Challenges impeding the successful eradication of money laundering

Two opposite necessities are at stake: on the one hand, it is politically unthinkable not to act to limit the scope of money laundering, which is considered to be a great threat to the world economy and security. On the other hand, strict control of international financial transfers would impede business freedom and efficiency. Indeed, anti money laundering policies tend to be seen as contradictory to the core principles of a globalised liberal economy. Often there is an economic rationale that sustains money laundering, and the Member States themselves

[10] Franco FRATTINI "Initiatives of the European Commission" in *Anti Money laundering International Law and Practice* Edited by Muller Kälin Goldsworth, Wiley, p. 57-67
[11] Europol Review General Report on Europol activities, 2011
https://www.europol.europa.eu/sites/default/files/publications/en_europolreview.pdf p.54-55
[12] Eurojust Annual Report 2010
http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202010/Annual-Report-2010-EN.pdf
[13] Report by the French Parliament n°1621 (2004) on the Protocol to the Convention of judicial cooperation :
http://www.assemblee-nationale.fr/12/rapports/r1621.asp#P232_25551

sometimes directly benefit from it. This illegal economy does not necessarily only have a negative impact on a country's general economy, and organised financial crime may hold a firm grip on the national economy. As a consequence, there is often a noticeable gap between political discourse and law implementation. For instance, the Financial Action Task Force's recommendations, revised in February 2012, are aimed at strengthening the fight against money laundering. Indeed, they call for better operational tools both for financial intelligence units and for law enforcement authorities. However, the FATF lacks significant enforcement power over jurisdictions that do not live up to its standards. For instance, in 2001, the FATF did "punish" an offshore banking haven –Nauru island- on the ground that the Russian mafia transferred 70 billion dollars through it. The FATF applied its "*naming and shaming policy*": Nauru Island was subject to countermeasures that included enhanced surveillance and reporting of financial actions. This demonstrates a limited scope to sanctioning non-compliance.

States have a very long track record and plenary powers in the criminal field. There is much consensus on objectives: no politician advocates terrorism or serious crimes, but there are disagreements over means and the extent of criminalisation, even at the European level. Although the need to design a harmonised framework prevails at the international level, a strong tendency of countries to safeguard their monopoly in criminal matters strongly limits the effectiveness of the overall apparatus. Indeed, the international conventional regime needs to be incorporated within each national system: the treaty provisions are not self-executing rules, as they simply design the framework that each legislator must comply with. This is even the case within the European Union, the directives need to be transposed and do not completely harmonise the domestic legal definitions of money laundering. As aforementioned, differences remain in the identification of predicate crimes. Some States accept to prosecute money laundering when the predicate crime has been committed abroad. Others exclude crimes committed abroad, or those they do not deem truly relevant according to the definition of domestic predicate crimes. In case of significant differences between domestic definitions of predicate crimes, European and international cooperation might break down as double criminality is often a prerequisite to authorise cooperation. In light of the above, the relevance of a harmonised definition for the predicate offence for the success of anti money laundering apparatus should be plain.

Furthermore, money laundering has been facilitated by the secrecy provided by offshore banking havens. Offshore financial centres constitute a weak link in curbing business corruption and hinder broader efforts to raise standards of accountability and transparency in the global financial system. Moreover, if a country sets too many administrative and judicial requirements for the banking system, discretion lessens and efficiency becomes less optimal from a financial point of view. As a consequence, investment moves on to countries with similar business and economic advantages but less accountability. All tax havens provide secrecy and many tax havens provide the additional benefit of anonymity. If there is to be an honest attempt to eradicate money laundering, anonymity must be eliminated.

Another issue relies on the time inherent to judicial cooperation. Whereas money launderers are able to wire-transfer illegal proceeds almost instantaneously from one State to another, it takes investigative authorities at best several months to track down financial flows by issuing a rogatory letter. What is more, other difficulties stemming from domestic procedural specificities may arise. Indeed, in some States, an appeal may be filed against the primary judicial decision to comply with the received rogatory letter. For instance, Liechtenstein applies a complex procedure. First, there is an administrative control over the request, which may be difficult to pass due to political considerations and then an ordinary internal appeal procedure may be initiated. On a practical level, according to the report carried out by the French Parliament[14], Liechtenstein often relies on article 2 of the European Convention on Mutual Assistance in Criminal Matters, stating that assistance may be refused if the requested party considers that execution of the request is likely to prejudice essential interest of its country.

Above all, the fight against money laundering is directly dependent on the cooperation of the professionals at the origin of the suspicious transaction report to the FIUs. Nevertheless, these professionals may be, for various reasons, reluctant to fully cooperate. Client confidentiality, possible loss of business, lack of awareness, awareness of the low risk of prosecution if they do not comply, and a belief that no or little laundering occurs in their sector are among the main obstacles. In order for these professionals to be really committed to fighting money

[14] Assemblée Nationale Française, Rapport d'information Peillon Montebourg (2000), *Obstacles au contrôle et à la répression de la délinquance financière et du blanchiment des capitaux en Europe*

laundering, it is essential to inform them of the different laundering techniques and of the guarantees they enjoy by cooperating.

2. Recommendations towards more effectiveness

Cooperation between and among Financial Intelligence Units across national borders both increases the effectiveness of individual FIU and contributes to the success of the global fight against money laundering and terrorism financing. Financial crime investigations affect a number of law enforcement agencies within a particular jurisdiction. This means that a completely effective, multi-disciplinary approach for combating and preventing financial crime is often beyond the reach of any single law enforcement of prosecutorial authority. Since money may transfer hands in a matter of seconds or be relocated to the other side of the world at the speed of an electronic wire transfer, law enforcement and prosecutorial agencies that investigate financial crimes must be able to count on a virtually immediate exchange of information. That is why FIUs do exist in many EU countries. They offer law enforcement agencies an important avenue for information exchange. Nevertheless, the effectiveness of the fight against money laundering would very likely increase by creating a European Agency which could be an interface between the different financial intelligence units. Indeed, it is to be regretted that the FIUs within the European Union are structurally different, as this difference does impede the exchange of information. Some obstacles continue to limit information exchange and effective cooperation between FIU, such as legal restrictions and the very nature of the FIU themselves. It is for instance complicated for an administrative FIU to share information with a judicial one. Creating a European Agency would be all the more interesting as an informal reunion of the different FIUs already exists with the European Union FIU Platform. Furthermore, having such an Agency would probably reduce the reluctance that can still prevent some institutions from exchanging information because of the status of the FIU (administrative or judicial).

In addition, this Agency could also monitor a common file gathering all the information about the bank accounts opened in Europe such as what currently exists in some Member States (e.g. FICOBA in France). Even if the setting up of such a file is likely to be contentious because of the sensitive information that would be included, a more feasible solution on a short term basis would be to impose that each Member State holds a national information file on bank account holders.

***

In conclusion, over the last decades, at the international level and particularly at the European level, the legal framework has intensively improved to fight money laundering. Even though public authorities have many tools to identify and prosecute money laundering, the implementation of the legal framework remains at its construction stage. It would benefit from an easier structure of cooperation, all the more as in matter of money laundering, criminals often tend to be a step ahead.

REFERENCES

Reports

- Assemblée Nationale Française, Rapport d'information Peillon Montebourg (2000), *Obstacles au contrôle et à la répression de la délinquance financière et du blanchiment des capitaux en Europe*
- Eurojust (2010), *Annual report*
- Europol Review (2011), *General report on Europol activities*
- Financial Action Task Force on Money Laundering (1996-1997), *Report on money laundering typologies*
- Financial Action Task Force on Money Laundering (2006), *Trade based money laundering*
- Tavares, C. & Thomas, G., (2010), *Money laundering in Europe : report of work carried out by Eurostat and DG Home affaires,* Eurostat European commission

Books

- Frattini, F., (2007), "Initiatives of the European Commission" *in Anti Money laundering International Law and Practice* Muller Kälin Goldsworth, Wiley, pp. 57-67
- Mani, M. (2008), *La lutte contre le blanchiment d'argent : acteurs et stratégiques publiques de l'Union Européenne* (directed by Cohen S.), Paris : [s.n]
- Koutouzis, M. & Thony, J-F. (2005), *Le blanchiment*, Presses Universitaires de France, QSJ
- Vernier, E. (2008), *Techniques de blanchiment et moyens de lutte*, Paris : Dunod

Journal articles

- Cutajar, C. (2012), "Le nouveau droit des saisies pénales", *AJ Pénal*, pp. 124-130
- Cutajar, C., (2009), "Le nouveau droit du blanchiment et du financement du terrorisme, à propos de l'ordonnance du 30 janvier 2009", *JCP G*
- He, P., (2010), "A typological study on money laundering", *Journal of money laundering control,* vol. 13, n°1, pp. 15-32
- Lopes de Lima, J. (2007), "La perspective d'une agence européenne anti-blanchiment", *Archives de politique criminelle*, n°29, pp. 271-289

- Manacorda, S., (1999), "La règlementation du blanchiment de capitaux en droit international : les coordonnées du système", *Revue de science criminelle*, p. 251
- Mitsilegas, V. & Gilmore, B. (2007), "The EU legislative framework against money laundering and terrorist finance: a critical analysis in the light of evolving global standards", *International and comparative law quarterly*, vol. 56, n°1, pp. 119-140
- Mugarura, N. (2011), "The institutional framework against money laundering and its underlying predicate crimes", *Journal of financial regulation and compliance*, vol. 19, n°2, pp. 174-194
- Riffault, J. (1999), "Le blanchiment de capitaux illicites, droit compare", *Revue de science criminelle*, p. 231
- Tan, S. T., (2002), "Money laundering and e-commerce", *Journal of financial crime*, vol. 9, n°3, pp. 277-285
- Zeldin, M. (1998), "Money laundering", *Journal of money laundering control*, vol. 1, n°4, pp. 295-302

Internet

- Access to European law

http://eur-lex.europa.eu

- European Commission DG Internal Market and Services EU AML Info-Letter December 2009

http://ec.europa.eu/internal_market/company/docs/financial-crime/aml-news-161209_en.pdf

- The French Ministry of Economy, Finance and Industry's Website:

http://www.economie.gouv.fr/tracfin/faqtracfin