

Criminal and regulatory enforcement of money laundering legislation in Europe

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today and in future under the AMLA

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Agenda

AML enforcement landscape in Europe today – an overview

Suspicious Activity Reporting in distress

Increasing prosecution of individuals

Limitations of the European directive legislation

Criminal and regulatory enforcement under the AMLA

AML enforcement landscape in Europe today – an overview (1)

30 years have passed since the **first EU Anti Money Laundering Directive (AMLD1)** went into effect in 1991.

- European legislator has **continuously increased regulatory requirements and expanded circle of obliged entities**
- **Heavily influenced by FATF recommendations**
- First AMLDs mainly targeted entities from **financial sector** (eg banks) and **organized crime** (eg drug trafficking)
- Countering the Financing of Terrorism (CFT) added at beginning of the century
- AMLDs had **major influence on member states' AML legislation** (regarding risk management measures, customer due diligence and Suspicious Activity Reports (SARs))

In terms of enforcement, Europe has long been way behind the U.S. and UK.

- Recently driven by **major money laundering scandals** (Panama Papers, Danske Bank, Russian laundromat)
- Focus shifts away from typical organized crime offences to **white collar crime/corporate misconduct**
- **Increasing enforcement pressure** from politics, authorities and the public towards corporations (regarding AML law, other regulatory requirements and integrity of business relationships in general)

AML enforcement landscape in Europe today – an overview (2)

A distinctive feature of AML law is the very **close relation of criminal and regulatory enforcement:**

- Violations of **regulatory AML law requirements** directly punishable by administrative fines
- Serious violations may fulfil requirements of the **crime of money laundering** / aiding and abetting such offences
- **Dual track regulatory and criminal proceedings:** investigation may lead to supervisory measures, a regulatory fine, or the authority handing case over to public prosecutors to initiate criminal proceedings

National borders are still an obstacle for law enforcement authorities in Europe.

- National authorities **focused too much on national threats**
- **Exchange of information often insufficient** to detect cross-border money laundering schemes in timely manner
- Inquiries in AML matters often take significantly longer than in other legal matters (with some national AML authorities responding only after a month on average)

Criminal and regulatory enforcement by national authorities is also still uneven across Europe.

- **Fines in the hundreds of millions of euros** for AML law violations in some jurisdictions (eg Scandinavia and the Netherlands)
- Regulatory fines and criminal prosecution of money laundering **not yet in focus in other member states**

Suspicious Activity Reporting in distress (1)

The obligation to file SARs to the national **Financial Intelligence Units (FIUs)** is an **important source of information** for law enforcement authorities, and failure to file SARs is the **subject of a large number of enforcement proceedings** against financial institutions.

- Problem: Current EU legislation **does not provide any dependable criteria** which factual indications trigger reporting obligation
- Lack of clear criteria promotes **hindsight bias**:
 - In retrospect, regulators may often attribute thousands of transactions to an uncovered money laundering scheme
 - Even if SARs were filed regarding vast majority of transactions, authorities tend to initiate administrative fine proceedings for all missed cases based on intelligence / data sets gathered in month-long investigations

In consequence banks file a **SAR for even the slightest irregularities** so their number explodes.

- **Max. 10 per cent of SARs are of potential value** to FIUs
- **Flood of SARs overburden often understaffed authorities**
- Due to backlog of thousands of unprocessed SARs build up at German FIU, perpetrators could not be prosecuted and incriminated funds could not be seized
- German public prosecutors raided German FIU for obstruction of justice in July 2020
- Further searches in these proceedings at the German Federal Ministry of Finance and the Federal Ministry of Justice followed this month (September 2021)
- German FIU reacted implementing a more risk-based approach
- Ever-increasing number of SARs is **similar challenge to other member states' authorities**

Suspicious Activity Reporting in distress (2)

The problem can only be addressed by a suspicious activity reporting practice that focuses much more on **quality rather than quantity**.

- **Use of big data and analysis by artificial intelligence could significantly reduce number of false positives**
- Without clear legal guidance or binding statements by authorities banks must continue to file SARs at slightest factual indication

Overburdened reporting system / ever new concealment methods often lead to detection of suspicious cases only after a **considerable time delay**.

- AML proceedings frequently target business relationships that have long since ended
- **Complete documentation of all steps in AML matters** is crucial to enable defence (eg checking media reports that rose suspicion against business partner lists)
- Also applies to **when and on what informational basis legal and business decisions were made** (eg initiation of an internal investigation or for which transactions bank files SARs as a result of media reports)

Increasing prosecution of individuals

There is a global trend towards **parallel or even stand-alone regulatory or criminal prosecution** of board members and other executives for alleged noncompliance or corporate misconduct.

- **Particularly high personal administrative fine risks in AML proceedings**
- Maintaining business relationship despite slightest indications for money laundering sufficient for **accusation of aiding and abetting criminal money laundering**
- Public prosecutors use **full range of investigative and coercive powers** in white-collar crime proceedings including in AML cases (wiretapping, searches of private residences, pre-trial detention etc.)
- **Prison sentences of several years possible**
- Proceedings target not only board members and most senior executives, but **also middle management** (especially Anti Money Laundering Officers)
- Irrespective of type of proceedings (regulatory or criminal) and outcome (dismissal or sanction), allegations may have **severe career and personal consequences**
- Despite presumption of innocence, institutions sometimes see themselves forced to **replace executives** or they **chose to suspend their management activities** on their own initiative
- Personal prosecution encouraged by **Directive on combating money laundering by criminal law** (Directive (EU) 2018/1673)

Limitations of the European directive legislation

European directive legislation is increasingly reaching its inherent limits.

- Directives do **not apply directly** in member states
- Minimum standards set forth **must first be transposed into national law**
- Member states have **leeway in this process** and can adopt more far-reaching or additional national regulations
- Example: Despite adoption of Directive (EU) 2018/1673 on combating money laundering by criminal law, there is **no uniform definition of criminal money laundering across Europe**
 - This year, the German legislator introduced the **all crimes approach** (according to which it constitutes a criminal money laundering offence if funds originating from any conceivable offence are obtained or transferred)
 - Banks that did not already follow the all crimes approach had to revise compliance procedures for German business
- **Mere minimum standards also lead to problems regarding regulatory requirements** laid down in AMLDs for three reasons:
 - **Lack of detail**
 - **Diverging implementation**
 - **Different interpretation and uneven enforcement by national authorities**

European directive legislations currently **hinders credit institutions to establish uniform compliance systems** for their business in Europe.

Criminal and regulatory enforcement under the AMLA (1)

The Commission published a legislative package on AML on 20 July 2021:

- Main pillars are **two draft regulations directly applicable in member states**:
 - EU single rulebook on AML/CFT
 - Regulation to create a new AML/CFT supervisory authority at EU level
- **Complemented by recast of AML Directive (AMLD6)** which further strengthens powers at national level and promotes information exchange

EU single rulebook on AML/CFT:

- **Most regulatory requirements** previously governed by AMLDs now to be **transferred to EU single rulebook**
- Particularly important for banking sector:
 - Introduction of **uniform definition of ultimate beneficial ownership** throughout Europe
 - **Further harmonization of customer due diligence requirements**

European AML authority (AMLA):

- **Centrepiece of an integrated AML/CFT supervisory system** alongside national AML authorities
- Supposed to have **staff of 250** and **budget of EUR 45.6 million**
- Responsible for overseeing implementation of new harmonized regulations
- Drafts **Implementing Technical Standards (ITS) and guidelines**
- AMLA will also exercise **supervisory powers** itself

Criminal and regulatory enforcement under the AMLA (2)

Supervision by AMLA

Direct Supervision

of selected financial institutions

AMLA will take over direct supervision for certain **selected obliged entities**:

- Selection based on **periodic assessment**
- **Criteria**: Exclusively from financial services sector, operating on cross border basis, high inherent AML/CFT risk
- Expected to **include some of the major banks operating across Europe**
- **Wide set of supervisory powers** (incl. restriction of business operations and order to divest certain business activities with excessive AML/CFT risk)

Indirect Supervision

of other non-selected entities

In respect of non-selected obliged entities, AMLA will perform indirect supervision:

- **Coordination and oversight over national AML supervisors**
- Promoting common supervisory standards
- May **request** national supervisory authority **to investigate and consider imposing sanctions in exceptional circumstances** (indications of material breaches of EU AML law)

Criminal and regulatory enforcement under the AMLA (3)

AMLA is also envisaged to be a **very important resource for law enforcement authorities**:

- **Supporting national FIUs** in cooperation, exchange of information and joint analysis
- Strong working relationships with other **European agencies (eg Olaf, Europol, Eurojust, EPPO)** expected

AMLA will also be competent to **sanction those financial institutions under its direct supervision**:

- **Administrative fines up to 10 per cent of the institution's yearly turnover**
- **Periodical penalty payments**
- **Robust enforcement expected**
- **Challenges** against supervisory measures and sanctions by AMLA must be brought to **European courts**
- Draft regulation also addresses **defence rights** in administrative offence proceedings (eg right to be heard and independence of investigatory team from supervisory department)

Outlook:

- EU single rulebook offers **promising opportunity to reduce complexity and facilitate compliance** through (largely) uniform standards across the EU
- AMLA may advance **uniform interpretation** of AML obligations
- Success of legislative package will mainly depend on AMLA's **prudent supervisory practice** and its interaction with national authorities

Timeline:

- Legislative process will take approx. 12 to 18 months
- AMLA is envisaged to be **fully operational by 2024** and **take over direct supervision by 2026**

Thank you

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