

THE CALL FOR MORE EUROPE IN THE AREA OF MEASURES AGAINST MONEY LAUNDERING

Assoc. Prof. Kaloyan Simeonov, Dr. Habil

*European Studies Department. Faculty of Philosophy,
Sofia University „St. Kliment Ohridksi“*

Abstract

On 20 July 2021 the European Commission published a new legislative package in the area of measures against money laundering and terrorist financing. The main aim of the package is to respond to the need for more Europe in that area. This need was declared by some European Parliament Resolutions, an Action Plan of the Commission from May 2020 as well as ECOFIN Conclusions in November 2020.

The call for more Europe was provoked by some cross-border money laundering cases that affected several EU Member States. The problem is similar to the one that initiated the establishment of the EU Banking Union – EU Internal Market implementation of common rules in the fight against money laundering is currently fragmented by divergent national supervisory authorities and national financial intelligence units.

Some of the main amendments in that package in comparison to the current EU legal framework is a clear sign for more Europe. One of them is the proposal for the establishment of a new EU Authority that shall perform tasks and functions in the areas of measures against money laundering and terrorist financing. This Authority is planned to be called AMLA (Anti-Money Laundering Authority). Another important change will be the replacing of the current EU Directive by two legal acts – a new Directive but also a new directly applicable Regulation where many of the current EU provisions will be transferred.

However, the current call for more Europe in the area of anti-money laundering will not be easily adopted and implemented – there are many legal, institutional and political factors and challenges in this new EU reform.

Keywords: EU reform, anti-money laundering, financing of terrorism

1. Introduction

The development of the EU Internal Market is a continuous and never-ending process.

The new realities and challenges in front of the EU lead to various and deep reforms in many policy areas, including the efforts to overcome the health crisis caused by COVID-19, the digitalisation of the EU economy and its single market, the prospect for the EU green deal, etc. These reforms are constantly changing the Internal Market for the EU-27 plus the other three countries from the European Economic Area Agreement (Norway, Iceland and Lichtenstein).

There is another recent EU reform in the financial services field that is rarely discussed in the news but that will also change significantly the European Union landscape in the future. This is the new reform in the areas of anti-money laundering and countering financing of terrorism.

The EU has started to implement anti-money laundering rules in the Internal Market since 1991. The Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, the so-called First Anti-Money Laundering (AML) Directive, established the first rules in this area for the EU Internal Market.¹ Currently, the 2015 Fourth AML Directive is applied in the EU, substantially amended by the 2018 Fifth AML Directive.²

Why there is a call for more Europe and for new EU reforms in the areas of anti-money laundering and countering financing of terrorism (AML/CFT)? Taking into account that the recent rules have only been applicable for the past few years in the EU. There are many reasons why such a call for EU reform and more Europe was spread across the EU and led to the new European Commission AML/CFT legislative package presented in July 2021.

One of them is the fragmented national supervision and national financial intelligence units' efforts to tackle the well-integrated EU-27 financial markets industry. Therefore, there is a call for new supranational and unified supervision, just like in the case of the Single Supervisory Mechanism in the EU Banking

¹ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28.6.1991.

² *The Fourth AML Directive is:* 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 (Text with EEA relevance), OJ L 141, 5.6.2015. *The Fifth AML Directive is:* 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 (Text with EEA relevance), OJ L 156, 19.6.2018.

Union, performed by the European Central Bank. Another reason for the new EU reforms is related to the difficulties experienced by the EU Member States to transpose and apply the EU AML/CFT Directives. Therefore, in the new 2021 legislative package many of the provisions in that area will be transferred to a directly applicable regulation. A third reason is the technological development and the wide-spread of crypto assets that may be also used for money laundering and terrorism financing purposes.

The current paper aims to discuss in more details this EU call for more Europe in the AML/CFT area, to identify what are the new realities and to present the main challenges for the new EU reform.

2. New realities – how the new EU reform was born?

The need for continuous reform in the AML/CFT area was recognised by all EU policy making institutions in the recent years. In late 2018 the Fifth AML Directive, that amended substantially the Fourth one, was already published in the EU Official Journal. However, the Council stressed on the need for the EU to take further non-legislative actions. These actions were primarily focused on the common and unified application of the AML/CFT rules across the EU. Therefore, the Council adopted in December 2018 an EU Action Plan on Anti-Money Laundering (Short term actions).³ The measures of this Action Plan were targeted mainly to the European Commission and the European Supervisory Agencies (EBA, ESMA and EIOPA⁴). In late 2018 the European Commission also published a Communication in the field of AML/CFT, targeted specifically to the financial sector.⁵

All the legislative and non-legislative measures that were undertaken in the period 2015-2018 at EU level achieved some success. However, substantial problems remained. A clear proof for that are the alleged money laundering cases where several EU banks from different EU Member States were involved. These cross-border cases within the EU proved that the fragmented supervision and financial intelligence among EU-27 may not achieve satisfying results in a well-integrated EU Internal Market for financial services. The European Commission published in July 2019 a special report on those alleged bank money laundering cases. It concluded that as a result of those cases „it becomes even more apparent that the application of the [AML] framework is largely

³ Council of the EU (2018), „EU Action Plan on Anti-Money Laundering (AML) = Short term actions“, Brussels, 04.12.2018.

⁴ For these three EU Supervisory Agencies in the financial services field, see the next section of the current report.

⁵ European Commission (2018), „Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions“, 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, COM(2018)645 final, 12.09.2018.

divergent, presenting a structural problem in the Union's capacity to prevent that the financial system is used for illegitimate purposes.⁶

It became obvious that much more horizontal and profound EU reform will be needed in the area of AML/CFT. Therefore, the European Commission published in May 2020 a more detailed Action Plan, called an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing. This Action Plan was structured in six pillars:

1. Ensuring the effective implementation of the existing EU AML/CFT framework;
2. Establishing an EU single rule book on AML/CFT;
3. Bringing about EU level AML/CFT supervision (this is the proposal for AMLA authority discussed in the next section of this paper);
4. Establishing a support and cooperation mechanism for FIUs;
5. Enforcing Union-level criminal law provisions and information exchange;
6. Strengthening the international dimension of the EU AML/CFT framework.⁷

Out of these six pillars, at least the second, the third and the fourth require legislative action by the EU. The result of this legal action is the Commission AML/CFT legal package that is the main focus of this report.

In November 2020 the Council of the EU in its ECOFIN format of the 27 ministers of finance approved conclusions. The Council's conclusions welcomed in principle the new May 2020 Commission Action Plan and agreed on the need of reform and on the main pillars of this reform.⁸

The European Parliament has also issued a number of Resolutions in the AML/CFT area in the recent years. One of them is again related to the May 2020 Commission Action Plan.⁹

Step by step, a new EU reform in the area of anti-money laundering and countering financing of terrorism was born. This reform is currently driven by the July 2021 AML/CFT Commission draft legislative package, comprising four legislative dossiers:

⁶ European Commission (2019), „Report on the assessment of recent alleged money laundering cases involving EU credit institutions“, Report from the Commission to the European Parliament and the Council, COM(2019) 373 final, Brussels, 24.7.2019.

⁷ European Commission (2020), „Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing“, Communication from the Commission, Brussels, 13.05.2020.

⁸ Council of the EU (2020), „Council Conclusions on anti-money laundering and countering the financing of terrorism“, Brussels, 05.11.2020.

⁹ European Parliament (2020), „Resolution on a comprehensive Union policy on preventing money laundering and terrorist financing - the Commission's Action Plan and other recent developments“, 2020/2686(RSP), Brussels, 10 July 2020.

- Regulation for the establishment of a new AML/CFT Authority (called AMLA);
- New Directive repealing the current Fourth and Fifth AML/CFT Directives;
- A new directly applicable Regulation where many of the current directive provisions will be transferred and amended;
- A revised (recast) Regulation on the information accompanying transfer of funds and certain crypto-assets.

The first legal proposal is discussed in section 3 of this report, the second and third one in section 4 and the fourth one is section 5. All these proposals are related to the call for more Europe in the reformed EU AML/CFT policy.

3. AMLA – the new Kid on the Block

After the global economic and financial crises which started in 2007-2008, the EU responded with establishing many new bodies and agencies in the financial services field. The recent decade has witnessed a number of new agencies, mechanisms and funds at the level of EU financial markets. They are the EU's response to the challenges in the financial services sector. Some of them are:

- the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) - the three EU agencies in specific sub-sectors in the financial services field;
- the European Systemic Risk Board (ESRB) was established to oversee the financial system of the EU on macro level;
- the European Central Bank was assigned the supervisory functions over the systemic banks in the Single Supervisory Mechanism within the EU Banking Union;
- the Single Resolution Board was established as a central body within the Single Resolution Mechanism within the EU Banking Union;
- the Single Resolution Fund is also part of the Single Resolution Mechanism;
- the European Stability Mechanism (ESM) is providing financial assistance to the euro area Member States.

The European Commission has also its powers as an independent policy institution, including the right to propose new legislative proposals and to monitor the implementation of the EU law. The ECOFIN Council of the EU and the ECON Committee at the European Parliament also participate in the EU decision making process. At the same time, the national authorities are also actively contributing to the EU financial services landscape – national supervisory authorities, national resolution authorities and funds, national deposit guarantee schemes, depositary institutions, national financial intelli-

gence units in the AML/CFT sector, etc. New EU agencies and mechanisms are also planned such as for example the European Deposit Insurance Scheme (EDIS), the European Monetary Fund that shall eventually replace ESM or a European Minister of Finance but there is still no political will for these three projects.

Who shall be the new kid on the block? The building of too many EU agencies will soon be enlarged with a newcomer: the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA). The need for such an EU authority is explained by the European Commission with the same arguments as for the other EU agencies. The Internal Market of the EU-27 is well integrated for the European financial institutions, companies and business. However, the national supervision of the financial institutions and the tasks of the national financial intelligence units are fragmented and do not correspond to the realities of the EU Internal Market. Furthermore, when it comes to issues such as crime and money laundering, we shall admit that criminals are even much more integrated, cooperative and creative when they establish their cross-border networks and schemes. Recent money laundering cases in the EU, including in cross-border banking, have also demonstrated the integrity and success of some money laundering schemes across the EU Internal Market.

Therefore, one of the main proposals of the new AML/CFT legislative package of the European Commission is the draft Regulation establishing AMLA.¹⁰ In accordance with the legislative proposal of the EC, the Authority for Anti-Money Laundering and Countering the Financing of Terrorism shall have two main areas of activity:

- Supervision of selected entities in the financial services field. As pointed out by the European Commission, AMLA shall become the centre of an integrated system of national AML/CFT supervisory authorities. It shall ensure their mutual support and cooperation. Another aim is supervisory convergence in the AML/CFT field and a common supervisory culture. For the financial sector AMLA shall have powers to directly supervise selected financial sector entities – those that are exposed to the highest AML/CFT risk.¹¹
- In relation to the financial intelligence units (FIUs) AMLA shall facilitate the coordination between them, shall establish standards for reporting and information exchange and shall host the central online system FIU.net.

¹⁰ European Commission (2021), 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, Brussels, 20.07.2021.

¹¹ AMLA shall have only a coordination role in the non-financial sector. For further information, see: European Commission (2021), Questions and Answers: Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT), Brussels, 20 July 2021.

It is envisaged at this stage that AMLA shall have around 250 staff members by 2026 when the agency shall be fully operational. Out of these staff members, around 100 shall work on direct supervision of certain obliged entities. This will be done in joint supervisory teams with the participation of the staff of national supervisors responsible for these entities.¹²

National supervisors and national financial intelligence units will continue to exist and to perform their functions. The new EU agency (AMLA) shall not only exercise direct supervision over certain selected entities but it shall be able to enhance the cooperation among national supervisors and FIUs in a single state or in the whole EU Internal Market.

AMLA will have extensive powers and tasks at EU level. The future establishment of this new Agency with substantial EU supervisory and coordinating functions is a clear proof that there is a call for more Europe in the AML/CFT field.

4. Why there is a need for a directly applicable regulation?

Another call for more Europe in AML/CFT field is the establishment of the Single EU rulebook in that area. The European Commission explains that the Single EU rulebook are all those directly applicable AML/CFT rules and requirements on obliged entities that will no longer need transposition into national law.¹³ As already mentioned, all the current main AML/CFT rules are in the form of a Directive that need transposition in Member States legislation. The problems with such an approach are that Member States often delay or transpose incorrectly some directive provisions. This leads to a distortion in the EU Internal Market on AML/CFT and not unified application of those rules.

Therefore, the new July 2021 Legislative package includes for the first time a directly applicable Regulation in the area of AML/CFT.¹⁴ This Regulation shall be approved by the European Parliament and the Council. However, taking into account that in the EU there are 27 different jurisdictions each with its own legal and institutional specificities, some of the future EU AML/CFT rules will continue to be in the form of directives that will need further transposition. This will be the so-called Sixth AML Directive.¹⁵

¹² Ibid.

¹³ Ibid.

¹⁴ European Commission (2021), 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 and terrorist financing, COM(2021) 420 final, Brussels, 20.07.2021.

¹⁵ European Commission (2021), 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 and terrorist financing and repealing Directive (EU) 2015/849, COM(2021) 423 final, Brussels, 20.07.2021.

The majority of the new and revised rules will be in the form of a directly applicable regulation. Some of the main rules that are being transferred from the Fourth and Fifth AML Directive to the new AML Regulation are:

- the list of the obliged entities, including credit institutions (banks), financial institutions and many other that shall perform strict AML/CFT rules;
- the majority of the AML/CFT definitions;
- some exemptions on EU level;
- the rules on internal policies, controls and procedures of obliged entities;
- the customer due diligence measures;
- the transparency rules on beneficial ownership (the rules for the beneficial ownership registers remain in the directive);
- the reporting obligations by the obliged entities;
- the data protection and record-retention rules;
- the measures to mitigate risks deriving from anonymous instruments.

The majority of the new EU rules will be in the form of a directly applicable European Parliament and Council Regulation for the first time in the AML/CFT legal history of the EU. The rules in that area will apply an approach that is already used in the EU financial supervision where both a regulation and a directive coexist in order to rule the respective area – for example for credit institutions and investment firms. This new approach in the AML/CFT field will ensure proper and more efficient application of the EU rules, i.e., this is more of a European approach with less maneuver for the national specificities of the Member States.

5. Amended rules for Crypto Assets

The Proposal for a Regulation on information accompanying transfer of funds and certain crypto-assets (recast) is the fourth legal proposal of the European Commission in its July 2021 AML/CFT legislative package.¹⁶ This Regulation shall replace the current Regulation (EU) 2015/847 on information accompanying transfers of funds.¹⁷

The main amendment to the current EU rules is the enlargement of the scope of the 2015 Regulation. The extension is for the information that accompanies the transfer of crypto assets. Currently, such an information is provided only for wire transfers in relation to the payments executed by payment service

¹⁶ European Commission (2021), Proposal for a Regulation of the European Parliament and the Council on information accompanying transfer of funds and certain crypto-assets (recast), COM(2021) 422 final, Brussels, 20.07.2021.

¹⁷ Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006 (Text with EEA relevance), OJ L 141, 5.6.2015.

providers. The new proposal takes into account the technology developments and the wider spread of crypto assets in the EU Internal Market. It aims to enhance the measures against money laundering and at the same time to respond to the updated international standards, i.e., the recommendations by the Financial Action Task Force (FATF).

The recast Regulation contains a new chapter that provides transparency requirements and obligations for the crypto-asset service providers. There are requirements for both the crypto-asset service providers of the originators as well as obligations for the crypto-asset service providers of the beneficiaries of the crypto-assets transfers.

The July 2021 AML/CFT proposals are in line with the draft Digital Finance Package where a market for crypto-assets is already being initiated at EU level. All the crypto-asset service providers become obliged entities according to the new AML/CFT package. This is also in line with the international standards that are identified by FATF.

6. Conclusions

There is a call for Europe in the area of measures against money laundering. The July 2021 AML/CFT legal proposals of the European Commission aim to respond to this call. The adoption of the new provisions shall establish a new European Authority in the AML area and shall transfer many current AML provisions to a new directly applicable regulation. They shall respond at the same time to the new technology developments and the amended international standards in the AML/CFT area. In principle, all the EU institutions agree that there is a need for such a reform, including the Member States in the Council of the EU.

However, the call for more Europe in the AML/CFT area is not without some important challenges. It will be difficult to transfer so many and substantial powers to a new EU Agency. There will be some legal impediments for establishing such an authority with direct supervisory powers in the EU Member States.

Another challenge is that the establishment of a new player in the AML/CFT field shall facilitate cross-border coordination for supervisory and financial intelligence purposes. But at the same time, this new EU player shall learn how to effectively perform its tasks with many other EU and national authorities and institutions.

Last but not least, criminals always try to be faster and to overcome new rules even before their adoption and implementation. It will be a challenge the call for more Europe in the AML/CFT field to bring a strong, tangible and sustainable success against those criminals trying to use the financial system for the purposes of money laundering and terrorist financing.

Bibliography:

1. Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28.6.1991.
2. Council of the EU (2020), „Council Conclusions on anti-money laundering and countering the financing of terrorism“, Brussels, 05.11.2020.
3. Council of the EU (2018), „EU Action Plan on Anti-Money Laundering (AML) = Short term actions“, Brussels, 04.12.2018.
4. 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 (Text with EEA relevance), OJ L 156, 19.6.2018.
5. 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 (Text with EEA relevance), OJ L 141, 5.6.2015.
6. European Commission (2021), 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 and terrorist financing, COM(2021) 420 final, Brussels, 20.07.2021.
7. European Commission (2021), 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, Brussels, 20.07.2021.
8. European Commission (2021), Proposal for a Regulation of the European Parliament and the Council on information accompanying transfer of funds and certain crypto-assets (recast), COM(2021) 422 final, Brussels, 20.07.2021.
9. European Commission (2021), 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 and terrorist financing and repealing Directive (EU) 2015/849, COM(2021) 423 final, Brussels, 20.07.2021.
10. European Commission (2021), Questions and Answers: Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT), Brussels, 20 July 2021.
11. European Commission (2020), „Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing“, Communication from the Commission, Brussels, 13.05.2020.
12. European Commission (2019), „Report on the assessment of recent alleged money laundering cases involving EU credit institutions“, Report from the Commission to the European Parliament and the Council, COM(2019) 373 final, Brussels, 24.7.2019.
13. European Commission (2018), „Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions“, 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, COM(2018)645 final, 12.09.2018.

14. European Parliament (2020), „Resolution on a comprehensive Union policy on preventing money laundering and terrorist financing - the Commission’s Action Plan and other recent developments“, 2020/2686(RSP), Brussels, 10 July 2020.
15. Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006 (Text with EEA relevance), OJ L 141, 5.6.2015.