

UDC 343

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BRIEF PRESENTATION OF THE PROVISIONS OF THE EU'S LATEST FINANCIAL REGULATION REFORM

1. Introduction: the preceding regulations

To regularise the black economy in order to decrease the level of illegal income and to take effective measures to combat organized crime have almost always been main subjects of the international legislation, which resulted in the concept of a global and unified defensive structure.¹ In regard to the ever increasing number of illegal money transactions, the EU as one of the leading powers of the financial sphere has decided to develop the level of protection with a decently stricter regulation frame and to take decisive actions against the crimes violating the financial interests of the European Union, especially money-laundering. It may be said that in view of the hereinafter examined reforms the warm contest against the phenomenon of 'black' money has reached a new milestone on Community level. However in order to properly understand the

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¹ It has to be admitted that not only legislation but jurisprudence is strongly influenced by globalization, e.g. in 2014 an unified guidebook was published for lawyers to detect the signs of money laundering and prevent it. The collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe is available at:

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/01748_MKT_SGP_Lawyer1_1413961642.pdf

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provisions of the latest directive, it seems to be essential to briefly overlook the phases of the evolution of the international legal instruments.

At first it can be clearly stated that at the end of the 80's a remarkable change occurred in the international legal environment concerning money-laundering. Several international bodies were born and legally binding treaties drafted in order to start the global fight against illegal financial activities. It is beyond doubt that the global protection system is founded on the recommendations of the entity called Financial Action Task Force on Money Laundering (FATF/GAFI).² This is an international body established to directly combat money-laundering via synchronizing national programmes, strengthening the cooperation between the competent authorities and improving the practical implementation of the provisions of the Basel Accord and the Vienna Convention on International Sale of Goods.³ The efforts made to harmonize the legal instruments of both the criminal and the administrative law have led to a very special and unique situation: the present legal frame of the fight against money-laundering is so unified worldwide that it is defined by the same principals, using the same terms with the same content during almost the same procedure aiming at the same circle of obligants. This globally unified regulation, the so-called AML⁴ regime is based upon the

² The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. The FATF has developed a series of Recommendations that are recognized as the international standard for combating of money laundering and the financing of terrorism and proliferation of weapons of mass destruction. They form the basis for a coordinated response to these threats to the integrity of the financial system and help ensure a level playing field. First issued in 1990, the FATF Recommendations were revised in 1996, 2001, 2003 and most recently in 2012 to ensure that they remain up to date and relevant, and they are intended to be of universal application.

More about the FATF: www.fatf-gafi.org

³ TAJTI Zsuzsanna: A bázeli ajánlások és a tökémegefelelési direktíva (CRD) formálódása, in: Hitelintézeti Szemle 2011./5. (X.), 499-519.

⁴ Anti-Money Laundering Regime (AML).

See in details e.g.: LEVI, Michael – REUTER, Peter: Money Laundering, Chicago, 2006., 304-308.

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following fundamental elements: close international co-operation, corresponding national legislation and similar social institutions.

The European level of legislation was at first dominated by three giant legal entities as the UN, the Council of Europe and the EU. Due to the parallel activity of these bodies, at first the regulation were not the least uniformed. Naturally, the obligations of the Member States were mainly determined by the EU's directives complemented with the FATF Recommendations, forming an effective, standardized and transparent regulatory system against the delictum on the Community level.

At the beginning of the 90's it was firstly recognized by the decision-making bodies of the EU that the increasing headway of organized crimes connected with the opportunities offered by the integrated financial system could have meant serious risks endangering the interests of the Community as it could have led to the relevant spread of money-laundering. Therefore on one hand Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering brought notaries and independent legal professionals within the scope of the Community anti-money laundering regime. Moreover it was structured in accordance with the provisions of the already effective treaties, ensuring the plain cooperation between the authorities of the different countries.

Approximately 10 years later the regulation was modified by Directive 2001/97/EC because due to the significant time-lapse and the revision of the FATF Recommendations as well, some element of the preceding directive seemed to have become exceeded and inflexible.⁵ However, the Community's legislation have not yet found it reasonable to create an absolutely new frame for the protection of the EU's financial interest.

⁵ See a detailed comparison of the two directive:

PAPP ZSÓFIA: Az európai unió pénzmosás elleni első és második irányelvének és a FATF ajánlásainak eltérő rendelkezései, in: *Iustum Aequum Salutare* II. 2006/1–2. · 229–238

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On the contrary, the overwhelming technical development, the revision of the FATF Recommendations in 2003 and the expanding number of criminal conducts related to terrorism made it inevitably necessary to adopt a completely new AML policy.⁶ As the FATF broadened the material scope of the Recommendations with the will of reducing the opportunities of financing terrorism, the EU had to take steps to support this action. As a result of this, Directive 2005/60/EC was accepted on 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, overriding the prior regulation. The directive became effective on 15 December 2005 with a 2 years long deadline for the Member States to implement its provisions in their national regulation frame and legal practice as well. In order to broaden the regulatory sphere of the directive, it was meant to be applied to financial and credit institutions, as well as to certain legal and natural persons working in the financial sector, including providers of goods (when payments are made in cash in excess of EUR 15.000). Moreover pursuant to the new directive's provisions these entities and persons had to apply a so-called customer due diligence (CDD). Furthermore as one of the most relevant innovation of the new legal frame, national Financial Intelligence Units (FIU) were set up to deal with suspicious transaction reports aiming to improve international co-operation via increased information exchange.

With the purpose of helping this process the Commission accepted Directive 2006/70/EC in 2006 laying down implementing measures regarding the definition of '*politically exposed person*' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis.⁷ (It has to be noted that in

⁶ Directive 2005/60/EC and its executive decrees as Commission Directive 2006/70/EC

⁷ As analysis of the new directive's innovations see:

PAPP ZSÓFIA: Az Európai Unió pénzmosás elleni második és harmadik irányelvének eltérő rendelkezései - A hatályos pénzmosás elleni törvény várható változásai, in: Iustum Aequum Salutare IV. 2008/1., 137–155.

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accordance with the various changes and innovations of the directive, the Member States also had to structure a completely new legal frame to be able to implement its provisions properly, also in regard of reviewing their national legal practice. Hungary e.g. accomplished these duties with the adoption of Act CXXXVI on the Prevention and Impending of Money Laundering and Terrorism Financing.⁸ However the directive's continuous practice revealed some deficiencies, problems and new challenges which have to be dealt with as explicated in the followings.⁹)

2. The revised AML policy of 2015

After constant disputes and due deliberation the comprehensive reform of the legal frame was finally accepted during the summer of 2015, naturally in accordance with the provisions of the directive-proposal¹⁰ on the fight against fraud to the Union's financial interests by means of criminal law and the Commission's communication on reinforcing sanctioning regimes in the financial services sector.¹¹

This innovative measure consists of two components: on one hand Regulation (EU) 2015/847 of 20 May 2015 on information accompanying transfers of funds and repealing the prior Regulation (EC) No 1781/2006¹², on the other hand the fourth AML directive.¹³ Both of these legal instruments comply

⁸A magyar szabályozás hatálybalépésének körülményeivel kapcsolatban lsd.: PAPP ZSÓFIA – ÚJVÁRINÉ FEJES RENÁTA – SIMONKA GÁBOR: A pénzmosás és a terrorizmus finanszírozása megelőzéséről és megakadályozásáról szóló új törvény, in: Pénzügyi Szemle, LIII. évf., 2008/2., 239-317.

⁹ See the Transparency International's review of third EU AML directive:

<https://www.transparency.de/fileadmin/pdfs/Themen/Finanzmarkt/Transparency-International-Review-of-Third-EU-Anti-Money-Laundering-Directive.pdf>

¹⁰ COM(2012) 363 final on the fight against fraud to the Union's financial interests by means of criminal law, 2012.07.11.

¹¹ COM(2010) 716. on reinforcing sanctioning regimes in the financial services sector

¹² Regulation (EU) 2015/847 of the European Parliament and of the Council on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006, 20.05.2015

¹³ Directive (EU) 2015/849 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, 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, 20.05.2015

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with the priorities¹⁴ laid down in the new European Agenda on Security¹⁵ as to reduce the threat of terrorist conducts in Europe. It is essential for this purpose to examine financial operations, especially the cross-boarder ones and to track the suspicious transactions in order to identify terrorist groups. The FIUs planned development may ensure to achieve this goal and additionally may create the opportunity of exploring the beneficiary and supporter circles behind the suspicious transactions.

The adoption of the EU-US TFTP agreement¹⁶ in 2010 was a vital antecedent of the latest innovations as this co-operation made it possible for the Member States and the American authorities to mutually access financial records from their databases in case of reasonable suspicion of terrorism. In addition to the EU-US agreement, the FIU.nets¹⁷ approaching integration into the Europol is supposed to enhance the effectivity and capacity of the fight against money-laundering as well. In view of these circumstances it has become essential to create a new, flexible legal environment ensuring on one hand also the applicability of the modern technology's novelties, on the other hand asserting stricter obligations and conditions for the financial service providers.

¹⁴ Such as tackling terrorism, transnational organized crime and cybercrime.

¹⁵ COM(2015) 185.: European Agenda on Security, 28.04.2015

¹⁶ The Terrorist Finance Tracking Programme (TFTP) was set up by the U.S. Treasury Department shortly after the terrorist attacks of 11 September 2001 and has generated significant intelligence that has helped detecting terrorist plots and trace their authors. The new EU-US TFTP Agreement, which took effect on 1 August 2010, is a substantial improvement compared to the prior interim Agreement between the parties. This new EU-US Agreement on the exchange of financial information on one hand ensures protection of EU citizens' privacy, on the other hand gives the U.S. and EU law enforcement authorities a powerful tool in the fight against terrorism. It has to be noted that appropriate safeguards were introduced as well to accommodate legitimate concerns about security, privacy and respect of fundamental rights and to ensure the conformity of the Agreement with the Community law.

¹⁷ FIU.net was launched in 2007 and via connecting Financial Intelligence Units (FIU), it enables them to share information while maintaining control over sensitive and classified data on a high level using the latest Ma³tch autonomous and anonymous analysis technology that enables FIUs to share information without revealing these kind of information. It also has to be noted that recognizing the importance of international cooperation in the fight against money laundering and financing of terrorism, a group of FIUs established an informal network of FIUs for the stimulation of international co-operation. Known as the Egmont Group of Financial Intelligence Units, members of the group meet regularly to find ways to promote the development of FIUs and to cooperate, especially in the areas of information exchange, training and the sharing of expertise.

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Prior to analyzing the concrete provisions of the new regulation, it is worth examining the working documents accompanying the Commission's proposals¹⁸, especially the stipulations of the common impact assessment.¹⁹ Stunning statistics are revealed in the document: according the UN's latest estimation annually approximately a sum of 1,6 billion dollars is utilized for purposes related to money-laundering, reaching the 2,7 % of the global GDP.²⁰ The appraisals also show that criminal procedures are initiated only in relation of 1 % of the suspicious transactions and virtual forfeits are applied only in connection with 0,2 % of the 'black' money. Moreover the recent scandals of the financial sphere enlightened that even well-known and world-wide reputable financial institutions – despite their strict inner regulations – could quite easily become subject to reasonable suspicion of money-laundering.²¹ Nonetheless, the revision of the FATF Recommendations in 2012 also made it inevitably necessary to declare a new European AML policy.

In view of the above mentioned circumstances the Commission proposed to accomplish the following 3 operational goals:

- ensuring conformity with the international standards

¹⁸ COM(2013) 44. Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds, 05.02.2013

COM(2013) 45. Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, 05.02.2013

¹⁹ SWD(2013) 22. Commission staff working document executive summary of the impact assessment accompanying the above documents, 05.02.2013

²⁰ These figures are confirmed by a holistic and detailed European study from 2010 as well: SCHNEIDER, F. (2010). "Money Laundering and Financial Means of Organized Crime: Some Preliminary Empirical Findings". Economics of Security Working Paper 26, Berlin: Economics of Security

²¹http://www.portfolio.hu/vallalatok/penzugy/drogkartellek_terroristak_penzmosas_megbuntettek_az_hsbct.170662.html

<http://www.tozsdeforum.hu/tozsde/reszvenyiac/penzmosas-miatt-kemenyen-penget-a-hsbc-az-usa-nak-7343.html>

http://index.hu/kulfold/2013/03/19/penzmosas_segitesevel_vadolja_a_hsbc-t_argentina/

<http://hu.euronews.com/2015/02/18/penzmosas-miatt-nyomoznak-az-hsbc-banknal-svajcban/>

<http://www.independent.co.uk/news/business/news/hsbc-pays-out-28m-to-settle-money-laundering-case-10298687.html>

<http://www.theguardian.com/business/2015/jun/04/hsbc-fined-278m-over-money-laundering-claims>

<http://www.reuters.com/article/2012/12/12/us-hsbc-probe-idUSBRE8BA05M20121212>

<http://www.wnd.com/2015/02/whistleblower-believes-hsbc-still-money-laundering/>

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- aggravation of the requirements while unifying the terms used with a clarified connotation

- broadening the scope of the regulation (e.g. under certain conditions gambling operators could also be subject to the new rules where customers wish to place a stake worth, or collect winnings of, at least €2,000)

In addition more decisive provisions were planned to be introduced in the question of protecting sensitive or classified data.

The official standpoint of the European Economic and Social Committee (hereinafter: EESC) – published under No. ECO/344 – supplements the above mentioned impact assessment. The EESC stated that ‘it is essential to equip the European Union and the Member States with effective means of bolstering the integrity and transparency of financial transactions [...] and Commission's proposals are certainly a step in the right direction in this respect.’ In concrete terms this means that the EESC welcomed the clarifications that have been made with regard to the customer due diligence requirements of professionals regarding beneficial owners. According to the opinion of the EESC these changes will boost transparency when it comes to individuals using legal entities as screens and also in relation to people who are politically exposed and may be at greater risk of corruption owing to their functions. The inclusion of gambling service providers on the list of professionals subject to the regulation’s requirements is also a step considered reasonable by the EESC, as this sector can especially be exploited for money laundering purposes. Moreover the EESC appreciated that the Commission was able to find a delicate balance between the conflicting interests of data protection and the combat against money-laundering. This means that though a wide range of professionals collect and analyze information, including data of a personal nature, these records are solely used for detecting criminal activities.

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Examining the provisions of the new legal frame – in correspondence with the above mentioned – it could surely be stated that the requirements are decently stricter compared to the prior regulation. Concluding the relevant changes, the followings should be highlighted.

The new regulation applies to a range of businesses, from banks and other financial institutions to auditors and accountants and it will also have to be complied with by any other kinds of businesses involved in making or receiving cash payments for goods reaching at least the value of EUR 10,000²², regardless of whether payment is made in a single, or via a series of linked, transactions. Apparently this could be interpreted also as a measure taken in order to spread non-cash transactions. Non the less gambling operators could also be subject to the new rules where customers wish to place a stake worth, or collect winnings of, at least EUR 2,000.²³

One of the most relevant novelty is that – although to define the notion of ‘tax crimes’ is out the Community’s competence and therefore lacks EU harmonization – within the scope of the Directive every other so-called tax crime should be evaluated and dealt with as money-laundering. Moreover the obligants shall orientate about the beneficial owners of the accounts falling in

As a consequence of this Member States should also ensure that other persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the those associated predicate offences, such as corruption, tax crimes and fraud, are granted access to beneficial ownership

²² Originally this limit was proposed to be defined in a sum of EUR 7.500, but as the issue had become subject of long and intense dispute, at last the sum of EUR 10.000 was accepted. Exception from the obligations specified in the Directive may albeit be given exclusively in the cases when regarding to the individual risk analysis the transaction could not be evaluated as suspicious and the measure of the related sum of money could not exceed the limits defined by the national legislators, maximalised at last in EUR 1.000 on the Community’s level.

²³ However according to the Directive ‘with the exception of casinos, and following an appropriate risk assessment, member states may decide to exempt, in full or in part, providers of certain gambling services from national provisions transposing this Directive on the basis of the proven low risk posed by the nature and, where appropriate, the scale of operations of such services.’

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information, in accordance with data protection rules. These persons should have access to information on the nature and extent of the beneficial interest held consisting of its approximate weight.

Furthermore new customer due diligence checking requirements are to be implemented, together with new obligations to report suspicious transactions and maintain records of payments. Additionally European supervisory authorities will be involved at European level in ML/TF risk analysis and may issue guidelines and regulatory standards for the Member States and financial establishments as well.

Moreover in order to ensure the consistent and correct application of the regulation's provisions, a list of administrative sanctions – which are dissuasive and commensurate with the sums of money being laundered – is given to be applied in cases where professionals systematically breach the basic requirements of the directive.

In addition, with the aim of broadening the access to the relevant pieces of information, EU countries shall set up centralized registers to record the ultimate 'beneficial' owners of businesses. These registers will be accessible by 'authorities' within each country, to 'obliged entities' such as banks doing due diligence into customers, and to others, such as investigative journalists, who can demonstrate a "legitimate interest" in gaining access to the information.

3. Summary: final consequences

In accordance with the above mentioned it may be stipulated that it was well expressed in the EESC's opinion about the reforms of the regulatory frame that 'the further development of the rules to prevent money laundering and terrorist financing as a symbol of a European Union that is ensuring high standards of probity and conduct in public and private behavior. The directive is both a practical step in the management of financial affairs and also a means of

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strengthening the European Union.²⁴ Obviously the problems of money-laundering and terrorism financing are one of the most relevant and urgent issues of the EU's legislation which are aimed to be dealt with more decisive actions and with ensuring transparency on a higher level.

Pursuant to these priorities the main purpose of the recently introduced reforms are to enhance the effectivity of the practice of the ML/TF regulation in consort of the social and economic changes and observations gained since the first regulatory frame established 25 years ago. Furthermore it has become essential to implement the revised FATF Recommendations.

All in all it could be noted that the requirements of the new regulation are more precisely developed and relevantly stricter than the former provisions. This results that they could be adopted more easily by the Member States and in accordance with this may be able to virtually increase the effectivity of the combat against money-laundering. However it has to be admitted that this new, more decisive attitude is not steadily welcomed as the reasonability of broadening the personal circle of obligants and the concept of the central register of the virtual 'beneficial' owners are questioned by some of the Member States, mainly on cause of fearing the violation of data protection rules.

It is inevitable on the contrary that the increasing volume of money-laundering and the connected crimes violating the Community's financial interest, causing enormous economic damages is an urgent issue that should be dealt with categorically. In view of this, my legal standpoint is that the new regulatory frame based on a stricter attitude is a correct and essential action. Moreover as the Community is one of the most relevant actors of the financial sphere, the EU's reforms will necessarily influence ML/TF regulations worldwide that may lead to

²⁴ ECO 344: 4.3. point, Brussels, 23.05.2013

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the recruitment of the – above-mentioned – specific, almost absolutely unified global protection web.

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14. ECO 344. Anti-money laundering package - Preliminary draft opinion.

Бекеш А. Г.

Коротка презентація положень останніх реформ фінансового регулювання ЄС

Останні реформи європейського регулювання ML/TF наведені в статті. Стисло продемонстровано попередній розвиток нормативних рамок. Для цілісної картини правового середовища були також описані супровідні документи. Розглянута думка ЄЕСК про пакет фінансової реформи. Також подана правова позиція автора.

Ключові слова: міжнародне кримінальне право, європейське право, відмивання грошей, нові правила.

▪ Brief presentation of the provisions of the EU's latest financial regulation reform / Ádám Gergely Békés // Часопис Національного університету «Острозька академія». Серія «Право». – 2015. – № 2(12) : [Електронний ресурс]. – Режим доступу : <http://lj.oa.edu.ua/articles /2015/n2/15bagfr.pdf>.

Бекеш А. Г.

*Краткая презентация положений последних реформ
финансового регулирования ЕС*

Последние реформы европейского регулирования ML/TF приведены в статье. Кратко продемонстрировано предшествующее развитие нормативных рамок. Для целостной картины правовой среды были также описаны сопроводительные документы. Рассмотрено мнение ЕЭСК о пакете финансовых реформ. Также представлена правовая позиция автора.

Ключевые слова: международное уголовное право, европейское право, отмывание денег, новые правила.

Ádám Gergely Békés

*Brief Presentation of the Provisions of the EU's Latest Financial
Regulation Reform*

The latest reforms of the European ML/TF regulation was summarized in the article. Prior to that the development of the regulatory frame was demonstrated briefly. In order to draft a whole picture of the legal environment the accompanying documents were also described. The EESC's opinion about the financial reform pack was also reviewed. Finally, the author's legal standpoint was also submitted.

Key words: international criminal law, European law, money-laundering, new regulation.

▪ Brief presentation of the provisions of the EU's latest financial regulation reform / Ádám Gergely Békés // Часопис Національного університету «Острозька академія». Серія «Право». – 2015. – № 2(12) : [Електронний ресурс]. – Режим доступу : <http://lj.oa.edu.ua/articles/2015/n2/15bagfrr.pdf>.