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Preventing money laundering in the European Union,
New developments and future challenges

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SUMMARY

There has been money laundering as long as there has been money¹. The aim of the European Union today is to be a responsible actor and even the leader in anti-money laundering legislation and prevention. It was not that a bit over 20-years ago than the European Union introduced its first Directive on the matter. At the same time, Union started a never-ending process of development a valid legislation with international co-operation. While it started with the idea of just prevent money laundering, the scope has widened covering now the terrorist financing as well. The current legislation is now the Directive 2005/60/EC but another Directive is just around the corner. While the legislation is continuously being updated and drafted to be even better, it goes without saying that new concerns arise constantly. Michaud case is the most current case addressing the confidentiality issue between lawyer and a client. A topic that has caused lot of discussion, inspired to write a series of articles and the debate is not slowing down but on the contrary. Only the future will be the key to show the real development and direction. While there still is uncertainty of the 4th Directive, the European Parliament has accepted the draft and the skeleton of the legislation is known already. One thing for sure is that the new Directive will be stricter, there will be more monitoring required and the risk-based system will be emphasized. While these are all known, it can be said for sure that there will be increasing cost-issues and the scope of 'protection' so to speak will be wider than ever before.

While the idea of this thesis is to look through the new developments on the money laundering area and the possible future challenges, there is also a short introduction of the history and current legislation on the matter. With this background information, it will be much easier to see the overall picture and realize the overall context where EU is working. Typically money laundering includes cross-border criminality and without an international collaboration, the prevention would be nearly impossible. While there has been a lot of improvements, the current legislation and especially the case law have brought new questions as well. Michaud-case mainly will illustrate the discussion circling the matter and show the place of client-lawyer confidentiality. While the case solves several questions, there are new ones to come. With the 4th Directive, EU is renewing its legislation according to the Recommendations by FATF. While the Directive is hopefully the best Directive so far, the reality is that the Directive alone will not be sufficient weapon to fight against the criminality. While it is an advantage of the stricter definitions and wider scope, there will always be resistance on a national level where the legislation comes into force on a detailed level. Finally a survey made this year 2014 by KPMG is a great illustration of the current position of anti-money laundering and the future challenges that there still is and will be even, and maybe just because of the proposed Directive. Finally it is good to remember that the topic would not be more current, not because Parliament have just accepted the proposed draft, not because the final judgment of the Michaud case was delivered last year but mainly because according to the statistics², reports from suspected money laundering cases are increasing which automatically means that there really is need and desire for the new better legislation and there is a willingness and passion to fight back against the criminal activity.

¹ Scott Cohn: Financial fraud in 25 years: A virtual Madoff at lightning speed, Consumer News and

² Rahanpesun selvittelykeskuksen vuosikertomus 31.12.2013. 20.05.2014 available at: [http://www.rahanpesu.fi/poliisi/krp/home.nsf/files/D6EB3D2DD7ABDF94C2257CA60038F8FB/\\$file/RAP%20vuosikertomus%202013.pdf](http://www.rahanpesu.fi/poliisi/krp/home.nsf/files/D6EB3D2DD7ABDF94C2257CA60038F8FB/$file/RAP%20vuosikertomus%202013.pdf)

ABBREVIATIONS

CCBE	The Council of Bars and Law Societies of Europe
CHARTER	Charter for Fundamental Rights in European Union
EBHRI	The European Bar Human Rights Institute
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
EUR	The Euro
FATF	Financial Action Task Force
FIU	Financial Intelligence Units
NRA	National Risk Assessment
OECD	Organization for Economic Cooperation and Development
PEP	Politically exposed person
TFEU	Treaty of Functioning the European Union
UN	United Nations
USA	United States of America
USD	United States Dollar
WTO	World Trade Organization

PREFACE

“Believe you can and you are halfway there.” – Theodore Roosevelt

While concluding a master thesis was something considered self evident for me, the point where I am now, writing the preface for a thesis ready to be submitted is a an achievement of which to be proud of. While at the same time I am graduating and leaving the studies behind, but most importantly I will leave the University of Lund considerably richer compared to the point where I started. I would sincerely thank all the Professors leading me to this point, the criticisms that I received which resulted me to learn even more and the environment that could not have been better. Special thanks I would like to address to my thesis supervisor Magnus Schmauch who guided me via Skype and e-mail giving me possibility to work and write master thesis at the same time – a task where I did truly doubt the possibility to graduate and where my relationship with friends and family was put tot the test.

While the environment, professors and University did their best to give me the opportunity, result and experience I had the real support, resources and joy of my life gave and still luckily comes from my family. Antti, husband to be were there for me, took care the rest of the family and supported me all the way. Without you my life would be emptier and graduation just a distant dream. With struggling in the middle of master thesis, work and other day-to day tasks, it was important to stop for a minute and really think the issues that mattered.

While the help I received was vital for this thesis to come to an end, the plain work, writing and researching was just for me to perform. I am truly proud of myself, this thesis and the fact that I will receive my diploma from the prestigious University of Lund!

1. INTRODUCTION

A. MONEY LAUNDERING; GENERAL CONCERN

Money laundering is a topic and an issue facing continuously increasing interest not only within the European Union but also internationally.³ The term is said to be the one of the most misunderstood one,⁴ however rarely any economic crime itself can affect that much not only to the legislation but also the general discussion of among legislators and general public.

Money laundering means in its implicitness that there has happened a pre-crime where received profits have been transformed into legal assets.⁵ After pre-crime, the money is typically being 'washed' and made to appear legal. After the money appears to be legal it is ready to be used and tracing it back to the original crime is nearly impossible.⁶ Usually when money laundering takes place, a three different steps are being used: 'Placement, layering and integration'⁷

Typically money laundering is done by either breaking the illegal profits into smaller amounts and deposited directly to bank accounts or by purchasing different monetary instruments which finally are deposited to either a domestic bank accounts or to international accounts where the making tracing the assets harder.⁸ After the money is on the bank account the layering and fading the origin of the assets takes place. Typically the assets are being transferred to international accounts, which are not complying with any kind of money laundering rules so no cooperation is being done if the help is being requested from a EU authority.⁹ It is also a common method to transfer the money to 'employer', thus being a payment from goods or services and giving it a legitimate appearance.

Criminality is always something worth fighting, but essential numbers relating to money laundering are stopping. Alone in the United Kingdom the organized crime causes damage that has a social and economic costs over 20 million pounds yearly¹⁰. And those numbers relates only to the United Kingdom alone. UN had calculated that overall the assets used in money

³ Raffaella Barone and Donato Masciandaro, Organized crime, money laundering and legal economy: theory and simulations, European Journal of law 2011 P. 116

⁴ Ari Huhtamäki, Asianajajan ilmoitusvelvollisuus rahanpesuepäilyistä, Lakimies 4/2000, pp. 487-505

⁵ Mark Hampton and Michael Levi, Fast spinning into oblivion? Recent developments in money-laundering policies and offshore, Third World Quarterly, 20:3, 1999 pp. 645-656

⁶ Ibid.

⁷ Maria Italia, Lawyers and accountants as 'gatekeepers' to combat money laundering: an international comparison, Australian Tax Review; 42:2 May 2013 pp. 116-143

⁸ Keskusrikospoliisi, Rahanpesun selvittelykeskuksen vuosikertomus. See supra note 2

⁹ Guy Stessens, Money Laundering: A New International Law Enforcement Model Cambridge university press 2000 p. 32

¹⁰ Malmström C, Speech on the conference on Money Laundering and Terrorist Financing, held on Brussels on 15th of March 2013 available at < http://europa.eu/rapid/press-release_SPEECH-13-233_en.htm?locale=en>

laundering are over 1,6 billion dollars which is 2,7 percent of the global gross domestic product.¹¹ Nevertheless of the huge amounts, public authorities are able to get caught approximately one percent and only 0,2 percent of the assets can be confiscated by authorities.¹²

Partly the type of criminality relating to money laundering explains the numbers. Typical pre-crimes are commonly drug trafficking, human trafficking and the so-called white-collar criminality.¹³ Even without money laundering the seriousness of the criminal act forms alone reasons to fight against especially in the level of EU.

Ways to prevent money laundering are various but the only sure thing is that while the legislation and nations co-operation are becoming better, the criminal organizations are becoming more efficient and closely connected as well. Electronic world enables extremely quick and efficient ways to transfer money and possible profits are now higher than ever before.¹⁴ EU will not fight against the money laundering alone; it is a worldwide fight with organizations such as UN closely working in the field as well.¹⁵

B. HISTORY OF FORMING THE CURRENT LEGISLATION

Money laundering as a crime has said to be appeared first time in 1920s' at the time of the prohibition in USA.¹⁶ After the 20s the history governing money laundering has been evolving slowly but surely. The complexity of the definitions has slowed down the development and it has taken time to really acknowledge money laundering as a crime.¹⁷ However after USA has fought against the phenomenon, EU has taken action on the matter as well. The legislation process can be traced back to the 1990's but after that the level of introducing new drafts has been rather rapid. EU has introduced 3 different directives namely to fight against money laundering and several directives relating and supporting the matter.¹⁸ Even before all the member states had ratified the latest edition of the third directive, EU started to draft its completely new, 4th directive which will be introduced in up coming years.

Looking back to the history, it is evident that change of the world has also affected to the legislation.¹⁹ Internet, technical equipment's and even the ability to perform tasks online even the person being present has caused an enormous benefit for the criminals to perform the illegal activities. However the international standards have been evolving as well, caused partly the

¹¹ United Nations office for Drugs and Crime: World drug report 2009, available at: accessed 10 of March 2014 <http://www.unodc.org/documents/wdr/WDR_2009/WDR2009_eng_web.pdf>

¹² Ibid.

¹³ Ibid.

¹⁴ Angela S.M. Irwin et al, Money laundering and terrorism financing in virtual environments: a feasibility study *Journal of Money Laundering Control* 17:1 2014, pp. 50-75

¹⁵ United Nations office for Drugs and Crime (2009) See supra note 11

¹⁶ Sahavirta Raija, Rahanpesu rangaistavana tekona. Suomalaisen lakimiesyhdistyksen julkaisu, A-sarja N:o 286. Jyväskylä: Gummerus Kirjapaino Oy, pp. 123-154

¹⁷ Mirella Pellegrini: Anti-Money Laundering Legislation in the Light of the Proposal of the Third EC Directive, *Volume 16:5*, 2005 at. 1181

¹⁸ See for instance: Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds

¹⁹ Mirella Pellegrini (2005) supra note 17 at. 1181

changes. 9/11 caused a worldwide war against terrorism, an event that affected legislation as well. The tempo of the renewal has to be speedier than normally, the law on the matter must not stand still.²⁰

First anti money laundering Directive was introduced on 1991²¹. Probably the increased awareness of the seriousness of the crime started the drafting process in a first place. First Directive gave only the path for new legislation to come, since the level of competing against money laundering was extremely thin.²² The first Directive protected especially financial institutions and regulated their actions. Traditionally financial sector has been the most vulnerable of being misused, probably because of the nature of business.²³ One remarkable thing considering the Directive was, that roots for the international collaboration was established and the co-operation between EU and organizations worldwide was able to start.²⁴

It was not until 2001 than the second Directive on the money laundering was published²⁵. The main thing was to renew the existing legislation but also add the 40 -recommendations by the FATF²⁶. The second Directive also widened the scope of the matter from purely financial sector to international organizations to be falling into the scope.²⁷ Also new methods of criminalization was added to authorities, namely right to seize and confiscate assets, relating to money laundering and terrorist financing.²⁸ Probably one of the most significant changes was the terminology that was adopted but also the broader use of that terminology. It was understood that for example corruption could be a vital part of the criminal process leading to money laundering.²⁹ The second Directive also started the ongoing argue whether the duty to

²⁰ Wouter H Muller et al., *Anti-Money Laundering: International law and practise*, John Wiley & Sons Ltd, West Sussex England, 2007

²¹ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering

²² Helen Xanthaki, *Lawyers' Duties under the Draft EU Money Laundering Directive: Is Confidentiality a Thing of the Past?*, *Journal of Money Laundering Control*, Vol. 5, No. 2, 2001, pp. 103-114

²³ Rajja Sahavirta (2008) *supra* note 1 at. 231

²⁴ See for instance Council directive 91/308/EEC and the quotation: 'Whereas any measures adopted by the Community in this field should be consistent with other action undertaken in other international fora; whereas in this respect any Community action should take particular account of the recommendations adopted by the financial action task force on money laundering, set up in July 1989 by the Paris summit of the seven most developed countries;'

²⁵ Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering

²⁶ Financial Action Task Force: *International standards on combating money laundering and the financing of terrorism & proliferation, the FATF Recommendations*, later cited as FATF

²⁷ Directive 2001/97/EC

²⁸ See the Joint Action 98/699/JHA of 3 December 1998

²⁹ Anghel Cristian, *Fighting Economic Crime in European Arena*, *Annals of the Univeristy of Oradea, Economic Science Series*, 2010

inform about one's suspicions should be reached to lawyers in certain transactions.³⁰ The idea raised a huge opposition and the main fear was that it could affect client confidentiality and in that way destroy the confidential relationship that was thought to be vital for performing the given tasks properly.

The trend that started with the second Directive continued to the third Directive, which still is the valid piece of legislation concerning the matter. The third Directive was even stricter and it again broadened the scope of the legislation³¹. While the Directive in its entirety will be dealt in later section, it is valid to say here that the third Directive really showed the path for the future legislation to come.

C. MEANING AND IMPORTANCE OF THE TERM

Conference on Money laundering and terrorist Financing was held in Brussels on 15th of March 2013. In that conference the concern relating the anti money-laundering regime was discussed and several future concerns were emphasized. The idea was to raise the questions and get comments because of the recent publication of the new FATF standards and a fund transfer Directive.³² Cecilia Malmström, Commissioner for Home Affairs kept a speech where she raised the future problems and introduced some possible solutions. She emphasized the importance and reasons why the money laundering is a huge problem and why the prevention is extremely hard but absolutely necessary. As a driven force to criminality she mentioned the profits, which are able increase into incredible levels. On the other hand she also pointed out the complex structure of the criminal organizations, which makes the prevention and even the sanctions sometimes nearly impossible to put in action. The typical money laundering is a cross-border crime, making the intervention even harder.³³

Money laundering is at this point one of the top priorities in the EU. It is apparent not only in the legislative level but also from the different angels of the sector.³⁴ Different Joint Actions are being prepared and coordination the work from different viewpoints is being done in order to fight against the phenomenon.

³⁰ See quotation from the directive 2001/97/EEC: 'Notaries and independent legal professionals, as defined by the Member States, should be made subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity.'

³¹ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

³² Fighting money laundering and terrorist financing: new framework, future challenges- European commission conference, Brussels, 15 March 2013

³³ Ibid.

³⁴ Communication from the Commission to the Council and the European Parliament on the prevention of and fight against organized crime in the financial sector 2004, accessed 20 February 2014 available at:

<http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_organised_crime/14523_en.htm>

In 2006 an action plan was made, the so-called Hague Programme³⁵, which laid down the political priorities in EU for the next years of 2006-2010. There money laundering was having a subject of top priorities together with human trafficking.³⁶ Also measures of indications were taken into use and data about money laundering was started to collect. The collection of data resulted a working group inside of Eurostat and pioneer work started.³⁷ Eurostat concluded a work about money laundering that was never actually done before and at the same time a definition of ‘Euro crime’ was the subject of data collection. In 2009 the Commission took action against France, Poland and Spain because of the failure to adopt the 3rd money-laundering directive on time.³⁸

This work illustrates the emphasis which the EU willingly tackle the problem of money laundering. It is not just a one-crime type among others, but it is really something essential that has been the top priorities of prevent for many years now. This also illustrates that money laundering is a type of crime, which requires close co-operation, not just from the part of the European Commission but also national co-operation as well as different organizations linked to work closely. With the help of Eurostat the prevention is being targeted better and costs kept as low as possible. However when discussing about money laundering the costs have and will be an issue.

The valid legislation on anti money laundering is the third money-laundering Directive.³⁹ Right after the adoption time had elapsed, a drafting process of the new fourth anti money laundering started. While the main reason for new directive was the renewal of the FATF decision, the reality was also that the current 3rd money-laundering directive is not just efficient enough in the terms of sanctions and coherent approach. The new 4th money-laundering directive will bring new monitoring systems and totally new areas falling into the scope, however only the case law will show the reality. There will be a close examination on the new directive as well as the current one in this thesis. Sure is, that remarkable changes will be made and the approach towards money laundering will most probably be stricter than ever before.

D. STRUCTURE AND METHODOLOGY

This thesis has been divided into five parts, first being the introduction. Introduction part will illustrate the basic knowledge about the theme and the importance of the prevention and also the historical development, which will help to understand the line of changes when examining the changes soon to become. The subject is so ‘on the table’ right now, so lot is happening in the area of money laundering prevention. While this thesis is not able to cover than just narrow area, it is good to keep in mind that overall the discussion around the matter is acute.

³⁵ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: An EU Action Plan 2006-2010, accessed: 10th of March 2014 available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0437:FIN:EN:PDF>>

³⁶ Ibid.

³⁷ Eurostat, Money laundering in Europe, 2013

³⁸ Anti-money laundering: Commission takes action to ensure that France, Poland and Spain implement EU laws, European Commission - IP/09/159 29/01/2009

³⁹ Directive 2005/60/EC (2005) see supra note 16

Commission has introduced the suggestion on the new Directive and response has been made from the Governments of the member states but also from the organizations with different interest.⁴⁰ At the same time the European Court of Human Rights has delivered its final judgment on the Michaud-case, which caused enormous amount of discussion. Same sensitive subject of lawyer-client confidentiality will be again jabbed with the new Directive and the result will be seen near future. Overall the topic will be extremely actual and it will be shown in this thesis as well.

Legislation forms the second part of the thesis. While the third Directive will most probably be replaced by the new Directive, getting the overall picture on the matter and especially the huge changes that will happen demands the understanding of the current legislation as well. One interesting point is also the development of the overall criminal law in EU that the paper will quickly address in the second part. It goes without saying that without the changes happened after, and because of the Treaty of Lisbon⁴¹ the legislation in the area of criminal law would have been left without a real value.⁴²

Third part will mostly deal with the Michaud-case, its reasoning, result and impact. The judgment and especially Court's reasoning was interesting. Court's findings and explanations might open a completely new path from the EU to ECHR.⁴³ Role of lawyers relating to right to secrecy was a major issue in the Michaud case, which will be dealt in the third part too. Lawyers are in an interesting position and the case on the other hand cleared the issue but at the same time raised uncertainty in certain matters.

Fourth part is about the future challenges that EU will definitely face. The subject is more recent than maybe ever before, the Parliament has just accepted a directive proposal on 11th March 2014⁴⁴. With that proposal The Commission demands a stricter manner of approach to the prevention not only from the level of EU but also from the national level. Member States are required to have even more sophisticated tools in order to successfully prevent the money laundering and a quick adoption of the new directive will be most probably required. The question of proportionality and effectiveness will be discussed as well as the challenges that will be along the way. While the directive is extremely proper tool to fight against the criminality, in a way it might also be rather heavy burden for the smaller actors on the field.

Final part contains the conclusion of the subjects dealt. Of course the subject is fresh in a way that no certain matters considering the fourth Directive has decided. That will affect for the conclusions as well which will be predictive. So many things in the area will be discussed, decided and eventually put into force in near future. Only the final piece of legislation,

⁴⁰ Hallituksen esitys Eduskunnalle laiksi rahanpesun ja terrorismin rahoittamisen estämisestä ja selvittämisestä sekä eräiksi siihen liittyviksi laeiksi, HE 25/2008 vp

⁴¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007]

⁴² G. Corstens, Criminal justice in the post Lisbon era, Eu-seminar on mutual trust and mutual recognition, 2010

⁴³ Case 45036/98 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirket v. Ireland*, European Court of Human Rights, 30th of June 2005, Strasbourg

⁴⁴ European Parliament legislative resolution of 11 March 2014 on the 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

interpreting case law and the practice will show the effectiveness and reality of the fourth Directive.

E. DELIMITATIONS AND RESEARCH QUESTIONS

This thesis is divided into five sections. However there are two main sections first dealing with the current legislation and the second part addressing the future challenges that the new changes will bring. Much of attention will be paid both, the current legislation being the third Directive but also on the new draft someday being the fourth directive, coming into force in near future. There will be examples from the case law, namely the Michaud case and *Ordre des barreaux francophones and germanophone and Others*.⁴⁵

Second part of the thesis will examine the Michaud case. Case raised several issues and discussion still continues. Lawyers right to client secrecy were not the only issue, however considering topic of money laundering the main one. Because of the limitations the Bosphorus⁴⁶ doctrine will be shortly discussed, however the equal protection-doctrine is left outside of the discussion being here irrelevant.

Prevention of money laundering and Terrorist financing do share a same Directive. However, the space is limited and because of the Terrorist financing is forming its own area of prevention and while here the object being money laundering the terrorism financing will not be discussed. In some cases, when illustrating the changes of the relevant legislation, the terrorism financing will be mentioned, but the subject will not be dealt in depth.

The underlying question this thesis is discussing is the evolving of the money laundering legislation and the future challenges it will inevitable face. That includes the relevant legislation but also the proposals that are presented. Secondly, case law has already changed the current legislative sphere and while the Michaud judgment will be the main case dealt, examples are being taken from older cases as well. While the money laundering Directives are aiming to prevent the money laundering itself, cases are mostly dealing with the lawyer's right to secrecy, which has become an issue after the new legislation was introduced.

While new legislation is being introduced there are typically reactions to both sides. This thesis will go through the reactions, which have been quite strong and the intensity of the discussion have been nearly touchable. This all just illustrates the relevance of the discussion and topic itself.

⁴⁵ Case C-305/05 *Ordre des barreaux francophones and germanophone and Others*⁴⁵ (2005)

⁴⁶ Julia Faure-Walker, 'Human Rights and EU directives – the ECtHR opens up a new avenue for challenge' Regulatory Crime Newsletter, 2nd Edition, June 2013,

2. CURRENT LEGISLATION

A. CRIMINAL LAW IN THE EUROPEAN UNION AFTER LISBON TREATY

Criminal law has traditionally been something that Member States are willing to hold on to. However the Lisbon Treaty brought remarkable changes for the traditional sphere.⁴⁷ While this thesis is about money laundering, the changes happened in the area of criminal law are good to be dealt briefly especially from the viewpoint of the topic in question.

Area of criminal law has been under a massive discussion and the Lisbon Treaty made totally new development possible.⁴⁸ However even before the Lisbon Treaty the criminal law in the EU has been evolving, the Tampere council being the venue for the first remarkable step. Mutual recognition was introduced first time in Tampere forming the base for the continuing development.⁴⁹ Mutual recognition- principle declares that while the criminal law in the area of EU is not harmonized the judgment given in another member states is being respected elsewhere in the EU as well.⁵⁰ Commission's quote: 'Each national judicial authority should ipso facto recognize request made by the judicial authority of another Member State with a minimum of formalities.'⁵¹ This principle is the governing one in the area of criminal law, although there has been extension namely in the articles 29-31 TEU⁵². Another point to notice is that ECJ has ruled in its case law that EU has a legislative competence also in criminal law if that is required for the protection of the environment.⁵³

After Lisbon Treaty EU has a twofold criminal law.⁵⁴ On the other hand there is an area where the competence of the EU is exclusive, meaning that Member States can no longer independently rule their own criminal law matters. The other part where EU does not have exclusive competence can be found in article 4 of TFEU⁵⁵. Not surprisingly the area of freedom, security and justice falls into scope of restricted competence.⁵⁶ However, even when it comes for the traditional national crimes, there could be a connection to EU legislation as well. Article 3 of TFEU stating the following:

'The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and

⁴⁷ Ester Herlin-Karnell, *EU Competence in Criminal Law after Lisbon*, 2011, Oxford University Press, Chapter 16 .

⁴⁸ *Ibid.*

⁴⁹ European Council of Tampere 1999 and 'The Hague Programme' Strengthening the Freedom, Security and Justice in the EU

⁵⁰ Craig, De Burca: *EU law: Text, cases and materials*, 2008, Fifth Edition, Oxford University Press p. 947

⁵¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

⁵² Consolidated versions of the Treaty on European Union

⁵³ Case C-176/03 *Commission v. Council*, 2005 ECR I-7879

⁵⁴ G. Corstens (2010) see supra note 42

⁵⁵ Article 4 on the Treaty on the Functioning of the European Union, art. 4, Consolidated version 2010

⁵⁶ *Ibid.*

cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.’⁵⁷ This article is a visible example of the importance of the criminal matters in EU and thus being an essential part of the legislation as well.

Article 83 paragraph 1 of the TFEU states the following: ‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.’⁵⁸

Simply put, the article 83 of the TFEU allows the Parliament of the EU and the Council to establish minimum rules not only for concerning the definition of criminal law offences but also for sanctions. However interestingly relating to the money laundering and terrorist financing article 75 of the TFEU provides more restricted measures to be adopted, as does the article 83. Article 75 quoted: ‘Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.’⁵⁹

That however raises questions whether the article 75 and 83 are intended to be used as together or whether one should decide whether the act in question falls into the scope of article 83 or article 75 of the TFEU. Also the question that might arise is the wording of related activities. The term is not explained, so should one be able to think that money laundering falls within the related activities too.

As it might be able to see, the legislation after the Lisbon Treaty is far from clear. However the main thing is that EU has competence to form its legislation and to be able to fight against cross-border crime. Because of the changed system in legislative level, the case law has also been developed together.

⁵⁷ TFEU article 3

⁵⁸ TFEU article 83

⁵⁹ TFEU article 75

This paper examines the current legislation in force but also the results of the developing process since the 4th money laundering directive is just around the corner, making the topic more recent than maybe ever before.

B. DIRECTIVE 2005/60/EC

The current piece of legislation concerning money laundering is the third anti-money laundering Directive, adopted 26th of October 2005⁶⁰. Member States were given only 18 months to implement the former, second Directive on money laundering.⁶¹ However even before the complete adoption, Commission started to draft the third Directive and 2004 a draft was introduced.⁶² Mainly the driving force of drafting a new Directive was again the revision of the new FATF standards. Still another vital reason was the happenings in 9/11. The war against terrorist caused the widening of the scope of the Directive and took with not only money laundering but also the terrorist financing.⁶³

It might be the unstable atmosphere that helped but after all the negotiations between the Council and the European Parliament went rather smoothly and the Directive was published in November 2005.⁶⁴ However if the negotiations between the organs of the EU went quickly, the adoption process took time. It was not until 18th of January 2013 when the Commission stated that all 27-member states had adopted the Directive.⁶⁵

Like already pointed out the including of the terrorist financing is already a massive change. However the directive in its preamble is prescribing the money laundering a ‘serious crime’⁶⁶ a definition, which largely differs from the old legislation.⁶⁷ Wording of the Directive actually means extremely lot, since while the criminal law back then was typically member states’ area of interest the wording of ‘serious crime’ shows a metaphorical strength that EU already possessed on the matter.

Still most of the important parts of the Directive are related to customer due diligence rules. Customer due diligence rules are addressed in the Directive starting from the article 6 and the second chapter in its entirety is dedicated for customer due diligence. Article 6 states the following:

‘Member States shall prohibit their credit and financial institutions from keeping anonymous accounts or anonymous passbooks. By way of derogation from Article 9(6), Member States shall in all cases require that the owners and beneficiaries of existing anonymous accounts or anonymous passbooks be made the subject of customer due diligence measures as soon as

⁶⁰ Directive 2005/60/EC (2005)

⁶¹ Directive 2001/97/EC article 3 (1)

⁶² 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, including terrorist financing Brussels, 2004

⁶³ Directive 2005/60/EC (2005)

⁶⁴ Mariano Salas, The third anti-money laundering directive and the legal professions, October 2005, accessed First of May 2014

⁶⁵ Ibid.

⁶⁶ See Preamble 7 Directive 2005/60/EC

⁶⁷ See for instance Directive 2001/97/EC and compare the wording to Directive 2005/60/EC

possible and in any event before such accounts or passbooks are used in any way.’⁶⁸ Article 6 makes explicitly prohibits the use of bank accounts without a good identification system. These provisions made the financial institutions act hard and basically renewed their systems and made them correspond to the valid legislation. The work is still on going. As an example, the Financial Supervisory Authority in Sweden gave over 3.6 million euros fee to Nordea Bank in Sweden, because it has failed to follow the given legislation precisely the customer due diligence part.⁶⁹ This example just illustrating the level of severity which EU will tackle against the problem and also the fact that sanctions are being imposed if necessary.

Another remarkable point to notice in the directive is the risk-based approach which can be seen in the due diligence part as well. Article 7 lays down an explicit amount of 15.000 euros when the origin of the amount needs to be cleared.⁷⁰ Customers due diligence may be simplified or enhanced. Enhanced due diligence should be followed when the customer has not been physically present⁷¹ or the activities are engaged with politically exposed persons.⁷² With PEPs is also good to notice the other requirements presented in article 13⁷³ which states the following: ‘In respect of transactions or business relationships with politically exposed persons residing in another Member State or in a third country, Member States shall require those institutions and persons covered by this Directive to: (a) have appropriate risk-based procedures to determine whether the customer is a politically exposed person; (b) have senior management approval for establishing business relationships with such customers; (c) take adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction; (d) conduct enhanced ongoing monitoring of the business relationship.’⁷⁴

Rules concerning the simplified due diligence process can be found in articles 11-12.⁷⁵ Typically the simplified due diligence applies to a listed companies and public officers as well as pensions and small insurances.⁷⁶ Article 12 lays down the rules when member states need to refrain of using the simplified due diligence.⁷⁷ Namely this is apparent in certain third country situations that do not meet other criteria laid down by the directive.

Moreover the monitoring system has been developing largely. While the first and second Directive left the monitoring options for the member states to decide the outcome was rather diverse. This was led to the situation where actually three different models were used. Some of the Member States reported to independent association usually being a bar associations or similar, while others were fulfilling the reporting duty to a Government and finally a public

⁶⁸ Article 6 in Directive 2005/60/EC

⁶⁹ “Viranomaisen mitta täytyi: Nordealle isot sakot” Taloussanommat (Helsinki) 16.04.2014. 01.05.2014 <<http://www.taloussanommat.fi/porssi/2013/04/16/viranomaisen-mitta-tayttyi-nordealle-isot-sakot/20135487/170>>

⁷⁰ Article 7 in Directive 2005/60/EC

⁷¹ Article 13 in Directive 2005/60/EC

⁷² Article 13 (4) in Directive 2005/60/EC

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Articles 11-12 in Directive 2005/60/EC

⁷⁶ Article 11 in Directive 2005/60/EC

⁷⁷ Article 12 in Directive 2005/60/EC

prosecutor was widely used as well.⁷⁸ The third Directive introduced the establishment of FIUs. The third part of the directive is dedicated to the reporting duties and article 21 states the following: ‘ 1. Each Member State shall establish a FIU in order effectively to combat money laundering and terrorist financing.

2. That FIU shall be established as a central national unit. It shall be responsible for receiving (and to the extent permitted, requesting), analysing and disseminating to the competent authorities, disclosures of information which concern potential money laundering, potential terrorist financing or are required by national legislation or regulation It shall be provided with adequate resources in order to fulfill its tasks.

3. Member States shall ensure that the FIU has access directly or indirectly, on a timely basis, to the financial, administrative and law enforcement information that it requires to properly fulfill its tasks.’⁷⁹

They are doing the monitoring system, with unlimited access to databases. As the directive in 2001 established, lawyers can report to for example bar association and this still remains.

However the receiving body should forward the received information to FIU’s unfiltered.⁸⁰ This bar association was in the discussed Michaud case the exact fact where the Court ruled that the confidentiality was not violated.⁸¹

While the secrecy between client and advisor has been under discussion after the second Directive was published, the third Directive caused discussion by removing the tipping- off provision. Commission proposal stated as follows: ‘The member states option to allow members of the professions acting as legal advisors to inform their client that a report is being made has been dropped as it is not in conformity with the revised FATF 40 Recommendations.’⁸² Instead of this article 28(1) explicitly states that disclosure to a client that a report has been made is prohibited. More importantly the second paragraph states that this prohibition is for law enforcement professions as well.⁸³

Another worth mentioning is the technical change of the directive. While the third Directive is explicitly stricter and the scope of area is wider it is also good to keep in mind that strictly from a technical point of view the current legislation offers a widened protection as well. While the definition of PEP is strict and there comes responsibilities with it, the current Directive is more protective towards the PEP as persons. They know what to expect and to what extent the directive is governing the action in question. Also article 27 is making an explicit statement that Member States need to take appropriate measures to protect employees of different institutions reporting money laundering suspicions.⁸⁴ This was a new addition and the idea is to encourage employees to report without the fear of individual actions or actions from the side of the undertaking.

⁷⁸ Valsamis Mitsilegas, Bill Gilmore: EU Legislative Framework against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards, *The International and Comparative Law Quarterly*, Vol. 56, No. 1 (Jan., 2007), p. 122

⁷⁹ Directive 2005/60/EC (2005) Article 21 (1-3)

⁸⁰ *Ibid.* p. 127

⁸¹ Case 12323/11 *Michaud v. France*, European Court of Human Rights, Strasbourg 6th of December 2012

⁸² Commission final proposal for New Anti-Money Laundering Directive, 30th June 2004 EEA relevance, COD 2013/0025

⁸³ Article 28 in Directive 2005/60/EC

⁸⁴ Article 27 in Directive 2005/60/EC

One of the key topics for discussion when drafting the first money-laundering Directive in 1990 was the criminality of the act.⁸⁵ At the first proposal stage, the money laundering was said to be a criminal offence but because of the competence of the Community was lacking before the Treaty in force the wording was changed from criminal to prohibited. While the money laundering was even then indisputably criminal in nature the justification would have been nearly impossible to find under EC treaty.⁸⁶ This really left little for member states to do but the wording satisfied the member states without the Community imposing any competence for member state's criminal law. However de facto money laundering was criminalized in all member states when a declaration of criminalization was attached to Directive. Since the Maastricht Treaty⁸⁷ came into force 1993 the area of constitutionality has changed a lot. The three-pillar system was introduced and criminal matters were left under third pillar giving then competence for the Union to work but not for the Community. The system however continued to be rather similar in the eyes of the criminality but the real change came with the Lisbon treaty like explained above.

C. FATF

The prevention of money laundering is based on international standards. It is the EU and organizations worldwide that are strongly combating against the phenomenon and that is why the legislation in the EU member states and internationally is based on those international standards.⁸⁸ One of the most recognized and the main base for other legislations are the 40 recommendations and 9 special recommendations by FATF. FATF is an intergovernmental body, established in 1989 and operating under OECD. It has 16 members including UK, USA and many European Union countries.⁸⁹ The recommendations do have a strong indication of the direction that the anti money laundering legislation will go in the future. Like already pointed out the main reason for drafting the 3rd directive so rapidly after the second one, were the renewed recommendations by the FATF. FATF do basically have just one purpose of function and that is the continuing combat against money laundering world-wide. Still with only one goal, the recommendations are drafted in a way, which enables states to have their own legislative system and despite the differences in common and civil law countries, recommendations are applicable in both.

The history of the FATF traces back to 1990 when the original forty recommendations was drawn up. Back then the recommendations protected the national monetary systems against money laundering in drug related offences but in 1996 when the level of understanding towards the total concept of money laundering was increased the recommendations took also the other possible pre-crimes into consideration. In October 2001 was an important date for FATF since then the mandate was expanded to cover the prevention of terrorist financing as well.⁹⁰

⁸⁵ M. Wasmeiser and N. Thwaites: 'The Battle of Pillars: Does the European Community have the power to approximate national criminal laws? *European Law Review*, 2004, pp. 620

⁸⁶ *Ibid.* P. 618

⁸⁷ European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002

⁸⁸ FATF

⁸⁹ Maria Italia, Lawyers and accountants as 'gatekeepers' to combat money laundering : an international comparison *Australian Tax Review*; 42 (2) May 2013: 116-143

⁹⁰ Kathryn L Gardner, Fighting Terrorism, the FATF way *Global Governance* 13, 2007, p. 329

The recommendations were revised again in 2003 and after that revision there are now 40 internationally accepted recommendations, being the standard for anti-money laundering and countering the terrorist financing. After 2003 the recommendations have been revised for making the combating easier, making states to be able to adopt flexible measures and making the alignment of resources more effective.⁹¹

Addition to 40 Recommendations FATF contains also nine special Recommendations addressed also for prevention of money laundering and terrorist financing. As already above mentioned the Terrorist financing is outside of this Thesis, however as a general knowledge FATF contains also provisions only directed to prevent terrorist financing, namely in C recommendations 5, 6, 7 and 8⁹²

As it can be seen, the current Directive on money laundering is following the recommendations in detail like is Finnish legislation on the matter as well.⁹³ In Finland the prevention of money laundering is based directly upon the recommendations as much as the third directive. I have selected few of the main points here to illustrate the framework given in these recommendations:

Firstly it is good to be noted that these recommendations have its base on UN Conventions on the Vienna Convention⁹⁴ and Palermo Convention.⁹⁵ The Recommendation is explicitly stating that states should adopt legislation similar to those Conventions.⁹⁶ However it goes without saying that the revised recommendations provides a much more detailed indications how to prevent money laundering than Conventions which were first of all directed against Narcotic substances. What comes to Customers Due Diligence, which is explained above considering the current legislation the directive can be said being almost word to word the same as in the recommendations considering the same matter. There is a list which states that when and how the customers due diligence should be handled. Like in the directive when a transaction or transactions together exceeds a 15.000 EUR/USD the origin of the money should be clear. Secondly when there is any suspicion rising, a customer relationship is being established or the customer is not present the customer due diligence forms a critical starting point when thinking money laundering⁹⁷ Among other things, according to this there should be a restored data for minimum of five years after the customer relationships has ended and a risk-based due diligence method for countries having a higher risk in money laundering. A practical example are banks, which are not taking any customers to start a business relationship without a valid

⁹¹ Ibid. P. 329

⁹² FATF Recommendation C, paragraphs 5,6,7 and 8

⁹³ Act on Preventing and Clearing Money Laundering, 68/1998; amendments up to 365/2003 included, Ministry of the interior, Finland

⁹⁴ United Nations Convention Against Illicit Traffic in Narcotic Durgs and Psychotropic Substances, Vienna, 1988

⁹⁵ United Nations Convention against Transnational Organized Crime And The Protocols Thereto, December 2000, Palermo Italy

⁹⁶ FATF Recommendation B, paragraph 3,

⁹⁷ Ibid. Recommendation D paragraph 10

identification paper, there is an on-going risk-based monitoring systems and inner security system to notify if there are suspicious transactions in the customers bank account.⁹⁸

Much of a critique has been evolving in this next recommendation where there is a list of profession who should be following the customer due diligence method. There is a list where paragraph D provides the following: ‘Lawyers, notaries, other independent legal professionals and accountants- when they prepare for or carry out transactions for their client concerning the following activities: Buying or selling a real estate, managing of client money, securities or other assets, management of bank, savings or securities accounts, organization of contribution for the creation operation or management of companies, creation, operation or management of legal persons or arrangements, and buying and selling of business entities.’⁹⁹ However there is a specification following in the next paragraph: ‘Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph d of Recommendation 22. Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants including auditing,’¹⁰⁰

This was clearly put here as to emphasize the importance of certain professionals to fall into the scope of the reporting duty. Lawyers and accountants are typically professions with great confidentiality and also an easy access to information where such suspicions may arise. However here as well as the case law the division was clearly made what are the transaction when lawyers are required to inform and report and as one can see they are not any way differiating from those which are dealt in monetary institutions daily. I think the valid question here is why the lawyers should be exempted from the report duty in these occasions. The nature of the transactions is the same and probably no lawyer willingly without knowing, does not want to be engaging in a money laundering process. On the other hand the secrecy between lawyer and a customer is so well preserved or at least have been, so the risk of losing the confidentiality can easily cause infringement to the basic rights guaranteed by the convention. A case, which was present in Michaud explained below.

⁹⁸ Financial Supervisory Authority, 25.02.2014, accessed 20.05.2014

<http://www.finanssivalvonta.fi/fi/Valvonta/Rahanpesun_estaminen/Pages/Default.aspx>

⁹⁹ FATF Recommendation D, paragraph 22(d)

¹⁰⁰ Ibid. Recommendation D, paragraph 23 (a)

3. RECENT DEVELOPMENTS

A. MICHAUD JUDGMENT¹⁰¹

European Court of Human Rights gave its final judgment on a Michaud case on 6th of March 2013. The overall process took over five years to reach its conclusion, on a matter where the money-laundering Directive was really showing its downsides. Just because the case is not dealing with money-laundering issues as a crime but the side effect of the legislation, the doubt on the Directive have increased. While it is known principle that confidential relationship does exists between lawyer and his client, the judgment in this case put the confidentiality in a different context.¹⁰²

The case was between Michaud v. France. Michaud later referred as applicant was working as a lawyer and was a member of the French speaking-bar. He alleged in his applications that the Directive adopted in the fight against money laundering was harmful and formed an obstacle for performing his legitimate profession.¹⁰³ He also alleged violations in article 6, 7 and 8 of the European Convention of Human Rights. Michaud started its proceedings in France, and finally got the judgment on the French Supreme Court. However no preliminary ruling was asked from ECJ and the judgment was in favor of the French Government. After getting the final judgment, Michaud took the case to the ECHR.

Directives adopted place a requirement for professionals such as lawyers an “obligation to report suspicions”¹⁰⁴ This part of the sentence has been under a constant discussion whether it is applicable to lawyers and if so under what circumstances.¹⁰⁵ However as a part of implementing process the French National Bar Council adopted these procedures and in the first article of the Decision¹⁰⁶ it was stated that these measures applies to all who are members of the French Bar. Decision also listed all the possible transactions where lawyers are under a duty to report. Mainly the list was about financial transactions and real estate trading. As an exemption it was also stated that ‘when acting as a legal counsel or in the context of judicial proceedings’¹⁰⁷ lawyers are not bound by the listed rules and as addition to that lawyers should always respect the client confidentiality and make sure it has been followed.¹⁰⁸ Disbarment or different disciplinary sanctions were used to those who were not following these rules.

¹⁰¹ Case *Michaud v. France*, no 12323/11, 6 December 2012

¹⁰² *Ordre des barreaux francophones and germanophone and Others* (2005), Opinion of Advocate General Poiares Maduro, Opinion 4th of December 2006

¹⁰³ Case *Michaud v. France*, Para. 47

¹⁰⁴ Directive 2005/60/EC (2005) article 20

¹⁰⁵ See for instance: Helen Xanthaki: Lawyers' Duties under the Draft EU Money Laundering Directive: Is Confidentiality a Thing of the Past?, *Journal of Money Laundering Control*, 5:2, 1997

¹⁰⁶ Decision adopting Regulations on internal procedures for implementing the obligation to combat money laundering and terrorist financing and an internal supervisory mechanism to guarantee compliance with those procedures, 12th of July 2007, Published in the Official Gazette on 9th of August 2007

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* Article 4

The applicant case was first ruled in Conseil d'Etat and was dismissed. The applicant was pointing out that the Directive in question was ambiguous, the word 'suspicion' was not clear enough and it lacked clear definition. Secondly the same applied to the word 'activities' used. It was a vague term and made it difficult for lawyer to see the activities, which are under to report duty and which are not. The applicant was not disputing the fact that there was a legitimate aim to interference article 8 of the Convention. However he deemed it unnecessary and exaggerated action in 'democratic society.'¹⁰⁹ He also pointed out the difference between a Directive and a Regulation. Since at this case the legislation in question was in a form of a Directive, States are able to use margin of appreciation while the option of appreciation is not available for Regulations.

In article 6 the plaintiff alleged violations since because the lack of confidentiality in business relationships between lawyer and the client there is a risk that the client might incriminate itself. The plaintiff overall pointed out that there is indeed a need to combat against money laundering, but the measures should be proportionate so measure taken should not exceed the limit necessary. He also mentioned the FIU's report where it was stated that under a quarter of the notified suspicions has been forwarded to the judicial authorities and kept that number too low in the eyes of proportionality. Plaintiff also relied two different sources stating the need and duty of loyalty from lawyer to his clients.¹¹⁰ Finally the applicant pointed out that some member states such as Italy, Estonia and Belgium are much more protective relating to the profession and secrecy of lawyers meaning that professionals working there are either better protected not to mentions outside the Union Canada and USA which do not know such obligation at all.¹¹¹

There were also third-party interveners on the case: CCBE thought that according to the plaintiff that there is a serious risk towards the 'essential values of the legal profession'¹¹² The organization pointed out that the duty to inform suspicious not actual offenses was the breach of client confidentiality. It was also pointed out that the situation transforms lawyers to 'agents of the states'¹¹³, which automatically creates a conflict with the actual clients. The society also continues with the same agenda than the plaintiff that as long as Canada and USA are not following this strict type of informing it is not essential part of legislation in EU either.

Secondly the French speaking bar council of Brussels took also part to the discussion stating that there were no questions about whether the professions of lawyers were protected by the articles 6 and 8 of the convention.¹¹⁴ Bar council also pointed out that the client confidentiality is a two-way street. It is essential for the lawyer to know exactly the rules of commands but it is also vital for the customer to be able to rely on the fact that the details stays between the lawyer and the customer. The last point is also closely connected to the right for fair trial. The customer

¹⁰⁹ Case *Michaud v. France*, no 12323/11, European Court of Human Rights, 6 December 2012

¹¹⁰ 'Basic principles on the role of lawyers' Adopted by the Eight United Nations Congress on the Prevention of crime and the treatment of offenders, from 27th of August to 7th September 1990 and Recommendation 21 of the Committee of Minister of the Council of Europe on the freedom of exercise of the profession of lawyer

¹¹¹ Case *Michaud v. France*, no 12323/11, 6 December 2012 Para 68

¹¹² Ibid. Para 75

¹¹³ Ibid.

¹¹⁴ Ibid. Para 79

will be able to tell everything in order to get a fair trial, not to leave something essential off because of the fear of loss of confidentiality. Society also relied to case law, namely on the case *M.S v. Sweden* where medical data and its confidentiality were under a discussion.¹¹⁵ There the court stated that respecting the confidentiality concerning a medical data was vital and the society alleged that this should be applied *mutatis mutandis* to client confidentiality between lawyer and the customer as well.¹¹⁶

Third intervener was EBHRI who unambiguously stated that client confidentiality is something that lawyers should be well preserving and it goes hand in hand with their profession. EBHRI pointed out four points for preserving the client confidentiality. First it pointed out that lawyers required to report suspicions would cause the risk for client incrimination. Secondly there is a lack of definition and thus foreseeability, which would be crucial for equitable legislation. Thirdly the confidentiality is something that court is always preserved throughout its case law. Journalist's sources and medical data are protected and the same should be applied to the work of lawyers as well¹¹⁷. EBHRI also emphasized the massive impact which lawyers and overall the term client confidentiality has. For that reason alone, it should be protected and Court should affirm that.

State view separated from the applicant's and third party intervener's views. The Government agreed that article 8 of the Convention protected one's right a professional privilege. However it was argued that there has been no interference since the plaintiff could not point any actual event that had been harmful. They also alleged that the legislation was 'sufficiently clear'¹¹⁸ and 'the suspicion could concern the identity of the client or the beneficiary of the operation, the origin of the funds, the unusual or complex nature of the transaction or its purpose.'¹¹⁹ That sentence was intended to clarify the alleged vague nature of the term suspicious. Government continued that the directive was adopted in accordance of the domestic law. The added that French Government has only been complying with the law of the European Union while adopting the directive and the competence was limited. Government also emphasized that there is a protection of confidentiality, and in this current situation there is no need to change that. The present case does not give any presumption that the protection of confidentiality would be damaged, but just clarified.

The Government also pointed out the French law took out the best of the possibilities granted. There is a filtering system where the lawyer is reporting the suspicious acts to a chairman of the bar that then decides whether there is suspicion large enough to take the case forward. The same also applies if the chairman thinks the information was got in activities excluded under the scope of the directive. While the applicant pointed out that there are some member states in EU where the protective level was considerably higher, the Government response is that actually there are only few nations that have taken this procedure in action. That makes the French law on of the most protective ones what comes to the protection of client confidentiality.¹²⁰ There is

¹¹⁵ Case *M.S v. Sweden*, 74/1996/693/885 European Court of Human Rights, 27th of August 1997,

¹¹⁶ *Ibid.* Para 51

¹¹⁷ Case *M.S v. Sweden*, 74/1996/693/885 European Court of Human Rights, 27th of August 1997

¹¹⁸ *Ibid.* Para 70

¹¹⁹ *Ibid.*

¹²⁰ Case *Michaud v. France*, no 12323/11, European Court of Human Rights, 6 December 2012
Para 88

also a time limit of 10 years of data collection and overall the process was under a strict supervision and any failure to comply would cause a criminal liability.

Court started its ruling by stating that there has been an continuing interference because the lawyer has been put in a situation where he either do what is told to do or faces the risk of criminal proceeding or even disbarment.¹²¹ So because of the interference it is the Court's task to examine whether the interference was justified. Court starts that the law has to have its base on a domestic law, which clearly is the case here. Secondly the applicant is not disputing the accessibility of the law. However what the applicant is disputing is the vague meaning of the term suspicion. According to applicant the term is lacking definition and is vague term, which makes it hard to use in practice. Court is not accepting the allegations. Court states that it is often the case that law is built with different wording which may first seem to be vague, which later on in a practice comes more accurate. It also continued that the term suspicion is a common sense and especially as a lawyer, the applicant should understand the term. Also the Government has listed the use of that term and domestic law gives even more guidelines for that. The Court reached a conclusion that the interference was 'in accordance with the law within the meaning of Article 8 of the Convention.'¹²² About the necessity and legitimate aim the Court shortly states that money laundering is indeed a legitimate aim to interference here.

Court continued its ruling by stating that like its case law points out the confidentiality between lawyer and a client is indeed among on of the most fundamental principles and need protection. Court also acknowledges the connection between lawyer's confidentiality and the proper functioning of a fair justice system. Court ruled that according to article 8 'lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential.'¹²³ However this right is not inviolable, thus the Court's task was to find out whether the French legislation imposed a disproportionate interference with that right guaranteed in Article 8 of the Convention. Court referred to the judgment delivered by Conseil d'Etat that no 'excessive interference'¹²⁴ was occurred and because combating against money laundering was the objective here, it was legitimate and proportionate aim.¹²⁵ Court also noted that the directive in question is addressed to protect fundamental values in societies such as democracy and prevent extremely dangerous crimes such as drug trafficking and international terrorism.

Applicant argued also about the unnecessary of reporting based on the reports of Traficin. Court is not accepting the applicant's view in this matter. Rather the Court stated that the applicant is missing the point of deterrent effect and secondly reports show actually that the French way of combating against the matter is rather productive. Court also noted that the duty of lawyers to report arises only when performing similar tasks than other professional, which already have the duty such as banks and other financial institutions. Lawyers are required to report only in limited areas of tasks and especially their core part of the work is exempted form the duty. Secondly there is the filter already mentioned above where the Chairman is the one who after

¹²¹ Case *Michaud v. France*, no 12323/11, European Court of Human Rights, 6 December 2012
Para 24

¹²² Ibid. 98

¹²³ Ibid. Para 118

¹²⁴ Ibid. Para 121

¹²⁵ Ibid. Para 99

got the report examines that and finally decided whether the report gives any reason to proceed further. That is a guarantee and it does protect the legal profession of lawyers.

As to the other allegations the Court very briefly noted that applicant could not claim to be a victim under article 7 because no criminal proceedings whatsoever were brought against the applicant. When there is not a victim status present in this case, Court ruled that part being inadmissible. As to the article 6 of the Convention the applicant was alleging that the duty to report was incompatible with the article since it lead the clients to incriminate themselves. Court was only rephrasing the reasoning of article 7 and stating that the applicant was not a direct victim himself and therefore could not rely on article 6 of the Convention. Therefore the application in this part was rejected.

B. ROLE OF LAWYERS AND THE RIGHT FOR PROFESSIONAL SECRECY

Michaud case imposes an interesting burden towards lawyers.¹²⁶ The Court noted that the wording and definition did not lack foreseeability because the law in question was addressed towards lawyers and was a matter of common sense. This reasoning is interesting since do the Court expect then that lawyers are required to know everything even the unwritten aspects? Daria Sartori, a PHD candidate wrote that hopefully the path opened in the judgment is not leading to ‘massive discrimination’¹²⁷ towards lawyers. Question of proportionality arises here as well, if the discrimination mentioned by Sartori is really the reality in fighting against money laundering.

While the Michaud case addressed several issues from equal protection to re-phrasing the Bosphorus doctrine¹²⁸, the main issue considering this thesis is the lawyers right to secrecy between their clients. While the ruling in the Michaud case was pretty straight forward there are still questions remaining unclear and new questions arising. Where the line is to be drawn is still unclear, when lawyer is acting mere as a business agent than lawyer and most of all, will the new directive bring changes to this sphere as well.

Michaud case was not the first case to issue the problem and most probably will no be the last one. Advocate General Polares Maduro delivered its opinion on 14th of December 2006 relating a case of *Ordre des barreaux francophones et germanophones and Others*¹²⁹ where he took a stance on the same matter.¹³⁰ In its opinion he precisely addressed the problem of lawyers’ professional secrecy. The issue is problematic since the right of secrecy is thought to be a fundamental right but on what base it must be granted and on the other hand what is the line

¹²⁶ ECBA working group on anti-money laundering legislation, evaluation of Michaud v. France pp. 1-4

¹²⁷ Daria Sartori, ‘MICHAUD V. FRANCE: A step forward into the Bosphorus doctrine, or a step backward into “subjective” foreseeability?’, Strasbourg Observers 21st of December 2012

¹²⁸ ECBA working group on anti-money laundering legislation, evaluation of Michaud v. France pp. 1-4

¹²⁹ Case C-305/05 *Ordre des barreaux francophones and germanophone and Others*¹²⁹ (2005) supra note 51

¹³⁰ *Ordre des barreaux francophones and germanophone and Others* supra note 51 (2005), Opinion of Advocate General Poiares Maduro, Opinion 4th of December 2006,

between the lawyers secrecy and a person engaging in extra-lawyer activities. It has been pointed out that there cannot be a situation where a person can escape from its reporting duties just because he is acting as a lawyer even the task in question do not anyhow relate to lawyer's normal activities.¹³¹

Like Maduro pointed out, the base for the lawyers right to secrecy can be found nearly anywhere in western world ¹³²however the exact dividing line is hard to be drawn. While the key aspect in lawyers' day-to-day work is acting in good faith toward its clients, the duty to report and not to tell the client of doing that is something that can easily destroy the confidence. Maduro pointed out that on there are two aspects on the matter, on the other hand the right to secrecy is procedural appearing for the right to fair trial. Where a lawyer needs to decide when giving not a procedural assistance but merely advisory whether to report or not, the trust between client and the professional is long gone.¹³³ However the other aspect being substantive, where everyone has the right to private life. Still it is good to keep in mind that just because there is a piece of legislation touching to something so essential than the lawyer's secrecy it cannot be untouchable. When there are proportionate aims enough, even the most preserved rights can be violated.

While the ECHR in Michaud case recognized the right to secrecy and even emphasized it, it still ruled in favor of the Government.¹³⁴ While the right is inseparable part of the occupation there has been cases where the profession of lawyer has been divided.¹³⁵ On the other side remains the right to secrecy but the other side is the part where the right can be either violated or there is not such a right at all. In case *Am & S v. Sweden* the Court ruled that there has to be continues or quasi-continues judiciary activities to remain the right to secrecy.¹³⁶ Where lawyer is engaging it in activities having an extra-legal in nature, the lawyer cannot be said to possess the right anymore.¹³⁷

Michaud judgment caused a massive amount of critics especially among lawyers.¹³⁸ However the aim of the judgment should be remembered. If the Court would have been founding a violation of article 8 would that be meant that lawyers would have been able to turn the blind eye for the money laundering? Financial institutions and actors there have a great burden of informing suspicions. With an interference according to article 8, lawyers would have been able to engage exactly same action, without no obligation to report suspicions acts. It is good to keep in mind that the confidentiality between lawyer and its client is still heavily protected and the duty to inform is only very limited type of cases and not having its effect when having a 'traditional legal relationship' with the client.

¹³¹ *Ordre des barreaux francophones and germanophone and Others* (2005) Para 47

¹³² *Ibid.* Para 36

¹³³ *Ibid.* Para 44

¹³⁴ See ruling in Case *Michaud v. France*, no 12323/11, European Court of Human Rights, 6 December 2012

¹³⁵ Case 155/79 *AM & S Europe Limited v Commission of the European Communities* (1982) Para 21

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ See for instance: *Lawyers turn into informers? Credit Management* December 1, 2003 and Helen Xanthaki: *Lawyers' Duties under the Draft EU Money Laundering Directive: Is Confidentiality a Thing of the Past?*, *Journal of Money Laundering Control*, 5:2, 1997

In *Ordre des barreaux francophones et germanophones and Others* the Court pointed out that: ‘It is clear from Article 2a(5) of Directive 91/308 that the obligations of information and cooperation apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions.’¹³⁹ However *Michaud* case somehow changed the interpretation here, since in that case Court ruled the interference being acceptable as long as there is such a proportionate and legitimate aim like fighting against money laundering.

The procedure in *Michaud* case lasted over 5 years starting from the first application in France, going there to the Supreme Court and finally ending up to the ECHR. The case has caused increasing interest probably because of the problematic nature: On the other side, no one is disputing the importance of anti money laundering legislation. However the secrecy between lawyer and client is another thing, which needs protection. The problem arises when these two vitally and even equally important aims are colliding. EU has issued the proposal that is soon to be the fourth money-laundering Directive and a greater importance is upon single actors to stop the money laundering. While the existing legislation was dealt already in the second section the following chapter is providing the possible threats and challenges that EU and its legislation will most probably face. The fourth Directive will be dealt in the fourth section as well, from the base of the fourth draft that has already been accepted by the European Parliament.¹⁴⁰

Secondly the *Michaud* case interestingly elaborated its case law concerning the *Bosphorus* doctrine. As elaborated in the *Bosphorus* case the doctrine meant that basically the EU law with the convention should not be examined because of the doctrine equivalent protection.¹⁴¹ However in the *Michaud* case the Court separated these two cases because of the lack of the preliminary ruling from the EJC but also because of the different nature of the directive.¹⁴² So actually Court found that the Equal protection-doctrine is not applicable here, which potentially will open doors for question the EU legislation under the Human rights grounds. Julia Faure-Walker wrote in regulatory crime newsletter that after the *Bosphorus* case it was basically clear that EU law was in compatible with ECHR and challenging that fact was unnecessary. However after the *Michaud*-judgment where ECHR clearly distinguished these two cases left the doors open for challenging the EU law in certain circumstances.¹⁴³

¹³⁹ Case C-305/05 *Ordre des barreaux francophones and germanophone and Others* ¹³⁹ (2005) para 33

¹⁴⁰ European Parliament legislative resolution of 11 March 2014 on the 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

¹⁴¹ Case *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirket v. Ireland*, 45036/98, European Court of Human Rights, 30th of June 2005,

¹⁴² ECBA working group on anti-money laundering legislation, evaluation of *Michaud v. France* pp. 1-4

¹⁴³ Julia Faure-Walker, ‘Human Rights and EU directives – the ECHR opens up a new avenue for challenge’ (2013)

4. FUTURE CHALLENGES

A. BACKGROUND FOR FOURTH DIRECTIVE ON MONEY LAUNDERING AND TERRORIST FINANCING

The third Directive on money laundering was due to be ratified on 15th of December 2007. However the ECJ took actions against certain member states for not ratifying the directive on time. While the existing legislation has been valid now for approximately seven years the EU has started to finish its fourth Directive on money laundering and terrorist financing.

This rather quick way of ratifying a new piece of legislation was notified in the beginning of the draft of the new Directive. However there was emphasized the fact that money laundering and terrorist financing are profitable type of criminality, criminals are not only changing the way of behavior and different methods, they are at the same time searching ways of avoid the existing legislation. While the directive and any EU instrument on this matter lays heavily on the base of FATF the revision there will automatically be affect the legislation in the EU level and also on a national level. Because of the rapidly changing legislation there is a mentioning in the beginning of the 4th directive that for the sake of clarity this new directive is reversing all existing directives on money laundering and terrorist financing.

Commission makes it extremely clear that the idea of this new directive is to tighten the existing rules governing the matter. It is also emphasized that because of the free movement, one of the essential principles of the EU there is also space for criminal activity. Because there is no ambition to tighten the free movement the only way of protection is to keep up with the international standards, equalize the national rules governing the matter and makes sure that the rules are being followed nationally. There should be also a continuing interest for future challenges and threats so EU clearly states here that continuing law process will become a future in the law-making process.

In Stockholm-programme the priorities of the area of freedom, justice and security is set. There is explicitly stated for the following: ‘further develop information exchange between the Financial Intelligence Units (FIUs), in the fight against money laundering. Within the framework of the European Information Management System, their analyses could feed a database on suspicious transactions, for example, within Europol’¹⁴⁴

In the Internal Security Strategy money laundering has been listed for one of the main security challenge for the next years of 2011-2014. The Strategy is stating the following: ‘Serious and organized crime is of increasing importance. In its various forms it tends to occur wherever it can reap the most financial benefit with the least risk, regardless of borders. Drug trafficking, economic crime, human trafficking, smuggling of persons, arms trafficking, sexual exploitation of minors and child pornography, violent crimes, money-laundering and document fraud are

¹⁴⁴ The Stockholm Programme- An open and secure Europe serving and protecting citizens, 2010/C 115/01, 4th of May 2010, Official Journal of the European Union, c 115/1, 4.4.3

only some of the ways in which organized and serious crime manifests itself in the EU.¹⁴⁵

EU is also emphasizing the new ways to hide assets and easily commit a crime of money laundering. In this new Directive there will be new monitoring rules, new rules concerning the collected data, and rules for PEP. However the idea of EU was to make the Directive as easily adopted as possible since the ratification process would then be more effective and quicker. Since there is no use of going the directive through article by article I have chosen the articles that are going to change the most. However the Directive is still at the drafting stage, but very likely to go on finalize stage at this form.

The size of the changes of course is depending the fact how strict the anti money laundering rules have previously been. For example in Finland, the rules concerning the matter have already been considerably stricter than the EU Directive has required so the level of change might not be so enormous compared to countries where the level of rules has been on the minimum level. Also solicitors from United Kingdom pointed out that UK has already adopted stricter rules than required so actually this new directive shows the reality of money laundering rules in UK today.¹⁴⁶

B. NEW DIRECTIVE PROPOSAL

First of all the largest change has been the widening of the scope of the fourth Directive. While the third Directive was covering wider actors than its predecessor the trend is continuing.¹⁴⁷ Article 2 lists the covered institutions and actors and like the third Directive covered rental-agents but the fourth one is also widening its scope to letting-agents.¹⁴⁸

Casinos were there on the third Directive but as the scope is now widened since the draft of the fourth Directive provides a wording: 'Providers of gambling services'¹⁴⁹ Of course the wording will be clarified at least with relevant case-law but as a provider of some sort of gambling services, there should be a preparation that it falls under the scope of the new directive.

Secondly the clear difference from the old Directive is the value amount of goods. It was 15.000 euros but is now reduced for being 7500,00¹⁵⁰ euros which makes much more easier to fall into the scope of the directive. Interesting is that how this new provision will affect in practical life since the amount of 7500 is already amount, which will make a regular goods-seller falling within the scope by the directive.

¹⁴⁵ Council of European Union, Internal Security Strategy for the European Union: Towards a European Security Model, 26th of february 2010, 5842/2/10 REV 2

¹⁴⁶ Graham Gibson and Richard Farquhar: The Significant Seven, 17th of June 2013, The Journal of the Law Society of Scotland

¹⁴⁷ Rachael Thind, Kai Zhang: 'The 4th EU money laundering directive- key changes' E-finance & payments law and policy, March 2013

¹⁴⁸ 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, Art. 2

¹⁴⁹ Ibid. Article 2 (3f)

¹⁵⁰ Ibid. Article 2

Third change is the National Risk Assessment (NRA) which each member states has to undertake¹⁵¹. The idea of national NRA is based on the risk assessment and the NRA will be able to identify assess the risks of money laundering. Concerning the situation in Finland after the third Directive the banks and financial institutions are already having their local NRA in function. For those entities the change is not major. However NRA should be used for all entities falling into scope of the Directive, so the major change will be for lawyers, casinos and other actors not already having their local NRAs.

It has also been pointed out that the reality in some member states do already effect the situation desired to have after adopted the fourth Directive. For example in UK the NRA is already built up and it is ready to work in later 2014. However the national NRA are not the only factor in this changing risk assessment. Firms and other actors are required also to have a written assessment of their terrorist and money laundering risk and also keep the assessment updated.¹⁵² Even though the institutions and actors working under the scope of the directive probably have already had a risk based system, there will be significant changes since the assessment is need to be done in different angles of the EU. While the Commission emphasized the risk of the free movement to cause abilities for easier money laundering system, so more guidance is required. This requirement will of course improve the guidance given in money laundering prevention but it remains to be seen how firms will operate under the requirement and same time have cross-border business. Surely this will affect for some time and will also be more specific after relevant case law.

C. DUE DILIGENCE AND THE DEFINITION OF PEP

Article 13 of the new Directive lists the rules governing the simplified customer's due diligence rules. In the third Directive the simplified procedure was quite permissive, in its article 11 was listed the situation when the simplified due diligence procedure was used. The current legislation governs that certain listed companies and public offices are exempted from the due diligence procedure.¹⁵³ That caused the effect of lot of people falling outside the scope of the Directive however acting in sensitive area concerning money laundering. So the article 13 of the 4th directive lists now the way to undertake the simplified due diligence procedure. The assessment must be based on risk.¹⁵⁴ Also the beneficial ownership of pooled accounts is restricted from the simplified procedure. That is something that very well could affect a change of behavior especially in lawyer-client relationships. Probably the ones benefiting from the simplified due diligence procedure are some public limited companies, certain insurance and pension companies and certain public authorities.¹⁵⁵ However under the fourth directive the enhanced due diligence must always be done when there is a PEP in question and because of the definition of PEP is

¹⁵¹ Ibid. Article 6

¹⁵² Rachael Thind, Kai Zhang: The 4th Money Laundering Directive (2013)

¹⁵³ Directive 2005/60/EC Article 2 (a,c)

¹⁵⁴ 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, Article 13 (2)

¹⁵⁵ Ashurst London: Financial services regulatory briefing, fourth European money laundering directive proposals published, February 2013, accessed 10.04.2014 available at:

www.ashurst.com/doc.aspx?id_Content=8867

also widening coming to cover also the national persons in certain offices the likelihood of the simplified due diligence rules to come actually in wide use is not probable.¹⁵⁶

Large functional and definitional change is coming to term PEP as well. For now under the third money laundering directive the definition of PEP is only persons who are internationally politically exposed so excluding domestically influenced people. Typically PEPs are often ambassador and as a straight quote from the FATF's definition of PEPs: 'Individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.'¹⁵⁷

The article 18 of the new proposed directive states as follows:

'In respect of transactions or business relationship with foreign politically exposed persons, Member states shall, in addition to the customer due diligence measures set out in Article 11, require obliged entities to:

- a) Have appropriate risk-based procedures to determine whether the customer or the beneficial owner of the customer is such person;
- b) B) obtain senior management approval for establishing or continuing business relationships with such customers;
- c) C) take adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction;
- d) Conduct enhanced ongoing monitoring of the business relationship.'¹⁵⁸

However there is another article dealing with same area but only domestic PEPs:

'In respect of transactions or business relationships with domestic politically exposed persons or a person who is or has been entrusted with a prominent function by an international organization, Member States shall, in addition to the customer due diligence measures set out in Article 11, require obliged entities:

- a) to have appropriate risk-based procedures to determine whether the customer or the beneficial owner of the customer is such a person;
- b) in cases of higher risk business relationship with such person, to apply the measures referred to in points (b), (c) and (d) of Article 18.'¹⁵⁹

These two articles from the proposed Directive show the increased importance of the definitions

¹⁵⁶ 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, Article 13 (7 a,b)

¹⁵⁷ FATF Recommendation 12, paragraph II,

¹⁵⁸ 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, Article 18

¹⁵⁹ 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, Article 19

and also the emphasized risk connected to those having politically exposed status. With the new Directive there has been a sub-division with two different articles dealing with the matter. As a comparison article 13 lists the actions that needed to be done when having a business relationship with PEP in the third Directive. The overall definition of PEP was rather narrow: ‘politically exposed persons’ means natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons;’¹⁶⁰

So actually with the new Directive there will be two ‘sets’ of PEPs. The foreign PEP staying pretty much similarly handled as before and as the new addition the domestic PEPs which for example can be working within the EU. After all they hold a ‘prominent public functions’¹⁶¹ or are currently working for international organization. It should also be remembered that family members and persons with the close association with PEP would hold the same PEP-status themselves.¹⁶² This goes for both, domestic and foreign PEPs.

The main change in this regard would be the enormous increase of the amounts of the PEPs because not only foreign PEPs but also the domestic PEPs will be calculated. For the same reason customer due diligence rules will be much more stricter than under the old Directive and the use of simplified customer due diligence will be extremely narrow.¹⁶³ However as looking this from the point of the money laundering, this new definition of PEPs will make the system better and protective. Money laundering is a crime where the pre-crime can be anywhere; it can be done internationally but as well domestically. So the current situation leaves out the possible threats because ‘only’ domestic in politically high places. The new system will look persons from the same perspective so to speak, not mattering whether they are working under their domestic title or international. However the actual working of this new legislation can be hard to achieve, the change is so remarkable that the implementation not just the official one but also the practical one will take time. But when it works, the achieved result will most probably be the wanted one.

D. BENEFICIAL OWNERSHIP AND SANCTIONS

Articles 29 and 30 of the new proposed article deal with the beneficial ownership.¹⁶⁴ European Parliament has just voted for the public register where the beneficial owners of EU companies and trust would be listed.¹⁶⁵ The register would be publicly accessible and the hope is that with the help of that public register EU gets a new effective weapon to tackle against money laundering. Whether Casinos would be on the public register, is under

¹⁶⁰ Directive 2005/60/EC Article 3 (8)

¹⁶¹ 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, Article 3

¹⁶² Ibid.

¹⁶³ Ashurst London: Financial services regulatory briefing, fourth European money laundering directive proposals published, February 2013, accessed 10.04.2014 available at:

www.ashurst.com/doc.aspx?id_Content=8867

¹⁶⁴ 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, Article 19

¹⁶⁴ Directive 2005/60/EC Article 29 and 30

¹⁶⁵ Bruce Zagaris: Money laundering and bank secrecy, European Union proposes 4th anti money laundering Directive, International enforcement law reporter, 1st of April 2013

a discussion but The Economic Affairs and Justice and Home Affairs have voted for the Casinos to be on the register too.¹⁶⁶ Interesting is that gambling services are already on the list but the Casinos excluded. However future will show whether the Casinos will be included for the scope of the beneficial owner rules.

Judit Sargentini from the Civil Liberties Committee said that: ‘With this vote Parliament has shown, from left to right, that it is in favor of public beneficial ownership registers, and thus sends a strong signal to the Council for forthcoming negotiations on the file. By approving the establishment of beneficial ownership registers, the committees have shown that they are serious in their demand to finally break with the tradition of hidden company ownership.’¹⁶⁷

Even though the availability of the register is at first point directed to everyone falling into the scope of the new Directive but there is also one exception. The list will be made according to risks so if there is only a limited little risk the member states could exclude some of the indented activities. However with the possibility to exclude some activities from a risk perspective, member states are also able to include activities there based on the risk as well. If the member state in question deem to have a high money laundering risk in some activity not in the list already, it is possible to attach on the list.

It goes without saying that the accessible list would be a huge change, not only in the eyes of a client relationship but also with the business itself. However there is a risk of being disproportionate in the matter when considering the client confidentiality in the lawyer’s perspective.¹⁶⁸ The Michaud case showed that the confidentiality is extremely protected and preserved and it has a special role in the society. That might very well be that even though lawyers are the list at the first point, but later on in practice, the situation might be different. However the list as it is presented in the Directive is extremely helpful and at least increases the openness needed when combating against money laundering. As to the beneficial ownership part, in any case of suspicion of the actual beneficiaries, firms are obligated to examine deeper the actual beneficiary.¹⁶⁹

Last remarkable change in the new money-laundering Directive is the level and severity of sanctions imposed of breaching the Directive. The third money laundering Directive in its article 39 stated the following: ‘Member States shall ensure that natural and legal persons covered by this Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive.’¹⁷⁰ Basically the guidelines for Member states were, that the sanctions need to be ‘effective, proportionate and dissuasive.’¹⁷¹ However the new proposed Directive started to emphasize the importance of proportionate sanctions even in the preamble of the Directive. For emphasizing

¹⁶⁶ Economic and monetary affairs, ‘Money laundering: MEPs vote to end anonymity of owners of companies and trusts, Europarlamentet/nyhetsummet, 20.02.2014, accessed 2.4.2014 available at: <<http://www.europarl.europa.eu/news/sv/news-room/content/20140210IPR35562/html/Money-laundering-MEPs-vote-to-end-anonymity-of-owners-of-companies-and-trusts>>

¹⁶⁷ Ibid. See the quotation from Judith Sargentini

¹⁶⁸ Graham Gibson and Richard Farquhar: *The Significant Seven*, (2013)

¹⁶⁹ Ashurst London: *Financial services regulatory briefing, fourth European money laundering directive proposals* (2013)

¹⁷⁰ Directive 2005/60/EC, Article 39

¹⁷¹ Ibid.

that the Commission clearly gave a message that the imposing of the sanctions were not tolerable level before.

The new directive set out four different articles¹⁷² dealing with the sanctions. Article 55 deals lays down the general provision considering the sanctions part: ‘Member states shall ensure that obliged entities can be held liable for breaches of the national provisions adopted pursuant to this Directive.’¹⁷³

‘Without prejudice to the right of Member States to impose criminal penalties, Member States shall ensure that competent authorities may take appropriate administrative measures and impose administrative sanctions where obliged entities breach the national provisions, adopted in the implementation of this Directive, and shall ensure that they are applied. Those measures and sanctions shall be effective, proportionate and dissuasive.’¹⁷⁴

‘Member States shall ensure that the competent authorities have all the investigatory powers that are necessary for the exercise of their functions.’¹⁷⁵

This is what article 55 basically governs. However the Directive goes much further than this. In its article 56 it is listed the situations where breach will cause the use of different sanctions types and what the different sanction types are. Member states have different variations and the directive says that ‘measures and sanctions that can be applied include at least the following.’¹⁷⁶ Meaning that member states are obligated to follow even stricter sanction types depending the breach.

Possible sanctions are for example a Public statement, order to cease the breaching conduct, withdrawal of certain rights, temporary ban from management body, if the breaching party is a legal entity, a monetary sanction of up to 10% of the total annual turnover can be used, in case of a natural person a sanction up to 500 000,00 euros or corresponding amount, monetary sanction of twice the amount of the profits gained or losses avoided.¹⁷⁷

Article 57 requires the Member states to ensure that the authorities in question do actually follow the directive adopted, unless there is a risk that publication would ‘seriously jeopardize the stability of financial markets.’¹⁷⁸ This sentence is of course not clear yet, but will most probably be used in case law later on. The third directive was not implemented in time, and like this fourth directive clearly states, the sanction were not implemented according to the aim of the Community. I would imagine, that after the implementation time of this new directive, there will most probably be attempts not to follow the sanctions imposed. However after relevant

¹⁷² 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, Article 19

¹⁷² Directive 2005/60/EC Articles 55-58

¹⁷³ Ibid. Article 55 (1)

¹⁷⁴ Ibid. Article 55 (2)

¹⁷⁵ Ibid. Article 55 (3)

¹⁷⁶ Ibid. Article 56 (2)

¹⁷⁷ 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, Article 19

¹⁷⁷ Directive 2005/60/EC Articles

¹⁷⁸ Ibid. Article 57

case-law the sentence will be much more clearer.

The instructions concerning the sanctions are not ending here. The Directive lists issues need to take into consideration when deciding the appropriate sanction. Member states are needed to consider the duration and gravity of the breach and the degree of responsibility for example. Also the financial strength is now taking into consideration meaning automatically that larger actor will also bear the larger consequences. This is a natural result and follows from the fact that the damage causing by larger actors breaching the anti-money laundering directive are generally larger than the smaller actions. This is similarly addressed also to be a proportionate sanction, when calculating the financial strength as well. Also the profits and the losses suffered will be taken into account when calculating the sanction. Last points that are taken into consideration are the level of co-operation and previous breaches. Does not matter whether the breach-maker in question is natural or legal person. Article 57 goes forward to its article and focuses over legal persons and the sanctions in those cases.

Finally the article 58 is about of the member states making sure that they have effective mechanism of reporting breaches but as importantly that the mechanism is preserving the confidentiality of the reporting body. Member states are required to make the entities have a reporting channel, which is 'a specific, independent and anonymous channel.'¹⁷⁹

These four articles illustrate the willingness and determination of the Commission to have more severe sanctions in case of breach. This illustrates that as this point, implementing the Directive is not on a coherent level when compared all the member states. As money laundering often is a cross-border crime, it would be extremely vital to have the legislation but also the consequences at the same level in all member states. Secondly the third Directive did not provide a protection good enough for the reporting organs, which automatically led to the situation that for example private individuals were, not protected enough to report a suspected crimes. Under the third Directive it was for each entity to decide whether they have a protection for the reporting party.

E. COMMENTS ON THE DIRECTIVE

The directive shows remarkable changes indented to be implemented after adoption. Every While the fourth Directive is still at drafting stage the sure thing is that when the adoption time is, it will face criticism. In Michaud case, the aim of good will not be enough when it interference with rights having a nearly fundamental status. As an example, Finland has raised an issue considering the small gaming activities falling into scope of the Directive.

Finland has an organization named Finland's Slot Machine Association (RAY), which is an organization of common good. It has a monopoly over Finnish gaming and the purpose is to raise funds through gaming and address the funds to different charitable organizations. RAY seeks to keep up with high moral in different gaming operations and in tat way increases the funds directed to organizations.

As in the light of the new fourth directive, RAY would be falling into the scope of the directive.

¹⁷⁹ Ibid. Article 58 (c)

Especially the smaller gaming activities such as different coin-games would somehow need to identify the gamer if the bet exceeds certain amount. However one could ask whether the real risk of money laundering really lies on a coin machine under the supervisory authority of Finnish Government. While the new Directive is effective in a point, the risk of its emphasizing too much of actors with no real risk of money laundering, does occur.

Relating to this is the question of effectiveness of the new directive. It is a known fact that the current third directive has been extremely costly, not only for the EU but also for the Member States as well.¹⁸⁰ While the third directive already increased the reporting duty and the scope of protection the fourth Directive is going way beyond. It might be relevant to think whether the costs-issue is becoming a real threat for anti money laundering. Because the new directive will focus even more on the smaller actions and under the scope of the new directive falls even more sectors, the question is relevant to ask again. The idea of working piece of legislation is usually that the use of the legislation is simple and not overly expensive for the Member States. With the economic situation at this point, there might be difficulties to justify the adoption of legislation, which will not only be expensive but also to hinder the business of certain national actors. Especially when the type of the criminality is thought to be international and the connection between the everyday lives might look thin.

One of the inevitable challenges the prevention of money laundering will face is the use of electronic equipment. People are transferring money electronically, person willing to do a transaction might not be actually present and most of the transactions are done online. In rare cases the person actually comes to a bank for example and does the wanted transaction. Also as an extra challenge the new Directive is bringing even the smallest actors falling into the scope of the new Directive. In many member states local post-offices and small shops do have possibilities to either send or transfer money. However the difficulties of following the legislation is the real challenge.

Another stumbling block might be the confidentiality issue. While the Michaud-case took five years to resolve, the issue is far from clear. The new Directive will drive even stricter reporting duties so the gap between the client confidentiality and reporting will most probably be lighter than ever before. Among the lawyers, issue which will be discussed again and again. However the opposite are asking, why lawyers should be exempted especially when having a client relationship similar than other professions needing to report. Michaud case of course solved the current case in question, but the real question is whether it actually solved the question relating to money laundering legislation at all. So it would not come as a big surprise, if there would be another case law concerning similar issues under the new directive.

After the Lisbon Treaty proportionality has been a highlighted issue. While the Michaud judgment dealt partly with this issue, it will most probably be discussed after the publishing and adoption of the fourth Directive as well. While there is a new piece of legislation there are new parts to rely on. One of the main issues in the area of proportionality might be the relationship between the real risk and the burden of following the directive. Do a small coin-machine really form a great risk for money laundering and if not is it proportionate for the operator of the small coin-machine to actually be required to follow exactly same methods as large financial unit?

¹⁸⁰ KPMG, Global anti-money laundering survey, risk consulting, 2014 p. 21

Having regarded the possible threats in future, it is valid to point the positive effects of the new system. While the changes from the third Directive to fourth one might seem to be almost dramatical, it is good to keep in mind that there are several member states already following stricter rules than required. Institutions such as large multinational banks with offices in US have already followed the extremely strict rules coming from States. Then the reality is, that actually many large actors are being well prepared.

Also the transparency will have a totally new meaning when the list of beneficiaries will be public. It will definitely grow the trust among public but also maybe increase the step for the direction of money laundering.

5. CONCLUSION

A. SURVEY

The idea of fighting against money laundering is probably a matter that needs no justification. However the wideness of the problem and the price of the pre-crimes might come as a surprise to many. The actors on the financial sectors and also other actors coming into the scope of the new Directive are in the main characters to prevent the problem. However the burden is heavy and several questions has been raised concerning the matter.

A survey made by KPMG in 2014¹⁸¹ shows that the importance of the anti-money laundering has increased. The survey was launched in November 2013 and was distributed to anti money-laundering professionals in the top 1000 banks¹⁸² as well as KPMG's contacts in over 40 countries. The survey got back 317 responses, representing 48 countries worldwide which lot of them in Europe. Most of the respondents were titled head of Anti money laundering so dealing with money laundering issues is regular. The areas of businesses were retail banking, corporate and private banking, insurance companies and others.¹⁸³ KPMG has conducted the survey now 10 times and while the money laundering has always be in priorities, emphasize is now focused on that matter alone. USA has faced a many updates concerning the regime and the fourth Directive is yet to come in EU.

The survey interestingly showed that money laundering is not just issue facing interest only in the legislator side. Senior managers are more and more aware of the business influence and being part of the prevention is also imago question.¹⁸⁴ Every undertaking probably takes the side on a good ones and being a responsible actor wants to promote the prevention of money laundering. The increased interest is clear while 2004 the importance was also high probably because of the new directive. 2011 the interest dropped clearly but of course remained in the interest because of the existing legislation. However now, 88 percent says the money laundering issue being priority for senior management.¹⁸⁵ Even more clearer evidence of the importance of the prevention on anti- money laundering was that up to 98 percent respondents told that prevention and current ways to fight against the problem is currently presented at the board and done quarterly or as required bases.¹⁸⁶ The risk was also thought being real and high especially in the finance sector. Interesting point was to notice that even though the money laundering is from the legislator's point of view thought to be international problem and usually appearing cross-border the globally consistent anti money-laundering framework was a challenge for majority of respondent.¹⁸⁷ This is a subject, which has caused a criticism from the legislators to

¹⁸¹ KPMG, Global anti-money laundering survey, risk consulting, 2014

¹⁸² See the listing in 2013 Edition of the Banker Magaine, 01.02.2013, 22.05.2014 available at: <<http://www.thebanker.com/Banker-Data/Banker-Rankings/The-Top-500-Banking-Brands-2013?ct=true>>

¹⁸³ KPMG, Global anti-money laundering survey, risk consulting, 2014, p. 4

¹⁸⁴ Ibid.

¹⁸⁵ Ibid. P.12

¹⁸⁶ Ibid. P. 8

¹⁸⁷ Ibid. P. 36

organizations.¹⁸⁸ However the undertakings did not in anyway challenge the importance and the idea of the internationally harmonized system but in reality the proper working of consistent system is not only a real challenge but a monetary issue as well.¹⁸⁹

The cost issue of the new regime was raised to be one of the stumbling blocks in the survey as well.¹⁹⁰ While the costs are already high, the respondents thought that the underestimation of the cost-side continues from the legislator's side. It was also believed that the costs will not be decreasing but increasing in the near future. Even though when dealing with companies the cost issue is among the key issues when deciding systems and how to implement the existing legislation. For that reason is interesting that it is so underestimated in a way that for 22 percent of the companies increased over 50 percent of the expenditures. 78 percent of the respondents answered that the expenditures have increased and still are going to increase.¹⁹¹ When thinking the system as a whole and in practice the companies are the key actors working in the practice on the field of high risk of money laundering. For that reason the costs issue is something vital for the future to calculate. However in my opinion the cost issue should be dealt with the principle of total costs, meaning that also the human resource is taking into consideration. Undertakings are required to hire new skilled persons to work in the area of money laundering and with those monitoring systems, the recruitment is a huge expenditure for the companies as well. With really an effective system, there is a price for the persons and the needed knowledge as well.

One of challenges is related to the recognizing of PEPs. While there is a duty for the companies to identify PEPs and follow the instructions laid down in a regulation the companies are struggling with the requirements. According to the survey, financial institutions are now more than ever concentrating on the identification process, and 80 percent of the respondent said that in case of PEP, evidence is required for their assets and incomes. Still as far as I have understood the main problem lies on the identification.¹⁹² As a simple example, opening a bank account. When PEP comes into the bank and wants to open the account, especially when it does that with the idea of laundering money, the person itself is not revealing the political position that one has. Also the one opening the bank account are not daily working with the money laundering regimes, most probably the employer have had a short training about the issue. The main problem thus being, how to on the other hand train the people properly but also how to make it so simple that the identification and overall the following the anti money laundering procedure is used even in the lowest positions of undertakings. Surveys shows as well that even in the board of directors the identification of PEP is not working properly. 70 percent of the respondents use commercial lists of the identification process and 68 percent of the respondents are relying on the information given by the customer. While this already concerning enough 60 percent is relying on the information in news-searches¹⁹³, which cannot be considered to be reliable enough.

¹⁸⁸ Ibid. p. 21

¹⁸⁹ Ibid.

¹⁹⁰ Ibid. p. 22

¹⁹¹ Ibid. p. 29

¹⁹² Survey made in Danske Bank, concluded among 50 persons working daily with customer identification, March 2014

¹⁹³ KPMG, Global anti-money laundering survey, risk consulting 2014, p. 29

While on preamble of the fourth Directive the sanctions were emphasized and one could easily draw a conclusion that sanctions were not a tolerable level before, the main struggling point for undertakings as well is to have a fault free screening systems for sanctions which is actually tested regularly. According to the survey, Western Europe and USA were the most satisfied with their screening systems, but overall the level of satisfaction was low.¹⁹⁴ The new legislation is also at least for EU bringing the compulsory requirement that the screening for sanctions need to be tested on a continuing bases. All this showing the growing impact on the sanction system.

On of the interesting point regarding the survey was the driving force behind all the done in order to fight against money laundering. Although the respondents agreed that ‘regulatory considerations’¹⁹⁵ are the driven force behind the money-laundering regime, it was thought to be inconsistent and fragmented.¹⁹⁶ Over 70 percent of the EU respondent wanted to see increasing guidance and overall worldwide the undertakings were facing problems for having harmonized approach cross-border. Interestingly enough, despite of the continuously growing tightness of the legislation 43 percent of the respondents were willingly see a stronger regulatory relationship. However despite of the stronger relationship wishing 65 percent of the respondent shared a common fear of regulatory visits. Firms are afraid of the reactions and feel that their ways of acting is not fulfilling the level of requirements set by authorities.

B.FINALLY

This thesis has given an overview of the current legislation situation and also the current changes that are happening in near future. Money laundering is a topic of current discussion, ongoing legislative drafting and endless fight against the criminals. While neither society nor EU will be free from money laundering and crimes related to it, the fight fill be much more easier with updated legislation and modern tools and monitoring systems. Still, it is good to keep in mind that without people using the modern systems and actually taking the legislation in the practical field, the regime will not be functioning.

Michaud-judgment gave clarity but also made new questions to be asked. While the Court clearly clarified the fact that confidentiality between lawyer and the customer is not untouchable the judgment also emphasized the extremely important meaning for the society that lawyers and the confidentiality do possess. However with the fourth Directive coming into force near future and with its even stricter reporting duties it remains to be seen what is actually the limits of the confidentiality and how thin is the line between the original lawyer work excluded from the duty and the work falling under the duty. For sure is that there will be new case law to come and while in the Michaud judgment the Court opened a door for challenging EU law using the Human Rights purposes, probable is that an EU law will be challenged for using a completely new arguments. On the other hand, while the French Supreme Court did not ask for a preliminary ruling, it will be seen whether in future the Court will do that.

According to the Michaud judgment, it is also interesting to see in the practice whether the ruling actually reflects the daily work of lawyers while the Court imposed quite heavy burden

¹⁹⁴ KPMG, Global anti-money laundering survey, risk consulting2014 p. 33

¹⁹⁵ Ibid. p. 36

¹⁹⁶

of interpreting the wording of the law for just the plain reason of being a lawyer. While the wording was matter of plain words, the interpretation was according to the judgment, simple to do because it was a matter of simple words used in everyday life.

Despite the fact that the case amounted a massive wave of criticism it should be remembered that it also clarified issues and made the position of lawyers on the other hand stronger. Also the method of reporting was emphasized and the unanimity was prompted. Also the judgment gave fairness for the interpretation of the law, since lawyers are not able anymore to hide themselves behind the professions but they are as required as everybody else to act according to the Directive when not acting as a legal counselor.

While the past of the EU has shown that while the third Directive was a good base for practice there was some undisputed faults that caused a remarkable hindrance for its use and prevention purposes. The fourth Directive will most probably bring ease to the pain caused by its predecessor but for sure is that there will be another challenges. There have been questions of the proportionality of the new Directive and also the Member States are worrying about the resources needed for the new system. However the new legislation seems to be more straightforward than the present one, definitions has been made clearer and there are only few exceptions. Of course that is also a challenge but it will also make the use of the Directive easier. Also when the sanctions are now clearer and easier to be used and the use of the sanctions is required the attitude towards the money-laundering regime may change as well.

The surveys showed that the changes in the legislation of money laundering are now more followed than ever before. Information gathered is being spread overall in the undertakings even though firms are continuously facing troubles of cross-border spreadings. Investments are being made to update the controlling and monitoring systems and resources are hired. However the survey showed that even though great investments are being made on the monitoring systems the area of weakness is just in the same place. There is the challenge of ever changing legislation. The systems are not following and if the undertaking is investing continuously new systems the costs are too much to bear. For that part as well a harmonized legislation would be a great help and for that in my opinion the fourth Directive brings the help necessary.

What the survey also showed was the inconsistency of the different legislations and gaps that the inconsistent regulations have left. For today's world when the criminals tend to be a one step ahead, the gaps should not be there. However when basing the directive on the FATF's updated recommendations, same as universally the money laundering is being based, the distance of the gaps should be shorter. Still there is inconsistency of legislation, that is for sure, but at least the legislation is heading into the right directions. With the harmonization of the legislation the costs of following the legislation probably would be smaller.

Also one aspect relating to the cost issues is the more proactive role that undertakings should take. Survey showed also that many of the respondents are afraid of the regulatory visits, however the reason remains unclear. On the other hand it might be that firms are not prepared enough which needs a change of attitude. Especially now when the sanctions are being emphasized firms are needed to take a more proactive approach and also learn from mistakes made from the past. One sure thing is that firms facing a regulatory visit the shortages will not be disregarded. Sanctions will be imposed and a quick look to the new directive shows that they may be severe.

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