COMBATING MONEY LAUNDERING AT THE EUROPEAN UNION LEVEL

***Peter HÄGEL**, a political scientist and a doctoral fellow at the Social Sciences Department of the Berlin Humboldt University, has spent time at the CESDIP during Spring 2003, as a participant to the Associated European Laboratory "Crime and Policies of Safety and Prevention : French-German Comparative Research".*

His work bears upon a comparison of European policies of control and regulation of persons' and financial flows. He is reflecting on the ten-year old struggle against money laundering at the European level as well as on criminal law harmonisation.

1. A new law enforcement approach in the European Union

Throughout the last two decades, the European Union (EU), via the Schengen Conventions (1985-1990) and the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001), is developing into what is called a common "*area of freedom, security, and justice*"[1]. During the same period, a new approach against profit-driven crimes has spread around the world, the fight against money laundering[2] Its logic is to lower the incentives for such crimes by taking away the profits with a combination of three methods: (1) criminalising money laundering, the transformation of proceeds of crime into seemingly legitimate income or assets; (2) preventive regulatory controls for private financial and non-financial institutions in order to deter and detect money laundering, and the setting-up of public Financial Intelligence Units which receive reports on suspicious transactions from the private sector for analysis and the decision whether to pass them on to law enforcement; and (3) laws that allow for the confiscation of proceeds of crime.

Starting in France, Italy, Switzerland, the USA and the United Kingdom in the 1980s, today more than 130 countries endorse this approach. The driving forces behind this global legal harmonisation are international standards and conventions – the Council of Europe's Strasbourg Convention, the United Nations' Vienna and Palermo Conventions, and, most importantly, the recommendations and evaluations of the Financial Action Task Force (FATF)[3]. They are being used, because, in a world of global finance, money laundering easily becomes a transnational process and national anti-money laundering (AML) efforts are therefore dependent on those of other countries. This argument is especially valid inside the EU, where people and capital can move freely and financial integration is deepening with the Euro and the evolving common market for financial services.

Consequently, the first EU Money Laundering Directive in 1991 turned the FATF recommendations concerning the control of financial institutions into binding EU law, in order to avoid that diverging national AML measures disturb the functioning of the common market. Member States had to pass legislation that makes customer identification and systems for the reporting of suspicious transactions mandatory for banks and non-bank financial institutions.

The original proposal for the directive also wanted to oblige Member States to introduce criminal sanctions against money laundering. But since the EU pre-Maastricht had no competency in criminal law matters, the final directive only asks Member States to "prohibit" money laundering. This clause nevertheless reached the desired goal. In 1995, all Member States had made money laundering a criminal offence, and a joint action in 1998 and a framework decision in 2001 try to achieve even further harmonisation in criminalising money laundering. In another decision, the Member States introduced provisions for information exchange between their Financial Intelligence Units.

The revision of the directive from 2001 significantly extends its scope. Now, not only the laundering of profits from drug-related offences has to be criminalised, but that from all serious crimes according to a list that still needs specification (which will produce a third revision of the directive in 2004). And preventive controls also have to be applied for the following professions: auditors, external accountants and tax advisors, real estate agents; notaries and other independent legal professionals, dealers in high-value goods, and casinos.

However, until recently, the implementation of AML measures was less successful than envisaged. Whereas speculative "guesstimates" assumed one trillion US-Dollars of criminal profits in need of laundering in Europe for 1998, law enforcement results lie in a very different range of numbers. Around 700 persons were convicted of money laundering and roughly 1,2 billion US-Dollars were confiscated in the EU Member States between 1994 and 1999[4]. The disappointing effectiveness of AML might be due to the newness of the approach – police and prosecutors need time to build adequate capacities for its application.

Nevertheless, empirical research highlights three more fundamental reasons. First, and notwithstanding the fact that in fields like wholesale drug-dealing or financial and economic crime, high profits require concealing, the overall magnitude of criminal profits in need of laundering might be much lower than expected, because many criminals use large parts of their profits directly for consumption. Second, reports about suspicious transactions from the financial sector are not as useful as hoped for. They are probably good for deterring some potential money laundering, but less good for its detection. Third, and related to the previous reason, money laundering is extremely difficult to detect without knowledge about the original crimes that produced the illicit profits, which belies the assumption that following the money is a key to uncover crimes. This

[1] *Cf.* BARBE (E.), *Justice et affaires intérieures dans l'Union Européenne : un espace de liberté, de securité et de justice*, 2002, Paris, la Documentation Française. Until 1992, the EU was called European Community, and most legislation still emanates from the so-called first pillar of the Treaty on European Community. Justice and home affairs matters are part of the so-called third pillar of the Treaty on European Union (chapter VI). For reasons of simplicity, this text uses the term EU for all measures, no matter whether they emanate from the first or third pillar.

[2] *Cf.* STESSENS (G.), *Money Laundering: A New International Law Enforcement Model*, 2000, Cambridge, Cambridge University Press. In the aftermath of the attacks of September 11, 2001, this approach has been extended to the financing of terrorism.

[3] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), United Nations Convention against Transnational Organised Crime (2000), FATF Forty Recommendations (1990, revised in 1996 and 2003).

[4] *Cf.* FATF, *Review of the FATF Anti-Money Laundering Systems and Mutual Evaluation Procedures 1992-1999*, Paris, FATF, 2001; KILCHLING (M.), (ed.), *Die Praxis der Gewinnabschöpfung in Europa: Eine vergleichende Evaluationsstudie zur Gewinnabschöpfung in Fällen von Geldwäsche und anderen Formen Organisierter Kriminalität*, 2002, Freiburg im Breisgau, Ed. Iuscrim, Max-Planck-Institut für ausländisches und internationales Strafrecht.

points to the need for investigative co-operation between countries whenever crimes and the laundering of their proceeds are organised across national borders.

2. Legal and institutional evolution

Common criminal law is only one step towards solving problems of transnational crimes and their investigation[5]. It facilitates judicial co-operation, but traditional mutual legal assistance under the conventions of the Council of Europe is often a highly bureaucratic and slow process. An evaluation exercise on mutual legal assistance in criminal matters between the EU Member States found out "(…) *that a number of Member States would agree to a request for mutual assistance involving interim protective and coercive measures in respect of property and assets only if the latter were completely identified. But this is precisely the stumbling block in combating crime as frequently the identification is incomplete*"[6].

To ameliorate such practical difficulties of mutual legal assistance, a European Judicial Network was set up in 1998. It functions as a decentralised network of professionals who try to help requesting investigators to better understand the different criminal law systems and to find the right correspondent for their request in the Member States. As a further response, the Convention on mutual assistance in criminal matters between the Member States of the European Union and its accompanying protocol, which focuses on economic and financial crimes, were drawn up in order to improve the legal basis of the Council of Europe conventions.

Combating EU-wide money laundering featured prominently in several proposals and action plans on how to strengthen co-operation in criminal matters. These were picked up by the Tampere European Council in October 1999 and resulted in a comprehensive EU strategy[7]. Mutual recognition, a principle that is already successful in establishing the common market for goods and services, is to be made the cornerstone of the common area of freedom, security, and justice, too. The European arrest warrant, foreseen to enter into force in 2004, is the first measure that will make it operational, substituting traditional extradition procedures and making cross-border requests for arrest quasi-automatic. For the filing of European arrest warrants, the Schengen Information System can be used, which supports police co-operation within the Schengen framework.

In addition, new institutions have been given the tasks for the EU-wide investigation and repression of money laundering (and other serious transnational crimes). Europol, in action since 1999, received a mandate for the analysis of transnational money laundering in 2000. With the amendment of its statute in 2002, it now also has operative prerogatives that allow Europol officers to ask for the initiation of police investigations in the Member States, and to participate in them. It has created an analysis file for money laundering offences and made money laundering a horizontal priority of its work programme for 2003, but no outcomes have been presented yet. Apparently, it generally suffers from insufficient forwarding of data from the national police in the Member States to Europol, on which it is dependent for its analysis[8]. From the perspective of combating EU-wide money laundering, the extension of Europol's analytic and operative capacities, e.g. via granting it access to the Schengen Information System, could deliver added value. Yet, any such step would need to go hand in hand with improved judicial oversight of the European police force. The current control mechanisms lack the qualifications and the distance that are common practise in the national criminal procedures of all Member States.

Eurojust, in action since 2002, brings together prosecutors, judges or police officers from the Member States in order to co-ordinate transnational investigations. During its first year in operation, among the 202 cases investigated by Eurojust, only two percent were money laundering cases. However, many other cases had money laundering connections, which once more emphasises the problems of treating this crime in isolation.

3. Basic deficiencies and future prospects

The activism inside the EU with regard to improving the repression of transnational money laundering appears impressive. But due to their recent origins, results of most measures cannot be evaluated yet. In fact, except for the European Judicial Network, Eurojust and Europol, almost all measures are still in their implementation phase. The transposition of EU conventions and framework decisions is proceeding slowly and unevenly in and among the Member States, which makes it very complicated for the criminal law practitioners to know where and since when specific legislation is in force. E.g., until now, only Denmark, Portugal and Spain have ratified the convention and the protocol concerning mutual legal assistance in criminal matters. Conventions come in force once half of the Member States have ratified them – and then only in these countries. Thus, an area of freedom, security, and justice is emerging, but it remains less common and less real than official rhetoric suggests.

Many observers blame the institutional framework of the EU's third pillar for these implementation deficiencies. The Convention on the Future of Europe has proposed to fully communitarise Justice and Home Affairs in the EU[9]. This would include the full competence of the European Court of Justice, which would help to ensure faster and more coherent implementation. In the current third pillar, implementation depends on the good will of the Member States, because conventions and framework decisions lack "direct effect", and their transposition therefore cannot be judged by the European Court of Justice. The proposed integration of the Charter of Fundamental Rights into the future EU constitution would mean that civil and human rights receive more solid legal guarantees at the EU level. Communitarisation would also imply the full participation of the European Parliament via the co-decision procedure, whereas today, it can only give opinions on third pillar legislation. This would bring the necessary democratic control for this sensitive field, where questions of data protection, procedural safeguards for suspects and defendants, or police competencies are at issue.

Peter HÄGEL
(*peterhaegel@aol.com*)

For further to :

HÄGEL (P.), *Geldwäschebekämpfung durch die EU. SWP-Studie S37*, 2003, Berlin, Stiftung Wissenchaft und Politik.

[5] BERNARDI (A.), Europe sans frontières et droit pénal, *Revue des Sciences Criminelles et de Droit Pénal Comparé*, 2002, 1, 1-13.

[6] *Final Report on the first evaluation exercise – mutual legal assistance in criminal matters* (OJ C216, 01.08.2001, p. 14), 18.

[7] *The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium* (OJ C124, 03.05.2000, 1).

[8] This problem is currently the topic of another mutual evaluation exercise between the Member States.

[9] *Cf. Final report of Working Group X "Freedom, security and justice"* of the Convention on the Future of Europe, *http://register.consilium.eu.int/pdf/de/02/cv00/00426d2.pdf*.

MAIN MEASURES AGAINST MONEY LAUNDERING AT THE EU LEVEL

Preventive Measures

Repressive Measures

National Harmonisation | *Co-operation between states* | *Repression via EU law enforcement*

Control of financial transactions

91/308/EC: Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L166, 28.06.1991, p. 77).

2001/97/EC: Directive 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 (OJ L344, 28.12.2001, p. 76).

Co-operation of FIUs

2000/642/JHA: Council Decision of 17 October 2000 concerning arrangements for co-operation between financial intelligence units of the Member States in respect of exchanging information (OJ L271, 24.10.2000, p. 4).

Criminalising money laundering

98/699/JHA: Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (OJ L333, 09.12.1998, p. 1).

Approximation of repressive measures

2001/500/JHA: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L182, 05.07.2001, p. 1).

Facilitating judicial co-operation

98/428/JHA: Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (OJ L191, 07.07.1998, p. 4).

http://ue.eu.int/ejn

2000/C 197/01: Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C197, 12.07.2000, p. 1).

2001/C 326/01: Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C326, 21.11.2001, p. 1).

Mutual recognition of arrest warrants

2002/584/JHA: 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ L190, 18.07.2002, p. 1).

Europol analysis & investigation

2000/C 358/01: Council Act of 30 November 2000 drawing up on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol Convention) of a Protocol amending Article 2 and the Annex to that Convention (OJ C358, 13.12.2000, p. 1).

2002/C 312/01: Council act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol (OJ C312, 16.12.2002, p. 1).

http://www.europol.eu.int

Eurojust Investigation

2002/187/JHA: Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L63, 06.03.2002, p. 1).

http://www.eurojust.eu.int

Cf. also the new Art. 29 of the Treaty on European Union after the Treaty of Nice.