

*Research note*

## **Money Laundering: A New Perspective in Assessing the Effectiveness of the AML Regime**

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**Abstract:** This article offers a review of anti-money laundering (AML) laws by adopting a critical perspective on the use of criminal law to tackle economic problems. The article questions whether the offence of money laundering is an adequate tool to cope with issues, such as dirty money and illicit financial flows, which are embedded in the current deregulated financial system. In particular, it looks at the European AML lawmaking process and at its implementation at a national level. It analyses the interests, needs and expectations that alimented the EU AML lawmaking process, with in the background the general tendency to harden white-collar crime legislations, with the goal of hindering economic crime in a situation of financial insecurity. Furthermore, it deals with the legal challenges that the continual widening of the criminalisation of money laundering has posed, which could constitute an obstacle for the effective enforcement of such measures.

**Keywords:** European Anti-money laundering policy – interests protected by AML law – effectiveness of AML law – symbolic legislations

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## Introduction

This article offers a critical perspective on Anti-Money Laundering (AML) laws. It debates the issues posed by the continuing and widening criminalisation of Money Laundering (ML) and examines whether the crime of ML threatens the core of the financial system. The focus is mainly on the way national legal cultures and enforcement practices in the European Union (EU) have responded to conduct which has been criminalised as ML. The underlying hypothesis is that the AML regime plays a symbolic role, while ML has been tolerated as the collateral effect of a deregulated financial system.

A recently published work on the effectiveness of European AML policies concludes that while it is possible to estimate what AML policies cost, it is almost impossible to quantify their benefits (Unger *et al.*, 2014: 218). Although there is as yet no agreed consensus on what constitutes the best method to assess AML laws<sup>1</sup>, a considerably vast body of literature exists that contests the effectiveness of these AML laws.<sup>2</sup>

Lawmakers<sup>3</sup> have been focusing on expanding the reach of AML in order to improve its effectiveness, yet without providing legitimacy for such expansion. While the European discourse on ML stresses the absolute urgency of protecting the soundness of the financial system from the infiltration of ill-gotten capitals, in practice the vague formulation and the further expansion of the ML offence, which contrasts with domestic legal principles of EU countries, results in a cumbersome implementation of these AML law. This article offers an original perspective on this subject by raising the hypothesis that those unsolved legal issues show the lack of political will to effectively tackle “dirty money” and illicit financial flows.

The article starts by tracing the development of European AML law and analysing the EU legislator’s declarations of intent. The emphasis will be placed on how the ever-changing new functions that European lawmakers attribute to the AML have impacted on its reception by national legal systems, and thus, how effectively it has been applied. While the vague wording of the ML offence has allowed for the tackling of ever-new

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<sup>1</sup> The FATF has set out standards for the assessment of AML effectiveness: the “Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations” (2004, updated in February 2009); “The AML/CFT Evaluations and Assessments: Handbook for Countries and Assessors” (2009). Other assessments have been carried out by the European Commission, e.g. the Report on the application of the Third AML Directive of 2012, and by the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). Private actors have also released such reports. See also Ferwerda (2009); Machado (2012); Yeandle *et al.* (2005); Unger *et al.* (2014).

<sup>2</sup> See among others Alldridge (2008); Arzt (2013); Bassiouni (1989); Bosworth-Davies (2008); Gathii (2010); Levi and Reuter (2006); Mitsilegas (2003); Naylor (2002); Nestler (2010: § 261 Rn.15); Pieth (2004); Sharman (2011); Zagaris (2007); Stessens (2000); Wang (2011).

<sup>3</sup> For the purposes of this paper, the terms “legislator” and “lawmaker” will be used to indicate all actors that take part in the lawmaking process.

emergencies, and the processing of a broader range of information on ML risks,<sup>4</sup> it has also raised dogmatic issues that could undermine the acceptance of such AML laws by national legal cultures, thus frustrating the implementation of policy. The second part of the article focuses on the domestic debates concerning the controversial issues raised by the criminalisation of ML, for it is particularly in regard to criminal law that EU member states are still reluctant to give up their sovereignty. It is, therefore, of crucial importance whether overarching AML policies respect principles embedded in national legal cultures, such as the principles of proportionality and of subsidiarity. A determining factor of effectiveness is, indeed, the level of perceived legitimation of a law (Machado, 2012).

### **Tracing legislative intents: a closer look at the European AML lawmaking process**

From the very beginning, the ML offence was drafted broadly to allow for it to be interpreted in such a way as to satisfy the various interests of a range of actors that took part in the lawmaking process. Very different, indeed, were the motives that triggered the respective legislatures to enact such laws. In the US, it was the need to wage the “war on drugs”. In the EU, on the other hand, the motive was initially to counteract politically inspired extremist terrorism.<sup>5</sup> Also, whilst banks sought to protect their confidential relationships with clients, the public at large was concerned with the threats posed by organised crime. The international community initially agreed to resort to criminal law because of the extreme danger that illicit trafficking and the consumption of narcotics posed to national security and public health. However, the vagueness of the wording has allowed lawmakers to fill the definition of the offence by taking into account continually unfurling emergencies. The result has been that the ML laws have assumed the additional function of combating the financing of terrorism, the funding of the proliferation of weapons of mass destruction (WMD), tax evasion, and other types of criminal conduct related to the recent financial crisis (2008-2010).

#### *The genesis of AML law: a patchwork of different expectations*

Throughout history, people have deployed a variety of tactics to ensure that they enjoyed the proceeds of their criminal activities without being prosecuted or having their assets confiscated (Johardt, 2013: 18). While the motives for engaging in this malpractice date back a long time, the legal concept and criminalisation of money laundering is a fairly recent invention. If the Vienna Convention of 1988 is considered the treaty that created

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<sup>4</sup> Countries with a high level of information sharing and a wide definition of ML produce higher convictions rates. However States where information is less shared, broad notions of ML cause impasses, due to the pressure exerted on bottlenecks (Unger *et al.*, 2014: 137).

<sup>5</sup> In particular, it was an attempt to counter the threat of the *Rote Armee Fraktion* and the *Brigate Rosse*, respectively in Germany and Italy. See M Pieth (2004: 4).

AML criminal law at the international level<sup>6</sup>, the Financial Action Task Force's (FATF) Forty Recommendations that were issued shortly thereafter, in 1990, introduced the prudential approach to combating ML by emphasising the role of financial institutions in its prevention<sup>7</sup>. These two aspects, the repressive and the preventive one, still characterise current AML policy.

What initially triggered the European legislature to adopt AML measures was the need to counter extremist terrorism in Europe. The Council of Europe started looking with suspicion at illicit transfers of funds with a criminal origin that were used frequently by terrorist and political extremist groups to perpetrate further crimes. As a consequence of “public anxiety” about “acts of criminal violence, such as hold-ups and kidnappings”, in 1980 the Committee of Ministers of the European Community adopted Recommendation 10 to “define an overall policy” to tackle the serious problems generated by the laundering of funds of criminal origin.<sup>8</sup> Aiming at preventing the spread of further criminal acts by terrorist organisations that injected illicit funds into the economic system, the Committee called upon banks to participate in a common effort with law enforcement agencies to prevent and to repress such acts<sup>9</sup>. However, EU Member States that were not yet ready to endorse such rules in their respective national legal orders did not implement the Recommendation (Nilsson, 1991: 423).

In the aftermath of the Vietnam War, in the wake of the United States' interest in tackling drug trafficking, the United Nations (UN) adopted several conventions criminalising the consumption and trade of psychotropic substances.<sup>10</sup> Also the fifteenth Conference of the European Ministers of Justice of 1986 “discussed the need to combat drug abuse [...], by, for example, by freezing and confiscating the proceeds from drug trafficking”<sup>11</sup>. The “war on drugs” appeared to hold more chances of success than the EU's

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<sup>6</sup> The ML offence, in the three-fold definition that has remained in force so far, was conceived in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention of 1988), under Article 3(1) b i and ii and c. Although this instrument does not use the term “money laundering”, Article 3 of the Convention requires States to criminalise the conversion or transfer of property, knowing that such property is derived from offences, for the purpose of concealing or disguising the illicit origin, the concealment or disguise of the true nature of property, knowing that such property derived from an offence, and the acquisition, possession or use of property, knowing that such property was derived from an offence. This three-fold notion of ML has been maintained in the following UNCAC of 2000 and in the Palermo Convention of 2003. Although some national legislatures introduced the offence of ML in their penal codes before the UN treaty was adopted, the Vienna Convention is considered the genesis of AML criminal policy. Italy, for instance, adopted in 1978 law d.l. 591/1978, which, under Article 3, introduced Article 648 *bis* of the criminal code; despite the conduct was not labelled as ML, the law criminalised acts of laundering proceeds of crime. In the USA, the crime of ML was introduced in 1986 with the Money Laundering Control Act.

<sup>7</sup> See the FATF “Forty Recommendations of the Financial Action Task Force on Money Laundering” (1990).

<sup>8</sup> CoE Committee of Ministers “Recommendation No. R (80) 10” (1980).

<sup>9</sup> CoE Committee of Ministers “Recommendation No. R (80) 10” (1980).

<sup>10</sup> See, among others, the “Single Convention on Narcotic Drugs” of 1961 and the Convention on Psychotropic Substances” of 1971.

<sup>11</sup> CoE Explanatory Report to the Convention of 1990, Introduction (1) (1990).

bare commitment to combat terrorism and political extremism, and in 1988, the UN adopted the “Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances” (Vienna Convention), which set the basis for the criminalisation of ML<sup>12</sup>. Two years later, in September 1990, the Council of Europe adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention), to “pursue a common policy aimed at the protection of society” from serious crime<sup>13</sup>. Having noted that EU Member States had very different and often inadequate national legal systems to counteract organised crime, the drafters of the Strasbourg Convention sought to lay down the minimum standards for facilitating international cooperation as regards investigative assistance, search, seizure and confiscation-measures, which were considered essential for the suppression of ML.

The introduction of a duty to confiscate and to cooperate internationally to implement forfeiture orders was justified as the only way to deprive offenders of their ill-gotten gains, given the fact that ML was a victimless crime (Stessens, 2000: 4). Moreover, resorting to such an invasive sanction was justified by the need to use a “follow the money” strategy. Given that the imprisonment of top-ranking criminals was not effective, the focus switched to attacking organised crime’s economic power through the confiscation of assets (Buscaglia, 2008; Naylor, 2002). In particular, in the context of the “war on drugs,” the prosecution of dealers and consumers did not yield much success. It was, therefore, decided to tackle organised crime’s Achilles’ heel, namely, the integration and use of the proceeds of crime in the lawful economy.

Thus, initially, the magnitude of the drug problem and the urgency to tackle organised crime justified the use of penal law, as well as the need for enhanced international cooperation, in order to confiscate the profits of crime. However, on the assumption that the polluting capacity of ML derived not only from the proceeds of drug trafficking, but also from other crimes, the European legislature did not limit the scope of ML to drug offences, as the Vienna Convention did<sup>14</sup>. In fact, the “war on drugs” was more of a concern to the US; other countries expected different outcomes from the implementation of the AML policies. For example, French president, Mitterrand, while taking part in the FATF negotiations, signalled an intention to crack down on tax havens, while Swiss banks worried about public confidence in their banking system (Pieth, 2004: 8). Italy criminalised ML in 1978 to tackle armed robbery and crimes cognate to organised crime, such as extortion and kidnapping for the purposes of extortion<sup>15</sup>.

While global consensus was found initially on the topic of drug trafficking, for the European Community, the introduction of a common AML control policy served the

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<sup>12</sup> For an analysis of the internationalisation of the “war on drugs” through the Vienna Convention, see Stewart (1989).

<sup>13</sup> See the Preamble of the CoE “Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime” (1990).

<sup>14</sup> CoE Explanatory Report to the Convention of 1990, General Considerations (8) (1990).

<sup>15</sup> Italian law d.l. 591/1978.

purposes of the creation of the “Single Market”, by way of avoiding that Member States would have adopted measures inconsistent with the completion of the Internal Market, while taking action to protect their own national economies from ML (Gilmore, 1992: XVI). The global fight against ML is indeed perceived as being triggered by the US, as a powerful country that periodically identifies a new enemy to combat according to their simplistic vision of “right and wrong” (Bosworth-Davies, 2006: 347).

Parallel to the adoption of the UN Convention, private agreements among banks underlined the fundamental importance of cooperation between law enforcement agencies and private actors in order to prevent the infiltration of any illegal money in the legal economy<sup>16</sup>. In 1990, the newly created FATF issued Forty Recommendations that left countries free to decide whether to extend the offence of ML to revenues generated by any serious offence<sup>17</sup>. The FATF regime developed as a western product, influenced by the EU and the US (Bosworth-Davies, 2006: 358), indeed, only the interests of western countries were expressly represented in this preliminary phase.<sup>18</sup> The US, in particular, has played an emphatic role in guiding and funding and in exporting its national regulatory model to form the transnational standards, from the definition of the social problem to the shaping of the policies and the FATF methods of monitoring compliance and punishing non-compliance (Machado, 2012: 361).

### *One offence, several purposes: Expanding the reach of the money laundering offence*

As the preventative AML policy expanded its scope, so, too, did the catalogue of “predicate offences”<sup>19</sup> for ML, which resulted in a corresponding increase in the number of acts criminalised by national laws. Yet the extension of the list of predicate offences to crimes others than drug-related offences was carried out without undertaking an adequate debate about the use of criminal law to tackle such new phenomena.

Lawmakers justified the need to expand the scope of AML policy with the argument that this step was necessary to protect the lawful economy from being infiltrated by capital of criminal provenance. The ultimate goal, so the argument went, was to prevent the financial system from being destabilised. None of these arguments were based on any legal grounds. In order to synchronise the EU’s AML policy with the FATF’s Forty Recommendations, the European Legislature adopted the first Anti-Money Laundering Directive in 1991, with the aim of protecting the financial system, particularly public confidence in the stability of the financial institutions concerned with the

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<sup>16</sup> See the Basel Committee on Banking Regulations and Supervisory Practices of 1988, and the subsequently “Wolfsberg Principles” of 2000.

<sup>17</sup> The Forty Recommendations of the Financial Action Task Force on Money Laundering (1990).

<sup>18</sup> Yet, the AML system will be justified with regard to the harm caused by ML to developing economies, see Alldridge, 2008: 446 ss.

<sup>19</sup> Predicate offences are offences, the proceeds of which may become the subject of money laundering.

laundering of ill-gotten gains<sup>20</sup>. Like the Strasbourg Convention, the Directive did not limit the scope of its application to drug offences. The European Community was, moreover, afraid that launderers would take special advantage of the freedom of capital movement and of the freedom of supplying financial services in the single market. This raised the necessity to implement a preventive policy, in addition to the repressive one set out in the Strasbourg Convention, which aimed at requesting the participation of private actors in defence of the free market. It was, indeed, underlined that “preventing the financial system from being used for money laundering is a task which cannot be carried out by the authorities responsible for combating this phenomenon without the cooperation of credit and financial institutions and their supervisory authorities”<sup>21</sup>.

The years between the first and the second directives were marked by a shift in the policy agenda from the “war on drugs” to the fight against transnational organised crime<sup>22</sup> and, by quite a large consensus, in favour of the extension of the offence of ML to tackle further crimes (Mitsilegas, 2003: 87). Indeed, the Second Directive underlined the “trend in recent years towards a much wider definition of money laundering based on a broader range of predicate or underlying offences”<sup>23</sup>, and recalled the necessity of ensuring a wider range of predicate offences in order to facilitate suspicious transactions reporting. The events of 9/11, in addition, had diverted the attention to the fight against terrorism and “from that date on the money laundering Directive was widely considered as part of the fight against terrorism”<sup>24</sup>.

In the subsequent years, lawmakers focussed more and more on the threats posed by ML with regard to the financial system. In the wake of the growing awareness about the negative effects of offshore jurisdictions and tax evasion, questions relating to ML and tax matters have become linked, since ML was considered an effective measure to counteract tax offences, too (Alldridge, 2001: 350). This further amplified the scope of AML policy in the direction of the protection of the financial system. In fact, since the year 2000, the International Monetary Fund (IMF), has supported actions against ML, and has made the fight against ML a priority of its agenda to “protect the integrity of markets and of the global financial framework”<sup>25</sup>.

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<sup>20</sup> Council Directive 91/308/EEC.

<sup>21</sup> Council Directive 91/308/EEC. Also the wording of the title stressed the need to protect the integrity of the financial system: “Council Directive on prevention of the use of the financial system for the purpose of money laundering”.

<sup>22</sup> See, for example, the CoE “Action Plan to Combat Organized Crime” (97/C 251/01) (1997).

<sup>23</sup> See the Preface of Directive 2001/97/EC (7).

<sup>24</sup> European Parliament, “Report on the Joint Text approved by the Conciliation Committee for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 in prevention of the use of the financial system for the purpose of money laundering”. A5 0380/2001. See also the following CoE “Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism” CETS 198 (2005).

<sup>25</sup> See the Factsheet “The IMF and the Fight Against Money Laundering and the Financing of Terrorism”, available at <http://www.imf.org/external/np/exr/facts/aml.htm>, last accessed on 23/09/14.

The Council of Europe's Third Directive highlighted the damages caused by massive flows of money to the stability of the financial sector and to the Single Market. It stressed, furthermore, that "the soundness, integrity and stability of credit and financial institutions and confidence in the financial system as a whole could be seriously jeopardised by the efforts of criminals and their associates either to disguise the origin of criminal proceeds or to channel lawful or unlawful money for terrorist purposes"<sup>26</sup>. Due to domestic budgetary pressure, after the 2008-2010 financial crises, initiatives to tackle the abuse of the offshore world have accelerated. The FATF, the Organisation for Economic Cooperation and Development (OECD) and the IMF have been leading the fight against economic crimes and stressing the link between ML, tax offences and offshore centres<sup>27</sup>, and thus, the economic function of AML policies. Also, the recent proposal for a fourth AML Directive expressively stated that "European legislation has been adopted to protect the proper functioning of the financial system and of the Internal Market"<sup>28</sup>. While focussing on the protection of the Internal Market, European lawmakers have not enhanced individual and collective positions; instead, they have defended purely economic rules.

### **Controversial issues relating to the current AML policy**

At a national level, especially in countries with strongly embedded criminal law principles, the versatile use of the offence of ML to tackle ever-new emergencies has raised legal challenges that, far from being purely dogmatic, may hinder the effective implementation of such measures.

Firstly, there is as yet no consensus among EU Member States on the interests protected by the offence of ML. It has been observed that the EU Member States have, among themselves, a widely varying understanding of the purposes of AML law. Some perceive it as an anti-drug policy, some as a measure against tax evasion, and some as a tool to curb corruption (Unger *et al.*, 2014: 237). National legislatures have adopted different approaches: some consider the offence of ML as a property crime; others have included it among the offences against the administration of justice; while others identify the interest protected by the law criminalising ML with the financial sector<sup>29</sup>. In addition,

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<sup>26</sup> See the Preface of Directive 2005/60/EC (1).

<sup>27</sup> For the analogies between tax evaders and money launderers, see Christensen (2013: 35ss). Sharman regards critically the FATF's approach to regulate offshore centres (2011); Also Alldridge disapproves of the approach of tackling ML and tax evasion under the same category of offshore (2008: 447).

<sup>28</sup> "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" 2013/0025 (COD).

<sup>29</sup> See, for example, articles 305 bis and 305 ter of the Swiss Penal Code and article 301 of the Spanish Penal Code, which include ML among the offences against the patrimony and against the socio-economic order, yet many scholars consider the administration of justice to be the legally protected interest. (see Blanco Cordero, 1997: 171). Belgian article 505 of the criminal code protects the financial



the tendency to amplify the catalogue of predicate offences and the low penalty threshold defining a “serious crime” under European law<sup>30</sup>, along with the vague definition of the *actus reus* for the ML offence, may lead to “an unlimited power of prosecution and punishment” (Mitsilegas, 2003: 125).

Furthermore, notwithstanding the burden created on financial institutions, designated professions and businesses, and on law enforcement agencies to detect ML, and despite the high social costs attached, there is not much evidence of the effectiveness of such policies yet. This fact, which contrasts to the criminal law principles of proportionality and *ultimo ratio*, also shows that such laws are merely “symbolic laws”, enacted with the sole purpose of making it appear that something is being done. The underlying hypothesis is that lawmakers did not put any effort into solving these legal issues while expanding AML law. Also, in order to tackle effectively illicit financial flows, capital mobility would need to be restricted. This has not been addressed in the AML policy agenda. Therefore, it seems that, after all, ML has been accepted as a collateral effect of the current financial system.

### ***The interests protected by the money laundering offence: an on-going debate***

In Germany, the controversy surrounding the demarcation of the interests protected by the offence of ML is particularly vivid. Given its nature as an ancillary offence, the offence of ML is said to protect those interests connected with predicate offences (Oswald, 1997: 63). Furthermore, it maintains the rule of law by reducing the commission of further crimes<sup>31</sup>. Thanks to its proximity to article 258 of the German penal code, which criminalises the assistance in avoiding prosecution or punishment, the offence of ML is regarded as protecting the administration of justice, too. Moreover, it is said to protect the state’s interest in the surveillance of financial transactions—much as the AML preventive regulation does<sup>32</sup>.

Due to this uncertainty, German scholars have defined the offence of ML as a crime “*ohne Herz und Hirn*” (without heart and brain), a pointless offence, whose legally

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system, besides the administration of justice (see Belgian Financial Intelligence Processing Unit, CTIF-CFI, Excerpts from the 5th annual report 1997/8). Italian ML offence, article 648 bis, is included among the offences against property; French article 324(1) that criminalises ML belongs to the third book of the penal code on the offences against property, too.

<sup>30</sup> Article 1 (b) of the “Council Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime” sets the minimum imprisonment sentence to consider an offence a serious offence, to 6 months.

<sup>31</sup> This view is expressed by the German Parliament in the draft of the law that introduced the offence of ML, see Deutsche Bundestag “Entwurf eines Gesetzes zur Bekämpfung des illegalen Rauschgifthandels und anderen Erscheinungsformen der Organisierten Kriminalität, In Drucks. 12/989: 27. According to Barton, the offence of ML should specifically prevent the commission of future crimes. See Barton (1993: 160).

<sup>32</sup> For a complete overview on the debate, see also Althenhain (2002: 395ff) and Heinrich (2015: §29 Rn.7).

protected interest has been trivialised (Arzt, 1997: 34; Arzt *et al.*, 2015: §29 Rn.7). ML is considered a multifaceted offence that serves to tackle a broad range of issues, from organised crime to the soundness of the single market economy, and thus protects a “*Globalrechtsgut*”, a global legal interest. Such a borderless offence is conceived as more dangerous than an offence that does not entail any legally protected interests, since it broadens the borders of criminal action by devolving police duties to designated professions, through the system of reporting suspicious transactions (Arzt *et al.*, 2015: §29 Rn.8).

The harm principle is of fundamental importance when resorting to criminal law. “There cannot be an offence without the harm to a legally protected interest” (Marinucci and Dolcini, 2006: 6), in other words, the harm to a legally protected interest is a *conditio sine qua non* for criminalisation (Paliero, 1992: 449). It has been argued that certain interests are socially so important that they require an anticipated safeguard. Thus, criminal law should punish acts that put in danger those interests, although the interests are not yet harmed. This thought, known as the “remote harm theory”, would allow states to sanction conduct that represents a threat for some interests but does not harm any of them directly<sup>33</sup>. However, by criminalising acts that do not cause direct harm to people, the legally protected interests would no longer serve to guarantee the limiting of criminal sanctions (Fiandaca, 1982: 172; Volk, 1985: 871). This would allow criminal law to be a mere tool for sanctioning socially dysfunctional conducts, without necessarily protecting the individual from materially harmful acts (Patalano, 1991: 634). The link between organised crime and ML is, for instance, contested, because it is too remote, since ML does not cause the direct commission of organised crime offences (Mitsilegas, 2003: 124).

Classic interests protected by law are individuals’ rights; yet new collective interests have been recognised as such, namely the environment, the transparency and the correct functioning of the financial market. The substitution of classic interests by abstract ones, such as the stable growth of the internal economy, as in the case of European AML law, would raise the question whether criminal law is the right tool to tackle economic problems (Rossi, 2012: 89; Severino, 2014: 676).

A further argument in support of making ML a crime is that the criminalisation protects the internal market against the harm caused by ML, and as a result the whole “economic order” is safeguarded. The defence of the “economic order” may yet coincide with the purpose of AML policy rather than with the legally protected interest that legitimates the resorting to a repressive intervention. The difference between the rationale for a law and the legal interests that it protects is fundamental; whereas the former coincides with the overall goal of the policy maker, the latter should be a limit of such policy. Criminal law can aim at achieving general criminal policy purposes only through the concrete protection of legal interests (Moccia, 1995: 739; Hassemer, 1989:

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<sup>33</sup> For a complete discussion on remote harm, see Ashworth (1999); von Hirsch (1996); Wallerstein (2007).

108). The latter argument may prevail if one interprets the notion of an economic order in a way that entails personal rights. In particular, in jurisdictions where the offence of ML is considered to harm personal property, by taking property as a modern, dynamic concept which entails material and immaterial goods and relations of an economic type, aimed at human development, it can be said that by distorting economic relations, act of ML undermines the individual's economic capacity to develop (Moccia, 1995: 740).

This notion of property would, thus, include the economic potential of the individual of acting in a context in which certain rules are respected. According to this approach, a criminal offence against the protected economic asset would consist of any act *contra jus* that would limit the economic potential of the individual, and thus acts of ML. Following this reasoning, the gravity of the harm caused by ML should justify resorting to criminal law, to protect law-abiding individuals disadvantaged by the illicit economic competition carried out also through the laundering of illegal capitals. This would anchor the offence of ML to the protection of the individual's rights.

The AML law is said to protect people's security too. The criminalisation of ML has been justified through the rhetoric of "securitisation" (Calvanese and Bianchetti, 2003: 123; Mitsilegas, 2003). The EU AML regime, in particular, is said to represent a new paradigm of security governance. After the fall of the Berlin wall, when there was no longer a looming threat of war, new risks for society appeared on the political horizon. Organised crime, in particular, was perceived as constituting a general threat to security and human life (Williams and Savona, 1996: 129), and this "highly moralised and subjective evaluation is reflected in the legislative crusade against organised crime" (Mitsilegas, 2003: 11).

ML was defined as "one of the great moral panics of our day" (Alldridge, 2008: 437), threatening the stability of the financial system and the very substance of the State. Tom Naylor speaks about the "need to create another moral panic in order to justify the money laundering proposals". According to these approaches, the criminalisation of ML turns out to be more of a political tool aimed at achieving global governance, while being presented to the public as an essential intervention to guarantee security and well-being. Throughout the debate on securitisation, the legally protected interests were imposed from "above", they did not represent a claim on behalf of the citizens (Baratta, 1982). "This shift is particularly dangerous in that legal certainty and the strict protective limits of criminal law are challenged, and has the potential to lead in what has been called the *dynamisation* of legally protected interests [...]" (Mitsilegas, 2003: 107).

### ***Do we really need the money laundering offence? Would other means be more effective? The Subsidiarity and proportionality test***

A further issue raised with reference to the criminalisation of ML is the fact that it may be possible to prevent the laundering of the proceeds of crime through measures other than through the offence of ML (Alldridge, 2008: 451; Levi and Reuter, 2006: 292). One

of the functions of AML law is tackling organised crime. Besides adopting legal measures to prevent and combat criminal activities, states should address education and development to avoid that criminal syndicates flourish thanks to the availability of “personnel” and the increase of demand of illicit commodities, like drugs. Moreover, banks in western countries are the largest absorbers of illicit flows, mainly deriving from corruption (Shaxson, 2011; Baker, 2005). Destinations are usually secret jurisdictions and offshore financial centres. By providing a veil of secrecy, these structures function as a supply side of corruption and criminal activities committed in developing countries. AML standards, even though require disclosure of information and refuse bank secrecy as a ground to avoid AML duties<sup>34</sup>, have not been so far able to tackle effectively these issues (Sharman, 2008:62).

If the aim of the AML law is to reduce the commission of crimes, the focus on the predicate offences should not be ignored. Taking as an example drug trafficking, the ML discourse does not include a discussion on the appropriateness of legalising certain types of narcotics, in order to diminish criminal activities linked to them<sup>35</sup>. The extension of the designated offences should not suppress local debates on the criminalisation of those offences (Alldridge, 2008: 458). In fact, the elimination of ML would require a total reworking of the financial system, since ML is deeply embedded in the current system of mobile capital (Tsingou, 2010: 629) where bankers have been tolerating the laundering of proceeds of crimes without obvious harm (Levi, 2002: 183). In other words, there are other ways of tackling dirty money, and AML law might not be the most adequate tool to reduce ML.

In regard to the criminalisation of ML, it constitutes a violation of the principle of subsidiarity also known as *ultima ratio*. According to this principle, lawmakers are supposed to limit the use of criminal law to situations where no other measures are available to tackle the matter effectively (Kaufmann, 1983). And if the AML law does not contribute to lowering the incidence of ML, the criminalisation of such conducts is difficult to justify.

The criminalisation of ML seems to violate the principle of proportionality too due to the AML law’s low effectiveness and the high costs of its implementation. This principle imposes a duty on the legislator to limit the use of criminal law only when the benefits are higher than the costs.

The “war on terror” has been often used to impose strict financial regulations on poor countries, without reasonable cost-effectiveness planning, thus resulting in an unbearable burden (Rahn, 2002: 341; Bosworth-Davies, 2008: 180; Sharman, 2011: 55). AML regulations are tailored for complex financial systems and countries that can afford the high costs of implementation. Furthermore, given that *pecunia non olet*, the negative

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<sup>34</sup> FATF Recommendation 9; Art. 40; 31(7) UNCAC.

<sup>35</sup> A discussion about the necessity of changing the current drug policy is taking place in some countries and within the UN. See also J C Garzòn Vergara (2014).

consequences of ML for developing countries are contested, while “far less controversial is the claim that it is against the interests of developed economies that developing economies should get the business” -meaning the dirty money- (Alldridge, 2008: 446). Given its rather hazy effectiveness, AML law is detrimental not only to poor countries but also to weaker and less influential private actors in wealthy countries (Sharman, 2011). Furthermore, AML preventive regulations and especially customer due diligence requirements, despite applied on a risk-based approach, might cause financial exclusion of those who are unable to provide the requested documentation in order to be identified (de Koker, 2006).

In a cost-benefit analysis of criminal law, costs are understood also as the social costs of punishment and exclusion. If these are higher than the benefits, the law infringes the principle of proportionality (Baratta 1990: 94; Marinucci and Dolcini, 2006: 8). Indeed, the analysis of a criminal law’s effectiveness should be performed in light of social costs. According to Baratta, laws that violate other constitutional norms, which set the limits of penal intervention, have an efficiency result of zero (Moccia, 1995: xv)<sup>36</sup>.

### ***AML: an example of a symbolic legislation?***

In times of financial insecurity, there is a particular tendency of hardening the laws enacted against economic crimes. Having previously deregulated the financial system to enhance economic liberties, legislatures resort to criminal law to control illegality in the economy, and thus, protect money savers, taxpayers and consumers. Yet, given the fact that such legal interventions are usually undertaken under urgent constraints and public pressure, the legislature may be more interested in drawing up a symbolic law than an effective one. Although symbolic laws may enhance the government’s political commitment in the eyes of the public, they are not deemed easily applicable in reality<sup>37</sup>. In other words, these laws promise more than they can actually deliver. Symbolic laws are adopted by following the logic of an emergency, which aims at galvanising public consensus in order to appear to be effective (Smaus, 1978; Musco 1993: 88; Donini, 2006; Mantovani, 2006;). Importantly, in the long term, symbolic laws may lead to public distrust of public institutions (C Beccaria, 1997: 80).

With respect to AML law, critical scholars have stated that the system has so far managed to create only a form of new professionalism (Arzt, 2013: 1130), or an appearance of public action (Tsingou, 2010: 630). While there is theoretical support for the perception

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<sup>36</sup> In a cost-benefit analysis of the enforcement of AML policy, for example, the reduction in privacy is considered a social cost (Geiger and Wuensch, 2007: 98). However, it is extremely difficult to measure the amount of it (Unger *et al.*, 2014: 214).

<sup>37</sup> There is a vast literature on the topic of symbolic criminal legislations: see, among others, G Arzt, 1997; A De Vita, 2003: 158; V Ferrari, 1997: 257; L M Friedman, 1975; J Gusfield, 1980; W Hassemer, 1989; H Kindermann, 1989; S Moccia, 1997; E Musco, 1993; L Stortoni, 1992; P Troncone, 2001; M Garcia Villegas, 1994).

that AML policies have contributed to a decrease in the incidence of ML, there is no evidence that this goal has actually been achieved (Unger *et al.*, 2014: 217).

Furthermore, symbolic criminal norms deceive citizens into thinking that their social claims for justice are satisfied, but actually, they do not provide the effective legal protection needed by civil society. These laws create situations of actual impunity covered by the appearance of symbolic punishment (Friedman, 1975: 96; Paliero, 2006: 444). Scholars have interpreted this impunity as a planned impunity, as a desired effect of the practice of decriminalising white collar crime in order for the perpetrators of such crime to avoid being punished (Chambliss, 1969; Chapman 1968: 99; Cottino, 1973: 61). If the class struggle nowadays is conducted through laws which are intended to entrench the position and the interests of the dominant class, while impeding the fight of the lower classes for their rights (Gallino, 2012: 21), it can be argued that criminal AML law could have been formulated in such way as not to harm the interests of money launderers.

The practice of “decriminalisation” theorised by Cottino envisages different ways of avoiding punishment through a blockage of the criminalisation process, which starts with the adoption of a law and ends with the action of law enforcement agencies. The adoption of a planned, ineffective norm is one of the possible ways of blocking such a process (Cottino, 1973). Few white-collar criminals are convicted of ML crimes with draconian punishments. Laws against economic crimes have always been, after all, very harsh on paper, but have not been widely applied in practice (Sutherland, 1949). AML policies are, according to this view, an example of a desired decriminalisation. Another hypothesis is that AML policies strengthen the position of big financial centres and institutions that can turn compliance requirements into marketing opportunities by creating market entry barriers for the less powerful (Tsingou, 2010: 630).

## Conclusions

AML criminal law has been criticised for not being able to reduce the rate at which predicate offences are committed, and thus for not being an effective tool to combat serious crime. A recently published work on the effectiveness of the EU AML policies makes the point that “the cost-benefit dilemma for AML policy is reduced to the question: are we willing to spend almost 44 million Euros, with a reduction in privacy and efficiency costs for unknown benefits?” (Unger *et al.*, 2014: 218). The question could be answered with another question, namely, are we willing to give up on the fight against ML?

The securitisation rhetoric has so far supported the extreme importance of such measures, and AML policy has been growing. Yet, the question could be inverted: Do we really want to fight money laundering and, by doing so, are we also willing to threaten the financial system as we know it today? A certain amount of illicit financial flows may be considered an acceptable price to pay for a market where free mobility of capital is guaranteed.

This article, by recalling the discussion on issues raised by the criminalisation of ML, offers a new point of view to assess the effectiveness of the AML regime. The fact that the criminalisation of ML causes so much uncertainty at a domestic level should be taken into account when evaluating how it is enforced. Moreover, instead of perpetuating the process of expanding the reach of AML, legislators should clarify the goals of such a cumbersome policy. If the aim is to reduce the incidence and scale of ML, this could be achieved in other ways. In addition, an effective prevention of ML would be contradictory to how the financial system works at present.

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