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**5th ANTI-MONEY LAUNDERING DIRECTIVE AND REALITY:
THE FAILURE OF COMPLIANCE AND EXECUTIVE
LIABILITY IN ANTI-MONEY LAUNDERING CONTROLS**

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I declare that I have compiled the paper independently
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ABSTRACT

This thesis studies the current anti-money laundering legislation in the European Union. It examines the effectiveness of monetary sanctions and introduces the concept of personal criminal liability for executives of financial institutions. Through an overview of recent cases and obstacles, this research demonstrates the seriousness of the issue of non-compliance. There is a needed discussion for reforming anti-money laundering laws in the European Union. Both preventative and consequential measures need to be amended. Monetary sanctions alone are weak of a deterrent for financial institutions. Especially smaller Member States lack resources and ability to respond to the increasing cross-border movement of capital via online banking inside and outside the European Union region. The thesis will provide arguments for more concise and detailed legislation regarding the responsibility of financial institutions.

Keywords: Executive liability, anti-money laundering directive, money laundering, European Union

ABBREVIATION

AML – Anti-Money Laundering

CFT – Countering the Financing of Terrorism

AMLDD – Anti-Money Laundering Directive

KYC – Know Your Customer

CDD – Customer Due Diligence

FAFT – The Financial Action Task Force

The Union – The European Union

EU – The European Union

TFEU – The Founding Treaty of European Union

EBA – European Banking Authority

FSA – Financial Supervision and Resolution Authority

FIU – Financial Intelligence Unit

SAR/STR – Suspicious Activity Report / Suspicious Transaction Report

FinCEN – Financial Crimes Enforcement Networks (USA)

PEP – Politically Exposed Person

INTRODUCTION

Financial institutions have become the main gateway for criminals to launder their illicit funds. Money laundering is no longer a business of mafia or drug cartels laundering their money through laundromats, and pizzerias, but a global phenomenon which goes beyond state borders.¹ It covers any type of profitable illegal business. Money laundering as its simplest form is not a complicated process. The goal is to hide the origin of the money by taking steps like transferring money from a bank account to another and purchasing objects to cover the source. The European Union defines money laundering as an intentional “...conversion or transfer of property...for the purpose of concealing or disguising the illicit origin of the property...” or assisting of such act.² In addition, knowingly receiving “the acquisition, possession or use of property” which originates from criminal activity constitutes as money laundering. Aiding, abetting, participating, and associating in such an act is also regarded as money laundering. In organized activity, launderers usually hold several companies, shell, or front, which seem legit, with no illegal activities to cover the true nature.

Rapidly developing technology has created a borderless world when it comes to banking services. Notwithstanding the fact that when internal borders were opened inside the European Union, regulated by The Founding Treaty of European Union (TFEU), and when the free movement of people, capital, and goods was established, it had similar impacts. Money transfers can be done easily from anywhere with few clicks. Interaction with the banking staff is no longer necessary. New bank accounts can be opened with couple of messages to a bank. It enables us to enjoy more convenient banking services, but on the downside, it is a luxurious opportunity to criminals, too. Money laundering has become a combination of finance and technology.³ It has created a great burden for financial institutions as they are “the first layer of defense”⁴ in the fight against money laundering and financing of terrorism from a state’s perspective. They have instant access to suspicious transactions. Financial institutions bear great risks for their services to be misused by

¹ Keating, T., (2018). We cannot fight cross-border money laundering with local tools. – *Financial Times*, 9 September 2018. Accessible: <https://www.ft.com/content/0397fc40-b281-11e8-87e0-d84e0d934341>, 2 April 2019

² European Parliament and of the Council of 20 May 2015 Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. OJ L 141, 5.6.2015, p. 73–117, art 1 p 83.

³ Boles, J., R. (2015). Financial Sector Executives as Targets for Money Laundering Liability. – *American Business Law Journal*, Vol. 52, No. 3, p 372.

⁴ Ibid.

criminals, hence, are bound to comply with strict legislation regarding compliance and risk management.⁵ Employees may willingly or unintentionally alleviate illicit transactions.

Headlines from all over Europe within the last year has revealed that, in some cases, the whole branch or financial institution is knowingly involved in money laundering.⁶ Several Chief Executive Officers have resigned, and massive monetary sanctions has been ordered. Yet, there has been no real discussion in Europe of where the individual criminal liability stands when it comes to executives of financial institutions. The main question examined in this thesis is, could, in hands of compliance, there be individual criminal liability for executives in the EU law and to what extent? In the examination of this question, the principle of *ultima ratio* will be taken into account. I.e. bring executive liability into consideration when punishing an individual is the last resort. The research methods used are doctrinal research and theoretical research. Doctrinal research is used to interpret the current EU legislation and suggest ways in which the law should develop. Opinions of different EU bodies are reviewed as well as articles and opinions from scholars. Relevant cases are provided to create base for the hypothesis that the EU law considering AML field should be reformed. The suggestion of reform of AML law is presented in the light of theoretical approach. With this approach, a set of principles are determined upon which the law should be based such as the principle of harmonization and mutual recognition along with the principle of proportionality. Currently, there is no guideline for under which circumstances banking license should be withdrawn, let alone, when to punish individuals. Cases presented in this thesis will show, that Member States are cautious and prudent to seek for punishment for individuals. The involvement of the Union in criminal law divides opinions as it is often said to interfere with the sovereignty of a state.⁷ But, as long as the European Union citizens are enjoying the free movement of goods, capital, employment, and establishment guaranteed by TFEU, cross-border crimes must be governed by the Union.

The first chapter explores the very basics of money laundering. This phenomenon does not only influence the criminals and the financial institution involved, but it affects the society in several levels. Loose Anti-Money Laundering (AML) legislation attracts criminals. At the same time, it sets a state in a bad light with a questionable reputation, increases corruption, and makes it less

⁵ Ibid.

⁶ European Parliament, EGOV, Deslandes, J., Magnus, M., Money Laundering – Recent Cases from a EU Banking supervisory perspective, 2019

⁷ Fichera, M. (2013). Criminal Law beyond the State: The European Model – European Law Journal, Vol. 19, No. 2, p 175.

attractive for legit business owners.⁸ Furthermore, international organization and unions (including the Financial Action Task Force and the European Union) keep public record of countries with weak AML legislation.⁹ These lists of high-risk countries create more obligations to financial institutions, and they are obliged to apply enhanced customer due diligence (CDD) when they are dealing with natural persons or legal persons originating from these countries.¹⁰

The second chapter introduces the concept of criminal liability for executives and examines money laundering scandals in Europe. The first part will start by explaining the structure of management and compliance in a broad sense in a financial institution. Monetary sanctions, alone, are weak deterrents for companies.¹¹ A discussion from the United States is presented to give more perspective to the issue. It also explains the classical criminal law theory covering *actus reus*, *mens rea*, recklessness and reflecting those into non-compliance.

The chapter continues to the recent money laundering scandals in Europe. Denmark, Estonia, Sweden, Latvia, and Netherlands have all witnessed tremendous scandals. The brutal reality is that these events have consequences, not just to the entities involved, but the European Union itself. It is time for a fundamental analysis of the state of the financial sector in Europe.

The third chapter covers the European Union legislation keeping the focus on the 4th and the 5th Anti-Money Laundering Directive and their interpretation. The latest Directive, which must be implemented into the national legislation of Member States in 2020, does not bring changes to sanctions or criminal liability for individuals concerning financial institutions. The meaning of “proportionate, dissuasive and effective”¹² sanctions will be evaluated concluding that such vague wordings should be changed. The importance of cooperation and its improvements will be discussed through the European Commission’s and the Parliament’s recent proposals.

The concluding chapter gives overall proposals and reasoning. The purpose of this thesis is to present a critical view of the current legislation and harmonization of the European Union legislation in its Member States, its effectiveness, and to bring the idea of criminal liability for executives into discussion. The European Union should amend AML Directive so that criminal sanctions would be specified, and it would result in uniformed measures among Member States. Criminal sanctions for individuals for non-compliance should not differ too much inside the European Union. This can be solved by creating culpability scale with minimum requirement for

⁸ The International Bank for Reconstruction and Development/The World Bank / The International Monetary Fund, Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, p II-3.

⁹ FAFT high-risk country listing, accessible: <http://www.fatf-gafi.org/countries/#high-risk>, 11 April 2019

¹⁰ OJ L 141, 5.6.2015, p. 73–117, art. 8 p 90.

¹¹ Malloy, T., F. (2003). Regulation, Compliance and the Firm. –*Temple Law Review*, Vol. 76, No. 3, p 453 – 54.

¹² OJ L 141, 5.6.2015, p. 73–117.

a maximum imprisonment sentence. Money laundering is a matter of cross-border crime, which the European Union has competence. The competence is based on two principles: harmonization of the law and mutual recognition.¹³ The principle of mutual recognition is often considered to be one of the corner stones of the EU criminal law policy.¹⁴ The principle was introduced in the European Court of Justice ruling of the *Cassis de Dijon* case in which was held that goods legally sold in one Member State must be allowed to be sold in another Member State.¹⁵ In criminal law perspective this means that judgements and decisions from one Member State must be recognized in other Member States.¹⁶ Harmonization secures the principle of mutual recognition and is a part of political unity in the EU.

¹³ Summers, S., Schwarzenegger, C., Ege, G., Young, F. (2014). *The Emergence of EU Criminal Law – Cyber Crime and the Regulation of the Information Society*. United Kingdom: Hart Publishing, p 78.

¹⁴ Stranbakken, A., Husab, E., J. (2005). *Harmonisation of Criminal Law in Europe*. Antwerpen: Intersentia. p 26.

¹⁵ Decision 20.02.1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78, EU:C:1979:42

¹⁶ Summers, S., Schwarzenegger, C., Ege, G., Young, F. (2014). *The Emergence of EU Criminal Law – Cyber Crime and the Regulation of the Information Society*. United Kingdom: Hart Publishing, p 79.

1. BACKGROUND

1.1. Money Laundering

Simply put, money laundering is making illicit funds look licit. Generally, it is a complex pattern which may contain many phases and steps. Money laundering is usually interrelated with drugs and guns, but it concerns any illegal activity that includes gaining profit.¹⁷ In theory, money laundering can be divided into three stages. The stages are placement, layering, and integration.¹⁸ The first step, placement, means that the illegally gained money is transferred away from the scene of the crime to a less suspicious place, or into a less attracting form.¹⁹ This can be, for example, putting the money into a bank account which is under another individual's name, exchanging currency into another currency, or simply converting bigger notes into smaller notes or vice versa. The second step, layering, means separating the money and origin from each other.²⁰ This can mean multiple transactions and transfers between different bank accounts, banks, and countries. This decreases the traceability of the origin of the money. Integration, the last step, involves the use of financial or commercial operations to convert the illicit funds to legitimate business earnings.²¹ False invoices and payments from one business to another, secure deposits for a loan from a foreign bank account, or movable or immovable property transactions to create an illusion of licit activities, are commonly used.²²

Money laundering as a phenomenon is not new, but it has certainly reached astonishing level and “unintended consequences”²³ due to globalization and technology. When the whole society is enjoying globalization and technology developments in daily life, so are the money launderers.

¹⁷ Schroeder, W. R. (2001). Money Laundering. A Global Threat and the International Community's Response. – *FBI Law Enforcement Bulletin*, Vol. 70, No. 5, p 2.

¹⁸ Schott, P., A. (2006). *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*. 2nd ed. The United States of America: The International Bank for Reconstruction and Development/The World Bank / The International Monetary Fund, p I-7.

¹⁹ *Ibid.*

²⁰ *Ibid.* p I-8.

²¹ Schroeder, W. R. (2001). Money Laundering. A Global Threat and the International Community's Response. – *FBI Law Enforcement Bulletin*, Vol. 70, No. 5, p 3.

²² *Ibid.*

²³ *Ibid.*, p 2.

Transferring funds from one account to another, or from country to country, can be done faster than ever and is just a few clicks away. To detect money laundering efficiently, the cooperation between countries, law enforcement, financial regulators, and financial institutions is vital. It is impossible to know how much money, annually, is being laundered worldwide because the criminals do not keep statics of their illicit assets. However, according to the United Nations Office on Drugs and Crime it roughly estimates to 2 to 5 percent of the global gross domestic products. It is between \$800 billion to \$2 trillion in US dollars.²⁴ The gap between these approximate numbers is huge, yet, the lowest point describes the seriousness of the issue.

1.2. Socio-Economic Effects and Risks

Money laundering has both social and economic effects. A country known as a haven for money laundering attracts criminals.²⁵ Typically, a haven for money laundering lacks AML/CFT (Anti-Money Laundering/Countering the Financing of Terrorism) procedures and does not comply with the international standards, such as the Financial Action Task Force Recommendations²⁶. Their legislation and penalties towards money laundering crimes are poor and ineffective.²⁷ Moreover, this increases corruption, and has a direct link to bribery of authorities like law enforcement, lawyers, prosecutors, and even courts.²⁸ On the other hand, a country with persuasive and broad AML/CFT framework, legislation, and implementation decreases its attractiveness to criminals, and increases the creditability of that country, making it a more appealing choice for foreign companies to form branches or cooperate with local businesses.²⁹ The Financial Action Task Force (FATF), which is an internationally recognized impartial organization, has set minimum requirements for countries considering AML/CFT. Moreover, the organization keeps public records of countries which lack these set requirements or have refused to cooperate. The European Union has formed such a high-risk country list as well.³⁰ These high-risk countries are taken into

²⁴ United Nations Office of Drugs and Crime, Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes Research Report, 2011

²⁵ Schott, P., A. (2006). *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*. 2nd ed. The United States of America: The International Bank for Reconstruction and Development/The World Bank / The International Monetary Fund, p II-2.

²⁶ Financial Action Task Force, Recommendations, 2012

²⁷ The International Bank for Reconstruction and Development/The World Bank / The International Monetary Fund, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, p II-2.

²⁸ Ibid.

²⁹ Ibid. p II-3.

³⁰ European Commission, Press Release IP/19/781, 2019. Accessible: http://europa.eu/rapid/press-release_IP-19-781_en.htm, 19 April 2019

serious consideration, by the Anti-Money Laundering Directive, for setting out the framework for special measures required to form client/customer relationship with both legal and natural persons originating from these countries.

The same effects apply with financial institutions. Financial institutions that are discovered to have dealt with criminals, or money laundering, can suffer from not only a bad public image due to unflattering news, but also concrete loss of profitable business, customers, cooperators, investors, and depositors.³¹ This incident happened in 2016 with the Swedish-based bank, Nordea, after the so-called Panama Papers leaked³². The Panamanian tax solution firm, Mossack Fonseca, was used by Nordea to help their customers buy and maintain secretive companies in tax havens. Several organizations in Finland announced they were leaving Nordea due to the scandal, including The Industrial Union TEAM, the Finnish Transport Workers Union, and political parties like the Social Democrats and True Finns.³³ Just a year earlier the Swedish FSA had ordered Nordea to pay 50 million kronor (\$5.5 million) sanctions for large deficiencies in anti-money laundering defenses.³⁴

Being involved in money laundering subjects' financial institutions to diverse types of risks. These risks can be divided into four categories. Reputational risk is the one explained above. It causes "a loss of confidence in the integrity of the institution"³⁵. Operational risk is either caused by a failed human action or system, causing potential loss.³⁶ Legal risks appear in legal costs, lawsuits, penalties, sanctions, and even closure of the institutions.³⁷ Lastly, concentration risk is "the loss potential of a company due to credit or loan exposure to borrowers."³⁸ Concentration risk, in practice, means a situation in which the bank lacks of Know Your Customer information (KYC) regarding specific customers, natural or legal persons. The most common reason for sanctions ordered to a financial institution is the lack of KYC information and poor CDD. These risks do not cancel each other out and can be faced at the same time.

³¹ The International Bank for Reconstruction and Development/The World Bank / The International Monetary Fund, Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, p II-4.

³² Nordea Bank AB, Report on Investigation of Nordea Private Banking in Relation to Offshore Structures, 2016

³³ YLE. (2016). *TEAM union leaves Nordea, taking banking business elsewhere*. Accessible:

https://yle.fi/uutiset/osasto/news/team_union_leaves_nordea_taking_banking_business_elsewhere/8833393, 13 March 2019

³⁴ Finansinspektionen 13-1784

³⁵ The International Bank for Reconstruction and Development/The World Bank / The International Monetary Fund, Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, p II-5.

³⁶ Boles, J., R. (2015). Financial Sector Executives as Targets for Money Laundering Liability, *American Business Law Journal*, Vol. 52, No. 3, p 17.

³⁷ Ibid.

³⁸ Ibid.

2. INDIVIDUAL LIABILITY

2.1. Criminal Liability for Executives

2.1.1. Risk Management, Compliance and Liability

Targeting individuals for AML non-compliance is complex. The structure of risk management and organization needs to be explained. According to the Basel Committee on Banking Supervision's guide "The Internal Audit Function in Banks"³⁹, which is also recognized by the European Union, risk management is divided into three levels called "Three Lines of Defense".⁴⁰ The first line of defense is front office, which, in the AML field, means the employees interact directly with clients, and form and enforce contracts with them.⁴¹ They apply the AML risk standards, both internal and external rules, making sound judgements and evaluating possible risks. It is transaction-based and on-going. The second line of defense is called back office, which consist of the risk management and compliance department.⁴² The risk management and compliance department are responsible for screening, monitoring, limiting, and reporting risks occurring in the first line of defense. These are usually AML officers, analysts, and managers. The third line of defense is internal audit, which is an independent and impartial body inside of the company.⁴³ The main function is to make independent reviews and enforce actions taken inside the company. Their work is risk-based and periodic. The idea of the levels is to create impartial bodies from each other inside the company and eliminate possible conflict of interests. Thus, in this simple model, it can be seen how the responsibility is divided among every level in the company. However, the final responsibility of the function of the company is on Board of Directors and Chief Executive Officer (CEO).⁴⁴ Therefore, there are a lot of people taking part for the decision making and screening transactions on a daily basis. In classical approach, the CEO is responsible for creating adequate behavioral standards so that the decision making is in line with the risk appetite set by the board.⁴⁵

Financial institutions face increasingly complex anti-money laundering compliance responsibilities and risk management obligations, including assisting and informing governmental

³⁹ Basel Committee on Banking Supervision, *The Internal Audit Function in Banks*, 2012, p 12.

⁴⁰ *Ibid.* p 3. *see the chart*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Financial Stability Board, *Principles for An Effective Risk Appetite Framework*, 2013, p 6 – 8.

⁴⁵ *Ibid.* p 8.

bodies such as Financial Intelligence Units (FIU).⁴⁶ As stated previously, there are several risks that financial institutions face. When these risks occur, and become reality, it will cause harm to the financial institution and possibly lead them to under a criminal investigation. A person being accused of laundering money often faces both civil and criminal proceedings including fines, confiscation of property, freezing of assets and is sentenced to imprisonment. Financial institutions are met with sanctions ordered by FSA or through settlement.⁴⁷ This has started heated conversations, especially in the United States, after HSBC was ordered to pay a \$1.9 billion US Dollars fine for allowing the Mexican drug cartel, Sinaloa, and the Colombian drug cartel, Norte del Valle, launder \$881 million US Dollars through HSBC's Mexican branch, and also, for doing business with Iran.⁴⁸ Critics in the United States feel that sanctions ordered to financial institutions for breaching anti-money laundering obligations are more of a "slap on the wrist" than actual punishment when it does not include personal fines or jail time for the people in charge.⁴⁹ Consequently, this has led to the bill "Holding Individual Accountable and Detering Money Laundering Act".⁵⁰ The bill consist of proposals including criminal penalties for executives that facilitate evasion of a program or controls, which could lead up to 20 years imprisonment.⁵¹ It also states that in cases of exchanging the prison sentence into a monetary penalty through settlement, the Department of Justice will report to the Congress why it did or did not pursue a prison sentence.⁵² The Bill has not been approved yet. But the essential message is clear: Corporations do not commit crimes, people do. The intention of a company is obvious: To maximize profit. When it comes to monetary sanctions and non-compliance, the company may not obey the law when the economic interest exceeds the risks and possible sanctions.⁵³ This is a familiar phenomenon especially in environmental obligations.⁵⁴ The benefit of non-compliance overcomes the deterrence and is worth trying.

⁴⁶ Boles, J., R. (2015). Financial Sector Executives as Targets for Money Laundering Liability. – *American Business Law Journal*, Vol. 52, No. 3, p 366.

⁴⁷ *Ibid.*, p 367.

⁴⁸ Viswanathe, A., Wolf, B., (2012). HSBC to pay \$1.9 billion U.S. fine in money-laundering case. – *Reuters*, 11 December 2012. Accessible: <https://www.reuters.com/article/us-hsbc-probe-idUSBRE8BA05M20121211>, 16 March 2018

⁴⁹ Boles, J., R. (2015). Financial Sector Executives as Targets for Money Laundering Liability. – *American Business Law Journal*, Vol. 52, No. 3, p 367.

⁵⁰ H.R.4242, 114th Congress (2015-2016)

⁵¹ *Ibid.* Section 120 Criminal Penalties

⁵² *Ibid.*

⁵³ Malloy, T., F. (2003). Regulation, Compliance and the Firm. – *Temple Law Review*, Vol. 76, No. 3, p 453-54.

⁵⁴ *Ibid.*

2.1.2. Criminal Law Principles

Typically, criminal acts consist of two basic elements – *actus reus* and *mens rea*. As *actus reus* refers to a guilty act. *Mens rea* refers to a guilty mind.⁵⁵ In other words, the committed act must be criminalized and there must have been an intention to commit the act. The simplest example would be someone intentionally taking a gun, pointing it at another person, and shooting them to death, while knowing the consequences. Or someone laundering illicit funds to make them look licit, in this context. However, most of the time things do not play out so simple. There are mistakes and accidents. There are also reckless and negligent actions. Recklessness means taking “an unjustifiable risk”⁵⁶. Being reckless means a reasonable person doing something, recognizing the risk it bears, and doing it regardless. In some instances, some risks are justifiable. Public transportation regardless of the risk of an accident is justified because it serves the public interest. A surgeon performing a surgery to a patient is justified because it serves the interest of the patient (the life and the health of the patient).⁵⁷ Things that can be socially justified, are often not considered recklessness.⁵⁸ Some may argue, that similar risks are involved in banking, because banking is necessary for the infrastructure of a state. It needs to exist nevertheless of the fact that someone may and will misuse the services. This type of risk is justifiable and almost unavoidable. There will always be bad apples in the basket. But, what if people responsible for AML compliance of the financial institution fail to detect money laundering due to reckless or careless act, or by ignoring the signs? What if it is systematic, goes on for years, and still passes every line of defense? Can it still be claimed that there is no individual to be held accountable for what has happened? With the legislation existing in many European countries, it is possible. There is no precedent on this matter, however. One way to further the idea of individual liability is through the European Union criminal law.

⁵⁵ Allen, M. (2013). *Textbook on Criminal Law*. 12th ed. United Kingdom: Oxford Press. p 58.

⁵⁶ *Ibid.*, p 82.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p 83.

2.2. Cases from Europe

The European Union has been working for a functioning and harmonized AML legislation to combat money laundering, and terrorism financing for a few decades. Recent years have shown us that there is more to work on concerning compliance and financial institutions. Cases presented in this chapter show disturbingly common features. The trend seems to be non-compliance regarding non-residents, both natural and legal persons, and suspicious transactions to and from third countries. Financial institutions in European Union are being used for the transit of illegal money flows. The purpose of this chapter is to illustrate the severity of non-compliance through cases.

2.2.1. Danske Bank in Estonia

At the time of this research, this case has not been settled and the investigation is still on-going. Regardless, it will work as a perfect example of how systematic and on-going non-compliance can be, and what levels and severity it might reach. In fall 2018, Danske Bank published the “Report on the Non-Resident Portfolio at Danske Bank’s Estonian branch” made by an impartial Danish law firm, *Bruun&Hjejle*.⁵⁹ Its content was shocking and worrisome. During a one-year investigation on an Estonian branch, it was discovered that roughly 200 billion Euros (\$234 billion US Dollars) was laundered, via the Danske Bank’s system, between 2007 to 2015. Furthermore, these suspicious transactions were made by non-resident customers, which lacked CDD.

In February 2007, Danske Bank announced its acquisition of the Finnish-based Sampo Bank in Estonia. Naturally, this transition brought in customers from Sampo Bank. Estonian Financial Supervision and Resolution Authority (FSA) started an investigation on Danske Bank’s customers and daily routines considering compliance in Estonian branch. On 16 August 2007, the FSA released its findings in Estonian.⁶⁰ Soon, an English translation of the summary of the report was sent to Denmark for Danske Bank’s Group Compliance & AML, who shared it with Group Legal.⁶¹ The report was specific, and clear that there were significant errors and breaches considering KYC, and routine practice. The FSA stated that the problem arose especially with customers of non-resident status. The report found suspicious details like legal entities holding bank accounts in Danske Bank, which were established and operating in low-tax areas (The United Kingdom and

⁵⁹ Bruun&Hjele, Report on the Non-Resident Portfolio at Danske Bank’s Estonian Branch, 2018

⁶⁰ Ibid., p 40.

⁶¹ Ibid.

British Virgin Islands). The FSA issued orders for the bank to comply with. By the end of the year 2007, Danske Bank closed 597 bank accounts held by non-residents, and natural persons. This was only the beginning of series of investigations made by the Estonian FSA. This started a series of events throughout the years. On 8 June 2007, the Russian Central Bank contacted the Danish FSA informing suspicious activities concerning non-resident clients from Danske Bank's Estonian branch. The Danish FSA forwarded the information to Danske Bank, and it was investigated internally. Danske Bank's Group Legal and Compliance & AML replied to the Danish FSA that according to Estonian FSA report earlier, Danske Bank complies with the existing laws and regulations, according to the report.⁶² Between years 2008 and 2013, the Estonian FSA and the Danish FSA inspected Danske Bank three times and found serious issues with KYC and CDD.⁶³

Thomas Borgen started as a member of Board of Directors in Danske Bank in 2009. In 2013, he was appointed CEO.⁶⁴ According to Rules of Procedure (2013 version), the Executive Board is "responsible for ensuring that Danske Bank has adequate procedures ensuring compliance with applicable anti-money laundering and similar requirements".⁶⁵ On 19 September 2018, the same day when the report by *Bruune&Hjele* was released, Thomas Borgen, announced his will to resign from his position as Danske Bank's CEO in a press release.⁶⁶ The Bruune&Hjele report found him not personally liable and that there was nothing indicating he breached his legal obligations towards Danske Bank during his years as CEO between 2013 and 2017.⁶⁷ In his own statement, he also pointed out his innocence to these events, but felt it was the right thing to do considering all parties.⁶⁸

On February 19, 2019, Danske Bank announced in its press release that the Estonian FSA has ordered Danske Bank to close down its branches in the Baltics and in Russia.⁶⁹ Danske Bank's new CEO, Jesper Nielsen, stated that "We acknowledge that the serious case of possible money laundering in Estonia has had a negative impact in Estonian society...".⁷⁰ It was only some days before when it came into light that the Swedish based Swedbank's branch in Estonia is also linked

⁶² Ibid. p 41.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid., p 83.

⁶⁶ Danske Bank, Press Release 55/2018, 2018

⁶⁷ Bruun&Hjele, Report on the Non-Resident Portfolio at Danske Bank's Estonian Branch, 2018. p 86.

⁶⁸ Ibid.

⁶⁹ Danske Bank, Press Release 4/2019, 2019

⁷⁰ Ibid.

to the scandal. Allegedly, approximately €3.8 billion of illicit funds had been transferred between these two banks.⁷¹ In addition, the case includes more and more notorious individuals from former Soviet Union countries as it was announced that the former president of Ukraine, Viktor Yanukovich, has transferred money out of the country using Swedbank's bank account in Estonia.⁷² It is impossible to say how far this case will go, and what consequences it may bring. However, Estonia, Denmark, and Sweden and Scandinavian banks have already damaged their reputation.

2.2.2. ABLV in Latvia

The Latvian ABLV Bank was one of the largest credit institutions in Latvia with a subsidiary branch in Luxemburg, which was established in 1993. Irrespective of the profitable business it had seemed thus far, the shareholders of ABLV had a meeting on 26 February 2018, and agreed to liquidate the bank.⁷³ Fortnight before, on 12 February, the US authority, Financial Crimes Enforcement Network (FinCEN), had proposed to ban the bank from establishing a correspondence account in the United States.⁷⁴

FinCEN found suspicious details concerning the bank's business model and concluded it to be unsound. In its statement in Chapter III, FinCEN states that "Non-resident banking in Latvia allows offshore companies, including shell companies, to hold accounts and transact through Latvian banks."⁷⁵ It noted that Non-resident deposits in Latvia amounted close to \$13 billion US dollars a year, of which it estimated that billions of dollars were entering the US financial system annually. Also, FinCEN found out that ABLV, starting from employees all the way to the executives had implemented money laundering into their business practice. The management of ABLV allowed employees to take part in money laundering schemes. They claimed that some of the transactions

⁷¹ Ahlander, J., Johnson, S. (2019). Estonia investigates alleged Swedbank link to money laundering scandal – *Reuters*, 20 February 2019. Accessible: <https://www.reuters.com/article/us-danske-bank-moneylaundering-swedbank/estonia-investigates-alleged-swedbank-link-to-money-laundering-scandal-idUSKCN1Q90RW>, 11 April 2019

⁷² Magnusson, N., Hoikkala, H., Ummelas, O. (2019). Swedbank Scandal Deepens as Laundering Linked to Yanukovich – *Bloomberg*, 27 February 2019. Accessible: <https://www.bloomberg.com/news/articles/2019-02-27/swedbank-scandal-deepens-as-dirty-flows-linked-to-yanukovich>, 11 April 2019

⁷³ European Parliament, EGOV, Deslandes, J., Magnus, M., Money Laundering – Recent Cases from a EU Banking supervisory perspective, 2018

⁷⁴ FinCEN, 4810-02P, p 7.

⁷⁵ *Ibid.*

could be connected to entities that are involved in North Korea's "procurement or export of ballistic missiles".⁷⁶ The list goes on, and the allegations are extremely alarming.

Due to FinCEN's report, on 9 March 2018, the Luxemburg Commercial Court, did not place the subsidiary in Luxemburg in liquidation, but ordered the entity to be sold to new investors. The Latvian banking supervisor, the Financial and Capital Market Commission, permitted the voluntary liquidation of the bank on 12 March 2018, and on the same day, the European Central Bank withdrew the banking license of ABLV Bank.⁷⁷ FinCEN is seeking to impose sanctions to ABLV.

2.2.3. ING in Netherlands

The Dutch bank was ordered to pay a 675 million Euros fine for non-compliance and failure to prevent money laundering, and another fine of 100 million Euros for disgorgement through settlement with Dutch authorities, on September 2018.⁷⁸ Between 2010 and 2016 the Dutch Bank had serious problems with CDD, and transaction monitoring. According to the press release by the Netherlands Public Prosecution Service (*Openbaar Ministerie*), hereinafter referred to as NPPS, the failure to comply with AML laws was structural and lasted for years allowing ING's clients to launder money through its system worth of hundreds of millions of euros.⁷⁹ The compliance department was found to be understaffed and untrained.⁸⁰ Clients with suspicious activities were not reported or were reported too late to the local FIU.⁸¹ Moreover, clients were classified in incorrect customer segments.⁸² The responsibility was divided in the classical "three lines of defense" introduced in the chapter 2. Nevertheless, these three departments were not communicating with each other properly, and information sharing was insufficient.⁸³ Therefore, the senior management was not aware of the events. According to the investigation, not a single person was able to see the forest for the trees. Investigators concluded that one of the reasons for the omission of the legal obligations was that the business was more important than compliance.⁸⁴

⁷⁶ Ibid. p 9.

⁷⁷ ABLV, Press Release, Accessible: <https://www.ablv.com/en/press/2018-07-12-ecb-withdraws-credit-institution-s-license-of-ablv-bank-as-in-liquidation>, 13 March 2019

⁷⁸ Transactieovereenkomst Houston, Openbaar Ministerie, 2018, p 22.

⁷⁹ Openbaar Ministerie, Press Release, 2018. Accessible: <https://www.om.nl/@103952/ing-pays-775-million/>, 16 March 2019

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Transactieovereenkomst Houston, Openbaar Ministerie, 2018, p 17.

After political pressure and public outrage, the Chief Finance Officer, Koos Timmermans, resigned in late 2018. Earlier ING announced that no one from its Executive Board needed to leave. No one was personally prosecuted of any wrongdoing. Not even the management. NPPS stated that the Supreme Court (*Hoge Raad*) has a high threshold “for prosecuting individuals for direct criminal offences”.⁸⁵ In ING’s case, there was no evidence found that any individual would have been aware of money laundering or would have purposely failed to stop it.

⁸⁵ Openbaar Ministerie, Press Release, 2018. Accessible: <https://www.om.nl/@103952/ing-pays-775-million/>, 16 March 2019

3. EUROPEAN UNION LEGISLATION

3.1. A brief history of the European Union Anti-Money Laundering Law

The Member States of the European Union implemented the first Directive regarding money laundering in 1991. It has been evolving rapidly ever since, especially in the 21st century. Sadly, Member States are struggling not keep pace with constantly changing Directives. For example, Ireland is coming two steps behind with its legislation. The 5th AML Directives needs to be implemented by 10 January 2020, but the 4th AML Directive is still on its way to Irish legislation despite a deadline set for June 2017.⁸⁶

After the FAFT published its 40 Recommendations in 2012, the European Union has taken further steps to create more secure and strict regulations to fulfill those recommendations. Directives are designed to protect not only Member States, but also financial institutions and other professionals, such as lawyers, from being used for laundering money by criminals. The measures taken are mostly preventative. As in the United States, the European Union focuses on four key elements: Customer Due Diligence, reporting (internal and external), regulation and supervision, and sanctions.⁸⁷ TFEU creates the basis for European Union to use its secondary legislation to combat against money laundering and terrorism. Earlier, Article 83 (1) of TFEU was the ground for AML Directives providing that the European Union can take measures concerning substantive criminal law regarding terrorism, human trafficking, child pornography and prostitution, drug trafficking, money laundering, corruption, counterfeiting, attacks on information systems, and organized crime.⁸⁸ These are all highly represented in cross-border crimes, albeit the Union's participation in criminal law has created controversy amongst the Member States.⁸⁹ There has been claims that it interferes with sovereignty of a state if criminal law initiatives are being accepted, but the European Union has continued its journey of criminal law beyond the State.⁹⁰ The Court of Justice ruled out in its judgement C-176/03, in 2005, that the EU has competence in criminal law and had thus continued its path.⁹¹ The third AML Directive in 2005, was the first Directive to

⁸⁶ Little, C. (2018). Trend Setter: The EU's fifth AML/CFT directive addresses new trends and technologies. – *Law Society Gazette*, Vol. 112, No. 7, p 61.

⁸⁷ Levi, M., Reuter, P. (2006). Money Laundering – *Crime & Justice*, Vol. 34, p 297.

⁸⁸ Graig, P., De Burca, G. (2015). *EU Law: Text, Cases, and Materials*. 6th ed. United Kingdom: Oxford Press. p 996.

⁸⁹ *Ibid.*, p 987.

⁹⁰ Fichera, M. (2013). Criminal Law beyond the State: The European Model – *European Law Journal*, Vol. 19, No. 2, p 175.

⁹¹ Court Decision, 26 May 2005, EU:C:2005:311, C-176/03

take more a risk-based approach. It followed the US model of concentrating on client characteristic, transactions and regions involved.⁹² Both the present Directive 2015/849 and the latest amending Directive 2018/843 have followed this approach but are based on Article 114 of TFEU which gives the legal basis for harmonization.

Lately, the focus has been more on the counter terrorism than combating money laundering due to multiple terrorist attacks in the EU region.⁹³ It has created constant threat of attacks leading states and its people to live under states of emergency.⁹⁴ Terrorist financing is often found to be coming from legal sources.⁹⁵ It is much more complex to spot and track than a classical money laundering scheme. Therefore, money laundering in public discussion is being overlooked as Europe is battling with refugee crisis, illegal immigration, and terrorism. But this is ought to change as we cannot ignore the fact that many Western banks are currently under investigation. The Union has taken an ad hoc approach for cooperation for years now regarding criminal law.⁹⁶ Strengthening cooperation in all levels, between authorities, Member States, and financial institutions is in the progress in AML field all the time.

Due to several cases that came into light during 2018, regarding financial institutions' non-compliance, the Commission published a press release announcing that it is seeking for better cooperation, information exchange, and supervision of the EU financial institutions.⁹⁷ The Commission noted that, due to recent cases, it is evident that the strong anti-money laundering rules within the Union, are not enforced and supervised, as they should be, across the EU. The release said: "This not only creates risks for the integrity and reputation of the European financial sector but may also have financial stability implications for specific banks".⁹⁸ The proposal is meant to amend Regulation 1093/2010, establishing a European Supervisory Authority to

⁹² Kelley, J., A. (2006). International Money Laundering and Professional Ethics – *International Financial Law Review*, Vol. 40, No. 2, p 434.

⁹³ Murray, D. (2018). *The Strange Death of Europe – Immigration, Identity, Islam*. Paperback edition. United Kingdom: Bloomsbury Continuum. p 322 – 328.

⁹⁴ Osborne, S. (2017). France declares end to state of emergency almost two years after Paris terror attacks – Independent <https://www.independent.co.uk/news/world/europe/france-state-of-emergency-end-terror-attacks-paris-isis-terrorism-alerts-warning-risk-reduced-a8029311.html> , 14 April 2019

⁹⁵ Petcu, I., C. (2016). Money Laundering – A Source of Terrorist Financing – *Human Rights in Law Enforcement*, Special Edition, p 9.

⁹⁶ Bergström, M., Jonsson Cornell, A. (2014). *European Police and Criminal Law Co-operation – Swedish Studies in European Law*. Vol. 5. United States: Hart Publishing, p 60.

⁹⁷ European Commission, Press Release IP/18/5724, 2018. Accessible: http://europa.eu/rapid/press-release_IP-18-5724_en.htm , 16 March 2019

⁹⁸ Ibid.

strengthen the role of the European Banking Authority (EBA) in AML supervision of the financial sector. In January 2019, the European Parliament released its proposals for the Regulation, and voted in its favor.⁹⁹ The responsible committee of the Parliament states that money laundering and financing of terrorism is “shared responsibility”, and financial institutions should “allow proper scrutiny and oversight of their actions”.¹⁰⁰ These statements further prove the issue of an incomplete AML legislation and lack of responsibility set to financial institutions.

3.2. Directive 2015/849 – 4th Anti-Money Laundering Directive

Current Directive 2015/849¹⁰¹ (4AMLD) had been in force only for a year after the Union started to draft new amendments to it. In the light of current legislation, individual liability is mentioned only in one Article and leaves room for interpretation. It is left upon to Member States to consider the severity of the punishment in their national criminal law. In pursuance of Article 58 it is provided that “...sanctions and measures can be applied to the members of the management body and to other natural persons who under national law are responsible for the breach.”¹⁰² Moreover, Article 59 provides that, in a case of systematic breach of obligations, it is possible to set a temporary ban for “any person discharging managerial responsibilities in an obliged entity”.¹⁰³ Section 3 of the said Article sets maximum pecuniary sanction for a legal person of at least 5 million Euros, or 10 % of the yearly turnover, depending on whichever is greater, and 5 million Euros for natural person or equivalent amount in local currency of the Member State. It is unclear whether the financial institution can pay the sanctions imposed to the natural person. There is no mention of other than pecuniary sanctions, meaning that the consideration of setting more severe liability for individuals is left to Member States, and thus, it will not settle the differences between Member States.

3.3. Directive 2018/843 – 5th Anti-Money Laundering Directive

Directive 2018/843 (5AMLD) does not bring any amendments to possible sanctions or cooperation. There are no improvements on these sectors. New amendments of 5AMLD are mainly

⁹⁹ European Parliament, Proposal A8-0013/2019

¹⁰⁰ Ibid.

¹⁰¹ OJ L 141, 5.6.2015, p. 73–117

¹⁰² Ibid.

¹⁰³ Ibid.

focused on virtual currencies, prepaid cards, and beneficial ownership. However, the increased obligations regarding beneficial ownership and politically exposed persons (PEP) will give a positive impact on combating money laundering. It will require financial institutions to keep better records on beneficial owners, get deep insight of the ownership of companies, and avoid situations like the previously discussed situations regarding Danske Bank or ABLV. As the 5th Anti-Money Laundering Directive states, “The need to increase the overall transparency of the economic and financial environment of the Union is clear”¹⁰⁴. The main concern is the different approach between Member States. It creates “weak spots” when it comes to the management of business relationships concerning third countries.¹⁰⁵ The EU pursues to increase information sharing and exchanging, not just between Member States and their responsible authorities, but also between financial institutions as well.

As the discretion for more severe criminal sanctions are left to Member States, it will not settle the issue of non-harmonized laws inside the Union. AML Directives have used the same rather vague instruction regarding criminal liability and sanctions. The sanction and criminal liability must be “proportionate, dissuasive and effective”. These three adjectives are mentioned in multiple Articles, and Recitals throughout the 4AMLD, and the 5AMLD. Proportionate, refers to the principle of proportionality. Meaning that the punishment and the culpability scale needs to be in balance with the criminal offence. It is pointless to establish absurd culpability scales like in the United States where people can be sent to jail or prison for years as a first-time offender for a minor non-violent crime.¹⁰⁶ The principle originates from German Law, as it was used for challenging excessive measures used for achieving goals.¹⁰⁷

It is also introduced in Article 5 of the Treaty on European Union (TEU), in which it is underlined that the Union must apply it in its content and actions (legislation and enforcement). The criteria for what constitutes proportionate sanctions, for non-compliance, are not set out in the AML Directives. Next, there is dissuasive: a synonym to deterring. In other words, criminal sanctions should be set high enough, hence, financial institutions would make sure they comply with the law. As previously stated in the chapter 2, sanctions, alone, are often too weak a deterrent when it comes to compliance issues.¹⁰⁸ Effective, means a method or practice that leads into

¹⁰⁴ European Parliament and of the Council of 30 May 2018 Directive 2018/843 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU. OJ L 156, 19.6.2018, p. 43–74, rec. 14

¹⁰⁵ OJ L 156, 19.6.2018, p. 43–74, rec. 12

¹⁰⁶ Alexander, M. (2012). *The New Jim Crow – Mass Incarceration in the Age of Colorblindness*. United States of America: The New Press. p 54.

¹⁰⁷ Graig, P., De Burca, G. (2015). *EU Law: Text, Cases, and Materials*. 6th ed. United Kingdom: Oxford Press. p 551.

¹⁰⁸ Malloy, T., F. (2003). Regulation, Compliance and the Firm. – *Temple Law Review*, Vol. 76, No. 3, p 453 – 54.

desirable results and goals. In this case, Member States need to make sure that financial institutions understand the responsibility that is given to them, and in cases of non-compliance, will learn through the given sanctions and improve. So, if a norm is applied and obeyed, it is legally effective.¹⁰⁹ If the norm is not seen relevant, presumably, the norm is not applied.¹¹⁰ But none of these terms are broke into pieces in Directives. What is really being expected from Member States, should be laid down more precisely.

When the national borders were eliminated by the TFEU, and free movement of goods, people, capital, and employment was introduced, cross-border crimes became easier.¹¹¹ People could reside in another Member State, seek jobs, study, work, or establish their businesses. Using banking services was a natural consequence. Thus, it is justified that the Union is exercising its power with regard to anti-money laundering laws because it concerns every Member State and goes over internal borders. Therefore, the AML legislation should lean towards to the Union than to Member States themselves.

When the amending of 5th Directive was proposed, there was an opportunity to fix these terms or even introduce personal liability in different manner. “Proportionate, dissuasive and effective” is almost as vague as the classical infamous line from international criminal law, “long-term, widespread, and severe”. Such words are hard to define, hence, harder to prove.¹¹² These words are from international soft law. Recommendation 35 of the FAFT Recommendations states that, “*Countries should ensure that there is a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, available to deal with natural or legal persons covered by Recommendations 6, and 8 to 23, that fail to comply with AML/CFT requirements. Sanctions should be applicable not only to financial institutions and DNFBPs, but also to their directors and senior management.*”¹¹³ In addition, in the section Legal Basis of Requirements on Financial Institutions and DNFBPs, Section 4 (c) (i) provides that, “there should be an adequate range of effective, proportionate and dissuasive sanctions available if persons fail to comply with their

¹⁰⁹ Unger, B., Ferwarda, J., van den Broek, M., Deleanu, I. (2014). *The Economic and Legal Effectiveness of the European Union’s Anti-Money Laundering Policy*. United Kingdom: Edward Elgar Publishing, p 5.

¹¹⁰ Ibid. p 6.

¹¹¹ Jones, E., Menon, A., Weatherill, S. (2012). *The Oxford Handbook of the European Union*. United Kingdom: OUP Oxford, p 617.

¹¹² Fleck, D. (2013). The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules – *Nordic Journal of International Law*, No. 82. p 11.

¹¹³ The FAFT Recommendations 2012, updated October 2018. Recommendation 35. p 24. Accessible: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>, 3 May 2019

obligations”, and in subparagraph (ii) that, “the sanctions should be directly or indirectly applicable for a failure to comply with an AML/CFT requirement...”. So, the FAFT is presenting here is the criminal liability for individuals in case of non-compliance. Undoubtedly, it says that sanctions should be applicable for senior management. It is clarified in the same Section 4 (a) (ii) that if the word “*should*” is used in this Recommendations, it is mandatory procedure if both the regulator and the regulated institution “demonstrate” that required measures are applied directly or indirectly. In other words, there should be criminal liability for the members of the Executive Board, in case of non-compliance, because at the end, the senior management is responsible to ensure effective compliance and AML practice. Even though, the European Union has taken its AML legislation above the international standards, it is still incomplete.

3.4. Evaluation of the situation by the Commission

In Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions titled “Strengthening the Union Framework for Prudential and Anti-Money Laundering Supervision for Financial Institutions”, the Commission presents that the current legislation leaves the discretion for the Member States in many areas. The Communication was published in fall 2018. Furthermore, it is noted that, the cooperation obligation is not explicit.¹¹⁴ This means that the cooperation is based on the good faith (*bona fides*) and willingness of the parties involved. Thus, it leaves room for interpretation on what kind of information is shared between authorities and when this information needs to be shared.¹¹⁵ It is not legally guaranteed that certain level of cooperation must be reached. In the same document, it states that, it is unclear under what conditions banking license can be withdrawn.¹¹⁶ Different approaches on the implementation of AML Directive lead to imbalance. States with lax rules attract financial businesses, and states with tougher rules may lose them.¹¹⁷

¹¹⁴ Communication from the Commission, (2018), *COM (2018)645*. p 4. Accessible:<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:645:FIN#footnoteref14>, 3 May 2019

¹¹⁵ Ibid. p 3.

¹¹⁶ Ibid.

¹¹⁷ Levi, M., Reuter, P. (2006). Money Laundering – *Crime & Justice*, Vol. 34, p 307.

4. SUGGESTIONS AND RATIONALE

The European Union is struggling with its reputation and financial sector. The creditability, integrity, and other European values are being questioned. Giving that current legislation leaves too much room for interpretation for its language and sanctions; it is vital that there will be a reformation. Reform is needed in terms of security, too. Europe cannot be used for money laundering haven for third countries and criminals anymore. There are a few steps that should be considered.

The first step is to bring the executive liability more strongly into the European Union criminal law. Like introduced previously in chapter 3, the European Union has competence in substantial criminal law. It follows the principle of proportionality, which is linked with principle of *ultima ratio*. An act can be criminalized if it protects fundamental interest, and if all the other measures are inadequate to guarantee that interest.¹¹⁸ The principle of *nulla poena sine culpa* is crucial: one must be individually responsible and guilty of an act. Therefore, it is not necessary to create individual criminal liability for executives in all circumstances, but only in cases where it can be proven that obligations were not fulfilled, and signs were continuously ignored due to negligence and recklessness. If such approval would come from the EU, CEO/CFO might face different punishments than just publicly apologizing and resigning. The individual liability would most likely increase better design and maintenance of an institution's AML program.¹¹⁹ Liability for non-compliance could be defined similarly as it is often defined in national corporate law. For example, in the Netherlands, liability of directors is divided in three categories: Either 1) internal liability is applied in case of improper performance of duties (*onberhoorlijke taakvervulling*);¹²⁰ i.e. a managing director is liable if she or he can attribute serious blame;¹²¹ 2) Or external liability jointly or separately towards third parties is applied when “no reasonable director would perform his duties such manner under the same circumstances” and it is manifestly improper management (*kennelijk onberhoorlijk bestuur*);¹²² or 3) external liability is applied in case of wrongful acts (*onrechtmatige daad*) and it is mainly applied towards creditors.¹²³ All cases require that the

¹¹⁸ Bergström, M., Jonsson Cornell, A. (2014). *European Police and Criminal Law Co-operation – Swedish Studies in European Law*. Vol. 5. United States: Hart Publishing, p 61.

¹¹⁹ Skinner, C., P. (2016). Executive Liability for Anti-Money Laundering Controls – *Columbia Law Review*, Vol. 116. p 2.

¹²⁰ Yvette, B. (2011). Directors' Liability: The Netherlands – *European Company Law*, Vol. 8, No. 6. p 247.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

principle of serious blame is fulfilled. But, as stated in the case studies, no one from ING was held personally accountable of any wrongdoing because the Dutch Supreme Court has a high threshold for criminal prosecutions. In Danske Bank's case it was stated that there is no one personally liable of what happened under Danish or Estonian law. However, as Danske Bank case is still evolving, Danish authorities are looking into the matter. Support for creating more concise structure and framework through the EU law would give the tools for Member States proceed with prosecutions of individuals.

The European Parliament has already approved tougher criminal sanctions in the Directive 2018/1673 on the European Parliament and of the Council Of 23 October 2018 on combating money laundering by criminal law.¹²⁴ The Directive is based on Article 83 of TFEU. It covers money laundering offences, but it does not cover the financial institutions and their non-compliance offences. Paragraph 2 of Article 5 of the Directive provides that Member States shall ensure that for a natural person a punishment for money laundering offences set out in the said Directive is punishable by a maximum term of imprisonment of at least four years.¹²⁵ In addition, offenders are subject to additional sanctions or measures. Similar sanctions are set out in Article 7 and 8 for legal persons. The liability set out to legal person does not exclude the liability of a natural person who acted on behalf of the legal person.¹²⁶ Thus, similar approach should be applied for non-compliance. Wilfull misconduct, aiding, or abetting, should be punishable. One way would be to add an Article (referred to as Article X in the following) that would define criminal acts following an Article, which would state that:

1. Member States shall ensure that in relation to the offences referred to in Article X any natural person discharging managerial responsibilities in an obliged entity, or any other natural person, held responsible for the breach, from exercising managerial functions in obliged entities are subject to criminal sanctions.
2. Member States shall ensure that in relation to the offences referred to in Article X by a natural person referred to in paragraph 1 are punishable by a maximum term of imprisonment of at least two years.

¹²⁴ European Parliament and of the Council of 23 October 2018 Directive 2018/1673 on combating money laundering by criminal law. OJ L 284, 12.11.2018, p 22–30

¹²⁵ Ibid.

¹²⁶ Ibid., art 7(3)

By setting out a framework for maximum sentencing would balance the differences between Member States. Creating a combination of corporate and individual liability would work as a more effective tool for regulators and authorities to supervise and detect wrongdoing, and thus assure the EU's financial sector's compliance.¹²⁷ Individual liability would be a straightforward and forceful approach making the part taking in non-compliance “too high a risk to take”.¹²⁸ Moreover, it would satisfy the public because of the more balanced, transparent and ethical financial sector.

Second step is to change the language of the next Directive. It is necessary to get rid of the vague wording in order to guarantee harmonized legislation in all Member States according to Article 114 of TFEU. The preventive anti-money laundering policy is currently regulated mostly at the national level because of the minimal harmonization of the procedural norms.¹²⁹ The EU anti-money laundering legislation should not leave any room for interpretation. Similarly, it should be clear what steps to take and in what manner, like the Commission concluded in its Communication.¹³⁰ The legislation should be more transparent and create a well-structured framework. The purpose of a Directive is to create a general framework, and in many occasions, the wording cannot be too precise. Nevertheless, this does not mean that the language could not be more descriptive when it comes to criminal liability and sanctions. “Effective, proportionate and dissuasive” can be used if it follows articles determining minimum requirements for maximum sentences such as the sentences introduced above, and better definitions for these terms. Terms could be defined in Recitals where the purpose and aim of the Directive is laid out.

Third step is to create independent supervisory agency and improve the cooperation through that agency. The European Central Bank is responsible for supervising financial institution, but it only covers the Euro area. When there is no EU body that can supervise all Member States equally, it creates conflicts and difficulties in supervision and sanctioning in cross-border situations.¹³¹ In each case, as the case studies in the latter chapter proved, it is uncertain where the money came from and where it went to. International cooperation is vital to safeguard Europe's financial sector.

¹²⁷ Boles, J., R. (2015). Financial Sector Executives as Targets for Money Laundering Liability. – *American Business Law Journal*, Vol. 52, No. 3, p 412.

¹²⁸ Ibid.

¹²⁹ van dan Boek, M. (2014). Designing Supervision under the Preventive Anti-Money Laundering Policy in the European Union – *Utrecht Law Review*, Vol 10, No. 5, p 167

¹³⁰ Communication from the Commission, (2018), COM (2018)645. Accessible: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:645:FIN#footnoteref14>, 3 May 2019

¹³¹ van dan Boek, M. (2014). Designing Supervision under the Preventive Anti-Money Laundering Policy in the European Union – *Utrecht Law Review*, Vol 10, No. 5. p 152.

As the issue is global, the combat against it should be global, too.¹³² In this matter, the European Union has already taken steps within the past few months. The European Supervisory Agencies which consist of European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) will be provided with new roles.¹³³ EBA will have power over Member States' national authorities so that it can assure consistent investigations toward financial institutions and order proper measures, such as sanctions in case the national authority fails to do so.¹³⁴ Thus, it will have direct decisions concerning individual financial sector operations, and it will be a common standard setter and cooperate with non-EU countries.¹³⁵ It will form a committee that will consist all authorities from Member States.¹³⁶

¹³² Ionescu, L. (2012). Money Laundering Directives and Corruption in the European Union – *Contemporary Readings in Law and Social Justice*, Vol.4, No.2, p 564.

¹³³ European Commission, MEMO/19/1928, 2019. Accessible: http://europa.eu/rapid/press-release_MEMO-19-1928_en.htm, 23 April 2019

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

CONCLUSION

The European Commission has stated in several publications between the fall 2018 and the spring 2019 that the reputation of European Union financial sector is at risk, and the policies and guidelines set out in Directives are insufficient in several levels. The European Parliament has agreed on these findings. Also, the EU Commission has stated, that in some instances, national authorities are uncertain of their own powers to take action. At the same time money laundering has become a cross-border crime, and a combination of finance and technology. As the European Union has the competence in substantial criminal law, and its job is to guarantee the function of the Single Market, the solutions to these issues must come from the EU level. It has suffered from scandals concerning financial institutions which include severe breaches of AML obligations. The most concerning point is that the largest scandals revolve around non-citizen portfolios and in many cases the origin of the money and the purpose of the transaction remains unknown. Lack of CDD and KYC information repeats case after case.

The European Union has adopted a risk-based approach on combating money laundering and terrorist financing by concentrating on transactions, client characteristics, and region in its Directives. There are obligations set for financial institutions, and specialized steps when dealing with third-country nationals. Financial institutions are following international standards regarding compliance and risk management. Regardless of the division of responsibilities into “Three lines of defense” for example, the outcome and execution has been blurry in many institutions. The role of each line (front and back office and internal audit) has been imprecise or so poorly executed that these segments have been barely communicating with each other and the training of employees has been inadequate.

The European Union has already published Regulation, which will hopefully solve one part of the problem by creating supervisory agency to supervise, and help with information sharing and cooperation between authorities, financial institutions, Member States, and the European Union. As proven, the cooperation provided via the 4th and the 5th AML Directives are solely based on willingness of the parties and *bona fides*. Single supervisory agency with competence to order sanctions over national authorities can be an extremely supportive institute and increase transparency if it is well established. The decision to establish such an agency supports the hypothesis that the Union’s AML legislation needs to be reformed.

Upon analysis, individual liability for executives could be set out in the EU criminal law based on Article 83 of TFEU. As previously mentioned, Article 83 of TFEU gives competence to

the EU in substantial criminal law stating “...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.” Crimes falling under this Article include money laundering, corruption, and organized crime which are all highly involved in recent money laundering scandals. Prosecuting executives in cases which they have breached their obligations regarding non-compliance due recklessness, willingly, knowingly, or intentionally taken these steps to aid, abet or participate in customers illicit conduct would be possible to set out in the EU level as it has already been done considering money laundering offences in the Directive 2018/1673. Hence, the EU financial sector has already been stated to have cross-border dimension due to its nature by the EU and thus, it falls under Article 83 of TFEU and the protection of the financial sector needs to start with the EU. Therefore, to guarantee the harmonization and mutual recognition of Member States’ national laws, strong and clear framework coming from the EU would solve the problem of different approaches and measures available to combat money laundering and supervise financial institutions. Additionally, monetary sanctions and individual liability would form better deterrent together than monetary sanctions alone. The poor effect of monetary sanctions can be seen by looking at the cases presented in this research, and findings from other fields like environmental protection. It seems almost as if financial institutions would be constantly calculating between the benefits of non-compliance and possible risks and sanctions lifting the business owner legal obligations. The discretion of criminal liability is left out to Member States creating imbalance in approaches between Member States. Till now, Member States have been unwilling or incapable of accusing CEOs individually causing nothing but agreements between corporations and their CEOs to step aside from their positions. The situation is alarming, and it will not fix itself. Most likely, a new AML Directive is expected be proposed in the next few years. However, there are no signs yet that the Union would seek criminal liability for individuals for non-compliance.

Aspects which were not discussed in this thesis are open to research and debate. Deeper analysis of the moral and ethical side of individual liability were not covered. This could be done in the light of different legal theories and through socio-legal studies. Whether the European Union should or should not be involved in criminal law by ordering minimum sentences for a maximum imprisonment is also up for debate.

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