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Anti-money laundering provisions in the light of EU directives

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Money laundering clearly belongs to the catalog of twenty-first century offenses. It has also become one of the most paying and vast businesses in the world and — according to IMF — the volume of money laundering amounts to 2–3% of the unified GDP of all the countries on Earth[1]. Money laundering is also regarded as the world's third largest industry after international oil trade and foreign exchange[2]. Regarding the data mentioned above, there is no doubt that nowadays anti-money laundering policy becomes a global issue.

The origins of money laundering indeed date back to the early twentieth century. However, its development undoubtedly was influenced by the progressive process of economic globalization, trade liberalization and development of communications technology and electronics[3]. Money laundering is traditionally considered as a process by which criminals attempt to hide the origins and ownership of the proceeds of

[1] G.I. László, 'Some Thoughts about Money Laundering', *Studia Iuridica Auctoritate Universitatis Pecs*, 139, 2006, p. 167.

[2] A. Veng Mei Leong, 'Chasing Dirty Money: Domestic and International Measures against Money Laundering', *Journal of Money Laundering Control*, 10, 2007, No. 2, p. 141.

[3] C. Nowak, *Wpływ procesów globalizacyjnych na polskie prawo karne*, Warszawa 2014, p. 347.

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their criminal activities[4]. Money laundering is one of the most dangerous white-collar crimes worldwide which has a clearly destabilizing effect on the domestic, international and global economy. Apart from the negative economic impact of such practices, its adverse consequences are visible in other areas as well. The phenomenon of money laundering has undoubtedly an interdisciplinary character, hence it needs to be a matter of common interest of not only criminal law but also, among others, politics, international relations, criminology, and economics[5]. It needs to be recognized that one of the most significant economic costs of corruption results from money laundering[6]. But we also need to keep in mind a multiplicity of other negative consequences of money laundering phenomena, such as undermining public trust in the integrity of financial institutions, corrupting officials, creating an inherent danger to the economic and financial stability of nations, causing a routine of legal norms violations, facilitating other offenses (i.e. drug trafficking, terrorism, tax evasion or bribery) etc.[7]

Therefore it is not in dispute that money laundering has become an international problem and all nations have to collaborate in international efforts to control, criminalize and counteract it[8].

Anti-money laundering policy is a global concern, hence it is also a priority for the European Union. Nowadays four European directives are dedicated to the money laundering phenomenon. They are: Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering[9]; Directive 2005/60/

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[4] O.J. Otusanya, S.O. Ajibolade, E.O. Omolehinwa, 'The Role of Financial Intermediaries in Elite Money Laundering Practices. Evidence from Nigeria', *Journal of Money Laundering Control*, 15, 2012, No. 1, p. 58.

[5] A. Płońska, 'Korzyści pochodzące z czynu zabronionego i ich legalizacja', NKPK, 30, 2013, p. 89.

[6] K.A. Lacey, B. Crutchfield George, 'Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms', Nw. J. Int'l L. & Bus, 23, 2002–2003, 263, p. 265.

[7] Ibid., p. 269.

[8] D.E. Alford, 'Anti-Money Laundering Regulations: A Burden on Financial Institutions', N.C.J. Int'l & Com. Reg, 19, 1993–1994, p. 438.

[9] OJ L 166, 28.6.1991, p. 77; as well as Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/

EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[10]; Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed persons and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of financial activity conducted on an occasional or very limited basis[11] and the latest — Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 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[12]. Provisions of the Directive are mainly based on legitimate assumptions that money laundering could seriously jeopardize the soundness and stability of credit and financial institutions, the confidence in the financial system and consequently losing the trust of the public. The need for the criminalization of money laundering follows from the above international law acts, as well as from other international law acts, such as, inter alia, the United Nations Convention against Transnational Organized Crime adopted by the General Assembly of the United Nations on 15 November 2000 or Council of Europe Convention No 198 on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism[13].

Provisions of the Council Directive 91/308/EEC (The First Money Laundering Directive) resulted from the adoption of the 1988 United Nations Convention and the European Convention and they were focused on prohibiting money laundering in all EU Member States, requiring finan-

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EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L 344, 28.12.2001, p. 76).

[10] OJ L 309, 25.11.2005, p. 15.

[11] OJ L 214, 4.8.2006, p. 29.

[12] OJ L 141, 20.5.2015, p. 73.

[13] J. Giezek [in:] *Kodeks karny. Część szczególna. Komentarz*, ed. J. Giezek, Warszawa 2014, p. 1214.

cial and credit institutions to report suspicious transactions and regulating professions such as casinos and foreign exchange operations[14]. This directive is focused on combating the laundering of drug proceeds through the financial sector[15] and it represents the first stage in combating money laundering at the Community level. Directive 2005/60/EC (The Second Money Laundering Directive) amended the First Directive by changing two issues: the first one referred to mandatory suspicious transactions reporting to not only drug trafficking but to all serious offences, while the second referred to extending its scope to all non-financial activities and professionals, such as lawyers, notaries, estate agents, accountants etc.[16]

Commission Directive 2006/70/EC (The Third Money Laundering Directive) provided a common basis for implementing the FATF[17] recommendations on money laundering. The original FATF 40 recommendations were drawn up as an initiative to combat the misuse of financial systems by persons laundering drug money in 1991. Five years later the recommendations were revised for the first time to reflect evolving money laundering techniques and to broaden their scope beyond drug money laundering. FAFT recommendations have been endorsed by more than 180 countries and are known as the international anti-money laundering and countering the financing of terrorism standard (AML/CFT)[18].

It should be noted that all previous anti-money laundering directives were enacted almost ten years ago, hence the Directive 2015/849 is crucial, because not only money laundering, but also terrorism financing and organized crime remain serious problems which should be solved at the European Union level. Therefore on the one hand it is essential to develop the criminal law approach as well as to prevent the use of the financial system for the purposes of money laundering and terrorist

[14] D.E. Alford, op. cit., p. 450.

[15] L. Ionescu, 'Money Laundering Directives and Corruption on the European Union', Contemp. Readings L. & Soc. Just, 4, 2012, p. 562.

[16] Ibid.

[17] Financial Action Task Force (FAFT) is an inter-governmental body established in 1989 by the Ministers of its member jurisdictions.

[18] *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FAFT 40 Recommendations, FAFT 2013, Groupe d'action financière sur le blanchiment de capitaux*, http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatf-recommendations.html, access: 17.07.2015.

financing. Such a two-pronged approach to combating money laundering, which involves preventing the entry into legal business transactions benefitting from illegal sources and at the same time effective investigation and prosecution for money laundering seems to be the optimal solution.

According to Article 1, the main aim of Directive 2015/849 is "to prevent the use of the Union's financial system for the purposes of money laundering and terrorist financing". The same article defines money laundering as the following committed intentionally conduct:

(a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action; (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity; (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity; (d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).

In addition, Article 1 states that money laundering would be considered as such activities carried out in the territory of any EU member state as well as of a third country.

It is also noteworthy that Directive 2015/849 provides the definition of "criminal activity", which, according to Article 3, means:

> (a) acts set out in Articles 1 to 4 of Framework Decision 2002/475/JHA; (b) any of the offences referred to in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; (c) the activities of criminal organizations as defined in Article 1 of Council Joint Action 98/733/JHA[19]; (d) fraud affecting the Union's financial interests, where it is at least serious, as defined in Article 1(1) and Article 2(1) of the Convention on the protection of the European Communities' financial interests[20]; (e) corruption; (f) all offenses,

[19] OJ L 351, 29.12.1998, p. 1.
[20] OJ C 316, 27.11.1995, p. 49.

> including tax crimes relating to direct taxes and indirect taxes and as defined in the national law of the Member States, which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offenses in their legal system, all offenses punishable by deprivation of liberty or a detention order for a minimum of more than six months.

According to Article 2, Provisions of Directive 2015/849 are addressed to three groups of entities, which are credit institutions, financial institutions, and a third broadly specified group consisting of natural and legal persons such as auditors, external accountants, tax advisors; notaries and other independent legal professionals participating in specified operations (buying and selling of real estate or business entities; managing of client money, securities or other assets; opening or management of banks, savings or securities accounts; organization of contributions necessary for the creation, operation or management of companies; and creation, operation or management of trusts, companies, foundations, or similar structures); other trust or company service providers; estate agents; other persons trading in goods to the extent that payments are made or received in cash in amounts of EUR 10,000 or more (in a single operation or in several operations which appear to be linked); and providers of gambling services.

The main assumption of the Directive is based on an assessment of the risk of money laundering and terrorist financing. Therefore, the European Commission will draw up by June 26, 2017 a report on these risks and will update the report every two years, or more frequently if necessary. In addition every EU state shall be involved in identifying, assessing understanding and mitigating the risk of money laundering and terrorist financing affecting it. Under the premise of the Directive the precise risk assessment and taking appropriate actions by obligated entities will improve the anti-money laundering and terrorist financing system.

In the Polish criminal law system the definition of money laundering is provided within the Act of 6 June 1997 — The Criminal Code[21] (hereinafter: CC) and the 16 November 2000 Act on counteracting money laundering and financing of terrorism[22] (hereinafter: ACMFT). Article 299 of

[21] Dz.U. (Journal of Laws) 1997, No. 88, item 553 as amended.
[22] Dz.U. (Journal of Laws) 2014, item 455.

the CC indicates two basic types of money laundering offenses. The first, governed by Article 299 § 1 CC states that:

> Anyone who receives, transfers or transports abroad, or assists in the transfer of title or possession of legal tender, securities or other foreign currency values, property rights or real or movable property obtained from the profits of offenses committed by other people, or takes any other action that may prevent or significantly hinder the determination of their criminal origin or place of location, their detection or forfeiture, is liable to imprisonment for between six months and eight years,

while Article 299 § 2 CC indicates providing financial, credit or other services to hide the illegal origin of "dirty money" and it states that:

> Anyone who, as an employee of a bank, financial or credit institution, or any other entity legally obliged to register transactions and the people performing them, unlawfully receives a cash amount of money or foreign currency, or who transfers or converts it, or receives it under other circumstances raising a justified suspicion as to its origin from the offenses specified in § 1, or who provides services aimed at concealing its criminal origin or in securing it against forfeiture, is liable to the penalty specified in § 1.

As previously mentioned, the practice of legalization benefits associated with committing a criminal act and placing them on the business market is undoubtedly one of the most dangerous crimes against business covered by Chapter XXXVI of the Polish Criminal Code. It is evidenced by, among others, the penalty designated for these offenses by the legislature — which is imprisonment from six months up to eight years, as well as the punishment for modified types of money laundering offenses defined within Article 299 § 5 and § 6 CC, which is a term of imprisonment of one up to ten years[23]. Modified types of money laundering offenses involve stricter imprisonment for admission to the above offenses by the perpetrator acting in concert with others (§ 5), as well as if the perpetrator achieves a significant financial advantage while committing such an act (§ 6). Article 299 § 5 CC provision is extremely important in the context of the protection of banks, financial institutions or credit or other entities from the potential entering into agreements between their employees or people acting on their behalf and money laundering perpetrators. The second category of aggravated money laundering occurs when the perpe-

[23] M. Bojarski [in:] *Prawo karne materialne. Część ogólna i szczególna*, ed. M. Bojarski, Warszawa 2012, p. 642.

trator gains significant financial benefit as a result of money laundering offenses committed by him or her. According to Article 115 § 4 CC, significant material benefit is a benefit whose value exceeds PLN 200,000[24].

It is important to note that the current Polish legal system also provides a definition of money laundering in Article 2 point 9 of ACMFT, which defines it as intentional conduct consisting of

> a) the conversion or transfer of property values derived from criminal activity or from participation in such activities, in order to conceal or disguise the illicit origin of the property or grant assistance a person who is involved in such activities in order to avoid the legal consequences of his or her actions, b) hiding or concealment of the true nature of the assets or rights associated with them, their source, location, disposition, the fact of their movement, knowing that the values are derived from criminal activity or participation in such activity, c) the acquisition, taking possession or use of property derived from criminal activity or participation in such activity

and also involving the interaction, attempts to commit, aiding or abetting in the above-mentioned instances of behavior — "even if their prohibited act was carried out on the territory of a State other than the Republic of Poland".

As noted by C. Nowak, recommended in international and EU law, money laundering criminalization may be questioned from the criminal law point of view. This includes mainly doubts arousing from widely defining the term of money laundering in the context of the specificity of criminal law principle[25]. The analysis of the anti-money laundering regulations in Poland allows one to conclude that a comprehensive, criminal-law system combating money laundering is in fact built on the basis of Article 299 CC, as well as Articles 35–37 ACMFT, which are based on international and EU laws. On the other hand — a lot of issues in terms of anti-money laundering are regulated at the international level by means of non-binding instruments, so-called soft laws, such as FATF Recommendations. But due to their importance for private sector operators, their influence is comparable to the provisions of the treaties[26].

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[24] J. Długosz [in:] *System prawa handlowego*, vol. 10. *Prawo karne gospodarcze*, ed. R. Zawłocki, Warszawa 2012, p. 393.

[25] C. Nowak, op. cit., p. 349.

[26] Ibid.

In conclusion it is worth mentioning the concept of "modern" anti-money laundering legislation, which "aims at creating, by the prohibition of money laundering, negative incentives with respect to the commission of the underlying acts"[27]. P. Lewisch points out the following negative incentives, which are: "if anti-money laundering legislation makes it difficult to enjoy the benefits of the criminal act (namely to sell the stolen goods or to save or invest the proceeds of crime), the expected utility of these crimes diminishes; hence, fewer primary crimes will be committed"[28].

Summary

Money laundering is one of the most serious white collar crimes that jeopardizes the proper functioning of the broad spectrum of business transactions, not only at the internal level but also at the international or even global level. Therefore it is extremely important to counteract money laundering at a wider than national level. Within the European Union complex anti-money laundering provisions are included in four EU Directives, which are covered in this article.

Keywords: EU Directive, money laundering, offense, anti-money laundering, AML.

[27] P. Lewisch, 'Money Laundering Laws as a Political Instrument: The Social Cost of Arbitrary Money Laundering Enforcement', *Eur. J. Law Econ.* 2008, No. 26, p. 123.

[28] Ibid.