

THE EUROPEAN COMMUNITY'S COMBAT AGAINST MONEY LAUNDERING: ANALYSIS AND EVALUATION

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I. THE INVOLVEMENT OF THE EUROPEAN COMMUNITY IN COMBATING MONEY LAUNDERING

The first concrete reference to money laundering can be traced to the European Parliament [hereinafter "EP"] Resolution of October 16, 1986. This Resolution urged the Council of Ministers (the community's main decision making organ) to adopt promptly an instrument on "concerted action to tackle the drug problem."¹ More particularly, the EP urged the Council of Ministers to introduce effective measures to deal with laundering of proceeds from narcotics trafficking by, *inter alia*, adopting a directive making the reporting of currency transactions compulsory in all Member States. On October 30, 1986, the Council of Ministers meeting at

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1. Council Resolution on The Drug Problem 1986, 1986 O.J. (C 383) 76; see Bull. Eur. Communities 10-1986, point 2.4.17.

the justice ministers level issued a declaration on the drug problem. However, the declaration did not go as far as the EP's proposal. It only proposed that practical guidelines be established for freezing and confiscating the assets of drug traffickers.²

The following year, the European Community [hereinafter "EC"] participated actively in the preparatory work of the International Conference on Drug Abuse and Illicit Trafficking [hereinafter "The Conference"] which was held in Vienna, Austria in June 1987.³ The Conference led to the adoption of the Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.⁴ The Vienna Convention is primarily concerned with criminalizing narcotics trafficking,⁵ it also envisages that signatory parties should make the laundering of proceeds resulting from narcotics a criminal offense. In the Vienna Convention, the term "money laundering" has been defined in the following two ways:

1. The conversion or transfer of property, knowing that [it has derived from a drug offense] for the purpose of concealing or disguising the illicit origin of the property or of assisting any other person who is involved in the commission of [a drug offense] to evade the legal consequences of his actions;⁶ and

2. See Bull. Eur. Communities 10-1986, point 2.4.10.

3. See European Commission Recommendation to the Council Concerning the Community's Participation and the Action Programme on its Contribution to the Conference, COM(86)457 final; Bull. Eur. Communities 7/8-1986, point 2.1.113.

4. Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, signed in Vienna, Austria, on Dec. 20, 1988, U.N. Doc. E/Conf.82/15, [1989] 28 I.L.M. 493, MISC 14 (1988) CM 804 [hereinafter "Vienna Convention"]. This Convention is a typical example among contemporary treaties which break away from the traditional rule of international law that only states may become signatory parties by allowing also regional economic integration organizations to accede to them. Another example of such a treaty is the 1982 United Nations Convention on the Law of the Sea, whose art. 305(1)(f) envisages that any international organization, which fulfills certain criteria, may sign it. The European Community (EC) did so on Dec. 7, 1984 and ratified the Law of Sea Convention by virtue of Council Decision 94/562 of July 25, 1994, 1994 O.J. (L 215) 9.

5. Vienna Convention, *supra* note 4, at art. 3(1). It obliges signatory parties to make the commission of relevant offenses liable to criminal sanctions, which take into account their grave nature. Note that the European Community has implemented this provision by adopting the Council Resolution of Dec. 20, 1996 on Sentencing for Serious Illicit Drug-Trafficking, 1997 O.J. (C 10) 3.

6. *Id.* at art. 3(1)(b)(ii).

2. The concealment or disguise of the true nature, source, location, disposition, movement or ownership of property, knowing that such property is derived from [a drug] offense.⁷

The Vienna Convention includes a number of provisions aiming at effective investigation and prosecution of money laundering cases. More particularly, it provides for extradition between signatory parties in criminal cases involving money launderers,⁸ for mutual legal assistance⁹ and for the possibility of transferring to another jurisdiction proceedings for criminal prosecution of alleged money launderers.¹⁰ Finally, the Convention obliges participating states to take appropriate measures to facilitate the confiscation of laundered property, which has been transformed or converted into *legitimate* assets. To that end, parties must ensure that national courts are empowered to order the disclosure of bank records; states may not invoke domestic rules of bank secrecy to avoid compliance.¹¹

Fresh impetus to the problems posed by the wide-ranging money laundering activities and the interaction between organized crime and the banking system was given once again by the EP. In its Resolution of September 12, 1991, it called upon the European Commission (the Community's executive organ) to work with national governments to come up with efficient measures drastically combating organized crime. In particular, it suggested that in appropriate circumstances, bank secrecy rules should be lifted in order to control and prevent money laundering.¹² However, since bank secrecy is an area traditionally associated with state sovereignty, the EP's call was largely ignored and no concrete action was taken by the EC.

These sporadic initiatives did not fully address the real problem facing the EC. The liberalization of the financial sector achieved in the late

7. *Id.* at art. 3(1)(b)(i).

8. *Id.* at art. 6. Extradition proceedings between most EC Member States are regulated by the European Convention on Extradition, Dec. 13, 1957, under the auspices of the Council of Europe, E.T.S. 24.

9. *Id.* at art. 7. A basis for mutual assistance is afforded by the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, Apr. 20, 1959, 472 UNTS 185, E.T.S. 30. Note that during the 1990s the United States has concluded mutual legal assistance treaties with the following EC Members: Austria (signed on Feb. 23, 1995, not yet in force), Luxembourg (signed on Mar. 13, 1997, not yet in force) and the United Kingdom (signed on Jan. 6, 1994, in force since Feb. 12, 1996).

10. *Id.* at art. 8. The European treaty covering this field is the Convention on Transfer of Proceedings in Criminal Matters, May 15, 1972, 1137 UNTS 29, under the auspices of the Council of Europe, E.T.S. 73.

11. Vienna Convention, *supra* note 4, at art. 5.

12. See PARL. EUR. DOC. B3-1393, 1399, 1420 and 1426/91, 1991 O.J. (C 267) 113; Bull. Eur. Communities 9-1991, point 1.2.134.

1980's and early 1990's posed complex problems of banking supervision.¹³ More importantly, it allowed money launderers to take full advantage of the new regime, thus endangering the foundations of the Community's financial sector. The situation became even more complicated, because in a large number of Member States the notion of *money laundering* was an unknown entity. It is true that the criminal law of all Member States does punish the offense of dishonestly handling stolen goods or goods deriving from the commission of other crimes or the proceeds of such crimes.¹⁴ Although the theoretical construction of money laundering and the handling of stolen goods share common characteristics, there are fundamental differences in their nature.¹⁵

The myriad of issues and difficulties involved in devising an effective framework for combating money laundering made it imperative that the EC responded *en block* and that it was not left to Member States to deal with money laundering on an individual basis. Although, at the time, the principle of subsidiarity had not yet been incorporated in the Community legal order.¹⁶ However, it has been submitted that money laundering constitutes a typical example of an area, where legislative action adopted by the EC can achieve far better results than any action undertaken by each Member State separately.

The reason for this submission is that money laundering is not a crime confined within the boundaries of any given country. On the contrary, money launderers operate as internationally organized players for which the notion of nation-state is obsolete.¹⁷ Due to the integration of the world economy at large and the bringing down of barriers in the EC in particular, it has been possible for money launderers to organize themselves on a transnational basis and exploit the financial sectors of those countries. This

13. On the interplay between effective supervision and money laundering, see KONSTANTINOS MAGLIVERAS, *THE ATTEMPTS OF THE EUROPEAN COMMUNITY TO INTRODUCE EFFECTIVE SUPERVISION IN THE FINANCIAL SERVICES SECTOR IN 1996 ONWARDS: LOWERING THE BARRIERS FURTHER* 81, 82 (Caiger & Floudas eds., 1996).

14. *E.g.* §§ 21-22 Theft Act, 1968, (Eng. & Wales); Larceny Act § 7 (1990) (Ir.); Penal Code art. 394 (Greece); Penal Code art. 261 (F.R.G.); Penal Code art. 546 (Spain).

15. See Magliveras, *supra* note 13, at 96-97.

16. It was inserted as art. 3b of the EC Treaty by virtue of art. G(5) of the Treaty Establishing The European Union [hereinafter "EU Treaty"], Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992). This principle sets out the rule that in those areas which do not fall within the European Community's exclusive legislative competence, the Community shall take action only if the objectives of the proposed action cannot be sufficiently achieved by the Member States acting on their own.

17. On global money laundering, see Bruce Zagaris & Shiela M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy*, 19 BROOK. J. INT'L L. 872, 874 (1993).

is because their legal systems, either premeditatedly¹⁸ or inadvertently,¹⁹ are unable to halt money laundering operations.²⁰

II. THE DIRECTIVE PREVENTING MONEY LAUNDERERS FROM USING THE EUROPEAN COMMUNITY FINANCIAL SYSTEM

The concerted response of the European Community to money laundering came in mid-1991. On June 10, 1991, the Council of Ministers adopted Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering.²¹ Directive 91/308 envisages a threefold action. First, to ensure that all Member States introduce legislation, which will make the laundering of proceeds deriving from serious crimes a criminal offense (Article 2). Second, to devise a system whereby credit and financial institutions facilitate investigations undertaken into money laundering operations by the competent national authorities. This is to be achieved, *inter alia*, by keeping adequate records of suspicious transactions, which will then be made available to such authorities (Articles 3 to 11). Third, to allow Member States to extend the provisions of Directive 91/308 to all those professions and entities involved in large cash transactions which are usually carried out undetected, *e.g.* dealers in art and in precious stones and metals, real estate agents, accountants, casinos, bureaux de change and travel agencies. In this way, it was hoped that the loopholes created by these largely unregulated businesses will be covered (Article 12).

In Article 1, Directive 91/308 attempts to cover the whole financial system of the European Community. Therefore, its provisions are not only applicable to banks but extend to all types of credit and financial institutions, which are being used or could be used by money launderers. Credit institutions are defined in accordance with Article 1(1) and (3) of the First Banking Directive.²² Financial institutions are very broadly defined:

18. We have in mind those states, which, although they have been severely criticized for lacking or maintaining lax money laundering legislation, they oppose any amendments to bring their laws in conformity with international standards; most of the so-called international tax havens belong to this category.

19. We refer to those states, which for various reasons (*e.g.* lack of expertise or resources) are prevented from promulgating the required anti-money laundering legislation.

20. In its report of Feb. 28, 1996, the United Nations International Narcotics Control Board concluded, *inter alia*, that criminals take advantage of countries with unregulated or inadequately supervised financial sectors to move their laundering operations there.

21. Council Directive 91/308, on prevention of the use of the financial system for the purpose of money laundering, 1991 O.J. (L 166) 77. On the legislative history of the Directive, KONSTANTINOS MAGLIVERAS, MONEY LAUNDERING AND THE EUROPEAN COMMUNITY, IN BANKS: FRAUD AND CRIME 171, 174-75 (Norton ed., 1994).

22. Council Directive 77/780, 1977 O.J. (L 322) 30, as last amended by Council Directive 89/646 of Dec. 15, 1989, 1989 O.J. (L 386) 1, (Second Banking Directive). Therefore,

on the one hand, they comprise undertakings, other than credit institutions, which have their registered offices inside or outside the European Community's territory and whose principal activity is to carry out any of the transactions stipulated in the Annex of the Second Banking Directive;²³ on the other hand, they comprise insurance companies duly authorized to carry out activities in accordance with the relevant Directive.²⁴

The definition of money laundering is also given in Article 1 and it becomes immediately clear that it has been heavily influenced by Article 3(1)(b) of the Vienna Convention.²⁵ The following intentional acts constitute the offense of money laundering:

(a) conversion or transfer of property, when it is known that such property has derived from criminal activities, for the purpose of concealing or disguising the illegal origin of the property or of assisting those involved in the carrying out of such activities to avoid prosecution;

(b) concealment or disguise of the true nature, source, location, disposition or movement of property, although it was known that the property had derived from the commission of criminal offenses;

(c) acquisition, possession or use of property, where the perpetrator was aware, at the time of receipt, that the property had derived from illicit activities; and

(d) participation or association in attempts to commit, aid, abet, facilitate or counsel the commission of any of the acts described above.

The offense of money laundering is also committed when the criminal operations from where the laundered proceeds originated, were carried out in the territory of a Member State or third country, different from the state where prosecution is pursued. The term *criminal activity* is defined in Article 1 and has been deliberately drafted in wide terms. It comprises the offenses specified in Article 3(1)(a) of the Vienna Convention. The

banks, other entities accepting deposits and offering banking services, and branches of banks whose registered offices are in a different Member State or in a third country, are covered.

23. See Nos. 2 to 12 and 14 of the Annex to the Second Banking Directive, *supra* note 22.

24. Council Directive 79/267 of Mar. 5, 1979 O.J. (L 63) 1, (First Life Directive) as last amended by Council Directive No. 92/96 of Nov. 10, 1992 O.J. (L 360) 1, (Third Life Directive).

25. See *supra* text accompanying notes 6-7.

definition of criminal activity includes the cultivation, production, manufacture, transportation and sale of narcotic drugs and the management or financing of any of these activities, and "any other criminal activity designated as such for the purposes of this Directive by each Member State." This wording suggests that Member States are not compelled to extend the scope of prohibited money laundering operations to proceeds other than those deriving from drug trafficking offenses (the predicate offenses).

In this respect, the definition of money laundering has been badly drafted because it leaves it to the discretion of Member States to decide which criminal activities should be designated. In effect it allows for considerable disparities between national legislation. One consequence of this disparity could be seen in cases of extradition: if Member State A requests from Member State B the extradition of C for alleged laundering of funds derived from terrorist activities and the laws of Member State B criminalize only the laundering of drug trafficking proceeds, the request shall be turned down, because the principle of double criminality (*i.e.* that the act for which extradition is petitioned must be a criminal offense in both Member States)²⁶ would not be fulfilled. It would have been better, if a minimum catalogue of predicate offenses had been included in Directive 91/308, possibly covering drug trafficking, terrorism, tax evasion, loan sharking, illegal gambling and prostitution, and Member States had been left free to add to that list.

Directive 91/308 has a stipulation that money launderers may only be prosecuted if they were aware that the property given to them for conversion derived from committing or participating in a predicate offense.²⁷ This places an additional obstacle to successfully bringing before the courts money laundering cases. This is because prosecutors bear the onus of proving that the launderers had concrete knowledge of the property's illicit origin.²⁸ It should be stressed that Directive 91/308's strict requirement that the alleged money laundering operations must have been intentional in order to be prosecuted has not been followed by all Member States. Thus, the implementing legislation adopted in the Netherlands,²⁹ Ireland³⁰ and Britain³¹ also punish negligent money

26. In *Wright v. Henkel*, 190 U.S. 40, 58 (1903), the United States Supreme Court stated that "the general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both states." This rule has been incorporated as art. 2(1) of the European Convention on Extradition, *supra* note 5.

27. Cf. Art. 3(1)(b) of the Vienna Convention, *supra* note 4.

28. Vienna Convention, *supra* note 4, at art. 5(7) (urging signatory parties to consider reversing the burden of proof regarding the lawful origin of alleged proceeds liable to confiscation).

29. Penal Code art. 417 bis (Neth.); see Konstantinos Magliveras, *The Implementation of the 1991 EC Directive on Money Laundering in Germany, Italy and the Netherlands*, 8 INT'L L. PRACTICUM OF THE N.Y. B.A. 89, 95-96 (1995).

laundering. In other words, cases where the defendant ought to have suspected that the proceeds whose identity he disguised had derived from the commission of a predicate offense.

A further difficulty with which prosecutors in Member States are faced is that they must link the illicit proceeds to a specific crime. This is particularly true in the case of drug trafficking offenses, which are usually committed many times in the course of a single day. As early as 1988, the British Metropolitan Police maintained that the fact that the prosecution had to show, beyond a reasonable doubt, that the laundered money had been the proceeds of drug trafficking resulted in considerable difficulties, not only in conducting in-depth investigations but also in securing convictions for money laundering offenses.³²

Similar obstacles exist in relation to confiscation orders. The position of the British law exemplifies how a Member State had to amend its legislation to overcome these difficulties. Under the Criminal Justice Act 1988, confiscation orders could have only concerned proceeds derived from the offense for which the defendant was convicted. It followed, that proceeds of crimes, the defendant was not charged with could have never been the object of a confiscation order. With the promulgation of the Proceeds of Crime Act 1995, the British legislator changed this state of affairs: section 2(4) of the 1995 Act now empowers courts to make the assumption that *all* property held by the defendant at the time of conviction is perceived as proceeds of the offense charged with.³³

Article 2 of the Money Laundering Directive proved to be quite controversial, because its original wording insisted that Member States "ensure that money laundering is treated as a criminal offense."³⁴ At one point, this provision jeopardized the adoption of the whole directive by the Council of Ministers.³⁵ The dispute at issue was whether the European Community enjoys any legislative power in the area of criminal law. This was not the first time that an EC instrument falling within the broad area of criminal law proved to be controversial. For example, in 1987 a proposal was put forward for a directive harmonizing insider dealing across the Community.³⁶ This Directive required that insider dealing should be

30. Criminal Justice Act § 93A(1)(1988); see Konstantinos Magliveras, *The Regulation of Money Laundering in the Republic of Ireland*, 11 INT'L ENFORCEMENT L.REP. 82, 83 (1995).

31. Criminal Justice Act § 93A(1)(1988)(Eng.), § 93A(1)(1998)(Eng.), inserted by virtue of Criminal Justice Act, § 29(1993)(Eng.).

32. See House of Commons, Home Affairs Committee, Session 1988-89, Seventh Report, Drug Trafficking and Related Serious Crime, Vol. I, para. 79, H.C. 370.

33. See Konstantinos Magliveras, *Extending Further the Powers of Confiscation in Britain: The Proceeds of Crime Act 1995*, 13 INT'L ENFORCEMENT L.REP. 8, 9 (1997).

34. Council Directive 91/308, *supra* note 21.

35. See Magliveras, *supra* note 21, at 178-79.

36. COM(87) 111 final, 1987 O.J. (C 153) 8.

treated as a criminal offense. The uncompromising position of Germany led to the amendment of the relevant provision (Article 13) to the following wording: "Each Member State shall determine penalties to be applied for infringement of the measures taken pursuant to this Directive."³⁷

A similar compromise was reached in the Money Laundering Directive and Article 2 was changed to read: "Member States shall ensure that money laundering as defined in this Directive is prohibited." In order to compensate for this watered-down provision, the European Community partners gave the undertaking that their implementing legislation would make money laundering a criminal offense by December 31, 1992.³⁸

Article 2 of the Money Laundering Directive was supplemented by two new provisions, which did not appear in the original proposal.³⁹ The first is Article 14, whose wording is identical to Article 13 of the Insider Dealing Directive.⁴⁰ This Directive obliges Member States to determine the penalties to be imposed in case the measures adopted under the Directive are infringed upon. The second is Article 15, which empowers Member States to promulgate against money launderers measures stricter than those envisaged in the Directive.⁴¹

During the deliberations for the adoption of the Money Laundering Directive, the EP proposed that Article 2 should have also obliged Member States to ensure that all proceeds from criminal activities were subject to confiscation. This view was not shared by the Council of Ministers. The EP amendment considerably altered the scope of the Directive, which aims only at preventing money launderers from exploiting the European Community's integrated financial system for their benefit. It follows that the Directive was not conceived as an instrument facilitating confiscation of illicit proceeds. Currently, this may only be achieved under specific

37. Council Directive 89/592, 1989 O.J. (L 334) 30., coordinating regulations on insider dealing. The German position has consistently been that insider dealing should not be criminalized. See Engel, *Zur Problematic eines gesetzlichen Verbots von Insider-Geschaeften*, 3 JAHRBUCH FUER SOZIALWISSENSCHAFT 338 (1991). It was finally outlawed under the Securities Trading Act (Gesetz ueber den Wertpapierhandel) of July 26, 1994, published in Bundesgesetzblatt (German Official Gazette), Part I, at 1749. See ASSMAN, THE PROPOSED GERMAN LEGISLATION ON INSIDER DEALING IN INSIDER TRADING IN WESTERN EUROPE: CURRENT STATUS 15 (Wegen ed., 1994).

38. The undertaking took the form of a declaration of intent, attached to the text of the Directive, *supra* note 21. Note that the European Parliament has argued that because of the importance of the organized crime problem, the fight against it should become a matter of exclusive Community competence. See European Parliament Resolution on Criminal Activities in Europe, PARL. EUR. DOC. A3-0033/94; 1994 O.J. (C 61) 235.

39. See Commission Proposal on a Directive to Curb Money Laundering, COM(90)106 final, 1990 O.J. (C 106) 6; 2 COMMON MKT. L. REP. 411 (1990).

40. Vienna Convention, *supra* note 4, at art. 5.

41. Council Directive 91/308, *supra* note 21.

treaties, such as the Vienna Convention,⁴² the Council of Europe Convention on Laundering, Seizure and Confiscation of the Proceeds of Crime⁴³ and the Schengen Implementing Agreement.⁴⁴

Articles 3 through 7 of the Money Laundering Directive contain the measures, which Member States must impose on credit and financial institutions operating in their jurisdiction.⁴⁵ Article 3(1) provides that such institutions must proceed with customer identification when an account is opened or a transaction is carried out exceeding, in local currency, the amount of ECU 15,000 (\$ 13,650) either in a single operation or in separate operations, appearing to be loosely connected (the so-called *smurfing*).⁴⁶ In practice, the identification requirement is implemented when banks check in detail the identity of customers (the so-called *know your customer* principle) and refrain from opening anonymous⁴⁷ or proxy accounts where the beneficiary's identity is not fully revealed.

The identification requirement also extends to insurance companies. Article 3(3) and (4) exclude from its application those insurance policies whose periodic premiums, in any given year, do not exceed ECU 1,000 (\$ 1,350) or whose lump sum investment amounts to ECU 2,500 (\$ 3,375) or less, or insurance policies of occupational pension schemes.⁴⁸ These limits have been set at rather low levels and that provision ought to have been made to index-link these amounts to inflation, which in certain Member States is not inconsiderable. Finally, Article 3(8) stipulates that the identification requirement is fulfilled, if payment of the insurance policy is effected through an account held in the customer's name and in a credit institution covered by the Directive. This provision could have been problematic at the time the Directive was adopted. However, because supervision in the financial sector was not properly harmonized across the

42. Vienna Convention, *supra* note 4, at art. 5.

43. The Convention was concluded in Strasbourg, France on Nov. 8, 1990, in force since Sept. 1, 1993, E.T.S. 141, at articles 13-17; *reprinted in* 30 I.L.M. 148 (1991). Twenty-seven states have signed it, but only thirteen have ratified it; the United Kingdom was the first country to ratify it on Sept. 28, 1992, 1993 Gr. Brit.T.S. No. 59 (Cmnd. 2337).

44. The Agreement was signed in Schengen, Luxembourg on June 19, 1990, in force since March 26, 1995, [1991], at art. 72; 30 I.L.M. 84. It supersedes the Convention on the Gradual Abolition of Checks at the Common Borders of France, the Federal Republic, Belgium, The Netherlands and Luxembourg of June 14, 1985 (the so-called Schengen Convention), [1991] 30 I.L.M. 73. See generally O'Keefe, *The Schengen Convention: A Suitable Model for European Integration?* 11 Y.B. EUR. L. 185 (1992).

45. Council Directive 91/308, *supra* note 21.

46. *Id.*

47. On Austria's insistence to maintain anonymous accounts, see *infra* at 108-111.

48. Council Directive 91/308, *supra* note 21.

European Community, the situation has been undoubtedly improved with the entry into force in July 1996, of the so-called Post-BCCI Directive.⁴⁹

Article 6 of the Money Laundering Directive imposes a duty on credit and financial institutions to report suspicious transactions to the competent national judicial or law enforcement authorities. However, it was agreed not to adopt a general reporting requirement similar to the one, which has been imposed in the United States since 1970.⁵⁰ The United States Currency and Foreign Transactions Reporting Act of 1970 requires banks to file a report (CTR) with the Treasury Department within 15 days after a customer deposits, withdraws or transfers currency in excess of \$10,000, regardless of whether the transaction was of a suspicious nature.⁵¹ Undoubtedly, the Directive's drafters had a lot to learn from the application of the United States regulations, especially in relation to *smurfing*. Courts have held that the 1970 Act did not prohibit the *structuring* of banking transactions to multiple operations involving amounts less than \$10,000 in order to avoid the CTR filing requirement.⁵² This *lacuna* was not closed until the Money Laundering Control Act was promulgated in 1986;⁵³ it enacted the so-called *anti-smurfing statute*, which provides that "no person shall for the purpose of evading the reporting requirements, structure or assist in structuring, or attempt to structure any transaction with one or more domestic financial institutions."⁵⁴

The United States legislation has been notably followed in Australia, where section 7 of the Cash Transaction Reports Act 1988 (in operation

49. European Parliament and Council Directive No. 95/26 of June 29, 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives No. 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives Nos. 79/267/EEC and 92/96/EEC in the field of life insurance, Directive No. 93/22/EEC in the field of investment firms and Directive No. 85/611/EEC in the field of undertakings for collective investment in transferable securities, with a view to reinforcing prudential supervision, 1995 I.J. L 168) 7. For examination of this Directive, see Magliveras, *supra* note 13, at 83-96.

50. Note that Taiwan's Money Laundering Control Act of Oct. 23, 1996 in force since April 23, 1997, has opted for the EC suspicion-based reporting system rather than the U.S. one; see Lee, *Recent Anti-Money-Laundering Efforts in Taiwan*, 12 INT'L ENFORCEMENT L.REP. 140, 143-44 (1998).

51. Commonly referred to by the misnomer Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1118, (codified at 31 U.S.C. §§ 321, 5311-5314, 5316-5322 (1994)), in particular § 5313(A). On the problems created by the vast number of CTRs (estimated to have reached over 100 million by the end of 1997). See Byrne, *Bank Secrecy Act Compliance in the 1990's*, 179 BANKERS MAG. 15 (1996).

52. See *United States v. Bucey*, 876 F.2d 1297, 1309 (7th Cir. 1988), *cert. denied*, 493 U.S. 1004 (1989); *United States v. Mastronardo*, 849 F.2d 799, 804 (3d Cir. 1988); *United States v. Gimbel*, 830 F.2d 621, 625-26 (7th Cir. 1987).

53. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 18 U.S.C. §§ 1956-1957 (1994)).

54. See 31 U.S.C. § 5324 (1994).

since July 1990 and amended by Part II of the Crimes Legislation Amendment Act 1992) has introduced a rather low threshold amount requiring banks, credit unions, casinos, etc. to report cash transactions over Ash 10,000 (\$6,650) to the Australian Transaction Reports and Analysis Centre (formerly, the Cash Transaction Reporting Agency). Section 31 of the 1988 Act creates the offense of *smurfing* and already there have been a number of prosecutions. It is interesting to note that in the first case of successful prosecution, the accused was not a bank customer, but the manager of a foreign bank's Sydney representative office, whose staff had itself developed a system to enable certain clients to engage in *smurfing*.⁵⁵

Although the system of compulsory reporting of all transactions involving a minimum amount has not been particularly effective in detecting money-laundering operations in the banking sector, certain countries have recently adopted it. More specifically, section 4 of Bahamas' Money Laundering (Proceeds of Crime) Act 1995 stipulates reporting requirements similar to those imposed on United States financial institutions.⁵⁶ In addition, Articles 11 through 13 of the 1998 Brazilian Bill on Money Laundering obligate home banks and representative offices of foreign financial institutions to report transactions above a certain threshold to the national Financial Activities Control Board.⁵⁷

Article 6 of the Money Laundering Directive also obliges credit and financial institutions to furnish the competent authorities of a Member State with all requested information, documents or records and to assist them in their criminal investigations into money laundering cases.⁵⁸ Since furnishing such information results in bank secrecy being lifted, this may possibly lead to a breach of contract by the forwarding institution. Article 9(2) stipulates that any such disclosure, done in good faith to the competent authorities, shall not involve civil or penal responsibility of any kind on the part of the institution or its employees that disclosed the sensitive information.⁵⁹

55. See Hammond & Waldie, *Money Laundering: Foreign Banks Beware*, INT'L FIN. L. REV., May 1996, at 49.

56. See Gibson, *Bahamas Money Laundering Regulations 1996*, 13 INT'L ENFORCEMENT L.REP. 1 (1997). The Bahamas was the first offshore financial center to enact legislation against money laundering.

57. Law No. 9613 of Mar. 3, 1998. See Bruce Zagaris & Sardenberg, *Brazil Enacts Anti-Money - Laundering Law*, 14 INT'L ENFORCEMENT L.REP. 136, 138-39 (1998).

58. Council Directive No. 91/308, *supra* note 21.

59. Cf. Post-BCCI Directive, *supra* note 49, at art. 5. It provides that when an auditor reveals irregularities in the audited company to the competent authorities and thus violates his duty of professional secrecy, such disclosures shall not constitute a breach of restrictions on disclosure of information imposed by contract or any legislative or administrative provision and shall not involve liability of any kind.

During the Directive's drafting stages, the EP proposed two amendments to the system of reporting suspicious transactions, which were accepted by the Council of Ministers. The first, incorporated as Article 8, ensures that banks will not disclose to their customers the fact that information relating to their transactions has been requested and transmitted to judicial authorities or that a money laundering investigation is being carried out and that their names are in some way implicated in it (the so-called *tipping off*).

The second amendment, incorporated as Article 6(3), imposes an obligation upon the competent authorities not to use the information released in accordance with this provision for purposes other than investigations into money laundering operations. A similar provision can be found in Article 10(3) of the Insider Dealing Directive, preventing the competent authorities from using the information received in any other context apart from administrative or judicial proceedings against insider traders.⁶⁰

In Article 10, the Money Laundering Directive calls for cooperation between the various competent authorities of a Member State. However, the exact structure of such cooperation is to be decided by each state individually. The exception is that if inspections have been carried out in credit or financial institutions by competent supervisory authority⁶¹ and they reveal evidence of possible laundering operations, it must be passed on to the judicial or law enforcement authorities responsible for combating money laundering. In the United Kingdom this obligation has been implemented in Regulation 16 of the Money Laundering Regulations 1993.⁶² This regulation places a legal duty upon the supervisory authorities to disclose to the police as soon as practically possible any information collected by them indicating money-laundering operations.

Unfortunately, the Directive's drafters did not include a provision allowing the competent authorities in one Member State to request the transmission of information from another Member State relating to money laundering investigations.⁶³ This possibility would have ensured the fullest cooperation and assistance between the competent authorities in all Member States by exchanging vital information regarding money launderers who operate across borders. The lack of such a provision is rather curious

60. See *supra* note 37. Enumerating in a restrictive fashion in which cases confidential information collected by or exchanged between banking supervisory authorities may be used and for what purpose.

61. In EC law, the principle is that supervision is exercised solely by the competent authorities of the state which first authorized the institution to pursue business, the so-called "home country principle;" see Second Banking Directive, *supra* note 24, at art. 13.

62. Statutory Instruments No. 1993/1933.

63. Council Directive 91/308, *supra* note 21.

considering that such requests are possible under Article 10(1)-(2) of the Insider Dealing Directive.⁶⁴

As the situation now stands, such assistance can be afforded either in the context of an official request pursuant to a bilateral mutual legal assistance treaty⁶⁵ or in accordance with the provisions of the European Convention on Mutual Assistance in Criminal Matters⁶⁶ or the Council of Europe Convention on Laundering.⁶⁷

Article 10 of the latter treaty empowers one signatory party to forward to another party, without prior request, information on proceeds from illegal activities when it considers that, by disclosing such information, the receiving state might be assisted in initiating or carrying out investigations or prosecuting money launderers.⁶⁸ It should be noted that this provision does not give rise to a binding obligation. In other words, signatory parties are entitled to exercise their discretion in deciding whether such information should be transmitted to another state. Taking into consideration that the Convention could be acceded to by non-Council of Europe Members, namely Australia, Canada and the United States,⁶⁹ the prospects which this provision opens for effective international cooperation are enormous, should states be prepared to implement it with an open mind.⁷⁰

Although it has been argued that this was the first time that a multilateral treaty has envisaged such wide-ranging cooperation between signatory parties,⁷¹ this submission is not accurate. Article 46(1) of the Schengen Implementing Agreement had already stipulated that "In particular cases, each Contracting Party may, in compliance with its national law and without being asked, send the Contracting Party

64. See *supra* note 37. In Germany this provision has been implemented under paragraph 14 of the Securities Trading Act.

65. E.g. Agreement between UK and Italy concerning mutual assistance in relation to traffic in narcotic drugs and the restraint and confiscation of the proceeds of crime, signed in Rome, Italy, on May 16, 1990, in force since May 8, 1994. 1995 Gr. Brit.T.S. No. 33 (Cmnd. 2853).

66. See *supra* note 9.

67. See *supra* note 43.

68. *Id.*

69. This reflects the fact that these three countries participated actively in the Convention's drafting; so far, only Australia has signed it, on Sept. 28, 1992.

70. See the Agreement between the United Kingdom and the Netherlands to Supplement and Facilitate the Operation of the Convention of the Council of Europe on Laundering, signed in London, on Sept. 15, 1993, in force since June 2, 1994. 1994 Gr. Brit.T.S. 45 (Cmnd. 2655).

71. See Nilsson, *The Council of Europe Laundering Convention: A Recent Example of a Developing International Criminal Law in Principles and Procedures for a New Transnational Criminal Law*, 457, 472 (Eser & Lagodny eds., 1993).

concerned any information which may be of interest to it in helping prevent future crime."⁷²

III. THE IMPLEMENTATION OF THE DIRECTIVE IN THE MEMBER STATES

According to Article 16, the European Community partners had to implement the Money Laundering Directive into their internal legal orders by January 1, 1993 at the latest. However, this deadline was not observed by the majority of Member States. It is interesting to note that even countries which had promulgated relevant legislation before the Directive was adopted failed to achieve complete implementation by the stipulated deadline. For example, in Britain where the laundering of proceeds from drug trafficking was made a criminal offense in 1986,⁷³ the Directive was fully incorporated into national law by virtue of the Criminal Justice Act of 1993⁷⁴ and the Money Laundering Regulations of 1993.⁷⁵ Similarly, in Belgium, where the Act of July 17, 1990, introduced to its Penal Code Article 505 creating the offense of intentional or negligent laundering of proceeds of any crime,⁷⁶ the Directive was finally given effect by the Money Laundering Act of January 11, 1993.⁷⁷

Although it is not within the scope of the present article to analyze how the Directive was turned into domestic legislation in each and every Member State, reference will be made to specific problems, which have been encountered. The method of implementation opted for by most Member States in Continental Europe has been to amend their Penal Codes in order to criminalize money laundering and to promulgate separate legislation catering for the substantive provisions of the Directive (*e.g.* the identification requirement, the obligation to reveal to the competent authorities all suspicious transactions and the duty not to alert customers suspected of money laundering). This method was followed, *inter alia*, by Germany where the 1992 Act on impeding illegal drug trafficking and other forms of organized crime introduced a new paragraph 261 to the

72. The Agreement, *supra* note 44, was concluded three months before the Council of Europe Convention on Laundering, *supra* note 43.

73. See Drug Trafficking Offenses Act, 1986 § 24 (Eng.). It was later replaced by the Drug Trafficking Act, 1994 § 50 (Eng.).

74. The Act received the Royal Assent on July 27, 1993.

75. See *supra* note 62.

76. Loi du 17 juillet 1990, modifiant les arts. 42, 43 et 505 du Code penal et inserant un art. 43bis dans ce meme Code (F90-2020), published in Moniteur Belge (Belgian Official Gazette), Aug. 15 1990, at 15886.

77. Loi du 11 janvier 1993 relative a la prevention d l'utilisation du systeme financier aux fins du blanchiment de capitaux, published in Moniteur Belge, Jan. 28, 1993. These two statutes were amended by the Act of Apr. 7, 1995, published in Moniteur Belge, May 10, 1995 which inserted a new art. 505(4) to the Penal Code expressly punishing attempted money laundering.

Penal Code⁷⁸ and the 1993 Act on the detection of proceeds from serious crimes incorporated the substantive provisions.⁷⁹

In the case of the Netherlands, the Dutch Penal Code was amended with effect on February 1, 1992, to criminalize intentional (Article 416) or negligent (Article 417bis) acceptance, possession or transfer of property (including money) which has been obtained by committing any felony.⁸⁰ The substantive provisions were implemented by the adoption of two separate pieces of legislation: the Identification (Financial Services) Act 1993 and the Disclosure of Unusual Transactions (Financial Services) Act 1993, both of which came into force on 1 February 1994.⁸¹

This method of implementation could be considered as advantageous, in the sense that it allows Member States to adopt detailed and precise legislation. However, it has the disadvantage of not being able to tackle the problem effectively should the various pieces of legislation prove to be incoherent with each other. The gist of the Directive is that the panacea of money laundering is not addressed by simply ensuring that it is made a criminal offense; this is only one of the required measures. Equally important is the assistance afforded by many different players: law enforcement agencies, financial institutions, supervisory authorities, etc. Only the concerted effort of the legislature and these players ensures that the money-laundering problem is efficiently tackled.

A. *The Case of Spain*

This argument is best illustrated by examining the shortcomings of the Directive's implementation in Spain. Organic Law 1/1988 of March 24, 1988, reforming the Penal Code in relation to illegal drug-trafficking introduced Article 546bis(f), which penalized the laundering of proceeds derived from dealing in drugs.⁸² A first attempt to incorporate the Directive's substantive provisions was the promulgation, on December 28,

78. Gesetz zur Bekämpfung des illegalen Rauschgift Handels und anderer Erscheinungsformen der organisierten Kriminalität of July 15, 1992, published in Bundesgesetzblatt, Part I, No. 34, July 27, 1992, at 1302; see Magliveras, *supra* note 29, at 90 et seq.

79. Gesetz ueber das Aufspueren von Gewinnen aus schweren Straftaten (Geldwaeshegesetz) of Oct. 25, 1993, published in Bundesgesetzblatt, Part I, No. 56, Oct. 29, 1993, at 1770.

80. See Magliveras, *supra* note 29, at 95.

81. Respectively, Wet identificatie bij financiële dienstverlening and Wet melding ongebruikelijke transacties both of Feb. 2, 1993, published in the Dutch Official Gazette, 1992-93, Nos. 23008 and 23009, respectively.

82. Published in Boletín Oficial del Estado (Spanish Official Gazette, B.O.E.), Mar. 26, 1988, No. 74, at 9498. Its scope was subsequently widened by Organic Law No. 8/1992 of Dec. 23, 1992, published in B.O.E., Dec. 24, 1992, No. 308.

1993 of Act 19/1993, on Offenses Relating to the Laundering of Moneys.⁸³ Since this instrument did not implement the Directive fully, a provision was made whereby the government was granted six months from the day the Act entered into force (i.e. until June 28, 1994) to adopt the necessary supplementary legislation. However, this deadline was not observed and, in effect, Spain was faced with a situation where only some aspects of the anti-money laundering legislation were in place. The supplementary legislation was finally promulgated on June 9, 1995, as Royal Decree 925/1995.⁸⁴

This plethora of instruments regulating the same area has resulted in unavoidable contradictions. As already mentioned, Article 564bis(f) of the Penal Code criminalizes the laundering of proceeds deriving solely from drug trafficking. Whereas the scope of Act 19/1993 has been augmented to cover not only drug trafficking proceeds, but also proceeds from criminal activities perpetrated by terrorists or by organized crime groups. It follows that although a person who launders proceeds from an armed attack on a security van carried out by terrorists may not be prosecuted under the Penal Code, a bank manager who failed to report a transaction for which there was evidence or knowledge that constituted an operation to launder proceeds from the armed attack will be prosecuted under Act 19/1993. This divergence between the two instruments, which had been acknowledged by the Spanish government,⁸⁵ was rectified in Article 301 of the new Penal Code.⁸⁶

It would be untrue to argue this state of affairs paralyzed the Spanish law enforcement agencies. The argument made here is that, until Royal Decree 925/1995 was promulgated, Spanish law was not in a position to deal, in a drastic manner, with money laundering operations. It is interesting to note the money laundering operations which have been unveiled by the Spanish police were not discovered as a result of the legislation's application but by reason of the arrest of the drug traffickers,

83. Ley 19/1993, de 28 de diciembre, sobre determinadas medidas de prevención del blanqueo de capitales published in B.O.E., Dec. 29, 1993, No. 311, at 37327.

84. Published in B.O.E., June 9, 1995, No. 160 and corrected in B.O.E., Oct. 31, 1995, No. 260. The Decree, *inter alia*, provides the complete list of entities whose activities are covered by the money laundering legislation (art. 2); stipulates in which cases the identification requirement does not apply (art. 4); sets out the functions of and the procedure before the Commission for the Prevention of Money Laundering and Monetary Offenses, the competent authority to receive notification of suspicious transactions (arts. 19-26); and amends the penalties imposed for money laundering offenses (art. 16).

85. See Konstantinos Magliveras, *The Recent Legislation to Combat Money Laundering in Spain*, 12 INT'L ENFORCEMENT L.REP. 84, 85 (1996).

86. It was promulgated by the Spanish Parliament on Nov. 8, 1995 and published in B.O.E., Nov. 24, 1995, No. 281, in force since May 24, 1996; see generally Mir, *Das neue spanische Strafgesetzbuch von*, 108 ZEITSCHRIFT FUER DIE GESAMTE STRAFWISSENSCHAFT 857 (1996).

who revealed how the proceeds were laundered.⁸⁷ The most spectacular prosecution occurred in October 1995, when four individuals were accused of laundering two billion pesetas (\$13 million) between 1988 and 1991, which had derived from drug trafficking. The method of laundering was a very simple one: they exchanged in a specific bank the narcotics proceeds, held in Italian liras and Dutch florins, into pesetas.⁸⁸

B. *The Case Of Austria*

The implementation of the Money Laundering Directive has not only been problematic for the existing Member States, but also for countries which acceded to the European Community after it was adopted. The case of Austria affords a very good illustration and shows that, notwithstanding the deep integration of the European Community's banking sector, there still exist considerable differences regarding banking ethics. As a signatory party to the Agreement on the European Economic Area⁸⁹ and to the Treaty of Nordic and Austrian Accession, under which she became a Member State on January 1, 1995,⁹⁰ Austria was under an obligation to transform the Money Laundering Directive into national law. Implementation was achieved on July 30, 1993, with the promulgation of the Penal Code (Money Laundering) Act 1993.⁹¹

The Act introduced the offense of money laundering in paragraph 165(1) of the Austrian Penal Code. It stipulates that anyone who conceals valuables in excess of ASh 100,000 (\$7,900) obtained through a crime or who disguises their illicit origin or makes untrue statements in respect of them is to be punished with a maximum term of imprisonment of two years or with a pecuniary penalty.⁹² Paragraph 165(3) deals with money laundering operations involving more than ASh 500,000 (\$39,500) or carried out by members of criminal groups which were established with the

87. See *Spanish Police Strike Against Drug-Related Laundering*, 13 INT'L ENFORCEMENT L.REP. 90 (1997).

88. See *Spanish Drug Prosecutor Seeks First Closure of Bank for Money Laundering*, 11 INT'L ENFORCEMENT L.REP. 479 (1995).

89. Signed in Oporto, Portugal on May 2, 1992, in force since Jan. 1, 1994, 1994 O.J. (L 1) 3.

90. Signed in Corfu, Greece on June 24, 1994, in force since Jan. 1, 1995, 1994 O.J. (C 241) 9; see article 2 of the attached Austrian Act of Accession, 1994 O.J. (C 241) 21. The legislative changes to Austria's financial services sector brought about by its accession are summarized in Huber and Luiki, *Austria - Major Changes in Financial and Securities Laws Prompted by New EC Era* [1995] 2 Eur. Fin. Serv. L. 35.

91. Bundesgesetz, mit dem das Strafgesetzbuch im Zusammenhang mit der Geldwaescherei geaendert wird, No. 527, published in Bundesgesetzblatt fuer Oesterreich (Austrian Official Gazette), No. 192, July 30, 1993, at 3885, in force since Oct. 1, 1993; on the Draft Act, see Kienapfel, *Die Geldwaescherei* [1993] 48 Oesterreichische Juristen Zeitung 80.

92. *Id.*

purpose of continuously laundering illicit proceeds; these offenses attract the heavier punishment of a term of imprisonment between six months and five years.⁹³ The lack of the possibility to impose a pecuniary penalty on money launderers involved in such cases should be criticized, because, as consistent practice has shown, it is not always possible for the prosecution to detect the physical location of the laundered funds so as to proceed with their seizure. In these instances, the imposition of a heavy penalty results, at least partially, in skimming the convicted launderer of his illicit gains.

Since 1996, Austria has been involved in a bitter dispute with the European Commission on whether its banking laws comply with the requirements of the Money Laundering Directive. The issue of the dispute is the fact that the Austrian legislation, unique among Member States, allows the opening and holding of anonymous savings accounts, known as *Sparbuch Kontos*.⁹⁴ On February 15, 1996, the Commission forwarded a formal complaint warning the Austrian government that, by not ensuring the proper identification of individuals opening savings accounts, it had failed to comply with its obligations under the Directive. The Commission concluded its communication with requesting Austria to proceed immediately with abolishing all such anonymous accounts.⁹⁵ The European Commission has not been alone in severely criticizing Austria in this respect. A 1995 United States government report on the vulnerability of the world banking system to money laundering ranked Austria's banking sector alongside those of Colombia, Venezuela and Thailand because of its potential for abuse by money launderers.⁹⁶

On April 9, 1996, Austria flatly rejected the Commission's complaint. Reflecting the strong nationalist reaction, which this issue provoked, Mr. Klaus Liebscher, the Central Bank president, characteristically said that anonymous savings accounts "are part of the Austrian savings culture [which] should not be touched."⁹⁷ In its response, Austria insisted that these accounts be maintained on the following considerations.⁹⁸ First, the Austrian Constitution guarantees bank secrecy and domestic legislation provides for adequate guarantees that bank secrecy will be lifted in the

93. Laundering the proceeds of a criminal organization at its request is regulated in Article 278a of the Austrian Penal Code and is punishable with a term of imprisonment of between six months and five years.

94. The Commission has estimated that Austria's population of eight million maintains some 26 million such savings accounts holding approximately AS\$ 1,4 trillion (\$ 110 billion).

95. Zagaris, *Austria Will Restrict Bank Secrecy Laws on Securities, But Not Savings Accounts*, 12 INT'L ENFORCEMENT L.REP. 88 (1996).

96. See Austria: Controversy over Austrian Anonymity Rules, CLIFFORD CHANCE EUR. FIN. SERV. NEWSLETTER, Mar. 1996, at 1.

97. See Fuchs, *Gewinnabschoepfung und Geldwaescherei Wie soll es weitergehen?* [1995] 50 OESTERREICHISCHE JURISTEN ZEITUNG 215.

98. *Id.*

event of criminal investigations.⁹⁹ Second, bank accounts have been held anonymously in Austria for 200 years. Third, these accounts may only be opened by Austrian citizens and the maximum amount held in them cannot exceed ASh 200,000 (\$15,800). Therefore, they are not of particular assistance to money launderers who are mostly engaged in transferring considerably larger amounts. Fourthly, although during 1995 Austrian banks reported 310 cases of suspected money laundering transactions, with a volume of ASh 2.5 billion (\$197 million), only a handful of these involved savings accounts.¹⁰⁰

As was expected, the European Commission was not at all impressed by the argumentation put forward by Austria and especially by the submission that a different banking culture has existed for so long, which should be taken into consideration. Consequently, in September 1996, the Commission addressed Austria in another communication stating its view that the rule of anonymity in opening savings accounts is incompatible with the identification requirement enshrined in Article 3(1) of the Directive¹⁰¹ and that the continued existence of such accounts offers a safe haven for illicit funds.¹⁰² The gist of the Commission's communication was that the current Austrian legislation infringes upon not only European, but also common international standards on the prevention of money laundering to which all countries are expected to subscribe.

Austria's uncompromising position on its bank secrecy laws led the Commission to commence the infringement proceedings envisaged in Article 169 of the EC Treaty.¹⁰³ Thus, in March 1997, it sent a Reasoned Opinion to the Austrian government where it recorded the alleged violations of the Money Laundering Directive and gave Austria final opportunity to have its anonymous bank accounts abolished. In April 1997, the Austrian government rejected the Commission's contentions and

99. *Id.*

100. According to paragraph 40(1) of the Austrian Banking Act 1993 (Bankwesengesetz) published in Bundesgesetzblatt, July 30, 1993, No. 194, at 3903, when banks suspect money laundering operations, they are under the duty to establish the customer's identity and communicate promptly their suspicions to the law enforcement authorities. The latter are empowered under paragraph 40(3) to demand that the bank does not carry out the suspicious transaction until authorization to do so has been granted. This power has been strongly criticized because it infringes customers' rights without the legislation expressly authorizing it. *See Fuchs, supra* note 97.

101. *See supra*, at note 21.

102. *See* CLIFFORD CHANCE EUR. FIN. SERV. NEWSLETTER, Sept. 1996, at 1-2.

103. This provision reads as follows: "If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."

refused to comply with its request.¹⁰⁴ The next step in the infringement proceedings is for the Commission to lodge an application before the European Court of Justice asking for a declaration that Austria has violated its obligations under the EC Treaty.¹⁰⁵

It has been reported that on October 15, 1997 the European Commission decided to refer the case to the European Court of Justice.¹⁰⁶ The Commission's case is based on two considerations.¹⁰⁷ First, that the retention of anonymous savings accounts is a flagrant breach of the principle of identification cornerstone of the Money Laundering Directive.¹⁰⁸ Second, that the offense of money laundering applies only if the laundered proceeds exceed the threshold amount of ASh 100,000 contravenes the Money Laundering Directive, which contains no such threshold. Although it is an undisputed reality that the judgments of the European Court can only rarely be predicted, it is submitted that Austria's position will not be vindicated. This is because the European Community's financial sector is so deeply integrated that no Member State could be permitted to maintain contradictory legislation. This is so, even though there are no clear cases suggesting that these anonymous savings account are being consistently used for money laundering operations in Austria.

IV. OTHER COMMUNITY ACTIVITIES RELATING TO MONEY LAUNDERING

A. *The European Police Office (Europol)*

In July 1995, the Council of Ministers drew up the Convention setting up EUROPOL.¹⁰⁹ Before examining what powers EUROPOL has been conferred in dealing with money laundering, it is worthwhile to refer briefly to EUROPOL's predecessors, namely the Trevi Group and the European Drugs Unit (hereinafter "EDU"). For a substantial number of years Member States had collaborated on an *ad hoc* basis on a string of

104. See Poech, *The Anonymous Bank Account and Recent Adoptions of EU Directives in Austria*, 12 J. INT'L BANKING L. (1997).

105. See EC Treaty, *supra* note 103, at art. 169(2).

106. See Leidig, *Austria Set to Take on Brussels Once Again*, THE EUROPEAN, Oct. 23-29, 1997, at 21, col. 1. For the decision to refer Austria to the European Court of Justice, see European Commission, Fifteenth Annual Report on Monitoring the Application of Community Law- 1997, COM(1998) 317 final, 27 May 1998, 1998 O.J. (C 250)1 at 29. Note that the case has still not been officially lodged before the Court.

107. See *EU Takes Austria to Court Over Anonymous Savings Account*, 13 INT'L ENFORCEMENT L REP. 476 (1997).

108. See *supra* note 21, at art. 3.

109. Council Act of July 26, 1995 drawing up the Convention based on article K.3 of the Treaty on European Union on the Establishment of a European Police Office, 1995 O.J. (C 316) 1. The European Parliament's evaluation of EUROPOL is contained in EP Resolution of May 19, 1995, PARL. EUR. DOC. B4-0732/95, 1995 O.J. (C 151) 376.

issues falling within the scope of the responsibility of justice/home affairs ministries. The most successful of these arrangements has been the Trevi Group. This entity was set up during the December 1985, Rome Summit of the European Council and became operative in June 1986. The Trevi Group's original terms of reference were to promote police cooperation and exchange of information in relation to terrorist activities.

Even though justice and home affairs ministers from all Member States participated in the Trevi Group, it operated outside the formal EC structure. In effect, its decisions were not legally binding on Member States, since they were not legislative acts of the European Community (they rather took the form of gentleman's agreements) and, at the same time, they were not open to judicial review by the European Court of Justice. In its meeting in Paris, France in December 1989, the Trevi Group adopted a declaration stating that its activities will extend to drug trafficking and money laundering of narcotics proceeds, because these were considered as areas of high priority.¹¹⁰

The important but not well documented work undertaken by the Trevi Group was integrated in Title IV of the Treaty on European Union (hereinafter "TEU")¹¹¹ providing for cooperation in the fields of justice and home affairs (the so-called *third pillar*). More particularly, it formed part of the Coordinating Committee of Article K.4. The European Drugs Unit was established by the Trevi Ministers in June 1993, and became operational in January 1994.¹¹² It was conceived as an entity to replace the activities of the Trevi Group until EUROPOL was set up.¹¹³ The European Council meeting in Essen in December 1994, decided to widen its mandate by including the following three criminal activities, which since the early 1990's have constituted the new areas of criminality in Europe: trafficking in motor vehicles; trafficking in nuclear and radioactive substances; illegal immigration smuggling and associated money laundering operations. Furthermore, it asked the Council to implement this action immediately by appropriate legal instruments.¹¹⁴

Soon thereafter the EDU's legal basis was replaced by a Joint Action based on Article K.3 TEU,¹¹⁵ which empowers the Council of Ministers to

110. See Benyon et al, *Police Cooperation in Europe - An Investigation*, 157 (Centre for the Study of Public Order, University of Leicester, 1993).

111. See *supra* note 16.

112. Agreement of Ministers responsible for internal security matters, signed in Copenhagen on June 2, 1993, Bull. Eur. Communities 6-1993, point 1.4.19; reproduced in Sweet & Maxwell, *Encyclopedia of European Union Law*, §§ 130.0007 et seq.

113. *Id.*

114. See Bull. Eur. Communities 12-1994, point I.26.

115. Council Joint Action 95/73/JHA concerning the European Drugs Unit adopted on the basis of Article K.3 of the Treaty on European Union, 1995 O.J. (L 62) 1, Bull. Eur. Communities 3-1995, point 15.4; reproduced in Sweet & Maxwell, *Encyclopedia of European Union Law*, §§ 130.0049 et seq.

adopt joint action in all matters of common interest in the fields of justice and home affairs. However, this only applies if the objectives of the European Union can be better achieved in this way rather than by the Member States acting individually. The areas of common interest are enumerated exclusively in Article K.1 TEU and include, *inter alia*, asylum, immigration and fraud.

In Article K.1 TEU the existence of EUROPOL was envisaged in the context of "police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime in connection with the organization of a Union-wide system for exchanging information within a European Police Office."¹¹⁶ Although this provision does not expressly lay down that such an entity is to be set up, the Council of Ministers drew up the EUROPOL Convention on the basis of the power conferred upon it under Article K.3(2)(c) to adopt treaties in any of the areas of common interest mentioned in Article K.1.¹¹⁷

Although the drawing up of the Convention had already been agreed in principle by the European Council meeting in Lisbon in June 1992, it met with considerable opposition which delayed its conclusion until June 21, 1996, when it was finally signed.¹¹⁸ The EUROPOL Convention is expected to enter into force on October 1, 1998, by which time it should have been ratified by all 15 Member States.¹¹⁹

EUROPOL's objective, as elaborated in Article 2(1) of the Convention, is to promote the effectiveness and cooperation of the Member States' competent authorities in preventing and combating terrorism, narcotics trafficking and other serious international crimes.¹²⁰ However, EUROPOL will assume jurisdiction only if there are factual indications that an organized criminal structure is involved affecting two or more Member States in such a way as to require a common approach by Member States owing to the scale, significance and consequences of the offenses concerned.

This objective is to be achieved progressively. According to Article 2(2) of the EUROPOL Convention, its initial terms of reference are to prevent and fight narcotics trafficking, trafficking in nuclear and

116. *Id.*

117. *Id.*

118. See Bull. Eur. Communities 6-1996, point I.5. The Convention is based on the Revised Draft of Oct. 25 1994, which has not been officially reproduced. This draft was the object of a meticulous examination by the British House of Lords; see House of Lords, Select Committee on the European Communities, Session 1994-95, 10th Report, EUROPOL, Apr. 25 1995, HL Paper 51.

119. See The European Commission (London Office), *The Week in Europe*, Feb. 5, 1998, WE/5/98, at 1.

120. Bull. Eur. Communities 6-1996, *supra* note 118.

radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime.¹²¹ Its areas of jurisdiction are identical with those of EDU with the addition of illicit trade in human beings. By virtue of Article 2(3), EUROPOL is also competent to deal with illegal activities to launder the proceeds from these offenses. By specifically linking money laundering with these crimes, the Convention acknowledges the fact that the traditional patterns of crime have changed fundamentally and that it is now imperative to address effectively at the Community level specific manifestations of these offenses, such as the laundering of proceeds.

Since the EUROPOL Convention did not offer its own definition of money laundering, it was to be expected that the definition contained in the Money Laundering Directive would have been adopted. However, the Convention expressly states that the term *money laundering* is understood as meaning the criminal offenses listed in Article 6(1)-(3) of the Council of Europe Convention on Laundering.¹²² The restrictive nature of the definition contained in the Directive made it inadequate for inclusion in the EUROPOL Convention, which opted for the quite extensive provisions of the Council of Europe Convention on Laundering.

B. *Relations with Central and Eastern European Countries*

The question of whether the membership of the European Community should expand to include the states of Central and Eastern Europe has given rise to considerable controversy. During the Luxembourg Summit Meeting (December 12-13, 1997), the European Community took the political decision to proceed with enlargement with 11 candidate-states.¹²³ With the six countries which were chosen as the first group of states to be considered for membership (Cyprus, Estonia, Hungary, Poland, Slovenia and the Czech Republic), the negotiations were formally opened in London, Britain on March 30, 1998.¹²⁴ This decision was the culmination of a long process, which commenced in the early 1990's, when the European Community entered into association agreements with these states.¹²⁵

121. On Dec. 4, 1997, the Justice and Home Affairs Ministers agreed to extend the EUROPOL's jurisdiction to include the collection and analysis of information on child pornography; see Bull. Eur. Union 12-1997, point 1.4.9.

122. See *supra* note 43.

123. See Bull. Eur. Union 12-97, point I.5.10.

124. With the remaining five states (Bulgaria, Latvia, Lithuania, Romania, and Slovakia) the European Community formally opened the accession process; see The European Commission (London Office), *The Week in Europe*, Apr. 2, 1998, WE/13/98, at 1.

125. See generally, Maresceau & Montagatti, *The Relations Between the European Union and Central and Eastern Europe: A Legal Appraisal*, 32 COMMON MKT. L. REV. 1327 (1995).

These instruments, commonly known as *Europe Agreements*,¹²⁶ have aimed at facilitating their economies to reach the standard, which is required for eventual European Community membership.¹²⁷ One common aspect of these Agreements is that they incorporate the following provision, which imposes upon them a duty to become active in combating money laundering:

1. The Parties agree on the necessity of making every effort and cooperating in order to prevent the use of their financial systems for laundering of proceeds from criminal activities in general and drug offenses in particular;
2. Cooperation in this area shall include administrative and technical assistance with the purpose of establishing suitable standards against money laundering equivalent to those adopted by the Community and international fora in this field, in particular the Financial Action Task Force.

The essence of this provision, which appears as Article 85 in the Europe Agreement with Poland,¹²⁸ as Article 86 in the Europe Agreements with Hungary,¹²⁹ Slovakia¹³⁰ and the Czech Republic¹³¹ and as Article 87 in the Agreements with Bulgaria¹³² and Romania,¹³³ is that the European Community expects that these countries shall adopt legislation which incorporates the Money Laundering Directive and the recommendations of the Financial Action Task Force (FATF). The latter was conceived during the 15th Economic Summit Meeting of the G-7 Group (Paris, July 1989), as a body to promote international cooperation in preventing the utilization

126. The idea to proceed with the Conclusion of the Europe Agreements was launched by the Commission in its Communication of Aug. 27, 1990 on the conclusion of association agreements with countries of Central and Eastern Europe, COM(90) 398 final; Bull. Eur. Communities 7/8-1990, point 1.4.5.

127. See GOWER, EC RELATIONS WITH CENTRAL AND EASTERN EUROPE *in* THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE 283 (Lodge ed., 2d ed. 1993); MARESCEAU, EUROPE AGREEMENTS: A NEW FORM OF COOPERATION BETWEEN THE EUROPEAN COMMUNITY AND CENTRAL AND EASTERN EUROPE IN EAST CENTRAL EUROPEAN STATES AND THE EUROPEAN COMMUNITIES: LEGAL ADAPTATION TO THE MARKET ECONOMY 209 (Muller Graf. 1993).

128. Signed in Brussels, Belgium on Dec. 16, 1991, 1993 O.J. (L 348) 2.

129. Signed in Brussels, Belgium on Dec. 16, 1991, 1993 O.J. (L 347) 2.

130. Signed in Luxembourg, on Oct. 4, 1993, 1994 O.J. (L 359) 2.

131. Signed in Luxembourg on Oct. 4, 1993, 1994 O.J. (L 360) 2.

132. Signed in Brussels, Belgium on Mar. 8, 1993, 1994 O.J. (L 358) 3. See also, the Europe Agreement with Slovenia, which was signed in Luxembourg on June 10, 1996, Bull. Euro. Communities 6-1996, point 1.4.52. This Agreement has not been officially reproduced.

133. Signed in Brussels, Belgium on Feb. 1, 1993, 1994 O.J. (L 357) 2.

of the banking system and financial institutions for money operations.¹³⁴ Its recommendations, which were adopted on February 7, 1990, and revised on June 28, 1996,¹³⁵ have long been regarded as the minimum standards that national anti-money laundering laws must observe.

Already a number of countries in the region have promulgated comprehensive anti money laundering legislation: Hungary,¹³⁶ the Slovak Republic,¹³⁷ Slovenia,¹³⁸ the Czech Republic¹³⁹ Poland¹⁴⁰ and Lithuania.¹⁴¹ On September 8, 1994, the European Community's Ministers for Justice and Home Affairs met with their counterparts from Central and Eastern Europe in Berlin, Germany to discuss even closer cooperation in the fight against organized crime.¹⁴² They agreed to make full use of the relevant provisions of the Europe Agreements and to focus their attention, apart from drug trafficking, to illegal immigration networks, crime involving radioactive and nuclear materials, motor vehicle theft and money laundering of proceeds derived from such offenses.¹⁴³

There is no dispute that most Central and Eastern European countries have made great advances in putting in place an effective framework for combating money laundering. However, it should not escape one's attention that these states were asked to change fundamentally the structure of their economy and financial sector within a relatively short period of time. This process has been plagued by the lack of adequate financing and expertise, and by inexperience on how to resolve conflicts between existing legislation and the adopted anti-money laundering statutes. These problems have been highlighted in a recent report by the United States government,

134. See Magliveras, *Defeating the Money Launderer - The International and European Framework*, J. BUS. L. 161, 166-67 (1992).

135. Reproduced in [1996] 35 I.L.M. 1293.

136. Act No. IX of 1994, published in Magyar Kazlony, No. 25. Mar. 8, 1994, at 797; it introduced Article 303 of the Penal Code making money laundering a criminal offense.

137. Act on combat against the legalization of proceeds from particularly heavy and specifically organized crime of Aug. 19, 1994, published in Zbierka Zakonov, No. 72, Sept. 17, 1994 at 249. It has been amended by the Act of Feb. 15, 1997, in force since July 1, 1997; see Blaha, *Money Laundering in the Czech Republic*, 12 J. INT'L BANKING L. 35 (1997).

138. Act on the Prevention of Money Laundering of May 8, 1994, published in URADNI LIST, No. 36, June 22, 1994, at 1474.

139. Act on certain measures against the legalization of proceeds from criminal activities of Feb. 15, 1996, published in Sbirka Zakonu, No. 19, Mar. 30, 1996, at 61.

140. Article 5 of the Act on the protection of financial transactions of Oct. 12, 1994, published in Dziennik Ustaw, 1994, No. 126, at 615; see Weigend, *Geldwaesche im polnischen Strafrecht*, 108 ZEISCHRIFT FUER DIE GESAMTE STRAFRECHTSWISSENSCHAFT 416 (1996).

141. Law on Prevention of Money Laundering of June 19, 1997, in force since July 1, 1997, published in Valstybes Zinios, No. 64, 1502.

142. See Bull. Eur. Communities 9-1994, point 1.4.1.

143. *Id.*

which has recorded the request by Hungary and Poland (the region's most important economies). The report states that the United States and the European Community provide increased training and financial support to help their banking institutions and law enforcement agencies to implement more strenuous anti-money laundering controls.¹⁴⁴

Finally, it should be noted that the European Community is taking every opportunity to press the candidate-states of Eastern and Central Europe to deal with organized crime in an effective manner. Thus, when in March 1998, the London negotiations on European Community membership were inaugurated,¹⁴⁵ the European Community and the eleven applicant states agreed to establish the European Conference as a high level forum for discussing and implementing policy issues relating to the European Community's enlargement.¹⁴⁶ Combating transnational organized crime was one of the five priority areas on which the European Conference will concentrate.¹⁴⁷

C. *The Extradition Convention (The Convention)*

Perceived as a top priority in improving judicial cooperation,¹⁴⁸ the Extradition Convention [hereinafter "Convention"] relating to Extradition between Member States of the European Union was adopted on September 27, 1996.¹⁴⁹ Building upon two relevant Conventions adopted under the auspices of the Council of Europe, namely the European Convention on Extradition¹⁵⁰ and the European Convention on the Suppression of Terrorism,¹⁵¹ it aims at accelerating extradition between Member States and at reducing the number of cases where extradition might be refused. In facilitating the latter goal, the Convention breaks away for the traditional rule of double criminality.¹⁵²

144. United States General Accounting Office, *Money Laundering: A Framework for Understanding United States Efforts Overseas* (May 1996).

145. *See supra* note 124.

146. *See* The European Commission (London Office), *The Week in Europe*, Mar. 19, 1998, WE/11/98, at 2.

147. *Id.*

148. *See* Council Resolution of Oct. 14, 1996 laying down the priorities for cooperation in the fields of justice and home affairs for the period from July 1, 1996 to June 30, 1998, 1996 O.J. (C 319) 1; Bull. Eur. Union 10-1996, point 1.5.1.

149. 1996 O.J. (C 313) 12; Bull. Eur. Communities 9-1996, point 1.5.3. The Explanatory Memorandum to the Convention is published in 1996 O.J. (C 374) 4. This instrument should not be confused with the EU Convention on Simplified Extradition Procedure, 1995 O.J. (C 78) 2; Bull. Eur. Union 3-1995, point 1.5.3.

150. *See supra* note 8.

151. Signed in Strasbourg, France on Jan. 27, 1977, in force since Aug. 4, 1978, E.T.S. 90, 1137 U.N.T.S. 93.

152. *See supra* note 26.

Article 3(1) of the Convention stipulates that extradition must be granted when requested in relation to any offense in the field of drug trafficking and other forms of organized crime, which is punishable in the requesting state by penalty of deprivation of liberty for more than twelve months. The innovative aspect of the Convention is that the requested state must observe the extradition request, even if its domestic law does not stipulate that the same facts and circumstances constitute a criminal offense. In other words, the rule of double criminality does not apply. Since laundering of drug proceeds is a crime directly associated with trafficking in narcotics, the Convention undoubtedly facilitates the extradition of money launderers. However, there is one consideration, which will significantly restrict the ambit of this provision: Article 3(3) allows signatory parties to declare that they reserve the right not to apply Article 3(1) or to apply it under certain conditions.

Whether the Extradition Convention will ever enter into force is open to speculation, since it requires the prior ratification by all fifteen Member States. Some of its provisions are extremely far reaching and may give rise to problems of a constitutional nature. For example, Article 8(1) lays down the rule that extradition may not be refused on the ground that the prosecution or punishment of the individual whose extradition is sought would be barred under the law of the requested Member State.¹⁵³ Finally, it should be noted that this Convention is not a comprehensive extradition treaty and does not seek to replace the European Convention on Extradition as between the Member States.¹⁵⁴ In effect, the preamble makes it clear that the provisions of the 1957 Treaty remain applicable for all matters not covered by it.

V. CONCLUSIONS

As G. Giacomelli, the Executive Director of the United Nations International Drug Control Program, noted the unprecedented advances in the areas of technology and communications together and the fact that the banking sector is becoming more and more globalized have resulted in making money laundering an extremely sophisticated crime.¹⁵⁵ The European Community, as a regional organization whose combined

153. See *supra* note 8. It would appear that this provision contradicts Article 10 of the Council of Europe Convention on Extradition. Stipulating that extradition will not be granted when the person claimed has, according to the law of either the requesting or the requested state, become immune by reason of lapse of time from prosecution or punishment.

154. Note that Article 28(2) of the Council of Europe Convention on Extradition, *supra* note 8, expressly allows signatory parties to conclude between them multilateral agreements in order to supplement the provisions of this Convention or to facilitate the application of its principles.

155. Giacomelli, *Take the Profit out of the Crime by Policing the Money Laundries*, INT'L HERALD TRIB., Dec. 4, 1996, at 10.

membership controls the largest banking sector in the world, is particularly vulnerable to be exploited by the internationally organized money launderers, whose vast proceeds exceed the annual gross national product of the smaller Member States.

The European Community has not regarded money laundering as simply a criminal offense. From the very beginning its efforts concentrated in making the laundering of illegal proceeds a crime and in adopting a series of measures to protect the banking and financial sectors from the sophisticated methods used by money launderers. However, it was soon realized that by concentrating on the Member States' banking and financial sectors, the European Community was not addressing the panacea of money laundering effectively, because launderers can very easily transfer their operations in less regulated systems. Therefore, the European Community, by exercising the considerable influence it enjoys, has attempted to persuade third countries to become seriously involved in the fight against money laundering.¹⁵⁶

Parallel to these efforts, the European Community has strived to improve its own framework. The conclusion of the EUROPOL Convention and the Treaty on Extradition will undoubtedly contribute in materializing this aim. Furthermore, the application of the Money Laundering Directive has already made apparent its shortcomings, especially in relation to its ambit. In June 1996, the European Parliament regarded that the system for fighting money laundering was inadequate and called upon the Community to revise urgently the provisions of the Money Laundering Directive and, in particular, to extend its scope to cover all conceivable natural and legal persons involved in financial transactions.¹⁵⁷

It has been reported that the Council of Ministers is considering broadening both the list of predicate offenses and the compulsory reporting of suspected transactions to gambling, prostitution and building industries.¹⁵⁸ However, there are no clear indications that an amendment is imminent. Any amendment of the Money Laundering Directive would be a very delicate exercise, because its implementation in the domestic laws of the Member States has led to considerable disparities among them. Perhaps it is high time to realize that whether the fight against money laundering will be won or lost does not any longer depend so much on further European Community initiatives but on how committed Member States are in applying, observing and safeguarding the existing framework.

156. In this respect, one should mention Council Regulation 2046/97 of Oct. 13, 1997 on North-South Cooperation in the Campaign against Drugs and Drug Addiction, 1997 O.J. (L 287) 1; Bull. Eur. Union 10-1997, point 1.3.39.

157. See Eur. Parl. Resol. of June 21, 1996, Eur. Parl. Doc. A4-0187/96, 1996 O.J. (C 198) 245.

158. See den Boer, *Police Cooperation in the TEU: Tiger in a Trojan Horse?* 32 COMMON MKT. L. REV. 555, 574-75 (1995).

Despite the spectacular integration that the European Community has achieved in the banking and financial sectors, Member States still retain peculiarities in these areas, as the dispute regarding Austria's anonymous savings accounts has characteristically shown.