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**Questioning the effectiveness of the money
laundering offence from a sociolegal perspective:
A case study of Germany**

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LIST OF ABBREVIATIONS AND ACRONYMS

BAFIN	Die Bundesanstalt für Finanzdienstleistungsaufsicht (German Federal Financial Supervisory Authority)
BCBS	Basel Committee on Banking Supervision
BGBL	Das deutsche Bundesgesetzblatt (German federal law gazette)
BGH	<i>Bundesgerichtshof</i> (German federal court)
BKA	<i>Bundeskriminalamt</i> (German federal criminal police)
BMF	<i>Bundesministerium der Finanz</i> (German federal Ministry of Finance)
BMI	<i>Bundesministerium des Innens</i> (German federal Ministry of Interior)
BMJ	<i>Bundesministerium der Justiz</i> (German federal Ministry of Justice)
BO	Beneficial Owner
BT-Drucks.	<i>Bundestag Drucksache</i> (German federal parliamentary records)
BR-Drucks.	<i>Bundesrat Drucksache</i> (German federal parliamentary records)
BverfG	<i>Bundesverfassungsgericht</i> (German federal constitutional court)
CDU	Christlich Demokratische Union Deutschlands (Christian Democratic Union of Germany)
CoE	Council of Europe
CSU	Christlich-Soziale Union in Bayern e. V. (Christian Social Union in Bavaria)
DM	<i>Deutsche Mark</i> (German Mark)
EEC	European Economic Community
EC	European Community
ECB	European Central Bank
EU	European Union
FATF	Financial Action Task Force
FDP	Freie Demokratische Partei (Free Democratic Party)
FIU	Financial Intelligence Unit
Gcc	German Criminal Code
GDP	Gross Domestic Product
GFG	<i>Gemeinsame Finanzaermittlungs Gruppe</i> (Common financial investigative group)
GFI	Global Financial Integrity
GG	<i>Grundgesetz</i> (German constitution)
GwG	<i>Geldwäschegesetz</i> (German anti-money laundering act)
G7/G8/G20	Group of 7/Group of 8/ Group of 20
IMF	International Monetary Fund
LKA	<i>Landeskriminalamt</i> (German state criminal police)
MEP	Members of the European Parliament
MER	Mutual Evaluation Report
ML	Money Laundering

MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
MP	Member of the Parliament
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Union
Palermo Convention	United Nations Convention against Transnational Organised Crime
PEP	Politically Exposed Person
PKS	<i>Polizeiliche Kriminalstatistik</i> (German police statistic)
SPD	<i>Sozialdemokratische Partei</i> (German Social-democratic party)
STR	Suspicious Transaction Report
TI	Transparency International
TFEU	Treaty on the Functioning of the European Union
TJN	Tax Justice Network
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime
US	United States
Vienna Convention	United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
WEED	World Economy, Ecology & Development
WB	World Bank

To Busch

INTRODUCTION

Prima arrivano i loro soldi,
poi arrivano loro con i loro metodi'.
(*Falcone*, 1991, p. 18)¹

Questioning the effectiveness of the money laundering offence is not only the outcome of a research on a controversial piece of legislation, but also the narration of a personal discovery about patterns of the relations between economic, financial and criminal policies in contemporary western societies.² While I have not expressed any personal opinions in order to safeguard the scientificity of the publication, I have tried to present all critical the aspects and arguments surrounding the matter, so that the reader is left free to interpret the research outcomes and to reach his or her own conclusion.

Money laundering is the process of giving profits originated illegally an appearance of having been made lawfully.³ Often this process is conducted by offenders who operate across national borders, thanks to the cooperation of professionals, such as attorneys, financial services' providers, estate agents, whose reputation is rarely suspicious (known as white-collars). The flow of ill-gotten gains is facilitated by the existence of offshore

¹ English translation: First their monies *-the Mafiosi's-* come, then they arrive with their methods.

² This research, being focussed on a European domestic legal system, is embedded in the so-called 'Western world', and thus does not aspire to be globally representative.

³ Typically the phenomenon is described as a three-stage process which starts with the money coming from the crime first being placed somewhere to hide its link to the crime (placement). After it has been placed it is layered, which means its connection to the crime and the criminal is further disguised. This can be done, for example, by a series of transactions, a process that often involves the money being transferred through several banks abroad or being used to set up shell companies in tax havens (layering). After it has been layered successfully, the money (which can also be in the form of property) is then integrated into the lawful economy (integration). These three phases are not always clearly separated; sometimes the placement and the integration overlap. What is essential, is that the offender must have the intention to conceal the provenance of the ill-gotten assets from the criminal justice authorities.

financial jurisdictions, financial secrecy, the liquidity of the current financial system and the availability of financial vehicles, and other means that were typically designed for legitimate purposes, but that can be easily abused.⁴ For instance, big corporations might need to integrate monies derived from mispricing in the legitimate economic circle through money laundering schemes, or wealthy individuals may adopt the same methods to stash away capital deriving from aggressive tax planning or tax evasion.⁵ In the last two situations, when the monies laundered are not proceeds of serious crimes such as human trafficking or drug trafficking, the society may perceive them as less dangerous than the laundering committed by organised crime; especially if the subterfuges adopted imply the accomplishment of apparently innocent financial transactions or other common economic activities.⁶ Due to the borderline nature of money laundering, which happens between the so-called 'legitimate economy' and the 'dirty economy', and thus involves different actors such as banks, the financial sector, certain professions and businesses, offenders, victims and law enforcement agencies, the legal response needs to compromise with all the various economic, political, social and financial interests at play. Furthermore, where legitimate business intermingles with illegal business and legitimate funds with illicit funds, it is very difficult to distinguish what is legal from what is not. The criminalisation of money laundering was specifically supposed to tackle this fine line. The goal of this research is to assess from a sociolegal⁷ perspective whether the choice of criminalising money laundering has been effective or not in eliminating the targeted practice. In order to assess the impact of the domestic implementation of the existing legal framework, the research uses a case study that

⁴ The combination of false documentation, mispricing, transfer pricing, tax havens, dummy corporations, shielded foundations, secrecy jurisdictions, shell banks, tax havens, offshore, flee clauses, collusion, kickbacks, numbered accounts, wire transfers that disguise transactions, 'the whole gamut of techniques and structures that support dirty money, affords a quasi-legal veneer over a system that revels in its ability to walk on the edge and get away with subterfuge, disguise, and theft'. *Becker*, 2005, p. 136. 'Whether it's moving drug money or tax-evading money, whether it's a thug or tyrant or terrorist or corporate titan, all use the same bag of tricks. And the truth is, western business and banking sectors have developed and promoted the mechanisms for bringing in dirty money from other countries for more than a century'. *Becker*, 2005, p. 24.

⁵ An estimated 50 % of all global commerce passes through tax havens and secrecy jurisdictions at some point between seller and buyer. This serves to eliminate taxes, avoid regulations, and accumulate wealth secretly. *Becker*, 2005, p. 134. Methods used by money launders and tax evaders are often the same. See *Zoppi*, 2013, p. 36.

⁶ 'There is no place in international financial statistics where you can find "dirty money" or "laundered proceeds" or "flight capital" or "trade mispricing" or any account remotely suggesting such figures. Most illicit flows are either disguised or invisible'. *Becker*, 2005, p. 106

⁷ The *Black's Law Dictionary* refers to 'sociolegal' as an adjective that means: 'of, relating to, or involving the field of study known as law and society'. *Garner (ed.)*, 2014, p. 1605.

specifically questions the effectiveness of the money laundering offence in the German national criminal legal system.

The discovery process originated from the assumption that money laundering is bad for the society, because it is an enabler of transnational organised criminal activities and corrupted practices, it distorts fair competition among economic actors and it contributes to the detriment of democratic societies,⁸ and therefore the laundering of money needs to be effectively contrasted through an appropriate legal framework, in particular through the criminalisation of the conduct. Yet, the in-depth analysis conducted for this research has revealed that the phenomenon is more complex than it may seem. Scholarly literature about the impact of money laundering on the economy is for instance controversial: On one hand money laundering is said to distort both fair competition and the market, on the other hand the investment of illicit monies can foster the economy by increasing the availability of credit. In addition, it has been estimated that money laundering contributes to national GDPs.⁹ In fact, money laundering has become 'one of the great morals panic of our day', perceived at the same time as bad, but also very interesting, and slightly daring.¹⁰ The anti-money laundering discourse highlights its huge dimension -the total volume of money laundered is estimated to amount to between 2,5 and 5, 5 % of the world GDP,¹¹ indeed the panic and the interest in the phenomenon has spread quite rapidly, so that currently most jurisdictions in the world have endorsed anti-money laundering laws.¹² Especially in recent times there has been a growing interest in it. To use *Dalla Chiesa's* words, a mythology surrounding the economic side of organised crime, in relation to the volume of profits deriving from

⁸ The literature on the 'bad' impact of money laundering is abundant, see for example *Masciandaro*, 2000; 1999.

⁹ In the literature there is also the idea that money laundering increases the availability of credits and the profits and therefore is good for the economy, see *Unger et al.*, 2014, pp. 217, 218. A popular anecdote tells that a Russian consultant, while drafting the new criminal code, after having heard the explanation of what money laundering is, said: 'Why should I be against it?'. See *Alldrige*, 2008, p. (437) 446.

¹⁰ *Alldrige*, 2008, p. (437) 437.

¹¹ UNODC, 2011, p. 5.

¹² The money laundering panic would have occurred in a different shape without globalisation; the coincidence in time of the two has created mechanisms of amplification. See *Alldrige*, 2008, p. (437) 437. The two main documents that set the international regime against money laundering are the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) and the Financial Action Task Force Recommendations (FATF Recommendations). The Vienna Convention has 189 parties and 87 States signatories. Over 180 jurisdictions around the world have committed to the FATF Recommendations, according to the FATF. See <http://www.fatf-gafi.org/countries/>, last accessed on 22/11/2015.

illegal businesses reinvested in the legal economic circle.¹³ The literature describes money laundering as the 'darker side of globalisation',¹⁴ or the 'illicit side of the global economy'; commonly money launderers are perceived as defying borders, increasingly agile, and technologically savvy.¹⁵ However, while containing many truths, this picture of money laundering strictly connected to globalisation obscures as much as it reveals.¹⁶ The temptation to blame globalisation is much too easy and convenient and can lead to a further escalation of flawed strategies and policies.¹⁷ On the assumption that the term 'globalisation' refers to 'an increased awareness of the variety of the world's interconnectedness of the diverse interacting societies, states and legal systems', the transnational legal framework set to tackle money laundering should be re-evaluated on the basis of reflections on eventually conflicting national and supranational interests. It is not completely true that globalisation has reduced the states' power; in fact states have a power to define the content of illicit globalisation.¹⁸ Illicit globalisation has challenged the State but State engagement with illicit economic flows has ranged from consideration and discouragement to toleration and complicity'.¹⁹

While the legal concept of money laundering is relatively recent, the motives for engaging in this practice date back a long time: Throughout history, people have deployed a variety of tactics to ensure the enjoyment of the proceeds from their criminal activities, for instance a villager who had stolen his neighbour's cow most likely led it out of the village to sell it or to exchange it for some other livestock in order to disassociate himself from the theft.²⁰ When criminal gain is not re-invested in illegal businesses and the offenders want to purchase goods for their own private enjoyment or create further profit, they need to integrate the ill-gotten gains in the 'surface economy' through a laundering process, and re-invest them for example in buying shares, real estate products, or already existing businesses, which produce clean gains. Due to the tightening of economic criminal policies that limit the possibility of integrating ill-

¹³ *Dalla Chiesa*, 2012, p. 11. The author highlights the importance of discerning grounded studies on the economic dimension of the Mafia from exaggerated theories that empathise the volume of the Mafia business.

¹⁴ *Levi and Reuter*, 2006, (289) 367.

¹⁵ *Andreas*, 2015, pp. 45, 46.

¹⁶ *Andreas*, 2015, p. 46.

¹⁷ *Andreas*, 2015, p. 46.

¹⁸ *Andreas*, 2015, p. 53.

¹⁹ *Andreas*, 2015, p. 63.

²⁰ *Johart*, 2013, p. 18.

gotten gains in the legitimate economy, offenders have developed more and more complex methods and subterfuges to launder proceeds of crime, so the rise of a proper 'money laundering industry' (*industria del riciclaggio*) is mentioned²¹ This phenomenon, while fostering the economic circle in the short-term may actually be very harmful in the long-term. In fact, the spread of companies, businesses and financial vehicles funded through illicit money may allow organised criminal groups to acquire ever-stronger positions. This, besides distorting fair competition among legitimate businesses and corporations, can lead to the successful creation of a growing economic power that can be used to influence the political scene. Moreover, the leading economic position acquired through the management of industrial structures and businesses allows criminal organisations to conquer social control on a local level. Mafia organisations, for example, have acquired control of entire communities through the distribution of job positions both in the private and public sectors, by manipulating public tenders and by managing private companies. These processes can finally lead to the detriment of social structures. On the other hand, given that money laundering links the underground world to the clean one, the practice has been considered organised crime's Achilles' heel in the sense that it represents a risky situation for offenders who try to escape law enforcement repression.

To question something implies to approach critically a certain subject. This criticality is rooted in the literature that has exposed challenges, inconsistencies and ineffectiveness of the anti-money laundering policies from its early days until now.²² With regards to international legislation, scholars have often criticized the ineffectiveness of the anti-money laundering regime to not be able to achieve its goals and thus to be only appearance of public action.²³ While there is theoretical support for the perception that policies have contributed to a decrease in the incidence of money laundering, there is no

²¹ See, among others, *Mainieri*, 2012, p. 230; *Levi and Reuter* argue that money laundering can be studied as a market model, in which there is a demand and an offer of money laundering services influenced by the intensity of law enforcement action. *Levi and Reuter*, 2006, pp. (289) 350 ss.

²² See, among others, *Alldrige*, 2008, pp. (437) 462, 462; *Arzt*, 2013, pp. 1134 ss; *Becker*, 2005, p. 91; *Bosworth-Davies*, 2008, p. 180; 2006, pp. (346) 363, 364; *van Duyne et al.*, 2005, pp. 143 ss; *Gathii*, 2010, p. (197) 203; *Mitsilegas*, 2003, pp. 16 ss; *Naylor*, 2002, pp. 133 ss; *Nelen*, 2004, p. (517) 521 ss; *GwG-Nestler*, 2014, § 261 mn. 15; *Pieth*, 2004, pp. (3) 7 ss; *Sharman*, 2011, p. 55; *Zagaris*, 2007, p. (157) 167; *Yeandle et al.*, 2005, pp. 34 ss; *Wang*, 2011, pp. (210) 220 ss. *Levi and Reuter* admit that they cannot dismiss the possibility that the regime's many critics are correct, since the controls in practice may do little to accomplish crime-fighting goals; yet, they undertake an assessment of US regime that generously supports its effectiveness. See *Levi and Reuter*, 2006, pp. (289) 294, 363 ss.

²³ See, for instance *Tsingou*, 2010, p. 630.

evidence that this goal has actually been achieved.²⁴ The official discourse describes the regime as a crucial tool to prevent and combat money laundering, and lawmakers have been focusing on expanding the reach of anti-money laundering laws. This work however takes a critical approach towards the existing legal framework and presents the view that questioning the effectiveness of the money laundering offence is essential before expanding the scope of the existing legal framework.²⁵ The term 'effectiveness' will be the object of deep reflection exposed in chapter one; the word derives from the Latin *efficere*, which means to accomplish something. A recently published work on the effectiveness of European anti-money laundering policies concludes that while it is possible to estimate what the policies cost, it is almost impossible to quantify their benefits.²⁶ While most of the existing literature has quantitatively assessed the effectiveness of the anti-money laundering regimes on the basis of statistical data and other quantitative indexes and has tried to reduce the complexity of the issue by measuring it numerically, this research adopts a qualitative methodology, which instead highlights the entanglement and the different perspectives on the question. The work takes a sociolegal perspective. Through this approach, the hypotheses built on the basis of theoretical reflections on the legal effectiveness are empirically verified through a case study. The study is a macro-sociological assessment of the effectiveness of a criminal legislation through the analysis of the motives that have triggered lawmakers to enact the current legal framework and the practical effects of the 'law in action'²⁷ and of the 'law inaction'.²⁸ Thanks to the use of sociological conceptual tools, as the ones of function, symbolic effectiveness, power, labelling, and legal culture, the research critically approaches the legal framework. In addition, the sociolegal perspective allows us to take into account the multidisciplinary nature of the phenomenon of money laundering and of its countermeasures and the diverse conflicting interests at play.

The thesis focuses primarily on the criminal legal part, which is the money laundering offence itself. The money laundering offence is a derivative offence, which means that it is built on the commission of previous breaches of the law, from which the offender

²⁴ Unger *et al.*, 2014, p. 217.

²⁵ See also Levi and Reuter on the necessity of empirical research on the effectiveness of the anti-money laundering regime. Levi and Reuter, 2006, pp. (289) 294, 365.

²⁶ Unger *et al.*, 2014, p. 218.

²⁷ The phrase refers to the applied law, in opposition with the 'law in books'. For more details, see chapter one, paragraph 1.1.

²⁸ The phrase is used by Pontell and Geis to define legal inactivity especially with regards to white-collar and corporate criminality. See Pontell and Geis, 2007, p. xv.

derives the money object of the laundering conduct. Money laundering is typically considered an economic crime.²⁹ Yet, the anti-money laundering regime entails a vast regulatory body directed at preventing the infiltration of ill-gotten gains in the so-called 'legitimate economy', whose deterrent effect is tightly connected to the criminal legal menace provided by the money laundering offence.³⁰ Therefore the research also examines the cooperation between prohibitory and preventive rules. Specifically, as regards to the case study of Germany, the study primarily deals with Article 261 of the German criminal code (Gcc), but also with the anti-money laundering act (*Geldwäschegesetz*, GwG), and their relative amendments. The choice of focussing on the criminal legal part serves the methodological necessity of restraining the scope of the current research, given that in the last twenty years the anti-money laundering regime has evolved very quickly to the point that currently the legal framework is rather complex and entails regulations in various different sectors. This work does not only aim to debate the technical suitability of the existing legal framework in tackling money laundering, but it questions the criminal policy choice of criminalising the conduct, also by looking at the practical effects of such criminalisation.

The interest in the German case derives from the fact that, according to the IMF, the OECD and the FATF, Germany might have 'a higher risk profile for large scale money laundering than many other countries'.³¹ There are some factors identified as enablers of money laundering activities, such as the large economy and financial centre, the

²⁹ A definition of economic crime can be taken by the 1981 Council of Europe Recommendation on Economic Crime, which lists sixteen specific and non-specific offences, such as different types of fraud, cartel offences, fiscal offences, offences related to currency regulations, bogus firms, stock exchange and bank offences, unfair competition and others. According to the Recommendation economic crime has an adverse impact beyond individual victims and the material damage in that: It affects a large number of persons, society and the state in general, it damages the functioning of the national or international economy, and it causes a loss of trust and confidence in the economic system. See Recommendation R (81) 12 on Economic Crime adopted by the Committee of Ministers on 25 June 1981. However, European countries continue to use different definitions or enumerate different types of crimes as economic crimes. Council of Europe, Organised Crime Situation Report 2005, pp. 9, 10. 'In Germany, economic crimes account for only 1.4% of all crimes recorded but for more than 55% of the material damage. However, immaterial damages are considered to be even more important, in particular in terms of distortion of market competition, the impact on other companies linked or depended on those committing crimes, the damage for society by offences against environmental, food, labour security and other laws, and the possible loss of confidence in the functioning of the economic and social order altogether'. See Council of Europe, Organised Crime Situation Report 2005, p. 12.

³⁰ A considerable part of the international anti-money laundering legal framework addresses also the financing of terrorism. However this thesis deals only marginally with terrorism, to the extent that the topic is relevant for the assessment of the money laundering offence's effectiveness.

³¹ FATF/OECD and IMF, Mutual Evaluation Report of Germany (FATF, MER Germany), 2010, p. 28.

strategical location in the middle of Europe, with strong international links, the substantial proceeds of the crime environment involving organised crime operating in most profit generating criminal spheres, the open borders, the large informal sector and a high use of cash, the large and sophisticated economy and financial sector, the important role in world trade, and finally the involvement in large volumes of cross-border trade and financial flows. 'The media have kept on reporting the fact that Germany is an ideal country, or even a paradise for money launderers.'³² According to most recent media reports, corruption is increasing in Germany along with money laundering and organised crime,³³ and illicit financial flows are estimated to amount to 50 Billion Euros annually.³⁴ Renowned banks such as Commerzbank, Deutsche Bank, and Hypovereinsbank have been the focus of recent scandals due to their involvement in large tax evasion and money laundering schemes, investigated mostly by US law enforcement agencies.³⁵ The issue has been already tackled from a satiric perspective, by the magazine Capital in 2012, which uses the following picture to represent the money laundering situation in Germany:³⁶

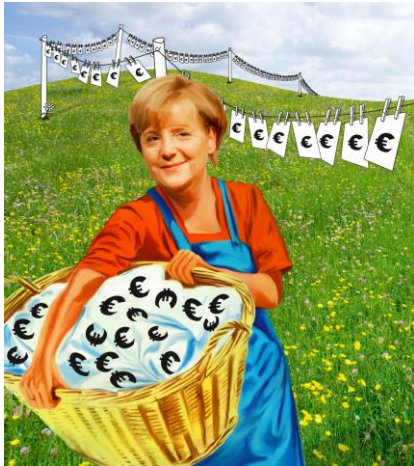
³² The latest news at the time of writing concern the fact that Germany is second only to Luxembourg in money laundering risk, according to a report published by Eurodad 'Fifty Shades of Tax Dodging: the EU's role in supporting an unjust global tax system' on November 3, 2015. The report is available at <http://www.eurodad.org/files/pdf/56378e84d0fac.pdf>, last accessed on 16/11/2015. See Crisp J, Deutschland belegt bei Geldwäsche Platz zwei hinter Luxemburg. Viel getan hat sich nach der Luxleaks-Steueraffäre nicht bei den EU-Ländern, so das Ergebnis einer Analyse des Netzwerks Eurodad. *Der Tagesspiegel*, 04/11/2015; OECD: Deutschland ist Geldwäsche-Paradies. *Deutsche Wirtschafts Nachrichten*, 18/01/2013; Dick W, Germany, a safe haven for money laundering. *Deutsche Welle*, 30/10/2012; Rimpel K, Geldwäsche-Paradies Deutschland. Nummer acht unter den Steueroasen. *Tz-online*, 07/11/2013.; Ramthum C, OECD: Deutschland versagt im Kampf gegen Geldwäsche. *Wirtschaftswoche*, 26/04/2014; 'Steueroase Deutschland ist Eldorado für Geldwäsche'. In *Handelsblatt*, 07/11/2013; Deutschland ein "Eldorado für Geldwäsche"? *Deutsche Welle*, 07/11/2013; Netzwerk Steuergerechtigkeit, Deutschland ist ein Eldorado für Geldwäsche. *Frankfurter Allgemeine*, 07/11/2013.

³³ See 'Dirty Money. The Rise of Organized Crime in Europe'. In *Deutsche Welle*, 15/11/2015, 19.15, available at <http://www.dw.com/en/documentaries-and-reports-dirty-money-2015-11-15/e-18795402-9798>, last accessed on 16/11/2015; Schnaust R, Korruption in Deutschland steigt unaufhörlich an. *Neopresse*, 12/11/2015.

³⁴ Grabitz M, Geldwäsche floriert in Deutschland. 50 Milliarden Euro illegale Zahlungen. *General Anzeiger Bonn*, 01/06/2015. The FATF/OECD and IMF estimated the amount of proceeds of crime that could be potentially laundered in the country to be between 43 and 57 billion Euros. FATF/OECD and IMF, 2010, Mutual Evaluation Report of Germany, p. 24. Yet, it is not possible to establish an objective number since profits criminally originated in Germany might be laundered in other countries, as much as gains produced elsewhere may be washed in Germany.

³⁵ Crisp J, Deutschland belegt bei Geldwäsche Platz zwei hinter Luxemburg. Viel getan hat sich nach der Luxleaks-Steueraffäre nicht bei den EU-Ländern, so das Ergebnis einer Analyse des Netzwerks Eurodad. *Der Tagesspiegel*, 04/11/2015; Rosbasch J, Deutschlands Problem mit der Geldwäsche-Bekämpfung. *Deutschlandfunk*, 06/08/2015; Geldwäsche Affäre in Russland. Deutscher Bank drohen Milliarden Bußgelder. In *Spiegelonline*, 14/08/2015.

³⁶ Illustration of *Voltmer A*. See *Brambusch*, 2012, pp. 40-45.



The legal framework has been considered as not being sufficient to tackle the estimated volume of money laundering. In 2007 and 2010 the European Commission initiated two proceedings against the German government for having contravened the European treaty by not having effectively transposed into national law the European framework to tackle money laundering and terrorist financing.³⁷ *Schäuble*, who in 2011 was the German Minister of Finance, taking part in an official conference at the Ministry of Finance on money laundering, was seen to be seeking confirmation from a colleague as to whether his Ministry was responsible for money laundering control or not; when he received a positive answer he then made sure that the implementation of such legislations was attributed to the states.³⁸ *Schäuble* was actually already in charge of the anti-money laundering regime in the years between 2005 and 2009, while he was also the Head of the Ministry of the Interior, because at that time

³⁷ On 14th October 2004, *Frank* addressed the European Commission with a complaint against the German government with reference to a report published by the IMF (International Monetary Fund), the OECD (Organisation for Economic and Commercial Development), and the FATF (Financial Action Task Force) to argue that Germany was contravening the second European anti-money laundering directive (Directive 2001/97/EC). *Frank's* complaint was particularly focussed on the lack of regulations in the field of casinos, which were not sanctioned pursuant to the German legal system in case they did not report a suspicious transaction. *Frank* is an expert in the field of anti-money laundering. See <http://www.frank-cs.org/cms/modules/welcome/index.php>, last accessed on 27/11/2015. The EU Commission Secretary general confirmed the receiving of the complaint on 13 June 2005, with the file number 2005/4572, SG(2005) A/5553. In the meanwhile the EU adopted a new Directive (Directive 2005/60/EU) and on 21st march 2007 the European Commission, on the basis of *Frank's* complaint, initiated a proceeding against Germany for the violation of the EU treaty. On 16 July 2007 the Ministry of justice declared that there was an ongoing legislative process in order to close the legal loopholes, which eventually concluded with the adoption of the 'law to fight money laundering and terrorist financing' (*Gesetz zur Bekämpfung der Geldwäsche und der Terrorismusfinanzierung, Geldwäschebekämpfungsergänzungsgesetz, GwBerkErgG*) on 13th August 2008, which discharged the complaint, according to the EU Commission. Yet, *Frank* was not satisfied by the transposition of the third anti-money laundering directive into German law and filed another complaint in 2009, after the Ministry of Finance declared that implementation at state level of international standards against money laundering and terrorist financing was considered as very critical (Communication GZ VII A 3-WK 7031/08/10014). For more details on the proceeding, see *Roth et al.*, 2007, pp. 287 ss.

³⁸ *Schütz*, 2012, p. 250.

that Ministry was competent for money laundering control.³⁹ According to the government's draft law to optimise money laundering prevention of 17 August 2011, the anti-money laundering act of 1993 has never been effectively enforced,⁴⁰ and this means that the '*Schwerstverbreche in Deutschland belohnt werden*'.⁴¹ *Frank* and *Fiedler* sent several letters to the Minister, in order to offer their help as consultants to tackle money laundering more effectively, given that for many years Germany had not implemented the European Anti-Money Laundering Directives and thus had deceived the guardian of such policies, the European Commission.⁴² It is the time, declares *Frank*, that he should admit that his Ministry is overburdened by the money laundering control task or but his Ministry does accept a certain amount of money laundering.⁴³ With regards to the FATF report of 2010 that strongly criticised the implementation of anti-money laundering regulations in the non-financial sector, such as real estate agents, insurance providers, and jewellers, the author observes that for instance a piece of jewellery sold by a jeweller paid for with 500 Euro notes not only represents a great deal for the jeweller but also for the state, due to the relating revenues. Yet, it also represents a great opportunity for a potential money launderer who has easily transformed the illegal monies into legitimate jewellery. According to *Frank* the states profit directly or indirectly from money laundering activities and therefore the supervisory agencies do not look at them that carefully.⁴⁴ Also in 2010 the IMF, the OECD and the FATF hardly criticised the legal system for not being fully in line with international anti-money laundering standards. In response to this wave of criticism, some important changes have been made.⁴⁵ With specific regards to penal law, the legislature has amplified the scope of the money laundering offence and the sphere of criminal liability in order to improve the effectiveness of the existing legislation.⁴⁶ Yet the continual expansion process has raised legal challenges that could constitute an obstacle for the effective enforcement of the measure. The underlying hypothesis is that the offence plays a symbolic role.

³⁹ *Schütz*, 2012, p. 248.

⁴⁰ *Schütz*, 2012, p. 251.

⁴¹ English translation: 'the most serious crimes are rewarded in Germany'.

⁴² *Schütz*, 2012, p. 250.

⁴³ *Schütz*, 2012, p. 247.

⁴⁴ *Schütz*, 2012, p. 252.

⁴⁵ See the FATF Mutual Evaluation of Germany: 3rd Follow-up Report of 2014.

⁴⁶ The main amendments to the money laundering offence recently approved consist of the introduction of the elimination of the exemption of punishment for those who participated in the predicate offence and of the introduction of the newly created offence of terrorist financing as a predicate offence for money laundering. For a more detailed overview, see chapter two.

This thesis contributes to the existing literature about criminal legal measures in tackling white collar-criminality, economic and organised crime, and more generally to the scholarly production dealing with legal responses to the globalisation era in which there has been an explosion in the volume of illegitimate commercial and financial transactions.⁴⁷ The thesis aims at contributing specifically to the literature that analyses the effectiveness of the current legal framework in tackling illicit financial flows, regardless as to whether they have a criminal, corrupt, or commercial origin.⁴⁸ The methodology adopted is qualitative. The research consists of a case study that includes a documental research, a qualitative analysis of statistical data and the conduction of interviews with privileged observers and legal actors. The work has been conducted by a single person and not by a team of researchers; this has imposed a limit on the interviewing sample and the impossibility of undertaking, along with the qualitative analysis of the provision, a qualitative analysis of the jurisprudence and a quantitative analysis of the case law. In addition, criminal provisions have a deterrent purpose, yet in certain cases it is almost impossible to quantify the deterrence effect of those provisions, as in the case of the money laundering offence, and this represents a shortcoming of the current research. Yet the assessment undertaken is rather qualitative and thus is not affected by the lack of such quantification. Another shortcoming is due to the fact that illicit financial flows are inherently difficult to measure because their actors are trying to avoid being caught.⁴⁹ Official numbers are highly problematic, this element, despite impeding an objective quantification of the phenomenon, can represent a partial result for the qualitative analysis, because it highlights the complexity of the matter. The anti-money laundering regime is constantly evolving, and this would require continuously updating the assessment, instead the research provides a picture of the current situation. Yet the work offers the reader an instrument to critically interpret also possible changes in the wording of the money laundering offence that may be made following the

⁴⁷ In particular 'North American and European banking and investment institutions have been flooded with laundered and ill-gotten gains'. *Becker*, 2005, p. 22. According to the author there are two key factors that underpin the rapid growth in international crime: '(1) alliances and agreements spanning national, regional, and ethnic divisions assure enormous profits for criminal syndicates choosing to cooperate rather than compete, and (2) the ease with which money is shifted among groups, laundered across borders, and transferred into the legitimate financial system is the primary facilitating mechanism that makes such operations so successful. Global crime is out of control and will remain so as long as dirty money flows effortlessly into respectable -particularly western- accounts'. *Becker*, 2005, p. 100.

⁴⁸ *Becker*, 2005, p. 23.

⁴⁹ The author particularly criticises estimates related to money laundering. *Andreas*, 2015, pp. 49-51.

publication of this work. The outcomes of the critical study on the reasons and effects of the current legislation can be used as a starting point for further research; the methodology set for the empirical analysis can be applied to assess the effectiveness of following developments.

The structure of the thesis is the following: The first chapter presents the theoretical sociolegal framework and provides an operational definition of the concept of effectiveness that directs the empirical research. At the end the chapter describes the methodology of the qualitative research. Chapter two traces the genesis of the money laundering offence, as well on an internal, European and domestic level. The chapter analyses legislative intents, parliamentary debates and other external contributions as declarations of intents and opinions through a desktop-study. The third chapter is dedicated to the doctrinal debate about the money laundering offence regulated in the German penal code. In particular the chapter highlights the controversial issues that have emerged through the abundant legal scholarship production, which might affect the effectiveness of the money laundering offence. Chapters four and chapter five present the empirical research. The fourth chapter analyses the quantitative data of the implementation of the money laundering offence from a qualitative perspective. The last chapter presents the results of the interviews.

1 CHAPTER

'An elastic concept of legal effectiveness: Instructions for the sociolegal research'

‘[...] Quelle gride, ripubblicate e rinforzate di governo in governo, non servivano ad altro che ad attestare ampollosamente l’impotenza de’ loro autori; o, se producevan qualche effetto immediato, era principalmente d’aggiunger molte vessazioni a quelle che i pacifici e i deboli già soffrivano dà perturbatori, e d’accrescer le violenze e l’astuzia di questi. L’impunità era organizzata, e aveva radici che le gride non toccavano, o non potevano smovere.’⁵⁰

(*Manzoni*, 1840, p. 21)

1.1 Foreword: The concept of legal effectiveness

Embarking on a study of the effectiveness of a legal act is a complex task. Firstly, it is a multidisciplinary question: The effectiveness of a legal act can be measured using different methodologies, it can be observed and studied from different perspectives, and it might both rely on and impact areas of human life exceeding the legal sphere. Defining the concept of legal effectiveness itself, has been an issue and the object of particularly vivid discussions among legal sociologists as well as among legal philosophers, legal theorists, political scientists and political sociologists, administrative scientists, and economists. Secondly, even within the sociology of law there are different perspectives on what legal effectiveness is.⁵¹ Despite this complexity it is

⁵⁰ Translation: 'Notwithstanding this, or, it may be, in consequence of this, these proclamations [*grida*], reiterated and reinforced from time to time, served only to proclaim in pompous language the impotence of those who issued them; or, if they produced any immediate effect, it was that of adding to the vexations which the peaceful and feeble suffered from the disturbers of society. Impunity was organised and effected in so many ways as to render the proclamations powerless'. (*Manzoni*, 1834, p. 10).

⁵¹ *Ferrari*, 1992, p. 146. *Blankenburg* takes the example of the effectiveness question to show the complexity of an external study, as a sociological-political study, on the law. *Blankenburg*, 1995, p. 4.

extremely necessary, especially in recent times of excessive legal production, to verify the effectiveness of legal acts before introducing new ones.⁵² The definition of legal effectiveness conceived in this chapter and adopted for the case-study draws upon mostly sociolegal theories on legal effectiveness, but also upon some of the definitions provided by the other disciplines. In addition, the nuances of varying meanings furnished by different disciplines which are used to interpret the perceived concepts of effectiveness emerging from the interviews. The work thus joins the vibrant discussion on the concept of legal effectiveness by proposing a methodological definition which is then applied to the empirical research.

Commonly a rule can be defined as effective if it achieves the goals for which it was adopted. As already mentioned several disciplines have showed an interest in the topic of legal effectiveness. Sometimes the terms used are different, such as efficiency, validity, effectivity, efficaciousness, efficacy, yet their definitions can provide relevant elements for the construction of the concept of effectiveness applied in this research.⁵³ This work adopts the term 'effectiveness', referring to the 'power to make an intended result occur, or the capacity to produce effects', on the basis of *Friedman's* milestone 'The Legal System: A social science perspective'.⁵⁴

Firstly, the sociological definition of legal effectiveness can be distinguished from the one given by legal dogmatic,⁵⁵ which defines effectiveness as the potential capacity of a legal act to produce its 'natural effects'.⁵⁶ For example from a legal perspective a contract is effective if it is validly stipulated, disregarding the actual capacity of the

⁵² Ferrari, 1992, pp. 146, 197, 261. Rottleuthner, 1983, pp. 56, 73. Treves, 2002, pp. 236, 289.

⁵³ The term effectiveness is translated in different ways. Piovani, for example uses the term 'effectivity' (*effettività*) to refer to legal orders and effectiveness (*efficacia*) to mention legal acts, Piovani, 1953, pp. 5-8. Kelsen instead uses the word *Effektivität* (effectiveness) to refer to legal orders and *Wirksamkeit* to talk about single legal acts. Kelsen, 1952, pp. 2, 24.

⁵⁴ Friedman, 1975. Also Allott, in his popular book 'The limits of law' speaks of 'effectiveness of law' to indicate whether a particular provision fulfils its purposes. See Allott, 1980, pp. 28 ss; 1981, p. (229) 233. Often it is referred to the same sociological concept of effectiveness by using the word 'efficacy'. See for instance the 'Black's Law Dictionary', Garner (ed.), 2014, pp. 628, 629; Villegas, 2003, p. (137) 151.

⁵⁵ In the German language such a dichotomy is expressed by the terms '*Wirksamkeit*' - '*faktische Geltung*' (effectiveness - factual validity) or '*normative Rechtsgeltung*' - '*faktische Geltung*' (legal normative validity - factual validity). See Paliero, 1992, p. (430) 487.

⁵⁶ The 'natural effects' of a legal act are those effects that Pino defines as a legal automatism, namely of effects that are automatically produced or through the compliant behaviour with the legal content. Pino, 2013, p. (181) 184.

contract to produce the consequences for which it was concluded.⁵⁷ According to the *Black's Law Dictionary*, a legal act is effective in a normative sense, if 'it is in operation at a given time';⁵⁸ for instance a statute, order, or contract is often said to be effective beginning at a designated time. More specifically the *Black's Law Dictionary* defines legal efficacy as 'the quality of having significance or force under law to produce certain effects'.⁵⁹ The *Burton's legal Thesaurus* uses the adjective 'effective', as operative, to indicate something 'having legal force'.⁶⁰ Using *Ferrari's* words, the legal definition moves from a factual *prius* (the existence of the legal act) to a deontological *posterius* (the capacity of producing natural effects), on the contrary the sociological notion moves from a deontological *prius* (the goals of the legislator) to a factual *posterius* (the concrete effects of the legal act).⁶¹ The main difference is between a potential attribute verifiable theoretically that is the legal notion and the sociological factual notion, which is verifiable empirically. Another diversity highlighted by jurist *Noll* is that while the legal definition shall be solely applied to a determined legal act, the sociological one is scalable, which means that a legal act can be either legally effective or not, but it can also be partially sociologically effective.⁶²

In the context of legal theory the concept of effectiveness is studied in opposition to the concept of validity.⁶³ A legal act is valid if the authority that produced it had the power to do so, if the act has not been abrogated by and is not inconsistent with another one, and if, by using a *Kelsenian* terminology, that legal act is legitimated by the fundamental law.⁶⁴ The legal theory notion of validity is different from the common definition of effectiveness because it does not look at the effects of the legal act, but rather focuses on intrinsic elements. Yet, when a law is valid but is not applied and is thus non effective, it loses its validity. Taking a valid constitution as an example, *Kelsen* states that if its provisions are not applied and not respected and thus are not effective

⁵⁷ *Falzea*, 1965, p. 432.

⁵⁸ The *Black's Law Dictionary* definition provides also two other meanings that are closer to the sociological concept: (2) Performing within the range of normal and expected standards, (3) productive, achieving a result. *Garner (ed.)*, 2014, pp. 628, 629.

⁵⁹ *Garner (ed.)*, 2014, pp. 628, 629.

⁶⁰ *Burton (ed.)*, 2007, p. 206.

⁶¹ *Ferrari*, 1992, p. 146.

⁶² *Noll*, 1972, p. (259) 260.

⁶³ This distinction has been highlighted also by *Weber*, who stressed the difference between an ideal validity, deductible systemically by legal theorists, and an empirical validity of a norm, which ought to be the subject of empirical observation. *Weber*, 1972, p. 31.

⁶⁴ *Kelsen*, 1952, p. 217.

such constitution loses its validity.⁶⁵ The measure in which dis-application and disobedience amount to ineffectiveness and thus invalidity is a political matter.⁶⁶ On the background of these reflections, the concept of validity cannot be kept completely detached from the concept of effectiveness.⁶⁷ As much as *Kelsen* could not prescind from the concept of legal effectiveness in order to define the validity, so legal sociologists actually often assume the validity of legal acts whose effectiveness they investigate.⁶⁸ Having said that, this research does not verify the validity of legislations studied, in fact it assumes that they are valid. However, it takes into account the possibility that eventual ineffectiveness might affect the legislation's validity.

In legal philosophy a norm is said to be valid if it has legal effects.⁶⁹ In legal philosophy there has been the approach to separate the concepts of validity and efficacy by stating that 'efficacy does not affect the validity and existence of laws'.⁷⁰ Yet, in the view of this research it is useful to recall another concept used by legal philosophers, which relates effectiveness and validity, that is the concept of applicability.⁷¹ According to this perspective, a norm can be said to be valid if it is applicable, and it can be defined effective if it is observed by those to whom it is applicable or it applies.⁷² The potential applicability determines the validity, while the actual application defines the effectiveness. Finally, another concept used in legal philosophy that could be relevant for this research is the one of effectuality⁷³ (*effettualità*), which indicates the potentiality of a legal act to be verified in one of its own alternatives.⁷⁴ Taking behavioural norms as example, the alternatives that would verify the norms are compliance or punished

⁶⁵ Yet, neither the Kelsenian definition of validity is applicable to common law systems in which the disuse does not have a negative validity. See *Losano*, 1981, p. 16.

⁶⁶ *Rottleuthner*, 1983, p. 76.

⁶⁷ Therefore the two spheres of *Kelsen's* theory, the be (*Sein*) and the should (*Sollen*) overlap. The scholar has been criticised because he was not able to provide a definition of validity without recurring to the *Sein*. See *Losano*, 1981, p. 10. Yet, the collision between the *Sein* and the *Sollen* could also be interpreted as the border between legal theory and sociology of law.

⁶⁸ It is also true that a sociologist may be interested in verifying social consuetudinary obedience to an invalid legislation that is perceived as still being in force. This because validity needs effectiveness but effectiveness does not need validity'. *Losano*, 1981, p. 23. Also, by unmasking the structures of power underlying the creation of the legal act, a sociological research can generate a loss of legitimation that can impact on the validity of the legal act. *Blankenburg*, 1995, p. 5.

⁶⁹ *Raz*, 1979, p. 149.

⁷⁰ *Raz*, 1979, p. 87.

⁷¹ *Comanducci and Guastini*, 1996, pp. 32, 33. 'To avoid circularity, the criterion for attributing applicability to legal norms cannot presuppose their effectiveness'; *Moreso and Navarro*, 1996, p. 21.

⁷² See *Bodenheimer*, 1974, p. 260; *Sumner*, 1987, p. 65.

⁷³ Effectual, according to the *Burton's legal Thesaurus*, is synonym with achieved, authoritative, binding, effective, efficacious, efficient and worthwhile. *Burton (ed.)*, 2007, p. 206.

⁷⁴ *Visalberghi*, 1975, p. 63.

deviance. Especially these last two approaches, which describe the sphere of legal effectiveness as a potential attribution that still needs to be verified empirically by looking at the behaviour of norms' addresses are useful to conceive a sociolegal concept of effectiveness.

Administrative science uses the concept of efficiency⁷⁵ in opposition to the one of effectiveness. While effectiveness looks at the outcome of the legal act's application, efficiency refers to the optimal relationship between the achieved goals and the employed means.⁷⁶ The concept of efficiency refers to the means used to implement a legal act and in particular to the administrative apparatus directed at enforcing the legal provision. An administrative apparatus is defined efficient if it manages to fulfil its purpose while rationally employing its means. *Bettini* believes that the two notions should contribute to each other, since any opinion on the efficiency of a legal act is also an opinion on its effectiveness because it contributes to the wider sociological concept of effectiveness.⁷⁷ A peculiar type of efficiency is the 'efficiency regardless the purpose' (*zielunabhängige Effizienz*),⁷⁸ which refers to entire legal frameworks and not to single provisions. According to this view an apparatus is efficient if it functions optimally notwithstanding what effects it achieves, because its purpose consists with its mere existence.⁷⁹

From a political science point of view the analysis on legal effectiveness belongs to the broader category of policy-analysis. In this field legal acts are part of a policy and their effectiveness is studied to the extent that it affects the impact of the policy.⁸⁰ While certain typologies of policy-analyses typically assume that legislative intent is capable

⁷⁵ According to the *Burton's legal Thesaurus* 'efficiency' is a synonym of ability, ableness, adeptness, capability, excellence, productiveness, but also efficacy, and effectiveness. *Burton (ed.)*, 2007, p. 206.

⁷⁶ This definition of efficiency is taken in particular from *Leisner*. The scholar describes a specific type of efficiency, the '*Zweck-Mittel Effizienz*', which consists of the optima relation between the goal (*Zweck*) and the means (*Mittel*). See *Leisner*, 1971, pp. 7 ss.

⁷⁷ *Bettini*, 1983, p. 107.

⁷⁸ *Leisner*, 1971, pp. 7 ss. See also *Paliero*, 1992, p. (430) 494.

⁷⁹ *Hierro*, 2010, p. 180; *Villegas*, 2014, p. 96.

⁸⁰ The *Black's Law Dictionary* defines a policy as 'a standard course of action that has been officially established by an organisation, business, political party, etc.'; and a public policy as 'the collective rules, principles, or approaches to problems that affects the commonwealth or (esp.) promote the general good; specific, principles and standards regarded by the legislature or by the court as being of fundamental concern to the state and to the whole society'. *Black's Law Dictionary*, 2014, pp. 1345, 1426. In this work it is referred to policy to indicate the whole system of legislations adopted to prevent and repress money laundering.

of being made clear and known and that language itself is transparent, and that the policy process is rational and oriented towards stipulated goals, others shift the focus to meaning-making, in order to take into account that policies may also be avenues or vehicles for human expressiveness. The latter typologies of policy-analyses are directed at revealing and interpreting conflicts between legislators, implementers, and other publics, triggered by the multiplicities of interpretation across policy-relevant groups, also considering that ambiguity in policy matters can be purposeful. Given that the main source of policy meanings is in the language, the methodology adopted for policy analysis is the discourse analysis.⁸¹ The present research focuses on the effectiveness of a single provision, which is the money laundering offence, yet, given the fact that the provision is part of a broader policy, its effectiveness cannot be completely detached from the effectiveness of the whole policy.

Finally, it seems useful to recall the definition of effectiveness provided by the economic analysis of law. In this field legal efficiency is measured in relation to undertaken costs; the type of analysis implies a costs-benefits method that compares the expenditures with the results in economic terms.⁸² The sociological perspective is different from the economic one: While in economic theory the individual is a rational actor that disregards his or her social ties in the market situation, the sociological individual is embedded in a network of social relations, and is thus influenced by social ties.⁸³ Not only, a rational analysis of crime control processes assumes that different actors, from the law-making phase to the enforcement phase, have a rational attitude, for instance, implementers respect the legislature's orders. Also, the economic analysis will disregard the personal motives of law enforcement agents. This difference approach has an impact on the meaning attributed to the concept of legal effectiveness in a market context: A legal act could be defined as effective according to the economic theory if it would take into account the rationality of the actors, while in a sociological perspective it would be necessary to tailor some different variables, such as political and social

⁸¹ Yanow, 2014, p. 142. For a complete overview, see also Pal, 1995, p. 185; Swaffield, 1998, p. 199.

⁸² A cost-benefit analysis is 'a method of setting put the factors that need to be taken into account in making choices about major investments in public sector projects. The objective is to assign all costs and all benefits, social and economic, so that one can see clearly whether the benefits exceed the costs of a venture [...]'. Scott (ed.), 2014, p. 130.

⁸³ For example a consumer might not buy from a seller, despite she or he having the best prices for personal reasons, as for instance the retailer belonging to a stigmatised group. Borgatta (ed.), 2010, pp. 725 ss.

elements.⁸⁴ Yet, the economic approach can offer interesting ideas, especially with regards to criminal law. In particular, according to an economic perspective, the criminal justice system shapes the legal response to a crime on the basis of a cost-analysis.⁸⁵ A study conducted by German scholars has highlighted that the compliance rate of a certain crime will be inversely proportional to the costs of preliminary investigations.⁸⁶ The economic approach assumes that the goal of law enforcement is the maximisation of compliance rates, and that agencies act in a rational way according to this goal. The economic calculation can also be applied in the initial phase in order to decide whether to punish behaviour under criminal or administrative law according to convenience. Despite the diversities between the sociological and the economic approaches, this work takes into consideration the outcomes of some cost-benefit analyses undertaken by other researchers on the anti-money laundering regime in order to contribute to the general sociolegal assessment on the effectiveness.⁸⁷

All things considered, the sociology of law's approach, differentiates itself from the legal dogmatic that looks at formal aspects of the law, and from the philosophy of law and legal theory because it empirically assesses the legal effectiveness. It also differentiates from other approaches (e.g. the economic), which assume rational behaviour of the actors involved, because it has a rather critical approach, which allows taking into account actual and unintended effects and non-rational behaviours. The sociolegal approach imposes going beyond considerations of technical qualities and

⁸⁴ In fact, the objection most often raised against the economic approach is that it gives a spurious air of economic rationality and objectivity to decisions that are necessarily social and political in nature. *Scott (ed.)*, 2014, p. 130.

⁸⁵ With regards to criminal law, *Amelung* describes the efficiency as the optimal relation between the means adopted and the goals achieved through a cost-benefit analysis. According to the scholar such analysis should take into account as costs also non-economic costs, such as social or individual costs and the collateral effects, which are those non-intended consequences. See *Amelung*, 1980, pp. (19) 30, 31.

⁸⁶ In addition, law enforcement will try to collect as much information as possible during preliminary investigations if this results to be more convenient. Prosecutors will prefer to indict for crimes that require the lowest degree of evidence. When prosecutors decide whether to indict a person they calculate *ex ante* the potentiality that the information gathered proves the fact in which the aim of conviction. With this regard, information revealed by the suspect in the appeal can be essential. Furthermore, public prosecutors will never try not to close a proceeding if they possess enough evidence to indict the offender, in the opposite situation they will always accept the proposed offer of closing the proceedings. According to the economic approach, the discretion granted in these situations does not frustrate the effectiveness of the law, because law enforcement has the liberty to choose whether to continue or to close a proceeding, and therefore could also always choose to continue it. See *Jost*, 1998, pp. 268 ss.

⁸⁷ The economic approach is similar to the one proposed by the legal realism's method of reasoning. Legal realism determines the meaning of a legal act by weighting the costs, benefits, probable consequences, and underlying values and purposes of the law. In addition, it also considers whether the interpretative result will be fair and just. *Black's Law Dictionary*, 2014, p. 1456.

deficiencies of a legal act, in order to assess its concrete impact. In fact what legal acts prescribe, despite being technically perfect, can be different from what those acts' impact. One of the scholars who has highlighted this gap is *Pound*, who stressed the importance of recognising the difference between the 'law in books' and the 'law in action'.⁸⁸ An analysis of the technical appropriateness of the 'law in books' may provide relevant information about the effectiveness,⁸⁹ yet it is not sufficient to assess the legal effectiveness of the 'law in action'. Therefore, a sociolegal study on legal effectiveness also empirically investigates the effects of the law in real situations, besides looking at its formal potential adequateness. The empirical method, despite leading to contingent outcomes based on facts, opinions and perceptions embedded in a certain place and time, has the advantage of taking into account aspects of the substantial application of the law that would not otherwise result from a study limited to technical considerations on the 'law in the books'. In addition, a sociolegal research on legal effectiveness does not presume the rationality of those that produce, implement and enforce the law; therefore it also looks at the perceptions, expectations, and opinions of those actors, on the assumption that these factors could also affect legal effectiveness.

As previously mentioned legal sociologists have several provided different definitions of legal effectiveness. One of the most common is the one that defines a legal act effective if the addressees comply with it, and ineffective when the addressees deviate from the prescribed conduct.⁹⁰ An example of this typology of definitions is the one provided by *Geiger* in his ground breaking work 'Vorstudien zu einer Soziologie des Rechts'. The scholar expresses the concept through the mathematic formula $e = (s \rightarrow bg) + [(s \rightarrow c\check{g}) \rightarrow r]$ that indicates that the coefficient (e) of effectiveness corresponds to the sum of compliant behaviours (g) and of deviant behaviour (ğ) to which a sanction follows (r). Dividing the coefficient of effectiveness (e) by the number of cases in which the addressees are in typical situations (s), it equals the level of obligatory (v) of a legal

⁸⁸ *Pound*, 1910, p. (12) 12 ss.

⁸⁹ For example *Evan* in the essay 'Law as an instrument of social change' lists some technical conditions of legal effectiveness, such as the prestige of the legal source, the appropriateness of the purpose, the publication of violations, whether legal actors are convinced about the legislation and the adequateness of the sanctions. *Evan*, 1965, p. 558.

⁹⁰ Generally there is the tendency to define the law's effectiveness by having in mind behavioural rules. These thoughts are not yet completely applicable to private law. For a detailed analysis of the differences existing between an effectiveness assessment of criminal law and of private law, see *Rottleuthner*, 1983, p. 85 ss.

act: $v = e / s$.⁹¹ The formula has been criticised because of the reduced applicability and because of the incapability of taking into account other factors.⁹²

By examining some of the critical issues challenging *Geiger's* formula, important elements will emerge that will help conceive a more suitable definition of legal effectiveness for this research. As regards to the obligatory relation, *Geiger* does not define a 'typical situation', thus making it difficult to apply the formula in those cases in which it is not easy to calculate the number of typical situations.⁹³ Taking the crime of murder as an example, for which the obedience consists in the abstention from killing, it is impossible to calculate how many times individuals have been in a 'typical situation' and have not committed a murder as a consequence of the deterrent effect of the criminal provision.⁹⁴ In the case of a high number of deviant behaviours sanctioned, the level of effectiveness of the legal act increases according to the formula. This might frustrate the deterrent potential and thus actually diminishes its effectiveness.⁹⁵ On another note, *Geiger's* formula has been contested because it does not provide information on other variables that can influence the addressees' behaviour. *Delavecuras* suggests that it would be interesting to acquire information on other variables, for example in a study of the effectiveness of fiscal acts it would be of great relevance to collect information on compliant individuals.⁹⁶ For example, if only subjects with high salaries complied this would reveal an important element to assess the effectiveness of the fiscal provision. Also investigating the reasons of deviance can contribute to the assessment of the effectiveness of the law, to the extent that for example a voluntarily disobedience that aims at expressing a refusal of a certain legal act is different than a deviant behaviour caused by a mistake; while the first takes into consideration the legal act but is a negative message in relation to its effectiveness, the

⁹¹ *Geiger*, 1987, p. 182.

⁹² *Geiger* gives more indications on the other variables relevant to an assessment of legal effectiveness in its work; see *Geiger*, 1987, pp. 182 ss, 204 ss. Yet according to *Rottleuthner* its formula has not been very successful in the sociology of law. *Rottleuthner* 1983, p. 82. *Blankenburg* on the contrary believes that *Geiger* has specifically provided such a formula in order to show that most rules regulating daily life are violated without that such deviant behaviours are followed by a sanction and are thus ineffective. *Blankenburg* 1995, p. 3.

⁹³ *Blankenburg*, 1995, p. 5.

⁹⁴ *Rottleuthner*, 1983, p. 80.

⁹⁵ The same critics could be raised against the philosophical definition of *effectuality*. An even more extreme critics is brought forward from scholars who believe that laws are effective if they do not need to be enforced by legal authorities. *Kelsen*, 1952, p. 20. See also *Rehbinder and Schelsky*, 1972, p. 558.

⁹⁶ *Delavecuras*, 2007, p. 158.

second might be part of a foreseeable impact.⁹⁷ Moreover, the mathematical formula is not able to take into account cases in which a high deviance rate does not nullify the effectiveness of the legal act, nor cases in which, on the contrary, a high compliance frustrates the goal of the legal act. On one hand 'frequent violations of a legal act are not evidence of the fact that that act has not had any influence'.⁹⁸ On the other hand full compliance with legal order might not lead to the intended goal,⁹⁹ or even frustrate its purpose. The addresses could fall short of the social target of a legal act when they do not obey to the content of the provision in the case such obedience actually provokes non-foreseen collateral effects, or in case of a mistaken formulation of the provisions or of an explicit will in this sense of the rule-makers.¹⁰⁰ *Ferrari* provides the example of Article 57 of the Italian code of civil procedure that, if substantially respected, would actually paralyse the civil judiciary system, because it imposes very strict obligations on registrars that, if followed, would block the work of the judiciary.¹⁰¹ In other words, partial non-compliance might lead to fulfilling the functions of a legal act better than full compliance.¹⁰² Furthermore some rules do not achieve their social goals only through compliance. *Rottleuthner* gives the example of rules that impose speed limits that are aimed at reducing or eliminating car accidents.¹⁰³ If all drivers respected the limits and thus complied with the rule but yet caused many more car accidents, those rules would not be effective because they would be unable to display their social function. There are also rules that are respected not because they are perceived as right but because there is no other alternative or due to passiveness; in these cases a high compliance rate might not mean that the rules are very effective. Given all these situations in which a calculation based on compliance and deviance rates does not correspond to the effectiveness of a law, it can be inferred that the effectiveness assessment cannot be limited to *Geiger's* formula. There is furthermore a methodological issue: Given that the field of money laundering is characterised by a high level of uncertainty about the volume of obedience and disobedience because

⁹⁷ *Friedman*, 1975, p. 45.

⁹⁸ *Aubert*, 1965, p. (313) 316.

⁹⁹ *Blankenburg*, 1985, p. (205) 209.

¹⁰⁰ *Noll*, 1972, p. (259) 261.

¹⁰¹ See article 57 of the Italian civil procedural code: '*Attività del cancelliere. Il cancelliere documenta a tutti gli effetti, nei casi e nei modi previsti dalla legge, le attività proprie e quelle degli organi giudiziari e delle parti. [...]'*. English translation: 'The registrar reports thorough in the cases and under the conditions provided by the law, the activities of the judiciary and of the parties'.

¹⁰² *Blankenburg*, 1985, p. (205) 214.

¹⁰³ *Rottleuthner*, 1983, p. 90.

statistics are often inconsistent. The data provided by the criminal justice system on deviance and compliance rates cannot offer a reliable basis for calculation. In addition the concepts of compliance and deviance are controversial concepts. *Friedman* defines them 'two poles of a continuum'.¹⁰⁴ Different people can interpret the same behaviour in different ways in different circumstances. In fact the two concepts are attributes deriving from sequences of decisions-definitions that emerge in the course of the interaction.¹⁰⁵ 'Deviance and compliance do not exist, only social definitions of what is compliant and what is deviant'.¹⁰⁶ As regards in particular to criminal law, there might be different definitions of deviance for the same fact: From the victims' perspective, one from the police's perspective, and finally one according to the public prosecutors. None of them is the correct one, only a view that would take into account all of them could get closer to the effective fact.¹⁰⁷ Most studies on deviance and compliance have been looking at the causes of deviant behaviour or at the processes through which, and the conditions under which, a criminal sanction is applied to particular deviance categories. The dominant problem relating to criminalisation is whether criminalisation is a neutral process or it serves the interests of the powerful. In this context the labelling theory has turned the traditional question around, 'Why do they deviate?' and asked 'Why do they label it as deviant?'¹⁰⁸ Besides being a socially relevant topic, the labelling of deviance has a marked political aspect, namely the fact that policy-makers can have an interest in defining certain behaviour as deviant.¹⁰⁹ The labelling theory is used in this research to interpret the reasons behind the criminalisation or the non-criminalisation of certain behaviours.¹¹⁰ The criminalisation of white collar crimes could also prove the theories wrong that describe the power of labelling as a political tool to strengthen most

¹⁰⁴ *Friedman*, 1975, p. 47.

¹⁰⁵ *Ferrari*, 1992, p. 143.

¹⁰⁶ *Gallino*, 2012 p. 217. A definition given is 'the violation of a norm that would, if discovered, result in the punishment or condemnation of the violator'. Yet not all deviant behaviours result in the punishment or condemnation of the deviant. *Ritzer and Ryan (ed.)*, 2011, pp. 139, 140.

¹⁰⁷ *Blankenburg*, 1995, p. 13 ss.

¹⁰⁸ The labelling perspective has been influenced by the thought of *Tannenbaum* who believed that the social definition of delinquency was attached to people, who would be more prone to take on a deviant role. In particular the author stated that 'the process of making the criminal, [...], is a process of tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious; [...]'. *Tannenbaum*, 1938, p. 20. Moderate reactivists belonging to the functionalist school of thought, such as *Becker* and *Erickson* believed that the labelling process is crucial to understand deviance as a social phenomenon, by taking into consideration problems such as the selectivity issue, the role and consequences of stigmatisation, the difference between known and secret deviants. See *Becker*, 1963, pp. 3 ss; *Erickson*, 1962, p. (307), 311 ss.

¹⁰⁹ *Gallino* gives the example of the strike, once perceived as a deviant act and nowadays as a fundamental right of workers. *Gallino*, 2012, p. 218.

¹¹⁰ The work does not seek to explain the motives of deviance.

powerful social groups while punishing the weakest. However, an empirical approach that looks at the 'law in action' besides the 'law in books' might show that in legal practice, white collar crimes are actually punished less than blue collar crimes, although deviance rates are estimated to be higher. Labelling theories have been adopted to explain the causes of deviance, as individuals would deviate because labelled as deviant. Yet this approach should not be seen as exclusive.¹¹¹ There are, indeed, also other factors influencing people's behaviour.¹¹²

With the goal of providing a definition of effectiveness that also embraces the cases in which the relation compliance-effectiveness is not proven, and that also allows other variables to be considered along with the possibility that the criminal label has a political nature, without denying that a certain level of compliance to a rule may coincide with a certain level of effectiveness of that rule, here it seems useful to recall *Friedman's* concepts of 'legal effectiveness' and 'legal impact'. The impact of the law encompasses all consequences somehow linkable to its application.¹¹³ In the notion of impact the scholar includes also those collateral effects that *Boudon* would define '*effet pervers*', namely those consequence that are unexpected and contrary to the will of the legislator.¹¹⁴ The impact of a legal act can also be defined as all the consequences that would have not taken place if the legal act would have not been enacted. In fact, even though not all scholars agree on the fact that new laws create new customs, it cannot be denied that a new piece of law creates a different situation, even despite it is often violated.¹¹⁵ The concept of legal effectiveness falls into the broader category of legal impact, to the extent that it corresponds to the positive impact of a legal act, namely to those consequences, even collateral and unexpected, which are in line with the intents of

¹¹¹ For a more detailed discussion on the opportunity of not taking the labelling approach in a paradigmatic way, see *Ferrari*, 1992, p. 143 ss.

¹¹² The *Marxist* criminological approach to law explains the reasons of deviance by looking at crime as the result of structural inequalities that are inherently associated with capitalist economic systems. Yet, this approach apparently does not furnish sufficient explanations for white collar crimes, which are mainly committed by individuals who are rather advantaged by the capitalist system. However, *Blankenburg* observes that individuals belonging to privileged classes tend to commit more sophisticated crimes that are harder to be detected or to be proved at court, because they have obtained a better education. *Blankenburg*, 1995, p. 22.

¹¹³ A legal act is according to *Friedman's* definition any act adopted by a public institution. For the purpose of this work the term 'legal act' is used as a synonym of legal provision or legislation. *Friedman*, 1975, p. 45.

¹¹⁴ *Boudon*, 1981, p. 24. The classical example are laws that criminalise abortion with the declared goal of safeguarding women's health, which actually have had the opposite effect of increasing the risk for women's health due to the conditions of illegality in which abortion was practiced.

¹¹⁵ *Aubert*, 1965, p. (85) 89.

the rule-makers.¹¹⁶ The indicator that distinguished the impact from the effectiveness is thus, the conformity with rule-makers' intentions. *Friedman's* definition of legal effectiveness allows situations to be considered in which compliance does not coincide with effectiveness, by looking at all consequences triggered by the legal act, and the eventual cases in which the labelling of a conduct is politically motivated, by looking at rule-makers' intentions.

1.2 An 'elastic concept': Variables for the assessment of legal effectiveness

An even more fitting definition is given by *Ferrari* in his essay '*Le funzioni del diritto*', the functions of law.¹¹⁷ The scholar adopts an *elastic* notion and defines a legal act effective when 'there is correspondence between the political plan and the effects of such act'.¹¹⁸ The political plan (*disegno politico*) is a wider concept than the purposes of the rule-makers and also includes those intentions that are not explicitly expressed by the rule-makers. The 'elastic' notion allows the *fictio* of the legislator to be overcome, because it allows all actors that have an influence in the process of rule-making to be taken into account.¹¹⁹ The legislator is a collective organ, constituted of different social groups that pursue their interests; political parties are composed of various individuals that might have diverse expectations and might interpret signs and messages differently. Besides the political legislator, in addition, legislations are often influenced by external factors, such as lobbies, economic actors, and international institutions. A political plan is always a compromise among different opinions rather than the expression of the unanimous will of the lawmakers. By using the word 'effects' and not compliance or deviance, the sociologist consents the researcher to consider not only those effects foreseen by lawmakers, but also those that were not planned and the so-called 'collateral effects', and the costs of enforcement. It is thus a variable definition, referring to variable finalities. In addition, the elasticity of the notion has the advantage of providing a scalable outcome: By taking into account elements that influence the formulation, the application and the reception of the legal act in a certain lapse of time and avenue, the assessment of the effectiveness is not a static piece of information but rather a revisable and modifiable outcome. The elasticity thus permits the limits of a contingent and relative assessment to be overcome.

¹¹⁶ *Friedman*, 1975, p. 48.

¹¹⁷ *Ferrari*, 1992, p. 148.

¹¹⁸ *Ferrari*, 1992, p. 148.

¹¹⁹ *Ferrari*, 1992, p. 133.

On the basis of *Ferrari's* elastic notion this work assesses the effectiveness of the German anti-money laundering legislation on the basis of the following variables: The expressed and latent intentions of lawmakers and of other actors that influence the law-making process (the political plan), the reception of such legislation by the doctrine and the legal actors and the implementation, including all the consequences attributable to the legislation (the effects). In particular this research will focus on the role of lawmakers as architects of the political plan and of its implementation and as communicators of the legal message to its public. In addition, given that 'the impact of the law cannot be studied in isolation from the impact of other factors',¹²⁰ other external factors are taken into account while studying a legislation that is indeed embedded in a particular historical-economic and political context and that is strongly influenced by it. Especially the political variable plays a very relevant role in the assessment of certain legal acts, in fact *Ferrari* states that 'every question regarding the effectiveness of the law sheds light on the intimate political nature of the law itself, it reveals the law's nature of macro-variable', influenced and influencing material and symbolic patterns of power.¹²¹ In this context it is important to focus not only on formal decision-making processes but also on non-decision making processes, which involve the mobilisation of the political agenda by powerful groups, taking decisions that prevent issues from becoming and emerging subject of formal decision-making.

Ferrari observes that a critical social theory cannot deal with legal actions without taking in to be taken into account consideration their functions, namely how such actions function, should function or do not function.¹²² The elastic definition of effectiveness is particularly useful under the perspective of a functional approach,¹²³ because it allows the researcher to take into account all different functions and effects attributed and displayed by the legal act.¹²⁴ This work does not take a functionalist

¹²⁰ *Aubert*, 1965, p. (85) 88.

¹²¹ *Ferrari*, 1997, p. 269.

¹²² *Ferrari*, 1992, p. 4.

¹²³ Some sociologists particularly focus on the functions of law, like *Geiger*, *Popitz*, and *Blankenburg*. See *Geiger*, 1987, p. 65; *Blankenburg*, 1980, p. 805; *Popitz*, 1968, p. 10.

¹²⁴ This work uses the word 'function' as a synonym of purpose, goal and aim. See *Merton*, 1983, p. 129.

approach that justifies the social order on the basis of its functions;¹²⁵ it rather adopts a functional approach that looks critically at the functions attributed by different actors and at various effects provoked. We look at law as 'a goal-oriented program, asking whether initial intentions are realized or not'.¹²⁶ This serves the goal of analysing the law without 'indulging in *a priori* patterns of knowledge'.¹²⁷ Through the study of the intentions and thus of the interests brought forward by the different actors taking part in the formulation of the legislation, the work aims at highlighting the controversial aspects of the law. The work in fact assumes the law as an instrument of conflict between social groups. Looking at the legislative process by using the concept of function can lead to the disclosure of conflicting interests and diverging expectations existing between the different actors taking part in the law-making process. The conflicting dimension of law also emerges in the implementation phase, when a piece of legislation can display *eu-functions*¹²⁸ for certain addressees and *dys-functions* for others.¹²⁹ The concept of function is particularly relevant for this research because it allows the taking of a critical approach to the study of legislative intents. Lawmakers can attribute direct and indirect functions to a legal act: The first corresponds to the required behaviour and thus to compliance, the second are the purposes that lawmakers aim at achieving through the direct functions. The intentions of lawmakers may vary with time, so that the same provision can be interpreted differently in time and if such differences are not translated into an amendment, the intent of the legislator cannot be predicted in relation to those provisions.¹³⁰ The purposes of lawmakers can result in being inapplicable so that the implementation of a legal act can be directed to a different aim. Moreover, the legislator can consider emanating a legislation that does not have a clear goal in order to allow contradictory and alternative applications. Finally, intentions can be declared or not. Those that are declared might not coincide with the real will of

¹²⁵ Functionalists consider the effectiveness of the law as the adequateness of the legal production methods to the necessary rational and control that the level of complexity reached by the social order. See Treves, 2002, p. 310. According to *Habermas* the functionalist philosophy justifies *a priori* the social order. *Habermas*, 1986, pp. 811 ss.

¹²⁶ *Blankenburg*, 1985, p. (205) 209.

¹²⁷ *Ferrari*, 1992, p. 4.

¹²⁸ A eu-function is 'one which contributes to the maintenance or survival of a social activity or of the social system as a whole'. *Scott (ed.)*, 2014, p. 226.

¹²⁹ *Aubert*, 1965, p. (85) 88. Something 'is dysfunctional if it inhibits or disrupts the working of the system as a whole or in part; for example, if teenage anomie disrupts the labour market or education system, it can be dysfunctional for the society'. *Scott (ed.)*, 2014, p. 194.

¹³⁰ It has to be noted that the legislator is not the only actor that can interpret the law, in fact in common law systems, the judiciary has the same duty. The reflections undergone for the legislator can be applied *mutatis mutandis* for the Supreme Court. See *Ferrari*, 1992, p. 135.

lawmakers. They might have been expressed in order to make the new piece of legislation more acceptable for the public, while the real intents have been kept latent.¹³¹ Non-declared intents may be kept secret due to stylistic reasons or due to opportunistic reasons, for example to avoid a loss of popularity.¹³² Sometimes declared intentions can be misleading, as *Friedman* observes 'lawmakers may say one thing and mean another'.¹³³ What lawmakers say is the manifest function, what lawmakers mean is the latent function of a legal act. There is abundant literature relating to the dichotomy manifest and latent functions, especially sociologists with a functionalist approach consider the research on the latent functions essential: For 'what does the sociologist's work serve if she or he studies only manifest functions?'¹³⁴ The concept of latent functions has been introduced in the western sociology of law by *Merton*, in opposition to that of manifest functions. The latter are the objective consequences of an act that contributes to the adaptation and adjustment of the system. Latent functions are instead those consequences that are neither wanted nor expected by those who acted.¹³⁵ The sociological research has given its major contribution when it analysed the latent functions of social actions, because it has allowed the revelation of patterns that go beyond the moral naive judgements based on manifest functions and consequences.¹³⁶ For the purpose of this work the term 'latent functions' is used with the meaning attributed by *Aubert*, who, by referring to legal acts, includes in the category also those functions that are wanted but not expressed by rule-makers.¹³⁷ In particular, the scholar states that, if one wants to understand the reasons why a legislation that does not achieve the goals for which it was enacted, yet still remains in force, it is necessary to look at that legislation's latent functions. The scholar, in a study on a social policy regulating housewives' working conditions, observed that the policy was not effective to pursue the declared goals, asked himself: 'Why was such a legislation not effective and why did parliament overvalue the provisions' capacity of achieving its purposes [...]?'¹³⁸ The scholar raised the hypothesis that Parliament consciously formulated an 'empty

¹³¹ *Ferrari*, 1992, p. 134.

¹³² *Villegas*, 2014, p. 55.

¹³³ *Friedman*, 1975, p. 55.

¹³⁴ *Merton*, 1983, p. 195.

¹³⁵ *Merton* takes as an example the indigenous propitiatory rituals, as for instance the rain dance or the fertility ritual, which do not cause any rain nor pregnancy but have the latent goal of fostering the collectiveness of a community *Merton*, 1983, pp. 173, 191, 193.

¹³⁶ *Merton*, 1983, pp. 197, 203.

¹³⁷ *Aubert*, 1965, p. (313) 329.

¹³⁸ *Aubert* conducted an empirical study on the Norwegian housewives' legislation, see *Aubert*, 1965, pp. (313) 321ss.

legislation'.¹³⁹ The most important element revealed by the research was the political element, namely the reasons triggering by the legislator. The scholar concluded that the legislation, while appearing ineffective, had the latent function of reconciling internal parliamentary conflicts by offering at the same time the satisfaction given by the promulgation to the political parties supporting the cause of the policy, and the certainty of its effectiveness to those opposing the legislative novelty.¹⁴⁰ The concept of latent functions is fundamental for this work. In order to analyse an act by using this concept, it is not necessary that the latent functions are only playing a role, yet it is sufficient that without those functions it would be impossible to explain the act.¹⁴¹ The avenues where a researcher can observe latent functions are on one hand the parliamentary debate and the *travaux préparatoires*, which 'constitute the privileged place of a study about the relations between social science and law',¹⁴² on the other hand the real effects of the law in reality.

Legislations whose latent functions prevail over the manifest ones are also critically defined as symbolic legislations.¹⁴³ It is important to stress that only those legislations whose symbolic dimension was intended by the legislature are actually considered symbolic legislations.¹⁴⁴ There is abundant literature on the concept of 'symbolic legislations';¹⁴⁵ the German constitutional court has recognised the existence of a typology of legislations with a symbolic effectiveness, as 'permanent expressions of a social-ethical, and thus legal evaluation of human actions'.¹⁴⁶ Also in 2006 the Supreme Court described the anti-corruption act '*Antikorruptionsgesetz*' as '*symbolische*

¹³⁹ From the empirical research conducted on the effective implementation and on the legislative process, *Aubert*, highlighted diverse factors that influence the legislation's effectiveness, among others the historical context, the level of implementation, the level of knowledge and the opinions of the addresses about the provisions. See *Aubert*, 1965, pp. 317 ss.

¹⁴⁰ *Aubert*, 1965, p. (313) 329.

¹⁴¹ *Merton*, 1983, p. 201.

¹⁴² *Treves*, 2002, p. 234.

¹⁴³ *Hassemer*, NStZ, 1989, p. (553) 556.

¹⁴⁴ In this sense also *Funcke-Auffermann*, 2007, p. 53.

¹⁴⁵ The adjective 'symbolic' is used with slightly different meanings. For instance, *Hegenbarth* defines it a corroboration of the normative claim, in opposition with the guarantee for enforcement; *Hill* speaks about legislations that are not able to produce change, but only to fulfil symbolic functions; *Ryffel* considers the symbolic impact of law as latent; and according to *Amelung* such legislations aim at prestige rather than effectiveness; *Neves* defines a symbolic legislation as the production of a texts [...] that have a manifest relation with the substantial normative reality, yet they primary serve the realisation of political purposes. See *Hegenbarth*, ZRP, 1981, p. (201) 202; *Hill*, 1982, p. 37; *Ryffel*, 1974, pp. 255 ss; *Amelung*, ZStW, 1980, p. (19) 54; *Neves*, IfS-Nachrichten 16, 1999, p. 9.

¹⁴⁶ BVerfG, sentence of 25.02.1975 in *Neue Juristische Wochenschrift* 1975, p. 580.

Gesetzgebung', symbolic legislation.¹⁴⁷ Legal scholarship too has confirmed the symbolic dimension of constitutional provisions in the field of criminal, environmental or labour law.¹⁴⁸ Constitutions often contain principles that are purely symbolic, whose vague formulation might be filled with a different content according to social progress.¹⁴⁹ Principles such as human dignity, freedom and equality have been interpreted very differently over the course of history; they have thus a rather symbolic nature, yet they are accepted as expressions and confirmations of shared values. Hence the symbolic effectiveness of the law can be a positive thing.¹⁵⁰ Indeed the adjective symbolic derives from the word 'symbol', which stems from the ancient Greek *sunballein* that means 'to meet', and thus in this context can be referred to legal acts that connect the public with the legal system. Yet, not all scholars have interpreted symbolic constitutional provisions as positive; for instance according to *Villegas*, principles declared in constitutional bodies often deceive people with the idea of democracy;¹⁵¹ according to *Bryde* in a legal system that respects the rule of law symbolic legislations should not be accepted, because the legislator ought to produce only legal acts that can be enforced.¹⁵²

By assuming that the law has an intrinsic communicative nature one can also say that all legal acts have a symbolic effectiveness that aim at delivering normative messages to the public.¹⁵³ Symbols used by the law can communicate cohesion, in order to unify a society and legitimise institutions, or differentiation, to glorify or degrade a specific social group.¹⁵⁴ *Villegas* identifies three main points of view on the general symbolic dimension of the law, which are the liberal, the *Marxist* and the constructivist approaches.¹⁵⁵ Scholars belonging to the first consider the law as the main instrument that can transform the use of force into a legitimate exercise of authority and thus interpret the symbolic dimension of the law as a tool that legitimises the modern state. One of the main exponents of this philosophy is *Bourdieu*, who speaks about the

¹⁴⁷ BGH 9/5/2006, 5 StR 453/05.

¹⁴⁸ Especially in America there is quite abundant literature about the symbolic nature of constitutions. See *Brigham*, 1987; *Lerner*, 1973; *Scheingold*, 1974; *Villegas*, 1993; *Neves*, 1994.

¹⁴⁹ *Noll*, 1972, p. (259) 262.

¹⁵⁰ See *Bryde*, 1993, p. 16 ss.

¹⁵¹ *Villegas*, 2014, p. 2.

¹⁵² *Bryde*, 1993, p. 18.

¹⁵³ See among others *Arnold*, 1962; *Edelman*, 1985.

¹⁵⁴ A symbol is most generally 'any act or thing that represents something else'. *Scott (ed.)*, 2014, p. 746.

¹⁵⁵ *Villegas*, 2014, p. 2.

'symbolic violence of law', by referring to the violence practised by the legal system on the social actors through a certain consensus, that is the acceptance by the latter of the existing structures of power.¹⁵⁶ *Bourdieu* especially recognised the symbolic strength of law in the legal language, as power of naming and categorising certain actions as valid, illicit or illegitimate. The scholar describes such power as an inherently violent practice, because it imposes determined meanings on social relations on the basis of which the political and economic powers lose their original arbitrariness and acquire a normal and acceptable appearance. According to this view the law is hence an instrument directed at normalising the political power through the universalisation of rules and thus a symbolic domination. In particular, one can speak here of legitimation, which refers to 'the process by which power is not only institutionalised but more importantly is given the moral grounding [...]'.¹⁵⁷ This view of the law as a dominating tool is considered to be similar to the *Marxist* approach, which, in a *Weberian* perspective, sees the law as the most important instrument of symbolic domination.¹⁵⁸ In particular *Weber*, by looking at patterns of domination, emphasises the role of perceived legitimacy as linked to the validity of a legal order, and thus to a social action: 'Action, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order'.¹⁵⁹ Yet, when the 'the myth of positive privilege' is no longer accepted unquestionably by the masses and the 'class situation' becomes visible, than legitimacy, in a *Weberian* sense, can be said to have broken down. The *Marxist* philosophy considers the law as an institution used by the stronger classes to protect their economic interests. Its symbolic dimension gives power an appearance of legality and justice. It is precisely the symbolic dimension of the law that creates a fake consciousness that impedes the recognition of the dominant power that acts behind the law. In this way people comply with legal regimes in an apparently natural way, as if they were part of a pre-constituted order.¹⁶⁰ This interpretation of the symbolic dimension of law has been used especially by critical movements in societies dominated by privileged classes, in which the symbols of unity, justice and equality were used by the most powerful to legitimise their status.¹⁶¹ According to the constructivist theory, the law represents a place of symbolic construction of social conflicts of interests, often in which if the most

¹⁵⁶ *Bourdieu and Wacquant*, 1992, p. 129.

¹⁵⁷ *Scott (ed.)*, 2014, pp. 413, 414.

¹⁵⁸ *Bourdieu*, 1986, p. (3) 16; *Scott (ed.)* 2014, pp. 413, 414; *Weber*, 1972, p. 31.

¹⁵⁹ *Weber*, 1972, p. 31.

¹⁶⁰ *Villegas*, 2014, p. 55.

¹⁶¹ *Gabel and Harris*, 1983, p. (369) 372.

powerful are advantaged, as theorised by *Marxists*, sometimes also disadvantaged classes can make use of the symbolic dimension of the law in order to fight for their rights.¹⁶² The constructivist approach mediates between the pessimist *Marxist* theories and the optimistic liberal philosophy, because it leaves an open door to the possibility that the symbolic effectiveness of law turns to be advantageous both for the maintenance of the status quo and for its criticism, thus both in a conservative and in a progressive sense.

All these approaches look at the law as having a general symbolic nature and take into consideration the possibility that the symbolic dimension of the law might be used to conceal issues that would otherwise not be accepted by society. In addition to these theories on the general symbolic dimension of law, some scholars take the view that the law is rather generally instrumental. Therefore they focus on the study of specific symbolic legislations, which, while not being completely ineffective, do not trigger instrumental effects.¹⁶³ Also with regards to specific legislations, the symbolic effectiveness can be interpreted as positive or negative. *Newig*, for instance developed the idea that symbolic legislations have an effectiveness that is not substantial but rather strategic-political, which can be even achieved before the entry into force of a legal act, due to public declarations about its legislative process.¹⁶⁴ Symbolic legislations can be interpreted positively to the extent that they are able to communicate certain messages to the public. According to *Lévi-Strauss* symbolic legislations communicate messages to the public mainly by using a psychological language.¹⁶⁵ According to this view, symbolic provisions reach their effectiveness not through their implementation but rather through their communication. Examples in the German legal system are criminal provisions that ban conducts, which are anyway never committed, as for instance

¹⁶² *Villegas*, 2014, p. 7.

¹⁶³ Various scholars have stressed the difference between instrumental and symbolic legislations. See, among others, *Schmel*, ZRP, 1991, p. (251) 251; *Kindermann*, JRR 100, 1988, p. (222) 229; *Hegenbarth*, ZRP, 1981, p. (201) 201.

¹⁶⁴ *Newig*, 2003, p. 112. *Hassemer* suggested a slightly different categorisation of symbolic legislations: Legislative denominations of values, appellative legislations, replacement legislations, which include compromise and crisis legislations, as for instance provisions enacted to counteract terrorism that are actually directed at pacifying the public's fear and indignation; finally compromise legislations that hardly regulate something, yet satisfy the need for action (*Handlungsbedarf*). *Hassemer*, NStZ, 1989, p. (553) 554.

¹⁶⁵ *Lévi-Strauss*, 1984, p. 173.

Article 233 (1) of the German criminal code, which prohibits slavery,¹⁶⁶ or the ban of genocide, introduced in 1954, whose goal was not the instrumental realisation of the normative wording, but rather the elaboration of the Nazi period, also from an external policy perspective.¹⁶⁷ In the essay 'Symbolische Umweltgesetzgebung' Newig proposes a categorisation of symbolic legislations into four groups in relation to their functions: Alibi-legislations (*Alibi-Gesetzgebung*), compromise-legislations (*Kompromiss-Gesetzgebung*), appellative-legislations (*Appellative Gesetzgebung*), legislations with a planned executive deficit (*Programmiertes Vollzugsdefizit*).¹⁶⁸ The first are introduced to give the appearance that something has been done and that the polity is taking care of the regulated matter. These types of legislations gather consensus through their mere existence: The effective content of the legal act has no importance, what counts in these situations is the appearance of justice.¹⁶⁹ In a cost-effectiveness analysis such legislations might represent a perfect solution for a legislator who is dealing with a complex phenomenon, subject to time pressure and does not want to add more voices of public expenditures in order not to lose popularity.¹⁷⁰ A symbolic alibi-legislation will not require any implementation costs because it is ineffective. Moreover, it will be perceived by the public as an efficient solution, because those that do not possess enough information to recognise the ineffectiveness of the legal acts will be satisfied by the mere adoption. In fact these types of legislation can serve propagandistic functions. Yet, if that satisfaction remains empty and the legal act does not have any instrumental effectiveness, individuals may eventually be deceived by the legislator. The second category that is the compromise-legislations is directed at mediating conflicting opinions and interests within the parliament and is usually formulated vaguely in order to allow various interpretations that would then satisfy all parties. The typology is also

¹⁶⁶ Article 233 (1) of the German criminal code: 'Whosoever exploits another person's predicament or helplessness arising from being in a foreign country to subject them to slavery, servitude or bonded labour, or makes him work for him or a third person under working conditions that are in clear discrepancy to those of other workers performing the same or a similar activity, shall be liable to imprisonment from six months to ten years. Whosoever subjects a person under twenty-one years of age to slavery, servitude or bonded labour or makes him work as mentioned in the 1st sentence above shall incur the same penalty'.

¹⁶⁷ See Hassemer, NStZ, 1989, p. (553) 554.

¹⁶⁸ Newig, 2003, pp. 49 ss. Also other scholars have categorised different types of symbolic legislations. See for example Kindermann, JRR, 1988, p. (222) 222.

¹⁶⁹ Ferrari, 1997, p. 268.

¹⁷⁰ Newig, 2007, p. 308.

known as '*gesetzgeberischer double talk*'¹⁷¹ or trade-off legislations. An example is the legislation studied by *Aubert*.¹⁷² Appellative legislations are typically constitutional provisions that recall and codify fundamental values, but can also be other sorts of rules, as for example the US Prohibition Act studied by *Gusfield*.¹⁷³ The effectiveness of such legislations derives not from what they prescribe but rather from what they express; their content is directed to the addresses of the message and not to the addresses of the rule.¹⁷⁴ The last type are legislations that need the adoption of administrative regulations in order to be implemented, but such regulations are not enacted or enforced. The question that arises is whether such ineffectiveness is to be ascribed to the parliament or rather to the administrative apparatus. According to *Bettini* the enforcement deficit can be explained within the administrative structure without recurring to the legislator;¹⁷⁵ *Blankenburg* instead asserts that especially political and legislative decisions taken under controversial circumstances are planned as not enforceable by policy-makers. Yet the scholar also recognises the hypothesis that 'under enforcement is a way of adapting laws with high symbolic importance to controversial social standards', that means that implementers can decide not to enforce a legal act in order to avoid social conflicts.¹⁷⁶

When not all that the law promises becomes true, and if in fact only a minimal part of the promises is maintained, the law is an empty promise that deceives its addresses.¹⁷⁷ The problem concerning symbolic legislations rises when these, while seeming to be pure declarations of values, deceive citizens making them think that the law is

¹⁷¹ The term '*gesetzgeberischer double talk*' is used also by *Lucke* in the work '*Das Geschlechterverhältnis im rechtspolitischen Diskurs. Gleichstellungsdiskussion und gesetzgeberischer "double talk"*', 1991.

¹⁷² *Aubert*, 1965, pp. (313) 321 ss.

¹⁷³ The scholar in particular reached the conclusion that the adoption of the legislation had a symbolic function, namely the one of satisfying the request of the catholic groups who opposed the consumption of alcohol and to establish their philosophy as dominant against the other. The scholar interpreted symbolic legislations as legal messages able to emotionally move their addresses, according to the '*dramatistic theory*', which states that the effectiveness of the symbolic legislation is not given by its strategical nature but rather through its capacity of conveying ideas, values, opinions. See *Gusfield*, 1963, pp. 166, 172. *Hassemer* provides the example of penal legislations in the field of environmental law that aim at sensitising people about environmental issues. *Hassemer*, *NStZ*, 1989, p. (553) 554.

¹⁷⁴ *Villegas*, 1994, p. 12; *Paliero*, 1992, p. (430) 537.

¹⁷⁵ The scholar has empirically studied cases of so-called '*leggi manifesto*', manifesto-legislations in Italy in the essay '*Il circolo vizioso legislativo*', in which the scholar criticises the approach adopted by sociologists about implementation problems. Yet, the scholar's theories find again a common point with those focussing on the legislative process when he declares that the assessment on the administrative implementation of rules should direct the production of new legal acts. See *Bettini*, 1983, p. 117.

¹⁷⁶ *Blankenburg*, 1985, p. (205) 210.

¹⁷⁷ The term 'promise' was used in a sociology of law conference held in Berlin in September 2015, 'the promises of law' (*Die Versprechungen des Rechts*). See <http://www.lsi-berlin.org/projekte/berlin2015>, last visited on 12/09/2015.

regulating a specific issue, while the legislations actually have the purpose (and the latent effect) of maintaining the status quo thanks to their ineffectiveness. Those legislations have a symbolic manifest function but at the same time an instrumental latent function, that is to keep the situation as it was before the introduction of the legal act. While the declared goal will not be achieved, the latent one will have a practical impact on society. Hence, while giving the appearance of a legal change, *mutatis mutandis* the status quo will not be modified. Especially provisions whose declared goal is to protect weaker social groups by changing certain patterns of power that disadvantage them, can cause real harm if they are merely symbolic. In fact, not only weak actors will remain without legal protection, but also social claims towards the law will be symbolically neutralised by the rule.¹⁷⁸ At the same time those who did not want to change the status quo remain untouched. These legislations are definitely not ineffective, they are rather mis-effective. In addition, those legislations would as being non-proportional because they are not appropriate to achieve the declared finalities. Even the attempt to implement them would require a useless effort that might cause ulterior damages and costs. In addition the ineffectiveness would lead to a public loss of confidence in the legal order. As *Beccaria* observed in the 18th century 'useless provisions, disregarded by people communicate their humiliation also to the healthiest rules'.¹⁷⁹ The concept of the symbolic dimension of the law is therefore necessary to reveal patterns of power underlying the law.¹⁸⁰ The relationship between the symbolic dimension of law and the effectiveness of law still represents a controversial topic. In reality it is not possible to clearly distinguish such categories, in fact often those attributes are rather scalable in different measures for the same provision.¹⁸¹ Yet it is possible to list some indexes of the possible existence of a symbolic legislation: The seriousness of the sanctions or of the legal response to a violation, the hierarchical position in the legal order, the time of adoption (if for instance closed to political elections), an external pressure on the legislator, the complexity and the social

¹⁷⁸ According to *Noll* symbolic legislations rise a normative claim without providing the conditions for the fulfilment of such claims. See *Noll*, *ZschwR*, 1981, pp. (347) 347 ss; also *Hassemer*, *NStZ*, 1989, p. (553) 554.

¹⁷⁹ *Beccaria*, 1786, p. 129.

¹⁸⁰ For the specific relation between criminal law and power structures it will be discussed more in the following lines.

¹⁸¹ Also *Hagenbarth* recognises that the law has a double nature, and that along with instrumental functions provisions can also a symbolic function. *Hagenbarth*, *ZRP*, 1981, p. (201) 201. According to *Hassemer* the question of the symbolic nature of a legislation cannot be answered with a yes or no, but rather with a 'more or less'. *Hassemer*, *NStZ*, 1989, p. (553) 555. See also *Funcke-Auffermann*, 2007, p. 56.

importance of the matter, existing conflicts of interest regarding the object of the matter.¹⁸²

While symbolic laws can display their functions through their mere existence, it is quite common to believe that instrumental legal acts need to be enforced in order to trigger substantial effects.¹⁸³ ‘*Eine Rechtsnorm ist wirksam, wenn sie befolgt oder durchgesetzt wird*’.¹⁸⁴ The implementation research¹⁸⁵ is particularly relevant with regards to policy-making, both *ex-post* because it provides information on unanticipated consequences, goal displacements and a change of original conceptions, and on vested interests of implementers that have influenced the legislative process, and *ex-ante* because it anticipates problems, and thus helps policy makers to foresee solutions and shifts. For these reasons *Blankenburg* believes that the study of policy making and policy implementation ought not to be divided.¹⁸⁶ The scholar adds that implementation research is necessary in order to complete research on the impact because it explains what the latter measures, which is the unintended and intended outcome. The question whether a failed enforcement has to be ascribed to the legislative process or rather to an administrative deficit can be answered on a case-basis. In fact implementation agencies can have an undeniable impact on policy making too. They can influence policy-makers about which policies might be more feasible to be implemented in relation for example to their competences. On the other hand, political decisions can impact on implementation by providing or not implementation agencies with the necessary resources and instruments such as incentives, control capacities, information. Where implementation depends on different third parties than policy-makers, these parties shall be granted an effective ability to mobilise the law. For example in federal states local authorities shall be given the necessary power, structure and resources in order to

¹⁸² *Newig*, 2003, pp. (276) 280, 281.

¹⁸³ *Villegas* states that even well written provisions largely acknowledged by the public would result ineffective if not implemented. See *Villegas*, 2014, p. 55. Yet not all scholars agree on this statement. *Rehbinder* believes on the contrary that a legal act is effective if it does not even require enforcing. *Rehbinder and Schelsky*, 1972, p. (25) 28.

¹⁸⁴ Translation in English: A legal act is effective if it is obeyed or enforced. *Garrn*, 1969, p. 168.

¹⁸⁵ For a complete overview on the topic of implementation research from German scholarship perspective, see *Mayntz (ed.)*, 1980, and *Mayntz (ed.)*, 1983, and in particular *Blankenburg*, 1980, p. 127. *Bettini* observes that while German scholars focus on implementation as a process of transformation of a political plan into an output and from the output to the impact, the Italian perspective looks at the legislative production of the political plan, see *Bettini*, 1983, pp. 166 ss.

¹⁸⁶ *Blankenburg*, 1985, p. (205) 208. Of the same opinion *Bryde*, who believes that it is possible to objectively assess the suitability of a legal act to be implemented, and that such research ought to connect in the field of the *Implementationsforschung* effectiveness assessments with studies on the implementation of policies. *Bryde*, 1993, p. 21.

implement a state legislation. In the context of private law or labour law, in which the law is not mobilised by public power, private actors should be able to access justice, which means that a range of substantial rights should be guaranteed.¹⁸⁷ In all these cases the way the legislature formulates the act may substantially influence its effectiveness. Indeed, the objective adequateness of the norm to fulfil its purposes and its suitability to be implemented can play an important role. Yet, the potential suitability does not guarantee an effective implementation. Although the enforcement of policies highly depends on implementation agencies, and thus the effectiveness of a legal act can be influenced by an administration in default,¹⁸⁸ it cannot be expected that policy-makers are always interested in programmes that can be effectively implemented. In fact often legislators may deliberately take into account implementation hindrances, as in the case of rules with a *programmiertes Vollzugsdefizit*. Yet, in such situations, when lawmakers intentionally adopt legal acts that are not supposed to be enforced, the judiciary cannot refuse to apply the law. In fact, in order to respect the rule of law, judges are actually supposed to apply the law.¹⁸⁹ This, in the end, can lead to a certain level of arbitrariness of the judiciary that is required to decide both how and whether to define the circumstances in which a legislation is applied.

After having taken into consideration two variables that are related to those actors that actively formulate or implement a legal act, the chapter is now going to focus on two factors linked with legal reception. On the assumption that the integration of a provision in the legal system can influence the effectiveness of a legal act, the research looks at the doctrinal debate surrounding the money laundering offence and at practitioners and privileged observers' opinions. In order to investigate the relationship between the level of acceptance of the law and its effectiveness means to understand to what extent the legal community of scholars, experts and practitioners have integrated the piece of legislation in their theoretical frameworks or in their daily practice. This is again a rather scalable variable: Legal actors might consider a policy effective and adequate for certain aspects or to fulfil certain functions and at the same time totally ineffective to pursue other goals or in relation to determined situations. The formulation of a legal

¹⁸⁷ With this regard *Aubert* raises the matter of the legal language: If a rule directed to housewives is written in a complicated manner, the addresses would not be able to understand it and thus apply it; see *Aubert*, 1965, pp. (313) 331, 337. See also *Blankenburg*, 1985, pp. (205) 211, 212.

¹⁸⁸ *Bettini*, 1983, p. 75.

¹⁸⁹ *Bryde*, 1993, p. 13.

programme that needs to be integrated in the legal system requires the programme not to be inconsistent with such a system. Those who produce the official doctrine and thus express the still diverging but official opinions on legal acts, have the advantage of looking at legislations from an external point of view. A legal act can be accepted and integrated in an existing legal framework if it is considered legitimate by those who are entitled to judge it. In this sense, the perceived legitimation affects legal effectiveness. Many factors can affect the perceived legitimation of a legal novelty, as for instance the way that news is communicated to the public by the media.¹⁹⁰ Yet, given that the analysed law is very complex, the research does not aim at assessing the public's perception of legitimacy, but rather focuses on the opinions of legal scholars who have a deep understanding of the law. Moreover the analysis of the doctrinal debate aims at revealing manifest and latent functions and effects of doctrinal interpretation, and in particular at showing the conflict of opinions on the law (*Meinungsstreit*) among the doctrinal monopolies (*Kommentarmonopole*) and the interpretations cartels (*Interpretationskartelle*) from an external critical perspective. According to *Blankenburg* the external critical approach allows sociologists to spot patterns of power that lead to the predominance of the dominant opinion (*herrschende Meinung*).¹⁹¹ The second element is researched through interviews that allow getting to know perceptions, opinions and practices otherwise not emerging from the documental research. From this perspective the concept of legal culture and particularly of internal legal culture is a very useful tool. Legal culture is part of a culture that refers to uses, customs, opinions, and practices that channel social forces towards or against the law.¹⁹² At the same time, according to *Friedman*, legal culture leads the conversion of social interests into legal claims.¹⁹³ It is thus a fundamental element in the process of legal production. Some events, such as technological invention, may require the introduction of new regulations.¹⁹⁴ In addition, legal culture shapes the reception of legislative news. As for

¹⁹⁰ The Media delivers messages to the public and can amplify social needs and claims towards the justice system. They can create the necessary consensus among society, for instance by reporting primarily and constantly about misbehaviours conducted by immigrants in order to legitimise the promulgation of certain legislations as for example provisions criminalising immigrants. This phenomenon is possible through the manipulation of the social perception of risk and is specifically linked to situations in which the public does not possess enough information in order to evaluate facts autonomously. This work did not evaluate the role of the media, however the topic emerged in the interviews. See Chapter five.

¹⁹¹ *Blankenburg*, 1995, p. 4.

¹⁹² *Friedman*, 1975, p. 56.

¹⁹³ *Friedman*, 1975, p. 260.

¹⁹⁴ *Nelken*, 1997, p. 34.

culture in general, within the main collective legal culture, there may be different sub-legal cultures, those being more or less dominant. These sub-cultures can try to influence the main legal culture, as for instance economic lobbies.¹⁹⁵ Furthermore, at present, while studying a domestic legislation it is not possible not to take into account the existence of supranational legal cultures. Especially in the field of money laundering control law, national laws are very much influenced by transnational bodies. For the purpose of this research a subcategory of the legal culture is particularly relevant, that is the internal legal culture. *Friedman* defines the internal legal culture as the legal culture created by legal actors in opposition to the external legal culture that is the one available to the society as a whole. Only complex societies that have a class of legal professionals have an internal legal culture, which is the values, the ideas and the principles of those that work 'within the magic circle of the legal system'.¹⁹⁶ Legal professionals are the means between society and law; they have a privileged position because they can influence the information flow between the public and the institutions by influencing the application of legal acts. Given the supranational dimension, the role of legal actors is also that of interpreting and adapting transnational rules to domestic legal systems. In addition the opinions and perceptions of practitioners can offer an important insight into law enforcement practices and thus on the effects of the 'law in action', on the background of the previous assumptions about the importance of revealing the latent functions and effects of law. The variable of the acceptance of the law is also interpreted as being potentially influenced by political decisions. In fact, as previously noted, policy makers can influence the reception of legal acts for example by choosing a certain type of language in relation to the addressees, therefore it is important to adopt a critical perspective. This work assumes that legal actors are familiar with the content of the legislation given the fact that they are selected on the basis of their expertise in the field, hence the empirical research is not directed at investigating the addressees' level of knowledge.¹⁹⁷ When legal scholarship or practitioners eventually highlight issues concerning a vague or mistaken legal formulation, the research takes a critical approach and considers the possibility that such 'bad formulation' has to be ascribed to a political decision. In the case-study analysed by *Aubert* in the sixties, one of the variables that

¹⁹⁵ *Friedman*, 1975, p. 192.

¹⁹⁶ *Friedman*, 1975, p. 194.

¹⁹⁷ Yet this assumption will be proved wrong. In fact respondents have raised this issue despite the questions not being directed at investigating the level of knowledge.

influenced the legislation's ineffectiveness was the addressees' lack of knowledge.¹⁹⁸ The scholar, however, interpreted this issue as part of a political plan of enacting an ineffective piece of legislation by adopting complex legal vocabulary that was not appropriate for the addressees. In this sense *Aubert* hypothesised that the legislator was not interested in letting housewives understand the content of the legal news. The use of complex language, while at first sight may seem like a guarantee of impartiality, precision and credibility, and thus legitimise the legislator's action, can be used to achieve latent functions.¹⁹⁹ A 'bad formulation' may be a technical issue linked to the appropriateness of the legislation, but it can also be a part of a planned ineffectiveness. By recalling the symbolic dimension of law, the use of complex language can serve the symbolic function of legitimation while concealing other latent functions.²⁰⁰

1.3 The effectiveness of criminal law

It is of great importance to mention the effectiveness of criminal law in a moment when criminal policy-makers seem to produce random legal acts that are ineffective, symbolic or even criminogenic.²⁰¹ Despite several definitions of legal effectiveness provided by the sociology of law being tailored to behavioural legal acts and are thus applicable to penal law, criminal law has some peculiarities that need to be taken in consideration.²⁰² Firstly, penal law has a double nature of prevention (deterrence) and repression. The level of deterrence achieved by a provision is part of that provision's effectiveness. The underlying idea of deterrence is that people will commit crimes to the extent they become more pleasurable than painful.²⁰³ Yet, this variable can only be verified through a behavioural research on potential offenders. This work infers the deterrent potential of the provision from interviewees' opinions and from criminal statistics on sanctions

¹⁹⁸ *Aubert*, 1965, p. (313) 325.

¹⁹⁹ *Rehbinder and Schelsky*, 1972, p. (25) 29.

²⁰⁰ *Aubert*, 1965, pp. (313) 331, 337.

²⁰¹ *Paliero*, 1992, pp. (430) 444, 528.

²⁰² Italian scholarship uses a different term to refer to the effectiveness of criminal law, which is 'effettività' (effectivity). See *Moccia*, 1996, p. 303; *Paliero*, 1992, p. (430) 447.

²⁰³ *Stafford and Dibert*, 2007, pp. 1065 ss. Deterrence is defined as the omission, that is when people refrain entirely from committing a crime, or curtailment, that is when people may only curtail or restrict their commission of a crime from fear of legal punishment. Yet many 'non-deterrence' variables are related to rates of crime, for example, while crime rates are related to perceived punishments, they also are related to threats of *extra-legal* punishments, such as stigma, divorce, and loss of job. *Stafford and Gibert*, 2007, pp. 1065 ss. Given that money laundering is an illegal business, one needs to take into account that the normal rules of deterrence might not work in this field. In fact, according to *Packer* in black - and grey - markets, criminal law may actually serve as protective tariff, because it limits the entry of entrepreneurs into the proscribed marketplace while guaranteeing exorbitant profits for those who are in the market, so that as the sanctions increases so do the likely rewards. *Packer*, 1969, pp. 277 ss.

applied to offenders.²⁰⁴ A research on the effectiveness of criminal law has to take into account the so-called 'dark number', namely a quote of cases that do not emerge through the activity of the criminal justice system. Especially in the field of organised crime and money laundering, the dark area is considered to be rather large, given the fact that those offenders aim at remaining unknown and unperceived.²⁰⁵ This, as already observed, impedes the assessment of the effectiveness of a criminal provision on the basis of a calculation of deviance and compliance or deterrence rates.

Another premise is necessary to introduce the topic: Assessing the effectiveness of criminal law means finding the right balance between the repressive claim and the necessity of respecting fundamental legal principles and thus limiting the scope and use of criminal law.²⁰⁶ If on one hand there is public interest in the persecution of crime, on the other hand the effectiveness of criminal law cannot be guaranteed at any cost. While persecuting crimes a state needs not to violate other fundamental principles. *Paliero* speaks of a prohibition of *iper-effectiveness* and recalls the extreme special-prevention effectiveness showed in the movie 'A Clockwork-Orange'²⁰⁷, and the *Orwellian* system of general-prevention described in 'big brother'. An example taken from reality is provided by the instigator agent created to tackle particularly dangerous situations such as organised crime; this tool seems to violate the rights of the defendant in order to grant an effective persecution of crime.²⁰⁸ According to *Hassemer* the legislature, especially in the field of organised crime, is more interested in achieving an effective criminal law rather than balancing it with fundamental rights.²⁰⁹ Also criminal law shall only be adopted as *ultima ratio* and only if effectively able to achieve the declared goals. Given that penal law has a harmful nature, it shall reach a certain determined purpose.²¹⁰ In particular it needs to protect superior legal interests. This limit should be respected not only in the enforcement phase but also during the law-making process: The resort to

²⁰⁴ The fourth chapter looks at sanctioning rates in order to estimate the actual deterrence potential, on the assumption that punishment increases the pain for crimes and, thereby can deter people from violating the law.

²⁰⁵ The fact that the phenomenon is resistant to quantification has caused that in the sociological domain these types of studies have always been something of an outlier. *Ritzer and Ryan (ed.)*, 2011, p. 98.

²⁰⁶ *Paliero*, 1992, p. (430) 475.

²⁰⁷ *Paliero*, 1992, pp. (430) 475, 476.

²⁰⁸ *Hassemer*, 1982, p. 81; *Paliero*, 1992, p. (430) 478.

²⁰⁹ *Hassemer and Starzacher*, 1993, p. 19.

²¹⁰ The theory of purpose (*das Zweckgedanke*) in criminal law was elaborated by *von Listz*. See *Von Listz*, 1905, pp. 126 ss.

criminal law ought to be restricted to situations in which no other means are applicable and only if the repressive instrument is suitable for the purpose.²¹¹ Not all purposes and not all interests legitimise the resort to penal law. It is thus necessary, while assessing the effectiveness of a criminal policy, to look at the attributed functions and thus at the law-making process. A criminal act that cannot be applied or that it is not able to produce the consequences for which it was enacted creates victims. Indeed, such an act will not guarantee the protection of the legal interests, and, by being applied on an arbitrary basis, could generate injustice and alienation. Such legislations may be applied discretionally for instance only on socially disadvantaged groups, while the middle class would remain in the impunity. This use of ineffective criminal law results in having an oppressive effect. The more ineffective criminal legislations are the more they can be *iper-selective*.²¹² Also from a mere legal point of view criminal laws that are not effective because they violate the principle '*in dubio pro libertate*' and the right to be treated equally. In addition, legal acts that are not effective lead to a public mistrust in law enforcement. The ineffectiveness of certain pieces of legislation discredits the whole criminal justice system in the eyes of the people who perceive it as leading to social injustice. In few words, on one hand the complete effectiveness of the criminal system cannot be guaranteed in disregard of fundamental rights, on the other hand the resort to penal law should be limited to situations in which this tool is effective in achieving the desired goals. An effective criminal provision is a provision that balances these two aspects. The effectiveness of a criminal act is defined by *Paliero* as 'the suitability of the repressive act, scientifically prognosticated *ex ante* and empirically verified *ex post*, to inhibit socially dysfunctional behaviours by achieving a social benefit significantly higher than the provoked social harm'.²¹³ The scholar suggests a way of how to assess it, by calculating the sum of compliant behaviours, validity of the sanctions, achievement of the general protective goal, in which both legislative intents and social purposes, dysfunctional and unwanted effects are included; such sums are then further relativized with a cost-effectiveness calculation.²¹⁴ The research will look at the real achievement of those purposes and will consider the possibility that a legal act's incoherence with determined core principles of the legal system can negatively affect the effectiveness of the legal act. The assessment of a criminal provision's effectiveness

²¹¹ *Von Liszt*, 1905, pp. 126ss; *Paliero*, 1992, p. (430) 434.

²¹² *Friedman*, 1975, pp. 96 ss.

²¹³ *Paliero*, 1992, p. (430) 447.

²¹⁴ *Paliero*, 1992, p. (430) 504.

has to take into consideration, besides factors such as the legislative intents, the implementation of the provision, its acceptance and its effects, also whether the criminal legal act is proportional and whether its enforcement does not violate other fundamental rights. In order to seize the inspiring criteria and the intimate political-economic rationale behind the adoption of the criminal policy it is necessary to study the political debate that has developed during and after the policy, which can also reveal possible latent functions and the underlying patterns of power; this is again the heart of the sociology of law.²¹⁵ In addition, the analysis of a criminal law's effectiveness should be performed in light of social costs. According to *Baratta*, laws that violate other constitutional norms, which set the limits of penal intervention, have an efficiency result of zero.²¹⁶ In a cost-effectiveness analysis of criminal law, costs are also understood as the social costs of punishment and exclusion. If these are higher than the benefits, the law infringes the principle of proportionality.²¹⁷ Among the costs deriving from the implementation of criminal policies one needs to include what *Hierro* defines as 'legal costs', namely the collateral effects eventually conflicting with the core principles of the legal system.²¹⁸ In addition, the research also takes into account what *Pino* defines as 'collateral social costs' with reference to a peculiar definition of effectiveness as 'happiness' (*felicità*). In the specific case of a criminal act these costs also consist of the eventual harm caused by repression.²¹⁹

Criminal law has a strong symbolic component that explicates the general-preventive function.²²⁰ This symbolic dimension does not yet exhaust the purpose of criminal law, which is usually directed at an instrumental functional of solving social conflicts through the protection of determined interests.²²¹ Criminal provisions that are purely symbolic instead do not aim at concretely changing a given situation, but rather at

²¹⁵ *Ferrari*, 1997, p. 376.

²¹⁶ *Baratta*, 1995, p. xv. In a cost-benefit analysis of the enforcement of money laundering control policy, for example, the reduction in privacy is considered a social cost. See *Geiger and Wuensch*, 2007, p. (91) 98. However it is extremely difficult to measure the amount of it. *Unger et al.* 2014, p. 214.

²¹⁷ *Baratta* 1990, p. 94; *Marinucci and Dolcini*, 2006 p. 8.

²¹⁸ *Hierro*, 2010, p. 180; *Villegas*, 2014, p. 96.

²¹⁹ *Pino*, 2013, p. (181) 185.

²²⁰ See for example *Günther*, who believes that punishment in penal law should be symbolical. See *Günther*, 2002, p. 219.

²²¹ According to *Hassemer*, on one hand associating criminal law, with all the consequences connected as execution, incarceration, and all the other duties imposed on the suspects, to a symbolic dimension is rather odd, because the impact of penal law on people's life is all but not symbolic. Yet, the scholar argues that, on the other hand, it is obvious that penal laws have a symbolic '*Wirkung*'. See *Hassemer*, NStZ, 1989, pp. (553) 553, 554.

providing an image of efficiency.²²² By applying *Hassemer* definition of symbolic legislations that refers to the supremacy of latent functions over the manifest ones, and by taking the scholar's view about a criminal law that should be limited to the protection of certain qualified goods, penal symbolic provisions are those that declare to protect a certain '*Rechtsgut*' (legally protected interest), but instead are directed at other latent functions, such as pacifying the public, or fulfilling a need for action.²²³ On the basis of this assumption it is therefore necessary to clearly identify those qualified goods that legitimise the resort to criminal law.²²⁴ From this perspective, the scholar observes that criminal policy has developed the idea of universal goods, *Universalrechtsgüter*, such as the administration of justice, or the economic order. This has amplified the scope of action of the criminal legislature, to the extent that criminal law is then used to minimise insecurity and to control global complex issues.²²⁵ Yet, these purposes do not serve the general preventive goal of protecting *Rechtsgüter*, but will rather generate an image of the legislature as a 'successful moral entrepreneur'.²²⁶ *Baratta* speaks about the criminal policy's tendency to achieve 'efficient symbolism', which, contrary to a symbolic efficiency would direct social behaviour thanks to its strong communicative power, does not affect the reality substantially.²²⁷ In particular the scholar addresses legal acts adopted in an emergency context, enacted under strong pressure and therefore vaguely formulated; their goals are to express an appearance of efficiency, yet such efficiency is rather symbolic, because they cannot guarantee what they promise. Their aim is galvanising public consensus around public actions and the governing party; in fact the scholar uses the term 'theatrical polity'. Yet, by enhancing the government's political commitment in the eyes of the public, they are not deemed to actually be applied. In other words, these laws promise more than they can actually achieve. With specific regards to the Italian criminal law in the field of organised crime, *Moccia* has dedicated an essay to analyse the 'emergency rationale' (*La perenne emergenza*); the scholar

²²² There is a vast literature on the topic of symbolic criminal legislations: see, among others *Alessandri*, 2007, pp. 925 ss; *De Vita*, 2003, p. 158; *Dolcini*, 1999, p. (857) 872; *Donini*, 2006, pp. (694) 694 ss ; *Ferrari*, 1997, p. 257; *Friedman*, 1975, pp. 96 ss; *Garcia Villegas*, 1994, pp. 188 ss; *Gusfield*, 1963; *Hassemer*, NStZ, 1989, p. (553) 553 ss; *Kindermann*, 1989, pp. 257 ss; *Mantovani*, 2006; *Moccia*, 1995b; *Musco*, 1993, pp. (80) ss; *Smaus*, 1978, pp. (351) 351 ss; *Stortoni*, 1992, pp. (39) 39 ss; *Troncone*, 2001.

²²³ *Hassemer*, NStZ, 1989, p. (553) 556.

²²⁴ Chapter three will discuss more deeply the question of the *Rechtsgut* and the different definitions and opinions provided by the legal doctrine.

²²⁵ *Hassemer*, NStZ, 1989, p. (553) 557.

²²⁶ *Hassemer*, NStZ, 1989, p. (553) 558.

²²⁷ *Baratta*, 1995, p. xiii.

believes that the tendency of regulating urgent issues with the use of symbolic criminal law is not exceptional but rather the usual way.²²⁸ According to him the issue of organised crime should be tackled firstly with social policies that aim at preventing the phenomenon, while repression should only intervene as *ultima ratio*. On the contrary the Italian legislator has been resorting to the penal law in order to address the problem of the Mafia by adopting symbolic provisions. In this context criminal procedural law has acquired a particularly relevant position and has substituted substantial law in the role of punishing misbehaviours. Given the abundant and chaotic number of regulations in this field, the judiciary acquires the role, which is usually otherwise reserved to the legislature, of determining which rule to apply. In fact, penal proceedings are considered an anticipated punishment, especially thanks to the modern media, which can spread news quickly about criminal trials. Considering this *Moccia* emphasises the fact that prosecutors' work is also influenced by the media to the extent that the external consensus can affect the action of law enforcement agencies, for example in relation to indictments.²²⁹ In this field, the increasing number of criminalised conducts actually serves for further sanctioning behaviours already regulated by private law. While this phenomenon can be partially explained with a general tendency in Europe to also regulate the private sector through criminal law, it testifies a regression towards an authoritarian state that abuses its monopoly of violence.²³⁰

Along with this debate, scholars has also stressed the role of the securitisation rhetoric that influences the social perception of crime and thus legitimising the political intervention. For instance, in the field of terrorism there has been a vast production of policies directed at eliminating or controlling the risks. The social perception of risk can be influenced in order to create a fertile environment for the adoption of particular legislations that would otherwise be not easily accepted as for example regulations limiting personal liberties or invading individuals' privacy. Through this rhetoric policy-makers have anticipated their intervention to the neutralisation of potential risks, thus missing the link between criminal law and the existence of concrete dangers for legal

²²⁸ *Moccia*, 1995b, p. 27. The scholar's analysis has been evoked by scholars with regard to other legal systems. See for example *Mitsilegas* with regard to the European anti-money laundering regime. *Mitsilegas*, 2003, p. 124.

²²⁹ *Moccia*, 1995b, p. 97.

²³⁰ *Lo Monte*, 1998, pp. (323) 335, 336, 338.

interests.²³¹ This has been driven by what *Baratta* calls a 'renouncement of the subsidiarity principle of penal law', which takes criminal law from being an instrument to protect society to being an instrument that controls society.²³² In particular the scholar connects this switch to the failure of the penal law's goal of re-socialisation and thus a general loss of legitimation, which has been substituted with the function of general prevention. This phenomenon has been extensively studied with regards to modern societies, and especially advanced capitalist countries that are living in a post-scarcity age where the major dilemmas are the side-effects of success. In this context 'a new politics of risk emerges, a politics that is concerned with the distribution not of "goods" but of "bad" [...]'.²³³ In fact criminal provisions continue to punish hypothesised damages and presumed dangers and not acts causing real harm. The anti-money laundering legislation can be an example of such a mechanism, because it is supposed to intervene to neutralise the risks of money laundering. In fact the policy, by imposing heavy duties on both the public and private sector, it infringes on certain privacy rights. Yet, law-makers have legitimised it on the basis of the serious threat posed by money laundering on the security of the economic sector, and thus of the whole society.

Against the flaunted rigorousness, the effects of criminal policies in the field of economic crimes are scarce. In this way the adopted acts symbolically neutralise social claims for justice but leave legal interests without protection. Therefore these mechanisms create victims without protection and at the same time privileged people *de facto* immune from the criminal justice system. These provisions deceive citizens that their social claims for justice are satisfied, but actually they do not provide the effective legal protection needed by society. These laws create situations of actual impunity covered by the appearance of symbolic punishment.²³⁴ Scholars have interpreted this impunity as a planned impunity, as a desired effect of the practice of decriminalising certain social groups in order for the perpetrators of such crime to avoid being punished.²³⁵ On this background *Cottino* interprets *Aubert's* research outcomes with an even more critical approach. The scholar believes that the housewives' legislation which *Aubert* proved to be ineffective in improving housewives' working condition but

²³¹ *Mitsilegas*, 2003, p. 124.

²³² *Baratta*, 1984, p. (132) 138.

²³³ *Borgatta (ed.)*, 2010, p. 1086.

²³⁴ *Friedman*, 1975, pp. 96 ss; *Paliero*, 2006, p. (467) 484.

²³⁵ *Chambliss*, 1969; *Chapman* 1968, p. 99; *Cottino*, 1973, p. 61.

effective in solving a parliamentary conflict, actually perpetuated power relations between 'workers' and 'bosses'. This was ultimately a defeat for the workers, according to *Cottino*. In fact the legislation confirmed and even legitimised the status quo. The instrument of the ineffective piece of legislation belongs to a social control strategy. The scholar theorises the practice of 'decriminalisation', which envisages different ways of avoiding punishment through a blockage of the criminalisation process, which starts with the adoption of a law and ends with the action of law enforcement agencies. The adoption of a planned, ineffective norm is one of the possible ways of blocking such a process.²³⁶ If class struggle nowadays is conducted through laws which are intended to entrench the position and the interests of the dominant class, while impeding the fight of the lower classes for their rights,²³⁷ it can be argued that the money laundering offence has been designed as non-effective in order not to harm the interests of money launderers. Laws against economic crimes have always been, after all, very harsh on paper, but in practice have not been widely applied. In fact, 'statistics unequivocally show that crime, *as popularly conceived an officially measured*, has a high incidence in the lower class and a low incidence in the upper class'.²³⁸ It returns again to the difference between the law in action and law in the books.

Looking at the implementation of a criminal policy means observing the activity of law enforcement agencies and the judiciary. The effectiveness of those agencies is referred to as efficiency, which is measured in relation to their primary functions through criminal statistics on the number of (preliminary) investigations, proceedings, convictions, typologies of sanctions inflicted. This data is not only representative of the implementation outcome but also expresses the level of efficiency from the perspective of the different repressive authorities. In particular, according to police forces the efficiency of a criminal legal act can be calculated by looking at clearance rates, according to prosecutors it is related to indictments, and from the perspective of judges what count is the number of convictions for a certain offence. Yet those statistics do not provide information on the reasons of law enforcement agencies activity. Given that, as observed for the law in general, implementers may be biased, the outcome of law

²³⁶ *Cottino*, 1973, p. 60.

²³⁷ *Gallino*, 2012, p. 21. This assumption is based on a *Marxist* approach to law that conceives law as a superstructure of a capitalist society. In this context legal concepts and doctrines reinforce the position of the ruling class.

²³⁸ *Sutherland*, 1940 (1) 1.

enforcement action is not always neutral. Therefore the selectivity of the criminal justice system cannot be assumed as primarily neutral, although it should be. 'Non enforcement is common in the law, perhaps as common as enforcement'²³⁹. Non enforcement may seem normal, or as even being necessary to balance the seriousness of repressive action. *Friedman* states that 'the police does not arrest and cannot arrest everyone that commits a crime, they do not try'.²⁴⁰ Besides conducts that are not detected, whose number could somehow be registered by police statistics, the organisational strategy of detecting some crimes is biased. *Blankenburg* explicitly states that for instance blue collar crimes or theft and personal injury are detected more than white collar crimes or fraud or embezzlement.²⁴¹ This biased implementation is often driven by political decisions to the extent that the substantive law does not furnish the means of implementing the provisions efficiently, and hence it does not resemble an automatic natural one, but rather as the result of a political strategy. In fact *Blankenburg* theorises that non enforcement ('*Nicht-Kriminalisierung*') is mostly linked to public action of law enforcement agencies and not to deficiencies of the criminal justice system.²⁴² A study conducted by the scholar pictures the criminal procedure as a funnel: The area of deviance including the dark number fills the bottom and becomes smaller and smaller along with the criminal proceeding due to the selectivity of criminal action. Therefore only 50 % of the bottom cases is dealt with, only 15 % is clarified and only 10 % receives a conviction, while even smaller parts are then actually sanctioned.²⁴³ Modern criminology has shown that the discretionary exercise of criminal action is a filter of punishment. From the research of offence notices, investigators can play an important role in labelling criminality. Also in a subsequent procedural phase prosecutors may label certain conducts and may prioritise certain cases over others; finally magistrates interpret legal provisions on the basis of their personal attitudes in the limits of judicial discretionary. *Cottino's* theories on intended decriminalisation can be useful to explain also a scarce implementation as one of the stages of the

²³⁹ *Friedman*, 1975, p. 94.

²⁴⁰ *Friedman*, 1975, p. 96.

²⁴¹ *Blankenburg*, 1985, p. (205) 210. Yet, this difference can be also explained by saying that individuals belonging to privileged classes obtain a better education, hence tend to commit more sophisticated crimes that are harder to be detected or to be proved at court. *Blankenburg*, 1995, p. 22.

²⁴² *Blankenburg*, 1995, p. 20.

²⁴³ *Blankenburg*, 1995, p. 10.

decriminalisation process.²⁴⁴ In short, the dys-functionality of the criminal justice system can be the result of a precise political plan.

A subcategory of the implementation of legal acts is the sanctioning system. The application of sanctions can influence the effectiveness of the substantial rule either by promising a price or by threatening with punishment.²⁴⁵ Yet, the research does not assess the *Sanktionsgeltung*,²⁴⁶ the validity of the sanction, it looks at the sanctioning provision only to obtain important information relating to the effectiveness of the substantial provision, on the assumption that the menace of punishment can foster the deterrent effect of criminal law. However, sanctions cannot be deterrent if not applied. Therefore, even though it is not possible to measure the deterrent effect of the studied legislation, the information collected about its enforcement can also be used to potentially assess it. What prevents a potential offender from violating the law is the perceived risk of a concretely applicable sanction and not a vague of menace of punishment; thus the certainty of punishment is of great importance besides being one of the fundamental principles of penal law. In order to influence people's perception of the risk of sanctions, the criminal justice system can accentuate its role through surveillance methods.²⁴⁷ As much as police cars parked along a street have a deterrent effect to the extent that drivers will think to be under surveillance while driving, other surveillance systems have a similar effect. With particular regards to the anti-money laundering regime, a complex system of surveillance has been created in order to prevent the laundering of illicit funds through the financial and economic system. Such regulations impact people's daily life because they regulate, for instance, the opening of bank accounts, transactions with real estate agents and therefore increase social awareness of state-control. Yet, if such mechanisms would result to be ineffective in preventing the laundering of ill-gotten monies, their deterrent effect would also diminish despite their publicity. Additionally, sanctions can be applied with a certain level of discretion by law enforcement agencies. It has been proven that police forces action may influence the implementation of a legal act to the extent that for example investigative efforts can be directed towards the prosecution of certain conducts rather

²⁴⁴ Cottino, 1973, p. 61.

²⁴⁵ Ferrari, 1992, p. 174; Bobbio, 1993, p. 154.

²⁴⁶ Noll in the work 'Gesetzgebungslehre' discerns the effectiveness of the implementation from the one of the substantial provision; see Noll, 1973, p. 259.

²⁴⁷ Friedman, 1975, p. 84.

than others. In addition, it is important to bear in mind that often in the criminal field a successful persecution of violations does not eliminate crime but it might just transfer it to a different sector. This phenomenon, known as 'spill-over effect' or '*Verlagerungseffekt*' can frustrate the efforts to counteract criminality of a particular legal branch or region or state or group of states when one actor does not effectively implement counter-regulations, thus creating an avenue of impunity.²⁴⁸ It is thus fundamental, particularly in relation to money laundering, to remember the globalised dimension of the phenomenon and thus the importance of international cooperation.

Besides being part of a strategic plan, law enforcement may be the result of a distorted perception about the seriousness of crime. Despite criminal law's general preventive function being direct to the whole society, the monopoly of penal action is in the hand of the state and thus of the authorities that on its behalf put it into practice. Therefore legal actors have the chance to interpret criminal provisions in the limits of the allowed discretionary, and thus to influence the effectiveness of a criminal act. In this context it is important to keep in mind that certain offences are perceived as less serious than others. Notoriously white collar crimes and other economic crimes are perceived as less serious than, for example, bodily injury or offences linked to organised crime.²⁴⁹ Economic crimes such as money laundering are characterised by a high level of technicality that hinders the public from fully understanding their seriousness. Moreover they are usually 'victimless' offences that do not directly harm specific individuals or goods. The infiltration of illicit financial flows into the economy has an impact on abstract collective goods such as the integrity of the financial system, the soundness of the EU Internal Market, free competition. Certain crimes receive a lot of attention from journalists, and are therefore named as '*reato massmediatico*', mass-media offences.²⁵⁰ Money laundering is one of them, yet this research does not aim at analysing the impact of media on the social perception of money laundering.²⁵¹ Since criminal law is applied by legal actors, the research focuses on their legal culture and their perceptions about

²⁴⁸ Moccia, 1995b, p. 67; Recktenwald, 1986, p. 259.

²⁴⁹ See Sutherland, 1940, pp. (1) 1 ss. See also Aubert, 1952, pp. (263) 263 ss.

²⁵⁰ Paliero, 2006, pp. (467) 492, 493. About the relation between the media and symbolic criminal law see Funcke-Auffermann, 2007, pp. 29-34.

²⁵¹ Actually, the topic of the mass media's impact on the social perception of the volume of money laundering and about the institutional response will emerge in the interviews, despite not being directly addressed. See chapter five, paragraph 5.2.

the seriousness of money laundering. It cannot be forgotten that the mass media plays an important role in shaping social perception.

1.4 Considerations

On the background of the reflections based on the sociolegal framework that sets the definition of legal effectiveness with specific respect to criminal law, and on the critical literature on the inadequateness of the international anti-money laundering system to eliminate the targeted activity recalled in the introduction, the hypothesis underlying the case study is the following: Article 261 Gcc may be an example of a symbolic legislation, whose latent functions prevail on its declared functions. In particular, it is hypothesised that the law is an example of a 'compromise-law' that satisfies all parties taking part in the law-making process, thanks to the vagueness of the wording that allows a broad range of possible interpretations, and also thanks to the actual ineffectiveness, which pleases those who were contrary to the introduction of the provision. It is here necessary to recall the considerations on the 'legislator' being an heterogeneous group of parties not only constituted of members of the Parliament but often also by external actors, who can influence more or less transparently the law making-process. While the manifested function of tackling money laundering has in fact remained in the background, the thesis hypothesises that other latent goals have been pursued. It is further hypothesised that the 'law inaction' is part of a process of decriminalisation that intentionally grants impunity to a certain group of actors, in this case those laundering money, while giving the appearance that the practice is not accepted by law by labelling it as criminal. By using the concept of function, the study focuses on eventual conflicting interests emerging throughout the policy-making process and/or being displayed through the implementation of the provisions. In order to verify these hypotheses the research proceeds with a case study that aims at empirically assessing the sociolegal effectiveness of Article 261 Gcc. In particular, by applying the 'elastic' definition of effectiveness, the following chapters analyse the law-making process, the level of acceptance by legal scholars, the implementation, and the opinions of legal experts and professionals.

1.5 The methodology of the research

The research does not aim at objectively evaluating the law's effectiveness but rather at highlighting nuances and controversies of such a topic. Therefore, a qualitative approach is adopted.²⁵² The work combines different techniques: A process tracing, a study of the doctrinal debate, a qualitative analysis of quantitative data and an empirical research with semi-structured interviews. In the first chapter a methodological definition of effectiveness as the varying result of a combination of factors and not of a mathematic calculation has been given, which serves as a hint for the case study. The following chapters, are built on the set of variables suggested in chapter one: the second deals with the legislative intents and the attributed functions, the third chapter addresses legal culture with specific focus on legal scholarship, the fourth chapter tackles the implementation of the law by looking at statistics on law enforcement, while the fifth chapter investigates legal actors' opinions and practices.

The study of the German law-making process together with the analysis of the doctrinal debate and the assessment of law enforcement outcomes and the research on the opinions of legal actors form the case study on the effectiveness of the German anti-money laundering regime. A case study is an in-depth investigation of a problem. This case study combines a positivist and an interpretive approach: It seeks to test the hypothesis but it also aims at building a more general theory that could be valid for other legal systems. This research method allows the discovery of a wide variety of social, cultural, and political factors related to the matter of interest that may not be known in advance. The field research captures a snapshot of practices, opinions and situations, by measuring independent and dependent variables at the same point in time and place; this process is conducted with the goal of testing a certain construct. With reference to this research, the construct is the theoretical assumption of the effectiveness of the offence of money laundering; the variables identified in chapter one are a combination of indicators at the empirical level representing a given construction.

Case studies tend to be qualitative in nature, they are contextualized and nuanced according to the time and avenue of the empirical research; thanks to the possibility of

²⁵² *Corbetta* highlights that the qualitative researcher is not interested in a statistically representative sample, but rather in substantial representativeness, which aims at covering all social situations linked to the area of research. *Corbetta*, 2003, p. 75.

capturing a rich array of contextual data through diverse methods, the case study derives from a contextualised and authentic interpretation of the phenomenon.²⁵³ With specific reference to this research, the contextualisation, the diversification of sources and the critical approach are considered fundamental. On the other hand, due to the string contextualisation, it is difficult to generalise outcomes of other contexts. Also findings may be criticised for being subjective, since the interpretation of the researcher is per se biased. The limitation of this type of research is also that the interpretation of findings may depend both on ability and attitudes of the researcher.

The second chapter analyses the law-making process by tracing legislative intents. The hypothesis is that behind the expressed intents, latent goals triggered lawmakers to introduce the offence of money laundering. Therefore, through the discourse analysis the aim is to reveal manifest functions communicated to the public and to unveil latent intentions that underpinned the foundation of the anti-money laundering initiative and its subsequent developments. The discourse-analysis is conducted through a documental research. Sources utilised are of primary type, such as official documents, recommendations and declarations of intents, UN-Resolutions and Conventions, official Commentaries, statements and fact-sheets, European directives and decisions, explanatory and evaluation reports, action plans and official records of the German Parliament (*Drucksachen*). The historical and political context has also been inferred through secondary sources, such as books, articles, and NGOs works. This is a pure desktop study, based on primary sources such as legal and parliamentary documents, and secondary sources, namely legal scholarship. A research conducted on institutional documents has advantages and disadvantages. The Italian author *Corbetta* summarises them as, among the positive aspects, the non-responsiveness, the possibility of a diachronic analysis and the reduced costs thanks to the availability. Disadvantages are, according to the scholar, the incompleteness of the information contained and the official character.²⁵⁴ It is however possible, to integrate and contextualise notions contained in the documents with other related sources. It is, on the other hand, true, that official documents often provide a distorted image of the reality, in accordance to the will of the authority that produced them. This is the technical perspective on the already debated issue of the manifest and latent functions. From official parliamentary

²⁵³ *Bhattacharjee*, 2012, pp. 93 ss.

²⁵⁴ *Corbetta*, 2003, p. 159.

documents, for example, the manifest intents are inferred, while from the political discussions that preceded the approval of the final draft of the law, latent goals are deducted. The analysis of the law-making process will be closely aligned to the theoretical assumptions spelt out above, and this will include looking at both the sociological, political and economic factors that play a role in obtaining a more balanced understanding of the issues at play here.

The third chapter analyses the legal doctrine about challenges posed by the article 261 of the German criminal code. The research takes into consideration the doctrinal debate because it is particularly vivid and controversial. Legal scholars have been involved in strongly criticising certain provisions, due to the difficulty of integrating them in the domestic legal system. The level of acceptance investigated through the documental research on legal scholarship aims at shedding light on the potential adequateness of the legal acts, while the empirical research with the practitioners is directed at verifying such potential in the concrete application. Since its enactment, legal scholars have interrogated themselves about the compatibility of the provisions with domestic legal fundamental principles and about potential incoherencies that could have hindered an effective application. The potential conflicts and issues highlighted by the doctrine are verified through the empirical research on the 'law in action'. The level of acceptance of a legal act impacts its effectiveness to the extent that it can shape its application. Also this variable is investigated through documental research, and specifically on legal commentaries and legal scholarship.

The empirical research on the legal praxis aims at revealing the real effects of the law. The fourth chapter undertakes a qualitative interpretative analysis of quantitative secondary data. In particular, the chapter makes use of criminal statistics published by the federal police, by the ministries of justice and of the ministries of finance and by the federal bureau for statistics. Moreover, data is inferred through reports compiled by transnational bodies such as the FATF. Secondary data is data that has been previously collected and tabulated by other sources. Due to the external origin, this type of data may be not 100 % reliable, however, thanks to the qualitative approach, a critical perspective on the outcome of the statistics is maintained. The use of a qualitative technique to analyse quantitative data serves the goal of keeping a critical approach

towards criminal statistics on money laundering. Moreover, the joint use of qualitative and quantitative generates a unique insight into the complexity of social phenomena, which would not be available from either type of data alone. Deeper considerations on the collection of data are conducted in the fourth chapter. Given that the underlying hypothesis is that the offence of money laundering does not address the phenomenon of money laundering in its complexity, the official numbers are seen as being representative of the functioning of the criminal justice system and thus as only one of the factors constituting to the variable of the implementation of the law.

Finally, the fifth chapter presents the outcome of the empirical qualitative research. Thirty semi-structured interviews were conducted with experts about the effectiveness of anti-money laundering law in Germany, between January 2014 and July 2015. The chapter aims at providing an insight on the experts and legal actors' opinions and perception about the law. In particular, interviews focus on respondents' perception on the money laundering phenomenon in Germany, on the technical appropriateness of the legislation, on perceived conflicts of interest related to the introduction or the implementation of the policy and finally on the interviewees' perceived regime's efficacy. Along with the interviews, official declarations of intents and opinions released by representing organisations and other official documents will be used in order to get an insight into the legal practice. The interview sampling, constructed on the basis of the theoretical study, was composed of privileged actors and legal actors and was limited geographically to the Berlin area.²⁵⁵ A pilot-interview was conducted with *Meinzer* from the NGO Tax Justice Network Germany, in order to acquire an initial view on the topic. In particular, *Meinzer* was one of the authors of the report '*Schattenfinanzzentrum Deutschland. Deutschlands Rolle bei globaler Geldwäsche, Kapitalflucht und Steuervermeidung*'²⁵⁶ published in November 2013 by WEED (*Weltwirtschaft, Ökologie & Entwicklung*), GPF (Global Policy Forum), Tax Justice Network Deutschland, and Misereor. The decision was particularly profitable because that report was one of the publications that in that period contributed to raising public awareness about the issue and because it was the first report published by the non-governmental sector about money laundering in Germany. Also, the authors made use

²⁵⁵ Two interviews have been conducted via telephone with interviewees living out of the Berlin area.

²⁵⁶ Available at http://www2.weed-online.org/uploads/schattenfinanzzentrum_deutschland.pdf, last visited on 10/05/2015.

of personal interviews and could already give insight about which partners would have been more open to be contacted and which instead would have responded in a superficial way. The eight experts interviewed are, in chronological order, *Uecker*, the policy advisor of the German Parliament for the socialist social democratic party (SPD); *Korte* and *Busch*, former and current deputy director generals, heads of division economic, computer, corruption related and environmental crime of the Ministry of Justice (BMJ), *Findeisen*, head of section 'VII A 3 payment, transactions, money laundering prevention' of the Ministry of Finance (BMF), an anonymous interview partner of the Ministry of Interior (BMI), *Schneider* and *Rech*, civil servants from the division 'I 18, public security and order' of the State department of Hessen, and policy officer *Henn* of the NGO WEED (World Economy, Ecology & Development). The twenty-two legal actors are composed of ten attorneys, among them some defence attorneys and some lawyers specialised in commercial law and compliance, six police officers, two public accountants and four public prosecutors. Those who accepted to be named are, among the legal actors, attorneys *Lubitz*, *Gutman*, and *Diergarten*, the representatives of the Chamber of public accountants *Reiher* and *Goltz*, the prosecutor *Hagemann*, *Finger* the former head of department three on organised crime of the Berlin criminal Police, and *Pietsch* and *Kunitsch* the Berlin State criminal Police chief superintendents. All interviews besides one were conducted face-to-face, either where the respondent was working or in the interviewer's university room; since respondents were mother tongue Germans, interviews were conducted in German, in order to facilitate respondents and to allow spontaneity. The objective of a qualitative interview is indeed to provide a frame within which the respondents can express their own way of thinking in their own words.²⁵⁷ If allowed, interviews were recorded in order to keep records. When requested the list of questions was provided to the respondents before the interview. This was only the case only three times. During initial conversations, the nature and purpose of the project, how the collected data would be used, the people involved and desired interviewees, were communicated to the respondent. However, during the interview, respondents were left free to express their own opinions, without being influenced by the perspective of the interviewer. Also, if required, anonymity was assured. Yet, despite suggested in methodology manuals,²⁵⁸ respondents were not left completely free to talk. The role of the interviewer was, in the opposite, an active one.

²⁵⁷ *Corbetta*, 2003, p. 72.

²⁵⁸ *Corbetta*, 2003, p. 93.

This tactic was adopted because of the specificity of the sample and of the object of the research. The risk dealing with political people and with public servants, the risk was that, in order to avoid 'hot potatoes', they would talk without interruption about a more desired topic. Since the goal was, instead, to stimulate conversation and specifically on problematic issues and bothersome questions, respondents were often interrupted or urged not to divert from the discussion. Even when interviews were recorded, notes were taken to capture important comments or critical observations, behavioural responses (e.g., respondent's body language), and the researcher's personal impressions about the respondent and his or her comments. Once interviews have been transcribed, the texts were sent electronically to the respondents for their authorisation. Contact with respondents was gained thanks to contacts provided by an anti-Mafia civil society association ('Mafia? Nein Danke! e V. '), and through the intermediation of professor *Heinrich*. Other respondents also provided some contacts. While some of the issues dealt with in the last chapter were expressively asked to respondents, such as the impact of money laundering on German economy and society, others were inferred from the arguments. Also, interviewees raised topics that were not part of the questions' list, such as the role of media in social perception on money laundering and countermeasures; relevant issues are included in the final analysis. Despite being time-consuming and at risk of bias, the choice of using personal interviews was informed by the several advantages: the opportunity to clarify any issues raised by the respondent, the possibility of asking probing or follow-up questions, the improvement of response rates through persuasion, the inferring of information thanks to body language, to pauses, to the voice, and to dynamics between respondents.²⁵⁹ Given that the goal of the empirical research was understanding the opinions, the perceptions, the interpretations and the motives of the actions of legal actors, the interview was considered the best tool in order to access the respondents' perspective on the issue, in order to get as closer as possible to their way of thinking. The sample was created by selecting a subset of the whole population, by choosing a sampling frame. The sampling design chosen was the so-called 'expert sampling'. Respondents were chosen in a non-random manner based on their expertise in the phenomenon being studied. The advantage of this approach is that experts tend to be more familiar with the subject matter than non-experts, thus opinions from a sample of experts are more credible. Yet, findings are still not generalizable to the overall

²⁵⁹ *Bhattacharjee*, 2012, p. 78.

population at large. Interviews were semi-structured: A track of question was set, but the order in which topics were addressed and the way of formulating questions was left free. A protocol was set on the basis of the study conducted on legal scholarship, the law-making process and the quantitative data collection. Some questions were set for all interviews, while others were designed corresponding to the group of experts. This semi-structured technique grants great freedom to the interviewer, who can also introduce new questions arose in the course of the interview, but at the same time it makes sure that all topics are dealt with, so that the necessary information is collected.

2 CHAPTER

'The genesis of the anti-money laundering regime: Tracing statements of legislative purposes'

'It is vital to place the debate in its historical context if we are to understand how we got to the present ludicrous state of affairs!'

(Bosworth-Davies, 2006. p. 346)

2.1 Foreword

This chapter introduces the case study on the effectiveness of the money laundering offence by describing the genesis of the offence and the following developments. Given that the offence was introduced in the German Penal Code in fulfilment of international duties, the chapter traces firstly the international law-making process. The chapter specifically sheds light on which motives triggered the introduction of the offence as a transnational crime.²⁶⁰ The money laundering offence has been amended often with the purpose of increasing the effectiveness of the fight against money laundering. In particular, given that money laundering is a derivative crime, the scope of the offence has been expanded mainly by adding ever-new emergencies

²⁶⁰The offence is not considered as one of the core crimes under international criminal law, which are listed in the statute of the international criminal courts. Yet, it is regarded as a serious crime (or list among serious crimes including other economic crimes like corruption and drug trafficking) by the African Union under the jurisdiction of the African Court of Justice and Human and People's Rights. See article 28 A (1) 9 (International jurisdiction of the court) of the 'Draft Protocol on amendments to the protocol on the statute of the African court of justice and human rights' available at http://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf, last accessed on 11/12/2015.

in the list of the designated predicate offences. Among European Member States, mostly the European directives have further triggered the development of anti-money laundering laws. Therefore, the chapter focuses on the European legal framework, and on the motives that drove European policymakers to adopt the current legislations. Secondly, it analyses the German legislative process and the specific national legislature's motivations for the criminalisation of money laundering and for the widening of the reach of the offence. The emphasis will be on the ever-new functions attributed by lawmakers, both at international and national level, to the anti-money laundering regime, in order to reveal eventual latent or symbolic functions. The chapter takes an historical perspective that traces the law-making process from its dawn to the current days. Yet, the aim is not purely descriptive, but rather critical as well. In fact, the goal is investigating whether intents other than those officially manifested have driven the creation and the consequent development of the legal framework. The chapter makes use of legislatures' official declarations of intent, *travaux préparatoires*, opinions and contributions of non-legislative actors to the decision-making process, transcriptions of parliamentary debates, and secondary sources that allow to placing the analysis in its political context.

Although nowadays it is not uncommon to view money laundering, either in terms of a crime typically linked to organised crime, or with reference to procedures connected to banking services, forty years ago it was not criminalised. Prior to 1988 some national legislatures criminalised under their penal codes the conduct of laundering the proceeds of crime in order to disguise their criminal nature and to integrate them in the legitimate economy before. However, the genesis of the offence of money laundering in international arena is considered to have occurred in 1988 with adoption of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention of 1988).²⁶¹ If the UN treaty marks the creation of anti-money laundering criminal law at transnational level, the Financial Action Task Force's (FATF) 'Forty Recommendations' that were issued

²⁶¹ The money laundering offence, in the three-fold definition that has remained in force so far, was conceived in the Vienna Convention of 1988 under Article 3 (1) b i and ii and c. Although this instrument does not use the term 'money laundering', the conducts described have been defined as money laundering in the following UNCAC of 2000 and in the Palermo Convention of 2003.

shortly thereafter in 1990, introduced the prudential approach to combating money laundering by emphasising the role of financial institutions in the prevention of money laundering.²⁶² These two aspects, the repressive and the preventive one, still characterise the current anti-money laundering policy. In order to understand the continuous expansion of the reach of the money laundering offence, the chapter refers to the parallel development of the preventive regime.

2.2 Tracing the international law-making process

From the very beginning, the money laundering offence was drafted broadly to allow for it to be interpreted in such a way as to satisfy the various wills and interests of the actors that took part in the law-making process. Very different, indeed, were the motives that triggered the respective legislatures to introduce the offence of money laundering. For example, Italy criminalised money laundering in 1978 to tackle armed robbery and crimes cognate to organised crime, such as extortion and kidnapping for the purposes of extortion.²⁶³ The UK was concerned with Irish terrorism; yet, influenced by the US, it developed initially money laundering control as part of an anti-drug trafficking policy²⁶⁴. The Australian government sought to tackle tax evasion when it established anti-money laundering law. In particular, the money laundering offence was introduced in Australia by the Proceeds of Crime Act (POCA) of 1987 that aimed at preventing individuals hiding assets that might be subject to confiscation.²⁶⁵ Likewise, in the US money, laundering control was introduced initially to combat tax evasion through the use of international banks: The US 'Bank Secrecy Act' of 1970 aimed primarily at preventing the use of foreign banks to launder criminal proceeds or to conceal money from American fiscal authorities.²⁶⁶ Thus, the focus of the US legislature was 'black money' (monies

262 See the FATF 'Forty Recommendations of the Financial Action Task Force on Money Laundering' (1990).

263 Italian law d.l. 591/1978, which, under Article 3, introduced Article 648 *bis* of the Italian criminal code; despite the conduct was not labelled as money laundering, the law criminalised acts of laundering proceeds of crime.

264 *Levi & Reuter*, 2006, p. (289) 305.

265 FATF, MER Australia, 2005, p. 27.

266 The law 'Financial Record-keeping and Reporting of Currency and Foreign Transactions Act' - known as Bank Secrecy Act- set regulations requiring various reports and record-keeping of financial institutions and individuals. 31 U.S.C. 5311 ss.

deriving from tax evasion) and not 'dirty money' (monies deriving from other serious crimes, such as crimes linked to organised crime).²⁶⁷ Yet, the first 'Money Laundering Control Act' passed in 1986 was part of the 'Anti-Drug Abuse Act'.²⁶⁸ France's President *Mitterand* exposed the expectation of putting an end to the abuse of offshore jurisdictions for the purpose of evading taxes, while taking part in the negotiations for the FATF Recommendations.²⁶⁹ Oppositely, Switzerland, given that money deriving from tax evasion was not perceived as harmful as money deriving from other serious crimes such as drug trafficking. Put differently, it was not interested in adding tax-related crimes to the anti-money laundering regime. As a jurisdiction profiting from financial in-flows, the state was interested in cleaning its reputation as offshore centre laundering profits of organised criminal activities, while maintaining its financial services.²⁷⁰ Indeed, the country accepted to join the FATF decision-making process with the condition that tax offences were not listed as predicate offences for money laundering.²⁷¹

What initially triggered the European legislature to adopt anti-money laundering measures was the need to respond to extremist terrorism in Europe. In particular, it was an attempt to counter the threat of the *Rote Armee Fraktion* and the *Brigate Rosse*, in Germany and Italy, respectively.²⁷² In the beginning of the eighties of the last century, the Council of Europe started looking with suspicion at illicit transfers of funds with a criminal origin that were used frequently by terrorist and political extremist groups to perpetrate further crimes. As a consequence of 'public anxiety' about 'acts of criminal violence, such as hold-ups and kidnappings', the Committee of Ministers of the European Community adopted in 1980 Recommendation 10 to 'define an overall policy' to tackle the serious problems generated by the laundering of funds of criminal origin. Aiming at preventing the spread of further criminal acts by terrorist organisations that injected illicit funds into the economic system, the Committee called upon banks to participate in a common effort with law enforcement

267 *Arzt*, 1997, p. 37.

268 US Public Law, pp. 99-570.

269 *Pieth*, 2004, p. 8.

270 *Pieth*, 1993, p. 101.

271 *Pieth*, 2004, p. 8.

272 *Pieth*, 2004, p. 4.

agencies to prevent and to repress such acts.²⁷³ However, Member States, that were probably not yet ready to endorse such rules in their respective national legal orders, did not implement the Recommendation.²⁷⁴

The private sector took initiative to combat the laundering of proceeds of crime too, the motives being, once again, different. Swiss banks, after having been involved in 'dubious practices', as for example the Chiasso banking scandal of 1977, worried about public confidence in the banking system. With the purpose of providing an image of integrity to their clients, banks got involved in the prevention of money laundering. In addition, banks decided to adopt internal regulations in order to avoid the imposition of external regulations that could have been stricter and more demanding. The Swiss Bankers Association adopted in 1977 a code of conduct that contained rules on internal risk management which were going to become the core principles of preventive anti-money laundering law.²⁷⁵ Furthermore, ten leading banking supervisors founded in 1974 the Basel Committee on Banking Supervision (BCBS), which adopted in 1988 a text where for the first time 'bank supervisors agreed internationally, in such prominent way'²⁷⁶ that 'Banks and other financial institutions may be unwittingly used as intermediaries for the transfer or deposit of funds derived from criminal activity'.²⁷⁷ Also, they referred to the use of the financial system to make payments and transfers of funds to hide the source and beneficial ownership of money as 'money laundering'. As the previous Recommendation of the Council of Europe already stressed, also the Basel Committee's Statement of Principles of 1988 recognised the significant role of the preventive strategy in the field of anti-money laundering and encouraged banks to ensure that the banking sector would not be 'associated with criminals or being used as a channel for money-laundering'.²⁷⁸ In this context, according to the Statement of Principles, the primary function is 'to maintain the overall financial stability and soundness of banks rather

273 CoE Committee of Ministers 'Recommendation No. R (80) 10' (1980).

274 *Nilsson*, 1991, p. (419) 423.

275 *Levi & Reuter*, 2006, p. 305; *Pieth*, 2004, pp. 7, 8.

276 *Pieth*, 2004, p. 7.

277 BCBS (1988), 'Prevention of criminal use of the banking system for the purpose of money-laundering', I statement.

278 BCBS (1988), 'Prevention of criminal use of the banking system for the purpose of money-laundering', 3 statement.

than to ensure that individual transactions conducted by bank customers are legitimate. Nevertheless, [...] supervisors cannot be indifferent to the use made of banks by criminals'.²⁷⁹ Thus, while adopting anti-money laundering declarations, banks committed primarily to the protection of the financial and the banking sector.

2.2.1 The genesis of the money laundering offence in the Vienna Convention

Given the different and contrasting expectations, the consensus had to be found on a topic on which all parties could agree upon.²⁸⁰ In this context, the need to wage the 'war on drugs' accommodated all parties, under a strong influence of the US.²⁸¹ The 'war on drugs' held more success than the EU's commitment to combat terrorism and political extremism or the desire to curb tax evasion. The Vienna Convention emphasised the universal agreement on the necessity of tackling the cancers of drug trafficking and drug consumption. According to the Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter the Commentary on the Vienna Convention), there was already a worldwide consensus on the threats posed by the magnitude of the drug problem since the beginning of the twentieth century.²⁸² This was testified by several international initiatives that were being taken to control the use of drugs, and various multilateral conventions were adopted with regard to the regulation of drugs, as for instance the 'Single Convention on Narcotic Drugs' of 1961, and the Protocol Amending the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances' of 1971.²⁸³ The UN was even demanded to declare drug

279 BCBS (1988), 'Prevention of criminal use of the banking system for the purpose of money-laundering', 6.

280 Actually, only western countries were represented in this preliminary phase of the anti-money laundering policy-making process. Yet, the expansion of the anti-money laundering system will be justified afterwards with regard to the harm caused by money laundering to developing economies, see *Alldridge*, 2008, p. (437) 446 ss.

281 For a complete overview on the war on drugs, see *Duke and Gross*, 1993.

282 Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998.

283 The main purpose of the first two treaties was to codify internationally applicable control measures in order to ensure the availability of narcotic drugs and psychotropic substances for medical and scientific purposes, and to prevent their diversion into illicit channels. The Convention on Psychotropic Substances of 1971 established an international control system for psychotropic substances. See [http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=526](http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=t rue&treatyId=526), last accessed on 16/10/2012.

trafficking a crime against humanity.²⁸⁴ This proposal, despite having been included in the preliminary elaboration of the draft, was not attached in the final version, because of strong governmental opposition from many countries. In the aftermath of the Vietnam War, in the wake of the US's interest in tackling the 'drug problem', also the fifteenth Conference of the European Ministers of Justice of 1986 'discussed the need to combat drug abuse (...), for example, by freezing and confiscating the proceeds from drug trafficking'.²⁸⁵ A consensus was, thus, found also at European level on the topic of drug trafficking. In 1984, the UN General Assembly demanded the Economic and Social Council of the United Nations to initiate the preparation of a draft convention against illicit traffic in narcotic drugs.²⁸⁶ Based on the comments made by Governments on the text drafted by the Secretary-General, and on the deliberations of the Commission on Narcotic Drugs on that draft, in 1987, the Secretary-General prepared a consolidated working document. The Commission on Narcotic Drugs reviewed the text in Vienna in 1988. In the same year, the Economic and Social Council convened a conference of plenipotentiaries for the adoption of a convention against illicit traffic in narcotic drugs and psychotropic substances.²⁸⁷ At the UN Conference that preceded the Convention, the legitimation for resorting to criminal law was based on of the extreme danger that illicit trafficking and consumption of narcotics posed to national security and public health. The Convention was adopted in the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, held at Vienna from 25 November to 20 December 1988. The treaty was signed on 19 December 1988 and entered into force on 11 November 1990. The 'Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (Vienna Convention) set the basis for the criminalisation of money laundering within the context of the fight against drug trafficking.

Given the declared consensus expressed for the UN treaty by the signatories parties

284 See UN Resolution A/RES/40/121 that recalled the Quito Declaration against Traffic in Narcotic Drugs of 11 August 1984 and the New York Declaration against Drug Trafficking and the Illicit Use of Drugs of 1 October 1984 in which drug traffic was considered a crime against humanity.

285 CoE Explanatory Report to the Convention of 1990, Introduction (1) (1990).

286 UN Resolution 39/141 of 14 December 1984.

287 UN Resolution 1988/8 of 25 May 1988.

on the necessity of stopping drug-related criminality, the criminalisation of money laundering acquired the appearance of an instrument universally recognised as useful to wage the 'war on drugs'. Yet, the urgency of tackling drugs was more of concern of the US, which indeed introduced the 'Money Laundering Control Act' explicitly as part of the federal 'war on drugs',²⁸⁸ and regarded it since then as a significant component of the US fight against drug trafficking and drug consumption.²⁸⁹ The drafters of the Commentary of 1998 stated that the Convention's definition of money laundering owed much to the then US formulation of the offence; however, the provisions have been formulated in such a way to be acceptable to and compatible with the largest number of legal systems.²⁹⁰ Indeed, the offence was designed broadly to allow different interpretations that would have accommodated the various parties.

The definition provided in the UN treaty under Article 3 (1) b and c has been nevertheless accepted globally. In particular, the offence was designed in a three-folds definition, which criminalised different conducts: 'i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; ii) 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 an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences'.²⁹¹ Subparagraph (c) requires states to criminalise, 'subject to its constitutional principles and the basic concepts of its legal system: i) The acquisition, possession or use of property, knowing, at the time of receipt, ii) That such property was derived from an offence or offences established in accordance with subparagraph

288 *Levi & Reuter*, 2006, p. (289) 296.

289 This issue will represent an important point of criticism in the opinion of some interviewees. See chapter five, paragraph 5.4.1.

290 Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, p. 10.

²⁹¹ Article 3 (1) b of the Vienna Convention.

a) of this paragraph or from an act of participation in such offence or offences'.²⁹²

Accordingly the criminalised conducts are the following: (a) Conversion or transfer of property for the purposes of disguising the illicit origin of it. (b) Knowingly assisting in disguising the source of proceeds of crime. This means persons ranging from family members to friends who allow criminal proceeds to be laundered through the opening of bank accounts or the purchasing of immovable property in their names, to gatekeepers such as accountants, lawyers and financial advisers who are aware of the actual source of their client's income. (c) A further conduct included is the concealment of the true nature, source, location, disposition or ownership of or rights with respect to property with knowledge that the property is the proceeds of crime. This would cover situations where, for instance, anonymous shell companies are founded with the ultimate goal of hiding the true ownership of the sums of money invested in such company. The elements of the crime determining the *actus reus* are: The commission of a predicate offence and the presence of the proceeds of crime. The *mens rea* required is the intent to conceal the proceeds and the knowledge of unlawfulness of the illegitimate origin. In the UN Conventions, the law requires that predicate offences must be established, but there is no requirement of a previous conviction. Thus, according to the wording of the UN treaty, the commission of the antecedent crime does not need to be proven beyond a reasonable doubt.

The UN treaty shaped the money laundering offence as a derivative crime, whose existence is linked to a predicate offence. Having built the provision on the fact that the handled objects derive from another offence, the wording of Article 3, paragraph 1, and subparagraph (b) and (c) has allowed lawmakers to fill the definition of the offence by taking into account continually unfurling emergencies. In particular, the expansion of the scope of the money laundering offence can be triggered in different ways, through an automatic process, in cases in which national legislatures adopt an 'all-crimes approach', every time a new offence is introduced in the penal code, this will automatically belong to the catalogue of the predicate offences; or through a specific process, in cases in which national legislatures set a limited catalogue of predicate offences, the introduction of new offences needs to be provided explicitly

²⁹² Article 3 (1) c of the Vienna Convention.

by new provisions that modify the money laundering offence. Finally, given that predicate offences can be committed abroad, there can be an indirect expansion as a consequence of the criminalisation of new conducts in foreign jurisdictions. The result has been that anti-money laundering laws have assumed, for example, the additional functions of combating non-drug related organised crime, the financing of terrorism, the funding of the proliferation of weapons of mass destruction, tax evasion, and other types of conduct arising out of the recent financial crisis, as it will be showed in the next paragraphs.

While allowing different interpretations, a certain degree of harmonisation among national jurisdictions ought to have served the cooperation between Member States. Given the transnational dimension of the phenomenon of money laundering, the Convention aimed at providing a common minimum standard for the implementation of the criminalisation of money laundering. One of the purposes of the Convention, set in Article two, was in fact to address more effectively the international illicit traffic in narcotic drugs and psychotropic substances through the promotion of cooperation among states. The then UN Secretary General, Kofi Annan stated: 'If crime crosses borders, so must law enforcement'.²⁹³ Hence, improving the effectiveness of domestic criminal justice systems in relation to drug trafficking was considered a precondition for such enhanced international cooperation.²⁹⁴

2.2.2 The money laundering offence: A tool to tackle organised crime

How did lawmakers legitimise the introduction of this new offence in relation to the fight against the trade of psychotropic substances? The criminalisation of money laundering was legitimised to defeat drug abuse and drug trafficking by depriving drug traffickers of their ill-gotten gains in order to eliminate the incentive for engaging in these crimes.²⁹⁵ The fifth and sixth paragraphs of the Preamble of the

293 UN Palermo Convention, Foreword, iii.

294 Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, p. 48.

295 In the Preamble the drafters expressed their concern with the 'magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society'. Preamble of the Vienna Convention. According to the Commentary on

Vienna Convention stressed the greatness and the danger of the economic profit deriving from drug trafficking and highlighted the necessity to eliminate the incentive for criminal activities, by depriving criminals of such illicit gains. These paragraphs should be read, according to the Commentary, as the introduction to Article three, as it relates to the offence of money laundering.²⁹⁶ Given the huge amount of drug sale in the late 1980s, which was estimated to be around US Dollars 124 billion,²⁹⁷ the solution identified in the Preamble of the UN treaty for the drug issue was to eliminate 'the root causes of the drug abuse problem, namely the enormous profits derived from illicit traffic'. One of the principal elements of an effective strategy to combat drug trafficking was considered undermining organised crime's financial power, by providing law enforcement agencies with the necessary tools.²⁹⁸ In this context, the offence of money laundering emerged as one of those necessary tools. The money laundering offence was, thus, introduced in the UN treaty as a tool to effectively counteract drug trafficking by making it less attractive, due to the risk of confiscation of criminal proceeds. In this way, the forfeiture of criminal assets, besides its repressive function, acquired the purpose of criminal deterrence. In particular, the introduction of a duty to confiscate and to cooperate internationally to implement forfeiture orders was justified as the only way to deprive offenders of their ill-gotten gains, given the fact that money laundering was a victimless crime, especially in those situations where confiscation might otherwise not be possible.²⁹⁹ Thus the underlying motivation was providing law enforcement with the necessary tools to undermine the financial power of criminal groups engaged in drug trafficking. Given that the imprisonment of even top-ranking criminals was not effective, because

the Vienna Convention, many threats were recognised being linked with illegal drug traffic besides the health and well-being of individuals, such as the spreading of corruption, criminal conspiracy and the subversion of public order, threats for sovereignty and security, disruption of the economy and the society. Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, p. 2. In addition to social and health concerns, the Preamble highlighted the 'links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States', see the Preamble of the Vienna Convention.

296 Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, p. 18.

297 International Monetary Fund *Financial System Abuse, Financial Crime and Money Laundering-Background Paper* (2001), available at <https://www.imf.org/external/np/ml/2001/eng/021201.htm>, last accessed on 16/10/2012.

298 Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998, p. 65.

299 *Stessens*, 2000, pp. 4, 85.

while public sectors devote more criminal justice system resources to incarcerating increasing numbers of organised crime members, criminals would expand their rings of violence and of corruption to higher levels of the public sectors in order to protect themselves from punishment. Therefore the focus was switched, rightly so, to attacking organised crime's economic power through the confiscation of assets. Indeed, it was observed that even when 'oligarchs of crime' were serving imprisonment, they could continue to manage the criminal networks and to profit from their crimes.³⁰⁰ Specifically in the context of the 'war on drugs,' the prosecution of dealers and consumers did not yield much success. It was, therefore, decided to tackle organised crime's economic power.³⁰¹ This strategy, which was initially related to the proceeds of drug trafficking, has been afterwards adapted to tackle any other type of organised criminal activity; in fact, it was considered also advantageous in terms of source of funding for law enforcement activity.³⁰²

Moreover, resorting to the criminalisation of money laundering and to the adoption of such an invasive sanction, as the confiscation, was justified based on the 'follow the money' strategy.³⁰³ Criminals, while enjoying the proceeds of crime, by purchasing

300 *Bosworth-Davies*, 2006, p. (346) 350.

301 In support of this philosophy, a study conducted between 2000 and 2007 on 107 countries about the most effective policies to counteract organised crime, showed that criminal groups react to higher expected punishments by re-assigning resources to expanding the scope and scale of violence and of corruption to higher levels of the public sectors in order to protect themselves from prosecution. As a result, when the expected punishment increases, but financial assets remain relatively untouched, there is a parallel paradoxical grow of organised crime too. 'This constitutes the paradox of criminal sanctions where more frequent and stiffer punishments applied to physical persons lead to higher levels of organized crime and to higher levels of corruption'. See *Buscaglia*, 2008, pp. (1) 2, 11.

302 *Nadelmann*, 1986, pp. (27) 33, 34.

303 *Stessens*, 2000, p. 86. The 'follow the money' strategy and the rationale linked to the confiscation of criminal assets that justified anti-money laundering law as a tool to fight organised crime have been criticised. First of all, following the money might not always bring investigators to the criminals, since cash that is further invested in criminal markets is not subject to anti-money laundering checks, because it remains out of the reach of anti-money laundering control. In addition, the confiscation of assets, due to its strong potential, should not only be attached to money laundering cases. In fact *Alldrige* argues that once there is enough evidence to prove the serious predicate offence, states could attach a duty to proceed with assets forfeiture to the main offence, without needing the money laundering conviction. *Alldrige*, 2008, p. (437) 450. Yet, confiscation of assets is according to Italian scholars and practitioners, together with the subsequent assignment of such assets to the State which then devotes them to social purposes has a particularly symbolic effect in territories where organised criminal groups exercise territorial control. Such system gives credibility to the State that can re-establish public power over private illegal control. A good-practice example, is the work of the Italian association Libera Terra, which manage several confiscated lands and farms and produce organic products in a sustainable and socially responsible way. Yet such system is not perfect yet: issues rise especially with regard to confiscated firms, which, after

items, services and properties, enter in contact with the legitimate economy. This, which has been called the 'integration phase' of the money laundering process, has been considered the weakest part of the whole process of money laundering, namely 'organised crime's Achilles' heel'. Since most high-level criminals usually stay aloof from the commission of crimes, while enjoying the financial profits, the offence of money laundering could serve the purpose of gathering evidence against top-ranking criminals by tracking the movement of money. By following the 'paper trail', law enforcement agencies should be able to trace the illicit money and thus find the criminal network acting behind the 'small soldiers' engaged in the frontline of illicit activities. Thus, the criminalisation of money laundering as set in the Vienna Convention, by allowing the confiscation of the proceeds of crime under Article 5 (1) a should have served the purposes of attacking criminal organisations economic power, and of facilitating investigations in criminal networks thanks to possibility of following the paper-trail.

2.2.3 Expanding the reach of the money laundering offence

On the assumption that the polluting capacity of money laundering derived not only from the proceeds of drug trafficking, but also from other crimes, international and national legislatures by endorsing the UN treaty, amplified the reach of the money laundering offence. Since, as shown before, the 'war on drugs' was a priority mainly of the US, other legislatures took advantage of the flexibility of the money laundering offence definition contained in the Vienna Convention, and expanded its scope to include proceeds of crimes other than drug-related offences. The focus was then on the risks posed by the laundering of proceeds of any crime in terms of adverse effect

being seized have a high risk to go bankrupt and thus cause unemployment. Such firms, indeed, could compete on the market thanks to the illicit managing and the illicit funding. Furthermore, financial institutions, customers and commissioners may not want to prolong their relations with the new managed company, which therefore is economically isolated in an often already socially adverse context. Solutions are being currently discussed in relation to the possibility of placing side by side the judicial administrator to the entrepreneur already during the seizure phase; allocating part of the confiscated sums to the reintegration in the market of such firms; training judicial administrators with entrepreneurship skills. The European Economic and Social Committee awarded the association with a prize for civil society in 2009, see <http://www.eesc.europa.eu/?i=portal.en.organised-civil-society-prize-2009>, last accessed on 16/10/2012. The Eu Directive 2014/42/EU 'on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union' introduced the social reuse of confiscated property under article 10. OJ, L 127, 29/04/2014.

for the legitimate economy. Lawmakers justified the need to 'spreading the gospel'³⁰⁴ with the argument that this step was necessary to protect the lawful economy from being infiltrated by capital of criminal provenance. The ultimate goal, so the argument went, was to prevent the financial system from being destabilised. Moreover, the anti-money laundering discourse pointed the fact that the laundering of proceeds of any crime was causing harm to society since it fostered the commission of further crimes. None of these arguments were based on any legal grounds. The expansion of the scope of the money laundering offence was, thus, based on two premises: First, the idea that money laundering was a very serious crime and; second that a concerted action was needed to reduce its incidence or at least to make it more complex and expensive.³⁰⁵ The Council of Europe, for example, two years after the Vienna Convention adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention), which did not limit the scope of the money laundering offence to drug-related proceeds of crime. The Convention was aiming at pursuing a common policy directed at the protection of society from any serious crime.³⁰⁶ Having noted that Member States had very different and often inadequate national legal systems to counteract organised crime, the drafters of the Strasbourg Convention sought to lay down the minimum standards for facilitating international cooperation as regards investigative assistance, search, seizure and confiscation-measures, which were considered essential for the suppression of money laundering. According to Commentary on the Vienna Convention the trend of extending the scope of the money laundering offence, by way of expanding the list of predicate offences, was promoted by the Council of Europe with the Convention of 1990 and by the FATF and by some national legal systems.³⁰⁷ The underlying motive for such a development was identified in the difficulty encountered by law enforcement in 'proving that particular proceeds are

304 The expression is used by *Pieth. Pieth*, 2004, p. 12.

305 *Alldridge*, 2008, p. (437) 439.

306 See the Preamble of the CoE 'Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime' (1990).

307 The idea of expanding the definition of money laundering beyond its traditional link with proceeds of drug-related criminality was not a complete novelty. In fact other national legislations did not link the offence of money laundering to drug- trafficking, as the case of article 305 of the Swiss penal code enacted in 1990, which considers any crime as a possible predicate crime for money laundering. *Gilmore*, 1992, p. XV.

attributable to drug trafficking activities especially when the persons in question are involved in a broad range of criminal activities'.³⁰⁸

Concurrently with the adoption of criminal instruments to counteract the phenomenon of money laundering, the necessity of a preventive regime emerged in the debate of the G7 and other industrialised countries. This led to the creation of the Financial Action Task Force in 1989. FATF is a body that had the goal to set international standards to promote the Vienna Convention.³⁰⁹ In 1990, the task force issued Forty Recommendations, which went beyond the scope of the UN treaty, by leaving up each country to decide whether to extend the offence of money laundering to proceeds generated by any serious offence or not.³¹⁰ The standards are the 'result of a patchwork of elements thrown together in complex negotiations by various contributing parties'.³¹¹ Due to the fact that those negotiations took place behind closed doors, the exact circumstances that brought to the approval of such Recommendations remain unclear.³¹² Since its creation, the FATF had a multifaceted nature: On one hand, the US Republican President Reagan fighting his war on drugs, on the other hand, the French Socialist President Mitterrand wanting to appear tough on economic crime and tax havens.³¹³ The FATF Recommendations have been particularly relevant in the evolution of the international anti-money laundering regime, because they introduced the preventive approach and they managed to trigger

308 Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1998.

309 The FATF is an 'inter-governmental body that develops and promotes policies to protect the global financial system against money laundering [...]'. Currently the FATF consists of 36 member countries, eight associate members, the so-called FATF-Styled Regional Bodies, and 26 observers. The FATF is housed within the Organisation for Economic Cooperation and Development (OECD), in Paris. The group had in the beginning an 'ad hoc' mandate that has been extended to the point that the FATF is currently a permanent body with a much broader competence.

310 The Forty Recommendations of the Financial Action Task Force on Money Laundering (1990). The FATF standards are a broad framework for preventing and combating money laundering. These standards lay down the criteria for criminalising particular types of conduct as conduct falling within the meaning of money laundering. In addition, they provide a framework that governments can implement to recover the proceeds of money laundering offences (assets recovery), and they set out how countries can go about preventing the misuse of financial institutions and non-financial designated businesses and professions (e.g. law firms) for money laundering purposes. The standards are made up of the Recommendations themselves as well as the Interpretive Notes to each Recommendation and the applicable definitions in the Glossary.

311 *Pieth*, 2004, p. 9.

312 *Pieth*, 2004, p. 8.

313 *Pieth*, 2004, p. 8.

compliance at almost global level.³¹⁴ The FATF's declared goal was the protection of the soundness of the global financial system from the infiltration of proceeds of crime or other illicit financial flows (e.g. terrorists' funds) in the legitimate economy.³¹⁵ In order to stop ill-gotten gains before entering in the licit system, the Recommendations required the commitment of the private sector. In particular, financial institutions and other businesses and professions at risk of being abused by launderers, should undertake specific due diligence in order to detect money laundering activities. The FATF standards imposed a set of duties, such as the identification of customers' identity, the collection of information, the reporting of suspicious transactions, which were supposed to, on one the one hand, prevent the penetration of dirty money, on the other support law enforcement with access to information to use in money laundering investigations.

A common tactic to enlarge anti-money laundering law has been to identify 'soft targets', that is conducts to the criminalisation of which few would object, and then expand the reach of the offence. The catalogue of predicate offences for money laundering was expanded, so that the money laundering offence became detached from its original declared function of combating drug traffickers. This expansion resulted in a corresponding expansion of acts criminalised by national laws. If this development has been welcomed positively because of the refusal of many countries to pursue the 'war on drugs', it has also raised questions relating to the adequacy of the measure to tackle the new phenomena. In fact, often the grounds given to

314 The Recommendations are a source of soft law, which means that governments are not legally bounded to implement these measures. Yet, given the fact that soft law can be very influential, to the point that it can be very forceful, just like hard law, the FATF wields tremendous political binding power. The implementation of the Recommendations is, in fact, rigorously assessed through Mutual Evaluation processes, and through the assessments conducted by the International Monetary Fund (IMF) and the World Bank (WB). In this regard, it is important to bear in mind that, when assessing compliance with FATF standards,' the word *should* has the same meaning as *must*'. The FATF's persuasiveness stems from the fact that it has the enormous ability to influence whether or not a country can be seen as a viable business partner or an investment destination. The FATF, thanks to its informal structure and procedures and to its flexible mandate, manages to impose compliance with the ever-updated standards in an easier way than a UN treaty-based organisation, bound to formal decision-making procedures and to a legal mandate, could do.

315 FATF, The Forty Recommendations of the Financial Action Task Force on money laundering, 1990, available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf>, last accessed on 16/10/2012.

legitimise such developments did not satisfy many scholars.³¹⁶ The then European Economic Community (EEC) committed itself to the international fight against drugs and money laundering by concluding? The Vienna Convention, despite lacking competence in criminal matters.³¹⁷ The EEC justified such initiative on the basis of its competence in commercial policy.³¹⁸ Subsequently the EU legislature incorporated anti-money laundering law as part of an economic preventive policy through the adoption of four Directives finalised at the protection of the financial system. The first three EU Directives in the field of money-laundering have been, indeed, generated within the Directorate General 'Internal Market and Financial Services'.³¹⁹ In 1991, in order to synchronise the EU's anti-money laundering policy with the FATF's Forty Recommendations, the European Legislature adopted the first Anti-Money Laundering Directive.³²⁰ Since the Community did not have an expressive competence in criminal law,³²¹ the European legislature's approach was a rather preventive, more than repressive one. Article 2, which requires Member States to prohibit money laundering was, in fact, initially rejected by the German parliament, due to the lack of competence in criminal matters of the ECC.³²² The wording 'prohibition' was used to avoid requiring an explicit criminalisation of such conducts since that would plainly fall outside the ECC's competence. However, the imposition of such criminalisation was included in a statement annexed by the end of 1992.³²³ Although the legislature acknowledged in the preamble that money laundering 'must be combated mainly by penal means and within the framework of international cooperation',³²⁴ and highlighted the link between organised crime and drug trafficking, the Directive, as a matter of fact, focussed on the preventive strategy. In

316 See, among others, *Artz et al.*, 2015, § 29, mn. 8; *Dyonnisopoulou*, 1999, pp. 118 ss; *Mitsilegas*, 2003, p. 14 ss; *Moccia*, 1995, p. (728) 730ss.

317 For a complete debate about the issue, see *Mitsilegas*, 2003, pp. 62 ss; 2014, pp 155 ss.

318 Council Decision of 22 October 1990 concerning the conclusion, on behalf of the EEC, of the UN Vienna Convention (1990) OJ L326/56.

319 In particular the first three Directives (91/308/EEC; 2001/97/EC; 2005/60/EC) are categorised under the following subjects: Internal Market; free movement of capital and approximation of laws and are put under the Directories Taxation and Prevention of Tax Avoidance and Tax Evasion (09.50.00.00), and the Directory Economic and monetary policy and free movement of capital (10.40.00.00).

320 Council Directive 91/308/EEC.

321 For a complete debate about the issue, see *Mitsilegas*, 2003, p. 62 ss; 2014, p. 155 ss.

322 BR-Drucks. 288/1/90, p. 2.

323 *Mitsilegas*, 2014, p. 155.

324 Preamble, Council Directive 91/308/EEC.

order to legitimise such approach, the drafters resorted in the preamble to the 'emotionally charged concept of public trust',³²⁵ underlying that 'when credit and financial institutions are used to launder proceeds from criminal activities [...], the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardised'.³²⁶ In this way money laundering was described as a threat to individuals, institutions and to the whole financial system. The European Community declared its particular concern about money launderers taking special advantage of the freedom of capital movement and of the freedom of supplying financial services in the single market.³²⁷ This justified the necessity of providing a preventive policy, besides the repressive one set out in the Strasbourg Convention, aimed at requesting the participation of private actors in defence of the free market. It was, indeed, signalled 'preventing the financial system from being used for money laundering is a task which cannot be carried out by the authorities responsible for combating this phenomenon without the cooperation of credit and financial institutions and their supervisory authorities'.³²⁸ For the first time, through the adoption of such Directive, the intention of protecting the cleanliness and integrity of the financial system, 'in the light of moves towards the creation of a single financial market'³²⁹ was coupled, at least in the declared legislative intents, with the goals of penal deterrence.³³⁰

2.2.4 The EU's motivation for criminalising money laundering

By looking at text of the first Directive, it can be observed that the common criminal policy was introduced by the EC, despite the lack of competence in criminal matters, in order to prevent that 'Member States, for the purpose of protecting their financial systems, [...] adopt measures which could be inconsistent with completion of the single market'. Thus the community was particularly afraid that 'launderers could try

325 *Mitsilegas*, 2003, p. 63.

326 Preamble, Council Directive 91/308/EEC.

327 Preamble, Council Directive 91/308/EEC.

328 Council Directive 91/308/EEC. Also the wording of the title stressed the need to protect the integrity of the financial system: 'Council Directive on prevention of the use of the financial system for the purpose of money laundering'.

329 *Gilmore*, 1992, p. xvi.

330 *Mitsilegas*, 2003, p. 64.

to take advantage of the freedom of capital movement'. It was also afraid that Member States would have adopted restrictive measures to impede the entrance of illicit financial flows, which would have hampered the creation of the internal free market in which the free movement of capitals should have been guaranteed. Like the Strasbourg Convention, the Directive, despite taking the definition of money laundering from the Vienna Convention, acknowledged that money laundering 'occurs also in relation to other criminal activities'³³¹ and therefore did not limit the scope of its application to drug offences.

The following developments of EU anti-money laundering regime have been triggered, as already mentioned, by the continuously updating process of the FATF standards. In particular, the adoption of the second directive was considered a 'top priority',³³² giving the fact that the Recommendations were revised in 1996. Moreover, the EU felt the call from the whole international community to find solutions to the global problem of serious and organised crime. The Second Directive, adopted in 2001, contributed to the further expansion of the scope of anti-money laundering law by recognising the 'trend in recent years towards a much wider definition of money laundering based on a broader range of predicate or underlying offences'.³³³ In particular, the legislature underlined the necessity of ensuring a wider range of predicate offences in order to facilitate the reporting of suspicious transactions.³³⁴ The Civil Liberties Committee rejected the proposal to extend definition of predicate offence to include any serious offence because it was considered too broad, yet the Parliament plenary reinstated the wording.³³⁵ The final text, under Article 1 (E) included in the list, besides, drug trafficking as defined in the first Directive, also activities of criminal organisations, fraud, corruption, and any other offence that may 'generate substantial proceeds' and is punishable by a severe custodial sentence according to the domestic criminal law. In addition, disagreement raised with regard to the degree of the exemption granted to the legal profession:

331 Preamble, Council Directive 91/308/EEC.

332 Debate of the European Parliament, 3/7/2000 and 4/4/2001.

333 Directive 2001/97/EC.

334 See the Preface of Directive 2001/97/EC (7).

335 *Mitsilegas*, 2003, p. 96.

While the Parliament advocated for a broader exemption, the Council and the Commission accepted to exclude the legal profession from the duty to report only under certain conditions, and not, for instance, while giving legal advice.³³⁶

In September 1997, the Committee of Ministers of the Council of Europe established the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, MONEYVAL (formerly PC-R-EV) to conduct self and mutual assessment exercises of the anti-money laundering measures that the Council of Europe member states, which are not members of the Financial Action Task Force, put in place.³³⁷ Since 2011, the Committee of experts has a new statute that elevates it to an independent monitoring mechanism within the Council of Europe,³³⁸ parallel to the FATF, the WB and the IMF. Indeed, the common methodology 'enables the mutual recognition of evaluations, and thus avoid repeating evaluations in the same countries and overloading national authorities with these exercises'.³³⁹

In order to comply with international standards and thus to extend the scope of the framework to cover terrorist finance, a key political priority in the post 9/11 world, and to update the regulations in the field of customers identification, the European legislature adopted in 2005 the Third Money Laundering Directive.³⁴⁰ In particular, the Directive updated the existing framework in consonant to the FATF revised Recommendations of 2003, which endorsed nine new standards in the field of terrorist financing.

336 Article 6 (3) of the Directive 2001/97/EC.

337 Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, available at http://www.coe.int/t/dghl/monitoring/moneyval/About/MONEYVAL_in_brief_en.asp, last accessed on 23/09/14.

338 Resolution CM/Res (2010)12 on the Statute of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism.

339 Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, available at http://www.coe.int/t/dghl/monitoring/moneyval/About/MONEYVAL_in_brief_en.asp, last accessed on 23/09/14.

340 Directive 2005/60/EC.

2.2.5 The fourth EU Anti-Money Laundering Directive

In 2013, the European Commission drafted a proposal for a new Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing in order to update the European legal framework to the new FATF Recommendations released in 2012.³⁴¹ The Directive is the result of a compromise between conflicting concerns and interests; some of them emerge from the study of the law-making process. The main novelties introduced by the proposal were the inclusion of tax crimes in the list of predicate offences, a greater focus on the risk-based approach, and thus the obligation for Member States to conduct national risk assessments. Besides the proposal encompassed a more detailed definitions concerning PEPs and BOs, the introduction of simplified due diligence and the expansion of the scope of the obliged institutions.³⁴² The Proposal was then submitted to the Council and the Parliament for amendments, and it was addressed to the European Data Protection Supervisor, the European Central Bank (ECB), and the European Investment Bank for consultation.³⁴³ The opinions expressed by the three stakeholders are particularly relevant because they highlighted different perspectives and interests surrounding the proposed anti-money laundering Directive. The ECB welcomed the proposal but contested the fact that, due to the freedom of member states to further lower or increase thresholds imposed by EU Directives according to Article 114 of the Treaty,³⁴⁴ stricter measures could have been applied to obliged institutions. The bank warned that 'any such measures should be carefully weighed against the expected public benefits'.³⁴⁵ Furthermore, the ECB stressed the importance of ensuring the 'continued smooth functioning of payment systems in Europe and warned that certain burden imposed on obliged entities 'could lead to significant difficulties and delays in processing payments between the banks and

341 Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (2013/0025/COD).

342 A critical overview on the novelties introduced by the Commission Proposal can be found in *Unger et al.*, 2014, pp. 43, 44.

343 Opinion of the European Central Bank of 17 May 2013 on a proposal for a directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and on a proposal for a regulation on information accompanying transfers of funds. *OJ C 166*, 12.6.2013, p. 2-5.

344 Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326*, 26.10.2012, p. 47-390.

345 *OJ C 166*, 12.6.2013, p. 4.

other entities providing payment services. This in turn would potentially have a severe impact on the banks' liquidity planning and ultimately on the smooth functioning of the financial markets'.³⁴⁶ The European Data Protection Supervisor opposed the inclusion of fighting tax evasion among the purposes of the data processing contained in the Proposal, on the basis of the purpose limitation principle pursuant to Article 7(e) of the Directive 95/46/EC.³⁴⁷ In addition, the authority recommended the Commission to 'respect the proportionality principle when limiting data subjects' rights and, as a consequence, add a specific provision to specify the conditions under which the data subjects' rights may be limited'.³⁴⁸ The European Economic and Social Committee recognised the necessity to balance data protection and the fight against money laundering.³⁴⁹ In particular, the Committee advocated that the obligation set out in Article 39 of the proposed Directive to destroy documents and information collected after a period of five or ten years from the time of the end of the business relationship, should not apply in specific cases, such as criminal proceedings, bankruptcies or successions, so as to prevent it from running counter to the general interest.³⁵⁰ The Committee, thus, recognised the general interest as prevailing over the interest of data protection in specific circumstances of serious economic crimes.

In March 2013, the European Parliament voted³⁵¹ on the Economic Affairs and the Justice and Home Affairs committees' amendments, which inserted an important

346 *OJ C 166*, 12.6.2013, p. 5.

347 Executive summary of the Opinion of the European Data Protection Supervisor on a proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and a proposal for a Regulation of the European Parliament and of the Council on information on the payer accompanying transfers of funds, *OJ C 32*, 4.2.2014, p. 9-12.

348 Opinion of the European Data Protection Supervisor, 2013, p. 23.

349 Opinion of the European Economic and Social Committee on the 'Proposal for a regulation of the European Parliament and of the Council on information accompanying transfers of funds' COM(2013) 44 final - 2013/0024 (COD) and on the 'Proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing', *OJ C 271*, 19.9.2013, p. 31-35.

350 *OJ C 271*, 19.9.2013, p. 34.

351 The legislative resolution on the amended text was passed by 643 votes to 30 with 12 abstentions, see Parliament toughens up anti-money laundering rules, Press release - Justice and home affairs / Economic and monetary affairs, 11-03-2014, available at <http://www.europarl.europa.eu/news/en/news-room/content/20140307ipr38110/html/Parliament-toughens-up-anti-money-laundering-rules>, last accessed on 13/09/2015.

change, namely the introduction of a European public register of ultimate owners of trusts and companies under Article 29 of the proposed text. The outcome of the European Parliament' vote was considered a big step forward in the fight against tax evasion, according to the Civil Liberties Committee rapporteur *Sargentini* (Greens/European Free Alliance, Netherland). The European-wide register of Beneficial Owners (BOs) 'will help to lift the veil of secrecy from offshore accountants and greatly aid the fight against money laundering and blatant tax evasion', added the other Economic and Monetary Affairs Committee rapporteur *Krišjānis Kariņš* (European People's Party, Latvia).³⁵² The introduction of more transparency in the financial sector was welcomed by most members of the Parliament as a benefit for the fight against tax evasion and money laundering. Yet, according to the official opinion expressed by a commercial litigation associate at law firm 'Stephenson Harwood', specialised in corporate crime and financial services regulation, the provision would have triggered the emersion of more complex corporate structures, making due diligence correspondingly more complex, time consuming and expensive. 'As such, it is arguable and conceivable that the additional compliance burden that a public register may create will - somewhat ironically - come to outweigh any benefit associated with transparency'.³⁵³ Again, the different opinions expressed reveal the complexity of the issue and the conflicting interests at play.

The Parliament tried to focus the Directive on the fight against tax havens and illicit financial flows.³⁵⁴ In particular, when the Commission used the term 'dirty money', which in the common sense refers to money typically deriving from organised criminal activities, The Parliament substituted it with 'massive flows of illicit money',

352 European Parliament 'Money laundering: MEPs vote to end anonymity of owners of companies and trusts', Press release - Economic and monetary affairs, 20-02-2014, available at <http://www.europarl.europa.eu/news/en/news-room/content/20140210IPR35562/html/Money-laundering-MEPs-vote-to-end-anonymity-of-owners-of-companies-and-trusts>, last visited on 13/09/2015.

353 *Ward*, 2014, p. (1) 3.

354 European Parliament legislative resolution of 11 March 2014 on the proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM(2013) 0045). The two texts are confronted: <http://www.europarl.europa.eu/sides/getDoc.do?jsessionid=4BA18570D8E8A891670CDA1F60B59F05.node1?pubRef=-//EP//TEXT%20TA%20P7-TA-2014-0191%200%20DOC%20XML%20V0//en>, last accessed on 13/09/2015.

which encompasses also monies deriving from fiscal crimes, and listed facilitators such as 'secretive corporate structures operating in and through secrecy jurisdiction, often also referred to as tax havens'. As regards the duties imposed on the private sector to comply with due diligence, the Parliament warned that 'the preventive approach should be targeted and proportional, and should not result in the establishment of a comprehensive system for controlling the entire population'.³⁵⁵ Moreover, recital two stated that 'any requirement imposed on obliged entities to fight money laundering and terrorist financing should therefore be justified and proportionate'.³⁵⁶ The MPs recognised the potentiality of a clash of interests between the goals of the Directive to tackle tax evasion and the interests of the private sector involved in the prevention of money laundering, therefore added under recital 9 that '[a]greeing on a definition of tax crimes is an important step in detecting those crimes [tax evasion, fraud, money laundering], as too is public the disclosure of certain financial information by large companies operating in the Union on a country-by-country basis. It is also important to ensure that obliged entities and legal professionals, as defined by Member States, do not seek to frustrate the intent of this Directive or to facilitate or to engage in aggressive tax planning'. The text was then passed to the Council and the Commission for further opinions and agreement, and then it was passed to the newly elected Parliament in May 2014. The members of the Parliament finally approved the text on 20th May 2015; the final Directive was adopted on the same day, with the signatures of the Presidents of the Parliament and of the Council. The Directive entered into force twenty days after its publication in the Official Journal of the European Union.³⁵⁷

In the final text, most of the significant changes introduced by the Parliament in 2013 were endorsed. For the first time a central European register has been created, in which beneficial owners ought to be listed. The Directive uses the term 'flows of

³⁵⁵ European Parliament legislative resolution of 11 March 2014 on the proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM(2013) 0045), Recital 1.

³⁵⁶ European Parliament legislative resolution of 11 March 2014 on the proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM(2013) 0045), Recital 2.

³⁵⁷ *OJ L 141*, 5.6.2015, p. 73-117.

illicit money' instead of 'dirty money' and keeps the mentioning of the harm to international development. While not mentioning the risk that the policy would become a tool to control the entire population, the new Directive mentions that 'the objectives of protecting society from crime and protecting the stability and integrity of the Union's financial system should be balanced against the need to create a regulatory environment that allows companies to grow their businesses without incurring disproportionate compliance costs'.³⁵⁸ The fourth Directive introduces tax crimes within the scope of the money laundering offence and thus allows the exchange of tax-related information among FIUs. In this regard, the Directive utilises the term tax crimes and not tax offences as proposed antecedent by the Parliament. While not imposing a definition of tax crimes at European level, the legislation requires that Member States 'should allow, to the greatest extent possible under their national law, the exchange of information or the provision of assistance between EU Financial Intelligence Units (FIUs)'.³⁵⁹ Due to all these novelties, the final text of the Directive is considered a tool to counteract tax evasion.

The final text contains a further significant element, which was already present in the Commission Proposal, namely the legitimisation of the Union of taking action in the field of money laundering, in accordance with the principle of subsidiarity set out in Article 5 TFEU.³⁶⁰ In particular, the Union shall adopt common measures to tackle money laundering 'since the objective of this Directive [...] cannot be sufficiently achieved by the Member States, as individual measures adopted by Member States to protect their financial systems could be inconsistent with the functioning of the internal market [...]'.³⁶¹ Again, the European legislator needs to balance between the purpose of avoiding that perpetrators could abuse the freedom of movement of capitals within the Union and the possibility that Member States could enact anti-

358 Council Directive EU/2015/849, *OJ L 141/73-115*, (2).

359 Council Directive EU/2015/849, *OJ L 141/73-115*, (11).

360 Article 5 of the TFEU states '1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro. 2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies. 3. The Union may take initiatives to ensure coordination of Member States' social policies'. *OJ C 326*, 26.10.2012, p. 47-390.

361 Council Directive EU/2015/849, *OJ L 141/73-115*, (64).

money laundering policies inconsistent with the free movement of capitals. In fact, the Directive, while imposing limitations on the market through the control of transactions, the criminalisation of gatekeepers, and the recording of users' data, it is endorsed as an instrument to foster the creation of the single market. Given the fact that the internal market is based on the principle of the free movement of capitals and that the anti-money laundering legislation imposes, as a matter of fact, restrictions on the movement of capitals, there is a clash of interests.

2.2.6 New developments: Organised crime, terrorism, corruption and economic lawbreakings

The following years were marked by a shift in the policy agenda from the 'war on drugs' to the fight against transnational organised crime and, by a quite large consensus, in favour of the extension of the offence of money laundering to tackle further crimes.³⁶² In June 1997, the European Council, while approving an Action Plan on Organised Crime, recognised that the major driving force behind organised crime was the pursuit of financial gain.³⁶³ The Action Plan called for a rigorous implementation of the existing international instruments in the field of anti-money laundering that can in turn require adjustments in national procedures and specialized training for law enforcement and judicial authorities.³⁶⁴ The Council stressed the significance of the harmonisation and widening of the scope of the money laundering offence in order to effectively combat money laundering.³⁶⁵ In 2000, the UN adopted the Convention against Transnational Organised Crime (Palermo Convention). In the Foreword, Kofi Annan underlined the ability of the so called 'uncivil society' to take advantage of 'the open borders, free markets and technological advances [...]' and identified globalisation as organised crime, by underlying that 'the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes'.³⁶⁶ The Convention, which was 'the most impressive

362 *Mitsilegas*, 2003, p. 87.

363 Paragraph 26(e) of the European Council Action Plan on Organised Crime, OJ C 251, 15/08/1997 P. 0001-0016.

364 Paragraph 6 (g) OJ C 251, 15/08/1997, p. 1-18.

365 Paragraph 26 OJ C 251, 15/08/199, p. 1-18.

366 Foreword, iii of the Palermo Convention.

contribution of a UN multilateral treaty towards the globalisation of criminal law',³⁶⁷ broadly criminalised money laundering. In fact, the treaty was expected to be 'an effective tool and the necessary legal framework for international cooperation in combating, *inter alia*, such criminal activities as money laundering'.³⁶⁸ The wording referred to the property derived from any offence established in accordance with subparagraph a) of the paragraph, namely with the drug-related offences described under Article 3,1, a) of the Vienna Convention, was substituted in the Palermo Convention by 'proceeds of crime', referred to 'any property derived from or obtained, directly or indirectly, through the commission of an offence'.³⁶⁹ According to Article 6, paragraph 2 (b) of this Convention, states are required to include as predicate offences all serious crimes punishable with up to four years' imprisonment,³⁷⁰ and offences associated with organised crime, such as Article 5, the participation in an organized criminal group, Article 8 corruption, and Article 23, the obstruction of justice. The Palermo Convention went beyond the Vienna Convention and regulated also the private sector, by setting a supervisory regime for designated bodies particularly susceptible to money laundering. In particular, Article 7, paragraph 1 (b) and paragraph 2 called for exchange of information, establishment of a financial intelligence unit and the implementation of measure to detect the movement of cash.

After the 9/11 events in America, the anti-money laundering principles were extended to the financing of terrorism on the background of the idea that in order to crack down terrorists, pursuing the money trail and confiscating assets were two fundamental tools. Since then, the securitisation discourse that referred to organised crime threats was partially overcome by the rhetoric of the fight against terrorism generated post-September 11.³⁷¹ The EU diverted the attention to terrorism too and in 2005 amended the second Directive and included already in the title the financing of terrorism, on the basis that 'terrorist financiers could try to take advantage of the

367 *Mitsilegas*, 2014, p. 157.

368 General Assembly resolution 55/25 of 15 November 2000.

369 Article 2 (e) of the Palermo Convention; Article 2 (e) UNCAC.

370 Article 2 of the Palermo Convention.

371 See FATF, IX Special Recommendations on terrorist financing, 2001, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>, last accessed on 27/11/2015.

freedom of capital movements and the freedom to supply financial services which the integrated financial area entails'.³⁷² 'From that date on the money laundering Directive was widely considered as part of the fight against terrorism'.³⁷³ In addition, the Council of Europe committed to the fight against terrorism and in 2005 updated the Strasbourg Convention of 1990 by including terrorism and the financing of terrorism among the predicate offences whose proceeds should be subject to forfeiture.³⁷⁴ The Convention justified such amendment by recalling the 'threats to international peace and security caused by terrorist'.

On the background of the observation that methods of stashing away undue monetary advantages are the same used by organised criminals to conceal proceeds of other serious crimes, anti-money laundering law emerged as a tool to curb corruption, too. Several international and transnational documents expressed, in fact, the necessity of tackling the two phenomena together. On one side, instruments to tackle corruption included money laundering as an offence constituting corruption, on the other side, anti-money laundering regulations started to being used to contrast corruption too, by expanding the scope of the money laundering offence. The UN Convention Against Corruption adopted in Merida in 2003 (UNCAC) listed the offence of money laundering as one of the eight offences constituting corruption.³⁷⁵ The definition of money laundering adopted in UNCAC is adopted by the previous Palermo Convention and thus is not limited to drug offences. UNCAC is said to have a great potential for tackling illicit financial flows³⁷⁶ with specific respect to the legal framework set for the confiscation of assets and for asset recovery mechanism and international cooperation for such purposes.³⁷⁷ Also the Council of Europe Criminal law Convention on Corruption of 2002, under Article 13, required signatory parties to

372 Directive 2005/60/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 OJ L 309, 25.11.2005, p. 15-36, Foreword (3).

373 European Parliament, 'Report on the Joint Text approved by the Conciliation Committee for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 in prevention of the use of the financial system for the purpose of money laundering', A5 0380/2001.

374 CoE 'Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism' CETS 198 (2005).

375 Article 23 of UNCAC.

376 Christensen, 2007, p. (1) 11; Chene, 2011, p. (1) 3.

377 Article 51 of UNCAC.

criminalise the laundering of proceeds from corruption offences.³⁷⁸ The FATF in 2003 introduced corruption and bribery in the list of designated categories of offences that states should include as predicate offence for money laundering. This further widening of the competence of the FATF has been justified because 'the G20 called upon the FATF to address the problem of corruption in the framework of its work on combating money laundering and terrorist financing', on the background that 'corruption and money laundering are intrinsically linked,' because 'corruption offences, such as bribery or theft of public funds, are generally committed for the purpose of obtaining private gain', while 'money laundering is the process of concealing illicit gains that were generated from criminal activity'.³⁷⁹ More specifically, the FATF described corruption as a phenomenon negatively impacting on transnational crimes, poverty, disease, and political instability and on the economy, recalling the fact that empirical evidence suggested that the negative effects of corruption are stronger than any possible positive effects.³⁸⁰

The European Community adopted instruments of signature and conclusion of the Palermo Convention on the basis of its competence with regard to 'progressively establishing the internal market'.³⁸¹ In particular, the EC explicitly linked the adoption of measures to combat money laundering with the purpose of establishing an area 'without frontiers in which the free movement of goods and services is ensured'. Once again, the European legislature, while further adopting anti-money laundering laws, expressed the intention of supporting the internal free market. The interest of tackling tax evasion through the anti-money laundering regime was manifested already in the initial phase of the anti-money laundering law making process and re-emerged in a more mature phase of the policy, yet there was no

378 Council of Europe (1999) Criminal law Convention on Corruption (ETS No. 173).

379 See FATF, The use of the FATF Recommendations to combat corruption, 2013, available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf>, last accessed on 16/10/2012.

380 FATF, Laundering the proceeds of corruption, 2011, p. 9, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf>, last accessed on 23/03/2015.

381 Council Decision of 29 April 2004 on the conclusion, on the behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime (2004), Annex II Declaration of competence in accordance to Article 36(3) of the Convention. OJ L261/69.

consensus on this.³⁸² On the background of the acceleration of economic globalisation, which multiplied the opportunities for economic crime in Europe, a new consciousness emerged that perpetrators of serious crime can be also firms. 'Following the multi-billion Euro financial fraud and misconduct schemes such as *Enron*, *WorldCom*, and *Tyco International* [...] the *Parmalat* scandal at the end of 2003 [...] demonstrated the importance of avoiding a frame of mind in which one looks only towards the organised crime underworld for serious economic crime threats'.³⁸³ In particular, in the wake of the growing awareness about the negative effects of offshore jurisdictions and tax evasion, questions relating to money laundering and tax matters have come to be linked, since money laundering was considered an effective measure to counteract tax offences, too.³⁸⁴ This further amplified the scope of anti-money laundering policy in the direction of the protection of the financial system. The debate on the urgency of tackling large scale tax evasion through anti-money laundering policy was prompted by the Organisation for Economic Co-operation and Development (OECD), the UN, the International Monetary Fund (IMF), the G20, the FATF and other regional organisations. In 1998, the UN Office for Drug Control and Crime Prevention (UNODC) presented the results of its report called *Financial Havens, Banking Secrecy and Money-laundering*. The report concluded, among other things, 'one of the key remaining facilitators of crime has been the tax avoidance/evasion exemption in the laundering regulations of

382 There are some practical hindrances that need to be highlighted with regard to making tax evasion a predicate offence to money laundering: If the suspected offence is committed abroad, it must be a criminal offence in that country too, and this assigns domestic prosecution a burden of collecting information about foreign legislation on tax matters. In addition the tax evasion might be discovered by tax authorities only after some years, and this might undermine the system of reporting of suspicious transactions by financial institutions, if they cannot access information about the lawfulness of the transaction under tax law. Moreover, compelling disclosure on fiscal management may, on the face of it, seem a breach of the individual's right to privacy and of the confidentiality principle. In addition, if even the proceeds of crime are considered subject to taxation, there is the danger that law enforcement will treat proceeds of drug trafficking, for example, as tax evasion, and choose to charge drug dealers with money laundering, just by proving the undeclared income. See *Alldridge*, 2001, p. (350) 35. The underlying claim seems to be that tax evasion liability can serve as a useful fallback for authorities who are unable to acquire sufficient evidence to secure a conviction for the main crime, as in the famous case of *Al Capone*, who was finally convicted for tax evasion by American authorities, because of their incapability of bringing charges of organised criminal activities against him.

383 Council of Europe, Organised Crime Situation Report 2005, p. 9.

384 *Alldridge*, 2001, p. (350) 350. For the analogies between tax evaders and money launderers, see *Christensen*, 2013, p. (35) 35ss. *Sharman* regards critically the FATF's approach to regulate offshore centres, see *Sharman*, 2011, pp. 99 ss. Also *Alldridge* disapproves of the approach of tackling money laundering and tax evasion under the same category of offshore. See *Alldridge*, 2008, p. (437) 447.

many countries'.³⁸⁵ The UNODC warned about the fact that the secrecy veil on tax matters would hamper the combating of money laundering by leaving open the opportunity of evading conviction by representing transactions as tax-related.³⁸⁶ The G7 Finance Ministers, in May of the same year, encouraged the tackling of tax-related crimes through the international anti-money laundering system.³⁸⁷ A dialogue between the FATF and the OECD came into being to examine ways of improving co-operation between tax and anti-money laundering authorities, and as a result, workshops for experts were organised to share expertise in both fields.³⁸⁸ In 1999, the G8 expressed deep concern about the growth in illicit international financial transactions, including money laundering, as well as wide-scale tax evasion, emphasizing how the two phenomena were related to each other.³⁸⁹ Since 2000, IMF made the fight against money laundering a priority of its agenda to 'protect the integrity of markets and of the global financial framework'.³⁹⁰ At the IMF meeting in Washington, in April 2000, the UK's Chancellor of the Exchequer called for a strong response to offshore tax havens and to financial crimes, and raised the need to link money laundering to tax matters.³⁹¹ In 2003, the FATF Recommendations were revised, and Recommendation 1 left it open to states to choose between the 'thresholds' or the 'all offences' approach. Tax related offences were not explicitly included, however, the interpretative note to Recommendation 13 (Reporting of suspicious transactions and compliance) stated that 'suspicious transactions should be reported by financial institutions regardless of whether they are also thought to involve tax matters'. Serious tax crimes were finally listed within the range of designated categories of offences that each state should at a minimum include in the FATF revised standards published on 16 February 2012.

Whether the use of anti-money laundering law for the purpose of protecting the

385 *Blum et al.*, 1988, p. (1) 51.

386 The link with tax matters was often used as a ground to refuse co-operation and information disclosure for purposes of anti-money laundering.

387 OECD 'Tax and crime' (2012), available at www.oecd.org/ctp/taxcrimes accessed on 16/10/2012.

388 OECD 'Tax and crime' (2012), available at www.oecd.org/ctp/taxcrimes accessed on 16/10/2012.

389 G7 Statement of G7 Finance Ministers and Central Bank Governors (1999: 6), available at <http://www.g8.utoronto.ca/finance/fm992509state.htm>, last accessed on 16/10/2012.

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

391 *Alldridge*, 2001, p. (350) 350.

soundness of the global financial system represents a recent shift of paradigm or it has always been part of its double nature is debatable. As a matter of fact, the current discourse about anti-money laundering reflects the supremacy of this rationale over the necessity of tackling drug consumption or organised crime. The IMF for example on its website expresses the concern 'about the possible consequences money laundering, terrorist financing, and related crimes have on the integrity and stability of the financial sector and the broader economy' and further adds that 'these activities can undermine the integrity and stability of financial institutions and systems, discourage foreign investment, and distort international capital flows'.³⁹² They may have negative consequences for a country's financial stability and macroeconomic performance, resulting in welfare losses, draining resources from more productive economic activities, and even have destabilizing spill over effects on the economies of other countries'.³⁹³ *Min Zhu*, IMF Deputy Managing Director, has declared '[a]ction to prevent and combat money laundering and terrorist financing [...] responds not only to a moral imperative, but also to an economic need'.³⁹⁴

The rhetoric of the protection of the global financial system is used also in the European discourse on money laundering control. MONEYVAL, for instance, is said to contribute to the protection of the global financial system from abuse.³⁹⁵ The Third Directive of 2005 highlighted the damages caused by massive flows of money to the stability of the financial sector and to the single market, and it stressed that 'the soundness, integrity and stability of credit and financial institutions and confidence in the financial system as a whole could be seriously jeopardised by the efforts of criminals and their associates either to disguise the origin of criminal proceeds or to channel lawful or unlawful money for terrorist purposes'.³⁹⁶ The last EU Directive, confirmed the necessity of protecting the 'integrity, stability and reputation of the

392 See IMF Factsheet 'The IMF and the Fight Against Money Laundering and the Financing of Terrorism', available at <http://www.imf.org/external/np/exr/facts/aml.htm> last accessed on 14/03/2015. Also *Tanzi* strongly supported the argument of the negative impact of money laundering for the economy. *Tanzi*, 1997 p. 97.

393 IMF Factsheet 'The IMF and the Fight Against Money Laundering and the Financing of Terrorism', available at <http://www.imf.org/external/np/exr/facts/aml.htm>, last accessed on 14/03/2015.

394 *Ibidem*.

395 http://www.coe.int/t/dghl/monitoring/moneyval/Activities/2013_AnnualReport_en.pdf, last accessed on 14/03/2015.

396 See the Preface of Directive 2005/60/EC (1).

financial sector, and [...] the internal market of the Union',³⁹⁷ especially from the fact that money launderers 'could try to take advantage of the freedom of capital movements and the freedom to supply financial services which the Union's integrated financial area entails'.³⁹⁸

2.2.7 Considerations

From the outcomes of the analysis of the process that has led to the formulation of the international and European current anti-money laundering criminal legal framework it can be observed that very different justifications were given for the criminalisation of money laundering at different stages. Often the declared motives did not correspond to the real goals of the actors taking part in the law-making process. In the beginning, for instance, the introduction of the offence of money laundering was presented to the public as a tool to counteract drug trafficking, and the resort to criminal law was justified on the background of the seriousness of the drug issue. Other actors were triggered by different motives when they agreed to criminalise money laundering conducts. The rhetoric connected to the seriousness of the drug issue was, therefore, the manifest function of the new criminalisation of money laundering. However, other latent goals, for instance, the desire of financial institutions to clean their reputation and gain customs confidentiality or the interest of some governments to curb tax evasion were already present during this initial phase. Yet, given that no agreement could be found on the other aspects, the offence was legitimised as an instrument to tackle drug trafficking. On the other hand, the international 'war on drugs', in the critical interpretation of scholars, was used by the US to impose its criminal policies at global level,³⁹⁹ to the point that *Nadelmann* defines the process of universalisation of these policies as 'the Americanization of international law enforcement'.⁴⁰⁰ In order to justify this strategy and to legitimise

397 Council Directive EU/2015/849, *OJ L 141/73-115*, (1).

398 Council Directive EU/2015/849, *OJ L 141/73-115*, (2).

399 *Aas*, 2014, p. 131. This mechanism, which has been defined as the doctrine of 'manifest destiny' is used by the US to protect its own interests, while using the rhetoric of a common war against an enemy threatening the whole world. Without using physical influence, as in the case of military invasion, the US has exercised its imperialistic strategy by taking advantage of its economic supremacy and by using the weapon of financial coercion. See also *Andreas*, 2015, p. 49; *Bosworth-Davies*, 2006, p. (346) 347.

400 *Nadelmann*, 1993, p. 469.

additional budgets and legal measures in front of the public, the US created a 'new moral panic', namely a phenomenon that needed to be addressed with special urgent measures.⁴⁰¹ Practically, this had the consequence that countries around the world had to actively contribute to the defeat of the common enemy, identified with drug producers, traffickers and abusers, by implementing the policies set under the US influence, the criminalisation of money laundering being one of them. Some of the interests expressed more or less manifestly from the actors taking part in the initial phase of the creation of the anti-money laundering regime were strongly conflicting with each other. One representative example is the question whether to use the policy also to tackle large scale tax evasion or to leave proceeds deriving from fiscal crimes outside of the regime: While some actors were strongly supporting this in order to protect their economies, others were firmly opposing it on the basis of the assumed difference between 'dirty money' and 'black money'.

Another controversial issue concerns the fact national states have adopted anti-money laundering measures under the pressure of the FATF, which has been defined as a 'rich countries club',⁴⁰² because it has been created and is still led by most industrialised countries.⁴⁰³ The 'club' is criticised due to the absence of transparency and accountability⁴⁰⁴ and a (deliberately) unrepresentativeness.⁴⁰⁵ Since the beginning, indeed, the body expressively stated, 'the FATF membership should not be

401 *Bosworth-Davies*, 2006, p. (346) 349; *Naylor*, 2002, p. 'Drugs, like terrorism today, obtained the position of a suitable enemy. By stressing the necessity of a global effort to prevent the danger of the drug issue, the US has imposed 'global governance' built around the framework established by the UN and other international initiatives. See also *Aas*, 2014, pp. 130, 131. On an even more critical note, the crime-control policy model of the 'war on drugs' has been interpreted as an example of the 'blurred line between crime control and warfare, both in discursive and practical terms'. *Aas*, 2014, p. 130. A known example is the American 'Plan Colombia', a US military intervention launched in the 90s of the last century in South-American, with the official goal of contrasting drug cartels, which was actually directed at controlling economically, politically and military an area rich of natural resources. *Becucci and Massari*, 2003, p. 63.

402 See *Mitsilegas*, 2014, p. 174.

403 *Alldrige*, 2008, p. (437) 443; *Bosworth-Davies*, 2006, p. (346) 358; *Levi and Reuter*, 2006, p. (289) 304; *Pieth*, 2004, pp. 8, 9. More specifically, from the definition of the social problem to the shaping of the policies and of the methods of monitoring compliance and punishing non-compliance the FATF owes a lot to the US. See *Machado*, 2012, p. (330) 361.

404 *Bosworth-Davies*, 2006, p. (289) 358; *Pieth*, 2004, p. 22.

405 *Alldrige*, 2008, p. (437) 443.

further widened, in order to preserve the efficiency of the Task Force'.⁴⁰⁶ Besides lacking democratic legitimation, the FATF has imposed a brand new regime of criminalisation, prevention and enforcement. The influence of the FATF Recommendations over the development of the European legal framework has been tremendous, in fact main changes adopted by the directives have been justified as necessary adaptations to the FATF updated regime. The uncritical transposition of the Recommendations into European law has been criticised by scholars because it does not allow European lawmakers to tailor legal measures on the Union's specific needs and patterns.⁴⁰⁷ On the other hand, it has been emphasised that the EU's growing autonomy in the development of a global paradigm of crime governance may lead to a higher protection of human rights and fundamental principles.⁴⁰⁸

The analysis shows also that the criminal legal framework adopted to tackle money laundering has been used to address ever-new challenges, and this expansion process has been coupled by a rhetoric that scholars have defined the securitisation rhetoric.⁴⁰⁹ One of the issues to which money laundering has been mostly associated, especially in the initial phase of the money laundering control discourse, is organised crime. After the fall of the Berlin wall, when there was no longer a looming threat of war, new risks for society appeared on the political horizon, and organised crime was perceived as constituting a general threat to security and human life.⁴¹⁰ In the beginnings of the nineties of the last century, for example, the US Senator declared organised crime as 'the new communism, the new monolithic threat'.⁴¹¹ However, the notion of international governance over organised crime and the idea that there was a right and a mechanism to impose minimum standards at global level to combat transnational criminal activities that developed at the end of the 1990s is not universally accepted.⁴¹² In this context, money laundering has been considered 'more

406 FATF Report 1990-1991, 1991, p.19, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/1990%201991%20ENG.pdf>, last accessed on 16/10/2012.

407 See in particular *Mitsilegas*, 2014, pp. 175 ss; Unger *et al.* 2013, pp. 221 ss.

408 *Mitsilegas*, 2014, p. 198.

409 See among others, *Calvanese and Bianchetti*, 2003, p. (99) 123; *Mitsilegas*, 2003, pp. 1 ss.

410 *Williams and Savona*, 1996, p. 129.

411 The quote is taken by *Bosworth-Davies*. See *Bosworth-Davies*, 2006, p. (346) 349.

412 *Levi & Reuter*, 2006, p. (289) 309. According to *Pieth*, the fact that organised crime poses the threat that western culture has always portrayed has been taken for granted. *Pieth*, 2004, p. 5.

than any other, the crime that reflects and energises globalization [...].⁴¹³ The discourse around it pictures money laundering as 'one of the great moral panics of our day', which threatens the very existence of the state.⁴¹⁴ Yet, also the idea that organised crime and money laundering represent the dark side of globalisation has been contested. In addition, while in the beginning the emphasis was confined on the utility of the money laundering offence for the purposes of confiscation, the link between anti-money laundering policy and confiscation has become less and less evident, especially since the monopoly of the fight against money laundering has been officially transferred from law enforcement to the private sector and thus to the switch from a prohibitory to a preventive approach.⁴¹⁵ In addition, the confiscation of assets, due to its strong potential, should not only be attached to money laundering cases. In fact, once there is enough evidence to prove the serious predicate offence, states could attach a duty to proceed with assets forfeiture to the main offence, without needing the money laundering conviction.⁴¹⁶

With regard to the financing of terrorism, the logic behind the application of the anti-money laundering discourse and standards to the new threat of terrorism has been 'skewed'.⁴¹⁷ By simply defining the financing of terrorism as a variation of money laundering and thus failed to provide a specific framework for tackling terrorists, the FATF missed the opportunity to give a definition of 'terrorist'. This has raised a series of problems, because 'in practice financial institutions have to follow concrete lists of names supplied by secret services, law enforcement agencies and supervisors'.⁴¹⁸ Moreover, the extension of anti-money laundering scope to the financing of terrorism

413 *Alldridge*, 2008, p. (437) 438.

414 *Alldridge*, 2008, p. (437) 437.

415 At European level, for example, the first Directive requiring a certain level of harmonisation in the context of confiscation of criminal assets was adopted only in 2014, Directive 2014/42/UE.

416 In addition, according to Italian scholars and practitioners the confiscation of assets obtained in an illicit way and the subsequent assignment of such assets to the State which then devotes them to social purposes has a particularly symbolic effect in territories where organised criminal groups exercise territorial control. Such system gives credibility to the State that can re-establish public power over private illegal control. Moreover it represents a great opportunity for the community in terms of availability of lands, properties, companies that can be used for social purposes, therefore the confiscation of proceeds of crime should be followed by a state re-appropriation of the assets to restore the symbolic supremacy of the state over the criminal control. See, among others *Baldascino and Mosca*, 2012; *Dalla Chiesa*, 2012; *Frigerio and Pati*, 2007, pp. 33 ss. See also *Memo et al.*, 2015, pp. 15 ss.

417 *Pieth*, 2004, p. 34

418 *Pieth*, 2004, p. 34.

has been criticised from a technical perspective, because funds available for terrorists have often an illicit origin and are used for (so labelled) illicit purposes. From a political point of view, according to *Pieth*, coupling anti-money laundering regulations with the 'war on terror' is dangerous because it makes the first being perceived as an instrument of oppression, as the latter is typically perceived, instead of an emancipatory tool.⁴¹⁹ Many scholars have contested the expansion of the catalogue of predicate offences to include the financing of terrorism as a diversion of the function of anti-money laundering law. The FATF being guided mainly by the US, endorsed the philosophy of the 'war on terror' without undertaking an appropriate debate about the suitability of the regime to tackle (the phenomenon labelled as) terrorism. Such development was justified in front of the public, once again by the rhetoric of securitisation, namely by stressing the necessity to adopt special measures in order to protect the security of the people from the attack of terrorists.

Corruption has been studied mainly from the demand side (e.g. the side of the corruptor), for example, passive corruption of African political leaders and senior public officials. The Transparency International Corruption Perceptions Index classifies many African states as very corrupt countries and the industrialised world, such as Switzerland, as least corrupt.⁴²⁰ Pointing fingers 'at petty officials and ruling kleptomaniacs has resulted in insufficient attention being paid to the (largely) western financial intermediaries who facilitate the laundering of the proceeds of corruption through offshore companies, trusts and similar subterfuges'.⁴²¹ Global Financial Integrity estimated that approximately US\$ 858 to US\$ 1 trillion flows annually from poorer countries as proceeds of corruption, state looting and tax evasion;⁴²² the main destinations being offshore jurisdictions in the western world. To make real efforts to stop illicit flows, it is necessary to tackle the abuse of banks and offshore

419 *Pieth*, 2004, p. 35

420 Transparency International Corruption Perception Index, 2015, available at <http://www.transparency.org/cpi2015#results-table>, last accessed on 16/01/2016.

421 *Christensen*, 2011, p. 186.

422 Global Financial Integrity, 'Illicit financial flows from developing countries: 2002-2006', 2008, p.12, available at www.gfintegrity.org/storage/gfip/executive%20-%20final%20version%201-5-09.pdf, last accessed on 16/10/2012.

jurisdictions.⁴²³ Yet the anti-money laundering regime, being a product of western countries and thus of destinations jurisdictions, does not seem to be the best tool to undertake this shift.

By following the developments of money laundering control policy, the analysis focuses in the last part at the most recent function manifestly attributed to the anti-money laundering legal framework, that is, in short, the protection of the soundness of the financial system. Especially in times of financial insecurity, the tendency of hardening laws against economic crimes increases. Having previously deregulated the financial system to enhance economic liberties, legislatures resort to criminal law to control illegality in the economy.⁴²⁴ Yet, the contribution of the IMF has been described in a very expressive way by *Alldrige* as 'economists being brought in to add both *gravitas* and the appearance of impartiality' to the anti-money laundering regime.⁴²⁵ Indeed, while focussing on the protection of purely economic interests, the anti-money laundering regime has not enhanced individual and collective positions. In fact, as a response to the European financial crisis of 2007-2011, legislatures, instead of rethinking the approach towards the protection of the global finance, called for a tightening of economic crimes regulations. Due to domestic budgetary pressure, initiatives to tackle the abuse of the Internal Market even accelerated. The European Community, for example, while introducing community rules in the field of money laundering, aimed at protecting the creation of the Internal Market. Since the beginning, the European legislature tackled the phenomenon of money laundering primarily as economic matter: Despite mentioning the link with organised crime and the danger for society, the European discourse on money laundering has mostly been related to other threats, such as the destabilisation of the market, the abuse of capitals' movement liberty, the disintegration of the internal economy. But, why was the EU so keen on imposing a common standard for the criminalisation of money laundering,

423 *Eva Joly*, French magistrate famous for her crusade against corruption, advocated for a shift of the corruption discourse to phase two, in which the role of bankers, lawyers and offshore financial centres in enabling corrupt practices comes under far greater scrutiny. See *Christensen*, 2011, p. 193.

424 *Levi and Reuter*, for example, consider the regulatory provisions, which imposes public control over the financial sector, as exceptional within the context of de-regulation. *Levi & Reuter*, 2006, p. (289) 309.

425 *Alldrige*, 2008, p. (437) 439.

without even enjoying competence in penal matters? The introduction of a common anti-money laundering control policy served to a latent function, namely to the purposes of the creation of the 'Single Market', by way of avoiding that Member States would have adopted measures inconsistent with the completion of the Internal Market, while taking action to protect their own national economies from money laundering.⁴²⁶ This was done by avoiding that domestic regulations implemented for protecting national economies from the infiltration of ill-gotten capital could have hampered the freedom of movement of capital within the European borders. The tension emerges, also in the wording of the most recent EU money laundering Directives, due to lack of Community action against money laundering could lead Member States, for the purpose of protecting their financial systems, to adopt measures which could be inconsistent with completion of the single market.⁴²⁷

There are thus conflicting interests between the claim for regulation to avoid the infiltration of illicit capital, and the demand for deregulation to foster the free market. The European legislature, however, did not declare completely this intention and justified, instead, the imposition of anti-money laundering rules given the threats posed by money laundering to the financial system and thus to society. According to this critical approach, the criminalisation of money laundering turns out to be more of a political tool aimed at achieving governance within the EU, while being presented to the public as an essential intervention to guarantee security and well-being. Once again, thus, the declared goals of the lawmakers did not correspond with the real intentions. It is especially in the interest of a research on the law's effectiveness to unveil functions that were undeclared, in order to evaluate the outcomes in a more critical way.

2.3 The German law-making process: Tracing legislative intents

Germany signed the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances on the 19th of January 1989.⁴²⁸ It was, therefore, bound to adopt the necessary legal and administrative measures to implement the UN treaty at

426 *Gilmore*, 1992, p. xvi.

427 Council Directive EU/2015/849, *OJ L 141/73-115*, (64).

428 The German Democratic Republic had signed and ratified the Convention on 21 June 1989 and 21 February 1990, respectively. The Convention was ratified by unified Germany on 30 November 1993.

domestic level.⁴²⁹ Germany, moreover, was bound by the Council Directive 91/308/EEC of 1991 that under Article 2 required states to prohibit money laundering.⁴³⁰ In particular, Article 3 of the Vienna Convention imposed a duty to criminalise the laundering of proceeds of drug trafficking, duty that has been fulfilled by the introduction of Article 261 in the German criminal code, with the law 'Act on Suppression of Illegal Drug Trafficking and other Manifestations of Organized Crime' (*Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderen Erscheinungsformen der Organisierten Kriminalität, OrgKG*) that entered into force on the 22nd of September 1992.⁴³¹ Already in 1988, the German government established a working group on money laundering, with the purpose of contrasting the laundering of proceeds of drug trafficking through the banking sector, in collaboration with the US government.⁴³² The debate that preceded the approval of the law shows that the parliament was especially worried about the drug situation in West Germany between the end of the eighties' and the beginning of the nineties' of the last century.⁴³³ Therefore, the government decided to issue a *nationaler Rauschgiftbekämpfungsplan*, a domestic policy to tackle the drug problem. Furthermore, the Parliament was concerned about the great annual turnover obtained by drug criminality in Germany, which was estimated in 1991 from two to four billion DM.⁴³⁴ Such immense amount of money was partly reinvested in drug trafficking and other criminal activities, but partly was infiltrated in the legal economy in order to produce legitimate profit.⁴³⁵ Germany was considered to be particularly propitious for organised crime's investments due to its strong legal system, to the prosperous economy and the stable currency, to the public infrastructure and the geographical position.⁴³⁶ The placement of dirty money in the legitimate economy was undertaken through activities that had a regular cash income

429 BT-Drucks. 12/3533, p. 12.

430 Yet, whether the federal state was bounded under international law directly by the Vienna Convention or by the EC Directive is controversial. See *Helmers*, 2009, p. (509) 509.

431 BGB I 1992, 1302.

432 *Remmers*, 1998, p. 28.

433 In particular the high number of dead people due to drug abuse that amounted to 2.096 in 1992, the amount of drug addicted estimated as 150.000 and the harm caused by drug trafficking to society raised the necessity of developing a more intense 'war on drugs'. BT-Drucks. 11/5525, pp. 2 ss.

434 BT-Drucks. 12/989, p. 20.

435 *Aepfelbach and Fülbier*, 1994, p. 2.

436 BT-Drucks. 12/2720, p. 2.

such as restaurants, bars, cinemas, casinos and greengrocers.⁴³⁷ Ill-gotten capital was invested also to fund or buy companies. This was considered particularly harmful because it would have allowed an unfair competition between illicitly and licitly conducted businesses.⁴³⁸ Both the economy and the financial system were, thus, abused for purposes of money laundering. Yet, the main motive that triggered the legislature to criminalise money laundering was the necessity of tackling drug-related organised crime. In fact, the legislature defined money laundering as a phenomenon related to organised crime: ‘The infiltration of properties deriving from organised crime in the legitimate financial and economic circle for the purpose of disguising them’.⁴³⁹ The connection between organised crime and money laundering was based on the fact that criminal organisations were said to pursue the highest profit possible, so that money laundering was considered a consequence of organised criminal activities.⁴⁴⁰ In this context, the German government recognised the importance of the ‘follow the money’ strategy and the possibility of tracking the paper trail (*Papierspur*) as a source of information for investigators.⁴⁴¹ The legislature hence was pursuing two goals with the introduction of Article 261 Gcc: A better disclosure of organised crime structures and the elimination of the economic incentive for organised crime to break the law through confiscation of ill-gotten gains and thus the isolation of offenders from their contexts.⁴⁴²

The first proposals for the introduction of specific norms directed at fighting the illegal traffic of psychotropic substances were drafted in 1990 by the government of Bayern and Baden-Württemberg.⁴⁴³ On the basis of those drafts, the Parliament formed a draft law that was contested because it contained very broad investigative instruments and it tightened the punishments for some offences.⁴⁴⁴ Financial

437 *Aepfelbach and Fülbier*, 1994, pp. 4, 5.

438 *Aepfelbach and Fülbier*, 1994, p. 2.

439 ‘Die Einschleusung von Vermögengegenständen aus Organisierter Kriminalität in den legal Finanz- und Wirtschaftskreislauf zum Zweck der Tarnung’. See BT-Drucks. 12/989, p. 26; BT-Drucks. 13/8651, p. 9; similar BT-Drucks. 12/3533, p. 11.

440 *GwG-Nestler*, 2014, § 261, mn 3.

441 BT-Drucks. 12/989, p. 26; BT-Drucks. 12/3533, p. 12.

442 In the second purpose the legislature included later also the fight against terrorism. See *NK-Altenhain*, 2013, § 261, mn. 7.

443 BR-Drucks. 74/90; BR-Drucks. 83/90.

444 BT-Drucks. 11/7663.

institutions,⁴⁴⁵ professionals associations and political institutions criticised particularly the formulation of the offence of money laundering.⁴⁴⁶ In the draft law of July 1991, the Parliament explained the motives that justified the adoption of the law by stressing the fact that criminality was alarming not only because of the increase of drug-related delinquency but also and especially because of the new organised way of acting and of the transnational dimension of the phenomenon.⁴⁴⁷ The parliamentarians' debate that accompanied the approval of the final text shows the complexity of the topic and the existence of conflicting interests.⁴⁴⁸ In particular, the

445 Zentraler Kreditausschuß, Stellungnahme zum Thema Drogenbekämpfung, 7/3/1990; *Steuer*, 1991, p. (138) 141.

446 BT-Drucks. 11/7663, pp. 49 ss; BT-Drucks. 11/6673; BT-Drucks. 11/5513. See also: *Caesar*, ZRP, 1991, p. (241) 242; *Fülber and Aepfelbach*, 1994, pp. 13-14; *Remmers*, 1998, p. 29.

447 BT-Drucks. 12/989, p. 20.

448 The states of Baden-Württemberg and Bayern re-proposed a new draft law on which there was a vivid discussion among the representatives of the different states. The debate is reported in an official document of the Bundesrat. See Bundesrat, Plenarprotokoll 629. Sitzung, 26.04.1991, p. 139-151. The two Bundesländern Baden-Württemberg and Bayern stressed the urgency of introducing the proposed legal novelties in order to preserve the security of the citizens. In particular, *Schlee* (CDU), Minister of the Interior of Baden-Württemberg, highlighted that the recent development of organised crime and drug criminality was alarming; he reported that victims of drug consumption has increased of 50% between 1989 and 1990. In addition, the governor pointed at the necessity of protecting victims of organised gangs of thieves, especially elderly people threatened by home burglary. Given organised crime's tremendous consequences for society, the state should take measures against it is not only in order to protect citizens' security, but also to enact a social policy. With the purpose of removing organised crime the financial basis to commit further crimes, the politician advocated the introduction of new criminal provisions, among others the money laundering offence. *Schlee* was of the opinion that organised crime represented a priority compared to other topics such as terrorism and asylum law. Also, threats posed by terrorism could be dealt together with those linked to organised crime. Dr. *Stoiber* (CSU), representative of the Bundesland Bayern motivated its cause by drawing attention on the facts that were happening in the US and in Italy at that time. In Italy, according to *Stoiber*, organised crime had contaminated the society, undermined the state integrity, increased taxes and threatened the personal security of every citizen. In addition, the politician drew attention on the immense volume of the mafia business that in the US amounted to 1,1 % of the GDP. With regard to money laundering, the Minister claimed that in the European financial centres, proceeds of crime were laundered silently by men with white collars, yet in Germany the media was not granting enough consideration to this topic. Finally, he described the draft law as a compromise, but still as a fundamental sign of engagement against organised crime that could not be ignored. Against these arguments, other parties reacted by highlighting the need to respect fundamental principles of the criminal legal system while tackling this new emergencies. Especially *Dr. Walter*, (Saarland, SPD) opposed the introduction of the draft law by saying that the new provisions would have left law enforcement agencies too discretion in dealing with organised crime, which would have infringed the rule of law. *Kröning* (Bremen, SPD) highlighted the conflict between the protection of security and the protection of the rule of law. While acknowledging the necessity of taking measures to combat organised crime, the politician argues that such measures should not violate constitutional requirements. In addition *Kröning* warned that because the new instruments relied on the know-how of law enforcement agencies, and given that such knowledge was yet not there, the effectiveness of the measures could be compromised. However, given the fact that a compromise was needed, and that the Parliament had spent the last three quarters of the year dealing with other issues, the member of the socialist party advocated for an agreement on the legal committee's compromise line. *Dr. Hohmann-Denhardt* (Hessen, SPD) welcomed the draft law, at the condition that secret criminal procedural

participants can be easily divided in two groups, one composed of politicians, law enforcement forces, public prosecutors and judges, who advocated for the adoption of almost all legal novelties, the other one comprise attorneys and scholars, who, instead, contested the constitutional legitimation and the efficiency of the new instruments.⁴⁴⁹ Yet, the final decision was taken more under the influence of political interests and the pressure from the media.⁴⁵⁰

The parliament discussed this draft together with a proposal of the social-democratic party (SPD),⁴⁵¹ and after a public hearing of the committee on legal affairs of the Parliament in January 1992, the final text was adopted.⁴⁵²

investigative instruments should have been limited. With this regard, the Hessen Minister stated there cannot be any compromise on the rule of law. The same approach was taken by *Trittin* (Niedersachsen, Bündnis 90/Die Grünen), who welcomed the agreement on the draft legislation, despite the complexity of the issue, yet refused to endorse the new investigative rules. Last intervention is provided by the Minister of Justice, *Dr Kinkel* (FDP). The Minister confirmed the complexity of the thematic and recalled that such complexity was revealed also in the coalition agreement. Yet, he underlined the importance of introducing the money laundering offence in order to allow the confiscation of proceeds of crime and therefore making the commission of offences less attractive. The Minister addressed the audience by recalling the murder of *Rohwedder* by the Rote Armee (*Rohwedder* was the president of the governmental agency directed at privatising East German enterprises, the 'Treuhandstalt', and was killed on 1st April 1991 by the Rote Armee) and the threat posed by terrorism. Yet, he argued that a constitutional state should not violate the rule of law while defending itself from terrorists' attack. In the fact he promised that, together with *Schaueble*, the then Minister of Internal Affairs, they were building a 'militant democracy' and thus they wanted to avoid a control over the citizens or groups of them. The Minister of Justice welcomed the introduction of the secret investigations and the *Rasterfahndung* (computer-based research of suspects), but claimed that the assembly should have not roused wrong reactions (from the public). In conclusion, the politician advocated for the achievement of a compromise upon the draft law, given the difficulty of the situation and the lack of other solutions. The exact result of the vote can be found in Bundesrat, Plenarprotokoll 629. Sitzung, 26/04/1991, p. 151. The new text was then drafted and proposed to the Parliament; see BR-Drucks. 219/91.

449 *Sotiriadis*, 2010, p. 173.

450 *Sotiriadis*, 2010, p. 174.

451 BT-Drucks. 12/731.

452 The current offence reads as follow: (1) *Whosoever hides an object which is a proceed of an unlawful act listed in the 2nd sentence below, conceals its origin or obstructs or endangers the investigation of its origin, its being found, its confiscation, its deprivation or its being officially secured shall be liable to imprisonment from three months to five years. Unlawful acts within the meaning of the 1st sentence shall be 1. felonies; 2. misdemeanours under (a) Section 332 (1), also in conjunction with subsection (3), and section 334; (b) Section 29 (1) 1st sentence No 1 of the Drugs Act and section 19 (1) No 1 of the Drug Precursors (Control) Act; 3. misdemeanours under section 373 and under section 374 (2) of the Fiscal Code, and also in conjunction with section 12 (1) of the Common Market Organisations and Direct Payments (Implementation) Act; 4. misdemeanours (a) under section 152a, section 181a, section 232 (1) and (2), section 233 (1) and (2), section 233a, section 242, section 246, section 253, section 259, sections 263 to 264, section 266, section 267, section 269, section 271, section 284, section 326 (1), (2) and (4), section 328 (1), (2) and (4) and section 348; (b) under section 96 of the Residence Act and section 84 of the Asylum Procedure Act and section 370 of the Fiscal Code, section 38(1) to (3) and (5) of the Securities Trading Act as well as sections 143, 143a and 144 of the Act on the Protection of Trade Marks and other Symbols, 106 to 108b of the Act on Copyright and Related Rights, 25 of the Utility*

The law OrgKG entered into force in 1992 and bound the Parliament to introduce the new offence of money laundering in the penal code by January 1993. Public expenditure, both at federal and state level, was expected; however, it was not possible to calculate them yet. In particular, due to the introduction of new offences and of an enhanced international cooperation, public authorities were required to tighten monitoring measures and activities, the costs being covered by the states or by the federal state.⁴⁵³ However, since public institutions were expected to profit from asset recovery measures, which should be able to bring some, not yet quantifiable, income, an economic burden for the public was not expected.⁴⁵⁴

Money laundering was defined in the draft law of the government that implements the Vienna Convention as the systematic concealing of objects through the financial

Models Act, 51 and 65 of the Design Act, 142 of the Patent Act, 10 of the Semiconductor Protection Act and 39 of the Plant Variety Rights (Protection) Act. which were committed on a commercial basis or by a member of a gang whose purpose is the continued commission of such offences; and 5. misdemeanours under section 89a and under section 129 and section 129a (3) and (5), all of which also in conjunction with section 129b (1), as well as misdemeanours committed by a member of a criminal or terrorist organisation (section 129 and section 129a, all of which also in conjunction with section 129b (1)). The 1st sentence shall apply in cases of tax evasion committed on a commercial basis or as a gang under section 370 of the Fiscal Code, to expenditure saved by virtue of the tax evasion, of unlawfully acquired tax repayments and allowances, and in cases under the 2nd sentence no 3 the 1st sentence shall also apply to an object in relation to which fiscal charges have been evaded. (2) Whosoever 1. procures an object indicated in subsection (1) above for himself or a third person; or 2. keeps an object indicated in subsection (1) above in his custody or uses it for himself or a third person if he knew the origin of the object at the time of obtaining possession of it shall incur the same penalty. (3) The attempt shall be punishable. (4) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of money laundering. (5) Whosoever, in cases under subsections (1) or (2) above is, through gross negligence, unaware of the fact that the object is a proceed from an unlawful act named in subsection (1) above shall be liable to imprisonment of not more than two years or a fine. (6) The act shall not be punishable under subsection (2) above if a third person previously acquired the object without having thereby committed an offence. (7) Objects to which the offence relates may be subject to a deprivation order. section 74a shall apply. section 73d shall apply if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of money laundering. (8) Objects which are proceeds from an offence listed in subsection (1) above committed abroad shall be equivalent to the objects indicated in subsections (1), (2) and (5) above if the offence is also punishable at the place of its commission. (9) Whosoever 1. voluntarily reports the offence to the competent public authority or voluntarily causes such a report to be made, unless the act had already been discovered in whole or in part at the time and the offender knew this or could reasonably have known and 2. in cases under subsections (1) or (2) above under the conditions named in No 1 above causes the object to which the offence relates to be officially secured shall not be liable under subsections (1) to (5) above. Whosoever is liable because of his participation in the antecedent act shall not be liable under subsections (1) to (5) above, either.

453 BT-Drucks. 12/3533, p. 10.

454 BT-Drucks. 12/3533, p. 11.

system with the purpose of avoiding access by law enforcement in order to maintain its economic value (*systematische Tarnung von Vermögenswerten mit den Mitteln des Finanzmarktes, um sie dem Zugriff der Strafverfolgungsorgane zu entziehen und in ihrem wirtschaftlichen Wert zu erhalten*).⁴⁵⁵ The offence was included in the particular part of the German penal code, chapter 21, dedicated to the assistance after the fact and handling stolen goods and was listed among the *Anschlussdelikte*, the derivative offences, namely the offences built on the commission of other offences, defined as the antecedent or predicate offences. The formulation introduced with the law OrgKG under Article 261 Gcc reflected Article 3 b, c (I) of the Vienna Convention, which differentiated between the concealing-offence (*Verschleierungstatbestand*) according to Article 261 (1) Gcc and the acquisition, the possession and the use of the criminal property, (*Erwerbs-, Besitz- und Verwendungstatbestand*) regulated under Article 261 (2) Gcc. The first conduct, constituting of acts directed at ensuring the enjoyment of proceeds of crime without fearing law enforcement repression, was considered harmful for the administration of justice. The second one, instead, was directed at impeding the procurement, the use, and the keeping of contaminated objects also by third parties. By punishing any contact with the ill-gotten property, the legislator aimed at isolating perpetrators and thus at eliminating incentives for engaging in the predicate offences. This function earned the second paragraph the name of 'isolation conduct'. The legislature aimed at isolating criminals by impeding them the access to the legitimate economy, and this was especially achieved by criminalising the providing, the storage, and the use also by third persons of the criminal property (Article 261 (2) Gcc).⁴⁵⁶

The legislature used the term 'object' (*Gegenstand*), instead of property, because the latter was not legally defined and because it was meant to cover a broad range of items economically valuable, regardless of the specific value. The expression *herrühren*, which means 'derived from an unlawful act', refers to the link between the

455 BT-Drucks. 12/3533, p. 12.

456 According to some scholars the provision criminalises three typologies of conducts: The concealing offence described in article 261 (1) Gcc, the avoidance of prosecution and confiscation, according to article 261 (1) 1) 2 Gcc, and the isolation conduct regulated in article 261 (2) Gcc. See NK-*Altenhain*, 2013, § 261, mn. 8, 9.

antecedent illegal act and the following acts. Both terms are subject of vivid controversies, as it will be shown in the third chapter.

Article 261 (4) envisages an aggravating punishment, from six months to ten years, for serious cases, namely 'if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of money laundering'. With this provision, the legislature tried to include the link with organised crime and terrorisms. In particular, the commission in form of a gang exists also when the offender of the antecedent crime acted in her or his interest or belongs to a mixed gang that has been created for the exact purpose of laundering the proceeds of crime. The legislature set a low burden of proof to facilitate the prosecution of organised and terrorist organisations.⁴⁵⁷

Article 261 (5) criminalises the reckless conduct. The decision of punishing even the reckless hypothesis has been long debated during the legislative process. The legislature declared that the introduction of the provision was necessary to avoid problems of evidence and thus allow a more effective fight against money laundering.⁴⁵⁸ The recklessness relates yet only to the illegal origin of the objects, while the other characteristics of the *actus reo* shall be covered by intention.⁴⁵⁹ Yet the problem arises with regard to Article 261 (2) Gcc, which requires knowledge by the offender of the illegitimate origin of the property. The reckless lack of knowledge exists already in the moment in which the actor receives the object.⁴⁶⁰

The degree of evidence required in relation to the antecedent act is the existence of an offence belonging to the catalogue of predicate offences. This has to be demonstrated along general lines, there is no need to know the identity neither of the offender nor of the characteristics of the antecedent act.⁴⁶¹ Previous convictions for a predicate offence for money laundering, decision on predicate offence can be used in the

457 See NK-*Altenhain*, 2013, § 261, mn. 43.

458 BT-Drucks. 989, p. 27.

459 BT-Drucks. 12/989, p. 28. See also *Schmidt and Krause*, 2010, StGB-*Fischer*, § 261, mn. 38.

460 *Schmidt and Krause*, 2010, StGB-*Fischer*, § 261, mn. 40.

461 See NK-*Altenhain*, 2013, § 261, mn. 49.

money laundering proceeding. However, the judge in the money laundering case would have to determine the existence of the antecedent law breaking.⁴⁶²

The declared function of the new provision was, according to an official statement of the Parliament, to confiscate organised crime's ill-gotten gains in order to impede that proceeds of crime would constitute the 'operating capital' (*Betriebskapital*) for the commission of further offences.⁴⁶³ In other words, the threat of criminal liability linked to the introduction of 261 Gcc (1) and (2) should have kept citizens far from illegal profits and should have made the commission of further crimes non profitable and thus not worth it violating the law.⁴⁶⁴ Indeed, the German provision went beyond the offence set out in Article 3 that referred only to property derived from drug-related offences of the Convention and included proceeds of other offences committed by a member of a criminal organisation (as defined by 129 Gcc) and proceeds of any crime (261 (1) 1 and 3 Gcc). Basically, three categories of predicate offences were included: Serious crimes, offences in violation of law on psychotropic substances and offences committed by a member of a criminal organisation. The government expressively did not opt for the all-crimes approach in order not to broaden the criminalisation too much.⁴⁶⁵ Yet, according to other statements published by the Parliament, the article ought to have impeded the infiltration of monies deriving from organised crime and related serious criminality in the legitimate economy. While this was the direct goal, the indirect purpose of the legislature would have been to avoid the distortion of the existing economic system.⁴⁶⁶

Despite the unanimous consensus on the necessity of criminalising money laundering, some issues relating to the introduction of this new offence were considered controversial. For instance, there were conflicting opinions about the level of *mens rea* required with respect to the illegal provenance of the assets in order to punish the

462 See NK-*Altenhain*, 2013, § 261, mn. 48.

463 BT-Drucks. 12/2720, p. 2.

464 *Nestler*, 2010, GwG-*Herzog*, § 261, mn 12, 13.

465 BT-Drucks. 12/989, p. 27.

466 BT-Drucks. 12/989, p. 26; BR-Drucks. 507/92. See also Müko-*Neuheuser*, 2012, § 216, mn. 2, 3.

offender.⁴⁶⁷ The SPD supported the criminalisation of the mere negligent behaviour in order not to reduce the efficiency of the offence of money laundering.⁴⁶⁸ On the contrary, it was argued that this proposal would have been cumbersome for the economic cycle and for the free circulation of goods, to the point that anyone taking part in these activities could have been prosecuted for money laundering. The debate reflects the underlying question whether the norm should be directed to effective law enforcement or to the security of the general business volume (*Geschäftsverkehr*). The solution was found in the following compromise: only the reckless money laundering (*leichtfertige*), under paragraph 5 of Article 261 Gcc (*leichtfertigen Begehung*), but not the mere negligent (*fahrlässig*), was criminalised. Recklessness is a heightened degree of negligence, by way of negative definition it constitutes a negligent behaviour and not an intentional one. Yet, under German law, property crimes and derivative crimes are always committed intentionally and not negligently.

In addition, the introduction of Article 261 Gcc raised concern with regard to already existing provisions, such as Article 258, Article 259, Article 257 Gcc, which punished conducts connected to money laundering. According to the legislature, there was the necessity to create a new offence in order to fill the loopholes of the then current legal framework.⁴⁶⁹ In particular, the offence of receiving and handling stolen goods (Article 259 Gcc) required that the properties direct derivation from the crime and thereby did not cover further transactions. The offence of obstruction of punishment (Article 258 Gcc) covered only those cases of money laundering when the act is committed with the intention of avoiding prosecution or forfeiture, while the hypothesis of accessory after the fact (Article 257 Gcc), which was based on the concept of *Begünstigung* (aiding and abetting), criminalised only cases when the proceeds of the crime were still held by the offender who committed the predicate offence.⁴⁷⁰ Yet, the Federal Government recognised, while answering to a query

467 BT-Drucks. 12/2720, p. 43.

468 BT-Drucks. 12/731, p. 3.

469 BT-Drucks. 12/3533, p. 26.

470 For a detailed analysis of the legal loopholes covered by the new offence, see *Aepfelbach and Fülbier*, 1994, pp. 22, 23; *Leip*, 1999, pp. 9-31.

posed by some members of the Parliament,⁴⁷¹ that whether the provisions previously existing have served the purpose of punishing certain typologies of money laundering could not be inferred from the criminal statistics.⁴⁷²

According to the declared motivations, the goal of the OrgKG law was, besides criminalising money laundering, to enhance confiscation of profits made by organised crime, to achieve a higher criminal deterrence effect through the tightening of penalties, and to improve the available investigative instruments and the programme of witnesses' protection.⁴⁷³ The OrgKG law contained twelve articles that, besides giving birth to the offence of money laundering under German law, introduced novelties in substantial and procedural criminal law.⁴⁷⁴ With the goal of breaking through the financial flow and to put an end to the ineffectiveness of the previous asset forfeiture mechanism, Article 1 of OrgKG introduced a confiscatory expropriation order.⁴⁷⁵ With the same goal of improving the system of confiscation of asset, the law introduced the hypothesis of the 'extended confiscation'. At the time current provisions were not considered suitable to attack organised crime, since in case of serious crimes custodial sentences were preferred. Furthermore, the confiscation of property was possible, until that time, only when the property was

471 BT-Drucks. 12/2803.

472 BT-Drucks. 12/3956, p. 26.

473 *Aepfelbach and Fülbier*, 1994, p. 14.

474 Tighter penalties were introduced with a general-preventive goal but also with the idea to balance the punishment with the seriousness of the conducts, BT-Drucks. 12/989, p. 1. Article 1 of OrgKG (Änderung des Strafgesetzbuchs) modified several provisions of the German criminal code, among them, it tightened penalties for article 244a Gcc (serious theft committed by gangs), articles 260 and 260a Gcc (receiving of stolen goods, also if committed by gangs, for commercial purposes).

475 *Remmers*, 1997, p. 31. According to the new article 43a, the imposition of a *Vermögensstrafe* was released by the daily rate and was estimated, instead, on the whole asset of the defendant. Currently article 43 a Gcc states that '(1) If the law refers to this provision the court may, in addition to imprisonment for life or for a fixed term of more than two years, order payment of a sum of money the amount of which shall be limited by the value of the offender's assets (confiscatory expropriation order). Material benefits which have been confiscated shall not be taken into account when assessing the value of the assets. The value of the assets may be estimated. (2) Section 42 shall apply *mutatis mutandis*. (3) The court shall indicate a term of imprisonment which shall be substituted if the amount cannot be recovered (default imprisonment). The maximum term of default imprisonment shall be two years, its minimum one month'. Such penalty could be inflicted also on the basis of a mere suspect that the asset had an illegal provenance, every time that a custodial sentence of minimum two years was imposed and that 43 s Gcc was recalled. The old system was considered ineffective because of the too high burden of proof, which was set by article 73 (1) Gcc to allow the confiscation order. Yet, the legislature recognised immediately the very invasive nature of the novelty, which, indeed, has been heavily criticised, also by the federal constitutional court.

proven to be originated from crimes for which the launderer has already been convicted.⁴⁷⁶ In other words, the confiscation was conviction based as opposed to civil forfeiture. Under Article 73d, 1 (1) Gcc was, thus, introduced, a type of non-conviction based confiscation, which allowed law enforcement to expropriate assets under lighter conditions in case of a high probability that they stemmed from a crime, without having to prove the commission of it. This provision was object of harsh criticism in Germany, while in other countries, such as Italy, it is considered a very useful instrument in the fight against mafia. Due to the ever professionalism of criminals and to the networked-structure of criminal organisations, new investigative measures were needed in order to be able to catch those acting behind the facade, such as financial services' providers.⁴⁷⁷ Therefore the legislation, under Article 3 (*Änderung der Strafprozessordnung*) introduced changes in the code of criminal procedure too.

Article 261 Gcc has been modified very often, mostly to extend the list of predicate offences. The most recent amendment entered into force on the 26th of November 2015. In particular, the act to fight against corruption (*Gesetz zur Bekämpfung der Korruption*) introduced two new predicate offences, namely, Article 299 Gcc, 'Taking and giving bribes in commercial practice', and Article 355a Gcc, which punishes the '[t]aking bribes meant as an incentive to violating one's official duties' and the 'Giving bribes as an incentive to the recipient's violating his official duties' in relation to international civil servants. The most important and discussed novelty introduced by the act to fight against corruption is the elimination of the exemption of punishment.⁴⁷⁸ The provision excludes the criminal liability for those who participated in the predicate offences, out of the cases in which the offenders put in circulation the objects deriving from the offences, in order to conceal their illegitimate origin (Article 261 (9) 2 Gcc). In Germany 'self-money laundering' had remained unpunished for long time, despite the existence of obligation to criminalize it under international standards. The jurisprudence confirmed the decision of

476 Remmers, 1997, p. 39.

477 BT-Drucks. 12/989, p. 21.

478 Article 1, BGBl. I S. 2025.

excluding personal criminal liability for someone who was already involved in the antecedent act, also if the act was committed abroad.⁴⁷⁹ The Ministry of Justice and other actors took a strong position to protect the rule, yet Germany was bound both by the FATF Recommendations and by the EU to introduce a new criminal liability.⁴⁸⁰ In June of the same year, the legislature introduced in the list of predicate offences the crime of terrorist financing, regulated by the new Article 89 c Gcc.⁴⁸¹ In 2014, along with the introduction of a new provision that punished the bribing of members of the parliament under Article 108 e Gcc, which allowed Germany to ratify UNCAC,⁴⁸² the scope of Article 261 Gcc was extended to include as antecedent act the 'bribing delegates'.⁴⁸³ With the act to improve the fight against money laundering and tax evasion of 2011 (*Gesetz zur Verbesserung der Bekämpfung der Geldwäsche und Steuerhinterziehung*) fiscal offences were included in the list of predicate crimes.⁴⁸⁴ Other major amendments were introduced in 2008 through the act to improve the fight against money laundering and terrorist financing (*Gesetz zur Ergänzung der Bekämpfung der Geldwäsche und der Terrorismusfinanzierung, Geldwäschebekämpfungsergänzungsgesetz - GwBekErgG*),⁴⁸⁵ which also implemented the Third EU Anti-Money Laundering Directive. In 2002, with the law on the suppression of money laundering and combating the financing of terrorism (*Gesetzes zur Verbesserung der Bekämpfung der Geldwäsche und der Bekämpfung der Finanzierung des Terrorismus, Geldwäschebekämpfungsgesetz*),⁴⁸⁶ and in 1998

479 BGH NStZ 1995, 500. See also *Schmidt and Krause*, 2010, *StGB-Fischer*, § 261, mn. 50.

480 See, in particular, *Schröder*, 2013. The German federal bar association published an official opinion on the proposal of excluding the exemption of punishment pursuant to article 261 (9) 2 Gcc, in which it expressed a strong scepticism. In particular, the bar association argues that the novelty would have been constitutional illegitimate because it would have infringed the principles of *ne bis in idem* and of legality. Bundesrechtsanwaltschaft, Stellungnahme Nr. 33/2015 p. 3, available at <http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2015/september/stellungnahme-der-brak-2015-33.pdf>, last accessed on 23/11/2015.

481 Article 1 of the GVVG-Änderungsgesetz (GVVG-ÄndG) of 12/06/15, BGBl. I S. 926.

482 BT-Drucks. 449/14.

483 Article 1 of the Achtundvierzigstes Strafrechtsänderungsgesetz-Erweiterung des Straftatbestandes der Abgeordnetenbestechung of 23/04/14, BGBl. I S. 410.

484 BGBl. I 676.

485 BGBl. I 37.

486 BGBl. I 02, 3105. Other major amendments to article 261 were introduced by the *Steuerverkürzungsbekämpfungsgesetz* of 2002, the *Gesetz zur Neuregelung der Telekommunikationsüberwachung* of 2008, the *Gesetz zur Ergänzung der Bekämpfung der Geldwäsche und der Terrorismusfinanzierung* of 2008, which implemented the Directive 2005/60/EC, the *Geldwäschebekämpfungsergänzungsgesetz*, *GwBekErgG* of 2008, the *Gesetz zur Verfolgung der*

with the act on improving measures to combat organised crime (*Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität*).⁴⁸⁷

From the beginning of the existence of Article 261 Gcc, it was clear that the provision was strictly linked with the regulations on the banking system. It was, indeed, observed, that the offence of money laundering would have been effective only if banks would have collected information and reported suspicious transactions to law enforcement agencies.⁴⁸⁸ The Federal Government in 1992 stated that an effective fight against money laundering was dependent on the possibility for law enforcement agencies to get evidence of money laundering transactions, by gaining access to financial documents. In fulfilment of this necessity, the money laundering act (*Geldwäschegesetz*, GwG) was adopted and entered into force on the 30th of November 1993,⁴⁸⁹ also in order to give complete implementation to the EC Directive 91/308/EEC. The main points of the GwG were the obligation imposed to credit and financial institutes of identifying clients (Article 1 (1) (2) GwG) and detecting beneficial owners (Articles 2, 6, 8 GwG), in the public interest of law enforcement agencies,⁴⁹⁰ the obligation of collecting information and keeping records about clients (Article 9 GwG) in order to facilitate the tracking of paper-trails, and the last but not the least, the duty to report suspicious transactions to the designated authority and the eventual interruption of such transactions (Article 11 GwG). Especially Article 11 of the anti-money laundering act set the collaboration between the private sector and law enforcement agencies directed at investigating money laundering. In fact, financial investigations on money laundering can be triggered by the collection of information in the context of another proceeding, for instance, about the predicate offences, or by specific preliminary investigations on the basis of a STR.

Most relevant changes to the anti-money laundering act are the anti-money

Vorbereitung von schweren staatsgefährdenden Gewalttaten of 2009, which established the financing of terrorism as predicate offence for money laundering. BGBl. I, 3922; BGBl. I, 3198; BGBl. I 1690.

487 BGBl. I 845.

488 *Remmers*, 1997, p. 45.

489 BGBl. 1993 I, p. 1770.

490 For a critical view on the use of such information for fiscal purposes, see *Dieter and Klos*, 1994, p (135) 135ss.

laundrying act of 2008⁴⁹¹ and the act to optimise money laundrying prevention (*Geldwäschoptimierungsgesetz*).⁴⁹² Since 2002, the Financial Intelligence Unit (FIU) was established in the BKA, as an intermediary between law enforcement and obliged entities. The FIU's mandate is supporting the federal and state police forces in the prevention and prosecution of money laundrying, and in particular, collecting and analysing suspicious transactions reports transmitted pursuant to Sections 11 and 14 of the act by the obliged entities.⁴⁹³ The STRs are put in a database and monitored as to whether there are grounds to justify an initial suspicion of a money laundrying offence, or an underlying offence under Article 261 Gcc, or any other criminal offence. The analysis results obtained in this connection are summarised in a report, which is then passed on to the relevant specialised office or public prosecutor's office. Among the cases received by the FIU, some are classified as noteworthy on the basis of indicators, as the amount of the transactions reported, the persons involved, other significant case-specific features, or to the high level of public interest (media coverage).⁴⁹⁴ In addition, the FIU maintains statistics on STRs received and analysed, follow up to those reports, cases investigated, numbers of prosecutions and convictions, property and assets frozen, seized or confiscated, in order to publish an annual report. Another relevant institution in the context of money laundrying prevention is the Federal Financial Supervisory Authority (BaFin), which monitors the financial sector and sanctions noncompliance with the measures, according to articles 16 and 17(4) of the GwG. Moreover, the authority has powers to issue rules, regulations or other enforceable instruments with respect both to individual institutions and to single institutions or groups of institutions.

2.4 Considerations

The analysis of the national law-making process is relevant to stress the divergent opinions and expectations relating to the criminalisation of money laundrying. The Parliamentarians debate that took place with regard to the introduction of the money

491 BGBI. 2008 I, p. 1690.

492 BGBI. 2011 I, p. 2959.

493 According to article 11 (1) and 14 (1) obliged entities shall report suspicious transactions both to the FIU and to the local police criminal office (*Landeskriminalamt*).

494 FIU Report 2013, p. 27.

laundering offence and other instruments to tackle drug-trafficking shows that the discussion was deeply embedded in the political-historical context. Given that Germany was just reunified after a period of two dictatorial regimes, the hearing gives the impression that lawmakers felt the responsibility of creating a new legal system against such historical background. In order to balance the very different legal cultures, the divergent approaches had to be compromised. The introduction of a new crime was particularly delicate due to the discriminatory and arbitrary use of criminal labels by the previous dictatorial regimes. Therefore, delegates would not easily give up on fundamental rights for the cause of persecuting criminals. The legislation can be seen as an attempt to balance the need to adopt more effective measures to tackle crime and the necessity of respecting the rule of law and creating a 'militant democracy'. Yet, given the external pressure of the FATF, the EU and of the media, the text was less of a compromise and rather a ratification of 'internationally' accepted standards.⁴⁹⁵ The rule of law was not the only issue emerged in the initial phase of the political debate. Controversial opinions were raised also with regard to the questions of the *mens rea* and the interest protected by the new criminal provision: Certain political parties such as the SPD supported the broadest criminal liability to ensure an effective prosecution of money laundering, other parties like the CDU were worried that a widespread liability would have been cumbersome for the economic system. Diverse were also the functions attributed to the criminalisation of money laundering, from the fight against organised crime, which was more of a concern for the CDU, to the elimination for incentives for any crime, or the protection of the economic system and of the fair competition from the infiltration of ill-gotten gains. Moreover, along with the expansion of the international criminal legal framework to fight against money laundering, also the scope of Article 261 Gcc was extended to include ever-new predicate offences. The eventual impact of those controversial issues and of the enlargement of the money laundering offence on the legitimacy and thus on the acceptance of the provision by legal scholarship is analysed in the following chapter. The underlying hypothesis based on the reflections spelled out in

495 In particular *Arzt* observes that the German government was under pressure of the US government, which wanted to collect information on financial transactions. See *Arzt*, 1997, p. 27. See also *Sotiriadis*, 2010, p. 174.

the first chapter is that a provision that integrates with difficulty in a legal system may be doomed to be dis- or mis- applied.

The underlying hypothesis that describes Article 261 Gcc as an example of a symbolic legislation directed at compromising contrary legislative interests can be supported by the outcomes of this chapter, which has underlined the diverse expectations more or less manifested by lawmakers and the diverse functions attributed to the policy in the course of its development, both at a transnational and at a national level.

3 CHAPTER

'Doctrinal legal scholarship about Article 261 of German criminal code'

'Gegen Kriminalität, deren Bekämpfung sich nicht lohnt, sind primär symbolische, wenig bis nichts kostende Massnahmen zu ergreifen' (*Arzt*, 2013, p. 1136).⁴⁹⁶

3.1 Foreword

This chapter continues the case study on the effectiveness of the money laundering offence under German law, by looking at one of the determining factors for a sociological research on the criminal law's effectiveness listed in chapter one, namely the norm's reception by legal actors. After having analysed the manifest and latent intentions of the legislature for the criminalisation of money laundering and the eventual symbolic functions attributed to the law, the research proceeds with the examination of the legal scholarship's reception of the provision, by looking in particular at the opinions of legal actors that constitute, according to Friedman, the internal legal culture.⁴⁹⁷ While this chapter looks at the perception of legal scholarship as part of the internal legal culture, chapter five focuses on the perception of practitioners. Due to the enormous amount of literature existing on this topic, interviews with single scholars were considered redundant.⁴⁹⁸ The underlying assumptions are that the level of acceptance expressed by legal scholars is a mirror of the level of integration in the system, and that the level of perceived legitimization of

⁴⁹⁶ English translation: 'Against a crime, whose repression is not worth it, it is resorted to symbolic measures costing few or nothing'.

⁴⁹⁷ *Friedman*, 1975, p. 135.

⁴⁹⁸ When contacted for an interview, one of the scholars suggested me to read his numerous publications on the topic. This made me think that I should have considered reading scholars' opinions instead of interviewing them.

the law is a determining factor of effectiveness.⁴⁹⁹ In order to understand the degree of acceptance, the following paragraphs summarise the doctrinal debate surrounding the criminalisation of money laundering. The introduction of Article 261 Gcc has triggered controversial issues, some of which have not been settled yet; this is considered a symptom of the difficulty of integrating the provision in the domestic criminal legal system. The aim is to draw attention to those particular controversial challenges raised by the formulation and the further widening of the money laundering offence that constitute an obstacle to the effective enforcement of the law. Given that the national law-making process has been much influenced by the transnational one, controversial issues may arise also from the transposition of international clauses. For it is particularly in regard to criminal law that states are still reluctant to give up their sovereignty. It is, therefore, of crucial importance whether overarching anti-money laundering policies respect the principles embedded in national legal cultures.

The expected outcome is the formulation of hypotheses on the motives of legal hindrances and on their potential impact on the application of the law. The following paragraphs discuss specifically these issues: The interests protected by Article 261 Gcc, the broad and vague wording of Article 261 Gcc, the criminalisation of the reckless conduct (*leichtfertige Geldwäsche*); finally it concludes with a summary of critical opinions on the (in)adequateness of the provision to serve its goals on its hypothesised symbolic dimension. This chapter analyses the opinions of legal scholars about Article 261 Gcc by focussing mainly on the challenges that have emerged so far in relation to the potential applicability of the norm and to legal obstacles encountered in the implementation of it. The underlying hypothesis is that the level of integration of a legal provision in a legal order impacts on its application and thus on its effectiveness. The level of acceptance expressed by legal scholarship is considered the mirror of the level of integration in the system. The expected outcome would have been the formulation of a hypothesis on the motives of such legal issues and on their consequences with regard to the effective application of the law. The chapter furthermore questions whether the offence of money laundering is an adequate tool to cope with money laundering from a theoretical perspective, by

499 In chapter one it has been argued that the perceived level of legitimacy affects the effectiveness of a provision. See chapter one, paragraph 1.2.

looking at the potentiality to achieve its goals. In particular, the chapter refers to legal scholarship production with regard to challenges posed by the introduction of the money laundering offence and with regard to the potential of the law to tackle issues, such as dirty money and illicit financial flows, which are embedded in the current deregulated financial system. The debate aims at contributing to the more general discussion on the suitability of criminal law to regulate economic matters.

3.2 The interests protected by the law: All interests or no interest?

Before looking at the controversial debate about the interests protected by Article 261 Gcc, few words are spent to contextualise the issue in the more general discussion on the limits and the functions of criminal law, and in particular on the legally protected interests. As the theoretical framework set in chapter one shows, a research on the effectiveness of criminal law must take into consideration some peculiar factors that refer to penal law; one of them is the fact that criminal law as per definition is a harmful tool, which in order to protect some interests, causes harm to the offenders. Given that the criminalisation of conducts is a question of labelling some behaviours as deviant in opposition to those that are compliant, it is fundamental to limit the labelling power between the constraints of a reasonable use of the repressive tool. In particular, chapter one recalls German scholar *von Liszt's* theory of purpose, which sets forth that the resort to penal law should be economised to achieve certain goals.⁵⁰⁰ *Von Liszt*, together with *Birnbaum*⁵⁰¹ and *Binding* theorised the concept of legally protected interests.⁵⁰² The so-called '*Rechtsguts-theory*'⁵⁰³ was based on the presumption of the existence of some particularly relevant goods, whose protection legitimised the use of the repressive public power. The resort to criminal law ought to be limited to the protection of those goods. Hence, the *Rechtsguts-theory* ought to limit the borders of criminal law.

The doctrinal debate is particularly vivid among Germans legal scholarship;⁵⁰⁴ scholars have engaged especially in trying to define the concept of *Rechtsgut*; a modern definition refers to 'the conditions and the aims needed for free development

500 *Von Liszt*, 1882. See also chapter one, paragraph 1.3.

501 *Birnbaum*, 1834.

502 *Binding*, 1872.

503 The term '*Rechtsguts-theory*' is used by *Ambos*, 2015 pp. (301) 305ss.

504 Common law applies instead the harm principle.

of the individual, for realisation of his fundamental rights, and for the proper functioning of state institutions that are needed for these purposes'.⁵⁰⁵ Recent discussions focus on the question whether the legally protected interest represents a 'critical, liberal' border for criminal policy that limits state intervention to the protection of only certain qualified interests, or it is a discretionary tool that perpetuates class inequalities through the selectivity of criminal punishment. According to the first approach,⁵⁰⁶ the state is allowed to punish only those conducts that harm or at least endanger legally protected interests. In other words, it is to say that there is no offence without harm to a legally protected interest (*bene giuridico*),⁵⁰⁷ and that the harm to a legally protected interest is a *conditio sine qua non* for criminalisation.⁵⁰⁸ The second viewpoint has criticised the *Rechtsguts*-theory for being imprecise, arbitrary and inconsistent, because the concept of *Rechtsgut* is still controversial,⁵⁰⁹ and thus the theory does not rely on pre-existing goods, nor it provides criteria to determine those goods.⁵¹⁰ The German constitutional court, due to the uncertainty surrounding this concept, has so far preferred to apply the well-established principle of proportionality while evaluating criminal provisions' legitimacy.⁵¹¹ Yet, the debate is still open, because, according to some scholars, even the proportionality principle has not managed to provide a foreseeable outcome.⁵¹² 'In fact it is fair to say that the constitutional processes and value judgments have proven to be open enough to justify almost any outcome [...]. This, in turn, shows that the *Rechtsgut*-concept is, at least compared to any constitutional standard, not as empty and vague as some have criticised.'⁵¹³ *Hassemer* has defended the personal *Rechtsgut*-concept (*personaler Rechtsgutsbegriff*), by referring to the theories of *von Liszt*.⁵¹⁴

505 Definition provided by *Roxin*, 2010, § 2 mn. 7-9.

506 *Amelung*, 1972, p. 302ss; *Appel*, 1998, pp. 344, 381ss; NK-*Hassemer*, 2010, § 1 mn. 108ss, 146ss; *Roxin*, 2006, § 2, mn. 1ss.

507 *Marinucci and Dolcini*, 2006, p. 6.

508 *Paliero*, 1992, p. 449.

509 *Helmerts*, 2009, p. 514, 515.

510 See *Amelung*, 1972, pp. 261-272; *Frisch*, 2003, pp. 216-218; *Hörmle*, 2005, pp. 11 ss; *Seher*, 2003, pp. 44, 46; *Stratenwerth*, 1998, pp. 378-381; *Wohlers*, 2000, pp. 213 ss., 2003, p. 281; *von Hirsch*, 2003, p. 18.

511 See, for example, BVerfG Decision 2 BvR 392/07 of 26 February 2008, para. 39, BVerfGE 120, 224-273. About this case, see also *Ambos*, 2015, p. (301) 307; *Roxin* 2010, pp. (573) 580-582; 2006, § 2 mn. 86-87, 89; *Schünemann*, 2003, pp. 142-149.

512 For example *Roxin* argued that the proportionality test gives too much discretion to the legislator. See *Roxin*, 2010, pp. (573) 584-585; 2006, § 2, mn. 93.

513 *Ambos*, 2015, pp. (301) 308, 309.

514 NK-*Hassemer*, 2010, mn. 131-148.

Far from being a philosophical question, this limitation concretely affects the manifestation of state power because it restricts public action both in the legislative and in the application phase. However, it has been observed that, for example among European countries, there is as yet no consensus on the interests protected by the offence of money laundering.⁵¹⁵ These differences reflect the fact that states have varying understanding of the purposes of anti-money laundering law, to the point that some perceive it as an anti-drug policy, some as a measure against tax evasion, and some as a tool to curb corruption. The European Directives justified primarily the criminalisation of money laundering with the necessity of protecting public confidence in the soundness of the financial system and secondarily with the need to tackle cooperatively transnational organised crime.⁵¹⁶ Hence the offence was directed at protecting various interests, 'ranging from individual ones, as property, to collective ones as state security'.⁵¹⁷ Given the different manifest and latent functions attributed to the offence of money laundering during the law-making process and along with the expansion process highlighted in the previous chapter, the lack of unanimity about the attributed goals should not surprise the reader.

In Germany, the controversy surrounding the demarcation of the interests protected by the offence of money laundering is particularly vivid. According to *Helmerts* the debate is even overwrought, since it seeks to find an element that should legitimise the offence and at the same time functions as yardstick for the restriction of its scope.⁵¹⁸ In other words, the scholar considers the doctrinal debate biased, because it aims at legitimising the provision ex-post, by allocating to the offence the protection of an interest. This is particularly dangerous since it tends to justify any means under a general protecting function.⁵¹⁹ On an even more critical note, *Helmerts* contends that the legitimacy of a criminal norm should be grounded in a different way than by

515 See *Unger et al.*, 2014, p. 237. For instance, in England the offence has been classified as drug-related offence (articles 49 - 52 of the English Drug Trafficking Act of 1994). Articles 305 bis and 305 ter of the Swiss criminal code are listed under the offences against the administration of justice; article 301 of the Spanish penal code includes the offence among those against the patrimony and against the socio-economic order; the Italian money laundering offence, regulated by article 648 bis, is included among the offences against property; French article 324 (1) belongs to the third book of the penal code on the offences against property, too.

516 *Vogel*, ZStW 109, 1997, p. (335) 351.

517 *Mitsilegas*, 2003, p. 105.

518 *Mitsilegas*, 2003, p. 105.

519 *Mitsilegas*, 2003, p. 105.

merely allocating any kind of function for the achievement of any type of purpose.⁵²⁰ Even the German constitutional court has declared that the determination of the interest (*Rechtsgutsbestimmung*) protected by Article 261 is vague and has recognised how complex it is to allocate a certain interest to the offence. Unfortunately the court has not taken the chance to appoint one. The doctrinal dispute reflects the various criminal policy intentions that have been expressed in the different conducts criminalised under the common umbrella of Article 261 Gcc. The legislature, indeed, identified different interests with regard to the two conducts punished by paragraphs 1 and 2 of Article 261 Gcc. According to the legislative statements, the legal interests protected by Article 261 (1) Gcc should have been the national administration of justice's task of eliminating the impact of crimes,⁵²¹ while Article 261 (2) Gcc should have protected the administration of justice but also any interest connected to the predicate offences.⁵²² The German Parliament further specified that the money laundering offence protects the rule of law by reducing the commission of further crimes.⁵²³ Yet, the indications provided by the legislature did not satisfy scholars, because it did not limit the scope of application of the money laundering offence through the application of the *Rechtsguts*-theory. It has been proposed to attribute three protecting functions to the offence: Ensuring asset forfeiture, supporting investigations, and protecting the interests connected to the predicate offence.⁵²⁴ Yet, also this approach does not offer a ground to limit the scope of application. Despite the situation of legal uncertainty, the judiciary has not taken action to narrow the question; in fact, the supreme federal court (*Bundgerichtshof*) has stated that the provision describes a unique unlawful content (*Unrechtsgehalt*), but did not specify this concept further.⁵²⁵

There are four main recognisable interests protected by Article 261,⁵²⁶ yet all of them have been criticised and there is no agreement among scholars. Given its nature as a derivative offence, the offence of money laundering is said to protect those interests connected with the predicate offences, which range from human life, property, the

520 *Helmers*, 2009, p. (509) 518.

521 BT-Drucks. 12/3533, p. 11.

522 BT-Drucks. 12/3533, p.13.

523 BT-Drucks. 12/989, p. 27.

524 *GwG-Herzog*, 2014, § 261, mn. 27; *Voß*, 1989, pp. 13, 16.

525 *GwG-Herzog*, 2014, § 261, mn. 28; BGH, NJW 1997, 3323, 3325.

526 *GwG-Herzog*, 2014, § 261, mn. 22 ss.

social fabric and public order.⁵²⁷ This is acknowledged with particular reference to the isolation offence contained in the second paragraph, which is directed at preventing the commission of the predicate offences by making them less attractive, and by depriving criminals of their financial means.⁵²⁸ Given the function of discouraging the commission of any offence by impeding the enjoyment of the proceeds, Article 261 (2) Gcc would protect all interests of the prevented predicate offences.⁵²⁹ This potentially expands the *Rechtsgut* protected by the money laundering offence consequently to the continuous expansion of the list of predicate offences. As a consequence, the provision becomes a multifaceted offence that serves to tackle a broad range of issues, and thus protects a '*Globalrechtsgut*', or a '*Universalrechtsgut*', a global or universal legal interest.⁵³⁰ Such a borderless offence is considered dangerous, since it broadens the borders of criminal action and it leads to the banalisation of the legally protected interest.⁵³¹ This, along with the vague definition of the *actus reus*, may lead to 'an unlimited power of prosecution and punishment'.⁵³² In addition, given the tight connection between the criminal provision and the preventive regulations, the broadening of the scope of the offence devolves ever-growing police duties to designated professions through the system of reporting suspicious transactions.⁵³³ Furthermore, from a substantial perspective, 'the threat of money laundering to the interests protected by the predicate offences [...] appears only indirect, if not tenuous'.⁵³⁴ Comments have been made on a more general level, with concern to criminal policy: If the aim of the law was to reduce the commission rate of the antecedent acts, the focus on the predicate offences should have not been ignored. Taking drug trafficking as an example, the money laundering discourse does not include a discussion on the appropriateness of legalising certain types of narcotics, in order to diminish criminal activities linked to them.⁵³⁵ The broadening of the

527 BGHSt 55, 36 (49); *Eisele*, 2015, § 49, mn. 1172; *StGB-Fischer*, § 261, mn. 2, 3; *MüKo-Neuheuser*, 2012, § 261, mn. 12; *Rengier*, 2015, § 23, mn. 4; *SK-Hoyer*, § 261, mn. 1; *Wessels and Hillenkamp*, 2015, § 261, mn. 891. See also *Althenhain*, 2002, p. 402; *GwG-Herzog*, 2014, § 261, mn. 24; *Oswald*, 1997, p. 63. Article 261 (2) is said to intensify the protection of the predicate offences' interests, see *Arzt*, ZStW 111, 1999, p. (757) 758.

528 See *Burr*, 1995, p. 25; *Müko-Neuheuser*, 2012, § 261, mn. 13; *Salditt*, *StraFo*, 1992, pp. (121) 121, 122.

529 See *Leip*, 1999, p. 54; *Dionyssopoulou*, 1999, p. 78; *Hefendehl*, 2001, p. (10) 14.

530 See *NK-Althenhain*, 2013, § 261, mn. 11; *Arzt et al.*, 2015, § 29, mn. 7; *Sotiriadis*, 2010, p. 209.

531 *Arzt*, 1997, p. 34.

532 *Mitsilegas*, 2003, p. 12.

533 *Arzt et al.*, 2015, § 29, mn. 8.

534 *Mitsilegas*, 2003, pp. 105, 106.

535 A discussion about the necessity of changing the current drug policy is taking place in some countries and within the UN. See also *Garzòn Vergara*, 2014, p. (1) 2 ss.

catalogue of designated offences, directed at increasing the effectiveness of general deterrence, should not suppress local debates on the (de)criminalisation of those offences.⁵³⁶ Finally, the protection of the predicate offences' interest does not exhaust the interests protected by the whole provision. While it is suitable for the conduct listed in paragraph two, it does not seem to be appropriate for the 'concealing offence' listed under paragraph one.

Thanks to its proximity to Article 257 Gcc, which criminalises the assistance after the fact (*Begünstigung*), the offence of money laundering is regarded as protecting the administration of justice (*Rechtspflege*), too.⁵³⁷ This opinion was expressed already during the law-making process by the parliament,⁵³⁸ with particular regard to the - by legal scholarship so called - 'real money laundering offence', which criminalises the integration of illegal objects in the legitimate economy pursuant to Article 261 (1) Gcc. In particular, by interpreting Article 261 (1) as a tool directed at avoiding investigations, prosecutions and forfeiture, it has been stated that it serves the purposes of defending the public interest in investigating, prosecuting and freezing and confiscating criminal assets.⁵³⁹ However, there is an open debate also about the interests protected by Article 257 Gcc. The controversy focuses on whether the offence defends individual or collective positions. The predominant opinion opts for an accumulative solution, which combines both the interest of the predicate offences and the administration of justice.⁵⁴⁰ Some scholars suggest that Article 257 Gcc safeguards the whole criminal legal system.⁵⁴¹ This argument is supported by referring to the functions attributed at least theoretically to the offence, such as the isolation of the offender, the enhanced risk of punishment and the reduction of the predicate offences' profitability. Yet, this opinion cannot be entirely translated to the offence of money laundering. Since the catalogue of the predicate offences is not unlimited under Article 261, the provision aims at making only those misdemeanours

536 *Alldridge*, 2008, p. (437) 458.

537 Among others, see *Otto*, Jura, 1993, p. 331; *Vogel*, ZStW 109, 1997, p. (335) 349 ss. Other scholars consider this function as rather minimal; see *Barton*, StV, 1993, p. 156 (160) or critically *Hefendehl*, 2001, p. (10) 14.

538 BT-Drucks. 12/989, p. 27.

539 According to some scholars the offence of money laundering should have facilitated seizure and confiscation. See *Arzt*, JZ 1993, pp. 913-917; *Gwg-Herzog*, 2014, § 261, mn. 23; see also *Arzt et al.*, 2015, mn. 8. Critical about this approach: *Müko-Neuheuser*, 2012, § 261, mn. 10.

540 *Amelung*, JR, 1978, p. (227) 227; *Geppert*, Jura, 1994, pp. (441) 441, 442; *Lackner and Kühl*, StGB, 1997, § 257, mn. 1; *Zipf*, JuS 1980, pp. (24) 24-26; see also *Burr*, 1994, p. 22.

541 For a complete overview on the debate, see *Burr*, 1994, p. 23.

and felonies contained in the catalogue less attractive. Also, the legislature in the beginning introduced the offence of money laundering in the context of the fight against organised crime and especially drug trafficking, therefore its purpose was not to defend the whole criminal justice system from the commission of any crime, but rather to protect those interests connected to those specific predicate offences.⁵⁴² Given the massive expansion of the catalogue, however, one could argue that the legislature in fact attributed to the money laundering offence the function of protecting the whole penal system. Against this argument, it has been noticed that the administration of justice cannot be ascribed to the conduct punished by Article 261 (2) Gcc, since this aims primarily at isolating offenders through impeding the use of their ill-gotten gains.⁵⁴³ Moreover, not all interests of a criminal justice system deserve to be protected.⁵⁴⁴ Therefore, being penal law anchored to the principle of *ultima ratio*, the legislature is supposed to balance the interests and protect only those that prevail to the detriment of others. *Dionyssopoulou* claims that it is necessary to restrain the concept of *Rechtspflege*, in order to restrict also the scope of the offence which would be otherwise too broad.⁵⁴⁵ The author specifies that the interest of the administration of justice should be understood as general deterrence, according to the legislator's intent of eliminating incentives for the commission of crimes through the menace of punishment, specifically through the threat of investigation and confiscation. This function should stay in foreground, while the specific interests protected by the different predicate offences would remain in the background. Since all offences contained under chapter twenty-one of the criminal code derive from Article 258 Gcc, the crime of assistance in avoiding prosecution or punishment, which was introduced with the goal of intensifying general deterrence, also the other new offences should be interpreted as serving the same function. In this way the exegesis approach can be used to limit the scope of the money laundering offence.⁵⁴⁶ In particular, the scholar argues that the historical and taxonomic perspective excludes the punishment of common social practices and actions directed at the procurement of necessities, because their punishment would not lead to general deterrence, but would, instead, constitute a strong interference with the rights of the individuals.⁵⁴⁷ Of a completely

542 *Burr*, 1994, p. 25.

543 *Voß*, 1989, p.12; *Herzog-GwG*, 2014, § 261, mn. 23.

544 *Burr*, 1994, p. 21.

545 *Dionyssopoulou*, 1999, p. 170.

546 *Dionyssopoulou*, 1999, p. 130.

547 *Dionyssopoulou*, 1999, p. 131.

different opinion is another scholar, *Bottke*, who argues that an effective money laundering offence should punish every negligent conduct, among those who are potential gate-keepers of money laundering activities. They should have the responsibility of monitoring transactions and operations at risk and should therefore be held liable even for a negligent conduct.⁵⁴⁸

Article 261 Gcc is said to protect the state's interest in the surveillance of financial transactions much as the anti-money laundering preventive regulation does.⁵⁴⁹ According to this approach, the provision should protect the legal economy from the infiltration of illegal capital.⁵⁵⁰ Consequently the law defends people's confidence in the soundness of the financial system. The protection of economic interests brings into the fore the European Directive's considerations on the need to defend the soundness of the Single Market.⁵⁵¹ This philosophy embraces the prudential strategy at the basis of the anti-money laundering act. However, being here in the field of criminal law, criticisms are raised with regard to the necessity of limiting criminal policy.⁵⁵² Critical scholars have contended that this interest is rather fictitious, 'wolkig' or 'luftig',⁵⁵³ because of the unexplained connection between the use of illegal property within the legal economy and the harm to public confidence.⁵⁵⁴ *Vogel* has further made the point that public confidence in the financial system is not harmed anymore when the property naturally deriving from a crime is not contaminated anymore, under a legal point of view, due to an in-between transaction with a third person in good faith.⁵⁵⁵ Another argument that has been raised against the determination of the 'economic order' as interest protected by the law: The economic order may coincide with the purpose of the policy rather than with the legally protected interest, and thus it does not legitimate resorting to a repressive

548 *Bottke*, *wistra*, 1995, p. (87) 89. The scholar's thoughts on this topic will be further explained in the following paragraphs.

549 Among others *Burr*, 1994, p. 26; *Findeisen*, *wistra* 1997, pp. (121) 121ss (the legal economy); *Forsthauser*, 1992, pp. 148-151, 159 (national economy); *Lampe*, *JZ*, 1994, p. (123) 123; *Vogel*, *ZStW* 109, 1997, pp. (335) 351-356.

550 Some scholars suggest that the protection of the economic order goes along with the protection of other interests. For example, along with the protection of the administration of justice *Hassemer*, *WM* 1995, p. (3) 14 (national economy). Critical about *Lampe's* statement *Müko-Neuheuser*, 2012, § 216, mn. 9.

551 *Lampe*, *JZ*, 1994, p. (123) 125; *Mitsilegas*, 2003, p. 106.

552 See among others *Arzt*, 1997, p. 34.

553 *Vogel*, *ZstW* 109, 1997, p. (335) 351.

554 *Vogel*, *ZstW* 109, 1997, p. (335) 351.

555 *Vogel*, *ZstW* 109, 1997, p. (335) 355.

intervention. According to *Hassemer* and *Baratta*, the difference between the rationale of a legislation and interests it protects is fundamental; whereas the former coincides with the overall goal of the policy maker, the latter should limit such policy.⁵⁵⁶ Yet, the protection of the financial interest may be supported by interpreting the notion of an economic order in a way that entails personal rights. In particular, this argument can be supported by interpreting property as a modern, dynamic concept that entails material and immaterial goods and economic relations aimed at human development. When the offence of money laundering is considered to harm property, it can be said that acts of money laundering, by distorting economic relations, undermine the individual's capacity to develop economically.⁵⁵⁷ This notion of property would, thus, include the economic potential of the individual to act in a context in which certain rules are respected. According to this approach, a criminal offence against the protected economic asset would consist of any act *contra ius* that would limit the economic potential of the individual, and thus also acts of money laundering. Following this reasoning, the gravity of the harm caused by money laundering should justify resorting to criminal law, to protect law-abiding individuals disadvantaged by the illicit economic competition carried out also through the laundering of illegal capitals, by anchoring the offence of money laundering to the protection of the individual's rights.⁵⁵⁸ For instance, scholars have suggested that the offence of money laundering protects fair competition.⁵⁵⁹ This approach considers *Hassemer's* and *Baratta's* image of a 'minimum criminal law'⁵⁶⁰ as antiquate and dangerous because it results in a selective repressive tool that supports a class system, by reducing the scope of penal law in the field of white collar crimes.⁵⁶¹ By referring to the category of white collars criminality, *Dionyssopoulou* argues that the economic interest protected by these offences is double: On one hand the fair competition, on the other hand economic institutions.⁵⁶² Fair competition is understood as the possibility of every economic actor to expect a fair competitive environment, in which money launderers should not be advantaged

556 *Moccia*, 1995, p. (728) 739; *Hassemer*, 1989, p. (553) 557.

557 *Moccia*, 1995, p. (728) 740.

558 *Bottke* instead contests the categorisation of the money laundering offence as a property crime, and legitimates the offence as protecting the global financial economic system and not someone's property. *Bottke*, *wistra* 1995, p. (87) 89.

559 *Bottke*, *wistra* 1995, p. (121) 121, 124; *Fiandaca and Musco*, 1992, p. 379; *Diéz Ripollés*, 1994, pp. (583) 591, 595 ss.

560 *Baratta*, 1992, p. 24; *Hassemer*, 1992, p. (378) 378.

561 See among others *Flick*, 2005, p. 1303; *Magro*, 2012, p. 16; *Silva Sanchez*, 2004, p. X.

562 *Dionyssopoulou*, 1999, p. 16.

by the fact that they can profit from illegality. The protection of economic institutions can be interpreted through the so-called game-theory, namely as the protection of the rules of the economic system.⁵⁶³ The protection of the rules of the game could be seen as a legal interest; still it should be clarified which rules such an enhanced need safeguard, whether those that regulate access or those that regulate actions. One option would be to limit the scope to those rules that are directed at maintaining the trust of money savers. Yet, once again, the protection of the confidentiality in the economic system does not enhance personal situations. Moreover this approach has also been contested, because the concept of economy is, at least in German language, a versatile concept that encompass different philosophical perspectives, such as the *Volkswirtschaft* (national/political economy), or the *Kreditwirtschaft* (credit economy), so that a question would raise: if the money laundering offence is said to protect the economic system, about which system are we talking about? Arguing from a pro-state-interventionist perspective, but with a still critical approach towards the protection of economic interests through criminal law, one can say that 'simultaneously, with the request for "less State" in the economic and social ordinance, "more State" is demanded to conceal and contain the destructive social consequences where the deterioration of social protection is also evident'.⁵⁶⁴ There is indeed a link between a lower degree of state intervention in the social sector and the use of the repressive arm. In other words: advocating for a reduction of the use of penal law to punish misbehaviours does not mean preventing state intervention in the economy. On the contrary, it means requiring that public action is directed to social policies rather than to repressive ones. Even if one considers penal law a necessary and legitimate tool, this should be directed at protecting individual or collective positions within the financial system, rather than at protecting the financial system's reputation. The goal should be the concrete protection of potential victims' rights and not their intangible confidence in the sector.

To protect client confidentiality in the financial system is a typical interest of the banking sector, as showed also in chapter two. Financial institutions aim to defend their name, without necessarily be willing to impede the infiltration of illegal money, while weaker actors aim at a more concrete safeguard of their economic potential

563 Severino, 2014, p. (672) 676.

564 Miranda Rodriguez, 2003, p. (182) 191.

from unfair competition. A money laundering offence that aims at regulating the (already deregulated) economic sector cannot operate within the frame of the actual system. Otherwise, as underlined by *Burr*, the law would protect those actors who get corrupted through illegal capital and who are, therefore, the offenders and not the victims.⁵⁶⁵ This diatribe, which reflects a more general question about the use of criminal law to sanction economic misbehaviours and to protect financial interests, mirroring the even more general tension between a liberal-civil libertarian and a socialist approach to the role of the state in the economy, will be further tackled in the last chapter, through the views expressed by the interviews' partners.

The last interest taken in consideration by a minor part of the legal scholarship, and also probably the most contested one, is the one of internal security. In particular, Article 261 Gcc is said to protect the security of citizens by avoiding the infiltration of organised crime in the society and the consequent distortion of social structures.⁵⁶⁶ The indefiniteness of the concept of internal security, which alone constitutes a ground of refusal, might be restricted to the concept of internal security protected by any criminal law enacted against organised crime., also this determination does not justify the allocation of national security as an interest protected by Article 261 since the scope of the provision is not limited to organised crime-related offences.⁵⁶⁷ The German doctrinal discussion is particularly extensive on the topic of security as a constitutional principle and a legally protected interest. Some scholars recognise the subjective feature of security, and thus the risk of manipulation of the element,⁵⁶⁸ some others elevate the feeling of insecurity to a factor justifying legal intervention.⁵⁶⁹ Both approaches do not specify the specific threats, instead by inferring that security is a matter of perception and not an objectively quantifiable value, these viewpoints transform the protection of fundamental rights to a dangerously arbitrary question of interpretation.⁵⁷⁰ Further critics are referred to the use of this broad and undefined concept - the one of security- for the purposes of

565 *Burr*, 1994, p. 27.

566 *Barton*, StV 1993, p. (156) 160. Critical against *Barton's* approach is *Müko-Neuheuser*, 2012, § 261, mn. 11.

567 *GwG-Herzog*, 2014, § 261, mn. 26.

568 According to *Pitschas* security coincides with internal peace and is, thus, conceived as a constitutional inalienable principle, which entails both the subjective and the state dimensions. *Pitschas*, 1993, p. (857) 857 ss.

569 *Isensee* claims that security is a fundamental right, which refers to the rule of law and public security. *Isensee*, 1983, pp. 22, 23.

570 *Lisken*, 1994, p. (49) 50.

justifying the adoption of provisions that would otherwise not be accepted, due to their high social costs and to their scarce efficiency. Indeed, legislatures have been accused of resorting to the topic of internal security while expanding the scope of the money laundering offence over the limits of criminal legal principles, and have imposed legally protected interests from 'above'. Against the securitisation rhetoric, scholars have also observed that conducts constituting money laundering consist of quite common daily actions, so that the offence has been defined an 'everyman misdemeanour' (*Jedermannsdelikt*).⁵⁷¹ As a consequence, the harm caused by these conducts is not a direct harm to security, and therefore it should not legitimatise the resort to criminal law. Oppositely, it has been argued that certain interests are socially so important that they require an anticipated safeguard. Thus, criminal law should punish acts that put in danger those interests, although the interests are not harmed yet. This thought, known as the 'remote harm theory', would allow states to sanction conduct that represents a threat for specific interests but does not harm any of them directly.⁵⁷² However, this would allow criminal law to be a mere tool for sanctioning socially dysfunctional conducts, without necessarily protecting the individual from materially harmful acts.⁵⁷³ Also, by criminalising acts that do not cause direct harm to legally protected interests, the latter would no longer serve to limit criminal policy.⁵⁷⁴

Due to the uncertainty surrounding the issue of the interests protected by Article 261, German scholars still define the offence of money laundering as a crime '*ohne Herz und Hirn*' (without heart and brain), a pointless offence, whose legally protected interest has been trivialised.⁵⁷⁵ Particularly critical about this issue is *Arzt*, who already in 1997 drew attention to the offence of money laundering as an example of a deficient criminal law in the book '*Das missglückte Gesetz*',⁵⁷⁶ basing this his critic mostly on the trivialisation of the legally protected interests. The author thinks that the more the offence is enforced, the clearer it becomes that the provision has the goal of monitoring financial transactions. This means that the criminalisation of money laundering protects the same public interest in controlling the economy as the

571 *Bottke*, 1995, p. (87) 89; *Vogel*, ZStW 109, 1997, p. (335) 351.

572 For a complete discussion on the remote harm theory, see *Ashworth*, 1999; *von Hirsch*, 1996; *Wallerstein*, 2007.

573 *Patalano*, 1991, p. (629) 634.

574 *Fiandaca*, 1982, p. (42) 72; *Volk*, 1985, p. (871) 871.

575 *Althenhain*, 2002, p. 402; *Arzt*, 1997, p. 34; *Arzt et al.*, 2015, § 29, mn. 7.

576 *Diederichsen and Dreier*, 1997.

preventive regulatory body does.⁵⁷⁷ As a consequence, the legally protected interest has lost its fundamental function of limiting criminal law. *Arzt's* reflections also shade light on the legislative intents since they show that the ultimate function of the offence criminalising money laundering is the one of controlling the financial system. As the scholar highlights, the real goal is not eliminating money laundering but rather classifying all money laundering acts as infringements.⁵⁷⁸ What remains to limit the action of the legislature is the general limit for the expansion of the offence of money laundering, which narrows the preventive purpose of the offence of money laundering that should be instead pursued by other means.⁵⁷⁹

3.3 Too broad or too narrow?

Interestingly, charges of ineffectiveness are raised against the money laundering offence because the provision is considered to be both too narrow and too broad.⁵⁸⁰

On one side a strict list of predicate offences may represent an obstacle for investigations and thus hamper the provision's efficacy. The catalogue of the predicate offences has been expanded on the assumption that the polluting capacity of money laundering derives not only from the proceeds of drug trafficking, but also from other crimes. In addition, the expansion of the catalogue of predicate crimes ought to have increased the effectiveness of the law, by way of facilitating the work of prosecutors and obliged entities. In addition, the FATF and other international organisations took advantage of the legal framework set out to prevent money laundering and decided to use it to tackle other “similar” phenomena, such as terrorism. The flexible wording of the money laundering offence also facilitates the harmonisation of national laws. In addition, the financial system evolves very quickly. Thanks to technological innovations, such as the cyber economy, the expansion of the catalogue of predicate offences can allow legislatures to take in consideration ever-new vehicles and subterfuges to move illicitly capital and thus to tackle ever-new ways of laundering money. The broad catalogue of predicate offences also facilitates, at a domestic level, the gathering of information by public prosecutors.

577 This violates the penal law principle of *ultima ratio* since it shows that the repressive tool is not the only mechanism to pursue such goal.

578 *Arzt*, 1997, p. 34.

579 *GwG-Herzog*, 2014, § 261, mn. 19, 20.

580 The scholar *Bottke* describes the wording of article 261 as partly too broad, partly too narrow. See *Bottke*, 1995, *wistra*, p. (87) 89.

On the other side, especially in countries with strongly embedded criminal law principles, the versatile use of the offence of money laundering to tackle ever-new emergencies has raised legal challenges that, far from being purely dogmatic, may hinder the effective implementation of such measures, because they undermine the acceptance of that law. Also the fact that the money laundering offence was designed very broadly, not only due to the continuous expansion of the catalogue of predicate offences, but also due the wording of the provision and to the decision of criminalising the reckless conduct, may lead to legal uncertainty, which can cause de-legitimation and hence dis-application.

3.3.1 The *mens rea* element: Punishing reckless bakers instead of mafia bosses

The legislative's controversial debate that preceded the decision of criminalising the reckless money laundering offence under Article 261 (5) Gcc, which has been analysed in the previous chapter, revealed that the different parties agreed on including the reckless hypothesis with the goal of reducing difficulties in bringing evidence of the knowledge of the illegal provenience.⁵⁸¹ Against this argument severe critics were raised by the doctrine, based on the fact that substantial criminal law should not have the function of facilitating procedures.⁵⁸² Moreover, it was the first time that the reckless property crime was punished, and this was fostered without undertaking an adequate legal debate. According to legal scholar *Vogel*,⁵⁸³ this decision was taken without being obliged by international duties; the Supreme Court, instead, has argued the opposite.⁵⁸⁴ The European Directives require intention and knowledge about the illicit origin of the property; on the contrary, the Strasbourg Convention of 2005 gave the opportunity to member states to extend the *mens rea* to negligent behaviour, by extending the criminalisation to situations when the offender 'ought to have assumed the criminal provenience of the property'.⁵⁸⁵ The punishment of reckless money laundering acts may potentially infringe the principles of culpability (*nullum crimen sine culpa*) and certainty (*nullum crimen sine lege*) of

581 BT-Drucks. 12/989, p. 27.

582 *Lampe*, JZ 1994, p. (123) 129; *Vogel*, ZStW 109, 1997, p. (335) 347.

583 *Vogel*, ZStW 109, 1997, pp. (335) 335, 337.

584 BGHSt 50, 347, 354 ss.

585 Article 6 (3) a of the Strasbourg Convention of 2005. Interpretation challenges have raised also in other jurisdictions that adopted the restrictive approach, such as Italy, England and Wales. See *Mitsilegas*, 2003, p. 112 ss.

penal law.⁵⁸⁶ Yet the Supreme Court denied the possible violation of these principles, and declared the law constitutionally legitimate.⁵⁸⁷ Many scholars agree upon the fact that by punishing reckless economic misbehaviours, the provision violates the interests of a free economic system.⁵⁸⁸ Requiring that every single person would need to act with diligence when undertaking an economic transaction would weight down a market situation by slowing down transactions. In addition, attributing to every economic actor the obligation not to launder money recklessly might negatively affect the free movement of economic goods. This may raise problems with regard to the purposes of the criminal policy. In fact, the criminalisation of the reckless offence together with the wide formulated conducts punished under article 261 (2) Gcc, allows the punishment of daily professional behaviours, whose relevance for the fight against money laundering is very low.⁵⁸⁹ It cannot be expected that citizens would monitor transactions to prove their legitimacy, because this would represent a too high burden for the financial sector. In fact, even the preventive regulations are not a guarantee of complete control, since bank employees cannot be expected to identify all money-laundering transactions correctly.⁵⁹⁰ Moreover, the author recalls the fact that while money laundering is punished for reckless conducts, some of the predicate offences are not, this constituting a major incoherence. On the background of these considerations, the scholar concludes that Article 261 (5) Gcc should be abrogated.⁵⁹¹ This incoherence has even increased when tax offences were included in the catalogue of the predicate offences: Even if the legislature considered this extension as to be indispensable, the inclusion of fiscal crimes in the scope of the money laundering offence has exacerbated the highlighted problems. Indeed, due to the fact that tax evasion does not create a profit but rather a saving, the assets in possession of a tax evader might have a legal provenience. Therefore punishing the reckless failure to acknowledge the criminal origin of property deriving from tax evasion, which might be used in daily transactions, seems to go beyond the legislative intentions.⁵⁹²

586 See among others: *Hassemer*, 1995, p. (1) 14; *Leip*, 1999, p. 146 ss; *StGB-Fischer*, § 261, mn. 42 a.

587 BGHSt 43, 158, 166 ss; *Arzt*, JR 1999, p. (75) 79.

588 *GwG-Herzog*, § 261, mn. 120; *StGB-Fischer*, § 261, mn. 42 a; *Arzt*, 2004, p. 3 ss; *Hetzer*, NJW, 1993, p. (3298) 3299.

589 *GwG-Herzog*, § 261 mn. 120.

590 *Dionyssopoulou*, 1999, p. 156.

591 *Dionyssopoulou*, 1999, p. 157.

592 The typical example used to clarify this absurdity is the one of the baker that sells bread to a notorious tax evader, who can be held liable for money laundering, only because she or he has accepted

Yet, according to the provocative article of *Bottke* published in 1995, the impunity of property crimes for negligent behaviours was not *sacrosanct*.⁵⁹³ The scholar claims that only by incriminating all transactions that integrate ill-gotten gains into the legal economy and committed both intentionally or negligently, the law would be adequate to fulfil its function. In fact, *Bottke* acknowledges that this hypothesis would be cumbersome for the whole economic system. Along with this provocative statement, the author recognises the excessive broadness of the scope of the money laundering offence and specifically criticises the fact that the formulation of the offence results in a '*Jedermannsdelikt*'. The provision instead should, punish only the so called 'gate-keepers', namely individuals who in the exercise of their professional or economic duties may permit the infiltration of illegal money in the legitimate economy.⁵⁹⁴ This approach is recalled also by *Moccia*, who ideally designs the offence of money laundering as a '*reato d'obbligo*' (a sort of a neglecting offence especially directed at individuals that have a guarantor position).⁵⁹⁵ In the specific case of money laundering, for instance, financial services providers should have a 'security position' and therefore a specific criminal liability.⁵⁹⁶ However certain professions would raise a conflict of interests between the interest to properly to exercise their profession and the public interest of persecuting a crime.⁵⁹⁷ In recalling the parliamentary debate, it should not be forgotten, that one of the functions attributed to the creation of the money laundering offence was the isolation of criminals through the criminalisation of any actions of third parties dealing with the incriminated object, pursuant to article 261 (2) Gcc. In other words, the legislator aimed at hitting gate-keepers, although this was not expressly stated.

In order to stop the drifting of such an offence, the courts have intervened and determined the borders of the reckless money laundering offence. The jurisprudence has anchored the case to the civil law culpable negligence.⁵⁹⁸ It has interpreted recklessness closer to intent, so that it coincides with particular negligence or gross

money that could derive from tax evasion. As a consequence, someone charged for tax evasion would not be able to purchase commodities.

593 *Bottke*, wistra 1995, p. (87) 89.

594 *Bottke*, wistra 1995, p. (87) 89.

595 Actually money laundering can be committed also through omission. The guarantor position is set for competent authorities (e.g. law enforcement and customs) and witnesses. See *NK-Altenhain*, 2013, § 261, mn. 93; *Leip*, 1999, p. 138; *Müko-Neuhauser*, 2012, § 261, mn. 92.

596 *Moccia*, 1995, p. (728) 747.

597 *Müko-Neuhauser*, 2012, § 261, mn. 77.

598 BGHSt 43, 158, 168; BGH NJW 2008, 2516, 2517.

carelessness. The mens rea required was a particular degree of negligence or gross recklessness.⁵⁹⁹ The latter hypothesis is also given when the defendant did not have the chance to acquire knowledge about the provenience of the property.⁶⁰⁰ The inclusion of the reckless case and the extension of the scope of the offence to commercial and organised tax evasion mostly impacts the categories of designated businesses and professions who are required to take particular care when receiving fees from clients, such as defence attorneys. In order to impede that some exposed categories become victim of the prejudice of being used for the purposes of laundering proceeds of crime, specific duties have been imposed to detect suspicious transactions.⁶⁰¹

3.3.2 Defence attorneys under threat

Within this scenario, the situation of defence attorneys is particularly critical due to the attorney-client privilege, namely the need to protect confidentiality in the relationship on one side, and the public interest in the persecution of crimes on the other side. The matter can be summarised as such: When a client is suspected to have committed one of the predicate offences for money laundering and to have gained some profit out of it, the defence attorney must ask her or himself whether the fee that she or he receives from the client is derived from that offence. In the case of receiving stolen goods, the question can be answered by looking at whether the attorney knew at the moment of receiving the fee that it was stolen. The peculiarity of money laundering is also derived from the fact that gross negligence is punished under the law. With respect to the lawyer-client relationship, issues linked to the peculiarity of the relationship could be raised. On one side, lawyers might be held liable, as many other professions, if they receive fees derived from predicate offences, on the other side, everyone should be granted legal counsel, even money launderers. In Germany there is abundant jurisprudence on the topic. Legal scholars have largely engaged in the discussion too. One of the breakthrough cases dealt with a defence attorney who allegedly received drug money from a gangster, and who could have suspected the illegal provenance of the money, thanks to previous experiences with

599 GwG-*Herzog*, § 261, mn. 122.

600 BGHSt 43, 158, 169; BGH NJW 2008, 2516, 2517.

601 StGB-*Fischer*, § 261, mn. 44.

gangsters belonging to the same group.⁶⁰² The higher regional court of Hamburg (*Oberlandesgericht*) ruled on the matter by interpreting the provision according to the constitution, and thus by stating that defence attorneys may not be liable when receiving fees, besides in particular cases. The three exceptions are: Firstly, if the lawyer's actions hinder law enforcement activities, secondly if the attorney receives money that should have been given back to victims, finally if the attorney and the client has a 'kick-back' deal, so that the offender would have received back the money.⁶⁰³ The constitutional court was called to express its opinion on this topic, with reference to a cases ruled by the Supreme Court, which convicted an attorney for money laundering, having received a fee of 200.000 DM (Deutsche Mark, the German currency) cash from a client suspected of fraud committed on commercial and organised basis.⁶⁰⁴ The Supreme Court inferred the liability of the attorney from the unusual high fee, from the fact that the fee was paid in cash carried in suitcases, from the circumstance that there was no written documents regulating the transaction, and from the fact that the alleged offence was a predicate offence for money laundering. In particular the court motivated the decision by proclaiming that attorneys should have not been exempted by the money laundering provision, since the legislator did not provide exceptions for Article 261 (2), which had the goal of isolating offenders. The constitutional court overruled the case and decided that in the particular case of the defence attorney the *mens rea* should consist a certain level of certainty about the illegal origin of the object. Therefore the court established an exception for defence attorneys, who cannot be held liable for gross negligence. Instead it is required evidence of knowledge (*dolus eventualis*).⁶⁰⁵

This decision raised a vivid doctrinal debate. Some scholars supported the privileged situation provided for defence attorneys, while others severely contested it. Arguments brought up in support for the privilege are: The right of the suspect to freely choose a defence attorney, the confidentiality between attorney and client, the exclusivity of the perceived interests of the lawyer towards the suspect, the harm to the offender's rights caused by resignation or refusal of defence attorneys, the

602 OLG Hamburg, Decision of 6 January 2000 - 2Ws185/99, NJW 2000. 673 = StV 2000, 140.

603 *Fernandez and Heinrich*, ZStW 126, 2014, p. (382) 417.

604 BGH, Decision of 4 July 2001 - 2 StR 513/00, BGHSt 47, 68 = NJW 2001, 2891 = JR 2002, 27= JZ 2002, 102.

605 *Fernandez and Heinrich*, ZStW 126, 2014, p. (382) 419.

absence of discriminatory treatment for serious offenders, the possible violation of the presumption of innocence, the professional freedom of defence attorneys, the eventual violation of the fair trial principle, the need to protect professional secrecy, the possible manipulations by public prosecutors.⁶⁰⁶

The last argument refers to criminal policy goals of the money laundering offence. In particular scholars argue that the law was enacted to fight organised crime, while the receiving of a fee by a defence attorney does not represent a typical conduct related to organised criminal activities. Through the payment of a fee, indeed, money launderers are not able to integrate ill-gotten gains in the legal economy, in fact they do not receive back anything from the lawyer. Moreover, hindering the payment of attorneys' fees does not make the commission of predicate offences less attractive. Offenders do not engage in crime to pay a more qualified defence; without committing the predicate offence, they would not need any defence.⁶⁰⁷ Yet, criminal organisations might be interested in getting a very qualified lawyer in order to receive counsel for other serious crimes. They would engage in predicate offences in order to accumulate the money to pay a qualified defence counsellor. In addition, even though the payment of an attorney fee does not represent a typical organised crime activity, nor a way to integrate illicit funds in the legitimate economy, it does represent an action that, if impeded, would isolate offenders and thus demotivate them from the commission of crimes, in accordance with the legislative intents related to Article 261 (2) Gcc. The opinion against the attorney privilege is sustained with the following arguments: The equal validity and application of criminal law for lawyers, the inclusion of defence attorneys as part of the administration of justice, and thus the inappropriateness of consciously receiving illegal money, the risk of advantaging offenders who committed predicate offences and who therefore could pay for a better qualified defence attorney, the possibility for the lawyer to ask to be recognised as public defender.⁶⁰⁸

For the purposes of the research, this discussion is relevant to the extent that shows the controversial matters arising from the criminalisation of money laundering. It is interesting to see that there is still strong resistance in accepting this '*Fremdkörper*'⁶⁰⁹

606 *Fernandez and Heinrich*, ZStW 126, 2014, pp. (382) 421-436.

607 *Fernandez and Heinrich*, ZStW 126, 2014, p. (382) 436.

608 *Fernandez and Heinrich*, ZStW 126, 2014, pp. (382) 436-441.

609 *Vogel*, ZStW 109, 1997, p. (335) 346.

within the criminal legal system, due to the clear inconsistencies existing between the offence and the principles, among them even some constitutional ones, embedded in the national legal culture. Another relevant question connected to this discussion concerns the functions assigned to the offence, if on one side the isolating function is regarded as serving the purpose of fighting organised crime and thus prevailing on the confidentiality principle, on the other side, the client-attorney privilege is perceived as deserving more importance than public interest in prosecuting crimes. The defence attorney doctrinal debate is important in relation to the effectiveness question because it is a discussion triggered by the implementation of the law. Therefore it shows that the law creates challenges not only 'in the books' but also in the praxis.

3.3.3 Definitions of '*Gegenstand*' and of '*herrührt*'

Since the offence of money laundering was created to close the loopholes left by the other derivative offences that required a strict link between the commission of the predicate offence and the main conduct, the legislature adopted the term '*herrühren*' (deriving) in order to soften that link. Moreover, given that the offence of handling stolen goods (Article 259 Gcc) refers only to goods, leaving money out of the scope, the legislature chose to use the undefined term '*Gegenstand*' (object) in order to comprehend any type of object having an economic value. Thanks to the broad interpretation of these terms, actions undertaken on the original criminal asset that changed its nature but maintained the economic value are considered to be liable. The aim was to have access to those surrogate assets that are not connected with the commission of the antecedent act.

The Parliament specified that the object in possession of the offender or of third persons was supposed to derive from a predicate offence.⁶¹⁰ However, this causality relation was criticised by legal scholars since it could have been perpetuated to any act of contamination with the illegal property.⁶¹¹ The legislature left the concept of *herrühren* without further clarifications; the only guideline provided was the wide

610 BT-Drucks. 12/3533, p. 12.

611 NK-*Altenhain*, 2013, § 261, mn. 52; GwG-*Herzog*, § 261 mn. 50; *Leip*, 1999, p. 71; StGB-*Schönke*, § 261, mn. 8.

criminalisation.⁶¹² Also the declared legislative intents do not provide information to restrain the field since, according to the follow the money strategy, any action linked to the paper trail is relevant. The legislature indeed opted for such a large criminalisation in order not to lose the link with the illegitimate conduct due to laundering process.⁶¹³ On the other side, the legislature recognised the risk of too wide criminalisation and posed a restriction, which should have not transformed the legitimate economy in a place full of somehow incriminated assets.⁶¹⁴ Yet, it has been observed that this restriction does not reply to the question about how to define the provenience of a property from a predicate crime. Scholars have also tried to anchor the determination of the provenience of the object to the rules provided for the forfeiture. Yet, those rules apply only for assets of the offenders, while the money laundering offence relates only to predicate offences committed by third parties.⁶¹⁵ *Dionyssopoulou* considers the term *herrühren* as an important element to determine the scope of the money laundering offence because it constitutes the link between the predicate offences and the object;⁶¹⁶ one could even see it as the link between the antecedent act and the main act. Yet, the vague definition of the interests protected by the law does not serve the purposes of limiting the scope of the offence and thus does not help to narrow the meaning of the term *herrühren*.⁶¹⁷ As concerns the burden of proof, law enforcement is required not only to prove that the object stems from any of the offences of the catalogue, or that the object does not have a legitimate origin, it has, instead, to bring evidence of the concrete situation of the antecedent act. This higher burden of proof is required in order not to violate the principles of *in dubio pro reo* and of culpability, and the rights of the offender. Due to the strictness of this doctrine, it seems not possible, therefore, to introduce a mechanism that, for example in Italy, has been very successful in this field, which is the inversion of the burden of proof.⁶¹⁸

612 On this topic see, among others, critics from *Wohlers*, StV 2001, p. (420) 425; *Hefendehl*, FS Roxin 2001, p. 145, 163; *GwG-Herzog*, § 261, mn. 48.

613 BT-Drucks. 12/989, p. 27.

614 BT-Drucks. 12/989, p. 27. See also *NK-Altenhain*, 2013, § 261, mn. 55.

615 *GwG-Herzog*, § 261, mn. 52; *Arzt*, JZ 1993, p. 914; *NK-Altenhain*, § 261, mn. 58; *Vest*, FS-Schmid 2001, p. 417; *Leip*, p. 76; *Voß*, p. 40.

616 *Dionyssopoulou*, 1999, p. 171.

617 *GwG-Herzog*, § 261, mn. 49.

618 The rule is contained in article 12 *sexies* of law 356/92. According to Italian scholars and practitioners the inversion of the burden of proof is a very useful tool for the purposes of tackling economic power of organised crime. However, the institution is still much debated due to the infringement of the constitutional *in dubio pro reo* principle. For a detailed debate about the issue, see *Maugeri*, 2009, 2007, 2001.

Section 261 Gcc does not refer to the term property; it refers instead to the term object (*Gegenstand*), which is not defined under German law. The legislature chose the term precisely because it was not legally defined, with the goal of including the whole chain of uses and substitutions of the original property.⁶¹⁹ Indeed the term was meant to cover a broad range of things and even surrogates of the original asset involving some kind of economic value, including for instance movable and immovable property, money, securities and accounts receivables.⁶²⁰ A classification has been proposed, which refers to the economic nature of the money laundering offence and considers only those objects that economically substitute the laundered value. Yet, in the literature there is, (as of now) no consensus on the definition of the term. The decision to adopt a broad concept may be related to the European Directives approach, which also adopted the broadest definition possible of proceeds of crime: 'Assets of every kind whether corporal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title or interests in such assets'.⁶²¹

3.3.4 The catalogue of the predicate offences: A wide scope for a limited application

Despite the declared goal of the 1992 legislature of fighting organised crime, the catalogue of the predicate offences does not comprehend only offences linked to organised crime activities. For example since the beginning it included the cultivation and the production of psychotropic substances for personal use.⁶²² As it was already observed in chapter two, by looking at the wording of the offence, the provision does not refer only to those typical conducts that are commonly understood as money laundering, but also to any action that is in contact with the incriminated object.⁶²³ *Arzt* describes the expansion of the scope of the money laundering as a fruitless attempt of the legislature to improve the effectiveness of the money laundering offence.⁶²⁴ The scholar speaks of a legislature's '*Flucht nach vorne*'⁶²⁵ and warns about the introduction in the catalogue of dubious offences.⁶²⁶

619 BT-Drucks. 12/989, p. 27; BT-Drucks. 12/3533, p. 12.

620 *Leip*, p. 116, *Altenhain*, 2002, p. 419; FATF, Mutual Evaluation report of Germany, 2010, p. 50.

621 Article 1 (8) Directive 2005/60/EC.

622 *Burr*, 1995, p. 30.

623 *Burr*, 1995, p. 32; StGB-*Fischer*, § 261, mn. 4c.

624 *Arzt et al.*, 2015, § 29, mn. 8.

There is quite a vast consensus on the fact that the scope of the liability under Article 261 Gcc is, at least theoretically, too broad.⁶²⁷ Given the borderless formulation of the offence and the various and vague functions attributed to the law, it can be concluded that Article 261 aims at penalising as many conducts as possible.⁶²⁸ This would collide with the neutral character of money expressed in the well-known sentence 'pecunia non olet', since it would make every transactions suspicious. According to *Barton* and *Bottke*, different theories have been proposed with the goal of limiting the scope of application of the money laundering offence, with reference to the concept of the 'Sozialadäquanz' of *Welzel*,⁶²⁹ or through the use of the *Rechtsgut* as a limiting factor.⁶³⁰ *Barton* claims that the function of isolating criminals should limit the liability under Article 261 by eliminating the criminalisation of actions directed at the procurement of necessities. These, indeed, do not put in danger national security. Once again, national security is considered a too vague concept to limit the applicability of the money laundering offence.⁶³¹ *Bottke*, instead, argues that if one accepts the financial market as the legally protected interest, minor misbehaviours (*Bagatellen*) should not be included because they do not threaten it.⁶³²

One of the main controversies is the question whether Article 261 Gcc shall also punish socially conventional acts. On one side the legislature aimed at punishing any act linked to the illicitly gained property in order not to miss the link with the predicate offence due to laundering schemes, on the other side it tried to limit the potential criminalisation of widespread economic activities to avoid a too high burden for the economy.⁶³³ The Supreme Court decided that Article 261 Gcc should also have been applied to actions undertaken to cover life needs.⁶³⁴ This thesis is based on the legislative declared intent of isolating lawbreakers which can be

625 The sentence can be translated with the saying: 'The best defence is offence'.

626 *Arzt et al.*, 2015, § 29, mn. 8.

627 For a complete overview on the different opinions, see *Dionyssopoulou*, 1999, pp. 119 ss.

628 *Dionyssopoulou*, 1999, p. 118.

629 *Welzel*, ZStW 58 (1939), p. (491) 517.

630 *Barton*, StV, 1993, p. 156 (160); *Bottke*, wistra 1995, p. (121) 124.

631 *Dionyssopoulou*, 1999, p. 125.

632 *Bottke*, wistra 1995, p. (121) 124.

633 BT-Drucks. 12/989, p. 27.

634 BGH StV 2001 506, 507.

fulfilled also by impeding the satisfaction of primary necessities.⁶³⁵ The offence indeed tends to target unobtrusive actions, such as the exchange of cash money in a bank.⁶³⁶ Despite a clause of social adequacy (*Sozialadaequanzklause*) to limit the criminal liability of activities linked to fundamental needs was not provided, in the praxis the purchase of food or clothes is not seen as a potential act of money laundering.⁶³⁷ On the other hand it has to be observed that the elimination of some bagatelle types of actions from the scope of the money laundering offence would allow money launderers to exploit those activities.⁶³⁸

3.4 Doctrinal opinions on the (symbolic) effectiveness of the money laundering offence

After one year of its entry into force, the law criminalising money laundering was the focus of a speech about symbolic legislation in the field of organised crime held by *Pieth* at the German defence attorney`s conference in Münster.⁶³⁹ The scholar deals with the new anti-money laundering regime in the context of the then current engagement against drug criminality and criticises fundamentally the fact that drug policy, by way of being a prohibition tool, notoriously causes the opposite effect of increasing criminal proceeds derived from the illegal drug market. At the same time, the money laundering offence, which is part of the drug policy, aims at confiscating the proceeds of drug-related crimes. On one hand the state provokes the accumulation of illegal capitals and on the other hand it confiscates it, so that it seems that 'the left hand does not know what the right hand does'. The author considers the hypothesis of complicity as well.⁶⁴⁰ The symbolic dimension of the money laundering offence has been re-evoked by legal scholarship. On the basis of a reflection about the legislator's intent of using the offence to overcome investigative challenges and on the better suitability of other measures to tackle organised crime rather than the criminalisation of money laundering, *Kilchling* defines the law as 'symbolic policy'.⁶⁴¹ Also *Dionyssopoulou* draws attention on the latent functions of the money laundering offence. The scholar observes that behind the introduction of this crime one can feel

635 Bt-Drucks. 11/7663, pp. 7. 50.

636 Müko-Neuheuser, 2012, § 261, mn. 75.

637 Schmidt and Krause, 2010, StGB-Fischer, § 261, mn. 25.

638 Müko-Neuheuser, 2012, § 261, mn. 76.

639 *Pieth*, 1993, p. 101.

640 *Pieth*, 1993, p. 105.

641 *Kilchling*, wistra 2000, pp. (241) 243, 244.

the intention of overcoming procedural difficulties in proving money laundering facts during a trial.⁶⁴² Yet, according to the researcher, the use of criminal law for procedural purposes violates the principles of culpability and of presumption of innocence and therefore the offence should be deleted. *Bottke* in his Article of 1995 expresses a quite provocative opinion, by stating that the money laundering offence as it is formulated consists of symbolic paper, excitement and lip service.⁶⁴³ In his opinion, a money laundering offence that would slow down the flow of money across the globe, would be an effective hindrance of the infiltration of illegal money into the legitimate economy, despite being a heavy burden for the private sector. Such offence would require that not only citizens, desk personnel, and subordinates but also managers would not be able to discharge their preventive duties.⁶⁴⁴ Such an offence, concludes the scholar, would be harmful for the whole society.

Dionyssopoulou interestingly recognises a symbolic dimension of the norm, in relation to the function of tackling organised crime.⁶⁴⁵ The author contextualises his reflections in the framework of the law against organised crime (OrgKG) and infers the symbolic effectiveness of the money laundering offence from its ineffectiveness proved in the praxis. The scholar believes that the OrgKG had a symbolic function.⁶⁴⁶ However, the non-application of the law frustrates even the symbolic function because the addresses would not be threaten by the menace of prosecution and could count on impunity. Therefore the scarce effectiveness of the criminalisation of money laundering can be related on one side to the fact that this measure can tackle only subsidiary issues, and on the other side to the symbolic effectiveness attributed to the crime within the context of the fight against organised crime. By assuming that organised crimes do not represent a threat in Germany, the scholar suggests to consider the money laundering offence as a new form of handling stolen goods, so that it can really overcome legal loopholes and have, thus, an instrumental efficacy.⁶⁴⁷

642 *Dionyssopoulou*, 1999, p. 157.

643 *Bottke*, wistra 1995, p. (87) 89.

644 *Bottke*, wistra 1995, p. (87) 89.

645 *Dionyssopoulou*, 1999, p. 174.

646 *Dionyssopoulou*, 1999, p. 169.

647 *Dionyssopoulou*, 1999, p. 168.

Quite a vast body of literature has been criticising the law for not being suitable to achieve the declared goals. Adopting a very critical approach towards the basis of criminal policy behind the criminalisation of money laundering, namely the fight against organised crime, *Arzt* raised a very strong critic in 1997, saying that the offence of money laundering was a conceptual failure, because criminal control is not a conflict that the state can win, therefore it should not aim at winning, but rather at finding a bearable balance.⁶⁴⁸ In other words, a society without criminality is not realistic, and thus also a society without organised crime, therefore the goal of the criminal justice system should not be the 'fight against organised crime', but rather diminishing the crime rates. The same scholar adds that the system has so far managed to create only a form of new professionalism.⁶⁴⁹ Also other scholars have raised their voices against tight approach in the field of organised crime. *Hassemer*, for example, theorised that social fear of organised crime was exploited to introduce new repressive measures.⁶⁵⁰ Along with this critical approach, other scholars have empathised the use of organised crime to expand criminal law, by adopting the securitisation rhetoric of the enemy. This philosophy, which refuses the idea of a criminal law against the enemy (*Feindstrafrecht*), regards the threat of organised crime as an excuse to introduce preventive regulations.⁶⁵¹ More specific concerns were raised with regard to the money laundering offence's suitability to tackle organised crime. Since the risk posed by organised crime was not unanimously recognised,⁶⁵² the introduction of the offence of money laundering for the purposes of dealing with it was not considered as a necessity. Some scholars, in fact, believed that the commission of crimes in an organised and collective way was the normality and that therefore organised crime was not posing a particular threat. In addition, Article 261 was not considered suitable to tackle gangster criminality.⁶⁵³

648 The scholar quotes the 'Gesetzgebungslehre' by Noll, where the author states that criminal law has never developed an idea of a society free from crime or the purpose of a total elimination of criminality (Noll, 1973, p. 85); see *Arzt*, 1997, p. 28.

649 *Arzt*, 2013, p. 1130.

650 *Hassemer*, 1993, pp. 16 ss.

651 *Dionyssopoulou*, 1999, p. 28.

652 *Rebscher* and *Vahlenkamp* have stated that criminality in Germany at that time was organised but was not using often violence, however it was dangerous because of its flexibility; while *Weschke* found out that there was an existing network of gangsters but that this did not have a hierarchical system; see *Rebscher and Vahlenkamp*, 1988, p. 181 ss; *Weschke*, *Kriminalistik*, 1994, p. (297) 298.

653 *Dionyssopoulou*, 1999, p. 27.

Another critical issue that has been raised is the incapacity of the money laundering offence to tackle the grey area, namely the fine line between legality and illegality, due to the proximity of money laundering conducts and legitimate financial transactions. Already in 1999 in his PhD thesis, *Dionyssopoulou* underlines that it is quite impossible to find out about the origin of sums of money used for financial transactions without disturbing the market.⁶⁵⁴ Investigations on customers, on juridical entities, or on businesses are cumbersome for the functioning of a free economy. Given the neutral nature of money as a universal payment method and the ability of criminals of exploiting all legal loopholes, the scholar is very sceptical about the efficacy of the anti-money laundering regulations. In addition the scholar highlights that some countries, without naming which ones, profit from financial flows and are thus not interested in restricting liberties of this lucrative business through public control.⁶⁵⁵ In other words, the scholar reveals a deep truth about the anti-money laundering regime, which is still very actual, namely the fact that the regulation of the financial sector through public interference to monitor transactions is not seen in a very good way from those who profit from the '*laissez faire*' philosophy.

On the same lines *Pieth* underlines that the financial system often profits of the flow of dirty money, deriving from fiscal crimes, or currency export laws violations.⁶⁵⁶ The scholar distinguishes between proceeds of organised crime and capital flight. While the first is perceived as more serious due to human rights allegedly involved, the second type of illegal money appears less harmful. The distinction between the two is what especially interests those countries that profit from financial flows. Switzerland, for instance, was, according to *Pieth*, very much concerned about its reputation as banking centre. Therefore the country would not want to be known for being an offshore centre where criminals launder their profits, still without renouncing to carry on its financial business behind the veil of bank secrecy.⁶⁵⁷

654 *Dionyssopoulou*, 1999, pp. 168 ss.

655 *Dionyssopoulou*, 1999, p. 168.

656 *Pieth*, 1993 p. 105.

657 *Pieth*, 1993 p. 105.

3.5 Considerations

This chapter has showed that the wording of Article 261 Gcc has the potential of frustrating some of the intentions expressed by the legislature in occasion of the adoption of the provision. For instance, while the vague wording of the money laundering offence was thought to tackle ever-new emergencies and has been justified by legislatures as necessary to ensure a more effective fight against money laundering, it has also raised issues that, far from being purely dogmatic, have undermined the acceptance of such law. If law makers have designed the offence in a broad way to allow the criminalisation of conducts that could not have been prosecuted by the existing offences before, the large discretion left to prosecutors, has resulted in a cumbersome element for the prosecution of money laundering. In addition, criminalising the reckless conduct without envisaging a specific criminal liability for security positions has widened the scope of the offence to the point that the law has missed its function of isolating criminals by criminalising gate-keepers' activities.

In addition, the chapter has revealed underlying controversies, for example the interests protected by Article 261 Gcc, which may, if not solved, affect its implementation. For instance, if on one side a state intervention is considered necessary to contain the impact of economic misbehaviours to protect citizens, on the other side it is important to limit the resort to criminal law only for safeguarding individual or collective situations and not for defending an existing economic structure. The economic system may, in fact, not be considered as a collective interest that needs protection. Also, safeguards provided by penal law need to be substantial and not symbolic, because they urge to change a given situation of inequality, where criminals can profit from illegal practices while legitimate economic actors undergo unfair competition. From the doctrinal analysis it has instead emerged that the legislator seemed to be more interested in drafting a symbolic legislation that can be hardly integrated in the legal system and that raise strong challenges. Lawmakers have been focusing on expanding the reach of anti-money laundering in order to improve its effectiveness, yet without providing legitimacy for such expansion. While the European discourse on money laundering stresses the absolute urgency of protecting the soundness of the financial system from the infiltration of ill-gotten capitals, in practice the vague formulation and the further

expansion of the money laundering offence, which contrasts with domestic legal principles of EU countries, results in a cumbersome implementation of these anti-money laundering law. The fact that the criminalisation of money laundering causes so much uncertainty at a domestic level should be taken into account when evaluating how it is enforced; therefore instead of perpetuating the process of expanding the reach of anti-money laundering, legislators should clarify the goals of such a cumbersome policy.⁶⁵⁸

On the background of the analysis conducted in this chapter it can be said that the hypothesised symbolic nature of Article 261 Gcc can be generally supported by the study of legal scholarship. Legal scholars have revealed technical hindrances that hinder the provision's legitimacy and thus hamper a positive integration of the act in the criminal legal system. In addition, given that most controversial issues are caused by the wording of the offence, the chapter seems to uphold the idea of an intentional potential decriminalisation of money launderers.

658 *Zoppei*, 2015, p. 130, 144.

4 CHAPTER

'The implementation of the law: A qualitative analysis of criminal statistics and economic estimates'

'Now all the criminals in their coats and their ties
Are free to drink martinis and watch the sun rise
While Rubin sits like Buddha in a ten-foot cell
An innocent man in a living hell'.

(Bob Dylan, Hurricane)

4.1 Foreword

Illicit globalisation operates in the gap between the authority to create laws and the ability to enforce such laws.⁶⁵⁹ In order to disclose the impact that the legislation has had in the past twenty-three years of being in force in order to compare this with the previously highlighted intents of the legislature, this chapter deals with the second factor, identified in the first chapter, for the empirical research on the effectiveness of law, namely the implementation of law. In particular, the chapter looks at the effects of the criminalisation of money laundering and the application of the GwG by analysing official statistics, and thus by looking at the implementation of law from the point of view of the authorities providing the figures. The chapter does not aim at assessing either the phenomenon of money laundering or the effectiveness of norms through the official figures. It would rather imply assuming that the effectiveness of a law depends merely on its implementation, and that the implementation could be

⁶⁵⁹ *Andreas*, 2015, pp. 52-53.

assessed through statistics on compliance, deviance and punished deviance. This research, instead, is based on the assumption that the (in)effectiveness of a norm may also depend on different factors and that, in order to assess the implementation of a law, it is necessary to look at all effects caused by the law, including those that are not registered by the official statistics. In addition, this work takes the view that a high convictions rate does not always correspond to a high level of effectiveness of the criminal law. As argued in the first chapter, compliance might not be enough to fulfil the indirect functions of a norm,⁶⁶⁰ while a high degree of disobedience does not mean that the norm has no effect.⁶⁶¹ Moreover, for interpreting statistics on the implementation of a law, it is fundamental to understand legal practices and legal actors' opinions on such law. Therefore, the results of this chapter will contribute to the evaluation of the effectiveness together with the considerations deriving from the interviews conducted with law enforcement personnel presented in the following chapter five. These should provide some insight to help interpret figures in a more critical way. Due to the great amount of reports that provide statistics on law enforcement, the research is purely directed at a qualitative understanding of the issue since it does not gather primary data. The figures on the criminal justice system activities relating to money laundering and on the preventive regime are provided by public authorities and are therefore official sources. There is a certain degree of approximation, though. On the one hand it is due to the fact that Germany is a federal state and that figures are firstly collected at a state level and then rounded up at a federal level, and on the other hand it is because every authority has its own methodology to collect the information. Yet, they both constitute a basis on which further qualitative reflections can be developed. The official statistics are analysed with a qualitative approach, on the basis of hypotheses built on the outcomes of previous researches and on the study conducted in the previous chapters, with the goal of understanding both the causes and the effects of the described outcomes.

Given the abundant literature that summarises and analyses the data and thanks to the results of an empirical research conducted shortly after the introduction of the policy, this work approaches the outcome of the statistics with an already critical perspective.

⁶⁶⁰ Full compliance with article 261 Gcc might not impede the infiltration of illicit financial flows, as much as the law that imposes a driving speed limit is not effective if car accidents take place despite obedience. See *Rottleuthner*, 1983, p. 90.

⁶⁶¹ *Aubert*, 1974, p. (85) 86.

Specifically, figures are studied on the basis of factors identified as relevant, such as the number of investigations initiated and the number of cases that reached a final decision, the number of convictions inflicted to the relatively different conducts punished by Article 261 Gcc, the type of punishment attached, the amount of assets effectively confiscated in relation to money laundering convictions, the nationality of the individuals and the headquarters of the companies reported. Furthermore, the typology of Suspicious Transactions Reports (STRs) filed will be also taken into consideration, in order to reveal which offences suspicious transactions are normally linked to. Moreover, despite being aware that economic estimates have a low degree of objectivity and that the flow of illicit capitals in the country might be influenced by several different factors, the chapter also presents estimates of the volume held by illegal economy in Germany. The German anti-money laundering regime was assessed by the FATF in 2010. A follow-up report was published in 2014.⁶⁶² Both reports provide relevant information that complete the analysis conducted on the statistics. Given the fact that money laundering is a transnational phenomenon that, for instance, takes advantages of the liberty of movement among the European Union, the chapter tries to give an overview of the results of international cooperation for the purpose of prosecuting money laundering. The research makes also use of a case study conducted by the BKA on money laundering in the real estate sector. A vast amount of publications, especially in the recent years, have focussed on an evaluation of the effectiveness of the anti-money laundering legislations by adopting different methods.⁶⁶³ Some of these studies provide relevant information for this research. For

⁶⁶² The implementation of the Recommendations is, in fact, rigorously assessed through Mutual Evaluation processes, and through the assessments conducted by the International Monetary Fund (IMF) and the World Bank (WB). After such mutual evaluations are conducted, Mutual Evaluation Reports are compiled, and countries which are found to be non-compliant with the standards are called upon to address the deficiencies. A follow-up report is thereafter published, the idea being to keep the countries on their toes. Jurisdictions which are found to be clearly non-compliant could be sanctioned. The FATF's persuasiveness stems from the fact that it has the enormous ability to influence whether or not a country can be seen as a viable business partner or an investment destination. The FATF Mutual Evaluation Report (MER) on Germany of 2010 is available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Germany%20full.pdf>, while the FATF 3rd Follow-up Report of Germany of 2014 is available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR-Germany-2014.pdf>, last accessed on 16/07/2015.

⁶⁶³ See, among others, FATF, 2013, Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems; *Ferwerda*, 2009; *Geiger and Wuensch*, 2007; Global Witness, 'How can FATF measure and promote an effective anti-money laundering system', 2012, available at <https://www.globalwitness.org/sites/default/files/library/How%20FATF%20can%20measure%20and%20promote%20an%20effective%20anti-money%20laundering%20system.pdf>, last accessed on 16/07/2015; *Harvey*, 2008; IMF, 2011, Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT). Report on the Review of the Effectiveness of the Program

instance, the chapter takes notice of a cost-benefit analysis conducted on the specific provision concerning the disclosure of Beneficial Ownerships (BOs). Furthermore, the chapter draws attention on a recently published cost-benefit analysis of the European anti-money laundering policy, which compares the burden imposed by the money laundering regime and the outcomes in terms of prevention or repression. The chapter concludes with speculations on potential *effet pervers* caused by the implementation of the policy and with considerations on the probable reasons of the revealed hindrances.

4.2 General information on statistics provided by the federal statistical office, the police and the Financial Intelligence Unit (FIU)

The chapter makes use of statistics provided by the federal statistical office (*statistisches Bundesamt*, Destatis), by the federal police (the police criminal statistic report, *Polizeiliche Kriminalstatistik*, PKS) and by the FIU (FIU reports). All statistics are official, since they are published annually by national institutions, respectively the federal statistical office of Wiesbaden, the Ministry of the Interior and the BKA. PKS statistics take the perspective of the police. Therefore, just the cases known by the police are taken into consideration, also including attempts and drug criminality dealt by customs.⁶⁶⁴ In relation to the criminal cases, the outcomes are thus different from those provided in the Destatis statistics, which are the results of the cases processed by public prosecution and judges. The figures are collected by the BKA and from the police authorities in the sixteen state departments (LKAs).⁶⁶⁵ PKS statistics also provide a clearance quote, which shows to what extent offences have been cleared by the criminal justice system, irrespective of conviction rates. As the report drafters highlight, there is an intrinsic limit in the collection of such figures, namely the fact that there is always a dark number in the crime field, which cannot be tackled by the statistics.⁶⁶⁶ Another limitation recognised by the drafters is that such

<http://www.imf.org/external/np/pp/eng/2011/051111.pdf>, last accessed on 16/07/2015; *Levi*, 2002; *Levi et al. (ed.)*, 2004; Savon and Riccardi (ed.), 2015; *Unger et al.*, 2013; *Kemal*, 2014.

⁶⁶⁴ Tax crimes and financial crimes are, for example excluded by these surveys. See PKS, 2014, p. 4.

⁶⁶⁵ The PKS statistics give information on the volume of cases processed by the police in relation to every offence. They aim at acquiring a general overview on criminality and a specific overview of the types of offences committed, the volume and the structure of the suspects as the changes in criminal rates. They also have the function of acquiring knowledge for planning, organising and deciding about the prevention and repression of criminality. In addition they may be used for criminological and sociological researches and criminal policies. See PKS, 2014, p. 4.

⁶⁶⁶ PKS, 2014, p. 4.

numbers do not provide explanations for the motives of the deviance. Therefore, not only they do not represent the reality of the criminal world, but also they do not take into consideration factors that might influence criminals' behaviour. However, this also applies to other two statistics. The Destatis statistics published by the Ministry of Interior takes the perspective of the judiciary and of the public prosecutors offices. They give information on justice administration, by presenting the decision-making praxis of criminal courts and the criminality registered and evaluated by criminal courts.⁶⁶⁷ This pursues the goal of serving the planning of criminal policy and the development of legislations in the field of criminal substantial and procedural law.⁶⁶⁸ The statistics are based on the crime category with the most serious punishment available, thus the figures do not provide the real total number of convictions pursuant to Article 261 Gcc. The Destatis statistics provide a wide range of information. The following paragraphs will focus only on relevant data for this research, though.⁶⁶⁹ Even though an in-depth analysis is conducted on the most recent statistics dating back 2013 and 2014, the chapter provides a compared analysis with some figures from the previous years, in order to give an overview of the eventual differences and to allow a research on the causes of such differences. Statistics on the administration of justice are available starting from 2002. The FIU annual report provides very detailed information not only on the typologies of suspicious transactions reports (STRs) received and on the processed cases, but also on the feedbacks received by law enforcement agencies. Especially the latter element is relevant to assess the effectiveness of the cooperation between the private sector and the criminal justice system through the mediation of the FIU.⁶⁷⁰ Yet, an analysis of such cases cannot be held as representative of all cases dealt with by the prosecutors, since it relies on proceedings forwarded to the FIU. For this reason, besides not including cases that are not transmitted, it does not include money laundering

⁶⁶⁷ Destatis statistics are mainly produced for the use of law enforcement departments, policy makers, legal actors and scholars; media and other information providers can use them too. Federal statistical office, Series 10, volume 3, 2013, p. 6.

⁶⁶⁸ Federal statistical office, Series 10, volume 3, 2013, p. 6.

⁶⁶⁹ The Destatis statistics differentiate between decisions based on the general criminal code and decisions taken in the context of other legislations, such as in the field of youth criminal responsibility; however the research focuses on figures referring to the criminal code. Moreover, the statistics provide for any number a gender quote, which will not be take in consideration for the purposes of this research.

⁶⁷⁰ Yet, in the 2013 Report, the FIU complains about the fact that follow-up responses do not contain enough qualified information in order to be able to undergo typological evaluation. It states 'in many reports, the predicate offences are often the triggering factor for filing a suspicious transactions report, whereas mostly no information is provided on the actual money laundering activities'. See FIU, 2013 Report, pp. 26, 33.

dependent investigations either.⁶⁷¹ From the comparative analysis of FIU reports referring to the period between 2002 and 2014 some trends can be observed with respect to the filing of STRs and the elaboration of such information by the law enforcement, in order to understand the functioning of the preventive system.

4.3 Oswald's research of 1996: A starting point for a further theorisation

Figures about the implementation of the anti-money laundering policy in the unified Germany are available from the beginning of this century. Therefore, data on the first years of the law enforcement are gained from an empirical research conducted between 1994 and 1996 by *Oswald* at the Max Planck Institute of Freiburg as a doctoral research.⁶⁷² The goal of the research was to analyse the implementation and thus the application and the execution of article 261 Gcc in connection with the GwG in the legal praxis, a few years after the regulations entered into force. The focus was put specifically on the cooperation between the private sector and law enforcement authorities, since this link represented a novelty at that time. The outcomes of that research provide an important starting point for the present work. *Oswald* opted for an implementation-focussed type of research, which observes the process of application of a law rather than an evaluation type of study that instead assesses the effectiveness and the outcome of a policy. This is due to the fact that the legislation was very recent at that time and that the outcome of a policy largely depends on the implementation of such policy.⁶⁷³ Given the limited existence time of the provisions, the research could not come to an exclusive outcome, but it rather aimed at providing an overview of the first implementation phase, in order to identify hindering factors. The empirical research consisted of a combination of three sources: an analysis of 380 law enforcement acts,⁶⁷⁴ oral interviews with sixteen public prosecutors⁶⁷⁵ and

⁶⁷¹ Money laundering cases can be differentiated between independent and integrated investigations; the first are commenced due to a suspicion of money laundering, as the typical case of a suspicious transaction report filed according to articles 11 and 13 of the GwG, while the latter are initiated in the context of another case relating to another offence.

⁶⁷² *Oswald*, 1997.

⁶⁷³ *Oswald*, 1997, p. 110. According to this approach, which has been described in the first chapter as '*Implementationsforschung*' typology, the ineffectiveness of a law depends mainly on the implementation.

⁶⁷⁴ For the purpose of understanding the functioning system of the STRs and the consequent investigative developments, criminal records were analysed in order to build a survey about the transactions reported and the subsequent law enforcement activities. The scholar aimed at shedding light on the link between the criminalisation of money laundering and the cooperation with the private sector and therefore focussed her research on investigations commenced on the basis of a filed suspicious

written questionnaires submitted to 75 financial institutions.⁶⁷⁶ The scholar identified three factors that influenced the implementation of the policy, namely the characteristics of the executive programme,⁶⁷⁷ the characteristics of the executing authorities (*Normakteuren*)⁶⁷⁸ and the characteristics of the norm addressees (*Normadressaten*).⁶⁷⁹ Being an '*Implementationsforschung*', the legislative intents are not considered a relevant factor.⁶⁸⁰ The main outcomes of the empirical research are hereafter summarised to the extent that they are relevant for the current study. It is particularly interesting to verify whether cumbersome issues emerged in the first years of implementation have been solved in the meanwhile or whether they still represent an obstacle for an effective implementation. This will be verified by comparing *Oswald's* outcomes with the implementation of the anti-money laundering policy in the recent years. Most of the information collected by the author through the interviews can be currently found in the official reports published by the FIU, the federal police office and the federal statistical office.

The empirical research was based on eight hypotheses,⁶⁸¹ which has been confirmed or proved wrong by the empirical research.⁶⁸² Outcomes of *Oswald's* study will be

transaction, without taking in consideration cases where the allegations of money laundering was triggered by a previous investigation on a predicate offence.

⁶⁷⁵ Due to the limited number of statistics on the implementation at that time, the research was conducted through extensive interviews of experts, with the goal of investigating not only the opinions and approaches toward the law, but also to compile surveys on the legal practice. Thanks to the fact that one prosecutor of every *Bundesländer* was interviewed, the sample was considered representative for describing legal practices in the different *Bundesländer*. The scholar chose to use semi-structured interviews in order to access perceptions, direct experiences and evaluations of the *Normakteuren* about the fight against money laundering.

⁶⁷⁶ Written questionnaires were submitted to financial institutions with the goal of investigating which impact the GwG has had with respect to the burden imposed. Specifically the scholar was interested in revealing problems of application and difficulties in the cooperation with the law enforcement. This method was adopted because of time and costs convenience but also to assure the anonymity of the speakers. *Oswald*, 1997, pp. 120, 164.

⁶⁷⁷ *Oswald* listed for example possible problems of application deriving from the incompatibility between criminal and administrative law or from legal loopholes or inconsistencies caused by the formulation of the provisions.

⁶⁷⁸ The second factor consisted of authorities devoted to implement the law, who can influence its implementation to the extent that they can interpret the content with a certain degree of discretion; they might have different degrees of acceptance of the law and therefore be more or less willing to cooperate, for example with private actors, for the purpose of preventing money laundering.

⁶⁷⁹ Addressees of the law are considered to be, for instance, money launderers who may not accept the prohibition and find subterfuges to elude it.

⁶⁸⁰ *Oswald*, 1997, p. 111.

⁶⁸¹ The hypotheses are to be found in *Oswald*, 1997, pp. 113-119.

⁶⁸² The results of the interviews with public prosecutors that are here discussed are to be found in *Oswald*, 1997, pp. 147-162. The results of the questionnaires submitted to credit institutions that are here discussed are to be found in *Oswald*, 1997, pp. 163-210. The results of the analysis of criminal records are to be found in *Oswald*, 1997, pp. 267, 268.

compared to the current state of affairs resulting from the analysis of criminal statistics.

1) Due to the vagueness of the wording with respect to what the law considers to be a suspicious transaction, the filing of STRs may be influenced by discretionary and biased elements such as the social class or nationality of the customer. This was confirmed by the analysis of the 380 records of relevant money laundering proceedings, where almost two thirds of the suspected individuals reported were non-German nationals, and 80 % were non-regular customs or relatively unknown new customs. Approximately half of the reported suspicions transactions included in the study of the criminal records were conducted with cash money, because there was a general suspicion on it. Another confirming result was that the nationality of the individual or the country of origin of the money was a factor influencing the filing of STRs. For instance, a relevant number of transactions were filed, related to high amounts of money by asylum seekers or transactions with countries in conflict or with countries with a high organised crime rate, or unexplainable deposits of unknown foreign currency from African states.⁶⁸³

2) Due to the threat posed by Article 261 (5) on professions and businesses, the amount of STRs filed should be very high in order to prevent criminal liability. The author reported that illegal transactions could not be easily differentiated from legal ones by bank employees, who could not, for instance, discern a 'mere' tax evasion operation from a money laundering one.⁶⁸⁴ With regard to the wording of the GwG, the interviews partners lamented the difficulty faced by employees without a legal education to understand the provisions of the GwG. Due to this lack of understanding and to the threat posed by Article 261 (5), many employees had been signalling daily transactions. For example the 67 interviewed credit institutions underwent internal examinations of 2.697 reports, but only 857 were considered relevant to be filed.

3) The burden imposed on private sector to prevent money laundering transactions may be too high with respect to the actual effectiveness of the mechanism. According to figures provided by the government in 1994, a total of 3.282 STRs were filed in 1994. In 3,3 billion cases they had to record information about customers, however in only 0,001 % cases public prosecutors required the recorded information.⁶⁸⁵ On the

⁶⁸³ *Oswald*, 1997, p. 195.

⁶⁸⁴ *Oswald*, 1997, p. 287.

⁶⁸⁵ FIU, Jahresbericht 2002, p. 27; *Oswald*, 1997, pp. 286, 287.

background of this situation, the central Credit monitoring authority refused the proposal of the SPD to lower the threshold value of 30.000 DM to 15.000DM.⁶⁸⁶ This was argued by asseverating that keeping a higher threshold would have diminished of 50 % the bureaucratic duties, without reducing effectiveness and efficiency of the regulation.⁶⁸⁷

4) Due to the vagueness of the concept of 'deriving', criminalising every act related to the object that is the proceed of a predicate offence, the offence may have a too broad scope, despite the restrictive interpretation of Article 261 Gcc. Instead of causing a widespread criminalisation of money laundering, it results in a very low conviction rate. According to the empirical research conducted on the criminal records, out of the 379 proceedings, in 83,7 % of the cases, it was not possible to proceed with an indictment for money laundering. In 3,4 % of the cases the closed proceedings were continued, pursuant to Article 11 (6) GwG.⁶⁸⁸ This was also confirmed by the 66 prosecutors interviewed, according to whom 88,5 % of the 1203 money laundering cases they had dealt with in 1994 were closed and in none of the cases the proceeding resulted in a conviction for money laundering. However, the reason was not the quality of the STRs filed, but rather the impossibility of proving the link between one of the predicate offences listed in the catalogue and the objects. Despite having a high suspicion that the objects had an illegal origin, the prosecutors could not bring sufficient evidence to prove the derivation from one of the antecedent acts.⁶⁸⁹ The '*doppelter Anfangsverdacht*'⁶⁹⁰ was considered too high for the purposes of indictment pursuant to Article 152 (2) German Code of Criminal Procedure.⁶⁹¹ As a solution, the prosecutors suggested to broaden the catalogue of the predicate offences and to introduce the possibility of criminalising also those who acted as perpetrators

⁶⁸⁶ BT-Drucksache 12/6784, p. 7.

⁶⁸⁷ Oswald, 1997, p. 288.

⁶⁸⁸ Oswald, 1997, p. 288.

⁶⁸⁹ Oswald, 1997, p. 289.

⁶⁹⁰ The '*doppel Anfangsverdacht*', double initial evidence, was required in relation both to the laundering of proceeds of crimes and to the predicate offence.

⁶⁹¹ In a meeting held in 1994, therefore, the prosecutors agreed to link the possibility of opening an investigation with the existence of a suspicion that the asset derives from one of the designated predicate offences according to the criminological practice. Yet, the standard of proof required by article 111 bff. German code of criminal procedure, for the purpose of seizing criminal assets in relation to article 261 Gcc, namely the necessity of proving the origin of the assets from one of the listed predicate offences, was considered still too high to fulfil the goal of confiscating criminal assets. Also, the introduction of the extended confiscation regulated by article 73d German code of criminal procedure was not considered to be effective in the practice, because even when prosecutors had suspicion about the illegal provenience of the goods but the defendant was able to prove at least any legitimate income, this would have been enough to discharge the suspicion. Oswald, 1997, p. 155.

of the predicate offences. A complete inversion of the burden of proof was though not advocated, since it would have been constitutionally illegitimate, according to the respondents. The author added that the effectiveness of the inversion of the burden of proof, as adopted in the US, was overestimated.⁶⁹²

5) Article 11 (1) of the GwG, which allows suspicious transactions to be nevertheless completed in order to facilitate money laundering investigations, might have opened a legal loophole. This was proved neither by the practice at that time nor by the current empirical research.

6) The rules contained in the GwG may not be well accepted by the banking sector since they are too complicated and they do not legitimise the burden imposed. In particular, the scholar observes that private sector employees, who do not have a legal education, may find it very difficult to recognise a money laundering operation. A further difficulty arises since banks need to explain customers about the preventive regulation and the necessity of collecting data and reporting suspected operations. More than one third of the fifty credit institutions that replied to the questionnaire highlighted the fact that anti-money laundering laws had caused insecurity and loss of confidence by the customs, thus confirming *Oswald's* third hypothesis.⁶⁹³ In particular regular customers did not easily accept the imposition of sharing so much personal information. The clients were generally concerned about the recording of private information by the institutions.⁶⁹⁴ Yet, credit institutions generally accepted the duties imposed by the new regulations, and, despite being of the opinion that some of them were not practicable, the majority agreed on the necessity of such provisions.

7) The lack of existence of a central authority that receives the STRs (the current FIU) may cause a chaotic situation where information is scattered. One of the main problems raised by the financial sector with respect to the cooperation with the law enforcement agencies was the lack of feedback about the further developments triggered by the filing of STR. The respondents complained about the discretionary approach of different prosecutors' offices while dealing with the signalled cases and the lack of personnel engaged in the elaboration of the STRs. In addition, they lamented the unclear division of duties within the different law enforcement

⁶⁹² FATF, MER Germany 2010, p. 50.

⁶⁹³ *Oswald*, 1997, p. 179.

⁶⁹⁴ *Oswald*, 1997, p. 179.

authorities.⁶⁹⁵ However, according to the opinion of the respondents, the level of cooperation between public prosecutors offices and credit institutions was considered to be sufficiently good, despite some problems of communication, mainly identified in the first months after the introduction of the new rules.

8) The last hypothesis consists of a prediction regarding the possibility that law enforcement authorities may recall the failing cooperation with other states for the prosecution of transnational money laundering cases, with specific reference to offshore centres. Investigators, indeed, claimed that the transnational nature of organised crime and the limited availability of instruments to investigate abroad impeded the successful prosecution of money laundering, so that the eighth hypothesis was positively verified.

The research also focussed on the sanctions imposed for money laundering cases, particularly on the volume of confiscated assets. Out of the 380 researched cases, none of them resulted in a conviction for money laundering. Not a single D-Mark could be confiscated. In three cases, assets were seized but the seizure order was cancelled afterwards. 87 % of the proceedings were dismissed pursuant to Article 170 (2) German code of criminal procedure, mostly because of the impossibility of proving the origin of the object from one of the listed predicate offences. Only 3,4 % of the proceedings were dismissed and continued for another offence.⁶⁹⁶

4.4 (Preliminary) investigations, type of charges, convictions and penalties⁶⁹⁷

The following paragraphs describe the application of the laws and the effects of the more recent years of implementation through the lenses of the law enforcement agencies and of the FIU, with a particular focus on the issues already raised by *Oswald* in 1997 and on the eventual emerging challenges. In 2013, in 789 cases out of the 935 money-laundering cases, on which a sentence was passed on (*abgeurteilt*), individuals were convicted (*verurteilt*) and 112 proceedings were closed. The

⁶⁹⁵ On two extreme cases, the private institutions observed a lack of interest and indifference from the offices, which did not reply to written requests nor to arranged telephone calls for investigative purposes. *Oswald*, 1997, p. 182.

⁶⁹⁶ BKA, Organisierte Kriminalität Bundeslagebild 2013, pp. 6, 7, available at http://www.bka.de/DE/ThemenABisZ/Deliktsbereiche/OrganisierteKriminalitaet/Lagebilder/lagebilder__node.html?__nnn=true, last accessed on 13/11/2015.

⁶⁹⁷ Figures are provided by the Federal statistical office, Series 10 on the administration of justice, volume 3, from the year 2002 to 2013. The year 2003 is missing because there are no statistics available for that year.

Destatis statistic offers information on the number of convictions for the four different conducts criminalised by Article 261 Gcc, namely the 'concealing offence' under paragraph one, 'the isolation conduct' under paragraph two, the aggravated conducts under paragraph four, and finally the reckless liability disciplined under paragraph five. In 2013, out of a total of 828 individuals convicted for money laundering, a great majority (510 individuals) was convicted under Article 261 (5) Gcc, which corresponds to the 61 % of total convictions for money laundering. Very few individuals were convicted under paragraphs two and four (respectively 31 and 33), while the rest was convicted under Article 261 (1) Gcc, namely 30,6 % of the total convictions for money laundering. This trend was started to be observed only from 2005 on. In the years between 2002 and 2004 the majority of convictions was pursuant to Article 261 (1). Since 2005 the number of persons convicted under Article 261 (5) Gcc increased consistently and kept on increasing in the following years to the point that, by 2007, the number of convicted persons under Article 261 (5) Gcc was higher than those convicted under Article 261 (1). It increased from 14 cases in 2002 to 512 cases in 2012, with a small decrease in 2013 (510 cases). The number of convictions under paragraph two has always been much lower with respect to the convictions for paragraph one. However, it can be noted that there has been a growing trend since 2006. By looking at the total number of sentences passed and at the number of individuals convicted pursuant to Article 261 Gcc, one can observe that there was a general increase between 2002 and 2013.

This trend was also registered by the FATF assessors in 2010.⁶⁹⁸ Yet, it is impossible to establish the reasons that lead to this development, since it may be related to the growth of the phenomenon of money laundering in the country or to an improvement of law enforcement techniques. According to the FATF Report of 2010, the general growth of money laundering cases from the year 2006 can be partly ascribed to a technical factor, namely to the fact that only since that year statistics comprehend all *Bundesländer* while before that they were referring only to Germany prior to reunification, including greater Berlin.⁶⁹⁹ The FATF assessors could not receive

⁶⁹⁸ FATF, MER Germany 2010. p. 61.

⁶⁹⁹ In particular, the report specifies that data for the entire Federal Republic, i.e. including the *Länder* of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia, have only been recorded since 2007. See FATF, MER Germany 2010. p. 61.

explanation by German authorities for the identified increase, though.⁷⁰⁰ Especially with regard to the convictions relating to the reckless conduct, the growth is very evident. Thus, in the recent years the Article 261 Gcc has been mostly adopted against those who act with recklessness. Consequently, if paragraph five had not been added, a large part of the convictions for Article 261 Gcc would have not been inflicted.

Article 261 has been used rather rarely to punish organised criminal groups or activities committed on a commercial basis. In fact, only 33 convictions out of the 828 inflicted in 2013 were related to paragraph four. Between 2002 and 2012, 229 individuals have been convicted for the aggravated conducts, while a total of 2.373 persons have been convicted pursuant to Article 261 (5) Gcc. Out of the 124.842 completed proceedings in the field of money laundering, tax crimes and economic crimes recorded by public prosecutors offices in 2013, 2.163 were categorised as organised crime proceedings, namely 1,7 % of the total.⁷⁰¹ According to the same source, only 18 % of the proceedings involved more than one person.⁷⁰² The BKA also offers figures on the economic aspect of criminal cases included under the technical definition of 'organised crime' provided by the same authority.⁷⁰³ In particular, in 2013 the BKA registered 580 ongoing-cases of organised crime, of which 35 % included money laundering activities, but in only 2,9 % of the cases money laundering was the main conduct.⁷⁰⁴ From these figures one can hypothesise that Article 261 (4) Gcc is not used often to persecute money laundering committed by organised criminal groups. Yet, the outcome might also be interpreted as a symptom of an effective deterrent effect of the law. Also, individuals convicted for

⁷⁰⁰ FATF, MER Germany 2010. p. 61.

⁷⁰¹ Federal Statistical Office, series 10 on the administration of justice by the state's prosecution, volume 2.6, 2013, p. 96.

⁷⁰² The number of convictions for illicit possession of narcotics, pursuant to article 29 (1) 1, 3 of the Narcotics Act (Betäubungsmittelgesetz) is for example much higher (22.702 in 2013) than the number of convictions under article 261 Gcc (828 in 2013) according to the Federal statistical office, Series 10, volume 3, 2013, pp. 37, 51.

⁷⁰³ According to this definition, organised crime is 'the planned violation of the law for profit or to acquire power, which offences are each, or together, of a major significance, and are carried out by more than two participants who co-operate within a division of labor for a long or undetermined time span using a) commercial or commercial-like structures, or b) violence or other means of intimidation, or c) influence on politics, media, public administration, justice and the legitimate economy', see *Küstler*, 1991, p. 60.

⁷⁰⁴ BKA, Organisierte Kriminalität Bundeslagebild 2013, pp. 6, 7, available at http://www.bka.de/DE/ThemenABisZ/Deliktsbereiche/OrganisierteKriminalitaet/Lagebilder/lagebilder__node.html?__nnn=true, last accessed on 13/11/2015.

Article 261 (4) might not result in the official statistics due to a cumulative conviction for an offence with a higher punishment. According to the FATF report of 2010, German authorities persecuted profit-oriented crimes under other offences. In fact, interrogated authorities stated that the offence of money laundering, due to various factors, is not used for this purpose. First of all, the impossibility of charging the offender of the predicate offence causes the drop of the allegation for money laundering and the indictment for the predicate offence. In addition, the weak range of sanctions available for the punishment of money laundering conducts and the possibility of suspension of the punishment execution make prosecutors decide to change the charge to pursue a higher punishment.⁷⁰⁵ Moreover, money-laundering conducts would be prosecuted as participation in the predicate offence, in the event that the perpetrator is different than the one of the predicate offence. This is due to the fact that predicate offences are usually easier to prove and carry a higher punishment than the ones envisaged for money laundering.⁷⁰⁶

Another relevant index concerns criminal records of individuals convicted pursuant to Article 216 Gcc. Assuming that pre-trial custody is imposed to rather dangerous offenders, one can infer that individuals convicted for money laundering are less dangerous, due to the fact that a very low number was subject to pre-trial custody, as disciplined by Article 112 of the German Code of Criminal Procedure (a total of 45). Another factor highlighted by the Destatis statistics is whether convicted individuals had been punished before and if so with which penalty. It can be observed that with respect to Article 261 (1) Gcc, the number of persons with previous convictions is almost equal to the one of those without (109 without and 105 with). 41 out of the 105, who had already been convicted, had received five or more convictions, yet most of them consisted of monetary fines (49). For convictions under Article 261 (5) Gcc, though, only a minority was subject to previous convictions before (171 out of 497).⁷⁰⁷ Given that habitual offenders might be considered more dangerous, it can be inferred that individuals convicted pursuant to Article 261 (5) are not considered socially dangerous. However, these data might also depend on other factors, such as the fact that prosecutors find it easier to proceed with a money laundering charge if

⁷⁰⁵ FATF, MER 2010. p. 63.

⁷⁰⁶ FATF, MER 2010. p. 64.

⁷⁰⁷ Federal statistical office, Series 10 on the administration of justice, volume 3, 2013, pp. 1438, 439.

the suspect was previously convicted for a predicate offence. The situation described from the point of view of law enforcement seems to prove wrong the idea of money launderers threatening the security of the whole society. Detected money launderers do not correspond, in fact, with the description of habitual offenders that pose a risk to the integrity of the social fabric.

As regards the penalties inflicted, in the vast majority of cases, the sentence inflicted is a *Geldstrafe*, a monetary fine (about 81 % of the total). This is not the case for sentences regarding Article 261 (4) Gcc, which indeed prescribes a higher punishment.⁷⁰⁸ However, given the low-end range of penalties, the fact that the majority of sanctions imposed do not involve prison sentences and that the vast majority of sanctions involving prison sentences are suspended, the FATF assessors concluded in 2010 that Article 261 (1) Gcc is not subject to effective, proportionate and dissuasive sanctions.⁷⁰⁹ In the follow-up report published by the FATF in 2014, German authorities have commented on this criticism by underlying that the range of punishment of imprisonment (from three months to five years) is broader than the average (imprisonment of up to 5 years or fine) for similar offences as 'fraud' (Article 263 Gcc), 'theft' (Article 242 Gcc), 'receiving stolen goods' (Article 259 Gcc) and 'accessory after the fact' (Article 257 Gcc). According to the authorities, the implementation of sanctions for article 261 Gcc is also higher than the average, while the share of sentences imposed for money laundering and involving a term of imprisonment is 19,6 %, and the average is 17,64 %. However, the FATF assessors replied that the share of sentences involving a term of imprisonment of more than 1 year was lower than the average: 4 % for money laundering against 9 % the average share. A very little number of convictions is referred to attempted conducts.⁷¹⁰ This may put in question the deterrent effect and the capability of preventing the commission of money laundering of the current legislation. However, the low number might be explained recalling Article 1 (1) second sentence of the GwG, which states that specific transactions shall not be reported when the reporting hinders the prosecution of money laundering. A positive element is the fact that most convictions under Articles 261 (1) and (5) are referred to the acts committed in the

⁷⁰⁸ Federal statistical office, Series 10 on the administration of justice, volume 3, 2013, pp. 214, 215.

⁷⁰⁹ FATF, MER Germany 2010, p. 60.

⁷¹⁰ Federal statistical office, Series 10 on the administration of justice, volume 3, 2013, pp. 136, 137.

year before the conviction (387 out of 764). This may mean that the cooperation between the private sector and the law enforcement could ensure a rapid repressive action. However, this has not been the case for conducts listed under paragraphs two and four, which happened before the previous year. An explanation for this difference may lie in the difficulty of providing enough evidence to prove the commercial basis or the commission in form of a gang or the conducts of third persons listed under paragraph two.

Another relevant factor that can be inferred from the criminal justice system's statistics is the comparison between the number of preliminary investigations and the number of convictions. The statistic of 2013, for example, shows that public prosecutors - including federal and state prosecutors - counted 24.624 completed investigations on money laundering cases.⁷¹¹ This number is quite high if compared to the total amount of money laundering cases on which a sentence was passed on (935, data provided by the Destatis statistic of 2013). Between the years 2004 and 2008⁷¹² a total amount of 45.462 preliminary investigations have been conducted, but only 2006 charges have been ascribed.⁷¹³ In fact, the vast majority of investigations concerning money laundering are suspended or discontinued and new proceedings are initiated for the predicate offence.⁷¹⁴ These figures confirm the fact that, while the number of STRs filed to law enforcement is very high, and therefore also the cases dealt by the prosecutors, few of the suspicions are confirmed by the preliminary investigations. However, as previously noted, the statistics do not provide figures on all convictions for money laundering. In addition, in the perspective of the authorities these outcomes are not a sign of inefficiency. On the contrary, they are considered to be consistent with the goal of clarifying cases. As already mentioned money laundering cases might have been finally charged for other offences. Therefore, according to the police, cases have been cleared, even without a conviction pursuant to Article 261 Gcc. The clearance rate for money laundering cases provided by the

⁷¹¹ Federal Statistical Office, series 10 on the administration of justice by the state's prosecution, volume 2.6, 2013, p. 22.

⁷¹² The figures for the period 2004-2007 refer to the entire area of the Federal Republic of Germany. Yet, the year 2004 does not include figures on Schleswig-Holstein.

⁷¹³ Figures derive from the Federal Statistical Office, series 10 on the administration of justice by the state's prosecution, volume 2.6, 2005-2008.

⁷¹⁴ FATF, MER Germany 2010, p. 60.

police is, indeed, very high.⁷¹⁵ Yet, one can also argue that Article 261 Gcc seems to have the function of facilitating investigations, while is not used to convict individuals. On the one hand, it looks like Article 261 Gcc helps investigators initiating criminal cases and collecting information thanks to the access to recorded data provided by the GwG. On the other hand, it is abandoned by prosecutors in favour of other indictments, which provide a higher sanction but a lower burden of proof. It may, thus, have a procedural rather than a substantial function. In the minority of the cases, when investigators find enough evidence to proceed with an indictment and trials for money laundering do take place, the percentage of acquittals of charges laid is very low. Between 2004 and 2008, the percentage has never been higher than 6 %.⁷¹⁶ This may be an indicator that the degree of evidence acquired by the prosecutors is very founded, so that it very often leads to a conviction.

With regard to the nationality of the convicted individuals, it can be observed that the majority of individuals convicted under paragraphs one, two and five had German nationality, whereas 57 % of those convicted for the aggravated hypotheses were non-German nationals.

Given the transnational nature of money laundering, figures referring only to the national criminal justice system may not give a complete overview of the activity undertaken by law enforcement agencies through international cooperation. Germany is, for instance, a member of Eurojust.⁷¹⁷ According to the Eurojust Report of 2014, Eurojust dealt with 220 cases of money laundering, among them 84 were connected to fraud and 52 to participation in criminal organisation, while 71 were dealt as stand-alone crime. In this context, Germany was the second most requested country

⁷¹⁵ In 2014 it amounted to 92,6 % and in 2013 it amounted to 90,6 %. See PKS statistic 2014, p. 88.

⁷¹⁶ See Federal statistical office, Series 10 on the administration of justice, volume 3, from 2004 to 2008.

⁷¹⁷ 'Eurojust stimulates and improves the coordination of investigations and prosecutions between the competent authorities in the Member States and improves the cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust supports in any way possible the competent authorities of the Member States to render their investigations and prosecutions more effective when dealing with cross-border crime. [...] Eurojust's competence covers the same types of crime and offences for which Europol has competence, such as terrorism, drug trafficking, trafficking in human beings, counterfeiting, money laundering, computer crime, crime against property or public goods including fraud and corruption, criminal offences affecting the European Community's financial interests, environmental crime and participation in a criminal organisation', Eurojust, The European Union's Judicial Cooperation Unit, available at <http://www.eurojust.europa.eu/about/background/Pages/mission-tasks.aspx>, last accessed on 16/07/2015.

for international cooperation.⁷¹⁸ The legal framework provided by the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition of financial penalties approved in 2005⁷¹⁹ offers the possibility to Member States to ask for the execution of financial penalties in another Member State. According to a report published by the Max Planck Institute for foreign and international criminal law and the European Commission, in 2012, European Anti-Fraud Office (OLAF) Germany received 6.095 (in 2011 have been 2.869) decisions from other Member States as executing state.⁷²⁰ In 2011, the Federal Office of Justice - an authority within the remit of the Federal Ministry of Justice - received 1802 decisions from the public prosecutor's offices and other German authorities. In 2012, 4.035 decisions were registered. Not all decisions have been transmitted to other Member States yet. In particular the translation of certificates is costly and time-consuming. Yet, no information is provided on the offences to which such decisions are related. According to the Council of Europe, 'Europe is a major stakeholder in global money laundering as being both a source and a destination of criminal proceeds, and through its financial markets as an actor in different stages of the money laundering process. In 2004, the number of suspicious transaction reports received by financial intelligence units continued to grow in most countries, such as in Belgium, France, Germany, Liechtenstein, Netherlands, Ukraine and the United Kingdom'.⁷²¹

4.5 The cooperation between FIU and law enforcement agencies

Figures on the typologies of money laundering convictions are partially provided by the FIU reports.⁷²² However, the FIU can provide statistics only with regard to the

⁷¹⁸ Eurojust, Report 2014, p. 38, available at <http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202014/Annual-Report-2014-EN.pdf>, last accessed on 30/07/2015. In January 2015, for example, a police action took place against a network of money launderers operating in France and Spain. It was a carousel fraud case: laundered funds were alleged to have been obtained from the sale of vehicles bought in Germany and in other countries, on which the value added tax was not paid. See Eurojust, VAT fraud and money laundering network disrupted, 2015, available at <http://www.eurojust.europa.eu/press/PressReleases/Pages/2015/2015-01-30.aspx>, last accessed on 30/07/2015.

⁷¹⁹ Framework decision 2005/214/JHA (*OJ L 76*, 22.3.2005, pp. 16-30), transposed in Germany by the *Gesetz zur Umsetzung des Rahmenbeschlusses 2005/214/JI des Rates vom 24. Februar 2005 über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen* (BGBl. 2005 I, p. 1408).

⁷²⁰ Sieber (ed.), 2013, pp. 65-68.

⁷²¹ Council of Europe, Organised Crime Situation Report 2005, p. 8.

⁷²² Figures are provided by FIU, 2002-2014 reports on Germany. Reports are available both in German and English languages, the reports quoted here are the English versions, while the 2014 report available at the time of writing is in German.

proceedings, about which they receive information by the prosecutors' offices, through the follow-up reports mechanism. In 2014, the FIU received 24.054 STRs and 15.789 follow-up reactions from public prosecutors. According to the FIU report of 2013, 11.868 follow-up responses were received by the FIU from the public prosecutors' offices, pursuant to Article 11 (8) of the GwG, against the total of the 19,095 STRs filed. Thus, there has been an increase of around 26 % of total STRs and about 33 % of follow-up responses received. Out of the 15.789 (in 2013 11,688) follow-up responses, only 414 (in 2013 374) referred to judgments, penalty orders or indictments, which corresponds to nearly 3 %.⁷²³ The main outcome is, however, the number of dismissal orders received by the FIU among the total of follow-up responses. This amounts to 14.368 (in 2013 10,771), nearly 91 % of the total. From the public prosecutors' perspective, in 2013, out of 124.842 completed proceedings in the field of money laundering, tax crimes and economic crimes, 39.322 have been terminated due to insufficient reasons to prosecute, pursuant to Article 170 (2) German code of criminal procedure, namely one third of the total.⁷²⁴ According to the 2013 FIU Report, 'the large number of dismissals is an indication that the threshold of suspicion for filing a report is very low and the suspicion of an offence - compared to the large number of reports - can be verified in a few cases only'.⁷²⁵ This conclusion reflects and confirms the issue debated by the doctrine and emerged in *Oswald's* research about the standard of proof required by the wording of Article 261 Gcc. Despite the formulation of the offence may cover a very broad range of conducts, it is in the end very hard to provide the necessary evidence for the indictment. At the same time, the number of follow-up reports sent by public prosecutors offices also increased from 13 in 2002 to 8.468 in 2012 and 11.868 in 2013. Despite the increasing number of information collected, however, the percentage of dismissals rose, thus inverting what looked like a positive trend of cooperation between the reporting actors and the law enforcement. In 2005 only 77 % of the follow-up reports consist of a dismissal, whereas in 2012 the percentage grew to 89 % and in 2013 to nearly 91 %. There has been a little growth in the number of judgements, penal orders or indictments deriving from STRs, while this corresponded to 4,9 % in 2007, and to 5,9 % in 2012. As a first conclusion, it can be said that the

⁷²³ FIU, 2013 Report, p. 11.

⁷²⁴ Federal Statistical Office, series 10 on the administration of justice by the state's prosecution, volume 2.6, 2013, p. 96.

⁷²⁵ FIU, 2013 Report, p. 26.

situation observed by *Oswald* between 1992 and 1996 was confirmed and that information filed to law enforcement through STRs did not result in a number of court decision such to legitimise the existence of the whole reporting mechanism. However, STRs filed to the FIU may trigger several convictions. Moreover, proceedings for money laundering might take long time so that an STR filed might triggered a conviction only some years later. Convictions registered in the same year might depend on STRs filed the previous years. In addition, it should be taken in consideration that STRs filed in Germany might trigger a proceeding in another country, thanks to the international cooperation among FIUs. Convictions in Germany can be likewise triggered by offence notices gathered abroad.

As already mentioned, the FIU reports provide partial information on criminal proceedings initiated by the filing of a STR. The 2014 report shows that in 59 % of the 304 cases dealt by public prosecutors and communicated to the FIU, concerned convictions of the so-called 'financial agents'⁷²⁶ with (computer-) fraud as predicate offence. This phenomenon is not new to the FIU, so that the report refers to the 'so called financial agents phenomenon', by referring to money laundering transactions undergone by individuals recruited from criminals, who act under the vests of clients interested in investing opportunities. According to the FIU, such facilitators might be recruited by using new methods, such as professional job offers. 'When designing such job offers, the perpetrators attempt to prevent critical analysis by the potential financial agents through numerous variations'.⁷²⁷ The 'financial agents' phenomenon has been registered since 2009. In the previous years, especially between 2005 and 2007, a quite high number of phishing cases were registered. In 2013, 290 of the 11.868 follow-up reports regarded penalty orders and judgements, whereas 77 % of them related to fraud, including a large number of computer fraud (166). Other offences, to which court orders refer, are document forgery, bankruptcy, handling stolen goods, violation of the payment service supervisory act, drug crime, robbery, misappropriation, market manipulation, and theft. Only two orders were connected to drug offences, which consists of the 2 % of the total. Since 2002 the percentage of

⁷²⁶ A definition of the 'financial agent' strategy is given by the FATF: the organised criminal group persuades third parties (the 'financial agents') to lend their accounts to receive the ill-gotten funds, in return for a commission. The funds are then withdrawn in cash by the agent, who subsequently uses the services of licensed money remitters to transfer the proceeds to individuals or accounts outside Germany. See FATF, MER 2010, p. 170.

⁷²⁷ FIU, 2013 Report, p. 29.

drug crimes, to which the courts orders refer to, has always been very low, namely between 6 and 1 %.⁷²⁸ These data may yet be completed by the cases dismissed by prosecutors for money laundering and prosecuted for one of the predicate offences. The most frequently mentioned predicate offences were fraud, including computer fraud, document forgery, while in some years tax offences represented the 2 to 5 %. At least for the cases forwarded to the FIU, these data may indicate that money laundering independent investigations were not directed to proceeds of drug criminality. No follow-up responses relating to cases of suspected terrorist financing have been received by the FIU so far.

4.6 Typologies of STRs filed to the FIU

Data provided by the FIU report are also relevant with regard to the assessment of the application of Article 261 Gcc in cooperation with the GwG. Such statistics show, for example, from which sources the STRs come and thus which attitude the designated businesses and professions have toward the preventive mechanism of reporting. There has been an increasing trend of STRs filed to the FIU since 1995. In 1995 they amounted to 2.759, reaching 14.361 in 2012, 19.095 in 2013 and 24.054 in 2014.⁷²⁹ Most of the STRs were filed by credit institutions, around 87 % of the total of STRS received in 2014 (the same percentage was registered in 2013). The non-financial sector contributed only to a very small extent to the filing of STRs, which means only 1 % (in 2013 0,9 %). This number confirms a trend that has been observed since 2003. According to the FIU, the number of reports filed by the non-financial sector is too small compared to the large number of designated business and professions and to their economic significance. Persons commercially trading in goods filed only 100 STRs and real estate brokers only filed 14 STRs, despite the awareness raising measures taken by the competent Land supervisory authorities. Individuals in independent occupations filed 12 STRs. According to the report, this was due to the special protection of the client relationship.⁷³⁰ The vast majority of STRs has been filed by credit institutions and among them by banking institutions. The financial sector has never contributed for less than 79,5 % of the total STRs, according to the

⁷²⁸ Data are provided by FIU, 2002-2014 reports. The FIU reports are available both in German and English, the reports quoted here are the English versions, besides the 2014 report for which there is at the moment of writing only the German available.

⁷²⁹ Data are provided by FIU, 2002-2014 reports.

⁷³⁰ FIU, 2013 Report, p. 11.

data collected since 2002.⁷³¹ While the constant engagement of credit and banking institutions cannot be blamed, it can be still claimed that, on the other side, attorneys have been reluctant in filing STRs, never representing more than 2 % of the total number, corresponding to a range of three to seventeen STRs in a year. Between 2004 and 2014, for instance, a total of 126 lawyers filed STRs.⁷³² Despite an increase of around 50 % of STRs filed by lawyers between 2013 and 2014, the number is still considered too low (23 in 2014 and 10 in 2013).

The FIU report provides some information also on the nationality of the individuals and about the headquarters of the company reported. In particular, 38.084 persons were mentioned (in 2013 34.502), and among them, 23.960 (in 2013 20.802) were provided information on the nationality. 14.359 (in 2013 12.577) persons had German nationality, which corresponds to 61 % of the total. 1.153 (in 2013 943) were Turkish, 611 (in 2013 519) were Romanian nationals and 561 (in 2013 581) Russians. The hypothesis spelled out by *Oswald* in 1996 about a possible bias of the STRs linked to the nationality of the suspects, which was confirmed by her empirical research, seems to find confirmation in the more recent statistics, on the rough confrontation between the percentage of non-German nationals among the whole population (around 10 %) and the percentage of non-German nationals object of STRs. Yet the numbers processed by the FIU do not offer a general view on the cases dealt by the prosecutors since they just analyse proceedings to the FIU and triggered by a STR or pursuant to Section 31 b of the fiscal code. German nationals have represented the majority of individuals subject of STRs since 2002; Russian and Turkish nationals have been always very represented among the foreign nationalities, while other nationalities have been changing such as Rumanian, Italian, Chinese, Iranian, Kazakh and Nigerian. A particular high number of Arab nationals have been reported in 2002, in particular from Lebanon, Iran, Pakistan and Afghanistan. This might be linked to the terrorism fear after the 9/11 facts.

The FIU report provides data about the 'nationality' of companies too. A total of 5.670 (in 2013 11.224) companies were recorded in the suspicious transaction reports, and for almost a half of them the headquarters were mentioned. Around 70 % of the

⁷³¹ Data referred to the previous years are provided by the FIU, 2002-2014 Reports.

⁷³² Data are provided by the FIU, 2002-2014 Reports.

companies whose headquarters was communicated were based in Germany (in 2013 62 %), 136 (in 2013 113) in the UK, 95 (in 2013 133) in Cyprus, 81 (in 2013 197) had headquarters in Switzerland and 75 (in 2013 124) in the British Virgin Islands.⁷³³ During the examined period, the companies object of STRs were mostly headquartered in Germany. Only in 2009 the majority of them were based abroad. The most recurrent headquarters have been the United Kingdom, Cyprus, Switzerland, Russia and the Virgin Islands. These figures could be interpreted as a symptom of the fact that it is easier to launder money through tax havens and offshore centres, such as the British Virgin Islands or Cyprus, or through jurisdictions with a strong bank secrecy, as for instance Switzerland, or through countries with lax company laws - listed by the tax justice network as a secrecy jurisdictions - such as the UK, the Netherlands and the US.⁷³⁴ Another interesting data revealed by the FIU report of 2013 with regard to the typology of involved individuals is that 101 STRs referred to fraud to the detriment of senior citizens. Indexes about senior citizens targeted by money launderers appear mostly in the recent years. However, the FIU assumes that there is a very high volume of unreported and unrecorded crime here. For this reason no exact statements can be provided about the different *modi operandi*. Between 2004 and 2005, instead, the FIU draws attention on the high number of low income individuals reported, namely students, pensioners, unemployed and housewives, constituting 19 % of the people reported in 2005 and 17 % in 2004. However, no explanations were provided for this trend. The year 2009 was signed by a peculiar phenomenon, namely the relevant number of cases of CO2 emission allowance trading.⁷³⁵ According to the FIU, in 2009 an increasing number of STRs have been filed in Germany by credit institutions and energy trading companies based on offers or money transfers in connection with emission allowance trading, in relation to suspected VAT frauds.⁷³⁶

⁷³³ FIU, 2014 Report, p. 15; FIU, 2013 Report, p. 18.

⁷³⁴ Index available at <http://www.financialsecrecyindex.com/introduction/fsi-2013-results>, last accessed on 14/07/2015.

⁷³⁵ FIU, 2009 Report, p. 30.

⁷³⁶ 'The CO2 emission allowances are sold in a chain of suppliers by circumventing VAT obligations and involving several companies seated in different member states of the EU', see FIU, 2009 Report, p. 30.

4.7 Critical issues

Issues highlighted by the FATF report of 2010 about the statistics provided by the FIU concern the low number of STRs, the subjects filing STRs and the number of dismissals. The FATF firstly considers the volume of transactions reported too low for an economy with a highly developed financial services sector, which has near-universal access to such services for its resident population.⁷³⁷ Secondly, only few cases against the high number of STRs filed to public prosecutors' offices reach a judgement or a criminal order or an indictment. The percentage is even decreasing if compared to the previous years, while the great majority is dismissed because of the impossibility of collecting enough evidence for starting a criminal case.⁷³⁸ In addition, reports are filed mostly from one typology of designated businesses and professions, namely banks and financial services providers. The majority of suspicions are related to one category of activity, namely the 'phishing' and the use of financial agents. According to the 2013 report of the FIU, in 211 cases contracting partners did not disclose the fact that they were acting on behalf of beneficial owners.⁷³⁹ In fact there was suspicion that the contracting partners had not complied with their disclosure obligations when arranging a business relationship or a transaction. This issue had already emerged in 2012, however the number of cases more than doubled in 2013. Another noted grey area is considered to be the groups of the legal advisors and of the persons trading in goods. Here the suspicion of a large number of unreported or unrecorded cases rises because of the very small volume of STRs filed by such categories. According to the FIU, the non-financial sector is 'definitely in a position to recognise and report money-laundering activities'. Therefore, the lack of specific know-how or expertise of these groups would not be an excuse.⁷⁴⁰ The high potential of these groups being used for money laundering purposes on the one hand and the very low reporting rate on the other hand are considered one of the two main challenges faced by the FIU in the prevention of money laundering. The BKA published a report in 2010 with specific regard to the real estate sector and its role in (preventing) money laundering.⁷⁴¹ The necessity of compiling such a report was

⁷³⁷ FATF, MER Germany, 2010, p. 170.

⁷³⁸ FIU, Report 2013, p. 46.

⁷³⁹ FIU, 2013 Report, p. 31.

⁷⁴⁰ FIU, 2013 Report, p. 33.

⁷⁴¹ The research was conducted through questionnaires and interviews submitted in 2010 by the Referat SO 32 of the FIU. See FIU 'Managementfassung zur Fachstudie. Geldwäsche im Immobiliensektor in Deutschland' (money laundering in the real estate sector in Germany), 2010.

triggered by the assumption that the real estate sector was not much aware of the money laundering risks and did not show much interest in complying with the GwG regulations. Against the volume of real estate transactions in 2011 amounting to 22 Billion Euros, only 292 STRs were filed to the FIU by this sector, representing a mere 2,6 % of the total. From these numbers it was inferred that there was a great dark number of unreported money laundering transactions, due to the low level of awareness. This assumption was confirmed by the outcomes of the research conducted by the BKA. In fact, only 94 out of 2.410 contacted partners completely replied to the questionnaire, meaning 3,9 % of the total. Respondents had different perception about the threats posed by money laundering and the role of the GwG. A lack of knowledge and of awareness about the issue and the related policies was generally perceived. Most of the respondents did not recognise the specific risk existing in the real estate sector. In addition, the predicate crimes were often confused with the offence of money laundering and the latter was mostly identified with cash transactions. A general prejudice against the category of real estate agents was registered by the questionnaires, while, according to the FIU, also other categories were used for the purpose of money laundering operations. On the contrary, according to the FATF report of 2010, real estate agents generally consider to be unlikely involved in suspicious transactions, since they do not accept client payments and since notaries and banks would be involved in any transactions. For this reason they would not be expected to undertake regular due diligence on clients.⁷⁴² With regard to the content of the regulations, it has been emphasised that there is a missing cooperation with law enforcement agencies not sending follow-up reports on the STRs filed. It was strongly recommended that the legislature should introduce the inversion of the burden of proof, namely it should impose a duty to bring evidence of a legitimate source of assets, on which there is a strong suspicion of illegal origin. Furthermore, it was suggested to introduce a central register on real estate properties, in order to facilitate the exchange of information and to increase transparency in the sector. Finally, the questionnaires highlighted the necessity of adapting the GwG regulations to the peculiarities of the real estate sector. According to the FATF report, real estate agents were aware of being subject to the GwG regulations, yet they did do not appear to be taking systematic steps to comply. This was due both to the fact that the requirements did not fit within their customary business practices and to the

⁷⁴² FATF, MER Germany 2010, p. 213.

fact that supervisory arrangements to promote compliance were underdeveloped.⁷⁴³ From the FATF assessors' point of view, especially real estate agents' approach fall short of the FATF standards.⁷⁴⁴

4.8 The volume of the phenomenon of money laundering in Germany: Economic estimates

The most useful figure to evaluate the effectiveness of anti-money laundering policy to impede the infiltration of illicit financial flows in Germany would be the volume of such flows. In fact, despite it may not depend only on the (in)effectiveness of the law, such number could reveal at least whether the efforts undertaken have been worth the beard burden or not. Unfortunately, as now, there is no availability of this figure, rather only estimates produced by different international organisations. According to the FATF report of 2010, proceeds of crime generated in the country are estimated to amount between 43 and 57 billion Euros, inclusive of tax evasion annually equivalent to between 1,2 % and 1.6 % of national GDP. Having said that Germany has one of the biggest GDP in the world, it can be easily inferred that this number exceeds the GDP of numerous countries and that it represents a large contribution to global illicit financial flows. Yet, these estimates could not be confirmed by the German authorities.⁷⁴⁵ According to the International Narcotics Control Strategy Report of 2009 of the US Government, Germany is a major money laundering country.⁷⁴⁶ Figures provided by the federal criminal police office, instead, picture a lower criminal turnover originated in the country. The 2007 Situation Report on Economic Crime in the Federal Republic of Germany, for example, reported a total loss or damage from economic crimes at approximately 4,12 billion Euros.. The same office publishes regularly reports on organised crime activities in Germany, and according to the 2008 report, the profits of organised crime amounted to 0,66 billion Euros. According to the FATF assessors, these figures seem relatively

⁷⁴³ FATF, MER Germany 2010, p. 221.

⁷⁴⁴ FATF, MER Germany 2010, p. 213.

⁷⁴⁵ FATF, MER 2010 p. 24.

⁷⁴⁶ A major money laundering country is defined by U.S. statute as one 'whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking.' However, the complex nature of money laundering transactions today makes it difficult in many cases to distinguish the proceeds of narcotics trafficking from the proceeds of other serious crime. Moreover, financial institutions engaging in transactions involving significant amounts of proceeds of other serious crime are vulnerable to narcotics-related money laundering. Report released by the Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State, in March 2009, available at <http://www.state.gov/j/inl/rls/nrcrpt/2009/vol2/116550.htm>, last accessed on 18/07/2015.

low. They conclude that this might be due to the fact that such statistics do not address the amount of proceeds generated from evasion of taxes and excise duties.⁷⁴⁷ As claimed by a very recent report on organised crime in Europe, the magnitude of criminal revenues from a selected number of illicit markets⁷⁴⁸ amount approximately to at least 110 billion Euros per year. The rough proxy corresponds on average to 0,9 % of the GDP of European countries in 2010.⁷⁴⁹ As far as Germany is concerned, the amount of criminal revenues that could be potentially laundered is estimated in 17.645 million Euros, corresponding to the 0,7% of national GDP.⁷⁵⁰ A research commissioned by the European Commission in 2013 estimated the amount of revenues laundered in Germany to 29.381 Euros, equivalent to 1,27 % of the total GDP.⁷⁵¹

On the background of estimates on the volume of money laundered in Germany, it is interesting to look at figures on the seized and confiscated assets. Recent statistics on the volume of seized and confiscated assets are provided by the FIU and by the FATF report of 2010. Exact figures on the amount of seized and confiscated assets respectively to each offence are not provided. The FIU estimates for the offence of money laundering a net value of 28.393.765 Euros seized in 2013. The figure is obtained by subtracting the volume of cancellation from the total seizure of cash, movable property, claims and titles, and immovable property seized in the context of a proceedings resulting directly or indirectly from information obtained by the law enforcement authorities from suspicious transaction reports pursuant to the GwG⁷⁵² As reported by the FATF in 2010, the total volume of assets forfeited or confiscated in 2007 in relation to Article 261 Gcc amounted to 15.074.378 Euros, in 2004 to 23.710.160 Euros, in 2003 to 65.453.313 Euros and in 2002 to 32.948.160 Euros.⁷⁵³ There is no information to interpret the varying trend. Also the BKA provides

⁷⁴⁷ FATF, MER 2010 p. 22.

⁷⁴⁸ The selected illicit markets are: heroin, cocaine, cannabis, ecstasy, amphetamines, illicit trade in tobacco products, counterfeiting, missing trader intra-community fraud and cargo theft. The overall figures on illicit revenues may be very conservative. Some important illicit markets, such as trafficking in human beings, both for sexual and labour exploitation purposes, or extortion, illegal gambling and other types of fraud different from missing trader intra-community fraud, lack estimates for most of the 28 EU member states, and thus are not included in this calculation, see *Savona and Riccardi (ed.)*, 2015, p. 35.

⁷⁴⁹ *Savona and Riccardi (ed.)*, 2015, p. 35.

⁷⁵⁰ According to the report, for example Italian organised criminal groups are investing in Germany especially in the following sectors: construction; bars and restaurants; hotels and other tourist accommodations; agriculture and fishing; wholesale and retail traders. *Savona and Riccardi (ed.)*, 2015, pp. 36, 160.

⁷⁵¹ *Unger et. al.*, 2013, p. 39.

⁷⁵² FIU, 2013 Report, p. 22.

⁷⁵³ FATF, MER Germany 2010, p. 82.

estimates on the volume of the proceeds of crime and on the seized and confiscated assets in Germany. The total amount of loss deriving from organised crime was estimated by the BKA to 720 million Euros in 2013, and the proceeds of crime generated and proved amounted to 630 million Euros. Assets were provisionally forfeited in 28 % of the ongoing cases, representing a total amount of temporarily forfeited assets of 85 million Euros.⁷⁵⁴

4.9 Cost-benefit analyses

The effectiveness of the anti-money laundering policy has been assessed through cost-benefits analyses. The results of two of these researches are here summarised.⁷⁵⁵ The research institute 'Transcrime'⁷⁵⁶ conducted a quantitative research on the costs and benefits of the disclosure system of beneficial owners (BO) in the context of the prevention of money laundering.⁷⁵⁷ The beneficial ownership disclosure is the process of making information of a company beneficial owner available outside the company. The process implies collecting, verifying, analysing and elaborating this information and then communicating it. The goal of the study was comparing two beneficial ownership disclosure systems⁷⁵⁸ in terms of the costs and benefits that may arise from their implementation in the 27 EU countries. The outcome of both types of measuring methods utilised for assessing the cost-benefit effectiveness of the German system of BOs disclosure were negative. In the first case, the value of benefit at the net of costs was -1.323.853.000 Euros, while in the second case it was -13.481.000 Euros. In both cases indirect net benefits were positive, though,

⁷⁵⁴ BKA, Organisierte Kriminalität Bundeslagebild 2013, pp. 6, 7, available at http://www.bka.de/DE/ThemenABisZ/Deliktsbereiche/OrganisierteKriminalitaet/Lagebilder/lagebilder__node.html?__nnn=true, last accessed on 13/11/2015.

⁷⁵⁵ The European Parliament commissioned a study on the impact of organised crime in Europe. However, money laundering was excluded, despite it was considered an important enabler, due to the fact that its costs would have doubled the costs already counted for the predicate crimes, since it was assumed that the offence of money laundering itself did not generate victims costs. Costs of organised crime data in Europe are measured on the basis of the financial and welfare impacts upon European victims and on Europeans who are not direct victims. They are not measured on the basis of the benefits to European offenders from crime. Nor are they consider the amounts of benefit from crime that are typically available from confiscation. *Levi et al. (ed.)*, 2013, pp. 15, 20.

⁷⁵⁶ Transcrime is a Joint Research Centre on Transnational Crime, Università di Trento/Università Cattolica del Sacro Cuore di Milano (Italy).

⁷⁵⁷ *Savona et al.*, 2007, pp. 13, 153.

⁷⁵⁸ 'Model 0 is an intermediary-based BO disclosure system embodied in the Third EU Anti Money Laundering Directive (Directive 2005/60/EC). This disclosure system foresees a primary reliance on financial and business intermediaries in order to obtain company beneficial ownership and control information using a risk based approach. On the other hand, Model 1 is a new upfront and ongoing BO disclosure system where the duty to disclose beneficial ownership of public and private unlisted companies is placed on the same beneficial owner, who should notify the company of his ownership details. The company should collect this information and file it in a Central National Registry available on-line to law enforcement agencies and to the wider public'. *Savona et al.*, 2007, p. 13.

amounting respectively to 274.977.000 and 295.395.000 Euros, so that one could infer that the system produces relevant effects in the long term rather than in the short term. However, since it is a cost-intense process, long-run effects might not convince policy makers of the utility of the system. In 2014 the outcomes of a European research on the economic and legal effectiveness of the European anti-money laundering policy in the 27 Member States were published.⁷⁵⁹ The study aims at evaluating the effectiveness of the anti-money laundering regimes, by comparing the implementation of policies with the purpose of identifying best practices.⁷⁶⁰ The authors explain as follows the reasons why such an assessment was particularly needed at that point, after two Conventions and three Directives were already enacted. 'Many actors have been involved, many efforts have been made and much money has been invested in this policy area. It seems time to stand still for a moment and to investigate whether all these efforts achieved their intended goals? And has the investment in police, public prosecution, reporting system and supervision had a positive impact on combating laundering and terrorist financing?'⁷⁶¹ For the purpose of the study, the effectiveness is measured through different legal and economic factors, such as the level of international cooperation, the numbers of STRs filed, prosecutions and convictions, the structure and the definition of the anti-money laundering policy, and the authorities involved.⁷⁶² In particular, the economic effectiveness is considered to be the achievement of the policy goal, namely the reduction and prevention of money laundering or of crime in general, while the legal effectiveness is understood as whether the norms are meaningful for the achievement of the policy goal, and they are applied and obeyed. Furthermore, with legal effectiveness, the authors of the study intend to reveal whether there are legal hindrances, such as horizontal or vertical conflicts between norms or loopholes, or

⁷⁵⁹ See *Unger et al.*, 2013.

⁷⁶⁰ One consideration needs to be made on the premises of the ECOLEF project. In order to assess the threat of money laundering, the authors have assumed that 'money launderers are economic actors, and [...] they follow the law of economics, which dictate that they should maximize profits and minimize risks'. This has been showed not to be valid for the Italian mafia, for example, since mafia bosses may decide to invest and launder their money in a low profit business for the purpose of establishing their power on the territory. Also, if this was the case, there would be much less drug criminality, due to the high imprisonment rate in the field, which would lower the economics of the crime. *Unger et al.*, 2013, p. 12.

⁷⁶¹ *Unger et al.*, 2014, p. vii.

⁷⁶² The study starts from money laundering threat-analysis and carries on by looking at the legal implementation of the policies, at the execution of such policies, at the enforcement and international cooperation and it ends with a final evaluation of the effectiveness, which is the result of a cost-benefit analysis. *Unger et al.*, 2014, p. 2.

other factors, such as insufficient resources or awareness, that negatively influence the application of the law.⁷⁶³ The research is the result of a combination of a technical assessment, carried out through the use of quantitative data, and of a qualitative evaluation of the 'law in action', conducted through interviews in the Member States. As far as Germany is concerned, quantitative data are mainly provided by the FIU annual reports and by the FATF Mutual Evaluation Report of 2010. The European research is based on the assumption that the (in)effectiveness of a policy depends on the implementation of it⁷⁶⁴ and it assumes that the policy's goal is the reduction or prevention of money laundering or other crimes, without contemplating eventual latent or symbolic functions of the law. The study takes a neutral approach, directed at evaluating objectively the implementation of policies through a cost-benefit analysis. With specific regard to the assessment of the effectiveness of criminal law, the book takes the view that a criminal justice system is effective if deviance is punished such that criminal behaviour is deterred.⁷⁶⁵ The results of the European study relevant for this research are hereafter summarised. According to the study, Germany had the lowest score of estimated threat in 2009 as percentage of the GDP (4,7 %, while the highest was registered in Estonia, with 207,7 %). The study has created a score of effective repression, based on the assumptions that an effective repression ensures that the sanctions are high enough and frequent enough.⁷⁶⁶ The suggested equation is calculated as the result of detected deviance in relation to the punished deviance. If the expected punishment is higher than the benefits yielded by the commission of money laundering, that individuals will probably not commit the crime. Based on this calculation, Germany has a medium-high score of effective repression. The economic and legal effectiveness is calculated on the basis of some indicators which are identified in the FATF compliance score, the legal effectiveness of preventing money laundering, the third EU money laundering implementation

⁷⁶³ Unger et al., 2014, p. 6.

⁷⁶⁴ The European research seems to belong to the '*Implementationsforschung*', implementation-based researches theorised by Blankenburg, see chapter one, paragraph 1.2.

⁷⁶⁵ Unger et al., 2014, p. 125. The European study takes a different approach respect to this research. This work considers effective a criminal justice system that limits the use of criminal law on the basis of the principles of proportionality and subsidiarity. In addition, this thesis takes in consideration the possibility that an ineffective criminalisation creates de facto impunity and that this 'process of decriminalisation' might have been a latent intent or at least an accepted consequence. Furthermore, according to this work, a high rate of conviction might not be a symptom of effectiveness. The fact that an increase of convictions rate may be due to an increase of money laundering and not of the effectiveness of the criminal justice system is recognised also in another chapter of the book, see Unger et al., 2014, p. 170. For the discussion on the two different approaches, see chapter 1, paragraph 1.3.

⁷⁶⁶ Unger et al., 2014, p. 140.

timelines, the international cooperation score, the information flow score, the number of money laundering convictions and the FIU policy response.⁷⁶⁷ According to these indicators, the German policy scores a standard level of effectiveness compared to the other Member States, without being considered under-proportional for any of the elements.⁷⁶⁸ The cost-benefit analysis is based on factors identified as costs of the policy and benefits of the policy response. The analysis is calculated on the basis of which costs a hypothetical country that has standard scores among the EU Member States would save without a money laundering policy in action, and what benefits it would lose consequently.⁷⁶⁹ The total costs of anti-money laundering policy for the EU has been estimated to 2 billion Euros, with an undetermined reduction of privacy and social inefficiency.⁷⁷⁰ Unfortunately, it has been possible 'to estimate most of the costs, but hardly any of the benefits.'⁷⁷¹ However, the research has produced an estimate of the costs and of benefits for every country: Germany performed the higher scores with 378.177.540 Euros of estimated costs and 4.063,254 Euros of estimated benefits.⁷⁷² The book concludes that 'the cost-benefit dilemma for AML policy is reduced to the question: are we willing to spend almost 44 million Euros, with a reduction in privacy and efficiency costs for unknown benefits?'⁷⁷³ The question could be answered with another question, namely: Are we willing to give up on the fight against money laundering? *Whitehouse* has answered this dilemma by stating that 'it would be a brave person who steps up to say that it is too high price to pay for countering terrorism and serious crime'.⁷⁷⁴ The securitisation rhetoric has so far supported the extreme importance of such measures, and anti-money laundering policy has been growing. Yet, the question could be inverted: Do we really want to fight money laundering and, by doing so, are we also willing to threaten the financial system as we know it today? A certain amount of illicit financial flows may be considered an acceptable price to pay for a market where free mobility of capital is guaranteed.

⁷⁶⁷ The indicators are explained in *Unger et al.*, 2014, pp. 188-199.

⁷⁶⁸ Results are showed through a table, see *Unger et al.*, 2014, pp. 202, 203.

⁷⁶⁹ Costs are considered to be on-going policy making, sanction costs, FIU, supervision, law enforcement and judiciary, duties of the private sector, reduction in privacy, efficiency costs for society and the financial system. Benefits components taken in consideration are fines, confiscated proceeds, reduction in the amount of money laundering and of predicate offences, reduction of the damages on the real economy and of the risks in the financial sector. *Unger et al.*, 2014, p. 207.

⁷⁷⁰ *Unger et al.*, 2014, p. 235.

⁷⁷¹ *Unger et al.*, 2014, p. 218.

⁷⁷² *Unger et al.*, 2014, p. 220.

⁷⁷³ *Unger et al.*, 2014, p.218.

⁷⁷⁴ *Whitehouse*, 2003, p. (138) 140.

4.10 Considerations

The results exposed in the previous paragraphs about the effects of the implementation of the anti-money laundering policy are summarised here in order to be further discussed. The eight hypothesis set by Oswald in 1997 are compared to the outcomes emerging from the current research: 1) The hypothesised relevance of nationality or social class of the persons, whose transactions are reported as suspicious, has been confirmed by the recent FIU reports. Although these contain a majority of German nationals object of STRs, on the basis of a rough confrontation with the percentage of non-German nationals among the whole population (around 10 %), the percentage of non-German nationals object of STRs is higher (40 %). Moreover, 57 % of those convicted for the aggravated money laundering have been non-German nationals. However, in Berlin for instance, a study has revealed that refugees are often refused to open a bank account due to lack of identification papers, so that there has been a discriminatory exclusion to financial services based on nationality.⁷⁷⁵ In addition, the FIU draws attention on the high number of low income individuals reported: namely students, pensioners, unemployed and housewives, constituting 19 % of the reported in 2005 and 17 % in 2004. However, no explanations were provided for this trend.

2) The most recent situation described by the FIU reports has confirmed the high number of STRs filed to the FIU, yet the FATF assessors claimed that the number was not sufficient if compared to the volume of the national economic sector.⁷⁷⁶

3) According to two cost-benefit analyses conducted recently by private researcher, the costs of implementation of the current anti-money laundering policy - and in

⁷⁷⁵ See, for example a study conducted in Berlin in 2013 by the NGO Antidiskriminierungsberatung Brandenburg, 'Geldinstitute verweigern Flüchtlingen die Eröffnung von Bankkonten', available at http://www.antidiskriminierungsberatung-brandenburg.de/sites/default/files/attachements/Hintergrundpapier%20Banken%20verweigern%20Konten_ADB%202013_1.pdf, last accessed on 17/07/2015. A similar research that lead to parallel conclusion has been conducted in Switzerland by *Killias and Nunes*. The authors denounce that anti-money laundering regulations lead to the discrimination of foreign citizens because they are not allowed to open bank accounts; see *Killias and Nunes*, *Diskriminierung*.

Nebeneffekte der Geldwäscherei-Bekämpfung. *Neue Zürcher Zeitung*, 21/05/2012, available at <http://www.nzz.ch/meinung/debatte/nebeneffekte-der-geldwaescherei-bekaempfung-1.16973351>, last accessed on 17/11/2015.

⁷⁷⁶ FATF, MER Germany, 2010, p. 170.

particular of the mechanisms to disclose beneficial ownerships - were too high with respect to the estimated benefits.⁷⁷⁷

4) Prosecutors interviewed by the FATF assessors in Germany in 2010 explained that in practice 'while it may not be a statutory requirement, it is easier to prosecute and convict a person for money laundering under section 261 Gcc when there is a prior conviction for the predicate offense, as prosecutors always need to establish a 'link' or 'connection' between the money laundering conduct and the predicate offence involved (i.e. the court must be convinced of the existence of the predicate offence). This means that the prosecutor will have to prove the specifics of the predicate offence, e.g. that the conduct amounted to a designated offense, the perpetrator, and the types of assets that originated from the predicate offence, which is a rather high standard of proof.'⁷⁷⁸ The praxis has therefore replied to the question about the standard of proof required to start a money laundering case. Interviews conducted by the FATF assessors in 2010 have confirmed that proceedings are closed because of the impossibility of bringing concrete evidence of a predicate offence. Therefore, the standard of proof is one of the main obstacles for obtaining a conviction under 261 Gcc in Germany.⁷⁷⁹

5) *Oswald* hypothesised that Article 11 (1) of the GwG, which allowed suspicious transactions to be completed in order not to hinder the pursuing of beneficiaries of a money laundering operation, would have opened a legal loophole. This was not proved by the current empirical research, though.

6) Until now, regulations for the designated financial and non-financial businesses and professions have rather increased and become even more complicated since then. On the other side, some categories of designated businesses and professions are still reluctant to undertake compliance with anti-money laundering standards, due to the complexity and the costs of the measures.

7) In the meanwhile, a FIU has been established at the federal criminal police office, which receives all STRs and forwards them to the competent law enforcement unity for investigations, so that the system of filing suspected operations has been regulated and is not a chaotic mechanism anymore as it was in the second half of the nineties. The FIU reports show that a high number of follow-up reports are now filed

⁷⁷⁷ For more details on the cost-benefit assessments, see paragraph 4.9.

⁷⁷⁸ FATF, MER Germany 2010, p. 50.

⁷⁷⁹ FATF, MER Germany 2010, p. 50.

to the FIU with information on the proceedings initiated on the basis of STRs. The centralised system created in 2002 at the BKA has indeed notably increased the communication between the two parties. This development negatively confirmed *Oswald's* eighth hypothesis. However, the FIU in the last published report of 2013 still complains about the too low amount of information provided by public prosecutors offices on the mentioned cases.⁷⁸⁰

8) Difficulties deriving from international cooperation still represent an obstacle for money laundering investigations. Despite the existing legal framework of international cooperation and the possibilities of asking and providing mutual legal assistance, the complexity of financial operations, the involvement of offshore jurisdictions and the demolition of borders between the EU have exacerbated. This problem is confirmed by the interviews presented in the following chapter (5). In a globalised economy, as long as some jurisdictions do not engage - or if so, only symbolically - to impede the laundering of proceeds of crime, the effectiveness of other compliant legal systems will be frustrated. The fact that, as stated in the FIU reports relating to the years between 2002 and 2014, the most frequent headquarters of companies reported have been tax havens or lax or secrecy jurisdictions mirrors exactly this situation.⁷⁸¹ However, reducing the problem to an issue of lack of international cooperation would be reductive.

One of the most meaningful fact observed is that organised crime and 'gross money laundering' are not persecuted through Article 261 Gcc. This fact can be inferred by the low number of convictions pursuant to Article 261 (4), by the low number of money laundering proceedings categorised as organised crime and by the low number of investigations in the field of money laundering, tax crimes and economic crimes recorded by public prosecutors offices in 2013, where more than one person was involved (18 %). Yet, this does not mean that the criminal justice system does not act against them, but rather that it uses other tools to achieve the goal. While the low conviction rate for serious money laundering cases could be also a symptom of a high degree of deterrence of the provision, it seems that law enforcement uses the money laundering charge as a fallback for authorities who are unable to acquire sufficient evidence in a preliminary phase for the predicate crime and necessitate

⁷⁸⁰ See FIU, 2013 report, p. 46.

⁷⁸¹ For more detailed figures, see paragraph 4.6.

further information otherwise not accessible. The charge of money laundering allows investigators to access the vast amount of information recorded pursuant to the GwG, which would not be otherwise accessible. Yet, after the investigative phase, prosecutors seem to prefer to modify the charge and opt for indictment for predicate offences instead. The law seems to be effective to the extent that it facilitates the initial investigations, while it does not serve directly the function of punishing money launderers. Besides having a substantial nature, the provisions seem to have a procedural function. It can be inferred that prosecutors find particularly difficult to bring evidence against organised money launderers also due to the fact that professional offenders do not leave traces, as already highlighted by *Oswald's* research. From the scarce use of Article 261 Gcc for tackling organised criminality, it can be inferred that the measure is not serving for one of the purposes declared by the legislature when introducing the offence. In addition, it can be hypothesised that other measures may be more suitable to tackle 'gross money laundering'. Already in 1997, *Oswald* positively assessed the introduction of anti-money laundering regulations by acknowledging the positive effects triggered by the information provided by the designated business and professions to law enforcement agencies for the purpose of conducting financial investigations.

Given the high number of STRs filed and the low number of money laundering charges and of convictions deriving from the STRs since the introduction of the laws, it can be assumed that the system has been anyway maintained because it still provides some sort of benefits. It can be hypothesised that one benefit is the number of information provided to law enforcement agencies, which can be used for other causes pursuant to Article 11 (6) GwG, even in case of dismissal. This amount of recorded information is helpful not only to support further indictments, but also to increase the personnel awareness about the ever-changing money laundering techniques and schemes. Therefore, the law is used, as already revealed by the prosecutors interviewed by *Oswald*, to gather information rather than to confiscate criminal assets. Again the effect of the 'law in action' differs in respect to the declared legislative intentions, which justified the criminalisation of money laundering with the necessity of tackling organised crime's economic power. By spelling out this function, the assessment on the effectiveness of the law - as the possibility of collecting information - can be positive. Yet, this effect could be considered a social

cost rather than a benefit. On a theoretical side, many scholars see the recording of personal information by private actors as an infringement of the right to privacy.⁷⁸² On a more practical side such mechanism imposes significant costs on the designated businesses and professions that are in charge of collecting the data.⁷⁸³ When compared to the effective outcomes of the preventive regulations, in terms of law enforcement results, this aspect does not seem to win a cost-benefit analysis, as showed in the quoted researches. If one considers the advantages in terms of information collected, the policy may be considered worth the burden imposed, instead. However, the fact that the laws would have an effective impact on the long run on the fight against money laundering and organised crime may be seen as a diminished deterrence effect, because perpetrators would have the time to adapt to the new laws and find new ways of circumventing them. A collateral effect of the long-run effectiveness of the policy hypothesised on the basis of the outcomes of the research on the implementation is the fact that perpetrators could take advantage of the initiated but not completed cases, by acquiring knowledge about law enforcement strategies and thus develop subterfuges to elude them. On the contrary, it seems that the legislature is always running after to cope with the offenders' ever-new strategies. In fact, regulations about a new sector are updated when there is evidence that there is a risk of money laundering in that specific sector. Yet, offenders might have already moved their laundering activities to another sector. This hypothesis will be further debated in the last chapter.

On the assumption that the inclusion of the reckless conduct would have potentially criminalised daily activities, a focus was posed on the number of convictions related to Article 261 (5) Gcc to verify the target of the criminal provision. Since 2005 a high number of convictions have been actually referring to reckless money laundering. This shows that the offence is used to punish primarily 'petty money laundering'. This fact can also be inferred from the relevant number of money laundering cases to the detriment of senior citizens, signalled by the FIU in the recent years. Also the fact that a significant number of STRs is filed in relation to the 'financial agents' phenomenon' is a symptom that the preventive mechanism targets

⁷⁸² See, among other, the essay of *Hassemer and Starzacher*, who argue that data protection should be considered a fundamental right, *Hassemer and Starzacher*, 1993, pp. 16 ss.

⁷⁸³ The research calculates the costs of the policy to 44 million Euros. See *Unger et al.*, 2014, p. 218.

more 'small fishes' rather than big perpetrators. Individuals convicted for the reckless conduct may be even victims of a fraud perpetrated by criminal networks. However, the criminal network acting behind the offender remains undetected. If on the one side it cannot be claimed that such offenders, given the lower degree of culpability should not be punished at all, on the other side this effect of the law involves a change of paradigm. The money laundering offence was initially introduced with the goal of tackling serious crimes. The observed effect, however, changes the function and the nature of the law, so that Article 261 Gcc could be considered rather a 'blue collar crime' more than a 'white collar crime'.

The spill-over effect of repressive and preventive regulations has been confirmed by the FIU as well. From the analysis of the reports published from 2002 to 2013, with regard to the quality of STRs filed to the FIU, it can be inferred that certain designated professions and businesses are very reluctant in filing STRs, despite their notably exposure to money laundering risks. The list of designated professions and businesses has been amplified over the years exactly with the goal of facing this transfer of crime from one area to the other. Yet some professionals, such as legal advisors, do not report them, although they possess the capacity of recognising illicit transactions. The fact that some sectors do not actively participate in the effort of preventing money laundering, by allowing criminal proceedings to enter the legitimate economy, may lead to a general ineffectiveness of the system, because it can significantly hinder the capacity of the whole anti-money laundering system to respond to the ability of offenders to move their field of activity there where the law is lax.

This chapter seems to support only partly the underlying hypotheses of a symbolic effectiveness and of an intended ineffectiveness of the money laundering offence. In fact it has showed that the provision does generate some instrumental effects by punishing offenders and by triggering a cooperation directed at signalling suspicious transactions between the obliged entities and law enforcement. However, some of the effects do not seem to completely fulfil the legislature's declared goals. For example the chapter seems to prove wrong the legislature's expectation of tackling the grey area by punishing gate-keepers or the attributed function of eliminating organised and serious crime. Given the high costs of implementation highlighted by the cost-

benefits analyses, the rather low outcomes seem to be insufficient to fulfil the legislature's goals. Since it is sufficient that without latent functions it would be impossible to explain the adoption and maintenance of a legal act,⁷⁸⁴ it can be concluded that the intents declared by lawmakers do not satisfy the reasons why the provision was introduced. This opens up the hypothesis that Article 266 Gcc is an example of a symbolic legislation, which has been enacted with the purpose of compromising a complex parliamentary debate.

⁷⁸⁴ *Merton*, 1983, p. 201.

5 CHAPTER

'The implementation of the law from the perspective of legal actors and experts'

'La politica, l'eterna madre dell'accadere umano,
è rimasta inceppata nell'economia e nel mercato [...]'

(*Mujica*, 2014, p. 109)

5.1 Foreword

This chapter presents the outcome of the interviews conducted on eight experts and twenty-two legal actors in Berlin between 2013 and 2015 with, with the goal of contributing to the assessment of the anti-money laundering law's effectiveness. In particular, the eight experts interviewed are, in chronological order, *Uecker*, a policy advisor for the German Parliament for the socialist party (SPD); *Korte* and *Busch*, a former and a current deputy director general, heads of the economic, computer, corruption related and environmental crime divisions of the Ministry of Justice (BMJ), *Findeisen*, the head of section VII A£ payment, transactions, money laundering prevention of the Ministry of Finance (BMF), a representative of the Ministry of Interior (BMI), *Schneider* and *Rech*, civil servants from the division I 18, public security and order of the State department of Hessen, and a policy officer *Henn* of the NGO WEED (World Economy, Ecology & Development). The twenty-two legal actors are composed of ten attorneys, among them some defence attorneys and some lawyers specialised in commercial law and compliance, six police officers, two public accountants and four public prosecutors. Those who accepted to be named are, among the attorneys, *Lubitz*, *Gutman*, and *Diergarten*, the representative of the Chamber of public accountants *Reiher* and *Goltz*, the prosecutor *Hagemann*, *Finger* the former Berlin State criminal

Police head of department three on organised crime and the Berlin State criminal Police chief superintendents *Pietsch* and *Kunitsch*.⁷⁸⁵ The chapter aims to provide an insight on the experts and legal actors' opinions and perception of the law. In particular, the interviews focus on the respondents' perception of the money laundering phenomenon in Germany, on the technical appropriateness of the policy, on the perceived conflicting interests related to the introduction or the implementation of the legislation and finally on the interviewees' perceived effectiveness of the policy.⁷⁸⁶ I choose to give voice to the interview partners and to quote direct conversations -translated into English- in order to highlight their expertise. In addition, given that many topics that have been dealt with had a strong political nature, I did not want it to interfere with my perspective. Along with the interviews, official declarations of intent and opinions released by representing organisations and other official documents will be used to obtain an insight into legal practice. Given the transnational nature of money laundering and of the anti-money laundering regulations, this chapter, despite focussing on a national legal system, re-opens the perspective on to the global level. Some of the challenges faced at this global level to tackle money laundering, in fact, have an impact on the domestic dimension. At the same time, issues that are raised in the national context can be further theorised in a widespread context.

5.2 Is Germany an Eldorado for money launderers?

As shown in the previous chapter, estimates on the volume of money laundered in Germany are not consistent. It is therefore not surprising that also perceptions on the size of the phenomenon in Germany differ among individuals. Between 2012 and 2013 the media have recurrently reported that the country is a preferential place for money launderers.⁷⁸⁷ This assumption was based, among other factors, on the declaration of a notorious senior public prosecutor from Palermo (Italy), who said that 'if he was a money launderer he would have invested in Germany' (*Wenn ich Mafiosi wäre, würde*

⁷⁸⁵ The interview sample consists of a majority of male respondents. Yet, given that gender is not considered a relevant variable for the purpose of this research, this element is not taken into account.

⁷⁸⁶ For a more detailed description of the methodology used see paragraph 1.5, chapter one.

⁷⁸⁷ Among others, see 'OECD: Deutschland ist Geldwäsche-Paradies' in *Deutsche Wirtschafts Nachrichten*, 18.01.13; Dick W, Germany, a safe haven for money laundering. *Deutsche Welle*, 30/10/2012; Rimpel K, Geldwäsche-Paradies Deutschland. Nummer acht unter den Steueroasen. *Tz-online*, 07/11/2013.; Ramthum C, OECD: Deutschland versagt im Kampf gegen Geldwäsche. *Wirtschaftswoche*, 26/04/2014.; Deutsche Presse Agentur, Steueroase Deutschland ist Eldorado für Geldwäsche. *Handelsblatt*, 07/11/2013; 'Deutschland ein "Eldorado für Geldwäsche"?' In *Deutsche Welle*, 07.11.2013; Netzwerk Steuergerechtigkeit „Deutschland ist ein Eldorado für Geldwäsche" In *Frankfurter Allgemein*, 07.11.2013.

ich meine Gelder in Deutschland anlagen').⁷⁸⁸ In 2013 five non-profit organisations published a report that drew attention to the alarming estimates provided by the IMF about the volume of money laundered in Germany, being equivalent to 1,3 % to 1,7 % of the German GDP.⁷⁸⁹ On the basis of such estimates the authors defined Germany as a 'Schattenfinanzzentrum' (an offshore financial centre). However, 'there is no evidence that in Germany more money is laundered in comparison to Italy, France or the USA, therefore I would not call only Germany 'the paradise for money launderers', observes *Korte* from the Ministry of Justice.⁷⁹⁰ To the question as to whether it is true that Germany is an Eldorado for money laundering, as described by the newspapers, one of the respondents replies: 'this question clearly has a yes/no (*Jain*) answer.'⁷⁹¹ Nobody can tell the truth, because what we possess are only estimates'. The attorney *Diergarten* also replies ambiguously: 'On one hand yes. On the other hand I do not agree with the statement of the FATF that Germany does too few to tackle money laundering'.⁷⁹² The last argument is also shared by other respondents. *Busch* asserts: 'even if this would be the case [that Germany is an Eldorado for money launderers], the reason would not be a lax legislation, because Germany has the necessary laws to tackle money laundering'.⁷⁹³ *Pietsch* and *Kunisch*, detective chief superintendents from the financial investigations group of Berlin LKA 311GFG (*Gemeinsame Finanzermittlungs Gruppe*) do not agree with the statement that Germany is an Eldorado for money launderers, and add that 'if one says that Germany is a paradise for money launderers it would mean that the criminal justice system does not function. According to the two investigators this cannot be true because the financial investigations groups have already been in existence for twenty years within the local criminal police office (LKA)'.⁷⁹⁴ *Schneider*, a representative of Hessen, one of the states that has been most engaged in anti-money laundering prevention, believes that 'thanks to public awareness and thanks to the involvement of non-financial institutions the laundering of proceeds of crime has recently become more difficult in Germany. Thus Germany is on the right track to

⁷⁸⁸ The statement was recalled in various sources; among them a judges association in Hamburg (*Hamburgerische Richterverein*) invited the senior prosecutor to give a speech and quoted the statement in the report of the meeting. See *Kaufmann* 'Mafia, Ein Parasit befällt Europa', 27.09.2011, available at <http://www.richterverein.de/index.htm?/mhr/mhr114/m11415.htm>, last visited on 12/07/2015.

⁷⁸⁹ *Henn et al.* 'Schattenfinanzzentrum Deutschland', 2013, pp. 4-6.

⁷⁹⁰ Annex I, p. iv.

⁷⁹¹ Annex I, p. I.

⁷⁹² Annex I, p. xxiv.

⁷⁹³ Annex I, p. iv.

⁷⁹⁴ Annex I, p. xxx.

eliminate the existing volume of money laundering'.⁷⁹⁵ The respondent thinks 'Germany is on the right track to eliminate the existing volume of money laundering. In the past, it was also recognized on an international level, that the amount of money laundered in Germany was very high, but thanks to the intense commitment with a focus on the non-banking sector, it is likely to decline'. *Finger* from the state criminal police of Berlin, instead, confirms the possibility that 'Germany is a favoured country in Europe for the laundering of proceeds of crimes', but at the same time he considers 'the term 'Eldorado' exaggerated, because it does not acknowledge the efforts made to prevent money laundering, which have successfully diminished the phenomenon'.⁷⁹⁶

The respondents point out that the media influences the social perception of the size of the phenomenon. From *Busch's* point of view, 'the fact that the media has recently started reporting more about economic crimes can be related to the fact that the criminal justice system only started dealing with crimes such as corruption and money laundering thirty years ago, and currently there are very specialised agencies that are responsible for law enforcement in this field, so therefore many more offences are detected and more information is provided to the public'.⁷⁹⁷ According to his colleague from the Ministry of Justice *Korte*, 'the media has an interest in presenting big scandals to the public, they prioritise hot topics and money laundering is a phenomenon that attracts public attention. Actually, the fact that big money laundering cases are reported, can be also interpreted as a success of the criminal justice system, which proves the fact that law enforcement has detected and persecuted the crime. Moreover, showing the public how these crimes are seriously persecuted has a deterrent effect'.⁷⁹⁸ Yet, 'the media, while drawing attention to the estimated volume of illicit financial flows in Germany, does not report the legal steps undertaken to tackle them, so the picture presented to the public is biased', complains *Uecker*.⁷⁹⁹ *Finger* considers the work of professional investigative journalists a factor that has contributed to raise people's awareness. He believes that 'public perception and politicians sensitivity to the topic are increasing, thanks to the public work of the law enforcement agencies that have in recent years drawn the attention of political institutions to these topics, and thanks to

⁷⁹⁵ Annex I, p. xiii.

⁷⁹⁶ Annex I, p. xxx.

⁷⁹⁷ Annex I, p. vi.

⁷⁹⁸ Annex I, p. vi.

⁷⁹⁹ Annex I, p. i.

investigative journalists who have been reporting the huge increasing level of organised crime's infiltration in Germany'.⁸⁰⁰ *Schneider* also thinks that people's awareness of the topic has improved in the last years.⁸⁰¹ Yet, according to *Findeisen* from the Ministry of Finance, the image of money laundering presented by the media is distorted: 'The media provides an image of money laundering as primarily connected to red light crime and criminal activities committed by foreigners and refugees. Many people are against money laundering, but they have the idea that money launderers are gypsies or those coming from the former Eastern-block. These ideas are not proven through proper investigations, in fact they do not mirror reality. Journalists sit in their offices and use secondary material and are therefore not able to provide a real picture of what money laundering is. This plays a big role in the phenomenon's inaccurate perception in Germany'.⁸⁰²

5.2.1 How much money is laundered in Germany?

The problem can be effectively summarised in a respondent's answer: 'nobody knows exactly how much money is washed'.⁸⁰³ Given the lack of objective figures on the volume of money laundered emerged in the fourth chapter, the reader will not be surprised that almost all of the respondents share this opinion. In the Ministry of the Interior it is confirmed that 'we do not possess enough data to produce a correct estimate of the volume of money laundered since part of the data is dealt with by the *Länders* and we do not collect it'. Also *Korte* acknowledges the impossibility of providing figures on the volume of money laundered due to the fact that 'the *Länder* that are entitled to deal with these issues and do not have the duty to report their work in the field of anti-money laundering to the BMJ'.⁸⁰⁴ Yet, neither on a state-level, according to *Schneider*, institutions possess solid statistics about the amount of money laundered in Germany, 'therefore it is not possible to evaluate the phenomenon objectively'.⁸⁰⁵ 'However, the fact that Germany is a federal State and therefore is more complicated to coordinate, it is not only a matter that concerns money laundering control', adds the civil servant. *Findeisen* confirms that 'we do not possess reliable statistical data on the volume of money laundered, neither about the organised criminal activities. What we

⁸⁰⁰ Annex I, p. xxviii.

⁸⁰¹ Annex I, p. xiii.

⁸⁰² Annex I, p. xi.

⁸⁰³ Annex I, p. i.

⁸⁰⁴ Annex I, p. v.

⁸⁰⁵ Annex I, p. xiii.

actually need is empirical research on the real amount of laundering money and reliable data of law enforcement activities in the states.⁸⁰⁶ There is, thus a consensus among the representatives of the Ministries, relating to the lack of reliable figures on the phenomenon of money laundering. *Henn* from the NGO 'WEED' interprets this lack/ as a missed chance for the institutions to effectively tackle the problem. The respondent believes that 'the lack of reliable figures on money laundering hinders the effective fight against it. If there were statistics that objectively showed how much money is laundered in Germany, they would support the argument that there is the necessity to do more. Currently, there is not enough evidence of the volume of money laundered in Germany. Facts, statistics and cut-cases are missing, the real amount could be much lower or much higher than the estimate that we have of 50 Billion Euros'.²³ Indeed, according to senior prosecutor *Hagemann*, 'the dark number in this field [of money laundering] is much higher than in other fields. What emerges through the legal prevention and repression is only the tip of the iceberg'.²⁴ This is confirmed also by other police officers, who say 'organised criminal groups have been active in Germany since before the fall of the wall, however, their structures are not visible'. *Henn* continues, by arguing 'even the estimates produced by the OECD [Organisation for Economic Cooperation and Development] on the amount of money laundered in Germany are biased because they are only based on cases dealt with in the country, while proceeds of crimes committed abroad can be also laundered here. For instance, with these estimates, they do not take into account the money invested by the Italian Mafia, because they would also need to compare Italian statistics. [...] Even *Fiedler*,²⁵ who is an expert in the casino sector, does not provide evidence of the phenomenon based on reliable estimates or clear-cut cases. Also, in the context of derivatives, attempts have been made to measure the volume of money laundering transactions but so far they have been unsuccessful. For the first time, the Ministry of Finance has recently commissioned a study to collect information about money laundering in the non-banking sector. However, from my point of view, the absence of reliable data and the fact that such a study has only just been commissioned are elements from which we can interpret that there has not been enough involvement. If even people in the Ministries, who have been working in the field for a very long time, cannot evaluate the estimates of the volume of money laundered in Germany, it seems that there is a lack of interest in providing such figures. However, the law is no longer young it has been in force for twenty years and it should show its results'.²⁶ The policy

⁸⁰⁶ Annex I, p. xi.

officer thinks that on the other hand 'the lack of statistics undermines the credibility of those who advocate for a more effective response from the State based on the estimated threat of money laundering in the country'. In his opinion 'many authors argue that the regime is not effective, yet, the lack of reliable figures makes it hard to criticise the system. Even those who say that the anti-money laundering regime has not yet helped to tackle illicit financial flows do not possess data that objectively shows this failure, since the failure might have been triggered by other factors'. The lack of reliable figures, which has already emerged from the FATF assessment in 2010, was confirmed by the follow-up report in 2014.⁸⁰⁷

The representative of the BMI draws our attention to another relevant issue connected to the compilation of statistics. By specifying that the BMI interprets the phenomenon of money laundering and organised crime using the data provided by the sixteen states, the BKA and the FIU, he stresses that the BKA's definition of organised crime is too restrictive and does not comprehend many activities that are typical of criminal networks.⁸⁰⁸ According to the respondent, for example, 'the biggest problem linked to organised crime in Germany is corruption, but this is not included in the definition of organised crime provided by the BKA and therefore does not contribute to the statistics on organised crime in the country'. In addition 'the FIU's perspective is only focussed on the offence of money laundering, but does not take into consideration the predicate offences, so that the image provided by FIU reports does not mirror the whole phenomenon of money laundering and of the counteraction'.

⁸⁰⁷ FATF, Mutual Evaluation of Germany: 3rd Follow-up Report, 2014, p. 25. This has prevented the assessors formulating a judgement on the implementation of specific provisions relating to money laundering. In particular, comprehensive annual statistics were missing or not available, or both in relation to, for instance, sanctions imposed for convictions pursuant to Article 261 Gcc to legal persons; the value of transactions associated with STRs; the provisional measures applied. Already in 2010, the FATF assessors observed that 'Nevertheless, given the high value of forfeitures and confiscations, assessors have no reason to doubt the authorities' claim that provisional measures were being applied in Germany. There is the possibility, however, that the use of provisional measures could be improved to help increase the level of assets confiscated and forfeited compared to the total claim made by the State for confiscation and forfeiture'. FATF, MER Germany 2010, p. 85

⁸⁰⁸ Annex I, p. xxxix. 'Organised crime is the planned violation of the law for profit or to acquire power, which offences are each, or together, of a major significance, and are carried out by more than two participants who co-operate within a division of labour for a long or undetermined time span using a) commercial or commercial-like structures, or b) violence or other means of intimidation, or c) influence on politics, media, public administration, justice and the legitimate economy' BKA, 1999, translation of *Levi*, 1998, p. 335.

5.2.2 What is the impact of money laundering?

The respondents were asked for their opinion on what the consequences of money laundering are on the German society and economy and thus why the state should impede the infiltration of illicit money into the country. Practitioners and experts express similar opinions, the most recurrent answer is that it is in the interest of the state to persecute money laundering, due to the dangers posed on society and on the economy'. *Korte* asserts 'it has often been observed that money laundering undermines the economy of a country'; however, 'we do not have the facts and numbers to answer this question [about the impact of money laundering on the German society and economy]'.⁸⁰⁹ In the Ministry of Interior it has been confirmed that 'the biggest threat posed by money laundering in Germany is the infiltration of illegal structures in the legitimate economy'; yet even the report published by the BMF on the risks of money laundering to the financial sector, is based on assumptions and not on proven data, therefore I cannot assess the risk to the whole Germany'. *Korte* adds 'within the FATF meetings, it has often been said that money laundering was one of the main causes of the financial crisis. However, nobody could explain to us how money laundering has played a role in the financial crises'.⁸¹⁰ According to *Findeisen* money laundering negatively impacts economic competition: 'Entrepreneurs that launder and invest their ill-gotten money in the legal economic sector undermine economic competition, and through their economic power they can indirectly influence politics and thus undermine the whole democracy and civil society'.⁸¹¹ Investigators perceive the fight against money laundering as a duty. *Pietsch* and *Kunisch* confirm 'all actors have an interest in combating money laundering, from the banks to the government, but among the police there is a particularly strict engagement in the fight against crime, because the police perceives the infiltration of any type of money deriving from a criminal action as a threat'.⁸¹² *Finger* adds that the interest in tackling money laundering generally relies in the goal of 'not letting the economy be distorted by illegal capital. Since market capitalism is the dominant economic structure, law-abiding individuals have an interest in not being put out of competition by those who are favoured through the infiltration of criminal assets. The legally protected interest is the interest of the law-abiding professionals, businesses and industries. Indirectly this has also had an impact on the

⁸⁰⁹ Annex I, p. v.

⁸¹⁰ Annex I, p. vi.

⁸¹¹ Annex I, p. ix.

⁸¹² Annex I, p. xxx.

whole society, through the impact on the labour market, and especially on the employees whose life depends on those businesses, commercial and industrial activities that might be infiltrated or contaminated by the infiltration of illegal capital'.⁸¹³ It is indeed a common perception that 'money laundering can affect the real economy, by distorting consumption, savings, investments, inflation, competition, trade and employment. [...] It can affect the financial sector with an increased risk for the insolvency, liquidity, reputation and integrity of the sector'.⁸¹⁴ Yet, in literature there is the idea that money laundering could also be good for the economy, for example because it increases profits and the availability of credit.⁸¹⁵

5.2.3 Economic stability, rule of law: A fertile or hostile environment for money launderers?

Interestingly, some characteristics of the German legal, political and economic system are perceived by the respondents as both enabling and obstructing money laundering. In particular, some factors are considered to be connected, either as enablers or as obstacles, to the threat of money laundering. Among them, the most recurrent is the level of corruption, the rule of law, the transparency of the administrative apparatus and the integrity of public officials, the soundness of the economic system. The respondents express differing opinions on these relations; again, the lack of empirical data on the matter impedes reaching a univocal conclusion. According to a respondent from the Ministry of the Interior, 'the fact that Germany has a secure banking sector and a strong financial centre attracts money launderers'. *Findeisen* states 'Germany due to its stable economy is a relevant country of investment of illegal monies generated in thirds countries'.⁸¹⁶ *Henn* specifies 'in the report ['Schattenfinanzzentrum Deutschland'] we argue that the fact that Germany has a stable economic and political system, is an attracting factor for money launderers who are willing to invest their money'.⁸¹⁷ The report infers from the size of the financial centre, the volume of the banking sector, and from the high amount of cash transactions, the fact that Germany is a preferential

⁸¹³ Annex I, pp. xxvii, xxviii.

⁸¹⁴ *Unger et al.*, 2014, pp. 217, 218.

⁸¹⁵ *Unger et al.*, 2014, pp. 217, 218.

⁸¹⁶ Annex I, p. ix.

⁸¹⁷ Annex I, p. xviii.

country for money launderers.⁸¹⁸ Also the FATF report of 2010 identifies some factors making Germany a country susceptible to money laundering: 'the large economy and financial centre, as well as the strategic location in Europe, the strong international links, the large informal sector (more than 400 billion Euros), and the diffused use of cash'.⁸¹⁹ The link between the size of the economy and the amount of revenue from illicit markets is confirmed by a report dealing with illicit markets too.⁸²⁰ In particular, drafters state 'it is not surprising that the four biggest European economies (Germany, Italy, France and the UK) are those that produce the highest revenues from illicit markets'.⁸²¹ Lawyers agree with the assumption that the fact that Germany has a great economy is attractive for money launderers.⁸²² However, not all respondents share this assumption. *Korte* admits 'the great dimension of the German financial centre might be connected to the volume of money laundered'. In his opinion it 'is not only organised crime that invests a lot of money in the country, in fact German total tax revenue is very high. Since the whole volume of the financial sector, and thus of the legal economy is big, the volume of the illegal sector is proportional to it'.⁸²³ According to *Finger* there are objective factors that favour criminals against law enforcement, which are, however, not a peculiarity of Germany, such as the speed of the financial system and the globalisation of the economic and financial structures.⁸²⁴ Another factor facilitating money laundering is said to be the widespread use of cash, which is supposed to complicate the tracing of ill-gotten gains. According to *Busch*, 'people say that in Germany there is the highest number of 100 € notes circulating, and it is true that in Germany there is still a high number of cash transactions. [...] Therefore, I would not agree with the statement that money launderers come to Germany because our legal system has loopholes that favour the laundering of money'.⁸²⁵ Also *Korte* does not agree with the idea of the high amount of cash transactions inferring a high volume of money

⁸¹⁸ According to the authors, the fact that the big banking sector attracts money launderers was particularly after the Arab spring, when it was revealed that almost all political leaders and /or their relatives have had financial relations with Germany. See *Henn et al.*, 2013, pp. 5, 7.

⁸¹⁹ Germany is the largest national economy in Europe, and the fourth largest by nominal GDP in the world. Frankfurt is a major financial centre, being the seat of the European Central Bank. See World Bank's World Development Indicators Database of 2010-2014, available at http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries/1W?order=wbapi_data_value_2014%20wbapi_data_value%20wbapi_data_value-last&sort=desc&display=default, last accessed on 06/09/2015.

⁸²⁰ Savona and Riccardi (ed.), 2015, p. 37.

⁸²¹ Savona and Riccardi (ed.), 2015, p. 37.

⁸²² Annex I, pp. Xliii; xlv.

⁸²³ The respondent actually confirms in this way the theory that links the size of the legitimate economy to the size of the illegitimate economy. Annex I, pp. iv, v.

⁸²⁴ Annex I, p. xxvii.

⁸²⁵ Annex I, p. iv.

laundering: 'Even though cash transactions hinder the tracing of dirty money, it is not enough to describe the country as a paradise for money launderers. It is true that in Germany organised criminal groups are active, especially foreign ones, but their activities are persecuted by law enforcement; of course there are some cases that remain unresolved but this happens in every legal system'.⁸²⁶ *Uecker* contests the link between the size of the financial centre and the amount of illicit financial flows, too. In his opinion, 'if one builds the estimates in relation to the volume of the economy, since Germany has a big economy, the number would be high. Yet, even those who infer that Frankfurt is a big centre for money laundering due to the fact that is a big financial centre, do not have evidence of this relationship. On the other hand Germany has a long-standing tradition of rule of law that makes it more difficult to infiltrate proceeds of crime in the country.'⁸²⁷ The strong rule of law and the transparent administration is a contra-argument also raised by another respondent.⁸²⁸ The low level of corruption is interpreted as a deterrent factor by the former senior policeman *Finger*, who states that 'corruption is not deeply rooted in society and in the economy; it does not affect the daily life of citizens. There are often cases of corruption, but it is not in the nature of the people to procure themselves privileges through corruption, in fact there is a massive refusal of corruptive practices amongst the population'.⁸²⁹ Moreover, the legal and regulative frameworks provide 'firewalls', namely specific compliance departments that impede corruption and money laundering both in the private and in the public sector, the possibility of reporting corruption cases anonymously, and protection for whistle-blowers'. These assumptions have been used in the NGO report of 2013, too. The document states that the rule of law and the low level of corruption, inferred by the Transparency International Index,⁸³⁰ are factors that make the laundering of proceeds of crime more difficult in Germany.⁸³¹ Also the 2010 FATF report identifies the long-standing legal tradition of the rule of law, the political environment, and the integrity of

⁸²⁶ Annex I, pp. iv, v.

⁸²⁷ Annex I, p. I.

⁸²⁸ Annex I, p. xxvii.

⁸²⁹ Annex I, p. xxvii.

⁸³⁰ At the time of the report, Germany was listed the 13th position out of 174 countries assessed by the Transparency International Perception Corruption Index. See www.transparency.org/cpi2012/results, last accessed on 30/06/2015. The most recently published index is available at: <http://www.transparency.org/cpi2015#results-table>, last accessed on 16/01/2016.

⁸³¹ According to the authors, the fact that the big banking sector attracts money launderers was particularly after the Arab spring, when it was revealed that almost all political leaders and/or their relatives have had financial relations with Germany. *Henn et al.*, 2013, pp. 5, 7.

the law enforcement personnel and of the judiciary as strength factors.⁸³² Another attorney holds a different opinion relating to the degree of corruption in Germany and on the impact of corruption on law enforcement activities. He thinks 'Germany is a very corrupt country, especially the state and the economic sector. The most corrupt state is Bayern, therefore I do not believe that there will be any further investigation [with regards to the *Hoeneß* case⁸³³]. This would destabilise the equilibrium between the fans, the sponsors, like Siemens, and the whole community'.

5.2.4 Considerations

There are three issues upon which the respondents agree, those are the lack of reliable statistics about the volume of money laundering in the country, the role played by the media in influencing the public's opinion and the fact that money laundering, at least indirectly, has a negative impact on society. These assumptions are however interpreted in different ways and thus cannot be used as independent variables. Some respondents are of the opinion that since estimates could also be much lower, lawmakers cannot rely on them in order to design new policies. Others interpret the fact that the responsible authorities have not yet found a way to provide more reliable figures due to a lack of involvement. The role of the media is also perceived differently among interview partners. While some accuse them of providing a biased representation of the phenomenon, others believe that their contribution has increased people's awareness. Finally, with respect to the impact of money laundering on the German society interviewees seem to no have doubts that the laundering of proceeds of crime through the legitimate economy is a distorting factor of economic competition, which has an indirect negative impact on the whole society.⁸³⁴ However, given the lack of reliable figures on the real volume of money laundered in the country, even this element cannot be used as common ground to assess the policy's effectiveness.

⁸³² FATF, MER 2010 p. 9. The assessors report: 'the excellence of the prosecutors from the public prosecution offices of the German *Bundesländer*, of the judges at the courts and the lawyers within the Ministry of Justice, their remarkable knowledge of the law, and their dedication to the responsibility that they have been entrusted with, confirms the solid foundation upon which the German system is established'. FATF, MER Germany 2010, p. 115.

⁸³³ *Hoeneß*, President of Bayern Munich football team, was convicted on 13th March 2014 for tax evasion committed on speculative business in Switzerland. Rehle M, Hoeneß spekulierte Mithilfe mehrerer Banken. *Die Zeit online*, 26/03/2014.

⁸³⁴ Yet some respondents are sceptical for example about attributing the European financial crisis of 2008/2009 to money laundering. In particular *Korte* highlights that at FATF meetings money laundering was signalled as one of the causes of the European financial crisis; yet without providing concrete facts. Annex I, p. viii.

5.3 Is the current policy appropriate to tackle money laundering? What are the legal hindrances and technical strengths of the policy?

The respondents are asked to highlight the strengths and weaknesses of the current policy. Some of the issues are particularly related to the wording of the piece of criminal legislation and of the preventive regulations. Other technical factors refer to the criminal justice system and thus cannot only be ascribed to the formulation of the anti-money laundering legislation. The aim of the interviews on the perceived appropriateness is to highlight the existing differing perceptions in order to stress the complexity of the topic. The interviews are not directed at evaluating the effectiveness of the whole legislation on the basis of technical challenges and advantages.

5.3.1 Legal hindrances

Issues already revealed in *Oswald's* research, as for instance the high **burden of proof** required by Article 261 Gcc, are still perceived as hindering the capacity of prosecuting money laundering through this law. According to a defence attorney, 'the high burden of proof lowers the possibility of prosecutions of successfully dealing with money laundering cases.' Also three of the public prosecutors interviewed confirm that 'the burden of proof of the illegitimate origin of the assets is very high, therefore only a few charges are preferred on the basis of the information received through STRs'. In order to further facilitate the work of the prosecutors and to lower the burden of proof, there is a discussion about the possibility of introducing the **reversal of the burden of proof**. According to *Henn* the criticism raised by the Italian senior prosecutor Dr *Scarpinato* has quite a strong impact the German national debate.⁸³⁵ Therefore, adds the respondent, 'I can imagine that this might be changed at some point. However, I doubt that Germany will ever enact a system similar to the Italian one [with regards to the reversal of the

⁸³⁵ Annex I, p. xix. *Scarpinato* has already been interviewed in 2011 and heard by different sources in Germany about the presence of organised crime and the consequent need for legal reforms. The prosecutor advocated specifically for the introduction of the crime of participation in a criminal organisation, a broader use of telephone tapping instruments and the reversal of the burden of proof. See **Bund Deutscher Kriminalbeamter, Interview mit Generalstaatsanwalt Roberto Scarpinato. Blickpunkt 4, Kölner Stadt Anzeiger, 11/10/2012.**; Meyer U, Mafia-Jäger warnt in Hamburg vor sizilianischen Verhältnissen. *Hamburger Abendblatt*, 27/09/2011; Lüke U, Tagung in Köln über das organisierte Verbrechen. *General Anzeiger Bonn*, 15/10/2012; Stoldt T-R, Wie stark ist die Mafia in Nordrhein-Westfalen? *Die Welt*, 20/10/2012; Kreikenbaum U, Die Mafia kann relativ frei arbeiten. *Kölner-stadt Anzeiger*, 10/09/2015.

burden of proof], because of the specificities of our legal culture.⁸³⁶ Also because one can argue that, despite the efficient asset recovery system, Italy has not yet managed to defeat the Mafia. It is thus controversial whether this instrument is effective; however one can say that without having it, the situation would be much worse'. According to prosecutors 'the inversion of the burden of proof would help us overcome these obstacles [of bringing evidence of the elements of the crime]. If we could infer the illegal origin of assets from circumstances and then require the offenders to prove the contrary, this would enormously contribute to the prosecution of money laundering cases'. *Diergarten* would personally welcome the introduction of the reversal of the burden of proof in the field of money laundering. He explains that 'at the moment there is a debate, and I believe that with specific regards to the fight against money laundering, this provision would play a significant role.⁸³⁷ In order not to violate constitutional principles, the measure should be authorised by a judge and not by the police and should be limited to cases of serious criminality'. Yet, the introduction of this criminal procedural mechanism would not be welcomed by all respondents. The Berlin detective chief superintendents are convinced that 'it will not be possible to introduce the inversion of the burden of proof in Germany because this concept goes against the fundamental principles of criminal law and against the rule of law. In Germany nobody is supposed to defend themselves -*nemo tenetur se detegere*- the law grants the right to silence of the accused, according to Article 136 (1) of the German code of criminal procedure'. In addition, the investigators claim that they are 'used to working without this instrument, so we would not feel comfortable to introduce it in the practice of criminal proceedings'. By putting herself into the shoes of potential offenders, *Kunisch* emphasises that 'as an individual I would not like to be subject to this burden when dealing with public prosecutions'.⁸³⁸

As regards to the **exemption of punishment** regulated under Article 261(9) Gcc, there are different opinions about whether this provision hinders an effective implementation of the law or not. At the time of the interviews, Article 261 (9) was still excluding

⁸³⁶ The judge *Scarpinato* is famous for having also stated, indeed: 'Es ist erstaunlich, dass in Deutschland die Angst vor dem Staat größer ist, als die vor der Mafia'. English translation: It is astonishing that in Germany the fear of the State is greater than the fear of the Mafia. See *Kaufmann*, 2011, p. 45.

⁸³⁷ Annex I, p. xxvi.

⁸³⁸ Annex I, p. xxxi.

punishment for the perpetrators of the predicate offence.⁸³⁹ The exclusion was provided in accordance with the constitutional principle of freedom from self-incrimination (*Selbstbelastungsfreiheit*).⁸⁴⁰ Legal scholars have produced a lot of literature about the topic. The issue is controversial because on one hand it is an obvious limitation of criminal action towards the offenders, on the other hand exactly this limitation is emphasised as a fundamental guarantee for defenders. According to *Diergarten* 'offenders should only be punished for the predicate offences and not also for money laundering, otherwise it would be a double punishment for the same conduct'.⁸⁴¹ The attorney adds that the private sector does not discern whether the individual who carried out the suspicious transaction could have been the same who committed the predicate offence'. The defence attorney thinks 'the provision would collide with the criminal legal system and the constitutional principle of freedom from self-incrimination, and that therefore 'the introduction of the liability for the perpetrators of the predicate offences would not be an appropriate solution'. Attorney *Gutman* is of the same opinion.⁸⁴² In the Ministry of the Interior the introduction of criminal liability for money laundering under Article 261 Gcc in case of the so called 'self- money laundering' is not considered as a possible step to take in order to improve the effectiveness of the provision. The Ministry of Justice has even commissioned a study on the issue to argue against the criminalisation of self-money laundering, triggered by the fact that the FATF declared that Germany should introduce self-money laundering.⁸⁴³ In particular *Busch* believes that 'the introduction of a general self-money laundering offence could mean that even a thief who steals something and hides it would be liable for money laundering because of the act of hiding the proceeds of the theft, and this is not in line

⁸³⁹ The provision excludes the criminal liability for those who participated in the predicate offences, out of the cases in which the offenders put in circulation the objects deriving from the offences, in order to conceal their illegitimate origin, under Article 261 (9) 2 Gcc. Article 1, BGBl. 2015 I, p. 2025.

⁸⁴⁰ The principle derives from the application of Articles 1 (1) and 2 (1) of the German constitution (Grundgesetz, GG) on criminal proceedings. Article 1(1) GG states that *Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt* (Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority); Article 2 (1) GG declares that *Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt* (Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend the constitutional order or the moral law).

⁸⁴¹ Annex I, p. xxiv.

⁸⁴² Annex I, p. xxiii.

⁸⁴³ The investigation reaches the conclusion that self-laundering must remain exempt from separate punishment. The text is based on an expert report, which was commissioned by the Federal Ministry of Justice of the Federal Republic of Germany. It was particularly caused by the 'Mutual Evaluation Report' of 19 February 2010 that was written on Germany by the international anti-money laundering and terrorism funding body 'Financial Action Task Force' (FATF). See *Schröder*, 2013.

with the fundamental principles of our criminal legal system'.⁸⁴⁴ According to *Hagemann*, 'self-money laundering should be criminally liable under the criminal code and Article 261 (9) should be deleted'.⁸⁴⁵ Also *Henn* believes that 'this is a legal loophole that should be filled. Even though this would not entirely solve the problem, at least it would not be wrong to have it in the criminal code, because otherwise it is not possible to prosecute someone for money laundering if it is suspected that she/he was also involved in the predicate offence. The Parliament has in fact announced that this might be introduced in the next future'.⁸⁴⁶ *Finger* states that the Parliament is indeed obliged by the fourth money laundering directive to eliminate Article 261(9) Gcc.⁸⁴⁷ This provision affects the filing of STRs too, according to the BMF, given the exemption of punishment provided by Article 261 (9) 2), it cannot be required that STRs are filled in cases in which it is clear that the perpetrator of the main offence is the same has also committed money laundering.⁸⁴⁸

The attorney also recalls the long-debated issue of the legally protected goods. In her opinion one of the problems of Article 261 Gcc is 'that is not clear which are the legally protected goods.' The conflict that has emerged during the law-making process with regards to the interests protected by Article 261 Gcc has had an impact on the application of the norm. This is also recognised by the BMF, which declares that the determination of the *Rechtsgut*, far from being a merely doctrinal issue, impacts the practical implementation of the law. The BMF advocates a change of paradigm and for the identification of the *Rechtsgut* with the protection of the financial system in opposition to the protection of the administration of justice, since the latter is not considered by any of the EU Member States and does not reflect the nature of the offence. With respect to the identification of the interests protected by Article 261 Gcc, a representative of the BMJ, *Busch*, acknowledges that the BMF approach, that supports the idea that the law should protect the financial system and not the administration of justice. According to him 'there has been a switch, if at the beginning the crime of money laundering was created to fight organised crime, there is a tendency in Germany

⁸⁴⁴ Annex I, p. v.

⁸⁴⁵ Annex I, p. xxxv.

⁸⁴⁶ Annex I, p. xviii.

⁸⁴⁷ Annex I, p. xxviii.

⁸⁴⁸ BMF Stellungnahme des BMF zum Änderungsbedarf bei § 261 Gcc und Defiziten in der Rechtspraxis aufgrund des Strafausschlussgrundes des § 261 Abs. 9 S. 2 Gcc bei der Selbstgeldwäsche. VII A 3-VK 5160/06/0002:005, 2013, p. 1 (non published).

to consider it as a tool to protect the legal economy from the infiltration of illegal money. In fact at the beginning the Ministry of the Interior was responsible for drafting the law, at the moment the duty lies in the hands of the Ministry of Finance'.⁸⁴⁹

Another issue that has emerged from the empirical research is the approach taken by Germany, from the beginning, about the **catalogue of the predicate offences** for money laundering. International lawmakers did not impose any particular approach, therefore certain jurisdictions have opted for the 'all crimes approach', thus considering all crimes as predicate crimes for money laundering, others have limited the list to certain offences, hence adopting the 'threshold approach',⁸⁵⁰ others provided a list of offences. Germany chose a combination of a 'threshold approach' and the compilation of a catalogue, which is continuously being expanded by the legislator. According to the interview conducted in the Ministry of the Interior, the introduction of the 'all crime approach' would be a necessary step in facilitating prosecutors' work and thus improving the law's effectiveness. Also *Busch* believes that 'the 'all crimes approach' might result in an advantage for the prosecution that needs to bring evidence of a money laundering offence, in case prosecutors would no longer need to prove one of the predicate offences listed in the catalogue, but rather only the general criminal origin of the proceeds'.⁸⁵¹ This change might finally release prosecutors from the so-called "*doppel Anfangsverdacht*", namely from the duty of providing evidence not only of the laundering conduct and of the illicit origin of the property, but also of the specific commission of an antecedent act.

Another issue that refers to the German criminal legal system is the **seizure** of criminal assets. The problem is summarised in the words of two anonymous policemen: 'at the end of the proceedings, prosecutors manage to confiscate only the half of what they seized'. The criminalisation of money laundering was directed at the confiscation of criminal assets to deprive drug traffickers of their ill-gotten gains in order to eliminate the incentive for engaging in crime⁸⁵² and to undermine organised crime's financial

⁸⁴⁹ Annex I, p. vii.

⁸⁵⁰ The fourth money laundering directive under Article 3 lists a number of predicate crimes that have to be included by member states.

⁸⁵¹ Annex I, p. vii.

⁸⁵² Opinion expressively stated by the Parliament. Confiscation should have impeded the proceeds of crime would constituting as the 'operating capital' (*Betriebskapital*) for the commission of further offences. See BT-Drucks. 12/2720, p. 2.

power. The opinions of the respondents regarding this issue partly describes it as a hindrance and an advantage and partly as not even corresponding to the policy's purpose. Confiscation can be a very useful preventive tool according to the interview partner of the BMI, yet the goal of the law enforcement is not to confiscate the assets, but rather to imprison the offenders.⁸⁵³ According to the attorney, 'the law [regulating asset forfeiture] is quite reasonable and there are no main hindrances'. One prosecutor expresses the opinion that 'the confiscation of criminal asset is a much more effective punishment for money launderers than one year of imprisonment'. The implementation of the law does not seem to satisfy *Henn*, who has the feeling that asset recovery is not considered very effective and thus is not often used by law enforcement. 'Authorities seem not to rely on this tool much, they do not invest resources on it. I have the impression that it is a very complicated system that requires specific knowledge and it is time consuming. I believe that Germany is not very good at asset recovery because our system considers the convictions of individuals more effective. I know that, for instance, the Italian system has much higher figures on asset recovery compared to Germany. Yet, in the German BMF they argue that most of the seized assets have to be cancelled'.⁸⁵⁴ The chief investigator *Kunisch* explains that in Germany, up to 10.000 Euros of confiscated assets can be kept by the prosecuting State. Usually, the confiscated assets are devolved to the victims. In the case of economic crimes, which are victimless, the assets go to the public budget of the *Bundesland* and not to the federal State, nor to the police offices⁸⁵⁵. There should be thus an interest to improve confiscation procedures at the state level in order to be able to face the costs of investigations, for instance as also suggested by the draft bill.⁸⁵⁶ In order to effectively confiscate proceeds of crime, without leaving the possibility that perpetrators invest them in legal activity that produces legitimate profit or sells the objects to good faith-third parties or stashes the money away to offshore jurisdictions or through complex schemes that make the tracing of the ill-gotten gains complicated, prosecutors should be able to rapidly freeze the assets. According to the FATF report of 2010, the authorities noted that measures are generally taken as early as possible to seize the assets held by a party charged with a crime, at the beginning of the criminal investigation procedures, in order to prevent the assets from being removed illicitly. However, some prosecutors also indicated that

853 Annex I, p. xli.

854 Annex I, p. xx.

855 Annex I, p. xxxii.

856 BT-Drucks. 12/3533, 1992, p. 11.

seizures were typically used to the extent that they can support the evidence in a criminal investigation and not as a means to prevent the dealing, transfer or disposal of property subject to forfeiture or confiscation.⁸⁵⁷

One of the most discussed topics in the field of the prevention of money laundering is the disclosure of **beneficial ownerships**⁸⁵⁸ through the establishment of a national register.⁸⁵⁹ At the moment, in Germany there are sixteen different state registers, which are not integrated on a federal level, therefore there is a debate about the possibility of introducing a national register of beneficial owners. With regards to this question respondents' opinions differ. On one hand prosecutors and the BMJ advocate for the introduction of a federal beneficial owners' register; this would, in their opinions, hugely facilitate investigations. On the other hand the representatives of the Ministries of Finance and of the Interior oppose this change. For example, according to one prosecutor 'when criminals use relatives to launder their money, and the relatives have a legal source of income, it is difficult to provide evidence of the illegal origin of that specific asset, since money has a neutral nature. While it is easier to catch the nominees

⁸⁵⁷ FATF, MER Germany 2010, p. 85.

⁸⁵⁸ Under European law a beneficial owner is 'any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least' a series of natural persons. Article 3 of the **Directive (EU) 2015/849, OJ L 141, 5.6.2015**, p. 73–117. (a) in the case of corporate entities: (i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information. A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership. A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership. This applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control. Control through other means may be determined, inter alia, in accordance with the criteria in Article 22(1) to (5) of Directive 2013/34/EU of the European Parliament and of the Council;(ii) if, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s), the obliged entities shall keep records of the actions taken in order to identify the beneficial ownership under point (i) and this point; (b) in the case of trusts: (i) the settlor; (ii) the trustee(s); (iii) the protector, if any; (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means; (c) in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point (b).

⁸⁵⁹ Given the most recent developments in European law, soon there will be a European central register of beneficial owners of companies. The details of this novelty are explained in the second chapter.

of dummy companies, it is much harder to catch those who act behind them [the beneficial owners]. Most often, indeed, nominees do not actually know who manages and profits from the business. Unfortunately, there are plenty of individuals willing to act as nominees, in exchange for some profit'. Also *Schneider* and *Rech* think that shell companies play a significant role [in the laundering of proceeds of crime]; nevertheless it is very difficult now to trace the complete paper trail in these cases.⁸⁶⁰ The lack of transparency in the field of corporations plays an important role for the abuse of companies for money laundering purposes, according to the NGOs report of 2013.⁸⁶¹ The authors believe that German companies are only partially required to comply with transparency standards. On the contrary *Findeisen* argues that law enforcement can already access a high quantity of information and that company registers are held at state level.⁸⁶² Therefore, according to him, there is no necessity of introducing a federal register on beneficial owners. A respondent from the BMI explains that 'the BMJ has published a report on the beneficial owners issue, where they state that there is a need of a public national register of beneficial owners, not only for companies and legal entities but also for boats and real estate property, and other types of properties, in order to improve the implementation of the anti-money laundering regime. At the BMI we do not agree with this opinion, since we do already have these kinds of registries and we could use them better, without creating new ones. Citizens, whose data is collected in a public registry, would see the creation of such a register as a danger'.⁸⁶³ According to *Diergarten* in the banking sector 'there is a remarkable focus on the disclosure of beneficial owners. However, I personally think that this system is not effective. The legislator and also the FATF have assumed that for example Mafia bosses acting behind the nominees would actually provide their identity. In reality I believe that they lie and conceal their identity, so that even by tracing back the beneficial owners of a company it would not be possible to detect them. The burden is very high: companies need to provide the data of the BOs and we need to verify it. If the beneficial owner of a company is another legal person we also need to trace back the BOs of the latter, and this process can go back five or six layers. I have never experienced that through this

⁸⁶⁰ Annex I, p. xv.

⁸⁶¹ *Henn et al.*, 2013, pp. 33-40.

⁸⁶² A report commissioned by the EU Commission on the effectiveness of asset recovery mechanism states that the Federal Financial Services Supervisory Authority (BaFin) has access to a database for basic data of account details of naturalised persons and legal entities in Germany, which is made available on request to law enforcement authorities in the process of investigation. *Irvin and Levi (ed.)*, 2009, p. 51.

⁸⁶³ Annex I, p. xl.

system a money launderer has actually provided his/her identity to the bank. Why would he/she? She/he would be weary of life or crazy if she/he were to say that she/he works for the Mafia. Nobody would do it, yet all believe so'.⁸⁶⁴ The use of complex cross-border schemes of corporate vehicles with a 'Chinese box' structure to conceal identities and hide illegal proceeds is considered to be an 'enabler'⁸⁶⁵ of money laundering also according to a report published by the Global Agenda Council on Organized Crime.⁸⁶⁶ According to the report, particularly the possibility of hiding offenders' identity behind the veil of beneficial ownerships is essential to give an appearance of legality and thus avoid prosecution and confiscation. The FATF assessors in 2010 expressed particular concern with regards to the issue of beneficial ownerships of companies and other legal entities, because German businesses and professions inquired during the mutual evaluation they were found non-compliant with the FATF requirements of verification of beneficial ownership. Assessors figured out that the designated businesses and professionals had different understandings of the related law.⁸⁶⁷ According to the report published by the NGOs in 2013, since 2005 every state has had a bank account register, where banks have to register all bank accounts, which have frequently been used in the last years by law enforcement authorities and tax authorities also for the purpose of mutual legal assistance.⁸⁶⁸ Yet, the authors believe that the real utility of the register for international cooperation can only be estimated because there are no statistics; moreover, given the cumbersome procedures required to access those registers for the purpose of

⁸⁶⁴ Annex I, pp. xxiv, xxv.

⁸⁶⁵ Organised crime enablers include 'the individuals, mechanism and facilities used for primarily legal purposes that are adapted for criminal objectives. They play an important role in facilitating organized crime activities, whether intentionally or inadvertently, increasing its benefits and scale, and predominantly reducing its risks', see Global Agenda Council on Organised Crime, 'Enablers of organised crime', 2012, p. 15, available at <http://reports.weforum.org/organized-crime-enablers-2012/#chapter-enablers-of-money-laundering>, last accessed on 30/07/2015.

⁸⁶⁶ Global Agenda Council on Organised Crime, 'Enablers of organised crime', 2012, p. 7, available at <http://reports.weforum.org/organized-crime-enablers-2012/#chapter-enablers-of-money-laundering>, last accessed on 30/07/2015.

⁸⁶⁷ FATF, MER Germany 2010, p. 146. Yet, according to a study commissioned by the European Commission in 2009 approximately 15 Member States stakeholders agreed that the European definition of beneficial owner is clear and not too wide. However, the definition is only clear in the case of simple corporate structures or companies for; where multi-level holding structures are concerned, the notion is still vague. Moreover, in the case of special national legal for, such as the 'partnership' under the German civil code there is the problem that a multitude of partners might be fully liable. See Deloitte, European Commission Final Study on the Application of the Anti-Money Laundering Directive, Service Contract ETD/2009/IM/F2/90, 2009, pp. 66, 67.

⁸⁶⁸ Henn *et al.*, 2013, pp. 33-40. The register has been introduced pursuant to Article 24c of the Kredit Wirtschaft Gesetz (KWG). In 2012 there have been for example 114.364 requests. See BaFin: Jahresbericht 2012, available at www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2012.pdf?__blob=publicationFile&v=5, last accessed on 20/07/2015.

sharing information with foreign authorities, the report concludes that the system might even diminish the effectiveness of several bilateral agreements between Germany and other countries in the exchange of information. In addition, the document draws attention to the European law-making process and to the role played by the German government. Authors complain about the fact that the German State together with other member countries is blocking the process of establishing a common European register, which is advocated by other countries.⁸⁶⁹

The international community has recently gone through a change of paradigm, according to *Busch* also the EU, the G20 and the FATF discuss the requirement of a public registry of the Beneficial Owners, in order to facilitate the access to this information.⁸⁷⁰ In fact in the meantime the fourth anti-money laundering directive has introduced a European wide public register of beneficial owners.⁸⁷¹ Yet, according to *Busch* 'with the introduction of the BO policy, the responsibility is put on the clients, who now have the duty to disclose information'.⁸⁷²

Another controversial matter concerning the preventive part of the anti-money laundering policy is the one regarding **Politically Exposed Persons (PEPs)**. *Henn* doubts 'that this system would ever work because it is a very political matter that could create diplomatic problems between countries. For example, if we look at the Arab spring, and at the relations between Germany and Egypt, they were good until 2011, when Mubarak was delegitimised by his own people and by the international community. Only then Mubarak was named as a dictator, however, at that point the preventive purpose of the anti-money laundering law was no longer fulfilled. What was, applied, however was the asset recovery mechanism, which is indeed very effective. On the other hand, it would have been a highly political issue had German banks seized his assets while he was ruling the country. There is too much discretion in this field, which might be abused for political reasons. On the other hand, providing official lists of PEPs would still not be a solution. Such lists would always need to be updated, and they could potentially ignite diplomatic disputes between states. This has already been experienced on an international level, for instance in the field of tax havens. Blacklisting also raises a lot of human right issues. The alternative to providing an index

⁸⁶⁹ *Henn et al.*, 2013, pp. 33-40.

⁸⁷⁰ Annex I, p. vii.

⁸⁷¹ See chapter two, paragraph 2.2.5.

⁸⁷² Annex I, p. vii.

of a persons or a countries potential risk would not solve the problem either, because in a legal context it is necessary to be able to differentiate between black and white, and not to have a gradual evaluation'. *Diergarten* is also very sceptical about these regulations: 'Also in this case the banking sector bears a high burden. Every year we spend 60.000 Euros in order to buy the lists of PEPs. For every transaction we need to verify whether the individuals involved are on the list. What would happen if we found a person listed on that list? We would need to undergo enhanced due diligence. Yet as long as the person carries out only normal transactions we would not intervene. We would need to intervene only when the transactions are suspicious, but such operations would emerge anyway through the normal monitoring system. This is again a useless provision. If such lists would be public they would reduce our burden, yet I do not see the point as to why we need to do enhanced due diligence for PEPs'.⁸⁷³

5.3.2 Systematic hindrances

Currently, secrecy covers not only banking activities, but also a whole range of financial transactions. Regulations that provide secrecy include laws that allow a low degree of transparency in the establishment and accounting by corporate entities, the creation of trusts whose real beneficiaries remain anonymous, zero or low tax rates and minimal exchange of tax information with other tax jurisdictions, banking secrecy, and barriers for the exchange of information relating to criminal matters. Secrecy is a controversial topic. The right to privacy is a fundamental right of any individual,⁸⁷⁴ and secrecy can, in fact, serve licit and valid purposes.⁸⁷⁵ Yet, secrecy can be exploited for unlawful purposes, such as violations of national tax or anti-money laundering laws, through the concealing of financial transactions. Banking secrecy had been used as a ground to refuse mutual legal assistance and cooperation in criminal matters, thus impeding or hindering criminal investigations or other legal proceedings.⁸⁷⁶ In this scenario,

⁸⁷³ Annex I, p. xxv.

⁸⁷⁴ Article 12 of the United Nations Declaration on Human rights (1948): *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

⁸⁷⁵ For example, politically persecuted individuals can use secrecy to secure their assets from being confiscated by authoritarian regimes. Secrecy can also be in the interest of the family. For instance the original purpose of trusts (financial tools which provide secrecy) was to promote the protection of spouses who are unable to look after their own affairs. See *Christensen*, 2011, p.183.

⁸⁷⁶ The veil of secrecy can be a bar to investigations, thus a guarantee of impunity. For example, secrecy has been used by corrupt dictators around the world to conceal stolen assets. See *Baker*, 2005, p. 238.

professionals can misuse the absence of direct supervision to launder funds or act as intermediaries in helping others to launder. In addition, money launderers, can beneficially own brokerages or firm of accountants and lawyers.⁸⁷⁷ According to *Diergarten* there is a particular area in which secrecy has not yet been regulated which is banks deposit boxes. 'Preventive regulations that impose the duty to collect information about clients and to share them with law enforcement agencies on request are not applicable to deposit boxes. While prosecutors may receive information about a suspect's transactions carried out on a bank account in the last two years, they cannot access the same information about deposit boxes. For example, in the *Hoeneß* case, he might still even have millions of Euros hidden in thirty deposit boxes in Germany. Assets hidden in deposit boxes in the form of gold or security papers do not result in any bank accounts and Germany has no central register for them, therefore investigators would never have access to this information. The Mafia could also have such deposit boxes in Germany and nobody would know. Why? Because the State for years has refused to create a so called central register. It would actually be very easy for the banks to communicate the required information because they collect it for internal purposes. Yet, the legislator has decided not to regulate this sector and I do not understand why. It could hugely help investigators. I actually believe that disclosing information about deposit boxes would help more than filing STRs, I would reduce the number of STRs and improve this other aspect. This would also reduce the burden for banks and would improve the effectiveness of the system'.⁸⁷⁸

Another issue raised by quite a number of interview partners is the lack of **knowledge**. The research started from the assumption that interviewees would have had a great familiarity with the wording of Article 261 Gcc. However, this assumption has been proven wrong by empirical research. In fact, according to the interview partners, the low level of expertise can be either due to the lack of specific legal training in the public and private sectors, or on the vague formulation of the law. In the Ministry of the Interior, for example, it is advocated that the wording of Article 261 Gcc should be formulated in a clearer way. According to *Gutman*, 'even many of the lawyers have never read the provisions of the GwG, and without sounding arrogant, if they were to do so, they

⁸⁷⁷ Global Agenda Council on Organised Crime, 'Enablers of organised crime', 2012, p. 8, available at <http://reports.weforum.org/organized-crime-enablers-2012/#chapter-enablers-of-money-laundering>, last accessed on 30/07/2015.

⁸⁷⁸ Annex I, p. xxiv.

would not understand the details straightaway after the first reading.'⁸⁷⁹ Neither prosecutors nor judges seem to be familiar with the law. According to senior prosecutor *Hagemann*, 'prosecutors who do not work in this department have never even read it and there is no judge that has ever read the whole legislation, this is the reason why most of them do not understand how the law is drafted.'⁸⁸⁰ The prosecutor believes that the lack of knowledge is related to unclear formulation but also in the lack of proper training: 'the provision is not part of legal education and is not part of the state exam for the legal professions in Berlin. Also in the university Article 261 Gcc is not part of the examinations, what is usually explained to the students are the requirements of a money laundering case. Therefore, those who start a legal career have no know-how in this field. The lack of legal training leads to the fact that, often when we bring forward a charge for money laundering, the courts are very surprised and do not know how to react'. *Findeisen* furthers the perspective about legal actors' knowledge by commenting on the legal education system. In his opinion 'there is the necessity to update the legal training since criminal law professors in Germany still adopt a reluctant approach towards economic crime regulations. A deep and scientific knowledge of about the matter is missing. In the past, at least some critical studies were undertaken and legal schools had a critical approach towards the law. What is currently being taught in law schools is even more conservative than at the times when I studied. The private sector, and especially industries, fund big parts of the legal education, and therefore there is even less critical thinking'.⁸⁸¹ Neither the courts have tried to improve the law through a better interpretation, in fact even the jurisprudence has not managed to clarify the legal framework, adds an anonymous respondent. In fact 'decisions taken by the upper state courts or by the Supreme Court are confusing and do not set clear guidelines; despite there being quite a lot of jurisprudence about the topic, whether such jurisprudence is useful to direct criminal action is another matter. For example, decisions that have recently been published are not tackling fundamental issues, they rather deal with cases of standard economic activities'.⁸⁸²

Yet, the perceived situation of the Berlin investigators is actually different since they do possess a specific knowledge in the field of financial investigations. According to

879 Annex I, p. xxiii.

880 Annex I, p. xxxiii.

881 Annex I, p. xi.

882 Annex I, p. xxxiv.

Pietsch 'Investigators working in this field receive a special training that is conducted at a federal level, so that it is the same for the whole country. Young professionals who are currently involved in financial investigations are experts and must keep on updating their knowledge. In Berlin there are fourteen offices exclusively devoted to financial investigations for money laundering cases'.⁸⁸³ This, however, if it is true it's speaks for the state of Berlin, however it does not seem to reflect the situation in the whole country. According to *Finger*, in fact, the police is not provided in all sixteen states with specialised personnel.⁸⁸⁴ Also within the supervisory authorities 'there is the necessity of specific training in the field. For all fields of work there is the possibility for employees to follow special training and I hope that there will soon be such opportunities also in the field of anti-money laundering law as well', states *Schneider*.⁸⁸⁵ The public official from Hesse stresses that 'the GwG is a law that has been frequently modified, therefore for us it is an ongoing process of updating and improving. When I started working in this field I had to learn from the very basics what money laundering was because before I was working in a different field. The anti-money laundering policy implies an ongoing learning process that requires professionals to always be up-to-date. One of the reasons why the process [of improvement of the policy] takes so long is because while applying new rules, issues and problems may arise. Sometimes, we can solve those issues by looking at some precedent examples but in other cases the challenges are completely new so that we need to figure out a solution on our own. Sometimes we pose questions to the State Ministry of Internal Affairs in Hesse and if they do not have an answer then they direct our query to the Federal Ministry of Finance in Berlin'. *Schneider* and *Rech* report an example of a problematic issue: 'at what time should a real estate agent identify the client of a contract? Every particular profession and business has different problems when applying the GwG and there are approximately 66.000 obligated businesses and individuals in our district that should be supervised, and we do not "know" them. There is no register that lists companies obliged to observe the GwG rules. We do not have adequate knowledge of their professions, of their way of working or their special risks, still we have to supervise them. It is therefore difficult for the authorities to provide answers in this context. Obviously we need to apply a "risk-based approach" that allows us to focus on those activities where the risk of money laundering

⁸⁸³ Annex I, p. xxxi.

⁸⁸⁴ Annex I, p. xxvii.

⁸⁸⁵ Annex I, p. xiv.

is higher.⁸⁸⁶ However, thanks to the introduction of the GwG, employees' awareness of the threats of money laundering in the private sector has increased. This has already been observed by credit institutions taking part in *Oswald's* empirical research. The credit institutions that took part in the survey with regards to the suitability of the -at that time current- regulation to prevent and repress organised crime considered the law necessary because it helped employees to understand the risks of money laundering.⁸⁸⁷ The law was hence considered suitable for the purpose of making the private sector aware of the risks of money laundering. This, in the long term, would have been a prerogative for the effective prevention of the infiltration of criminal assets through credit institutions. Important steps have been made also with regards to the exchange of information between the supervisory authorities at the state level. Given that anti-money laundering regulations have been in force for more than twenty years, one can expect that the law instigators are indeed sensitised to the issue. Indeed, according to *Schneider* there is currently a much higher perception of the problem than fifteen years ago.⁸⁸⁸ In addition, in order to favour the exchange of information between local authorities, 'the Federal Ministry of Finance organizes a meeting several times a year where representatives of all the German states participate and exchange information, in order to coordinate actions at all levels. This does not work for all topics but it allows them to reach agreements on the most important issues'. The foundation stone for good cooperation has been laid: 'since 2011 -adds the public official -I have been every year to the police academy to show and report our work as a supervisory authority. And the *Regierungspräsidium* Darmstadt invites representatives of police departments, the state office of criminal investigation (Landeskriminalamt), tax offices, the customs office, public prosecution and the German Financial Intelligence Unit (FIU) to our annual congress. So they receive information about our administrative responsibilities and sometimes we receive information in return'.

'Even if there were to be only one jurisdiction that does not enforce anti-money laundering standards, the problem could not be solved completely'.⁸⁸⁹ One of the cumbersome matters pointed out by prosecutors interviewed by *Oswald* was the fact that some countries had not yet implemented adequate rules and thus it was not possible

⁸⁸⁶ Annex I, p. xiv.

⁸⁸⁷ *Oswald*, 1997, p. 208.

⁸⁸⁸ Annex I, p. xiii.

⁸⁸⁹ Annex I, p. xix.

to receive **mutual legal assistance**.⁸⁹⁰ This is still perceived quite unanimously by respondents as one of the main factors hindering the effectiveness of money laundering investigations and prosecutions. In particular, one respondent mentions the example of economic operations conducted by foreign criminal organisations: 'When money comes from a foreign country, first of all it is very difficult to prove the illegal origin; secondly there is not much interest in investigating these cases. For instance, it is quite well known that Russian and Italian criminal networks operate in Germany, but it is very difficult to prove the illegal origin of the money invested. Let us say if, for example, money invested in the real estate sector derives from an illegitimate privatisation in Russia committed in the last century, it would be very hard to provide evidence of such an illegal act. Information on the operation would be difficult to trace and it would be necessary to translate it and to verify whether the act constituted as an offence in the country at the time of commission, since the high degree of suspicion is not enough, prosecutors have to prove the illegal provenience and the commission of the predicate offence'. According to public prosecutors 'international cooperation works very well at least on paper, because the law provides all the instruments. However, in practice, this mostly depends on the countries with which one wants to cooperate. The problem is that money laundering is a transnational phenomenon, so as soon as the money has crossed several countries, it becomes very difficult to trace back the paper trail and to conduct financial investigations finalising in the confiscation of assets. In addition, offshore centres and secrecy jurisdictions, where companies with limited responsibility are registered, do not provide information on real and beneficial owners. When moneys reaches Germany, it has an appearance of cleanliness. International cooperation might represent a problem, especially when dealing with some jurisdictions (e.g. we have been waiting for four months to cooperate with law enforcement agencies based in Rome). Also foreign banks -if they do not belong to the same group as a national one- are reluctant to provide help for money laundering investigations. In these cases we are forced to deal with the public authorities of the foreign states, but they require a higher burden of proof to cooperate'.⁸⁹¹ Also according to *Finger* international cooperation is cumbersome because 'it is often influenced by economic purposes. In addition, there are still main differences between the 28 member states. There are countries that have a great interest in integrating dirty money in their economies, in order to foster their GDP.

⁸⁹⁰ Oswald, 1997, p. 149.

⁸⁹¹ Annex I, p. xxxviii.

Therefore, the German authorities have limited possibilities of identifying and detecting money laundering transactions undertaken in those jurisdictions'.⁸⁹² However, adds the prosecutor 'issues relating to mutual legal assistance and the possible problems deriving from the necessity of making sure that the predicate offence -if committed abroad- constitutes a crime under foreign law, do not even appear in practice. Frequently the cases do not even reach the investigation stage, because of the lack of evidence for starting investigations'. With regards to international cooperation as a factor that influences the effectiveness of a law, European research conducted recently looks at whether Member States have signed, ratified and implemented the main international and European instruments dealing with money laundering.⁸⁹³ The non-ratification or non-implementation of international measures, according to the research project, might negatively influence the effectiveness of the policy, particularly in the field of international cooperation.⁸⁹⁴ Besides being a missed opportunity for international cooperation, the fact of not ratifying international instruments might also be interpreted as an unwillingness, on the part of the legislator, to comply with international standards, or as an incompatibility between such standards and the domestic legal system. As regards to Germany, the country has recently ratified the UN Convention Against Corruption,⁸⁹⁵ while it has not yet ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 2005.

A further problematic issue raised by the respondents is the inappropriateness of **resources** allocated to the prevention and repression of money laundering. Credit institutions interviewed by *Oswald* between 1993 and 1996 were already very sceptical about the capability of public prosecutors to seize the suspicious assets by the deadline fixed by the law of two working days. In addition, institutions predicted that prosecutors would never have been able to deal with the large amount of information deriving from the STRs.⁸⁹⁶ the criticism was practically argued because financial transactions were mostly happening electronically, while public prosecutors offices did not dispose of the technical tools to follow the money electronically, but were still anchored to the 'paper

⁸⁹² Annex I, p. xxviii.

⁸⁹³ *Unger et al.*, 2013, p. 21.

⁸⁹⁴ *Unger et al.*, 2013, p. 21.

⁸⁹⁵ The German Parliament, after eleven years, ratified UNCAC, so that it came into force on 12th December 2014, see BGBl. 2015 II, p. 140. The research highlights that a specific delay in implementing the third directive was encountered in many states; however, this was not linked to the quality of the directive but rather to internal matters. *Unger et al.*, 2014, pp. 144, 145.

⁸⁹⁶ *Oswald*, 1997, p. 189.

trail'. Instruments available for financial investigations have been updated, so that nowadays prosecutors no longer face the problems highlighted in *Oswald's* research. Yet, the lack of resources understood as insufficient public expenditure for law enforcement personnel, is still perceived as one of the main issues impeding an effective repression of money laundering. 'Investigations on the structure of organised crime are too expensive and time consuming; they take four to five years and they require one person to be permanently devoted to those proceedings, with the risk that the process might not reach to a satisfactory conclusion', this is due to the resources issue connected to money laundering investigations according to two exponents of the police forces. 'Designing a broad offence and limiting public expenditure for law enforcement does not seem to me an effective solution', comments *Lubitz*.⁸⁹⁷ Another attorney agrees with this criticism and points out the fact that 'trials in the field of economic crimes that last between three to five years are absurd and very ineffective. Law enforcement authorities are not able to deal with offence notices in due course, due to the lack of personnel. The defence attorney recalls the example of the eight proceedings in which he was involved that have been closed pursuant to Article 170 (2) of the German code of criminal procedure',⁸⁹⁸ because prosecutors could not prove the elements of the offence. [...] Sometimes attorneys can also allow proceedings to 'die' on their own. One can be sure that the longer a proceeding lasts, the harder it would be for investigators to provide evidence of the facts'. Another attorney adds 'when I realise, as in the two on-going cases, that the prosecutors have not conducted any further investigation for more than a year, I am happy for my clients. After two or three years, for example, witnesses are no longer able to remember the circumstances that they assisted to, records are difficult to provide after years, so the insecurity of a public prosecutor's office will grow bigger and bigger'. Trials for money laundering are costly- and time-consuming. In fact, according to the attorney 'the risk for prosecutors is very high, if they prefer charges and seek for conviction, they face 20-30 hearings, up to fifty witnesses, and someone has to pay for it'. 'My clients', continues the attorney 'have not an interest in a conviction but neither in an acquittal. We aim to close the proceeding through the payment of a financial penalty (*Bußgeld*) pursuant to Article 153a of the German code of criminal

⁸⁹⁷ Annex I, p. xvi.

⁸⁹⁸ Art. 170 (2) Conclusion of the Investigation Proceedings of the German code of criminal procedure: In all other cases the public prosecution office shall terminate the proceedings. The public prosecutor shall notify the accused thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he requested such notice or if there is a particular interest in the notification.

procedure. The longer the proceedings take, the higher the chance of the prosecution accepting such a deal'. However, the lack of personnel is connected to a general reduction of the public budget, due to the financial crisis. The only difference between Greece and Germany is, according to the respondent, that 'Germany still receives credit, while Greece does not. Germany has a functioning economy, yet it has also a high public debt and nobody knows how to get out of the crisis. Therefore, in the last 20/30 years there has been a cut of public expenditure, for example in Berlin there were 90 tribunals, while nowadays there are only 35. When a judge retires, she/he will be not replaced, but rather her/his duties will be shared between the remaining colleagues. This is one of the causes of the long preliminary investigations and proceedings. Yet, no politician would admit it'.⁸⁹⁹ Also the attorney *Diergarten* states 'the police do not have enough resources in order to deal with all of this information. The personnel in the police has even been reduced in the last years, therefore they are not able to cope with the work imposed by the anti-money laundering policy'.⁹⁰⁰ Indeed, while telephone tapping would be a great instrument to get more information on the networks, it is not possible to record the number of a telephone, and this would help the investigations significantly. Telephone tapping requires a lot of personnel, but there is a lack of human resources. According to *Uecker*, 'it is easy to say that Germany should invest more resources in this field, this is an issue that can be questioned in every government; however in the field of money laundering the responsibility of the State ends with its borders and the German government cannot prosecute offences committed across borders. I would not agree 100 % with this statement that Germany does not do enough to cope with money laundering'.⁹⁰¹ According to *Gutman* the lack of resources is especially cumbersome for the conduction of telephone tapping.⁹⁰² 'Telephone tapping is time-consuming and very costly. It requires a lot of personnel who are only focussed on the task, and as soon as there is the suspicion that the predicate offence is a serious offence, more personnel are then required. In addition, the recorded phone calls may need to be translated and this is also very costly. With organised crime being perceived as a great threat from a policy perspective, the Ministry of Justice could also require more resources to devolve for telephone tapping investigations. Public authorities often

⁸⁹⁹ Annex I, p. xlv.

⁹⁰⁰ Annex I, p. xxv.

⁹⁰¹ Annex I, p. i.

⁹⁰² Annex I, p. xxii.

have the necessity of receiving more resources'.⁹⁰³ *Uecker* recognises that 'the State must set priorities where to invest its resources, this is a question that every state faces. Therefore, firstly the State must assess the risk and the threat posed by the issue and secondly it must verify which possibilities the existing legal framework offers to tackle the problem'.⁹⁰⁴ In this context, two anonymous policemen confirmed that 'the priority of investigative personnel since 2001 has been terrorism'. With regards to the question that links the effectiveness of the policy to the disposal of resources, according to a respondent the criticism has been raised against Germany by *Frank*. Yet quantity does not mean quality, and that the philosophy adopted by the BMI considers qualified personnel more effective than a high number of employees.⁹⁰⁵

5.3.3 Considerations

In conclusion, it can be summarised that respondents have focussed on the following issues: The exclusion of punishment of the predicate offender; the high level of burden of proof required and the absence of a reversal of the burden of proof; the uncertainty surrounding the legally protected interest and the limitative catalogue of predicate offences. With respect to the preventive regulations, respondents perceive rules, specifically relating to beneficial owners and to politically exposed persons, as obstacles for an effective implementation of the policy. Systematic challenges that have emerged from the interviews are: The degree of knowledge and expertise of practitioners, the difficulties linked to international cooperation in criminal matters, and (scarce) public expenditure in the sector. The perception about whether such issues hinder the effective implementation of the policy are neutral or rather improves varies. The possibility of introducing the reversal of the burden of proof has been addressed for instance both as positively and (potentially if introduced) negatively impacting the effectiveness of the policy, because of the incompatibility with the domestic criminal system. The reader will have noticed that some of the obstacles pointed out by the respondents are in the focus of critical legal scholarship, too, and have in fact already been dealt with in the third chapter. Given that the respondents do not always agree on those matters, one can infer that they have not yet been solved, and thus the discussion still remains open. In addition, certain challenges have already been mentioned in *Oswald*' research. This

⁹⁰³ Annex I, p. xxiii.

⁹⁰⁴ Annex I, p. i.

⁹⁰⁵ Annex I, p. xxxix.

shows that despite almost twenty years of enforcement since analysis was conducted in 1996, practitioners face similar obstacles. From studying previous analysis the fact that certain problematics are still perceived as unresolved is an element from which it can be hypothesised that amendments approved in the meantime have not effectively improved the legislation on such issues.

However, it seems that finally some of the hindrances that have emerged through the interviews conducted will be tackled, according to *Finger*, by the Parliament in the process of conversion of the fourth anti-money laundering directive. In particular, 'the most important changes that will be introduced concern the introduction of a constitutionally legitimate inversion of the burden of proof, as it has already been mentioned in the *Koalitionsvertrag* (coalition agreement); the adoption of the 'all serious-crimes approach', and the criminal liability of the perpetrator of the predicate offence', which has recently been introduced. In addition, the interviewee claims that 'there is currently a debate about the possibility of introducing a mechanism that interrupts the transmission of the legal property when the first object was procured from a criminal action'.⁹⁰⁶ This would avoid interception of a third person in good faith, who buys an object that was procured through illegal money and then sells it on, interrupting the 'illegal derivation' of that object. Yet the directive, given the differences existing among member states with regards to the regulation of corporate liability, does not tackle one of the fundamental matters relating to money laundering control. In Germany criminal liability is only attributed to natural persons. This, according to *Findeisen* of the BMF, 'is an important area in which Germany needs to make some progress. It is almost impossible to tackle economic crimes with the same legal tools used for addressing other crimes such as bodily injury, because economic crimes are often undertaken by legal entities and not by natural persons. Yet criminal liability for legal persons has not been recognised and no political party is really fighting for this'.⁹⁰⁷

5.4 Perceived conflicting interests

The critical approach in the analysis of the law discloses conflicting interests that, have either existed since the introduction of the policy or that have emerged during the course

⁹⁰⁶ The institute proposed would be similar to the one regulated by Article 935 BGB, *Bürgerliches Gesetzbuch*, which regulates the 'No good faith acquisition of lost property'. Annex I, p. xxviii.

⁹⁰⁷ Annex I, p. xi.

of its application. Through the analysis of the law-making process, chapter two has revealed the existence of different expectations attributed to the introduction of Article 261 Gcc. The contrasting expectations and intents connected to the criminalisation of money laundering reveal the conflicting interests surrounding the genesis of the anti-money laundering policy. Expectations that were conflicting with each other had to be negotiated and were compromised through the formulation of a vague offence that allowed different interpretations. Yet, the implementation of the law has led to the re-emersion of some of the conflicting situations. In addition, given that the policy regulates a complex and multifaceted issue new conflicts have emerged through its enforcement. The effects triggered by the norm can be indeed perceived positively or negatively by the different actors involved. By using Aubert's words, the implementation of the policy has displayed simultaneously eu-functions and dis-functions.⁹⁰⁸ Again, the analysis of the conflicts is aimed at highlighting the perspective of legal actors representing the different points of view of practitioners and experts representing the divergent views of institutions.

5.4.1 The law-making process

'The problem [the fact that Article 261 Gcc is so badly formulated] relies on the law-making process. The offence derives from a complex international and European law-making process that has been influenced especially by the US',⁹⁰⁹ exclaims *Hagemann*. This is true for the preventive regime too, continues the prosecutor: 'the introduction of the FIU for the collection of information on suspicious transactions was based on the US American system'. External actors, as also shown in chapter two, influenced the way the offence was designed under German law. This, according to some of the respondents, has negatively impacted the formulation of the law and thus on its implementation. In particular, *Korte* explains that 'the creation of the crime was not a specific necessity of Germany. Actually, the offence punishes acts that were already considered as crimes under other existing provisions, such as *Hehlerei* (Receiving of stolen goods); *Begünstigung* (Assistance after the fact), *Strafvereitelung* (Assistance in avoiding prosecution or punishment)'. This has also been confirmed by two more respondents who state that Germany introduced the offence in order to comply with

⁹⁰⁸ *Aubert*, 1965, p. (313) 311.

⁹⁰⁹ Annex I, p. xxxiv.

international standards.⁹¹⁰ *Korte* attributes the unclearness of the law to the fact that the law does not completely fit in the German criminal legal system: 'The formulation of the offence as created under international law was constructed on the basis of the Anglo-American system, which do not have the duty to prosecute, and thus designed the law in a broad way to allow more cases to be dealt with. Actually for the German criminal system, in which prosecutors have the duty to start an investigation for any offence notice, such an undetermined offence creates problems of interpretation. Prosecutors sometimes do not know whether a case can be subsumed under the money laundering definition or not. In these cases, prosecutors usually prefer to indict for another offence'.⁹¹¹ The respondent adds that 'if the law had been drafted without having to comply with the FATF Recommendations and with the EU Directives, it would have been formulated in a much clearer way, so that it would not have resulted so undetermined'. Not only the design of the norm was influenced by external actors, but also the fact that the offence was categorised in the first place as a measure to tackle drug trafficking. In fact, according to *Findeisen*, 'the setting up of anti-money laundering instruments including the money laundering offence was created in the first place to counter drug trafficking under the strong influence of the US, which missed the opportunity to solve the drug issue with political and economic instruments on its own'.⁹¹² The fact that money laundering was dealt with in the same way as the war on drugs, and was thus part of a prohibition policy, does not reflect the European approach, in the opinion of the interview partner. In fact, 'in Europe we should use these regulations in order to tackle more compelling issues than drug trafficking, such as the infiltration of illegal money from white collar crimes or corruption in the legal economy.' Also the subsequent expansion of the scope of the policy to deal with terrorist financing is criticised as not being perfectly in line with the European approach. 'The necessity of expanding the scope of the offence was linked to the need of tackling any type of illicit financial flow and to the expansion of organised criminal activities. However, the introduction of the crime of the financing of terrorism under the umbrella of the anti-money laundering regime seems to be odd. In fact, the financing of terrorism is the opposite phenomenon, because it consists of taking money with a legitimate origin in order to use it for illicit purposes. Yet, the anti-money laundering regime deals with illicit financial flows and therefore the financing of terrorism is considered to be

⁹¹⁰ Annex I, pp. xxxiv; xliii.

⁹¹¹ Annex I, p. vi.

⁹¹² Annex I, p. ix.

part of it'.⁹¹³ As a consequence of the ambiguous formulation, prosecutor *Hagemann* stresses that the criminal definition of money laundering differs radically among European states, while the only common point of the different legislations is the fact that the proceeds of crime should not stay with the perpetrators and these differences hamper cooperation between the law enforcement authorities.⁹¹⁴ On the other hand, *Uecker*, while admitting the important role played by the FATF in the law-making process and thanks to the first round of mutual evaluation process, does not agree with the statement that Germany did not need the offence of money laundering. In fact, 'notwithstanding the influencing capacity of the FATF -which is more effective than soft law produced by the UN-' he believes 'that there was the necessity of criminalising the laundering of proceeds of crime.'⁹¹⁵ In addition, despite the fact that Germany was bound by the first European Directive to introduce the money laundering offence, this was not an external imposition because Germany did take part in the European decision-making process and it had a strong interest in the fight against organised crime'. Yet, such representation is not perceived to be in existence within the other bodies at the core of the money laundering control legislation, namely the FATF and the OECD, which according to *Busch* to a certain extent lack democratic representation.⁹¹⁶ Also a recent publication of the European anti-money laundering regime contests the significance of the role played by the FATF in shaping the anti-money laundering policy.⁹¹⁷ In particular the authors advocate taking back the ownership of the policy at the European level. This in order to avoid the uncritical transposition of FATF standards in EU law, and to however take a more suitable approach to the different European legal cultures. Otherwise, there would be the risk that countries would inflate their policy outcomes to appear compliant on paper, without actually putting the standards into practice.

5.4.2 Dirty money vs. capital flight

In the early days of the policy, a question emerged as to whether money laundering should have been linked to tax crimes by adding tax-related offences as predicate offences for money laundering or as to whether the offences should have been restricted to only tackle serious crimes, namely those crimes that, in the common understanding

⁹¹³ Annex I, p. xl.

⁹¹⁴ Annex I, p. xxxiv.

⁹¹⁵ Annex I, pp. ii, iii.

⁹¹⁶ Annex I, p. vii,

⁹¹⁷ *Unger et al.*, 2014, pp. 240-241.

were perceived as to be seriously harming society. It is well-known that white collar crimes are perceived as less dangerous than other crimes also because they are victimless offences since they cause only indirect harm to individuals.⁹¹⁸ In fact, the credit institutions interviewed by *Oswald* between 1993 and 1996 expressed the opinion that organised crime was more serious due to the alleged violations of human rights connected, instead capital flight was perceived as less harmful.⁹¹⁹ In addition, the financial system is partially based on illicit flows of money deriving from fiscal-, currency or export laws violations, so that financial centres are not interested in excluding these revenues from their business.⁹²⁰ Yet, in wake of the growing awareness of the negative effects of offshore jurisdiction and tax evasion, questions relating to money laundering and tax matters have yet again been linked together as from the beginning of 2000. The anti-money laundering regime was considered an effective measure to counteract tax offences.⁹²¹ However, this change is still considered controversial. Also *Henn* from the NGO WEED highlights the link between tax evasion and money laundering. The NGO, indeed, have come across the topic of money laundering by dealing with the issue of illicit financial flows: 'We were trying to understand where does the money goes that is stashed away through for example high corruption, and capital flight in developing countries . Money laundering is part of the problem'.⁹²² The report published by the NGO in 2013, indeed, focuses on money laundering in the context of autocrats' grand-corruption, tax evasion conducted by

⁹¹⁸ Proceeds of crime are usually considered properties deriving from the commission of a criminal offence; for example, money obtained from drug smuggling is *ab initio* criminal. Monies deriving from tax evasion, are, instead, lawfully earned, but may become tainted, for example, when not declared or when retained due to fraudulent tax deductions. This has raised criticism, on the basis that the proceeds of tax evasion are different in nature from profits of conventional criminality; yet, even though the underlying conduct which generates the proceeds may be legal, it is the retention of the money that should be paid over as tax which constitutes the criminal conduct. It might be argued that proceeds of crime are monies 'derived from or obtained, directly or indirectly, through the commission of an offence' (Article 2 of UNCAC), and therefore monies retained are not included. However, it is the evasion of taxes that generates the illicit profits. It can be, thus, argued that those profits derive from an offence. Another controversial issue is related to tax evasion committed abroad. The traditional approach is, in fact, that countries are not supposed to enforce other countries' revenue laws. Some jurisdictions, therefore, do not consider tax offences predicate crimes if committed abroad. See Implementation Review Group of the United Nations Convention Against Corruption, 2011, p. 7.

⁹¹⁹ This was, for instance, revealed through the questionnaires submitted to credit institutions by *Oswald* in which employees lamented the fact that they were not able to discern proceeds of predicate offences to money laundering from capital flight. See *Oswald*, 1996, p. 144.

⁹²⁰ *Pieth*, 1993, pp. 102 ss.

⁹²¹ *Alldridge*, 2001, p. 350. Serious tax crimes were thus introduced in the FATF Recommendations revised in February 2012 under the definition of predicate offences provided in the Glossary, See FATF Recommendations, 2012, p. 12.

⁹²² Annex I, p. xviii.

multinational companies, and mis-invoicing.⁹²³ Also *Uecker* believes that 'the problem of money laundering is also hugely linked to tax evasion. According to criminal statistics, money laundering offences are mostly committed in relation to economic crimes (*Wirtschaftskriminalität*), such as fraud'; and that 'the field in which there is the highest volume of prominent white-collar crimes is high likely to be the financial sector; employees of banks have been involved in tax evasion especially committed through missing trader fraud (*Umsatzsteuerkarussell*). According to the respondent, tackling tax evasion was one of the goals for which the policy was enacted, yet he observes that 'tax crimes have only been added recently'.⁹²⁴ Oppositely *Busch* believes that the two phenomena should be tackled separately: 'there is a common misunderstanding between the concepts of money laundering and black money, meaning tax evasion. While tax evasion is a problem in Germany, that one can experiences in daily life, the same cannot be said for money laundering. According to the BMF -he adds- there is a lot of black money in Germany, but this does not mean that there is a lot of money laundering, too'.⁹²⁵ In his opinion it is important to discern the two phenomena in order not to confuse them, and thus have a biased perception of their size. Given that the money saved through tax evasion is intermingled with legitimately originated profits and that tax evasion is a predicate crime for money laundering, and from a theoretical perspective, there is the potential of broad contamination, and thus of a widespread commission of money laundering. Indeed the interviewed practitioner observes 'the fact that tax evasion is a predicate offence for money laundering, leads to the contamination of quite a lot of capital'. The potential widespread contamination of properties that has been intermingled with ill-gotten gains has also been pointed out by legal scholarship.⁹²⁶ On the other hand, from an official point of view, the BMF supports the idea that tax-related crimes are offences connected to money laundering, because this helps to overcome the fact that tax havens refuse requests for mutual legal assistance based on tax evasion offences, raising sovereignty issues, since such requests could be grounded on the basis of money laundering. Such a refusal has already been opposed for example against a request from a foreign state by the BMJ. The Ministry argued that since the tax

⁹²³ *Henn et al.*, 2013.

⁹²⁴ Annex I, p. ii.

⁹²⁵ Annex I, p. iv. *Korte* adds that 'also in this field [of tax evasion] Germany puts a big effort to persecute tax evaders who own bank accounts in foreign countries, such as in Luxembourg or Switzerland, by requiring those States to share information. Therefore it will be more and more difficult for tax evaders to evade taxes in Germany'. Annex I, pp. iv, v.

⁹²⁶ See chapter three.

evader could not be liable for having laundered his/her money, mutual legal assistance could not be granted.⁹²⁷ The suspicion for money laundering would force jurisdictions to provide mutual legal assistance.

5.4.3 Conducting business vs. persecuting and preventing crime

From the interviews with the prosecutors and with the three respondents who are in contact with businesses and professionals obliged by the GwG, it emerges that there seems to be a conflict between the necessity of accessing information to conduct investigations and prosecute money laundering and the necessity of protecting the right to privacy. If on one hand, as we have seen, one of the perceived advantages of the policy is the availability of information provided by the designated financial and non-financial businesses and professions to investigators, on the other hand, the collection and the recording of such a vast amount of information can be considered a reduction (if not a violation) of privacy. It seems thus that there is a perceived conflict between the necessity of law enforcement to access personal information in the course of money laundering investigations and the right to data protection. However, the interview partners do not relate the right of privacy with the protection of fundamental civil rights. The perspective adopted is rather that of the private sector, which is reluctant to file STRs and share information with law enforcement authorities in order not to interfere with private relations with customers. In addition, subjects obliged by the GwG are diffident towards taking over law enforcement duties, such as the search of offence notices. In summary, if investigators advocate for more transparency in the field of corporate and banking services, on the other hand private actors are concerned with not hindering the conduction of the business or of the profession. Investigators, on the other hand, welcome information provided in order to be able to support their work. Senior prosecutor *Hagemann*, for instance, believes that the state interest in tackling organised criminality should prevail on the interest of not breaking the privacy of the suspects. The reason being not a balance of interests, but rather a matter of practicability. If investigators had to discern between the private life of suspected members of organised criminal networks and their criminal activities they would not be able to conduct investigations; 'we cannot say that what concerns the private life of perpetrators is not

⁹²⁷ BMF Stellungnahme des BMF zum Änderungsbedarf bei § 261 Gcc und Defiziten in der Rechtspraxis aufgrund des Strafausschließungsgrundes des § 261 Abs. 9 S. 2 Gcc bei der Selbstgeldwäsche. VII A 3-VK 5160/06/000:005, 2013, p. 10 (non published).

relevant for the investigations.' Also prosecutors agree on the necessity of more transparency in the field of corporate and banking services; yet the prosecutors do not consider banking secrecy an obstacle for financial investigations. Also according to the two chief detective superintendents 'the main advantages introduced by the GwG are the possibility of requiring recorded information about customers from the private sector, and the possibility of exchanging information with the BAFIN. This represents a great advantage in terms of the speed of the investigation and of availability of data'. On the other hand, 'lots of Designated Non-Financial Businesses and Professions (DNFBP) have difficulties with their clients in explaining why they need to collect and verify personal information about customers, also because of privacy issues', according to *Schneider*.⁹²⁸ For this reason, the regional council of Darmstadt in Hesse has designed a flyer with explanations that companies can use and show to their clients, reports *Schneider*, who continues: 'You can imagine a real estate agent who asks for identification of his clients at the first meeting would have huge difficulty in doing business with them (in Germany real estate agents are usually not involved in the classical financial transaction, they just mediate between seller and buyer). While banks have time to collect information about clients during the business relationship, this is not the case of many professions that have rather short relationships with their customers. Especially in these cases the extensive system of anti-money laundering rules often represents a burden. The obligation to report a money laundering suspicion is difficult to communicate especially to individuals and small firms, because they fear retaliation'.⁹²⁹ The lawyer *Gutman* agrees on the fact that private actors, especially companies, are afraid of hampering their relationships with clients when reporting suspicious operations: 'From the criminal investigations it emerges who has filed the STRs, therefore, even if the criminal proceeding triggered by the filing of a STR ends with a closure, the relationship between the suspected client and the filing institution is spoiled. For this reason, we suggest to our corporate clients, when dealing with good customers, that it is necessary to evaluate the situation, in order not to compromise the relations between the company and the customer'.⁹³⁰ Also accountants and auditors, according to the federal chamber, do not file many STRs (only twelve in the last three years), because they are not interested in investigating the criminal connections of their

⁹²⁸ Annex I, p. xv.

⁹²⁹ Annex I, p. xv.

⁹³⁰ Annex I, p. xxii.

customers or related third persons.⁹³¹ From the perspective of professionals, the duties imposed by the law in order to monitor operations to detect money launderers are not commensurate. 'The businesses and professions to whom we relate, as a supervisory authority, are not investigators, they only aim to conduct their own business in a clear way. Many of them do not possess adequate knowledge of how to tackle the phenomenon of offshore finance and of shell companies. Therefore, it is very hard for normal businesses to even recognize such cases', claim *Schneider* and *Rech*.⁹³² According to *Goltz* and *Geithner*, representatives of the chamber of accountants and auditors, the supervisory body that receives and checks the STRs from the financial auditors and certified general accountants and send them to the BKA and to the public prosecutors offices, 'these professions take the obligations imposed by the GwG very seriously. In particular, financial auditors and certified general accountants belong to the designated professions that are obliged, pursuant to Article 2(1)8 GwG, to undergo anti-money laundering prevention according to Article 3 GwG. In fact we do not know of any cases in which financial auditors and certified general accountants have violated their obligations to file STRs pursuant to Article 11 GwG'. However, the two respondents consider the obligations too complex for the sector. In fact, they believe that 'the [low] number of STRs received by the authority confirms the opinion that obligations imposed by the GwG are problematic with regard to the professions, from a proportionality viewpoint. The uncovering of criminal schemes among clients or other third parties is not the main activity neither of those professions nor of other business accountants, nor is something that frequently recurs or that can easily be detected by those professions'. Also banks are overloaded with bureaucratic duties imposed by the anti-money laundering policy, comments *Diergarten*: 'For example in the bank where I work, there are seven people involved in the prevention of money laundering. Out of them, three are responsible for tracking the beneficial owners, while there time could be better spent something more useful to detect money laundering transactions'.⁹³³ The respondent adds 'when we file the STRs after having conducted this research, the police cannot use the results of our research to start investigations, they need to undergo their own investigations. The research that we have conducted is totally useless, because the police has to do it again anyway '. In his opinion also in the real estate sector the burden imposed is too high: 'agents, for example, need to ask for the identity of clients, from

⁹³¹ Annex I, p. xvii.

⁹³² Annex I, p. xv.

⁹³³ Annex I, p. xxv.

the very beginning of the business relationship. This means that in cities where the real estate sector is booming such as in Munich, for a flat there might be a hundred interested buyers and the agent needs to verify the identity of each of them even though only one will be able to buy the flat'. In conclusion, *Diergarten* summarises the conflicting situation with the following statement: 'This should actually be the duty of the police to investigate the identity of those who conduct suspicious transactions. The private sector should not carry out duties that actually belong to the public sector, namely to the criminal justice system'.⁹³⁴

5.4.4 Expanding criminal law vs. ultima ratio

This conflict can be summarised with the words of a respondent, who says that 'the problem is due to the fact that Article 261 is tightly connected to the GwG, and therefore, although it is a criminal law, it has been drafted by the Ministry of Finance. The Ministry of Justice can only approve the drafted text. The whole money laundering legislation is a matter of financial policy'.⁹³⁵ The problem is obviously referred by the respondent not as a pure matter of competence but rather as something affecting the true meaning of the policy. This is due to the fact that 'there was a trend in the whole of Europe, and in the globalised world to deregulate the financial sector [...]. The State however needs to take a clear position and to persecute financial misbehaviours'.⁹³⁶ Within the German debate on anti-money laundering law, the two interests are represented by the Ministry of Finance, which advocates for a stricter control of economic violations through criminal law, and the Ministry of Justice, which tries to put brakes on the continuous expansion of criminal law. According to *Korte*, indeed, 'there is a recent tendency in Germany, but not only here, to harden criminal law. In the seventies there was the idea that the resort to criminal law should have been limited, it was a time of decriminalisation. Nowadays, public opinion finds it easier to resort to criminal law than to tackle social problems. Therefore, the duty of the BMJ is to slow down this tendency and to keep penal law as an *ultima ratio* tool, otherwise the whole society would be put under the control of criminal law'.⁹³⁷ Also, according to *Diergarten* 'hardening the law is not effective to catch big organised criminals, because

⁹³⁴ Annex I, p. xxv.

⁹³⁵ Annex I, p. xxxiv.

⁹³⁶ Annex I, p. xi.

⁹³⁷ Annex I, p. vi.

they always find a way to overcome the new regulations'.⁹³⁸ On the other hand, *Findeisen* of the BMF recognises that 'for a criminal lawyer to say that a criminal law is made to protect the economic sector is shocking, but economic crimes also need to be tackled by criminal law, since they affect the economy and thus society, especially because the society does not have proper instruments to protect itself, more than drug criminality'.⁹³⁹ The use of criminal law to punish money laundering for the purpose of protecting the soundness of the global financial system or, respectively of the European internal market, corresponds to the FATF and to the EU approaches too. In fact, according to *Busch* from the BMJ, 'these bodies do not always adequately take into consideration the necessity of balancing the persecution of money laundering, corruption and other related offences, and the necessity for a State to respect the principle of proportionality, the privacy of its citizens, the personal and civil rights. Sometimes it is only Germany, within these bodies' meetings, that raises these issues. The problem is that States often send professionals of the anti-money laundering sector to these meetings who are convinced of the necessity of fighting crime, but take into account only to a lesser extent the need to balance this interest with the rule of law and the respect of fundamental rights. Some delegates think of the FATF as an instrument to put pressure on their governments and to politically push forward their expert agenda. I find this approach highly problematic, since I believe that it is important to maintain the law within the limits of our basic legal principles, therefore I highlight the need to respect for example the proportionality principle and data protection.'⁹⁴⁰ *Korte* complains that at FATF meetings, 'when one tries to raise these issues, the others immediately think that he/she does not want to fight money laundering and wants to protect organised crime'.⁹⁴¹ On the contrary, it is argued that the peculiarity of economic crimes and the massive impact that these have on society, however, requires a new approach that might collide with the traditional principles of criminal law. 'It is not possible to deal with economic crimes in the same way as one would deal with offences against the person, therefore it does not make sense to focus on the rule of law and other fundamental principles in this field'.⁹⁴² As a matter of fact, in Germany 'there has been a switch: if at the beginning the crime of money laundering was created to fight organised

⁹³⁸ Annex I, p.p. xxv, xxvi.

⁹³⁹ Annex I, p. x.

⁹⁴⁰ Annex I, pp. vii, viii.

⁹⁴¹ Annex I, p. viii.

⁹⁴² Annex I, p. x.

crime, lately there has been a tendency to consider it a tool to protect the legal economy from the infiltration of illegal money. In fact if in the beginning the Federal Ministry of the Interior was responsible for the anti-money laundering law, currently is the Ministry of Finance that drafts the bills'.⁹⁴³ 'If one looks at the formulation of Article 261 Gcc one can see that it mirrors these two contrary approaches, on one hand the expansion of criminal law and on the other hand, the resistance towards criminalizing too broadly. The legislative debate shows the difficulty of mediating between the need of formulating a law in accordance with German rule of law and fundamental principles and the necessity of protecting the financial and the economic system from the infiltration of ill-gotten gains. The problem is summarised by a public prosecutor as follows: 'there is the necessity of protecting the financial system from the infiltration of illegal money, however criminal law should not be the only instrument to do it'. In fact, according to *Korte*, 'the prevention of money laundering is much more important than its repression. However, it costs more. In addition, the GwG, despite requiring strict compliance from banks and other financial institutions, does not manage to completely prevent the infiltration of illegal money'.⁹⁴⁴ Those advocating for a reduced use of criminal law do not actually underestimate the fight against money laundering, neither do they support the abstention of state control in the economy. They somehow ask to diminish the expectations raised by lawmakers about criminal law, because alone 'criminal law is not enough to deal with illicit financial flows, since money flows are per se not criminal'.⁹⁴⁵ The debate might find a compromise in the idea of tackling financial misbehaviours within a separate part of the criminal code that imposes administrative sanctions, as suggested by *Findeisen*: 'We believe that these reforms should not be undertaken within the criminal law code, but rather in the administrative law. There should be a division between crimes against the person and economic crimes. The latter should be tackled in a separate part of the criminal code, which applies administrative sanctions'.⁹⁴⁶

⁹⁴³ Annex I, p. vii.

⁹⁴⁴ Annex I, p. vii.

⁹⁴⁵ Annex I, p. xxxviii.

⁹⁴⁶ Annex I, p. x.

5.4.5 Is it possible to tackle illicit financial flows without conflicting with the interests of a free market?

Findeisen of the Ministry of Finance is convinced that 'through the financial crisis we have learned that the deregulation and the 'laissez faire' strategy have caused many problems, because they let finance reach the point where everything is allowed. This is why we need clear distinction between illegality and legality'.⁹⁴⁷ In his opinion the criminalisation of money laundering should serve the purpose of reducing those situations of illegality that have consequently emerged due to the deregulation of the financial sector. Yet, given that from the banks perspective, the deposit of money deriving from a crime on a bank account does not harm the bank itself, a conflict emerges between the interest of stopping illicit financial flows and the interest of allowing flows of money; indeed as everyone knows 'pecunia non olet', money has a neutral nature, observes the interviewer.⁹⁴⁸ In addition, there are jurisdictions that do not mind receiving dirty money, 'for example those countries whose economies are based on foreign investment do not differentiate between licit or illicit in-flows', states *Finger*.⁹⁴⁹ By providing secrecy services such as jurisdictions, attract international investments and thus foster their economies. The interviewee claims that the interest of some jurisdictions of stopping these flows of ill-gotten gains contrast with the concern of other countries of taking advantage of such flows. By carrying on the argument even further, the attorney claims that 'the law regulates problems when the necessity of criminalising a conduct emerges. In the GDR, for example, there was no need to criminalise prostitution or drug criminality, since these crimes were not committed. There was no need for Individuals to steal because existence and work were guaranteed. I believe that in order to reduce economic crimes, something in society should be modified rather than using criminal law. I personally think that abolishing the capitalist system would help reduce money laundering, because the capitalist economy aggravates the impact of illicit financial flows'. The capitalist system, from the point of view of the respondent is thus an environment that favours money laundering. This clash between the claim for regulation and the demand for deregulation has already been highlighted in the second chapter, with regards to the European law-making process. The tension emerged in the wording of the first money laundering Directive, which states that 'the lack of Community action against money laundering could lead Member States, for the

⁹⁴⁷ Annex I, p. xi.

⁹⁴⁸ Annex I, p. vii.

⁹⁴⁹ Annex I, p. xxvii.

purpose of protecting their financial systems, to adopt measures which could be inconsistent with completion of the single market'. The European Community before and after the Union were particularly concerned about the issue of money launderers taking special advantage of the freedom of capital movement and of the freedom of supplying financial services in the single market. Yet, the Community was concerned with the possible tendency of Member States implementing too restrictive measures limiting the free movement of capitals. Thus, the common anti-money laundering control policy was introduced by way of avoiding that Member States -while taking action to protect their own national economies from money laundering- would have adopted measures inconsistent with the completion of the Internal Market. The European legislator seemed to have found a compromise while drafting the anti-money laundering policies. However, in the perception of the respondents the tension seems not to have been solved yet.

5.4.6 Considerations

Five principal conflicting situations have surfaced from the interviews. The first issue is the role played by external actors in the law-making process and the constant influence exercised by those actors in the process of updating the policy. The imposition of a US American approach to money laundering control through the role of the FATF has also been highlighted in the second chapter. Specifically, some scholars see the development of a global prohibition regime fostered by the US in the diffusion of anti-money laundering law. According to this literature, the powerful state creates an international regime focussed on achieving its own goals through global acceptance triggered by the securitisation rhetoric and compliance processes imposed through the menace of exclusion by international business relations.⁹⁵⁰ The second conflict that emanates from the words of the respondents is the one of the demand for criminal law to face financial misbehaviours and the necessity of limiting the tendency of expanding criminal law on the background of a situation of financial instability. Given the previous deregulation of the market, policy makers need to control and sanction economic abuse in order to protect fair competition and law-abiding individuals. On the other hand, the state needs to respect fundamental principles, such as the rule of law and the principle of *ultima ratio* that imposes a restriction of the use of criminal law in situations in which no other

⁹⁵⁰ See for example *Andreas and Nadelmann*, 2006. For a more complete overview on the literature, see chapter two.

measures are suitable. This conflict has already been raised along the formulation of the money laundering offence with regards to the question of the interests protected by the law. Despite the legislator trying to limit the scope of the offence by attributing to Article 261 Gcc the protection of the administration of justice and of the interests protected by the predicate offences, this explanation was not considered suitable to the peculiarity of the offence. Indeed, shortly after the enactment, legal scholarship and the judiciary entered in a vivid debate in order to identify more suitable interests protected by the law, among them the financial and economic system under different perspectives. However, as chapter three shows, no solution could be found. In fact, the question concerning the suitability of criminal law to tackle illicit financial flows is perceived in the current research as still unsolved. The matter does not only concern money laundering control. On the contrary, it is a fairly widespread issue that has recently emerged due to the tendency of hardening economic crimes on the background of a situation of financial instability. The third conflict can be summarised as the following: on the one hand the policy being required to interfere with the personal sphere of suspected money launderers; on the other hand private institutions being interested in protecting their relations with loyal and trusted customers. Therefore, they are reluctant to give law enforcement the possibility to interfere too much in their business. The interest manifested by the private sector involved in the prevention of money laundering seems thus to collide with the legislative intent of preventing the infiltration of dirty money by way of preventing gate-keepers to help money launderers.⁹⁵¹ The clash emerges at a micro-economic level and is triggered by the fact that the anti-money laundering policy demands an active participation by private sector in the detection of suspects. Private actors, are not appropriate to bear the burden of detecting offenders, moreover they need to protect the relationships with customers by avoiding unnecessary interferences. At the same time, the privatisation of crime control is questionable also from a governance point of view. It seems therefore that the public interest in persecuting crimes through having access to personal information from the private sector only marginally collides with the interest of protecting the right to privacy. Businesses and professions are predominantly interested in not interfering with their clients and in not bearing the burden of detecting offenders. The issue was also addressed during the national Parliamentary debate, with regards to the degree of *mens rea* required for money laundering criminal liability. While the socialist party was advocating for the

⁹⁵¹ BT-Drucks. 12/989, p. 21.

criminalisation of gross negligence, the other parties opposed this proposal by motivating the refusal on the basis of the assumption that punishing gross negligent economic misbehaviours would have violated the interests of a free economic system. It was argued that the SPD proposal would have been cumbersome for the ordinary business and for the movement of goods and capitals. Making everybody take part in economic or financial activities actively participating in the monitoring of the economic system under the threat of criminal liability for negligent money laundering was considered harmful for the business market. The same debate has been picked up by legal scholarship too.⁹⁵² Yet, it seems that, despite the law being the result of negotiations, the question is still open. The fourth issue consists of discording opinions with regards to the opportunity of including tax evasion as predicate offence for money laundering. On one hand there is the interest of tackling tax evasion through the anti-money laundering regime, on the other hand the concern of keeping the two phenomena distinct in order to avoid an overrating of money laundering. Since the genesis of the anti-money laundering policy, some actors taking part in the international law-making process, opposed the labelling of 'black money', naming money deriving from tax violations, as 'dirty money', indicating all proceeds of crime typically committed by organised crime. This distinction was based on the perception that tax-related offences were less serious and less harmful than capital flight and were advocated by financial centres in order to maintain a good reputation while still granting peculiar financial services, such as bank secrecy. This issue is a good example of the labelling theory, to the extent that it shows how a practice that was firstly not considered criminal enough to amount to a predicate offence for money laundering, has become part of the scope of the anti-money laundering regime on the basis of a political decision of labelling it as such. Respondents of the current research show to have different perceptions of the degree of the seriousness of tax laws violations and thus about the appropriateness and necessity of tackling them under the umbrella of the anti-money laundering policy. Again, the matter, which seemed to have been resolved through the negotiations on an international and European level, is still being debated at national level. The last conflict reflects the previous two on a macro-economic level. The two contrasting interests are the necessity of regulating the flows of money and the free movements of capitals in a neoliberal economy. The question is intrinsic in the nature of money laundering, which is a phenomenon that happens at the interface between legality and illegality. Regulations

⁹⁵² See chapter two, paragraph 2.3.

that facilitate the licit exchange of goods, capitals and services do also facilitate the flow of ill-gotten gains; there are thus conflicting interests between the public interest of persecuting crime and the claims for less regulation in a free market economy.

5.5 Perspectives on the effectiveness of the law

The respondents were asked to assess the effectiveness of the policy in tackling money laundering and organised crime. The goal of the analysis of the interviews is to present legal actors and experts ideas on the effectiveness of the anti-money laundering policy. Therefore, the interviewees were not given a pre-determined definition of effectiveness neither of symbolic effectiveness. Given that the policy has been enforced for more than twenty years, respondents' assessment is not to be interpreted as the potential effectiveness but rather as a displayed effectiveness of the laws. The reader will not be surprised that the respondents have different perceptions about whether the anti-money laundering policy is effective or not. As previously mentioned, they have also dissimilar approaches to define whether a criminal legal policy is effective, and about the goals considered or the elements of the policy examined.

5.5.1 Is the anti-money laundering (law) effective?

Some interesting data that has emerged from the interviews is that, while defence attorneys dealing with economic crimes have rather few cases in which Article 261 Gcc is involved, investigators, prosecutors and public officials working in the specialised units daily have to deal with the provision. For example, from the lawyers' perspective, *Lubitz* states that 'despite the several years of experience in the economic and criminal legal practice, I have never had a client who had been accused of money laundering. Accusations of prosecutors are in practice very vague, thus making the offence difficult to prove. Also, the range of sentences is so low (for the basic conduct between three months and five years) that it would not even make sense to try to get a deal'. The attorney has had ten cases in the last two and half years, while *Gutman* has had only one case in which he was acting as an attorney providing legal counsel for an individual accused of money laundering. On the other hand, *Hagemann* exclaims that, on the day of the interview he had dealt with twenty-five STRs, and that the standard is between ten to twenty cases a day.⁹⁵³ This is confirmed by the other prosecutors too. 'This means

⁹⁵³ Annex I, p.xxxiii.

that every day I work on new money laundering cases and on on-going cases. This is because department 241 that I direct has exclusively been responsible for money laundering since 2000; only phishing cases are excluded. Phishing is considered standard criminality and when we receive such cases we forward them to the appropriate department. The STRs that arrive simultaneously at the FIU and at the public prosecutor's office, trigger a preliminary investigation that has to be brought to a first clearance. After these preliminary investigations, which in the case of legal persons consist of a search in the company register, the cases arrive on my desk and I distribute them to the competent prosecutors. If there is enough evidence that further investigations would reveal more information about the alleged offence, the case proceeds, in the opposite case, the procedure is closed and the case is considered solved. In the case that the suspect has an on-going proceeding, we need to clarify whether the two proceedings can be dealt with together'. This represents quite a different situation if compared to the one described previously by the attorneys. The fact that from a law enforcement perspective the offence fills the daily work and from the side of the lawyers, however, the Article represents an exceptional situation, impacts on the actors' perception of the effectiveness of the norm as it will be showed in the next paragraphs. A defence attorney in her political role believes that the law is not effective. Also *Diergarten* thinks that the anti-money laundering system is not effective.⁹⁵⁴ The same opinion is shared by two other attorneys and by *Henn*.⁹⁵⁵ However, as the attorney observes, the fact that the law is ineffective in repressing money laundering cannot be a motive to complain for a defence attorney, whose work is actually facilitated by such an ineffective law. In fact, the attorney cynically comments 'As a defence attorney I am not unhappy about it'. One defence attorney understands for effectiveness the capacity of the norm to detect expert offenders, and thus grounds her negative assessment on the assumption that professional criminals will devise subterfuges in order not to be detected through the preventive regulations and thus not to be prosecuted under Article 261 Gcc. The attorney considers the ineffectiveness of Article 261 Gcc as the inability of the overloaded criminal justice system to investigate and prosecute complex cases. Both respondents acknowledge the fact that many proceedings are initiated on the basis of money laundering offence notices. However, they evaluate such cases as not fulfilling the indirect goal of the policy, which is, according to them, the conviction of

⁹⁵⁴ Annex I, p. xxiv, xxv.

⁹⁵⁵ Annex I, p. xviii.

professional criminals involved in complex money laundering schemes and not the prosecution of petty crimes. Also *Diergarten* argues that the legislation's aim is to detect serious criminality and not petty criminals. He reports that 'in this year, out of the 18.000 STRs filed, only five cases involved big organised criminal activities. Ten years ago there was also only five cases. This shows that the effectiveness of the policy to detect organised crime has not improved despite the growing number of information collected. The rest of the cases concerned petty criminals, yet the goal of the policy was to detect serious criminality. On the other hand, I know that there is the tendency to not report a client in case of the suspicion of minor offences. However, also from investigations of a minor offence prosecutors can detect bigger cases. Therefore it is important that the law imposes the duty to file STRs also in cases of smaller offences. I believe that a reduction in the filing of STRs and thus a reduction in the number of money laundering cases would actually improve the effectiveness of the anti-money laundering policy'.⁹⁵⁶ 'Although there have only been a handful of trials for money launderers in which the defendants were bankers, the provision should not be deleted', states *Findeisen*.⁹⁵⁷ 'As far as I can judge, STRs filed due to the suspected terroristic purpose are mostly proved wrong', thus the policy is not effective in preventing terrorist financing'.⁹⁵⁸ Given that under Article 261 Gcc only minor offences are investigated, one can say that the indirect purpose of the norm has not been accomplished. It can be thus inferred that both defence attorneys rely on a concept of effectiveness that is equivalent to the achievement of the indirect goals of the policy.

Senior prosecutor *Hagemann*, who is in charge of directing all of the money laundering investigations in Berlin, is equally critical of this ineffectiveness. The respondent, indeed, states that Article 261 Gcc is 'one of the unhappiest offences that the legislator ever added in the criminal code'.⁹⁵⁹ From the way he further explains the difficulty that he faces working with this provision one can tell that he is definitely not happy with it. Yet, he has never thought about how as to improve Article 261 of the German criminal code. I have rather focussed on the understanding of the categorisation of the provision, in order to improve the prosecutions work'. In fact he can be satisfied. He has found his way through the complex provision and has managed to motivate the prosecutors

⁹⁵⁶ Annex I, p. xxvi.

⁹⁵⁷ Annex I, p. x.

⁹⁵⁸ Annex I, p. xxx.

⁹⁵⁹ Annex I, p. xxxiii.

working in his departments, who actually seem to have figured out how to cope with this odd piece of legislation. Therefore, his evaluation on the work conducted by the personnel in his department is rather positive: 'we have obtained very successful results'. Indeed the number of indictments, which is the factor that prosecutors usually take into consideration when measuring the effectiveness of a legal measure, is high. Against a badly drafted law, practitioners have thus managed to develop a strategy in order to comply with the existing framework in their daily work. The fact that most cases involve less serious offences, as also proven by the prosecutors, while 'most serious cases remain in the dark', while not fulfilling the indirect goals of the policy as claimed by the attorneys, is not inconsistent with the wording of the norm. Therefore, it legitimises the positive perception of the prosecutors with respect to their role. By refraining from any judgment on the formulation of the policy, the prosecutors can comply with the law so that Article 261 Gcc results to be effectively implemented with respect to its direct function.

A positive assessment of the law's effectiveness is provided by investigators of the police department of Berlin. According to the police, the effectiveness of a provision corresponds to the clearance rate, which, as chapter four has shown, is very high for the money laundering offence. Therefore, 'the low number of convictions pursuant to Article 261 Gcc is not a symptom of a bad functioning criminal justice system. On the contrary, offenders are convicted for other crimes. The type of conviction does not play any role, what is relevant is the fact that the case has been cleared and that the assets can be confiscated. The goal of the German criminal justice system is [according to the police's perspective] to reach a high clearing rate (*Aufklärungsquote*), which is based on conviction for any offence and confiscation'.⁹⁶⁰ The Federal Ministry of the Interior sees the situation from the point of view of the federal police, and also confirms this approach. The interviewee states 'according to the police, effectiveness corresponds to putting the orders and the law into practice in the best way possible. Even though individuals are convicted for another offence, maybe the predicate offence, instead of for money laundering, the result does not change. The important factor is to solve the case, while the type of charge is irrelevant. The goal is sanctioning perpetrators'.⁹⁶¹ Yet, according to the BMF the difficulties that prosecutors face in bringing evidence of

⁹⁶⁰ Annex I, p. xxx.

⁹⁶¹ Annex I, p. xxxix.

money laundering, accentuated by the complexity of financial transactions and by the fact that prosecutors are supposed to track the money back to the antecedent act, have an impact on the effectiveness of the law enforcement activities.⁹⁶² Despite prosecutors frequently handling money laundering cases and receiving a high number of STRs, only a few investigations are conducted on the basis of the information contained in the STRs.⁹⁶³ For example, according to the prosecutors 'the mere suspicion of the illegal provenience of a high sum of cash suddenly deposited in the bank account of a low-income person (e.g. *Hartz-IV-Empfänger*), would not suffice in order to receive authorisation to undergo a search of the person's.. Even though we could carry out the search, it would be very difficult to find evidence of the commission of a predicate offence and of the link between that offence and the suspicious transaction'. Therefore, proceedings are closed, without that the investigations have managed to lead to a charge for money laundering. However, proceedings for the predicate offences might be initiated on the basis of the information collected. Yet, *Henn* believes that 'it is absurd that proceedings often start with a charge for money laundering, because it allows the use of more investigative instruments, but afterwards the charge is dismissed and the suspect is convicted for the predicate crime, which usually provides a higher sanction. I wonder whether this is actually legal'.⁹⁶⁴ *Findeisen* justifies the crime also in this sense, by saying that 'from a law enforcement perspective the offence is absolutely necessary, because it allows the use of fundamental procedural tools in this field'.⁹⁶⁵ 'Even though it does not seem a completely legitimate mechanism, it is indeed very efficient' continues *Henn*.⁹⁶⁶

With specific regards to the Ministry of the Interior's perspective on the assessment of the effectiveness of money laundering policy the approach can be summarised as follows: 'The police has a different idea of efficiency than the one of political effectiveness. The process of assessment of the effectiveness of the anti-money

⁹⁶² BMF 'Stellungnahme des BMF zum Änderungsbedarf bei § 261 Gcc und Defiziten in der Rechtspraxis aufgrund des Strafausschließungsgrundes des § 261 Abs. 9 S. 2 Gcc bei der Selbstgeldwäsche'. VII A 3-VK 5160/06/000:005, 2013, p. 3 (non published).

⁹⁶³ Annex I, p. xxxvii.

⁹⁶⁴ Annex I, p. xix.

⁹⁶⁵ Annex I, p. x.

⁹⁶⁶ Annex I, p. xix. If one assumes that the policy was enacted also with the function of allowing the starting of other proceedings, one can infer that the legislation is indeed effective in achieving this effect. The same effect has been studied in relation to criminal legal provisions in the field of terrorism. See *Hawickhorst*, 2011.

laundrying regime goes from bottom up. Instead of making an assessment at the federal level, every state reports problems of application and proposes improvements. There is no evaluation process but rather a debate about possible improvements. The question is not whether the law is effective or whether the goals have been achieved, the question is rather how law enforcement can improve the implementation of the law and overcome the hindering issues'.⁹⁶⁷ This approach assumes the correctness of the policy. This notion of effectiveness can be compared to the concept developed by German scholarship of the '*Zielunabhängige Effizienz*'.⁹⁶⁸ The point of view of the sixteen states and of the Ministry implies that the policy is directed at its implementation, without verifying whether it has any indirect functions. It is indeed one of the duties of the policymakers to design a policy that, if correctly applied, would lead to the desired indirect consequences. It cannot be expected that law enforcement, and in particular police forces, would question the suitability of the law. Their task is completely fulfilled through compliance. This does not exclude the possibility of improving the way the policy is implemented, however this is limited to technicalities. It is therefore an approach that reduces the question of effectiveness to a technical matter.

Yet, the question is not as simple as it looks. Indeed, as chapter two has highlighted, the debate about the functions attributed to the policy was very clear and from the reconstruction of the law-making process it could not be possible to establish with certainty which the indirect functions were. Most probably the policy has several indirect functions. One of them is to punish predicate offences. In the words of a respondent 'the fight against money laundering is not a self-fulfilling mission, it has instead an indirect function that is the elimination of predicate offences'. This goal has actually been achieved through Article 261 Gcc. Investigations are initiated on the basis of a suspicion of money laundering and are afterwards continued for the predicate offences, because of the reasons presented in the previous chapters. This makes the anti-money laundering policy actually a great instrument for the purpose of persecuting predicate offences because it facilitates the initial phase of the investigations by providing access to a range of information that would otherwise not be available. The Berlin investigators share this approach. In particular *Kunisch* states that 'the purpose of the introduction of Article 261 Gcc and of the GwG was to facilitate the clearing of the predicate offences listed in Article 261 (1) Gcc. Proceedings are triggered by STRs and

⁹⁶⁷ Annex I, p. xi.

⁹⁶⁸ For the definition of '*Zielunabhängige Effizienz*' see chapter one, paragraph 1.3.

start with an allegation of money laundering. However, during the investigations, the charge is modified usually in favour of a charge for one of the predicate offences, because of the prohibition to prosecute self-money laundering and because penalties for the other offences are higher than those provided by Article 261 Gcc. In this way the purpose of the law is fulfilled: the money laundering offence has triggered investigations, which, thanks to the “follow the money “strategy, have led prosecutors to clarify the predicate offences. The scheme is the following: from the illegal money – signalled through STRs to law enforcement agencies – investigators follow the paper trail to finally prosecute the predicate offence'.⁹⁶⁹

The respondents have expressed rather positive opinions with regards to the effectiveness of the preventive regulations. It seems that even in this case the law's addresses have developed practices that help the application of a rather complex legislation. Again, those who are called to apply the law on a daily basis find ways of coping with it in order to reduce the haze of the regulations. Thus, they result to be compliant. As a consequence, if one considers effectiveness equivalent to a high degree of compliance, the regulatory body would score a high level of effectiveness. *Pietsch* and *Kunitsch* put forward an interesting example: The investigators say 'in the beginning banks were afraid of reporting suspicious transactions, because they feared a loss of reputation. Currently, instead, they file many STRs, because they are afraid of becoming victims of a money laundering scheme and thus of being accused of not being compliant with anti-money laundering regulations by the newspapers'.⁹⁷⁰ The interest in protecting banking institutions' reputations has come to coincide with the interest of the preventive anti-money laundering regulations, at least to the extent of compliance. According to *Schneider* also 'companies perceive the threat that the offence poses and are willing to prevent damage to one's reputation. The result is the same: The prevention of money-laundering'.⁹⁷¹ Whether the private sector is interested in complying not only in order not to be labelled as non-compliant and thus undermine its reputation or whether they actually share the legislator's intents of preventing the infiltration of ill-gotten gains in the economy remains an open question. As a matter of fact, medium and big financial institutions that are concerned with their prestige comply with the regulations. The policy has thus found a way of being effective, at least with regards to the fulfilment of its direct function, namely compliance with the regulations.

⁹⁶⁹ Annex I, p. xxx.

⁹⁷⁰ Annex I, p. xxx.

⁹⁷¹ Annex I, p. xv.

The conclusion reached by the respondent assumes that private actors by correctly implementing the provisions of the GwG achieve the goal of preventing money laundering. Yet this has not always been shown to be true. Absolute compliance does not assure the accomplishment of the indirect functions of the policy. However, it is a political matter to verify this correlation. The law is effective because it can adapt to situations, refers Gutman, an attorney providing consultancy for companies in the field of anti-money laundering compliance. The attorney explains 'on one hand the law is far too complex and imposes a high burden on the industrial sector, so that the requirements cannot be completely fulfilled. [...] On the other hand, the supervisory authorities are aware of the difficulties in this sector, therefore the monitoring process is less stringent'. In this sense the GwG is perceived by the respondent as effective, because it compromises the two opposing necessities. Indeed, 'if the law were less demanding and controls were more rigorous, the system would not have a deterrent effect'. In the opinion of the lawyer, the policy is effective because it manages to foster compliance among professions and businesses involved, despite being perceived by the latter as a burden. In this sense the law has managed to partially solve the clash between the private interest of conducting business and the public interest of detecting money laundering activities through the private sector.

Yet, *Diergarten* warns us of a too high level of compliance that could even frustrate the functions of the policy. In particular he observes that 'this year the BKA has received about 18.000 STRs and that they would like to reach the 30.000 STRs per year in order to effectively implement the law. Also, increasing the number of STRs would actually lead to the consequence that the police would not be able to focus on those STRs that contain relevant information, because they would have to deal with the rest of STRs'.⁹⁷²

The effectiveness of the legislation is also evaluated from a more general perspective, as a policy embedded in a broader system. By considering the anti-money laundering legislation as a policy that involves different elements and that develops in time, respondents' assessment is scalable. In particular from a dynamic perspective, a legislation's degree of effectiveness may vary during the course of its application. In fact, according to *Schneider*, 'changes do not happen overnight, they require rather a long time'. In addition, according to the respondent, 'the public does not perceive the

⁹⁷² Annex I, p. xxv.

dangers of money-laundering, people rather perceive anti-money laundering regulations as a burden and as a measure sweeping distrust from cash payments, which are actually not forbidden or limited in Germany'.⁹⁷³ In this context policymakers play an important role in assessing and reviewing it. Yet the legislator does not have the duty to review the implementation of the policy. Indeed, once the states have identified areas in which they can pursue improvements, they need to undertake this process on their own since there is no feedback from the federal level. The interviewee from the BMI declares that the Ministry cannot say whether the anti-money laundering regime is effective or not, because it does not possess the figures to assess the policy⁹⁷⁴. Also according to the FATF report of 2010, the legislator does not review the implementation of the anti-money laundering regime, and there is no evidence that overall reviews of effectiveness of the anti-money laundering system have been undertaken.⁹⁷⁵ The FATF assessors have found out that authorities have no duty to report anti-money laundering matters to the Parliament, and none of the main policy ministries reported these matters in their annual report. According to the FATF report and to the report commissioned by the EU commission in 2009, the German review mechanism constitutes mainly of periodical meetings.⁹⁷⁶ Meetings held are for example among the heads of the financial investigation offices, the heads of the asset recovery offices.⁹⁷⁷ For instance, there are meetings between the authorities and financial and non-financial bodies (*Verbände und Kammervvertretungen*) to discuss the potential difficulties in applying existing legal provisions, which have led to improvements in procedures. There are also regular meetings of the German delegation to the FATF, which have also been heard on proposals to amend legislation on the subject of money laundering. These meetings have the purpose of discussing and sharing information about emerging trends, best practices, effective techniques and experiences about how to successful approach needs.⁹⁷⁸ Actually, Article 44 (1) of the fourth-money laundering directive requires Member States to 'ensure that they are able to review the effectiveness of their systems to combat money laundering [...] by maintaining comprehensive statistics on matters

⁹⁷³ Annex I, p. xv.

⁹⁷⁴ Annex I, p. xxxix.

⁹⁷⁵ FATF, MER Germany 2010, p. 265.

⁹⁷⁶ Deloitte, European Commission Final Study on the Application of the Anti-Money Laundering Directive, Service Contract ETD/2009/IM/F2/90, 2009, p. 139.

⁹⁷⁷ FATF, MER Germany 2010, p. 110.

⁹⁷⁸ FATF, MER Germany 2010, p. 110.

relevant to the effectiveness of such systems'.⁹⁷⁹ Yet, the directive does not define the concept of effectiveness. National legislation in general does not provide a definition either.⁹⁸⁰ *Uecker* affirms that the policy's effectiveness can be inferred from the fact that there are many different public authorities that are involved in the prevention and repression of money laundering and organised crime.⁹⁸¹ This shows that the state is committed to money laundering control. Yet, in the opinion of *Henn*, setting the legal framework is not enough. The WEED representative believes that a policy's effectiveness can only be assessed through complete enforcement. In this context, the respondent asserts 'one cannot even assess the effectiveness of the law, since it has not been implemented yet'.⁹⁸² *Henn* believes that the main problem lies on the enforcement side: 'I believe that there is a political will to tackle money laundering and that organised crime has so far not managed to infiltrate politics or other institutions such as the police, at least according to the research that we have conducted for this report', adds *Henn*.⁹⁸³ 'Since the law has never really been tested in Germany it is impossible to assess its effectiveness. In fact, in the USA, where cases like the one of the HSBC bank, which was sentenced to pay a high fine, the policy seems to be very effective. It is not the first time that this bank has been sued, and these facts might have a deterrent effect in the long term. It could be that, for example, in the next ten years drug cartels would no longer know where to launder their money', concludes the respondent.⁹⁸⁴

5.5.2 Is the policy effective to deter organised crime?

One of the functions that has been attributed to the criminalisation of money laundering since the very beginning of its history has been fighting organised crime by making the commission of serious crimes less attractive through the menace of confiscation. It is thus interesting to verify whether legal actors and privileged observers perceive the law as being able to fulfil this function. Answers are sometimes ambiguous with respect to the deterrent capacity of the money laundering policy to tackle organised criminal activities. In the research conducted by *Oswald* between 1993 and 1996 both prosecutors and credit institutions questioned the potential suitability of the policy

⁹⁷⁹ Council Directive EU/2015/849, *OJ L 141/73-115*.

⁹⁸⁰ The BaFin regularly undergoes an assessment. If it finds that improper implementation is widespread and therefore reflects more systemic problems, this would be published in the BaFin annual report.

⁹⁸¹ Annex I, p. i.

⁹⁸² Annex I, p. xix.

⁹⁸³ Annex I, p. xx.

⁹⁸⁴ Annex I, p. xix.

infiltrated in the structure of organised criminal networks or to deprive them of economic power. None of these goals were considered achievable by the majority (97 %) of the interviewees through the legal framework provided by the law. In particular, 56 % of the respondents considered the law only marginally suitable to impede the infiltration of illicit money in the licit economy or to diminish organised crime economic power; 38,7 % of the respondents stated the law was completely ineffective for this purpose. Prosecutors even questioned the very deep suitability of the two instruments to fight organised crime by preventing the infiltration of ill-gotten gains into the economy, given the fact that organised criminals do not leave traces of their illicit activities. According to the interview partners, in fact, professional criminals did not leave incriminating material, so the investigations were very often in vain. Therefore, aiming to fight organised crime through the implementation of anti-money laundering measures was considered a theoretical failure. In only 15 % of the 380 analysed proceedings, further investigations were undertaken in order to gather more information of the contextual elements, and thus on the eventual criminal network acting behind offenders of the main conducts.⁹⁸⁵ Respondents as for the current research have divergent opinions. According to *Findeisen* 'since most complex cases that are filed as suspicious transactions to the FIU are afterwards dismissed and do not reach the conviction phase, it results that Article 261 Gcc is primarily applied in trials related to “dis-organised crime” and in very low-level criminal cases’.⁹⁸⁶ Indeed, according to prosecutors 'most money laundering cases are connected to fraud and tax crimes. Typical examples of frauds are: phishing, the “nephew fraud”, the “Romeo scam”, and the “Nigeria connection”. The first one consists of elderly people living in the USA or in Australia with polish surnames, contacted by a fictitious nephew, who would ask for financial help through a pretext, the amount of money would be received by a “financial agent”, who t would then transfer it forward to the beneficial. The “Romeo scam” functions in a similar way, but the victim is contacted for a dating purpose. The last example consists of individuals who, for instance, pretend to be American soldiers in Afghanistan and have found a treasure or have an inheritance to share, and would then ask to transfer some money as advanced fees in order to be able to receive a share of the alleged treasure or inheritance sum. Also in these cases the “fees” paid by the victims are received by “financial agents” or in fake bank accounts. In all these cases, individuals

⁹⁸⁵ Oswald, 1997, p. 293.

⁹⁸⁶ Annex I, p. ix.

who accept to make their bank accounts available are at the same time perpetrators and victims of a greater money laundering scheme. However, the criminal proceedings are directed to punish reckless conduct, namely those who knew or could have known the illegal origin of the money. Investigations do not manage to reveal the whole organised network behind the scheme.' Public prosecutors warn that even though in their department organised crime cases do not occur often, 'there are money laundering cases dealt with in other departments [e.g. the organised crime department] of the public prosecutors offices that are related to drug smuggling and trafficking, human trafficking, cigarette smuggling and tax evasion perpetrated through the sale of gold. In these cases, adds *Hagemann*, telephone tapping is very useful to catch the suspects. 'Trials are initiated for allegations of other crimes and in the course of the proceedings the suspicion of money laundering raises. The money laundering charge would be added to the other charges, in order to confiscate the proceeds of crime after conviction. Also behind missing trader frauds (*Steuerkarrusellen*) there is often organised crime. In case of a suspected commission on a commercial basis or in an organised form we also have the possibility of using for instance telephone tapping. However these cases do not happen very often, in this year for instance we have not had any case relating to Article 261 (4) Gcc, while last year only one,' explains the prosecutor.⁹⁸⁷

Pietsch argues however that 'the combination of Article 261 Gcc and the GwG has introduced a great change in the practice of persecuting organised crime: If before the laws were introduced investigators would have started from the predicate offence in order to trace the money back for the purpose of confiscation, now investigations are initiated on the suspicion of money with illegal origin and then trace back the predicate offences. This novelty has made the fight against organised crime more effective'.⁹⁸⁸ This opinion is also shared by *Schneider*, who thinks 'the GwG is one of many tools in the fight against organized crime. Its rules provide the investigating authorities with useful and important paper-trails'.⁹⁸⁹ However, the two investigators emphasise that Article 129 Gcc, which criminalises the criminal association, is according to the statistics applied in very few cases and it has never been applied with respect to a money laundering case. According to them 'the BKA definition of organised crime is

⁹⁸⁷ Annex I, p. xxxviii.

⁹⁸⁸ Annex I, p. xxxi.

⁹⁸⁹ Annex I, p. xiii.

also too restrictive, and there is no interest in classifying cases under this notion'. In fact *Findeisen* believes that the problem is also due to the definition, since 'even criminal law professors do not take a position to dismantle prejudices [about organised crime]; nobody has the courage to speak up and talk about the real situation of organised crime in Germany. The concept of organised crime has been contaminated by historical issues and people use it in a very cautious way'.⁹⁹⁰ Lawyers are rather sceptical about the effectiveness of the law to tackle organised crime. The attorney, despite not being able to support his assertion with figures, believes that Article 261 Gcc has no impact on organised criminal networks. Similarly another defence attorney interviewed believes in the deterrent effect of the criminal provision: 'Nobody who acts in an organised criminal group would come to the idea not to commit a crime so as not to be liable for money laundering'.⁹⁹¹ She does not recognise a preventive capacity of the administrative regulations neither, because 'organised criminal groups invest their ill-gotten gains in a way so it would not be detected through the GwG'. In the BMI it is confirmed that especially the preventive regulations provided by the FATF aim to control the financial sector rather than at tackling organised crime.⁹⁹² There is, thus not even the intention of tackling organised crime through the anti-money laundering regime. However, he adds, 'through the control of financial transactions, the goal is identifying suspicion activities, among them there are also organised crime operations'.

The scarce use of the law for the purpose of tackling organised crime was a concern of the FATF assessors as well. According to the report of 2010 'authorities have generally indicated that not much emphasis is being placed on prosecuting serious money laundering as an effective tool to tackle serious organized crime'.⁹⁹³ Subsequently, assessors concluded, 'more efforts need to be put on raising awareness of the opportunity that money laundering investigations and convictions represent to the general fight against organized crime'.⁹⁹⁴ One of the obstacles that has emerged in the report was the impossibility of using some of the more intrusive special techniques of investigation due to the fact that the offence was categorised as a 'less serious

⁹⁹⁰ Annex I, p. xi.

⁹⁹¹ Annex I, p. xlii.

⁹⁹² Annex I, p. xlii.

⁹⁹³ FATF, MER Germany 2010, p. 64.

⁹⁹⁴ FATF, MER Germany 2010, p. 64.

offence.⁹⁹⁵ In addition, the report confirms that there are relatively 'few investigations conducted on more complex structures, where professional money launderers may be acting separately from the people involved in the commission of the predicate offence, which is often the *modus operandi* for organized crime'.⁹⁹⁶

Finally, according to two respondents, the fact that Article 261 Gcc is not used to tackle organised crime is not a problem. In fact according to *Findeisen*, 'the fight against organised crime is not a priority, therefore the law should not serve the purpose of tackling organised crime or drug criminality. These were priorities of other countries, such the USA. In Europe, however, anti-money laundering provisions are primarily directed at protecting the financial and economic system and its legally acting market participants. In this context fighting organised crime with repressive instruments only partially serves this task. German civil society is at the moment not severely threatened by organised crime related to drug trafficking or trafficking of human beings. These aspects of economic crime distort the public discussion about the real dimensions of money laundering and organised crime that impacts on the economy'.⁹⁹⁷ *Uecker* takes the same approach and believes that the fact that money laundering cases are not related to organised crime is due to the fact that most of the time they are not committed by criminal groups. He states that 'according to criminal statistics, money laundering offences are mostly committed in relation to economic crimes (*Wirtschaftskriminalität*), such as fraud. In these cases the perpetrators are rather single or few individuals and not organised criminal groups in the traditional understanding of organised crime. The reason is often not because prosecutors cannot prove the existence of the criminal network, but rather because they are often not committed by larger organised groups, nor are the cases per se indicators of organised crime, indeed they can also be committed by single offenders'.⁹⁹⁸ According to the respondent, 'most economic crimes are not committed by organised criminals. Having said that, of course, this doesn't mean in any way to deny that there actually is a connection between organised crime and money laundering, as some spectacular cases show.'

⁹⁹⁵ FATF, MER Germany 2010, p. 116.

⁹⁹⁶ FATF, MER Germany 2010, p. 115.

⁹⁹⁷ Annex I, p. ix.

⁹⁹⁸ Annex I, p. i.

5.5.3 Is Article 261 Gcc an example of a symbolic legislation?

The respondents are asked to express an opinion about the hypothesis that pictures the anti-money laundering policy as a symbolic legislation. Again, perceptions differ in relation to which functions respondents attribute to the policy. Also, while the answers provided are sometimes univocal (yes or no), the argumentations show that the interviewees have rather scalable opinions. The concept of symbolic legislation is perceived by all respondents as negatively, a positive answer, thus, would have expressed a negative assessment of the policy.

Two respondents strongly oppose the idea that the policy is symbolic legislation by arguing that its importance consists in demarcating licit and illicit conducts. According to *Findeisen*, 'it would be a catastrophe to delete Article 261 Gcc, because at least it is very useful to describe what is legal and what is not, what people are allowed to do and what they are not'.⁹⁹⁹ Also the GwG is fundamental in the respondent's opinion because 'it defines clear red lines between legal and illegal economic activities'. In addition, 'There is a real need to explain what is organised crime and what is money laundering, [...] we need a clear distinction between legality and illegality'.¹⁰⁰⁰ *Finger* adopts the same argument: 'the law is not symbolic because it is a boundary between lawful and unlawful activities; the question about the symbolic nature of the policy is a purely rhetoric scientific question, while Article 261 Gcc is an important and necessary landmark for the purpose of tackling money laundering'.¹⁰⁰¹ Especially because 'the motor of organised crime, that is the maximisation of profit with illegal means, is not much different than what drives any profit oriented corporation, Article 261 Gcc is an indispensable clear distinction between illegality and legality; the provision is fundamental because it states that anyone can make a profit but only in a legitimate way' adds *Findeisen*.¹⁰⁰² The interview partner grounds his arguments by pointing out the fact that the law creates a new paradigm that is supposed to prevent economic and financial activities conducted by non-criminal actors through subterfuges similar to those adopted by money launderers, which pose a danger to the economic system and thus to society. This is supported by the previously mentioned reflection of the necessity to avoid the spread of illegality within the financial sector which has been made possible by the

⁹⁹⁹ Annex I, p. x.

¹⁰⁰⁰ Annex I, p. x.

¹⁰⁰¹ Annex I, p. xxix.

¹⁰⁰² Annex I, p. xi.

process of market deregulation undertaken in the last thirty years.¹⁰⁰³ By summarising the argument, the respondent claims that the law has a deterrent function that cannot be defined as symbolic.

A second counterargument raised by several respondents is the fact that the anti-money laundering policy has triggered substantial actions in terms of the creation of expertise, specialised authorities and routines, both within the public and the private sectors. According to the respondents' perception this argument shows that the policy has had a strong instrumental impact and thus cannot be defined as symbolic. From a criminal justice system perspective, *Finger* recalls the efforts made by law enforcement to detect, investigate and prosecute money laundering cases.¹⁰⁰⁴ A whole new legal apparatus has been created to comply with the policy. The police department of Berlin, for instance, has a great expertise employed in this field and practitioners who work on a daily basis with the money laundering policy. This exercise cannot be simply symbolic. The same can be said for the actors involved in the prevention of money laundering according to the GwG. In particular, the BMF representative stresses that the *Geldwäschegesetz* (GwG) has substantial consequences: 'the whole preventive regulation that requires financial institutions to comply has a great impact on business. Banks have been convicted and have had to pay very high fines, and this cannot be called symbolic politics, because it has practical consequences'. Thus, the burden placed on credit institutions to comply with anti-money laundering regulations is perceived as an instrumental effect of the policy. In addition, the respondent states that also 'sanctions imposed on non-compliant institutions in case of violations of the regulations are instrumental'. Due to his long experience in the field – he has been working in money laundering control from when Germany introduced the crime in 1992- *Findeisen* has witnessed the development of the system and hence strongly argues that the policy does not only have a symbolic effectiveness. Furthermore, 'other anti-money laundering measures of the multidisciplinary policy, e.g. the sophisticated rules of the Banking Act, the Insurance Supervision Act etc. are not only an appendix of Article 261 Gcc, but rather impact the whole economic and financial sector, and thus are far from being symbolic legislations'.¹⁰⁰⁵ Also other respondents raise the argument relating to the

¹⁰⁰³ See paragraph 5.4.5.

¹⁰⁰⁴ Annex I, p. xxvii.

¹⁰⁰⁵ Annex I, p. x.

actual instrumental consequences of the policy in terms of compliance. *Schneider* highlights the commitment of those who are obliged by the GwG to actively participate in the prevention of money laundering and of the local supervisory authorities. The respondent acknowledges the shortcomings of the legislation, yet does not agree with the idea of defining the laws as symbolic, due to the satisfying level of instrumental compliance to the GwG regulations, which has created an operating structure.¹⁰⁰⁶

The creation of specialised units and of new expertise in order to comply with the money laundering control standards is perceived differently however by respondents. The representative of the Ministry of Finance thinks that 'the prevention of money laundering has become a business sector in itself. Companies and financial institutions have specific departments that undergo due diligence, and there is, thus, a new professionalism that has been created'. The creation of a new professionalism was an element observed by the respondents taking part in *Oswald's* interviews. This was seen, at the dawn of the new policy, as a positive note to the extent that it would have increased law enforcement capability to 'follow the paper trail'. A defence attorney interprets the creation of specific apparatus and the specialisation of personnel to tackle money laundering from a critical point of view, as a symptom of a symbolic legislation. The attorney believes that the anti-money laundering policy, and specially the FATF, has generated the possibility of creating new remunerative professionalism and job positions. Also scholars have interpreted this effect of the policy as an attempt to give the appearance that something has been achieved, while the practical declared effects have not.

Pietsch and *Kunisch* disagree with the hypothesis of a symbolic legislation by saying that 'the effort that has been undertaken so far to prevent and repress money laundering cannot be defined as symbolic, because Article 261 Gcc facilitates investigations for the predicate offences. Therefore the law is not symbolic it has at least the instrumental function of facilitating investigations.'¹⁰⁰⁷ Given that reducing the predicate offences rate was also one of the legislative intents, respondents have a point in stating that the law leads to instrumental desired effects. Other respondents adopt this perspective too. In fact, according to them, the anti-money laundering policy is primarily directed at

¹⁰⁰⁶ Annex I, pp. xiii, xiv.

¹⁰⁰⁷ Annex I, p. xxxi.

reducing predicate crimes. This idea has already been presented in the previous paragraph with regards to the perceptions on the policy' effectiveness. Yet, the function of facilitating the detection of predicate offences does not seem to fully explain the burden imposed by the policy, as previously observed. In addition, attributing investigative functions to a criminal substantial provision seems not to be legitimate, as acknowledged by *Henn* and by legal scholarship.¹⁰⁰⁸

Also in the Ministry of Justice two respondents disapprove with the idea that the policy is an example of a symbolic legislation. In particular, *Korte* believes that the law was the result of a compromise in a positive sense. According to the interviewee 'the policy is the result of the compromise among members of the parliament who represent the different interests of society, and this is a characteristic of a functioning democracy. It is the result of political compromise, as much as for example another criminal law, Article 100a of the code of criminal procedure that regulates telephone tapping'.¹⁰⁰⁹ For this reason 'the law might not be 100 % coherent, it might even be a bit contradictory and may have some loopholes that make its application difficult' yet only because it was the result of a parliamentary compromise, I would not call it symbolic', explains *Korte*.¹⁰¹⁰ The respondent does not interpret the policy as a compromise-legislation enacted with the goal of pacifying a parliamentarian internal conflict without aiming to trigger substantial effects but rather as an example of a democratic exercise.

A symbolic effectiveness of a specific authority devoted to preventing money laundering, that is the FIU, is spotted by the FATF report of 2010. In particular assessors argue that it seems that the FIU has been established to perform some rather symbolic functions, as analytical ones, the elaboration of guidelines, and the publishing of reports, while 'it does not lead the process of analysis of STRs for the purpose of substantiation of suspicions. It makes only a modest contribution to the substantiation of suspicions of money laundering or TF by *Länder* Police units [...]'.¹⁰¹¹ These factors

¹⁰⁰⁸ See the hypothesis on the potential use of Article 261 Gcc for investigative purposes resented in chapter four, paragraph 4.10.

¹⁰⁰⁹ Annex I, p. vii. Article 100 of the German code of criminal procedure has triggered a vivid debate in Germany because telephone tapping investigations are considered to be too invasive of the personal sphere and thus violating the right to privacy of the individuals.

¹⁰¹⁰ Annex I, p. vii.

¹⁰¹¹ FATF, MER Germany 2010, pp. 105, 106.

lower the effectiveness of the FIU, despite the fact that the amount of resources devolved to the agency has increased lately.¹⁰¹²

5.5.4 Considerations

What has emerged from the interviews is that not only opinions on the effectiveness of the law differ, but the very concept of effectiveness is perceived differently among the interview partners. This, far from being a pure ontological matter impacts the implementation of the law. Given that legal actors have diverse perceptions on when a law can be defined effective, they would direct their actions in different ways to achieve this effectiveness. Perceptions about how effective the anti- money laundering policy is appear to be similar among respondents belonging to the same experts' group. In particular, given the fact that the policy triggers many preliminary investigations, investigators work on a daily basis with the provision. This led to their opinion on the implementation of the legislation being rather positive. Positive opinions have common ground: they assert that the policy is not a simple one to implement, however, they believe that the legal practice has found its way through. On the contrary, defence attorneys specialised in economic crimes do not receive a significant amount of clients suspected for money laundering. For this reason they tend to have a rather negative opinion on the policy's effectiveness, also driven by the perception that the policy is not able to achieve the indirect goals.

The diverse concepts of effectiveness provided by disciplines close to the sociology of law and the different definitions of effectiveness given by sociologists of law, which were illustrated in the first chapter, turn out to be useful here. Particularly the notions of 'efficiency' and of 'efficiency regardless of the goals' are proved very useful to interpret the respondents' opinions. Efficiency, is according to the administrative legal approach, the optimal relation between the goals achieved and the instruments used. A subcategory of this concept is the efficiency calculated through a cost-benefit analysis, of which some examples have been presented in the fourth chapter, which defines efficiency as the functioning of a legal order without assessing the goals achieved. This type of analysis focuses on the correctness of the operating system since the purpose of the system is its own existence. It refers to a whole legal order rather than to a specific

¹⁰¹² FATF, MER Germany 2010, p. 105.

single provision. Given that the anti-money laundering policy constitutes a legal order, due to the diverse regulations involved and the competent authorities created in order to achieve the goals of the policy, this notion can be applied. In the field of administrative legal theories, the first chapter has focussed on the approach that considers the (in)effectiveness of a law depending on its (failing) enforcement. In particular, *Bettini's* philosophy attributes the ineffectiveness of a law to a problem of inefficiency of the administrative apparatus. This is argued on the background of the assumption that states are undertaking a process of transformation from a legislative status to an administrative one.¹⁰¹³ Thus issues connected to policies implementation are to be attributed to an administration in default (*säumig*)¹⁰¹⁴ rather than to latent legislative intents. The latter is the approach adopted by sociologists who explain human phenomena according to a functional analysis. In particular, scholars supporting Merton's theory, study legal actions by investigating their functions in society. The functional analysis, far from taking a functionalist approach that legitimatizes the social order, aims at disclosing social conflicts through the detection of different functions attributed to the same action from different actors. In particular when lawmakers agree on the introduction of a new legal act, they pursue a direct function which, especially in the field of behavioural norms, corresponds with the obedience of the norm's addressees to the wording of the provision. In addition, they might pursue an indirect goal which should be caused by the achievement of the direct function. If citizens did not exceed speed limits, the direct function of the traffic law would be accomplished. Yet, if citizens, despite respecting the speed limit cause car accidents, the indirect function of the rule, which is the prevention of car accidents, would not be achieved. This difference is particularly relevant for the analysis of the interviews, given that respondents take different approaches. In fact, a high degree of compliance of the anti-money laundering legislation might correspond to a high level of effectiveness of the policy with respect to its direct function, but at the same time to a rather low level of effectiveness with regards to its indirect purposes. The way to evaluate the degree of effectiveness is therefore also different. While compliance with legal provisions is calculated through a quantitative assessment of the processes in force and of the functioning of the system, the achievement of the indirect functions is measured on the impact of the policy. Interview partners have different perceptions about the indirect functions of the

¹⁰¹³ *Bettini*, 1983, pp. 149, 154.

¹⁰¹⁴ The author recalls Geiger's theory on the administration, see *Geiger*, 1987, p. 70, in *Bettini*, 1983, p. 117.

legislation too. This reflects, once again, the fact that the policy was a result of a compromise between different expectations and that the legislator was not able to limit the scope of its application to a particular goal. The different expectations and intents, which already emerged in the doctrinal debate about the legally protected interests, appears again in the different perceptions of the interviewees. The respondents were asked about the legislation's effectiveness with regards to one of the indirect functions, namely the capacity to deter organised crime. The legislator enacted the money laundering offence in the context of the fight against drug trafficking and other forms of organised crime, thus Article 261 Gcc's expressed rationale is the prevention and repression of organised crime.

The respondents are finally asked about the eventuality that the policy has a latent symbolic function, besides the declared one of preventing and repressing money laundering. Attitudes are different. Some of them agree with this. Others strongly oppose the hypothesis. They argue instead that the policy has instrumental effects on their daily practice, which cannot be defined as purely symbolic. According to most respondents, the law cannot be defined as symbolic, because it has led to instrumental effects. In the first place information gathered thanks to the GwG is used to start preliminary investigations under Article 261 Gcc. Secondly, the structure enacted to comply with the anti-money laundering policy is attainable and is visible and cannot be denied. Thirdly, the law is considered necessary because it labels a deviant behaviour. In particular, despite the fact that investigations do not lead to a conviction for money laundering they allow investigators to collect information in support of criminal cases for the predicate offences or to start a preliminary investigation for a predicate offence. In this sense, the function of the 'law in action', despite being questionable, is objectively instrumental. However, the fact that the law serves the purpose of tackling predicate offences through the support of investigations does not exclude the hypothesis that the law was enacted to pursue latent functions too. According to the sociologist *Aubert*, it is not necessary that the latent goal is the only one that plays a role, but it is necessary that the other purposes would not explain the analysed phenomenon completely.¹⁰¹⁵ Indeed, in the opinions of those who exclude the symbolic function, yet the results achieved through compliance do not legitimate the burden imposed by the legislation. In other words, it seems that they recognise that the purpose of compliance

¹⁰¹⁵ *Merton*, 1983, p. 201.

cannot completely explain the policy makers' motivation, which re-opens the doors for the hypothesis of the existence of latent functions. In fact, such a demanding policy cannot be accepted for the sole purpose of re-enforcing the action of the criminal justice system in tackling predicate offences. On the other hand, compliance with the policy in terms of building of a structure and of expertise does not automatically mean fulfilling the policy's purpose. Particularly the creation of new professionalism, has been interpreted by scholars as a sign given to the public that the policy has produced certain effects. Finally, arguments stressing the fact that the law is a necessary landmark between what is licit and what is illicit can be interpreted also as supporting the hypothesis of a symbolic legislation by taking a positive connotation of the concept. According to this perspective, for example constitutional laws can have a strong positive symbolic effectiveness of setting values and principles. However, in order for such principles to be put into practice and to really enhance people's rights, they need to be substantiated, otherwise they would remain empty promises; therefore regulations that implement principles should have a rather instrumental effectiveness.

5.6 General considerations

Given the abundant literature on the ineffectiveness of the anti-money laundering regime to eliminate its target, the underlying hypothesis of this research was that especially the money laundering offence as drafted by the German legislature, was a purely symbolic provision, whose function was to compromise political parties, to publicly declare the laundering of proceeds of crime as wrong, and to provide an appearance to the public that something had been done. The hypothesis was built on the basis of socio-legal theories on the symbolic effectiveness of the law, and on the literature criticising the current anti-money laundering system. In particular the socio-legal concept of symbolic legislation was adopted to explain why the law might not be an adequate tool to impede the infiltration of illicit financial flows, while it has been so often modified and improved. The discovery process, which started from the assumption that anti-money laundering law is necessary to protect fair competition among economic actors, also revealed that whether money laundering is good or bad depends on the perspective of those who evaluate it. The diverse opinions on the phenomenon influence the functions attributed to the measures adopted to deter and punish money laundering. In other words, social actors have different expectations from the introduction and the implementation of the offence. Moreover, some hindrances

deriving from the formulation of the offence, which does not explicit the legally protected goods, which is way too broad in its wording and in its scope, and which does not integrate smoothly in the existing legal framework, actually obstruct a complete acceptance of the new provision by legal scholarship and by legal actors and thus hinder an effective application. In particular, given the diverse and sometime conflicting opinions expressed manifestly or latently by lawmakers and presented in the second chapter, it has been hypothesised that the legislation was the result of many compromises. Due to the strong pressure on national legislatures due to the international, transnational and European legal frameworks that were binding states to adopt such measures, and on the background of the literature on the emergency attitude of criminal legislatures in recent years, with special regards to laws tackling organised crime, it was hypothesised that the offence was formulated under urgency conditions, and thus to accomplish a rather symbolic function. In addition, given the securitisation rhetoric surrounding money laundering, which attached the worst scenarios and the most challenging issues relating to the economic and financial system to the practice, and the fast widespread of the regime across the world, the thesis assumed that the criminalisation of such conduct could have served other policy goals of international governance.

Yet the case study has partially proved the initial hypothesis wrong. In fact the provision, besides accomplishing the symbolic functions, does impact instrumentally on the reality. In particular the qualitative analysis of criminal statistics and economic figures show that Article 261 Gcc has been applied quite often in criminal cases and thus cannot be described as having a purely symbolic effectiveness. From the interviews it emerges that the provision has a massive impact on the daily work of some legal actors, and that there are instrumental effects that cannot be overlooked, as for example the facilitated collection of information for the purpose of preliminary investigations. In addition, the combination of the offence with the preventive regulations may display a deterrent effect and thus positively impacts the effectiveness of the criminal provision too. In the perception of respondents, the existence of a complex apparatus to prevent money laundering is a sign that the legislation is not purely symbolic and that it is actually efficient. Given the extreme complexity of the standards, once compliance is achieved, the perception of actors involved is that the goal is fulfilled. Thus, compliance becomes the goal. The question is not about the effectiveness of the regulations but

rather about the efficiency of the structure. The goal of the structure becomes its existence. The ultimate purpose is not impeding the laundering of proceeds of crime but rather making any suspicious transaction (customer) traceable and thus under control. Even though investigations do not manage to reveal the networks or the single perpetrators operating behind those who are caught as money launderers, suspects are identified, charged and convicted. Cases are indeed cleared. In addition information gathered through the anti-money laundering regime are used in other proceedings. This further supports the idea that the law triggers instrumental effects. However, as long as the offence is used to prosecute '*Bauernopfer*' (farmer victims)¹⁰¹⁶ it does not seem to be able to fulfil its indirect purpose.

Given that the conduct was not considered a crime before the seventies, one can infer that there was indeed the need to clarify that the further use of unlawfully originated gains was no longer allowed. The provision, indeed according to respondents, introduces a novelty in the way of making profits, which is not only directed at punishing criminals infiltrating dirty money in the legal economy, but it aims at tackling the illegality that has spread in the economic sector due to the deregulation carried out in the last thirty years. The interviewees especially point out corporations that, while seeking profit, behave not dissimilarly to criminals. Yet, the offence of money laundering relies on what has been already labelled by the criminal justice system as illicit. In fact, the provision punishes actions conducted on objects that are the proceeds of unlawful acts, namely of acts that are already listed as offences under the German legal order. Article 261 Gcc does not regulate the process of making profits; it impedes that unlawfully made profits entering the legitimate economy in order to produce further licit gains. Therefore, it does not introduce a criminal label for certain ways in which profits are made immorally or unfairly. Hence the goal of reducing illegality in the financial sector is limited to the boundaries of acts already labelled under the German law as deviant. An example can be provided by a corporation aggressively avoiding taxes to the point of managing not to pay taxes despite having made a great gain. While the conduct sounds immoral, it does not amount to a crime given that tax avoidance is legal. In this context the anti-money laundering policy cannot intervene, because it

¹⁰¹⁶ Term used by *Münch* to describe the phenomenon of innocent private persons' bank accounts used by offenders to launder money through 'financial agents'. See Münch T, *Bauernopfer*. Wie Privatleute zur Geldwäsche missbraucht werden. *Sächsische zeitung*, 20/02/2016.

cannot create new areas of criminal behaviour.¹⁰¹⁷ The scope of action of the offence is thus limited to what national governments already labelled as illicit.

Thus, the policy has generated compliance in the twenty-three years of implementation, and has therefore fulfilled its direct function. However, it has not impeded the infiltration of illicit financial flows in the country, and therefore it has not achieved its indirect purpose. The impossibility of eliminating the infiltration of illegal capitals in the licit economy might have been caused by other factors other than the ineffectiveness of the law. It can be hypothesised that those who designed the law have known since the beginning that it was not possible to completely impede ill-gotten gains entering the country through the criminalisation of money laundering. Having said this, the purpose of protecting the soundness of the global financial system appears to be too ambitious.

¹⁰¹⁷ The example is described in a report published by Action Aid on 'aggressive tax avoidance' carried out by the second biggest brewery in the world, SAB Miller. The multinational corporation, through a system of misinvoicing managed not to pay taxes on the profits made between in Ghana, by declaring a profit equivalent to zero. This was showed not to be true by the report that reveals that, while the company based in Ghana registered no profit, the sisters based in tax havens did. Actually, the Ghanaian sister managed to move almost all its profits to those countries through mis-invoicing. This scheme is about tax avoidance and not evasion. Yet, while being perfectly legal, it does not seem very fair. See Action Aid 'Calling Time', available at https://www.actionaid.org.uk/sites/default/files/doc_lib/calling_time_on_tax_avoidance.pdf, last accessed on 11/12/2015.

CONCLUSIONS

In einer Gesellschaft deren Selbstverständnis sich in der Gewinnmaximierung erschöpft,
ist die Organisierte Kriminalität mindestens latent'.
(Hetzer, 2001, p. 38)

Is the money laundering offence effective? This research has showed that the money laundering offence is very little effective from a socio-legal perspective. Giving the 'elastic' approach, the evaluation is scalable. On the basis of the outcomes emerging from this research, the answer could also be, yes. There are different interpretations about which functions the offence should have, and according to some perspectives, the provision is actually effective. Why is the offence scarcely effective, according to this research? The assessment reveals that there are various elements that hinder the legal effectiveness of the provision. While technical hindrances can (and perhaps) will be removed through legal reforms,¹⁰¹⁸ the inherent political economic and financial conflicting interests that impede a higher level of effectiveness are more difficult to solve. This research presents the controversial nature of money laundering and its policing. The creation of the offence was, according to some lawmakers,

1018 On 28 January 2016, Germany signed the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

directed at impeding that proceeds of crime are infiltrated in the so-called 'legitimate economy'. Yet, since the very beginning, determining the boundary between an area defined as 'criminal' and the space of 'legality' has been controversial. In fact, money has a neutral nature, *pecunia non olet*, making profit, irrespective of the monies' origin, is a very strong interest for both private and public entities, which collides with the one of eliminating illicit financial flows. In other words criminal policy goals diverge from purely economic interests.

How can the effectiveness of the money laundering offence be improved? Besides eliminating technical inconsistencies of the overall anti-money laundering policy, the question is a matter of global financial governance. In contemporary industrialised economies there is a complicated and sometimes shifting boundary between legitimate and illegitimate transactions. This is particularly exacerbated in the context of financial capitalism, which 'subordinates the capitalist productive process to the circulation of money and monetary assets and hence to the accumulation of money profits'. From a Marxist perspective, economic liberalisation can be interpreted as a process of subordination of states to capital, in which states have increasingly competed to attract investments and promote their economic and financial interests. It has been said that for example the offshore financial system owes much to the tolerance, collusion and support of regulatory authorities in the leading countries, while some countries at the margins of the global economy have markets niches in laundering and sheltering illicit financial flows. While one can assume the justice and correctness of the current financial system, and thus describes money laundering as harmful because it interferes with the existing economic order, one can also assume that the capitalist system leads per se to injustice and inequality, and that money laundering is actually embedded in this profit-oriented system and represents just the darker side of the capitalist economy. A compromised viewpoint is the one that describes money laundering as an accepted collateral effect of the capitalist system, that is to say 'a certain amount of illicit financial flows may be considered an acceptable price to pay for a market where free mobility of capital is guaranteed'. That is to say that a financial system in which the free circulation of capitals is guaranteed, and there is a competition between financial systems to attract new investments and make profit -which often consists of a 'race to the bottom' with

regard to regulations- is a perfect environment for money launderers. In other words, money laundering is intrinsic in or at least exacerbated by the capitalist system.

A key-element of the money laundering control strategy that ought to impede the infiltration of ill-gotten gains in the economic and financial sector, is the cooperation between gate-keepers and investigative authorities. However, the research has revealed that also improving anti-money laundering preventive mechanisms means dealing with conflicting interests between private entities, such as the banking sectors, firms, other financial and non-financial institutions, and public actors, namely law enforcement agencies. The shifting boundary between private and public spheres and interests affects not only money laundering control. In fact the central paradox of global finance is that while a sound and stable economic and financial system is a public good, banking and finance has been always treated as a private sphere. In the period since 1973 often described as financial deregulation, in which there has been major transformations such as the liberalisation of financial capital, and a growth of the financial sector and its profitability along with the development of offshore systems, such changes have been facilitated by formalised regulations of financial institutions. In this context finance has become less regulated by public rules but more regulated in form of private self-regulation, generated by and among market participants themselves'. This switch has led to the fact that regulations have followed private interests rather than public ones. New regulatory institutions, which have widespread to respond to regulatory failure, in fact support controlling the forces leading to financialisation and speculation, and thus have generated new forms of risk and instability.

Given that tightening and expanding domestic laws may just move criminality to less regulated sectors or geographical areas, regulations in the field of money laundering control have been enacted through transnational policy-making processes. However, transnational anti-money laundering policy is an example of a regime that has been imposed across the world through an ad hoc body whose binding capacity has showed to be stronger than other international institutions, but whose democratic legitimation is rather controversial. Indeed, the established framework mirrors current controversial patterns of transnational soft law-making processes: In the international system there has been a shift from formal law to 'quasi-legal forms', which are

typically referred to as 'soft law', in opposition to 'hard law'. The research has indeed highlighted that through the use of 'soft law' the anti-money laundering regime has been used to impose priorities on the international political agenda boosted by governments belonging to the 'club of rich countries'. In this way the most powerful states typically determine which flows are illicit and which of the illicit flows are at the top of the political agenda. Money laundering and the policies to tackle it reflect hence broader power asymmetries in the international system.

In order to stop the 'race to the bottom' by harmonising regulations within the Union, the EU has adopted common policies in the field of money laundering. However, while the growth of the EU in the post-war is often seen as a cooperation with the purpose of social solidarity, but contrary to such expectations, the European example has rather focused on 'economic unity'. In fact, while aiming at harmonising anti-money laundering legislation within the Union, European lawmakers have made sure that such legislation would have not been cumbersome for the creation of the free Single Market. If it is true that 'there are certainly inherent limits to how much states can deter and forbid illegal cross-border economic activities, especially if they wish to maintain open borders and societies', it is also true that today borders have been closed for natural persons while capitals and legal persons are still free to circulate.

BIBLIOGRAPHY

- Aepfelbach R and Fülbier A (1994) *Das Geldwäschegesetz. Eine einführende Kommentierung. 2. Auflage.* Cologne: Verlag Kommunikationsforum GmbH.
- Alldridge P (2008) Money Laundering and Globalization. *Journal of Law and Society* 35 (4): 437-463.
- Alldridge P (2001) Are Tax Offences Predicate Offences for Money-Laundering Offences? *Journal of Money Laundering Control* 4 (4): 350-359.
- Allott A N (1981) The effectiveness of laws. *Valparaiso University Law Review* 15 (2): 229-242.
- Allott A N (1980) *The limits of law.* London: Butterworths.
- Altenhain K (2013) § 261 Geldwäsche; Verschleierung unrechtmäßig erlangter Vermögenswerte. In Kindhäuser U et al. (ed.) *Strafgesetzbuch. Nomos Kommentar (NK)* 3 (4). Baden Baden: Nomos, pp. 483-547.
- Altenhain K (2002) *Das Anschlussdelikt. Grund, Grenzen und Schutz des staatlichen Strafanspruchs und Verfallsrechts nach einer individualistischen Strafrechtsauffassung.* Tübingen: Mohr Siebeck.
- Ambos K (2015) The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles. A Second Contribution Towards a Consistent Theory of ICL. *Criminal Law and Philosophy* 9: 301-329.
- Amelung K (1980) Strafrechtswissenschaft und Strafgesetzgebung. *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 92 (1): 19-72.
- Amelung K (1978) Vorteilssicherung und Angehörigenprivileg. *Juristische Rundschau (JR)*: 227-233.
- Amelung K (1972) *Rechtsgüterschutz und Schutz der Gesellschaft: Untersuchungen zum Inhalt und zum Anwendungs- Bereich eines Strafrechtsprinzips auf dogmengeschichtlicher Grundlage.* Frankfurt am Main: Athenrum-Verlag.
- Andreas P (2015) Illicit Globalisation Myths and Misconceptions. In Mitsilegas et al. (ed.) *Globalisation Criminal Law and Criminal Justice. Theoretical, Comparative and Transnational Perspectives.* Oxford: Hart.
- Andreas P and Nadelmann E (2006) *Policing the Globe: Criminalization and Crime Control in International Relations.* Oxford: University Press.
- Appel I (1998) *Verfassung und Strafe. Zu den verfassungsrechtlichen Grenzen staatlichen Strafen.* Berlin: Duncker & Humblot.
- Arzt G et Al. (ed.) (2015) *Strafrecht Besonderer Teil 3.* Bielefeld: Giesecking Verlag.

- Arzt G (2013) Milliardenschwere Geldwäscherei im Untergrund Schweizer Banken - Eine Märchenhafte Rechtsgeschichte. In Kuhn A et al. (ed.) *Kriminologie, Kriminalpolitik und Strafrecht aus Internationaler Perspektive. Festschrift für Martin Killias zum 65. Geburtstag*. Bern: Stämpfli Verlag, pp. 1127-1139.
- Arzt G (1999a) Wissenschaftsbedarf nach dem 6. StrRG. *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 111 (4)*: 757-784.
- Arzt G (1999b) Anm. zu BGHSt 43, 149, 1 StR 208/97 v. 17. 7. 97, betr. Geldwäsche, Fall EKC-Callmaster; BGHSt 43, 158, 1 StR 791/96 v. 17. 7. 97, betr. Geldwäsche durch Kuriere, Rückfluss an Drogengroßhändler. *Juristische Rundschau (JR) 53*: 75-81.
- Arzt G (1997) Das mißglückte Strafgesetz. Am Beispiel der Geldwäschegesetzgebung. In Diedrichsen U and Dreier R (eds) *Das missglückte Gesetz, 8. Symposium der Kommission "Die Funktion des Gesetzes in Geschichte und Gegenwart"*. Göttingen: Wandenhoeck & Ruprecht, pp. 17-38.
- Arzt G (1993) Geldwäsche und rechtsstaatlicher Verfall. *JuristenZeitung (JZ)*: 913-917.
- Arnold T W (1962) *The Symbols of Government*. New York: Harcourt, Brace & World.
- Ashworth A (1999) *Principles of Criminal law*. Oxford: Oxford University Press.
- Aubert V (1974) The social functions of law. *Archiv für Rechts- und Sozialphilosophie 8*: 85-97.
- Aubert V (1965) Alcune funzioni sociali della legislazione. *Quaderni di sociologia 14*: 313-338.
- Aubert V (1952) White collar crime and social structure. *American journal of sociology 58 (3)*: 263-271.
- Baldascino M and Mosca M (2012) *Sussidiarietà orizzontale, welfare comunitario ed economia sociale*. Naples: De Frede.
- Baratta A (1995) Prefazione. In Moccia S *La perenne emergenza. Tendenze autoritarie nel sistema penale*. Naples: Edizioni scientifiche italiane.
- Baratta A (1990) Requisitos minimos del respeto de los derechos humanos en la ley penal. Introducción. In Aa. Vv. (ed.) *Seminario Criminologia critica y sistema penal*. Lima: Universidad Nacional Mayor de San Marcos, pp. 89-107.
- Baratta A (1985) Principi del diritto penale minimo. Per una teoria dei diritti umani come oggetti e limiti della legge penale. In Baratta A (ed.) *Il diritto penale minimo. La questione criminale tra riduzionismo e abolizionismo*. Naples: Edizioni Scientifiche Italiane, pp. 443-
- Baratta A (1984) Integration-Prävention. Eine systemtheoretische Neubegründung der Strafe. *Kriminologisches Journal 16 (2)*: 132-148.
- Baratta A (1982) *Criminologia critica e critica del diritto penale*. Bologna: Il Mulino.
- Bassiouni M C (1989) Critical Refections on International and National Control of Drugs. *Denver Journal of International Law & Policy 18*: 311-337.

- Baker R W (2005) *Capitalism's Achilles heel. Dirty money and how to renew the free market system*. New Jersey: John Wiley & Sons.
- Barton S (1993) Sozial übliche Geschäftstätigkeit und Geldwäsche (§ 261). *Strafverteidiger (StV)*: 156-163.
- Beccaria C (1786) *Dei delitti e delle pene*. Paris: Cazin.
- Becker H S (1966) *Outsiders. Studies in the sociology of deviance*. New York: The free press of Glencoe.
- Becucci S and Massari M *Globalizzazione e criminalità* (2003) Bari: Laterza.
- Bettini R (1983) *Il Circolo vizioso legislativo: efficacia del diritto ed efficienza degli apparati pubblici in Italia*. Milan: Franco Angeli.
- Blankenburg E (1995) *Mobilisierung des Rechts: Eine Einführung in die Rechtssoziologie*. Berlin, Heidelberg: Springer-Verlag.
- Blankenburg E (1985) Research concept for the study of implementation. *Tidskrift för Rättssociologi* 2 (3/4): 205-226.
- Blankenburg (1980) Die Implementation von Recht als Programm. In Mayntz R (ed.) *Implementation politischer Programme*. Königstein: Athenäum Verlag.
- Bhattacharjee A (2012) Social Science Research: Principles, Methods, and Practices. Textbooks Collection. Book 3. http://scholarcommons.usf.edu/oa_textbooks/3 University of South Florida.
- Blum J A et al. (1988) *Financial Havens, Banking Secrecy and Money-laundering. UNODC Global Programme against Money Laundering*, available at <http://amnet.org.il/joomla/attachments/UN-FINANCIAL> 20HAVENS64%20laundering.pdf, last accessed on 16/10/2012.
- Bobbio N (1993) *Teoria generale del diritto*. Turin: Giappichelli.
- Bodenheimer E (1974) *Jurisprudence*. Cambridge: Harvard University Press.
- Bosworth-Davies R (2008) The influence of Christian moral ideology in the development of anti-money laundering compliance in the west and its impact, post 9-11, upon the South Asian Market. *Journal of Money Laundering Control* 11 (2): 179-192.
- Bosworth-Davies R (2006) Money laundering: towards an alternative interpretation. *Journal of Money Laundering Control* 9 (4): 346-364.
- Boudon R (1981) *Effetti perversi dell'azione sociale*. Milan: Feltrinelli.
- Bourdieu P (1986) La force du droit; éléments pour une sociologie du champ juridique. *Actes de la recherche en sciences sociales* 64 (1): 3-19.
- Bourdieu P and Wacquant L J D (1992) *An Invitation to Reflexive Sociology*. Chicago: The University of Chicago Press.
- Borgatta E F (ed.) (2010) *Encyclopedia of sociology. Second Edition* (2). New York: Macmillan Reference USA.
- Bottke W (1995a) Teleologie und Effektivität der Normen gegen Geldwäsche. *Zeitschrift für Wirtschaft, Steuer und Strafrecht (wistra)*: 87-91; 121-130.

- Bottke W (1995b) Teleologie und Effektivität der Normen gegen Geldwäsche. *Zeitschrift für Wirtschaft, Steuer und Strafrecht (wistra)*: 121-130.
- Brambusch J (2012) Im Geldäwsche-Paradies. *Capital* 2: 40-45, available at http://www.frank-cs.org/cms/pdfs/NEWS/CA_18.1.12.pdf, last visited on 16/11/2015.
- Brigham J (1987) *The Cult of the Court*. Philadelphia: Temple University Press.
- Bryde B O (1993) *Die Effektivität von Rechts als Rechtsproblem. Vortrag gehalten vor der Juristischen Gesellschaft zu Berlin am 17. März 1993*. Berlin, New York: De Gruyter.
- Burr C (1995) *Geldwäsche: eine Untersuchung zu § 261 StGB*. Siegburg: Respublica-Verlag.
- Burton B (ed.) (2007) *Burton's legal Thesaurus. Fourth Edition*. McGraw-Hill: New York.
- Buscaglia E (2008) The Paradox of Expected Punishment: Legal and Economic Factors Determining Success and Failure in the Fight against Organized Crime. *Review of Law & Economics* 3: 1-25.
- Caesar P (1991) Das Gesetz gegen die Organisierte Kriminalität: Eine unendliche Geschichte? *Zeitschrift für Rechtspolitik (ZRP)*: 241-244.
- Calvanese E and Bianchetti R (2003) Messaggi mediatici, funzioni della pena e senso di sicurezza dei cittadini. *Sociologia del diritto* 3: 99-138.
- Chambliss W J (1969) *Crime and the legal process*. New York: McGraw-Hill.
- Chapman D (1968) *Sociology and the stereotype of the Criminal*. London: Tavistock.
- Chene M (2011) The potential of UNCAC to combat illicit financial flows. U4 Expert Answers 176, available at <http://www.u4.no/publications/the-potential-ofuncac-to-combat-illicit-financial-flows-2/>, accessed on 16/10/2012.
- Christensen J (2007) The long and winding road: tackling capital flight and tax evasion, available at <http://www.tni.org/sites/www.tni.org/archives/crimedocs/christensen.pdf>, accessed on 16/10/2012.
- Comanducci P and Guastini R (1996) *Struttura e dinamica dei sistemi giuridici*. Turin: Giappichelli.
- Corbetta P (2003) *La ricerca sociale: Metodologia e tecniche. III Le tecniche qualitative*. Bologna: Il Mulino.
- Cottino A (1973) *Il mercato delle braccia e il problema dell'efficacia della legge*. Turin: Edizioni Giappichelli.
- Dalla Chiesa F (2012) *L'impresa mafiosa. Tra capitalismo violento e controllo sociale*. Milan: Cavallotti University Press.
- Delavecuras T (2007) *La sociologia del diritto di Theodor Geiger*. Geneva: Thémis.
- De Vita A (2003) Evoluzione e deriva del sistema transnazionale di lotta contro il riciclaggio. In Patalano V (ed.) *Nuove strategie per la lotta al crimine organizzato transnazionale*. Turin: Edizioni Giappichelli, pp. 155-165.

- Diederichsen U and Dreier R (1997) *Das missglückte Gesetz*. Göttingen: Wandenhoek & Ruprecht.
- Dieter C and Klos J (1994) Das Bankgeheimnis. *Steuerberater (StB)*: 135-143.
- Diéz Ripollés (1994) El blanqueo de capitales procedentes del tráfico de drogas. *Actualida Penal* 32: 583-613.
- Dolcini E (1999) Le misure alternative oggi: alternative alla detenzione o alternative alla pena? *Rivista italiana di diritto processuale penale*: 857-876.
- Donini M (2006) Il diritto penale di fronte al „nemico”. *Cassazione Penale* 2: 694-735.
- Dionyssopoulou A (1999) *Der Tatbestand der Geldwäsche: eine Analyse der dogmatischen Grundlagen des § 261 StGB*. *Frankfurter kriminalwissenschaftliche Studien* 66. Frankfurt am Main: Lang.
- Duke S B and Gross A C (1993) *America's longest war: Rethinking our tragic crusade against drugs*. New York: Tarcher, Putnam.
- Edelman M (1985) *The symbolic use of politics*. Urbana: University of Illinois Press.
- Erickson K T (1962) Notes on the Sociology of Deviance. In Becker H S (ed.) *The Other Side: Perspectives on Deviance*. New York: The Free Press, pp. 9-21.
- Evan W M (1965) Law as an instrument of social change. In Gouldner A W and Miller S M (ed.) *Applied sociology*. New York: Free Press, pp. 554-562.
- Falcone G (1991) *Cose di Cosa Nostra*. Milan: Rizzoli.
- Fernandez L and Heinrich B (2014) Die Strafbarkeit des Strafverteidigers wegen Geldwäsche durch Annahme des Honorars nach Südafrikanischem und deutschem Recht. *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 126 (2): 382-445.
- Ferrajoli L (2002) Crisi della legalità e diritto penale minimo. In Curi U and Palombarini G (ed.) *Diritto penale minimo*. Milan: Donzelli editore, pp. 9-21.
- Ferrajoli L (1985) Il diritto penale minimo. *Dei delitti e delle pene* 3 (3): 443-474.
- Ferrari V (1997) *Lineamenti di sociologia del diritto. Azione giuridica e sistema normativo*. Bari: Laterza.
- Ferrari V (1992) *Le funzioni del diritto*. Bari: Laterza.
- Ferwerda J (2009) The Economics of Crime and Money Laundering: Does Anti-Money Laundering Reduce Crime? *Review of Law and Economics* 5: 903-929.
- Fiandaca G (1982) Il bene giuridico come problema teorico e come criterio di politica criminale. *Rivista italiana di diritto e procedura penale*: 42-81.
- Fiandaca G and Musco E (1992) *Diritto penale. Parte speciale*. Bologna: Zanichelli.
- Findeisen M (1997) Der Prävention im Geldwäschegesetz. Anforderungen der Bankenaufsicht an die internen Sicherungsmaßnahmen der Kreditinstitute gem. § 14 Abs. 2 GwG zur Bekämpfung der Geldwäsche. *Zeitschrift für Wirtschaft, Steuer und Strafrecht (wistra)* 16 (4): 123-128.
- Fischer T (2014) *Strafgesetzbuch: StGB*. 61. Auflage. Munich: C H Beck.

- Flick (2005) Problemi e prospettive del diritto penale dell'impresa all'alba del nuovo secolo: Il nodo dei beni protetti. In Vv. AA. *Governo dell'impresa e mercato delle regole*. Milan: Giuffré.
- Friedman L M (1975) *The Legal System: A Social Science Perspective*. New York: Russell Sage Foundation.
- Frigerio L and Pati D (2007) *L'uso sociale dei beni confiscati. La dimensione etica e culturale, le opportunità di sviluppo economico, il ruolo delle istituzioni e degli enti locali*. Ministero dell'Interno Dipartimento della Pubblica Sicurezza con il cofinanziamento dell'Unione Europea Programma Operativo Nazionale "Sicurezza per lo Sviluppo del Mezzogiorno d'Italia" 2000-2006, available at <http://www.mafieeantimafia.it/images/download/bookformativo.pdf>, last accessed on 27/11/2015.
- Frisch W (2003) Rechtsgut, Recht, Deliktsstruktur und Zurechnung im Rahmen der Legitimation staatlichen Strafens. In Hefendehl R et al. (ed.) *Die Rechtsgutstheorie*. Baden-Baden: Nomos, pp. 215-238.
- Fülbier A (1990) Geldwäscherei: Bankangestellte im Dienst der Ermittlungsbehörde. *WertpapierMitteilungen (WM)*: 2025-2034.
- Funcke-Auffermann N (2007) *Symbolische Gesetzgebung im Lichte der positiven Generalprävention. Eine Untersuchung am Beispiel des „Gesetzes zur Änderung der Vorschrift über die Straftaten gegen die sexuelle Selbstimmung und zu Änderung anderer Vorschriften“ vom 27. Dezember 2003*. Berlin: Duncker & Humblot.
- Gabel P and Harris P (1983) Building Power and Breaking Images: Critical Legal Theories and the Practice of Law. *New York University Review of Law and Social Change 11*: 369-412.
- Gallino L (2012) *La lotta di classe dopo la lotta di classe*. Roma Bari: Laterza.
- Garcia Villegas M (1994) *La eficacia simbólica del derecho*. Bogotá: Ediciones Uniandes.
- Garner B A (ed.) (2014) *Black's law dictionary. Tenth Edition*. Thomson Reuters Opperman Drive.
- Garrn H (1969) Rechtswirksamkeit und faktische Rechtsgeltung: Ein Beitrag zur Rechtssoziologie. *Archiv für Rechts- und Sozialphilosophie 55 (2)*: 161-181.
- Garzón Vergara, J C (2014) Fixing a broken system: modernizing drug law enforcement in Latin America. *Series on legislative reform of drug policies 29*: 1-11.
- Gathii J T (2010) The Financial Action Task Force and Administrative Law. *Journal of Professional Lawyer 197*. See for a draft version Forthcoming Albany Law School Research Paper 10 (10), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/jpl10_09gathii.authc heckdam.pdf, last accessed on 27/11/2015.
- Geiger T (1987) *Vorstudien zu einer Soziologie des Rechts*. Berlin: Duncker und Humblot.
- Geiger H and Wuensch O (2007) The fight against money laundering: An economic analysis of a cost-benefit paradox. *Journal of Money Laundering Control 10 (1)*: 91-106.

- Geppert K (1994) Zum Verhältnis von Täterschaft/Teilnahme an der Vortat und anschließender sachlicher Begünstigung. *Jura*: 441-446.
- Gilmore W C (1992) *International efforts to combat money laundering*. Cambridge: Grotius Publications.
- Günther K (2002) Die Symbolisch-expressive Bedeutung der Strafe, Eine neue Stratheorie jenseits von Vergeltung und Prävention? In Prittwitz W et al. (ed.) *Festschrift für Klaus Lüderssen*. Baden Baden: Nomos, pp. 205-220.
- Gusfield J R (1963) *Symbolic Crusade. Status Politics and the American Temperance Movement*. Urbana: University of Illinois Press.
- Habermas J (1986) *Teoria dell'agire comunicativo*. Bologna: Il Mulino.
- Hagenbarth R (1981) Symbolische und instrumentelle Funktionen moderner Gesetze. *Zeitschrift für Rechtspolitik (ZRP)* 14 (9): 201-204.
- Hassemer W (2010) Preliminary remark to § 1. In U. Kindhäuser U et al. (ed.) *Strafgesetzbuch 1 (3) Nomos Kommentar*. Baden-Baden: Nomos.
- Hassemer W (1995) Vermögen im Strafrecht. Zu neuen Tendenzen der Kriminalpolitik. *Zeitschrift für Wirtschafts- und Bankrecht. Wertpapier Mitteilungen (WM) Sonderbeilage* 3: 3-31.
- Hassemer W and Starzacher K (1993) *Organisierte Kriminalität - geschützt vom Datenschutz?* Baden Baden: Nomos Verlag.
- Hassemer W (1992) Kennzeichen und Krisen des modernen Strafrechts. *Zeitschrift für Rechtspolitik (ZRP)*: 378-383.
- Hassemer W (1989) Symbolisches Strafrecht und Rechtsgüterschutz. *Neue Zeitschrift für Strafrecht* 9: 553-559.
- Hawickhorst K (2011) *§ 129a StGB-ein feindstrafrechtlicher Irrweg zur Terrorismusbekämpfung: Kritische Analyse einer prozessualen Schlüsselnorm im materiellen Recht*. Berlin: Duncker & Humblot.
- Hefendehl R (2001) Kann und soll der Allgemeine Teil bzw. das Verfassungsrecht miß-glückte Regelungen des Besonderen Teils retten? Die „Geldwäsche“ durch den Strafverteidiger. In Schünemann B at al. (ed.) *Festschrift für Claus Roxin zum 70. Geburtstag*. Berlin, New York: De Gruyter, pp. 145-172.
- Heinrich B (2015) Geldwäsche, § 261. In Arzt G et Al. (ed.) *Strafrecht Besonderer Teil 3*. Bielefeld: Gieseking Verlag, pp. § 29 Rn. 1-59.
- Helmers G (2009) Zum Tatbestand der Geldwäsche (§ 261 StGB): Beispiel einer rechtsprinzipiell verfehlten Strafgesetzgebung. *Zeitschrift für die gesamte Strafrechtswissenschaft* 121 (3): 509-547.
- Henn et al. (2013) Schattenfinanzzentrum Deutschland. Deutschlands Rolle bei globaler Geldwäsche, Kapitalflucht und Steuervermeidung, available at http://www2.weed-online.org/uploads/schattenfinanzzentrum_deutschland.pdf, last accessed on 17/11/2015.
- Hetzer W (2001) *Organisierte Kriminalität und Korruption. Schattenseiten der Globalisierung*.

- Hetzer W (1993) Der Geruch des Geldes: Ziel, Inhalt und Wirkung der Gesetze gegen Geldwäsche. *Neue Juristische Wochenschrift (NJW)*: 3298-3301.
- Hierro L (2010) La eficacia de las normas jurídicas. México: Fontamara.
- Hörnle T (2005). *Grob anstößiges Verhalten: Strafrechtlicher Schutz von Moral, Gefühlen und Tabus*. Frankfurt am Main: Vittorio Klostermann.
- Hoyer A (20) In Wolter J (ed.) *Systematischer Kommentar zum Strafgesetzbuch. 9. Auflage (SK)*
- Irvin B and Levi M (ed.) (2009) Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets. European Commission, Final Report, available at http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/final_asset_recovery_report_june_2009_en.pdf, last accessed on 12/10/2015.
- Isensee J (1983) *Das Grundrecht auf Sicherheit. Zu den Schutzpflichten des freiheitlichen Verfassungsstaates*. Berlin, New Yorck: Walter de Gruyter.
- Johart C (2013) Money Laundering: Motives, Methods, Impact, and Countermeasures. In Schoeneberg R (ed.) *Transnational Organised Crime. Analyses of a Global Challenge to Democracy*. Bielefeld: Transcript Verlag, pp. 17-34.
- Jost P J (1998) *Effektivität von Recht aus ökonomischer Sicht*. Berlin: Duncker und Humblot.
- Kaufmann J (2011) Mafia, Ein Parasit befällt Europa. *Mitteilungen des Hamburgischen Richtervereins 4*: 45.
- Kelsen H (1952) *Lineamenti di dottrina pura del diritto*. Turin: Einaudi.
- Kilchling M (2000) Die vermögensbezogene Bekämpfung der Organisierten Kriminalität - Recht und Praxis der Geldwäschebekämpfung und Gewinnabschöpfung zwischen Anspruch und Wirklichkeit. *Zeitschrift für Wirtschaft, Steuer und Strafrecht 9 (wistra)*: 241-249.
- Kindermann H (1989) Alibigesetzgebung als symbolische Gesetzgebung. *Symbole der Politik - Politik der Symbole*. Opladen: Leske Verlag, pp. 257-273.
- Kindermann H (1988) Symbolische Gesetzgebung. *Jahrbuch für Rechtssoziologie und Rechtstheorie (JRR) 13*: 222-245.
- Lerner M (1973) Constitution and Court as Symbols. *The Yale Journal 46*: 1290-1319.
- Levi M (2002) Money laundering and its regulation. *Annals of the American Academy of Political and Social Science 582*: 181-194.
- Levi M and Reuter P (2006) Money Laundering. *Crime and justice 34 (1)*: 289-375.
- Levi M et al. (ed.) (2013) The Economic, Financial & Social Impacts of Organised Crime in the EU. European Parliament, Study, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493018/IPOL-JOIN_ET%282013%29493018_EN.pdf, last accessed on 12/10/2015.
- Levi M et al. (ed.) (2004) Reducing and Preventing Organised Crime: An Evidence-Based Critique. *Crime, Law and Social Change 41(5)*: 397-469.

- Lévi-Strauss C (1984). *Antropología Estructural*. Buenos Aires: Universidad de Buenos Aires.
- Lo Monte E (1998) Riflessioni in tema di controllo della criminalità economica: Tra legislazione simbolica ed esigenze di riforma. *Rivista trimestrale di diritto penale dell'economia* 2/3: 323-366.
- Leip C (1999) *Der Straftatbestand der Geldwäsche: zur Auslegung des § 261 StGB*. Berlin: Berlin Verlag Spitz.
- Leisner W (1971) *Effizienz als Rechtsprinzip*. Tübingen: Mohr Siebeck.
- Lisken (1994) 'Sicherheit' durch 'Kriminalitätsbekämpfung'. *Zeitschrift für Rechtspolitik*: 49-51.
- Losano M G (1981) Il rapporto tra validità ed efficacia nella dottrina pura del diritto. *Sociologia del diritto* 8 (2): 5-23.
- Lucke D (1991) *Das Geschlechterverhältnis im rechtspolitischen Diskurs. Gleichstellungsdiskussion und gesetzgeberischer 'double talk'*. Bremen: Bremen Verlag.
- Machado M (2012) Similar in their differences: Transnational legal process addressing money laundering in Brazil and Argentina. *Law & Social Inquiry* 37 (2): 330-366.
- Mainieri N (2012) Il contrasto finanziario al riciclaggio e la collaborazione con l'autorità giudiziaria. In Cappa E and Cerqua L D (ed.) *Il riciclaggio del denaro: il fenomeno, il reato, le norme di contrasto*. Milan: Giuffrè, pp. 229-270.
- Mantovani F (2006) La «perenne crisi» e la «perenne vitalità» della pena. E la «crisi di solitudine» del diritto penale. In Dolcini E and Paliero C E (ed.) *Studi in onore di Giorgio Marinucci*. Milan: 2006, p. 1170-1181.
- Manzoni A (1840) *I promessi sposi*. Milan: Guglielmini e Redaelli. English translation: Bentley R (1834) *The Betrothed*. London: Bentley.
- Marinucci G and Dolcini E (2006) *Manuale di diritto penale. Parte generale*. Milan: Giuffrè Editore.
- Masciandaro D (2000) The illegal sector, Money Laundering and the legal economy: A macroeconomic analysis. *Journal of Financial Crime* 8 (2): 103-112.
- Masciandaro D (1999) Money Laundering: The economics of regulation. *European Journal of Law and Economics* 7: 2-38.
- Mayntz R (ed.) (1983) *Implementation politischer Programme 2. Ansätze zur Theoriebildung*. Königstein: Athenäum Verlag.
- Memo F et al. (2015) *Il riuso sociale dei beni confiscati e la riattivazione delle aziende sottratte alla criminalità nel panorama normativo europeo: Una ricerca comparativa sulla legislazione comunitaria e sugli ordinamenti nazionali*. ICARO Instruments to remove Confiscated Asset Recovery's Obstacles-No. HOME/2013/ISEC/AG/FINEC/4000005223, available at http://www.icaro-confiscatedassetrecovery.eu/wp-content/uploads/2015/11/Report_Analisi_Comparata_def_impaginato.pdf, last accessed on 11/12/2015.

- Merton R K (1983) *Teoria e struttura sociale 1. Teoria sociologica e ricerca empirica*. Bologna: il Mulino.
- Miranda Rodriguez A (2003) Criminal Policy: New Challenges, Old Ways. *Cahiers de defense sociale*: 182-212.
- Mitsilegas V (2014) The European Union and the Global Governance of Crime. In Mitsilegas V et al. (ed.) *Globalisation, Criminal Law and Criminal Justice. Theoretical, Comparative and Transnational Perspectives*. London: Hart, pp.153-198.
- Mitsilegas V (2003) *Money Laundering Counter-measures in the European Union: A new paradigm of security governance versus fundamental legal principles*. The Hague: Kluwer Law International.
- Moccia S (1995a) Impiego di Capitali illeciti e riciclaggio: la risposta del sistema penale italiano. *Rivista italiana di diritto e procedura penale*: 728-739.
- Moccia S (1995b) *La perenne emergenza. Tendenze autoritarie nel sistema penale*. Naples: Edizioni scientifiche italiane.
- Moreso J J and Navarro P (1996) Applicabilità e efficacia delle norme giuridiche. In Comanducci P and Guastini R (ed.) *Struttura e dinamica dei sistemi giuridici*. Turin: Giappichelli, pp. 15-35.
- Mujica J P (2014) *La felicità al potere*. Rimini: Editori Riuniti.
- Musco E (1993) Consenso e legislazione penale. *Rivista italiana di diritto e procedura penale 1*: 80-92.
- Nadelmann E A (1993) *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement*. Park: Pennsylvania State University Press.
- Nadelmann E A (1986) Latinoamérica: Economía Política Del Comercio De Cocaína. *Texto y Contexto. Sept-Dic 9*: 27-49.
- Naylor T (2002) *Wages of Crime. Black Markets, Illegal Finance, And The Underworld Economy*. Ithaca: Cornell University Press.
- Nelen H (2004) Hit Them Where It Hurts Most? The Proceeds-of-Crime Approach in the Netherlands. *Crime, Law and Social Change 41*: 517-34.
- Nelken D (1997) *Comparing legal culture*. Hanover: Dartmouth.
- Nestler C (2014) Geldwäsche; Verschleierung unrechtmäßig erlangter Vermögenswerte. In Herzog F (ed.) *Geldwäschegesetz (Gwg). 2. Auflage*. Munich: C H Beck.
- Nestler C (2010) Geldwäsche; Verschleierung unrechtmäßig erlangter Vermögenswerte. In Herzog F (ed.) *Geldwäschegesetz (Gwg). 1. Auflage*. Munich: C H Beck.
- Neuheuser S (2012) § 261 Geldwäsche; Verschleierung unrechtmäßig erlangter Vermögenswerte. In Joecks W (ed.) *Münchener Kommentar zum Strafgesetzbuch 4 2. Auflage (MüKo)*. Munich: C H Beck.
- Neves M (1999) *Von der symbolischen Gesetzgebung zur symbolischen Konstitutionalisierung: Ein Überblick*. Neubiberg: Institut für Staatswissenschaft.

- Neves M (1994) *A constitucionalizacáo Simbolica*. San Pablo: Academica.
- Newig J (2007) Symbolic environmental legislation and societal self-deception. *Environmental Politics* 16 (2): 276-296.
- Newig J (2003) *Symbolische Umweltgesetzgebung*. Berlin: Duncker & Humblot.
- Nilsson H G (1991) The Council of Europe Laundering Convention: A Recent Example of Developing International Criminal Law. *Criminal Law Forum* 2 (3): 419-441.
- Noll P (1981) Symbolische Gesetzgebung. *Zeitschrift für Schweizerisches Recht (ZschwR)*: 347-364.
- Noll P (1973) *Gesetzgebungslehre*. Reinbek: Rowohlt.
- Noll P (1972) Gründe für die soziale Unwirksamkeit von Gesetzen. In Reh binder M and Schelsky H (ed.) *Zur Effektivität des Rechts. Jahrbuch für Rechtssoziologie und Rechtstheorie* 3. Düsseldorf: Bartelsmann Verlagsgruppe, pp. 259-269.
- Oswald W (1997) *Die Implementation gesetzlicher Massnahmen zur Bekämpfung der Geldwäsche in der Bundesrepublik Deutschland: Eine empirische Untersuchung des § 261 StGB i.V.m. dem Geldwäscher*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht.
- Otto H (1993) Geldwäsche § 261 StGB. *Jura*: 329-332.
- Paliero C E (2006) La maschera e il volto. Percezione sociale del crimine ed „effetti penali“ dei media. *Rivista italiana di diritto e procedura penale* 2: 467-504.
- Paliero (1992) Il principio di effettività del diritto penale. *Rivista italiana di diritto e procedura penale*: 430-478.
- Patalano V (1991) Beni costituzionali e tutela penale degli interessi economici. In Bassiouni M C et al. (ed.) *Evoluzione e riforma del diritto e della procedura penale: Studi in onore di Giuliano Vassalli*. Milan: Giuffrè, pp. 629-648.
- Picciotto S (2011) *Regulating Global Corporate Capitalism*. Cambridge: Cambridge University Press.
- Pieth M (2004) International standards against money laundering. In Pieth M and Aiolfi G (eds) *A comparative Guide to Anti-Money Laundering: A critical Analysis of Systems in Singapore, Switzerland, the UK and the USA*. Cheltenham: Edward Elgar, pp 3-61.
- Pieth M (1993) "Symbolische Gesetzgebung" gegen Geldwäscherei und organisiertes Verbrechen? Vortrag am 17. Deutschen Strafverteidigertag, Münster, 7. - 9.5.1993. In *Strafverteidigervereinigungen, Organisationsbüro der Strafverteidigervereinigungen* (ed.) *Rechtsstaatliche Antworten auf neue Kriminalitätsformen*. Cologne: Der Andere Buchladen: pp. 99-106.
- Pino G (2013) Sul concetto di efficacia. In *La metamorfosi del diritto. Studi in memoria di Alfonso Catania*. Mancuso et al. (ed) *Mimesis. Quaderni del laboratorio Kelsen* 4: pp. 181-186.
- Piovani P (1953) Il significato del principio di effettività. Milan: Giuffrè.

- Pitschas R (1993) Innere Sicherheit und international Verbrechenbekämpfung als Verantwortung des demokratischen Verfassungsstaates. *JuristenZeitung (JZ)* 19: 857-866.
- Popitz H (1968) *Prozesse der Machtbildung*. Tübingen: Mohr.
- Pontell H N and Geis G (2007) (ed.) *International Handbook of white-collar and corporate crime*. New York: Springer.
- Pound R (1910) Law in Books and Law in Action. *American Law Review* 44: 12-36.
- Raz J (1979) *The Authority of Law*. Oxford: Oxford University Press.
- Rebscher E and Vahlenkamp W (1988) *Organisierte Kriminalität in der Bundesrepublik Deutschland. Bestandsaufnahme, Entwicklungstendenzen und Bekämpfung aus Sicht der Polizeipraxis*. Wiesbaden: BKA-Forschungsreihe.
- Recktenwald H-C (1986) Effizienz und innere Sicherheit. In Aa Vv (ed.) *Aspekte der Kosten-Nutzen-Analyse in der Kriminalpolitik*. Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht, pp. 259-280.
- Rehbinder M and Schelsky H (1972) Zur Effektivität des Rechts. *Jahrbuch für Rechtssoziologie und Rechtstheorie* 3. Düsseldorf: Bertelsmann Universitätsverlag, pp. 555-564.
- Remmers B (1998) *Die Entwicklung der Gesetzgebung zur Geldwäsche*. Frankfurt am Main: Lang.
- Rottleuthner H (1983) *Teoria del diritto e sociologia del diritto*. Bologna: il Mulino.
- Roxin C (2010) Zur neueren Entwicklung der Rechtsgutsdebatte. In Herzog F et al. (ed.) *Festschrift für Winfried Hassemer*. Heidelberg: C F Müller, pp. 573-597.
- Ritzer G and Ryan J M (ed.) (2011) *The concise encyclopedia of sociology*. West Sussex: Wiley-Blackwell.
- Ryffel H (1974) *Rechtssoziologie. Eine systematische Orientierung*. Neuwied-Berlin: Luchterhand.
- Silva Sánchez J M (2004) Sfide scientifiche e sfide politiche della scienza del diritto penale. In Stortoni L and Foffani L (ed.) *Critica e giustificazione del diritto penale nel cambio di secolo. L'analisi critica della scuola di Francoforte*. Milan: Giuffré, pp. 23-40.
- Salditt F (1992) Der Tatbestand der Geldwäsche. *Strafverteidiger Forum (StraFo)*: 121-136.
- Savona E and Riccardi M (ed.) (2015) *From illegal markets to legitimate businesses: the portfolio of organised crime in Europe*. Final Report of Project OCP - Organised Crime Portfolio, available at
- Scheingold S (1974) *The Politics of Rights: Lawyers, Public Policy, and Political Change*. New Haven: Yale University Press.
- Schmel A (1991) Symbolische Gesetzgebung. *Zeitschrift für Rechtspolitik (ZRP)* 24 (7): 251-253.

- Schmidt W and Krause J (2010) § 261 Geldwäsche, Verschleierung unrechtmäßig erlangter Vermögenswerte. In Laufhütte et al. (ed.) *Strafgesetzbuch. Leipziger Kommentar 8. 12. Auflage*. Berlin: De Gruyter.
- Schönke A (2010) *Strafgesetzbuch: StGB. 28. Auflage*. Munich. C H Beck.
- Schröder C (2013) *Warum die Selbstgeldwäsche straffrei bleiben muss*. Berlin: Berliner Wissenschaft Verlag. English translation: Schröder C (2013) *Why self-money laundering must remain exempt from punishment*. Berlin: Berliner Wissenschaft Verlag.
- Schünemann B (2003) Das Rechtsgüterschutzprinzip als Fluchtpunkt der verfassungsrechtlichen Grenzen der Straftatbestände und ihrer Interpretation. In Hefendehl R et al. (ed.) *Die Rechtsgutstheorie*. Baden-Baden: Nomos, pp. 133-154.
- Schütz H P (2012) *Wolfgang Schäuble: Zwei Leben*. Munich: Droemer Knaur.
- Scott J (ed.) (2014) *A dictionary of Sociology. Fourth Edition*. Oxford: Oxford University Press.
- Severino P (2014) Sicurezza dei mercati finanziari: Interessi tutelati e strumenti di tutela. *Rivista italiana di diritto processuale penale 2*: 672-683.
- Sharman J C (2011) *The money laundry: regulating criminal finance in the global economy*. New York: Cornell University Press.
- Smaus G (1978) L'immagine della criminalità nei mass media, contenuti e significati simbolici. *La questione criminale 4*: 351-377.
- Sotiriadis G (2010) *Die Entwicklug der Gesetzgebung über Gewinnabschöpfung und Geldwäsche. Unter Berücksichtigung der jeweiligen kriminalpolitischen Tendenzen*. Berlin: Duncker & Humblot.
- Stafford M and Deibert G (2007) *Blackwell Encyclopedia of Sociology*. London: Wiley.
- Stessens G (2000) *Money Laundering: A New International Law Enforcement Model*. Cambridge: University Press.
- Sutherland E H (1940) White-Collar Criminality. *American sociological review 5 (1)*: 1-12.
- Stortoni L (1992) Criminalità organizzata e legislazione di emergenza. *Dei delitti e delle pene 3*: 39-51.
- Sumner L W (1987) *The Moral Foundation of Rights*. Oxford: Oxford University Press.
- Pal L (1995) Competing Paradigms in Policy Discourse. *Policy Sciences 18 (2)*: 185-207.
- Swaffield S (1998) Contextual Meanings in Policy Discourse. *Policy Sciences 31 (3)*:199-224.
- Yanow D (2014) Interpretive Analysis and Comparative Research. In Engeli I and Rothmayr C (ed.) *Comparative policy studies: Conceptual and methodological challenges*. New York: Palgrave Macmillan, pp. 131-59.

- Tannenbaum F (1938) *Crime and the community*. Boston: Ginn.
- Tanzi V (1997) Macroeconomic Implications of Money Laundering. In Savona E U (ed.) *Responding to Money Laundering, International Perspectives*. Malaysia: Harwood Academic Publisher.
- Treves R (2002) *Sociologia del diritto. Origine, ricerche, problemi*. Turin: Einaudi.
- Troncone P (2001) *La legislazione penale dell'emergenza in Italia: tecniche normative di incriminazione e politica giudiziaria dallo Stato liberale allo Stato democratico di diritto*. Naples: Jovene.
- Tsingou E (2010) Global financial governance and the developing anti-money laundering regime: what lessons for international political economy? *International Politics* 47: 617-637.
- Unger B (2007) *The scale and impacts of money laundering*. Cheltenham: Edward Elgar Publishing.
- Unger B et al. (2014) *The Economic And Legal Effectiveness Of The European Union's Anti-Money Laundering Policy*. Cheltenham: Edward Elgar Publishing Limited.
- Unger B et al., (2013) ECOLEF final report, available at [http://www2.econ.uu.nl/users/unger/ecolef_files/Final%20ECOLEF%20report%20\(digital%20version\).pdf](http://www2.econ.uu.nl/users/unger/ecolef_files/Final%20ECOLEF%20report%20(digital%20version).pdf), last accessed on 30/07/2015.
- UNODC (2011) Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes. Research Report, available at http://www.unodc.org/documents/data-andanalysis/Studies/Illicit_financial_flows_2011_web.pdf, accessed on 16/10/2012.
- Van Duyne et al. (ed.) (2005) *Drugs and Money: Managing the Drug Trade and Crime-Money in Europe*. Abingdon: Routledge.
- Vest H (2001) Probleme des Herkunftsprinzips bei der Geldwäscherei. In Ackermann J B (ed.) *Wirtschaft und Strafrecht: Festschrift für Niklaus Schmid zum 65. Geburtstag*. Zürich: Schulthess, pp. 417-436.
- Visalberghi A (1975) *Esperienza e valutazione*. Florence: La Nuova Italia.
- Vogel J (1997) Geldwäsche - ein europaweit harmonisierter Straftatbestand? *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 109 (2): 335-356.
- Volk K (1985) Entkriminalisierung durch Strafwürdigkeitskriterien jenseits des Deliktsaufbaus. *Zeitschrift für die gesamte Strafrechtswissenschaft* 97(4): 871-918.
- Von Lampe K (1994) Der neue Tatbestand der Geldwaesche (para. 261 StGB). *Juristen Zeitung (JZ)* 3: 123-132.
- Voß M (1989) *Symbolische Gesetzgebung*. Munich: C H Beck.
- Von Hirsch A (2003) Extending the Harm Principle: "Remote" Harms and Fair Imputation. In Aa Vv (ed.) *Harm and Culpability*. Oxford: Clarendon Press, pp. 259-276.
- Von Liszt F (1905) *Strafrechtliche Vorträge und Aufsätze*. Berlin: Gruyter.

- Yeandle M et al. (2005) Anti-money laundering requirements: Costs, benefits and perceptions. *City Research series* 6: 1-74.
- Wallerstein S (2007) Criminalising remote harm and the case of anti-democratic activity. *Cardozo Law Review* 28 (6): 2697-2738.
- Wang J R (2011) Regulating Hawala: a comparison of five national approaches. *Journal of Money Laundering Control* 14 (3): 210-224.
- Ward A (2014) Why we might not benefit from naming beneficial owners. *Compliance monitor* 6 (3): 1-10.
- Weber M (1972) *Wirtschaft und Gesellschaft*. Tübingen: Mohr.
- Welzel H (1939) Studien zum System des Strafrechts. *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)*: 491-566.
- Weschke E (1986) Netzstruktur-Kriminalität: Eine spezifische Form des Intensivitätsverhaltens. *Kriminalstatistik* 6: 297-317.
- Wessels J and Hillenkamp T (2015) Strafrecht Besonderer Teil 2. 38 Auflage. Heidelberg: C F Müller.
- Williams P and Savona E (1996) *The United Nations and transnational organized crime*. London: Frank Cass.
- Whitehouse A (2003) A brave new world: The impact of domestic and international regulation on money laundering prevention in the UK. *Journal of Financial Regulation and Compliance* 11 (2): 138-145.
- Wohlens K (2001) Strafverteidigung vor den Schranken der Strafgerichtsbarkeit. *Strafverteidiger (StV)*: 420-429.
- Wohlens W (2000) *Deliktstypen des Präventionsstrafrechts-zur Dogmatik "moderner" Gefährdungsdelikte*. Berlin: Duncker und Humblot.
- Zagaris B (2007) Problems applying traditional anti-money laundering procedures to non-financial transactions, "parallel banking systems" and Islamic financial systems. *Journal of Money Laundering Control* 10 (2): 157-169.
- Zipf H (1980) Begünstigung durch Mitwirken am Rückkauf der gestohlenen Sache-OLG Düsseldorf. *Neue Juristische Wochenschrift (NJW)* 1979: 2320: 2324.
- Zoppei V (2015) Money Laundering: A New Perspective in Assessing the Effectiveness of the AML Regime. *The European Review of Organised Crime* 2 (1): 130-148.
- Zoppei V (2013) What do a tax evader and a money launderer have in common? The role of secrecy in the financial sector. In Schöneberg R (ed.) *Transnational*

Organised Crime. Analyses of a Global Challenge to Democracy. Bielefeld: Transcript Verlag, pp. 35-39.

NEWSPAPERS

Bund Deutscher Kriminalbeamter, Interview mit Generalstaatsanwalt Roberto Scarpinato. *Blickpunkt 4, Kölner Stadt Anzeiger*, 11/10/2012.

Crisp J, Deutschland belegt bei Geldwäsche Platz zwei hinter Luxemburg. Viel getan hat sich nach der Luxleaks-Steueraffäre nicht bei den EU-Ländern, so das Ergebnis einer Analyse des Netzwerks Eurodad. *Der Tagesspiegel*, 04/11/2015.

Deutsche Presse Agentur, Steueroase Deutschland ist Eldorado für Geldwäsche. *Handelsblatt*, 07/11/2013.

Dick W, Germany, a safe haven for money laundering. *Deutsche Welle*, 30/10/2012.

Grabitz M, Geldwäsche floriert in Deutschland. 50 Milliarden Euro illegale Zahlungen. *General Anzeiger Bonn*, 01/06/2015.

Killias M and Nunes A, Diskriminierung. Nebeneffekte der Geldwäscherei-Bekämpfung. *Neue Zürcher Zeitung*, 21/05/2012.

Kreikenbaum U, Die Mafia kann relativ frei arbeiten. *Kölner-stadt Anzeiger*, 10/09/2015.

Lüke U, Tagung in Köln über das organisierte Verbrechen. *General Anzeiger Bonn*, 15/10/2012.

Meyer U, Mafia-Jäger warnt in Hamburg vor sizilianischen Verhältnissen. *Hamburger Abendblatt*, 27/09/2011.

Münch T, Bauernopfer. Wie Privatleute zur Geldwäsche missbraucht werden. *Sächsische zeitung*, 20/02/2016.

Netzwerk Steuergerechtigkeit, Deutschland ist ein Eldorado für Geldwäsche. *Frankfurter Allgemein*, 07/11/2013.

Ramthum C, OECD: Deutschland versagt im Kampf gegen Geldwäsche. *Wirtschaftswoche*, 26/04/2014.

Rehle M, Hoeneß spekulierte Mithilfe mehrerer Banken. *Die Zeit online*, 26/03/2014.

Rimpel K, *Geldwäsche-Paradies Deutschland*. Nummer acht unter den Steueroasen. *Tz-online*, 07/11/2013.

Rosbasch J, Deutschlands Problem mit der Geldwäsche-Bekämpfung. *Deutschlandfunk*, 06/08/2015.

Schnaust R, Korruption in Deutschland steigt unaufhörlich an. *Neopresse*, 12/11/2015.

Stoldt T-R, Wie stark ist die Mafia in Nordrhein-Westfalen? *Die Welt*, 20/10/2012.

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