ANNEX I

1. Interview conducted with *Uecker*, current senior policy advisor at the German Parliament (SPD).

- **The media has described Germany as an Eldorado for money launderers. Do you agree with this statement?**

This question has clearly a yes/no (*Jain*) answer. Nobody can tell the truth, because what we possess are only estimates. Nobody knows exactly how much money is laundered. If one builds the estimates in relation to the volume of the economy, since Germany has a big economy, the number would be high. On the other side Germany has a strong tradition of rule of law that makes it more difficult to infiltrate proceeds of crime in the country. Even those who state that the fact that Frankfurt is a big financial hub automatically means that it is a big centre for money laundering too do not have evidence of this relation. The media, while drawing attention to the estimated volume of illicit financial flows in Germany, not always report on risk reducing factors and the legal steps undertaken to tackle them, so that the so that the picture presented to the public is bias.

- **What is the impact of money laundering on German society and economy?**

This is an interesting question. I believe that since the offence was created to deter the commission of the predicate offences, the question should be posed in relation to the predicate offences. I actually believe that the problem of money laundering is to a huge part linked to tax evasion. According to the 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 if the criminal network, but rather because they are more often than not not committed by larger organised groups, nor are the cases per se indicators for organised crime, indeed they can also be committed by single offenders. Most economic crimes are not committed by organised criminals. If one takes the Italian mafia as an example, a lot of people assume that they invest money in Germany, for instance through the real estate sector. However if the predicate offences are committed in Italy or elsewhere abroad, it is not easy to bring evidence of the link between the money and the predicate offence. Having said that, of course, 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.

- **It has been said that Germany does not enough to tackle organised crime and money laundering, what is your opinion on this?**

Which measures would Germany need to implement to effectively tackle these issues? I would not agree with this generalisation, because there are many different public authorities involved in the prevention and repression of money laundering and organised crime. The State must set priorities where to invest resources; this is a question that every state faces. Therefore the state must firstly assess the risk and the threat posed by the respective issue and secondly it must verify which possibilities the existing legal framework offers to tackle the problem. In this context the fight against money laundering is not a self-fulfilling mission, it has instead an indirect function that is the elimination of predicate offences. If one looks at the criminal statistics it emerges that drug-related offences have a high conviction rate, while economic

crimes have rather low conviction rates, so this can be seen as a critical point, where more could be done. However, one needs to take in consideration that proceedings for economic crimes take longer time because financial investigations are complex and time-consuming.
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. So I would not agree 100 % with this statement, yet there are two fields in which there is the necessity to improve. One is the non-financial sector, in which there are not many anti- money laundering activities happening, yet there is the necessity to prevent it. The sector is composed by mostly small businesses that do not count as much as banks on their public reputation. If a bank's name incurs in a money laundering case, it has to face the criticism from the media and the consequent loss of public confidence. A used car dealer, instead, would not worry so much about being named negatively in the media, but rather about paying her/his employees, therefore she/he would act in a different way than what is expected from the big players in the financial sector.
Also, small businesses are more difficult to control, this issue was already revealed by the FATF Mutual Evaluation Report in 2010, so that in the meanwhile every Bundesland has constituted a supervisory authority, and such authorities exchange information and best practices. However, the field remains difficult to control. The second issue is the confiscation of proceeds of crime. The problem is here, as in the field of money laundering, the difficulty in proving the illicit origin of assets. At the moment there is a debate in the Parliament about the possibility of introducing a kind of reversal of the burden of proof, in the context of the coalition agreement, yet I cannot say more about it.1

- **Why did Germany introduce the offence of money laundering?**

The offence was introduced in the context of the 'war on drugs', however, by looking at the implementation it can be observed that the law can effectively used better for the the purposes of tackling economic criminality.
Yet the law seems to tackle more rather 'petty' economic rimes, how could be this changed?
It is an interesting question. As a matter of fact, the most crimes committed are petty crimes, if one out of two registered crimes would be a big white-collar crime it would be odd. The field in which there is the highest volume of prominent white-collar crimes is with some probability the financial sector; employees of banks have been involved in tax evasion especially committed through missing trader fraud (*Umsatzsteuerkarussell*). Given the existence of the GwG (Geldwäschegesetz) one would assume that such transactions would not happen without that employees would report this to the competent authority. Apparently there are still loopholes in this sector too.
I do not agree with the statement that Germany did not need the offence of money laundering, I do believe that there was – and is - the necessity of criminalising the laundering of proceeds of crime, yet I personally do not fully agree with the legislator approach of limiting the catalogue of the predicate offences. Since the rationale of the law is impeding the laundering of ill-gotten gains, the all-crimes approach would have served this goal more effectively, and tax crimes were added only recently.
I believe that the FATF has had a great influence in the German law-making process, because of the pressure exercised in the beginning and due to the evaluation process. Also the EU played a role because Germany was bound to the first European Directive that imposed to punish money laundering. However, the introduction of the offence was not an imposition, since Germany did take part in the European decision-making process and it had a strong interest in the fight against organised crime. As a matter of fact the FATF is much more effective than the

1The proposal has been endorsed in the meanwhile in the *Koalitionsvertrag.*

UN, which produces only soft law. So does the FATF, but thanks to the rather rigid mutual evaluation process, the FATF has managed to be very effective.

Where do you see a threat for the future?
In the field of bit coins I would be careful in assuming that there is a lot of money laundering only because there is the potentiality of abuse; as long as there is no evidence about the volume of money laundered through this system it cannot be said how high the risk is. In the field of money laundering the dark number is so big that it is hard to have objective evidence about the real amount of money laundered, so predictions about future developments are even more speculative.

2. Interview conducted with *Dr Korte* (MK), Deputy Director General. Ex-Head of Division, Economic, Computer, Corruption related and Environmental Crime, Ministry of Justice (2004-2011), and with *Busch* (MB), Head of Division, Economic, Computer, Corruption related and Environmental Crime, Ministry of Justice and for Consumer Protection.

- **The media has been describing Germany as an 'Eldorado for money launderers' on the basis of the report '*Schattenfinanzzentrum Deutschland*' published by WEED, Misereor, Tax Justice Network and GPF. Would you agree with this statement**?

MB: Well, it is said that in Germany there is the highest number of 100 € notes circulating, and it is true that in Germany there is still a high level of cash transactions, however, even if this would be the case, the reason would not be a lax legislation, since Germany has the necessary laws to fight Money Laundering (money laundering). Actually we do not possess enough data to produce a correct estimate of the volume of money laundered since part of the data are dealt at the Länder level and we do not collect them. However, 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.

MK: In Germany one can still pay big amounts of money with cash, and this is of course a hinder for the tracing of dirty money, but this 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. Actually the crime of money laundering is extensively punishable under German law, the fact that it does not result often in criminal statistics is due to the fact that our statistics indicate only the most serious offences and often money laundering cases are linked to other offences that are more serious than it. Especially in the field of narcotic drugs, that is the motive why this crime was at the beginning created, money laundering offences do not result in the statistics because drug-related crimes are considered more serious than money laundering.

MK: Yes, the volume of the economy may be an explanation. But still, 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'. German general tax revenue is very high, the whole volume of the financial sector, namely of the legal economy, is big, thus the volume of the illegal sector is proportional, so it is not only organised crime that invests a lot of money in the country.

MB: I believe that 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 also in daily life, this does not correspond to money laundering. According to the BMF, there is a lot of black money in Germany, but this does not mean that there is a lot of money laundering too.

MK: But 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 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.

It is anyway very important to separate the two phenomena of tax evasion and money laundering when talking about numbers.

- **What would be possible solutions to improve the current legal system?**

MB: The FATF declared the Germany should introduce self-money laundering, but we can only do this in line with our fundamental criminal legal principles. The BMJ has commissioned an expert opinion on this issue (see Christian Schröder 'Why self-money laundering must remain exempt from punishment'). The introduction of a general self-money laundering offence could mean that even a thief that steals something and hides it would be liable for money laundering because of the act of hiding the proceed of the theft.

MK: States that do consider self-money laundering punishable, like the USA, have introduced it to make it easier for the prosecution to prove a case in front of the court, if it is hard to find evidence for the predicate offence.
Another argument that is used to promote the introduction of self-money laundering is that by doing so it would be easier to confiscate the proceeds of crime, but this is not correct since confiscation is possible under German criminal law for proceeds of any crime, not only for money laundering.

- **What are the risk-sectors in Germany?**

MB: It is said that gambling houses are a tool to launder money, but there is no simple explanation how this would work, given that users may loose money by playing and therefore it may not be convenient for money launderers. In fact, there seems to be no hard evidence that casinos are extensively used to launder money.

MB: A new regulation of casinos has been implemented, which aims at protecting addicted individuals. However, as regarding the preventive part of anti-money laundering law (GeldWäscheGesetz, GwG), meaning the private sector regulations, the BMJ is not responsible, since our area of competence is criminal law.
When it comes to reporting suspicious transactions in the field of gambling, a the risk-baed approach requires that the risk needs to be evaluated before implementing new rules, and perhaps in the casinos sector it would not be worth it.
As regarding the online gambling sector, the fact that electronic money is more traceable is an advantage for law enforcement. Yet, what concerns the GwG, as for instance pre-paid cards regulations, is not under the BMJ jurisdiction.

- **What is the social and economic impact of money laundering in Germany?**

MK: It has often been observed that money laundering undermines the economy of a country. However, we do not have the facts and numbers to reply to this question, because the Länder that are entitled to deal with this issues do not have the duty to report to the BMJ about their work in the field of Anti-money laundering.

- **What role do media play in shaping social perception of money laundering in Germany?**

MK: The media has an interest in presenting big scandals to the public; they prioritise hot topics, and money laundering is a phenomenon that attracts the public attention.
However, the fact that the media report more about economic crimes may be related to the fact that the criminal justice system has started dealing with these crimes, like corruption too, only 30 years ago, and currently there are very specialised agencies that are responsible for law

enforcement in this field, so that much more offences are detected and more information is provided to the public.
Actually when the media talks about a scandal this means that the criminal justice system has worked in the right way, because the law enforcement detected the case and persecuted it.
Moreover, the fact of showing to the public how these crimes are seriously persecuted has a deterrent effect.

- **What role did the International community play in the genesis of the crime of money laundering?**

MK: The creation of the money laundering crime was not a specific necessity of Germany. The formulation of the offence as it was created under international law was constructed on the Anglo-american system. The provision in foreign countries has been formulated in a vague way so that it serves the needs of a legal system that does not have the duty to prosecute. Actually for the German criminal system, where the prosecution has the duty to prosecute any offence, such a vague formulation would create problems of interpretation, since prosecutors sometime do not know whether a case can be subsumed under the money laundering definition or not. In these cases, usually prosecutors prefer to indict for another crime that is easier to bring evidence against it.
If this crime would have been created without the influence of the FATF Recommendations and of the EU Directives, it would have been formulated in a much clearer and exacter way, so that it would not result so undetermined.
Actually the money laundering crime constitutes a double criminalisation, because it punishes behaviours that were already considered criminal under other existing articles, such as *Hehlerei* (Receiving of stolen goods); *Begünstigung* (Assistance after the fact)*, Strafvereitelung* (Assistance in avoiding prosecution or punishment).

- **Why has been the scope of anti-money laundering law expanded so much?**

MK: The EU Directives and the FATF Recommendations have expanded the scope of the anti-money laundering system.
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 the time of the 'decriminalisation'. Nowadays, public opinion finds it easier to resort to criminal law 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*, otherwise the whole society would be put under the control of criminal law.

MB: If one looks at the formulation of article 261 of the penal code (that criminalises money laundering in Germany), one can sees that it reflects exactly this two contrary approaches, on one side the expansion of criminal law and on the other side, 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 criminalising illegal behaviours and the pressure exercised by external actors, such as the FATF and the EU. All these transnational bodies, the FATF as much as the OECD, too a certain extent, lack some democratic representation. Iin particular in the FATF the US place an important role.,
The law is the result of a political compromise, as much as for example another criminal law, article 100a of the code of criminal procedure that regulates telephone tapping.

- **Compromise legislations are considered a type of 'symbolic legislation', would you**

agree on this definition for article 261 Gcc?

MB: No, I spoke about political compromise in a positive sense, laws are the result of the compromise among members of the parliament who represent the different interests of the society, and this is a characteristic of a functioning democracy.
Legislation might not always be to a 100% coherent, and might be even 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.

- **What would you change in the formulation of article 261 Gcc to make it more effective?**

MB: I believe 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 not need anymore to prove one of the predicate offences listed in the catalogue, but rather only the general criminal origin of the proceeds.
In addition, there are calls for clarifying *Rechtsguter* the law protects. It is said that the protected good is the 'administration of justice', but some have included also the 'integrity of the financial system'. However, if we consider the banks' perspective, when ones deposit money, even though that money may originate from a crime, it is still money that does not harm the bank itself; indeed as everyone knows 'pecunia non olet'.

MK: 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 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 Interior was responsible for the anti-money laundering law, while currently is the Ministry of Finance.

MB: The topic of the 'Beneficial Owners' (BO) is currently plays an important role in the EU, the G20 and the FATF. Banks have the duty to ask clients who they are, whether they act on behalf of other persons, about the other company members, etcetera. But with the introduction of BO policy, the responsibility is put on the clients, who now have the duty to disclose information. One could call this a change of paradigm, and now the EU, the G20 and the FATF discuss requirement of public registry of the Beneficial Owners, in order to facilitate the access to these information.

MK: The prevention of money laundering is much more important than repression, but it costs more. The GwG requires strict compliance, however banks and other financial institutions, despite undertaking Know Your Customer duties, cannot avoid 100% the infiltration of illegal money.

MB: Moreover I see two kinds of problem concerning the FATF and the OECD. The first is that these bodies do not always take enough 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 often to these meetings States send professionals of the anti-money laundering sector, which are convinced of the necessity of fighting crime, but do take into account only to a lesser extent the rule of law requirements and the issues concerning 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 very problematic, since I do not personally believe that this policy should be pushed to this extent on an expert level. On the contrary I believe that it is important to maintain anti-money laundering law within the limits of our basic legal principles, therefore I underline the need to respect for example the proportionality principle, the data protection.

MK: The problem is also that when one tries to raise these fundamental issues, the others immediately think that he/she does not want to fight money laundering and wants to protect organised crime.
Also, with regard to the financial crisis, it has been often said within these bodies, that money laundering was one of the main causes of it. And this assumption has been used to harden even more economic crimes legislations. This approach towards money laundering and the financial crisis has been taken also at the BMF in Germany, and this corroborates the idea that anti-money laundering law should protect the financial system and not the administration of justice. However, nobody could explain us how did money laundering play a role in the financial crisis.

3. Interview conducted with *Findeisen*, currently Head of Section VII A3 (payment systems, money laundering prevention), Federal Ministry of Finance.

- **Why should Germany tackle money laundering?**

I believe that Anti-Money Laundering provisions in Europe which follow a multidisciplinary approach are primarily directed at protecting the financial and economic system and its legally acting market participants. In this context also fighting organised crime with repressive instruments also -at least partially- serves this task. German civil society is at the moment not severely threatened by organised crime related to drug trafficking or trafficking in human beings. These aspects of economic crime distort the public discussion about the real dimensions of money laundering and organised crime. In reality, Germany is threatened by all aspects of economic crimes, mainly white collar crime like financial fraud, embezzlement etc. In this context Germany and its stable economy is also relevant as a country of investment for illegal monies generated in thirds countries. Entrepreneurs that launder and invest their ill-gotten money in the legal economic sector undermine economic competition, and through their economic power they can influence on a second stage politics and thus undermine the whole democracy and civil society. The best example is exactly at the moment Mexico or Italy, since also there the economic power of mafia is what creates the greatest threat for society.
However, even in Mexico, despite the high level of drug trafficking, drugs do not constitute the only problem, since organised criminals deal with any kind of illegal and even legal product that can generate profit. Misuse of patent law, product counterfeiting such as fake medicine, are an example of a new products in which organised crime is investing because it produces a great profit margin. And this happens not only in developing countries, but also in Europe, where, thus, the health and well-being of people is under threat.

- **Which factors have influenced the law-making process?**

In its beginnings the setting up of anti-money laundering instruments including the crime of money laundering was created in first place to counter drug trafficking under the strong influence of the USA. The USA missed the opportunity to solve the drug issue by political and economic instruments on its own, and not through the anti-money laundering system alone. In general, the money laundering problem in the context of drug trafficking, which was caused by prohibition policies, should not be exaggerated in European countries by losing touch with other predicate crimes, which are more relevant for money laundering and organised crime. In Europe we should use these regulations in order to tackle more compelling issues, such as the infiltration of illegal money from white collar crime or corruption in the legal economy.

- **Which are the problems relating to the implementation of anti-money laundering law in Germany?**

Actually the problem is that the money laundering offence in Germany is primarily applied in trials against predicate offences of money laundering related to 'dis-organised crime' and in very low-level criminal cases. The most complex cases that are filed as suspicious transactions to the FIU are afterwards dismissed, because often the prosecutors prefer to indict for the predicate crime since the maximum penalty is higher than the one for money laundering. This is way the perception about money laundering is totally wrong, Most of the important cases do not reach the conviction phase. However, the crime of money laundering is from a law enforcement perspective absolutely necessary, because it allows, for example, the use of telephone tapping or the confiscation of assets, which are a fundamental tool for investigations in this field.
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 simply focus on the rule of law and other

fundamental principles in this field. This would allow taking out the subjective side of the crime structure, namely the necessity to prove the *mens rea*, because the subjective element of the defendant should is less relevant in such cases. 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 should be tackled in a separate part of the criminal code, which applies administrative sanctions.

- **Is article 261 Gcc a symbolic legislation?**

Thanks to my long experience in the field, I can say that I would not agree with defining anti-money laundering law as a symbolic legislation. I started working in the field since the 90is, since when Germany introduced the crime of money laundering in 1992 and I could see the development of the system.
Although article 261 of the German penal code generates only few convictions, the impact of the regulatory part of anti-money laundering law cannot be forgotten, since it has enormous preventive and consequences for the economic sector by defining clear red lines between legal and illegal activities. Furthermore, other anti-money laundering measures of the multidisciplinary legal package, i. e. the sophisticated anti-money laundering rules of the Money Laundering Act, Banking Act, Insurance Supervision Act etc. are not only an appendix of the money laundering offence and far away from symbolic legislation.

The prevention of money laundering has become a business sector itself. Companies and financial institutions have specific departments that undergo due diligence, and there is, thus, a new professionalism that has been created.
Moreover, one cannot forget that the whole repressive part of anti-money laundering law is deeply intermingled with the preventive part (the Geldwäschegesetz, GwG); and this latter part has definitely consequences. The whole preventive regulation that requires financial institutions to comply has a great impact on business. Banks have been convicted and had to pay very high fines, and this cannot be called symbolic politics, because it has practical consequences.
The preventive part of anti-money laundering law is based on the fact that the conduct of money laundering is criminalised; otherwise the GwG would not have the deterrent effect that it has.
I agree on the fact that trials for money laundering are not successful and that illegal activities in this context are persecuted under other predicate crimes. However it would be a catastrophe to delete 261 Gcc, because it is at least very useful to describe what is legal what is not, what people are allowed to do and what not.
Although there have been only a handful of trials for money laundering where the defendants were bankers, while often money laundering cases concern fishing issues and other fraud related offences, the provision should remain. There is a lot to criticize, the law is unclear and incomplete, for example it is not clear which are the legally protected goods, and about this it should be debated. I know that for a criminal lawyer to say that a criminal law is made to protect the economic sector is shocking, but economic crimes need to be tackled also by criminal law, since they affect society more than drug criminality. money laundering is a real threat for economy and thus for the society, especially if the society does not have proper instruments to protect itself.

- **What is the impact of money laundering?**

We do not possess reliable statistical data on the volume of money laundering, neither about organised criminal activities. What we actually need is reliable data of law enforcement authorities in the Länder (law enforcement is in general empirical research on the real amount of laundering money, on money laundering activities and on dis-organised crime. Many people

are against money laundering, but they have the idea that money launderers are the gipsies or those from the former east-bloc, they do not really know about money laundering.
Even criminal law professors do not take position to dismantle these prejudices; nobody has the courage to speak up and to talk about the real matter of organised crime. The concept of organised crime is in Germany contaminated from historical issues and people use it in a very cautious way.
There is a real need to explain what organised crime is and what is money laundering, so that they will see that the motor of organised crime (maximisation of profit with illegal means) is not much different to any company that is profit oriented. This is why we need clear borders between illegality and legality. The crime of money laundering is fundamental because it states that anyone can make profit but only in a legitimate way. Also for the monitoring authorities it is fundamental to have a law that landmarks what is licit and what is illicit.

- **Which are the main hindrances of the current system?**

The problem is that there was a trend in the whole Europe, and in the globalised world to deregulate the financial sector. This has also influenced efficient and far reaching measures against money laundering and opaque money flows in the nineties
We have learned through the financial crisis that the deregulation and the 'laissez faire' strategy have caused many problems, because they let finance reaching this point where everything is allowed. The State needs instead to take a clear position and to persecute financial misbehaviours.

However there is the necessity to update also legal training in this perspective, since criminal law professors in Germany do still have a reluctant approach towards economic crime regulations. There is missing a deep and scientific know-how about the matter. In the past at least some critical studies were undertaken and legal school had a critical approach towards law. What is currently 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.

It is almost impossible to tackle economic crimes with the same legal tools used for addressing other crimes, such as bodily harm, because economic crimes are often undertaken by legal entities and not by natural persons. Yet Germany is the only place where criminal liability for legal persons has not been recognised, and no political party is really fighting for this. This is another important issue where Germany needs to make some progress.

In Germany there is also the problem that contrary to supervision of the financial markets the prosecution of money laundering is dealt at the Länder level, therefore it is harder to have an overview of the whole phenomenon and the necessary data.

In addition, the media influences the public idea of money laundering where money laundering is still and primarily connected with red light crime and criminal activities of foreigners and refugees. However, the media is not able to undergo proper investigations and write objective reports about this topic, mirroring the reality. They rather sit in their offices and use secondary material and therefor do not give a real image of what is happening.
I believe that this plays a big role in the wrong perception of money laundering in Germany.

Another issue is the digital revolution in payment systems and the misuse of these products for money laundering, Virtual currencies, or electronic money like monies which are stored on p

re-paid cards, for example, can be used outside of the formal financial system as cash money, because one can charge as much as he/she wants, thus avoiding the anti-money laundering regulation limits. Electronic monies are not traceable like credit cards, and thus they allow anonymity. Electronic money and virtual currencies needs to be addressed in the next future with priority.

4. Interview with *Schneider* and *Rech*, from the department of Public Security and Order of the Regierungspräsidium Darmstadt, one of 3 Regional Administrative Authorities in Hesse.

- **Is Germany an 'Eldorado' for money-launderers as described in the media?**

I have followed the debate in the media too and I can say that the situation in Germany regarding prevention has become much better. However we do not possess solid statistics about the amount of money laundered in Germany, therefore it is not possible to evaluate the phenomenon objectively. Yet I am sure that thanks to the awareness of the public and thanks to the engagement of non-financial institutions the laundering of proceeds of crime has become more difficult in Germany recently. Thus I believe that Germany is on the right track to eliminate the existing volume of money laundering. In the past it was recognized also at international level that the volume 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. Yet such changes do not happen overnight, they rather require a long time. The situation is getting better constantly, I believe that the improvement process has started in 2012, although in our Department we started earlier, but at that time not all German states had a supervisory authority, which is not the case anymore.

- **In your statement on the draft money-laundering legislation you expressed concern for the lack of coordination at the federal level. I would like to know whether this constitutes still a problem nowadays.**

Even in this regard there have been improvements. For example the Federal Ministry of Finance organizes several times a year a meeting where representatives of all German states participate and exchange information, in order to coordinate actions at all levels. This does not work for all topics but it allows to find agreements on most important issues. 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.

- **In your statement on the draft money-laundering legislation you underlined the lack of specific educational programmes for the anti-money laundering supervisory authorities**

There is indeed a necessity of specific training in the field. For all fields of work there is the possibility for employees to follow a special training and I hope that there will be soon such opportunities also in the field of anti-money laundering law as well.

- **Why should a State oppose money laundering?**

I am deeply convinced that a State should protect its own economy from the infiltration of illicit money. Not only the financial system but also the economic system, namely the industrial and commercial sectors as a whole need protection from illicit money, because this can subvert the economy and – in the worst case - have influence on the whole system of a nation.

- **Is the GwG ('Geldwäschegesetz' – the German prevention of money laundering act) an effective tool to fight organized crime?**

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. It also raises the awareness especially in small firms who would not know how to deal with the problem when they suspect that some customers are linked with organised crime. Thanks to the GwG such firms have to

collect the information and report immediately such a suspicion and the authorities in charge will conduct the financial investigation. So the GwG can help to reduce money-laundering in Germany and make it more difficult for criminals to invest in the German market.

- **Why are there so few convictions for money laundering?**

I guess that one of the reasons is that self-laundering is not a criminal offence in Germany, therefore often the accused are convicted for the predicate offences rather than for money laundering in order to respect the principle of double jeopardy.

- **What has been the impact of FATF?**

The FATF's report of 2010 has definitely had a strong impact on the implementation of anti-money laundering law in Germany, especially in the non-financial sector.

- **Are casinos and online game companies at risk of money-laundering?**

We are not competent to supervise casinos - the Hessian Ministry of the Interior is the competent supervisory authority.
Since 2013, online game companies also fall under the rules of the GwG. So the legislator has affirmed this question.

- **How is the cooperation with law enforcement authorities?**

The foundation stone for good cooperation has been laid: Since 2011 I go every year to the police academy to show and report about our work as a supervisory authority. And the Regierungspräsidium Darmstadt invites representatives of police departments, state office of criminal investigation (Landeskriminalamt), tax offices, 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.

- **Why does this process take so long?**

The GwG is a law that has been modified very often, 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 be always updated.
One of the reasons why the process takes long is that because due to the application of rules some 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. For example, an issue could be: 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 for example no registration of companies obligated to observe the GwG-rules. We don´t have adequate knowledge of the professions we have to observe and their ways of work or their special risks; so it is difficult for the authorities to recognize the pertinent questions with reference to anti-money laundering 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 is higher.

- **How are anti-money laundering regulations perceived by businesses?**

Many businesses do not deal with cash at all, yet they need to identify customers and submit Suspicious Transaction Reports (STRs). 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. For this reason our office designed a flyer with explanations that companies can use and show to their clients. You can imagine a real estate agent who asks for identification of clients at the first appointment would have high difficulty to handle the business (in Germany real estate agents usually are not involved in the classical financial transaction – they just team seller and buyer). While banks have the time to collect information about clients during the business relation, this is not the case of many professions that have rather short relations with 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: They fear retaliation. However companies perceive the threat that the offence poses and are willing to prevent such risks – also to prevent reputational damage. The result is the same: the prevention of money-laundering.

- **What is the social perception?**

The public does not perceive the dangers of money-laundering, people rather perceive anti-money laundering regulations as a burden and sweeping distrust for example when paying cash, which is not forbidden or limited in Germany. There is a need for more public information about the reasons and the necessity of collecting all these personal data.

- **What role do shell companies play in the anti-money laundering system?**

I guess, they play a significant role – nevertheless it´s very difficult to engage in tracing the complete paper trail in these cases. The businesses and professions to whom we, as supervisory authority, relate are not investigators, they only aim at conducting their own business in a clear way. Lots of them do not possess an adequate know-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. In suspiciously cases businesses and professions are required to report the suspicion to the law enforcement authorities so that the latter can carry on the necessary financial investigations.

5. Interview with *Dr Lubitz,* defence attorney.

- **How often have you defended someone charged with money laundering?**

The provision occurs very rarely in the practice. The German debate about the practical application of the law falls apart. Despite I have several years of experience in the economic and criminal legal practice I have never had a client who was accused of money laundering/that I suspect he/she had committed money laundering. Accusations are in the practice very vague, so that the offence is difficult to prove.
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.
I have never reported a transaction, because, according to the jurisprudence of the constitutional court I am liable fro money laundering only if at the time of receiving the fee from the client I had knowledge of the illicit origin. This has never happened so far.
I cannot give information about the proceeding I am working at, what I can say is that the alleged predicate offences are drug-related crimes.

- **What are the main legal hindrances concerning article 261 Gcc?**

From the perspective of defence attorneys the vagueness of the formulation of article 261 Gcc poses a problem. Investigations can be seriously invasive for the defendant, due to the vague wording of the offence, even though there will not be any conviction in the end. Part of the jurisprudence and some prosecutors would like to expand the scope of the offence even more, to the extent that the predicate offence should be proved only in broad outline (*in groben Zügen*).

- **Is the money laundering offence effective to tackle organised crime?**

I would not be able to estimate the effectiveness of the law to tackle organised crime. What I can say is that Confiscation and seizure are instruments that affect and harm enormously the defendant. Therefore the idea of confiscating assets seems to me very effective from the prosecutors' point of view.

- **Would you agree with defining article 261 Gcc an example of a symbolic legislation?**

I agree with the definition of the law as an example of symbolic legislation, because of different reasons. Designing a broad offence and limiting public expenditure for law enforcement it does not seem to me an effective solution.

6. Interview with *Reiher* and *Goltz,* from the Chamber of public accountants.

By responding to the questions we are limited by our mandate, which imposes us to limit our activities to the interests of our members.

- **What is your mandate?**

Our members 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 about any case in which financial auditors and certified general accountants have violated their obligations to file STRs pursuant to article 11 GwG.
We are 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. In the last three years we have received twelve reports about suspicious transactions that have been promptly sent to the competent authorities.

- **What role do accountants play in the prevention of money laundering?**

Our members are completely subject to article 3 of the GwG to the obligations relating to the prevention of money laundering. However, the uncovering of criminal schemes among clients or other third persons is not the main activity neither of those professions nor of other business accountants, nor is something that recurs often or that can be easily detected by those professions. Therefore the obligations imposed to these professions in the field of the prevention of money laundering contribute to an effective fight against money laundering.
Yet, from a proportionality view point, the Chamber of accountants and auditors considers the obligations problematic. In our opinion, the number of STRs confirms this complexity.

7. Interview with *Henn* from WEED.

- **Why has WEED decided to approach the topic of money laundering and publish the report 'Schattenfinanzzentrum Deutschland. Deutschlands Rolle bei globaler Geldwäsche, Kapitalflucht und Steuervermeidung'?**

Our NGO deals also with the issue of illicit financial flows. We were trying to understand where does money that is stashed away through for example high corruption, and capital flight in developing countries go. Money laundering is a part of the problem. Actually money laundering covers also the activities of organised crime, but we look more at autocrats' grand-corruption, tax evasion conducted by multinational companies, mis-invoicing. We have started in 2012 to focus on anti-money laundering law. Actually already in 2011 the OECD published a report on tax evasion and there was a discussion in the Parliament where we contributed but mainly on the tax evasion side and the issue of the disclosure of beneficial owners. There I met *Frank,* a money laundering expert from Switzerland, who even sued Germany because the country did not comply with the European law in the field of money laundering. We started in 2012, while the third money laundering directive was reviewed, there was a public consultation and Tax Justice Network presented an opinion on the proposal. In 2011 *Fiedler*, an expert from the University of Hamburg, wrote an opinion on the proposal to regulate the casino sector in relation to money laundering, on behalf of Tax Justice Network.
Also, in the past we dealt with the issue that Germany had not signed UNCAC, so we were debating about the issue of beneficial owners, which is very controversial. For the purpose of writing this report, we have conducted a research on the existing legal framework. The interviews we have conducted with FIUs did not reveal important information, the answers we received were uncritical, we had the impression that the answers were not reliable. However, this report is just a first step, the research has revealed the necessity of conducting more in depth investigations.

- **Is the anti-money laundering regime effective to tackle illicit financial flows? If not, which are the main obstacles?**

Many authors argue that the regime is not effective, yet, the lack of reliable figures makes it hard to criticise the system, because even those who say that the anti-money laundering regime has not helped so far to tackle illicit financial flows do not possess data that show objectively this failure. The failure might have been triggered by other factors. In the report 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. On the other side the law is not that young anymore, it has been in force since twenty years and it should show its results.

One of the main issue, which is still very controversial, is the question whether self-money laundering should be criminalised. The Parliament has announced that they might introduce it. I believe this is a legal loophole that should be filled. Even though I know that this would not solve completely 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 there is the suspect that she/he was involved also in the predicate offence.
Another much debated matter concerns money deriving from tax evasion, whether it should be considered as laundered money or not.

I believe that the main problem lies on the enforcement side. So far there has not been a real enforcement of the policies. One cannot even assess the effectiveness of the law, since it has

not been implemented. Therefore one cannot make argue that the law is not effective, since it has never been tested. On the other side, if one looks at the US case about the HSBC bank, which was sentenced to pay a very high fine, this seems to be very effective. It is not the first time that this bank has been sued, and this facts might have a deterrent effect in the long term. It could be that, for example, in the next ten years drug cartels would not know anymore where to launder their money. However, as long as there will be a jurisdiction that does not enforce anti-money laundering standards, the problem could not be solved completely. In Germany the monetary sanctions attached to the money laundering offence under German law are too low, they cannot serve the deterrent function.

Another questionable issue is the one of the Politically Exposed Persons (PEPs). I doubt 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 its own people and by international community. Only then *Mubarak* was named as a dictator backwards. However, at that point the preventive purpose of the anti-money laundering law was not fulfilled anymore. What was, instead, applied, was the asset recovery mechanism, which is indeed very effective. On the other side, it would have been a very political issue if German banks would have seized his assets while he was ruling the country. There is too discretion in this field, which might be abused for political reasons. On the other side, providing official lists of PEPs would also not be a solution. Such lists would always need to be updated, and they could potentially rise diplomatic matters between states. As it has been already experienced at international level, for instance in the field of tax havens, blacklisting rises a lot of human right issues. The alternative of providing an index of persons or countries potentially at risk would not solve the problem neither, because in the legal context it is necessary to be able to differentiate between black and white, and not to have a gradual evaluation.

The burden of proof is another cumbersome issue. I can imagine that this needs to be changed at some point. The German legal system has been criticised by the Italian judge Dr. *Scarpinato* as too lax with respect to money laundering and organised crime. This criticism has quite strongly impacted on the discussion here. However, I doubt that Germany will ever enact a system similar to the Italian one, because of the specificities of our legal culture. For example, the broad use of telephone tapping for investigative purposes would not be possible in Germany. On the other side, one can argue that despite the efficient asset recovery system, Italy has not managed to defeat the mafia. Therefore I doubt whether this tool is really effective. Yet, one can say that without having it the situation would be much worse.

I find it absurd that proceedings often start with a charge for money laundering, because it allows to use 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. *Findeisen* (BMF) justifies the crime also in this sense, even though it does not seem completely legal, it is very effective.

The real estate sector is a sector at risk of money laundering. Apparently, the sector does not serve all three stages of money laundering so it might be that the money is only integrated through it, once it has already acquired an appearance of legitimacy, after it has been placed and layered in countries with lax laws. The problem is again the lack of figures.

- **Is the lack of enforcement a matter of time or of political will? Is there a real**

interest in enforcing the law or is does the law have just a symbolic effectiveness?

The problem is that I cannot figure out where the interest relies on this topic. For example for tax evasion I know that the states have no interest in prosecuting it because the money confiscated would go to a common federal fund. Also if the tax evasion is committed abroad there is not much interest to prosecute the offence.

I have the impression that asset recovery is not considered very effective. Authorities seem not to rely on this tool much, they do not invest resources on it. I have the impression that 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.

With regard to the political will, 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 as the police, at least according to the research that we have conducted for this report.

- **What is the impact of money laundering in Germany?**

I believe that the lack of reliable figures about money laundering hinders the effective fight against it. If there would be statistics that show objectively 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 about the volume of money laundering in Germany. Facts, statistics and cut-cases are missing, the real amount could be much lower or much higher of the estimates we have of 50 Billion Euros. Even the estimates produced by the OECD on the amount of money laundered in Germany are only based on cases dealt within the country, while proceeds of crime committed abroad can be also laundered here. For instance, with these estimates, they do not capture the money invested by the Italian mafia, because they would need to compare Italian statistics too.

The debate about figures and statistics that needs to be carried out more intensively. As for now it is very difficult to find good and reliable figures on money laundering; those who critic the existing ones do not have some on their own. In our opinion, providing reliable figure or at least to set guidelines to calculate them on the phenomenon is a fundamental issue. The OECD provides figures but they are mere estimations and we do not agree on the way the organisation calculates them. In the Ministry of Finance also criticises them, however it does not provide alternative measuring systems. Yet *Findeisen*, on behalf of the Ministry, does admit that there is a problem concerning the lack of statistics. On the other side, he argues that there is no need of introducing a new register of beneficial owners, since there is already a company register. Even *Fiedler*, 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, there are attempts to measure the volume of money laundering transaction but there has been no success so far. 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, already the absence of reliable data and the fact that just recently such a study was commissioned are elements from which it can be inferred that there has not been enough engagement. As a matter of fact, if even *Findeisen*, who has been working in the field since very long time cannot evaluate the estimates on the volume of money laundering in Germany, it seems that there is a lack of interest in providing such figures.

8. Interview with *Dr Gutman*, attorney specialised in commercial law and compliance.

- **How often do money laundering cases recur in your daily practice?**

Anti-money laundering is a more and more important issue for our clients. However, in practice, we mainly focus on and get in touch with prevention aspects. I had only single cases, were we actually had to file a STR. In more occasions we had to deal with suspicious of money laundering, however we then do not file a proper STR, but rather a '*Vormeldung*'.

We provide consultancy services for companies that need to establish or advance their compliance systems. We set up compliance rules and provide effective solutions for both major companies as well as small and medium sized firms. In the banking sector such rules are even more complex. Areas of compliance concerns are usually in the field of corruption and competition law but also increasingly money laundering. Additionally, specific areas of law are relevant depending on the business model, e.g. environmental law. Anti-money laundering is now often considered one of the core areas of compliance, as one gets easier into trouble than expected. In the banking sector anti-money laundering rules are even more complex.

Corporations of different industries have their specific anti-money laundering supervisory bodies. Bigger companies have the expertise and capacities to monitor and report suspicious operations on their own, consulting external lawyers only in unusual or difficult cases.

From our practice, the most problematic structure is a sales or a contracting company that makes business in certain, lower developed countries with a high score in corruption indices, and let pay off fees in cash money or to foreign bank accounts. These types of transactions would trigger a STR from the German banks to the supervisory authority, which very probably would be filed to the FIU and preliminary investigations would be undertaken to prove whether the conduct constitute a money laundering offence. Yet, not seldom, the suspicion can be proved false by explaining the legal business conducted, from which the money originated. Convincing explanations for the legitimacy of the transaction stops further investigations

In order to avoid suspicious transactions, one major advice is to avoid any cash payments, so that the transaction is monitored and documented in advance by the credit institution.

- **Is the anti-money laundering policy effective?**

One could have doubts as to the preventive system (regulated by GwG) being effective to detect terrorists. There is a rather low probability that terrorists would use transfers in a way that they could be be detected. Instead, business transaction are either well covered or alternative means are used. As far as I can judge, STRs filed due to the suspected terroristic purpose are mostly proved wrong. However, in the field of drug criminality, where many transactions are conducted in cash, preliminary investigations are often conducted through telephone tapping and other more invasive instruments, so that investigators have the chance to track rapidly perpetrators. In this sense is the STR a good starting point for further criminal investigations.

In case of doubts, we do suggest our clients to file more STRs to be on the safe side. Yet, when dealing with good customers that are subject to higher thresholds for filing a STR, it has to be considered that criminal investigations emerging out of a STR, might negatively impact on the relations between the company and the customers, even if the proceeding is afterwards closed. One must expect that STRs filed to the supervisory authority trigger investigation.

I do not think that criminalising self-money laundering would improve the effectiveness of the offence; also it would collide with our criminal law principles.

Money from former Eastern Bloc countries is often problematic, because the origin of the money is difficult to clarify, for example if it derives from an illegitimate privatisation undertaken in the nineties in Russia, it would be very difficult for German authorities to track the process of privatisation, get all the documents and compare them with the law that was in force at that time. Yet, deposits of high amounts of cash money would be immediately reported by banks and other credit institutions. In these cases the GwG is indeed to some extent helpful to impede the infiltration of illegal capital in the legitimate economy.

Although taking into account the benefits, anti-money laundering rules provide to the society, the burden imposed on the industrial sector are rather high and burdensome. The wording and systematic of the GwG is too complicate for those who do not have an expertise. The duties imposed on the industrial sector, in particular with regard to smaller firms, cannot be completely fulfilled by some of them. However, the supervisory authorities seem to be aware of the difficulties, and therefore monitor in particular smaller companies with sense of proportion as long as they show their goodwill to comply. Furthermore, the GwG provides some exceptions that allow for adaption to the situations, which is effective.

- **What are the legal hindrances that obstacle an effective implementation of the anti-money laundering policy?**

Telephone tapping is time-consuming and very costly. It requires a lot of personnel that is focussed only on that task, and as soon as there is the suspicion that the predicate offence is a serious offence, more personnel is required. In addition, recorded phone calls in foreihn languages need to be translated and this also very costly. Since from a policy perspective, organised crime is perceived as a great threat, the Ministry of Justice could also require more resources to devolve for telephone tapping investigations. Public authorities have often the necessity of receiving more resources.

One has to consider that even many of the lawyers have never read the provisions of the GwG, and without sounding arrogant, if they would do, they would not understand straightforward the details at the first reading. What we do is to help companies to understand what they need to undergo in order to comply with the regulations and what the most important steps to take are and how to recognise 'red flags'. For this purpose we prepared a scheme, which explains the duties imposed by the GwG in a much simpler way than the wording of the GwG.

Due diligence regarding Public Exposed Persons (PEPs) is not that important in the private sector in Germany. It is relevant with companies that are based in foreign countries like Africa or Saudi Arabia, where States leaders often run also big corporations. In Germany due diligence in the field of PEPs is mainly undertaken in the field of public businesses, such as airports or other services.

9. Interview with *Diergarten*, attorney.

- **The media have described Germany as an Eldorado for money launderers. Do you agree with this statement?**

On one side yes. On the other side I do not agree with the statement of the FATF that Germany does too few to tackle money laundering and that we should criminalise self-money laundering. I believe that offenders should be punished only for the predicate offences and not also for money laundering, otherwise it would be a double punishment for the same conduct. This would not increase the effectiveness of the law. Also from the side of the private sector, those who file STRs do not discern whether the predicate offence could have been committed by the individual who carried out the suspicious transaction.
I have filed 20.000 STRs in this bank and in all these cases I have never known from which offences the money originated, because what we do is just signalling suspicions financial operations but we do not research about the possible predicate offences. For example, once I have filed an STR because I have realised that on a bank account of someone that had a rather low monthly income, suddenly 100.00 Euross were transferred, but I did not know where this amount of money originated.

- **Is the law effective to detect money launderers? What are the main challenges?**

The system is not effective because the 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 undergone on a bank account in the last two years, they cannot access the same information about deposit boxes. For example, in the Uli Hoeneß case, he might even have still million Euross 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 these information. Also the mafia could have in Germany such deposit boxes and still nobody would know. Why? Because the state since years refuses to create such a central register. It would be actually very easy for the banks 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 help investigators a lot. 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.

- **Is the Geldwäschegesetz effective to detect money launders?**

Banks are overloaded with bureaucratic duties imposed by the anti-money laundering policy. For example, in our 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 the 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 about the BOs and we need to verify them. If the beneficial owner of a company is another legal person we need to trace back also the BOs of the latter, and this process can go back to five to six layers. I have never experienced that through this system a money launderer has actually provided his/her identity to the bank. Why should he/she? She/he would be weary of life or crazy if she/he would say that she/he

handle for the mafia. Nobody would do it, yet all believe so. And we have to bear the burden. For example in the bank where I work, there are seven persons involved in the prevention of money laundering. Out of them, three are responsible for tracking the beneficial owners, while they could be occupied in doing something more useful to detect money laundering transactions. In addition, when we file the STRs after having conducted this research, the police cannot use the results if 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 anyway again.

Another example for the ineffectiveness of the anti-money laundering regulation is the rules about the PEPs. Also in this case we bear a high burden. Every year we spend 60.000 Euross in order to buy the lists of PEPs. For every transaction we need to verify whether the involved individuals are on the list. What would it happen if we do find a person listed in that list? We would need to undergo enhanced due diligence. Yet as long as the person carries out only normal transactions we do 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 why we need to do enhanced due diligence for PEPs. This should be actually 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.

Also real estate agents, for example, need to ask for the identity of clients, since the very beginning of the business relation. This means that, for example in cities where the real estate sector is booming like Munich, for a flat there might be a hundred interested buyers and the agent needs to verify the identity of all of them even though only one will be able to buy the flat. This is also a very high burden.

I know 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. However, the police does not have enough resources in order to deal with all of this information. The personal has been even reduced in the police in the last years, therefore they are not able to cope with the work imposed by the anti-money laundering policy. 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.

A sector that is at risk of money laundering is the casino sector. In my city for example there were 40.000 inhabitants ad three casinos. Now, after the deregulation of the sector there are 13 casinos for the same number of inhabitants. Casinos can pay very high rents. One of the casino is based in a huge building, however I never see cars parked in front of it, thus I wonder whether this casino has actually any client. The fact that it has to pay a high rent leads to the suspicion that it might be a case of money laundering. However, the sector has not been fully regulated by the anti-money laundering policy, perhaps due to the lobbying work.

- **Does the anti-money laundering regime contribute to prevent and repress organised crime?**

Hardening the law is not effective to catch big organised criminals, because they always find a way to overcome the new regulations. In fact, this year, out of the 18.000 STRs filed, only five cases involved big organised criminal activities. Ten years ago there has been also only five

cases. This shows that the effectiveness of the policy to detect organised crime has non 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 side I know that there is the tendency of not to reporting a client in case of the suspicion of minor offences. However, also from investigations about a minor offence prosecutors can detect bigger cases. Therefore it is important that the law imposes the duty to file STRs also in case of smaller offences. This also in order to release the private sector from the additional burden of determining from which predicate offences the money originated. Actually the legislator should adopt the all-crimes approach in order to facilitate our work. In the anti-money laundering training that I lead I usually say that employees should follow their own gut feeling about a suspicious transaction without reflecting too much about the possible predicate offences involved.

- **What would you change I order to improve the effectiveness of the law?**

I would personally welcome the introduction of the reversal of the burden of proof, especially in the field of money laundering. There is at the moment a debate, and I believe that with specific regard to the fight against money laundering, this provision would play a significant role. 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.

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.

10. Interview with *Finger***,** former detective commander LKA Berlin, Head of Department 4, Organised Crime Serious Gang and Property Crime Organised Violent and Red Light Crime, and current member of 'Mafia? Nein Danke! e V.'.

- **The media has described Germany as an Eldorado for money launderers. What is your opinion on this statement?**

Germany is a favoured country in Eurospe for the laundering of proceeds of crimes, however the term 'Eldorado' is exaggerated because in the country since 10/15 years there has been a developing legislation to prevent money laundering, which has successfully diminished the phenomenon.

There are in fact two factors that may be exploited by organised crime in Germany, the first is the fact that the police is not provided in all sixteen Bundesländer with specialised personnel, moreover in the law enforcement is missing qualified personnel with specific know-how to be able to deal with money laundering. The second factor is that money laundering is from definition a typology of hidden criminality, since its purpose is the concealment of the illicit origin of properties. Through the use of several mechanisms, such as shell companies, the use of nominees, shadow companies, fake bank accounts, offshore companies, false addresses, bakers (*Hintermännern*) is objectively difficult to control flows of money. This, together with the fact that the financial services providers are subject to lax regulations and undergo low control increases the possibilities of exploitation for criminals. Also the real estate sector, notaries, and the modern forms of e-commerce and the ever new forms of investments offer an attractive environment for money launderers.

On one side Germany has some factors that may deter money launderers. For example corruption is not rooted deeply in the society and in the economy. It does not affect 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 massive refusal of corruptive practices in the population. There are also firewalls, namely specific compliance departments that impede corruption and money laundering both in the private sector and the public sector. There is the possibility of reporting anonymously corruption cases; whistle-blowers in public view are accepted and regularly protected.

On the other side, there are objective factors that favour criminals, such as the speed of the financial system, the globalised nature of the financial system and the difficulty of cooperating internationally among investigative authorities. Often international cooperation is influenced by economic purposes; there are countries that have a great interest in integrating dirty money in their economies, in order to foster their GDP. Especially countries where the economy is based on foreign investment do not differentiate between licit or illicit flows. Authorities have sometime still limited possibility of identifying and detecting money laundering transactions.

- **Who has interest in preventing and repressing money laundering?**

It is first of all a legal mandate. Secondly it serves not to let the economy to be distorted by illegal capital. Since market capitalism is the dominant economic structure, law-abiding

individuals have an interest too in not being put 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 and businesses and industries. Also indirectly this has an impact on the whole society, through the impact on the labour market, and especially to employees whose life depend on those businesses, commercial and industrial activities that might be infiltrated or contaminated by the infiltration of illegal capital. Therefore the uncensored critical view of NGOs such as 'Transparency International' and 'Mafia? Nein Danke! e V.' is extremely important and necessary.
The perception of the public and of the politicians is increasing with respect the phenomena of money laundering and organised crime. This is due to the public work conducted by law enforcement agencies that have drew the attention of political institutions on these topics in the recent years. There are fortunately investigative journalists that have improved the level of awareness of the public. However, also the level of infiltration has increased constantly.

- **Is the law effective to tackle money laundering and organised crime?**

The suitability and the effectiveness of the different investigative and legal instruments depend on the single case. The effectiveness does not depend only on the implementation of one measure, but rather from the whole system, as for instance from instruments such as the rejection of public grants, employment ban (*Berufsverbot*), economic control, the monitoring of economic licenses, drastic prison sentences for organised crime bosses instead of pure monetary sanctions, enhancement of human and technical resources of the monitoring authorities, with the purpose of allowing a more effective surveillance in the practice.

It is expected a final text from the Parliament that will update the current national law to the very recent fourth money laundering directive that has entered into force on the 20th of May 2015 Directive.2 The most important change that will be introduced through the conversion of the fourth money laundering directive concerns the introduction of a constitutionally legitimate inversion of the burden of proof, as it was already mentioned in the *Koalitionsvertrag*. The second element is the adoption of the 'all serious-crimes approach' because of the polluting potentiality of any proceed of crime. The third element is the criminal liability of the perpetrator of the predicate offence.
As soon as a third person in good faith buys an object that was procured through illegal money and then sells it further, it is not possible anymore for law enforcement to prosecute the offenders. It is therefore necessary to introduce a legal institute that interrupts the transmission of the legal property when the first object was procured from a criminal action.3
International cooperation is often is 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. Especially countries

2Directive EU2015/849, *OJ L 141,* 5.6.2015, p. 73–117.
3The institute proposed would be similar to the one regulated by article 935 BGB (No good faith acquisition of lost property.

where the economy is based on foreign investment do not differentiate between licit or illicit flows. Therefore German authorities have limited possibility of identifying and detecting money laundering transactions undertaken in those jurisdictions

- **Would you agree with the definition of the law as a symbolic legislation?**

A law makes sense because it differentiate what is legal and what is not. Therefore the question about the symbolic nature of a law is a purely rhetoric scientific question. I am of the opinion that also if there are not many convictions in Germany, the effort put by law enforcement to target money laundering cannot be called symbolic. In fact the impact of the law on the daily work of investigators and prosecutors is rather relevant. Article 261 Gcc is an important and necessary starting point for the purpose of tackling money laundering and it is as an instrument that defines what is licit and what is illicit.

One has to consider also that the law was created in the aftermath of the fall of the wall and of the German reunification. After the reunification there has been a paramount work of compromising between and integrating the two legal cultures [in which the respondent took part and was awarded for the contribution to the creation of a common criminal justice system] in order to build a common legal culture. In this context, the law needs to be considered also as a compromise between the West German and the Eastern German approaches to criminal law.

11. Interview with *Kunisch* and *Pietsch*, from the LKA 311GFG, (*Gemeinsame FinanzermittlungsGruppe*) Financial investigations group.

- **Germany has been described as an Eldorado for money launderers by the media, what is your opinion on this?**

We do not agree, Germany is not an Eldorado for money launderers. The Financial investigations groups exist since already twenty years within the local criminal police office (LKA). If one says that Germany is a paradise for money launderers it would mean that the criminal justice system does not function. 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. It does not play any role the type of conviction, 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 to reach a high clearing rate (*Aufklärungsquote*), which is based on conviction for any offence and confiscation. Therefore the German criminal system cannot be compared with that of other European countries.
In particular, with regard to money laundering cases, the goal of the criminal system is to clear the predicate offences. 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 Suspicious Transactions Reports (STRs) and 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 conducted 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.
The advantage of starting an investigation pursuant to article 261 Gcc is the accessibility to information. Thanks to the *Geldwäschegesetz* (GwG), indeed, it is possible to require information from the private sector about the suspicious transaction. The GwG imposes the duties of recording information about customers and to share this with law enforcement agencies. The possibility of exchanging information with the BAFIN represents a great advantage in terms of speed of the investigation and of availability of data.

- **What is the impact of money laundering on German society and economy?**

All actors have an interest in combating money laundering, from the banks to the government. Among the police, instead, there is a very strict engagement in the fight against crime. The police has a different approach, we perceive the infiltration of any type of dirty money in the legitimate economy as a threat.
In the beginning banks were afraid of reporting suspicious transactions, because they feared a loss of reputation. Currently, instead, they do file many STRs, because they are afraid of becoming victim of a money laundering scheme and thus of being pointed as not compliant with anti-money laundering regulations by the newspapers. For instance, the banking sector has a prejudice against bit coins, therefore they often block transactions that are done with this currency, in order to prevent suspicious operations. Also, banks fear the monitoring process conducted by the BAFIN. On the other side, other businesses and professions do not have the

same approach. For example in the real estate sector, agents file too few STRs. Yet, one cannot compare the German system with other European countries with regard to the STRs regime. Germany is a federal state, therefore the monitoring process of some businesses and professions is undergone at a state level and not by the BAFIN.

The anti-money laundering regime is still developing because it needs to be continuously updated. The fact that much resources are devoted to preventing and repressing money laundering show that institutions do perceive the danger posed by money laundering and that they are interested in tackling the problem.

- **Along with article 261 Gcc, which other measures would allow a more effective fight against organised crime?**

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) StPO. We are used to work without this instrument, so we would not feel comfortable to introduce it in the practice of criminal proceedings. Also, as an individual I would not like to be subject to this burden when dealing with public prosecutions.

The anti-money laundering legislation (article 261 Gcc and the GwG) has introduced a great change in the practice of persecuting organised crime: if before the laws was introduced investigators would have started from the predicate offence in order to trace back the money 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.
However, there is not much evidence that anti-money laundering law is used in organised crime cases. Article 129 Gcc, which criminalises the criminal association, is applied in very few cases, according to the statistics, and it has never been applied with respect to a money laundering case. The BKA definition of organised crime is also too restrictive, and there is no interest in classifying cases under this definition.

- **What does make financial investigations so difficult?**

Financial investigations are indeed very complex. Investigators working in this field receive a special training. The training is conducted at a federal level, so that it is the same for the whole personnel. Young professionals who are currently involved in financial investigations are experts and must keep on update their know-how. In Berlin there are fourteen offices devoted to financial investigations for money laundering cases.

- **Given the low conviction rate pursuant to article 261 Gcc, would you define this law as symbolic?**

No, the effort that has been undertaken so far to prevent and repress money laundering cannot be defined 'symbolic'. Article 261 Gcc facilitates, as previously mentioned, investigations for the predicate offences. Therefore the law is not a symbolic law, it has at least the instrumental function of facilitating investigations. The cooperation introduced by article 261 Gcc together with the GwG is very efficient.

- **How would you evaluate international cooperation for the purpose of prosecuting money laundering?**

International cooperation works very well at least on the paper, because the law provides all the instruments. However, in the practice, this depends mostly in the countries with which cooperation is needed. According to the asset sharing law 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 state and not to the federal State, nor to the policed offices.

13. Interview with *Hagemann*, senior public prosecutor, Department 241, economic crimes of Berlin.

- **How often do money laundering cases recur in your daily practice?**

Daily. For example today we have just displayed 25 cases. Between 10 and 20 cases a day is the standard. This means that every day I work on new money laundering cases and on on-going cases. This is because the department 241 that I direct since 2000 is exclusively responsible for money laundering; only phishing cases are excluded. Phishing is considered standard criminality and when we receive such cases we forward them to the competent department. The most recurrent alleged predicate offence is computer fraud pursuant to article 261 (1) 1 (4) Gcc, but the catalogue is very broad, other recurrent offences are for example fiscal offences, or property crimes in a broad sense. Rarely money laundering cases are connected to violations of the immigration law or of intellectual property rights, we have never had a case of *Kapitaldelikte* (capital offences). The STRs that arrive simultaneously at the FIU and at the public prosecutors office, trigger a preliminary investigation that has to bring to a first clearance. After these preliminary investigations, which in the case of legal persons consist of a research in the company register, the cases arrive to my office 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 proceeding is closed and the case is considered completed. In the case that the suspect has an on-going proceeding, we need to clarify whether the two proceedings can be dealt together.
We need to decide from the beginning whether the reported transaction corresponds to one of the situations described in article 11 (1) a GwG. In case of a '*Frist Fall'*, prosecutors have 48 hours to decide whether the reported transaction can be conducted. In the opposite case, the bank account or the assets are temporarily seized. Only after the conviction the seizure becomes permanent and the assets are confiscated.

- **Is article 261 Gcc effective to tackle money laundering and organised crime?**

Article 261 Gcc is one of the unhappiest offences that the legislator has ever added in the criminal code. The wording is very unclear, and the prosecutors who do not work in this department none has ever even read it. 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. The provision is not part of the legal education and is not part of the state exam for legal professions in Berlin. Neither in the university article 261 Gcc is part of the examinations, is what 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 causes the fact that often when we bring forward a charge for money laundering, the courts are very surprised and do not how to act.
The complexity relies on the link between the predicate offences listed in the catalogue and the main offence of money laundering. In addition, for property offences, prosecutors need to bring evidence of the commission in an organised way or for commercial purposes. Also the burden of proof required to prove a money laundering case is very vague.
Unfortunately even the jurisprudence has not managed to clarify the legal framework. Decisions taken by the upper state courts or by the Supreme Court are confusing and do not set clear guidelines. There is jurisprudence in the topic, whether it is useful to direct criminal action is another question
Decisions that have been published recently are not tackling fundamental issues, they deal with cases of standard economic activities,

I commented on a decision of the Supreme Court of last year (ndr 2014) about the determination of the concept of 'procuring' with reference to a bank account. The high state court stated that the action of procuring starts when the money is withdrawn from the bank account, while I believe that the procuring action starts already with the transfer of the money on the bank account, because it provides the possibility of using it.
In conclusion, the law is not effective because it is too complex. The problem relies on the fact that article 261 is tightly connected to the GwG. Therefore, although it is a criminal law, is 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.

- **Given the fact that article 261 Gcc is not effective, what would you modify to improve its effectiveness?**

I have never thought about this question, because my competence has always been before connected to seizure and confiscation of criminal assets. I have never reflected on possible changes of the law; I have rather focussed on the understanding of the categorisation of the provision, in order to improve the prosecutions work. Now I can work with this provision and I can say that in this department we obtain very successful results. However the offence is too vague and complex to be integrated successfully in the criminal justice system.
The problem relies on the law-making process. The offence derives from a complex international and European law-making process that was influenced especially by the US.
The introduction of the FIU, for example, was based on the US American system. The fact that the offence was formulated so vague brought for example to very different formulation of the money laundering offence in the European Member States. The only common point of the different legislations is the fact that proceeds of crime should not stay with the perpetrators, yet the offences have been designed very differently.
Since the spread of phishing activities the offence of money laundering has become a standards crime and there are much more convictions for article 261Gcc than for article 259 Gcc for example. Usually the standard perpetrator is the so-called 'financial agent' that would be punished under article 261 (5) for the reckless conduct. Yet, phishing cases can be convicted also for intentional conducts. We had for example yesterday a case of reckless money laundering and the individual was charged for a 9 months sentence.

- **Which other instruments would serve the fight against money laundering and organised crime more effectively?**

The confiscation of criminal assets is a well-known instrument to tackle money laundering and organised crime, the provisions in this case are well formulated, the problem is the implementation. Again, there is widespread lack of knowledge about the possibilities that the law offers. Therefore often the law enforcement acts in a wrong way or does not take completely advantage of the forfeiture legal potentiality. The rules about confiscation and seizure are usually not tested during the legal education, because, although they are part of the state exam program, they are not standards rules, rather ancillary provisions. For example, article 111i) StPO4 that was introduced in 2007 is considered too complex and thus is not taken seriously by the personnel. The framework provided by this article needs to be applied in the very beginning of the proceeding, otherwise it would not function properly. The offices of public prosecutors should have an interest in confiscating assets

4Article 111 i StPO regulates the possibility of maintaining the seizure.

because such assets remain in the availability of the Bundesland and is not shared at the federal level, as it happens for assets connected to tax offences.

Investigative instruments linked to article 261 Gcc are not particularly more invasive than those inked with other property crimes. In case of a suspected commission on a commercial basis or in an organised form, there is indeed more possibilities 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 (5) Gcc, while last year only one. The nature of the offence does not provide the necessity of using telephone tapping, because usually when there is the suspicion of a money laundering case, this has already happened. Telephone tapping is used instead for offences that might happen in the future of that might be happening at the moment.
We also use this instrument, as in Italy, in cases where we want to disclose the network of perpetrators that act behind the suspects.
At the moment, for example, in the parallel department there is an on-going proceeding about a carousel fraud case and perpetrators are telephone tapped since half a year. In these cases there are no other instruments to investigate.
In the field of the fight of organised crime and money laundering there is the discussion about the necessity of protecting privacy rights. However, we cannot make this distinction in this context. We cannot say that what concerns the private life of perpetrators is not relevant for the investigations.

I believe that self-money laundering should be criminally liable under the criminal code and that article 261 (9) should be deleted. According to the current legislation, a perpetrator of a predatory crime, after having served the five years sentence might be able to go back to the basement where she/he hid the proceeds and enjoy them. The introduction of this liability would increase the effectiveness of the offence of money laundering; we are waiting for the draft of the Ministry of Finance. However, it will be difficult to integrate such novelty in the criminal code, due to the prohibition of the *ne bis in idem.*

- **Which are the goods protected by article 261 Gcc?**

It is an old debate. In the past there was the idea that the law could protect only individual goods. In the recent debate about the goods protected by article 261 Gcc, instead, many different goods are taken in consideration that do not only refer to personal rights. Article 261 (1) protects also individual goods connected to the predicate offences, while article 261 (2) 1) Gcc is similar to the offence of 'receiving stolen goods' so that the good protected is every transaction that is in contact with the illegal object, article 261 (2) 2) protects only the collective interest of the market economy.

- **Germany has been defined by the media as an Eldorado for money laundering; what is your opinion on this statement?**

I do not have the absolute number. The dark number is in this field much higher than in other fields. What it emerges through the legal prevention and repression is only the peak of the iceberg. Despite the number of STRs has increased in the last years, most cases remain in the dark area.
We receive many STRs where international business is involved and several transactions are conducted also in offshore jurisdictions, such as the Virgin Islands, or through countries like Cyprus, Estonia and Latvia, then to Germany and back to Estonia. However, we are not

able to trace back the flow of money and to find evidence of a predicate offence, we should perhaps observe such financial flows for years in order to trace the criminal network acting behind. This would be really time-consuming; it would require much more human and technical resources. Despite the existing framework among EU Member States, such financial investigations are too expensive and complex and no country has enough resources to undergo such investigations. If we require international cooperation Member States are willing to do it, however, by the time they manage to provide us with the information needed it might be already too late.

14. Interview with three anonymous public prosecutors.

- **How often do money laundering cases occur in the legal practice?**

We handle money laundering cases very often. However, despite the high number of Suspicions Transactions Reports (STRs) received, only few trigger an investigation. The burden of proof of the illegitimate origin of the assets is very high, therefore only few cases are initiated on the basis of the information received through STRs. For example, when criminals use relatives to launder their money, and the relatives have a legal source of income, it is difficult to bring evidence of the illegal origin of that specific asset, since money has a neutral nature. While it is easier to catch the nominees of dummy companies, it is much more harder to catch those who act behind them. Most often, indeed, nominees do not know themselves who is managing the business in the reality. Unfortunately, there is plenty of individuals willing to act as nominees, in exchange of some profit.

- **Is the anti-money laundering law effective to tackle organised crime? Which/Would other instruments (would) be more effective?**

The confiscation of criminal asset is a much more effective punishment for money launderers than one year of imprisonment. Asset confiscation is a quite recent legal measure, it exists since almost ten years. The problem is that money laundering is a transnational phenomenon, so that as soon as the money has crossed several countries, it becomes very complex to trace back the paper trail and to conduct financial investigations finalised at confiscating the 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 reach Germany, they have an appearance of cleanliness. Despite the fact that banks file many STRs, it is complex for us to work with the little information contained in the files. More transparent regulations with respect to companies and financial transactions would help prosecutors a lot in revealing the identity of those who act behind shell companies.
The inversion of the burden of proof, in this scenario, would help us to overcome these obstacles. If we could infer the illegal origin of assets from circumstances and then require the offenders to prove the contrary, this would contribute enormously to the prosecution of money laundering cases.

The mere suspicion of the illegal provenience of, for example a high sum of cash money suddenly deposited on the bank account of a low-income person (e.g. Hartz-IV-Empfänger), would not suffice to receive authorisation to undergo a search in the house of the person. Even though we could indeed carry out the search, it would be anyway very difficult to find evidence of the commission of a predicate offence and of the link between that offence and the suspicious transaction.

- **How is international cooperation for the purpose of money laundering prosecutions?**

Issues relating to international cooperation 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 the practice. Most often the cases do not even reach the investigation stage, because of the lack of evidence for starting investigations.

However, the lack of international cooperation does represent a problem, especially when dealing with some jurisdictions (e.g. we are waiting since four months to cooperate with law

enforcement agencies based in Rome). Also foreign banks -if they do not belong to the same group of a national one- are reluctant in providing help for money laundering investigations. In theses cases we are forced to deal with public authorities of the foreign states, but they require a higher burden of proof to cooperate.

- **Which type of money laundering cases do you handle?**

Most cases are connected to frauds 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 US or in Australia with polish surnames, contacted by a fictitious nephew, who would ask for a financial help through a pretext, the amount of money would be received by a 'financial agent', who then would transfer it forward to the beneficial. The 'Romeo scam' functions in a similar way, but the victim is contacted for the purpose of dating. 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 sums. Also in these cases the 'fees' paid by the victims are received by 'financial agents' or on fake bank accounts.

In all these cases, individuals 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 conducts, namely those who knew or could have known about the illegal origin of the money. Usually investigations do not manage to reveal the whole organised network behind the scheme.

Other money laundering cases dealt with in other departments of the public prosecutors offices are related to drug smuggling and trafficking, human trafficking, cigarette smuggling and tax evasion perpetrated through the sell of gold. In such cases 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 (*Steuerkarruselen*) there is often organised crime.

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. Criminal law is not enough to deal with illicit financial flows, because money flows are per se not criminal.

15. Interview with anonymous partner from the Federal Ministry of Interior (BMI)

The BMI usually does not grant public interviews, this talk is exceptional, yet it cannot be recorded.
The BMI perceives the phenomena of money laundering and organised crime through the data provided by the sixteen states, the BKA and the FIU. However, the BKA definition of organised crime is too restrictive and does not comprehend many activities that are typical of criminal networks.5 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. Also, the FIU perspective is focussed only on the offence of money laundering, but does not take in consideration the predicate offences.

- **Is the German anti-money laundering regime effective to tackle money laundering and organised crime?**

We cannot say whether the anti-money laundering regime is effective or not, because we do not possess the data to do such assessment, it is difficult for us to tell. Partly this is due to the federal system and to the fact that data are gathered at a state level.
Frank [Andreas, anti-money laundering expert] criticises Germany for not being effective in tackling money laundering. In his opinion there is a lack of resources to deal with money laundering. We believe that quantity does not mean quality, and that to have qualified personnel is more important than to have a high number of personnel.
Also, it is important to respect fundamental principles of the legal system, while fighting organised crime. For instance, Germany uses telephone tapping less than other countries in investigations against organised criminal groups, because we consider the personal right to privacy higher than the public interest to persecute money laundering activities. I addition, tapped telephone calls made by foreign nationals are very difficult to interpret and offenders - who know that they might be tapped - use cryptic messages. Therefore this investigative tool is not considered very effective.

- **What is the risk of money laundering in Germany?**

There is a report published by the BMF on the risks of money laundering for the financial sector. However the report is based on assumptions and not on proved data, therefore it cannot assess the risk for the whole Germany. The BMI does not possess enough statistics o assess the volume of money laundering in Germany. The biggest threat posed by money laundering in Germany is the infiltration of illegal structures in the legitimate economy. The fact that Germany has a secure banking sector and a strong financial centre attracts money launderers.
The problem is, again, when the money comes from a foreign country. First of all it is very complex to prove the illegal origin if the predicate offence was committed abroad; secondly there is not much interest in investigating these cases. For instance, it is quite acknowledged 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 it would be very hard to bring

5 *'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.

evidence of such illegal antecedent act. Despite the existence of strong suspicions, if prosecutors cannot prove the illegal provenience and the predicate offence, the case will not end with a conviction for article 261 Gcc. Also, often money laundering activities happen in places that are above suspicion, such as the city of London. After all, pecunia non olet.

- **Why has been article 261 Gcc amended so often?**

The scope of the money laundering offence has been introduced and consequently broadened to comply with international standards. Before article 261 Gcc was introduced, the conduct of laundering proceeds of crimes was considered an aggravating factor. Currently, media pose a lot of attention on the phenomenon of money laundering. Even the coalition agreement speaks about the necessity of updating the offence in the German criminal code to the international standards. 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 crime activities to ever-new fields. However, the introduction of the crime of financing of terrorism under the umbrella of the anti-money laundering regime seems odd, because actually the financing of terrorism is the opposite phenomenon, since it consists of taking money with a legitimate origin 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 part of it.
The FATF aims at controlling the financial sector rather than at tackling organised crime, however, through the control of financial transactions, the goal is identifying suspicion activities, in order to reveal illicit flows, and among them also organised crime operations.

- **Is the anti-money laundering regime effective?**

The anti-money laundering regime is effective, however it is difficult to prove the effectiveness of the system because we do not have parameters to evaluate it. The police has a different idea of efficiency than the one of political effectiveness. According to the police, effectiveness corresponds to putting in practice the orders and the law in the best way possible. The process of assessment of the effectiveness of the anti-money laundering regime goes from button up. Instead of making an assessment at the federal level, every Bundesland reports about problems of application and proposes improvement measures. It is then a duty of every state to improve the system. There is no feedback or 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. Article 261 Gcc is difficult to prove in a trial. However, the goal of the law enforcement is not to confiscate the assets, but rather to imprison the offenders. Therefore, even though individuals are convicted for another offence, maybe the predicate offence, instead of for money laundering, the result does not change. The effectiveness of the offence is measured through the clearance rate (*Aufklärungsquote*): The important is to solve the case and the type of charge is not relevant, while the sanctioning of the individual is more important. In addition, confiscation is possible also for other crimes.
The FATF experts are, instead, economists and do not understand properly the legal way of thinking, they have looked at formalities, and not at the real effects of the law. For example if one compares Germany and the UK, the latter has much more STRs filed to the FIU than Germany. Yet, Germany has started the same amount of investigations of the UK. In Germany we look at the outcome of the process and not at the input. In addition, in Germany it would not be possible for the police to collect so much data about citizens without that they would trigger an investigation. It is, therefore, a legal culture issue.
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 have already these kinds of registries and we could use them better, without creating new ones. Citizens, whose data are collected in a public registry, would see the creation of such a register as a danger.

- **What would you improve in the anti-money laundering regime?**

If I could improve the 261 Gcc I would adopt the 'all crime approach', I would formulate the text in a clearer way. However I would not consider the introduction of criminal liability for money laundering under article 261 Gcc in case of the so called ‘self- money laundering'. Confiscation should be tackled separately from money laundering. It could be a very useful preventive tool. However, confiscation is not the purpose of the anti-money laundering regime.

16. Interview with anonymous defence attorney.

- **How often do money laundering cases recur in your daily practice?**

I am not obliged to file STRs, only specific categories of attorneys are obliged. This is often confusing. According to article 2(1) 7 of the GwG, only those lawyers who provide legal counsel for the planning and conduction of private civil law businesses in the real sector field, or for the funding of a company. As defence attorney the problem emerges only while accepting the fees from the client who has allegedly committed one of the predicate offences. I have already refused a fee from a client.
The money laundering cases I dealt with were cases in which the offenders would use someone's bank account for the purpose of laundering proceeds of crime. However, the bank account holders had no clue about was what happening. In one case it was very probable that a criminal network was involved, but the prosecution did not investigate it further.

- **Is the anti-money laundering policy effective?**

From a policy perspective I would say that article 261 Gcc is not effective, however as a defence attorney I would not be able to say this. As an attorney I would not be able to complain about the scarce effectiveness of criminal law.
In my opinion article 261 Gcc is scarcely used. Our criminal justice system persecutes rather the predicate crimes, given that predicate crimes perpetrators cannot be convicted for money laundering. I have cases in which predicate offences are alleged; in such cases one could charge the assistants for money laundering, yet this does not usually happen.
For example, in corruption cases, once a company employee has bribed a foreign public official, the whole profit of the company is contaminated. Therefore the company would not be able to pay neither the loans to the workers. However, all this will not be object of prosecutions. Law enforcement focuses on the predicate crimes, it does not seek to indict those who legally profited from the offences.

Article 261 Gcc does not serve the purpose of tackling organised crime. Those who are not intimidate by the potential liability for offences connected to organised crime, would not be intimidated by the offence of money laundering. Organised crime invests ill-gotten gains in a way that it is not detected through the GwG. Nobody who acts in an organised criminal group would come to the idea not to commit a crime in order not to be liable for money laundering.

- **Would other measures be more appropriate to tackle money laundering?**

I cannot tell much more than that I believe that the best way to tackle the issue would be through prevention. With regard to the confiscation of assets, the law is quite reasonable and there are no main hindrances.

I do not think that the introduction of the liability for the perpetrators of the predicate offences would solve the problems. On the contrary, the provision would collide with the criminal legal system and the constitutional principle of freedom from self-incrimination *(Selbstbelastungsfreiheit)*.

- **What are the legal hindrances that obstacle an effective implementation of the anti-money laundering policy?**

Money laundering can be prosecuted only if there is enough evidence about the predicate offence. Investigators need to prove the commission of a predicate offence and only if the

suspect has not participated in the antecedent act, the prosecutor can charge the person for money laundering. This lower the possibility of prosecutions of convicting individuals for money laundering cases.

The problem of article 261 Gcc is that is not clear which the legally protected good are. I do not see the socio-legal urgency of criminalising money laundering. Money emanating from a crime should be punished separately. The State should criminalise the conducts, yet the chain of conducts does not make sense to me. It is quite complex to discern those who act in good faith and those who, instead, were aware of the predicate offences. Also, we believe that is not our duty to do prevention for the state, prevention should be done by state authorities, not by lawyers. In my opinion the article is a legal policy failure.

- **On the basis of the low effectiveness of the law, would you define article 261 Gcc a symbolic legislation?**

Yes, I do agree that the provision is an example of a symbolic legislation, even at the European level. The German government did not formulate this offence on its own.
The GwG does not play a relevant role in the private sector besides in the financial sector. Compliance for company is important to avoid bribery and to undergo risk management, about the possibility of becoming victim of a fraud. Companies do undertake due diligence with customers, however they do not do it specifically because it is imposed by the GwG, but rather because they comply with tax law. I think that for the FATF the topic of money laundering is a possibility of creating new professionalism and job positions.

- **The media has described Germany as an Eldorado for money launderers, what is your opinion on that?**

Yes, it may be that Germany is an Eldorado for money launderers, because it has a large economic and financial sector. Tax evasion is a predicate offence causes and therefore a lot of capital is intermingled and thus contaminated. For example, with regard to the famous case of Hoeneß, he could not buy anymore bread, because his property was contaminated. This shows the absurdity of this law.

Interview with anonymous defence attorney.

- **How often do money laundering cases recur in your daily practice?**

In the last two and half years I have had ten cases of money laundering, of which eight have been closed and two are on-going. Trials in the field of economic crimes last longer than standard ones, between three to five years. This is absurd, it is very ineffective. Law enforcement authorities are, due to the lack of personnel, be able to deal with offence notices in due course.

- **What are the strategies that a defence attorney put in practice to avoid a conviction for money laundering for her/his clients?**

Usually defence attorneys adopt the 'deal' strategy to prevent a conviction for money laundering for the clients, so that the proceeding would be closed pursuant to article 153a StPO. Yet, I cannot speak for all my colleagues. The eight proceedings in which I was involved have been closed pursuant to article 170 (2) StPO,6 because prosecutors could not prove the elements of the offence. Therefore I did not need to use the 'deal' strategy. Sometime, indeed, attorneys can also let that the proceedings 'die' on their own. One can rely on the fact that the longer a proceeding lasts, the harder would be for investigators to provide evidence of the facts. When I realise, as in the two on-going cases, that the prosecutors are not conducting any further investigation for more than a year, I am happy for my clients. After two or three years, for example, witnesses are not able to remember any more about the circumstances that they assist, records are difficult to provide after years, so that the insecurity of a public prosecutor's office will be grow bigger and bigger.
The risk for the prosecutors is very high, if they prefer charges and decide to proceed with the trial to achieve a conviction, they face 20-30 hearings, up to fifty witnesses to be heard, and so on and so forth; this is a high burden. My clients have not an interest in a conviction but neither in an aquittal. We aim at closing the proceeding through the payment of a financial penalty (*Bußgeld*) pursuant to article 153a StPO. The longer the proceeding takes, the higher is the chance that the prosecution would accept the 'deal'.

- **Is the criminal justice system effective in tackling money laundering?**

I would not be able to assess the effectiveness of article 261 Gcc to tackle organised crime. Yet I do not believe that it has any impact. Criminal law regulates problems when the necessity of criminalising a conduct emerges. In the GDR, for example, there was no necessity of criminalising prostitution or drug criminality, since these crimes were not committed. Individuals had less necessity of stealing because existence and work were guaranteed. I believe that in order to reduce economic crimes, one should modify something in the society rather than using criminal law. I personally think that abolishing the capitalistic system would help reducing money laundering, because the capitalistic economy aggravate the impact of economic misconducts.

I cannot tell whether the instruments in the hands of the investigators are too invasive for my clients. Law enforcement and the judiciary are overworked, so that they try the most effective

6Art. 170 (2) Conclusion of the Investigation Proceedings StPo: 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.

and fastest way to bring the proceeding to a result, whether the result looks like. Yet, this effectiveness does not propagate in the whole system. Many policemen and prosecutors work contemporaneously at different cases. The question is: which case should be dealt as the first one? Theoretically the oldest one. However, in the practice, it happens that a new case gets the priority, so that immediately a special commission of 25 policemen would be created to deal with the case and conduct the investigations (for example searches). Examples of such cases would be fraud committed within a big bank or a big corporation. These cases occupy investigators intensively for a long time; the records produced are 200.000-300.000 pages long that would need to be read. If the media get involved, the urgency of dealing with the case increases. In this context is impossible to proceed with a structured and effective work. Our criminal justice system is dilapidated, it does not work anymore; it is qualitative and quantitative overburdened.
As defence attorney I am not unhappy about it. Yet, I can tell that the whole system does not work as it should. A sample case is the one of the Hoeneß,7 in which investigations in Bayern started on a suspected tax evasion of 3,5 million Euros, when the process started the amount of tax evaded amounted to already 15 million, during the trial a witness referred that the volume amounted to even 25 million Euros. The judiciary received 70.000 pages of recorded information about the case from Switzerland, which might have never been read started investigating. The trial ended with an imprisonment sentence of 3,5 years. Against an amount of at least 25 million Euros of tax evasion, this is a ridiculous penalty. In addition, no further investigation was conducted on the basis of the 70.000 pages, which might have been a source of further offences notices. In my opinion this could be called as obstruction of justice in office (*Strafvereitelung im Amt*). In fact, prosecutors should have suspended the case and proceeded with further investigations on the documents received. Indeed, on the civil law side, there is a trial going on, in which the proved amount of tax evaded reached already 32 million Euros. I wonder whether a new case will be initiated on the basis of the new evidence. Germany is a very corrupted country, especially the state and the economic sector. The most corrupted state is Bayern, therefore I do not believe that there will be any further investigation. This would destabilise the equilibrium between the society (the fans), the sponsors, like Siemens and so on and so forth.

- **What are the legal hindrances that obstacle an effective implementation of the anti-money laundering policy?**

It is not only due to the lack of resources that article 261 Gcc s not effective. The lack of personnel is, in fact, connected to a general reduction of the public budget, due to the financial crisis. The only difference between Greece and Germany is indeed, that Germany still receive 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 by the remaining colleagues. This is one of the causes of the long preliminary investigations and proceedings. Yet, no politician would admit it.

7Uli Hoeneß, president of Bayern Munich football team, was convicted on 13th of March 2014 for tax evasion committed on speculative business in Switzerland. See *Die Zeit online* "Hoeneß spekulierte mithilfe mehrerer Banken", 26/03/2014, available at http://www.zeit.de/wirtschaft/2014-03/hoeness-vontobel-baer, last accessed on 30/06/2015.