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### **Articles**

- Constraints on developmental regionalism in low-income countries: the limitations  
of convergence policies ..... Alice Nicole SINDZINGRE 1
- The Introduction of International Norms Relating to Gender Equality in the Japanese  
Armed Forces in the Period of 1954-1979 ..... Slavica NINIĆ 29

### **Symposium**

- Schutz wertvoller Stadtlandschaften durch das Zivilrecht?  
Bemerkungen zum Schutz individueller und kollektiver Rechtsgüter  
..... Alexander PEUKERT 45
- Legal protection of landscape in Japan - A response to Prof. Peukert's presentation  
..... Sayuri TAIRA 71

### **Seminar**

- Foreword ..... Dai TAMADA 81
- Network Regulation of Cross-Border Economic Crime ..... Sara DE VIDO 83

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# Network Regulation of Cross-Border Economic Crime

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## 1. Introduction

In his speech at the opening of the Seventh Session of the Conference of the Parties (COP) to the UN Convention on Transnational Organized Crime (UNTOC), the so-called Palermo Convention, the United Nations Office on Drugs and Crime (UNODC) Executive Director Yury Fedotov affirmed that “the fight against organized crime cannot be won by any one government, nor by governments alone. Civil society and the private sector play an important role, also in raising awareness and strengthening resilience to organized crime”.<sup>2</sup> He also noted that, in the debate about the successors to the Millennium Development Goals, protection against crime and violence is a major concern for people everywhere.

These words confirm that the fight against cross-border economic crime has become a top priority issue for the international community and civil society worldwide in recent years. For the purpose of our research, with the expression cross-border economic crimes or transnational economic crimes we identify offences committed across borders, in more than one country, having economic implications. Among economic crimes, money laundering emerges as it is the “natural or logic consequence”<sup>3</sup> of profit generating offences like drug trafficking, terrorist financing, fraud, corruption, diamond trafficking. As a matter of fact, the origin of illicit gains obtained through criminal activity need to be concealed, “laundered”, in order the funds to be used in the legal economy.<sup>4</sup> The character of transnationality derives from the fact that criminals take advantage of the differences in national legislations in order to commit illegal activities and/or to disguise the origins of illegal money. As clearly reported by the Secretariat to the Conference of the Parties to the Palermo Convention, “while transnational organized crime takes on many forms and presents a diverse set of challenges, which can vary greatly between States and regions,

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2 *No room for complacency in global crime fight, says UNODC Chief at crime conference opening*, press release, 6 October 2014, <http://www.unodc.org/>

3 P. Conte, J. Languier, *Droit pénal des affaires* (Paris, Dalloz, 11ed., 2004), p. 238, defining it as a « consequential crime ».

4 On the evolution of anti-money laundering legislation, see, *inter alia*, G. Stessens, *Money Laundering. A New International Law Enforcement Model* (Cambridge, Cambridge University Press, 2000); P. Reuter, E. Truman, *Chasing Dirty Money. The Fight against Money Laundering* (Washington: Institute for International Economics, 2004); W. Gilmore, *Dirty Money* (Strasbourg, CoE edition, 2011); B. Unger, “Money Laundering Regulation: From Al Capone to Al Qaeda” in B. Unger and D. Van Der Linde (eds), *Research Handbook on Money Laundering* (Cheltenham, Elgar, 2012), p. 19, R. Razzante (ed.), *Il riciclaggio come fenomeno transnazionale: normative a confronto* (Milano, Giuffrè, 2014). An economic perspective in D. Masciandaro, “Money Laundering: The Economics of Regulation” (1999) 7 *European Journal of Law and Economics* 225.

organized criminal groups and their activities share a number of characteristics. Such groups are often flexible, dynamic, innovative and resilient; they adapt and respond quickly to law enforcement measures, easily identifying new markets, commodities, routes and methods of operation, forming new alliances when necessary and engaging in a growing range of illicit activities”.<sup>5</sup> Considering the “complex and volatile transnational threat”<sup>6</sup> caused by criminality, the answer must be international, or, as we will try to prove, truly “transnational”. Over the years, the response at the international and regional level has been twofold: first, international cooperation by means of bilateral or multilateral treaties, and, more recently, by means of networks. The purpose of the first part of this article is to explain what we consider for “network regulation” in the fight against transnational criminality, and to provide some concrete examples of this concept. The notion has been developed in the field of financial regulation but we will strive to demonstrate that it perfectly suits the struggle against different forms of criminality expanded worldwide. In a second part of this contribution, we will outline pros and cons of network regulation in order to answer to the question as of whether or not it can be considered as an alternative to international treaties in responding to current global threats.

## 2. From international treaties to the emergence of networks to combat transnational crimes

States have concluded several international treaties in order to establish forms of cooperation in the fight against specific forms of transnational crimes. Here some examples both at the international and regional level are given as illustration. The UN General Assembly adopted the Convention for the suppression of the financing of terrorism in 1999, which entered into force only in 2002, after the 2001 terrorist attacks showed how terrorists need financial support for the purpose of carrying out their illegal activities.<sup>7</sup> The most comprehensive legal instrument in the field is the UN Convention against transnational organized crime, adopted in 2000 and entered into force in 2003.<sup>8</sup> This widely ratified treaty criminalizes the participation in an organized criminal group (Article 5), money laundering (Article 6), corruption (Article 8), and obstruction of justice (Article 23), and provides the legal framework for mutual legal assistance, extradition and law enforcement cooperation. Furthermore, it includes provisions on training and technical assistance. Specifically

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5 Ensuring effective implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, Report of the Secretariat, 4 July 2014, para. 3.

6 Report of the Secretariat, cit., para. 4. See also, for the Asia Pacific Region, A. Schloenhardt, “Fighting Organized Crime in the Asia Pacific Region: New Weapons, Lost Wars” (2012) 2 *Asian Journal of International Law* 138.

7 States parties: 186 (last update 3 December 2014). Italy ratified the Convention in 2003, Japan in 2002.

8 The Convention (States Parties 183 as of 3 December 2014) is supplemented by three Protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Italy ratified the Palermo Convention in 2006. Japan only signed it in 2000.

devoted to the fight against corruption is the UN Convention against corruption adopted in 2003, entered into force in 2005.<sup>9</sup> Interestingly, the UN Convention does not define corruption, but it rather criminalizes a range of corrupt behaviours which involve both the public and the private sector. Active corruption is criminalized by the Organization for Economic Cooperation and Development (OECD) Convention on combating bribery of foreign public officials in international business transactions, dating back to 1997.<sup>10</sup> Shifting to the regional level, and limiting our perspective on Europe, the Council of Europe (CoE) Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism was adopted in 2005, replacing the 1990 Convention in the mutual relations among States parties to the former.<sup>11</sup> Two CoE conventions are expressly aimed at combating corruption, dealing with civil law and criminal law aspects respectively. Dating back to 1999, they have been ratified by Italy no sooner than 2013.

The examples provided demonstrate that the fight against transnational criminality has gained momentum in recent years and that States have agreed on certain measures necessary to prevent and suppress transnational crimes. Nonetheless, two issues arise. First, conventions need implementation at the domestic level. Therefore States are obliged to criminalize the conducts enshrined in the treaties, to extradite or adjudicate alleged perpetrators, to provide mutual legal assistance and to adopt preventive measures. The provisions related to preventive measures are however quite vague. Let us provide an example. Article 7 of the Palermo Conventions requires States to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions. The provision at stake is non self-executing; it requires, in other words, the national legislator or the competent authorities to clearly define the regulatory and supervisory regime for financial institutions in accordance with the domestic legal system. It follows that differences in implementation among States may occur.

Secondly, international treaties face one major obstacle in implementation, that is the assessment of State compliance with the treaty provisions. The 1999 UN Convention does not provide any mechanism to verify States parties compliance, whereas the UN Palermo Convention and the UN Convention against corruption establish the Conference of the Parties, which constitutes a political body periodically meeting in order to ascertain the respect of the convention by States. For the sake of completeness, it should be acknowledged that the COP to the Convention against corruption established in 2010 the *Implementation Review Process*,<sup>12</sup> which

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9 States parties 173 (as of 3 December 2014). Italy ratified the Convention in 2009, Japan only signed it in 2003.

10 Italy ratified the convention in 2000, Japan in 1998.

11 25 Parties, Italy only signed it in 2005.

12 <https://www.unodc.org/unodc/en/treaties/CAC/IRG-sessions.html> (last accessed on 7 December 2014).

also provides technical assistance and has spurred the process of ratification. The implementation of the Palermo Convention is ensured by the activity of several working groups and was strengthened by a Pilot Review Programme, which evaluated in the period 2010-2012 the status of implementation of some provisions of the Convention in few volunteer States parties.<sup>13</sup>

A question naturally arises as to whether or not international treaties are effective tools to combat transnational crimes. The answer is not straightforward. The role of international conventions, as we will argue later in this article, should not underestimated as they create the legal background to legitimize cooperation among States. Nonetheless, treaties have proved to be insufficient in order to create a common ground for cooperation.

In recent years, the international community has faced a new phenomenon, which only apparently contradicts the traditional categories of public international law: the establishment of new bodies which cannot be defined international organizations, but that nonetheless allow cooperation, mainly among domestic authorities (central banks or financial intelligence units, for instance). “Network”, a term which is almost unknown in legal doctrine, well depicts the situation of bodies which are characterized by horizontal rather than vertical relations.<sup>14</sup> Nonetheless, this concept was not created for the purpose of identifying the mechanisms in the fight against transnational criminality, but rather to depict the new financial architecture emerging from the global financial crisis, the Financial Stability Board, the Basel Committee being a couple of clear examples.<sup>15</sup> Bodies that can be defined networks are typically not grounded in constitutive treaties, they are composed of regulators instead of (only) political élites or heads of States, and they are characterized by limited institutionalization with generally small secretariats and flexible mandates. These networks are sometimes simply composed of private parties, like banks. Network regulation or “transnational regulation” has developed over the years in

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13 *Evaluation of the pilot programme to review implementation of the United Nations Convention against Transnational Organized Crime*, Report of the Secretariat, 27 August 2012.

14 In this sense, E. Tourny, “La gouvernance financière internationale face au paradis fiscaux”, in M. Arcari, L. Balmond, (eds), *Global Governance and the Challenges of Collective Security* (Napoli, Ed. Scientifica, 2012), pp. 311-312; M. Zürn, “Global Governance as Multi-Level Governance”, in H. Enderlein, S. Wälti, M. Zürn (eds), *Handbook on Multi-level Governance* (Cheltenham, Elgar, 2010), p. 80; R.H. Weber, “Multilayered Governance in International Financial Regulation and Supervision” (2010) 13 (3) *JIEL* 692.

15 A lot of literature is available on “networks”. See, *inter alia*, M. Giovanoli, “A New Architecture for the Global Financial Market”, in M. Giovanoli (ed.), *International Monetary Law: Issues for the New Millennium* (Oxford, OUP, 2000); A.-M. Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004); P.-H. Verdier, “Transnational Regulatory Networks and Their Limits” (2009) 34 *The Yale Journal of International Law*; K. Alexander, “Global Financial Standard Setting, the G10 Committees, and International Economic Law” (2009) 34 *Brooklyn J. Int’l. L.*; E.J. Pan, “Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks” (2010) 11 (1) *Chicago Journal of International Law*; T. Cottier, R. M. Lastra, “The Quest for International Law in Financial Regulation and Monetary Affairs” (2010) 13 (3) *JIEL*; D. Zaring, “International Institutional Performance in Crisis” (2010) 10 (2) *Chicago Journal of International Law*; R. Bismuth, *La coopération internationale des autorités de régulation du secteur financier et le droit international public* (Bruxelles, Bruylant, 2011); C. Brummer, “How International Financial Law Works (and How It Doesn’t)” (2011) 99 *The Georgetown Law Journal*; C. Brummer, *Soft Law and the Global Financial System* (Cambridge, Cambridge University Press, 2012); ID, “Why Soft Law Dominates International Finance – and not Trade”, in T. Cottier, J.H. Jackson, R.M. Lastra (eds), *International Law in Financial Regulation and Monetary Affairs* (Oxford, OUP, 2012); E.F. Greene, J.L. Boehm, “The Limits of ‘Name-and-Shame’ in International Financial Regulation” (2012) 97 *Cornell Law Review*; D. Zaring, “Finding Legal Principles in Global Financial Regulation” (2012) 52 *Virginia Journal of International Law*.

several sectors, including the environmental one and in the field of harmonization of technical requirements.<sup>16</sup> Two questions arise: first, why do we need informal means of cooperation? Second, why do we need the involvement of the private sector? The answer to the former relies on the fact that international treaties are the outcome of a long process of negotiation, followed by domestic ratification procedures and the consequent entry into force once achieved a certain number of ratifications. Accordingly, the recent financial global crisis has spurred States to react in a timely way and often to bypass national parliaments in order to ensure an effective answer to current threats. The second question is more “practical” in nature. The involvement of the private sector does not come as a surprise, indeed. Financial institutions and transaction partners or intermediaries (real estate, lawyers, casinos, etc.) encounter (potential) money laundering transactions in their daily business.<sup>17</sup>

It is not the purpose of this contribution to speculate on the nature of these bodies and their legitimacy,<sup>18</sup> but to demonstrate that network regulation (well) works (despite some legitimate perplexities) in the sector we are focusing on. Therefore, some instances will be provided in the following paragraphs. We propose three different categories. The first one is composed of standard setting bodies, like the Financial Action Task Force on Money Laundering (FATF), which establish common standards to be transposed into domestic law. The second category encompasses bodies that realize operational cooperation, in terms of exchange of data and information. To this group belong the Egmont Group and Eurojust. The third category is formed by private bodies like corporations or financial institutions (cooperation private to private). For our purposes, the analysis will be limited to the Wolfsberg group.

## **2. 1. Example of “networks”: The Financial Action Task Force on Money Laundering**

The FATF is the most illustrative example of “network” in the fight against transnational criminality and it is included in the so-called “international financial architecture”.<sup>19</sup> By means of its action against transnational criminality, the FATF contributes to market integrity and therefore to financial stability. FATF was established by the G-7 in 1989 and it is now composed of 34 States and two international organizations, namely the European Union and the Gulf Cooperation Council. It is composed of the ministers of the Member States Parties. Since its

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16 T. Hale, D. Held (eds), *Handbook of Transnational Governance* (Cambridge, Polity, 2011). In environmental law, see J. Brunnée, “Enforcement Mechanisms in International Law and International Environmental Law” in V. Beyerlin, P.-T. Stoll, R. Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements* (Leiden, Boston, Brill, 2006), 1.

17 B. Unger, F. Van Waarden, “How to Dodge Drowning in Data? Rule – and Risk-based Anti-Money Laundering Policies Compared”, in B. Unger and D. Van Der Linde (eds), *Research Handbook on Money Laundering* (Cheltenham, Elgar, 2012), p. 399.

18 See, extensively, S. De Vido, *The FSB and the Other New Modes of Governance*, in M. Waibel, G. Bastide Burdeau (eds), *The Legal Implications of Global Financial Crises / Les implications juridiques des crises financières de caractère mondial* (Leiden, Martinus Nijhoff, 2015 forthcoming).

19 See, among others, D. Zaring, 2012, *op. cit.*, p. 693; E. Avgouleas, *Governance of Global Financial Markets* (Cambridge, Cambridge University Press, 2012), p. 185.



creation, it has adopted a corpus of recommendations, periodically revised, to fight against money laundering, terrorist financing (since 2001) and, more recently, the financing of the proliferation of weapons of mass destruction. The recommendations, whose most recent version dates back to 2012, are interpreted in the explanatory notes and are considered to be the widely recognized “standards”<sup>20</sup> in the fight against offences that can undermine the integrity of the global financial market. After the terrorist attacks of September 11, 2001, the international community has realized how vulnerable the global financial system was to criminal infiltration and agreed that States should cooperate in the protection of financial channels from terrorist organizations.<sup>21</sup> The FATF presents a tripartite structure: Plenary, Steering committee and a Secretariat which is based in Paris, at the headquarters of the OECD. One of the most interesting features of the body is that it is not an international organization, having a flexible structure and mandate, but it works as it is. As a matter of fact, the organization has gradually consolidated its structure and it is deemed to be the main body in the fight against money laundering at the international level. Several FATF-style regional bodies established over the years in different regions of the world follow the same guidelines and the same evaluation procedures established by the FATF. Of extreme interest is the way through which the body assesses compliance with its recommendations. Its experts prepare reports after on-site visits and interviews to national authorities. States are ranked compliant, largely compliant, partially compliant and non-compliant in relation to each recommendation. Furthermore, the FATF periodically updates a list of non-cooperative and high risk countries, which prove to be vulnerable to money laundering. Although non-binding, recommendations spur cooperation and induce States to comply.<sup>22</sup>

## 2. 2. Operational Cooperation: The Egmont Group

The Egmont group is described in its official website as “an informal network of financial intelligence units (FIU) for the stimulation of international cooperation”.<sup>23</sup> The definition of FIU is taken from the FATF recommendations. A FIU is a “national centre for the receipt and analysis of: a) suspicious transaction reports; and b) other information relevant to money laundering, associated predicate offences and financing of terrorism, and for the dissemination of the results of that analysis”. Italy has established its own FIU within the Bank of Italy. The Japan Financial Intelligence Center was established within the Organized Crime Department, the Criminal Investigation Bureau of the National Police Agency in 2007.

The adjective “informal” highlights the fact that at the basis of cooperation

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20 The word “standard” is used by the FATF for its recommendations. On the notion of standard as «instrument normatif des institutions de coopération» (normative instrument used by bodies that allow international cooperation), see v. Bismuth, R., *La coopération internationale des autorités de régulation du secteur financier et le droit international public* (Bruxelles, Bruylant, 2011), p. 374.

21 S. De Vido, *op. cit.*

22 See further, S. De Vido, *op. cit.*

23 <http://www.egmontgroup.org/>.

there is not any international treaty, but rather Memoranda of Understanding concluded between Financial Intelligence Units. According to the guidelines provided by the Egmont Group, “whenever possible, exchanges of information should take place without the need for a Memorandum of Understanding, but in some countries it is the domestic legislation that requires an act for the purpose of starting cooperation”.<sup>24</sup> Egmont group falls under the second category we have proposed for our research as it allows FIUs to exchange data and information. Nonetheless, it should be acknowledged that it also produces principles and guidelines for FIUs.<sup>25</sup>

The report named “FIUs in action. 100 cases from the Egmont group” describes successful cases of cooperation among units.<sup>26</sup> An interesting example is the following case, dealing with money laundering through the real estate.<sup>27</sup> The Jamesons, a criminal family, laundered dirty money by purchasing a building in Southern Europe. They financed the investment with a bank loan for which two life insurance policies were lodged as security. A notary and a European exchange office, rather than the individuals involved, had paid the contracts. The insurance company (correctly, we must acknowledge) reported the unusual transaction to the local FIU, which started investigation discovering that the money had been deposited in cash in two other European countries by a person involved in criminal activities. Furthermore, investigation allowed the analysts to discover that other similar investments had been conducted over recent years. A further interesting aspect identified by the analysts was that the family did not have a way of life that matched with the amount of known investments in Europe. The members of this family seemed to have only small incomes and lived in an inexpensive house that was almost entirely financed by a mortgage. Furthermore, according to the local anti-drugs agencies, the family had links with a criminal known to be involved in drug trafficking. The information obtained by the analysts, together with information received by other FIUs, led to conclude that the Jamesons were a criminal organization operating in Europe. The analysts hence decided to send the case to the public prosecutor. The operation under analysis represents a concrete example of how cooperation among FIUs should work. Several indicators, “red flags”, like the inexplicable complex method of purchasing financial products and large-scale cash transactions, constituted the stimulus for further investigation and for a fruitful exchange of information among FIUs.

Notwithstanding many positive cases similar to the one described above, the cooperation among FIUs, even among European FIUs, does not always appear devoid of difficulties. In particular, differences existing in domestic legislation may represent

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24 Egmont Group, *Operational Guidance for FIU Activities and the Exchange of Information*, July 2013, p. 4.

25 The revised *Egmont Charter (2013)*, *Egmont Principles for Information Exchange* and *Operational Guidance for FIUs* provide the foundation for the future work of the Egmont Group and contribute to greater international cooperation and information exchange between FIUs.

26 Egmont Group, *FIUs in action. 100 cases from the Egmont Group*, 2000. Other recent cases are available at this website. <http://www.egmontgroup.org/library/cases> (last accessed on 3rd December 2014).

27 The case is reported at p. 17-18.



a major obstacle to cooperation. A case recently examined by the European Court of Justice can be taken as an example.<sup>28</sup> Jyske Bank Gibraltar, a Gibraltar branch of a Danish bank, was under the supervision of the Financial Services Commission in Gibraltar (home State)<sup>29</sup> and operated in Spain (host State) under the rules on the freedom to provide services.<sup>30</sup> The *Servicio Ejecutivo*, the Spanish Financial Intelligence Unit, asked Jyske to provide documents and information on the identity of its customers, since there was a very high risk that the bank was used for money laundering operations.<sup>31</sup> Jyske only partially answered to the request, invoking banking secrecy in Gibraltar, and therefore was fined by Spanish authorities. Was Jyske obliged to report to the FIU of the host State? The Spanish Tribunal Supremo, before which an appeal against the administrative decision was brought by the bank, referred the following preliminary question to the ECJ: “Does Article 22(2) of Directive 2005/60/EC<sup>32</sup> ... permit a Member State to make it a mandatory requirement that the information which must be provided by credit institutions operating in its territory without a permanent establishment be forwarded directly to its own authorities responsible for the prevention of money laundering, or, on the other hand, must the request for information be directed to the [FIU] of the Member State in whose territory the addressee institution is situated?” The Court conducted the analysis both under the directive no. 2005/60, also known as “third anti-money laundering directive” and art. 56 TFEU. It is not the purpose of our research here to delve into the case, but it is worth commenting on the conclusions presented by the Court in its judgment of 25 April 2013. According to the European judges, “the obligation imposed by that legislation on credit institutions carrying out their activities under the freedom to provide services may constitute a proportionate measure in pursuit of that aim in the absence, at the time of the facts in the main proceedings, of any effective mechanism guaranteeing full and complete cooperation between financial intelligence units”. In other words, lacking precise forms of

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28 ECJ, case C-212/11, judgment of 25 April 2013.

29 Apart from the exceptions in the act of accession, Gibraltar is within the EU and subject to EU law. See I. Hendry, S. Dickson, *British Overseas Territories Law* (Oxford, Hart Publishing, 2011), p. 273.

30 Article 56 TFEU.

31 According to a report prepared by the Spanish FIU “in order to develop such an operation in Spain, the institution has dual support or backing, namely from the branch in Spain of the parent company and from two firms of lawyers in Marbella (Spain). According to information in the public domain, the proprietor of one of the two firms was investigated for money laundering offences and his name appears, as does the name of the other firm of lawyers mentioned above, in connection with a number of operations divulged to the Servicio Ejecutivo by other persons subject to a duty of disclosure regarding evidence of money laundering”.

32 Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. [2005] OJ L309/15. Article 22 reads: “1. Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully:

- (a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted;
- (b) by promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the FIU of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated in accordance with the procedures provided for in Article 34 shall normally forward the information”.

cooperation among FIUs,<sup>33</sup> more restrictive measures taken by the host State against transnational criminality are allowed.

### 2. 3. (...) and Eurojust

Eurojust is taken as an example of operational cooperation here in order to demonstrate that “networks” can have a solid legal basis in an international treaty. As it is well-known, Eurojust was first established by Council Decision 2002/187/JHA as a judicial coordination unit enshrined in the third “intergovernmental” pillar called “justice and home affairs”, before being included in the TFEU by the Lisbon Treaty. Article 85 TFEU mentions Eurojust and defines its mission “to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States [...]”. Eurojust is composed of 28 National Members, one from each Member State, seconded in accordance with their legal systems. Its competence covers crimes such as terrorism, drug trafficking, trafficking in human beings, counterfeiting, money laundering, computer crime, crime against property or public goods including fraud and corruption, criminal offences affecting the European Community’s financial interests, environmental crime and participation in a criminal organisation.<sup>34</sup> Eurojust creates ad hoc coordination meetings, which “bring together both law enforcement and judicial authorities from Member States and third States, allowing for strategic, informed and targeted operations in cross-border crime cases and the resolution of legal and practical difficulties resulting from the differences in the 30 existing legal systems in the European Union”.<sup>35</sup> Joint investigation teams (JIT) constitute a specific instrument in the fight against transnational criminality at EU level allowing for cross-border legal assistance through direct exchange of information and evidence within a team without the need for traditional channels for mutual legal assistance requests.<sup>36</sup> According to the 2013 report, Eurojust’s assistance in fighting serious cross-border crime registered a 2.8 percent increase, from 1,533 cases in 2012 to 1,576 cases in 2013.<sup>37</sup> One of the cases reported relates to a joint Belgian and Spanish police and judicial operation, supported by Eurojust and Europol, which targeted a drug trafficking network that had been active in Belgium, Spain, France, the Netherlands and Morocco since 2007. The operation, executed between 2012 and 2013, resulted in the neutralization of the group in 2013. The criminal organization, mainly composed of individuals having Moroccan origin, laundered 50 million euro from trafficking cannabis. The drug was transferred to Spain from Morocco, and then distributed across Europe. The Belgian and Spanish desks at Eurojust worked together and facilitated mutual legal assistance. Eurojust allowed the parties to overcome an obstacle related to electronic interception that

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33 Some improvements could be achieved once the Fourth Anti-Money Laundering Directive will be adopted.

34 [www.eurojust.europa.eu](http://www.eurojust.europa.eu).

35 Eurojust, *Annual Report 2013*, The Hague, 2014, p. 23.

36 Eurojust, *Annual Report 2013*, cit., p. 27.

37 Eurojust, *Annual Report 2013*, cit., p. 9.

was caused by differences in the codes of criminal procedure in the two Member States. Furthermore, the proceedings were transferred from the Public Prosecutor Office in Brussels to a Spanish judge in Torre Vieja, thanks to an agreement reached within the joint investigation team. The outcome was the arrest of 46 alleged members of the organization.

#### 2. 4. Private-to-private: The Wolfsberg group

The final body we will focus on is the Wolfsberg Group, an informal network of eleven banks worldwide, which can be proposed as an expression of self-regulation.<sup>38</sup> The purpose of the group is to develop financial services industry standards, and related products, for anti-money laundering and counter terrorist financing policies. It adopted anti-money laundering principles for correspondent banking in 2014 and prepared a questionnaire addressed to banks, a sort of self test which is useful to assess the level of customer due diligence applied by financial institutions in their daily activities. Customer due diligence consists, as well defined at the international level, in the identification of the customer and the assessment of customer's identity.<sup>39</sup>

This form of cooperation "private-to-private", which may effectively answer to the needs of the banking sector, presents a dark side. Let us propose only one case which has been widely reported by the press. The Swiss branch of one of the global banks belonging to this network has been recently "mise en examen", which means investigated, by French authorities for "illicit financial and banking practices". The bank allegedly helped clients to avoid taxes in 2006 and 2007.<sup>40</sup> A similar investigation has started in Belgium. Furthermore, in 2012, the bank agreed to pay a record of \$ 1.92 billion in fines to US authorities for allowing itself to be used to launder a river of drug money flowing out of Mexico and other banking lapses.<sup>41</sup> The US Senate Permanent Subcommittee on Investigations prepared a 330-page report on the financial institution. In the words of the chairman of the Committee, Sen. Carl Levin, D-Mich, "in an age of international terrorism, drug violence in our streets and on our borders, and organized crime, stopping illicit money flows that support those atrocities is a national security imperative". The bank, he added, "used its US bank as a gateway into the US financial system for some HSBC affiliates around the world to provide US dollar services to clients while playing fast and loose with US banking rules".<sup>42</sup> The Subcommittee focused on some areas of alleged abuses. In particular, "the HSBC's U.S. bank, HBUS, offered correspondent banking services to HSBC Bank Mexico, and treated it as a low risk client, despite its location in a country

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38 Members are: Banco Santander, Bank of Tokyo–Mitsubishi UFJ, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan Chase, Société Générale, UBS.

39 FATF Recommendation no. 10.

40 Financial Times, *Paris formally investigates HSBC Private Bank*, 21 November 2014, <http://www.ft.com/intl/fastft/240192/paris-formally-investigates-hsbc-private-bank> (last accessed on 7 December 2014).

41 Reuters, *HSBC Holding Plc to pay \$ 1.9 billion US fine in money laundering cases*, 11 December 2012. <http://www.reuters.com/article/2012/12/11/us-hsbc-probe-idUSBRE8BA05M20121211> (last accessed on 7 December 2014).

42 *HSBC Exposed U.S. Financial System to Money Laundering, Drug, Terrorist Financing Risks*, 16 July 2012, <http://www.hsgac.senate.gov/subcommittees/investigations/media/hdbc-exposed-us-financial-system-to-money-laundering-drug-terrorist-financing-risks> (last accessed on 7 December 2014). In (2013) 47 *International Lawyer* 392.

facing money laundering and drug trafficking challenges, high risk clients like *casas de cambio*, high risk products like US dollar accounts in the Cayman Islands, a secrecy jurisdiction, and weak AML controls”.

### 3. Pros and cons of networks

Some conclusions can be drawn from the analysis above. First and foremost, the notion of network regulation clearly describes the cooperation existing among international – or better “transnational” - bodies against cross-border economic crime. The increasing number of “networks” seems to challenge the traditional concept of cooperation in international law, based on bilateral and multilateral conventions and requiring the involvement of sovereign States. Network regulation is different, as it does not necessarily involve governments or international organizations. Nonetheless, States accept the existence of these new forms of cooperation. As a matter of fact, not only governments allow regulators to directly cooperate, but also accept the sources of law, in terms of standards, of these bodies. Standards, recommendations, guidelines are usually transposed into national law, indeed. Furthermore, networks are often mentioned by the conference of the parties to international conventions in their reports.<sup>43</sup>

Secondly, network regulation cannot be considered the solution to all the problems. As we tried to explain in the previous pages, networks have proved to be efficient in several situations – and the FATF is a perfect example of that – but have showed some weaknesses too. The evaluation reports prepared by the FATF, for example, have spurred the improvement of national legislations, but a mere piece of legislation is not enough to ensure an effective action against criminality.<sup>44</sup> The cooperation among FIUs faces obstacles due to the differences in domestic legal systems and would require an intervention at the regional or international level. The Wolfsberg group has eventually proved to be the glittering façade of a precarious building. Regarding the latter example, however, it should be outlined that banks allegedly involved in criminal activities – mainly indirectly, which means by *facilitating* illicit movements of money – have always demonstrated to be cooperative with the investigative authorities and/or tried to reach a deal.<sup>45</sup> The comparison with

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43 See for example Conference of the parties to the Palermo Convention, *Provision of technical assistance to States in the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 7 July 2014, par. 18: “In order to strengthen interregional cooperation, UNODC promoted cooperation among the centres as well as with international and regional organizations, such as the Association of Southeast Asian Nations Chiefs of Police (ASEANAPOL), the Asia-Pacific Information and Coordination Centre for Combating Drug Crimes, the European Police Office, the International Criminal Police Organization (INTERPOL); the Southeast European Law Enforcement Centre and the World Customs Organization. This initiative, known as the “networking the networks” initiative, aims at building and strengthening cooperation between participating entities in order to enhance effectiveness in the fight against organized crime”.

44 This is why the FATF recently started a new round of evaluation focusing on effectiveness of implementation. FATF, *Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CTF Systems*, February 2013. <http://www.fatf-gafi.org/media/fatf/content/images/FATF%20Methodology%2022%20Feb%202013%20.pdf> (last accessed on 7 December 2014).

45 See for example the official declaration of the bank involved in the investigation we have described above. “We confirm

States may seem hazardous, but a good solution might be that the Wolfsberg group lists “uncooperative institutions” like the FATF lists “uncooperative countries” for the purposes of anti-money laundering. Accordingly, banks would be induced to cooperate in order to avoid proceedings against them at national level and to safeguard their image of sound and secure bank in the international financial market.

A question remains: is network regulation useful? Or, has network regulation proved to be adequate in order to achieve the objective of fighting against transnational criminality? Taking into account pros and cons, it should be acknowledged that it has well worked, although it has better worked where governments (the ministers in the case of FATF) or national authorities (the financial intelligence units) are involved. The FATF has increased awareness at the international level of the risks of money laundering and terrorist financing. Its standards are used by the large majority of States and the reports have influenced national legislations and induced States to comply with (non-binding) standards.<sup>46</sup>

The cons are related to the nature of these bodies, which do not generally have any legal basis in an international treaty. Networks raise concerns regarding accountability and transparency, indeed. Starting from the former, the lack of an international treaty – an instrument which is ratified according to the procedure established by the national constitution – as a legal basis for the “network” means that national parliaments are deprived of their power to “control” to which conventions their own State should be part or not. Nonetheless, it might be argued that national regulators are domestically accountable. The financial intelligence units, for example, are headquartered in a ministry or a national central bank. Turning to transparency, especially as far as the decision-making process is concerned, the situation has gradually improved. At the beginning of the activity of the FATF, for example, decisions were adopted by the plenary meeting with little involvement of actors others than States. Nowadays, the FATF develops guidance with input from the private sector and experts. Accordingly, these instruments are not merely taken at intergovernmental level but consider the position of private parties in order to better answer to the necessities of a specific sector.

#### **4. Networks as alternative to traditional international cooperation?**

Will network gradually replace international treaties in defining ways of cooperation in the fight of transnational criminality? We are convinced that the answer should be negative for a couple of reasons. First, international treaties can

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that HSBC Private Bank (Suisse) SA has been placed under formal investigation by French magistrates who are examining whether the bank acted appropriately between 2006-07 in relation to certain clients of the bank who had French tax reporting requirements, as well as in relation to the way the bank offered its services in the country. We will continue to cooperate with the French authorities to the fullest extent possible” (reported in Financial Times, *Paris formally investigates HSBC Private Bank*, cit.).

<sup>46</sup> On this issue, see C. Brummer, *Soft Law and the Global Financial System Soft Law and the Global Financial System*, cit.



offer the legal basis for the establishment of networks. It is the case of Eurojust, which was created at the beginning by a purely intergovernmental Council decision and then incorporated into the TFEU. We may argue that a legal obligation enshrined in a treaty is at the basis of the Egmont group as well, insofar as States have international legal obligations stemming from treaties to which they are parties related to mutual legal assistance. Therefore, the importance of a “traditional” form of cooperation like a treaty should not be underestimated. Secondly, the “threat” posed by networks to the sovereign power of States should not be – on the contrary – overestimated. As a matter of fact, States authorize their national authorities to cooperate according to their legal system and accept the recommendations prepared by networks by incorporating them in their national legislation. Networks could not work, and even exist, without the will of States.<sup>47</sup>

Accordingly, there should be a process of cross-fertilization, meaning that international treaties may provide the legal framework for more enhanced forms of cooperation, which can be better realized with the involvement of national regulators and private parties. It does not mean that this situation is the best possible solution to combat cross-border economic crimes. Nonetheless the practice has evolved emphasizing the role of network regulation.

Given the above, one should ask whether and to what extent international law will be able to answer to current challenges. Criminals are moving fast, exploiting all the possibilities given by globalization and modern technologies. Let us consider money laundering through art works and virtual currencies like bitcoins. Starting from the former, we are not referring here to the theft, forgery or smuggling of artworks, which have been known for centuries, but rather to the much more recent phenomenon of legal purchase of pieces using ill-gotten money. As the illicit art trade ensures high margins of profit, it may be used for laundering proceeds from drug trafficking, arms dealing and other illegal activities, indeed.<sup>48</sup> This criminal phenomenon has been only poorly examined by the international law doctrine and by the FATF itself.<sup>49</sup> As a matter of fact, among the “designated non-financial business and professions”, FATF glossary does not mention art dealers. Criminals therefore exploit a gap in the system. In line with FATF recommendations, even the EC Directive no. 2005/60 does not include among the addressees of the legislation art dealers, although it considers “obliged entities” for the purposes of anti-money laundering “other natural or legal persons trading in goods, only to the extent that payments are made in cash in an amount of EUR 15 000 or more, whether the transaction is executed in a single operation or in several operations which appear to be linked”.<sup>50</sup> In the new proposal for a fourth anti-money laundering directive, which is under discussion before EU institutions, the threshold was fixed by the EU

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47 On this aspect, see S. De Vido, *op. cit.*

48 D. Nelson, “Economic Woes, Art Theft, and Money Laundering: A Perfect Recipe” in N. Charney (ed.), *Art and Crime: Exploring the Dark Side of the Art World* (Santa Barbara, California, Praeger Press, 2009), p. 197.

49 In this sense, F. Martin De Sanctis, *Money Laundering Through Art* (Heidelberg, Springer, 2013), p. 15.

50 Art. 2, para. 1, letter e).



Commission at 7500 euro<sup>51</sup>, without expressly mentioning art dealers.<sup>52</sup> Art dealers and galleries, where permanently engaged in the business, should have an obligation to report suspicious transactions, as provided in some national laws, included the Italian one.<sup>53</sup> The reduction of the threshold fixed at the EU level to 7500 euro for “other” natural or legal persons may reach the majority of the sales from art galleries and dealers, but the European legislator could have been more explicit in its new legislation. Furthermore, some auction houses, although not obliged to behave that way, require under penalty of cancellation, in the contract they propose to the clients, evidence that no money laundering or funds for financing of terrorism are involved.<sup>54</sup> In any event, the international framework is good enough to encompass the activities of natural or legal persons dealing with artworks.

A major problem is caused by bitcoin, very recent created virtual currency which has a “link” to the real world through exchange offices. Bitcoin was launched by Satoshi Nakamoto (maybe a nickname) in 2009. According to the definition provided by the FATF in a recent report on virtual currencies, Bitcoins are “the first decentralised convertible virtual currency, and the first cryptocurrency. Bitcoins are units of account composed of unique strings of numbers and letters that constitute units of the currency and have value only because individual users are willing to pay for them. Bitcoins are digitally traded between users with a high degree of anonymity and can be exchanged (purchased or cashed out) into US dollars, Euros, and other fiat or virtual currencies”.<sup>55</sup> Bitcoins are stored in online “wallet”. Transactions (fund flows) are anonymous, but “publicly available in a shared transaction register and identified by the Bitcoin address, a string of letters and numbers that is not systematically linked to an individual”.<sup>56</sup> You can also “mine” bitcoins, that is to create them by virtue of a software. Nonetheless, only 21 million bitcoins can be created, therefore “as more and more people compete to mine them, they require more and more computing power to unlock”<sup>57</sup>. Bitcoins are vulnerable to money laundering, due to anonymity.<sup>58</sup> Bitcoin addresses, which are considered the “accounts”, have no names or other customer identification. No financial institution exercises customer due diligence. The question is the following: should bitcoins be regulated? And if so, how? It is not the purpose of our article to provide a specific

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51 The threshold has been finally fixed at 10,000 euro by Parliament and Council negotiators at the end of 2014. Negotiators have also agreed on central registers in EU countries listing the ultimate owners of companies.

52 Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing /\* COM/2013/045 final - 2013/0025 (COD) \*/, art. 2, para. 1, letter e).

53 Ministerial Decree no. 143, 3 February 2006. See also in Brazil, F. Martin De Sanctis, *op. cit.*, p. 177. The Brazilian Council for Financial Activities Control Resolution no. 8 of September 15, 1999.

54 F. Martin De Sanctis, *op. cit.*, p. 175.

55 FATF, *Virtual Currencies – Key Definitions and Potential Aml/Cft Risks*, 2014, pp. 5-6. <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf> (last accessed on 7 December 2014).

56 *Ibid.*

57 M. Sparkes, *How to get your virtual hands on some bitcoins*, The Telegraph, 15 January 2014. <http://www.telegraph.co.uk/technology/news/10559175/How-to-get-your-virtual-hands-on-some-bitcoins.html> (last accessed on 7 December 2014).

58 Concerns over the vulnerabilities in the Bitcoins market have been expressed by several actors, including the FATF and the European Banking Authority. See EBA opinion on virtual currencies, 4 July 2014, <http://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf> (last accessed on 7 December 2014).

answer to a sector that is still developing and requires thorough examination. Nonetheless, in light of what we have argued in the previous pages, we may attempt to find an answer. We should first precise that we will not deal with privacy issues and the rights of individuals, and that, for the purposes of our research, we assume that Bitcoins are a currency, not a good. First, Bitcoins should be regulated as all the movements of money are regulated in the world in order to fight against transnational criminality. We are convinced that it is not conceivable to have anonymous accounts, although virtual, in the global financial market of today. This situation would allow unidentified and unregulated subjects to have a competitive advantage compared to traditional financial institutions. The problem is how to regulate Bitcoins. An international treaty does not seem useful for the purposes of tracing virtual transactions. Bitcoins are moving quickly and a treaty would require a long period of negotiation. Furthermore, a treaty would not solve all the problems as it would probably be the common denominator for cooperation without addressing specific issues. Regulation at the domestic level could be more effective, but the exercise of jurisdiction may face some challenges. How to reach a virtual account which “tumbles” from a server to the other in different parts of the world?<sup>59</sup> And here we turn to network regulation. In its recent report, the FATF demonstrated to have the skills to deal with such new challenge. It could prepare reports or amend its recommendation in order to include among the “obliged entities” the “exchangers”, defined as “a person or entity engaged as a business in the exchange of virtual currency for real currency, funds, or other forms of virtual currency and also precious metals, and vice versa, for a fee (commission)”.<sup>60</sup> Furthermore, the FATF could identify the most vulnerable jurisdictions where servers are most likely to be found. Operational cooperation would also be necessary, in order to arrest persons using Bitcoins for the purposes of helping criminals to launder their ill-gotten gains. It is in such challenging sectors that network regulation comes into play to propose quick responses and to address the behaviour (and the legislation) of States and regional organizations in the future.

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59 See the Silk Road and Silk Road 2 cases. The US Federal Bureau of Investigation closed both websites because they were favouring the buying and selling of illegal drugs and other unlawful activities. On 7 November 2014, the FBI seized over 400 Tor website addresses—known as “.onion” addresses—as well as the servers hosting them. US Department of Justice, More Than 400 .Onion Addresses, Including Dozens of ‘Dark Market’ Sites, Targeted as Part of Global Enforcement Action on Tor Network, <http://www.fbi.gov/news/pressrel/press-releases/more-than-400-.onion-addresses-including-dozens-of-dark-market-sites-targeted-as-part-of-global-enforcement-action-on-tor-network> (last accessed on 7 December 2014). Ulbricht, the creator of Silk Road, was arrested in the US and charged with one count of narcotics conspiracy, one count of engaging in a continuing criminal enterprise, one of count of conspiracy to commit computer hacking, and one count of money laundering conspiracy. US Attorney’s Office, *Manhattan U.S. Attorney Announces the Indictment of Ross Ulbricht, the Creator and Owner of the Silk Road* <http://www.fbi.gov/newyork/press-releases/2014/manhattan-u.s.-attorney-announces-the-indictment-of-ross-ulbricht-the-creator-and-owner-of-the-silk-road-website> (last accessed on 7 December 2014).

60 FATF, *Virtual Currencies*, cit., p. 7.