COMPLIANCE, ETHICS & SUSTAINABILITY

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We Have Been Nominated!

We Have Been Nominated!
The Compliance, Ethics & Sustainability Journal has been nominated for the National Compliance Award, and for a good reason.

Voting for the nomination round is now open and will close on 25 March 2024 via the following link:
https://compliance-instituut.nl/over-ons/nationale-compliance-award/

The Netherlands Compliance Institute annually facilitates the election and presentation of the National Compliance Award to the person or organization that has made a special contribution to the field of compliance and the professionalization of the compliance function in particular. In the approximately 25 years that compliance has been anchored in organizations in the Netherlands, it has grown into a mature field in which specialists from various disciplines work. In various sectors, compliance has become an important part of the organization and is often embedded on the basis of legal obligations. Established in 2004 the award has the aim of stimulating developments in the field and further professionalizing the compliance function.

And now for the first edition of this year's journal, published in March 2024, with the theme, Financial Crime.
When talking about compliance, Financial Crime is the topic that first comes to mind for many people. Whether it be with regard to controls and procedures to ensure that an organization is robustly protected from external threats; or ensuring that employees and stakeholders are abiding by the rules to minimise the risks from the more insidious and, by some studies, more prevalent insider threat. The authors and interviewees in this edition look at international regulations, including in the crypto sector and anti-money laundering and counter terrorist financing area. Regarding the latter, EU and UK legislation on AML/CFT are compared, the development of the Risk-Based Approach in the Netherlands is discussed, and a practitioner shares their personal views on lessons learned in this area. We further look at forensic investigations from different perspectives and in the two interviews in this edition, the proposed changes to the EU anti-corruption framework and last year's publication of the Dutch Industry Baselines are discussed. We conclude on a philosophical note: in his 90th (!) contribution, Edgar Karssing shares his recommendations for books on philosophy.

Meredith M. Fitzpatrick and Peter Bott
Meredith M. Fitzpatric and Peter Bott, who are both consultants in the area of cryptocurrency, investigations, and compliance, explore whether clear regulations can actually be a competitive advantage for the European Union as the Markets in Crypto Asset Regulation comes into force and compare it with other global legislation. Their article gives compliance professionals some insight into the regulatory priorities of different jurisdictions and potential law enforcement actions to come.

Jeroen Boogaard interviews Helene Erftemeijer of the Dutch Association of Banks
Last year, the Dutch banking association (*Nederlandse Vereniging van Banken* published a set of guidelines known as the NVB Industry Baselines. The Industry Baselines set out standards for the risk-based application of the open norms in the Money Laundering and Terrorist Financing (Prevention) Act for Client Due Diligence (CDD) by banks. CDD means the act of collecting identifying information to verify a customer's identity and more accurately assess the level of criminal risk they present, divided into Risk-based Industry Baselines and Sector Industry Baselines. Aim is to provide guidance on how to adequately implement the risk-based customer due diligence approach, described for and by banks and in consultation with the Dutch Central Bank and Ministry of Finance. Jeroen Boogaard spoke with Helène Erftemeijer about the creation of the new Industry Baselines.

Neil Williams, Stan Reiz, Charley Weldrick
The global effort to fight financial crime is never-ending and countries will continue to develop their own laws as they see fit to protect their citizens. As the dust still settle from Brexit, *Neil Williams*, solicitor, *Stan Reiz*, Kings Counsel and *Charley Weldrick*, Counsel, question whether the EU or the UK have more effective Anti-Money Laundering and Counter Terrorist Financing capabilities. Whilst once fully aligned, the two jurisdictions have now gone their own ways and this article examines whether cracks have begun to develop. An interesting dilemma considering the particularly international nature of these issues.

Maud Bökkerink

For two decades, there has been a call for a more risk-based approach to Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT). Although the Dutch AML/CFT Act permits such an approach, supervisory enforcements measures over the past years illustrate that implementing a Risk-Based Approach (RBA) within AML/CFT measures is far from straightforward. Collaborative efforts and recent (draft) guidance provided by the Dutch central bank (*De Nederlandsche Bank*) and the Dutch banking association (*Nederlandse Vereniging van Banken*) articulate the principles underpinning the RBA, aiming to enhance the effectiveness of the financial sector's response to AML/CFT challenges. However, with developments in the EU AML/CFT framework, the extent to which an RBA can be sustained remains an open question.

This article seeks to explore the development of the RBA in AML/CFT compliance within the Netherlands, highlighting the collaborative efforts between supervisors and financial institutions and the strategic shifts in guidance. This article will also look to the future of the RBA in light of developments in the EU AML/CFT framework.

Frank Erkens
In de 'driver's seat' of op de achterbank? Compliance officers kunnen direct of indirect betrokken zijn bij het opstellen van beleid en procedures voor forensische onderzoeken dan wel bij de uitvoering van zo'n onderzoek. Om in die rol op een professionele manier in de 'driver's seat' sturing aan het onderzoek te kunnen geven, is het met het oog op de belangen van de diverse betrokkenen, de bestaande wettelijke verplichtingen en de maatschappelijke ontwikkelingen noodzakelijk het 'waarom', 'wat' en 'hoe' van deze onderzoeken goed te begrijpen en te kunnen toepassen. Frank Erkens gaat in op de wetenschappelijke achtergrond van onderzoeken vanuit verschillende invalshoeken, het juridische normenkader, het epistemologische normenkader en geeft uiteindelijk een aantal handvatten aan de compliance officer, zodat deze daadwerkelijk in de driver's seat kan plaatsnemen.

Jeroen Boogaard interviews Jeroen Blomsma, Head of Sector Anti-Corruption at the European Commission
The EU is stepping up the fight against corruption and has proposed new legislation. Jeroen Boogaard spoke with Jeroen Blomsma, Head of Sector Anti-Corruption at the European Commission, about the updated directive and its potential impact on companies.

In her 2022 State of the Union Speech, Commission President von der Leyen announced to update the EU's legislative framework on anti-corruption to better prevent and fight corruption across the European Union in the future. On 3 May 2023, the Commission presented a new proposal to combat corruption by criminal law. Jeroen Blomsma elaborates on the reasons, the proposal and the wider consequences of this new legislation.

Maria Shalimova
In her contribution to this journal Maria Shalimova provides a personal practitioner's view of lessons learned, challenges and ways forward within the AML compliance banking industry. The aim of her article is to reflect some regulatory and market developments over the last years and to consider future directions and ways forward in evolution of financial crime trends, systems and controls. This article addresses professionals working in the financial sector, in particular, AML compliance officers and financial crime investigators, risk managers, internal and external auditors, quality assurance managers as well as students of banking and financial laws and other fields within the financial markets.

Edgar Karssing
In zijn alweer 90ste (!) bijdrage aan ons tijdschrift gaat Edgar Karssing in op zijn verborgen agenda. Deze bestaat eruit om mensen enthousiast te maken voor het mooie vakgebied van de wijsbegeerte. Filosofie en filosoferen kan bijdragen aan goed leven en samenleven, aan gemoedsrust en wederzijds begrip. En omdat filosoferen van zichzelf een waardevolle activiteit is. Filosofie betekent letterlijk 'liefde voor de wijsheid'. In de rubriek 'boekenkast' zet Edgar zijn verzameling boekentips bij elkaar voor iedereen die een goed, toegankelijk filosofieboek willen lezen. Belangrijke criteria zijn daarbij: Nederlandstalig (dat mag in vertaling) en in de goede boekhandel verkrijgbaar.

We hope you enjoy the edition and please don't forget to vote!

Marlon Straathof, Frank Segers, Edward Nkune

Using Clear Regulations as a Competitive Advantage: The European Union's Markets in Crypto Asset Regulation Kicks Off a New Global Era of Crypto Legislation

M.M. Fitzpatrick and P. Bott[1]

The past decade has showcased a dynamic cryptocurrency industry populated with incredible successes and fantastic failures, marked by innovative technical developments, aggressive business expansion, and exploitative actors. Regulatory and legislative bodies across the globe are faced with the herculean task of sufficiently applying existing traditional finance (TradFi) laws and regulations to this novel industry or drafting new legislation that strikes the balance between consumer protection and anti-money laundering/combating the financing of terrorism (AML/CFT) safeguards while also supporting innovation.

Some jurisdictions, like the US, have taken the approach of applying their existing TradFi regulations to the cryptocurrency industry while new legislation is still being debated. Other jurisdictions like the UK, Dubai, and South Korea have forged ahead with innovative new crypto-specific legislation in the hope of positioning themselves as international hubs for this rapidly evolving industry while also protecting their citizens from fraudulent actors. However, in June 2023, the European Union ushered in a cryptocurrency regulatory framework with the passing of the Markets in Crypto Asset Regulation (MiCAR), making it the first comprehensive cryptocurrency legislation to be passed at an international body level. MiCAR sets its sights on securing consumer protection for the EU populace, while eliminating complex and piecemeal regulatory hurdles for crypto enterprises.

While in TradFi, some jurisdictions use low visibility and regulatory requirements as a competitive advantage, the EU, UK, Dubai, and South Korea are doing the exact opposite when it comes to crypto. These jurisdictions are using clear regulatory and licensing requirements to bring the crypto industry to their shores and help it mature in a responsible way. This paper examines MiCAR and the regulatory frameworks of the EU, UK, Dubai, and South Korea and provides compliance professionals with some insight into the regulatory priorities of these jurisdictions and potential enforcement actions to come.

1. Crypto Services Definitions

A chief concern of the overarching MiCAR legislation is the foundational problem of crypto asset definitions. A host of historical, both state and EU-level, financial bills existed prior to the drafting and implementation of MiCAR but these addressed crypto in a piecemeal fashion and were largely based on legislation governing the traditional financial sector. To create a holistic cryptocurrency bill, the EU set about defining different aspects of the crypto ecosystem and industry, most principally the definition of “crypto-asset services".[2]

MiCAR principally derives its definition of “crypto asset services" from those in the Markets in Financial Instruments Directive II (MiFID II). These definitions, initially based on investment service topics, were given crypto-specific contexts and roles, as the European Securities Markets Authority (ESMA) noted, MiFID II would be insufficient in regulating current and further crypto ventures.[3] In the scope of MiCAR, a “crypto-asset service" is an entity that provides one or a mix of services relating to a crypto-asset and its activity on the blockchain. The ten definitions or parameters divulged within MiCAR as crypto-asset services include providing custody services on behalf of clients, operating a trading platform, exchanging crypto assets for funds or other crypto assets, execution of orders for clients, plac-

1. Meredith M. Fitzpatrick is a Director and Peter Bott is a Senior Associate with Forensic Risk Alliance. Both specialize in cryptocurrency, investigations and compliance.
2. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1114\&pk_campaign=todays_OJ\&pk_source=EURLEX\&pk_medium=TW\&pk_keyword=Crypto%20assets\&pk_content=Regulation\&pk_cid=EURLEX_todaysOJ
3. https://www.esma.europa.eu/sites/default/files/2023-10/ESMA75-453128700-438_MiCA_Consultation_Paper_2nd_package.pdf

ing orders, providing crypto asset advice or portfolio management, and providing transfer services on behalf of customers. Similarly, a “crypto-asset service provider" is any person or undertaking provisioning one or more crypto asset services on a professional basis and is allowed to do so in accordance with the legislation.[4]

2. MiCAR Targets Three Main Tokens

After providing foundational definitions for crypto-asset services and crypto-asset service providers, MiCAR defines and sets parameters for three main types of virtual asset (VA)[5] tokens: Asset Referenced Tokens (ARTs), E-Money Tokens (EMTs), and Utility Tokens.[6] These three types of assets are unique and fall outside the scope of assets like Bitcoin or Ethereum as they fundamentally have different purposes in how they are created or intended to be used.

ARTs are a type of VA token that are backed by the value of several different fiat currencies, commodities, or crypto assets. A defunct example of a notable ART is Facebook's Libra Project, which was an ambitious project by the company to create a stablecoin ecosystem within Facebook's larger Meta infrastructure. Libra was planned to be backed by a grouping of currencies and US securities to eliminate volatility in their own stablecoin payments system.[7] Additional types of ARTs include cryptocurrencies that are backed by traditional commodities, such as gold or silver.[8]

EMTs are VAs that maintain a stable value by being backed by the value of one fiat currency. EMTs are what would be known colloquially as stablecoins and differ definitionally from ARTs due to the fact that ARTs can be backed by a bucket of multiple fiat currencies, while EMTs are backed by only one.[9]

MiCAR also specifically defines the concept of significant ARTs and EMTs. These tokens can be denoted as significant if they meet certain criteria for the overall number of token holders, value and volume of transactions, general significance of activities, or connectivity to the financial system. In these cases, additional requirements are triggered for business stress tests, risk management, custody guarantees, and enhanced European Banking Authority (EBA) supervision.[10]

Utility tokens are a type of VA intended to give access to a good or service provided by the specific token's issuer.[11] These tokens can be featured within blockchain environments such as games, social media sites, forums, and similar blockchain-leveraged enterprises. These tokens facilitate exchanges of value within the self-contained ecosystem and act as the ecosystem's native economy.

3. MiCAR's Phased Implementation

MiCAR's implementation is established in a two phased, 36-month approach with close consultation occurring between legislators and the crypto community. This deliberately measured approach recognizes MiCAR as a groundbreaking piece of legislation in a complex and developing industry. The first phase encompasses information exchange, technical debates, and policy and procedure drafting, while the second phase encompasses fully implementing MiCAR.[12]

3.1. Phase 1 – Implementation

The first phase of MiCAR encompasses 18 months and is referred to as the implementation phase. This phase, starting with MiCAR's publication in June 2023, lasts until 30 December 2024 and entails the formulation of three consultation packages to be published in June 2023, October 2023, and November 2023.[13] These consultation packages encompass a host of standards, mandates, and requirements which must necessarily be followed to maintain compliance with the eventual fully-fledged implementation of MiCAR. The consultation packages will be debated in concert between the crypto industry and EU legislators and the crypto community has periods of several months to review each consultation package and submit comments to the EMSA and EBA. This showcases the investment by both parties to create legislation that is mutually beneficial and comprehensive for the industry.

Consultation Package 1, which was published in July 2023, must cover the forms, documents, and information Crypto-Asset Service Providers (CASPs) must compile and submit in order to meet MiCAR stan-

4. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1114\&pk_campaign=todays_OJ\&pk_source=EURLEX\&pk_medium=TW\&pk_keyword=Crypto%20assets\&pk_content=Regulation\&pk_cid=EURLEX_todaysOJ
5. The term “virtual asset" and “crypto asset" and “cryptocurrency" are often used interchangeably in the industry. For the sake of simplicity, we'll refer to them as "virtual assets" in this article.
6. https://www.eba.europa.eu/regulation-and-policy/asset-referenced-and-e-money-tokens-micar
7. https://www.coindesk.com/policy/2021/11/02/unpacking-europes-looming-mica-crypto-regulation/
8. https://www.centralbank.ie/regulation/markets-in-crypto-assets-regulation
9. https://www.centralbank.ie/regulation/markets-in-crypto-assets-regulation
10. https://www.eba.europa.eu/sites/default/files/document_library/Publications/Other%20publications/2023/1062227/EBA%20advice%20on%20MICAR%20CfA%20on%20significance%20criteria%20and%20supervisory%20fees.pdf
11. https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica
12. https://www.esma.europa.eu/sites/default/files/inline-images/MiCA_Implementation_timeline_0.png
13. https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica

dards. This includes business information that must be submitted to the National Competent Authority (NCA) of the CASP's home member state, regulatory standards pertaining to the risk mitigation CASPs must go through when applying for authorization, conflict of interest deconfliction, complaint handling procedures, and standard templates for all documents.[14] The host of both technical and regulatory details helps kick off MiCAR implementation with uniform, agreed upon standards and material.

Consultation Package 2 was released in October 2023 and aims to expand upon the guidelines established in Consultation Package 1. The content of Consultation Package 2 contains the mandates not covered under the first consultation process and general business information such as record keeping requirements, business continuity requirements, and inside information disclosure.[15] Of note, Consultation Package 2 covers sustainability indicators, and mandates that CASPs detail any potential adverse impacts to the climate in the crypto project's white paper. Additionally, the climate impact study information must be contained within the CASP's website. This is a critical component for the EU, as the energy necessary to maintain business operations and enact transactions on the blockchain is significant, with one transaction costing almost 780 kilowatt hours, the same power an average US household uses over the course of almost 30 days.[16] Consultation Package 2 acknowledges that the EU's previous climate pledges like the Paris Accords need to be taken into account for CASP operations as well.

Consultation Package 3, released in November 2023 and open for comment until February 2024, focuses on liquidity requirements for CASPs, abuse and stress testing plans, system resilience, reporting requirements for non-EU currencies, and asset recovery plans.[17] This package closes the implementation phase of MiCAR with final, housekeeping style requirements and transitions to the entry phase of MiCAR.

3.2. Phase 2 - Transitional Phase

MiCAR's second 18-month phase is the transitional phase, lasting from January 2025 through July 2026. During this phase, if entities applied to opt into the MiCAR's grandfathering clause by the June 2024 deadline, they will proceed into the application phase of MiCAR or they can apply for a simplified procedure.[18] This simplified procedure process is for CASPs already authorized in their native country and currently engaging in crypto activity.

4. Crypto Asset Service Provider Authorization Steps

A key potion of MiCAR is devoted to processes CASPs must go through in order to meet eventual compliance with the new regulatory process. MiCAR codifies universal authorization standards for crypto enterprises and requires them to furnish of a host of documents in order to assess the health, stability, security, and business plans of the entity.

Information relating to the business model and shareholder information that must be provided includes a program of operations, proof of compliance with prudential safeguards, and a list of all notable shareholders and members. Additionally, information on all programs, policies and procedures relating to the handling and mitigation of risks to the business' and customers' assets and information must be provided.[19]

Many of these requirements expand upon measures that the EU has been trying to adopt to counteract crypto market volatility and provide measures of consumer protection and confidence. One of the first steps to assembling the material necessary for crypto-asset services to operate in a compliant manner within the EU is the authoring of specific crypto white papers.

MiCAR sets a standard for what at minimum must be contained within a compliant crypto white paper. The first parameter deals with the authors of the white papers and the necessary disclosures needed for submission, such as information about the person or entity seeking approval, the operators, consultants, developers, and a project description. Information must be included that describes the crypto assets involved, rights and obligations attached to the assets, description of assets, and characteristics of the underling blockchain technology. Finally, the white paper must contain details about the environmental and climate impact of the project, to include information on energy consumption and waste in the operation of crypto operations, transaction processing, and mining. This information is necessary to mitigate negative environmental impacts and keep the EU in accordance with climate agreements and promises.[20]

14. https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica
15. https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica
16. https://digiconomist.net/bitcoin-energy-consumption
17. https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica
18. https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica
19. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1114\&pk_campaign=todays_OJ\&pk_source=EURLEX\&pk_medium=TW\&pk_keyword=Crypto%20assets\&pk_content=Regulation\&pk_cid=EURLEX_todaysOJ
20. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1114\&pk_campaign=todays_OJ\&pk_source=EURLEX\&pk_medium=TW\&pk_keyword

Throughout the application process, CASPs must provide copious information on anti-money laundering and terrorist financing concerns, principally with the applicant country's NCA.[21] These documents are furnished at the initiation step and is one of the first documentary hurdles CASPs must go through in the application process.

5. Question Marks Amid Some Crypto Categories

There are still several blockchain and crypto categories that are not covered under MiCAR, providing space for future action and debate. Specific grey areas already known deal with Non-Fungible Tokens (NFTs) and Decentralized Finance (DeFi). NFTs and DeFi use different technical standards than ARTs, EMTs and Utility Tokens and are therefore difficult to regulate under the current MiCAR framework.[22]

In the case of DeFi, MiCAR possesses some authority to exert regulatory control, but only under specific parameters. MiCAR identifies truly decentralized finance as “where crypto-asset services are provided in a fully decentralised manner without any intermediary" and goes on to say that where this is the case “they should not fall within the scope of this Regulation". In essence, MiCAR's fully decentralized definition is true to the theme of DeFi, in that there is no intermediary with authority or control and no single entity influencing the project. Conversely, MiCAR identifies a DeFi project as being only partially decentralized if there is an intermediary party with any level or partial control. In this sense, if an individual owns a large portion of an advertised “decentralized" project, it would be subject to MiCAR.

The concept of NFTs also largely falls out of MiCAR's scope due to NFTs being unique and inherently “non-fungible", and there is no comparison to an existing market asset. Much like the case of DeFi though, some NFTs may be regulated under MiCAR should they fall under a specific category of NFTs, like those belonging in a digital collection.

6. UK

Though the United Kingdom left the European Union in 2020, the UK itself has been proactive in proposing and drafting their own cryptocurrency legislation with parallels to MiCAR. Since July 2020, the UK government has proposed and debated legislation with the expressed intention of providing crypto firms and the UK crypto market with “certainty and security".[23] This culminated in the passing of the Financial Services and Markets Act 2023 (FSMA 2023). The FSMA 2023 also takes a phased approach of implementation of new crypto rules and regulations through April 2025, similar to MiCAR's roll out process.

A chief concern pursued by the UK's Financial Conduct Authority (FCA) plaguing the global crypto community involves the aggressive marketing of VAs and associated fraudulent activity. Between February and October 2023, the FCA identified three critical points involving VA promotions: the lack of communicated risk involved in assets advertised as secure and safe, deceptive or misleading risk information in promotions, and the failure to provide adequate risk information on promoted products. On 8 October 2023 the FCA issued new guidance to address these issues, stating that VA promotions can only be carried out by authorized individuals or firms, or firms registered under the Money Laundering Regulations, unless they qualify for specific exemptions.[24] These policies apply to any VA venture offering services in the UK, regardless of the location where the business operates.

7. Dubai

On the other side of the globe, Dubai created the world's first regulatory body exclusively dedicated to VAs with the Virtual Asset Regulatory Authority (VARA) in March 2022[25]. VARA touts itself as the “world's first tailor-made Virtual Asset regime, and as such, its Full Market Product (FMP) Regulations are designed to specifically cater for the provision of permissible activities to customers and investors"[26]. VARA's mission statement seems to embrace the concept that fostering innovation in the VA space while protecting consumers and investors does not need to be mutually exclusive. It sets out to create a replicable regulatory framework by creating a series of Rulebooks that will remain adaptable to the speed of innovation in the industry[27]. VARA recognizes the continuing developments, and with that, the evolving risk vectors, of the VA industry and pledges to update their regulatory framework and appliable Rulebooks so they grow with the industry.

The VA Issuance Rulebook pertains to any entity in the Emirate that issues a VA in the course of their business. All Virtual Asset Service Providers (VASPs), similar to a CASP under MiCAR, licensed in Dubai must comply with the Company Rulebook, Compliance and Risk Management Rulebook, Technology and Information Rulebook, and Market Conduct Rulebook. Additionally, VASPs licensed in Dubai must comply with the following Rulebooks that correspond to the VA activities they are licensed

=Crypto%20assets\&pk_content=Regulation\&pk_cid=EURLEX_todaysOJ
21. https://assets.gov.ie/279015/3c3f70bd-2f28-4ec1-a049-3527f8a4ec13.pdf
22. https://fin-law.de/en/2022/11/21/europe-goes-crypto-part-ii-how-much-defi-is-in-micar/
23. www.gov.uk/government/news/chancellor-sets-out-ambition-for-future-of-uk-financial-services
24. www.fca.org.uk/news/statements/common-issues-crypto-marketing
25. www.vara.ae/en/about-vara/
26. rulebooks.vara.ae/
27. rulebooks.vara.ae/node/11

to carry out: Advisory Services Rulebook, Broker-Dealer Services Rulebook, Custody Services Rulebook, Exchange Services Rulebook, Lending and Borrowing Services Rulebook, VA Management and Investment Services Rulebook, and the VA Transfer and Settlement Services Rulebook[28]. The VARA regulations are especially thorough when it comes to AML/CFT matters. In addition to the AML/CFT requirements set forth in the Rulebooks, VASPs licensed in Dubai must also comply with all Federal AML/CFT laws of the UAE and the AML/CFT recommendations put forth by the Financial Action Tast Force (FATF).

Addressing the borderless nature of VAs, the Company Rulebook mandates that VASPs must maintain a legal entity in Dubai and that if the VASP establishes a trust, nominee arrangement, or a Decentralized Autonomous Organization (DAO), it must provide VARA the reason(s) for adopting a complex structure, the relationship between the VASP and the other entity, and whether the inclusion of a DAO or other entity would adversely affect the VASPs ability to ensure compliance with the Regulations, Rules and Directives. Additionally, VASPs must appoint two individuals responsible for compliance with all legal and regulatory requirements, and those individuals must be a resident of the UAE or a holder of a UAE passport.

The Compliance and Risk Management Rulebook also specifies that a VASP must have a compliance officer that is a resident of the UAE or holder of a UAE passport. Additional VA specific rules include the requirement for any VASPs developing or using anonymity enhanced cryptocurrencies (AECs), also known as privacy coins, like Monero or Zcash to implement proportionally enhanced AML/CFT controls to ensure compliance with all applicable laws and regulations and effectively monitor these transactions to prevent illicit activity. An additional notable inclusion is the requirement of compliance with the FATF's "Travel Rule" for any transfer exceeding 3,500 AED – a potential step towards the UAE's removal from the FATF's "grey list".

The requirements of the Technology and Information Rulebook clearly reflect the enhanced cybersecurity and information security posture required to protect an ecosystem that exclusively exists online. VARA requires all licensed VASPs to have a cybersecurity policy that addresses elements specific to VAs, such as the generation of cryptographic keys, the signing and approval of transactions, the storage of keys and seed phrases, and the management of VA wallets. To prevent a single point of failure in the event of a cyber-attack or infrastructure takeover, VASPs licensed in Dubai must ensure that keys stored online or in any single location are insufficient to conduct a VA transaction. Audit logs are also required for key access.

VARA's website[29] provides a publicly accessible register of VASPs authorized to operate in Dubai, which includes the VASPs Name, License Type, Reference Number, Licensed Activities, License Issue Date, and License Status. The types of licensed activities as defined by VARA are Exchange Services, Management and Investment Services, Broker-Dealer Services, Custody Services, and Custody Services (including custodial staking). As of January 2024, 16 VASPs are licensed to operate in Dubai, with the first licensed issued to BitOasis Technologies FZE in April 2023 and the most recent license issued to OKX. However, it should be noted that in November 2023 VARA suspended BitOasis's license[30] over noncompliance allegations. VARA's website[31] also provides a publicly accessible list of VASPs against whom it has variously issued Enforcement Notices, Warning Notices, and Licensing Notices.

It's an interesting thought exercise to consider the factors that led to some of most well-known cryptocurrency enforcement actions and collapses over the past few years and compare them to the requirements of VARA. The overlap between points of failure and the things the rulebooks are designed to prevent is hard to ignore.

Part of VARA's mission is to position Dubai as a global leader and international hub in the VA space. Success at this will depend on VARA's willingness to take swift action against VASPs that do not comply with its rules and regulations. In November 2023, VARA announced that it had issued fines to 18 licensed VASPs for failing to comply with VARA's directives[32]. If VARA can continue to hold VASPs accountable to its Rulebooks and keep up with the pace of innovation in the crypto industry, it may be able to accomplish its mission.

8. South Korea

South Korea has also made significant progress toward comprehensive crypto legislation. In June 2023, the National Assembly passed the Act on the Protection of Virtual Asset Users, the first part of a multi-phase legislation for a comprehensive regulatory framework specific to VAs[33]. The Act on the Protection of Virtual Asset Users (the Act) makes the Financial Services Commission (FSC) the lead regulatory agency over VAs and has a consumer protection focus, aiming to guarantee the protection of assets held by VA users and to regulate unfair transaction activities in the VA market.

28. rulebooks.vara.ae/entiresection/10
29. www.vara.ae/en/licenses-and-register/public-register/
30. www.financemagnates.com/cryptocurrency/bitoasis-license-suspended-in-dubai-over-non-compliance-allegations/
31. www.vara.ae/en/regulations/regulatory-notices/#licensing-notices
32. www.vara.ae/en/vara-news/market-notice-market-wide-enforcements-pick-up-pace-as-final-vara-deadline-for-virtual-asset-service-provider-licensing-engagement-lapses/
33. www.fsc.go.kr/eng/pr010101/80317

Like other pieces of VA legislation around the globe, the Act establishes a set of rules VASPs must follow to ensure the protection of users' VA assets. Under the Act, VASPs must manage their customers' VA deposits separately from their own assets, must maintain a certain portion of customer VAs in cold storage wallets, have an insurance plan or set aside reserves as a safeguard in the evet of a cyber-attack, and maintain records of VA transactions for a period of 15 years. In order to prohibit market manipulation or other unfair activity, the Act prohibits the improper use of non-public material information, the manipulation of market prices and fraudulent transaction activities, and transacting in any self-issued VAs.

In December 2023, the FSC proposed additional rules to the Act which are scheduled to take effect in July 2024[34]. The additional rules add more specificity to the rules originally covered by the Act in June 2023, both in the kinds of VAs subjected to the Act and the consumer protection requirements of VASPs. Building upon the requirement for VASPs to manage customer assets separately, the rules mandate that these funds must be deposited in a credible financial institution, a “custodian bank". Custodian banks are allowed to invest VASP customer funds but only in safe assets such as government bonds and VASPs must pay fees to customers for using their deposits.

The additional rules under the Act also require VASPs to store at least 80% of customer VAs in cold wallets[35]. Moreover, the amount in cold storage must be calculated for each VA type against the average daily price in KRW for the past year and this calculation must be updated on a monthly basis. To safeguard against network failures, VASPs are required to purchase liability insurance with a compensation limit of at least 5% of customer VAs stored in hot wallets. This compensation limit number must also be calculated on a monthly basis.

The rules proposed in December 2023 do provide more details on VASPs duties as it pertains to transaction monitoring, but with a heavier focus on consumer protection rather than AML/CFT. The updated rules mandate that VASPs monitor transactions for abnormal activity like extreme price fluctuations and trading volumes. Such activity must be immediately reported if detected, and fines may be imposed “even before the prosecutor's disposition [of a case] if consultation with the prosecutor has been made or if one year has passed since the case was first reported or notified to the investigative agency".

On the securities vs commodities debate, the Act defines VAs as electronic tokens with economic value that can be traded or transferred electronically, with the exception of game money, electronic stocks, electronic bills, and central bank digital currency (CBDC), electronic bonds, deposit tokens linked to CBDCs, and non-fungible tokens (NFTs). Korea has also specifically addressed VAs that meet the traditional definition of a security. In February 2023, the FSC published guidelines on “security tokens", defining them as the digitization of securities under the Capital Markets Act using distributed ledger technology[36]. The guidelines also define Security Token Offerings (STOs), similar to Initial Coin Offerings (ICOs), as the issuance and distribution of token securities utilizing distributed ledger technology to improve the issuance and trading of existing securities more efficiently and conveniently. Both Security Tokens and STOs are securities under the law, and subject to the disclosure, authorization, permission systems, and investor protection provisions of the Capital Markets Act.

9. US

Unlike the other jurisdictions discussed, the US is best known for its lack of regulatory clarity. In the US, there is a mix of licensing and regulatory regimes, and no clear front runner for the agency with the primary authority on VAs. The current chair of the Securities and Exchange Commission (SEC), Gary Gensler, has famously claimed that no new legislation is needed for this rapidly evolving asset class[37]. Gensler has also repeatedly said that bitcoin isn't a security, but a commodity, meaning that it would fall under the purview of the Commodity Futures Trading Commission (CFTC) [38].

However, Gensler has also claimed that “everything but bitcoin" could be considered a security, and the SEC brought numerous and significant enforcement actions against VASPs in 2023, to include lawsuits against Coinbase, Binance, and Kraken[39]. Discussions about whether certain VAs qualify as securities or an investment contract in the US often reference the “Howey" test, a three-pronged test that determines if an instrument qualifies as an “investment contract", as established in the SEC v. W.J. Howey Co. Supreme Court case. Under the Howey test, if an instrument satisfies the three prongs of (1) the investment of money in (2) a common enterprise with (3) a reasonable expectation of profits derived from the efforts of others then it qualified as a security[40]. In the SEC's lawsuits against Coinbase and

34. www.fsc.go.kr/eng/pr010101/81217
35. In cryptocurrency, cold storage or a cold storage wallet refers to transferring the private keys of a wallet to a device that is not connected to the internet. This practice is thought to be more secure that "hot wallets", or wallets whose private keys are stored on a device connected to the internet, as it mitigates the threat of the private keys being stolen in a cyber-attack.
36. www.fsc.go.kr/no010101/79386?srchCtgry=\&curPage=\&srchKey=\&srchText=\&srchBeginDt=\&srchEndDt=
37. www.reuters.com/technology/us-sec-denies-coinbase-petition-crypto-rulemaking-2023-12-15/#.
38. blockworks.co/news/gensler-testimony-pokemon-bitcoin
39. www.nasdaq.com/articles/secs-gensler-warns-crypto-investors-but-differentiates-bitcoin
40. www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets

Binance, it alleged that specific coins listed on the VASPs were securities, including Solana, Cardano, and Polygon[41].

The CFTC, The Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) and Office of Foreign Asset Control (OFAC) have also brought forth significant enforcement actions against various elements of the VA industry. In September 2023, the CFTC charged and settled with three Decentralized Finance or "DeFi" protocols, Opyn, Inc, ZeroEx, Inc., and Deridex, Inc., for failing to register as swap execution facilities (SEF), designated contract markets (DEM), and/or future commission merchants (FCM)[42]. FinCEN has also levied significant fines against VASPs for failing to maintain effective AML programs, such as the 2021 charges against BitMEX[43] and the 2022 charges against Bittrex[44]. OFAC has sanctioned numerous "mixers", or cryptocurrency services that enhance the anonymity of cryptocurrency transactions by combining transactions and funds with other pools of transactions or funds, for their part in enabling sanctioned entities to obfuscate the source and destination of stolen VA. In OFAC's May 2022 sanctions against Blender.io[45]. August 2022 sanctions against Tornado Cash[46], and November 2023 sanctions against Sinbad.io[47], it specifically called out the Democratic People's Republic of Korea (DPRK) of those mixers to evade sanctions.

However, there has been notable progress on crypto legislation however at the state level, particularly in New York and California. In June 2015 the New York Department of Financial Services (NYDFS) issued virtual currency regulation mandating that any VASP operating in New York obtain a "BitLicense" issued by NYDFS[48]. Similar to VARA, the goal of the NYDFS BitLicense is to promote New York as the centre of technological innovation while ensuring consumer protection for New Yorkers. In September 2023, recognizing the evolution of the VA market since the creation of the BitLicense, NYDFS issued updated requirements[49]. The updated requirements focus on the heightened risk standards for coin-listing policies, or "greenlisting", enhanced requirements for retail consumer-facing products or service offerings, and new requirements for when licensed VASPs need to delist a coin. California has also created a licensing regime for any VASPs wishing to operate in the state. In October 2023, California passed the Digital Financial Asset Law, which will go into effect in July 2025[50]. The new law promotes consumer protection by creating a clear regulatory framework and provides the state enforcement authority for certain crypto activities.

New York and California are known as the financial and technology centres of the United States, one of the largest economies in the world. It would be extremely hard for a VASP to operate everywhere else in the US except New York and California and be particularly relevant or profitable. Comprehensive and clear VA legislation is sorely needed in the United States, with numerous agencies with different priorities making their mark on the future of VAs and VASPs in the US.

10. VA Regulation Outlook

MiCAR was first proposed in the European Commission in September 2020 but was not fully endorsed by the European Parliament and published in the Official Journal of the European Union until June 2023.[51] That timeline shows the amount of research, commitment, and most importantly, time, needed to create an international regulatory framework that strikes the appropriate balance between protecting consumers, combatting illicit finance, and fostering innovation of this budding and rapidly evolving industry. In order for MiCAR and VA-specific regulatory and licensing regimes throughout the globe to be successful, they'll need to constantly evolve to account for things like NFTs and DeFi.

New regulations like MiCAR are only powerful if they are appropriately enforced. The new and differing regulatory requirements in the EU, UK, Dubai, and South Korea provide a window into those governments' primary concerns when it comes to this new financial ecosystem and foreshadow what their regulatory and investigative agencies will be looking for. MiCAR and the new VA regulatory frameworks in the UK, Dubai, and South Korea will also need to constantly evolve to incorporate the "lessons learned" from future regulatory and judicial enforcement actions. If these jurisdictions can maintain VA regulatory frameworks with clearly communicated standards and reasonable compliance requirements, it will be a competitive advantage for them in attracting major players within this new financial ecosystem to their jurisdictions. MiCAR, if successful, can do this on a scale never seen before.

41. www.coindesk.com/markets/2023/06/06/altcoins-dip-following-second-sec-lawsuit-against-crypto-exchange/
42. www.cftc.gov/PressRoom/PressReleases/8774-23
43. www.fincen.gov/news/news-releases/fincen-announces-100-million-enforcement-action-against-unregistered-futures
44. www.fincen.gov/news/news-releases/fincen-announces-29-million-enforcement-action-against-virtual-asset-service
45. home.treasury.gov/news/press-releases/jy0768
46. home.treasury.gov/news/press-releases/jy0916
47. home.treasury.gov/news/press-releases/jy1933
48. www.dfs.ny.gov/virtual_currency_businesses
49. www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing
50. dfpi.ca.gov/dfal/
51. https://www.bundesbank.de/en/tasks/banking-supervision/individual-aspects/micar-markets-in-crypto-assets-regulation-913886

'The new Industry Baselines bring a clear set of principles'

J. Boogaard[1]

The NVB Industry Baselines provide Dutch banks with clear principles for the targeted and proportionate implementation of their Wwft obligations. 'Banks are provided with principles for an adequate risk-based approach. Applying risk relevant measures only for customers with risk indicators, reduce controls, where possible, and do less for customers deemed low-risk', says Helène Erftemeijer, Sector Coordinator AML and CFT at NVB.

Last year, the Dutch Banking Association (NVB) published a set of guidelines known as the NVB Industry Baselines. The Industry Baselines set out standards for the risk-based application of the open norms in the Money Laundering and Terrorist Financing (Prevention) Act (Wwft) for Client Due Diligence (CDD) by banks CDD means the act of collecting identifying information to verify a customer's identity and more accurately assess the level of criminal risk they present, divided into Risk-based Industry Baselines and Sector Industry Baselines. Aim is to provide guidance on how to adequately implement the risk-based customer due diligence approach, described for and by banks and in consultation with DNB and Ministry of Finance. We spoke to Helène Erftemeijer about the creation of the new Industry Baselines[2].

Why are these new standards needed?

'Banks risk high fines if they do not comply with money laundering rules. In addition, banks are investing heavily in improving money laundering controls, such as KYC checks. We noticed that customers were increasingly impacted by the due diligence checks. How relevant are the checks, we wondered. Is the scope of CDD, screening and monitoring not too strict for the risks we see? In 2022, DNB published the study *Van herstel naar balans*. This study called for a more risk-based approach to money laundering measures in banks' efforts to prevent financial-economic crime. So for the first time, we saw room for more risk-based customer diligence so that we could perform our gatekeeper role in a more risk sensitive way.'

'In roundtable discussions with DNB and the Ministry of Finance, we were given the opportunity to discuss our wishes. We found that there were several bottlenecks. Let me give an example. Suppose a Netherlands-based minor receives €160,000 from a bank account in Italy credited to his child account. That is more than the usual birthday present, so the bank starts asking questions. Then it turns out that his grandmother died, her holiday house in Italy was sold and the proceeds went to this grandchild in the Netherlands. The deed of sale of the house is handed over. Granted, the transaction is not usual, but there is nothing suspicious about it. However, DNB would say: You haven't finished your investigation because how did grandma get the money to buy the house in Italy?'

'This example shows that we interpret the open Wwft norms differently. What do we consider relevant to the risk? We took this type of issues into the roundtable discussions in the last year. We managed to work it out relatively quickly with DNB. They saw room in the Wwft obligations to accommodate a risk-based approach on all 9 bottlenecks we identified. We incorporated the outcomes of the discussions into our Industry Baselines. More controls where necessary and less where possible. That, in short, is what the new approach boils down to.'

How were the Industry Baselines created?

'It has been a collaborative process. During the discussions, we always had DNB and the banks at the table. The Ministry of Finance also joined the process fairly quickly, because there were topics directly related to legislation. Together with DNB and the Ministry of Finance, we also formed joint working groups on specific topics. That worked well. Often the banks came up with a first draft, based on the experienced problems. Think of the example with the grandchild receiving an inheritance from Italy. In the working groups we worked a lot with these kinds of examples. We asked ourselves: What kind of measure is proportionate and relevant to the risks we see? At times DNB was surprised by the impact of the controls they expected banks to implement. This is the advantage of working on something together. It was the first time that banks, DNB and the Ministry of Finance worked together this way. That took some getting used to. Banks had to be open and explain their daily practices. For the regulator, it was good to add a risk management perspective to their more legalistic view.'

1. Jeroen Boogaard is financieel journalist en medewerker van dit tijdschrift.
2. www.nvb.nl/publicaties/protocollen-regelingen-richtlijnen/nvb-standaardennvb-risk-based-industry-baselines/

What were the main insights of the banks present and the NVB during this process?

'The discussion focused on how to reduce the need to monitor customers with low risk profiles. Banks can now apply a more risk-based approach and limit enhanced due diligence to relevant risks. We will reduce impact for customers deemed low risk. I think we have also given the "customer perspective" much more attention in the discussions. Money laundering controls are meant to tackle criminals further up the chain, not to bother innocent citizens with things that mitigate non-existent or minimal risks, in their case. There has been a greater understanding of each other's perspective. By working together with the supervisors, we reached more than we initially had thought two years ago. The relationship between banks and supervisor has definitely improved. We will certainly continue the dialogue with each other. We do not always agree with each other, but discussions can also be useful and bring clarity.'

What are the main benefits of these new standards for banks?

'The main thing is clarity. The new standards provide coherent principles and we share the same set of expectations. We reduced unnecessary efforts. Another example: with the new House of Representatives following the recent elections, there are a lot of new politically exposed persons, or PEPs. For both the banks and the new PEPs this creates a lot of work. Banks have to apply enhanced due diligence on PEPS, resulting in the PEP being confronted with numerous detailed questions they have to answer. But if a new member of parliament has been a customer of the bank for, say, 30 years and thus the source of funds and source of wealth is known, why should the bank then ask again about the origin of the assets? If in that long period there has never been an alert that led to questions for the customer, should the bank suddenly take all kinds of additional measures now? That would not be relevant to the risk. The Industry Baselines provide clear principles but are not a legal requirement. Banks will always have to decide how to implement them based on their risk appetite and on their customer portfolio. For example, ING has a different customer portfolio than de Volksbank.'

The banks' various remediation programmes and ongoing compliance with the Money Laundering and Terrorist Financing Act (Wwft) create a high cost-pressure. Will this cost-pressure now reduce?

'If you have a clearer understanding of what to do in various situations, that will certainly help you target your customer research, monitoring and screening. This will lead to an effective allocation of efforts but may not directly lead to cost reductions. However, I don't think costs will increase further. Costs may go down once the AML/CFT framework is applied proportionately. At Dutch banks, approximately 13,000 people are now engaged in AML/CFT activities. That is a lot if you consider that there are, for example, only 3,400 municipal police officers in the Netherlands. As gatekeepers, we have an important responsibility in society, but the many highly educated people involved can also do many good things for society in other areas such as healthcare and education.'

How have banks responded to the new standards so far?

'Banks are happy with the achieved clarity. But there are operational differences between banks. Some are very happy with the Industry Baseline on PEPs, while others benefit more from the Industry Baseline related to EC high risk third countries as set out in Article 9 of Directive EU 2015/849. For some, the clarity provides new insights leading to positive changes. For others, it is a confirmation of what they were already doing. And we certainly still have a wish list. For example, one area to work on is commercial real estate. What qualifies as commercial real estate, and what not? Further, clarity is still desired in the area of adverse media screening. There is also still a discussion ongoing regarding transaction monitoring: when is this effective and when does it yield too little?'

How do you expect DNB to handle the Industry Baselines?

'DNB is updating their Wwft guidance to align it with the principles of the Industry Baselines. The consultation process for this update has been completed and we are now expecting their response and final version. DNB's policy statement is now going to be called "Q&As and Good Practices Wwft". Just like the former Wwft guidance, the updated version will not be legally binding. However, it offers good practices, suggestions and recommendations on how to apply an adequate AML/CFT framework. It also contains various examples and is therefore directly related to daily practices. Recently, the new EU AML Regulation and AMLD6 have been approved. Although the final texts are not yet available, we think our Industry Baselines are sufficiently aligned with these new AML regulations. We used our work on industry baselines to lobby in Brussels for more awareness on risk-based improvement and harmonisation. The new European regulations are not expected to come into force until 2027. Legislation is constantly changing, which is why we will regularly update our Industry Baselines.'

What do international partners or banks think of your new baselines?

'We often get questions and enquiries from various countries. In multiple settings I come across our Industry Baselines serving as input in many discussions. DNB also receives many questions from international colleagues about the creation and outcomes of Industry Baselines. There is a lot of international interest. As far as I know, there are no international examples where parties have collaborated together in such a way.'

Under the old approach, many customers rejected. Will the new standards reduce customer exits?

'I prefer not to associate customer exits with either the old or new system. We will continue to offboard customers who engage in illicit or criminal activity. However, we will never exclude sectors, but always assess each individual case. There are also customers who, for different reasons, do not answer our questions. Unfortunately, we are obliged to offboard non-responsive customers as well because banks can't maintain a relationship with customers whose CDD cannot be completed. We published, among other things, a Sector Industry Baseline for sex workers. This is a high-intensive sector. We sat down with representatives of this sector, DNB and Ministry of Finance to jointly establish risk-increasing and risk-reducing factors. We have described what banks need to open and maintain a bank account. In consultation with the supervisor, we have come a long way. As a result, sex workers will experience less inconvenience because it is clear to the bank and the sex worker what kind of information is adequate. Whether fewer customer exits will ultimately follow, is currently difficult to predict. But I will be surprised if there will be more.'

Did ESG also come up during discussions with the regulator? For example, could customers be turned away for sustainability reasons?
‘Each bank has its own ESG policy and risk appetite. Sustainability ambitions are also an important societal responsibility. These questions are much more top-of-mind now than, say, 10 years ago. So there are more reasons than only AML risks why a bank could refuse a customer.'

EU v UK: AML and CTF evolutionary changes under scrutiny. Who will come out on top?

S. Reiz KC, C. Weldrick and N. Williams[1]

The global effort to combat financial crime is a fight which is unabated, requiring constant review and evolution to make sure legislative tools are fit for purpose. There is unlikely to ever be an outright victor, but governments and leaders across the world will always strive to at least be on the winning side. This requires ever developing laws and regulatory frameworks to protect their citizens and make it harder for those who seek to benefit through ill-gotten means.

1. Anti-Money Laundering ("AML") and Counter Terrorist Financing ("CTF")

How have the EU and the UK fared post Brexit? Since Brexit, the UK government has been vocal in promulgating the notion that the UK is 'open for business', but concomitantly attempted to strengthen its armor to combat fraud facilitated by offenders hiding behind the corporate veil of limited companies.

Fraud detection and asset tracing are self-evidently more difficult in modern times due to complex corporate structures and the growing use of cryptocurrency. Legislative changes in recent years have attempted to increase transparency in the structure of limited companies and partnerships recognizing that corporate fraud, money laundering and tax evasion will only significantly reduce if the rate of detection and successful prosecution of those responsible increases. Since 2016[2] in the UK, registration of people with significant influence or control over companies has been a legal requirement.

While such changes have increased transparency and reduced the risk of companies being used as vehicles for fraud and money laundering by unscrupulous shadow directors, larger companies provide a unique challenge to prosecutors attempting to establish corporate criminal liability.

As technological developments continue to benefit the global economy, they also bring additional challenges to ensure fraud risks are minimized. Whether it is an individual, a criminal group or a nation state, there are always new threats emerging, and with them increasingly onerous detection needs. Criminal assets have long been concealed behind an impenetrable wall of identities and obfuscation to enable those engaged in criminal conduct to retain their proceeds. This has been facilitated by those willing to use corporate entities to thwart the authorities investigating the provenance of assets held.

As with any effort to overcome a challenge, there is strength in numbers and in unity. Co-operation will always be key, together with a commitment to implement agreed objectives and outcomes. The EU has long sought to harmonize its approach to money laundering, and until recently, the UK was a willing partner. Times change however, and different paths are followed. While the fight will always continue, new legislation is being introduced by both parties independently which provokes the question: are their objectives and commitments still aligned or will cracks will begin to develop?

2. Financial Action Task Force – A Consistent Benchmark

In order to consolidate and coordinate AML responses by nation states, the Financial Action Task Force ("FATF") was created by the G7 countries in 1989 and included the European Commission. Its purpose is to monitor trends in money laundering, assess responses by nation states, and promote additional legislative changes needed to combat evolving threats.[3] More countries have been added as signatories to what has essentially become the gold standard for AML policy and provision.[4]

Since its inception, following on from the original 40 recommendations to combat money laundering, as well as providing continuous assessment of threats and responses, further recommendations have been issued as new threats emerge. These have, since 2001, incorporated measures to combat terrorist financing, and more latterly sought to address dif-

1. Stan Reiz KC and Charley Weldrick are Barristers at 2 Bedford Row Chambers.
   Neil Williams is a Business Crime and Regulatory Partner at Gunnercooke LLP.
2. Schedule 1A of Companies Act 2006 as amended by Schedule 3 of Small Business, Enterprise and Employment Act 2015
3. https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html
4. Countries (fatf-gafi.org)

ficulties posed by identifying assets hidden behind complex corporate structures, as well as regulatory supervision for cryptoasset service providers. These will always be, in part, a response to unexpected events or growing needs, as well as a prediction for future requirements. It is right to say that the 2001 terrorist attacks in the USA brought the issue of financing for terrorist groups to the public domain, and subsequent AML objectives constantly strive to evolve to meet the challenges posed by illicit financing. In other areas such as beneficial ownership of assets, whilst it was long known that global networks of corporate identities were utilized to hide assets in plain sight, disclosures such as those in the Panama Papers have made it impossible for nation states to shirk their responsibility to address the veil of secrecy which pervaded,[5] or at least give the appearance of doing so.

3. EU Anti-Money Laundering Directives ("AMLD")

The early 1990's was a period of political turmoil in Europe, with the break-up of the Soviet Union, Yugoslavia, and the subsequent Balkan wars. Against this backdrop, and with the newly formed FATF providing guidance, the original European Commission member states agreed a statewide effort to harmonize regulatory frameworks to combat and criminalize money laundering. To enable this, AMLDs were first brought to the fore in 1991. AMLD 1 established minimum requirements for KYC and customer due diligence, focusing on banks and financial institutions; the emergence of Suspicious Activity Reports ("SARs") was also an important introduction. However, whilst the principles were sound, the scope was not. To overcome this, numerous other entities would need to be brought under the regulatory umbrella.

This shortfall was addressed in the 2nd AMLD in 2001, with non-banking financial institutions such as money service bureaus now included, as well as certain non-financial entities. Other professionals such as estate agents, auditors, external accountants, and tax advisors were now included, and not forgotten lawyers.[6]

The 3rd AMLD in 2005 reshaped AML compliance, with the introduction of a more flexible risk-profile based approach to customer due diligence.[7]This was, however, tempered by the introduction of other AML requirements, such as Simplified and Enhanced Due Diligence ("SDD" and "EDD"). It also introduced an obligation to report suspicious transactions to nation state Financial Intelligence Units ("FIUs"). By then, it was recognized that penalties for non-compliance were required, ramping up the pressure to adhere to the ever-strengthening regulations.

The next and 4th installation of the AMLDs did not appear until 2015, with a new drive and focus to enhance measures to counter terrorism financing, it also sought to address issues relating to corruption risks in countries where malfeasance was deemed rife.[8] Politically exposed persons were to be subject to EDD, as a preventative measure, not a punitive one.

In addition, the veil of secrecy surrounding ownership of assets and corporate entities was slowly being pulled down. A 25% ownership rule was to be maintained by nation states in central registries, accessible to authorities, however, the release of the Panama Papers would soon prove that this was insufficient.

While the 4th AMLD was another step forward, a tragic spate of terrorist attacks across Europe together with a damning dossier of disclosures regarding corporate ownerships and structures meant that larger strides would need to be taken to stay ahead in the battle against terrorist financing and money laundering and to maintain public confidence. Therefore, little more than a year after the implementation of the 4th AMLD, the 5th soon appeared.

The 5th AMLD sought to enhance and strengthen the previous incarnation, with the public now allowed access to corporate beneficial ownership registers. In addition, trusts and other legal frameworks were now obliged to comply with beneficial ownership verification, making available such details to authorities. Registers were to be harmonized across the EU to allow member states access across the bloc. Compulsory EDD checks were mandated for those based in designated 'high-risk' countries.[9]

Recognizing the increasing use and proliferation of virtual assets, the concerns regarding anonymity were addressed by expanding on the previous requirements to now include crypto exchanges and wallet providers. This marked the long march towards regulation, recognizing the value of alternative finance, but allowing authorities access to ownership details. However, it was also recognized that it would not cover all transactional scenarios, such as where transactions take place outside exchanges.

The 5th AMLD also enhanced the functionality and cooperation of FIUs, requiring prompt responses to information requests from other units. They were also given access to information held by obliged entities, whether or not a SAR had been submitted. Greater supervisory powers were being introduced in an effort to essentially allow the sharing of information in near real time.

5. https://www.icij.org/investigations/panama-papers/
6. https://eur-lex.europa.eu/eli/dir/2001/97/oj
7. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ
8. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849
9. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX

3.1. Brexit – Let's still be friends?

The 5th AMLD would prove to be the final directive which the UK would transpose into UK law, viewing current and planned laws sufficient going forward. After a difficult break-up, the relationship between the EU and the UK post Brexit was condensed into the Trade and Cooperation Agreement in 2021.[10]

EU nationals and clients have now been redefined for the purposes of AML compliance, with EU states now deemed 3rd countries, with attendant considerations for AML compliance, following the implementation of The Money Laundering and Transfer of Funds (Information) (Amendment) (EU Exit) Regulations 2019.[11] This may require additional risk considerations applicable to 3rd countries for businesses, which may not mean high risk country considerations, but are an extra burden in themselves.

Both sides have committed to information sharing and agreeing standards and policies for AML. The UK, whilst not now a member of Eurojust or Europol, does have a presence which allows for access to resources, despite as an invited guest rather than a full member. In addition, the UK's position within the Egmont group of FIUs has been moved from the abundantly populated Europe I region, to the more sparsely membered Europe II area.[12] Both of these downgrades will surely have an impact on the ability of UK authorities and investigators to gather and share information as they were previously able to, and could well undermine efforts to strengthen laws which can only succeed through the free-flowing exchange of data.

4. 6th AMLD – A New Drive for Consistency

The difficulties faced in applying standardized rules across the EU have led to an overhaul of approach to AML policies, mandating minimum requirements and defining offenses to provide clarity. To achieve this, in Article 2 the directive sets out a list of 22 predicate offenses which give rise to money laundering.[13] In addition to more established criminal activities such as corruption, fraud and tax offenses, new offenses relating to environmental and cybercrime have been included, reflecting the shift to meet new and emerging threats.

Moving beyond the offenses giving rise to money laundering, the definition of money laundering itself is further expanded and detailed. Article 3 specifies that money laundering offenses are committed where a person intentionally converts, conceals, or acquires property which they know to derive from criminal activity. Member states may legislate to expand this definition to those who suspect or ought to have known the property derived from criminal activity, as the UK did over 20 years ago. Those who assist in the commission of offenses will be considered equally culpable under Article 4 if found to be: "aiding, abetting, inciting and attempting to commit an offense of money laundering". As a further deterrent, maximum sentences for money laundering are increased to a minimum of 4 years.

As well as broadening the scope for individuals to be found accountable for money laundering, legal entities are now brought under legislative scrutiny. The offenses under Articles 3 or 4 are "... committed for their benefit by any person, acting either individually or as part of an organ of the legal person and having a leading position within the legal person, based on any of the following: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person."

The new provisions increase the need for stringent AML policies and controls which companies and partnerships must implement to ensure there are sufficient safeguards in place to avoid costly sanctions resulting from employee misbehaviors.

The UK has chosen a slightly different path, which is discussed further in this article. This maintains the position that individuals are culpable in their own right, but criminal liability is extended to the corporate entity if certain criteria are met, including whether reasonable measures were not in place to prevent the fraud.

4.1. A new set of rules applicable to all

Recognizing the need for a uniform approach to rules and implementation of AML/CTF provisions, a new single rulebook will be applied across the EU.[14] The aim is to provide "more detailed rules on customer due diligence, beneficial ownership and the powers and task of supervisors and FIUs. Existing national registers of bank accounts will be connected, providing faster access for FIUs to information on bank accounts and safe deposit boxes ." There is likely to be an EU wide limit on cash transactions over €7k and rules to ensure adherence to sanctions.

Other notable provisions will include wealth managers, football associations of member states, high level clubs and agents as obliged entities. Further, it will also include cryptoasset providers, crowdfunding platforms, and migration operators. In recognition of issues relating to anonymous crypto transactions outside crypto providers, a proposed single or cumulative limit of €1k for transactions from a

10. eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.149.01.0010.01.ENG\&amp%3Btoc=OJ%3AL%3A2021%3A149%3ATOC
11. www.legislation.gov.uk/uksi/2019/253/contents/made
12. egmontgroup.org/about/organization-and-structure/
13. eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv
14. oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1670825\&t=d\&l=en

self-hosted address is proposed, unless the ownership is known. There is also a clampdown on so called 'golden visas', with investments in exchange for citizenship rights no longer allowed unless there is a genuine link with the applicable member state.

It is proposed that the beneficial ownership percentage threshold is reduced from 25% to 15%. The registers themselves will be held centrally and interconnected at EU level. They will hold information for at least 5 years, and up to 10 years, unless information is subject to criminal investigation. Access to the registers will be readily available to competent authorities and investigators. In addition, obliged entities and other interested parties such as journalists and civil rights organizations will be allowed access subject to a reasonable fee.[15]

4.2. The EU Anti-Money Laundering and Countering the Financing of Terrorism Authority ("AMLA")

With rules to be implemented across the board, it is perhaps a natural evolution that a new body is created to monitor implementation and adherence. The AMLA will have direct and indirect supervisory control over 'high risk financial entities'. It will also coordinate member state national supervisors to assist with obliged entities compliance with AML/CTF provisions in the financial sector, as well as a supporting role in non-financial sectors.
The AMLA will have additional punitive powers for serious systemic breaches of AML controls including:

- €10 million or 10% of total annual turnover for Financial or Credit Institution legal persons.
- €5 million for natural persons.
- Obliged entities - €1m or twice the benefit derived from the breaches.
- Public reports can also be made, suspension of a firm's authorization, as well as banning senior management.

The AMLA will begin an assessment process to select up to 40 groups or entities in high-risk areas or who operate multi-jurisdictionally, to be supervised directly. These can include financial and credit institutions, as well as cryptoasset providers. It will play a role for non-financial sectors by carrying out reviews and assisting with the investigation of breaches.[16]

Although agreement has been reached for the establishment of the AMLA, its final form and location have yet to be decided. However, it is anticipated that it will be fully implemented by the end of 2025.

5. UK Legislation

The Economic Crime and Corporate Transparency Act ("the Act") received Royal Assent on 26 October 2023, but has not yet come into force. The government described its objective as creating "world-leading powers which will allow UK authorities to proactively target organized criminals and others seeking to abuse the UK's open economy".[17]

5.1. Offense of Failure to Prevent Fraud - who does it affect?

Section 199 of the Act creates the offense of Failure to Prevent Fraud. It applies only to a relevant body which is a "large organization". The term is defined by section 201 as a body to which two of three conditions apply to it in the financial year which precedes the fraud offense, namely: (1) its turnover was more than £36 million, (2) its balance sheet total exceeded £18 million and/or (3) it had in excess of 250 employees. Medium sized companies, as defined by sections 465 of the Companies Act 2006, and smaller organisations, are excluded.

5.2. How the Offense is Committed

The offense requires a "fraud offense" to be committed by a person "associated with the body", including employees, with the intent of benefitting the relevant body or a subsidiary to whom the associated person provides services on behalf of the relevant body.

The question of whether or not a particular person performs services for or on behalf of a relevant body is to be determined by reference to all of the relevant circumstances and not merely by reference to the nature of the relationship between that person and the body (s .199(9)).

The applicable offenses are listed in Schedule 13 and include: fraud, false accounting, and false statements by company directors.

If, for example, a broker at a large company misled a client in order to secure a contract for the business, on the face of it, both the employee and the company could be prosecuted, even if the broker acted without the authority or knowledge or his employer.

5.3. The Defence

However, section 199(4) of the Act creates a due diligence defence. If the organization proves it had "pre-

15. https://www.europarl.europa.eu/news/en/press-room/20240115IPR16801/deal-on-new-eu-measures-against-money-laundering; oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1740580\&t=d\&l=en
16. www.consilium.europa.eu/en/press/press-releases/2023/12/13/anti-money-laundering-council-and-parliament-agree-to-create-new-authority/
17. www.gov.uk/government/news/robust-new-laws-to-fight-corruption-money-laundering-and-fraud

vention procedures" in place which were "reasonable in all the circumstances to expect the body to have in place" or it was not reasonable to expect it to have any prevention procedures in place, it will not be convicted of the offense.

As with many offenses, the determinative issue is what was reasonable in the circumstances. Section 204 requires the Secretary of State to issue guidance about procedures which can be put in place to prevent fraud, but unhelpfully, no such guidance has been published yet.

As a general observation, companies and partnerships to whom the offense applies who are unable to provide evidence of risk assessments they have performed and action they have taken to prevent fraud, may be vulnerable to prosecution even if the substantive offense was committed by a single rogue employee.

In comparison, the guidance for the offenses of failure to prevent bribery[18] and failure to prevent facilitation of tax evasion[19], in respect of which guidance has been published, encourage the applicable bodies to adopt the following approach[20]: (1) risk assessment; (2) proportionality of risk-based prevention procedures; (3) top level commitment; (4) due diligence; (5) communication (including training); and (6) monitoring and review.

The offense under the Act can only be committed where the actual or intended victim is not the relevant body itself (s.199(3)). Had this exception not been added, there may have been a perverse incentive for companies who had been offended against, to refuse to report 'internal' offenses to the authorities or worse, cover them up to escape criminal liability themselves.

As with other corporate offenses committed by omission, it remains to be seen whether this new offense leads to successful prosecutions and a change of approach.

The offense can be committed by organizations irrespective of their place of incorporation provided that the relevant fraud offense is one over which the UK has jurisdiction if an element of the offense was committed in the UK - whether that was the fraudulent act itself (such as the false representation) or the receipt of the benefit.

Organizations are also responsible for fraud offenses committed by associated parties. This too is extra-territorial as set out above – an organization will be criminally liable for any fraud offense committed by an associated overseas organization if that organization commits fraud under UK law or targets UK victims. The practical implication of this is that organizations will have to engage in rigorous compliance monitoring and assessment when considering how and with whom to do business.

5.4. What are the changes to investigative powers?

The Act creates a number of new investigative powers and, to that extent, can be meaningfully differentiated from previous legislation for offenses arising from a failure to prevent an offense.

The primary changes to information sharing are domestic and take the form of disapplying civil liability for breaches of confidentiality when sharing customer information for the purpose of preventing, investigating, and detecting economic crime. The Act also removes the requirement for a SAR to have been submitted for an information order to be obtained by the National Crime Agency's Financial Intelligence Unit.

This represents a substantial change in how quickly and easily information can be shared and may well create an opportunity in which investigative links are made which previously would not have been due to the cost benefit analysis taken when determining whether to seek additional information.
While ineffective information sharing has been identified as a cause of the difficulties in financial crime enforcement, the problem is as much reluctance as inability.[21] While the disapplication of civil liability may go some way to remedying this, there may be a broader culture of non-cooperation affecting the effectiveness of prosecutions and investigations.

The raft of new changes very closely mirror the recommendations made by the Law Commission in their 2022 review of failure to prevent offenses[22], which were by any metric unsuccessful at tackling financial crime. Indeed, there have been no convictions under the failure to prevent tax evasion offense and there are currently only 11 live Corporate Crime Offenses investigations, despite 94 'opportunities' which were reviewed and rejected.[23] While Failure to Prevent Bribery has been marginally more successful, it has, as per data from 2022, still led to fewer than 10 prosecutions since the offense was introduced.[24] By any measure, that is a poor record.

18. https://www.legislation.gov.uk/ukpga/2010/23/section/7
19. https://www.legislation.gov.uk/ukpga/2017/22/section/45/enacted
20. https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-quick-start-guide.pdf, p5
21. https://static.rusi.org/340_EI_Corporate%20Criminal%20Liability_Westmore_web_final.pdf p14 and p15
22. https://lawcom.gov.uk/law-commission-sets-out-options-to-government-for-reforming-how-companies-are-convicted-of-criminal-offences/
23. https://www.gov.uk/government/publications/number-of-live-corporate-criminal-offences-investigations/number-of-live-corporate-criminal-offences-investigations [Last updated 01/01/2024]
24. https://www.simmons-simmons.com/en/publications/ck2bx0e6cn6180b489tt2te5q/corruption-enforcement-tracker

The high watermark in relation to that offense is the 13 Deferred Prosecution Agreements it has given rise to.[25]

On that basis, there will be understandable skepticism as to how effective the enforcement of the new offense will be, although prosecutions are not the only measure of success of this legislation. The deterrent effect of criminalizing a failure to prevent fraud is likely to lead to a more proactive assessment of risk by large organizations who do not wish to suffer the financial and reputational consequences of being criminally guilty for not doing so.
However, as with all new criminal offenses, how pervasive and sustained the impact will be in the medium to long term is likely to depend upon how efficiently it is used in practice.

Ultimately, additional offenses and investigative powers only have teeth if those charged with enforcing and utilizing them have the resources to do so effectively. Analysis of the impact of other similar legislative changes tends to indicate that "longstanding issues with prosecutorial resources and capacity [were cited] as the main reason for the lack of activity".[26]

5.5. Cryptoasset Tracing

Preventative measures and effective enforcement are demonstrably important to reducing the prevalence of financial crime, but it is axiomatic that the tracing of the proceeds is a vital part of criminal and civil recovery.
Cryptocurrency creates an obvious difficulty for tracing the proceeds of crime. Historically, converting fiat currency or assets into cryptocurrency has enabled fraudsters and money launderers to hide away their proceedings under a cloak of anonymity.

What is commonly referred to as the 'Travel Rule' was enacted in the new Part 7A of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692)[27] and brought into force in September 2023.

Their functionality is similar to pre-existing regulations on the transfer of money associated with older technology, such as wire transfers. They impose duties on those who facilitate the transfers of cryptoassets and are concerned with the information stored by those firms. Notably, the regime makes a distinction between a cryptoasset (generally cryptocurrencies such as Bitcoin) and non-fungible tokens ("NFTs").

As it stands, the regulatory position in relation to NFTs is that they are digital artwork and not cryptoassets. This categorization is, however, much more flexible than in relation to physical art and will depend on the 'core usage' of the NFT.[28] Given that for a number of individuals involved in the trade of NFT's they do appear to be *de facto* stores of value rather than artwork, this is a potential difficulty for firms responsible for the transfer of these assets and is an issue that firms should be alive to.

5.6. Who does the 'Travel Rule' apply to?

The 'Travel Rule' relates to the transfer of cryptoassets and applies to UK based businesses. Any and all businesses based in the UK must carry out the requisite checks and send the information onto any firm based in a different jurisdiction which is to receive assets from it. If that firm cannot receive the information, the UK based firm still has a responsibility to collect, verify and store the information.

If the UK based firm is receiving a cryptoasset from a jurisdiction without the 'Travel Rule' and the transfer has missing or incomplete information, the UK based firm must make a risk assessment in determining whether to make the cryptoasset available to the beneficiary.

How effectively this safeguard will work in practice is unclear. The transfer of cryptoassets can often be time sensitive. Firms operating in this market may expose themselves to regulatory danger if they conduct a risk assessment which is inadequate. Alternatively, an overly cautious approach may cause issues with their legitimate clients. This is particularly true in the market as it currently stands due to an uneven global roll out of regulations of this kind and the large number of small firms operating within the crypto sector. The risk of money laundering resulting from the transfer of cryptoassets is high. Firms should ensure they have ready access to expertise, as the UK appears to be ahead of other jurisdictions in regulating this sector.

5.7. De Minimis Payments

The area most likely to create difficulties for firms are payments under €1000. They are subject to a far less stringent information gathering regime.

The information required in respect of all transfers is[29]: (1) the name of the originator and beneficiary; (2) the registered/trading name of the originator or beneficiary if they are a legal entity; and (3) the account number of the originator and the beneficiary

25. https://www.linklaters.com/en/insights/blogs/businesscrimelinks/2023/december/number-13-proves-to-be-a-first-for-the-cps
26. https://static.rusi.org/340_EI_Corporate%20Criminal%20Liability_Westmore_web_final.pdf, p14
27. https://www.legislation.gov.uk/uksi/2017/692/part/7/made
28. https://www.skadden.com/insights/publications/2023/11/a-new-uk-cryptoasset-framework
29. https://www.jmlsg.org.uk/wp-content/uploads/2023/08/Board-approved_JMLSG-Guidance_Part-II-Sector-22-Annex-I_Aug2023.pdf, p2

or unique transaction identifier, if there is no account number.

If the value of the transaction is greater than €1000 and the originator is a legal entity, the following additional information is required: (1) customer identification number; or (2) the address of the originator's registered office.

If the value is greater than €1000 and the originator is an individual, the customer identification number; address or birth certificate, passport number or national identity card number is required (or the individuals date and place of birth).[30]

5.8. What are the risks to firms affected?

Where a number of payments thought to be linked exceed that limit, the more stringent regime comes into effect in relation to all of those payments. A firm could therefore find itself subject to a more stringent information gathering regime in respect of an earlier payment for which the requisite steps were not taken. Generally, linked payments are those from the same originator to the same beneficiary over a short period of time.[31]

It would therefore be recommended to engage, initially, in the more intensive information collection regime in respect of all payments unless there is certainty that the payment will never be considered as part of a bundle with others. Indeed, the guidance note makes clear that firms may request the additional information regardless of the value of the transaction.

Of course, and as any actor familiar with crypto will be aware, these are assets which can be very volatile. There is scant guidance from the government as to how this possibility for fluctuation will interact with the *de minimis* rule, save for guidance that a standardized approach may be used.[32]

5.9. What does this tell us about the future of Crypto regulation?

These are the first tentative steps taken towards the tracing of cryptoassets and appear to constitute a more involved approach than has previously been advocated by the Prime Minister, who has in recent times presented the UK as a jurisdiction which will adopt a more *laissez-faire* approach to cryptocurrency. Amidst the increasing regulatory turmoil in the United States and the criminal proceedings in relation to large crypto exchanges, it seems likely that this will be the beginning of a more intensive regime for the regulation of cryptocurrency. That, though, is likely to hinge on the effectiveness of these measures and the extent to which their demands have a dampening effect on the growth of the sector.

The primary takeaway from this string of regulation is in relation to what has not happened, rather than what has. In May 2023, the House of Commons Treasury Committee, alongside a number of charities and commentators, argued that crypto should be regulated in the same way as gambling, rather than as an asset.[33] The decisions set out above to regulate cryptoassets in a functionally identical way to wire transfers and to regulate NFTs as artwork, can be taken as a decisive statement that that suggested approach has been rejected.

6. Final Thoughts

There are certain elements of parity between the new legislative approaches in the EU and UK, which have a common objective of increasing transparency and accountability to reduce the prevalence of financial crime. Recent announcements from the stalwarts of UK corporate investigative bodies such as the SFO and the FCA suggest there is a new vigor for investigations and regulatory oversight.[34] However, the true measure of their success will be how effectively they balance the public interest in preventing crime with the undesirable impact on legitimate companies of an increased administrative burden caused by rolling changes to the regulatory framework. A new approach is to be welcomed given previous failings, and to utilize tools now at the authority's disposal. There will be those who embraced the opportunity for the UK to go it alone, lauding the fact that at least the UK is seen to be doing something 'differently'. The stark reality however is actions and words are measured differently. The EU are building on a combined approach to align principles and objectives, and their new provisions envisaged can only bolster investigative management and enforcement capabilities. The UK however is increasingly finding itself outside the circle of trust, without the significant regulatory overhaul being seen in Europe, and reliant on much of its own efforts to deliver new success, which to date has been woefully lacking.

30. https://www.jmlsg.org.uk/wp-content/uploads/2023/08/Board-approved_JMLSG-Guidance_Part-II-Sector-22-Annex-I_Aug2023.pdf, p3
31. https://www.jmlsg.org.uk/wp-content/uploads/2023/08/Board-approved_JMLSG-Guidance_Part-II-Sector-22-Annex-I_Aug2023.pdf, p6
32. https://www.jmlsg.org.uk/wp-content/uploads/2023/08/Board-approved_JMLSG-Guidance_Part-II-Sector-22-Annex-I_Aug2023.pdf, p7
33. https://committees.parliament.uk/publications/39945/documents/194832/default/, p4
34. www.fca.org.uk/news/speeches/evolving-enforcement-approach-protect-grow-markets

The evolution of the risk-based approach in AML/CFT

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For two decades, there has been a call for a more risk-based approach to Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT). Although the Dutch AML/CFT Act (*Wet ter voorkoming van witwassen en financieren van terrorisme,* Wwft) permits such an approach, supervisory enforcements measures over the past years illustrate that implementing a Risk-Based Approach (RBA) within AML/CFT measures is far from straightforward. Collaborative efforts and recent (draft) guidance provided by the Dutch central bank (*De Nederlandsche Bank*, DNB) and the Dutch banking association (*Nederlandse Vereniging van Banken,* NVB) articulate the principles underpinning the RBA, aiming to enhance the effectiveness of the financial sector's response to AML/CFT challenges. However, with developments in the EU AML/CFT framework, the extent to which an RBA can be sustained remains an open question.

This article seeks to explore the development of the RBA in AML/CFT compliance within the Netherlands, highlighting the collaborative efforts between supervisors and financial institutions and the strategic shifts in guidance. This article will also look to the future of the RBA in light of developments in the EU AML/CFT framework.

1. Background to the risk-based approach in AML/CFT

The evolution of the RBA in AML/CFT compliance in the past decades represents a significant evolution in regulatory strategy, aimed at enhancing the effectiveness of the financial sector's efforts to combat money laundering (ML) and terrorism financing (TF). This change underscored a transition from a predominantly prescriptive framework towards a more nuanced, flexible, and risk-sensitive model.

The development and implementation of the RBA can be traced back to legislative changes that have progressively refined the risk-based AML/CFT compliance framework. This journey reflects a broader international trend towards embracing a risk-sensitive approach, guided by the Financial Action Task Force (FATF) Recommendations and the EU directives. Over the years, the Netherlands has aligned its national legislation and supervisory guidance with these standards, culminating in targeted policies and practices designed to optimize risk-based AML/CFT efforts across the financial sector.

Initially, the concept of risk and a specific RBA were not present in the first AML Directive of 1991, nor in its amendment in 2001.[2] However, the landscape began to change with the introduction of the AML Directive of 2005, which marked a pivotal moment in AML/CFT compliance.[3] This directive introduced an RBA, following the FATF Recommendations that underwent substantial revisions and expansion in 2003.[4] These revisions included the introduction of the concept that Customer Due Diligence (CDD) measures could be tailored on a risk-sensitive basis, varying with the type of customer, product or transaction involved.

The 2005 AML Directive's implementation in Dutch law came with the enactment in 2008 of the Wwft, which consolidated and replaced both the *Wet identificatie bij dienstverlening* (WID) and the *Wet melding ongebruikelijke transacties* (Wet MOT).[5] The Wwft's introduction signified a decisive move towards a more nuanced AML/CFT framework, allowing for greater flexibility in the application of CDD measures. This flexibility was particularly aimed at focusing resources on higher-risk areas, such as transactions involving foreign legal entities, while permitting a lighter touch for lower-risk scenarios, such as simple account relationships with individuals. This differentiation was expected to lead to a reduction in compliance costs for institutions.

These developments of the Wwft were already pre-

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2. Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001.
3. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.
4. History of the FATF, https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html#., consulted on 1 March 2024.
5. Wet van 15 juli 2008, houdende samenvoeging van de Wet identificatie bij dienstverlening en de Wet melding ongebruikelijke transacties (Wet ter voorkoming van witwassen en financieren van terrorisme), Staatsblad 2008, 303, 29 juli 2008.

empted with changes made to the Wet MOT indicators in 2005 that emphasized the shift from a rule-based (objective) system to a risk-based (subjective) system.[6] Under this revised system of indicators, the focus moved away from the objective characteristics of transactions towards the subjective judgement of reporting entities in determining whether to report a transaction as unusual to the financial intelligence unit. This was particularly evident in the domain of transactions by banks, where the number of objective indicators was significantly reduced, and sub-indicators were eliminated. The rationale behind this reduction was the recognition that banks, through years of experience with the reporting system and typically long-term relationships with their customers, were well-equipped to make informed judgements about the unusual nature of transactions and that a rule-based system defeated its purpose.

In 2008, the Memorandum of Explanation accompanying the Wwft announced the RBA with great expectations, suggesting that it would provide the necessary flexibility for institutions to apply CDD more effectively.[7] This approach, as opposed to a prescriptive, rule-based one, meant that institutions were no longer bound by detailed requirements for customer identification, thereby alleviating perceived constraints.

Also the AML Directive of 2015 and its amendment in 2018 further placed the RBA at the core of the EU's AML/CFT regime, underlining its centrality in current AML/CFT efforts.[8] This directive, along with the Netherlands' legislative implementation, illustrates the wish for an adaptable, nuanced, and effective AML/CFT approach and underscoring the importance of assessing and managing risks in a holistic manner.

Accordingly, over the past 20 years, the development of the RBA in AML/CFT compliance within the Netherlands reflects a broader trend towards greater flexibility, efficiency, and effectiveness in AML/CFT practices.

2. Role of DNB in the RBA

The role of DNB in ensuring the successful implementation of the RBA has been outlined in the Memorandum of Explanation of the Wwft.[9] DNB's essential function involves assessing whether CDD conducted by financial institutions under the supervisory remit of DNB meets the required standards of evaluating the risk sensitivity of customers and products. Given the possibility of institutions assessing the risks of similar customers and products differently, the supervisory role of DNB is to take these variations into account, ensuring a balanced and fair evaluation.

Over the years, DNB has published various guidelines highlighting the RBA. Notably, DNB's Guidance on the Wwft and the Sanctions Act first issued in 2011 and periodically updated until 2020 emphasized the importance of the RBA.[10] However, there were also several challenges in the application of the RBA in the sector, ultimately witnessed by the settlements of the Dutch Public Prosecution Service with ING Bank[11] and ABN AMRO[12] where significant deficiencies in the banks' AML/CFT frameworks were highlighted, including ineffective risk assessment of customers and inadequate monitoring of customer transactions. These events underscored the importance of the banks' gatekeeper role and also led to DNB imposing enforcement measures on a range of other institutions.[13] In response, according to DNB, banks have significantly increased their efforts to ensure compliance with the law, but not every bank is equally advanced in this respect.[14]

3. EBA Guidance

In addition to guidance by DNB, the European Banking Authority (EBA) has also produced a plethora of opinions and guidance on AML/CFT.[15] Specifically, the EBA's ML/TF Risk Factors Guidelines provide a comprehensive framework that encapsulates the essence of the RBA in AML/CFT compliance.[16] These guidelines are designed to assist financial in-

6. Regeling tot hernieuwde vaststelling van een indicatorenlijst voor ongebruikelijke transacties (Regeling indicatoren ongebruikelijke transacties 2005), Staatscourant 2005, 164, pagina 7, 25 augustus 2005.
7. Memorie van Toelichting Wet ter voorkoming van witwassen en financieren van terrorisme, Kamerstukken II 2007-2008, 31238, nr 3, p. 6.
8. Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.
9. Memorie van Toelichting Wet ter voorkoming van witwassen en financieren van terrorisme, Kamerstukken II 2007-2008, 31238, nr 3, p. 6.
10. DNB Guidance on the Wwft and the Sanctions Act, https://www.dnb.nl/en/sector-information/open-book-supervision/laws-and-eu-regulations/anti-money-laundering-and-anti-terrorist-financing-act/dnb-guidance-on-the-wwft-and-the-sanctions-act/, consulted on 1 March 2024.
11. https://www.om.nl/actueel/nieuws/2018/09/04/ing-betaalt-775-miljoen-vanwege-ernstige-nalatigheden-bij-voorkomen-witwassen#, consulted on 1 March 2024.
12. https://www.om.nl/actueel/nieuws/2021/04/19/abn-amro-betaalt-480-miljoen-euro-vanwege-ernstige-tekortkomingen-bij-het-bestrijden-van-witwassen#, consulted on 1 March 2024.
13. https://www.dnb.nl/nieuws-voor-de-sector/?p=2\&l=10\&nt=MTgxODk, consulted on 1 March 2024.
14. DNB, From recovery to balance, September 2022, p. 3.
15. https://www.eba.europa.eu/regulation-and-policy/anti-money-laundering-and-countering-financing-terrorism, consulted on 1 March 2024.
16. EBA, Guidelines on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions ('The ML/TF Risk

stitutions across the EU in understanding and effectively managing the ML/TF risks to which they are exposed.

The EBA's ML/TF Risk Factors Guidelines emphasize the importance of financial institutions conducting a thorough risk assessment as the foundation of their AML/CFT efforts. This should be an assessment of both business-wide risks and the risks associated with individual business
relationships, taking into account various risk factors related to customers, countries or geographical areas, products, services, transactions, and distribution channels. The RBA is reflected in the guidelines' view that measures applied by institutions to mitigate identified risks should be proportionate to the nature and level of those risks. This ensures that resources are allocated efficiently and that measures are not unduly burdensome on customers or the institutions themselves.

Key elements of the EBA ML/TF Risk Factors Guidelines include per financial (sub-)sector an overview of:

- Customer Risk Factors with detailed criteria for assessing the risk associated with individual customer types, including their business activities, ownership structure, and the transparency of their transactions.
- Country and Geographical Risk Factors guiding institutions to consider the ML/TF risks associated with the countries in which their customers are based, conduct transactions, or have significant business ties.
- Product, Service, Transaction, and Distribution Channel Risk Factors requiring institutions to evaluate the risk posed by the specific nature of their products and services, the ways in which these are offered, and the types of transactions they facilitate.

Per (sub-)sector, mitigating measures are described. These focus on Enhanced Due Diligence (EDD) measures for higher-risk scenarios and Simplified Due Diligence (SDD) measures for lower-risk situations.

By setting out these guidelines, the EBA aims to harmonize the application of the RBA across Member States, ensuring that financial institutions are both vigilant against ML/TF risks and that their compliance practices are grounded in a good understanding of their specific risk exposures.

4. Some points of critique

Nevertheless, several points of critique can be identified in how the RBA is addressed by DNB and the EBA. These critiques generally revolve around the practical application and flexibility.

Despite the emphasis on the RBA, the ample enforcement measures by DNB, as well as by other supervisory authorities in the Netherlands and in the EU, combined with detailed guidance has unintentionally lead to a "tick-the-box" compliance mentality among institutions. The comprehensive nature of the supervisory enforcement measures and guidelines was often interpreted by institutions as prescriptive requirements, thereby stifling the flexibility that the RBA is supposed to offer. This has limited institutions' ability to tailor their AML/CFT measures based on their risk assessments.

Smaller institutions might have found the guidelines challenging to implement due to their complexity and the resource implications of complying with such detailed requirements. An RBA, while flexible, requires significant expertise and resources to implement effectively, which could disproportionately burden smaller entities.

Also, the rapid pace of innovation in financial services poses a challenge to the ability to stay current. The risks identified in the various guidelines may not fully encompass the emerging risks associated with new technologies and business models, potentially leaving gaps in institutions' risk assessments and mitigation measures.

While the supervisory guidelines are comprehensive in detailing risk factors and mitigation measures, focus on compliance with the guidelines might lead institutions to prioritize adherence over the actual effectiveness of their AML/CFT measures in detecting and preventing financial crimes. This also requires the supervisory authorities to adopt a flexible approach and not taking compliance with the regulations as the basis, but the risks to which an institution is exposed.

5. DNB's new approach

In September 2022, DNB took a significant step by publishing the report "From recovery to balance: A look ahead to a more risk-based approach to preventing and combating money laundering and terrorist financing." This publication marks a commitment to advancing a more risk-based approach, urging banks to refine their customer risk classification processes. DNB pledged to support institutions through additional guidance, particularly regarding the appropriate level of scrutiny for lower-risk customers. This move aims to make the financial sector's efforts to combat financial crime more targeted and efficient.[17]

DNB advocates for a more risk-based approach to reduce the administrative burden on banks and their

Factors Guidelines') under Articles 17 and 18(4) of Directive (EU) 2015/849, 1 March 2021.

17. https://www.dnb.nl/en/general-news/press-release-2022/fight-against-money-laundering-must-be-more-focused/, consulted on 1 March 2024.

customers, promoting a system that is both more effective and more efficient. The challenge for both institutions and the supervisor are to implement the RBA more emphatically and effectively. This entails better risk identification and ensuring that the measures taken are proportionate to the identified risks. Stricter measures are necessary for greater risks, while simpler measures suffice for smaller risks, allowing for the optimal allocation of resources to achieve the most significant impact.

This strategic direction from DNB reflects a nuanced understanding of the complexities involved in risk-based AML/CFT compliance and a commitment to fostering a supervisory environment that is adaptable. By encouraging a more nuanced application of the RBA, DNB aims to enhance the Dutch financial sector's resilience against ML/TF, ensuring that efforts are focused where they are most needed and effective.

A further milestone in this new approach has been the publication for consultation of the "Wwft Q&As and Good Practices" by DNB in October 2023.[18] This document aims to replace the "DNB Guidance on the Wwft and the Sanctions Act," which in the opinion of DNB had the pretence of an extensive reference book that was perceived by some institutions as binding and prescriptive.[19]

The "Wwft Q&As and Good Practices" marks DNB's effort to provide institutions with practical, concise guidance on their legal obligations under the Wwft. By explaining the rationale behind legal obligations, offering specific Q&As, and outlining Good Practices, DNB aims to have a less prescriptive tone, intending to empower entities with the autonomy to interpret and apply the Wwft based on their own risk analysis. The Q&As and Good Practices are outlined with examples and DNB's insights on how institutions can fulfil their AML/CFT requirements effectively. DNB states that this approach allows for a degree of flexibility and encourages institutions to engage in their own thorough risk-based analysis. Specifically, the Good Practices address situations of higher risk and detail measures institutions can implement to mitigate such risks.

6. NVB Industry Baselines

Additional developments have been made through collaboration between DNB and the NVB further aiming to enhance the structural implementation of the RBA across the banking sector, particularly in relation to CDD.

To facilitate a deeper understanding of the challenges within the sector, DNB and the NVB have initiated a series of round table discussions. These sessions have brought together representatives from the financial sector and other stakeholders, focusing on identifying main bottlenecks and areas where additional guidance could streamline the adoption and execution of the RBA going forward.[20]

A pivotal outcome of these discussions is the formulation of the NVB Risk-based Industry Baselines, which serve as a comprehensive framework for banks. These standards offer clear principles for applying the open norms of the Wwft in CDD processes. They are comprised of a set of risk-based standards for banks along with sector standards that address CDD and risk factors specific to various sectors. The Industry Baselines detail both risk-enhancing and risk-reducing factors, supporting a risk-relevant and proportional approach to CDD.[21]

The NVB Risk-based Industry Baselines and the NVB Sector Baselines are developed through dialogues with representatives from diverse industry organizations, DNB, and, for certain sectors, the Ministry of Finance.[22] These baselines provide banks with distinct principles for the risk-based fulfilment of their Wwft obligations, encompassing areas such as ongoing due diligence, models in alert and event generation, UBO identification and verification, politically exposed persons, and EDD measures for high-risk third countries. Furthermore, the NVB Sectors Baseline addresses specific sectors like sex workers, crypto-asset service providers, and not-for-profit organisations. In development are standards for cash, real estate, and adverse media.

It is important to note that adhering to the NVB Industry Baselines is not a statutory requirement but rather offers guidance for banks to effectively implement the RBA. The guidance is instrumental in navigating different risk levels. By providing clarity not only on higher-risk situations but purposely also on measures appropriate for lower-risk scenarios, the NVB Industry Baselines assist banks in achieving a risk-relevant implementation of the RBA. This approach ensures that resources are deployed efficiently, thereby enhancing the sector's resilience against financial crimes.

18. Consultation DNB Wwft Q&As and Good Practices, https://www.dnb.nl/en/publications/supervision-publications/consultation-2023/consultation-dnb-wwft-qas-and-good-practices/, consulted on 1 March 2024.
19. DNB Question and Answer The DNB Wwft Q&As and Good Practices, www.dnb.nl/media/rslcfocn/questions-and-answers-about-the-consultation.pdf, consulted on 1 March 2024.
20. DNB, Fight against money laundering must be more focused, 9 September 2022, https://www.dnb.nl/en/general-news/press-release-2022/fight-against-money-laundering-must-be-more-focused/, consulted on 1 March 2024.
21. NVB, Een meer risicogebaseerd klantonderzoek (NVB Standaarden), https://www.nvb.nl/themas/veilig-en-integer-financieel-stelsel/een-meer-risicogebaseerd-klantonderzoek/, consulted on 1 March 2024.
22. NVB Industry Baselines Risk-based approach for Client Due Diligence (CDD) by Dutch banks, November 2023.

7. Proposed AML Regulation

The EU's draft AML Regulation (AMLR) aims to strengthen the EU's AML/CFT framework by establishing more uniform rules across the EU Member States.[23] A central element of this draft regulation is the reinforcement of the RBA to AML/CFT compliance. The proposed AMLR encourages institutions to assess and mitigate ML/TF risks in a manner proportionate to the nature and size of these risks.

The AMLR emphasizes the need for entities to conduct thorough risk assessments, both at the initiation of customer relationships and on an ongoing basis. It outlines specific factors to be considered in these assessments, such as customer activities, the types of products and services used, and the geographical regions involved in transactions. Nevertheless, some negative implications could occur.

While an RBA is inherently flexible, the draft AMLR overly prescribes detailed requirements, leaving little room for institutions to tailor their approaches based on their unique risk profiles. An example is that the AMLR introduces more specific and detailed provisions on when and how to apply CDD.[24] This rigidity might stifle innovation and the ability to respond swiftly to emerging risks. The level of detailed requirements with exceptions on exceptions in the AMLR appear to focus more on compliance with prescribed measures rather than on the effectiveness of those measures in actually preventing ML/TF. It could therefore – again – lead to a box-ticking mentality. Financial institutions might prioritize meeting the regulatory requirements over developing genuinely effective AML/CFT strategies.

Also, given the diversity of financial sectors within the EU, a one-size-fits-all approach to the RBA may not be effective. The proposed AMLR does not fully account for the varying levels of maturity and sophistication in AML/CFT frameworks across Member States, possibly leading to implementation challenges and inconsistencies. Moreover, smaller and newer institutions might find it particularly challenging to meet the detailed requirements of the AMLR due to limited expertise and resources.

In summary, while the draft AMLR signifies a crucial step towards strengthening the EU's AML/CFT framework, the proposed measures are not flexible and proportionate and impose undue burdens on the financial sector, thereby in the end not ensuring effectiveness in combating financial crimes.

7.1. Some examples from the AMLR

The draft AMLR frequently employs the terminology "risk-based" within its preambles, suggesting a general preference for AML/CFT measures to be implemented following an RBA. However, a closer examination of some articles of the AMLR reveals a sparing use of terms such as "risk-based," "risk-sensitive," or "reasonable measures," indicating a discrepancy between the intended approach and its practical application within the regulation.

The emphasis is primarily on ensuring that risk-based policies, procedures, and controls are proportionate to the entity's risks. Specific mention is made regarding the necessity for reasonable measures in verifying the ultimate beneficial owner's (UBO) identity and applying EDD in higher-risk situations or SDD in lower-risk scenarios.

A detailed look into the requirement on the verification of the UBO's identity underlines the challenges in applying a risk-based process based on the AMLR. Article 16 paragraph 1 under b requires that reasonable measures are taken to verify the UBO's identity so that the obliged entity is satisfied that it knows who the UBO is and that it understands the ownership and control structure of the customer. In contrast, article 44 paragraph 1 details all the personal information on the UBO that needs to be adequate, accurate and up-to-date. This includes all names and surnames, place and full date of birth, residential address, country of residence and nationality or nationalities of the UBO, number of identity document, such as passport or national identity document, and, where it exists, unique personal identification number assigned to the person by his or her country of usual residence, and general description of the source of such number. The collection of extensive personal information on the UBO, raises questions about the extent to which the verification measures can genuinely be risk-based in all cases.

Article 21 further complicates the application of the RBA by specifying the frequency of customer information updates based on risk, yet setting fixed intervals for these updates. For higher-risk customers, updates must occur annually, and for all others, at least every five years. This provision seemingly limits the effectiveness of an RBA for managing lower-risk private customers, as institutions are at least once every five years compelled to update the customer information.This limits the effectiveness of a genuine risk-based approach.

Furthermore, article 18 delineates the procedure for cases where no natural person is identified as the UBO, requiring the identification and verification of all senior managing officials' identities without explicitly allowing for reasonable measures in this verification process. This omission contrasts with the riks-based verification of the UBO's identity.

The AMLR does reference the RBA in the context of SDD and EDD. Article 27 allows for the postpone-

23. Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing - Confirmation of the final compromise text with a view of agreement, 13 February 2024.
24. Articles 15 – 19 of the proposed text of the AMLR.

ment of verifying the customer and UBO's identity under specific low-risk conditions but does not explicitly state that in case of SDD the verification of the UBO's identity can rely on reasonable measures.

Article 28 introduces the requirement of employing EDD measures proportionate to the risk, offering a degree of flexibility in their implementation. Paragraph 4 of this article lists seven specific measures that may be included when applying EDD measures. However, the AMLR is ambiguous if specifically one or more of these measures need to be applied or that the entity can also opt for other measures. Moreover, with respect to business relationships or occasional transactions involving natural or legal persons from a third country with significant strategic deficiencies in its national AML/CFT regime there is no room for risk-based discretion; in those cases all seven EDD measures have to be applied in accordance with article 23 paragraph 4.

In summary, while the AMLR incorporates the language of an RBA, its application within the regulation appears limited and inconsistently defined. The detailed requirements for data collection and prescriptive measures for certain higher-risk scenarios suggest a departure from the flexibility inherent in the RBA. This approach may hinder the efficiency intended by the RBA, suggesting a need for further clarity to enable an effective implementation in AML/CFT compliance efforts.

8. The AMLA

A final observation must be made regarding the Anti-Money Laundering Authority (AMLA). Despite the draft AMLR frequently invoking the RBA in its preambles, it does so to a lesser extent within the actual articles. It is however specified across numerous articles that to endorse an RBA, AMLA is to be tasked with issuing guidelines and regulatory technical standards.

The AMLA is set to play a pivotal role in the EU's framework for AML/CFT supervision. AMLA will act as the central authority coordinating national supervisory authorities to ensure more consistent and effective AML/CFT supervision across the EU. AMLA will be instrumental in developing, updating, and harmonizing AML/CFT standards across the EU.[25]

This encompasses formulating guidelines and regulatory technical standards tailored to address ML/TF risks, ensure consistency in application across Member States. By issuing guidelines and regulatory technical standards, AMLA will aim to minimize discrepancies in how AML/CFT requirements are interpreted and enforced by national supervisors. However, too much uniformity in guidelines and technical standards might not adequately account for the diverse risk landscapes and operational realities of different Member States and sectors. This could lead to a "one-size-fits-all" approach that may not be optimal for addressing specific risks effectively. Moreover, this could also result in numerous and sizeable guidance documents that will invoke detailed policies and procedures that do not leave much room for a genuine RBA by an institution.

The guidelines and technical standards that AMLA will issue, could consequently inadvertently transition the desired and necessary RBA towards being more rule-based. As noted above, the AMLR specifies more detailed requirements around CDD. With comprehensive technical standards, there might arise an increased pressure on institutions to meet even stricter and more complex rules and regulations. This could diminish the willingness of institutions to engage with certain customers, thereby exacerbating further de-risking.[26]

There is a risk that AMLA's guidelines and technical standards could lead to over-regulation, imposing additional compliance burdens on institutions. If these requirements become too prescriptive or complex, smaller institutions, in particular, may struggle with the resources needed for compliance. This situation could adversely affect their operational efficiency and capacity for innovation, highlighting the delicate balance AMLA must strike in enhancing AML/CFT effectiveness without impeding the financial sector's developments and inclusivity.

9. Conclusion

Despite the RBA being a priority for two decades in AML/CFT compliance, it is clear that achieving an effective RBA is challenging. The introduction of the draft DNB Wwft Q&As and Good Practices, along with the NVB Risk-based Industry Baselines, signifies a clear commitment to more risk-sensitive CDD. This approach allows for reduced scrutiny of lower-risk customers while acknowledging the possibility that some risks may go undetected.

However, recent EU developments, notably the detailed requirements in the proposed AMLR and AMLA's role in setting technical standards, might complicate these advancements, potentially reverting AML/CFT compliance to a more rule-based approach. The challenge lies in ensuring that these new EU regulations enhance, rather than hinder, the effectiveness and flexibility of the RBA, maintaining a balance between a robust AML/CFT framework and the nuanced assessment of risk that the RBA advocates.

25. https://www.consilium.europa.eu/en/press/press-releases/2023/12/13/anti-money-laundering-council-and-parliament-agree-to-create-new-authority/, consulted on 1 March 2024.

26. Maud Bökkerink, Wat is er nodig om de AMLA echt effectief te laten zijn?, in "De Compliance Officer", nummer 45, Nederlands Compliance Instituut, juli 2023.

Het dubbele normenkader van forensische onderzoeken van financieel economische criminaliteit

F.J. Erkens MEWI FFE LL.M.[1]

1. Inleiding

In de '*driver's seat*' of op de achterbank? Compliance officers kunnen direct of indirect betrokken zijn bij het opstellen van beleid en procedures voor forensische onderzoeken (hierna: Onderzoeken) dan wel bij de uitvoering van zo'n onderzoek.[2] Om in die rol op een professionele manier in de '*driver's seat*' sturing aan het Onderzoek te kunnen geven, is het met het oog op de belangen van de diverse betrokkenen, de bestaande wettelijke verplichtingen en de maatschappelijke ontwikkelingen noodzakelijk het '*waarom*', '*wat*' en '*hoe*' van deze Onderzoeken goed te begrijpen en te kunnen toepassen.

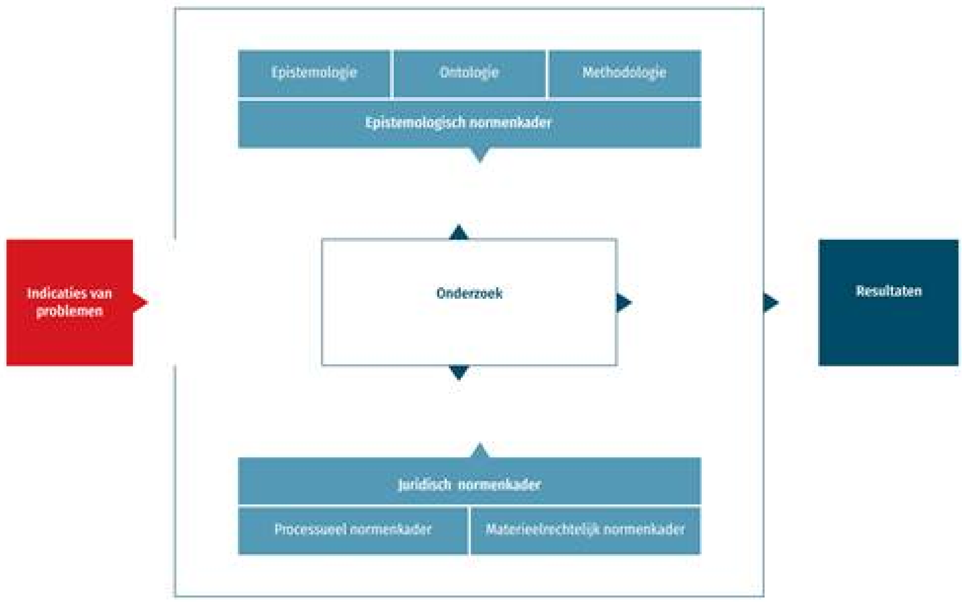
In de huidige maatschappij wordt het steeds belangrijker om zorgvuldig om te gaan met de belangen van betrokkenen. Europese en nationale wettelijke en andere verplichtingen moeten in acht worden genomen om potentiële risico's, strafrechtelijke vergrijpen, zoals financieel economische criminaliteit, milieu- en andere problemen, en andere vormen van ongewenst gedrag (hierna voor de leesbaarheid gezamenlijk samengevat onder de term: FEC) inzichtelijk te maken en te mitigeren. Dit behelst in de kern vaak het '*waarom*' van de Onderzoeken. Het geheel of gedeeltelijk nalaten de belangen van betrokkenen te beschermen en op een toereikende wijze deze problemen inzichtelijk te maken en zo nodig aan te pakken, gaat in toenemende mate straf-, bestuurs-, privaat-, tuchtrechtelijke en/of reputationele consequenties krijgen.[3] Zo zijn de (aanstaande) vervolgingen van bankbestuurders voor nalatigheid om witwassen te voorkomen,[4] het aanspreken van ondernemingen voor corruptie, witwassen en gebrekkige berichtgeving hierover,[5] de verschillende juridische procedures tegen vervuilende ondernemingen en hun bestuurders,[6] en de #metoo-zaken[7] duidelijke voorbeelden van maatschappelijke en juridische reacties op (vermeende) schendingen van belangen en het niet nakomen van (vermeende) wettelijke verplichtingen.

Om de bovengenoemde verplichtingen op een professionele wijze te kunnen nakomen, is het belangrijk om de integriteit van het onderzoeksproces in het oog te hebben en te bewaken. Om dat te kunnen realiseren zal de compliance officer niet alleen inzicht in de opzet en uitvoering van het onderzoeksproces moeten hebben, maar ook de daaraan ten grondslag liggende juridische eisen en epistemologische[8] principes moeten kennen en kunnen (laten) toepassen. Deze eisen en principes vormen de fun-

1. Frank Erkens is partner bij het forensische onderzoeks- en adviesbureau Holland Integrity Group en voert momenteel een promotieonderzoek uit met betrekking tot het onderwerp 'forensisch onderzoek'. De schrijver dankt onder meer L. Block, B. Bruin en N. Keijser voor het lezen van eerdere versies.
2. Onder forensische onderzoeken wordt verstaan het verzamelen, analyseren, interpreteren en verstrekken van informatie over de aard en omvang van de mogelijke onregelmatigheden met het doel om beslissers op basis van het verstrekte inzicht in staat te stellen om beslissingen te nemen voor het oplossen van problemen en/of het treffen van maatregelen. Het woord 'forensisch' wordt gehanteerd voor een onderzoek dat in het kader van een mogelijke juridische procedure wordt uitgevoerd.
3. 'Bestuurders in het vizier van claimadvocaten en overheid', FD, 20 juni 2022; 'Uit de zaak Gündogan-Volt zijn pijnlijke lessen te trekken, FD, 2 maart 2022; 'MeToozaken werken ook door in de beurskoers', FD 8 februari 2022.
4. 'Justitie is klaar met witwasonderzoek naar ex-top ABN Amro', FD, 19 december 2023; 'Rabobank verdacht in onderzoek schending witwaswet', FD, 7 december 2022; ECLI:NL:GHDHA:2020:2347 (artikel 12 procedure ING Bank).
5. 'Groep grote beleggers claimt half miljard van ING vanwege witwasaffaire', FD, 7 februari 2024; 'AFM fines SBM Offshore for non-timely disclosure of inside information', AFM, 5 april 2019; 'VEB/SBM – vragen naar aanleiding van SBM-persbericht d.d. 29 maart 2019 naar aanleiding van de voorgenomen AFM-boete', Vereniging van Effectenbezitters, 5 april 2019; 'OM gaat Shell vervolgen voor omkoping Nigeria', FD, 1 maart 2019; Press release 'SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries', US Department of Justice, 29 November 2017.
6. 'Boete of stillegging dreigt voor Chemours na uitspraak rechter', FD, 22 december 2023; ECLI:NL:RBDHA:2023:20494; 'Milieuclubs eisen sluiting 'ziekmakende' fabrieksonderdelen Tata Steel in 2030', FD, 17 december 2023; 'Nederlandse beursfondsen zien winsten verdampen als maatschappelijke kosten meetellen', FD, 22 november 2023; ECLI:NL:RBDHA:2021:5337.
7. *Niets gehoord, niets gezien en niets gedaan*, Onderzoekscommissie Gedrag en Cultuur Omroepen, 1 februari 2024; 'Marc Overmars jaar geschorst', FD, 16 november 2023; 'Mariëtte Hamer: 'Paniek is schadelijk bij aanpak grensoverschrijdend gedrag', FD, 17 mei 2023.
8. Epistemologie is de filosofische wetenschap die zich richt op het verwerven van kennis (in de betekenis van onder meer relevante en betrouwbare informatie).

dering van het Onderzoek wanneer dat in het kader van een (toekomstige) juridische procedure, die gericht moet zijn op materiële waarheidsvinding, wordt uitgevoerd. Internationaal is waarheidsvinding als een fundamenteel beginsel van procesrecht terug te vinden in de Universele Verklaring van de Rechten van de Mens (hierna: UVRM) van de Verenigde Naties en het Europese Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden (hierna: EVRM). Nationaal heeft waarheidsvinding een belangrijke plaats in het Wetboek van Burgerlijke Rechtsvordering en andere wetten. De Hoge Raad heeft in een arrest van 2009 verwezen naar '*het algemene maatschappelijke belang dat de waarheid in rechte aan het licht komt ten dienste van een goede rechtsbedeling (...)*'.[9]

Voor Onderzoeken geldt dat zij een dubbel normatief kader hebben, namelijk een juridisch en een epistemologisch kader.[10] Kaders, waarin de juridische eisen en epistemologische principes op verschillende wijzen worden verwoord, maar die op een vergelijkbare manier werken om waarheidsgetrouwheid, integriteit en gerechtvaardigdheid te waarborgen.



In het bovenstaande schema zijn de twee normenkaders vereenvoudigd weergegeven. Kort gezegd bepaalt het juridische kader het juridische '*wat*' en het epistemologische kader het onderzoekstechnische '*hoe*' van het Onderzoek. De constatering van De Bock: '*Een goede rechterlijke uitspraak vergt niet alleen dat de rechter de juiste rechtsregels toepast, maar vóór alles dat de feitenvaststelling deugdelijk is*' geeft de kern en het belang van deze dubbele normativiteit goed weer.[11] In het verlengde hiervan stelt Giard terecht vast dat het op twee fronten fout kan gaan, namelijk de onbehoorlijkheid van het bewijsmateriaal (het juridische kader) en de onbetrouwbaarheid van het bewijsmateriaal (het epistemologische kader).[12]

In de praktijk blijkt dat opdrachtgevers en onderzoekers vaak onvoldoende rekening houden met één of beide kaders. Hierdoor komt het voor dat de onderzoeksresultaten geen standhouden bij de rechter, maar ook dat de onderzoekers worden aangesproken voor onzorgvuldig en/of onprofessioneel handelen. Verwezen kan worden naar de mogelijke strafrechtelijke vervolging van het onderzoeksbureau dat diverse individuen zonder noodzakelijke vergunning heeft onderzocht.[13] Alsmede naar de voorwaardelijke schorsing van de advocaat die zich volgens de Raad van Discipline '*opportunistisch en misleidend*' had opgesteld in een onderzoek voor zijn cliënt,[14] en naar de casus van de advocaat, die een tuchtrechtelijk verwijt kreeg wegens het opstellen

9. ECLI:NL:HR:2009:BG9470.
10. R.W.M. Giard, *Werken aan waarheidsvinding*, Boom Juridisch, 2016, p. 23.
11. R.H. De Bock, *Tussen waarheid en onzekerheid: over het vaststellen van feiten in de civiele procedure*, Kluwer, 2011, p. 337.
12. R.W.M. Giard, *Werken aan waarheidsvinding*, Boom Juridisch, 2016, p. 20.
13. L. Block, Jurisprudentie 2022, www.blockint.nl, 5 februari 2023; 'Aangifte tegen onderzoeksbureau in zaak Gijs van Dijk: 'geen vergunning', HP De Tijd, 27 oktober 2022.
14. 'Raad van Discipline legt oud-advocaat van Gerard Sanderink voorwaardelijke schorsing op', NRC, 23 mei 2022; ECLI:NL:TADRAMS:2022:73.

en verspreiden van een onvolledig en suggestief rapport voor De Nederlandsche Bank dat de bestuursrechter mogelijk in de waarheidsbevinding belemmert.[15]

In dit artikel zal eerst ingegaan worden op de wetenschappelijke achtergrond van Onderzoeken. Daarna worden het juridische- en epistemologische kader verder uitgewerkt.

2. Wetenschappelijke achtergrond van onderzoeken vanuit verschillende invalshoeken

2.1. Natuur- en sociale wetenschappen

Natuurverschijnselen hebben sinds mensenheugenis een belangrijke rol in de wetenschap gespeeld. Dit zal er mede aan ten grondslag hebben gelegen dat door de eeuwen heen een meer prominente rol in de wetenschap is toegekend aan natuurwetenschappen dan aan sociale wetenschappen. Laatstgenoemde heeft pas tijdens de Verlichting een gelijkwaardige positie gekregen.[16] Sinds de Verlichting hebben in de natuurwetenschappen allerlei belangrijke ontdekkingen plaatsgevonden, zoals de telescoop van Galileo Galilei en de verschillende wetten op het terrein van de klassieke mechanica door Isaac Newton. Deze wetenschappers benadrukten het belang van op bewijs gebaseerd redeneren en de systematische studie van natuurverschijnselen, hetgeen een belangrijke basis heeft gelegd voor onze huidige kijk op de wetenschap.

Een belangrijk kenmerk van natuurwetenschappen is dat zij door gecontroleerd onderzoek in laboratoria met behulp van meetinstrumenten kwantificeerbare, verifieerbare en voorspelbare resultaten kunnen produceren, en kunnen inzoomen op afzonderlijke onderdelen. Dit werd in het verleden lange tijd als een soort ijkpunt voor '*de ware wetenschap*' gezien.[17] Bij natuurwetenschappen wordt aangenomen dat de bestudeerde verschijnselen een bestaan hebben dat onafhankelijk is van menselijke percepties, overtuigingen en interpretaties. In deze optiek sluiten ze goed aan bij de filosofische stroming van het objectivisme, dat stelt dat de objectieve werkelijkheid onafhankelijk van het bewustzijn bestaat en dat zintuigelijke waarneming en redenatie de enige bron van de objectieve kennis van de mens is.

Aan de andere kant houden sociale wetenschappen zich vaak bezig met verschijnselen die juist sterk verbonden zijn met menselijke percepties, overtuigingen en interpretaties. Met de Verlichting is er aandacht gekomen voor de persoonlijke ontwikkeling van mensen en de erkenning van sociale wetenschappen. Enerzijds omdat binnen sociale wetenschappen ook registratie- en analysemethoden toegepast zijn gaan worden die hun oorsprong vinden in de natuurwetenschappen, anderzijds ook omdat binnen de sociale wetenschappen eigen onderzoeksmethodologieën en theoretische denkkaders zijn ontwikkeld die betrouwbare en verifieerbare resultaten opleveren. Zo is onderkend dat historische, sociale, culturele, psychologische, politieke, financiële en economische factoren veelal sterk met elkaar verweven zijn en vanuit een holistische benadering in elkaars perspectief moeten worden gezien. Het onderzoeken van één specifiek onderdeel zonder de noodzakelijke context levert in de sociale wetenschappen gefragmenteerde resultaten op, die door het ontbreken van de noodzakelijke verbanden weinigzeggend en niet probleemoplossend zijn. Dit maakt dan ook dat sociale wetenschappen als meer complex en minder voorspelbaar worden ervaren dan natuurwetenschappen. Sociale wetenschappers kunnen, in tegenstelling tot natuurwetenschappers, geen gecontroleerd onderzoek doen in een laboratorium, waardoor het ook lastiger is om algemeen geldende uitspraken te doen. In de sociale wetenschap is de wetenschapper vaak zelf het meetinstrument, omdat deze zelf een deel van het onderzoeksveld waarneemt, vastlegt, analyseert en beschrijft. De filosofische stroming van het subjectivisme hangt met name met sociale wetenschappen samen, omdat het de visie aanhangt dat de werkelijkheid geen vaste entiteit is, maar wordt geconstrueerd en geïnterpreteerd door het individu.

Een Onderzoek naar FEC kan ook niet in een laboratorium plaatsvinden; misschien wel bepaalde technische onderdelen, maar niet het Onderzoek als geheel. De onderzoeker zal de relevante feiten en omstandigheden zelf moeten verzamelen, waarbij rekening moet worden gehouden met de complexe werkelijkheid waarin de mogelijke gedragingen hebben plaatsgevonden. De complexe werkelijkheid komt tot uitdrukking in de brede context waarbinnen organisaties opereren met een bepaald wettelijk kader, bedrijfscultuur, persoonlijkheden van de betrokken individuen, maatschappelijke en economische ontwikkelingen en vele andere aspecten. Het aanbrengen van beperkingen in de context, tijd, gegevens, individuen en andere relevante componenten zal afbreuk doen aan de kwaliteit van een Onderzoek en de betrouwbaarheid van de bevindingen. De constatering van Jennen en Biemond over de reikwijdte van een onderzoek: '*(...) de onderneming is meestal gebaat bij een onderzoek met een duidelijke focus en een beperkte reikwijdte*' wringt met de beschreven holistische benadering van de sociale wetenschap.[18] Een Onderzoek naar FEC zal door de complexe context met veel relevante factoren vanuit een interdisciplinaire, subjectivistische en holistische benadering aangepakt moeten worden. Uiteindelijk zijn deze opzet en uitvoering van het Onderzoek én de ken-

15. ECLI:NL:TAHVD:2021:166.
16. R.W. Shaffern, *Law and Justice from Antiquity to Enlightenment*, Rowman & Littlefield Publishers, 2009.
17. A.C. Crombie, 'Experimental Science and the Rational Artist in Early Modern Europe', Daedalus, Vol. 115, No. 3, Art and Science, Summer 1986, p. 49-74.
18. B.C.G. Jennen & H.J.Th. Biemond, 'Het interne fraudeonderzoek, Enkele juridische overwegingen', TOP 2009, maart, p. 61.

nis en ervaring van de onderzoeker bepalend voor de kwaliteit van het Onderzoek en betrouwbaarheid van de bevindingen.

2.2. Conventionele en forensische wetenschappen

Conventionele wetenschappen zijn de al lang bestaande, gebruikelijke natuur- en sociale wetenschappen, zoals wiskunde, economie, natuurkunde en psychologie. Forensische wetenschappen daarentegen zijn kleine, bijzondere wetenschappen die veelal met een geheel ander doel uit deze conventionele wetenschappen zijn ontsproten, namelijk voor het toepassen van wetenschappelijke methoden en technieken ten behoeve van de rechtspleging.

Uit de wetenschappelijke literatuur blijkt dat conventioneel en forensisch onderzoek veel overeenkomsten, maar ook enkele kenmerkende verschillen hebben. Bij beide typen onderzoek gaat het om empirische waarheidsvinding; bij conventionele wetenschap om waarheidsvinding in het kader van de wetenschap en bij forensische wetenschap in het kader van de rechtspleging. Voor de besluitvorming in het kader van de rechtspleging gelden echter andere spelregels dan voor de besluitvorming in een conventionele context, namelijk juridische spelregels die soms botsen met wetenschappelijke spelregels.[19] Een ander kenmerkend verschil wordt door Broeders aangehaald, die vaststelt dat conventionele wetenschap '*probeert structuren en relaties te ontdekken tussen objecten door ze in te delen in klassen en de juistheid van deze generalisaties toetst door het doen van voorspellingen ten aanzien van het gedrag van groepen en klassen in verleden, heden en toekomst*'.[20] Deze karakterisering van conventionele wetenschap komt overeen met het ene deel van forensische wetenschap, maar staat diametraal op het andere onderdeel, namelijk de forensische individualisatiewetenschap. Forensische wetenschap kan in twee categorieën worden onderverdeeld:[21]

1. De forensische individualisatiewetenschap, waarbij het onderzoek zich richt op de individualisatie van een object of subject.[22]
2. De forensische categorisatiewetenschap, waarbij het onderzoek gericht is op categorisatie en kwantificering.[23]

Een Onderzoek naar FEC kan in de meeste gevallen als forensisch individualisatieonderzoek worden gekenmerkt, omdat het veelal gericht is op het kunnen koppelen van mogelijk onrechtmatige of ongewenste gedragingen aan een individu in het kader van een (toekomstige) rechterlijke beoordeling in een juridische context. Uit de forensische wetenschapsliteratuur en de praktijk blijkt dat dit kunnen koppelen van gedragingen aan een individu het moeilijkste onderdeel betreft, waar, dientengevolge, de meeste fouten door onderzoekers worden gemaakt.[24] Het kunnen beargumenteren dat er *mogelijk* sprake is van een relatie tussen een bepaalde gedraging en één of meerdere individuen is vaak niet zo moeilijk. Maar het *onderbouwd* kunnen terugbrengen naar de juiste individu(en), de individualisatie, en het kunnen uitsluiten van bepaalde feiten en/of individuen, het falsificeren, dat bepaalde individuen zich niet misdragen (kunnen) hebben, is veel lastiger. Deze constatering speelt een belangrijke rol in de volgende onderdelen, waar nader ingegaan zal worden op de juridische en epistemologische normenkaders.

3. Het juridische normenkader

Het juridische normenkader kan onderverdeeld worden in twee onderdelen, namelijk het processuele en materieelrechtelijke normenkader. Deze twee kaders vormen de juridische spelregels en criteria, die leidend voor de onderzoeker moeten zijn in het opzetten en uitvoeren van een Onderzoek.

3.1. Het processuele normenkader

De processuele normering voor de opzet en uitvoering van het Onderzoek bestaat uit de regels, procedures en andere richtlijnen, die in de verschillende rechtsgebieden zijn opgenomen voor de opzet en uitvoering van het Onderzoek. In internationale verdragen, zoals in de artikelen 7 en 10 UVRM en in artikel 6 EVRM, zijn belangrijke algemene kaders vastgelegd, die gelden voor alle rechtsgebieden. Meer concreet zijn in het straf- en bestuursrecht processuele spelregels uitgebreid in wetten en jurisprudentie vastgelegd, terwijl deze regels in het privaatrecht veel abstracter in de wet- en bijbehorende regelgeving zijn neergelegd.[25] Een belangrijke reden hiervoor is dat men in de laatste eeuwen meer belang is gaan hechten aan het reguleren van het gedrag van overheidsinstellingen in de richting van burgers, terwijl men minder heeft willen ingrijpen in de wijze waarop burgers met elkaar omgaan.

19. R.M. Morgan et al, 'Interpretation of forensic science evidence at every step of the forensic science process. Decision-making under uncertainty', in R. Wortley et al, *Routledge Handbook of Crime Science*, Taylor & Francis, 2019.
20. P.A. Broeders en E.R. Muller (red.), *Forensische wetenschap. Studies over forensisch kennis en organisatie*, Kluwer, 2008.
21. M.J. Saks, 'Merlin and Salomon: Lessons from the Law's Formative Encounters with Forensic Scientific Identification Science', Hastings Law Journal, 49(4), 1998.
22. Saks hanteert twee begrippen '*identificatie*' en '*individualisatie*'. Met '*identificatie*' wordt bedoeld het onderkennen van fragmenten van een samenhangend geheel en met '*individualisatie*' het aan de hand van deze fragmenten toerekenen aan een individu. In dit artikel wordt met '*individualisatie*' beide begrippen bedoeld.
23. Hierbij kan gedacht worden aan het vaststellen of het witte poeder cocaïne of waspoeder is of het vaststellen van de hoeveelheid alcohol in iemands bloed.
24. R.M. Morgan, 'Forensic science' in R. Wortley et al, *Routledge Handbook of Crime Science*, Taylor & Francis, 2019.
25. Onder meer artikel 21 RV, artikel 198, lid 1 Rv, de Leidraad deskundigen in civiele zaken en de Gedragscode voor gerechtelijk deskundigen in civielrechtelijke en bestuursrechtelijke zaken.

Daarnaast bepalen gedrags- en beroepsregels voor de verschillende beroepsbeoefenaren, waaronder accountants, advocaten en onderzoekers, hoe zij zich in de uitoefening van hun beroep moeten gedragen. De wetgever heeft het aan de rechter overgelaten om in de jurisprudentie een nadere normering voor Onderzoeken vast te leggen. Dat heeft in de afgelopen decennia in uiteenlopende casus voor accountants[26], advocaten en andere onderzoekers dan ook plaatsgevonden.[27] Deze aanscherping heeft veelal betrekking op belangrijke aspecten uit het eerdergenoemde artikel 6 EVRM en de gedrags- en beroepsregels, zoals hoor en wederhoor, het dienen van het algemeen belang, volledigheidsplicht, onafhankelijkheid, objectiviteit, deugdelijke grondslag en deskundigheid.

Voor accountants is de reikwijdte van artikel 6 EVRM door vele tuchtzaken aan het eind van de vorige eeuw duidelijk geworden. Advocaten, die zich richten op het uitvoeren van onderzoeken, zijn zich de afgelopen jaren door verschillende gerechtelijke uitspraken ervan bewust geworden dat deze spelregels ook voor hen gelden.[28] In de kern zijn de recente uitspraken over advocaten een echo van de eerdere uitspraken over accountants.

3.2. Het materieelrechtelijke normenkader

Het materieelrechtelijke normenkader betreft de inhoudelijke juridische normering dat geldt voor de beoordeling van de verzamelde en nog te verzamelen gegevens. Dit normenkader geeft de onderzoeker richting naar '*wat*' gezocht moet worden, teneinde te voorkomen dat de onderzoeker zelf gaat bepalen wat wel of niet relevant zou kunnen zijn. Deze objectieve, wettelijke normering kan bovenal gevonden worden in het straf-, bestuurs- en privaatrecht, ook wel genaamd '*hard law*', maar ook in mindere mate in richtlijnen, gedragscodes en andere regelgeving, ook wel aangeduid als '*soft law*'. Wil een onderzoeker het Onderzoek kunnen afstemmen op de juiste problemen en de noodzakelijke feiten en omstandigheden kunnen onderkennen en verzamelen, dan zal de onderzoeker bekend moeten zijn met de objectieve en subjectieve bestanddelen (de gedragingen en bedoelingen) van strafrechtelijke normschendingen, zoals witwassen en corruptie, en de vereisten[29] voor een overtreding van privaatrechtelijke normen, zoals onrechtmatige daad of wanprestatie.

Zo zal de onderzoeker bij een Onderzoek naar witwassen de strafrechtelijke terminologie, zoals onder meer '*verhullen*', '*verwerven*' en '*voorhanden hebben*', niet alleen moeten kennen, maar hij zal ook in staat moeten zijn om deze terminologie te hanteren als materieelrechtelijk normenkader in het kader van zijn Onderzoek als controlerend accountant, CDD-analist of forensisch onderzoeker. Dit betekent dat de onderzoeker in de eerste plaats aan de voorkant van het Onderzoek moet weten waar concreet naar gezocht moet gaan worden. De onderzoeker zal dan ook een actieve houding moeten aannemen om op zoek te gaan naar deze aspecten. In de tweede plaats om gedurende het Onderzoek te kunnen vaststellen dat alle relevante aspecten onderzocht zijn en of het onderzochte feitencomplex wel of niet voldoet aan het materieelrechtelijke normenkader. Zo zal de onderzoeker in het kader van het eerdergenoemde Onderzoek naar witwassen zich continu moeten afvragen of aspecten van bijvoorbeeld een te onderzoeken transactie wel of niet kunnen kwalificeren als '*verhullen*', '*verwerven*' of '*voorhanden hebben*'.

4. Het epistemologische normenkader

Het epistemologische kader bepaalt in belangrijke mate de inhoudelijke onderzoekstechnische opzet en uitvoering van het Onderzoek naar FEC. Door de complexiteit van dit soort gedrag zal een Onderzoek veelal met een interdisciplinaire, subjectivistische en holistische benadering vanuit verschillende wetenschappelijke achtergronden moeten plaatsvinden, teneinde recht te doen aan de belangen en verplichtingen van de diverse betrokkenen. Zoals hieronder zal worden toegelicht, is een '*paraplu-wetenschap*' noodzakelijk die de afzonderlijke wetenschappelijke disciplines kan verbinden.

Volgens de overlevering hebben de inzichten van Griekse filosofen, zoals Socrates, Plato en Aristoteles, de aanzet gegeven voor belangrijke filosofische studies, zoals epistemologie, ontologie en methodologie, die ten grondslag liggen aan ons denken over wetenschap en onderzoeken. Deze drie studies bepalen in grote lijnen het "*waarom*', '*wat*' en '*hoe*' van een Onderzoek en hangen als zodanig nauw met elkaar samen. Deze studies verschillen van de eerdergenoemde conventionele studies doordat zij meer normatief dan empirisch van aard zijn. Zij richten zich op het begrijpen en beoordelen van de principes die ten grondslag liggen aan kennis, bestaan en menselijk gedrag, in plaats van op het observeren en meten van natuurlijke of sociale fenomenen.

26. L. van Almelo, *Rode vlaggen. Frauderisico's ontdekken en melden*, NBA, juli 2020 en maart 2018; L. van Almelo, *Uitglijders. Lessen uit accountantstuchtrecht*, NBA, 2016; H. Blokdijk en J. Agten, *Tuchtrechtspraak voor accountants*, IFO, 2011.
27. ECLI:NL:CBB:2023:168; ECLI:NL:CBB:2015:365; ECLI:NL:CBB:2015:42; ECLI:NL:CBB:2012:BX5082; ECLI:NL:GHLEE:2012:BW9793; ECLI:NL:CBB:2010:BO8034; ECLI:NL:TACAKN:2010:YH0043.
28. ECLI:NL:TADRAMS:2022:140; ECLI:NL:TADRAMS:2022:108; ECLI:NL:TADRAMS:2022:73; ECLI:NL:TADRSGR:2022:8; ECLI:NL:GHAMS:2021:1091; ECLI:NL:TAHVD:2021:166; ECLI:NL:TAHVD:2020:252; ECLI:NL:GHARL:2020:8890; ECLI:NL:TAHVD:2019:181; ECLI:NL:TADRAMS:2017:275 en 276.
29. Het doen (of nalaten), onrechtmatige karakter, toerekening, schade en causaal verband.

4.1. Epistemologie

Epistemologie, de theorie van kennis, gaat over de vraag wat we als kennis beschouwen en hoe wij kennis vergaren. Epistemologie richt zich onder meer op de begrippen '*overtuiging*'[30], '*waarheid*'[31] en '*rechtvaardiging*',[32] waarbij kennis wordt omschreven als de '*gerechtvaardigde ware overtuiging*'.[33] Deze drie begrippen vormen de kern van de epistemologische benadering van onderzoeken.[34] Zo moet een overtuiging, dat hetgeen is onderzocht en gepresenteerd in het rapport, waar en onderbouwd zijn. Anders is het gepresenteerde niets meer dan een veronderstelling of een onderbouwde onjuistheid.

Epistemologische overwegingen over objectieve en toegankelijke kennis zijn dan ook nauw verbonden met de juridische beginselen van rechtvaardiging, '*equality of arms*' en '*air play*', zoals verankerd in de artikelen 7 en 10 UVRM en artikel 6 EVRM. Door de overeenkomsten daartussen biedt epistemologie een cruciaal kader voor het begrijpen en beoordelen van de beginselen die ten grondslag liggen aan het processuele normenkader van forensische onderzoeken. Het benadrukt het belang van een zorgvuldige, methodologische en ethische benadering van het verzamelen, analyseren en rapporteren van feiten, omstandigheden en kennis in een juridische context, in overeenstemming met de waarden van rechtvaardigheid en rechtvaardige procedures vastgelegd in internationale verdragen, en nationale wet- en regelgeving. De bevestigingsbias, onvoldoende rechtvaardiging van overtuigen, overmatig beroep op anekdotisch bewijs uit interviews, methodologische tekortkomingen en niet-kritische acceptatie van secundaire bronnen zijn concrete voorbeelden waar het op epistemologisch terrein in een Onderzoek fout kan gaan. Een mooi voorbeeld van de toepassing van epistemologie in nationale wet- en regelgeving betreft de introductie van het begrip '*professioneel kritische instelling*' in de Wet toezicht accountantsorganisaties (Wta) in 2016 en de Verordening Gedrags- en Beroepsregels Accountants (VGBA).[35] De professioneel kritische instelling kan worden gezien als een praktische toepassing van epistemologische principes.

Vanuit forensisch perspectief is de keuze van een onderzoeksfilosofie en -methodiek vaak gericht op het maximaliseren van de nauwkeurigheid, betrouwbaarheid en objectiviteit van de bevindingen, gezien de potentiële juridische gevolgen van het Onderzoek voor de betrokken individuen. De erkenning van de mogelijke invloed van subjectieve factoren speelt echter ook een rol, vooral bij de het verzamelen, analyseren en rapporteren van feiten en omstandigheden. Het navigeren tussen deze epistemologische overwegingen is cruciaal voor het waarborgen van de integriteit en effectiviteit van een Onderzoek, en daardoor een essentieel onderdeel om te bespreken bij de selectie van een onderzoeker en de aanpak van het Onderzoek. Zo zijn vragen bij de start van een Onderzoek of dat met een conventionele methodiek of met een forensische identificatiemethodiek aangepakt moet worden, of dat aan het Onderzoek een objectivistische of subjectivistische methodiek ten grondslag moet liggen, ook van epistemologische aard.

4.2. Ontologie

Ontologie, als een fundamentele tak van de filosofie, richt zich op de studie van het '*zijn*' of '*bestaan*' en poogt de basiscategorieën van het bestaan en hun onderlinge relaties te begrijpen en te classificeren.[36] Dit omvat het Onderzoeken van concepten zoals entiteiten, eigenschappen, processen, en gebeurtenissen, alsook hun basisstructuren en de principes die hun interacties en relaties bepalen.

Ontologie kan in het kader van Onderzoeken naar complexe problemen een cruciale rol spelen als interdisciplinaire brugfunctie bij het integreren en complementeren van inzichten en methoden in diverse academische velden. Dit komt omdat ontologie, door haar focus op de fundamenten van het bestaan, raakvlakken heeft met disciplines uit de natuur- en sociale wetenschappen. In elk van deze gebieden kan ontologie bijdragen aan een dieper begrip van de fundamentele aspecten van hun studieobjecten.

In zekere zin ligt er een relatie tussen ontologie en het materieelrechtelijke normenkader, omdat ontologie kan helpen bij het definiëren en begrijpen van juridische concepten, zoals de aard van rechten, plichten, verantwoordelijkheden, en entiteiten, zoals individuen, organisaties en zaken, die drager kunnen zijn van onder meer bepaalde rechten en plichten. Door inzicht te bieden in de fundamentele aard van deze concepten, kan ontologie ondersteuning bieden bij de interpretatie en toepassing van feiten, omstandigheden en het recht. In Onderzoeken kan het ontologisch fout gaan bij onder meer misclassificatie en overgeneralisatie, het reduceren

30. Overtuiging betreft iemands persoonlijke positie ten aanzien van de waarheid van een bewering.
31. Waarheid betreft de realiteit van een bewering onafhankelijk van iemand zijn overtuiging.
32. Rechtvaardiging betreft de kwaliteit van de onderbouwing van de overtuiging.
33. In de Engelstalige literatuur wordt gesproken over '*justified true belief*'.
34. M.N.K. Saunders, *Research methods for business students*, Eight Edition, Pearsons, 2019; R. Audi, *Epistemology, A Contemporary Introduction to the Theory of Knowledge*, Third Edition, Routledge, 2011; H.L. Ho, *A Philosophy of Evidence Law, Justice in the Search for Truth*, Oxford University Press, 2008; S. Haack, *Evidence and inquiry: towards reconstruction in epistemology*, Blackwell Publishers, 1995.
35. P. Jongstra, 'Kwaliteit en professioneel-kritische instelling in de VGBA', Opinie, De Accountant, 22 augustus 2016; Memorie van Toelichting, TK vergaderjaar 2015-2016, 34469, nr. 3; *In het publiek belang*, Werkgroep Toekomst Accountantsberoep, NBA, 26 september 2014.
36. R. Bhaskar, *A Realist Theory of Science*, Routledge, 2008; C. Lorenz, *De constructive van het verleden*, Negende druk, Boom, 2008.

van complexe situaties tot eenvoudige aspecten, en het verwarren van sociale constructies met juridische entiteiten. Het navigeren door deze potentiële valkuilen vereist een zorgvuldige en kritische benadering van ontologische analyse, met een voortdurende bereidheid om aannames te heroverwegen en te verfijnen in het licht van nieuwe inzichten en informatie.

Een toepasselijk voorbeeld van de invloed van ontologische principes in nationale wet- en regelgeving is te vinden in de context van het eigendomsrecht en het onderscheid tussen fysieke en digitale goederen. Met de opkomst van de digitale economie en de groeiende beschikbaarheid van digitale goederen en diensten, zoals e-books, crypto currency en online diensten, zijn wetgevers en rechtsstelsels geconfronteerd met de uitdaging om bestaande juridische kaders, die traditioneel gericht zijn op fysieke objecten, aan te passen. Ontologie speelt een cruciale rol in deze context door te helpen definiëren wat '*eigendom*' precies betekent in een digitale context. Deze vraagstukken worden in het kader van FEC nog complexer, omdat de gepresenteerde papieren werkelijkheid vaak niet overeenkomt met de feitelijke werkelijkheid.

Vanuit een forensisch perspectief houdt de keuze van een onderzoeksfilosofie en -methodologie rekening met een diepgaand begrip van de aard van het beschikbare feitencomplex en de entiteiten die in onderzoek zijn. Deze ontologische benadering erkent de complexiteit en diversiteit van fysieke en digitale bewijzen, de manieren waarop ze kunnen bestaan, en hoe ze kunnen worden beïnvloed of veranderd door verschillende omstandigheden. Ook vereist de keuze tussen een conventionele of forensische identificatiemethodiek, of een objectivistische versus subjectivistische benadering, een grondige overweging van de ontologische eigenschappen van het onderzoeksobject. Bijvoorbeeld, de beslissing om digitale forensische methoden toe te passen in plaats van andere forensische methoden, hangt af van het begrip van de aard van digitale gegevens en hun unieke eigenschappen. In de kern gaat de ontologische discussie in Onderzoeken over het begrijpen van de ware aard van het toekomstige bewijs en de realiteit die het vertegenwoordigt. Dit omvat vragen over wat feiten en omstandigheden kunnen onthullen over gebeurtenissen uit het verleden, hoe betrouwbaar deze onthullingen zijn, en hoe verschillende soorten bewijsmateriaal met elkaar in verband staan binnen het grotere geheel van een Onderzoek.

4.3. Methodologie

Methodologie verwijst naar de systematische, theoretische analyse van de methoden die toegepast worden in een Onderzoek.[37] Het gaat over de manier waarop kennis wordt verzameld, geanalyseerd, geïnterpreteerd en gepresenteerd. In conventionele en forensische wetenschappen omvat dit zowel kwantitatieve als kwalitatieve methoden. De keuze voor een bepaalde methodologie wordt vaak bepaald door de eerdergenoemde epistemologische en ontologische uitgangspunten van de onderzoeker. Vanuit een methodologisch perspectief is het belangrijk dat de selectie van onderzoeksmethoden, -middelen en -technieken,[38] gericht is op het maximaliseren van de nauwkeurigheid, betrouwbaarheid en objectiviteit van de onderzoeksresultaten. Dit is van cruciaal belang gezien de mogelijke juridische implicaties die voortvloeien uit de bevindingen van het Onderzoek. De keuze van een specifieke onderzoeksmethodologie, zeker in een juridische context bij de forensische identificatiemethodiek, moet zorgvuldig worden overwogen om te verzekeren dat de methode geschikt is voor de problematiek en de aard van de feiten en omstandigheden die onderzocht worden.

Een goed voorbeeld van methodologisch onderzoek op het terrein van FEC betreft het gebruik van geavanceerde data-analysetechnieken en machine learning-algoritmen om grote datasets van financiële transacties en andere relevante gegevens te analyseren, teneinde afwijkingen te identificeren die kunnen wijzen op onregelmatigheden of ongebruikelijke transacties. De toepassing van deze technieken vereist niet alleen technische en FEC expertise, maar brengt ook methodologische uitdagingen met zich mee.[39] Onderzoekers die deze onderzoeksmiddelen toepassen, moeten zorgen voor een methodologisch robuust kader dat niet alleen de technische effectiviteit van de data-analyses garandeert, maar ook de juridische, onderzoekstechnische en ethische integriteit van het onderzoeksproces. Fouten, die in de methodologie gemaakt kunnen worden, betreffen onder andere onjuiste data-analyse, bevestigingsbias en beschikbaarheidsheuristiek, overinterpretatie, onvoldoende validatie van modellen en technieken, het negeren van contextuele informatie, en het gebruik van onbetrouwbare bronnen.

4.4. De samenhang van de juridische en epistemologisch normenkaders

Samengevat kan gesteld worden dat het epistemologische normenkader zich in een forensische en juridische context richt op de methodologie van kennisvergaring en de uiteindelijke betrouwbaarheid van de verzamelde feiten en omstandigheden. Het bepaalt de criteria waaraan informatie moet voldoen

37. M.N.K. Saunders, *Research methods for business students*, Eight Edition, Pearsons, 2019; P.J.M. Verschuren, *Kernthema's in de methodologie. (...)*, Amsterdam University Press, 2017; R.W.M. Giard, *Werken aan waarheidsvinding*, Boom Juridisch, 2016; P.J.M. Verschuren, *De probleemstelling voor een onderzoek*, 14e druk, Spectrum, 2011.
38. Zie '*Onderzoeksmethoden voor financieel forensisch onderzoek*', www.nffi.nl/forum/artikelen.
39. F.J. Erkens, 'De professionalisering van customer due diligence', Tijdschrift voor Toezicht, Nr. 2/3 2023.

om als betrouwbaar en relevant beschouwd te worden in de context van de casus en latere juridische besluitvorming. Het epistemologisch normenkader in een forensische en juridische context is direct verbonden met wetenschappelijke principes. Zo is de eis dat overtuigingen gebaseerd moeten zijn op feiten en logisch redeneren een fundamenteel aspect in zowel de wetenschap als het recht. Dit epistemologische normenkader bevordert een systematische en kritische benadering van de verzamelde feiten en omstandigheden, waarbij zij worden onderzocht op hun merites, betrouwbaarheid, en relevantie voor de casus. Hierdoor kunnen juridische beslissingen worden genomen op een basis die zo dicht mogelijk bij de waarheid ligt, met respect voor de complexiteit van de casus en nuances van menselijke kennis en ervaring.

Dit is feitelijk ook wat een onderzoeker in het kader van een Onderzoek naar FEC zal moeten doen en in het rapport tot uitdrukking zal moeten brengen. De overtuiging, dat hetgeen is onderzocht en gepresenteerd in het rapport, waar en onderbouwd is, anders is het gepresenteerde niets meer dan een veronderstelling of een onderbouwde onjuistheid. Om de gebruikers van het rapport '*naar beste weten*' ex artikel 198, lid 1 Rv of '*naar waarheid, volledig en beste inzicht*' ex artikel 51i, lid 3 Sv, en gemotiveerd ex HR 18 februari 1994, NJ 1994, 742 r.o. 3.4[40] of '*met redenen omkleed*' ex artikel 51l, leden 1 en 3 Sv[41] te kunnen informeren, zal de onderzoeker in het rapport onder meer de eigen achtergrond, de onderzoeksstrategie en -werkzaamheden, de ter beschikking staande gegevens, de analyses en de redenen van wetenschap, zoals genoemd in bijvoorbeeld artikel 198, lid 4 Rv, uiteen moeten zetten. Dit geldt mijns inziens niet alleen voor een door de rechter benoemde deskundige, maar voor alle onderzoekers.

De principes uit artikel 6 EVRM[42], strafvordering en burgerlijke rechtsvordering zijn in wezen bedoeld om de integriteit en betrouwbaarheid van het straf-, bestuurs- en civielrechtelijk onderzoek en het proces te waarborgen. Door de verschillend geformuleerde eisen dat feiten en omstandigheden '*naar beste weten*' of '*naar waarheid, volledig en beste inzicht*' worden verstrekt en dat methodologische transparantie en expertise worden aangetoond, proberen artikel 6 EVRM en de wetten een stevig fundament van '*gerechtvaardigde ware overtuiging*' in de straf-, bestuurs- en civielrechtelijke contexten te leggen. Het voorgaande onderstreept het belang van gerechtvaardigdheid in overtuigingen, vooral in een juridische context, waar de gevolgen van onjuiste, niet onderbouwde of ongerechtvaardigde overtuigingen ernstig kunnen zijn. Het toont aan hoe de eisen van de wet en de principes van epistemologie op een vergelijkbare manier werken om waarheidsgetrouwheid, integriteit en gerechtvaardigdheid te waarborgen.

5. De compliance officer in de 'driver's seat'

Wil de compliance officer de belangen van de eigen organisatie en andere betrokkenen bij indicaties van FEC op een professionele wijze kunnen behartigen, dan is het belangrijk dat de beide normenkaders in acht worden genomen. De volgende vragen kunnen behulpzaam zijn bij het bepalen van het '*waarom*', '*wat*' en '*hoe*':

1. **Problematiek** - Wat is de mogelijke aard en complexiteit van de problematiek?
2. **Relevante belangen** - Wat zijn de belangen van de organisatie en andere betrokkenen?
3. **Boven- en ondergrens van de doelstellingen** - Wat wil én moet bereikt worden met het Onderzoek en eventueel aansluitende juridische procedures?
4. **Juridische normenkader** - Wat zijn de relevante processuele en materieelrechtelijke bepalingen?
5. **Epistemologische normenkader** – Kan dit met conventioneel of individualisatieonderzoek gerealiseerd worden? En met een objectivistische of subjectivistische methodiek?
6. **Onderzoeker** – Welke onderzoeker kan het Onderzoek op een professionele wijze binnen de geformuleerde kaders uitvoeren?

Bij de beantwoording van bovenstaande vragen is het belangrijk het volgende in ogenschouw te nemen. FEC kenmerkt zich door onzichtbaarheid en complexiteit, maar ook door informatie-asymmetrie en de daarmee samenhangende onbetrouwbare (onjuiste en onvolledige) gegevens. Deze zaken maken dat de onderzoeker bij indicaties van FEC kritisch naar de papieren werkelijkheid moet kijken en zich bewust moet zijn dat de gepresenteerde gegevens onjuist zijn en belangrijke gegevens ontbreken. Deze twee aspecten, onjuistheid en onvolledigheid, hebben in de accountancy een belangrijke onderzoekstechnische betekenis in het kader van Onderzoeken, omdat zij nauw samenhangen met het doel en de richting die nagestreefd wordt met een Onderzoek. Bij de opzet en uitvoering van een Onderzoek naar FEC zal de onderzoeker zich continu moeten afvragen hoe hij het onzichtbare zichtbaar wil maken en de mogelijke verantwoordelijken wil identificeren.

40. R.o. 3.4: 'Een burgerlijk geding op tegenspraak brengt daarenboven mee dat de rechter zich bij de vaststelling alleen op die gegevens van feitelijke aard mag baseren waarvan de partijen de juistheid en volledigheid hebben kunnen nagaan en ten processe ter discussie hebben kunnen stellen'.
41. Lid 1: 'Hij geeft daarbij zo mogelijk aan welke methode hij heeft toegepast, in welke mate deze methode en de resultaten daarvan betrouwbaar kunnen worden geacht en welke bekwaamheid hij heeft bij de toepassing van de methode'. Lid 3: 'De deskundige verklaart het verslag naar waarheid, volledig en naar beste inzicht te hebben opgesteld. Het verslag is gebaseerd op wat zijn wetenschap en kennis hem leren omtrent datgene wat aan zijn oordeel onderworpen is'.
42. EHRM 18 maart 1997, JB 1997/112, m.nt. A.W. Heringa (het Mantovanelli-arrest).

Bij FEC is de onderzoeker genoodzaakt tot een omgekeerde benadering in vergelijking met de conventionele accountancy. In het geval van bijvoorbeeld witwassen moet de onderzoeker de juistheid van ontvangsten vaststellen en niet de volledigheid ervan; bij uitgaven gaat het daarentegen juist om het vaststellen van de volledigheid van uitgaven en niet om de juistheid ervan.[43] Dit betekent, in tegenstelling tot een conventioneel onderzoek waar de focus zich voor een belangrijk deel richt op het onderzoeksobject of -subject, dat bij een forensisch identificatieonderzoek naar FEC de aandacht voornamelijk naar de externe omgeving van het object of subject zal moeten gaan en minder naar het object of subject zelf.[44]

De nadruk op de externe omgeving en de context in het Onderzoek naar FEC onderstreept het belang van een interdisciplinaire, subjectivistische en holistische benadering. Het gaat niet alleen om het analyseren van de directe feiten en omstandigheden, maar ook om het begrijpen van de bredere maatschappelijke, economische, financiële en sociale context waarbinnen deze criminaliteit plaatsvindt.

6. Tot slot

De eerdergenoemde uitspraak van de Hoge Raad uit 2009, die het algemene maatschappelijke belang van waarheidsvinding in rechte benadrukt ten dienste van een goede rechtsbedeling, raakt aan de kern van het Onderzoek in een juridische context. Deze uitspraak erkent dat het vinden van de waarheid niet alleen een doel op zich is, maar ook essentieel voor het verzekeren van rechtvaardigheid binnen de juridische context. Dit principe van rechtvaardigheid is nauw verbonden met de juridische en epistemologische normenkaders, die samen de fundering vormen voor een Onderzoek naar FEC in een juridische context. Met deze inzichten in het ‘waarom', ‘wat' en ‘hoe' van dergelijke Onderzoeken zullen compliance officers beter in staat moeten zijn om in de ‘driver's seat' mede de fundamentele zaken te bepalen die ten grondslag liggen aan de opzet en uitvoering daarvan.

43. F.J. Erkens, ‘De professionalisering van customer due diligence', Tijdschrift voor Toezicht, aflevering 3-4, 2023.
44. Het antwoord of er mogelijk sprake is van witwassen zal veelal niet gevonden worden door naar de bestemming van de financiële middelen te kijken, maar zal in belangrijke mate gevonden moeten in het onderzoek van de herkomst van deze middelen.

'The Qatargate showed that corruption is everywhere'

J. Boogaard[1]

The EU is stepping up the fight against corruption and has proposed new legislation. We spoke with Jeroen Blomsma, Head of Sector Anti-Corruption at the European Commission, about the updated directive and its potential impact on companies.

In her 2022 State of the Union Speech, Commission President von der Leyen announced to update the EU's legislative framework on anti-corruption to better prevent and fight corruption across the European Union in the future. On 3 May 2023, the Commission presented a new proposal to combat corruption by criminal law.

What were the reasons for the EU to step up the fight against bribery and corruption?
'First, Europeans are increasingly skeptical of all our efforts to tackle corruption. And scandals at the level of the EU and member states fuel this skepticism. The Qatargate[2] showed that corruption is everywhere, even in the capital of the EU. In some parts of Europe, we tend to think there is no or hardly any corruption, but that is certainly not true. The Qatargate has encouraged us to do even more against corruption than we already planned.'

'Our latest Eurobarometer survey on corruption shows that nearly 70% of EU citizens believe that high-level corruption is not adequately prosecuted. Opinions from the private sector paint a similarly bleak picture. Almost 50% believe that people or companies engaged in corruption are unlikely to be caught by the police or prosecutors. Those are high numbers. We do this survey every year and the results are not getting much better, despite efforts to fight corruption in most member countries. We see improvement in some countries but also a marked deterioration in others.'

'Second, the cost of corruption is high. Some older figures put the cost of corruption to the EU economy at €120 billion a year. Companies face a huge loss of competitiveness when competitors get a contract not on the basis of their price, but thanks to the payment of bribes. But corruption also has broader implications: for the rule of law, for public confidence in institutions - essential elements for our democracies.'

'And third, corruption is more than just classical bribery, where brown bags are secretly exchanged in return for favors. Corruption can also hide behind favoritism and nepotism and manifest itself even in high-level political corruption. In short, corruption has many forms. And this should be reflected in our EU legislative framework on corruption.'

What can the EU do to prevent favoritism?
'First, transparency in public decision-making is important. People in decision-making positions must make a declaration of assets and interests. This makes it clear, for example, when a person responsible for awarding contracts has an interest in the company to which the contract was awarded. The public, but in many cases also the authorities auditing these asset declarations, can actually see when there is a conflict of interest. The principle of integrity is to avoid - perceived - conflicts of interest. The proposed new legislation does not set out detailed rules on how Member States should regulate conflicts of interest or asset declarations, because the rules are very different in the member states. What works in the specific framework of one country State is not necessarily sufficient to ensure integrity in another country.'

Specifically, what is the Commission proposing?
'We are now really focusing on the criminal rules. We want to expand the range of corruption offenses from bribery to include abuse of office, misappropriation and trading in influence, among others. Some of these forms of corruption are not punishable everywhere now, such as trading in influence. This actually is said to have happened at Qatargate, where an intermediary was bribed to use his influence on others within his circle. By the way, the Belgian authorities are responsible for investigation and prosecution. All we can do at the EU level is to help those authorities, for example by ensuring that the police and prosecutors in each member state have the resources to fight such corruption cases.'

'Our goal is to criminalize certain forms of corruption throughout the European Union to ensure that there is no impunity. Of course, if trading in influ-

1. Jeroen Boogaard is financieel journalist en medewerker van dit tijdschrift.
2. Qatargate is an ongoing political scandal, involving allegations that European Parliament officials, lobbyists and their families have been influenced by the governments of Qatar, Morocco and Mauritania, engaging in corruption, money laundering, and organized crime.

ence is not a crime in one member state, there is a risk that criminals will carry out their activities in the member state where the rules and sanctions are the most lenient. This also distorts fair competition in the internal market. We also aim for better cross-border cooperation. For example, if trading in influence is not punishable in the Netherlands and the Belgian authorities were to ask for evidence from the Netherlands, that could become a problem. Normally, a country will not cooperate with another country in a criminal investigation if it does not consider that behavior criminal itself.'

'If we are all better at fighting corruption, we will of course also see that perceptions will improve in our annual surveys and that citizens will have more confidence in the national and EU institutions and democracy as a whole. In addition, we want to ensure that there are sufficiently long statutes of limitations to prevent corruption cases from being closed simply because time has expired. And we want to discourage corruption more strongly by adjusting the penalties for corruption.'

What changes will occur?
'The proposal will help modernize our 20-year-old legislative framework on corruption, bring it in line with our international obligations under the UN Convention against Corruption, and adapt it to ever-changing corruption trends. More harmonized criminal charges and sanctions across the EU offer the possibility of better cross-border cooperation between the competent authorities of Member States, as I mentioned earlier. Other important measures were taken last year. We made a proposal for a dedicated Common Foreign and Security Policy (CFSP) sanctions regime to target serious acts of corruption worldwide. In addition, we established the EU Network Against Corruption, bringing together law enforcement, public authorities, practitioners, civil society and other stakeholders, that will act as a catalyst for corruption prevention across the EU and will develop best practices and practical guidance.'

Why is an update of the current EU legal framework needed?
'Our legislative framework is already outdated for a long time. This Commission with president Ursula von der Leyen has made the fight against corruption a priority. In 2019, the Commission started the Rule of Law report, which reports annually on developments, both good and bad, in the member states in the fight against corruption, judicial independence and media pluralism. The Commission is delivering on the commitment made by President von der Leyen in her 2022 State of the Union address.'

How is the process being executed?
'The proposal was prepared after consultation with the public and stakeholders, including civil society. We also held workshops with Member State authorities. The Commission adopted a legislative proposal with anti-corruption rules on May 3, 23. Under normal EU rules, it is up to the European Parliament (EP) and member states in the Council to reach agreement. The EP adopted a draft position on Jan. 31, 2024, and we expect the Council to do so in June 2024. Then after the summer the so-called trilogue negotiations with the three institutions will start and we hope to conclude this by the end of this year or early next year.'

What is the expectation regarding future fines?
'The Commission's legislative proposal suggests that legal persons can be fined the maximum limit of which should not be less than 5 percent of the total worldwide turnover of the legal person, including related entities, in the business year preceding the decision imposing the fine. To ensure that it is a good deterrent, we want to link the fine to the international turnover of the company involved, so that it really hurts. This is an approach we have also taken in other recent files, such as on environmental crime and the criminalisation of violations of Union sanctions, like with the EU-sanctions against Russia. The agreement reached at the end of 2023 between the European Parliament and the Council on environmental crime includes this link, but also allows member states to set a fixed amount of fine of €40 million instead.'

'In addition to fines, we have proposed that the authorities can also impose other sanctions for persons held liable for corruption offences such as the exclusion of that legal person from entitlement to public benefits or aid; public procurement procedures; the exercise of commercial activities; the withdrawal of permits or authorizations to pursue activities in the context of which the offence was committed; the possibility for public authorities to annul or rescind a contract with them, in the context of which the offence was committed. For natural persons we have proposed, as possible additional or alternative sanctions to imprisonment, the removal or suspension from office, disqualification from holding a public office and deprivation of the right to stand for elections.'

'For natural persons, we have also proposed prison sentences ranging from 4 to 6 years. Sometimes imprisonment is not possible, but in that case we want to ensure that this person will not be able to commit these offences again. Therefore, it should also be possible to remove these persons from office. Taking away the right to stand for election is slightly more sensitive for member states, as it is often a constitutional right to be elected. It is always up to the courts to decide this. But if someone is convicted of corruption, we think it should be possible in serious cases to prevent that person from standing in the next election.'

How will the EU deal with carbon copy prosecution?
'If I understand correctly, this refers to a situation where a company makes a guilty plea or settlement with authorities in a certain jurisdiction, while be-

ing afraid that another jurisdiction might also prosecute based on this guilty plea or settlement. In the EU we have this fundamental right to not to be tried or punished twice in criminal proceedings for the same criminal offence. In case-law of the Court of Justice, it has already been established that a settlement with the public prosecution service can also be considered as a final disposal of the case, triggering the protection against prosecution in another member state for the same facts.'

Has there been any coordination with authorities outside the EU?

'We have considered the anti-corruption approach in the UK and US. In particular the US Magnitsky Act authorises the US government to sanction those involved in significant corruption, to freeze their assets, and to ban them from entering the US. We already have these kind of sanctions regimes for human rights violations. For instance, we imposed restrictive measures on individuals responsible for serious human rights violations in the areas temporarily occupied by Russia in Ukraine. In May 2023, we proposed that the Union also adopt a regime whereby persons involved in corruption can be placed on a list resulting in the freezing of their assets and barring them from entering the EU. However, it is for the member states to decide on this and they are still divided on this. We also considered the UK offence of failure to prevent bribery for our EU legislation but decided against it. This is because this is not an offence that is common to our EU member states and is also not part of the UN Convention against corruption, which we aimed to implement also with our legislative proposal.'

Has the EU consulted with the industry to understand the challenges and obstacles?

'The EU anticorruption directive does not include any detailed requirements for companies. We proposed that judges should be able to treat as mitigating circumstances that companies have taken preventive measures such as compliance and ethics programmes. For us, this is an indirect way of encouraging companies to get their compliance right. Companies that do not have a proper compliance program face the normal sanctions. On the one hand, we have these mitigating circumstances, but on the other hand, we also propose aggravating circumstances. For example, when the person involved is a high-ranking official or when the activity is carried out within a criminal organization. To be clear, it is not an aggravating circumstance if the company did nothing to prevent the crime.'

Will there also be guidance on what a good compliance program looks like?

'We established the EU network against corruption last year to assist us with providing guidance and best practices. The idea is to bring all stakeholders together. To fight corruption holistically, you need the vision of all people and sectors involved. The network is expected to develop guidance materials and best practices. The Commission will choose topics for guidance in consultation with the members of the network and is considering to propose this as a possible topic for future discussion. One of the topics high on our agenda is advice on what a good compliance program should look like, as we have been approached by companies asking us to provide more guidance on compliance programs.'

How should organizations prepare for the new landscape of enforcement?

'If the legislation is passed, member states will have two years to transpose the rules into national law. The legislation is likely to come into force in 2027. The European Commission will organize transposition workshops with national authorities and will also consider preparing stakeholders through the EU network against corruption.'

Any comments or suggestions of readers can be sent to HOME-ANTI-CORRUPTION@ec.europa.eu

Lessons learned and going beyond 2024

M. Shalimova[1]

For some time, we have observed the apparent failures and breaches in the financial regulation within the European and other world financial markets. Moreover, the last several years were full of geopolitical tensions, environmental and regulatory challenges that had a substantial impact on reputational and financial crime risks of Financial Institutions ("FIs"). Regulatory developments towards increasing measures against financial crime, such as (i) an increased scope of enforcement actions, (ii)creation of the new regulator AMLA in the EU and (iii) recently introduced 12th and 13th European packages of individual and economic sanctions targeting Russia[2] are constantly evolving. The use of technologies such as AI also have a tremendous impact on financial crime compliance practitioners and the way how they daily operate. The Fenergo Report states the following: "since the financial crash in 2007, an estimated USD 56.1 bln in enforcement actions has been levied to financial institutions and individuals for AML, data privacy, MiFID, and ESG compliance violations. The global fines for failing to prevent money laundering and other financial crime surged more than 50 percent in 2022, fueling warnings that such penalties are not curbing the behavior and systems flaws that allow criminals to channel money through the global financial system."[3]

The abovementioned failures of the FIs in adhering to the regulatory requirements were often followed by substantial fines, financial impact and reputational losses. That is why the FIs as one of the main front lines in the financial market must ensure efficiency and efficacy of full scope of their AML/CFT activities to comply with the AML laws and expectations of their regulators.

Further to the Kroll's recent 2023 Fraud and Financial Crime Report[4] "financial crime is growing, with 69% of participants responding that they think financial crime is likely to become more prevalent over the next 12 months. Among the key factors considered responsible for increased financial crime risk were specified (i) cybersecurity and (ii) data breaches." It can be further anticipated that due to the high level of financial volatility and geopolitical tensions, the financial crime risks will be further evolving and may become a global threat, thus the role and capabilities of the anti-financial crime compliance officers would become more vital and challenging than ever.

This article provides a personal view of lessons learned, challenges and ways forward within the AML compliance banking industry. The aim of this article is to reflect some regulatory and market developments over the last years and to consider future directions and ways forward in evolution of financial crime trends, systems and controls. This article addresses professionals working in the financial sector, in particular, AML compliance officers and financial crime investigators, risk managers, internal and external auditors, quality assurance managers as well as students of banking and financial laws and other fields within the financial markets.

1. Lessons learned

Regulators draw on a range of approaches as they seek to gain and maintain compliance. It is important to acknowledge the distinction between failure of regulation and failure in compliance: often, failure is attributed to regulation when the actual issue is poor compliance. As it was specified in the OECD (2000) paper '...dramatic regulatory failures tend to produce calls for more regulation with little assessment of the underlying reasons for failure. Though there is little hard evidence, a growing body of anecdotes and studies from OECD countries suggests that inadequate regulation underlines many such failures. This is a common, but little understood form of regulatory failure' (p.7)[5].

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2. Amendments into EU Regulation 833/2014 and Regulation (EU) 269/2014 via introducing Regulation (EU) 2023/2878 and Regulation (EU) 2023/2875 published on 18 December 2023, more information is available in the EU Council Press Release ' Russia's war of aggression against Ukraine: EU adopts 12th package of economic and individual sanctions' - Consilium (europa.eu), more information is available in the EU Council Press Release ' Russia: two years after the full-scale invasion and war of aggression against Ukraine, EU adopts 13th package of individual and economic sanctions' - Consilium (europa .eu)
3. Global AML Fines Research Report, Fenergo, available at https://www.fenergo.com/aml-fines-report
4. Kroll Report, available at www.kroll.com/-/media/kroll-images/pdfs/2023-fraud-and-financial-crime-report.pdf
5. Organisation for Economic Co-operation and Development (OECD) (2000) '*Reducing the Risk of Policy Failure:*

The pressure on the FIs is growing gradually while AML scandals continue to hit not only financial institutions but other participants of the financial markets. In 2021 the financial sector was globally penalized for USD 5.4 bln. or non-compliance with the AML/CFT, KYC, and data protection regulations. Moreover, the personal liabilities for AML related compliance breaches have also increased. Consequently, in 2022 "12 individuals were fined for USD 31.3 mln for their Money Laundering Reporting Officer (MLRO) roles in AML breaches".[6]

As for the lessons learned for the AML/CFT Compliance officers for the last several years it can be summarized that most of the regulatory penalties were related to (i) the improper and/or inadequate identification and verification of high-risk clients, PEPs, Authorized Signatures, IBO/UBO, (ii) ineffective and fragmented Know Your Client (KYC)/KYCC processes, (iii) unbalanced approach to the private data and transparency principles, (iv) unclarity or absence of some Transactions Monitoring rules and typologies and overall insufficient Transaction Monitoring/Name List Screening systems, (v) failures to properly monitor the initial amount declared by the clients with the actual turnover, (vi) fragmented training and competence regime, (vii) weak internal control processes leading to the inefficiency of the entire AML/CFT controls.

The interesting take-aways, such as (i) risk-based approach varied depending on jurisdictions, (ii) top-down approach to compliance with C-suit and the Board education on the risks, (iii) keeping compliance processes/workload updated on a regularly basis, (iv) taking alerts and even earlier worrying seriously and investigate properly and many others are provided in the e-book made by Sentinels[7]. The analysis of AML breaches in 7 world banks (Danske, Standard Chartered, ING Group, Deutsche Bank, ABN AMRO, NatWest and HSBC and Capital One) has been made with the proposals how these fines could have been avoided. The key takes aways provided in this Report could be very useful, as the starting point for gap analysis of the FI-wide regulatory compliance by the AML/CFT Compliance Officer. As the contribution to the money laundering and terrorist financing case database and aiming to share their knowledge, expertise, and experiences within the global AML/CFT community, the Egmont Group has published their 2014-202 BECA book[8]. This book provides 26 best Egmont cases across 7 inter-related targeted categories (bribery and corruption, cybercrime, drug trafficking, fraud, and embezzlement, smuggling and gambling, trade based and third-party money-laundering, and terrorism, organized crime and human trafficking) of predicate offences and associated money-laundering typologies. These cases are interesting reading for AML/CFT and Financial Crime Compliance officers, as they represent real cases with some details and description. This is a classic example of sharing knowledge and expertise around the globe, as these cases are provided by the Financial Investigations Units of the members of the Egmont Group to benefit both FIUs and stakeholders in the AML/CFT areas. This Report can be considered as the lessons learned realising that majority of the financial crime cases are global, interconnected and cause a devastating effect over the economies of all countries exposed to these financial crime activities.

2. Challenges

Ambiguities and anomalies of AML/CFT Compliance can represent one of the main challenge for the AML/CFT Compliance practitioners. Therefore, there is a significant difference in expectations by various groups of stakeholders, e.g. regulators, FIs, academic scholars that exist about AML/CFT compliance. The range of factors that contribute to this is quite diverse, included (i) conflicting& changing legislative and regulatory frameworks, (ii) the organisational complexity of global banks, and (iii) the operational complexity of the compliance function within these banks. There is a kind of interdependent, dialectical relationship between the regulator and the regulated firms. Through its policies, enforcement actions and audits, the regulator requires that regulated FIs respond by fulfilling their regulatory obligations. The FIs will comply either by fulfilling the minimum compliance standards, namely complying with the letter of the regulations, or by fulfilling a high level of compliance standards, namely, compliance with the spirit of the regulation. The reflection is that in implementing its policies, the regulator uses many devices, such as KYC/KYCC policies, due diligence procedures, enhanced TM requirements. It is interesting to note that even operating under the same guidelines and recommendations (FATF, Basel, Egmont Group, G20), AML/CFT compliance practices do significantly vary and AML/CFT compliance officers apply different approaches to how they conduct compliance work. In their compliance initiatives, the regulated FIs utilise a number of tools across business units such as corporate governance and internal control functions, all of which originate from their need to comply with the regulator's requirements. Moreover, there is a number of internal intra-organizational relations, e.g. between compliance and internal audits that complicates the overall processes. These elements can be considered as sub-policies within the banking regulatory process, which all create additional challenges towards meeting the expectations and requirements of the regulators. For example, every subsidiary and/or the branch of the international FI worldwide needs to fully comply with the local regulatory requirements

Challenges for Regulatory Compliance'. Available at: http://www.oecd.org.

6. Global AML Fines Research Report, Fenergo, available at https://www.fenergo.com/aml-fines-report
7. Sentinels e-book '7 *Case studies on AML Compliance: How to avoid fines*', 16.12.2022, available at sentinels.ai.
8. Best Egmont Cases Financial Analysis Cases 2014–2020, available at www.egmontgroup.org

established by its National Bank and other national regulatory authorities per se. In addition to the local regulatory requirements, the subsidiary or the branch of the international FI should be fully compliant with the national laws of the mother company and fully adherent to the internal global standards and procedures, which leads to situations where locally there can be differences and ambiguities.

The other challenge is the recent technological developments. Rapidly evolving technology and its implementation into the banking processes, e.g. data integrity and data sharing, is another challenge for the next years for many FIs and their AML/CFT Compliance officers. It was expected that some modern AML/CFT software platforms are available to ensure that the FI is in line with the regulatory expectations and up to date to the competitors on the financial markets, as well as able to detect and suspect various forms of suspicious activities. However, many legacy and internal integration issues can further complicate any implementation of the new technology in the FIs. The financial challenge for any FI is the budget restrictions towards buying and implementing new system into the internal process. This requires enormous amount of the financial resources paid towards technical implementation, teaching and introducing new platform among the users and maintaining the system at the regular basis.
From this point we come to another challenge, which is hiring unexperienced new employees, who are not experienced with advanced Money Laundering/Financing Terrorism (ML/ FT) patterns and technologies. This may create a niche for active Money Laundering activities in the FI for the time being until these new employees will become aware/trained for any advanced ML/FT patterns and schemes. The high rate of attrition of the experienced AML/CFT employees may cause another challenge for the FI.

3. Future Trends

As for future trends, it is clear that Artificial Intelligence (AI) & Machine Learning (ML) features and the future of AFC Compliance are closely interconnected. To what extent AI and ML could envisage and cover some areas of AFC/CFT activities, such as KYC reviews, industry/country/product risk-assessment, TM Surveillance and Monitoring, as well as AML Trends analysis depends on the risk appetite, business and regulatory strategy, as well as infrastructure peculiarities of the FI per se. Raising trends for digitalisation, AI and ML technologies by e.g. accelerating of identification and verification process within the clients on-boarding may hinder the vulnerabilities and increase internal/external fraud. However, it is obvious that in the nearest 2-3 years, AI and ML will be an essential part of the AFC Compliance program and daily AML/CFT routine.

The significant impact on a daily operation of each AML/CFT compliance officers would have further technological developments. It is now not clear what would be the strategic solution implemented in the FIs to ensure both market competitiveness and regulatory expectations.

Among the other key AML/CFT trends within the next 2-3 years the following can be highlighted:

i. Further Technological Developments (Fintech, Crypto-digital assets, Decentralized transactions, Bitcoin, etc) and further relevant guidance from regulators;
ii. Further Regulatory scrutiny over the effectiveness and efficiency of KYC, Transactions Monitoring/Transactions Filtering and Sanctions screening systems;
iii. Consequent regulatory penalties and fines for non-compliance with the standards and expectations with a potential application of a personal accountability regime for such failures;
iv. Alignment and Cooperation of the regulated companies and banks with the regulators and authorities (4 LoD); more public driven partnership;
v. Harmonization and Regulatory Collaboration on AML/CFT processes across EU countries and further development of minimum cross-border standards.

4. Opportunities and Going Beyond

The AML/CFT Compliance is a dynamic concept. New AML/CFT regulatory requirements are constantly evolving, with new regulations being established because of international recommendations, local standards, and best practices around the world. In many spheres of life, social behaviour is standardised or controlled through a regulator or officially appointed body to implement law, and compliance can be considered as 'behaviour fitting the behavioural expectations' (Etienne, 2010)[9]. In a broader sense, there is a growing body of regulation, which encompasses environmental, ethical, economic and social issues. With this in mind, facing such a complex and constantly developing regulatory environment with a significant cross-border implications is some kind of "sailing in unchartered waters". This is based on some of the abovementioned challenges, as well as far-reaching expectations of the regulators. Thus, the balancing act with regards to time, priorities, costs and resources to run an effective, consistent, and robust AML/CFT compliance systems and controls becomes one of the core objectives of the FI.

It is worth noting that the current regulatory en-

9. Etienne, J. (2010) *The Impact of Regulatory Policy on individual behaviour: A Goal Framing Approach. Discussion Paper N59.* London: Centre for Analysis of Risk and Regulation of the London School of Economics and Political Science.

vironment also gives a lot of opportunities for collaboration among the peers dealing on the principles-based approach. For example, in the UK some banks consider on joining a data-sharing platform between the peers in fighting financial crime. Such practice would involve the regulators, as the four Lines of defence (LoD). A similar approach towards collaboration is the creation of the Transaction Monitoring Netherlands platform.[10] Additionally, under the GDPR laws banks have been sharing client data and submitting information to the Register UBO on country level.
Another example is the work of the Austrac's Fintel Alliance aiming to increase the resilience of the financial sector to criminal exploitation and support law enforcement investigations[11]. This Alliance is the world's first public-private partnership on financial crime, bringing experts from a wide range of organisations involved in the fight against money laundering, terrorism financing, and other types of financial crime. In accordance with the website of the Australian Regulator "...Fintel Alliance has an established program of work based on targeting priority themes including crimes targeting our most vulnerable community members, exploitation of government revenue, disrupting professional money laundering, and crimes and threats to Australia's domestic and international interests"[12].
The recent creation of the European AMLA could be also considered as an opportunity in centralized approach towards professionally fighting against the global financial crime. Although, considering the speed of technological developments, new AI platforms, instant cross-border payments, etc. the proper timely actions become a pivotal condition for effective fighting with the financial crime. Therefore, aiming to boost the efficiency of the AML and CFT framework by having an integrated mechanism for the cross-borders transactions, on 20 July 2021, the European Commission presented its package of legislative proposals to strengthen the EU's rules on AML and CFT[13]. In this package a regulation established a new EU Anti-Money Laundering authority (AMLA), which has powers to impose sanctions and penalties was proposed. On 13 December 2023 "[...] the Council and the Parliament reached a provisional agreement on creating a new European authority for countering money laundering and financing of terrorism (AMLA) - the centrepiece of the anti-money laundering package, which aims to protect EU citizens and the EU's financial system against money laundering and terrorist financing".[14] It is expected that AMLA will become operational during 2025 and carry out direct supervision starting from 2026. The new authority will have the power to directly supervise certain types of credit and financial institutions, including crypto-asset service providers, if they are considered high-risks or operate across the border. The authority will supervise up to 40 groups and entities in the first selections process, and the others non-selected entities, will be continued to be governed by the national regulators, which may create a rather fragmented approach in a medium/long term perspective. It is obvious that collaboration between the authority and national regulators, as well as NCAs will be further increased, especially where the AMLA would have indirect supervision for other financial institutions. Further evolution of the supra-national AML/CFT risk assessment and risk classification, further clarifications with regards to de-risking criteria, Enhanced Due Diligence (EDD) and Simplified Due Diligence (SDD) as well as denomination of PEP criteria are highly anticipated. Having in mind the potential scope of the above-mentioned regulatory initiates to be conducted by the AMLA within a rather short time frames, the question on hiring the right number of the experienced and competent resources with the high level of understanding the conceptual nuances of the AML/CFT remains open.

Another interesting and positive development is the upcoming 5th Round of the Financial Action Task Force (FATF) Mutual Evaluations, 2024, thus the countries will be able to confirm or update their risk assessment processes and legislature in line with the FATF Recommendations - the global standards of AML and CFT. Further to the FATF website "...the FATF methodology behind this round and the focus will be made on strengthening AML/CFT detection capabilities and ensuring countries are making use of existing regulations and policies. FATF is aiming for evaluation reports to be more results-driven, focusing on specific actions and timelines to tackle money laundering, terrorist financing and the financing of weapons of mass destruction"[15].

What steps can be taken to protect the FIs from the ever-increasing financial crime risks? Considering that financial crimes are getting more and more complex with technologically advanced patterns, the recommendations and requirements of the international organizations and regulators are also becoming increasingly granular, requiring application of multiple scenarios, patterns of transactions as well as an additional analysis threat/trends conducted by FIs building and maintaining an effective and efficient AML/CFT Annual Compliance program with a right calibre and level of suitability Financial Crime Compliance (FCC) team members becomes a crucial mission for the FIs.

With this in mind, any delivery of effective AML/CFT program now requires a significant adaptability and new ways forward to manage the expectations of

10. Available atTMNL in brief - TMNL
11. Australian Fintel Alliance, available at www.austrac.gov.au/partners/fintel-alliance
12. Australian Fintel Alliance, available at https://www.austrac.gov.au/partners/fintel-alliance
13. European Council, available at https://www.consilium.europa.eu/en/policies/fight-against-terrorism/fight-against-terrorist-financing/
14. www.consilium.europa.eu/en/press/press-releases/2023/12/13/anti-money-laundering-council-and-parliament-agree-to-create-new-authority/
15. https://www.fatf-gafi.org/en/publications/Mutualevaluations/5th-Round-Methodology.html

the regulator, internal and external auditors. Better collaboration among the peer banks on more effective ways in managing financial crime risks, as well as better and more transparent communication with the regulator could be one of the approaches to manage successfully financial crime risks in the current regulatory, geopolitical and technological complex environment. Developing minimum cross-border EU standards towards managing financial crime risks would be also very beneficial for the whole industry. In addition, applying any modern compliance solution means costs for the FIs. Therefore, a kind of balancing of the dual aims of reducing cost of compliance and at the same time, ensuring effective compliance, is more critical and complex than ever before.

5. Conclusion

In conclusion, it seems obvious that AML/CFT Compliance as a concept is full of ambiguities and a one-size-fits-all solution cannot be applied universally to different scenarios. This can lead to more innovative behaviour on the part of the regulator and regulated entities. Moreover, compliance involves a high level of interpretive flexibility that leads to differences in understanding and treatment of the same phenomenon depending on the interests of stakeholder groups and the socio-cultural context. The regulator may provide any statements about AML/CFT compliance, but the reality for regulated entities is more complex than anticipated and compliance officers must deal with the various competing demands posed by institutional, systemic, local and global AML/CFT compliance requirements. It is also worth mentioning that multiple requirements in different areas, that often need to be applied simultaneously, require FIs to have varied and dynamic strategies to meet regulatory standards and expectations.

With this notion in mind, I would consider the overall AML/CFT compliance concept through the notion of constant change. The financial regulations, regulatory requirements, AML/CFT compliance expectations as well as internal processes are in constant flux, which are constantly evolving. Therefore, rephrasing the favourite quote of Sir W. Churchill: "to improve AML/CFT Compliance is about to change, so to be perfect is to change often."[16]

16. Sr.Winston Churchill, statement made in 1925, 'To improve is to change; to be perfect is to change often'

Uit de boekenkast van de bedrijfs-ethiek (90)

prof. dr. E. Karssing[1]

In de bedrijfsethiek is een groot aantal boeken en artikelen verschenen waarin op praktische wijze prangende vraagstukken worden behandeld en concrete aanbevelingen worden gedaan voor het bevorderen van de ethiek en integriteit van organisaties en hun medewerkers. Niet iedereen weet deze publicaties te vinden of heeft tijd ze te lezen. Daarom kijkt Edgar Karssing geregeld voor het *Compliance, Ethics & Sustainability Journal* in de boekenkast van de bedrijfsethiek en bespreekt hij een artikel of boek. Deze bijdragen zijn geen recensies, maar een samenvatting van de belangrijkste conclusies en aanbevelingen van de auteur(s), die hij zal confronteren met zijn eigen observaties als onderzoeker, trainer en adviseur op het gebied van ethiek en integriteit.

1. Inleiding

Ik krijg na afloop van een college, workshop of training geregeld de vraag: wat is een goed boek om verder kennis te maken met de filosofie? Daar word ik altijd helemaal blij van. Mijn verborgen agenda – nu dus niet meer verborgen – is om mensen enthousiast te maken voor mijn mooie vakgebied: de wijsbegeerte. Met de vraag wordt duidelijk dat dit in ieder geval deels is gelukt. Nu de volgende stap. En dan wordt het meteen spannend. Want filosofieboeken kunnen heel esoterisch zijn, vaag en abstract, een discussie tussen vakgenoten over punten en komma's. Gelukkig zijn er heel veel goede inleidende boeken. Die filosofie in het algemeen neerzetten (als een historisch overzicht) of vanuit een bepaald thema zoals vriendschap, ethiek of waarheid. Mijn adviezen weerspiegelen natuurlijk mijn voorkeuren. En mijn blinde vlekken; zo ben ik vooral bekend met de Westerse filosofie en heb ik een hekel aan veel Franse filosofen omdat ik er geen touw aan kan vastknopen. Ik probeer echter altijd zo goed mogelijk bij de wensen van de vraagsteller aan te sluiten. Ik heb in de loop der jaren een aardige verzameling boekentips opgebouwd. In deze 'boekenkast' zet ik ze bij elkaar. Voor al degenen die een goed toegankelijk filosofieboek willen lezen. Belangrijke criteria zijn daarbij: Nederlandstalig (dat mag in vertaling) en in de goede boekhandel verkrijgbaar. Helaas zijn veel mooie boeken niet meer te koop.

Waarom is mensen enthousiasmeren voor filosofie mijn verborgen agenda? Het is verborgen omdat dit meestal niet de reden is waarom ik word gevraagd om een verhaal te vertellen. Het is mijn agenda omdat ik meen dat filosofie en filosoferen kan bijdragen aan goed leven en samenleven, aan gemoedsrust en wederzijds begrip. En omdat filosoferen van zichzelf een waardevolle activiteit is. Filosofie betekent letterlijk 'liefde voor de wijsheid'. Mij is ooit door mijn promotoren gevraagd wat voor soort filosoof ik ben. Het is denk ik de vraag waarna ik het langst stil ben geweest. Ik wist niet eens wat voor soort antwoord ik zou kunnen geven. Alsof iemand je een vraag stelt en je niet weet of je moet antwoorden met een getal, een kleur, een smaak, een diersoort... Op 2 februari 2024 was de oratie van Stine Jensen, de rede waarmee ze als nieuw benoemde hoogleraar het ambt officieel heeft aanvaard. Haar leerstoel heet 'publieksfilosofie' en ze definieert dit als 'het toegankelijk maken van filosofische ideeën voor een breed publiek en het aanleren van een filosofische houding aan mensen buiten de academische discipline'.[2] Misschien is dat wel het antwoord dat ik zolang zocht: ik wil een publieksfilosoof zijn die mensen buiten de academie kennis laat maken met filosofie, met het gedachtengoed van filosofen. Graag zie ik filosofie als de hulpwetenschap van het nadenken. Het nadenken moeten mensen zelf doen, maar filosofen kunnen hierbij helpen. Jensen waarschuwt daarbij overigens voor te hoge verwachtingen: 'Een filosoof komt zelden met kant-en-klare oplossingen. Als mij tijdens lezingen gevraagd wordt wat een publieksfilosoof doet, dan antwoord ik doorgaans met een geleende en serieuze grap: ik breng de verwarring op een hoger niveau'.[3]

Filosofen zijn gek op onderscheidingen, op onderverdelingen, op categoriseren. Ik heb dus geen Top 10, maar zal enige ordening aanbrengen in mijn adviezen. Het eerste onderscheid is tussen 'filosofie leren' en 'leren filosoferen'. Terugkijkend naar de definitie van Jensen van publieksfilosofie: het eerste is gericht op filosofische ideeën voor het voetlicht brengen, het tweede op een filosofische houding. Ik zal bij 'filosofie leren' een onderverdeling maken naar 'algemeen' en 'thematisch' en dit laatste categorise-

1. Edgar Karssing is als hoogleraar Filosofie, Beroepsethiek en Integriteitsmanagement verbonden aan Nyenrode Business Universiteit. De auteur dankt Olga Crapels en Wim Lieve voor hun commentaar op het concept van deze bijdrage. Voor reacties en suggesties: e.karssing@nyenrode.nl.
2. S. Jensen (2024), *De onderstroom. Over de rol van de publieksfilosofie*, oratie, Erasmus Universiteit Rotterdam. Zie ook S. Jensen (2024), *Onderstroom. Over publieksfilosofie en andere overdenkingen*, Kluitman.
3. Jensen (2024), ibid.

ren naar de kernproblemen in de filosofie volgens de grote Verlichtingsfilosoof Immanuel Kant. Tot slot besteed ik ook aandacht aan levenskunst waarin vragen rondom een goed en gelukkig leven centraal staan: filosofie als een manier van leven. Ik zal steeds per titel aangeven waarom een boek mij aanspreekt, voor een korte beschrijving maak ik vaak gebruik van flapteksten.

2. Filosofie leren

Ik begin met twee algemene inleidingen in de filosofie. Daarna zal ik themagewijs nog meer boekentips geven. Kant benoemde aan de hand van vier vragen de kernproblemen in de filosofie. De eerste drie zijn:

1. Wat kan ik weten?
2. Wat moet ik doen?
3. Wat mag ik hopen?

En als je die drie vragen weet te beantwoorden, dan heb je volgens Kant meteen ook een antwoord op de vierde vraag: Wat is de mens?
Ik zal bij alle vier vragen (thema's) enkele boektips geven.

2.1. Algemene inleidingen

De wereld van Sophie, van Jostein Gaarder
Het is officieel een 'jeugdboek', maar ook voor volwassenen is het een speelse inleiding in de filosofie. In korte hoofdstukken van steeds ongeveer 10 bladzijden wordt een filosoof geïntroduceerd. Als roman vond ik het lang wat kinderachtig, maar halverwege het boek wordt het steeds spannender. De flaptekst: 'Deze roman over de geschiedenis van de westerse filosofie is een spannend verhaal, een detective en een naslagwerk in één: een intrigerend boek dat iedereen zal aanspreken die iets over zichzelf en de wereld om zich heen wil leren. Twee ondernemende tienermeisjes komen terecht in een wervelende speurtocht die tot antwoorden leidt op vele vragen, maar elke vraag roept weer nieuwe raadsels op'.[4]

Het avontuur filosofie. Denkers die de wereld veranderden, van Fernando Savater
Ik ben een groot fan van Savater, ik zou al zijn boeken op mijn lijstje kunnen zetten. Zijn eerste boek dat ik las – *Het goede leven. Ethiek voor mensen van morgen* – was een heel heldere inleiding in de ethiek, geschreven als een brief aan zijn zoon.[5] Ik gebruik nog steeds zijn inzet in mijn eigen verhalen: ethiek vereist twee keer nadenken. Welke argumenten heb ik om te doen wat ik wil doen en zijn dit goede argumenten? De tweede keer nadenken bestaat uit het bevragen en toetsen van argumenten: passen ze bij de waarden en normen die leidend zouden moeten zijn in mijn handelen? In het boek *Het avontuur filosofie* wordt een overzicht gegeven van belangrijke denkers in de Westerse filosofie. Volgens de achterflap: 'In de vorm van korte en glasheldere hoofdstukken over deze denkers die de wereld veranderden wordt de filosofie gepresenteerd als een daadwerkelijk avontuur, een verhaal van tegendraadse vragen en impertinente antwoorden, van persoonlijke twijfels, van het vergeefs zoeken naar zekerheden en van het omarmen van onzekerheden. Dit boek maakt duidelijk dat denken altijd een individuele daad is, die moed vereist en lang niet altijd welkom is in een wereld die liever van niets wil weten'.[6]

2.2. Wat kan ik weten?

De eerste vraag van Kant is onderwerp van filosofische disciplines als epistemologie (kennisleer), wetenschapsfilosofie en logica. Hoewel gebrek aan logica een belangrijk euvel is van moderne tijden, weet ik niet zomaar een goede inleiding in de logica. Dit is in de filosofie ook een heel formele discipline geworden (heel wiskundig qua karakter). Iets smeuïger zijn argumentatieleer en drogredenen. Helaas nog alleen verkrijgbaar als tweedehands of in de bibliotheek is het boekje *Leren argumenteren met Vader en Zoon. Een spoedcursus in twintig lessen*, waarin Van Eemeren en Grootendorst met behulp van tekeningen van Peter van Straaten allerlei drogredenen bespreken.[7] Een ander belangrijk euvel van moderne tijden is ons waarheidsbegrip: wat kan dit nog betekenen in het 'post-truth'-tijdperk waarin 'fact-free-politics' gemeengoed lijkt? Twee boekentips:

Kinderen van Apate. Over leugens en waarachtigheid, van Alicja Gescinska
Dit is het goedkoopste en dunste boekje op mijn lijst, maar absoluut de moeite waard.[8] Gescinska gaat op zoek naar de heilige graal in de filosofie: wat is waarheid? Ze geeft aan dat er in de filosofie grofweg drie benaderingen van waarheid zijn:

- *De correspondentietheorie*: waarheid is de mate waarin een bewering correspondeert met de werkelijkheid.
- *De coherentietheorie*: waarheid is de mate waarin een bewering de interne samenhang van een wereldbeeld ten goede komt.
- *De pragmatische theorie*: waarheid is wat werkt.[9]

Om het begrip waarheid verder te onderzoeken, verdiept Gescinska zich in de leugen en stelt de fascinerende vraag: Kun je liegen en toch nog de waarheid spreken? Ze laat zien dat dit kan en concludeert daarom dat een leugen dus niet zozeer het tegendeel is van waarheid, maar van waarachtig-

4. J. Gaarder (2022), *De wereld van Sophie*, Houtekiet.
5. F. Savater (1996), *Het goede leven. Ethiek voor mensen van morgen*, Bijleveld.
6. F. Savater (2016), *Het avontuur filosofie. Denkers die de wereld veranderden*, Bijleveld.
7. F.van Eemeren, R. Grootendorst en P. van Straaten (1996), *Leren argumenteren met Vader en Zoon. Een spoedcursus in twintig lessen*, Atlas Contact.
8. A. Gescinska (2020), *Kinderen van Apate. Over leugens en waarachtigheid*, Lemniscaat.
9. Gescinska (2020), ibid.: 27.

heid. En dat levert een verrassend inzicht op: 'Met de overgang van waarheid naar waarachtigheid gaat een subtiele, maar substantiële betekenisverschuiving gepaard. Het is de verschuiving van een amorele term naar een morele [...] Het gaat niet langer om de kwaliteit van beweringen, maar om de kwaliteit van personen. Waarheid is een neutrale term. Waarachtigheid is een morele term'.[10]

Voor ieder wat waars. Hoe waarheid ons verdeelt en ons weer kan samenbrengen, van Rob Wijnberg
Wijnberg, oprichter van *De Correspondent*, geeft in zijn mooie boek een systematisch overzicht hoe onze opvattingen over waarheid door de geschiedenis heen steeds zijn veranderd. Waar eerst waarheid ons door de goden werd gegeven, werd het later iets dat wordt gevonden, gemaakt of geconsumeerd. Ook het 'doel van waarheid' verschoof in de loop der tijd: van verlossing, naar vooruitgang, naar bevrijding, naar behoeftebevrediging. Wijnberg ziet dat vandaag de dag waarheid haar zeggingskracht heeft verloren. Op de flap: 'Het gevolg: een samenleving waarin cynisme en wantrouwen hoogtij vieren. Het enige wat daar iets aan kan veranderen, is een hoopgevend verhaal over vooruitgang in de 21ste eeuw. Een verhaal dat laat zien dat waarheid weer iets kan worden wat we delen in plaats van wat ons verdeelt'.[11] Kan het anders? Ja, Wijnberg biedt ons een wenkend perspectief.

2.3. Wat moet ik doen?

Met de tweede vraag van Kant komen we in mijn vakgebied, de ethiek. Maar ook de sociale filosofie en de politieke filosofie. Nu wordt kiezen echt lastig, maar ik doe een poging.

Perfect: de handleiding. Het juiste antwoord op elke ethische kwestie, van Michael Schur
Wellicht moet ik ook nog eens een lijstje maken met films en series. Dan zal zeker de serie *The Good Place* (Netflix) erop staan. Een comedy waarin een filosoof als een van de hoofdrolspelers voortdurend filosofische inzichten inbrengt. De maker van deze serie, Michael Schur, heeft nu ook een geweldige inleiding in de ethiek geschreven. Een tikje Amerikaans qua humor, maar als je daar tegen kunt, dan heb je een boek dat lekker weg leest met heel veel herkenbare situaties en voorbeelden. Onderweg worden allerlei filosofische inzichten besproken en getoetst op praktische bruikbaarheid. Al snel wordt duidelijk dat je de titel met een dikke knipoog mag lezen.[12]

Rechtvaardigheid. Wat is de juiste keuze?, van Michael Sandel
Sandel is een jaloersmakende popster-filosoof die rustig een stadion vol krijgt. En hij schrijft ook nog eens heel goed. Niet met de humor van de vorige Michael, maar met een veel serieuzere ondertoon bespreekt hij de belangrijkste stromingen in de Westerse ethiek. Heel toegankelijk. Op de flap: 'In een tijdperk waarin de vaste vormen van tradities zijn verdwenen, blijkt het lastig een moreel kompas te vinden. *Rechtvaardigheid* vormt echter sinds verschijning een krachtige gids bij het maken van de juiste morele keuze. Sandel toont hoe denkers zoals Aristoteles, Kant en Rawls ons helpen met hedendaagse maatschappelijke kwesties. Dit doet Sandel met zijn kenmerkende heldere stijl en treffende voorbeelden'.[13]

Het goede leven en de vrije markt. Een cultuurfilosofische analyse, van Ad Verbrugge, Govert Buijs en Jelle van Baardewijk
Dit boek is geschreven als studieboek voor 17 en 18 jarigen die op het VWO het vak filosofie doen. Het heeft de Socratesbeker 2019 gewonnen als 'het meest urgente, oorspronkelijke en prikkelende Nederlandstalige filosofieboek'.[14] De auteurs gaan in gesprek met filosofen uit alle tijden om te reflecteren op de invloed van de vrije markt op het goede leven. Centraal staat de vraag: brengt de vrije markt in haar huidige vorm het goede leven dichterbij of staat ze dit juist in de weg? En ondertussen laten ze de scholieren ook nadenken over de vraag: wat is eigenlijk het goede leven? Wat een kadootje. Ik zou willen dat ik dit boek als 17 jarige had mogen lezen.

2.4. Wat mag ik hopen?

De derde vraag van Kant verwijst naar onderwerpen als religie, spiritualiteit en zingeving. Daarmee komen we al in de buurt van levenskunst, maar dat zal ik als aparte categorie behandelen. Hier noem ik een meer beschouwend boek dat duiding probeert te geven aan de betekenis van bijvoorbeeld religie en zingeving in het leven van mensen.

De geest uit de fles. Hoe de moderne mens werd wie hij is, van Ger Groot
Dit is in ieder geval het mooiste boek op het lijstje, qua vormgeving. Een harde kaft, mooi papier, heel veel kleurrijke illustraties. En het is ook een fascinerende kennismaking met heel veel filosofen, geordend rondom een belangrijk thema. Op de flap: 'Dit boek is een geschiedenis van de moderne filosofie en een zinnenprikkelende beschouwing ineen. Ger Groot laat zien en horen hoe wij, zelfbewuste én onzekere mensen aan het begin van de eenentwintigste eeuw, zijn geworden wie we zijn. Sinds Descartes heeft de radicale twijfel zijn intrede gedaan en is“de geest uit de fles". De filosofie van de afgelopen vier eeuwen laat zich beschrijven als één lange worsteling met de erfenis van de religie. Niet alleen de

10. Gescinska (2020), ibid.: 37.
11. R. Wijnberg (2023), *Voor ieder wat waars. Hoe waarheid ons verdeelt en ons weer kan samenbrengen*, de Correspondent.
12. M. Schur (2022), *Perfect: de handleiding. Het juiste antwoord op elke ethische kwestie*, Lev.
13. M. Sandel (2015), *Rechtvaardigheid. Wat is de juiste keuze?*, Ten Have.
14. A. Verbrugge, G. Buijs en J. Baardewijk (2018), *Het goede leven en de vrije markt. Een cultuurfilosofische analyse*, Lemniscaat.

filosofie, maar de hele cultuur is van die worsteling doordrongen'.[15]

2.5. Wat is de mens?

En als je al deze boeken hebt gelezen, dan moet je langzamerhand een antwoord hebben gevonden op de vraag: wat is de mens? Je bent er nog niet helemaal uit? Dan heb ik nog een boekentip.

Een beestachtige geschiedenis van de filosofie, van Erno Eskens
Eskens is een echte publieksfilosoof. Hij was onder veel meer hoofdredacteur van *Filosofie Magazine* en hoofd van de Internationale School voor Wijsbegeerte in Leusden. Tip: dit is de plek voor een cursus filosofie voor leken! Je kunt je gratis abonneren op hun magazine (iFilosofie) waarin steeds de nieuwste filosofieboeken worden besproken. Het boek is bijna zo mooi vormgegeven als het boek van Groot. Op de flap: 'Aan de hand van talloze schilderijen, beeldhouwwerken, tuinontwerpen, historische foto's en manuscripten vertelt dit boek hoe 26 eeuwen filosofie ons zelfbeeld hebben gevormd. Hoe kijken we in het bijzonder aan tegen ons lichaam en tegen onze dierlijkheid? Het verhaal begint bij de prehistorische cultus van de moedergodin en eindigt in onze tijd'.[16]

3. Leren filosoferen

Bovenstaande boeken brengen filosofische ideeën voor het voetlicht. Publieksfilosofie richt zich daarnaast op het aanleren van een filosofische houding aan mensen buiten de academische discipline. Dan gaat het om leren filosoferen. Dat is een houding die je ontwikkelt, een vaardigheid die je leert door oefening in de praktijk. Leren filosoferen vereist tijd en wellicht enige begeleiding. Ook hierbij kunnen boeken houvast bieden.

Socrates op sneakers, Filosofische gids voor het stellen van goede vragen, van Elke Wis
Dit boek is een enorme hit, en terecht. De titel is al lekker catchy, de inhoud leest weg als een roman. Met heel veel oefeningen. Want vragen stellen is net als zwemmen, dat leer je slechts in zeer beperkte mate op het droge. Op de flap: 'Met *Socrates op sneakers* tackelt praktisch filosoof Elke Wiss de kunst van een goed gesprek. In een tijd waarin iedereen door elkaar roeptoetert en meningen al snel dezelfde waarde als feiten krijgen, is de verbinding vaak ver te zoeken. We proberen de ander eerder te overtuigen van ons gelijk dan dat we samen op zoek gaan naar wezenlijke antwoorden. Veel van onze gesprekken hebben daardoor meer weg van een debat dan van een dialoog. We praten liever dan dat we luisteren, voor vragen stellen hebben we geen tijd. En toegeven iets niet te weten is al helemaal geen optie. Hoe mooi zou het zijn als je op elk moment en in iedere situatie weet hoe je precies dié vraag stelt die leidt tot een goed gesprek? In *Socrates op sneakers* leert Elke Wiss je hoe je dat doet. Met Socrates en andere filosofen als inspiratiebron laat zij zien waarom we zo slecht zijn in het stellen van goede vragen, én hoe we er beter in worden'.[17]

Word zelf filosoof, van Jan Bransen
Aan het begin van zijn boek stelt Bransen dat filosoferen belangrijk is, maar niet populair: 'Geduldig en standvastig werken aan de taal; schaven, beitelen en hakken aan de woorden zodat ze ons precies toestaan de dingen te zeggen die we willen zeggen en zo de dingen te doen die we willen doen – er lijkt geen tijd en belangstelling meer voor te zijn. En toch, als we die tijd er niet voor nemen en de vaardigheden niet ontwikkelen die we nodig hebben om grondig te reflecteren op de wijze waarop we aan onze meningen komen, dan zullen we zelfs ons eigen meningen helemaal niet kunnen begrijpen. Dan zeggen we maar wat'.[18] Ik heb zijn boek al eens uitgebreid in een 'boekenkast' besproken.[19] Het blijft een topper.

Vrije ruimte. Filosoferen in organisatie, van Jos Kessels, Erik Boers en Pieter Mostert
Ik ben al heel lang fan van Jos Kessels, hij heeft een belangrijke bijdrage geleverd aan filosofie naar bedrijven brengen. Topper blijft zijn boek *Socrates op de markt. Filosofie in bedrijf.* Toch kies ik voor een ander boek. In dit boek staat namelijk een groot aantal oefeningen waarmee je direct aan de slag kunt met zelf filosoferen.[20]

4. Levenskunst

Hoe kunnen we ons leven vormgeven op een manier dat we ooit kunnen zeggen: het was een zinvol leven! Hoe kan filosofie een manier van leven zijn? Joep Dohmen heeft hier veel over geschreven, zijn magnus opus *Iemand zijn. Filosofie van de persoonlijke vorming* heb ik echter nog niet gelezen en wil ik om die reden (nog) niet aanraden. Ik heb een zwak voor stoïcijnen. Vanwege hun mens- en wereldbeeld (hoewel dat soms wat erg gelaten is), maar vooral omdat ze wisten dat je alleen met hard werken jezelf kunt cultiveren. Hard werken, waarover Sitskoorn terecht streng aangeeft: 'En nee, vat dit nou niet samen als “ik wil wel maar ik kan het dus niet", het is namelijk: “ik wil wel maar het wordt me niet makkelijk gemaakt".[21] Ik ben niet de enige met een zwak voor stoïcijnen, er worden steeds meer boeken uitgebracht,

15. G. Groot (2017), *De geest uit de fles. Hoe de moderne mens werd wie hij is*, Lemniscaat.
16. E. Eskens (2014), *Een beestachtige geschiedenis van de filosofie*, ISVW.
17. E. Wis (2020), *Socrates op sneakers, Filosofische gids voor het stellen van goede vragen*, Ambo|Anthos.
18. J. Bransen (2010), *Word zelf filosoof*, Veen: 21.
19. E. Karssing (2015), 'Uit de boekenkast van de bedrijfsethiek 57', *Tijdschrift voor compliance*, jrg. 15, november, 269-274.
20. J. Kessels, E. Boers en P. Mostert (2002), *Vrije ruimte. Filosoferen in organisatie*, Boom.
21. M. Sitskoorn (2016*), Ik2 De beste versie van jezelf*, Management Impact: 115.

met oefeningen om onszelf te cultiveren. Enkele titels:

Leer denken als een Romeinse keizer. Succesvol leven met Marcus Aurelius, van Donald Robertson.[22]
Hoe word je een stoïcijn? Oude filosofie voor het moderne leven, van Massimo Pigliucci.[23]
Handboek voor de moderne stoïcijn. 52 oefeningen voor een evenwichtig leven, van Massimo Pigliucci en Gregory Lopez.[24]

Natuurlijk zou je *Persoonlijke notities* van Marcus Aurelius zelf moeten lezen, of het *Zakboekje* van Epictetus.[25] Maar ik beperk me in mijn lijstje tot boeken 'over' grote filosofen, niet de boeken van de grote filosofen zelf. Zo zou je ook de *Essays* van Montaigne kunnen lezen, nog steeds een schitterende verzameling mijmeringen over het leven.[26] Voor een goede kennismaking is er gelukkig een prettig geschreven boekje.

Levenskunst à la Montaigne, van Ronald Wolbink
Zonder het plat te slaan geeft Wolbink je belangrijke inzichten van Montaigne mee. Op de flap: 'Je kunt naar een coach gaan om te zoeken naar je diepste gevoelens, maar je kunt beter eerst dit boek lezen. Het beschrijft wat jij, hier en nu, kunt opsteken van de levenskunst van de Franse filosoof Michel de Montaigne. Deze zestiende-eeuwse denker hield er een aantal verrassende denkbeelden op na. Zo beschrijft hij de mens als een veranderlijk wezen, boordevol tegenstellingen. We zijn van nature wisselvallig en daarom past ons eerder bescheidenheid dan standvastigheid. Montaigne staat ook stil bij de onvermijdelijke eindigheid van ons leven; een gedachte waaraan de moderne coach, die stilzwijgend uitgaat van een steeds verdergaande ontwikkeling en ontplooiing, liever niet wil denken. Alleen door stil te staan bij de dood kunnen we verder leven in het hier en nu'.[27]

De troost van de filosofie, van Alain de Botton
Met publieksfilosofie kun je niet om De Botton heen. Hij is de oprichter van *The School of Life* (2008) die nu over de hele wereld vestigingen heeft en allerlei cursussen en lezingen aanbiedt. Al jarenlang schrijft hij zeer prettig leesbare boeken waarin hij het gedachtegoed van filosofen loslaat op alledaagse problemen. Net als bij Savater is kiezen moeilijk, maar met *De Troost van de filosofie* heb je een goede kennismaking met deze auteur. Op de flap: 'Kan Socrates ons helpen bij impopulariteit? Of zou Epicurus ons bij geldgebrek en Seneca ons bij frustraties terzijde kunnen staan? *De troost van de filosofie* van Alain de Botton levert het overtuigende bewijs dat de grote filosofen beslist niet alleen theoretisch toepasbaar zijn. Een gebroken hart kan geheeld worden met de filosofie van Schopenhauer en moeilijkheden in het menselijk bestaan zijn weliswaar vervelend maar ook een absolute noodzaak, aldus sprak Nietzsche'.[28]

Even goede vrienden. Een zoektocht naar hoe vriendschap (niet) werkt, van Raounak Khaddari
Vriendschap is een van mijn favoriete filosofische thema's. Aristoteles schreef in zijn verhandeling over een goed leven, de *Ethica*, zelfs twee van de tien hoofdstukken over vriendschap. Ikzelf heb ooit een stuk geschreven hoe compliance officers de relatie met klanten vanuit een vriendschapsperspectief zouden kunnen bekijken.[29] Veel Nederlandse filosofen hebben een boekje over vriendschap geschreven, vaak mannen die refereren aan mannelijke filosofen. Verfrissend is het meest recente boek, van Khaddari, waarin zij als jonge vrouw filosofeert over vriendschap en daarbij heel dicht bij zichzelf en daarmee bij het hier en nu blijft. Op de flap: “De druk van deze vriendschap wil ik niet. Heel veel liefs". Met die woorden zette journalist Raounak Khaddari via WhatsApp een punt achter een vriendschap. Sindsdien worstelt ze met vriendschappen en hoe ze zelf een goede vriend moet zijn. Dat leidde tot een zoektocht naar deze meest ondergewaardeerde relatievorm. Aan de hand van de filosofie, wetenschap, geschiedenis en persoonlijke verhalen van verschillende mensen, ontdekt ze waarom vriendschappen onmisbaar zijn. En gaandeweg vindt ze antwoorden op vragen als: Hoe onderhoud je vriendschappen? Waarom worden vrienden steeds belangrijker in onze moderne levens? En doe je er goed aan een vriendschap zo expliciet uit te maken als Khaddari deed, of had ze dat met de kennis van nu anders gedaan?'.[30]

Wat mij aanspreekt aan vriendschap is het relationele denken. Dit vind ik ook in Ubuntu. Ik heb aan het begin bekend dat ik een blinde vlek heb voor niet-Westerse filosofie. Dit is de uitzondering die de regel bevestigt. Ubuntu is een Afrikaanse filosofie, een levensfilosofie waardoor mensen als Nelson Mandela en Desmond Tutu zich lieten inspireren. De hele korte samenvatting is: ik ben, omdat wij zijn. Ubuntu betekent dat een mens een mens is omdat er andere mensen zijn. Het kan alleen goed met mij gaan, als het ook goed met de ander gaat. Ofwel: de zorg voor jezelf impliceert de zorg voor de ander. Een 'ik' is pas succesvol als het 'wij' succesvol is. Ik noem twee boeken.

Opsoek naar Ubuntu. Zuid-Afrika onder mijn huid, van Annette Nobuntu Mul
De lessen van ubuntu. De Afrikaanse filosofie voor een

22. D. Robertson (2019), *Leer denken als een Romeinse keizer. Succesvol leven met Marcus Aurelius*, Ten Have.
23. M. Pigliucci (2017), *Hoe word je een stoïcijn? Oude filosofie voor het moderne leven*, Ten Have.
24. M. Pigliucci en G. Lopez (2019), *Handboek voor de moderne stoïcijn. 52 oefeningen voor een evenwichtig leven*, Ten Have.
25. M. Aurelius (2015), *Persoonlijke notities*, Ambo|Anthos; Epictetus (2011), *Zakboekje. Wenken voor een evenwichtig leven*, Boom.
26. M. de Montaigne (2019), *De essays*, Athenaeum.
27. R. Wolbink (2016), *Levenskunst à la Montaigne*, ISVW.
28. A. de Botton (2022), *De troost van de filosofie*, Atlas Contact.
29. E. Karssing (2018), 'Vriendschap. Over betekenisvolle relaties met klanten', hoofdstuk 17 in: *Als de oplossing het probleem is. Compliance met een moreel kompas*, NCI.
30. R. Khaddari (2023), *Even goede vrienden. Een zoektocht naar hoe vriendschap (niet) werkt*, Spectrum.

gelukkig leven, van Mungi Ngomane, met een voorwoord van Desmond Tutu

Het eerste boek is op meeslepende wijze geschreven door een Nederlandse. Dat helpt met de culturele overbrugging, ze neemt je stap voor stap mee.[31] Mungi Ngomane is de kleindochter van Desmond Tutu en is van binnenuit bekend met deze filosofie.[32] Naast een heldere uitleg geeft ze ook heel veel oefeningen mee, waaronder een fraaie dankbaarheidsoefening: Maak een overzicht van al degenen die jou hebben geholpen om te zijn wie je nu bent, en die je geholpen hebben te zijn waar je nu bent. Je begint vast met ouders en vrienden. Maar maak de kring breder. Waarschijnlijk zal de lijst heel snel heel lang worden: allemaal mensen die hebben geholpen met het realiseren van een aangenaam en succesvol leven. Laten we dat in dankbaarheid aanvaarden. Maar ook beseffen dat jij ook op de lijst van anderen staat. Hopelijk...

Tot slot, als Adam Smith liefhebber kan ik natuurlijk niet om hem heen. Zijn boeken zijn de afgelopen jaren eindelijk in het Nederlands vertaald. Smith geeft ons veel wenken voor een goed leven mee. En daar zijn mooie boekjes over geschreven. Alleen, *bummer*, nog niet in het Nederlands. Hoewel dat een van mijn twee criteria was, kan ik het niet laten om toch twee titels te noemen.

Our great purpose. Adam Smith on living a better life, van Ryan Hanley.[33]
How Adam Smith can change your life. An unexpected guide to human nature and happiness, van Russ Roberts.[34]

Het Nederlandstalige boek zal ik dan wel zelf schrijven.

31. A. Nobuntu Mul (2018), *Opsoek naar Ubuntu. Zuid-Afrika onder mijn huid*, Bigbusinesspublishers.
32. M. Ngomane (2019), *De lessen van ubuntu. De Afrikaanse filosofie voor een gelukkig leven*, HarperCollins.
33. R. Hanley (2019), *Our great purpose. Adam Smith on living a better life*, PUP.
34. R. Roberts (2014), *How Adam Smith can change your life. An unexpected guide to human nature and happiness*, Penguin.