

Student Paper

The Influence of the European Legislator on the National Criminal Law of Member States: It Is All in the Combination Chosen

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1. Introduction

Over the years European law and legislation have obtained more influence on the domestic legal order. This influence could increase, especially in the field of criminal law, with the entry into force of the Treaty of Lisbon. Therefore, questions arise about the extent of the influence of the European legislator on the national justice system. In this article I will discuss how the choice of the European legislator between the degree of harmonisation and the amount of detail in the directive can influence the national criminal law of the Member States. I will illustrate this with examples from 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 (2005/60/EC), OJ L 309, 25.11.2005, p. 15, (hereinafter: Directive 2005/60/EC).

The European Union has different instruments to harmonise law and legislation. Article 288 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), the former Article 249 of the Treaty of the European Community (hereinafter: TEC), determines that the institutions of the Union may adopt regulations, directives, decisions, recommendations and opinions. Directives are binding, according to Article 288 TFEU, as to the result to be achieved. The Member States are free to choose their own form and methods to transpose a directive. The discretion that Member States have in transposing a directive depends on the directive itself and other Union legislation (Section 2). To what degree they are limited depends on the degree of harmonisation which the directive envisages. In the following sections, I will argue that Directive 2005/60/EC envisages minimum harmonisation (Section 2.1-2.2). If that is the case, Member States are free to deviate from the directive so as to adopt so-called stricter rules in their legislation. I will also establish that the directive makes use of a highly detailed prohibition

* This paper is an adapted version of the the research project by S.S. Buisman, LL.M (e-mail: sanne_buisman@hotmail.com), entitled 'Witwassen – De implementatie van de verbodsbepaling van richtlijn 2005/60/EG in artikel 420bis Sr en artikel 505 Sw', which was completed at Utrecht University School of Law, Utrecht (the Netherlands) on 1 November 2010 under the supervision of Prof.Dr. F.G.H. Kristen.

(Section 2.1.2). This limits the discretion that the Member States have in transposing the directive into domestic law (Section 2).

In Section 3 I will determine the meaning of the different elements of Directive 2005/60/EC. By doing so, I will be able to establish what the consequences of the chosen combination of minimum harmonisation and highly detailed norms are (Section 4). I will also attempt to assess whether the consequences would have been any different if the European legislator had made different choices in the degree of harmonisation and the amount detail of the prohibition (Section 4). Finally, in Section 5 I will draw some conclusions.

2. The degree of harmonisation

2.1. Directives – the European framework

Directives are binding, according to Article 288 TFEU, formerly Article 249 TEC, as to the result to be achieved. Member States are allowed to choose their own form and methods to transpose the directive. However, the directive itself and also other Community law limit the discretion that Member States have in transposing the directive into their national justice system.¹ The determination of the degree of harmonisation is decisive for the question of to what extent Member States can deviate from a directive.² The European legislator could choose, for example, total harmonisation³ or minimum harmonisation. In the case of total harmonisation the national legislator is not allowed to deviate from the directive, not even to implement more flexible or stricter rules.⁴ The directive provides a complete regulation for the Member States.⁵ In the case of minimum harmonisation, the directive provides a minimum norm or a minimum level of protection.⁶ In that case Member States are free, while respecting the other restrictions, to implement stricter norms or a higher level of protection in their national legal system.⁷ The degree of harmonisation also influences the legislative powers of the Member States after a directive has been implemented.⁸

The degree of harmonisation can be determined on the basis of three criteria, which are inextricably bound with each other.⁹ These criteria are:

1. the legal basis, the wording and the objective of a directive;
2. the amount of detail;
3. the explicit granting of powers to adopt own rules.¹⁰

1 F.G.H. Kristen, 'Integrity on European Financial Markets: Backgrounds, Objectives, Reasons, Overall Contents and Implications of the Market Abuse Directive', 2005 *European Company Law*, no. 1, p. 20; J.H. Jans et al., *Europees milieurecht in Nederland*, 2000, pp. 128 and 139.

2 J.H. Jans et al., *Europees milieurecht in Nederland*, 2000, p. 130; D.R. Doorenbos et al., *Handboek marktmisbruik*, 2008, p. 32.

3 Also referred to as full or complete harmonisation. In this article I will use the term total harmonisation.

4 P.J.G. Kapteyn & P. VerLoren van Themaat, *The law of the European Union and the European Communities: with reference to changes to be made by the Lisbon Treaty*, 2008, p. 317; J.H. Jans et al., *Europees milieurecht in Nederland*, 2000, p. 130.

5 P.J.G. Kapteyn & P. VerLoren van Themaat, *The law of the European Union and the European Communities: with reference to changes to be made by the Lisbon Treaty*, 2008, p. 317.

6 F.G.H. Kristen, 'Integrity on European Financial Markets: Backgrounds, Objectives, Reasons, Overall Contents and Implications of the Market Abuse Directive', 2005 *European Company Law*, no. 1, p. 20. Different Y. Hofhuis, *Minimumharmonisatie in het Europees recht: vormen, begrip and gevolgen*, 2006, p. 11. According to Hofhuis, the protection which the European regulation provides is not 'minimum' as the term minimum harmonisation suggests, but optimal.

7 P.J.G. Kapteyn & P. VerLoren van Themaat, *The law of the European Union and the European Communities: with reference to changes to be made by the Lisbon Treaty*, 2008, p. 318; K. Lenaerts & P. Van Nuffel, *Europees recht in hoofdlijnen*, 2008, p. 152.

8 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, p. 56; Y. Hofhuis, *Minimumharmonisatie in het Europees recht: vormen, begrip en gevolgen*, 2006, p. 14.

9 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, pp. 42, 53.

10 These criteria are derived from F.G.H. Kristen, 'Integrity on European Financial Markets: Backgrounds, Objectives, Reasons, Overall Contents and Implications of the Market Abuse Directive', 2005 *European Company Law*, no. 1, pp. 20-21. For a further explanation of these criteria see F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, pp. 42 et seq. For an identical application of these criteria see,

Especially the second criterion, the amount of detail, has a great impact on the discretion that Member States have when transposing the directive into their national legislation. The general rule we can apply is the more a directive regulates, the less discretion the Member States have.¹¹ This means that, in the case of total harmonisation, the directive will be highly detailed.¹² Consequently, the room which Member States have to manoeuvre will be very little or even non-existent. Reservations must be made when extracting a decisive argument from a prohibition's degree of detail in a directive.¹³ Member States have to know what kind of behaviour the prohibition aims to prohibit.¹⁴

The use of open terms or terms that give Member States the opportunity to implement the directive in a different way gives the Member States more freedom, and could point in the direction of minimum harmonisation. A Member State will need to clarify open norms in the directive when it chooses to enforce the directive through criminal law.¹⁵ This has to do with the *lex certa* principle, which determines that criminal offences must be sufficiently precise and clear. Therefore, the discretion of Member States will increase when a directive, which will be enforced by criminal law, uses open norms, even in the case of total harmonisation.

2.2. The application of the three criteria concerning Directive 2005/60/EC

Because the third money laundering directive does not define what degree of harmonisation the directive envisages, we shall have to apply the three criteria to determine the degree of harmonisation. It is important to look at the earlier money laundering directives as well. These could provide a historical argument.

2.2.1. The legal basis, the wording and the objective of Directive 2005/60/EC

Legal basis

The directive finds its legal basis in Articles 47(2) and 95 TEC (old) (now Articles 53 and 114 TFEU). Article 47 TEC does not provide any insight into what degree of harmonisation should be applied in this area. In addition, minimum harmonisation as well as total harmonisation can take place on the basis of article 95 TEC.¹⁶ The degree of harmonisation must therefore be determined by a directive's wording, its objective and the other two criteria.

for example, B.J. de Jong & M.P. Nieuwe Weme, *Publicatie van de jaarrekening*, 2006, pp. 53 et seq. Partly different: Y. Hofhuis, *Minimumharmonisatie in het Europees recht: vormen, begrip and gevolgen*, 2006, pp. 9-10: she examines a directive's degree of harmonisation on the basis of its legal basis, the presence or absence of an explicit authority to deviate from a directive, its wording, the content and context of a directive and the presence or absence of a free movement clause.

11 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, p. 49; R.H. Lauwaars & C.W.A. Timmermans, *Europees recht in kort bestek*, 2003, p. 109; G. Corstens & J. Pradel, *European Criminal Law*, 2002, p. 23.

12 F.G.H. Kristen, 'Integrity on European Financial Markets: Backgrounds, Objectives, Reasons, Overall Contents and Implications of the Market Abuse Directive', 2005 *European Company Law*, no. 1, p. 21; R.H. Lauwaars & J.M. Maarleveld, *Harmonisatie van wetgeving in Europese organisatie*, 1987, p. 152.

13 F.G.H. Kristen, 'Integrity on European Financial Markets: Backgrounds, Objectives, Reasons, Overall Contents and Implications of the Market Abuse Directive', 2005 *European Company Law*, no. 1, p. 21.

14 D.R. Doorenbos et al., *Handboek marktmisbruik*, 2008, p. 46. Also F.G.H. Kristen, 'Integrity on European Financial Markets: Backgrounds, Objectives, Reasons, Overall Contents and Implications of the Market Abuse Directive', 2005 *European Company Law*, no. 1, p. 21.

15 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, pp. 50-51.

16 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, p. 46; P.J.G. Kapteyn & P. VerLoren van Themaat, *The law of the European Union and the European Communities: with reference to changes to be made by the Lisbon Treaty*, 2008, p. 318.

Wording

The wording of Directive 2005/60/EC seems to point in the direction of minimum harmonisation. First of all, several articles use the words ‘at least’.¹⁷ Furthermore, the directive offers Member States the opportunity to implement stricter measures in their national legislation. For example, Article 5 Directive 2005/60/EC lays down explicitly that Member States have the power to adopt stricter rules.¹⁸

A counterargument can be found in article 40(1) Directive 2005/60/EC. Article 40 gives the Commission the authority to adopt implementing measures, which ‘ensure uniform implementation of this Directive’. If a directive envisages uniform implementation, national implementing measures should be uniform, in which case it is not allowed for Member States to deviate from the directive. Nevertheless, this does not, in my opinion, exclude minimum harmonisation.

The measures that can be adopted on the basis of Article 40 Directive 2005/60/EC are listed in a limited list. Furthermore, the objective of these measures is to offer Member States guidelines in certain situations, for example to establish if there is a high or a low risk of money laundering. However, these measures do not restrict the discretion of the Member States to adopt deviating rules. Thus, the Member States are still free to deviate from the directive, since these measures do not restrict the discretion of the Member States, and neither do they restrict or preclude the opportunities to deviate from the directive. Therefore, the wording of the directive points in the direction of minimum harmonisation.

Objective

The predecessor of Directive 2005/60/EC, the Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (91/308/EEC), OJ L 166, 28.06.1991, p. 77 (hereinafter: Directive 91/308/EEC), was created to protect the financial sector and the internal market. A lack of Community action could lead to Member States adopting their own measures to protect their own financial sector, which could be inconsistent with the competition of the single market.¹⁹ In this context money laundering should be combated mainly by penal means.²⁰ The first money laundering directive envisaged that the objectives of the directive could be attained through minimum harmonisation.²¹ Article 15 of Directive 91/308/EEC determined that Member States may adopt, or retain in force, stricter provisions to prevent money laundering. With the amendment of the first money laundering directive by Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (2001/97/EC), OJ L 344, 28.12.2001, p. 76 (hereinafter: Directive 2001/97/EC) the envisaged degree of harmonisation was not changed.

In the proposal²² for Directive 2005/60/EC of the Commission, the Commission chose to preserve Article 15 of Directive 91/308/EEC and placed it under Article 4 of its proposal. At the European Parliament there were three amendments that favoured the deletion of Article 15 of

17 For example, Articles 13(1) and 39(3) Directive 2005/60/EC.

18 For other examples see preamble recital no. 18 Directive 2005/60/EC and Article 4 Directive 2005/60/EC.

19 Preamble recital nos 1 and 2 Directive 91/308/EEC.

20 Preamble recital no. 4 Directive 91/308/EEC.

21 C. Rijken & V. Kronenberg, ‘Organised crime and the EU’, in: V. Kronenberg (ed.), *The European Union and the international legal order: discord or harmony?*, 2001, p. 497.

22 COM(2004) 448 final, p. 16.

Directive 91/308/EEC from the new directive.²³ The new directive would go beyond the previous money laundering directives; therefore, there would be no need for Member States to implement further provisions.²⁴ In addition, money laundering could only be combated with uniform regulations.²⁵ Finally, it would be necessary to adopt common, uniform standards, so as to create an effective internal market.²⁶ Thus, these amendments point in the direction of total harmonisation.

In the final directive, Directive 2005/60/EC, Article 4 was not deleted, but placed under Article 5. By doing so, the European legislator ruled out total harmonisation. It retained the degree of harmonisation which the first two directives envisaged: minimum harmonisation. Otherwise, if the European legislator had wanted to have a directive that envisaged total harmonisation, it would have chosen to delete Article 4 from the directive.

2.2.2. The amount of detail

Directive 2005/60/EC contains a detailed prohibition of money laundering. Especially the acts of money laundering, as described in the second paragraph of Article 1, are sufficiently precise to be directly transposed into the national legislation of the Member States. This could be explained by the fact that this is a prohibitive rule. In that case the directive has the objective of prohibiting certain behaviour. In the case of Directive 2005/60/EC, it has the objective of prohibiting money laundering in order to protect the financial sector and the internal market. Therefore, a precise definition of money laundering is required as Member States must be aware of which behaviour they should prohibit.²⁷ Thus, a decisive argument that Directive 2005/60/EC envisages total harmonisation cannot be deduced from the detail of the prohibition as contained in the directive.

2.2.3. The explicit granting of powers to adopt own rules

Article 5 of Directive 2005/60/EC gives the Member States the authority to deviate from the directive. This article reads: 'The Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing.' This is an indication that Directive 2005/60/EC envisages minimum harmonisation.

2.3. The envisaged degree of harmonisation of Directive 2005/60/EC: minimum harmonisation

The wording and objective of Directive 2005/60/EC both point in the direction of minimum harmonisation. Its legal foundation also does not rule out minimum harmonisation. Furthermore, the power to adopt stricter rules as described in Article 5 points in the direction of minimum harmonisation as well. This brings me to the conclusion that Directive 2005/60/EC envisages minimum harmonisation.

3. The meaning of the prohibition in Directive 2005/60/EC

To analyse whether a Member State has correctly transposed the directive, we have to determine what, exactly, is the meaning of the directive. In the forthcoming sections I will determine the

23 Amendments 43-45, Draft opinion European Parliament, PE 353.292v01-00, pp. 16-17.

24 Amendments 43 and 44, Draft opinion European Parliament, PE 353.292v01-00, pp. 16-17.

25 Amendments 45, Draft opinion European Parliament, PE 353.292v01-00, pp. 16-17.

26 Amendments 44, Draft opinion European Parliament, PE 353.292v01-00, p. 17.

27 F.G.H. Kristen, 'Integrity on European Financial Markets: Backgrounds, Objectives, Reasons, Overall Contents and Implications of the Market Abuse Directive', 2005 *European Company Law*, no. 1, p. 21; D.R. Doorenbos et al., *Handboek marktmisbruik*, 2008, p. 46.

meaning of the different elements of the prohibition of money laundering as contained in Directive 2005/60/EC. This prohibition reads:

‘Article 1:

1. Member States shall ensure that money laundering and terrorist financing are prohibited.
2. For the purposes of this Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:
 - (a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;
 - (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;
 - (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;
 - (d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points.
3. Money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country.
4. For the purposes of this Directive, ‘terrorist financing’ means the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.
5. Knowledge, intent or purpose required as an element of the activities mentioned in paragraphs 2 and 4 may be inferred from objective factual circumstances.

Article 3:

For the purposes of this Directive the following definitions shall apply: (...)

3. “property” means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form including electronic or digital, evidencing title to or an interest in such assets;
4. “criminal activity” means any kind of criminal involvement in the commission of a serious crime;
5. “serious crimes” means, at least:
 - a) acts as defined in Articles 1 to 4 of Framework Decision 2002/475/JHA;
 - b) any of the offences defined in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
 - c) the activities of criminal organisations as defined in Article 1 of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union;

- d) fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the Protection of the European Communities' Financial Interests (6);
- e) corruption;
- f) all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months;'

To establish the exact linguistic meaning of these elements, I will compare the elements of the English version of the directive with the elements of the Dutch version. Thereafter, I will determine the objective and the tenor by teleological interpretation of the prohibition. When necessary, I will also use a systematic approach. Finally, I will assess the meaning of the prohibition in Directive 2005/60/EC.

3.1. Acts of money laundering

Article 1(2) Directive 2005/60/EC contains three types of money laundering. These vary according to the degree of the offender's involvement with the basic offence, from active to passive participation.²⁸ While discussing the three types of money laundering I will follow the order of Article 1 Directive 2005/60/EC.

3.1.1. The conversion or transfer of property

Article 1(2)(a) Directive 2005/60/EC prohibits the conversion or transfer of property. This first type of money laundering act requires the most active form of participation by the money launderer.²⁹ He has to perform acts to convert or transfer property.

Linguistic meaning

The English linguistic meaning of 'conversion' is a 'change in its character, nature, form, or function'.³⁰ For example, changing a car for a computer, or repainting a bike. On the other hand, the Dutch linguistic meaning of 'exchange' (*omzetten*) is 'changing [money and goods] with a different monetary value or with certain commodities'.³¹ This is so-called substitution, in which case an object is replaced by another object. For example, A buys a bike with criminal money, or he swaps his stolen car for a computer. This is a more limited meaning compared to the English linguistic meaning. According to the English linguistic meaning we can also speak of conversion when the appearance of an object is altered. The object is still the same object, only this is not clear for outsiders. This is the case when A disguises a stolen car by repainting it, giving it new number plates and removing its chassis number. It is still the same car, but outsiders can no longer recognise the original vehicle. For that reason, I will adhere to the English linguistic meaning of 'conversion'.

28 G. Stessens, *Money laundering: a new international law enforcement model*, 2000, p. 114; V. de Langhe et al., 'Witwassen', in G. Vermeulen (ed.), *Aspecten van Europees formeel strafrecht*, 2002, p. 231.

29 G. Stessens, *Money laundering: a new international law enforcement model*, 2000, p. 114; V. de Langhe et al., 'Witwassen', in G. Vermeulen (ed.), *Aspecten van Europees formeel strafrecht*, 2002, p. 231.

30 *Oxford English Dictionary Online*, 2010 (<www.oed.com>; only accessible to subscribers).

31 Translated from *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

The English linguistic meaning of the transfer of property is equivalent to its Dutch counterpart.³² In the case of a transfer, the power a person holds over an object moves from one person to another.

The meaning of the elements in the light of Directive 2005/60/EC

The objective of Directive 2005/60/EC is to prohibit those acts that disguise the origin of criminal proceeds so as to give a new legal origin to these proceeds.³³ This would mean that the acts mentioned in Article 1(2)(a) Directive 2005/60/EC, concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action,³⁴ can also be regarded as conversion or transfer. In that case, A converts or transfers property, as a result of which the illicit origin is disguised and the property appears to have been acquired through legal means. However, I come to a different conclusion when I look at the structure of Article 1 Directive 2005/60/EC. Concealment and disguise have their own classification in Article 1(2)(b) Directive 2005/60/EC. Therefore, concealment and disguise in Article 1(2)(a) Directive 2005/60/EC must contain a purpose or intent requirement. Both requirements have a subjective character, which must be inferred from objective factual circumstances.³⁵

The English linguistic meaning of the word ‘purpose’ is ‘[t]hat what a person sets out to do or attain’.³⁶ The word purpose indicates that the acts should be intended to conceal or disguise the illicit origin of the property or to assist any person who is involved in the commission of such activity to evade the legal consequences of his action. This points in the direction of a purpose requirement. In that case, the acts have to be committed with a certain purpose in mind. The purpose of these acts must be inferred from objective factual circumstances,³⁷ for example the effect of the conduct.

The Dutch linguistic meaning of ‘purpose’ (*oogmerk*) is similar to its English counterpart. According to the Dutch linguistic meaning a purpose is ‘that which one bears in mind as that which one wants to achieve, that which one tries to achieve’.³⁸ In such a case the acts are committed to achieve a certain goal or purpose, and, in the case of money laundering, this amounts to concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action.

Thus, in my opinion, the acts described in Article 1(2)(a) Directive 2005/60/EC will have to be committed with the purpose of concealing or disguising the illicit origin of the property or with the purpose of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action.

Definition of the elements

The meaning of the elements, considering what has just been said, is in my opinion the following. The conversion of property is the change in its character, nature, form, or function, with the purpose of concealing or disguising the illicit origin thereof or to assist a person to evade the

32 Compare *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers), to the *Oxford English Dictionary Online*, 2010 (<www.oed.com>, only accessible to subscribers).

33 Directive 2005/60/EC, preamble recital no. 2.

34 See Art. 1(2)(a) Directive 2005/60/EC.

35 Art. 1(5) Directive 2005/60/EC, English version.

36 This is the linguistic meaning of the noun purpose. *Oxford English Dictionary Online*, 2010 (<www.oed.com>, only accessible to subscribers).

37 Art. 1(5) Directive 2005/60/EC.

38 Translated from *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

legal consequences of his actions. The transfer of property is to hand over one's possession to another, with the purpose of concealing or disguising the illicit origin thereof or to assist a person to evade the legal consequences of his actions.

*3.1.2. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property*³⁹

Article 1(2)(b) Directive 2005/60/EC prohibits the concealment and disguise of the true nature etc. of property.

Linguistic meaning

The English linguistic meaning of 'concealment' is 'to keep from the knowledge or observation of others, refrain from disclosing or divulging, keep close or secret; to hide'⁴⁰. Concealment is a broad term. It embodies covering up as well as keeping out of sight and hiding. The linguistic meaning of the Dutch verb 'to cover up' (*verhelen*), which means 'to keep a secret, not revealing',⁴¹ is synonymous with the verb 'to hide'⁴², and is partly similar to the English linguistic meaning.

The meaning of 'to cover up' corresponds with the Dutch linguistic meaning of 'to veil' or 'to shroud' (*verhullen*), which means 'to hide or to obscure'.⁴³ This is not the same as the English meaning of the term 'to disguise'. To disguise means, 'to alter the appearance of (anything) so as to mislead or deceive as to it; to exhibit in a false light; to misrepresent'.⁴⁴ Where the Dutch linguistic meaning shows a correlation between to cover up and to veil, the English meaning shows more correlation with unlawfully masking the property. The English linguistic meaning of 'to disguise' is all about deceiving and exhibiting in a false light by altering the appearance of something. The fact that someone disguises property already shows that his actions are illegal. Thus, the illegality is captured within his acts. For that reason, I will adhere to the English linguistic meaning of 'disguise'.

Meaning of the elements in the light of Directive 2005/60/EC

On basis of the text of Article 1(2)(b) Directive 2005/60/EC the question arises whether 'disguising and concealing' is in fact a requirement. Should not the acts of disguising and concealing result in hiding the illicit origin of property? The directive states that not only the source of the property can be disguised or concealed, but also its true nature, location, disposition, movement, rights with respect to, or ownership thereof.⁴⁵ These are all different kinds of information relating to the property, which can be associated with its origin. Often the concealing or disguising of these different kinds of information will occur simultaneously. When A changes the appearance of a stolen car, he conceals or disguises the true nature of an object, which subsequently means that the origin of the car cannot be discovered or can only be discovered with difficulty.

39 Hereinafter, these will be referred to as 'the true nature etc.'.

40 *Oxford English Dictionary Online*, 2010 (<www.oed.com>, only accessible to subscribers).

41 Translated from *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

42 *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

43 Translated from *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

44 *Oxford English Dictionary Online*, 2010 (<www.oed.com>, only accessible to subscribers).

45 The Dutch translation of true nature etc. is the literal translation of the English terms in the directive. *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

Definition of the elements

The meaning of the elements of concealment and disguise, considering what has just been said, is in my opinion the following. The concealment of property is to keep its true nature etc. from the knowledge or observation of others so that the illicit origin of the property cannot be determined or is more difficult to determine. The disguising of property is to exhibit its true nature etc. in a false light so that its illicit origin cannot be determined or is more difficult to determine.

3.1.3. *The acquisition, possession or use of property*

This last category of money laundering – the acquisition, possession or use of property – is laid down in Article 1(2)(c) Directive 2005/60/EC. These acts require at least a passive involvement by the money launderer, but they can also be committed actively.⁴⁶

Linguistic meaning

The Dutch linguistic meaning of ‘acquisition’ is equivalent to its English counterpart.⁴⁷ Someone has to acquire a good for himself, not for someone else. As a result, a holder does not fall within the scope of the term ‘acquisition’.⁴⁸

The Dutch linguistic meaning of ‘to own’ (*bezitten*) is not equivalent to the English linguistic meaning of ‘possession’. The English term ‘possession’ concerns the actual power someone has over property. It concerns ‘the action or fact of holding something as one’s own or in one’s control’.⁴⁹ However, ‘to own’ means, according to the Dutch linguistic meaning, ‘to have in possession, (in the broadest sense) to have’.⁵⁰ It is the juridical power that a person has over an object. In this case someone can exercise his right over an object.⁵¹ The Dutch juridical meaning of ‘possession’ is more in line with the English linguistic meaning. According to Article 3:107 Dutch Civil Code⁵² (hereinafter: DCC) the meaning of ‘possession’ is to hold a good for oneself. In this case someone has to have actual control over a good.⁵³

The English linguistic meaning of ‘to use’ is ‘[t]o work, employ, or manage (an implement, instrument, etc.); to manipulate, operate, or handle, esp. to some useful or desired end’.⁵⁴ When someone manipulates a good for a certain purpose the good is being worked to achieve a certain goal.⁵⁵ For example, A borrows a stolen car from B to transport goods. The linguistic meaning of the Dutch term ‘to employ’ (*gebruiken*) is ‘to deploy something to a certain cause’.⁵⁶ For example, using a bike to get from A to B. This meaning is more limited than the English linguistic meaning. The English linguistic meaning is not only to deploy something to a certain cause, but also to manipulate something to achieve a certain goal.

46 G. Stessens, *Money laundering: a new international law enforcement model*, 2000, p. 114; V. de Langhe et al., ‘Witwassen’, in G. Vermeulen (ed.), *Aspecten van Europees formeel strafrecht*, 2002, p. 231.

47 Compare *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers) to *Oxford English Dictionary Online*, 2010 (<www.oed.com>, only accessible to subscribers).

48 When someone is a holder, he keeps the good for someone else, and not for himself, which is the case with possession. For more information about holding and possessing according to Dutch law see J. Hijma & M.M. Olthof, *Compendium van het Nederlands vermogensrecht*, 2008, pp. 121 et seq. and H.J. Sniijders & E.B. Rank-Berenschot, *Goederenrecht*, 2007, pp. 99 et seq.

49 *Oxford English Dictionary Online*, 2010, (<www.oed.com>, only accessible to subscribers).

50 *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

51 J.E. Fesevur, *Goederenrechtelijke colleges*, 2005, p. 92.

52 For the English version of the Dutch Civil Code see H.C.S. Warendorf et al., *The Civil Code of the Netherlands*, 2009.

53 Article 3:113 (1) DCC.

54 *Oxford English Dictionary Online*, 2010 (<www.oed.com>, only accessible to subscribers).

55 *Oxford English Dictionary Online*, 2010 (<www.oed.com>, only accessible to subscribers).

56 *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

Meaning of the elements in the light of Directive 2005/60/EC

The Commission's original proposal for the first money laundering directive did not contain *acquisition, possession and use*. The underlying reason for this was that some Member States had made reservations to Article 3(1)(c) under I of the Vienna Convention.⁵⁷ After the general approval of the Member States these acts were eventually included in the first money laundering directive. The underlying objective was that they also wanted to prohibit those acts that are not money laundering *strictu sensu*, but are usually connected with this phenomenon.⁵⁸ It is for that reason that at least a passive involvement is enough. Therefore, accepting a gift can be classified as money laundering.⁵⁹

The money launderer must know at the time of the acquisition, the possession or the use of the property that that property is derived from a criminal activity.⁶⁰ If no such knowledge⁶¹ exists at the time of the acquisition, the possession or the use of the property, but only subsequently, the acts do not qualify as money laundering.

Definition of the elements

The meaning of the elements 'conversion or transfer of property', considering the foregoing, is, in my opinion, the following. Acquisition means acquiring possession of property while being aware, at the time of acquiring such property, that it derives from a criminal activity. Possession is the actual power someone has over property, while knowing at the time of possessing it, that the property derived from a criminal activity. Finally, use means to work, employ, or manage, manipulate, operate, or handle property for the purpose of some useful or desired end, while knowing at the time of that use that the property was derived from a criminal activity.

3.2. Property

Article 3(3) Directive 2005/60/EC determines that property means 'assets of every kind'. The article then provides a list of different kinds of assets. In my opinion this is not a limited list. If it would be limited, it would rule out that property could be assets of every kind. Thus, property could take any form, e.g., money, cheques, vehicles and real property.

3.3. Derived from criminal activity or from an act of participation in such an activity

The requirement that possession should be derived from criminal activity or from an act of participation in such activity consists of three parts: i) derived from, ii) a criminal activity and iii) an act of participation in such activity. These elements will be discussed below.

3.3.1. Derived from

The English term 'derived' means 'to draw, fetch, get, gain, obtain (a thing from a source); to take its origin'.⁶² This is not only the acquisition of property, but also the origin of property. This meaning is broader than the Dutch linguistic meaning of the term 'acquired' (*verworven*).

57 UN Vienna Convention 1988 against Illicit Traffic in Drugs and Psychotropic Substances.

58 Communication from the Commission to the European Parliament, SEC(91) 298 final – SYN 254, p. 7, no. 13.

59 A person also acquires possession of the property in this case.

60 Art. 1(2)(c) Directive 2005/60/EC: 'the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity.'

61 For the definition of 'knowledge' see Section 3.6.

62 *Oxford English Dictionary Online*, 2010 (<www.oed.com>, only accessible to subscribers).

Acquired is the past tense of acquire, which means, ‘to get in possession of; to get through labour or effort’.⁶³

The English linguistic meaning of ‘derived’ is more in line with the objective of the directive: preventing the laundering of proceeds from criminal activities. These proceeds must be drawn, fetched, gotten, gained or obtained, and they have to find their origin in a criminal activity. This explanation is also a good match with the other elements – criminal activity and an act of participation in such activity.

3.3.2. Criminal activity

The meaning of the term ‘criminal activity’ is defined in Article 3(4) Directive 2005/60/EC. Paragraph 4 determines that a criminal activity is ‘any kind of criminal involvement in the commission of a serious crime’.⁶⁴ The definition consists of two parts: i) any kind of criminal involvement and ii) a serious crime.

By stating that a criminal activity is ‘any kind of involvement’ in a serious crime, the term criminal activity also covers any kind of participation in a serious crime. This means that also the proceeds obtained by an accomplice, a provoker, an aider and abetter can be laundered.

The meaning of a serious crime has been widened on two occasions over the years. The first money laundering directive, Directive 91/308/EEC, defined the term criminal activity as those acts specified in Article 3(1)(a) of the Vienna Convention. These are all drug-related offences. These offences should be sanctioned by the deprivation of liberty, which underlines the grave nature thereof.⁶⁵ However, it was possible for the Member States to designate other criminal activities.⁶⁶ Directives 2001/97/EEC and 2005/60/EC added a few other offences, including the fairly broad category of offences which are punishable by the deprivation of liberty or a detention order for a maximum of more than one year or, with regard to those States which have a minimum threshold for offences in their legal system, all offences punishable by the deprivation of liberty or a detention order for a minimum of more than six months. This last group of offences seems to be somewhat misplaced in a category entitled ‘serious crimes’. According to Dutch criminal law, these offences could amount to, for example, intimidation (*bedreiging*),⁶⁷ systematically insulting a group of people (*de gewoonte maken van het beledigen van een groep mensen*),⁶⁸ and breaching the privacy of correspondence (*de schending van briefgeheim*),⁶⁹ These offences do not amount to the serious crimes mentioned in Directive 91/308/EEC which should be sanctioned by the deprivation of liberty, thereby underlining the grave nature of these offences. Therefore, I come to the conclusion that the term ‘serious crimes’ no longer has any special meaning.

Finally, Article 1(3) Directive 2005/60/EC determines that the jurisdiction principle of universality is applicable to the basic offence.⁷⁰ Proceeds derived from a criminal activity committed in another Member State or in that of a third country can also be laundered. Thus, the serious crimes in question do not have to be committed on the territory of that Member State.

63 *Dikke Van Dale Online*, 2010 (<www.vandale.nl/vandale/opzoeken/woordenboek/>; only accessible to subscribers).

64 Art. 3(4) Directive 2005/60/EC.

65 Art. 3(4)(a) Vienna Convention.

66 In both Art. 1 and Art. 15 Directive 91/308/EEC Member States were given this opportunity.

67 This is penalized by a maximum of 2 years imprisonment, according to Art. 285 Dutch Criminal Code.

68 This is penalized by a maximum of 2 years imprisonment, according to Art.137c (2) Dutch Criminal Code.

69 This is penalized by a maximum of 18 months imprisonment, according to Art. 273a Dutch Criminal Code.

70 C.D. Schaap, *Heling getoetst*, 1999, p. 197.

3.3.3. Participation in such activity

In my opinion, the final part – participation in such activity – is not a useful addition. Property can be derived from criminal activity amounting to any kind of criminal involvement, as determined in Section 3.3.2 above. Any kind of criminal involvement also covers participation in a criminal activity.

3.4. Knowledge

When the term ‘knowledge’ (*wetenschap of wetende dat*) is used in Dutch criminal law, it refers to intent (*opzet, dolus*), in particular conditional intent (*voorwaardelijk opzet, dolus eventualis*), unless the legislator has decided otherwise.⁷¹ In such a case, the perpetrator has knowingly and willingly accepted the considerable possibility that a certain effect will be the result, which means in the case of money laundering that the property is derived from a criminal activity.

This is different from English criminal law. Under English law the word ‘knowledge’ indicates a certain knowledge with regard to the circumstances of the offence committed.⁷² It is not clear what degree of knowledge is necessary.⁷³ It is assumed that it covers at least the most pure form of intent: knowingly and willingly.⁷⁴

The difference between Dutch criminal law and English criminal law does not mean that the Dutch term should also only cover the purest form of intent.⁷⁵ This difference can be attributed to the differences in the domestic criminal law of Member States, which are respected by the European Union.⁷⁶ Therefore, conditional intent must be considered to be sufficient.

3.5. Attempt to commit, forms of participation and the accountability of legal persons

Article 1(2)(d) Directive 2005/60/EC determines that also ‘participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned [in Article 1(2)(a-c)]’ should be regarded as money laundering. So, also an attempt to, and the different ways in which one can participate in a crime, for example by abetting, should be prohibited. Finally, Member States also have to ensure that legal persons can be held criminally liable for infringements of this prohibition.⁷⁷

3.6. Sanctions

Article 39 (1) Directive 2005/60/EC prescribes that the penalties must be effective, proportionate and dissuasive. This phrase is similar to the one that was used in Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing.⁷⁸ It is a neutral phrase, which does not rule out that Member States can decide to make use of sanctions other than criminal

71 J. de Hullu, *Materieel strafrecht*, 2009, p. 250; HR (Supreme Court) 30 May 2008, LJN BC8673, 3.6 and 3.7. In this judgment the Supreme Court delivered a general decision on the element of knowledge (*wetende dat*). In principle, the element of knowledge also covers conditional intent, unless the legislator has decided differently.

72 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, p. 484; E. van Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law*, 2003, p. 44; R. Card et al., *Criminal Law – Card, Cross and Jones*, 2006, pp. 106-107.

73 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, p. 484.

74 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, p. 484; R. Card et al., *Criminal Law – Card, Cross and Jones*, 2006, p. 107.

75 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, p. 487.

76 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, 2004, p. 487.

77 This follows from Art. 39(1) Directive 2005/60/EC.

78 Common Position adopted by the Council on 14 February 1991 on the amended proposal for a Council directive on the prevention of use of the financial system for the purpose of money laundering, Council’s reasons, no. 4282/91, p. 5.

penalties.⁷⁹ At the time of the proposal of Directive 2005/60/EC, the Commission had pointed out that it preferred a criminal approach. The phrasing of Article 39 does not alter this.

4. The effects of the choices of the European legislator on the national legislation of the Member States

4.1. Minimum harmonisation and a highly detailed prohibition

For Directive 2005/60/EC the European legislator chose a combination of a highly detailed prohibition and minimum harmonisation. The prohibition is sufficiently detailed to be implemented directly in the national legislation of the Member States,⁸⁰ although they are free to adopt stricter rules. These stricter rules can penalize additional acts or they can adopt a more liberal definition of criminal liability than the directive. This choice by the European legislator can on the one hand be explained by the objective of the money laundering directive, namely to avoid Member States adopting measures to protect their financial systems which could be inconsistent with the internal market. On the other hand, Member States had to know what they had to prohibit; what is the precise meaning of the term ‘money laundering’? Consequently, the prohibition of Directive 2005/60/EC is highly detailed. The Member States have been given a(n) (almost) complete prohibition.⁸¹ Even the open terms of property, criminal activity and serious crimes are defined in Article 3(3-5) Directive 2005/60/EC.

Although the envisaged minimum harmonisation makes it possible for the Member States to adopt stricter rules, the possibilities to do so are limited by the degree of detail in the prohibition. This can also be found in the national legislation of the Netherlands and Belgium.⁸² These countries have directly implemented most of the prohibition in their domestic criminal law. Although the Netherlands and Belgium have adopted some stricter rules, the basis of the prohibition remained the same. These stricter rules will be discussed below.

Both countries, the Netherlands and Belgium, have chosen to penalise not the possession of property derived from a criminal activity, but having an object in trust.⁸³ In those cases the perpetrator is neither the owner nor the holder of the property. For example, a third party who transports the property derived for a criminal activity from A to B is guilty of money laundering. Because of this, both countries have penalised more acts than solely being in possession of an object, as is required by the directive.

Another example of a broadened application in the Netherlands and Belgium can be found within the element ‘derived from a criminal activity’.⁸⁴ In the Netherlands it is required that property has its origin in any criminal offence. Belgium goes even further by stating that the property can have its origin in any offence, even in a misdemeanour.⁸⁵ Both countries apply a broader implementation in comparison to the directive. Furthermore, in the Netherlands the

79 F.G.H. Kristen, *Misbruik van voorwetenschap naar Europees recht*, pp. 205-206; C.D. Schaap, *Heling getoetst*, 1999, pp. 199-200.

80 See Section 2.1.2.

81 Especially Art. 1(2) Directive 2005/60/EC is highly detailed and can be seen as a complete penalty clause.

82 Because I only investigated the implementation of the prohibition of Directive 2005/60/EC in the Netherlands and Belgium in my master’s thesis on which this contribution is based, I will restrict myself in this article to discussing the Dutch and Belgian legislation.

83 Article 505(1)(2°) Belgian Criminal Code. In the Netherlands the administration of an object is defined as ‘having that object in one’s possession’ (*voorhanden hebben*). See Art. 420bis(1)(b) Dutch Criminal Code.

84 Belgium refers to items in the sense of Art. 42(3°) Belgian Criminal Code, these are the proceeds (*vermogensvoordelen*) directly derived from an offence, the goods and merchandise which are put in the place thereof, and the earnings from invested proceeds. The Netherlands refers to this as an object (*voorwerp*) derived from any criminal offence.

85 Art. 42(3°) Belgian Criminal Code; property can be derived from any offence, a criminal offence or a misdemeanour.

courts are not required to determine precisely who committed which crime at which time and at which place.⁸⁶ This means that less evidence is needed for a conviction.

An example of criminal liability occurring sooner can be found in Article 420bis(1)(b) of the Dutch Criminal Code: the conversion or transfer of property. In the Netherlands, in contrast with the directive, it is not required that the acts have been committed with the purpose of concealing or disguising their illicit origin or assisting a person to evade the legal consequences of his actions. Therefore, there are fewer elements to be fulfilled and there is therefore criminal accountability at an earlier point in time.

Another example of criminal liability occurring at an earlier point in time can be found in Article 420quater Dutch Criminal Code. This article requires that the perpetrator should have known (*redelijk vermoeden, culpa*) that the property derived from a criminal offence, instead of knowledge or intent. According to the Dutch Parliamentary Proceedings this means that someone has been very careless.⁸⁷ Someone should have presumed that the property was derived from a criminal offence and should not have handled the object without further investigation.⁸⁸ So, instead of knowledge or intent, only a form of negligence is required.

The number of stricter rules in the Dutch and Belgian legislation, in comparison to Directive 2005/60/EC, is limited. This can be ascribed to the highly detailed prohibitions. These highly detailed prohibitions reduce the number of options available to the Member States, as a result of which they can only implement the prohibition, or parts thereof, directly into their national criminal law.⁸⁹ For example, the property element, which is defined in Article 3(3) Directive 2005/60/EC as every kind of asset, leaves no room for the implementation of stricter rules. There is no broader meaning of 'property' than every kind of asset.

4.2. Total harmonisation and a highly detailed prohibition

The following question now arises: what would the consequences have been for the Member States if the European legislator had made different choices? For example, what would have been the consequences if the European legislator had chosen for a combination of total harmonisation and a highly detailed prohibition?

In the case of total harmonisation, as pointed out above,⁹⁰ the objective of the directive is to accomplish uniform legislation in all Member States. The directive provides a complete regulation for the Member States. They are not allowed to implement stricter rules; it is not possible to penalise more strictly or to find that criminal liability occurs at an earlier point in time. The discretion of the Member States is therefore limited to a minimum.

As a result of the highly detailed norms, the room for Member States to manoeuvre is also restricted. Consequently, the Member States can only implement the directive directly and the legislation in all Member States will be the same. Because of this, Member States cannot decide on the content of their own national criminal law. They can only adopt almost literally the prohibition of the directive in their national implementing measures.

For example, in the case of the term 'possession' in Article 1(2)(c) Directive 2005/60/EC, the Netherlands has chosen to penalise having property in trust instead of possession of the property. By doing so the Dutch legislator has tried to find an affiliation between the element of

86 *Kamerstukken II* 1999/00, 27 159, no. 3, p. 16 (MvT); *Kamerstukken I* 2000/2001, 27 519, no. 288a, p. 8 (MvA); HR (Supreme Court) 28 September 2004, LJN AP2124.

87 *Kamerstukken II* 1999/00, 27 159, no. 3, p. 15 (MvT).

88 *Kamerstukken II* 1999/00, 27 159, no. 3, p. 15-16 (MvT).

89 G. Corstens & J. Pradel, *European Criminal Law*, 2002, p. 23.

90 See Section 2.

being in possession (*voorhanden hebben*), which was used in Article 416 Dutch Criminal Code, and handling stolen goods (*helings*). This would not have been possible if the Netherlands could only have literally adopted the prohibition of the directive in its domestic criminal law.

Also the basic offence of money laundering can only amount to those offences which are punishable by the deprivation of liberty or a detention order for a maximum of more than one year or, with regard to those States which have a minimum threshold for offences in their legal system, all offences punishable by the deprivation of liberty or a detention order for a minimum of more than six months.⁹¹ The stricter rules that both the Netherlands as Belgium have implemented in their legislation on this point, namely that property can be derived from any criminal offence, respectively from any misdemeanour, would not have been allowed either.

With this combination the European legislator provides the Member States with a complete regulation, which means that it has a far-reaching influence on their national legislation. Directives that envisage total harmonisation and contain highly detailed norms will have far-reaching effects for the Member States with respect to their sovereignty in organizing their criminal law system.

4.3. Total harmonisation and an open prohibition

This would have been different if the European legislator had chosen a combination of total harmonisation and open norms. Because Member States have to enforce the directive through criminal law,⁹² they are obliged, on basis of the *lex certa* principle, to clarify the open norms in their national implementing measures. A citizen has to know, before he commits a crime, which acts are punishable by law. Therefore the use of open norms increases Member States' room for manoeuvre. In my opinion, this would mean that the basis of national legislation would be the same in every country, but because of the obligation to clarify open norms, there could be mutual differences between Member States.

For example, if the term 'criminal activity' in Directive 2005/60/EC, which means any criminal involvement in offences which are punishable by the deprivation of liberty or a detention order for a maximum of more than one year or, with regard to those States which have a minimum threshold for offences in their legal system, all offences punishable by the deprivation of liberty or a detention order for a minimum of more than six months, would not have been defined in the directive, Member States would have to define criminal activity themselves. Even now, the element of criminal activity has a different meaning in the Netherlands than it has in Belgium. In the Netherlands the property must derive from a criminal offence, while in Belgium the property can derive from any offence, even a misdemeanour. Both meanings fall within the scope of the element of criminal activity. In a situation of total harmonisation, both the Netherlands and Belgium would use the term criminal activity, but in Belgium it would have a broader meaning than it would have in the Netherlands. Even though they would use the same terms, there would be mutual differences in interpretation.

How much room there is for Member States to manoeuvre depends on the open terms. When the prohibition in Directive 2005/60/EC merely states, for example, that Member States have to prohibit money laundering, without defining what money laundering actually entails, Member States have to define money laundering themselves. In that situation Member States have a great deal of room for manoeuvre. But in the situation where the European legislator has merely left the definition of property and criminal activity open, Member States' room to

91 See Section 3.3.2.

92 See Section 3.6.

manoeuvre is somewhat smaller. Then they merely have to define the elements of criminal activity and property.

In my opinion the combination of total harmonisation and open terms seems strange. Why try to accomplish uniform legislation and still provide the Member States with the opportunity to provide their own definition of these open terms? Even though total harmonisation is used to create uniform legislation in all Member States, sometimes certain terms can be better defined on a national level, not only to give the national legislator the opportunity to find an affiliation with other national terms, but more importantly to cover the endless variety of cases. By using open terms the national legislator can choose which cases do and which cases do not fall within the scope of the prohibition. Therefore, a combination is not impossible.

With this combination the European legislator has an influence on the national criminal law of the Member States through total harmonisation. However, the Member States do retain some degree of discretion. The degree of discretion depends on the amount of open terms or the kind thereof. If the legislator does not define the key element of the prohibition, for example the term money laundering, the Member States will have more influence on the prohibition in comparison with the situation in which they have to define an open term, which is only an element of the offence, such as property or criminal activity.

4.4. Minimum harmonisation and an open prohibition

Finally, the European legislator could have chosen for minimum harmonisation in combination with open norms. In that case, Member States would have the discretion to adopt stricter rules alongside the obligation to clarify the open norms of the prohibition. If the legislator had not defined the meaning of ‘property’ and ‘criminal activity’, there would be an obligation for the Member States to do so. Consequently, Member States could adopt very broad and mutually divergent national implementing measures.

This last combination gives the Member States a great deal of room for manoeuvre, which consequently limits the influence of the European legislator. Thus, directives, which embody this combination, are the least far-reaching for the Member States.

4.5. Findings

I can conclude, based on what has been said above, that there is a sliding scale of influence by the European legislator on the criminal law of Member States. The European Union has the most influence in the case of total harmonisation in combination with highly detailed norms. But, at the other side of the scale, in the case of minimum harmonisation and open terms the influence of the European legislator is limited. Consequently, in this situation Member States have the power to adopt their own – stricter – rules. In between these two combinations we find a combination of total harmonisation and open norms and a combination of minimum harmonisation and highly detailed norms.

The combination of total harmonisation and open norms could have, in my view, a similar effect as the combination of minimum harmonisation and highly detailed norms. Both combinations provide the Member States with an almost complete regulation, by means of highly detailed norms or by means of total harmonisation. At the same time, both combinations provide the opportunity to deviate from the directive, by means of open norms or by means of minimum harmonisation.⁹³ In these situations the European legislator has an influence on the criminal law

⁹³ This is only applicable in those situations in which the norms are enforced through criminal law. Only then does the obligation to clarify open terms exist.

of the Member States, but they still retain some discretion to provide their own definitions or to adopt stricter rules.

In the case of a combination of total harmonisation and open terms, the degree of discretion that Member States have to provide their own definition of the elements used in the directive depends on the amount of open terms and their kind. The influence of Member States on the prohibition will be greater when they have to define a key element of the prohibition, for example the definition of money laundering. The influence of the Member States will therefore be marginal when they have to define the elements of the prohibition which have minor importance, like the terms ‘property’ and ‘criminal activity’.

In the case of minimum harmonisation in combination with a highly detailed prohibition, the Member States do have discretion to adopt stricter rules in their national legal system. However, their room for doing so is restricted by the highly detailed prohibition. In that situation the elements of the prohibition are defined so that there is no room to broaden their meaning.

5. Final remarks

I now return to the question which I posed at the beginning of this article; how does the choice of the European legislator between the degree of harmonisation and the amount of detail in the directive influence the domestic criminal law of the Member States? Both the degree of harmonisation as well as the amount of detail in the prohibition determine to what degree the discretion of the Member States is limited and what influence the European legislator can have on domestic criminal law. The degree of harmonisation, minimum or total, determines whether Member States are allowed to adopt stricter rules, or whether they have to implement the directive directly. The degree of detail in the prohibition determines whether Member States are obliged to clarify the terms used in the directive’s prohibition. In the case of open terms the Member States are obliged to clarify these terms when they choose to enforce the directive through criminal law. In those cases their room for manoeuvre will increase.

The European legislator can choose to apply one of the four combinations in a directive. These are: i) total harmonisation and highly detailed norms, ii) total harmonisation and open norms, iii) minimum harmonisation and closed norms, and iv) minimum harmonisation and open norms, and also within a directive he can choose to combine these four combinations.

Regarding the first combination, the European legislator has the most influence on the criminal law of Member States. In that case, they can only adopt, almost literally, the prohibition of the directive in their national implementing measures. Member States are not able to decide on the content of their domestic criminal law which aims to implement the directive.

Regarding the second and third combination, total harmonisation and open norms and minimum harmonisation and highly detailed norms, the European legislator does have some influence on national criminal law, but the Member States retain some room for manoeuvre by means of minimum harmonisation, or by means of open terms. In the case of the combination of total harmonisation and open terms, the degree of discretion that Member States have to provide their own definition of the elements of the directive depends on the amount and the kind of open norms in the prohibition. In the case of minimum harmonisation in combination with a highly detailed prohibition, Member States do have the discretion to adopt stricter rules in their national legal system. However, the room to do so is restricted by the highly detailed prohibition.

In the case of the last combination – minimum harmonisation and open terms – the European legislator has the least amount of influence on the national criminal law of the Member

States. In that case the Member States have the discretion to adopt stricter rules as well as the obligation to clarify any open terms in the directive.

On the basis of the foregoing, the conclusion can be drawn that the influence of the legislator is dependent on two factors: the degree of harmonisation and the amount of detail contained in the norms. There is a so-called sliding scale of influence by the European legislator on domestic criminal law, with full harmonisation in combination with highly detailed norms on the one side, and a combination of minimum harmonisation and open terms on the other side of the scale. Thus, depending on the combination(s) the European legislator chooses to apply in the directive, the influence of the European legislator on the domestic criminal law of the Member States will either increase or decrease. The influence of the European legislator is therefore all in the combination chosen.