Public-Private Cooperation In European Anti-Money Laundering And Counteracting Terrorism Financing Regulations—Challenges For Fundamental Freedoms And Rights

Magdalena Jaczewska*

I. Introduction

The last twenty-five years have been a vibrant and dynamic time for the European Union's (EU) legal regime aimed at counteracting money laundering[1] and terrorism financing.[2] As will be discussed, Anti-Money Laundering Directives are the European legal instruments of choice to tackle ML and TF. Up to 2018, five successive Directives have been drafted. Even though some of the Member States have not yet implemented the Fourth Anti-Money Laundering (AML)

* Magdalena Jaczewska, PhD Candidate at the University of Warsaw, Department of European Law, Institute of International Law, m.jaczewska@student.uw.edu.pl.

1 The Financial Action Task Force describes money laundering as a process of allowing criminals to disguise the illicit origins of profits (resulting from the sale of weapons, drug trafficking, smuggling, prostitution, corruption, insider trading and cybercrime), enabling them to freely use the proceeds.

2 Terrorism financing is understood as collecting, transferring or offering means of payment, securities, foreign currencies, financial instruments, property rights or rights to other movable or immovable property in order to finance a terrorist offense or to make assets available to an organised group or union seeking to commit such a crime or a person involved in such a group. Money laundering and terrorist financing are characterised by rather opposing dynamics and objectives. The former aims to rub out the illicit origin of funds. The latter, instead, diverts "clean money" into terrorist activities. Thus, terrorism financing mirrors money laundering.

Directive,[3] the subsequent, Fifth AML Directive[4] entered into force in July 2018. Its final transposition date is January 2020. This creates the interesting situation of both of them being applicable (the previous AML Directives have been repealed). The adoption of the last two Directives followed terrorist attacks that struck the EU and the extensive financial dealings uncovered by the "Panama Papers".[5] This represents a significant step in improving the effectiveness of the EU's efforts to counteract money laundering and terrorism financing.

Nevertheless, this article critically evaluates the EU anti-money laundering initiatives. I focus primarily on the preventive aspects of the AML regime, introduced via the imposition of a series of duties on the private sector, and through the adoption of a risk-based approach. Importantly, the prevention of money laundering and terrorism financing crimes is based on the direct and dynamic involvement of the private sector. EU legislation attempts to elicit high levels of compliance through a system of public-private cooperation. However, due to the wide involvement of private entities, there exist considerable opportunities for inconsistencies of the AML regime with fundamental rights and freedoms to arise. Therefore, the article will especially scrutinise the impact of anti-terrorism financing legislation on fundamental freedoms and rights—the freedom to provide services, the right to a fair trial, and the rights to privacy and data protection.

The EU is required to comply with fundamental freedoms and rights while exercising its legislative power. Since the 1970's judgement in the *Internationale Handelsgesellschaft* case,[6] fundamental rights have been considered a general principle of the EU legal system. Also, the Charter of Fundamental Rights of the EU (Charter)[7] has eventually acquired EU primary law status. However, whether

3 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73 (Fourth AML Directive).

4 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 [2018] OJ L 156/43 (Fifth AML Directive).

5 The world's largest whistle-blower case, reported by media on 3 April, 2016, which to date consists of eleven-and-a half million documents and involves a year-long effort by the International Consortium of Investigative Journalists to expose a global pattern of crime and corruption where millions of documents reveal heads of state, criminals and celebrities using secret hideaways in tax havens.

6 Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und* Futtermittel [1970] ECR 1125.

7 Charter of Fundamental Rights of the European Union, [2012], OJ C 326 (Charter).

EU AML and counteracting terrorism financing (CFT) law is always consistent with the abovementioned freedoms and rights remains questionable.

In particular, this article will explore the interplay between AML and CFT-measures and the freedom to provide services, the right to a fair trial, and the right to privacy and data protection. These rights and freedoms are specifically important, as AML and CFT- regulations may potentially violate them, due to the strong involvement of private entities under the AML-regime. An attempt will be made to determine if and in which direction changes should take place, not to exclude entire classes of customers or terminate customer relationships and not to overburden the private sector with further responsibilities, but to help it to gain confidence and to perform its duties in an effective manner. Thus, the article aims to balance technological achievements, transparency and social entrepreneurship.

This article consists of four sections. Part II presents the influence of globalisation on the evaluation of the AML- and CFT-regime. Part III presents the private-public cooperation and enforcement of AML- and CFT-regulations, which is concluded mainly through the preventive role of the private sector and an obligation to enforce the preventive duties by public subjects. In Part IV, I analyse how AML- and CFT-regulations interfere with fundamental freedoms and rights. I conclude with the observation that whereas the AML fight is recognised in the EU as a general interest, its effect on fundamental freedoms and rights must be constantly evaluated in light of the principle of proportionality.

This article is based on a theoretical and legal analysis of legislation at the EU level, relevant existing studies on the application of existing rules by Member States, newly established international requirements (in particular, the revised Financial Action Task Force (FATF) Recommendations, FATF Guidelines) as well as a legal analysis of communications and reports of EU bodies and international organisations.

II. The AML Legal Framework: Shaped by Globalisation

The globally interconnected financial system, fuelled by the development of financial technologies (FinTech), makes the anonymous movement of funds around the world, across borders and jurisdictions, possible at any time. In such an environment, the fight against money laundering and terrorism financing is increasingly difficult. Emerging platforms offering a high level of anonymity—such as crowdfunding and virtual currencies trading—appear to be significantly exposed from a risk perspective. Also, a growing variety of financial instruments, such as virtual currencies or blockchain, may facilitate the perpetration of illegal conduct. To adapt to the ongoing technological developments, it is of utmost

importance to understand the risks resulting from products in these fast-developing sectors, and how to leverage the possibilities of new technologies to improve anti-money laundering and terrorism financing efforts. Additionally, launderers and terrorists have obtained new possibilities because of deregulation and progressive internationalisation of financial markets, and fragmentation of public controls. Loopholes in legal oversight of many financial means, ranging from cash and trade in cultural artefacts to anonymous pre-paid cards, still exist.[8] Against this background, local jurisdictions and authorities often fall short of tackling crimes, which have an international or even global dimension. It is thus indisputable that international cooperation is vital to create an efficient system. Measures adopted at a national or even EU level would, considering the international scale of money-laundering, have a very limited effect. The actions taken by the EU should therefore be compatible with those taken in the international context.

EU law in the area of money laundering is shaped by internal and external initiatives. Being aware of the global character of money laundering and terrorism financing crimes, the EU has been active in international initiatives, mainly those of the United Nations[9]. The need to arrange a global strategy to tackle the proceeds of profit-generating criminal offences was implemented via a combination of "hard law" treaty instruments and "soft law" standards, elaborated within the confines of the FATF.

The FATF is an intergovernmental organisation founded in 1989 at the initiative of the G7, to develop policies to combat money laundering. In 2001, its mandate was expanded to include terrorism financing. This *ad hoc* body became the institutional centre of a supra-national legal regime.[10] Although the FATF output takes the form of Recommendations, which should be characterised as "soft law", their influence on the development of EU anti-money laundering law has been undeniable. Indeed, all of the AML Directives have highlighted the need to implement the Recommendations. As to their content, the FATF Recommendations consists of forty provisions. Overall, they tackle two main aspects: (a) the criminalisation of money laundering and terrorism financing; and

[8] European Commission, 'Proposal for a Directive of the European Parliament and of the Council 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 Directive 2009/101/EC' COM(2016) 450 Final.

[9] See the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the UN Convention against Corruption, the U.N. Convention against Transnational Organized Crime and the UN International Convention for the Suppression of the Financing of Terrorism.

[10] Leonardo Borlini, 'Regulating Criminal Finance in the EU in the Light of the International Instruments' (2017) 36 Yearbook of European Law 553.

(b) measures designed to prevent the proceeds of crime from entering into the legitimate financial system.

The prevention of money laundering and terrorism financing crimes is based on the direct and dynamic involvement of the private sector. EU legislation, therefore, attempts to elicit high levels of compliance from a system of public-private cooperation, imposing preventive obligations on a wide array of private actors. The following analysis aims to assess the main elements of the current EU AML and CFT-preventive framework and the related problems for fundamental freedoms and rights.

III. Preventive Aspect of the AML and CFT EU Regulations—Public-Private Cooperation

An effective enforcement of AML and CFT law, as described by Mitsilegas and Vavoula, which is also in line with the FATF Recommendations, should be based on three pillars: (a) the criminalisation of money laundering and terrorism financing; (b) the prevention of money laundering via the imposition of a series of duties on the private sector; and (c) the establishment of a cooperation regime between private and public sectors.[11] Nowadays, the borders between the public and private sectors are becoming smoother.[12] The traditional model of command and control is more and more often replaced with a model in which enforcement is being shared between public and private actors.[13] The EU legislator has noticed this change in perspective, and has wisely implemented it in EU regulations, creating a paradigm of security governance, based on the so-called "responsibilisation strategy".[14] Its dominant concern is to delegate responsibility for crime prevention to private entities which are outside the scope of the state and persuade them to act as a "private policeman". The market, in turn, has opened up the EU for private authority and placed the emphasis on output legitimacy.[15] In Section III.A, I will

[11] Valsamis Mitsilegas & Niovi Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23 Maastricht Journal of European and Comparative Law 261.

[12] Maria Bergström & Karin Helgesson Svedberg Ulrika Mörth, 'A New Role for For-Profit Actors? The Case of Anti-Money Laundering and Risk Management' (2011) 49 Journal of Common Market Studies 1043.

[13] Ulrika Mörth, *European Public-Private Collaboration: A Choice Between Efficiency and Democratic Accountability?* (Edward Elgar, Cheltenham 2008).

[14] David Garland, 'The Limits of Sovereign State' (1996) 36 British Journal of Criminology 445.

[15] Ulrika Mörth, 'The Market Turn in EU Governance -The Emergence of Public–Private Collaboration' (2009) 22 Governance 120.

analyse the role of private entities in the AML regime. Then, in Section III.B, public enforcement will be described.

A. The role of private actors

Taking the new tendencies in EU governance into consideration, the imposition of a series of preventive duties upon the private sector has become the cornerstone of the AML regime.[16] Private actors are here defined as for-profit organisations, such as banks, financial institutions and lawyers. Public actors, instead, are governments, governmental international organisations and agencies. The EU legislator imposes a wide array of obligations on private actors. These, in the present context, constitute: (a) identification of the customer; (b) customer due diligence; (c) reporting of suspicious transactions; and (d) report keeping. To enhance the prevention pillar, financial and professional intermediaries should be involved directly at as many stages of the AML and CFT-process as possible. These subjects, who have tangible, constant and direct contact with their clients, are in a better position to assess risk and to detect potentially suspicious activities. The need for greater involvement of private actors is linked to the importance of getting access to their resources.[17] Private subjects possess valuable knowledge of their clients, which cannot be assessed at the state or EU level. Companies have control over databases and customer data which are normally out of the reach of the public authorities. Hence, the wider the range of business entities engaged in the AML process, the more valuable the information to assess risks the public authorities will be able to gain.[18]

The development of anti-money laundering preventive duties has been elaborated in a two-fold manner.[19] Firstly, this was implemented via a broadening of the scope of *ratione personae* and imposing, on the entities concerned, an increasingly broad range of responsibilities, which are of greater detail and are more sophisticated in their content. Secondly, a risk-based approach has been adopted. Both aspects will be discussed in more detail below.

(I) The Extension of the Ratione Personae Scope

The list of concerned entities (*i.e.* subject to AML-preventive obligations) is closed (*numerus clausus*). It has grown with each subsequent directive. The First

[16] Mitsilegas and Vavoula (n 11).

[17] Bergstrom and Svedberg Morth (n 12).

[18] ibid.

[19] Mitsilegas and Vavoula (n 11).

AML Directive[20] included only bankers and financial institutions. The Second AML Directive[21] recognised a trend of increased money-laundering by non-financial businesses.[22] Thus, the scope of obliged entities addressed also a limited number of professions, such as notaries and other independent legal professionals, casinos, insurance companies and remittance offices, which have been shown to be exposed to money laundering. As the tightening of controls in the financial sector has prompted money launderers and terrorist financers to seek alternative methods for camouflaging the origins of the proceeds of their crimes,[23] the Third AML Directive[24] further covered life insurance intermediaries, and trust and company service providers. After adoption of the Third AML Directive, the use of (online) gambling sector services became a concern. To mitigate it, the Fourth AML Directive included professionals from the gambling sector ('the providers of gambling services'). Due to the latest achievements of the FinTech industry, new threats have emerged. Terrorist groups may be able to transfer money into the EU financial system through virtual currencies networks, by camouflaging transfers or by benefiting from a certain degree of anonymity on those platforms.[25] It therefore became essential to again widen the scope of the obliged entities, as was done in the Fifth AML Directive. Currently, AML-procedures apply to entities that are in charge of holding, storing and transferring virtual currencies. Moreover, due to the leakage of information concerning tax havens (because of the "Panama Papers"), the provisions of the Fifth AML Directive also apply to auditors, external accountants and tax advisors, and any other person that undertakes to provide material aid, assistance or advice on tax matters as a principal business or professional activity. Additionally, after the devastation of heritage sites in Syria and Iraq, art trafficking became one of the most profitable illegal trades in the

[20] Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering [1991] OJ L 166 (First AML Directive).

[21] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering [2001] OJ L 344 (Second AML Directive).

[22] Recital 14 of the Second AML Directive.

[23] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing' COM (2004) 448 Final.

[24] 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] OJ L 309 (Third AML Directive).

[25] Fourth AML Directive, Recital 8.

world. Thus, under the Fifth Directive, persons trading in works of art (such as galleries or auction houses) are also included in the compliance list.[26]

Although more and more sectors are involved in the AML-regime, it must also be highlighted that the extension of anti-money laundering preventive duties to sectors, which are not under the supervision of national regulators (such as auction houses), may raise questions of the feasibility of compliance and effectiveness.[27] In case of large financial institutions, such as banks, which have compliance and law departments working on the adjustment of internal procedures to provisions of law, compliance might be more feasible. Smaller private entities may however be overburdened with obligations and compliance costs. To make requirements more flexible, unburden market participants, and facilitate the delivery of regulatory actions, a risk-based approach has been adopted.

(II) Risk-Based Approach

The second feature in the development of money laundering-preventive public-private cooperation is the risk-based approach. The risk-based analysis has been applied successfully in different academic disciplines, such as management and economics. Under the AML regime, it means that countries, state authorities and obliged entities should have an understanding of the risks associated with money laundering and terrorism financing to which they are exposed, and apply measures in a manner and to an extent which would ensure the mitigation of these specific risks.[28] At first, the set of AML and CFT-measures was required only to be based on an understanding of the risks actually present. Such an approach was notably present in the 2003 FATF Recommendations. The EU transposed these attempts to risk-based standards through the Third AML Directive.

However, in the 2003 FATF Recommendations, the risk-based model was supposed to be applied only in certain circumstances. Conversely, under the 2012 FATF Recommendations, it is an underlying requirement, constituting the foundation for an effective implementation of all the recommendations.[29] Thus, with the revised 2012 FATF Recommendations, the risk-based approach has become central to an effective implementation and enforcement of all requirements set out therein. In the EU, this extended risk-based approach was implemented through the Fourth AML Directive. It can be seen as an attempt to move from mechanical compliance to a system where the quality of compliance is

[26] Fifth AML Directive, Article 1(1).

[27] Mitsilegas & Vavoula (n 11).

[28] Council of Europe, 'Risk-based approach' <https://www.coe.int/en/web/moneyval/implementation/risk-based-approach> accessed 8 September 2018.

[29] ibid.

enhanced.[30] Since the adoption of the Fourth AML Directive, there exist basically three dimensions of risk-assessment and risk-management: the EU dimension (located at the European Commission (EC) to be exact), the national dimension, and the private sector dimension.

At EU level, the EC is entrusted with the obligation to assess the risks which may emerge on the internal market. It is also the EC's duty to identify high-risk countries so as to protect the proper functioning of the cross-border market.[31] In terms of the national dimension, Member States are placed under the obligation to identify, assess, understand, and mitigate the risks of money laundering and terrorism financing by constructing a mechanism or authority that would organise the national response to the risks identified.[32] As to the private sector dimension, the obliged entities are required to ensure the preparation of an analysis in which business activities would be identified and holistically assessed in light of the risk adequate for customers, countries or geographic areas, offered services or products, delivery channels, and transactions. Therefore, the risk-based approach is in fact a self-assessment regime. All steps taken by private entities need to be proportionate to the nature and size of the obliged entities.[33] Furthermore, the risk analysis must be documented and kept up to date.[34] Obliged entities should have policies and procedures in place according to which they can manage risks properly.[35]

The risk-based approach implies that components of AML-procedures, *i.e.* regulation, compliance and control, should be framed in light of the risks that are to be mitigated. According to FATF, the principle is that 'resources should be directed in accordance with priorities, so that the greatest risks receive the highest attention'.[36] Alternative approaches are that resources are either applied evenly, so that all customers, financial institutions and products receive equal attention, or that resources are targeted, but on the basis of factors other than the risk assessed.[37] Thus, the regulatory framework must be determined by the regulated entities themselves, in light of the concrete circumstances and potential risks. As soon as

30 Earlier, the emphasis was placed on a rule-based approach, *i.e.* a system of AML rules that does not take into consideration the different nature and risk profiles of the business.
31 4th AML Directive, Article 9(1) and Article 9(2).
32 ibid, Article 7.
33 ibid, Article 8(1).
34 ibid, Article 8(2).
35 ibid, Article 8(3).
36 FATF, 'RBA Guidance for Dealers in Precious Metal and Stones' (2008).
37 ibid.

risk indicators are signalling, the obliged entities are expected to react in line with readily prepared AML-procedures.

Under a risk-based approach, the legislator delegates to the obliged entities both design and implementation of model AML- and CFT-controls, which will be monitored and assessed by public supervisors, in the format of a self-assessment.[38] Moreover, businesses are expected to make a risk assessment of their customers and divide them into low and high risk segments, to whom simplified or enhanced measures will be taken. If the risk-based approach is applied in a reasoned and well-enunciated way, it will justify the determinations of financial institutions with regard to managing potential money laundering and terrorism financing risks. It will also allow these subjects to exercise equitable business judgement with respect to their customers.[39] It should be emphasised that client monitoring is to be conducted in a continuous manner, and that the risk evaluation is not concluded only once. Instead, ongoing monitoring of the business relationship must be undertaken throughout the course of the relationship. On a daily basis, obliged entities collect information about their clients, in particular concerning the source of their wealth, the possible destination and economic rationale of a given transaction.[40] Of particular relevance is the identification of beneficial owners, *i.e.* 'any natural person who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted'[41]. If the transaction raises suspicions of the obliged entity, it must be reported to a Financial Intelligence Unit.

The adoption of a risk-based approach to counteracting money laundering and terrorism financing can be beneficial for all parties, including public entities. Applied effectively, it should allow lower administrative costs. Financial institutions and supervisory authorities applying risk should be more effective and efficient while using their resources and minimising burdens on customers. When the focus is on higher-risk threats, beneficial policy effects can be achieved more effectively. Efforts to combat money laundering and terrorism financing should also be flexible, to adapt as risks evolve. Obliged entities use their knowledge, judgment and expertise to calibrate an appropriate solution for their particular organisational structure and business activities. Thus, cooperation between private and public entities is an indispensable element to achieve an effective risk-based process.

However, a risk-based approach is not inevitably an easy option, and there may be barriers to overcome in the implementation process. It must be noted that

38 Borlini (n 10).
39 FATF, 'Guidance on the risk-based approach to combating money laundering and terrorist financing' (2007).
40 Fourth AML Directive, Article 20.
41 ibid Article 3(6).

granting a greater degree of discretion to the private sector may also create a greater degree of legal uncertainty for those who have to comply with the preventive AML duties.[42] Moreover, private entities might have incentives not to comply, as incentive costs might be lower. From a law and economics perspective, incentive costs shall outweigh the administrative costs so that policy becomes more effective. Additionally, given the higher risk of money laundering, terrorism financing and other predicate offences associated with certain intermediary structures, the risk-based approach might not allow for the timely disclosure and assessment of issues. It is therefore important to ensure that some clearly particularised categories of existing customers are also monitored on a regular basis.[43] Attempting to pursue a risk-based approach without sufficient expertise may lead to obliged institutions making flawed judgments. They may overestimate risk, which could lead to a wasteful use of resources, or they may underestimate risk, thereby creating susceptibilities.[44] Also, staff members of the obliged entities might be uncomfortable making risk-based judgements. This may lead to overanalysed decisions, or an excessive amount of time spent documenting the decision process.[45] Another problem may arise in the context of the allocation of the responsibility between sectors; for instance, the issue of who is to be called to account when the system disappoints.[46] In general, the risk-based approach implies a transfer of responsibility regarding the quality of the assurance from public authorities towards the private sector, by changing the focus from the regulator to the regulatees.[47] Thus, there exists a risk that responsibilities would be diluted and that the involvement of multiple subjects encourages processes of blame shifting.

Taken together, the risk-based approach makes regulation more flexible and intensifies the responsibilities of professional intermediaries. These subjects, under the supervision of regulatory or other public entities, design and implement a model of AML and CFT.

B. Role of the public sector

As described above, private-public collaboration constitutes the basis for an efficient AML- and CFT-regime. In general, in this partnership the public sector is entrusted with the obligation to enforce the preventive duties laid down on private actors. However, the division of responsibilities between private and public actors

42 Mitsilegas and Vavoula (n 11).
43 Fifth AML Directive, recital 24.
44 FATF (n 39).
45 ibid.
46 Bergström, Svedberg and Mörth (n 12).
47 ibid.

is not clearly defined in the AML Directives. Although the "risk-based approach" is presented as a general device that can be used for structuring the AML-regime and for combating terrorism financing, its operationalisation may differ across Member States, as legislators are left to set up national procedures at their own discretion. Such standards may be implemented in two ways: (i) by the national regulator, who sets hard rules for the private sector, or (ii) by actors across the public-private divide (for example, the "rubber stamping" system adhered to in the UK).[48]

(I) Procedures Introduced by National Regulators

As the main role of the public sector is to enforce the preventive duties of private entities, it should have appropriate tools for this task. Public subjects must be able to ensure that obliged entities can be held liable for breaches of national provisions transposing the AML Directives. In terms of sanctions for non-compliance, the national rules may differ, as considerable discretion is left to the Member States in this regard.[49] Nevertheless, any resulting sanction or measure should be effective, proportionate and dissuasive. Article 59 of the Fourth AML Directive presents the minimum scope of the implemented sanctions, those being sanctions for breaches on the part of obliged entities that are serious, repeated and systematic. The Fourth Directive presents also a list of basic penalties, which include a public statement which identifies the natural or legal person and the nature of the breach, a temporary ban on discharging managerial responsibilities in the obliged entity, and administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach where that benefit can be determined, or EUR 1,000,000, whichever is higher.[50]

(II) Procedures Resulting from Public-Private Cooperation

The most important role from the public entities' perspective is entrusted to financial intelligence units (FIUs). The purpose of FIUs is to collect and analyse information which they receive from the private sector, with the aim of establishing links between suspicious transactions and concealed criminal activities.[51] FIUs convey the results of their analysis to the competent authorities.[52] Indeed, FIUs are of fundamental importance in uncovering the collaboration of terrorist offences and networks of terrorist organisations. Therefore, as is the case in the majority of the Member States, FIUs should be established outside the state's criminal

48 ibid.
49 Fourth AML Directive, Article 58(1).
50 ibid, Article 59(2).
51 Fifth AML Directive, Recital 18.
52 ibid.

prosecution sector, to prevent the public authorities from using the information gathered from the private sector for other purposes. Such a solution would also help to safeguard the privacy of the private entities involved and would be helpful in building trust between regulatees and the regulator.

The competences of FIUs have been constantly expanded in subsequent directives, in particular in the most recent Fifth AML Directive. FIUs play an important role in identifying the financial operations of terrorist networks, especially in cross-border relationships, and in detecting their financial supporters.[53] Thus, in the Fifth AML Directive, the cooperation between FIUs has been strengthened – the exchange of information between FIUs should not be restricted for reasons such as a lack of identification of an associated predicate offence or differences between definitions – but be conducted spontaneously or upon request.[54]

According to the Fifth AML Directive, differences between Member States must not hamper the flow of information between FIUs, and the cooperation with FIUs outside the EU should be facilitated. A huge change lays also the possibility to obtain information from any obliged entity, even without a prior report. In the past, delayed access to information concerning the identity of holders of bank accounts and safe-deposit boxes by FIUs and other competent authorities constrained the detection of transfers of funds immensely. Thus, under the Fifth AML Directive, FIUs will have access to more information through centralised bank account registers or data retrieval systems. In all cases, information should flow directly and without undue delays to ascertain effective action. It is therefore essential to enhance the cooperation between FIUs.

In conclusion, the role of the public sector is implemented mainly through FIUs. They are the link between private entities and public authorities. Private entities report to the FIUs using a risk-based approach analysis. To enforce their preventive and reporting duties, the public sector is equipped with relevant sanctions.

IV. The Compatibility of AML Preventive Measures with Fundamental Freedoms and Rights

The involvement of private actors in AML- and CFT-measures may require the restriction of individual fundamental freedoms and rights. The issue is how to set the correct balance between the fight against transnational crime and the protection of human rights and fundamental freedoms. The fundamental rights

[53] Fifth AML Directive, Recital 16.
[54] ibid, Recital 18.

and freedoms particularly relevant to this research are the freedom to provide services, the right to a fair trial, and the right to privacy and data protection.

The analysis of the compatibility of the AML regime and the freedom to provide services and the right to a fair trial, presented in Sections IV.A and IV.B, focuses on the judgments rendered by the European Court of Justice (ECJ). Part V considers the interferences between the AML measures and the provisions concerning data protection. Contrary to Sections IV.A and IV.B, Part V is based on the Fourth AML Directive as amended by the Fifth AML Directive, and on the opinions of the European Data Protection Supervisor (EDPS) rather than case-law.

A. The AML and CFT-regimes as a restriction of freedom to provide services

The prohibition on restrictions on the freedom to provide services is not absolute. Member States may interfere on either the specific grounds designated in the Treaty on the Functioning of the EU (TFEU),[55] or by relying on the more general justifications that can be found in the case law of the ECJ. Article 51 TFEU provides for an exemption, which may emerge when the provision of services is combined with the exercise of public authority. Moreover, the freedom to provide services may also be limited in the event of a threat to public security, policy or health.[56] In case law, considering the enshrinement of fundamental freedoms, the general approach of the ECJ is quite strict (an example may be found in the jurisprudence related to so-called "golden shares").[57]

According to the ECJ, restrictive measures provided for in national law can be justified if they satisfy the following conditions: (a) they are non-discriminatory; (b) the Member State protects a certain social value that can be considered as an overriding public interest; (c) the mean is proportionate; and (d) the value to be protected in the host country is not protected in the country of origin.[58] The catalogue of values to which the ECJ has granted public interest status is open and constitutes, inter alia, maintaining the good reputation of the financial sector.[59] In *Cassis de Dijon* case, the ECJ ruled that:

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the

[55] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (TFEU).
[56] ibid, Article 52.
[57] See for example Case C- 543/08 *European Commission v Portuguese Republic* [2010] E.C.R. 669.
[58] Anna Zawidzka-Łojek & Robert Grzeszczak *Prawo materialne Unii Europejskiej. Vademecum* (4th edn, Instytut wydawniczy Europrawo 2015).
[59] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] E.C.R. 1141.

> product in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[60]

Therefore, national measures must serve a purpose which is recognised as a general interest and is proportionate and necessary.[61] A landmark case regarding the restriction of the freedom to provide services by anti-money laundering polices is the *Jyske Bank Gibraltar*[62] case, which was ruled under the provisions of the Third AML Directive. Jyske, a branch of a Danish bank, was a credit institution established in Gibraltar which operated in Spain under the freedom to provide services, that is to say, without being incorporated there. Under the provisions of the Third AML Directive, each Member State was required to establish a FIU responsible for receiving, analysing and conveying to the responsible authorities information concerning potential money laundering or terrorism financing. The Third AML Directive required that the information be forwarded to the FIU of the Member State where the institution was situated. Jyske was requested by the Spanish FIU to provide it with certain information. Jyske partially complied with the request, but refused to provide data relying on the banking secrecy rules applicable in Gibraltar. Jyske considered that the Third AML Directive imposed an obligation of disclosure only vis-à-vis the FIU of the country of origin and that, therefore, the Spanish legislation did not comply with EU law. The bank brought an action before the Spanish Supreme Court, which decided to refer the question to the ECJ. The ECJ decided that, according to Article 22(2) of the Third AML Directive,

> [T]he entities referred to must forward the requested information to the FIU of the Member State in whose territory they are situated, that is to say, in the case of operations performed under the rules on the freedom to provide services, to the FIU of the Member State of origin.[63]

In the absence of harmonisation at EU level, Member States may adopt national measures restricting the free movement of capital, persons, goods and

[60] Case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649 (Cassis de Dijon).
[61] ibid.
[62] Case C-212/11 *Jyske Bank Gibraltar Ltd. v Administraction del Estado* [2013] ECR 270 (*Jyske Bank Gibraltar*).
[63] *Jyske Bank Gibraltar* [43].

establishment, as well as the freedom to provide services, provided that these measures "serve important interests recognised by the Union as valuable".[64] The solution adopted in Spanish legislation was of a more restrictive nature than the one adopted in the Third AML Directive and, as such, was considered a restriction on the freedom to provide services. Therefore, the ECJ further considered whether the Third AML Directive precluded host Member States from requiring a credit institution to forward the information also directly to its own FIU. To this end, it was necessary to consider the scheme and purpose of the Third AML Directive. All in all, the ECJ decided that the mechanism subscribed to the general aims of the Third AML Directive, which is the assertion of the proper functioning of the internal market and prevention of the use of the financial system for the purposes of money laundering and terrorism financing. Such legislation would make it possible to obtain information to more effectively combat money laundering and terrorism financing, and accordingly would pursue a similar aim to that of the Directive. Therefore, the host Member State is not precluded from requiring a credit institution, which carries out activities on its territory under the freedom to provide services, to forward the information concerned directly to the FIU of this Member State "in so far as such legislation seeks to strengthen, in compliance with EU law, the effectiveness of the fight against money laundering and terrorist financing".[65]

As legislation of one Member State, such as that at issue, constitutes a restriction to provide services, the ECJ assessed next whether Spanish legislation complied with the freedom to provide services. Indeed, Member States can restrict the four EU freedoms when they aim to protect a certain social value that can be considered an overriding public interest. Similar to what is stated in the first recital of the preamble to the Third AML Directive, "massive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market, and terrorism shakes the very foundations of our society". Likewise, the third recital notes that, "in order to facilitate their criminal activities, money launderers and terrorist financers could try to take advantage of the freedom of capital movements and the freedom to supply financial services".

Moreover, the ECJ had already accepted that combating money laundering, which is related to the aim of protecting public order, constitutes a legitimate aim, capable of justifying a barrier to the freedom to provide services. It did so in a ruling concerning gambling services in France.[66] The ECJ also positively assessed the suitability of Spanish legislation for attaining the aims it pursues. Indeed, the ECJ considered the obligation imposed on credit institutions carrying out their activities under the freedom to provide services a proportionate measure, pursuing

[64] Catherine Barnard, *The Substantive Law of the EU The Four Freedoms* (5th edn, OUP 2016).
[65] *Jyske Bank Gibraltar* [45] [49].
[66] Case 212/08 *Zeturf Ltd v Premier Ministre* [2011] ECR I-5633.

its aim in the absence of any effective mechanism guaranteeing full and complete cooperation between FIUs.

In the *Jyske Bank Gibraltar* case, the ECJ gave priority to AML and CFT over the EU freedoms. The desire to effectively combat money laundering is not merely that of one EU Member State, but also the objective of the entire EU. Usually, the ECJ examines the balance of interests, correlating the national objective with the EU objective. In the given case, both interests are equally "European"—the freedom to provide services and the effective fight against money laundering. Although the case was ruled under the provisions of the repealed Third AML Directive, the ruling confirmed that AML is seen by the ECJ as a free-standing public interest or overriding requirement[67] and a supranational interest, which is still prevailing under the regulations currently in force.

B. AML and CFT-regimes as a limitation of human rights

It has also been analysed in case law whether the fight against money laundering or terrorism financing could be considered a legitimate reason for the limitation of human rights. The ECJ analysed the compatibility of AML and CFT-regimes with the right to a fair trial in the *Ordre des barreaux* case,[68] which was ruled on under the First AML Directive as amended by the Second AML Directive.

The right to a fair trial constitutes a fundamental right, which the EU respects as a general principle under Article 6(2) Treaty on the EU (TEU)[69]. Article 6 of the ECHR provides that 'everyone is entitled to a fair hearing, whether in the determination of their civil rights and obligations or in the context of criminal proceedings'. It entails that individuals must have the possibility to attain legal advice and assistance from a lawyer. To protect the lawyer-client trust relationship, a lawyer has the right not to disclose any information covered by secrecy to third parties, including law enforcement agencies.[70] Carrying out the tasks of advising, defending and representing their clients in a satisfactory way would be impossible if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of legal consultations. Although the legal professional

67 Sara De Vido, 'Anti-Money Laundering Measures Versus European Union Fundamental Freedoms and Human Rights in the Recent Jurisprudence of the European Court of Human Rights and the European Court of Justice' (2015) 16 German Law Journal 1272.

68 Case 305/05 *Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres* [2007] ECR I-5305 (*Ordre des Barreaux*).

69 Consolidated version of the Treaty on the European Union [2012] OJ C 326 (TEU).

70 Michiel Luchtman and Rob van der Hoeven, 'Case C–305/05, *Ordre des barreaux francophones et germanophone et al v Conseil des Ministres*, judgement of the Court of Justice of 26 June 2007, Grand Chamber [2007] ECR I–5305' (2009) 46 Common Market Law Review, 301.

privilege is generally not regarded as absolute, it is maintained that limitations are only possible when they are strictly necessary and accompanied by adequate safeguards.[71]

The legal obligations of the First AML Directive have been expanded to subjects outside the financial sector, including lawyers and other legal professionals. Lawyers are obliged to inform the competent authorities when they notice facts which they know or suspect are linked with money laundering. Such activities might be considered to impinge unjustifiably on the professional secrecy and independence of lawyers - which are an ultimate element of the fundamental right of every individual to a fair trial and the right to defence. The *Ordre des Barreaux* case revolved exactly around this matter. The Belgian legislator had transposed the provisions of the First AML Directive (as amended by the Second AML Directive) to the extent that lawyers should report these alleged irregularities. Before the national court, the Belgian bar associations argued that these provisions breached several rights, because they affected the legally privileged lawyer-client relationship. The Belgian court decided to ask the ECJ preliminary questions. The ECJ, in turn, confirmed the legality of the challenged articles, for two main reasons. Firstly, the lawyer-client privilege is limited. The obligation to inform and cooperate with competent authorities applies equally to lawyers, in case they advise or act on behalf of their client in any financial or real estate transaction. The nature of such activities is that they take place in a context with no link to judicial proceedings, and so those activities fall outside the scope of the right to a fair trial. Secondly, as soon as the lawyer, acting in connection with a transaction, is called upon to defend the client in judicial proceedings, that lawyer is absolved from the obligations laid down by the First AML Directive, regardless of whether the information has been received or obtained before, during or after the proceedings. These exemptions safeguard the clients' right to a fair trial.

However, the legal professional privilege is not absolute. Limits must pursue an objective of general interest, recognised by the EU, and be proportionate to that objective.[72] In the *Ordre des Barreaux* judgment, AML policies emerged as a general interest. In the opinion of the Advocate General,[73] provided that the proportionality principle is maintained, the waiver of the lawyer's secrecy may be justified (provided that this does not affect the context of the lawyer's core activities). However, AML and CFT-regulations may still come into conflict with fundamental rights, as it is difficult to demarcate lawyers' activities related to a trial

71 ECtHR, *Iliya Stefanov v Bulgaria* [2008] Application No 65755/01.

72 Case 305/05 *Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres* [2007] ECR I-5305, Opinion of AG Maduro [49].

73 ibid [78].

and those which are unrelated to court representation. So far, the matter has not been resolved by the ECJ. Thus, the proper balance must be defined by national judges in each of the Member States.

V. AML and CFT-Regimes and Interferences with the EU Data Protection Provisions and the Right to Privacy

The problematic coexistence between the AML and CFT-regulations and data protection is not new, but the General Data Protection Regulation (GDPR)[74] and the Fourth AML Directive, as amended by the Fifth AML Directive provisions, certainly bring the problem into focus. Undoubtedly, the AML regime requires the processing and exchange of personal data, for example during customer identification, due diligence, transaction monitoring, reporting duties, internal and external data sharing, or when creating a central beneficial ownership information register. The GDPR places restrictions on why, when and how personal data can be collected and processed. It also broadens the definition of personal data, bringing all information gathered under the AML regulations directly within the jurisdiction of the GDPR. Therefore, there are a number of tension points between the AML regime and the GDPR. To assess the problematic interaction between the Fourth AML Directive (as amended by the Fifth AML Directive), the provisions concerning data protection, and the right to privacy, a brief analysis on the EU data protection framework is required.

The right to privacy can be defined as the right to be protected from unjustified interferences by states or other public entities in individuals' private lives, or simply as the right "to be left alone".[75] Violations of the right to privacy may take various forms. The one which is of the greatest significance for this study is linked to the processing of personal data. The right to privacy is protected under Article 7 of the Charter, where it is stated that, "Everyone has the right to respect for his or her private and family life, home and communications". Personal data is also protected under Article 8 of the Charter, which states that, "Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right

[74] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119.

[75] Samuel D. Warren & Louis D. Brandeis 'The Right to Privacy' (1890) 4 Harvard Law Review 193.

of access to data which has been collected concerning him or her, and the right to have it rectified."

The problematic interaction of public policy with fundamental rights is not new. The existence of the EU's interest to interfere with the data protection prerogatives for AML and CFT-purposes is acknowledged directly in Article 43 of the Fifth AML Directive, which states that the processing of personal data for the prevention of money laundering and terrorism financing shall be considered a matter of public interest under GDPR provisions. However, according to the EDPS,[76] the provisions of the Fifth AML Directive may still interfere with the purpose of limitation principle and the principle of proportionality.

Under the principle of purpose limitation, personal data may only be collected for precisely defined purposes and must not be further processed in a manner inconsistent with those purposes.[77] The Fifth AML Directive clearly indicates two purposes which may be the reason for a limitation of data protection—the prevention of money laundering and terrorism financing. Additionally, the provisions of the Fifth AML Directive introduce another policy purpose, which is the fight against tax evasion. In this respect, the description of the purpose of processing personal data progressively departs from the original AML-objective. The processing of any personal data must serve a legitimate, specific and determined purpose and must be proportional and necessary. The processing of personal data for one purpose, which was collected for another purpose which was a completely unrelated one infringes the data protection principle of purpose limitation and the principle of proportionality.[78]

The principle of proportionality is enshrined in Article 52(1) of the Charter, which provides that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and must respect the essence of those rights and freedoms". Under this principle, limitations may be made only if they are necessary and accurately meet the objectives of general interest recognised by the EU. The issue of proportionality has been addressed by the ECJ in *Digital Rights Ireland*,[79] in which the fight against international terrorism and serious crime constituted an objective of general interest.

Consequently, there are three aspects which might be problematic in connection with an appropriate application of the proportionality rule. The first alarming matter is that the Fifth AML Directive seems to depart, in some

[76] EDPS, *1/2017 EDPS Opinion on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC – Access to beneficial ownership information and data protection implications* (2017).

[77] GDPR, Article 6(3).

[78] EDPS (n 76).

[79] Case C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECR 238.

respects, from the previously described risk-based approach. Indeed, it is stated that certain categories of customers must be monitored on a methodical basis—it is however not clear on what basis, if not risk, these categories would be identified.[80] It is clear that the risk-based approach is more compatible with the principle of proportionality and tends to lead to a more positive outcome, also on the grounds of data protection. The second distressing aspect, from the data protection point of view, is connected with the extended scope of the powers of FIUs. To gain additional information from obliged entities, FIUs may no longer be triggered by suspicious transactions but also by their own analysis, even without prior reporting. With such an approach, FIUs might be incentivised to pursue data mining rather than targeted investigation purposes. This may obviously have questionable consequences in terms of data protection, because personal data would be analysed for completely different purposes. The third concerning aspect is public access to beneficiary information, by both competent authorities and public entities. Beneficiary information is very valuable and can be used in many ways (for example for marketing strategies). Here, the question is how to avoid opportunistic behaviour and how to design access to beneficial information in line with the principle of proportionality, restricting access only to law enforcing entities.[81]

In conclusion, it is clear that there are questions as to why certain forms of personal data processing are necessary and whether they are proportionate. In particular, it is of concern that the collected data should not be used for purposes completely different than the one for which they have been obtained.

VI. Conclusions

My analysis has painted a picture of a multi-layered, continuously evolving and rapidly emerging anti-money laundering and counteracting terrorism financing framework. Consequently, it can be noticed that an AML-regime should be based on a number of regulatory prescriptions, including: (a) a better emphasis on the preventive aspects of AML-regulations; (b) a stronger involvement of private entities, which is necessary because of an asymmetry of information between private subjects and regulatory agencies, and to reduce compliance costs; (c) a greater calibration of the regulatory framework based on risks; (d) broader cooperation on the international level, mainly between FIUs; and (e) better recognition of AML and CFT as a "European" general interest.

In the field of prevention, consecutive EU directives have expanded the list of professions which are covered by the scope of the AML Directives to deliberately

[80] EDPS (n 76).
[81] ibid.

include non-financial and non-regulated professions. Concurrently, the objective of protecting the European community from criminals and the protection of the integrity and stability of its financial system should be harmonised with the need to create a regulatory environment that allows companies to flourish without incurring overburdening compliance costs. Therefore, the risk-based approach has been implemented. The involvement of private actors in AML and CFT-measures often causes tensions as far as the compatibility with fundamental freedoms and rights protected at the EU-level is concerned. The tensions arises especially because the prevention of money laundering and terrorism financing is recognised at EU level as a security issue. In analysed case-law, the ECJ correlated AML and CFT-measures with the freedom to provide services and the right to a fair trial. The fight against money laundering and terrorism financing is considered as an objective of general interest of the EU. However, any requirement imposed on obliged entities to fight money laundering and terrorism financing should be proportionate and justified. Tensions also occur between AML and CFT-instruments and the right to privacy and the right to data protection. As far as proportionality is concerned in that respect, a number of issues, such as the possibility of gathering data for purposes other than those for which they are allowed in the provisions of law to be collected, raise concerns and allow a considerable amount of leeway for misuse.

In conclusion, the fight against money laundering has infiltrated the European legal system and is considered as general interest. Thus, AML policies may be a basis for the restriction of or limitations on fundamental rights and freedoms. The tensions between the attempts to effectively fight money laundering and terrorism financing and the fundamental rights and freedoms will not go away, and the AML regime in its nature will always have to evaluate things in a flexible manner to provide a ready solution for every security threat emerging in the international political sphere. The assessment of the effects on the aforementioned rights should be always concluded in light of the principle of proportionality. Such an approach, especially the thorough use of the proportionality test, should also guide the ECJ if other and more contentious issues of compatibility of EU AML and CFT-legislation with fundamental rights should arise.