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EUROPEAN UNION DIRECTIVE ON THE FIGHT AGAINST MONEY LAUNDERING AND THE FINANCING OF TERRORISM FROM THE ASPECT OF HUMAN RIGHTS

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Abstract: *This paper analyses the directives of the European Union on the fight against money laundering and financing of terrorism (AMLD) as one of the key measures of the European Union in the fight against international terrorism after September 11, 2001, from the aspect of respect for human rights. Through various revisions, from the first AMLD to the most recent, this legislative framework has been progressively improved to respond to emerging challenges in the financial world and to strengthen the fight against financial crimes. In the paper, a special research focus is given to solutions to the "security vs. human rights" and problems in the implementation of AMLD. The results of the analysis show that the European Union is developing the AMLD measure regarding the dilemma "security vs. human rights" found an adequate balance, i.e. AMLD is continuously developing in such a way that it respects human rights while not jeopardizing the effectiveness of protecting democratic societies within the EU and accepted common values.*

Keywords: EU, terrorism, security, human rights, money laundering

1. Introduction

Despite many years of experience with terrorism, the European Union has only developed a comprehensive legal and institutional framework for the fight against terrorism in the last twenty years. Although the number of direct and indirect measures accepted and implemented after September 11, 2001 within the framework of the EU's fight against terrorism is measured in the hundreds, this paper is focused on the analysis of one important, but often controversial: the European Union directive on the fight against money laundering money and financing of terrorism (AMLD).

As part of the analysis of the European Union's directives on the fight against money laundering and terrorist financing, an answer is sought to the question of whether the EU has fulfilled its strategic promise to fight terrorism globally while respecting human rights [1].

To research the European Union's directives on the fight against money laundering and terrorist financing while respecting human rights, a comprehensive analysis method is required. This involves a legal analysis of the directives to understand their provisions, scope, and implications. Comparative analysis should be used to examine how these directives align with international human rights standards and obligations under instruments like the European Convention on Human Rights. Additionally, stakeholder analysis, including input from civil society organizations, legal experts, and affected communities, is crucial to understand the

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directives' broader social and ethical implications.

In an era marked by increasing global interconnectedness, the challenges of combating money laundering and terrorist financing have risen to the forefront of international security concerns. The European Union, as a central entity in the global financial and political environment, has been proactive in establishing directives aimed at combating these illegal activities. However, these measures are not without their complexity, especially when viewed through the lens of human rights. The balance between protecting the financial system and respecting fundamental human rights is a nuanced dilemma that requires careful consideration.

This paper aims to explore the European Union's anti-money laundering and anti-terrorist financing directives, focusing in particular on how these regulations relate to human rights. The evolution of these directives will be critically analysed, examining key legislative frameworks such as the Fourth and Fifth Anti-Money Laundering Directives, which have broadened the scope of due diligence and increased the transparency of financial transactions. While these directives are useful in preventing financial crime, they also raise significant human rights issues, particularly in relation to privacy, data protection and the potential for disproportionate impact on certain populations.

By examining the intersections and interplay between financial regulation and human rights protection, this paper will reveal the complexities inherent in the implementation of strong anti-money laundering and terrorist financing (AMLD) policies. Through this research, the paper will highlight the EU's efforts to balance the need for security with the imperatives of justice and human dignity, offering recommendations to ensure that these twin goals are achieved in a way that respects and strengthens the human rights of all citizens.

2. Historical Development of the Directive against Money Laundering and the Financing of Terrorism

It is known that the very act of carrying out a terrorist attack usually does not require large financial resources, however, the preparatory phase through the acquisition of personnel, training, and often also some kind of marketing, usually requires larger finances. Therefore, activities and instruments against the financing of terrorism are part of one of the most important preventive measures in the fight against terrorism. The terrorist attack on September 11, 2001 launched all the most important global actors (the United Nations, the United States of America, the European Union, the International Monetary Fund, the Financial Action Task Force, etc.) in the field of combating terrorist financing, which led to a rapid increase, as the quality and quantity of cooperation and new innovative preventive measures at the regional and international level. The cornerstone of EU legislation in the area of money laundering (the most important aspect of terrorist financing) is the Directive on preventing the use of the financial system for the purpose of money laundering or terrorist financing (AMLD), which has been renewed six times so far.

For the first time, the directive in question was accepted by the Council of the European Community in 1991, in accordance with the accepted recommendations and standards of the Financial Action Task Force (FATF), an organization that is globally accepted as an authority in creating standards in the fight against money laundering and terrorist financing. The first European AMLD defined rules for combating money laundering from the illicit drug trade and introduced requirements for identification and storage of customer data, training of financial staff and reporting of suspicious financial transactions over €15,000 [19].

The second European AMLD supplemented the first AMLD in 2001 by expanding the scope of application of the directive to all serious crimes (not only related to drugs) and from the traditional financial sector to other areas: lawyers, notaries, real estate sales, non-governmental organizations, auditors, accountants, tax advisors, insurance businesses, trade in high-value products and casinos [6].

The third EU Anti-Money Laundering Directive was adopted in 2005, and was drafted in accordance with the new FATF recommendations (2003) and completely replaced the first AMLD (supplemented by the second AMLD). Under the influence of 9/11, the area of prevention of terrorist financing is introduced for the first time, but the earlier provisions on the obligation to collect data on parties (due diligence) and the reporting system are additionally expanded, and EU member states are required to establish a Financial Intelligence Unit (FIU) as specialized institutions in the fight against money laundering and terrorist financing [7].

In accordance with the new FATF recommendations from 2012, the fourth AMLD, which completely replaces the previous one, was adopted in 2015 with a deadline for full implementation by mid-2017. The fourth version of the AMLD emphasizes the obligation for better and more detailed due diligence on the ownership and origin of money (CDD); the definition of a politically exposed person (PEP) was expanded; the reporting of suspicious financial transactions was reduced to €10,000; the jurisdiction of the AMLD was extended to the entire gaming industry; the obligation to assess risks for banks, lawyers and accountants becomes stricter; the cooperation of national FIUs is facilitated; a joint policy is established towards third countries with a poor regulatory framework against money laundering, and an increase in the powers of punishing national competent authorities is requested [8].

The fifth version of the AMLD was adopted in 2018, and the deadline for the full implementation of the Directive by the member states was 2020. This amendment focuses on the expansion of the scope of those obliged to implement the measures defined by the Directive, brings changes in the area of the implementation of party due diligence measures and foresees new measures to increase data transparency. Regarding electronic money, the fifth AMLD requires that a non-reloadable payment instrument with a maximum monthly payment transaction limit of €150 and where the maximum electronically stored amount exceeds €150 must undergo party due diligence measures [9].

Improvements under the fifth AMLD relate to the following:

- Member states are required to maintain a public register of the beneficial owners of companies operating within their jurisdiction, which aims to prevent money laundering by making financial ownership more transparent, i.e. making it more difficult to hide or launder funds through corporate structures.
- Recognizing the potential of crypto currencies in facilitating money laundering, the fifth AMLD expanded its jurisdiction to include in application all entities that provide exchange services between virtual and traditional currencies, as well as custodial wallet providers. This measure aims to reduce the anonymity associated with crypto transactions, which can be exploited for illegal purposes.
- The directive introduced stricter due diligence requirements, especially for transactions involving high-risk third countries. Increased scrutiny is needed to determine the source of wealth and funds in transactions related to these countries.

On May 7, 2020, the European Commission presented the “Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing” [4], in which it undertook to take measures to strengthen EU legislation to combat money laundering and terrorist financing, and that through six priorities:

1. Ensuring more efficient implementation of the existing EU framework for combating money laundering (AML) and combating the financing of terrorism (CFT).
2. Establishment of a single EU rulebook for AML/CFT.
3. Establishment of AML/CFT supervision from the EU level,
4. Establishing a support and cooperation mechanism for Financial Intelligence Units (FIU).
5. Encourage the exchange of criminal law provisions and information at the EU level.
6. Strengthening the international dimension of the EU AML/CFT framework.

While the Action Plan priorities 1, 5 and 6 were implemented, other priorities required additional legislative measures. Therefore, on 20 July 2021, the European Commission presents an ambitious package of laws to strengthen the EU's anti-money laundering (AML) and countering the financing of terrorism (CFT) rules. According to the proposal of the European Commission [10]), the proposed AML/CFT package consists of four parts:

1. The EU's "Single Rulebook" regulation provides guidelines for completing due diligence, revealing the identity of beneficial owners, using anonymous instruments such as crypto-assets, and introducing new entities such as crowd funding platforms and "golden" passport clauses and visas.
2. The sixth AMLD includes national supervisory provisions, financial intelligence units (FIUs) and information exchange requirements that will allow competent authorities access to reliable information, such as beneficial ownership registrations and assets held in free zones.
3. Regulation on the establishment of the European Anti Money Laundering Agency (AMLA) with supervisory and investigative powers, to ensure compliance with AML/CFT requirements.
4. Amendment of the EU Regulation on the transfer of funds on information accompanying transfers of funds and certain crypto-assets, in order to enable the monitoring of the transfers in question.

Since the presentation of the AML/CFT package in 2021, dozens of negotiations and harmonization of parts of the package have been organized between the European Parliament, the European Council, and the European Commission, and finally an inter-institutional agreement was reached at the beginning of 2024, and the adoption of a comprehensive legislative package against money laundering and financing is expected soon.

3. Directives against Money Laundering and the Financing of Terrorism through the Prism of Respecting Human Rights

Regarding the operational use of the AMLD, although the directives have been in use for thirty years, and the implementing acts in the member states have incorporated the obligations and standards from the Directive into almost all areas of life, the effectiveness of the AMLD is not clear. Some authors such as Vandezanda [22], Mitsilegas and Vavoula [13], Rose [15], Turksen [20], Nestorova [14], believe that complicated implementation processes under the AMLD make money laundering more difficult, while other authors such as Steenwijk [17], Covolo [2], Herlin-Karnell [11], Vido [23], Silva [16], express concern about the lack of evidence necessary for the consistent application of AMLD provisions, which is ultimately a sign of inefficiency.

It is important to note that the third AMLD prescribed the authority of the European Commission to issue legally binding measures in the part of clarifying the implementation of some provisions of the

AMLD. Accordingly, the European Commission issued several such directives to clarify the AMLD in the implementation process in member countries, which were later incorporated into the fourth AMLD, such as: the definition of “politically prominent person”; technical criteria for in-depth recording procedures (due-diligence); implementation of rules on electronic payment; powers of the EU Commission in implementation procedures; confidential relationship between lawyer and client [8].

This last problem, where the “lawyer-client confidential relationship” and some provisions of the third AMLD conflict, are particularly interesting in connection with the subject analysis of the AMLD regarding the solution to the dilemma “security vs. human rights”, because they were repeatedly the subject of disputes due to violations of the European Convention on Human Rights [3]. Under the second AMLD, lawyers had to implement the provisions of the AMLD only in the case when they directly carry out financial or property transactions, but they were exempted from reporting on money laundering information obtained in the course of representing a client before the court. The third AMLD extended the obligation to implement provisions and direct reporting to the FIU to lawyers who participate in: buying and selling real estate; managing money or other assets; opening bank accounts; managing companies; funds or similar institutions. As in the second AMLD, lawyers were exempted from reporting suspicious transactions in cases where they represent clients in court, but they were not exempted from reporting when someone seeks legal advice and on that occasion the lawyer becomes aware of a suspicious transaction. The reaction was fierce. European lawyers immediately engaged all national and international bar associations against the relevant provisions of the AMLD, organized conferences, public appearances, working groups, wrote open letters and finally filed lawsuits before national courts and the European Court of Justice (ECJ) [12] [18]. The lawsuits in question were initiated on the basis of Article 6 of the Treaty on the EU, which requires all member states to respect the European Convention on Human Rights (ECHR), but ultimately none of the courts concluded that the AMLD violates the Convention, although it was found that some of the provisions of the AMLD are unclear. Finally, in 2007, the European Court of Justice ruled that the AMLD does not violate the provisions of the ECHR, but with a note that the provision on the obligation of lawyers to report information on suspicious transactions can be interpreted ambiguously. In mentioned judgment it is stated that lawyers are not obliged to report suspicious transactions under Article 6 (3) of the AMLD every time a lawyer assesses that the information about a suspicious transaction is related to advising the client in the representation before the court, but what is more important also in the process of advising the client how to avoid court proceedings [21].

The sharp reactions of national and European bar associations and legal associations had such an impact on the delay in the implementation of the third AMLD that even the European Commission was forced in 2008 to officially threaten Belgium, Ireland, Spain, Sweden, France and Poland and sue them at the European Court of Justice for continuous refusal to implement the EU Directive [12]. Finally, with many problems and delays, the third AMLD was implemented in all EU member states including Ireland in July 2010 [12]. National laws on implementation vary, mostly in the part that regulates the mandatory reporting of suspicious transactions, because the term “confidential lawyer-client relationship” is interpreted differently in relation to Article 6 of the ECHR, which prescribes the right to a fair trial, especially the part that gives the right not to be incriminated himself.

In order to avoid controversies regarding the issue of “confidential lawyer-client relationship” before the expected new FATF recommendations and accordingly in the preparation of the fourth AMLD from 2015, the European Commission started in 2011 official consultations with the Council of Bar Associations and Legal Associations of Europe and other interested parties resulting in a comprehensive report on the third AMLD in April 2012 [18]. After the FATF issued a new set of recommendations in February 2012, the European Commission, using the recommendations from the report on the third AMLD, prepared a new proposal for the fourth MLD, which it first submitted to the institutional declaration procedure in February 2013, and finally sent for approval to the European Parliament, which and done on May 20, 2015 [8]. The newly introduced new Directive introduces provisions for harmonizing the AMLD with new EU strategic documents in the field of security (Stockholm Program, EU Internal Security Strategy) and additionally expands earlier provisions covering: gambling in facilities outside of casinos; reporting of cash payments in transactions of high value items; sanctions regime, statistical data in reports; data protection, tax fraud; information on company owners; FIU cross-border cooperation; and finally specifically clarifies the relationship of AMLD provisions to the ECHR (Directive 2015). Finally, due to the previously described problems in the application of the third AMLD due to the ill-defined obligation of lawyers to report suspicious transactions that are contrary to the confidential lawyer-client relationship, the fourth AMLD simply introduces the previously mentioned wording from the ECJ judgment and exempts lawyers from the obligation to report “if the information obtained before, during or after representation in court proceedings and during the provision of legal advice to the client” [8].

The fifth AMLD, adopted by the European Union in 2018, marked a significant step in strengthening the EU's legal framework against money laundering and terrorist financing. By amending the fourth AMLD, it was aimed to respond to new challenges, such as the rise of virtual currencies and the need for greater transparency of financial transactions. However, while the fifth AMLD represents key measures to improve security, it had also raised concerns about the respect of human rights, especially regarding privacy and data protection [9].

The potential dangers of human rights violations based on the fifth AMLD are the following [2]:

- There are privacy concerns about the public availability of beneficial ownership registries. While transparency is essential in the fight against money laundering, it also exposes personal data to a wide audience, potentially leading to misuse.
- Enhanced due diligence measures, especially those involving high-risk countries, could lead to risk reduction practices, i.e. companies avoid doing business with nationals or companies from those countries in order to reduce risk. This could lead to discriminatory practices and financial exclusion, affecting the rights of individuals based on nationality or residence.
- Regulation of virtual currencies under the fifth AMLD could affect user anonymity, which is a fundamental aspect of many digital currencies. While this is seen as a necessary step to prevent illegal activities, it also encroaches on the privacy rights of legitimate users who prefer crypto currencies for their anonymity.

The fifth AMLD demonstrates the EU's commitment to strengthening its financial systems against illicit activities, but at the same time, the directive must take into account the balance between effective law enforcement and the protection of fundamental human rights. In order to ensure that measures do not disproportionately infringe privacy rights, it is necessary to ensure continuous monitoring and possible adjustment of regulations in response to technological progress and the development of legal standards concerning privacy.

If we analyse the proposal of the European Commission [10] for the new AML/CFT package or the sixth AMLD, we can conclude that the proposal marks another step forward in the EU's efforts to strengthen its regulatory framework against money laundering and terrorist financing. The goal of the sixth AMLD is to tighten existing legal provisions by clarifying the definitions of criminal offenses and strengthening cooperation between financial institutions and supervisory authorities. However, similar to previous directives, the sixth AMLD raises potential human rights concerns, particularly in the areas of privacy, due process and potential discrimination.

Potential concerns of human rights violations based on the proposal of the sixth AMLD are the following [2]:

- The increased scope of information sharing and expanded access to personal data by various authorities can lead to significant privacy issues. While the directive includes anti-money laundering measures, expansive access to sensitive financial and personal data must be carefully managed to prevent privacy breaches that could run afoul of the EU's General Data Protection Regulation (GDPR) and the European Convention on Human Rights (ECHR).
- By expanding the definition of money laundering and including legal entities in its scope, there is a risk of excessive criminalization. This could potentially lead to unfair punishments for minor or unconscious offences, raising concerns about proportionality and fairness in legal proceedings. Such measures should be carefully considered to ensure that they do not violate fundamental principles of justice and due process.
- The directive's focus on increased penalties and expanded supervision could result in discriminatory practices, particularly towards smaller companies or companies operating in sectors considered high-risk. These entities could find themselves disproportionately targeted or under scrutiny under the new regulations, which could disrupt their operations and lead to some form of financial exclusion or discrimination.

4. Conclusions

Most experts agree that the effectiveness of measures in the fight against terrorism is most often in some form of conflict with human rights. Sometimes it is direct when the implementing law violates conventions on human rights or indirectly when the same results from procedures based on by-laws and other acts. Despite this, the measures implemented by the European Union in the fight against terrorism in accordance with the EU Treaty must be in accordance with universal values: norms of respect for human rights, fundamental freedoms and the rule of law. The results of the analysis in this paper show that the term "satisfactory" is the most appropriate when describing the conclusions of the analysis of European Union directives on the fight against money laundering and terrorist financing in relation to respect for human rights.

As for the AMLDs, despite many objections and lawsuits for non-respect of human rights, especially from the level of national and international bar associations, they were finally fully implemented in all member states. In the context of the Decision on AMLD and compliance with the provisions of the EU Treaty and human rights conventions, it is important to repeat that all the courts that decided on the lawsuits in question ruled that the EU was "not to blame" and that the AMLD can be applied. Nevertheless, despite the positive decisions of the courts, the EU carried out a process of coordination and preparation with the Council of Bar Associations and Legal Associations of Europe and other interested parties in 2013-2014, and later accepted the fourth and fifth AMLD, which raised the level of respect for human rights in the application process.

However, not everything is ideal, according to AMLD's analysis, which reveals that there are still some parts of the EU legislative framework that can be interpreted differently, which often leads to violations of the provisions of the European Convention on Human Rights. Also, the European Commission is ready (or sometimes forced) to check the provisions of implementing laws at the level of EU member states, and in order to react in time in case of human rights violations through consultations, additional instructions, but in some cases also through lawsuits before the ECJ.

In conclusion, this paper shows the positive side of the European Union directives on the fight against money laundering and terrorist financing, where it is evident that AMLD is continuously monitored from several sides.

In accordance with everything stated, it can be concluded that the European Union is developing AMLDs with regard to the dilemma "security vs. human rights" found an adequate balance, i.e. the measure was developed in such a way that it maximally respects human rights without jeopardizing effectiveness at the same time.

After concluding research on the European Union's directives on the fight against money laundering and terrorist financing with respect to human rights, a promising next area of research could be the evaluation of the effectiveness and fairness of enforcement mechanisms across member states. This would involve examining how different jurisdictions implement these directives, the consistency of enforcement practices, and their impact on both preventing financial crimes and protecting individual rights. Additionally, exploring the role of emerging technologies, such as artificial intelligence and blockchain, in enhancing compliance while safeguarding privacy and human rights would provide valuable insights. This research could also assess the balance between regulatory measures and financial innovation, ensuring that anti-money laundering efforts do not stifle economic growth or innovation.

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