

EU ANTI-MONEY LAUNDERING MEASURES AS A POTENTIAL SOURCE OF HUMAN RIGHTS RISKS

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Abstract: *The report examines the European Union's anti-money laundering (AML) measures through the prism of the New AML Package and the potential of the new rules to be a source of risks to human rights. The aim is through an analysis of the objectives and logic of both AML regulation and human rights protection, to demonstrate how fundamental rights may be affected in the context of money laundering prevention. Several core instruments of the AML framework are identified as immanent sources of risks to human rights, leading to the conclusion that, although legislative reform may modernise the regulatory framework, the structural challenges remain.*

Keywords: anti-money laundering, human rights, proportionality, artificial intelligence

1. Introduction

Money laundering (ML) is a global phenomenon that has evolved alongside with the globalization of the world economy, technological advancement and the liberalisation of capital flows. It is associated with a range of adverse economic, financial, social, and governance-related consequences [1], which has led the international community to adopt coordinated actions to tackle money laundering and terrorist financing (ML/TF). Since 1990 the European Union (EU) has progressively developed its regulatory framework in the field of AML leading to the adoption of a comprehensive legislative package in 2024 aimed at strengthening the prevention of ML/TF, known as the New AML Package.

While the effectiveness of AML measures and their impact on the competitiveness of the Union are increasingly debated, the question of their implications for human rights has also gained prominence and this is particularly evident in light of the introduction of tools based on artificial

intelligence (AI).

The report examines the objectives and underlying logic of the EU AML framework in order to identify the structural risks it poses to human rights with particular attention to those areas where the possibility to impact the fundamental rights is most significant. This approach allows the identification of key areas of concern and raises the question how to achieve an effective equilibrium between financial security and human rights protection.

2. AML regulation objectives and logic

Within the context of EU law money laundering can be seen as a form of abuse of the free movement of capital whereby criminals unlawfully exploit the opportunities for facilitated cross-border integration within the internal market in order to hide the illicit origin of assets generated through criminal activity and to use them unimpeded within the legal economy.

From this perspective ML can be defined as a process involving the intentional transfer

and transformation of assets derived from criminal activity into assets of apparently lawful origin with the aim of concealing their connection to the source and ensuring their free circulation and use within the economic system.

This approach makes it possible to highlight the link between money laundering and the movement of capital while also clarifying the objectives pursued by AML measures. Accordingly, it follows that neutralising the threat posed to the financial sector by illicit financial flows, as well as preventing the misuse of the free movement of capital for criminal purposes is among the primary objectives of Directive (EU) 2015/849 [2]. Article 1 of the Directive (EU) 2015/849 explicitly states that its purpose is to ensure that the EU's financial system is not used for ML/TF, while Recitals 1 and 2 emphasise the need for proportionate preventive measures to protect the financial system of the EU.

These objectives have been reaffirmed by the New AML package, adopted in 2024, which establishes the new EU legal framework in this field, in particular Regulation (EU) 2024/1624 [3], aimed at creating a harmonised and directly applicable regulatory framework within the Union [4].

Directive (EU) 2015/849 significantly transformed the EU AML framework by introducing a risk-based approach, public registers of beneficial ownership, and enhanced customer due diligence requirements. The risk-based approach has been established as a central principle of the AML regime. It serves both as the foundation for the implementation of preventive measures and as a mechanism to ensure compliance with the principle of proportionality according by which the undertaken actions must be appropriate for achieving their objectives and must not exceed what is strictly necessary.

On the basis of risk assessment the application of customer due diligence,

reporting and monitoring measures is determined, which makes it essential for Member States to assess, comprehend and reduce the risks of ML/TF to which they are exposed and to implement measures which are proportionate to the identified risk degree [5].

The preventive nature of AML measures demonstrates that the regulatory framework is built on the understanding that proactive intervention is necessary at an early stage in the manifestation of risks to the financial system. For this reason the existence of suspicion in relation to transactions, the customer and beneficial owner identification, and/or the purpose of the transaction constitutes a key trigger for the activation of preventive mechanisms under Directive (EU) 2015/849.

Furthermore, within the context of AML prevention, anonymity is regarded as an undesirable phenomenon and its elimination is considered a necessary condition for the establishment of a transparent and traceable financial environment. This is reflected in the prohibition on obliged entities to maintain anonymous accounts and anonymous passbooks in accordance with Recommendation 10 of the Financial Action Task Force [6]. Transparency with regard to transactions and beneficial ownership is established as a necessary condition to ensure that the Union's financial system is not misused for the purposes of ML/TF.

3. Human rights as AML measures limits within the EU

Human rights as a concept are reflecting the idea that all individuals, regardless of race, language, sex, religion, or belief, are entitled to certain rights and freedoms deriving not from a social contract or the will of a sovereign but from their very human nature [7]. Although the Treaties of Rome do not contain explicit provisions concerning human rights, viewed from the perspective of subsequent legal and

constitutional development, we may say that the protection of human rights is an core element of the EU legal architecture. The well-being of individuals is established as a central objective of the European project which is ment to be achieved primarily through economic means - through the internal market and the four fundamental freedoms [8]. Nevertheless, the course of European integration gradually emerged an understanding that in the context of ever closer economic integration human rights standards may come under pressure [9]. This gave rise to the landmark judgments of the constitutional courts of Germany and Italy in Solange I and Frontini respectively, as well as to the subsequent development of the case-law of the Court of Justice of the EU (CJEU) and the later adoption of The Charter of Fundamental Rights of the European Union (The Charter) which became obligatory by 1.12.2009 with Treaty of Lisbon.

Human dignity, the integrity of the person, the right to liberty and security, non-discrimination, the right to an effective remedy and to a fair trial, and other fundamental rights are important part of the process aimed at achieving the desired peace and prosperity, pursued primarily through economic means [10]. In this way, the individual and their universal values are in practice placed at the centre of the EU's activities.

At the legislative level this is ensured by virtue of Article 6, paragraph 1 of the Treaty on European Union (TEU), according to which the Union is required to respects the rights, freedoms and principles recognized by the Charter which possesses equal legal force as the Treaties. At the same time, Article 51, paragraph 1 of the Charter obliges "the institutions, bodies, offices and agencies of the Union" to respect fundamental rights while Article 263 Treaty on the Functioning of the European Union provides for the possibility of annulment of legislative acts by the

CJEU in the event of non-compliance with fundamental rights.

Article 5, paragraph 4 of the TEU reflects the proportionality principle which requires that measures adopted at Union level must not go beyond what is required to achieve the objectives laid down in the Treaties. In essence, the proportionality test is intended to ensure a sufficient level of protection against the risk that powers conferred on public authorities under a given legal measure, for example, legislation on electronic surveillance, may unduly impac fundamental rights, such as with privacy, non-discrimination, freedom of expression and the right to a fair trial.

In this regard, the proportionality test is set out in Article 52, paragraph 1 of the Charter, according to which limitations of the rights and freedoms recognised by it shall be provided by law and shall not infringe the essence of those rights and freedoms, while at the same time comply with the principle of proportionality.

Legislative acts in the field of AML/CFT are no exception, as the Regulation explicitly provides that the harmonistaion ot the AML/CFT framework with the revised FATF Recommendations shall be fully compliant with Regulation (EU) 2016/679 (General Data Protection Regulation) and the Charter.

It can be concluded that while AML legislation is aimed at ensuring security for both the financial system and society, human rights are seen as a natural limit to political power insofar as they are seen as a counterweight to state power. [11].

Finding a balance between the protection of the financial system and the preservation of fundamental human rights constitutes a "nuanced dilemma that requires careful consideration with the aim the measures measures to be developed in such a way that maximally respects human rights without jeopardizing effectiveness at the same time" [12].

4. Inherent Human rights risks arising from the New AML Package

Despite the identified weaknesses primarily expressed in the fragmented approach at national level, Directive (EU) 2015/849 constitutes the main legal instrument for preventing the use of the EU's financial system for the purposes of ML/TF. One of the main objectives of the New AML Package is to achieve full harmonisation of the rules, given the established limitations of the current directive-based regime. This follows from the legal nature of directives as Union acts, which leave Member States a significant degree of discretion in their implementation and thereby facilitate the emergence of diverse and inconsistent national regimes.

At the same time, as the key changes introduced by the Regulation (EU) 2024/1624 relate primarily to the extension of the range of obliged entities, the lowering of thresholds for cash payments, and the introduction of enhanced due diligence measures particularly with regard to high-net-worth individuals it may be concluded that the new legal framework will continue to exhibit the human rights risks inherent to Directive (EU) 2015/849. This is because the new framework preserves the main instruments of AML regulation, along with their associated "side effects" in relation to fundamental rights. These include:

- extensive access to sensitive financial and personal data, including beneficial ownership, transactional history, source-of-funds information;
- mass transactional monitoring over determined thresholds;
- enhanced supervision and high-cost sanctions for non-compliance potentially resulting in discriminatory practices and financial exclusion [13];
- preventive logic triggered primarily by suspicion, not by evidence and private entities involvement as quasi-supervisory bodies;
- emerging dependence on AI based risk assessment, monitoring and decision-making;

With Regulation (EU) 2024/1624 is introduced prohibition persons trading in goods or providing services to accept cash payments exceeding EUR 10 000 with the aim of minimising the ML risks associated with cash transactions. Article 19, read in conjunction with Article 20, paragraph 1, (a), provides that cash transactions exceeding EUR 3 000 are subject to customer due diligence measures, which must include at minimum the customer's identification and the verification of the identity data gathered. The derogations provided for in Article 19, paragraph 7 with regard to electronic money are formulated so narrowly that they leave rare possibility for exemption from due diligence obligations. This results in an exceptionally broad category of transactions becoming subject to general preventive monitoring even in the absence of individualized suspicion of unlawful conduct. Such systematic monitoring creates potential risks regarding privacy rights and personal data protection while also raising serious questions as to compliance with the principle of proportionality.

Regarding data related to beneficial owners, emphasis should be placed on the CJEU's ruling of joined Cases C-37/20 and C-601/20 and on the subsequent regulatory development reflected in the New AML package, in particular Directive (EU) 2024/1640.

Although the significant role of transparent beneficial ownership registers in the fight against money laundering was recognised by the EU, the CJEU in its judgment in the abovementioned joined cases held that the general public's access to information on beneficial ownership provided in Article 30, paragraph 5 of Directive 2015/849 as amended, constitutes an interference with the rights guaranteed in Articles 7 and 8 of the Charter. The main risk of such unrestricted access is the impact on

beneficial owners' fundamental right to personal data protection, particularly because public access facilitates detailed profiling. The legislative response to the ruling of Cases C-37/20 and C-601/20 is reflected by the shift from public access to legitimate interest based regime, as provided for in Article 12 of Directive (EU) 2024/1640.

Enhanced regulatory scrutiny and the significant sanctions that may be imposed in cases of non-compliance with the legal framework often result in the adoption by obliged entities of risk-avoidance strategies rather than risk-management approaches as de-risking. De-risking is associated with a range of adverse consequences, including the financial exclusion of economically fragile communities relying mostly on money service businesses as means of access basic banking needs may therefore be of effective access to financial services [14]. As such the restriction on discrimination laid down in Article 21 of the Charter is directly engaged, since the widespread termination of correspondent banking relationships with banks located in jurisdictions classified as 'high-risk' [15] may result in effective exclusion of entire regions from the international financial system despite the legitimate nature of a significant share of their financial transactions [16].

As the previous regulatory framework based on directives, the New AML Package still relies on preventive architecture built around suspicion as a means of protecting the financial system. This is reflected in the obligation imposed on obliged entities to collect and process extensive volumes of personal and financial data relating to customers identified as high-risk linked to suspicious transactions or connected with high-risk jurisdictions. It is important to give particular consideration to the fact that obliged entities and financial institutions as gatekeepers of the financial system are private entities with different levels of risk appetite, human resources and technological

capacities, which is resulting in inconsistent compliance practices affecting broad range of individuals. Taken together with the prohibition of disclosure laid down in Article 73 of Regulation (EU) 2024/1624 this creates a potential risk to the right to an effective remedy and to a fair trial as provided by Article 47 of the Charter.

Technological advancement creates conditions both for economic growth and financial integration and for an increased risk of abuse including ML while at the same time it emerged as one of the key instruments for combating ML. Although The New EU AML package remains formally technologically neutral, a significant proportion of obliged entities would find it difficult to fulfil their regulatory obligations and ensure the timely execution of their services without relying on specialised software including systems incorporating AI.

Nowadays, credit institutions increasingly employ AI with the aim of alleviating the burden placed on human reviewers. In this context, several principal ways in which AI is being integrated into anti-money laundering efforts can be identified, including the automation of data gathering, the refinement of alert prioritisation and customer risk scoring, the use of link analysis, improved customer segmentation, and enhanced anomaly detection. [17]. However, it is questioned whether AI-based AML systems are capable of satisfying the proportionality test in the context of the judgments in Digital Rights Ireland and Tele2 Sverige/Watson [18]. The principal concerns relate to the lack of specificity in AML/CFT legislation regarding the characteristics and limits of the transaction-monitoring systems that obliged entities, and banks in particular, are required to deploy, the use of machine-learning techniques which may further aggravate these concerns due to algorithmic opacity and limited explainability and to the persistent inability to reliably assess the effectiveness of banks' AML/CFT systems

in reducing financial crime [19]. All of this increases the risk of disproportionate limitation of the rights to privacy and personal data protection, the prohibition of discrimination, and the right to an effective remedy.

5. Conclusion

Despite the ambition of the New AML Package to overcome the inconsistent and fragmented approach that has characterised the practical application of AML rules across Member States, the new legal framework continues to rely on methods and regulatory techniques whose actual effectiveness and efficiency remain arguable, considering that total value of laundered money each year is estimated at approximately 2.7% of global GDP, while less than 1% of these criminal proceeds are confiscated or frozen by law-enforcement authorities [20]. While a 2021 report by the European Court of Auditors indicates that approximately 1.3% of the EU's GDP is linked to suspicious transactions [21] the absence of reliable data prevents hinders the reasonable determination of the actual volume of criminal assets laundered through the legal economy and thus the

assessment of the effectiveness and efficiency of the AML rules. At the same time, by preserving the main methods of AML regulation including extensive data collection, suspicion-triggered intervention, broad monitoring obligations and involving private entities in public functions, the new framework also preserves the human-rights risks inherently associated with those methods. The growing dependence on AI-based software is capable of optimising AML activities at a technical and operational level, but creates additional risks in relation to fundamental rights, particularly with regard to privacy, personal data protection, non-discrimination, transparency and effective legal remedies. It could be concluded that the question of how to obtain an appropriate balance between financial security and the protection of human rights is likely to become increasingly actual while greater attention will need to be paid to the actual effectiveness of AML measures in order to perform a meaningful assessment whether the results achieved are proportionate to the degree of interference with fundamental rights they affect.

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