



# **The limits of the fight against money laundering in the European Union : state of play, challenges and perspectives.**

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# The limits of the fight against money laundering in the European Union: *state of play, challenges and perspectives*



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# Summary

<b>Introduction</b>	2
<b><u>I. State of play of the implementation of the fight against money laundering in the European Union.</u></b>	3
A) <u>Developments in the fight against money laundering and terrorist financing.</u>	3
B) <u>Practical implementation of the fight against money laundering and terrorist financing.</u>	4
<b><u>II. The main pitfalls in the fight against money laundering and terrorist financing.</u></b>	5
A) <u>The technicality of European law: an obstacle to accelerating the fight against money laundering.</u>	5
B) <u>The lack of communication between the supervisory institutions and the Member States: an obstacle in the fight against AML/CFT.</u>	6
<b><u>III. AML/CFT: a threat to individual and fundamental freedoms?</u></b>	7
A) <u>Blacklists: an obscure and unfounded procedure that violates individual liberties.</u>	7
B) <u>Filtering and profiling, tools for the fight against money laundering that infringe fundamental rights.</u>	8
<b>Conclusion</b>	10
<b>Bibliography</b>	11

## Introduction

Money laundering is an activity that consists of legitimizing the proceeds of crime by integrating them into the economic system. The primary objective of this process is to conceal the origin of money from illegal activities (drug trafficking, insider trading, corruption, etc.). The proceeds of these crimes take different forms. It can be cash, financial assets or material objects (works of art, jewelry, etc.). Money laundering is most often carried out in three distinct stages: placement, layering and integration. The placement stage consists of placing the dirty money in the financial system. Most often, criminal organizations come through companies to increase the inflow of capital, which is then deposited in a banking institution. Afterwards, the stratification process takes place, which consists of a large series of conversions and movements of funds in order to mask the origin of these products. Finally, once the money is laundered, it is reused by criminals to finance their activities. Today, the emergence of new information and communication technologies (NICT) in particular is giving a new boost to money laundering activities. The advent of online payment systems, crypto-currencies and dematerialized cash transfers make it even more difficult to track down illegal money transfers. Moreover, the multiplication of online auctions or gambling sites greatly facilitates money laundering.

Faced with the development of these new methods, the authorities of European countries are trying to set up a new system to fight against money laundering, in particular by strengthening their cooperation. In addition, following the numerous attacks that occurred in the decade 2010-2020, the fight against the financing of terrorism has become the focus of these institutions. Despite the strengthening of the fight against money laundering and terrorist financing (AML/CFT), the latter "*has weaknesses*"<sup>1</sup>. These weaknesses are based on "*institutional fragmentation and insufficient coordination at the European Union level*"<sup>2</sup> but also because the EU bodies have "*limited tools*". Furthermore, following the work of many researchers, it is estimated that today the fight against money laundering and terrorist financing is liberticide. Indeed, as early as 2003, a report by the CNIL pointed out the numerous liberticidal measures to fight against money laundering.

In this paper, we will first present the framework of the fight against money laundering and terrorist financing in the European Union (I), then we will describe the main flaws of this system (II), and finally we will demonstrate that this fight is today deeply liberticidal, notably because of the tools it uses (III)

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<sup>1</sup> ECA. "EU efforts to fight money laundering in the banking sector are fragmented and implementation is insufficient", *Special Report 13/2021*, 2021.

<sup>2</sup> Ibid.

## **I. State of play of the implementation of the fight against money laundering in the European Union.**

This section presents the various developments in the fight against money laundering and terrorist financing (A) and their concrete implementation (B).

### **A) Developments in the fight against money laundering and terrorist financing.**

In recent decades, many governments have intensified their efforts to fight money laundering. The beginnings of governmental cooperation appeared at the dawn of the 1990s with the formation of the Financial Action Task Force (FATF). This body was created following the G7 meeting in Paris and now has about thirty member states. It has developed numerous recommendations that serve as essential measures in the fight against money laundering and terrorist financing. In recent years, the FATF has been working on the preventive measures to be implemented by financial institutions as well as on the powers to be attributed to national authorities in order to fight against money laundering and terrorist financing. It is in the dynamics of the creation of the FATF that the fight against money laundering in the European Economic Community (EEC) was built. One year after the creation of the FATF, the Member States of the Union adopted a directive aimed at preventing the development of money laundering. With the adoption of the Single Act in 1993 establishing a Single Market and the free movement of capital, the European Union (EU) had to equip itself with an arsenal in the fight against money laundering. Indeed, the establishment of the Single Market led to fears that criminals would take advantage of the free movement of capital to make the fruits of their crime more easily. Since then, the EU has adopted the FATF's point of view. All the updates of the directive on the fight against money laundering and terrorist financing are inspired by the work of the FATF.

Despite the existence of an anti-money laundering directive, there is no supervisory institution in the EU similar to those existing in the Member States such as TRACFIN or SEPBLAC. It is the European Commission (EC) which, through the Directorate General for Financial Stability, Financial Services and Capital Union (DGFISMA), coordinates the EU's actions on money laundering. Its role is more of a coordinator than a controller. The EC develops policy and ensures the proper transposition of the directive in national jurisdictions. It also formulates recommendations to the Member States to provide the main guidelines in the fight against money laundering and terrorist financing. Thus, this fight relies mainly on the financial intelligence units (FIU) of the Member States. These units ensure that financial institutions respect their obligations and issue a report in case of suspicious activity. However, these services are currently poorly coordinated at the European level, which slows down investigation procedures when money laundering activities are carried out in several countries. However, it would be wrong to assert that the fight against money laundering rests solely on the shoulders of the Member States. In recent years, there has been a trend towards increased European

cooperation in the fight against money laundering and terrorist financing. In May 2020, the EC published an action plan for a comprehensive EU anti-money laundering and anti-terrorist financing policy. It is clear that by 2022-2023, the creation of a true supranational institution is planned. The latter would probably be attached to the European Banking Authority (EBA) already in charge of the stability of the European financial system. Such a supervisory office would be a major step forward in order to truly coordinate the actions of States in their fight against AML/CFT.

#### B) Practical implementation of the fight against money laundering and terrorist financing.

At the European level, Europol estimates that money laundering transactions represent 1.3% of European GDP. In 2010, Eurostat, based on data from member countries, identified nearly 500,000 suspicious transactions in the EU<sup>3</sup>. The first level of the fight against money laundering concerns the institutions involved in regular financial transactions. These are most often banks, insurance companies, accounting firms, gaming and betting companies. All of these institutions are called "obliged entities" and must be able to detect suspicious transactions by monitoring the activities of their clients. When a suspicious transaction occurs, these obliged entities must report it to the FIU. The most developed entities in reporting such transactions are financial and banking organizations. They have implemented transaction monitoring software that monitors the millions of transactions made by their clients on a daily basis. These entities are only able to detect these suspicious transactions without knowing their origin.

The FIUs of each country are responsible for investigating the origin of these funds. The FIU carries out a complete analysis of the financial flow to determine the origin and the reasons for such an operation. If, following the conclusions of the analysis, the movement appears to be the result of a criminal operation, the FIU informs the competent judicial authorities. Otherwise, the FIUs record all the reports, investigations and analyses of financial flows that they carry out. These data collected by the FIU constitute huge databases that are reused in case of recidivism of the person. In order to collect this valuable information during the analysis of financial flows, the FIU has what is known as a "right of communication". This is a tool that allows FIUs to receive all financial information that would be useful when analyzing a financial movement. It is impossible for financial and banking establishments to invoke professional secrecy to protect their clients. This tool is particularly effective in the fight against money laundering and terrorist financing because it is an easy law to apply and binding on professionals. In 2014, TRACFIN had exercised more than 8,000 communication rights to carry out its analyses<sup>4</sup>.

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<sup>3</sup> Eurostat. "Money Laundering in Europe", 2013 Edition, 2013.

<sup>4</sup> Carpentier, Jean-Baptiste. "Chapter 6. TRACFIN, the anti-money laundering unit, a tool at the heart of the fight against corruption", Michel Hunault éd., *The fight against corruption, money laundering and tax fraud*. Sciences Po Presses, 2017, pp. 165-174.

The FIUs have proven to be a formidable tool in the fight against money laundering and terrorist financing thanks to increased cooperation. A Council decision of October 17, 2000<sup>5</sup> establishes an action plan to improve the exchange of information between European FIUs. This decision was taken with the aim of better fighting money laundering, particularly in its stratification phase. Most often, money launderers resort to transfers of funds between banks in different countries in order to cover their tracks for investigators. The commission is aware of the extent of the problem and has therefore sought to increase cooperation between FIUs. However, its action is difficult to evaluate. In particular, in 1995, under the impetus of the FATF and the Egmont Group, the FIUs set up an operational mechanism to strengthen their cooperation. Indeed, the Egmont Group has formulated rules of good practice to strengthen communication between FIUs worldwide. In addition, all the member countries of the Egmont Group have set up a communication network enabling them to exchange information on suspicious financial flows in a secure and rapid manner. However, the Council's decision is a major step forward. Until the Council's decision, due to their different legal status, FIUs could not communicate with each other. Article 3 of the directive reinforces cooperation: "*Member States shall ensure that the performance of the functions of the FIUs under this Decision shall not be affected by their internal status, regardless of whether they are administrative, law enforcement or judicial authorities.*". Thus, in recent years, the trend has been to strengthen cooperation in the fight against money laundering and terrorist financing. The next step to complete this cooperation seems to be the creation of a supranational body in charge of coordinating the actions and work of the European Union FIUs.

## **II. The main pitfalls in the fight against money laundering and terrorist financing**

In this second part, we will examine the pitfalls in the fight against money laundering and terrorist financing. We will see that these flaws are the result of the technical nature of European law (A) but also of a lack of communication between the European authorities and the Member States (B).

### **A) The technicality of European law: an obstacle to accelerating the fight against money laundering**

One of the main flaws in the fight against money laundering and terrorist financing within the European Union is undoubtedly the result of a very disparate involvement of the States. One of the illustrations of this is the long delay in the transposition of the directives by the Member States. During the transposition of the 4th anti-money laundering directive, the European Commission launched an infringement procedure against the Member States between July 2017 and March 2019, because none

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<sup>5</sup> Council Decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information

of them had reported progress on the transposition process. As a result, it was found that only six Member States had transposed the directive<sup>6</sup>. This example illustrates that money laundering legislation is unevenly implemented across the EU. As a result, the legal framework for the fight against money laundering and terrorist financing is not homogeneous. Consequently, the Union is vulnerable in the fight against money laundering. Moreover, this fight is currently torn by a major paradox, which is that many countries aspire to strengthen this fight by establishing a supranational entity, but in fact they do not use all of their prerogatives to fight money laundering and terrorist financing effectively. This double discourse of most European States is today an obstacle to the reinforcement of cooperation in the fight against money laundering.

However, the member states cannot be the only ones to blame. According to a report by the European Court of Auditors (ECA), the Commission is also at the root of this difficulty in transposing European law. On the one hand, because the directives adopted are so technical that the states are reluctant to transpose them. In the survey conducted by the ECA on the factors explaining this difficulty in transposition, 19 of the 20 states questioned considered that the difficulty was linked to the "complexity of the legislation"<sup>7</sup>. This technicality in the elaboration of European legal norms is today burdensome for the members of the Union but also for its citizens. Yet, the fight against money laundering and terrorist financing relies first and foremost on citizens, especially those working in sectors that are highly exposed to it. Enacting such complex norms in this area does not encourage the citizens of the Union to concern themselves with such a subject and, on the contrary, a strong lack of interest in European affairs is growing among many of them. One of the ways of improvement would be to transform directives into European regulations. This would make it possible to do away with the transposition process which creates disparities in the application of the fight against money laundering and terrorist financing. Furthermore, it would also be beneficial to improve communication on such a theme in order to allow a collective awareness of European citizens. As a result, professionals in sensitive sectors would be more inclined to initiate a procedure for reporting suspicions in case of doubt about the origin of a fund.

B) The lack of communication between the supervisory institutions and the Member States: an obstacle in the fight against AML/CFT.

Today, two major European institutions in the supervision of anti-money laundering are the European Central Bank (ECB) and the European Banking Authority (EBA). The ECB has been in charge since 2013 of the supervision of commercial banks that make up the banking union. It has been given

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<sup>6</sup> ECA. "EU efforts to fight money laundering in the banking sector are fragmented and implementation is insufficient", *Special Report 13/2021*, 2021.

<sup>7</sup> Ibid.



prudential supervision of these institutions. In other words, the ECB must ensure that credit institutions in the presentation of their balance sheet do not have significant shares of liquidity linked to money laundering or terrorist financing. In order to carry out this task, the ECB has approached national anti-money laundering and anti-terrorist financing authorities. However, most of the interactions between the ECB and the national authorities are informal and based on a loose structure. Despite the signing of an agreement on the modalities of information exchange between European supervisory institutions and national authorities in 2019, the trend does not seem to be towards increased exchanges. Indeed, between January and December 2019, the ECB did not receive any information relating to the supervision of banking institutions in the context of the fight against money laundering and terrorist financing. Conversely, the ECB has not communicated to national authorities the supervisory measures it has put in place over one third of European credit institutions.

This lack of communication between money laundering control institutions in the financial sector and national authorities raises questions about the very existence of a will to curb money laundering within the Union. There is a lack of cooperation, not to say disastrous, between these actors. Since the beginning of the year 2021, communications have been strengthened between the actors, even if there are still delays in the transmission of information. On the side of the European institutions, these delays stem from the inability of many staff to share information with the national authorities. On the side of the national authorities, it is the quality of the reports (especially those on surveillance) that is called into question. These reports are not standardized between the Member States, which makes the control procedures of the European institutions more complex. It would be commendable in the future to standardize all these procedures so that the fight against money laundering, particularly in the banking sector, is more effective. For the time being, the lack of communication between national and supranational supervisory bodies illustrates once again a great lack of cooperation in the fight against money laundering and terrorist financing. Increased collaboration between these actors would undoubtedly strengthen this fight against money laundering and could make it more respectful of fundamental freedoms.

### **III. AML/CFT: a threat to individual and fundamental freedoms?**

In the context of the fight against the financing of terrorism, the European institutions have drawn up a blacklist identifying numerous criminals, but this has proved to be without any real basis, thus infringing on the rights of individuals (A). Moreover, the methods of financial surveillance cover more and more investigative functions, thus infringing on fundamental freedoms (B).

#### **A) Blacklists: an obscure and unfounded procedure that violates individual liberties**

Following the attacks of September 11, 2001, the United States drew up a list of 27 individuals and organizations linked to Al Qaeda. All of the people on the list had their financial assets frozen. In December 2001, the European Union created a similar list with the objective of eliminating the financing of terrorism. This action quickly proved to be effective in terms of the assets confiscated by the authorities. However, since its birth, this list has been strongly criticized, notably because of the lack of motivation, but also because of the blurred criteria for the inscription of an individual on this register. Indeed, the persons appearing on this autonomous European list are designated at the request of the Member States without any real formal proof. The request is then transmitted to the Committee of Permanent Representatives (COREPER) and then to the Council of the EU, which approves it without any real discussion. Following this, the people on the list are neither informed nor asked to defend themselves.

This results in an infringement of fundamental rights that the Court notes in its judgment "ECJ, 12 December 2012, People's Mujaheddin Organization of Iran/Council of Europe". It considers that the Council's decision "violates the rights of the defense, the obligation to state reasons and the right to effective judicial protection." From the decision, any inclusion in this list must be subject to a motivation as well as a notification to the individual. Moreover, in a similar judgment, "ECJ, 3 September 2008, Yassin Kadi & Al Barakat International Foundation / Council & Commission", Mr. Kadi was not informed by the notification of the reasons for his inclusion in the list, in particular because this information is classified as confidential and therefore inaccessible to the accused. The ECJ in its deliberation reaffirms that one should not compromise with the fundamental rights of individuals and considers that Mr. Kadi must know the reasons for his inclusion on this list. It considers that the inscription on this list is more of an administrative sanction than a judicial one. In many cases, the evidence justifying the listing does not allow for an accurate determination of the degree of participation of the individual in the financing of terrorism. Consequently, these preventive sanctions are mostly unfounded and plunge the accused into a situation of "civil death"<sup>8</sup>. Thus, the fight against the financing of terrorism, one of the main tools of which is the registration on an asset freeze register, is the result of an untransparent procedure whose foundations must be questioned.

#### B) Filtering and profiling, tools for the fight against money laundering that infringe fundamental rights.

The increasing use of the banking sector by criminal networks in the money laundering process is forcing credit institutions to put in place countermeasures. Over the last few years, these institutions

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<sup>8</sup> Amicelle, Anthony, et Gilles Favarel-Garrigues. « The fight against “dirty money” from the perspective of fundamental freedoms: which mobilizations? », *Cultures & Conflicts*, vol. 76, no. 4, 2009, pp. 39-66.

have multiplied the number of tools used to detect suspicious transactions. These computer tools have proven to be useful in order to filter blacklisted individuals but also to establish monitored relationships with exposed political persons (PEP). Indeed, the filtering tools collect all the information related to the financial flows on the account of the PEP. In Europe, more than half a million individuals are concerned by these measures. However, many risk managers in banks criticize the use of these tools because they are misused by bankers. This is particularly true of World Check, which is a platform for finding out if an individual is a PEP. In many cases, the lists of persons are not updated and many errors appear, especially in the case of homonyms. Thus, according to a UN Security Council investigation team, there is a "risk that people whose names appear on the list will not be identified and that sanctions will be applied to people who were not targeted"<sup>9</sup>. So, while filtering tools are useful, they lead to errors that restrict the freedoms of many users. In the United States, an investigation by the Department of Justice revealed that 24,000 people were wrongly placed on these filtering lists<sup>10</sup>. The misuse of these filtering tools leads to individuals being deprived of their freedoms when they are not targeted by such measures in the first place.

These filtering tools are completed by profiling operations. These operations aim to use algorithms to analyze the unusual functioning of a bank account, particularly on the basis of the individual's current transactions. These profiling operations thus make it possible to "*predict the behavior of a client and to distinguish the deviations from his profile*". These profiling operations, even if they are based on a defined regulatory base, are redefined by the banks in order to better identify their customers. A wide margin of maneuver is left to the credit institutions in these profiling operations. The latter do not hesitate to reinforce these operations on customers coming from certain geographical areas, in particular Africa, where the number of money laundering operations is high. Thus, practices are being created within banks that consist in discriminating against certain clients using profiling tools. Consequently, the principle of equality between clients is broken in the name of the fight against money laundering. Profiling and filtering techniques are today strongly criticized by professionals of the banking sector who express strong doubts on the relevance of such methods. The result for the persons concerned is a reduction of their freedom, which leads us to rethink these prevention tools in the context of the fight against money laundering and terrorist financing.

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<sup>9</sup> United Nations Security Council. "Report of the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated Individuals and Entities", 2008.

<sup>10</sup> U.S. Department of Justice Office of the Inspector General Audit Division. "The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices", 2009.



To conclude, we saw that the European Union has implemented many measures to fight against money laundering such as the directives and have created many institutions as the Financial Action Task Force or the Financial Intelligence Units. Nevertheless, the fight against money laundering and terrorist financing comprises major pitfalls. The EU has no supervisory institution like the one of the Member States. Moreover, the main entities in this fight (banks, insurance companies, accounting firms...) are not high-performance to find the origin of the illegal transactions. The major flaws in money laundering and financing terrorism are the long delay of directive's transposition by Member states, the technicity of the Commission laws but also the lack of communication between the European authorities and the Member States. Finally, the European Union uses an unfounded procedure to fight AML and CFT that violates individual liberties and rights. To better fight against money laundering, the European Union must establish clearer directives and better communicate with Members States. To fight against terrorist financing, the EU have to find measures and tools without violating fundamental rights.

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