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## Developments

# 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

*By Sara De Vido\**

### Abstract

This article will evaluate whether, and to what extent, preventive measures in the fight against money laundering may limit fundamental freedoms and human rights within the European Union ("EU"). It will analyze two judgments rendered by the European Court of Justice ("ECJ") and one judgment rendered by the European Court of Human Rights ("ECtHR"). In these three cases, the courts were asked to investigate the compatibility of specific Anti-Money Laundering ("AML") preventive measures with the freedom to provide services enshrined in the Treaty on the Functioning of the European Union ("TFEU") and human rights. Considering the gravity of the phenomenon, AML measures have gradually emerged as a "European general interest." The Fourth EU Anti-Money Laundering Directive, which has been recently adopted, displays this compelling need.

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## A. Introduction

As it is well known, banks existed in Greek and Roman times, though people began to use the word *bancus* in the Middle Ages to identify the bench on which a professional banker used to display and exchange the money.<sup>1</sup> Notwithstanding the ancient origins of banks, money laundering has flourished as a crime more recently.<sup>2</sup> Criminalization of money laundering began in late twentieth century, when states realized that the process of making illegally gained proceeds—“dirty money”—appear legal could severely affect economies. Nonetheless, until the 1970s, “there was no emphasis on the illegal earnings from crime, at least not as an autonomous concept, since it was viewed only as an accessory.”<sup>3</sup> The term “money laundering” was first used in the mid-1970s by U.S. law enforcement officials,<sup>4</sup> and a U.S. District Court first introduced this wording in a judgment in 1982.<sup>5</sup> Money laundering became a federal crime with the enactment of the 1986 U.S. Money Laundering Control Act.<sup>6</sup> At the regional level, the Council of Europe adopted the Recommendation no. 80 (10) on measures against the transfer and the safekeeping of funds of criminal origin in 1980. The Council acknowledged that:

the transfer of funds of criminal origin from one country to another and the process by which they are laundered through insertion in the economic system give rise to serious problems, encourage the perpetration of further criminal act and this course the phenomenon to spread nationally and internationally.<sup>7</sup>

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<sup>1</sup> Robert S. Lopez, *The Dawn of Modern Banking*, in *THE DAWN OF MODERN BANKING* 1, 1 (R.S. Lopez et al. eds., 1979); see also ALESSANDRO MARZO MAGNO, *L'INVENZIONE DEI SOLDI, QUANDO LA FINANZA PARLAVA ITALIANO* 45 (2013).

<sup>2</sup> For the origins of money laundering, see GUY STESENS, *MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL* (2000). See also EDWIN TRUMAN & PETER REUTER, *CHASING DIRTY MONEY: PROGRESS ON ANTI-MONEY LAUNDERING* (2004); BILL GILMORE, *DIRTY MONEY* (2011); Brigitte Unger, *Money Laundering Regulation: From Al Capone to Al Qaeda*, in *RESEARCH HANDBOOK ON MONEY LAUNDERING* 19 (2013); *IL RICICLAGGIO COME FENOMENO TRANSNAZIONALE: NORMATIVE A CONFRONTO* (R. Razzante ed., 2014).

<sup>3</sup> John Vervaele, *Economic Crimes and Money Laundering: A New Paradigm for the Criminal Justice System?*, in *RESEARCH HANDBOOK ON MONEY LAUNDERING* 379, 382 (Brigitte Unger & Daan Van Der Linde eds., 2013).

<sup>4</sup> Money laundering was linked to drug trafficking. ROBERT E. GROSSE, *DRUGS AND MONEY: LAUNDERING LATIN AMERICA'S COCAINE DOLLARS* 69 (2001).

<sup>5</sup> *U.S. v. Four Million Two Hundred & Fifty-Five Thousand*, 551 F. Supp. 314, 325 (S.D. Fla. 1982); see also GILMORE, *supra* note 2, at 22.

<sup>6</sup> Money Laundering Control Act of 1986, Pub. L. No. 99-579, 100 Stat. 3207-18-21 (1986) (codified as amended at 18 U.S.C. §§ 1956-57 (2006)); see also Vervaele, *supra* note 3, at 383.

<sup>7</sup> *Recommendation No. R (80) 10 of the Committee of Ministers to Member States on Measures Against the Transfer and the Safekeeping of Funds of Criminal Origin*, 1980 EUR. Y.B. 1. A thorough analysis of the first

In 1989, the then G7 became aware of the fact that illegal narcotics trafficking had become “a problem of alarming proportions and world-wide concern” and established the Financial Action Task Force on Money Laundering (“FATF”).<sup>8</sup> These initial steps demonstrate the increasing awareness of the effects of globalization of finance, a phenomenon that presents two conflicting views. On the one hand, globalization has spurred investments and movement of capital across borders, positively affecting the worldwide economy. On the other hand, globalization has created a fertile ground for criminal activities, with money laundering being the “natural” consequence of predicate offences, such as drug trafficking, fraud, corruption, and terrorist financing. Over the years, the impression of money laundering constituting a threat to the economy and societies has determined increasing action at the international, regional, and national level.

This article will evaluate whether, and to what extent, preventive measures in the fight against money laundering may limit EU fundamental freedoms and human rights. Criminal law often requires the restriction of individual fundamental freedoms to pursue more general purposes. The issue is how to set the “correct balance” between the fight against transnational crimes and the protection of human rights and fundamental freedoms. The analysis will focus on two judgments rendered by the ECJ, respectively in *Ordre des Barreaux* and *Jyske Bank Gibraltar*, and the judgment rendered by the ECtHR in the *Michaud v. France*. European courts were asked to investigate the compatibility of specific AML preventive measures with human rights and the freedom to provide services enshrined in the TFEU. This article will contend that anti-money laundering measures have gradually emerged as a “European general interest.” The compelling need in Europe to fight against this “invisible crime,” having a multitude of indirect effects—such as the distortion of consumption and investments<sup>9</sup>—is confirmed by the recently adopted Fourth EU AML Directive (“4AML Directive”).<sup>10</sup>

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instruments related to anti-money laundering are described in VALSAMIS MITSILEGAS, MONEY LAUNDERING COUNTER-MEASURES IN THE EUROPEAN UNION 44 (2003), and in GILMORE, *supra* note 2.

<sup>8</sup> Financial Action Task Force on Money Laundering, *Report on the Extent and Nature of the Money Laundering Process and FATF Recommendations to Combat Money Laundering* (1990), <http://www.fatf-gafi.org/media/fatf/documents/reports/1990%20ENG.pdf>.

<sup>9</sup> Joras Ferwenda, *The Effects of Money Laundering*, in RESEARCH HANDBOOK ON MONEY LAUNDERING 35 (Brigitte Unger & Daan Van Der Linde eds., 2013).

<sup>10</sup> Directive 2015/849, On the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, amending Regulation 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, 2015 O.J. (L 141) 73.

**B. AML as a Restriction of EU Fundamental Freedoms: The *Jyske Bank Gibraltar* Case Before the ECJ (2013)**<sup>11</sup>

The ECJ has used a “restrictive” approach when analyzing the compatibility of national measures with the four freedoms enshrined in the Treaties.<sup>12</sup> In the absence of harmonization at EU level, Member States may adopt national measures restricting the free movement of goods, persons, capital, and establishment, as well as the freedom to provide services, provided that these measures “serve important interests recognized by the Union as valuable,” they are proportionate, and they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.<sup>13</sup> Hence, the Court posited as early as 1979 that in the absence of common rules relating to the production and marketing of a certain product, Member States are free to regulate all matters related to the production and the marketing of that product on their territory.<sup>14</sup> Nevertheless, the Court further explained:

[O]bstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted *in so far as* those provisions may be recognized 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.<sup>15</sup>

National measures, therefore, must serve a “purpose which is in the general interest”<sup>16</sup> and be recognized as necessary and proportionate.

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<sup>11</sup> Case C-212/11, *Jyske Bank Gibraltar Ltd. v. Administración del Estado* (Apr. 25, 2013), <http://curia.europa.eu/>.

<sup>12</sup> Free movement of goods, persons, services and capital, which are the bases of the EU internal market. See Consolidated Version of the Treaty on the Functioning of the European Union, art. 26, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

<sup>13</sup> CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU* 155 (2013).

<sup>14</sup> Case C-120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), 1979 E.C.R. 649; see also GIUSEPPE TESAURO, *DIRITTO DELL'UNIONE EUROPEA* 409 (2012); LUIGI DANIELE, *DIRITTO DEL MERCATO UNICO EUROPEO* 68 (2012).

<sup>15</sup> *Cassis de Dijon*, Case C-120/78 at para. 8.

<sup>16</sup> *Id.* at para. 14.

To demonstrate the “restrictive approach” of the ECJ, we may refer to one further example: the jurisprudence related to the so-called “golden shares” or “special rights,” which implicates both the free movement of capital and the freedom of establishment.<sup>17</sup> In a judgment concerning special rights maintained for the Portuguese State and for other public entities or public sector bodies in *GALP Energia SGPS SA*, the ECJ affirmed that:

[I]t is common ground that requirements of public security must, in particular as a derogation from the fundamental principle of the free movement of capital, be *interpreted strictly*, with the result that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.<sup>18</sup>

Regarding anti-money laundering policies, on 25 April 2013, the Court decided a landmark case in its preliminary ruling in *Jyske Bank Gibraltar*, addressing the implementation of the Third Anti-Money Laundering Directive (“3AML Directive”) in Spain.<sup>19</sup> Jyske Bank was a branch of the Danish Jyske Bank established in Gibraltar, which operated in Spain under the rules governing the freedom to provide services. Article 22, paragraph 2 of the 3AML Directive provides that information on suspicious transactions shall be forwarded to the “financial intelligence unit of the Member State in whose territory the institution or person forwarding the information is situated.”<sup>20</sup> States must establish a financial intelligence unit (“FIU”) to receive, analyze and disseminate to the competent authorities “disclosures of information which concern potential money laundering, potential terrorist financing or are required by national legislation or regulation.”<sup>21</sup> According to Spanish law, credit institutions operating in Spain must inform the Spanish FIU of transfers of more than 30,000 euro to or from tax havens and uncooperative territories, such as Gibraltar.<sup>22</sup>

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<sup>17</sup> For a comprehensive study, see DANIELE GALLO, *I SERVIZI DI INTERESSE ECONOMICO GENERALE* (2010); *COMPANY LAW AND ECONOMIC PROTECTIONISM: NEW CHALLENGES TO EUROPEAN INTEGRATION* (Ulf Bernitz & Wolf-Georg Ringe eds., 2010) and bibliography cited.

<sup>18</sup> Case C-212/09, *Comm’n v. Portugal*, 2011 E.C.R. I-10889 (emphasis added).

<sup>19</sup> Directive 2005/60/EC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, 2005 O.J. (L 309) 15 [hereinafter 3AML Directive].

<sup>20</sup> *Id.* at art. 22, para. 2.

<sup>21</sup> *Id.* at art. 21.

<sup>22</sup> *Jyske Bank Gibraltar Ltd.*, Case C-212/11 at para. 20. Territories regarded as tax havens and uncooperative territories were specified by Royal Decree 1080/1991 of 5 July 1991 (BOE No 167, of 13 July 1991, p. 233371), and by order ECO/2652/2002 of 24 October 2002 on the implementation of disclosure obligations in relation to operations with certain States to the Servicio Ejecutivo of the Commission for the prevention of money



Jyske bank only partially complied with the request forwarded by the Spanish FIU, invoking the banking secrecy in force in Gibraltar, resulting in a fine of 1,700,000 euro. The bank appealed against the decision before the Spanish Supreme Court, which referred the case to the ECJ. The analysis of the European judges was twofold. They first interpreted Article 22 of the 3AML Directive and then Article 56 TFEU, even though the domestic court did not refer to the latter provision in its question.<sup>23</sup>

*I. Article 22 of the Third AML Directive*

The 3AML Directive was adopted to transpose into the EU legal system the FATF recommendations on combating money laundering and the financing of terrorism revised in 2003.<sup>24</sup> It applies to the operators listed in Article 2—not only credit and financial institutions, but also legal and professional persons such as auditors, notaries and legal professionals acting on behalf of and for their client in any financial or real estate transaction, trusts, real estate agents, natural or legal persons when payments are made in cash in an amount of 15,000 euro or more, casinos—and contains provisions on customer due diligence, reporting obligations, record keeping, and enforcement measures.<sup>25</sup>

Focusing on the case under review, the text of Article 22 of the 3AML Directive is quite clear. The Court explained that it must be interpreted:

as meaning that the 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

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laundrying and monetary offences (Orden ECO/2652/2002 por la que se desarrollan las obligaciones de comunicación de operaciones en relación con determinados países al Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias) (BOE No 260 of 30 October 2002, p. 38033). Gibraltar appears on this list.

<sup>23</sup> *Id.* at para. 38.

<sup>24</sup> See 3AML Directive, *supra* note 19, Preamble, recital no. 5 (“Since the FATF Forty Recommendations were substantially revised and expanded in 2003, Directive should be in line with that new international standard.”); see also SARA DE VIDO, IL CONTRASTO DEL FINANZIAMENTO AL TERRORISMO INTERNAZIONALE. PROFILI DI DIRITTO INTERNAZIONALE E DELL’UNIONE EUROPEA 172 (2012).

<sup>25</sup> The article is not aimed at a deep analysis of the Directive. For further details, see GILMORE, *supra* note 2, at 236; Valsamis Mitsilegas & Bill Gilmore, *The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards* 56 INT’L & COMP. L.Q. 119 (2007); Lucia Dalla Pellegrina & Donato Masciandaro, *The Risk-Based Approach in the New European Anti-Money Laundering Legislation: A Law and Economics View*, 5 REV. L. & ECON. 931 (2009); Italo Borrello, *Il ruolo dell’Unione europea nel controllo dei capitali di provenienza illecita*, in IL RICICLAGGIO COME FENOMENO TRANSNAZIONALE: NORMATIVA A CONFRONTO 159 (Ranieri Ruzzante ed., 2014).

freedom to provide services, to the FIU of the Member State of origin.<sup>26</sup>

Nevertheless, the Court pushed the boundaries of the provision by concluding that Article 22 “does not expressly prohibit” the host Member State from requiring a credit institution carrying out activities in its territory under the rules on the freedom to provide services to forward the information referred directly to its own FIU “in so far as such legislation seeks to strengthen . . . the effectiveness of the fight against money laundering and terrorist financing.”<sup>27</sup> According to the judges, credit institutions remain nonetheless obliged to supply the required information to the FIU of the home state, which are in turn asked to cooperate with FIUs situated in other EU countries.<sup>28</sup>

The Court could have interpreted the word “situated” in a broader sense to include situations in which a bank operates through agents and not through a branch.<sup>29</sup> As an alternative, European judges could have drawn on Article 5 of the Directive, which allows States to “adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing.”<sup>30</sup> The measures adopted by Spain may be covered by this provision in so far they are aimed to apply to credit institutions situated in a country whose AML policies show severe weaknesses. As the Advocate General argued, the control by the FIU of the host State could prevent situations in which “a credit institution opts for the freedom to provide services regime in order to circumvent the more stringent supervision exercised by the host Member State and so opens a registered office or branch in a Member State where supervision is perhaps less stringent.”<sup>31</sup>

## II. Article 56 TFEU

According to Article 56 of the TFEU, restrictions on the “freedom to provide services” within the Union are prohibited in respect of nationals of Member States who are established in a State other than that of the person for whom the services are intended.<sup>32</sup>

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<sup>26</sup> *Jyske Bank*, Case 212/11 at para. 43.

<sup>27</sup> *Id.* at paras. 45, 49.

<sup>28</sup> *Id.* at paras. 51, 54.

<sup>29</sup> In this sense, see the Opinion of Advocate General Bot at paras. 95–96, Case C-212/11, *Jyske Bank of Gibraltar Ltd. v. Administración del Estado* (Oct. 4, 2012), <http://curia.europa.eu/>.

<sup>30</sup> *Id.* at para. 6.

<sup>31</sup> *Id.* at para. 85.

<sup>32</sup> TESAURO, *supra* note 14, at 541.

In the case *Jyske Bank Gibraltar*, the ECJ affirmed that a national measure such as the one adopted by Spain constitutes a restriction on the aforementioned freedom when it implies costs and is additional to the controls already conducted in the Member State where the institution at issue is situated.<sup>33</sup> After assessing that there was a restriction on one of the freedoms granted by the Treaty, the Court answered two main questions: Whether national legislation was justified by an “overriding requirement relating to the public interest,” and whether the same legislation was “appropriate for securing the attainment of the aim which it pursues and does not go beyond what is necessary in order to attain it.”<sup>34</sup> As for the first question, the ECJ affirmed that the prevention and the combating of money laundering and terrorist financing are “legitimate aims.”<sup>35</sup> AML as a public interest had already emerged in a previous judgment concerning gambling services in France.<sup>36</sup> Accordingly, the ECJ includes in the “mandatory” or “public interest” requirements issues like the fight against crime and the prevention of fraud.<sup>37</sup>

The ECJ then assessed the suitability of national legislation for attaining the aims it pursues. The answer was positive. On the one hand, domestic legislation, such as the Spanish one, enables the Member State concerned to require at any time, “where there is reasonable doubt as to the legality of a financial transaction,” information necessary to pursue and punish alleged perpetrators of the crime.<sup>38</sup> On the other hand, it is appropriate and non-discriminatory as all operators are subject to similar obligations.<sup>39</sup>

The Court finally examined national legislation according to the principle of proportionality.<sup>40</sup> The Court explained that the mechanism for cooperation between FIUs

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<sup>33</sup> *Jyske Bank Gibraltar Ltd.*, Case C-212/11 at para. 59.

<sup>34</sup> *Id.* at para. 60.

<sup>35</sup> *Id.* at para. 62.

<sup>36</sup> Case 212/08, *Zeturf Ltd. v. Premier Ministre*, 2011 E.C.R. I-5633, paras. 45–46.

<sup>37</sup> BARNARD, *supra* note 13, at 173.

<sup>38</sup> *Jyske Bank*, Case 212/11 at paras. 65–66.

<sup>39</sup> *Id.*

<sup>40</sup> On the principle of proportionality, see, e.g., Gráinne De Burca, *The Principle of Proportionality and Its Application in EC Law*, 13 Y.B. EURO. L. 105 (1993); Christian Tomuschat, *Le Principe de Proportionnalité: Quis Judicabit?*, 13 CAHIERS DE DROIT EUROPÉEN 97 (1997); ENZO CANNIZZARO, *IL PRINCIPIO DELLA PROPORZIONALITÀ NELL'ORDINAMENTO INTERNAZIONALE* (2000); Jan H. Jans, *Proportionality Revisited*, 27 LEGAL ISSUES ECON. INTEGRATION 239 (2000); Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EURO. L.J. 158 (2010); Marco Pertile, *Il Principio di Proporzionalità nell'Interazione tra Diritto Umanitario e Tutela dei Diritti Umani: Strumento per la Risoluzione delle Antinomie o mero Argomento Retorico?*, in *LA TUTELA DEI DIRITTI UMANI E IL DIRITTO INTERNAZIONALE* 159 (2012); Vassilis Hatzopoulos, *The Court's Approach to Services (2006–2012): From Case Law to Case Load?*, 50 COMMON MKT. L. REV. 459 (2013).

presents some deficiencies that prevent authorities from acting in short time.<sup>41</sup> As a consequence, proportionality is respected to the extent that national legislation requires

credit institutions situated in another Member State to forward, concerning operations carried out under the freedom to provide services, information necessary for combating money laundering and terrorist financing directly to the FIU of the host Member State, *only* where there is no effective mechanism ensuring full and complete cooperation between the FIUs and allowing money laundering and terrorist financing to be combated just as effectively.<sup>42</sup>

At least for the time being, FIUs are not obliged to automatically forward information to the FIUs of another Member State. Furthermore, inasmuch as Spanish legislation was limited to operations exceeding 30,000 euro and involving transfers of funds from or towards certain territories, it does not appear to be disproportionate.<sup>43</sup>

### *III. The Priority Given to AML Over EU Freedoms*

When it comes to analyzing alleged violations of fundamental freedoms, the focus is usually on domestic measures which may, or actually do, affect EU freedoms. In *Jyske Bank*, Spain did not intervene in the proceeding in order to justify its measures, but it tried to have a decision of inadmissibility from the ECJ, arguing that the question presented by the Spanish judge was “purely hypothetical.”<sup>44</sup> Accordingly, the State did not present arguments on the “national interest” pursued by domestic law. On the merits, the ECJ mainly referred to the fact that national legislation was aimed to effectively combat money laundering, hence a much more general objective, the one enshrined in the 3AML Directive. In *Jyske Bank*, the “overriding reason” does not seem to be merely the one of an EU Member State, but also—or mainly—an objective of the entire Union. Borrowing the reasoning of an author in another context, the Court did not see AML as constituting “the express public-policy derogation.”<sup>45</sup> It saw AML as a free-standing public interest or overriding requirement. This essential interest has gained such momentum in the EU that

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<sup>41</sup> Case C-212/11, *Jyske Bank Gibraltar Ltd. v. Administración del Estado*, paras. 73–75 (Apr. 25, 2013), <http://curia.europa.eu/>.

<sup>42</sup> *Id.* at para. 81.

<sup>43</sup> *Id.* at para. 83.

<sup>44</sup> *Id.* at para. 32.

<sup>45</sup> Referring to fundamental rights, see BARNARD, *supra* note 13, at 159.

the Court did not analyze the possibility of a less restrictive alternative. The host state's action is usually justified, in the field of services, where it takes into account the actions taken by the home state to protect a particular interest. The failure by the host state to consider supervision already carried out in the home state "means that the national measure fails the test of proportionality."<sup>46</sup> For example, the Court could have asked the national judge to assess whether the FIU of the host state actually sought to cooperate with the Gibraltar one. To the contrary, the Court assessed the general system of cooperation between FIUs, shifting to a certain extent the focus from the national system to the system within the European Union.

Despite the Court's reasoning, Article 22 of the 3AML Directive needs further clarification. The new 4AML Directive includes an entire subsection on "Cooperation between FIUs and with the Commission."<sup>47</sup> It does not appear, however, to overcome the differences between EU Member States' legislation regarding FIUs. The Commission "may" lend assistance to facilitate coordination between FIUs within the Union.<sup>48</sup> Therefore, the EU institution could play an important role to reinforce cooperation and define guidelines for national authorities. As outlined by a commentator, even though practice shows that the closest authority to the activity at risk should be competent, this acknowledgment does not fill the lacunae in the level of cooperation among EU FIUs.<sup>49</sup>

One more consideration may be drawn from the case at issue. Some ECJ judgments are based on a balance of interests, opposing the "national objective with the EU (free movement) objective," in an analysis of the principle of proportionality *stricto sensu*.<sup>50</sup> One of the interests prevails. In the case under examination, the balance of interests appears to be between two "European" interests: The effective fight against money laundering and the freedom to provide services. Contrary to previous judgments related to national legislation concerning gambling—in which the Court has applied "a very relaxing" and "laissez faire" approach relying on the determination of the level of protection provided by the Member States,<sup>51</sup> and differing from other judgments in which the Court strictly interpreted the limitations to EU freedoms<sup>52</sup>—in the case at issue, the Court

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<sup>46</sup> *Id.* at 391.

<sup>47</sup> Directive 2015/849, *supra* note 10, at arts. 51–57.

<sup>48</sup> *Id.* at art. 51.

<sup>49</sup> Arnaud Lecocq, *Le Blanchiment des Capitaux*, 6 J. DROIT EUR. 233 (2013).

<sup>50</sup> Hatzopoulos, *supra* note 40, at 497; *see also* FRIEDL WEISS & CLEMENS KAUPA, EUROPEAN UNION INTERNAL MARKET LAW 34 (2014).

<sup>51</sup> Hatzopoulos, *supra* note 40, at 499; WEISS & KAUPA, *supra* note 50, at 264.

<sup>52</sup> *See* TESAURO, *supra* note 14, at 562 (concerning the freedom to provide services and indistinctly applicable measures, the ECJ has stressed the "exceptional character" of the derogations).

attempted to strike the right balance between two European interests. European judges afforded priority to AML policies, which, in the absence of complete harmonization, are clearly achieved at the national level, but also aimed to realize a “supranational” interest. This “supranational” European interest also emerges when AML is pitted against human rights issues.

### C. May AML Policies Limit Human Rights?

European courts have also investigated whether AML measures may constitute a legitimate restriction on human rights. The two judgments analyzed in the following paragraphs, rendered respectively by the ECJ and the ECtHR, dealt with the same issue—that is, the obligations lawyers and legal professionals must abide by in order to combat money laundering. These obligations derive from national legislation transposing EU law, which in turn is in conformity with the FATF Recommendations adopted at the international level. The two courts use different perspectives in these cases. In the first judgment this article will focus on, *Ordre des barreaux francophones et germanophone*,<sup>53</sup> the ECJ analyzed the compatibility of a specific provision of a former version of the AML Directive with the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights (“ECHR”). The *prospective clients* of legal professionals were considered to be entitled to such right. In the second judgment under analysis, *Michaud v. France*, the ECtHR examined the compatibility of a measure imposing reporting obligations on lawyers with the right *of the lawyer*—and not of the client—with the respect for his/her correspondence enshrined in Article 8 ECHR.

#### I. *Ordre des Barreaux*

This case concerns the First AML Directive (“1AML Directive”),<sup>54</sup> as amended by the Second AML Directive (“2AML Directive”),<sup>55</sup> which provided for a wider scope of application—including among the addressees, notaries, and legal professionals.<sup>56</sup> The Belgian legislator transposed the 1AML Directive as amended, including Articles 2(a)(5) and 6, according to which the Directive is applicable to notaries and other independent

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<sup>53</sup> Case 305/05, *Ordre des Barreaux Francophones et Germanophone v. Conseil des Ministres*, 2007 E.C.R. I-5305.

<sup>54</sup> Council Directive 91/308, June 10, 1991, On Prevention of the Use of the Financial System for the Purpose of Money Laundering, 1991 O.J. (L 166) 77 [hereinafter 1AML Directive].

<sup>55</sup> Directive 2001/97 of the European Parliament and of the Council of Dec. 4, 2001, amending Council Directive 91/308 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 2001 O.J. (L 344) 76 (EC) [hereinafter 2AML Directive].

<sup>56</sup> *Id.* art. 2(a), para. 5. See Jan Komárek, *Legal Professional Privilege and the EU’s Fight Against Money Laundering*, 27 CIV. JUST. Q. 13, 15 (2009); Michiel Luchtman & Rob Van der Hoeven, *Case C-305/05, Ordre des Barreaux Francophones et Germanophone et al. v. Conseil des Ministres, Judgment of the Court of Justice of 26 June 2007, Grand Chamber; [2007] ECRI-5305*, 46 COMMON MKT. L. REV. 301 (2009).

legal professionals when they assist clients in commercial or financial activities.<sup>57</sup> The bar associations argued before the Belgian Constitutional Court that the domestic provisions were in breach of several rights, including but not limited to Article 6 ECHR, because they affected the legal privilege present in the lawyer-client relationship. The Court decided to request a preliminary ruling from the ECJ regarding whether the said articles of the Directive infringed the right to a fair trial as enshrined in the ECHR. Other rights mentioned by the parties were not taken into account by the referring Court.

The ECJ confirmed the legality of the contested articles of the Directive for two main reasons. First, lawyers are subject to the obligations of information and cooperation in certain transactions “listed exhaustively.” Second, there is a clear exemption in Article 6, paragraph 3 of the 1 AML Directive as amended:

It would not be appropriate for Directive 91/308 to impose the obligation of reporting suspicions of money laundering on independent members of professions providing legal advice which are legally recognized and controlled, such as lawyers, where they are ascertaining the legal position of a client or representing a client in legal proceedings.<sup>58</sup>

Acknowledging a certain ambiguity in the text of this article, the ECJ posited that preference should be given “to the interpretation which renders the provision consistent with the EC Treaty” and that national law must be interpreted in a manner consistent with Community law and fundamental rights.<sup>59</sup> Referring to Article 6 ECHR, the Court emphasized that reporting obligations are limited to activities that take place “in a context with no link to judicial proceedings and, consequently, those activities fall outside the

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<sup>57</sup> See 2AML Directive, *supra* note 55, art. 2(a), para. 5

Member States shall ensure that the obligations laid down in this Directive are imposed on the following institutions: . . . 5. notaries and other independent legal professionals, when they participate, whether: (a) By assisting in the planning or execution of transactions for their client concerning the (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets; (iii) opening or management of bank, savings or securities accounts; (iv) organization of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures; (b) or by acting on behalf of and for their client in any financial or real estate transaction.

<sup>58</sup> Case 305/05, *Ordre des Barreaux Francophones et Germanophone v. Conseil des Ministres*, 2007 E.C.R. I-5305, para. 24.

<sup>59</sup> *Id.* at para. 28.

scope of the right to a fair trial.”<sup>60</sup> According to the judges, the exemptions concerning assistance in defending the client, representation before the courts and advice as to the manner of instituting or avoiding judicial proceedings, safeguard the right of the client to a fair trial.<sup>61</sup>

Although not expressly stated by the Court, AML policies have emerged as a general interest, which might, in specific circumstances, limit legal privilege. Advocate General Poiares Maduro more clearly posited that “the objective of combating money laundering may be regarded as an objective of general interest.”<sup>62</sup> Some commentators correctly observe that there is a “tension” between effectiveness in the fight against money laundering and the protection of human rights (legal privilege),<sup>63</sup> and it is difficult to distinguish between what is related to a trial and what it falls outside its scope.<sup>64</sup> Nevertheless, the importance of the judgment should not be underestimated. Lawyers, notaries, and other professionals could play a key role in the fight against transnational criminality, as they may be asked, for example, to prepare real estate sales contracts or handle mergers, acquisitions, and share exchanges which may hide money laundering operations.<sup>65</sup> “Good governance requires a proper balance with . . . other values,” indeed.<sup>66</sup> The proper balance must be defined by national judges, due to the lack of a common European definition of the expression “ascertain the legal position of a client.”<sup>67</sup> Hence, in 2008, the Belgian Constitutional Court that referred the preliminary question to the ECJ dismissed the appeal presented by bar associations claiming the violations of their rights, but it pronounced at the same time what follows:<sup>68</sup>

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<sup>60</sup> *Id.* at para. 33.

<sup>61</sup> *Id.* at para. 34.

<sup>62</sup> Opinion of Advocate General Maduro at para. 78, Case C-305/05, *Ordre des Barreaux Francophones et Germanophone v. Conseil des Ministres* (Dec. 14, 2006), <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-305/05&td=ALL>.

<sup>63</sup> Melissa Van Den Broek & Henk Addink, *Prevention of Money Laundering and Terrorist Financing from a Good Governance Perspective*, in RESEARCH HANDBOOK ON MONEY LAUNDERING 368, 374 (Brigitte Unger & Daan Van Der Linde eds., 2013).

<sup>64</sup> *Id.* at 313.

<sup>65</sup> The real estate sector is particularly vulnerable to money laundering. See Joras Ferwenda & Brigitte Unger, *Detecting Money Laundering in the Real Estate Sector*, in RESEARCH HANDBOOK ON MONEY LAUNDERING, *supra* note 64, at 269.

<sup>66</sup> Van Den Broek & Addink, *supra* note 63, at 375.

<sup>67</sup> Maaïke Stouten & André Tilleman, *Reporting Duty for Lawyers vs. Legal Privilege—Unresolved Tension*, in RESEARCH HANDBOOK ON MONEY LAUNDERING *supra* note 2, at 431.

<sup>68</sup> Cour constitutionnelle [CC] [Constitutional Court] decision No. 10-2008, Jan. 23, 2008 (Fr.).



The information of which the lawyer [becomes] aware during the exercise of the essential activities of his or her profession, including . . . the defense or representation in court of the client and the provision of legal advice, even outside the context of judicial proceedings, remain . . . covered by professional secrecy and [cannot] therefore be drawn to the attention of the authorities.

To the contrary, when a lawyer exercises an activity that goes “beyond his or her specific role of defense or representation in court and the provision of legal advice,” he or she “could be subject to the obligation to communicate to the authorities the information of which he or she [is] aware.” The broad interpretation given by the Belgian Court to the wording “ascertain the legal position” was confirmed by a judgment rendered by the French *Conseil d’Etat* in April 2008. In that case, the *Conseil d’Etat* determined that the activity of giving legal advice to a client should be exempted from reporting obligations, provided that it is aimed at the defense or representation of the same client in court. Pursuing “*l’intérêt général*” (the “general interest”) of the fight against money laundering, however, lawyers are not exempt from reporting suspicious transactions whenever legal advice is given for the purposes of committing a crime.<sup>69</sup> French judges concluded that the domestic legislation correctly transposed the 2AML Directive, and the latter, under the interpretation given by the *Conseil d’Etat*, does not breach human rights. If we consider that national judges have a margin of appreciation in defining the boundaries of “ascertaining the legal position,” it seems clear that “harmonization [clearly] fails.”<sup>70</sup>

## II. *Michaud v. France*

This case decided by the ECJ in 2007 had a sort of “sequel” before the ECtHR. As a matter of fact, the ECJ did not evaluate the compatibility of the AML Directive—at that time, the 1AML Directive as amended by the 2AML Directive—with the right to respect for private and family life enshrined in Article 8 ECHR. In its opinion in *Ordre des barreaux*, the Advocate General expressly mentioned the two legal bases, Articles 6 and 8 ECHR, on which the lawyers’ professional secrecy is based.<sup>71</sup> The Court limited its analysis to the questions presented by the national judge.

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<sup>69</sup> *Séance du 28 Mars 2008—Lecture du 10 Avril 2008*, D.P. III 296845, 296907 (2008), available at <http://www.conseil-etat.fr/>.

<sup>70</sup> Stouten & Tilleman, *supra* note 67, at 431.

<sup>71</sup> Opinion of Advocate General Maduro, *supra* note 62, at para. 41.

The judgment rendered in 2012 by the ECtHR in *Michaud v. France*<sup>72</sup> is related to the transposition of the 3AML Directive into the French Monetary and Financial Code. According to the law amending the French code, lawyers have an obligation to report suspicious transactions related to their clients, as envisaged by EU law. The National Bar Council then adopted a decision on internal procedures. A French lawyer argued before the *Conseil d'Etat* that the national law, particularly the National Bar Council's decision, violated Articles 7 and 8 of the ECHR. According to the applicant, the French law infringed the right to privacy typically related to a lawyer's activities by imposing the disclosure of strictly confidential information. The lawyer then asked the *Conseil d'Etat* to refer the matter to the ECJ for a preliminary ruling on the conformity of the "declaration of suspicion of criminal offence" with Article 6 TEU and Article 8 of the ECHR. The *Conseil d'Etat*, however, dismissed all requests, basing its reasoning on the *Ordre des barreaux* judgment rendered by the ECJ some years before. The lawyer eventually registered an application with the ECtHR.

### 1. Admissibility

After carefully describing the relevant legal instruments concerning the case—including FATF recommendations, which appear to receive formal recognition by the European jurisprudence—the Strasbourg Court confirmed the admissibility of the application. France maintained, and the objection seems *prima facie* quite reasonable, that the lawyer should not be considered a "victim" according to Article 34 of the ECHR. It is well-known that individuals bringing a case to the Court must be a "victim" of a violation. In other words, "a person must be directly affected by the impugned measure."<sup>73</sup> Nevertheless, a person is victim even when "he is required to either modify his conduct or risk being prosecuted, or if he is a member of a class of people who risk being directly affected by the legislation."<sup>74</sup> In the circumstances of this case, although the lawyer was not directly affected by the national measure, he faced a dilemma: Either he applied the rules and thus ignored the principle of legal privilege, or he decided to prioritize the relation with the client and risk disciplinary sanctions. To that extent, the Court considered the position of the lawyer as the one of a "victim" under Article 34 of the Convention.

### 2. The Application of Article 8 ECHR and the Rebuttal of the Presumption of "Equivalent Protection"

Article 8 of the Convention was invoked because the right to respect for private and family life includes, applying the jurisprudence of the ECtHR, the confidentiality of private

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<sup>72</sup> *Michaud v. France*, 2012 VI Eur. Ct. H.R. 89.

<sup>73</sup> *Id.* at para. 51.

<sup>74</sup> *Id.*

communications.<sup>75</sup> Accordingly, the obligation to report suspicions for the purposes of AML constitutes a “continuing interference” with lawyers’ right to respect of their correspondence. Once affirmed that the interference existed, the Court argued first that it was “in accordance with the law” and easily rejected the applicant’s objection on the vagueness of the law.<sup>76</sup> Second, the Court ruled that the interference had “legitimate aims,” namely to combat money laundering and associated crimes.<sup>77</sup> Focusing on the test of the necessity of the interference, the Court asked whether the presumption of “equivalent protection,” elaborated on by the ECtHR in *Bosphorus*, applied in this case.<sup>78</sup> It goes beyond the scope of this article to offer insights into the reasoning of the Court, or how this judgment could be considered a further step in clarifying the not-always straightforward Strasbourg jurisprudence on the doctrine of equivalent protection. Thus, following lines will simply summarize the main paragraphs of the judgment where the Court decided to examine the case on its merits.

Provided that a State party to the ECHR is responsible under the Convention, even in situations when it complies with its obligations as a member of another international organization, compliance with such obligations is justified: “Where the relevant organization protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent—that is to say not identical but “comparable”—to that for which the Convention provides.” Accordingly, “the presumption will be that a state has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization.”<sup>79</sup>

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<sup>75</sup> Laura Tomasi, *Articolo 8*, in COMMENTARIO BREVE ALLA CONVENZIONE EUROPEA PER LA SALVAGUARDIA DEI DIRITTI DELL’UOMO 355 (Sergio Bartole et al. eds., 2012).

<sup>76</sup> See *Michaud*, 2012 VI Eur. Ct. H.R. at paras. 97–98 (“[S]uspicion is a matter of common sense” and “an informed group such as lawyers can scarcely claim that they do not understand it.”)

<sup>77</sup> *Id.* at para. 99.

<sup>78</sup> On the doctrine of “equivalent protection” and the *Bosphorus* case, see *ex multis*, Giorgio Gaja, *The Review by the European Court of Human Rights of Member States’ Acts Implementing European Union Law: Solange Yet Again?*, in *ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT* 517 (Pierre-Marie Dupuy ed., 2006); Florence Benoit-Rohmer, *A propos de l’arrêt Bosphorus air lines du 30 juin 2005: l’adhésion contrainte de l’Union à la Convention [On the Judgment in Bosphorus Airlines of 30 June 2005: The EU Accession to the ECHR]*, 64 *REV. TRIM. DR. H.* 827 (2005); Enzo Cannizzaro, *Sulla responsabilità internazionale per condotte di Stati membri dell’Unione europea: in margine al caso Bosphorus [On the International Responsibility for Actions Taken by EU Member States: The Bosphorus Case]*, 88 *RIVISTA DI DIRITTO INTERNAZIONALE* 762 (2005); Christina Eckes, *Does the European Court of Human Rights Provide Protection from the European Community?—The Case of Bosphorus Airways*, 13 *EUR. PUB. L.* 47 (2007); Paul De Hert & Fisnik Korenica, *The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights*, 13 *GERMAN L. REV.* 874 (2012); Jean-Paul Jacqué, *L’arrêt Bosphorus, une jurisprudence Solange II de la Cour européenne des droits de l’homme? [The Judgment in the Bosphorus Case: A Solange II Jurisprudence for the ECHR?]*, 3 *RTDE* 749 (2005); Kathrin Kuhnert, *Bosphorus: Double Standards in European Human Rights Protection?*, 2 *UTRECHT L. REV.* 177 (2006).

<sup>79</sup> *Michaud*, 2012 VI Eur. Ct. H.R. at paras. 102–03.

This presumption can be rebutted through two hypotheses. First, a State is fully responsible under the Convention where it exercises discretion in complying with its obligations. Second, the equivalent protection does not apply if, in the circumstances of a particular case, “the protection of Convention rights was manifestly deficient.”<sup>80</sup>

Turning to *Michaud*, the Court confirmed that the protection of fundamental rights afforded by EU law is basically equivalent to the protection granted by the ECHR system, even though private individuals have limited access to the ECJ.<sup>81</sup> The Strasbourg Court then considered the question of whether France had a margin of maneuver in complying with EU law “not without relevance.”<sup>82</sup> Nonetheless, what determined the rebuttal of the presumption in the present case was the fact that the French Court refused to ask the ECJ for a preliminary ruling on the matter, and therefore limited the EU control mechanism.<sup>83</sup> As a matter of fact, in the *Ordre des Barreaux* judgment invoked by the *Conseil d’Etat*, the Luxembourg Court analyzed the compatibility of the obligation for lawyers only under the right to a fair trial, which means under the rights of the lawyer’s client. To the contrary, the complainant Michaud focused his application on his own rights, protected by Article 8 ECHR. The Court thereupon decided that the presumption did not apply. The conclusion of the Court on the non-applicability of the presumption of equivalent protection should be taken into account in the current academic debate, which is not the core of this article, on the accession of the European Union to the ECHR, particularly the exhaustion of “domestic” remedies.<sup>84</sup>

### 3. The Obligation for Lawyers to Report Suspicions as Proportionate Interference Under Article 8 ECHR

The Court then turned to the question of whether the French measure amounted to a disproportionate interference with the legal professional privilege. It started by agreeing with the *Conseil d’Etat*, which considered the “general interest served by combating money-laundering” in its judgment of 23 July 2010.<sup>85</sup> The Court then focused on the fact

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<sup>80</sup> *Id.* at para. 103.

<sup>81</sup> *Id.* at para. 108.

<sup>82</sup> *Id.* at para. 113.

<sup>83</sup> *Id.* at para. 114.

<sup>84</sup> Alessandra Giannelli, *L’adesione dell’Unione europea alla CEDU secondo il Trattato di Lisbona [The Accession of the EU to the ECHR According to the Lisbon Treaty]*, 14 IL DIRITTO DELL’UNIONE EUROPEA 645, 678 (2009); see generally, PAUL GRAGL, *THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1st ed. 2013).

<sup>85</sup> *Michaud*, 2012 VI Eur. Ct. H.R. at para. 121.

that the right under Article 8 ECHR is not inviolable, and consequently, “Its importance should be weighed against that attached by the member States to combating the laundering of the proceeds of crime, which are likely to be used to finance criminal activities linked to drug trafficking, for example, or international terrorism.”<sup>86</sup>

The judges supported this conclusion by observing that the European Directives are part of “a series of international instruments,” therefore stressing the need to combat money laundering at the international level. The Court mentions two factors in order to prove the proportionality of the national measures at issue. First, lawyers are subject to the obligation to report suspicious transactions *only* in specific circumstances related to the clients’ financial or property transactions—therefore, this obligation does not affect the essence of the lawyer’s defense role.<sup>87</sup> Second, the Court welcomed the solution envisaged by the French legislation: lawyers must communicate the suspicious transaction to the president of the Bar or to the president of the Bar council of the *Conseil d’Etat*, without directly addressing the report to Tracfin (the French FIU).<sup>88</sup> This solution contributes to safeguard the position of the lawyer in his/her relationship with the client. The European judges eventually decided by unanimity that France did not violate Article 8 ECHR.

#### D. AML as a “European” General Interest

Based on the foregoing analysis, it is clear that AML policies are considered a “general interest” which may limit—in well-defined hypotheses—EU fundamental freedoms, such as the freedom to provide services, and human rights. As far as fundamental freedoms are concerned, this consideration should not come as a surprise. The fight against crimes may be invoked by States to justify domestic measures limiting the free movements of goods, persons, services, and capital.<sup>89</sup> Interestingly, in *Jyske Bank Gibraltar*, the ECJ considered the fact that the domestic law was aimed at transposing an EU directive, which in turn constituted a transposition of international standards. This is a refreshingly innovative point. The interest in question consists in effectively fighting against money laundering on the *European* level, although the Directive must be implemented at the national level. Even the ECtHR, although mentioning the importance “attached by the member States to combating the laundering of the proceeds of crime,” referenced the fact that European directives are a transposition of a “series of international legal instruments.” Furthermore, the Strasbourg Court stressed the “threat to democracy” caused by such crimes<sup>90</sup> and the

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<sup>86</sup> *Id.* at para. 123.

<sup>87</sup> *Id.* at paras. 127–28.

<sup>88</sup> *Id.* at para. 129.

<sup>89</sup> DANIELE, *supra* note 14, at 188.

<sup>90</sup> *Michaud*, 2012 VI Eur. Ct. H.R. at para. 123.

“particular importance” of a legitimate aim—combating money laundering—in a “democratic society.”<sup>91</sup> In this regard, the ECtHR seems to consider democracy synonymous with fairness in the market, which would be jeopardized by transnational crimes.<sup>92</sup> Therefore, it is possible to argue that a “European” general interest in the fight against money laundering has emerged.

The new 4AML Directive, adopted on 20 May 2015 according to the ordinary legislative procedure,<sup>93</sup> can also be considered in this light.<sup>94</sup> As a matter of fact, in presenting the proposal for the Directive in 2013, the Commission stressed that the measures enacted to combat transnational crimes aim to:

Safeguard the interests of society from criminality and terrorist acts, [...] safeguard the economic prosperity of the European Union by ensuring an efficient business environment, [...] contribute to financial stability by protecting the soundness, proper functioning and integrity of the financial system.<sup>95</sup>

Recital 2 of the preamble to the new Directive emphasizes the limitations of a national approach to the phenomenon:

In order to facilitate their criminal activities, money launderers and financers of terrorism could try to take advantage of the freedom of capital movements and the freedom to supply financial services which the Union’s integrated financial area entails. Therefore, certain coordinating measures are necessary at Union level.

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<sup>91</sup> *Id.* at para. 131.

<sup>92</sup> We will not deal with pure economic theories on markets and democracy. *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1943); *see also* ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE (1976). These nonetheless do not take into account “supranational” entities such as the ones that have developed after the Second World War

<sup>93</sup> TFEU art. 289.

<sup>94</sup> According to the 4AML Directive, EU member states are obliged to transpose it into their national legal systems by 26 June 2017. Directive 2015/849, *supra* note 10, at art. 67.

<sup>95</sup> *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 and Terrorist Financing*, at 2, COM (2013) 45 final (May 2, 2013), available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013PC0045>.

This recital should be read together with the new recital 42, according to which “the fight against money-laundering and terrorist financing is recognized as an important public interest ground by all Member States.”<sup>96</sup> Combating money laundering is a matter of European interest, although the specific measures must be adopted at national level. Furthermore, one provision clearly takes into account the jurisprudence on the reporting obligations for lawyers. Article 14, paragraph 4 of the new 4AML Directive provides that:

Member States shall not apply the first subparagraph [customer due diligence requirements] to notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that those persons ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings.<sup>97</sup>

The solution accepted in the definitive version of the Directive most likely does not address the concerns expressed by the national bar associations,<sup>98</sup> but it is evidently in line with the position taken by EU institutions. In other words, the lawyer-client relationship cannot serve as a shield against obligations meant to battle money laundering.

A final consideration deserves attention. The outcomes achieved in less than three decades since the adoption of the 1AML Directive are important, albeit not sufficient. First, states sometimes face multiple difficulties in aligning their legislation with the EU AML Directives and, accordingly, to international standards. At the European level, states can be judged by the ECJ in the litigation phase of an infringement procedure initiated by the European Commission (Article 258 TFEU). At the international level, the FATF and

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<sup>96</sup> Directive 2015/849, *supra* note 10, at recital no. 42.

<sup>97</sup> Directive 2015/849, *supra* note 10, art. 14, para. 4; *see also id.* at art. 34, para. 2

regarding reporting obligations, “Member States shall not apply the obligations laid down in Article 33(1) to notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.”

<sup>98</sup> Consider for example the strong position taken by the national bar associations before the ECtHR in the *Michaud* case. *Michaud*, 2012 IV Eur. Ct. H.R. at para. 75.

Moneyval assess states' compliance with international standards elaborated by the FATF (the so-called recommendations).<sup>99</sup> Aware of the fact that adopting a new law does not mean to eliminate criminality, the FATF will assess the effectiveness of national legislation in the new round of mutual evaluations.<sup>100</sup> Second, economic costs that financial and legal operators must bear in their everyday activity are too often underestimated. An amendment to the provisional text of the new 4AML Directive proposed by the European Parliament seemed to address this issue:

At the same time, the objectives of protection of society from criminals and protection of the stability and integrity of the European financial system should be balanced against the need to create a regulatory environment that allows companies to grow their businesses without incurring disproportionate compliance costs. Any requirement imposed on obliged entities to fight money laundering and terrorist financing should therefore be justified and proportionate.<sup>101</sup>

The second sentence is struck in the final version of the recital, but the objective is nonetheless clear. Proportionality would mean, for example, that a unique instrument at the domestic level should be preferred to a piece-meal approach, or that operators should be able to have access to information on how to concretely apply binding provisions in a timely manner.

In sum, the fight against money laundering has permeated the European legal system and is considered a "general interest", whose effects on EU fundamental freedoms, on the one hand, and human rights enshrined in the ECHR, on the other hand, must be carefully evaluated in light of the principle of proportionality.

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<sup>99</sup> FATF-style regional body established within the Council of Europe.

<sup>100</sup> Financial Action Task Force (FATF), *Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CTF Systems*, at 4–5 (2013), <http://www.fatf-gafi.org/media/fatf/content/images/FATF%20Methodology%202022%20Feb%202013%20.pdf>.

<sup>101</sup> European Parliament Ordinary Legislative Procedure for the Legislative Resolution on the 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 and Terrorist Financing, Amendment 2, COD (2013) 25 (Mar. 11, 2014), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0191+0+DOC+XML+V0//EN>.



