

# THE EU PROJECT OF THE ‘AML PACKAGE’ – REFORM OR REVOLUTION IN THE FIELD OF COUNTERACTING OF MONEY LAUNDERING

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## ABSTRACT

The study is an original scientific article devoted to the issues of proposed changes in the EU regulations on counteracting money laundering (the so-called ‘AML package’). A significant part of the amended provisions of EU legal acts will be governed by EU Regulations and, as such, they will be directly applicable. This situation justifies the need for an in-depth analysis. On the other hand, those provisions which remain in the form of directives raise certain reservations. Therefore, the aim of this article is to analyse the nature and scope of the comprehensive amendment to the AML regulations using a formal-dogmatic method. Based on this analysis, conclusions were drawn regarding the assessment of the legitimacy and possible effectiveness of the proposed regulations in combating money laundering. The conclusion also highlights the inaccuracies and deficiencies they are burdened with, allowing for *de lege ferenda* postulates concerning the desired correction of the regulations.

Keywords: money laundering, counteracting money laundering, AML directive, AML package, AML set

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## INTRODUCTION

Money laundering is one of the most serious economic crimes, given its effects on the economy and the global scale of the phenomenon.<sup>1</sup> In Polish criminal law, it is penalised under Article 299 of the Polish Criminal Code.<sup>2</sup> Additionally, the Anti-Money Laundering and Counter Financing of Terrorism Act of 1 March 2018<sup>3</sup> is devoted to aspects related to the prevention of this practice.<sup>4</sup> The shape of this act, as well as its predecessors,<sup>5</sup> has been significantly influenced by EU regulations, which often necessitated amendments. Currently, the fundamental legal act in the EU legal system is Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015,<sup>6</sup> known as the IV or V AML Directive,<sup>7</sup> partially amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018.<sup>8</sup> However, on 20 July 2021, the European Commission presented a set of legal acts

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<sup>1</sup> It is estimated that the global economy loses about 2 to 5% of the world's GDP annually due to money laundering, i.e., approx. EUR 1.87 trillion – cf. European Union Agency for Criminal Justice Cooperation 'Eurojust', *Money laundering cases registered at Agency doubled in the last 6 years according to Eurojust's new report* of 20 October 2022, at: <https://www.eurojust.europa.eu/news/money-laundering-cases-registered-agency-doubled-last-6-years-according-eurojusts-new-report> [accessed on 7 March 2023].

<sup>2</sup> The Criminal Code of 6 June 1997 (consolidated text, Journal of Laws of 2024, item 17, as amended).

<sup>3</sup> AML/CFT Act of 1 March 2018 (consolidated text, Journal of Laws of 2023, item 1124, as amended). This act, similarly to international regulations on counteracting money laundering, covers counteracting the financing of terrorism (AML/CFT). The present study will only address issues related to counteracting money laundering, omitting the possible specificity of regulations relating to the financing of terrorism.

<sup>4</sup> Cf. Article 2(2)(14) of the AML/CFT Act of 1 March 2018, according to which money laundering is understood as 'an act specified in Article 299 of the Act of 6 June 1997 – Criminal Code'.

<sup>5</sup> AML/CFT Act of 16 November 2000 on counteracting money laundering and financing of terrorism (consolidated text Journal of Laws of 2017, item 1049, as amended).

<sup>6</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (OJ L 141, 5.6.2015, p. 73).

<sup>7</sup> Taking into account the directives issued within the EU institutional framework, it is referred to as the 4<sup>th</sup> AML Directive – cf. Koster, H., 'Towards better implementation of the European Union's anti-money laundering and countering the financing of terrorism framework', *Journal of Money Laundering Control*, 2020, Vol. 23, Issue 2, pp. 380–381. This author recognises as the subsequent AML directives (i.e., V and VI) the following acts: Directive 2018/843 of 30 May 2018 and Directive 2018/1673 of 23 October 2018 on combating money laundering by criminal law (OJ L 284, 12.11.2018, p. 22). Similarly, in the light of EU documents – cf. [https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism\\_en](https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en) [accessed on 19 April 2024]. Taking into account the Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering – 5<sup>th</sup> AML Directive – cf. Soana, G., 'Regulating cryptocurrencies checkpoints: fighting a trench war with cavalry?', *Economic Notes*, 2022, Vol. 51, Issue 1 (e12195), pp. 3–4; Golonka, A., 'Zakres podmiotowy ustawy o przeciwdziałaniu praniu pieniędzy w świetle znowelizowanych przepisów', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2020, Vol. 82, No. 3, pp. 155–168; Petit, Ch.A., 'Anti-money laundering', in: Scholten, M. (ed.), *Research Handbook on the Enforcement of EU Law*, Glos, UK, 2023, pp. 248–249.

<sup>8</sup> Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the

in the form of three regulations and two directives (the 'AML/CFT package').<sup>9</sup> The main purpose of their development was to provide a comprehensive approach to counteracting money laundering in the EU.

As emphasised many times in the literature,<sup>10</sup> Directive 2015/849, *inter alia*, due to the need to implement it into the national legal orders of EU Member States, does not provide coherent legal solutions enabling effective detection of cases of suspected introduction of illegal assets into financial circulation. This matter, involving issues related to criminal matters (justice),<sup>11</sup> in the field of cooperation between EU countries, is based mainly on Articles 82–86 of the Treaty on the Functioning of the European Union (TFEU).<sup>12</sup> These articles establish a foundation for cooperation between EU countries, primarily based on the principle of mutual recognition of judgments and judicial decisions.<sup>13</sup> Moreover, they include a policy of striving to harmonise the laws and regulations of the Member States (Article 82 TFEU). At the same time, the pursuit of the unification of legal solutions and the need to

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purpose of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156, 19.6.2018, p. 43).

<sup>9</sup> Document and change strategy available at: [https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-counteracting-financing-terrorism\\_en](https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-counteracting-financing-terrorism_en) [accessed on 19 April 2024]. Regarding the assumptions – see: Petit, Ch.A., 'Anti-money laundering...', *op. cit.*, p. 250.

<sup>10</sup> Cf. Subbagari, S., 'Counter Measures to Combat Money Laundering in the New Digital Age', *Digital Threats: Research and Practice*, 2023 (accepted on September 2023), p. 5; Çemberci, M., Başar, D., Yurtsever, Z., 'The effect of institutionalization level on the relationship of corporate governance with money laundering activity: An example of the BIST Corporate Governance Index Murat', *Borsa Istanbul Review*, 2022, Vol. 22, Issue 5, pp. 1020–1021; Tiemann, M., 'A commentary on the EU money laundering reform in light of the subsidiarity principle', *Journal of Financial Regulation and Compliance*, 2024, Vol. 32, pp. 1–3; Pavlidis, G., 'The dark side of anti-money laundering: Mitigating the unintended consequences of FATF standards', *Journal of Economic Criminology*, 2023, Vol. 2 (100040), p. 1; Petit, Ch.A., 'Anti-money laundering...', *op. cit.*, pp. 252–259.

<sup>11</sup> Police and judicial cooperation in criminal matters until 2009, i.e., until the entry into force of the Lisbon Treaty, constituted the third pillar of cooperation between EU Member States (police and judicial union) – cf. Grzelak, A., *Trzeci filar Unii Europejskiej. Instrumenty prawne*, Warszawa, 2008, pp. 50–64; Gruszczak, A., 'III filar Unii Europejskiej po Tampere: wnioski i perspektywy', *Studia Europejskie*, 2000, Vol. 15, No. 3, pp. 87–106; Banach-Gutierrez, J., *Europejski wymiar sprawiedliwości w sprawach karnych. W kierunku ponadnarodowego systemu sui generis?*, Warszawa, 2011, pp. 156–208; Grzelak, A., Kolowca, I., *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Współpraca policyjna i sądowa w sprawach karnych. Dokumenty. Tom 1*, 1<sup>st</sup> ed., Warszawa, 2009, pp. 17–20; Masło, K., 'Współpraca policyjna i sądowa w sprawach karnych w Unii Europejskiej z perspektywy członkostwa Polski w Unii Europejskiej', *Kwartalnik Prawa Publicznego*, 2011, No. 1–2, pp. 191–217.

<sup>12</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016, p. 13). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN> [accessed on 20 May 2024].

<sup>13</sup> Cf. Steinborn, S., 'Ewolucja zasad współpracy karnej na obszarze Europy', in: Grzelak, A., Królikowski, M., Sakowicz, A. (eds), *Europejskie prawo karne*, 1<sup>st</sup> ed. Warszawa, 2012, pp. 51–90; Krysztofiuk, G., 'Zasada wzajemnego uznawania orzeczeń w sprawach karnych w Traktacie Lizbońskim', *Prokuratura i Prawo*, 2011, Issue 7, p. 11; Szwarc, A.J., Długosz, J., 'Unijne instrumenty współdziałania państw w sprawach karnych', *Edukacja Prawnicza*, 2011, No. 3, pp. 31–34; Brodowski, L., 'Zasada podwójnej karalności czynu w kontekście ekstradycji', *Studia Prawnicze KUL*, 2015, No. 1, pp. 31–58.

ensure coordination of activities in the area of AML,<sup>14</sup> crucial in combating money laundering, is fully guaranteed through the direct application of EU regulations. This led to the decision to regulate many of the AML proposals in legal acts of the rank of regulation.<sup>15</sup> As provided for in Article 288 TFEU, a regulation is a legal act of general application because 'it shall be binding in its entirety and directly applicable in all Member States,' while a directive is binding only as to the result to be achieved, leaving to the national authorities the choice of forms and methods of implementing its provisions. This determined both the form taken by the legal acts that make up the 'AML package' and the inclusion of many existing legal acts in the scope of the amendments.

This state of affairs makes the issue of proposed changes to EU AML regulations important, especially considering the prospect of their direct application by Polish institutions and offices. It is therefore worth analysing their scope and attempting to assess the justification for their introduction and the expected effectiveness in combating money laundering.

#### 'AML PACKAGE' – THE ESSENCE OF THE REGULATION AND THE REASONS FOR ITS DEVELOPMENT

The proposed 'AML package', presented on 20 July 2021 by the European Commission, is intended to replace or supplement the applicable regulations. It consists of the following regulations of the European Parliament and of the Council (EU):

- on the establishment of the European Union Anti-Money Laundering and Terrorist Financing Authority, amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, and (EU) No. 1095,
- on information accompanying transfers of funds and certain crypto assets and amending Directive (EU) 2015/849, i.e., Regulation 2023/1113 of 31 May 2023,<sup>16</sup>
- on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, concerning high-risk third countries.

Due to the scope of the regulated matter, including criminal matters,<sup>17</sup> the Commission proposals – in addition to the above – also include the adoption of

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<sup>14</sup> Krzysztofiuk, G., 'Perspektywy współpracy sądowej w sprawach karnych w Unii Europejskiej', *Prokuratura i Prawo*, 2015, No. 7–8, pp. 186–205; Hofmański, P., 'Przyszłość ścigania karnego w Europie', *Europejski Przegląd Sądowy*, 2006, No. 12, pp. 4–11.

<sup>15</sup> See preamble to the Regulation on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, included in the Commission proposal (2021/0239 (COD)); recitals: 2, 3, 28, 32, Brussels, 5.12.2022, taking into account the position of the Council (EU). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0420> [accessed on 20 May 2024].

<sup>16</sup> Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849 (OJ L 150, 9.6.2023, p. 1).

<sup>17</sup> On this subject see Grzelak, A., *Trzeci filar Unii Europejskiej...*, op. cit., pp. 50–64; Grzelak, A., Kolowca, I., *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości...*, op. cit., pp. 17–20;

two directives, i.e., Directive of the European Parliament and the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (and repealing Directive (EU) 2015/849 currently in force) and the Directive of the European Parliament and the Council amending Directive 2019/1153 of the European Parliament and of the Council as regards access of competent authorities to centralised bank account registries through the single access point.<sup>18</sup>

It is worth noting that the 'AML package' was the subject of disputes and discussions both within the EU and its Member States.<sup>19</sup> On 7 December 2022, the Council of the EU presented its agreed position on the Commission proposal, and on 28 March 2023,<sup>20</sup> the proposals were approved by MEPs from the Committee on Economic and Monetary Affairs and the Committee on Civil Liberties, Justice and Home Affairs,<sup>21</sup> while raising some reservations about the proposals put forward. However, it was only on 12 and 13 February 2024 that the Council (EU) presented documents confirming that a compromise had been reached regarding two of the five legal acts making up the 'AML package'. This includes the Directive of the European Parliament and of the Council (EU) on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing,<sup>22</sup> as well as the Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ('the AML Regulation').<sup>23</sup> Their entry into force is scheduled for the twentieth day after their publication in the Official Journal, with two years for the transposition of the provisions of the 'new' AML Directive into the legal orders of EU Member States (Articles 52, 59 of this Directive) and three years for the application of the regulations (Article 65 of the AML Regulation).

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Maroń, H., 'Współpraca policyjna i sądowa w sprawach karnych wg projektu Konstytucji Europejskiej', *Państwo i Prawo*, 2007, No. 4, pp. 100–110.

<sup>18</sup> On the role and importance of the ECSB in the context of the three-system of European Supervisory Authorities (ESAs) – cf. Botopoulos, K., 'The European Supervisory Authorities: role-models or in need of re-modelling?', *ERA Forum*, 2020, Vol. 21, pp. 178–180.

<sup>19</sup> *Sprawozdanie Generalnego Inspektora Informacji Finansowej z realizacji ustawy z dnia 1 marca 2018 r. o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu w 2021 roku*, Warszawa, March 2022. The document can be downloaded at: <https://www.gov.pl/web/finanse/sprawozdania-roczne-z-dzialalnosci-generalnego-inspektora-informacji-finansowej> [accessed on 23 April 2024].

<sup>20</sup> Cf. <https://www.consilium.europa.eu/en/press/press-releases/2022/12/07/anti-money-laundering-council-agrees-its-position-on-a-strengthened-rulebook/> [accessed on 23 April 2024].

<sup>21</sup> Cf. <https://www.europarl.europa.eu/news/en/press-room/20230327IPR78511/new-eu-measures-against-money-laundering-and-terrorist-financing> [accessed on 23 April 2024].

<sup>22</sup> This directive is also intended to replace the currently applicable Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015, called 'the 5<sup>th</sup> AML Directive' (OJ L 141, 5.6.2015, p. 73). Document containing 'confirmation of the final compromise text with a view to agreement' on the draft new AML directive available at: <https://data.consilium.europa.eu/doc/document/ST-6223-2024-INIT/en/pdf> [accessed on 18 April 2024].

<sup>23</sup> Document confirming the final compromise text with a view of agreement on the Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AML Regulation) available at: <https://data.consilium.europa.eu/doc/document/ST-6220-2024-REV-1/en/pdf> [accessed on 18 April 2024].

They are to replace or supplement the applicable EU AML regulations, constituting the main weapon in the fight against money laundering. In turn the regulation on information accompanying transfers of funds and certain crypto assets (constituting a recast of and replacing Regulation 2015/847)<sup>24</sup> has entered into force, and will apply from 30 December 2024 (Article 40 of Regulation 2023/1113).<sup>25</sup> However, the date of entry into force of the Regulation establishing a supranational anti-money laundering authority, the Anti-Money Laundering Authority (hereinafter 'AMLA'), is not specified. Originally scheduled for 1 January 2024 (Articles 92, 93 of the AMLA Regulation), it is now indicated that this will probably take place in 2026.<sup>26</sup> There is still no compromise as to the competencies of this body. Under the agreement concluded on 22 February 2024 between the European Parliament and the Council, it was only specified that the headquarters of AMLA would be in Frankfurt.<sup>27</sup>

Nevertheless, the legal acts that make up the 'AML package' allow us to determine the direction chosen by the EU institutions, which, in light of the referred legal acts, is intended to ensure effective cooperation among EU Member States in counteracting money laundering. Therefore, the priority objectives of the common policy of EU Member States in this area are:

- ensuring the direct application of AML regulations adopted at the EU level;
- improving the exchange of information and coordinating activities in counteracting the phenomenon;
- establishing an EU body responsible for supervising the activities of financial intelligence units of the Member States in counteracting money laundering; the Authority for Counteracting Money Laundering of the European Union;
- establishing a mechanism to support and improve cooperation for Financial Intelligence Units (FIUs);<sup>28</sup>
- ensuring that cases of money laundering are effectively combated, including by enforcing criminal laws in the Member States.

To achieve these goals, specific solutions are to be developed, with particular attention and analysis given to those that will introduce significant changes to the legal order in force in our country, especially since the regulated matter falls within the scope of EU Regulation).

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<sup>24</sup> Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds (OJ L 141, 5.6.2015, p. 1, and OJ L 334, 27.12.2019, p. 1).

<sup>25</sup> The text of Regulation 2015/847 as amended by the proposals presented by the European Commission on 20 July 2021, in a consolidated version, available at: <https://www.consilium.europa.eu/en/press/press-releases/2023/05/16/anti-money-laundering-council-adopts-rules-which-will-make-crypto-asset-transfers-traceable/> [accessed on 20 April 2024].

<sup>26</sup> Pavlidis, G., 'The birth of the new anti-money laundering authority: harnessing the power of EU-wide supervision', *Journal of Financial Crime*, 2023, Vol. 31(2), p. 323.

<sup>27</sup> See: *Commission welcomes the selection of Frankfurt as the seat for the Authority for Anti-Money Laundering and Countering the Financing of Terrorism*, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_972](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_972) [accessed on 20 April 2024].

<sup>28</sup> In Poland, such a unit is the General Inspector of Financial Information (Generalny Inspektor Informacji Finansowej – GIIF).

## ANALYSIS OF CHANGES AND BASIC SOLUTIONS PROVIDED IN THE 'AML PACKAGE'

The analysis of the proposed changes should begin with a discussion of issues related to the Anti-Money Laundering Authority (AMLA), particularly its duties and powers. According to the regulation establishing the AMLA, its basic tasks include the preparation of draft 'regulatory standards' and draft 'technical standards'. The former defines the minimum requirements for AML procedures based on established situations and detected cases of money laundering (Article 38 of the AMLA Regulation). The technical standards include indications of additional measures to be taken against third countries if their legal systems do not meet basic AML requirements, e.g., due to restrictions on the ability to access, process, or exchange information due to insufficient data protection or banking secrecy, (Article 16 of the AMLA Regulation). This Authority will also be empowered to issue guidelines for Financial Intelligence Units (FIUs) of EU Member States regarding the assessment of the level of risk related to politically exposed persons and their family members, which is important given the lack of a uniform approach to these issues in EU Member States (Article 7(5) of the AMLA Regulation). The development of a uniform template to report suspicious transactions will also be centralised (Article 50(5) of the AMLA Regulation). This will be based on the powers granted to AMLA to identify risk areas based on information from the monitoring of transactions and economic relations (taking into account the need to ensure that the intensity of monitoring business relations and transactions is adequate and proportionate to the level of risk) (Article 21, Article 55(5) of the AMLA Regulation). However, this Authority was established to improve the exchange of information and cooperation between FIUs.<sup>29</sup> As a result, it was granted powers related to supporting and coordinating the activities of these units,<sup>30</sup> including those related to the development of joint analyses based on suspicious transaction reports and suspicious activity reports with a significant cross-border footprint by obliged entities in EU Member States. AMLA also provides stable hosting of the FIU.net platform as a secure information exchange system in the field of AML (Articles 33–37 of the AMLA Regulation). This Authority will also supervise, to some extent, the activities of the FIUs (Articles 31–32 of the AMLA Regulation).<sup>31</sup> More importantly, however, it will also obtain the status of an authority exercising direct supervision over certain obliged entities, including the possibility of imposing pecuniary sanctions on them (Articles 20–25 of the AMLA Regulation).<sup>32</sup>

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<sup>29</sup> Siena, F.A., 'The European anti-money laundering framework – At a turning point? The role of financial intelligence units', *New Journal of European Criminal Law*, 2022, Vol. 13, Issue 2, pp. 216–221, and about cooperation options – Allegrezza, S., *The proposed Anti-Money Laundering Authority, FIU cooperation, powers and exchanges of information- a critical assessment*, IPOL-Study, Luxembourg, 2022, pp. 35–40.

<sup>30</sup> Pavlidis, G., 'The birth of the new...', *op. cit.*, pp. 323–326.

<sup>31</sup> Critically on this topic – see Allegrezza, S., *The proposed Anti-Money...*, *op. cit.*, pp. 21–34; negatively about limiting the role of national FIUs – cf. Siena, F.A., 'The European anti-money...', *op. cit.*, pp. 220–245.

<sup>32</sup> Allegrezza, S., *The proposed Anti-Money...*, *op. cit.*, pp. 21–29.

In turn, the new regulation on the transfer of funds and certain crypto-assets<sup>33</sup> does not introduce any significant changes to the existing EU legal order.<sup>34</sup> A certain novelty is the changes regarding entities subject to AML obligations, as well as the update resulting mainly from the standards set by the FATF in the field of services and tools used in trading crypto assets.<sup>35</sup> In accordance with the above-mentioned Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023, entities referred to as VASPs (Virtual Asset Service Providers), are required to obtain, store, and transfer information about the transaction initiator and its recipient, the so-called real beneficiary (Articles 14(2), 16–18). Such transactions typically involve the exchange of cryptocurrencies or other virtual assets for fiat currencies or the exchange of virtual assets for other virtual assets (which is most commonly used for money laundering and will be properly described). Additionally, VASPs also conduct activities related to the transfer of virtual assets, provide financial services related to the issue and sale of virtual assets (tokens), and deal with the storage and administration of virtual assets (VAs) or instruments enabling control over them.<sup>36</sup> In this area, the EU regulation *expressis verbis* refers to the standards developed by the Financial Action Task Force (FATF). Their implementation in EU law was ensured by specifying and extending the scope of information obligations imposed on VASPs. For example, ‘third party funding intermediaries’ that operate a digital platform to match or facilitate the matching of funders with project owners, such as associations or applicants for funding, as well as unlicensed social finance platforms under Regulation (EU) 2020/1503, are covered. Legal solutions are also provided to facilitate remote customer due diligence, regulated in Regulation (EU)

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<sup>33</sup> Regarding the definition of ‘crypto-asset’ – cf. Article 3(5) of Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-asset markets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150, 9.6.2023, p. 40), where it is indicated that: ‘crypto-asset means a digital representation of a value or right that is able to be transferred and stored electronically using distributed ledger technology or similar technology.’ The current Directive 2015/849 defines virtual currencies as: ‘digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically.’ In turn, a ‘custodian wallet provider’ means ‘an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies’ (Article 3(18)). The AML/CFT Act of 1 March 2018 provides a similar definition of virtual currency in Article 2(2)(26). On the criticism of the definition – Opitek, P., ‘Przeciwdziałanie praniu pieniędzy z wykorzystaniem walut wirtualnych w świetle krajowych i międzynarodowych regulacji AML’, *Prokuratura i Prawo*, 2020, No. 12, p. 49.

<sup>34</sup> On the VA regulations in the 5<sup>th</sup> AML Directive (i.e., Directive 2015/849): Behan, A., *Waluty wirtualne jako przedmiot przestępstwa*, Kraków, 2022, pp. 392–421.

<sup>35</sup> Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets (recast), COM(2021) 422 final. Document 52021PC0422.

<sup>36</sup> IEWG, *FIU-FinTech Cooperation and Associated Cybercrime Typologies and Risks*, Ottawa, July 2022, p. 4.



No 910/2014 of the European Parliament and of the Council and covered by the proposal to amend it with the European digital identity framework.<sup>37</sup>

From the perspective of preventing money laundering, the actions of EU institutions against countries classified as high-risk are also of particular importance. The list of such countries is periodically updated,<sup>38</sup> and the Commission recently presented another list.<sup>39</sup> Conducting transactions or establishing economic relations with such countries requires the obliged entities of an EU Member State (in Poland, referred to as the 'Obligated Institutions'<sup>40</sup>) to take enhanced due diligence measures (Article 9 of Directive 2015/849). The currently applied enhanced due diligence measures include the obligation to obtain additional information on the client and the beneficial owner, the intended nature of business relationships, the source of the assets being the subject of these business relationships or transactions, as well as information on the reasons and circumstances of the transaction.<sup>41</sup> These measures also require the establishment of business relationships with senior management. They are also subject to increased monitoring by increasing the number and frequency of related activities, as stipulated in Articles 43 and 44 of the AML Act.<sup>42</sup>

However, under the assumptions of the new EU AML policy, the approach to transactions with such countries will change.<sup>43</sup> First of all, in accordance with

<sup>37</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73) and Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing framework for a European Digital Identity, COM(2021) 281 final.

<sup>38</sup> In 2019, the Council unanimously decided to reject the list of *the 23 High-Risk Third Countries* proposed by the Commission, stating in the justification for its decision that '(...) it cannot support the current proposal that was not established in a transparent and resilient process that actively incentivises affected countries to take decisive action while also respecting their right to be heard.' Cf. Communication: Money laundering and terrorist financing: Council returns draft list of high risk countries to the Commission (press release of 7 March 2019), available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/03/07/money-laundering-and-terrorist-financing-council-returns-draft-list-of-high-risk-countries-to-the-commission/> as well as: the amended methodology for identifying high-risk third countries (European Commission): [https://ec.europa.eu/info/files/200507-anti-money-laundering-terrorism-financing-action-plan-methodology\\_en](https://ec.europa.eu/info/files/200507-anti-money-laundering-terrorism-financing-action-plan-methodology_en); and the list of countries presenting strategic deficiencies in their regimes on anti-money laundering and countering terrorist financing (Official Journal): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32020R0855> [accessed on 18 February 2023].

<sup>39</sup> Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Anti-money laundering: the Commission updates its list of high-risk third-country jurisdictions to strengthen the international fight against the financial crime*, of 20 December 2022, available at: [https://finance.ec.europa.eu/news/anti-money-laundering-commission-updates-its-list-high-risk-third-country-jurisdictions-strengthen-2022-12-20\\_en](https://finance.ec.europa.eu/news/anti-money-laundering-commission-updates-its-list-high-risk-third-country-jurisdictions-strengthen-2022-12-20_en) [accessed on 18 February 2023].

<sup>40</sup> Cf. Article 2(1) of the AML/CFT Act of 1 March 2018.

<sup>41</sup> In Poland, under Article 43(2)(12) and Article 44 of the Act on Counteracting Money Laundering and Terrorist Financing.

<sup>42</sup> Article 44 of the AML/CFT Act. For more details – cf. Obczyński, R., in: Kapica, W. (ed.), *Przeciwdziałanie praniu pieniędzy oraz finansowaniu terroryzmu. Komentarz*, Warszawa, 2020, pp. 151–159. The introduction of these provisions is an expression of the implementation of Article 18a and 19 of the Directive (EU) 2015/849.

<sup>43</sup> Section 2, Articles 23–26 of the AML/CFT Regulation (*Third-country policy and ML/TF threats from outside the Union*).

Articles 23–25 of the draft Regulation on counteracting the use of the financial system for the purpose of money laundering or terrorist financing (‘the AML Regulation’), high-risk third countries, third countries showing compliance deficiencies, and countries that pose a specific and serious risk to the EU financial system will be subject to intensified monitoring. It should be recalled (since it is stated *expressis verbis* by the binding EU act) that countries not included in the Commission list as high-risk countries: ‘should not be automatically considered to have effective AML/CFT systems’.<sup>44</sup> Nevertheless, in light of the AML Regulation, apart from its direct application, the very idea of approaching third countries will change. Classifications will be introduced, forming the basis for the application of differentiated due diligence measures proportionate to the risk these countries pose to the EU financial system. At this point, it seems indispensable to refer to the lists of countries developed by the FATF,<sup>45</sup> since the Commission also did so when preparing the draft regulation.<sup>46</sup> The draft AML Regulation also clearly indicates that the EU will rely on these lists in its work when introducing rules for conducting transactions with third countries (recitals 50 and 51 of the AML Regulation). Therefore, referring to the division adopted by the FATF it is necessary to distinguish countries whose jurisdictions pose a high risk of money laundering from those that show a higher risk in this respect.<sup>47</sup> In addition, a third category is included in the form of countries posing a specific and serious threat to the EU financial system (recital 52 of the Regulation). Consequently the due diligence measures applied to them will also be differentiated. Those third countries that are ‘blacklisted’ by the FATF will, in principle, be subject to all enhanced due diligence measures and additional due diligence measures (countermeasures, Article 29) that are appropriate for the country (Article 23(3) and (4)). On the other hand, those that the FATF has placed on the ‘grey list’ will be subject to enhanced measures appropriate to the risk of ‘laundering’ posed by a given third country (Article 24). In cases where the obliged entity (its branch or subsidiary) is in a third country where the basic AML requirements are less stringent than those set out in EU regulations (e.g., due to banking/professional secrecy; data protection and the level of this protection), requirements are introduced in this entity by EU AML regulations. If this is not possible (due to the restrictive provisions of a third country), it develops additional security measures for this entity (its branch or subsidiary). The draft technical standards will be developed by AMLA (Article 26). There is also a ban on using the services of outsourcing companies based in high-risk countries (Article 40(1)). It is also worth noting that this rigour in risk assessment applies to other countries which, in the opinion of the FATF, do not deserve to be included in the relevant list; however, in the opinion of the Commission, transactions and economic relations with them should be treated

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<sup>44</sup> Recital 29 of the Directive 2015/849; similarly, recitals 52 and 53 of the AML Regulation.

<sup>45</sup> The organisation publishes two lists three times a year: a ‘black list’ covering high-risk jurisdictions, the so-called countries called upon to introduce legal changes, and the ‘grey’ list, which includes countries that are ‘under increased monitoring’.

<sup>46</sup> Explanatory memorandum to the AML Regulation (COM(2021) 420 final).

<sup>47</sup> Current lists available at: <https://www.fatf-gafi.org/en/countries/black-and-grey-lists.html> [accessed on 24 February 2023].

with the application of enhanced due diligence measures equal to those for high-risk countries (Article 25). Including these regulations under the principle of direct application will avoid difficulties arising from the transposition of provisions into the national legal orders of the Member States, but it will not eliminate them. There is a specific exception in the form of abandoning the 'maximum harmonisation approach' because, as clearly stated in the Regulation: 'it is incompatible with the basic risk-based approach'.<sup>48</sup> A further consequence is that Member States are free to introduce provisions that go beyond those set out in the AML Regulation in areas that relate to the specific nature of national risk. It may be questioned whether such an approach will actually contribute to the development of harmonious solutions and will not affect the implementation of AML regulations in practice.

On this occasion, it is also appropriate to point out that, given the status quo, the transposition of the applicable provisions (i.e., Directive 2015/849) into Polish law is not sufficient. As pointed out by the Commission, national law does not regulate issues related to the risks arising from the use of anonymous prepaid cards issued in high-risk third countries.<sup>49</sup> The current regulations impose only an obligation on card organisations to enable confirmation of whether an anonymous prepaid payment card issued in a third country meets the conditions justifying a waiver of the basic due diligence measures.<sup>50</sup>

It also seems important to note that the AML Regulation departs from the 'ineffective' (according to the Commission) obligation to register transactions of people who trade goods and make or accept cash payments of at least EUR 10,000. The reason for the change, as indicated in the justification for the Regulation, was the non-application of this provision in practice, resulting from... 'its poor understanding'.<sup>51</sup> Instead, a ban on cash transactions over EUR 10,000 was introduced for persons trading in goods or providing services (Article 59(1)). The obligation imposed on obliged entities to register transactions worth at least EUR 10,000 or the equivalent of this amount in the national currency has also been maintained. Cash transactions above EUR 10,000 are still allowed if they are payments between natural persons who 'are not acting in a professional function' or payments or deposits made on the

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<sup>48</sup> See explanatory memorandum to the AML Regulation (COM(2021) 420 final): 'However, the present proposal does not adopt a maximum harmonization approach, as being incompatible with the fundamental risk-based nature of the EU's AML regime. In areas where specific national risks justify it, Member States remain free to introduce rules going beyond those laid out in the present proposal.' Surveys showing difficulties with assessment under the RBA (Risk-based approach) – cf. Ogbeide, H., Thomson, M.E. et al., 'The anti-money laundering risk assessment: A probabilistic approach', *Journal of Business Research*, 2023, Vol. 162 (113820), pp. 4–14.

<sup>49</sup> Cf. Bujalski, R., *Komisja wytyka Polsce naruszenia prawa UE. 12 razy, 17 June 2021*, article available at: <https://www.lex.pl/prawo-ue-a-prawo-krajowe-sprawy-komisji-przeciwko-polsce,16535.html> [accessed on 21 April 2024].

<sup>50</sup> Under Article 2(19b) of the Act of 19 August 2011 on Payment Services, a card organisation is an entity (including an authority or organisation and an entity referred to in Article 2(16) of Regulation (EU) 2015/751), defining the rules for the functioning of a payment card system and responsible for making decisions regarding the functioning of the payment card system (consolidated text, *Journal of Laws of 2022*, item 2360, as amended).

<sup>51</sup> *Ibidem* ('Such an approach has shown to be ineffective in light of the poor understanding and application of AML requirements, lack of supervision, and the limited number of suspicious transactions reported to the FIU').

premises of credit institutions (although in this case, the institution reports this fact to the FIU and the amount exceeding the indicated limit) (Article 59(4)).

It is also worth pointing out that in March 2023, Members of the European Parliament presented an even more restrictive proposal. In line with that proposal, the cash transaction limit would be EUR 7,000 in cases when it would be impossible to identify the customer.<sup>52</sup> In addition, the European Parliament wants to ban citizenship under the investment programme – the so-called ‘golden passport’, that is, EU citizenship obtained in exchange for investments in an EU country, and introduce restrictive rules to control stay in an EU country under the investment programme – the so-called ‘golden visa’.<sup>53</sup> This issue was also the subject of the debate<sup>54</sup> that took place while preparing the final (i.e., compromise) version of the AML documents.

The version of the AML Regulation of 13 February 2024 takes into account additional threats related to money laundering, including those posed by financial mixed activity holding companies (Article 3(la) of the AML Regulation), defined in Article 2(6a), similarly in relation to agents and football clubs referred to in Article 3(lb) and (lc) (except as provided for in Article 4a of the AML Regulation). In addition, definitions were introduced, including non-financial holding companies with mixed activities (Article 2(8a)), crypto-assets service providers (Article 2(6a)), crowdfunding service providers (Article 2(14b)), virtual IBAN (Article 2(20c)), basic information on legal persons (Article 2(23a)(a) and (b)), and the definition of persons in exposed positions was extended (Article 2(26)(ca)), also including persons performing ‘eminent public functions, heads of regional and local authorities, including groupings of municipalities and metropolitan regions with at least 50,000 inhabitants’ (Article 2(25)(iii) and (via)). The purchase of luxury vehicles (motorcycles, boats; – Article 48(1)(ba); Article 54(1)(a)) was also considered particularly susceptible to ‘laundering’. Exceptions have been allowed for obligations related to the identification of persons or registration of transactions for, among others, professionals who act in the exercise of the right to defend themselves or determine the client’s legal situation, except existing representatives of legal professions (Article 16a(4)) or certain transactions, e.g. electronic (Article 15(3b)). The regulation *expressis verbis* requires taking into account those criminal solutions in force in EU Member States that, having regard to the provisions of Directives 2015/849 and 2018/1673, ‘have adopted a broader approach to the definition of criminal activities constituting predicate offences in relation to money laundering’ (recital 5a).

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<sup>52</sup> Cf. <https://www.europarl.europa.eu/news/en/press-room/20230327IPR78511/new-eu-measures-against-money-laundering-and-terrorist-financing> [accessed on 25 April 2024].

<sup>53</sup> *Ibidem*.

<sup>54</sup> Directive of the European Parliament and of the Council on prevention of the use of the financial system for the purposes of money laundering or terrorist financing – cf. Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849, C(2021) 423 final. Document 52021PC0423.

The regulation also stipulates that when the regulation refers to investigative bodies, it includes the European Public Prosecutor's Office (EPPO), and clearly states the need to comply with the provisions of the GDPR (Regulation 2016/679).<sup>55</sup>

In turn, the AML Directive, which is to replace Directive 2015/849, covers only regulations regarding: the application of national measures in sectors exposed to money laundering and terrorist financing by Member States (including maintaining the obligation to prepare a national risk assessment once every four years – Article 8(1)). National measures applied in sectors particularly 'vulnerable' to money laundering involve the imposition of AML obligations on institutions or persons other than the obliged entities, according to the results of the national risk assessment carried out by a given Member State and after submitting information on this matter to the Commission (Article 3). Member States may, but are not required to, take advantage of such a possibility, which would in fact mean a broader authorisation to apply the AML Regulation in a wider (subjective) scope.

The 'new' directive, in its originally drafted version, also established public access to information contained in the registers of beneficial owners to all persons who demonstrate a relevant legal interest (Article 12). Refusal to provide information contained in the register was to be possible only if its disclosure would jeopardise the actual beneficiary 'to a disproportionate risk of fraud, abduction, blackmail, extortion, harassment, violence, or intimidation' or when the beneficial owner is a minor or a person deprived of full capacity to legal actions. In exceptional cases, preceded by a thorough analysis of a given case, it will be possible to refuse to provide information on part or all data collected in the register of beneficiaries also in other 'individual cases' (Article 13).

In the compromise text of the 6<sup>th</sup> AML Directive, the need to ensure access to the Central Register of Beneficiaries is still strongly emphasised. These issues received a lot of attention during discussions on developing the final version of the new AML directive. The reason for this is, on the one hand, the need to effectively detect money laundering cases, made possible by the relevant authorities obtaining information about both parties to a suspicious financial transaction,<sup>56</sup> and, on the other hand, the right to data protection and respect of the parties to the transaction, guaranteed in particular by the provisions contained in the Charter of the Fundamental Rights of the EU and the provisions of the Regulation on the protection of natural persons with regard to the processing of personal data (GDPR).<sup>57</sup> As indicated in the literature, an open register and open access to data, in particular regarding entrepreneurs, constitutes a violation of the rights arising

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<sup>55</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>56</sup> Masciadaro D., 'Financial supervisory unification and financial intelligence units', *Journal of Money Laundering Control*, 2005, Vol. 8, No. 4, pp. 354–370; Al-Rashdan, M., 'An analytical study of the financial intelligence units' enforcement mechanisms', *Journal of Money Laundering Control*, 2012, Vol. 15, No. 4, pp. 483–495.

<sup>57</sup> Goździaszek, Ł., 'Dostęp do danych z Krajowego Rejestru Sądowego na potrzeby analiz branżowych', *Przegląd Prawa Handlowego*, 2024, No. 2, p. 40.

from EU regulations, in particular the EU Charter of Fundamental Rights and the GDPR. The judgment of the Court of Justice of the EU of 22 November 2022 is also important in this respect.<sup>58</sup> In this judgment, the Court of Justice of the EU declared invalid the provisions of Directive 2015/849 AML allowing public access to data contained in the Central Registers of Information on Beneficial Owners (hereafter 'CRB'). As a result of the entry into force of the above-mentioned judgment of the Court of Justice, the previously applicable rules of access to the CRB were restored (Article 30(5)(1)(c)), which is also important in the context of national regulations in force in the EU Member States.<sup>59</sup> However, as a result of the consensus reached, the wording of the AML Directive of 12 February 2024 decided, among other things, on the need to demonstrate a legal interest by entities requesting access to information contained in the CRB (Article 12(1)) and the rules for making it available are specified (Articles 12a and 12b). This applies to ensuring the possibility of obtaining data from the CRB, in particular for non-governmental organisations, institutions operating in third countries, and journalists (Article 12(2)). In the above-mentioned judgment, the Court of Justice of the European Union emphasised that information containing data collected in the CRB should be 'limited to what is strictly necessary'.<sup>60</sup> Therefore, during the work on the compromise text of the 'new' AML directive, the need to harmonise EU regulations regarding the 'legal interest' on which access to data in the CRB depends (recital 30) was emphasised.

The right of access to the data collected in this register will, of course, be provided to state and EU authorities (including AMLA and EPPO) responsible for counteracting money laundering or prosecuting crimes and obliged entities operating in EU Member States (Article 11(2)).

The proposed AML Directive, therefore, establishes for the FIU and 'other competent authorities' the right to access to information enabling the timely identification of any natural or legal person owning real estate (Registry of Real Estate, Article 16). Significant changes included in the 'new' AML Directive also refer to the principles of cooperation between EU institutions, entities, and organisations in the field of counteracting money laundering (Articles 45–52). With regard to international cooperation, the obligations and powers related to the provision of information by national supervisory authorities, including those concerning beneficial owners, have been clarified (Article 45(2) of the Directive). An assurance has also been introduced that AML requests between EU Member

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<sup>58</sup> Judgment of the Court (Grand Chamber) of 22 November 2022, C-37/20 and C-601/20, *WM and Sovim SA v. Luxembourg Business Registers*, ECLI:EU:C:2022:912. In its justification, the Court of Justice noted that Article 30(5), first subparagraph, point (c) of Directive 2015/849: 'constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, whatever the subsequent use of the information communicated.'

<sup>59</sup> With regard to Article 67 of the AML Act of 1 March 2018, providing for the transparency of the CRB and the effect of the judgment of the Court of Justice of the European Union of 22 November 2022 – see Sawczuk M., 'Komentarz do ustawy o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu', in: Mikos-Sitek, A., Nowak-Far, A., Zapadka, P. (eds), *Prawo obrotu pieniężnego. Komentarz*, Warszawa, 2023, LEX document, Article 67.

<sup>60</sup> Justification of the judgment of the CJEU of 22 November 2022, in joined cases C-37/20 and C-601/20.

States will not be refused solely on the basis that the proposal also addresses tax issues; the information is covered by professional secrecy (excluding cases where the requested information is protected by attorneys' or legal advisors' secrecy to the appropriate extent); an investigation or proceeding is being conducted in the requested member state, unless assistance would jeopardise its conduct; the nature or status of the requesting competent authority is different from the nature or status of the requested counterpart competent authority (Article 45(3) of the Directive). Naturally, the new regulations also provide for the addition of references to the AMLA and the obligation for other authorities to cooperate with this Authority (including informing the AMLA of all administrative penalties and measures imposed, Article 44; providing it with information on the authorities responsible for supervising compliance with AML regulations, Article 46; and providing it with any information that the FIU needs, Article 47 of the Directive). It also provides for the need to ensure security in the exchange of information, which will be based on the use of the information exchange system, the so-called 'FIU.net'. This system will be managed by AMLA, providing its hosting. Protected communication channels will be used to exchange information between the FIUs of EU Member States and their counterparts in third countries, as well as with other EU bodies and agencies (Article 23 of the Directive). At the same time, emphasis was placed on ensuring mutual cooperation between the FIUs of the EU Member States (on their own initiative or upon request), including, providing any information that may be relevant to the processing or analysis of information by the FIU in relation to suspected money laundering (Article 24 of the Directive). In addition, provisions have been introduced relating to cooperation with authorities responsible for the supervision of credit institutions to ensure compliance with the Payment Accounts Directive and the Payment Services Directive (Article 48). The changes also cover implementing regulations, including the format for submitting information on beneficial owners to registers. Provisions are also provided for cases in which there are doubts about the information on beneficial owners or it is impossible to identify them at all. A kind of complement to the aforementioned directive is the second directive, which makes up the AML/CFT 'package' the scope of which includes access by competent authorities to centralised bank account registers through a single access point (amending Directive 2019/1153 of the European Parliament and of the Council).

In addition to the aforementioned changes, it is also worth noting the unification and tightening of the rules for imposing penalties (more precisely: pecuniary sanctions) and administrative measures. Principles and conditions for imposing penalties were defined, as well as the maximum amount of the fine. It will be 'at least twice the amount of the benefit derived from the breach where that benefit can be determined, or at least EUR 1 000 000' (Article 40(2)).<sup>61</sup> Finally, the novelty

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<sup>61</sup> The version of 12 February 2024 also includes a provision stating that: 'Member States shall ensure that, when determining the amount of the pecuniary sanction, the ability of the entity to pay the sanction is taken into account and that, where the pecuniary sanction may affect compliance with prudential regulation, supervisors consult the authorities competent to supervise compliance by the obliged entities with relevant Union acts' (Article 40(5) of that version).

provided for in the aforementioned AML Directive is the introduction of the so-called College of Anti-Money Laundering Supervisors, meaning a 'permanent structure for cooperation and exchange of information for the supervision of a group or entity with cross-border activities' (defined in Article 2(6)). On the other hand, under Article 2(7) an entity that conducts cross-border activity will be 'an entity with at least one establishment in another member state or in a third country'. It is worth noting that the version of this document presented on 12 February 2024 provides for solutions regarding control over non-financial sector institutions and introduces a definition of the entity exercising such control (Article 2(1a) and (1b); Article 36a). Furthermore, the information provided includes data from virtual bank accounts (virtual IBANs, Article 14 of the AML Directive), and the FIU is obliged to appoint a Fundamental Rights Officer, who may be a member of the existing staff operating in the organisational structures of a national unit established to counteract money laundering (Article 17a).

## CONCLUSION

To recapitulate, by ensuring comprehensive normalisation, the set of established AML regulations is intended to create pillars of cooperation between EU Member States in the field of counteracting money laundering. The actions taken by EU institutions to harmonise AML regulations across EU Member States should be positively assessed. Therefore, the Commission legislative initiative covering a set of AML/CFT regulations should be considered worthy of support. Similarly, acceptance, in principle, should refer to the change in the nature of regulations and the inclusion of the matter related to the discussed phenomenon in adequate regulations. However, some reservations can be raised in this regard.

First of all, the EU AML 'package' is in a way 'incomplete', as it lacks a separate regulation (directive) on the rules, procedures, and scope of applying penal measures (i.e., equivalent to Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law). Although this directive will not lose its force with the entry into force of the legal acts that make up the EU AML set (in the case of directives – their transposition into national legal systems), this directive (and even more precisely, its scope of matter) ought to be included in the mentioned 'package'.

The analysis of the changes proposed by the European Commission encourages reflection on both the very scope of individual regulations that make up this set and certain provisions contained therein.

In the first respect, it would be justified to consider a kind of remodelling in relation to the 'package' of AML. After including some issues currently regulated in Directive 2015/849 within the scope of the AML Regulation, and others in the 'new' AML Directive, a kind of normative chaos will arise. As a result, the provisions laying down the obligations for obliged entities, specifying the rules of cooperation of these entities with the FIUs and AMLA, and other regulations of an administrative nature were laid down in various legal acts, although many of these standards could



successfully become the subject of one or a maximum of two EU regulations. Thus, the provisions regarding, for example, the mode of appointment, scope of activity, etc., of the central unit (according to the draft AMLA), its cooperation with the FIUs of the EU Member States, the rules for collecting, sharing or widely-exchanging information at the international level should be regulated in a separate legal act having the status of a regulation. However, the scope of the AML Directive should *de facto* cover issues that fall within the competence of EU Member States, such as regarding penalties, forfeiture of property or proceeds from the crime of money laundering, confiscation; provisions related to jurisdiction (with the need to take due account of the jurisdiction in cases of this crime of 'laundering' committed in cyberspace); rules and procedures in cases of suspected money laundering – in terms of cooperation between EU Member States, etc. In other words, the 'new' AML Directive should cover the regulatory scope in the current legal status which is the subject of the provisions of Directive 2018/1673.

Moreover, referring to the regulation establishing the EU Authority for Anti-Money Laundering, the very idea of coordinating activities at the EU level should be considered worthy of support.<sup>62</sup> The need to establish such a supranational unit at the EU level that would coordinate the activities of FIUs of Member States has already been noted in the literature.<sup>63</sup> However, the analysis of the tasks entrusted to AMLA raises some objections and justifies the *de lege ferenda* postulate. It should be noted that the powers granted to AMLA largely consist of developing regulatory and technical standards (based on data provided by the FIUs of the Member States) and the coordination of FIU activities. This raises doubts related to the legitimacy (necessity) of creating a 'central unit' in the form of a separate AML Authority. Taking into account modern technological possibilities, in my opinion, it would be better to strive to develop algorithms that would improve cooperation between the FIUs of the EU Member States, instead of creating a separate institution. More precisely, a solution can be proposed that would use an information exchange system based on artificial intelligence. Properly developed, it would allow for both ongoing monitoring of money laundering threats to the EU financial system and enable coordination of the activities of national Financial Intelligence Units, supporting them, and setting directions for their activities tailored to current needs. At the same time, the solution in which AMLA was granted competencies to exercise direct supervision over the obliged entities of the EU Member States should be considered

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<sup>62</sup> The literature has often emphasised the negative effects of the lack of unified norms and standards in the area of AML regarding the activities of national FIUs. It was most often reported that difficulties with early detection of suspicious transactions or implementation of actions at the transnational level result from, among others, from: lack of possibility or knowledge allowing to distinguish the origin of property values from legal or illegal sources in the era of modern technologies – cf. Ogbeide, H., Thomson, M.E. et al., 'The anti-money laundering risk...', op. cit., pp. 1-3; Tiwaria, M., Ferrill, J. et al., 'Factors influencing the choice of technique to launder funds: The APPT framework', *Journal of Economic Criminology*, 2023, Vol. 1 (e1100006), p. 6; underfinancing of FIUs and the AML system – cf. Bolgoriana, M., Mayelib, A., Ronizic, N.G., 'CEO compensation and money laundering risk', *Journal of Economic Criminology*, 2023, Vol. 1 (e1100007), pp. 1-6, or language difficulties (translations of documents, i.e., audit reports) – cf. Koster, H., 'Towards better implementation...', op. cit., pp. 382-383.

<sup>63</sup> Pavlidis, G., 'The birth of the new...', op. cit., pp. 323-324.

too far-reaching. Despite full support for the coordination and improvement and acceleration of FIUs cooperation at the EU level, the change consisting of granting AMLA the power to impose sanctions on obliged entities of EU Member States should be regarded with great reserve.

In addition to the above, the analysis of the legal solutions contained in the 'package' of AML raises objections related to a certain inconsistency. An example of this can be, on the one hand, a relatively rigorous approach to the rules of applying enhanced financial security measures to third countries and, on the other hand, the establishment of exceptions, in the form of 'gaps' in the system of prevention against the dealings in question. The AML Regulation may apply to countries that even the FATF has not included in its lists (i.e., on the 'black' or 'grey list'). However, the Commission foresees a break from the adopted comprehensive approach and harmonisation of AML regulations, pointing out that striving to ensure them to the full extent would be... inconsistent with the approach based on risk analysis (i.e., *de facto* with the very idea of AML activities). As a result, it allows the freedom of EU Member States to introduce different regulations (in theory, 'going beyond EU standards') in those areas that are related to the specificity of national risk. However, concerns may be expressed as to whether such an approach will not result in the adoption by EU Member States of such regulations that will hinder effective cooperation and at the same time distort the cardinal assumption of the EU anti-money laundering policy, i.e., unification of AML regulations within the EU Member States.

It is also impossible to omit the reference to the abandonment of the 'unworkable' obligation for entrepreneurs to register cash transactions with a value of at least EUR 10,000. As practice proves, 'fragmented' cash transactions (smurfing, structuring) are still most often used by money laundering perpetrators. A clear example of this is inherently cross-border migrant smuggling and its benefits, which are laundered most often through cash-related methods.<sup>64</sup> Cash payments often appear in the layering stage and are then converted into other assets.<sup>65</sup> This state of affairs raises the question of what and whom the proposed solution is intended to serve. It is doubtful that it serves anti-money laundering purposes since it does not address the heart of the problem. It neither excludes cash transactions in this amount in an absolute manner (although exceptions to the prohibition of such transactions have been established), nor does it meet the expectation related to the lack of supervision over entrepreneurs conducting such transactions.

The conclusions presented lead to the conclusion that the draft EU AML regulations, although accurate in principle, are not free from defects. This will not

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<sup>64</sup> According to research on money laundering methods in relation to human trafficking and smuggling of migrants, cash transactions are the most frequently chosen form of payment (52%), followed by the transport of (literally) cash between jurisdictions. Cf. <https://dxcompliance.com/money-laundering-risks-arising-from-migrant-smuggling/> [accessed on 27 May 2023].

<sup>65</sup> The use of informal value transfer systems (IVTS) is also popular when chipping deposits, such as hawala and repeated off-site prepaid card transactions – cf. FATF, *Money Laundering and Terrorist Financing Risks Arising from Migrant Smuggling*, Paris, 2022, pp. 20–24. Document available at: <https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Methodsandtrends/Migrant-smuggling.html> [accessed on 25 May 2023].

be without significance for the prevention of the practice discussed. In addition, bearing in mind the Polish AML regulations, one should expect their amendment, although – as should be assumed – rather limited to the necessary minimum, i.e., dictated by the requirements related to the need to adapt national legal solutions to EU directives, without using the possibility of a more rigorous approach to the principles of applying financial security measures.

Thus, when trying to answer the question indicated in the title of this study, it should be assumed that the 'AML package' is rather a major reform of the AML policy and the approach to the procedures for counteracting these dealings, than a legislative revolution. However, they do not provide extraordinary solutions or measures, because the establishment of AMLA cannot be included among them, and they do not provide, for example, the use of cutting-edge technologies in the field of AML.

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