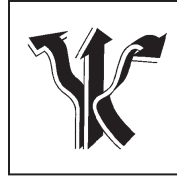


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ЗМІСТ

Відомості про авторів	4
Ігнатюк О. В.	
<i>Сутність оперативно-розшукових заходів як засобів доказування у кримінальному провадженні</i>	5
Лисенко С. О.	
<i>Організаційно-правові шляхи визначення основних дисфункцій концептуальної моделі інформаційної безпеки підприємництва</i>	12
Лісовська Ю. П.	
<i>Вища освіта України як протидія корупційним маніпуляціям у законодавчому полі світової та європейської інтеграції</i>	24
Стасюк С. В.	
<i>Оновлені моделі правових відносин в Україні</i>	32
Щокін Р. Г.	
<i>Адміністративно-правове забезпечення державної політики у галузі освіти</i>	37
Заверуха В. Г.	
<i>Поняття “правоутворення” як складова частина теоретичного підґрунтя нормотворчої діяльності</i>	45
Кожем’яка І. В.	
<i>Історія організації забезпечення екологічної безпеки в Чорнобильській зоні відчуження</i>	50
Міхеев М. В.	
<i>Учасники виконавчого провадження в Україні та їхні повноваження на сучасному етапі</i>	56
Найченко А. М.	
<i>Проблеми застосування електронних доказів у господарському процесі.....</i>	62
Невесенко Т. С.	
<i>Валютні відносини — компетенція банків та державних органів в Україні</i>	67
Поліщук М. Г.	
<i>Особливості участі адвокатів у адміністративному процесі.....</i>	72
Шапранський Т. О.	
<i>Адміністративно-правове забезпечення рекультивації земель в Україні</i>	79
Sciurba M.	
<i>The end of privacy for EU citizens: a closer look at the fourth Anti-Money Laundering directive</i>	86

ВІДОМОСТІ ПРО АВТОРІВ

- **Заверуха Володимир Георгійович** — аспірант каф. адм., фінансового та банківського права, МАУП, м. Київ — 45
- **Ігнатюк Олег Володимирович** — канд. юрид. наук, заступник голови Апеляційного суду Київської області — 5
- **Кожем'яка Ігор Володимирович** — аспірант, МАУП, м. Київ — 50
- **Лисенко Сергій Олексійович** — канд. юрид. наук, доц., доц. каф. упр. безпекою, правоохоронної та антикорупційної діяльності, Навчально-науковий ін-т права ім. князя Володимира Великого, МАУП, м. Київ — 12
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- **Міхеєв Михайло Володимирович** — здобувач, МАУП, м. Київ — 56
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- **Поліщук Марина Геннадіївна** — викладач, МАУП, м. Київ — 72
- **Стасюк Світлана Валентинівна** — канд. юрид. наук, доц. каф. адм., фінансового та банківського права, Навчально-науковий ін-т права ім. князя Володимира Великого, МАУП, м. Київ — 32
- **Шаправський Тарас Олександрович** — аспірант, МАУП, м. Київ — 79
- **Щокін Ростислав Георгійович** — канд. юрид. наук, доц., доц. каф. господарського, трудового права та цивільно-правових дисциплін, МАУП, м. Київ — 37
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THE END OF PRIVACY FOR EU CITIZENS: A CLOSER LOOK AT THE FOURTH ANTI-MONEY LAUNDERING DIRECTIVE

Наукові праці МАУП. Серія Юридичні науки, 2017, вип. 54(3), с. 86–98

The current Anti-Money Laundering regime jeopardises the essential achievements of the state under the rule of law. The increasing centralisation and cooperation of the competent authorities in the exchange of personal data creates a security architecture that leads to a considerable risk of freedom restriction. In particular, the extension of the authorities' power of intervention granting them access to citizens' personal data without the need for initial suspicion underlines that a substantial part of the constitutional state is at risk today. The fact that employees of financial institutions and other professionals involuntarily execute the role of auxiliary policemen is the symbol for AML regime amendments in the European Union and Financial Action Task Force countries ignoring fundamental constitutional principles. The Brexit further complicates the compliance with AML requirements for UK companies, posing an additional challenge for the future development of the EU AML regime.

This paper promotes the improvement of the compatibility of AML/CTF legislation, provisions as well as recommendations with fundamental human and civil rights by presenting areas of massive intrusions into civil liberties, and strengthens the legal academic discourse of adherence to these fundamental rights under the principle of the rule of law in the fight against money laundering and terrorist financing.

1. INTRODUCTION

The concept of civil rights in the Magna Carta, including the presumption of innocence and the rule that there must be grounds for initial suspicion before bringing charges against someone, evolved into the core elements of a modern constitutional state [1]. As the European Union (EU) and the international community has recognised the problem of transnational organised crime related to money laundering (ML) activities through illegal business, there has been an increasingly closer cooperation of states at the legislative, executive and judicial levels, resulting in the creation of one of the most extensive legal frameworks not only in the EU

but worldwide [2]. The most important international body to combat money laundering and terrorist financing (TF) is the Financial Action Task Force (FATF), which was founded at the G7 Summit in Paris in 1989, involves 35 countries and two regional organisations, and is affiliated with the Organisation for Economic Co-operation and Development (OECD) in Paris [3]. The FATF has been given the task of developing recommendations and international standards concerning AML/CTF for the financial sector. The recommendations the FATF adopted on 16 February 2012 [4], in which the previous 40 [5] +9 [6] recommendations were unified, provided a central component in combating financing of weapons of mass destruction. The EU today has largely adopted the FATF's 2012 recommendations in its fourth Anti-Money Laundering Directive 849/2015 (4th AMLD) [7], after previously adopting in 2014 Directive 2014/42/EU [8] on the freezing and confiscation of instrumentalities and proceeds of crime [9]. These two directives form the core of the current EU AML/CFT regime. The 4th AMLD broadens the range of money laundering predicate offences by including crimes in connection with direct and indirect taxes [10]. In addition, it significantly extends the obligation to store and distribute data of the member states in comparison to the third Anti-Money Laundering Directive (3rd AMLD) [11]. The 4th AMLD also extends the obligation of credit and financial institutions to carry out customer due diligence and to report suspicious transactions by professionals like lawyers, trustees, company service providers, real estate agents or gambling companies [9]. It thereby creates conflicts of interest not only in the trust relationships of bank customers and their bankers but also with tax advisors, lawyers, etc. Employees of financial institutions and these new professional groups are drafted into the role of auxiliary policemen suggesting the AML regime in the EU and the FATF states has abandoned common sense and fundamental principles of the rule of law. Although the 4th AMLD is primarily intended to prevent money laundering, terrorist financing or tax evasion by creating a transparent system of data in each member state, which is publicly available and can identify final beneficial owners, its design is highly suitable to spy upon normal citizens without warrant or grounds of suspicion. While the 4th AMLD gives Financial Intelligence Units (FIUs) significantly more autonomy in evaluating and accessing data related to ML, TF and tax offences [10], the European Commission believes there are gaps which need to be closed involving high-risk third countries, virtual currency exchange platforms, prepaid instruments and further improvement of central data registers with regard to electronic payments and even greater access to information for and exchange between FIUs. The Commission has taken these issues into account in its proposal COM(2016) 450 final [12], without however addressing their highly heterogeneous nature due to the lack of harmonisation of criminal law among the member states, especially the issue of tax offences as a ML predicate offense [13].

2. THE EU AML REGIME UNDER THE 4TH AMLD

The 4th AMLD, on the basis of Article 288 TFEU [14], creates a series of new obligations for the member states, but leaves it to them how to precisely implement the Directive at the national level. In contrast to the 3rd AMLD, in Chapter III of the 4th AMLD member states are obliged to ensure that information on compa-

nies and other legal entities located in the respective member state is available in a central register and up to date in terms of their beneficial ownership and beneficial interests pursuant to Article 30(3) and (4) 4th AMLD [9]. In addition, the member states must ensure that the competent authorities and FIUs performing customer due diligence have unrestricted access to this register at all times [10]. The 4th AMLD extends these disclosure obligations once more under Article 31 by obliging trustees of any legally possible type of trust in the respective member state to comply with this transparency requirement. A further change compared to the 3rd AMLD is that a risk-based approach and documentation is required from all persons and companies covered by the Directive. In addition, a risk assessment of politically exposed persons (PEPs) is required while, at the same time, the group to be considered as PEPs has been significantly expanded [15]. In practice, an inadequate definition of PEPs under the 4th AMLD and the simultaneous far-reaching extension of its scope to family members and other related parties means that many banks, for fear of possible risks, collectively have rejected opening bank accounts for these customers, resulting in unjustifiable discrimination. Even though the 4th AMLD expressly states that the PEP status must not lead to discrimination, the opposite is actually true. It remains unclear what reasons are advanced for expanding scrutiny to family members and relatives in the PEP context [16]. As it is de facto left to each bank to decide how far-reaching this inspection goes and how it is performed, the 4th AMLD creates even more uncertainty for the banks and their customers. The 4th AMLD requires individual financial institutions and professional figures such as lawyers, trustees, real estate agents or casino operators to carry out customer due diligence when establishing a relationship or a transaction and, in particular, to report to the competent authorities, if the risk of TF or ML offences including tax offences occurs [15]. This creates the basis for a transnational data exchange system within the European financial system that de facto lies beyond any democratic checks and balances by the individual member states. The improvement of the exchange of information across Europe based on Article 53(1) 4th AMLD, in conjunction with Articles 53(2) and (3), has granted the FIUs immense power, as they are allowed to exchange or analyse any available information in the context of ML or TF independently or upon request. Although Article 30(9) 4th AMLD to a limited extent permits that the member states can refuse or restrict access to data on a case-by-case basis, Recital 56 of the 4th AMLD underscores that the request for information exchange, as a rule, has to be granted. Overall, the 4th AMLD raises a number of doubts about its democratic procedures, the guarantees of the rule of law and on its adoption. Indeed, the EU's decision not to adopt the 4th AMLD based on Article 83(2) TFEU but based on Article 114 TFEU was aimed at obstructing interference by member states in the area of criminal law, as Article 83(2) TFEU would have provided the option for member states to prevent the introduction of the Directive in order to first examine whether it is in line with their own respective constitutions [17]. Article 83 TFEU would not have circumvented national sovereignty in order to avoid the inconsistencies between EU criminal law and national laws. These inconsistencies are especially evident today in the area of serious cross-border crime such as terrorism, money laundering and tax evasion. The 4th AMLD

not only prohibits ML, but links ML offences to the obligation of member states to impose sanctions or penalties on private companies that fail to carry out their due diligence, record-keeping and reporting duties under Article 58(1) 4th AMLD in conjunction with Articles 59 and 61. As a result, everyone who falls within the 4th AMLD's scope de facto becomes an extension of the investigative authorities and suspicious activity reports (SARs) can be filed without initial suspicion to avoid institutional and personal liability [10]. This law enforcement practice is partly hindered by the European Court of Justice (ECJ), as demonstrated by the judgments of *Digital Rights Ireland and Seitlinger and Others* (2014) [18] and *Schrems v Data Protection Commissioner* (2015) [19]. Despite the US law allows US intelligence to access personal data from EU citizens, the ECJ has declared this practice to be inadmissible in the EU, as no adequate protection of privacy is ensured, resulting in a clear breach of EU law [20]. Accordingly, the infringement of Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union (the Charter) [21] led the ECJ not only to classify the transfer of personal data to US authorities as inadmissible, but also to annul all of the Data Protection Directive 95/46 [22]. The reason for the annulment was that Article 25 of Directive 95/46 in relation to the Commission Adequacy Decision 2000/520 [23] had allowed a too far-reaching extraterritorial effect of the US law and the related competence of the US authorities in monitoring the EU citizens' data. Ultimately, the ECJ confirmed this legislation to be in breach with the Charter in respect to data protection and privacy [20]. Overall, the 4th AMLD aims to reveal violations of ML, TF and tax evasion to the fullest extent by maximising the information exchange at European level, which is softening personal data protection and the principles of the rule of law in criminal law [10]. Therefore, the 4th AMLD raises significant questions about its efficiency and the preservation of the principles of the law.

3. THE AML/CTF LEGISLATION'S INABILITY TO PREVENT TERRORIST ATTACKS

In the UK, the linking of AML policies to counter-terrorism strategies is one of the current stated goals of the Home Office and the UK Security Service. In 2015, the Joint Money Laundering Intelligence Task Force was consisting of government and law enforcement representatives and led by the National Crime Agency (NCA) [9]. Its mission was to implement faster and more efficient intervention and law enforcement mechanisms in the private and public sectors to combat ML and TF. Thereby, a central element was a fast and far-reaching information gathering of customer-related data by financial institutions, without the possibility of protection under section 7 of the Crime and Courts Act 2013 [24]. For banks, this means that they may disclose any information about clients without violating their obligation of confidence. Accordingly, the UK government created a way to override the banker's duty of customer confidentiality that is more extensive than the SAR process and justifies this development primarily on the grounds that it is necessary to effectively combat terrorism, without however providing reliable empirical data to support this assumption. In the UK, Part 8 of the Proceeds of Crime Act 2002 (POCA 2002) [25] has unified ML offences similar to the 4th AMLD through the extension of confiscation, civil recovery and money laundering investigations. This

resulted in a merging of civil and criminal jurisdictions, which aims at covering three investigation areas [9]. Together with the Serious Crime Act 2007 [26] and the amendments of sections 327-329 POCA 2002 by the Serious Organised Crime and Police Act 2005 [27], the POCA 2002 is now one of the key legislations within the AML and CTF framework in the UK [28]. Currently, the AML legislations in most jurisdictions worldwide, for example the Indian Prevention of Money Laundering Act 2002 [29] and the Australian Anti-Money Laundering and Counter-Terrorism Financing Act 2006 [30], have a similar structure to the POCA 2002, as they include CTF provisions [31]. These laws, which the UK and many other FATF countries established more than a decade ago to effectively combat ML and TF, in fact form the basis for the increasing prosecution risks for financial institutions and financial professionals. Moreover, institutions are subject to the risk of considerable sanctions if they do not apply a sufficient compliance structure in line with AML/CTF legislation. One may question the efficiency of this AML/CTF legislation, as the recovery of proceeds of crime through 15 enforcement agencies in the UK was only GBP 155 million in 2014, while estimated administrative costs amounted to GBP 100 million [32]. Also, the British bankers' association assumes that most of the largest international banks are spending around GBP 700 million to one billion annually on financial crime compliance [33]. These figures show that the AML/CTF legislations create immense bureaucratic burdens without actually providing any proportionate results. This also applies to the AML/CTF legislation's efficiency as a tool to prevent terrorist attacks. In its 2016 recommendations on terrorist financing [34], the FATF states that similar to ML, the monitoring of financial flows, including cash transactions, helps the investigators to identify terrorists and prevent terrorist attacks. However, when taking a closer look at the cost of current terrorist attacks, the conclusion must rather be that the FATF recommendations may only help to uncover small tax evaders, but are completely unsuitable for preventing terrorist attacks [35]. The low costs of terrorism attacks highlight that de facto only minimum financial resources are needed to carry them out. According to the estimates of the Center for the Analysis of Terrorism (CAT), the Nice attack of 14 July 2016, in which ISIS fanatic Mohamed Lahouaiej-Bouhlel killed 86 people and injured more than 450 people with a truck, cost no more than GBP 2200 [36]. This latest low tech strategy for terrorist attacks is based on the use of everyday objects and vehicles as deadly weapons. The Westminster attack on 22 March 2017 at the Westminster Bridge in London, in which three people were killed with a truck and 20 were injured, and the Berlin Christmas Market attack on 19 December 2016, where 12 people were killed with a truck and around 50 were injured, were based on the use of improvised weapons, including vehicles and knives [37]. Overall, the catch-all approach of the AML/CTF regulations is touted as means of preventing terrorism, but is in fact unsuitable to prevent low tech terrorist attacks, which are relatively simple and inexpensive to realise. Most terrorist attacks in recent years have not required major financial transactions or large sums of money. Yet, the policy makers and investigative authorities still use the prevention of terrorist attacks and the prevention of the financing of terrorism as the main argument for the increasingly excessive expansion of the AML/CTF legislation worldwide.

4. BREXIT AND OTHER FUTURE CHALLENGES OF THE EU AML REGIME

The AML/CTF regime in the UK places disproportionate burdens on companies and financial institutions. Brexit could further complicate this situation for companies, if they are no longer part of the EU and, thus, of the EU single market. Particularly in view of the fact that the 4th AMLD includes combating tax evasion in its regulatory system, the Brexit implies that the joint efforts of the EU network of information exchange and administrative cooperation will be significantly weakened by the withdrawal of the UK economy. Accordingly, the network's joint aim of the promotion of European harmonisation will be weakened as well. This may lead to substantial problems regarding the administrative cooperation related to cross-border tax issues within the EU, as EU directives will no longer apply for the UK after Brexit. In 2016, Directive 2016/1164 [38] was adopted, which includes provisions to combat tax avoidance practices that have direct negative effect on the functioning of the internal market. Through the Brexit, this Directive will become ineffective in the UK as does Directive 2014/107 [39] with regard to mandatory automatic exchange of information in the field of taxation, which ensures the existence of a cross-border administrative cooperation among the financial authorities of the member states and allows the member states to obtain full information on taxable persons or companies from member states concerned [40]. Particularly with regard to corporate groups or multinational corporations, Directive 2014/107 gives financial authorities the opportunity of jointly carrying out audits by tax authorities of several member states [40]. After the Brexit, there will no longer be a legal basis to which the UK can refer to for this precise tax administrative cooperation, which will probably have a wide range of negative consequences for companies registered in the UK, as their tax treatment within the EU will be reduced in accordance with the status of a third country. The 4th AMLD poses further challenges for the EU AML regime in the EU beyond the Brexit issue. Thereby, the lack of harmonisation of criminal law regarding tax evasion is paramount. The 4th AMLD raises fundamental doubts as to what extent it is in conflict with existing civil and human rights. Against the background of the planned amendment to the 4th AMLD or the possible adaptation of the 5th AMLD, the question of the compatibility of the legislation with constitutional principles becomes increasingly important. A core element of the 4th AMLD is directed at tax avoidance and evasion. In addition, the 4th AMLD focuses on national risk assessments. In this connection, the important standard setter, the Basel Committee on Banking Supervision, has adopted the FATF recommendations of 2012 in its January 2014 guidelines Sound Management of Risks Assessment on Money Laundering and Financing of Terrorism (see in its current version [41]) similar to the 4th AMLD [20]. The guidelines describe risk assessments as a central responsibility of credit and financial institutions, in which three lines of defence against money laundering are specified: The first line of defence is the front-office staff, which is in direct contact with the customer and responsible for identifying the customer, for accessing and monitoring the business risk, and for implementing respective AML/CTF policies and procedures. The second defensive line is the senior man-

agement, which is responsible for the on-going monitoring and implementation of AML/CFT requirements, and is also the point of contact for AML/CFT related queries from internal and external authorities and FIUs. The third line of defence against ML is the internal auditing, which provides an independent assessment of the effectiveness of the implementation of risk management and controlling in compliance with AML/CFT policies and procedures [15]. At the same time, the interlinking of the recommendations of the Basel Committee, the 4th AMLD and other regulatory technical standards set by the European Supervisory Authorities creates an ever-finer network of financial institution control [20]. This network is increasingly far-reaching, as Europol is getting more closely involved in the fight against financial crimes and is becoming a central hub of information, in which data is exchanged and evaluated at unprecedented levels. Furthermore, Europol actively contributed to proposals contained in the agreement between the EU and US on the Terrorist Finance Tracking Program (TFTP) [42]. The fight against financial crimes is now being expanded with proposals about the future of the 4th AMLD involving its amendment or the 5th AMLD. Thereby, it is particularly noticeable that the proposals intend a tightening of due diligence requirements regarding the transparency of beneficial ownership [43]. The so-called “Panama Papers affair” has contributed to the greater focus on the prevention of tax evasion and on controls on the movement of anonymous funds. Against this background, the EU Council Proposal COM/2016/0450 final [44], which is supposed to close gaps in the ML and TF area, is highly problematic due to the fact that the objective of closing gaps is being mixed with the aim to create more transparency in financial transactions in relation to offshore jurisdictions in order to prevent tax avoidance or evasion [45]. Ultimately, the integration of CTF and the inclusion of tax evasion prevention into the EU AML framework means to lump completely different phenomena together at the same level, which makes the whole system inefficient and legally questionable.

Sources

1. *Baldus M.* Freiheitssicherung durch den Rechtsstaat des Grundgesetzes // Vom Rechtsstaat zum Präventionsstaat / Eds S. Huster, K. Rudolph. 1st edn. Suhrkamp, 2008. 115.
2. *Quedenfeld R.* Grundlagen der Geldwäschebekämpfung // Bekämpfung der Geldwäsche und Wirtschaftskriminalität: Handbuch / Ed R. Quedenfeld. 4th edn. ESV, 2017. 23 ff.
3. FATF Members and Observers [Electronic resource] // Financial Action Task Force (FATF). URL: <http://www.fatf-gafi.org/about/membersandobservers/> (Accessed 29 November 2017).
4. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The FATF Recommendations // Financial Action Task Force (FATF). 2012. February. Updated 2016. October.
5. FATF 40 Recommendations // Financial Action Task Force (FATF). 2003. 20 June.
6. FATF IX Special Recommendations // Financial Action Task Force (FATF). 2004. October, 22.
7. Directive (EU) 2015/849 of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) № 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/EC (4th AMLD). 2015. OJ L 141/73.
8. Directive 2014/42/EU of the European Parliament and of the Council on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union. 2014. OJ L 127/39.
9. Blair W., Brent R., Grant T. Banks and Financial Crimes // The International Law of Tainted Money. 2nd edn. 2017. OUP. 104.
10. Mitsilegas V., Vavoula N. The Evolving EU Anti-Money Laundering Regime. Challenges for Fundamental Rights and the Rule of Law // Maastricht Journal of European and Comparative Law 2016. 23 (2). 270.
11. Directive 2005/60/EC 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. 2005. OJ L 309/15
12. 2016/0208 (COD) for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money laundering or Terrorist Financing and Amending Directive 2009/101/EC // Proposal COM/2016/0450 final 2016. 5 July.
13. Action Plan for Strengthening the Fight against Terrorist Financing: Communication COM/2016/050 final From the Commission to the European Parliament and the Council. 2016. February, 2. And: Action Plan for Strengthening the Fight against Terrorist Financing to the Communication from the Commission to the European Parliament and the Council: Annex 1 COM(2016)50 final. 2016. February, 2.
14. Treaty on the Functioning of the European Union (TFEU). 2016. Consolidated Version. OJ C 202 art. 288.
15. Cox D. Handbook of Anti Money Laundering. 1st edn. Wiley, 2014. 77.
16. Sheen S. Politically Exposed Persons (“PEPs”) regime in the UK: Anticipatory Response to the 4AMLD. ACAMS. 2017, October, 4.
17. Oppermann T., Classen C. D., Nettesheim M. Europarecht. 7th edn. CH BECK, 2016. 613.
18. Case C-293/12 Digital Rights Ireland and Seitlinger and Others: Digital Reports (Court Reports – General). 2014. ECLI:EU:C:2014:238.
19. Case C-362/14 Maximillian Schrems v Data Protection Commissioner: Digital Reports (Court Reports – General). 2015. ECLI:EU:C:2015:650.
20. Herlin-Karnell E., Ryder N. The Robustness of EU Financial Crimes Legislation: A Critical Review of the EU and UK Anti-Fraud and Money Laundering Scheme [Electronic resource] // European Business Law Review. 2017. (Forthcoming) 36 URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816980 (accessed 29 November 2017)
21. Charter of Fundamental Rights of the European Union (the Charter). 2012. OJ C326/391 art. 7, 8 and 11.
22. Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data. 1995. OJ L 281/31 art. 25.
23. Commission Decision Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce: 2000/520/EC. OJ L 215/7.
24. Crime and Courts. Act 2013. 22. s. 7.
25. Proceeds of Crime. Act 2002. POCA. 29.
26. Serious Crime. Act 2007. 27.
27. Serious Organised Crime and Police. Act 2005. SOCPA. 15.
28. Harvey J., Ashton S. Anti-money Laundering Policy: A Response to the Activity of Criminals or of Agencies? // The Relativity of Wrongdoing: Corruption, Organised Crime,

- Fraud and Money Laundering in Perspective / PC van Duyne, A Maljević et al. (eds). Wolf Legal Publishers, 2015. 285
29. The Prevention of Money-Laundering Act 2002. Act № 15 of 2003. 17 January.
 30. Anti-Money Laundering and Counter-Terrorism Financing Act 2006. № 169,
 31. *Nobanee H., Nejlá E.* Voluntary Disclosures of Anti-Money Laundering and Anti-Terrorist Financing [Electronic resource] // SSRN Electronic Journal. 2017. Jan. 7. URL: <https://ssrn.com/abstract=2971473> (accessed 6 December 2017)
 32. *Gentle S., Spinks C., Harris T.* Legislative Comment // Proceeds of Crime Act. 2002. Update 2016. COB. 139. Sep. 2.
 33. Future Financial Crime Risks. Considering the Financial Crime Challenges Faced by UK Banks: LexisNexis Risk Solutions for the British Bankers' Association. 2015. November.
 34. Terrorist Financing [Electronic resource] // Financial Action Task Force (FATF). URL: <http://www.fatf-gafi.org/publications/fatfgeneral/documents/terroristfinancing.html> (accessed 6 December 2017)
 35. *Mai H.* Cash, Freedom and Crime // Deutsche Bank Research, 9. 2016. 23 November.
 36. *McGuinness R.* The Price of a Life – How European ISIS Terror Attacks Cost just £2,000 [Electronic resource] // Express. 2016. 18 October. URL: <https://www.express.co.uk/news/world/722642/European-ISIS-terror-attacks-cost-study> (accessed 6 December 2017)
 37. *Hoffman B.* Low-Tech Terrorism // National Interest. 2014. 130, 67.
 38. Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market // Council Directive (EU) 2016/1164 [2016] OJ L 193/1
 39. Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation // Council Directive 2014/107/EU [2014] OJ L 359/1
 40. *Reimer E.* Nach dem Brexit: Die Zukunft der europäischen Steuerrechtsordnung // Brexit und die juristischen Folgen / Eds M. Kramme, C. Baldus et al. Nomos, 2017. 180 ff.
 41. Guidelines. Sound Management of Risks Related to Money Laundering and Financing of Terrorism: Basel Committee on Banking Supervision, June 2017.
 42. Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for the Purposes of the Terrorist Finance Tracking Program. 2010. OJ L 195/5
 43. Financial Crime Update / A. Srivastava et al. // Compliance Officer Bulletin 2017. Jun 3. 147
 44. 2016/0208 (COD) for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money laundering or Terrorist Financing and Amending Directive 2009/101/EC // Proposal COM/2016/0450 final (5 July 2016)
 45. Action Plan for Strengthening the Fight against Terrorist Financing to the Communication from the Commission to the European Parliament and the Council // Annex 1 COM (2016) 50 Final (2 February 2016)

Sciurba M. The end of privacy for EU citizens: a closer look at the fourth anti-money laundering directive. The progressive development of the European AML/CTF legislation combined with the clear target to eliminate tax evasion has resulted in the over-burdensome administrative monitoring of every EU citizen and the increasing undermining of fundamental civic rights. Accordingly, the 4th AMLD raises questions about its efficiency and the preservation of the principles of the law. In this context, a very critical point is that the 4th AMLD includes the conformity of ML, TF and tax evasion which ques-

tions the admissibility of the Directive in principle due to the lack of harmonisation of criminal law and of the definition of tax crimes relating to direct and indirect taxes. In particular, as there is no reciprocity among the member states in the field of tax evasion in many areas in terms of what is punishable and what is not, the 4th AMLD raises fundamental questions on data protection and an European law enforcement that, by lack of harmonisation, allows the conduct of European investigations without the existence of a criminal offense in the respective member state. At the same time, the high-risk third country and non-cooperative jurisdictions policy in the EU led to the criminalisation of countries that are primarily considered as tax havens, but which pose no actual criminal threat to the security through terrorist financing or money laundering of funds generated from illegal sources. The “Panama Papers” have raised questions about and criticism of existing policies regarding offshore structures. The legislative reaction has been one of blind activism. The fight against terrorism and the prevention of tax evasion are being used as arguments, both politically and in the media, to create increasingly far-reaching legislation that allegedly create fair taxation and prevent terrorist attacks. The integration of these highly divergent objectives into the EU AML framework has led to an explosion of compliance costs in the EU and worldwide, with no empirical data to suggest the actual effectiveness of this legislation in preventing terrorist attacks. Neither an intensified customer due diligence nor a comprehensive monitoring and control of millions of financial transactions of ordinary citizens can prevent the new low-tech method of terrorist attacks, since these attacks require only minimal financial resources. Primarily, the 4th AMLD is apt to spy on ordinary citizens without any initial suspicion to an unprecedented degree. Today, the EU promotes an on-going unbridled and unrestricted transfer of personal data to third-party countries by virtue of the AML framework, placing every citizen under a general criminal suspicion and carrying out investigations under this policy without grounds for reasonable suspicion, which is incompatible with the rights described in the ECHR and the Charter of Fundamental Rights. Therefore, the proposals for the amendment of the 4th AMLD that suggest to extend the powers of the FIUs must include a detailed review of the rights to privacy and data protection that citizens enjoy by virtue of the ECHR and the Charter. The extension of the powers to investigate tax evasion ultimately requires the prior harmonisation of the bases for offences punishable under criminal law within the EU.

Щурба М. Кінець приватного життя громадян ЄС: пильний погляд на Четверту Директиву по боротьбі з відмиванням грошей. Прогресивний розвиток європейських законодавчих актів у галузі боротьби з відмиванням грошей/протидії фінансуванню тероризму у поєднанні з чітким завданням ліквідації ухилення від сплати податків призвели до надмірного адміністративного контролю кожного громадянина ЄС та все більш серйозного підризу основних громадянських прав. Відповідно, Четверта

Директива про боротьбу з відмиванням грошей піднімає питання про її ефективність та збереження принципів закону. В цьому контексті дуже важливо те, що Четверта Директива про боротьбу з відмиванням грошей включає відповідність відмивання грошей/фінансування тероризму та ухилення від сплати податків, що в принципі ставить під сумнів допустимість Директиви через відсутність гармонізації кримінального права та визначення податкових злочинів, пов'язаних з прямими та непрямими податками. Оскільки між державами-членами немає взаємодії у багатьох сферах в аспекті ухилення від сплати податків з точки зору того, що караємо, а що ні, Четверта Директива проти боротьби з відмиванням грошей піднімає основні питання захисту даних та європейського законодавства, яке, через відсутність гармонізації, дає змогу проводити європейські розслідування без наявності злочину у відповідній державі-члені. У той же час треті країни з високим ступенем ризику та несумісні за юрисдикцією країни в ЄС привели до криміналізації країни, які насамперед вважаються податковими сховищами, але які не представляють реальної загрози безпеці шляхом фінансування тероризму або зняття грошових коштів, отриманих з незаконних джерел. "Панамські документи" підняли питання та критику існуючих політик щодо офшорних структур. Законодавча реакція була дією навмання. Боротьба з тероризмом та запобігання ухиленню від сплати податків використовуються як аргументи в політиці і в засобах масової інформації для створення все більш жорсткого законодавства, яке начебто створює справедливе оподаткування та запобігає терористичним атакам. Інтеграція цих надто відмінних цілей в рамках боротьби з відмиванням грошей в ЄС призвела до вибуху витрат на дотримання в ЄС та в усьому світі без будь-яких емпіричних даних, щоб передбачити фактичну ефективність цього законодавства у запобіганні терористичним атакам. Ні інтенсифікована експертиза клієнтів, ні всесторонній моніторинг та контроль мільйонів фінансових операцій звичайних громадян не можуть запобігти новим низькотехнологічним терористичним атакам, оскільки для цих атак потрібні лише мінімальні фінансові ресурси. Передусім Четверта Директива про боротьбу з відмиванням грошей схильна шпигувати за звичайними громадянами з безпрецедентним рівнем без будь-якої початкової підозри. Сьогодні ЄС підтримує постійну неприборкану та необмежену передачу персональних даних у треті країни по базі системи боротьби з відмиванням грошей, що ставить кожного громадянина під загальну підозру та проводить розслідування відповідно до цієї політики без обґрунтованих підозр, які несумісні з правами, описаними в Європейському суді з прав людини і Хартії основних прав. Тому пропозиції щодо внесення поправок до Четвертої Директиви щодо боротьби з відмиванням грошей, яка пропонує розширити повноваження підрозділів Фінансової розвідки, повинні містити детальний аналіз прав на недоторканість приватного життя та захист

даних, якими користуються громадяни в Європейському суді з прав людини та Хартії основних прав ЄС. Розширення повноважень на розслідування ухилення від сплати податків у кінцевому результаті вимагає попереднього узгодження підстав для обвинувачення у злочинах, що караються кримінальним законодавством в рамках ЄС.

Щурба М. Конец конфиденциальности для граждан ЕС: более пристальный взгляд на Четвертую Директиву по борьбе с отмыванием денег. Прогрессивное развитие европейского законодательства в области борьбы с отмыванием денег/противодействия финансированию терроризма в сочетании с четкой целью ликвидации уклонения от уплаты налогов привело к чрезмерному административному контролю каждого гражданина ЕС и все более серьезному подрыву основополагающих гражданских прав. Соответственно, Четвертая Директива о борьбе с отмыванием денег поднимает вопросы о ее эффективности и сохранении принципов закона. В этом контексте очень важно то, что Четвертая Директива о борьбе с отмыванием денег включает в себя соответствие отмывания денег/финансирование терроризма и уклонение от уплаты налогов, что в принципе ставит под сомнение допустимость Директивы из-за отсутствия гармонизации уголовного права и определения налоговых преступлений, связанных с прямыми и косвенными налогами. Поскольку между государствами-членами нет взаимодействия во многих областях в аспекте уклонения от уплаты налогов с точки зрения того, что наказуемо, а что нет, Четвертая Директива о борьбе с отмыванием денег поднимает фундаментальные вопросы по защите данных и европейскому законодательству, которая, из-за недостающей гармонизации, позволяет проводить европейские расследования без наличия уголовного преступления в соответствующем государстве-члене. В то же время третьи страны с высокой степенью риска и несовместимые по юрисдикции страны в ЕС привели к криминализации страны, которые в первую очередь считаются налоговыми убежищами, но которые не представляют реальной угрозы безопасности посредством финансирования терроризма или отмывания денежных средств, полученных из незаконных источников. “Панамские документы” подняли вопросы и критику существующих политик в отношении офшорных структур. Законодательная реакция была действием вслепую. Борьба с терроризмом и предотвращение уклонения от уплаты налогов используются в качестве аргументов как в политике, так и в средствах массовой информации для создания все более далеко идущего законодательства, которое якобы создает справедливое налогообложение и предотвращает террористические атаки. Интеграция этих сильно расходящихся целей в рамках борьбы с отмыванием денег в ЕС привела к взрыву расходов на согласование в ЕС и во всем мире, без каких-либо эмпирических данных, чтобы предположить фактическую эффективность этого законодательства

в предотвращении террористических атак. Ни интенсифицированная экспертиза клиентов, ни всесторонний мониторинг и контроль миллионов финансовых операций обычных граждан не могут предотвратить новые низкотехнологичные террористические атаки, поскольку для этих атак требуются только минимальные финансовые ресурсы. В первую очередь, Четвертая Директива о борьбе с отмыванием денег склонна шпионить за обычными гражданами в беспрецедентной степени без какого-либо первоначального подозрения. Сегодня ЕС поощряет постоянную необузданную и неограниченную передачу персональных данных в третьи страны по базе системы борьбы с отмыванием денег, что ставит каждого гражданина под общее подозрение и проводит расследования в соответствии с этой политикой без обоснованных подозрений, которые несовместимы с правами, описанными в Европейском суде по правам человека и Хартии основных прав. Поэтому предложения о внесении поправки в Четвертую Директиву о борьбе с отмыванием денег, которая предлагает расширить полномочия подразделений финансовой разведки, должны включать подробный анализ прав на неприкосновенность частной жизни и защиты данных, которыми пользуются граждане в Европейском суде по правам человека и Хартии основных прав ЕС. Расширение полномочий по расследованию уклонения от уплаты налогов в конечном итоге требует предварительного согласования оснований для обвинений в преступлениях, наказуемых уголовным законодательством в рамках ЕС.

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