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INTERNATIONAL REGULATION ON MONEY LAUNDERING AND  
FINANCING OF TERRORISM AND ITS NATIONAL IMPACT: THE  
PHENOMENON OF DE-RISKING INFLUENCING THE FUNDAMENTAL  
RIGHTS OF NATURAL PERSONS

Master Thesis

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Tallinn 2023

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## INTRODUCTION

In July 1989 the G7 countries, European Commission, and a few other countries gathered in Paris to discuss economic challenges that would profit from international cooperation. The initial agenda of this summit was to implement measures to maintain or enhance sustainability, promote social justice, create jobs, and offset inflation.<sup>1</sup> In 1989 drug issues and transnational crime regarding drug trafficking and money laundering had reached a devastating point so it was decided in the summit to convene The Financial Action Task Force (FATF) that would examine money laundering techniques and trends and give recommendations to the member states and the international community.<sup>2</sup>

FATF recommendations aim to combat transnational crime, money laundering, and terrorist financing. In time FATF has revised and updated its standards multiple times. By 2023 these standards have been implemented in numerous international treaties and national legislation. Starting from the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) where member states applied and established AML- anti-money laundering laws to their domestic legislation to fight drug-related crimes. It was followed by the UN Palermo Convention against Transnational Organized Crime (2000) and in 2003 UN Merida Convention against Corruption.<sup>3</sup> EU set up its first AML (1AMLD) directive in 1991 and since then the directive has had many amendments due to the change in financial economic environment and technology.<sup>4</sup>

We can certainly agree that money as a source of a commodity is essential in our lives. For some money gives the opportunity to arrange life and decide the standard of it, for some money can be of utmost importance to cope with everyday life. The latter is in the case of people who for example are undereducated, depend on social welfare, refugees or the elderly. Thus, a person should have the fundamental right to obtain, earn or make transactions with money regardless of nationality, age, sex or geographical location.<sup>5</sup> We can argue that money

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<sup>1</sup> History of the FATF, FATF, available at: <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html>

<sup>2</sup> Economic Declaration, G7 Research Group, 1989, available at: <http://www.g8.utoronto.ca/summit/1989paris/communiqu/index.html>

<sup>3</sup> Young,S, Money Laundering in International Law, 2021, available at: <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0233.xml>

<sup>4</sup> History of Anti Money Laundering Directive: A Summary - Part One, Comply Advantage 2022, available at: <https://complyadvantage.com/insights/brief-history-amlds-part-one/>

<sup>5</sup> Hegadekatti, Kartik, The Right to Money as the Fundamental Right of Individuals in the Coming Digital Economy (April 23, 2017). Available at SSRN: <https://ssrn.com/abstract=2957172> or <http://dx.doi.org/10.2139/ssrn.2957172>

is the prerequisite for social inclusion, thus depriving one of it can violate a person's fundamental rights.<sup>6</sup> The Universal Declaration of Human Rights, article 22, confirms before mentioned: "Everyone, as a member of society, has the right to social security and the right, through national measures and international cooperation, taking into account the system and resources of each country, to enjoy the economic, social and cultural rights necessary for his human dignity and the free development of his individual being."<sup>7</sup> Financial exclusion in the era of the green digital economy cuts people out of society and has an adverse outcome.<sup>8</sup> Thus regulators need to address this problem widely and offer solutions to people who are directly affected by these international agreements and laws that are also transposed to national legislation. The author is interested in the principle of the state's obligation to protect constitutional fundamental rights in relation to the international law of money laundering and terrorism financing.

European Union Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features in paragraphs 35, 36,37,38 confirm that consumers have the fundamental right to use basic banking services and to not be excluded from them. This applies to the permanent residents of the union but also pressures member states to take needed measures to assure basic banking services to people who do not have a permanent address, e.g. asylum seekers, and consumers who are not granted a residence permit.<sup>9</sup> The relationship between EU law and national law will be evaluated through the doctrine of legal sources.

De-risking is a quite new phenomenon in financing. Still in recent years with the development of Anti-Money Laundering Recommendations by the FATF and thus amendments to the EU legislation de-risking has become somewhat of a problem. There has been a relevant rise in closing banking services for customers or not opening them at all.<sup>10</sup>

In practice, de-Risking means that the reporting party offers or terminates the services, based on anti-money laundering regulations, to avoid the risk of money laundering. According to

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<sup>6</sup> Lyons.Mara, Money as a Human Right, Rethinking work, disability and inclusion, Citizen Network, 2019, available at: <https://citizen-network.org/uploads/attachment/638/money-as-a-human-right.pdf>

<sup>7</sup> Article 22, Universal Declaration of Human Rights

<sup>8</sup> Bayot.B, Social, Economical and Financial consequences of Financial Exclusion, 2018, available at: <https://www.finance-watch.org/wp-content/uploads/2018/06/4-Social-economical-and-financial-consequences-of-financial-exclusion.pdf>

<sup>9</sup> European Union Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0092&from=en>

<sup>10</sup> Lapsi menee pesuveden mukana rahanpesun torjunnassa, Tilisanomat 2020, available at: <https://tilisanomat.fi/kolumnit/nakokulmia/lapsi-menee-pesuveden-mukana-rahampesun-torjunnassa>

the risk-based approach, risks should be managed proportionately.<sup>11</sup> Risks combating money laundering must be targeted where the risk is highest. A Russian-speaking pensioner permanently living in Finland, or a multinational politically exposed person has to have different risk levels and needs to be assessed separately. The first needs to manage his pension or social benefits and the second wants to keep an extra account for savings or larger deposits from property or car sales. To limit the pensioner's access to basic banking account due to anti-money laundering regulations will limit his fundamental rights. Services like water, electricity supply and basic banking services are part of basic services that the public authorities of a state need to ensure. Finnish Constitution (The Constitution of Finland, 11 June 1999 (731/1999, amendments up to 817/2018 included) provides in Chapter 2, section 6, people are equal before the Finnish law, and no one will be discriminated due to nationality, sex, gender, age or religion. Also, section 19 states that everyone have the right to social security.<sup>12</sup>

This thesis examines a situation where the right to have basic banking services in the EU has been violated. A situation where a natural person's banking account is not opened or is terminated due to the Anti-Money Laundering Regulation where the bank wants to avoid money laundering and terrorist financing risk and monitoring expenses. In the research, the central actor besides the individual is the financial institution, the bank. Anti Money Laundering and Terrorist Financing regulations are regulated under public law, the main regulatory framework of which is created through international agreements, standards and provisions and also based on European Union law. To evaluate states positive obligation to protect fundamental rights, the author will be examining and comparing also national legislation of two EU member states - Finland and Estonia in this master's thesis.

The central questions for the thesis are:

1. How to reconcile and implement anti-money laundering and terrorist financing regulations in compliance with fundamental rights?

In order to answer the question, first the nature of the AML is discussed.

2. Does de-risking infringe the fundamental rights of natural persons?

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<sup>11</sup> Undesirable consequences of de-risking for customers and banks, An analysis by the Dutch Banking Association (NVB), with assistance from PwC, pg 14-22, 2022, available at: <file:///C:/Users/toome/Downloads/undesirable-consequences-of-de-risking-for-customers-and-banks-dutch-banking-association.pdf>

<sup>12</sup> The Constitution of Finland 11 June 1999 (731/1999, amendments up to 817/2018 included), available at: <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>

In the first chapter, the research analyses the development of Anti Money Laundering and Terrorist Financing regulations through FATF recommendations and introduces EU Anti-Money Laundering legal framework and authorities.

The second chapter analyzes the phenomenon of de-risking and its relationship to financial exclusion. The chapter further discusses the methodology behind risk-based assessment and onboarding of a customer and KYC (know your customer) process. It then places de-risking phenomenon in the context of the fundamental rights of a natural person and thus elaborates on the possible effect of de-risking on internationally protected fundamental and human rights.

The third chapter discusses the intersection of money laundering regulations and the rights to basic financial services that are vital to the public. The thesis analyzes the proportionality of limiting individual's fundamental and constitutional financial rights and the obligations set by international agreements and European Law to protect society against money laundering and terrorism. The thesis discusses the implementation of the proportionality principle in the example of Finland and Estonia. As mentioned, a person cannot perform liabilities, like paying taxes or getting social benefits without a banking account. The author, therefore, analyzes the role of the public and private sectors as the prevention of money laundering and the obliged parties to provide basic banking services to the public.

On one hand, the need to halt international crime, terrorism, and corruption and on the other hand the state's obligation to maintain the standard of living and to provide protection against violations of the fundamental rights of the natural person. A person should not be excluded from society because of anti-money laundering regulations. The state is obliged to offer solutions in these types of cases and adequate legislation should be set forward in private legal relations where fundamental rights would be protected. The author, therefore, evaluates the legal basis of financial institutions to terminate or refuse to open a basic bank account to an individual. The thesis will end with a conclusion where the author draws the analysis together and suggests amendments to procedures and regulations.

Next, it is justified to open the methodological choices of the dissertation in more detail. Legal research methods can be divided into several different subgroups, but the author uses legal dogmatics and the comparative method. The subject of this research is set up on valid law - legal norms, the content of which is clarified and systematized through interpretation.

The main endeavor in legal research is to find out what is the content of valid law from the point of view of the referred legal problem at this given time.<sup>13</sup>

The focus of the legal analysis is therefore the law in force as described above and its meaning. In this interpretation, not only legal norms are used, but also other legal sources, such as legislative drafting documents, proposals, and justifications for the decisions of various courts. Legal norm as a concept covers both legal rules and legal principles. Hence legal research does not only focus on the provisions of the law and the above-mentioned legal sources, but it also includes an interpretation aimed at legal principles.

Through legal argumentation in legal research, legal norms are interpreted, their mutual relationship is systematized, and other solution standards are weighed. The goal is to form a set of argumentation rules and principles through this.<sup>14</sup> The relevant jurisdiction regarding money laundering and terrorist financing have been clarified and systemized through a legal approach in a way that answers the research questions. The thesis research includes studies and materials issued by competent authorities in English and other foreign languages like Estonian and Finnish. The author acknowledges that previous research has been made in the field of financial exclusion but the topic that was analyzed was: how does de-risking limit the fundamental rights of legal entities? Therefore, the objective of the research differs in many ways. Further, there is not much legal research regarding the topical issue of Ukrainian refugees and their right to financial services. In many cases, the refugees flee their home country without identity documents which in many cases are required by the banks to fulfill KYC compliance. Therefore, the topic of this legal research is valuable and will offer insightful information.

Keywords: anti-money laundering, de-risking, basic financial services, fundamental rights, state responsibility.

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<sup>13</sup> Hirvonen.A, Mitkä metodit? Opas oikeustieteen metodologiaan, Yleisen oikeustieteen julkaisuja, 2017, pg 35-56

<sup>14</sup> Ibid

# 1. PREVENTION OF MONEY LAUNDERING AND FINANCING OF TERRORISM

Money laundering and preventing the financing of terrorism is based on internationally agreed practices. The aim of international practices and regulation is to uniformly regulate international financial markets and local economical activities. The goal to harmonize the regulation globally has been demanding, but necessary to stop the abuse of the economic environment and thus influence the criminal scenery so that it will not benefit from criminal activity. This chapter will look into the history and analyze the development of anti-money laundering regulations. In an Indianas Law Review article, the author referred to an American Judge Robert Grant who once said in his court hearing: “Never move a fence until you understand why it was built there in the first place”.<sup>15</sup> The author agrees with the judge and therefore introduces the development of the beforementioned topic in the next subchapters.

## 1.1 The development of Anti-Money Laundering and Terrorism financing regulations

The Financial Action Task Force on money laundering (FATF) has explained that illegal activity such as illegal arms sales, smuggling, organized crime like prostitution rings and drug trafficking generates money outside the legal financial banking system and by disguising the sources, moving funds or changing the form on the assets money gets laundered and replanted into the financial system.<sup>16</sup> Finnish Financial Intelligence Unit (FIU) determines that: “money laundering is the concealment or obliteration of the origin of money obtained through an offense.”<sup>17</sup> The purpose is to introduce illicit money into the legal financial structure so that the criminal can use it freely.

As was beforementioned in the introduction, anti-money-laundering regulations were seen as a growing need to fight back drug trafficking and crimes related in the 1980’s. With the rise of Pablo Escobar and other similar cartel that worked together to manufacture, transport, and sell cocaine in United States some measures had to be taken by the government to protect its citizens from drug-related crimes and of course downfall of society by misuse or addiction to

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<sup>15</sup> Shepard, Randall T. "The Importance of Legal History for Modern Lawyering." *Indiana Law Review*, vol. 30, no. 1, 1997, pp. 1-6. HeinOnline, <https://heinonlineorg.ezproxy.utlib.ut.ee/HOL/P?h=hein.journals/indlr30&i=13>.

<sup>16</sup> FATF. Frequently Asked Questions. Available at: <https://www.fatf-gafi.org/en/pages/frequently-asked-questions.html#tabs-36503a8663-item-6ff811783c-tab>

<sup>17</sup> Money Laundering. <https://rahanpesu.fi/en/money-laundering>

narcotics.<sup>18</sup> Money laundering is not only linked to crime per se, but also affects the whole economy, healthcare systems, and security of the state. The regulation process of money laundering is very challenging because the whole field of criminal activity is elusive.<sup>19</sup> From the early 1990's the United States turned the tables, instead of attacking cartel's illegitimate activity the government started to target money laundering to reduce the narcotics trade whereas it would be *pari passu* not profitable.<sup>20</sup> Americans started war against drugs and money laundering with the Money Laundering Control Act of 1986. This new idea of regulation had not been welcomed universally because it breached the financial privacy rule, where the customer is subject to surveillance and his bank transaction activity can be accessed by the police when money laundering was suspected. Then the regulations acquired two different approaches to confiscate or freeze individuals assets. These were : a) personam procedure, where the person has been charged with a crime and his guilt been proven and b) rem procedure when state can prove that the property of an individual has been gained through criminal activity.<sup>21</sup>

As in the US, Italy was also having significant problems with cartels and thus was the first state to experiment seizure of assets in 1982 when Italian government enacted a new law named :”La Torre” to their national legislation. This law provided the authorities to fight back against mafia conspiracy and seizure and confiscation of property and assets of criminals and their associates. Impact assessment showed positive results, but also boosted the phenomenon of private mafia firms and entrepreneurs. <sup>22</sup> Thus, that altogether led to the development of FATF in 1989 to tackle money laundering, terrorist, and proliferation financing. The intergovernmental organization that operates under the Organization for Economic Co-Operation and Development ( OECD) and promotes effective standards and implementation of legal, regulatory, and operational measures in member states.<sup>23</sup> This was followed by the regional establishment of anti-money-laundering standards and regulations in- the European

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<sup>18</sup> Khaled A. A. Alasmari, Cleaning up Dirty Money: The Illegal Narcotics Trade and Money Laundering, Economics & Sociology, Vol. 5, No 2a, 2012, pp. 139-148, available at: [https://www.economics-sociology.eu/files/15\\_MOD\\_Dirty%20Money\\_e%20new.pdf](https://www.economics-sociology.eu/files/15_MOD_Dirty%20Money_e%20new.pdf)

<sup>19</sup> Heinälouma.E,Lannoo.K, Rarlour.R, Anti-Money Laundering in the EU,Time to get serious, CEPS-ECRI Task Force Report, 2021, available at: [https://www.ceps.eu/wp-content/uploads/2021/01/TFR\\_Anti-Money-Laundering-in-the-EU.pdf](https://www.ceps.eu/wp-content/uploads/2021/01/TFR_Anti-Money-Laundering-in-the-EU.pdf)

<sup>20</sup> Khaled A. A. Alasmari, Cleaning up Dirty Money: The Illegal Narcotics Trade and Money Laundering, Economics & Sociology, Vol. 5, No 2a, 2012, pp. 139-148, available at: [https://www.economics-sociology.eu/files/15\\_MOD\\_Dirty%20Money\\_e%20new.pdf](https://www.economics-sociology.eu/files/15_MOD_Dirty%20Money_e%20new.pdf)

<sup>21</sup> Ibid

<sup>22</sup> Arlacchi.P, Effects of the new anti-mafia law on the proceeds of crime and on the Italian economy, 1984,available at: [https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin\\_1984-01-01\\_4\\_page008.html](https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1984-01-01_4_page008.html)

<sup>23</sup> History of the FATF, FATF, available at: <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html>

Union, Council of Europe, Organization of American States and many others.<sup>24</sup> Thus we can see that the regulation of that field has developed quite rapidly and aggressively to fight back against money laundering and terrorist crimes.

## 1.2 FATF recommendations

The FATF Recommendations set up an international standard by their framework of measures that member states should implement in their national jurisdiction. It is clear that all measures can't be taken over identically, but should be adapted to their actual circumstances.<sup>25</sup> These basic standard measures that states should enact to their legislation would be to manage and identify AML/CTF risks and develop set of policies. Also to prevent and pursue the legislation of AML/CTF. FATF recommends to establish governmental authorities to halt money laundering and criminal activity regarding it. Investigative authorities like Financial Intelligence Units should be created in every member state to supervise the procedures in financial sector. To enhance the transparency and know the source of money and beneficial owners of transactions or accounts. And to continue and support international cooperation in the field of money laundering and terrorist financing.<sup>26</sup>

There are three main elements of money laundering procedure that have to be considered and are described in the FATF recommendations: placement, layering and integration. Placement is seen as a replacement of dirty money in the banking system, whether through cash deposits or by other means. Layering involves the activity of hiding the crime behind the money so it would seem legitimate and integration is converting the money into legal businesses to make it seem as normal business.<sup>27</sup> This could be selling and buying property or cars with dirty cash and later reselling them and planting the money to banks.

Forty recommendations were drafted by the FATF in 1990. With the development of economical environment, crimes and technology these recommendations have been amended several times. Special Recommendations have been added to these standards due to the situation in the world. Over 180 countries have ratified these into their legal system and thus these are universally recognized for anti-money laundering and countering the financing of

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<sup>24</sup> What is Money Laundering, FATF, available at: <https://www.fatf-gafi.org/en/pages/frequently-asked-questions.html#tabs-36503a8663-item-6ff811783c-tab>

<sup>25</sup> FATF (2012-2022), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France, [www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html) (ei avane)

<sup>26</sup> Ibid

<sup>27</sup> Heinäluoma.E,Lannoo.K, Larlour.R, Anti-Money Laundering in the EU,Time to get serious, CEPS-ECRI Task Force Report, 2021, available at: [https://www.ceps.eu/wp-content/uploads/2021/01/TFR\\_Anti-Money-Laundering-in-the-EU.pdf](https://www.ceps.eu/wp-content/uploads/2021/01/TFR_Anti-Money-Laundering-in-the-EU.pdf)

terrorism ( AML/CTF).<sup>28</sup> FATF has gained extensive amount of influence power and works through political pressure. These abovementioned recommendations are stated in many international agreements and instruments, for instance in the UN Security Council resolutions against terrorism and the European Unions Anti Money Laundering directives, which vice versa validates FATF recommendations legitimacy. <sup>29</sup>

### 1.3 EU Anti Money Laundering Directives

European Union has had a significant impact on money laundering and terrorist financing regulation. As this criminal activity is transnational it needs to be confronted universally, thus it is essential for the European Union to make an effort and try to break the spread and possibilities to launder money and finance terrorism through the Union's common market and freedom of movement.<sup>30</sup> Money gained from international and national crimes by the criminals in the EU is estimated to be around 1.2 % of the EU's GDP. Since 1991 the European Union has introduced the member states altogether six directives that aim to harmonize and promote the prevention and detection of money laundering in member states.<sup>31</sup>

At first, the competence of the European Union to regulate areas that are arguably related to criminal offences like money laundering and terrorist financing, where a bit of question mark. The competence of EU to fully take responsibility to regulate some area on the behalf of member states come from the given competence by the member states. Nevertheless, the Commission argued that money laundering heavily disrupts the internal market of the Union, thus the need for the properly harmonized prohibition is necessary. Lisbon Treaty article 83(1) gives the full competence to regulate criminal offenses and sanctions regarding the particular crimes mentioned in that article with a cross-border dimension that needs to be combated on common bases.<sup>32</sup> According to Article 83 of the Treaty on the Functioning of the European Union ( hereinafter TFEU) crimes like trafficking of drugs or children and women, terrorism, illicit arms trafficking, money laundering, corruption and counterfeiting of means of payment also computer crimes, and organized crimes are regulated by the Union.<sup>33</sup> Hence,

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<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Sahavirta. R, Rahanpesu rangaistavana tekona. Suomalaisen Lakimiesyhdistyksen julkaisu A-sarja N:o 286., Helsinki 2008, pg 100

<sup>31</sup> Hyttinen, T. Rahanpesu ja rikosvastuu: teoria ja käytäntö. Alma Talent. Helsinki.2021, pg 46

<sup>32</sup> Csonka.P,Dr.Landwehr.O, 10 Years after Lisbon – How “Lisbonised” is the Substantive Criminal Law in the EU?, EUCRIM Issue 4/2019, <https://doi.org/10.30709/eucrim-2019-023>

<sup>33</sup> Treaty on the Functioning of the European Union, Article 83

the importance also lies in the EU legal method in which it sets legislation forward. EU has a minimum harmonisation rule that is applied to anti-money laundering directives. This means member states are allowed to define the transposition scope themselves. This does not mean, that member states can under regulate the offences, but rather they can choose to transpose AMLD to their national legislation with variations<sup>34</sup>, thus it is interesting to see the discrepancies in national law between countries like Finland and Estonia, mutual members of the EU.

The first Anti Money Laundering Directive was released 10<sup>th</sup> June 1991, with three years of transition time to member states national jurisdiction (1.04.1994).<sup>35</sup> The transition period in the European Union law gives the governments a phase to prepare the private and public sectors and to give lawmakers the necessary time to enforce the law and administrative regulations to fulfill the directive. European Union directives must be transposed timely, transition deadline is given in the directive. Usually, the directives must be transposed in two or three years, like the 1<sup>st</sup> Anti Money Laundering Directive was set to transpose in three years.<sup>36</sup> Furthermore, European Court has explained that because member states participate in the preparatory work for the adoption of directives, the adoption has to be on time.<sup>37</sup> Also directives have to be transposed to national jurisdiction so, that they are in force and applicable.<sup>38</sup> Thus, an impact assessment of these regulations must be carried out by the Union to ensure the intended effect and possible negative impacts on other relevant areas of law, in this case, the fundamental rights of natural persons.<sup>39</sup>

The first directive (Council Directive 91/308/EEC on preventing the use of the financial system for money laundering purposes) provided the base for all the next directives to come, thus was a cornerstone in the development of the European Union's Anti Money Laundering and Financing of Terrorism regulations. The first directive determined key preventative procedures like customer and client identification and data record keeping, customer due

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<sup>34</sup> Muradyan.D, The efficiency of the European Union's Anti-money laundering legislation, An analysis of the legal basis and the harmonisation of the EU Anti-money laundering legal framework, Stockholm University, Master Thesis, 2021, available at: <https://www.diva-portal.org/smash/get/diva2:1634568/FULLTEXT01.pdf>

<sup>35</sup> History of the European Union Anti-Money Laundering and Financing of Terrorism Directive, Anti Money Laundering Forum, available at: <https://www.anti-moneylaundering.org/Europe.aspx>

<sup>36</sup> Parind.M, Euroopa Liidu õigus. Eesti vaade, kirjastus Uku, 2022, lk 199-206

<sup>37</sup> Judgment of the Court of 12 October 1982. - Commission of the European Communities v Italian Republic. - Failure to implement Directive 77/91/EEC. - Case 136/81., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0136#SM>

<sup>38</sup> Parind.M, Euroopa Liidu õigus. Eesti vaade, kirjastus Uku, 2022, lk 200

<sup>39</sup> OECD (2019), "Regulatory impact assessment across the European Union", in Better Regulation Practices across the European Union, OECD Publishing, Paris, <https://doi.org/10.1787/9b745623-en>.

diligence, and most of all obliged member states to ensure that their banking sector was not used to launder money.<sup>40</sup>

The second AMLD, 4.12.2021 was set to be transposed by 15<sup>th</sup> June, 2003 (Directive 2001/97/EC of the European Parliament and of the Council, for the purpose of money laundering in financial system amending Council Directive 91/308/EEC on preventing the use of additional obligations in anti-money laundering activities) . The directive entails expanded provisions and an extended definition of money laundering and sets it ahead of drug-related crimes and sets an obligation for member states to ensure compliance of finance corporations that are positioned more than in one state. Also, the list of professionals who have to comply with the regulations was now extended, added were: lawyers, auditors, tax advisors, real estate agents, and accountants.<sup>41</sup> The goal of the second money laundering directive was that, in addition to drug crimes, several other serious crimes that generate financial gain would be considered as predicate crimes for money laundering thus engaging more of civil society. Also FIU's were mentioned, financial intelligence unit, who would assess the reports of private sectors and also refers cases to criminal investigation, and even more gives permission to financial institutions to freeze assets. FIU's mediate between private and public sector continuously.<sup>42</sup> FIU is the public institution carrying out public policy. The legal entities supervised by the authority include banks, insurance and pension companies. Beforementioned entities are obliged to know their customers and report to the FIU of any suspicion transactions that might be involved in money laundering or terrorist financing.<sup>43</sup>

The third AMLD, (2005/60/EC), which was implemented by the member states by 15<sup>th</sup> December 2007 was the first one entailing also terrorist financing due to the new FATF special recommendations that were amended due to the 9/11 terrorist attack.<sup>44</sup> We can therefore clearly see the international concept in these regulations and most but not least the political power of FATF and its regulations that are carried into the national legislation and other agreements as well. The third directive also brought new obligations to legal and natural

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<sup>40</sup> Hyttinen.T, Rahanpesu ja rikosvastuu: teoria ja käytäntö. Alma Talent. Helsinki.2021,pg 48-50

<sup>41</sup> Money laundering: amendment to Directive, Nating Group, Thomson Reuters, 2002, available at: [https://uk.practacallaw.thomsonreuters.com/3-102-1830?originationContext=knowHow&transitionType=KnowHowItem&contextData=\(sc.Default\)&comp=pluk](https://uk.practacallaw.thomsonreuters.com/3-102-1830?originationContext=knowHow&transitionType=KnowHowItem&contextData=(sc.Default)&comp=pluk)

<sup>42</sup> Prevention of money laundering and terrorist financing, Financial Supervisory

<sup>43</sup> Ibid

<sup>44</sup> Salas.M, The third anti-money laundering directive and the legal profession, 2005, available at: <file:///C:/Users/toome/Downloads/'The%20third%20anti-money%20lauding%20directive%20and%20the%20legal%20profession'%20-%20Oct%202005%20by%20Mariano%20Fernandez%20Salas.pdf>

persons to know their customers better, customer due diligence (CDD) process procedures.<sup>45</sup> The process included more detailed provisions regarding customer relationships, onboarding, and continuing relationships, as the obligation to verify the customer and the beneficial owner. Due to this recommendation that was implemented to national banking regulations in U.S., many money service businesses (MBS) were closed due to high AML risk by the federal banks. This type of *hawala* service provider, term meaning international money transfer service, was used extensively in Africa and Asia. This was of course damaging to the poorer community, the unbanked individuals, who operated through MBS/ hawala service and did not have access to other financial services.<sup>46</sup> In the author's opinion, this clearly violated the rights of these individuals, for not getting access to money services that are clearly essential.

The directive also mentions in its preface (65,66) the importance of fundamental rights and in particular the right to respect for private and family life and right to the protection of personal data, the freedom of conduct a business, the prohibition of discrimination, the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of defense.<sup>47</sup> These are all in one way or another part of many international instruments, the European Charter of Fundamental Rights and member state Constitution. Whereas we can determine by the directive that the public policy sets heavy regulatory obligations to private sector - the financial institutions, and prohibits to violate the rights of natural persons, making them responsible of the harmonization of these two intersecting systems.

The 4th AMLD or The Directive (EU) 2015/849 of the European Parliament was published on 5 June 2015 and transposed into national legal systems 26<sup>th</sup> of June 2017. Fourth directive, taking to consideration of the FATF recommendations, widened the scope of professionals or business entities who the directive applies to. Traders in goods such as jewelry shops were added to the directive. Also the requirement of payments that are made 10 000,00 euros in cash had to always be investigated and beneficial owner or source of money verified.<sup>48</sup> Main

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<sup>45</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

<sup>46</sup> FATF Report, The role of *Hawala* and other similar service providers in money laundering and terrorist financing, 2003, pg. 9-11, available at: <https://www.fatf-gafi.org/en/publications/MethodsandTrends/Role-hawalas-in-ml-tf.html>

<sup>47</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20th May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 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, preface( 65-66)

<sup>48</sup> Summary of: Directive (EU) 2015/849 — prevention of the use of the financial system for the purposes of money laundering or terrorist financing , available at: <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32015L0849>

focus on these directives so far has been to identify and monitor the transactions to prevent money -laundering and terrorist financing. This is a very relevant thing to keep in mind and will be returned to throughout the thesis. The relevance of the intention of the regulation in question is important from the aspect of a natural person and state liability to protect constitutional rights.

Article 32a of the Fifth Money Laundering Directive instructs the obligation for EU member states to implement centralized automated mechanisms, such as electronic registers or data retrieval systems, which enable up-to-date identification in credit institutions the holder or controlling authority of an existing. The account holder's name, social security number or other unique identification number and the information of the document used to identify the customer must be stored in the systems. The information must also be stored about representatives authorized to act on behalf of the account holder and on possible actual beneficiaries.<sup>49</sup> Secondly, the directive is extended to virtual currencies and thirdly increased monitoring of third high-risk country customers is added. This type of automatization caused the banks to update their systems and in many cases KYC information about their clients, which ended with some of the client's funds being freezed and some client relationships being terminated.<sup>50</sup>

From the perspective of fundamental rights of natural persons, the European Court of Justice (ECJ) gave preliminary judgement on 22.11.22 about 5<sup>th</sup> anti-money laundering directive, (Joined Cases C-37/20 | Luxembourg Business Registers and C-601/20 | Sovim) violation of personal data that enabled anyone to access information of companies beneficial owners. Court stated that it was invalid and unproportionate to the objective that was pursued. Further, when the beneficial ownership information is available to the public it infringes fundamental rights to respect for private life and personal data, protected in Articles 7 and 8 of the EU Charter of Fundamental Rights, that could therefore enable possible abuse of that data and for the purpose of money laundering and terrorist financing is not proportionate and expands to more serious interference with fundamental rights assured in before mentioned articles.<sup>51</sup> Even though this thesis does not continue to analyze the protection of privacy and personal

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<sup>49</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 purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance)

<sup>50</sup> Järvinen.J, Nordea väläyttää jopa pankkipalveluiden rajoittamista, ellei asiakas päivitä tietojään – kenenkään tiliä ei vielä suljettu, YLE, 30.09.2020, available at: <https://yle.fi/a/3-11568974>

<sup>51</sup> Judgment of the Court in Joined Cases C-37/20 | Luxembourg Business Registers and C-601/20 | Sovim, Press Release No 188/22, available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-11/cp220188en.pdf>

data, it is relevant to show that these EU directives can be disproportionate to natural persons and can be heard in the ECJ. The decision reminds us of the importance of the EU's fundamental rights and the fact that in practice the ECJ sometimes also acts as a "constitutional court" when assessing the conformity of not only national laws but also EU regulations with fundamental rights.

Further, the fifth directive continues to strengthen monitoring agencies, the FIUs and competent authorities must have real-time access to the unfiltered parts of the systems for information. The mechanisms must also be such that the money laundering investigation center can give any money laundering investigation center operating in the EU territory access to the system's stored data if the data is necessary to perform a legislative task. FIU must be given all the information it needs. When entities such as insurance companies or private financial institutions who are bound to this treaty do not comply, large regulatory fines are sanctioned. A case that was handled by the Finnish FIU, was S-Pankki OY case, where the FIU determined from their annual reports and further investigations that the beforementioned bank did not comply with the requirements to have automated mechanisms to monitor customer transactions and neglected to perform the risk-based assessment referred to in the regulation of Finnish act of anti-money laundering and terrorism financing, thus gives a fine amount to 980 000,00 € to be paid to the government of Finland.<sup>52</sup>

The second case the author wants to highlight is a case from Estonia where during the supervision procedure, the Estonian FIU established that in the case of AS SEB Bank, there were deficiencies in the collection of customer data and the identification of the actual beneficiaries. Also, money laundering reporting practices were poor. The FIU issued a sanction to the bank, obliging it to eliminate the deficiencies in 6 months' time. Due to the reasons identified during the supervision procedure, the FIU also started violation proceedings and fined AS SEB Bank a million euros for the deficiencies in 2017-2019.<sup>53</sup>

These beforementioned cases are not the cream top but will give an idea of the fines that are drafted. In 2022 the biggest penalty, \$2 Billion, was given to Danske Bank A/S, a global financial corporation, with headquarters in Denmark. It was investigated that money was laundered through U.S banks and Estonia Danske branches where AML controls and

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<sup>52</sup> Toimituskirja Finanssivalvonnin johtokunnan päätöksestä, 16.12.2019, Seuraamusmaksun määrääminen, available at: [https://www.finanssivalvonta.fi/globalassets/fi/tiedotteet-ja-julkaisut/lehdistotiedotteet/2019/s-pankki\\_paatos.pdf](https://www.finanssivalvonta.fi/globalassets/fi/tiedotteet-ja-julkaisut/lehdistotiedotteet/2019/s-pankki_paatos.pdf)

<sup>53</sup> Ettekirjutus AS-ile SEB Pank nõudmises viia oma tegevus kooskõlla krediidasutuste tegevust reguleerivate Õigusaktidega, 25.06.2020 nr 4.1-1/83, available at: [https://www.fi.ee/sites/default/files/2020-06/ettekirjutus\\_as-ile\\_seb\\_pank\\_0.pdf](https://www.fi.ee/sites/default/files/2020-06/ettekirjutus_as-ile_seb_pank_0.pdf)

monitoring were absent and lied about in the corporate. Danske Bank laundered \$160 billion through U.S. banks on behalf of the Non-Resident Customers. Danske Bank pleaded guilty of bank fraud.<sup>54</sup> This demonstrates the agenda of financial institutions when carrying out anti-money laundering and terrorist financing regulations, to be compliant. Also, for governments, it is easier to combat money laundering by compliant finance institutions rather than criminals. So, when onboarding a customer that has bad financial data, meaning adds risk and compliance costs to the bank, it might be useful and cost-efficient to not onboard that client because of the risk. As presented above, financial institutions must be compliant or otherwise can have detrimental consequences when compliance fails. This risk-based evaluation procedure and the consequence to customers is the phenomenon of de-risking and has been a hot topic in the financial world for a few years now. Understandably, it is not in the bank's interest to not onboard customers, they clearly are an asset, but due to international and governmental requirements, these decisions are still done.

6th AMLD was proposed by the Commission of EU to be implemented on 3.06.21. The pre-text, of the directive (2018/1673) on combating money laundering by criminal law, section 2,3 highlight the importance of international co-operation and significant relevance of the Financial Action Task Force Recommendations and instruments of other international organizations and bodies that actively fight against money laundering and terrorism financing.<sup>55</sup> The objective of the directive is to harmonize domestic penalty regulation and thus clarifies the term of money laundering and predicate offenses, adding two, cybercrime and environmental crime.

#### 1.4 EU Payment Accounts Directive

The EU wants to be green and digital by 2050. This means that the agenda is to grow digital solutions, artificial intelligence (hereinafter AI) and financial technology. Nevertheless, the World Bank recently released data that nearly 4% of the adult population in the EU are financially excluded, meaning 13 million people are without a basic banking account. Now, the EU promises to improve this number and has done that, as the reported percent in 2017 was 8,2 meaning close to 31 million people were financially excluded, whereas the number has improved drastically by 18 million people. EU mentions inclusion in their articles and

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<sup>54</sup> Danske Bank Pleads Guilty to Fraud on U.S. Banks in Multi-Billion Dollar Scheme to Access the U.S. Financial System, The U.S. Department of Justice, 13.12.22, available at: <https://www.justice.gov/opa/pr/danske-bank-pleads-guilty-fraud-us-banks-multi-billion-dollar-scheme-access-us-financial> fo

<sup>55</sup> Directive (EU) 2018/1673 of the European Parliament and of the council of 23 october 2018 on combating money laundering by criminal law

researches many times, the aim is to fight inequality with digital solutions. “Inclusion must be the rule not the exception, and digital services and products should promote inclusion”. The author finds this agenda to be very ambitious, but also useful. The World Savings and Banking Institute state that Finland had 21.861 unbanked adults in 2021 whereas in 2017 the number was much lower being 9.866 which clearly indicates that the problem has grown in the society and AML/CTF regulations have impacted negatively on the state. In Estonia, the unbanked adult statistics show a decrease as in 2017 the number of people that were financially excluded was 22.137 and in 2021 the number was 6.929, which shows improvement in financial inclusion. It’s important to show the data regarding financial exclusion because this is clearly relevant also from the perspective of anti-money laundering directives that counter ways enable to end and terminate client relationships and furthermore end the relationships without the client’s consent and the right to get a proper explanation from the service provider according to the anti-money laundering directive. Thus, it is important to see what kind of protection the European Payments Directive (2014/92/EU) (PAD) provides to the individual.

Directive 2014/92/EU of the European Council and Parliament was issued already in July 2014. The directive is known as the Payments Account Directive (PAD) and it regulates the use of a basic payment account, the transfer of payments, and the comparability of payments related to payment accounts. The EU developed a significant need to build up internal market banking services. With the new account directive, the aim was to ensure the availability of basic banking services, the development and competition of retail banking in the internal market, the comparability of payments, and the transfer of payment accounts from one bank to another.<sup>56</sup>

The European Commission issued a recommendation letter in July 18 year 2011, they then noted that it is of great importance to have social and financial inclusion in the Union and not to weaken it by unnecessary restrictive criteria imposed by financial institutions to open basic payment accounts. They further emphasized the principle to access basic payment accounts consistently through the Union. Still, they draw attention to the financial institution’s responsibility to terminate the basic payment account contract in exceptional situations or

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<sup>56</sup> Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features

crimes that are under national or international jurisdiction, such as legislation on AML/CTF or on the prevention and investigation of relevant crimes.<sup>57</sup>

Still, they continue to explain that basic banking services should be guaranteed in all the member states. Further, they should entail services like depositing and withdrawing cash in and from the account and they should enable making essential payment transactions, for example, receiving social benefits or paying bills and taxes. Also, they notice that access to credit would not be necessary for a basic banking account in terms of financial inclusion. The Commission also draws attention to the client's right to make a court complaint when a dispute arises. Further, it is important to give justifications from the service provider in case of not giving access to basic banking services to ensure transparency and fairness.

The before- mentioned is also stated in the PAD directive articles 15,16 and 17. Article 25 of the PAD directive explains that when a consumer has already paid a fee for their basic payment account but has been denied access to it, member states have to ensure that this person gets a basic banking account free of charge.

There is a fundamental challenge in harmonizing Money Laundering regulations and PAD, because they seem to have somewhat diametrically opposed interests. PAD aims to broaden the social and financial inclusion of vulnerable people and thus enable the free movement of for example people as the workforce. Money Laundering legislation obliges the banks to obtain maximum quantities of information about the clients, whilst giving the financial institution the possibility to terminate, freeze or not to onboard clients and contracts same time not obligating banks to give precise reasoning on why they process some personal data as they do. According to the Payments Account Directive this infringes the right of a natural person to access effective and efficient dispute resolution procedures when a payment service provider is not obliged under the Money Laundering and Terrorist Financing regulation to give an accurate explanation about contract termination or asset freezing. Finding a balance between these regulations due to the conflict of interest in the legislative environment is challenging to financial institutions and due to the dynamism, the jurisprudence is still evolving.

### 1.5 EU Anti-money-laundering authorities

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<sup>57</sup> EBA alerts on the detrimental impact of unwarranted de-risking and ineffective management of money laundering and terrorist financing risks, EBA, 05.01.2022, available at: <https://www.eba.europa.eu/eba-alerts-detrimental-impact-unwarranted-de-risking-and-ineffective-management-money-laundering-and>

The author wants to point out that European Banking Authority (hereinafter EBA) is important in the EU governance system, as a control organ for all financial business institutions operating in EU. Last year, in 2022, EBA released an opinion about de-risking and its impact on customers' access to banking services.<sup>58</sup> Thus, EBA's opinion will be more elaborated in the following chapter. EBA was established in 1.01.2011 as part of the European System of Financial Supervision (ESFS) and was in one point transferred all the obligations of ESFS institution. EBA was set up by the European Parliament and has given the mandate to carry out unions' public interest that is based on the union's public law.<sup>59</sup> The European Commission proposed a new EU authority to deal with money laundering and financing of terrorism, the Anti-money-laundering Authority (hereinafter AMLA).<sup>60</sup>

The European Commission revised, that because of several significant money laundering cases in 2019 that took place in EU financial institutions, a set of new reforms were urgently needed in the areas of supervision and cooperation amongst FIU's. The Commission concluded that too much of the responsibility is on the national FIU's, making the quality and effectiveness uneven in the union. These problems arise due to the different practices and major variations in resources that again criminals can use for their benefit. EBA also determined that not all competent AML/CTF authorities are able to collaborate and communicate with domestic and international stakeholders.<sup>61</sup> Also, this was determined in the EU's Security Union Strategy for 2020-2025 where the importance of EU's framework for anti-money laundering and the terrorist financing was heavily pointed out to protect Europeans from terrorism and organized crime.<sup>62</sup> Therefore they concluded to establish central EU authority AMLA that would have obligation to centrally strengthen and facilitate joint analysis amongst FIU's. The governance of the coordination and support mechanism should be based on the full involvement of FIUs and should respect national FIU's core roles and duties but also respect the operational independence and sovereignty but also the security and

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<sup>58</sup> EBA alerts on the detrimental impact of unwarranted de-risking and ineffective management of money laundering and terrorist financing risks, EBA, 05.01.2022, available at: <https://www.eba.europa.eu/eba-alerts-detrimental-impact-unwarranted-de-risking-and-ineffective-management-money-laundering-and>

<sup>59</sup> EBA at a glance, EBA, available at: <https://www.eba.europa.eu/about-us/eba-at-a-glance>

<sup>60</sup> Proposal for a regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0421>

<sup>61</sup> Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0421#footnote3>

<sup>62</sup> Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing 2020/C 164/06; C/2020/2800; OJ C 164, 13.5.2020, p. 21–33: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0513\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0513(03))

privacy of financial intelligence. Thus AMLA should be the EU's center for anti-money laundering and terrorist financing. AMLA will start operating at the beginning of two thousand and twenty-three.<sup>63</sup>

AMLA's key responsibilities are to make sure that the existing EU AML/CTF framework is implemented into national legislation correctly. AMLA is also required to establish an EU single rulebook about AML/CTF rules, recommendations and regulations. They further have to be competent and effective about supervisory tasks and AMLA has to establish support and cooperation mechanisms for national FIUs. When cases are directed to AMLA, they have to enforce EU-level criminal law provisions and improve information exchange. Their challenge is to also enhance the international dimension of the EU AML/CTF framework.<sup>64</sup>

EU has set up outstanding operational units and heavily regulated financial business activity in the Union. Financial governance in one hand as public law and financial institutions and client contractual relationships as private law practice, both have a important part to play to protect public and private interests. It is understandable, that the development of law, due to the changing circumstances, might heighten the disparity between those two. Still, as the union and the member states stand for equality and injustice, do they consider or provide legal tools for the protection of weaker contract parties who have been discriminated? This question is part of the main thesis study and is gradually answered in the following chapters.

## 2. DE-RISKING AND FINANCIAL EXCLUSION

This chapter will evaluate the phenomenon of De-risking. De-risking will be introduced and issues regarding financial exclusion due to De-Risking assessed. The chapter further discusses the methodology behind risk-based assessment, onboarding of a customer and KYC (know your customer) process. International and national (Finnish and Estonian) regulations concerning financial services and anti-money laundering and terrorist financing regulations, acts and literature has been thoroughly examined by the author. In depth legal analysis of financial exclusion due to the preventative measures of money laundering and terrorism financing with limitations to fundamental rights will be carried out. This chapter will answer

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<sup>63</sup> Anti-money-laundering authority (AMLA): Countering money laundering and the financing of terrorism, 19.01.2023, available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2022\)733645](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733645)

<sup>64</sup> Proposal for a regulation of the EU Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010

the supportive question of the main question of the thesis: Is de-risking infringing the fundamental rights of natural persons?

## 2.1 Definition and development

Exploring the term of de-risking gives us a better understanding of this phenomenon and why it is relevant. As the author analyses and compares two EU member states in this thesis – Finland and Estonia, and thus also can investigate how both countries have explained this term. In Finland, the English version of that term is quite new to the public, still, mostly it is used and spoken about in English, however, a suitable translation could be *riskienpoisto/ riskien vähentäminen*, meaning risk removal or reduction. Finnish ministry of finance has slightly elaborated on the terminology. Risk is the impact of uncertainty on goals. The effect is a deviation from what was expected. The effect can be positive or negative compared to the expected effect. Risk assessment is essential for defining the risk level, assessing the importance of risk, and making decisions regarding risk handling.<sup>65</sup> Risks can be handled in a multiple way:

- preventing or eliminating the risk by deciding not to start or continue the risk-causing activity / (de-risking)
- taking or increasing a risk to achieve an opportunity
- removing the source or cause of the risk
- changing the probability or influencing the probability
- changing the consequences or preparing for the effects
- sharing the risk with another party or parties
- preserving and tolerating risk with an informed decision<sup>66</sup>

In the authors opinion the latter objective from the abovementioned list - to deal with the risk and competently handle it is a more efficient risk-handling practice than to eliminate the risk and hope that it does not backfire. The reality of course might be the opposite. The author recently attended in a two-day seminar about fraud and corruption, where Finnish Central

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<sup>65</sup> Liite 2, Käsitteiden määritelmät, Finnish Ministry of Finance, available at: <https://vm.fi/documents/10623/307569/Liite+2+-k%C3%A4sitteiden+m%C3%A4%C3%A4ritelm%C3%A4t/f61984fa-ea13-4e5c-9ced-07ea72581c15/Liite+2+-k%C3%A4sitteiden+m%C3%A4%C3%A4ritelm%C3%A4t.pdf>

<sup>66</sup> Ibid

Crime Police, financial crime department sergeant stressed that criminals are not dumb, they actually are 1,5 steps ahead of the police and also the legislation, thus dealing with the problem is crucial to keeping the threads in governments hands.<sup>67</sup> Thus, not dealing with the problem creates space for new crimes and in this case, possibilities to avoid legal banking systems and for example forces entities or individuals in need to use shadow banking or illegal ways to transfer or use their money.<sup>68</sup>

In Estonian, the term is also used in English but can be translated to *riskivälistus*, risk exclusion in English. The term is known from Estonian Insurance Act and refers to a form of risk that is excluded and is not covered by insurance coverage and therefore the insurance company is not obliged to compensate for the damage.<sup>69</sup> This sounds similar to the term de-risking as from the translation part of it, but does not fully comply with the whole spectrum of the term, still, EFIU and other governmental organizations and financial institutions seem to understand the broader meaning of the term.

Andre Nõmm, a board member of the Estonian Financial Supervision Authority, stresses in his 2020 article that, growth in social awareness is becoming a big challenge for bankers. Mere compliance with financial sector regulations is not a guarantee for not getting in trouble. Bankers are asked questions also from a broader ethical perspective regarding “money laundering cases”. He further assesses that the banking sector is cutting the risk by de-risking a certain line of businesses or groups of people, where transparency is less, and risks are difficult to assess. The banks seem to have an easier way to drop that customer rather than applying costly control over them. He argues that the debate about the relationship between private and public tasks is intellectually interesting, but does not help the banking sector, this is a well-known fact that financial institutions deal with “public tasks” and also contribute in fulfilling the requirements. In his opinion, this certainly causes criticism at financial institution address but is sometimes inevitable.<sup>70</sup>

Anne Vanhala explains in her book “Yritysvastuu ja Oikeus” (translation: Corporate responsibility and Law) that corporate responsibility is not anything new. Corporates are

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<sup>67</sup> Auhtor attended a 2 day seminar , Sijoitusakatemia, Fraud and Corruption, 14-15.2.23

<sup>68</sup> HACHER, André. " DE-RISKING SHADOW BANKING, How infrastructural power of shadow finance shapes U.S. derisking policymaking :a genealogical study of the Fed's ON RRP facility ". Université de Genève. Master, 2023. <https://archive-ouverte.unige.ch/unige:166737>

<sup>69</sup> Aavik.M, Kindlustusandja vabanemine kohustuse täitmisest vabatahtliku sõidukikindlustuse korral, Kohtupraktika analüüs, 2014,pg.8, available at:

[https://www.riigikohus.ee/sites/default/files/elfinder/analysid/2014/kindlustusandja\\_vabanemisest\\_kohustuse\\_taitmisest\\_vabatahtliku\\_soidukikindlustuse\\_korral\\_aavik.pdf](https://www.riigikohus.ee/sites/default/files/elfinder/analysid/2014/kindlustusandja_vabanemisest_kohustuse_taitmisest_vabatahtliku_soidukikindlustuse_korral_aavik.pdf)

<sup>70</sup> Nõmm.A, Rahapesu riskide vältimine pole suur kunst, 16.09.22, available at:

<https://www.fi.ee/et/blogi/andre-nomm-rahapesu-riskide-valtimine-pole-suur-kunst>

largely a part of society and thus have practiced responsibility in various forms and scenery. She also draws attention to Milton Friedman's leading idea whereas the company's only responsibility is to make a profit for its shareholders. However, we can already determine fundamental changes in corporate responsibility towards human rights in general but also national fundamental rights.<sup>71</sup> Vanhala also draws attention to a new association in Finland that was established in 2020 for corporate liability law. She explains that there is a clear need to have this kind of association to actively organize events regarding corporate responsibility and to promote dialogue about corporate responsibility and human rights. Still, it has been evaluated in the Government's SIHT project that, despite the company's extensive commitment to respect human rights, the integration of these rights into the company's core operations and monitoring mechanism are still at a very early stage.<sup>72</sup>

Furthermore, the EU Commission has enforced rules that regulate corporate responsibility toward human rights. The Commission introduced new proposal on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 in the second of February, 2022. The directive aims to set forward harmonized standards and regulations to improve due diligence and corporate governance of human rights, and aid for corporate shareholders to have quick and reasonable access to remedies. The companies have to safeguard and analyse possible adverse impacts of their policies and governance or regulations towards human rights. The directive will apply to bigger multinational EU Companies by revenue and number of employees and companies outside EU whose turnover is more than 150 million euros.<sup>73</sup> The author finds the corporate responsibility also to be important regarding this research as to it shows the level of responsibility is carried in private law sector. In author's opinion EU legislation interrelates and thus De-Risking in financial organizations may occur due to lack of understanding how to implement these regulations properly. This clearly shows the need for precise recommendations and regulations from the international plenary who also strictly form these requirements for money laundering and terrorism financing, being the FATF organization and European Union.

FATF determines de-risking as situation where banks end or limit business relationships with individuals or groups of people because of a higher risk category that is defined by the FATF,

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<sup>71</sup> Vanhala.A, Yritysvastuu&Oikeus, Kauppakamari, 2022, pg.5-7

<sup>72</sup> Ibid

<sup>73</sup> Proposal for a directive- Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>

rather than managing them according to FATF's risk-based approach.<sup>74</sup> They further explain that the phenomenon occurs when profitability to maintain or enter into client relations is low, when there are sensible requirements, global financial crises, and last but not least reputational risk.<sup>75</sup>

In February 2021, a project was launched on behalf of FATF to investigate the unintended consequences resulting from the incorrect implementation of the FATF Standards. The author finds the wording "incorrectly" quite peculiar in this context, as when looking at the percentage of states and financial institutions who have followed FATF initial recommendations in similar way's is quite high if not all the member states. To claim that they have followed rules in the wrong way is in the author's opinion a too broad statement on their behalf. Further, taking into consideration the numerous AML/CTF cases in 2019 in the EU banking corporation where fines and sanctions were drafted to banks who did not comply. Again, this raises the question of legal certainty and the utmost need for harmonized practices. The synopsis establishes that regardless of numerous guidance's and continuous engagement de-risking, financial exclusion continues to be challenge for many sectors. The project established analyses and examines the unintended consequences related to four major topics: 1) De-risking, 2) Financial Exclusion, 3) Undue targeting of NPO's , and 4) Restriction of Human Rights.<sup>76</sup>

So, what did this synopsis conclude about de-risking and human rights infringement? FATF further justifies the statement of states and financial institutions not implementing risk-based approach (hereinafter RBA) correctly by stating that when RBA's are not conducted correctly de-risking results. The paper further analyses that de-risking is a sum of many factors that are complex and interwoven and that vary also in importance. They explain that de-risking might occur because of fear for supervisory actions, decreased risk appetite in banks, and reputational concerns. They also establish that de-risking might be the consequence of the country's weakness to regulate and supervise their financial institutions who then don't believe they can effectively manage the risks.<sup>77</sup>

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<sup>74</sup> FATF, FATF Clarifies Risk-Based Approach: Case-by-Case, Not Wholesale De-Risking, 2014, available at: <http://www.fatf-gafi.org/publications/fatfgeneral/documents/rba-and-de-risking.htm>

<sup>75</sup> Ibid

<sup>76</sup> High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards, FATF, 27.10.2021, available at: <https://www.fatf-gafi.org/en/publications/Financialinclusionandnpoissues/Unintended-consequences-project.html>

<sup>77</sup> Ibid

FATF determines that financial exclusion is something they have fought against and continue to do so. They again draw attention to misuse of RBA and conclude that financial exclusion is a complex problem with various reasons why people can't access or don't use financial services regularly. Identified examples were digital infrastructure, limited access, cost of accounts and issues with trust and privacy.<sup>78</sup> They also bring out an interesting perspective on misuse of proportionality when applying a risk-based approach. They evaluate that proportionality is central in RBA and misuse of that can and will increase financial exclusion.<sup>79</sup>

European Bankin Authority explains the term de-risking as a decision made by the financial institution to end or terminate client relationships due to high anti-money and terrorist financing risk.<sup>80</sup> Determining de-risking phenomenon is important. Yes, de-risking is present and can become a threat to fundamental rights. Fortunately, international organizations and EU authorities have gradually studied the risk and approached it, so that relevant changes to the risk assessment can be done and thus lowering the burden of financial institutions to incorrectly apply RBA and thus minimizing the job of monitoring these fundamental rights regarding financial exclusion.

## 2.2 KYC procedure

The due diligence policy of FATF chapter D, paragraph 10, requires financial institutions to Know Your Customer (KYC here and after) . Recommendations require financial service providers to identify and verify their customers, but also gather information about beneficial ownership and do risk-based ongoing monitoring. This is done as part of mandatory anti-money laundering and countering the financing of terrorism (AML/CFT) measures to combat financial crime and check the customer's background. KYC process is also the first step of onboarding a customer, thus an important instrument that influences the risk appetite of financial institutions and the fundamental rights of individuals. The author analyzes the procedures and regulations regarding KYC procedures through the example of vulnerable customers in the next subchapters.

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<sup>78</sup> High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards, FATF, 27.10.2021, pg 3, available at: <https://www.fatf-gafi.org/en/publications/Financialinclusionandnpoissues/Unintended-consequences-project.html>

<sup>79</sup> Ibid

<sup>80</sup> EBA, Consultation paper on effective management of ML/TF risks access to financial services

### 2.2.1 Finnish KYC procedure and example of Ukrainian refugees

Review of Ukrainian refugees in Finland was done in 2022 and a press release published in January 2023 stated that before the Russian invasion of Ukraine, about 7,000 Ukrainian citizens lived in Finland. In 2022 Finland granted 45,000 temporary protection permits to Ukrainians which meant that Finland accepted more Ukrainian refugees per capita than Sweden, but considerably less than Estonia or Poland. It is expected that around 30-40k new applications for temporary protection is issued in 2023 in Finland.<sup>81</sup> This raises the question of how the Ukrainian refugees will manage their lives and use financial services during their life in the EU. Are they permitted to open basic banking services in Finland? Ukraine is known for scandals around money-laundering, corruption and trafficking.<sup>82</sup> Few months ago news about financial aid misuse had again raised the surface.<sup>83</sup> False banking accounts named Aku Ankka (Donald the Duck) for the purpose of money laundering is nothing new to the Finnish banking sector<sup>84</sup>, thus the fear of the financial institutions to secure their bank's reputation and not engage in criminal activity through unidentifiable clients is a real struggle. When the state enables Ukrainians to seek protection from Finland, meaning they allow these people to live and work here for a certain period of time. Therefore, the fundamental rights to work and live with dignity and have education is also a right for the refugees. The newspapers reflected on the issue still in autumn 2022, where Ukrainian refugee got a job and rental accommodation, but did not get a basic banking account from Finland due to a lack of documentation.<sup>85</sup> This clearly points out the problem. Further,

It is very questionable, that how can a person live without bank account or online banking in today's society. Basic questions – how will one pay for the rent or electricity or for the bus ticket? From the perspective of Finnish Constitutional law before mentioned would count as infringement of persons fundamental rights. Chapter 2, section 6 of Finnish Constitutional law states that all people are equal before the Finnish law. No one can or should be discriminated

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<sup>81</sup> Review of Ukrainians in Finland: Ukrainians will continue to be an important immigrant group, Ministry of the Interior, 19.01.23, available at: <https://valtioneuvosto.fi/en/-/1410869/ukrainians-will-continue-to-be-an-important-immigrant-group>

<sup>82</sup> Human traffickers luring Ukrainian refugees on the web targeted in EU-wide hackathon, EUROPOL, 23.06.22, available at: <https://www.europol.europa.eu/media-press/newsroom/news/human-traffickers-luring-ukrainian-refugees-web-targeted-in-eu-wide-hackathon>

<sup>83</sup> Ukraine corruption scandal: US promises 'rigorous monitoring' of aid, Euronews, 30.01.23, available at: <https://www.euronews.com/2023/01/24/ukraine-corruption-scandal-string-of-officials-resign-in-kyiv>

<sup>84</sup> Kunnas.R, Fiva myöntää: Maksun saajana voi olla vaikka Aku Ankka - "yritysten pitäisi olla tarkkana", Italehti, 20.09.2017, available at: <https://www.iltalehti.fi/kotimaa/a/201709192200402496>

<sup>85</sup> Onali.A, Saarilahti.E, Työ ja asunto löytyivät, mutta passi-vääntö pankkien kanssa estää sotaa Ukrainasta paenneen perheidin kotoutumisen Suomeen – "En pysty maksamaan vuokraa", Helsingin Sanomat, 23.08.2022, available at: <https://www.hs.fi/talous/art-2000008995610.html>

against because of their origin, nationality, opinion, health, disability or other differentiative reasons.<sup>86</sup> Furthermore, the public authority is obliged to protect people's basic and human rights according to the Finnish Constitution.<sup>87</sup> Basic banking services are part of financial institutions and private contract law, that allows banks to enter into or to refrain from contractual relationships.<sup>88</sup> Still, public law governs government agencies like FIU's who again are the main authorities who supervise bank sector, thus we can say that banks need to act according to the governments recommendations and regulations set out to protect these above-mentioned rights.

Finnish Financial Supervisory Authority released recommendations regarding Ukrainians and basic banking services. They reminded that the Finnish Anti-Money Laundering Act, Chapter 1, section 4, paragraph 7 explains that identity verification means verifying the customer's identity based on documentation or reliable independent source. If a person has been given a Finnish personal identification number (ID) and has a Ukrainian passport or ID card, then their identity is sufficiently reliably proven.<sup>89</sup> In the case where a person does not have a reliable ID document, for example, due to an imminent need to escape his/hers home, travel documentation and other reliable authority-issued documentation may be used to proceed KYC procedure.<sup>90</sup>

The preservation of travel data is also mentioned in the Finnish Money Laundering Act and thus sets the above-mentioned requirements for persons who do not have a Finnish ID number. Finnish Ministry of Foreign Affairs has a separate list for documents that are accepted by the Finnish authorities and institutions. These can be a passport, diplomatic passport, service passport or official duty passport, travel documents of a child, refugees document for traveling, a certificate for return to Ukraine, Seaman's book (on duty), and travel document for a person granted the complementary protection.<sup>91</sup> These documents,

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<sup>86</sup> Finnish Constitution, Chapter 2, Section 6, available at:

<https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>

<sup>87</sup> Finnish Constitution, Chapter 2, Section 22, available at:

<https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>

<sup>88</sup> Freedom of Contract in General, Fondia, Virtual Lawyer, available at:

<https://virtuallawyer.fondia.com/en/articles/freedom-of-contract-in-general>

<sup>89</sup> Finanssivalvonnan suositus liittyen ukrainalaisten pakolaisten henkilöllisyyden todentamiseen ja mahdollisuuteen saada peruspankkipalveluita, Valvottavatiedote 25.7.2022 – 37/2022, available at:

<https://www.finanssivalvonta.fi/tiedotteet-ja-julkaisut/valvottavatiedotteet/2022/finanssivalvonnan-suositus-liittyen-ukrainalaisten-pakolaisten-henkilollisyyden-todentamiseen-ja-mahdollisuuteen-saada-peruspankkipalveluita/>

<sup>90</sup> Ibid

<sup>91</sup> Visa requirement and travel documents accepted by Finland, Ministry of Foreign Affairs, available at:

[https://um.fi/visa-requirement-and-travel-documents-accepted-by-finland/-/asset\\_publisher/Obdz8bMcFgr1/content/ukraina-matkustusasiakirjat-suomeen/385107?\\_com\\_liferay\\_asset\\_publisher\\_web\\_portlet\\_AssetPublisherPortlet\\_INSTAN](https://um.fi/visa-requirement-and-travel-documents-accepted-by-finland/-/asset_publisher/Obdz8bMcFgr1/content/ukraina-matkustusasiakirjat-suomeen/385107?_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTAN)

according to the FFIU (Finnish Financial Supervisory Authority), can be approved when identifying the customer in the case of acquiring basic banking services. Still, they leave room for independent decisions when deciding on the scope of services banks want to offer these clients and which of the above-mentioned documentation they will accept from the Ukrainian refugee.

EBA has gathered guidelines about risk factors like identification when a person does not have an appropriate ID. Sections 4.9-4.11 explain the relevance of appropriate risk management by financial institutions when dealing with refugees and namely draw attention to the proportionality of restrictions, unproportionate restrictions to basic banking services exclude a person from society and infringe their fundamental rights.<sup>92</sup> Also the Council of Europe enacted Temporary protection Directive (2001/55/EC) on 4<sup>th</sup> march 2022, which will set the Ukrainians under the protection of PAD and enables them to open basic banking account in the EU.<sup>93</sup>

### 2.2.2 Estonian KYC procedure and example of Ukrainian refugees

KYC actively combats criminal activity by collecting and confirming customer data but is very costly and not profitable for the banks.<sup>94</sup> Still, these inspections increase confidence in the industry and help financial service providers manage their risks. On the other hand, due diligence processes raise challenges for people like refugees, the elderly and people whose nationality falls under sanctioned states, but also diplomats and foreign students or people without a permanent address. From any point of view, the due diligence policy and KYC process clearly exclude certain groups of people from financial institutions and the services thereof and thus aggravates financial exclusion. De-risking due to these processes is not to be taken lightly as it significantly contributes to the infringement of the fundamental rights of

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<sup>92</sup> Ohjeet, jotka on annettu direktiivin (EU) 2015/849 17 artiklan ja 18 artiklan 4 kohdan nojalla asiakkaan tuntemisvelvollisuudesta sekä tekijöistä, joita luotto- ja finanssilaitosten olisi tarkasteltava arvioidessaan yksittäisiin liikesuhteisiin ja yksittäisiin liiketoimiin liittyvää rahanpesun ja terrorismin rahoituksen riskiä (jäljempänä 'rahanpesun ja terrorismin rahoituksen riskitekijöitä koskevat ohjeet') ja joilla kumotaan ja korvataan ohjeet JC/2017/37)

<sup>93</sup> European Council decision 2022/382, 4th March 2022, establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D0382&from=EN>

<sup>94</sup> Asiakkaan tunteminen ja tunnistaminen, Finanssivalvonta, available at:

<https://www.finanssivalvonta.fi/pankki/rahanpesun-estaminen/asiakkaan-tunteminen-ja-tunnistaminen/>

individuals and has a devastating impact on society which also increases the flourishing of illegal activities where customer protection is non-existent.<sup>95</sup>

A letter from the Estonian Bank Association, in the beginning of 2023, to Estonia's Chancellor of Justice asserted the problem of de-risking in financial institutions, where individuals or groups of people are not onboarded, or their contracts are terminated mostly because of the evolving anti-money laundering and terrorist financing regulations. The Chancellor evaluated that when financial institutions have restricted a person's basic payment service (internet banking, card payments, cash withdrawal) or terminated bank account contract and refused to open a new one, will create a situation where it is very difficult to take part of this society when bills concerning everyday normal life have to be paid. She stresses that when a person is judged legally and his/hers access to basic banking accounts is terminated, a prerequisite for social exclusion is created. Chancellor Madise insists that it is therefore necessary to assess whether the goal of preventing money laundering and terrorist financing is possible to achieve without restricting individuals' fundamental rights.<sup>96</sup>

Furthermore, the Chancellor raises two problems concerning the protection of constitutional rights in the case of de-risking (terminating or not onboarding a customer due to AML/TFC regulations). The obligation of the bank to give a reason of why a person's account is terminated or not opened and the second problem is concerning the right to access basic banking services that are essential to life.

Estonian procedures regarding opening banking accounts to Ukrainian refugees seem to be somewhat different than in Finland. Many articles state that Estonian banks even offer free service when concerning the opening of bank accounts to Ukrainians and they do not have to pay monthly payments for the bank services for some time.<sup>97</sup> Estonian Banking Association has listed all the Estonian Banks that offer basic banking services to Ukrainian refugees and gives a very good insight into the procedures of acquiring a basic banking account in Estonia. The relevant documentation that is needed is listed on their website.<sup>98</sup> Documents that are accepted by Estonian banks are Estonian temporary residence permit card (ID card), Foreign

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<sup>95</sup> Money Laundering and Financial Exclusion, Bright Line Law, 23.07.2018, available at: <https://s3.amazonaws.com/documents.lexology.com/30dad116-f716-4e6f-8e62-603770b13ecb.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1679145056&Signature=oJxNLqr9LI%2FihimHG8oQIJZ3e1M%3D>

<sup>96</sup> Kiri Õiguskantslerilt Eesti Pangaliidule teemal „Põhimakseteenuste kättesaadavus“, 13.01.2023, available at:

<sup>97</sup> SEB-s on Ukraina kodanikele konto avamine ja haldamine tasuta, SEB, 02.03.2022, available at: <https://www.seb.ee/foorum/pressiuudised/seb-s-ukraina-kodanikele-konto-avamine-ja-haldamine-tasuta>

<sup>98</sup> Ukraina kodanikest sõjapõgenikele konto avamise tingimused, Eesti Pangaliit, available at:

<https://pangaliit.ee/ukraina-kodanikest-sojapogenikele-pangakontode-avamise-tingimused-pankades>

passport of Ukraine, Ukraine passport, Ukraine ID card, and Ukraine driver's license. All these documents have to be accompanied together with a copy of the decision granting temporary protection or residence permit.<sup>99</sup>

As researching the articles and other relevant papers and news about Ukrainian refugees in Estonia and Finland it seems that the problems to open bank accounts due to AML/CTF restrictions or sanctions for refugees are a lot smaller than in Finland. It seems that in one hand the Estonian banks have clarified relevant risks and updated their risk models and KYC so that Ukrainian refugees can earn a salary and make bank transactions accordingly and, in another hand, the governmental contribution and political will to support Ukrainians is stronger. Therefore, their fundamental and human rights are well protected in this subject in Estonia. This clearly indicates the importance of well-managed government communication and the political will of a state to manage these problems. Also, we can conclude that Estonia is following the EBA recommendations about ensuring Ukrainian refugee's access to financial systems.<sup>100</sup> Still, as the Chancellor of Justice elevated a problem concerning the protection of constitutional rights for all the other people who have been restricted to use basic banking services and proportionality of anti-money laundering and terrorism financing regulations regarding basic human rights and constitutional rights and their reconciliation remains a question still. The analysis in this chapter again raised doubts about the legal certainty and practice that is done by the member states when carrying out anti-money laundering and terrorist financing obligations and the obligation to proportionately determine the need to restrict or terminate basic payment accounts. From the perspective of equality, this sets a new level to all other groups of people, not only refugees, but also the homeless or people who have violated the AML/TF laws, to have the right to acquire basic banking services so that they are not excluded from the society and can maintain their right to dignity and equality.

### 2.3 Economic Sanctions

Sanctions are a form of political tool to pressure some state or company, or individual. They are a tool that can be implemented quite fast towards a country or a person that can have serious consequences in the long run. Sanctions are a part of FATF Recommendations and

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<sup>99</sup> Ibid

<sup>100</sup> EBA statement on financial inclusion in the context of the invasion of Ukraine, EBA, 27.04.22, available at: [https://www.eba.europa.eu/sites/default/documents/files/document\\_library/Publications/Other%20publications/2022/1031627/EBA%20statement%20on%20financial%20inclusion%20in%20relation%20to%20Ukraine.pdf](https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Other%20publications/2022/1031627/EBA%20statement%20on%20financial%20inclusion%20in%20relation%20to%20Ukraine.pdf)

thus part of EU AML/CTF regulations. The control of economic sanctions and, among other things, the monitoring and blocking/ freezing the money flow to persons or entities or states subject to these sanctions are part of the anti-money laundering process. The objective of targeting someone with sanctions can be because of a political disagreement or because the objective is to prevent crime like terrorism.<sup>101</sup> This subchapter will discuss the potential infringement of fundamental rights due to sanctions, through the process of de-risking from the perspective of a right to basic banking services.

### 2.3.1 Development of United Nation Sanctions

FATF launched a set of recommendations regarding sanctions and freezing of assets for member states: “Targeted Financial Sanctions related to Terrorism and Terrorist Financing, Recommendation 6)”. The resolution demands that member states follow these instructions and thus implement sanctions without delay, like freezing of assets and ensuring that these entities or persons do not have any access to their funds or property. Also, banning traveling, de-listing of individuals, access to funds for basic and extraordinary expenses, this includes banning the use of assets by their family member or relatives/friends thereof under the decision of the authority of, the United Nations Security Council, under Chapter VII of the Charter of the UN.<sup>102</sup>

The development of sanctions began in October 1999, when the UN Security Council first imposed sanctions on Afghanistan with resolution 1267. Where they condemned the human rights violation against women and girls in Afghanistan and training and funding of terrorism and the growing opium, but also for the killing of Iranian diplomats and journalists and the hiding of Usama Bin Laden by the Taliban who was convicted due to the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States.

For this reason, the Council agreed that the following measures must be applied: 1) deny permission to enter or to take off any aircraft that is owned, leased or operated by or on the behalf of Taliban.

2) Freeze the funds and other financial resources of Taliban and to ban transactions by the member states banks or any persons within their territory to Taliban or any undertaking

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<sup>101</sup> Andersen,A, Rahapesu estäminen,Alma Talent 2020, pg.161-169

<sup>102</sup> Targeted Financial Sanctions Related to Terrorism and Terrorist Financing ( Recommendation 6), FATF 2016, available at: <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Bpp-finsanctions-tf-r6.html>

owned or controlled, directly or indirectly by the Taliban. Exception is made on a case-by case basis on the grounds of humanitarian need.<sup>103</sup>

After the 9/11 the sanctions to Afghanistan were made stricter and now after 20 years of restrictions, Afghanistan faces the worst humanitarian crisis in the world. According to UN experts, Afghanistan has the highest number of people starving that counts with 95% of the population having insufficient food consumption. There is a global emergency, people do not have food or medicine and are left out of education, tortured and treated inhumanely. Thus, the experts of human rights are calling the UN and US to ease the sanctions and give more humanitarian help to Afghanistan.<sup>104</sup>

From the perspective of de-risking, Afghanistan is on the sanctions list provided by the UN and EU, thus the whole country is of high risk, and therefore companies do not wish to do business with sanctioned jurisdiction. The high compliance cost and legal risk is not something banks, companies or individuals want to take upon themselves. Even in the epicenter of Covid 19, when the UN Secretary- General called out to the US to lift some sanctions in order to protect already vulnerable people from Covid, the United States refused to make any exceptions regards Sanctions towards Syria, Iran, and the DPRK.<sup>105</sup> Therefore, this concludes as a de-risking practice when companies refuse to do any business with high-risk jurisdiction. This mean also restricting the financial flow to humanitarian assistance that are complicating the already devastating situation of Afghans in need. Therefore, the measures are seen as unproportionate towards fundamental and human rights in many cases, but because of the complexity of the political environment, the changes are hard to implement so that they would fulfill both of the objectives, being the suppression of terrorism and enforcement of fundamental human rights.<sup>106</sup>

### 2.3.2 Development of European Union Sanctions

As the European Union is a member of FATF these recommendations have been implemented to the Unions law as well. Like in the UN, EU has used sanctions in different occasions, sanctions are a instrument in the EU's Common Foreign and Security Policy (hereinafter

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<sup>103</sup> UN resolution 1267

<sup>104</sup> Afghanistan: UN experts call on US Government to unblock foreign assets of central bank to ease humanitarian impact, UN press release, 25.04.2022, available at: <https://www.ohchr.org/en/press-releases/2022/04/afghanistan-un-experts-call-us-government-unblock-foreign-assets-central>

<sup>105</sup> Vladimir.J, Us Sanctions and the Right to Use Bankin Services in European Banks for Foreign Citizens Who Do Not Live in the European Economic Area, available at: <https://doi.org/10.17816/RJLS33872>

<sup>106</sup> Kurtzer.J,Moss.K,Eckert.S, U.S. Sanctions Squeeze Humanitarian Assistance in Afghanistan, CSIS, 29.09.21, available at: <https://www.csis.org/analysis/us-sanctions-squeeze-humanitarian-assistance-afghanistan>

CFSP) that are imposed under TEU Chapter 2. Whereas Article 29 of TEU gives a legal basis to the European Council to impose such restrictions.<sup>107</sup> The fourth title of the TFEU, in art.215, the Union is authorized to impose restrictive measures against natural or legal persons but also non-state entities.<sup>108</sup>

The EU concept of Sanctions has developed in time like most the regulations regarding AML/CTF. EU imposed restrictive measures on Burma/Myanmar on 28<sup>th</sup> of October 1996, when they banned entry for politicians and suspended some high-level bilateral visits, but when they renewed the sanctions in 2003, the Council added restrictions to the arms embargo and enabled the freezing of assets. This was due to the absence of democracy and state-led violations against human rights.<sup>109</sup> European Sanctions are very diverse in nature, they may be economic restrictions, travel, and service restrictions, restrictions on export and import, and also financial restrictions to ensure peace and security and to prevent conflict and enhance democracy.

For the council to enforce restrictive measures, they need to have evidence about the connection to the sanctioned party and also they need to add extensive information and grounds on which these individuals are listed. Now, people who feel that they are wrongfully listed can make a complaint to the ECJ and ask to be removed from that list. Therefore, the legitimacy of the restrictions might be contested and annulled when they are not proportionate, when there is no real evidence of linkage to terrorist financing or abetting or when they are unproportionally infringing fundamental rights.<sup>110</sup> Therefore the Council is required to ensure that the sanctions are in compliance with fundamental rights and also the general requirements in which individual persons are sanctioned. Therefore, three criteria's have to be passed:

- 1) Designation criteria - must be based on a decision that is clear and where the criteria are met by the relevant legislation when imposing restrictions on a specific person. The decision has to be explained in detail in such a manner that the application could be foreseeable with sufficient certainty. Moreover, the objective of the connection to

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<sup>107</sup> Council of the European Union, Sanctions Guidelines – update, 4 May 2018, document no. 5664/18, <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>

<sup>108</sup> Ibid

<sup>109</sup> Dr Kilchling.M, Beyond Freezing? The EU's Targeted Sanctions against Russia's Political and Economic Elites, and their Implementation and Further Tightening in Germany, EUCRIM issue 2/2022, pg 136-146, [//">https://doi.org/10.30709/eucrim-2022-010 //](https://doi.org/10.30709/eucrim-2022-010)

<sup>110</sup> Ibid

the foreign and security policy cannot be too broad as it would lose the applicability to the person.<sup>111</sup>

- 2) Statement of Reasons must be accompanied with relevant legal provisions when imposing sanctions on individuals. The person must be aware of the reasons why such procedures are implemented. The decision must be precise and has to have sufficient amount of information so that the person in question could contest the factual correctness or relevance of it.
- 3) Supporting evidence must be present when restricting a certain person, this needs to be based on factual relevant proof. If the Council does not have sufficient factual evidence to support their claim the case must be suspended and the person de-listed.<sup>112</sup>

Restrictive sanctions are usually authorized in an unpredictable and intense situation that requires fast decisions by the Union to defend its security and interest and also the interests of allies and member states. This can be the obstacle to gather precise information about a person, which could take years, has to be done in matter of days or weeks, thus the Court has accepted this and is willing to allow substantial flexibility, but when the criteria is not met the court has to dismiss the Council's decision to not infringe the fundamental rights of natural persons. As when the person is listed in the EU or UN sanctions list he's reputation is destroyed, but also sanctions restrict the right to private and family life, home, and communications<sup>113</sup> and in many cases to the well-established fundamental right of access to justice under the International Covenant on Civil and Political Rights (hereinafter ICCPR) and under EU law in a substantial way.<sup>114</sup> Case of Kadi I and II where the landmark cases in the right of justice and effective legal protection. Where the ECJ decided that UN Security Council measures, like sanctions, do not enjoy immunity from jurisdiction in the EU and secondly that Mr Kadi could not exercise his right to defense and legal justice without any proper justification of why he had been placed in the sanctions list. Thus, the court judged that Mr Kadi must be

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<sup>111</sup> EU Targeted Sanctions and Fundamental Rights, Solid Plan, Research projects in the Finnish Ministry for Foreign Affairs, 2022, available at: [https://um.fi/documents/35732/48132/eu\\_targeted\\_sanctions\\_and\\_fundamental\\_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751](https://um.fi/documents/35732/48132/eu_targeted_sanctions_and_fundamental_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751)

<sup>112</sup> Ibid

<sup>113</sup> Kurtzer.J,Moss.K,Eckert.S, U.S. Sanctions Squeeze Humanitarian Assistance in Afghanistan, CSIS, 29.09.21, available at: <https://www.csis.org/analysis/us-sanctions-squeeze-humanitarian-assistance-afghanistan>

<sup>114</sup> Eckes. C, 'The Right of Access to Justice', EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions, Oxford Studies in European Law (Oxford, 2009; online edn, Oxford Academic, 1 May 2010), <https://doi-org.ezproxy.utlib.ut.ee/10.1093/acprof:oso/9780199573769.003.0003>, accessed 14 Apr. 2023.

delisted, and this was a precedent case that noted how the listing process must be more accurate.<sup>115</sup>

## 2.4 Case Law

Boris Rotenberg a citizen of Russia and Finland brought a case R18/6573 against Finnish financial institutions like Svenska Handelsbanken AB, Nordea Bank Abp, Danske Bank and OP Yrityspankki OYj to Helsinki District Court<sup>116</sup> who made a precedent decision and dismissed the claim in 13<sup>th</sup> of January, 2020.<sup>117</sup> The claim was since these financial institutions froze and terminated contracts of Boris Rotenberg, who is under US sanctions list of the Office for Foreign Assets Control (OFAC). Rotenberg is a Russian/Finnish billionaire who owns many holdings and real estate in Finland. The Rotenberg family also owns a significant part of Hartwall Arena and the Jokere hockey team.<sup>118</sup> Now, Rotenberg claimed that he had tried to transfer money to his Finnish basic banking account to pay bills like, tax, electricity, rent, garbage collection fees and such and was not able to do so, because the banks in question did not service him due to the Specially Designated Nationals and Blocked Persons List (SDN). Which again resulted in damage to his creditworthiness meaning that due to the restrictions he could not perform his financial liabilities and thus the debt would have been collected through a court decision which again would require the forced selling of his property to pay off court costs and bills.<sup>119</sup>

The banks' defense argued that, in fact, Finnish banks are not required to comply with OFAC requirements through the US Sanctions Act directly, but that does not mean that the risk of ending up in the US Sanctions list is not possible due to "substantial assistance" that is laid down in the President Obama order No. 13661 that ordered to implement sanctions against any persons who "provided substantial assistance/support" to Russian citizens who are listed in SDN.<sup>120</sup> Furthermore, the Finnish Credit Institutions Act specifies in Section

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<sup>115</sup> European Commission and Others v Yassin Abdullah Kadi, C-584/10 P, judgment ECLI:EU:C:2013:518

<sup>116</sup> Vladimir J., Us Sanctions and the Right to Use Bank Services in European Banks for Foreign Citizens Who Do Not Live in the European Economic Area, available at: <https://doi.org/10.17816/RJLS33872>

<sup>117</sup> Tiedote: Boris Rotenbergin kanne pankkeja vastaan hylättiin, Tuomioistuineläitos, 13.01.20, available at: <https://oikeus.fi/karajaoikeudet/helsinginkarajaoikeus/fi/index/tiedotteet/2020/tiedoteborisrotenberginkanne-pankkejavastaaanhylattiin.html>

<sup>118</sup> Sajari, P., Suomalainen miljardööri Boris Rotenberg hävisi riitansa pankkeja vastaan Helsingin kärjäoikeudessa, Helsingin Sanomat, 13.01.20, available at: <https://www.hs.fi/talous/art-2000006371217.html>

<sup>119</sup> Ibid

<sup>120</sup> Executive Order 13661—Blocking Property of Additional Persons Contributing to the Situation in Ukraine, GPO, Administration of Barack Obama, 16.03.2014, available at: <https://www.govinfo.gov/content/pkg/DCPD-201400171/pdf/DCPD-201400171.pdf>

1 of Chapter 9, that a bank must refrain from situations or agreements / transactions and such that would cause a significant risk to the solvency or liquidity of that institution.<sup>121</sup>

Now Chapter 15 of the Credit Institutions Act section 6 a,b,c provides that people who live in European Economic Area (hereinafter EEA) have to have access to basic banking services on an equal basis without discrimination.<sup>122</sup> Therefore the Court found that as Mr. Rotenberg could not show sufficient prove that he is resident of Finland , he was not obliged to offer the basic banking services thereof.<sup>123</sup> The legislation on Credit Institutions, which has been amended since then, but then provided in Chapter 16 that, financial institutions may refuse to open basic banking accounts due to the Law on the Prevention of Money Laundering and the Financing of Terrorism (444/2017) or the Law on the Fulfillment of Certain Obligations of Finland as a Member of the United Nations and the European Union (659/1967) that requires Finland to fulfill its obligations towards UN due to the treaty signed.<sup>124</sup>

Therefore, the Court concluded that Finnish financial institutions could possibly be seen as given “substantial assistance” to Boris Rotenberg through transactions and OFAC would in high possibility investigate it as such, and therefore that would be significant risk to the banks continuation. The court ordered Rotenberg to pay 530,528.64 euros of court costs. Further, the Court did not consider the EU Councils Decision 2014/145/CFSP, where the council provided in Article 2, section 3, that the:

”competent authority of a Member State may authorize the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, under such conditions as it deems appropriate, after having determined that the funds or economic resources concerned are:

(a) necessary to satisfy the basic needs of the persons listed in the Annex and their dependent family members, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;”<sup>125</sup>

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<sup>121</sup> Laki luottolaitostoiminnasta, 8.8.2014/610 (amended and published 29.3.2023), Chapter 9, section 1, available at: <https://www.finlex.fi/fi/laki/ajantasa/2014/20140610#O3L9P1>

<sup>122</sup> Laki luottolaitostoiminnasta, 8.8.2014/610 (amended and published 29.3.2023), Chapter 15, section 6

<sup>123</sup> Vladimir.J, Us Sanctions and the Right to Use Bankin Services in European Banks for Foreign Citizens Who Do Not Live in the European Economic Area, available at: <https://doi.org/10.17816/RJLS33872>

<sup>124</sup> Ibid

<sup>125</sup> COUNCIL DECISION 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0145>

Above mentioned, was the main reason, supposedly, of Rotenberg to carry out transactions in Finland. In 31 of March 2023 Boris Rotenberg withdrew his appeal in the district court of Finland where he lost a dispute regarding banking services in Finland and where he was ordered to pay half a million euros of legal costs. He canceled the appeal on the requirement that he would be exempted from the legal costs. Banks agreed to this condition and withdrew their counter-appeal.<sup>126</sup> As the laws regarding Sanctions and money-laundering and terrorist financing have been constantly changing it would have been enormously interesting to see the development of this case when it had reached the Supreme Court of Finland. Unfortunately, it did not. With this decision the court established a precedent where regarding constitutional rights – being a basic banking account in this context- can be derogated when the individual is not a resident of EEA and is appointed on some sanctioned list. And proportionately the bank could be significantly damaged due to processing some payments of this individual that would ultimately significantly negatively impact other customers of these banks.

A year later, in 29<sup>th</sup> of October 2021, a Finnish authority, the Finnish Financial Ombudsman Bureau (hereinafter FFOB) that deals with dispute resolution regarding financial, insurance and investment claims by the customers, gave a binding decision to a Finnish bank. The decision, FINE-040411, where the authority was asked to give a response regarding the issue: has the bank had the right to prevent a person living in Finland from using basic banking services when the customer has been placed on OFAC's SDN blacklist?<sup>127</sup>

A customer had opened a private basic bank account in this bank with normally provided services such as online banking and debit card and account. Now, customer's account was frozen in May 2021 without terminating it completely. The bank gave an explanation that this was due to the sanctions of Office of Foreign Assets Control ("OFAC") Specially Designated Nationals blacklist. Customer added that a private banking account was opened due to the need of online identification to different Finnish authorities, as it is recommended by the authority. That year the company he owned got tax refunds and he transferred these to his own bank account like dividends. The customer mainly used this account to make basic payments and pay bills. The customer claimed in his statement that the freezing of his account was unlawful and disproportional due to the fact that 1) OFACs

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<sup>126</sup> Rosvall.M, Boris Rotenberg perui valituksensa, pankkien ei tarvitse antaa palveluita, Helsingin Sanomat, 31.03.23, available at: <https://www.hs.fi/talous/art-2000009490779.html>

<sup>127</sup> FINE-040411, Vakuutus ja Rahoitusneuvonta, available at: <https://www.fine.fi/ota-yhteytta/ratkaisutietokanta/ratkaisu/fine-040411.html>

backlist does not extend to Finland and secondly because basic banking account is a fundamental right in Finland.<sup>128</sup>

The bank responded that the customer has been added to the abovementioned backlist that demands the banks to block the accounts of these customers. Executive Order (E.O.) 13757 section one implicitly states that:

“All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: [...]”.<sup>129</sup>

Further, as was in the previous case, “substantial assistance” in same order section 1. (a)(ii)(B) was prohibited. Bank further continued that even though Finland is not obliged to that particular blacklist, the bank refrains on taking risks that could get them on to that list because of “substantial assistance”. The bank therefore concludes that it has the right to block customers account due to the Credit Institutions Act, Chapter 9, Section 1, where the law obliges the bank to assess its risks and not to take such significant risks that would endanger its continuation.<sup>130</sup>

The FFOB has evaluated that due to the fundamental rights of a person to have a basic banking account in EEA territory as a resident cannot be diminished without sufficient legal grounds. Therefore, the FFOB recommends that the bank would return basic banking services to the client. The bank also stated that, in the Credit Institutions Act the reason to refuse to open basic banking account can be due to the AML/CTF legislation or due to the law (659/1967) on the fulfillment of certain obligations of Finland as a member of the United Nations and the European Union.<sup>131</sup>

Still, the banking board concludes that the following of OFAC sanctions and the reporting obligation to FIU due to the Money Laundering Act and due diligence obligation is not sufficient to end customer relationships. In principle, customers who live in the EEA area must have access to basic banking services.<sup>132</sup> In this regard, the FFOB has

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<sup>128</sup> Ibid

<sup>129</sup> Cyber Sanctions, Order 13757, 28.12.2016, US department of State, available at: <https://www.state.gov/cyber-sanctions/>

<sup>130</sup> Laki luottolaitostoiminnasta, 8.8.2014/610 (amended and published 29.3.2023), Chapter 9, section 1, available at: <https://www.finlex.fi/fi/laki/ajantasa/2014/20140610#O3L9P1>

<sup>131</sup> Laki eräiden Suomelle Yhdistyneiden Kansakuntien ja Euroopan unionin jäsenenä kuuluvien velvoitusten täyttämistä, 29.12.1967/659, prg 2, available at: <https://www.finlex.fi/fi/laki/ajantasa/1967/19670659>

<sup>132</sup> FINE-040411, Vakuutus ja Rahoitusneuvonta, available at: <https://www.fine.fi/ota-yhteytta/ratkaisutietokanta/ratkaisu/fine-040411.html>

enforced fundamental rights over international legislation. Now, in such cases, the author could see that the financial institution would have the right to inquire for more evidence about the customer's financial activity, for example, does the customer have another basic banking account in Finland, that would minimize the risk of the service provider and would give more legal certainty, thus a person needs no more than one basic banking account in a state to manage their basic fundamental everyday needs. Therefore as was established in the decision that de-risking a customer due to sanctions is not proportionate and infringes the fundamental rights of the person, thus banks as the private actors of public law need to ensure that fundamental rights are ensured to their customers.

### 3. NATIONAL IMPACT OF ANTI-MONEY LAUNDERING AND TERRORIST FINANCING REGULATION TO FUNDAMENTAL RIGHTS

During this thesis, many practical and topical issues have been referred to, which mainly originate from the fact that the FATF Recommendations and AMLA directives work well in the context of money laundering and prevention of terrorist financing, but they in some cases fail to do so when combining them with other regulation in the state level, for example, the fundamental rights. The author believes that this situation is due because the legislation is not related enough to be able to be implemented in practice without violating some rights. The problem is recognizable when looking at the PAD directive or the national basic payment account regulation and the AMLD because they are in ways controversial. Therefore, this chapter will discuss the issue of the interrelation between money laundering regulations and national constitutional rights, considering that it is under the auspices of Public Law. The chapter further evaluates to what extent AML/CTF measures and legal framework can limit or infringe on national fundamental rights. Can international law override the right of the individual to be protected by its state Constitution? The author analyzes the proportionality between states' liability to protect and balance the individual's constitutional rights and the obligations set by international agreements and European Law. Thus, an overview and comparison of constitutional rights and national legislation regarding anti-money laundering and terrorist financing of Finland and Estonia will be discussed.

The author feels public discussion on the matter has developed in time. First the discussion was more on the heavy compliance requirement of the financial sector and how to comply and

then it seems the discussion has inclined to how to protect individuals from heavy compliance requirements without infringing their constitutional rights.

As de-risking is influencing mostly vulnerable people, like the elderly, refugees, the homeless, and the poor, therefore the author investigates what kind of legal protection does legislation provide in the context of money laundering and terrorist financing regulation. As before mentioned, a person cannot perform liabilities like paying taxes or getting social benefits without a banking account, and thus de-risking seems to infringe the fundamental rights like equality, the presumption of innocence, right to private and family life, right to privacy, property rights, and right to health and government assistance. These rights are listed similarly in the Finnish and Estonian Constitutions, but also in the EU Charter of Fundamental Rights.

### 3.1 FATF legislative powers

The introduction of this thesis explained the development of FATF and the conclusion was that AML/CTF regulations derive firstly from FATF. FATF is an intergovernmental organization operating under Economic CO-operation and Development (hereinafter OECD) that is setting the policies and recommendations to fight against money laundering and terrorist financing globally. More than 200 countries are a member of this international agreement. Finland joined FATF in 1991 and Estonia has been a member through the European Union.<sup>133</sup>

FATF recommendations are quasi-legal instruments that are not legally binding per se, but the criteria set out in the membership policy require states to:<sup>134</sup>

- 1) endorse and support the FATF Forty Recommendations and the Nine Special Recommendations and other guidelines given.
- 2) Members agree to implement all the FATF Recommendations in a reasonable time but within 3 years.
- 3) Member states agree to undergo a mutual evaluation so that compliance with membership criteria can be assessed.

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<sup>133</sup> Who we are, FATF, available at: <https://www.fatf-gafi.org/en/the-fatf/who-we-are.html>

<sup>134</sup> Gardner, Kathryn L. "Fighting Terrorism the FATF Way." *Global Governance*, vol. 13, no. 3, July-September 2007, pp. 325-346. HeinOnline, <https://heinonline.org/HOL/P?h=hein.journals/glogo13&i=340>.

This will be done during the membership and when applying membership.<sup>135</sup> Finland has done Mutual Evaluation assessment in 2019.<sup>136</sup> The assessment developed an understanding that Finland has a good framework but needs to improve the effectiveness of their supervision regarding AML/CTF of financial and non-financial institutions. Furthermore, Finnish money laundering risk originates principally from grey economies, but also from local and foreign frauds and drug crimes.<sup>137</sup> The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (hereinafter Moneyval) released Estonia's Mutual Evaluation assessment in January 2023, where they determined that Estonia was moderately compliant, and some improvements had to be done. The priority of Estonian authorities is to implement Moneyval recommendations in the following years to be highly compliant and effective against money laundering and terrorist financing.<sup>138</sup>

4) The fourth criterion in the membership is to actively participate in FATF and to support the role and overall fora of the organization.<sup>139</sup>

Therefore, we can establish that the obligation to implement FATF recommendations is upon the states and therefore regulated by public law. The key to this chapter lies in the fact that states form a network of commitment between themselves while recognizing some common values and principles of how things should be done.<sup>140</sup> In many societies, the legal structure is indeed vertical and hierarchical while the international legal system is seen as horizontal. This is due to the sovereignty principle, where all states are equal, and no one is above them. Further, state domestic law is obligatory for individuals, but international law exists only among states.<sup>141</sup> Another peculiar thing with obeying the law is that individuals cannot create law, this is done by state authorities and accepted by the state parliament and in some cases president of the country. Moreover, the law for legal entities acting in states or individuals must be followed. As in international law, states create the laws, and they can also decide whether they want to follow them or not.<sup>142</sup> The author draws her conclusion regarding AML-CTF regulations that these are mandatory for states and therefore are classified under public

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<sup>135</sup> FATF membership policy, FATF, 2008, available at: <https://fatf-gaif.org/fatfmembershippolicy-2.html>

<sup>136</sup> International Cooperation, Rahanpesu.fi, available at: <https://rahanpesu.fi/en/international-cooperation>

<sup>137</sup> Finland's measures to combat money laundering and terrorist financing, FATF, 2019, available at: <https://www.fatf-gafi.org/en/publications/mutualevaluations/documents/mer-finland-2019.html>

<sup>138</sup> Anti-money laundering and counter-terrorist financing measures Estonia, Fifth Round Mutual Evaluation Report, December 2022, MONEYVAL, available at: <https://rm.coe.int/moneyval-2022-11-mer-estonia/1680a9dd96>

<sup>139</sup> FATF membership policy, FATF, 2008, available at: <https://fatf-gaif.org/fatfmembershippolicy-2.html>

<sup>140</sup> Shaw.M,N, International Law, Ninth Edit, Cambridge University Press, 2021, pg.5

<sup>141</sup> Ibid

<sup>142</sup> Ibid

law. Therefore, FATF recommendations are not directly enforceable on individuals but can be enforced through state legislation upon them.

### 3.2 European Union Competence and Jurisdiction

The basic principle on which the power of the European Union is distributed amongst member states is the so-called principle of delegated authority, which means that the member states have agreed that the Union makes decisions for them in certain areas. This principle determines that the EU can act only on the issues given to it in the founding treaties. Thus, everything else is decided by the member states. Therefore, EU does not have 100% of competence in every area one could imagine. Article 2 of the Functioning of the European Union (hereinafter TFEU) establishes the principle of conferral whereas the EU has full competence only when conferred to it by treaties. This means that the EU can only act within the limits of the treaties to reach the treaties objective.<sup>143</sup>

The Lisbon Treaty has divided these competences amongst the Member States and the EU. The treaty divides these competences into three categories:

1. exclusive competences of the EU
2. shared competences and
3. supporting competences.

The EU has exclusive competence to conclude international agreements as it has done with FATF. But the treaty also explains the following: EU will honor the equality of the Member States before the Treaties and their national identities, their fundamental structures which are fundamental and political in their nature, and self-government. The Union respects their territorial integrity and the right to national security which is the sole responsibility of each Member State.<sup>144</sup> FATF again tries to share the responsibility of global security with these developing recommendations and guidelines. But, as part of the UN, this is justified, as the United Nation (hereinafter UN) stands for international peace and security.

The principle of subsidiarity is also demonstrated in the Treaty of Lisbon article 5(3), where it underlines the states responsibility to constantly be conscious of justification of EU level regulation and that these acts are carried out proportionally, which creates the rule of to not infringe any other rights that are not in compliance with EU law beyond what is necessary to

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<sup>143</sup> Division of competences within the European Union, EUR-lex, available at: <https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html>

<sup>144</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, paragraph 3a

achieve the aim of treaties.<sup>145</sup> Therefore, we can establish that fundamental rights have to be proportionally evaluated when international laws are enforced.

The full competence of the EU means that only the EU is allowed to regulate and adopt legally binding acts. The EU can delegate the power to the Member States if requested and necessary. The areas relevant to the current research that EU has full competence in are:

- economic and financial policy
- making sure there are harmonized regulations regarding competition policy and good functioning of the internal market
- has a full competence in common commercial policy”<sup>146</sup>

Shared competence that is referred to in Article 4 of TFEU means that the Member States and the EU are equally allowed to adopt legally binding acts. Competence may be exercised by both where one or the other lacks competence. Shared competence relevant to the current research is in the fields of:

- regulation and harmonization of policies in the internal market
- social policy (only in some aspects)
- consumer protection regulation
- the area of justice, freedom, and security
- the development of cooperation and humanitarian aid in the EU.<sup>147</sup>

Article 6 of the TFEU gives an overview of supporting competencies where the EU can in some cases where necessary support Member States. These areas are the enhancement and protection of human health, culture, tourism, educational matters, and vocational, youth, and sport aspects also civil protection and administrative cooperation.

As mentioned in the first chapter of this thesis the competence of the European Union to regulate areas that are arguably related to criminal offenses like money laundering and terrorist financing, were at first questionable. The competence of the EU to fully take responsibility to regulate some areas on behalf of member states comes from the given competence by the member states, as clarified above. Because money laundering heavily disrupts the internal market of the Union, the need for a properly harmonized prohibition is necessary. Lisbon Treaty article 83(1) gives the full competence to regulate criminal offenses

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<sup>145</sup> Principle of subsidiarity, EUR-lex, available at: <https://eur-lex.europa.eu/EN/legal-content/glossary/principle-of-subsidiarity.html>

<sup>146</sup> Division of competences within the European Union, EUR-lex, available at: <https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html>

<sup>147</sup> Ibid

and sanctions regarding the crimes mentioned in that article with a cross-border dimension that needs to be combated on common bases. According to Article 83 of the TFEU, crimes like trafficking of drugs or children and women, terrorism, illicit arms trafficking, money laundering, corruption and counterfeiting of means of payment also computer crimes, and organized crimes are regulated by the Union.<sup>148</sup>

Now, the Union has regulated money laundering and terrorist financing through Anti-Money Laundering Directive and has mentioned the directive also in other Unions regulations like the PAD. These directives have been transposed to national legislation by the member states. As mentioned in the second chapter. As already mentioned in this research the AMLD and Fundamental rights can be in conflict when applied unproportionally. Now the Anti-Money Laundering directive states in its article 8(1)<sup>149</sup> that member states shall ensure that the obliged entities carry out proportionate steps to identify and assess the risk of money laundering and terrorist financing relating to their customers and in article 14(1;4) states that the obliged entities, in this case the banks, need to verify the customer (and the regulation does not specify in detail the identification documentation requirements, which also has resulted different CDD procedures in the member states) and in sub section 4 of the paragraph allows the financial institution to freeze assets or terminate contract when CDD measures cannot be implied.

The author wants to give an example of a case regarding an elderly person who lives in a retirement home. With the major development in technology and the requirement of banks to monitor transactions automatically through a specific software, the need to update customers data, can be very challenging for the financial institutions, the development of anti-money laundering regulation has forced banks to carry out regular updates to verify and know their customers. Now in the case of an elderly person, who may not have a valid identification document anymore and who is not reachable by phone or email, the bank decides to terminate his contract relying to the anti-money laundering act and the obligation of CDD. A question arises, how will this person get his pension or social benefits? Has the bank evaluated the risks of this customer proportionately? Does the enforcement of anti-money laundering law in this case constitutes as an infringement of the person to get basic livelihood and taking to consideration the vulnerable state of this elderly person it clearly shows that this would

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<sup>148</sup> Treaty on the Functioning of the European Union, TFEU, Article 83 (1)

<sup>149</sup> Directive (EU) 2015/849 of the European Parliament 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, amending Regulation (EU) No 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

represent a serious infringement of this person's fundamental rights like the right to property as stated in the Charter, Chapter 17<sup>150</sup>, right to property or in the Finnish Constitution section 15, protection of property, that entails, also social benefits that are paid by the government.<sup>151</sup> Therefore, in this case, the state would have to apply national jurisdiction, to prevent the disproportionate infringement of fundamental rights of this person.

Sometimes EU-level regulations can infringe fundamental rights like in the case of (Joined Cases C-37/20 | Luxembourg Business Registers and C-601/20 | Sovim), where the Court of Justice acted as the EU's Constitutional Court and established that the public's access to the information about the real beneficiaries represents a serious infringement of the fundamental rights protected by Articles 7 and 8 of the Charter - privacy and protection of personal data, which is why the court declared the provision invalid.<sup>152</sup>

Legal scholars have raised the question of EU-Law and the National Constitution and their intercourse. Parind explains in his book that the abovementioned question is very delicate and, in many ways, politically sensitive. He continues, that the primacy of one or the other is questionable, but according to the EU legislation and court practice EU law prevails<sup>153</sup>, this was already established in a well-known landmark case *Costa vs. ENEL* in 1964.<sup>154</sup> The reason why Parind questions the ultimate supremacy of EU law regarding states' constitutions is that the law of the EU is interactive<sup>155</sup>, meaning that because of the multiplicity and convolution of the laws, they are managed together not separately.

When Estonia or Finland would step out of the Union would not mean they would not have any legal order, Constitution is inalienable, thus Parind sees these laws as two-dimensional principles that do not have a hierarchy but are placed horizontally. Therefore, the question of the relationship between EU law and Constitutional law is utmost complex, even for experienced legal scholars.<sup>156</sup> Still, when analyzing the problem of e.g the right for a person to have a basic banking account to get social benefits and the prohibition to onboard or terminate a contract with a client who does not comply with KYC, raises the question of legal certainty and disproportionate interference to individuals' fundamental rights. Now, the EU

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<sup>150</sup> Charter of Fundamental Rights of the European Union, article 17

<sup>151</sup> HE 309/1993, Hallituksen esitys Eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta, available at: <https://www.edilex.fi/he/19930309>

<sup>152</sup> EU Court of Justice: Judgment of the Court in joined Cases C-37/20 and C-601/20: Luxembourg Business Registers and Sovim Anti-money-laundering directive, 22.11.2022

<sup>153</sup> Parind, M., Euroopa Liidu Õigus, Eesti Vaade, UKU 2022, pg.36-41

<sup>154</sup> EU Court of Justice judgment, *Costa vs. ENEL*, C 6/64, 15.07.1964

<sup>155</sup> Kerikmäe, T., Euroopa liit ja õigus, Õiguskirjastus, 2000, pg.9

<sup>156</sup> Parind, M., Euroopa Liidu Õigus, Eesti Vaade, UKU 2022, pg.43-45

has stated that even though the union has its own Charter of Fundamental rights<sup>157</sup> and implements a check list of fundamental rights when drafting legislation, proposals and making impact assessments<sup>158</sup>, and determines that the EU Charter of Fundamental Rights obliges the member states only when implementing EU law, in other matters the states are obliged to apply their national constitution and international human rights.<sup>159</sup> Fundamental rights are not some theoretical ideals, but these rights are a legal requirement that are subject to the European Court of Justice.<sup>160</sup>

In one hand EU law prohibits to infringe fundamental rights and in the other enforces law that does not support financial inclusion. This is the reason why it is relevant to understand the relation between national constitution, international and EU law and determine their competence to regulate some area of the legislation.

### 3.3 Estonian Legislation and EU law

There are similarities and differences in laws. We certainly can't expect Estonia and Finland to have the same jurisdiction in all matters. Yes, European Law and directives thereof need to be transposed into the member state jurisdiction so that the minimum standard is achieved, still as mentioned in the previous chapter EU has a different level of competences to regulate member state jurisdiction, therefore they can't really never completely overlap.<sup>161</sup>

The European Court of Justice (hereinafter ECJ) has continuously searched for ways to create a certain category for "common constitutional practices and values" that would benefit both and enhance legal certainty. Thus, the Court has preferentially begun to draw similarities together and started to create these common constitutional practices. This has been part of the Unions common identity. The result of this practice is of course similarities in constitutions even though every Member State has its own constitutional identity, which is specific to a

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<sup>157</sup> Charter of Fundamental Rights of the European Union (2000/C 364/01)

<sup>158</sup> Commission Staff Working Paper, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, 6.5.2011, available at: [https://commission.europa.eu/system/files/2017-09/operational-guidance-fundamental-rights-in-impact-assessments\\_en.pdf](https://commission.europa.eu/system/files/2017-09/operational-guidance-fundamental-rights-in-impact-assessments_en.pdf)

<sup>159</sup> The charter and national law, Incorporating fundamental rights into EU legislative process, EU Commission, available at: [https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/incorporating-fundamental-rights-eu-legislative-process\\_en](https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/incorporating-fundamental-rights-eu-legislative-process_en)

<sup>160</sup> Ibid.

<sup>161</sup> Parind.M, Euroopa Liidu Õigus, Eesti Vaade, UKU 2022, pg.102-107

certain extent, but it is understandable that the integration of EU Laws into national legislation brings a certain level of blending.<sup>162</sup>

Therefore it is not unimaginable that cases, where the union law requires states to practice law in a different manner than the national Constitution, lead to some sort of legal contradiction.<sup>163</sup> For example where a directive obliges states to enforce money laundering practices in such a manner that infringes the constitutional rights of natural persons. Therefore, cases related to the enforcement of money laundering regulations and the protection of constitutional rights are gradually setting the tone for legal certainty in that matter.

Parind further explains that when a state's Constitutional Court takes a stand for constitutional supremacy over EU-Law, this should not be seen as an anti-European act, but a basic right to test the legitimacy of the legislation. Definitely, this is not constituted as antagonism against European Union Law, but the principle to protect the Constitution against unwanted external influence.<sup>164</sup>

As mentioned previously, this is the way two legal orders can work together in balanced relationships for the people and their governments. Ultimately the EU values fundamental rights and it is not in its intention to diminish these rights, but to harmonize and balance the obligation of union security and the obligation of protecting Europeans' fundamental and constitutional rights.

### 3.3.1 Case Law

In 22. March, 2023 the Supreme Court of Estonia gave a judgment (2-21-3552) regarding natural person's right to have a basic banking account even when she has been determined as a high-risk customer due to the anti-money laundering and terrorist financing regulations. Where the plaintiff filed a lawsuit against Swedbank AS (defendant) in the Viru County Court in which she asked for the annulment of termination of the basic banking account contract that was established in 7<sup>th</sup> of December 1998 with Hansabank (later Swedbank) and was terminated on 23<sup>th</sup> of November 2020 with the banks notice that was sent to the client. The defendant referred to the change in its risk policy and clauses in its current policy for the reasons of termination. Also, the defendant explained that because of the new domestic and

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<sup>162</sup> Opinion of Advocate General, Cruz Villalon, Case C-62/14, 14.01.2015, prg.61 available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CC0062>

<sup>163</sup> Parind.M, Euroopa Liidu Õigus, Eesti Vaade, UKU 2022, pg.102-107

<sup>164</sup> Parind.M, Euroopa Liidu Õigus, Eesti Vaade, UKU 2022, pg.102-107

international obligations to financial institutions, they need to implement various due diligence measures in customer relationships and assess risks related.<sup>165</sup>

Also, defendant relied on the principle of contractual freedom where no one is obliged to enter into or continue a contract that would possibly be harmful for them in any way. Besides that the Credit Institutions Act, § 89 lg 9, enables that the bank is free to decide whom to serve or whom not, unless the law provides otherwise. This legislation of Credit Institutions Act establishes the credit institution's right to conclude legal relationships only with such persons who are in accordance with the credit institution's risk appetite. Therefore, gives the bank autonomy to determine in accordance with § 10 (3) of the Money Laundering and Terrorist Financing Prevention Act. According to Section 10(3) of the act the obliged person (credit institution) with which persons it wishes to avoid business relations.<sup>166</sup> According to the defendant basic banking accounts may be proportionately limited due to the purpose of preventing money laundering and terrorist financing according to Directive 2014/92/EU, member states ensure that credit institutions reject the request for opening a basic payment account in the event that the opening of such an account would result in a violation of the provisions of Directive 2005/60/EC Article 14 (4) on preventing money laundering and preventing terrorist financing, where the article states that:

“Member States shall require that, where an obliged entity is unable to comply with the customer due diligence requirements laid down in point (a), (b) or (c) of the first subparagraph of Article 13(1), it shall not carry out a transaction through a bank account, establish a business relationship or carry out the transaction, and shall terminate the business relationship and consider making a suspicious transaction report to the FIU in relation to the customer in accordance with Article 33.”<sup>167</sup>

Now, the County Court pointed out that this was a case regarding a persons constitutional rights. The court elaborated that basic banking services are indispensable in modern economic society. The account is related to the person’s right to exercise constitutional rights like the right to engage in business (EC § 31) and the right of everyone to health protection in the payment of state aid (EC § 28), both of which require the existence of a bank account.<sup>168</sup>

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<sup>165</sup> RKKKo 2-21-3552, pg 1-2

<sup>166</sup> Ibid

<sup>167</sup> Directive E (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, amending Regulation (EU) No 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

<sup>168</sup> Ibid

According to the ECJ practice the court has to interpret national law in accordance with the European Union directives. Furthermore, the domestic court has to interpret EU law in accordance to national law even when the directive has not been transposed correctly to the national law, in order to establish a result that is close to the directive's objective. The panel also finds that the Law of Obligations Act § 720, paragraph 2 of must be interpreted in accordance with Article 19, paragraphs 2 and 3 of the Directive 2014/92/EU in such a way that the credit institution cannot orderly cancel the payment service agreement if the payment service agreement meets the characteristics of the basic payment service agreement.<sup>169</sup> The right of a client to hold such an account comes from the Directive 2014/92/EU, Art.16 and from Law of Obligations Act ,Section 7101(2). A person cannot be a part of today's society, basic payment account is needed for capital income but also for social benefits and paying bills and taxes, buying food and medicine. Payment services are considered, among other things, to be vital services according to § 36 (8) (1) of the Emergency Act.

“The Bank of Estonia shall organise the continuous operation of the following vital services: 1) payment services; 2) cash circulation.”<sup>170</sup>

The panel also raises the question of de-risking as a tool to avoid high compliance cost and overall risks. They add, that this should not be a reason why banks refuse to open or decide to terminate basic banking accounts, this should be done only in exceptional circumstances, such as non-compliance with the legislation on money laundering and terrorist financing or the prevention and investigation of crimes. Therefore, the panel concludes that in this case the circumstances did not meet and it is not possible to terminate the client's basic banking account for these above-mentioned reasons. The civil panel of the Supreme Court agreed with the district court that the termination of the basic payment service contract was not allowed, therefore the client's claim had to be satisfied. Only an exceptional termination of the contract is possible, which the credit institution must justify in substance and to which the consumer can also raise objections.<sup>171</sup>

Not only does this justification and objection principle rise from the PAD, Article 19 (4,5), but also it derives from the Estonian Constitution, article 13.<sup>172</sup> The article states that:

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<sup>169</sup> Ibid

<sup>170</sup> Emergency Act, Passed 15.06.2009, RT I 2009, 39, 262, prg 36

<sup>171</sup> Ibid

<sup>172</sup> The Constitution of the Republic of Estonia, Passed 28.06.1992, RT 1992, 26, 349, Entry into force 03.07.1992, prg 13

“§ 13. Everyone is entitled to protection by the government and of the law. The Estonian government also protects its citizens abroad. The law protects everyone from the arbitrary exercise of governmental authority.”

Now, the supremacy of constitutional rights with other non-constitutional jurisdiction is obvious,<sup>173</sup> this could not be the other way around without diminishing a state’s integrity and thus people’s fundamental rights. The Supreme Court of Estonia has in numerous times stated that the government has the obligation to protect fundamental rights according to this article.<sup>174</sup>

The Supreme Court has stated: "The right to judicial protection provided for in § 13-15 of the Constitution includes both the right of a person to go to court in the event of a violation of his rights and freedoms, as well as the state's obligation to create an appropriate judicial procedure for the protection of fundamental rights, which is fair and ensures the effective protection of the rights of the person."<sup>175</sup> Also according to the case law the Court has the freedom to choose how to reach the constitutionally required level of protection.<sup>176</sup>

Another important impact to evaluate the required level of constitutional protection is proportionality, where the court must assess whether a constitutional fundamental right has been restricted and whether the regulation provides any protection from that infringement and then decide on the proportionality of the objective.<sup>177</sup>

The author wants to point out that it is very important to understand the abovementioned legislation in the context of the thesis objective, as this clarifies the methods of how courts overall decide on constitutional matters like the protection of fundamental rights of natural persons. In the above-mentioned case, the court assessed the proportionality and mentioned basic banking account features as a constitutional fundamental right and therefore enforced the right to protect the person from financial exclusion due to de-risking. It is important to state that the state’s obligation to protect such fundamental rights, as the right to a basic banking account, can be exercised through existing regulation and through positive action.

Now, European Law also sets an obligation to the State to protect the aforementioned rights of individuals. For example in the PAD directive , where it obliges the states to not

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<sup>173</sup> Klatt.M, Meister,M. Proportsionaalsus kui universaalne põhiseaduslik printsiip. Juridica, Riigiõiguse aastaraamat, 2020, pg 118-135.

<sup>174</sup> Eesti Vabariigi põhiseadus,kommenteeritud väljaanne, available at: <https://pohiseadus.ee/sisu/3484>

<sup>175</sup> RKPJKo 18.10.2012, 3-4-1-15-12, p 30

<sup>176</sup> Ibid

<sup>177</sup> Eesti Vabariigi Põhiseadus, kommenteeritud väljaanne, 2017, Paragrahv 13, p.13

discriminate consumers ( article 15) and also who should have access to basic banking account in the Member States –“ including consumers with no fixed address and asylum seekers, and consumers who are not granted a residence permit but whose expulsion is impossible for legal or factual reasons”, (article 16) and also about termination of the contract (article 19) and seeking of legal remedy (article 24).<sup>178</sup> Therefore we can conclude that the State is obliged by the union law, state law and constitution to provide positive legal protection to its people. Thus, the state has the possibility to choose from many legal opportunities to enforce these fundamental rights.

### 3.4 Finnish Legislation and EU Law

The Finnish Constitution of 1919 was replaced in 2000 (Act No 731/1999) and was amended in 2012. With the amendment, the Finnish Government committed constitutionally to EU membership and therefore transferred legislative powers to the union. Finland joined the EU on 1 January 1995. Finland does not have a separate constitutional court, like Estonia, constitutional matters are taken into consideration in every stage of litigation, but a key role to give a constitutional review to some cases or legislation has been given to the Constitutional Law Committee of Parliament, who also reviews EU legislations compatibility to the national constitution and human rights obligations that are binding to the state(Section 74 of the Constitution of Finland) . The Constitutional Law Committee of Parliament is a parliamentary sub-committee, a committee consisting entirely of MPs. The Committee’s decisions are binding under the Finnish Constitution Section 74. The Committee’s main objective is to analyze and give reviews of the compatibility of new legislation or EU Law regards to constitutional law and human rights through well-analyzed interpretations and consistent use of precedent cases.<sup>179</sup>

Ojanen explains in his article that since the late 1980 and with the growing rise of international organizations and Europeanisation, international agreements, and policies which Finland is a member of have started to impact the Finnish constitutionalism and courts in general. This generated some fruitful action towards the Constitution that now in its chapter 2 entails a very comprehensive set of fundamental rights like economic rights and cultural rights

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<sup>178</sup> DIRECTIVE 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, in force 23.07.2014

<sup>179</sup> Ojanen.T, EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament, 2012, available at: <https://www.scandinavianlaw.se/pdf/52-12.pdf>

but also traditional civil and political rights. Therefore EU-s membership has been a good influence on stronger judiciary safeguards for fundamental rights protection.<sup>180</sup>

The Finnish Constitution accepts international obligations but also announces in its Section 94 that:

“The acceptance of the Parliament is required for such treaties and other international obligations that contain provisions of a legislative nature, are otherwise significant, or otherwise require approval by the Parliament under this Constitution. The acceptance of the Parliament is required also for the denouncement of such obligations.

A decision concerning the acceptance of an international obligation or the denouncement of it is made by a majority of the votes cast. However, if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international organisation or an international body that is of significance regarding Finland’s sovereignty, the decision shall be made by at least two thirds of the votes cast. (1112/2011, entry into force 1.3.2012)

An international obligation shall not endanger the democratic foundations of the Constitution.”

As so far, Finland has taken a dualist approach towards international agreements and treaties but also EU law. The enforcement of international law domestically is done by and parliamentarian act or similar government policy, this procedure enables the direct effect of these EU laws and the international treaty’s to be applicable in national courts and authorities.<sup>181</sup>

Now, when we limit the fundamental rights of natural persons the Constitution of Finland (hereinafter CF) stipulates in article 23 (1) according to which fundamental rights may only be limited by law and the limited rights and respecting the central content of freedoms.<sup>182</sup> Meaning that the principle of proportionality and constitutional rights need to be considered when enforcing public power, meaning that the constitution obligates the government and

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<sup>180</sup> Ibid

<sup>181</sup> Ojanen.T, EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament, 2012, available at: <https://www.scandinavianlaw.se/pdf/52-12.pdf>

<sup>182</sup> Suomen perustuslaki, 11.6.1999/731, available at: <https://www.finlex.fi/fi/laki/ajantasa/1999/19990731#L2P22>

public authority. Therefore, the objective has been to protect individuals' sphere of freedom from unnecessary and disproportionate interference by the state.<sup>183</sup>

Fundamental rights are mainly unconditional, but there can be derogation from the rights when it is seen necessary to protect national security or public health. For example, in times of Corona pandemic, the State Council and the President of the Republic announced that Finland is in exceptional circumstances and therefore some derogation from the fundamental freedoms of people may be allowed. This is mainly established by the Emergency Powers Act.<sup>184</sup> Again some of the fundamental rights and freedoms are seen as more significant than others, and deviations are usually not allowed. For example, Chapter 2, article 6 about equality, where the constitution states that all are equal before the law and no one can be treated differently based on gender, age, origin, language, religion, belief, opinion, state of health, disability or any other reason related to the person without an acceptable reason. In other words, no one should be discriminated against because of the above-mentioned reasons.<sup>185</sup>

Another important fundamental right that is protected by the constitution is the right for privacy, in the FC Article 10(1)<sup>186</sup>, this fundamental right should be guaranteed for every person residing in Finland. The public authority is obliged to secure this right and not to infringe it without legal ground. The principle of privacy was also established by the ECJ case mentioned earlier in this thesis, where disproportionate interference to a person's privacy is prohibited because it violates the fundamental rights of a person. Further, on the 28<sup>th</sup> of March 2023, the European Data Protection Board ( hereinafter EDPB) sent a formal letter to the European Council, the Parliament and Commission regarding data sharing for AML-CFT purposes and ultimately asked for the Council to not add several regulations to the new proposal for a Regulation on AML/CTF<sup>187</sup> because they were infringing the privacy of a natural person and would exacerbate the practice of de-risking.<sup>188</sup> They raised the issue due to

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<sup>183</sup> Lainkirjoittajan opas, Perusoikeuksien sääntely, Finlex, available at: <http://lainkirjoittaja.finlex.fi/4-perusoikeudet/4-1/>

<sup>184</sup> Valmiuslaki, 29.12.2011/1552, available at: <https://finlex.fi/fi/laki/ajantasa/2011/20111552>

<sup>185</sup> Suomen perustuslaki, 11.6.1999/731, available at :

<https://finlex.fi/fi/laki/ajantasa/1999/19990731?search%5Btype%5D=pika&search%5Bpika%5D=perustuslaki>

<sup>186</sup> PL, 10 § Yksityiselämän suoja

<sup>187</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Authority

for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, 20 July 2021, COM/2021/420 final, available at: <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A52021PC0420>.

<sup>188</sup> EDPB letter to the European Parliament, the Council, and the European Commission on data sharing for AML/CFT purposes in light of the Council's mandate for negotiations, EDPB , 28 March 2023, available at: [https://edpb.europa.eu/system/files/2023-04/edpb\\_letter\\_out2023-0015\\_aml\\_cft\\_ep\\_en.pdf](https://edpb.europa.eu/system/files/2023-04/edpb_letter_out2023-0015_aml_cft_ep_en.pdf)

the Commission’s Proposal for Regulation on AML/CTF on the 5<sup>th</sup> of December 2022, where they presented regulations that would permit, under certain conditions, obliged entities or in certain cases also the public authority, that are party to the “partnership for information sharing”<sup>189</sup> to share information, like personal data or “suspicious account activity” that has been reported to FIU (Article 54(3a), with each other (Article 55(5). Even though the EDPB understands the necessity of the Union to protect its member states from money laundering and terrorist financing and understands that the fight against it is important because of public interest, they still draw attention to the importance of proportionality between regulative objective and fundamental rights to privacy and to the protection of personal data.<sup>190</sup> The author opines, that this kind of third party data sharing would probably create inner corporate “black lists” of people who would not be offered services and therefore would be fallen under the practice of de-risking.

### 3.4.1 Case Law

The Supreme Court of Finland, KHO:2017:19, decided based on the prohibition of discrimination and principle of equality. When an individual applied for basic banking account and also for online banking credentials, the bank had not accepted a passport issued by the Estonian authorities to verify the identity of Estonian citizen T, who lives in Finland and has a Finnish personal identification number but had required the presentation of an identification document issued by the Finnish authorities in addition to the passport of the European Union member state mentioned. This was due to anti-money laundering regulations setting out to have extensive CDD rules in place. In its decision, the Discrimination Board considered that the bank had discriminated against T under the FC article 6 in obtaining basic banking services. The Discrimination Board had forbidden the bank, under the threat of 5000 euro fine, to continue the procedure deemed to be in violation of the Equality Act. In its decision, the Administrative Court had considered that there was no reason to change the decision of the Discrimination Board.<sup>191</sup>

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<sup>189</sup> In accordance with definition (42), Article 2, of the Council’s proposal for amendments, “partnership for information sharing in AML/CFT field’ refers to a “formal cooperation established under national law between obliged entities, and where applicable, public authorities, with the purpose of supplementing compliance with this Regulation through cooperation and by sharing and processing data, in particular through the use of new technologies and artificial intelligence”.

<sup>190</sup> EDPB letter to the European Parliament, the Council, and the European Commission on data sharing for AML/CFT purposes in light of the Council’s mandate for negotiations, EDPB , 28 March 2023, available at: [https://edpb.europa.eu/system/files/2023-04/edpb\\_letter\\_out2023-0015\\_aml\\_cft\\_ep\\_en.pdf](https://edpb.europa.eu/system/files/2023-04/edpb_letter_out2023-0015_aml_cft_ep_en.pdf)

<sup>191</sup> KHO:2017:19

The passport issued to T by the Estonian authorities was accepted as a travel document in the European Union, and its reliability in identifying identity had to be compared to the passport issued by the Finnish authorities. In the case at hand, the bank had not presented any concrete aspect related to the risk assessment of the case in question, which would have given the bank a justified reason to doubt the authenticity of T's Estonian passport, or that the identification of T's identity would have been subject to other provisions of Section 17 of the Identification Act and its preambles of the intended situation.<sup>192</sup>

The Supreme Administrative Court considered, like the Discrimination Board and the Administrative Court, that the bank had, without proper justification, placed T in a less favorable position than the corresponding holders of passports issued by the Finnish authorities, considering the European Union's harmonized regulations for issuing passports and therefore violated his right to equality.<sup>193</sup>

States' obligations are torn in both directions, towards its obligation to international agreements and towards its obligation to its people. Now, the chapter established the principle that the state is obliged to protect its national security and ultimately its people. The state must act in defense of the public interest, but also defend the individual from disproportionate interference from public power. The fine line between states' constitutional powers and EU law has been also raised in this chapter, the main understanding that the evaluation of the balance between EU law and the Constitution provided that the law of the European Union is interactive, meaning that because of the multiplicity and convolution of the laws, the Constitution and EU law are managed together not separately. From the perspective of fundamental rights, the case law jurisprudence establishes a correlation between national fundamental rights and the union's fundamental rights, therefore the goal is to establish common constitutional practices and values that would benefit both and enhance legal certainty.

The question of can international law override the right of the individual to be protected by its state Constitution. The case law that was evaluated in this context provided that constitutional rights are being considered in cases regards de-risking and basic banking accounts. Yes, there are exceptions to the right of having a basic banking account in the member states when a person is not part of the European Economic Area, but as the case was dismissed the evaluation was deficient from the perspective of infringement of fundamental rights. The

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<sup>192</sup> Ibid

<sup>193</sup> Ibid

state's obligation to protect fundamental and human rights is stated in the Finnish Constitution article 22, where the act simply confirms that fundamental and human rights must be protected by the public authority.<sup>194</sup> Estonian Constitution provides a lengthy chapter (Chapter 2) about fundamental rights and freedoms.<sup>195</sup> As determined from the case law regarding de-risking in this chapter, these rights and freedoms are in many cases protected. There are similar values in many constitutions and this is mainly because of the influences of international law and human rights.<sup>196</sup> When analyzing the case law regarding money laundering and terrorist financing and the right to a basic banking account, the case law provided certainty that most fundamental rights prevail and a person is allowed to have a basic banking account to be part of society, because otherwise, when a person would be denied to have a basic banking account, fundamental rights like, right to social security, right to work, right to equality, as the fundamentals would be disproportionately disregarded.

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<sup>194</sup> Suomen Perustuslaki, 22 §, Perusoikeuksien turvaaminen

<sup>195</sup> Eesti Põhiseadus, RT 1992, 26, 349

<sup>196</sup> Maruste, R. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse. – Tallinn: Juura 2004, lk 78.

## CONCLUSION

The main objective of this master thesis was to analyze: How to reconcile and implement anti-money laundering and terrorist financing regulations in compliance with fundamental rights? And secondly to see if de-risking is infringing the fundamental rights of natural persons. The common starting point for the research was international law that obliges states to implement money laundering and terrorist financing regulations to their domestic jurisdiction. Both of the thesis's questions were analyzed through Finnish and Estonian national legislation, which also gave an insight to how EU member states implement international jurisdiction and how the member states are enforcing protection to their fundamental and human rights. The author analyzed de-risking from the perspective of vulnerable persons, e.g. refugees, sanctioned persons and elderly and their right to basic financial services in the EU member states.

The thesis concludes that international legislation and cooperation aimed at preventing money laundering and terrorist financing but also fight against drug and tax related crime is of great interest to the States. The FATF, operating under OECD, has significantly influenced international but also domestic legislation regarding anti-money laundering and terrorist financing jurisdiction. The 40 Recommendations set out by this international organization is daily referred to as a basis for many decisions regarding financial services. The First chapter established that there is a fundamental challenge in harmonizing e.g. anti-money laundering regulations and payment accounts directive because they seem to have somewhat diametrically opposed interests. PAD aims to broaden the social and financial inclusion of vulnerable people and thus enable the free movement of, for example, people as the workforce. Money Laundering legislation obliges the banks to obtain maximum quantities of information about the clients, whilst giving the financial institution the possibility to terminate, freeze or not to onboard clients and contracts same time not obligating banks to give precise reasoning on why they process some personal data as they do. According to the Payments Account Directive, article 16, this infringes the right of a natural person to access effective and efficient dispute resolution procedures when a payment service provider is not obliged under the Money Laundering and Terrorist Financing regulation, article 39, to give an accurate explanation about contract termination or asset freezing. The cases that were assessed showed that finding a balance between these regulations due to the conflict of interest in the legislative environment is challenging to financial institutions and due to the legal dynamism, the jurisprudence is still evolving.

Financial institutions realize that the failure to comply with regulatory requirements can lead to extensive and even irreparable damages and therefore refrain from taking risks that could possibly lead to that, and what could eventually cause “black-listing” or in other words de-risking. FATF launched a study to tackle unwarranted consequences resulting by the incorrect implementation of their standards and concluded that it the objective was not to remove clients from the financial system but to apply the correct risk-based approach. The procedures in the banking sector regarding opening banking accounts (KYC) are part of the compliance mechanism and concerning Ukrainian refugees seem to be somewhat different in Finland and Estonia. Estonian Banking Association has listed all the Estonian Banks that offer basic banking services to Ukrainian refugees and gives a very good insight into the procedures of acquiring a basic banking account in Estonia. Also, all the identification requirements are listed on their website. It seems that the open communication and clear insight into procedures by the Estonian Banking Association helped to gain legal certainty for financial institutions to offer banking services to Ukrainian refugees. Therefore, the thesis establishes that clear communication by the public authorities is essential to add legal certainty and lower the risk of financial exclusion.

The question of states’ obligation to protect individual’s constitutional fundamental and human rights was analyzed in the third chapter. The case law that was evaluated in this context provided that constitutional rights are being considered in cases regarding de-risking and basic banking accounts. Yes, there are exceptions to the right of having a basic banking account in the member states when a person is not part of the European Economic Area, but as the case was dismissed the evaluation was deficient from the perspective of infringement of fundamental rights. The state’s obligation to protect fundamental and human rights is stated in the Finnish Constitution article 22, where the act simply confirms that fundamental and human rights must be protected by the public authority. Estonian Constitution provides a lengthy chapter (Chapter 2) about fundamental rights and freedoms. Regarding to Ukrainian refugees the EU activated the Temporary protection Directive (2001/55/EC) which gave Ukrainians the right to access and use basic payment accounts with the note that banks could apply Simplified CDD measures.<sup>197</sup> As determined from the case law regarding de-risking in this chapter, these rights and freedoms in many cases are protected. When analyzing the case law regarding money laundering and terrorist financing and the right to a basic banking

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<sup>197</sup> EBA statement on financial inclusion in the context of the invasion of Ukraine, 27.04.2022, available at: [https://www.eba.europa.eu/sites/default/documents/files/document\\_library/Publications/Other%20publications/2022/1031627/EBA%20statement%20on%20financial%20inclusion%20in%20relation%20to%20Ukraine.pdf](https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Other%20publications/2022/1031627/EBA%20statement%20on%20financial%20inclusion%20in%20relation%20to%20Ukraine.pdf)

account, the case law provided certainty that mostly fundamental rights prevail and a person is allowed to have a basic banking account to be part of society, because otherwise, when a person would be denied to have a basic banking account, fundamental rights like, right to social security, right to work, right to equality, as the fundamentals would be disproportionately disregarded.

The thesis established that not only is the state obliged to protect fundamental and human rights by its constitution, but also by international agreements and EU law. In the author's opinion, the topic of the thesis has been very relevant and important due to the constant changes in the regulations concerning anti-money laundering and terrorist financing. Still, it seems that some legal uncertainty regarding the establishment of client relations exists.

As the opinion of the European Data Protection Board regarding data sharing for AML-CFT purposes concluded that some regulatory proposals were infringing the privacy of a natural person and would exacerbate the practice of de-risking. They raised the issue due to the Commission's Proposal for Regulation on AML/CTF on the 5th of December 2022, where they presented regulations that would permit, under certain conditions, obliged entities or in certain cases also the public authority, that are party to the "partnership for information sharing" to share information, like personal data or "suspicious account activity" that has been reported to FIU (Article 54(3a), with each other (Article 55(5)). In the author's opinion such a practice would definitely add the risk of de-risking for some higher risk clientele like e.g refugees who are not able to show proper documentation and because of the high compliance costs will not be offered banking services. The EDPB also draws attention to the importance of proportionality between regulative objectives and fundamental rights to privacy and to the protection of personal data.

The solution to this legal uncertainty and reliant protection of fundamental rights would be achieved through 1) clear governmental communication to the financial sector on how to resolve issues regarding high-risk customers and providing basic banking services. The author believes that this could be mainly done through clear and harmonized CDD measures in the member states. But also 2) a clear statement in the AML directive about financial inclusion and how to ensure basic banking services to vulnerable people like e.g the elderly, homeless or refugees. The PAD, Article 16(7,8,9,10), directive states how a customer should be notified in accordance with the refusal of opening a bank account with basic features but in many cases, that were evaluated, the objectives set out in the PAD directive were not followed due to the AMLD directive thus it seems that AMLD should be updated specifically regarding this jurisdictional interest. The right to a basic banking account is a fundamental right in many

aspects. For financial institutions to comply with the AMLD and with the prohibition of e.g. discrimination should have clear instructions of procedures from the domestic FIU who are responsible for carrying out supervision. The third issue with the AMLD directive and guidelines is the differences in the interpretation and terminology by member states. E.g. regarding also CDD measures and the legalized identification document. In some states legalized documentation is a certificate validated by the local authority and in some states legal valid documents are with the apostille stamp and in some states they require a document that is notarized. Therefore, such differences could again result in unnecessary problems when opening a basic banking account in the EU member states.

Fourth recommendation that the author wants to appoint is the possibility, in cases regarding vulnerable population or sanctioned persons, to use simplified CDD measures in some cases and in others conclude risk management measures that would minimize the risk of finance institution exploitation, like e.g. restricting the magnitude of basic banking account services, for example not allowing international transactions and raising risk level to conclude extra monitoring. This practice would minimize de-risking and would not infringe fundamental rights regarding to have a basic banking account for everyday life.

## Rahvusvaheline rahapesu ja terrorismi rahastamise tõkestamise regulatsioon ning selle riiklik mõju: de-riskinguga kaasnev üksikisikute põhiõiguste riive

Käesoleva magistritöö põhieesmärk oli analüüsida: Kuidas ühitada ja rakendada rahapesu ja terrorismi rahastamise tõkestamise regulatsioone kooskõlas põhiõigustega? Ja teiseks uurida, kas de-risking riivab füüsiliste isikute põhiõigusi. Uurimise ühiseks lähtekohaks oli rahvusvaheline õigus, mis kohustab riike rakendama rahapesu ja terrorismi rahastamise regulatsioone oma siseriiklikus jurisdiktsioonis. Mõlemaid lõputöö küsimusi analüüsiti läbi Soome ja Eesti siseriikliku seadusandluse, mis andis ka ülevaate sellest, kuidas EL-i liikmesriigid rakendavad rahvusvahelist jurisdiktsiooni ning kas rahvusvahelised inim- ja põhiõigused on kaitstud. Autor analüüsis de-riskimist haavatavate isikute, nt pagulaste, eakate ja sanktsioonide vaatenurgast ja nende isikute õigust põhimakseteenusele EL-i liikmesriikides. Magistritöös jõutakse järeldusele, et rahapesu ja terrorismi rahastamise tõkestamise, aga ka uimasti- ja maksukuritegevuse vastase võitluse rahvusvaheline seadusandlus ja koostöö pakub riikidele suurt huvi. OECD alluvuses tegutsev FATF on oluliselt mõjutanud nii rahvusvahelisi kui ka siseriiklikke õigusakte rahapesu ja terrorismi rahastamise vastase jurisdiktsiooni reguleerimisel. Selle rahvusvahelise organisatsiooni 40 soovitus rakendatakse igapäevaselt paljude finantsteenustega seotud otsuste tegemisel. Esimeses peatükis leiti, et nt rahapesuvastaste määruste ja maksekontode direktiivi ühtlustamine on põhimõtteline väljakutse, kuna nende huvid näivad olevat mõnevõrra diametraalselt vastandlikud. Maksekonto direktiivi eesmärk on laiendada haavatavate inimeste sotsiaalset ja rahalist kaasatust ning võimaldada seeläbi näiteks inimeste kui tööjõu vaba liikumist. Rahapesuseadus kohustab panku hankima klientide kohta maksimaalselt teavet, andes samas finantsasutusele võimaluse lepinguid lõpetada või külmutada, samas ei kohusta panku andma täpset põhjendust, miks nad teatud isikuandmeid töötlevad, nagu nad teevad. Töö tulemuse leiti, et riik ei ole kohustatud kaitsma põhi- ja inimõigusi mitte ainult põhiseaduse, vaid ka rahvusvaheliste lepingute ja EL õigusega. Autori hinnangul on lõputöö teema olnud väga aktuaalne ja oluline seoses rahapesu ja terrorismi rahastamise tõkestamise regulatsiooni pideva muutumisega. Sellegipoolest tundub, et teatud õiguslikku ebakindlust kliendisuhete loomise ja lõpetamise osas on endiselt olemas. Euroopa Andmekaitsekoostöögrupi arvamuses andmete jagamise kohta rahapesuvastase võitluse eesmärgil järeldati, et mõned regulatiivsed ettepanekud rikuvad füüsilise isiku eraelu puutumatust ja süvendaksid de-riskingu praktikat. Ettepanekuga, kus komisjon esitas määrused, mis lubavad teatud tingimustel kohustatud isikutel või teatud juhtudel ka riigiasutusel, kes on lepingu osalised.

„teabe jagamise partnerlust”, et jagada omavahel teavet, nagu isikuandmed või „kahtlane kontotegevus”, millest on rahapesu andmebüroole teatatud (artikli 54 lõige 3a) (artikli 55 lõige 5). Autori arvates selline praktika kindlasti lisab de-riskingu võimalust mõne kõrgema riskiga klientuuri puhul, nagu näiteks pagulased, kes ei suuda esitada nõuetekohast dokumentatsiooni ja mistõttu ei pakuta neile pangateenuseid. Euroopa Andmekaitseõukogu juhtis tähelepanu ka regulatiivsete suhete proportsionaalsuse tähtsuses seoses regulatiivsetele eesmärkidele ja põhiõigused eraelu puutumatusse ja isikuandmete kaitsele. Autor leiab, at selle õigusliku ebakindluse ja parema põhiõiguste kaitse saaks lahendada 1) selge valitsuse kommunikatsiooniga finantssektorile selle kohta, kuidas lahendada kõrge riskiga klientide ja põhipangandusteenuste pakkumisega seotud probleeme. Autor usub, et seda saaks teha peamiselt selgete ja ühtlustatud CDD( kliendikontrolli) meetmete kaudu aga ka 2) rahapesuvastases direktiivis selge avaldusega finantskaasamise ja selle kohta, kuidas tagada põhimakseteenused haavatavatele inimestele, nagu kodutud, eakad või pagulased. Põhimakseteenuse direktiivi artikli 16 lõiked 7, 8, 9, 10, mis sätestab, kuidas tuleb klienti teavitada põhifunktsioonidega pangakonto avamisest või keeldumisest, kuid paljudel juhtudel, kui seda hinnatakse, järgitakse rahapesudirektiivist tulenevat õigust selgitusest keelduda. Seega tundub, et AMLD tuleks ajakohastada konkreetselt seoses selle õigusliku huviga. Õigus põhipangakontole on põhiõigus mitmes aspektis. Selleks et finantseerimisasutused järgiksid rahapesutõkestamise direktiivi ja nt diskrimineerimise keeldu, peaksid järelevalve teostamise eest vastutavatelt siseriiklikelt rahapesu andmebüroodelt olema selged protseduurijuhised.

Kolmas probleem rahapesu direktiivi ja suunistega on liikmesriikide vahelised tõlgendused ja terminoloogia erinevused. Nt ka kliendikontrolli meetmete ja legaliseeritud isikut tõendava dokumendi kohta. Mõnes osariigis on legaliseeritud dokumendid kohaliku omavalitsuse poolt kinnitatud sertifikaat ja mõnes osariigis on seaduslik kehtiv dokument apostilliga ning mõnes osariigis on vaja notariaalselt kinnitatud dokumenti. Seetõttu võivad sellised erinevused taas tekitada tarbetuid probleeme EL-i liikmesriikides põhipangakonto avamisel. Mistõttu täpne terminoloogia hõlbustaks kliendikontrolli meetmete täpsema kohaldatavuse ja suurendaks õiguskindlust. Rahapesu regulatsioon annab võimaluse rakendada haavatava elanikkonna või sanktsioonide alla sattunud isikute puhul, mõnel juhul, lihtsustatud CDD meetmeid ning rakendada riskijuhtimismeetmeid, mis minimeeriksid finantsasutuse ärakasutamise riski, nt piirata pangakonto põhiteenuste ulatust rahvusvaheliste tehingute piiramisega ja riskitaseme tõstmine lisajärelevalve rakendamiseks. Selline praktika vähendaks de-riskimise praktikat ega riivaks põhiõigusi ebaproportsionaalselt.

## ABBREVIATIONS

Anti-Money Laundering Authority of the European Union - AMLA

Anti-Money Laundering Directive - AMLD

Anti-Money Laundering/Combating the Financing of Terrorism - AML/CTF

Customer due diligence – CDD

European System of Financial Supervision - ESFS

Financial Action Task Force - FATF

Know Your Customer – KYC

Risk Based Approach - RBA

The European Banking Authority - EBA

The European Central Bank – ECB

The European Central Bank – ECB

The European Data Protection Board – EDPB

The European Union – EU

The Financial Intelligence Unit – FIU

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## Appendix 2 Acknowledgements

The author would like to thank her supervisor Katre Luhamaa for excellent advice and observations that were in great help writing this Master Thesis.