

Law enforcement access to financial data – off the beaten track

Summary by Alessandra Calvi (VUB/LSTS) and Juraj Sajfert (VUB/University of Luxembourg)

On 9 June 2021, the Brussels Privacy Hub, in cooperation with the [University of Luxembourg](#) within the framework of the FWO/FNR-funded MATIS project, and in media partnership with [Privacy Laws & Business](#) organised the last webinar within the series [Enforcing Europe - Webinar Series 1](#).

The sixth webinar, entitled the **Law enforcement access to financial data – off the beaten track**, discussed the law enforcement access to financial data and the related (and somewhat unknown) data protection intricacies. How long, and why, are our bank records retained? What kind of inferences can we make out of them? What is the difference between the Financial Intelligence Units (FIUs) and law enforcement authorities? Does the GDPR or the LED apply to them? How widely are our financial data being exchanged in the EU and worldwide? What is the role of Europol in all that? And many, many other questions.

Juraj Sajfert (VUB/University of Luxembourg) moderated the discussion. Invited speakers were **Chiara Bacci** (European Commission, DG FISMA, Financial Crime), **Max Braun** (Director of CRF (Financial Intelligence Unit), Luxembourg), **Mario Guglielmetti** (European Data Protection Supervisor, Policy and Consultation Unit) and **Maxime Lassalle** (postdoctoral researcher, Max Planck Institute for the Study of Crime, Security and Law).

Chiara Bacci opened the discussion by setting the scene on anti-money laundering and countering terrorism financing. She explained that FIUs are tasked with identifying suspicious transactions that can be subjected to criminal investigations. The anti-money laundering (AML) framework has been an area at the center of the policy debate and the [Commission Action Plan was adopted last year](#). A proposal for an anti-money laundering package is currently under discussion.¹ From a data protection point of view, the main issues that have been raised in relation to the AML framework concern:

- the registers of beneficial ownership, on the one hand, and of bank accounts, on the other hand. For the former, only competent authorities have access to all the information available through the interconnection of beneficial ownership registers, whereas the public and obliged entities have lower levels of access. One question from a data protection perspective is the tension between data minimisation and accuracy, as the more information and the higher cross-check, the higher the accuracy;
- the customer due diligence, that is the procedure of verification of information that e.g. lawyers, banks, investment companies need to perform. Considering that in the various Member States the procedures are different, and so is the quantity of personal data collected. The object of the reform is to achieve clearer and more uniform rules, based on the risk-based approach;
- the role and nature of FIUs, that is the intelligence side. FIUs can be both administrative or police authorities. EU AML rules take a functional approach, meaning that regardless of where the FIU is located, its function needs to be producing financial intelligence, which is a step before criminal investigations. In other words, they analyse suspicious financial transactions reported to them and other information to produce intelligence for law enforcement agencies, but are not criminal investigators themselves. To exercise their functions, they need to have access to certain information (both law enforcement and administrative/financial). One of the questions raised from some corners is whether FIUs should be bound by general data protection rules or rather by those specific rules laid down in the police data protection directive;

¹ After the event, on 20 July 2021, the European Commission presented a [package of legislative proposals to strengthen the EU's anti-money laundering and countering the financing of terrorism \(AML/CFT\) rules](#).

- the role of public-private partnerships, considering that more clarity as to their reciprocal roles when handling sensitive information is necessary.

Max Braun stated that their FIU in Luxembourg is quite specific as it is a judicial organ. Like other FIUs, their task is to fight against money laundering and terrorist financing. Yet, Luxembourg's national legislation foresees that they apply the LED and not GDPR as other FIUs do. When they created their internal rules, they tried to comply with both texts but it was not easy. FIUs are used to confidentiality, data safety and protect information properly: they are aware of the risks arising from the lack of protection of personal information, and are data processed without a legal basis cannot be used. They work exclusively in a digital environment. As Luxembourg is a very important financial centre, being able to exchange info with FIUs at the EU level but also third countries is of utmost importance. Yet, for third countries, the legal framework may not be clear. They take into account the [Financial Action Task Force \(FATF\)](#) recommendations also in terms of privacy and data security. Networks of FIUs worldwide exist and they represent fora of discussion. They can also exchange info directly with Europol.

Mario Guglielmetti mentioned some criticalities of the AML system depending on its decentralisation and bottom-up approach. As everything starts from banks, that do due diligence, then pass information to FIUs, that then address to investigating and prosecuting authorities, the effectiveness is compromised by the lack of collaboration and uncertainty on how to deal with suspicious reports. He stressed that the issues of the AML framework are not purely data protection related but regard also the rule of law, the legal certainty, the value of information sharing. Many percentage points of the GDP are money laundered. Europol has already high knowledge of crimes in a filtered way. The EDPB and EDPS issued [opinions](#) and identified some loopholes, that include data retention rules, that are applicable to banks but not to supervisory actors; data transfer; data quality; data minimisation. He noted that when financial data are exchanged by telephone, the data retention directive is applicable.

Maxim Lassalle, referring to his recent publication,² mentioned certain relevant case law (e.g. [Digital Rights Ireland](#) and [La Quadrature du Net](#)), wondering whether it would apply also to the banking and finance sector. He wondered whether the definition of private data, contained in para 117 of *La Quadrature du Net*, would apply to bank and financial data. He then referred to the case [California Bankers Assn. v. Shultz, 416 U.S. 21 \(1974\)](#) of the US Supreme Court, and in particular to the dissenting opinion of Justice Douglas, concerned about the violation of the Fourth Amendment deriving from the intrusion into privacy deriving from the recording and access to bank data. Considering that San Marino and Luxembourg were criticised by the Court of Justice of the European Union (CJEU) and by the European Court on Human Rights for not respecting financial privacy, he concluded that the CJEU in the future may question the existing legal framework regarding international financial investigations.

During the Q&A, the discussion moved towards trans-atlantic AML cooperation and the mutual legal assistance treaties (MLATs), as opposed to direct cooperation with the financial entities. As many data are collected by US companies, would the EU e-evidence package also facilitate access to this kind of data? Seemingly, the goal would be to replace the need for intermediate competent authorities. Currently, MLATs are an important source that are used by investigation to gather financial data. However, it was also noted how FIUs' channels are used to exchange information among FIUs and are faster than MLATs.

² Lassalle, M. (2021). *L'accès transnational aux données bancaires dans le cadre de l'enquête pénale - Perspective transatlantique* Collection de la Faculté de Droit, d'Économie et de Finance de l'Université du Luxembourg. Bruxelles: Editions Larcier.