CHAPTER 3

Averting Terror Funds: New Grounds for Racial Discrimination?

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Introduction: Penalising the Financing of Terrorism

As defined by the International Convention for the Suppression of the Financing of Terrorism (1999), terrorist financing constitutes an offence committed by a person who:

> … by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act [of terrorism] (Article 2, para. 1)

Enforcers and investigators of terrorist incidents, such as J. Roth et al. (n.d.), have found that contemporary terrorist attacks require relatively insignificant sums of money. This has changed the concept of terrorism as a phenomenon, and during the last two decades legislation has been focused on everyday financial transactions which has been found to predominantly fund terrorism.

The whole idea of criminalising the financing of terrorism is based on the widespread idea of preventing all economic crimes that could endanger the integrity of financial markets, national security and social development.

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Effective prevention depends on financial intelligence (McCulloch & Carlton 2006: 403), thus classical financial principles, such as data confidentiality and the fiduciary duty, are no longer applied to this fight. Furthermore, measures taken to fight terrorist financing branch off into obligations imposed by the General Data Protection Regulation (GDPR) 2016/679. It is generally accepted that finances could be misused for terrorist purposes, if there is no control, or no adequate control, of the customers of financial institutions and their transactions.

The fight against terrorist financing establishes a duty to secure national safety and state sovereignty. This duty, although traditionally executed by the State and its official bodies, has been transferred to the private sector and especially to financial services providers, despite the fact that the aim of ensuring national security seems incompatible with the lucrative purposes of the latter. As highlighted by scholars such as Mugarura (2015), financial institutions are transforming into a kind of economic police force (ibid.: 352) which controls customers, rejects those who seem 'suspicious' and blocks transactions which could put an institution's reputation[1] and economic status[2] at stake. The whole structure of the system set to prevent terrorist financing turns out to be extremely vulnerable to discriminatory practices (McCulloch & Carlton 2006: 405). In this sense, the classic rhetoric on how terrorism threatens peace, security and the Rule of Law meets the other side of the coin: how counterterrorism becomes the vehicle of legalising restrictions to fundamental human rights recognised and protected in most developed countries.

With special focus on the UK, this chapter seeks to investigate the implicit impact of the European counterterrorist policy on human rights, based on the structure and philosophy of the preventive system applied in the private sector. Firstly, it is argued that financial institutions have been assigned a duty to monitor closely and effectively the money transferred through their channels, with the support and supervision of competent national authorities. Secondly, several cases are analysed to demonstrate how the policy on countering the financing of terrorism may in practice give rise to discrimination against specific ethnicities or religions. Finally, the chapter concludes with recommendations for achieving a better balance between these two essential purposes: the prevention of terrorist financing and most importantly for this volume, the elimination of discrimination in the financial sector.

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[1] Often, supervisory authorities publish their decisions on an institution's failure to comply with CFT obligations. See e.g., Financial Conduct Authority. (2017). Final Notice on Deutsche Bank AG, point 7.5.

[2] The most common penalty for not complying with CFT obligations is the payment of heavy fines. See, e.g., Canara Bank and Sonali Bank (UK) Ltd were fined £896,100 by the FCA in June 2018 for breaching Principle 3 of the FCA's Principles for Businesses (taking reasonable steps to organise its affairs responsibly and effectively, with adequate risk management systems).

Legal and Ethical Duties on Financial Institutions

National, international (FATF[3] 2012–2022) and European (Directive 2015/849 as amended) regulations illustrate in general the obligations of financial institutions concerning the prevention of terrorist financing. So, each institution must put into force the most appropriate measures in regard to the nature of its services, the size of its business, the extent of its activities and any other specific characteristics. All these measures and internal policies adopted by each operator are regularly examined in situ and surveyed by the relevant national authorities[4] through obligatory reports submitted by every responsible entity as identified by the applicable national law. Competent national authorities can either make recommendations for possible ameliorations of the terrorist-tracking system in place or impose high fines and administrative penalties in order to sanction the business for failing to conform to its legal obligations. In the author's opinion, this system constitutes a particular form of Corporate Social Responsibility (hereinafter CSR), given that the nature and number of measures and policies to fight possible financing of terrorism (i.e., internal conduct codes) are chosen freely by each obliged entity (Joint Committee 2017: 24) and are usually coordinated by their CSR managers. Traditionally, CSR is linked to voluntary initiatives taken with the discretionary power of commercial enterprises, in order to contribute to the welfare of the society in which they conduct their business. However, in principle there are no mechanisms of judicial oversight to control the respect of these obligations and their effective application. By contrast, in the case of measures and policies to counter the financing of terrorism (hereinafter CFT), it is the law that dictates their general adoption and demands that these measures and policies prove able to fulfil their ultimate purpose. It follows that financial institutions have to fight terrorism in any way they deem to be effective and appropriate. If this legal obligation is not thoroughly respected, it can lead to sanction of the institution in question. In the case of CSR initiatives, however, the liability of a company for not respecting its own engagements can only be sanctioned indirectly and through complicated court cases, if it is first proven that the company's failure to provide appropriate measures resulted in consumers being hurt.

In Europe, member States are supposed to '*monitor effectively*' the compliance of financial institutions in their legal duty of preventing terrorist financing (EU Directive 2015/849, article 48(1)). This control covers the whole process of adopting CFT measures until their effective application in practice. Neither the EU Directive 2015/849 nor UK law determines the regularity of the evoked

[3] The Financial Action Task Force (FATF) is an intergovernmental policy-making organisation which issues non-binding recommendations on money laundering and terrorist financing, conducts research and monitors the level of security in all countries.

[4] In the UK, this duty is upon the Financial Conduct Authority (FCA).

control. However, the phrase '*monitor effectively*' implies regularity of examination that will permit national bodies to have an actualised knowledge of the CFT policies used by each institution under their authority. As discussed below, in case of insufficient or inadequate measures applied by the obliged entities, national authorities are competent to order immediately financial and non-financial penalties with serious consequences for the implicated institutions.

Menace of Severe Penalties for Insufficient CFT Measures

National legislation provides for a varied number and type of sanction. In the UK and USA, for example, financial institutions can be found liable for civil and penal[5] infractions for failing to comply with their CFT obligations. For instance, the Financial Conduct Agency (FCA), which is the competent authority in the UK, has ordered several substantive financial penalties, such as a fine of £896,100 imposed on Canara Bank for having failed to establish and design adequate internal systems and controls of risk assessment (2015). Moreover, the FCA temporarily prohibited the Bank of Beirut from offering any services aimed at acquiring new customers who 'were residents or incorporated in "high risk jurisdictions"' (Artingstall et al. 2016: 17).

The problem of establishing efficient and up to date CFT systems is even more complicated for European financial institutions with branches or affiliates in the USA, and since Brexit, in the UK as well.[6] They face a greater risk of being punished twice, i.e., once in each country or once only in the USA. In the USA, sanctions include even higher fines or bans from executing dollar transactions, thus bans from the international market, given that the dollar is the common currency in international trade (McCulloch & Carlton 2006: 405; Wolosky & Heifetz 2002: 2). Such was the case of the British bank, Barclays Bank Plc which, in 2016, was found liable under US law and ordered to pay a fine of $2,485,890 (approximately £1,976,618) to the American Office of Foreign Assets Control (OFAC 2016). Another British bank, HSBC, faced a similar situation in 2012: after a settlement with the US authority and the US Department of Justice, it agreed to pay a fine of $1.9 billion (approximately £7,286,767,841.08)[7] and since then stopped paying out remittances at its Mexican branches (Corkery 2014). It is obvious that these penalties harmed the bank's fortune and endangered its global reputation as 'the world's local bank' (Slater & Scuffham 2013; Durner & Shetret 2015: 11). Consequently, HSBC's long-term profitability could be put at risk. In the harsh world of business,

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[5] In most European countries, sanctions against moral persons can only be administrative or civil.

[6] After Brexit, the UK is free to impose its own sanctions and freeze assets at a lower threshold than that of the EU.

[7] The penalty was equal to 11% of the bank's profit the previous year (Tangel 2012).

reputation plays an important role in a business's development and affects its principal aim of profitability. As will be demonstrated below, this factor appears to make financial institutions extremely cautious when dealing with certain groups of people and their transactions.

The Abstract Concept of the Risk-Based Approach in Implementing Counterterrorist Policies

The measures that financial institutions must adopt are summarised by two main obligations: customer due diligence (or the 'know your customer' obligation) and the reporting of 'suspicious' transactions. The first obligation means that financial institutions should regularly verify the identity, home and professional addresses, employment details, as well as the family and legal status of all their existing and future customers to ensure that the latter have no connections to blocked countries or entities[8] in order to establish their overall profile, which must be kept current (FATF 2012–2022: 72). This profiling method serves to effectively monitor customers, allowing the punctual ascertainment of transactions that do not seem to fit the customer's financial behaviour and economic status, thus raising suspicions of criminal activity (FATF 2002). The second requirement follows on from the due diligence obligation. Consequently, once a transaction is found to be suspicious by the obliged entity, it must refrain from executing it and must immediately disclose that transaction to the competent authority[9] for further examination and permission regarding whether or not to proceed with the transaction.[10] In practice, this means that a transaction characterised as 'suspicious', founded on the risk-based approach elaborated by each financial operator and on a de-risking method, could be suspended for a very long time or for an indefinite period.[11] The risk-based approach is the method of assessing the potential terrorist financing risk of each operation before its execution.[12] However, the de-risking strategy,

[8] These lists include the names of individuals, companies and associations sentenced by national jurisdictions or with connections to countries excluded from the EU market or for whom there is a number of indications for their exclusion from the financial market.

[9] This obligation is known as 'Suspicious Activity Report' (SAR).

[10] In the UK this authority is the Serious Organised Crime Agency (SOCA).

[11] See case: *Shah and another v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB), in which HSBC was found not liable for the economic damage suffered by its customer due to a SAR she executed delaying the execution of the transaction demanded by the claimant. The Court considered that the bank acted according to the legal framework of its anti-money laundering (AML) and CFT obligations.

[12] This assessment is being made mostly in an automated way through special software. Based on the customers' personal, professional and financial information collected by financial institutions, this software has the ability to categorise each transaction

which is adopted by most financial institutions, constitutes an internal process of minimising the risks of criminal activity by de-banking certain groups of people or legal entities categorised as high risk clients (Durner & Shetret 2015: 1).

The Financial Action Task Force (hereinafter FATF), national authorities and individual states have suggested several criteria and guidelines for the assessment of risks and the categorisation of clients and transactions as at low, medium, high or very high risk of terrorism.[13] Although risk management is considered a well-developed economic practice in the financial sector, financial crime risk, as yet, cannot be calculated as accurately as credit risk. The parameters of criminal risks are not purely economic, but involve various other social, typical and atypical elements, such as a person's geographical origin, which cannot be assessed a priori as a good or bad factor.

The fluidity of notions such as 'suspicious transactions', adopted by the law, undeniably contribute to the proliferation of racial and religious discrimination. Competent authorities receive thousands of Suspicious Transactions Reports (STRs) every day.[14] This is because financial institutions are not willing to take responsibility and decide whether a transaction which may seem suspicious does indeed conceal criminal intentions. They prefer to freeze the transaction and refer the case directly to the competent authority[15] (see, for example, *R v Da Silva* [2006], *Shah v HSBC Private Bank (UK) Ltd* [2012] and *Iraj Parvizi v Barclays Bank* [2014]). What makes this situation worse is that the general criteria suggested by the national authorities and/or international institutions (such as FATF) for reporting a transaction are dangerously vague and ambiguous.[16] As a result, competent authorities cannot act promptly, despite the importance of the transaction in question to the client. This issue has been highlighted at the latest review of the UK's Anti-Money Laundering (AML)/CFT Regulations conducted by the HM Treasury (2022: 36).

Moreover, financial institutions have gained the power to determine if a person has the right to access the financial system or not on the grounds of executing their duty to protect national security and the integrity of the market. Consequently, it tends to have been accepted by market operators that the exclusion of *certain people* is necessary for achieving a high level of protection.

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as regular or suspicious. Blocked countries, individuals and other entities are regularly added to this system as an indication of risks of criminal activity (see: FATF 2014a).

[13] See e.g., FATF 2013.

[14] The number of transactions being reported is increasing across Europe and especially in the UK. See further: Vedrennem 2019.

[15] It is worth noting that in this case UK law (subsection 4A into s. 338 of the Proceeds of Crime Act UK 2002) protects financial institutions from civil liability for breaching confidentiality duty, provided that the disclosure has been made in good faith.

[16] These criteria usually comprise a certain threshold amount above which all transactions must be reported to the competent authority and the subjective judgement of each entity based on the information it has collected. See further: Ping 2005.

According to a survey conducted by John Howell & Co. Ltd at the request of the FCA (Artingstall et al. 2016), it was found that high compliance costs oblige banks to refrain from providing services to customers who they consider able to abuse their services for terrorist purposes or for who they think they cannot apply the necessary and highly expensive monitoring controls. So, financial exclusion tends to be justified and completely lawful under anti-money laundering/combatting the financing of terrorism (AML/CFT) regulation. FATF has raised awareness about this extremely perilous situation (2014) and suggested actions to mitigate the negative repercussions of overly stringent prevention mechanisms (2017). These issues will be further analysed in the following section.

Discrimination in the Financial Sector – The Legal Framework Against Discrimination

The prohibition of discrimination constitutes the core of human rights protection law and cannot be permitted under any circumstances. The notion of discrimination appears in both international and European law. According to article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD 1999; see further Keane, Chapter 1), discrimination is defined as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The fight against racial discrimination is coordinated internationally by the Committee on the Elimination of Racial Discrimination. In this context, the UN adopted a project to fight xenophobia and racial discrimination (Durban Declaration and Programme of Action 2002), as well as another more specific project aiming to fight, in particular, ethnic, religious and ideological discrimination (Rabat Plan of Action 2013).

The conflict of laws concerning anti-terrorism strategies and the protection of human rights was acknowledged by the General Assembly of the UN through its resolution 60/288 (The UN Global Counter-Terrorism Strategy 2006). In this text, the General Assembly explicitly held that anti-terrorist actions must be compatible with international law and especially with human rights law, refugee law and international humanitarian law.

At a regional level, the EU is very sensitive to matters of discrimination of any type. It has established a rigorous system of common rules for all member states relating to non-discrimination (see for example articles 18 and 45 of the TFEU, Employment Equality Directive 2000/78/EC, Racial Equality Directive

2000/43/EC, Gender Equality Directive 2006/54/EC) complemented by the powers of the European Court of Justice and the European Court of Human Rights to prevent discrimination and to punish States or individuals engaging in discriminatory acts. This system is applied in a great number of countries, each with different legal systems so is consequently considered, worldwide, as the most important system. The European Court of Human Rights plays a determinative role in the respect and the evolution of these rules. Indeed, abolishment of discrimination can be found in:

- Directive 2000/43/EC against discrimination on grounds of race and ethnic origin;
- Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- Article 2 of the 14th Protocol attached to the Convention, in recommendation no. 8 ('Combating Racism while Fighting Terrorism') of the general policy of the Commission against Racism and Intolerance; and
- Article 21 of the Charter of Fundamental Human Rights of the European Union.

It is worth mentioning that the EU Network of Independent Experts on Fundamental Rights has raised the issue of profiling using contested criteria, such as birthplace, nationality and religion, which reproduces discriminatory beliefs (2006, 13–15, 40). Also, the European Commission against Racism and Intolerance (hereinafter ECRI)[17] recommends that Member States should ensure that national legislation and national enforcement policies secure the right to equal and non-discriminative treatment (2004: 4–5).

Background Reasons of Discrimination when Applying CFT Regulation

The Western world traditionally connects terrorism with Arabic and Muslim organisations (Corbin 2017), as it is usually considered to be religiously motivated.[18] However, religiously motivated terrorism constitutes only a small percentage of all terrorist attacks that occur worldwide. In Europe, in 2018, there were only seven completed jihadist attacks as opposed to 83 ethno-nationalist and separatist terrorist attacks (Europol Report 2019). A recent report of the UN Human Rights Council entitled 'Report of the Special

[17] For details on the role and the activities of this body visit: https://rm.coe.int/leaflet-ecri-2019/168094b101.

[18] Nevertheless, according to the most recent report of the Institute for Economics and Peace: 'political terrorism has now overtaken religious terrorism in the West, with religiously motivated attacks declining 82 per cent in 2021. There were 40 politically motivated attacks, compared with just three religiously motivated attacks' (Global Terrorism Index 2022: 4).

Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (2017) emphasised the fact that the overall fight against terrorism feeds xenophobia and inequality based on the ethnic origin and religious beliefs of certain people or groups of people (2017: 11). According to this report, there is a proliferation of anti-Muslim rhetoric that creates a hostile environment for refugees and immigrants from Muslim countries (2017: 4–5). These people suffer the inherent suspicion of terrorism because of their nationality and/or religion and the destination country of their financial transactions, e.g., when they send money to their families or pay taxes in their country of origin (Bantekas 2003: 321). They also often lack a number of identification documents due to the different bureaucracies in the countries they move to and their country of origin, and of course, in the case of refugees, because of the traumatic circumstances in which they may have left their homes (The White Collar Crime Centre 2018: 16).

The UK, because of its role as 'a major global financial centre and the world's largest centre for cross-border banking' (FATF 2018: 18) engaged early in the fight against terrorist financing. Since the 1990s, when the UK enacted several anti-money laundering legislative acts, based on the 'know your customer' idea, banks have been obliged to seek information regarding the true identity of their clientele. Moreover, the UK was one of the first Member States to apply the EU's anti-money laundering and counterterrorist financing legislation. Post-Brexit, its legislation remains harmonised at the level of the 5th EU AML Directive. In particular, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017,[19] as amended by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019,[20] require all regulated bodies (including banks, and other financial institutions, such as insurance and real estate companies) to obtain information on the identity, origin, home and work addresses, employment details and the family status of every customer, in order to prevent accounts being used for terrorist aims (either by financing an attack or by financing a terrorist group or a combat organisation). All this information is stored in one or more electronic databases of the obliged entity, and it is checked through adequate algorithms. This is the case for international markets as well. As this technique is applied worldwide, the initial financial exclusion of certain people is usually due to their inability to provide the correct documents deemed by law as 'necessary' for opening an account, for applying for credit or for securing health insurance. Usually, those

[19] These Regulations implemented the 4th EU AML Directive (EU) 2015/849 and transposed all new standards suggested by the FATF to the national legislation.

[20] These Regulations implemented the 5th EU AML Directive (EU) 2018/843 which came into force on 10 January 2020 while the 6th EU AML Directive 2018/1673 which harmonises the definition of predicate offences against money laundering across the EU was not transposed to British legislation because of its withdrawal from the EU.

who have no proof of residence or no employment contract are not accepted as customers. Several scholars have identified the opposing nature of each party's needs: one to prevent money laundering on the basis of de-risking practices and the other to have access to the financial system (de Koker 2006: 27; Durner & Shetret 2015; McKendry 2014). They all agree that law enforcement requires regulatory authorities to find the right balance between these needs, although it may be difficult to satisfy both.

Practically, major banks prefer to exclude customers rather than face liability, as money laundering or terrorist financing accusations can harm their reputation and cause further economic problems (Nakajima 2017: 132). This issue was noticed and publicly addressed by the FCA in February 2016 following the financial exclusion of certain legal entities by some English banks. The FCA acknowledged the discretionary authority of a financial institution to deny an entity as its customer but suggested that this authority should only be used as a last resort, if no other viable solution could be found between the contracting parties. Recently, the European Banking Authority (EBA) published an opinion regarding this emerging situation and called on national authorities and EU institutions to provide financial operators with clearer instructions on how to abstain from 'unwarranted de-risking' (2022: 4–5).

Access to finance may not be an official fundamental right, although it is undeniably the main and sometimes only means by which to exercise several fundamental rights (such as the right to property, the right to social life or the right to health) in contemporary societies (Hudon 2009; Kumar 2014: 3–4). In other words, a person with no bank account cannot find an 'official' job and 'officially' be paid, cannot rent a house or ask for medical care. We could say that a person with no bank account does not 'officially exist'.

Research conducted by economists (Stefan et al. 2018: 3) has also pointed out this inherent subconscious discriminatory behaviour of the private financial sector (Sciurba 2019: 161). Bankers, in the context of CFT obligations, take discriminatory decisions that lead individuals to financial and social exclusion and therefore to criminality (de Koker 2006: 27). Moreover, employees, who can also be found liable for not effectively applying CFT controls, when making decisions take into account a number of inappropriate factors, such as their own personal experiences and social prejudices (McCulloch & Carlton 2006: 404; Rondel 2017). In other words, analysis of the risk of terrorism linked to an individual or a transaction is not absolutely objective but rather the result of the interaction between an employee's subjective opinion and an indication from the compliance software. Further, this software is driven by algorithms, programmed by 'subjective' humans, that raise the alarm when one or more criteria, selected by designers of the software, are fulfilled. It is therefore possible that such software, like any other AI tool, enhances discrimination.[21] This

[21] In fact, in recent years, and especially after the Covid-19 crisis, a wide range of AI systems have been integrated in several sectors of public life (i.e., health, administration,

implies that a risk-based approach is not unbiased and objective and cannot fully preserve the integrity of financial markets. The British Joint Money Laundering Steering Group explicitly suggests in its Guidance that 'firms have to make their own determination as to the risk weights. Parameters set by law or regulation may limit a firm's discretion' (2018: 50). However, in practice the law gives financial institutions great latitude.

This situation is also encouraged by international bodies, which, in the context of protecting global peace and security, declare specific countries to be at a high risk of terrorism, although in reality such declarations indirectly serve their economic and political interests (Sullivan & Hayes 2010). In 2010, based on UN resolution 1373, which encouraged member states to set up their own blacklists, more than 200 were adopted worldwide, each containing different countries, individuals and legal entities (de Goede 2012: 178). The large number of countries on these blacklists created numerous problems and uncertainty for financial institutions who were supposed to follow these resolutions and immediately integrate them into their warning systems as long as they were engaged in executing international transactions. In addition, it must be kept in mind that these lists are extremely controversial because the process followed for their establishment raises serious concerns regarding transparency, equality and respect of the internationally recognised right to property (Office of the UN High Commissioner for Human Rights, Terrorism and Counter-terrorism 2008: 20). Both the UN and USA have the power, and often use this power, to impose sanctions against countries whose regimes they disagree with. These sanctions, no matter how well-meaning, can in turn create prejudice against citizens of those sanctioned countries, even when its social status indicates no, or an extremely low, risk of terrorist financing. Considering that people suffering from financial exclusion usually have limited or no access to the justice system, few cases of discrimination have been brought to court (Durner & Shetret 2015: 21). Nonetheless, several cases can be found in the media, as discussed further below.

Indicative Discrimination Cases Connected to CFT Measures

According to the Financial Ombudsman's statistics, bank customers all across the UK have been subject to the closure of their accounts (Artingstall et al. 2016: 13) as a result of discrimination (Sciurba 2019: 160). As mentioned in a report conducted by the Global Center on Cooperative Security (Durner & Shetret 2015: 23), no financial institution has admitted or will ever admit that their de-risking methods are driven mainly by religious or cultural indications.

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justice) and a debate has begun worldwide as to whether these systems may or may not discriminate against certain people based on their race, their gender, their age etc. See e.g., Equality and Human Rights Commission 2022.

The following indicative examples of cases involving racial or religious discrimination has been confirmed by the FCA (Artingstall et al. 2016).[22]

In the past, such behaviour rarely reached the courts or other dispute resolution bodies. However, in the last few years the media has shone some light on this phenomenon and encouraged individuals to claim their legal rights. One example concerns an Irish bank which was found liable by the Workplace Relation Commission (WRC) for demonstrating discriminatory behaviour based on race in relation to an Iranian couple (Deegan 2018). The couple in question had functioning accounts with the bank for over five years, worked legally in Ireland as doctors, and the wife possessed Irish citizenship. Despite this, the bank unilaterally decided that, due to their ethnicity, the couple presented a high risk of terrorist financing. As a result, it imposed, without prior warning, restrictions to the functional conditions of their business relationship. The couple were deprived of their right to make any transactions involving Iran, regardless of the amount of the transaction or the reasons for the transfer. The bank was finally ordered to pay damages of €12,000 to the wife and €8,000 to the husband as moral damages, i.e., damages for the psychological and reputational harm caused.

Similarly, Allied Irish Bank was ordered to pay €4,000 to a dentist after refusing to open an account in his name on the grounds that he was a refugee from Syria, a country which is blacklisted by the UN (Deegan 2019). The WRC found that, under the Equal Status Acts 2000–2015, Allied's action was direct discrimination based on race (WRC ADJ-00013897 2018).

Further, in 2012, HSBC, following the fine imposed by the American authorities for lax controls in its anti-money laundering/counter-terrorist systems (as discussed above), shut down several accounts belonging to Muslim customers, with the justification that their religion and/or nationality presented risks incompatible with the bank's updated risk assessment policy (Laurie 2014). Customers were not given prior warning of the closure of their accounts and were only subsequently sent short letters, in which the bank implied that the decision was not driven by Islamophobia but by its proper interests: to mitigate the risk of being sanctioned again for failing to prevent illegal money transfers (Laurie 2014). It is worth noting, however, that despite these decisions, HSBC was sentenced, in 2021, by the FCA to pay a civil penalty of £63.9 million due to deficiencies in its transaction monitoring systems during the period 2010–2018 (FCA 2021).

Barclays Bank, while trying to comply with the UK's AML/CFT rules, decided unilaterally and without warning, to terminate several client relationships that it considered to be 'suspicious' (*The Guardian* as cited by Tins 2017),

[22] In this report entitled 'Drivers & Impacts of Derisking' it is claimed that some clients were cut off by their banks with no specific justification and without having the chance to demand further information, prove their case or seek remediation (Artingstall et al. 2016: 43–44).

and similar cases concerning accusations against financial institutions are regularly published by the media internationally (Jones 2018). Even though these disputes are usually not resolved by independent bodies, national authorities or by national courts as the individuals involved usually do not have the necessary financial resources to claim their rights, these cases still raise questions about the existence of racist incentives behind a private actor's internal policies.

In another case, the Finnish National Discrimination Tribunal identified that a bank's policy led to ethnic discrimination, given that only individuals with Finnish identity cards could be accepted as customers (Ministry of the Interior 2014). The Tribunal considered that neither national legislation nor international and EU standards concerning the fight against terrorist financing, prevented the bank from accepting customers of a different nationality. Consequently, the Tribunal imposed a fine of €5,000 to the Finnish bank for denying its services to someone who had provided an Estonian passport as proof of identity (Ministry of the Interior 2014).

In this context, one of the most important discrimination cases of international interest is the case of Ahmed Ali Yusuf, brought before the European Tribunal of First Instance (T-306/01). Yusuf was a Swedish citizen of Somalian origin and an entrepreneur whose bank accounts were frozen by a decision of the UN Security Council for a period of five years due to a suspicion that the accounts were facilitating international organised crime. This suspicion was based on the fact that Yusuf worked for Al Barakaat, a network of independent money remitters. This organisation was established in Sweden and was considered a terrorist shell company, used to move money to Somalian combatants. Yusuf's name remained on the UN blacklist, although other members' names were de-listed and no other evidence or judicial decisions had been produced. As a result, this caused Yusuf problems in his social and family life, and though the European Tribunal ordered the bank to unfreeze his assets, the damage caused to Yusuf's professional reputation was irreparable (Guild 2008: 182–183).

Another illustrative EU case concerned Kadi, a Saudi entrepreneur whose property remained frozen for eight years under authority of EU Council Regulation No. 881/2002.[23] As a consequence, certain specific restrictive measures were imposed and directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban. Only after Kadi addressed the Court of Justice of the European Communities (cases C-402/05 P and C-415/05 P) did he regain his assets. The Court held that Kadi had not been informed of the grounds for his inclusion on the list of individuals and entities subject to the sanctions adopted by the UN, nor had he been given any opportunity to challenge this decision (CJEC C- 402/05 P and 415/05, para. 343–352, 368–370). As a result, his fundamental human

[23] This regulation transposed Resolution No 1390 (2002) of the Security Council.

rights to respect for property, to be heard and to effective judicial review were unlawfully violated.

In contrast, the Court of Justice of the European Union (CJEU), in case C-668/15, considered that a provision in a bank's policy demanding additional identification documents for those having been born in a country other than Denmark was not based on ethnic origin and therefore did not constitute direct or indirect discrimination under article 2 para. 2 of Directive 2000/43/EC. Rather it was merely a lawful practice applied by the bank in its effort to comply with the provisions of the anti-money laundering Directive in force at the time of the dispute. The CJEU explained that the contested policy did not put potential customers of a certain ('specific') origin in a less favourable situation as it was a very general and abstract provision, thus no grounds for discrimination could be established (CJEU C-668/15, para. 33–37).

In terms of legal argument, the CJEU's justification is in line with the aforementioned Directive. However, the request for additional documentation in place only for certain clients clearly indicates the protectionist attitude of financial operators. In other words, such disputes arise when financial institutions, instead of taking responsibility and verifying a low risk of terrorism, prefer to apply stringent criteria regarding access to financial services unless they are given official guidance by state authorities. It may be argued that, in case C-668/15, the CJEU should not have limited its judgment on whether the criterion of place of birth is related to ethnic origin within the meaning of article 2, but instead should have assessed more thoroughly whether such a policy could eventually result in discrimination against people of a certain ethnic or racial origin. The CJEU's reasoning could be used in the future as a lawful basis for establishing other conservative banking practices which, although neutral in principle, may camouflage racism and indirectly jeopardise the rule of law. In the author's opinion, if a similar case was to be heard in the European Court of Human Rights (ECHR) instead of the CJEU, a broader approach of the discrimination risks surrounding the application of the AML/CFT rules and the respect of human rights, as defined in the European Convention of Human Rights, would probably have been followed. This is because, firstly, the ECHR solely addresses issues of human rights violation. Secondly, a less strict approach in terms of proving 'indirect discrimination' based on origin has already been adopted in the landmark case Biao v Denmark (no 38590/10, para. 110–114).

Conclusion: Potential Solutions

Undeniably, anticipation and prevention of terrorist attacks is an absolute necessity for the protection of national and regional security. However, if financial exclusion is used as a means of combatting terrorist financing and thus terrorism, it can lead to the increased use of shadow banking methods

(de Koker 2014: 27; Durner & Shetret 2015: 19), including 'hawala' offices[24] and cryptocurrencies as alternative, less visible means of funding terrorism. Exclusion from official financial markets does not therefore lead to the elimination of terrorism.

Experts have repeatedly argued that as long as financial institutions intensify controls over the funds they manage, terrorists will keep trying to find new ways to finance their activities. This is why the EU adopted a new regulation system for virtual currencies (Directive 2018/843). In the author's opinion, even though regulation is important, it cannot be the answer to every problem. There is no doubt that people involved in criminal economic activity will keep finding new ways to bypass the official system. For that reason, it is important to have as many people as possible under surveillance, meaning more people should be accepted into the official financial system to ensure scrutiny of their movements and therefore prevent a terror attack or even discover a terrorist organisation (Gordon 2014: 280). Additionally, national authorities should assist financial institutions in finding the right balance between financial inclusion and the prevention of terrorism by expanding the resources available. Given that national security is at stake, some of the national budget should be invested for these purposes, especially for smaller companies who face difficulties in covering the costs of prevention. Currently, risk assessment is left to the discretion of financial officers and is thus interconnected with their ethics, beliefs and values. A possible measure to reduce the likelihood of such indirect discrimination could be continuous training of staff. For example, regular seminars could be organised internally and in collaboration with the State or academic institutions to train staff to be able to make the distinction between possible terrorists and innocent people of a certain origin. According to experts, that was the case with the 2015 Paris terror attacks. Those involved in the attacks lived in France legally and there was no obvious evidence linked them to jihad or the Islamic State (ICSR 2016: 44). Further, several other terrorist attacks were partially or completely financed via the receipt of cash funds (Oftedal 2015: 22). This demonstrates that the fight against terrorist financing, as long as it remains focused on the official financial sector, tends to be unable to achieve its main objective of preventing the circulation of terror funds as terror groups use shadow banking systems and therefore avoid the traditional financial sector (Centre on Law and Globalization 2014: 51).

In the author's opinion, in order to control terror funds, states must 'follow the money', i.e., let money circulate in a system equipped with all the necessary tools to prevent terror funds from arriving at their ultimate destination. Moreover, this approach can facilitate enforcement authorities in identifying

[24] Hawala is the self-regulated Islamic bank system that permits Muslims to transfer remittances through 'hawala' offices established all over the world. Because of its nature, it is considered to be one of the main methods of 'shadow banking' which enables economic crime.

and imprisoning terrorists before they commit a terrorist attack. In other words, terror fighters are the 'soldiers' of the terrorist 'army' that could possibly lead police authorities to the upper commanders, that is to the heart of terrorist organisations. Further, states, the EU and the international community should re-examine the effectiveness of CFT measures in light of their impact upon society and the international economy because, as the ECRI clearly states, 'the fight against terrorism should not become a pretext under which racism, racial discrimination and intolerance are allowed to flourish' (2004: 3).

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