

https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/

National measures suspected to infringe Union law: (required)

1-Dutch law implementing AMLD5 - <https://www.officielebekendmakingen.nl/stb-2020-146.html> - Wet van 22 april 2020 tot wijziging van de Wet ter voorkoming van witwassen en financieren van terrorisme en de Wet toezicht trustkantoren 2018 in verband met de implementatie van richtlijn (EU) 2018/843 van het Europees Parlement en de Raad van 30 mei 2018 tot wijziging van richtlijn (EU) 2015/849 inzake de voorkoming van het gebruik van het financiële stelsel voor het witwassen van geld of terrorismefinanciering, en tot wijziging van de Richtlijnen 2009/138/EG en 2013/36/EU (PbEU 2018, L 156) (Implementatiewet wijziging vierde anti-witwasrichtlijn)

2- Lower level Decree -> <https://www.officielebekendmakingen.nl/stb-2020-147.html> -> articles 10/11 as well as objective indicators for reporting specific transactions (which indicators in themselves violate article 8 of the EVRM)

3- Lowest level Ministerial decree -> <https://zoek.officielebekendmakingen.nl/stcrt-2020-27198.html> -> Regeling van de Minister van Financiën van 6 mei 2020, nr. 2020-0000084921, directie Financiële Markten, tot wijziging van onder meer de Uitvoeringsregeling Wet ter voorkoming van witwassen en financieren van terrorisme ter implementatie van richtlijn (EU) 2018/843..... -> open ended and extensive registration requirements...

If you know it, please specify which EU law is concerned:

AMLD - 5 -> <https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:32018L0843&from=EN>

AMLD4 -> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>

Convention for the Protection of Human Rights and Fundamental Freedoms -> https://www.echr.coe.int/Documents/Convention_ENG.pdf

5. Problem description

Please describe the problem (Describe the problem max of 7000 characters): (required)

The European 5th Anti Money Laundering Directive (EU) 2018/843) explicitly provides for a registration mechanism for crypto-service providers (those who offer fiat-crypto exchange services or provide hosted crypto wallets). While the Directive started out with the obligation of a license or registration regime for cryptoplayers, the possibility of a license regime has been explicitly been struck out in the final text, for considerations of proportionality.

The Dutch Ministry of Finance started transposing the directive and consulted a licensing regime with the market in December 2018. As the actual rules of the registration still bore resemblance to the registration regime mentioned in the Directive, the industries comments focused on unworkable technicalities and explanations by the Ministry. The formal legal advice of the Council of State however

(<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2019/07/02/advies-van-raad-van-state-wijziging-vierde-anti-witwasrichtlijn/advies-van-raad-van-state-wijziging-vierde-anti-witwasrichtlijn.pdf>), were quite explicit and it advised against the introduction of the law as long as a supervisory mechanism and supervisory rules would be part of it. as a violation of the EU Directive

In response the Dutch Ministry of Finance changed the label of license regime to registration, but the essence is still a supervisory regime. The actual legal construct involves detailed evaluation of the company, a revocation of registration when a company is no longer compliant with the rules and a prohibition to operate on the market without a registration. As a new set of actual rules the Ministry included further inspections and checks of business plan, organisation, risk management etc originating from the Act on Supervision of the Financial Sector. This is beyond the necessities of the AMLD5 and goes against the advice of the Council of State.

The inclusion of the additional rules is the direct result of the intervention of the Dutch central bank that requested a supervisory regime (regardless of the EU discussion). -> <https://www.simonl.org/wp-content/uploads/reactie-DNB-op-concept-wetsvoorstel-AMLD5.pdf>

A comparison of consulted text with final text demonstrates this inclusion and highlights how the proportional AMLD5 approach turned the law into prudential supervisory approach. -> <https://draftable.com/compare/lvTNIOXdhEPb> This is independently confirmed by legal advice of Hafrt advocaten. -> <https://bitcoin.nl/img/posts/408/Advies%20't%20Hart%20advocaten%20-%2004112019-%20implementatiewet%20witwassen%20-%20niet%20beleidsarm.pdf>

Even as late as October 2019 the central bank still underscore its financial supervisory approach rather than the registration approach
<https://www.internetconsultatie.nl/besluitwijzigingamld4/reactie/126109/bestand>)

'Vergunning- vs. registratiestelsel

Begin 2019 heeft DNB in haar gezamenlijke advies met de AFM aan de Minister van Financiën gepleit voor een vergunningstelsel vanwege de significante integriteitsrisico's die gepaard gaan met crypto's. Wij benadrukken dat wij de waarborgen die een vergunningstelsel biedt, nog altijd onderschrijven.

On november 8, 2019, further communications by the Dutch intended supervisor (De Nederlandsche Bank) during an industry reach out session clarified the plan to invoke and apply prudential rules/supervision. There will be a supervisory regime with integrity/organisation rules that are almost identical to the regime for regular payment institutions. The net result will be disproportional high costs for local players inevitable leading to a shakeout of the market

In 2019, the central bank (having received prior funding comfort of Ministry of Finance) assigned 5-7 people to the task and budgeted for a supervisory effort for obliged entities (!) that on a per-company basis exceeds the supervision intensity for credit-card companies, trust offices, exempted payment institutions. This became clear in the budget publication 2020 (https://www.dnb.nl/binaries/zbo2020_tcm46-386984.pdf). In addition, the Ministry of Finance is recovering those costs under the financial supervision cost recovery act (which aims to recover costs of supervision for financial institutions rather than obliged entities).

The industry has outlined its dismay with the situation repeatedly and requested the Ministry of Finance to revert to the text as consulted with the market (December 2018) and eliminate the add-ons included on request of the central bank. (<https://bitcoin.nl/nieuws/vbnl-minister-schrap-het-onevenredig-toezicht-457> and: <https://bitcoin.nl/img/posts/408/20191029%20-%20VBNL%20implementatiebesluit%20AMLD5%20v1.0.pdf>). The Ministry of Finance has refused to do so, thus creating the infringement of AMLD5/AMLD4.

Despite formal clarifications by the Ministry of Finance to Parliament and Senate that the cost would not be as high as in the DNB budget, the communication of the supervisor in May 2020 outlined the contrary. <https://www.dnb.nl/en/news/dnb-nieuwsbrieven/nieuwsbrief-cryptodienstverleners/nieuwsbrief-aanbieders-van-cryptodiensten-mei-2020/dnb388459.jsp>. In a similar vein it may be expected that the supervisor will not limit itself to the risk-based approach required under article 48.10 of the AMLD4/5.

In particular it must be noted that the lower level Ministerial decree outlining the required information for the registration (<https://zoek.officielebekendmakingen.nl/stcrt-2020-27198.html>) under article o) provides for an open ended information obligation of obliged entities which finds its basis not in the AMLD5 but in the subjective judgment of the supervisor only.

In view of the legislative discussion and statements of the central bank itself it is clear that this article will be used with the intention to apply financial supervision standards rather than to check the limited number of registration requirements under the AMLD5. This is thus contrary to the explicit political choice to make the Directive a registration and to not request supervision.

The infringements at stake are therefore:

- 1- The Ministry of Finance infringes the AMLD5 by adding in wording, text and effect a de facto license regime while using the label 'registration' to suggest compliance with the registration requirement,
- 2 - The Ministry of Finance is primarily responsible for the legitimate behaviour of the financial supervisor. It has failed to restrict the actions of its financial supervisor, DNB, to the remit defined under the AMLD5 (registration - no supervision). It has allowed the supervisor to embark on an approach where, even when under the current wording of the law a de facto proportional supervisory approach (akin to registration) might theoretically still be possible, the actual impact exceeds that for financial players
- 3- The Ministry obliges/enforces a data distribution system that violates EU Treaty human rights without sufficient legal basis (see below)

Please explain how EU law is involved and **which fundamental right** has been breached (required)

1. The Ministry of Finance and Ministry of Justice do not do justice to the advice of the Data Protection Authority with respect to the mass surveillance character of the proposed rules and their compatibility with the EU Charter of fundamental rights (the Dutch DPA mentions the Digital Rights Ireland case specifically. - <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2019/07/02/advies-conceptvoorstel-autoriteit-persoonsgegevens/advies-conceptvoorstel-autoriteit-persoonsgegevens.pdf>
2. A relevant Dutch legal verdict on limits to data retention (for storing telecommunications data) is left undiscussed. <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:2498>
3. Similarly, no further discussion occurred with respect to the dissertation, mentioned by the Dutch Data Protection Authority (AP), that demonstrates where the AMLD(5) may infringe on the EU Charter -> https://www.rug.nl/research/portal/files/65647303/Complete_thesis.pdf
The Ministry of Finance responds: the AP view is incorrect and the privacy versus crimefighting need for data discussion will be done at the AMLD5 review (2022).

The two fundamental rights at stake are the innocence presumption (6.2) and right to privacy (article 8). The collection, storage and provision of private customer data constitutes a disproportional privacy violation which is based on the assumption that all customers (none excepted) may be committing the crime of money laundering or terrorist financing.

The obliged automated transmissions of ALL private transaction data of customers on the basis of ONLY the amount of the transaction is based on lower legislation, not the law) and does in each individual case by definition fail the test of article 8 of being necessary with respect to the interests of national security, etc..... The necessity must be argued on a case-by-case suspicion and may not be invoked on a catch-all policy point of view.

6. Supporting documents

1) 2018 - Dutch legal text, consulted with the market, proper and proportional translation of AMLD5 into text:

<https://www.internetconsultatie.nl/wijzigingamld4/document/4146> but using the word license instead of registration.

2) Jan 2019 -> Policy/advice of DNB/AFM to wish to supervise rather than register the crypto-players in the Dutch market

<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2019/01/18/advies-afm-en-dnb-rapport-crypto%E2%80%99s-aanbevelingen-voor-een-regelgevend-kader/advies-afm-en-dnb-rapport-crypto%E2%80%99s-aanbevelingen-voor-een-regelgevend-kader.pdf>

3) Letter of DNB/financial supervisor request change of legal text in order to implement supervisory rules and safeguards from financial supervision;

<https://www.simonl.org/wp-content/uploads/reactie-DNB-op-concept-wetsvoorstel-AMLD5.pdf>

4) Advice of Data Protection Authority: outlining incompatibility of law and of AMLD rules with ECHR EU treaty on Human Rights

<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2019/07/02/advies-conceptvoorstel-autoriteit-persoonsgegevens/advies-conceptvoorstel-autoriteit-persoonsgegevens.pdf>

5) First legal analysis outlining/fearing that effectively the law implements financial supervisory regime

<https://www.vandoorne.com/globalassets/documenten--bijlagen/bijlagen-nieuwsberichten/fr042019---j.-baukema.pdf>

6) Council of State responding to consulted text (under 1) and outlining that AMLD5 remit to registration means that this transposition cannot be the basis - even if there would truly be a very high risk on money laundering - to enforce a supervisory regime akin to financial supervision

<https://www.raadvanstate.nl/adviezen/@114801/w06-19-0080-iii/#highlight=gewijzigde%20vierde%20richtlijn>

7) Changed law, incorporating suggestions of supervisor DNB/central bank and changing only the wording of license to registration

<https://www.rijksoverheid.nl/documenten/kamerstukken/2019/07/02/implementatiewet-wijziging-vierde-anti-witwasrichtlijn>

Differences old/new are visible via: <https://draftable.com/compare/lvTNIOXdhEPb>

8) Consultation lower level legislation -> structure and content is copied from financial supervision law into the money laundering law

<https://www.internetconsultatie.nl/besluitwijzigingamd4/document/4967>

9) Response of industry in letter/annex to outline issue at hand

<https://bitcoin.nl/img/posts/408/20191029%20-%20VBNL%20implementatiebesluit%20AMLD5%20v1.0.pdf>

<https://bitcoin.nl/img/posts/408/Brief%20Bijlage.pdf>

10) Independent legal advice outlining how addition of rules lead to de facto supervisory regime beyond intention of registration

<https://bitcoin.nl/img/posts/408/Advies%20't%20Hart%20advocaten%20-%2004112019-%20implementatiewet%20witwassen%20-%20niet%20beleidsarm.pdf>

11) DNB - reaffirming supervisory approach

<https://www.internetconsultatie.nl/besluitwijzigingamd4/reactie/ec464152-4e01-41b7-a537-af4ead9dd4dd>

12) Research article

<https://www.ftm.nl/artikelen/woordspel-van-minister-hoekstra-verhult-hoe-ver-zijn-omstreden-cryptowet-gaat?share=H38ZY4Z>

<https://www.ftm.nl/artikelen/woordspel-van-minister-hoekstra-verhult-hoe-ver-zijn-omstreden-cryptowet-gaat?share=H38ZY4Z%2FMFpDTxNvpHrNrmRLJuhYwILp%2F5%2B2xyu3Ip9tmvGyZfN1FyTYJFg%3D>

13) DNB budget for 2020, allocating 1,7 million euro for crypto registration activity;

https://www.dnb.nl/binaries/zbo2020_tcm46-386984.pdf

14) Urgent request to Senate, by Crypto-industry and Privacy First International to request renewed advice of Council of State in order to properly evaluate legitimacy of rules under consideration:

https://www.privacyfirst.nl/images/stories/financiele-privacy/20200225_PrivacyFirst_VBNL_AMLD5_RaadvanState.pdf

15) Final request of industry to Senate/Ministry Finance to revert to originally consulted legal text

<https://bitcoin.nl/nieuws/vbni-minister-schrap-het-onevenredig-toezicht-457>

Letter available on request.

16) Supervisor: extensive approach

<https://www.dnb.nl/nieuws/dnb-nieuwsbrieven/nieuwsbrief-cryptodienstverleners/nieuwsbrief-aanbieders-van-cryptodiensten-mei-2020/dnb388459.jsp>

Have you already taken action in the Member State concerned to try to solve this problem? (required)

• Yes

• No

What action have you already taken? (required)

- Administrative action (e.g. appeals, complaints to the relevant public authorities (central, regional or local), complaints to a national or regional ombudsman)

Please explain (max. 3000 characters) what type of decision(s) resulted from this. If applicable, list your correspondence / contact(s) with public authorities.

Are you aware of any action in the Member State concerned covering the issue you raise in this complaint?

It has been well covered in media and further questions are now raised in parliament.

So far no legal action has been taken that I know of: all crypto-companies involved do not wish to risk their registration process by further taking any action.

8. Review data

Please review the data you have entered in this form before submitting it to the European Commission.

To make any changes, please use the **Back** button to go to the previous pages.