ANTI MONEY LAUNDERING PREVENTION

Constantino Gouvras
College of Law, Manchester

Financial Action Task Force, *Forty Recommendations on Money Laundering and the Nine Special Recommendations on Terrorist Financing* (Paris, 2004)

Money laundering and terrorism financing have seen an increase in international regulatory reform. Governments across the globe have united to call on countries to impose a standard regulatory framework and to join international institutions. Those who do not directly adhere to a certain standard of policy risk facing alienation and criticism. But what standard is to be achieved? Is it actually reducing international crime or increasing bureaucratic burdens? Focusing primarily on the impacts on lawyers, this article will review the international anti money laundering framework and analyze the impact it has on professional sectors.

Although complex to define in practice, money laundering is the process by which criminals try to hide their illegitimate gains by disguising their form. Usually they try to create the appearance that criminal proceeds have been sourced legitimately. The process occurs whenever a criminal act has been undertaken, from the simplest tax evasion to the complexities of drug trafficking, with the criminal calling on a number of intermediaries to alter the form of the proceeds. To illustrate, imagine that an illegal arms sale has generated substantial profits for the dealers. In order to avoid raising suspicion and bringing attention to the large sums, the criminals may divide the sum into smaller units. They then could use one portion for investment, another for buying property, etc. This would disguise the original form of the proceeds by altering it into another, namely shares and property. These investments and assets could later be sold and the money gained would appear to have come from a legitimate transaction.

With a rise in the numbers of suspected money laundering activities, the G7 decided to take action in 1989 to counter these acts and established the Financial Action Task Force (FATF)[1] which created international standards for combating money laundering. The FATF published the *40 + 9 Recommendations* (hereafter the *Recommendations*) which are at the heart of legal regulatory frameworks at both the national and international level.[2] As described by the FATF itself, the *Recommendations* "provide a complete set of countermeasures against money laundering covering the criminal justice system and law enforcement, the financial

1 FATF, "Mission," www.fatf-gafi.org (accessed October 3, 2009).
2 FATF, "The 40 Recommendations," www.fatf-gafi.org (accessed October 3, 2009).

system and its regulation, and international cooperation."[3] The *Recommendations* set out the minimum measures that financial institutions and professional bodies should undertake to prevent money laundering and terrorist financing.

Under the *Recommendations*, the 'reporting institutions,' namely the financial and professional sectors, need to undertake client due diligence, verification and risk assessments in relation to the client or business transaction. Throughout the business relationship with the client, the institution is required to continually monitor for any new signs of illegality (Recommendations, 4-12). Any suspicion of money laundering needs to be reported to the national Financial Intelligence Unit (the Unit) and the reporting institution will need to fully cooperate with the Unit (Recommendations, 13-15).

In accordance with the *Recommendations*, most national legislation will also include provisions for dealing with countries that do not comply with these international standards (Recommendations, 21, 22). Reporting institutions that enter into a business relationship with clients from these countries will need to check the details of the client and their transactions with scrutiny and undertake enhanced forms of due diligence (Recommendations, 21, 22). This form of alienation had previously caused understandable concern to countries deemed noncompliant. In order to avoid being classified as a non-cooperative country or territory, most countries that had fairly weak anti-money laundering frameworks in place had strived to correct this.[4]

Despite all the work put in to fighting this type of financial crime, the anti money laundering obligations that have been imposed on the financial and professional sectors have faced criticism. After initially covering the financial sector, the recent addition of other professional bodies, such as lawyers and casino operators, has not been wholly accepted.[5] The FATF had planned to simply apply the same *Recommendations* to all the other reporting institutions. But this left almost no room for the non-financial sectors to maneuver.

Members from these other professions thereby lobbied to avoid their addition without prior consultation.[6] As pointed out by the American Bar Association Task Force, the rules asked for reporting institutions to "identify and verify identities, identify the business purpose of the transaction, identify and verify beneficial owners, and in some instances, [continue] due diligence on the source of funds."[7] How can these rules be adopted by non-financial professions when the

3 Ibid.

4 Myanmar, Nigeria, Nauru and the Cook Islands were delisted from the category of Non-Cooperative Countries and Territories in 2005. FATF, www.fatf-gafi.org (accessed November 30, 2009).

5 Rose N., "Making the case for appropriate anti-money laundering rules for lawyers," *IBA News*, April 2009.

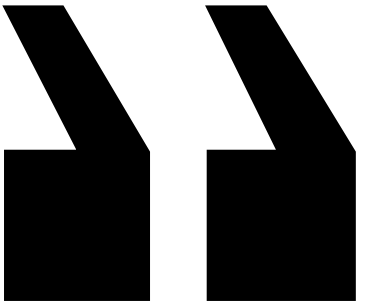
6 Ibid.

7 American Bar Association Task Force, "American Bar Association Task Force on Gatekeeper Regulations and the Legal Profession Comments on Gatekeeper Provisions on FATF Consultation Paper," www.abanet.org (accessed November 21, 2009).

actions concerned are worded in ways that would apply solely to large financial sectors?[8] Can the non-financial sectors comply with these rules when only a portion of their meaning is applicable to their circumstances?

As a result, the FATF conceded and agreed to issue guidance notes for different professions.[9] But the battle between the FATF and these sectors is not over. With regard to the legal sector, the International Bar Association's Anti-Money Laundering Legislation Implementation Group has called for evidence that lawyers are unwittingly being facilitated by money launderers.[10] The evidence has so far been scarce and the Group thereby questions the need for strict and disproportionate rules.[11]

Additionally, a crucial argument raised by the Japan Federation of Bar Associations is that the reporting system undermines the independence of lawyers. On one level, the idea of confidentiality is being endangered as lawyers become tools of the state. The profession is thus in contradiction with its own principle of working in the best interests of the client, and as such, the foundations of lawyer-client trust have been shaken.[12] Although there is some guidance as to the circumstances in which legal privilege and confidentiality is to be respected (Recom-



DESPITE ALL THE WORK PUT IN TO FIGHTING THIS TYPE OF FINANCIAL CRIME, THE ANTI MONEY LAUNDERING OBLIGATIONS THAT HAVE BEEN IMPOSED ON THE FINANCIAL AND PROFESSIONAL SECTORS HAVE FACED CRITICISM.

8 Ibid.

9 "Risk-Based Approach Guidance for Legal Professionals," FATF, www.fatf-gafi.org (accessed November 30, 2009).

10 Rose N., "Making the case."

11 Ibid.

12 Japan Federation of Bar Associations, "The JFBA's Basic Stance on the FATF Mutual Evaluation," www.nichibenren.or.jp (accessed November 21, 2009).

mendations, 12, 16),[13] the level of trust that clients are now prepared to place on lawyers as well as other professions remains to be seen.

To add complexity to the legislation, and to ensure compliance, most countries have imposed penalties for those found breaching their duties. For most countries the threshold for conviction is low as the test for determining the breaching of one's duty is an objective one. This means that it is not required to show that the individual did not suspect that money laundering was taking place but that he *reasonably ought* to have suspected it.[14] In the UK, an individual who breaches his duty can be sentenced to five years of imprisonment[15] while in Kuwait penalties for any breach can include a fine of twenty thousand Kuwaiti dinars (approximately 70,000 USD).[16] In Malaysia an individual can be fined one million ringgit (approximately 295,000 USD) with the additional threat of one year's imprisonment.[17] As can be seen from these examples, certain countries have adopted harsher punishments than others.

This can result in difficulties for some countries, with professionals finding themselves caught between a rock and a hard place. In the UK, thousands of solicitors were filing suspicious transaction reports as the burden on them was high and the definition of the crime wide.[18] The Law Society criticized this response, seeking that the law be reviewed. Additionally, the disproportionately adopted sanctions have allowed professionals in some jurisdictions to take advantage of their less stringent legislation, compared to those in Europe, in order to attract clients, as raised by the Law Society.[19] To add insult to injury, the costs of setting up internal compliance measures and client due diligence training can be high and some businesses have felt the financial sting of meeting these obligations.[20] Faced with these pitfalls both the FATF and the European Commission need to properly assess, as argued by the Law Society, whether the benefits from anti-money laundering legislation really are proportionate to the burdens placed on these industries in Europe and on a global scale.[21]

There are also practical aspects that need to be taken into consideration. Whenever you open a bank account, or buy and rent property, you would have

13 "RBA Guidance on Legal Professionals," www.fatf-gafi.org (accessed November 30, 2009).
14 Proceeds of Crime Act, UK 2002.
15 Section 334, Proceeds of Crime Act, UK 2002.
16 Ministerial Order No.9, 2005 Informal Translation, International Bar Association, http://www.anti-moneylaundering.org/middleeast/Kuwait.aspx (accessed October 4, 2009).
17 Anti Money Laundering and Anti Terrorism Financing Act 2001, Act 613, Bank Negara Malaysia, www.bnm.gov.my (accessed October 4, 2009).
18 The Law Society, "Select Committee on the European Union – Sub- Committee F (Home Affairs) Inquiry into Money Laundering and the Financing of Terrorism: Response from the Society of England and Wales," www.lawsocietymedia.org.uk (accessed February 23, 2009).
19 Ibid.
20 The Law Society, "Select Committee on the European Union – Sub –Committee F (Home Affairs) Inquiry into Money Laundering and the Financing of Terrorism: Supplementary Written Evidence from the Law Society of England and Wales," www.lawsocietymedia.org.uk (accessed March 8, 2009).
21 The Law Society, "Inquiry into Money Laundering... Response."

probably needed at some point to provide proof of your own identity. These requirements are part of the anti-money laundering obligations that need to be followed. But this in itself has caused problems for some clients who search endlessly for bills, proof of address and several different types of identifications in order to fit the criteria. In 2004, Theresa Villiers, the then-Conservative Member of the European Parliament, wrote in the *Financial Times*, that these rules did not aid the crackdown on criminals but merely added to the inconvenience to the law-abiding: "Few of your readers will have been able to escape demands for passports, utility bills and so on just to open a bank account."[22] Although we have become accustomed to these requirements, we need to further analyze whether the reduction in crime is proportionate to the burdens they cause.

Yet for all its criticism, anti-money laundering legislation has its merits. In light of the recent crisis, the G20 has vowed to restore financial stability, and the prevention of financial crime is at its core.[23] The United Nations has highlighted the fact that political corruption alone costs governments around $1.6 trillion every year and this money is lost as it moves across borders via money laundering.[24] Anti-money laundering legislation serves to 'protect public finances and international risk posed by non-cooperative countries'[25] and the G20 has called on all jurisdictions to adhere to international standards. A global united front against this crime might aid the return of trust to the financial sector in light of the recent public debts and financial scandals (for example, Bernard Madoff and Frank di-Pascali). However, progress is on the way. In September 2009 the G20 proudly showed that recent figures of non-cooperative jurisdictions were already showing signs of success.[26] More and more jurisdictions are implementing tighter levels of compliance to the *Recommendations*.

In conclusion, anti-money laundering legislation is an essential component in supporting financial stability. Yet, the international players who create these policies need to take into account the practical aspects of the resulting burdens. Financial and non-financial sectors contain businesses that compete with each other to attract clients. Although measures need to be in place to prevent financial crime, various aspects of these measures will always be cumbersome as the reporting institution will need to provide training, finance and internal checks in order to ensure compliance. In order to reduce the load, these obligations need to reflect the work carried out by each sector and be proportionate to the risk of crime likely to be faced. Further, they need to ensure they do not undermine the principles that

22 T. Villiers, "Money-laundering measures cause hardship for the law-biding and fail to catch the terrorists," Financial Times, www.ft.com (accessed November 9, 2009).

23 G20, "Declaration On Strengthening the Financial System," www.g20.org (accessed November 9, 2009).

24 "Corruption Costs $1.6tn, says UN," *BBC*, news.bbc.co.uk (accessed November 9, 2009).

25 G20, "Declaration."

26 G20, "Leader's Statement: The Pittsburgh Summit," www.pittsburghsummit.gov (accessed November 9, 2009).

professions are built on, namely confidentiality and independence. Increased research into the number of crackdowns and preventions of crime weighed against the risks, costs and complexities would highlight the improvements that need to be made. Only then would there be a common ground in which proper consultation and dialogue between the policy makers and the reporting institutions can emerge. **PEAR**