

Institute of Advanced Legal Studies

School of Advanced Study

University of London

Dissertation

LLM in International Corporate Governance, Financial Regulation and Economic law (ICGFREL)

2<sup>nd</sup> September 2014

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Dissertation Title:

'Conflict between anti-money laundering and anti-terrorism finance laws requirements and bank secrecy and confidentiality laws'

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**'Conflict between anti-money laundering and anti-terrorism finance laws requirements and bank secrecy and confidentiality laws'**

Abstract

*The bank's common law contractual duty of confidentiality to its customer has been established in 1924. It is not an absolute duty but qualified. The duty of confidentiality is regarded as an essential feature of the bank-customer relationship and it was enunciated at a time when crime was viewed as a local phenomenon. However, the last two decades have seen the rise of transnational crimes such as money laundering and terrorist financing. To counter these crimes a number of legislations were enacted which, inter alia, require banks to disclose their customers' financial information in certain circumstances to law enforcement authorities. This is justified by the fact that banks are used by criminals to launder criminal proceeds and the audit trail they leave behind helps criminal investigation and prosecution. The question arises whether the duty to disclose is in conflict with the duty to secrecy or that the duty to disclose can be accommodated by the qualifications to the duty of confidentiality.*

## Chapter 1

### Introduction

The bank's common law contractual duty of confidentiality to its customer has been established in 1924. It is not an absolute duty but qualified.<sup>1</sup> The duty of confidentiality is regarded as an essential feature of the bank-customer relationship and it was enunciated at a time when crime was viewed as a local phenomenon. However, the last two decades have seen the rise of transnational crimes such as money laundering and terrorist financing. To counter these crimes a number of legislations were enacted which, *inter alia*, require banks to disclose their customers' financial information in certain circumstances to law enforcement authorities. This is justified by the fact that banks are used by criminals to launder proceeds of crime and the audit trail they leave behind helps criminal investigation and prosecution.

However, the increase in the number of legislations has been criticised as a 'torrent of legislations' which 'constitutes a serious inroad into the whole principle of customer confidentiality.'<sup>2</sup> Others argue that where 'major crime is alleged customer confidentiality is now almost dead.'<sup>3</sup> The duty to disclose has the effect of changing, in certain conditions, the banker from confidant to police informer.<sup>4</sup> Nevertheless, the question arises whether the duty to disclose is in conflict with the duty to secrecy or that the duty to disclose can be accommodated by the qualifications to the duty of confidentiality. In this paper I will address this issue and as sources I will use the relevant primary and secondary sources. The paper is organised in the following. First the duty of confidence and its qualifications will be analysed and evaluated. Second, the relevant provisions of the anti-money laundering and anti-terrorism financing measures will be outlined and evaluated in light of the qualifications to the duty of confidentiality. Third, mutual legal assistance as a mechanism of cooperation between states in criminal matters will be analysed and evaluated. Finally it will conclude by summarising the finding and suggest possible solutions.

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<sup>1</sup> *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 CA

<sup>2</sup> HM Treasury, '*Banking Services: Law and Practice*' (Report by the Review Committee, London, 1989, Cm. 622) (Jack Report)) paras. 5.07-8

<sup>3</sup> Michael Levi (1991), '*Regulating Money Laundering: The Death of Bank Secrecy in the UK*', *British Journal of Criminology*, Vol.31 No. 2, p 113

<sup>4</sup> Peter Alldridge P. '*Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*' (Hart 2003) p 270

## Chapter 2

### Bank Secrecy and Confidentiality Under English Law

#### Introduction

Under English law, the relationship between a bank and its customer is based on a contract and that relationship comes to existence when the bank agrees to open an account in the name of the customer.<sup>5</sup> The bank's duty of secrecy to its customer is an implied term of the contract between the bank and the customer that the bank will keep the customer's information confidential. The duty of secrecy is a professional obligation and right which means that the bank assumes responsibility not to disclose the information of its customer to a third party except in certain circumstances and that the bank has a right to resist a third party's inquiry into the financial affair of its customer so as to protect the interest of its customer. Furthermore, the relationship between a bank and its customer has an aspect of agency relationship which can impact the contractual relationship as the agent is under obligation of confidence and loyalty towards his principal.

In this chapter I will first, discuss the origin and nature of the duty. Second I will discuss the rationale for imposing a duty. Third I will discuss the jurisdictional basis of the duty. Forth I will discuss the scope and duration of the duty. Fifth I will analyse the qualifications to the duty. Sixth I will outline and discuss the application the qualifications in the common law jurisdictions. Seventh, I will briefly summarise the finding.

#### **Bank's Duty of Confidentiality Under English Law**

By virtue of its nature a professional relationship imposes on the professional person, who is confided or whose professional service is engaged, a duty to respect the confidentiality of disclosure made to him in his professional capacity. This duty applies to bankers, doctors, solicitors and other professionals. While the extent of the duty of each of these professionals differ from each other by virtue of their peculiarity, they all share the same underlying principle on which the duty of confidentiality is founded.<sup>6</sup>

Bank's duty of secrecy or confidentiality<sup>7</sup> has been recognised as a fundamental pillar of the bank-customer relationship for a long time. Its purpose is 'to respect and to protect the confidence of the customer'.<sup>8</sup> Under English law bank's duty of secrecy or confidentiality, from a legal point of view, is well established on the basis of principles of contract as debtor and creditor.<sup>9</sup> For the purpose of the bank-customer relationship, the

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<sup>5</sup> *Ladbroke & Co. v Todd* [1914] 19 Com. Cas. 256

<sup>6</sup> Tanya Aplin, et al *'Gurry on Breach of Confidence: The Protection of Confidential Information'* (2<sup>nd</sup> edn, Oxford University press 2012) pp 381 -382

<sup>7</sup> Although there is no definition of the term bank secrecy, nevertheless it refers to the professional legal obligation of a banker to keep the confidential information of his/her customer secret. The terms 'bank's duty of secrecy' and 'bank's duty of confidentiality' will be used synonymously and interchangeably throughout this paper

<sup>8</sup> Paul Latimer, *'Bank Secrecy in Australia: Terrorism Legislation as the New Exception to the Tournier Rule'* [2004] 8 (1) JMLC p 56

<sup>9</sup> *Foley v Hill* (1848) 9 ER 1002, 1005

existence of bank account is the main criterion for the establishment of that relationship.<sup>10</sup> The fact that the account was there for a short period of time or the account is overdrawn is irrelevant for this purpose. Nevertheless, it is argued that a customer who receives services from a bank without having an account with the bank may become a customer of the bank as banks offer a variety of financial products and services.<sup>11</sup> The confidential nature of the banker-customer contract also contains an aspect of agency relationship similar to that of doctor-patient and solicitor-client relationships. Generally, an agent owes a duty of loyalty and secrecy to his principal, but the scope of the duty depends on the type of the agent involved.<sup>12</sup>

In tracing the origin of the duty, a perusal of the literature on the origin of the subject of bank's duty of secrecy under English law shows that the 'locus classicus'<sup>13</sup> of the concept of bank secrecy is the decision of the Court of Appeal in the case of *Tournier v National Provincial and Union Bank of England (Tournier's case)*<sup>14</sup> where for the first time it was held that there was an implied contractual term that a bank will not disclose its customer's information to third parties. The Banking Services Review Committee (Jack Report)<sup>15</sup> in 1989 also identified the decision in *Tournier's case* as the general starting-point of the history of bank's duty of secrecy.

In the *Tournier's case*, Tournier was a customer of National Provisional and Union Bank of England and his bank account was overdrawn by about £10. He agreed to pay the overdraft by instalments and for correspondence purpose he gave his new employer's address where he was offered employment under three months' agreement, but after paying three instalments he failed to make any payment. Subsequently, a cheque in his favour was drawn by a fellow customer of the defendant bank. But the plaintiff instead of paying the cheque to his account he endorsed the cheque to a third party and it was presented for payment. The manager of the defendant bank made enquiries of the presenting bank and learned that payment of the cheque has been obtained by a bookmaker. In order to contact the plaintiff, having retained the address of the plaintiff's employer in the instalment agreement, the manager called the plaintiff's employer and spoke with two directors of the company. During the conversation, the manager told the employer that the plaintiff was overdrawn and that he was mixed up with bookmakers. As a result the employer decided not to renew the plaintiff's employment after the three months' employment agreement expired.

Tournier brought a legal action for slander and for breach of implied contract that the bank would not disclose the state of his account to a third party. At first instance a judgment was entered for the defendant bank. But Tournier appealed against the decision on the ground that the trial judge, Avory J, misdirected the jury and thought a retrial. The appeal in relation to the breach of implied contract claim was based on the question left to the jury by Avory J where it was stated that 'was the communication with regard to the plaintiff's account at

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<sup>10</sup> *Commissioner of Taxation v English, Scottish and Australian Bank Ltd.* [1920] AC 683 (PC)

<sup>11</sup> E.P Ellinger, et al 'Ellinger's Modern Banking law' (5<sup>th</sup> edn, Oxford University press 2011) pp 116-117

<sup>12</sup> *Ibid*, p 171

<sup>13</sup> Roy Goode, 'The Banker's Duty of Confidentiality', [1989] *Journal of Business Law*, 269, 269

<sup>14</sup> *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 CA

<sup>15</sup> HM Treasury, 'Banking Services: Law and Practice' (Report by the Review Committee, London, 1989, Cm. 622) (Jack Report)) para. 5.1

the bank made on a reasonable and proper occasion?’<sup>16</sup>Counsel for the appellant argued that this direction was defective as it gave the jury no guidance as to the circumstances in which it would be reasonable and proper to disclose information concerning a customer’s bank account and the Court of Appeal concurred with this argument. Bankes LJ stated that the direction given at the trial was not ‘sufficient explanation of what is a difficult and hitherto only a very partially investigated branch of the law.’<sup>17</sup>Thus, the appeal succeeded and confidentiality was recognised as implied term of the contract between bank and its customer. Accordingly, Bankes LJ stated that:

‘at the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualifications and to indicate its limits’<sup>18</sup>

This pronouncement by Bankes LJ, established, for the first time, the existence of bank’s implied contractual duty of secrecy and it is clear that it is not absolute. Until the decision of the *Tournier’s* case, the bank’s duty of secrecy to its customer has been held to be a moral duty only, and Bankes LJ stated that there was no authority on the point prior to this case.<sup>19</sup> Nevertheless, prior to the *Tournier’s* case, there had been cases<sup>20</sup> where litigations in relation to a breach of duty of secrecy had been litigated but no decision was made upon whether or not there existed a legal duty of secrecy or confidentiality. The courts were reluctant to impose a duty of secrecy on a bank and rather implied that the obligation was a matter of moral, not legal.<sup>21</sup> The reason for not imposing an obligation of secrecy on a bank despite a number of litigations, it is argued, is that banks would responsibly exercise the trust reposed in them and there was no need for the imposition of an obligation.<sup>22</sup>If the reason for not imposing duty of secrecy on banks was due to the responsible exercise of trust, then what change did then occur that prompted the Court of Appeal to hold in the *Tournier’s* case that duty of secrecy exists?

### **The Rationale of Bank’s Duty of Secrecy**

In justifying the imposition of a duty of secrecy on banks, the Court of Appeal in the *Tournier’s* case gave no much detailed reasoning. The only suggestion that was made was by Bankes LJ that the ‘the credit of the customer depends very largely upon the strict observance of that confidence.’<sup>23</sup> However, this reasoning can be easily refuted as credit does not depend on withholding information related to the state of affair of a person’s bank account. It is argued that even in the 1920s traders were able to obtain information by way of banker’s reference without the need of the customer’s express consent.<sup>24</sup> According to Cranston<sup>25</sup>, concealing

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<sup>16</sup>*Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 CA at 464

<sup>17</sup> *Ibid*, at 471

<sup>18</sup> *Ibid* at 471-2

<sup>19</sup> *Ibid*, at 473

<sup>20</sup> *Hardy v Veasey* (1868) LR 3 Ex. 107

<sup>21</sup> *Ibid*

<sup>22</sup> Ross Cranston, ‘*Principles of Banking Law*’ (2<sup>nd</sup> edn, Oxford University Press 2002) p 168

<sup>23</sup>*Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 CA, at 474

<sup>24</sup> Ross Cranston, ‘*Principles of Banking law*’ (2<sup>nd</sup> edn, Oxford University Press 2002) p 169

fundamental financial information from creditors, which if disclosed would damage the person's reputation, may be equated to a seller defrauding customers by concealing the defects of the products, thus the idea that the credit of the customer depends on strict observance of confidence may not be sufficient justification for the imposition of duty of confidence. Nevertheless, according to Cranston, two fundamental arguments can be advanced in favour of the imposition of duty of confidence on banks. The first relates to the commercially sensitive nature of the information as information about a business has market value. This type of information would need protection from disclosure because if it is disclosed by the bank it would put the business in jeopardy from competitor. The second one is the value of duty of confidentiality in protecting personal autonomy of the individual. The second argument may overlap with the first one in an economic context as it attempts to protect the customer from exploitation and domination. Cranston further, argues that at practical level private and business customers of a bank value to keep their finances confidential and a bank that acquires a reputation of failure to keep its customers' finance secret would lose public confidence.<sup>26</sup> Similarly, from the principal-agent perspective, it is argued that certain professions could not be done or successfully done without the agent giving the principal an assurance in undertaking confidential work that the agent will not generally be compelled to disclose confidential information and of his personal discretion thereby enabling the principal to disclose his financial affair and discuss about it without fear that the information will be disclosed.<sup>27</sup>

Furthermore, the Jack Committee argues that the principle of confidentiality is a tradition which should be respected and if under threat strongly emphasised because 'its roots go deeper than the business of banking: it has to do with the kind of society in which we want to live.'<sup>28</sup> In its broader economic sense, a duty of secrecy can be justified on a number of grounds. Aplin et al<sup>29</sup> identified seven potential justifications for the imposition of a duty of secrecy, namely 'to incentivise the creation of certain information, to prevent socially undesirable expenditure of resources preserving secrecy, to prevent the unjust enrichment of one person at the expense of another, to preserve and promote ethical standards of conduct, to promote individual autonomy, to give effect to an implicit societal agreement and to promote the national interest.' Therefore, one can argue that there are strong justifications that favour the imposition of a duty of secrecy on banks that confidential financial information about customers need not be disclosed to third party except in certain circumstances.

### **Jurisdictional Basis**

In some jurisdictions the duty of bank secrecy is based on constitution or criminal code. Of these jurisdictions, Switzerland can be identified as a jurisdiction where its protection of confidential information of customers of banks is based on its civil and criminal law. Under Article 47 of the Swiss Federal Law of 8 November 1934 on

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<sup>25</sup> Ibid

<sup>26</sup> Ibid, pp 169 - 170

<sup>27</sup> E.P Ellinger, et al '*Ellinger's Modern Banking Law*' (5<sup>th</sup> edn, Oxford University Press 2011) p 172

<sup>28</sup> Jack Report Cha.5 para 5.26

<sup>29</sup> Tanya Aplin, Lionel Bently, Philip Johnson and Simon Malynicz, '*Gurry on Breach of Confidence: The Protection of Confidential Information*' (2<sup>nd</sup> edn, Oxford University press 2012) pp 76 - 77, para 3.04

Banks and Savings Banks (Banking Act), as amended, anyone who divulges private information about Swiss bank account or encourages others to do the same can be liable to imprisonment or fine.<sup>30</sup> Originally the act was designed to protect bank's customers from unwarranted official investigation mainly from Germany<sup>31</sup> but soon after it became well known for being a barrier to law enforcement agencies from other jurisdictions who attempt to trace proceedings of wrongdoings. There are qualifications to the duty of secrecy under Swiss Law similar to the qualifications provided under the common law which will be discussed below. Article 47, para 5 of Banking Act expressly reserves federal and cantonal provisions on the duty of secrecy to testify or disclose information to the authorities.<sup>32</sup> Switzerland had taken a number of measures including anti-money laundering measures and Mutual Assistance Agreements to lessen its attractiveness to money launderers and drug traffickers. Jurisdictions which have put bank secrecy on statutory basis justify this by arguing that they distinguish between activities where legitimate persons or businesses are trying to escape from capital gain tax or exchange control which are legitimate in those jurisdictions and any other criminal activities. Such jurisdictions that have strong secrecy rules also deny that they attract drug traffickers, money launderers and corrupt officials who try to avoid a trail of audit papers that would expose them to criminal investigations.<sup>33</sup>

In contrast, a number of jurisdictions base their duty of secrecy on the common law. Under English law, it is broadly accepted that the bank-customer relationship is based on contract. The confidential nature of the contractual relationship comprises an element of agency relationship. Although, the maintenance of an account characterised the bank-customer relationship as contract between a debtor-creditor relationship, the fact that banks offer a variety of services beyond the maintenance of an account have caused an argument to develop that characterises the contract as a *sui generis* one that encompasses distinct, well defined contract, including elements of the debtor-creditor contract.<sup>34</sup> This reflects the fact that a contract alone does not afford protection where confidential information has been obtained by a third party and is disclosed inadvertently or otherwise. In this type of situation equity affords protection independently of the contract.<sup>35</sup> Furthermore, there is the possibility that tort would also play a role in protecting confidential information where a third party has induced the bank to disclose confidential information to it in breach of contract.<sup>36</sup>

In England it has been suggested that the principle of bank secrecy or confidence needs to be strengthened through statutory codification. The Jack Committee, which in its review of banking services recognised that the duty of confidentiality is based on the contractual relationship of the bank-customer, recommended the principle of bank's duty confidentiality recognised in the *Tournier's case* to be strengthened by statutory codification in order to avoid uncertainty and shore up the confidence of customers in the banks. However the

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<sup>30</sup> Stefan Breitenstein, 'Switzerland' in Gwendoline Godfrey (eds), *Neate and Godfrey: Bank Confidentiality* (Bloomsbury Professional 2010) pp 782 - 784

<sup>31</sup> Hen Ping, '*Banking Secrecy and Money Laundering*' [2004] 7(4) *Journal of Money Laundering Control* 376

<sup>32</sup> *Ibid*, p 790

<sup>33</sup> Ross Cranston '*Principles of Banking Law*' (2<sup>nd</sup> edn, Oxford University Press 2002) pp -170 -171

<sup>34</sup> E.P Ellinger, et al, '*Ellinger's Modern Banking Law*' (5<sup>th</sup> edn, Oxford University Press 2011) p 124

<sup>35</sup> Halsbury's Laws (5<sup>th</sup> edn, 2010) vol 19, para 4

<sup>36</sup> Ross Cranston, '*Principles of banking Law*' (2<sup>nd</sup> edn Oxford University Press 2002) p 171

government rejected the idea of codification as unnecessary<sup>37</sup> and left the industries to regulate themselves through voluntary standards of best practice. A Banking Code was introduced and subsequently replaced by a Lending Code. The Lending Code<sup>38</sup> recognises personal information to be treated as private and confidential and it specifically prohibits the exchange of customer's name and address with any company, including companies within the banking group without a specific permission from the customer.<sup>39</sup> It also prohibits the passing of general information on to credit reference agencies unless the information is related to customer's default and 28 days' notice is given to the relevant customer.<sup>40</sup> Nevertheless, there are two legislations considered to be relevant to the duty to protect confidential information. The Data Protection Act 1998 (DPA 1998) and the Human Rights Act 1998 (HRA 1998).

Under DPA 1998<sup>41</sup> banks and other businesses are under obligation that they use personal information for the purpose(s) for which it was obtained and to protect it in the course of processing and transferring it. HRA 1998 incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR 1950) into English law. Under the HRA 1998 courts are required to construe all legislations 'so far as it is possible to do so' in line with ECHR rights.<sup>42</sup> The HRA 1998 makes it unlawful for 'public authority' to act in a way that is incompatible with ECHR rights.<sup>43</sup> As courts are 'public authority',<sup>44</sup> they have to act in a way that gives effect to ECHR's requirements. Courts are also authorised to declare legislation incompatible if found to be in contradiction with ECHR rights.<sup>45</sup> The HRA 1998 does not give private citizens the right to bring direct horizontal action against each other under ECHR, but it does have an indirect horizontal effect on proceedings brought by private citizens. The relevant Article of ECHR which duty of confidentiality has to fall under is Article 8. Under Article 8 (1) 'everyone has the right to respect for his private and family life, his home and his correspondence.' Although, the rights under Article 8 are qualified, it is argued that there is evidence that Article 8 is influencing the development of the general law that protects confidence and there is no reason why this cannot be extended to bank's duty of confidentiality.<sup>46</sup>

### **The Scope and Duration of the Duty of Secrecy**

Under English law, the starting point in delineating the scope and duration of bank's duty of secrecy is the *Tournier's case* where it was established that it is an implied contractual term that a banker owes a customer a duty of confidentiality in relation to information provided by the customer to the bank as well as information gathered by the bank from third party in the course of banking business. In the *Tournier's case*, the

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<sup>37</sup> HM Treasury, *White Paper on Banking Services: Law and practice* (white paper, Cm 1026, 1990) 4

<sup>38</sup> The Lending Code (March 2011, ( Revised 12<sup>th</sup> December 2013)) para 15  
<http://www.lendingstandardsboard.org.uk/docs/lendingcode.pdf> accessed 10 July 2014

<sup>39</sup> The Lending Code (March 2011, Revised 12<sup>th</sup> December 2013) para 23

<sup>40</sup> Lending Code (March 2011, Revised 12<sup>th</sup> December 2013) para 41

<sup>41</sup> Data Protection Act 1998 s 4

<sup>42</sup> Human Rights Act 1998, s 3

<sup>43</sup> *Ibid*, s 6(1)

<sup>44</sup> *Ibid*, s 6(3)

<sup>45</sup> *Ibid*, s 4

<sup>46</sup> E.P Ellinger, et al '*Ellinger's Modern Banking Law*' (5<sup>th</sup> edn Oxford University Press 2011) pp 175-176

confidential financial information that was disclosed to third party was obtained not directly from the Tournier's account but from a third party bank in circumstances where inquiries were made to find out the identity of the person to whom Tournier endorsed a cheque.

In this case the Court of Appeal decided that the bank breached its duty of secrecy to its customer. In reaching this conclusion the Court of Appeal had to decide whether the bank's duty of secrecy extended to the information the bank obtained from resources other than the customer or his account because the information that the defendant bank disclosed was not obtained from the Tournier or his account with the defendant bank but from the third party bank. Bankes LJ rejected the view that 'the duty of not-disclosure is confined to information derived from the customer himself or from his account'<sup>47</sup> and held that it extends to any information that was acquired 'in the character of banker.'<sup>48</sup> Atkin LJ in a similar fashion agreed by noting that 'the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers.'<sup>49</sup> However Scrutton LJ expressed different view by holding that bank's duty of confidentiality does not apply to 'knowledge derived from other sources during the continuance of the relation.'<sup>50</sup> In this case the Court of Appeal accepted the majority view. Therefore, the duty of confidentiality covers information derived not only from customer's account or customer but also information obtained from other sources which have been obtained during the currency of the account. Information obtained before the bank-customer relation began and after it ended is outside the scope of the duty of confidentiality.<sup>51</sup> Nevertheless information obtained by bank outside bank-customer relation may be covered by duty of confidence. If information was given prior to the commencement the bank-customer relation and repeated during the relation it may fall within the scope of the duty. It is also possible that the bank may have given express undertaking to keep particular information under confidence and that information may be passed on to the bank subject to the general duty of confidentiality.<sup>52</sup>

As to the duration of the duty of confidentiality, Atkin LJ indicated that the protection of confidential information which has been obtained during the bank-customer relation does not lose the protection after the relation has come to termination.<sup>53</sup> It is argued that the protection of the confidential information can persist even after the death of the customer.<sup>54</sup>

### **Qualifications to the Duty of Secrecy Under *Tournier's Case***

If there are public interests in imposing a duty of secrecy on banks to keep the information of customers confidential, it is equally recognised that there are competing public interests which justify the disclosure of

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<sup>47</sup> *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 CA at 474

<sup>48</sup> *Ibid*, at 474

<sup>49</sup> *Ibid*, at 485

<sup>50</sup> *Ibid* at 481

<sup>51</sup> *Ibid* at 481, 485

<sup>52</sup> E.P Ellinger et al, '*Ellinger's Modern Banking Law*' (5<sup>th</sup> edn, Oxford University Press 2011) p 177

<sup>53</sup> *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 CA at 485

<sup>54</sup> E.P Ellinger et al, '*Ellinger's Modern Banking Law*' (5<sup>th</sup> edn, Oxford University Press 2011) p 177

confidential information of bank's customer. Therefore the contractual duty of secrecy that was established by the Court of Appeal in the *Tournier's case* is not absolute. It is subject to some qualifications and limits. In the *Tournier's case*, Bankes LJ set out four qualifications to the bank's duty of secrecy as follow:

'There appears to be no authority on the point. On principle I think that the qualifications to be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interest of the bank requires disclosure; (d) where the disclosure is made by the express or implied consent of the customer.'

It is important to note that Bankes LJ based the formulation of the qualifications on principle rather than precedent as there was no precedent set prior to the *Tournier's case* which would assist the Court of Appeal in setting out the qualifications to the contractual duty of secrecy. The qualifications to the duty of secrecy can therefore be divided into two groups. Qualifications (a) and (b) can be characterised as a group that aims at preventing crime and maintain public order. This group includes provisions related to anti-money laundering and anti-terrorism finance. This group allows domestic and foreign authorities access to financial information of a customer of a bank. Qualifications (c) and (d) can be grouped together and they are to do with trade and economic development. They aim at, inter alia, promoting ethics, better credit assessment and competition in the provision of credit by allowing banks to disclose customer's financial information. Let us now discuss the qualifications and their limits according to their order.

#### **Where Disclosure is Under Compulsion By Law**

Under the compulsion by law qualification a bank can legally be compelled to disclose confidential information without being liable for breach of duty of secrecy and the circumstances under which disclosure can be made depend on legislations or court order.

In the *Tournier's case*, Bankes LJ's instance of a circumstance under which a bank could be required to disclose information about its customer was the duty to obey an order under the Bankers' Books Evidence Act 1879. At the time of the decision of *Tournier's case*, in 1924, it is believed that there were only two statutes requiring disclosure of information about a bank's customer and that the customer and bank were based in England. The statutes were section 7 of the *British Bankers' Book Evidence Act 1879* and section 5 of the *Extradition Act 1873*. But the late 1980s and early 1990s saw a 'torrent of new legislations'<sup>55</sup> requiring or obliging banks to disclose confidential customer's information and this was seen as a 'massive erosion' to the duty of confidentiality, to the point where 'major crimes are alleged, customer confidentiality is now almost dead in Britain.'<sup>56</sup> However, the government denied there has been erosion of bank's duty of confidentiality and the legislations enacted were carefully deliberated and do not apply to the vast majority of customers of banks.

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<sup>55</sup> Jack Report Cha, 5, para 5.07

<sup>56</sup> Michael Levi, 'Regulating money laundering: the death of bank secrecy in the UK', (1991) Vol. 31 No.2 British Journal of Criminology p113

Nevertheless, these are areas where public policy overrides customer's right to confidentiality.<sup>57</sup> However, in the last decade there has been a steady increase in the volume of anti-money laundering and anti-terrorist financing legislations which require or oblige banks to disclose customers' confidential information and it does not seem it will end here given the international nature of money laundering, terrorist financing and other major crimes.

The circumstances under which banks can be legally ordered to disclose confidential information can be given in the following situations. First, a bank can be required to disclose information about its customers by the authorities under statutory power. Section 20 of the Taxes Management Act 1970 can be used to illustrate this situation where a bank may be required to provide information about its customer's financial position to H.M Revenue & Customs. Second, a bank can also be obliged by legislation to disclose confidential information about its customer on its own initiative to the authorities. The best example of this is the Terrorism Act 2000 and Proceeds of Crime Act 2002 which compel banks, under the threat of criminal liability, to disclose to National Crime Agency (NCA) or constable in the case terrorism, their knowledge or suspicion that a customer may be involved in money laundering or terrorist activity. However, disclosure under these legislations may constitute 'protected disclosure' and incur no liability for breach of confidence. Banks are not allowed to inform their customer that disclosure is made to the authorities as this may amount to tip off which is an offence on itself. Third, a bank may be legally compelled to make a pre-action disclosure of its customer's confidential information by a court order within the context of civil proceeding which the bank itself is not normally a party to the proceeding.

Disclosure under compulsion by law is usually straightforward as a bank is under obligation to disclose information about its customers and has limited discretion in the matter. However the disclosure under compulsion by law has a limit. The courts may not make disclosure order if the disclosure is 'for fishing expedition'<sup>58</sup> or to gather evidence. The other limitation with the compulsion by law qualification to the duty of confidence is that it was purely made on the assumption that the bank and the customer were located in England that the applicable law was English law. Thus, any disclosure order that comes from other jurisdiction cannot be enforced unless it is supported by local law. The applicable law is the law where the bank account is held unless local law expressly allows disclosure.<sup>59</sup> The compulsion by law exception will be further analysed in the next chapter within the context of anti-money laundering and anti-terrorism financing measures taken.

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<sup>57</sup> HM Treasurer, *'White Paper on Banking Services: Law and Practice'* (1990, London, Cm. 1026) Annex 2, para 2.13

<sup>58</sup> Ross Cranston, *'Principles of Banking Law'* (2<sup>nd</sup> edn, Oxford university Press 2002) p 176

<sup>59</sup> David Chaikin, *'Adapting the Qualifications to the Banker's common Law Duty of Confidentiality to Fight Transnational Crime'* (2011), Vol 33.265, Sydney Law Review, p 273 <[http://sydney.edu.au/law/slr/slr\\_33/slr33\\_2/Chaikin.pdf](http://sydney.edu.au/law/slr/slr_33/slr33_2/Chaikin.pdf)> accessed 15 July 2014

### Where there is a Duty to the Public to Disclose

Under this qualification banks can legally disclose confidential information about their customers where there is a duty to the public to disclose. This can be done where ‘a higher duty than the private duty is involved as where danger to the State or public duty may supersede the duty of the agent to his principal.’ Disclosure under this qualification would be used to prevent crime or fraud.<sup>60</sup> This qualification has rarely been used and the Jack Report recommended that the generalised ground of public interest needs to be abolished as ‘statutory specification of this type of disclosure ... has now been carried so far that it is hard to see in what circumstances the generalised provision, with its uncertainty of application, could any longer be needed, given that emergency legislation could always be enacted in time of war.’<sup>61</sup> However the government rejected the Review Committee’s view and argued in favour of retaining this exception as it gives ‘a banker a safeguard if he believes that he must disclose information in the public interest.’ Whereas the compulsion by law exception ‘requires’ information from banker, the public duty exception ‘permits’ a banker to disclose confidential information. As financial crime becomes more and more sophisticated it is possible there may an occasion where banks wish to disclose information but would not be sure if whether there is a specific statutory ground for them to do so. Furthermore, this exception enables banks make disclosure to the regulatory authorities to discharge their duties.<sup>62</sup> In *Price Waterhouse v BCCI Holdings (Luxembourg) SA*,<sup>63</sup> Millet J confirmed that the ‘duty to the public’ qualification could be relied on to justify the disclosure of confidential information in an inquiry by the Bank of England to review its statutory performance. Accordingly, Cranston<sup>64</sup> argues that the ‘duty to the public’ qualification is not redundant and if it is in public interest disclosure of confidential information albeit in a narrow public duty exception will be allowed. It is further argued that this exception’s use will be limited to uncovering major fraud and complying with foreign legal obligation as most of the grounds for disclosure are related to statutory obligations.<sup>65</sup>

### Where the Interest of the Bank Requires Disclosure

The third qualification to the bank’s duty of confidentiality is where to do so is in the interest of the bank. In the *Tournier’s case*, Bankes J give as an example of this circumstances ‘where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft.’ Another example is where a bank had to dishonour a cheque. In the case of *Sunderland v Barclays Bank Ltd*,<sup>66</sup> a banker was asked by a customer why a cheque was dishonoured and he informed the customer that a series of cheques were made out by his wife to a bookmaker. The court accepted this by stating that the banker had to give reason why the cheque was dishonoured. Similarly a bank is allowed to give a reason if there are insufficient funds to

<sup>60</sup> *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 CA, at 486

<sup>61</sup> Jack Report, para 5.30

<sup>62</sup> HM Treasury, ‘*White Paper on Banking Services: Law and Practice*’ (1990, London, Cm. 1026) Annex 2, para 2.14

<sup>63</sup> [1992] BCLC 583

<sup>64</sup> Ross Cranston, *Principles of Banking Law* (2ed edn, Oxford university Press 2002 ) p 179

<sup>65</sup> Tanya Aplin, Lionel Bently, Philip Johnson and Simon Malynicz, ‘*Gurry on Breach of Confidence: The Protection of Confidential Information*’ (2<sup>nd</sup> edn, Oxford University press 2012) p 385

<sup>66</sup> (1938) 5 LDAB 163

honour a cheque drawn<sup>67</sup>. However in the case of *Foster v Bank of London*,<sup>68</sup> Erle CJ expressed that the banker cannot say other than 'no sufficient assets.' When banks disclose confidential information under this qualification the disclosed information needs to be strictly limited to the interest of the bank. Banks can justify disclosure if there is litigation between the bank and customer or guarantor. A problem for banks especially those with a branch in another jurisdiction is when a court makes an order to disclose information held in another jurisdiction. In the case of *XAG v A Bank*<sup>69</sup> a subpoena was issued in a US court to compel the defendant bank to disclose confidential information of the claimant held in London. The plaintiffs sought an interim injunction and the bank argued it was in their interest to disclose in order not to be held for contempt of the United States' court. These arguments were rejected on the ground that the bank's interest in disclosure was different from that was contemplated in *Tournier's case* as to allow disclosure in this circumstance would amount to assist to the US court's order to have an extra-territorial effect.

#### **Where the Disclosure is Made by the Express or Implied Consent of the Customer**

The forth qualification to bank's duty of confidentiality is where the bank's customer has expressly or impliedly given consent for the disclosure to be made. Example given in *Tournier's case* is 'where the customer authorises a reference to his banker.' As the right to confidence belongs to the customer, the customer may give express consent to disclosure and this can absolve a bank from responsibility for breach of duty of confidence. Express consent can be general or limited and it is not controversial. However it is problematic when the bank believes that the customer gave implied consent for the bank to make different disclosures, particularly in relation to sharing information among banks about the creditworthiness of the customers. In some circumstances it is possible to assume customer's implied consent, but not always. It has been banking practice to provide customer reference at the request of other bank. Usually it was the requesting bank that would seek reference on behalf of its customer rather than for itself. Banks were aware of this practice but not the customer and this led to conclude that it was not possible to imply consent on the part of the customer. Thus, the provision of reference under this circumstances amounts to disclosure without the customer's consent and constituted a breach of the duty of confidentiality.<sup>70</sup>

#### **Tournier's Case Exceptions Dominate the Financial World**

The adaption of the common law system in many jurisdictions may be to do with the historical relation they had with Great Britain but a discursive survey on the common law jurisdictions shows that the decision in the *Tournier's case* is accepted as of good authority around the Commonwealth<sup>71</sup> in the field of bank's duty of

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<sup>67</sup> *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 CA, at 481

<sup>68</sup> (1862) 3 F & F 214, 176 ER 96

<sup>69</sup> [1983] 2 All ER 464

<sup>70</sup> *Turner v Royal Bank of Scotland plc* [1999] 2 All ER (Comm) 664

<sup>71</sup> Tanya Aplin and others '*Gurry on Breach of Confidence, the protection of confidential information*' (2ed edn, Oxford University Press 2012) Chap 9, p 382

confidentiality and it has been applied and followed in every common law jurisdiction.<sup>72</sup> In Australia, bank's duty confidentiality is not codified and in the absent of legislation the duty is based on common law and equity. The principles and qualifications enunciated in the *Tournier's* case still summarise the scope of the duty and exceptions to it.<sup>73</sup> Similarly, the decision of the *Tournier's* case is the basis of the duty of bank's confidentiality in Canada and the exceptions to the duty are the same. Even in the United States of America the decision in the *Tournier's* case was applied by an Appellate Court, in Florida, in the case of *Milohnich v First National Bank of Miami Springs*,<sup>74</sup> in determining whether or not financial privacy is based on contract or tort and the majority held that a bank had an implied contractual duty to maintain the confidential information of its customers.<sup>75</sup> However, in another case it was decided that the approach in *Tournier's case* 'would leave a bank with too much discretion' and if the exceptions (duty to public and in the interest the bank) in *Tournier's case* were followed then the Court would permit a bank to decide what is or is not in public interest to disclose and what is or is not in the best interest of the bank to disclose.<sup>76</sup> One can argue that this reasoning reflects the gap in the *Tournier's case* where it appears that the Court of Appeal left it for the bank to decide when to apply the exceptions to disclose, except compulsion by law where it does not give discretion to banks.

### Conclusion

The bank's duty of secrecy has been well established for such a long time and it is essential feature of the bank-customer relationship. In some jurisdictions the duty of bank secrecy is based on constitution or criminal code, but in England and in some common law jurisdictions it is based on contract as well equity. The duty is not absolute. It allows the disclosure of financial information of customers to third party where there is compulsion by law, where it is in public interest, where it is in the bank's interest and where the customer consents to it. The next chapter I will discuss whether or not bank's duty of secrecy comes into conflict with the requirements of anti-money laundering and anti-terrorism finance laws.

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<sup>72</sup> David Chaikin, 'Adapting the Qualifications to the Banker's common Law Duty of Confidentiality to Fight Transnational Crime' (2011), vol 33.265, Sydney Law Review, p 265 <[http://sydney.edu.au/law/slr/slr\\_33/slr33\\_2/Chaikin.pdf](http://sydney.edu.au/law/slr/slr_33/slr33_2/Chaikin.pdf)> accessed 15 July 2014

<sup>73</sup> Kate Jackson-Maynes and Katherine Forrest, 'Australia' in Gwendoline Godfrey (eds), Neate and Godfrey: Bank Confidentiality (Bloomsbury Professional 2010) p 15

*Milohnich v. First National Bank of Miami Springs*, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969) <[http://www.leagle.com/decision/1969983224So2d759\\_1795.xml/MILOHNICH%20v.%20FIRST%20NATIONAL%20BANK%20OF%20MIAMI%20SPRINGS](http://www.leagle.com/decision/1969983224So2d759_1795.xml/MILOHNICH%20v.%20FIRST%20NATIONAL%20BANK%20OF%20MIAMI%20SPRINGS)> accessed 17 July 2014

<sup>75</sup> Danforth Newcomb, Greg Rozansky and Brian Burke, 'United states' in Gwendoline Godfrey (eds), Neate and Godfrey: Bank Confidentiality (Bloomsbury Professional 2010) p 816

<sup>76</sup> *Suburban Trust Co. v. Waller*, 408 A.2d 758 (Md. Ct. Spec. App. 1979) <<http://law.justia.com/cases/maryland/court-of-special-appeals/1979/274-september-term-1979-0.html>> accessed 17 July 2014

### Chapter 3

## **Anti-money Laundering and Anti-terrorism Financing Laws Requirements vis-a-vis bank's**

### **Duty of Secrecy**

#### **Introduction**

In the second chapter above, it is established that under English law the duty of a bank to keep its customers' financial affairs confidential was legally recognised in 1924 in the decision of the *Tournier's case* and the duty is not absolute but qualified. Under certain circumstances a bank can be compelled by law or allowed to disclose confidential information about its customers to the relevant authorities or third party. At the time of the decision in *Tournier's case*, it is claimed that the number of legislations under which a bank could be compelled to disclose information about its customers were two. However by 1989, according to the Jack Report the number of legislations reached nineteen, and were soon to be twenty. The increase in volume of legislations was described by the Jack Report as a 'torrent of new legislation' which represented a 'serious inroad into the whole principle of customer confidentiality.' However, in the last decade there has been a steady increase in the number of legislations that require not only bank's duty of confidentiality to be overridden for the purpose of the prevention, investigation and prosecuting of crimes but also a qualitative change namely the obligation to report suspicious activities to the authorities and the attending criminal liability for failure to do so. The most notable legislations in this regard are the enactment and expansion of anti-money laundering and anti-terrorist financing measures. In this chapter first, I will discuss what money laundering and terrorist financing are and their historical development within the context of international efforts against them. Second I will outline and discuss the international measures against money laundering and terrorism financing in light of bank's duty of secrecy. Third I will outline and discuss the UK's anti-money laundering and anti-terrorism financing regime and the duty it imposes on banks vis-a-vis the bank's duty of secrecy. Forth, I will conclude by summarise the finding.

#### **Money Laundering and Terrorism Financing**

Money laundering was not a crime in the United Kingdom until the 1990<sup>77</sup> but it is argued that it suddenly 'has become one of the great moral panic of our day'<sup>78</sup> and a concerted international efforts against money laundering began to emerge in the late 1980s in the form of International Treaty, Convention, International Standards etc. The first international instrument against proceeds of crime was the United Nations Convention

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<sup>77</sup> Concealing or transferring of proceeds of drug trafficking was for the first time outlawed by section 14 of the Criminal Justice (International Co-operation) Act 1990

<sup>78</sup> Peter Alldridge, 'Money Laundering and Globalisation' (2008) vol.35 (4) Journal of Law and Society 437

Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance of 1988<sup>79</sup> where state parties agreed to criminalise dealing in proceeds derived from drug trafficking. Soon after and incrementally the ambit of the anti-money laundering law expanded to organised crime, any acquisitive crime, financial and professional sectors and terrorist financing.<sup>80</sup>

There is no internationally agreed definition of money laundering. However scholars, governments and non-governmental organisations give similar definition of money laundering. A practical description of money laundering is provided by the October 2004 UK anti-money laundering policy document as follow:

‘Money laundering is a term generally used to describe the ways in which criminal process illegal or “dirty” money derived from the proceeds of any illegal activity (e.g. the proceeds of drug dealing, human trafficking, fraud, theft or tax evasion) through a succession of transfers and deals until the source of illegally acquired funds is obscured and the money takes on the appearance of legitimate or “clean” funds or assets.’<sup>81</sup>This description of money laundering is interesting as it includes tax evasion as a predicate offence.

The extent of money laundered every year is difficult to know exactly, but according to the United Nations Office on Drugs and Crime (UNODC) the estimated money laundered globally in one year is between 2-5 per cent of global GDP or \$800 billion - \$2 trillion.<sup>82</sup> In the UK, the Home Office in 2012 estimated that organised criminal gangs generated between £20 – 40 billion a year from various criminal activities.<sup>83</sup>

The process of laundering is believed to involve three stages, namely placement, layering and integration. The placement stage involves a step to dispose of the cash by introducing it to the financial system or retail economy. The layering stage involves the severing of the link between the laundered money and the crime that generated it by conducting a series of transactions so as to obscure the audit trail of the transaction and make the proceeds appear as if it come from legitimate sources. The final stage is simply to use or invest the cleaned money.<sup>84</sup>Without a network of banks and financial institutions to facilitate the three stages of money laundering and make the proceeds appear as if they come from legitimate sources, it is almost impossible for money launderers to launder their ill-gotten proceeds. Thus, it has become imperative for banks and other

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<sup>79</sup> U.N. Doc. E/Conf. 82/15, 20 December 1988 < [http://www.unodc.org/pdf/covention\\_1988\\_en.pdf](http://www.unodc.org/pdf/covention_1988_en.pdf) > accessed 18 July 2014

<sup>80</sup> Peter Alldridge, ‘*Money Laundering and Globalisation*’ [2008] Vol. 35, (4), *Journal of Law and Society* pp 438-439

<sup>81</sup> HM Treasury, ‘*Anti-Money Laundering Strategy*’ (HM Treasury: London, 2004) para 1.3 <<http://www.amnet.co.uk/joomla/attachments/uk%20Anti-Money%20Laundering.pdf>> accessed 18 July 2014

<sup>82</sup> UNODC, ‘*Money Laundering and Globalisation*’ < <https://www.unodc.org/unodc/en/money-laundering/globalization.html> > accessed 17 July 2014

<sup>83</sup> Financial Conduct Authority, ‘*Anti-money Laundering Annual Report 2012/13*’ (July 2013) para 2.4 <<http://www.fca.org.uk/static/documents/anti-money-laundering-report.pdf>> Accessed 17 July 2014

<sup>84</sup> Financial Action Task Force, ‘*F.A.Q. How is money laundered?*’ <<http://www.fatf-gafi.org/pages/fag/moneylaundering/>> accessed 17 July 2014

sectors to be deployed at the forefront in the fight against money laundering and terrorist financing.<sup>85</sup> It is argued that if money laundering was immoral it is equally immoral not to participate in efforts to counter it.<sup>86</sup>

Given that the amount of money laundered every year is huge, the consequence of not tackling it is not only immoral but from a point of view of national governments, there are four principal reasons for tackling money laundering. First, 'failure to prevent money laundering permits criminals to benefit from their actions, thus making crime more attractive. It also allows criminal organisations to finance further criminal activity. These factors combine to increase the level of crime.' Second, 'the unchecked use of the financial system for this purpose has the potential to undermine individual financial institutions, and ultimately the integrity of the entire financial sector. It could also have adverse macro-economic effects and affect exchange rates through large capital flows, and could lead to distorted resources allocation.' Third, 'unchecked laundering may engender contempt for the law, thereby undermining public confidence in the legal system and the financial system, in turn promoting economic crime such as fraud, exchange control violations and tax evasion.' Fourth, 'money laundering facilitates corruption. Ultimately the accumulation of economic and financial power by unscrupulous politicians or by criminal organisations can undermine national economies and democratic systems.'<sup>87</sup>

Following the 9/11 terrorist attack in the United States anti-money laundering tools have been deployed to fight terrorist financing and this has attracted criticisms as the purpose of a terrorist is different from that of a common criminal because financing of terrorism is a means to an end. It is argued that money laundering is a financial activity conducted to clean the proceeds of a crime that generated it whereas terrorist funds come from both criminal activity and legitimate sources. So money laundering happens after the crime that produced the proceeds is committed whereas terrorist financing is for future use to commit terrorist act. Nevertheless, although it is accepted that there is a difference between the two in terms of purposes, money launderers and terrorists adopt similar techniques in using banks to disconnect money from its origin and/or destination at the layering stage so as to make difficult to follow the audit trail. Thus, both are treated as similar phenomena and treated in similar manner.<sup>88</sup>

### **International Measures Against Money Laundering and Terrorism Financing**

Money launderers and terrorists, like legitimate bank customers, use banks to transfer money from jurisdiction to jurisdiction particularly in the layering stage. This means that the process of money laundering involves a number of cross-border financial centres, particularly those offshore centres where there is bank secrecy laws that protect financial information of customers.<sup>89</sup> Hence, it became clear that if money laundering and the

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<sup>85</sup>E.P Ellinger, et al *'Ellinger's Modern Banking Law'* (5<sup>th</sup> edn, Oxford University Press 2011) p 92

<sup>86</sup>Valsamis Mitsilegas, *'Money Laundering Counter Measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles'* (Kluwer 2003) p 133

<sup>87</sup>Commonwealth Secretariat, *'Combating Money Laundering and Terrorist Financing: A Model of Best Practice for the financial Sector, the Profession and Others'* (2<sup>nd</sup> edn, Commonwealth Secretariat 2006) pp 6-7

<sup>88</sup>E.P Ellinger, et al *'Ellinger's Modern Banking Law'* (5<sup>th</sup> edn, Oxford University Press 2011) p 93

<sup>89</sup>Ibid

financing of terrorism were effectively to be tackled then nations have to come together and play their role in fighting these cross-border crimes. This necessitated the need to set international standards for governments and enforce them. To this effect, the Basel Committee on Banking Supervision (Basel Committee) responded by releasing its five principles in December 1988 including the need for banks to identify customers and cooperate with law enforcement authorities.<sup>90</sup> At the same times the United Nations Convention Against Illicit Traffic in Narcotic Drugs and psychotropic Substances of December 1988 (1988 Vienna UN Convention) was signed<sup>91</sup>and it requires signatories to criminalise money laundering,<sup>92</sup>confiscate proceeds of crimes and cooperation between law enforcement authorities.<sup>93</sup> But the leading international standard setter institution on this subject is the Financial Action Task Force (FATF)<sup>94</sup> which was established by the G-7 Nations in July 1989 at the Organisation for Economic Co-operation and Development (OECD) Economic Summit in Paris. FATF is a non-governmental organisation and it has 34 member jurisdictions and 2 regional organisations, the European Commission and Gulf-Cooperation Council.<sup>95</sup>

Based on the Basel Committee's principles and the 1988 Vienna UN Convention, FATF drew up its '40 Recommendations' in 1990 for governments to follow focusing mainly on proceeds of drugs and the role financial institutions. FATF revised its '40 Recommendations'<sup>96</sup> in 1996 to include proceeds of all serious crime and the mandatory reporting requirements of suspicious transactions by financial institutions as well as non-financial business. Following the 9/11 terrorist attack in the United States, the FATF issued another '9 Special Recommendations' in 2001 which urge on all nations, among others, to ratify and implement UN instruments,<sup>97</sup>to criminalise the financing of terrorism and associated money laundering and to make suspicious transactions related to terrorism reportable to the relevant authorities or Financial Intelligence Unit (FIU). The FATF reviewed its Recommendations in 2003. Again in 2012, FATF reviewed the Recommendations and amalgamated them to make 40 Recommendations.<sup>98</sup>FATF's recommendations are also used by the World Bank and International Monetary Fund as benchmarks in their financial assessment of countries.

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<sup>90</sup> Basel Committee, 'Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering' (December 1988) < <http://www.bis.org/publ/bcbsc137.pdf>> accessed 14 July 2014

<sup>91</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and psychotropic Substances (19 December 1988) <[https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf)> Accessed 17 July 2014

<sup>92</sup> The phrase 'money laundering' is not used in the Convention.

<sup>93</sup> arts 3, 5, 6 and 7 of the 1988 UN Drugs Convention

<sup>94</sup> FATF,< <http://www.fatf-gafi.org/pages/aboutus/>> accessed 17 July 2014

<sup>95</sup> FATF, <<http://www.fatf-gafi.org/pages/aboutus/membersandobservers/>> Accessed 17 July 2014

<sup>96</sup> The original Recommendations were 8 and the 9<sup>th</sup> one, in relation to cash couriers, was added in October 2004.

<sup>97</sup> Among the 'U.N Instruments' are, UN Security Council Resolution 1373 (2001) and International Convention for the Suppression of the financing of Terrorism of 1999. Both these call for the criminalisation of terrorist financing.

<sup>98</sup> The FATF Recommendations, 'International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation', February 2012< [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf)> accessed 17 July 2014

The European Union in line with FATF's Recommendations and with a view to harmonising anti-money laundering measures across the European Union issued its first Money Laundering Directive, in 1991,<sup>99</sup> for the prevention of the use of financial system for the purpose of money laundering for Members States of the European Union to implement. The first Money Laundering Directive was amended in 2001 by a second Money Laundering Directive and for third time by the third Money Laundering Directive in 2005(Third EU Directive)<sup>100</sup> in order to give effect to FATF's Special Recommendations. The Third EU Directive which consolidated and updated the first and second Money Laundering Directives requires Member States to criminalise money laundering and terrorist financing<sup>101</sup>and set up a FIU.<sup>102</sup>It also requires relevant persons in the private sector to perform customer due diligence,<sup>103</sup> record keeping<sup>104</sup>and report suspicious activity to the national FIU.<sup>105</sup>Furthermore the European Commission has proposed a draft fourth EU Money Laundering Directive on 5 February 2013.<sup>106</sup>The fourth EU Directive is aimed at, inter alia, increasing transparency by requiring companies and trusts to hold detailed information on the beneficial ownership and make this information available to the authorities and those who conduct due diligence. It also aims at harmonising fiscal offence as predicate offence and strike a balance between data protection and the anti-money laundering and terrorism finance measures.

The international and regional measures against money laundering and terrorism financing also acknowledge that if the fight against money laundering and terrorist financing is going to be effective then cross border cooperation between law enforcement authorities is essential and a party should not refuse to act on the ground of bank secrecy law. What this means is that the international community has accepted that bank secrecy is not absolute and in some circumstances it should be lifted. This is in line with the common law qualifications to the bank's duty of secrecy discussed above. The lifting of bank secrecy is embodied in the most important international documents such as the art 5(3) of the 1988 Vienna UN Convention,<sup>107</sup> art 4(1) of

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<sup>99</sup> Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L166 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0308:EN:HTML>> accessed 17 July 2014

<sup>100</sup> European Parliament and Council Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L309/16 (This directive consolidated and updated the previous Directives in line with FATF' Recommendations and the nine special Recommendations in relation to the financing of terrorism). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:en:PDF> Accessed 17 July 2014

<sup>101</sup> Ibid, art 1(1)

<sup>102</sup> Ibid, art 21

<sup>103</sup> Ibid, art 7

<sup>104</sup> Ibid, art 30

<sup>105</sup> Ibid, art 22(1)(a)

<sup>106</sup> European Commission proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0045:FIN:EN:PDF>> accessed 17 July 2014

<sup>107</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and psychotropic Substances (19 December 1988) <[https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf)> Accessed 17 July 2014

the 1990 Strasbourg Convention,<sup>108</sup> art 12(6) of 2000 Palermo UN Convention<sup>109</sup> and art 12(2) of the International Convention for the Suppression of the Financing of Terrorism of 1999<sup>110</sup> where states are required not to decline to act on the ground of bank secrecy. The purpose of these provisions is to prevent bank secrecy law from obstructing the investigation and prosecution of crimes. Furthermore FATF's Recommendation 9 of 2012<sup>111</sup> urges countries to ensure that 'financial institution secrecy laws do not inhibit implementation of the FATF Recommendations' and this recommendation has been endorsed by the EU member states within the context of the 'know your customer' requirements under the Third EU Directive. Therefore, the requirement that states should not invoke bank secrecy law in order to decline to act is not only an acknowledgment that bank secrecy can be overridden sometimes in certain circumstances but also it is consistent with the principle of bank secrecy which is not an absolute principle.

### **UK's Anti-money Laundering and Anti-terrorism Financing Regime**

The United Kingdom has its own experience in dealing with terrorism and had taken legal measures to deal with it before. Nevertheless as a member of the European Union and international community the United Kingdom has incorporated the international measures against money laundering and terrorism financing into domestic law. The UK's legal regime that implements the Third EU Directive and the UN Measures against money laundering and terrorism financing comprises primary and secondary legislations and Industry Guidance. The primary legislation comprises the Proceeds of Crime Act (POCA) 2002<sup>112</sup> and the Terrorism Act (TA) 2000,<sup>113</sup> both as amended, implement Third EU Directive by criminalising money laundering and terrorist financing and by laying down reporting requirements. The secondary legislation comprises the Money Laundering Regulation (MLR) 2007<sup>114</sup> and some regulations related to terrorism. The MLR 2007 implements the due diligence and record keeping requirements of the Third EU Directive. There is also some secondary legislation in relation to terrorist financing. The relevant Industry Guidance is the Joint Money Laundering Steering Group Guidance (JMLSG Guidance).<sup>115</sup> The JMLSG comprises leading UK trade associations, including the British Bankers' Association, and the Guidance issued by the JMLSG is approved by HM Treasury and the courts are under obligation to take account of the Guidance in determining whether or not a bank has complied with the anti-money laundering and anti-terrorism financing requirements. Compliance with the Guidance is likely to provide banks with a defence for breach of compliance requirements.

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<sup>108</sup> Convention on Laundering, search, Seizure and Confiscation of the Proceeds of Crime of 1990  
<<http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm>> accessed 17 July 2014

<sup>109</sup> United Nations Convention Against Transnational Organised Crime of November 2000  
<[http://www.unodc.org/pdf/crime/a\\_res\\_55/res5525e.pdf](http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf)> accessed 17 July 2014

<sup>110</sup> International Convention for the Suppression of the Financing of Terrorism of 1999  
<<http://www.un.org/law/cod/finterr.htm>> accessed 17 July 2014

<sup>111</sup> Before the consolidation of the Recommendations in 2012, this Recommendation was Recommendation 4.

<sup>112</sup> Proceeds of Crime Act 2002

<sup>113</sup> Terrorism Act 2000

<sup>114</sup> The Money laundering Regulation 2007, SI 2007/2157

<sup>115</sup> JMLSG Guidance <<http://www.jmlsg.org.uk/industry-guidance/article/guidance>> accessed 18 July 2014

Before moving on to analyse the obligations imposed on banks by UK's anti-money laundering and terrorism financing regime it is important to note that the UK anti-money laundering and anti-terrorism financing regime has gone beyond the minimum requirements imposed by the Third EU Directive in two ways: first, by adopting an all crime (any offence)<sup>116</sup> approach that expands the scope of the predicate offences instead of referring to the 'serious crimes'<sup>117</sup> as provided by the Third EU Directive. The reason for this is rather partly practical as it would be difficult for bank's employee to identify whether or not the suspicious property is derived from a serious or any crime<sup>118</sup> and, second, by imposing criminal liability for failure to comply with the anti-money laundering and anti-terrorism financing requirements banks and other financial institutions are encouraged to be vigilant.

### **Suspicious Activity Reporting Requirements under POCA 2002 and TA 2000**

Financial information, like fingerprints and DNA analysis, has become to be one of the most powerful investigative and intelligence tools available to law enforcement authorities.<sup>119</sup> As money moves through the financial system, it leaves a trail of audit that can indicate illicit activities, identify those responsible and locate the proceeds of the crime that can then be confiscated.<sup>120</sup> Thus, the preventive anti-money laundering and anti-terrorist financing measures oblige financial institutions, particularly banks, to report suspicious activities to the relevant authority, to conduct know your customer checks and to maintain record keeping thereby furnishing the authorities with the information they need and deter crime and terrorism by increasing the risk to perpetrators of being caught and decreasing the reward they might expect to gain.<sup>121</sup> Reporting suspicious activities is necessary condition for effective fight against money laundering and terrorist financing. Without imposing reporting obligation on financial institutions, banks in particular, a set of rules designed to prevent money laundering and terrorism financing may succeed in closing the doors of financial institutions to a number of dubious financial transactions but it is unlikely to have a meaningful impact in the fight against money laundering and terrorist financing as these transactions would not be reported to the relevant authorities. However mandatory reporting obligation, although it falls within the ambit of the compulsion by law qualification to the duty of bank secrecy, has attracted severe criticism for eroding the principle of bank confidentiality. However, without reporting obligation, law enforcement authorities would be kept in dark, unless banks voluntarily report suspicious transactions, because as money laundering and terrorist financing are victimless crime there is no one who can provide the authorities with information that proceeds have been derived from crime or they are for terrorism purpose.<sup>122</sup>

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<sup>116</sup> Proceeds of Act 2002, s 340(2)

<sup>117</sup> Ibid, art 3(5)

<sup>118</sup> Miriam Goldby, 'Anti-money laundering reporting requirements imposed by English law: measuring effectiveness and gauging the need for the reform' (2013) *Journal of Business Law*, p 368

<sup>119</sup> HM Treasury, 'The Financial challenge to Crime and Terrorism' (HMSO, February 2007) paras 1.16 – 1.18 <[http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/financialchallenge\\_crime\\_280207.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/financialchallenge_crime_280207.pdf)> accessed 18 July 2014

<sup>120</sup> Ibid

<sup>121</sup> Ibid

<sup>122</sup> Guy Stessens, 'Money Laundering: A New International Law Enforcement Model' (Cambridge 2000) p 160

According to Stessens<sup>123</sup> there are two transaction reporting models. The first one is the reporting of all financial transactions of an amount at a certain threshold similar to the one introduced in the United States in 1970 (\$10,000). The second is only transaction that appears to be linked to money laundering and terrorism financing and it is based on suspicion. The problem with the first model is that it generates a lot of reports and it takes a lot of time and resources to process the reports. Furthermore, it is only after processing the report that suspicion that the transaction is linked to money laundering or terrorism financing activities arises. This is the logical consequence of the objective criterion used by the reporting institution. On the contrary, the second model is based on the reporting institution's subjective assessment of the nature of the transaction and it is a targeted one. It produces fewer reports and it is cost effective. It also exposes fewer customers to the authorities.<sup>124</sup> Given the advantage the second model has, the UK's reporting system is based on this model. For reporting suspicious activities purpose the UK's FIU is the National Crime Agency (NCA).

Furthermore, reporting suspicious transaction can be divided into two, namely non compulsory or compulsory reporting system. To put it in another way, the non- compulsory reporting system gives the reporting institution the liberty to report or give information on request, whereas the compulsory reporting system is an obligation to report and failure to do so may entail either criminal or civil liability. Accordingly banks play proactive rather than reactive role in disclosing suspicious transaction to the relevant authorities.<sup>125</sup> Initially, FATF's recommendation in this regard was that 'if financial institutions suspect that the funds stem from criminal activity, they should be permitted or required to report promptly their suspicion to the competent authorities.'<sup>126</sup> According to this recommendation countries could chose either the mandatory or the non-mandatory reporting system. Adopting the non-mandatory reporting system would give banks the discretion whether or not to report suspicious transaction to the relevant authorities. However, FAFT in its 1996 review of its Recommendations opted for the mandatory reporting system. Recommendation 15 states that if financial institutions suspect ... they should be required to report promptly their suspicion to the competent authorities. Furthermore, FATF in its 2003 review of its Recommendations recommended that if a 'financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation,' to report to authorities.<sup>127</sup> The removal of the discretion to report and make the reporting compulsory have been justified by the need to avoid competition distortion and encourage banks to be vigilant of suspicious activities and help in the fight against money laundering and terrorist financing. However imposing mandatory reporting

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<sup>123</sup> Ibid, p 161

<sup>124</sup> Ibid

<sup>125</sup> Ibid, p 163

<sup>126</sup> FATF Recommendations -1990, Recommendation 16 <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf>> accessed 18 July 2014

<sup>127</sup> FATF Recommendations -2003, Recommendation 13 <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf>> accessed 18 July 2014

obligation on banks and other financial institutions may encourage banks to be in the defensive and produce more reports as this may be the safest thing to do so as to avoid criminal liability.<sup>128</sup>

Under Part 7 of POCA 2002 it is an offence (a), to 'conceal', 'disguise', 'convert', 'transfer or remove criminal property' from the UK,<sup>129</sup>(b), enters into or becomes concerned in arrangement which a person knows or suspects facilitates the use or control of criminal property,<sup>130</sup>and (c), to acquire, use or have possession of criminal property.<sup>131</sup>

Money laundering is defined under section 340(11) as an act that constitutes the offence under ss 327, 328 or 239 or an attempt, conspiracy, or incitement to commit any of those offences, or aiding, abetting, counselling, or procuring their commission.

The meaning of criminal conduct extends to any conduct that constitutes an offence in the UK and that would constitute an offence if it occurred in the UK. Criminal property is property that constitutes a person's benefit from criminal conduct or it represents such a benefit and that the alleged person knows or suspects that it constitutes or represents such a benefit. Property defined widely to include all form of property wherever situated and in whatever form and this include money, real or personal property, things in action.<sup>132</sup>

In addition to the offence of money laundering, it is an offence under s 330 of POCA 2002 if a person in the 'regulated sector'<sup>133</sup>who conducts 'relevant business' fails to make the 'required disclosure' to NCA or the Money Laundering Reporting Officer(MLRO) of the bank if (1), he knows or suspects, or has reasonable grounds for knowing or suspecting, that other person is engaged in money laundering, (2), the information or other matter ... came to him in the course of business in the regulated sector as soon as practicable after the information or other matter comes to him. Under section 331 an MLRO in the regulated sector commits an offence if he fails to disclose his/her knowledge or suspicion (or report by bank employee) that other person is engaged in money laundering. A conflict can arise between the duty to disclose suspicious activities and duty of confidentiality. However, disclosure under ss 330 and 331 does not breach a duty of confidentiality if it satisfies the requirements under s 337 of POCA 2002 and this addresses any issue of conflict. Furthermore a bank is not under obligation to let the customer know that a disclosure is made as this would also amount to tipping off which is a criminal offence under s 333A (1) POCA 2002.

Similarly the TA 2000 imposes disclosure obligation on a bank (including its employees) as a regulated sector. Under s 21A (1) of TA 2000 a person commits an offence if he knows or suspects or has reasonable grounds for knowing or suspecting that another person has committed or attempted to commit an offence relating to terrorist property and that the information or other matter came to him/her in the course of business in the

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<sup>128</sup> Miriam Goldby, 'Anti-money laundering reporting requirements imposed by English law: measuring effectiveness and gauging the need for reform' [2013] Journal of Business Law, No 4, p 371 -2

<sup>129</sup> POCA 2002, s 327

<sup>130</sup> POCA 2002, s 328

<sup>131</sup> POCA 2002, s 329

<sup>132</sup> POCA 2002, s 340 (2) (3)

<sup>133</sup> Regulated sector is defined under POCA 2002, Schedule 9

regulated sector and that if he/she fails to disclose the information or other matter to a constable or a nominated officer (MLRO) as soon as is practicable.<sup>134</sup> Terrorist property is defined widely under s 14 of TA 2000 and it includes money or property which is likely to be used for the purpose of terrorism. Offences related to terrorist property the offences under ss 15 – 18 of TA 2000. Terrorism is defined under s 1 of TA 2000 as the use or threat of action ... designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause. The act of terrorism includes acts outside the United Kingdom.<sup>135</sup> Under s 21B of TA 2000 disclosure to constable or NCA does not breach a duty of confidentiality if certain conditions under this section are satisfied and this addresses any issue of conflict that would arise. However, under s 21D of TA 2000 a person (in the regulated sector) commits an offence if he discloses any specified matter which the disclosure is likely to prejudice any investigation that might be conducted following suspicious disclosure.

A bank (relevant institution) is also under an obligation that it must as soon as practicable inform the Treasury if it knows or suspects that a relevant person commits an offence under the Order.<sup>136</sup>

### **Customer Due Diligence**

The Money Laundering Regulations 2007 (MLA 2007) came into force on 15 December 2007 and incorporates the Third EU Directive into UK law and to the FATF's recommendations. Customer due diligence is one of the duty MLR 2007 imposes on bank and other financial institutions. It is very important because it enables the banks and other financial institutions to better identify suspicious activities if they know their customers and understand the reason behind the instructions they get from the customers. The banking system can be used by money launderers and terrorist if they are able to provide false names and addresses and instructions are followed. Furthermore if any suspicious activity is detected and there will not be the audit trail or useful information that would help any investigation. Therefore MLR 2007 requires banks and other institutions to apply customer due diligence measures at various levels. Customer due diligence means identifying the customer and verifying the customer's identity on the basis of the document, data or information obtained from reliable and independent sources, identifying beneficial owner, taking adequate measures and verifying the identity of the beneficial owner so that the relevant person knows who the beneficial owner is including the beneficiary of trust and understanding the ownership and control structure of a person, trust or arrangement as well as obtaining information on the purpose and intended nature of the business relationship.<sup>137</sup>

Banks are required to conduct due diligence measures before establishing a business relationship, carry out occasional transaction, suspect suspicious activities, and doubt the adequacy of document and veracity of

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<sup>134</sup> Terrorism Act 2000 s 21A (1) (2) (3) (4)

<sup>135</sup> Ibid, s 1

<sup>136</sup> Terrorism (United Nations Measures) Order 2006, SI 2006/ 2657, Sched 1. Para 2(4)

<sup>137</sup> The Money Laundering Regulation 2007, SI 2007/2157 reg 5

documents received for the purpose of identification and verification of the customer.<sup>138</sup> If customer refuses to supply with customer due diligence materials then banks must abandon transaction and consider suspicious reporting activity under POCA 2002 or TA 2000.<sup>139</sup> Furthermore if customer refuses to provide information during periodical renewal accounts must be closed. However, there are exceptions to the customer due diligence requirement if customers are subject to the same customer due diligence or to Third EU Directive or a company whose stocks are listed in a regulated exchange.<sup>140</sup>

A relevant person must apply on risk sensitive basis enhanced customer due diligence and enhanced ongoing monitoring where customer is not physically present, when a bank wants to establish correspondent banking relationship but it is not from EEA countries, and where customer is Politically Exposed Person.<sup>141</sup> Furthermore, branches and subsidiaries of banks are required to apply same customer due diligence if they are not in EEA countries.<sup>142</sup> Banks must not establish relationship with shell bank and not open an anonymous account or set up an anonymous passbook for new or existing customer.<sup>143</sup>

### **Record keeping**

Record keeping is another obligation that the MLR 2007 imposes on relevant persons. If money laundering and terrorist financing are going to be effectively countered if the evidence needs to be properly recorded and made available for that purpose, so that transactions can be traced through that documentary evidence.<sup>144</sup> Therefore MLR 2007 requires that all information in relation to customer information, transactions, internal and external suspicious reports, MLRO reports, training and compliance monitoring and others need to be recorded and kept for minimum period of five years.<sup>145</sup> Records can be kept in whatever form but they need to be retrieved without delay when needed.

### **Conclusion**

The international, regional and national legal measures taken against money laundering and terrorist financing indicate that money laundering and terrorist financing are not only serious concern but they are also international crime. The efforts to fight these crimes at different levels show that inter states cooperation is vital and bank secrecy laws must not be invoked as a ground to decline legal assistance or disclose. As the international legal measures against money laundering and terrorist financing are incorporated into UK law, the disclosure obligation imposed on banks and other financial institutions are in line with the bank secrecy law which allows disclosure under the compulsion by law qualification. Thus there is no conflict between bank's duty of confidentiality and duty to disclose under the anti-money laundering and anti-terrorism

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<sup>138</sup> Ibid, reg 7

<sup>139</sup> Ibid

<sup>140</sup> Ibid, reg 11

<sup>141</sup> Ibid, reg 14

<sup>142</sup> Ibid, reg 15

<sup>143</sup> Ibid, reg 16

<sup>144</sup> Charles Proctor, *'The Law and Practice of International Banking'* (Oxford University Press 2010) p 151

<sup>145</sup> The Money Laundering Regulation 2007, SI 200/2157 reg 19

financing law requirements. In the next chapter I will discuss how countries can afford each other legal assistance in investigating and prosecuting crime of money laundering and terrorist financing and how bank's duty of secrecy can be lifted.

## Chapter 4

### **Mutual Legal Assistance and Bank Secrecy**

#### **Introduction**

In the above two chapters it is established that bank's duty of secrecy is not absolute but qualified and that money laundering and terrorist financing are national and international crimes. Therefore law enforcement authorities investigating money laundering or terrorist financing offence may find themselves in a situation where the proceeds from the crimes they are investigating have been taken out of the country to a jurisdiction where financial information is protected by bank secrecy law. Moreover if the financial transaction is part of a criminal scheme then the information related to the transaction may lead the authorities to the predicate offence from where the money is derived and enable them to find the perpetrator of the crime yet there is no access to that financial information due to the idea of sovereignty. To solve this type of situation the law enforcement authorities will need the assistance of the law enforcement authorities of the other country where the money is held. To this effect two methods of international evidence gathering have been developed. On one had a number of co-operative mechanisms in the form of mutual legal assistance have been developed. On the other hand a unilateral measure have been developed by some countries in particular the United States.<sup>146</sup>In this chapter first, I will outline and evaluate mutual legal assistance and unilateral measures to gather evidence from another jurisdiction vis-a-vis bank secrecy. Second, I will discuss and suggest how mutual legal assistance can be enhanced through the support of international organisation and a conclusion.

#### **Mutual legal assistance**

Mutual legal assistance is the provision of assistance by one state to another in the investigation and prosecution of crimes.<sup>147</sup>Mutual legal assistance is a tool in the fight against cross border crimes and it is the case in that law enforcement authorities who are engaged in the investigation and prosecution of crimes need the assistance of law enforcement authorities of other countries. As the growth in technology and cross border banking becomes wider, effective implementation of anti-money laundering and anti-terrorists laws needs international cooperation. All international instruments that attempt to tackle cross border crime stipulate mutual legal assistance as the mechanism by which states should afford each other assistance in gathering

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<sup>146</sup> Guy Stessens *'Money Laundering: A New International Law Enforcement Model'* (Cambridge 2000) p 311

<sup>147</sup> Clive Nicholls et al, *'Nicholls, Montgomery, and Knowles on the Law of Extradition and Mutual Legal Assistance'* (3<sup>rd</sup> edn, Oxford 2013) p 311

evidence for investigation and prosecution of crimes and call upon State parties not to invoke bank secrecy as a ground to decline assistance. For criminal investigation and prosecution purpose, there are two primary methods of obtaining evidence, namely Mutual Legal Assistance Treaty and a letter rogatory.

Mutual legal assistance treaty (MLAT) is a treaty which creates a binding obligation on state parties to afford assistance to each other in the investigation and prosecution of crimes. It enables central authorities of state parties to directly exchange information. There are many international and regional mutual assistance treaties as well as bilateral ones. MLAT is treaty based and it is used only for the purpose of an ongoing criminal investigation and proceedings and it is only available for government only and does not apply to civil matter. MLAT is implemented by national law.

Letter rogatory on the other hand is a formal request issued by a court to another country's court for judicial assistance. It is not treaty based, so that it can be used for civil and criminal matters by governments as well as individuals. It can be conveyed through diplomatic channels or sent directly from court to court. It is only used for the purpose of proceedings and it is time consuming in comparison with MLAT. Letter rogatory is less formal and in some countries it can be refused on ground of bank secrecy law.<sup>148</sup>

In the UK mutual legal assistance in relation to criminal matters is governed by the Crime (International Co-operation) Act 2003 (CICA 2003)<sup>149</sup> and the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (POCA Order).<sup>150</sup> CICA 2003 allows the UK to seek and provide assistance in number of ways including banking information in connection with criminal investigation. POCA Order enables the UK to freeze and confiscate assets at the request of another country.

Mutual legal assistance is the best mechanism that states have in affording assistance to each other but this mechanism faces some legal and practical difficulties. The implementation of mutual legal assistance depends on the state parties. Accordingly the executing of the request, the gathering of the evidence and documents and others depend on how the whole process is governed under the law of the requested state. Moreover the interpretation of the grounds for refusal such as national interest, public order, national security and issues of human rights are left to the requested states and this opens the door for different interpretations.<sup>151</sup> Dual criminality requirement and bank secrecy are also seen as impediment to the successful implementation of mutual legal assistance. Although international conventions and standards prohibit States parties from declining mutual legal assistance on grounds of bank secrecy, yet issue of bank secrecy within the context of international mutual legal assistance becomes a problem when the money is traced to a specific institution but

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<sup>148</sup> U4 Expert Answer, 'Mutual legal Assistance treaties and money laundering'  
<[file:///C:/Users/teklit1/Downloads/expert-helpdesk-173%20\(3\).pdf](file:///C:/Users/teklit1/Downloads/expert-helpdesk-173%20(3).pdf)> accessed 24 July 2014

<sup>149</sup> Crime (International Co-operation) Act 2003

<sup>150</sup> Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, SI 2005/3181

<sup>151</sup> ADB/OECD 'Denying Safe haven to the Corrupt and the proceeds of Corruption', Manila, 2006, pp 29–30  
<<http://www.oecd.org/site/adboecdanti-corruptioninitiative/37574816.pdf>> accessed 24 July 2014

for law enforcement authorities the problem is first identifying the institution. What this means is that money laundering and terrorist financing can possibly happen without being shielded by bank secrecy. Moreover it may well be the case that launderers and terrorist avoid bank secrecy as it operates as a red flag and use other means. Therefore the danger then becomes not bank secrecy that is becoming the impediment to the disclosure of information and thereby giving time to the suspects to move their assets to other jurisdiction but It is the potential delay between identifying the institution and account and getting permission to investigate that is the problem, not bank secrecy per se.<sup>152</sup>

Difficulties in executing legal assistance are not only due to legislation difference between states but also due to differences in working methods of law enforcement agencies and prioritising. Lack of skilled manpower and resource is another problem, particularly in developing countries. The results of these complicated challenges are delays and uncertainty that would eventually make the investigation impossible and bring the offender to justice. One way to lessen this problem is by making informal contact with the, possibly police to police, law enforcement authority of the requested country and discuss the matter before issuing a request letter or letter rogatory. However, In order to circumvent the difficulties, law enforcement authorities in different countries have sought different approaches, namely unilateral measure.<sup>153</sup>

The absence of MLAT, in many case, and the slowness and uncertain process of letter rogatory have led some countries to obtain evidence held in another country by means of unilateral measures. The United Kingdom and other countries do this but the most notable is the United States. The United States within the context tax evasion has developed a unique method of obtaining financial information of its citizens who are clients of banks in another country. This measure is not consonant with the idea of sovereignty of a country. One of the methods is extra-territorial court order. A case in point is the case of *In re Grand Jury Proceedings v Bank of Nova Scotia*<sup>154</sup> where a Federal Grand Jury conducting a tax and narcotics investigation against the client of the Canadian bank with branches in the United States and the Bahamas served the bank with a *subpoena* calling on the bank to produce certain records of the client maintained in the Bahamas. The bank declined to produce the records on the ground that to do so in the absence of the client's consent or court order from Bahamas would breach Bahamian bank secrecy law and would expose the bank to prosecution under Bahamian bank secrecy law. Furthermore, the bank argued that the American authorities could obtain court order from the Supreme Court of Bahamas allowing disclosure provided that the subject of the investigation is an offence in Bahamas. Yet the American court ruled that failure comply with the subpoena constituted contempt of court. Clearly this court order would not fall under the compulsion by law qualification in the *Tournier's case* as to do so would amount to judicial recognition and enforcement of a 'government interest of a foreign

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<sup>152</sup> Jack Blum et al, 'Financial Havens, Banking Secrecy and Money Laundering' UNDCP Technical series issue 8 (New York, United Nations 1998) 31 <<http://www.cardiff.ac.uk/socsi/resources/levi-laundering.pdf>> accessed 24 July 2014

<sup>153</sup> Guy Stessens 'Money Laundering: A New International Law Enforcement Model' (Cambridge 2000) pp 311-313

<sup>154</sup> *In re Grand Jury v Bank of Nova Scotia*, 691 F.2d 1384(11<sup>th</sup> Cir. 1982) <<http://www.uniset.ca/other/css/691F2d1384.html>>

state.<sup>155</sup> However, this may fall under the second qualification, public interest, because if the subject of the investigation is serious crime.<sup>156</sup> The problem with second it is not clear what constitutes public interest and at what point do banks know it is in the interest of the public? To avoid this, banks have to seek consent from their customer before the disclosure is made.

### **The Role of Intergovernmental Organisation in Enhancing Mutual Legal Assistance**

Given that each country is sovereign, MLAT is the best mechanism to obtain assistance from another country in the fight against national and international crime. However, the delay and uncertainty in obtaining evidence from another country meant that anti-money laundering and anti-terrorism financing laws cannot be effectively implemented. One option of enhancing mutual legal assistance mechanism is to get intergovernmental organisations involved in the coordination and collaboration of obtaining evidence through mutual legal assistance. One notable organisation is the International Criminal Police Organisation (Interpol). Interpol as its name suggests is an organisation whose purpose is 'to ensure and promote the widest possible mutual assistance between all criminal police authorities ... and to establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crime.'<sup>157</sup> Interpol has 190 member countries and each of the 190 countries maintains a National Central Bureau staffed by its own highly trained law enforcement officials. Interpol's work is invaluable as it can facilitate police cooperation across 190 countries, even where diplomatic relationship does not exist between the requesting and requested country.<sup>158</sup> Interpol's resources and expertise can help particularly developing countries as the police force of these countries may lack the resources, expertise and independence.

### **Conclusion**

Mutual legal assistance is the best mechanism states have in obtaining evidence from other countries. MLAT prohibits the use of bank secrecy law as a ground for decline. But bank secrecy issue only becomes an issue once the institution that maintains the evidence is identified by the requesting state. Therefore, a requesting state needs to make informal contact before it makes formal request. Mutual legal assistance mechanism needs to be further enhanced by the use of services and expertise of Interpol.

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<sup>155</sup>David Chaikin, 'Adapting the Qualifications to the Banker's common Law Duty of Confidentiality to Fight Transnational Crime' (2011), vol 33.265, Sydney Law Review, p 273

<[http://sydney.edu.au/law/slr/slr\\_33/slr33\\_2/Chaikin.pdf](http://sydney.edu.au/law/slr/slr_33/slr33_2/Chaikin.pdf)> accessed 15 July 2014

<sup>156</sup> *Libyan Arab Foreign bank v Bankers Trust Co.* [1989] QB 728

<sup>157</sup> Constitution of the International Criminal Police Organisation-Interpol [I/CONS/GA/1956(20089)] art 2 <<file:///C:/Users/teklit1/Downloads/Constitution.pdf>> accessed 10 August 2014

<sup>158</sup> John Hatchard, 'Combating Transnational Crime in Africa: Problems and Perspectives' [2006] Vol.50. No.2 Journal of African Law, p 150

## **Chapter 5**

### **Conclusion**

Bank's contractual duty of confidentiality to its customer has been established since 1924. It is not absolute but subject to qualifications. Since the establishment of the duty, the number of legislations that require overriding bank's duty of confidentiality in certain circumstances have grown in volume. Of these are legislations against money laundering and terrorism financing, namely POCA 2002, MLR 2007 and TA 2000. The duty to disclose imposed on banks by these legislations fall within the ambit of the first qualification to the duty of confidentiality and leaves no room for conflict. However there is uncertainty whether a disclosure order of a court of another country can be enforced in the UK. If this falls under the first qualification that is not a problem but there is legal uncertainty as to when banks can disclose confidential information to foreign authorities under the second qualification, 'public interest', nor do they know how the court will decide.<sup>159</sup>The third qualification does not help banks in this situation. Thus some certainty is due either through legislation or clarification by judicial decision or by enhancing the mutual legal assistance mechanism.

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<sup>159</sup> David Chaikin, 'Adapting the Qualifications to the Banker's common Law Duty of Confidentiality to Fight Transnational Crime' (2011), Vol 33. Sydney Law Review, 265 p 293  
<[http://sydney.edu.au/law/slr/slr\\_33/slr33\\_2/Chaikin.pdf](http://sydney.edu.au/law/slr/slr_33/slr33_2/Chaikin.pdf)> accessed 15 July 2014

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