A CRITICAL APPRAISAL OF THE LAW AND PRACTICE RELATING TO MONEY LAUNDERING IN THE USA AND UK

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DECLARATION

I, Sirajo Yakubu, hereby declare that this thesis is entirely my own work. All sources of information have been appropriately acknowledged. The law is correct as of 1st June 2016.

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ABSTRACT

This thesis critically appraises the disruptive effect of the law and practice relating to ML in the US and the UK on money laundering. This thesis concludes that the law and practice relating to ML in both jurisdictions do not disrupt ML. This thesis consists of six chapters. Chapter 1 introduces this work. It is this chapter that provides the synopsis of the whole work chapter by chapter. Chapter 2 critically analyses the law relating to ML in the US, which includes the main ML statutes – BSA 1970, MLCA 1986 and the Patriot Act 2001. In addition, chapter 2 also critically analyses other US laws that have application in disrupting ML.

Chapter 3 critically examines the law relevant to ML in the UK. This chapter critically appraises the AML law under POCA 2002 and under MLR, the proceeds of crime law under POCA 2002, as well as other alternative laws that can be used to disrupt ML. The CFA 2017 enacted in April amended POCA substantially. Thus, this Chapter also analysis the major CFA provisions. The analysis in Chapters 2 and 3 reveals the weak links in the main AML statutes and the limits of the other laws regarding their application to ML offences.

Chapter 4 critically analyses the practice relating to ML in the US and UK. This chapter focuses on issues relating to AML compliance, which consists of a set of AML practices, which the law requires regulated persons to establish and maintain for the disruption of ML. Chapter 5 critically evaluates the effectiveness of the law and practice in disrupting ML and TF in both jurisdictions. Based on the analysis in chapters 2, 3, and 4, and also

based on the views of scholars in this field, Chapter 5 concludes that the AML law and practice do not disrupt ML and TF.

The concluding chapter – Chapter 6 – first explores factors that militate against the law and practice relating to ML. It then suggests how (through the UWO and whistleblowing) the UK and US AML law could be strengthened. The law in both jurisdictions provides protection to whistle-blowers. However, it is only the UK that has UWOs in its statute book. Even in the UK, the UWOs are just introduced by CFA 2017.

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DEDICATION

To my late parents, Hajiya Saadatu and Malam Yakubu, may the Almighty Allah forgive their shortcomings and make Jannatul Firdausi their final abode, amin. Also, to Aisha, my lovely wife, and my lovely children – Saadat, Safiyya, Yunus, and Muhammad.

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TABLE OF ABBREVIATION

ABA	American Bar Association
AML	Anti-Money Laundering
ACLU	American Civil Liberties Union
AML/CFT	Anti-Money Laundering/Counter Terrorist Financing
BC	Before Christ
BSA	Bank Secrecy Act
CAB	Criminal Asset Bureau
CAB Act	Criminal Asset Bureau (CAB) Act
CAFRA	Civil Asset Forfeiture Reform Act
CCA	Crimes and Courts Act
CCA	Crimes and Courts Act
CDD	Customer Due Diligence
CEA	Commodities Exchange Act
CFA	Criminal Finances Act
CFR	Code of Federal Regulations
CFT	Counter Terrorist Financing
CIP	Customer Identification Programme
CJA	Criminal Justice Act
CLC	Commercial Letter of Credit
CMIR	Report on International Transportation of Currency or Monetary Instruments
CPR	Civil Procedure Rules
CPS	Crown Prosecution Service
CTR	Currency Transaction Reporting
DETI	Department of Enterprise, Trade and Investment
DOEF	Designation of Exempt Person
DPA	Deferred Prosecution Agreement
DPP	Director of Public Prosecutions
DPP-NI	Director of Public Prosecution for Northern Ireland
DTA	Drug Trafficking Act 1994
DTOA	Drug Trafficking Offences Act 1986
ECHR	European Convention on Human Rights
ECI	Extended Custodial Inventory
ERA	Employment Right Act
EU	European Union
FATF	Financial Action Task Force
FBAR	Foreign Bank Accounts Reports
FCA	Financial Conduct Authority
FCPA	Foreing Corrupt Practices Act
FERA	Fraud Enforcement and Recovery Act
FI	Financial Institution
FinCEN	Financial Crime Enforcement Network
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act
GAO	Government Accountability Office
GDP	Gross Domestic Project
HC	House of Common

HL	House of Lords
HMRC	Her Majesty's Revenue and Customs
ICA	International Compliance Association
ICAEW	Institute of Chartered Accountants in England and Wales
IMF	International Monetary Fund
INCSR	International Narcotics Control Strategy Report
IOD	Innocent Owner Defence
IRS	Internal Revenue Service
JMLSG	Joint Money Laundering Steering Group
KYC	Know Your Customer
LPP	Legal Professional Privilege
LWMA	Local Weight and Measures Authority
MDA	Misuse of Drugs Act
MiFID	Markets in Financial Instruments Directive
ML	Money Laundering
ML/TF	Money Laundering/Terrorist Financing
MLAT	Mutual Legal Assistance Treaty
MLCA	Money Laundering Control Act
MLPIA	Money Laundering Prosecution Improvement Act
MLR	Money Laundering Regulations
MLRO	Money Laundering Reporting Officer
MSB	Money Services Business
NAFCU	National Association of Federal Credit Unions
NASD	National Association of Securities Dealers
NCA	National Crime Agency
NFA	National Futures Association
NYSE	New York Stock Exchange
OCC	Office of the Controller of Currency
OECD	Organisation for Economic Co-operation and Development
OFAC	Office of Foreign Asset Control
OFT	Office of Fair Trading
OSHA	Occupational Safety and Health Administration
PCA	Policing and Crime Act
PCCA	Powers of the Criminal Courts Act
PEP	Politically Exposed Person
PIDA	Public Interest Disclosure Act
POCA	Proceeds of Crime Act
POCA (Cth)	Proceeds of Crime Act 2002 (Commonwealth)
PSI	US Senate Permanent Subcommittee on Investigation
PTDF	Petroleum Technology Development Fund
RBS	Royal Bank of Scotland
RICO ACT	Racketeer Influenced and Corrupt Organisation Act
S	Section
SAR	Suspicious Activity Reporting
SCA	Serious Crime Act
SEA	Securities and Exchange Act
SEC	Security and Exchange Commission
SFO	Serious Fraud Office

SOCA	Serious Organised Crime Act
SOCPA	Serious Organised Crime and Police Act
Sox	Sarbanes-Oxley Act
SRO	Self-Regulatory Organisations
SS	Sections
SUA	Specified Unlawful Activity
TACT	Terrorism Act
TF	Terrorist Financing
TI	Transparency International
UK	United Kingdom
UN	Unite Nations
UNCAC	United Nations Convention Against Corruption
US	United States
USAM	United States Attorneys' Manual
USC	United States Code
UWO	Unexplained Wealth Order

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Occupational Safety and Health Act
Sarbanes-Oxley Act 2002
Securities Act 1933
Securities and Exchange Act 1934
The Act of 3 March 1819
The Patriot Act 2001
The Revenue Act 1918
The RICO Act 1970
Uniform Foreign Money-Judgement Recognition Act 1962
Whistle-blowers Protection Act 1998

STATES' MONEY LAUNDERING CODE

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Arkansas: Ark. Code Ann.
California: Cal. Penal Code
Colorado: Colo. rev Stat. Ann.
Connecticut: Conn. Gen. Stat. Ann.
Delaware: Del. Code Ann. tit. 11
Florida: Fla. Stat. Ann.

Georgia: GA. Code
Hawaii: HAWAII REV. STAT.
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Illinois: ILL. COMP. LAWS ANN. ch.720
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EC EFTA Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention) 1988

European Convention on Human Rights 1950

European Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering

European Treaty Series - No. 141 1990

International Convention for the Suppression of the Financing of Terrorism (ICSFT)1999

The Strasbourg Convention

United Nations Convention Against Corruption (UNCAC) 2003

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (The Vienna Convention) 1988

CHAPTER 1: INTRODUCTION

> Money laundering: a process that bridges the gap between criminal world and the rest of the society.
>
> ***Michel Sindona, a Corporate tax lawyer and financial expert***[1]

1.1 INTRODUCTION

This thesis critically appraises the law and practice relating to ML in the US and the UK in terms of disrupting ML. It concludes that the law and practice relating to ML in both jurisdictions do not disrupt ML. This thesis consists of six chapters.

Chapter 1 introduces this work. It proceeds by giving an overview of the whole work chapter by chapter. This is followed by explanation of why and how this research has been conducted. It then goes on to explain the concept of ML. Based on selected definitions of ML, this chapter describes what ML is, in theory.

To understand how the law and practice relating to ML in both jurisdictions evolve, this chapter seeks to trace the origin of ML and how the two jurisdictions have been tackling the problem. This chapter then analyses why people engage in ML. Finally, Chapter 1 concludes by discussing the three basic stages involved in ML, acknowledging that ML scheme can be much more complex.

Chapter 2 critically analyses the law relating to ML in the US. This chapter proceeds with a brief discussion on the Patriot Act 2001. The objective is to highlight the amendment the Patriot Act made to the primary ML statutes – Bank Secrecy Act (BSA) 1970 and Money Laundering Control Act (MLCA) 1986. It then critically analyses the

[1] Kris Hinterseer, Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context (Kluwer Law International 2002) 11 quoting Michel Sindona

recordkeeping and reporting requirements of BSA 1970, sanctions for failure to comply with these requirements, and the challenges faced by the 1970 Act. Chapter 2 then critically analyses the substantive ML law, MLCA 1986 and its impact on ML.

As other laws are also being used to disrupt ML in the US, also, this chapter critically analyses general asset forfeiture law, Racketeer Influenced and Corrupt Practices (RICO) Act 1970, and tax and securities laws relevant to combating ML. Also, this chapter discusses state ML laws to demonstrate that the federal authorities are not alone in their effort to disrupt ML. The analysis in this chapter reveals the weak links in the US AML regime and shows the limits of the other laws about their application to ML.

Chapter 3 critically examines the law relevant to ML in the UK. This chapter starts with highlighting the key developments in the UK AML landscape. The objective is to provide a synopsis of how the AML law evolves and where it is now. In particular, emphasis is on the substantial amendments the CFA 2017 made to POCA 2002.

It then discusses the interplay between UK AML law and the EU Directives on ML, to demonstrate the interaction between the EU initiatives and the UK's effort in combating ML. This is followed by a critical appraisal of the AML law under the POCA 2002 and MLR 2007. Also in the UK, as in the US, there are other laws that can be used to disrupt ML.[2] The analysis in this chapter reveals the weak links in the main AML statutes and shows the limits of the other laws concerning their application to ML.

Chapter 4 analyses the practice relating to ML in the UK and US. This chapter focuses on issues relating to AML compliance programme, which consists of a set of AML practices that must be established to disrupt ML. It begins by exploring the regulatory

[2] For example, the Theft Act 1968 s 22, which criminalises handling the proceeds of crime

framework in UK and US, followed by an analysis of the need for an effective AML compliance function to disrupt ML effectively.

This chapter then explores why government shifts the responsibility to disrupt ML onto the regulated persons and the implications of that. As the AML compliance comes with costs, this chapter also presents a cost-benefit analysis of compliance. This is followed by an analyses of the role of the senior management, law enforcement and gatekeepers in ensuring effective AML compliance.

The need for co-operation between the stakeholders for effective disruption of ML is then disscussed. As the regulated sector finds itself positioned between the contractual duties they owe their clients and their obligations under the AML law, finally, Chapter 4 critically analyses the tension that arises in practice between AML compliance and confidentiality.

Chapter 5 evaluates the effectiveness of the law and practice in the disruption of ML. This chapter concludes that the AML law and practice do not disrupt ML. It first examines whether the AML law as it is today, disrupts ML as well as TF. Due to lack of space, this thesis omits the discussion of the legal and regulatory provisions that deal with TF. However, in evaluating the effectiveness of the AML law and practices, terrorist financing cannot be ignored.

The cost of AML is also discussed, to further support the findings of this thesis that AML law and practice do not disrupt money laundering. Having found that AML law and practice do not disrupt ML, this chapter further explores where does the problem lies between preventive or enforcement aspects of AML.

Finally, the concluding chapter examines the factors that militate against the law and practice relating to ML in the authorities' effort to disrupt ML and TF. This chapter concludes with analysis of the significance of the UWOs just introduced into the UK AML legal framework, and whistleblowing in disrupting ML and TF.

1.2 THE PURPOSE OF THIS RESEARCH AND ITS METHODOLOGY

The objective of this research is to provide a holistic assessment of whether the law and practice relating to ML does disrupt ML activities in the US and the UK. The thesis is a critical analysis, by way of comparison, between the US and UK law. Obviously, because of the various international initiatives, virtually every country has relevant law. In the main they are very similar to the experience of the US and UK. Thus, this thesis does not attempt to look at other jurisdictions – because of lack of space. However, where something is particularly relevant such as the new legislation in the UK in relation to the UWOs, where there is no background, then it is pertinent to look at the experience of Australia and Ireland – the two countries that already have UWOs in their legal system.

As this study is primarily exploratory research, which is aimed at discovering whether the law and practice relating to ML actually disrupt it, this thesis adopts the qualitative method and is conducted through the analysis of primary and secondary sources. While the AML law may differ among England and Wales, Scotland and Northern Ireland, the analysis of the UK AML law and practice centers on the AML law of England and Wales. The reason is, the AML law and practice in England and Wales is similar to that in Scotland and Northern Ireland. Secondly, lack of space makes it difficult even to highlight the differences between the law and practice relating to ML in those jurisdictions.

In the course of this research, there is consideration of the AML legislation in the UK and the US. This includes the POCA 2002, MLR 2007, MLCA1986, The Patriot Act 2001, BSA 1970 and its associated Regulations issued by the Treasury. There is also consideration of other relevant laws applicable to ML. Equally important are the secondary sources. Thus, Hansard, US Congressional reports, and many other reports will be consulted. Other secondary sources to be consulted include books, scholarly articles, and newspaper articles. Of particular importance is the FAFT mutual evaluation reports.

This thesis is not a gender-specific, thus, where "he" is used it is just for consistency purposes and the pronoun refers to all genders. Also for consistency purposes, the term "regulated person" is used throughout this study to refer to "relevant person" and "covered person/entities". As will be seen, the way cases and legislation are cited in UK and US differs. With regard to legislation, the US style is complicated as legislations are in codes, and mostly a code contains more than one piece of legislation. For example, the primary ML statutes, the RICO Act and forfeiture statutes are codified in Title 18 of the United States Codes. On the other hand, a legislative provision can be enacted across many codes. However, this is not the case in the UK. In this case, nothing can be done to ensure consistency.

1.3 THE CONCEPT OF MONEY LAUNDERING

1.3.1 WHAT IS MONEY LAUNDERING?

ML has been defined in a number of ways. Among the scholars, Professor Barry Rider describes ML as 'A process, which obscures the origin of money and its source…a wide approach, which would encompass transactions designed to hide money as well as wash

dirty money to clean'.[3] At the international level, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (Vienna Convention), defined ML. Under the Vienna Convention, ML includes conversion or transfer of, the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of; the acquisition, possession or use of, property, knowing that such property is derived from an offence.[4]

Article 6(1) of the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime defines ML in a similar way.[5] Similarly, the first EU Directive on ML describes ML almost in the same way. The difference, however, is that the Directive brings within its scope aiding, abetting, attempting, counselling, and conspiracy to commit ML.[6] The FATF defines ML as 'the processing of these criminal proceeds to disguise their illegal origin'.[7]

Statutorily, POCA defines ML as an act which constitutes (a) an offence under section 327, 328 or 329, (b) an attempt, conspiracy or incitement to commit an offence specified in (a), (c) aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a), or (d) would constitute an offence specified in (a), (b) or (c) if committed in the United Kingdom.[8] In the United States, ML is defined by the 18 USC 1956. In the simplest terms, laundering means a transaction involving a

[3] Barry A K Rider, 'Recovering the Proceeds of Corruption' [2007] 10(1) Journal of Money Laundering Control 5, 15. By way of contrast, TF has been described as 'the process of conducting financial transactions with clean money for the purpose of concealing or disguising the future use of that money to commit a criminal act (see Stefan D Cassella, 'Reverse Money Laundering' [2003] 7 Journal of Money Laundering Control 92, 93). The United Nation's defines TF broadly, in that it classifies assisting terrorist with travel documents as terrorism financing (see International Convention for the Suppression of the Financing of Terrorism (ICSFT) 1999 Article 1(1). However, TACT 2000 s 14 defines "terrorist property" even more broadly (please see Clive Walker, *The Blackstone's Guide to The Anti-Terrorism Legislation* (3rd edn OUP 2014) 83). TF offences are contained in ss 15 – 18 of the TACT 2000

[4] Article 3(1)(b)(i) and (ii); 3(1)(c)(i)

[5] European Treaty Series - No. 141 1990

[6] Council Directive 91/308//EEC Article 1

[7] FATF, 'What is Money Laundering' <http://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223> accessed 27 December 2015

[8] POCA 2002 s 340(11)

property derived from an unlawful activity.[9] The offence of ML is said to be committed in the United States if 18 USC section 1956 or 1957 is contravened.

Despite some differences in the way these definitions were framed, all these definitions point to one thing – dealing with criminal assets with the aim of disguising their illicit origin. However, according to the 18 USC section 1956 definition, mere dealing in the proceeds of crime falls within the definition of ML.

1.3.2 THE ORIGIN OF MONEY LAUNDERING

ML is not a new phenomenon.[10] The processes that we now describe as ML have been used for entirely salutary and legitimate purposes. For example, one of the the rationale for bank secrecy has been to protect those who could be victimised by a tyrant regime.[11] Similarly, the phrase "money laundering" itself has a long history – it is said to have originated in the 1920s during the prohibition era.[12] However, the term "money laundering" is said to have received its first judicial recognition in the US in 1982 in a case, United States v $4,255,625.39 551 F. Supp. 314 (S.D. Fla. 1982).[13]

History is important in understanding how authorities in the US and UK struggle against ML. Thus, since the focus of the present research is on the US and UK, tracing the

[9] 18 USC s 1956 (a)(1) (2012)

[10] Barry Rider, 'The Price of Probity' [1999] 7(2) Journal of Financial Crime 105, 112 (stating that ML is nothing new); Fletcher N. Baldwin Jr., 'Organized Crime and Money Laundering in the Americas' [2002] 14 Florida Journal of International Law 41 (stating that (i) the history of ML goes back at least to the Roman Empire when Roman soldiers stationed in France used to hide and "launder" money; and (ii) during the crusade, the Knight Templar were masters at hiding and laundering their money); Hinterseer (n 1) 23 (referring to hawala, Hundi and Chop as some of the oldest systems of laundering); P Kevin Carwile and Valerie Hollis, 'The Mob: From 42nd Street to Wall Street' [2004] 11(4) Journal of Financial Crime 325, 327 (the authors reflected on the history of organized crimes dating back to 1800); Robin T Naylor, *Wages of crime: Black markets, illegal finance, and the underworld economy* (Cornell University Press, 2004) 134-137

[11] George J Mascarino and Michael R Shumaker, 'Beating the Shell Game: Bank Secrecy Laws and Their Impact on Civil Recovery in International Fraud Actions' [1997] 1 Journal of Money Laundering 42

[12] Naylor (n 10) 134 -137 (suggesting that the phrase "money laundering" dates back to the prohibition era of 1920s)

[13] Jesse S Morgan, 'Dirty Names, Dangerous Money: Alleged Unilateralism in US Policy on Money Laundering' [2003] 21 Berkeley Journal of International Law 771-76

history will help in showing how law and practice in relation to ML evolved in these two jurisdictions.

In the US, the origin of modern-day ML can be traced to the Prohibition era. As the Volstead (National Prohibition) Act in 1919 ushered in the Prohibition era,[14] criminals had to find a means of hiding the illegal profit made from "bootlegging" and "loan sharking".[15] Because bootlegging was an expensive business (characterised by the purchase of raw materials for the production of liquor on the one hand, and on the other, smuggling liquor into the US from other countries), it necessitated co-operation among the various organised crime groups who at the time exercised control over different territories in the US.[16]

Following the conviction of Al Capone and the explosion in drug dealing, Meyer Lansky, whose laundering legacy endures till today, devised more efficient and sophisticated ways of laundering the proceeds of crime.[17] Similarly, the failure of Al Capone, led to the emergence of Salvatore 'Charlie Lucky' Luciano as the leading United States organised crime figure who together with the duo of Meyer Lansky and Michele Sindona orchestrated modern transnational money laundering to sustain international narcotics trade.[18]

Rather than the Narcotics Control Act 1956 (which imposed up to 40 years imprisonment if convicted of drug trafficking offence) to deter organised crime in the United States, Luciano, Lansky and Sindona made ML to assume its modern

[14] Rowan Bosworth-Davies and Graham Saltmarsh, Money Laundering: A Practical Guide to the New Legislation (Chapman & Hall 1994) 2
[15] ibid 2-3
[16] Carwile and Hollis (n 10) 325, 328 (Organised crime families that exercised control over territories across the US include families of Al Capone, Bugs Moran, Carlo Gambino, Salvatore Lucky Luciano and Russell Bufalino)
[17] Bosworth-Davies and Saltmarsh (n 14) 1 - 3
[18] ibid 3 - 6

sophisticated, organised and institutionalised a system of alternative financial management.[19] While Luciano was the brain behind international heroin business connecting Sicilians with the Americans, Lansky and Sindona were responsible for the laundering of heroin money through the so-called 'Pizza Connection'.[20]

Despite the efforts of the United States to address the growing threat of organised criminal groups by using criminal as well as fiscal law, these threats continued unabated. Consequently, the United States enacted the BSA 1970, RICO 1970 and sixteen years later, MLCA 1986, and then following 9/11, Congress enacted The USA Patriot Act 2001 – all these in a bid to attack the laundering of the proceeds of crime. The Patriot Act made substantial and significant amendments to the BSA 1970 and MLCA 1986.

In the UK too the history of ML is long. Years before the abolition of forfeiture and deodand in 1870 and 1846, respectively, wealthy felons laundered their assets before their arrest to prevent the Crown from taking it away from them.[21] In modern times, however, DTOA 1986, which criminalised ML and which also encouraged reporting of laundering of proceeds of drug trafficking, is the starting point in discussing the law and practice on ML in the UK.

Certain events led to the DTOA 1986. Starting from Operation Julie, a successful police undercover operation, which resulted in the discovery in the UK of a large LSD

[19] ibid 5 - 6
[20] ibid 5 - 7
[21] Howard League for Penal Reform, Profits of Crime and their Recovery: Report of a Committee chaired by Sir Derek Hodgson (Heinemann, 1984) 15-16 (Howard League for Penal Reform) (Deodand was the power of the court to seize as deodand any object which caused person's death, while forfeiture was the power of the medieval criminal courts to forfeit all the property of the convicted felon to the crown)

manufacturing and distribution network, and arrest and prosecution of the organisation's principal actors.[22]

While the defendants were successfully prosecuted and jailed, the forfeiture provision then in force, section 27 of the Misuse Drugs Act 1971, proved to be ineffective not because the defendants hid away the proceeds of the drug but because of the limits of the law.[23] As Lord Diplock pointed out in **R. v. Cuthbertson**, orders of forfeiture under section 27 could never have been intended by Parliament to serve as a means of stripping the drug traffickers of the total profits of their criminal enterprises.[24]

The apparent inability of the Court effectively to deprive an offender of the profits of his offending caused substantial public concern.[25] It was partly against this backdrop that Sir Derek Hodgson's Committee was set up to review, among other things, the forfeiture laws existing at the time, which led to the enactment of the DTOA 1986.[26]

Then the Brinks Mat robbery that took place after Operation Julie, but before coming into force of DTOA 1986 section 24. For the first time, a UK court convicted the defendants of ML.[27] That was achieved using the offences of "handling" stolen goods as a basis for ML conviction.[28] Thus, even if the DTOA 1986 had been in force, the Act would not have been of any help since the case was not drug related (because the Act was limited to drugs cases).

[22] ibid 3
[23] R v Kemp and Others [1979] Cr App R 330; R v Cuthbertson [198 1] AC 470
[24] Bosworth-Davies and Saltmarsh (n 14) 108
[25] Howard League for Penal Reform (n 21) 3
[26] ibid 70
[27] R v Brian Henry Reader and Others (1988) 10 Cr. App. R. (s.) 210
[28] Theft Act 1968 s 22(1)

R v Brian Henry Reader[29] marked the beginning of judicial intervention in the UK in combating ML using handling offences as the basis. In the words of Watkins LJ:

> In our experience, this is the worst case of handling stolen goods or conspiring so to do that we have ever encountered. The Brinks-Mat robbery, in the view of this Court, was astounding in its audaciousness. The handling of the stolen gold is no less remarkable for the audacity and skill with which the gold disappeared and reappeared upon the legitimate market in the form and, further, the dissemination of the proceeds of sale; in other words, the laundering of the money so wickedly come by.[30]

The trial arose out of a robbery involving gold bars weighing approximately three tonnes and worth £26 million.[31] Due to the large quantity of the gold involved, the identity of the stolen gold had to be changed if it were to get into the legitimate market.[32]The defendants successfully laundered the proceeds of their crime by changing the identity of the stolen gold bars and then realising their market value. To secure the conviction of the defendants for ML, the prosecution used section 22(1) "handling" offence of the Theft Act 1968, and that proved successful.[33] Section 22(1) provides that:

> a person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.[34]

Like the ML offence, handling stolen goods also carries a maximum jail term of fourteen years. [35] Although section 22 is wide-ranging provision and was used

[29] (1988) 10 Cr. App. R. (s.) 210
[30] ibid
[31] ibid 211
[32] Peter Alldridge, 'Introduction' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (Sweet and Maxwell 2005) 1-250
[33] Reader (n 29)
[34] Theft Act 1968 s 22(1)
[35] ibid 22(2)

successfully to prosecute the Brinks Mat defendants,[36] its limitation in scope is that it only applies to cases involving the laundering of stolen property.[37]

1.3.3 THE MOTIVE BEHIND MONEY LAUNDERING

Reasons why people engage in ML obviously differ and Professor Barry Rider has provided an analysis of this subject.[38] As such, this thesis will not go into details on the subject, as it will amount to repeating what has already been discussed. However, this section highlights why people engage in ML for the benefit of those who will read this thesis but without the privilege of reading Professor Rider's analysis.

Having said this, the desire to make proceeds of crime appear legitimate is one of the core reasons for ML. As Michel Sindona has rightly observed, ML enables criminals to integrate their ill-gotten wealth into the legitimate economy.[39] As physical handling of a large amount of cash, for example, generated from drugs sales, would expose the dealer to so many risks including scrutiny of law enforcement, theft, and robbery, ML allows the dealer to avoid these risks and remain below the radar.[40]

As money is the lifeblood of criminality, through ML, criminals put their assets beyond government's reach to avoid confiscation.[41] Criminals prefer to go to jail rather than lose their assets. Overall, the time served by criminals in prison is disproportionately low in value to the illicit wealth. Because criminals launder their assets most of the

[36] Bosworth-Davies and Saltmarsh (n 14) 108
[37] Nicholas Clark, 'The Impact of Recent Money Laundering Legislation on Financial Intermediaries' [1995] 3 Journal of Financial Crime 131, 134
[38] Barry A. K. Rider, 'Financial Regulation and Supervision after 11th September, 2001' [2003] 10(4) Journal of Financial Crime 336, 342-46
[39] Hinterseer (n 1) 11
[40] Jeffrey Simser, 'The significance of money laundering: The example of the Philippines' [2006] 9(3) Journal of Money Laundering Control 293, 294
[41] Barry Rider, 'The Limits of the law: An Analysis of the Interrelationship of the criminal and civil law in the control of money laundering' [1999] 2(3) Journal of Money Laundering Control 209, 217

orders made are never met.[42] As laundered assets normally resurface, the UWOs introduced by the CFA 2017 section 1 will allow the law enforcement to take away illicit profits.

However, these are not the only motives. A wealthy person or company may resort to ML to hide their wealth, to reduce the amount of tax payable or to avoid tax altogether.[43] Others may launder clean money to further a particular cause, for example, funding of terrorism, while they distance themselves from the cause.[44] A migrant worker affected by exchange control restrictions may launder his legitimately hard-earned pay to maintain his family living in his home country.[45] At the other end of the spectrum, people may launder their legitimate wealth to evade unlawful seizure of their assets by a tyrant and oppressive regimes.[46]

The distinction has been drawn between "dirty" and "hot" money because the property may have a legal source, but the owner may seek to distance himself from it for some reasons.[47] Professor Barry Rider defined dirty money as money or some other form of wealth acquired from crime or other wrongs.[48] While dirty money could be regarded as hot, the reverse is not necessarily true, yet some monies could be grey due to the difference in religious, cultural and societal values.[49]

[42] Peter Alldridge, *What Went Wrong With Money Laundering Law?* (Palgrave 2016) 15-17; Michael levi and Lisa Osofsky, 'Investigating, seizing and confiscating the proceeds of crime' [1995] Police Research Group, Crime Detection & Prevention Series: Paper 61, Home Office Police Department
[43] Bosworth-Davies and Saltmarsh (n 14) 1
[44] Cassella (n 3)
[45] Hinterseer (n 1) 23
[46] Mascarino and Shumaker (n 11)
[47] Angela Itzikowitz, 'Nature of Money Laundering' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (CCH Editions Limited 1999) 5-125
[48] Barry AK Rider, 'The Control of Money Laundering - a Bridge Too Far?' European Financial Services Law [1988] 5 27, 30
[49] Itzikowitz (n 47) 5-125 – 5-175

1.3.4 THE PROCESS OF MONEY LAUNDERING

ML activities are carried out on a micro and macro scale.[50] Irrespective of its scale, ML involves three basic stages: placement, layering and integration.[51] However, the process of ML is not as simple as this. It usually involves a very complex set of transactions that may not proceed in that order and may involve more stages.

Simplistically, placement involves the depositing of the proceeds of crime, mostly in cash into the regular or non-regular banking system by converting small denominations into larger, or by structuring the transaction to avoid triggering threshold reporting requirements.[52] Alternative techniques, such as cash smuggling across a border to deposit it in another country, injecting money into smaller businesses or investing a huge amount of capital into a well-established large-scale business, exploitation of gaming industry, investing in precious metals and artefacts, etc. are also being used to place illicit funds into the legitimate economy.[53]

On the other hand, layering as the second stage of ML, involves the separation of illegal gains from their origin by creating convoluted layers of transactions,[54] 'designed to confuse the onlooker and confound the inquirer'.[55] The complexity of layering requires some parallel transactions, establishing mutual obligations that can be married or crossed, often on a contingent basis.[56] Layering is often achieved through electronic

[50] ibid 5-250
[51] Richard W Harms and others, 'Nature of Money Laundering' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (CCE Editions Limited) 6-950
[52] Itzikowitz (n 47) 5-300
[53] ibid 5-300
[54] ibid 5-400
[55] Rider (n 3) 9
[56] Itzikowitz (n 47) 5-400

funds or wire transfers, converting cash into monetary instruments, setting up companies including 'shell' or 'front' companies in offshore financial systems.[57]

Finally, integration is the process of placing back the laundered proceeds into the economy in a manner that the proceeds appear as normal and legitimate earnings.[58] Integrating the proceeds of crime can be done in a number of ways, which include: the use of real estate; the use of false import/export licence; foreign bank complicity; remuneration; and consultancy fee.[59]

1.4 CONCLUSION

As it has been seen in this chapter, ML is not new in the UK and US. Thus, the authorities in both jurisdictions have tried to attack ML and the predicate crimes long before they enact AML legislation. Consequently, criminals launder their tainted assets. They do so, for example, to give an illicit property some sorts of legitimacy or to avoid forfeiture, or confiscation in the event the criminals are arrested and prosecuted. In theory, the process of ML involves three stages. However, in practice, ML can be very complicated process encompassing multiple transactions.

This chapter has explained the objective of this work and its methodology, the concept of ML, the reason why people, especially criminals launder their illicit proceeds, and the basic stages involved in the process of ML. It has also traced the history of ML in both jurisdictions. Consequently, The main work now begins. It starts with Chapter 2, which evaluates the US AML law.

[57] ibid 5-400
[58] ibid 5-450
[59] ibid 5-450

CHAPTER 2: LAW RELATING TO MONEY LAUNDERING IN THE UNITED STATES

2.1 INTRODUCTION

This chapter discusses the efforts made by the US to fight ML. Such efforts to combat ML culminated in the passage of Currency and Foreign Transaction Reporting Act, popularly known as BSA 1970.[60] Before the enactment of BSA, United States adopted some legal measures to combat organised crime. One of these measures was the use of tax laws to prosecute the leadership of organised crime.[61] Other legislation include Trading with the Enemy Act,[62] Bretton Woods Agreements Act,[63] and RICO Act 1970. Despite the broad scope given to RICO by the Courts, and its advantages in fighting organised crime, its effectiveness against organised crime has been questioned.[64]

The BSA 1970 was enacted to frustrate the use of banks for tax evasion, tax fraud and ML and other financial crimes.[65] Rather than relying on their discretion, this Act mandates FIs domiciled in the United States to file reports on certain transactions.[66] Congress passed this Act believing it would have 'high usefulness' in detecting and investigating financial crimes. However, the "detection rationale" of the BSA has been challenged.[67]

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[60] 31 USC s 5313-32
[61] The Revenue Act 1918
[62] CH 106-40 Stat 411(1917) now codified as 50 USC ss 1-44 (2012) (This law requires reports of large currency transactions. However, enforcement of this law rely on the co-operation and discretion of the reporting institutions. Thus, law enforcement find it difficult to trace large cash deposit made into the banking system due to the lack of paper trail)
[63] ss 8(a) and 59 Stat. 515, 22 USC s 286(f) confer powers on the Treasury Department to collect information regarding international currency holdings and financial transactions
[64] Diane Marie Amann, 'Spotting Money Launderers: A Better Way to Fight Organised Crime' [2000] 27 Syracuse Journal of International Law and Communication 199, 203
[65] ibid 208;
[66] Alfred L Schubkegel, 'Tresury's Reporting Rules Governing Transfers of Currency' [1986] 64 The Tax Magazine 339, 240-41
[67] Courtney J Linn, 'Redefining the Bank Secrecy Act: Currency Reporting and Crime of Structuring' [2010] 50 Santa Clara Law Review 407, 409

Afterwards, various laws were passed either to amend BSA or create new offences. Such laws include Deficit Reduction Act 1984;[68] Money Laundering Penalties Act 1984;[69] MLPIA 1988;[70] Annunzio-Wylie Anti-Money Laundering Act 1992;[71] Money Laundering Suppression Act 1994;[72] Money Laundering and Financial Crime Strategy Act 1998;[73] and The Patriot Act.[74] Although BSA is the first indirect assault against ML, MLCA 1986[75] marked an era of a direct attack on money laundering. The 1986 Act criminalised ML. This Act also amended BSA to make structuring of financial transactions (to evade reporting requirement) a crime.[76]

Asset forfeiture laws and securities laws also contribute significantly to the effort of fighting organised crime. Despite criticisms, forfeiture laws expanded both the class of the crimes that fall within its ambit and the property subject to forfeiture.[77] In addition to the reporting requirements imposed on broker-dealers by various laws mentioned above, SEC and SROs have adopted different regulations to ensure due diligence in the securities industry.[78]

This chapter therefore critically appraises the law and practice relating to ML in the US. The analysis in this chapter covers BSA 1970, MLCA 1986, RICO Act 1970 and forfeiture laws. The Patriot Act amended BSA and MLCA extensively. Reference will be made to those amendments as analysis progresses.

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[68] 98 STAT 494 Pub. L 98-369 (1984)
[69] P. L. 98-473
[70] 31 USC s 5312
[71] 106 STAT 3672 Pub L 102-550
[72] 108 STAT 2160 Pub L 103-325 (1994)
[73] 112 STAT 2941 Pub L 105-310 (1998)
[74] 84 STAT 1116 Pub L 107-56
[75] 100 STAT 3207 Pub L 99-570
[76] John J Byrne, 'The Bank Secrecy Act: Do Reporting Requirements Really Assist the Government?' [1993] 44 Alabama Law Review 801, 808
[77] 18 USC ss 891(a)(1)(G)(i) and 892 (2012)
[78] Marc C Cozzolino, 'Money Laundering Requirements for Broker-Dealers and Hedge Funds under The USA Patriot Act 2001' [2002] 3 Villanova Journal of Law and Investment Management 65, 66

This chapter consists of ten sections. Section two provides an overview of the Patriot Act, with particular emphasis on the amendment to BSA recordkeeping and reporting requirements and MLCA 1986. Section three analyses in detail the recordkeeping and reporting requirements of the BSA, and section four discusses MLCA 1986. Section five reviews the RICO Act and its limitations in combating organised crime.

Section six analyses the effectiveness and utility of forfeiture laws in fighting ML, TF and organised crimes in general. Section seven discusses how the government uses tax laws to combat organised crime since the early 20th century. Section eight discusses the role of SEC and SROs in fighting financial crimes. Section nine discusses AML efforts by the states, followed by discussion of the AML laws adopted by the state of New Jersey. Finally, section ten concludes this chapter.

2.2 THE USA PATRIOT ACT

After 9/11, Congress enacted a law entitled **"Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001**", which is popularly known as "**The Patriot Act"**.[79] The Act passed both the Senate and the House and enacted within barely six weeks after the Septermber 11 terrorist attack.[80] Although the Patriot Act 2001 provided additional tools to disrupt terrorist financing,[81] it was really intended to address organised crime.

Originally, the draft legislation was prepared by the Clinton administration to deal with the problems of organised crime, particularly drug trafficking cartels such as Cali and Meddellin. However, when President Bush requested a draft legislation from the Treasury Department to respond to the September 11 terrorist attack, the already

[79] 84 STAT 1116 Pub L No 107-56 (2001)
[80] Ibrahim Warde, *The Price of Fear: Al-Qaeda and the Truth Behind the Financial War on Terror* (I.B. Tauris, 2007) viii
[81] ibid

prepared draft legislation became handy. Thus, the Patriot Act was enacted primarily not to deal with ML but with TF and terrorist organisations such as the Al Qaeda. However, this thesis does not primarily address TF because its discussion of ML generally subsumes terrorist financing.

The Patriot Act consists of ten sections, Title I – X. Title III – International Money Laundering Abatement and Anti-Terrorist Financing Act 2001, which heavily amended Bank Secrecy Act 1970[82] and Money Laundering Control Act 1986 [83] is the most relevant to this thesis.[84] The Patriot Act inserted 5318A[85] into BSA 1970. Under this section, the Secretary of the Treasury is granted powers to mandate FIs or domestic agency to take special measures described in subsection (b).[86] To trace and block terrorist financing, the Patriot Act granted powers to the Secretary of the Treasury to mandate FIs or domestic agency to keep records and file reports of certain transactions as the Secretary may determine.[87]

The 2001 Act introduced special due diligence for correspondent accounts and private banking accounts,[88] and prohibited banks in the US from maintaining a correspondent account with foreign shell banks.[89] The Act encourages and in some cases compels, sharing of information among FIs, regulators and law enforcement authorities.[90] Moreover, Title III amended 18 USC section 1956(b) to give the US a long-arm

[82] Title 31 USC s 5313-32
[83] Title 18 USC ss 1956 and 1957
[84] Pleases see Fletcher N. Baldwin Jr., 'Money Laundering Countermeasures with Primary Focus upon Terrorism and the USA Patriot Act 2001, [2002] 6(2) Journal of Money Laundering Control 105-129 for a diagnosis on Title III of the Patriot Act
[85] The Patriot Act s 311 (a)
[86] 31 USC s 5318A (a) (2011)
[87] The Patriot Act 2001 s 311(b)(1)(B); 31 USC s 5318A(b)(1)(B)
[88] ibid ss 312, 326
[89] ibid s 313
[90] ibid 314 (a) (1)

jurisdiction over foreign money launderers.[91] The Act also amended 18 USC section 1956 to include foreign corruption offences as ML crimes.[92]

Furthermore, the Patriot Act section 352 requires FIs to establish AML compliance programme.[93] However, the requirement to establish AML programme is nothing new as the BSA 1970 had already required most FIs to establish similar AML programmes.[94] What Section 352 of the Patriot Act did was to re-adjust and further standardise existing AML programmes.[95] The Patriot Act amended 31 USC section 5312 to extend the definition of FIs to cover institutions hitherto not covered under the BSA 1970.[96]

Before the enactment of the Patriot Act, there was concern about the detrimental effect that ever-increasing CTR filings was having on the detection effort of the BSA 1970. Thus, Money Laundering Suppression Act 1994[97] was passed to reduce the number of CTRs by thirty per cent. Despite the presence of this legislation, while passing the Patriot Act Congress still expressed concern over excessive CTR filing and its adverse effect on the effectiveness of the AML regime.[98]

Instead of reducing the volume of CTR filings the passage of the Patriot Act 2001 caused a rise in the reports[99] because the 2001 Act introduced harsher sanctions for

[91] ibid s 317
[92] ibid s 315
[93] ibid s 352
[94] Please see earliest versions of the BSA 1970 codified as 31 USC s 5325(a) (2000) and 31 CFR ss 103.28; 103.29; 103.33(e)-(f) (2001); and the latest versions of the BSA 1970 codified as 31 USC s 5318 (2012) and 31 CFR Parts 1020.100 et seq - 1029.100 et seq (2012)
[95] Jimmy Yicheng Huang, 'Effectiveness of US anti-money laundering regulations and HSBC case study' [2015] 18(4) Journal of Money Laundering 525, 526
[96] The Patriot Act s 321 (the following are now regarded as FIs within the meaning of 31 USC s 5312: any futures commission merchant, commodity trading advisor, or commodity pool operator registered, or required to register, under the CEA)
[97] Pub. L. No. 103-325, 108 Stat. 2243 (1994)
[98] The Patriot Act 2001 s 336(a)(3)
[99] Eric J Gouvin, 'Bringing out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism' [2003] 55 Baylor Law review 955, 968

failure to report and also introduced safe harbour for the reporting entities.[100] Thus, while the Patriot Act was enacted to remove the deficit, the new reporting sanctions of the Act undermine the previous legislative effort of reducing the number of CTRs, which had made the US AML regime less effective in disrupting ML.[101]

Having considered very briefly some of the changes and the adverse effect the Patriot Act 2001 brought to the US AML landscape, this thesis now turns to the US primary reporting statute.

2.3 THE BANK SECRECY ACT 1970

The previous section highlighted the amendments the Patriot Act 2001 had made to the BSA 1970. Reference will be made to those amendments while examining the recordkeeping and reporting requirements of the BSA in this section. This section starts with a discussion of what prompted Congress to enact the 1970 Act. It then goes on to analyse the recordkeeping and reporting requirements. This section argues that the detection rationale behind these requirements is faulty considering the volume of reports filing, especially the CTR. It also analyses sanctions for BSA violations as well as early challenges encountered in the course of the Act's implementation.

2.3.1 WHY WAS THE BSA 1970 ENACTED?

The US Congress enacted BSA 1970 believing that the reports required by the 1970 Act are useful in detecting certain economic crimes. The Act stated thus:

> It is the purpose of this subchapter (except section 5315) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.[102]

[100] The Patriot Act 2001 ss 327; 363; 351 (a)(3)(A)
[101] Gouvin (n 99) 973
[102] 31 USC s 5311

The Congress restated this notion while enacting the Patriot Act 2001. However, the Patriot Act extended the detection rationale of the BSA 1970 to serve as a weapon against the financing of terrorism.[103] Codified in Chapter 51 Title 31 of the United States Code, BSA 1970 requires FIs to keep track of their customers' financial transactions.[104] The aim was to use the records and reports of customers' suspicious and large currency transactions to create an "audit trail" to detect and deter ML and the use of foreign secret bank accounts to evade tax.[105]

In recent years there is a shift from the traditional approach of investigation and prosecution in combating organised crime due to practical, legal and evidential difficulties to disruption or intervention. However, the law enforcement moved entirely to disruption without thinking out exactly what disruption means. While the AML law and procedure presupposes that regulated persons are operating within the legal system, disruption takes the regulated persons out of the legal system. Disruption simply means 'an interruption in the usual way that a system, process, or event works'.[106] It's success depends on the effective implementation of the AML compliance measures put in place to interrupt ML scheme.

While disruption of ML begins right at the CDD stage by weeding out suspected launderers,[107] placement stage is a vulnerable stage in ML scheme.[108] It is at this stage

[103] The US Patriot Act 2001 – Pub. L. 107-56 added: "or the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism"
[104] John K Villa, 'A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes' [1998] 37 Catholic University Law Review 489, 491
[105] Bruce Zagaris, 'Brave new World Recent Developments in Anti-Money Laundering and Related Litigation Traps for the Unwary in International Trust Matters' [1999] 32 Vanderbilt Journal of Transnational Law 1032, 1056
[106] Cambridge Dictionary <http://dictionary.cambridge.org/dictionary/english/disruption>
[107] 31 USC s 5318(h) states that "in order to guard against money laundering through financial institutions, each financial institution shall establish anti-money laundering programme, which includes CDD (31 USC s 5318(i); 31 CFR s 1010.620)
[108] Paul Fagyal, 'The Anti-Money Laundering Provisions of the Patriot Act: Should they be allowed to Sunset?' [2006] 50 St. Louis University Law Journal 1361; 1364-367

that criminal assets are either detected, and the laundering scheme disrupted, or get through into the financial system undetected. Although eventually ML scheme can be discovered even after the laundering cycle is completed, the BSA 1970 is breached once criminal assets successfully enter the financial system.

If the reporting requirements of the BSA 1970 do not serve as a tool to detect ML at the placement stage, it is then difficult to rate the US AML law effective in disrupting ML. While successful laundering scheme conceals the criminal source of the asset, it renders criminal forfeiture (that serve as another tool for disrupting criminal finance) ineffective because the forfeiture process kicks in only when the prosecution can substantiate ML charges.

Since its enactment in 1970, the BSA has undergone continuous amendment to enhance its effectiveness in disrupting ML.[109] However, it should be noted that The implementation of the BSA (AML) requirements is done through Regulation issued by the Secretary of the Treasury. Therefore, in discussing the AML provisions of the BSA 1970 reference will be made to the Regulation issued by the Treasury Department.[110] The next subsection critically analyses the recordkeeping requirements of BSA 1970.

2.3.2 RECORDKEEPING REQUIREMENT

The BSA saddles banks and non-banks FIs with recordkeeping requirements. The most significant ones are records of cash purchases of monetary instruments and wire transfers.[111] 18 CFR sets out the recordkeeping requirement.[112] FIs are required to

[109] For example, MLCA 1986, amended BSA 1970 to criminalise structuring
[110] 31 CFR s 1010.100 et seq
[111] Linn (n 67) 419
[112] 18 CFR s 1010.100 et seq. (2012)

retain for at least five years either the original or a microfilm or other copy or reproduction of each transaction exceeding USD10,000.[113]

Moreover, generally, FIs are required to maintain records of purchase of monetary instruments in cash of USD3,000 and above.[114] Records of the type of the financial instrument purchased, its value, serial number, and the date of purchase are to be recorded and retained for at least five years.[115] Similarly, non-bank FIs are also required to keep records of transactions involving funds transmission of USD3,000 or more.[116]

FIs are also required to verify and record the purchaser's name, address, date of birth and other relevant information that will help in tracing the customer.[117] Keeping these records could be valueless if the person who made the transaction cannot be identified. To this end, maintaining records of identifying information about the individual who conducted the transaction is vital for investigation and prosecution purposes.[118]

While these records could be helpful in criminal, tax, or regulatory investigations or proceedings,[119] banks are more concerned about the cost implications of keeping such records.[120] While it could be argued that guarding against ML is ultimately beneficial to the regulated persons, it is also arguable whether keeping these records is worth the cost. Despite this however, keeping records of cash and wire transfers is fundamental to the successful fight against ML and other crimes, as these records serve as a audit trails that could potentially aid the investigation of criminality.

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[113] 31USC s 1010.410 (a)-(d)
[114] 31 USC s 5325 (2011); 31 CFR s 1010.415 (2012)
[115] 31 CFR s 1010.415 (c)
[116] 31 USC s 1010.410(e)
[117] 31 CFR s 1010.415 (a)(1)(ii)
[118] Linn (n 67) 420
[119] 31 CFR s 1010.401
[120] Linn (n 67) 420

A successful investigation could lead to the conviction of criminals and confiscation of criminal assets and thereby disrupt ML. Lack of records undermines the ML investigation.[121] Thus, Congress authorised the Secretary of the Treasury to require FIs to record and report all cross-border wire transfers.[122]

One of the utilities of recordkeeping requirements is that it encourages criminals to structure their transactions.[123] Structuring draws the attention of FIs to a potential suspicious activity that would necessitate the filing of SARs. Thus, the utility of recordkeeping requirement of the BSA is very high because it not only serves as a trail, it could also help to trigger an investigation of criminals who try to circumvent the BSA recordkeeping and reporting requirements through structuring.

Having considered the obligation on FIs to keep records of their customers' transactions, and the utility of these requirements in disrupting ML and the underlying predicate crimes, the next subsection critically analyses the utility of CTR and SAR to the law enforcement agents in detecting ML scheme right from the onset. The subsection argues that the high volume of these reports affects the effectiveness of the US AML laws in disrupting ML.

2.3.3 REPORTING REQUIREMENT

Theoretically, the utility of BSA 1970 revolves around the "detection rationale." Congress finding asserts that currency reporting has "high degree of usefulness" in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against

[121] Sarah Jane Hughes, 'Policing Money Laundering Through Bank Transfers: A Critique of Regulation Under the Bank Secrecy Act' [1992] 67 Indiana Law Journal 283, 296
[122] Intelligence Reform and Terrorism Prevention Act of 2004, Pub L No 108-458, s 6302, 118 Stat 3638 (2004)
[123] Linn (n 67), 420

international terrorism.[124] This belief has however been challenged.[125] Indeed, the reports being filed by FIs are too many for the government fully and efficiently to utilise them.[126]

BSA 1970 and the implementing Regulations require filing of certain reports. The reports include SAR, CTR, FBAR, Reports of Transactions with Foreign Financial Agencies; CMIR, Reports relating to currency in excess of USD10,000 received in a trade or business; and Reports relating to currency in excess of USD10,000 received for bail by court clerks.[127]

For the purpose of this thesis, these reports are broadly grouped under the first five headings, with the last two coming under CTR. While the law requires FIs to file CTR and SAR on their clients' transactions, the law requires persons (legal and natural) to report their financial transactions through the filing of FBAR, CMIR and Reports of Transactions with Foreign Financial Agencies. Although all these reports can be useful in disrupting ML, the most significant for the purpose of this thesis are the SAR and CTR – because they are the most relevant in disrupting ML.

2.3.3.1 CURRENCY TRANSACTION REPORT (CTR)

The BSA 1970 placed obligations on all FIs[128] to file CTR on their customers' transactions exceeding USD10,000.[129] Casinos were required to file FinCEN Form 103, while other covered FIs are to file FinCEN Form 104.[130] However, criminals do engage

[124] 31 USC s 5311 (2011); 31 CFR s 1010.301 (2012)
[125] Linn (n 67) 409
[126] ibid
[127] 31 USC ss 5313 – 5316 (2012); 31 CFR s 1010.320 – 370 (2012)
[128] 31 CFR s 1010.100(t)(1)-(3) & (5) (the following are included withing the meaning of FI: banks, brokers/dealers in financial securities, money services businesses and casinos)
[129] 31 USC s 5313 (e); 31 CFR ss 1010.311; 1020.300-1020.310; 1022.300-1020.310; 1023.300-1023.310; 1124.300-1124.310; 1125.300-1125.330; 1126.300-1126.310; 1127.300-1127.330; 1128.300-1128.330; 1129.300-1129.330(2012)
[130] 31 CFR s 103.22

in structuring, that is, multiple transactions below the threshold of USD10,000 to avoid the reporting requirement.[131] As we shall see subsequently in this chapter, structuring posed a serious challenge to FIs and law enforcement. It enables launderers to circumvent the recordkeeping and reporting statute.[132]

Certain non-financial trades and businesses such as automobile dealers, real estate agents and attorneys are required to file Form 8300 to report currency more than USD10,000 as payment for goods or services.[133] Until 2001, Form 8300 was codified in the Tax Code[134] purposely to assist the Internal Revenue Services exclusively to identify tax evaders.[135] However, Form 8300 was detached from the Tax Code and re-enacted as part of BSA to assist law enforcement officials who are involved in non-tax investigation.[136]

A duly filled Form 8300 provides information about the person who conducted the transaction, the details of the transaction and parties to the transaction.[137] Form 8300 is filed as SAR where a suspicious activity is noticed.[138] Where a normal transaction that exceeds the threshold occurred, Form 8300 is filed as CTR. The CTR provides what is known as audit trail through creation of records of transactions that shows the movement of the illict proceeds. The audit trails created by CTR allow law enforcement

[131] See Scott Sultzer, 'Money Laundering: The Scope of the Problem and Attempts to Combat it' [1996] 63 Tennessee Law Review 143, 158
[132] Please see analysis of the challenges structuring posed to the BSA 1970
[133] Linn (n 67) 414-15
[134] IRC s 6050I (2006)
[135] Linn (n 67) 416
[136] ibid
[137] ibid 415
[138] ibid 415-16

to follow the money and detect the underlying crime.[139] Thus, CTR is perceived as a useful tool of disrupting ML and the predicate crimes.[140]

Furthermore, the success US law enforcement recorded in disrupting criminal finance and the predicate crimes as a result of "Operation Greenback" and "Operation El Dorado" was attributed partly to the valuable information investigators and law enforcement agents extracted from the CTR filed by the BSA compliant FIs.[141]

Despite the utility of CTR, a major factor that works against the effectiveness of the BSA 1970 reporting statute in disrupting ML is the large volume of reports filed by FIs. According to FinCEN, while about 15 million reports were filed as CTR in 2011, the total reports combined were over 17 million.[142] This large volume of CTR poses a setback to the US AML law because as many as seventy-five per cent of those reports filed in 2006 are related to innocent business transactions.[143]

Similarly, CTR filed each year dwarf all other BSA reports combined.[144] While nearly 15 million CTRs were filed in 2011, only about 1.44 million SARs were filed in the same period.[145] The latest FinCEN's SAR statistics covering five years shows a decline in the SAR filing. FinCEN SAR Statistics 2012-2016 released March 2017, shows that

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[139] United States v. Herron, 825 F.2d 50 (5th Cir. 1987); United States v LBS Bank- N.Y., Inc., 757 F. Supp. 496 (E.D. Pa. 1990)

[140] United States Government Accountability Office, BANK SECRECY ACT: Increased Use of Exemption Provisions Could Reduce Currency Transaction Reporting While Maintaining Usefulness to Law Enforcement Efforts GAO-08-355 [2008] (GAO Report)

[141] House of Representatives, Subcommittee on General Oversight and Renegotiation, Committee on Banking, Finance and Urban Affairs to Investigate the Enforcement and Effectiveness of the Bank Secrecy Act, Legislative History of the Comprehensive Crime Control Act of 1984: P.L. 98-473: 98 Stat. 1837 [1984] 24(I) 3-5 (According to Leo C. Zeferetti, Chairman Select Committee on Narcotics Abuse and Control, Bank Secrecy information can be effectively used to identify narcotics trafficking organizations and destroy their financial base)

[142] FinCEN, Fiscal Year 2008 Annual Report [2011] 8 (the reports include SAR and other type of reports. With regards to CTR, this is the recent statistics available on the FinCEN website)

[143] Michael J Parrish, 'The burden of Currency Transaction Reporting on Deposit Institutions and the Need for Regulatory Relief' [2008] 43 Wake Forest Law Review 559, 565

[144] Linn (n 67) 413

[145] FinCEN, 'Fiscal Year Annual Report' [2011]

about 3.9 million SARs were filed by the reporting institutions, with depository instutions filing the highest number of reports – about 3.43 million. This is an average of nearly 780 thousand SARs yearly. However, the number of SAR filing is on the rise again. According to the same statistics, slighty below 1 million reports were filed in 2016. These huge numbers of SARs require huge time and workforce to be able to sort and analyse the reports correctly.[146] Otherwise, criminally tainted transactions may hide under legitimate commercial transactions. Thus the aim of disrupting ML at its early stage could be defeated.

One thing that adds to the volume of CTRs is the requirement that FIs aggregate structured transactions and file CTR once the aggregated value exceeds USD10,000.[147] Ordinarily, those structured transactions would have been reported as SAR since structuring leads to suspicion. Thus, filing CTR as well as SAR on the same transactions is a duplication that inevitably renders the US AML law less effective in disrupting ML because the large volume of reports filed reduces the chances of ML detection at the very beginning.[148]

Given the large volume of reports filed as CTR, hardly would investigators distill any remarkable information that would prompt investigation.[149] This argument sounds strong, as an IRS agent has once told American Bankers Association (ABA) that only one criminal prosecution was initiated as a result of CTR in his area of operation in five years.[150]

[146] Byrne (n 76) 820
[147] Frederick J Knecht, 'Extraterritorial Jurisdiction and the Federal Money Laundering Offense' [1986] 22 Stanford Journal of International Law 389, 391
[148] GAO Report (n 140) 84 (CTR filed on aggregated transactions account for approximately 66 per cent of the total CTRs filed between 2004 and 2006)
[149] Linn (n 67) 431
[150] Byrne (n 76) 820

Thus, it was argued that at best, CTR deters rather than detects crimes, because it forces professional launderers to resort to structuring to evade the reporting requirement of the BSA.[151] Indeed, bankers have long suspected that law enforcement agents valued CTR because they helped detect crime, but not because they deter it.[152] Despite these criticisms, CTR remains very useful in influencing criminals' behaviour towards structuring their transactions, which automatically gives rise to suspicion and filing of SAR. As we shall see in the next subsection, according to FinCEN data, criminals do resort to structuring resulting in SAR filings, which leads to law enforcement action.

Although law enforcement agents have responded to this criticism by using technology to manage the CTR data, that does not support the detection rationale because CTR filing remains high.[153] In a bid to make CTR more useful, Congress has once contemplated tripling the threshold, but the GAO recommended granting power to the FIs to exempt certain customers from the reporting requirements.[154]

Since as many as seventy-five per cent of those reports filed in 2006 were related to innocent business transactions, exemption remains a viable option to reduce the number of innocent transactions that may fall within the ambit of the reporting statute.[155] Subsequently, banks[156] were allowed to exempt some specified customers from complying with the CTR requirements on limited currency transactions recognised by law.[157] The law requires FIs to file FinCEN DOEP form 110 for each client they

[151] Linn (n 67) 410
[152] ibid 429
[153] FinCEN, Fiscal Year 2011 Annual Report
[154] GAO Report (n 140) 7-10
[155] Parrish (n 143)
[156] As defined by 31CFR 1010.100(d)
[157] Money Laundering Suppression Act of 1994 Pub L. No. 103-325, title IV, 108 Stat. 2243 (1994) (exemption provision of the 1994 Act were codified as 31 USC s 5313(d) (mandatory exemptions) and (e) (discretionary exemptions)); also see 31 CFR s 103.22 (a) (2005) (now 31 CFR s 1020.315

exempt, documenting the client's eligibility, while review and verification of eligibility must be carried out at least once each year.[158]

However, the lengthy list of "exempt person" (which includes a department or agency of the US or any State or any political subdivision of a State) did not draw a clear distinction between those that are eligible for exemption and those that are not, leaving the exemption clause open to abuse.[159] In one instance, customs officers, bank examiners, and even prosecutors helplessly examined exemption list full of ineligible customers.[160]

United States v First National Bank of Boston[161] illustrated that there are guidelines governing exemption. However, as demonstrated by Boston, collaboration between banks and criminals would undermine governments effort at reducing the volume of CTR, which is aimed at making CTR more efficient in disrupting ML.[162] On the other hand, uncertainty about required documentation and some regulatory requirements, concerns of BSA noncompliance, and biennial renewals may unnecessarily discourage FIs from granting exemptions to eligible customers. Thus, increasing the volume of CTRs, which undermines the effectiveness of the AML law in disrupting ML.[163]

This and other examples suggest that the utility of CTR is to provide a trail rather than to detect ML scheme from the onset.[164] To make the US AML reporting statute more effective in detecting and disrupting ML it is submitted that the volume of CTR filing

[158] GAO Report (n 140) 2
[159] 31 USC s 5313(d)-(f) (2012); 31 CFR s 1010.315 (exempting non-bank FIs from filing reports otherwise required by s 1010.311 with respect to a transaction in currency between the institution and a commercial bank); 31 CFR s 1020.315 (formerly 31 CFR s 103.22(d)(2))
[160] Villa (n 104) 494
[161] CR 85 52-MA (D. Mass Feb 7, 1985)
[162] ibid (Bank of Boston granted an exemption to a criminal group from filing CTR, which allows the group to deposit USD20 bills or less in the bank and later made withdrawals in a block of USD100 bills and shipped the money out of the US)
[163] GAO Report (n 140) 38-48
[164] Byrne (n 76) 820

should be reduced significantly. 31 Code of Federal Regulation should be amended to remove section 1010.313 that requires FIs to report aggregated multiple transactions as CTR. Instead of filing those aggregated transactions as CTR, only SAR, which is more of assistance to the law enforcement, should be filed.[165]

2.3.3.2 SUSPICIOUS ACTIVITY REPORTING

A SAR is a piece of information which alerts law enforcement that certain financial activity of a client is in some way suspicious and might indicate ML or TF.[166] Title 31 U.S.C. section 5318(g) empowered the Secretary of the Treasury to issue a regulation requiring FIs and those acting on their behalf to report any suspicious transaction.

Consequently, banks, casinos and cards clubs, brokers/dealers in financial securities, mutual funds, insurance companies, futures commission merchants and introducing brokers in commodities, and loan and finance companies are required to file SAR where a transaction involves at least USD5000.[167] Furthermore, MSBs have an obligation to file SAR on transactions involving at least USD2000.[168] At the moment, dealers in precious metals, gems and jewels, and operators of credit card system are not required to file SAR[169] except in a limited circumstances.[170] As reliance is put on suspicious activity to trigger SAR, proceeds of crime can easily be laundered, as until now, some financial transactions that involve proceeds of crime appear normal and legitimate.[171]

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[165] Philip J Ruce, 'The Bank Secrecy Act: Considerations for Continuing Banking Relationships After the Filing of a Suspicious Activity Report' [2012] 30 Quinnipiac Law Review 43, 50; George A Lynden, 'International Money Laundering and Terrorist Financing Act 2001: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift' [2003] 8 Fordham Journal of Corporate and Financial Law 201, 208; also see GAO Report (n 140) 28

[166] National Crime Agency, Suspicious Activity Annual Report [2014] 42

[167] 31 CFR ss 1020.320; 1021.320; 1023.320; 1024.320; 1025.320; 1026.320; 1029.320 (2012)

[168] 31 CFR ss 1022.320 (2012)

[169] 31 CFR ss 1027.320 and 1028.320

[170] For example see 31 CFR s 1020.320(2)(i)-(iii) (2012)

[171] This has been a problem that has been lingering since the early days of the BSA 1970; please see The President's Commission on Organized Crime, 'Interim Report to The President and the Attorney General,

A SAR must contain certain informations, such as the contact details of the FI filing the report, the subject matter of the report, detailed description of the activity that gave rise to the suspicion, and the person who witness the suspicious activity, if any.[172] Some regulators may require a SAR to contain additional information regarding the individuals conducting the transactions, including their names, address, telephone numbers, account details, social security number, occupation and date of birth.[173]

To reinforce the utility of SAR, BSA provides a safe harbour against civil liability for FIs that voluntarily reported a suspicious transaction made by one of its customers.[174] BSA also created a "tipping off" offence to prevent FIs and their employees from alerting the person involved of an impending investigation.[175] Although the law is silent on whether FIs can proceed with suspicious transactions, which they have documented and reported,[176] continuing with such transactions could amount to a criminal offence of knowingly been involved in illicit financial transactions.[177]

On the other hand, stopping the transaction alerts the client of an impending investigation thereby tipping off the customer.[178] In this situation, while the law prohibits tipping off to prevent suspects from interfering with the investigation, the unintended consequence of stopping the transaction as a result of SAR, is to tip off a client whose suspicious transaction was reported. This is because he will automatically

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the Cash Connection: Organized Crime, Financial Institutions, and Money Laundering' (1984) 3; Sultzer (n 131) 158

[172] Mathew R. Hall, 'An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report', [1996] 84 Kentucky Law Journal 643, 656-57 citing suspicious Activity Report, 6 Bankers' Hotline 1 (1995)

[173] Ruce (n 165) 51 citing NAFCU, Suspicious Activity Reporting: In Compliance with the Banking Secrecy Act, 2 (Dec. 10, 2010)

[174] 31 USC s 5318 (g) (3) (2012); 12 USC s 3403 (c) (2006)

[175] 31 USC s 5318 (g)(2) (i)-(i)

[176] Both BSA and associated regulations are silent on this

[177] 18 USC s 1957; for analysis on this please see Ruce (n 165) 55-60

[178] Ruce (n 165) 55-60

be alerted of impending investigation once he notices that his transaction could not proceed.

Another defect of the reporting statute is that neither 31 USC s 5318 nor 31 CFR s1010.320 defined the term "suspicious transaction". Rather, FIs are advised to hinge their suspicion on some red flags.[179] Thus, FIs would rather file report on the slightest suspicion to avoid sanction.

Despite these limitations, SAR is the primary weapon in the hands of law enforcement.[180] FinCEN yearly SAR Activity Reviews indicate how SAR provides direct leads for investigators, and evidence against criminals and criminal activities, allowing law enforcement agents to disrupt ML.[181] Review of these reports shows how SARs filed led to an investigation and subsequent charges of ML, convictions, imprisonment, seizure, and forfeiture.

2.3.3.3 CURRENCY AND MONETARY INSTRUMENT REPORT (CMIR)

The BSA requires persons who physically transport, mail or ship currency or monetary instrument of more than USD10,000 within or across the borders of the United States to file FinCEN Form 105 with Customs and Border Protection.[182]

The person filing FinCEN Form 105 is required to provide information about the courier, the person on whose behalf the freighting of the money is conducted, the total amount of money or monetary instrument being freighted, and finally, to attest the truth

[179] For example see 31 CFR 1010.320(a)(2); NAFCU, 'Bank Secrecy Act: Red Flags of Money Laundering' [2016]
[180] Ruce (n 165) 50
[181] FinCEN, 'SAR Activity Review - Trends, Tips & Issues', BSA Advisory Group Issues 1-23 (2000-2013)
[182] 31 USC s 5316 (2012); 31 CFR s1010.340 (2012)

of the information so provided.[183] CMIR differs from other BSA reporting requirements, in that the law places a duty on the public as a whole to provide information when they are involved in a movement of currency or monetary instruments exceeding USD10,000 across US borders.[184]

2.3.3.4 GEOGRAPHIC TARGETED ORDERS

GTOs enable US law enforcement to use BSA reporting mechanisms to squeeze criminal activities. The BSA 1970 empowers the Secretary of the Treasury to issue GTOs either on his initiative or at the request of law enforcement agency, to impose obligations on covered businesses in a targeted area, suspected of high concentration of organised crime within the US, to comply with the new threshold requirement on covered transactions.[185]

As banks become more regulated and therefore less vulnerable to ML, criminals turn to institutions that are less regulated and therefore more vulnerable such as MSBs.[186] While turning away from banks, criminals may resort to structuring to evade reporting requirements. GTOs normally lower the CTR threshold and impose an obligation on the businesses targeted by the Order to report those transactions. Thus, GTOs are necessary for disrupting ML.

For example, in 1996 the Secretary of the Treasury issued GTO that required money transmitters along with their agents in New York to report currency transactions involving USD750 or more to Columbia.[187] That order was issued in response to a report from law enforcement suspecting that the money transmitters were laundering

[183] 31 USC s 5316(b) (2012)
[184] Linn (n 67) 417
[185] 31 USC s 5326(a); 31 CFR s1010.370; also cf (n 196)
[186] Henry B. Gonzalez, New and Continuing Challenges in the Fight Against Money Laundering [1997] 20(5) Fordham International Law Journal 1543, 1552-53
[187] ibid 1553

vast sums of money for drug cartels to Columbia.[188] The effect of that order was significant.[189]

Money transmission to Columbia dropped significantly as the drug cartel had to shift to bulk cash smuggling, resulting in the seizure of USD50 million at various ports of entry along the eastern seaboard.[190] Furthermore, some targeted remitters stopped remitting funds to Columbia all together while the rest are sending amounts significantly lower than before.[191] The orders also led to high-profile ML prosecutions.[192]

Although GTOs can be very effective in disrupting ML, its impact could be temporary. This is because the order does not last for a long time as no order could last more than 180 days unless renewed in accordance with the requirement of 31 USC section 5326(a) and CFR section 1010. 370(a). One of the implications of this is that if the criminals lie low within the 180 days period, there may be no justification for renewing the targeted order as there will be reduced laundering activity. Similarly, criminals might adopt other techniques such as resorting to bulk cash smuggling or conducting business outside the targeted area to evade the order.

Although non-disclosure provision operates to prevent tipping off clients of the subsisting order, criminals would get to know as law enforcement may not wait until the end of the life of the GTO to celebrate their success. Again, if a high-profile arrest is made within the period, criminals will get to know about the order, as the law enforcement would not be able to keep a suspect beyond the time limit set by the law

[188] Mariano-Florentino Cuellar, 'The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance' [2003] 93(3) The Journal of Criminal Law & Criminology 311, 357
[189] ibid; Gonzalez (n 186) 1553
[190] ibd 1553-54
[191] ibid 1554
[192] ibid

without charging him to court. Moreover, some businesses may opt to seize business altogether, and therefore information flow to the law enforcement agencies will also seize. Although this can be viewed as a success, it does not mean that ML activities are over in the targeted area, as criminals might just devise ways to circumvent the order.

However, overall, GTOs remain useful because they provide a real and timely intelligence for the disruption of ML and organised crime.[193] The underground economy is a big issue in the US[194] as most of the South American cartels in the US operate within the underground economy – the Peso-Dollar exchanges. Underground economy encompasses all sort of activities, legal and illegal which go unreported to government and consequently avoid being taxed.[195] Thus, the importance of the GTOs in providing credible intelligence.

Similarly, where criminals hide behind shell companies, GTOs provides credible intelligence of the people behind those companies and their activities. In February 2017, FinCEN issued a GTO that temporarily requires US title insurance companies to identify the natural persons behind shell companies used to pay "all cash" for a high-end residential real estate in six major metropolitan areas.[196] According to FinCEN Acting Director Jamal El-Hindi:

> These GTOs are producing valuable data that is assisting law enforcement and is serving to inform our future efforts to address money laundering in the real estate sector, the subject of money laundering and illicit financial flows involving the real estate sector is something that we have been taking on in steps

[193] cf (n 197)
[194] Nancy Zarate Byrd, 'Dirty Side of Domestic Work: An Underground Economy and the Exploitation of Undocumented Workers' [2010] 3 DePaul Journal of Social Justice 245
[195] Richard A. Epstein, 'Moral and Practical Dilemmas of an Underground Economy' [1994] 103 Yale Law Journal 2157
[196] FinCEN News Release, FinCEN Renews Real Estate "Geographic Targeting Orders" to Identify High-End Cash Buyers in Six Major Metropolitan Areas < https://www.fincen.gov/news/news-releases/fincen-renews-real-estate-geographic-targeting-orders-identify-high-end-cash> accessed 16 June 2017

> to ensure that we continue to build an efficient and effective regulatory approach.[197]

2.3.4 EXEMPTION FROM LIABILITY

One thing that can undermine the effectiveness of the US AML law is the tension between the obligation on the FIs to safeguard confidentiality regarding their clients' financial transactions, and the duty to report their clients' suspicious transactions. A client, whose activity is reported as suspicious to the authorities in compliance with the BSA reporting requirements, may view the SAR filing as an invasion of his privacy.[198]

While filing SAR can lead to litigation with the attendant consequences of damaging the relationship between FIs and their clients,[199] failure to file SAR creates a knowledge gap that can undermine the effectiveness of AML reporting statute. A safe harbour provision was later inserted into the BSA, granting FIs immunity from civil liability.[200]

Under 31 U.S.C. section 5318(g)(3), FIs incur no liability (under any federal, state or local government law or regulation) to a customer whose suspicious activity is reported, or for failure to notify the client of filing such report.[201] The Annunzio-Wylie Act 1992[202] extended this immunity. Thus, filing of SAR will not violate any contract or other legally enforceable agreement (including arbitration agreement).[203]

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[197] ibid
[198] Ruce (n 165) 53
[199] ibid
[200] 12 USC s 3403(c) (2011)
[201] Tipping up client is an offence, please see 31 USC s 5318(g)(2)(A) (2011); 31 CFR s 1020.320(e)(1)(i) (2011); 21 CFR s 21.11(k) (2011) (OCC's Regulations)
[202] 31 USC s 5318(g)(3)(A) (2012)
[203] ibid

2.3.5 SANCTIONS FOR FAILURE TO COMPLY WITH THE BSA

The aim of the sanctions is to punish persons (legal and natural) for the failure of AML compliance.[204] The sanctions take the form of criminal and civil money penalties, both of which can serve as tools for disrupting ML.[205] A natural person (such as bank employee) convicted of a willful violation of AML may risk fine ranging from USD250,000 to USD500,000 or imprisonment ranging from 5 to 10 years, or both fine and imprisonment.[206]

FIs may be liable to criminal fine up to USD1M for violation of this statute.[207] Furthermore, violation of BSA or its subsidiary legislations promulgated by Treasury Department also attracts civil money penalty, except for violation of 31 USC ss 5314 and 5315 or a regulation prescribed under these sections.[208] Civil money penalties to be imposed may depend on the type of violation, the period through which the violation continued, and whether it was wilful or negligent.[209] A bold step taken to control ML is that criminal and civil money penalties are not mutually exclusive.[210] Also, a power is given to the Secretary of the Treasury to delegate the authority to assess civil money penalties to federal banking regulatory agencies.[211]

Criminal fines and civil money penalties have been and are still being imposed on persons who violate BSA recordkeeping and reporting requirements.[212] However, as

[204] Michael Levi and Peter Reuter, 'Money Laundering' [2006] 34(1) Crime and Justice 289, 299
[205] 31 USC s 5322(a) (2011) (Except for s 5324 structuring offence (as it is covered under different statute) and violation of s 5315, or violation of regulations prescribed under these ss)
[206] 31 USC s 5322 (a)-(b)
[207] ibid (d)
[208] 31 USC s 5321 (2011)
[209] ibid (a)
[210] ibid s 5321(d)
[211] ibid s 5321(e); also, please see Stephens B Woodrough, 'Civil Money Penalties and the Bank Secrecy Act - A Hidden Limitation of Power' [2002] 119 Banking Law Journal 46, 48
[212] US v Delta National Bank and Trust Company (2003); FinCEN, In the Matter of JPMorgan Chase Bank Number 2014-1; FinCEN, In the matter of HSBC Bank USA, NA 2012-2; FinCEN, In the matter of TD Bank, NA 2013-01; FinCEN, In the matter of Saddle River Valley Bank, NJ Number 2013-02; see

will be seen in Chapter 5, the penalties do not deter future violations of the US AML statutes. Having said this, the BSA criminal and civil penalties are not without side effects. Although the sanctions are aimed at strengthening the AML regime, they compound the over-reporting problem.[213]

As mentioned above, the alleged wrongdoing these sanctions are aimed at punishing is failure of compliance – not the offence of ML or TF. Apart from failure of compliance, another alleged wrongdoing that attracts sanction is the violation of economic sanctions imposed by, for example, the US or UN against certain countries such as Iran.[214] However, there are concern about the proportionality of the sanctions.

The questions here is who is being punished when a sanction is imposed say for example, on a bank for compliance failure or for violation of economic sanction. At first sight, it will appear as if the bank bears the brunt. Obviously, sanctions can have so many effects on banks, which include confidence crises because the public perception could tilt towards believing that the banks are being sanctioned because they facilitate ML or TF. An example is where the Guardian reported that "British banks handled vast sums of laundered Russian money".[215]

However, the bulk of the effects of the sanctions imposed on FIs could pass to the depositors, employees, investors, and the society at large for no fault of their own. The depositors could lose their deposit where the sanction is so harsh that it caused the bank

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Robert S. Pasley, 'Recent Developments in Bank Secrecy Act Enforcement' [2005] 9 North Carolina Banking Institute 61, 86

[213] Gouvin (n 99) 973

[214] For example, under "ECI" programme, UBS laundered huge amount of US banknotes to Cuba, Iran, Iraq, Libya and former Yugoslavia (now Serbia and Montenegro) in violation of economic sanctions imposed on these countries by OFAC

[215] Luke Harding and others, 'British Banks Handled Vast Sums of Laundered Russian Money' *The Guardian*, (London 20 March 2017) <https://www.theguardian.com/world/2017/mar/20/british-banks-handled-vast-sums-of-laundered-russian-money?CMP=share_btn_tw> accessed 5 June 2017

to crash. Where the bank survives the sanctions as they often do, the bulk can be passed onto depositors for example through charges.

Similarly, banks could shed their workforce, especially where the sanction bites hard. Also, investors may lose out as more often share prices drop as investor-confidence reduces on the announcement of sanctions. Finally, sanctions on bank could have direct effect on the society. For example, due to the effect of sanctions banks will pay less taxes, may close certain lines of business or reduce their operations.

2.3.6 EARLY CHALLENGES

The initial challenges BSA 1970 faced demonstrate how ineffective the statute has been right from its inception as the major legislative assault against ML. While bankers failed to comply with the Act's requirements from the beginning, professional launderers circumvented the BSA recordkeeping and reporting requirements by structuring their transactions below the threshold.

2.3.6.1 CONSTITUTIONALITY OF THE BSA REQUIREMENTS

Initially, bankers perceived BSA reporting and recordkeeping requirement as unconstitutional. In **Stark v Connally**,[216] a bank, its customer, Bank Association, and ACLU sought to test the constitutionality of the Act.[217] The plaintiffs' main question to the Court was whether domestic reporting requirements of the Act amount to unreasonable search, invading the privacy of the defendant and therefore a violation of the Fourth Amendment. [218] While the District Court held domestic reporting

[216] 347 F. Supp. 1242 (ND Cal 1972)
[217] James K LeValley and John S Lancy, 'The IRS Summons and the Duty of Confidentiality: a Hobson's Choice for Bankers' [1972] 89 The Banking Law Journal 979, 980
[218] Stark v Connally, 347 F. Supp 1246 (ND Cal 1972)

requirements of the Act unconstitutional, it upheld the legitimatimacy of both the domestic recordkeeping, and the foreign recordkeeping and reporting requirements.[219]

Two years later, part of **Stark** was overturned by the Supreme Court in **California Banker Association v Shultz,** upholding the constitutionality of the domestic reporting requirements, foreclosing any argument that the domestic reporting requirements of the BSA 1970 and its associated regulations violate the Fourth Amendment.[220] Despite this ruling, banks were reluctant to comply with the reporting regime,[221] on the belief that the main targets of BSA were drug barons.[222] However, this perception changed following the guilty plea by the Bank of Boston, resulting in an upsurge in filing of BSA reports.[223]

Nevertheless, those massive filings of CTRs had detrimental effect on the effectiveness of the reporting statute. In one instance, the banking community accused law enforcement agencies with not using the data actively due to the large volume of CTR filing.[224] Similarly, in **Stark**, although the Court held the recordkeeping requirements constitutional, it strongly suggested that, authorities should require fewer documents to be kept by banks.[225] The Court's reasoning was based on the premise that too many records would obscure the most relevant information, and that can lead to arbitrary

[219] 347 F. Supp. 1242 (ND Cal 1972)
[220] California Bankers Association v. Shultz, 416 U.S. 21 (1974)
[221] Sarah N Welling, 'Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions' [1989] 41 Fla L Rev 287, 295
[222] Villa (n 104) 493
[223] Jonathan Rush, 'Hue and Cry in the Counting-House: Some Observations on the Bank Secrecy Act' [1988] 37 Catholic University Law Review 465, 474
[224] Linn (n 67) 429
[225] Stark v Connally, 347 F. Supp 1250-51

application of the Act.[226] In the end government enacted a law requiring the Treasury Department to take measures to reduce the number of reports by thirty per cent.[227]

2.3.6.2 STRUCTURING

The primary technique that almost rendered BSA AML statute ineffective in disrupting ML was structuring. Structuring simply refers to a method adopted by launderers, which entails splitting a cash transaction (which if conducted as a single transaction would trigger BSA recordkeeping and reporting requirements) into multiple transactions below the USD10,000 threshold to avoid recordkeeping and reporting requirements.[228]

Structuring is mostly accomplished by distributing illicit funds to several couriers popularly known as "smurfs" who then make multiple deposits below the threshold, or convert the funds into other forms of negotiable instruments such as money orders or travellers' cheques with a view to avoiding BSA reporting requirements.[229]

Structuring can be classified as "perfect" and "imperfect". Perfect structuring occurs where transaction is structured in such a way that it does not place FIs under any obligation to file CTR. [230] In contrast, "imperfect structuring" occurs when multiple financial transactions below the threshold are conducted at one or more FIs, but nevertheless, when aggregated, trigger the duty to file a CTR.[231]

Because professional launderers would rather distance themselves from large cash transactions, they resort to structuring as a technique to evade the reporting

[226] Case Comments, 'Bank Secrecy Act-Threat to First and Fourth Amendment Rights' [1974] 27 Rutgers Law Review 176, 182
[227] Linn (n 67) 429
[228]Welling (n 221) 288
[229]Lynden (n 165) 206
[230] Linn (n 67) 439
[231] Ibid 488

requirements.[232] Large cash transactions are legal but failure to comply with the BSA recordkeeping and reporting requirements is a crime.[233] Originally, there was no provision in the BSA that prohibited structuring and therefore prosecuting offenders was difficult for the government to do.[234]

In one case the prosecution argued that bank customer was an FI, who then has the duty to comply with the BSA requirements.[235] In another, the prosecution argued that those who structure their transactions defraud government of reports to which it is entitled to.[236] The more common prosecution theory government used against violators of the BSA was that structuring aids and abets an FI to fail to comply with the BSA requirements.[237]

It was however argued that the third prosecution theory strained the aider and abettor liability and thus, it splits the Circuits.[238] **United States v Tobon-Builes 706 F.2d 1092 (11th Circuit 1983)** and **United States v Anzalone 766 F.2d 676 (1st Circuit 1985)** are the two major cases that caused the split. In Toban-Builes, the Court of Appeal saw merit in 18 U.S.C. sections 2 and 1001 and adopted it as a weapon against defendants

[232] Rush (n 223) 474
[233] Welling (n 221) 294
[234] Linn (n 67) 437
[235] United States v Mouzin, 785 F.2d 682, 689-90 (9th Circuit 1986); United States v Rigdon, 874 F.2d 774, 777 (11th Circuit 1989); United States v Schimidt, 947 F.2d 362, 370-71 (9th Circuit 1991)
[236] United States v Nersesian, 824 F.2d 1294, 1309-10 (2d Circuit 1987); United States v Winfield, 997 F.2d 1076, 1082-83 (4th Circuit 1993)
[237] United States v Tobon-Builes, 706 F.2d 1092, 1096-1101 (11th Circuit 1983) (affirming conviction under 18 USC ss 2, 1001); United States v Anzalone, 766 F.2d 676, 682-83 (1st Circuit 1985) (reversing conviction under 18 USC ss 2, 1001); United States v Heyman, 794 F.2d 788, 790-93 (2d Circuit 1986) (affirming conviction under 18 USC ss 2, 1001); United States v Lafaurie, 833 F.2d 1468, 1471 (11th Circuit 1987) (affirming conviction)
[238] Linn (n 67) 437

who through structuring caused or attempted to cause FIs not to comply with the BSA requirements where they ought to have.[239]

In contrast, Anzalone line of argument asserted that, stretching sections 2 and 1001 to prosecute defendants for structuring means failure to give fair notice to the public what the statute forbids.[240] The main principle of law Anzalone tries to establish was that, " a defendant cannot be prosecuted for aiding and abetting violation of the CTR reporting requirement where in fact the FI owes no duty to file CTR.[241] This means that, a defendant who conducts only one transaction below the threshold with the purpose of avoiding CTR filing, cannot be convicted of aiding and abetting even though he was the one who caused the FI not to be under any obligation to file CTR.[242]

As the law proves to be ineffective, government responded to these challenge from two fronts. While the Secretary of the Treasury issued a regulation to address the problem of aggregation,[243] MLCA 1986 enacted 31 USC section 5324 into the BSA 1970 to addressed the issue of structuring.[244] The government sought to resolve the problem posed by "imperfect" structuring by making it an offence to cause or attempt to cause non-filing of the report required by the BSA.[245]

Secondly, "perfect" structuring was confronted directly by prohibiting structuring transactions without regard to whether an individual transaction has, itself, falls under the scope of the reporting statute.[246] Also, the deliberate misleading of FIs to file the

[239] Tobon-Builes, 706 F.2d 1092, 1100-01; United Sates v Massa, 740 F.2d 629, 645 (8th Circuit 1984); United States v Konefal, 566 F. Supp. 698, 701 (NDNY 1983)
[240] Anzalone, 766 F.2d 676, 680-83; United Sates v Denemark, 779 F.2d 1559, 1562-64 (11th Circuit 1986)
[241] Anzalone, 766 F.2d 676, 679-83
[242] Linn (n 67) 439
[243] Welling (n 221) 299
[244] 31 USC s 5324 (2011)
[245] ibid s 5324(a)(1) (2011)
[246] ibid s 5324(a)(3) (2011)

inaccurate report was prohibited.[247] A defendant convicted of structuring is liable to a fine in accordance with title18 U.S.C., or imprisonment for up to 5 years.[248]

Although section 5324 of the BSA was meant to resolve the problem posed by structuring, it created fresh problems.[249] A major flaw of section 5324 is the uncertainty about the *mens rea* required to prove structuring offence.[250] The lack of clarity as to what *mens rea* elements the prosecution must prove to convict the defendant under section 5322 for "willful violation" of section 5324 led to split among the circuits.[251] While ten circuits held that knowledge that structuring is illegal was not an element of the *mens rea* requirement,[252] the first circuit held that actual knowledge is an element of the *mens rea* and must be proven to secure conviction for structuring.[253]

This uncertainty was however laid to rest in **United States v Ratzlaf,**[254] where the Supreme Court held that, "willfully" as used in subsection 5324(a), requires proof that "defendant acted with knowledge that his conduct was unlawful."[255] Ratzlaf did not sit well with an established principle of law, which has grown up around a maxim:

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[247] ibid s 5324(a)(2) (2011)
[248] ibid s 5324(d)
[249] Joseph B Mays, 'The Mens Rea Requirement in the Money Laundering Statute' [1993] 44 Alabama Law Review 725, 731
[250] ibid
[251] United States v Scanio 900 F.2d 485 (2d Circuit 1990) (the Court held that the defendant needs not to know that structuring is unlawful, but that the bank is obliged to file CTR and intended to misled the bank); Cheek v United States, 498 US 192, 201 (1991) (the defendant must know that his conduct is actually unlawful, not just the conduct falls within the ambit of the statute)
[252] United States v. Scanio, 900 F.2d 485, 489-92 (2d Cir. 1990); United States v. Shirk, 981 F.2d 1382, 1389-92 (3d Cir. 1992); United States v. Rogers, 962 F.2d 342, 343-45 (4th Cir. 1992); United States v. Beaumont, 972 F.2d 91, 93-95 (5th Cir. 1992); United States v. Baydoun, 984 F.2d 175, 180 (6th Cir. 1993); United States v. Jackson, 983 F.2d 757, 767 (7th Cir. 1993); United States v. Gibbons, 968 F.2d 639, 643-45 (8th Cir. 1992); United States v. Ratzlaf, 976 F.2d 1280 (9th Cir. 1992); United States v. Dashney, 937 F.2d 532, 537-40 (10th Cir. 1991); United States v. Brown, 954 F.2d 1563, 1567-69 (11th Cir. 1992)
[253] United States v. Aversa, 984 F.2d 493, 498 (1st Cir. 1993)
[254] 510 US 135, 137 (1994)
[255] Ratzlaf v United States, 510 US 135, 137 (1994)

"ignorance of the law is no excuse".[256] However, the difference is that structuring is a regulatory offence, not a traditional criminal offence. Thus, the question is whether in establishing the *mens rea* requirement of the offence, an exception to this rule should apply, and therefore the prosecution must prove that the defendant knew that structuring is illegal.

If exceptions to this common law rule apply to a limited number of criminal law cases,[257] why not to regulatory cases like structuring? It has been remarked that as the criminal law is increasingly used to regulate ordinary and unremarkable conduct, the danger that criminal law sanctions will apply in an arbitrary manner to un-blameworthy people, who have had no notice of possible criminal liability, thus, had no chance to conform their behaviours to law increases significantly.[258] Accordingly, the general assumption that the defendant knew the law is not always fair.[259]

Before Ratzlaf there were cases, such as **Liparota v. the United States**[260] and **Cheek v. the United States.**[261] These two cases involve food stamp duty and tax offences respectively, which are not strictly historical common law criminal offences. In Liparota, the US Supreme Court departed from the principle that ignorance of the law is not a defence. In deciding Liparota, the Supreme Court (in what appears to be approving a dictum in **United States v Yermian 468 U.S. 63 (1984)**) was reluctant to construe the

[256] It is well established that ignorance of the law is not a defense – Reynolds v. United States, 98 U.S. 145, 167 (1879); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910); for analysis on the origin of the maxim "ignorance of the law is no excuse" and how it developed under the common law please see: Edwin R Keedy, 'Ignorance and Mistake in the Criminal Law' [1908] 22(2) Harvard Law Review
[257] Richard E. Kohler, 'Ignorance or Mistake of Law as a Defense in a Criminal Cases' [1936] 40 Dickinson Law Review 113, 119-20
[258] Bruce R Grace, 'Ignorance of the Law as an Excuse' [1986] 86 Columbia Law Review 1392, 1416
[259] For analysis on ignorance of the law defence please see Paul H Robinson and Jane A Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' [1983] 35 Stanford Law Review 681, 725-32; Laura A Miller and Andrea B Tuwiner, 'Ignorance of the Law can be an excuse' [1996] 31(3) The Procurement Lawyer 27
[260] 471 U.S. 419, 441 (1985) (White, J. dissenting)
[261] 498 U.S. 192, 199 (1991)

statute in a manner that would criminalise a broad range of apparently innocent conduct.[262]

It is not surprising that Ratzlaf followed the direction of these two cases since structuring is also a regulatory offence.[263] However, unlike tax evasion and food stamp duty crimes, structuring with the intention to circumvent BSA 1970 reporting statute is a much more serious crime. This is because it facilitates the free flow of proceeds of crime, and also causes FIs to fail to file reports that could be useful in disrupting ML. An actor who causes another to engage in a criminal conduct should be treated as having committed the offence.[264] To remedy this deficit, Congress overruled Ratzlaf by amending 31 USC sections 5322 and 5324, eliminating the need for the prosecution to prove that the defendant knew structuring was a crime.[265]

This analysis shows how defective the BSA recordkeeping and reporting statute has been in disrupting ML. It also shows how the law was continuously adjusted to remedy the defects. However, still, the volume of reports allows ML to continue undetected. The FinCEN enforcement actions and the SAR annual reports suggest that the BSA reporting statutes do not disrupt ML scheme before it occurs. At best, the BSA reports help in the incident investigation following a successful ML scheme.

Having analysed the BSA recordkeeping and reporting requirements, this thesis will now analyse the substantive US AML law.

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[262] Grace (n 258) 1401

[263] Miller and Tuwiner (n 259) 27 (Citing Cheeck v United Sates 498 U.S. 192, 199 (1991), the authors said "the Court, essentially finding tax law beyond the ken of the average citizen, concluded that a defendant should be protected from conviction for a crime inadvertently committed")

[264] United States v Morse, 174 F.539 (2nd Circuit) (1909) (Where the Court held that it was immaterial whether Morse, vice-president of the National Bank of North America, himself recorded stock purchases as loans or whether he caused employees so to record the transactions in the ordinary course of business); for full analysis on causing another to engage in criminal conduct please see Robinson and Grall (n 259) 631-39

[265] Linn (n 67) 445

2.4 SUBSTANTIVE MONEY LAUNDERING LAW

Having analysed the US AML regulatory law in terms of its effiency in disrupting ML, the thesis continues with the analysis of the substantive US AML law. MLCA 1986[266] was enacted in response to the ineffectiveness of the BSA 1970 in combating ML.[267]

Before the enactment of the MLCA 1986, BSA was the primary US AML statute. However, ML was not a crime under the BSA. Thus, a launderer who complied with recordkeeping and reporting requirements committed no offence. MLCA 1986 brought two major changes – it prohibited structuring and it criminalised ML. Structuring has already been analysed above. The primary focus of this section is the criminalisation of ML. This section starts with a brief overview of 18 USC sections 1956 and 1957. It then analyses the elements of ML offence, which must be proven to convict a defendant.

2.4.1 OVERVIEW OF MONEY LAUNDERING OFFENCES UNDER MLCA 1986

18 USC sections 1956 and 1957 are the US premier statutes that criminalised ML.[268] They extended criminal culpability to anyone involved in ML in any of its various forms.[269] Furthermore, the statutes apply extra-territorially where a US citizen is

[266] MLCA 1986, Pub L No 99-570 s (A), 100 Stat 3207, 3207-22 (1986) (codified as amended at 18 USC ss 1956-1957 (2006)); 31 USC s 5324 (2006)

[267] The President's Commission on Organized Crime, 'Interim Report to the President and the Attorney General, 'The Cash Connection: Organised Crime, Financial Institutions, and Money Laundering' [1983] (The President's Commission on Organized Crime)

[268] Peter J Kacarab, 'An Indepth Analysis of the New Money Laundering Statute' [1991] 8 Akron Tax Journal 1, 2

[269] 18 USC s 1956 and 1957; United States v Johnson 971 F.2d 562 (10th Circuit 1992) at 568-69 the court states that "The Act appears to be part of an effort to criminalise the conduct of those third persons – bankers, brokers, real estate agents, auto dealer and others – who have aided drug dealers by allowing them to dispose of the profits of drug activity, yet whose conduct has not been considered criminal under traditional conspiracy law"; see also Kelly N Carpenter, 'Eighth Survey of White Collar Crime: Money Laundering' [1993] 30 American Criminal Law review 813, 814

involved, or where the offence was committed in part in the US.[270] However, these statutes have been criticised for not providing a statutory defence to the ML offences.[271]

18 USC section 1956, which deals with the laundering of monetary instruments, created the following three offences: "transaction" ML, "transportation" ML, and "government sting operations" ML.[272] In contrast, section 1957 created only one offence – engaging in a transaction involving property exceeding USD10,000 knowing that the property was derived from a SUA.[273] However, as will be seen, section 1957 can easily be violated, because (unlike section 1956 offences) only "knowledge" rather than "intent" is required to satisfy the *mens rea* requirement of section 1957.

2.4.1.1 AN OVERVIEW OF SECTIONS 1956 AND 1957 OFFENCES

As mentioned above, while section 1956 created three offences, section 1957 created only one offence. For sections 1956 and 1957 offences, the term "SUA" is wide ranging, covering almost all criminal acts through which financial benefit can be obtained.[274]

2.4.1.1.1 TRANSACTION MONEY LAUNDERING

The transaction ML offence criminalised four types of activity using illegally obtained property.[275] Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, commits an offence if he

[270] 18 USC s1956(f) and 1957(d)
[271] United States v Jackson, 983 F.2d 757, 764-65 (7th Circuit 1993) the court rejected the challenge that s1956 is unconstitutionally vague; Awan 966 F.2d at 1424 where it was held that the knowledge requirement that proceeds were driven from some form of unlawful activity is clearly defined by s1956(c)(1) as the proceeds from commission of acts constituting any state or federal felony; in United States v Monaco, 194 F.3d 381, 385-86 (2d Circuit 1999) it was held that "proceeds" is a commonly understood word and therefore the defence of vagueness failed; also see Pancho Nagel and Christopher Wieman, Money Laundering' [2015] 52 American Criminal Law Review 1357, 1379
[272] 18 USC s 1956 (2012)
[273] 18 USC 1956(c)(7) defined the term "SUA" using a long list of crimes. The long list of SUAs is one of the weaknesses of the MLCA 1986. Please also see Carolyn L Hart, 'Money Laundering' [2014] 51 American Criminal Law Review 1449
[274] 18 USC s 1956(c)(7)
[275] Lynden (n 165) 210

conducts a financial transaction with that property with intent to (i) engage in financial transactions intended to promote SUA;[276] (ii) evade tax;[277] (iii) conduct a financial transaction designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of criminal activity;[278] and (iv) engage in a transaction with the purpose of avoiding a state or federal reporting requirement.[279] This offence can be committed by simply attempting to commit the offence itself.

2.4.1.1.2 TRANSPORTATION MONEY LAUNDERING

Whoever becomes involved in the following three activities commits an offence: (i) transportation, transmission, or transfer of funds from or into the United States (directly or via another country) with the intent to promote the carrying on of a SUA;[280] (ii) transportation, transmission, or transfer of the proceeds of some form of unlawful activities for the purpose of concealing or disguising the nature, location, sources, ownership or control of the proceeds of crime;[281] and (iii) transportation, transmission, or transfer of funds (however obtained) to avoid a transaction reporting requirement under a State or Federal law.[282]

The wording of section 1956(a)(2) suggests that this offence is also committed where a laundering scheme originates from and ends in the US, but the asset was channelled through another jurisdiction as a transit. An attempt to violate this section is also a crime.

[276] 18 USC s 1956 (a)(1)(A)(i) (2012)
[277] ibid s 1956 (a)(1)(A)(ii) (2012)
[278] ibid s 1956 (a)(1)(B)(i) (2012)
[279] ibid s 1956 (a)(1)(B)(ii) (2012)
[280] ibid s 1956 (a)(2)(A) (2012)
[281] ibid s 1956 (a)(2)(B)(i) (2012)
[282] ibid s 1956 (a)(2)(B)(ii) (2012)

2.4.1.1.3 GOVERNMENT STING MONEY LAUNDERING

The last limb of section 1956 addressed ML transactions that occur as part of government sting operation.[283] The aim is to allow law enforcement agents to investigate crimes through a sting operation.[284] The moment a property is represented to be the proceeds of crime, then it becomes unlawful to deal with such assets.[285] A financial transaction with the intent to do the following is an offence: (i) promote a SUA;[286] (ii) conceal or disguise the nature, location, source, ownership, or control of funds;[287] or (iii) avoid a state or federal transaction reporting requirement.[288]

Like the other two limbs, this offence can be committed by attempting to commit the crime. Originally subsection (a)(3) was not part of section 1956. It was inserted following the passage of the Anti-Drug Abuse Act 1988, to allow the government to conduct sting operation which was hitherto prevented by the language of subsection (a)(1), which requires that the property involved in the transaction must to, "in fact", be a proceed of SUA.[289]

2.4.1.1.4 DEALING IN CRIMINAL PROPERTY

18 USC section 1957 made it a crime, to knowingly engage or attempt to engage in a monetary transaction in criminally derived property of a value greater than USD10,000 and is derived from a SUA.[290] 18 U.S.C. section 1957 differs from section 1956 in many respects, but the two major differences are worth mentioning. First, unlike section 1956, "intent" is not a *mens rea* requirement under section 1957.

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[283] ibid s 1956 (a)(3) (2012)
[284] Operation Greenback, though predates 18 USC s 1956(a)(3) is an example of a successful sting operation that led law enforcement to the heart of criminal activity; please see Lynden (n 165) 210
[285] Lynden (n 165) 210
[286] 18 USC s 1956 (a)(3)(A) (2012)
[287] ibid s 1956 (a)(B) (2012)
[288] ibid s 1956 (a)(C) (2012)
[289] Kacarab (n 268), 35
[290] 18 USC s 1957 (a) (2012)

The offence is simply committed once the defendant knew that the property involved in the transaction represents the proceeds of some unlawful activity.[291] Intention to conceal illicit fund or further criminal activity is not an element of section 1957, and it does not matter whether the recipient exchanges or launders the funds.[292] Because an intention is not required to establish section 1957 offence, a person who engages in an apparently innocent transaction can be caught by section 1957,[293] though that was not the intention of the Congress.[294]

Secondly, section 1957 was enacted more broadly to criminalise the knowing acceptance of illicit property.[295] A mere interaction with a criminal is enough to bring section 1957 into operation.[296] In **United States v Johnson,**[297] the Court of Appeal analysed the scope of section 1957. Johnson shows that dealing in property knowing that the property represents proceeds of crime triggers section 1957.[298] It does not matter whether the property is purely the proceeds of crime or it was comingled with other properties obtained legally.[299]

Despite the advantages of section 1957 over section 1956 in terms of scope and *mens rea* requirement, section 1957 has a significant limitation. Section 1957 comes into operation only when the defendant deals in the unlawfully obtained property. This is because ML is a conduct that follows 'in time' the underlying crime.[300] In a fraud case for example, where a victim wired money into a defendant's bank account, section 1957

[291] ibid 1957(c); please see United States v. Lovett, 964 F.2d 1029, 1038-39 (10th Cir.)
[292] Lynden (n 165) 211
[293] United States v Pianza, 421 F3d 707, 725 (8th Circuit 2005); Elizabeth Johnson and Larry Thompson, 'Money Laundering: Business Beware' [1993] 44 Alabama Law Review 703, 719
[294] The US Senate, Money Laundering Legislation, Hearing of the Committee on Judiciary 99-540 (1985)
[295] Sultzer (n 131) 159-60
[296] ibid 160
[297] 971 F.2d 562 (10th Circuit 1992)
[298] ibid 566-70
[299] ibid 570
[300] ibid 569

may not apply, unless the defendant deals in that money. Thus, the prosecution may not be able to prosecute the defendant under section 1957 despite its broad and easy-to-prove *mens rea*.

2.4.1.1.5 PENALTIES FOR VIOLATING SECTIONS 1956 AND 1957

Civil and criminal penalties are available for violation of 18 USC sections 1956 and 1957. However, the quantum of the sanctions differs, depending on which section is violated.[301] While the maximum criminal penalties for the violation of section 1956 is twenty years imprisonment, a fine of USD10,000 or twice the value of the monetary instruments or funds laundered (whichever is greater), or both,[302] violation of section 1957 carries a maximum of ten years imprisonment, a fine, or both.[303]

The ten years jail term for the violation of section 1957 is a reflection of the fact that it is easier to prove section 1957 than 1956 offences, as 'intent' is not an element of section 1957 offence.[304] Civil money penalty of the value of the property, funds, or monetary instruments involved in the transaction or USD10,000 is also available for sections 1956 and 1957 violations.[305] In addition to civil and criminal sanctions, a defendant risks forfeiting the property involved in the ML offences contrary to 18 USC sections 1956 and 1957.[306]

Except imprisonment, these sanctions are very useful tools of disrupting ML. Imprisonment may not disrupt crimes because any vacuum left will be filled immediately and operation continues. In contrast, criminal fine, civil money penalty and

[301] Nagel and Wieman (n 271)
[302] ibid s 1956(a)(1) - (3) and (b) (2012)
[303] ibid s 1957(a), (b)(1)-(2) (2012)
[304] ibid s 1957 (c) (2012)
[305] ibid s 1956(b)(1)(A)-(B) (2012)
[306] ibid s 981(a)(1)(A) and 982(a)(1); please see Stefan D Cassella, *Asset Forfeiture Law in the United Sates* (2nd edn Juris 2013) 975-1012

forfeiture remove proceeds of crime from the criminal venture. As ML is the lifeblood of criminality, removing the money acquired through illegal activity disrupts ML.[307]

2.4.2 ELEMENTS COMMON TO 18 USC SECTIONS 1956 AND 1957 CRIMES

To establish the above ML offences, the prosecution must prove the following four common elements: knowledge; the existence of proceeds derived from a SUA; the existence of financial transactions; and intent. An in-depth analysis of these elements has already been done.[308] Thus, this thesis does not attempt to repeat that exercise. However, briefly discussing these four elements would help in appraising the ML offences under 18 USC sections 1956 and 1957.

2.4.2.1 KNOWLEDGE

The prosecution must prove that the defendant knew the transaction involves either illegally derived property[309] or a SUA.[310] However, this does not mean that prosecution must prove that the defendant knew the specific unlawful activity that generated the proceeds.[311] Rather, it is enough to prove that the defendant knew that the proceeds represent a form of unlawful activity.[312] Furthermore, the level of knowledge required varies with a particular offence. Although 'actual knowledge' is required,[313] it was held that 'wilful blindness' could satisfy the knowledge requirement.[314]

2.4.2.2 PROCEEDS DERIVED FROM A SPECIFIED ILLEGAL ACTIVITY

[307] The President's Commission on Organized Crime (n 267); also, please see analysis on forfeiture below
[308] For analysis of the 18 USC ss 1956 and 1957 offences please see Kacarab (n 268) 5-50; Sultzer (n 131) 159-168
[309] 18 USC s 1957(a) (2012); United States v Reiss 186 F.3d 149 (2d Circuit 1999)
[310] 18 USC s 1957(c) (2012); United States v Montague
[311] Sultzer (n 131) 161
[312] 18 USC s 1956(c)(1)
[313] United States v Sayakhom 186 F.3d 928, 943 (9th Circuit 1999)
[314] United States v Flores 454 F.3d 149, 155-56 (3d Circuit 2006)

The 1986 Act prohibits specific financial transactions that involve the SUA.[315] The SUA or the ML predicate offences comprise both domestic and foreign crimes for the purpose of ML prosecution.[316] The statute defined SUA using a long list of well over two hundred criminal activities, which includes drugs related offences, RICO violations, financial frauds, fraudulent bank entries, kidnapping, robbery, extortions, murder, destruction of property using explosives, and bribery of foreign officials.[317]

Except for 18 USC section 1956(a)(3), the prosecution must prove the source of the funds involved, to show that they were derived from a SUA. Thus, the prosecution cannot just adduce evidence that the defendant has no known source of legitimate income.[318] Due to lack of statutory definition, the term 'proceeds' became so ambiguous that eventually led to split among the Circuits.[319]

While the Seventh Circuit construed the term 'proceeds' to mean net income,[320] the Third Circuit held it to mean 'gross profits'.[321] This created uncertainty in determining which definition to adopt.[322] Four years after, the Supreme Court clarified the issue in the **United States v Santos,**[323] by adopting the Seventh Circuit construction of the term 'proceeds' to mean "net income".[324] The reasoning behind Santos was that where there

[315] 18 USC s 1956 (c)(7) (2012)
[316] Kathleen A Lacey and Barbara Crutchfield George, 'Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms' [2003] 23 Northwest Journal of International Law & Business 263, 292
[317] 18 USC s 1956(c)(7) (2012); please also see Mark Motivans, 'Money laundering Offenders, 1994-2001' [2003] Office of Justice Programs 1, 2, (stating that there are over 250 SUAs from which federal prosecutors can use to pursue ML cases)
[318] United Sates v Blackman, 897 F.2d 309, 317 (8th Circuit 1990)
[319] United States v Monaco 194 F3.d 381,386 (2d Circuit 1999); United v Santos 461 F.3d 886, 890-92 (2006); also see Cassella (n 306) 6-8
[320] United States v Scialabba, 82 F.3d 475 (7th Circuit 2002)
[321] United States v Grasso,
[322] Leslie A Dickson, 'Revisiting the "Merger Problem" in Money Laundering Prosecutions Post-Santos and the Fraud Enforcement and Recovery Act of 2009' [2014] 28 Notre Dame Journal of Law, Ethics and Public Policy 579, 585
[323] 128 S. Ct. 2020, 2022 (2008)
[324] William T Noonan Jr, 'Congress' Failure to Define Proceeds and the Fallout After United States v Santos' [2010] 36 New England Journal on Criminal and Civil Confinement 133, 137

is ambiguity in the criminal statute, the ambiguity is resolved in favour of the defendant.[325]

After Santos, the Circuits were confronted with increasing ML appeals on the interpretation of the term 'proceeds'. [326] While some followed Santos, some distinguished it and yet others remained in-between.[327] Finally, Congress while enacting **Fraud Enforcement and Recovery Act (FERA) 2009** defined 'Proceed' to mean 'gross receipts' not 'profit'.[328]

2.4.2.3 FINANCIAL TRANSACTION

The basis for sections 1956 and 1957 violation is the occurrence of financial transactions.[329] For the purpose of sections 1956 and 1957, the meaning of 'transaction' and 'financial transaction' has been extended very broadly.[330] Courts have interpreted 'financial transaction' broadly to accommodate a wide variety of transactions.[331] Thus, movement of cash by wire or other means,[332] exchange of money for cashier's cheque, and purchase of a vehicle with a cheque are considered to be financial transactions.[333]

Although the definition of financial transaction is not limited to transactions with the bank and non-bank FIs,[334] some movement of funds without more, may not qualify as a financial transaction. For example, transportation of proceeds of crime without a

[325] United States v Santos [325] 128 S. Ct. 2020, 2025 (2008) (applying the rule of lenity)
[326] Noonan Jr (n 324) 143
[327] Dickson (n 322) 590
[328] 18 USC s 1956(c)(9); 1957(f)(3) (2012)
[329] Hart (n 273) 1465
[330] 18 USC s 1956(c)(3)-(4); see United States v. Skinner (946 F.2d 176) (1991) (where the court upheld the conviction of ML though the transaction did not involve a bank; and also Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (highlighting the ability of congress to exercise its 'commerce clause power' to bring any activity within the definition of 'financial transaction')
[331] United States v Gotti 459 F.3d 296, 335-36 (2d Circuit 2006)
[332] United States v Herron 97 F.3d 234, 237 (8th Circuit 1996); United States v King 169 F.3d 1035 (6th Circuit 1999)
[333] United States v Bowman 235 F.3d 1113 (8th Circuit 2000) where it was held, moving money among safe deposit boxes is a ML transaction
[334] United States v Carrell 252 F.3d 1193 (11th Circuit 2001)

disposition would not constitute a financial transaction.[335] In contrast, transportation and delivery of drug proceeds taken together may qualify as a financial transaction.[336] To prove financial transaction element under section 1956, the elements of 'interstate commerce' and 'multiplicity of transaction' must be established.[337]

2.4.2.3.1 INTERSTATE COMMERCE

For the prosecution to prove that the transaction affected interstate commerce, they also need to satisfy the requirement of 'financial transaction' in section 1956.[338] Although this requirement is necessary to establish federal jurisdiction,[339] 'minimal effects' on interstate commerce suffice.[340] Because the interstate element is jurisdictional in nature, government burden of proving it is not heavy.[341] Thus, use of bank implicates interstate commerce.[342] However, inability to provide evidence linking the transaction to interstate commerce may spell doom to an ML prosecution.[343]

2.4.2.3.2 MULTIPLE TRANSACTION

The international nature of ML suggests that criminal proceeds may pass through many jurisdictions before reaching its destination.[344] Thus, professional money launderers might resort to multiple transactions, involving many FIs and non-FIs in various

[335] United States v Puig-infante 19 F.3d 929, 938 (5th Circuit 1994) (Disposition means 'placing elsewhere, a giving over to the care or possession of another')
[336] United States v Elso 422 F.3d 1305, 1310 (11th Circuit 2005); United States v Pitt 193 F.3d 751, 762 (3d Circuit)
[337] Hart (n 273) 1467
[338] 18 USC s 1956 (c)(4) (2012); please also see ibid
[339] United States v Bazuaye 240 F.3d 861, 863 (9th Circuit 2001)
[340] United States v Gotti 459 F.3d 296, 336 (2d Circuit 2006)
[341] United States v Leslie 103 F.3d 1093 (2nd Circuit 1997)
[342] United States v Oliveros 275 F.3d 1299 (11th Circuit 2001)
[343] United States v Edward 111 F. Supp 2d 1057, 1062 (ED Wis 2000)
[344] Hart (n 273) 1468

countries and 'states' (within the US) to evade detection.[345] Consequently, each transaction would constitute a separate offence or unit of prosecution.[346]

2.4.2.4 INTENT

Like any serious criminal offence, the prosecution must prove *mens rea* to secure a conviction. While 18 USC section 1956 prescribed intent as an element of ML offence, section 1957 requires the prosecution only to prove knowledge that the transaction involves the proceeds of criminal activity.[347] Section 1956 prescribed four different kinds of specified intentions[348] - showing any of these may secure a conviction for the section 1956 offences.[349] While proving any of the intentions may secure a conviction, alternative intentions can be alleged in a single indictment for section 1956 offences.[350]

In determining intent, and having satisfied all other elements, the Court may consider the nature of the transaction as evidence of the defendant's criminal intent to launder.[351] If the transaction does not involve the techniques commonly deployed by launderers, the Court is not likely to find that the defendant intends to disguise or conceal the transaction.[352] Thus, structuring implies intent to launder. It follows that SAR filed against structuring not only helps in detecting ML but also provides evidence of intent to launder.

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[345] ibid
[346] United States v Martin 933 F.2d 609 (8th Circuit 1991); United States v Smith 46 F.3d 1223 (1st Circuit 1995)
[347] 18 USC s 1957 (a) (2012)
[348] ibid s 1956 (a)(1)(A)-(B) (2012); (i) intent to promote the carrying on of specified unlawful activity; (ii) intent to engage in conduct constituting a violation of s 7201 or 7206 of the Internal Revenue Code of 1986; (iii) intent to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; and (iv) intent to avoid a transaction reporting requirement under State or Federal law
[349] Sultzer (n 131) 163-64
[350] United States v Navarro 145 F.3d 580, 589-90 (3d Circuit 1998)
[351] Hart (n 273) 1470
[352] United States v Demmitt 706 F.3d 665, 678-79 (5th Circuit 2012)

The doctrine of transferred intent has been raised in reference to the intent requirements of section 1956.[353] This doctrine, which provides a tool for the prosecution to convict on the intent of another – a defendant who did not design the scheme – has been challenged unsuccessfully. [354] However, some Courts have held that section 1956 does not incorporate transferred intent. One aspect of ML that presents problems to Court, in formulating 'intent' to support a criminal conviction, is "transport sting operation" allowed by section 1956 (a)(3)(C).[355] Here, it is enough to show that the defendant 'believed' rather than to show that he 'knew' the funds were the proceeds of a crime.

Section 1957 extends the scope of section 1956 to punish a defendant who handles other people's property worth more than USD10,000, which he knows are tainted.[356] To convict under section 1957 prosecution needs not prove that the transaction was executed with the intent to carry on the activity, nor with the intent to conceal the assets, nor that the transaction was conducted with the intent to avoid reporting requirements of the BSA 1970.[357]

Consequently, the four intentions specified under section 1956 are not a requirement for the section 1957 prosecution.[358] The primary requirement is the proof that the defendant "knowingly" engaged or attempted to engage in monetary transactions involving a criminal property of the value USD10,000 or more that was derived from the SUA.[359] Lack of the intention requirement made it easier to prove section 1957 offence than any of the three offences under section 1956. Thus, section 1957 offence carries a lesser criminal punishment of 10 years in prison.

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[353] Hart (n 273) 1461
[354] ibid 1471
[355] ibid 1470
[356] Sultzer (n 131) 167
[357] ibid
[358] ibid
[359] 18 USC s 1957(a)

2.4.3 THE IMPACT OF THE SUBSTANTIVE AML LAW

An important step in the US efforts to fight ML is the enactment of 18 USC section 1956 and 1957. These two statutes criminalise handling of the proceeds of crime to render the handler just as liable as the criminal himself.[360] The whole idea of criminalising ML was to attack criminal organisations and cripple their finances, through proactive investigation, forfeiture and stiffer penalties.[361]

As discussed above, while the elements of the offences are not difficult to prove, the statutes are designed so broadly to catch offenders in a variety of ways. The statutes' various statutory sanctions – in the form of civil penalties, criminal fine, and forfeiture – are necessary tools for disrupting ML.

These AML statutes are critical in disrupting ML in two significant ways. First, the sting operations ML of section 1956 allows law enforcement to investigate suspicion of ML proactively and that in most cases lead to law enforcement to the heart of the criminal group. In proving the offence of ML under section 1956(a)(3) (sting operation ML), the prosecution needs not to prove that the asset represented was derived from one of the SUAs.[362] The only requirement is that asset has been represented to the offender and he reasonably believed that the asset was derived from criminal activities.[363]

The codification of section 1956(a)(3) into 18 United States Code, was a deliberate attempt to provide a legal basis for investigating organised crime using sting operation,

[360] Kacarab (n 268) 3
[361] ibid
[362] Sultzer (n 131) 166
[363] United States v. Fuller, 974 F.2d 1474 (5th Cir. 1992)

and for prosecuting offenders.[364] However, to establish an ML offence under this subsection, the prosecution must prove "intent" as opposed to "knowledge".[365]

Secondly, the offence of "dealing in the proceeds of crime" (18 USC section 1957) is a very powerful tool against handlers of other people's wealth, without whom ML will not flourish. As discussed above, the only *mens rea* requirement for this offence is "knowledge" that the asset (more than USD10,000) involved in the transaction is derived from a SUA. This is a lower standard compared with the *mens rea* requirement of section 1956, and of course, knowledge is much easier to prove than intention.

Despite all these advantages, the AML statutes are reactive (just like the BSA reporting statute),[366] except 18 USC section 1956(a)(3) which authorises the government to investigate crimes through a sting operation. Though the sting operations enable the government to take on professional launderers, and to seize millions of dollars, there is no evidence to suggest that ML is reducing due to such operations.[367]

Such operations make professional launderers more professionals by being more cautious. Similarly, while those operations reveal little out of numerous laundering scheme involving several billions of dollars,[368] assets seizures resulting from those operations are minuscule compared to the estimated criminal assets laundered yearly in

[364] Kacarab (n 268) 35
[365] 18 USC s (a)(3)
[366] Sultzer (n 131) 220
[367] The US Senate, Money Laundering Legislation, Hearing of the Committee on Judiciary 99-540 (1985) 1, 78 (Stings like Operation Greenback and approximately 40 similar operations such as El Dorado, Swordfish and Bancoshares resulted in over 1330 indictments and a seizure of criminal assets worth above £116 million in about six years. These figures do not translate to enough success when compared to the estimated laundering in the US)
[368] The US Senate, Money Laundering Legislation, Hearing of the Committee on Judiciary 99-540 (1985)

the US. In fact, an investigation suggests that hundreds of billions of dollars are still being laundered.[369]

Having analysed the provisions and application of the US substantive AML law, this thesis now turns to examine the utility of federal asset forfeiture law in disrupting ML.

2.5 GENERAL ASSET FORFEITURE LAW

Simplistically, forfeiture means the loss or giving up something such as a property as a penalty for wrongdoing. It is a way of divesting criminals of their property without compensation.[370] It allows government to disrupt ML and fight against crimes.[371] This section argues that, forfeiture remains a vital tool that turns the tide against ML, terrorism and organised crime. This section starts with a brief history of forfeiture law. It then discusses the types of forfeiture, and concludes with the analysis of the utility of forfeiture in disrupting ML and other related crimes.

2.5.1 HISTORY OF FORFEITURE LAWS

Both criminal and civil forfeiture has a long history.[372] Early history shows the crown forfeit the inanimate objects (the deodand) irrespective of the guilt of the owner or possessor, on the ground that it was the property that committed the crime.[373] Laws were enacted as far back as late eighteenth century to allow the law enforcement to use

[369] House of Representative, Federal Government's Response to Money Laundering' Committee on Banking, Finance and Urban Affairs 103-40 (1993) 1
[370] Fletcher N. Baldwin, 'The Regulation of the Financing of Terrorism' in Barry Rider, *Research Handbook on International Financial Crime* (Edward Elgar 2015) 543
[371] Owen Sucoff, 'From the Court House to the Police Station: Combating the dual biases that surround Federal Money-Laundering Asset Forfeiture' [2012] 46 New England Law Review 93, 94
[372] Austin v United States, 509 US 602, 611-13 (1993); Calero-Toledo v Pearson Yatch Leasing Co., 416 US 663, 680-83 (1974); please also see: Cassella (n 306) 7-8
[373] The Mary, 13 U.S. (9 Cranch) 126 (1815) (for breach of war embargo); The Palmyra, 25 US (12 Wheat.) 1, 8 (1827); Harmony v United States, 43 US (2How.) 233-34; please see Baldwin (n 370) 3

civil forfeiture to seize cargos and vessels that violated the US customs laws or involved in other forms of criminal offences.[374]

The rationale behind pursuing the property instead of the person who violated the law, is because most times the property involved in the commission of the crime might be found within the US jurisdiction, but the owner or the person in possession of the property either lives in another jurisdiction or remains forever unidentified.[375] Thus, it is only by going against the property that government may be able to recover taxes owed on smuggled goods or to prevent the use of the property to commit further criminal activities.[376]

Forfeiture laws developed in piecemeal over a period of time.[377] The first forfeiture statute was enacted during the civil war to confiscate properties belonging to the Confederate States.[378] During the Prohibition era in the 1920s, the reach of forfeiture law was extended to enable the government to seize and forfeit properties that facilitate the production and sale of illegal liquor.[379] The major expansion of forfeiture law, however, came through the **Organised Crime Control Act 1970**,[380] to deal with the illicit drug trade.[381] The Congress continues to expand the reach of existing forfeiture

[374] Cassella (n 306) 29; Amy M Schalenbrand, 'The Constitutional and Judicial Limitations of IN REM Jurisdiction in Forfeiture Actions: A Response to International Forfeiture and the Constitution: The Limits of the Forfeiture jurisdiction over Foreign Assets under 28 USC s1355(B)(2)' [2011] 38 Syracuse Journal of International Law and Communication 55, 57
[375] Cassella (n 306) 30
[376] ibid
[377] The Act of 3 March 1819; also see ibid 29 (stating that the First Congress, in 1789 enacted statues authorising seizure of properties involved in the violation of the federal statute)
[378] Schalenbrand (n 374)
[379] Dobbins's Distillery v United States, 96 US 395 (1877) (Court upheld the forfeiture of land and landed properties housing the distillery); J.W. Goldsmith, Jr.-Grant Co. v United States, 254 US 505 (1921) and Van Oster v Kansas 272 US 465 (1926) (the court upheld the forfeiture of automobiles that facilitated bootlegging)
[380] The RICO Act 1970 (18 USC s 1963 (a)(1)-(2)
[381] Jon E Gordon, 'Prosecutors who seize too much and the theories they love: money laundering, facilitation and forfeiture' [1995] 44 Duke Law Journal 744, 747

legislation to capture as much property as possible.[382] These laws are now scattered across the Federal Criminal Code.[383]

In 1986, the Congress enacted general forfeiture statute that provides for civil and criminal forfeiture, which can be used to forfeit assets of those involved in any of a range of crime, including ML and TF.[384] 18 USC sections 981 and 982 were enacted on the belief that the most efficient way to combat ML is through forfeiture law.[385] By 1990s the old common law notion of criminal forfeiture resurfaces, applying to a wide variety of crimes.[386]

The constitutionality of civil forfeiture first arose in **Dobbins's Distillery v United States**.[387] The Supreme Court held that forfeiture of a tainted property used in a crime is constitutional, irrespective of the defendant's innocence at a criminal trial.[388] This ruling boosted the use of forfeiture law in the US throughout the nineteenth and twentieth centuries.[389] However, this expansion raised concerns regarding the lack of adequate procedural safeguards to protect the right of property owners.[390] Consequently, the Congress enacted CAFRA 2002[391] to provide some safeguards.

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[382] Cassella (n 306) 33 (citing United States v United States Coin and Currency 401 US 715 (1971))
[383] For example, 18 USC s 981(a)(1)(C) which allows government to forfeit proceeds of well over 200 federal and states crimes; 21 USC ss 853(a), 881(a), 8 USC s 1324(b), 18 USC ss 982(a)(6), 981(a)(1)(B), 2253 and 2254, allowing government to forfeit both any property that facilitate the crime in addition to the illegal products and/or proceeds of the crime; 18 USC ss 981(a)(1)(A) and 982(a)(1) allowing government to forfeit all property "involved" in ML offences; 18 USC s 1963(a) allowing the forfeiture of any property acquired or maintained through racketeering and interest the defendant has in the racketeering enterprise; and 18 USC s 981(a)(1)(G) authorising forfeiture of all terrorist assets. For detailed discussion on this please see Cassella (n 306) 4-9
[384] 18 USC ss 981-982 (2012)
[385] Sultzer (n 131) 168
[386] Cassella (n 306) 36 citing United States v Bajakajian 524 US 321, 332
[387] 96 US 395 (1877)
[388] Dobbins's Distillery v United States 96 US 395 (1877)
[389] Eric Moores, 'Reforming the Civil Forfeiture Reform Act' [2009] 51 Arizona Law Review 777, 781
[390] Schalenbrand (n 374) 59
[391] Pub. L. No. 106-185, 144 Stat 202

The role of asset forfeiture in the 1990s was vital in interdicting criminal assets worth hundreds of millions of US dollars.[392] Asset forfeiture law is essential in disrupting ML in the US for the following reasons:[393]

i) Convicted criminals may still retain control over their illegitimate activity while serving a prison term if the illicit proceeds remain at their disposal. Thus, forfeiture removes proceeds of crime from criminals enabling government to prevent criminals from funding further criminality;

ii) It serves as the most efficient way to recovering funds to compensate innocent victims of crime, such as in cases of fraud;

iii) It deprives criminals of enjoying the fruits of their crimes, to discourage others from engaging in crime;

iv) Forfeiture also sends a strong signal to the society that crime does not pay and the expensive criminal lifestyle is not permanent;

v) Asset forfeiture serves as punishment for using the property inappropriately.

2.5.2 TYPES OF FORFEITURES

Forfeiture can be classified into administrative, civil and criminal.[394] The approach and procedure with which each kind of forfeiture is carried out differ, though their impact and purpose are similar.[395]

[392] Cassella (n 306) 28
[393] ibid 2-3

2.5.2.1 ADMINISTRATIVE FORFEITURE

Forfeitures can be pursued administratively. This means the property is forfeited without recourse to court because it was not challenged.[396] Very briefly, the process of administrative forfeiture involves a seizure (backed by a warrant) of the property based on a "probable cause" to believe that the property is subject to forfeiture.[397] Then the agency that seized the property must make its intention to forfeit the property known to the property owner and the general public, to allow ample time for the property owner or anybody else with sufficient interest in the property to contest it.[398]

An advantage of administrative forfeiture is that, unless someone files a claim, the property remains forfeited and the forfeiture acquires the same legal force and effect as if it was judicial.[399] Except for real property and personal property (other than cash and monetary instruments) that have a value exceeding USD500,000, most properties are forfeited administratively.[400]

Once someone contests the administrative forfeiture, the agency responsible must return the property to the owner, or forfeiture must proceed judicially in the form of either civil or criminal forfeiture.[401] At this point, regards must be given to the advantages and disadvantages of both civil and criminal forfeiture.[402]

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[394] ibid 9
[395] David Pimentel, 'Forfeiture Revisited: Bringing Principle to Practice in Federal Court' [2013] 13 Nevada Law Journal 1, 4
[396] For an in-depth analysis on administrative forfeiture please see Cassella (n 297) 149-223
[397] Cassella (n 306) 95-98
[398] ibid 10
[399] ibid 151
[400] 19 USC s 1607 (which sets maximum value of a personal property that can be forfeited administratively); 18 USC s 985(a) (real property may never be forfeited administratively) please see ibid 154-56
[401] 18 USC s 983(a)(3); also see Catherine E McCaw, 'Asset Forfeiture as a Form of Punishment: A case for Integrating Asset Forfeiture into Criminal Sentencing' [2011] 38 American Criminal Law Journal 181, 191
[402] Cassella (n 306) 17-25

AS civil and criminal forfeitures are not mutually exclusive, the law enforcement can pursue both at the same time.[403] While criminal forfeiture is more desirable because of its efficiency in depriving criminals of their illicit proceeds, where the prosecution has failed to secure a conviction, the government can easily fall back on civil forfeiture.[404]

Historically customs law governs the administrative forfeiture.[405] However, this law was widely perceived to be unfair, because it placed heavy burden on the claimants.[406] CAFRA 2000[407] has now addressed the perceived lop-sidedness of the forfeiture law.[408] However, CAFRA 2000 did not repeal and replace the forfeiture law, but it simply made some changes to the law, limiting its applications in some situations in which it applies before.[409]

2.5.2.2 CRIMINAL FORFEITURE

18 USC section 982 provides the legal basis for criminal forfeiture for the violation of ML law and of the law prohibiting unlicensed money transmitting businesses.[410] The law states:

> The court, in imposing sentence on a person convicted of an offence in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeits to the United States any property, real or personal, involved in such offence, or any property traceable to such property.[411]

[403] McCaw (n 401) 195
[404] ibid 195-97
[405] 19 USC s 1607(a)
[406] 19 USC s1608 (requiring person filing a claim to accompany it with a bond); Asset Forfeiture Policy Manual, ch. II, s II.c (1996) (unless the bond is waved)
[407] 18 USC s 983(a)(1)-(2)
[408] Cassella (n 306) 158
[409] For the interplay between CAFRA and the Customs laws please see ibid 158 – 169
[410] For an in-depth analysis on criminal forfeiture please see Cassella (n 297) Part III
[411] 18 USC s 982(a)(1)

Criminal forfeiture also applies to a range of ML predicate crimes, such as fraud,[412] and violation of AML statute of the BSA 1970.[413] The procedure for effecting criminal forfeiture for violation of 18 USC sections 1956 and 1957 is governed by 21 USC section 853.[414] Thus, section 853 empowers the authorities to disrupt ML. For example, once the violation of 18 USC sections 1956 and 1957 has occurred, all rights, titles, and interests in such property vest in the US government. This is so, even where the defendant has already transferred the property to a third party, unless the transferee establishes that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture.[415] This and many other provisions of 21 USC section 853 make criminal forfeiture a powerful tool of disrupting ML.[416]

Although the standard of proof in a criminal trials is beyond a reasonable doubt, in criminal forfeiture action the prosecution needs only to prove its case by a preponderance of the evidence that the property is subject to forfeiture.[417] The defendant forfeits both the proceeds and the assets that facilitated the crime, and if those assets cannot be located, the court may order a forfeiture of a substitute asset.[418] The forfeiture is not defeated in the event a substitute asset cannot be identified during the trial, as an alternative property can always be forfeited whenever identified.[419]

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[412] Please see 18 USC s 982(a)(2)-(8)
[413] United States v 1988 Oldsmobile Cutlass Supreme 2 Door, 983 F.2d 670, 674 (5th Cir. 1993)
[414] Chapter 13 - Drug Abuse Prevention and Control Pub L. 91-513, title II, §413, as added and amended Pub. L. 98-473, title II, ss 303, 2301(d)-(f), Oct. 12, 1984, 98 Stat. 2044, 2192, 2193; Pub. L. 99-570, title I, ss 1153(b), 1864, Oct. 27, 1986, 100 Stat. 3207-13, 3207-54
[415] 21 USC s 853(c)
[416] Please see 21 USC s 853(a)(1)-(3); 21 USC s 853(d); 21 USC s 853(e)-(f)
[417] Libretti v United States, 516 US 29, 49 (1995); Apprendi v New Jersey 530 US 466 (2000); for analysis on the burden of proof please see Cassella (n 306) 663-72
[418] 21 USC s 853(p); McCaw (n 401) 193
[419] McCaw (n 401) 193-94

Criminal forfeiture has been less controversial because the procedural standards for criminal trials are very high.[420] Although criminal forfeiture forms part of the defendant's criminal sentence,[421] it does not however affect the length of the defendant's prison term, as courts do not depart from the sentencing guidelines to favour a defendant who has forfeited property to the government.[422] Also, courts do not have the discretion to reduce the amount of forfeiture to compensate for the defendant's lengthy prison term.[423]

Despite its advantages, criminal forfeiture has its limitations.[424] First of all, criminal forfeiture is *in personam*[425] that follows a criminal conviction of the property owner.[426] Thus, the defendant's guilt must be established either at a trial or through a guilty plea, otherwise the defendant's property cannot be forfeited.[427] Even if the defendant has to be convicted, criminal forfeiture can only proceed if a notice of forfeiture has been included in the criminal indictment.[428] Also, third party's property that was used to facilitate the crime is forfeitable only when superior ownership cannot be established.[429] Moreover, a forfeiture process can be slow. Besides, failure to prosecute the defendant spells doom to criminal forfeiture.[430]

Where criminal forfeiture fails; for example, where law enforcement could not secure conviction against the defendant, civil forfeiture is the alternative tool available to law

[420] Pimentel (n 395) 4
[421] Libretti v United States, 516 US 29, 39-41
[422] United States v Coddington, 118 F.3d 1439, 1441 (10th Cir. 1997); United States v Weinberger, 91 F.3d 642, 644 (4th Cir. 1996); United States v Hendrickson, 22 F.3d 170, 176 (7th Cir. 1994); United States v Crook, 9 F.3d 1422, 1425 (9th Cir. 1993); United States v Shirk, 981 F.2d 1382, 1397 (3d Cir. 1992); Shirk v United States, 510 U.S. 1068 (1994)
[423] United States v. Monsanto, 491 U.S. 600, 606 (1989)
[424] For advantages and disadvantages of criminal forfeiture please see Cassella (n 306) 22-25
[425] United States v Vampire Nation, 451 F.3d 189 (3rd Circuit 2006); for an in-depth analysis on criminal forfeiture procedure please Cassella (n 306) Part III
[426] Pimentel (n 395) 4
[427] 18 USC s 982(a)(1)-(2); 21 USC s 853
[428] Federal Criminal Procedure Rule 32.2(a)
[429] 21 USC s 853(n)(6)
[430] Pimentel (n 395) 5

enforcement, as it has been held that civil forfeiture is not punitive for the purpose of double jeopardy.[431]

2.5.2.3 CIVIL FORFEITURE

18 USC section 981 provides the legal basis for forfeiture of property that is in itself, a proceed of crime, or involved in the violation of ML law and of the law prohibiting unlicensed money transmitting businesses.[432] This statute is enacted widely to enable forfeiture of any asset derived from a whole range of offences. The offences include any of the SUAs, fraud, and offences against foreign nations. Others include facilitating ML, the commission of ML predicate crimes, violation of certain statute,[433] and violation of AML statute of the BSA 1970.[434] Civil forfeiture action proceeds *in rem* against the property to be forfeited, because it is tainted by its involvement or its mere connection with criminal activity.[435] However, the historical notion that *in rem* forfeiture follows the property because the property itself is the guilty party no longer holds.[436]

18 USC section 983 governs the general rules and procedure for civil forfeiture proceedings.[437] While the prosecution bears the initial burden of proving a probable cause that the property to be forfeited is connected to the predicate offence,[438]

[431] United States v Ursery, 518 U.S. 267, 278-79 (1996)
[432] 18 USC s 981(a)(1)
[433] ibid s 981(a)(1)(A)-(H)
[434] United States v 1988 Oldsmobile Cutlass Supreme 2 Door, 983 F.2d 670, 674 (5th Cir. 1993)
[435] United States v Bajakajian, 524 US 321, 38 (1995); for in depth analysis on civil forfeiture procedure please see Cassella (n 306) Part II
[436] Cassella (n 306) 15 (stating "It is true that the property is named as a defendant in the civil forfeiture case, but not because the property itself did anything wrong. Things do not commit crimes; people commit crimes using or obtaining things that consequently become forfeitable to the state. The in rem structure of civil forfeiture is simply procedural convenience"); also see McCaw (n 401) 191
[437] For in-depth analysis on civil forfeiture please see Cassella (n 306) 225-362
[438] One 1987 Mercedes 560 SEL, 919 F.2d at 331; United States v Puello, 814 F. Supp. 1155, 1159 (E.D.N.Y. 1993)

prosecution needs not to trace the property to a particular offence.[439] The proof of 'probable cause' is satisfied by showing "a reasonable ground for belief ... supported by less than prima facie proof but more than mere suspicion."[440]

Civil forfeiture procedure allows prosecution to show probable cause at the forfeiture proceedings using evidence obtained before, after, or at the time the property was seized.[441] Once the prosecution succeeded in establishing probable cause, then the burden shifts to the claimant to prove, by a preponderance of the evidence, that the property was not in fact, connected to the commission of the predicate crime,[442] or that a defence to the forfeiture applies.[443]

Civil forfeiture is more flexible than criminal forfeiture. Thus, because the innocence of the defendant is immaterial, government can circumvent a failed prosecution to forfeit property belonging to a defendant whose guilt could not be established.[444] Similarly, in so far as the property can be identified and seized, the death or whereabouts of a wrongdoer will not impede civil forfeiture.[445] Furthermore, because it is not subject to constitutional safeguards that govern criminal forfeiture, civil forfeiture can be easy,

[439] United States v Blackman, 897 F.2d 309, 316-17 (8th Cir. 1990); United States v $41,305 in Currency, 802 F.2d 1339, 1343 (11th Cir. 1986)
[440] United States v One 1978 Chevrolet Impala, Etc., 614 F.2d 983, 984 (5th Cir.1980); United States v One 1986 Nissan Maxima GL, 895 F.2d 1063, 1064 (5th Cir.1990); United States v 1988 Oldsmobile Cutlass Supreme 2 Door, 983 F.2d 670, 674 (5th Cir. 1993)
[441] United States v $41,305 in Currency, 802 F.2d 1339, 1343 (11th Cir. 1986)
[442] 18 USC s 981 (a)(2) (1988); United States v 1988 Oldsmobile Cutlass Supreme 2 Door, 983 F.2d 670, 674 (5th Cir. 1993) (quoting United States v $364,960.00 in United States Currency, 661 F.2d 319, 325 (5th Cir.1981))
[443] United States v 1988 Oldsmobile Cutlass Supreme 2 Door, 983 F.2d 670, 674 (5th Cir. 1993) (quoting LITTLE AL, 712 F.2d at 136)
[444] See for example a UK cases, Serious Organised Crime Agency v Gale and another [2011] UKSC 49 [2011] 1 W.L.R. 2760
[445] Pimentel (n 395) 5-6

less complicated and quick.[446] However, lack of these safeguards made civil forfeiture far more controversial.[447]

Despite the advantages, civil forfeiture has limitations.[448] The major limitation of civil forfeiture as a tool of disrupting ML is that prosecution must establish a direct nexus between the properties to be forfeited and the criminal activity.[449] Unlike in the case of criminal forfeiture, a substitute property cannot be forfeited where the actual property is no longer available.[450] Additionally, the great deal of unnecessary extra work involved in filing civil forfeiture action makes it less attractive.[451] Thus, civil forfeiture will be a desirable tool for disrupting ML in situations such as where the defendant is a fugitive, dead, or incompetent to stand trial.[452]

2.5.2.4 INNOCENT OWNER DEFENCE

Although forfeiture is a powerful tool against ML, IOD serves as a very serious limitation on the efficacy of forfeiture in disrupting ML.[453] As criminals have used third parties' properties to commit crimes, the IOD has been used successfully to prevent the forfeiture of properties that facilitated the commission of the crime.[454]

One major controversy about civil forfeiture that has been resonating for over 200 years is the power of government to forfeit a property of innocent owner on the basis that the

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[446] ibid 6
[447] ibid 5
[448] For advantages and disadvantages of civil forfeiture please Cassella (n 306) 18-22
[449] United States v Puello, 814 F. Supp. 1155, 1159 (E.D.N.Y. 1993)
[450] McCaw (n 401) 196
[451] Cassella (n 306) 20
[452] ibid 30
[453] For an in-depth analysis on 'The IOD' please see ibid 489-522
[454] For example please see The Harmony 43 US (2 How.) 210, 233 (1844); Piesch v Ware 8 US (4 Cranch) 347 (1808); United States v Stowell, 133 US 1 (1890) (where the court protected the right of lienholder on a distillery forfeited for violating revenue laws); and United States v United States Coin and Currency 401 US 715, 719 (1971) (where the court upheld the IOD, expressing the this opinion: 'if we were writing on a clean slate, this claim that s 7302 operates to deprive totally innocent people of their property would hardly be compelling')

property was involved in the commission of the crime.[455] However, putting property owners on their toes to guard their properties from being used by criminals to commit crimes, is necessary for the disruption of ML.[456]

A chain of judicial authority developed this power into near-absolute rule. However, the judiciary itself sought to limit the power by creating exemption to the rule.[457] In **Harmony**, while the forfeiture of pirate vessel was upheld regardless of the innocence of the owner, it was held that the cargo was not subject to forfeiture since the owner neither authorised nor co-operated in committing the crime.[458] Similarly, in **Peisch v Ware,**[459] the Supreme Court declared forfeiture inappropriate in the circumstances of the case. Furthermore, in **United Sates v Stowell**,[460] while the Supreme Court upheld the forfeiture of a distillery despite the innocence of the owner, it held that the interest of an innocent lienholder is not forfeitable.[461]

Despite the attack on forfeiture of properties belonging to innocent owners,[462] the Court in **Calero-Toledo v Pearson Yacht Leasing Co**.[463] rejected any idea that IOD should be read into the statute. However, the Court acknowledge the appropriateness of the defence where the owner had taken measures to prevent the illegal use of his property, and emphasised that in certain circumstances disregard to IOD may be unduly oppressive.[464] Finally, in **Bennis v Michigan**,[465] the court failed to protect the right of Mrs Bennis to her car, which was used by her husband in an inappropriate way.

[455] Cassella (n 306) 39
[456] ibid
[457] ibid 39-44
[458] United States v The Brig Malek Adhel, 43 US 2 How 210, 233 (1844)
[459] 8 US (4 Cranch) 347, 363-64 (1808); Bennis v Michigan, 516 US 442 n 12 (1996)
[460] 133 US 1 (1890)
[461] 133 US 1, 20 (1890)
[462] J W Smith Jr.-Grant Co, 254 US 505 (1921); United States v United States Coins and Currency 401 US 715 (1971)
[463] 416 US 663 (1974)
[464] 416 US 663, 686-90
[465] 516 US 442 (1996)

Michigan does not have IOD in its statute book. Thus, Michigan Supreme Court had no difficulty upholding the forfeiture.[466]

This rule was however altered when the Congress enacted "uniform IOD" effectively codifying *Calero-Toledo* dicta into the CAFRA 2002 – conferring on innocent owners, a defence in a civil forfeiture action.[467] This defence applies to almost all federal cases except in traditional custom cases.[468] The limitation of this defence is that it does not apply to a case brought under a State's law.[469] Thus, this statute would not help innocent owners in states like Michigan. Also, the defence does not apply to contrabands such as illicit drugs even if the criminal donated them to an innocent third party.[470]

Although the IOD is vital to protecting innocent property owners, it is submitted that limited application of the IOD is critical to the successful disruption of ML. Non-collaboration with the criminals and lack of knowledge that the property was being used for criminal purpose should not be enough to bring the IOD into operation. It is therefore submitted that to prove his innocence the owner must show that he has done what is reasonably required to ensure his property is not used for criminal purposes.

2.5.3 JURISDICTION: ENFORCEMENT OF THE FORFEITURE ORDERS

Although jurisdiction is an essential element in disrupting ML, this thesis does not discuss jurisdiction because the US approach to jurisdiction in transnational crime is worthy of a thesis in itself. Thus, certain lines must be drawn. However, two issues are worthy of discussion here. These issues are enforcement of US orders overseas and

[466] Cassella (n 306) 42 – 43 (in contrast Florida has IOD)
[467] 18 USC s 983(d); for detailed analysis on "uniform IOD" and its application please see Cassella (n 306) chapter 12
[468] Cassella (n 306) 44
[469] ibid
[470] 18 USC s 983(d); United States v $557,933.89, more or less, in US Funds, 287 F.3d 66, 77

enforceability of overseas orders in the US. Discussion on these two issues is important because, due to the transnational nature of ML, jurisdiction is crucial to its disruption.

The enforcement of both *in rem* and *in personam* order made by one District Court for the forfeiture of criminal assets located in another district within the US is no longer a problem.[471] Also, there is a provision in the US law for the forfeiture of criminal properties located abroad.[472] The major authority in this area is **United States v All Funds on Deposit in Any Accounts Maintained in the names of Heriberto Castro Meza et. al. (Meza) 63 F.3d (2d Circuit 1995) 151.**

In All Funds, the law enforcement sought to forfeit funds on deposit in the UK.[473] The District Court held that it has jurisdiction over the deposited funds, and granted a forfeiture order against the funds. On appeal, the Court of Appeal upheld the District Court decision. However, it was held that actual or constructive jurisdiction, i.e., actual or constructive control of the *res* is required for 28 USC section 1355(b) to apply, and the District Court has constructive control, therefore had jurisdiction over the funds in the UK.[474] In a later decision of the Court of Appeal, the Ninth Circuit held that section 1355(b) does not require the government to establish constructive control over the asset.[475]

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[471] Steven L. Kessler, 'Asset Forfeiture: Home and Abroad' [1998] 4 ILSA Journal of International and Comparative Law 385, 397

[472] 28 USC s 1355 (b)(2) (2010)

[473] Please see Fletcher N. Baldwin Jr., 'All Funds and International Seizure Cooperation of the USA and the UK' [1997] 5 (2) Journal of Financial Crime 111, 113 for an analysis of the history and development of the law utilised by the courts in *All Funds*, the rationale of the court(s), and the implications of the final holding.

[474] United States v All Funds on Deposit in Any Accounts Maintained in the names of Heriberto Castro Meza et. al. (Meza) 63 F.3d (2d Circuit 1995) 151

[475] United States v Approximately $1.67 Million (US) in Cash, Stock, and Other Valuable Assets (Hartog) 513 F.3d 991 (9th Circuit 2008) 988 (However, the in rem jurisdiction of Courts could suffer a set back where a foreign country where the asset is located is not willing to cooperate with US law enforcement)

Before the amendment of 28 USC section 1355,[476] US Courts have no jurisdiction over properties located abroad. That was a big problem because criminals use offshore facilities to put their assets beyond the reach of the law enforcement.[477] With the amendment, Courts have jurisdiction, and can forfeit to the US governement criminal propertes irrespective of where the crime is committed or the properties are located.[478]

However, the main issue is whether foreign Courts would recognise and enforce US orders. For example, where assets subject to the US forfeiture order are located abroad, whether such orders will be enforced by the foreign nation where the property is located will depend on the law of the nation, bilateral or multilateral arrangements that subsist between the US and the nation.

Taking the UK by way of illustration – in the UK, foreign judgement can be enforced where there is MLAT between the UK and foreign nation.[479] Also, there are common law and statutory provisions under which foreign judgement can be enforced. Although the US authorities can seek assistance to repatriate assets stashed offshore through the MLAT it had with some countries including the UK,[480] the MLAT does not confer automatic jurisdiction on the US to forfeit assets located in those countries.[481]

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[476] Congress enacted 28 USC s 1355(d), which gives the District Court a jurisdiction over assests located abroad in a forfeiture action pursuant to s 1355(b)

[477] Courtney J Linn, 'International Asset Forfeiture and the Constitution: The Limits of Forfeiture Jurisdiction Over Foreign Assets Under 28 USC s 1355(b)(2)' [2004] 31 American Journal of Criminal Law 251, 262

[478] Baldwin (n 370) 542

[479] These Treaties include the 1968 Brussels Convention allowing enforcement of judgement from the EU Member States; and 1988 Lugano Convention to enforce judgements from EU Member States and the European Free Trade Association

[480] The US has Mutual Legal Assistance Treaty under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (The Vienna Convention) 1990, which requires signatories to the Convention to aid each other in cases involving narcotics and ML prosecutions, including forfeiture

[481] Linn (477) 264

Statutorily, foreign judgement can be enforced under the Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933.[482] These two legislations provide for reciprocal arrangements under which, a judgement obtained from the English Courts can be registered for enforcement in the enforcing country, and foreign judgment can be registered for enforcement in England and Wales. Thus, where such reciprocity subsists, registered judgments take effect in the country of registration as if they were obtained in that country. However, there is no such arrangement between the US and UK.[483] Therefore, where the property is located in the UK, US *in rem* and *in personam* forfeiture orders can not be enforced under these two statutes.

Under the common law, a foreign judgement is enforceable in the UK on meeting certain conditions.[484] Usually, the judgement is viewed as a foreign debt between the parties to it.[485] The implication of this is that the party holding the judgement must commence a new suit in the UK courts to enforce the recognised debt, which may be enforced through a simple summary judgment proceeding.[486] This applies to enforcements of US *in rem* and *in personam* orders since there are no reciprocal agreements between the UK and US.

However, the UK courts do not recognise and enforce *in rem* orders under the common law. Also, they do not recognise and enforce *in personam* orders involving taxes, fines and penalties. **United States of America v Abacha and others** [2015] 1 WLR is an appeal case against the High Court freezing order made for the claimant, the US, to

[482] Foreign judgemnt can also be enforced under the 1968 Brussels Convention (judgement from the EU Member States); 1988 Lugano Convention (judgements from EU Member States and the European Free Trade Association)
[483] Brian Richard Paige, 'Foreign Judgments in American and English Courts: A Comparative Analysis' [2003] 26 Seattle University Law Review 591, 592
[484] Please see Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed (2014)
[485] Paige (n 483) 608-09
[486] Richard Twomey, 'Enforcing US Judgements in England and Wales' (Pinsent Masons 2015) <https://www.pinsentmasons.com/PDF/Enforcing-US-Judgments-in-England-and-Wales.pdf> accessed 9 June 2017

freeze assets situated in the UK belonging to the defendants. The Court of Appeal held that, a judgement *in rem* would not be enforceable in England and Wales at common law for want of jurisdiction of the US Court on a property located outside the territorial jurisdiction of the US court.[487]

It was also held that a judgement *in personam* would still not be recognised and enforced at common law in England and Wales because it would amount to the enforcement of a foreign penal law.[488] Accordingly, any judgment obtained at the suit of the claimant in the US proceedings would be unenforceable in England and Wales at common law.[489] Thus, the option open to the US is to bring proceedings under the Proceeds of Crime Act 2002, and Parts 4A and 5 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 with its relevant constraints and restrictions.[490]

Regarding enforcing foreign judgement in the US, US also adopts common law approach where like the approach in the UK, the foreign judgment is treated as a judgement against a debtor. **Hilton v Guyot** established the US common law principles for the enforcement of foreign nation judgement.[491] However, this principle is anchored on reciprocity based on the comity of nations.

Like in the UK, in the US too, a foreign judgement is recognised and enforced under statutory provisions such as the Uniform Foreign Money-Judgement Recognition Act 1962. The current US approach to recognition and enforcement of foreign judgments is

[487] [2015] 1 WLR
[488] ibid
[489] ibid paras 60-61, 63-64, 65, 71, 73-74, 75, 78, 89, 90
[490] Abacha (n 487)
[491] 159 US 113 (1895)

costly, complex and full of uncertainties, which creates many problems for both the US and foreign parties.[492]

2.5.4 PERCEPTION ON ASSET FORFEITURE

As a result of the steady expansion of forfeiture law, forfeiture provisions extended the law to allow for forfeiture of all property involved in an offence.[493] While this expansion would give law enforcement an edge in fighting crimes, the operative framework that developed around the forfeiture law is prone to abuse.[494]

For example, a broad interpretation given to the "involved in" language, coupled with the lack of judicial discretion in forfeiture, low standard of proof required of prosecution, and reluctance of the courts to extend Eighth Amendment protection to forfeiture paved way for judicial bias towards forfeiture.[495] One major source of concern was the lack of procedural safeguards in place to enable property owners to defend their properties subject to forfeiture.[496] All these raise human rights issues.[497]

Another source of concern is the way and manner Justice Department places emphasis on revenue collection as a driving force behind forfeitures.[498] Thus, abuse of the system is imminent in as much as the department that is responsible for putting an operational

[492] S. I. Strong Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities [2014] 33(1) The Review of Litigation 46
[493] 18 USC s 891 and 892;
[494] Sucoff (n 371) 94
[495] ibid 108
[496] Schalenbrand (n 374) 59
[497] Fletcher N. Baldwin, Jr, 'The Rule of Law, Human Rights and Proportionality as Components of the War against Terrorism: Is the US Judiciary in Self-Imposed Exile?' [2004] JMLC 7(3) Journal of Money Laundering Control 218,
[498] ibid 109

limit on forfeiture amount also has a strong appetite to pursue forfeitures to maximise revenue.[499]

The development of facilitation theory also rendered asset forfeiture to criticism.[500] Under 18 USC section 981(a)(1)(A), a property that was used to facilitate ML is considered to be involved in ML. Thus, under the broad definition of facilitation theory, clean money that comingled with tainted ones facilitates ML by making the tainted money to appear innocent.[501] Consequently, the untainted money is subject to forfeiture.[502] In **United States v All Monies ($477,048.62) in Account No. 90-3617-3,** the court held that the legitimate money concealed the tainted money, facilitating ML and therefore subject to forfeiture.[503]

Courts have since expanded this theory to include the entire balance in the account even if only part of the clean money facilitated the crime.[504] However, the court refused to extend facilitation theory regarding indirect account and concluded that mere tracing of cheques into an indirect account was insufficient to justify forfeiture of the entire balance, adding that, probable cause was extremely thin.[505]

To address these concerns, Congress enacted CAFRA 2000.[506] Because most of the concerns were centred on civil forfeiture, the bulk of the reforms were also directed at it.[507] Before the passage of CAFRA, the burden is on the property owner to prove that

[499] Katherine Baicker and Mireille Jacobson, 'Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets' [2007] 91 Journal of Public Economics 2113, 2130
[500] Gordon (n 381) 765 (arguing that because the theory is not 'intent-based', the theory has no limit)
[501] ibid 755
[502] ibid
[503] 754 F. Supp 1467 (D Haw 1991) 1475-76
[504] United States v Certain Funds on Deposit Account No. 01-0-71417, 769 F. Supp 80 (E.D.N.Y. 1991) 84
[505] United States v Certain Accounts, 795 F. Supp 391 (S.D. Fla 1992) 397-98
[506] Moores (n 389) 780-84
[507] Pimentel (n 395) 16

the property is not subject to forfeiture, while all that is required of the government is just to show a probable cause.[508]

CAFRA now placed the burden of proof on the prosecution to prove by a preponderance of the evidence that the property is forfeitable.[509] The only exception to this rule is where the asset subject to forfeiture belongs to terrorists, in which case the burden is reversed.[510] Thus, all that is required on the part of government is to show a probable cause to seize the property and then the claimant must prove by a preponderance of the evidence that the property is not subject to forfeiture.[511]

CAFRA 2000 also introduced a range of protections for property owners, which include appointment of counsel for property owners who could not afford legal representation where the forfeiture involved their primary dwelling.[512] Others include uniform IOD for a bona fide purchaser without notice, hardship provision, and adequate notice to contest the forfeiture.[513] Another important protection for property owners is the requirement that forfeiture involving real estate must be pursued judicially.[514]

However, CAFRA appears to be lopsided in placing a lower standard of proof on the government, and for failure to provide adequate safeguards in civil forfeiture cases.[515] Despite the seeming lop-sidedness, the utility of forfeiture outweighs the criticisms that

[508] ibid
[509] 18 USC s 983 (2012)
[510] Cassella (n 306) 9
[511] The Patriot Act s 316(a)(1) (2001)
[512] 18 USC s 983(b), (d) (2012)
[513] For discussions on this please see Pimentel (n 395) 17-20
[514] 18 USC s 985(a) (2012)
[515] Schalenbrand (n 374) 59-60

trail it because forfeiture law allows law enforcement to attack the economic aspect of crimes.[516]

One good advantage of forfeiture law is that it has expanded both the class of crimes that falls within its ambit and the property that is subject to forfeiture.[517] The law has developed to reach almost any property involved, including those that facilitate the conduct of ML and other crimes.[518] Also, the Patriot Act amended 18 USC section 981(a)(1)(G) to allow forfeiture of all assets of anyone associated with terrorism or terrorist organisation.[519] Section 981(a)(1)(G) does not require any connection between the property and any terrorist act.[520]

Furthermore, forfeiture achieves significant goals for criminal justice system.[521] Unlike a fine, which sets the price for a crime, forfeiture communicates that an activity is forbidden.[522] The Supreme Court in **Calero-Toledo** asserted that forfeiture serves as a punishment to criminals and deterrence to others.[523] Moreover, while administrative forfeiture assists government to obtain title to assets efficiently when the owner failed to claim it, civil forfeiture serves as a middle ground between no punishment and full entry into the criminal justice system.[524] Finally, while administrative forfeiture helps law enforcement to confiscate property without tying-up resources in the judicial process, civil forfeiture allows the government to punish criminals without recourse to the criminal justice system. [525]

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[516] Sucoff (n 371) 98
[517] 18 USC ss 891(a)(1)(G)(i) and 892 (2012)
[518] Calero-Toledo v Pearson Yacht Leasing Company, 416 US 663 (1974)
[519] 18 USC 981 (a)(1)(G)
[520] Cassella (n 306) 8
[521] McCaw (n 401) 212
[522] ibid 185
[523] Calero-Toledo v Pearson Yacht Leasing Company, 416 US 663, 686 (1974)
[524] McCaw (n 401) 212
[525] ibid

Having analysed the US forfeiture laws, the focus now shifts to RICO Act 1970, which is one of the legislations enacted to combat the infiltration of criminal families into legitimate businesses to legitimise their illicit gains.

2.6 RICO ACT 1970

RICO was enacted as T**itle IX of the Organised Crime Corrupt Organisation Act 1970** to fight organised crime families in the United States,[526] as they infiltrate legitimate business.[527] ML is one of several predicate offences on which RICO is charged.[528] Thus, prosecutors could charge RICO violations alongside ML.[529]

Despite the wider application of RICO,[530] this section argues that RICO Act has a limitation with regard to fighting ML. This section proceeds with an overview of RICO prohibition, followed by discussions of the elements of the offence. This section then analyses sanctions for RICO violation and then concludes with an analysis of the limitations of RICO.

2.6.1 OVERVIEW OF RICO PROHIBITIONS

Pursuant to 18 USC section 1962, it is unlawful to: (a) derive any income from a pattern of racketeering activity, or to use such income to engage in an activity which affects interstate or foreign commerce;[531] (b) acquire interest, through a pattern of racketeering activity or collection of debt, in an enterprise which carries out interstate or foreign

[526] Terence McCarrick and others, 'Racketeer Influence and Corrupt Organisations' [2014] 51 American Criminal Law Review 1601, 1602
[527] Amann (n 64) 201
[528] 18 USC s 1961 (2012); for analysis on this please see Charles Doyle, 'Money Laundering: An Overview of 18 USC 1956 and Related Federal Criminal Law' [2012] Congressional Research Services 1, 39
[529] United States v Lazarenko 564 F.3d 1026, 1032 (9th Circuit 2009); United States v Boscarino 437 F.3d 634, 636 (7th Circuit 2006)
[530] Jerold H Israel and others, White Collar Crime: Law and Practice (2nd edn Thomson West 2003) 206
[531] 18 USC s 1962 (a) (2011)

commerce;[532] (c) conduct affairs of an enterprise which carries out interstate commerce through racketing activity;[533] (d) conspire to violate any of the provisions of subsection (a), (b), or (c) mentioned above.[534]

Nevertheless, defences such as invalidity of one or more predicate acts; statute of limitations (four and five years for civil and criminal RICO claims, respectively); withdrawal from the conspiracy; horizontal pre-emption (primary jurisdiction); reverse vertical pre-emption; and constitutional challenges are available to a RICO defendant.[535]

The RICO Act offers some obvious advantages in government's effort to fight crimes. First, showing that the defendant knew predicate offence was illegal easily satisfies the *mens rea* requirement. [536] Secondly, violation of RICO statute carries severe sanctions.[537] Thus, the government have deployed RICO in a wide variety of criminal contexts.[538] However, to ensure that RICO is used selectively and uniformly,[539] USAM requires that prior approval from the criminal division of the DOJ must be obtained before the prosecution can proceed with a RICO (civil or criminal) action.[540]

2.6.2 ELEMENTS OF THE OFFENCE

The prosecution must prove four elements to secure a conviction under RICO Act. They include two or more predicate offences of racketeering; the pattern of racketeering activity; enterprise; and effect on interstate commerce.

2.6.2.1 TWO OR MORE PREDICATE OFFENCES OF RACKETEERING

[532] 18 USC ibid1962 (b) (2011)
[533] ibid s 1962 (c)
[534] ibid s 1962 (d)
[535] McCarrick and others (n 526) 1626-1636
[536] Bruner Corporation v RA Brunner Company, 133 F.3d 491, 495 (7th Cir 1998)
[537] 18 USC s1963 (2011)
[538] A. Laxmidas Sawkar, 'From Mafia to Milking Cows: State Rico Act Expansion' [1999] 41 Arizona Law Review 1133, 1135
[539] USAM s 9-110.200 stated the reason behind this policy
[540] ibid s 9-110.101

The prosecution must prove two or more predicate acts of racketeering.[541] A defendant can still be charged with the violation of RICO even if he is acquitted of those predicate offences under a different statute.[542] The Court has held the racketeering activities listed in the RICO Act to mean the predicate offences since they form the basis for liability under RICO.[543]

2.6.2.2 PATTERN OF RACKETEERING ACTIVITY

Nine States' offences and over thirty federal offences can potentially serve as the basis for a RICO Action.[544] However, a pattern of racketeering activity has to be established. To establish the pattern, the prosecution must prove that at least two racketeering activities occur in the space of ten years,[545] and those activities must not be isolated.[546] In **H.J. Inc. v. Northwestern Bell Telephone Company,**[547] the Supreme Court held that prosecution must show a relationship between the predicate acts and continuity of those acts to prove a pattern of racketeering activity for RICO action.[548]

Although the relationship and continuity elements must be separately proved, the Supreme Court in H.J. Inc held that evidence on these two prongs often would overlap.[549] In contrast, **Sedima v Imrex Co**. [550] held that in a private civil RICO action the plaintiff need not prove that the defendant has been previously convicted of the predicate offences that constitute the pattern of racketeering.

2.6.2.3 ENTERPRISE:

[541] 18 USC ss 1961(5) and 1962 (2011)
[542] BancOklahoma Mortgage Corporation v Capital Title Company, Inc 194 F.3d 1089,1102 (10th Circuit 1999)
[543] Inc 194 F.3d 1089,1102 (10th Circuit 1999)
[544] Israel and others (n 530)
[545] 18 USC s 1961(5) (2011)
[546] Sedima SPLR v Imrex Co Inc 473 US 479, 496 (1985)
[547] 492 US 229 (1989)
[548] ibid, 250
[549] ibid, 239
[550] 473 US 479 (1985)

Proving the element of the enterprise is not an easy task. Accordingly, the prosecution must establish the existence of RICO enterprise and whether the evidence adduced is sufficient to establish such existence.[551] Both legitimate and illegitimate organisations fall under the meaning of "enterprise".[552] Section 1961(4) defines the term "enterprise" to include individuals, legal entities and association-in-fact.

While it is easier to establish the existence of an enterprise if it is a legal entity,[553] establishing an association-in-fact (which does not have a legal existence) is not. In **United States v Turkette**[554] the Supreme Court defined the term association-in-fact to mean, different groups associated together for a common purpose of engaging in a course of conduct.[555] Because the Supreme Court in Turkette did not specify the level of structure needed to qualify association-in-fact enterprise, circuits have held different views as to the proof required to establish the existence of an enterprise that is sufficiently separate and distinct from the pattern of racketeering.[556]

2.6.2.4 EFFECT ON INTERSTATE COMMERCE

Finally, the prosecution must prove that the alleged racketeering activities affect interstate commerce as required by 18 USC section 1962(a)-(c). Proving this element is relatively straightforward. It can be satisfied if the enterprise itself affects interstate commerce, [557] or the predicate acts have an impact, however small, on interstate commerce,[558] or by establishing that, the enterprise's activities impact on interstate

[551] McCarrick and others (n 526) 1626-1616
[552] United States v Turkette, 452 US 576 (1981)
[553] Webster v Omnitrition International Inc 79 F.3d 776, 786 (9th Circuit 1996)
[554] 425 US 576 (1981)
[555] United States v Turkette, 452 US 576 (1981)
[556] United States v Bledsoe, 674 F.2d 647 (8th Circuit 1982); United State v Perholth, 842 F.2d 343, 363 (DC Circuit 1988); United States v Riccobene, 709 F.2d 214, 222-224 (3rd Circuit 1983); please see McCarrick and others (n 526) 1626-1617
[557] United States v Nerone, 563 F.2d 836, 854 (7th Circuit 1977)
[558] United States v Johnson, 440 F.3d 832, 841 (6th Circuit 2006)

commerce.[559] Purchase of raw materials or sourcing workforce from a State, in the US, different from where the enterprise is domiciled qualifies as the effect on interstate commerce. [560] Even interstate phone call qualifies as the effect on interstate commerce.[561]

2.6.3 SANCTION AND COURSES OF ACTION FOR RICO VIOLATION

A RICO conviction attracts three criminal penalties, which consist of imprisonment, fines and forfeiture of property.[562] Civil penalties in the form of treble damages and attorney fees are also available against a RICO defendant.[563] RICO violations are pursued through criminal prosecution and civil action.

2.6.3.1 CRIMINAL PROSECUTION

In addition to forfeiture of assets associated with the offence, a RICO defendant faces twenty years' imprisonment, (or a life sentence if the racketeering activity is punishable by life imprisonment), or fine or both.[564] A crucial feature of RICO is its forfeiture provisions, which enables the government to attack criminal activities.[565] RICO forfeiture allows for forfeiture of property in the form of interests the defendant acquired or maintained through racketeering; an interest that provides any source of influence over the racketeering enterprise; and proceeds of racketeering activity.[566] The court in **Russello v United States**[567] has interpreted the word "interest" in 18 USC section 1963(a)(1) to include both proceeds and profits.

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[559] United States v Juvenile Male, 118 F.3d 1344,1349 (9th Circuit 1997)
[560] United States v Robertson, 514 US 669 (1995);
[561] United States v Bagnariol, 665 F.2d 877 (9th Circuit 1981)
[562] Israel and others (n 504)
[563] ibid 207
[564] 18 USC s 1963 (a) (2011)
[565] Israel and others (n 530) 250
[566] 18 USC s 1963(a)(1) - (3)
[567] 464 US 16 (1983)

18 USC section 1963 extends the concept of property subject to RICO forfeiture to include landed property including things fixed to or found in land, tangible and intangible properties, and these, are deemed to have been vested in the government at the time violation of section 1962 occurred.[568] This is not limited to proceeds personally obtained by the defendant as many circuits have held defendants jointly and severally liable for all proceeds obtained by co-defendants.[569] The forfeiture can proceed *in personam or in rem.*[570]

The concept of *in personam* and *in rem* forfeiture has already been discussed. However, it is worthy of mention here, that under RICO Act, where the prosecution pursues the property itself, a separate civil action must be brought in each district in which the property is located.[571] RICO Act empowers courts to issue temporary restraining orders or injunction to prevent a defendant from depleting forfeitable assets pending the conclusion of adjudication.[572] However, the right of a third party to property subject to forfeiture may be protected if it can be shown that the right predates the RICO violation[573] or the third party is a bona fide purchaser for value without notice.[574]

2.6.3.2 CIVIL ACTION

Both government and private parties can bring a civil action against a defendant. The government is empowered to seek civil remedies under section 1964 in addition to criminal penalties provided in section 1963. Civil remedies include orders of divestiture, restrictions on future activities or investments, and dissolution or reorganisation of the

[568] 18 USC s 1963(b)-(c); subsection (c) codifies the "relation-back" doctrine in stating that the property subject to RICO forfeiture vests at the time the RICO offence occurred (please see United States v Angiulo, 897 F.2d 1169 (1st Circuit 1990)
[569] United States v Browne, 505 F.3d 1229,1278 (11th Circuit 2007); see also United States v Corrado, 227 F.3d 543 at 553
[570] Israel and others (n 530) 253
[571] ibid
[572] 18 USC s 1963 (d) (1)(A), (B)
[573] United States v Saccoccia, 354 F.3d 9, 15 (1st Circuit 2003)
[574] 18 USC s 1983 (c) (2011)

enterprise.[575] However, due process must be observed by the Court in ordering dissolution or reorganisation of an enterprise to safeguard the rights of innocent persons.[576] Although these penalties may breach citizens' rights of association as guaranteed by the First Amendment, public interest in suppressing organised crime takes precedence over such concerns.[577]

On the other hand, private parties injured in their businesses or property as a result of a violation of section 1962 may sue for damages, to recover threefold the damages they sustain, the cost of filing the suit, and a reasonable attorney's fee.[578] However, person/enterprise distinction, standing, and statute of limitation constitute a challenge to private parties in pursuing a civil cause of action.

2.6.4 THE LIMIT OF RICO ACT

Before RICO, the government had to bring two separate actions – one against the property used in the commission of the crime in the district where it was located and the other against the defendant in the district where the crime was committed.[579] Under RICO, law enforcement can pursue both the defendant and the property in one action.[580] The broad scope of RICO had enhanced the powers of federal prosecutors in dealing with crime hitherto they were not able to so easily.[581]

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[575] 18 USC s 1964 (a) (2011)
[576] 18 USC s 1964 (a)
[577] McCarrick and others (n 526) 1645
[578] 18 USC s 1964(c)
[579] Margaret Mainusch, 'Protecting Third Party Property Rights in RICO Forfeitures' [1988] 2(1) Hofstra Property Law Journal 237, 240
[580] Israel and others (n 530) 206
[581] ibid. Also please see Fletcher N. Baldwin Jr., 'The Constitution, Forfeiture, Proportionality and Instrumentality: United States n Bajakajian – The United States Supreme Court Tries Again' [1998] 1(4) Journal of Money Laundering Control 319, 321 (describing RICO as the weapon of choice for government)

However, RICO Act has limitations.[582] One of the major limitations of RICO Act is its complexity.[583] Close examination of the RICO Act reveals its complexity and validates the arguments against it. The complex nature of RICO, made it ineffective in combating organised crimes against which it was enacted.[584] For example, for a defendant to be convicted, it has to be established that the defendant committed the predicate racketeering activities in a pattern, before even considering whether the defendant's violation of RICO was sufficiently linked to this pattern.[585] Consequently, RICO involves protracted investigations that unnecessarily cause confusion in giving instructions to the jury and delay trials.[586]

Most of the RICO predicate offences are also substantive crimes, which are easier to prove than the RICO charges.[587] For example, instead of bringing ML charges under RICO Act, it is easier to bring them under 18 USC sections 1956 and 1957. Only about eight per cent of indictments filed under RICO within its first fifteen years appears to have included charges of violations of section 1962(a)-(c) or subsection (d) – conspiracy to violate section 1962(a)-(c).[588]

As RICO Act allows for private action, instead of attacking organised crimes, the Act serves private litigants who resort to RICO in a significant number of cases that were not related to the traditional notion of organised crimes.[589] For example, in **National Organisation for Women v Scheidler,** the Supreme Court allowed the use of RICO

[582] Amann (n 64) 203
[583] ibid 204 (The complex nature of RICO made it ineffective in combating even the organised crimes for which it was enacted)
[584] ibid
[585] ibid 205
[586] ibid
[587] United States v Turkette, 452 US 579 (1981); please also see J Henning, 'Individual Liability for Conduct by Criminal Organisations in the United States' [1998] 44 Wayne Law Review 1305, 1328
[588] Gerard E Lynch, 'RICO: The Crime of Being a Criminal, Parts I & II' [1987] 87 Columbia Law Review 661, 726
[589] Amann (n 64) 203

Act to challenge anti-abortion protesters, eventhough they had no intention to acquire an economic benefit from their conduct.[590] The ever-changing nature of criminal groups, from relatively stable crime families to loose and ever-changing amalgamations of individuals, exposes the limits of RICO.[591] Professor Lynch has argued that RICO is nearly a total failure as a weapon against the activity that led to its enactment.[592]

Before the enactment of most of the laws discussed above, US government have been using fiscal laws to combat crime. As mentioned somewhere above, tax law was used where other laws failed to bring down Al Capone.

2.7 TAXING THE CRIME

This section analyses government's response to organised crime – using income tax law to convict and imprison leadership of organised crime. The analysis shows that, although tremendous success has been recorded in using tax law to attack organised crime, the dynamic nature of organised crime means that tax law alone cannot be relied upon to control economic crime.

One of the weapons deployed by the law enforcement in the United States against the leadership of organised crime is a charge of tax fraud,[593] such as failure to file a tax return or keep the proper records.[594] Since 1814, the Supreme Court held that goods smuggled into the United States were subject to import tax and were forfeitable for non-payment of tax.[595] Though smuggling is illegal, it does not exempt smugglers from

[590] National Organisation for Women v Scheidler, 510 US 249 (1994)
[591] Amann (n 64) 205
[592] Lynch (n 588) 726 (RICO was enacted address is the infiltration of legitimate business by criminal organisations)
[593] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organised Crime (1967) 11
[594] 26 USC s 7203 (1964)
[595] Hartford v United States, 8 Cranch 109, 3 L Ed 594 (US 1814)

appropriate payment of relevant taxes.[596] The Court has since affirmed the legality of tax collected from unlawful businesses.[597]

As prosecuting organised crime (such as drugs dealing, bootlegging or murder) became difficult, the government resorted to tax laws to convict leaders of organised crime.[598] One of the earliest culprits caught by the law was Al Capone. Al Capone never completed any tax returns, based on the misconception that making a full declaration of his illegal gains to the Internal Revenue Service would mean depriving himself of his Fifth Amendment Constitutional right against self-incrimination.[599] Contrary to his beliefs, the American Supreme Court fined him USD50,000 in addition to an eleven-year jail term, thereby disabusing his mind and that of his cohorts.[600]

In 1996, **Tax Act 1913** was amended to allow the government to tax income derived from any business whatsoever.[601] The US Supreme Court examined the intention of the Congress behind this amendment and stated that Congress intended to tax both legal and illegal income.[602] Thus, there were some cases in which courts held that proceeds of crimes fall within the meaning of gross income,[603] for the purpose of tax assessment.

Congress amended BSA 1970 to require the filing of Form 8300 to enhance law enforcement's access to more information about financial transctions involving the proceeds of crime. Thus, violation of this requirement attracts stiff sanctions of up to

[596] Rutkin v United States, 343 US 130 (1952)
[597] The License Tax Cases, 5 Wall 462, 18 L ED 497 (US 1867)
[598] Daniel C Richman and William J Stuntz, 'AL Capone's Revenge: An Essay on the Political Economy of Pretexual Prosecution' [2005] 105 Columbia Law Review 583, 584
[599] Bosworth-Davies and Saltmarsh (n 14) 1
[600] Earl Johnson, 'Organised Crime: Challenge to the American Legal System' [1963] 54 Journal of Criminal Law, Criminology and Political Science 1, 18
[601] ch 16, s II B 38 Stat 114, 167
[602] James v United States, 366 US 312, 218 (1961)
[603] United States v Sullivan, 274 US 259 (1927)

five years in prison, fine,[604] and civil penalties.[605] Additionally, US citizen and residents are required to declare and pay taxes on their worldwide income.[606] Thus, tax evasion by persons and businesses may constitute tax crimes.[607]

Tax fraud prosecutions continued to be one of the weapons against the leaders of organised crime. A survey indicated that sixty per cent of the convictions secured against the members of organised crime between 1961 and 1965 were the result of investigations conducted by the IRS.[608] This makes IRS one of the important enforcement agencies in the US.

Despite this success, organised crime remains viable because as one leader is convicted and imprisoned, another one emerges.[609] Moreover, the ever-increasing complexity of the internal structure and flow of finances within organised crime made it increasingly difficult to prosecute tax fraud successfully.[610] Besides, organised crime has resisted the attack on its leaders by infiltrating legitimate business to secure their financial base.[611]

2.8 SECURITIES LAWS

Securities Act 1933[612] and Securities Exchange Act 1934[613] are the two primary pieces of legislations that govern the national securities market in the US.[614] Securities Act 1933[615] was modelled after a New York's anti-fraud Statute[616] and an English Act[617]

[604] 18 USC s 3571 (2012); IRC s 6050I; see 2.4.2.1 Currency Transaction Reporting for discussion on Form 8300
[605] IRC s 6721(a)
[606] Zagaris (n 105) 524
[607] 26 USC s 7201 (1998); also see ibid
[608] President's Commission on Law Enforcement and Administration of Justice (n 597)
[609] Johnson (n 600) 21-23
[610] ibid 18
[611] Earl Johnson, 'Organised Crime: Challenge to the American Legal System' [1962] 53 Journal of Criminal Law, Criminology and Political Science 339, 403-07
[612] 15 USC s 77a – 77bbbb
[613] ibid s 78a – 78pp (2012)
[614] Thomas C Newkirk, 'The Advantages of a Dual System of Civil and Criminal Enforcement of the US Securities Laws' [1999] 3(2) Journal of Money Laundering Control 176, 181
[615] 15 USC ss 77a-77aa (2012)

existing at the time. The Securities Act 1933 requires a full disclosure of information about company's plan, operations, and financial condition before a company can register for and start an initial public offer of its securities to the public.

On the other hand, Securities Exchange Act 1934 created SEC to administer federal securities laws to regulate the securities market and its actors, and the trading of securities on the stock exchanges, while also requiring every stock listed on the market to be registered with the SEC.[618] Under the Securities Act 1933 and the Securities and Exchange Act 1934, SEC is authorised to take administrative and civil action against erring broker/dealers, and also to report criminal violations of laws and rules to criminal authorities such as the FBI for prosecutions.[619]

While these two Acts are subject to violation, monies made from such violations are typically laundered to obscure their origins. Under BSA 1970, brokers in securities and commodities markets are subject to the AML requirements of the BSA 1970[620] and that of MLCA 1986.[621] Brokers are required to file CTR, SAR, and CMIR, and maintain records of wire transfer.[622] The rule that requires FIs to keep records of transactions involving cheque, bank draft, cashier cheque, money order or traveller's cheque worth USD3000 and over,[623] also applies to brokers even though most broker/dealers do not conduct cash transactions and do not sell the above mentioned monetary instruments.[624]

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[616] NY General Business Law Article 23-A
[617] Companies Act 1929, 19 & 20 Geo. 5
[618] ibid ss 78a-78pp (2012)
[619] ibid ss 77h-1, 77t and 78u – 78u-3, 78ff (2012); please see Newkirk (n 589) 182-85
[620] 31 USC s 5312(a)(2)(G)-(H) (2011)
[621] 18 USC ss 1956 and 1957 (2012)
[622] 31 USC s 5316 (2011); 31 CFR ss 103.22(b)(1)-(c)(1); 103.19 and 103.33(f)
[623] 31 CFR 103.29
[624] Cozzolino (n 78) 65-66

Pursuant to section 352 of the USA Patriot Act 2001, which amended 31 USC section 5318(h), broker-dealers are required to establish and maintain AML compliance programme, which must include at the minimum (a) development of internal policies, procedures, and controls; (b) designation of a compliance officer; (c) provision of on-going employee training programmes; and (d) performance of independent audits to test the programme. [625] Broker/dealers who breached these provisions committed an offence.[626]

Consequently, SEC is empowered to sanction broker-dealers found in violation of the BSA requirements, which include seize and desist orders, debarment, disgorgement (given up of profits and interest), and civil money penalties.[627] Additionally, OFAC is empowered to sanction broker/dealers who trade with the identified enemies of the US such as terrorist groups.[628]

On the other hand, money launderers exploit the securities industry to launder proceeds of crime.[629] In **United States v Gray,**[630] to convict Gray for ML, prosecution adduced evidence that he purchased stocks and bonds to launder over USD1million of proceeds of illicit drugs trade.

While SEC has adopted various regulations requiring the reporting of securities violations to ensure the safety and soundness of securities firms, with regards to the

[625] The Patriot Act 2001 s 352(b)
[626] 31 USC s 5324(d)
[627] Nancy Morris, 'Investment Advisers Act of 1940: Release Nos. 2679-2681' [2008] 92 SEC Docket [2008] 92
[628] Cozzolino (n 78) 66
[629] Anthony Kennedy, 'Dead Fish across the Trail: Illustrations of Money Laundering Methods' [2005] 8(4) Journal of Money Laundering Control 305, 312-13
[630] 47 F.3d 1359 (5th Circuit 1995); other cases that illustrates how stock markets are being exploited by launderers include: United States v Hill 167 F.3d 1055 (6th Circuit 1999) (where the defendant used part of the proceeds of illegal gambling he deposited with his bank to by cashiers cheque with which he bought stock); United States v Bennet, 252 F.3d 559 (2nd Circuit 2001) (where fraud money was used to acquire stock of a race track and a hotel); United States v Fuller and Foster 947 F.2d 1474 (5th Circuit 1992)

commodities market, Commodities Exchange Act (CEA) 1974[631] did not expressly adopt the concept of due diligence.[632]

However, the NYSE, NASD NFA through the application of KYC programme, have over the years ensure due diligence in the securities industries.[633] Although this concept developed in the security industry mainly to satisfy customer's specific needs, such as identifying which securities meet a particular client's need, the concept now has application as a tool to combat ML in the industry.[634]

Although the Patriot Act and FinCEN Regulations require US securities firms to maintain AML compliance programme to prevent launderers and terrorist from gaining access to the market,[635] the commission-incentive-based nature of the securities market could still be exploited to raise fund for terrorist organisations.[636]

However, the extension of protection afforded to a whistle-blower and the introduction of lucrative monetary incentive for a whistle-blower would help in exposing violations of security laws and ML in the sector.[637] Thus, the role of whistle-blower in exposing shady deals in the securities industry is very relevant in policing the stock market.[638] This incentive acquires additional attractive character with the passage of Whistleblower Protection Enhancement Act 2012, [639] which allow another

[631] Commodity Exchange Act of 1974, 7 USC s 1a
[632] Cozzolino (n 78) 67
[633] ibid 66
[634] ibid
[635] The Patriot Act s 302(b)(1)
[636] Richard V Rodriguez, 'Economic Terror: Market Manifestations of Terror Attacks' [2010] 1 National Security Law Brief 129, 133
[637] Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub L No 111-203, 124 Stat 1376 (2012) also expands the scope of whistle-blower provisions of Securities Act 134 and the Sarbanes-Oxley Act 2002 by giving whistle-blowers from 10 to 30 per cent share of penalties exceeding USD1 million paid by violators
[638] Barry Rider and Michael Ashes, *Insider Crime: The New Law* (Jordans 1993) 1
[639] Pub Law 112-199, 126 Stat 1465 (2012)

whistleblower, whose report comes in the ordinary course of his duties to receive the reward though he is not the first to report the violation.[640]

2.9 STATE ML LAWS

This section provides an overview of State ML laws in general and then discusses ML Law adopted by the State of New Jersey, being once a safe-haven for organised and white-collar criminals.[641]

2.9.1 OVERVIEW OF STATES AML LAWS

So far about 36 States have adopted AML laws to combat ML and organised crime.[642] Arizona is the first state to adopt AML law.[643] States laws were to some extent designed after the following four models:[644]

(a) the Federal Statute (18 USC sections 1956 and 1957) adopted particularly by New York;

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[640] Nagel and Weiman (n 271) 1362

[641] James B Johnston, 'An Examination of New Jersey's Money Laundering Statutes' [2006] 30 Seton Hall Legislative Journal 1, 2

[642] Here are some of the State Money Laundering Laws citations: **Arizona**: Ariz Rev. Stat. Ann. s13-2317; **Arkansas**: Ark. Code Ann. ss 5-42-201 to 5-42-205; **California**: Cal. Penal Code ss 186.9, 186.10; **Colorado**: Colo. rev Stat. Ann. s 18-18-408; **Connecticut**: Conn. Gen. Stat. Ann. ss 53a-275 to 53a-282; **Delaware**: Del. Code Ann. tit. 11, s 951; **Florida**: Fla. Stat. Ann. ss 896.101 to 896.107; **Georgia**: GA. Code ss 7-1-910 to 7-1-916; **Hawaii**: HAWAII REV. STAT. ss 708A-1 to 708A-3; **Idaho**: IDAHO CODE s 18-8201; **Illinois**: ILL. COMP. LAWS ANN. ch.720 s 5/29B-1; **Indiana**: IND. CODE ANN. ss 35-45-15 to 35-45-15-5; **Iowa**: IOWA CODE ANN. ss 706B.1 to 706B.3; **Kansas**: KAN. STAT.ANN. s 65-4142; **Louisiana**: LA. REV. STAT. ANN. s 14:230; **Michigan**: Mich. Comp. Laws Ann. ss 750.411j to 750.411p; **Mississippi**: Miss. Code Ann. s 97-23-101; **Missouri**: Mo. Ann. Stat. s 574.105; **Montana**: Mon. Code Ann. s 45-6-341; **Nebraska**: Neb. Rev. Stat. s 28-205; **New Jersey**: NJ. Stat. Ann. s 2C: 21-23 to 2C:21-29; **New Mexico**: N.Mex. Stat. Ann. ss 30-51-1 to 30-51-5; **New York**: N.Y. Panel Law ss 470.00 to 470.25; **North Dakota**: N.D. Cent. Code s 19-03.1-23, 12.1-08-04; **Ohio**: OHIO REV. CODE ANN. ss 1315.55, 2909.29; **Oklahoma**: OKLA. STAT.ANN., tit.21 s 2001; **Oregon**: ORE. REV. STAT. ss 164.170 to 164.174; **Pennsylvania**: 18 PA. CONS. STAT. ANN. s 5111; **Rhode Island**: R.I. GEN. LAWS s 11-9.1-15; **South Carolina**: S.C. CODE ANN. s 44-53-475; **Tennessee**: TENN. CODE ANN. ss 39-14-901 to 39-14-909; **Texas**: TEX. PENAL CODE ANN ANN. ss 34.01 to 34.03; **Utah**: UTAH CODE ANN. ss 76-10-1901 to 76-10-1908; **Virginia**: VA. CODE ANN. ss 18.2-246.1 to 18.2-246.5; and **Washington**: WASH. REV. CODE ANN. ss 9A.83.010 to 9A.83.04

[643] Motivans (n 317), 10

[644] ibid

(b) the President's Commission on Model State Drugs Law (1993), including ML, money transmitting, asset forfeiture, and related provisions;

(c) the Money Transmitter Regulators Association, State regulator group and publisher of a model statute; and

(d) the National Conference of Commissioners on Uniform States Laws, model statute.

These laws vary from state to state, with predicate offences ranging from SUAs, such as racketeering or fraudulent activities, corruption and crime for profit, to any felony. Transaction involving a statutorily defined unlawful activity is the basis of culpability across States.[645] Like the provision of MLCA 1986, most states AML laws require the prosecution to prove the following elements: Transactions involving criminal proceeds; intent to conceal the source of the property involved; and knowledge.[646] While some States' laws require the transaction to have taken place in a bank, other State laws require any transaction. Similarly, while some States criminalise movement of proceeds without an intervening transaction, others do not.

However, while there may be a clash of jurisdiction between state and federal government in prosecuting ML offences, the federal government has jurisdiction once the financial transaction affects interstates commerce,[647] no matter how minimal.[648] Thus, inability to link transactions to interstate commerce may spell doom to the federal

[645] ibid
[646] ibid
[647] The first-time federal government asserts jurisdiction over state government was through the Supreme Court decision in Gibbons v Ogden, 22 U.S. (9 Wheat) 1 (1824); this power expands through the cases like Hipolite Egg Co. v United States, 220 U.S. 45 (1911); Champion v Ames, 188 U.S. 321 (1903); Hammer v Dagenhart, 247 U.S. 251 (1918); and United States v Bazuye 240 F.3d 861, 863 (9th Circuit 2001)
[648] United States v Gotti, 459 F. 3d 296, 336 (2nd Circuit 2006); for historical development on how federal government encroaches into states' jurisdiction in prosecuting crimes please see Andrew Weis, 'Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes' [1996] 48 Stanford Law Review 1431, 1436-483

ML prosecution.[649] Following the enactment of the USA Patriot Act, some States adopted a new AML legislation or amended the existing one to regulate the money transmitter industry to prohibit TF.[650]

2.9.2 NEW JERSEY'S AML LAW

New Jersey is one of the states that have enacted AML law to prosecute criminals and forfeit proceeds of crime. New Jersey's AML statute is codified at Title 2C, Chapter 21, sections 23 through 28 of the New Jersey Criminal Code.[651] Like the federal AML statute,[652] the New Jersey Criminal Code broadened the traditional meaning of ML to include a range of other activities.[653] A charge of ML can be brought under any of the following three prongs: (a) transportation/possession prong [2C: 21-25(a)]; (b) transactional prongs [2C: 21-25(b) and 2C: 21-25(e)]; and (c) director/organiser prong [2C: 21-25(c)].[654]

Like the federal law, a conviction for ML under New Jersey's law attracts significant criminal and civil sanctions.[655] While the crime attracts fine and forfeiture, if convicted, a defendant faces a mandatory consecutive prison sentence for both the ML and the predicate offence.[656]

The Superior Court Appellate Division of New Jersey had the opportunity to examine the ML statute in **State v Harris**.[657] In 2001, Ms Harris along with others were charged with mortgage fraud; ML; conspiracy; theft by deception; and misapplication of entrusted funds. She was convicted on all counts and was sentenced to an 18 year jail

[649] United States v Edward 111 F. Supp. 2nd 1057, 1062 (ED Wis 2000)
[650] Motivans (n 317) 10
[651] N.J. STAT. ANN. ss 2C:21-23 to 21-29 (2005)
[652] 18 USC s 1956(a)
[653] N.J. STAT. ANN. ss 2C: 21-23 to 21-28 (2005)
[654] For detail analysis on this please see Johnston (n 641) 16 - 26
[655] N.J. STAT. ANN. s 2C: 21-28
[656] N.J. STAT. ANN. s 2C: 21-27(a)-(c)
[657] 861 A.2d 165 (N.J. Super. Ct App. Div. 2004)

term. On appeal, the Court rejected the defence argument that a defendant can only be convicted of ML if the transaction was conducted to conceal or hide the nature of the illicit money. The defence that specific crime must underlie the ML offence was also rejected, asserting that ML and the underlying offence must not be independent of each other.[658]

2.10 CONCLUSION

As we have seen, agencies of the US government have been struggling to be ahead of criminals in thier effort to combat ML, TF and other organised crime. To combat ML and other crimes, US enacted AML law on an incremental basis. The modern-day fight against ML started with Bank Secrecy Act 1970 which require banks to report and keep records of financial transactions. Before BSA 1970, authorities in the US have tried other legal measures such as Tax Act 1913 to combat organised crime. As launderers continue to circumvent the law, government continue to expand the reach of AML law. MLCA 1986, the Patriot Act, to name a few were enacted at different times to close one loophole or another. Meanwhile, Courts were also kept busy with prosecutions, forfeiture proceedings and appeals. While law enforcement won in some cases, they fail in some.

The conclusion is that not all is rosy. The analysis in this chapter reveals the strength and the weakness in the US AML and other relevant laws. BSA 1970 requires FIs, including non-banks FIs to record and report their customer's financial transactions above a certain threshold. It also requires the filing of SAR on suspicious transactions. These requirements were enacted to create an audit trail and help detect ML at the placement stage. However, the volume of CTR renders those reports ineffective. One

[658] For detailed analysis of this case please see Johnston (n 641) 27-34

thing that compounds this problem is that, a large percentage of these reports involve innocent transactions that hide the criminal transactions - making it difficult for law enforcement to distill any meaningful information.

Tax fraud charges, which were successfully used against the leadership of organised crime in the early 1900s, became less effective due to the dynamic nature of crime and criminals. Similarly, the RICO Act which was passed to prevent infiltration of legitimate businesses by organised criminal families failed to serve that purpose well because of the complexity and other factors associated with RICO investigations and prosecutions.

The passage of MLCA 1986 criminalised ML, and unlike the BSA, it extends culpability to those who handles people's wealth. However, to secure conviction the prosecution needs to surmount the hurdle of proving four elements of the crime. A charge of ML can fail if the prosecution fails to prove that the transaction affects interstate commerce.

Forfeiture law remains a vital tool in disrupting ML because it takes away not only the proceeds of crime but also any assets associated with it. Preventing criminals from enjoying their illicit gains removes the incentive for engaging in crime. Without money, criminals would not be able to fund their operations and in the long run, the illegal activity may either reduce drastically or stop altogether. In contrast, imprisonment alone does not harm criminals as much as forfeiture does because criminals consider keeping their assets more important, as they can still control business while in prison.

Before putting the final full stop on this chapter, it is pertinent to note the likely consequence of President Donald Trump coming to power, on the global war against

financial crime. For example, the stance of the US President on Foreign Corrupt Practices Act is not encouraging.[659] As Trump is known to be a man of his word,[660] it is not clear whether the US will continue to take its leading role or even cooperate with the rest of the world in fighting the global menace of financial crime.

Although the US law enforcement agencies are independent, war on financial crime requires political will. While the agencies can operate without direct interference, budget cuts can affect their effective functioning. Having appraised the law and practice relating to ML in the USA, the focus in this thesis now shifts to the UK. The next chapter appraises the law relating to ML in the UK.

[659] Jeffrey Davidson, 'Brexit Trump and the Implications for Financial Crimes' (*FTSE Global Market,* 20 January 2017) <http://www.ftseglobalmarkets.com/news/brexit-trump-and-the-implications-for-financial-crime.html> accessed 6 June 2017

[660] For example, President Trump is opposed to the Paris Agreement, and few days ago Trump announced that the US will pull out of the agreement signed by 136 countries (please see 'Anger as Trump announces US will withdraw from Paris climate deal' (*Sky News,* 2nd June 2017) <http://news.sky.com/story/trump-announces-us-will-withdraw-from-paris-climate-deal-10901316> accessed 7 June 2017)

CHAPTER 3: LAW RELATING TO MONEY LAUNDERING IN THE UNITED KINGDOM

> There are clear advantages in pursuing the facilitators of transactions who are often relatively well funded, more susceptible in practical terms to the jurisdiction of the court, and often because they are regulated or at least subject to some kind of professional supervision, bound to keep and maintain records. In other words, they are easy targets who are almost certainly not going to adopt the tactics of a 'real' fraudster.
>
> ***Professor Barry A.K. Rider.***[661]

3.1 INTRODUCTION

The above quotation explains the essence of placing AML obligations on intermediaries. ML can only occur with the deliberate or inadvertent involvement of the financial intermediaries and professional advisers.[662] Of course, there would not be so many thieves if there were no receivers.[663] The law relating to ML in the UK developed incrementally, starting from DTOA 1986 to POCA 2002, and now CFA 2017. Similarly, regulating ML through MLRs developed incrementally, beginning from the 1991 Regulations to the current one, MLR 2007. By June 2017 another MLR is expected to come into effect.

DTOA 1986 was enacted as a response to the outcome of Operation Julie Case, which had shown the ineffectiveness of the UK confiscation regime. DTOA 1986 was then passed to criminalise the laundering of the proceeds of drug trafficking and to allow for the confiscation of proceeds associated with drug trafficking. CJA 1988 was later enacted to extend the confiscation law to the proceeds of all crimes. Both the DTOA 1986 and the CJA 1988 were amended by the CJA 1993.

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[661] Rider (n 41) 219
[662] Stephen Gentle and others, 'Handling Funds' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (CCH Editions Limited 1999) 10-000
[663] R. v William Steven Battams (1979) 1 Cr. App. R. (S.) 15, 16

While the CJA 1993 amended CJA 1988 to create all crime ML, a dichotomy was created between drug-ML and all crime ML. This dichotomy posed challenges for the prosecution, as they were required to prove which criminal conduct generated the proceeds. While the CJA 1988 continue to exist after the amendment, Drug Trafficking Act (DTA) 1994 replaced the DTOA 1986.

The ML provisions of DTA 1994 and the CJA 1993 were later revoked and replaced by POCA 2002, thereby removing the dichotomy. POCA 2002 was severally amended to bring the ML provisions up to date. CFA 2017 has made a substantial amendment to POCA 2002, introducing UWO for the first time in the UK. The Act also give additional powers to law enforcement to combat ML and the proceeds of crime. The introduction of the UWO in the UK is novel as it will help law enforcement deal with the resurfacing of illicit funds – ranging from proceeds of corruption to drugs, and to the proceeds of all sort of crimes.[664]

Since the enactment of the DTOA 1986 a body of case law developed which helped in clarifying the ambiguity in the law. In addition to the main AML primary and secondary legislation, the Theft Act 1968 and tax laws were used and can still be used to disrupt ML. In fact, Theft Act 1968 (section 22) was used succesfully to prosecute ML case, when there was no statutory AML provision.

The EU initiatives in combating ML and organised crime in general have had a significant impact on the UK AML landscape. However, the UK is well ahead of the EU in the fight against ML and other organised crime. Thus, the UK hardly amends its laws in a significant way to give effect to the EU Directives. The current legislations

[664] Transparency International, 'Unexplained Wealth Orders: How to Catch the Corrupt and Corrupt in the UK' (*Transparency International,* 28th April 2017) <https://www.transparency.org/news/feature/unexplained_wealth_orders_how_to_catch_the_corrupt_and_corrupt_money_in_the> accessed on 7th July 2017

might undergo minor amendments when the fourth Directive (2015/849) is finally transposed into the UK law on 26th June 2017. FATF has subjected UK, just like other countries, to its periodic evaluation to determine the UK's level of compliance with its recommendations. The next round of FATF evaluation of UK is scheduled for 2018.

This chapter focuses mainly on the following. First, the current AML law contained in the POCA 2002, which consolidated the CJA 1993 and the DTA 1994. The substantive AML law contained in sections 327, 328, and 329 of POCA 2002 Act applies to any person, regardless of whether they work within a regulated sector.[665] Secondly, the secondary legislation - MLR 2007. Thirdly, the alternative means of combating ML - handling offences and tax laws. The analysis in this chapter centres on the law applicable to England and Wales. This is because the applicable law in Scotland and Northern Ireland are to some extent similar to the law in England and Wales. Moreover, some laws have geographical spread across England and Wales, and Northern Ireland.

This chapter consists of eight sections. Section 2 highlights the key development in this area of law, as well as the interplay between the EU Directives on ML and TF. While section 3 analyses the primary AML legislation, section 4 discusses the AML subsidiary legislation. Section 5 discusses the means of recovering the proceeds of crime under POCA 2002, and section 6 critically analyses the alternative means of tackling ML. Section 7 explores the impact FATF recommendations, and mutual evaluations have had on the UK AML landscape. Finally, section 8 concludes this chapter.

[665] Shereen Billings, 'UK Law and Practice' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (Sweet and Maxwell 2003) 20-000

3.2. THE KEY DEVELOPMENTS

AML law in the UK developed incrementally creating laundering offences and empowering courts to deprive criminals of their ill-gotten gains.[666] Before the codification of ML offences into the statute book in the UK, an incidence of ML, as illustrated by the Brinks Mat case, could only be prosecuted with the aid of the offence of 'handling', under section 22 of the Theft Act 1986.[667] This section highlights the developments of AML law in the UK. The objective is to provide a list of the AML legislations, both repealed and current, to show in brief how and when the modern war against ML in the UK started and where we are now.

Before the Brinks Mat, an attempt by the government to confiscate criminal proceeds in the hands of 'Operation Julie' case defendants exposed the inadequacy of the existing laws – section 27 of the Misuse of Drugs Act 1971 and section 43 of the Powers of Criminal Courts Act 1973 – in dealing with drug trafficking.[668] In response to this problem, the government established the Hodgson Committee to look into the issue.[669] Following the committee's recommendations, DTOA 1986 was enacted criminalising ML, and allowing the government to confiscate proceeds of drug trafficking.[670] CJA 1988 later extended the confiscation power to cover the proceeds of other crimes.

The DTA 1994 repealed and replaced almost every provision of DTOA 1986.[671] But before that, DTOA 1986 was amended by CJA 1988 and the Criminal Justice (International Co-oporation) Act 1990. The UK further enacted CJA 1993, which

[666] Janet Ulph, Commercial Fraud, Civil Liability, Human Rights, and Money Laundering (1st edn, OUP 2006) 128
[667] R v Brian Henry Reader and Others (1988) 10 Cr. App. R. (s.) 210
[668] R v Cuthbertson [1981] AC 470
[669] Howard League for Penal Reform (n 21) 4
[670] HC Deb 21 January 1986, vol 90, col 242 (The Secretary of State for the Home Department, Mr Douglas Hurd stated that, 'by attacking the profits made from drug trafficking, we intend to make it much less attractive to enter the trade. We intend to help guard against the possibility that the profits from one trafficking operation will be used to finance others…')
[671] Ulph (n 666) 129

amended its earlier version, the CJA 1988. POCA 2002 now harmonised and replaced ML provisions of the DTA 1994 and CJA 1988, which ends the previous problem of having to deal with the statutory dichotomy.[672]

The subsidiary legislations pass through similar developments as series of MLRs were enacted to complement the primary AML legislations. The MLRs includes MLRs 1993, 2001 (SI 2001/3641), 2003 (SI 2003/3075), and 2007 (SI 2007/2157). The MLR 2007 was sequel to the 2005 Directive, which implemented the recommendations issued by FATF to include FT within the ambit of ML provisions.[673] Meanwhile, MLR 2017 is expected on 26th June 2017.

Since its enactment, POCA has been amended by SOCA 2005, SOCPA 2005, SCA 2007, PCA 2009, CCA 2013, and SCA 2015.[674] Section 45 of SCA 2015 introduced for the first time in the UK the offence of joining organised crime group. This is a novel approach in the fight against organised criminal groups who commit crimes such as ML, drug trafficking, and human trafficking to say the least.[675] The aim is to allow law enforcement to prosecute the leadership of the organised crime groups as well as the professionals, haulage companies, and corrupt officials who facilitate organised crime.[676] These are people who are difficult to prosecute using conspiracy or joint

[672] HC Deb 30 October 2001, vol 373, cols 765-766 (Minister for Police, Courts and Drugs noted, 'At the moment, the law makes it too easy for people to turn a blind eye to money laundering…Under the Bill, the distinction between the offence of laundering drug proceeds and the offence of laundering other criminal proceeds will be removed. The need under the present law for the prosecution to prove whether the proceeds was derived from drug or non-drug offences is one reason for the small number of prosecutions')

[673] Ian Smith and others, Asset Recovery, *Criminal Confiscation and Civil Recovery* (first published 2003, 2nd edn, OUP 2008) Vol I, I.3.540

[674] Edward Rees and others, Blackstone's Guide to The Proceeds of Crime Act 2002 (1st published 2003, 5th edn, OUP 2015) 5

[675] Liz Campbell, 'The offence of participating in activities of organised crime group: s 45 of the Serious Crime Act 2015 (2015)' 10 Archbold Review 6

[676] Paul Jarvis and Ros Earis, 'Participating in the activities of an organised crime group: the new offence' [2015] 10 Criminal Law Review 766, 772-77

enterprises statute because it is hard to find agreement to commit, or participation in, for example drug trafficking.[677]

As stated earlier, the law in this area developed incrementally culminating into POCA 2002, thereby consolidating and harmonising previous legislation into a single statute. This, made the law simpler and more effective in providing for a generic offence of ML.[678] CFA 2017 has amended POCA 2002 substantially. Thus, the important provisions of CFA 2017 enacted to augument the fight against financial crime merit attention here to highlight the major changes CFA 2017 made to POCA 2002.

3.2.1 CRIMINAL FINANCES ACT 2017

CFA 2017 is the most important piece of legislation on AML and unexplained wealth that the UK has ever had. The Act, which received Royal Assent on 27th April 2017 which brings some of its provisions partially into effect, seeks to strengthen the law on recovering the proceeds of crime, tackle ML, tax evasion, corruption, and counter TF. Thus, the synopsis of the four parts of the Act needs to be provided here.

Among other range of powers, Part 1 of the Act introduces for the first time in the UK the concept of UWO.[679] UWO is an investigatory power given to law enforcement to compel a person suspected of criminal activity to explain the provenance of the wealth he seems to have acquired overnight and which is disproportionate to his known income. Failure to respond to the order triggers the presumption that the property represents the proceeds of crime.

[677] ibid
[678] Ulph (n 666) 130
[679] Drawing on the experience of Australia and Ireland, an synopsis of how the UK UWO will likely work in practice is discussed in chapter six

Under POCA 2002, law enforcement are unable to confiscate the proceeds of crime due to difficulty in obtaining evidence, especially where the evidence is located abroad. CFA 2017 (section 1) inserts into POCA 2002 section 362A-362I to aid the recovery process under POCA 2002. The Minister stated that:

> Unexplained wealth orders will flush out evidence to enable enforcement agencies to take forward recovery action under POCA. Such an order will require a person to provide information that shows that they obtained identified property legitimately. If they do so, agencies can then decide whether to investigate further, take civil recovery action or take no further action. If the person does not comply with the order, the property identified in the order is presumed to be recoverable under any subsequent civil recovery proceedings. [680]

Section 1 is aimed at tackling foreign kleptocrats and corruption inside the UK.[681] Although this thesis does not discuss corruption in greater detail due lack of space, it is worthy of mention that corruption is a real issue in UK for several reasons. First, it is the failure to have anti-corruption law that led the FATF and the OECD to be critical on the UK's commitment to prevent corruption.[682] Secondly, corruption is a stumbling block in enforcing AML law because evidence tends to suggest that organised crime groups do corrupt and penetrate institutions.[683] Thus, there is a symbiotic relationship between corruption and ML.[684]

[680] HC Deb 17 November 2016, Vol 617, Col 87
[681] CFA 2017 s 1
[682] F. Joseph Warin and others, 'The British Are Coming Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' [2010] 46(1) Texas International Law Journal 1, 4-5; FATF 'Third Mutual Evaluation Report on the United Kingdom, [2007] page 3 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UK%20FULL.pdf> accessed 7 June 2017
[683] European Commission Report: Examining the Links Between Organised Crime and Corruption [2010]; National Crime Agency, strategic assessment of serious and organised crime 2014 pages 7, 10, 13, 20; Baldwin N. Fletcher and Theresa A. DiPerna, 'The rule of law: An essential component of the financial war against organized crime and terrorism in the Americas' [2007] 14(4) Journal of Financial Crime 405-437 (there is also a nexus between corruption and terrorist financing)
[684] David Chaikin and Jason C Sharman, *Corruption and Money Laundering: a Symbiotic Relationship* (Springer 2009)

Following the BAE-Al Yamamah defence contract scandal and the resultant international pressure, especially from outside the UK, government presented a bill which culminated into the enactment of the Bribery Act 2010. Section 7 created an offence of corporate failure to prevent corruption. Under section 7(1), a relevant commercial organisation is guilty of an offence if a person associated with it bribes another person intending to obtain or retain business for the commercial organisation, or to obtain or retain an advantage in the conduct of business for commercial organisation. Thus, to avoid criminal liability a company must establish and maintain adequate measures to prevent its officers and agents from breaching section 7(1). The SFO secured a conviction against a UK company, Sweett Group Plc, for failure to prevent corruption offence in 2016.[685]

This statute is aimed at preventing corruption. However, what happened to the proceeds obtained in breach of section 7, or stolen assets associated with foreign PEP, or the proceeds of drug trafficking? Since corruption and other crimes cannot be eradicated completely, another mechanism is needed to attack the criminal proceeds whenever they resurfaced. Although, Sweett was ordered to pay £2.35 million, this amount is not the actual bribe paid. The bribe money remained in the hands of the persons to whom it was paid.

If the person to whom the bribe was paid, laundered the money into the UK, for example, by buying a property and there is no sufficient evidence to link the person to the bribe money, the law enforcement may find it difficult to recover that money. A research conducted by TI identified a total of £4.2 billion properties in London that have

[685] Serious Fraud Office v Sweet Group Plc unreported 19 February 2016 (Crown Court (Southwark))

been bought by individuals with suspected wealth.[686] UWO provides a mechanism to investigate the source of assets suspected of being the proceed of crime, especially because illicit proceeds are normally laundered before finally resurfacing as clean assets.

Although corruption is also a big issue in the US, discussion on corruption in the States is excluded to remain within this thesis' word limit. However, it worthy to mention that following the Watergate scandal 1977, US enacted FCPA 1977 to prohibit corporate entities from bribing foreign officials.[687] Since then, many multinational companies have robust FCPA compliance programs, and lawyers who specialize in international white-collar crime are already intimately familiar with the FCPA structures.[688]

Chapter 3 of the CFA strengthens the POCA civil recovery regime giving new powers to the law enforcement to tackle ML, TF and organised crime through asset forfeiture. First, gaming vouchers, fixed-value casino tokens, and betting receipts are now included in the list of items that are regarded as cash.[689] Secondly, law enforcement is now empowered to forfeit certain personal (or moveable) properties,[690] and money held in bank and building society accounts worth £1,000 and above – there is no upper limit.[691]

Most importantly, the law ushered in administrative forfeiture into the UK AML regime, but applies only to money in the account of a bank or building society.[692] However, despite the decision of the court in **R (Bunnvale Limited and others) v.**

[686] Transparency International (n 664)
[687] 15 USC s 78dd-1 (2011)
[688] F. Joseph Warin and others, 'The British Are Coming: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' [2010] 46(1) Texas International Law Journal 1, 4-7
[689] CFA 2017 s 14 inserts these provisions into POCA 2002 s 289 (because they store value and can easily be transferred, which make them attractive to money launderers)
[690] CFA 2017 s 15 inserts s 303B – 303Z into POCA 2002
[691] CFA 2017 s 16 inserts s 303Z1 – 303Z19 into POCA 2002
[692] HC Deb 17 November 2016, vol 617, col 110

Central Criminal Court [2017] EWHC 747 (Admin), that possession of a substantial quantity of cash inherently gives rise to suspicion, making the processes of forfeiting such cash easier and less rigorous, potential difficulties remain especially regarding the forfeiture of money held in a bank account.[693]

The CFA 2017 also changes the way SAR is handled. CFA 2017 s 10 amended Part 7 of POCA 2002 to allow for the 31 day moratorium period to be extended successively up to six times (186 days in total) beginning from the day after the end of the initial 31 days. During the moratorium period, the reporting person is prohibited from dealing with the asset. Thus, the asset is effectively frozen albeit temporarily. The essence is to allow investigators more time to collect evidence for further action such as applying to court for a restraining order. Before this amendment, the moratorium period cannot be extended beyond 31 days, which is not enough time for the law enforcement to conduct proper investigation especially where evidence is located abroad.

However, for the moratorium period to be extended an application must be made to the relevant court before the end of an existing moratorium period, and the court may only grant an extension where it is satisfied that: an investigation is being conducted diligently and expeditiously; further time is required; and the extension is reasonable.[694]

It is interesting to note that, following complaint from the banks the government promised to reform consent regime to allow the regulated person to carry on with a suspicious transaction after filing SAR if discontinuing the transaction will alert the

[693] Jasvinder Nakhwal and Nicholas Querée, 'The Criminal Finances Act 2017: Account Freezing and Forfeiture Provisions, [2017] 181 Criminal Law & Justice Weekly 303, 304 (the authors analyse other potential policy and practical difficulties that could be faced in operating the law)
[694] CFA 2017 s10 inserts s 336A into POCA 2002

client of an impending investigation.[695] Instead, the law extends the period by six months.

During the debate, the minister for security, Mr Ben Wallace, explained that 31 days is not enough to conduct ML investigation properly, to the end, especially where evidence is located abroad or where the case involves grand foreign corruption or other serious crime.[696] The minister also explains that extending the moratorium period will protect the proceeds of crime from being dissipated when there is a suspicion that ML activity has taken place and when the law enforcement agency has not had the opportunity to complete its inquiries.[697] This is a positive development. However, it remains to be seen how the requirement for the extension of the order will be met.

Another important feature in CFA 2017 is the new provision allowing voluntary sharing of information between bodies in the regulated sector and between those bodies and the police or the NCA, in connection with suspicions of ML.[698] Also, TACT 2000 is amended in a similar way for countering terrorism and TF.[699] Part 2 of CFA 2017 brings the fight against TF in line with the fight against ML, reflecting existing provisions relating to financial crime.[700] It does so by making the tools available for TF investigations and the powers available to seize terrorist cash and property as

[695] Home Office and Her Majesty's Treasury, *UK Action Plan on Anti-Money Laundering and Counter-Terrorist Financing 2016* (Action Plan 2016) Annex B
[696] HC Debate 17 November 2016, Vol 617, Cols 98-99
[697] ibid
[698] CFA 2017 s 11 inserts ss 339B-339G into POCA 2002
[699] CFA 2017 s 36 inserts s 21CA-21CF into TACT 2002 (allowing the voluntary sharing of information between bodies in the regulated sector, and between those bodies and the police or the NCA, in connection with suspicions of terrorist financing or the identification of terrorist property or its movement or use)
[700] HC Deb November 2016, vol 617 cols 122-123

comprehensive as those available for dealing with other financial crime or, in some cases, more robust.[701]

The CFA 2017 also expands the investigative power of the law enforcement such as the SFO in relation to ML. S 7 extends the disclosure order in confiscation proceedings involving cases, such as ML and fraud. Disclosure orders empower law enforcement to require anyone that they believe has relevant information to an investigation, to answer questions, provide information or to produce documents.[702]

CFA 2017 part 3 creates offences of corporate failure to prevent the criminal facilitation of tax evasion.[703] A corporate body will be vicariously liable for failure to prevent the criminal facilitation of the UK and foreign tax evasion, where the corporate body has not put in place necessary measures to prevent its employees or agents from facilitating tax evasion.[704] However, these offences are not offences of corporate failure to prevent itself from evading tax, and do not create a legal obligation for corporations to prevent their client's tax evasion.[705] Having reasonable prevention procedures in place serve as a defense to a charge of failure to facilitate.[706]

This offence mirrors section 7 of the Bribery Act 2010, which criminalised failure of corporate bodies to prevent corruption. Like section 7 BA 2010, it appears that Parliament intended section 45 to have extraterritorial effect, to allow law enforcement

[701] HL Deb October, 2016 vol 616, cols 198-99
[702] Edmund Smyth and Jonathan Blunden, 'Criminal Finances Act 2017' (*Kingsley Napley*, 2 May 2017) <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/criminal-finances-act-2017> accesses 13 June 2017
[703] HL Deb October 2016, vol 616, col 194 (The Minister for Security said: "It [the Bill] also goes some way to dealing with people who evade tax overseas. Just because they are not evading our tax but are robbing another country, it does not mean that we would not still like to take action against those individuals")
[704] CFA 2016 ss 45 and 46 (Criminal facilitation is as defined by Accessories and Abettors Act 1861 s 8. This section has been examined in Jogee and Ruddock v The Queen (Jamaica) [2016] UKSC 8)
[705] HC Deb November 2016, vol. 617, cols 136
[706] CFA ss 45(2) and 46(3)

to go after those who encourage people to evade UK tax wherever they are domiciled in the world.[707]

However, the new tax offences has gone one step further. Unlike section 7 offence, sections 45 and 46 offences are not premised on the associated person himself evading tax.[708] However, this could lead to due process deficit because in its present form, the tax model appears to permit a court finding that an individual has committed a tax evasion facilitation offence, even if he has never had the opportunity to defend himself against the accusation of criminal conduct.[709] While this could help in fighting tax evasion, it remains to be seen whether the HMRC will optimally utilise the new powers, as powers previously given were under-utilised.[710]

The Act, however, fell short of creating the offence of corporate failure to prevent ML. The designers of the CFA 2017 are very ambitious as the Act expands the powers of the law enforcement in relation to combating financial crimes and TF. Whether the Act will in practice operate optimally to achieve the purpose it was designed for remains to be seen.[711] Discussing CFA 2017 in it its entirety would exceed this thesis' word limit. However, analysis in this thesis will take into account the changes the CFA 2017 made to the AML landscape.

Now, this thesis shifts to the assessment of the impact the EU AML law on the UK AML landscape. Also, the next section will seek to examine the future of the AML regime after the completion of the Brexit negotiations.

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[707] HC Deb November 2016, vol 617, col 139
[708] Anita Clifford, 'Failure to Prevent: Corporate Liability at the Cost of Individual Due Process?' (*Bright Line Law,* 6 June 2017) https://www.brightlinelaw.co.uk/BLL-Portal/Failure-to-prevent-corporate-liability-at-the-cost-of-individual-due-process.html accessed 7 June 2017
[709] ibid 3
[710] HL Deb October 2016, vol 616, cols 209-10
[711] Please see Nicola Padfield, 'The Criminal Finances Act' [2017] 7 Criminal Law Review 505

3.2.2 INTERPLAY BETWEEN UK AML LAW AND THE EU DIRECTIVES

Although the UK has been giving effect to the EU law, as it is obliged to do, in terms of combating ML and other financial crimes the UK has always been ahead of the European initiatives.[712] As the UK has been leading the debate on financial crime both at the EU and global stage, rarely does the UK change its laws to accommodate European Directives on ML.

For example, UK enacted DTOA 1986 and CJA 1988, years before the 1991 Council Directive 91/308/EEC on Prevention of the use of the Financial System for the purpose of ML.[713] As it is obliged to comply with the EU Directives, the UK simply fulfiled its obligation under Article 9 of the Directive, by enacting the DTA 1994 and CJA 1993, which amended its earlier version, CJA 1988.[714] The remaining obligations under 1991 Directive were implemented through the MLR 1993 (SI 1993/1933). This marked the first interplay between the EU law and the UK domestic law with regards to ML.

MLR 1993 required those carrying on relevant businesses to among other things ensure customer identity checks, recordkeeping, maintaining a procedure for filing SAR, training of employees to enable them to understand the law and to recognise transactions involving the proceeds of crime.[715] The Regulations also require the establishment of internal reporting procedure to prevent their businesses from abuse.[716] Failure to comply with the requirements of the 1993 Regulations attracts severe sanction,[717] even if ML has not taken place.

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[712] The Strasbourg Convention and the EC Directive 91/308/EEC
[713] European Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the purpose of money laundering
[714] Trevor Millington and Mark Sutherland Williams, The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture (1st edn, OUP 2003) 532
[715] Smith and others (n 673) Vol I, I.3.429
[716] MLR 1993, reg 5-14
[717] ibid reg 5(2)

As criminals seek an alternative means to conceal their illicit profits, the European Parliament and the Council issued Directive 2001/97/EC amending Council Directive 91/308/EEC. The UK gave effect to the second Directive through the POCA 2002 and MLR 2001 (SI 2001/3641).[718] The 2001 Regulations tightened-up the 1993 Regulations.[719] The 2001 Regulations were issued to bring bureaux de change and MSBs within the scope of the AML regime.[720] This shift was necessitated by the 9/11 attacks.[721] The 1993 and 2001 Regulations were revoked and replaced by the MLR 2003 (SI 2003/3075). The MLR 2003 introduced greater duties and responsibilities to businesses, such as requirements that MLRO be appointed from within the organisation, and proper recordkeeping.[722]

The 2003 Regulations imposed additional AML administrative requirements on regulated persons to assist in the detection, prosecution, and prevention of financial crime.[723] Besides, the Regulation required Bureaux de change, MSBs, and dealers in high-value goods, and professionals, such as lawyers, auditors and accountants who were not explicitly captured within the confines of the 1993 and 2001 to comply with the UK AML regime.[724] The MLR 2003 has since been repealed and replaced by the MLR 2007.[725]

The Third Directive, Directive 2005/60/EE of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money

[718] Her Majesty's Treasury and the Home Office, *UK National Risk Assessment of Money Laundering and Terrorist Financing* [2015] page 14
[719] Smith and others (n 673) Vol I, I.3.430
[720] Richard Alexander, 'The Money Laundering Regulations' [2004] 8 Journal of Money Laundering Control 75
[721] ibid
[722] Smith and others (n 673) Vol I, I.3.531
[723] Roberts Rhodes and Serena Palastrand, 'A Guide to Money Laundering Legislations' [2004] 8(1) Journal of Money Laundering Control 9, 13
[724] ibid 13-14
[725] The 2003 Regulations were repealed by MLR 2007/2157 Part 1 reg 1(3)

laundering and terrorist financing was transposed into the UK law through the POCA 2002, the TACT 2000 and the MLR 2007 (SI 2007/2157).[726] The MLR 2007 implemented the main preventative measure of the 2005 Directive by instituting CDD, requiring firms to identify the beneficial owners of customers that are legal entities or trust, allowing firms to rely on other firms in meeting their CDD obligations, and ensuring supervised compliance with the Regulations.[727]

On 20th May 2015 the Fourth Directive (EU) 2015/849 of the European Parliament and of the Council was issued, repealing the third Directive 2005/60/EC effective 26th June 2015.[728] EU Member States have till 26th June 2017 to transpose the provisions of the Fourth Directive into their national laws.[729] One of the changes the Fourth Directive made is that, it reduces the threshold amount from Euro15,000 to 10,000.[730] Changes to the UK ML law are envisaged when the 2015 Directive is finally given effect on the 26th June 2017. Some of the changes to be expected are in the areas of CDD, application of CDD on local PEPs, and transparency on beneficial ownership.

As the UK has voted to leave the EU, the question is, what is the future of fighting ML in the UK when the UK finally pulls out of the EU on completion of the Brexit negotiations. Going by the leading role the UK has been playing in the fight against ML in particular, and organised crime in general, it is easier to say with near certainty that UK will remain committed to fighting financial crime.[731] As mentioned above, the UK

[726] Her Majesty's Treasury and the Home Office, *UK National Risk Assessment of Money Laundering and Terrorist Financing* [2015] page 14
[727] Andrew R Mitchell and Others, *Confiscation and the Proceeds of Prime* (Sweet & Maxwell 2008) Vol II, VIII.065
[728] Directive (EU) 2015/849 of the European Parliament and of the Council article 66
[729] ibid article 67
[730] ibid article 2(e)
[731] Her Majesty's Government, *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions* [2017] Cm 9408 Foreign and Commonwealth Office HM Treasury Department for International Trade (the government is aware that, once section 2(2) of the European

has been ahead of the EU in this regard, and that UK has been giving effect to the EU AML Directives as a mere formality because Member States are obliged to do so. Meanwhile, the EU AML Directives already domesticated into the UK law will not be affected by Brexit – the law remains.[732]

With its membership of intergovernmental bodies, such as the OECD, UN and FATF, UK will not take a back seat in the fight against ML and organised crime. It is worthy to mention that some of the EU AML laws and policies reflect the policies already rolled out by these organisations.

So far, the UK has demonstrated commitment and political will towards having a global coalition against financial crime. Last year the UK hosted a global summit against corruption, which is the first of its kind, bringing together world leaders, business and civil society to agree to a package of practical steps to expose corruption, punish the perpetrators, support those affected by corruption, and drive out the culture of corruption wherever it exists.[733] As mentioned above, there is a nexus between corruption and organised crime. Thus, any fight against corruption is a fight against organised crime, including ML.

At home, there is a clear sign that fight against financial crime continues. In its manifestos, the conservative party reassured the nation of its commitment to fighting financial crime. It says:

> We will strengthen Britain's response to white collar crime by incorporating the Serious Fraud Office into the National Crime Agency, improving intelligence sharing and bolstering the

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Commuinites Act 1972 is repealed, it needs new powers to be able to amend AML law to to respond to emerging risks after Britain's exit from the EU)

[732] 2017 Conservative Manifesto p 36

[733] Anti-Corruption Summit 2016 <https://www.gov.uk/government/topical-events/anti-corruption-summit-london-2016/about> accessed 9 June 2017

> investigation of serious fraud, money laundering and financial crime.[734]

With Theresa May elected as the Prime Minister, there is a clear signal that the UK will not relent in its effort to fight financial crime. However, whether enough resources would be deployed to fight financial crime remains to be seen. Also, whether those commitments would make the AML effective remain to be seen.

Having discussed the starting point of the modern-day war against ML and the current position of the law as well as the recent changes made to the POCA 2002, the thesis focuses on the substantive AML law.

3.3 THE PRIMARY AML LEGISLATION

While the AML law in the United Kingdom developed incrementally, the POCA 2002 marked a significant overhaul of the whole regime by introducing several important changes to the old regime.[735] POCA replaced all earlier ML legislations (except the terrorism legislation) and extended the scope of ML provisions from drug trafficking, terrorism and serious crimes, to all crimes committed on or after the date POCA came into force.[736]

However, all offences committed prior to the coming into force of POCA will still be handled in accordance with the previous legislations that POCA replaced.[737] POCA has been described as an extensive piece of legislation that primarily suppressed the use of the commercial and banking system for ML.[738] Among other things, POCA abolished the dichotomy between the "drug" and "all crime" ML created by DTOA 1986 and CJA

[734] 2017 Conservative Manifesto p 44
[735] Billings (n 665) 20-500; Jonathan Fisher, 'The Anti-Money Laundering Disclosure Regime and the Collection of Revenue in the United Kingdom' [2010] British Tax Review 235
[736] Rhodes and Palastrand (n 723) 9
[737] ibid
[738] Paul Marshall 'Risk and Legal Uncertainty Under the Proceeds of Crime Act 2002 - the Result of Legislative Oversight' [2004] Company Lawyer 354

1988 respectively.[739] It also created mandatory universal reporting marking the departure from the reporting regime restricted only to cases of drug-related ML.[740]

This section examines the offences created by POCA Part 7, which has geographical extent covering England and Wales. First, this section briefly highlights the most relevant amendments to the ML law under POCA 2002. It then discusses the primary offences under sections 327-329 and then followed by the disclosure offences under sections 330-332. It then discusses tipping off offences, MLR 2007, and finally, the extraterritorial effect of POCA 2002.

3.3.1 PRIMARY OFFENCES

POCA 2002 created three main laundering offences. Therefore, this sub-section focuses on these offences and the conspiracy to commit them. The basis upon which these offences are created is the concepts of "criminal property" and "criminal conduct".[741] This sub-section focuses more on the current law under POCA 2002. Therefore, the equivalent offences under the CJA 1988 and the DTA 1994 will not be discussed in detail. Before analysing the primary ML offences, some concepts common to all the offences will be discussed first.

3.3.1.1 THE COMMON CONCEPTS

Some concepts such as property and criminal conduct are common to all the three main ML offences. The penalties for the offences are also the same. Having an idea about these concepts from the onset is key to the understanding of the AML offences. Also, discussing the concepts and the penalties from the very beginning means unnecessary repetition is avoided, and space is saved.

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[739] Fisher (n 735)
[740] Robert Strokes and Anu Arora, 'The duty to report under the money laundering legislation within the United Kingdom' [2004] Journal of Banking Law 332, 340
[741] Billings (n 665)

3.3.1.1.1 PROPERTY

Is defined as all property wherever situated. This includes: money; all forms of property, real or personal, heritable or moveable; things in action and other intangible or incorporeal property.[742] And person obtains property if he obtains an interest in it, including equitable interest or power in relation to land or properties other than land.[743]

3.3.1.1.2 CRIMINAL PROPERTY

The property is criminal if it constitutes a person's benefit from criminal conduct or if it represents such a benefit (in whole or in part and whether directly or indirectly), and the alleged offender knows or suspects that it constitutes or represents such a benefit.[744] By this definition, the *mens rea* required to establish an offence for the purpose of section 327, 328 and 329 offences is knowledge or suspicion. Thus, to secure a conviction for ML prosecution must prove that a person deals with criminal property knowing or suspecting it was derived from crime.[745]

In ***R v Gabriel***,[746] the Court of Appeal held that failure to declare income from a legitimate trade while under state benefit does not taint the profit, and that profit could not be said to constitute criminal benefit within the meaning of POCA section 340. Where prosecution alleges that property is a criminal property, particulars should be given in advance to set out facts upon which the Crown relies and the inference that jury will be invited.[747] Obtaining pecuniary advantage by cheating the public revenue will amount to 'criminal property' within the meaning of section 340(5).[748] For the purpose

[742] POCA 2002 s 340(9)
[743] ibid s 340(10)
[744] ibid s 340(3)
[745] Rees and others (n 674) 127
[746] [2007] 1WLR 2272
[747] Mark Sutherland Williams and Others, *Proceeds of Crime* (1st published 2003, 4th edn, OUP 2013) 514-15
[748] R v IK [2007] EWCA Crim 491

of section 327, the property needs to be criminal property at the time of the transaction not as a result of the transaction.[749]

3.3.1.1.3 CRIMINAL CONDUCT

Section 340(2) POCA 2002 defines criminal conduct as a conduct that constitutes an offence in any part of the UK or would constitute an offence in any part of the UK if it occurred there.[750] This definition of criminal conduct is similar to that in section 76 POCA 2002.[751] The problem that prosecution must prove the commission of a predicate offence in an ML prosecution, which originated from the dichotomy created by the DTA 1994 and CJA 1988,[752] continues post-POCA 2002, though the provisions of the two pieces of legislations have been harmonised.[753]

Because of this dichotomy, the prosecution has found it difficult in securing convictions against professionals who handle other people's wealth because the prosecution must link the proceeds of crime to a particular class of criminal conduct.[754] However, the decisions of the courts in **R v Anwoir**[755] and **R v F**[756] remedied this defect in the then AML law. It is out of this difficulty that the law in this area developed.[757] The Court of Appeal in R v F has certified a point of law of general public importance in the following terms:

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[749] R v Loizou [2005] EWHC Crim 1579; R v Montila [2004] UKHL 50
[750] POCA s 340(2)
[751] Mitchell and Others (n 727) Vol II para VIII.006
[752] R v El Kurd [2001] Crim 234 CA (Crim Div) (While giving judgment, Latham LJ expressed the concern that the Parliament has created a dichotomy with the attendant difficulties, which the case exemplifies)
[753] POCA 2002 s 340(2); for an in-depth analysis of this problem and how the Supreme Court resolved it please see Vivian Walters, 'Prosecuting Money Launderers: Does the Prosecution have to prove the Predicate Offence' [2009] 8 Criminal Law Review 571
[754] R v El Kurd [2001] Crim 234 CA (Crim Div)
[755] [2009] 1 W.L.R. 980
[756] [2008] EWCA Crim 1868; [2008] Crim LR 45
[757] R v El Kurd [2001] Crim 234 CA (Crim Div); Singh (Rana) [2003] EWCA Crim 3712 Montilla [2004] UKHL 50; R v Craig [2007] EWCA Crim 2913; R v Kelly, Unreported March 2005 Plymouth Crown Court; R v W (N) [2008] EWCA Crim 2

> Whether in a prosecution under sections 327 or 328 of POCA 2002, section 340 requires the prosecution to prove at least the class or type of criminal conduct that it is alleged to have generated the crime.[758]

The decision of the Court of Appeal in **Anwoir** and **F** changed the law. In **Anwoir** Latham LJ reviewed *R v W (N)* in some detail and concluded that that decision does not mean that in every case the Crown must show specific kind of predicate offence from which the property was derived.[759] In **F** the Crown could not point to a particular predicate offence as being the source of the money.[760] At the close of the prosecution case, the court of first instance acceded to the defence submission of no case to answer, because at that time the decision in *Craig*, as it relates to the point before *F* was obiter, and Anwoir was not yet decided. The Crown appealed, and on 17th July 2008, Latham LJ following his own decision in Anwoir allowed the appeal and directed a retrial.[761]

3.3.1.1.4 PENALTIES FOR OFFENCES UNDER SECTIONS 327-329

Penalties applicable to offences committed under sections 327, 328 and 329 are the same, and they are contained in section 334. A person guilty of an offence under these sections is liable on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory minimum or to both. On conviction on indictment, to imprisonment, for a term not exceeding 14 years or a fine or both.[762]

3.3.1.1.5 PROFESSIONALS: LIABILITY UNDER PRIMARY OFFENCES

Like banks and other FIs, handlers of other people's wealth, such as accountants, tax consultants and lawyers could be liable for failure to comply with the provisions of section 327, 328 and 329. Thus, handlers of other people's wealth need to have a sound

[758] [2008] EWCA Crim 1868
[759] [2009] 1 W.L.R. 980
[760] R v F [2008] EWCA Crim 1868
[761] ibid
[762] CJA 1988 s 93B(9) as inserted by CJA 1993 s 30

working knowledge and understanding of the law and their respective professional guidelines.[763]

In contrast, the situation as it relates to lawyers in the US is different.[764] MLR 2007 requires professionals who handle client's account to comply with the AML law by adopting appropriate compliance procedures and training of their staff.[765] The need for professionals to comply with the provisions of Part 7 of POCA 2002 was emphasised in ***P v P [2005] EWCA Civ 226*** and in ***Bowman v Fels [2005] 2 Cr. App. R. 19***. In the light of section 329, in addition to being liable for not disclosing their knowledge or suspicion, professionals' fees could be classified as tainted if paid from clients' tainted money.[766]

Having discussed the common concepts, this thesis turns on the primary offences. We begin with section 327 offences - concealing criminal property.

3.3.1.2 CONCEALING CRIMINAL PROPERTY (S. 327)

POCA section 327 replaced CJA 1993 (section 93C) and DTA 1994 (section 49). Under section 327, a person commits an offence if he conceals, disguises, converts, transfers, or removes criminal property from England and Wales or Scotland or Northern Ireland.[767] The scope of section 327 is very broad, as offences can be committed in five different ways. The definition of "concealing or disguising criminal property" makes it,

[763] Rees and others (n 674) 136
[764] cf 4.6.3
[765] Rees and others (n 674) 136
[766] ibid 143-144
[767] POCA 2002 s 327(1)(a)-(e)

even more broader, as it applies to those involved in criminal activity as well as to those who merely receive criminal property.[768]

Merely moving criminal property from one jurisdiction to another within the UK, irrespective of who committed the predicate crime, can violate section 327(3).[769] Because of its wide scope, section 327 will catch not only those who engage in ML (typically concealing and disguising criminal property) but also financial intermediaries.[770] However, section 327(2)(c) exempts law enforcement from liability where they facilitate handling of a criminal property in a manner that will contravene section 327, either pending an investigation or in a sting operation as part of a further investigation.

Despite the wider scope of section 327, to secure a conviction the prosecution must establish that the property in question is a criminal property derived from a criminal conduct and the defendant knew or suspected it to be so.[771] Thus, securing a conviction against a defendant depends on whether he had knowledge or suspicion that the property presented was a criminal property.[772]

Unlike section 93C, which require the prosecution to prove an objective element of "reasonable grounds for knowledge or suspicion" and a purposive element of "avoiding prosecutions or enforcement of confiscation orders", section 327 offence is committed entirely through the actual concealing, disguising, converting, transferring or removing

[768] Ulph (n 666) 138-39 (it includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it)
[769] Please see Rees and others (n 674) 133
[770] Strokes and Arora (n 740) 341
[771] Rees and others (n 674)133
[772] Ulph (n 666) 139

property from the United Kingdom.[773] However, the *mens rea* element to be proved is that the defendant knew or suspected that the property is criminal.[774]

One major development is the provision of statutory defences, which were not available under CJA 1988 section 93C. It is now a defence to show that: (i) a person made authorised disclosure;[775] (ii) a person intended to make disclosure but has a reasonable excuse for failing to do so;[776] (iii) appropriate consent has been obtained;[777] and (iii) where the act is done in fulfilment of a function he has relating to any negative provision concerning criminal conduct or benefit from it.[778] However, the second defence remained the subject of criticism.[779] It has been described as a good defence if the defendant can prove the "excuse" for not reporting his knowledge or suspicion is a "reasonable" one,[780] because hardly will a court accept that defence, considering the importance placed upon such disclosures.[781]

Other defences available to the defendant include "below the threshold defence" and the "overseas defence". Once the "overseas defence" is raised, it is for the prosecution to show that this defence does not apply.[782] The court has ruled in ***R. v O'Mahony***[783] that this defence will not be available to a person who mistakenly believes that his acts were committed in a foreign jurisdiction where the act is legal, but where in actual fact the act was done in the United Kingdom.

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[773] Strokes and Arora (n 740) 341
[774] ibid
[775] POCA s 327(2)(a)
[776] ibid s 372(2)(b)
[777] ibid s 355(1)
[778] ibid s 327(2)(c)
[779] Strokes and Arora (n 740) 342
[780] N C Morrison, 'Money Laundering Legislation in the UK' [1995] 14 International Banking and Financial Law 3,6
[781] Strokes and Arora (n 740) 342
[782] Williams and Others (n 747) 515-16
[783] [2012] EWCA Crim 2180

The intention behind section 327 of POCA 2002 is to simplify and replace section 49 of the DTA 1994 and section 93C of the CJA 1988.[784] POCA no longer distinguishes between the proceeds of drug trafficking and the proceeds of other crimes.[785] Under DTA 1994, section 49 criminalised laundering the proceeds of drug trafficking.

The offence can be committed by the drug trafficker himself or another person acting for and on behalf of the trafficker knowing or having reasonable ground to suspect that the property, in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking.[786] In addition to knowledge or suspicion, there was a requirement in both situations that the defendant committed the laundering act purposely to avoid prosecution or avoid a confiscation order.[787] In ***Causey,***[788] it was held that provided the defendant had such a purpose, it was immaterial that he acted for innocent purposes as well.

The equivalent of section 49 under CJA 1988 is section 93C. Section 93C was inserted by section 31 of CJA 1993 to create the offence of "concealing or transferring the proceeds of non-drug-related criminal conduct.[789] This provision intended to punish anyone who assisted in hiding property from the English courts, or removing it from the jurisdiction,[790] for the purpose of avoiding prosecution, or avoiding a confiscation order.[791] A significant development is that no such conditions appear in the POCA 2002, making the offence simpler to establish.

3.3.1.3 ENTERING INTO AN ARRANGEMENT (S. 328)

[784] Millington and Williams (n 714) 535
[785] HC Deb 30 October 2001, vol 373, cols 765-766
[786] DTA 1994 s 49(1)-(2)
[787] Millington and Williams (n 714) 543
[788] Unreported, October 18, 1999, 98, 7879/W2
[789] Gerard McCormack, 'Money Laundering and Banking Secrecy' [1995] Company Lawyer 6, 8
[790] Clark (n 37) 136
[791] ibid

POCA section 328 mirrors DTA 1994 section 50 and CJA 1988 section 93A both of which criminalised assisting another person to retain the proceeds of crime.[792] Like the previous legislation, section 328 was drafted very widely to afford prosecutors wide latitude to articulate their case against offenders.[793] One of the implications of this is, once a person becomes concerned with "an arrangement to facilitate ML" section 328 is potentially violated, as there is no need to have any direct link with the ML.[794]

A person is said to have violated section 328 if he enters into, or becomes concerned in an arrangement, which he knows, or suspects facilitates the acquisitions, retention, use or control of criminal property by or on behalf of another person.[795] The objective is to capture a person who entered into an arrangement without the need for such a person to have to deal with property, which in part or in whole represents the proceeds of criminal conduct.[796]

As decided in ***R. v Geary***,[797] for section 328(1) laundering offence, the property in question must be criminal. *Geary* is now a settled law in this area having disapproved ***Izeko***r[798] and having been followed in subsequent cases.[799] However, the recent decision of the Supreme Court in **R v GH**[800] has altered the landscape a bit. Where a property is obtained by fraud, the original property remains clean. But once the property is paid into the defendant's account, its character changed to that of criminal property.[801]

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[792] Rees and others (n 674) 136
[793] Strokes and Arora (n 740) 343
[794] ibid
[795] POCA 2002 s 328
[796] Mitchell and Others (n 727) Vol II para VIII-24
[797] [2011] 1 Cr. App. R. 8 (considering Loizou [2005] 2 Cr App R 37; Kensington International Ltd v Republic of Congo [2008] 1WLR 1144)
[798] [2008] EWCA Crim 828
[799] Abida Amir and Urfan Akhtar [2011] EWCA Crim 146
[800] [2015] UKSC 24
[801] ibid 21-27

Like the CJA 1988 section 93A where the inclusion of the word "otherwise" was thought to indicate that the violation of section 93A could be facilitated in "limitless" ways, the words "by whatever means" in section 328 points to the same thing.[802] Involvement in a preparatory stage is however not enough to render the defendant guilty of an offence under section 328.[803]

While knowledge and suspicion are the relevant mental elements required to establish guilt, the two mental elements are to be evaluated subjectively.[804] If the subjective test is not satisfied, the court may convict the defendant of a lesser offence for which the prosecution needs only to prove these elements using an objective test, to the ordinary standard of proof, to avoid placing the burden of proof on the defendant.[805]

However, no offence will be committed for subsequent dealing with the criminal property, if a disclosure pursuant to section 338 has been made and consent obtained, or if intended to be made but there was reasonable excuse for failing to do so, or if the act was done in carrying out a function the person has relating to the enforcement of the act.[806] "Below the threshold" and "overseas defence" are also available as defences available to the defendant.

Notwithstanding, an offence may be committed if a bank proceeds with a suspicious transaction without obtaining consent. It was held in ***Squirrell Ltd v National Westminster Bank Plc***[807] that, once a suspicion arose that a customer's account contained the proceeds of crime, the bank is obliged to report that suspicion to the relevant authority and desist from carrying out any transaction in relation to that account

[802] Strokes and Arora (n 747) 343
[803] Dare v The CPS [2012] EWHC 2074
[804] Rees and others (n 674) 138
[805] ex Parte Kebeline [1999] 4 All ER 801 HL
[806] POCA 2002 s 328(3)
[807] [2006] 1 W.L.R. 637, 642

until consent is given, or the relevant time limit under section 335 has expired. Thus, in Squirrel, Laddie J said NatWest did precisely what this legislation intended it to do. To do otherwise would be to require it to commit a criminal offence.[808]

Further, it was held in ***K Ltd v National Westminster Bank Plc***[809] that, a bank facilitates ML contrary to POCA section 328 if it dealt with a customer's property knowing or suspecting it to be criminal property, without making a disclosure or without consent. It would be no defence to a charge under section 328 that the bank was contractually obliged to obey its customer's instructions. K Ltd can be contrasted with ***Shah v HSBC***[810] where the moratorium period has passed, and the bank still refused to carry out the customer's instructions.

Section 328 is to a certain extent a reflection of section 50 of the DTA 1994 and section 93A of CJA 1988.[811] The definition of 'proceeds of criminal conduct' under section 328 includes property, which in whole or in part, directly or indirectly, represents benefits from criminal conduct.[812] Under section 93A(2), knowledge or suspicion of engagement in criminal activity is required in addition to the knowledge that the property represents the A's proceeds of crime.

Under section 328, the property needs not to be the product of A's criminal conduct, it is enough for the property to be the product of another person's criminal conduct.[813] Thus, an intermediary who handles client's proceeds of crime can be convicted of section 328 offence if the prosecution can prove the requisite *mens rea.*

[808] [2006] 1 WLR 311, 315
[809] [2007] 1 W.L.R. 311, 315
[810] [2010] 3 All ER 477
[811] Millington and Williams (n 714) 548
[812] Rees and others (n 674) 138
[813] ibid

3.3.1.4 ACQUISITION, USE AND POSSESSION OF CRIMINAL PROPERTY (S. 329)

Section 329 of POCA 2002 replaced both the DTA 1994 section 51 and CJA 1988 section 93B to deal with those who acquired, used, or possessed criminal property.[814] The *mens rea* required for this section is knowledge or suspicion as to the provenance of the property concerned, which is to be determined subjectively. Thus, a person is not guilty of an offence under section 329 if he possessed a criminal property without the requisite knowledge because arguably the property itself is not criminal.[815] There are some difficulties with this offence, as the concept of knowledge may be subject to different interpretation.[816] However, according to **R v Harris**,[817] knowledge is to be given its ordinary English meaning.

A person who possesses proceeds of crime knowing or suspecting it to be so, potentially violates section 329 as well as section 22 of the Theft Act 1968. Thus, the discretion lies with the prosecution to charge the defendant with any of the two offences. This issue arose in ***Wilkinson [2006] EWHC 3012***, and the court held that it is ultimately a matter for the CPS and their internal guidance to decide which charge to bring. The issue of giving preference to section 329 of POCA over section 22 of the Theft Act 1968 was returned in ***CPS Nottinghamshire v Rose,***[818] and the court found nothing wrong with that.[819]

The burden of proof rest with the prosecution unless the defendant raised a defence of lack of knowledge or suspicion, in which case the onus rests with the defendant to prove

[814] ibid 142
[815] ibid 142
[816] McCormack (n 789)
[817] (1987) 84 Cr. App. R. 75
[818] [2008] EWCA Crim 239
[819] Williams and Others (n 747) 519

the defence on the balance of probabilities.[820] This principle was subsequently approved by the Privy Council in ***A-G of Hong Kong v Lee Kwong-Kut*** [1993] AC 951.[821]

Liability can be avoided if an authorised disclosure under section 338 is made and appropriate consent has been obtained.[822] The 'overseas defence', as well as 'threshold defence', also apply.[823] Acquiring or using or possessing the property for an adequate consideration is a defence where the consideration is adequate, as the consideration has to be evaluated in accordance with section 329(3).[824] If any of these defences are raised, it is for the prosecution to prove that they do not apply.[825]

The situation is different under the old law. The Court in ***R v Gibson***[826] concluded that under CJA 93B(2), it is for the defence to prove adequate consideration if it was advanced as a defence. The reason is that, a defendant is in a position to know whether he had given adequate consideration, and as such it would be easy for the defendant to deal with the issue but usually impossible for the prosecution.

However, under POCA 2002 the opposite is the case. In ***Mark Hogan v The DPP,***[827] their Lordships were asked to decide on whose shoulders the burden of proof rests. It was held that once the defence of adequate condideration is raised, it is for the prosecution to prove that the consideration was inadequate.[828] The court observed that once the defendant proves that the consideration was adequate, then no offence is made

[820] R v Colle [1992] 95 Cr App R 67
[821] Williams and Others (n 747) 520
[822] POCA 2002 s 329(2) (it will also be a defence where an MLRO intended to make a disclosure but had a reasonable excuse for not doing so; or the property so acquired or used or possessed was for adequate consideration; or dealing in the property was done in carrying out a function relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct)
[823] POCA 2002 s 329(2)(A) and (C)
[824] Rees and others (n 674) 142
[825] Williams and Others (n 747) 520
[826] [2000] Crim. L.R. 479, 4780
[827] [2007] 1 WLR 2944
[828] [2007] 1 WLR 2944

out under the 2002 Act, even if the defendant who has acquired the property knows that it was stolen.[829]

In view of this observation, uncertainty remains as to whether an offence of handling stolen goods could have been committed instead. If a defence of adequate consideration operates to protect a defendant who purchased property knowing or suspecting it to be tainted, then the limitation of section 329 in terms of disrupting ML is very clear.

3.3.1.5 CONSPIRACY TO COMMIT OFFENCE UNDER SECTIONS 327-329

As per ML definition under POCA 2002 (section 340(11)(b)), it is an offence to conspire to commit any of the laundering offence under any of sections 327, 328 and 329. Also by virtue of section 415(2) conspiracy is an ML offence. A considerable number of appellate cases that emerged around conspiracy to commit ML were mostly decided under the CJA 1988 and DTA 1994.

R v El Kurd[830] and ***R v Suchedina***[831] demonstrated that, in cases involving conspiracy to launder, there must be an agreement to launder the proceeds of either drug trafficking or other crimes. However, the prosecution need not adduce evidence that the property was the proceeds of either drug trafficking or other crimes. Since the *mens rea* requirement for the section 327-329 offences is 'knowledge or suspicion', the question arose whether conspiracy to launder can be established on the basis of mere suspicion.[832] The Court of Appeal decided in a number of cases that a person who

[829] [2007] 1 WLR 2944, 2948
[830] [2001] Crim LR 234
[831] [2006] EWCA Crim 2543 305, 309-12
[832] Andrew R Mitchell and Others, *Confiscation and the Proceeds of Prime* (Sweet & Maxwell 2008) Vol I, 9.012

agreed with others to deal with a property, knowing or suspecting that it was proceeds of crime, was guilty of criminal conspiracy to launder.[833]

However, considering the provision of section 1(2) of the Criminal Law Act 1977, conspiracy cannot be committed unless at least two conspirators *intend or know* that the fact or circumstance shall or will exist at the time when the conduct constituting the offence took place. In the light of ***R v Montila [2004], 1 WLR 3141*** and of section 1(1)(2) of the Criminal Law Act 1977, the Court of Appeal in ***R v Liaquat***[834] decided that the person could not be guilty of criminal conspiracy to launder on the basis of mere suspicion. Therefore, while knowledge is appropriate where the property exist at the time of the parties agreeing to conspire, an intention that the property would be the proceeds of crime must be established where the property does not exist.[835]

This principle has been considered in *Suchedina* and ***R v K, S, R & X [2007] EWCA Crim 1888***. This principle was also considered in ***R v Pace and Rogers***[836] where, in the light of section 1 of the Criminal Attempts Act 1981, the Court of Appeal disagreed with the trial judge's position that in an attempted ML offence, the mental element was not knowledge but suspicion.

Therefore, in the light of section 1(2) of the Criminal Law Act 1977 and the above decisions of the courts, mere suspicion is not enough to establish the guilt of conspiracy. The defendant must know that the source of the property was criminal. Alternatively, he must intend the future property to be so.

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[833] R v Rizvi [2003] EWCA Crim 3575; R v Singh (Gulbir) [2003] EWCA Crim 3712; R v Sakavickas [2005] 1 WLR 857; and R v Saik [2004] EWCA Crim 2936
[834] [2006] Q.B. 322, 344
[835] Mitchell and Others (n 832) Vol I para 9.015
[836] [2014] EWCA Crim 186

Independent of the substantive POCA ML offences discussed above, there exist failure-to-disclose ML offences as enacted under sections 330-332 POCA 2002. The main difference between the substantive offences and section 330-332 offences is that the substantive offences are a reactive way of confronting ML.[837] The violation must occur or at least there must be a conspiracy to violate the AML law. In contrast, section 330-332 offences are proactive, in that the law requires certain steps to be taken to prevent ML. Additionally, while anybody can commit the substantive offence, sections 330, 331 and 332 place obligations on a limited class of people.

Having discussed the primary offences and the conspiracy to commit them, next is the discussion on the failure-to-disclose offences that can be committed by omission if a third party (who is not involved in the laundering) failed to disclose knowledge or suspicion of ML that came to him in the cause of employment.

3.3.2 SUSPICIOUS ACTIVITY REPORT (SAR)

As we have seen, POCA 2002 criminalises ML in the UK.[838] While banking, other businesses and professions within the regulated sector require secrecy to ensure client confidentiality, that secrecy provides a conducive atmosphere for ML to thrive. ML by its very nature requires secrecy, and professional launderers normally conduct their affairs in manner that their transactions look as genuine as possible. Thus, POCA 2002 require those who handle other people's wealth to look out for, and report, suspicious transactions.[839]

[837] John A. Terrill II, And Michael A. Breslow, 'The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach' [2015] 56 New York Law School Law Review 433, 447 (suggesting that the substantive offences require active participation in ML conduct)
[838] See section 3.2.1 for analysis on the way CFA 2017 affects the handling of SAR
[839] CFA 2017 has changed the way SAR is handled, please see 3.2.1

The standard response to the risk of offence being committed has been for anyone (who has a duty to report) with suspicion of ML to make disclosure.[840] Disclosure is made in the form of SAR, which is basically a statement that the property is a 'criminal property' or it is suspected to be so.[841] The requirement that FIs should make a disclosure to the authorities of transactions that they consider unusual and suspicious is the most proactive approach to fighting ML,[842] and is the government's main weapon in the battle against ML and other financial crimes.[843]

The preferred mode of filing SAR is electronically, though forms are available in a hardcopy format.[844] In return for their cooperation, FIs are afforded protection from civil and criminal liability for breach of confidentiality provided they act in good faith.[845]

3.3.2.1 TYPE OF DISCLOSURE

There are three types of disclosure viz: Authorised Disclosure; Protected Disclosure; and Required Disclosure.

3.3.2.1.1 AUTHORISED DISCLOSURE (S. 338)

A disclosure is termed authorised if the disclosure is made before the prohibited activity is undertaken and an 'appropriate consent'[846] is given to proceed, or it was made after the prohibited activity is done but provided there was a good reason for failing to make

[840] Eoin O'Shea and Matthew Stone, 'Civil Liability Protection for those Making Suspicious Activity Reports (SARs)' [2015] Reed Smith Client Alerts
[841] Rees and others (n 674) 144
[842] Michael Hyland and Sue Thornhill 'Prevention and Compliance' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (CCH Editions Limited 1999) 32-250
[843] Williams and Others (n 747) 538
[844] ibid 538-39
[845] Hyland and Thornhill (n 842) 32-275
[846] As defined in POCA 2002 s 335

the disclosure before the act was done, and the disclosure was made on the defendant's own initiative, and was made as soon as it was practicable for him to do so.[847]

However, to avoid the risk of incurring criminal liability, it is important for the defendant to keep records to help to explain his state of mind at the time he formed the suspicion and the reason for not making the disclosure before the transaction was carried out.[848] The essence of authorised disclosure is to obtain the consent from the NCA to carry on with a suspicious transaction already reported. This has the effect of avoiding criminal liability if it is later discovered that the reported transaction for which consent was given actually involved the proceeds of crime.

The issue of consent under CJA 1988 (sections 93A and 93B) and DTA 1994 (section 52) was not very clear, as sometimes the constable may decline to give appropriate consent. To avoid committing 'tipping off', as illustrated by ***Bank of Scotland v A Ltd,***[849] ***C v S,***[850] ***and Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit,***[851] banks usually approach the court for guidance on how to proceed.

POCA section 335(2)-(4) procedure has resolved this problem to a certain extent. The procedure stipulates that where appropriate consent to proceed is neither given nor refused, and after the statutory notice period of seven working days passes, then the person may undertake the 'prohibited act'. Similarly, if the consent is refused within seven working days and thereafter the 31 days statutory moratorium passes and the relevant authorities have not taken further action against the suspected property, the

[847] ibid 338(1)-(3)
[848] Rees and others (n 674) 144
[849] [2001] 1 WLR 751
[850] [1999] 1 WLR 1551
[851] [2003] EWHC 703 (Comm)

person may carry out the prohibited activity.[852] In these two situations, the person is deemed to have appropriate consent to carry out the prohibited act, and a person may incur civil liability if he refused to carry out customer's instruction.[853]

The logic behind the moratorium period of 31 days is to allow for further investigations and to obtain a restraining order.[854] The 31 days period is now considered inadequate for the law enforcement to gather evidence (especially where evidence is located abroad) and to conduct a proper investigation.[855] Prior to CFA 2017 the moratorium period cannot be extended. CFA 2017 has now amended POCA 2002 to allow law enforcement to seek a successive extension of the initial 31 days moratorium period up to 186 days starting after the day the initial moratorium period ends.[856]

The intention of Parliament behind the extension of the moratorium period is to allow the law enforcement to gather evidence (especially where evidence is located abroad) and to conduct a proper investigation, as well as to prevent the dissipation of proceeds of crime while investigation into the alleged ML activity has not been completed.[857]

However, the person who made the disclosure may find it difficult to keep the customer uninformed throughout the moratorium period to avoid tipping off,[858] especially now that the period can be extended by about six months. As persons working in a regulated or non-regulated sector may need to complete a transaction, which they know, or

[852] POCA s 335(2) and (4)
[853] Shah v HSBC [2010] EWCA Civ 31
[854] HL Deb May 27 2002, vol 635, col 1056
[855] HC Deb 26 November 2016, vol 617, cols 98-99
[856] CFA 2017 s 10
[857] HC Deb 26 November, 2016 vol 617, col 99
[858] Bank of Scotland v A Ltd [2001] 1 WLR 751; C vS [1999] 1 WLR 1551; and Shah v HSBC [2010] EWCA Civ 31;

suspect involves a criminal property, section 338 gives them a basis for obtaining authorisation required to complete the transaction without any criminal liability.[859]

3.3.2.1.2 PROTECTED DISCLOSURE (S. 337)

While making a disclosure, and obtaining consent, protect the discloser from criminal liability, a client may sue the discloser for breach of confidentiality or contract, especially where consent was not given, and therefore the transaction could not proceed. Consequently, section 337 gives immunity from legal action for example for breach of contract or confidentiality for making a disclosure.[860]

By its nature, suspicion does not always turn out to be founded. Where transaction is delayed due to the SAR the reporting person might incur civil liability. The SCA 2015 takes this protection further. Section 37 inserted subsection 4A into section 338 of POCA 2002 to protect the discloser from civil liability in respect of the disclosure made in good faith. SCA section 37 gives effect to Article 26 of the Third AML Directive to protect disclosers who made disclosure in good faith from liability of any kind.

This protection is needed in the light of the long battle between HSBC and its client Mr Jayesh Shah and Shaleetha Mahabeer.[861] In ***Shah v HSBC***[862] Supperstone J found for the defendant bank on the basis of an implied term in the contract which permitted the defendant bank to refuse to carry out the payment instruction, without an appropriate consent under section 335 of POCA, where it suspected a transaction involves proceeds of crime.

[859] Smith and others (n 673) Vol I, 1.3.123
[860] POCA 2002 s 337 (1)-(4)
[861] Shah v HSBC [2010] EWCA Civ 31
[862] [2012] EWHC 1283

It was also held that an implied term exists in the contract that permitted the bank to refuse to provide the customer with information that would lead to tipping off contrary to section 333 of POCA 2002. However, whether the court will imply a term into a contract will depend on judicial discretion and the fact of each case.[863] However, in **Iraj Parvizi v Barclays Bank Plc** the court accepted that a claim by a customer, that its bank has failed to carry out instruction will be usually a strong claim in contract.[864]

Thus, section 337 removes the uncertainty that legal immunity would not apply as the SAR was not based on a genuine suspicion.[865] Suspicion is subjective, which does not need to be reasonably held, and can be proven even where evidence of suspicion is not coherent.[866] As SAR is one of the weapon against ML, both the extension of the moratorium period and the statutory protection against liability of any kind, would bolster the position of the law enforcement in their effort to disrupt ML.

3.3.3. FAILURE TO DISCLOSE: REGULATED SECTOR (S. 330)

Section 330 POCA criminalised failure to disclose knowledge or suspicion of ML. Employees in a regulated sector (as defined in Schedule 9 of POCA 2002 for the purpose of laundering offences under POCA Part 7) are required to disclose knowledge

[863] Eoin O'Shea and Matthew Stone, 'Civil Liability Protection for those Making Suspicious Activity Reports (SARs)' [2015] Reed Smith Client Alerts
[864] [2014] WL 4081295 (Master Bragge stated: "I accept that a claim by a customer that its bank has failed to carry out instructions will be usually a strong claim in contract. The burden of proof that the implied term, which effectively is what is in issue here, operates because a suspicion is on the bank, because, as I observed in the course of argument, only the bank can explain its position. I have briefly referred to the witness statement evidence that has been presented. This is a fairly recent witness statement, 12 February 2014. It is to be observed that this type of material was not available in the Shah v HSBC private bank case summary judgment application"
[865] ibid
[866] ibid

or suspicion of ML to MLRO. An offence of failure to disclose knowledge or suspicion of ML is committed if each of the following four conditions is satisfied:[867]

i) The person carries on specified activity within a 'regulated sector';

i) The person knows or has reasonable ground to suspect that another is engaged in money laundering;

ii) That the person can identify the other person or the whereabouts of any of the laundered property, or that he believes, or it is reasonable to expect him to believe, that the information will or may assist in identifying that other person or the whereabouts of any of the laundered property; and

iii) The person fails to make disclosure as soon as is practicable after the information came to him.

Due to the broad meaning of 'criminal conduct',[868] offences committed abroad can violate section 330 subject to the 'overseas conduct defence'. Pursuant to sections 340(11) and 415(2), a conspiracy constitutes an offence under this section.[869] Upon summary conviction, a defendant risks up to six months in prison or fine not exceeding statutory minimum or both; and upon indictment, the maximum prison term is five years, or fine, or both.[870]

The *mens rea* required is knowledge or suspicion, which can be subjective or objective, and can be met if the defendant 'knows' or 'suspects' or 'has reasonable grounds for knowing or suspecting' that another is engaged in ML. Concern has been raised about

[867] POCA 2002 s 330; s 19 of TACT 2000 requires a person, as soon as is reasonably practicable, to report a transaction suspected of involving terrorist property or property meant to be used for terrorist act
[868] POCA 2002 s 340(2)
[869] Rees and others (n 674) 152
[870] POCA 2002 s 334(2)

the broad nature of the test. However, section 330(6)(c) and (7) appears to have alleviated this concern.[871]

The relevant test for knowledge or suspicion is both subjective and objective.[872] In order not to fail this test, regulated persons must take into consideration the FCA and JMLSG guidance notes, issued to help them in identify conduct and transactions of suspicious nature.[873] Consequently, in deciding whether a person has committed section 330 offence the court is required to consider whether the person followed any approved relevant guidance, which was at the time issued by a supervisory authority or other appropriate bodies, and which was published in a manner appropriate enough to bring the guidance to the attention of the affected person.[874]

Exceptions under section 330(6), (7A) and (7B) serve as a defence, and where they apply no offence will be committed. Section 102 SOCPA 2005 amended section 330 to provide for 'overseas defence'. Pursuant to 330(7), a defendant may escape ML charges if he can establish that he does not know or suspect that another is engaged in ML; or if his employer has not provided him with training as required by the MLR 2007. However, if the employee is properly trained to the required standard, the defence of lack of training may not stand.[875]

3.3.3.1 DEFENCE OF PROFESSIONAL PRIVILEGE

As it has been under the earlier legislation, LPP is a defence under POCA. An individual does not commit an offence under section 330 if he is a professional legal adviser or relevant professional adviser and the information came to him in privileged

[871] Rees and others (n 674) 153
[872] Billings (n 665) 21-600 and 21-650
[873] ibid 21-600
[874] POCA 2002 s 330(8)
[875] Rees and others (n 674) 153

circumstances.[876] The information came to the professional adviser if it came to him in accordance with the provision of subsection 10, on condition that it is not communicated or given with the intention of furthering a criminal purpose.[877]

In ***Bowman v Fels***[878] the Court of Appeal held that absent clear and unambiguous language, Parliament could not have intended to override important and well-established principles underlying professional privilege. Until this decision, the court in ***P v P***[879] rendered LPP and duty of confidentiality secondary to the POCA 2002 disclosure requirement. Under *P v P* a lawyer may violate POCA section 328 if failed to make a disclosure of a suspected criminal activity.

However, following *Bowman v Fels*, in carrying out his duties to his client, a legal advisor would not be prosecuted even where he informs his client or his opponent of any disclosure that he considered appropriate to make for a purpose connected with the proper representation of his client.[880] However, LPP does not protect information or other matter from disclosure if there was a criminal motive behind it.[881]

The defence of lack of training under section 330(7) and (7B), and 'reasonable excuse' remain available to professional advisers.[882] Pursuant to section 330(9)(A), the LPP remains even where the professional adviser discusses matters with their nominated officer in their firm, even if the nominated officer is himself a professional legal adviser.[883] This provision allows professional legal advisers and relevant professional

[876] POCA 2002 s 330(6)
[877] POCA 2002 s 330(11); Francis and Francis v Central Criminal Court [1988] 3 All ER 775
[878] [2005] 1 W.L.R. 3083
[879] [2003] EWHC 2260
[880] Mitchell and Others (n 727) vol II, VIII.044
[881] R v Central Crown Court Ex p. Francis and Francis [1989] AC 349
[882] Williams and Others (n 747) 536
[883] ibid

advisers to consult their nominated officers, without formal disclosure made to the nominated officer, giving some comfort to both the professional and the client.[884]

Section 330 was amended to extend this privilege to other professional advisers.[885] It includes an accountant, auditor or tax adviser who is a member of a professional body, which is established for accountants, auditors, or tax advisers.[886] The amendment also provides an exemption to employees and partners of professional advisers.[887]

3.3.4 FAILURE TO DISCLOSE: NOMINATED PERSON IN THE REGULATED SECTOR (S. 331)

Pursuant to section 331 a nominated officer (i.e. MLRO) is required to make a disclosure, as soon as practicable, to the authorities of information regarding ML activities he received pursuant to section 330 disclosure made to him by employees. This section, therefore, criminalises conduct where the MLRO receives a report under section 330 which causes him to know or suspect, or gives reasonable grounds for knowing or suspecting, that ML is taking place, and the MLRO does not make a disclosure as soon as practicable after the report comes to him.[888]

In determining whether the defendant has a requisite knowledge or suspicion, the objective and subjective test that applies to section 330, also applies to 331.[889] In deciding whether a person has committed an offence under this section, the court must have regard to whether he has followed any relevant guidance.[890]

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[884] ibid
[885] POCA 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006/308 article 2(5) inserted subsection 14 into s 330 to define the term 'relevant professional adviser'
[886] POCA 2002 s 330(14)
[887] Williams and Others (n 747) 533
[888] ibid 534
[889] Billings (n 665) 21-650
[890] POCA 2002 s 331(7)

An offence committed under section 331 is triable either way: upon summary conviction by a Magistrates' Court the penalty is up to six months imprisonment or of fine not exceeding statutory minimum or both, and on conviction on indictment in the Crown Court, a maximum of five years in prison or fine or both.[891] The 'reasonable excuse' and 'overseas conduct' defences also applies to section 331 offence.[892] However, the term 'reasonable excuse' is undesirably vague, because what one considers reasonable, another person may not.[893]

This provision is a replica of section 330 but with specific application to MLROs within the regulated sector.[894] Curiously, unlike in section 330, the defence of "lack of training" is not available to the section 331 offences. This appears to be harsh considering the main function of MLROs is to decide whether to make disclosure to NCA. Thus, to be able to make an informed decision based on the information he received from within the organisation, the MLRO needs to be well trained, because not every suspicion will turn out to be a true money-laundering scheme.[895]

However, considering the pivotal role MLROs play in preventing their organisations from being used as ML conduit, even absent proper training, it is expected that they exercise due care and diligence in discharging their duties, otherwise, they could be liable for negligence.[896]

[891] POCA s 334(2)
[892] POCA ss 331(6) and (6A)
[893] Williams and Others (n 747) 535
[894] Fisher (n 735) 237
[895] Shah v HSBC [2010] EWCA Civ 31
[896] Strokes and Arora (n 740) 351

3.3.5 FAILURE TO DISCLOSE: OTHER NOMINATED OFFICERS (S. 332)

Section 332 is worded almost the same way with section 331.[897] However, this section applies to nominated persons in a non-regulated sector who have received internal reports, which make them suspect that another person is engaged in ML activities.[898] This section, therefore, criminalises conduct where the MLRO receives a report made under section 330, which causes him to know or suspect, or gives him reasonable grounds for knowing or suspecting, that ML is taking place, and the MLRO does not make a disclosure as soon as practicable after the report came to him.[899]

It has been suggested that the term "other nominated officers" includes within its meaning constables and customs officers.[900] Going by the title of this section, the term "other nominated officers" also actually includes nominated officers in the regulated sector, though the provisions of section 332 are less onerous than that of section 331.[901]

For the offence to be committed four conditions as specified in section 332(1)-(4) has to be met. The test for the *mens rea* elements of this offence (knowledge or suspicion) is a combined subjective and objective test.[902]

3.3.6 TIPPING OFF

Initially, section 333 governs tipping off offence. This section has been repealed and replaced by 333A-333E. Though the old offence under section 333 is repealed, it will continue to govern offences committed before the coming into force of section 333A-333E.

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[897] POCA 2002 s 332
[898] Fisher (n 735) 237
[899] Williams and Others (n 747) 535
[900] Billings (n 665) 21-700
[901] ibid
[902] Rees and others (n 674) 155 (SOCPA 2005 amended POCA 2002 to introduce the combined test)

3.3.6.1 OFFENCES UNDER S. 333

Section 333 replaced tipping off provisions of sections 53 and 58 of DTA 1994 and section 93D(1) CJA 1988. However, section 333 has also been repealed by the TACT 2000 and POCA 2002 (Amendment) Regulations 2007. Schedule 2 of the Regulations omitted section 333 and in its place inserted sections 333A-333E to correspond with the new sections 21D to 21H of the TACT 2000. As there is no transition period, section 333 would continue to apply in relation to allegations of tipping off that occurred before the coming into force of the new provisions.[903]

According to the old law, a person commits a tipping off offence under section 333 if he knows or suspects that a disclosure falling within section 337 or 338 has been made, and he makes a disclosure, which is likely to prejudice any investigation, which might be conducted following the disclosure. Section 333(2) provides defences to tipping off offences.

The operation of section 333 has been occasioned by some practical difficulties especially for the banks and legal professionals.[904] Thus, the Law Society issued guidance to help solicitors comply with their AML obligations without tipping off their clients.[905] Expiriencing difficulties in this area is nothing new. The Court had to intervene to resolve those difficulties that had arose under the CJA 1988 (section 93D).

In ***Governor and Company of the Bank of Scotland v A Ltd,***[906] the bank found itself in a difficulty as to whether to comply with the police request not to allow the payment to go through and not inform A Ltd about the impending investigation (in order not to tip

[903] ibid
[904] ibid 156
[905] Solicitors Practice Note, Chapter 5, paragraph 5.8.3 <http://www.lawsociety.org.uk/support-services/advice/practice-notes/aml/money-laundering-offences/#aml5_8> accessed 3 January 2016
[906] [2001] 1 WLR 751

them off), or risked being sued as a constructive trustee by A Ltd for not allowing the payment to go through.

Consequently, the bank applied without notice in private to a judge to seek directions.[907] The Court of Appeal *held* that, where the bank found itself in such difficulty, it is appropriate for the bank to apply for interim declaratory relief under Civil Procedure Rules – CPR r 25.1(1)(b) – naming the SFO as the defendant, not the customer.[908] In ***C v S***[909] the Court of Appeal provided 8-point guidance for courts to follow when they are approached for directions to provide protection for the institution and the party seeking disclosure without prejudicing the investigations.

In ***Squirrell Ltd v National Westminster Bank plc (Customs and Excise Commissioners intervening),***[910] a case brought under POCA 2002, the bank argued that, for it to warn or explain the situation to Squirrell would amount to tipping off while allowing the transaction to proceed would contravene section 328 of POCA 2002. Although Laddie J agreed with the bank's view, he highlighted the grave injustice the interrelation of section 328 and 333 causes.[911]

In ***Shah v HSBC***[912] Supperstone J found for the defendant bank on the basis of an implied term in the contract which permitted the defendant bank to refuse to carry out the payment instruction without an appropriate consent under section 335 of POCA, where it suspected a transaction involves proceeds of crime. It was also held that an implied term exists in the contract that permitted the bank to refuse to provide the

[907] ibid
[908] ibid
[909] [1999] 1 WLR 1551,1555
[910] [2006] 1 W.L.R. 637
[911] ibid 639
[912] [2012] EWHC 1283

customer with information that would lead to tipping off contrary to section 333 of POCA 2002.

3.3.6.2 OFFENCES UNDER S. 333A AND S. 333B-333D EXCEPTIONS

As mentioned above sections 333A - 333E were inserted into POCA 2002 by TACT 2000 and POCA 2002 (Amendment) Regulations 2007.[913] The amendment gave effect to Article 28.1 of the Directive 2005/60/EC 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.

Section 333A offence can be committed in two ways.[914] A defendant will be liable on summary conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding level 5 on the standard scale, or to both. On conviction on indictment, the defendant is liable to imprisonment for a term not exceeding two years, or to a fine, or to both.[915] However, a two-year prison term may not deter a determined criminal from tipping off clients in exchange for a handsome reward.

Pursuant to section 333B-333D, section 333A offence will not be committed if the disclosure was made: within entities in the same group;[916] or between credit or financial institutions, if disclosure relates to a customer and the disclosure is in the context of a transaction involving both institutions; [917] or to the person's own supervisory authority.[918] The explicit defences available to legal advisers as contained in 333(2)(c)

[913] SI 2007/3398
[914] POCA 2002 s 333A(1)-(3)
[915] ibid s 333A(4)
[916] ibid s 333B
[917] ibid s 333C
[918] ibid s 333D

and (3) are no longer available under section 333A, thus, how court will interpret the new provisions will be of great importance.[919]

Having discussed the primary and the secondary UK ML offences under POCA 2002, we now analyse the extent of the extraterritorial effect of sections 327-329.

3.3.7 EXTRATERRITORIAL EFFECT OF SS.327-329

Another major development in the United Kingdom's AML regime is the extra-territorial effect of POCA 2002 sections 327, 328 and 329. Traditionally, except in certain limited circumstances, the jurisdiction of English criminal law has been limited locally, and it is not concerned with the crimes committed abroad.[920] There is also a presumption that in English law, unless legislation expressly provides otherwise the general rules of private international law will apply to that legislation.[921]

One rule of private international law is that, ordinarily, the criminal jurisdiction does not extend to the conduct which occurs abroad and to the conduct of foreign national abroad. As decided by the House of Lords in **Cox v Army Council**, it is well settled, unless contrary intention appears, subject to the general rules of private international law, that an Act of Parliament is not intended to apply to Britons (including corporations) outside the territory of the United Kingdom.[922]

This principle was also followed in **Arab Bank Plc v Mercantile Holding Ltd**, in which Millett J declined to give a literal construction to the prohibition on financial assistance under Companies Act 1985 section 151, as having an extra-territorial effect

[919] Rees and others (n 674) 161
[920] Marshall (n 738) 355
[921] ibid
[922] Cox v Army Council [1963] A.C. 48, 67 per Viscount Simonds

on a foreign subsidiary of UK's company abroad.[923] This reasoning sits well with the traditional view that the criminal jurisdiction is an emanation of sovereign power, closely tied to the sovereign territory, therefore derogation is apt to infringe the principles of comity.[924]

However, the transnational nature of certain crimes makes derogation a necessary evil. Exception to this general rule can apply to certain criminal acts such as payment of bribe to a foreign official or failure of commercial organisation to prevent payment of bribe;[925] and where a materially false or misleading statement is made in order to induce another person to enter into or refrain from entering into a relevant agreement.[926]

Before POCA, the most notable legislation in this regard is CJA 1993, which introduced an extraterritorial jurisdiction for inchoate offences of conspiracy and incitement in relation to theft and fraud, but subject to the requirement that the offence must have some connection with the United Kingdom.[927]

POCA has very significant extraterritorial consequences for conduct which takes place abroad and which is deemed under the definitional provisions of the POCA section 340, to be criminal conduct from which criminal property is derived.[928] By these provisions, a person may be criminally liable in the UK for offences committed abroad and for which criminal property is derived, without having any effect on the UK.[929]

[923] [1994] Ch. 71,
[924] Marshall (n 738) 355
[925] Bribery Act 2000 s 6,7 and 12
[926] FSMA 2000 s 397(1) and (6)
[927] CJA s 5(2)(1A)
[928] Marshall (n 738) 356
[929] ibid

The Court of Appeal in **R v Rogers**[930] confirmed the extraterritorial effect of POCA 2002. Rogers was convicted of converting criminal property, which is an offence under POCA section 327(1)(c).[931] He appealed against his conviction on three grounds, one of which is that the judge wrongly ruled that the Crown Court had jurisdiction to deal with the amended count where all the activities alleged were undertaken in Spain by a non-resident of the UK in relation to a Spanish bank account.[932]

The Court of Appeal *held,* dismissing the appeal, that, having regard to section 327 and 340(11)(d) of the POCA 2002, it was clear that Parliament had intended to confer extraterritorial jurisdiction on the courts of England and Wales in respect of offences contrary to section 327 of the 2002 Act; therefore, the court had jurisdiction in respect of a charge of converting criminal property, contrary to section 327(1)(c) of the 2002 Act, where a defendant living and working abroad had merely permitted money to be paid into and then withdrawn from his foreign bank account.[933]

Section 327(1)(e) taken together with section 327(1)(c) strongly suggest extraterritorial application of the AML statute.[934] While section 327(1)(e) stipulates that criminal property must be removed from England, Wales, Scotland or Northern Ireland, no such geographical limitation is placed on the other methods of committing the offence, including section 327(1)(c), which is committed through the conversion of criminal property.[935]

Section 327(2A) taken together with section 340(2)(b) also gives a strong indication that a defendant's ML activity abroad is potentially within the jurisdiction of the

[930] [2015] 1 W.L.R. 1017
[931] ibid 1018
[932] ibid
[933] ibid 1017
[934] ibid 1018
[935] ibid

English courts. Similarly, the definition of criminal property in section 340(3) taken together with the provision of section 340(9) that 'Property is all property *wherever situated*...'[936] is a further indication of the extra-territorial reach intended by Parliament. Furthermore, in **R v Rogers** their Lordship reasoned that the specific provision of section 340(11)(d) that ML is an act which would constitute an offence (including one under section 327) if done in the UK, appears to admit of no other construction than that Parliament intended extra-territorial effect to this legislation.[937]

In their submission, the defence argued that any extra-territorial effect relates only to the criminal property element, and unlike CJA 1993, the language of POCA did not indicate any clear intention of Parliament to confer extraterritorial jurisdiction. Their Lordships, however, rejected that argument as unsustainable given that section 327(2A), section 340(2) and section 340(11) clearly relate to the "conduct" element of the offence rather than the "criminal property" element.[938]

Their Lordships concluded that the offence of ML is *par excellence* an offence which is no respecter of national boundaries and it would be surprising indeed if Parliament had not intended the AML statute to have extra-territorial effect.[939] Although it is section 327 that is at issue in **Rogers**, this judgment also applies to sections 328 and 329.[940]

The extra-territoriality of POCA is crucial in disrupting ML. As ML is transnational in nature,[941] the POCA AML law would have been even less effective had the Parliament restricted the violation of sections 327, 328, and 329 to conduct that wholly took place

[936] POCA ss 340(3) and 340(9)
[937] Rogers (n 930) 1018
[938] ibid
[939] ibid
[940] Rudi Fortson, 'R v Rogers (Bradley David): Money Laundering - Jurisdiction - Proceeds of Crime Act 2002 s 327(1)(c)' [2014] 12 Criminal Law Review 910, 13
[941] Selina Keesoony, 'International anti-money laundering laws: the problems with enforcement' [2016] 19(2) Journal of Money Laundering Control 130, 136

in the UK. A person, who knows that UK AML can be violated without any physical presence in the UK, would be careful not to conduct his financial affairs in a way that would breach the UK AML law. As that would render him criminally liable and upon indictment he could be extradited to the UK.[942]

In conclusion, discussions under this section centred on the primary and secondary ML offences. It shows how the AML provisions evolved and continue to evolve even after POCA 2002, which harmonises the AML provisions of DTA 1994 and CJA 1988. This section also reveals the deficiencies inherent in the UK AML law. These deficiencies signal the inefficiencies of the UK AML law in disrupting ML. Having achieved this, the next section discusses the subsidiary UK AML law.

3.4 THE SUBSIDIARY AML LAW

MLR serves as the regulatory AML law in the UK. The MLR consists of set of obligations that require regulated persons in the UK to take certain AML measures to prevent being used to launder proceeds of crime or to fund terrorism. This thesis has already discussed the evolution of this regulatory regime. Thus, that discussion will not be repeated here. Rather, this section will mainly focus on MLR 2007,[943] being the most current regulation at the time of writing this thesis.[944]

While POCA created both primary and secondary ML criminal offences, MLR 2007 placed certain obligations on relevant persons (as defined in reg. 3) to take various steps to detect and prevent ML and TF.[945] In other words, MLRs form the basis of the AML

[942] The extradition and conviction of James Ibori illustrates the extra-territorial effect of POCA; see R v Ibori (Onanafe James) Unreported April 17, 2012 (Southwark Crown Court)
[943] MLR 2007 (SI 2007/2157)
[944] New MLR is expected on 26th June 2017 to give effect to Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 (The Fourth AML Directive). Although the new MLR will not repeal MLR 2007, changes are expected. Until then provisions of MLR 2007 remain the law
[945] MLR 2007 (SI 2007/2157), reg 1 (Annotation)

compliance regime in the UK. MLR 2007 consists of six parts (which in total consist of 51 Regulations) and six schedules. The 2007 Regulations form the main thrust of the UK AML regulatory regime. What follows below is the discussion on the AML provisions of the MLR 2007.

3.4.1 BUSINESSES TO WHICH THE REGULATIONS APPLY

Subject to regulation 4, regulation 3 determines to whom MLR 2007 applies. It applies to credit institutions, FI, auditors, insolvency practitioners, external accountants and tax advisers, independent legal professionals, trust or company service providers, estate agents, high value dealers, and casinos. Regulation 3(3)-(13) provides a legal definition of the above-listed businesses. MLR 2007 differs from the previous regulations. For example, for MLR 2003 to apply to a person, that person must be engaged in "relevant business". In contrast, MLR 2007 uses business, profession or commercial activity to determine whether a person falls within the scope of the 2007 Regulations.[946]

3.4.2 CUSTOMER DUE DILIGENCE

Part 2 of MLR 2007 sets out in more detail than the previous Regulations the requirements for CDD.[947] Regulation 5 requires regulated person to apply CCD measures to identify and verify the identity of a customer and any beneficial owner, and to obtain information on the purpose and intended nature of the business relationship. Regulation 6 provides a definition of the term 'beneficial owner'. While for a body corporate or partnership a beneficial owner is one who controls more than 25 per cent of the stake, for a trust vehicle it is anyone who is entitled to at least 25 per cent.[948]

[946] Peter Snowdon and Simon Lovegrove, 'Money Laundering Regulations 2007' [2008] 54 Compliance Officer Bulletin 1, 22
[947] ibid 23
[948] MLR 2007, reg 6 (2)-(3)

A regulated person is required to carry out CDD on new and existing customers. This he does in certain cercumstances, such as when establishing a business relationship with new customer, when carrying out an occasional transaction, when he suspects MLor TF, where there are doubts as to the veracity or adequacy of documents, or data, or information previously obtained for the purposes of identification or verification.[949] The CDD should not be a one-off activity performed at the time when the relationship is to be established. Rather it should be a continuous task performed whenever situation demands, to ensure information about a customer is up-to-date and to keep a vigilant eye on the transaction patterns of a customer.[950]

Where a regulated person is unable to apply CDD measures in accordance with the provisions of section 7, the relevant person must cease transaction with the affected customer, and must consider whether he is required to make a disclosure under Part 7 of the POCA 2002 or Part 3 of the TACT 2000.[951] However, LPP may prevent the operation of this rule (reg. 11(2)).

It is now a requirement that identity of customers and beneficial owners must be verified before a business relationship is established.[952] Where this is not practically possible, the verification must be completed as soon as practicable after contact is first established.[953] Rules governing identity checks with respect to casinos are covered by regulation 10. Establishing the identity of a customer as part of the CDD can be done simply by obtaining documents such as drivers licence, utility bills, international passport, national identity card and the like, to ascertain client's identity by comparing

[949] ibid reg 7(1)
[950] ibid reg 8(2); please see Hyland and Thornhill (n 842) 32-050
[951] ibid reg 11(1)
[952] ibid reg 9(2)
[953] ibid reg 9(3)

the picture in the photo ID and the person's face and to ascertain the residential address of the customer.[954]

However, criminals who are determined to engage in ML may not find it difficult to satisfy this requirement by providing fake documents that bear the names they are using.[955] Moreover, criminals do obtain identification documents in the name of persons who have died long ago.[956] Thus, mere identification of a customer is not enough. To ensure compliance with the CDD requirements the regulated person must verify the documents the customer presented to prove he is who he says he is, using data provided by reliable and independent sources.[957]

A similar level of scrutiny should be applied to trust and legal entities not only to verify the identity of beneficial owners but also to understand the ownership and control structure of the person, trust or arrangement.[958] Compliance with the CDD requirements also entails obtaining information on the purpose and intended nature of the business relationship.[959] The 2007 Regulations makes it possible for a relevant person to apply a different level of CDD on different clients.[960]

3.4.2.1 OUTSOURCING/RELIANCE

The process of conducting CDD is expensive and time-consuming. Therefore where reasonable, a regulated person may rely on another to verify or confirm the identity of a customer to avoid duplication of effort and to also minimise unnecessary friction

[954] Andrew Haynes, 'Money Laundering: From Failure to Absurdity' [2008] 11 Journal of Money Laundering Control 303, 311
[955] ibid
[956] Richard Alexander, 'Reputational Issues Arising Under the EU Third Money Laundering Directive' [2006] 27 Company Lawyer 373
[957] MLR 2007, reg 5(a)
[958] ibid reg 5(b)
[959] ibid reg 5(c)
[960] ibid reg 13 and 14 (Depending on the level of risk associated with the clients, enhanced or simplified CDD can be applied)

between regulated persosns and their customers.[961] MLR 2007 allows regulated persons to rely on another for its CDD function.[962] Similarly, regulation 17(4) allows a regulated person to outsource its CDD function from another. This innovation can be traced to Article 14 of the 2005 Directive. However, because CDD is at the heart of the AML measures, this provision appears to be tricky.

Thus, it is not surprising that reg. 17(4) is not a requirement but rather an option open to the regulated persons should they chose to outsource. However, regulated persons must be extremely careful to protect their names and to avoid sanction. Should anything go wrong, outsourcing will not absolve the regulated person from blame although the person on whom reliance was placed can be sued for negligence.[963]

3.4.3 RECORD KEEPING

Once CDD is done, the identity documents obtained must be kept as a record for at least five years commencing on the date when the occasional transaction is completed or when a business relationship ends.[964] Records of supporting documents relating to a business relationship or occasional transaction, which are subject to the CDD measures or on-going monitoring must be held for five years commencing from the date on which the transaction is completed.[965] All other records must be kept for five years commencing on the date on which the business relationship ends.[966] Moreover, this includes situations where a third party relies on the regulated persons.[967]

[961] Hyland and Thornhill (n 842) 32-000
[962] MLR 2007, reg 17(1)-(2)
[963] Council Directive (EC) 2005/60 Article 14; also see Alexander (n 956)
[964] MLR 2007, reg 19
[965] ibid reg 19(1)
[966] ibid reg 19(3)(b)
[967] ibid reg 19(4)

3.4.4 SYSTEM AND TRAINING

3.4.4.1 SYSTEM

MLR 2007 places an obligation on a regulated person to establish and maintain a functional AML compliance programme. To prevent the financial system from ML and TF, regulated persons are required to establish and maintain appropriate and risk-sensitive policies and procedures relating to CCD and on-going monitoring, reporting, recordkeeping, internal control, risk assessment and management, monitoring and management of compliance with, the internal communication of such policies and procedures.[968]

The responsibility of ensuring that effective business policies and procedures that meet the requirements of MLR 2007 are put in place to prevent abuse by launderers, rests on senior managers.[969] Thus, management control must be put in place to detect any attempt to use regulated persons for ML or TF, and to enable the management to take appropriate action and file a report to the relevant authorities.[970] Such systems must be subjected to regular evaluation to ensure their efficiency in managing ML and TF risks efficiently, and also to ensure that they are compliant with the Regulations.[971]

The system must establish a clear internal reporting channel from staff to an MLRO who should in turn report suspicious activity (detected and reported to him by staff) to the NCA, and the system should identify and allocate responsibilities to senior management staff.[972]

3.4.4.2 TRAINING

[968] ibid reg 20(1)
[969] Mitchell and Others (n 727) Vol II, VIII.075
[970] ibid
[971] ibid
[972] ibid

The key component in ensuring success in disrupting ML is the human elements who operate AML system. Thus, staff training is vital for the staff to detect and deter ML effectively.[973] Regulated persons are required to take appropriate measures so that all their employees are made aware of the law relating to ML and TF.[974] MLR 2007 requires continuous training on a regular basis for employees to be able to recognise and deal with transactions and other activities, which may be related to ML or TF.[975]

3.4.5 SUPERVISION AND REGISTRATION

Regulations 23 and 24 allocate supervisory responsibility and duties to different bodies that cover the sectors to which the MLR 2007 applies.[976] Regulation 25 requires Customs Commissioners to maintain a register of high-value dealers, MSBs, and trust or company service providers. Regulations 26-29 govern the registration process. Certain supervisory bodies may maintain their register in accordance with sections 33-35.[977]

3.4.6 ENFORCEMENT

Regulation 36 designated FCA and HMRC as ML enforcement authorities.[978] Regulation 37 provides that an officer may, in connection with the exercise of designated authority of its function, require a regulated person or the connected person to provide specified information, to produce such recorded information as may be so specified, or to attend before an officer at a time and place specified in the notice and answer questions.

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[973] Hyland and Thornhill (n 842) 32-650
[974] MLR 2007 reg 20 - 21
[975] ibid reg 21(b)
[976] These bodies include the Law Society and ICAEW
[977] MLR 2007 reg 32
[978] Before its closure, OFT was the AML supervisor for estate agents and certain types of credit businesses. This role has since been transferred to the HMRC (OFT Annual Report and Accounts [2014] 31-2)

Under regulation 38, an officer is empowered to enter and search premises without a warrant regarding the exercise of the power conferred on a designated authority. Regulation 39 prescribed the procedures for obtaining a search warrant, and a judge may issue a warrant under this paragraph if satisfied on information on oath given by an officer that the required conditions are satisfied.

3.4.7 POWER TO IMPOSE CIVIL PENALTIES

Powers to impose civil penalties are contained in regulations 42-44. Regulation 42 conferred on a designated authority power to impose a penalty of such amount, as it considers appropriate on a regulated person (except an auction platform) who fails to comply with any requirement of the regulations specified in section 42(1). However, the designated authority must not impose a penalty where there are reasonable grounds for it to be satisfied that the person took all reasonable steps and exercised due diligence to ensure that the requirement would be complied with.[979]

Regulation 42(3) stipulates that, in deciding whether a person has failed to comply with a requirement of these Regulations, the designated authority must consider whether the person followed any relevant guidance, which was at the time issued by a supervisory authority approved by the Treasury.[980] The decision of the commissioners made under regulations 28,29,30 and 42 is subject to appeal (regs. 43-44).

3.4.8 CRIMINAL OFFENCE

Although MLR 2007 is a regulatory law (which place AML obligations on the regulated persons), failure to comply with those obligations can be a criminal offence. Regulation 45 creates an offence triable either way. A person who fails to comply with any requirement listed above is guilty of an offence and liable on summary conviction, to a

[979] MLR 2007, reg 42(2)
[980] Such as FCA Handbook on Money Laundering and Guidance notes issued by JMLSG

fine not exceeding the statutory maximum; on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both (reg. 45(1)). In deciding whether a person has committed an offence, the court must consider whether he followed any approved guidance, which was at the time issued by a supervisory authority, and published in a manner approved by the Treasury (reg. 45(2)).

A person is not guilty of an offence under this regulation if he took all reasonable steps and exercised due diligence to avoid committing the offence.[981] Moreover, where a person is convicted of an offence under this regulation, he shall not also be liable to a civil penalty under reg. 42.[982] HMRC, LWMA, DETI, DPP and DPP-NI are empowered to bring criminal proceedings against a regulated person or any person liable to prosecution.[983] Part 6 of the MLR 2007 contains provisions for Recovery of charges and penalties through the court (reg. 48). It also contains obligations on public authorities to report suspicion of ML and TF (reg. 49).

3.4.9 ASSESSING MLR 2007

These regulations formed the basis for the AML compliance regime in the UK. As discussed above, these regulations imposed obligations on regulated persons to prevent themselves from being used to launder proceeds of crimes or to fund criminality, including terrorism. These obligations can be broadly grouped under the following: customer due diligence; record keeping; training and establishing and maintaining systems and controls.

[981] MLR 2007 reg 45(4)
[982] ibid reg 45(5)
[983] ibid reg 46(1)-(2)

At least, in theory, this sounds a very good legislative effort aimed at involving regulated persons in the government drive to disrupt ML. However, whether in practice these regulations have the desired impact on ML, is entirely a different issue.

Although MLR 2007 had a significant impact on the UK AML regime, the law does not have the desired impact because it placed obligations (on the regulated persons), which in practice, cannot be met.[984] One major loophole inherent in the MLR 2007 is that they did not specifically address trade finance such as CLC – the main banking activity.[985]

Though technology has enhanced the way CDD is conducted, loopholes still exist that renders CDD less effective in disrupting ML. This is because in some cases technology based CDD does not and cannot reveal all the information about a client.[986] For example, to ascertain the residential address of clients through postcodes in developing countries is almost impossible because they do not exist. Also, other means of linking the client to where he said he lives (such as electoral register, hospital register or vehicle licence cannot be accessed online. In this situation relying on technology to conduct CDD may not yield the desired result.

Although the focus of this chapter is on UK ML regime, some mention should be made of the proceeds of crime law, because a successful prosecution of ML offence often results in the court issuing a confiscation order. Furthermore, the policy behind ML law is to augment the proceeds of crime law.

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[984] Haynes (n 954) 303

[985] For in-depth analysis on this please see Ramandeep Kaur Chhina, 'Managing money laundering risks in commercial letters of credit: are banks in danger of non-compliance? A case study of the United Kingdom' [2016] 19(2) Journal of Money Laundering Control 158

[986] George Demetriades, "Is the person who he claims to be?" old fashion due diligence may give the correct answer!' [2016] 19(1) Journal of Money Laundering Control 79

3.5 PROCEEDS OF CRIME LAW

Those who profit from crimes must find a way of laundering the proceeds, not just for the illicit assets to reappear clean, but also to avoid confiscation in the event that law enforcement closes in on them.[987]

3.5.1 EVOLUTION OF CONFISCATION REGIME

Before the passage of the DTOA, two statutes empowered the Courts to confiscate proceeds generated from drug trafficking. First, the MDA 1971, if it can be shown that the assets relate to an offence for which the defendant has been convicted.[988] Secondly, the PCCA 1973, if the assets relate to an offence for which the defendant was convicted, but provided that the assets have been used or was intended to be used to facilitate or to assist in the commission of that offence.[989]

Following the unsuccessful attempt by the law enforcement to confiscate assets of those convicted of drugs offences in the Operation Julie case,[990] Hodgson Committee was set up to recommend solutions to the limitation in the then confiscation law.[991] The Committee made certain recommendations on, but not limited to, the following: the limit of the confiscation power; the objective of the confiscation power; burden of proof; and confiscation and imprisonment.[992]

Specifically, the Committee recommended that the courts should be empowered to confiscate proceeds of criminal offences of which defendants have been convicted.[993] Consequently, Parliament enacted the first confiscation statute into the DTOA 1986.[994]

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[987] Williams and Others (n 747) 8
[988] Misuse of Drugs Act (MDA) 1971 s 27
[989] Powers of the Criminal Courts Act 1973 s 43
[990] R v Cuthberton [198 1] AC 470
[991] Howard League for Penal Reform (n 21) 72
[992] ibid 73-84
[993] Millington and Williams (n 714) 2
[994] DTOA 1986 s 1

This intervention was needed because the profits from drug trafficking were so great that the lengthy jail term do not deter convicted drug lords who were able to direct their illicit businesses from their prison cell.[995]

The legislative intervention reflects Parliament's desire to deprive offenders the fruits of their crime, as the confiscation statutes under the two legislations were inadequate for that purpose.[996] The DTOA allowed the government to confiscate assets associated with a convicted offender, not just the ones that represent proceeds of the particular drug trafficking offence for which he was convicted.[997]

However, the scope of the 1986 Act was limited to drugs proceeds only. Two years after the 1986 Act, Parliament passed the CJA 1988. CJA extended the scope of the DTOA confiscation regime to cover all indictable offences, together with a small number of offences triable only summarily, where the benefit accruing to the defendant were likely to be unusually high.[998]

This was followed by the Criminal Justice (International Co-oporation) Act 1990, which augmented the DTOA confiscation regime by requiring payment of interest on unpaid confiscation orders.[999] The 1990 Act also empowered the prosecutor to apply to the court for confiscation orders to be increased where the further realisable asset was identified.[1000] The Drug Trafficking Act (DTA) 1994 consolidates the 1986 and 1990 Acts, and also strengthened the provisions of the 1986 Act by implementing many of the recommendations of the Home Office Working Group on Confiscation.

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[995] Millington and Williams (n 714) 1-2
[996] ibid 2
[997] DTOA 1986 s 1(5)
[998] Williams and Others (n 747) 2; McCormack (n 789) 6
[999] Criminal Justice (International Corporation) Act 1990 s 15
[1000] ibid s 16

Though the enactment of CJA 1988 augmented the proceeds of crime law, enabling law enforcement to confiscate proceeds of other crimes, it created a dichotomy. POCA 2002 now removed the dichotomy. At present POCA 2002 and its related rules of procedure provides a comprehensive code governing confiscation law.[1001]

A confiscation investigation is aimed at ascertaining whether a person has benefited from his criminal conduct and/or the extent or whereabouts of his benefit from criminal conduct.[1002] In contrast, a civil recovery investigation is aimed at discovering whether the property is recoverable, who has possession of the property, or its extent or whereabouts.[1003]

The SCA 2015 amended POCA 2002 to improve the collection rate dramatically, and to ensure restraint and confiscation regime starts to yield the desired result.[1004] CFA 2017 has changed this area of the law, empowering law enforcement to forfeit personal assets and money in bank and building society account.[1005]

Going into a detailed examination of this vast area of law is beyond the scope of this thesis. However, the three main ways (confiscation, civil forfeiture and taxation) through which criminals can be divested of their illicit profits are analysed below.

3.5.2 MEANS OF RECOVERY

POCA 2002, as amended by the SOCPA 2005, allows for the recovery of the proceeds of crime through either the criminal or civil courts. Recovery can be pursued in three distinct ways: (i) confiscation orders may be sought in criminal proceedings by the

[1001] POCA Parts 2-6 and 8-13
[1002] Sean Larkin 'Investigation, Prosecution and Confiscation of the Proceeds of Crime' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (Sweet and Maxwell 2006) 40-200
[1003] ibid 40-250
[1004] Jonathan Fisher, 'Part 1 of the Serious Crime Act 2015: Strengthening the Restraint and Confiscation Regime' [2015] 10 Criminal Law Review 754
[1005] Please see s 3.2.1

prosecution upon conviction, but the assets does not have to be the actual proceeds of the crime for which the defendant was convicted;[1006] (ii) illicit gains can be taxed;[1007] and (iii) use of civil forfeiture, which targets directly the proceeds of crime.[1008] Taxing the proceeds of crime is discussed under section 3.6.

3.5.2.1 CRIMINAL CONFISCATION

Criminal confiscation, i.e. confiscation proceedings upon conviction remain the most favoured by the law enforcement as a means of depriving criminals of their unlawful criminal proceeds.[1009] Only when confiscation may not be possible prosecutors are encouraged to pursue proceeds of crime through an alternative means. The Crown CPS, asset recovery strategy guidelines for the prosecution, states:

> Prosecutors should consider asset recovery in every case in which a defendant has benefited from criminal conduct and should instigate confiscation proceedings in appropriate cases. When confiscation is not appropriate and/or cost effective, consideration should be given to alternative asset recovery outcomes. :[1010]

Because of its advantages, a criminal confiscation is a good tool of disrupting ML. Its major advantage is that the standard of proof applicable in confiscation proceedings is the civil one – prosecution need not prove its case beyond reasonable doubt but on the balance of probabilities.[1011] Secondly, the "strict"[1012] rules of criminal evidence do not

[1006] POCA 2002 part 2
[1007] ibid part 6
[1008] ibid part 5
[1009] For analysis on criminal forfeiture please see Rees and others (n 674) 15-122
[1010] Proceeds of Crime, CPS *Assets Recovery Strategy* <http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/index.html#a03> accessed 25 September 2015
[1011] POCA 2002 s 6(7) (where the prosecution can only prove that the defendant obtained benefit by proving a criminal offence separate from the indictment, then the criminal standard may apply – Briggs-Price [2009] 1AC 1026)
[1012] CJA 2003 s 134(1) defines "criminal proceeding" as "a criminal proceeding to which the strict rules of evidence apply"

apply.[1013] Thirdly, the CJA 2003 hearsay regime does not apply directly and strictly but may apply by analogy in ensuring the fairness of the proceedings.[1014] Fourthly, confiscation proceedings are not penal,[1015] and so do not attract the protection of Articles 6.2 and 6.3 of the ECHR,[1016] even when the lifestyle rules are triggered.[1017]

Though criminal in nature, confiscation order is governed by civil procedure rules.[1018] Confiscation orders are made by the Crown Court against a convicted defendant to pay a sum equivalent to the benefit he derived from his criminal activity.[1019] A sum is assessed on the basis of both the benefit derived from the offence and the ability of the defendant to realise sufficient assets to meet the order.

However, as confiscation order is not *in rem* but an *in personam* against the defendant himself, it does not divest the defendant the legal title to his properties – though all the properties are subject to confiscation but to the extent of the value of the order.[1020] In fact, whatever amount is available becomes the 'amount recoverable'.[1021] Meanwhile, if the defendant can successfully launder his assets to the extent that no property is available, then the amount recoverable is a nominal amount.[1022]

3.5.2.2 CIVIL RECOVERY

Civil forfeiture proceedings do not depend on a criminal conviction, as the forfeiture is *in rem* not *in personam,* and the proceedings take place in the civil and not criminal

[1013] Levin [2004] EWCA Crim 408; [2004] 2 Cr App R (S) at p 69, the Court of Appeal declined even to certify this question as being of general public importance. Levin decides that they do not, and this was affirmed on Clipston [2001] EWCA Crim 446 at p569
[1014] Clipston [2011] EWCA Crim 446 at p569
[1015] POCA 2002 s 13(4)
[1016] HM Advocate v McIntosh (no1) [2001] UKPC D 1 at 14
[1017] POCA 2002 s 10, for analysis on confiscation regime under the old law as it relates to human rights please see Richard Alexander, 'Confiscation Orders: Do the UK's Provisions for Confiscation Orders Breach the European Convention on Human Rights? [1998] 5(4) Journal of Financial Crime 374
[1018] R v Levin [2004] EWCA Crim 408
[1019] Stephen Gentle and others, 'Proceeds of Crime 2002:Update' [2014] Compliance Officer Bulletin 1, 7
[1020] Millington and Williams (n 714) 3
[1021] POCA 2002 s 7(2)(a); Summers [2008] 2 Cr App R (S) 569; Winters [2008] EWCA Crim 1378
[1022] POCA 2002 s 7(2)(b)

courts.[1023] Once the prosecution reveals that the person was living beyond his means, the prosecution then must show probable cause that the property is subject to forfeiture, for the Court to order the seizure of the asset.[1024] It is then for the person from whom the property is seized to contest the forfeiture within a limited time by proving innocent ownership of the property in question.[1025]

The enforcement officer must then prove on the balance of probabilities that property to be seized was obtained by criminal conduct.[1026] The civil standard applies even though the allegation is that a specific criminal conduct generated the property.[1027]

Civil forfeiture proceeding may be brought irrespective of an on-going criminal proceeding in connection with the property.[1028] Civil forfeiture may also be brought where, the defendant is acquitted of the offence, or a conviction did not result in a confiscation, or the defendant died, or there is insufficient evidence to convict the defendant, or the property owner cannot be ascertained; or the defendant is outside the jurisdiction.[1029]

The civil forfeiture provisions under POCA 2002 Part 5 were designed to enable the prosecution to target proceeds of crime in the hands of criminals, where the evidence will not allow for a successful conviction in the criminal courts.[1030] Under POCA 2002 law enforcement can recover criminal assets given to another person in the form of a

[1023] Tom Serby, 'Follow the Money: Confiscation of Unexplained Wealth laws and Sport's Fixing Crisis' [2013] 1 International Sports Law Review 2, 6
[1024] Ivan Pearce, 'Nature of Money Laundering' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering* Guide (Sweet and Maxwell 2003) 9-525
[1025] ibid
[1026] Rees and others (n 674) 178
[1027] SOCA v Gale [2011] 1 WLR 2760
[1028] Serby (n 1023) 6
[1029] ibid, also see Anthony Kennedy, 'Civil Recovery Proceedings Under the Proceeds of Crime Act 2002: The Experience So Far' [2006] 9(3) Journal of Money Laundering Control 245, 246 – 53
[1030] Explanatory note to Part 5 of POCA 2002 at paragraph 290; Jonathan Barnard 'Investigation, Prosecution and Confiscation of the Proceeds of Crime' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (Sweet and Maxwell 2006) 47-000

gift,[1031] while any property obtained with inadequate consideration is treated as a gift.[1032] CFA 2017 has now augumnet this area of law substancially, by introducing UWO to support civil recovery process, and also, by introducing administrative forfeiture.[1033]

Apart from POCA 2002 and MLR 2007, ML can be tackled using alternative means. Next is the discussion on these alternatives.

3.6 THE ALTERNATIVE LAWS

Besides POCA 2002 and associated legislations, ML can be tackled using the offences of handling and tax law. This section discusses these alternative means, and it begins with handling.

3.6.1 HANDLING OFFENCES

In the late seventeenth and early eighteenth centuries, significant attempts were made to deal with the handling of stolen goods.[1034] Initially, 'assistance' by way of receiving stolen goods was treated as 'accessory after the fact of larceny'.[1035] Later the courts adopted a narrow view of the crime of larceny and refused to hold that a person who handled stolen goods was guilty as an accessory to larceny unless the principal had been convicted.[1036] Because high-level criminals need the services of professional handlers to

[1031] POCA 2002 s 77; National Crime Agency v Amir Azam and Others (No. 2) [2014] EWHC 3573 (QB)
[1032] POCA 2002 s 78
[1033] Please s 3.2.1
[1034] Peter Alldridge, Money laundering law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime (first end, Hart Publishing, 2003) 72
[1035] The legislation of 1692, 3 & 4 W. & M., c.13
[1036] Alldridge (n 1034)

dispose of the large amount they generate from illicit activities,[1037] tackling those who handle other people's wealth is one way of disrupting ML.

Since the nineteenth century, the specific offence of 'handling' has been enacted, treating handling as a separate and independent crime than being an 'accessory' after the fact to the offence of 'theft'.[1038] First, the Larceny Act 1827[1039] recognised receiving as an offence in its own right.[1040] Criminal Law Act 1967 expanded the scope of the handling offence to encompass other forms of assistance.[1041] At the moment, The statutory offences of handling are contained in the Theft Act 1968 section 22, and in Financial Services Act 2012 (section 6(1H)(3)(c)).[1042] Statutorily, handling offence is as defined in the Theft Act 1968 section 22.[1043]

The ML provisions contained in POCA 2002 sections 327, 328, and 329 is a replica of FSA 2012 section 6(1H)(3)(c) and Theft Act 1968 section 22. In its ordinary dictionary meaning as defined by Cambridge Online Dictionary, "handling" simply means "dealing with". Thus, sections 327-329 laundering offences are nothing but handling or dealing with illicit profits but in different ways. Similarly, section 22 handling offence is wide ranging, and it creates two offences, which can be committed in many ways.[1044]

[1037] R. v William Steven Battams (1979) 1 Cr. App. R. (S.) 15, 16 (Professional thieves do not steal goods merely for their own consumption; they steal them for disposal and it is essential to the success of the criminality that there should be receivers…who will dispose of their goods unobtrusively in various markets.)

[1038] David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (1st published 1965, 14 end, OUP 2015) 1102

[1039] 7 & 8 Geo 4, c. 29

[1040] A T H Smith, *Property Offences: The Protection of Property Through the Criminal Law* (1st edn, Sweet & Maxwell 1994) 944

[1041] ibid

[1042] s 6(1H)(3)(c) referred to money laundering as "handling the proceeds of crime". This section replaced the repealed FSMA 2000 s 6(3)

[1043] s 22(1)

[1044] R v Bloxam [1983] 1 AC 109, 113 where Lord Bridge stated: 'it is, I think, now well settled that this subsection creates two distinct offences, but no more than two. The first is equivalent to the old offence of receiving under section 33 of the Larceny Act 1916. The second is a new offence designed to remedy defects in the old law and can be committed in any of the various ways indicated by the words from

The offence of handling stolen goods is similar to the laundering offence in that they are offences of disposal of unlawfully acquired property.[1045] Due to overlaps between handling and laundering offences, it has been suggested that the laundering offences are little but an updated version of handling.[1046] However, the limitation of section 22 as compared to sections 327-329 laundering offences, is that section 22 is not all crime ML statute.

For the offence of handling, the prosecution needs to prove the goods were stolen, that the defendant handled the goods, and that at the time when the defendant handled the goods, he was acting dishonestly and knew or believed that they were stolen.[1047] In contrast, as discussed above the elements of section 327, 328, and 329 laundering offences are different.

Owing to the similarities between the two offences, the first prosecution of ML case by an English court at the time when there was no statutory offence of all crime ML was achieved using section 22 of the Theft Act 1986.[1048] The maximum penalty for handling offences under the Theft Act 1986 is 14 years in prison, which is the same for offences of ML under sections 327-329.[1049] The punishment for the handler doubles that available for the thief himself, which is seven years imprisonment.[1050] Reason being that there would not be so many thieves if there were no receivers.[1051]

"undertakes" to the end of the subsection'; in contrast, the Court of Appeal opined that s 22 creates only one offence, which can be committed in a number of ways (**R v Muriel Willis** (1973) 57 Cr. App. R. 1, affirming Sloggett [1972] 1 QB 430 and approving Grifffiths v Freeman [1970] 1 WLR 659); Smith (1040) 945 and Ormerod and Laird (n 1038) 1111 support R v Muriel Willis line of argument

[1045] Alldridge (n 1034) 210

[1046] HL Deb May 27 2002, cols 1064 - 1065

[1047] s 22(1); see also Smith (1040) 945

[1048] R v Brian Henry Reader (1988) 10 Cr. App. R. (s.) 210

[1049] Theft Act 1968 s 22(2)

[1050] ibid s 7

[1051] R. v William Steven Battams (1979) 1 Cr. App. R. (S.) 15, 16

3.6.2 TAXATION

Income tax, in economic terms, is a levy on persons measured by an index of their gains and advantages, or 'control over society's resources'.[1052] While tax evasion is regarded as a predicate offence to ML for the purposes of confiscation of the proceeds of crime, tax assessment is used to deprive criminals of their illicit gains.

3.6.2.1 PAYMENT OF TAXES

People who make gains through criminal activity are required to pay tax on the proceeds of thier crime.[1053] It has long been established in the UK that illegally acquired gains are taxable.[1054] The tax authorities need not prove the source of the taxpayer's gains. All that is required is that the taxpayer has made a taxable gain for which he is liable to pay the appropriate tax together with any interest and penalties where the taxpayer failed to pay in time.[1055]

However, for the proceeds of criminal activity to be taxable, the activity must represent a trade, profession or vocation, or the provision of services for payment.[1056] Although trade is the main yardstick in determining whether income is taxable, the tax regime does not sustain a trade that is entirely illegal such as theft, robbery, or murder-for-hire.[1057] The courts have always rejected the argument that the State encourages criminal activities by taking a share of the profits of crime through taxing the proceeds generated by the crime.[1058]

[1052] John Glover, 'Taxing the Proceeds of Crime' [1997] 1(2) Journal of Money Laundering Control 117
[1053] Anthony Kennedy, 'An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom' [2007] 10(1) Journal of Money Laundering Control 33, 40
[1054] Partridge v Mallandaine (1886) 18 Q.B.D. 276, 278; Lindsay Wood and Hiscox v IRC (1932) 18 TC 43; R v Poynton (1972) 72 DTC 6329; IRC v Aken (1990) STC 197
[1055] Kennedy (n 1053)
[1056] Mallandaine (n 1054) 278; also see Martyn J Bridges, 'Taking the Profit out of Crime' [1997] 1(1) Journal Money Laundering Control 26
[1057] JP Harrison (Watford) Ltd v Griffiths (1962) 40 TC 281, 229; also see Bridges (n 1056)
[1058] Mann v Nash [1932] 1 K.B. 752, 758-59

As criminals are often not known to the HMRC, the Parliament vested in the NCA the power to assess and issue a tax demand where they have reasonable grounds to suspect a person of having received income or gains derived from unlawful activity but felt that other means of recovering the proceeds of crime are not viable.[1059] With the introduction of the UWO, NCA may not necessarily go down this line since there may be no need to tax an unexplained wealth that just resurfaced. It is difficult to imagine a tax evader admitting to tax evasion when he is confronted with an UWO, knowing that he could be liable to tax evasion and ML, while the unexplained wealth could be subject to civil recovery.

The general revenue function that can be exercised by the NCA is spelt out by POCA 2002 section 323.[1060] However, the NCA power with regard to revenue function is limited to such functions provided by section 323. For example, the NCA does not have the power of making subordinate legislation relating to revenue offence.[1061] The purpose of the restriction is to clearly demarcate the functions of the two agencies with regard to revenue collection.[1062]

While raising the revenue for the crown and associated functions such as formulation and enforcement of the revenue regime remain the preserve of HMRC, crime prevention through asset forfeiture is for the NCA.[1063] To exercise its revenue power, the NCA

[1059] HC Deb 30 October 2001, vol 373, col 765 (Originally Part 6 of POCA vested this power in the director of ARA, and then to SOCA. Since 1st October 2013, CCA 2013 abolished SOCA and transfer this function to the NCA)
[1060] s 323(1)(a)-(h)
[1061] s 323(3)
[1062] Ian Smith and others on Asset Recovery, *Criminal Confiscation and Civil Recovery* (first published 2003, 2nd edn, OUP 2007) updated 2008 Vol II, IV.2.38
[1063] ibid

must reasonably suspect that the person has taxable profits, income or gains arising from criminal conduct.[1064]

Subject to POCA section 326(2), criminal conduct, is conduct which constitutes an offence, or would constitute one if it occurred in the United Kingdom.[1065] However, a reasonable suspicion that offence of tax evasion has been committed does not entitle NCA to assume revenue function.[1066] The reasonable suspicion must relate to conduct constituting an offence rather than an unlawful conduct. However, there is no express requirement for the suspicion to relate to a particular type of unlawful conduct.[1067]

Suspicion is to be given its ordinary meaning.[1068] The inclusion of the word 'reasonable' means that 'suspicion' must be based on some facts. For example, the issue is within the knowledge of the NCA, or at least it was reported to it. Thus, the 'suspicion' must not be capricious but rational and capable of explanation.[1069] What could amount to 'reasonable grounds to suspect' is explained in ***O'Hara Appellant v Chief Constable of the Royal Ulster Constabulary.***[1070]

While the test for 'reasonable ground to suspect' has objective and subjective elements,[1071] Lord Steyn postulates certain general propositions about the nature and the quality of information, which may lead a constable to form 'reasonable ground to

[1064] ibid IV.2.106
[1065] POCA 2002 s 326(1)
[1066] POCA s 326(2); also see Smith and others (n 1062) Vol II, IV.2.11
[1067] Smith and others (n 1062) Vol II, IV.2.12
[1068] Hussien v Chong Fook Kam [1970] A.C. 942, 948 per Devlin LJ
[1069] Smith and others (n 1062) Vol II, IV.2.16
[1070] [1997] A.C. 286, 294 (Lord Steyn explained that, an order to arrest cannot without some further information being given to the constable be sufficient to afford the constable reasonable grounds for the necessary suspicion)
[1071] [1997] A.C. 286

suspect'.[1072] Therefore, NCA must have reasonable ground to suspect that income or chargeable gains accrued to the taxpayer as a result of his conduct or that of another.[1073]

With regard to disruption of ML, taxing the proceeds of crime have certain advantages. First, it is faster than the civil recovery process and the evidentiary burden of proof is also lower than even that required in civil recovery cases.[1074] Second, taxpayer's liability to tax remains independent of his liability under the confiscation order made under a criminal proceeding.[1075] Third, assessment of the proceeds of crime under section 29 of Taxes Management Act 1970 with a view to determining the tax payable does not violate Article 7 of the ECHR 1950, as Article 7 applies only to criminal offences and criminal penalties.[1076]

Fourth, article 6 ECHR did not apply to tax assessments made under Part 6 of POCA, since tax assessment proceedings relating to Part 6 general Revenue functions do not involve criminal charge status.[1077] Fifth, taxing the proceeds of crime was held not to contravene Article 1 of the First Protocol of the ECHR that guarantees the protection of properties of individuals.[1078]

Six, even where a defendant cannot stand trial due to ill health, assessment of tax can still go on, and that does not amount to a breach of article 6 ECHR.[1079] In this regard, a living taxpayer's position is no different from that of the estate of a deceased taxpayer in relation to the payment of inheritance tax.[1080] Seven, expenses incurred illegally may

[1072] [1997] A.C. 286, 293; also, please see: Smith and others (n 1062) Vol II, IV.2.17
[1073] Smith and others (n 1062) Vol II, IV.2.18
[1074] Kennedy (n 1053)
[1075] Smith and others (n 1062) Vol II, IV.2.20
[1076] Khan v Director of the Assets Recovery Agency [2006] S.T.C. (S.C.D.) 154 para 47
[1077] ibid para 25-27
[1078] ibid para 44-45
[1079] ibid para 29-30
[1080] ibid para 30

not be considered in determining the amount of profit made. Thus, gross receipts of a drug dealer may be taxed without allowing a deduction for expenses incurred in obtaining the drugs, and in some cases, tax liability might exceed profits generated.[1081]

3.6.2.2 CRIMINAL TAX EVASION

Those involved in economic crimes will naturally evade tax to avoid exposing themselves by revealing to the revenue authorities the nature of their commercial activities.[1082] Tax evasion is another term for tax fraud, which relies on falsehood or on ML techniques to hide the tax due to the crown.[1083] Statutorily, there is no indictable offence of tax evasion.[1084]

However, under the common law, tax evasion is an indictable offence known as 'cheating the revenue'.[1085] In ***R v Mulligan***,[1086] the court cited with approval the following passage from Hawkins 'Pleas of the Crown' (28th end, p. 1322): "frauds affecting the Crown and public at large are indictable cheats at common law". This principle has been applied in many other tax evasion cases since 1917.[1087]

Tax evasion is also prosecuted under the Theft Act 1968 as cheating the revenue[1088] or false accounting.[1089] Section 2 of the 1968 Act, i.e evading liability by deception, used

[1081] Smith and others (n 1062) Vol II, IV.2.106
[1082] Bridges (n 1056)
[1083] ibid 27; Aileen Barry, 'Examining Tax Evasion and Money Laundering' [1999] 2(4) Journal of Money Laundering Control 326
[1084] Toby Graham and Taylor Joynson Garrett, 'Money Laundering and Foreign Tax Evasion' [2000] 3(4) Journal of Money Laundering Control 377, 380
[1085] The Court of Appeal defined the common-law offence of cheating the public revenue R v Less Times, March 30, 1993
[1086] [1990] STC 220; [1990] Crim LR 427
[1087] R. v Hudson (Alan Harry) [1956] 2 Q.B. 252, (1989) 89 Cr. App. R. 1
[1088] s 32
[1089] s 17

to be another means of prosecuting tax evasion.[1090] This section has since been repealed and replaced by Fraud Act 2006.[1091]

Section 1 of the 2006 Act now provides three ways in which fraud can be committed which include fraud by false misrepresentation.[1092] During the House of Commons' Standing Committee debate on the Fraud Bill, the minister stated that 'the new offence closely follows proposals set out in the 2002 Law Commission report on fraud, which concluded that the existing legislation was deficient in a number of respects'.[1093]

To convict a defendant of tax fraud, the prosecution needs to prove that the defendant omits to hand over revenues lawfully due to the Crown, they need not prove false representation, or deception – in fact, conspiracy to defraud is sufficient.[1094] Although most of the cases of tax evasion dealt with by HMRC are indictable, it does appear that very few cases are prosecuted as criminal tax offences.[1095] This is because HMRC has the discretion to determine whether to proceed with civil settlement if it will be more efficient than to proceed with prosecution.[1096]

Its predecessors, the Inland Revenue and Customs and Excise were given wide-ranging powers in dealing with tax offences.[1097] Both the 'Board' and the 'Commissioners' have used these powers against those who have cheated the public revenue.[1098] Though the

[1090] Barry (n 1083)
[1091] Schedule 3 para 1
[1092] Fraud Act 2006 s 1(2)(a)
[1093] HC Deb 20 June 2006, Col 4
[1094] Scott v Metropolitan Police Commissioner [1975] AC 819, 840; also see Ben Brandon, 'Tax Crimes Money Laundering and Professional Advisers' [2000] 4(1) Journal of Money Laundering Control 37, 38
[1095] Kennedy (n 1053)
[1096] Barry (n 1083) 327-328
[1097] Taxes Management Act 1970 s 102; Customs and Excise Management Act 1979 s 152
[1098] Howard League for Penal Reform (n 21) 72

HMRC favours civil settlement, still very few cases in the so-called heinous categories are considered from the outset as potential prosecutions.[1099]

Sections 327-329 created the three-primary ML offences. The common denominator among the three offences is the notion of 'criminal property'.[1100] The criminal property is defined as 'a person's benefit from criminal conduct', or where it represents such benefit (in whole or in part and whether directly or indirectly), and the alleged offender knows or suspects that it constitutes or represents such a benefit.'[1101] Thus, proceeds derived from tax offences such as cheating the public revenue will represent the proceeds of criminal conduct for the purpose of POCA 2002 section 327-329. Also, failure to report suspicion of tax evasion will breach section 330-331.

It was argued that proceeds of tax evasion are fundamentally different from the proceeds of conventional crimes such as drugs related crime, and therefore AML legislation does not apply to the proceeds of tax evasion.[1102] The logic is simply that 'proceeds' generally means funds obtained rather than retained.[1103] Also, it was argued that tax offence should not be treated as a predicate offence for the purposes of the AML regime.[1104]

However, POCA 2002 section 327 taken together with section 76(5) seems to defeat the above argument because section 76(5) extends the definition of 'benefit' to any pecuniary advantage derived because of or in connection with the commission of an

[1099] Andrew Hinsley and Others 'Fiscal Aspect of Money Laundering' in Barry AK Rider and Chizu Nakajima, *Anti Money Laundering Guide* (CCH Editions 1999) 54-300 and 400; Barry (n 1083) 328
[1100] Fisher (n 735) 246
[1101] POCA 2002 s 340(3)
[1102] Hinsley and Others (n 1099) 51-175; Martyn J Bridges and Peter Green, 'Tax Evasion and Money Laundering — An Open and Shut case?' [1999] 3(1) Journal of Money Laundering Control 51,
[1103] Martyn J Bridges and Peter Green, 'Tax Evasion: Update on the Proceeds of Crime Debate' [2000] 3(4) Journal of Money Laundering Control 371
[1104] Fisher (n 735) 244

offence.[1105] Thus, obtaining pecuniary advantage by cheating the public revenue will amount to 'criminal property' within the meaning of section 340(5).[1106]

For section 327 to apply, the property needs to be criminal property at the time of the transaction, not because of the transaction.[1107] Since a tax evader by his criminal conduct derived financial advantage for retaining funds that should be paid as tax, it will be an offence to deal with the proceeds of tax evasion in a manner prescribed by sections 327-329. It will also be a crime to tip-off a suspected tax evader after a disclosure has been made.[1108]

Furthermore, the Court of Appeal in ***R v Dermot Dimsey and Brian Roger Allen***[1109] provide a clear authority that AML legislation applies to the proceeds of tax evasion. Pursuant to section 340(2)(b) of POCA 2002, the UK ML regime also applies to foreign tax evasion despite authorities such as ***Government of India v Taylor,***[1110] ***Re Visser***[1111] and ***QRS1 APS v Flemming Frandsen***,[1112] and despite the opinion expressed by the Law Commission on the jurisdiction over offences of fraud and dishonesty with the foreign element,[1113] all of which sought to limit the Courts' jurisdiction to tax evasions that occurred in the UK.[1114]

CFA 2017 part 3 creates offences of corporate failure to prevent the criminal facilitation of tax evasion.[1115] Section 45 targets people, in Crown dependency or overseas territory

[1105] Bridges and Green (n 1103)
[1106] R v IK [2007] EWCA Crim 491
[1107] R v Loizou [2005] EWHC Crim 1579; R v Montila [2004] UKHL 50
[1108] Hinsley and Others (n 1099) 51-125 — 52-000
[1109] [2000] 1 Cr App R (S.) 497
[1110] [1955] A.C. 491
[1111] [1928] Ch. 877
[1112] [1999] STC 616
[1113] Law Commission's Report on the Jurisdiction Over Offences of Fraud and Dishonesty with a Foreign Element
[1114] Graham and Garrett (n 1084) 377-79
[1115] CFA 2017 s 45 and 46; Please see s 3.2.1

or wherever in the world, who advise UK citizens to evade UK tax – it does not matter that they have no presence or partners in the UK.[1116] On the other hand, section 46 creates a new offence that will be committed by relevant bodies that fail to prevent persons associated with them from criminally facilitating evasion of taxes owed to a foreign country.[1117] The new overseas tax evasion offence can be committed by relevant bodies that are formed or incorporated in the UK, or which are carrying out a business activity in the UK, or where the criminal act of facilitation occurs within the UK.[1118]

Having reasonable prevention procedures in place serve as a defense to failure to facilitate offence.[1119] What constitutes "reasonable prevention procedures" is informed by six guiding principles, which follow the guiding principles identified in the guidance to the Bribery Act.[1120] Based on the guiding principles, the prevention measures should be bespoke and risk-based.

Sections 45 and 46 apply extraterritorially. Thus, the offences are committed irrespective of geographical location from where they are committed – all what is required is facilitating UK tax evasion by any person wherever situated or facilitating foreign tax evasion by a UK person from wherever.[1121] It will be difficult for a relevant body that violates this statute to escape liability because guidance on how to prevent the facilitation of tax evasion would be made available by the Chancellor of the Exchequer.[1122]

[1116] HC Deb 22 November 2016, vol 617, col 139
[1117] HC Deb 22 November 2016, vol 617, col 143
[1118] HC Deb 22 November 2016, vol 617, col 143
[1119] CFA ss 45(2) and 46(3)
[1120] 'Criminal Finances Bill: The new corporate offences of failing to prevent the facilitation of tax evasion' (*Norton Rose Fulbright*, October 2016) <http://www.nortonrosefulbright.com/knowledge/publications/143796/criminal-finances-bill-the-new-corporate-offences-of-failing-to-prevent-the-facilitation-of-tax-evasion> accessed 4 June 2017
[1121] CFA 2017 s 48
[1122] ibid s 47

The offence of failure to prevent mirrors Bribery Act 2010 section 7 – failure to prevent corruption. As a result, relevant bodies would be vicariously liable for the wrongdoing of their employees or agents. Unlike section 7 of the Bribery Act, it does not matter whether benefit has accrued to the facilitator.[1123] Thus, senior management must be on their toes to prevent their corporate entities from becoming liable for this offence.

Overall, CFA 2017 part 3 has effectively extended the offence of tax fraud to cover practices such as advising persons to evade tax. Businesses which pay large sums to consultants, do cross-border business, engage casual or itinerant labour and contractors, or handle goods and services where organised fraud is a risk, are at high risk of falling foul of the new legislation.[1124]

The new tax offence has generated controversy. As it is broadly drafted, it has the potential to criminalise inadvertent facilitation in cases where senior management were unaware of and uninvolved in any of their employees criminal conduct, and liability could arise even where no benefit has accrued to the company.[1125] Whether HMRC would have the resources to prosecute cases successfully remains to be seen.[1126]

3.7 FATF MUTUAL EVALUATION OF THE UK

FATF is an inter-governmental body established in 1989 by the G7 countries in response to the growing concern over ML.[1127] The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational

[1123] (n 1120)
[1124] Paul Stainforth, 'Thoughtful commentary - by tax experts, for tax experts' [2017] 1352 Tax Journal 2 quoting Jason Collins, head of tax at Pinsent Masons
[1125] Roger Sahota, 'In Practice: Legal Update: Financial Crime: Criminal Finances Act 2017' [2017] 19 Law Society Gazette 1, 3
[1126] ibid
[1127] FATF, 'History of the FATF' <http://www.fatf-gafi.org/about/historyofthefatf/> accessed 18 January 2016

measures for combating ML, TF and other related threats to the integrity of the international financial system.[1128]

As part of its practices, the FATF conducts regular and continuous peer evaluation of each Member State to assess levels of compliance with its Recommendations, providing an in-depth description and analysis of each country's system for preventing criminal abuse of the financial system.[1129] Consequently, FATF had conducted a mutual evaluation on the UK's AML regime to determine the level of compliance with its recommendations. The first mutual evaluation was conducted between 1991 and 1995 to monitor the degree of compliance with the FATF's Forty Recommendations, and in 1996 the second round began.[1130]

Following the first evaluation report, the United Kingdom effected significant changes to its legislation.[1131] That was achieved by enacting CJA 1993, which amended CJA 1988 to create all crime ML. [1132] CJA 1993 also strengthen the confiscation legislation.[1133] Other AML measures put in place by the UK include the enactment of MLR 1993[1134] and adoption of administrative measures to complement her legislative efforts.[1135]

[1128] FATF 'Who are we' <http://www.fatf-gafi.org/about/> accessed 18 January 2016
[1129] FATF 'Mutual Evaluations' <http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate)> accessed 18 January 2016
[1130] FATF 'Annual Report 1996-1997' [1997] <http://www.fatf-gafi.org/media/fatf/documents/reports/1996%201997%20ENG.pdf> accessed 19January 2016
[1131] ibid
[1132] CJA 1993 Part II and III
[1133] ibid
[1134] SI 1993/1933
[1135] FATF (n 1130)

The third mutual evaluation exercise was conducted at the end of 2006 to test the UK's levels of compliance with the FATF's 40+9 Recommendations on AML/CFT.[1136] The evaluation, which was conducted at a time when POCA 2002 was already in place, adjudged the UK as having broad and comprehensive legal structure to combat ML and TF.[1137]

However, failure to have an effective anti-corruption law led FATF to be critical on the UK's commitment to preventing corruption.[1138] This and other reasons led to the enactment of the Bribery Act 2010.[1139] Other deficiencies were uncovered during FATF's onsite assessment visits in the UK, and recommendations were made on how to address the deficiencies identified, and improve on measures already on the ground.[1140]

Having been placed on a regular follow-up process, the UK reported back to the FATF Secretariat with a full report on its progress in June 2009 and FATF conducted a paper-based desk review of the data supplied by the UK.[1141] Satisfied with the progress the UK made in addressing the issues raised, FATF granted the UK's application for removal from the regular follow-up process.[1142]

[1136] FATF 'Third Mutual Evaluation Report on the United Kingdom, [2007] page 3 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UK%20FULL.pdf> accessed 19 January 2016. Aslo, see International Monetary Fund, United Kingdom: Anti-Money Laundering/Combating the Financing of Terrorism Technical Note [July 2011] IMF Country Report No. 11/231
[1137] FATF 'Third Mutual Evaluation Report on the United Kingdom, [2007] page 1 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UK%20FULL.pdf> accessed 19 January 2016
[1138] (n1136) accessed 7 June 2017
[1139] Please see section 3.2.1 above
[1140] ibid 1-9
[1141] FATF 'Mutual Evaluation Fourth Follow-Up Report on the United Kingdom' [2009] p3-4 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FoR%20UK.pdf> accessed 19 January 2016
[1142] ibid

The fourth round of mutual evaluation commenced in 2014, and according to the assessment calendar, the likely date for assessing the UK will be March/April 2018.[1143] The fourth round of mutual evaluation differs from the previous evaluations because FATF has now added a new component to the exercise. In addition to the traditional compliance assessment, the effectiveness of the individual countries AML/CFT system will now be tested to see how well the system works in achieving the desired result.[1144]

3.8 CONCLUSION

While ML and other crimes posed a serious threat to the UK, countering the threat is not an easy task. However, the UK is relentless in its efforts to disrupt ML. AML legislation developed incrementally, starting from the DTOA 1986 to POCA 2002 and MLR 2007. To complement these two pieces of legislation guidance has been issued to aid proper AML best practices.

This chapter reveals that while the UK AML law is comprehensive, it has its strengths and weaknesses. The evolution of AML law in the UK shows that adjusting UK AML law to remedy failures or respond to new challenges is an on-going thing. Operation Julie Case proved the UK confiscation regime ineffective. Consequently, the government established the Hodgson Committee to recommend solutions. Following the Hodgson Committee recommendations, the DTO 1986 was enacted to criminalise laundering the proceeds of drug trafficking, and to allow for the confiscation of proceeds associated with drug trafficking. Moreover, CJA 1988 enabled the confiscation of the proceeds of all crimes.

[1143] FATF 'Assessment Calendar' <http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=0&r=%2Bf%2Ffatf_country_en%2Funited+kingdom&s=asc(document_lastmodifieddate)&table=1> accessed 19 January 2016

[1144] FATF 'Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations' [2013] p3 <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf> accessed 19 January 2016

Both the DTOA 1986 and the CJA 1988 were amended by the CJA 1993. While the CJA 1993 amended CJA 1988 to criminalise all crime ML, a dichotomy was created between drug ML and all crime ML. This dichotomy posed challenges to the prosecution, as they were always required to prove which criminal conduct generated the proceeds. While the CJA 1988 continue to exist after the amendment, DTA 1994 replaced the DTOA 1986.

The DTA 1994 and the CJA 1993 were later revoked and replaced by the POCA 2002, removing the dichotomy. The POCA 2002 was severally amended to bring its ML provisions up to date. MLRs, which have been complimenting UK primary legislations, also continue to witness changes to respond to the growing AML threats. Since the enactment of the DTOA 1986 body of case law developed which help to clarify ambiguities in the law.

Handling offences under the Theft Act 1968, and tax law, prove to be useful in combating ML. Section 22 of the Theft Act 1968 have been used successfully to prosecute ML case at a time when there was no AML law existing in the UK statute book. However, regarding combating ML and TF, these laws have limited application.

The conclusion is that the AML law has loopholes that need to be closed. However, one good thing is that these laws, especially the substantive AML law are constantly undergoing regular amendments to respond to the threat of ML and TF. CFA 2017 substantially amended POCA 2002 to give law enforcement additional powers to deal with the constantly evolving threat of ML, TF and other economic crimes.

CFA has introduced UWO to attack proceeds of crime, especially the proceeds of foreign corruption. It also introduced the offence of corporate failure to prevent tax

evasion. Furthermore, CFA substantially amended the way SAR is handled. These are by no means the only changes CFA has made to the UK AML landscape. In conclusion, CFA is the most important legislation relating to ML the UK has had.

Having critically appraised the UK AML law in this chapter, and the US AML law in the preceding chapter (chapter 2), this thesis now progresses with a critical analysis of the practice relating to ML in the US and UK. In other words, this thesis now discusses the compliance aspect of the AML regime.

CHAPTER 4: PRACTICE RELATING TO MONEY LAUNDERING IN UK AND US

> The legal and administrative burdens that have been cast upon bankers and other intermediaries are onerous and may well involve serious legal and other liabilities for no or deficient compliance.
>
> **Professor Barry A. K. Rider**[1145]

4.1 INTRODUCTION

Chapters 2 and 3 critically examined the law relating to ML in the US and the UK respectively. The law in both jurisdictions requires certain practical steps to be taken to prevent ML and to TF. For example, both BSA 1970 and POCA 2002 require individuals and regulated persons to report knowledge or suspicion of ML. Thus, an AML compliance system needs to be established and maintained to discharge this and other obligations imposed by AML law in both jurisdictions.

This chapter examines AML compliance in both the US and UK. In other words, this chapter appraises practice relating to ML in the US and UK. Cambridge Dictionaries online defines compliance as "the act of obeying an order, rule, or request".[1146] ICA refers to compliance as "the ability to act according to an order, set of rules or request".[1147]

In AML context, compliance refers to administering and maintaining internally developed systems and controls to ensure internal compliance with the AML

[1145] Barry AK Rider, 'The Practical and Legal Aspects of Interdicting the Flow of Dirty Money' [1996] 3(3) Journal of Financial Crime 234

[1146] Cambridge Dictionary < http://dictionary.cambridge.org/dictionary/english/compliance#translations> accessed 1 April 2016

[1147] International Compliance Association <http://www.int-comp.org/careers/a-career-in-compliance/what-is-compliance/> accessed 12 April 2016

programme.[1148] AML programme is the system designed to assist regulated persons in their fight against ML and TF.[1149]

Title 31 CFR laid down the requirements for implementing US AML compliance programme mandated by Title 31 USC section 5318(h). The requirements cover areas such as CDD and CIP.[1150] In the UK, these requirements are contained in MLR 2007 and the FCA Systems and Controls. On the other hand, the JMLSG provides detailed guidance specifying how and what steps should be taken to implement UK AML compliance programme.

The JMLSG guidance notes are important, in that, the Court is required to have regard to whether a firm has complied with the notes, when determining whether an offence has been committed.[1151] Other professional organisations, such as the Law Society and ICAEW, also issued guidance to their members to help them comply with their AML obligation under POCA 2002 and MLR 2007.[1152] As the CFA 2017 amended POCA 2002 substantially, the AML compliance obligations on the regulated persons will increase.

The overall effectiveness of the AML law partly depends on the efficiency of the practices through which the law is implemented. To ensure effective AML compliance regime all hands must be on deck, each playing its part of the role. While senior management bears the responsibility for ensuring effective AML compliance in their

[1148] Maria A de Dios, 'The Sixth Pillar of Anti-Money Laundering Compliance: Balancing Effective Enforcement with Financial Privacy' [2016] 10(2) Brooklyn Journal of Corporate, Financial & Commercial Law 495, 505
[1149] ACAMS, AML Glossary of terms < http://www.acams.org/aml-glossary/> accessed 15 July 2016
[1150] Michael F Zeldin and Carlo V di Florio, 'Strengthening Laws and Financial Institutions to Combat Emerging Trends in Money Laundering' [1999] 2(4) Journal of Money Laundering Control 303, 305
[1151] POCA 2002 s 330(8); TACT 2000, MLR 2007 reg 45(2); FCA Handbook SYSC 3.2.6E
[1152] Martyn Bridges, 'Tax Evasion – A Crime in Itself: The Relationship with Money Laundering' [1996] 4(2) Journal of Financial Crime 161, 166

organisation, the law enforcement agencies must discharge thier duty to ensure the law is enforced to prevent compliance failure.

On the other hand, gatekeepers have an important role to play in AML compliance, because they serve as a gateway to businesses through which proceeds of crime are usually laundered. While the AML law in the UK placed compliance obligation on the gatekeepers, AML law in the US does not, leaving a big loophole.

The hallmark of the AML compliance programme is the risk-based approach, which allows for discretion on how to discharge AML obligations, taking into account an approved guidance.[1153] This discretion appears to be vital if the AML laws are to gain the needed legitimacy. The law that retains legitimacy from those it regulates is more likely to result in enhanced order, stability and effectiveness.[1154]

Co-operation between government and the private sector may engender compliance culture. Despite enforcement efforts by the regulators and law enforcement, as well as the magnitude of fines and other penalties against erring regulated firms for failure of compliance, AML compliance breaches are still occurring. While this points towards failure in law and practice relating to ML in both jurisdictions, it also underlines the need for co-operation to stimulate willing compliance by the regulated firms.

This chapter comprises of nine sections. Section 2 discusses the regulatory framework in the UK and US. Section 3 examines the need for an effective AML compliance programme. Section 4 seeks to explore why the law placed compliance obligation on the financial intermediaries. Section 5 presents the cost-benefit analysis of the AML

[1153] Kimberly Anne Summe, 'The Battle Against Money Laundering: An Examination of US Law, International Cooperative Efforts and Corporate Governance Issues' [2000] 3(3) Journal of Money Laundering Control 236, 241

[1154] David Beetham, *The Legitimation of Power* (first published 1991, Palgrave Macmillan 2013) 33-35

compliance. Section 6 examines the role of senior management, law enforcement and the gatekeepers in ensuring an effective compliance system. Section 7 explores the need for co-operation among the stakeholders. Section 8 analyses the tension that normally arises due to the conflict between contractual duty to carry out client's instruction and the obligation, not to tip-off the client about impending investigations. Finally, section 9 concludes this chapter.

4.2 REGULATORY FRAMEWORK FOR THE AML COMPLIANCE PROGRAMME

This section discusses the legal basis for the AML compliance in the US and UK. Compliance drives its lawful authority from contract law and employment law.[1155] When parties agreed to the contractual terms they comply with them. Where parties breach the agreement, they try to settle out of court using alternative dispute resolution. Where the parties settle out of court they still come to agreement which they need to comply with. Where parties fail to comply voluntarily then there may be the need for enforcement.

The concept of compliance applies to AML compliance, even though AML compliance is not voluntary. The law requires regulated persons to behave in certain ways, and failure to do so attracts sanction. For example, FCA SYSC 6.1.1R places obligation on firms to pay specific attention to the risk that they may be used for financial crime. There are corresponding legal requirements in the US that require AML compliance

4.2.1 REGULATORY FRAMEWORK: US

BSA 1970 lays the foundation for the AML compliance regime in the US. BSA placed a duty on FIs to report their customers' suspicious transactions and currency transactions

[1155] For example, parties to contract comply with their obligations under the terms of contract voluntarily

above the threshold of USD10,000 and to also keep records of all transactions to serve as a paper trail.[1156] In the case of cash movement across the borders, BSA also places an obligation on individual couriers or travellers to report such movements to the US Customs, and failure to do so is a ML offence.

The Patriot Act 2001 re-enacted these provisions by amending BSA 1970 to require each FI to establish AML compliance programme.[1157] The Act further amends BSA to empower the Secretary of the Treasury to issue a regulation prescribing the minimum standards for the AML compliance programmes established under section 352(a)(1).[1158] 31 CFR section 1010.100 et seq, require FIs to develop and maintain AML compliance programme.[1159]

The regulations require organisations to develop (on a risk-based approach) policies, procedures and controls based on ML risks that a particular company or industry faces.[1160] As effective ML deterrence programme is necessary to disrupt the laundering of proceeds of crime,[1161] the risk-based approach provides entities with substantial discretion to design an AML compliance programme capable of preventing the entity from being used for financial crimes.[1162]

The compliance burden on the regulated person has been expanding with the expansion of the scope of the BSA.[1163] The expansion also extended the scope of the BSA

[1156] 31 USC ss 5313, 5314, 5315, 5318(g)
[1157] The Patriot Act 2002 s 352(a)(1)
[1158] The Patriot Act 2001 s 352(a)(2)
[1159] 31 CFR s 1010.100 et seq
[1160] Harvey M Silets and Carol R Van Cleef, 'Compliance Issues in the Wake of the Patriot Act' [2003] 10(4) Journal of Financial Crime 392, 394
[1161] Robert E Powis, Bank Secrecy Act Compliance (fifth edn, The McGraw-Hill 1997) 176
[1162] Silets and Van Cleef (n 1160)
[1163] The BSA was amended several times. For example, MLCA 1986 amended BSA to criminalised "structuring"; Annunzio-Wylie Money Laundering Act 1992 amended BSA to require FIs to file suspicious transactions

compliance requirements to bring more institutions, especially non-bank FIs, within the framework of the BSA.[1164] Furthermore, the Patriot Act 2001 extended significantly the scope of the BSA compliance regime to cover many other FIs, such as security brokers and dealers and insurance companies, to regulate certain banking and deposit relationship which could pose great risk to the regulated person in particular and to national security in general.[1165]

However, as a result of additional criteria that apply to firms in accordance with their nature of operations, size and complexity, the impact of the Patriot Act on the FIs varies with firms.[1166] Initially, branches of foreign banks in the US were not subject to BSA recordkeeping and reporting requirements despite being classified as banks by Title 31 of the Code of Federal Regulations.[1167] That has since changed.[1168] Treasury regulation now requires foreign banks doing business in the US to implement and maintain AML programmes.[1169]

4.2.2 REGULATORY FRAMEWORK: UK

In the UK, MLR 2007 and FCA rules provide the basis for the AML compliance programmes that businesses in the regulated sector and professions must establish and maintain.[1170] The MLR 2007 and the FCA rules on systems and controls impose parallel obligations on regulated person to develop and maintain systems and controls to protect

[1164] For example, Money Laundering Suppression Act 1994 brought tribal casinos and gaming industry, card clubs etc. within the scope of the BSA
[1165] Lucindia A Low and others, 'Country Report: The US Anti-Money Laundering System' in Mark Pieth and Gemma Aiolfi, *A Comparative Guide to Anti-Money Laundering* (Edward Elgar 2004) 346 – 47 (One of the "great risks" to national security and the FIs themselves is terrorist attack which cost both life and properties. The main target of the 9/11 terrorist attack was the world's financial community - the attack did not spare FIs or even the class of FIs the terrorist used in laundering the money with which they funded the attack: see ibid p 348 - 49)
[1166] Dennis Cox, *Handbook of Anti Money Laundering* (John Wiley, 2014) 123
[1167] Low and others (n 1165) 381-83
[1168] The Patriot Act 2001 inserted s 5318(h) into title 31 of United States Codes to empower the Secretary of the Treasury to issue Regulations granting federal functional regulator (The Board of Governors of the Federal Reserve System), to require foreign banks operating in the US to comply with AML programmes
[1169] 12 CFR s 103.120(b)
[1170] Gentle and others (n 1019) 20

themselves from being used for financial crime.[1171] New obligations are expected when the MLR 2017 is enacted later in June.

In the UK, the lawful authority for AML compliance has its roots in the MiFID. [1172] FCA implemented MiFID Article 13(2)[1173] together with the Article 6 implementing Directive[1174] through SYSC 6.1.1R. This rule requires firms to establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm (including its managers, employees and appointed representatives) with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.[1175]

Failure to comply with the 2007 Regulations and the FCA rules constitutes an offence distinct from ML offence – irrespective of whether ML has been committed. However, sanctions for violation of these two parallel regulatory obligations differ. While non-compliance with 2007 Regulations is a criminal offence,[1176] failure to comply with the FCA Rules is a regulatory offence.[1177]

On the other hand, the JMLSG[1178] also issues guidance notes, which provides practical assistance on how to interprete and implement the AML regulatory provisions of the

[1171] Nichola Padfield, 'Country Report: Anti-money Laundering Rules in the United Kingdom' in Mark Pieth and Gemma Aiolfi, *A Comparative Guide to Anti-Money Laundering* (Edward Elgar 2004) 273-274
[1172] Barry Rider and others, *Market Abuse and Insider Dealing* (Butterworth, first published 2002, Bloomsbury 2016) 319-337
[1173] Council Directive 2004/39/EC OJL145/1
[1174] Council Directive 2006/73/EC OJL241/26
[1175] Rider and others (n 1172) 323-34
[1176] MLR 2007 reg 45(1)
[1177] For example, FCA imposes penalties on Sonali Bank (UK) Limited and its former money laundering reporting officer for serious anti-money laundering system failings see FCA Press Release 12 October 2016 <https://www.fca.org.uk/publication/final-notices/sonali-bank-uk-limited-2016.pdf> accessed 18 April 2017
[1178] JMLSG is made up of eighteen trade associations, including the British Bankers' Association, and it has been providing guidance notes since 1990, please see JMLSG website <http://www.jmlsg.org.uk/what-is-jmlsg>

MLR 2007 and the FCA rules. This, is to encourage the regulated person to adopt best practices to disrupt ML.[1179]

Though JMLSG Notes are just guidance, there are implications for following or disregarding them. For example, the court is required to have regard to whether a person has followed JMLSG guidance in determining whether an offence of ML has occurred.[1180] Similarly, FCA rules made it very clear that in considering whether a breach of its rules on systems and controls against ML has occurred, the FCA will consider whether a person has followed the JMLSG guidance.[1181]

Thus, departures from the guidance and the reason for doing so should be documented, and firms must be ready to justify departures before the FCA.[1182] Therefore, it is advantageous (particularly when laundering has occurred) for a firm to show that guidance has been followed since that evidence could shield the regulated firm from criminal liability or administrative sanction.

Having considered the AML regulatory framework in both jurisdictions, we now analyse the need for an effective AML compliance programme in the US and UK.

4.3 THE AML COMPLIANCE FUNCTION

An AML compliance programme must operate effectively to disrupt ML. While regulated persons establish AML compliance programme to comply with the law, for

[1179] Billings (n 665) 22-675; Cox (n 1166) 93
[1180] POCA 2002 s 330(8); TACT 2000, MLR 2007 reg 45(2); please also see Stuart Bazley, 'Compliance – the Risk and Obligations' in Barry Rider, *Research Handbook on International Financial Crime* (Edward Elgar 2015) 290
[1181] FCA Handbook SYSC 3.2.6E
[1182] Preface to JMLSG Guidance Notes para 29 (2014 Version)

compliance to be effective in disrupting ML, it needs to acquire certain attributes to function properly.[1183]

4.3.1 COMPONENTS OF AN AML COMPLIANCE PROGRAMME

Although different laws govern the AML compliance programmes in the United States and the United Kingdom, the components are almost the same, and they are geared towards achieving the same purpose, which is maintaining the integrity and stability of the financial sector.[1184]

In the US, Title 31 CFR part 1010.200 (2012) spelt out what is required of a regulated person to comply with 31 USC Section 5318(h) to establish AML compliance programme. Regulated persons covered by section 5312 definition are obliged to establish and maintain AML compliance programme prescribed by 31 USC section 5318(h) unless clearly exempted by the Treasury Department.[1185]

Similarly, in the UK, MLR 2007 requires a regulated person[1186] to establish and maintain appropriate policies and procedures to comply with the AML law.[1187] Also, the FCA Rules on Systems and Controls[1188] impose similar obligations. The JMLSG Guidance Notes supplement both MLR 2007 and the FCA rules to help firms to implement AML programmes properly.[1189]

In both jurisdictions, at a minimum the AML compliance programme must include the development of internal policies and controls; the designation of a compliance officer;

[1183] These attributes include permanence; effectiveness; operational independence; monitoring and assessment; and providing advice and assistance. Please see Rider and others (n 1172) 325-31
[1184] Angela Veng Mei Leong 'Anti-money laundering measures in the United Kingdom: a review of recent legislation and FSA's risk-based approach' [2007] Company Lawyer 39
[1185] Michael Ashes and Paula Reid, *Anti-Money Laundering: Risks, Compliance and Governance* (Thomson Reuters 2013) 38; Silets and Van Cleef (n 1160) 393
[1186] For the purpose of compliance programme, "relevant person" is as defined in reg 3 and 4
[1187] Such as Part 7 of POCA 2002
[1188] FCA Handbook 2014 Version, SYSC 3.2.6 R, 3.2.6A R, 6.1.1 R, 6.1.2 R
[1189] Bazley (n 1180) 292

training of employees on a regular basis to enable them to understand and know how to comply with the law; and impartial and periodic auditing of the programme to determine its effectiveness or otherwise.[1190] Policies and procedures must be adequate to enable firms to comply with their regulatory obligations and prevent themselves from being used for financial crime.[1191]

An AML compliance programme must specify the procedure for proper recordkeeping, and continuous update of the records kept, to serve as an audit trail and to aid investigations.[1192] These procedures must be incorporated into the AML compliance programme as part of policies and controls.[1193] Moreover, a proper compliance function must be permanent, efficient and operationally independent.[1194] An ideal AML compliance programme must specify KYC procedure. This involves CDD programme, comprising of appropriate customer identification programme and identity verification procedure.[1195]

While due diligence applies to clients and products such as foreign correspondent accounts, little attention is being given to employee vetting.[1196] Some investigations and prosecutions reveal how employees connived with criminals to manipulate even the best

[1190] 31 USC s 5318(h) (2011); MLR 2007, reg 20(1)
[1191] Rider and others (n 1172) 324; Warde, (n 80) 170
[1192] 31 CFR part 103.22-26; 103.15-21; 103.32-38; please also see Ashes and Reid (n 1218) 38; Silets and Van Cleef (n 1160) 395
[1193] Silets and Van Cleef (n 1160) 393 (please see 31 CFR part 103.121 (2011) identification programmes for banks etc)
[1194] Discussion on these key attributes of compliance function can be found in Rider and others (n 1172) 325-27
[1195] Cox (n 1166) 691
[1196] Although it has become a practice by almost all employers to conduct background checks prior to employment, there is need to incorporate employee vetting in an AML compliance obligation. Other regulators should follow the foot path of Federal Deposit Insurance Corporation (FDIC), a US regulator, which in June 2005 issued a Guidance on Developing an Effective Pre-Employment Background Screening Process

compliance programme to launder or assist others to launder proceeds of crime.[1197] Involvement of human elements in the operation of compliance is one of its major weaknesses. Consequently, vetting of employees (know your employees) should be introduced. This should be emphasised by the senior management, and it should cover all staff, including compliance officers. Furthermore, the vetting should be continuous to reveal changes in behaviour among staff.

4.3.2 RISK-BASED APPROACH: TIME TO EXCUSE ACCIDENTAL FAILURE

In both the US and UK, regulated person are required to design and implement AML compliance programmes on a risk-based approach basis.[1198] The defunct rule-based approach requires compliance with a particular set of rules irrespective of the quantum of the risk factors associated with a client.[1199] According to JMLSG guidance, the risk-based approach 'needs to be part of the firm's philosophy, reflected in its procedural controls and which requires the active support of senior management as well as the co-operation of the business unit'.[1200]

The risk-based approach is the hallmark of the AML compliance programme, because hardly will any human endeavour be hundred per cent error proof and perfect. Any programme that does not allow for discretion would be too mechanical and less cost effective and would undermine innovation, competition and legitimate commercial

[1197] US v Peter Berlin and Others 99 Cr. 914 (SWK) (Lucy Edwards, a Vice President of the Bank of New York, Eastern European Division helped her husband Peter Berlin to launder Russian criminal assets)
[1198] MLR 2007 reg 20 (Risk based approach in the UK was initially the initiative of six major UK banks and the FSA; please see FSA, Press Release FSA/PN/075/2002 15 July 2002 <http://www.fsa.gov.uk/library/communication/pr/2002/075.shtml> accessed 1/1/2017
[1199] Kevin L. Shepherd, 'Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers' [2009] 43 Real Property, Trust and Estate Law Journal 607, 625; Stephen Revell, 'The Financial Action Task Force – Lawyers as "Gatekeepers": Risk-Based Approach Guidance for Legal Professionals' [2009] Freshfields Bruckhaus Deringer LLP 10
[1200] JMLSG Guidance note 2014 version n. 4.5

success.[1201] The aim is to encourage regulated firms to allocate resources to activities that are most likely to deter and detect ML.[1202]

Under the risk-based approach, regulated persons have substantive discretion to establish and maintain a compliance programme that is reasonably designed to prevent their entity from being used for ML or TF.[1203] The purpose of the discretion is to allow regulated persons to adopt a programme appropriate to the unique nature of their businesses and products, the size and location of the company, the nature and location of the customer.[1204]

This means that, while the law imposed certain obligations on the regulated firms, the firms retain discretion on how to discharge the obligations taking into account an approved guidance. This discretion is essential if the AML law is to be effective in disrupting ML, as the flexibility would make AML law more legitimate in the eyes of those it regulates. A law that retains legitimacy from those it regulates is more likely to result in enhanced order, stability and effectiveness.[1205] This is also true of AML legislations.[1206]

The risk-based approach recognises the diverse nature of threat ML poses to the regulated firm due to jurisdictional, product, customer and delivery channel differences.[1207] However, a risk-based approach is not a zero-failure regime, and the

[1201] Bazley (n 1180) 289
[1202] AM Whittaker, 'Better Regulations – Principles v Rules' [2006] 21(5) Journal of International Banking Law and Regulations 233, 234
Silets and Van Cleef (n 1160) 394
[1204] For example, see 31 CFR s 103.125(a)-(b), which governs money service businesses (MSB) compliance programme
[1205] Beetham (n 1154) 33-35
[1206] Hyland and Thornhill (n 842) 30-450
[1207] Leong (n 1184) 40

FSA has acknowledged that.[1208] It means that someday the risk will be misjudged and an accident will happen.[1209]

This raises a critical question. If failure at some point is the inevitable feature of a risk-based approach, will the law excuse regulated firms who have designed and implemented risk-based AML compliance programme as required by the law? For now, the answer appears to be in the negative.[1210] Instead, in both UK and US, evidence of compliance with the relevant AML laws may only reduce culpability where the risk is misjudged and an accident happened.

Meanwhile, regulated persons bear the enormous cost of implementing an effective AML compliance programme.[1211] Components of AML compliance costs faced by banks and other regulated persons include the direct expenses incurred in establishing and maintaining risk management and compliance systems; the prospect of reduced income as a result of decisions to forgo certain lines of business; the costs that might be associated with the possible diversion of resources from other aspects of the bank's work; and the more intangible but yet significant costs of inconvenience to customers.[1212]

The US Treasury Department claims that the flexibility and discretion inherent in risk-based approach is sufficient to reduce the financial burden of AML compliance on

[1208] FSA, The Regulator of the New Millennium [2002] paragraph 6 (FCA replaced FSA)
[1209] Stuart Bazley, 'The Financial Services Authority, risk-based regulation, principles based rules and accountability' [2008] 23(8) Journal of International Banking Law and Regulation 422,430
[1210] Ernest L Simons IV, 'Anti-Money Laundering Compliance: Only Mega Banks Need Apply' [2013] 17 North Carolina Banking Institute 249, 266
[1211] Jackie Harvey, 'Compliance and Reporting Issues Arising for Financial Institutions from Money Laundering Regulations: A Preliminary Cost Benefit Study' [2004] 4 Journal of Money Laundering Control 333,335-336
[1212] R Barry Johnston and Ian Carrington, 'Protecting the Financial System from Abuse: Challenges to Banks in Implementing AML/CFT Standards' [2006] 9(1) Journal of Money Laundering Control 48, 57

regulated persons.[1213] The FSA has made a similar assertion.[1214] However, this claim has been debunked as evidence suggests that the AML compliance cost is surging due to the uncertainty surrounding the implementation of the risk-based approach.[1215]

Given the nature and cost of implementing risk-based AML compliance programme the law should excuse a regulated firm that has taken all the necessary measures to prevent itself from being used for financial crime, but nevertheless, a breach of compliance occurs.[1216] This idea may help government obtain greater co-operation from the financial sector. This idea of tolerating an accidental violation of AML law due to the nature of the 'risk-based' approach may incentivise FIs to redouble their effort to complement government's effort towards disrupting ML.

However, this idea could be a potential loophole that can be exploited by criminals with the active connivance of the regulated persons. Criminals might infiltrate existing institution or even create an entity for the purpose of taking advantage of this idea. In this situation, the exemption should not apply. Thus, in deciding whether a compliance failure is accidental, a thorough investigation must be conducted to ensure there are no ulterior motives behind the failure.

As a disincentive to those who would like to exploit this avenue, causing willful failure of compliance programme should be punished heavily. Punishment could include the combination of long jail term, criminal fine, and banning individuals involved from

[1213] Simons IV (n 1210)
[1214] Nicholas Ryder, 'The Financial Services Authority and money laundering: a game of cat and mouse' [2008] 67(3) Cambridge Law Journal 635, 641 citing Ruth Kelly, (2002) Speech to the Financial Services Authority Money Laundering Conference, 11th July, p.3
[1215] Neil Katkov, Trends in Anti-Money Laundering 2011 (*Celent,* 2011) <http://amlcft.com/files/2011/09/Celent-AML-Trends-2011-2013-Report.pdf visited> 22 May 2016
[1216] Jackson Grundy Ltd [2016] UKFTT 0223 (TC) (here the court has taken similar approach)

working in any capacity that could give them further opportunity to launder criminal assets.

4.3.3 WHY MAINTAINING AN EFFECTIVE COMPLIANCE PROGRAMME

For the regulated firm, compliance can serve as a defence to criminal charges of ML. In the UK, evidence that a regulated person has followed the JMLSG Guidance Notes will serve as evidence that a regulated person has implemented or has made efforts to implement AML compliance programme.[1217] Consequently, a regulated person could adduce evidence of compliance as a defence, to a charge under POCA 2002 section 330, MLR 2007 in so far as the regulated person has implemented risk-based AML compliance programme.[1218]

A regulated person may also avoid sanction if they can show that adequate policies and procedures sufficient to ensure its compliance with its obligations under the regulatory system has been established and maintained.[1219] Even if a regulated person could not escape liability altogether, the level of culpability could be reduced on evidence that approved guidelines has been followed in establishing systems and policies to ensure compliance. In the US, where ML has occurred, proof of an effective AML compliance programme could likely reduce the level of culpability under the Federal Sentencing Guidelines.[1220]

In the UK, the case of **Jackson Grundy Limited v The Commissioners for Her Majesty's Revenue and Customs** [1221] illustrates the advantage a regulated firm can

[1217] For example the court is required to have regards to whether a regulated person has followed JMLSG Guidance in deciding whether an offence of a failure to disclose knowledge or suspicion of ML has occurred (POCA 2002 s 330(8) and MLR 2007 reg 45(2)) please also see Bazley (n 1180) 290-93
[1218] This also would apply to a charge under TACT 2000 s 19
[1219] Bazley (n 1180) 293; please also see FCA Rule SYSC 6.1.1R
[1220] Stuart Bazley and Andrew Haynes, Financial Services Authority Regulation and Risk-based Compliance (Tottel 2007) 194; Summe (n 1190) 241
[1221] [2016] UKFTT 0223 (TC)

drive from having AML compliance programme. In this case, having taken evidence of the appellant's compliance with the relevant AML programme under MLR 2007, the First Tier Tribunal reduced the penalty imposed on the appellant by the HMRC.[1222]

It is interesting to note that, the Tribunal came to this conclusion even though Jackson has conceded to some lapses, and that evidence of compliance was not tendered in a documentary form.[1223] However, under a risk-based approach, it is imperative for a regulated person to keep proper records of its compliance efforts, as that will indicate what steps were taken, and what steps were not taken in the implementation of the AML compliance programme and why.[1224]

In Jackson, as the firm operates mainly in small villages, it knows its clients very well and therefore considered it unnecessary to take steps to verify their identities, and the firm did not keep proper records of why it took that decision.[1225] Had the firm kept proper records, they could have avoided any penalty, negative publicity and the subsequent loss of business.

As already observed, CDD is one of the most important aspects of AML compliance programme. Meanwhile, at the heart of the CDD itself is the ICP.[1226] Benefits a regulated person can drive through an effective ICP alone are enormous.[1227]

By establishing and maintaining an effective AML compliance programme: suspicious activity could easily be spotted and reported. Furthermore, a regulated person could

[1222] OFT imposed the penalty 4 days before its demise and its AML functions in relation to estate agents transferred to the HMRC
[1223] [2016] UKFTT 0223 (TC) 34-37
[1224] Hinterseer (n 1) 314
[1225] [2016] UKFTT 0223 (TC) 3, 34
[1226] FATF recommendation 5
[1227] Susan Galli and Jane Wexton, 'Anti-Money Laundering Initiative and Compliance – A US Perspective' in Barry Rider and Michael Ash, *Money Laundering Control* (Sweet and Maxwell 1996) 375-76

avoid expensive and unnecessary civil litigation associated with, for example, knowing receipt or dishonest assistance, and could avoid negative publicity.[1228] Effective AML compliance programme can also help regulated persons avoid consequences which otherwise would befall them for non-compliance.

4.4 COMPLIANCE: WHY THE INTERMEDIARIES?

One pertinent question here is why the law places the responsibility to detect ML on those who handle people's wealth? Why not the government police the regulated sector by itself as it does normal street policing? Various arguments have been adduced to support the claim that the regulated sector needs to police itself to guard against being used for ML.[1229] Of course, by so doing, ML becomes difficult and expensive due to fear of detection. Also audit trails could serve as evidence against criminals and their accomplices. The ultimate aim is to protect the integrity of the financial system.[1230]

Protecting market integrity is vital to the stability and soundness of the financial system, [1231] the achievement of which require the involvement of the regulated sector.[1232] While the need for regulated sector support in combating ML has since been recognised,[1233] avoiding criminal liability is enough to motivate regulated persons to prevent themselves from being used for ML.[1234] However, why does the law requires regulated persons to be at the forefront of disrupting ML?

[1228] Hinterseer (n 1) 313
[1229] 31 USC s 5318(h)(1)
[1230] Anna Simonova, 'The Risk-Based Approach to Anti-Money Laundering: Problems and Solutions' [2011] 14(4) Journal of Money Laundering Control 346, 347
[1231] Johnston and Carrington (n 1212) 52
[1232] Simonova (n 1230)
[1233] Kern Alexander, 'The International Anti-Money-Laundering Regime: The Role of the Financial Action Task Force' [2001] 4(3) Journal of Money Laundering Control 231, 234
[1234] Jackie Harvey, 'The Search for Crime Money – Debunking the Myth: Facts Versus the Imagery' [2009] 12(2) Journal of Money Laundering Control 97, 98

4.4.1 AUTHORITIES ARE JUST SEEKING FOR HELP

Due to their small number, law enforcement cannot be physically present at every crime scene at the time the crimes are taking place. Thus, authorities always seek for help from the public for any information that will assist in apprehending and bring the perpetrators to justice.

The regulated person is in the best position to detect suspicious activities as almost all financial transactions pass through the banks.[1235] Thus, it is normal to assume that by drafting regulated person into the battle against financial crime, authorities are just seeking for help from persons who have information on illegal financial transactions,[1236] as it does when, for example, murder was committed, and the law enforcement has no lead on who committed it.

Ordinarily, criminal law does not punish a person for not volunteering or for declining to give information.[1237] However, Police believe that bankers, like other citizens, generally have a moral obligation to provide them with any information relevant to the prevention and detection of [financial] crime.[1238] AML laws in the UK and US criminalise failure to disclose knowledge or suspicion of ML.[1239] Also, the law requires regulated persons to take positive steps to put in place policies, procedures and processes, with the overall objective of preventing illegal transactions that occur through their entities.[1240]

[1235] Alexander (n 1233) 232-34

[1236] Bosworth-Davies and Saltmarsh (n 14) 54 (authors quoted Levi (1992) as saying "police want the assistance of the banks to deter money laundering, and to trace the transfer of criminal assets…so that more explicit attention than used to be the case has been given to the matrix of networks that lie behind criminal enterprise. Within this matrix, the transfer of money has become a key point in the criminal enterprise and therefore in the enforcement chain")

[1237] Hyland and Thornhill (n 842) 30-275

[1238] Bosworth-Davies and Saltmarsh (n 14) 54

[1239] Please see POCA 2002 s 330-332 and 31 USC s 5311 et seq.

[1240] Please see 31 CFR s 103.135 and MLR 2007 reg 20(1)

4.4.2. AUTHORITIES HAVE FAILED

Although it is normal to seek help and for the citizens (including corporate citizen) to complement government effort, it is rather a sign of failure for the authorities to pass their responsibility of fighting financial crime to the regulated person whose mandate is to make a profit.[1241] Indeed, the intricacies of the financial markets require expertise to appropriately and efficiently police the market, resources that government may not have sufficient.[1242]

However, as the UK and US are capitalist societies, businesses are in the hand of individuals and organised private sector. Consequently, almost all commercial transactions pass through privately-owned firms. Therefore, authority's reliance on the regulated persons to police the market against ML is not unusual, and it does not translate to failure.

4.4.3 REGULATED SECTOR IS PART OF THE PROBLEM

The desire to maintain client confidentiality and maximise profit make it difficult for regulated persons to place priority on AML compliance, thus, on this note, regulated persons can be said to have been part of the problem.[1243] While employees facilitate ML on behalf of organised crime groups,[1244] businesses may be found responsible and therefore bear the brunt.

For example, in the US, Riggs Bank failed to establish and maintain AML compliance as required by law.[1245] The Broadway case is another example of how a bank

[1241] Hyland and Thornhill (n 842) 30-275 (the authors have argued that law enforcement lack the capacity to implement AML compliance initiatives)
[1242] Barry Rider and Michael Ashe, *Insider Crime: The New Law* (Jordan 1986) 79; Hyland and Thornhill (n 842) 30-275
[1243] Bosworth-Davies and Saltmarsh (n 14) 54 - 55
[1244] Rider and others (n 1172)179
[1245] Other incidences of misconduct include: Laundering of hundreds of millions of US dollars by UBS Zurich to countries like Iraq, Iran, Libya in violation of the OFAC (US) sanctions on those countries

deliberately facilitated ML involving about USD230 million by failing to put in place an effective BSA/AML programme and for failure to file SAR, and by assisting the customer to structure his transaction to evade BSA reporting requirement.[1246]

Similarly, the FSA had in 2001 sanctioned UBS Zurich for poor AML controls.[1247] In February 2016, FinCEN fined Gibraltar Private Bank and Trust Company of Coral Gables, Florida, USD4 million civil money penalty for various willful violations of federal AML law.[1248] These cases reveal the various levels of involvement of regulated persons in financial crimes.

In this situation, to effectively disrupt ML, authorities must devise a way of preventing the convergence of regulated sector and organised crime groups to commit a crime. The authorities achieve this by asking regulated sector to report the financial activities of criminals.[1249] Thus, for being part of the problem, regulated persons must be part of the solution.[1250]

4.4.4 AN EARLY TRIPWIRE

From whichever perspective (out of the three discussed above) the issue is looked at, the government has a legitimate concern to make the regulated persons get involved in the fight against ML. Whether the authorities have failed or they are just seeking for help, involving regulated sector in disrupting ML is a good option as almost all transactions pass through the sector. Similarly, if regulated person is perceived to be complicit,

[1246] U.S. v Broadway National Bank (2002) (02 Cr 1507 (TPG)); other cases include: U.S. v Banco Popular de Puerto Rico (2003)
[1247] Pasley (n 212) 65-66
[1248] FinCEN Press Release, FinCEN Penalizes Florida's Gibraltar Private Bank for Wilful Anti-Money Laundering Compliance Violations <https://www.fincen.gov/news_room/nr/pdf/20160225.pdf> accessed 20 June 2016
[1249] See 31 USC s 5311 et seq; 31 CFR s 1010; POCA 2002 Part 7; and MLR 2007 reg 20(1)
[1250] Alldridge (n 42)19

obligating those who handle other people's wealth to establish AML compliance programme is tactical for successful disruption of ML.[1251]

While involving the regulated persons is desirable for ML to be disrupted successfully, the regulated persons bear compliance cost. Thus, next is the cost benefit analysis of an AML compliance programme.

4.5 COST BENEFIT ANALYSIS

Whatever the rationale behind compliance obligation, placing that obligation on regulated persons shifts certain government responsibility to the regulated persons.[1252] Consequently, the shift of responsibility comes with some administrative and financial burden.[1253] Financial burden due to AML compliance is huge, and it includes components such as the cost of physical infrastructure and human capital development needed to ensure the functioning of an efficient compliance programme.[1254]

However, it is of concern that the compliance burden especially on regulated persons are not worth the cost and do not yield any value in disrupting financial crime or in assisting law enforcement.[1255] While it is not an issue for large banks to allocate resources for a proper AML compliance function, smaller banks and non-bank FIs

[1251] Rider and others (n 1172) 179-181
[1252] Harvey (n 1211) 336; Antoinette Verhage, 'Supply and Demand: Anti-Money Laundering by the Compliance Industry' [2009] 12(4) Journal of Money Laundering Control 371, 373; Laurel S Terry, 'US Legal Professional Efforts to Money Laundering and Terrorist Financing' [2015] 59 New York Law School Law Review 487, 498
[1253] As CFA 2017 amended the UK AML law significantly, the compliance cost will also increase as FIs would no longer be able to rely on what they already do. For example As tax evasion is a money laundering predicate crime, with the new corporate offence the current AML procedures are just a starting point. Please, also Johnston and Carrington (n 1212) 56-7
[1254] Jackie Harvey, 'An Evaluation of Money Laundering Policies' [2005] 8(4) Journal of Money Laundering Control 339, 341
[1255] Rider and others (n 1172) 202

struggle with the cost, which sometimes causes compliance failure or even forces businesses to close down.[1256]

For example, both FinCEN and OCC fined Zion First National Bank for failure of compliance just after it wound up its foreign correspondent relationships.[1257] Zion terminated its foreign correspondent relationship because they could not bear the high cost of the required compliances technology.[1258]

A careful reading of FinCEN Report on Zion also reveals the administrative burden AML law imposes on the regulated persons. For example, establishing a compliance function, designating a compliance officer, filing SAR, and initiating or supporting on-going law enforcement investigation are examples of how involving the regulated sector in the fight against ML imposes an administrative burden on the bank.[1259]

The risk-based approach to compliance placed a burden on regulated persons to identify and address the risks facing them.[1260] AML compliance can be costly, can reduce competitiveness and innovation, and can impede a firm's commercial growth and employees' success.[1261]

On the other hand, non-compliance offers, among other things, competitive advantage and huge profits.[1262] Notwithstanding the adverse effects of compliance, in the long run

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[1256] Simons IV (n 1210) 259
[1257] FinCEN Release <https://www.fincen.gov/news_room/ea/files/ZionsAssessment.pdf> accessed on 7 August 2016
[1258] Simons IV (n 1210) 259
[1259] FinCEN Release < https://www.fincen.gov/news_room/ea/files/ZionsAssessment.pdf> accessed on 7 August 2016 (this case is only one out of many that demonstrate the administrative burden on FIs in implementing an effective AML compliance programme)
[1260] Rider and others (n 1172) 202
[1261] George P Gilligan, Regulating the Financial Sector in Barry AK Rider, *Studies in Comparative and Financial Law*, Vol 6 (Kluwer Law International 1999) 66
[1262] Stuart Bazley and others, Risk-Based Compliance in Barry AK Rider, *Butterworths Compliance Series* (Butterworth 2001) 2-

a regulated person stands to benefit more by establishing and maintaining AML compliance programme.[1263]

Considering the enormous economic and social cost of crimes against the reputational boost compliance brings to regulated persons, and the benefit of an effective compliance system to the society in terms of crime reduction and financial stability, there appears to be a trade-off between the cost and the benefit associated with an effective AML compliance regime.[1264] The evidence tends to suggest that courts and regulatory agencies will not hesitate to deprive non-compliant regulated person of any financial profits they might make from laundering activities.[1265]

The greatest risk to a regulated person for non-compliance with AML regulations or association with ML activities is the reputational risk.[1266] This is because the firm stands to lose a lot through income decline, client withdrawal, legal cost and loss of future business opportunity.[1267] As "trust" is the basis of banking and other sectors in the financial services industry, regulated person risks reputational loss should a regulatory authority impose sanction on the person for non-compliance with its AML regulatory obligations.[1268]

While banks should have an inherent interest in preserving their reputation as being the cornerstone of integrity,[1269] compliance makes it difficult for criminals to launder their

[1263] ibid
[1264] Please see Harvey (n 1254); and, Sam Brandon and Richard Price, Home Office Study 217 on the analysis of Economic and Social cost of crime in the UK [2002]
[1265] UBS Case
[1266] Hyland and Thornhill (n 842) 30-400 (citing the reputation of the firms and the sector as a whole, and the transient nature of laundered assets as the reasons why regulated firms should take keen interest in establishing AML compliance programme)
[1267] Harvey (n 1244) 341
[1268] Millind Sathey and Jesmin Islam, 'Adopting a Risk-based Approach to AMLCFT Compliance: the Australia Case' [2011] 18(2) Journal of Financial Crime 169, 171
[1269] Jackie Harvey, 'The Search for Crime Money – Debunking the Myth: Facts Versus Imagery' [2009] 12(2) Journal of Money Laundering Control 97,

profits and acquire a cloak of respectability.[1270] Therefore, a strong, efficient and fully implemented AML compliance programme that takes into account the type of risk associated with individual businesses, is a way of protecting the integrity of the financial sector and shareholder value against the threat of ML.[1271]

4.6 ENSURING COMPLIANCE

Regulated persons need to remain vigilant to detect when they are being or about to be used for ML purposes.[1272] This, can only be achieved if an effective AML compliance programme is established and maintained. Despite the involvement of those who handles other people's wealth in the effort to disrupt ML, the finding of the PSI reveals non-compliance culture by banks and deficient oversight by the regulators.[1273]

While senior management must institute compliance culture within their firms, law enforcement must do their part to ensure AML compliance. Similarly, gatekeepers must not be exempted from AML compliance obligations.

4.6.1 INDIVIDUAL LIABILITY VERSUS CORPORATE RESPONSIBILITY

While the law requires regulated persons to establish and maintain AML compliance to disrupt ML effectively, it is the senior management and staff who run the day to day activities of the company. As the senior management is the brain behind the corporate entity, it has the responsibility of ensuring effective compliance culture in a regulated firm.[1274] Thus, where there is responsibility, there is a liability for failure to discharge that responsibility. The question here is: Who should be held responsible for compliance

[1270] Bridges (n 1152) 167, see also Rider and others (n 1172) 184
[1271] Zeldin and Florio (n 1150) 311
[1272] Galli and Wexton (n 1227) 361
[1273] United States Senate Permanent Subcommittee on Investigations, U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History (Report 202/224-9505 and 202/224-3721) 2012
[1274] Rider and others (n 1172) 180

failure? Should the law impose direct personal liability or corporate responsibility on the companies?

Already both the civil and criminal law have placed direct personal liability on individual employees, and vicarious liability on corporate entities.[1275] Professor Barry Rider and others have analysed the issue of corporate responsibility and direct personal liability from the angle of civil and criminal law.[1276] Given the role of the senior management in ensuring compliance,[1277] the efficiency of the AML compliance function partly depends on the senior management establishing and supporting a robust compliance function and discharging their compliance oversight duties.[1278]

The FCA has made clear the roles of senior management in ensuring compliance culture[1279] In the US, SEA 1934 section 20 requires senior management to take responsibility for an effective compliance system.[1280] Thus, the high-ranking officials assume the role of a controlling person referred to in 17 CFR section 230.405.[1281] As regulated persons are required to take reasonable care to build and maintain effective AML compliance system,[1282] so does senior management's responsibility and liability

[1275] For example, under tort and criminal law
[1276] Rider and others (n 1172) Chapter 14 and 15
[1277] Rider and others (n 1172) 348
[1278] Please see Christopher Stears, 'Control Liability and Compliance: Tools for Controlling Financial Crime' in Barry Rider, *Research Handbook on International Financial Crime* (Edward Elgar 2015) 625 - 57 for analysis on the role of senior management in ensuring compliance
[1279] FCA Handbook SYSC 2.1.1R
[1280] s 20(a) states: "Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 21(d)), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action"
[1281] Barry A K Rider, 'Facilitators Beware' [2017] 38(2) Company Lawyer 37; (17 CFR s 230.405 refers to senior management as a person or body who 'possesses, directly or indirectly…the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise)
[1282] FCA Handbook, SYSC 6.1.1 R, SYSC 6.3

increase. The senior management remains the 'soul' of their firm although regulated persons have a life and personality of their own.[1283]

As the directing mind of the company, the board of directors together with the senior management have the power to entrench and motivate a culture of compliance.[1284] However, there are indications in some instances that the senior management does not inculcate an effective compliance function in their organisations. For example, early 2016 FinCEN accused Sparks Nugget, a casino in Nevada, of lacking a compliance culture. This follows a finding that reveals systematic compliance failure caused by the senior management's negative attitude towards the casino's compliance function.[1285] Also, the report of the PSI reveals deliberate crippling of compliance function by the top management of HSBC (USA).[1286]

While there is no clear narrative as to why the senior officials of Sparks Nugget disregarded the AML compliance function, a close look at the FinCEN report links the adverse attitude of the senior management to their desire to maximise profit and minimise cost at the expense of disrupting ML. Similarly, the HSBC (US) case indicates that senior management neglected the compliance function to reduce cost.[1287] FinCEN has advised that interest in revenue should not compromise an effective compliance programme.[1288]

[1283] Solomon v Solomon [1897] AC 22

[1284] V K Rajah SC, 'Prosecution of Financial Crimes and its Relationship to a Culture of Compliance' [2016] 37(4) Company Lawyer 122, 128

[1285] FinCEN, Assessment of Civil Money Penalty Against Sparks Nugget <https://www.fincen.gov/news_room/ea/files/Sparks_Nugget_EA.pdf> accessed 8 August 2016

[1286] United States Senate Permanent Subcommittee on Investigations, U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History (Report 202/224-9505 and 202/224-3721)

[1287] ibid 26-27

[1288] FinCEN, Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance, FIN-2004-A007 (2014)

Based on the shortcomings identified during its AML enforcement actions, FinCEN, advises that the culture of an organisation be critical to its compliance.[1289] Poor AML compliance culture undermines the effectiveness of firm's AML compliance programme.[1290] Although the law did not criminalise failure to prevent ML, ensuring an effective AML compliance is the function of senior management. For the AML compliance to be effective, demonstrable support of the leadership is critical.[1291] Thus, imposing of potential liability on senior management would encourage them to fund and support compliance and ensure it's proper functioning.[1292]

At the other end of the spectrum is the issue of imposing liability on the corporate entities for the failure of compliance. The US approach of holding corporations and senior management liable for the misconduct of their employees has been positive. For example, control liability has been playing a very significant role in promoting and maintaining integrity in the financial markets.[1293] Control liability is critical in ensuring compliance because in addition to holding control person personally liable for the failure of compliance, the action of the control person can be statutorily attributed to the company, being the controlling mind of the company.[1294]

In the UK, the Bribery Act 2010 section 7 created an offence of corporate failure to prevent corruption. Thus, section 7 placed corporate responsibility on firms to prevent a

[1289] ibid 1
[1290] ibid 2
[1291] ibid
[1292] Rider and others (n 1172) 365
[1293] Rider and others (n 1172) 365, 380-381
[1294] The Common Law Doctrine of Identification is commonly used to attribute fault to company and hold it criminally liable. Under this doctrine, 'the acts and state of mind' of those who represent the directing mind and will be imputed to the company, *Lennards Carrying Co and Asiatic Petroleum [1915] AC 705, Bolton Engineering Co v Graham [1957] 1 QB 159 (per Denning LJ) and R v Andrews Weatherfoil [1972] 56 Cr App R 31* – please see CPS: Corporate Prosecution). However, this doctrine inhibits holding bigger companies to account – it is less difficult to identify the directing mind of the smaller companies while, bigger companies avoid prosecution. Please see ICAEW response to the MOJ consultation paper on the proposal to create offence of corporate failure to prevent financial crime

person associated with it from bribing another person including an official of foreign government. In the US, the best way to defend against FCPA exposure is having a pre-existing compliance programme that is risk tailored and risk-based. The programme must include not only mechanisms to prevent and detect violations, but also adequate financial and accounting processes to make and keep accurate books and records, and to devise and maintain an adequate system of internal accounting controls.[1295]

Similarly, for a firm to escape liability under Bribery Act 2010 section 7, it must show that it has taken adequate measures to prevent persons associated with it from bribing another on its behalf.[1296] Thus, the defence of "adequate-measures-to-prevent" would allow a company to escape liability. CFA 2017 introduces a similar offence of corporate failure to prevent the facilitation of domestic and foreign tax evasion.[1297] Companies must now take positive steps to prevent its officers, employees and agents from assisting people to evade tax due to the Crown even if the facilitator is not a UK registered company, and even if domiciled outside UK. Also, UK registered companies must take steps to avoid facilitating evading tax due to foreign nations.

There was a proposal to extend this offence to ML, which was not pursued in the Criminal Finances Bill. As the idea is not abandoned completely, it is envisaged that the offence of corporate failure to prevent ML will soon find its way into the UK statute book.[1298] Already, the EU is contemplating enacting the corporate failure to prevent ML

[1295] Deloitte, New FCPA resource guide: Ten things for legal and compliance officers to consider 2013 @ p 3 <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/finance/us-fas-new-fcpa-resource-guide-printer-friendly-012413.pdf> accessed 16 June 2017

[1296] Bribery Act s 7(2)

[1297] CFA 2017 ss 45 and 46

[1298] The Ministry of Justice consulted with the stakeholders on the issue: <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf> Small businesses opined that the proposed extension of section 7 to ML is disproportionate in the burden they will create. see <https://www.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-submission---corporate-liability-for-economic-crime---march-2017.pdf?sfvrsn=0>

offence.[1299] If the Council issue the proposed Directive before the completion of the Brexit negotiations, UK might transpose the Directive into the national law even after pulling out. However, when eventually enacted, if the offence of corporate "failure-to-prevent" ML follows the pattern of section 7 Bribery Act, the defence of "adequate-measures-to-prevent" might be problematic.[1300]

Although pursuing companies could make senior management to take ownership of risk that their corporate bodies could be used to launder illicit proceeds, imposing liability on companies rather than the senior management has negative consequences. In fact, imposing corporate liability will potentially punish innocent shareholders, employees, creditors and the society.[1301]

Moreover, while imposing liability on FIs could influence the behaviour of smaller firms, it may not affect how big firms conduct themselves, as the larger firms could systematically pass the fine to customers. Nevertheless, it is acknowledged that imposing corporate criminal liability on the companies and direct personal liability on the senior management is the best approach as that will encourage senior management to ensure an efficient use of their institutions to disrupt financial crime.[1302]

4.6.2 THE ROLE OF ENFORCEMENT

While some regulated persons will be willing to comply with the law, others will have to be compelled to comply. By the nature of the risk-based approach, compliance failure could occur even when a firm has implemented compliance programme commensurate

[1299] Council of the European Union, Proposal for a Directive of The European Parliament and of The Council on Countering Money Laundering by Criminal law 2016/0414 (COD) Article 7
[1300] Rider (n 1281) 38
[1301] Rider (n 1172) 339
[1302] The SFO has charged Barclays Bank and its former senior management with fraud contrary to s 1 and s 2 of Fraud Act 2006 and s 1(1) of the Criminal Law Act 1977, and with unlawful financial assistance contrary to s151 Companies act 1985. Please see SFO News Release [20 June 2017] <https://www.sfo.gov.uk/2017/06/20/sfo-charges-in-barclays-qatar-capital-raising-case/> accessed 20 June 2017

with the risk it faces.[1303] Thus, there is a need for enforcement where a failure has occurred.

There are some cases where regulatory enforcement actions were taken against erring regulated person. In **UBS Case**, the bank was able to launder US banknotes under ECI, a programme managed by the Federal Reserve to facilitate, monitor, and control the international distribution of US banknotes.[1304] The New York Fed Reserve imposed a record-breaking USD100 million civil penalty against UBS for laundering huge amount of US banknotes to Cuba, Iran, Iraq, Libya and former Yugoslavia (now Serbia and Montenegro) in violation of sanctions imposed on these countries by OFAC.[1305]

The USD100 million penalty UBS suffered, is more than the profit (USD87 million) the bank made under the scheme and is 20 times the profit (USD5 million) made from transactions with those countries.[1306] In addition to the civil penalty, the Federal Reserve terminated the ECI Agreement with UBS, as a penalty for breaching the Agreement.[1307]

Similarly, FinCEN together with the OCC assessed a civil money penalty of USD25 million against Riggs Bank for failure to comply with all the four elements of the BSA compliance programme.[1308] Due to the failure, Riggs could not detect or investigate suspicious transactions and could not file SAR as required under the law.[1309] Riggs allowed several transactions involving governments of Saudi Arabia, Equatorial Guinea

[1303] Carol R Van Cleef and others, 'Does the Punishment Fits the Crime' [2004] 12(1) Journal of Financial Crime 57
[1304] Pasley (n 212) 64
[1305] ibid 63-65
[1306] ibid 65
[1307] ibid
[1308] ibid 68-77
[1309] Johnston and Carrington (n 1212) 51

and former Chilean President, Augusto Pinochet, to go through in total disregard to its AML obligations.[1310]

Similarly, on April 5, 2016, FinCEN announced in a press release a USD1 million penalty against Sparks Nugget, a Nevada Casino, for wilful violation of AML provision of the BSA.[1311] According to Jennifer Shasky Calvery, the outgoing Director of FinCEN, Sparks Nugget had a systemic breakdown in its compliance programme despite warning from its compliance officer.[1312] Violation includes: relegating its compliance officer and transferring his function to a management committee; recordkeeping violations; failure to file CTR; and failure to file SAR despite being alerted by its compliance officer.[1313]

In the UK, the defunct FSA fined RBS £750,000 for ML control failings.[1314] In 2004 FSA again fined RBS £1.25 million for failure to keep customer identification records to the required standard.[1315] In 2010, FSA imposed a financial penalty of £140,000 on Alpari (UK) Ltd (Alpari), and £14,000 on its former MLRO for failing to have in place an adequate AML compliance function.[1316] FSA and its successor, the FCA has brought many other enforcement actions against violators.[1317]

[1310] Pasley (n 121) 68-77
[1311] FinCEN News release 5/4/2016 <https://www.fincen.gov/news_room/nr/pdf/20160405.pdf> accessed 15 April 2016
[1312] ibid
[1313] ibid
[1314] FSA, Press Release FSA/PN/123/2002 17 Dec 2002 <http://www.fsa.gov.uk/library/communication/pr/2002/123.shtml> accessed 1 January 2017
[1315] FSA, Press Release FSA/PN/001/200415 Jan 2004 <http://www.fsa.gov.uk/library/communication/pr/2004/001.shtml> accessed 1 January 2017
[1316] FSA Press Release, FSA/PN/077/2010 May 2010 <http://www.fsa.gov.uk/library/communication/pr/2010/077.shtml> accessed 11 January 2017
[1317] FSA/FCA have brought actions against other various covered institutions MLROs for various AML failings including, Turkish Bank (UK) Ltd (£294,000); Habib Bank AG Zurich (£525,000) and its MLRO (£17,500); Coutts (£8.75m); Bank of Ireland (£375,000); Raiffeisen Zentralbank sterreich (150,000); Bank of Scotland Plc £1.25m); Northern Bank (£1.25 million) Standard Bank PLC (£7.6m); Guaranty Trust Bank (UK) Ltd (£525,000); and EFG Private Bank (£4.2m) please see FSA/FCA press release <http://www.fsa.gov.uk/library/communication/pr> accessed 1st January 2017

The FSA/FCA is also empowered to bring criminal action against AML violators. In **R v Collins,**[1318] the defendants challenged the power of the FSA to prosecute ML offences under POCA 2002. The court concluded that the FSA have the authority to prosecute offences beyond those referred to in sections 401 and 402 of FSMA 2000 and it has the power to prosecute the offences contrary to sections 327 and 328 of POCA 2002.[1319]

AML compliance programme must be implemented to the fullest if a firm is to escape liability.[1320] In extreme cases, the very existence of the regulated person could be threatened due to heavy loss and diminished customer confidence.[1321] Following Riggs' scandal in the US, its UK subsidiary was in 2005 taken over by PNC Financial Services, which rebranded the bank completely, and Riggs Bank in the UK became history.[1322]

In the US, the case of **US v Broadway National Bank**[1323] cannot escape mention. In Broadway, the bank pleaded guilty to three criminal charges for failure to establish and maintain BSA AML compliance programme, failure to file SARs, and aiding its customers to structure currency transaction to avoid BSA reporting requirements.[1324]

In one instance Broadway allowed its clients, Alfred Dauber to make 250 deposits totalling USD46 million in a typical laundering fashion despite complaints made to the senior management.[1325] Dauber claimed that he was into electronic business, and that his office was blocks away from the bank, but the bank neither attempted to verify such

[1318] [2009] EWCA Crim 1941
[1319] [2009] EWCA Crim 1941; [2010] Bus. L.R. 734, 745
[1320] FSA, Press Release FSA/PN/001/200415 Jan 2004 <http://www.fsa.gov.uk/library/communication/pr/2004/001.shtml> accessed 1 January 2017
[1321] Loss could be as a result of fraud, civil penalty, criminal fine, forfeiture, etc
[1322] Robert J Souster, Financial Crime and money Laundering (2nd edn Global Professional Publishing 2013)
[1323] (2002) (02 Cr. 1507 (TPG)
[1324] ibid
[1325] ibid 18-21

claims nor inspected Dauber's business premises.[1326] Apart from the Dauber Incident, within the same period, Broadway aided many of its customers to structure thousands of transactions involving about USD76 million.[1327] Following the guilty plea, Broadway agreed to and paid a USD4 million criminal fine.[1328]

As recent cases indicate, a regulated person may suffer a much heavier financial loss for not implementing an effective AML compliance programme.[1329] In 2012, having admitted to failure to implement AML control programme, which facilitated the laundering of at least USD881 million of drug money, HSBC agreed to pay USD1.256 billion in a DPA with the prosecutors in the US.[1330] The USD1.256 billion payment exceeded the USD881 million laundered and whatever profits HSBC had made. Similarly, JP Morgan Chase in 2014 agreed to pay USD1.7 billion for failure to maintain an effective AML programme and failure to file SAR and its role in facilitating Bernard Madoff's Ponzi scheme.[1331]

While some firms will be willing to comply with the AML laws, for various reasons others will not, leaving a window for criminals to operate. In view of this, there is the need for the regulators and law enforcement to act against erring firms. However, whether enforcement actions against defaulting firms helps in entrenching a culture of compliance is not entirely clear. Incidences of compliance failure support the notion that no matter the level of enforcement efforts, some firms will not keep to their compliance obligations.

[1326] Pasley (n 212) 68-77
[1327] ibid
[1328] ibid 80
[1329] Rajah SC (n 1318) 123
[1330] Case 1:12-cr-00763-ILG Document 3-2 Filed 12/11/12
[1331] Rajah SC (n 1318)123; (please see "US v JPMorgan Chase – Deferred Prosecution Agreement Packet" <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/JPMC%20DPA%20Packet%20(Fully%20Executed%20w%20Exhibits).pdf> accessed 18 April 2016

However, compliance failure does not suggest that enforcement action is not effective in influencing firms to ensure compliance. One major factor that can affect enforcement effort is a significant number of regulators.[1332] Although each regulator has its jurisdiction, overlap in their function and sphere of authority is inevitable. This can lead to competitive enforcement among the regulators and harsh sanction against the erring FIs.[1333]

One enforcement option that is available to prosecutors is the DPA. CCA 2013 schedule 17 paragraph 1 defines DPA as 'an agreement between a designated prosecutor and a person ("P") whom the prosecutor is considering prosecuting for an offence specified in Part 2 (the "Alleged offences)'. The agreement normally requires the defendant to act in a particular way including refraining from further violation, payment of fine and disgorgement in return of deferring or forgoing prosecution.[1334]

While DPA has been in use in the US since 1992, it was introduced in the UK in 2014 by the CCA 2013. While the DPA in the two jurisdictions are similar, they differ in some respect. For example, the role of the US courts in the DPA process is less compared to the role the UK courts play.[1335] Similarly, whereas in the UK, DPA may be

[1332] Due the large number (27) of AML supervisorhe UK's supervisory system for AML compliance is regarded as not "fit for purpose", and therefore needs to be consolidated to make the system more coherent and consistent – please see Transparency International UK, *HM Treasury's Call for Information on the UK's Anti-Money Laundering (AML) Supervisory Regime: Submission from Transparency International UK* <http://www.transparency.org.uk/publications/hm-treasurys-call-for-information-on-the-uks-anti-money-laundering-aml-supervisory-regime/> accessed 14 June 2017. Also, in the US, for example due to their numbers the area of responsibility of federal functional regulators may overlap

[1333] Van Cleef and others (n 1303) 56

[1334] Please see SFO and CPS Deferred Prosecution Agreements Code of Practice 2014 for the guidance on DPA in the UK

[1335] Asheesh Goel and others, 'Comparing Deferred Prosecution Agreements in the U.K. and U.S.' (*Bloomberg law*, 2014) <https://www.bna.com/comparing-deferred-prosecution-n17179890589/> accessed 19 June 2017

available only for corporate crimes, in the US, they may be available where both companies and individuals are the defendants.[1336]

Schedule 17 Paragraph 3 of CCA designated the DPP and SFO as the prosecutors empowered to use DPA to settle corporate criminal cases.[1337] In the US it is the Department of Justice USAM (ss9-22.000)) and SEC (Enforcement Manual (s6.23)) that operate the DPA regime. The DPA is available for a range of offences. Unlike in the UK where offences, including ML, are listed as crimes eligible for DPA, in the US the Department of Justice narrowly defines conduct for which DPA is not available.[1338] However, one thing is clear – DPA is not the right of the defendant, and as such he cannot demand it.

Given the length of time the DPA is in use in the US, many DPAs were reached. The decline by 29 per cent in the prosecution of corporate crimes in the US between 2004 and 2014 is attributable to the use of DPA to dispose of corporate criminal cases.[1339] In the UK, despite its small budget, the SFO has been very aggressive in pursuing financial crimes resulting in reaching DPAs with large enterprises such as the Rolls-Royce.[1340]

[1336] ibid
[1337] However, the government can allow other bodies that have power to prosecute, such as the FCA, to use DPA where the need arises
[1338] CCA 2013 Schedule 17 paragraph 17-28; Emma Radmore and Stephen L Hill Jr., Deferred Prosecution Agreements: the US experience and the UK potential [2014] Denton
[1339] TracReports Inc, Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations [2015] available at http://trac.syr.edu/tracreports/crim/406/ accessed 18 June 2017
[1340] SFO: Budget <https://www.sfo.gov.uk/about-us/#ourfundingandbudget>; Serious Fraud Office v Rolls-Royce Plc Rolls-Royce Energy Systems Inc [2017] Case No: U20170036; SFO v Standard Charted Bank [2015] Case No: U20150854

Although DPA was useful as a means of obtaining the co-operation of the corporate bodies and alternative ways of disposing of criminal cases, they were not a general solution to financial crimes as they are tied to a specific incident.[1341]

Despite the success SFO recorded in prosecuting financial crimes, there is a proposal to merge SFO with the NCA.[1342] This has already generated controversy with politicians, academicians and city lawyers voicing their concern.[1343] The message is obvious – subsuming the SFO into the NCA will spell doom to UK's practical ability to combat financial crimes. Given the current political situation in the UK, whether this plan will receive the backing of parliament remains to be seen.[1344]

[1341] David Fitzpatrick, 'The Traditional Criminal Justice System: its efficacy in Dealing with Financial and Economically Motivated Crime' in Barry Rider, *Research Handbook on International Financial Crime* (Edward Elgar 2015) 561

[1342] 2017 Conservative Manifesto @ 44

[1343] For example, see Jane Croft, 'Lawyers warn May against scrapping Serious Fraud Office' (*Financial Times*, 30 May 2017) <https://www.ft.com/content/e0eb1214-4543-11e7-8519-9f94ee97d996> accessed 7 June 2017;
Caroline Binham and Jane Croft, 'Conservatives pledge to scrap Serious Fraud Office' ((*Financial Times*, 18 May 2017) <https://www.ft.com/content/7be30e90-3bc4-11e7-ac89-b01cc67cfeec> accessed 7 June 2017;
Alan Tovey, 'Tory plan to fold Serious Fraud Office into National Crime Agency comes under attack' (*The Telegraph,* 18 May 2017) <http://www.telegraph.co.uk/business/2017/05/18/tory-plan-merge-sfo-national-crime-agency-comes-attack/> accessed 7 June 2017;
Claire Shaw, 'Serious Fraud Office merger into National Crime Agency announced in Conservative Manifesto' (*Keystone Law*, 19 May 2017) <http://www.keystonelaw.co.uk/keynotes/serious-fraud-office-sfo-merger-into-national-crime-agency-nca-announced-in-conservative-manifesto> accessed 7 June 2017;
Mark Taylor, 'UK Lawyers Warn Nixing Fraud Squad Will Hurt Enforcement' (*Law 360*, 18 May 2017) <https://www.law360.com/articles/925586/uk-lawyers-warn-nixing-fraud-squad-will-hurt-enforcement> accessed 7 June 2017

[1344] Sue Hawley and Paul Holden, **'**Theresa May has been trying to bring corruption investigations under her control for years – but the election may have just ruined her plans' (*Independent,* 15 June 2017) <http://www.independent.co.uk/voices/serious-fraud-office-national-crime-agency-theresa-may-government-control-corruption-a7791696.html> accessed 7 June 2017;
London Evening Standard, 'Senior Tories Urge May to Drop Manifesto plan to Axe Serious Fraud Office' (*London Evening Standard,* 13 June 2017) <https://www.pressreader.com/uk/london-evening-standard-west-end-final-b/20170613/281672549926528> accessed 7 June 2017;
Labour Press, 'Thomas-Symonds MP, Labour's Shadow Solicitor General, backing senior Tories on the SFO' (*Labor Press,* 14 June 2017) <http://press.labour.org.uk/post/161814100964/this-is-yet-more-evidence-of-the-chaos-at-the> accessed 7 June 2017

4.6.3 THE ROLE OF GATEKEEPERS

As regulated persons establish and maintain AML compliance, the risk of detecting ML scheme through the banking system becomes greater. Thus, launderers engage the services of specialised professionals known as gatekeepers to help facilitate their illegal financial operation.[1345]

Gatekeepers are, essentially, individuals that protect the gates to the financial system through which potential users of the system, including launderers, pass.[1346] The American Bar Association explained that the underlying theory behind the "gatekeeper" idea is that the lawyer can monitor and control, or at least influence, the conduct of his or her clients and prospective clients to deter wrongdoing.[1347]

The term encompasses professionals, such as lawyers, notaries, accountants, investment advisors, and trust and company service providers who assist in transactions involving the movement of money, and are deemed to have a particular role in identifying, preventing and reporting ML.[1348] As they are a gateway to the financial sector, those gatekeepers occupy a strategic position in the ML disruption chain. They either help in disrupting ML or assist criminals to circumvent AML controls.[1349] Thus, this subsection is dedicated to analysing the obligations of the gatekeepers to establish and maintain an effective AML compliance programme.

[1345] Ping He, 'Lawyers, notaries, accountants and money laundering' [2006] 9(1) Journal of Money Laundering Control 62, 64; FATF, 'Report on Money Laundering Typologies' [2004] 24 <http://www.fatf-gafi.org/media/fatf/documents/reports/2003_2004_ML_Typologies_ENG.pdf> accessed 7 January 2017

[1346] FATF, 'Report: Laundering the Proceeds of Corruption' 2011 19 <http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf> accessed 7 January 2017

[1347] ABA Formal Opinion 463 (2013) 1

[1348] Association of Certified Anti-Money Laundering Specialists (ACAMS) <http://www.acams.org/aml-glossary/index-g/> accessed 7 January 2017; also see International Bar Association, 'A Lawyer's Guide to Detecting and Preventing Money Laundering' [2014] 5

[1349] Gatekeepers are likely to be affect the most by the CFA 2017 ss 45 and 46. Thus, gatekeepers must put in place reasonable measures to prevent people associated with them from facilitating tax evasion

Like any other regulated person, gatekeepers, such as lawyers, notaries and accountants in the UK and US are subject to the AML law that prohibit anyone from engaging in ML.[1350] Regarding other obligations, approaches in the UK and US differ. In the UK, in addition to being prohibited from engaging in ML, gatekeepers are also required to make disclosure of the knowledge or suspicion that their client is engaging in ML.[1351] Also, they are obliged to desist from tipping off their clients that a disclosure has been made or that they are being investigated.[1352]

As they fall under the definition of relevant persons, gatekeepers are also subject to the MLR 2007.[1353] Thus, lawyers, accountants, auditors and other professionals are required to establish and maintain a functional risk-based compliance programme.[1354] The compliance programme is to enable the gatekeepers to comply with AML obligations.

As part of compliance effort, lawyers and other professionals in the UK are required to carry out CDD on both new and existing customers.[1355] It means that gatekeepers are to properly identify and verify the client's identity to ensure he is who he says he is, and also, to ascertain the identity of the beneficial owner if different from the client, or where the client is a corporate entity.[1356] Gatekeepers must also monitor client's transactions on an on-going basis.[1357] All records arising from CDD and on-going

[1350] Pursuant to 18 USC ss 1956 and 1957, and POCA 2002 ss 327, 328, and 329, gatekeepers, like any other person, are prohibited from engaging in ML
[1351] POCA ss 330, 331 and 332 (MLR 2007 reg 20(1)(b) requires regulated persons to establish compliance programme to enable them report suspicion of ML)
[1352] POCA ss 333 and 333A
[1353] MLR 2007 reg 3
[1354] ibid reg 20
[1355] ibid reg 7
[1356] ibid reg 5 (beneficial owner is as defined in regulation 6)
[1357] ibid reg 8

monitoring must be kept, as such records, may be useful for an investigation that may arise in the future.[1358]

Where suspicion arises, the law requires lawyers and other professionals to file SAR to the NCA.[1359] However, the obligation on gatekeepers to file SAR may not sit well with the LPP that guarantees the confidentiality of the client-attorney correspondence. Where information is communicated to the attorney in the course of litigation and not with the intention to further criminal activity, LPP operates to protect attorneys from liability.[1360]

In practical terms, lawyers should take AML compliance seriously (irrespective of whether they engage in corporate, transactional, or trust activities) because they can never tell when an existing customer may require those services.[1361] The Law Society issues AML Practice Note to help solicitors comply with their AML obligations under POCA 2002, TACT 2000, and MLR 2007.[1362]

However, the situation, especially with regards to AML compliance obligation on lawyers, is different in the US. Lawyers are not subject to compliance obligations imposed by 31 USC section 5318(h) and 31 CFR 1010.100.[1363] Thus AML compliance is a matter of self-regulation.[1364] For example, although US lawyers would carry out CDD when taking in a new client, they do so by reference to the "Voluntary Good

[1358] ibid reg 19
[1359] POCA 2002 s 330-332
[1360] Bowman v Fels [2005] 1 W.L.R. 3083; also see John A. Kelley, 'International Anti-Money Laundering and Professional Ethics' [2006] 40 International Law 433, 438
[1361] Terrill II and Breslow (n 837) 439-40
[1362] The Law Society, AML Practice Note 2013
[1363] Terrill II and Breslow (n 837) 435-439
[1364] The main AML guiding template for US lawyers is "Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing" (Good Practices Guidance) which finds support among the US law enforcement and Judges (see Conference of Chief Justices Resolution Supporting the Voluntary Good Practices Guidance and the Risk-Based Approach (2003))

Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing" (Good Practice Guidance), which the ABA issued as a guide.[1365]

The CDD carried out by lawyers on their new clients is in most cases not as comprehensive as banks would do.[1366] But even if lawyers carry out detailed and comprehensive CDD, they are not obliged to report their suspicion of ML but are only required to decline relationship with a client they suspect of engaging in ML.[1367]

Client confidentiality is accorded great importance to the extent that attorney-client communications can only be disclosed in very limited circumstances including where it is necessary to comply with the requirements of other laws or a court order.[1368] AML compliance among lawyers is rendered largely voluntary[1369] because ABA has been resisting any attempt to impose AML compliance requirement on its members.[1370] ABA opts for voluntary guidance to the legal profession on AML compliance for a number of reasons.

ABA had objected to the mandatory reporting of suspicious transaction on lawyers because it felt that such disclosure would compromise client confidence or the attorney-

[1365] FATF has issued lawyer guidance on carrying out CDD on which ABA has significant input. For analysis on the substance of the lawyer guidance please see: Nicole M. Healy and others, 'U.S. and International Anti-Money Laundering Developments' [2009] 43 International Lawyer 795, 798-801

[1366] Shepherd (n 1199) 83 (the author provides a scenario that depicts how lawyers carry out CDD on new intake)

[1367] Terrill II and Breslow (n 837) 59 New York Law School Law Review citing Model Code of Professional Conduct R. 4.1 (2014)

[1368] Model Rules of Professional Conduct R. 1.6 (2014)

[1369] Resolution & Report 116. Also please see Good Practices Guidance @ 3 states: "It is not intended to be, nor should it be construed as, a statement of the standard of care governing the activities of lawyers in implementing a risk-based approach to combat money laundering and terrorist financing. Rather, given the vast differences in practices, firms, and lawyers throughout the United States, this paper seeks only to serve as a resource that lawyers can use in developing their own voluntary risk-based approaches"

[1370] ABA Formal Opinion 463 (2013) 2 (stating that The Model Rules neither require a lawyer to fulfill a gatekeeper role, nor do they permit a lawyer to engage in the reporting that such a role could entail); ABA Resolution 300 Opposing Federal Beneficial Ownership Reporting Mandates and Regulation of Lawyers in Formation of Business Entities (August 2008)

client relationship.[1371]Also, ABA argued that such a requirement would undermine the independence of the bar from the government.[1372] Besides resisting mandatory reporting requirement, ABA also views the obligation not to tip off client as a direct conflict between the duty of loyalty attorneys owe their client and compliance with AML laws.[1373]

These arguments hinged on legal and public policy.[1374] Citing various judicial supports, ABA stressed the importance of the independence of the Bar in dispensing justice.[1375] ABA made it clear that lawyers in the US are independent professionals who are in-between the State and the persons under its jurisdiction, and thus, lawyers are not, and cannot be, agents of the government.[1376]

ABA further expresses the concern that Imposing AML compliance obligation on lawyers would conflict with the Sixth Amendment, which guarantees legal representation in criminal proceedings.[1377] This, is because lawyers would be seen to be acting for the government to the detriment of the client who paid for their services.

[1371] ABA Resolution 104 Supporting Reasonable and Balanced AML Initiatives consistent with the Confidential Lawyer-Client Relationship (February 2003) 7
[1372] ibid
[1373] ibid
[1374] ibid 8-13
[1375] The United States Supreme Court has repeatedly noted the importance of the independence of legal profession to the administration of justice in the United States (See In Re McConnell, 370 U.S. 230 (1962) (reversing the conviction of an attorney for criminal contempt); Sacher v. United States, 343 U.S. 1, 39 (1952)); An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice (see In Re McConnell, 370 U.S. at 236. See also Legal Services Corporation v. Velaquez, 531 U.S. 533, 545 (2001)); The Court has also observed: "The very independence of the lawyer from the government on the one hand and the client on the other is what makes law a profession .... It is as crucial to our system of justice as the independence of judges themselves" (See Application of Griffiths, 413 U.S. 717, 732 (1973))
[1376] ABA Resolution 104 Supporting Reasonable and Balanced AML Initiatives Consistent with the Confidential Lawyer-Client Relationship (February 2003) 8-9
[1377] United States v. Sindel, 53 F.3d 874, 877 (8th Circuit 1995); In re Grand Jury Subpoenas, 906 F.2d 1485, 1488 (l0th Circuit 1990)

Under the Tenth Amendment, the power to regulate legal profession is the exclusive preserve of the States.[1378]

Thus, any attempt by the federal government to regulate lawyers through AML law will conflict with the ethical requirements and regulations imposed by state authorities on the legal profession.[1379] However, judicial decisions have indicated that lawyers can be subject to Federal regulations.[1380] Thus, if lawyers can be subject to some Federal government's regulation why can they not be subject to AML compliance obligations?

Apart from legal and policy concerns, ABA also cited practical concerns among which are the vague notion of "suspicion" and the large number of SUAs. While the legal and policy argument appears to be strong, the practical concerns argument appears to be weak. As regulated persons are subject to AML compliance regime, why not lawyers who are better equipped to draft, assess and interpret the law. It is not entirely clear which difficulty would the lawyers face in complying with the AML regulatory requirements on the basis of large number of SUAs. Furthermore, difficulties arising from misunderstanding the nature of the SUAs can be resolved through training.[1381]

As lawyers handle commercial transactions involving large amount of money on behalf of their clients, they may get involve (wittingly or unwittingly) into a laundering scheme.[1382] Thus, lawyers need to be subject to the same AML compliance obligations

[1378] Leis v. Flynt, 439 U.S. 438,442 (1979)
[1379] Healy and others (n 1365) 797
[1380] For example, the Supreme Court has noted several times that lawyers can fall within the sphere of the federal government regulatory control, see: Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Sperry v. State of Florida, 373 U.S. 379 (1963)
[1381] Terry (n 1252) 487 (the author provides a detailed account on the effort being made to educate lawyers on practical steps to prevent themselves from being used for money laundering and terrorist finances)
[1382] Lawyers were convicted in the US for involvement in money laundering activities; see: In re Blair, 40 A.3d 883 (D.C. 2012); In re Tezak, 898 A.2d 383 (D.C. 2006); In re Abbell, 814 A.2d 961 (D.C. 2003); United States v. Tarkoff, 242 F.3d 991 (11th Cir. 2001) In re Lee, 755 A.2d 1034 (D.C. 2000); In re Toussaint, 753 S.E.2d 118 (Ga. 2014); Office of Lawyer Regulation v. Stern, 830 N.W.2d 674 (Wis.

other regulated persons are subject to (with some exception) as it is the practice in the UK, if the US AML law will have a semblance of being effective in disrupting ML.

Otherwise, a large window is left open for criminals to launder proceeds of crime. As pressure from ABA and other groups made FATF agree to a risk-based approach to identifying the beneficial ownership behind corporate clients,[1383] it is apparent that criminals would seek to exploit that avenue to launder the proceeds of crime.[1384] As the services of lawyers, like other gatekeepers, are vulnerable to being used by criminals to launder the proceeds of crime, it is respectfully submitted that ABA's stance could undermine AML compliance.

Another important way of ensuring effective compliance with AML law but on which little attention has been paid is co-operation between the government and the regulated sector. It is almost certain that enforcement action alone will not yield the desired result.

4.7 THE NEED FOR CO-OPERATION

Whether fines and penalties (despite appearing to be staggering) imposed by the US and UK regulators for the failure of compliance serve the purpose is debatable.[1385] If fines, penalties and criminal prosecution seem not to exert enough influence on regulated persons towards compliance, perhaps a better approach is to work towards more co-operation between the stakeholders.[1386]

2013); also see HC Deb 30 December, 2001, vol 373, col 757 (2001) (where John Denham, the then Minister for Police, Courts and Drugs noted that criminals employ bankers, lawyers and accountants to help them launder their illicit profit)

[1383] Healy and others (n 1365) 799

[1384] United States Senate Permanent Subcommittee on Investigations, Keeping Foreign Corruption out of the United States: Four Case Histories (2010) 202/224-9505

[1385] Barry A K Rider, 'Editorial: Don't Panic' [2016] 37(5) Company Lawyer 133

[1386] Please see Christopher Stears, 'Control Liability and Compliance: Tools for Controlling Financial Crime' in Barry Rider, *Research Handbook on International Financial Crime* (Edward Elgar 2015) 635 - 36

Co-operation between the regulators, whose duty is to ensure that the law are complied with, and the regulated whose duty is to comply with the law is vital for the AML law and practice to have the desired impact on ML.[1387] While the lack of cooperation between the government and the financial sector would likely undermine the effectiveness of the AML law no matter its quality, co-operation would likely stimulate the much-needed willing compliance with the AML law. In this regard, involving financial sector at each stage of coming up with compliance strategy is crucial. Hyland and Thornhill suggest that:[1388]

> Willing compliance is only possible if the financial sector is fully consulted from the outset and empowered to operate within a strategy that is sympathetic to its own need.

The fact that legislation alone is not enough to disrupt ML, and the need to obtain the cooperation of the regulated sector has been recognised.[1389] FIs attach importance to banking confidentiality. Thus, anti-secrecy laws are usually viewed as an unnecessary intrusion into normal business practice. The constitutionality of the BSA was challenged on privacy ground, because the banking community in the US initially viewed BSA 1970 as an intrusion into financial privacy.[1390] Despite being defeated at the Supreme Court, banks were still reluctant to comply – undermining the effectiveness of the BSA.[1391]

[1387] William Baity, 'Banking on Secrecy -- The Price for Unfettered Secrecy and Confidentiality in the Face of International Organised and Economic Crime' [2000] 8(1) Journal of Financial Crime 83, 85
[1388] Hyland and Thornhill (n 842) 30-050
[1389] Commonwealth Secretariat, Combating Money Laundering and Terrorist Financing: A model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses (2nd edn, Formora Ltd 2006) 4 (The Common Wealth senior finance officials in June 1995 recognised the need for collaboration to effectively combat money laundering)
[1390] United States v Miller, [1976] 425 US 441-443; California Bankers Association v. Schultz 416 U.S. 21 (1974)
[1391] Villa (n 104) 493

To some corporate entities failure to conform to the law is a fact of business life.[1392] Thus obtaining the cooperation of the regulated persons remains vital in disrupting ML. A financial sector that has not been consulted and which believes that AML law is either onerous or impracticable in their delivery, or are an unnecessary intrusion into the client's privacy, can frustrate the law no matter how good it is, and can also frustrate investigation while still complying strictly with the law.[1393]

Historically, in the US, there has been close co-operation between banks and the regulators and law enforcement agencies. However, this co-operation was nearly jeopardised when section 1957 of the MLCA 1986 was enacted because it was riddled with ambiguities that present enormous problems for FIs.[1394] Co-operation between UK government and financial services industry can be traced to the history of the City's financial services industry. Lately, the UK government announced a collaborative approach in which:

> …a joined-up partnership approach between government, law enforcement and regulatory bodies are essential to maintain and strengthen the element of self-regulation, flexibility and discretion in providing specific guidance on how objectives and framework set by the Government should be interpreted and implemented by the industry. [1395]

The simpler the AML law is, the easier for the financial sector to put in place programmes to comply with these laws. The 2016 UK Action Plan for Anti-money Laundering and Counter Terrorist Financing depicts an AML regime that is deficient. Complex laws and bureaucratic bottlenecks are identified among the factors that hinder compliance.[1396] For effective compliance, AML law must be made clear and simple.[1397]

[1392] Gilligan (n 1261) 67
[1393] Michael Hyland and Sue Thornhill (n 842) 30-225
[1394] Villa (n 104) 500
[1395] HM Treasury, Anti-Money Laundering Strategy (HMSO, London, October 2004)
[1396] The Action Plan 2016 (n 695) para 1.4; Annex B

Law that is vague may impede commerce and may also undermine investigation and prosecution.[1398] Owing to the high cost of complying with vague law, regulated person may resist complying with the law or may find a way of circumventing them.[1399]

In the US, co-operation with the government earns banks a status of "good corporate citizens" who have no systemic AML compliance failure and will, therefore, attract little or no attention of the law enforcement.[1400] Similarly, in the event of compliance failure, an established record of cooperation with the government could be taken as an evidence of lack of intent to violate AML requirement.[1401] Furthermore, co-operation with government is one of the deciding factors when considering whether to withdraw FI's operational licence.[1402]

However, evidence of a successful implementation of AML compliance programme, including filing a SAR on clients' activities, would not shield regulated persons if they facilitate ML.[1403] Then one would wonder how would a bank facilitate ML when it has established and maintained AML compliance programme.

Systems and controls may be put in place as required by law, but it is the human elements that operate them. While this exposes the weakness of the whole AML compliance system, it also stressed the need for co-operation between the government and the regulated person. Cooperation would motivate human elements to police the market for effective disruption of ML.

[1397] Rajah SC (n 1318) 127 (laws that are overlay vague, complex and technical hinder compliance due to difficulty in interpreting and applying them)
[1398] ibid
[1399] ibid
[1400] Whitney Adams, 'Effective Strategies for Banks in Avoiding Criminal, Civil, and Forfeiture Liability in Money Laundering Cases' [1992] 44 Alabama Law Review 669, 699
[1401] ibid
[1402] Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, ss 1502-1503, 106 Stat. 3672, 4045-51 (1992) (to be codified at 12 USC ss 93, 1464, 1752, 1786, 1818)
[1403] Ruce (n 165) 55

Disruption of ML is intelligence driven. Thus, sharing of information will would create an informal network within the regulated sector.[1404] This approach has since been adopted in the US allowing regulated persons to share information with the law enforcement, and between regulated person and another regulated person. [1405] A similar approach has been introduced into the UK AML landscape by section 11 of the CFA 2017.

On the other hand, it is a matter of self-interest for the regulated persons to co-operate with the government in its effort to disrupt ML. This, is because ML could affect the soundness and stability of financial market.[1406] A terrorist organisation that successfully laundered money to fund its operations can bring harm directly to regulated sector. 9/11 attack, which resulted in the loss of lives and properties, is a typical example. For this reason, the regulated sector needs to ensure proper compliance with the AML law, because proper compliance will not only make the AML regime effective but also benefits the financial sector itself.

4.8 TENSION BETWEEN CONTRACTUAL DUTY AND TIPPING OFF

Where a bank forms a suspicion about client's transaction, the bank is under a duty to disclose its suspicion to the relevant authorities.[1407] As sometimes this results in freezing of the client's account, the bank may come under pressure to explain to the client the reason for the delay in executing his mandate.

[1404] The Action Plan 2016 (n 695) Annex B
[1405] 13 CFR s1010.500 – 1010.540
[1406] Hyland and Thornhill (n 842) 30-400
[1407] Please see POCA 2002 s 338; 31 USC s 5318(g)(1) (the relevant authorities in the UK are constable, Revenue and a Custom office, nominated officer or an authorized NCA officer; and in the US, they include FinCEN and nominated officer)

While the investigation is still on, disclosing any matter already disclosed to the relevant authorities amounts to tipping off if such disclosure is likely to prejudice any investigation.[1408] A tension could arise where, for example, a client instructs his bank to carry out certain transaction but unfortunately due to suspicion the bank couldn't execute the instruction, and the bank is obliged to refrain from tipping off the customer.[1409]

In **Squirrrell Ltd v National Westminster Bank Plc**, it was held that the combined effect of sections 330-331, 338, 335 and 333A of POCA 2002 is to compel NatWest to report its suspicion, not to execute its client's instruction for the maximum of the 7 working days, plus 31 days moratorium, and to refrain from giving any information to anybody which is likely to prejudice any investigation following a section 333 disclosure.[1410] Thus, in the opinion of the court, the course adopted by NatWest was unimpeachable as it did what the POCA 2002 intended it to do.[1411]

CFA 2017 has provided for the successive extension of the moratorium period of 31 days (maximum) up to 186 days starting from the day the first 31 days moratorium period ends.[1412] The intention behind this extension is to allow more time for law enforcement to collect evidence as sometimes evidence is located overseas, and to carry out proper investigation on the suspected laundering activity.[1413]

[1408] POCA s 333A; 31 USC s 5318(g)(2) (these statutes prohibit tipping off); for an in-depth analysis on the tension between contractual duty and tipping off please see Rider and others (n 1172) 203; Barry AK Rider, Intelligent investigations: the use and misuse of intelligence – a personal perspective [2013] 20(3) Journal of Financial Crime 293
[1409] Shah v HSBC Private Bank (UK) Limited [2010]3 All ER 477 CA
[1410] Squirrrell Ltd v National Westminster Bank Plc [2006] 1 WLR 637 para 18
[1411] ibid para 21
[1412] CFA 2017 s 10
[1413] HC Deb 26 November 2016, vol 617, cols 98-99

While Squirrell depicts a typical compliance effort, it also reveals how compliance effort impedes commercial activities. Nevertheless, the Court of Appeal in **K Ltd v National Westminster Bank Plc**,[1414] held that, while it is true that to intervene between a banker and his customer in the performance of the contract of mandate is a serious interference with the free flow of trade, the interference is limited, and that the Parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of ML to run rife in the commercial community.[1415]

Longmore LJ also held that where the law makes it a criminal offence to honour the customer's mandate in these circumstances, there could be no breach of contract for the bank to refuse to honour the mandate.[1416] Once a disclosure is made, the tipping off provision of the POCA 2002 section 333A comes into effect,[1417] and the bank is not under any duty to inform its client of the reason why the transaction is declined.[1418]

This issue might be complicated in a situation where clients suffered a loss because the bank refuses to execute their lawful instructions. In **Shah and another v HSBC Private Bank (UK) Ltd,**[1419] the plaintiff claimed breach of contractual duty by HSBC for failing to carry out his instruction promptly and for failing to provide an explanation. Relying on the provision of POCA 2002 and the decision of Longmore LJ in ***K Ltd.***, Hamblen J rejected these claims.[1420]

[1414] [2007] 1 WLR 311
[1415] K Ltd v National Westminster Bank Plc [2007] 1 WLR 311 para 22
[1416] [2007] 1 WLR 311 para 10
[1417] [2007] 1 WLR 311 para 18 (in the case of US, 31 USC s 5318(g)(2)
[1418] Shah and another v HSBC Private Bank (UK) Ltd (No 2) [2012] EWHC 1283
[1419] [2009] EWHC 79 (QB)
[1420] [2007] 1 WLR 311 paras 28- 53 and 71-82

In an appeal case: **Shah and another v HSBC Private Bank (UK) Ltd,**[1421] Longmore LJ upheld these decisions.[1422] However, regarding tipping off a customer, his Lordship expressed the view that, there might come a time during the investigation when a customer is entitled to have more information about the conduct of his affairs because at that time the tipping-off might not be relevant anymore.

In ***Shah v HSBC***[1423] Supperstone J found for the defendant bank on the basis of an implied term in the contract which permitted the defendant bank to refuse to carry out the payment instruction without an appropriate consent under section 335 of POCA where it suspected a transaction involves proceeds of crime. It was also held that an implied term exists in the contract that permitted the bank to refuse to provide the customer with information that would lead to tipping off contrary to section 333 of POCA 2002. Whether the court will imply a term into a contract will depend on judicial discretion and the fact of each case.[1424] However, in what could be described as a shift in position, in **Parvizi v Barclays Bank Plc** the court accepted that a claim by a customer that its bank has failed to carry out instruction will be usually a strong claim in contract.[1425]

These cases highlight the dilemma faced by the regulated firms in their AML compliance efforts. As it is no longer secret to customers that FIs are required to file

[1421] [2010] 3 All ER 477 (CA)
[1422] Please see Squirrell Ltd v National Westminster Bank Plc [2006] 1 WLR 637 and K Ltd v National Westminster Bank Plc
[1423] [2012] EWHC 1283
[1424] Eoin O'Shea and Matthew Stone, 'Civil Liability Protection for those Making Suspicious Activity Reports (SARs)' [2015] Reed Smith Client Alerts
[1425] [2014] WL 4081295 (Master Bragge stating: I accept that a claim by a customer that its bank has failed to carry out instructions will be usually a strong claim in contract. The burden of proof that the implied term, which effectively is what is in issue here, operates because a suspicion is on the bank, because, as I observed in the course of argument, only the bank can explain its position. I have briefly referred to the witness statement evidence that has been presented. This is a fairly recent witness statement, 12 February 2014. It is to be observed that this type of material was not available in the Shah v HSBC private bank case summary judgment application.

SAR in compliance with their AML obligations, clients become alerted to an impending investigation whenever their instruction are delayed beyond a certain time.[1426]

4.9 CONCLUSION

Laws are enacted to serve a purpose. However, the purpose can only be achieved if the laws are complied with. Thus, compliance is a key element in any legal regime. The AML law in both UK and US places obligations on the regulated persons to comply with the laws by establishing and maintaining AML compliance programme to prevent their entities from being used for financial crimes.

By doing so, regulated firms serve as detectives helping government to disrupt ML. While BSA 1970 and Title 31 Code of Federal Regulations constitute the US AML framework; POCA 2002, TACT 2000, MLR 2007, FCA rules and JMLSG Guidance notes constitute the UK AML framework. These laws require compliance with the AML law and set out the components of the AML compliance programme. As CFA 2017 amended POCA substantially, expansion of the AML compliance requirements is likely.

As the law develops incrementally so are the compliance obligations. On the other hand, while expansion in the AML law increases compliance burden and thus, the cost,[1427] there is concern that the AML compliance burden is not worth the cost and the regime do not do enough to assist law enforcement or to discourage crime.[1428]

Regulated firms faced various sanctions for compliance failure despite the enormous compliance cost they bear and the fact that risk-based approach does not aim to

[1426] The Action Plan 2016 (n 695) para 2.8
[1427] Harvey (n 1244)
[1428] Rider and others (n 1172) 202

eliminate risk completely. Thus, it is respectfully suggested that the law should exempt a regulated person from liability for failure of compliance where there is enough evidence to show that a regulated firm has taken all necessary measures on a risk-based basis to protect itself from being used for ML and other financial crimes. However, adequate safeguards need to be in place to ensure that criminals do not exploit this avenue to undermine the whole AML regime.

This together with other reasons already discussed in this chapter may foster the much-needed co-peration between government and the financial sector in order to influence willing compliance with AML law. At the other end of the spectrum, there are incentives for regulated firms to comply with the AML law. It has been pointed out that both compliance and non-compliance have advantages and disadvantages. While compliance with the AML law affords a regulated firm the status of 'good corporate citizen', a regulated firm faces the risks of various sanctions for non-compliance.

CHAPTER 5: EVALUATING THE AML LAW AND PRACTICE

> One never knows the extent to which intelligence gleaned from these reports, and the follow-up which may take place has resulted directly and indirectly in the prevention or reduction of crime…Indeed, a number of years ago one very senior police officer submitted a report to his superiors and their political masters claiming that proceeds of crime laws that in practice could not be enforced sufficiently to represent a real risk to criminal organisations might well simply result in more and more complex money laundering. The Treasury and Home Office's assessment would seem to recognise a current situation, not at variance with such a warning.
>
> ***Professor Barry A.K. Rider***[1429]

5.1 INTRODUCTION

This chapter evaluates the effectiveness of the law and practice relating to ML in disrupting ML in the UK and US. Chapters 2 and 3 critically examined the US and the UK AML law respectively.[1430] Both chapters examined how authorities in UK and US use criminal law, regulatory law, fiscal law, as well as forfeiture law to tackle ML in their respective jurisdictions. The analysis in those chapters reveals loopholes in the law relating to ML in the two jurisdictions.

Chapter 4 focused on the regulatory aspects of the AML law. It examines those practices or AML compliance activities that need to be established as required by the law in the UK and US for the proper working of the AML law. As the law develops incrementally, so are the compliance obligations. On the other hand, while expansion in the AML law increases compliance burden and cost,[1431] there is concern that the AML

[1429] Barry Rider, 'Looking at the Tea Leaves' [2016] 23(2) Journal of Financial Crime 247
[1430] POCA 2002 has undergone an overehaul to strengthen the AML law – please see section 3.2.1
[1431] Harvey (n 1244)

compliance burden is not worth the cost and the regime do not do enough to assist law enforcement or to discourage crime.[1432]

Despite the lack of data on the actual scale of ML in both jurisdictions to enable us to measure the effectiveness of the AML law, this chapter tries to evaluate the effectiveness of the law and practice relating to ML in disrupting ML and TF. It concludes that the law and practice relating to ML in UK and US is not effective in disrupting ML and TF. This conclusion is drawn from the analysis in Chapters 2,3,and 4, and based on the strength of some available facts as will be discussed in this chapter.

Importantly, the UK's confession regarding the ineffectiveness of its law, and the US Treasury's confession that there exist loopholes in the US AML law that are being exploited to launder proceeds of crime, evade tax, and engage in other illicit financial activities underpin this conclusion.[1433] Finally, views of the reputable AML scholars on the effectiveness of the law and practice relating to ML in the two jurisdictions reinforce this conclusion.

This chapter is organised into five sections. Section 2 measures the effectiveness of the law and practice relating to ML in disrupting ML and TF. Section 3 analyses AML costs. While AML cost is generally high, banks bear the largest chunk. Despite the staggering AML costs, the AML regime in both UK and US does little to prevent ML and TF. Section 4 then goes on to explore where the problem lies. Section 5 concludes this chapter.

[1432] Rider and others (n 1172) 202

[1433] The Action Plan 2016 (n 695) 7 (The UK authorities have confirmed that the AML law is not effective); Department of the Treasury, 'US transparency announcement Secretary Lew Letter to Congress' [2016]
(The Treasury Department had in a letter to Congress admitted loopholes in the US AML system)

5.2 EFFECTIVENESS OF THE LAW AND PRACTICE

As this thesis sought to appraise the law and practice relating to ML in UK and US in terms of its disruptive effect on ML and TF, the two key terms – 'effective' and 'disruption' – need to be defined. So what do these terms mean? Taking its ordinary dictionary meaning, the term 'effective' means 'successful in producing a desired or intended result'.[1434] On the other hand 'disruption' means 'an interruption in the usual way that a system, process, or event works'.[1435] According to the NCA, 'disruption' is a measurement of impact against serious organised crime.[1436] So, what impact has the UK and US AML law made against ML and TF in their respective jurisdiction?

Effectiveness of legislation is largely determined by (a) the purpose of the legislation (which sets the benchmark for what the legislation aims to achieve); (b) the substantive content and legislative expression (which determine how the law will achieve the desired results and how this is communicated to its subjects); (c) the overarching structure (determines how the new provisions interact with the legal system); and (d) the real life results of legislation (indicate what has been achieved).[1437]

Effectiveness reflects the relationship between the purpose and the effects of legislation and expresses the extent, to which it is capable of influencing the behaviour of target population towards the desired direction.[1438] The effectiveness of the law and practice relating to ML can be determined by critically examining the extent to which the law in practical terms performs the functions it is designed for, as well as examining the

[1434] Oxford Dictionary online <https://en.oxforddictionaries.com/definition/effective> accessed 6 November 2017
[1435] Cambridge Dictionary <http://dictionary.cambridge.org/dictionary/english/disruption> accessed 6 November 2017
[1436] National Crime Agency, 'National Strategic Assessment of Serious and Organised Crime' [2016] 9
[1437] Maria Mousmouti, 'The "Effectiveness Test" as a Tool for Law Reform' [2014] 2(1) IALS Student Law Review 5
[1438] ibid 4 (citing Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Costantin Stefanou and Helen Xantaki (eds) Drafting Legislation: A Modern Approach (Ashgate: 2008) 17

burden the AML regime places on regulated persons.[1439] If the law fails practically to achieve the purpose for which it is designed, the law is not effective.

If the law and practice are effective in disrupting ML, then the following scenario is likely to play out: First, disruption will lead to a reduction in funds available for personal spending and further funding of criminal activity. Secondly, reduction in monies available to fund further act of criminality may result in a decline in crime and profit.[1440] Thirdly, reduction in profit reduces the amount to be laundered.

Therefore, if this scenario plays out continuously, AML law is said to be effective in disrupting ML.[1441] It is therefore respectfully submitted that continuous disruption of ML may potentially lead to the reduction of ML because there would be less funds available to finance and sustain the commission of the predicate crimes.

5.2.1 DISRUPTING THE LAUNDERING OF THE PROCEEDS OF CRIME

The need to disrupt the flow of the proceeds of crime gave rise to the law and practice relating to ML.[1442] Disrupting ML is a way of preventing criminals from enjoying their illicit wealth, and of cutting the source of financing further criminal activities like terrorism.[1443] Understanding the impact, and ability to measure the impact the law and practice made against the scale of ML will enable the determination of the effectiveness of the law and practice relating to ML.

[1439] Her Majesty's Treasury, *Anti-money laundering and counter terrorist Finance supervision report 2014-15* [May 2016] @ p 11 (describing an effective AML/CFT regime as one that focuses resources proportionately on the risks, and reduces unnecessary burdens on business that do not effectively prevent ML and TF)

[1440] This may not necessarily be true as market forces of demand and supply may help maintain or even increase profits. However, what matters most in commerce is not higher price of commodity but the turnover. The higher the turnover, the higher may be the overall profit. Therefore, disrupting free flow of proceed of crime is likely to have negative impact on profit

[1441] The Action Plan 2016 (n 695)

[1442] Alldridge (n 42) 1

[1443] CFA 2017 has introduced certain measures to deprive criminals of their illicit proceeds – please see sections 3.2.1 and 6.3

To effectively disrupt ML, all aspects of AML law and practice must function properly. At this stage of this thesis, it will be helpful to look at the AML law and practice through the lens of Professor Reuter and Truman's two-pillar (prevention and enforcement) structure, which depicts the mechanism for disrupting criminal finance.[1444] Each pillar is subdivided into four elements. The prevention pillar consists of: sanctions, regulation and supervision, reporting, and customer due diligence.[1445] In contrast, the enforcement pillar consists of: confiscation, prosecution and punishment, investigation, and predicate crime.

While, the preventive pillar represents largely the legal requirements and practices that are required to be established to disrupt criminals or their professional launderers from using regulated person to launder proceeds of crime, the enforcement pillar represents legal measures and practices that can be used (where preventive measures have failed) to disrupt ML and funding of criminal activities.[1446]

In both UK and US, AML law substantially cover these two pillars.[1447] The law and practice relating to ML have been covered in Chapters 2, 3, and 4. Although these jurisdictions are not in short of AML law, the concern is growing that the AML regime is not effective.[1448] However, the challenge is how to measure the effectiveness of the AML law and practice in disrupting the free flow of proceeds of crimes.[1449]

[1444] Peter Reuter and Edwin Truman, *Chasing Dirty Money: The Fight Against Money Laundering* (Institute for International Economics 2004) 45
[1445] CFA 2017 has ameneded the way SAR is being handled – please 3.2.1
[1446] Reuter and Truman (n 1444) 45
[1447] POCA 2002 and TACT 2000 (as amended by CFA 2017), and MLR 2007 in the UK; and BSA 1970 and associated regulations, MLCA 1986, and the Patriot Act 2001 in the US
[1448] Jason C Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press, 2011)
[1449] Harvey (n 1244) 339

Due to elusive and secretive nature of ML, the actual global scale of ML remains unknown.[1450] All that is available is an estimate, like that of the IMF, which puts the global figure of ML activities between 2 and 5 per cent of the global GDP. Using the IMF estimate, an estimated figure of between £36 and £90 billion is laundered through the UK annually,[1451] and USD300 billion through the US.[1452]

While the actual figure of criminal assets restrained seized and confiscated, as well as the actual figures of civil penalties and fines against defendants for AML violations are ascertainable, there is no estimated figure of money disrupted due to arrest and imprisonment of offenders. Again, this is due to the secretive nature of the predicate crimes and the difficulty in calculating how much profit would have been made had the criminal activity taken place.

While difficulty remains in having actual statistics on ML, the general view on the UK AML law is that the regime is not working.[1453] Indeed the US Department of State has for years been categorising the UK among jurisdictions of primary ML concern.[1454] INCSR 2016 Report issued by the US Department of State identified UK as having a comprehensive AML regime, and as an active player at the international stage in

[1450] Fletcher N. Baldwin Jr., 'Money Laundering and Wire Transfers: When the New Regulations Take Effect Will They Help?' [1996] (14)3 Dickinson Journal of International Law 413, 416 (As most crime funds are hard to detect, the global scale of money laundering will remain unknow)

[1451] National Crime Agency, 'National Strategic Assessment of Serious and Organised Crime' [2016] 28 <http://www.nationalcrimeagency.gov.uk/publications/731-national-strategic-assessment-of-serious-and-organised-crime-2016/file> accessed 18 October 2016

[1452] Department of the Treasury, National Money Laundering Risk Assessment [2015] 2 <https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National%20Money%20Laundering%20Risk%20Assessment%20–%2006-12-2015.pdf> accessed 18 October 2016

[1453] Barry A. K. Rider, 'A bold step - but not quite where no man has gone before!' [2016] 19(3) Journal of Money Laundering Control 222 (there were for many years concern that AML regime is not working effectively); Professor Rider has raised this concern as far back 1999 - please see Rider (n 41) 218

[1454] UK has been featuring in the list of countries the US Department of States considers jurisdictions of AML primary concern, please see International Narcotics Control Strategy Report (INCSR) from 2000 to 2016

combating transnational financial crime.[1455] Nevertheless, the report indicates that the UK remains attractive to money launderers because of the size, sophistication, and reputation of its financial markets.[1456] Also, the report have been featuring US among the countries of ML primary concern.[1457]

While this report is a product of an annual review of ML situations in different jurisdictions, it is not aimed at measuring the effectiveness of AML law in the jurisdictions the report evaluated. However, this report includes an assessment of the quantum of the proceeds of serious crime that passes through the financial sector of individual countries, the steps taken or not taken to address financial crime and ML and the effectiveness with which the government has acted.[1458]

Despite this, the report can still support a conclusion about the effectiveness of the AML law and practice in the jurisdictions it covers. Indeed, failure by a country to act effectively might result in enacting poor AML law and regulations and having poor AML practices, making the country vulnerable to ML.

Similarly, designating a country as a jurisdiction of ML concern because of the large volume of a transaction involving proceeds of crime through its financial sector, sounds a warning on the effectiveness of the country's AML regime in disrupting the flow of the proceeds of crime.[1459] Thus, going by the INCS Report, a big question mark is placed on the effectiveness of the UK AML law.

[1455] please see International Narcotics Control Strategy Report (INCSR) from 2000 to 2016

[1456] US Department of State, International Narcotics Control Strategy Report 2016 <http://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253438.htm> accessed 11 October 2016

[1457] Please see International Narcotics Control Strategy Report (INCSR) from 2000 to 2016

[1458] Other areas the report touched on include: each jurisdiction's vulnerability to ML; the conformance of its laws and policies to international standards; the effectiveness with which the government has acted; and the government's political will to take needed actions

[1459] National Crime Agency, National Strategic Assessment of Serious and Organised Crime [2014] p 12

As an apparent confirmation of some views, [1460] the UK government itself acknowledged that the law and practice relating to ML are not working well.[1461] The regime does not work because the law does not achieve the purpose it is designed to achieve; according to the UK authorities:

> A successful anti-money laundering and counterterrorist finance regime will result in the relentless disruption of money laundering and terrorist finance activities, the prosecution of those responsible and the recovery of the proceeds of crime. A successful regime will dissuade those seeking to undertake money laundering and terrorist finance activities from doing so.[1462]

The story about the effectiveness of the US AML regime is not much different.[1463] Indeed, the Mossack Fonseca leaks reveal that more needs to be done to make US AML law more effective.[1464] While authorities in the US have not admitted failure in the AML law and practice, the Treasury Department admitted having loopholes in the US AML law, and the loopholes are being exploited to launder the proceeds of crime, evade tax, and engage in other illicit financial activities.[1465]

31 CFR (2011) sets out AML compliance requirements. However, it does not require covered FIs to know the identity of the individuals who own or control their corporate

[1460] Alldridge (n 42) 1-3
[1461] The Action Plan 2016 (n 695) 7
[1462] The Action Plan 2016 (n 695) 9. CFA 2017 has amended POCA susbstantially to address the deficiencies of the POCA AML provisions – please see section 3.2.1
[1463] Christina Parajon Skinner, 'Executive Liability for Anti-Money Laundering Controls' [2016] 166 Columbia Law Review Sidebar 116, 121
[1464] White House, 'Fact Sheet: Obama Administration Announces Steps to Strengthen Financial Transparency, and Combat Money Laundering, Corruption, and Tax Evasion' (announcing series of measures to ensure transparency in ownership and control of companies registered in the United States) <https://www.whitehouse.gov/the-press-office/2016/05/05/fact-sheet-obama-administration-announces-steps-strengthen-financial> accessed 17 October 2016; also, please see Fusion, 'Meet the U.S. one-percenter criminals revealed in the Panama Papers' <http://fusion.net/story/287775/panama-papers-leak-american-lawsuits/> accessed 17 October 2016
[1465] Department of the Treasury, 'US transparency announcement: Secretary Lew Letter to Congress' [2016]

clients (beneficial owners).[1466] Similarly, Title 31 USC did not empower the Secretary of the Treasury to require covered FIs to maintain records and file report on the beneficial ownership of US entity.[1467]

As discussed in chapter 4, lawyers in the US are not obliged to follow the statutory AML compliance requirements or to file SAR, even where they suspect their client of engaging in ML, but they are only required to withdraw from the relationship.[1468] AML compliance among the US lawyers is largely voluntary with the Good Practice Guidance as the guide on how to carry out a certain aspect of AML compliance such as CDD. Provided lawyers are not involved in ML activity, failure to establish AML compliance is not an offence.

Even the ABA's Model Rule of Professional Conduct (2013), which regulates US lawyer's ethical conduct, neither require a lawyer to fulfil a gatekeeper role nor do they permit a lawyer to engage in the reporting that such a role could entail.[1469] This is, however, one major loophole that casts doubt on the effectiveness of US AML law and practice in disrupting ML, as these loopholes allow foreign persons to hide assets in the US.[1470]

A PSI Report reveals how corrupt leaders used lawyers and other gatekeepers to launder proceeds of corruption, because the category of gatekeepers involved was at the time

[1466] Federal Register, Volume 81 No 91 May 2016 (Rules and Regulations) (FinCEN has now issued final rule, to among other things, require CDD on the beneficial ownership of US entity)
[1467] It was after Panama Paper scandal and external pressure especially from small countries that a bill seeking to amend Subchapter II of Chapter 53 of Title USC was sent to Congress for enactment. The amendment will insert s 5333 to empower the Secretary of the Treasury to require FIs to maintain records and file reports on beneficial ownership of US entity
[1468] Please see gatekeeper section in chapter 4; also see United States Senate Permanent Subcommittee on Investigations, Keeping Foreign Corruption out of the United States: Four Case Histories, Report 202/224-950 (2010) 16
[1469] ABA Formal Opinion 463 (2013) 2
[1470] Department of the Treasury, 'US transparency announcement: Secretary Lew Letter to Congress' [2016]

not obliged to have AML compliance programme or to report suspicion of ML or even to decline to handle suspect funds involving a PEP.[1471] The situation remains unchanged for the US lawyers. The report also reveals some laxity on the part of the banks. For example, when Wachovia wanted to close a client's account, the client's attorney convinced the bank to grant the client more time to take the money to another bank[1472]

Even the evolution of the law and practice relating to ML in the US suggests that US has been expanding its AML law and practice to catch-up with launderers.[1473] For example, the attempt by law enforcement to prosecute those who circumvent BSA reporting statute by structuring their transactions failed because structuring was not a criminal offence at that time.[1474] This informed the amendment of BSA 1970 to criminalise structuring.

Similarly, as the culture of AML compliance increased among the bank's, ML activity shifted to the non-bank FIs that were at the time less or not regulated.[1475] This exposes the weakness of BSA 1970 AML provisions in disrupting ML. Although the law may not perform the function it wasn't designed for, the ability of criminals to circumvent

[1471] United States Senate Permanent Subcommittee on Investigations, Keeping Foreign Corruption out of the United States: Four Case Histories, Report 202/224-950 (2010) 15-105 contains a detailed account on how Teodoro Nguema Obiang Mangue, a cabinet minister and son of the president of Equatorial Guinea, Teodoro Nguema Obiang Mbasogo, employs the services of gatekeepers to launder public funds for personal use

[1472] United States Senate Permanent Subcommittee on Investigations, Keeping Foreign Corruption out of the United States: Four Case Histories, Report 202/224-950 (2010) 187 provides an account of how a US Lawyer, Edward Weidenfeld convinced Wachovia Bank to allow Ms Jennifer Atiku Abubukar more time to open another account at a different bank for the suspect fund to be moved

[1473] For example, to avoid CTR money launderers resort to restructuring. The statute as originally enacted had no provision for dealing with that situation. Thus, the Treasury Department issued a regulation that require banks to aggregate transactions that fall under the threshold, but were made by or on behalf of one person. To remedy this deficit, Congress passed Money Laundering Control Act 1986, which enacted 18 USC s 5324 into the BSA 1970 to criminalise structuring

[1474] United States v Mouzin, 785 F.2d 682, 689-90 (9th Circuit 1986); United States v Rigdon, 874 F.2d 774, 777 (11th Circuit 1989); United States v Schimidt, 947 F.2d 362, 370-71 (9th Circuit 1991)

[1475] United States House of Representative Committee on Banking, Finance and Urban Affairs, Federal Government's Response to Money Laundering, Report 103-40 (1993) 8

the law to avoid triggering the reporting statute exposed the inability of the statute to achieve its purpose of detecting criminal activities.

The 2007 FATF mutual evaluation on the US reveals an effective AML system.[1476] However, the purpose of FATF mutual evaluation was to investigate whether the country subject to the evaluation has technically complied with the FATF recommendations – but not to assess the effectiveness of the domestic AML law. Thus, conformity of local AML law with FATF policy requirements does not automatically means the law is achieving what it is designed for.[1477] Reported incidences of laundering involving major banks in the US casts doubt on the effectiveness of the US AML law.[1478] Thus, the FATF evaluation in question, which was aimed at finding whether US has complied with FATF global AML standards may not be used to gauge the effectiveness of the US AML laws.

In 2013, FATF announced a shift in policy, which will see FATF evaluating (in addition to its traditional assessment of technical compliance with the FATF recommendations) the effectiveness of the AML regime established in compliance with the FATF recommendations.[1479] It is not the aim of this thesis to discuss the FATF 2013 methodology of evaluating the effectiveness of countries AML law in any detail, but rather very briefly. Effectiveness has been defined as "the extent to which the designed

[1476] FATF, 'Mutual Evaluation Report: Executive Summary' [2007] states that: 'Overall, the U.S. has implemented an effective AML/CFT system, although there are remaining concerns…'
[1477] Harvey (n 1244)339
[1478] United States Senate Permanent Subcommittee on Investigations, U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History (Report 202/224-9505 and 202/224-3721) 2012 (which reveals non-compliance culture by banks among other things)
[1479] Please see FATF, Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems (FATF Methodology) 2013

outcomes are achieved".[1480] The 2013 methodology explained the effectiveness of country's AML/CFT system in the following terms:[1481]

> …the extent to which financial systems and economies mitigate the risks and threats of money laundering, and financing of terrorism and proliferation. This could be in relation to the intended result of a given (a) policy, law, or enforceable means; (b) programme of law enforcement, supervision, or intelligence activity; or (c) implementation of a specific set of measures to mitigate the money laundering and financing of terrorism risks, and combat the financing of proliferation.

Evaluating the extent, to which financial systems mitigate the risks and threats of ML, will potentially indicate the effectiveness or otherwise of the AML law in disrupting ML. The fourth mutual evaluation on the US was carried out in 2016 using the 2013 FATF mutual evaluation methodology. The report described the US AML/CFT framework as well developed and robust.

However, the report reveals gaps in the US AML system.[1482] First, the AML regulatory framework either does not or only covered gatekeepers minimally.[1483] This confirms, as discussed above, that lack of AML compliance obligation on gatekeepers – lawyers in particular – remains a serious concern. Secondly, the report reveals that there is no requirement to identify beneficial ownership and this allows criminals to abuse corporate entities to launder illicit proceeds.[1484]

It is pertinent to point out that at present the only obligation to identify the beneficial ownership is limited to very specific situations, including private banking, to ascertain

[1480] ibid 15
[1481] ibid
[1482] FATF, Mutual Evaluation Report on the United States of America (2016) 3
[1483] ibid 3-4 and 153-161
[1484] ibid 3-4 and 153-161

whether a senior foreign PEP is involved.[1485] However, AML obligations do not sit well with the nature of private banking. While AML law is aimed at reducing the risk of firms being used to launder the proceeds of crime, private banking is aimed at providing specialised financial services and emphasises loyalty to clients.[1486] Thus, instead of carrying out CDD to identify the beneficial ownership of a non-US person (which in most cases the relationship manager is familiar with), a private banker may either create a US person for the client or use other means to conceal the identity of the client.[1487]

The US Senate hearing on the use of private banking to launder illicit money reveals how powerful individuals use private banking facilities to move and invest stolen public funds through UK and US banking systems.[1488] The culture of secrecy and other advantages over retail banking, makes private banking more attractive to criminals.[1489] The use of a corporate vehicle to mask the identity of beneficial owners increases the chances of circumventing US AML law.

Early detection of potential launderers and threats to the banking system at the CDD stage, as well as detecting and blocking transactions involving proceeds of crime at the placement stage is key to disrupting ML.[1490] In the US like in many other jurisdictions,

[1485] 31 CFR s 1010.620 (this obligation also applies to correspondent account for foreign FIs, see 31 CFR s 1010.610)
[1486] United States Senate Permanent Subcommittee on Investigations, Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities (1999) 876-881 (the following five factors: the role of private bankers as client advocates, a powerful clientele, a corporate culture of secrecy, a corporate culture of lax controls, and the competitive nature of the industry demand private banker's loyalty to the client)
[1487] ibid 874-75
[1488] as part of the investigation, a case study was conducted on the financial conduct of four PEPs – the Abacha sons, Asif Ali Zardari, El Hadj Omar Bongo, and Raul Salinas – at Citibank involving the use of private banking
[1489] United States Senate Permanent Subcommittee on Investigations, Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities (1999) 875 and 877
[1490] Rob Gruppetta, 'Effectiveness of the AML regime in disrupting financial crime' 2016 (Opening comments for a panel discussion at our Financial Crime Conference) <https://www.fca.org.uk/news/speeches/effectiveness-aml-regime-disrupting-financial-crime> accessed 8th January 2017

some regulated persons either turn their eyes away from the obvious or facilitate ML.[1491]

Investigations launched by the PSI into the prolonged AML breach by HSBC revealed that AML laws could only be effective to the extent regulated persons comply with them and regulators enforce them.[1492] A separate PSI's investigation reveals collusion between Riggs bank and its regulators in handling proceeds of corruption involving Chile and Equatorial Guinea.[1493] The OCC's Examiner-in-Charge kept on shielding OCC from taking action against Riggs Bank for obvious AML failures, and in the end, the examiner left OCC to join Riggs.[1494]

While the US AML law placed compliance obligation on regulated person, it does not in any way governs the behaviour of the regulators. Lack of specific provisions in the AML laws that regulate the conduct of the AML regulators in relation to exercise of their statutory duty is a gap in the US AML law. The conduct of the OCC's Examiner-in-Charge can be partly attributed to this gap, because had there been no such gap, it is likely that the examiner would have acted differently.[1495]

Forfeiture (or confiscation as it is called in the UK) is one of the strategic weapons that are being deployed to disrupt and dismantle the economic infrastructure of criminal

[1491] In the Matter of Sparks Nugget, Inc. Nevada Number 2016-03 (Spark Nuggets violated 31 USC ss 5318(a)(2), 5318(g) and 5318(h); 31 CFR. ss 1021.210, 1021.320, and 1021.410; In the Matter of First National Community Bank, Dunmore, Pennsylvania Number 2015-03 (violated 31 CFR s 1010.810)
[1492] United States Senate Permanent Subcommittee on Investigations, U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History (Report 202/224-9505 and 202/224-3721)
[1493] United States Senate Permanent Subcommittee on Investigations, Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act – Case Study Involving Riggs Bank, Report 108-633 (2004)
[1494] ibid 3-4
[1495] For a summary of how the Examiner handled the Riggs affair see ibid 3-4 r

organisations.[1496] Imprisonment of criminals alone was never substantially disruptive to many criminal organisations as any vacant position is promptly filled, and thus, an attack against their criminal assets is necessary.[1497] Confiscation denies an offender the opportunity to benefit from his crime or to commit further offences in the future.[1498]

In the UK for example, only 26 pence out of each £100 of proceeds of crime was confiscated in 2012/2013 fiscal year.[1499] In percentage term, the amount of recovery is just 0.26 per cent.[1500] Using these statistics to judge the effectiveness of UK AML law in terms of disrupting ML will reveal not just an ineffective, but also a failed law. It is estimated that USD300 billion proceeds of crime are laundered annually in the US.[1501] The fact that this estimate remains static (assuming this is a true estimate), shows that ML persists. This shows that AML law does little to disrupt ML.

The foregoing analysis is in line with the position of the major AML scholars. The foremost scholar who pioneer research in ML and related crimes, Professor Barry Rider, has this to say about the effectiveness of the AML regime:

> There has been concern, not least expressed in the pages of this journal over many years, as to the apparent lack of effectiveness of the anti-money laundering and proceeds of crime regime. The amounts of money that are actually permanently taken out of the

[1496] Please see 18 USC s 981 (civil forfeiture), 18 USC s 982 (criminal forfeiture), and POCA 2002 Part 2. During the debate on the Proceeds of Crime Bill, John Denham said: "the Bill is about taking the profit out of crime. The proceeds of crime have a corrosive effect on society and our economy…The proceeds of crime also provide the working capital for future criminal enterprise. Recovering the money is therefore essential for crime reduction" (HC Deb 30 October 2001, Vol 373, Col 757)

[1497] Andrew Haynes, 'Money Laundering and Changes in International Banking Regulation' [1993] Journal of International Banking Law 454 citing Nicholas Dorn and others, *Traffickers: Drug Markets and Law Enforcement* (Routledge, 1992) at 69 (a practical example of how organised criminal groups fill vacuum very quickly is demonstrated by how Ismael 'El Mayo' Zambada replaced the Mexican drug lord, Joaquin 'El Chapo' Guzman, following the latter's arrest): *Daily Mail Online* <http://www.dailymail.co.uk/news/article-3393581/Is-farmer-man-step-replace-El-Chapo-Ismael-El-Mayo-Zambada-68-tipped-leader-Sinaloa-drugs-cartel.html> accessed 20th January, 2017))

[1498] Alexander (n 1017)

[1499] National Audit Office, Confiscation Orders (HL 738, 2013-2014) p5

[1500] The rate of recovery of the proceeds of crime is likely to improve courtesy of the UWO introduced by the CFA 2017

[1501] The Treasury, 'US National Money Laundering Risk Assessment' [2015] 2

> criminal pipeline are miniscule, and there have been few successful prosecutions against professional money launderers. While the situation is not different in most other jurisdictions, there is a perception, which is probably near the truth, that the UK has remained a key international Centre for money laundering and the investment of suspected wealth. [1502]

In his study, which concentrates mainly on the US AML law, Professor Mariano-Florentino Cuellar found that there is a weak link between the fight against ML and disruption of ML and the underlying predicate crimes, and he concludes that:

> Whatever one thinks of the enterprise of disrupting financial activity related to crime, there is a tenuous relationship between the draconian aggressive prosecutorial efforts to punish money laundering and the larger project of using criminal penalties, regulation, and detection strategies to disrupt criminal finance. The relationship is tenuous primarily because of limitations in what sort of suspicious activity the system can detect, a limitation that becomes obvious once the system is viewed as a product of statutes, rules, and detection strategies.[1503]

Professor J. C. Sharman whose research focused on mostly the UK and US (among the developed countries), and developing countries, used an indirect and direct test of effectiveness to find out whether AML law is effective in disrupting the flow of proceeds of crime. Both tests reveal that little evidence shows that UK and US AML policy does work and a good deal indicate that it does not.[1504] Professor Jackie Harvey was sceptical on the impact of UK AML law on ML and organised crime, she said:

> It is difficult to establish for the UK whether the diligent application and enforcement of rules and regulations will have had any appreciable impact on money laundering activity. Despite its particularly assiduous application of anti-money laundering systems and procedures, the UK still appears on the list of countries in which money laundering is taking place.[1505]

[1502] Rider (n 1453)
[1503] Cuellar (n 188) 461
[1504] Sharman (n 1448) 37 - 95
[1505] Harvey (n 1244) 344

In a study on the US and UK Professor Levi and Professor Reuter concluded that 'available data weekly suggest that the AML regime has not had major effects in suppressing crime and that the proceeds of crime confiscated is very small compared with income or even profits from crime'.[1506] In a separate study, Professor Reuter and Truman concluded that:

> …there was no empirical base to assess the effectiveness of the current AML regime in terms of suppressing money laundering and the predicate crimes that generate it…the regime has made progress in the general area of prevention, but without much effect on the incidence of underlying crimes. Critics argued that the regime has done little more than force money launderers to change their methods. Felons' lives are a bit more difficult and few more are caught, but there is little change in the extent and character of either laundering or crime. Critics may well be right.[1507]

The recent work of Professor Peter Alldridge questioned the empirical foundation upon which the AML movement was established, and of the narrative underpinning the AML industry.[1508] In the second part of the book, the author questioned the rationale behind criminalising ML, pointing to the lack of clarity and the artificial nature of the term "laundering". One major argument that kept on recurring throughout the book was that AML law is just an alternative to already existing laws in the UK which can effectively deal with whatever predicate crimes the AML law can deal with. He concluded by making some suggestion on how to control the growth of AML in the UK, and far more controversial of all is that AML regime rein can be abandoned altogether.[1509]

These arguments are valid. While abandoning AML regime may sound a good idea, at this point, it is not the best idea. Let us assume that AML law is just a toothless bulldog. Still, it serves a purpose no matter how little. Here, an anology is drawn with the

[1506] Levi and Reuter (n 204) 289
[1507] Reuter and Truman (n 1444) 192
[1508] Alldridge (n 42) 1-32
[1509] ibid 77-78

presence of a single unarmed police officer patrolling a street in the night. His presence alone may deter petty criminals; may cause middle-level criminals to devise a way of avoiding him. Only hardened and well-armed criminals may confront the officer. Even among the hardened criminals, the 'rational' ones may chose to avoid having contact with the officer. Otherwise, the officer will raise alarm on detecting criminal activity. Furthermore, the fear of leaving a trail may make a rational criminal to avoid any confrontation with the officer.

AML law works in a similar way.[1510] It is the lack of a reliable estimate of the scale of ML, even from FATF,[1511] that makes a determination of the disruptive effects of the AML law almost impossible. The existence of AML law in the law books may steer many people away from crime; may exclude criminals from the financial sector; may help detect ML; may cause displacement,[1512] or cause criminal to adopt different tactics,[1513] increasing chances of detection. Only a determined criminal may take the gamble. To sum it all, Guy Halfteck has argued that the threat of legislation rather than the legislation itself plays a remarkable role in controlling behaviour, in creating and setting incentives, and in maintaining social order.[1514]

Practically, when charged with ML in addition to other charges, criminals tend to plead quilty to charges related to predicate crime in return for the prosecution dropping the

[1510] Cuellar (n 118)
[1511] John Walker, 'How big is Money Laundering?' [1999] 3(1) Journal of Money Laundering Control 25
[1512] Moving from high risk methods to less risk methods of laundering
[1513] For example, criminals resorted to structuring transactions below the threshold to avoid BSA reporting requirements
[1514] Guy Halfteck, 'Legislative Threats' [2009] 61 Stanford Law Review 629, 635 (The author analysed how threat of legislation influence the behaviour of the targeted population towards behaving in a particular way. The author used ten case studies, including a case study on ML (652-53), to demonstrate how the threat of enacting legislation influenced various sectors of the economy in the US and elsewhere (645-656). This theory can also be used to demonstrate the influence of enacted legislation on the targeted population. Please also see Mousmouti (n 1437)

ML charges.[1515] The mere threat of ML charges and the possibilities of receiving a harsh sentence is enough incentive for many defendants on their own to seek for a plea bargain.[1516] **United States v. McNab**[1517] demonstrates how devastating ML charge can be. Consequently, it is respectfully submitted that abandoning AML system altogether will not be desirable.[1518]

5.2.2 DISRUPTING TERRORIST FINANCING

Up to this point, the focus of this thesis is on ML.[1519] However, for the purpose of appraising the law and practice relating to ML in both UK and US, it is relevant to look at whether the law and practice do disrupt TF, which since 9/11 is being viewed together with ML, though the two are significantly different.[1520] Discussion in the preceding chapters focused on ML, thus, at this stage, we only need to refer to ML for comparison purposes.

TF has been described as reverse ML.[1521] Reverse ML is a process of conducting financial transactions with clean money for the purpose of concealing or disguising the future use of that money to commit a criminal act such as terrorism.[1522] TF can be classified as reverse ML because the property with which to finance terrorism may not necessarily involve proceeds of crime, as part of terrorist funding comes from legitimate

[1515] Reuter and Truman (n 1444) 112
[1516] Eric J Gouvin Are There Any Checks and Balances on the Government's Power to Check Our Balances – The Fate of Financial Privacy in the War on Terrorism' [2005] 14 Temple Political & Civil Rights Law Review 517, 534-35
[1517] United States v. McNab, 331 F.3d 122S, 1234 (l1th Cir. 2003)
[1518] It is expected that the dramatic changes CFA 2017 made to the UK AML landscape would strengthen the law and practice relating to ML
[1519] Due to limitation of space I have omitted to discuss TF, which involves a range of wholy different issues. But for the purpose of evaluating the effectiveness of the AML law the two are often treated as one and the same. However, as we shall see TF can be quite opposite to ML
[1520] Rider (n 3) 13-4
[1521] Cassella (n 3) 92
[1522] ibid 92-93

sources, such as legitimate contracts, fundraising in the name of promoting a good course, and donations.[1523]

In contrast to ML where the criminal activity that generates the proceeds comes before laundering scheme, in TF the intended criminal act is in the future. The focus is not on the proceeds of crime that have already been generated, but the purpose for which the resources – licit or illicit – are going to be deployed. The definition of TF points to this fact. For example, the Third Money Laundering Directive defines TF as:

> …the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences [defined as terrorism].[1524]

In the UK, TACT 2000 criminalised TF. It is a criminal offence to raise fund for terrorist activities;[1525] to use or possess money to fund terrorism;[1526] to enter or become concerned in funding arrangement of terrorist activities, or to engage in terrorist finance ML.[1527] These offences mirror ML provisions in section 327, 328, and 329 of POCA 2002. Like the ML offences under POCA 2002, TF offences under TACT 2000 carry 14 years imprisonment.[1528]

Unlike ML offences under POCA 2002, the defendant bears the burden of proving that he did not know and had no reasonable cause to suspect that the arrangement related to

[1523] For example, Osama bin Laden made his fortune through legitimate contracts but deployed them for terrorism purposes, see HC Deb 30 October 2001, vol 373, col 802
[1524] Directive 2005/60/EC of the European Parliament and of the Council, article 1(4)
[1525] TACT 2000 s 15
[1526] ibid s 16
[1527] ibid s 18(1)
[1528] ibid s 22(a)

the terrorist property.[1529] Like POCA 2002, TA 2000 also contains provisions such as duty of disclosure and non-tipping-off obligation.[1530]

A very logical argument has been made that the two offences should be dealt with under one and the same legislation.[1531] Although the two offences are not yet married together, MLR 2007 imposed an obligation on regulated person in the UK to police the regulated sector against both ML and TF. In the US, the Patriot Act substantially amended BSA 1970, to among other things, conjoin the fight against ML and TF, requiring FIs to use the existing AML regulatory regime to disrupt TF.[1532] Due to the large amount of funds terrorist organisations, such as Islamic States in Iraq and Levant (ISIL) and Al Qaeda control, would need to deploy the conventional ML to move money around for their operations or to launder their illicit proceeds.[1533] Hence, the need to deal with ML and TF under the same legislations.

As discussed above the AML law proved to be ineffective in disrupting ML. But would AML law that proved to be ineffective in disrupting ML be effective in disrupting TF given that ML and TF are not the same, though terrorism is sometimes funded from the proceeds of crime.[1534] With very few exceptions, the AML law looks backwards focusing on the proceeds of crime that have been committed,[1535] while CFT is forward looking.

[1529] TACT 2000 s 18(2)
[1530] See TACT 2000 s 19-21
[1531] Please see Richard Alexander, 'Money laundering and terrorist financing: time for a combined offence' [2009] 30(7) Company Lawyer 200
[1532] Please see The Patriot Act 2001 Title III
[1533] Tony Harvey, 'Beware of dirty laundry' [2015] 165 New Law Journal 18, citing Professor Jonathan Fisher QC; also, please see Fletcher N. Baldwin Jr., 'The Financing of Terror in the Age of the Internet: Wilful Blindness, Greed or a Political Statement?' [2004] 8(2) Journal of Money Laundering Control 127-150
[1534] Baldwin Jr. (n 1533) 131
[1535] Cassella (n 3) 92

Moreover, the AML compliance is aimed at detecting convoluted transactions aimed at concealing or disguising the source of the money, or its ownership, or its destination; or at converting a criminal asset into a different one or converting local into foreign currency, etc.[1536] While the proceeds of crime involve tainted assets capable of drawing the attention of regulated person and law enforcement, TF mostly involves relatively small amount of money usually deposited or withdrawn in smaller transactions which may not attract the attention of the regulated firm and law enforcement.[1537]

It is pertinent to state that AML compliance obligations were designed to focus specifically on transactions and to a certain extent on persons through the conduct of CDD – and the mission is to trace the proceeds of crime.[1538] As the intended terrorist activity comes after financing, AML compliance may not be able to uncover future terrorist plots since the transactions in relation to TF does not indicate the purpose for which it is intended.

While the use of forfeiture law is an attempt to deprive criminals the fruit of their illicit labour and to restrain ML, and the use of money to further criminal activity such as TF, the dynamic nature of terrorist could limit the efficacy of such measures.[1539] For example, while the blacklisting of terrorist organisations and freezing their assets may disrupt TF, that may affect only the large and known organisations – and probably temporarily.[1540] Since terrorists operate in cells and their operation does not usually involve large amount of money, they may not have the need of conducting their

[1536] ibid
[1537] Gauri Sinha, 'AML-CTF: a forced marriage post 9/11 and its effect on financial institutions' [2013] 16(2) Journal of Money Laundering Control 142, 149 (sometimes involving money of clean origin)
[1538] Gouvin (n 99) 973
[1539] Baldwin (n 370) 543
[1540] They search for loopholes to launder their assets. Please see ibid 544

businesses through banks.[1541] They can easily use alternative means of remittance such as the hawala, to move funds around.

Thus, neither the AML compliance measures nor asset forfeiture could on their own effectively disrupt TF. Consequently, intelligence is key to the disruption of TF. In this regard, information sharing within the financial sector and between the financial sector and the law enforcement and intelligence agencies would be helpful in disrupting not only TF, but also ML.[1542]

5.3 AML COST

In evaluating the effectiveness of AML law in disrupting ML/TF, it is pertinent to weigh the AML cost against the impact of AML law and practice on ML/TF.[1543] For the purpose of this research, this thesis defines the term AML cost as the cost of complying with the AML law (including opportunity cost), and cost incurred as a punishment for non-compliance, including compliance remediation cost.

AML cost can be classified as direct (incurred as a result of complying with the law, rules and regulations) and indirect (such as the opportunuity cost).[1544] Although government may incur costs in establishing and administering the AML regime,[1545] this thesis focuses on the cost incurred by the private sector in complying with the AML regime and for failure of compliance. The reason is, under the current AML regime in

[1541] Sinha (n 1537) 149
[1542] The Patriot ACT 2001 and CFA 2017 s 11 allow for the sharing of information among FIs
[1543] Due to space and time constrain this thesis does not attempt to conduct research on AML costs. Rather, it leverages on the research findings on the subject such as that of the Corporation of London, CCP Research Foundation, Conduct Cost Project Report (CCP Report) [2016]; CELENT (n 1215)
[1544] Johnston and Carrington (n 1212) 57
[1545] Reuter and Truman (n 1444) 93

both US and UK, it is the regulated persons that the law saddles with the responsibility of policing the market to help detect and prevent or disrupt ML and TF.[1546]

Compliance cost include cost related to personnel recruitment, training, customer due diligence, ongoing monitoring, analysis, recordkeeping, and filing report.[1547] Regulated persons also incur the cost of acquiring technology such as costs of purchasing and maintaining AML software, which accounts for 23 per cent of AML compliance costs. [1548] Then, opportunity costs – of forgoing lucrative businesses for AML compliance in an overregulated business environment.

Separate from these costs, regulated persons incur cost due to regulatory sanctions and enforcement actions for breach of AML regulations. They also incur cost in remedying compliance system. The cost regulated persons incur due to AML misconduct is huge. For example, a 2016 Report reveals that the 20 major banks incurred £4.12billion in connection with ML related issues from 2011-2015.[1549]

An estimate of AML cost to regulated persons in the UK and US as at 2004 stood at £253 million and £1.2 billion respectively.[1550] Against these estimates, is the UK and US estimated GDP of £964 billion and £5,850 billion respectively.[1551] In percentage terms, AML cost to the regulated persons stood at 0.026 and 0.021 per cent of the GDP of the UK and US respectively.

[1546] Please see 31 CFR s 1010.100 et seq; MLR 2007
[1547] Celent (n 1215) 11
[1548] ibid
[1549] CCP Research Foundation (n 1543) 16
[1550] The Corporation of London, Anti-Money Laundering Requirements: Costs, Benefits and Perceptions [2005] City Research Series No. Six (City Research Series) 24 (relying on HM Treasury for the UK figures, Reuter & Truman for the USA figures, and cross validating with other sources including Celent (a leading AML software supplier))
[1551] City Research Series 2005 (n 1550) 33

It is alarming that the AML spending trends indicate that the AML cost is on the increase and will continue to rise.[1552] As the law develops incrementally, so are the compliance obligations. As banks are hit by huge fines,[1553] they recruit more staff into their compliance departments, while they also increase spending for AML controls.[1554] The British Bankers' Association (BBA) estimates that its members are collectively spending at least £5 billion annually on core financial crime compliance, including enhanced systems and controls and recruitment of staff.[1555]

Although the figures presented above were estimates, they show that the AML regime imposed a heavy burden on regulated persons. The figures also show that regulated persons in the UK incur more AML cost as a proportion of national GDP than their counterparts in the US. The higher AML cost in the UK can be attributed to the UK's approach to AML regulations.[1556] While the AML related cost is perceived to be higher in the UK than in other jurisdictions, banks are perceived to incur more AML-related cost than other regulated persons, due to their large number of customers, which means carrying out more AML activities such as KYC, and ongoing account monitoring.[1557]

[1552] Celent (n 1215) 9 (stating that AML compliance cost is expected to rise by about 5-10 per cent)
[1553] Jason Demby, 'More Money Spent on Less Money Laundered: The AML Big Data Story' (Datameer, 25 February 2016) <https://www.datameer.com/company/datameer-blog/more-money-spent-on-less-money-laundered-the-aml-big-data-story/> accessed 17 June 2017
[1554] Are Compliance Cost Breaking Banks? (*Trulioo,* 25 August 2015) <https://www.trulioo.com/blog/are-compliance-costs-hurting-banks-bottom-lines/> accessed 17 June 2017
[1555] The Action Plan 2016 (n 695) 12. An ABA survey indicated banks are adversely affected by the growing compliance cost, with small banks being the most affected, please see ABA Survey: Regulatory Burden Limiting Bank Products and Services (*American Banks Association,* 30 July 2015) <http://www.aba.com/Press/Pages/073015BankComplianceOfficerSurvey.aspx> accessed 17 June 2017
[1556] City Research Series 2005 (n 1550) 13-15 (It appears that UK do exceeds the minimum requirements in terms of implementing international AML obligations, resulting in over-regulating the UK's financial services industry more than those of other jurisdiction including the US)
[1557] City Research Series 2005 (n 1550) 25-6

While the AML law keeps on expanding,[1558] compliance burden and cost increase.[1559] However, there is concern that the AML compliance burden is not worth the cost and the regime do not do enough to assist law enforcement or to discourage crime.[1560] Thus, while the AML cost is perceived to be high, overall, the AML regime is perceived to be less effective in disrupting ML.[1561]

On the other hand, despite the UK being perceived as more heavily regulated than other major financial centres, UK AML regime is not perceived as being more effective at detecting and deterring ML than the AML regimes in other jurisdictions.[1562]

5.4 WHAT IS THE PROBLEM WITH THE AML LAW

Having concluded in the previous sections that the UK and US AML law do not effectively disrupt ML, this section investigates which aspect of the AML regime is not functioning properly. As the focus of the fight against ML has now shifted to disruption,[1563] the UK and US are not in short of AML law – primary and subsidiary legislations.[1564]

In addition, the AML law is broad in both jurisdiction,[1565] while the case law has also developed over the years.[1566] In addition, regulators and industry supervisors issue

[1558] For example, the CFA 2017 that has just received a Royal Assent has expanded the UK AML landscape substantially. Similarly, the UK AML regulatory framework is expected to expand when MLR 2017 is enacted on 26 June 2017
[1559] Harvey (n 1244)
[1560] Rider and others (n 1172) 202
[1561] City Research Series 2005 (n 1550) 26
[1562] ibid 4
[1563] The Action Plan 2016 (n 695) 3
[1564] Rider (n 41) 217 (In the US, a bill seeking to amend Subchapter II of Chapter 53 of Title 31, United States Code to empower the Secretary of the Treasury to require FIs to maintain records and file reports on beneficial ownership of US entity has been sent to Congress)
[1565] The US ML criminal statutes –Title 18 USC ss 1956 and 1957 – are very broad, in that knowledge that the asset involved is a proceed of a SUA is enough to satisfy the mens rea requirement of s 1957, while there are more than 150 predicate crimes which can give rise to ML charges. POCA 2002 AML provisions are also wide in that the ss 327, 328 and 329 captured any form of dealing with proceeds of crime

guidance to help regulated persons comply with the law.[1567] The criminal aspect of the AML law appears to be wide-ranging in both jurisdictions,[1568] though there may be some difficulty in securing a conviction.[1569] Parallel to the criminal law is the regulatory law.

With the vast array of AML law in both UK and US, the question here is, what is the problem with the AML law? Professor Richard K. Gordon took a radical view on the measures taken to prevent ML and concluded that the preventive measures cannot work and that they need to be rethought.[1570] His view re-echoed an earlier view on the preventive strategy, albeit in a radical way.[1571]

So, looking back at the two-pillar structure of the AML law, the preventive pillar play a significant role in disrupting ML, because the pillar should serve as the obstacle to criminals. It is only when laundering has occurred or has been attempted that investigation, prosecution and confiscation kick in. The success of the enforcement pillar of the AML system partly depends on the efficiency of the preventive pillar.

[1566] In the US, loads of case law have developed over the years in support of the US AML laws – cases such as: Stark v Connally, 347 F. Supp 1246 (ND Cal 1972); California Bankers Association. v. Shultz, 416 U.S. 21 (1974); United States v St. Michael's Credit Union, 880 F.2d 579, 584 (1st Cir 1989); United States v Campbell 977 F.2d 854 (4th Cir. 1992); R v Anwoir [2009] 1 W.L.R. 980 and R v F [2008] EWCA Crim 1868; [2008] Crim LR 45 (Where the Court of Appeal held that the prosecution need not to point to a particular crime that generated the proceeds, resolving a real difficulty prosecution faced in the fast)

[1567] For example, the FCA issued guidance, as part of its Handbook to help regulated persons comply with the law; a similar guidance was issued by the JMLSG to help its members comply with the law

[1568] Cuellar (n 118) (…the criminal statutes that govern who gets charged, convicted, and sentenced for money laundering give authorities tremendous power to call almost anything that involves money from crime, a "money laundering offence")

[1569] Rachel Ratliff, 'Third Party Money Laundering: Problem of Proof and Prosecutorial Discretion' [1996] 7 Stanford Law and Policy Review 173, 175; please also see United States v Jewell 32 F.2d 697 (9th Cir. 1976)

[1570] Richard K Gordon, 'Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing' [2011] 21 Duke Journal of Comparative & International law 503, 507

[1571] Cuellar (n 118)

While acknowledging that regulated sector is better equipped and positioned to police the financial market,[1572] the preventive pillar cannot be effective in disrupting ML without the full cooperation of those who handle people's wealth. Is the regulated person willing to shoulder the responsibility of disrupting ML? At the very beginning, banks were reluctant.[1573] The regulated entities did not only refuse to fully comply with the recordkeeping and reporting statute but also challenged the record keeping and reporting requirements (which is deemed to be part of the useful tool in disrupting ML) unsuccessfully.[1574]

It was after Bank of Boston was sanctioned that banks in the US started to file reports.[1575] Even the banking supervisors never wanted to become involved in law enforcement as their main concern was about the safety and soundness of the banking system.[1576]

5.5 CONCLUSION

Taking various reports cited above together with the informed judgements of different scholars, the AML cost, and the analysis of the law and practice relating to ML, this thesis concludes that the law and practice relating to ML in UK and US do not effectively disrupt ML and TF. The effectiveness of the AML compliance is key to ensuring the disruption of ML. Thus, various enforcement actions that were taken against regulated persons in both UK and US for the failure of compliance suggest that the law and practice in both jurisdictions are defective.

[1572] ibid 366

[1573] In the US, from the very beginning banks were reluctant because they thought that they were not the target of the recordkeeping and reporting statute

[1574] Stark v Connally 347 F. Supp. 1242 (ND Cal 1972); California Banker Association v Shultz 416 U.S. 21 (1974)

[1575] Rush (n 223) 474

[1576] Reuter and Truman (n 1444) 79-80

Once compliance does not work, criminals will have unfettered access to the financial system, and hardly would regulated persons detect ML activities. Thus, the system will not be able to disrupt ML and TC. In the US, failure to place AML obligation on lawyers appears to undermine the US AML law. As lawyers are gatekeepers to the FIs, inability to bring them within the ambit of the BSA 1970 undermines the effectiveness of the US AML law. Moreover, private banking poses a threat to the US AML law. Criminals exploit the secrecy and privacy inherent in private banking to launder proceeds of crime.

As discussed above, there are lapses in the UK's AML landscape. However, CFA 2017 has amended POCA AML provisions substantially. The Act introduced UWO into the UK statute book. UWO is meant to strengthen the civil recovery provision of POCA. As criminals launder proceeds of crime just for it to resurface clean, UWO will compel criminals to explain the provenance of their wealth which appears to be beyond their known earnings.

CFA also overhauls the way SAR is handled. As the consent regime is now reformed, law enforcement agencies can now seek the extension of the 31-day moratorium period up to six times in succession. This is to enable the law enforcement agencies to conduct a thorough investigation and uncover evidence, particularly when evidence is located abroad, as it is the case in most foreign corruption cases. Also, the Act allows for sharing of information between the law enforcement and regulated persons on the one hand, and among the regulated persons on the other. However, it remains to be seen the impact this amendment will make to ML and TF and how soon those impact will be felt.

This thesis has appraised the law and practice relating to ML in the UK and US. Consequently, this thesis draws conclusions that the US and UK AML legislation and practice do not effectively disrupt ML and TF in both jurisdictions. This thesis now explores the factors that undermine the AML law and practice in the UK and US.

CHAPTER 6: CONCLUSION – ENHANCING THE LAW AND PRACTICE

> Of course, the application and administration of a legal procedure can be tested and found to be efficient or otherwise, but the assessment as to what impact it makes on the…activity against which it is directed, presupposes an ability to quantify the extent of the relevant activity.[1577]

6.1 INTRODUCTION

This thesis concludes that the law and practice relating to ML in UK and US do not effectively disrupt ML/TF. This conclusion, however, does not mean that every aspect of the law and practice as they were and are today, are not working and therefore the AML law and practice should be abandon altogether. Rather what is needed is what the two jurisdictions have been doing and are still doing – continuous review of the law and practice relating to ML to close the loopholes and improve their efficiency.

It has been seen throughout this research that the law and practice relating to ML, as they evolve, in the USA and UK had gaps, which criminals have been exploiting to breach the law and compromise the practices and procedures established to ensure proper AML compliance. While the law undergoes amendments from time to time to confront new threats and to remedy defects in the law, the compliance aspect of the AML law also keeps expanding to cover many regulated persons that hitherto, either were not covered or were partially covered. However, despite being amended the existing AML law and practice failed to prevent ML. Rather ML persisted in both jurisdictions.

In this final and concluding chapter, this thesis searches for factors that undermine the effectiveness of the law and practice as well as ways to strengthen the law and practice

[1577] Rider (n 41) 218-219

relating to ML. For example, a large volume of CTRs and SARs has been a concern not only to those who file them, but also to those who analyse them, as well as the authorities – because the many genuine transactions conceal the few suspicious ones.

Because of the ineffectiveness of the law and practice, certain measures need to be taken to enhance the disruptive effect of both AML law and practice. Both new and existing law can be useful in this regard. In order not to exceed the word limit, this chapter restricts the analysis to two issues. First, this chapter explores factors that undermine the law and practice relating to ML. Secondly, it then analyses the two ways – UWO and whistleblowing – through which AML law and practice can be strengthened.

6.2 FACTORS AGAINST AML LAW AND PRACTICE IN US AND UK

This section explores factors that undermine AML law and practice in both UK and US. These factors are: shifting the responsibility of detecting ML from government shoulders to the private sector; emphasis on following the money; the large volume of data; collaboration with the insiders, and Shifting focus from predicate crimes to ML.

6.2.1 SHIFTING THE RESPONSIBILITY OF DETECTING ML FROM GOVERNMENT'S SHOULDERS TO THE PRIVATE SECTOR

A major factor that makes AML law ineffective is shifting government's responsibility of disrupting criminal activities to the financial sector and at no cost. Since 1970, regulated persons (banks in particular) were placed under a duty to report their

customers' financial activities.[1578] With the birth of FATF placing responsibility on the financial sector to police criminals became a norm.[1579]

Obligation is placed on the regulated persons to establish and maintain a compliance programme to prevent themselves from being used as ML conduit.[1580] Failure to perform the tasks required under an AML compliance programme attracts various sanctions.[1581] Under this approach, authorities place a duty on regulated persons to serve as detectives for no payment or reward of any kind.[1582]

On the other hand, regulated persons get punished for not preventing a third party from committing ML offence.[1583] Thus, regulated persons must place their customers and their transactions on extensive surveillance with a view to disrupting the flow of proceeds of crime; doing otherwise attracts various sanctions.

Traditionally criminal law does not place positive duty to report or prevent crime.[1584] However, corporate reporting exists long before the AML law imposes a duty on regulated person to report financial activities of their customers.[1585] The imposition of duty on regulated persons to report suspicion of ML is justifiable on the basis of the social cost of crime, the benefits of incorporation, and corporate social

[1578] BSA 1970, being the starting point of the US AML regime, mandated banks to file currency transaction reports. While in the UK, it was DTOA 1986 s 24(3)(a) that first placed duty – albeit indirectly – on the banks to report suspicion of drug ML

[1579] FATF on ML was established by the G-7 Summit that was held in Paris in 1989 as a response to mounting concern over ML; it has since expanded its membership and also a number of FATF style regional bodies have been establish by other jurisdiction around the world to combat ML and TF

[1580] FATF 40 Recommendations R5 – 16

[1581] ibid R17

[1582] Alldridge (n 42) 75

[1583] Rider and others (n 1172) 339

[1584] Hall (n 172) 645-49 (the author provides a detailed analysis on the imposition of duty to report criminal activity)

[1585] In the US for example, it is a requirement for corporations, while making public offer, to make a full disclosure of material information regarding the securities they are offering (Securities Exchange Act 1933 s 5, 15 USC s 77 (1994)); it is an offence to make material misrepresentations relating to the trading of securities (Securities Exchange Act 1934 s 10(b), 15 USC s 78 (1994))

responsibility.[1586] It is more justifiable on the premise that, since banks and other regulated persons serve as conduits through which proceeds of crime flow, one of the most effective ways of disrupting the flow of those proceeds is for the banks to intercept them.[1587]

While the imposition of this duty comes with costs, there is concern that the burdens placed on regulated persons are not cost-effective and do not do much in reducing crimes or assisting law enforcement.[1588] While authorities are very clear about the penalties for dereliction of duty, and of course regulators and supervisors provide regulated persons with guidance on how to discharge their compliance obligation, little guidance is provided on how to differentiate illegal from legal assets.[1589] Thus, there is a tendency that proceeds of crime may pass undetected since assets do not have any specific character.

One of the reasons given for involving regulated persons in policing is safeguarding the stability and integrity of financial system.[1590] However, that reason has been disputed, as there is no evidence to suggest that any bank (or regulated persons) has collapsed because the bank facilitated ML.[1591] Furthermore, while UK and US laws permit sharing of recovered proceeds of crime between the State and law enforcement, the dirty money has never threatened the existence of either the States or their recovery agencies. Then why is dirty money harmful to banks and not to the recovery agencies?

[1586] Pamela H. Bucy, 'Epilogue: The Fight against Money Laundering: A New Jurisprudential Direction' [1992] 44 Alabama Law Review 839, 847-50
[1587] ibid 840
[1588] Rider and others (n 1172) 202
[1589] Sharman (n 1448) 8
[1590] Preamble to Fourth Money Laundering Directive (EU) 2015/849 stated that, flows of illicit money can damage the integrity, stability and reputation of the financial sector
[1591] Alldridge (n 42)36

Once the proceeds of crime have been recovered through the legal process they lose their dirty character and become clean – the "dirt" in the money is a mere attribute but not physical filth capable of contaminating other clean assets held by the bank. Meanwhile, with the advance in technology, there may be no need to move money in their physical form. Thus, the difference between legal proceeds and proceeds of crime is not based on their physical attributes but legal interpretation. Consequently, in the absence of any law that criminalises ML, proceeds of crimes are a good investment that increases banks' (or even nations') liquidity.[1592] While nations have a legitimate concern to prevent corruption and ML, if not for anything but capital flight, banks need not worry, provided the assets end up with them.

Another possible argument that could be advanced in favour of involving regulated persons in disrupting the proceeds of crime without any compensation is that the social cost of crime may affect their operations and profits. For example, where there are drugs there is a crime. Thus, businesses might have to increase their security budget by, for example, raising the level of security around their premises and their technical infrastructure to protect their investment.

Regulated persons may have to pay protection money in the form of insurance cover or any other form to criminals to guard against theft, armed robbery or even arson.[1593] In this situation, there is a clear need for the regulated persons to assume the role of public authorities of policing to protect their businesses, personnel and assets; and to also bring down cost and increase profits.

[1592] ibid
[1593] Rider (n 10) 108

Assuming ML actually threatens the integrity of the financial system, and the authorities have failed to protect regulated persons against the threat, then it is expected that regulated persons will have the incentive to protect themselves.[1594] However, as it stands now in the US and UK, regulated persons do not fit into this situation. Consequently, placing a duty on regulated persons to disrupt ML created a costly unfunded mandate. [1595] While the unfunded mandate increases the cost of doing business, it also reduces the profits.[1596]

Although regulated persons may be influenced by the force of law to become involved in disrupting the crime of others without compensation,[1597] the decision to take up the unfunded mandate of policing the financial market is likely to be influenced partly by the cost and benefit of discharging the mandate. Regulated persons may also weigh the consequences of non-compliance with the mandate against the possible benefits of going against the mandate. If the benefits of going against the unfunded mandate outweigh the consequences, some regulated persons are likely to launder or allow others to use their facilities to launder other people's dirty money and face regulatory sanctions when they are caught.[1598]

[1594] Gordon (n 1570) 529-30 (citing many scholar at footnote 120 the author stated: "In the Anglo-Saxon world enforcement of the criminal law was almost entirely private up until the first half of the nineteenth century, when the state began to take a dominant role in policing, investigating, and prosecuting breaches of the criminal law)

[1595] John F Gilsinan and others, 'The Role of Private Sector Organisations in the Control and Policing of Serious Financial Crime and Abuse' [2008] 15(2) Journal of Financial Crime 111, 122

[1596] The Action Plan 2016 (n 695) 12 (The British Bankers' Association (BBA) estimates that its members are collectively spending at least £5 billion annually on core financial crime compliance, including enhanced systems and controls and recruitment of staff)

[1597] Gordon (n 1570) 530

[1598] Rider (n 41) 217 (Stating that since the days of Meyer Lansky there have been individuals who are prepared, for a fee or part of the action, to provide their services to whoever may wish to have their money hidden or laundered)

Thus, in this circumstances relying on regulated persons to police the financial system may not be the ineffective way of disrupting ML.[1599] If the desired result of disrupting ML and the underlying predicate crimes is to be achieved, a different approach should be adopted to get the commitment of the financial sector.[1600]

The report of the US Permanent Subcommittee on Investigation on HSBC reveals that effectiveness of AML laws in disrupting criminal finance depends largely on the willingness of regulated persons to co-operate genuinely in complying with the AML law.[1601] While obtaining the co-operation of the financial sector is very vital, placing an unfunded mandate on the regulated persons hinders the realisation of such co-operation, which is key to ensuring the effectiveness of AML law in disrupting ML. Indeed, regulated persons can frustrate the effectiveness of AML laws even where they implement them.

6.2.2 LARGE VOLUME OF DATA

The large volume of CTR and SAR is among the factors that affect the effectiveness of the AML law in disrupting ML. Although CTR and SAR are vital tools for detecting crimes, the volume of filings undermines the effort being made to detect and disrupt ML.[1602] Meanwhile, the number of reports keeps on rising by the year. Statistics reveals that 1,276,509 and 1,726,971 SARs were filed in 2013 and 2014 respectively in the

[1599] Gilsinan and others (n 1595) 112-123

[1600] Gilsinan and others (n 1595) 114-15 (One of such approaches is outsourcing public policing by hiring private security firms to protect strategic installations, or private companies to gather data for law enforcement purposes. If this can be replicated with banks, it could motivate the banks to genuinely embark on a mission to disrupt ML)

[1601] United States Senate Permanent Subcommittee on Investigations, U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History (Report 202/224-9505 and 202/224-3721). This is in line with the view expressed by Hyland and Thornhill (n 842) 30-450

[1602] The Patriot Act 2001 s 366(a) (where Congress noted that despite the Money Laundering Suppression Act 1994, which sought to reduce the number of CTRs, the volume of CTRs is interfering with the effectiveness of the enforcement of AML law because some FIS are not utilizing the exemption system, or are filing reports even if there is an exemption in effect)

US.[1603] This shows an increase of 450,462 reports or 35.29 per cent increase in just one year. By the middle of the fiscal year 2015, almost a million SAR was filed.[1604] On the other hand, about 15 million CTRs were filed in 2011.[1605] In the UK where the AML law does not require regulated persons to file CTR, 4,872 reporters filed 381,882 SARs in 2014/15 with the 83.4 per cent of these reports coming from retail banks. [1606]

Given the huge number of these reports, it is a huge task for NCA and FinCEN to carefully consider and analyse each of these reports and distill from them meaningful intelligence which could lead to actual disruption of ML. Indeed, the huge number of these reports suggests defensive reporting on the slightest suspicion to avoid a huge penalty for violation of reporting statutes. The case of **Shah v HSBC**[1607] is just one example. How many SARs lead to law enforcement action is unknown because both NCA and FinCEN SARs statistics did not give any meaningful insight on how these reports are utilised.

Much more problematic is the large volume of CTR filings in the US. Based on the FinCEN 25 minutes per report conservative estimate, it was estimated that about 4.5 million staff hours were required to file the over 15 million CTRs filed in 2006.[1608] If it takes an employee of a regulated person 25 minutes to file one CTR, then more time is needed to analyse that same report by FinCEN staff. One thing is very clear – large numbers of staff at both FinCEN and NCA are required to handle these reports

[1603] FinCEN, SAR Statistics Issue 2 [2014]. There is a slight decrease in SARs annualy beginning 2012 (cf n 1603);
[1604] ibid. According to the latest FinCEN SAR statistics, almost 1 million SARs were filed in 2016 (FinCEN, SAR Issue 3 [March 2017])
[1605] FinCEN, 'Fiscal Year Annual Report' [2011]
[1606] The Action Plan 2016 (n 695) 13
[1607] [2010] EWCA Civ 31
[1608] House Committee on Financial Services, Suspicious Activity and Currency Transaction Reports: Balancing Law Enforcement Utility and Regulatory Requirements: Hearing Before the Subcommittee on Oversight and Investigations [2007] 110th Congress 84

properly.[1609] Consequently, with this large number of reports, there is every tendency that criminally-tainted transactions can hide under genuine commercial transactions. Thus, undermining the effectiveness of the AML laws in disrupting ML.

6.2.3 EMPHASIS ON FOLLOWING THE MONEY

Right from the beginning, the fight against ML and the underlying predicate crimes places emphasis on following the money through tracing. Audit trails allow law enforcement to trace financial transactions to criminals. The legal requirements to create audit trails have been discussed in the previous chapters. But still, at this point, it is worthy of mention that the importance of keeping records and filing reports of financial transaction to regulate ML and seize criminal assets through tracing or paper checks has been emphasised.[1610]

While involving those who handles other people's wealth is necessary if this approach is to succeed, equally vital is the creation of accurate and accessible records of financial transactions because, without them, there will be no trail to follow.[1611] The question, however, is whether this approach is effective in disrupting ML. The argument has been made that creating audit trails of financial transactions and following these trails is the only way to combat white-collar crime and one of the few effective ways to combat illegal drugs and drug-related crime.[1612] While this argument sounds strong, criminals do engage in convoluted financial arrangements to complicate paper trails.[1613]

Thus, creating paper trails may not necessarily disrupt ML because the use of those trails might be useful only when the laundering scheme is completed to help identify the

[1609] Byrne (n 76) 820
[1610] 31 USC s 5311
[1611] Bucy (n 1586) 847
[1612] ibid
[1613] Marco Arnone, 'International anti-money laundering programs: Empirical assessment and issues in criminal regulation' [2010] 13(3) Journal of Money Laundering Control 226, 238

criminal and the predicate crime, and also to help uncover the whereabouts of laundered assets. And by that time, as Professor Barry Rider has pointed out, the criminal might be on Copacabana beach, and the money is in a Liechtenstein Anstalt.[1614]

As it is now, regulating ML and seizing of criminal assets through tracing or paper checks does not and in fact, cannot work for many reasons. One of these reasons is the large volume of data generated through the filing of reports that provides the trail. As discussed above, the large number of CTR and SARs filings is enough to frustrate timely detection and disruption of ML. Tracing involves connecting the dots in order to get to the crime and to prevent it. Because of the large volume of data searching for the right dots would be like searching a needle in a haystack.[1615] Thus, it is unlikely that paper trail alone could flag any suspicion.[1616]

Another reason why tracing through the paper trails is never going to work is how sophisticated financial transactions have become. Criminals engage in convoluted transactions to avoid paper trail altogether.[1617] Once proceeds of crime are successfully placed into the financial system, it will be difficult to trace those proceeds back to the underlying predicate crime.[1618] Layering gives another opportunity for criminals to distance the asset further from its criminal source.[1619] Complex transactions (sometimes through dummy corporations); creating lengthy and ambiguous paper trails;[1620] offshore

[1614] Richard Alexander, 'Case Comment: Does the Akzo Nobel case spell the end of legal professional privilege for in-house lawyers in Europe?' [2010] 31(10) Company Lawyer 310
[1615] Sinha (n 1537) 149-50
[1616] Amann (n 64) 226
[1617] Sucoff (n 371) 96
[1618] City Research Series 2005 (n 1550) 11
[1619] Keesoony (n 941) 131
[1620] Carwile and Hollis (n 10) 325,

banking; and corruption frustrates efforts to use tracing to regulate ML and to seize criminal assets.[1621]

There is also a problem of evidence.[1622] The challenge that criminals face the most is how to legitimise their illicit earnings. This makes them to engage in laundering activities. At that stage, criminals might leave behind their footprints. The ability to follow those trails is key to a successful investigation, prosecution, and confiscation of proceeds of crime. Leaders of organised crime groups are difficult to investigate let alone prosecute because they distance themselves from the crime. Thus, paper trails can provide a useful link for investigation purposes.[1623]

However, criminals tend to devise means of confusing the onlooker and confounding the inquirer. Bearer shares pose particular problem in this regard, and because they are not registered, ownership of a company and control over assets may be deceptive, leaving behind an ambiguous paper trail.[1624] Similarly, criminals engage in structuring to avoid triggering reporting requirements thereby avoiding paper trails – leaving behind no evidence.

Without evidence, law enforcement would find it difficult to prosecute offenders. In the absence of direct evidence, the prosecution must resort to circumstantial evidence to obtain a conviction and to secure the confiscation of the illicit proceeds. Using

[1621] Andrew Haynes, 'The Struggle Against Corruption – A Comparative Analysis' [2000] 8(2) Journal of Financial Crime 123,
132
[1622] For an in-depth analysis on this please see Linn (n 67) 407; Kenneth Murray, 'The uses of irresistible inference: Protecting the system from criminal penetration through more effective prosecution of money laundering offences' (2011) 14(1) Journal of Money Laundering Control 7; Ratliff (n 1579) 173
[1623] Amann (n 64)207 citing David A. Chaikin, Money Laundering as a Supra-National Crime: An Investigatory Perspective, in Principles and Procedures for a new Transnational Criminal Law (Albin Eser & Otto Lagodny eds., 1992) 415, 420-21
[1624] Andrew Haynes, 'The Wolfsberg Principles – An Analysis' [2004] 7(3) Journal of Money Laundering Control 207, 209

circumstantial evidence to prove AML violations is nothing new.[1625] AML violation under POCA 2002 can be proven using circumstantial evidence[1626] by showing that the manner in which the relevant funds or assets were handled gave rise to an "irresistible inference" that the money was criminal without the need to identify the nature of the predicate crime.[1627]

This is a departure from earlier decisions of the court that require the prosecution to prove at least the class of offence that constitute the unlawful conduct.[1628] However, uncertainty still remains as the court in **R v. Geary** held in relation to ML prosecution under POCA 2002 section 328(1) that the arrangement to which this section referred to had to be one, which relates to a property of criminal origin at the time when the arrangement began to operate on it.[1629] It was further held that to say that section 328(1) extended to property which was originally legitimate but became criminal only as a result of carrying out the arrangement was to stretch the language of the section beyond its proper limits.[1630]

In the US except in one situation, proving that the funds involved are derived from a SUA is necessary to secure a conviction under 18 USC sections 1956 and 1957.[1631] Finding evidence to support ML or TF charges under these statutes could be difficult as sometimes the evidence is located in a foreign jurisdiction or is otherwise difficult to

[1625] For example, see: United States v. Hovind, 305 F. App'x 615, 621 (11th Cir. 2008) (testimony against the defendants showed that defendants knew of and complained about reporting requirements); MacPherson, 424 F.3d at 193 (stating that s 5324 makes no reference to the reason why a person structures); United States v. Gibbons, 968 F.2d 639, 645 (8th Cir. 1992)
[1626] Such as audit trail evidence, lack of legitimate income to account for amounts transferred, obvious links to criminality such as drug-contaminated notes, accomplice evidence, etc
[1627] R v. Anwoir & Others, [2008] EWCA Crim 1354; HM Advocate v. Ahmad, [2009] HCJAC 60 Appeal No XC261/06; for an in-depth analysis on this please see Murray (n 1622) 9-15
[1628] For example, see R v W [2009] 1 W.L.R. 965
[1629] R v Geary [2010] EWCA Crim 1925
[1630] [2010] EWCA Crim 1925
[1631] Except in international transportation of funds to promote SUA 18 USC s 1956(a)(2)(A), all ML offenses require prosecution to proof that the funds in fact were derived from SUA 18 USC s 1956(a)(1), (a)(2)(B), (a)(3) and 1957

extract.[1632] Where there is no direct evidence to prove ML violation, linking the proceeds of crime to the predicate crime through tracing may be quite difficult if not impossible.[1633]

The underground economy is yet another reason why tracing will not work in regulating ML and seizure of proceeds of crime.[1634] The underground economy is characterised by cash transactions outside the formal banking system. Cash is an important means of financing crimes, including TF because it is anonymous and nearly undetectable.[1635] Cash transactions have certain advantages. It doesn't require authorisation or special hardware to complete financial transactions; it can stay below the radar of law enforcement; it is instant, final and irreversible; and anybody can claim ownership of cash.[1636] Thus, a cash transaction is a convenient way of concealling the origin of proceeds of crime, or the illegal purpose for which the money is intended.

Because cash transaction hardly leaves traces, it is difficult to regulate ML and seize proceeds of crime through paper checks. The solution to this is to substitute cash transaction with non-cash transactions. Although developed countries have transformed into cashless economies, underground economies poses a challenge to the global fight against ML.[1637] As cash transactions are extremely difficult to hunt and bring down, ML and TF become difficult to disrupt.[1638]

[1632] Linn (n 67) 426 (stating that the US Supreme Court in United States v Bajakajian, 524 U.S. 321, 353-54 (1998) explained that Congress shaped the penalties for cash smuggling and reporting offenses because of "problems of individual proof" of another crime)
[1633] Murray (n 1622) 10
[1634] For analysis on the effect
[1635] Yuliya G. Zabyelina, 'Reverse money laundering in Russia: clean cash for dirty ends' [2015] 18(2) Journal of Money Laundering Control 202
[1636] ibid
[1637] ibid 203
[1638] Sinha (n 1628) 145

Corruption, collaboration with insiders, comingling of funds, and bitcoins and virtual money also make the disruption of ML and seizure of proceeds of crime unrealistic. While these factors and products frustrates the ability to determine the source of the money for the purpose of ML prosecution, it also frustrates efforts to trace and seize proceeds of crime.[1639]

6.2.4 COLLABORATION WITH INSIDERS

As some cases reveal, collaboration with insiders to undermine the effectiveness of AML laws in disrupting ML and the underlying predicate crimes is not uncommon. There are many cases where an insider or insiders collaborate with criminals to launder proceeds of crime. For example, an MSB operator was convicted of ML and conspiracy to launder. The facts of the case reveal how the operator laundered large amounts of sterling that were converted into euros, and a wholesale non-compliance with the relevant MLR.[1640] Other cases reveal similar patterns.[1641] In the US, the case of Lucy Edwards – a very senior official of the Bank of New York – reveals the extent employees go in undermining the effectiveness of AML laws to their own personal gain.[1642]

While authorities rely on the regulated sector to help in disrupting ML, the effectiveness of any AML strategy partly depends on the willingness of the human elements within

[1639] National Money Laundering Risk Assessment [2015] 52 citing Jennifer Shasky Calvery, 'Testimony before the House Subcommittee on Crime, Terrorism, and Homeland Security, February 8, 2012' (saying: "The use of businesses and other legal entities to commingle licit and illicit funds tests a bank's ability to accurately identify sources of funds to determine if transaction activity is suspicious. Even when a bank is able to do so, a business mixing licit and illicit proceeds can frustrate a prosecutor's use of the money laundering charge that prohibits the spending of more than USD10,000 of illicit proceeds" (18 USC 1957))

[1640] R v Syed Abidi [2016] EWCA Crim 1119

[1641] For example, James Ibori was assisted by his lawyer to launder public funds

[1642] US v Peter Berlin and Others 99 Cr. 914 (SWK)

the regulated sector to support the AML system fully.[1643] Almost every enforcement action against a particular regulated person reveals not just the failure of the system but the roles human elements play in undermining the AML law to facilitate ML.[1644]

6.3 STRENGTHENING THE LAW AND PRACTICE

The analysis in the preceding chapters causes this thesis to conclude that the law and practice relating to ML in the UK and US do not effectively disrupt ML.[1645] The first part of this chapter explored some of the factors that undermine the effectiveness of the law and practice relating to ML. The concluding part of this thesis presents two mechanisms that could help reinforce the law and practice relating to ML in both jurisdictions.

6.3.1 SURFACING OF UNEXPLAINED WEALTH

As we have seen, ML involves processes aimed at turning dirty assets into clean.[1646] As criminals would not want to lose the respect they enjoy in their communities, they would not want to associate themselves with crime.[1647] It is not uncommon in some countries to see civil servants and public officials owning properties that are beyond their known legitimate earnings. In other countries, people living easy lives, without legitimate employment could be seen driving expensive cars.[1648] Through ML, proceeds of crime reappear in the legitimate economy very clean. The surfacing of unexplained wealth raises the suspicion as to the legitimacy of the sources of such wealth.[1649]

[1643] Hyland and Thornhill (n 842) 30-450
[1644] FinCEN, In the Matter of JPMorgan Chase Bank Number 2014-1
[1645] Also, the conclusion is the same with regard to terrorist financing
[1646] Rider (n 3) 15
[1647] Rider (n 38) 349 (Professor Barry Rider rightly observed that, criminals no doubt prefer their neighbours and admirers to remain in ignorance of their criminal profile)
[1648] Booz Allen Hamilton, Comparative Unexplained Wealth Order: Final Report [2011] 133
[1649] Rider (n 10) 112

Concerned about the seriousness of the problems and threats posed by corruption to the stability and security of societies, the UN adopted a convention known as UNCAC 2003.[1650] UNCAC urges member states to take action against corruption both in public and private sector.[1651] Wherever there is corruption there is obviously the need for ML services, as the ultimate aim is the enjoyment of the ill-gotten assets.[1652] Thus, UNCAC also urges member states to put in place measures to combat ML in order to make corruption less attractive.[1653]

Unless ML is attacked, crimes that generate illict proceeds will continue to flourish because there is a symbiotic relationship between ML and corruption.[1654] Based on the UNCAC Article 20 definition of illicit enrichment, the term "unexplained wealth" can be described as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.[1655] Prior to UNCAC, a number of countries have enacted in their legal codes the offence of illicit enrichment.[1656]

Unexplained Wealth Orders (UWO) can be described as the legal mechanism through which illicit enrichment or the unexplained wealth can be attacked. The process normally involves court issuing an order, known as UWO, to a person suspected of having accumulated assets worth more than his lawful earnings to explain the source of his wealth. Countries that have in place the unexplained wealth regime include Australia

[1650] For analysis on UNCAC 2003 provisions against corruption and ML the nexus between the two please see Indira Carr and Miriam Goldby, 'Recovering the proceeds of corruption: UNCAC and anti-Money Laundering standards' [2011] 2 Journal of Business Law 170
[1651] See UNCAC 2003 articles 7-13
[1652] Carr and Goldby (n 1650) 172
[1653] See UNCAC 2003 articles 14, 23 and 24
[1654] The Action Plan 2016 (n 695) 21 (The UK made it clear that it will introduce the Unexplained Wealth Orders to tackle financial crimes such as money laundering and money corruption)
[1655] United Nations Convention Against Corruption 2003 Article 20
[1656] Jeffrey R. Boles 'Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations' [2014] 17 New York University Journal of Legislation and Public Policy 835, 849-52

and Ireland. While the US has not followed suit, UK have enacted the UWOs as part of the CFA 2017

Already UK and US have civil forfeiture regimes in place.[1657] However, how does the concept of UWO looks like in practice? To understand the concept of UWO we look at the Australian and Irish models of the unexplained wealth regime.

6.3.1.1 AUSTRALIA

At the federal level, UWO is covered under Proceeds of Crime Act 2002 (Commonwealth). UWO is an order requiring the person to pay an amount equal to so much of the person's total wealth if the person cannot satisfy the court that his wealth is not derived from certain offences.[1658]

Upon application by law enforcement, a court with "proceeds-jurisdiction" makes a preliminary UWO for the purpose of enabling the court to decide whether to make an UWO against the person suspected of amassing wealth beyond his lawful means.[1659] The presumption is that wealth has been unlawfully acquired unless the respondent proves otherwise on the balance of probabilities.[1660] If the court is not satisfied with the person's explanation that whole or part of the person's wealth is derived from his lawful means, the court proceeds to make a final order against the person to pay an amount equal to his "unexplained wealth" to the commonwealth.[1661]

From the above, it can be understood that the unexplained wealth regime proceeds in two basic stages. First, the preliminary UWO (which appears to be an investigatory

[1657] POCA 2002 part 5; 18 USC s 981
[1658] PoCA 2002 (Cth) s 179(A)
[1659] ibid s 179(B) (preliminary UWO is revocable –s 179(C)
[1660] David Lusty, 'Civil Forfeiture of Proceeds of Crime in Australia' [2002] 5(4) Journal of Money Laundering Control 345, 355
[1661] PoCA 2002 (Cth) s 179(E)

tool) is issued to enable the court determines whether the person has unjustly enriched himself. Secondly, if the respondent could not provide a satisfactory explanation, the court issues the actual UWO (a civil recovery mechanism) to order the person to forfeit to the federal government of Australia the unexplained wealth he unlawfully accumulated.

As UWO is civil in nature, the burden of proving that the wealth is lawfully obtained is on the respondent.[1662] This requires the court to assume that the allegations by law enforcement regarding unexplained wealth are correct unless the respondent proves otherwise on the balance of probabilities.[1663]

There are differences and similarities between UWO and civil forfeiture regimes. The standard of proof required for both regimes is the civil standard (balance of probabilities). With the UWO the burden of proof is on the defendant. Whereas the UK and US civil forfeiture/recovery regimes place on the claimant a reversed burden on the preponderance of the evidence, but after prosecution discharges his burden by showing a 'probable cause'. Secondly, unlike in traditional *in rem* forfeiture, in UWO the prosecution does not have to prove that the property is the instrument or proceeds of crime. Thirdly, civil forfeiture targets the property, while UWO targets the person suspected of accumulating unexplained wealth even though no specific allegation of wrongdoing needs to be made.

The targeting of persons in UWO proceedings renders the proceedings more criminal than civil in nature.[1664] However, in Australia, both regimes have been criticised for

[1662] ibid s 179(E)(3)
[1663] Anthony Gray, Compatibility of Unexplained Wealth Provisions and 'Civil' Forfeiture Regimes with Kable [2012] 12(2) Queensland University of Technology Law & Justice Journal 18, 21
[1664] ibid 23-32

offending Kable principle – for the civil forfeiture being punitive and for UWO being both punitive and for reversing the burden of proof.[1665]

6.3.1.2 IRELAND

Two statutes underpin the UWO regime in Ireland – PoCA 1996 and Criminal CAB Act 1996. While PoCA provides the legislative framework for making the UWO, the CAB Act establishes CAB, which is an institutional framework to help with the PoCA's implementation. CAB is a joint – an elitist type and well-resourced – operational unit, with staff from police, prosecutors, tax, and social welfare agencies, each bringing its powers to the CAB.

Unlike in Australia, the Irish version is not specifically referred to as UWO. However, both are the same in substance, as both are non-conviction based forfeiture. The UWO was introduced in Ireland to attack organised crime which at the time flourished with impunity.[1666] The Irish UWO proved successful in disrupting and dismantling criminal activities in Ireland forcing criminals to flee to countries in Europe and to go underground.[1667]

While the UWO regime led to the forfeiture of criminal assets, the interlocutory provision section made the regime less efficient and swift because criminal property cannot be forfeited to the state before seven years after the interlocutory order is made except by agreement of the parties to dispose the asset earlier.[1668] However, following its initial impact a low success is being recorded probably due to the initial impact which makes the organised crime groups to shift base and become wiser at concealing

[1665] Kable v DPP (NSW) [1996] 189 CLR 51; International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319
see ibid 32-4
[1666] Booz Allen Hamilton (1648) p 122
[1667] ibid 132
[1668] PoCA 1996 s 4 (Ireland)

their activities and their illicit proceeds.[1669] Nevertheless, overall the Irish UWO is a success. In fact, because of its devastating effect on criminals, defence lawyers have described it as radical and oppressive.[1670] Thus, its constitutionality has been challenged on many grounds, but it has been upheld.[1671]

Having provided some background of the Irish UWO, we now look at how it works in practice. The first stage. Where CAB suspects a person of having a wealth of a suspicious source, the first stage is to apply to the High Court for an *ex parte* interim order to freeze the assets.[1672] The order may be granted where it is shown on the balance of probabilities to the satisfaction of the court that: (i) a person is in possession or control of property, (ii) that property constitutes directly or indirectly the proceeds of crime, and (iii) the property's value is greater than £10,000 or €11,335.44 or USD12,699.90.[1673]

The order remains in force for 21 days unless an application is made to vary or discharge the order.[1674] All parties who might be affected by the order will be informed of the making of the order and conditions and restrictions thereof. An application for the freezing order must be brought within 21 days, but there is no requirement that the application be heard in courts during that period.[1675]

The second stage in the process is for the CAB to apply for an interlocutory order which further restrains and freezes the property for a period of seven years, prohibiting the

[1669] Booz Allen Hamilton (n 1648) 133
[1670] ibid 122
[1671] Gilligan v Criminal Assets Bureau [1998] 3 IR 185; Murphy v GMBC HC, 4th June 1999 (unreported).
[1672] PoCA 1996 s 2 (Ireland)
[1673] ibid s 2(2) (Ireland) the Euro and Dollar value is based on the current exchange rate of the pound
[1674] ibid s 2(3)
[1675] McKv. F and other [2005] IESC 5 (SC)

respondent or any person from dealing in the property.[1676] For the interlocutory order to be made, section 3(1)(a)-(b) must be satisfied by tendering evidence to the court. The order may be varied or discharged where the order causes injustice to the respondent.

While a freezing order or interlocutory order is inforce, or at any stage during section 2 or 3 proceedings, the court may order the respondent to file an affidavit with the High Court to explain the source of his wealth and the income acquired during such period not exceeding six years ending the date of the application for the order.[1677] There is a rebuttable presumption that all property acquired six years before the proceedings represents the respondent's proceeds of crime.

If the respondent could not satisfy the court that the property does not constitute, or was not acquired with, directly or indirectly the proceed of crime, the court may issue a disposal order.[1678] The effect of the disposal order is to forfeit the property to the State divesting the respondent of any right upon the property.[1679]

Comparing the two models, the Irish model was more successful than the Australian model. Although Australia is the first country in the world to identify its law with name unexplained wealth orders, its model was less successful. Compared to Ireland, little forfeiture was achieved in Australia. This is partly because of the push back by the courts, caution on the part of prosecutors to bring actions under these new laws, disagreements between police and prosecutors over how strenuously to use the law, a lack of forensic accounting staff, and strict forfeiture laws for drug crimes that in some

[1676] PoCA 1996 s 3(1) (Ireland)
[1677] ibid s 9
[1678] ibid s 4
[1679] ibid s 4(2)

cases obviate the need for UWOs, downward public support, and the absence of a CAB-like agency.[1680]

Another major factor is that property owners can meet their evidential burden simply by stating that the funds in question were an inheritance or gambling winning. Since in Australia such income does not have to be reported to tax officials, there is no record that prosecutors can use to contradict the respondent's claim, and in the absence of paper trail it is difficult for the government to disprove the property owner's claims.[1681]

In contrast, the Irish UWO proved successful. The two major factors that contributed to the success of Ireland's UWO is the institutional framework – CAB – put in place to implement and support PoCA. Also, Irish UWO enjoys judicial support, as the Irish High Court appoints a judge, assisted by a special registrar, to work solely on forfeiture cases for a period of at least two years. Therefore, this should be a lesson for the UK having just enacted UWO into its statute book.

6.3.1.3 US AND UK

Having learned how the UWO works in practice from both the Australian and Irish models, the thesis now turns on the US and UK. Although US does not have UWO in its strict sense, civil asset forfeiture laws can be found in more than one hundred federal statutes.

They include RICO Act 1970 section 1968, which can be compared with Australian Proceeds of Crime Act 2002(Cth) section 179(B). Like section 179(B), 18 USC section 1968 is an investigatory tool that allows the Attorney General to cause civil investigative demand to require a person to produce documents relevant to racketeering

[1680] Booz Allen Hamilton (n 1648) p 2
[1681] ibid

investigation in his possession.[1682] What the US does not have, is the equivalent to Australian POCA 2002 (Cth) section 179(E).

However, the Department of Justice has funded a research, which studied different models of UWO in some jurisdictions including Australia and Ireland, to consider whether US should adopt UWO into its legal system in addition to its many existing forfeiture statutes.[1683] Although the research team concluded that UWO could be useful if used appropriately and judiciously, the team cautioned that introducing UWO applicable to all offences in the US in addition to the already existing forfeiture laws would be overambitious and ineffective.[1684]

While introducing UWO could be duplication and could also lead to increase in public spending, there appears to be some wisdom in the use of UWO in disrupting ML, because ML makes tracing and recovery of proceeds of crime very difficult (if not impossible). When laundered criminal asset resurfaces clean, though explaining their sources satisfactorily may be difficult. Thus, UWO would be useful as an investigatory tool to assist in forfeiting those illicit assets.[1685]

The AML landscape in the UK received a significant boost following the enactment of CFA 2017, which amended the POCA 2002 substantially. One of the major changes the Act brought about is the introduction of UWO into the UK legal system. The UK UWO resembles the Australian preliminary UWO (POCA 2002 (Cth) section 179B), in that, it is an investigatory tool to assist in civil recovery.

[1682] 18 USC s 1968(a)
[1683] Booz Allen Hamilton (n 1648)
[1684] ibid 165; Boles (n 1656) 835 (critises UWO/illicit enrichment statutes for they offend presumption of innocence, and encroach upon the right to silence)
[1685] Rider (n 3) 14 and 25

CFA 2017 defines UWO as an order requiring the respondent to provide a statement: (a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made, (b) explaining how the respondent obtained the property (including how any costs incurred in obtaining it were met), (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and (d) setting out such other information regarding the property as may be so specified.[1686]

The UWO procedure allows the law enforcement[1687] to apply to the High Court for an order to compel the respondent to explain the nature and extent of his interest in the property in respect of which the order is made, and how he obtained the property including how the cost is met.[1688] The respondent could be the owner or someone having possession of the property.

Before the court issues the order, law enforcement must prove that there is reasonable ground for suspecting that the wealth is disproportionate to known income, respondent is a PEP, he (or an associate) is involved in a serious crime, the property is more than £50,000, and finally, the respondent holds the property.[1689]

If the order is issued the respondent must respond within the time specified in the order, otherwise failure to comply within the specified time triggers the presumption that the property is recoverable.[1690] Where the respondent could not give a satisfactory explanation as to the provenance of the property, or where the respondent fails to

[1686] CFA 2017 s 1 inserts s 362A(3) into POCA 2002
[1687] The law enforcement agencies are: NCA, HMRC, FCA, DPP and SFO (CFA 2017 s 362A(7)
[1688] CFA 2017 s 1 inserts s 362A into POCA 2002
[1689] CFA 2017 s 1 inserts s 362B into POCA 2002 (property's worth was reduced from the initial proposal of £100,000.00 as a compromise for the bill to pass the Lords swiftly)
[1690] CFA 2017 s 1 inserts s 362C into POCA 2002

respond,[1691] then the property is presumed to be recoverable. This would allow the law enforcement to commence civil recovery action against the property under the existing POCA 2002.[1692] Thus, UWO is free standing – it does not require a precursor or parallel civil or criminal proceedings underway before an application is made.[1693]

UWO is intended to have a retrospective effect.[1694] This means that the time the illicit enrichment took place is irrelevant. What is important is the resurfacing of the property. The UWO is to enable the law enforcement to recover property, which otherwise they will not be able to recover for lack of evidence. This could be a situation where the property is in the UK, but the evidence is located abroad and cannot be obtained easily. This could include a situation where assets are successfully laundered, but their emergence into the economy give rise to suspicion as to their origin.

The requirement that the application for UWO must identify the respondent and the respondent must explain the provenance of his property before the court makes the UWO to look like a criminal indictment. However, according to the Home Office, UWO provisions fit into the existing civil recovery scheme under POCA 2002, which means that law enforcement agencies needs to prove, only on the balance of probabilities, that the property is derived from unlawful conduct – a lower standard of proof than would be needed for a criminal offence.[1695]

[1691] Jonathan Grimes and Kingsley Napley, 'Analysis - Unexplained wealth orders: Insight and Analysis' [2017] 1355 Tax Journal 12, 13 (stating ignoring to respond to UWO could lead to a charge for contempt of court)
[1692] CFA 2017 s 1 inserts s 362C(2) into POCA 2002
[1693] Jonathan Grimes and Kingsley Napley, 'Analysis - Unexplained wealth orders: Insight and Analysis' [2017] 1355 Tax Journal 12
[1694] CFA 2017 s 1 inserts s 362B(5)(b) into POCA 2002
[1695] Home Office, Explanatory Notes: Factsheet 2 [2017]

Again, the presumption that the property targeted by the order amounts to unexplained wealth unless the respondent proves otherwise,[1696] amounts to a reverse burden of proof. The respondent is expected to give a satisfactory answer for the UWO to fail. However, this fear is somehow assuaged. The reversed burden of proof is justified on the basis that UWO does not create a criminal offence.[1697] In fact UWO should be seen as an investigatory tool. Because UWO is civil, it does not contravene Article 6 of European Convention on Human Rights: right to fair trial.[1698]

Whereas UWO is not a criminal indictment, an offence is committed where the respondent who purported to comply knowingly gave a misleading statement.[1699] On the othere hand, a party may be entitled to compensation for a loss suffered due to a serious default on the part of the enforcement authority applying for the UWO after an interim freezing order is made.[1700]

The HMRC, SFO, NCA, DPP and FCA are the authorities that can apply to the High Court for UWO. It is my view that UK should learn from the Australian and Irish experiences. Although UK's model of UWO is just an investigatory tool, and therefore not the same as the Australian and Irish models, it is respectfully suggested that the UWO regime would benefit from having a multi-agency implementation taskforce (like the Irish CAB) drawn from the above listed agency to implement the UWO regime. The taskforce should also be empowered to pursue civil recovery so that once the court determines that the property represents the respondent's proceeds of crime and is recoverable, they can proceed with the civil recovery process.

[1696] CFA 2017 s 1 inserts s 362C into POCA 2002

[1697] Please see Dominic Thomas-James, 'Editorial: Unexplained Wealth Orders in the Criminal Finances Bill: a suitable measure to tackle unaccountable wealth in the UK?' [2017] 24(2) Journal of Financial Crime 178 for an analysis on the suitability in asset recovery and its consistency with human rights

[1698] Please see *Gogitidze and Others* v. *Georgia* [2015] App. No. 36862/05

[1699] CFA 2017 s 1 inserts s 362E into POCA 2002

[1700] CFA 2017 s 1 inserts s 362R into POCA 2002

6.3.2 WHISTLEBLOWING

For the AML law to be effective in disrupting ML, AML violations or possible AML violations by regulated persons need to come to the notice of law enforcement in time to be disrupted. One way of bringing AML violations to the attention of law enforcement is through whistleblowing.[1701] There is no consensus on the definition of whistleblowing.[1702] Simply, however, whistleblowing refers to the passing of information concerning wrongdoing, which an employee typically (but not necessarily) witnessed.[1703]

Whistleblowing differs from "leaking" of information, which refers to a situation whereby an employee reveals information not necessarily concerning any wrongdoing.[1704] Indeed there are similarities and differences between the two terms.[1705] It is instructive to note that in both UK and US freedom of expression is guaranteed even though a person may suffer consequences for expressing certain opinions.[1706]

Senior management of banks and other regulated persons directly or indirectly undermine the AML law in both jurisdictions.[1707] Thus, revealing information by

[1701] FCA encourages and recognizes the intelligence value of whistling-blowing to prevent ML. Please see Financial Conduct Authority, *Business Plan 2016/17* @ p 26 <https://www.fca.org.uk/publication/corporate/business-plan-2016-17.pdf> accessed 16 November 2016

[1702] Transparency International, International Principles for Whistleblower Legislation 2013 @ p 4 (defined whistleblowing – for guidance only – as "the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action")

[1703] Department for Business, Innovation and Skill, Whistleblowing Guidance for Employers and Code of Practice 2015

[1704] Bjorn Fasterling and David Lewis, 'Leaks, Legislation and Freedom of Speech: How Can the Law Effectively Promote Public-Interest Whistleblowing? [2014] 153(10) International Labor Review 73

[1705] ibid 72-5

[1706] The First Amendment to the US Constitution guarantees freedom of speech by prohibiting abridging the freedom of speech among others; in the UK, Human Rights Act 1998, Schedule 1 Part I article 10 guarantees freedom of expression

[1707] United States Senate Permanent Subcommittee on Investigations, U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History (Report 202/224-9505 and 202/224-3721); also see FinCEN, Assessment of Civil Money Penalty Against Sparks Nugget <https://www.fincen.gov/news_room/ea/files/Sparks_Nugget_EA.pdf> accessed 8 August 2016; Peter

insiders to law enforcement is one way of enhancing the effectiveness of AML law and practice. However, fear of reprisals may prevent employees from coming forward with information that would assist the law enforcement to nip in the bud the threat of ML. Thus, for the whistleblowing law and policy to work well, employees need to be protected against such reprisal. Lack of whistle-blower protection would allow senior management who have a criminal mind to continue undermining the effectiveness of the AML law.

Whistleblowing is protected in most jurisdictions against the consequences that constitutionally guaranteed freedom of expression would not ordinarily protect.[1708] In the UK, PIDA 1998 amended ERA 1996 to give protection to whistle-blowers.[1709] However, for an employee to qualify for protection under the Act, the disclosure must be made in the public interest,[1710] and must also satisfy one or more other requirements.[1711] For the purpose of AML violation, once the public interest requirement is satisfied, the next step is to show AML violation has been committed, is being committed, or is likely to be committed, and/or to show deliberate failings in AML compliance.[1712]

By amending ERA 1996, it is evident that Parliament intended to prevent the reoccurrence of previous disasters (such as the Zeebrugge Ferry Disaster and collapse of BCCI) that could have been avoided had there been at that time a legal framework that

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Yeoh, 'Enhancing effectiveness of anti-money laundering laws through whistleblowing' [2014] 17(3) Journal of Money Laundering Control 327, 334 -36

[1708] In fact, even International Instruments, such as ECHR 1950, Article 10; UNCAC 2003, Article 33 sought to provide for the protection or whistleblowers

[1709] PIDA 1998 s 1 inserted Part IVA into ERA 1996

[1710] ERA 2013 s 17 inserted into ERA 1996 s 43B: "is made in the public interest and" to prevent public interest where in reality the wrong doing was personal to the whistle-blower like in the case of Perkins v Sodexho Ltd [2002] IRLR 109

[1711] ERA 1996 s 43B(1)

[1712] ibid s 43B(1)(a)-(b)

affords employees necessary protection against retaliation.[1713] However, first, the 1996 Act requires an internal disclosure unless where there are good reasons that such concern cannot be raised and resolved internally.[1714] Secondly, the disclosure must also be made in a reasonable and responsible way.[1715] Whether whistle-blower protection under ERA 1996 applies depends on whether the whistle-blower is an employee or worker within the meaning of ERA 1996 sections 43K and 230.

For a long time, whistleblowing has been encouraged as a means of exposing fraudulent activities in the US. In 1778 Congress urged that:[1716]

> [It] is the duty of all persons in the service of the United States...to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanours committed by any officers or persons in the service of these states, which may come to their knowledge.

However, protection for whistle-blowers against reprisal was recent.[1717] The US government enacted statutes such as Civil Service Reform Act 1978 (CRSA);[1718] False Claims Reform Act 1986;[1719] Sox 2002;[1720] Consumer Products and Safety Improvement Act 2008;[1721] and Whistleblower protection Act 1998 (WPA).[1722]

[1713] HL Deb May 1998, vol 589, col 889
[1714] ibid
[1715] ibid (Initially, it was a condition that disclosure must be made in good faith (ERA 1996 s 43C, 43E-43H), that requirement has been removed by Enterprise and Regulatory Reform Act 2013 s 18)
[1716] Shawn Marie Boyne, 'Whistleblowing' [2014] 62 American Journal of Comparative Law 425 citing Stephen M. Kohn, Op-Ed., The Whistle-Blowers of 1777, N.Y. TIMES, June 12, 2011
[1717] Reprisal can be any retaliatory action such as discharge, dismissal, demotion, suspension, threat, harassment, or any sort of discrimination against an employee in the terms and conditions of employment (18 USC s 1514A(a))
[1718] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 USC)
[1719] 31 USC ss 3729-3733 (1986)
[1720] Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15 USC & 18 USC)
[1721] 15 USC ss 2051-2085 (2006) (CPSIA), (the CPSIA amends the Consumer Product Safety Act of 1972, 15 USC ss 2051-2089 (1972))
[1722] Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 USC

Although these legislations prima facie protect whistle-blowers against reprisal, the protection is not adequate, automatic and absolute.[1723]

Besides, there is no specific law dedicated to protecting employees who expose ML violation in banks and other regulated persons. [1724] However, since most of the persons who handle other people's wealth are companies that trade stocks on public exchanges or that are required to file a report with the SEC,[1725] Sox 2002 could protect employees who expose ML violation in the organisations they work.[1726]

However, there are hurdles to overcome. Under Sox the claimant must show that the action taken against him was retaliatory for exposing wrongdoing.[1727] As the whistle-blower anti-retaliation statute of Sox is one of the statutes that OSHA administers under the Occupational Safety and Health Act, a complaint filed with OSHA cannot be anonymous.[1728]

Thus in the event that the action taken against an employee whistle-blower was not, in fact, retaliatory because his employers had no cause to suspect, and have not suspected that the employee was the actual whistle-blower, the OSHA procedure will give him away. Although the law in both jurisdictions prohibits and provides relief against retaliatory action, employers can still retaliate. Regardless of whether the employee obtains a remedy, any form of retaliation is enough to cause distress to a whistle-blower.

[1723] Please see Boyne (n 1718) 425 for discussions on the evolutions, operations and limitations of the several US legislations that sought to protect whistleblowers
[1724] Most of the legislations are aimed at exposing fraud, market manipulations etc
[1725] 18 USC s 1514A
[1726] ibid 1513(e)
[1727] ibid s 1514A(b)(2)(C); 49 USC s 42121(b)
[1728] US Department of Labor, Information about Filing a Whistleblower or Retaliation Complaint with OSHA <https://www.osha.gov/whistleblower/WBComplaint.html> accessed 4th March 2017

The secretive nature of ML, coupled with the negative attitude of some senior management to AML compliance, and collaboration between criminals and some regulated persons, underline the need for employees who become aware of ML violations by either the senior management or any other staff to expose such violations.

Employees in the regulated sector, as well as those who advise financial intermediaries, have access to information regarding ML and the predicate crimes. Although revealing wrongdoing by advisers and employees could be viewed as a breach of loyalty and confidentiality, exposing AML violation will not amount to disloyalty or breach of confidentiality,[1729] as the importance of disclosure and compliance is vital for the healthy functioning of the regulated sector and for the prevention of economically motivated crime.[1730] In fact, FSMA section 131A encourages internal disclosure of knowledge or suspicion of wrongdoing.

Although the law in both jurisdictions protects whistle-blowers against discrimination, whistle-blowers may face some practical difficulties. It is not certain if a whistle-blower will ever enjoy working in the same organisation for exposing a wrongdoing, because while some of his colleagues may see him as a hero, others may see him as a traitor[1731] Similarly, moving to another organisation within the same industry may not be easy if one is known as a whistle-blower. Also, there could be a problem of obtaining a good reference from previous employers for the whistle-blower to apply for another job elsewhere.

[1729] ERA 1996 s 43J (Disclosing wrong doing does not breach contractual duty of confidentiality)
[1730] Securities and Exchange Act 1933 ss 3(b)(4), 4A(a)(3) and 4A(b)(1)(G), and 7; FSMA s 80, also see POCA 2002 ss 330-331; and 31 USC ss 5313-5317
[1731] Paul Latimer, Reporting Suspicions of Money Laundering and 'Whistleblowing': The Legal and Other Implications for Intermediaries and Their Advisers [2002] 10(1) Journal of Financial Crime 23, 24

In view of the need to expose the violation of AML law at the very early stage, and the difficulties an employee might face for exposing the violation of AML law, it is respectfully submitted that whistle-blower laws and policies should be strengthened to afford more protection against retaliation of any sort.

6.4 CONCLUSION

The finding of this thesis is that the law and practice relating to ML in UK and US do not effectively disrupt ML and TF. However, there are some factors that contribute to the failure of the AML law and practice. The factors discussed above: large volume of data, emphasis on following the money, collaboration with insiders, placing responsibility on the private sector rather than government to guard against ML are by no means the only factors. However, in order not to exceed the word count, only these four factors were discussed.

There are so many other ways to strengthen the law and practice relating to ML. But again, due to limitation of space this thesis limits itself to discussing UWOs and whistleblowing.

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