Fundamental Principles of EU Law Against Money Laundering

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List of Journal Abbreviations

BLI	*Business Law International*
Brit J Criminol	*British Journal of Criminology*
BTR	*British Tax Review*
Comp Law	*Company Lawyer*
ELJ	*European Law Journal*
ELRev	*European Law Review*
ICCLR	*International Company and Commercial Law Review*
ICLQ	*International and Comparative Law Quarterly*
IJCL	*International Journal of Constitutional Law*
JBL	*Journal of Business Law*
JFC	*Journal of Financial Crime*
JIBL	*Journal of International Banking Law*
JIBLR	*Journal of International Banking Law and Regulation*
JIFM	*Journal of International Financial Markets*
JMLC	*Journal of Money Laundering Control*
PCB	*Private Client Business*

Preface

The European Union's anti-money laundering system has been restructured to combat international economic crime and to reshape criminal finance. Today's money laundering conspiracies are more complex and are pregnant with the proceeds of transnational crime. The more criminals succeed in introducing their ill-gotten gains from the informal to the formal economies, the more financial systems and anti-money laundering systems will be exposed to the serious and immediate threats of corruption and penetration.

The reporting system and the exchange of information platforms enable competent authorities to rapidly trace, freeze and confiscate criminal and subversive assets, and to sanction wrongdoers. The harmonious operation of the reporting system and the exchange of information constitutes the central and suspicious eye of the global anti-money laundering regime. However, without the co-existence of the latter and their operational harmony, the central eye of the global anti-money laundering regime will become legally and operationally obsolete.

Against that background, not all suspects and accused persons will be found guilty, that is, subject to not failing to reasonably and truthfully explain the source of their wealth to the competent authorities applying money laundering controls. On the one hand, prosecutors shoulder the burden of proving in court the class of crime as opposed to particularising the specific offence having generated the criminal proceeds traced and attacked by the anti-money laundering system. On the other hand, defendants rightly shoulder the burden of offering, to the satisfaction of the court, reasonable and truthful explanations about the sources of their wealth.

In today's globalised financial system, the shifting of responsibility to private sector reporters to disclose alleged offences through the submission of Suspicious Activity Reports; the confidential investigation of the financial affairs of suspects on the precondition that Suspicious Activity Reports are well founded so as to constitute the starting point for financial intelligence; and the statutory imposition of the obligation on suspects and accused persons to publicly explain the sources of unexplained wealth in their possession and control, cannot but constitute the prescribed tools for the prevention and control of economic crime, illicit enrichment and terrorist financing. After all, businesses and financial institutions have become more transparent and more accountable to financial regulators and to tax authorities than ever before as a result of the responsibility shifted to them by financial regulation.

Moreover, effective money laundering controls must also be compatible with the ECHR. Compatibility is synonymous with proportionality, especially in regard to the retention and movement of the personal of unconvicted persons.

Unconvicted persons are innocent persons and their right to information privacy is inviolable under Article 8(1) of the ECHR. It is therefore the duty of legislators and financial regulators to ensure that when criminal proceedings are terminated against suspects and accused persons due to acquittal or discontinuance, the retention and movement of their sensitive personal data, such as fingerprints, cellular samples and DNA profiles, does not stigmatise them for the rest of their lives as a result of the erroneous application of Article 8(2) of the ECHR.

Prior to turning to the introduction of the book, I would like to single out for thanks Professor Barry Rider, who gave me the opportunity to research and study under him, and for having made numerous meaningful and useful suggestions during the course of my research at the Institute of Advanced Legal Studies, School of Advanced Studies, University of London. Indeed, his guidance and observations were invaluable. His work has not only inspired me, but it has also made me all the more devoted to this fascinating, challenging, and evolving area of the law. In the same spirit, I would like to also single out for thanks Dr Chizu Nakajima, Cass Business School, City University of London and Professor Andrew Campbell, School of Law, University of Leeds, for having encouraged me to take the decision for the publication of this book as a means of contributing to the academic scholarship.

I cannot but close this preface by thanking my loved ones, including my colleagues and associates, for having tolerated my social isolation all these years. I will not explicitly refer to names, relations and professions, for I have come to appreciate that, sometimes, anonymity leaves an enduring gentle touch in writings. However, I do genuinely feel the need to express my most sincere apologies to all these persons, for my conversations with them primarily concerned the law and nothing else but the law.

Contents

Introduction:
The Guide to Understanding AML Law

Conceptual Framework

In present times, one of our biggest challenges is to confront the new realities of economic crime and to redefine proportionately our anti-money laundering and counter-terrorism financing policies. This can be accomplished through deepening knowledge and understanding of the phenomenon we call money laundering and sharing that knowledge and understanding openly yet modestly with those who have similar views as well as with those who happen to have diametrically opposite opinions on the effects of anti-money laundering legislation on the financial, political and social aspects of out lives.

We Europeans, despite our being part of a pluralistic politico-economic community well founded upon the principle of a united diversity, are still part of a world vexed with problems, the solution of which requires, on the part of governments and their officials, legislators, financial regulators, judges, prosecutors, practitioners, academics and professionals handling other people's money, to work in collective partnership to ensure that money laundering controls are effective, proportionate and, where circumstances permit, cost-effective.

Of course, it should also be recognised that studies of this nature and character constitute intellectually stimulating sources for the further development of a substantial dialogue between the key players in Member States that will hopefully endeavour to enhance mutual recognition, which is based on the principles of mutual trust, criminal justice, judicial cooperation and compliance with the ECHR.

The transfer of clean money is neither illegal nor worthy of prosecution. Anomy has no place in those financial activities involving property in disposable form emanating from lawful sources. Yet the genuine need to protect national security, public safety, financial integrity and stability, and economic wellbeing as a whole, have become so compelling that today's financial regulators can discharge their enforcement responsibilities only through the application of money laundering controls on the blueprints of financial activities taking place through financial intermediaries at the national and cross-border levels.

The mandatory rules of financial regulation are highly peculiar if not socially unpleasant as they provide that suspicion can be eliminated only when two specific criteria are satisfied: the documentary evidence of the lawful sources of the funds involved and the establishment of innocent financial and commercial motives on the part of the transacting parties. In short, when suspects fail to publicly,

reasonably and truthfully explain the legal sources of the property they handle, possess and control, the suspicion of criminal liability cannot be eliminated and will thus become the subject of judicial procedures.

As any jurist would confirm, the imposition of the aforementioned two obligations on natural and legal persons, not only unveils the confidentiality of financial and commercial transactions, but also consolidates the legal extroversion of two diametrically contrary forces that establish innocence or guilt in the context of anti-money laundering law: the statutorily guaranteed confidential submission of self-induced suspicion by reporters and the publicly offered reasonable and truthful explanations on the part of those who have been reported for alleged wrongdoing.

Against that background, it is important to appreciate that these two opposite forces will colourfully paint the suspect's or even the accused's picture of innocence or guilt in the following five different stages of the prevention and control of money laundering: genesis of automated or self-induced suspicion of unusual financial activities; internal processing of the findings of suspicion by financial institutions; submission of Suspicious Activity Reports as disclosures of alleged offences to financial intelligence units (triggering the investigation of the financial affairs of suspects); confidential and compatible with the ECHR financial investigations of suspects; and prosecution of suspects for money laundering, the bringing of the indictment for the offences, and trial.

With the above submissions in mind, it would be useful to recall that anti-money laundering laws are 30 years old. In these three decades, systematic legal research has sufficiently established that money laundering is criminal finance. Henceforth, the criminal liability of money laundering conspirators is strict. Despite the fact that today's financial regulation enables us to fix our eyes on evolving transparency laws, it does not always make sense to the untutored eye that the prevention and control of economically motivated serious crime concerns nothing else but human greed, self-interest and what theologians would be inclined to refer to as the propensity of the ethically weak to fall for Mammon.

Yet what makes this book all the more intellectually challenging is its quest to raise awareness of the great extent to which the international, regional and national legislators have *horizontally* linked this *vertical* lawmaking process to the promotion of global prosperity, in addition to sustainable economic and social development.

Paradoxically, the heteromorphous criminal, civil and tax laws of European Union Member States are continuously being enhanced to combat illicit enrichment in all of its different forms; while wrongdoers, organised criminals and those who become concerned in terrorist financing schemes are constantly preoccupied with discovering systemic weaknesses or inventing new techniques to bypass the controls of the anti-money laundering legislation and to corrupt those holding positions of trust in the financial system.

There are two different categories of readers that will find this book interesting and intellectually stimulating. In the first category there are those who are already

convinced that financial regulation has a tremendous potential to enable societies to: deal effectively and proportionately with the immediate and serious threats posed by organised crime and terrorist financing to national security, public safety and financial stability; promote the integrity of financial systems; trace, prosecute and sanction those who engage in serious and economically motivated crimes (money laundering, corruption, fraud, market abuse, insider dealing and the peculation of public and private wealth); and enhance transparency, accountability, good central governance and tax justice at the global level. In the second category there are those who are equally convinced that anti-money laundering legislation is draconian, financially unbearable, and one of the main drivers of the surveillance–security state.

Contents Overview

The contents of this book are divided into eight chapters excluding the introduction. Part I deals with the basic principles of the law and is divided into three chapters (chapters 1–3). Part II deals with the advanced principles of the law and is divided into four chapters (chapters 4–7). With the exception of the introduction and Chapter 8, which contains the conclusions, recommendations and some prognostications, chapters 1 to 7 are identically structured. They contain an introductory section setting out the structural and methodological approaches to the legal issues addressed. At the end of each chapter, a concise recapitulation of the fundamentally important issues discussed is provided in an effort to avoid unnecessary complexity.

Chapter 1 sets out the conceptual scene of money laundering countermeasures and puts to the test the 12 conceptual objectives of anti-money laundering laws through a critical assessment of *what* European Union Member States can achieve from the reporting system and the exchange of information.

Chapter 2 examines *how* the criminal enterprise is resisted and disrupted in light of the amalgamation of international and regional anti-money laundering measures under European Union law, and emphasises the concept of internationalism for mutual benefit. The last section focuses on the legally *interactive* provisions of Directive 2005/60/EC, Regulation 1889/2005 of the European Parliament and of the Council of 26 October 2004 on control of cash entering or leaving the Community, and Regulation 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfer of funds.

Chapter 3 examines in detail the role of anti-money laundering laws dealing with organised crime and corruption by focusing in particular on: the critical function of anti-money laundering in dealing with transnational organised crime especially from the United Nations' perspective; the role of money laundering in the context of organised crime and corruption; and the role of corruption as the internal enemy of the anti-money laundering system. The fifth and last section

closes not only the chapter, but also Part I of the book, and defends the position that the previous trends were drugs, organised crime, terrorism financing and money laundering, but the current trend is corruption.

In Part II, Chapter 4 is concerned with the *economics* of the anti-money laundering strategy and equates global anti-money laundering policy with the establishment and vertical enforcement of rules of transparency from the international to the national level. The critical analysis is thus devoted to four popular topics: unaccountable wealth; taxation; transparency laws; and the *power* versus *reinvestment* issue.

Chapter 5 addresses from the common law perspective three fundamentally important issues concerning the *pragmatic* maintenance of criminal and subversive assets within the reach of the law: shifting statutory responsibility to financial institutions to disclose offences; anatomising the conspiracy charge to launder criminal proceeds; and reflecting upon the burden of proof mainly in criminal cases.

Chapter 6 *thinks* in financial intelligence law. Its areas of primary concern are mainly three: setting the scene of Suspicious Activity Reports analysis; setting out the fundamentals of the law of intelligence; and putting to the test all the hypotheses and legal observations by focusing in particular on the case of the Hellenic Financial Intelligence Unit.

Chapter 7 is equally dynamic for it addresses the following two crucial issues with a particular focus on the UK: the impact of the retention and movement of personal data on the rights of unconvicted persons; and the main effects of financial regulation on businesses. The legal arguments on the incompatibility with the ECHR are based on research findings deriving mainly from jurisprudence and authority, whereas the effects of financial regulation on businesses are presented on the notional platform that concerns the way that people structure and conduct business at the present time.

The final chapter in this book, Chapter 8, provides a synoptic assessment and modestly offers to the readers four key prognostications that look into the future of financial regulation in regard to: the security state; whether the European Union's anti-money laundering regime will become more restrictive and punitive in the future; the rise of the global transparency regime in the immediate future; and the legal changes that technological advancements can bring in the field of DNA analysis in the next decade or so.

PART I
Basic Principles