

Michele Sciurba

The Incompatibility of Global Anti-Money Laundering Regimes with Human and Civil Rights

Reform Needed?



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*To my mother, Giuseppa Sciurba, neé Pepe,
and my late father, Girolamo Sciurba*

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Preface

This monograph is based on the doctoral thesis “Global Anti-Money Laundering Regimes and their Compatibility with Human and Civil Rights in the US and EU: A Comparative Study” submitted in the winter semester 2017/2018 to complete requirements for a doctoral degree in International Law at the Interregional Academy of Personnel Management in Kyiv, Ukraine. The thesis was successfully defended on 6 March 2018 before the Specialized Academic Board of the Interregional Academy of Personnel Management in Kyiv. It has been revised and updated for this publication.

This work analyses the objectives, the development and the effectiveness of global Anti-Money Laundering (AML) regulations in order to assess their compatibility with international human and civil rights. AML legislation was initially aimed at preventing financial institutions from being misused by money launderers. After the 9/11 terrorist attacks on the World Trade Center in New York, international AML regulations were expanded to include Counter-Terrorism Financing (CTF), resulting in the passage of the USA Patriot Act 2001 and the tightening of the Bank Secrecy Act 1970 in the US; the promulgation of the Proceeds of Crime Act 2002 in the UK; and the fourth Anti-Money Laundering Directive in the EU, respectively. These laws have added tax evasion to the list of money laundering offences. Nevertheless, the lack of regulatory and legislative harmonisation among the EU Member States, the US and other Financial Action Task Force (FATF) members with respect to tax evasion as a predicate offence remains a central enforcement problem.

Although the rationale behind AML legislation has been to move from a punitive to a preventive system of enforcement, based on the FATF's recommendations, it has resulted in a “catch-all” approach that places ordinary citizens under a general blanket of suspicion. In an effort to avoid legal liability and the excessive sanctions imposed by AML/CTF legislation for non-compliance, banks have developed a new de-risking policy that have largely led to the suspension of banking secrecy laws and made financial institutions *de facto* an extended arm of law enforcement authorities.

The implementation of these compliance policies by financial institutions have led to denying entire groups of people access to basic financial services, including denying many people with migrant backgrounds access to bank accounts, in effect forcing them to use alternative systems of money transfer like hawala that are opaque and unaccountable and thus perfectly suited for

terrorist financing. As a result, the stated objectives of AML/CTF legislation, such as greater transparency in financial transactions, are *de facto* undermined by the way the EU is implementing these goals.

Thus an unintended result of the implementation of the AML/CTF legal framework is the methodical and systematic discrimination against entire population groups, which infringes upon Article 14 of the European Convention on Human Rights (ECHR) and Article 21 of the Charter of Fundamental Rights of the European Union. Although Article 14 is an accessory equality right that can only be claimed in connection with the infringement of another freedom right, viz. Article 8, it would seem to apply to non-nationals living in the European Union since the protection of the right to private and family life applies to foreigners that reside in the Member States in accordance with Article 8 ECHR.

This monograph also analyses the connection between money laundering and corruption. Corruption is a major problem in both developing and highly developed industrialised countries, as it undermines the fair competition and the rule of law. Political elites in countries like Nigeria, Equatorial Guinea and Venezuela have often used their country's abundant natural resources to enrich themselves and their cronies at the public's expense resulting in a culture of corruption and creating economic inefficiencies that undermine free and fair economic competition. In such situations, influence and votes are subject to the highest bidder and can be bought and sold like commodities. Public funds are often misappropriated to gain loyalty through bribes. The presence of oil reserves and the financial resources resulting from them offer abundant opportunities for corruption and bribery, putting the brakes on democratic reforms and economic development. By contrast, countries that are less corrupt have substantially more efficient governments. Thus, reducing corruption is the single most important factor in improving government and public service efficiency.

Frankfurt am Main, April 2019

Michele Sciarba

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List of Abbreviations

1st AMLD	First Anti-Money Laundering Directive
2nd AMLD	Second Anti-Money Laundering Directive
3rd AMLD	Third Anti-Money Laundering Directive
4th AMLD	Fourth Anti-Money Laundering Directive
5th AMLD	Fifth Anti-Money Laundering Directive
AEOI	Automatic Exchange of Information
AFSJ	Area of Freedom, Security and Justice
AML	Anti-Money Laundering
AMLD	Anti-Money Laundering Directive
ANCIR	African Network of Centers for Investigative Reporting
ANIF	Equatorial Guinean FIU
APG	Asia Pacific Group on Money Laundering
ASEAN	Association of Southeast Asian Nations
BaFin	German Financial Supervisory Authority
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
BJA	German Federal Criminal Police Office
BLIHR	Business Leaders Initiative on Human Rights
BSA	Bank Secrecy Act
BSAAG	Bank Secrecy Act Advisory Group
CAT	Center for the Analysis of Terrorism
CEMAC	Economic Community of Central African States
CFATF	Caribbean Financial Action Task Force
CFR	Code of Federal Regulations
CGD	Center for Global Development
CIA	Central Intelligence Agency
CNV	Comision Nacional de Valores
COAF	Council for Control of Financial Activities

List of Abbreviations

CONASEV	National Supervisory Commission of Companies and Securities
CSN	Charity & Security Network
CTF	Counter-Terrorism Financing
CTGI	Counter Terrorism/General Investigation Unit
CTITF	Counter-Terrorism Implementation Task Force
CTR	Currency Transaction Report
DIN	German Institute for Standardisation
DNFBP	Designated Non-Financial Business and Profession
DTROP	Drug Trafficking (Recovery of Proceeds) Ordinance
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOLEF	Economic and Legal Effectiveness of Anti-Money Laundering and Combating Terrorist Financing Policy
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EITI	Extractive Industries Transparency Initiative
EPPO	European Public Prosecutor's Office
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
ESRB	European Systemic Risk Board
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FCA	Financial Conduct Authority
FCPA	Foreign Corrupt Practices Act
FIG	Financial Integrity Group
FinCEN	Financial Crimes Enforcement Network
FISA	Foreign Intelligence Surveillance Act
FISC	United States Foreign Intelligence Surveillance Court
FIU	Financial Intelligence Unit
FLEG	Forest Law Enforcement and Governance

FNLA	National Front for the Liberation of Angola
FPC	Financial Policy Committee
FSA	Financial Services Authority
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
FSF	Financial Stability Forum
FSMA 2000	Financial Services and Markets Act 2000
FSRB	FATF-style Regional Body
GDPR	General Data Protection Regulation
GFC	Global Financial Crisis
GG	German Basic Law
GIA	International Grading Standards
GLBA	Gramm-Leach-Bliley Act
GPML	Global Programme Against Money Laundering
GwG	German Money Laundering Act
GwBekErgG	Act Supplementing the Act to Fight Money Laundering and Terrorist Financing
HBMX	HSBC Mexico S.A. Banco
HMRC	Her Majesty's Revenue and Customs
ICJ	International Court of Justice
IEEPA	International Emergency Economic Powers Act
IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
IMoLIN	International Money Laundering Information Network
IOSCO	International Organization of Securities Commissions
ISO	International Organisation for Standardisation
JCPOA	Joint Comprehensive Plan of Action
JMLSG	Joint Money Laundering Steering Group
KWG	German Banking Act
KYC	Know-Your-Customer
KYCC	Know-Your-Customer's-Customer
MILA	Latin American Integrated Market

List of Abbreviations

MLCA	Money Laundering Control Act
Moneyval	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
MPLA	People's Movement for the Liberation of Angola
MSB	Money Service Business
MTO	Money Transfer Operator
NCCT	Non-Cooperative Countries and Territories
NCIS	National Crime Intelligence Service
NDPI	Niger Delta Partnership Initiative
NGO	Non-Governmental Organisation
NSA	National Security Agency
OAS/CICAD	Organisation of American States/Inter-American Drug Abuse Control Commission
OECD	Organisation for Economic Co-operation and Development
OFAC	Office of Foreign Assets Control
OLAF	European Anti-Fraud Office
OrgKG	German Law against Illegal Drug Trafficking and Other Forms of Organised Crime
OSCE	Organization for Security and Co-operation in Europe
OSCO	Organized and Serious Crimes Ordinance
P2P	Peer-to-Peer
PEP	Politically Exposed Person
Petrobras	Petróleo Brasileiro S.A.
PIF	Proactive Intervention Framework
PIND	Foundation for Partnership Initiatives in the Niger Delta
POCA	Proceeds of Crime Act 2002
PPATK	Financial Transaction Reports and Analysis Centre
PRA	Prudential Regulation Authority
RFPA	Right to Financial Privacy Act
ROSC	Report on the Observance of Standards and Codes
SAR	Suspicious Activity Report
SCUML	Special Control Unit against Money Laundering
SEC	United States Securities and Exchange Commission

SIB	Securities and Investments Board Ltd.
SML	Securities Market Law
StGB	German Criminal Code
StPO	German Code of Criminal Procedure
StUmgBG	German Anti-Tax Evasion Law
SWF	Sovereign Wealth Fund
SYSC	Senior Management Arrangements, Systems and Controls
TBTF	Too-Big-To-Fail
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFTP	Terrorist Finance Tracking Program
TWEA	Trading with the Enemy Act
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNITA	National Union for the Total Independence of Angola
UNODC	United Nations Office on Drugs and Crime
US	United States

1. Introduction

1.1 *Global Anti-Money Laundering Regimes & Human and Civil Rights: State Control without Proportionate Safeguards*

This monograph deals with the progressive derogation of civil and human rights in the fight against money laundering, terrorist financing and tax evasion. The marriage of Anti-Money Laundering (AML) and Counter-Terrorism Financing (CTF) legislation has systematically expanded the scope of the authorities' rights of enforcement and compliance such that ordinary citizens are now placed under a general blanket of suspicion without any initial reasonable grounds. This work assesses whether AML/CTF legislation is actually effective in its stated aim of preventing the financing of organised crime and terrorism. There is currently no comparative analysis in the academic literature of international AML regimes. In addition, there is surprisingly little research into whether these regimes violate national or international civil and human rights and freedoms. This monograph proposes ways and mechanisms to effectively address money laundering while maintaining fundamental human rights. It also addresses the symbiotic relationship between money laundering and political corruption based on a current analysis of the fundamental characteristics and types of AML regimes in the United States (US), the European Union (EU), Latin America, Africa and Southeast Asia.

During the Prohibition Era in the US in the 1920s, large-scale organised crime had to find ways to reintegrate revenues derived from the illegal trafficking of alcohol into the US financial system. This was the birth of modern money laundering. At the time, the primary objective of the AML regimes was to combat organised crime. Over the past three decades, the scope of money laundering and predicate offences for money laundering has increased significantly. After 9/11, the US initiated a fundamental and global change of AML policies under the banner of fighting a "war on terror." This resulted in the marriage between AML and CTF legislation, leading to new policies governing security and pre-emptive surveillance such that vast amounts of personal data have been gathered and the activities of ordinary citizens are constantly monitored without initial legal grounds for suspecting they are engaged in illegal activities.¹ AML/CTF legislation allows public authorities

1 V Mitsilegas, 'Surveillance and Digital Privacy in the Transatlantic War on Terror: The Case for a Global Privacy Regime' (2016) 47 Colum Hum Rts L Rev 1, 3.

1. Introduction

access to the personal data of ordinary citizens without their knowledge and consent and authorities can access different cross-border databases at any time to create risk profiles. As a result, the legal activities of a large number of citizens are being continuously monitored for potential threats such as terrorist financing or money laundering.² In 2013, the whistle blower Edward Snowden exposed that on the basis of the Foreign Intelligence Surveillance Act (FISA) 1978³ and the USA Patriot Act 2001⁴, US authorities such as the National Security Agency (NSA) have been globally spying on people and their personal data, including telephone communications, to an unprecedented extent. The US response was to restrict this surveillance practice through the USA Freedom Act.

In the EU, similar developments were taken following the 2004 terrorist attacks in Madrid and the London 7/7 bombing of 2005. The 2006 Data Retention Directive⁵ first allowed the substantial surveillance and transmission of personal data related to financial transactions between the US and the EU. In doing so, the Directive disregarded fundamental civil rights, which led the European Court of Justice (ECJ) to rule in *Digital Rights Ireland*⁶ that the Directive was disproportionate and violated the right to private life and data protection. While the first EU Anti-Money Laundering Directive (1st AMLD)⁷ was focused on implementing the newly created 40 recommendations of the Financial Action Task Force (FATF), the second Anti-Money Laundering Directive (2nd AMLD)⁸ expanded predicate offences for money laundering and extended preventive duties to non-financial professions for the first time.⁹ This development in EU legislation was consistent with the FATF's directive

2 ibid 4.

3 Foreign Intelligence Surveillance Act (FISA) 1978 (Pub. L. 95-511).

4 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) (Pub. L. 107-56).

5 Directive 2006/24/EC of the European Parliament and of the Council on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC [2006] OJ L 105/54.

6 Case C-293/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238.

7 Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering [1991] OJ L 166/77.

8 Directive 2001/97/EC of the European Parliament and of the Council Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering (2nd AMLD) [2001] OJ L 344/76.

9 V Mitsilegas and N Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23(2) MJECL 261, 264.