AML Compliance and CTF in Kenya (Introductory)

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Introduction

Within the contemporary world's unstable political and economic landscape, individuals and organisations with evil or hostile intents try to create financial schemes and confusion to destabilise the International Commonwealth further locally or globally. Therefore, anti-money laundering policy has widely extended beyond personal beneficiation through theft or plunder of political or private money earned and applied illegally. Kenya, together with the other African countries, actively tries to tackle money laundering to stabilise the East African region and help the world to trace terrorist or crime financing. As a result, Kenya has been adopting and developing its AML and CTF policies in cooperation with foreign partners to help tackle and prevent criminal and terrorist organisations from receiving financial aid for their anti-human activity.

1. Money Laundering, FATF, and ESAAMLG

Unfortunately, Kenya is one of the countries where there exist certain levels of terrorism emergence or funding. Therefore, the country has been prudently engaging in international AML institutions and local practices. It is prudent to identify some great notions for the reasons of smoother perception and development of this paper.

Although most people know the term “money laundering,” they lack the awareness of the actual content. “Money laundering” commonly refers to processes when criminals attempt to conceal the existence of the illegal sources or utilisation of incomes while disguising them as legitimate ones.[1] Sadly, the said crime represents an enormous sum of money. The reported financial damage comprises approximately two to five percent of the global GDP, which amounts to $800 billion to $2 trillion every year.[2] To commit the money laundering crime, one has to conduct three steps, but even one is enough for proving the attempted offence; they are placement, layering, and integration. [3] The names are logical about separate illegal actions.

Organizations use diverse methods to launder the money. The most popular one is to illegally receive cash through a business, which inflates the daily revenue[4] constituting the criminal organisations “fronts.” Another way is a smurf. Smurfing implies criminals are breaking up bold

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[1] William R. Schroeder, *Money Laundering: A Global Threat and the International Community's Response*, 70 FBI Law Enforcement Bulletin (2001), https://www.ncjrs.gov/App/publications/abstract.aspx?ID=188586 (last visited Sep 14, 2017).

[2] Standard Chartered Bank - On the front lines of financial crime, BBC News, http://www.bbc.com/storyworks/banking-on-innovation/security (last visited Sep 14, 2017).

[3] Money Laundering: A Three-Stage Process, About Business Crime Solutions, https://www.moneylaundering.ca/public/law/3_stages_ML.php (last visited Sep 14, 2017).

[4] Money Laundering, Investopedia (2016), http://www.investopedia.com/terms/m/moneylaundering.asp (last visited Sep 14, 2017).

cash and deposits it for a durational period into a financial system or several ones.[5] The idea is to conceal the origin of money, but then to make it appear legally owned.

On the international arena, the Financial Action Task Force is responsible for defending, protecting, and preventing money laundering on the criminal organisations and terrorist scales. It is an independent, non-governmental body, established in 1989.[6] The core goal is to aid in creating and promoting levers and plans to protect financial systems around the world against laundering, hazards their integrity and terrorist financing.[7] FATF is rudimental to the protection of financial systems since money laundering is an organised criminal activity, which needs an organisation to battle it, too.

To activate and upkeep the FATF's provisions, Africa created its organisation - ESAAMLG. It was designed specifically to implement the FATF recommendations.[8] Attempting to develop itself in all sectors, Kenya actively takes part in ESAAMLG. The latter closely

[5] Ibid.

[6] History of the FATF, Financial Action Task Force (FATF), http://www.fatf-gafi.org/about/historyofthefatf/ (last visited Sep 14, 2017).

[7] Ibid.

[8] Giancarlo Del Bufalo, Advancing AML/CFT initiatives in the South and Eastern Africa region Financial Action Task Force (FATF) (2011), http://www.fatf-gafi.org/pages/advancingamlcftinitiativesinthesouthandeasternafricaregion.html (last visited Sep 14, 2017).

cooperates with the U.S. and the UK to enhance the implementation of the mentioned recommendations and track down criminal organisations.

2. Cash Carriers

Criminal organisations and terrorist groups tend to exercise three main methods to launder money. Predominantly, they utilise international trade systems, cash carriers, as well as international finance systems. As I have mentioned above, the money laundering offence has to include placement, layering, and integration as core actions to comprise a single crime and achieve the set goal.

Firstly, the actual transportation of cash often comprises a huge challenge to detect and prevent. Multiple countries in the world have to deal with the smuggling of bulk cash daily, which makes it challenging to detect the cash carriers and the ways they hide the money.[9] On the other hand, developing countries are at a bigger risk of money carrying and are central because their economies are virtually cash-based more than wire-transfer-based. Nonetheless, countries with sophisticated financial systems face problems with cash carriers as well.

[9] FATF Report: Money Laundering Through the Physical Transportation of Cash, Financial Action Task Force (FATF) (2016).

Monitoring and investigating within financial systems has served as an instigator of a rise in cash carrying. In addition to other factors, the FATF questionnaires prove that the growth in the AML robustness within the global financial sector has caused the increase in actual physical transportation of bulk cash as an alternative way to move the criminal proceeds and ensure their security.[10] The idea is to still the cash away from it appearing in the digital world. Besides that, criminals have to invent sleeker and tricky ways of smuggling bulk cash because of the AML advancement.

3. International Financial System

Aside from bulk cash, the international financial system comprises a large playing ground for criminal organisations in devising schemes to launder money and finance their criminal activities. Respectively, the FATF takes an interest in a global financial inclusion to drive its purpose of protecting the integrity of the worldwide financial system through acquiring access to the most financial operations. Hence, it aims to cover the largest portion and range of currency transactions that may imply money laundering and financing terrorism.

[10] FATF Report: Money Laundering Through the Physical Transportation of Cash, Financial Action Task Force (FATF) (2016).

As a result, the FATF decided to integrate its work with FSRBs more. In its new mandate for 2012 to 2020, the eight regional FATF-style regional bodies acquired a stronger status in the FATF.[11] Since 2012, the FSRBs are entitled to engage in all FATF activities.[12] It means that 180 countries that work for a single goal of tackling money laundering have become more united.

Financial exclusion concludes a genuine risk to achieving effective implementation of the AML and CFT recommendations, which the FATF designs with zeal and dedication. Financial crimes and networks were established to battle the money laundering hazards, as well as prevent and punish all criminals and their networks that endanger the global economy. Therefore, the integration above of the cooperation of countries in fighting money laundering means tighter and more efficient protection of the world financial system.

4. Universal Trade Schemes

Criminal organisations also include trading within their devious plans of financing evil. The common routes to use for money laundering purposes involve the utilisation of trade links

[11] FATF Guidance: Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion, Financial Action Task Force (FATF) (2013), http://www.fatf-gafi.org/media/fatf/documents/reports/AML_CFT_Measures_and_Financial_Inclusion_2013.pdf (last visited Sep 14, 2017).

[12] Ibid.

system.[13] Since the bulk cash and the financial system routes are tightly secured, the trading sector becomes attractive to criminals to launder income. The application of AML and CTF standards to the former two areas allowed to develop defences for the trade system, too.

Nonetheless, trade operations are different. Multiple law enforcement bodies, financial intelligence units (FIU), customer agencies, banking supervisors or tax authorities sometimes fail to recognise a money laundering operation.[14] Since they work with cash bulk or financial systems more, where they successfully prevent such issues frequently, the trade system is still a challenge.[15] Nonetheless, the international cooperation steadily acts to enhance this problem as well.

5. Placement, Layering, and Integration

The three methods to launder money are already known. Placement involves actions of introducing the criminal gain to the financial system.[16] In the first step, the cash is introduced

[13] Ibid.

[14] Best Practices on Trade Based Money Laundering, Financial Action Task Force (FATF)(2008), http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP%20Trade%20Based%20Money%20Laundering%202012%20COVER.pdf (last visited Sep 14, 2017).

[15] Best Practices on Trade Based Money Laundering, Financial Action Task Force (FATF)(2008), http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP%20Trade%20Based%20Money%20Laundering%202012%20COVER.pdf (last visited Sep 14, 2017).

[16] Money Laundering: A Three-Stage Process, About Business Crime Solutions, https://www.moneylaundering.ca/public/law/3_stages_ML.php (last visited Sep 14, 2017).

physically along with other assets, which stem from a criminal act. The placement enables the criminal income to infiltrate the financial system. Placement arises when the money gets into the financial circulation through shops, casinos, enterprises, where financial institutions serve as mediums for the cash transit.[17] Also, precious metals, artworks, or international financial institutions are used to place the money.[18] The large sum is dissected into smaller ones and dispersed in that way.

The second step is layering. The process of layering includes the illicit proceeds taken from the previous source by layered financial transactions, which allow concealing the root source of the laundered money.[19] Examples include further placing money in life insurance or securities. Moreover, can be converted into traveler cheques or kept as prepaid value products.

The second phase of layering involves transforming the criminal proceeds to another, more complicated form. That is done through a sophisticated monetary transaction to disguise the cash from audit analyses. For instance, the wire transfer may be done from one bank account to another, as well as onto overseas institutions or jurisdictions. Shell corporations and other entities serve as the primary methods of obscuring the asset ownership.

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[17] Ibid.

[18] Ibid.

[19] Money Laundering, Investopedia (2016), http://www.investopedia.com/terms/m/moneylaundering.asp (last visited Sep 14, 2017).

The third step of money laundering is integration. Here, the initially criminal proceeds enter the business' or person's account as legal through a standard business transaction.[20] For example, a criminal may invest the money in real estate or the stock market. Further, it becomes virtually impossible to discern illegal money from legal ones that a person owns. The integration phase is tough to spot unless there is a clear laundering pattern of an operation in the investment.

6. The Kenya Anti-Money Laundering Framework

Kenya put the Anti-Money Laundering framework (the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)) in place in Kenya since 2009.[21] The establishment of the framework connects the respective legislation that the country had adopted. Unfortunately, money laundering remained a huge problem in Kenya still. To enhance the framework, President Kenyatta encouraged and signed the Proceeds of Crime and Anti-Money Laundering Amendment Act, 2017

[20] Money Laundering, Investopedia (2016), http://www.investopedia.com/terms/m/moneylaundering.asp (last visited Sep 14, 2017).

[21] Allan Olingo, Kenya to Amend Law to Tackle Money Laundering by Banks The East African (2016), http://www.theeastafrican.co.ke/business/Kenya-to-amend-law-to-tackle-money-laundering-by-banks---/2560-3172804-nxfk9y/index.html (last visited Sep 14, 2017).

(.[22] The new legislation and amendments are to enforce the AML and CTF framework and mechanisms.

Also, two other laws were passed to widen the scope of the AML policies. Kenya enacted the Prevention of Terrorism Act (POTA) together with the Prevention of Organized Crimes Act (POCA). Both of the acts aim at tracking, identifying, and preventing or punishing organised criminal or terroristic actions, as well as retrieve the criminal proceeds and direct them to proper use and cause.

7. The Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), DNFBPs, and KYC

POCAMLA provides the Kenyan Government with substantial authority to fight the money laundering. The major areas of its focus are the provisions that identify money laundering as a crime and the introduction of measures to combat the respective activities, as well as to provide for the seizure and confiscation of the illegal money. POCAMLA came into force in 2010. Other

[22] Ibid.

countries in the East African region that have already enacted anti-money laundering legislation include Tanzania, Rwanda, and Burundi, and Uganda. Anti-money laundering legislation strengthens the area in cooperation amongst member states to fight money laundering and terrorist financing because such crimes involve transnational cooperation.

Criminals cannot launder directly, so they need real, legal entities or professionals to help them. DNFBPs is a term that usually refers to non-financial business and professional firms, such as trust and company service providers, lawyers, accountants, real estate agencies, casino operators, dealers in precious metals and stones.[23] DNFBPs operations involve various risks money laundering and terrorist financing. The ML/TF operations, whether done through DNFBPs or the financial system, are undoubtedly risky. The risks arise in diverse situations where the DNFBPs damage the plan in ML/TF operations. The risks DNFBPs pose as potential money laundering accomplices led to their inclusion in POCAMLA's section 2.

KYC is the abbreviation for Know Your Customer and it means knowing one's customer. It means the process of identifying customers and finding out relevant information about them, which is vital for engaging in business operations with them.[24] KYC's major objective is to protect

[23] Proceeds of Crime and Anti-Money Laundering, Kenya Law (2009), http://www.kenyalaw.org/lex//actview.xql?actid=No.%209%20of%202009 (last visited Sep 14, 2017).

[24] Customer Due Diligence - Overview, FFIEC, https://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_013.htm (last visited Sep 14, 2017).

organisations from such crimes, for example, as identity thefts, money laundering, fraud and terrorist financing. The existing practice and patterns of knowing the customers alert any suspicious activities, which fall within the customer due diligence procedure and trigger red flags.

8. Customer Due Diligence

Customer Due Diligence (CDD) is also a part of KYC. It is the responsibility of financial institutions or other affiliated organisations to diligently identify their customers and verify all the necessary information that can aid tracking business operations and transactions connected to them. Section 45(2) of POCAMLA requires reporting institutions to execute customer due diligence on the existing customers or clients at all times and with vigilance.[25] While POCAMLA does not define customer due diligence expressly, in practical terms, banks acquire access to international resources and instruments, which are specifically developed specially by the Financial Action Task Force (FATF) for CDD. POCAMLA grants reporting institutions the ability to exercise stricter check-ups and reports.

In Kenya, all reporting institutions are subject to POCAMLA and must show that the person they are dealing with actually exists. Also, they must be able to identify those persons who are mandated to undertake the transactions, on their behalf or behalf of others. Banks and other

[25] Proceeds of Crime and Anti-Money Laundering, Kenya Law (2009), http://www.kenyalaw.org/lex//actview.xql?actid=No.%209%20of%202009 (last visited Sep 14, 2017).

reporting institutions have to conduct the CDD in such a way that they will be able to explicitly identify the business operations and transactions with the customer in the future.

Enhanced Customer Due Diligence (ECDD) is not internationally defined. Nonetheless, it is clear that ECDD is a process of investigation, which is rigorous and robust over and above the KYC procedures.[26] Its goals are the verification and validation of the customer's actual identity, as well as comprehending and testing the customer's data. The drawback of there being no international definitions of ECDD is that reporting institutions do not have a single guideline and may be held liable for different reasons, depending on their jurisdiction.

In Kenya, POCAMLA includes the ECDD reference. Section 45(3) forces the reporting institutions to exercise reasonable methods to identify all the necessary data about the customer and whether they act in someone else's interests while concealing it.[27] Section 45(4) binds the reporting institutions to identify the end beneficiary of the requested business relationship or the potential ones whether they would be agents, nominees, or trustees, or others.[28] The idea is to evaluate the ECDD and CDD with maximum precision and know all stakeholders.

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[26] Customer Due Diligence - Overview, FFIEC, https://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_013.htm (last visited Sep 14, 2017).

[27] Proceeds of Crime and Anti-Money Laundering, Kenya Law (2009), http://www.kenyalaw.org/lex//actview.xql?actid=No.%209%20of%202009 (last visited Sep 14, 2017).

[28] Ibid.

9. Hon. Chris Okemo and Mr Samuel Gichuru

Despite the above, Kenya's commitment to fighting money laundering was challenged a couple of years ago, based on two Kenya top officials suspected of criminal activities involving illegal income. The two were the Energy Minister, Honorable Chris Okemo, and a former Managing Director of the Kenya Power and Lighting Company (KPLC), Mr Samuel Gichuru charged with money laundering.[29] The cases involved high international criticism.

The UK government challenged Kenya on both individuals. There were reports regarding Gichuru's trip to the Jersey island, the UK, which had not harboured good business intent. Instead of meeting contractor for business negotiations, there were reports that Gichuru flew there to receive kickbacks from them.[30] Okemo was involved in visiting the island too to receive bribes to launder the money for the Alcatel-CIT company further. [31] Further, the two were charged with

[29] Charles Abugre, *Tax and banking havens that landed Okemo and Gichuru in money-laundering trouble*, Business Daily, August 7, 2011, http://www.businessdailyafrica.com/analysis/How-Okemo-and-Gichuru-landed-in-money-laundering-trouble-/539548-1215130-dnjjng/index.html (last visited Sep 14, 2017).

[30] Ibid.

[31] Ibid.

receiving bribes in approximately KShs.902 million, wired through Windward Trading Ltd., an affiliate organisation owned by KPLC. [32] The kickbacks aimed at providing lucrative government contracts from KPLC to the bribing companies. The Jersey Island forwarded the charge and demand for extradition of the two to the Kenyan government. Currently, Kenya did not deliver the charged to the UK, but it did sign a pact to return KShs.380 million to Jersey in the case. [33] Thus, the damage done by the two goes beyond reasonable count.

Conclusion

To conclude, it is worth noting that money laundering is a criminal activity that is deteriorating to the entire world on all levels. Not only does it prevent national budgets from acquiring its legal money, but it also destabilizes economies and overall global welfare. The FATF and its affiliate organisations exist to protect the financial, trade, and cash systems of the globe. Unfortunately, criminal and terrorist organisations create multi-layered, international schemes to evade surveying and launder money still. Although Kenya has been trying its hardest to be a diligent and efficient member of the FATF with its legislation and endeavour, the country still

[32] Ibid.

[33] Nancy Agutu, *Jersey, Kenya sign pact to return Sh380m stolen assets in Okemo, Gichuru case*, The Star, May 7, 2017, https://www.the-star.co.ke/news/2017/03/07/jersey-kenya-sign-pact-to-return-sh380m-stolen-assets-in-okemo-gichuru_c1520045 (last visited Sep 14, 2017).

faces a long way to minimise the damage from money laundering done by persons living in its country.

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