

Comparative analysis of Anti-Money Laundering (AML) and Counter Terrorist Financing (CTF) regimes in the UK and USA

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Abstract

This paper examines the Anti-Money Laundering (AML) initiatives and Counter Terrorist Financing (CTF) approaches in the United Kingdom (UK) and United States of America (USA). Furthermore, it examines the various regulatory frameworks in the above-mentioned jurisdictions. AML/CTF regulations are very critical for the security of economies and societies because they provide frameworks and guidelines for detecting and combating money laundering and other associated crimes. Some of the significant statutory frameworks are: The Bank Secrecy Act (BSA)¹ in the United States, the USA Patriot Act,² the Anti-Money Laundering Directives (AMLDs) in Europe, the Sanctions and Anti-Money Laundering Act (SAMLA) in the United Kingdom, and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA) in Canada are some examples of these laws. The paper used legal methodologies to explicate the phenomenon under investigation. A doctrinal methodology hinges upon analysis of existing case laws, statutes and other primary sources³ to understand better the legal proposition. The study established that AML and CTF compliance is one of the important outcomes beneficial to combating Money Laundering and Terrorist Financing.

Key Words: Money laundering, Terrorist financing, Regulatory frameworks, Compliance

¹ Bank Secrecy Act (BSA) 1970 > <https://www.fincen.gov/fincens-legal-authorities>>accessed 18 May 2022.

²USA Patriot Act of 2001 > <https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act>>accessed 18 May 2022.

³ Dobinson I. and Johns F., 'Qualitative Legal Research', in McConville M. and Chui W.H (eds), Research Methods for Law (Edinburgh University Press 2007), p.18.

INTRODUCTION

Money Laundering and Terrorist Financing have been topical in recent years as the global community experienced a resurgence of cases. Money Laundering is defined as using proceeds from illegal activities to avoid paying tax or confiscation of the funds. While Money Laundering has varied definitions but the widely accepted definition is from The Financial Action Task Force (FATF) which defines it as the “the processing of criminal proceeds to disguise their illegal origin”.⁴ Thus, it is often referred to as ‘making illegal money to be legal’. Whereas Terrorist Financing involves monies used to finance terrorist activities. Accordingly, the Financial Action Task Force (FATF) defines it as the “financing of terrorist acts, and of terrorists and terrorist organisations.”⁵ This simply means those involved in terrorist activities need the money for their daily upkeep and more sophisticated terrorist activities like buying guns, bombs, and buildings where they operate.

Thus, AML/CTF regulations are very critical for the security of economies and societies because they provide frameworks and guidelines for detecting and combating and other associated crimes. Consequently, many jurisdictions have enacted laws to combat Money Laundering and Terrorist Financing to mitigate serious global threats. According to the UN Office on Drugs and Crime, "the estimated amount of money laundered internationally in one year is 2-5 percent of global GDP, or \$800 billion – \$2 trillion in current US dollars." This gives an indication of the huge scale of Money Laundering as a global phenomenon. Following the signing into law of the Anti-Money

⁴ What is money laundering (FATF)? <https://www.fatf-gafi.org/faq/moneylaundering/> >accessed 14 May 2022.

⁵ Ibid.

Laundering Act of 2020 (AMLA2020)⁶ in the United States, the EU and its Member States drafted comparable laws to combat Money Laundering and Terrorist Financing (FATF, 2019).

No doubt, many countries have enacted various laws to combat money laundering. In general, these laws specify how a country's financial institutions would collaborate with law enforcement agencies mandated to investigate money launders and invariably protect clients, societies, and the country. The Bank Secrecy Act (BSA)⁷ in the United States, the USA Patriot Act,⁸ the Anti-Money Laundering Directives (AMLDs) in Europe, the Sanctions and Anti-Money Laundering Act (SAMLA) in the United Kingdom, and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA) in Canada are some examples of these laws.

It is against this background that this paper provides a critical analysis of the comparison between the United Kingdom and United States Anti-Money Laundering laws and Anti-Terrorist Financing regime. Further, it postulates strengths and weaknesses thereof (Raval, 2021).

⁶ Anti-Money Laundering Act of 2020 (AMLA2020) <https://www.fincen.gov/anti-money-laundering-act-2020> accessed 14 May 2022.

⁷ Ibid.

⁸ Ibid.

AIM AND OBJECTIVES

The research objectives for this study are:

- To describe main AML/CTF regulations and legislations in the UK and USA
- To contrast Money Laundering typologies in the UK and USA
- To examine the issues mitigating against effective AML/CTF in the UK and USA and current challenges faced in ensuring effective AML/CTF framework
- To discuss the implications of the current challenges within the UK and USA and on a global scale
- To explicate the areas for improvements and strategies for improving the current state of AML/CTF regime currently adopted

RATIONALE FOR THE PROJECT

The rationale of this research is to conduct a comparative analysis on AML//CTF approaches in the UK and USA regimes. Furthermore, identify the gaps and make recommendations on what can be done to strengthen Anti-Money Laundering and Terrorist Financing Fight.

METHODOLOGY

This paper followed the doctrinal legal methodology and socio-legal research methodologies. A doctrinal methodology hinges upon analysis of existing case laws, statutes and other primary sources⁹ to better understand the legal proposition. This helps the researcher to synthesize the regimes in the context of the UK and USA, as

⁹ Dobinson I. and Johns F., 'Qualitative Legal Research', in McConville M. and Chui W.H (eds), *Research Methods for Law* (Edinburgh University Press 2007), p.18.

different socio-cultural contexts can present different dynamics. Whereas, the socio-legal methodology helps us to see the impact of the AML/CTF regimes in societies, in this case UK and USA societies.¹⁰

MAIN ARGUMENTS: DISCUSSION

This section below will critically examine the AML/CTF approaches and typologies, as well as further examine similarities between these two chosen jurisdictions, UK and US. Later, this section will briefly make recommendations.

UK AML/CTF

UK adopted a risk-based approach in combating money laundering. Pursuantly, it enacted key pieces of legislations each of which will be discussed briefly.

PRIMARY LEGISLATION: THE PROCEEDS OF CRIME ACT 2002¹¹

In essence, this legislation disguises, transforms, transfers and/or removes from the jurisdiction property that is (or represents) the profits of crime that a person knows (or suspects) is the proceeds of crime are all offenses under Section 327.¹² In order to commit an offense, a person must know or suspect that he is involved in an arrangement that will allow another person to acquire, retain, use or control criminal property. Using, possessing or possessing property that one knows to be proceeds of crime constitutes an offense under Section 329 of the Criminal Code.¹³

¹⁰ Cotterell, R. 1998. Why must legal ideas be interpreted sociologically? *Journal of Law and Society*, 25(2): 171.

¹¹ Proceeds of Crime Act 2002. <https://www.legislation.gov.uk/ukpga/2002/29/contents>>accessed 14 May 2022.

¹² Ibid.

¹³ Section 329 of the Criminal Code>

<https://www.legislation.gov.uk/ukpga/2002/29/section/329>>accessed 14 May 2022.

SECONDARY LEGISLATION: THE MONEY LAUNDERING REGULATIONS 2017¹⁴

The main goal of this regulation is to prevent criminals from exploiting professional services to launder money by mandating professionals to use a risk-based approach. Firms must take steps to identify their customers and track how they use their services (The Law Society, 2021). Thus, record keeping and customer due diligence are critical.

INDUSTRY AND PROFESSIONAL GUIDANCE

In an effort to guide professional practice and general industry conduct, the Fifth Money Laundering Directive (EU) 2018/843 (5MLD) went into effect on January 10, 2020. The Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (MLR 2019), which alter the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, were put before Parliament on 20 December 2019. 5MLD broadens the scope of enterprises subject to the UK's Anti-Money Laundering framework (for example, Tax Advisers, Letting Agencies and Crypto-Asset Exchanges), while also revising a number of substantive requirements.

¹⁴ The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (https://www.legislation.gov.uk/uksi/2017/692/pdfs/uksi_20170692_en.pdf)(<https://www.legislation.gov.uk/uksi/2017/692/contents/made>).

KEY UK LAW ENFORCEMENT AUTHORITIES

The Financial Conduct Authority (FCA)

When the FCA announced its Mission, it promised to provide a series of publications that would explain its regulatory strategy in detail. These describe how the FCA carries out its key functions, with the goal of ensuring that its thought and decision-making process are transparent.

The FCA's Approach to Supervision demonstrates how it intends to be more proactive and forward thinking in its company supervision. Most major failures may be traced back to a Company's Strategy and culture (Jones & Knaack, 2019). The proactive engagement of supervision with Businesses will be focused on Business Models and the determinants of behaviour in Businesses. The activities of supervision will be prioritized based on the greatest risk of injury. The FCA's Strategy is described in the document, which describes how it uses intelligence-driven and data-driven approaches to take early and decisive action once harm has been recognized (Financial Conduct Authority, 2018).

Statutory Authority

Furthermore, the UK's authority on Money Laundering has been hinged upon 5-statutory pieces that extend to all parts of the society. These are:

- The Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 (SI 2020 No.991) - Prevention of Money Laundering and Terrorism Financing, implement parts of EU Directive 2018/843, especially registration of trusts.

- The Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017 (SI 2017 No. 692), came into force in June 2017 and stipulates obligations to private firms operating in areas with money high risks of money.
- The Criminal Finances Act 2017 amends the Proceeds of Crime Act 2002 by expanding provisions to confiscate proceeds from tax evasion and funds from Terrorist Financing.
- The Proceeds of Crime Act 2002 (as amended by the Crime and Courts Act 2013 and the Serious Crime Act 2015), the latter Act brought significant changes to the Proceeds of Crime Act, those included civil liability.
- The Money Laundering Regulations 2007 (SI 2007 No. 2157).
- The Terrorism Act 2000 (as amended by the Anti-Terrorism, Crime and Security Act 2001, the Terrorism Act 2006 and the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007).

AML/CTF LAWS IN USA

The most significant AML laws and regulations in the US are the Bank Secrecy Act of 1970(BSA). Further, the Uniting Strengthening America Providing Tools Required to Intercept and Obstruct Terrorism Act (2001). It can be argued that September '11 forever changed how America viewed terrorism as they witnessed with shock the crash-landing of planes by terrorists. In the aftermath, they aggressively embarked on their AML/CTF regimes to mitigate the risk of the repeat of that catastrophe. Below is the brief discussion of key legislation on AML/CTF laws:

Bank Secrecy Act (BSA) 1970¹⁵

Governments and multilateral Corporations have developed specific rules, recommendations and processes for Subject Corporations and persons in order to combat Money Laundering. The Currency and Foreign Transactions Reporting Act of 1970, commonly referred to as Bank Secrecy Act, requires financial institutions to assist government in both the detection and prevention of Money Laundering activities.¹⁶ Anti-Money Laundering (AML) frameworks for regions and countries are formed by combining these elements. AML regulations are critical in the fight to combat Money Laundering and other associated crimes.

The Importance of the Bank Secrecy Act¹⁷

The BSA is regarded as one of the most important Anti-Money Laundering legislation in the US. In order to comply with the BSA, companies operating in the US must take a number of steps such as implementing an AML program based on risk, including Customer Due Diligence (CDD) and screening procedures, as well as reporting any questionable transactions or customers.¹⁸ This Act is important to ensure that financial institutions are not used as tools by money launderers.

USA Patriot Act¹⁹

This law was enacted in the aftermath of the September 11, 2001 terrorist attacks (Katulis & Juul, 2021). This legislation focuses on financial crimes related to terrorism and broadens the scope of the BSA by granting law enforcement agencies additional surveillance and investigative powers, instituting new screening and customer due

¹⁵ Bank Secrecy Act (BSA) 1970

¹⁶ History of Anti-Money Laundering Laws. <https://www.fincen.gov/history-anti-money-laundering-laws>

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ USA Bank Secrecy Act 1970. <https://www.fincen.gov/resources/statutes-regulations/fincens-mandate-congress>accessed> 12 May 2022.

diligence measures, as well as imposing increased penalties on firms or individuals found to be involved in terrorism financing. To combat international terrorism and financial crime, the USA Patriot Act includes special provisions and controls for cross-border transactions (Company Advantage, 2020).

Arguments for the Role of USA Patriot Act²⁰

As an expansion of principles embedded in the BSA Act, the USA Patriot Act ensures that there is empowerment of investigative authorities, enhanced screening and customer due diligence processes, as well as harsher sanctions for Organizations or persons discovered to be implicated in terrorism financing (Tookitaki, 2021)

ADDITIONAL STATUTORY PIECES

While the BSA and USA Patriot Act are perceived as key pieces of law for curbing Money Laundering in USA, there are a number of other legislative pieces that support execution and/or implementation thereof. For example, FinCen as seen in the famous case of Capital One and IRS, play critical roles in AML.

TYOLOGIES

Typologies are simply defined as techniques used to launder money or finance terrorism.²¹ The mandate of the Financial Action Task Force (FATF) is to provide, among others, regulatory frameworks on how to combat money laundering and Terrorist Financing.²² Thus, it is vital to provide latest information and trends, as

²⁰ USA Patriot Act 2001. <https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act>>accessed 18 May 2022.

²¹ Ibid.

²² FATF – Egmont Group (2020), Trade-based Money Laundering: Trends and Developments, FATF, Paris, France, www.fatf-gafi.org/publications/methodandtrends/documents/trade-based-money-laundering-trends-anddevelopments.html>accessed 18 May 2022.

Money Laundering is a continually evolving activity.²³ Against that backdrop, FATF undertook a study on typologies on Money Laundering to gain a better understanding on the evolving trends and methods criminals use. This information becomes incredibly useful in the fight against Money Laundering and Terrorist Financing.²⁴ Topical issues addressed were Wire Transfers, Non-Profit Organisations (NPO's) and their links to Terrorist Financing, the vulnerabilities of the Insurance Sector to money laundering, Politically Exposed Persons (PEPs) and gatekeepers,²⁵ among others. Furthermore, it identified alternative remittance systems,²⁶ Insurance and Money Laundering vulnerabilities,²⁷ Money Laundering associated with human being trafficking and illegal migration,²⁸ Money Laundering and Terrorist Financing trends and indicators.²⁹ These kind of typologies are common both in the UK and in USA, although with varying degrees of vulnerabilities, exposure and threats.

The identified typologies in these two jurisdictions assist to outline vulnerabilities, exposure, threats and even best practices in the fight against money laundering. The Wire Transfers are identified as one of the vulnerabilities in Money Laundering as they “are a fast and efficient way of moving funds, thus they can also be used for terrorist purposes.”³⁰ In a more digitalised Western world, Wire Transfers are very common and the UK and USA are no exception to crimes associated with them. The Covid

²³ FAFT Report >[https://www.fatf-gafi.org/publications/methodsandtrends/?hf=10&b=0&s=desc\(fatf_releasedate\)>accessed](https://www.fatf-gafi.org/publications/methodsandtrends/?hf=10&b=0&s=desc(fatf_releasedate)>accessed) 18 May 2022

²⁴ Financial Action Task Force. MONEY LAUNDERING & TERRORIST FINANCING TYPOLOGIES 2004-2005. https://www.fatf-gafi.org/media/fatf/documents/reports/2004_2005_ML_Typologies_ENG.pdf>accessed 18 May 2022.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ ATF, Trade-Based Money Laundering, Trends and Developments. <http://www.fatf-atf-gafi.org/media/fatf/content/Trade-Based-Money-Laundering-Trends-and-Developments.pdf>accessed> 18 May 2022.

³⁰ Ibid.

pandemic also saw a resurgence of Wire transfers as many people were using a lot of online banking.

Use of financial institutions to conceal the origin of funds from criminal proceeds is a common occurrence in Wire Transfers. This can include Risk of Money Laundering through Financial Instruments and Users and Employees of Financial Institutions.³¹ This typology is very useful to money launderers as banking institutions are often vulnerable and fail to do proper due diligence on their clients. Money launderers not only identify this gap but use it for their criminal activities. The use of confusing audit trails also makes this typology useful for money launderers and terrorist financiers. It was also discovered that Wire Transfers often have a connection to Non-Governmental Organizations (NGO's) as "Terrorists use Wire Transfers to move the funds intended for financing their activities."³² This makes Wire Transfers very conducive for both money launderers and terrorist financiers, as also seen in the September 11 US terrorist attack. The UK has also seen a rise in Wire Transfers. They are also useful to terrorists as they can be done within a country or in between countries.

AREAS FOR IMPROVEMENTS AND STRATEGIES FOR IMPROVING THE CURRENT STATE OF AML/CTF REGIME CURRENTLY ADOPTED

The cost to compliance is high and, thus an area of improvement. Customer due diligence is a continuous challenge as Businesses need to do better to keep records of their customers and understand their profiles. Some of the challenges faced by Small Businesses include resources, as they may not have adequate resources to do

³¹ Risk of Money Laundering through Financial Instruments, Users and Employees of Financial Institutions (2010)11 <http://www.unrol.org/doc.aspx?d=3041>>accessed 18 May 2022.

³² Ibid.

proper due diligence. One of the critical strategies is investing adequate resources in Law Enforcement Agencies so that they are well equipped and well-staffed. For example, in the UK, improvements can be made to ensure the effectiveness of the supervisory regime. Sharing information between Law Enforcement Agencies is also important and identified as such in both jurisdictions. Both countries emphasize compliance and harsher penalties and thus, confiscating proceeds can be an effective strategy.

SIMILARITIES/DIFFERENCES IN THE MONEY LAUNDERING APPROACH ADOPTED THE UK AND USA

Compliance is an important aspect in both the UK and USA and, thus is described as the common similarity. Failure to comply attract punitive actions and penalties in both jurisdictions. Potential consequences may include punitive fines, criminal proceedings and sanctioning.

In the USA, a new theory should be implemented in order to improve AML program effectiveness. Financial Institutions should be encouraged to deploy significant resources for detecting high-risk Organizations (Company Advantage, 2020). In order to better target resources and arrest criminals, law enforcement should not utilize this data as a check on other illegal activities after wrongdoing has already been discovered elsewhere. The goal of Financial Institutions' AML compliance under this regime is to offer high-quality information to support critical strategic goals of Law Enforcement.³³ There should be no doubt that the concentration of the current regime is on producing documents without adequate input on their quality or effectiveness.

³³ USA: Anti-Money Laundering Laws and Regulations. <https://iclg.com/practice-areas/anti-money-laundering-laws-and-regulations/usa>>accessed 14 May 2022.

Fixed expenses should not be increased to serve consumers but resources should be allocated to those that pose a greater risk (Klein, 2020).

Whereas in comparison to the quantity of Anti-Money Laundering activities, the amount of assets recovered by the UK appears to be negligible. Additionally, the Law Enforcement Agencies only investigate a small percentage of suspicious behaviour complaints related to grand corruption. For grand corruption cases, the 31-day "moratorium period" for reacting to suspicious behaviour complaints is often insufficient. Grand corruption cases fail to make full use of the civil authority of Non-Conviction Based Asset Forfeiture (NCBAF). Finally, the existing structure for asset recovery relies too heavily on a conviction in the country of origin, which is a major flaw (Transparency International, 2015).

RECOMMENDATIONS

Some recommendations include:

- The Public-Private Co-operation (PPC) is an important aspect in combating Money Laundering and Terrorist Financing.
- Keeping up to date client information.
- Strengthening audit systems.
- Sound Customer Due Diligence
- Strengthened Information Management Systems.
- Development of clear AML/CTF procedures and policies; and
- Adequate training skills to designated staff.

Conclusion

The importance of combating Money Laundering can never be understated worldwide. As Money Laundering harms economies and societies, Private-Public Partnerships (PPP's) are important, so are global initiatives. Compliance is a strong emerging theme in this paper. The UK and US have made good progress on their AML/CTF regimes and with effective compliance. However, there is still room for improvement on both jurisdictions as money launderers continuously try to circumvent systems.

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