The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries

NORMAN MUGARURA

ROUTLEDGE

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List of Abbreviations

AIDS	acquired immunodeficiency syndrome
AML/CFT	anti-money laundering/combating the financing of terrorism
ARS	alternative remittance systems
BCCI	Bank of Credit and Commerce International
BIS	Bank for International Settlements
CDD	customer due diligence
CJA	Criminal Justice Act
CTAG	Counter-Terrorism Action Group
CTC	Counter-Terrorism Committee
EAC	East African Community
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EDU	European Drug Unit
EEC	European Economic Community
EFTs	Electronic funds transfers
EU	European Union
EUROPOL	European Police Office
FATF	Financial Action Task Force
FDI	foreign direct investment
FIU	Financial Intelligence Unit
FSAP	Financial Sector Assessment Programme
FSF	Financial Stability Forum
FTR	Financial Transaction Reporting
GDP	gross domestic product
HIV	human immunodeficiency virus
ICT	information and communications technology
IFIs	international financial institutions
IGG	Inspector General of Government
ILO	International Labour Organization
IMF	International Monetary Fund
INTERPOL	International Criminal Police Organization
IOSCO	International Organization of Securities Commissions
KYC	know your customer
NCCT	Non-Cooperative Countries or Territories
NCIS	National Criminal Intelligence Service
NGOs	non-governmental organizations
NRM	National Resistance Movement
OAS	Organization of American States

OECD	Organisation for Economic Co-operation and Development
OFCs	offshore financial centres
OGBS	Offshore Group of Banking Supervisors
POCA	Proceeds of Crime Act 2002
SADC	Southern African Development Community
SAPs	Structural Adjustment Programmes
SIS	Schengen Information System
SOCA	Serious Organised Crime Agency
TI	Transparency International
UCB	Uganda Commercial Bank
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNDCP	United Nations Drug Control Programme
UNDP	United Nations Development Programme
URA	Uganda Revenue Authority
WTO	World Trade Organization

Foreword

The book has been precisely written to strike a balanced approach to the study of money laundering in the asymmetric global marketplace. It underscores the importance and challenges of harnessing a global anti-money laundering framework, taking into account the dynamics of development in less developed economies. In conceptualizing the need for a global anti-money laundering framework, the book highlights a dichotomy of challenges. First, there are challenges in relation to the dynamics of the market economy such as deregulation, liberalization and conflict of laws. Secondly, there are challenges inherent in the domestic economy such as corruption, general systemic failure and lack of infrastructural capacity. In deconstructing the aforementioned challenges, the book delineates a need to consolidate the existing global anti-money laundering/combating the financing of terrorism (AML/CFT) framework so that it is capable of delivering the envisaged AML/CFT standards globally. For the global anti-money laundering framework to work globally, it should be designed with an ethos which reflects the prevailing global climate in which it operates.

While the book proffers insights into money laundering and its predicate offences, it also discusses the infrastructure that facilitates money laundering and a wide range of predicate offences. The thrust of the book is that the global anti-money laundering framework cannot translate locally into practice unless it creates something of a level playing field for the member countries subject to it. Apparently, the playing field is not leveled, which potentially plays in favour of some countries while undermining the ability of others to harness the prescribed global anti-money laundering regimes. The precarious environment in some countries is manifested in the absence of local capacity building, the prevalence of corruption and the absence of tailored reforms to pertinent and novel challenges in particular countries. Thus, the book proffers an alternative approach for further studies and policy development on money laundering, fronted on well-sequenced reforms domestically and, where necessary, at a global level. This approach is an essential requirement, if not a prerequisite, in order for states to domesticate desired global anti-money laundering regimes. The proliferating global anti-money laundering regimes, desirable as they may be, are implemented locally and are inherently prone to the prevailing local environment. For instance, developing countries are deficient in economic and social infrastructure, and are constrained by limited resources and requisite education, not to mention the prevalence of corruption. The above challenges are compounded by a lack of institutional and structural capacity to harness global anti-money laundering standards locally. Similarly, the institutional and structural weaknesses in some countries have translated into an environment conducive to criminal exploitation, while diminishing the same state's capacity to counteract new challenges, such as money laundering. In the majority of less developed economies, efforts towards harnessing global AML/CFT regimes are derailed by many factors, which it is perhaps needless to reiterate. In part, this predicament translates into an environment for criminal exploitation and renders societies vulnerable in confronting their common challenges. In view of the varying dynamics of development, this book wonders whether countries still need to be clustered together and treated as one or whether regions should forge different arrangements and simply coexist as different entities.

Thus, this book is an essential read for policy and intellectual reasons. In relation to policy, it underscores externalities of the global system on individual local societies. It articulates that in view of overlapping global exigencies such as money laundering and its predicate threats, countries have very little choice but to come together by way of harmonization of internal policies and adopting other common initiatives. For instance, there is a need for a common legal grid to enable countries to deal with conflict of laws and different jurisdictions, and also with regard to sharing resources such as intelligence information. Some states have been sidelined as a result of their participation in the globalization of markets and, in my view, this has been due to the fact that these states have failed to position themselves properly in the face of global changes.

At an intellectual level, the book proffers a scholarly alternative to the study of money laundering in a global regulatory landscape. It highlights the ethos of global AML/CFT regimes, articulating the challenges that this global framework has to confront. While the manuscript would have benefited from the author's earlier scholarly work, this was distinctly done to underscore the broader objectives for writing this book.

Preface

The book articulates that the global anti-money laundering/combating the financing of terrorism (AML/CFT) framework replicates global asymmetries of power in both approach and reality and cannot afford a level playing field to the majority of less developed countries. Globalization generally and the global anti-money laundering regimes specifically are information-driven, and the ability of societies at rudimentary stages of development to harness the potential synergies of the global system is significantly curtailed by the inefficiency of 'local societies' to harness meaningful information. In many developing countries, there are weak or no centralized data registry centres to process and supply data to AML/CFT agencies such as the Financial Intelligence Units (FIUs) and the police. Information is deemed to be meaningful if it is society-oriented and informed by the challenges facing the society in question. Information is the prerequisite for the effective enforcement of laws and regulations. Information is essential for the construction of the money trail, given that the money laundering process would have been executed in stages; however, requisite information is also essential for law enforcement agencies in order to secure a successful prosecution of the alleged money laundering/terrorist culprits. Without the requisite information, these agencies will not be able to function properly in enforcing the implementation of laws and in ensuring that when violations occur, they do not go unsanctioned.[1] I have deconstructed the global AML/CFT framework within the context of some domestic jurisdictions to demonstrate its limitations as a global framework.

The book illuminates the challenges to an effective global AML/CFT environment in some jurisdictions. The aforementioned environment potentially dictates the ease of harnessing normative global AML/CFT standards in a country. The AML/CFT control paradigms, which have evolved at the level of the Financial Action Task Force (FATF) or at a regional level (for example, the EU) and have been adopted by states as a regulatory framework, are difficult to apply, let alone enforce, given that the majority of these regimes function on the strength of generating good information on present and future bank clients. Similarly, in many developing economies, either there is no data generated to help quantify and evaluate the magnitude of money laundering/terrorism threats or the little data generated is too patchy to properly inform any policy choices. Underdevelopment and its attendant shortcomings have generated significant, if not insurmountable,

1 Ian Carrington and Heba Shams, 'The Elements of Effective AML/CFT Framework: Legal, Regulatory, and Best Institutional Practices to Prevent Threats to Financial Stability and Integrity', Seminar on 'Current Development in Monetary and Financial Law', Washington DC, 23–27 October 2006.

challenges for financial and law enforcement agencies in some countries with regard to developing requisite measures against both local and global-oriented crimes.

The last part of the book underscores the need for countries to first address their novel development challenges before they countenance the adoption of global regimes on money laundering and its predicate crimes. Individual countries will have to address the question of infrastructure deficiencies at home as a prerequisite for assimilating the desired anti-money laundering standards into their domestic law. As such, there is a need to co-opt some developing countries onto the committees charged with the responsibility of producing the global anti-money laundering standards to ensure that the proliferating regimes have an ethos not only of representivity but also of legitimacy in different societies.

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In part, this book is a culmination of hard work, inspiration and the influence of people like John Strawson, Professor Mads Andenas, Professor George Walker, Dr Richard Alexander, Professor Kofi Oteng Kufuor, Dr Frank Byamugisha of World Bank Washington and Professor Mondo Kagonyera. I am thankful to each one of them for their contribution towards my academic and professional development.

I wish to pay tribute to my parents, who in those formative years impressed on me the importance of education to someone's life. The fact that I understood and internalized the education cause in my early years has instilled in me a sense of academic insatiability. I vividly remember being told that education is a platform where 'the son of a minister and the son of a peasant vie for the same office'. As a matter of fact, writing this book goes a long way towards fostering my early childhood dream.

As ever, I remain indebted to my family, friends and colleagues for their support and encouragement; and, most importantly, I thank God who is my anchor in all my aspirations. To cap it all, this book is a product of hard work, discipline and above all the innate desire to succeed. Perhaps finally I should say that I alone remain responsible for any errors and infelicities it might contain.

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Chapter 1
The Conceptualization of Money Laundering Offences and Typologies

Introduction

This chapter explores the genesis of money laundering and its underlying offences (hereinafter the money laundering predicate offences). Money laundering is an elusive concept that involves the illicit movement of funds generated from drug trafficking, human trafficking, terrorism, motor vehicle trafficking, etc. In view of this, this chapter addresses multiple issues such as the scope, nature and money laundering typologies.[1] Specifically, it outlines money laundering offences and why it is a preferred method of avoiding law enforcement, its strategies and techniques, and its relationship to other forms of crimes. Money laundering can be described as an opportunistic crime because not only does it 'lubricate the wheels' of other organized crimes, it is also exploited as a strategy to transmit the proceeds of crime to their destination and purpose. Thus, unless robust money laundering countermeasures are devised, it has the potential to fuel the commission of transnational organized crime such as terrorism, drug trafficking and human trafficking. Since money laundering is a transnational crime, its typologies are likely to differ from society to society.[2] Criminals in some countries might choose to launder their profits, while in others they might simply decide to spend them. In this regard, the explosion of corruption and counterfeit currency crimes in some countries constitute money laundering predicate crimes. Thus, the last part of this chapter addresses the nexus of corruption and money laundering within the broad context of money laundering predicate offences.

The Early History of Money Laundering

The term 'money laundering' is relatively new, having come into parlance in the mid-1970s. According to the *Oxford English Dictionary*, the term first came into use

1 Directive 2001/97/EC [2001] OJ L 344/76.

2 For example, tax evasion is a crime in the USA, yet not only is it perfectly legal in Switzerland, it is often encouraged in the quest to maximize shareholders' wealth and investors' returns.

in connection with the Watergate Scandal in 1973–1974.[3] It is derived from the early practice of American criminal organizations operating laundromats as cash-intensive businesses to hide their criminal wealth. It has become the accepted term ever since in relevant legislation and legal texts. It can be found, for example, in titles such as the US Money Laundering Control Act (1986) and the 1990 European Convention on Money Laundering, Search, Seizure and Confiscation of Crime Proceeds.[4] Money laundering was not criminalized in the USA until the passage of Money Laundering Control Act. The earliest legal development against money laundering took place in the USA with the passage of Bank Secrecy Act 1970.[5] This Act fully recognized the link between money laundering, including security fraud and the global dimension of the problem.[6] It required banks to report cash transactions of $10,000 or more and this provision was also enacted in the Money Laundering Act 1986, which for the first time defined money laundering as a federal crime.[7]

In the UK, money laundering was not a distinct offence but would be prosecuted under various statutes in the 1980s. Section 22 of the Theft Act 1968 provided the framework for the prosecution of launderers who dishonestly handled stolen assets. The most famous case to be prosecuted under this provision was the Brink's-Mat bullion robbery case. Michael Relton, a former solicitor, was successfully prosecuted under this provision of the Theft Act 1968. The concept of money laundering in the UK can also be traced back to the House Lords' decision in *R v. Cuthbertson* (1980).[8] This decision revealed the failure of forfeiture laws to deprive the offender of the proceeds of crime. The defendants were engaged in long-term criminal activity involving the supply of controlled substances. They are said to have generated over £750,000, some of which was placed in bank accounts in Switzerland and France. Pleading guilty, the defendants were convicted and the court ordered that their assets be forfeited. The defendant appealed to the House of Lords against the sentence and the forfeiture orders of their assets. The question of law presented before their Lordships was the interpretation of the Misuse of Drugs Act 1971 and the section on which the court was empowered to order the forfeiture of the aforementioned assets.[9] It was concluded that the powers of the court to order the forfeiture of assets did exist, but only as long as the asset in question was a tangible property and not choses in action such as cheques or other

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3 Jeffrey Robinson, *The Laundrymen* (London: Pocket Books, 1998), quoted in Heba Shams' paper 'Using Money Laundering Control to Fight Corruption: An Extraterritorial Instrument', 7 *Law and Business Review of the Americas* (2001): 85–133.

4 Shams, 'Using Money Laundering Control to Fight Corruption'.

5 Ibid.

6 Ibid.

7 See the United Nations Drug Control Programme website: www.unodc.org (date accessed 22 November 2011).

8 [1980] 2 All ER 401.

9 Ibid.

intangibles.[10] In 1986 the Drug Control Act was passed, which was to consolidate confiscation orders of criminal assets by stripping criminals of the proceeds of their criminal activities. Section 24 of the Act creates an offence of assisting another to retain the proceeds of drug trafficking. However, to secure a successful prosecution, the defendant must demonstrate that he/she knew or suspected that the owner of the property has been engaged in drug trafficking or has benefited from drug trafficking.[11] Yet, s. 24 was only applicable in relation to the confiscation of the proceeds of drug trafficking, an issue that for some time confined money laundering to drug trafficking. This was later to be addressed by states following the adoption of United Nations (UN) instruments such as the United Nations Convention against Transnational Organized Crime in 2000 signed at Palermo (hereinafter the Palermo Convention).

The Definition of Money Laundering

Money laundering is defined as a process of manipulating legally or illegally acquired wealth in a way that obscures its existence, origin or ownership for the purpose of avoiding law enforcement.[12] Money laundering describes a deliberate, complicated and sophisticated process by which the proceeds of crime are camouflaged, disguised or made to appear as if they were earned by legitimate means. It is a three-stage process, which is as follows: (i) the dirty money must be severed from the predicate crime generating it; (ii) it must be characterized by a series of transactions designed to obscure or destroy the money trail in order to avoid detection; and (iii) the criminal proceeds must be reinvested in furtherance of the objectives of the business (launderer). In Article 3(1) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and other Psychotropic Substances (1988), states are required to enact legislation necessary to establish a modern code of criminal offences relating to illicit trafficking in all its different dimensions.[13] The scope of criminalization should cover a comprehensive list connected to drug trafficking – from production, cultivation and possession to the organization, management and financing of trafficking operations.[14] This article

10 Shams, ‘Using Money Laundering Control to Fight Corruption’.

11 Ibid.

12 Ibid.

13 W.C. Gilmore, *Dirty Money: The Evolution of Money Laundering Counter-Measures* (Strasbourg: Council of Europe Publishing, 1999), p. 161.

14 D.P. Stewart, ‘Internalising the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’, 18 *Denver J. International Law and Policy* (1990): p. 387.

requires each party to the Convention to establish money laundering as a criminal offence in its domestic law when it is committed internationally.[15]

In Article 3(1)(b), each state party is required to establish as a criminal offence:

> the conversion or transfer of property knowing that such a property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences, for purposes of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence or offences to evade the legal consequences of his action. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.

Article 3(1)(c) provides that each party render as criminal: 'The acquisition, possession or use of property, knowing at the time of the receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences.'[16] Article 3 creates a framework for criminalization and treating money laundering as a serious offence, and would ease state cooperation in relation to confiscation, mutual legal assistance and extradition of alleged money laundering criminals. The Convention is particularly important because all parties are obliged to establish Article 3(1) offences as criminal offences in their domestic law.

Thus, money laundering involves the following when committed intentionally:

- The conversion and transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his/her action.[17]
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity.
- The acquisition, possession or use of property, knowing at the time of receipt that such property was derived from criminal activity or an act of

15 For this, see Article 3(3), which says that 'knowledge, intent or purpose' required as an element of the offence may be inferred from an objective factual circumstances.

16 Gilmore, *Dirty Money*.

17 This definition derives from Article 3, s. 1(b) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, signed in Vienna (hereinafter the Vienna Convention).

participation in such activity.

- Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing indents.
- Knowledge, intent or purpose required for the commission of the above-mentioned money laundering activities should have been carried out in the territory of another state or in that of a third country.[18]

'Property' means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title or interests in such assets.[19]

The element of conversion is central to the study of money laundering offences because it marks the point at which illicit cash is turned into a less suspicious form, so that the true source or ownership is concealed and a legitimate source is created. A shortcoming of the Vienna Convention is that it was specifically limited to the laundering of the proceeds of drug trafficking. Following the Vienna Convention, a number of countries based their anti-money laundering laws on this framework, limiting the definition of this offence to the laundering of drug profits. Subsequently, there has been a move to extend the definition of money laundering to include the proceeds of other serious criminal activities, such as smuggling, fraud, serious financial crimes and the sale of stolen goods.[20] The 1996–1997 survey by the Financial Action Task Force (FATF) on money laundering measures noted that, along with drug trafficking, financial crimes (bank fraud, credit card fraud, investment fraud, advance fee fraud, bankruptcy fraud embezzlement, etc.) were the most mentioned sources of the proceeds of crime.[21] Many countries have now taken action to extend the scope of their money laundering offences to include a wider range of all predicate offences.

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18 This is the United Nations Drug Control Programme (UNDCP) definition of money laundering adopted from its anti-money laundering unit programme paper, 'An Overview of the UN Conventions and International Standards Concerning Anti-Money Laundering Legislation', February 2004.

19 Article 3, s. 1(b) of the Vienna Convention.

20 Rick McDonnell, 'Money Laundering Methodologies: International and Regional Counter-Measures', National Crime Authority, NSW, paper presented at the Australian Institute of Research in Sydney, May 1998.

21 'An Overview of the Global Money Laundering Problem: International Anti-Money Laundering Standards and the Work of the Financial Action Task Force', in Rick McDonnell, above, note 20.

The Extent of the Global Money Laundering Problem

Estimating the amount of money laundered has been recognized as problematic (if not impossible) because of the covert nature of the crime. However, some estimates have been developed which give the rough magnitude of the problem. In 1987, the UN estimated the value of drug trafficking worldwide at US$300 billion, much of which would be laundered. Other estimates[22] have been made which put the amount at between US$300 and US$500 billion of dirty money that is introduced into the global financial system each year, or roughly two per cent of global GDP.

The Outcome of Money Laundering

The definition of money laundering envisages several outcomes:

- The launderer intends to hide the existence of the wealth or its amount, as in the case of a tax evader who wants to shelter his/her wealth.
- He/she could also be intending to hide or disguise the owner of the generated wealth, as in the case of a drug lord who wants to obscure the money trail that might lead to his/her detection by severing the link between him/her and the funds through a shell company or a trust.
- He/she could be intending to hide the way it is put to use, where the money is intended for investment in a criminal or terrorist organization.
- He/she could be intending to disguise the origin of funds by fabricating another legitimate source of wealth.

The outcome of the laundering process depends on the purpose of the launderer himself/herself, as well as on the law and law enforcement in the jurisdiction where the activity is taking place.[23] The money launderer's chief objective is to reinvest the illegal wealth in another illegal enterprise by obscuring the ownership of the money or its trail to the illegal destination. Disguising the source and legitimizing it will be irrelevant when the launderer invests his/her wealth in jurisdictions which operate a lax approach to the illegality of funds.

Avoiding Law Enforcement

Any money laundering operation ultimately aims at circumventing law enforcement and evading the reach of the law. The purpose of the launderer is to

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22 Rick McDonell, 'Regulatory Challenges for the 21st Century', paper presented at the Australian Institute of Criminology in Sydney, 7–8 May 1998.

23 B.A.K. Rider, 'Taking the Profits Out of Crime', *Journal of Money Laundering Control* (2001): pp. 2–3.

secure or avoid the confiscation of his/her ill-gotten wealth or to avoid or evade the tax authorities. For those who extend money laundering to civil wrongs, the launderer's purpose could be to avoid the enforcement of a court ruling against his/her assets in a divorce case.[24]

Strategy

Drug trafficking, like any other form of criminal activity, is highly cash-intensive. Indeed, in the case of hard drugs (heroin and cocaine), the physical volume of notes received from street dealing is much larger than the volume of the drugs themselves.[25] Reliance on cash as a central medium of exchange in turn gives rise to at least three common factors:

- drug dealers need to conceal the true ownership and origin of the money;
- they need to control the money; and
- they need to change the form of the money.

Money laundering can be summarized as the conversion of illicit cash to another asset, the concealment of the true source or ownership of the illegally acquired proceeds and the creation of the perception of legitimacy of the source and ownership.[26]

In their efforts to achieve the above goals, money launderers have resorted to the use of a variety of techniques. The most common ones include: currency smuggling; the conversion of cash into negotiable instruments; the creation or use of facilities offered by financial and tax havens; the establishment and use of front or shell companies; the use of currency and brokerage houses; the creation of false or inflated invoices; the use of casinos and other gambling enterprises; the use of credit cards obtained from tax haven banks; the use of facilities provided by underground or parallel banking systems; and resorting to cash purchases.[27] As will be noted, the techniques of money laundering are innumerable, diverse, complex, subtle and secret. What is not in dispute is the ability of the launderer to manipulate the legitimate process in his/her transactions. Analysis of the Canadian money laundering police files[28] revealed that over 80 per cent had an international dimension, suggesting that the perpetrators of this trade exploit the transnational movement of goods, capital and people, in the same way as the legitimate

24 Shams, 'Using Money Laundering Control to Fight Corruption'.

25 P. O'Brien, 'Trafficking Narco-Dollars: The Evolution of a Potent Weapon in the Drug War', 21 *Inter-American Law Review* (1990): p. 643.

26 Ibid.

27 Ibid.

28 M.E. Bearer et al., *Tracing Illicit Funds: Money Laundering in Canada* (Ottowa: Ministry of Solicitors General of Canada, 1990): p. 304.

business community does in this global era. As the EU Commission has noted, the internationalization of economies and financial services are opportunities which are seized upon by money launderers to carry out their criminal activities, since the origin of funds can be better disguised when put beyond the reach of the national authorities where the crime was initially committed.[29] This warrants a need for international cooperation in evolving an international framework in relation to money laundering challenges, such as with regard to bank secrecy laws and making sure that money laundering is criminalized internationally.

Typologies of Money Laundering

Money laundering patterns are said to fall into three distinct categories. The first is internal money laundering, characterized by the laundering of the proceeds of crime committed within a given country or assets to be used in committing more crimes there – an example would be the prominent case of the 'daga' trade in South Africa. The second is incoming/inflowing money laundering, which entails the laundering of assets derived from crimes committed outside the country and reintroduced as investment – the most notorious of this type being foreign currency importation. The third category is outgoing money laundering, which very closely mimics the classical cases. In this typology, the proceeds of crime committed within the country are exported to one or more countries, as highlighted by the case of counterfeit currency in Uganda. The overriding objective[30] of the launderer is to get the money to the international money markets at some stage, whereby total flexibility can be achieved. The origin having been totally concealed, the beneficiary can pose as a rich person who invests anywhere in the world legitimately using the banking system at will.

The Process of Money Laundering

The acts or transactions that constitute money laundering are limited only by the purpose for which they are structured and the skill of the launderer. There are an almost unlimited number of ways in which the launderer can achieve his/her purpose. This process encompasses the three money laundering stages, which are covered separately below.

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29 This was the overriding objective of the first European Anti-Money Laundering Directive of 1991.

30 This section draws on a panel discussion paper on money laundering presented by Mr Kessy Herman to the Interim Executive of Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in South Africa.

Money Laundering Techniques

Money can be laundered using one of the following techniques:

- Investing the dirty money in legitimate businesses, either through shell companies or through genuine companies using pseudonyms.
- Where the launderer acquires assets from the proceeds of crimes.
- Depositing of money in banks in non-cooperative countries and remittances through banking channels to the host country.
- Use of non-banking channels to transfer money (such as hawala and hundi), which is now a common method of remitting money to many parts of the world. For example, this method is popular among Ugandan and other East African citizens in sending money to their countries;
- Over-invoicing of goods in seemingly normal business transactions.
- Routing money through tax haven countries – the Cayman Islands and other Caribbean territories have been very prominent in this respect.

These techniques are further broken down in each of the stages (placement, layering and integration) through which the money laundering is processed.

The first stage is the placement stage, where the illegitimately acquired or destined assets are placed into the financial system. This initial stage can also involve the greatest risks for the culprit, since the placement stage often requires substantial sums of money across the counters of a bank or other financial institution. According to Rider,[31] 'money in flight will first be noticeable when it literally first splashes into the pool'. Thus, money laundering operations are more noticeable, and thus easier to stop, when money is first introduced into the system (the placement stage), since deposits without an apparently bona fide commercial reason will tend to arouse suspicion at the point of face-to-face contact with the bank. However, detection at this stage can often be avoided by the process known as 'smurfing', which involves the use of what is a small army of individuals who deposit cash sums[32] which fall below the reporting threshold. These 'smurfs' are often known to the banks and banking institutions which deal predominantly or exclusively in cash.[33] It may be said that individual bankers are in the best position

31 Ibid.

32 C. Howard, 'The *Mens Rea* Tests for Money Laundering Offences', 4 *New Law Journal* (1998): pp. 118–19. This article distinguishes between the following categories of the mental state that constitute knowledge: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and reckless failing to make such inquiries as an honest and reasonable person would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable person; and (v) knowledge of circumstances which would compel an honest and reasonable person on inquire further.

33 Cash from unknown persons in mixed denominations is often a cause of suspicion. For this reason, many drug traffickers and professional launderers have sought to operate

to monitor and report suspicious financial transactions. However, attempts to stop money laundering at the placement stage has put considerable pressure on banks and indeed on the tradition of the legal systems of countries. Several issues arise here: not only is there the bank's requirement to report to the authorities knowledge or suspicion of illicit activities, but there is also the duty the bank owes to the customer based on the principle of customer confidentiality.[34]

During the placement stage, one or all of the following are likely to occur:

- Physical disposal of bulk cash proceeds. Because large volumes of cash may draw attention to their illegal source and carry the continuous risk of theft or seizure, criminals are motivated to exchange small denomination bills for larger bills, to deposit cash and buy financial instruments or otherwise dispose of bulk cash promptly.
- Structuring/smurfing of cash transactions (deposits, monetary instrument purchases, etc.) in order to evade the common regulatory requirement that transactions which exceed a certain amount of money must be recorded and sometimes reported.
- Bank complicity, where money laundering is facilitated when bank personnel are corrupted, intimidated or controlled.
- Misuse of exemptions. The unsupervised unilateral ability of a financial institution to exempt itself or its customers from a reporting or recording regime can offer money launderers a way in which to avoid an audit of their cash transactions.
- Committing of licit and illicit funds. The committing of funds and establishing front companies is a way to take advantage of these circumstances by obscuring illicit proceeds in a forest of licit transactions (co-mingling) or masking them with the appearance of legitimate receipts of a largely cash business activity (a front company).
- Assets purchased with cash. Large-scale purchases can support a luxurious lifestyle, change the form of the proceeds from conspicuous to inconspicuous, or can be used to obtain major assets which will be employed to further the criminal enterprise.
- Currency smuggling. The cross-border smuggling of currency and monetary instruments by various methods accomplishes the desired physical transfer without leaving an audit trail.[35]

What generally happens at this stage can be illustrated by the following two metaphors:

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from behind the cover of cash-intensive businesses, such as casinos, bars or restaurants.

34 *Tournier v National Provincial Union Bank of England* [1924] 1 KB 46.

35 Robinson, *The Laundrymen*, p. 35.

- Money laundering is analogous to throwing an object[36] (for example, a stone) into water. As soon as the object is thrown into water, one can see the ripples where it first hit, but as it sinks and goes deeper, the ripples disappear with it, to a point where they can no longer be seen. At some point, it is hard to tell that the object was even thrown into the water. Drawing on this metaphor, it has been said that unless money laundering is prevented at the placement stage, it becomes very difficult to control at the layering or integration stage when it has 'sunk deeper' within the financial system.
- Money laundering typologies[37] have also been explained in the following 'laundry' analogy. The 'hand wash' is when a criminal organization uses the money (generally small amounts) to buy goods and services for the organization. The 'family washing machine' is when the criminal organization or family launders its money according to family goals and in collusion with banks or financial institutions. Washing programmes can also consist of a short cycle, such as opening a deposit account in a bank in the name of a given person and depositing the money there, or a long cycle, which involves terms such as 'pre-wash', 'wash', 'rinse' and 'drying' to describe the different stages from cleaning the money to its investment in legitimate activities. Then there is the 'condominium washing machine', when several families belonging to the same criminal syndicate (such as the Mafia) organize a laundering enterprise with the complicity of someone in a bank or financial institution. Last, but not least, is what is called the launderette, where a criminal organization offers criminals and criminal syndicates a money laundering service with different cycles: a short cycle for cleaning the money only or a long cycle which includes all the activities from laundering to investment.

The second stage is the layering or agitation stage, where numerous transactions arise that are designed to act as a smokescreen to disguise the true origin of the money:

- One of the many methods used at the layering stage is over-invoicing regarding the value of imported goods.
- The use of gold is also much favoured by money launderers, in view of its highly mutable qualities. Whether in the form of ingots, rings, bracelets, pendants or ornaments, the value remains constant, so therefore a single piece of gold can be changed many times in order to disguise its original form without any significant change in its worth. This approach (to a great extent) mirrors parallel calls to transplant interpretations of knowledge on the basis of the case law on constructive trusts into the sphere of criminal

36 Ibid.

37 D. Savona, 'Mafia Money Laundering versus Italian Legislation', 3 *European Journals of Criminal Policy and Research* (1993): p. 35.

law in order to include a broadly defined concept of wilful blindness.

- The creation of a false paper trail involves the intentional production of false documentary evidence to disguise the true source, ownership, location, purpose of or control over the funds.
- Cash converted into money instruments – once illicit proceeds have been placed into a bank or other financial institution, they can then be converted into monetary instruments such as traveller's cheques, letters of credit, money orders, cashiers' cheques, bonds or stocks. Conversion into monetary instruments allows the proceeds to be more readily transported out of the country without detection, to be deposited into other domestic financial institution accounts, pledged for loans, etc.
- Tangible assets purchased with cash and converted in order to offset transaction costs. The identity of the parties may be obscured by untraceable transactions, so the assets become difficult to locate and seize.
- Electronic funds or wire transfers. This is possibly the most effective layering method available to money launderers. It offers criminals much-needed speed, distance, a minimal audit trail and virtual anonymity amid the enormous daily volume of electronic funds transfers (EFTs), all at a minimal cost.

The third stage in the money laundering process is the integration or reintegration stage. This stage occurs when the dirty money has been safely placed and then layered to the extent that it is safe to return to the launderer via a legitimate financial system. In effect, the illicitly gained proceeds of the original criminal activity have been cleaned by the time they reach the integration stage. This stage encompasses the following activities:[38]

- Real estate transactions, where property can be bought by shell corporations using illicit proceeds. The property can then be sold and the proceeds appear as legitimate sales proceeds. A reduced price can be declared and partial payment made in cash to the seller, guaranteeing a paper profit when the property is resold at the market value. Inflated prices can be established by a series of trades, enabling the last seller to show a legitimate source of substantial (although fictitious) profit or providing justification for inflated loan transactions.
- Front companies and sham loans, whereby the owner can pay his/her foreign laundering subsidiary interest on the loan and deduct it as a business expense, thereby reducing his/her tax liability.
- Foreign bank complicity. This form of money laundering is committed using accomplice foreign banks and represents a higher order of criminal sophistication, presenting a very difficult problem both at the technical and

38 The three stages in the laundering of dirty money are intended to give a simplistic overview of what in reality is a complex and sophisticated process.

political levels. Such a bank can conceal many incriminating details relating to persons and transactions, not to mention providing sham loans secured by criminal proceeds, while guaranteeing immunity from law enforcement scrutiny due to the protective banking laws and regulations.

- False import/export invoicing, involving fictitious transactions, over-valuation of entry documents and/or over-valuation of exports serving to justify fund transfers involving criminal proceeds.[39]

It has to be said that the above stages are not cumulative constituent elements of money laundering in the sense that they should all exist before an offence is committed. The commission of any one of them could be sufficient for guilt to arise. However, it is improbable that layering or integration could occur with placement having preceded it. As is apparent in the three stages of money laundering, there are instances when it is committed without the placement stage. While there are instances where all three stages are clearly discernible, the variability and complexity of the money laundering process can result in cases where only a number of these stages occur, where they occur simultaneously or where they overlap.[40] This has led to a number of alternative models to the three stages:

- The two-phase model distinguishes between money laundering in the first degree (concerning the laundering of money stemming directly from illegal acts) and money laundering in the second degree, indicating mid- or long-term operations through which the laundered money appears as a legal income and is restructured in the legitimate financial system (recycling).
- The circulation model, which is based on the cycle of water and is divided into seven stages.[41]
- The four-sector model, in which the sector contains a refinement process.
- The destination/teleological model, based on diverse money laundering targets (e.g. integration, investment, tax evasion and the financing of organized crime).

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39 E.U. Savona and M.A. De Foe, 'International Money Laundering Trends and Prevention/Control Policies', in E.U. Savona (ed.), *Responding to Money Laundering: International Perspectives* (New York: Harwood Academic Publishers, 1997), pp. 27–8.

40 Ibid.

41 Schematically the cycle goes as follows: rain (insertion of cash) – insertion of water into the soil (first wash) – creation of undercurrent waters (creation of reserves) – creation of underground seas through drainage (preparation and transportation abroad) – recollection in the underground seas (preparation for legitimation) – water pumping station (entrance to the legitimate financial system) – biological cleansing installations (second wash) – consumption/use (transportation and investment) – evaporation (legal reintroduction into the country of origin) – new rain (new insertion of cash from criminal activities). This model is cited in Valsamis Mitsilegas, *Money Laundering Counter-measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles* (Dordrecht: Kluwer Law International, 2003), p. 29.

As far as the criminal underground community is concerned, money laundering is embedded primarily in its potential to avoid detection of the underlying criminal activity that generates the profit.[42] In addition, money laundering can sustain the enjoyment of profit from crime or its reinvestment in future criminal activities. Moreover, money laundering facilitates the development of transnational networks and links with criminal environments of disparate origins. Law enforcement authorities in many parts of the world have come to the conclusion that by combating money laundering activities, they can disrupt the cycle used by criminal groups to derive benefits from illegal profits, and thereby weaken or even destroy their viability. If the primary motivation behind syndicated crime is economic, and the economic gain is removed, the crime will cease.

Sophisticated attempts to conceal the sources of money can involve hundreds (sometimes thousands) of bank accounts in numerous jurisdictions in an attempt to create as complex a web as possible. This makes it difficult or impossible to trace transactions, presenting law enforcement authorities with huge administrative barriers against obtaining financial details.[43]

It must be said that in any type or stage of the money laundering process, the goal remains the concealment of the true ownership and origin of criminal proceeds and changing its form by constantly maintaining control.[44] This element of concealment or disguise is integral to the conceptualization of the money laundering phenomenon and is essential to distinguish it from the simple hiding of illicit proceeds.[45] This is not always taken into account by certain theories on the process of money laundering, especially in models such as the ‘hand wash’, which involves the use of a small amount of money to buy goods. This does not involve an intention to conceal the origin of the criminal proceeds and may not involve the use of credit or financial institutions.

The *Actus Reus* of Money Laundering Offences

In the context of an EU Directive,[46] the conduct that describes money laundering consists of: the conversion or transfer of property; the concealment or disguise of its origin; its acquisition or possession or use; and the participation or association to commit, attempt to commit and aiding, abetting, facilitating and counselling the commission of any of the acts. It also involves conduct which in effect is similar

42 Savona and De Foe, ‘International Money Laundering Trends’.

43 Jarrod Wiener, ‘Money Laundering: Transnational Criminals, Globalization and the Forces of Redomestication’, 1 *Journal of Money Laundering Control* (1997): pp. 54–66.

44 Ibid.

45 United Nations Office on Drugs and Crime, www.unodc.org (date accessed 22 November 2011).

46 Council Directive of 10 June 1991 on prevention of the use of financial systems for the purposes of money laundering (91/308/EEC), OJ L 166, 28 June 1991, at 77.

to the offences of handling of the proceeds of crime. This is a well-established offence in many EU Member States,[47] except that as money laundering it would incur a higher penalty.[48] In the UK, s. 329 of the Proceeds of Crime Act (POCA) 2002[49] criminalizes the mere possession of criminal property. It can rightly be noted that the conduct that constitutes money laundering extends beyond the mere handling of stolen goods (as in the UK Theft Act 1968) because there is a need for action beyond mere possession (for example, assisting in the retention or removal of property for the benefit of another person).[50] The POCA 2002 assimilates the money laundering offences introduced by the Criminal Justice Act 1988 as amended by the Criminal Justice Act 1993. Section 93A(1)(a) of the Criminal Justice Act 1988 focused on assistance when the retention or control by or on behalf of another (A) of A's proceeds of criminal conduct is facilitated, whether by concealment, removal from the jurisdiction or transfer of nominees or otherwise. However, in order for the prosecution to secure a conviction against a money launderer, it must prove that he/she had a requisite *mens rea* of the offence.

The *Mens Rea* of Money Laundering Offences

In criminal justice, most notably with regard to the presumption of innocence, the prosecution must prove that the launderer knew that the money was derived from unlawful activity. The prosecution must also prove that by manipulating the funds, the accused intended to hide its origin, nature, location, ownership or any other aspect thereof as described in the definition of the offence.[51] This burden of proof can be very onerous, especially in view of the complexity of money laundering operations and the extensive use of shell companies and bearer securities.[52] To render this burden manageable, there is a growing consensus to allow for the reliance on inferential evidence. This is also set out in the Vienna Convention framework (1988), which provides that 'knowledge, intent or purpose' required as an element of the offence set forth in para. 1 of this article may be inferred from objective factual circumstances.[53] As noted in *R v Harmer*, the defendant's

47 Article 1(3).

48 Mitsilegas, *Money Laundering Counter-measures in the European Union*, p. 107.

49 This legislation is truly universal in nature, for not only does it encompass universal mandatory reporting, it also has the unique effect of drawing all the relevant offences of money laundering under a single, unified statute. The previous incremental system has been replaced, almost in its entirety, by a complete legislative framework aimed at reducing the ability of criminals to engage with the financial system to launder their illicit gains.

50 P. Alldridge, *Money Laundering Law* (Oxford: Hart Publishing, 2003), p. 92.

51 Article 3(1) of the Vienna Convention.

52 Ibid.

53 Article 3(3), which reads that 'knowledge, intent or purpose required as an element of the offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances'.

knowledge may be inferred from factual circumstances where that inference is absolutely compelling.[54]

It will always be necessary for the prosecution to prove that the property was in fact the proceeds of crime or drug trafficking. Under s. 93C(1) of the Criminal Justice Act 1988[55] and s. 49 (1) of the Drug Trafficking Act 1994, there is an express reference to dealing with the proceeds of crime and, as a result, it is essential for the prosecution to prove the source of money so as to make clear that the alleged property is a proceed of crime.[56] It will also be incumbent on the prosecution to prove that the defendant knew of the foundation facts on which he/she ought to have formed the suspicion.[57] The requirement for the 'reasonable grounds to suspect' is a subjective test that seems to oblige the prosecution to establish that the defendant himself/herself had formed the suspicion and that it was based on reasonable grounds.[58]

Money laundering is thus established in cases where the defendant either knew or reasonably ought to have known that the money in question was the proceeds of crime.[59] The efforts to adopt a broad framework have led to the additional element of suspicion in the *mens rea* of a number of offences constituting or relating to money laundering. This is the case with regard to assisting another to retain the benefits of criminal conduct and tipping off.[60] Valsamis Mitsilegas contends that the *mens rea* requirement is more stringent in the offences of concealing or transferring proceeds of drug trafficking of a third person and of assisting another to retain the proceeds of terrorist-related activities. In both cases the knowledge element will have to be accompanied by the defendant having the reasonable grounds to suspect the origin of the property from drug trafficking in the first case and an engagement in terrorist activities in the second.[61] Section 330(2) of the UK

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54 *Kwan Ping Bang* [1979] AC 609, 615.

55 Fundamentally, the Criminal Justice Act 1993 introduced the concept of mandatory reporting – where in the course of his/her trade, profession, business or employment, a person knows or suspects that another person is engaged in drug money laundering, he/she is under a legal duty to report his/her knowledge or suspicion to the authorities. See s. 26B of of the Drug Trafficking Offences Act 1986, as inserted by s. 18 of the Criminal Justice Act 1993.

56 For a discussion on the requisite mental element of the offence, see the case of *R v Montila (Steven William)* [2004] UKHL 50; [2004] WLR 3141 (HL).

57 Mitsilegas, *Money Laundering Counter-measures in the European Union*.

58 *R v Harmer (Roy Peter)* [2005] EWCA Crim 1; [2005] 2 Cr App R 2 (CA, Crim Div).

59 R.E. Bell, 'Prosecuting the Money Launderer: Who Acts for the Organised Crime', 3(2) *Journal of Money Laundering Control* (1999): p. 107.

60 See ss. 93A and 93D of the Criminal Justice Act 1988 as amended by the Criminal Justice Act 1993.

61 Section 14(2) of the Criminal Justice Act 1993 and s. 53(1)(b) of the Northern Ireland (Emergency Provisions) Act 1991.

Proceeds of Crime Act (POCA) 2002[62] further extends the *mens rea* requirement of the offence of failure to disclose, having reasonable grounds for knowing or suspecting that the property was the proceeds of crime.[63] This is particularly important for professionals dealing with the regulated sector. The failure to report suspicion or knowledge of money laundering is, in accordance with s. 334(2)(b), punishable on indictment by a maximum of five years' imprisonment or an unlimited fine. It is important to note that the offence of failing to disclose knowledge or suspicion of money laundering is strictly limited to knowledge or suspicion of money laundering and does not extend to cover 'all-crime' money laundering.[64] The facts or circumstances of the substantive offence that must be proved are that the proceeds are criminal as defined in s. 340 (3)(a), where the alleged offender must know or suspect that the property is criminal. Perhaps also worthy of mention is that knowledge can also be inferred from objective factual circumstances. The scope of money laundering offences as set out in Articles 5 and 6 of the Palermo Convention encompasses a wide range of activities that generate illicit proceeds of crime.

Money Laundering Predicate Offences

The Council of Europe Anti-Money Laundering Convention of 1990 defines predicate offences broadly to include 'any criminal offence as a result of which proceeds were generated that may become the subject of laundering'.[65] While the FATF approach leaves the choice of whether to include or exclude corruption as a predicate offence for money laundering to national legislatures, the approach of the Council of Europe does not seem to offer such a choice.[66] According to the UK approach on money laundering, predicate offences are defined by s. 93A of the Criminal Justice Act 1993, which extends the predicate offence of money laundering to include 'any criminal conduct which constitutes an offence triable on indictment in the Crown Court'.[67] Countries are given the discretion to exclude

62 The POCA 2002 simplifies the law, dispensing with the need for the prosecutor to prove that the defendant was aware of the type (drugs or other criminality) of illicit provenance of the property.

63 In a situation where a person intended to make a necessary disclosure but failed to do so, he/she will not be guilty of the offence under the provisions provided that he/she has a reasonable excuse for his/she failure to disclose.

64 R. Stokes and A. Arora, 'The Duty to Report under the Money Laundering Legislation within the United Kingdom', 5 *Journal of Banking Law* (2004): pp. 332–56.

65 Article 1(e) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (11 November 1990), available at www.conventions.coe.int/treaty/en/treaties/html/141.htm (date accessed 22 November 2011).

66 Stokes and Arora, 'The Duty to Report under the Money Laundering Legislation within the United Kingdom'.

67 Ibid.

crimes committed abroad or to eliminate those crimes that they do not deem truly relevant from the definition of domesticate predicate crimes.[68]

Substantive Money Laundering Offences in the UK

There are six distinct money laundering offences which apply in England and Wales:

1. concealing, disguising, converting, transferring or removing from the UK;
2. entering into or becoming concerned with an arrangement which facilitates the acquisition, retention, use or control of criminal property;
3. acquiring, using or having possession of criminal property;
4. failing to disclose knowledge or suspicion of money laundering, which came to his/her attention by virtue of his/her position as the nominated officer in the regulated sector;
5. failing to disclose knowledge or suspicion of money laundering where the offender is another nominated officer; and
6. the disclosure of information prejudicial to an investigation, i.e. ‘tipping off’.

The Acquisition, Use and Possession of the Proceeds of Crime

It is a separate offence under s. 22 of the Theft Act 1968 for a person to handle stolen goods or their proceeds, knowing or believing them to be stolen goods, or to dishonestly assist in the retention, removal, disposal or realization of such goods by or for the benefit of another person or if he/she arranges to do so.[69] Section 329 of the POCA 2002 which replaces s. 51 of the Drug Trafficking Act 1994 and s. 93B of the Criminal Justice Act 1988, creates a unified position on those who deal with or those who come into possession of the proceeds of crime. This section catches all those who help directly or indirectly in the removal, disposition or retention of criminal property with requisite subjective knowledge or suspicion as provenance. It is therefore a defence for those who take possession of the proceeds of crime in the course of their official duties, such as the police and law enforcement agencies. It will therefore be upon the defendant to prove innocence on this position, as illustrated by their lordships in the case of *R v Gibson* (2000).[70]

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68 Marco Arnone, ‘International Anti-Money Laundering Programmes: Empirical Assessment and Issues in Criminal Regulation’, 13(3) *Journal of Money Laundering Control* (2010): p. 226.

69 C.M.V. Clarkson and H.M. Keating, *Criminal Law: Text and Materials* (London: Sweet & Maxwell, 1998), p. 836.

70 [2000] Crim LR 479.

The Offence of Concealing, Disguising, Converting, Transferring or Removing Criminal Property from the UK

This offence is underscored by s. 327 of the POCA 2002 and will be committed by any person who either conceals,[71] disguises, converts, transfers or removes criminal property from the UK.[72] What is noteworthy with regard to this offence is the vastly broad scope of the offence covered by the section and indeed the expansive definition of the offence.[73] The section will catch those engaged in money laundering activities, that is, as per the definition, but will also extend to standard banking practices, such as transfers, conversions and sending funds abroad through wire transfers. In effect, this section combines two offences from the earlier legislation – those of concealing or disguising criminal proceeds and converting or removing from the jurisdiction criminal proceeds for the purposes of avoiding a prosecution for a money laundering offence or in order to avoid an enforcement order, and either concealing or disguising, converting or transferring criminal proceeds with the knowledge or reasonable grounds to suspect that the funds were criminally derived.[74]

The POCA 2002 abolishes the distinction between laundering the proceeds of drug trafficking activities and laundering the proceeds of other criminal activities, which was the chief characteristic of the previous regimes under the Criminal Justice Act 1988 and Drug Trafficking Act 1994.[75] It also abolishes any requirement that the conduct in question amounts to an indictable offence in the UK, as was previously the case under the Criminal Justice Act 1988. Thus, the laundering of any criminally derived property,[76] whether or not the conduct in question would amount to an indictable offence, is now a criminal offence.

In relation to the offence in earlier legislation, namely that of confiscation orders, and the second offence, namely that of containing the objective *mens rea* before the person may be convicted of concealment, these have been amalgamated.[77]

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71 Section 327(1)(a) of the POCA 2002.

72 The other elements of the offences are covered by ss. 327(1) (b), (1)(c), (1)(d) and 327(2)(e) respectively.

73 See, for example, what constitutes concealing or disguising in the definition under s. 327 (3) of the above regime.

74 Section 31 of the Criminal Justice Act 1988.

75 See Part 7 of the POCA 2002 in relation to double criminality set out under s. 340 of the same regime.

76 'Property' is criminal property if: (i) it constitutes a personal benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly); and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit. Criminal conduct is conduct which constitutes an offence in any part of the UK or would constitute an offence in any part of the UK if it occurred there. It is immaterial who carried out the criminal conduct, who benefited from it and whether it occurred before or after passing of the Act. See s. 340(3) of the POCA 2002.

77 Section 340 of the POCA 2002.

The offence of concealing criminal property is now committed solely through concealing, disguising, converting, transferring or removing criminal property from the UK provided that the person cannot avail himself/herself of one of the statutory defences. However, to bring a successful prosecution, the necessary element of prosecution must be established in order for the property to be criminal by virtue of s. 340(3), but the alleged offender must also know or suspect that the property is criminal. The above section provides the definition of criminal property, which includes two components: that the property constitutes a benefit from criminal conduct (s. 340(3)(a)); and that the alleged offender knows or suspects that it constitutes such a benefit (s. 34(3)(b)). Interestingly, it is the suspicion element in the absence of specific criminality in relation to allegedly laundered criminal proceeds that has been the cause of much concern for practitioners in the interpretation of money laundering offences.[78] The drafters of the POCA 2002 intended to relax the onerous requirement for the prosecution to have to prove underlying criminality – an issue that had in the past caused problems for courts in successfully prosecuting money laundering offences. In *R v Whitham* (2008),[79] the decision of the court demonstrates that suspicion alone could suffice in bringing a prosecution for money laundering against the defendant. For example, having a substantial and unexplained substantial sum of money or a sudden increase in one's assets could be seen as evidence of money laundering. The draconian confiscation of suspected assets could then follow. The defendant would then then be given the opportunity before the court to prove otherwise. It is an offence under s. 327 of the POCA 2002 for the defendant to conceal, disguise, convert, transfer or even remove criminal property from its jurisdiction.

Failure to Disclose in the Regulated Sector

Under s. 330 of the POCA 2002, a person commits an offence where through the course of his/her business in the regulated sector, he/she knows or suspects that another person is engaged in money laundering and fails to make the required disclosure as soon as practically possible.[80] Suffice it to say that this offence creates a

78 D. Bentley and R. Fisher, 'Criminal Property under POCA 2002 – Time to Clean Up the Law?, 2 *Archbold News* (March 2009).

79 [2008] EWHC Crim 239; see also *Wilkinson v DPP* [2006] EWHC 3012 and *Hogan v DPP* [2007] EWHC 978.

80 There will be no offence where the person is a professional legal adviser and the information or other matter which causes him/her either to know or suspect money laundering came to him/her in privileged circumstances. This defence is elaborated on in s. 330(10), which provides that: 'information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him/her: (a) by (or representative of) a client of his in connection with the giving by the adviser of legal advice to the client, (b) by (or representative of) a person seeking legal advice from the adviser, or (c) by a person in connection with legal proceedings or contemplated legal

universal duty to disclose knowledge or suspicion of money laundering, something which previously had been limited to the laundering of drug trafficking or terrorist funds.[81] This offence is structured on a tripartite basis and all requirements must be proved beyond reasonable doubt in order to secure a successful prosecution under this section. First, the person must know or suspect or have reasonable grounds for knowing or suspecting that another person is engaged in money laundering. Secondly, the information upon which his/her knowledge is based, or which gives him/her reasonable grounds for such knowledge or suspicion, must have come to him/her through the course of business in the regulated sector. What constitutes the regulated sector is defined in broad terms. It is defined in negative terms, with Sched. 9, para. 3 providing:

> A business is not in the regulated sector to the extent that it engages in any of the following activities –
>
> (a) The issue of withdrawal share capital within the limit set by section 6 of the Industrial and Provident Societies 1996 Act;
>
> (b) The acceptance of deposits from the public within the limit set by section 7(3) of that Act by a society registered under that Act;
>
> (c) The acceptance of deposit from the public within the limit set by section 7(3) of that Act by such a society;
>
> (d) Activities carried out by the Bank of England;
>
> (e) Any activity in respect of which an exemption order under section 38 of the Financial Services and Markets Act 2000 has effect if it is carried on by a person who is for the time being specified in the order or falls within a class of person.

The scope of the regulated sector encompasses a range of professional businesses including, for example, bankers, accountants and members of the legal profession. These professionals are under a duty to disclose and failure to comply with this requirement will result in criminal and heavy penal consequences.[82]

Thirdly, and perhaps lastly, the person must not fail to make the necessary disclosure[83] as soon as reasonably practicable after the information relating to

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proceedings'. However, this defence is restricted in s. 330(11), which provides that where the information or other matter is communicated or given with the intention of furthering a criminal purpose, the legal privilege defence is unavailable.

81 Section 340(3), (4) of the POCA 2002.

82 Ibid.

83 Under s. 334 of the POCA 2002, failure to report is punishable by, where tried summarily, imprisonment for a term not exceeding six months. Where the offence is tried

possible money laundering offences has come to his/her attention.[84] The meaning of 'required disclosure' is clarified in s. 330(5), which defines this in terms which essentially refer to 'reporting up the line', that is, the person must make a disclosure to a nominated officer (defined in s. 330(9) as referring to the person appointed to receive and handle money laundering disclosures in the disclosures company or alternatively to any person authorized to receive such disclosures by the Director General of the Serious Organised Crime Agency (SOCA)).[85]

The jeopardy of the bank is clearly demonstrated in the case of *Squirrel Ltd v National Westminster Bank Plc and HM Customs and Excise* (2005).[86] Squirrel Ltd held a bank account with NatWest that was £200,000 in credit. Without warning or explanation of its supposedly unusual actions to its customer, the bank froze the account. Squirrel applied to the court for an order that NatWest unfreeze the account and disclose the reason for its conduct. Apparently, it transpired that Squirrel Ltd was under investigation by HM Customs and Excise for VAT-related offences, and accordingly the bank suspected that the funds in Squirrel Ltd's account represented criminal property.[87] Two issues were raised by this scenario: (i) unfreezing would amount to a breach of s. 328 of the POCA 2002 (entering into an arrangement to facilitate the use of criminal property); and (ii) disclosing to Squirrel the reason for its decision to freeze the account would cause the bank to breach s. 333 (tipping off). The court ruled that the course of action adopted by the bank was unimpeachable, even though there were no material facts before the court to justify that the funds in the respective bank account represented criminal property. The court expressed that even if Squirrel Ltd were entirely innocent, there was no question of the bank being required to compensate Squirrel Ltd for damages suffered. However, the court found itself powerless to impeach the position of the bank, even though there was nothing material before the court to justify the conclusion that the funds in the ban (as alleged) was criminal property. Squirrel Ltd's predicament was compounded by the fact that it could not afford legal representation without access to its funds. In essence the inference drawn from this case is that courts will require financial institutions to comply with anti-money laundering legislation regardless of the detrimental effect it might have on the relationship between the financial institution and its customers. The reporting regimes in the above section are so onerous on the bank that has reasonable ground to suspect, as demonstrated in Squirrel Ltd, that it should freeze the account instantly. This is so that even if the bank processes a cheque to transfer the money

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on indictment, the offence is punishable by a maximum of five years' imprisonment and an unlimited fine.

84 E. Radmore, 'Money Laundering Prevention: Effect of the New Law on Solicitors', 16(5) *Comp. Law* (1995): p. 155.

85 J. Wadsley, 'Professionals as Policemen', 275 *Conv*. (1994): p. 281.

86 [2005] EWHC 664.

87 The bank did not want to be seen as if it was entering into an arrangement to facilitate the use of criminal property, contrary to s. 328 of the POCA 2002.

into the account of another person without making due inquiry where it should have, it could be liable for facilitating the use or control of criminal property and hence be committing an offence under s. 328 of the POCA 2002.[88] For professionals advising a client on the matter that might involve the legal advisor or the client being involved in money laundering, steps should be taken to make an authorized disclosure, as clearly demonstrated by their Lordships' decision in *P v P* (2003).[89] This case is of particular importance in relation to legal advisors not falling foul of s. 328 of the POCA 2002 in relation to having inadvertently participated in an arrangement which facilitates the acquisition, retention, use or control of criminal property. The case of *Bowman v Fels* (2005)[90] sheds more light on the interpretation of s. 328 of the POCA 2002 and its relevance to the legal professions. The underlying facts were that the relationship between the claimant and the defendant ended, and the claimant asserted a right to a beneficial interest in the property that they had occupied together, but which was registered in the defendant's sole name. In preparing for trial, the claimant's solicitors suspected that the defendant had included in his business accounts the cost of non-business-related work carried out at the property, and notified the National Criminal Intelligence Service (NCIS) by virtue of their perceived obligation under s. 328. The important issue to be determined was whether s. 328 means that, as soon as a lawyer acting for a client in legal proceedings discovers or suspects anything in the proceedings that may facilitate the acquisition, retention, use or control (usually by his/her own client or his/her client's opponent) of 'criminal property', he/she must immediately notify the NCIS of his/her belief if he/she is to avoid being guilty of the criminal offence of being concerned in an arrangement which he/she knows or suspects facilitates money laundering.

The court concluded that the proper interpretation of s. 328 was that it was not intended to cover or affect the ordinary conduct of litigation by legal professionals. This included any step taken by them in litigation, from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment. The court did not consider that either the European or the UK legislation could have envisaged that any of these ordinary activities would fall within the concept of 'becoming concerned in an arrangement which facilitates the acquisition, retention, use or control of criminal property'.

The overriding importance of the banks' duty to report suspicious transactions has also been reiterated in the recent case of *Shah v HSBC Private Bank* (2009).[91] In this case the High Court underscored the importance of HSBC's statutory obligation to report suspicious transactions. The facts of this case related to the delayed payment of US$4 million from the accounts of Mr and Mrs Shah following a suspicious activity report to a designated person in Zimbabwe. An

88 *K v National Westminster Bank and others* [2006] EWCA Civ 1039.

89 [2003] EWHC Fam 260.

90 [2005] EWCA Civ 226.

91 [2009] EWHC 78.

intended recipient of the money reported the matter to the authorities, who then froze the account of Mr and Mrs Shah, which included funds of US$300 million. The claimants challenged HSBC, alleging that it had breached its implied term in the contract to take reasonable care and to comply with the instructions, and had breached confidentiality. The traditional position has always been that in the event of conflict between common law and statutory law, statutory law would always take precedence. The court held that the common law duty of confidentiality alleged by the claimants (Mr and Mrs Shah) had been overridden by the provisions of the POCA 2002 and hence the bank had acted lawfully within the provisions of s. 328 of the POCA 2002. It also needs to be noted that for the bank to secure a successful prosecution, it needs to file a suspicious activity report (SAR) as soon as practically possible. If the bank delays in filing a SAR, it could jeopardize the trail on the grounds of Article 6 of the European Convention on Human Rights (ECHR). Such a scenario has been underscored by the case of *RCPO v C* (2010),[92] where a solicitor had fraudulently laundered money through the firm's accounts. Due to delays in bringing the prosecution, the defendant was cleared of all six counts of money laundering after the judge ruled that a fair trial was impossible. Had the court proceeded with the trial, it would have been in breach of Article 6 of the ECHR.

Therefore, the suspicion-based reporting regime in the above case and in *Squirrel Ltd v NatWest Bank Plc and HM Customs and Excise* (2005), which is still operative in the UK, is vulnerable to attack through recourse to human rights principles and jurisprudence.[93] Confidentiality in financial dealings and status is an important facet of one's private life and, as such, ought to be protected as far as reasonably possible by law. Confidentiality is also a feature of the bank–customer relationship, and indeed any professional relationship, based on trust, loyalty and fair dealing, not to mention contract law.[94] A person who fails to disclose may argue that he/she was justified in doing so under Article 8(1) of the ECHR.[95] The only exceptions to public bodies are set out in Article 8(2), where the following can be established. The five legitimate justifications are: where national security is at stake, there is the need to protect national safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, and the protection of freedom of others.[96] The traditional principle of banking confidentiality created by the contract between the customer and the bank (as a

92 [2009] EWCA Crim 97.

93 The application of Article 8(1) of the ECHR has a negative effect on the disclosure requirements under s. 330, since it prohibits a public body (for example, courts) from interfering with an individual's right to privacy.

94 Robert Stokes, 'The Banker's Duty of Confidentiality, Money Laundering and the Human Rights Act', 3 *Journal of Banking Law* (2007): pp. 502–20.

95 Ibid.

96 James Otty, 'Money Laundering and Human Rights', *New York Law Journal* (2001): p. 634.

confidant) and data protection could be undermined under the provisions of Article 8(2). Any common law disclosure of confidential information held by a banker in respect of a customer must also be proportionate[97] to the legitimate aim pursued. The case of *Sunderland v Barclays Bank Ltd* (1938)[98] underscores problems with regard to the critical nature of the principle of proportionality. 'Proportionality' was defined as 'a deliberately flexible concept whereby each specific interference with conventional rights had to be analysed on its individual merits'. The doctrine of proportionality may require the review of a court decision to assess the balance which the court has struck, not merely whether it is within the range of rational or reasonable decisions. The proportionality test may go further than the traditional grounds of review, inasmuch as it may require attention to be directed to the relative weight accorded to the interests and considerations: *R v Ministry of Defence, ex parte Smith* (1996).[99]

Tipping Off

The remaining offence under the POCA 2002 is that of tipping off – where a professional or those working in the regulated sector make a disclosure that is likely to prejudice a money laundering investigation being undertaken by the law enforcement agencies.[100] It is in fact worthy of mention that where the person does not know or suspect that the disclosure was likely to be prejudicial, he/she does not commit an offence.[101] The offence of tipping off is highlighted by the case of *Governor and Company of the Bank of Scotland v A Ltd* (2001).[102] In this case, the bank made enquiries in respect of a number of accounts opened by A Ltd into which substantial sums of money were transferred. The police advised the bank that money laundering investigations were being carried out into the activities of the company and asked it not to reveal the information to A Ltd. The bank was fearful that it would risk being sued by the company if it failed to pay money held in the accounts or by third parties as constructive trustees if it did. As such, it was in an invidious position of 'damned if you don't, damned if you do'. The Court of Appeal indicated that it was important in such a situation for the bank to file an interim declaration under r. 25.1(1)(b) of the Civil Procedure Rules (CPR), naming the Serious Fraud

97 Proportionality seeks to establish the balance between democratic principles of tolerance, pluralism, broadmindness and 'necessity'. Interference with the provisions of Article 8(1) will only be necessary in a democratic society when it is proportionate to the legitimate aim being pursued.

98 (1938) 5 LDAB 163.

99 [1996] QB 517.

100 Section 333 of the POCA 2002, which replaces ss. 53 and 58 of the Drug Trafficking 1994 and s. 93D of the Criminal Justice Act 1988.

101 Section 333(2) of the POCA 2002.

102 [2001] 1 WLR 751.