

**A study of the anti-money laundering framework in South Africa
and the United Kingdom**

by

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DECLARATION

I declare that **A study of the anti-money laundering framework in South Africa and the United Kingdom** is my own work, that it has not been submitted before for any degree or examination in any other University, and that all sources I have used or quoted have been indicated and acknowledged by means of complete references.

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ABSTRACT

Given the fact that money laundering can serve to create a smokescreen for financing of various activities that not only are criminal in nature but that can also threaten lives and can sweep across borders it has been recognised globally that mechanisms have to be put in place to prevent money laundering as a conduit for criminal activity. An effective AML framework is thus not only necessary but is essential for South Africa to combat money laundering.

This study investigates whether the AML framework in South Africa is sufficient in combating money laundering. In addition, it seeks to address the shortcomings of the AML framework in South Africa, highlight certain areas for improvement in comparison to the UK AML framework and reveals the need for further incorporation of the global AML framework into the AML framework in South Africa.

The UK has adopted a progressive stance towards combating money laundering which pre-dates the measures introduced by the international community. It has implemented all the international legal AML instruments emanating from the UN and EU and in many instances, its provisions have exceeded the international benchmarks.

South Africa is a country that is highly susceptible to money laundering as a result of its financial system being the major financial center in the African region and it is clear that South Africa will need to rely on the available international expertise in money laundering from countries such as the UK.

Ultimately this study illustrates that it is essential for South Africa to critically examine its AML framework and address remaining deficiencies to bring it in line with the global AML framework. In addition, South Africa needs to adopt an aggressive stance towards money laundering and go beyond the international standards and implement and formulate its own legislation which is tailored towards its own unique challenges. South Africa further needs to increase available resources and institutional and structural capacity in order to combat money laundering and ultimately seek solutions to overcome the challenges it faces as a developing country.

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Chapter One

Background to study

1.1 Introduction

The term ‘money laundering’ is a reasonably new concept, having come into phrasing in the mid-1970s and is defined as the processing of criminal proceeds to mask their illegal source.¹ It is said to have its origins from the early practice of American criminal organisations, particularly the Italian Mafia, operating Laundromats as cash-intensive businesses to hide their criminal income from the authorities.² Money laundering is a term used to describe a deliberate, complicated and sophisticated procedure by which the proceeds of crime are camouflaged, masked or made to appear as if they were earned lawfully by other legitimate means.³ Norman Mugarura describes money laundering as a three-stage process, which is as follows:

- ‘the dirty money must be severed from the predicate crime generating it;
- it must be characterised by a series of transactions designed to obscure or destroy the money trail in order to avoid detection; and
- the criminal proceeds must be reinvested in furtherance of the objectives of the business (launderer).⁴

Money laundering is one of the essential weapons that organised crime syndicates use around the world as it enables these criminals to retain the proceeds of their unlawful undertakings and enjoy the benefits of their crimes.⁵ The biggest benefit that money laundering has to criminal organisations is that it has the possibility of providing a steady and readily available cash flow to criminals to carry out further offences, and may possibly provide an incentive to criminals as it allows these criminal acts to become profitable.⁶ Money laundering, not only in South Africa, but around the world, has been featured prominently in the media and has been associated with various crimes such as arms dealing, kidnapping, murder, drug trafficking and human trafficking.⁷ It has

¹ Brigitte Unger & Daan van der Linde *Research Handbook on Money Laundering* (2013) 35.

² Norman Mugarura *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries* (2012) 1.

³ Ibid.

⁴ Arun Srivastava, Mark Simpson & Nina Moffatt *International Guide to Money Laundering Law and Practice* 4 ed (2013) 1179.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

further provided infamous political dictators and notorious organised crime figures with means through which they can have their financial interests protected and aided them to avoid the legitimate confiscation of their dishonest crime proceeds.⁸

With the recent advances in online technology and new payment systems which allow the effortless transfer of currencies globally, the methods used in present-day money laundering are essentially limitless whilst more ancient money transfer processes can be easily adapted and utilised to camouflage the proceeds of crime.⁹

Due to the guarded nature of money laundering it is justly difficult to identify and categorise the various methods of money laundering used by criminals and no finite description can be given to the full range of criminal devices used.¹⁰

The ultimate goal of any money launderer is to circumvent law enforcement and evade the reach of the law, more specifically, to avoid the confiscation of their fraudulent income or to avoid or evade the relevant tax authorities.¹¹ When applied to civil wrongs, the aim of the money launderer is to avoid, for example, the enforcement of a court order against their assets in a divorce case.¹²

Norman Mugarura eludes that money laundering patterns fall into three distinct categories:

- ‘internal money laundering, characterised 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 ‘dagga’ trade in South Africa;
- 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; and
- outgoing money laundering, which very closely mimics the classical cases. In this typology, the proceeds of crime committed within the county are exported to one or more countries, as highlighted by the case of counterfeit currency in Uganda.¹³

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Norman Mugarura op cit note 2.

¹³ Ibid.

The principal goal of the money launderer is to completely conceal the origin of the illegal proceeds and to get the money to the international money markets where total elasticity can be achieved, the beneficiary being able to invest the ill-gotten gains anywhere in the world.¹⁴

Given the fact that money laundering can serve to create a smokescreen for financing of various activities that not only are criminal in nature but that can also threaten lives and can sweep across borders it has been recognised globally that mechanisms have to be put in place to prevent money laundering as a conduit for criminal activity.

1.2 Global anti-money laundering framework

The Basel Committee under the Bank of International Settlement; the Council of Europe; the Vienna Convention of 1988 and the FATF constitute the global anti-money laundering (hereafter “AML”) framework, but is not limited to the aforementioned regimes.¹⁵ The global AML framework is an internationally accepted framework which is a necessity to ensure a synchronised and vigorous application of internationally accepted AML standards on a progressive basis.¹⁶ The global AML framework is an essential weapon used to inhibit criminals from mistreating the global financial system and serves as a tool to overcome flaws in the AML framework of individual countries.¹⁷

Norman Mugarura notes that attempts made by less developed countries towards implementing the global AML framework are disrupted by various factors, such as deficient economic and social infrastructure, limited resources and corruption.¹⁸ This dilemma creates an environment for exploitation and reduces these countries defenceless when opposing their money laundering challenges.¹⁹ The challenges faced by less developed countries are further compounded by a lack of institutional and structural capacity to harness global AML standards locally which have in turn translated into an environment conducive to criminal exploitation, while diminishing the same state’s capacity to counteract new challenges, such as money laundering.²⁰

¹⁴ Ibid.

¹⁵ Norman Mugarura op cit note 2.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

1.3 Overview of the anti-money laundering framework in South Africa

The IMF has pointed out that, as a result of South Africa's economy being primarily cash-based and compounded with the fact that corruption, smuggling of precious metals and fraud are the main proceeds-generating crimes, South Africa is a country that is susceptible to the pressures posed by money laundering.²¹ Lawyers, other service providers and the establishment of shell companies are only but a number of ways in which funds are laundered and in addition, the sophistication of South Africa's financial system contributes to its susceptibility to misuse by domestic and foreign criminals.²² Furthermore, South Africa's establishment as the major financial hub in the sub-Saharan region, its advanced banking and financial sector, and more prominently, its cash-based market, makes it susceptible to misuse by international and domestic money launderers.²³ An effective AML framework is not only necessary but is essential for South Africa to combating money laundering.

Strivastava, Simpson and Moffat remark that South Africa has had minimum exposure to and relative immunity from international organised crime as a result of the extensive exchange controls and segregation from the international community during the apartheid era.²⁴ The only legislation which addressed the issue of money laundering in South Africa prior to 1998 was the Drugs and Drug Trafficking Act 140 of 1992 which made it an offence to convert the proceeds of drug trafficking, and provided for the reporting of suspicious transactions relating to drugs and drug trafficking.²⁵ It is worth noting that developed countries such as the US and the UK have AML policies which pre-date international AML policies and can be traced back to the 1960s.²⁶

There was an increasing need for effective money laundering legislation when South Africa re-entered the international community in 1994.²⁷ This increasing need was further compounded by

²¹ International Monetary Fund 'Anti-money Laundering and Combating the Financing of Terrorism (AML/CFT)—Technical Note' available at <https://www.imf.org/external/.../cr1551.pdf>, accessed on 12 February 2016.

²² Ibid.

²³ Art Garffer 'Analysis – South Africa: A Snapshot of Global Patterns of Money Laundering and Corruption' available at <http://www.afimacglobal.com/agarffer/2015/06/analysis-south-africa-a-snapshot-of-global-patterns-of-money-laundering-and-corruption-by-art-garffer-of-afimac/>, accessed on 27 June 2016.

²⁴ Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 6 at 1179.

²⁵ Ibid.

²⁶ Nicholas Ryder *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (2012) 4.

²⁷ Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 6.

pressure on South Africa to bring its legislation into line with international money laundering standards.²⁸ This increasing pressure led to the promulgation, in 1998, of the Prevention of Organised Crime Act 121 of 1998 (“POCA”) and of the Financial Intelligence Centre Act 28 of 2001 (“FICA”) in 2001.²⁹ The POCA and FICA are closely linked: the POCA effectively deals with substantive money laundering offences while the FICA provides the necessary administrative framework for regulating money laundering.³⁰ The FICA was subsequently amended in 2005 to include combating of the financing of terrorism by the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (“POCDATARA”).³¹

On an international level, South Africa acceded to the 1988 UN Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substance in 1998.³² In addition, South Africa is a member of the Eastern and South African Anti-Money Laundering Group which participates in regional and international efforts to control and eliminate money laundering.³³ The South African government is also a signatory to the UN Convention against Trans-National Organised Crime.³⁴

In March 2015, the World Monetary Fund, through its Financial Sector Assessment Program published a Technical Note on Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) on South Africa.³⁵ The Technical Note contains technical analysis and detailed information supporting the FSAP’s findings and recommendations.³⁶ The FSAP note that South Africa has made substantial progress in refining its AML framework since its last assessment which took place in 2008.³⁷ The World Monetary Fund makes important recommendations that South Africa needs to critically amend its AML framework in order to effectively combat money laundering.³⁸

Art Garffer notes that corruption and money laundering are still widespread in South Africa with worrying estimates of approximately \$2BB to \$8BB moving through South African banks, while

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ International Monetary Fund op cit note 2.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

providing the smokescreen that its AML framework complies with international requirements and fails to provide intelligible oversight within its borders.³⁹ Furthermore, he remarks that South Africa is just an example of a camouflage approach to responsible anti-corruption and money laundering methodologies.⁴⁰

1.4 Scope of dissertation

The objective of this study is to determine whether the AML framework in South Africa is sufficient in combating money laundering. This investigation will be done by means of a critical review of the AML framework in South Africa. It will further be determined how the AML framework in South Africa compares to the AML framework of the United Kingdom (hereafter “UK”) in combatting money laundering and to what extent the global AML framework has been incorporated into the AML framework in South Africa.

The global threat from money laundering has resulted in a swathe of professional bodies and regulatory regimes, each engaged with a variety of AML processes. The concerted AML efforts to stem and reduce criminal opportunities are ultimately aimed at diminishing the volume of crime committed. The UK’s AML efforts, enshrined within the Money Laundering regulations 2007, are specifically intended to detect, disrupt and deter crime and terrorism through a range of strategies, including measures to restrict criminal access to the financial system.⁴¹

The UK is chosen as a comparative jurisdiction because it has adopted an aggressive stance towards money laundering which pre-dates the measures introduced by the international community.⁴² Nonetheless, its legislative framework has been broadened to encapsulate the legislative measures introduced by the United Nations (hereafter “UN”) and the European Union (hereafter “EU”).⁴³ The UK’s AML policy is influenced by the need to protect its banking sector and the City of London due to the contribution that each make to the economy.⁴⁴ Therefore, it is at greater risk than other financial markets.⁴⁵ The UK plays a leading role in European and world

³⁹ Art Garffer op cit note 5.

⁴⁰ He remarks that this same pattern of behaviour is evident in countries such as Mexico, Colombia, Venezuela, Guatemala, Honduras, Panama, which affect negatively the operations of many multinational companies.

⁴¹ Ibid

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

finance and remains attractive to money launderers because of the size, sophistication, and reputation of its financial markets.

1.5 Methodology

The theoretical point of departure for the exploration of the problem, as illustrated, will be a critical approach to the South African AML framework and a comparative approach to AML in South Africa and the UK. Secondary material such as books, articles and internet sources will be used in this study.

1.6 Structure

Chapter 1 is an introductory chapter acquainting the reader with the concept of money laundering and AML laws as well as its background in South Africa. Chapter 2 contains a critical discussion of the AML framework in South Africa, more specifically the POCA, FICA, POCDATARA, International Co-operation in Criminal Matters Act No. 75 of 1996, Banks Act No. 94 of 1990, case law and other legislation. Chapter 3 is a comparative study of the AML framework in the UK. Chapter 4 entails a discussion on the global AML framework and to what extent the global AML framework has been incorporated into the AML framework in South Africa. Chapter 5 will conclude the research with a discussion and evaluation of the conclusions and the results that have been found in this study.

Chapter Two The anti-money laundering framework in South Africa

2.1 Introduction

As briefly alluded to in Chapter One, South Africa has passed various AML laws against money laundering.⁴⁶ South Africa's primary AML legislation is the POCA, FICA and POCDATARA as discussed in more detail below. It should be noted that the financial aspects of POCDATARA have been incorporated in FICA.⁴⁷ The POCA and the FICA are closely linked, and must be read together for a full understanding of the legislation directed at combating money laundering in South Africa.⁴⁸ The South African Courts have handed down various convictions for money laundering offences and the most high profile of these cases is that of *S v Shaik*, where the business advisor to the then Deputy President was convicted of corruption offences and two of his companies convicted of money laundering offences under the POCA.⁴⁹

The concept of money laundering refers to various offences committed under the provisions of POCA and the term also shares similarities with other crimes such as corruption.⁵⁰ The Drugs and Drug Trafficking Act 140 of 1992 greatly enhanced the South African AML framework as money launderers were only convicted as accessories after the fact before its enactment.⁵¹ The Act also criminalised the laundering of drug proceeds and imposed a reporting of suspicious transactions obligation.⁵² AML provisions were further extended to all kinds of offences by the POCA.⁵³

2.2 Provisions of POCA

⁴⁶Charles Goredema, Prine Bagenda, Louis De Koker, Bothwell Fundira, Ray Goba & George Kegoro 'Profiling money laundering in Eastern and Southern Africa' (2003) 90 *Institute for Security Studies Monographs* 209 at 83.

⁴⁷Chinelle van der Westhuizen *Money laundering and the impact thereof on selected African Countries: A comparative study* (unpublished LLM mini-dissertation, University of Pretoria, 2011) 19.

⁴⁸International Monetary Fund op cit note 2.

⁴⁹Ibid.

⁵⁰Charles Goredema, Prine Bagenda, Louis De Koker, Bothwell Fundira, Ray Goba & George Kegoro op cit note 44.

⁵¹Ibid.

⁵²Ibid.

⁵³Ibid.

POCA came into effect in 1999, introducing legislative instruments to combat racketeering activities, organised crime and money laundering and further served as the foundation for Acts such as FICA.⁵⁴

POCA has:

- established offences relating to money laundering and racketeering;
- criminalised money laundering in its entirety;
- criminalised racketeering;
- established offences in relation to activities of criminal groups; and
- imposed an obligation on businesses to report suspicious property in their possession.

These aspects of POCA are discussed in more detail below.

2.2.1 Money laundering offences

The South African legislature defines the concept of ‘money laundering’ in POCA as:

‘Any person who knows or ought to reasonably have known that any property⁵⁵ is or forms part of the proceeds of unlawful activities⁵⁶ and (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or (b) performs any other act in connection with such property whether it is performed independently or in concert with another person, which has or is likely to have the effect –

- (i) of concealing or disguising the nature, source location disposition or movement of the said property or ownership thereof or any interest which any one may have in respect thereof;

⁵⁴Art Garffer op cit note 5.

⁵⁵“property – money or other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any other interest therein and all proceeds thereof”.

⁵⁶“unlawful activity – any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of the POCA and whether such conduct occurred in the Republic or elsewhere.

proceeds of unlawful activities – any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly in the Republic or elsewhere at any time before or after the commencement of the POCA, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived”.

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic of South Africa or elsewhere –

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly or indirectly as a result of the commission of an offence, shall be guilty of an offence.⁵⁷

POCA applies to any act committed in association with the income of criminal activities which assists or is likely to assist the person who committed such crime to avoid prosecution or to disguise, diminish or remove the proceeds of such criminal activity.⁵⁸

POCA also makes it an offence for a person who knows or ought reasonably to have known that another person has obtained the income of criminal activities to enter into any transaction, agreement or arrangement in terms of which the first person facilitates the second person in retaining or controlling the proceeds of the unlawful activity:⁵⁹

- to make capital available to the second person;
- to obtain property on the second person's behalf; or
- to benefit the second person in any other manner.

This provision criminalises the behaviour of third parties who assist other persons to enjoy the benefits of the proceeds of criminal activities and it is not necessary to be personally involved in an act to have committed an offence in terms of POCA.⁶⁰

An offence is committed in terms of POCA if:

- 'a person is involved directly or indirectly in concealing or disguising the nature, source, location or disposition of property forming part of the proceeds of unlawful activities;
- a person assists another person in retaining, controlling or enjoying the proceeds of unlawful activities; or

⁵⁷ Prevention of Organised Crime Act 121 of 1998.

⁵⁸ Arun Srivastava, Mark Simpson & Nina op cit note 5 at 1182.

⁵⁹ Prevention of Organised Crime Act 121 of 1998.

⁶⁰ Arun Srivastava, Mark Simpson & Nina op cit note 5 at 1183.

- a person acquires, possesses or uses the proceeds of unlawful activities.’⁶¹

The test to determine whether a person has knowledge of a fact is set out in Section 1 of FICA and provides that a person has awareness of a certain fact if he or she believes that there is a reasonable likelihood of the reality of a fact, and he or she fails to verify the existence of such fact.⁶² Arun Srivastava, Mark Simpson & Nina note that, ‘a person ought reasonably to have known or suspected a fact if a reasonable diligent and vigilant person has both the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position and the general knowledge, skill training and experience that he or she in fact has.’⁶³ This instance sets out the relationship between the POCA and the FICA: the FICA sets out the situations in which a person ought rationally to have known that the property forms part of the income of criminal activities.⁶⁴ The aforementioned test was set out in the case of *Frankel Pollak Vinderine Inc v Stanton* as:

‘Where a person has a real suspicion and deliberately refrains from making enquiries to determine whether it is harmless, where he or she sees red (perhaps amber) lights flashing but chooses to ignore them, it cannot be said that there is an absence of knowledge of what is suspected or warned against.’⁶⁵

A defence may be raised that a person reported a suspicion where a charge of an offence committed under s 2(1)(a) or (b), 4, 5 or 6 is reported in terms of POCA.⁶⁶ The penalty under the provisions of the POCA is a minimum fine of R100, 000,000.00 and/or a period of imprisonment of thirty years or less.⁶⁷ Furthermore, the proceeds and property involved in the crime may be forfeited under the provisions of POCA.⁶⁸

2.2.2 Money laundering and racketeering

When there is a continuous or enduring involvement in at least 2 offences, such as public violence and robbery, a pattern of racketeering activity will have been established under the Criminal Procedure Act.⁶⁹

⁶¹Ibid.

⁶²Ibid.

⁶³Arun Srivastava, Mark Simpson & Nina op cit note 5 at 1183.

⁶⁴Ibid.

⁶⁵Ibid.

⁶⁶Ibid.

⁶⁷Ibid.

⁶⁸Ibid.

⁶⁹Prevention of Organised Crime Act 121 of 1998.

The POCA provides that when proceeds resultant from the abovementioned act are invested, received, used, and retained in or on behalf of an organisation, such an act constitutes an offence.⁷⁰

The POCA further criminalises the following acts:

- ‘the direct or indirect acquisition or maintenance of an interest in or control of an enterprise through a pattern of racketeering activity;
- the direct or indirect conduct, or participation in the conduct, of the affairs of an enterprise through a pattern of racketeering activity by a person who manages or is employed by or associated with that enterprise; and
- the management of the operational activities of an enterprise by a person who knows, or ought reasonably to have known, that any person who is employed by or associated with the enterprise is conducting, or participating in the conduct, directly or indirectly, of the affairs of the enterprise through a pattern of racketeering activity.’⁷¹

A conviction in terms of Section 2(1) carries a fine of R100,000,000.00 or life imprisonment.⁷²

2.2.3 Confiscation and forfeiture

The POCA has developed the law relating to confiscation and forfeiture to a large extent by introducing the civil forfeiture procedure.⁷³ The civil forfeiture procedure, in addition to forfeiting a benefit a criminal may enjoy through unlawful activities, forfeits property that aided or was instrumental in the commission of an offence.⁷⁴ Property may be confiscated under the terms of POCA without prosecution or conviction taking place.⁷⁵ A confiscation order made under POCA is a civil procedure which requires only that the prosecution prove that the property and/or income were derived from criminal activities.⁷⁶

2.3 Provisions of FICA

⁷⁰Arun Srivastava, Mark Simpson & Nina op cit note 5 at 1185.

⁷¹Prevention of Organised Crime Act 121 of 1998.

⁷²Charles Goredema, Prine Bagenda, Louis De Koker, Bothwell Fundira, Ray Goba & George Kegoro op cit note 44 at 87.

⁷³Arun Srivastava, Mark Simpson & Nina op cit note 5 at 1186.

⁷⁴Ibid.

⁷⁵Ibid.

⁷⁶Ibid.

2.3.1 Purpose

Section 2 of FICA together with the preamble states that its purpose is: “to establish a Financial Intelligence Centre and a Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities and to amend the POCA.”⁷⁷

2.3.2 The Financial Intelligence Centre

The FIC assists in combating money laundering and identifying criminal income.⁷⁸ The FIC compiles, collects, analyses and retains all material it acquires in terms of the FICA.⁷⁹ The FIC does not do any investigations related to unlawful activity, it does however provide evidence to co-operate with and guide various investigating authorities, SARS and intelligence services who perform the inquiries.⁸⁰

2.3.3 The Money Laundering Advisory Council

The MLAC counsels the Minister of Finance on money laundering best practices and policies together with the use by the Minister of his powers under the provisions of FICA and further guides the FIC regarding the exercising of its powers.⁸¹

2.3.4 Money laundering control obligations

In terms of FICA, an accountable institution has the following duties regarding money laundering control:

- to identify clients;
- to retain records of business relationships and single transactions;
- to report certain transactions;
- to appoint a compliance officer; and

⁷⁷The Financial Intelligence Centre Act 38 of 2001.

⁷⁸The Financial Intelligence Centre Act 38 of 2001.

⁷⁹Ibid.

⁸⁰Ibid.

⁸¹Ibid.

- to train employees in their money laundering control duties.⁸²

These duties are levied on accountable institutions, international travellers in general, reporting institutions and persons involved in trades.⁸³

2.3.5 Duty to identify clients and to keep records

In terms of Section 21(1) of FICA, an accountable institution is obligated to verify and establish the identity of a client before concluding a single transaction or initiating a business relationship.⁸⁴ Accountable institutions also have an obligation to ascertain related facts with regard to clients with whom they concluded business transactions with prior to FICA.⁸⁵

Failure to identify persons as stipulated constitutes an offence carrying a penalty of 15 years imprisonment or a fine not greater than the amount of R100,000,000.00.⁸⁶ Recently, the SARB fined five South African banks over R30 million as a result of weaknesses in their control measures relating to money laundering.⁸⁷ The five banks were GBS Mutual Bank, Habib Overseas Bank Limited, Investec Bank Limited, The South African Bank of Athens Limited, and the Johannesburg branch of Standard Chartered Bank.⁸⁸

2.3.6 Cash transactions

Certain information of each transaction to which an accountable institution is party and which comprises the receipt or payment of an amount of money larger than a set amount, must be reported to the FIC within a certain time frame.⁸⁹ In section 1 of FICA, cash is defined as coin and paper money of South Africa and travellers' cheques.⁹⁰ In addition, a transaction, in terms of FICA, is a transaction fulfilled among a client an accountable institution in accord with business of that institution.⁹¹

⁸²Ibid.

⁸³Ibid.

⁸⁴Ibid.

⁸⁵Ibid.

⁸⁶Ibid.

⁸⁷ Fin24, 'SARB fines SA banks a whopping R30m', <http://www.fin24.com/Economy/just-in-sarb-fines-5-sa-banks-a-whopping-r30m-20160805>, accessed on 15 October 2016.

⁸⁸ Ibid.

⁸⁹Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

2.3.7 Transfer of cash to and from South Africa

Where a person has the intention of sending cash, exceeding the prescribed amount, he or she must report certain particulars before sending any cash and a duplicate of the report must be sent to the FIC promptly.⁹²

2.3.8 Electronic transfer of cash to and from South Africa

Cash, exceeding the prescribed amount, transferred or received electronically across South African borders by an accountable institution must be accounted for to the FIC within a prescribed time period.⁹³

2.3.9 Unusual and suspicious transactions

The FICA places a duty on certain institutions and persons to identify and verify the identity of a new client prior to any transaction or any business relationship.⁹⁴ The FIC issued its first guidance note concerning the approach that should be followed and it advocates a risk-based approach with regard to the verifications of particular clients.⁹⁵

The Money Laundering Control Regulations⁹⁶ oblige certain accountable institutions to verify the address details furnished by a client and many are unable to supply any details or records which can sensibly serve to verify their residential details.⁹⁷ This difficulty is not restricted to those who reside in informal accommodation, but it also happens in many instances that formal residential addresses cannot be verified.⁹⁸ The difficulties on the subject of verification created predicaments for financial institutions, because the Financial Institutions made an assurance in the Financial Sector

⁹²S 30(2). “Any person who willfully fails to report the conveyance of cash into or out of South Africa in accordance with S 30(1) commits an offence (S 54). It is important to note that this offence can only be committed by a person who willfully fails to report the conveyance. This offence carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (S 68). If the person referred to in S 30(2) fails to send a report regarding the conveyance of cash to the FIC in accordance with that section, he commits an offence under S 55. This offence carries a penalty of imprisonment for a period not exceeding five years or a fine not exceeding R1 million (S 68(2)).”

⁹³The Financial Intelligence Centre Act 38 of 2001.

⁹⁴Chinelle van der Westhuizen op cit note 45 at 47.

⁹⁵Ibid.

⁹⁶Money Laundering Control Regulations, [file:///C:/Users/User%20pc/Downloads/Money%20laundering%20and%20terrorist%20financing%20control%20regulation%20\(1\).pdf](file:///C:/Users/User%20pc/Downloads/Money%20laundering%20and%20terrorist%20financing%20control%20regulation%20(1).pdf), accessed 30 October 2016.

⁹⁷Chinelle van der Westhuizen op cit note 45 at 47.

⁹⁸ Ibid.

Charter to decisively and considerably increase admission to financial services.⁹⁹ FICA is clear about the need to re-identify current clients, thus the re-identification scheme evidently poses financial and practical challenges to banks.¹⁰⁰ It is therefore relevant to consider the incentive behind the scheme.¹⁰¹ The two main motivations that are often cited is required by International Anti-Money Laundering and Combating of the Financing of Terrorism standards and that it is crucial to enable accountable institutions to identify suspicious transactions by their clients.¹⁰²

The unusual and suspicious transactions created by FICA are a very wide group and are applied to a broad range of persons.¹⁰³ Any person who has a suspicion or is aware of an unusual or suspicious transaction must report the transaction to the FIC within a set period of time after he had such a suspicion.¹⁰⁴

2.3.10 Access to information held by FIC

FIC information together with the FIC's access to information is regulated in terms of FICA.¹⁰⁵ Information held by the FIC contains information regarding single transactions and clients and may be inspected and copied by an authorised agent of the FIC by virtue of a warrant issued by a judge or magistrate.¹⁰⁶ A warrant is not needed if the records are publicly available.¹⁰⁷ An accountable institution may be obligated to disclose the fact that a person was or was not a client and the FIC may request additional information.¹⁰⁸

If the SARS suspects or knows that an accountable institution is unintentionally or purposely implicated in a suspicious or unusual transaction, it must report to the FIC and provide the FIC with any accounts concerning that suspicion or knowledge which the Centre may necessitate to attain its goals.¹⁰⁹ If the FIC considers that a controlling body has such information, it may request

⁹⁹Ibid.

¹⁰⁰Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴The Financial Intelligence Centre Act 38 of 2001.

¹⁰⁵ Ibid.

¹⁰⁶Chinelle van der Westhuizen op cit note 45 at 56.

¹⁰⁷ Ibid.

¹⁰⁸S 27. Failure to furnish this information to the FIC constitutes an offence (s 50) that carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (s 68).

¹⁰⁹Ibid.

SARS or the body to refute or verify that belief and if established, certain material must be furnished to the FIC.¹¹⁰

2.3.11 Search, seizure and forfeiture

Where there are reasonable grounds to suspect that a Section 54 offence has been committed or is about to be committed, and where cash is transferred or about to be transferred, the seizure of cash is provided for in terms of FICA.¹¹¹ The cash amount stated where a person is convicted of the offence, will be forfeited to the state.¹¹²

Chinelle van der Westhuizen notes that:

‘The forfeiture may not affect any innocent party’s interests in the cash or property. To qualify for this protection, a person must prove:

- that he or she acquired the interest in that cash or property in good faith; and
- that he or she did not know that the cash or property in question was: - conveyed as contemplated in section 30(1) or
- that he or she could not prevent such cash from being so conveyed; or - used in the transactions contemplated in section 64 or
- that he or she could not prevent the property from being so used, as the case may be.’¹¹³

While FICA protects innocent third parties, it is essential to note that the protection does not extend to parties who were simply ignorant of the objective to commit an offence.¹¹⁴ It is restricted to parties who can provide evidence to the fact that they were not aware that the property was to be transferred across South African borders or utilised in a section 64 transaction.¹¹⁵

2.4 The Banks Act 94 of 1990

¹¹⁰Ibid.

¹¹¹ Ibid.

¹¹²Ibid.

¹¹³Ibid.

¹¹⁴Chinelle van der Westhuizen op cit note 45 at 66.

¹¹⁵Ibid.

Prospective clients wanting to open bank accounts must be identified and verified in accordance with the Bank's common law duty.¹¹⁶ In addition, the bank must select a senior compliance officer and uphold a self-regulating and sufficiently equipped compliance function in terms of the Banks Act.¹¹⁷ Banks are also required to implement and uphold procedures and policies to safeguard against money laundering, market abuse, insider trading, financial fraud, and market manipulation in terms of Regulation 48.¹¹⁸ These procedures and policies must at least be sufficient to guarantee observance with applicable legislation, assist collaboration with law enforcement agencies, to provide satisfactory guidance and assistance to staff and to report suspicious transactions.¹¹⁹ In terms of Regulation 46, money laundering activity must be reported to the Registrar of Banks.¹²⁰

2.5 Prosecutions and convictions

The three cases discussed below illustrate convictions for money laundering offences under the South African AML framework.

2.5.1 *S v Dustigar*

Nineteen persons were convicted in *S v Dustigar*¹²¹ for their participation in South Africa's largest armed robbery with 7 of the accused convicted as accessories after the fact on the strength of their involvement in the laundering of the takings and an eighth accused was convicted on a count of statutory laundering under the Proceeds of Crime Act. Several of the accused were third parties or family members who permitted the abuse of their bank accounts to launder the money. The ninth accused was an attorney who facilitated fraudulent agreements and manipulated his trust account records to launder the illegal money, and was sentenced to five years imprisonment. The thirteenth accused was a member of the SAPS and shaped the laundering plot that implicated seven of the other accused. He was sentenced to 15 years' imprisonment.

2.5.2 *S v Van Zyl*

¹¹⁶Charles Goredema, Prine Bagenda, Louis De Koker, Bothwell Fundira, Ray Goba & George Kegoro op cit note 44.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹(Case no 27/180/98, Regional Court, Cape Town) reported Case no. CC6/2000, Durban and Coast Local Division.

The accused in *S v Van Zyl*¹²² pleaded guilty to negligent laundering in terms of the Proceeds of Crime Act and was sentenced to a fine of R10 000.00 and to imprisonment for 10 years. He allowed his sister-in-law to deposit money she stole from her employer totaling R7 600 000.00 into his bank account. The money was subsequently transferred by means of cheques and ATM withdrawals. The accused made statements that he was under the illusion that the money was made from successful business dealings and investments. He later acknowledged in hindsight, that his beliefs were irrational.

2.5.3 *S v Gayadin*

In *S v Gayadin*¹²³, the accused was convicted of money laundering under the provisions of POCA. Gayadin managed to launder more than R11 000 000.00 received from his numerous illegal casinos by enlisting the help of various people to hide the illegal proceeds in offshore bank accounts.¹²⁴

2.6 Conclusion

With the advent of FICA in South Africa and its interaction with the provisions of the POCA, it appears that South Africa's legislative endeavours are in sequence with global standards, as recommended by the Palermo Convention.¹²⁵ However, the mere existence of legislation against money laundering is not a guarantee of its adequacy or effectiveness.¹²⁶ Even though this legal framework exists, the South African Parliament received the Protection of State Information Bill on the 25th of April 2013, which greatly undermines labours to advance transparency.¹²⁷ Gaffer thus remarks that South Africa has abided by AML policies in order to depict a fantasy of tackling corruption and money laundering.¹²⁸

Strivasta, Simpson and Moffatt point out that the lack of resources for implementation at state level to ensure enforcement with the FICA is not merely financial.¹²⁹ Enforcement of the FICA

¹²²(Case no 27/180/98, Regional Court, Cape Town)

¹²³(Case no 41/900/01, Regional Court, Durban)

¹²⁴Charles Goredema, Prine Bagenda, Louis De Koker, Bothwell Fundira, Ray Goba & George Kegoro op cit note 44 at 83

¹²⁵Ibid.

¹²⁶Arun Srivastava, Mark Simpson & Nina op cit note 5 at 1199.

¹²⁷Art Garffer op cit note 5.

¹²⁸Ibid.

¹²⁹Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 1199.

requires training, experienced personnel and appropriate equipment in order to ensure compliance with the obligations imposed by the Act.¹³⁰ Increasing efforts in South Africa have been made to train staff and other individuals dedicated to the purpose of ensuring the enforcement of anti-money laundering measures, but according to Strivasta, Simpson and Moffatt such training and education falls short of the international standards of some First World countries.¹³¹ Accountable institutions are given the task of identifying illegally obtained funds. The aforesaid authors however remark that the difficulty of this task is compounded by a high volume of legitimate business conducted with respected institutions.¹³²

Van Der Westhuizen indicates that global money laundering control prowess is accessible for South Africa to depend on in this progression.¹³³ However, she points out that the various issues South Africa faces are unfamiliar to developed jurisdictions such as the US and the UK.¹³⁴ As a result, South Africa will have to devise its own answers and strategies in this regard and cooperate with other countries in the sub-region to band their knowledge and assets to grow systems that will effectively deal with money laundering in their economies.¹³⁵

¹³⁰Ibid.

¹³¹Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 1199.

¹³²Ibid.

¹³³Chinelle van der Westhuizen op cit note 45 at 55.

¹³⁴Ibid.

¹³⁵Charles Goredema, Prine Bagenda, Louis De Koker, Bothwell Fundira, Ray Goba & George Kegoro op cit note 44 at 121.

Chapter Three The anti-money laundering framework in the United Kingdom

The UK has long recognised the importance of AML legislation as an instrument against terrorist financing and drug trafficking.¹³⁶ Its AML framework has been developed in such a way as to include the various legislative processes introduced by the European Union, the Recommendations of the Financial Action Task Force and the United Nations.¹³⁷ HM Treasury, the UK's finance department, leads the war against money laundering and is responsible for the UK's AML strategy.¹³⁸ HM Treasury has in recent years aggressively developed the UK's AML framework which surpasses the recommendations made by FATF and the three European Money Laundering Directives.¹³⁹

The UK's AML legislative framework was originally formed in a fragmented manner, with a number of statutes containing money laundering offences and identifiable inconsistencies between these offences.¹⁴⁰ The first UK legislation specifically aimed at criminalising money laundering was the Drug Trafficking Offences Act 1986 together with the Criminal Justice Act 1988 which contained the UK's primary AML offences.¹⁴¹ Terrorist financing was however dealt with by the Prevention of Terrorism 1989 and the Northern Ireland Act 1996 and drug trafficking proceeds by the Drug Trafficking Act 1994.¹⁴² This fragmented structure was subsequently substituted by the Money Laundering Regulations 2007 and the Proceeds of Crime Act 2002 which, together with the Terrorism Act 2000 make up the UK's current AML legislative framework.¹⁴³

3.1 Implementation of international anti-money laundering legislative instruments

As eluded to above, the UK has incorporated a number international AML instruments into its framework.¹⁴⁴ In December 1988, the UK signed the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, otherwise known as the Vienna Convention, and

¹³⁶Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 56.

¹³⁷Nicholas Ryder op cit note 27 at 73.

¹³⁸Ibid.

¹³⁹Nicholas Ryder op cit note 27 at 73.

¹⁴⁰Ibid.

¹⁴¹Ibid.

¹⁴²Ibid.

¹⁴³Nicholas Ryder op cit note 27 at 74.

¹⁴⁴Ibid.

ratified it in June 1991, the impact of which is exemplified by the Criminal Justice Act 1990.¹⁴⁵ In addition, the UK also signed the UN Convention against Transnational Organised Crime, otherwise known as the Palermo Convention.¹⁴⁶ Evidence of its influence is illustrated by the fact that it is referred to in the Serious Organised Crime and Police Act 2005.¹⁴⁷

The UK also implemented a number of AML legislative provisions from the EU, an example of which is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in 1990.¹⁴⁸ The range of the Convention of 1990 was widened by the Council of Europe Convention on Laundering Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005.¹⁴⁹ The EU has further introduced three Money Laundering Directives, the first of which was published in 1991 and the UK implemented the First Money Laundering Directive in 1993, the second directive extended the scope of the UK'S AML obligations.¹⁵⁰ The third Money Laundering Directive was published in 2005 and was implemented by means of the Money Laundering Regulations 2007.¹⁵¹ The UK's AML framework goes beyond the Money Laundering Directives as a result of its proactive stance towards implementing the UN and the EU's AML measures.¹⁵²

In addition to implementing the international money laundering legislative instruments, the UK has clearly recognised and implemented international best practices and industry guidelines.¹⁵³ An obvious illustration of this is the Serious Organised Crime Agency's membership of the Egmont Group of Financial Intelligence Units.¹⁵⁴ Furthermore, the UK is a member of the Basel Committee on Banking Supervision, and it has been a member of the FATF since 1990.¹⁵⁵

Finally, the UK is an active member of the FATF regarding the UK's any-money laundering policy and legislative framework as was illustrated in the publication of its 2007 money laundering and

¹⁴⁵Ibid.

¹⁴⁶ Section 95 of the Serious Organised Crime and Police Act 2005.

¹⁴⁷Ibid.

¹⁴⁸Financial Action Task Force, *Third Mutual Evaluation Report Anti-money Laundering and Combating the Financing of Terrorism: United Kingdom*, Paris: Financial Action Task Force, 2007 at 50.

¹⁴⁹Nicholas Ryder op cit note 27 at 75.

¹⁵⁰Nicholas Ryder op cit note 27 at 76.

¹⁵¹Ibid.

¹⁵²Ibid.

¹⁵³Ibid.

¹⁵⁴Financial Action Task Force op cit note 151 at 85.

¹⁵⁵Nicholas Ryder op cit note 27 at 76.

terrorist finance strategy.¹⁵⁶ In its 2007 Mutual Evaluation Report the FATF concluded that the UK was fully compliant with 19 out of the 40 Recommendations, largely compliant on 9, partially compliant on 9 and non-compliant on 3 Recommendations.¹⁵⁷ The mutual evaluation report concluded that the UK has a far-reaching anti-money laundering legislative framework that fully complies with the Vienna and Palermo Conventions.¹⁵⁸ Ryder accordingly remarks that the UK is clearly committed to implementing the international best practices and industry guidelines, and that these measures have been incorporated into the UK's AML policy.¹⁵⁹

Ryder further points out that the UK has fully embraced the risk-based approach towards money laundering.¹⁶⁰ The risk-based approach is one by which institutions identify the criteria to measure potential money laundering risks allowing them to determine and implement proportionate measures and controls to mitigate these risks.¹⁶¹ Evidence of the risk-based approach in the UK is contained in secondary legislation, the Money Laundering Regulations 2007, the FSA's money laundering Rules and the Joint Money Laundering Steering Groups Guidance Notes.¹⁶²

3.2 Proceeds of Crime Act 2002

The enactment of the PCA amalgamated all the UK's money laundering crimes into one piece of legislation.¹⁶³ Van Jaarsveld remarks that these offences are so concisely put into words that definitions relating to each of them appear misleadingly uncomplicated.¹⁶⁴ Three principle money laundering offences are created by the PCA together with four related offences, namely, involvement in money laundering activities, acquiring, using or possessing criminal property, and concealing criminal property.¹⁶⁵ Tipping-off¹⁶⁶, failure to disclose possible money laundering

¹⁵⁶Ibid.

¹⁵⁷Financial Action Task Force op cit note 151 at 10.

¹⁵⁸Ibid.

¹⁵⁹Nicholas Ryder op cit note 27 at 77.

¹⁶⁰Ibid.

¹⁶¹ The Wolfsberg Group, Guidance on a Risk Based Approach for Managing Money Laundering Risks, available at [http://www.wolfsberg-principles.com/pdf/standards/Wolfsberg_RBA_Guidance_\(2006\).pdf](http://www.wolfsberg-principles.com/pdf/standards/Wolfsberg_RBA_Guidance_(2006).pdf), accessed on 22 August 2016.

¹⁶²Ibid.

¹⁶³Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 130.

¹⁶⁴Izeldel Louise van Jaarsveld *Aspects of Money Laundering in South African Law*(unpublished LLD thesis, University of South Africa, 2011) 336.

¹⁶⁵Ibid.

¹⁶⁶ 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.

activities, prejudicing an investigation, and invalid permission to conduct a money laundering transaction are further criminalised by the PCA.¹⁶⁷

“Criminal property” is property that a person knows or suspects to represent a profit or benefit derived from criminal conduct.¹⁶⁸ An offence is committed in terms of section 327 if a person disguises, conceals, transfers or converts criminal property.¹⁶⁹ These deeds must be performed in relation to the source, nature, disposition, location, ownership, or movement with regards to the criminal property.¹⁷⁰

Section 328(1) of the PCA makes it an offence for a person to enter into or become concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.¹⁷¹ Banks may either become unknowingly involved in a money laundering arrangement or may be used by an employee to help criminals with money laundering arrangements.¹⁷²

Section 329(1) of the PCA makes it an offence to use, have or acquire possession of criminal property.¹⁷³ The definition of the concept ‘criminal property’ means that it is impossible to commit the offence unknowingly.¹⁷⁴ Consent, a reasonable excuse, conduct sanctioned by the PCA, or acquiring the property for adequate consideration may be used as defences to this offence.¹⁷⁵ The defence is not available where a person provides services or goods which he suspects or knows may aid another to perform criminal conduct.¹⁷⁶

Under the PCA, a person may be required or choose to report a suspicion or knowledge of money laundering either where a consent is required in order to avoid the commission of a principal money laundering offence or where a proactive reporting obligation applies.¹⁷⁷ In the former case where consent is required, a person makes an “authorised disclosure” under section 338 of PCA seeking

¹⁶⁷ Ibid.

¹⁶⁸ Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 63.

¹⁶⁹ Section 327 of the PCA.

¹⁷⁰ Ibid.

¹⁷¹ Section 328(1) of the PCA.

¹⁷² Izelde Louise van Jaarsveld op cit note 147 at 311.

¹⁷³ Section 329 of the PCA.

¹⁷⁴ Izelde Louise van Jaarsveld op cit note 147 at 312.

¹⁷⁵ Section 329(2) of the PCA.

¹⁷⁶ Section 329(3)(c) of the PCA.

¹⁷⁷ Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 69.

an appropriate consent under section 335 of PCA.¹⁷⁸ The PCA differentiates between three forms of “failure to disclose” - offences: an offence for nominated officers working in the regulated sector, an offence for other nominated officers and an offence for persons employed in the regulated sector.¹⁷⁹

In terms of section 333A, it is an offence for individuals in the regulated sector to “tip-off” after a STR has been filed.¹⁸⁰ Where a person has knowledge that a STR has been filed and proceeds to disclose information to a third party that may prejudice an investigation, that person will have committed the auxiliary money laundering offence of tipping-off.¹⁸¹ The PCA further provides three statutory defences in respect of this offence, including that the disclosure was made in accordance with legislation, that the disclosure was made by a legal advisor in the course of giving legal advice; or lack of knowledge that the disclosure was expected to prejudice an investigation.¹⁸² It is not clear whether disclosure for these purposes includes so-called “constructive disclosure”, which might arise, for example, where an intermediary terminated the client’s retainer, or delays carrying out those instructions.¹⁸³

3.3 The Terrorism Act 2000 (TACT)

TACT came into force on 19 February 2001 and combined previous fragmented offences under former legislation.¹⁸⁴ The Act comprises various provisions concerning money laundering and expressly creates an offence to enter into or become concerned in an arrangement which facilitates the control or retention of terrorist property by transfer to nominees, removal from jurisdiction, concealment or in any other way.¹⁸⁵

There are two elements to the main offence.¹⁸⁶ First, “terrorist property” which is defined to mean:

‘(a) money or other property which is likely to be used for the purposes of terrorism (including any resources of a prescribed organization),

¹⁷⁸Ibid.

¹⁷⁹Izeldé Louise van Jaarsveld op cit note 147 at 313.

¹⁸⁰ Section 333A of the PCA.

¹⁸¹Ibid.

¹⁸²Ibid.

¹⁸³Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 80.

¹⁸⁴Ibid.

¹⁸⁵Ibid.

¹⁸⁶Section 18 of the Terrorism Act 2000.

- (b) proceeds of the commission of acts of terrorism, and
- (c) proceeds of acts carried out for the purpose of terrorism.¹⁸⁷

It includes property which is wholly or partly directly or indirectly terrorist property.

“Terrorism” is defined widely in TACT, section 1(1) as the use or threat of action where:

- ‘(a) the action falls within subsection (2),
- (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
- (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.’¹⁸⁸

An action falls within TACT, section 1(2) if it:

- ‘(a) involves serious violence against any person,
- (b) involves serious damage to property,
- (c) endangers a person’s life, other than that of the person committing the action,
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously to disrupt an electronic system.’¹⁸⁹

Section 15 of TACT makes it an offence for a person to receive, or to solicit, property or money on behalf of terrorists if he/she knows or has reasonable cause to suspect that such property or cash may be used for terrorist purposes.¹⁹⁰ An offence is also created in terms of Section 16 for the possession or use of cash for the purpose of terrorism.¹⁹¹

The next offence created under the Act embraces the notion of the knowingly concerned person in creating an offence for a person who enters into or becomes concerned in an arrangement in which property or money is made available to another and the person knows or has cause to suspect that it may be used for terrorism.¹⁹² The second element of the offence created by TACT, is entering

¹⁸⁷Section 14(1) of the Terrorism Act 2000.

¹⁸⁸ Section 1 (1) of the Terrorism Act 2000.

¹⁸⁹ Section 1(2) of the Terrorism Act 2000.

¹⁹⁰Section 15 of the Terrorism Act 2000.

¹⁹¹Section 16(1) of the Terrorism Act 2000.

¹⁹²Section 17 of the Terrorism Act 2000.

into an arrangement which facilitates the control or retention of terrorist property.¹⁹³ Unlike the other offences relating to terrorist fundraising and the use of terrorist property under sections 15 to 17 of TACT, the section 18 offence is a strict liability offence, which means the prosecution does not have to prove any mental state on the part of the defendant.¹⁹⁴ However, it is a defence for the defendant to show that he did not know, and that there were no reasonable grounds to cause the defendant to suspect, that the arrangement related to terrorist property.¹⁹⁵ In practice, therefore, if the defendant became involved with terrorist property completely unknowingly, then criminal liability may not result. The maximum penalty upon conviction is 14 years imprisonment and/or an unlimited fine.¹⁹⁶

Section 19 also creates the offence of failure to disclose a belief or suspicion that an offence has been committed under sections 15 to 18 of TACT.¹⁹⁷ The Act creates a criminal offence for people who conduct relevant business in the regulated sector who do not make known their suspicion or knowledge that a person is engaged in money laundering.¹⁹⁸

3.4 Money Laundering Regulations 2007

As a result of the 1991 Directive, the UK released its first anti-money laundering regulations in 1993 and released revised regulations in 2003.¹⁹⁹ The Money Laundering Regulations 2007 replaced the 2003 Regulations and came into effect on 15 December 2007 as a result of the EU's enactment of the 2005 Directive which required updated regulations.²⁰⁰ The Money Laundering Regulations 2007 comprises of a detailed AML framework encompassing training obligations, record-keeping and customer due diligence measures.²⁰¹ The 2007 Regulations created strict liability money laundering offences which apply to a list of relevant persons as provided for in Regulation 3(1) and criminalised failure to implement AML measures.²⁰² Under the provisions of the MLR, a person commits a money laundering offence where he/she does not apply customer

¹⁹³Section 18 of the Terrorism Act 2000.

¹⁹⁴Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 83.

¹⁹⁵Ibid.

¹⁹⁶Ibid.

¹⁹⁷Section 19 of the Terrorism Act 2000.

¹⁹⁸Section 21A of the Terrorism Act 2000.

¹⁹⁹Izeldel Louise van Jaarsveld op cit note 147 at 317.

²⁰⁰Ibid.

²⁰¹Ibid.

²⁰² Ibid.

due diligence measures, preserve transaction records and fails to provide employees with adequate money laundering control training.²⁰³

The MLR imposes five main duties or obligations on firms and importantly legally enshrines the concept of a ‘risk-based approach’.²⁰⁴ Briefly, these main requirements are:

- Customer due diligence measures – Firms have a duty to carry out customer due diligence measures on a risk-sensitive basis. These measures must involve the identification and verification of customers and beneficial owners. Firms must also obtain information regarding the intended nature and purpose of the business relationship.
- Internal policies and procedures – Firms must develop and uphold sufficient and suitable procedures and policies to mitigate money laundering risks.
- Record keeping – Firms must make and retain records of their customer due diligence measures and transactions carried out by the firm, as evidence that they have complied with their legal and regulatory obligations.
- Suspicious transaction and reporting procedures – Firms must ensure that suspicious transactions are identified and reported to the firm’s MLRO, who may report the incident.
- Education and training to employees – Firms must ensure that employees are adequately trained to identify suspicious transactions and that they are aware of the firm’s money laundering risks.²⁰⁵

The offences under PCA apply to all persons.²⁰⁶ The MLR, on the other hand, are limited in scope, applying only to persons engaged in certain types of activities.²⁰⁷ The rationale for this is that the

²⁰³Ibid.

²⁰⁴Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 103.

²⁰⁵Ibid.

²⁰⁶Ibid.

²⁰⁷Ibid.

specified sectors are more likely to be involved in money laundering.²⁰⁸ The MLR apply to ‘relevant persons’:

- (a) ‘Credit institutions;
- (b) Financial institutions;
- (c) Auditors, insolvency practitioners, external accountants and tax advisors;
- (d) Independent legal professionals (when participating in financial or real property transactions concerning-
 - i. The buying and selling of real property or business entities);
 - ii. The managing of client money, securities or other assets;
 - iii. The opening or management of bank, savings or securities or other assets;
 - iv. The organisation of contributions necessary for the creation, operation or management of companies; or
 - v. The creation, operation or management of trusts, companies and similar structures;
- (e) Trust or company service providers (being persons who provide the following service to other:
 - i. Forming companies or other legal persons;
 - ii. Acting or arranging for another person to act as a director/secretary of a company, a partner of a partnership, or similar position for other legal persons;
 - iii. Proving a registered office, business address, correspondence or administrative address or other related services for a company partnership or any other legal person or arrangement;

²⁰⁸Ibid.

- iv. Acting, or arranging for another person to act as a trustee of an express trust or similar legal arrangement; or a nominee shareholder for a person other than a company whose securities are admitted to trading on a regulated market.

- (f) Estate agents;

- (g) High value dealers being a firm or sole trader who by way of business trades in goods (including auctioneers), who accept cash payments, in respect of any transaction, of €15,000 or more (whether the transaction is executed in a single operation or in a series of operations that appear to be linked); and

- (h) Casinos, being the holder of a casino operating licence.²⁰⁹

It is a criminal offence not to comply with MLR requirements and carries a fine or 2 years' imprisonment and it is not a requirement to have committed any money laundering.²¹⁰ It is also important to understand that in practice, an offence may also be committed by a director of the company or partner of the partnership.²¹¹

Failure to comply with the requirements of the MLR may also give rise to civil penalties imposed by the relevant supervisory authorities.²¹²

3.5 Authorities

The UK has a large number of competent authorities that tackle money laundering.²¹³ This includes HM Treasury, Home Office, Foreign and Commonwealth Office and various other bodies.²¹⁴ HM Treasury is the leading AML primary authority in the UK and it is responsible for the execution of the Money Laundering Directives and the UN's financial sanctions regime; it is the UK's representative at the FATF and it sanctions the industry guidelines on compliance with money

²⁰⁹Regulation 3 of the Money Laundering Regulations 2007.

²¹⁰Regulation 45 of the Money Laundering Regulations 2007.

²¹¹Regulation 47 of the Money Laundering Regulations 2007.

²¹²Regulation 42 of the Money Laundering Regulations 2007.

²¹³Nicholas Ryder op cit note 27 at 78.

²¹⁴Ibid.

laundering controls.²¹⁵ The objective of HM Treasury is to develop tools in order to detect, disrupt and deter threats and crimes against the financial system.²¹⁶

3.6 Conclusion

The UK has adopted progressive stances towards combating money laundering.²¹⁷ It has implemented all the international legal AML instruments emanating from both the UN and EU and in many instances its provisions have exceeded the international benchmarks.²¹⁸ The Proceeds of Crime Act 2002 introduced a new era in the UK towards the criminalisation of money laundering; a single codified law.²¹⁹ The ambit of the offences is extremely wide and meets the benchmarks of the FATF and the international measures of the UN and EU.²²⁰ Harvey noted that ‘the UK is particularly assiduous in the application of its anti-money laundering systems and procedures and has been identified as the greatest devotee of anti-money laundering provisions within the European Union’.²²¹ The US State Department considers the UK to be a major money laundering country, which is defined by the Foreign Assistance Act 1961 as one ‘whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking’.²²² Harvey thus recommends that the UK should persist with its efforts to provide assistance to countries with promising or developing AML frame works and its vigorous involvement in international fora.²²³ South Africa on the other hand, seems to have only done the bare minimum to implement international legal AML instruments and is still lacking in this field. South Africa needs to adopt a similar progressive and aggressive stance as that of the UK towards money laundering by forming an inter-agency mechanism dedicated to national AML policy making.

²¹⁵Nicholas Ryder op cit note 27 at 79.

²¹⁶Ibid.

²¹⁷Nicholas Ryder op cit note 27 at 99.

²¹⁸Ibid.

²¹⁹Ibid.

²²⁰Ibid.

²²¹J Harvey, ‘An evaluation of money laundering policies’, *Journal of Money Laundering Control*, 2005, 8(4), 399-45, at 341.

²²²Ibid.

²²³Ibid.

Chapter Four Global anti-money laundering framework

4.1 Introduction

Money laundering poses a significant threat to the stability of the global financial markets, national security and business around the world.²²⁴ It can be described as a cancer that undermines the financial integrity of jurisdictions, allowing organised criminals to enjoy the profits of their illegal activities.²²⁵ Synchronised international action to combat money laundering first originated in the 1980s within the framework of international efforts against drug trafficking, when a high priority was afforded to law enforcement tactics designed to unsettle the management and organisation and halt the economic power of key trafficking networks.²²⁶ Money laundering was pushed to the summit of the international community's financial crime agenda in the 1980s, partly due to the renaissance of the US-led 'war on drugs' in the 1970s.²²⁷ The International Monetary Fund and the Financial Action Task Force have estimated that the scale of money laundering transactions is between 2 and 5% of global GDP.²²⁸

The global AML framework is not only desirable but is also an imperative to ensure a coordinated and robust implementation of internationally agreed AML standards on a forward-looking basis.²²⁹ It is internationally accepted that this framework is necessary in order to prevent criminal organisations from mistreating the financial system as well as to overcome weaknesses in the AML laws of individual countries.²³⁰

The global AML framework includes but is not limited to the following regimes: the Vienna Convention of 1988; the FATF; the Council of Europe; and the Basel Committee under the auspices of the Bank of International Settlement.²³¹ The global AML regime is based on two important principles, prevention and enforcement, and administered at three levels: national,

²²⁴ Nicholas Ryder op cit note 27 at 8.

²²⁵ Ibid.

²²⁶ Arun Srivastava, Mark Simpson & Nina Moffatt op cit note 5 at 237.

²²⁷ Nicholas Ryder op cit note 27 at 9.

²²⁸ United Nations Office on Drugs and Crime, 'Estimating Illicit financial flows resulting from drug trafficking and other transnational organised crime', October 2011.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Norman Mugarura op cit note 11 at 61.

regional and international.²³² In 2001, the UN Security Council adopted nine Special Resolutions on Countering the Financing of Terrorism, calling on member countries to implement them in combating money laundering and the financing of terrorism.²³³

4.2 The United Nations Convention Against Illicit Traffic in Narcotic Drugs and other Psychotropic Substances 1988 (Vienna Convention)

The Vienna Convention is the first binding multilateral agreement containing methods against money laundering intended to support collaboration between signatories so that drug trafficking could be more efficiently combated.²³⁴ The worry over drug abuse expressed by delegates from many national governments at General Assembly Resolutions led to the adoption of the 34 article Vienna Convention in 1988.²³⁵ It was internationally recognised that the authorities require tools to challenge the financial abilities of drug trafficking organisations, and that international cooperation must be a vital part of this objective.²³⁶ The treaty offers a meticulous definition of the detailed elements that comprise trafficking in drugs and other related drug substances.²³⁷

The Vienna Convention creates an anti-money laundering framework on a wide array of matters, such as: the necessary interstate cooperation, together with mutual legal assistance and extradition arrangements; enforcement mechanisms, together with stripping criminals of the incomes realised from money laundering and other predicate crimes; and the definition and characterisation of the offence.²³⁸ Governments are obliged to comply with obligations created by the treaty because of the international law principle of *pacta sunt servanda*.²³⁹

Article 3(1) of the Vienna Convention requires signatories to pass legislation necessary to create a current code of criminal offences concerning illicit trafficking in all its diverse forms and to establish money laundering as a criminal offence in its domestic law.²⁴⁰ The Vienna Convention only discusses money laundering indirectly as conduct that amounts to money laundering crime.²⁴¹

²³² Nicholas Ryder op cit note 27 at 10.

²³³ Norman Mugarura op cit note 11 at 61.

²³⁴ Izelde Louise van Jaarsveld op cit note 147 at 238.

²³⁵ Norman Mugarura op cit note 11 at 64.

²³⁶ Ibid.

²³⁷ Norman Mugarura op cit note 11 at 65.

²³⁸ Ibid.

²³⁹ Article 36 of the Vienna Convention on the Law of Treaties, 23 May 1969.

²⁴⁰ Ibid.

²⁴¹ Izelde Louise van Jaarsveld op cit note 147 at 239.

The transfer or conversion of property whilst knowing that it derives from criminal activity, or concealment of the property's exact source and/or nature is therefore criminalised by signatories.²⁴² Article 3 is very substantial because by creating the limitations for treating and criminalising money laundering as a serious offence, Mugarura points out that the drafters confirmed that cooperation in respect of extradition, confiscation and mutual legal assistance would be imminent.²⁴³

The Convention recognises the indispensability of domestic courts and permits each state party's relevant authorities to order that commercial or financial records be made available before the judge for inspection under Article 5(3).²⁴⁴ No party shall refuse to comply under the provisions of this article on the grounds of bank secrecy.²⁴⁵ In terms of Article 5(6), proceeds resulting from illegal trafficking cannot escape forfeiture simply because their form has been changed or they have been mixed with other property.²⁴⁶

Article 7 of the Vienna Convention highlights important elements for effective mutual legal assistance and has been described as a 'miniature legal assistance treaty' because it focuses not so much on procedural detail.²⁴⁷ Requests for assistance are subject to the national law of the requested state party, yet the latter may not refuse a request on the basis of its bank confidentiality laws, a provision that is essential to the attainment of money laundering control.²⁴⁸ A request for mutual legal assistance, however, may be postponed or refused on the basis that it interferes with an on-going investigation.²⁴⁹ In contrast to article 7 which formally provides for mutual legal assistance, article 9 makes an informal mechanism for mutual assistance and training.²⁵⁰ This process entails, *inter alia*, that parties establish ways to ensure cooperation as regards requests for information and coordination towards establishing training programmes.²⁵¹

²⁴² Ibid.

²⁴³ Norman Mugarura op cit note 11 at 66.

²⁴⁴ Norman Mugarura op cit note 11 at 67.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Izelde Louise van Jaarsveld op cit note 147 at 239.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

Though the Vienna Convention was the leading anti-money laundering framework adopted, it has now been superseded by the Palermo Convention 2000.²⁵²

4.3 UN Convention Against Transnational Organised Crime 2000 (Palermo Convention)

The Palermo Convention 2000 is the most vital anti organised crime initiative since 1988.²⁵³ This is because it concerns the prosecution and prevention of several offences as regards organised crime together with money laundering.²⁵⁴ The fact that the list of criminal activity that constitutes an issue of international concern increased dramatically resulted in the commencement of the Palermo Convention.²⁵⁵ Organised crime in specific was acknowledged as a cause for concern by the international parties.²⁵⁶ Consequently, in 1994 the World Ministerial Conference on Organised Crime formulated an action plan against transnational organised crime, emphasising both the need for assistance to countries in drafting legislation for improved international assistance and knowledge about organised crime.²⁵⁷ On 15 November 2000 the Palermo Convention was finally adopted by the UN General Assembly.²⁵⁸

The aim of the Palermo Convention is to encourage international cooperation in an effort to combat and prevent international organised crime, together with the availability of the profits of crime, more efficiently.²⁵⁹ It applies to the investigation, prosecution and prevention of transnational offences by organised crime parties.

The Palermo Convention compels parties to cooperate closely in tracking suspects involved in money laundering, or tracing the benefits of crime.²⁶⁰ The international community realised that national legislation is needed to implement the provisions of the Palermo Convention.²⁶¹

²⁵² Norman Mugarura op cit note 11 at 69.

²⁵³ Banarji, C 'The United Nations Convention Against Transnational Organised Crime: A Study of Measures to Combat Money Laundering' (2002) 42 *Indian Journal of International Law* 549 at 32.

²⁵⁴ article 3(a)(i)–(v), article 3(b)–(c) of the UN Convention against Transnational Organised Crime.

²⁵⁵ Izelde Louise van Jaarsveld op cit note 147 at 243.

²⁵⁶ Ibid.

²⁵⁷ Williams, Phil 'Money Laundering' (1997) 5 *South African Journal of International Affairs* 71 at 119.

²⁵⁸ UN *Summary of the Convention Against Organised Crime* par 3, available at <http://www.unodc.org/adhoc/palermo/convensumm.htm> accessed on 23 August 2016.

²⁵⁹ Ibid.

²⁶⁰ Article 9(1) of the UN Convention against Transnational Organised Crime.

²⁶¹ Izelde Louise van Jaarsveld op cit note 147 at 244.

Therefore, parties were obliged to use existing regional and multilateral organisational rules and establish a national regime.²⁶²

It creates modalities on matters such as mutual legal assistance on civil and criminal matters, extradition, conducting joint investigations and transfer of proceedings.²⁶³ State parties are obliged to provide the necessary technical support to developing countries so that they are able to take measures to deal with large-scale organised crimes.²⁶⁴ The EU responded by issuing Directives to transpose its international obligations following the adoption of international conventions such as the Palermo Convention.²⁶⁵

4.4 The European Anti-Money Laundering Directives

Europe has long been at the forefront of combating money laundering, as confirmed by its early enterprise by the Council of Europe.²⁶⁶ The Council of Europe Convention in 1990 was to adopt a framework for harmonisation of policy and practice on money laundering, seizure, confiscating and tracing of the profits of crimes within EU Member States.²⁶⁷ The EU consequently issued three Money Laundering Directives (1991, 2001 and 2005) to bring a certain degree of harmonisation of the money laundering laws within its Member States.²⁶⁸ The European Anti-Money Laundering Directives are also adopted to bring EU law into line with its international obligations, such as FATF recommendations on AML.²⁶⁹

The European Council adopted a money laundering directive²⁷⁰ on the prevention of the use of the financial system for the purpose of money laundering when the FATF issued its first Forty Recommendations.²⁷¹ The 1991 Directive was intended to legitimise the Forty Recommendations of the FATF in the EU, as discussed in more detail in paragraph 4.5 below.²⁷² The 1991 Directive

²⁶² Article 7(3) of the UN Convention against Transnational Organised Crime.

²⁶³ Norman Mugarura op cit note 11 at 71.

²⁶⁴ Articles 16-30 of the UN Convention against Transnational Organised Crime.

²⁶⁵ Norman Mugarura op cit note 11 at 71.

²⁶⁶ Eleni Tsingo, 'Global Governance and Transnational Crimes: Opportunities and Tensions in Global Anti-Money Laundering Regimes', CDGR Working Paper No. 161/005, 2005 at 50.

²⁶⁷ Norman Mugarura op cit note 11 at 71.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Council Money Laundering Directive on the Prevention of the Use of the Financial System For the Purpose of Money Laundering 91/308/ EC of 10 June 1991.

²⁷¹ Izelde Louise van Jaarsveld op cit note 147 at 244.

²⁷² Ibid.

contained four key features, namely, criminalisation of conduct that constituted money laundering, adequate retention of account records, international cooperation aimed at combating money laundering and proper customer identification.²⁷³

The Second European Directive²⁷⁴ took the form of amendments to the First Directive, the Commission realising that it should modernise the instrument's AML provisions.²⁷⁵ Definitions of criminal activity and money laundering were extended to include all kinds of serious crime.²⁷⁶ Parties were required to confirm that obligations were enforced on, among others, independent legal professionals and notaries when they assist in the execution or planning of any activities which constitute money laundering.²⁷⁷

The Third Anti-Money Laundering Directive²⁷⁸ had a very broad mandate, not least extending its remit regarding lawyers to include money used for the financing of terrorism.²⁷⁹ It also introduced a risk-based approach to customer due diligence, creating a dual reporting regime for low-risk clients and enhanced due diligence in situations regarded as being likely to be used for money laundering.²⁸⁰ The EU anti-money laundering counter-measures have been emboldened by the Third Anti-Money Laundering Directive, which consolidates the earlier Directives on the same issue.²⁸¹ In particular, the revision was designed to extend the scope of predicate offences, providing guidance on customer identification requirements, which now take place on the basis of a risk-based approach, taking into account categories of individuals such as politically exposed persons and misuse of corporate vehicles.²⁸²

4.5 The FATF

²⁷³ Article 2–4, 8 of the 1991 Directive.

²⁷⁴ Council Money Laundering Directive 2001/97/EC of 4 December 2001 Amending EC Directive No 91/308/EEC on the Prevention of the Use of the Financial System For the Purpose of Money Laundering.

²⁷⁵ Wiessala, Georg, *The European Union in 2000 at A Glance*, 2001, 39(1) *J of Common Market Studies* 175 at 181.

²⁷⁶ Article 1(c) of the 2001 Directive.

²⁷⁷ 2001 Directive Preamble Recitals 14–17, article 2(A).

²⁷⁸ Council Money Laundering Directive 2005/60/EC of 26 October 2005 on the Prevention of the Use of the Financial System For the Purpose of Money Laundering and Terrorist Financing.

²⁷⁹ Norman Mugarura op cit note 11 at 73.

²⁸⁰ Ibid.

²⁸¹ Norman Mugarura op cit note 11 at 78.

²⁸² Ibid.

The most prominent intergovernmental agency on money laundering and the financing of terrorism is the FATF.²⁸³ The FATF is the only international body that specialises in strategies to control money laundering and was established by the G7 nations in July 1989 and its membership extends to 31 member countries.²⁸⁴ It is made up of 36 member states or territories and four affiliate regional organisations and maintains a small secretariat based at the offices of the Organisation for Economic Co-operation and Development in Paris.²⁸⁵ It is given the task of examining measures needed to combat money laundering, largely in recognition of the enormous extent of the drug problem, organized crime and money laundering.²⁸⁶ The FATF released a set of forty recommendations in April 1990 providing a framework for analysing and keeping abreast of money laundering trends, but also streamlines the Basel Committee anti-money laundering regimes.²⁸⁷ Annual mutual evaluations of members' progress in employing the recommendations are conducted by the FATF and measures the compliance of other countries in combating money laundering.²⁸⁸

The FATF issued a report encompassing an assessment of the money laundering problem and forty recommendations that created a strategy for countries to combat it.²⁸⁹ The Forty Recommendations is an endeavour to establish an AML regime with two components, namely:

- A national regulatory regime encompassing monitoring and reporting of cash transactions above a certain amount and suspicious activity reporting; and
- A network for international cooperation against money laundering that includes mutual assistance treaties and extradition as well as information dissemination.²⁹⁰

Therefore, the FATF set a minimum criterion for an effective AML programme which is known as the Forty Recommendations.²⁹¹ The original Forty Recommendations provide a wide set of measures to develop an AML system with universal application.²⁹² They may be adopted by

²⁸³ Norman Mugarura op cit note 11 at 269.

²⁸⁴ Izelde Louise van Jaarsveld op cit note 147 at 609.

²⁸⁵ Ibid.

²⁸⁶ Norman Mugarura op cit note 11 at 79.

²⁸⁷ Norman Mugarura op cit note 11 at 80.

²⁸⁸ Izelde Louise van Jaarsveld op cit note 147 at 224.

²⁸⁹ FATF Forty Recommendations 1990.

²⁹⁰ Williams op cit note 280 at 21.

²⁹¹ Izelde Louise van Jaarsveld op cit note 147 at 224.

²⁹² Ibid.

countries with different legal systems and are flexible.²⁹³ The FATF placed importance on countries establishing first a standard AML framework before attempting to implement more advanced measures.²⁹⁴

The Forty Recommendations are separated into four key groups whose recommendations fell into three categories, namely, first, legal recommendations explaining what law-making bodies must do to establish a legal framework to combat money laundering, secondly, financial regulatory recommendations that provide a framework for how countries should regulate their financial systems and thirdly, international cooperation recommendations that clarify how governments should facilitate cooperation among one another.²⁹⁵

The FATF released an additional eight special recommendations aimed at combating terrorist financing following the September 2001 terrorist attacks on the US.²⁹⁶ The Special Recommendations advise ratification of the UN' money laundering and terrorist related instruments, criminalisation of terrorist acts, organisations and financing, freezing and confiscation of terrorist assets, reporting of suspicious transactions relating to terrorism, international cooperation, alternative remittance services, electronic fund transfers and the prevention of non-profit organisations for terrorist purposes.²⁹⁷

A formal review of the revised Recommendations took place in 2001 when consensus was reached that the FATF should focus more on the subject of suspicious transaction reporting.²⁹⁸ Consequently, an improved form of the revised Recommendations was adopted in 2003 to inform banks about new money laundering matters.²⁹⁹ The Forty Revised Recommendations are structured as follows: legal systems (Revised Recommendations 1 to 3), measures to be taken by banks to prevent money laundering and terrorist financing (Revised Recommendations 4 to 25), other measures necessary in systems for combating money laundering and terrorist financing

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ FATF *Eight Special Recommendations 2001* Annex 152 A Preamble; Lilley *Dirty Dealing* 150–152.

²⁹⁷ Ibid.

²⁹⁸ FATF Report 2000–2001 17–18.

²⁹⁹ Ibid.

(Revised Recommendations 26 to 34) and international cooperation (Revised Recommendations 35 to 40).³⁰⁰

4.6 The Wolfsberg Group

The Wolfsberg Group is an association of 11 international banks whose mandate includes developing financial services industry standards and related products for KYC and AML/CFT policies.³⁰¹ The Group was established in 2000, at the Château Wolfsberg in north-eastern Switzerland, in the company of representatives from Transparency International whilst working on drafting anti-money laundering guidelines for private banking.³⁰² The group published a series of papers on financing of terrorism as well as on anti-money laundering principles for correspondent banking and the Wolfsberg Statement on Monitoring Screening and Searching.³⁰³ The Wolfsberg Group's principles for private banking are an important element of global efforts to fight money laundering.³⁰⁴ This is because the Wolfsberg Group secured the commitment of private banks, which are one of the newest target of criminals for laundering the benefits of crime.³⁰⁵ The Code of the Wolfsberg Group comprises 11 principles that are 'appropriate for private banking relationships'.³⁰⁶ Included are rules on customer acceptance and a list of additional scenarios where enhanced due diligence is advised when, for example, conducting business with a customer connected with high risk countries, or who is a 'politically exposed person.'³⁰⁷

4.7 The Egmont Group

The Egmont Group of Financial Intelligence Units of the World, established in 1995, is an FATF-affiliated organisation comprising of 106 FIUs.³⁰⁸ Money laundering is an international issue that renders the work of the Egmont Group critical because a FIU can operate as a 'filter' between law

³⁰⁰ Ibid.

³⁰¹ Norman Mugarura op cit note 11 at 91.

³⁰² Izelde Louise van Jaarsveld op cit note 147 at 248.

³⁰³ Norman Mugarura op cit note 11 at 91.

³⁰⁴ Lacy & George (2003) *Northwestern J of Internat L & Business*; Carrington *Rule of Law* 16.

³⁰⁵ Izelde Louise van Jaarsveld op cit note 147 at 248.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Izelde Louise van Jaarsveld op cit note 147 at 249.

enforcement and banks.³⁰⁹ An FIU assists in detecting patterns among large numbers of suspicious and complex transactions since it provides a gathering point for analysing information.³¹⁰

4.8 The World Bank and the International Monetary Fund

The IMF and the World Bank commence various programmes that summarise stimulating stronger economic, legal and financial systems internationally.³¹¹ The IMF accepted in 2001 that money laundering posed a danger to both the good governance of banks and the international financial system.³¹² Since then the IMF has added to the battle against money laundering in three ways.³¹³ First, it applies its experience by assisting the FATF in its reviews and conducts financial sector assessments and,³¹⁴ secondly, the IMF in partnership with the World Bank conducts studies as regards the nature of money laundering in an effort to help with collecting information about the crime.³¹⁵ Thirdly, it provides technical support to its members to strengthen national supervisory frameworks.³¹⁶

4.9 Conclusion

The global AML framework is an essential weapon used to inhibit criminals from mistreating the global financial system and serves as a tool to overcome flaws in the AML framework of individual countries.³¹⁷ The global AML framework enhances cooperation between countries and transcends the limitations of territorial boundaries that criminals wish to exploit.³¹⁸ The benefits of the Global AML framework provide developing countries with resources such as the ability to share information on the fight against organised crime.³¹⁹ It is however suspected that South Africa and other developing countries' socio-economic realities may be in conflict with the global AML framework.³²⁰ It is important to note the context of developing countries' socio-economic

³⁰⁹ Carrington *Rule of Law* 13; Verhelst *Financial Intelligence Units* 415.

³¹⁰ *Ibid.*

³¹¹ Rhys Bollen *The International Financial System and Future Global Regulation* *Journal of International Banking Law*, 200

³¹² *IMF Money Laundering* 1.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ Norman Mugarura *op cit* note 15 at 205.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

conditions of underdevelopment, which are different to those of developed countries such as the US and the UK. The challenges faced by less developed countries are further compounded by a lack of institutional and structural capacity to harness global AML standards locally which have in turn translated into an environment conducive to criminal exploitation, while diminishing the same state's capacity to counteract new challenges, such as money laundering.³²¹

³²¹ Norman Mugarura op cit note 15 at 61.

Chapter Five Conclusion and Recommendations

In Chapter 1, it was stated that the objective of this study is to determine whether the AML framework in South Africa is sufficient in combating money laundering. In addition, this study seeks to address the shortcomings of the AML framework in South Africa, highlight certain areas for improvement in comparison to the UK AML framework and indicate the need for further incorporation of the global AML framework into the AML framework in South Africa. Given the fact that money laundering can serve to create a smokescreen for financing of various activities that not only are criminal in nature but that can also threaten lives and can sweep across borders it has been recognised globally that mechanisms have to be put in place to prevent money laundering as a conduit for criminal activity. An effective AML framework is thus not only necessary but is essential for South Africa to combat money laundering. It is hoped that the findings of this study will aid the South African AML authorities and other countries facing similar issues to pursue further research on some of the issues arising from this study with the aim of developing an effective AML framework for combatting money laundering.

In Chapter 2 we discussed the South African AML framework. We focused on three main pieces of legislation; POCA, FICA and POCDATARA, the regulations and the institutions that play a major role in the implementation and enforcement of the AML framework. We noted that South Africa has made significant progress in improving its AML framework, that South Africa has a fairly strong AML framework, is not listed as one of the countries by the FATF as having strategic AML shortcomings and that South Africa's criminalisation of money laundering and criminal confiscation has been deemed to be in line with international standards.³²² The IMF has also noted that the FIC is operating efficiently as the country's financial intelligence unit.³²³ In addition, we found that with the advent of FICA and its interaction with the provisions of the POCA it appears that South Africa's legislative endeavours are in accordance with global standards, as recommended by the Palermo Convention.³²⁴ However, it is suspected that South Africa has abided

³²² International Monetary Fund op cit note 2 at 9.

³²³ Ibid.

³²⁴ Charles Goredema, Prine Bagenda, Louis De Koker, Bothwell Fundira, Ray Goba & George Kegoro op cit note 44 at 83

by AML policies in order to depict a fantasy of tackling corruption and money laundering.³²⁵ The mere existence of legislation against money laundering is not a guarantee of its adequacy or effectiveness against money laundering.³²⁶ Enforcement of the FICA requires training, experienced personnel and appropriate equipment in order to ensure compliance with the obligations imposed by the Act.³²⁷ South Africa needs to increase available resources and institutional and structural capacity in order to combat money laundering and ultimately seek solutions to overcome the challenges it faces as a developing country.

In Chapter 3, we found that the UK has adopted a progressive and aggressive stance towards combating money laundering which pre-dates the measures introduced by the international community. It has implemented all the international legal AML instruments emanating from the UN and EU and in many instances, its provisions have exceeded the international benchmarks. We observed that HM Treasury, the UK's finance department, leads the war against money laundering and is responsible for the UK's AML strategy.³²⁸ That HM Treasury has in recent years aggressively developed the UK's AML framework which surpasses the recommendations made by FATF and the three European Money Laundering Directives.³²⁹ South Africa on the other hand, seems to have only done the bare minimum to implement international Legal AML instruments and is still lacking in this field. South Africa needs to adopt a similar progressive and aggressive stance as that of the UK towards money laundering by forming an inter-agency mechanism dedicated to national AML policy making.

In Chapter 4 we examined the global AML framework and noted that the global AML framework is not only desirable but is also an imperative to ensure a coordinated and robust implementation of internationally agreed AML standards on a forward-looking basis.³³⁰ That it is internationally accepted that this framework is necessary in order to prevent criminal organisations from abusing the financial system as well as to overcome weaknesses in the AML laws of individual countries.³³¹ We observed that South Africa's AML framework is largely in line with International standards

³²⁵ Art Garffer op cit note 5.

³²⁶ Arun Srivastava, Mark Simpson & Nina op cit note 5 at 1199.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Nicholas Ryder op cit note 27 at 73.

³³⁰ Ibid.

³³¹ Ibid.

and according to the last Mutual Evaluation Report undertaken by the FATF in 2009, South Africa was deemed compliant for nine and largely compliant for fourteen of the FATF 40 + 9 Recommendations, and partially compliant or non-Compliant for two of the six Core Recommendations.³³² It is however suspected that South Africa and other developing countries' socio-economic realities may be in conflict with the global AML framework. It is important to note the context of developing countries' socio-economic conditions of underdevelopment, which are different to those of developed countries such as the US and the UK. That attempts made by less developed countries towards implementing the global AML framework are disrupted by various factors, such as deficient economic and social infrastructure, limited resources and corruption.³³³ The challenges faced by less developed countries are further compounded by a lack of institutional and structural capacity to harness global AML standards locally which have in turn translated into an environment conducive to criminal exploitation, while diminishing the same states' capacity to counteract new challenges, such as money laundering.³³⁴ This is a possible issue for further research. In light of the FATF's current schedule of mutual evaluations, South Africa is expected to undergo a comprehensive assessment against the recently revised standard and methodology³³⁵ after 2017.³³⁶ It is essential for South Africa to critically examine its AML framework and address remaining deficiencies to bring it in line with the global AML framework.

The International Monetary Fund, based on its 2014 Financial Sector Assessment Program for South Africa, made the following key recommendations in the areas of anti-money laundering:

- 'South Africa needs to conduct a national assessment of money laundering risks in an inclusive and cooperative manner.
- Require financial institutions including banks to identify and verify the identity of beneficial owners in line with the standard.

³³² Know your Country, South Africa, available at <http://www.knowyourcountry.com/southafrica1111.html>, accessed on 22 August 2016.

³³³ Norman Mugarura op cit note 15 at 61.

³³⁴ Ibid.

³³⁵ The FATF revised the AML/CFT standard in 2012, and the assessment methodology in 2013. The latter places greater focus on assessing the effectiveness of countries in identifying, managing, and mitigating the money laundering and financing of terrorism risks they confront.

³³⁶ International Monetary Fund op cit note 2 at 7.

- Provide more guidance to banks and set reasonable and clear supervisory expectations to facilitate the application of a risk-based approach to AML preventive measures.
- Ensure that accurate beneficial ownership information of legal persons can be accessed by the competent authorities in a timely manner.
- Enhance capacity (in particular in terms of specialized AML knowledge) within the law enforcement and prosecutorial agencies to enable them to pursue complex money laundering cases.³³⁷

In order to address remaining deficiencies in the South African AML framework, the FIC has taken the initiative to review the current legislative framework with the aim of bringing South Africa's legal framework in line with international standards set by the FATF. The Financial Intelligence Centre Amendment Bill is one initiative in the review process and is expected to address remaining legal deficiencies in AML preventive measures, strengthen supervision of the financial sector, and introduce an RBA to AML preventive measures. The Bill was introduced in the National Assembly on 27 October 2015 and has been approved by both Houses of Parliament.³³⁸ Parliament has referred the Bill to the President for assent and signature.³³⁹

The FIC advises that the amendments will widen the application of the Act by including additional categories of institutions and businesses under its scope; improve the Centre's ability to obtain information concerning the identities and financial activities of customers of a wider range of financial and other institutions; and improve the Centre's ability to produce high-quality analysis for law enforcement and security agencies, as well as to supervisory bodies and policy formulating entities.³⁴⁰

The FIC proposes to include the following in Schedule 1 of the FIC Act, based on the view that these institutions may present a higher risk of being used to carry out money laundering activities:

- 'Professional accountants

³³⁷ International Monetary Fund op cit note 2 at 11.

³³⁸ Financial Intelligence Centre, NOTICE: AMENDMENT OF THE SCHEDULES TO THE FINANCIAL INTELLIGENCE CENTRE ACT, 2001 (ACT 38 OF 2001), available at <https://www.fic.gov.za/Documents/CONSULTATION%20DOCUMENT%20September%202016.pdf>, accessed on 22 November 2016.

³³⁹ Ibid.

³⁴⁰ Ibid.

- Persons who provide trust and/or company services
- Dealers in high value goods (including, amongst others, precious metals and stones, motor vehicles and coins)
- Co-operatives which provide financial services, as defined in the Co-operatives Banks Act, 2007 (Act 40 of 2007)
- Short-term insurers as defined in the Short-Term Insurance Act, 1998 (Act 53 of 1998)
- Credit providers who are required to register as contemplated in section 40 of the National Credit Act, 2005 (Act 34 of 2005)
- Money or value transfer providers
- Providers of private security boxes or security vaults for the safekeeping of valuables
- Auctioneers, including sheriffs, as defined in the Sheriff's Act, 1986 (Act 90 of 1986) when performing the job of an auctioneer at a public auction
- Dealers in copper material
- Virtual currency exchanges where virtual currency is bought and sold for fiat currency (money that government has declared to be legal tender).³⁴¹

The FIC Act amendments further seek to address regulatory gaps and enable compliance with best practice; strengthen customer due diligence measures, particularly relating to beneficial ownership and persons in prominent positions; introduce a flexible risk-based approach to identifying and verifying customers thus reducing the burden on customers; and improved sharing of information among designated entities and enhancing co-ordination and crime-fighting capabilities.³⁴²

The introduction of a risk-based approach is an important change to the FIC Act which gives institutions the flexibility to assess and manage the risks in their businesses, depending on the category of customer.³⁴³ The institutions will seek to understand their customers and scrutinise the

³⁴¹ Ibid.

³⁴² Financial Intelligence Centre, ANNUAL 2015/16 REPORT, available at https://www.fic.gov.za/Documents/FIC%20Summary%20booklet_LR.pdf, accessed on 22 November 2016.

³⁴³ Ibid.

way they use their products or services, making it easier to recognise inconsistent behaviour, going beyond basic know-your-customer requirements to establish and verify their clients' identities.³⁴⁴

The concept of beneficial ownership will require institutions to know the people behind their companies – those who benefit financially – and this will bring greater transparency to the financial system.³⁴⁵ It will place a duty on institutions to take reasonable measures to determine the identity of beneficial owners. This requirement brings South Africa in line with current global standards.³⁴⁶

In accordance with global standards, institutions should pay close attention to their politically exposed customers – people in prominent positions in the public sector.³⁴⁷ The FIC Act amendments have adopted this measure and broadened its scope to include the application of additional customer due diligence to prominent influential persons such as politically exposed customers and those in the private sector who do business with government.³⁴⁸

In addition, the Amendment Bill establishes a legal framework for applying and administering financial sanctions emanating from UN Security Council Resolutions which aims to fulfil South Africa's obligations as a UN member state and bring its legislation in line with international standards.³⁴⁹

It is yet to be seen if the amendments to the FIC Act will effectively combat money laundering. South Africa has a comprehensive AML framework and have harnessed the global AML framework as seen through the proposed amendments. It estimated that between \$2 and \$8 billion is laundered through South African financial institutions each year.³⁵⁰ The challenge that South Africa faces is to implement the AML framework effectively. South Africa is a country that is highly susceptible to money laundering as a result of its financial system being the major financial center in the African region and it is clear that South Africa will need to rely on the available international expertise in money laundering from countries such as the UK. However, South Africa faces many challenges which are foreign to developed economies, for instance those in respect of the abuse of its informal economy by launderers. South Africa thus needs to adopt an aggressive

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Art Garffer op cit note 5.

stance towards money laundering. It is accordingly submitted that South Africa needs to go beyond the international standards and implement and formulate its own legislation which is tailored towards its own unique challenges.

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