Anti-money laundering policy: A response to the activity of criminals or of agencies?

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Introduction

Compliance by financial insitutions for the purposes of anti-money laundering was introduced by the 1993 Money Laundering Regulations.[2] This was only seven years after the the first prescribed system of regulation had been brought to bear upon financial markets in the UK in the shape of the1986 Financial Services Act. These markets had, prior to that point been largely left to their own devices, observing *Uberrimae Fidea.*[3] Indeed it can be argued that it was this 1986 Act that gave birth to the construct of compliance that is at the heart of the British model of regulation. It is fair to observe that the ensuing relationship between the financial markets and their regulators has proved to be somewhat complex and far from easy, described as "*a constant battle of wits between the surveyors and the surveyed – a battle where rituals of verification abound, where enormous energy goes into those rituals and into their subversion*" (Moran, 2000, p 11).

The 1986 Act created the mechanism for formal self-governance but it was two subsequent parliamentary Acts that provided the shift of power in favour of the regulators, the first of these was the Financial Service and Markets Act, 2000, an Act that saw the introduction of a model of statutory regulation.[4] The 2000 Act provided the regulator with an extensive range of disciplinary, criminal and civil powers to use against regulated firms and individuals.

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Recognition is also given to Mr Rowan Bosworth-Davies who had provided prior research support, some of which has featured in this paper.

2 The Money Laundering Regulations, 1993 (statutory Instrument No. 1933 effective 1st April, 1994)

3 Literally translated as 'my word is my bond'.

4 This Act effectively combined the self regulatory bodies that previously governed each part of the financial market into a single regulator – the Financial Services Authority (FSA).

These powers were subsequently further tightened by the Financial Services Act, 2012. The various incarnations of the financial markets regulatory body has tended to be achieved simply by rearrangement much like deckchairs being moved on the beach to track the sun's rays. The 2012 Act dismantled the single regulator, the Financial Services Authority (FSA) which had come under increasing criticism that its span of oversight and control had grown too large to be effective. It was replaced with two regulators; the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA). In addition, the 2012 Act broadened and strengthened the law in relation to market manipulation (arising from the LIBOR fixing 'scandal')[5] in order to improve accountability within the industry.

The relationship between regulatory bodies and the regulated sector was made more complex through the introduction of the anti-money laundering legislative framework (AML). The role of compliance as originally envisaged by the 1986 Act was very much one of internal focus, ensuring that the individual traders kept on the right side of the law and that their employing financial institutions did not step out of line and attract the opprobrium of the regulator. AML, however, introduced a new dimension to this compliance task. Not only did compliance officers have to ensure that the activities of their organisations did not themselves constitute aiding and abetting money laundering but they acquired the additional task of protecting their firms from becoming unintentionally embroiled in potentially illegal activity perpetrated by their clients. Thus, it placed upon them an additional external policing role in which they would have to monitor and report upon the activities of their customers. The regulatory relationship therefore acquired a new dimension which brought about interaction with law enforcement and the agencies of the police.[6]

The narrative within this chapter is built around the twin agencies of the FSA and the Serious Organised Crime Agency (SOCA) and their role in AML, recognising that both agencies now exist in a different form.[7] Thus

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5 Forex scandal: What it that all about? BBC Business news, 12th June, 2014 available at: http://www.bbc.co.uk/news/business-26526905 (accessed 20/7/14)

6 A further change in anti-money laundering legislation is anticipated in response to the pending EU 4th Money Laundering Directive (the proposal for which was published in February, 2013). Following completion of the third round of mutual evaluation reports, the Financial Action Task Force (FATF) has modified their 40 Recommendations launching the 2012 version in February 2013. The EU's 4th Directive will reflect the updated Recommendations.

7 As noted the 2012 Financial Services Act created the FCA and PRA; whilst SOCA was dismantled as a result of the Crime and Courts Act 2013 and was replaced by the National Crime Agency (NCA).

we consider the 'matrimonial' relationship between the regulators and the regulated entity that is *internal* to the financial markets. We further consider how both relate to the police enforcement agency, an agency that is *external* to the financial markets and in our metaphor is the silent jealous lover. It is the external enforcement agency that we suggest to be the ultimate beneficiary of the outcome of their joint compliance effort. This is played out through the regulatory 'rituals' that define the terms of engagement for the different sides, where each knows the rules, how they should be adhered to and both benefit from their continued existence; tending towards a mutual support for the *status quo*. Indeed, their relationship can be viewed as that of a married couple where the initial ardour has long since departed but they stay together in mutual tolerance because their history is jointly constructed and co-dependent such that one could no longer envisage life without the other.

It considers evidence from a range of material taken from public sources and uses for illustration, previously unpublished data that has been collected from three semi structured interviews that were conducted in June and July 2009 with Money Laundering Reporting Officers (MLROs) based respectively, in a financial institution, a firm of accountants and from within the gaming industry. These were selected as representative of the range of professions that fall within the AML regulatory framework.

Background: overview of the UK legal framework

As can be seen from Table 1, the legal framework for money laundering within the UK is contained within a range of primary legislation, related regulations and guidance notes. However, the key pieces of legislation are the Proceeds of Crime Act 2002 (POCA), in particular Sections 327 to 329, as amended by the Serious Organised Crime and Police Act 2005 (SOPCA) and the Serious Crime Act, 2007. The 2002 Act simplified the pre-existing law by replacing the parallel drug (Drug Trafficking Act 1994) and non-drug money laundering offences (Criminal Justice Act 1988 as amended) with single offences. In addition to confiscation of assets it included provision for civil recovery. It also required (enforced by criminal liability) compliance by the regulated sector with the principal requirements to monitor customers (KYC) and to report suspicious activity (SARs). The legal framework has been translated into financial industry rules and codes (through the regulator) and subsequently into detailed (and lengthy) industry guidance and interpretational notes.

Table 1
The relationship between international, national law, regulation and guidance

Intergovernmental standards	Financial Action Task Force, 40 Recommendations 1990, 1996, 2003 and 2012
EU Money laundering Directives	Money laundering Directives: 1st Directive (1991) implemented in UK in 1993; 2nd Directive (2001) implemented in the UK in 2001 3rd Directive (2005) implemented in the UK in 2007
UK Primary legislation	1993 Criminal Justice Act as amended by the 1996 Criminal Justice Act 1994 Drug Trafficking Act 1995 Proceeds of Crime Act 2000 Terrorism Act as amended by the 2001 Anti-Terrorism Crime and Security Act 2002 Proceeds of Crime Act (combines and simplifies the 1996 Criminal Justice Act and the 1994 Drug Trafficking Act) as amended by the Serious Organised Crime and Police Act 2005 and the Serious Crime Act 2007
UK Secondary legislation	1993 Money Laundering Regulations 2001 Money Laundering Regulations 2007 Money Laundering Regulations
International regulatory standards	Basel Committee on Banking Supervision 1988 "Prevention of Criminal use of the banking System for the Purpose of Money Laundering" 2001 "Customer Due Diligence for Banks" 2014 "Sound Management of Risks Related to Money Laundering and Financing of Terrorism"
UK Regulation	2001 FSA Handbook 2011 FSA Financial Crime: a Guide for Firms (PS11/15) 2013 FCA Financial Crime: a Guide for Firms Part 2: Financial Crime Thematic Review 2014 FCA Financial Crime: a Guide for Firms Part 1: A Firm's Guide to Preventing Financial Crime
Industry guidance	Joint Money Laundering Steering Group (JMLSG) guidance notes "Prevention of Money Laundering/Combatting Terrorist Financing 2006 (parts 1 and 2) 2007 (parts 1 and 2) 2009 (parts 1 and 2) 2010 (part 3) 2011 (Part 1- Guidance for the UK Financial Sector; Part 2 Sectoral Guidance; Part 3 Specialist Guidance The Wolfsberg Anti-Money Laundering Principles for Private Banking 2000, revised in 2002 and the current version is 2012. BBA 'money laundering Officer's Practical Handbook; annual publication

Source: compiled by the authors

Initial ardour: rituals and relationships

Vass (2006, pp. 191-192) discusses how "*the development of codification as institutionalisation*" is embedded within the regulatory framework. This takes place within two dimensions: Firstly, regulation becomes subject to judgement with academics drawing attention to the need for accountability and fairness (often referred to as transparency), proportionality to the problem; targeting to avoid unintended consequences; and consistency to avoid uncertainty (Baldwin and Cave, 1999, p.77; Kirkpatrick, 2006, p 236). Secondly, the regulators themselves are open to external scrutiny as retention of public interest as the dominant paradigm requires that they do not fall prey to regulatory capture.[8] Thus Vass (2006) further deconstructs accountability into three components: (a) being able to provide reasons for decisions, (b) to make them available for scrutiny and (c) to submit (if required) to independent review.

Beyond the legal structure, agencies of government will be created in order to enforce and ensure compliance with the legislation. Once created, such agencies will somewhat rationally seek to ensure their own survival and longevity. Thus reality and the behavioural interactions between policy making actors clashes headlong with this rational process, as Vass described above.

In this tension there is much organisational social-psychology, as can be deduced from the courtship between the regulator and the regulated sector: while each reveals its own desires, it carefully gauges the response of the other. If one accepts that the AML framework is here for the long term, both sides have to adhere to their respective roles and responsibilities such that the regulator can be seen to be proportional, objective and reasonable. For its part, the regulated entities have to balance their desire to be compliant against the interests of their shareholders.

This courtship dance can be illustrated by the move from a rules-based to a risk-based approach to AML promulgated by the FSA. Companies governed by the regulations are required to obtain information about the nature and purpose of the business relationship that they will be entering with the customer. This is to be carried out at the commencement of the business relationship, and at other appropriate times during the relationship on the basis of their risk estimation, something that is referred to as being on a 'risk-

8 Capture theory is attributed to George Stigler (1971) and describes a state whereby regulators rather than acting in the public interest gain benefit from promoting the interests of those they profess to regulate.

sensitive basis'. In its consultation paper, DP22 "*Reducing money laundering risk: know your customer and AML monitoring*", the FSA discussed the practical application of the then proposed risk based approach to AML, noting that without its adoption "*firms' costs will be disproportionate*" (section 2.6, p 7). Thus suggesting that its implementation was in response to cost pressures within the institutions. This risk-based model requires regulation by exception – trusting that organisations self-police leaving the regulator to concentrate resource and effort in areas of high risk. The important point here and one that sometimes is a point of contention, is that the 'relevant person' must be able to demonstrate to his supervisory authority that the extent of the measures in place is appropriate in view of the risks of money laundering and terrorist financing. The purpose behind this risk-based approach was to enable banks in particular, to tailor their scrutiny and AML efforts in a more cost effective manner and help, therefore, reduce the costs of compliance. The problem that arose from implementing this approach is that the institutions felt that they still needed clarity and direction from the regulators which for their part were trying to divest some of the decision making falling to them under the previous 'rule-based' approach. But by being reasonable and proportionate did the regulators really intend to slacken the reins? The negative answer to this question is complicated by the coincidence with the recent pursuit of a policy of visible deterrence that has witnessed a gradual increase in the overall size of regulatory fines levied on transgressors. This visibility, far from slackening the reins, is probably also resulting from the financial crisis that has, inevitably, led to calls for what Moshella and Tsingou (2013, p. 409) refered to as "*re-regulation*" of these markets and "*to a more assertive and interventionist role for the public sector*", with perceived failings of the system resulting in further regulatory constraint (and power for the regulator). Moran's 'constant battle' in our regulatory courtship sets the scene whereby the regulated entity aims to demonstrate compliance (at minimum cost) and the regulatory agencies seek to maximise status, resources and enforcement tools. Thus we see a proliferation of interpretational guidance of what were originally quite simple principles. This guidenace tends to expand with each iteration of the rules as illustrated by Table 2. It can be seen that the original 1988 guidance from the BIS was just four pages in length, this becomes 170 plus pages in the guidance notes from the Joint Money Laundering Steering Group.

Table 2
Size of documents by source and date order

Document	Author	Number of Pages
Prevention of Criminal use of the Banking System for the Purpose of Money-Laundering (December 1988)	Bank for International Settlements	4 pages
Customer due diligence for banks (October 2001)	Bank for International Settlements	17 pages (21 including appendices)
Sound Management of Risk Related to Money Laundering and Financing of Terrorism (January 2014)	Bank for International Settlements	29 pages
Handbook (release 001) December 2001 section on Money Laundering	Financial Services Authority	29 pages
DP22 "Reducing money laundering risk: know your customer and AML monitoring" 2003	Financial Services Authority	26 pages (54 pages including appendices)
"Financial Crime: a Guide for Firms" PS11/15 December 2011 Chapter 3 Money Laundering	Financial Services Authority	15 pages
"Financial Crime: a guide for firms: part 1 - a firm's guide to preventing financial crime" April 2014 Chapter 3 Money Laundering and Terrorist Financing	Financial Conduct Authority	15 pages
Guidance notes for the financial sector on the prevention of money laundering/ combating terrorist financing January 2006 Part 1	Joint Money Laundering Steering Group	153 pages
Guidance notes for the financial sector on the prevention of money laundering/ combating terrorist financing December 2007 Part 1	Joint Money Laundering Steering Group	159 pages
Guidance notes for the financial sector on the prevention of money laundering/ combating terrorist financing November 2009 Part 1	Joint Money Laundering Steering Group	175 pages
Guidance notes for the financial sector on the prevention of money laundering/ combating terrorist financing December 2011 Part 1	Joint Money Laundering Steering Group	174 pages
Forty Recommendations 1990	Financial Action Task Force	6 pages
Forty Recommendations 1996	Financial Action Task Force	13 pages
Forty Recommendations 2003	Financial Action Task Force	27 pages
Forty Recommendations 2012	Financial Action Task Force	124 pages

Source: compiled by the authors

It was earlier pointed out that one of the principles of regulation is to ensure that regulators are open to external scrutiny to avoid regulatory capture. The desire to operate in their own best interest rather than in the interest of those that they served led Stigler (1971) to conclude in terms of 'capture theory' that "*the regulated system comes to be operated in the interest of the regulated firms rather than the more general public interest*" (Ricketts, 2006, p. 38)[9].

It may be constructed that 'capture' explains how once created, agencies seek to influence the state of affairs to perpetuate the need for their continued existence and this might reasonably explain this proliferation of guidance and explanation. Whilst we contemplate the content of Table 2 (and Figure 1 below) it is worth noting that the original 40 Recommendations from the FATF covered a mere six pages whilst the revised version runs to 124 pages with 20 pages for the Recommendations and 75 pages supplying 'interpretive notes'.

Figure 1: FATF Plenary in session February, 2012

Source : http://www.fatf-gafi.org/pages/aboutus/

[9] Capture theory can be seen as a component of bureaucracy theory (attributed to Max Weber) as it highlights one of the problems that arises within such as system.

Wooing: agency justification and the moral imperative

In so far as we have agency creation there is a need for justification and in the context of AML the dominant discourse narrative is woven around the 'problem' of money laundering by ensuring that rather than decreasing as a result of and in response to increasing rounds of legislative intervention, the problem simply continues to grow. The imagery of fear around the threat of money laundering is reflected in the expansion of the global AML framework from its initial focus on drugs to a wide range of other areas of criminal activity (refer for example to the United Nations conventions: Vienna, 1988; Palermo, 2000; and Merida, 2003) making it far more difficult to reverse (Alldridge, 2008). Alldridge further notes the endorsement to the international imperative through the involvement of the IMF and IBRD to "*add both gravitas and the appearance of impartiality*" to the debate (p. 439). Sharman (2008) draws attention to the 'rational fiction' of the AML framework, spread not because of unassailable effectiveness, but to signal membership of 'the group'. Add to this the observed broadening of the definition of what actually constitutes money laundering (van Duyne, 2003 and Alldridge, 2008) and the problem inevitably becomes bigger, attracting greater public attention (and presumably disquiet) and the apparently rational requirement for additional resources with which to counter this threat.[10]

The more we move from reality, the subject of objective assessment, towards a fiction that is interpreted by perception, we move into areas that cannot be rationally challenged. As such we witness a rather creative *ex post* rationalisation of actions through construction of validating behavioural 'norms' underpinned through what van Duyne and vander Beken (2009) describe as a restructuring of the facts that collectively achieve a 're-framing' of reality. As eloquently argued by van Duyne and vander Beken (2009) objectivity in assessment becomes waylaid by emotion in any discussion of criminal activity and the tenor consistently evokes images of threat. This becomes an example of what Jolls *et al.* (1998, p. 1518) term "*pollutant of the month*" syndrome where regulation is driven by recent and memorable instances of harm. Thus "*when beliefs and presences are produced by a set of probability judgements, made inaccurate by the availability heuristic*[11]*, legislation*

[10] Made all the more urgent by the threat posed by terrorism and its financing.

[11] The availability heuristic explains ease of availability of information recall in the brain: negative events that are easy to remember are accorded a greater perceived frequency

will predictably become anecdote driven" *(ibid*). Sunstein (2002) argued that 'emphasised' stories related to a crime will trigger this availability heuristic, which in turn is responsible for skewing perceptions of what is considered normal and further when "*intense emotions*" are engaged, people tend to focus on the adverse outcome rather than its plausible likelihood.

Drawing on these ideas, the availability of such a threat will be determined by perceived frequency and resonance in addition to its recency. Thus if something has occurred recently, perception of it occurring again is attached a higher probability. In addition, perception is open to manipulation according to how information is presented. When a threat becomes 'available' (however unrealistic) there will be an associated demand for action on the part of policy makers. For as noted by Dorn (2009, p. 2) although "*righteous indignation may drive 'quick fix' policy activity, it does not facilitate a reasoned public debate of policy alternatives*". Indeed, Combs and Slovic (1979) identified a high correlation between availability biases and the amount of media coverage an event received. Agencies are able to exploit 'availability'; thus it is possible for them to influence government legislation through employment of the threat rhetoric, employing media coverage and heightening awareness such that a legislative response is automatic and 'justified'. Harvey (2014, p. 187) points to "*the ability to create evidence of overwhelming importance of function*" leading to a system that is self-reinforcing. Agency justification from the perspective of law enforcement is premised upon the 'threat' to the integrity of the financial system posed by criminal contamination. Indeed, Woodiwiss and Hobbs (2009, p. 124) quoting Garland (2001, p. 179[12]) state that institutions: "*have a way of taking on a life of their own, and outliving the meanings and motivations that led to them being set up in the first place . . . continuing long after the original reasons for their creation have faded*".

This relationship between the media and the Government was identified by Wilkins (1964) in what he terms the "deviancy amplification spiral" (see below). The manner of how such issues are presented to society has been noted as an important factor in how perceptions are manipulated, Stallings (1990), notes that written media publications play a crucial role in this process. Similarly, Cohen (2004, p. 66) explains how the media can engage these intense emotions and create moral panic (a term attributed to him arising from his work in the 1970s in relation to British teenage gangs) which involves:

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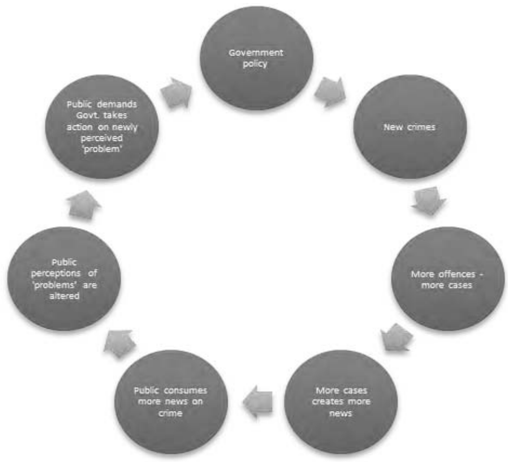
and thus risk. This ease of recall can be influenced by heavy media coverage where such items are overstated as risk.

12 Garland, D., (ed.) *Mass Imprisonment: Social Causes and Consequences,* London, Sage, 2001 .

"A condition, episode, person or group of persons emerging to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, politicians and other right-thinking people . . ."

Figure 2
Example Deviancy Amplification 'Spiral'



Source: Adapted from Wilkins 1964

Problem perception by the general public can be influenced by the activities of 'claim-makers' examples of whom are cited as government, law enforcement agencies and media, amongst others (Fishman, 1980). Similarly, Nichols (1997) argued that 'landmark' cases were used by 'claim-makers' to heighten perception of the crime of money laundering within the United States. Framing information in a negative way can also be achieved by context and structure of the words themselves (Jewkes, 2004). Take the following examples in relation to a discussion of information about asset recovery. The first extract is from a document published by the Home Office reporting on work undertaken by Dubourg and Prichard[13] in both 2005 and 2007:

13 Dubourg, R. and Prichard, S. (Eds) (2008) *Organised crime: revenues, economic and social costs, and criminal assets available for seizure*. Home Office available at: http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information1/foi-archive-crime/9886.pdf?view=Binary

> Dubourg and Prichard (2008, p. 57) estimate "the value of additional criminal assets *theoretically* [emphasis added] available for seizure is about £2bn per year in the UK, with more than £3bn of revenue sent overseas annually". The authors go on to note "Given the lack of reliable data, many of the underlying assumptions are speculative and some calculations are unfortunately reliant on judgements rather than hard evidence" . . . and . . . "provided these estimates are not treated as established facts,"

Sadly, too often the original *caveats* of the authors are disassociated from subsequent repetition of the 'facts'. Is it coincidental that the derived values are curiously similar to those reported by HM Treasury (2007, p. 29[14]) which "*suggested that organised crime domestically generates over £2 billion of assets in seizable form annually, while a further £3 billion is likely to be sent overseas*". Of greater concern is that this figure is derived from the following simple arithmetic (with no *caveats* attached: a sizeable sample of the 200.000 SARs indicated a median value of £10.000 and a mean of £35.000. Assumed 40% 'suspicious' thus revealing £2-3 billion of laundered funds (35.000*200.000*40%).[15] This is reminiscent of the FATF 1990 estimation (see van Duyne, 1994). Similarly, Harvey (2014, p. 201-202) notes:

> "While there are clear gaps in the knowledge of the current academic literature by virtue of lack of access, it is suggested that the amounts available for recovery are less than accurate, skewing performance expectations placed upon those tasked with its recovery."

Thus issues become matters of public concern with crimes such as money laundering being treated by the media as *'infotainment'* (Levi, 2001). As illustrated in the web site of the former SOCA and the current NCA, use is made of imagery to exploit the righteous indignation of the hard working majority that criminals are able to achieve the trappings of the good life through crime, justifying their crusading 'tough on crime' mantra that goes back to the early years of the Blair government.[16]

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[14] HM Treasury, (2007) "The Financial Challenge to Crime and Terrorism" available at www.hm-treasury.gov.uk

[15] Information extracted from p. 28 of the 2007 report.

[16] Refer to the Labour Party Manifesto 1997 that promised to be "*tough on crime and tough on the causes of crime"*.

Figure 3
Images and narrative from the Crime Agency

SOCA Annual Report 2008/9[*]

'*Some of the assets seized from Mark McKinney*'

Extract from the SOCA website from 2012 available from
http://webarchive.nationalarchives.gov.uk/20120405020725/http://www.soca.gov.uk/about-soca/how-we-work/asset-recovery
"SOCA is determined to ensure that criminals can't enjoy their profits. We also want to reduce the damage they cause by getting in between them and their working capital. The driving principle behind our approach is that criminals must not be allowed to hold onto their assets, profits and lifestyles. We will do everything we can to ensure they don't have it, can't use it, and can't flaunt it.
In 2009/10 SOCA denied criminals access to assets worth £317.5 million. This includes work that has been done as a result of SOCA referrals to our partners. Since April 2008, the assets subject to recovery and consent orders in our cases have included 205 properties or areas of land; 37 vehicles, including cars, a plane, a helicopter, two boats, and a petrol tanker; 190 bank accounts; 17 financial products including pensions, investments and shares; 56 cash payments; and numerous other assets including paintings, licence plates, cattle, and jewellery."

Taken from the rolling banner on the NCA website
http://www.nationalcrimeagency.gov.uk/ (accessed 12th October, 2014)

'*Yacht sailed from Caribbean carrying more than £100m worth of cocaine*'

[*] Page 19 Serious Organised Crime Agency Annual Report 2008-9 available at http://webarchive.nationalarchives.gov.uk/20100505093946/soca.gov.uk/about-soca/library (accessed, 19th February, 2014)

Compliance and the contribution of the regulated sector

Whilst compliance was always viewed as a necessary cost that would protect the institution from regulatory sanction arising from its own rule transgression, the further monitoring of the activities of its clientele for potential criminal conduct placed on them an additional burden of cost. Compliance will be accorded value within an organisation where it converges with the internal ethics, as "*the sense of moral obligation, it turns out, is very common throughout society and, it appears, may be a significant motivation explaining much of the evidence on compliance behaviour*" (Sultinen and Kuperan, 1999, p. 178). Bosworth-Davies (2009) has in the past argued that the general run of compliance officers share their employer's free-market cultural beliefs in both the propriety and the priority of the commercial considerations of their industry over other interests; that their appointment does nothing more than simply provide the visible manifestation of a purely cosmetic response to legislation, and that they will actively resist developing attitudes or practices which would increase the likelihood of criminalisation of fellow industry practitioners.

Just the regulators face a conflict in executing their dual role: they are charged with reducing financial crime at the same time as maintaining confidence in the financial system. Prosecuting financial crime inevitably involves exposing wrong doing within the industry which may reduce confidence as it is exposed into the public domain. In the same fashion and undoudebly creating also tension in the marital home, the conflict for the compliance professional is that in undertaking the policing function with which they are charged, they have to remain mindful of the reputation (and profitability) of their employer. This implies treading a thin line between enforcing adherence to these extended rules whilst at the same time avoiding disclosure of any information that would potentially damage the public reputation of the business. Many compliance officials come from a police background and perceive their role as one of fighting money laundering with great emphasis on the security aspect (Favarel-Garrigues, Godefroy and Lascoumes, 2008, pp. 10-11), engaged in protecting the bank by undertaking defensive reporting as observed by Demetis and Angell (2007). The extent that such people are attracted into the profession was observed by an MLRO from the accounting profession interviewed by the lead author in July 2009: "*they might attract the sort of people who for some reason never managed to join the police – the detective wanabees*".

Profit driven organisations are required to balance their underpinning commercial objectives against the resource cost requirements associated with this extended compliance function. More concerning from a cost perspective is the decision by some banks to further extend this responsibility by establishing their own internal police function. Take for example the following statement:

> "One of the things we are looking at is to create a small intelligence unit that would make more effective use of the data we generate internally to try and understand whether our risk assessment methodology is helping us to identify the likelihood of suspicious activity. Feedback on SAR quality from the authorities, which is a typical industry gripe (and on which SOCA is working), is helpful in this process, but I have quite low expectations about the level of feedback we will ever see even in relatively well resourced places like the UK".

It has also been suggested (Bosworth-Davies, 2009) that money laundering prevention does not rank highly in the ambitions of financial institutions or of others subject to the money laundering regulations. Willingness to comply for a profit driven firm and to bear the exogenous cost will be driven by fear of regulatory sanction associated with non-compliance (failure of systems) or of criminal proceedings in the event of breaking the law (failure to indentify laundering activity) or some combination of the two aimed at protecting the institution. It is interesting to note that as part of some earlier research with compliance officers undertaken by the first author, an attempt was made to interview one of the banks that had been fined for non-compliance to understand the potential impact on reputation. Whilst the particular Money Laundering Reporting Officer within this bank was willing to explore the impact on the bank of having been the subject of a fine it was disclosed that "*one of the terms of the FSA enforcement notice was that we would not discuss the matter with any third party other than the FSA*." Thus the matter could not be pursued.[17]

This perception is not limited to the broader financial sector. In this regard it is interesting to consider the comments made in an interview with an MLRO from the gaming sector that was conducted by the first author in June 2009:

[17] E-mail exchange with deputy MLRO of a financial institution 16th June, 2004.

> "Risk to [name of company] of non-compliance is what drives the company to be compliant – otherwise we will lose our licence to operate. The driver is not to identify proceeds of crime but to be showing to be seen as compliant and diligent."
>
> And:
>
> "SARs is a small percentage of what we do – the focus is on processes and polices in place to prove against any challenge from the regulators". . . . "Drive is integrity of the industry and reputation and integrity of the sport."

Is it possible then that, mindful of the threat of regulatory censure for non-compliance, the regulated sector will show their adherence to the rules and invest in appropriate systems in order to avoid the attention of either law enforcement or the regulatory agencies. Is there now a point of containment that has been reached where the regulated entities feel that they have shouldered a sufficient burden and the regulators recognise that they will be unable to extract anything further? An accepting and 'comfortable' symbiotic relationship in that each knows where they stand in relation to the other – much as our elderly married couple?

It is interesting to also note the content of a document produced by the FSA in August 2009:"*FSA Scale and Impact of Financial Crime Project*". The first part of this paper (published as Occasional Paper 36[18]) provides a review of the academic work in the field that has considered scale and measurement of financial crime. The second part of the document [19] looked not only at the impact of financial crimes but significantly at their amenability to control by the regulator. The opening paragraph in the section 4.3:"*Amenability of money laundering to FSA control*" includes a quotation from Levi:

> "[I]t remains uncertain and seldom asked, whether or not it is harder to practise as an 'organised criminal', a fraudster or a terrorist now compared with 1988, when the UN Vienna Convention and the Basle Committee on Banking Supervision ushered in the Brave New World of seeking on a global basis to control the criminal money trail".[20]

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[18] A copy of the report can be found at: http://hb.betterregulation.com/ external/Occasional%20Paper%20OP%2036.pdf

[19] A copy can be located at: http://www.caerdydd.ac.uk/socsi/resources/scale_and_impact_paper.pdf

[20] Levi, M., "Pecunia non olet? The control of money-laundering revisited". In Bovenkerk, F. and Levi, M. (eds) *The Organised Crime Community: Essays in Honour of Alan A Block* (studies in organised crime) vol. 6 (pp. 161-182), New York: Springer, 2007

Unfortunately the paper does not answer the question posed in the title but instead sets out the additional research that the authors argue should be undertaken with victims, launderers and risk professionals. It does note, however that "*there is much scepticism in market circles over whether anti-money laundering measures have any deterrent effect on the volume of laundering overall*" (p. 34).

Harmony: tension, dilemmas and cost avoidance

The FSA and the current FCA have interpreted the money laundering laws and associated regulations and defined them in a series of rules and compliance actions required by the regulated sector. There emerged an uneasy truce whereby those that are regulated give the appearance of maximum support and the perception of compliance with the money laundering regulations. Compliance mechanisms will be highly organised and well-composed, systems will be well documented; staff will be identifiable, and apparent controls will be in place. The overwhelming impression will be one of compliance and orderly conduct, regardless of whether any meaningful results are being achieved. Hence investment in systems and procedures is viewed as providing concrete evidence of an institution's commitment to fulfilling obligations. The effect is that those firms who manifest these signs will be able to deflect any too critical attention of the regulators (Bosworth-Davies, 2009). What they achieve, however, is the evidence of being compliant without necessarily being effective, the 'tick-box culture' identified by Harvey (2005).

The role of compliance is a cost overhead and frequently viewed as business inhibiting by the revenue generating parts of their business. It therefore serves their purpose if those employed in compliance are able to ensure that they justify their own position and contribution to their employers. It is interesting to consider the comments of the interviewee from the accounting sector from 2009:

> "There is a problem with resources for a firm this size – we ignore stuff and keep our fingers crossed. Small companies will have a manual and it will all be kept up to date. If you are larger you can afford some overhead staff . . . A lot of analysis is done because we have to do it but it is totally meaningless . . ."

The MLRO from the financial institution interviewed in June 2009 noted:

> "It is very hard to get costs. I used to do a lot with the BBA and they would always be moaning that nobody ever gives us these numbers apart from you can identify what you have brought and how much that costs, say £15 mill plus the staff support plus the team to run it – we've got 40 staff. Looking at it from the firm's view, from the law enforcement, from the FSA, constantly at us all the time have we got money laundering here? The fact that we haven't is probably nothing to do with the money laundering controls in place. So yes cost is reasonable in some areas, not in others, but at the bottom of it all who is going to decide what the risk is?"

Harvey and Lau (2009) suggested that given the investment undertaken by the regulated institutions over the past decade or so they would rather not consider alternative approaches, indicating support for the maintenance of the *status quo*. This takes us into a difficult area because banks rationalise their investment costs on the basis of the harm that money laundering can do to the institution. There is now (Levi, 2007) a massive industry that has been spawned – accreditation, training, new areas of government and restructured law enforcement agencies.[21] As a business cost it is in the interests of those within the compliance field to overstate importance and significance of the threat and justification for the expense incurred (Harvey, 2008; Alldridge, 2008). We see exploitation of 'fear' and the availability heuristic (footnote 10) to ensure greater resource allocation and status by the employees within the compliance function.

A further tension surrounds the quality of what is reported by the institutions to the police. Demetis and Angell (2007) draw attention to our innate desire to manage the unusual as, "*by finding a way to represent risk our hopelessness with uncertainty is swapped for the optimism in a structured plan of action that is meant to handle the risk*" (p. 413). Further, they go on to point out that the risk of the reporting regime is that reporting of the unusual generates a high degree of "false-positives" such that "*Under the fear of regulatory enforcement, institutions reported excessively, and thereby uncertainty and thus risk were passed onto the FIU, whose staff could not be certain whether it was real suspicion being reported or a self-defensive act by the reporters*" (p. 419).

[21] Indeed, a simple Google search for the phrase "AML due diligence" returned 751.000 hits, primarily focuesed on how to ensure compliance (1st September 2014)

From a different perspective but adding weight to the debate over quality of reporting from institution to police, consider the following statement:

> "One of my main concerns is that so much of the approach used across banks is based on such limited empirical evidence. The main risk assessment inputs we use – country, product type, and customer business – are hard to assess objectively and I really wonder whether there is a significant correlation between customer AML risk ratings and actual money laundering."[22]

Conclusion: the interconnection and regulatory capture

The narrative of complexity and threat can serve well the agencies and indeed those involved in compliance. Dorn discusses '*regulatory ineffectiveness*' (2009, p. 12) pointing to evidence of regulatory capture whereby initially independent agencies become closely intertwined with those that they regulate, reflective of the tendency for collaboration and cooperation (and movement) between the two. The result was that rather than acting objectively in the public interest the regulators adopt the interests and objectives of those that they regulate seeing that they serve a joint purpose of mutual personal and institutional sustainability and support – back to our long suffering married couple! The regulator rather than being the objective arbiter of public interest, began to take decisions in the interests of the regulated sector. Van Duyne (2010, p 10) refers to this regulatory capture and to the evidence that "*the regulatory bodies adapted their view to the interests of those they had to supervise* . . .[with the result that] *the supervisors and supervised adopted a similar way of (rosy) thinking*." Thus, the underlying legislation may not act as was originally intended (Cook, 2006), particularly if not properly applied by the regulators. Indeed any external criticism of the sector that might challenge or undermine this *status quo* could be dismissed simply because those from outside would lack tacit knowledge and understanding of the internal workings of the financial sector. The MLRO from the financial sector interviewed in June 2009 commented in this regard: "*There is a professionalisation of this as if you look at the obligations on the individual you all tend to huddle together*". Thus industry shibboleths are

[22] E-mail correspondence with the author from a compliance officer within a bank 30th July 2008

accepted as being truisms without underpinning evidence. It is inevitable that MLROs will repeat industry mantras without thought to their validity or having examined evidence to the contrary, being expected to know the proper response to questions or challenge. The power dynamics reinforce the *status quo* of the didactic rhetoric justifying the approach on grounds of complexity. It would appear that they are acting in an entirely rational way, exploiting any inherent advantage to justify their own existence. As such reality is re-framed such that, from their perspective, their activity and approach is entirely justified. Agency bias means that tensions will exist but having got to this point the rules of the relationship are accepted and as long as all play their allotted part, the *status quo* is maintained and the relationship continues in uneasy but tolerant harmony.

Before closing it is perhaps interesting to add the following note taken from the first Anti-money Laundering Annual Report of the FCA[23] that stated:

> "However, our risk-based supervisory techniques (set out in Section 4) have led us to conclude that the level of anti-money laundering compliance in financial services firms is a serious concern". (p. 11)
>
> They go on to note:
>
> "The root cause of these problems is often a failure in governance of money laundering risk, which leads, among other things, to inadequate anti-money laundering resources and a lack of (or poor quality) assurance work across the firm. This often focuses on whether processes have been followed rather than on the substance of whether good AML judgements are being made." (p 12).

It is possible that the long standing relationship is finally at an end.

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