From Global Rules and Standards to Enforceable National Provisions: The Case of Anti-Money Laundering Regulation and Implementation

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1 Introduction

On a theoretical level, the creation of international rules is one of the most controversial problems discussed in the area of global governance.[1] In particular, the uncertainty surrounding soft law and self-regulation when discussing international rules and lawmaking is enormous.

> "Considering the variety of "soft" categories of norms, what is pertinent in the field of science is the prominence of standards generated by private or at least hybrid actors: networks of scientific institutions, professional bodies or other non-state actors. … Domestic administrative law has for a long time sought for appropriate terminological and conceptual tools for the integration of private standard setting into its scope of application. This is mainly effectuated by concentrating upon the (domestic) act of recognition or incorporation of such rulemaking. This strategy is far less viable in global administrative law, given that the elaboration of norms and their final implementation do regularly take place at different regulatory levels – international, transnational, supranational and domestic. If we are searching for mechanisms to assess the normative framework of the global governance of science that is globally operational, rulemaking and standard-setting activity involving private actors cannot be left apart."[2]

One of the most striking features of the current field of Anti-Money Laundering (AML) regulation is the multilevel cooperation of public and private actors. Not only are private parties expected to work against anti-money launderers and to report suspicious transactions under threats of administrative and criminal sanctions, they also take active part in formulating the underlying rules and procedures on different levels. In short, traditional public tasks are shared by public and private actors.[3] As a result, this regulatory field is extremely complicated involving international, EU and national law, embracing public, private and penal rules as well as enforcement mechanisms.[4]

Although the main focus of this chapter is to provide yet another empirical example from a specific policy area i.e. that of anti-money laundering (AML) regulation and implementation, a corollary purpose is to contribute to the

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1 Ruffert, M., Steinecke, S., *The Global Administrative Law of Science*, Springer 2011 p. 89, with further references to Goldmann, M., *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, in von Bogdamdy, A., Wolfrum, R., von Bernstorff, J., Dann, P., Goldmann, M. (eds.), The Exercise of Public Authority by International Institutions, 2010, pp. 661-711; Alvarez, J.E., *International Organisations as Law-makers*, OUP 2005, at pp. 588 *et seq.*

2 Ruffert, M., Steinecke, S., *The Global Administrative Law of Science*, Springer 2011 p. 115.

3 For the purposes of this chapter, private actors are simply defined as for-profit actors whereas public actors are governments, agencies and governmental international organisations.

4 The phenomenon of 'Public-Private Cooperation in International Law' has been given special attention at the International Criminal Law Network (ICLN) 6th Annual Conference 13-14 December 2007, at the World Forum Convention Centre, The Hague, Netherlands.

theoretical discussion of global administrative law in relation to its specific challenges.[5] In particular the issue of accountability needs to be addressed. Arguably, a legal accountability model is emerging where public actors entrusted with public tasks are accountable to a limited extent.

The regulatory field of AML where private actors have a prominent role has previously been discussed by the author in different contexts.[6] While drawing on these publications,[7] this contribution aims at illustrating the interrelationship of private and public actors on different regulatory levels, including international, regional and national levels. Hopefully, this empirical example could be used in order to point to some of the theoretical challenges involved in the process of making and implementing global rules and standards.

2 International Rules and Standards

Besides established international institutions such as the UN[8] and the Council of Europe,[9] the Financial Action Task Force on Money Laundering (FATF), has become a major player in AML regulation. FATF is an *ad hoc* international organisation that was established in July 1989 by the Paris summit of the G-

5 *See* the various contributions in Chiti, E., and Mattarella, B.G. (eds.) *Global Administrative Law and EU Administrative Law; Relationships, Legal Issues and Comparison*, Springer 2011.

6 *See* e.g. Bergström, M. *EU Anti-Money Laundering Regulation: Multilevel Cooperation of Public and Private Actors*, in Eckes, C., and Konstadinides, T. (eds.) Crime within the Area of Freedom, Security and Justice: A European Public Order, Cambridge University Press, 2011, and Bergström, M., Svedberg Helgesson, K., Mörth, U., *A New Role for For-profit Actors? The Case of Anti-Money Laundering and Risk Management*, Journal of Common Market Studies, 2011(5): 1043-1064.

7 Section two, three and four are based upon these earlier publications.

8 Although still focused on drug trade, in 1988, there was attention to ML as a global problem with the prohibition of the laundering of drug proceeds in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. United Nations Convention (the Vienna Convention) against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988.

In 2000, the UN General Assembly adopted the United Nations Convention against Transnational Organized Crime. This Convention was intended to close the major loopholes blocking international efforts to crack down on those engaging in illegal activities ranging from ML to trafficking in human beings. (Kersten 2002, at p. 51.) The focus was now clearly transnational organized crime of a certain severity. In the 2000 UN Convention, ‘serious crime’ is defined as ‘conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’. (Article 2 b of the United Nations Convention against Transnational Organized Crime.)

9 The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, opened for signature on 8 November 1990 in Strasbourg (Strasbourg Convention), has a heading phrased ‘laundering offences’. In this respect, the Strasbourg Convention widened the so-called ‘predicate offences’ beyond drug- trafficking. The term ‘proceeds’ in the Strasbourg definition covers ‘any economic advantage from criminal offences’, whereas the term ‘predicate offence’ covers ‘any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in the ‘laundering article’. (Article 1 of the Strasbourg Convention.)

7's, as an important response to the G-7's recognition of the threat to banking and other financial institutions by drug ML.[10] FATF cover issues related to the combating of ML and terrorist financing, as well as proliferation. It currently consists of 34 Member States and two regional organizations.

FATF sets standards which form a kind of non-binding intergovernmental developed model rules and evaluate member states against these. Applied sanctions include blacklisting, which partially explain the effect of its non-binding rules.

After 9/11 FATF explicitly extended its recommendations to include the financing of terrorism.[11] On 30 October 2001, FATF adopted eight special recommendations for that purpose.[12] According to these, each country should take immediate steps to ratify and implement the 1999 UN International Convention for the Suppression of the Financing of Terrorism,[13] and implement the UN Resolutions on the Prevention and Suppression of the Financing of Terrorist Acts.[14] Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations, and ensure that such offences are designated as ML predicate offences.[15] FATF also agreed upon rules about freezing and confiscating terrorist assets,[16] rules about reporting suspicious transactions related to terrorism,[17] and rules concerning international co-operation, alternative remittance, wire transfers, and non-profit organisations.[18] On 22 October 2004, a ninth special recommendation on cash couriers was developed with the objective of ensuring that terrorists and other criminals cannot finance their activities or launder the proceeds of their crimes through the physical cross-border transportation of currency and bearer negotiable instruments.[19]

Besides the public initiatives within this field, banking organisations have been involved in regulatory activity. During the 1990's, the Basel Committee on Banking Supervision (BCBS),[20] and the International Organization of

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10 Winer, J.M., 2002, *Globalization, Terrorist Finance, and Global Conflict – Time for a White List?* in Mark Pieth (ed), Financing Terrorism, Kluwer Academic Publishers.

11 US President George W. Bush use of the term "Global War on Terror" cover the US response to the 9/11 attacks in New York and Washington in 2001. The term illustrates the securitization of threats to the financial sector since finance was to be used as an explicit means in this global war on terror.

12 Agreed upon at a special meeting after the 11 September attacks.

13 1999 UN International Convention for the Suppression of the Financing of Terrorism.

14 FATF Special Recommendation I.

15 FATF Special Recommendation II.

16 FATF Special Recommendation III.

17 FATF Special Recommendation IV.

18 FATF Special Recommendations V to VIII.

19 FATF Special Recommendation IX.

20 The Basel Committee on Banking Supervision (BCBS) is a standard-setting body on banking supervision consisting of senior representatives of bank supervisory authorities and

Securities Commission (IOSCO),[21] began to focus on standards for international regulation to cover questions on AML. These mainly focused upon making banks more transparent.[22]

In 1988, BCBS issued a document entitled 'Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering' (1988 BCBS Principles), which stated:[23]

> This Statement of Principles is intended to outline some basic policies and procedures that banks' managements should ensure are in place within their institutions with a view to assisting in the suppression of money-laundering through the banking system, national and international. The Statement thus sets out to reinforce existing best practices among banks and, specifically, to encourage vigilance against criminal use of the payments system, implementation by banks of effective preventive safeguards, and cooperation with law enforcement agencies.

The BCBS thereby agreed on several important principles, which included identifying their customers, refusing suspicious transactions, cooperating with law enforcement agencies, training their staff, and introducing compliance procedures. These principles have had enormous effects, although not legally binding as such:

> The Committee does not possess any formal supranational supervisory authority, and its conclusions do not, and were never intended to, have legal force. Rather, it formulates broad supervisory standards and guidelines and recommends statements of best practice in the expectation that individual authorities will take steps to implement them through detailed arrangements - statutory or otherwise - which are best suited to their own national systems. In this way, the Committee encourages convergence towards common approaches and common standards without attempting detailed harmonisation of member countries' supervisory techniques.[24]

Hence, formally, the BCBS does not issue binding regulations, but 'its main function is to act as an informal forum to find policy solutions and to promulgate standards'.[25] Nevertheless, the banking standard has become compulsory because of public enforcement by law. For instance, the FATF

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central banks. It was created by the central bank Governors of the Group of Ten nations in 1974.

21 The International Organization of Securities Commission (IOSCO) is a private international organisation dealing with AML that brings together regulators of the world's securities.

22 Winer, *Globalization, Terrorist Finance, and Global Conflict*.

23 BCBS 1988, Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering, Statement of Principles, issued in December 1988, available at www.bis.org.

24 History of the Basel Committee and its Membership, available at the homepage of the Bank for International Settlements (BIS) at "www.bis.org".

25 D. Kerwer, *Rules that Many Use: Standards and Global Regulation*. Governance 18 (4) (2005) 611–32, p. 619.

recommendations strengthened and supplemented banks' own initiatives.[26] In comparison with other standards, this can explain the greater success of the banking standard where the BCBS has an uncontested authority.

Two major factors have been identified that make standards work: expertise and third-party enforcement. However, the same factors make it hard for users to hold standard setters accountable and the fact that 'private actors, firms, and NGOs can be agents of enforcement as well', complicates the picture even further.[27] As a result, the accountability challenges vary considerably across different modes of standard-setting. Notwithstanding the success of the banking standards, the main responsibility for AML crime prevention initially rested with the public actors in FATF and the EU.

3 Regional Implementation and Lawmaking

The first AML directive is the first stage in combating ML at European level. It was strongly influenced by the international level and reference was made to the recommendation of the Council of Europe of 27 June 1980, and to the 1988 BCBS Principles, 'both of which constitute major steps towards preventing the use of the financial system for money laundering'.[28] Further, for consistency reasons, it was emphasised that any Community action should take particular account of the recommendations adopted by FATF.

The first directive required Member States to prohibit ML and to oblige the financial sector, comprising credit institutions and a wide range of other financial institutions, to identify their customers, keep appropriate records, establish internal procedures to train staff and guard against ML and to report any indications of ML to the competent authorities.[29]

The preamble of the directive states that ML has an evident influence on the rise of organized crime in general and drug trafficking in particular and that there is more and more awareness that combating ML is one of the most effective means of opposing this form of criminal activity, which constitutes a particular threat to Member States' societies. Yet, the directive recognized that a penal approach should not be the only way to combat ML 'since the financial system can play a highly effective role'.[30]

On 4 December 2001, the second AML directive was adopted thus amending the first AML directive.[31] The second AML directive specifically referred to the widened definition of ML, beyond that of drugs offences, as

26 Cameron, I., *Terrorist Financing in International Law*, p. 91.

27 Kerwer, *Rules that many use: standards and global regulation*, p. 623.

28 Ibid.

29 Recital 4 of Directive 2005/60/EC.

30 Directive 91/308/EEC.

31 Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ 2001, L 344/76.

reflected in the 1996 revisions of the forty FATF recommendations.[32] The directive further stated that the suppression of organised crime was particularly closely linked to AML measures.[33]

The main changes by the second AML directive was this widening of the prohibition of ML to embrace also all sorts of organised crime, and an extension of the obligation of the directive to certain non-fiscal activities and professions, i.e. auditors, external accountants, tax advisors, real estate agents, notaries, lawyers, dealers in high-values goods whenever payment is made in cash amounting to EUR 15,000 or more, and finally, casinos.[34]

The second AML directive was soon to be replaced when FATF after 9/11 explicitly extended its recommendations to include the financing of terrorism. The third AML directive brought the regional EU rules into line with the global, revised and expanded, 2003 FATF recommendations,[35] i.e. the forty recommendations on ML and the nine special recommendations on terrorist financing. In the recitals of the directive,[36] it is specifically stated that the EU should continue to take particular account of the recommendations of the FATF as the foremost international body active in the fight against ML and terrorist financing. It is further emphasised that the directive should be in line with the new international standard brought about by the revised and expanded FATF recommendations.[37] As a result, the preventive measures of the directive now cover not only the manipulation of money derived from crime, but also the collection of money or property for terrorist purposes.[38]

In this respect, the solution to the problem of ML was to establish a standard for risk analysis ‘the risk- based approach’ which has a prominent position in the third AML directive as well as in the amended FATF recommendations that it builds upon.[39] Accordingly, the biggest change in the third AML directive is this introduction of a risk based approach.

The starting point is that the risks differ between countries, customers and business areas and over time. The operators themselves are the best analysts of where the risk areas are, or might arise, as they best know their business and their customers. The idea is that the resources should be used where the needs arise and the framework is supposed to be more flexible and adjustable to the

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32 Recital 7 in Directive 2001/97/EC.

33 Recital 10 in Directive 2001/97/EC.

34 By Directive 2001/97/EC newly inserted article 2a into Directive 91/308/EEC.

35 FATF 40 Recommendations of 20 June 2003, incorporating the amendments of 22 October 2004.

36 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ 2005, L 309/15.

37 Recital 5 in Directive 2005/60/EC.

38 Recital 8 in Directive 2005/60/EC.

39 For a critical analysis of the risk-based approach, see Herlin-Karnell, E., *The EU’s Anti Money Laundering Agenda: Built on Risks?* in Eckes, C., and Konstadinides, T. (eds.) Crime within the Area of Freedom, Security and Justice: A European Public Order, Cambridge University Press, 2011.

risk. Within a risk-based approach, businesses are expected to make risk assessments of their customers and divide them into low and high-risk. In order to enable operators to assess whether a situation involves a risk of ML and terrorism financing and to then act accordingly, the directive introduces more detailed provisions. For this purpose, the directive specifies a number of customer due diligence (CDD) measures that are more extensive and far-reaching for situations of higher risk, such as appropriate procedures to determine whether a person is a politically exposed person. The risk-based approach further emphasizes that the evaluation of who is high or low risk is to be a continuous process. As a result, the concept of "know your customer" as used in the financial sector, is now in practice applicable to all covered by the directive.

Besides extending its provisions to any financial transaction which might be linked to terrorist activities, and the introduction of the risk-based approach, the main changes of the third AML directive were the widening of identity checks on customers opening accounts,[40] that checks apply to any transaction over EUR 15,000,[41] stricter checks on politically exposed persons (PEPs),[42] and the introduction of penalties for failure to report suspicious transactions to national financial intelligence units (FIUs).[43] Further, in comparison with the second AML directive, the third directive now explicitly covers also trust or company service providers and instead of ‘dealers in high-value goods’, ‘natural or legal persons trading in goods’, amounting to EUR 15,000 or more.[44]

The third AML directive, as well as its predecessor, outlines a long list of actions to be considered an offense when committed intentionally (Article 1). The directive applies to a large number of private actors whose participation is no longer voluntary. Recital 41 of the directive states that the importance of combating ML and terrorist financing should lead Member States to establish effective, proportionate and dissuasive sanctions in national law for failure to respect the national provisions adopted pursuant to the directive. Article 39 (1) provides that Member States shall ensure that natural and legal persons covered by the directive can be held liable for infringements of the national provisions adopted pursuant to the directive. Again, the directive states that sanctions must be effective, proportionate and dissuasive, which resembles, among other the wordings of the environmental crime case.[45] The directive further provides

40 Article 6 in Directive 2005/60/EC.

41 Article 7 in Directive 2005/60/EC.

42 Article 13(4) in Directive 2005/60/EC, According Article 3(8) ‘Politically exposed persons’ means natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons.

43 Article 39, Section 4 on penalties, in Directive 2005/60/EC.

44 Article 2 in Directive 2005/60/EC compared with article 2a in Directive 91/308/EEC inserted by Directive 2001/97/EC.

45 The third AML directive was published one and a half months after the ECJ’s judgement in the environmental crimes case. Compare ground 48 of the European Court of Justice’s judgment on 13 September 2005 in case C-176/03 Commission v Council, [2005] ECR I-

that sanctions should be provided for natural and legal persons. Hence, there are rules on liability also for legal persons (Article 39(3) and 39(4)) and the directive states that sanctions should be tailored to the operations of legal persons when they are often involved in complex ML or terrorist financing operations.

The use of administrative sanctions is governed by Article 39(2) which states:

> Without prejudice to the right of Member States to impose criminal penalties, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions can be imposed against credit and financial institutions for infringements of the national provisions adopted pursuant to this Directive. Member States shall ensure that these measures or sanctions are effective, proportionate and dissuasive.'

In sum, the requirements imposed in the form of customer due diligence, reporting and record keeping of statistics are extensive and cover a wide range of private actors. The sanctions required, however, are largely of an administrative rather than criminal nature. A comparison between Article 39(1) and 39(2) does not preclude Article 39(1) to include criminal sanctions should this be required in order to be effective, proportionate and dissuasive. After Lisbon, this option is no longer an issue, should the EU legislator decide to adopt minimum rules on criminal sanctions relying on the new legal basis in Article 83(1) TFEU.[46]

4 National Implementation

With the third AML Directive has been fully implemented by almost all member states,[47] the co-operation of private parties is no longer voluntary. The involvement of private parties is, however, looked upon differently depending on the general position of public-private cooperation in the member states. A comparison between the UK and Sweden in implementing the third AML Directive is particularly interesting in this respect, since it shows two different ways of approaching public-private cooperation, implying different roles for

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7879: "… the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."

46 The proposal for the fourth AML Directive that like its predecessors closely follow the FATF update of the 40 recommendations (COM (2013) 45 final) is based on the main legal basis for the internal market, i.e. Article 114 TFEU.

47 Transposition of Financial Service Action Plan (FSAP) Directives and Post-FSAP Directives (including the third AML Directive), state of play as of 21 January 2010, available at the Commission's homepage.

private actors in the public sector. Although both Member States have implemented the Union's risk-based approach, and public-private cooperation is important in both cases, the division of roles and allocation of responsibilities differ.[48]

In this respect, the main aim of this section is to map out some major similarities and differences in public-private cooperation rather than to provide an overview of the current law. The sources of this section consist of a combination of official documents and empirical evidence gathered through interviews with public officials in various national agencies and ministries.[49] What emerges from the below study is the decisive influence of binding legislation, but also of non-binding standards and recommendations.

4.1 Implementation in the UK

Not surprisingly, the UK is comparatively influential in organisations that regulate and strive to set transnational AML best practices, like the FATF. This influence could explain why the UK was an early mover in implementing the third AML Directive. On the other hand, the UK was being evaluated within the FATF mutual evaluation system,[50] just before the Directive had to be implemented. Whereas the mutual evaluation report of the UK was released on 1 August 2007, the third AML Directive had to be implemented by 15 December 2007. Despite the fact that late implementation of EU secondary legislation by Member States carries the risk of an infringement action by the Commission,[51] receiving criticism in a FATF mutual evaluation might be more pressing for individual member states. Such criticism might affect the global trust of the country's financial system and thus entail more severe consequences.

In the UK, the HM Treasury is responsible for all policy on the regulation of the financial services sector including joint overall co-ordination of AML policy within the Home Office. The HM Treasury and the Home Office jointly

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48 There are further differences between the UK and Sweden, which make them particularly suitable for comparison. First, the UK is a major international centre for investment and private banking with one of the largest commercial banking sectors in the world. In contrast, Sweden is peripheral. Second, the UK's experience in handling terrorist threats cannot be compared to the situation in Sweden. Third, whereas the threat to the UK from serious organised crime and money laundering is high, Sweden is not considered to be a major money laundering or terrorist-financing centre. Fourth, both the UK and Sweden uses a police model of FIUs.

49 The empirical material used for the purposes of this Chapter consists of ten semi-structured interviews in the UK and Sweden between 2007-2008. Since then, there have been some structural changes within the UK AML system.

50 A key element in the fight against money laundering and the financing of terrorism is the need for countries systems to be monitored and evaluated, with respect to the international FATF standards. 'FATF 40 Recommendations, Introduction', available at FATF homepage, "www.fatf-gafi.org".

51 Article 258 TFEU.

chairs the Money Laundering Advisory Committee (MLAC) which is a forum for key public and private stakeholders 'to co-ordinate the UK's AML regime and review its efficiency and effectiveness'.[52]

A distinguishing mark of AML reform in the British case was that a private sector initiative was instrumental in translating the Directive into the national context. A private corporation consisting of the leading UK trade associations in the financial services industry, the Joint Money Laundering Steering Group (JMLSG),[53] worked out guidance notes on AML that were later approved as national law. The JMLSG Guidance, which advocates and promotes the risk based approach, was formally 'rubber stamped' by the HM Treasury,[54] and is explicitly referred to in the handbook of the then main supervisory authority, the Financial Services Authority (FSA). The Guidance was the key document that provided practical interpretation to financial institutions in complying with AML legislation and FSA AML rules.[55] Consequently, by following the JMLSG Guidance, financial institutes could ensure that they acted in accordance with British AML legislation, the third AML Directive and the FATF recommendations.[56]

In short, the British case illustrates how public-private cooperation can take the form of private sector actors taking on the task of deciding rules and procedures, while the role of the public partner was to legitimise the content of these rules. This system was partly criticised by the third FATF mutual evaluation of the UK.[57] The fact that certain CDD requirements were not laid down in law or regulation gave rise to criticism. Yet, according to the 2009 FATF follow up report, the CDD legal framework had then been enhanced to a satisfactory level.[58]

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52 FATF, 2007, *Third Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism, The United Kingdom of Great Britain and Northern Ireland*, 29 June 2007, p. 24.

53 *See* further the homepage of the *Joint Money Laundering Steering Group*, available at "www.jmlsg.org.uk".

54 Interviews with British Bankers' Association, Member of the Board, JMLSG, and with Money Laundering, Financial Crime Team, HM Treasury, June, 2008.

55 FATF, *Third Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism, The United Kingdom of Great Britain and Northern Ireland*, 29 June 2007, p. 11.

56 The FSA is complemented by other bodies supervising additional fields and sectors such as accounting firms and law firms. In this respect, the JMLSG Guidance is considered even outside the area of financial services. Other professional bodies involved in AML supervision, like accounting associations, tend to look at the content of the JMLSG Guidance regarding customer identification, etc., and shape their rules in line with these. As a result, the JMLSG model is spread across sectors. Interview with Money Laundering, Financial Crime Team, HM Treasury, June, 2008.

57 FATF, *Third Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism, The United Kingdom of Great Britain and Northern Ireland*, 29 June 2007.

58 FATF, *Mutual Evaluation Fourth Follow-Up Report Anti-Money Laundering and Combating the Financing of Terrorism, United Kingdom*, 16 October 2009, pp. 10-11.

4.2 Implementation in Sweden

The Swedish case-study provides evidence of a more conventional division of roles between public and private parties. Though private bodies, such as the Swedish Banking Association (SBA), are engaged in the issue of AML and in international regulatory developments, deciding rules and procedures largely remains a public prerogative.

In contrast to the UK, the Swedish implementation of the third Directive was rather slow. This gave rise both to external and internal criticism, such as by the third FATF evaluation of Sweden (FATF 2006), and by the Swedish FIU.[59] Despite threats of being brought before the CJEU by the European Commission, the Swedish implementation of the Directive was delayed more than a year. Although eventually fully implementing the Directive, the CJEU ruled against Sweden for late implementation.[60] In Sweden, one part of the delay was due to a discussion of how supervision was to be organized – and by whom.[61] In this respect, the Swedish Agency for Public Management (*Statskontoret*) had been commissioned by the Swedish Government to investigate the scope for and suitability of assigning to one government agency the task of exercising the supervision required under the third AML Directive.[62] The Agency thereby argued that although effective supervision is a key element in reducing money laundering, supervision must be seen as part of a chain that demands a comprehensive approach and 'a judicious balance between supervision, examination, intelligence, investigation and legal proceedings'.[63] In general, the Government Bill stressed the importance of a flexible supervisory system since forms of money laundering change over time and when AML measures become more effective.[64]

The institutional framework on the ministerial level is divided between several of the Swedish ministries. The Ministry of Finance has the responsibility for issues relating to financial markets regulation. The Financial

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59 Interview with Financial Police, National Police, May, 2008.

60 Case C-546/08 *Commission* v. *Sweden,* [2009] ECR I105. In this case, the Commission first wrote to the Swedish Government about its failure to implement the Directive on 28 January 2008, delivered a reasoned opinion on 6 June 2008, and instituted proceedings before the Court on 9 December 2008. On 11 June 2009, i.e. 18 months after Sweden should have transposed the Directive, the Court ruled that its failure to do so put it in breach of its obligations under Article 45(1) of the Directive; but the only available sanction was to order Sweden to pay the costs.

61 Interview with Legal Department, Swedish Financial Supervisory Authority, February, 2008.

62 Statskontoret, Swedish Agency for Public Management, *The Third Money Laundering Directive: compliance supervision and organization in Sweden*, Statskontoret 2 (2008), available in Swedish at www.statskontoret.se. A summary in English is also available.

63 Statskontoret 2008 English Summary.

64 Prop (2008/09: 70) *Genomförandet av tredje penningtvättsdirektivet*, Government Bill 2008/09: 70 on the implementation of the third AML Directive, available in Swedish at "www.riksdagen.se", p. 162.

Institution and Markets Department is responsible for the AML legislation.[65] The Financial Institution and Markets Department has co-responsibility for issues related to financing of terrorism under the Ministry of Justice and the Ministry of Foreign Affairs. The Ministry of Justice is responsible for the National Police Board which houses the Swedish FIU. The Ministry of Foreign Affairs has a leading role in the Government's international political cooperation against terrorism and the Ministry of Industry is responsible for AML legislation related to dealers of high value goods. This division of responsibility coupled with the extensive consultation procedure in the Swedish lawmaking tradition, might also be part of the explanation of late implementation.

Yet, despite late government implementation, the Swedish Financial Services Authority (FSA) and most major banks were early movers. The Swedish FSA, *Finansinspektionen* issued revised recommendations on AML in line with expected changes in national legislation, and provided information on recent developments in AML-regulation on its website.[66] The Swedish FSA and FIU further arranged joint seminars for banks and other organisations to which the legislation would be applicable. The SBA on their part, had also been active in informing its members, and major banks worked towards fulfilling the requirements in the FATF recommendations and the third AML Directive already before the legislation came into force on 15 March 2009.[67]

5 From Global Rules and Standards to Enforceable National Provisions

5.1 Private Actor Lawmaking and Implementation

In particular the banking sector has been successful in deciding AML rules and procedures. The Basel Committee thereby considered that the most important safeguard against money laundering 'was the integrity of banks' own managements and their vigilant determination to prevent their institutions becoming associated with criminals or being used as a channel for money-laundering.'[68] Further, it is argued that public confidence in banks may be undermined through their association with criminals. As suggested by Kerwer, the banking standard has uncontested authority, where expertise and third-party enforcement has been decisive for its success. The banking standard is not a legal document, but its implementation depends on national practice and law. Yet, the banking sector has been given a role that traditionally is the prerogative of the public actors.

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65 FATF 2006: 20.

66 Interview with Legal Department, Financial Supervisory Authority, February, 2008.

67 Money Laundering and Terrorism Financing (Prevention) Act 2009:62.

68 BCBS, *Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering, Statement of Principles*, issued in December 1988. available at "www.bis.org".

The model used in the UK was a private sector initiative that was instrumental in implementing the Directive. In this respect, the JMLSG worked out guidance notes on AML that were later approved as national law. This Guidance provided practical interpretation to financial institutions in complying with AML legislation and FSA AML rules. This guidance proved to be of value also outside the area of financial services. Other professional bodies involved in AML supervision, such as accountants, tend to look at the guidance, and shape their own rules in line with the guidance notes. In Sweden, private actors were less influential, but still implemented the requirements of the FATF recommendations and the third AML Directive voluntarily, already before the implementing legislation came into force.

5.2 Public Actor Lawmaking and Implementation

As has been exemplified, any changes in the FATF 40 + 9 recommendations or model rules result in changes of the EU rules, which help in giving the rules effect. Of particular interest here is that EU rules on ML, in principle, fully comply with the FATF recommendations. In addition, the non-binding BCBS regulations have become compulsory because of public enforcement, such as the FATF recommendations that strengthened and supplemented banks' own initiatives.

The first AML directive made reference to the Council of Europe recommendations, the BCBS principles, and the FATF recommendations. The second AML directive, specifically referred to the widened definition of ML in the 1996 revised FATF recommendations. The third AML directive brought the regional EU rules into line with the global, revised and expanded 2003 FATF recommendations.

In addition, it has been suggested that receiving criticism in a FATF mutual evaluation might be more pressing for individual member states than the risk of an infringement action by the European Commission, due to the naming and shaming aspect. In this respect, the global trust of the country's financial system might have more severe consequences if not upheld.

5.3 Towards a Theory on Legally Accountable Private Actors?

The AML Directive and the risk-based approach imply a shift towards the private sector. New rules for CDD and risk assessment are introduced. This extra burden on the private sector is turned into benefits regarding reputational benefits or rather avoidance of reputational risks of not fulfilling the FATF and BCBS requirements, but are no longer voluntary for the private sector to assume. Yet, whereas the public actors are accountable within the democratic system of command and control, the private actors are not. From an EU law perspective, this might be less of a problem since the EU AML Directive and the FATF recommendations that it builds upon are guided by efficiency, where emphasis lies on output legitimacy.[69]

Whether this is enough, and whether the EU AML rules are really effective, is highly questionable. Heavy burdens are put on the private actors concerning risk-assessment and CDD measures, and the introduction of penalties for failure to report suspicious transactions to national FIUs. These expansions coupled with the national FIUs broad monitoring and enforcement powers point towards the emergence of a different model of accountability for private actors compared to that of public actors. As a result, a key characteristic of the risk-based approach has to do with the allocation of responsibility between sectors.

In this respect, a new model of legal accountability is emerging where private actors entrusted with public tasks are accountable to a limited extent.[70] The closer elements of such a model are set down in binding legislation, but also in non-binding standards and recommendations.

There is indication that rules are more easily complied with by those actors previously involved in lawmaking and implementation. Having input during these phases is turned into benefits in relation to the vast enforcement powers of the monitoring agencies. The eventual success of such a legal accountability model is, however, relying on the quality of the underlying rules and procedures in holding the private actors accountable, their effect on actually combating crime, and last but not least, on their acceptance by those who are being regulated.

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69 Concerning the distinction between the notions, see F. Scharpf, *Governing in Europe: Effective and Democratic?*, (Oxford University Press, 1999). *See* further Mörth, U., *European Public-Private Collaboration. A Choice Between Efficiency and Democratic Accountability?*, (Edward Elgar, 2008).

70 M. Bergström, *Privatoffentliga partnerskap, direkt effekt och det funktionella stats-begreppet: privata aktörer med tidsbegränsat offentligt ansvar,* Europarättslig Tidskrift *(ERT)* (2008) 665-80. Compare Mitsilegas' findings from 2003, on *Security Governance through Responsibilisation: The Imposition of Duties on the Private Sector* in Mitsilegas, Money Laundering Counter-Measures in the European Union, pp. 126 ff.