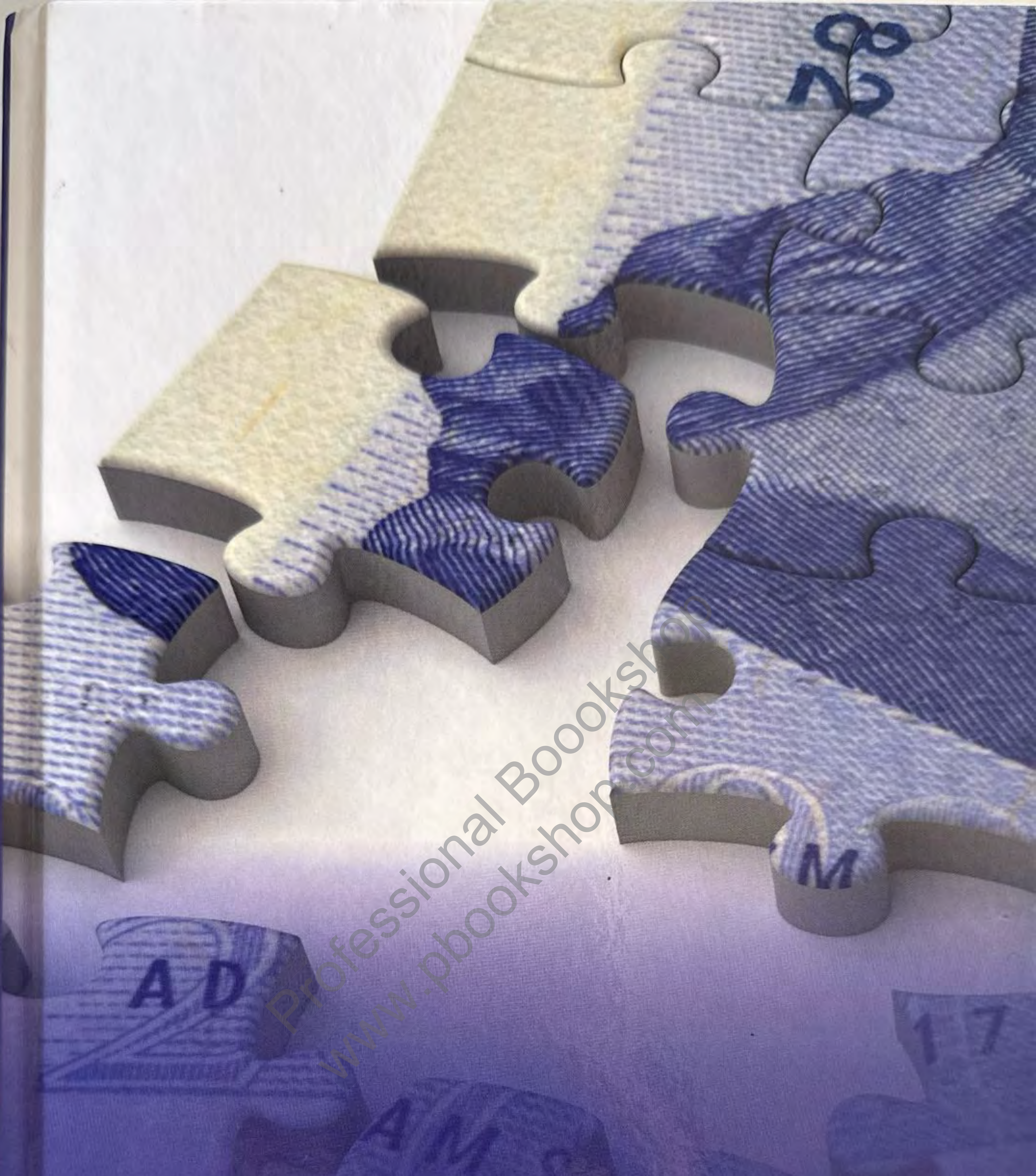

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Money Laundering Compliance

Fourth Edition

Tim Bennett

BLOOMSBURY

Contents

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Table of Cases

[All references are to paragraph numbers.]

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of the biggest centres of expertise in the planning of international structures using the laws of present (and many former) dependencies or colonies, near and far (the Financial Secrecy Index in **Appendix 8.2** contains a preponderance of such present or past British possessions and territories). These jurisdictions are nowadays referred to as Offshore Financial Centres ('OFCs'), the term 'tax haven' having become pejorative. Many of these structures involve the use of Offshore Trusts and Offshore Companies, as these provide the architecture for wealth preservation, confidentiality and good governance.

It is inevitable that some Trust and Company structures established internationally may indeed conceal ML as currently broadly defined. Execution/administration of these structures is undertaken by Trust Service Providers ('TSPs' – **Chapter 16**) and Corporate Service Providers ('CSPs' – **Chapter 15**) often far away from the United Kingdom, but also in many instances with the strings leading back to the United Kingdom in terms of professional and financial service providers. Thus, those UK 'string-pullers' also need an informative guide as to what they can (and cannot) do, and what they must (and must not) do to prevent themselves from becoming inadvertent money launderers, tippers-off, etc. And of course those in the OFCs also need reliable reference and support materials.

TAX EVASION

1.3 The addition of the proceeds of tax evasion (see **3.4** ('predicate offences') and **Chapter 8**) to anti-money laundering law (AML/CFT) and regulation makes it all-embracing, and of constant concern to professionals and practitioners both onshore and offshore of the United Kingdom.

THE INTERNATIONAL CONTEXT

1.4 The book goes on to consider AML/CFT in an international context (both onshore and offshore), as many overseas jurisdictions (especially most the offshore jurisdictions) derive their AML/CFT framework from the United Kingdom. The Author's extensive experience in dealing with international business derives from his lengthy spells living and working in a number of offshore jurisdictions, and enables the book to refer authoritatively to the AML/CFT laws and practices of many other jurisdictions.

PROFESSIONAL SECTORS

1.5 Individual Chapters deal with specific Issues facing different groups of professional or financial players, namely:

- Legal & Accounting Professionals and Practitioners (**Chapter 14**);
- CSPs (**Chapter 15**);
- Trustees, TSPs, Family Offices and Executors (**Chapter 16**); and

- Banks, Investment Managers and Funds (**Chapter 17**).

Please be reassured that this Book is not just another *Compliance Manual*, or *Operations and Procedures Manual*, although the Author has included certain passages of his own from such Manuals that he has previously drafted.

THE WORK OF THE FINANCIAL ACTION TASK FORCE ('FATF')

1.6 *Wikipedia* notes that the FATF is an intergovernmental organisation founded in 1989 on the initiative of the G7 to develop policies to combat money laundering, and with an expanded mandate post 2001 to include terrorist financing. A list of current Member countries/jurisdictional (and observer status countries or organisations) is on the FATF website, and also set out in **Appendix 1.1**: it is significant that fewer than ten countries in the World are not FATF members.

The objectives of FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. FATF is a 'policy-making body' that works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

FATF have developed their **40 Recommendations + 9 Special Recommendations** (most recently amended in March 2022) as internationally endorsed global standards designed to increase transparency and enable countries to successfully take action against illicit use of their financial system for money laundering and terrorist financing. These are variously looked at in **Chapters 6, 7, 11, 12, 13, 16** and **17**.

And FATF Member Countries are subjected to FATF evaluation through peer reviews' ('mutual evaluations') to monitor their progress in implementing the FATF Recommendations and to see that they are upholding their related laws and regulations. Linked to these are the FATF *Blacklist* (**Appendix 1.2**) and *Greylist* (**Appendix 1.3**). Being placed on the Blacklist can be traumatic and lead financial institutions immediately to shift resources and services away from any such Blacklisted country or jurisdiction: that in turn creates domestic economic pressure in such a Blacklisted country and pressures its government to introduce policy changes FATF-compliant regulations. The effect of the FATF Blacklist has been significant, and arguably has proven more important in international efforts against money laundering than the **FATF Recommendations** themselves. Under international law, the FATF Blacklist does not carry any formal sanctions, but in reality, jurisdictions that are placed on the FATF Blacklist face intense financial pressure to reform. Even being paced on a Greylist can be mildly traumatic (eg Gibraltar, which recently found itself on the list for the first time).

Key FATF Reports since the 3rd Edition include:

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- Transparency and Beneficial Ownership (October 2014) see **Chapters 10, 15 and 16**
- Professional Money Laundering (July 2018) see **Appendix 16.2**
- Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures (2018) see **Chapter 10** and **Appendix 15.2**
- Trust and Company Service Providers – Guidance for a Risk-Based Approach (2019) see **Chapters 15** and **16** and **Appendix 15.3**
- Virtual Assets Global Standards (2019) see **Chapter 18**
- Virtual Assets and Virtual Asset Service Providers (October 2021) see **Chapter 18**
- Risk-Based Approach Guidance for the Real Estate sector (Consultation, March 2022) see **Appendix 1.7**
- Virtual Assets Standards (30 June 2022) see **Chapter 18**
- ML and CFT Risks (1 August 2022) see **Chapter 9.11**
- Recommendation 24 (amendments 25 October 2022) see **Chapter 15** and **Appendix 15.1**
- Money Laundering and Terrorist Financing in the Art and Antiquities Market (February 2023)
- Guidance on Beneficial Ownership for Legal Persons (March 2023)

With its Secretariat of approx. 70 staff based at the OECD HQ in Paris, and an annual budget of approx. USD12 Million, it possibly surprising that FATF's commitment and work output is so phenomenal. But one can't help wondering if there are other social or political targets for remediation where the time and money and human resource involved in all their analysis and Reports might be better spent (and produce greater benefits to humanity) not so much by attacking the 'low-hanging fruit' of AML Compliance, but in focussing on other areas such as medicine, health, military conflict and financial frauds (such as in the VC space).

In the interests of balance, I also refer to Dr Ronald Pol's 2020 paper (see www.effectiveaml.org) where he states that while the FATF has been very successful in getting its policies adopted worldwide, the actual impact of those policies is rather small. The global AML industry may (he says) be stuck in a rut, 'steadfastly refusing to contemplate effectiveness'. According to Pol's estimates, existing AML results in less than 1% of criminal finances illegal profits being seized, whereas the costs of implementing AML policies are at least one hundred times larger. Pol contends that industry and policymakers consistently ignore this, instead evaluating the policies based on success metrics that are largely irrelevant. Pol notes that the UN has recently joined the conversation, slamming the FATF AML model for its immense harm to countries, businesses, taxpayers and millions of people. Meanwhile profoundly ineffective AML model will continue spreading its exponential costs to new industries, with cryptocurrencies next in line.

BASEL AML INDEX 2022

1.7 The 11th Public Edition of the Basel AML Index was published in October 2022, providing risk scores based on data from 18 publicly available sources (such as the FATF, Transparency International, the World Bank and the World Economic Forum).

The Basel AML Index (published by the Basel Institute on Governance) is an independent annual ranking that assesses AML/CFT risk around the world. See **Appendix 1** and https://baselgovernance.org/publications/basel-aml-index-2022.

TOWARDS A 'CASHLESS SOCIETY'?

1.8 Cash is anonymous! But as *The Economist* of 17 February 2007 famously remarked 'the suspicion clings that where you find anonymity you find drugs, fraud, money-laundering, terrorist financing, and a huge amount of humdrum tax evasion'.

As a result of AML/CFT initiatives, large denomination banknotes are rapidly disappearing! As a Swiss citizen, my favourite was the purple CHF1,000 note, with a total value of more than CHF35 billion in circulation in 2012. However, in April 2014 the Swiss Federal Council considered requests to abolish the note, to reduce the risk of money laundering.

The World's highest value note in circulation used to be Singapore's Sing$10,000 note, but the MAS ceased printing these as of 1 October 2014

New note issues (and retirement or 'demonetising old ones by requiring exchange at a bank) is an effective way of controlling the underground cash economy.

3MLD adopted a threshold approach of €15,000 for payments in cash for goods (see **9.4**) which in December 2022 was lowered to €10,000. Despite this, there were €295 billion of €500 notes in circulation shortly after the ECB announced that such notes would cease to be issued after the end of 2018

The Economist of 20 September 2014 cited Professor Rogoff of Harvard University's view that scrapping physical currency entirely would help governments to collect more tax, fight crime and develop better monetary policy.

2023 will see the continued switch away from cash to EPS – the past ten years has seen the use of cash to pay for goods and services decline by almost 75% (of course Covid-19 had a strong causative effect on this migration to EPOS). UK Finance (www.ukfinance.org) in their Report '*UK Cash and Cash Machines 2022*' (published on 16 December 202) note that 85% of all payments are now made electronically, and by persons of all ages. Put simply, cash is a necessity that we cannot live without, and provides a backup if and when online systems fail.

And in September 2016, Andrew Haldane (the then Chief Economist of the Bank of England) noted his desire to abolish cash, force everybody to hold all their money digitally and give the 'Old Lady' the tools to impose negative interest rates! The latter was still under discussion as recently as October 2020, when

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Deputy Governor Sam Woods wrote to all UK Banks asking them how ready they would be of the BoE Base Rate moved into negative territory. Although the Bank Base Rate came close to zero, it hasn't ever been negative since the BoE was founded in 1694 (contrast the recent position in the Eurozone, Switzerland, Sweden, Denmark and Japan).

Also February 2023 saw news reports that Barclays and Santander have repurposed certain branches for meetings only, and have closed facilities for cash deposits or withdrawals

However, in a welcome post-Brexit pushback, 2023 will see a legal and regulated 'right of access to cash' via Part 2 Access to Cash provisions of the Financial Services and Markets Act 2023, which received Royal Assent on 29 June 2023. Section 55 and Schedule 8 cover cash withdrawal services; and section 56 and Schedule 9 apply to wholesale cash distributions.

ELECTRONIC MONEY

1.9 *Wikipedia* tells us that:

> 'In theory, electronic money should provide as easy a method of transferring value (without revealing identity) as untracked banknotes, especially wire transfers involving anonymity-protecting numbered bank accounts. In practice, however, record-keeping capabilities of ISPs tend to frustrate that intuition. While some cryptocurrencies … have aimed to provide for more possibility of transaction anonymity for various reasons, the degree to which they succeed—and, in consequence, the degree to which they offer benefits for money laundering efforts—is controversial.'

The EU's 4MLD (see **9.11**) raised concerns from financial services sector experts due to its failure to co-ordinate cross-border issues for electronic businesses, the risk that it will be disproportionately burdensome and costly for EU businesses, it would damage innovation in new business areas such (as the regulated e-money and payment services sectors, prepaid cards, e-wallets and money remittances), and may perversely increase the use of cash (where there are less controls and there is less monitoring information available to the relevant authorities and law enforcement agencies).

Bitcoin and VCs, being a form of 'electronic money', are looked at in more detail in **Chapter 18**.

Finally, and for completeness, *The Economist* of 20 May 2023 contained a special report on digital finance, including on payment systems and cryptocurrencies, entitled 'Cashless Talk'; it is well worth reading!

CHAPTER 2

The UK AML/CFT framework – background

LEGISLATIVE HISTORY

2.1 There is nothing new about the notion of criminal offences similar to anti-money laundering ('AML') offences! Section 22(1) of the Theft Act 1968 (also see the Theft Act 1978 and the Theft (Amendment) Act 1996) was the first 'money laundering' ('ML') style offence created under English law, involving the receipt of goods derived from an underlying crime of theft, prior to a dishonest involvement in their retention, removal, disposal or realisation on behalf of another person.

Although the Theft Act provision is confined to 'goods' and the underlying offences of theft and robbery, it has a wide-ranging effect covering a multitude of 'laundering' activities (that is, retention, removal, disposal or realisation) and it is significant that, by virtue of s 34 of the Theft Act 1968, 'goods' includes money.

The offence has consistently been applied to those laundering money and facilitating the realisation of unlawfully obtained property. In addition, the inchoate offences of aiding and abetting, counselling or procuring have long been part of the English legal system, thereby rendering those who somehow participate in the crime of another as criminal.

MEASURES AGAINST DRUG TRAFFICKING

2.2 With the enactment of the Misuse of Drugs Act 1971 it became possible under s 27(1) for the courts to order the forfeiture of property – whether it be money, drugs, weapons or vehicles – of a person convicted of a drugs-related offence classified as an 'offence under this Act'. However, the House of Lords severely curtailed the application of s 27(1) in *R v Cuthbertson* [1981] AC 470, [1980] 2 All ER 401: as a result of *Cuthbertson*, the Hodgson Committee Report of 1984 recommended the introduction of specific offences to deal with persons laundering the proceeds of drug trafficking. This in turn prompted a 1985 report by the Home Affairs Committee, resulting in the enactment of the Drug Trafficking Offences Act 1986 ('DTOA 1986') which created the forerunner to s 50 of the Drug Trafficking Act 1994 (DTA 1994) by establishing the offence of 'assisting another to retain the benefits of drug trafficking'.

The enactment of specific AML legislation in relation to drug trafficking prompted Parliament in 1989 to introduce an offence modelled on s 24 of the DTOA 1986

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in relation to terrorism. Given the increasing concern that terrorist organisations were involved in organised crime and were effectively laundering the resulting proceeds, s 11 of the Prevention of Terrorism (Temporary Provisions) Act 1989 (PT(TP)A1989) created *inter alia* the offence of 'assisting in the retention or control of terrorist funds'.

The Criminal Justice (International Co-operation) Act 1990 enabled the UK Government to ratify both the *European Convention on Mutual Assistance 1957* and the AML legislative obligations imposed by the *Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* which created a new offence in s 14 of concealing or transferring proceeds of drug trafficking. This offence has since been consolidated into s 51 of the DTA 1994. The enactment of the 1990 Act took place within the background of a review of drug trafficking and AML laws by the House of Commons Home Affairs Committee, whose November 1989 report resulted in the extension of AML laws in s 14.

THE CRIMINAL JUSTICE ACT 1988; AND THE CRIMINAL JUSTICE ACT 1993: EXTENSION TO 'OTHER SERIOUS CRIMES'

2.3 The Criminal Justice Act 1993 ('CJA 1993') extended the scope of the AML offences in the 1988 Act from specific defined crimes (drugs, terrorism, etc) to the non-specific category of 'other serious crimes', pursuant to The First EC Money Laundering Directive 91/308/EEC (1MLD) and the Second EU AML Laundering Directive (2MLD) – see **9.2** and **9.3**.

The principal AML offences created by the CJA 1993 were as follows:

(a) Assisting the retention or control of the proceeds of criminal conduct by another, knowing or suspecting that other to be involved in ML (s 93A of the CJA 1988);

(b) Acquisition, possession or use of proceeds of criminal conduct, *knowing* the property concerned to be tainted (s 93B of the CJA 1988); and

(c) Concealing or transferring property, *knowing or having reasonable grounds to suspect* that the property is the proceeds of criminal conduct (s 93C of the CJA 1988). This includes transferring or removing property from the jurisdiction.

THE PROCEEDS OF CRIME ACT 2002

2.4 In 2002, the PoCA 2002 replaced the CJA 1988 and CJA 1993 provisions noted at **2.3**: the impact of this important piece of legislation is reviewed in detail in **Chapters 3**, **4** and **5** and set out in **Appendix 2.1**. Essentially the PoCA 2002 sets up and defines the principal ML offences from 2MLD:

- Concealing etc (s 327) – see **Chapter 3**;
- Assisting with Arrangements (s 328) – see **Chapter 3**;

- Acquisition, use or possession (s 329) – see **Chapter 3**;
- Failure to disclose (ss 330–332) – see **Chapter 4**; and
- Tipping off (ss 333 and 333A) – see **Chapter 4**.

And s 362A sets up and defines the recently added 'Unexplained Wealth Orders' ('UWOs') – see **5.7**.

THE SERIOUS ORGANISED CRIME AND POLICE ACT 2005

2.5 The Serious Organised Crime and Police Act 2005 ('SOCPA 2005') amended the PoCA 2002 with effect from 1 January 2006 in the following ways:

- providing a territorial defence to charges under ss 327–329 of the PoCA 2002 where the conduct took place outside the United Kingdom (and see **7.2**);
- creating a new offence – 'Failure to Report on the required Form' (and see **Chapter 4**);
- establishing 'internal' SAR procedures (and see **Chapter 12**);
- establishing a defence to 'failure to report', where there is insufficient information either of the alleged perpetrator or of the 'property' in question (see **Chapter 4**); and
- establishing SOCA as a new law enforcement agency (the UK's FIU) (the NCA replaced SOCA in 2013 and took over running the UK FIU).

SOCA assumed its responsibilities on 1 April 2006, and assumed all functions previously held by NCIS; and in 2007 (as noted in **2.6**) SOCA assumed the role and functions of the (former) ARA: however in October 2013 SOCA was replaced by the NCA, which came into being under the Crime and Courts Act 2013 (Royal Assent 25 April 2013).

It is a bit of a complicated genealogy but it seems to have settled down now!

THE SERIOUS CRIME ACT 2007

2.6 The Serious Crime Act 2007 (SOCA 2007) introduced the concept of a '*Serious Crime Prevention Order*' to be effected by means of a civil injunction. This remedy is available to the applicant where the Court is satisfied that the person enjoined has been involved in a 'serious crime' in the jurisdiction, and that grant of such an Order would protect the public by preventing, restricting or disrupting involvement by that person in a serious crime in the jurisdiction. Applications may only be brought by the DPP; the Director of HMRC Prosecutions; or the Director of the SFO (and see **4.4**).

The Serious Crime Act also introduced a range of inchoate offences, including 'intentionally encouraging or assisting an offence', 'encouraging or assisting an

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offence believing it will be committed' and 'encouraging or assisting offences believing one or more will be committed'.

As noted at **2.5**, SOCA 2007abolished the ARA and transferred its role and functions to SOCA; but in 2013 SOCA was in turn replaced by the NCA (see **5.1–5.2**).

Schedule 4 to SOCA 2007 contains detailed complex provisions relating to 'extraterritoriality' of the Defendant's behaviour relating to a serious crime, and whether such behaviour (if committed wholly or partly *outside* the jurisdiction) would nonetheless be triable within the jurisdiction. The key condition is that 'D knows or believes that what he anticipates might take place wholly or partly in a place outside England and Wales' (see **7.2** and **8.11**).

THE SANCTIONS AND ANTI-MONEY LAUNDERING ACT 2018

2.7 The Sanctions and Anti-Money Laundering Act 2018 ('SAMLA 2018') was introduced following the Brexit Referendum result. The SAMLA 2018 has two purposes:

- to make provisions of the purposes of the detection, investigation and prevention of money laundering and terrorist financing, and to implement FATF published standards and
- to enable the UK to create its own sanctions framework, allowing it to issue sanctions rather than adopting EU or UN models

The SAMLA 2018, s 51(1) contains transparency provisions regarding the ownership of foreign companies,

> 'For the purposes of the detection, investigation or prevention of money laundering, the Secretary of State must provide all reasonable assistance to the governments of the British Overseas Territories to enable each of those governments to establish a publicly accessible register of the beneficial ownership of companies registered in each government's jurisdiction.'

The SAMLA 2018, s 50 requires the Secretary of State to publish regular reports on the progress made in creating the register of beneficial owners of overseas entities (see **6.8** and **15.10**), which came into effect on 1 August 2022. And the House of Commons Library Research Briefing 'Registers of beneficial ownership' (dated 6 April 2022) is well worth reading – see **Appendix 15.6**, www.researchbriefings.files.parliament.uk/documents/CBP-8259/CBP-8259pdf.

The timing of the SAMLA 2018 is interesting as it also followed shortly after the '*Pandora Papers*' leak ((and see **10.3**).

THE FINANCIAL SERVICES ACT 2021 – POST-BREXIT MEASURES

2.8 On 29 April 2021, the Financial Services Act 2021 ('FSA 2021') received Royal Assent. It is seen as the UK's first step in control of the financial

services regulatory framework post-Brexit, and ensuring that the UK remains an 'open and dynamic financial centre' while delivering on the British Government's vision for a more open, technologically advanced and greener industry.

While the majority of the Act seeks to shape the regulatory framework for UK financial services outside of the EU, the legislation also contains a range of non-Brexit connected measures.

The FSA 2021 has changed the UK ML regime in various ways:

- **Money laundering offences** – the PoCA 2002 amendments bring payment and e-money institutions within the threshold amount provisions. Where the value of criminal property falls below the threshold amount, a payment or e-money institution will be able to do certain specified acts in relation to that property when operating an account maintained by it, without committing an offence;
- **Forfeiture of money** – the PoCA 2002 (and the **Prevention of Terrorism Act 2005**) amendments extend the scope of account freezing and forfeiture powers, to include accounts held at payment and e-money institutions (note that the CFA 2017, s 16 created parallel 'Account Freezing Orders'; and 'Account Forfeiture Orders'); and
- **Overseas trustees** – the SAMLA 2018 (which established the framework for implementing post-Brexit sanctions and AML policy) amendments will ensure the continued ability of the UK Government to enforce and continue to make changes to Regulations with *extra-territorial application to overseas trustees of trusts with links to the UK*.

THE GLOBAL ANTI-CORRUPTION SANCTIONS REGULATIONS 2021, SI 2021/488 ('THE REGULATIONS')[1]

2.9 These Regulations (made under the SAMLA Act 2018) combine with the UK Global Human Rights regime introduced in July 2020. The sanctions are designed to capture individuals or entities profiting from bribery and misappropriation of state funds from any country outside the UK, as well as colluding with terrorists and drug trafficking.

Individuals and entities designated under the regime are included on the consolidated UK sanctions list. They are prevented from entering the UK, opening UK bank accounts, or doing business with UK businesses. Any assets that they already hold in the UK are also frozen. Those designated under the Regulations have the right to request that a minister reviews the decision and can also apply to challenge their designation in the UK courts.

The restrictions have initially targeted 22 individuals, including 14 individuals involved in in the diversion of $230 million of Russian state property through a fraudulent tax refund scheme uncovered by Sergei Magnitsky in 2009.

1 And see **20.14**.

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The Regulations are an indication of the UK's tougher stance regarding sanctions. This is the second set of autonomous UK sanctions that have been introduced post-Brexit and following the entry into force of the global human rights sanctions regime in July 2020.

The sanctions regime also give the UK authorities an additional tool in their arsenal, which, along with the PoCA 2002 (see **2.4**) and the Bribery Act 2010 (see **20.03**) can be used to combat extraterritorial corruption.

THE ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT) ACT 2022 (THE 'ECTEA 2022')

2.10 This recent new law (Assented to on 15 March 2022) introduced a number of requirements, most notably for practitioners the need for offshore entities owning UK real estate to register their details at Companies House by 31 January 2023; and also relaxed liability for breaches of confidentiality – see **Appendix 4.1**.

'Overseas Entity' refers to any legal vehicle that is governed by the law of a country or territory outside the UK.

The stated policy reasons for this omnibus piece of legislation are based on the UK's very openness and attractiveness for global business, which (it is argued) also 'exposes the UK to the risk of bad actors taking advantage, including to perpetrate fraud and ML, which, in turn funds serious and organised crime in the UK, and facilitates corruption overseas.' In terms of timing, Russia's invasion of Ukraine triggered the need for the UK to crack down on dirty Russian money.

The ECTEA 2022 (see **Appendix 2**) has:

- created a Register of Overseas Entities, to help crack down on foreign criminals using UK property to launder money; and
- reformed and strengthened the UK's UWO regime (see **5.7**) to improve law enforcement investigations;

and seeks to achieve this through:

- reforms to Companies House;
- reforms to prevent the abuse of limited partnerships;
- creating additional powers to seize and recover suspected criminal crypto assets (and see **18.8**);
- reforms to give businesses the ability to share information in order to tackle ML and other economic crime; and
- granting law enforcement new intelligence gathering powers, and removing specific procedural or legal burdens on business.

The Companies House reform increases transparency over UK companies (and other legal entities) by introducing identity verification for all new or existing company directors, PSCs, and even those delivering documents to the Registrar: information held on the ROE has to be updated annually. The Registrar's powers are broadened so the Registrar becomes more active as a 'gatekeeper' over the incorporation process. Financial information on the Register is to become more accurate (using digital technology). And Companies House now has effective investigation and enforcement powers. Also all personal information provided to Companies House will be better protected against fraudulent access or use.

The Limited Partnership reforms tackle their notorious misuse (including by Scottish LPs), and tighten registration requirements (also requiring a proper 'UK connection').

Crypto assets also fall within the ECTEA 2022 through the additional powers granted to law enforcement to seize and recover crypto assets which are the proceeds of crime or associated with illicit activity (such as ML, fraud or ransomware attacks): amendments to the criminal confiscation powers in Parts 2, 3 and 4 of the PoCA 2002 and the civil recovery powers in Part 5 of the PoCA 2002 grant these enhanced powers).

Procedural issues relating to AML have also been refocussed, enabling professionals or businesses to share information on suspected ML, fraud and other economic crimes (for the purposes of their prevention, investigation or detection) by very helpfully disapplying civil liability for breaches of confidentiality where information is shared to combat economic crime (and see **14.6**). Also the NCA's FIU now has the ability to obtain information relating to ML/TF from professionals or businesses by simply removing the requirement for a SAR to have been submitted *before* an Information Order ('IO') can be made.

The ECTEA 2022 also focusses the private sector on high value activity, reducing the reporting burden on professionals and businesses, and enabling law enforcement to prioritise resources by expanding the types of case where professionals and businesses can continue to deal with clients' property without first having to submit a DAML SAR (and see **13.5**).

The UK Government has published a useful reference source 'Factsheet: Economic Crime in the UK' (updated 08 November 2022) – see www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/fact-sheet-economic-crime-in-the-uk**, Appendix 2.7**.

Following the expiry of the 31 January registration deadline, HMRC have issued a document entitled "*Why the Register of Overseas Entities is important for Tax*", advising increased penalties and inviting notifications of intended disclosures within the impossibly short deadline of 28 February 2023

THE REGISTER OF OVERSEAS ENTITIES (DELIVERY, PROTECTION AND TRUST SERVICES) REGULATIONS 2022, SI 2022/870 ('THE ROE REGS')

2.11 These Regulations were issued under the ECTEA 2022, and contain detailed rules for the ROE:

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Regulation 5 sets out the circumstances where the Registrar must make information relating to a relevant individual *unavailable* for public inspection.

And Part 4 (reg 14) describes a legal entity subject to its own disclosure requirements:

> '14.—(1) A legal entity is specified for the purposes of paragraph 7(1)(f) of Schedule 2 (registrable beneficial owners) to the ECTEA as "subject to its own disclosure requirements", if—
>
> (a) it is a legal entity governed by the law of a country or territory outside the United Kingdom;
>
> (b) it provides trust services; and
>
> (c) the provision of trust services is regulated in that country or territory by a supervisory authority.
>
> (2) In this regulation "trust services" means acting as a trustee of a trust or similar legal arrangement.'

so that regulated offshore trust company trustees must henceforth also take reasonable steps to report their trust beneficiaries to the Registrar.

THE EU INITIATIVES

2.12 The EU Money Laundering Directives ('MLD') and the Directives on Administrative Cooperation ('DAC') are discussed in **Chapter 9**, along with the impact of Brexit.

CHAPTER 3

The UK AML/CFT framework – the principal UK ML offences

INTRODUCTION AND BACKGROUND

3.1 The principal statute is the Proceeds of Crime Act 2002 ('PoCA 2002') which received Royal Assent on 24 July 2003 (see **Appendix 2** for its key sections 327–330). The PoCA 2002 replaced the anti-money laundering provisions of the Criminal Justice Act 1988, the Criminal Justice Act 1993 and the Drug Trafficking Act 1994, and has itself been amended by the Criminal Finances Act 2017.

The PoCA 2002 introduced a requirement for mandatory reporting on an 'all crimes' basis. The PoCA 2002 restates the money laundering offences, and has replaced the parallel drug- and nondrug-crime money laundering (ML) offences with single offences that do not distinguish between the proceeds of drug trafficking and other crime.

As noted in **2.5**, the Serious Organised Crime and Police Act 2005 ('SOCPA 2005') amended the PoCA 2002 with effect from 1 January 2006 and created and added a further offence of 'Failure to Report on the Required Form' (and see **13.4**).

Also the Money Laundering Regulations 2007 ('MLR 2007') were replaced by the Money Laundering Regulations 2017 ('MLR 2017') which themselves incorporated much of MLD4 into UK domestic law (and see **9.10** and **Appendix 6.1**).

THE PRINCIPAL OFFENCES

3.2 The PoCA 2002 contains three principal offences, as follows:

(1) concealing, etc (PoCA 2002, s 327);

(2) assisting with arrangements, etc (PoCA 2002, s 328); and

(3) acquisition, use or possession, etc (PoCA 2002, s 329).

- *Concealing, etc*: the offence is committed where a person conceals, disguises, converts, transfers or removes 'criminal property' from the jurisdiction (PoCA 2002, s 327).
- *Assisting with arrangements, etc*: the offence is committed where a person enters into or becomes concerned in an arrangement which facilitates another person to acquire, retain, use or control 'criminal

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property' and the person concerned also 'knows' or 'suspects' that the property constitutes or represents benefit from 'criminal conduct' (PoCA 2002, s 328).

- *Acquisition, use or possession, etc*: the offence is committed where a person 'knows' or 'suspects' that the property which he acquires, uses or has possession of constitutes or represents his own or another's benefit from 'criminal conduct' (PoCA 2002, s 329).

THE FOUR ELEMENTS

3.3 There are four elements of the main ML offences:

- criminal (unlawful) conduct; leading to
- criminal property; with
- some act in relation to the 'criminal property'; and coupled with
- knowledge or suspicion.

There must be criminal conduct (known as the 'predicate offence', and see **3.4**) which results in 'criminal property' (defined as property which the alleged offender 'knows' or 'suspects' constitutes or represents benefit from such 'criminal conduct') (see **7.5** on the technical issues relating to the concept of 'knowledge' or 'suspicion'). And note that there will often be cases where an AML/CFT offence will automatically arise in consequence of conviction of a predicate offence – even though (as noted in **7.2**) a conviction for the predicate offence is not required to support an AML/CFT prosecution. Examples include the famous 'Society Madam' Heidi Fleiss (who spent 21 months in prison for conspiracy and tax evasion); or Benazir Bhutto who received a six-month suspended prison sentence in Switzerland for laundering USD 11 million through Swiss accounts: it is noteworthy that neither led to an AML/CFT prosecution.

There must also be some act in relation to the 'criminal property' (the *actus reus*) such as concealing, assisting with arrangements, or acquisition/use/possession (see **3.2**). Knowledge or suspicion is also required (the *mens rea*) (see **7.5**). Also refer to the principles stated by Lord Scarman in *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1984] 2 All ER 503 on the presumption of *mens rea* and strict liability.

PREDICATE OFFENCES

3.4 The range of predicate offences is extremely wide. It includes (but without limitation) the following:

- robbery;
- theft;
- illicit trafficking in stolen and other goods;

- piracy;
- forgery;
- counterfeiting and piracy of products;
- smuggling;
- extortion;
- kidnapping;
- illegal restraint and hostage taking;
- sexual exploitation, including CSE;
- trafficking in human beings and migrant smuggling;
- murder, grievous bodily injury;
- corruption and bribery;
- fraud and tax evasion;
- environmental crime;
- insider trading and market manipulation;
- illicit trafficking in narcotic drugs and psychotropic substances;
- participation in an organised criminal group and racketeering;
- illicit arms trafficking;
- terrorism, including terrorist financing;

And no doubt others!

PENALTIES

3.5 The maximum penalty for each of the above offences is 14 years' imprisonment and an unlimited fine for conviction on indictment. Summary conviction carries the lesser penalties of six months' imprisonment and a fine not exceeding the statutory maximum.

DEFENCES

3.6 It is a defence to each of these PoCA 2002 offences for the person in question to have reported his/her knowledge or suspicion to a constable, or if the law enforcement agency has given permission (a consent) for the transaction to proceed (see **13.5**). The Author refers to this as the statutory 'Get-Out-Of-Jail Free' Card (rather like the one in 'Monopoly')

In fact, internal suspicious activity reports ('SAR') (previously known as suspicious transaction reports or 'STRs') are made to the money laundering

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