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Combating Money Laundering through Criminal Law: How Do We Measure Success and Failure?

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I. Introduction

It is far from self-evident (proponents of a pure theory of retributive punishment, for example, would probably not agree), but in my view desirable, that rational criminal policy is evidence-based. Thus, new measures should only be implemented if there is data indicating that the benefits of the measures will exceed the harm they cause. According to the same principle, existing measures must regularly be reviewed to ascertain whether they achieve their purpose at a proportional cost.

Looking at the efforts of many jurisdictions in the fight against money laundering, it is unfortunately often doubtful whether these fundamental requirements for rational governmental action are being met,[1] even though an evidence-based approach would be particularly important in this field of law, which generates significant costs and often intrusively interferes with the human rights of citizens.

One reason for the hypertrophic and irrational tendencies of AML policy, in my opinion, lies in the fact that no viable parameters have yet been developed to assess the success or failure of an AML instrument, not to mention calculating its costs. On the contrary: It is often observed that AML policy relies on statistical values that encourage even more irrational measures. An example for this is the number of annual suspicious transaction reports (STR), which for some years was considered one of the key figures for evaluating the quality of AML structures in Germany. Some of these measures seem sensible, such as raising awareness of the obligations of those subject to money laundering legislation. For other measures, doubts may be raised. For example was the criminal offense of money laundering in Germany expanded greatly through a so-called "all-crimes"

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1 C. f. *Jahn/Helferich*, Diritto Penale Contemporaneo 2023, p. 213, 221-222.

approach and does now includes even minor offenses (e. g., transferring a $5 profit from an illegal online poker game to the player's bank account or gifting a stolen apple to a friend).[2] Although the resulting (very considerable) increase in the number of reports of STRs was not the declared aim of this reform of the criminal offense of money laundering, it was a welcome side effect. Moreover, a court ruling, which garnered much attention and whose significance has also been emphasized by the responsible financial supervisory authority *BaFin*, obligated entities under money laundering law to submit STRs very quickly and without their own detailed examination of the facts.[3] As a result of these and other developments, the German FIU (Financial Intelligence Unit), responsible for processing these reports, has in the last years been flooded with reports and could no longer process them adequately.[4] A failure that has also arisen from orienting AML policy towards the wrong statistical parameter.

Against the backdrop of the danger posed by statistical parameters which are "false friends", this paper addresses the question of how AML activities can be numerically captured in such a way that they provide a better data basis for criminal policy. I will limit my focus to the area of anti-money laundering through criminal and asset forfeiture law. Under section II., I will first outline the guidelines set by the Financial Action Task Force (FATF) for data collection in this field, and how these guidelines are typically implemented by FATF jurisdictions. Then, I will subject this common approach to criticism (section III.) and make a suggestion for improvement (section IV.).

II. FATF Recommendations on Statistics in the Field of Combating Money Laundering through Criminal Law and Confiscation Law and their Implementation by FATF Jurisdictions

Recommendation No. 33 of the 40 FATF Recommendations advises FATF jurisdictions to maintain comprehensive statistics on matters pertinent to the effectiveness and efficiency of their AML/CFT systems, including statistics

- on the STRs received and disseminated,

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2 Federal Law of March 9th, 2021, Federal Law Gazette I, pp. 327 seq.

3 Higher Regional Court of Frankfurt a. M., Decision of April 10th, 2018, File Number 2 Ss OWi 1059/17.

4 C f. FATF Mutual Evaluation Report on Germany from August 2022 (accessible via https://t1p.de/l9d77), pp. 59 seq.

− on money laundering and terrorist financing investigations, prosecutions, and convictions,

− on property frozen, seized, and confiscated as well as

− on mutual legal assistance or other international requests for cooperation.

It is, however, not specified by Recommendation No. 33, under which conditions such statistics can be considered "comprehensive". Unlike many other FATF recommendations, there exists also no Interpretative Note for Recommendation No. 33, which would provide FATF jurisdictions with a methodological framework for their statistical work.

It is therefore not surprising that the way FATF member states implement Recommendation No. 33 varies and the FATF Mutual Evalution Reports emphasize very different aspects regarding Recommendation No. 33. Particularly in the realm of combating ML/FT through criminal law, it can be observed that many states simply "count" the number of investigations conducted and, if applicable, the criminal convictions for specific offenses (such as for the crime of money laundering), often including the amount of the penalty imposed.[5] This strategy is reinforced by some FATF Mutual Evaluation Reports, which measure the success of criminal anti-money laundering by the number of money laundering convictions achieved and the ratio of the number of money laundering convictions to the total number of criminal convictions in a jurisdiction.[6] Some jurisdictions also record whether criminal proceedings have been initiated on the basis of an STR.[7] Sanctions imposed on legal entities are also sometimes recorded separately, which is given considerable importance in some Mutual Evaluation Reports.[8] All of these figures (be it in FATF Mutual Evaluation Reports or in National Risk Analysis Reports) are often supplemented by anecdotal descriptions of spectacular individual cases or by qualitative interviews with experts in which the experts share their experiences with the respective investigative tools and the legal framework.

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5 For examples see Mutual Evaluation Report for Italy from February 2016 (accessible via https://t1p.de/qp3cx), pp. 54 seq. or for the USA from December 2016 (accessible via https://t1p.de/2a0w2) pp. 241 seq.

6 *Pars pro toto* see MER Italy (Fn. 5), p. 56.

7 MER Italy (Fn. 5), p. 56.

8 MER Italy (Fn. 5), p. 57.

III. Critique of the Conventional Approach to Compiling Statistics in the Fight Against Money Laundering Using Criminal Law and Asset Forfeiture

In my assessment, the methods described above do not yield reliable insights into the effectiveness and efficiency of the criminal law response to ML/FT. The first weakness lies in an overly strong focus on the criminal offense of money laundering. FATF Recommendation No. 3 does set certain minimum requirements for structuring this offense,[9] based on two UN Conventions.[10] However, FATF jurisdictions have the freedom to expand the definition of the criminal offense beyond these guidelines and to even shape money laundering as a catch-all offense. This results in situations being classified under the money laundering statute that may be irrelevant for the precise adjustment of the AML structure.

Worse than capturing undesirable cases, a too strict statistical focus on the criminal offense of money laundering risks overlooking numerous relevant case scenarios. Just because the police and the public prosecutor's office are not formally investigating a particular case based on the respective money laundering offense does not mean that money laundering as a criminological phenomenon is not playing a role in the case. Perhaps the investigators simply do not include the money laundering provision in the investigation file simply because they formally dedicated the file to the investigation of the predicate money laundering offense or another crime that carries a heavier penalty than the money laundering offense. In many jurisdictions, the criminal offense of money laundering is generally applied only subsidiarily, when no other criminal provision with a heavier penalty applies. If successful money laundering investigations lead to the conviction of the perpetrators of the predicate offense (such as fraud or drug trafficking), the money laundering charge may therefore not be used at all.[11] Instead, defendants who

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9 *„Sanctions imposed on legal entities are Countries should criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. also sometimes recorded separately, which is given considerable importance in the Mutual Evaluation Reports of the FATF."*

10 C. f. Art. 3 lit b) (i), (ii), lit. c) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (signed on 20 December 1988 in Vienna) and Art. 6 of the United Nations Convention against Transnational Organized Crime (signed on 15 November 2000 in Palermo).

11 This problem is adressed – for example – in the MER German (Fn. 4), p. 301: *"The statistics on prosecutions do not include all ML proceedings; they only record the main focus (Schwerpunkt) of the case. Since 2017, Germany collects supplementary data on ML-related court decisions […] but these do not cover earlier stages of the process."*

have supported the predicate offense through typical money laundering activities may be convicted of aiding and abetting regarding the predicate offense. In my view, such cases must be statistically recorded, because it is a significant success if a money laundering investigation leads to uncovering the predicate offense.

For evaluating the effectiveness and efficiency of a criminal law AML/CFT system, it would also be interesting if one could ascertain in how many cases an investigation, which from a criminological viewpoint can be classified as a money laundering case, resulted in neither a criminal conviction for money laundering nor for another offense but facilitated asset forfeiture (e. g. by non-conviction-based confiscation). Because even such an outcome of the proceedings could – from an AML/CFT perspective – be considered a partial success.

And even when dealing with genuinely "failed" procedures, a criminal justice statistic oriented towards the formal assignment of cases to specific legal provisions is not helpful for analytical purposes. Whether a case did not lead to a conviction or to asset forfeiture due to structural deficiencies (e. g., ineffective mutual legal assistance, lack of staff) or due to coincidences (such as an initial suspicion of money laundering ultimately proving to be unfounded) cannot be statistically represented in this manner.

IV. Proposal for the Implementation of a Case Tracker Statistics System in the Area of AML via Criminal Law and Asset Forfeiture

To address the shortcomings in the statistical recording of criminal AML measures, from my perspective, it seems advisable to create a case-tracking statistic that identifies potential cases from a criminological viewpoint early on and then follows the entire progression of the procedure and its respective outcome. The establishment of such a case-tracking-based statistic will be described in three steps:

- First, a criminologically sound, yet practically manageable (i.e., suitable for a checkbox test) definition of a money laundering-relevant case needs to be determined to mark statistically relevant investigations.

- Secondly, it is necessary to define which developmental stages of the money laundering investigation process should be statistically recorded, beyond the question of conviction/acquittal for the offense of money laundering.

– Thirdly, the reasons for the discontinuation of an investigation must be documented in greater detail than is typically the case.

1. Step 1: Selection of Cases Relevant for an AML Statistics in the Field of Criminal Law and Asset Forfeiture

As already mentioned, it is not very useful to rely solely on the formal criteria of the money laundering offense for selecting cases for an AML statistic. Instead, the focus should be on *criminological circumstances* that distinguish money laundering from other forms of criminality and make it particularly challenging to prevent and to prosecute. The criminological circumstances that are relevant will vary in each jurisdiction and depend on the risks and potential vulnerabilities identified in the National Risk Analysis. Typically, however, it will involve the following criteria, only one of which needs to be relevant for an investigation to qualify as a money laundering case:

– cash or goods of substantial value are found, under circumstances that raise the suspicion that the assets could originate from unknown criminal offenses

– persons subject to anti-money laundering obligations have seriously violated their prevention obligations and there are indications that this has made it possible or at least easier to transfer illegal proceeds of crime

– individuals outside the legal financial sector offer services to handle assets and there are indications that these assets might stem from unknown criminal activities ("ML as a service")

– delivery of goods or provision of services is pretended to suggest a legal origin of assets

– suspicious use of legal arrangements, straw men, virtual assets, or unusual cross-border transfer of assets makes it challenging to determine the origin of an asset and identify who controls it

Of course, the selection criteria could be described in more detail. However, it seems imprudent to choose more than four or five criteria, as it becomes increasingly unlikely that a case worker at the investigating authority will take the time to check whether one or more of the criteria apply during case processing.

Theoretically, it is also conceivable to assign individual cases to the criteria without the help of the responsible case worker. Researchers could do this themselves after the conclusion of each case, if the respective case file is provided to them for research purposes. However, this form of retroactive file analysis is extremely labor-intensive and costly, as demonstrated e. g. by a study conducted by *Bussmann et. al.*[12] It is preferable to tag and continuously record the cases during their initial processing.

2. Step 2: Definition of Analytically Relevant Outcomes of Money Laundering Investigation Procedures

In a second step, it is essential to determine the outcomes of the AML investigations that should be statistically recorded. Naturally, this varies depending on the specific jurisdiction but typically, the following outcomes will need to be statistically recorded:

- dismissal of the case or acquittal
- conviction (or similar outcome, e. g. a Deferred Prosecution Agreement) for a money laundering offense
- conviction (or similar outcome, e. g. a Deferred Prosecution Agreement) for a predicate money laundering offense
- conviction (or similar outcome, e. g. a Deferred Prosecution Agreement) for another financial offense (for example violation of AML Due Diligence Obligations)
- asset forfeiture decision
- or permanent measures with a preventive nature (e. g., freezing of assets)

This approach allows for a better assessment of whether various instruments for combating financial crime are working together effectively, compared to simply focusing on the parameter of conviction / acquittal for the offense of money laundering.

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12 National Risk Analysis on Combating Money Laundering and Terrorist Financing - Preliminary Investigations and Criminal Proceedings against Money Laundering in Germany from 2014-16, accessible via https://t1p.de/82a9v.

3. Step 3: Typologization and Documentation of Reasons for the Discontinuation of Proceedings

Thirdly, considering procedures that did not lead to a conviction or to asset forfeiture, a typology of reasons for the discontinuation of AML investigations needs to be created. This typology should identify those reasons for discontinuation, which are both essential for evaluating the AML system's effectiveness and efficiency, while also being practically manageable (ideally, law enforcement agencies should be able to complete the data recording effortlessly "on the side" by simply ticking a few checkboxes in the file).

The reasons for the discontinuation of a procedure that need to be statistically recorded depend on the National Risk Assessment of the respective jurisdiction. However, typical reasons could include:

- original suspicion proved to be false,
- accused provided an explanation for the origin of suspicious assets that could not be conclusively disproven,
- STR (or comparable information triggering an investigation) reached the investigative authorities only after the paper trail had already been obscured,
- quality of STR (or comparable information triggering an investigation) not sufficient to derive further investigative measures,
- issues with mutual legal assistance / lack of information from abroad,
- problems in inter-agency communication,
- staff shortage, or
- overloaded judiciary.

Such granular recording of the reasons for the discontinuation of a criminal or asset forfeiture money laundering investigation can expose weaknesses in anti-money laundering (AML) defenses much more effectively than conventional statistics.

V. Summary

In this paper I have argued that the conventional method of measuring AML activities in the field of criminal law and asset forfeiture by the number of convictions for the offense of money laundering or the volume of confiscated assets does not provide meaningful data for AML policy. Instead of a formal orientation on the legal definition of money laundering, cases should be identified based on criminological criteria that reflect the typical challenges for law enforcement associated with combating money laundering. If cases are marked in this way, the statistics should track their further progress. Besides the conviction for the offense of money laundering as one possible outcome of the process, other outcomes relevant for evaluating the AML structure should be considered as data points (e.g., whether a conviction for the predicate offense of money laundering or seizure of suspicious assets was achieved). Additionally, causes for the discontinuation of a procedure should be defined and recorded to the extent that they can provide insight into the quality of the criminal branch of AML. The implementation of a case-progression statistic like this allows a more precise observation whether the various instruments used to combat money laundering interact effectively and where the system's weaknesses are located.