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Botswana's Anti-Money Laundering and Combating the Financing of Terrorism Regime

By

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Declaration

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Summary

Money laundering, the financing of terrorism and proliferation financing continue to be serious threats to the stability of the international financial system. The international community therefore has prioritised the fight against these activities. For example, international bodies such as the Financial Action Task Force (FATF) and others have developed standards and recommendations against which countries and organisations are measured in this regard.

Against this background, this thesis investigates to what extent Botswana's legislative framework regarding money laundering, terrorism financing and other illicit financial flows complies with international standards, especially the FATF Recommendations. The study sets the scene by defining and describing money laundering, financing of terrorism and proliferation financing, after which the current statutory framework in Botswana is discussed in detail.

After subsequently setting out the various global and regional (specifically African) initiatives in the fight against money laundering and other financial crimes, the current state of affairs in Botswana is benchmarked against both the South African framework as well as the FATF Recommendations. The investigation is limited to a technical assessment (doctrinal analysis) of Botswana law to determine the current compliance (or lack thereof) of the country's statutory provisions and to make recommendations regarding how the framework can be improved.

It is difficult for some countries, especially African countries like Botswana, to comply fully with the FATF Recommendations, since compliance can be expensive and dependent on high levels of expertise on the part of the relevant authorities. Therefore, such more vulnerable countries tend to face a higher risk of being used as conduits for money laundering and related activities. Despite these and other challenges, Botswana has gone to great lengths to re-assess and improve its anti-money laundering and combating the financing of terrorism (AML/CFT) legislation with a view to move towards full compliance with the FATF Recommendations. Nevertheless, the evaluation indicates that there are some remaining shortcomings in Botswana's legislation.

Consequently, the thesis concludes by proffering certain recommendations towards ensuring that Botswana's AML/CFT legislation is rendered fully compliant with the FATF Recommendations.

Dedication

This thesis is dedicated to my daughters Sarona and Sebaga.

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This study would not be a success without the contribution of many. I am so grateful to the most High God for carrying me through this journey. My sincerest gratitude to my primary supervisor Prof. Reghard Brits for his painstaking supervision throughout the study. He has been an ideal mentor offering unparalleled support, guidance, encouragement, inspiration, knowledge and read my numerous revisions. I am grateful to my secondary supervisor Prof. Corlia Van Heerden for her invaluable support, guidance and skillful supervision. I would also like to thank her for facilitating a scholarship which enabled me to complete this work. I am immensely grateful for the two of you for taking me on as a student and for your faith and confidence in my abilities and capabilities.

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I thank my parents for instilling in me the discipline of dedication and perseverance which carried me through the program. A special thank you to my siblings for always offering support, motivation and love. My accomplishments are attributed to their faith and confidence in me. I thank all my friends who cheered me on and in particular my accountability partners who kept checking on me and ensured that I met my set targets. I thank them for the unequivocal support and the vote of confidence.

Delight yourself in the LORD, and He will give you the desires of your heart

– Psalm 37:4

Table of content

List of acronyms

AfCFTA	Continental Free Trade Area Agreement
AfDB	African Development Bank
AML/CFT	Anti-Money Laundering / Combating the Financing of Terrorism
ARINISA	Asset Recovery Inter-network for Southern Africa
AU	African Union
AUPSC	African Union Peace and Security Council
BCBS	Basel Committee on Banking Supervision
BNIs	Bearer Negotiable Instruments
BPOPF	Botswana Public Officers Pension Fund
CDD	Customer/Client Due Diligence
CECA	Corruption and Economic Crime Act
CEDA	Customs and Excise Duty Act
CPA	Criminal Procedure Act
CTAFA	Counter-Terrorism Analysis and Fusion Agency
DCEC	Directorate on Corruption and Economic Crime
DDT Act	Drugs and Drug Trafficking Act
DIS	Directorate of Intelligence and Security
DNFBPs	Designated Non-Financial Business and Professions
DPP	Director of Public Prosecutions
ECOWAS	Economic Community of West African States
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
FI Act	Financial Intelligence Act
FIA	Financial Intelligence Agency
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act
FICAA	Financial Intelligence Centre Amendment Act
FIUs	Financial Intelligence Units
FSCA	Financial Sector Conduct Authority
FSRA	Financial Sector Regulation Act
FSRBs	FATF-Style Regional Bodies

GIABA	Inter-Governmental Action Group against Money Laundering in West Africa
IAIS	International Association of Insurance Supervisors
IFF	Illicit Financial Flows
INCSR	International Narcotics Control Strategy Report
IOSCO	International Organisation of Securities Commissioners
IVTS	Informal Value Transfer Systems
KYC	Know Your Customer
LSB	Law Society of Botswana
MACMA	Mutual Assistance in Criminal Matters Act
ML	Money Laundering
MLAC	Money Laundering Advisory Council
MSB	Money Services Businesses
MVTS	Money or value transfer services
NBFIRA	Non-Bank Financial Institutions Regulatory Authority
NCCFI	National Coordinating Committee on Financial Intelligence
NCTC	National Counter-Terrorism Committee
NCA	National Credit Act 34 of 2005
NCC	National Consumer Commission
NCR	National Credit Regulator
NPA	National Prosecuting Authority
NPOs	Non-Profit Organisations
NPT	Nuclear Non-Proliferation Treaty
NRA	National Risk Assessment
PA	Prudential Authority
PCA	Proceeds of Crime Act
PEPs	Politically Exposed Persons
PICA	Proceeds and Instruments of Crime Act
POCA	Prevention of Organised Crime Act
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act
POSCA	Proceeds of Serious Crime Act
PRECCA	Prevention and Combating of Corrupt Activities Act
PSC	Peace and Security Council

RBA	Risk-Based Approach
SADC	Southern African Development Community
SARB	South African Reserve Bank
STRs	Suspicious Bank Transactions Reports
TBML	Trade-Based Money Laundering
UN	United Nations
UNSC	United Nations Security Council

Chapter 1
Introduction and background to the study

1.1 Introduction

Money laundering has been identified as one of the most prevalent financial crimes internationally.[1] Therefore, many governments throughout the world have agreed to fight this crime as well as the organised crimes, terrorism and proliferation financing often associated with this practice.[2] Botswana is no exception and as a result, the overall purpose of this thesis is to analyse the legal regime in Botswana pertaining to money laundering, the financing of terrorism and proliferation financing. More specifically, the position in Botswana will be benchmarked against global best practice and compared to the legal regime in South Africa, with the ultimate aim to make recommendations for the improvement of Botswana law in this regard.

There is a plethora of definitions for money laundering, but a common denominator to all these definitions seems to be that 'dirty money' is 'cleaned' to conceal not only the illegal source and its true identity but also its destination.[3] Money laundering has been categorised as an organised crime because significant criminal activity is undertaken by organised groups and money laundering is the process of disguising the illegal origins of criminal property. It is often calculated, business like and transactional in nature, is perpetrated by various criminals and sometimes involves multiple different jurisdictions.[4]

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[1] FATF website. https://www.fatf-gafi.org/faq/moneylaundering/ (accessed 20 June 2018); Hitesh Patel and Bharat S. Thakkar, 'Money Laundering Among Globalized World,' (2012) Open access peer-reviewed chapter 1.

[2] FATF 'Financial Action Task Force – 30 years' (2019) 10. www.fatf-gafi.org/publications/fatfgeneraldocuments/FATF-30.html (accessed 23 December 2020). See also 'Money laundering Our obligation to comply with the Financial Intelligence Centre Act' Standard Bank.

[3] Jackson Madzima 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies* 1. www.issafrica.org (accessed 30 June 2018).

[4] FATF website (on definition of Money Laundering); Jackson Madzima 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies 1*; Endre Nyitrai 'Money Laundering and Organised Crime' (2015) *Journal of Eastern European Criminal Law* 2.

It is widely accepted that the money laundering process is a three-tier process.[5] The first stage is known as placement. This is the point of entry or when the illicit proceeds are introduced into the financial system.[6] The second stage is called layering, which entails a process whereby attempts are made to distance the proceeds from the criminal activities as far as possible.[7] This basically means to separate the 'dirty money' from its original source.[8] The last stage is known as integration, which entails a re-introduction of the funds into the legitimate economy.[9]

It has been emphasised that the three stages summarised above are not mutually exclusive, as often the illicit funds may be re-introduced directly into the legitimate economy without initially undertaking the layering and/or placement processes.[10] In fact, Charles Godema explains it thus:

> 'The stages are not cumulative elements of money laundering, in the sense that they should all exist before the offence may be deemed to have been committed. The commission of any one of them could constitute money laundering.'[11]

Money laundering is usually discussed along with the financing of terrorism and, more recently, proliferation financing. The latter category is sometimes not specifically mentioned and/or is included in the broader category of terrorism financing. Terrorism financing and money laundering are similar in many respects. However, there are notable differences between these two notions.[12] These are covered in the next chapter.

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[5] Jonathan E. Turner *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud* (2011) 6.
[6] Directorate on Corruption and Economic Crime (DCEC) Botswana website. http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/Money-Laundering/What-is-Money-Laundering/ (accessed 17 June 2018); J.P Straub 'The Prevention of E-Money Laundering: Tracking the Elusive Audit Trail' (2001-2002) *Suffolk Transnational Law Review* 25.
[7] Jackson Madzima 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies 2.*
[8] J.P Straub 'The Prevention of E-Money Laundering: Tracking the Elusive Audit Trail' (2001-2002) *Suffolk Transnational Law Review* 25.
[9] Jackson Madzima 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies 2.*
[10] Charles Goredema 'Money Laundering in East and Southern Africa: An overview of the threat' (2003) *Institute for Security Studies* 2.
[11] Charles Goredema 'Money Laundering in East and Southern Africa: An overview of the threat' (2003) Institute *for Security Studies* 2.
[12] Jackson Madzima 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies 2.*

Terrorism is widely understood as 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political or religious purposes'.[13] Terrorist activities include things like causing immense property damage, killing, harming a number or a segment of the population, and disrupting essential facilities and other essential services.[14] These criminal activities are usually meant to coerce governments to act in a particular way.[15]

Terrorism financing, in turn, is simply the financing of terrorist acts and emanates from two primary sources, namely, licit and illicit sources.[16] This therefore means that the financing of terrorism can emanate from both legitimate and illegitimate sources, such as (1) financial support from countries, business entities and individuals; and (2) obtaining funds from human and drug trafficking, theft and fraud activities.[17] Such funds are then channelled towards terrorist activities.

The United Nations intensified its mandate to combat terrorism and the financing of terrorism in 2001.[18] Furthermore, in October 2001, the Financial Action Task Force (FATF) also included the countering of terrorism financing in its publications and developed special recommendations aimed at deterring, detecting and disrupting the financing of terrorism.[19]

Regarding proliferation financing, the concept is related to both money laundering and, most importantly, the financing of terrorism. Proliferation financing gained more express recognition around 2004 and is premised on the United Nations Security Council Resolution 1540 of 2004. This Resolution requires all states to take deliberate action

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[13] United Nations Assembly General Resolution 54/110, 9 December 1999. www.un.org (accessed 29 June 2018); FATF Glossary.
[14] Duhaimes website '*Anti-Laundering Law in Canada'* http://www.antimoneylaunderinglaw.com/aml-law-in-canada/what-is-terrorist-financing (accessed 29 June 2018); FATF Glossary.
[15] Duhaimes website '*Anti-Laundering Law in Canada.'*
[16] FATF Glossary; Kevin D. Stringer 'Tackling Threat Finance: A Labor for Hercules or Sisyphus' (2011) 41 *Parameters* 101-109.
[17] Duhaimes website '*Anti-Laundering Law in Canada.'*
[18] United Nations Security Council Resolution (UNSCR) 1373 of 2001.
[19] FATF *'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' (2012-2020) www.fatf-gafi.org/recommendations.html (accessed 23 December 2020); see also* Duhaimes website '*Anti-Laundering Law in Canada.'*; see also *FATF 'Guidance for financial institutions in detecting terrorist financing'* http://www.fatf-gafi.org/documents/documents/guidanceforfinancialinstitutionsindetectingterroristfinancing.html (accessed 1 July 2018).

against the financing of weapons of war, either in whole or in part, especially where the financing of weapons is connected to the financing of terrorism and other similar ills.[20]

In addition, the FATF's Recommendation 7 requires that countries should urgently implement measures directed at the prevention of proliferation financing.[21] It further prohibits extending, either directly or indirectly, funds or property to any person or entity listed by the UN Security Council that intends to or promotes the proliferation of arms of war and its funding.[22] It is generally accepted that countries approach Recommendation 7 differently. Some countries have decided to criminalise proliferation financing as a standalone crime, while other countries subsume it under other offences such as the financing of terrorism.[23] However, it is important that each country should, together with all stakeholders, understand its proliferation financing risks to counter such risks effectively, which includes implementation of the targeted financial sanctions related to proliferation financing.[24]

Chapter 2 contains a more comprehensive discussion of the concepts of money laundering, financing of terrorism and proliferation financing. For the sake of brevity, this thesis mostly refers to money laundering and the financing of terrorism (ML/TF) or anti-money laundering and combating the financing of terrorism (AML/CFT). Unless otherwise indicated, or when a specific activity is discussed, it should be assumed that ML/TF is a collective term for all forms of financial crime, including proliferation financing.

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[20] FATF '*Combating Proliferation Financing: A Status Report on Policy Development and Consultation'*; FATF Report (February 2010) 5-6; UNSCR 1540 of 2004; UNSCR 1673 of 2006; UNSCR 1810 of 2008.
[21] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/ CFTCFT* Systems (2013) 42.
[22] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/ CFT* Systems (2013) 42.
[23] FATF '*Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction'* FATF Report (2018) 6.
[24] FATF '*Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction'* FATF Report (2018) 6-8; Recommendation 7 of the FATF 2012 FATF Recommendations.

1.2 Botswana's vulnerability to money laundering and financing of terrorism

For many decades, Botswana has been dubbed as the shining example of democracy in Africa mainly because of its legal system and the way it handles its natural resources, especially its diamonds. Botswana has even been referred to by some writers as the miracle of Africa and to cement this, in 2008 President Festus Mogae was the recipient of the Mo Ibrahim award for achievement in African leadership.[25] This, in turn, resulted in Botswana being referred to as the 'Switzerland of Africa'.[26] Botswana has also been rated highly for its governance and economic development and this was the major reason behind the attraction of foreign direct investment into the country.[27]

For a long time, there was even a popular belief that Botswana is not severely threatened by financial crimes such as money laundering and terrorist financing.[28] However, of late the country has become under more intense scrutiny and criticism in its governance, rule of law and the way it does business. Botswana has in fact scored low in the 2017 Mo Ibrahim findings, where it has enjoyed exaltation and praise in previous years.[29] It has also become apparent that combatting money laundering and terrorism financing is not only an issue of the first world but should also be a priority for a developing country such as Botswana, as it is often these least suspected countries that are targeted for laundering money. For example, it has been reported that over seventy million dollars were laundered through Botswana in one instance in a period of three months and that the perpetrators were not questioned or punished.[30]

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[25] Amelia Cook and Jeremy Sarkin 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development' *Transnational Law and Contemporary Problems Journal* 19:453 (2010) 454.
[26] John Teeling *'Mining and Travel-Teeling briefs BOD shareholders in Botswana; the Switzerland of Africa*' 13 June 2013. https://minetravel.co.bw/diamonds/2013/06/13/teeling-briefs-bod-shareholders-in-botswana-the-switzerland-of-africa/#.Whw1PxGsXIU (accessed 14 July 2018.
[27] UNDP website. https://www.bw.undp.org/content/botswana/en/home/democratic-governance-and-peacebuilding.html.
[28] Charles Goredema 'Tackling Money Laundering in East and Southern Africa' (2004) *International Security Studies* 24.
[29] 2017 Ibrahim Index of African Governance (IIAG); See also, 'Mo Ibrahim gives Khama' s Presidency the thumbs down' *Sunday Standard* 20 November 2017. https://www.sundaystandard.info/mo-ibrahim-gives-khamaocos-presidency-the-thumbs-down/.
[30] 'Botswana turns into giant dirty money Laundromat' *Sunday Standard* 28 Aug 2017.

Moreover, in 2014 research by Tax Justice revealed that a large number of Botswana's politically exposed persons had amassed so much wealth offshore that it could actually pay off the country's indebtedness several times over.[31] In addition, Botswana has been condemned for its outright refusal to provide statistics on suspicious bank transaction reports (STRs).[32]

Furthermore, the annual International Narcotics Control Strategy Report (INCSR) (2014) by the Department of State to the US Congress expressed the view that Botswana's inadequate infrastructure on money laundering and terrorism financing could make Botswana a risk hub.[33] The report further notes that the influx of second-hand car dealing businesses into Botswana along with other organised criminal activities in the country, pose money laundering and terrorism financing risks for the country.[34] Interestingly also, in January 2009 Botswana security agents reported that they had Al Qaeda terrorists in custody who were believed to have taken advantage of the surge in second hand car imports in the country.[35]

The Basel AML Index 2017 Report rated Botswana as 6.02 (with the highest score being 10).[36] The Basel AML Index is a composite index that factors in ML, TF, corruption and sanctions risk. Botswana's score should therefore technically rather be 'high risk environment for financial crime', based on several factors.[37] The results of this report show that Botswana's risk for money laundering and other related crimes is too high, which can have negative implications for the ambition to lure foreign direct investment to the country.

This rating puts Botswana on the 74th spot out of 146 countries.[38] The Basel AML Index also assesses the extent of money laundering and financing of terrorism of

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[31] 'Botswana–US clash over money laundering' *Sunday Standard* 28 July 2014. http://www.sundaystandard.info/botswana-%E2%80%93-us-clash-over-money-laundering (Accessed 2 July 2018).
[32] Botswana–US clash over money laundering' *Sunday Standard* 28 July 2014.
[33] Bureau of International Narcotics and Law Enforcement Affairs '*Countries/Jurisdictions of Primary Concern – Botswana*' (2014) International Narcotics Control Strategy Report (INCSR).
[34] Bureau of International Narcotics and Law Enforcement Affairs '*Countries/Jurisdictions of Primary Concern – Botswana*' (2014) International Narcotics Control Strategy Report (INCSR).
[35] R Pitse 'Al Qaeda setting upsleeper cell in Botswana-claim' *Sunday Standard* 2 February 2009.
[36] Institute on Governance, *Basel AML Index Report* (2017) 3.
[37] Institute on Governance, *Basel AML Index Report* (2017) 3.
[38] Institute on Governance, *Basel AML Index Report* (2017) 3.

countries in light of the present public sources.[39] Fourteen factors dealing with AML/CFT regulations, corruption, financial standards, political disclosure and the rule of law are aggregated into one overall risk score.[40] In 2020 Botswana's rating was 5.06 which shows an improvement even though in terms of ranking it is in the 76th position of the 141 listed countries.

The above overview is testament to the fact that no country is immune to the scourge of ML/TF. It is a global phenomenon that the international community should be concerned about and take intentional action to combat. It further reveals that where terrorism financing and money laundering occurs is not dependent on the location or the size of the economy of the country. Indeed, any country with weaknesses in its legal regime could potentially be abused for money laundering and/or the financing of terrorism.

A newspaper article from 2017 shows a rather disturbing example of a complaint of money allegedly being laundered from Zimbabwe into Botswana.[41] The article also highlights some of the issues Botswana is faced with in combating money laundering and terrorism financing in terms of infrastructure and officers who fail to take their responsibilities and obligations seriously. What is more troubling is that the entities that are supposed to act as watchdogs against money laundering and terrorism financing appear to be resting on their laurels.[42]

1.3 Botswana's current money laundering and financing of terrorism legislative framework

1.3.1 Core statutes

There are several laws in place dealing with or relating to money laundering and terrorism financing in Botswana. In the first place, there are certain core statutes and

[39] BASEL Institute on Governance '*Basel AML Index Report*' (2017) 2.
[40] BASEL Institute on Governance '*Basel AML Index Report*' (2017) 2.
[41] *'Botswana turns into giant dirty money Laundromat'* Sunday Standard *28* Aug 2017. https://www.sundaystandard.info/botswana-turns-into-giant-dirty-money-laundromat/ (accessed 1 July 2018.)
[42] *Botswana turns into giant dirty money Laundromat'* Sunday Standard 28 Aug 2017.

regulations with a direct impact on money laundering and terrorist financing. These laws and regulations govern the banks, non-bank financial institutions (NBFIs), financial parastatals as well as designated non-financial businesses or professions (DNFBPs). The following paragraphs contain a brief summary of the core (as well as certain other) statutory instruments geared towards combating money laundering and financing of terrorism, while a more detailed analysis appears in chapter 4 of the thesis.

For a long time, the Proceeds of Serious Crime Act (POSCA)[43] together with the Penal Code has been the base legislation for money laundering, financing of terrorism and other financial crimes. POSCA was enacted to address money laundering challenges and associated matters as well as to prevent the offenders of serious crimes from benefiting from the rewards of such crimes.[44] Although the legislature did not attempt to provide definitions for 'money laundering' and 'financing of terrorism', part V of the Act deals with activities deemed to be money laundering regardless of whether such acts are carried out in Botswana or elsewhere.[45]

The preamble of the Financial Intelligence Act[46] (FI Act) provides that this Act was enacted to lay a foundation for the Financial Intelligence Agency (FIA). The FIA is expected to be the leading authority for 'requesting, receiving, analysing and disseminating to an investigatory authority, supervisory authority or comparable body, disclosures of financial information'.[47] The FI Act also provides for the establishing of the National Coordinating Committee on Financial Intelligence, while the FIA furthermore serves as a body enabling the reporting of suspicious transactions.[48]

The Counter-Terrorism Act[49] is a fairly new piece of legislation geared towards preventing and combating acts of terrorism, including terrorism financing.[50] The Counter-Terrorism Act also provides for the establishing of the Counter-Terrorism Analysis and

[43] Chapter 08: 03, commencement date 2 November 1990.
[44] POSCA preamble.
[45] Section 14 of the POSCA.
[46] Laws of Botswana, 2009.
[47] Section 4 of the FI Act.
[48] See the FI Act preamble.
[49] Laws of Botswana, 2014.
[50] Preamble of the Counter-Terrorism Act.

Fusion Agency.[51] It highlights what is deemed to be terrorism offences as well as support offences.[52] It further lays down the investigative powers and possible court orders that can be granted in this respect.[53]

The Corruption and Economic Crime Act[54] was enacted primarily for the formation of the Directorate on Corruption and Economic Crime (DCEC or the Directorate).[55] The Act lays down the powers of the Directorate and the offences punishable under the Act, while it also provides for the prosecution of these offences.[56] The central objective of this Act is to fight and prevent corruption by clothing the Directorate with investigative powers not only to investigate but also to refer suspected cases of economic crime to the Director of Public Prosecutions (DPP).[57] It is worth highlighting that section 39 of the Act does not confer prosecution powers on the Directorate but it is required to refer such cases to the DPP who will decide whether or not to prosecute.

The Banking Act[58] is the primary statute concerning the powers to control and regulate banks.[59] The Act makes no attempt at defining money laundering or terrorist financing. However, closely connected to combating money laundering and terrorist funding, banks are required to keep clear and concise financial records to enable the central bank, the Bank of Botswana, to determine the banks' compliance with the provisions of the Act.[60] Banks are to keep these records for a period of at least five years from the date of last entry.[61]

The Banking Act further provides that the central bank may request any information concerning any client of the bank.[62] Banks are moreover obliged to report any transaction which is suspected to involve money laundering.[63] An illustration of this can be

[51] This has not yet been established. See Part VII of the Act.
[52] See part II of the Counter-Terrorism Act.
[53] Part IV of the Counter- Terrorism Act.
[54] Chapter 08:05, Laws of Botswana, No 13 of 1994.
[55] See the Preamble of the Corruption and Economic Crime Act.
[56] See part II, III, IV and V of the Corruption and Economic Crime Act.
[57] See the Preamble and also section 39 of the Corruption and Economic Crime Act.
[58] Chapter 46:04, Laws of Botswana.
[59] Banking Act Preamble.
[60] Section 18 (1) Banking Act.
[61] Section 18 Banking Act.
[62] Section 21 (1) Banking Act.
[63] Section 21 (4) Banking Act.

seen in the newspaper article quoted above, wherein it is reported that Stanbic Bank alleges that it reported the Zimbabwean suspicious money laundering transactions, but that no action was taken by the Bank of Botswana.

Banks are to apply the utmost due diligence and reasonableness when opening bank accounts or accepting security deposits from clients.[64] Banks also have to satisfy themselves that the clients have been fully identified.[65] This is commonly known as the 'know your customer' (KYC) principle or Customer/Client Due Diligence (CDD). As a testament to how seriously the banks are beginning to take the KYC principle, banks in Botswana have recently started requesting, in fact demanding, that all the customers should update their information lest they risk their accounts being closed.[66]

In addition to the Banking Act, another important instrument is the Banking (Anti-Money Laundering) (Amendment) Regulations, 2013. These regulations stem from the power, in terms of the Banking Act, of the Minister of Finance to make regulations that will ensure the effective application of the Act.[67] Money laundering measures and practices are defined in the regulations as 'appropriate procedures and controls put in place by a bank to prevent money laundering'.[68] Money laundering is not defined in the regulations but instead reference is made to section 14 of POSCA.[69] The regulations also provide that, should banks contravene any provision of the regulations, they could be liable for a fine not exceeding P10 000.00.[70]

Other statutes and regulations relevant to the fight against money laundering and terrorist funding include the Penal Code,[71] the Criminal Procedure and Evidence Act,[72] the National Security and Intelligence Act,[73] the Customs and Excise Act[74] and the

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[64] Section 44 Banking Act.
[65] Section 44 Banking Act.
[66] Botswana Guardian 'KYC requirements: Is the bank being unreasonable?' 18 September 2017.
[67] Section 51 Banking Act.
[68] Regulation 3 Banking (Anti-Money laundering) Regulations.
[69] Regulation 3 Banking (Anti-Money laundering) Regulations.
[70] Regulation 25 Banking (Anti-Money laundering) Regulations.
[71] Chapter 08:01, 1964 Laws of Botswana.
[72] 1939.
[73] This is Act establishes the Directorate of Intelligence and Security Service (DISS). This law was received with mixed feeling by Batswana, even to this day there is still a debate as to whether it is necessary.
[74] Act 22 of 1970.

Bank of Botswana Act.[75] The entire statutory framework in Botswana is discussed and analysed in greater detail in chapter 4, whereafter the framework is assessed against that of South Africa and international best practice in chapter 5.

1.3.2 Conviction and prosecution of money laundering cases in Botswana

Money laundering and financing of terrorism incidents and cases are still fairly new in Botswana despite the fact that these concepts have captured the world's attention as some of the most serious financial crimes. In fact, some in Botswana might not realise that these crimes are committed in their country. This lack of awareness may be attributed to the fact that the institutions tasked with regulating and overseeing the fight against money laundering and terrorism financing seem to be focused on predicate offences and, as a result, the prosecution of money laundering cases is somewhat neglected.[76]

It has been reported that, between 2008 and 2015, only six cases of money laundering were prosecuted and in three of these cases, only three accused persons were actually convicted.[77] Recently, there have been several money laundering and financing of terrorism cases brought before the courts of law. All these cases are still ongoing.

What is even more interesting and concerning is the fact that lawyers in Botswana often seem to be implicated in money laundering cases. In fact, attorneys were connected to the offence of money laundering, either as perpetrators or facilitators, in quite a number of cases.[78] For instance, in April 2008 two convictions were reported against two attorneys who committed acts of fraud and money laundering against the Government of Botswana. These two were committed to prison for eighteen months.[79] This supports the notion that money laundering is often committed by professionals.

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[75] Act 19 of 1996.
[76] http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/ESAAMLG-MER-Botswana-2017.pdf (accessed 14 July 2018.)
[77] 'Agency assesses money laundering and terrorism financing in Botswana' *Sunday Standard* 20 July 2015.http://www.sundaystandard.info/agency-assesses-money-laundering-and-terrorism-financing-botswana (accessed 23 July 2018.)
[78] In 2008 the Director of Public Prosecutions laid charges of money laundering against prominent Gaborone based attorney and Botswana opposition youth president (at the time), Gabriel Kanjabanga.
[79] https://www.anti-moneylaundering.org/africa/Botswana.aspx Anti-Money Laundering Forum held on the 6 December 2012.

However, it is astounding that only a few cases of ML/TF have been reported thus far. This may be due to inadequate infrastructure and facilities as well as a lack of expertise in the field. ML/TF concepts are very specialised areas and the relevant stakeholders should be trained towards sufficient knowledge in this field to help combat financial crime. The latter position has been confirmed by the International Monetary Fund (IMF), which posits that the implementation of robust AML/CFT frameworks in developing countries, such as Botswana, is often a challenge due to severe resource challenges.[80]

The prosecution and conviction of some prominent ML/TF cases are discussed more comprehensively in chapter 4 of this thesis.

1.4 Money laundering, financing of terrorism and proliferation finance: International perspective

Money laundering, financing of terrorism and proliferation finance continue to be threats to the stability and integrity of the international financial system.[81] The international community has therefore made AML/CFT a priority. Indeed, significant efforts have been made by both international and regional bodies to fight money laundering as well as terrorism and proliferation financing.

These international bodies include the United Nations, the World Bank, the International Monetary Fund, the African Development Bank, the African Union, the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) and the Basel Committee on Banking Supervision.[82] These bodies are mentioned here in passing, while chapter 3 is dedicated to a more comprehensive discussion of the international and regional perspectives and/or governance of AML/CFT. The purpose of including the

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[80] International Monetary Fund *'Anti-money laundering and combatting the financing of terrorism (AML/CFT)-IMF'* (March 31, 2009) 4.
https://www.imf.org/external/np/otm/2009/anti-money.pdf

[81] Navin Beekarry '*The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law'* (2011) Northwestern Journal of International Law & Business 138.

[82] *Combating Money Laundering and the Financing of Terrorism: A Comprehensive Training Guide* http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/CombattingMLandTF.pdf

international dimension in this study is to benchmark Botswana against global best practice, and hence to identify gaps that will have to be filled so as to render the Botswana AML/CFT regime in line with the global community's efforts in this regard.

The most famous international initiative is the Financial Action Task Force, an intergovernmental entity founded by the G7 group of countries in 1989.[83] The main objective of the FATF is to enhance the global community's efforts at combating money laundering and terrorist financing.[84] The FATF has published 40 Recommendations on AML/CFT.[85] These standards have been accepted by most countries and it is worth highlighting that the FATF, as a policy-making entity, also supports the implementation by countries of these standards against money laundering and terrorist financing through their mutual evaluation exercises amongst other things.[86]

The second important international organisation is the United Nations (UN) through the UN Convention on Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (Vienna Convention),[87] which contains detailed measures against serious crimes – amongst them money laundering – and also emphasises the need for international cooperation amongst nations.[88] Other relevant conventions include the UN Convention against Transnational Organized Crime (Palermo Convention),[89] the UN Convention against Corruption[90]and the International Convention for the Suppression of the Financing of Terrorism.[91] The common thread running through these UN instruments

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[83] FATF website. http://www.apgml.org/fatf-and-fsrb/page.aspx?p=a8c3a23c-df6c-41c5-b8f9-b40cd8220df0

[84] Concepcion Verdugo Yepes '*Compliance with the AML/CFTCFT International Standard: Lessons from a Cross-Country Analysis*' (2011) IMF Working Paper 7.

[85] FATF website.

[86] FATF website.

[87] 1988 Convention.https://www.incb.org/incb/en/precursors/1988-convention.html

[88] 1988 Convention.

[89] Adopted by the UN General Assembly: 15 November 2000, by Resolution 55/25. https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html

[90] Adopted by the UN General Assembly in October 2003 and entered into force in December 2005. https://www.unodc.org/unodc/en/treaties/CAC/

[91] 1999. The Convention commits states to take preventative measures to combat terrorism financing and hold those who finance terrorism activities accountable. http://www.un.org/en/counterterrorism/legal-instruments.html

is that they have provisions on tracing, freezing, seizure and confiscation of the proceeds of crime, which are very critical for any AML/CFT framework.[92]

Another international body aimed at fighting money laundering and terrorism financing is the Egmont Group. It is named after the Egmont Arenberg palace in Brussels where the first meeting of the group was convened.[93] The Egmont Group is essentially an informal network of financial intelligence units (FIUs) in the member countries and which collects suspicious financial information relating to money laundering and terrorism financing.[94] The Egmont Group was founded in 1995 and its main objective is to establish and harness best practices for exchange of information amongst the FIUs of member countries.[95]

The Basel Committee on Banking Supervision (BCBS) is also a pivotal international standard-setter for 'the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters'.[96] It was established to ensure the regulation and supervision of international banks with a view of strengthening financial stability.[97] The BCBS is also one of the main global structures providing guidance on AML/CFT standards and practices.[98]

A prominent regional grouping is the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).[99] ESAAMLG is an FATF-style regional body, an interdependent partner in AML/CFT activities mainly through mutual country evaluations.[100] The secretariat of ESAAMLG is based in Dar es Salaam, Tanzania. It has member states from Eastern and Southern Africa as well as observer states and

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[92] United Nations Office on Drugs and Crime '*Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime'* (2012) 18-24; African Development Bank '*Bank Group Strategy for the prevention of money laundering and terrorist financing in Africa'* (May 2007) 3.
[93] Egmont Group '*Egmont Annual Report'* (June 2009-July 2010) 2.
[94] Egmont website. https://egmontgroup.org/en.
[95] Egmont website.
[96] Basel Committee on Banking Supervision Charter (2013) 1.
[97] Basel Committee on Banking Supervision Charter (2013) 1; Bank for international settlements, https://www.bis.org/bcbs/about.htm.
[98] Basel Committee on Banking Supervision *'Guidelines on sound management of risks related to money laundering and terrorism*' (July 2020) 1-19.
[99] It considered by many to be a regional FATF which came into being in August 1999.
[100] FATF '*High-Level Principles for the relationship between the FATF and the FATF-style regional bodies'* (2019) 1-13.

organisations.[101] Its mandate is mainly to ensure members' compliance with FATF standards on AML/CFT and financial crime risks in the region.[102] The group further seeks to ensure that the FATF Recommendations are implemented by the member states.[103] Botswana is a member of this group and an assessment of Botswana's AML/CFT measures was completed in 2017.[104] Reference will be made to the key findings of this assessment in Chapter 5.

Other international and regional organisations, such the World Bank, the IMF and the African Development Bank, also have well-structured measures and strategies in place on AML/CFT.

1.5 Research questions / objectives

The over-arching objective of the thesis is to assess whether Botswana's current legislation effectively ensures, on a technical level, the control and regulation of money laundering, financing of terrorism and proliferation finance.

In pursuit of addressing the abovementioned objective, the following are the main sub-objectives:

(a) To interrogate the concepts of money laundering, financing of terrorism and proliferation finance.

(b) To analyse the international and regional recognised regulatory institutions and measures against money laundering, financing of terrorism and proliferation finance.

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[101] Bank of Botswana website. http://www.bankofbotswana.bw/content/2009103012014-countering-financial-crime (accessed 14 June 2018).
[102] ESAAMLG '*Anti-money laundering and counter-terrorist financing measures–Botswana*' Second Round Mutual Evaluation Report (2017) 2; See also https://pilac.law.harvard.edu/africa-region-efforts//eastern-and-southern-africa-anti-money-laundering-group-esaamlg (accessed 14 June 2018).
[103] ESAAMLG MOU Preamble, ESAAMLG MOU of the Eastern and Southern Africa Anti-Money Laundering Group with Amendments Approved by Sixteenth and Eighteenth Ministerial Council Meetings in Victoria Falls, Zimbabwe (September 2016) 2.
[104] ESAAMLG '*Anti-money laundering and counter-terrorist financing measures–Botswana*' Second Round Mutual Evaluation Report (2017) 2.

(c) To examine Botswana's current AML/CFT regulatory regime.

(d) To assess Botswana's AML/CFT regulatory framework against the FATF Recommendations and the South African AML/CFT regime and determine whether there are any lessons for Botswana to enhance its legislative framework.

(e) To put forward proposals and recommendations for the enhancement of Botswana's current AML/CFT legislative framework.

1.6 Methodology

The methodology of the study entails a doctrinal analysis, mainly desk and library based. The study relies on both primary and secondary sources, that is, published and unpublished material on the subject matter such as books, journal and newspaper articles, theses, reports, legislation, internet sources and case law. In addition, the study makes extensive reference to internationally and regionally accepted principles and/or standards on AML/CFT against which Botswana's legislative framework and its effectiveness are measured and weighed. This study is therefore descriptive, investigative and exploratory in nature as it critically analyses Botswana's state of AML/CFT laws.

Usually, FATF assessments on AML/CFT envisage two distinct components, namely the technical compliance assessment and an effectiveness assessment. A technical compliance assessment basically evaluates the AML/CFT laws, processes, procedures and powers vested in the accountable institutions.[105] It checks the level of compliance with the FATF Forty Recommendations in the countries' legislative frameworks. The effectiveness test, on the other hand, is also critical as it assesses the level of execution or implementation of the FATF Recommendations by countries as well as the efficacy of the accountable institutions and other relevant persons.[106] It

[105] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013) 7.
[106] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013) 7.

therefore assesses whether or not the objectives behind the Recommendations are being achieved and if not, the mitigation measures to be put in place to close the identified gaps. As a result, a combination of both technical and effectiveness assessments ideally provides a clearer indication of a country's compliance with the FATF Recommendations, which are a yardstick against which countries and institutions are measured.

This study is largely premised on the last ESAAMLG mutual evaluation assessment of Botswana, which concluded that the country was significantly lacking both in terms of technical and effective compliance. However, this thesis focuses solely on the technical compliance assessment of Botswana's laws against the FATF Recommendations on AML/CFT. In other words, the effectiveness assessment is out of scope in this study. The study also undertakes a comparative study with South Africa's AML/CFT regime to assist in evaluating Botswana's technical compliance with the FATF Recommendations.

The purpose of the comparison with South Africa is to determine the extent to which South Africa has adopted the FATF AML/CFT Recommendations. South Africa is also chosen because Botswana often benchmarks itself against South Africa and due to the similarities in their legal systems. As the only African member of the FATF and thus arguably the most compliant country on the continent, South Africa offers an ideal system for other African countries to rely on for comparative purposes. The way in which South Africa has incorporated the FATF AML/CFT standards into its systems, along with the challenges experienced by this system, can accordingly serve as an important lesson for Botswana.

In summary, therefore, the analysis will proceed by considering the 2017 ESAAMLG Botswana Mutual Evaluation Report to determine what the findings were. It will then re-assess the current legislation against the FATF Recommendations using the FATF Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems Guidance (2013, updated in November 2020) and the South African legislative framework to draw conclusions on whether or not there is improvement on the 40 Recommendations compared to the 2017 ESAAMLG assessment.

1.7 Limitations

Little literature on the subject matter in the context of Botswana is the ultimate limitation of this study. AML/CFT regulation and monitoring is also relatively young and as a result the application of the present legislation is yet to be tested. In addition, the financial crime concepts are constantly and rapidly changing and so is the response by international organisations and other relevant entities. In light of this, a comparative study with other jurisdictions is necessary.

The other main limitation is that this study is confined to the technical assessment of Botswana's legislative regime on money laundering, financing of terrorism and proliferation financing and does not cover the effectiveness nor the implementation assessment of the laws in place. The study is limited to the question whether or not the laws conform to the international standards on AML/CFT and proliferation financing.

1.8 Overview of chapters

Chapter 1, the current chapter, introduces the thesis by setting out the background to the study.

Chapter 2 explores the nature of money laundering, financing of terrorism and proliferation financing, by presenting the definitions, forms, causes, cost and consequences of these forms of financial crimes. The chapter will also interrogate the effects of money laundering and terrorism financing in Botswana's economic development and its efforts to attract foreign direct investment.

In Chapter 3, the efforts pertaining to AML/CFT on an international level are explored by discussing the accepted and recognised guidelines and principles in place are explored. This chapter will also consider the role of inter-governmental organisations such as the FATF and the Basel Committee on Banking Supervision.

Chapter 4 focuses on Botswana's current regulatory regime on AML/CFT. It further assesses and discusses the role of entities tasked with control and regulation of

ML/TF. It further discusses the prosecution of ML/TF cases in Botswana and highlights some of the cases currently pending before Botswana's courts.

Chapter 5 investigates whether or not there are any lessons to be learnt from South Africa, particularly with the new amendments to legislation in that country, which could ensure the effective regulation and control of ML/TF in Botswana. More specifically, the chapter evaluates the regime in Botswana against South African law as well as the FATF Recommendations.

Chapter 6 concludes the study and offers recommendations for how the shortcomings of the Botswana regime, as identified in the prior chapters, can be rectified to bring Botswana in line with international best practice as represented by the FATF standards as well as the example set by its most prominent neighbouring country. To my knowledge, this thesis represents the only study of its kind thus far conducted with reference to AML/CFT in Botswana. Therefore, it is hoped that the thesis will make a valuable and original contribution to knowledge in this field of law.

Chapter 2
Money laundering, financing of terrorism and proliferation financing concepts explored

2.1 Introduction

The preceding chapter introduced the study and noted that the over-arching objective of the study is to determine whether Botswana's current legislation effectively fulfils the purpose of combating money laundering, financing of terrorism and proliferation financing in Botswana. ML/TF as well as other financial crimes disrupt the world economic and social order, hence the need for a robust response to suppress these activities. In response to the debilitating impacts of illicit financial flows the world over, countries such as South Africa have developed, and are regularly improving, their legislation in a quest to comply with the accepted international standards and principles on AML/CFT.

ML/TF are interrelated financial ills that have loomed over the heads of the international community for years and continue to be a deleterious risk globally. It has been noted that it is very difficult to state with precision how much money is laundered and used for financing terrorist activities around the world, as the means used to facilitate and enable illicit financial flows have become exceptionally sophisticated, complex and technologically advanced.[1] There is consensus, however, that the money lost through several forms of financial crimes is not negligible.[2] It is estimated that the African continent alone has over the past fifty years lost approximately one trillion US dollars to financial crimes.[3] It cannot be gainsaid how much Africa needs the money for

[1] P. C. van Duyne, J.H. Harvey and L.Y. Gelemerova*The Critical Handbook of Money Laundering*, (2018) 1. Available at https://doi.org/10.1057/978-1-137-52398-3_1 (accessed 12 February 2019); 0 Jeffrey Simser ' Money laundering: emerging threats and trends' (2013) 16 *Journal of Money Laundering Control* 42.; FATF 'How much money is laundered per year?' Available at http://www.fatf-gafi.org/faq/moneylaundering/ (Accessed 14 February 2019).
[2] Tim Edmonds *Money Laundering Law* (14 February 2018) 2592; AFDB *Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 17.
[3] Mohd Yazid bin Zul Kepli and Maruf Adeniyi Nasir 'Money Laundering: Analysis on the Placement Methods, International Journal of Business' (December 2016) 11 *International Journal of Business, Economics and Law* 1; AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 17.

economic development, otherwise socio-economic development will continue to be stifled.[4]

There is concern by the global village regarding the exponential growth and effects of ML/TF.[5] This reality is worsened by the fact that financial crime occurs through rapid technological means and the transactions are often multi-national, which makes it difficult to control and thus allows the perpetrators to continue enjoying the gains of their illegal activities. This challenge has been termed as the 'dark side of globalization'.[6] The effects are particularly felt by emerging and developing economies with weaker regulatory frameworks and financial muscle to control these activities.

In response to the evident effects of financial crime, the international community has heightened its efforts to combat these activities with particular emphasis on regional and global cooperation.[7] It is therefore imperative to fully understand these concepts, which have over the years undermined the socio-economic and political order of legitimate economies to a significant extent. Understanding the nature, form and consequences of these financial crime would ensure that not only relevant but also commensurate measures can be developed and applied to suppress and eventually eliminate the occurrence of all forms of financial crime.

Against the above background, the present chapter is dedicated to exploring the nature of money laundering, financing of terrorism and proliferation finance. The definitions, forms, causes, cost and consequences of these financial crimes in developing economies, such as Botswana, will also be emphasised. The chapter will highlight the techniques used in money laundering and terrorism financing. It will reveal that perpetrators are continuously coming up with creative ways of laundering money, financing terrorism and committing proliferation finance. The chapter concludes by putting

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[4] Hinterseer Kris 'Criminal Finance- The Political Economy of Money Laundering in a Comparative Legal Context' (2000) Kluwer *Law International* 1.
[5] Navin Beekarry 'The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law' (2011) North western Journal of International Law & Business 137.
[6] International Monetary Fund *Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) —A Multi-Donor Trust Fun* (March 31, 2009) 4.
[7] Kern Alexander 'The International Anti-Money-Laundering Regime: The Role of the Financial Action Task Force' (1993) *Money Laundering Control Journal* 231.

forward the challenges faced by African countries when implementing or attempting to implement AML/CFT control measures.

2.2 Money laundering

Some historians are of the view that money laundering and tax evasion dates as far back as 2000 years ago.[8] They note that money laundering particularly began with the Chinese merchants who hid their wealth from the government of the day by taking it outside their countries for fear of losing their money to oppressive rulers.[9] This in essence meant that illicit financial flows possibly began in ancient China, even though it did not yet have the formal financial systems of today.[10]

Money laundering can also be traced to the United States, where wealthy mafia families owned laundromats in the 1920s and 1930s.[11] It is reported that these persons were engaged in illicit activities such as prostitution, gambling, extortion and bootlegging and as a result they had to 'clean' these proceeds so that they could appear to be legitimate.[12] It is therefore apparent that the concept of money laundering has been in existence for many years.[13]

A plethora of definitions of money laundering have been put forward by various persons and institutions. It is universally agreed that money laundering is a form of organised crime and should be interpreted widely to include the 'clean-up' of the proceeds of all forms of predicate offences, such as drug trafficking, fraud and corruption.[14] What is deemed predicate offences is determined by each jurisdiction and may not

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[8] https://www.antimoneylaundering.net/public/Counter-Money_Laundering/brief-history-money-laundering (accessed 15 February 2019).

[9] 'Anti-Money Laundering: How does it work and how is it regulated, Everything You Need to Know About Money Laundering and Regulations' *Money Transfer Comparison Magazine* 6 April 2016 https://moneytransfercomparison.com/aml/ (accessed 20 February 2019).

[10] 'Anti-Money Laundering: How does it work and how is it regulated, Everything You Need to Know About Money Laundering and Regulations' *Money Transfer Comparison Magazine* 6 April 2016

[11] Alex Ferguson *Trinidad Money Laundering* (2014) *Inter-American Drug Abuse Control Commission Presentation* 3.

[12] Alex Ferguson *Trinidad Money Laundering* (2014*) Inter-American Drug Abuse Control Commission Presentation* 3.

[13] David Cafferty and Simon Young *Money Laundering Reporting Officer's Handbook* (2005) 1.

[14] Perula, Johanna *European Union's Anti-Money Laundering Crusade- A Critical Analysis of the response by EU/EC to Money Laundering Police College of Finland Report*, (2009) 15.

necessarily be the same for all countries, but a predicate offence is any offence the proceeds of which may be subject to financial crime such as laundering illicit funds.[15] Money laundering is also understood as a process through which the proceeds of crime are sanitised, which involves a three-tier process.[16] Below are examples of several money laundering definitions that have been put forward.

Journalist Geoffrey Robinson has defined money laundering thus:

> 'Money Laundering is called what it is because it perfectly describes what takes place–illegal or dirty money is put through a cycle of transactions, or washed, so that it comes out the other end as legal or clean money. In other words, the source of the illegally obtained funds is obscured through a succession of transfers and deals in order that those same funds can eventually be made to appear as legitimate income.'[17]

Ernesto U Savona defined money laundering as follows:

> 'The process by which criminals attempt to conceal the true origin and ownership of the proceeds of their criminal activities. If done successfully, it also allows them to maintain control over these proceeds and ultimately to provide a legitimate cover for their source of income.'[18]

The first EU anti-money laundering Directive defines it thus:

> 'The conversion or transfer of property, knowing that such property is derived from serious crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in committing such an offence or offences to evade the legal consequences of his action, and the concealment or disguise of the true nature, source, location, disposition, movement, rights with

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[15] Julie Walter *Anti-money laundering and counter-terrorism financing across the globe: A comparative study of regulatory action (Australian Institute of Criminology Report* (2011)) xi-xii. Predicate offences are deemed to be serious crimes; https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_3-5.pdf (accessed 29 December 2020)

[16] Michael Levi and Peter Reuter *Money Laundering Essay*, University of Chicago, (2006) 294.

[17] Robinson, J, The Laundrymen – Inside the World's Third Largest Business, (1994), Simon & Schuster Ltd, Great Britain; 'What is money laundering?' *Financial Crime News* 3 June 2019. https://thefinancialcrimenews.com/what-is-money-laundering/ (accessed 12 March 2019).

[18] Ernesto U. Savona 'European Money Trails' in R.B Jack 'Introduction' in Money Laundering' (1999) 4.

> respect to, or ownership of property, knowing that such property is derived from serious crime.'[19]

The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)[20] was the first international instrument to criminalise money laundering. It defines money laundering as:

> 'The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences.'

The Financial Action Task Force (FATF) provides the following definition for money laundering:

> 'Money laundering is the processing of criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source.'[21]

In essence, money laundering is conducted outside the economic and financial statistics and except for its reference in Recommendation 3, 'money laundering offence' refers not only to the primary offence or offences, but also to ancillary offences.[22] Recommendation 3 of the FATF Recommendations requires countries to criminalise money laundering in accordance with the Vienna and the Parlemo Conventions.[23]

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[19] First anti-money laundering Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering. It should be noted that the EU has since issued four further amending directives and that we therefore currently work with the 5'th EU anti-money laundering Directive.
[20] 1988.
[21] FATF website. https://www.fatf-gafi.org/faq/moneylaundering (accessed 29 December 2020). /
[22] Glossary of the FATF Recommendations. https://www.fatf-gafi.org/glossary/j-m/ (accessed 23 December 2020.
[23] FATF '*International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*' (2012-2020) 12.

Finally, in Botswana, Part V of the Proceeds and Instruments of Crime Act provides that a person who receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes or brings into Botswana any property which in whole or in part, directly or indirectly represents the proceeds of any crime, where he or she knows, suspects or has reasonable grounds to believe that the property was realised directly or indirectly from any confiscation offense or foreign serious crime related offense commits the offence of money laundering.[24]

All the definitions above have one thing in common, namely that 'dirty' money is cleansed or sanitised to obscure the true source of the funds. If authorities fail to detect acts of money laundering, perpetrators would be unduly enriched, which is why money laundering is such a big issue. Therefore, the aim of combating money laundering is to deprive criminals of the opportunity to benefit from their criminal activities.

2.3 Money laundering processes

Money laundering is usually understood in the context of three stages, namely placement, layering and integration.[25] Placement is recognised as the initial introduction of 'dirty money' into the financial system.[26] This can happen, for instance, by depositing the illegal money into various bank accounts or converting the property derived from illegal sources into non-cash assets.[27] It has been argued that this is the most critical stage of money laundering because, if detected at this stage, money laundering would be preventable but if placement is successful, then it would become much harder to identify it at the next stage.[28]

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[24] Section 47 (1) Proceeds and Instruments of Crime Act (2014), Laws of Botswana.
[25] David Cafferty and Simon Young *Money Laundering Reporting Officer's Handbook* (2005) 1; AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 4.
[26] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) I-7.
[27] Alison S. Bachus 'From Drugs to Terrorism: The Focus Shifts in the international fight against money laundering after September 11, 2001' (2004) *Arizona Journal of International & Comparative Law* 842; David Cafferty and Simon Young *Money Laundering Reporting Officer's Handbook* (2005) 4.
[28] Ioana Livescu 'The link between Money Laundering and Corruption: Is the fight effective?' Masters thesis, Tilburg University Law School, Netherlands, 2017 10.

Layering is the second stage of money laundering.[29] Here the illegitimate funds or assets are transformed from illegal sources to money or property which cannot easily be linked to the original criminal activities. In essence, the funds or property is distanced as far as possible from the illegal sources by, for example, transferring the funds to other jurisdictions or financial institutions.[30] The intention here is to disassociate or obscure the proceeds from the original source, thus making it difficult to know the true source of the funds.[31]

The final stage is known as integration, where the proceeds of crime are re-integrated into legitimate and unsuspicious forms of assets.[32] This is usually accomplished by purchasing intangible and/or tangible assets, such as real estate or securities.[33] As Daniel Ramirez Vasquez interestingly puts it, the integration stage is a 're-union' of the criminal with the cleaned money.[34]

2.4 Financing of terrorism

Just like money laundering, financing of terrorism remains a major challenge for the global village, especially for developing countries. Terrorist financing is defined as 'financing of terrorist acts, and of terrorists and terrorist organisations.'[35] Financing of terrorism not only leads to economic instability and unrest, but usually also ultimately results in the loss of lives and displacement of citizens. It has been argued that terrorist attacks represent the bargaining power of terrorists against their enemies, usually

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[29] David Cafferty and Simon Young *Money Laundering Reporting Officer's Handbook* (2005) 4; Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) I-7.
[30] AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 4; David Cafferty and Simon Young *Money Laundering Reporting Officer's Handbook* (2005) 4.
[31] William R. Schroeder *Money Laundering: A Global Threat and the International Community's Response*, *FBI Law Enforcement Bulletin* (May 2001) 1 – 7.
Available at https://www.unl.edu/eskridge/cj394laundering.doc (accessed 16 April 2019).
[32] AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 4; David Cafferty and Simon Young *Money Laundering Reporting Officer's Handbook* (2005) 4.
[33] AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 4; David Cafferty and Simon Young *Money Laundering Reporting Officer's Handbook* (2005) 4.
[34] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 10.
[35] FATF Glossary.

governments.[36] They use acts of terrorism to communicate or 'send a message' with the objective to convince governments to make concessions and agree to their demands.[37]

Both regional and international instruments have been promulgated to address the financing of terrorism. The regional instruments include the OAU Convention on the Prevention and Combating of Terrorism[38] and the Protocol to the African Union on the Prevention and Combating of Terrorism.[39] On the international level, there is the International Convention for the Suppression of the Financing of Terrorism[40] and the FATF Special Recommendations on Terrorist Financing. These FATF Special Recommendations have been incorporated and updated into the 40 FATF Recommendations and therefore no longer exist as standalone standards. These instruments are discussed in depth in Chapter 3 below.

Terrorism has been defined in several instruments some of which are captured below. The International Convention for the Suppression of the Financing of Terrorism (1999)[41] describes an act of terrorism as follows:

> '1. Any person commits an offense within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willingly, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: a. An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or b. Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking any active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing an act.

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[36] Tim Krieger and Daniel Meierrieks 'Terrorist Financing and Money Laundering' (June 2011), *University of Paderborn, Germany* 7.
[37] Tim Krieger and Daniel Meierrieks 'Terrorist Financing and Money Laundering' (June 2011) *University of Paderborn, Germany* 7.
[38] 1999.
[39] 2004.
[40] 1999.
[41] Article 2 of the International Convention for the Suppression of the Financing of Terrorism (1999). http://www.un.org/law/cod/finterr.htm. (accessed 15 March 2020).

2. For an act to constitute an offense set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offense referred to in paragraph 1, subparagraph (a) or (b).'

It has been observed that the latter definition used by the Convention for the offense of financing terrorism is couched broader so as to cover several acts, including the provision and collection of funds with the aim to carry out a terrorist act and the source of the funds can either be illicit or licit.[42] The Convention is not only applicable to the 'originators' but also the accomplices, as it requires punishment of those who intended to engage in acts of terrorism as well as those who had the knowledge of the destination of the funds.[43] Finally, it is not a requirement that the funds were actually used, which means that the fact that the funds were intended for committing a terrorist act would suffice.[44]

The FATF provides that the financing of terrorist acts, terrorist organisations and individual terrorists should be criminalised.[45] In addition, Recommendation 6 mandates countries to have targeted financial sanctions related to terrorism and terrorism financing.[46] Targeted financial sanctions means that it should be possible to freeze immediately and prohibit assets from being accessible either directly or indirectly for the benefit of designated persons and organisations.[47]

The use of targeted sanctions has become a significant, if not the dominant, feature of modern anti-terrorism regimes.[48] Terrorism related targeted sanctions originated through the UNSC Resolution 1267 (1999), which initially imposed a limited air

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[42] IMF 'Money laundering and Terrorism Financing: An overview.' https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/thony.pdf (accessed 30 December 2020).
[43] Article 2 of the International Convention for the Suppression of the Financing of Terrorism (1999). http://www.un.org/law/cod/finterr.htm. (accessed 15 March 2020); IMF 'Money laundering and Terrorism Financing: An overview.' https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/thony.pdf (accessed 30 December 2020).
[44] Article 2 of the International Convention for the Suppression of the Financing of Terrorism (1999). http://www.un.org/law/cod/finterr.htm..
[45]FATF '*International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation'* (2012-2020)13.
[46] FATF '*International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation'* (2012-2020) 13.
[47] FATF Glossary.
[48]Léonard S., Kaunert C. (2012) Combating the Financing of Terrorism Together? The Influence of the United Nations on the European Union's Financial Sanctions Regime. In: Costa O., Jørgensen K.E. (eds) The Influence of International Institutions on the EU.

embargo and asset freeze on the Taliban.[49] Overtime, the regime evolved and these measures were extended to include a targeted asset freeze, travel ban and arms embargo against designated individuals and entities associated with terrorist organisations.[50] Subsequent resolutions systematically expanded the application of targeted financial sanctions to also target Al-Qaida and ISIL (Da'esh).[51]

Terrorism-related sanctions were further strengthened through UNSCR 1373 (2001), which is aimed at ensuring that the respective territories of member states are not abused for purposes of the financing of terrorism.[52] The targeted sanctions under UNSCR 1373 (2001) are broader in scope than those under UNSCR Resolution 1267 (1999).[53] Firstly, suspects or groups need not necessarily be associated with Al-Qaida, the Taliban or ISIL (Da'esh) under this regime.[54] Secondly, the resolution allows for the designation of individuals or groups as considered necessary to prevent and suppress the financing of terrorist acts.[55] Lastly, these designations are made at a national or regional level.[56] UNSCR 1373 (2001) therefore establishes a second and parallel listing system to UNSCR 1267 (1999).

In Botswana, the Counter-Terrorism Act[57] defines an act of terrorism as:

> Any act or omission in or outside Botswana which is intended to advance a political, ideological or religious cause, or by its nature or context, may reasonably be regarded as being intended to intimidate or threaten the public or a section of the public, or compel a government or international organization to do or abstain from doing any act, or to adopt or abandon a particular position.[58]

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[49] United Nations Security Council resolution 1267 was adopted unanimously on 15 October 1999.
[50] Resolution 1330 of 2000; Klaudijo Stroligo 'Guidelines Regarding the necessary steps to be taken for effective implementation of the United Nations Security Resolutions on terrorism' (2007) 3.
[51] Resolution 1390 of 2002; Klaudijo Stroligo 'Guidelines Regarding the necessary steps to be taken for effective implementation of the United Nations Security Resolutions on terrorism' (2007) 3.
[52] UNSCR Resolution 1373 of 2001; Klaudijo Stroligo 'Guidelines Regarding the necessary steps to be taken for effective implementation of the United Nations Security Resolutions on terrorism' (2007) 5.
[53] UNSCR Resolution 1373 of 2001; Klaudijo Stroligo 'Guidelines Regarding the necessary steps to be taken for effective implementation of the United Nations Security Resolutions on terrorism' (2007) 5.
[54] UNSCR Resolution 1373 of 2001; Klaudijo Stroligo 'Guidelines Regarding the necessary steps to be taken for effective implementation of the United Nations Security Resolutions on terrorism' (2007) 5.
[55] UNSCR Resolution 1373 of 2001; Klaudijo Stroligo 'Guidelines Regarding the necessary steps to be taken for effective implementation of the United Nations Security Resolutions on terrorism' (2007) 5.
[56] UNSCR Resolution 1373 of 2001; Klaudijo Stroligo 'Guidelines Regarding the necessary steps to be taken for effective implementation of the United Nations Security Resolutions on terrorism' (2007) 5.
[57] 2014.
[58] Section 2(1) Counter-Terrorism Act.

In terms of the above Act, to qualify as an act of terrorism, the act should be committed in or outside Botswana for a political, ideological or religious cause and the public or a section thereof should feel threatened or a government or an international organisation should be compelled to act or not to act in a certain manner.

Examples of acts of terrorism include endangering or threatening to endanger the life, physical integrity or freedom of any person or group of persons;[59] the likelihood of and/or causing the death or serious injury to any person;[60] threatening to or causing damage to natural resources, environmental or cultural heritage;[61] the disruption of any public or essential service;[62] the use and transportation of explosives, lethal devices and nuclear, biological or chemical (NBC) weapons;[63] and causing or threatening to cause damage to a ship, vehicle, fixed platform, nuclear facility, aircraft or aerodrome.[64]

In summary, therefore, terrorism financing is entails providing funding for acts of terrorism, to terrorists and/or terrorist organisations. In turn, terrorism acts are those activities intended to intimidate a population, or to compel a government or an international organisation to act or to abstain from doing something. Generally, terrorists need funding for continuity of their operations including for recruitment of support members and for logistics purposes, which is where the financing of terrorism comes in.[65]

2.5 Money laundering and financing of terrorism techniques

The different creative ways in which money is laundered and used for the financing of terrorism and proliferation financing is commonly referred to as 'methods' or

[59] Section 2(a) Counter-Terrorism Act.
[60] Section 2(b) Counter-Terrorism Act.
[61] Sections 2(c) and (m) Counter-Terrorism Act.
[62] Section 2 (d) Counter-Terrorism Act.
[63] Section 2 (f) and (g) Counter-Terrorism Act. NBC weapon is defined in Section 2 of the Financial Intelligence Act as (a) nuclear explosive device as defined in the Nuclear Weapons (Prohibition) Act; (b) biological or toxin weapons as defined in the Biological and Toxin Weapons (Prohibition) Act; or (c) chemical weapons as defined in the Chemical Weapons (Prohibition) Act.
[64] Sections 2 (i), (j), (k) and (l) Counter-Terrorism Act.
[65] UNODC website.https://www.unodc.org/unodc/en/terrorism/news-and-events/terrorist-financing.html (accessed 12 May 2020).

'typologies'.[66] It has been argued that the money laundering process described above is also true and applicable to terrorist financing.[67] However, there is a notable difference in the final stage, being the integration stage.[68] While money laundering entails funds being integrated into the financial system, terrorism financing involves funds being distributed towards different destinations to finance terrorist activities.[69] In addition, unlike the case with money laundering, money used for terrorism financing does not always come from illegitimate sources.[70]

It is impossible to pinpoint a universal way in which financial crime take place, such as through money laundering and terrorism financing.[71] This is so because the techniques employed by criminals differ from jurisdiction to jurisdiction, while it also depends on a particular country's financial market make-up and complexion.[72] This means that there is no 'one glove fits all' method, and consequently perpetrators often tend to be creative about the approach they take to move illegitimate money in each financial system.

Despite the general inability to pinpoint an exhaustive list of money laundering techniques, money is usually laundered in some of the ways described in the following paragraphs.

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[66] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) I-10. I-10; AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 7.

[67] Floerintino Mariano Cuellar 'The Tremendous Relationship between the Fight Against Money laundering and Disruption of Criminal Finance' (2003) 93 *Journal of Criminal Law and Criminology* 6. http://www.jstor.org (accessed 25 April 2019). Proliferation techniques are discussed at 2.4 above,

[68] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) I-10.

[69] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) I-10.

[70] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) I-10.

[71] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 10.

[72] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) I-10.

2.5.1 Structured transactions

Committing money laundering via structured transactions is where illicit cash is deposited into a bank account as if the source of the funds is legitimate. The cash deposits may, for example, be made to different bank accounts and by many different people to ensure that the individual transactions do not attract the attention of law enforcement personnel.

2.5.2 Cash couriers and bulk cash smuggling

Banks have made strides in ensuring that the financial system is not used for money laundering and terrorism financing. As a result, perpetrators have turned to other forms of placing illegitimate money into the financial system.[73] These include cash couriers and bulk cash smuggling.[74] Cash couriers and bulk cash smugglers prefer either road or air travel to smuggle cash by, for instance, hiding it in cargo or luggage.[75] Sometimes, natural persons pose as cash couriers and bulk cash smugglers who cross borders with a lot of cash.[76] The cash is then later deposited in various deposit-taking automatic teller machines by different people and at different times so as to conceal the true source of the funds.

2.5.3 Money service businesses and informal value transfer systems

Money can also be laundered through money service businesses (MSBs) and informal value transfer systems (IVTSs).[77] Examples of MSBs are Western Union and

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[73] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures' *Resource Material Series (UNAFEI)* (2011) 2.
[74] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures' Resource Material Series (UNAFEI) (2011) 2.
[75] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures' Resource Material Series (UNAFEI) (2011) 2.
[76] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures' Resource Material Series (UNAFEI) (2011) 2.
[77] FATF and APG *Anti-money laundering and counter-terrorist financing measures - Malaysia, Fourth Round Mutual Evaluation Report (2015) 7.* www.fatf-gafi.org/publications/mutualevaluations/documents/mer-malaysia2015.html (accessed 5 May 2019) Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures' *Resource Material Series (UNAFEI)* (2011) 3.

MoneyGram services, which are usually regulated.[78] Western Union and Moneygram as MSBs are used as ways of transferring money from one person to another either within a country or across the globe.[79] Examples of IVTSs include the *hawala*, which was developed in India and is common in the Middle East and North Africa. Hawala is an informal method of transferring money without any physical movement.[80] Money is therefore transferred via a network of hawala brokers, or hawaladars.[81] Another example of an IVTS is *mukuru*, which is also a fintech platform which was introduced recently in Southern Africa and is used mainly by Zimbabweans, who live and work in another country, to send money home.

The objective of establishing MSBs and IVTSs was to encourage financial inclusion to ensure that even the unbanked have access to financial services.[82] However, these services are usually not strictly regulated or monitored for AML/CFT compliance. As a result, it is also possible that money may be laundered or used for terrorism financing through these channels.[83]

2.5.4 Trade-based money laundering

In 2006, the FATF reported that trade-based money laundering (TBML) was, along with the misuse of financial systems and cash smuggling, one of the three most common ways in which money laundering occurred.[84] In terms of TBML, money laundering is concealed as legitimate trading by concealing the transactions and the source of

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[78] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures' *Resource Material Series (UNAFEI)* (2011) 3.
[79] https://www.westernunion.com/us/en/home.html (accessed 28 September 2021).
[80] Patrick M. Jost *The Hawala Alternative Remittance System and its Role in Money Laundering* (2016) 5; The Balance '*What is Hawala'17* August 2021. https://www.thebalance.com/what-is-hawala-5197853 (accessed 28 September 2021).
[81] Patrick M. Jost *The Hawala Alternative Remittance System and its Role in Money Laundering* (2016) 5; The Balance '*What is Hawala'17* August 2021. https://www.thebalance.com/what-is-hawala-5197853 (accessed 28 September 2021).
[82] FATF *The Role of the Hawala and other similar service providers in money laundering and terrorist financing Report* (October 2013) 7.
[83] FATF *The Role of the Hawala and other similar service providers in money laundering and terrorist financing Report* (October 2013) 7.
[84] FATF *ASIA/Pacific Group on Money Laundering, APG Typology Report on Trade Based Money Laundering* (2012) 11. http://www.fatfgafi.org/publications/methodsandtrends/documents/trade-based-moneylaunderingtypologies.html (accessed 6 May 2019).

funds.[85] It usually happens when invoices for goods and services are altered either to over-price or under-price the goods or services.[86] In Botswana, this is likely to occur in the sale of second-hand cars from Japan, Singapore and the United Kingdom.[87] The reason for this is because it is suspected that, due to tax evasion, many second-hand car dealers collude with the original car dealers to understate the true prices of the vehicles purchased.[88]

2.5.5 Prepaid value cards

Recently, non-bank services, like prepaid value cards, have made it possible to transact without the need to have any contact with financial service providers.[89] While making transacting more efficient and easier, it also has its downfalls such as the fact that the element of anonymity embedded in it may attract criminals.[90] These services include, for example, the electronic purses, store cards and mobile financial services offered by telecommunications companies, which services may be used by criminals for money laundering and terrorism financing purposes.

2.5.6 Online payment systems

Online or internet based payment services allow customers to access pre-funded accounts that are used to transfer funds quickly and globally for different services.[91] These payment channels such as PayPal may or may not require registration thus making it difficult to trace and identify the customers/users as well as the end

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[85] FATF *ASIA/Pacific Group on Money Laundering, APG Typology Report on Trade Based Money Laundering* (2012) 11. http://www.fatfgafi.org/publications/methodsandtrends/documents/trade-based-moneylaunderingtypologies.html (accessed 6 May 2019).
[86] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures' *Resource Material Series (UNAFEI)* (2011) 2.
[87] ESAAMLG *Anti-money laundering and counter-terrorist financing measures – Botswana, Second Round Mutual Evaluation Report* (2017) 9.
http://www.esaamlg.org/reports/me.php
[88] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures', *Resource Material Series (UNAFEI)* (2011) 2.
[89] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures', *Resource Material Series (UNAFEI)* (2011) 4.
[90] FATF *Global Money Laundering & Terrorist Financing Threat Assessment* (July 2010) 34-35. http://www.fatf-gafi.org (accessed on 16 May 2019).
[91] FATF *Emerging Terrorist Financing Risks* (2015) 38-39.

beneficiary of the online payment services.[92] These electronic payment methods are said to have heightened the threat of financing of terrorism around the globe as they are becoming more popular.[93]

It has been argued that the challenges posed by online payment channels cannot be gainsaid.[94] The argument is that these platforms, whether involving virtual banking or digital currency systems, usually renders it difficult to know the exact location of the funds because the transactions are often multinational in nature. This makes it difficult to obtain assistance from a foreign country in the course an investigation and also because the operators are usually unknown.[95]

2.5.7 Capital markets

It has been established that some criminals disguise criminal proceeds as profits gained from capital markets.[96] It is noted that placing 'dirty money' into the capital markets is common in China where laundered funds are sometimes used to establish big private companies.[97]

2.5.8 Non-profit organisations

Non-profit organisations too pose a risk of being used to launder money and facilitate terrorism financing.[98] These organisations receive donations from an array of donors. Included here are churches, which have of late been receiving bad publicity, as it is

[92] FATF *Emerging Terrorist Financing Risks* (2015) 38-39.
[93] FATF *Emerging Terrorist Financing Risks* (2015) 38.
[94] Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures'*, Resource Material Series (UNAFEI)* (2011) 5.
[95] Nicholas Gilmour and Nick Ridley (2015) 'Everyday vulnerabilities – money laundering through cash intensive businesses' (2015) 18 *Journal of Money Laundering Control*,.293 –303; Jean B. Weld 'Current International Money Laundering Trends and Money Laundering Cooperation Measures' *Resource Material Series (UNAFEI)* (2011) 6.
[96] Mohd Yazid bin Zul Kepli and Maruf Adeniyi Nasir 'Money Laundering: Analysis on the Placement Methods' (December 2016) 11 *International Journal of Business, Economics and Law* 9.
[97] Mohd Yazid bin Zul Kepli and Maruf Adeniyi Nasir 'Money Laundering: Analysis on the Placement Methods' (December 2016) 11 *International Journal of Business, Economics and Law* 9.
[98] FATF *Risk of Terrorist Abuse in Non-Profit Organisations Report* (June 2014) 16.

alleged that some of them are used for money laundering purposes and for facilitating terrorism financing.[99]

The accounting records of non-profit organisations could deliberately be made complex and exaggerated with a view to obscure the true source of the funds or the true destination of the funds in the case of terrorism financing.[100] It has been noted that although the intention of creating non-profit organisations could be altruistic, there are those who take advantage and use them for money laundering and to facilitate terrorism financing, especially because they are not effectively regulated in some countries.[101]

2.5.9 Casinos and other gambling related businesses

It is common knowledge that casinos are cash intensive and involve rapid transactions.[102] Money can be laundered via casinos if, for example, customers use 'dirty' cash to buy chips to play games and then request a re-fund in the form of a cheque or for a credit that can be used in another country in which the casino also operates.[103] In this way, dirty money is sanitised in the process.

Casinos are susceptible to be used for money laundering purposes, as in some countries they are not adequately regulated, or they may lack expertise in effectively fostering compliance within the gambling space.[104] Indeed, it has been argued that despite the fact that casinos offer financial services as far as foreign exchange and cash issuing are concerned, some countries confine themselves to regulating gambling as

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[99] For instance, the well-known Prophet Bushiri and wife were arraigned before the court for a charge of money laundering in contravention of the South African Prevention of the Organised Crime Act (POCA).
[100] Constantin Nedelcu 'Money Laundering Techniques Commonly Used-General Approaches' Lecturer PhD, Department of Criminal Law, Faculty of Law, Nicolae Titulescu University, Bucharest, 2011 3.
[101] FATF *Risk of Terrorist Abuse in Non-Profit Organisations Report* (June 2014)16.
[102] FATF *Vulnerabilities of Casinos and Gaming Sector Report* (March 2009) 10. http://www.fatf-gafi.org/media/fatf/documents/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf (accessed 27 June 2019).
[103] Constantin Nedelcu 'Money Laundering Techniques Commonly Used-General Approaches' Lecturer PhD, Department of Criminal Law, Faculty of Law, Nicolae Titulescu University, Bucharest, 2011 5.
[104] FATF *Vulnerabilities of Casinos and Gaming Sector Report* (March 2009) 10. http://www.fatf-gafi.org/media/fatf/documents/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf (accessed 27 June 2019).

an entertainment activity as opposed to enforcing the same stringent requirements usually imposed on the financial services sector.[105]

2.5.10 Political donations

Donations made to politicians, especially during elections, may also be tainted. It is sometimes easier to dispose of 'dirty' money during an election campaign, as a lot of cash is usually required to fuel motorcade vehicles, feed supporters and entice the voters. In fact, it is alleged that the President of Botswana received some of the National Petroleum Fund's proceeds, which are said to have been laundered.[106]

2.5.11 Gatekeepers: auditors, lawyers and accountants

Auditors, attorneys and accountants are said to be gatekeepers who can either exacerbate money laundering or contain it.[107] Many countries have therefore tightened their legislation to ensure that these professionals assist in curbing money laundering and terrorism financing.[108] Indeed, in all the money laundering cases before the Botswana courts, attorneys were implicated, which corroborates the assumption that attorneys can block or encourage money laundering.

2.5.12 Correspondent banking

Correspondent banking occurs when a bank transacts on behalf of another bank's customers. Verification of identities and documentation can therefore be compromised, as verification or KYC is done in the absence of the customer, and large quantities of money are usually transacted through this platform. Furthermore, if the

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[105] FATF *Vulnerabilities of Casinos and Gaming Sector Report* (March 2009) 10. http://www.fatf-gafi.org/media/fatf/documents/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf (accessed 27 June 2019).

[106] 'Seretse donated to Masisi campaign' *Mmegi online* 30 November 2018. http://www.mmegi.bw/index.php?aid=78735&dir=2018/november/30 (accessed 24 June 2019). The case is still before the courts

[107] Constantin Nedelcu 'Money Laundering Techniques Commonly Used-General Approaches' Lecturer PhD, Department of Criminal Law, Faculty of Law, Nicolae Titulescu University, Bucharest, 2011 5.

[108] See for instance the FI Act which imposes obligations and responsibilities on lawyers, auditors and accountants to report instances of money laundering failing which they would be liable to hefty penalties.

financial crime is not detected, it may go unpunished.[109] It is submitted that this arrangement is prone to money laundering because suspicious transactions cannot easily be identified due to a lack of information on the customer.

2.6 Proliferation financing

Several attempts have been made to bring the issue of proliferation financing to the fore, especially on the basis of its interconnectedness with other crimes like terrorism financing.[110] It is believed that proliferation financing might be a tool used to exacerbate other financial crimes.[111] The Nuclear Non-Proliferation Treaty (NPT) of 1968 is perhaps one of the first attempts of international cooperation against proliferation.[112]

It is accepted that the anti-proliferation financing initiative is primarily anchored in and premised on the United Nations Security Council Resolution (UNSCR) 1540 and Recommendations 2 and 7 of the FATF.[113] Recommendation 2 provides that domestic inter-agency cooperation should include combating the funding of proliferation of arms of war, while Recommendation 7 obliges countries to give effect to UNSC Resolutions which impose targeted financial sanctions related to proliferation.[114]

The approach for countering proliferation financing by the United Nations Security Council (UNSC or UN Security Council) is two-pronged in terms of the Resolutions made under Chapter VII of the UN Charter.[115] The first approach is a global one under the UNSCR 1540 (2004) and its successor resolutions.[116] These are broad-based

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[109] Constantin Nedelcu 'Money Laundering Techniques Commonly Used-General Approaches' Lecturer PhD, Department of Criminal Law, Faculty of Law, Nicolae Titulescu University, Bucharest, 2011 6.
[110] Council of Europe website *Financing of proliferation* https://www.coe.int/en/web/moneyval/implementation/financing-proliferation (accessed 12 March 2020)
[111] Council of Europe website *Financing of proliferation*.
[112] Council of Europe website *Financing of proliferation*.
[113] Council of Europe website *Financing of proliferation*.
[114]FATF *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (2012-2020) 11-13; FATF *Combating proliferation Financing: A Status Report on Policy Development and Consultation* (February 2010) 5.
[115] FATF *Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 3.
[116] UNSCR Resolution 1540 (2004); FATF *Guidance on Counter Proliferation Financing The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 3.

provisions which affirm that the proliferation of nuclear, chemical and biological weapons and their means of delivery constitutes a threat to international peace and security.[117] In addition, the resolution prohibits states from providing any form of support to non-state actors that attempt to acquire nuclear, chemical and biological weapons, including proliferation financing.[118]

The second approach is country specific, under Resolutions UNSCR 1718 (2006), 2231 (2015) and their successor resolutions. These are country-specific resolutions against the Democratic People's Republic of Korea (DPRK or North Korea) and the Islamic Republic of Iran (Iran).[119]

Proliferation financing has been defined by the FATF as follows:

> 'The act of providing funds or financial services which are used, in whole or in part, for the manufacture, acquisition, possession, development, export, transshipment, brokering, transport, transfer, stockpiling or use of nuclear, chemical or biological weapons and their means of delivery and related materials (including both technologies and dual use goods used for non-legitimate purposes), in contravention of national laws or, where applicable, international obligations.'[120]

On the other hand, proliferation is defined as:

> 'the transfer and export of nuclear, chemical or biological weapons, their means of delivery and related materials.'[121]

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[117] UNSCR Resolution 1540 (2004); FATF *Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 3.
[118] UNSCR Resolution 1540 (2004); FATF *Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 3.
[119] Resolutions UNSCR 1718 (2006), 2231 (2015); FATF *Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 4.
[120] FATF *Combating proliferation Financing: A Status Report on Policy Development and Consultation* (February 2010) 5.
[121] *FATF Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 3. www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-counter-proliferation-financing.(accessed 16 March 2019); Council of Europe website 'Financing *of proliferation*.'

It is critical to note that the above definition of proliferation financing, unlike the definitions of money laundering and terrorism financing, does not require intention or knowledge on the part of the proliferators for what the funds or assistance was intended for.[122] The definition also suggests that not only is financing the proliferation of weapons of war confined to the actual funding of the procurement of weapons, but also the individual components which could be assembled together to make (or be used in) weapons of war, such as software and laptops.[123] The question whether intent is required, and to what extent, is a matter that will depend on the legal principles governing this offence in any given jurisdiction.

The UNSCR 1540, the first UNSCR on proliferation funding, provides that:

> (2) ...in accordance with their national procedures, countries shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;
>
> (3)(d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.[124]

It has been reported that proliferation financing, just like money laundering,[125] occurs in three stages.[126] Firstly, funds are raised either domestically or through international networks to fund the cause. Secondly, the funds are disguised and moved to other

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[122] FATF *Combating proliferation Financing: A Status Report on Policy Development and Consultation* (February 2010) 5.
[123] Financial Reporting Authority Identifying Proliferation Financing-Why Should you be Concerned with the Prevention and detection of Proliferation Financing Report (February 2020) 5.
[124] United Nations Security Council Resolution on Non-Proliferation.
Resolution 1540 (2004) of the Security Council, adopted on 28 April 2004.
[125] See 2.5 below.
[126] Financial Reporting Authority Identifying Proliferation Financing-Why Should you be Concerned with the Prevention and detection of Proliferation Financing Report (February 2020) 5.

financial jurisdictions where the third element would take place.[127] The final element is the purchasing of the hardware, technology, software and/or logistics necessary for processing the arms of war.[128] It is therefore imperative that countries, and indeed the entire international financial system, understand these phases so as to put measures in place to deter and combat proliferation funding at early stages as the consequences (namely warfare activities) not only affect the financial systems worldwide but also the lives of people.

Internationally, there is no consensus on the criminalisation of proliferation financing, the reason being that countries seem to understand proliferation financing differently.[129] This is also apparent from the different approaches adopted by the various jurisdictions in addressing proliferation financing.[130] Some countries have criminalised proliferation financing while other have resolved to subsume it under other illicit crimes, such as terrorist financing.[131] This means that they treat it like other financial crimes.[132] It is argued that if countries do not understand this phenomenon, then it might be difficult to curb the proliferators and to a certain extent even prosecute the offence.

In the context of Botswana, the FI Act does not implicitly criminalise the financing of proliferation of arms of war, nor is there a section dedicated to proliferation financing in the Act, even though it is defined in the Act.[133] In addition, it is recorded that the Agency shall be responsible for coordinating information related to the financing of proliferation of arms of war.[134] The language of the FI Act is probably wide enough to

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[127] Financial Reporting Authority Identifying Proliferation Financing-Why Should you be Concerned with the Prevention and detection of Proliferation Financing Report (February 2020) 5.
[128] Financial Reporting Authority Identifying Proliferation Financing-Why Should you be Concerned with the Prevention and detection of Proliferation Financing Report (February 2020) 5.
[129] *FATF Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 12. www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-counter-proliferation-financing.(accessed 16 March 2019).
[130] *FATF Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 4.
[131] *FATF Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 12.
[132] Stewart, I.J, Viski, A. and Brewer, J. 'Combating the financing of proliferation: challenges and new tools' (2000) Journal *of Financial Crime* 5.
[133] Section 2 FI Act.
[134] Section 6 (1) (c) FI Act.

cover proliferation of arms of war, as it provides that specified and accountable bodies should control and combat financial offences generally.

In conclusion, it can be said that money laundering differs from the two other offences. With money laundering, 'dirty money' is cleaned so as to be re-used in the legitimate economy. On the other hand, in the case of the financing of terrorism and proliferation financing, money is moved through certain stages to procure goods and services for aiding either terrorism or proliferation.[135] In effect, therefore, the money has a 'dirty' destination.

2.7 Effects of money laundering and financing of terrorism on developing economies

Illicit financial flows (IFFs), defined by the AU-UNECA High Level Panel (HLP) as 'money illegally earned, transferred or used' are usually used to cover both money laundering and terrorism financing.[136] It is estimated that the amount lost by the African continent to IFFs in the past fifty years can be equated to the amount of aid received by the continent over the same period.[137] This is a rather shocking statistic and therefore defeats the continent's ability to develop and meet its sustainable developmental goals to better the lives of its people.

It is evident that while globalisation and the interconnectedness of the world have had positive effects, the opposite is also true. In fact, the world is faced with numerous challenges emanating from the globalised world in which most people around the world can connect with each other almost instantaneously. Furthermore, because of globalisation and instant communication, it is easier to facilitate money laundering, the effects of which affect the development and advancement of the world economy.[138]

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[135] Dr Jonathan Brewer 'The Financing of Nuclear and Other Weapons of Mass Destruction Proliferation (January 2018) *Centre for a New American Security* 4-5.
[136] The 4th Joint AU/ECA Conference of African Ministers of Finance, Planning and Economic Development held in 2011 mandated the ECA to establish the Thabo Mbeki High Level Panel (HLP) on IFFs from Africa.
[137] African Development Bank Policy *on the Prevention of Illicit Financial Flows* (March 2017) 1.
[138] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 10.

Money laundering and financing of terrorism enable predicate offences such as drug dealing, illegal arms trafficking, racketeering and corruption.[139] It also ensures that criminals continue to not only profit but also benefit from illegitimate activities.[140] The other notable disadvantage of illicit financial flows is that it leads to even more strife in developing countries that are still grappling with issues of poverty and corruption, thus worsening the debilitating situations in those economies.[141]

Money laundering and terrorism financing destabilise the world economy and also affect the integrity of the financial system.[142] This in turn erodes the public confidence in the legitimacy of the financial systems, thus placing more power in the hands of criminals and diminishing the markets and governments' muscle to regulate and control the financial services sectors.[143]

Money laundering and terrorism financing thrive on secrecy. The more the source of the funds is kept secret, the more the African economies are losing revenue due to transactions taking place in the informal sector. If the money lost through illicit financial flows were to be circulated in the formal financial system, it could also contribute to the liquidity of the African financial markets, thus enhancing and strengthening their quality.

In addition, money is also lost through tax avoidance. Tax crimes in the United States and Europe are considered money laundering predicate offences.[144] The link between tax evasion and money laundering was succinctly summarised as follows:

> '[S]ince bank secrecy is being upheld by most or all of the banks tax evasion (and even money laundering) is made easy because the strict bank secrecy rules

[139] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 13.
[140] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 13.
[141] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 13.
[142] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 13.
[143] David Cafferty and Simon Young 'Money Laundering Reporting Officer's Handbook' (2005) 2; Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 16.
[144] European Union Horizon *Money Laundering and Tax Evasion Paper* (October 2017) 28-30.

> prevent the exchange of information with the individual's country of residence. This makes it difficult for the domestic tax authorities to track capital income. He (2010) specifically refers to the use of banking institutions for money laundering purposes. It was found to be a popular route to follow, as it is convenient and quick to transfer funds across international borders. Since bank secrecy exists in almost every country, financial institutions are very vulnerable to money laundering (He, 2010). Bank secrecy enables criminals to cover up or conceal the nature and source of the illegally obtained proceeds, thus evading taxes at the same time.'[145]

2.8 Challenges faced by African countries in implementing AML/CFT control measures

A number of factors make it difficult, particularly for developing countries on the African continent, to fully adhere to and implement AML/CFT standards. Despite political willingness, these factors, if not fully addressed, have the potential to promote the committing of financial crime, in particular money laundering and terrorism financing. The intention in this section is not to make excuses for the African continent's failure to fully implement the well-recognised, agreed and accepted standards and principles against money laundering and terrorism financing. Instead, the aim is merely to highlight that although financial crime is a global concern, Africa has its own unique challenges, many of which differ from challenges experienced in other regions. These unique challenges have slowed Africa's strides in fully implementing robust and effective anti-financial crimes measures. The aim is also to extrapolate why a 'one size fits all' approach would not be suitable in the African context.

Some African countries, such as Ethiopia, have for many years shut themselves off from the international arena when it comes to AML/CFT standards.[146] This usually happens where one political party has a monopoly or where the country is a one-party state, the result being that economic growth is hampered by a lack of interaction with the outside world as well as criminal activities such as tax evasion, drugs and human trafficking and corruption.[147] As some African states are beginning to liberalise their

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[145] Ansia Storm 'Establishing the Link Between Money and Tax Evasion' (November 2013) 12 *International Business & Economics Research Journal* 1442.
[146] Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012) vi.
[147] Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012) vii.

economies, it is necessary to note that they need to be handled with a different set of gloves than the rest of the world, if they eventually are to fully implement AML/CFT standards and measures.[148]

The argument here is that most African countries are poor and in an early stage of development, when compared to many other parts of the world. Therefore, the pressure placed on African countries by other parts of the world regarding the full implementation of the FATF standards, should arguably be more lenient for some African countries. In particular, it is preferable that a more lenient approach should be taken regarding sanctions for non-compliance. This is also informed by the fact that Botswana, like many other African countries, has moved with speed to attempt to align their laws with the FATF Recommendations.

However, as illustrated in this thesis, there are still certain shortcomings in Botswana's AML/CFT regime, which has resulted in the country consistently being blacklisted without appreciating the developments and the efforts made to towards compliance. In other words, blacklisting a country might not always be an appropriate sanction, especially if that country has made (and is willing to continue making) strides towards compliance.

Technological advances is a major factor that can further negatively affect the world's efforts to curb illicit financial flows.[149] Technology has made it possible to transfer money through online platforms that allow several simultaneous and instant transactions, which in turn make it difficult to monitor and detect the original source of the funds being exchanged.[150] Such mediums include electronic payments for goods, the introduction of pre-paid cards and mobile financial services.[151] Although the world is rapidly progressing in terms of technology, some African countries do not have the

[148] For example, South Sudan's legislative framework is still at an infant stage.
[149] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 27.
[150] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 28.
[151] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 28.

resources and expertise to adapt to these changes and thus Africa is often left behind in combating financial crime that involve the use of advanced technology.

Another element contributing to money laundering and terrorism financing, especially in Africa, is financial exclusion.[152] The FATF defines financial inclusion as the 'provision of access to an adequate range of safe, convenient and affordable financial services to disadvantaged and other vulnerable groups, including low income, rural and undocumented persons, who have been underserved or excluded from the formal financial sector. Financial inclusion also involves making a broader range of financial products and services available to individuals who currently only have access to basic financial products.'[153]

A significant number of people living on the African continent do not participate in the formal banking system and therefore they may be tempted to use other forms of cash conveyance for their daily lives. Moreover, some Africans do not have identity cards, which are key for KYC and therefore this means that they are excluded from the financial systems that require these documents as a bare minimum. If there is no way to ensure that even the poorest of citizens are included in the formal financial sector, it is possible that they may explore alternatives such as sending money from one country to the other by person or by bus, thus increasing the risks of financial crime.

The FATF notes that financial inclusion strengthens the soundness of the international financial system, since it ensures that a myriad of potential money laundering and terrorist financing transactions are covered effectively.[154] Successful financial inclusion could therefore minimise the inherent risks associated with illicit financial flows because it ensures that both the formal and the informal financial services sectors are adequately regulated and controlled.[155] Financial inclusion also means that not only

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[152] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 28.
[153] *FATF Guidance Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion, February* (2013)13; Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 30.
[154] *FATF Guidance Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion, February* (2013)13.
[155] *FATF Guidance Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion, February* (2013)13.

the regulator but also the private sector becomes a key participant in countering illicit financial flows.[156]

A further factor that inhibits effective AML/CFT measures in Africa is the costs associated with compliance.[157] Compliance is very costly for both the regulators and the regulated financial institutions.[158] Due to being low-income economies, most African countries are usually constrained in fully implementing the FATF recommendations because they are incapacitated in terms of financial knowledge and resources.[159] For instance, Kenya has been listed by the FATF for its failure to implement measures to address the shortcomings identified by the FATF.[160] In the meantime, Kenya remains a hub for money laundering and terrorism financing in the East African region, especially due to its close proximity to Somalia, which is known to be a home to corruption and terrorism according to the Transparency International Organisation.[161]

African financial systems are generally small and still busy developing, and as a result they often lack comprehensive legislative frameworks for combating money laundering and terrorism financing.[162] This consequently makes African financial markets more susceptible to illicit financial flows, which means that such activities can go undetected and unpunished.[163] Somalia is an example of a country that effectively has no financial system in place and thus poses a risk of money laundering and terrorism financing in

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[156] Mark Pieth and Gemma Aiolfi 'The Private Sector becomes Active: the Wolsberg Process' (2003) *Journal of Financial Crime* 2.
[157] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 30.
[158] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 31.
[159] AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 7.
[160] Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012) viii.
[161]Institute for Economics & Peace *Global Terrorism Index-Measuring the impact of terrorism* (2020) 8; Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012) viii. Somalia has been referred to as a 'stateless economy' and is deemed to be the most corrupt state in the world. See also, 'Prominence of money laundering in Africa – Ten things to know' Norton Rose Fulbright February 2014.
[162] Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (October 2007) 152 *Institute for Securities Studies* 5; Bank for International Settlements website. https://www.bis.org/press/p970922.htm (accessed 6 May 2019); AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 7.
[163] AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 7.

the African region.[164] Its economy is tainted with illicit financial flows in various forms, including money laundering and trafficking of weapons and humans.[165]

The other notable challenge is that even if African countries succeed in implementing a fully-fledged, comprehensive and effective AML/CFT legislative regime, the financial crime activities will probably be shifted to the informal, underground world, thus undermining the efforts made to protect the legitimate financial systems.[166] The existence of the informal non-banking sector in African markets plays a major role in facilitating the flow of dirty money.[167] Eritrea is an example of an African country with no legislative framework against financial crime but which depends largely on cash-based transactions from abroad.[168] This is so because these sectors are rarely regulated and if they are controlled, the control measures are usually minimal to allow small businesses to thrive. However, at the same time they are havens for perpetrators and thus increase the vulnerability of the sector to money laundering and terrorism financing.

It is also common knowledge that African economies are mainly cash based.[169] This therefore means that most of the transactions that occur are cash based and often cash is moved from one country to another. This is particularly true for Botswana and Zimbabwe.[170] It has been observed that a number of Zimbabweans working in

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[164] Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012) viii.
[165]US Overseas Security Advisory Council *Somalia 2020 Crime & Safety Report* (2020) *https://www.osac.gov/Country/Somalia/Content/Detail/Report/4a1550e6-cc18-40d9-b587-18946f742968 (accessed 31 December 2020);* Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012) viii.
[166] Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (October 2007) 152 *Institute for Securities Studies* 5. 5; Bank for International Settlements website; AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 7.
[167] AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 8; Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (October 2007) 152 *Institute for Securities Studies* 5; Bank for International Settlements website.
[168] Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012) vi.
[169] African Currency Forum *African Cash Report* (2018) 3; 'In South Africa Cash is Still Key for the Country's Biggest Lenders' *World Economic Forum* 6 August 2019; AFDB *African Development Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa* (May 2007) 8. Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (October 2007) 152 *Institute for Securities Studies* 5. Bank for International Settlements website. https://www.bis.org/press/p970922.htm (accessed 6 May 2019).
[170] Firnmark Trust *Understanding remittances from Botswana to Zimbabwe* (2018) x.

Botswana usually send cash back home to their relatives through buses as opposed to using the formal banking services, as the latter are deemed too expensive.[171] There are even people whose daily job is to collect money and other goods in Botswana and send them to Zimbabwe. In this way, both Botswana and Zimbabwe are losing out, and although this is known by both governments to be the norm, no measures have been put in place to curb this practice yet. Such practices also make both countries susceptible to be used for ML/TF purposes.

Corruption also contributes to the rapid growth of financial crime in Africa and therefore should be brought under control.[172] Corruption among public officials in Africa also impacts negatively on the development of Africa as a whole.[173] Where corruption is rampant, illicit financial crimes thrive because it is easier for cash to move without detection, confiscation and punishment. Therefore, it will take political will among African leaders to combat corruption, which, if successfully combatted, should in turn decrease the occurrence of financial crime.

It has been noted that many African countries lack operational and enforcement capabilities to tackle financial crimes.[174] The lack of effective regulation or the presence of weak regulation and supervision usually emanates from a lack of expertise, which contributes significantly to money laundering and terrorism financing.[175] This was revealed as an outcome of the Botswana ESAAMLG mutual evaluation report, wherein it was reported that the regulatory authorities were not confident with their mandate and also lacked awareness regarding issues of financial crime.[176]

The lack of deeper regional integration can also breed money laundering and terrorism financing activities.[177] This is so because without regional cooperation, it would be difficult to fight financial crime in isolation, trace and confiscate assets, while these

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[171] Firnmark Trust *Understanding remittances from Botswana to Zimbabwe (2018)* xvi.
[172] Daniel Ramirez Vasquez 'The Global Anti-Money Laundering Regime: An Assessment of Effectiveness' Masters in International Business (MIB) Thesis, Universidad EAFIT, Colombia, 2017 34.
[173] African Development Bank *Policy on the Prevention of Illicit Financial Flows* (March 2017) 2.
[174] Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012) vi.
[175] ESAAMLG *Ten Year Report- From Arusha to Maseru* (1999-2009) 34.
[176] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 37.
[177] CEN-SAD Strengthening the institutional capacity of the Communauté Des Sahélo-Sahariens (January 2015) ii.

efforts are also disturbed by terrorist activities which are rampant in some parts of the continent, such as in Eastern and Western Africa.[178] Other sub-regional groupings have acknowledged that it is expensive to belong to a regional cluster due to annual subscriptions.[179]

The other challenge faced by African countries in implementing the right solutions against financial crime is the lack of expertise. This was confirmed in the Botswana mutual evaluation report wherein it was reported that some of the employees of the accountable and specified bodies did not have sufficient knowledge of what was expected of them.[180] It has been pointed out that African countries often struggle to detect proliferation financing in particular.[181] For instance, customs officers who receive the goods may fail to link the goods declared at the borders to proliferation financing.[182] This is therefore another challenge in need of addressing on the African continent.

2.9 Conclusion

Money laundering, financing of terrorism and proliferation financing are growing at an alarming rate and it is believed that the amount of money economies are losing is very significant. This calls for stringent and effective measures to match the complexity and speed with which these financial crimes occur. The complexity of these financial crimes is exacerbated by globalisation and technological advances that give these crimes an international element.

This chapter gave a conceptual overview of money laundering, financing of terrorism and proliferation financing. It was noted that although these three concepts differ in certain respects, they are interrelated. It was noted that money laundering, unlike the financing of terrorism and proliferation financing, entails sanitising dirty money to

[178] CEN-SAD Strengthening the institutional capacity of the Communauté Des Sahélo-Sahariens (January 2015) ii.
[179] CEN-SAD Strengthening the institutional capacity of the Communauté Des Sahélo-Sahariens (January 2015) ii.
[180] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 7.
[181] Togzhan Kassenova 'Challenges with Implementing Proliferation Financing Controls: How Export Controls Can Help' (30 May 2018) *The Journal of Export Controls and Sanctions* 1.
[182] Togzhan Kassenova 'Challenges with Implementing Proliferation Financing Controls: How Export Controls Can Help' (30 May 2018) *The Journal of Export Controls and Sanctions* 4.

legitimise it, while both the financing of terrorism and proliferation financing entail legitimate and illegit money being used to advance the relevant motive. The similarities, however, are that all three financial crime thrive on secrecy and concealing the true sources, usage or destination of the proceeds. Furthermore, all three see law enforcement agencies and personnel as a threat to their existence. Furthermore, due to the interconnectedness of the world, these crimes are mostly, transnational in nature. In all these cases, funds are typically moved in a three thronged process, namely placement, layering and integration.

The chapter also discussed some of the most common methods through which money is laundered, used for funding terrorism and proliferation. These include the use of both informal and formal financial services platforms; cash couriers and cash smugglers; money services businesses (MSB) and informal value transfer systems (IVTS) such as *hawala* and *mukuru*; trade-based money laundering; internet-based payment systems, like virtual currencies; non-profit organisations; correspondent banking and casinos and other gambling activities.

It is worth noting that the sources of funds used in money laundering and terrorism and proliferation financing are very diverse and include funds from drugs and human trafficking, blood diamonds, proceeds obtained from the sale of stolen property as well as corruption and tax evasion. The chapter also revealed that money laundering, financing of terrorism and proliferation financing are economic and social ills that undermine the global financial order, erodes public confidence in the financial systems, and also contribute to poverty. Developing countries, especially African countries, are not spared as they face some unique challenges.

The challenges faced by African countries in combating money laundering and terrorism financing were also explored in this chapter. The top three challenges faced by African countries are corruption, a shortage of expertise and a lack of resources to foster compliance and implement effective AML/CFT measures. The extent to which these challenges have affected Botswana will be discussed in Chapters 5 and 6.

The next chapter will explore the international and regional responses to financial crimes. It cannot be gainsaid that financial crimes are not crimes for the first world only

but should be a global concern. The chapter will therefore set off by highlighting the various ways in which the international community is promoting AML/CFT and conclude by fleshing out what Africa as a continent is doing to curb these financial crimes.

Chapter 3
Global and regional responses to money laundering, financing of terrorism and proliferation financing

3.1 Introduction

As the liberalisation of the financial services sector gains momentum, so do the effects and consequences of such liberalisation, including the growth of financial crime across the globe. Organised crime, corruption, money laundering and terrorism are also ever-increasing threats and therefore require to be met with stringent measures within the sector. What is especially challenging is that these crimes are now international and not confined to a single state. This element requires cooperation amongst nations to bring an end to or at least reduce the incidences of illicit financial flows.

The African continent has, for some time, observed religiously the principle of self-determination as espoused under international law. Simply put, states on the continent have not been very willing to interfere with the internal affairs of individual states, as they believed in each state's right to independence and to make its own choices.[1] As a result, the African continent took a non-action stance and was largely silent on issues affecting the international community, such as terrorism.[2] It has been pointed out that it was only in 1992 that the African continent began to be more involved internationally by beginning to shed its spectator role, and that this might have been triggered by the exponential growth of terrorism attacks in North Africa, Nigeria and East Africa.[3]

The present chapter is organised into two main parts, focusing on the international and regional responses to and interventions aimed at combatting financial crime. This is in accordance with the development of AML/CFT frameworks which follow a top-down approach. The chapter considers the role of the international bodies, namely

[1] Article 1 United Nations Charter; International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 1976; See also the African Union Charter and the African Charter on Human and Peoples' Rights.
[2] Ben Saul *Research handbook on International Law and Terrorism* (2014) 1.
[3] Ben Saul *Research handbook on International Law and Terrorism* (2014) 1.

how the global community has responded to money laundering and the financing of terrorism. It will highlight the international conventions and protocols against money laundering and terrorism financing. It will also discuss well-accepted principles and guidelines regarding AML/CFT. The international community has long recognised that attempts to combat financial crime require cooperation and consistency across national boundaries. In response to this challenge, a range of international bodies have contributed to the law and standards. They have been crucial in defining incidences of financial crime, identifying emerging trends and good practice against which countries examine themselves.

The chapter concludes by exploring what the African region has done or is currently doing to eliminate and arrest the spread of money laundering and terrorism financing incidences. It discusses the initiatives taken by the African region in terms of conventions, protocols and entities put in place to police these financial crimes. This also includes considering the initiatives that African sub-groupings, such as SADC, North Africa, East Africa and West Africa, are engaged in to combat money laundering and terrorism financing as well as discussing their effectiveness.

The strategic initiatives and actions by different major players, such as international and regional organisations and financial institutions, are explored to glean how Botswana can strengthen its role in combating financial crimes.

3.2 AML/CFT response by various international bodies

It has been established that ML/TF are global concerns with debilitating impacts on the international socio-economic system.[4] As a result, concerted international cooperation is necessary to combat the ills brought about by these financial crimes.[5] In response to the ML/TF, a number of initiatives have been adopted by the international community. Some of these initiatives have a binding effect while other merely consist

[4] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 4.
[5] This was emphasised in both the regional and international legislative instruments such as the Vienna and Palermo Conventions and the ESAAMLG MOU.

of recommendations and standards, the implementation of which depends on the political will of the individual countries. This section gives an overview of the international organisations that have issued the various instruments against ML/TF.

3.2.1 The United Nations, the Basel Committee, the Wolfsberg Group

The United Nations was the first organisation to develop global initiatives to suppress the effects of money laundering and terrorism through the Vienna Convention of 1988. However, this Convention was specifically aimed at the trafficking of drugs and it was restrictive to the extent that it only criminalised the laundering of drug proceeds, while it did not contain provisions relating to terrorism.[6] This shortcoming was remedied by the Palermo Convention, which criminalised all forms of organised crime and included clear provisions on the criminalisation of money laundering. However, just like the Vienna Convention, the Palermo Convention did not explicitly mention terrorism financing, but its text is broad enough to subsume any organised crime, including terrorism financing.[7]

Terrorism was more expressly criminalised by the International Convention for the Suppression of the Financing of Terrorism.[8] The Convention came before the 2001 United States terrorism misfortune and this shows that the international community has always been grappling with this issue.[9] All these United Nations Conventions can have the force of law in a country once ratified and will therefore then be binding on a country to make the necessary legislative reforms in accordance with the provisions of the respective Conventions.

In addition, the FATF, which is recognised as a major authority on issues of AML/CFT, has published Recommendations which are revised regularly to adapt to the ever-changing techniques used by the perpetrators.[10] The text of the FATF

[6] See the Vienna Convention text.
[7] See the Palermo Convention text.
[8] Adopted in 1999.
[9] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 3.
[10] See the FATF website.

Recommendations is comprehensive and provides guidance to countries on implementation.[11] The FATF's standards have been adopted world-wide and countries that fail to adequately implement the Recommendations are grey-listed, which can affect their economy because investors would be highly cautious to do business in such economic climates.[12]

The FATF maintains two types of lists, namely black listing and grey listing. The FATF's black list contains so-called non-cooperative countries or territories. The list includes countries that are considered deficient in their AM/CFT regulatory regimes. These countries are highly likely to be subjected to economic sanctions and other prohibitive measures by FATF member-states and other international organisations.[13] On the other hand, the grey list contains so-called jurisdictions under increased monitoring. The list includes countries that represent a much higher risk of money laundering and terrorism financing but have formally committed to working with the FATF to develop action plans that will address their AML/CFT deficiencies.[14].

Both the United Nations Conventions and the FATF Recommendations require that countries should put in place measures that would enable them to seize, freeze and confiscate the proceeds of and property derived from crime.[15] The legislative texts also emphasise the importance of these measures amongst national law enforcement agencies and all AML/CFT supervisory bodies.[16] Furthermore, they recognise that mutual legal assistance, extradition and international cooperation are essential to fight money laundering and terrorism financing.[17]

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[11] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 3.
[12] FATF website. http://www.fatf-gafi.org/countries/#high-risk (accessed 2 October 2019).
[13] FATF 'High-Risk Jurisdictions subject to a Call for Action' (21 February 2020). https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/call-for-action-february-2020.html (accessed 28 September 2021).
[14] FATF 'Jurisdictions under Increased Monitoring' (June 2021). https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-june-2021.html (accessed 28 September 2021).
[15] Vienna and Palermo Conventions texts and the FATF Recommendations.
[16] Vienna and Palermo Conventions texts and the FATF Recommendations.
[17] Vienna and Palermo Conventions texts and the FATF Recommendations.

In establishing standards for banking supervision, the Basel Committee also did not lag behind when it comes to money laundering and terrorism financing.[18] Although the Basel Committee cannot compel enforcement of its standards on members, it is accepted as the prime setter of financial services regulations and is recognised around the globe as such.[19] To address the issue of money laundering in the financial services sector, the Committee has issued three sets of principles.[20] These are the 1988 Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering, the 1997 Core Principles for Effective Banking Supervision, and the 2001 KYC Policies and Procedures.[21]

In addition, there is the Wolfsberg Group which is an association of thirteen global banks established in 2000 at the Château Wolfsberg in north-eastern Switzerland.[22] The initial objective of the Group was to combat money laundering in private banking.[23] It therefore issued out The Wolfsberg Anti-Money Laundering (AML) Principles for Private Banking in October 2000, revised in May 2002 and subsequently in June 2012.[24] The mandate of the Group has since been expanded to address other financial-crime risks within the financial system ranging from corruption, sanctions and terrorist financing.[25]

Some of the documents issued by the Group include the 'Statement on the Financing of Terrorism, Anti-Money Laundering Principles for Correspondent Banking, Guidance on a Risk Based Approach for Managing Money Laundering Risks, FAQs on Politically Exposed Persons (PEPs), Trade Finance Principles, Guidance on Anti-Bribery & Corruption Compliance Programmes and a statement endorsing measures to enhance

[18] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 2.
[19] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 2.
[20] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 2.
[21] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 2.
[22] Wolfsberg website. https://www.wolfsberg-principles.com/about/mission (accessed 4 January 2021).
[23] Gemma Aiolfi and Hans-Peter Bauer *the Wolfsberg Group* (2012) 1; Wolfsberg website.
[24] Wolfsberg website.
[25] Gemma Aiolfi and Hans-Peter Bauer t*he Wolfsberg Group* (2012) 1-5; Wolfsberg website.

the transparency of international wire transfers to promote the effectiveness of global AML and CFT programmes.'[26]

The Group continues to release documents in the form of guidance and principles aimed to proffer a positive approach or perspective to combating financial crime and effective financial risk management.[27]

3.2.2 Other international organisations

Apart from the United Nations, the Basel Committee, the Wolfsberg Group and the FATF discussed above, there are also certain other international organisations that are committed to ensure that money laundering, terrorism financing and the proliferation of weapons of war are suppressed. These are briefly discussed in the following paragraphs.

3.2.2.1 The Egmont Group

The Egmont Group represents a group of FIUs around the globe and serves as a forum in which financial expertise on money laundering and terrorism financing is exchanged.[28] The Group is currently made up of one hundred and sixty-four such units.[29] The FIUs act as a focal point in each country for the sharing of financial information both nationally and globally.[30] The requirement for individual countries to establish an FIU is contained in all the legislative instruments discussed above. The Group works closely with other international organisations to enhance the support it gives to its stakeholders (national FIUs) and ensuring that domestic FIUs adopt and implement effective AML/CFT legislative regimes.[31]

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[26] Wolfsberg website.
[27] Wolfsberg website.
[28] Egmont Group website. https://egmontgroup.org/en/content/about. (accessed 10 October 2019).
[29] Egmont Group website. https://egmontgroup.org/en/content/about. (accessed 10 October 2019).
[30] Egmont Group website. https://egmontgroup.org/en/content/about. (accessed 10 October 2019).
[31] Egmont Group website. https://egmontgroup.org/en/content/about. (accessed 10 October 2019).

3.2.2.2 International Organization of Securities Commissioners (IOSCO)

The International Organisation of Securities Commissioners (IOSCO) was formed in 1983 to integrate and coordinate securities regulation globally.[32] It has a presence in one hundred and fifteen countries,[33] and it issues standards, ethics, policies and procedures for the securities sector.[34] The main objectives of IOSCO include establishing standards for the regulation of the securities sector; assuring investors of the integrity of the securities sector; and coordinating the exchange of information amongst members.[35]

With regard to money laundering, IOSCO issued a Resolution on Money Laundering in 1992.[36] The Resolution contains seven provisions.[37] The Resolution covers effective customer identification to easily impose sanctions on money launderers; record-keeping requirements; reporting of suspicious money laundering transactions; cooperation with foreign securities exchanges; effective tools for money laundering detection and deterrence; and exchange of information to curb money laundering.[38]

3.2.2.3 International Association of Insurance Supervisors (IAIS)

The International Association of Insurance Supervisors (IAIS) was formed in 1994 with the aim to bring insurance regulators together and set standards and policies on insurance regulation, amongst others.[39] Another objective was to establish an

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[32] IOSCO website. https://www.iosco.org/about/?subsection=about_iosco. (accessed 15 October 2019).
[33] IOSCO website. https://www.iosco.org/about/?subsection=about_iosco. (accessed 15 October 2019). IOSCO website.
[34] IOSCO website. https://www.iosco.org/about/?subsection=about_iosco. (accessed 15 October 2019). IOSCO website.
[35] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-18; See also the IOSCO website.
[36] A Resolution on Money Laundering passed by the Presidents' Committee October 1992. https://www.iosco.org/library/resolutions/pdf/IOSCORES5.pdf. (accessed 17 October 2019).
[37] A Resolution on Money Laundering passed by the Presidents' Committee October 1992. https://www.iosco.org/library/resolutions/pdf/IOSCORES5.pdf.
[38] A Resolution on Money Laundering passed by the Presidents' Committee October 1992. https://www.iosco.org/library/resolutions/pdf/IOSCORES5.pdf. (accessed 17 October 2019).
[39] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-17; See also the IAIS website available at https://www.iaisweb.org/page/about-the-iais. (accessed 16 November 2019).

international forum where insurance regulators could engage and share expertise on the industry as well as information about how to maintain a stable financial market.[40]

The insurance sector, like the rest of the financial world, is affected by money laundering.[41] Therefore, in 2002 the IAIS issued Anti-Money Laundering Guidance Notes for Insurance Supervisors and Insurance Entities, Paper no. 5.[42] The Guidance Notes laid down four core principles that the insurance sector is expected to adopt against money laundering.[43] These principles require insurance entities to observe anti-money laundering laws; apply the KYC principles; cooperate with national law enforcement investigations; and finally, the insurance entities should adopt anti-money laundering procedures and ensure that their employees are trained in this respect.[44]

3.3 Global initiatives in response to money laundering and financing of terrorism

It cannot be denied that the effects of financial crime have been felt by all members of the international community.[45] It has become harder to arrest perpetrators because financial crime are not only transnational, but the methods and technologies used are also dynamic and taking place through various platforms, both formal and informal.[46] The incidences of AML/CFT undermine the socio-economic development of the world at large, as the money that could be used for developing the lives of citizens is lost to

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[40] IAIS website available at https://www.iaisweb.org/page/about-the-iais. (accessed 16 November 2019). IAIS website.
[41] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-17.
[42] https://ms.hmb.gov.tr/uploads/2018/11/Rehber-4.Sigorta-Denet%C3%A7ileri-ve-%C5%9Eirketleri-i%C3%A7in-Kara-Para-Aklamaya-%C4%B0li%C5%9Fkin-Rehber-Kitap.pdf. (accessed 17 November 2019).
[43] IAIS 'Anti-Money Laundering Guidance Notes for Insurance Supervisors and Insurance Entities' (2018) 5. https://ms.hmb.gov.tr/uploads/2018/11/Rehber-4.Sigorta-Denet%C3%A7ileri-ve-%C5%9Eirketleri-i%C3%A7in-Kara-Para-Aklamaya-%C4%B0li%C5%9Fkin-Rehber-Kitap.pdf. (accessed 20 November 2019).
[44] IAIS 'Anti-Money Laundering Guidance Notes for Insurance Supervisors and Insurance Entities' (2018) 5. https://ms.hmb.gov.tr/uploads/2018/11/Rehber-4.Sigorta-Denet%C3%A7ileri-ve-%C5%9Eirketleri-i%C3%A7in-Kara-Para-Aklamaya-%C4%B0li%C5%9Fkin-Rehber-Kitap.pdf. (accessed 20 November 2019). 5.
[45] Daniel Neale 'Taking Stock of 2018's Money Laundering Scandals: When is Enough Enough? (6 January 2019) Global Financial Integrity; 'Prominence of Money Laundering in Africa – Ten things to know' *Norton Rose Fulbright* February 2014.
[46] Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (2007) Paper 152 *Institute for Securities Studies* 2.

illegal activities.[47] This therefore calls for integrated cooperation amongst nations and the adoption of robust and effective measures to minimise the debilitating impacts of AML/CFT.[48]

The global community has responded to the ever-evolving challenges of money laundering and terrorism financing by developing internationally and well-accepted standards and procedures against money laundering, terrorism financing and all financial crimes in general.[49] The common feature cutting across these initiatives is the emphasis on regional and international cooperation and implementation of functional AML/CFT legislative frameworks.[50] Therefore, this section of the chapter is dedicated to highlighting the international initiatives against money laundering and terrorism financing.

There is broad international consensus that the FATF Recommendations and the United Nations Conventions represent an international framework on AML/CFT within which each country develops its own legislative approach and requirements.[51] The first class of global initiatives came from the United Nations, and the advantage of the United Nations Conventions is that, once ratified by a country, they can have the force of law in that state, depending on the legal system of that country.[52] The first

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[47] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 4; Zaiton Hamin, Normah Omar and Muhammad Muaz Abdul Hakim 'When Property is the Criminal: Proceeds of Money Laundering and Terrorism Financing in Malaysia' (2015) *Paper Presented at the International Accounting and Business Conference* 1.

[48] OAU convention on the Prevention and Combating of Terrorism Preamble; Protocol to the African Union Organisation on the Prevention and Combating of Terrorism Preamble; ESAAMLG MOU Preamble; ECOWAS Protocol on the Fight Against Corruption Preamble.

[49] Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (2007) Paper 152 *Institute for Securities Studies* 3; AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 4.

[50] Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (2007) Paper 152 *Institute for Securities Studies* 3; AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 4; 'Prominence of Money Laundering in Africa – Ten things to know' *Norton Rose Fulbright* February 2014.

[51] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-3; AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 8; Julie Walters *Anti-Money Laundering and Counter-Terrorism Financing Across the Globe: A Comparative Study of Regulatory Action Australian Institute of Criminology Report* (2011) xi-xii.

[52] Norman Mugarura 'The institutional Framework Against Money Laundering and its Underlying Predicate Crimes' (2011) 19 *Journal of Financial Regulation and Compliance* 177; Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-2.

convention to be introduced by the United Nations in this regard was the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, also commonly referred to as the Vienna Convention.[53]

3.3.1 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)

The Vienna Convention was developed in response to the rise in the trafficking of and demand for narcotic drugs and psychotropic substances.[54] Its aim is not only to deprive perpetrators of the money derived from their illegal activities but also to address the root cause of the illicit traffic in narcotic drugs and related substances.[55] Aware that the trafficking of illicit narcotic drugs is an international phenomenon, the state parties to this convention call for a cooperative approach regarding the suppression and elimination of these activities through regional and international organisations.[56]

The Vienna Convention contains comprehensive preventative provisions and measures against the illicit traffic in narcotic drugs and psychotropic substances.[57] These include provisions on the confiscation, seizure, freezing and restraint of proceeds of crimes.[58] The Vienna Convention, however, is couched narrowly to cover only drug trafficking and related offences and does not explicitly refer to money laundering. It nonetheless requires criminalisation of the concealment, transfer and conversion of any form of property derived from illegitimate sources.[59]

Although the Vienna Convention defines the concept of money laundering, it does not address it comprehensively.[60] Notwithstanding this fact, the Vienna Convention was

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[53] Adopted in 1988 and came into force in November 1990.
[54] Vienna Convention Preamble.
[55] Vienna Convention Preamble.
[56] Vienna Convention Preamble; Article 10 of the Vienna Convention.
[57] Vienna Convention.
[58] Articles 5 and 6 Vienna Convention.
[59] Articles 3 (1) (b) and (c) Vienna Convention.
[60] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-3; Zaiton Hamin, Normah Omar and Muhammad Muaz Abdul Hakim 'When Property is the Criminal: Proceeds of Money Laundering and Terrorism Financing in Malaysia' (2015) *Paper Presented at the International Accounting and Business Conference* 4.

the first instrument to introduce the criminalisation of money laundering activities and paved the way for more comprehensive AML/CFT instruments in future.[61]

3.3.2 United Nations Convention against Transnational Organized Crime (Palermo Convention)

The shortcomings of the Vienna Convention were rectified to a degree by the United Nations Convention against Transnational Organized Crime (Palermo Convention) in 2000, which became operational in 2003.[62] The Palermo Convention widened its scope to cover all forms of serious and organised crimes.[63] The objective of the Palermo Convention is to foster state parties' 'cooperation to effectively tackle transnational organised crime'.[64] The Convention has been hailed as a significant commitment by the international community to suppress incidences of transnational organised crime.[65]

Like the Vienna Convention, the Palermo Convention contains provisions criminalising the laundering of the proceeds of crime; the freezing, confiscating and seizing of assets; and mutual legal assistance and extradition.[66] Over and above the latter provisions, the Palermo Convention contains an article specifically dedicated to money laundering.[67] This is a notable difference from the Vienna Convention and depicts state parties' commitment to disrupting all forms of organised crime, including money laundering. Indeed, the Palermo Convention mandates state parties to criminalise money laundering and all predicate offences.[68]

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[61] William C. Gilmore 'Money Laundering: 'The International Aspect' in David Hume Institute, *Money Laundering* (1993) 1 *Papers on Public Policy* 2; Iona Livescu 'The link between Money Laundering and Corruption: Is the fight effective?' LLM Thesis, Tilburg University, 2018 13.
[62] United Nations Office on Drugs and Crime (UNODC) website. https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.
[63] Palermo Convention Preamble; Iona Livescu 'The link between Money Laundering and Corruption: Is the fight effective?' LLM Thesis, Tilburg University, 2018 13.
[64] Article 1 Palermo Convention.
[65] United Nations Office on Drugs and Crime (UNODC) website. https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.
[66] Articles 6, 12, 13, 16 and 18 Palermo Convention.
[67] Article 7 Palermo Convention.
[68] Article 6 of the Palermo Convention.

The Convention obliges members to adopt and implement legislative and administrative measures for banks, non-financial institutions and other entities which might be vulnerable to money laundering.[69] These measures should include customer identification, record keeping, reporting of suspicious transactions and monitoring of money movement across borders.[70] Members are encouraged to collaborate regionally and internationally and exchange information pertaining to money laundering.[71] In addition, each nation should have in place a financial intelligence unit that would be the central platform for information exchange.[72]

Furthermore, in developing their own legislative regimes, state parties are to borrow extensively from and be guided by the regional and multilateral instruments on anti-money laundering.[73] State parties also have to strive to facilitate and strengthen bilateral and multilateral cooperation amongst key entities in the countries, such as financial and supervisory bodies, the judiciary and law enforcement agencies.[74] The importance of the cooperation of nations has been stressed in all the legislative instruments, which shows the realisation that no country can fight illicit financial flows in isolation.

3.3.3 International Convention for the Suppression of the Financing of Terrorism

The financing of terrorism has always been a concern to the global community even before the aftermath of the 2001 attacks in the United States.[75] The International Convention for the Suppression of the Financing of Terrorism was adopted in 1999 and came into effect in 2002.[76] This was the state parties' response to the rise of terrorism incidences and the desire to promote international peace and stability.[77] This

[69] Article 7 (1) (a) Palermo Convention.
[70] Articles 7 (1) (a) and 7 (2) Palermo Convention.
[71] Article 7 (1) (b) Palermo Convention.
[72] Article 7 (1) (b) Palermo Convention.
[73] Article 7 (3) Palermo Convention.
[74] Article 7 (4) Palermo Convention.
[75] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-4.
[76] International Convention for the Suppression of the Financing of Terrorism. https://www.un.org/law/cod/finterr.htm. (accessed 14 August 2019)
[77] International Convention for the Suppression of the Financing of Terrorism Preamble.

instrument was also promulgated because, at the time, there was no multilateral treaty that adequately addressed the financing of terrorism.[78]

The primary objective of the International Convention for the Suppression of the Financing of Terrorism is to suppress the effects of terrorism activities by prosecuting and punishing the wrongdoers.[79] This is to be achieved primarily through international cooperation.[80] The Convention obliges state parties to criminalise all acts of terrorism financing committed knowingly or unknowingly, directly or indirectly.[81] Terrorist organisations should also be outlawed.[82] State parties should furthermore establish effective legislative frameworks with commensurate penalties to counter terrorism financing.[83]

It is interesting to note that the Convention provides that a person or a group commits the relevant offence even if the funds were not actually utilised to finance terrorism, as long as the funds were intended to finance terrorist activities.[84] In this case, what is criminalised is the 'intention' to finance terrorist activities and being aware that funds were intended for financing terrorist activities. The scope of the offence of terrorism financing is broad and covers even attempts at committing terrorism financing.[85] Accomplices in the acts of terrorism financing also commit an offense if they aid in the organising or actual commission of terrorist activities.[86]

An act will not be regarded as an act of terrorism financing if it takes place in one country, is committed by a national of that country who is actually present in that country and involves invoking the jurisdiction of another State.[87] This therefore means that, for purposes of this Convention, terrorism financing should only be punishable where it involves more than one state, if it occurs in another state and is committed by a national of another state or the effects of the acts of terrorism financing committed by

[78] International Convention for the Suppression of the Financing of Terrorism Preamble.
[79] International Convention for the Suppression of the Financing of Terrorism Preamble.
[80] International Convention for the Suppression of the Financing of Terrorism Preamble.
[81] Article 2 International Convention for the Suppression of the Financing of Terrorism.
[82] Article 2 (1) International Convention for the Suppression of the Financing of Terrorism.
[83] Article 4 International Convention for the Suppression of the Financing of Terrorism.
[84] Article 2 (3) International Convention for the Suppression of the Financing of Terrorism
[85] Article 2 (2) International Convention for the Suppression of the Financing of Terrorism.
[86] Article 2 (5) International Convention for the Suppression of the Financing of Terrorism.
[87] Article 3 International Convention for the Suppression of the Financing of Terrorism.

a national of one state is felt in another state.[88] The Convention has clear provisions on when a state party can assume jurisdiction over a terrorist or terrorist group.[89]

The Convention, as with the two instruments discussed above, contains provisions on the confiscation, forfeiture, identification, detection, freezing and seizing of proceeds of funds intended to be used for terrorist activities.[90] In addition, the Convention provides for mutual legal assistance,[91] the extradition of perpetrators[92] and the cooperation of states against terrorism financing.[93]

3.3.4 The Basel Committee on Banking Regulation and Supervision

The Basel Committee on Banking Regulation and Supervision (the Basel Committee), previously referred to as the Committee on Banking Regulations and Supervisory Practices, was formed in 1974.[94] The Committee is based in Basel, Switzerland at the Bank for International Settlements.[95] It was formed by the central bank governors of ten countries[96] and today it has members from twenty-eight countries.[97] The aim of the Basel Committee is to reinforce and promote quality banking supervision in the global community and foster collaboration amongst its members.[98]

Although the Committee has no legal supervisory powers over its members, it has developed a wide range of standards and principles on banking supervision which

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[88] Articles 3 and 7 International Convention for the Suppression of the Financing of Terrorism.
[89] Article 7 International Convention for the Suppression of the Financing of Terrorism.
[90] Article 8 International Convention for the Suppression of the Financing of Terrorism.
[91] Article 12 International Convention for the Suppression of the Financing of Terrorism.
[92] Articles 9, 10 and 11 International Convention for the Suppression of the Financing of Terrorism.
[93] Article 18 of the International Convention for the Suppression of the Financing of Terrorism.
[94] Bank for International Settlements website. https://www.bis.org/bcbs/history.htm. (accessed 14 August 2019).
[95] Bank for International Settlements website. https://www.bis.org/bcbs/history.htm. (accessed 14 August 2019)
[96] The founding countries are Belgium, Canada, France, Germany, Italy, Japan, Luxemburg, the Netherlands, Spain, Sweden, Switzerland, United Kingdom and United States.
[97] Bank for International Settlements website. https://www.bis.org/bcbs/history.htm. (accessed 14 August 2019).
[98] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-13; Bank for International Settlements website. https://www.bis.org/bcbs/history.htm . (accessed 14 August 2019).

have nonetheless been accepted and adopted worldwide.[99] For purposes of this thesis, the more relevant Basel Committee instruments are the 1988 Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering; the 1997 Core Principles for Effective Banking Supervision and the 2001 Know Your Customer (KYC) Policies and Procedures.[100]

3.3.4.1 1988 Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering

The Basel Committee published the Statement on the Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering (1988 Basel Statement on Prevention) in 1988, being aware that the banking and non-banking financial sectors are susceptible to be used for money laundering purposes.[101] The Basel Committee was concerned with the widespread magnitude of organised crime, which could only be suppressed through international collaborative efforts.[102] The Committee also wanted to ensure that the integrity and stability of the international financial services sector, especially banking, is restored and maintained.[103]

This 1988 Basel Statement on Prevention was also informed by the need to establish an international agreement on the principles and standards to which all global financial institutions can adhere.[104] The 1988 Statement on Prevention was therefore intended to ensure policies and procedures which do not undermine the integrity of the

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[99] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-13; Bank for International Settlements website. https://www.bis.org/bcbs/history.htm.(accessed 14 August 2019).
[100] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-14; Bank for International Settlements website. https://www.bis.org/bcbs/history.htm. .(accessed 14 August 2019).
[101] Preamble of the Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 1. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[102] Preamble of the Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 1. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[103] Preamble of the Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 1. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[104] The Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering (December 1988) Statement 2. Available at https://www.imolin.org/pdf/imolin/basle98.pdf; Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-15.

international banking system as well as foster good ethical professional conduct.[105] Consequently, the 1988 Basel Statement on Prevention establishes four principles which ought to be adopted by banking supervisory entities.[106]

The first principle is on customer identification.[107] This essentially means that banking and non-banking services should only be offered to customers who have been adequately identified. Customer identification should be mandatory for both new and existing customers.[108] Secondly, the banking business should be operated in consonance with the set national laws and policies regulating the financial services sector.[109] Although it might be difficult to identify an international transaction tainted by money laundering activities, banks are encouraged not to offer services where they suspect that the business transaction might involve money laundering.[110]

Thirdly, banks are encouraged to work closely with other national law enforcement entities.[111] Such cooperation could help deter money laundering activities, as it involves joint efforts against money laundering. Banks are particularly encouraged to cooperate with respect to the issue of customer confidentiality, as banks are usually reluctant to expose customer information, rightly so because professional ethics demand that they keep customer information in confidence.[112] Lastly, banking supervisors are encouraged to adopt the policies and principles enunciated in this 1988 Basel

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[105] The Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 2. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[106] The Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 3. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[107] The Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 3. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[108] The Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 4. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[109] The Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 4. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[110] Preamble of the Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 4. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[111] Preamble of the Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 4. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[112] Preamble of the Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 4. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).

Statement of Principles and ensure that their staff are adequately equipped to put in place the principles laid down by this Statement.[113]

3.3.4.2 1997 Core Principles for Effective Banking Supervision

The Basel Committee is committed to ensuring that the financial system is stable and is not used for fraudulent and criminal activities such as money laundering.[114] It has therefore continued to issue ethics, standards and principles to ensure that this objective is realised.[115] In 1997 the Basel Committee expanded its mandate by issuing the Core Principles for Effective Banking Supervision (Core Principles).[116] These Core Principles are continuously reviewed to adapt to the dynamic financial services sector.[117] For instance, they were reviewed in 2006 and 2012 respectively.[118]

The Core Principles are broad enough to cover all aspects of effective banking supervision.[119] It has been described as a comprehensive, all-rounded document providing valuable guidance to banking supervisors, since it covers an array of topics on effectively supervising the financial services sector.[120] The latest revision of the Core

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[113] Preamble of the Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering Statement (December 1988) 4. https://www.imolin.org/pdf/imolin/basle98.pdf. (accessed 24 August 2019).
[114] Duncan E. Alford 'Core Principles for Effective Banking Supervision: An Enforceable International Financial Standard?' (2005) 28 *Boston College International and Comparative Law Review* 239.
[115] Final Report to the G-7 Heads of State and Government on Promoting Financial Stability (1997) Denver Summit of the 8 June 1997.
[116] Humphrey P B Moshi, Fighting Money Laundering: The Challenges in Africa, Institute for Securities Studies Paper 152, October 2007, 5; Bank for International Settlements website. https://www.bis.org/press/p970922.htm. (accessed 14 August 2019)
[117] Bank for International Settlements website. https://www.bis.org/press/p970922.htm. (accessed 14 August 2019).
[118] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-15; Bank for International Settlements website. https://www.bis.org/press/p970922.htm. (accessed 14 August 2019).
[119] Duncan E. Alford 'Core Principles for Effective Banking Supervision: An Enforceable International Financial Standard?' (2005) 28 *Boston College International and Comparative Law Review* 239.
[120] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-15.

Principles entails twenty-nine core principles for effective banking supervision.[121] These Core Principles are categorised into two main classes.[122]

The first category, comprising of Core Principles 1 to 13, deals with the powers, functions and responsibilities bestowed on supervisors.[123] The second category, Core Principles 14 to 29, concerns the prudential regulation of banks.[124] Of the twenty-nine Core Principles, only one explicitly addresses the issue of money laundering,[125] namely Core Principle 29. It provides as follows:

> 'Principle 29 – Abuse of financial services: The supervisor determines that banks have adequate policies and processes, including strict customer due diligence rules to promote high ethical and professional standards in the financial sector and prevent the bank from being used, intentionally or unintentionally, for criminal activities.'[126]

3.3.4.3 2001 Customer Due Diligence for Banks

In 2001 the Basel Committee heightened its quest to ensure that the international financial system is not used for illicit purposes and to this end it published the Customer Due Diligence for Banks (Customer Due Diligence Principles).[127] These principles are

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[121] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 10. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019).
[122] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 10. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019).
[123] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 10. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019).
[124] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 10. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019).
[125] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 10. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019). http://www.bis.org/publ/bcbs230.htm;; Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-15.
[126] Core Principles for Effective Banking Supervision text, 2012 Revision.
[127] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 2. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019).

commonly referred to as Know Your Customer (KYC) Principles.[128] The KYC Principles are essential in assisting banks to combat money laundering, as they elaborate further on the principles and policies issued by the Basel Committee with particular emphasis on customer identification.[129]

The KYC Principles have four key features, namely the customer acceptance policy; customer identification; on-going risk monitoring of high-risk accounts; and risk management.[130] Customer acceptance policy means that banks should determine what policies and procedures would be followed in deciding to conclude business transactions with their customer as well as being clear about which business transactions would be declined.[131] Secondly, banks should manage all forms of risks, including operational, systemic and legal.[132]

The third element, namely customer identification, requires that the true identity of both natural persons and legal entities should be effectively established.[133] This means that efforts should be made to know the person or entity that the bank is dealing with and, in the case of companies, the true ownership of those companies should be determined.[134] Lastly, the KYC Principles dictate that there should be continuous monitoring of high-risk accounts.[135] After customers have been adequately identified and

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[128] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 2. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019).
[129] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 2. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019).
[130] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document Core Principles for Effective banking Supervision' (December 2011) 9. http://www.bis.org/publ/bcbs230.htm. (accessed 9 September 2019).
[131] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 16. https://www.bis.org/publ/bcbs85.pdf;; Customer Due Diligence for Banks text, 2001. (accessed 20 September 2019).
[132] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 16. https://www.bis.org/publ/bcbs85.pdf;; Customer Due Diligence for Banks text, 2001. (accessed 20 September 2019).
[133] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 10. https://www.bis.org/publ/bcbs85.pdf; Customer Due Diligence for Banks text, 2001. (accessed 20 September 2019).
[134] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 10. https://www.bis.org/publ/bcbs85.pdf;; Customer Due Diligence for Banks text, 2001. (accessed 20 September 2019).
[135] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 11. https://www.bis.org/publ/bcbs85.pdf;; Customer Due Diligence for Banks text, 2001. (accessed 20 September 2019)

categorised, the accounts of those who are considered high-risk clients, such as Politically Exposed Persons (PEPs), should be continually monitored.[136]

3.3.5 The Financial Action Task Force

3.3.5.1 General

The Financial Action Task Force (FATF) is an inter-governmental body formed by the Group of Seven (G7) countries in 1989.[137] The main objective of the FATF is to ensure that robust and functional measures (both legislative and administrative) against money laundering, terrorism financing and proliferation financing are adopted worldwide so as to maintain the stability and security of the financial system.[138] It has thirty-nine members with South Africa being the only African member.[139] The FATF also has associate members, which are mostly regional organisations such as the GIABA and ESAAMLG.[140] Other organisations, such as the AfDB, United Nations, International Monetary Fund and the World Bank, participate as observers.[141]

To fulfil its mandate, the FATF produces Recommendations that have been accepted as international policy on issues of money laundering, terrorism financing and proliferation financing.[142] The first set of Recommendations was published in 1990 and these are revised periodically.[143] The Recommendations were accordingly reviewed in 1996,

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[136] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 11. https://www.bis.org/publ/bcbs85.pdf;; Customer Due Diligence for Banks text, 2001. (accessed 20 September 2019); Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-16.

[137] FATF website. https://www.fatf-gafi.org/about/whoweare/. (accessed 22 September 2019). The G7 Countries are Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.

[138] FAFT *FATF Annual Report* (2017-2018) 9.

[139] FATF website. https://www.fatf-gafi.org/about/membersandobservers/. (assessed 25 September 2019). FATF website.

[140] FATF website. https://www.fatf-gafi.org/about/membersandobservers/. (accessed 25 September 2019). FATF website.

[141] FATF website. https://www.fatf-gafi.org/about/membersandobservers/. (accessed 25 September 2019). FATF website.

[142] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 2; See also the FATF website. https://www.fatf-gafi.org/about/membersandobservers/.

[143] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 2.

2001, 2001 and 2012.[144] These FATF Recommendations, together with the United Nations Conventions discussed above, are recognised as the accepted international legislative policy on the subject matter.[145] Countries are therefore expected to adopt these Recommendations and implement them subject to their national laws, failing which they run the risk of being listed as high-risk countries, which could affect doing business in such countries.[146] For instance, Botswana has been on the list of high-risk countries since October 2018.[147]

3.3.5.2 FATF Recommendations

In 1990 the FATF issued 40 Recommendations dealing with the laundering of drug money, while in 1996 the Recommendations were revised to include clear anti-money laundering provisions.[148] In 2001 the scope of the FATF Recommendations was extended to the financing of terrorism and in 2008 the financing of the proliferation of arms and weapons of war was added to the FATF mandate.[149] Together, all of these recommendations were known as the 40+9 FATF Recommendations.[150] The 2012 revision resulted in the 9 TF Recommendations being subsumed into the other Recommendations, thereby once again resulting in 40 Recommendations in total. The FATF Recommendations are categorised into several broad groups.[151] The breakdown provided below represents a high-level overview of the FATF Recommendations.

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[144] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 3.
[145] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-9.
[146] FATF website. Available at http://www.fatf-gafi.org/countries/#high-risk. (accessed 2 October 2019).
[147] Mbongeni Mguni 'Botswana battles dirty money greylisting in Paris' *Mmegi Newspaper* 24 May 2019.
[148] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 6.
[149] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 6.
[150] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 9; Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-12.
[151] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 9.

The first class is referred to as Anti-Money Laundering and Counter-Terrorism Financing Policies and Coordination.[152] Under this heading one finds Recommendations 1 and 2.[153] Recommendation 1 requires that countries should adopt a risk-based approach towards money laundering, and terrorism and proliferation financing.[154] This effectively means that countries should identify their risks and then take proportionate measures to address such risks.[155] Recommendation 2 obliges countries to ensure that there is effective collaboration between and coordination of all AML/CFT key players nationally.[156] All national authorities and institutions should therefore work together to curb money laundering and terrorism financing.[157]

The second class of Recommendations is titled 'money laundering and confiscation' and contains Recommendations 3 and 4.[158] Recommendation 3 requires states to criminalise money laundering and to ensure that the offence of money laundering is extended to all serious crimes, including all forms of predicate offences.[159] Recommendation 4 calls on countries to confiscate, seize and freeze all proceeds and property derived from crime in accordance with the Vienna and Palermo Conventions.[160]

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[152] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 8-9.
[153] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 8-9.
[154] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 8-9.
[155] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 8- 9.
[156] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 9.
[157] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 9.
[158] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 10.
[159] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 10.
[160] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 10.

The third broad category deals with the financing of terrorism and proliferation of arms of war, and consists of Recommendations 5 to 8.[161] Recommendation 5 provides that terrorist acts and groups should be criminalised.[162] Recommendations 6 and 7 require states to comply with the United Nations Security Council Resolutions in terms of which targeted financial sanctions are imposed, as and when they are passed, against the financing of terrorism and the proliferation of arms of war.[163] Recommendation 8 emphasises that non-profit organisations, which are susceptible to terrorism and terrorism financing, should be closely regulated and monitored nationally.[164]

The fourth category, which only has Recommendation 9, deals with preventative measures and requires that the implementation of the FATF Recommendations should not be hindered by financial services secrecy laws, such as the regulations and policies on customer confidentiality.[165] The fifth heading is on customer due diligence and record keeping, and contains Recommendations 10 and 11.[166] Recommendation 10 requires that business transactions should only be conducted with customers who have been adequately identified and if, with respect to legal persons, the beneficial ownership has been determined.[167] Financial institutions are also required to keep records of all their business transactions for at least five years.[168]

The sixth category requires that additional measures should be undertaken for certain customers and activities, and comprises of Recommendations 12 to 16.[169] In this

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[161] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 11-12.
[162] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 11.
[163] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 11-12.
[164] Recommendation 8 of the FATF Recommendations.
[165] Recommendation 9 of the FATF Recommendations.
[166] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 12-13.
[167] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 12.
[168] Recommendation 11 of the FATF Recommendations.
[169] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 12-16.

regard, stringent and additional precautions should be taken when dealing with Politically Exposed Persons, including the on-going monitoring of their accounts.[170] In addition, when dealing with a correspondent bank, the local financial institution should be satisfied that the cross-border correspondent has effective AML/CFT controls.[171]

Particular emphasis is also placed on persons that offer financial services, and thus it is required that they should be properly licensed to provide such services.[172] With respect to new technologies and new products, financial institutions should ensure that thorough risk management is conducted to ensure that the products and new inventions about to be launched would not be utilised for money laundering and terrorism financing purposes.[173] When carrying out wire transfer instructions banks should ensure that both the originator and the beneficiary's details are captured.[174]

The seventh category is on reliance, controls and financial groups, and consists of Recommendations 17 to 19.[175] Recommendation 17 provides that group banks may rely on third party information, provided that they have effective financial group programmes that are able to detect money laundering and terrorism financing transactions.[176] Furthermore, with regard to financial groups, internal controls should be put in place to ensure that information is easily shared between the entities.[177] Countries are also obliged to be alert when conducting business with countries that have been identified as higher-risk by the FATF.[178]

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[170] Recommendation 12 of the FATF Recommendations.
[171] Recommendation 13 of the FATF Recommendations.
[172] Recommendation 14 of the FATF Recommendations.
[173] Recommendation 15 of the FATF Recommendations.
[174] Recommendation 16 of the FATF Recommendations.
[175] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 16-17.
[176] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 16.
[177] Recommendation 18 of the FATF Recommendations.
[178] Recommendation 19 of the FATF Recommendations.

The eighth broad category involves the reporting of suspicious transactions.[179] Recommendation 20 requires that all business transactions which seem suspicious should be reported to the national FIU.[180] The entire financial institution, its employees and directors should be shielded by the law in cases where they report suspicious transactions and divulge confidential information in good faith.[181] The protections should include both civil and criminal liabilities.[182]

The nineth category is directed towards designated non-financial businesses and professions (DNFBPs).[183] It provides that Recommendations 10 to 21, which are applicable to financial institutions, shall be applicable to DNFBPs *mutatis mutandis*.[184] The tenth category deals with transparency and the beneficial ownership of legal persons and arrangements, and comprises Recommendations 24 and 25.[185] These recommendations essentially provide that countries should guard against legal persons and arrangements being used for money laundering and terrorist activities.[186] It requires that countries should determine the actual beneficial ownership and control of the legal persons and arrangements.[187]

Group eleven is focussed on the powers and responsibilities of competent authorities and other institutional measures.[188] Countries are obliged to subject financial institutions and DNFBPs to comprehensive, robust and stringent regulation and supervision in accordance with the FATF Recommendations to ensure that money laundering and

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[179] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 17.
[180] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 17.
[181] Recommendation 21 of the FATF Recommendations.
[182] Recommendation 21 of the FATF Recommendations.
[183] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 17.
[184] Recommendation 22 and 23 of the FATF Recommendations.
[185] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 20.
[186] Recommendations 24 and 25 of the FATF Recommendations.
[187] Recommendations 24 and 25 of the FATF Recommendations.
[188] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 21.

terrorism financing are minimised.[189] The supervisors should also be empowered to effectively monitor and foster compliance by financial institutions and DNFBPs.[190]

The twelfth class deals with operational matters and law enforcement, and it includes Recommendations 29 to 32.[191] Countries are obliged to establish Financial Intelligence Units (FIUs), which should serve as each country's primary contact point on AML/CFT issues.[192] The FIUs should have access to all information relating to money laundering, financing of terrorism and associated predicate offences.[193] Recommendation 30 provides that law enforcement and other investigative authorities should have functions relating to money laundering and terrorist financing.[194] In addition, law enforcement agencies and investigation entities should be empowered to obtain all information relevant to their investigations.[195] Recommendation 32 stipulates that countries should adopt measures that would ensure that money laundering does not occur through cash couriers.[196]

The thirteenth category lays down certain general requirements.[197] For instance, countries should keep statistics of everything related to money laundering and terrorism financing, including prosecutions, investigations, seizure and freezing of properties and proceeds of crime, amongst other things.[198] Supervisory authorities are also required to furnish financial institutions and DNFBPs with feedback to enable them to improve their AML/CFT initiatives.[199] The fifteenth category makes it mandatory for

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[189] Recommendations 26 and 28 of the FATF Recommendations.
[190] Recommendation 27 of the FATF Recommendations.
[191] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 22-23.
[192] Recommendation 29 of the FATF Recommendations.
[193] Recommendation 29 of the FATF Recommendations.
[194] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 22.
[195] Recommendation 31 of the FATF Recommendations.
[196] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 23.
[197] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary'(February 2012, updated in June 2019) 23-24.
[198] Recommendation 33 FATF Recommendations.
[199] Recommendation 34 FATF Recommendations.

commensurate sanctions to be taken against financial institutions and DNFBPs that fail to adhere to the AML/CFT requirements.[200]

The final class of Recommendations contains provisions on international cooperation and entails Recommendations 36 to 40.[201] Countries are called upon to become parties to the Vienna and Palermo Conventions, the UN Convention against Corruption, the UN Terrorist Financing Convention and other relevant treaties.[202] In addition, countries have to commit to extend mutual legal assistance to one another.[203] This mutual legal assistance should be broad enough to cover providing of assistance with foreign requests regarding the freezing and confiscation of proceeds and property of crime.[204] Countries are furthermore expected to cooperate on issues of extradition and also extend other forms of cooperation to one another.[205]

The FATF Recommendations will be discussed more comprehensively in the Chapter 5, where they are used to benchmark the current regime in Botswana.

3.3.6 Comments on the international AML/CFT initiatives

It has been established that money laundering, the financing of terrorism and proliferation financing are global concerns with debilitating impacts on the international socio-economic system.[206] Consequently, international cooperation is necessary to combat the economic and social ills brought about by AML/CFT.[207] In response to the money laundering and terrorism activities, a number of initiatives have been adopted by the international community. Some of these initiatives have a binding effect while others

[200] Recommendation 35 FATF Recommendations.
[201] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 25-28.
[202] Recommendation 36 FATF Recommendations.
[203] Recommendation 37 FATF Recommendations.
[204] Recommendation 38 FATF Recommendations.
[205] Recommendations 39 and 40 respectively FATF Recommendations.
[206] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 4.
[207] This was emphasised in both the regional and international legislative instruments such as the Vienna and Palermo Conventions and the ESAAMLG MOU.

are not binding and depend on the political will of the individual countries for implementation.

The United Nations was the first organisation to develop global initiatives to suppress the effects of money laundering and terrorism through the Vienna Convention of 1988. However, this Convention was specifically aimed at the trafficking of drugs and it was restrictive to the extent that it only criminalised the laundering of drug proceeds, while it did not contain provisions relating to terrorism.[208] This shortcoming was remedied by the Palermo Convention, which criminalised all forms of organised crime and included clear provisions on the criminalisation of money laundering. However, just like the Vienna Convention, the Palermo Convention did not explicitly mention terrorism financing, but its text is broad enough to subsume any organised crime, including terrorism financing.[209]

Terrorism was more expressly criminalised by the International Convention for the Suppression of the Financing of Terrorism.[210] The Convention came before the 2001 United States terrorism misfortune and this shows that the international community has always been grappling with this issue.[211] All these United Nations Conventions can have the force of law in a country once ratified and will therefore be binding on a country to make the necessary legislative reforms in accordance with the provisions of the respective Conventions.

In addition, the FATF, which is recognised as a major authority on issues of AML/CFT, has published Recommendations which are revised regularly to adapt to the ever-changing techniques used by the perpetrators.[212] The text of the FATF Recommendations is comprehensive to provide guidance to countries on implementation.[213] The FATF's standards have been adopted world-wide and countries that fail to adequately

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[208] See the Vienna Convention text.
[209] See the Palermo Convention text.
[210] Adopted in 1999.
[211] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 3.
[212] See the FATF website.
[213] FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019) 3.

implement the Recommendations are grey-listed, which can affect their economy because investors would be highly cautious to do business in such economic climates and their transaction will be subject to enhanced due diligence.[214]

Both the United Nations Conventions and the FATF Recommendations require that countries should put in place measures that would enable them to seize, freeze and confiscate the proceeds of and property derived from crime.[215] The legislative texts also emphasise the importance of these measures amongst national law enforcement agencies and all AML/CFT supervisory bodies.[216] Furthermore, they recognise that mutual legal assistance, extradition and international cooperation are essential to fight money laundering and terrorism financing.[217]

In establishing standards for banking supervision, the Basel Committee also did not lag behind when it comes to money laundering and terrorism financing.[218] Although the Basel Committee cannot compel enforcement of its standards on members, it is accepted as the prime setter of financial services regulations and is recognised around the globe as such.[219] To address the issue of money laundering in the financial services sector, the Committee has issued three sets of principles.[220] These are the 1988 Principles on the Prevention of Criminal Use of the banking System for the Purpose of Money Laundering, the 1997 Core Principles for Effective Banking Supervision, and the 2001 KYC Policies and Procedures.[221]

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[214] FATF website. http://www.fatf-gafi.org/countries/#high-risk. (accessed 2 October 2019).
[215] Vienna and Palermo Conventions texts and the FATF Recommendations.
[216] Vienna and Palermo Conventions texts and the FATF Recommendations.
[217] Vienna and Palermo Conventions texts and the FATF Recommendations.
[218] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 2.
[219] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 2.
[220] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 2.
[221] Bank for International Settlements 'Basel Committee on Banking Supervision-Consultative Document- Customer Due Diligence for Banks' (2001) 2.

3.3.7 Regional institutions against money laundering, financing of terrorism and proliferation financing

This section presents an overview of the efforts made by African institutions and organisations to combat money ML/TF as well as the instruments they issued on AML/CFT.

3.3.7.1 The Eastern and Southern Africa Anti-Money Laundering Group

The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) is an inter-governmental organisation whose vision is to combat money laundering and terrorism financing.[222] Its mission is to coordinate all regional efforts of combating money laundering and terrorism financing by fostering robust and functional AML/CFT legislative frameworks amongst its member states.[223] The principal objectives of ESAAMLG are to ensure that member states not only adopt but also implement the FATF recommendations.[224]

In essence, ESAAMLG exists to encourage members states to adhere to their obligations under other multilateral treaties aimed at fighting money laundering, terrorism financing and proliferation activities.[225] ESAAMLG's membership is divided into three tiers, being the members, the cooperating and supporting nations, and the observers.[226] When ESAAMLG was formed in 1999, it had sixteen members.[227] Today it boasts of eighteen members, namely Angola, Botswana, Eswatini, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.[228] ESAAMLG has observers from both regional and international organisations, such as the AUSTRAC, Commonwealth Secretariat, East African Community, FATF, IMF, SADC, United

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[222] ESAAMLG*ESAAMLG Anti-Money Laundering and Counter-Terrorist Financing Measures, Botswana Evaluation Report* (May 2017) 2; ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).
[223] ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 4.
[224] Article I (a) ESAAMLG MOU.
[225] Article I (b) ESAAMLG MOU.
[226] See Articles II, III and Iv ESAAMLG MOU.
[227] ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 4.
[228] ESAAMLG website. https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).

Kingdom, United States of America, UNODC, World Bank and World Customs Organization.[229] Cooperating and supporting nations are the United Kingdom and the United States of America.[230]

ESAAMLG is made up of key structures to enable it to meet its strategic objectives. These structures include the Council of Ministers (the Council), which is the chief decision-making arm of the ESAAMLG.[231] The Council is made up of one ministerial representative from each member state, and the Council members choose a President from amongst themselves who shall occupy the office for a year.[232] The Council meets at least once annually.[233] The Council is responsible for the strategic management of the group and is tasked with approving the Group's annual reports; approving ESAAMLG's strategic plans and annual business plans; appointing the Secretary General of the Secretariat; and approving the mutual evaluation procedures and reports of state parties, amongst others.[234]

The second structure of the ESAAMLG is the Task Force.[235] The Task Force is made up of senior government officials of the state parties who meet at least twice annually.[236] All technical matters of the Group are vested in the Task Force, which is responsible for making recommendations for approval by the Council.[237] The Task Force recommends the adoption of the agenda for the next Council meeting; makes recommendations for strategic positions such as the External Auditor, Executive Secretary and the Deputy Executive Secretary; makes recommendations on policy issues; and

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[229] ESAAMLG website. https://www.esaamlg.org/index.php/about. (accessed 12 August 2019). ESAAMLG website.
[230] ESAAMLG website. https://www.esaamlg.org/index.php/about. (accessed 12 August 2019). ESAAMLG website.
[231] Article VII ESAAMLG MOU; ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 12; See also the ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).
[232] Article VII ESAAMLG MOU; ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 12; See also the ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).
[233] Article VII (2) ESAAMLG MOU; ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 12; See also the ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019)..
[234] Article VII (4) ESAAMLG MOU; ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 12; See also the ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).
[235] Article IX ESAAMLG MOU; ESAAMLG *Annual Report (*1 April 2016 – 31 March 2017) 12. See also the ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).
[236] Articles IX (1) and (2) ESAAMLG MOU; ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 12; See also the ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).
[237] Article IX (4) ESAAMLG MOU; ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 12; See also the ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).

considers self-assessment and mutual evaluation rules and reports, financial reports and the ESAAMLG's objectives and goals.[238]

The third structure of the ESAAMLG is the Steering Committee.[239] It comprises of the chairperson of the Task Force and his Deputy; the immediate-past chairperson of the Task Force; an ESAAMLG member who is a FATF member; another ESAAMLG member; and two additional members.[240] This Committee is essentially an advisory committee advising the Task Force on all policy issues and the overall operation of the Secretariat.[241] The Secretariat is pivotal to the effective implementation of the ESAAMLG objectives, as it offers support to all the structures of the ESAAMLG discussed above.[242]

3.3.7.2 Inter-Governmental Action Group against Money Laundering in West Africa (GIABA)

In response to the problems surrounding money laundering and terrorism financing, the heads of state of ECOWAS members established the Inter-Governmental Action Group against Money Laundering in West Africa in 2000.[243] The member states are Benin, Burkina Faso, Cape Verde, Comoros, Côte d'Ivoire, Gambia, Ghana, Guinea Bissau, Liberia, Guinea Conakry, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.[244]

The objective of GIABA is to strengthen the capability of its members in the fight against money laundering and terrorism financing.[245] GIABA observer status is not only extended to African countries but also to all other countries and organisations

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[238] Article IX (4) ESAAMLG MOU; ESAAMLG *Annual Report* (1 April 2016 – 31 March 2017) 12; See also the ESAAMLG website https://www.esaamlg.org/index.php/about. (accessed 12 August 2019).
[239] Article IXA ESAAMLG MOU.
[240] Article IXA (2) ESAAMLG MOU.
[241] Article IXA (1) ESAAMLG MOU.
[242] Article XI ESAAMLG MOU.
[243] FATF website. .https://www.fatfgafi.org/pages/intergovernmentalactiongroupagainstmoneylaunderinginwestafricagiaba.html. (accessed 17 August 2019).
[244] FATF website. https://www.fatfgafi.org/pages/intergovernmentalactiongroupagainstmoneylaunderinginwestafricagiaba.html. (accessed 17 August 2019).
[245] GIABA website. https://www.giaba.org/about-giaba/index_656.html. (accessed 18 August 2019).

with an interest in its objective.[246] GIABA fights money laundering and terrorism financing by ensuring that state parties implement the FATF recommendations; offering technical support to members; conducting research and facilitating mutual evaluation exercises; and offering capacity building. GIABA was recognised by FATF as an associate member in 2010.

3.3.7.3 African Development Bank Group

Other than inter-governmental organisations, financial institutions are also instrumental in the fight against illicit financial flows of all forms, money laundering and terrorism financing included. As a result, the African Development Bank (AfDB) also assists the African continent to reduce the detrimental and adverse effects of illicit financial flows.[247] The AfDB's primary objective is to stimulate socio-economic development on the African continent so as to eradicate poverty.[248] It seeks to attain this goal by allocating investment resources to its members as well as through technical assistance and capacity building.[249]

The AfDB was established in 1964 and comprises of two categories of shareholders.[250] The shareholders are the fifty-four African countries and twenty-six non-African countries.[251] The two categories are also referred to as regional and non-regional members respectively.[252] The AfDB was therefore created specifically to enhance the economic performance of the African continent.[253] As a bank it has the fiduciary duty to ensure that the loans and guarantees issued are not associated with corruption, money laundering or terrorism financing.[254]

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[246] GIABA website. https://www.giaba.org/about-giaba/index_656.html. (accessed 18 August 2018). GIABA website.
[247] AfDB *African Development Bank Group Annual Report* (2018) 11. https://www.afdb.org/en/documents/annual-report-2018. (accessed 12 August 2019).
[248] AfDB website. https://www.afdb.org/en/about/mission-strategy. (accessed 12 August 2019).
[249] AfDB website. https://www.afdb.org/en/about/mission-strategy. (accessed 12 August 2019). AfDB website.
[250] AfDB website. https://www.afdb.org/en/about/corporate-information. (accessed 12 August 2019). AfDB website.
[251] AfDB website. https://www.afdb.org/en/about/corporate-information. (accessed 12 August 2019). AfDB website.
[252] AfDB African Development Bank Annual Report (2018) 4.
[253] AfDB African Development Bank Annual Report (2018) 4.
[254] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 4.

The AfDB has also developed a strategy to combat money laundering and terrorism financing in Africa to ensure that internal controls and measures are put in place to safeguard its operations from illicit financial flows.[255] This strategy is four-fold.[256] Firstly, the AfDB is mandated to strengthen its internal procedures and policies to ensure that the money lent to regional members is not the subject of money laundering, terrorism financing or corruption.[257] This involves carrying out due diligence exercises to ensure that loans issued will not be used for money laundering and terrorism financing activities and also capacitating its staff to be able to detect potential money laundering transactions.[258]

Secondly, the strategy requires the AfDB to make it possible for its African members to implement and adopt international standards on AML/CFT as well as to encourage participation in activities aimed at eliminating the adverse effects of money laundering and terrorism regionally and internationally.[259] The AfDB, as with the international community, is guided by the FATF Recommendations and the various United Nations Conventions on money laundering and terrorism financing.[260]

The AfDB has therefore adopted the above-mentioned instruments into its own operations and the strategy requires that it should facilitate implementation of these internationally agreed instruments by its regional member countries.[261] It has also capacitated its staff on issues of illicit financial flows.[262] Having implemented the well-recognised and agreed standards on money laundering and terrorism financing, the strategy

[255] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 4.
[256] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 15.
[257] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 15.
[258] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 16.
[259] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 15.
[260] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 17.
[261] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 17.
[262] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 17.

is to provide an accessible platform to its regional members by assisting with research for an AML/CFT database.[263]

Thirdly, the AfDB seeks to assist its regional member countries to review and align their AML/CFT legislative framework to the international standards and to implement these standards.[264] The AfDB is of the view that a lack of or limited AML/CFT financing policies and laws in some countries make them lose a significant amount of money which could be used to develop those countries.[265] The AfDB has furthermore noted that the legislative frameworks of its regional member countries vary significantly and thus it aims to bridge this gap through regional initiatives so that countries may benefit from collaborative efforts.[266]

Lastly, the AfDB's strategy is to fight financial crimes by aiding in the creation of functional sub-regional FATF-Style Regional Bodies (FSRBs).[267] Regional cooperation is encouraged in money laundering and terrorism financing matters.[268] No country can win the fight against financial crimes on its own, as the perpetrators have also become sophisticated.[269] The AfDB thus intends to assist FSRBs financially and technically as well as implore those regional member countries that do not belong to any FSRBs to join them so that they can be part of the regional efforts against money laundering and terrorism financing.[270]

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[263] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 17.
[264] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 17.
[265] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 18.
[266] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 18.
[267] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 18.
[268] OAU convention on the Prevention and Combating of Terrorism Preamble; Protocol to the African Union Organisation on the Prevention and Combating of Terrorism Preamble; ESAAMLG MOU Preamble; ECOWAS Protocol on the Fight Against Corruption Preamble.
[269] Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (2007) Paper 152 *Institute for Securities Studies* 3.
[270] AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 19.

3.4 Regional policy frameworks on anti-money laundering and countering the financing of terrorism

This section is dedicated to discussing the various regional instruments on the African continent that are relevant to the fight against money laundering, financing of terrorism and proliferation financing. It will highlight those provisions which show how different regional economic groupings have committed themselves to eradicate these financial crimes.

3.4.1 OAU Convention on the Prevention and Combating of Terrorism, 1999

The Organisation for African Unity (OAU) Convention on the Prevention and Combating of Terrorism, 1999[271] recognises that terrorism is a fundamental violation of people's rights and that it should be prevented and eliminated. As a result, the parties to the Convention have vowed to fight terrorism by reviewing their local laws and criminalising all acts of terrorism.[272] State parties also committed to ensuring that they sign, ratify and accede with speed to the various international instruments listed in the Annex to the Convention.[273] Furthermore, state parties agreed to implement actions, punish identified offenses adequately and promulgate relevant laws in line with regional and international instruments.[274] All actions adopted by state parties, including legislative interventions and penalties on terrorist acts, should be reported to the Secretary General of the OAU within a year.[275]

Although state parties recognise each country's sovereignty and right to self-determination, it is clear that political, philosophical, racial, ethnic and religious ideologies cannot be relied on as justifications for terrorism.[276] State parties are in acquiescence about cooperation to combat all forms of terrorism.[277] They have specifically agreed to ensure that their respective countries do not support, aid, finance, organise and/or

[271] Convention was adopted on 14 July 1999 at Algiers.
[272] Article 2 (a) OAU Convention on the Prevention and Combating of Terrorism.
[273] Article 2 (b) OAU Convention on the Prevention and Combating of Terrorism.
[274] Article 2 (c) OAU Convention on the Prevention and Combating of Terrorism.
[275] Article 2 (d) OAU Convention on the Prevention and Combating of Terrorism.
[276] Article 3 OAU Convention on the Prevention and Combating of Terrorism.
[277] Article 4 OAU Convention on the Prevention and Combating of Terrorism.

commit acts of terrorism either directly or indirectly.[278] They have also committed to ensuring that their territories are not utilised as terrorism havens.[279]

A country may assert its jurisdiction in line with this Convention when an act of terrorism is committed in its jurisdiction.[280] It may also assume jurisdiction if the person who committed the offence is arrested within its territories and it is actually provided for by national law.[281] If the offence is committed against an aircraft of a country or it is committed on board a vessel or ship flying that country's flag, that country may exercise jurisdiction over that offence and offender.[282] Not only that, jurisdiction may be exercised by a country if the offence is committed by its nationals or a stateless person but who is a habitual resident in that territory.[283] In addition, if the offence is committed against one of its state organs abroad, such as an embassy, or if the act is committed against the security of that state, then that country may assume jurisdiction.[284]

In terms of the Convention, state parties are to ensure that they have measures in place to detect cross-border transportation, importation and exportation of arms which can be utilised to commit terrorism acts.[285] State parties should come up with mechanisms to dismantle all terrorist support networks as well as ensure that people granted asylum status are not involved in acts of terrorism.[286] State parties should also collaborate in arresting and trying terrorism perpetrators in terms of national laws or extradite them according to the Convention or other applicable treaties between the member states.[287]

State parties have agreed to strengthen their cooperation by the exchange of information amongst the member states.[288] This information exchange should assist with the arrest of a terrorist group or persons who committed or attempted to commit acts

[278] Article 4 OAU Convention on the Prevention and Combating of Terrorism.
[279] Article 4 OAU Convention on the Prevention and Combating of Terrorism.
[280] Article 6 (1) (a) OAU Convention on the Prevention and Combating of Terrorism.
[281] Article 6 (1) (a) OAU Convention on the Prevention and Combating of Terrorism.
[282] Article 6 (1) (b) OAU Convention on the Prevention and Combating of Terrorism.
[283] Articles 6 (1) (c) and 6 (2) (a) OAU Convention on the Prevention and Combating of Terrorism.
[284] Articles 6 (2) (b) and (e) OAU Convention on the Prevention and Combating of Terrorism.
[285] Article 4 OAU Convention on the Prevention and Combating of Terrorism.
[286] Article 4 OAU Convention on the Prevention and Combating of Terrorism.
[287] Article 4 (i) OAU Convention on the Prevention and Combating of Terrorism.
[288] Article 5 (1) OAU Convention on the Prevention and Combating of Terrorism.

of terrorism against that state.[289] In addition, the information to be exchanged by member states includes seizure and confiscation of any instruments used in committing terrorist crimes.[290]

In an effort to strengthen their cooperation, the state parties to the Convention have agreed on extradition terms. For instance, state parties have agreed to ensure the extradition of perpetrators in their territories to answer for their charges in the requesting states in consonance with this Convention or bilateral treaties between state parties.[291] Extradition may, however, be refused if the requesting state has already passed final judgement in respect of the terrorist acts for which extradition is sought.[292]

A request for extradition may also be declined when a competent authority of the requested state has already decided not to take further action with respect to actions committed by the perpetrator sought by the requesting state.[293] However, it shall be mandatory for the requested state to submit the case to a competent authority for prosecution within its jurisdiction if it decides against extradition notwithstanding that the offense was not committed in its territory.[294]

In addition, when contracting amongst each other, state parties have to ensure that terrorist acts, as articulated in article 1 of the Convention, are incorporated as extraditable offences.[295] Extradition requests shall also be routed through diplomatic means or other established arms of the state parties.[296] The Convention further dictates how all extradition request submissions should be packaged.[297] For instance, it is mandatory for all extradition requests to be in writing.[298]

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[289] Article 5 (2) (a) OAU Convention on the Prevention and Combating of Terrorism.
[290] Article 5 (2) (b) OAU Convention on the Prevention and Combating of Terrorism.
[291] Article 8 (1) OAU Convention on the Prevention and Combating of Terrorism.
[292] Article 8 (3) OAU Convention on the Prevention and Combating of Terrorism.
[293] Article 8 (3) OAU Convention on the Prevention and Combating of Terrorism.
[294] Article 8 (4) OAU Convention on the Prevention and Combating of Terrorism.
[295] Article 9 OAU Convention on the Prevention and Combating of Terrorism.
[296] Article 10 OAU Convention on the Prevention and Combating of Terrorism.
[297] Article 11 OAU Convention on the Prevention and Combating of Terrorism.
[298] Article 11 OAU Convention on the Prevention and Combating of Terrorism.

There are special rules for dealing with cases which are deemed urgent when the requested state is also required to provisionally arrest the perpetrator.[299] However, such an arrest should be backed by the local law and only allowed for a reasonable duration.[300] The Convention recognises that a country may receive multiple extradition requests in respect of the same perpetrator or terrorist acts and in that case, the requested state should consider the overall available information whether or not to extradite and to which country.[301]

State parties may request extra-territorial investigations (*commission rogatoire*) and mutual legal assistance amongst themselves, as this strengthens the cooperation and capability in matters of legal proceedings related to criminal investigations.[302] This request should, however, be declined in instances where it may undermine the sovereignty of the requested state, where it may counter efforts to curb terrorism ills and where both the requested and the requesting states have to implement the execution of the *commission rogatoire* in respect of similar terrorist crimes.[303]

The *commission rogatoire* should not be done in a vacuum but should be anchored in local laws.[304] State parties are to accord each other police and legal assistance to deal with the terrorism offences recognised by the Convention.[305] State parties should put in place measures to ensure that extra-territorial investigations and mutual legal assistance are achieved.[306] Reservations which purport to derogate from the aims of the Conventions shall not be allowed.[307] Finally, article 21 provides that the Convention may be augmented by entering into further agreements and special protocols.[308]

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[299] Article 12 OAU Convention on the Prevention and Combating of Terrorism.
[300] Article 12 OAU Convention on the Prevention and Combating of Terrorism.
[301] Article 13 OAU Convention on the Prevention and Combating of Terrorism
[302] Article 14 OAU Convention on the Prevention and Combating of Terrorism
[303] Article 15 OAU Convention on the Prevention and Combating of Terrorism.
[304] Article 16 OAU Convention on the Prevention and Combating of Terrorism.
[305] Article 17 OAU Convention on the Prevention and Combating of Terrorism.
[306] Article 18 OAU Convention on the Prevention and Combating of Terrorism.
[307] Article 19 (4) OAU Convention on the Prevention and Combating of Terrorism.
[308] Article 21 (1) OAU Convention on the Prevention and Combating of Terrorism.

3.4.2 Protocol to the African Union Organisation on the Prevention and Combating of Terrorism[309]

The states parties to the Convention discussed above, in terms of article 21 of the Convention,[310] have developed a Protocol to the AU Convention on the Prevention and Combating of Terrorism to augment the provisions of the Convention. The Protocol was informed and necessitated by the rise in terrorism acts in both the African and international arenas.[311] Furthermore, the state parties recognised that the use of advanced technology for acts of terrorism was increasing and that the region needed to take proactive steps to join the international community to fight terrorism.[312]

In addition to ensuring that the provisions of the Convention are given effect to, the Protocol also established the Peace and Security Council (PSC) of the African Union and, most importantly, it aims to ensure that the objectives enumerated in article 3(d) of the Protocol are realised.[313] Through article 3(d) of the Protocol, state parties essentially commit to designate national contact points to ensure that information and activities about terrorists are shared with ease and timeously in the region, continent and even at an international level.[314] The aim is to strengthen cooperation between all the groupings to eliminate terrorism.[315]

The Protocol's most notable contribution is perhaps the establishment of the PSC, which is responsible for centralising all efforts by the parties in eliminating terrorism.[316] The PSC is therefore tasked to coordinate and centralise all regional activities aimed at combating terrorism.[317] These activities include ensuring that mechanisms are put

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[309] Adopted by the Third Ordinary Session of the Assembly of the African Union, Addis Ababa, 8 July 2004.
[310] Article 21 (1) of the OAU Convention on the Prevention and Combating of Terrorism.
[311] Protocol to the African Union Organisation on the Prevention and Combating of Terrorism Preamble.
[312] Protocol to the African Union Organisation on the Prevention and Combating of Terrorism Preamble.
[313] Article 2 (2) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[314] Article 3 (1) (d) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[315] Article 3 (1) (d) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[316] Article 4 Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[317] Article 4 Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.

in place for the collection and dissemination of information on acts of terrorism;[318] keeping state parties up to date with developments on terrorism practices, including providing advice on best methods for terrorism reduction;[319] submitting an annual report to the AU Assembly capturing the state of terrorism in the region;[320] ensuring that all plans of action and programmes adopted by the AU are implemented;[321] considering reports submitted by members;[322] and ensuring the establishment of information networks at country, regional and international level.[323]

3.4.3 SADC Protocol on Finance and Investment

The Southern African Development Community (SADC) Protocol on Finance and Investment[324] was enacted by state parties with the aim to promote and stimulate the harmonisation of financial and investment policies amongst SADC state parties.[325] It is intended that the latter would be achieved through the state parties' cooperation, coordination and regional integration, amongst others.[326] With regard to anti-money laundering, state parties have undertaken to cooperate to eradicate money laundering within the region so as to sustain economic development.[327] It is important to note that the protocol only alludes to money laundering and does not mention financing of terrorism or the proliferation of arms of war.

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[318] Article 4 (a) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[319] Article 4 (b) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[320] Article 4 (c) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[321] Article 4 (d) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[322] Article 4 (e) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[323] Article 4 (f) Protocol to the African Union Organisation on the Prevention and Combating of Terrorism.
[324] Enacted in 2006 and came into on 16 April 2010.
[325] Article 2 (1) SADC Protocol on Finance and Investment.
[326] Article 2 (2) SADC Protocol on Finance and Investment.
[327] Article 2 (2) (m) of the SADC Protocol on Finance and Investment; see also Chapter 8 of the Protocol which reiterates the State Parties' commitment to cooperation to fight money laundering within the region.

3.4.4 Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment

On 18 August 2011 the SADC state parties signed Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment (SADC Annex 12)[328] relating to anti-money laundering.[329] The entire Annex 12 is dedicated to elaborating on how state parties would address the issue of money laundering within the region. It goes further by not only addressing money laundering (as the Protocol did) but also containing provisions relating to the financing of terrorism.[330]

The objective of SADC Annex 12 is to promote uniformity in the laws, policies and regulations relating to AML/CFT to ensure that these are aligned as much as possible to the FATF Recommendations.[331] The other objective is to ensure that corresponding and commensurate actions and/or activities taken by state parties to combat money laundering and terrorism financing within the SADC regional block are supported.[332]

State parties are mandated to put in place all necessary measures calculated to effectively combat money laundering and terrorism financing, and these measures should be in consonance with the FATF Recommendations.[333] Low capacity countries should also receive capacity support to comply with the FATF Recommendations.[334] It is worth highlighting that state parties are to ensure that actions taken to combat money laundering and terrorism financing are not only functional but commensurate at any given time.[335]

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[328] 2011. This comes after entry into force of the Protocol on Combating Illicit Drugs Trafficking for SADC Region in March 1999. This Protocol also discusses the State Parties commitment to combat money laundering and there is no mention of terrorism financing.
[329] Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment. This Annex gives effect for the implementation of Chapter 8 of the SADC Protocol on Finance and Investment.
[330] See Annex 12 Preamble and Article 2 on the objectives of Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[331] Article 2 Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[332] Article 2 Annex (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[333] Article 3 (1) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment. It is mandatory in the sense that the Article 3 stipulates that State parties shall adopt measures in line with the FATF recommendations.
[334] Article 3 (2) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment
[335] Article 3 (1) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.

In addition, in taking such measures, state parties should consider the effect that these measures may have at country and regional level, especially with regard to crime, financial regulation and the lower-class population's ability to access financial services.[336] In essence, when deciding which measures to adopt, state parties should be cognisant of their level of economic development to determine their ability to comply fully with the FATF Recommendations. Article 3 concludes by prompting state parties to accede as soon as possible to international conventions against money laundering, drugs trafficking and corruption.[337]

According to the Annex, state parties are required to criminalise money laundering and terrorism financing in line with the FATF Recommendations.[338] Furthermore, state parties are to ensure that all key players involved in combating money laundering and terrorism financing cooperate both nationally and internationally with regard to information exchange.[339] However, state parties are to allow information exchange only in the event that it is dictated or authorised by national law.[340]

The latter point, however, leaves room for a lack of compliance by state parties on the basis that provision of the information required is not prescribed by national law. Not only that, a challenge may arise due to the lack of harmonisation and coordination of laws, policies and regulations on money laundering and terrorism financing, as what is allowable in one country may not be authorised by the other country's national law.

The Annex also stipulates that independent financial intelligence units (FIUs) are to be set up by the state parties and that these units should be functional.[341] The independent FIUs within each country are required to be affiliated to the Egmont Group.[342] In Botswana, FIA is the designated FIU and thus the only entity allowed to be a member of the Egmont Group.[343] The independence of the FIA in Botswana was raised in Chapter 1 and will be interrogated further in the following chapters.

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[336] Article 3 (1) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[337] Article 3 (3) of Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[338] Article 4 of Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[339] Article 5 (1) (a) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[340] Article 5 (1) (a) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[341] Article 5 (1) (b) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[342] Article 5 (1) (c) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[343] Section 31 FI Act.

Additionally, all supervisory as well as regulatory entities, individually or in conjunction with financial intelligence units, should be well capacitated in terms of having the relevant legal regime and resources for countering money laundering and terrorism financing.[344] State parties should also develop procedures for monitoring the movements of cash and other bearer negotiable instruments, especially transfers of large quantities of money across their borders.[345] State parties are cautioned, however, not to obstruct the flow of legitimate money across their borders.[346] This therefore means that state parties should be able to assess and differentiate between illegitimate and legitimate money being transferred across their borders.

The Annex also requires state parties to implement compliance procedures for AML/CFT.[347] These preventative measures should include customer due diligence, record keeping, information sharing and reporting as well as having adequate internal controls.[348] State parties should also adopt a risk-based approach (RBA) for regulated entities, thus ensuring that preventative measures adopted against money laundering and terrorism financing are proportionate for the identified risks.[349] A RBA has been said to be the essential ingredient to any country's AML/CFT legal framework.[350] This was evidenced by the emphasis placed on RBA when the FATF Recommendations were updated in 2012.[351]

Adequate information on crime, terrorism financing and money laundering should be shared with regulated entities to enable them to determine to what extent they are affected by these forms of financial crime.[352] This will also assist them to employ the right measures to mitigate the effects. State parties should moreover ensure that, whilst imposing measures on regulated institutions, the consequences of such measures on their clients, whether direct or indirect, are taken into account.[353]

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[344] Article 5 (2) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[345] Article 5 (3) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[346] Article 5 (3) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[347] Article 6 (1) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[348] Article 6 (1) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[349] Article 6 (2) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[350] FATF *Guidance for a Risk-Based Approach, The Banking Sector* (October 2014) 10. http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Banking-Sector.pdf.
[351] FATF Recommendation 1.
[352] Article 6 (3) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[353] Article 6 (4) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.

State parties are to ensure that, over and above regulating and supervising regulated institutions, other entities that may be vulnerable to money laundering and terrorism financing are also adequately and comprehensively regulated and monitored.[354] Each state party is to align its regulatory and supervisory measures to the FATF Recommendations, international best practices and the terms of Annex 12.[355]

The SADC Anti-Money Laundering Committee[356] is expected to review and produce an evaluation report on the milestones achieved by employing the agreed tools against money laundering and terrorism financing in each country and on the region as a whole every five years.[357] The report should also advance recommendations for enhancing the positive impact of mitigating the effects of money laundering and terrorism financing within the region.[358] This report is to be shared with state parties for their input and deliberated on by the SADC Anti-Money Laundering Committee prior to publication.[359]

Where they are non-existent, state parties are mandated to assemble national committees comprising of all key players necessary in terrorism financing and money laundering reduction and eradication, such as government departments, regulatory and supervisory institutions and the regulated entities.[360] This national committee shall ensure that members adhere to their obligations under Annex 12; review and evaluate the country's implementation of Annex 12; advise State parties if there are additional measures to be put in place; and support the SADC Anti-Money Laundering Committee.[361]

Article 10 establishes the SADC Anti-Money Laundering Committee and stipulates that it shall comprise of one member as well as one alternating member from the respective national committees.[362] The primary objectives of the Committee are to assess state parties' adherence to Annex 12 and advise on additional measures to be adopted by

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[354] Article 7 (1) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[355] Article 7 (2) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[356] Established in terms of Article 10 of Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[357] Article 8 (1) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[358] Article 8 (1) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[359] Article 8 (3) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[360] Article 9 (1) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[361] Article 9 (2) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[362] Article 10 (1) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.

members as and when necessary.[363] To avoid duplication of efforts, the Committee shall work with the ESLAAMLG and other relevant bodies and facilitate the sharing of information.[364] The Committee is self-regulated and meets at least once a year.[365] It reports yearly to the Committee of Ministers of Finance and Investment.[366]

3.4.5 MOU of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG)[367]

Determined to maintain the socio-economic stability within the region, members of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) have signed a memorandum of understanding (MOU) to tackle the effects of money laundering, terrorism financing and proliferation as well as to promote regional and international cooperation amongst member states.[368] The chief objective of this ESAAMLG MOU is to ensure that member states not only adopt but also implement the FATF Recommendations.[369] The other primary objective is to encourage member states to adhere to their obligations under other multilateral treaties aimed at fighting money laundering, terrorism financing and proliferation activities.[370]

Members of the ESAAMLG are those countries which signed the ESAAMLG MOU in 1999 or which did so six months thereafter.[371] Countries seeking membership of the ESAAMLG should be determined to fight money laundering, terrorism financing and financing the proliferation of arms of war.[372] They should also commit to the sharing of information as well as adopting legislation aimed at combating financial crimes.[373] Members should also be committed to ensuring that decisions of the ESAAMLG are implemented as well as paying membership subscriptions.[374] They should strive to

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[363] Article 10 (2) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[364] Article 10 (4) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[365] Article 10 (5) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[366] Article 10 (3) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[367] Amendments approved by the sixteenth and eighteenth Ministerial Council meetings in Victoria falls, Zimbabwe, September 2016 and Mahe, Seychelles, September 2018.
[368] ESAAMLG MOU Preamble.
[369] Article I (a) ESAAMLG MOU.
[370] Article I (b) ESAAMLG MOU.
[371] Article II (1) ESAAMLG MOU.
[372] Article II (3) (a) ESAAMLG MOU.
[373] Article II (3) (b) and (c) ESAAMLG MOU.
[374] Article II (3) (d) and (e) ESAAMLG MOU.

bring money laundering, terrorism financing and the proliferation of financing of weapons of war under control by cooperating with other states and implementing international treaties geared towards combating financial crimes.[375]

Article III provides for cooperating with and supporting nations.[376] These are members which are committed to supporting the objectives of the ESAAMLG either technically or financially.[377] They further allow mutual evaluations of the implementation of the FATF Recommendations to be carried out in their countries.[378] The members also recognise that some organisations and countries may only want to participate as observers.[379] These are countries and organisations which have an interest in the objectives of the ESAAMLG.[380]

Member states should, in line with municipal laws, have a standing Anti-Money Laundering Committee, which should comprise of diverse professionals from all relevant fields.[381] Members are further requested to carry out self-assessments and mutual evaluations facilitated by the Secretariat.[382] The chief decision-making arm of the ESAAMLG is the Council of Ministers who are required to meet at least once annually.[383]

3.4.6 Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption

The Economic Community of West African States (ECOWAS) is a fifteen member states regional trading block formed in 1975.[384] The objective of ECOWAS was to establish a borderless regional block to deepen and foster economic trade of goods and services.[385] In 2015, ECOWAS developed the ECOWAS Protocol on the Fight

[375] Article II (3) (f) ESAAMLG MOU.
[376] Article III ESAAMLG MOU.
[377] Article III (1) ESAAMLG MOU.
[378] Article III (2) ESAAMLG MOU.
[379] Article IV ESAAMLG MOU.
[380] Article IV (1) (a) ESAAMLG MOU.
[381] Article XII ESAAMLG MOU.
[382] Articles XIII and XIV ESAAMLG MOU.
[383] Article VII (2) ESAAMLG MOU.
[384] ECOWAS website. https://www.ecowas.int/about-ecowas/basic-information/ (accessed 24 September 2019).
[385] ECOWAS website.

against Corruption.[386] The objectives of this Protocol are to ensure the reduction and elimination of all forms of corruption amongst member states, by promoting the effective cooperation between states against corruption.[387]

The other aim of the Protocol is to ensure that legislative measures across the region are harmonised so as to effectively fight corruption.[388] It is worth highlighting that the main ECOWAS Treaty has no explicit provisions on AML/CFT. The current Protocol covers corruption generally and only dedicates one article to the laundering of proceeds of corruption.[389] The latter article is not couched in broad enough terms to cover all aspects of money laundering but is narrowed to cover the laundering of proceeds of corruption only. Terrorism financing is not mentioned either.

The region has nonetheless responded to the effects of money laundering and terrorism, which are expanding at an alarming rate in the region and globally, by establishing the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA).[390] GIABA is a special arm of ECOWAS created to combat money laundering and terrorism financing in the region.[391] GIABA will be discussed in greater detail further below.

3.4.7 Continental Free Trade Area (AfCFTA) Agreement[392]

The African Continental Free Trade Area (AfCFTA) is the largest trading zone to have been created in the world, as it seeks to integrate approximately 1.3 billion people in Africa covering over fifty-five countries.[393] It has been referred to as the 'potential economic game changer' should it live up to expectations.[394] The objectives of this

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[386] 2015.
[387] Article 2 (i) and (ii) ECOWAS Protocol on the Fight Against Corruption.
[388] Article 2 (iii) ECOWAS Protocol on the Fight Against Corruption.
[389] Article 7 ECOWAS Protocol on the Fight Against Corruption.
[390] It was established in 2000.
[391] https://www.giaba.org/about-giaba/index_656.html.
[392] Signed 21 March 2018 in Kigali, Rwanda and came into effect on 30 May 2019.
[393] Claire Bisseker 'Will Africa's Free-Trade Area Live up to the Hype?' *Financial Mail* 20 June 2019. https://www.businesslive.co.za/fm/features/africa/2019-06-20-will-africas-free-trade-area-live-up-to-the-hype/. (accessed 23 August 2019).
[394] Boureima Balima 'Economic 'game changer'? African leaders launch free-trade zone' *Business News* 7 July 2019. https://www.reuters.com/article/us-africa-trade/economic-game-changer-african-leaders-launch-free-trade-zone-idUSKCN1U20BX. (accessed 24 August 2019).

agreement includes establishing and deepening economic relationships amongst state parties; creating a single market for goods and services; and eliminating trade barriers and overlapping memberships of state parties to regional blocks.[395]

Although the creation of a single market and liberalisation of goods and services within the continent is a welcome development, this alone cannot take the region very far if the continent does not also address other issues related to trade and economic development, such as corruption, money laundering and terrorism financing. However, the state parties did not seize this opportunity to also harmonise the legislative framework and facilitate the implementation of effective measures against money laundering and terrorism financing on the continent. The reason for this is because the Agreement together with its Protocols do not have any provisions on this pertinent issue of money laundering and terrorism financing despite these practices being rampant on the African continent.[396]

3.4.8 Similarities and differences in the regional policy frameworks

Having discussed the various policy frameworks on the African continent above, this section is dedicated to highlighting the similarities and differences in these documents. This would help determine to what extent these policy frameworks are complementary and contradictory.

Firstly, all the instruments are aligned as far as the aim of combating money laundering and terrorism financing is concerned. This is so because the objectives of all the instruments clearly and unequivocally stipulate that their aim is to fight either money laundering or the financing of terrorism activities or both.[397] It is worth highlighting that only the ESAAMLG recognises, as an aim, the combating of the financing of the proliferation of arms and weapons of war.[398] However, some policy frameworks, like the

[395] Article 2 AfCFTA.
[396] 'Prominence of Money Laundering in Africa – Ten things to know' *Norton Rose Fulbright* February 2014.
[397] Article 2 OAU Convention on the Prevention and Combating of Terrorism, 1999; Protocol to the African Union Organisation on the Prevention and Combating of Terrorism Preamble; Article I (a) and (b)of the ESAAMLG MOU.
[398] ESAAMLG MOU Preamble.

ECOWAS Protocol against corruption, deals with corruption generally and does not have clear terms on money laundering and terrorism financing.[399] The African Union Protocol, on the other hand, focuses mainly on terrorism financing.

The AfCFTA,[400] which is the latest agreement seeking to integrate and harmonise the trading of goods and services on the African continent, also does not contain provisions on the combating of money laundering and terrorism financing. This agreement's objective is instead to harmonise the provisions of all the regional economic communities' agreements and therefore should have seized the opportunity to also harmonise provisions on AML/CFT, as these are key if the African economy is to thrive.

In addition, all the above instruments show that their state parties are aware of and recognise that, if a war is to be won against money laundering, terrorism financing and the financing of arms of war, then regional cooperation is necessary.[401] State parties have therefore sought to tackle this issue through their regional blocks for deeper integration and coordination.[402] The challenge however is that the provisions of these various regional grouping may differ due to the differing levels of economic development.[403]

Not only are state parties encouraged to support regional cooperation but they should also cooperate amongst themselves.[404] For instance, state parties are to cooperate in the areas of information sharing and knowledge.[405] It is widely accepted that money laundering, terrorism financing and other financial crimes are usually multi-national in

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[399] Article 7 ECOWAS Protocol on the Fight Against Corruption.
[400] Signed 21 March 2018 in Kigali, Rwanda and came into effect on 30 May 2019.
[401] OAU convention on the Prevention and Combating of Terrorism Preamble; Protocol to the African Union Organization on the Prevention and Combating of Terrorism Preamble; ESAAMLG MOU Preamble; ECOWAS Protocol on the Fight Against Corruption Preamble.
[402] OAU convention on the Prevention and Combating of Terrorism Preamble; Protocol to the African Union Organization on the Prevention and Combating of Terrorism Preamble; ESAAMLG MOU Preamble; ECOWAS Protocol on the Fight Against Corruption Preamble.
[403] ESAAMLG *Annual Report* (1 April 2012-31 March 2013) 22.
[404] Article 5 OAU Convention on the Prevention and Combating of Terrorism; OAU convention on the Prevention and Combating of Terrorism Preamble; Protocol to the African Union Organization on the Prevention and Combating of Terrorism Preamble; ESAAMLG MOU Preamble; ECOWAS Protocol on the Fight Against Corruption Preamble.
[405] Article III of the ESAAMLG MOU and Article 6 (3) of Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.

nature.[406] As a result, not only do the above policy tools call for national and regional cooperation but they also require that state parties should be open to the international community's cooperation as well.[407]

Furthermore, a common thread running through the regional policy tools is that state parties should implement the FATF Recommendations.[408] The implementation of the FATF Recommendations should be aligned to each country's level of economic development as well as national laws.[409] However, this aspect is not contained in the AfCFTA Agreement or the ECOWAS Protocol on the Fight Against Corruption. The GIABA, which is a specialised arm of the ECOWAS's mandate, includes the aim of ensuring that members implement the FATF Recommendations. Over and above this, state parties should adhere to their obligations under the various treaties that aim to reduce the prominence of money laundering and terrorism financing.[410]

The other notable similarity is that each policy tool mandates that there must be some national committees dedicated to addressing all issues of money laundering and terrorism financing.[411] These contact points or centres are responsible for the exchange of information amongst states, regionally and even internationally; ensuring that state parties comply with their obligations under the different treaties; as well as assessing state parties' implementation of the policy frameworks.[412]

State parties are required to produce reports annually stipulating their level of adherence to their obligations and showing national efforts in reducing the flow of money

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[406] Zaiton Hamin, Normah Omar and Muhammad Muaz Abdul Hakim 'When Property is the Criminal: Proceeds of Money Laundering and Terrorism Financing in Malaysia' *Paper Presented at the International Accounting and Business Conference* (2015) 1.
[407] Protocol to the African Union Organisation on the Prevention and Combating of Terrorism Preamble; Article 5 (1) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment; ESAAMLG MOU Preamble.
[408] Article I (a) ESAAMLG MOU; Article 2 Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[409] Article 7 (2) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[410] Article 1 (b) ESAAMLG MOU; Article 3 (3) Annex 12(Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[411] Article 3 (1) Protocol of the African Union Organisation on the Prevention and Combating of Terrorism; Article 9 (1) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[412] See Article 9 (2) Annex 12 (Anti-Money Laundering) of the SADC Protocol on Finance and Investment.

laundering and financing of terrorism.[413] However, this requirement is not found in the AfCFTA or the ECOWAS Protocol on the Fight Against Corruption. Furthermore, only the ESAAMLG MOU includes mandatory provisions for self-assessment and mutual evaluations by member states.[414] The Secretariat is to assist state parties to undertake these evaluation exercises.[415]

Membership of these policy instruments differs. For instance, some policy frameworks only allow 'countries' to be members while allowing other entities only as observers, as is the case with the African Union Organisation on the Prevention and Combating of Terrorism; the AU Protocol to the Convention on the Prevention and Combating of Terrorism; and Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment. However, the ESAAMLG MOU goes further by categorising its membership to include cooperating and supporting nations.[416] These are nations who are committed to the objectives of the ESAAMLG and assist either technically or financially.[417]

3.5 Conclusion

This chapter discussed both the international and regional initiatives on anti-money laundering, terrorism financing and the proliferations of arms of war. It was noted that there is international consensus that the United Nations Convention on Anti-Money Laundering and Counter-Terrorism Financing and the FATF Recommendations represent the international legislative regime on AML/CFT. These instruments therefore entail the yardstick against which other regional bodies and national entities should measure their AML/CFT initiatives.

The chapter commenced by noting that the international community has also responded to money laundering and terrorism financing through several initiatives, which

[413] Article 2 (d) African Union Organisation on the Prevention and Combating of Terrorism; Article 4 (c) of the AU Protocol to the Convention on the Prevention and Combating of Terrorism; Article 8 (1) Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment.
[414] Articles XIII and XIV ESAAMLG MOU.
[415] Articles XIII and XIV ESAAMLG MOU.
[416] Article III ESAAMLG MOU.
[417] Article III ESAAMLG MOU.

include both binding and ‘soft law’ instruments. These international organisations, such as the FATF and the IAIS, are regarded as setters of standards, policies and ethics. However, even though some of these international instruments do not have the force of law, such as the Basel Committee Principles and those of IOSCO, they cannot be ignored because they are perceived by the global community to be authoritative in the money laundering, terrorism financing and proliferation of arms of war space. They also involve sanctions that can be imposed on countries that fail to implement the set standards, an example being the recent grey-listing of Botswana by the FATF.

It further examined the African continent’s efforts against illicit financial flows. It discussed both the African regional legislative frameworks and the institutions assisting in the fight against illicit financial flows on the continent. The examination of the African initiatives revealed that efforts were initially channelled towards fighting corruption. Later money laundering was added and, most recently, their efforts were expanded to also cover terrorism financing and the proliferations of arms of war.

It was further noted that the AfCFTA, which seeks to ensure deeper intra-African trade, does not contain any AML/CFT measures. However, it is hoped that such provisions will be included in the Investment Protocol to the AfCFTA, which is yet to be adopted. It would have been beneficial for the African continent to also integrate and harmonise laws and policies on AML/CFT at an African level to avoid the different and overlapping initiatives across the African region.

Lessons learnt from the examination of both the regional and the international instruments are incorporated in Chapter 6. The next chapter is dedicated to fleshing out the current AML/CFT legislative framework in Botswana. It will also bring to the fore the role of AML/CFT regulators and institutions in Botswana. Finally, the chapter will highlight the prosecution and conviction of persons and/ or entities in ML/TF cases in Botswana.

Chapter 4

Botswana's regulatory regime in combating money laundering, financing of terrorism and proliferation financing

4.1 Introduction

The effects of money laundering, financing of terrorism and proliferation financing cannot be understated. It has an impact on the national, regional and even international economic order. If a country is deemed to have low levels of corruption and has sound financial and other laws in place, the country is considered more attractive for foreign direct investment. This is particularly important for a developing country such as Botswana, where the development of a diversified economy depends on creating an environment that would be attractive to foreign investors and ensuring that banks can maintain foreign correspondent banking relationships.

However, in contravention of the above assumption, in May 2020 Botswana was blacklisted by the European Union as a result of money laundering issues.[1] In addition, on 19 October 2018 Botswana was amongst the countries identified as money laundering high risk destinations by the FATF.[2] In its ongoing country reviews, the FATF found that Botswana had 'strategic deficiencies' which warrant that the country be regarded as a high risk hub for money laundering and terrorism financing.[3] The report further mentioned, however, that Botswana had made a high level political commitment to tackle these deficiencies while working with the FATF and ESAAMLG.[4]

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[1] 'EU names 4 African nations to financial crimes watchlist' *Africa Times* 9 May 2020; 'Money laundering: The EU says Botswana poses a risk' *Sunday Standard* 11 May 2020; 'Africa hits back against EU's name and shame game' *Euractive.com* 2 June 2020 https://www.euractiv.com/section/botswana/news/africa-hits-back-against-eus-name-and-shame-game/ (accessed 20 June 2020).

[2] FATF website. http://www.fatf-gafi.org/countries/a-c/bahamas/documents/fatf-compliance-october-2018.html (accessed 21 November 2019).

[3] FATF website, http://www.google.co.bw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjmwOe31breAhWLJMAKHebUD_YQFjAAegQIC-BAB&url=http%3A%2F%2Fwww.mmegi.bw%2Findex.php%3Faid%3D78161%26dir%3D2018%2Foctober%2F26&usg=AOvVaw3Zray-ejzCNs5xL72iUzRJ (accessed 20 November 2019)

[4] FATF website. http://www.fatf-gafi.org/countries/a-c/bahamas/documents/fatf-compliance-october-2018.html (accessed 21 November 2019).

In terms of the above-mentioned report, Botswana was tasked to expeditiously come up with a plan of action to:

> '(1) assess the risks associated with legal persons, legal arrangements, and NPOs, and developing and implementing a risk-based comprehensive national AML/CFT strategy; (2) develop and implement risk-based AML/CFT supervisory manuals; (3) improve its analysis and dissemination of financial intelligence by the Financial Intelligence units (FIU), and enhancing the use of financial intelligence among the relevant law enforcement agencies; (4) develop and implement CFT strategy, and ensuring the TF investigation capacity of the law enforcement agencies; (5) ensure the implementation without delay of targeted financial sanctions measures related to terrorist financing and proliferation financing, and (6) apply a risk-based approach to monitoring non-profit organizations.'[5]

Following the 2017 ESAAMLG mutual assessment findings, Botswana made amendments to several laws with a view to comply with the international standards on money laundering, terrorism financing and proliferation financing. In light of the above development, this chapter is dedicated to fleshing out the current AML/CFT legislative framework in Botswana. It will also discuss the AML/CFT regulators and furthermore highlight the prosecution and convictions on ML/TF cases in Botswana.

4.2 AML/CFT regulatory regime in Botswana

4.2.1 Introduction

It has been said that South Africa has adopted a three-tier legal framework consisting of legislation, regulations and sector-specific guidelines when it comes to AML/CFT.[6] The same can be said of Botswana. The discussion below therefore considers the legislation, regulations and guidelines aimed at combating money laundering and terrorism financing in Botswana.

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[5] http://www.fatf-gafi.org/countries/a-c/bahamas/documents/fatf-compliance-october-2018.html.

[6] MA Mamooe 'Banking Confidentiality with Reference to Anti-Money Laundering and Terrorist Financing Measures in South Africa and Lesotho' LLM thesis, North-West University, 2018 3. https://repository.nwu.ac.za/bitstream/handle/10394/31330/Mamooe_MA.pdf?sequence=1&isAllowed=y (accessed 20 March 2020).

4.2.2 Proceeds of Serious Crime Act

The Proceeds of Serious Crime Act[7] (POSCA) was enacted to deprive those convicted of serious crimes from benefiting from such offences and to deal with matters associated with money laundering.[8] No attempt was made to define money laundering. However, a definition of a related crime, namely 'serious offence' is provided.[9] In terms of the POSCA, a person would have committed a serious offence if they received proceeds or rewards as a result of the commission of an offense or the furtherance of criminal offences.[10] The serious offence shall carry a maximum penalty of death, or imprisonment for not less than two years.[11]

Chapter V of the POSCA is dedicated to the offence of money laundering. The POSCA provides that a person shall be deemed to be engaged in acts of money laundering if they are involved directly or indirectly in a transaction concerning money or property which is derived from proceeds of serious crime, whether committed in Botswana or outside, if they receive, possess, conceal, dispose of, or bring into Botswana any money or property that qualifies as the proceeds of a serious offence, whether committed in Botswana or elsewhere.[12] An offence would be committed if a person knows or ought reasonably to know that such money or property is derived directly or indirectly from some unlawful activity.[13]

The offence of money laundering for an individual attracts imprisonment for a term not exceeding three years or a maximum of P 10 000.00 or both.[14] If a body of persons is found guilty of money laundering, then every director, manager or partner of that body at the time of commission of the offence shall be liable for a fine not exceeding P 25 000.00.[15] Whether or not these fines are adequate to deter acts of money laundering, which usually involves billions, will be discussed in chapters 5 and 6.

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[7] Chapter 08:03, 1990, Laws of Botswana.
[8] Preamble POSCA.
[9] Section 2 POSCA.
[10] Section 2(5) POSCA.
[11] Section 2 POSCA.
[12] Section 14(1) POSCA.
[13] Section 14(1) POSCA.
[14] Section 14(2) POSCA.
[15] Section 14(2) POSCA.

The POSCA not only criminalises money laundering transactions but it also creates consequences for a person who receives, possesses, conceals, disposes of or brings into Botswana any money or property that may reasonably be suspected of being the proceeds of a serious offence.[16] The latter offence attracts charges similar to the ones associated with money laundering for individuals and a body of persons (as mentioned above).[17]

It is interesting to note that for both offences, a person ought to have known definitely that they were engaged in either money laundering or gaining from the proceeds of serious offences or should reasonably have known or suspected that the money and/or property involved were derived directly or indirectly from some unlawful activity.[18] The court must therefore be satisfied that a person engaged in money laundering or serious offences knew, suspected or had reason to believe that the proceeds or property derived from illicit transactions.[19]

It is yet to be discovered how the courts will interpret the requirement of 'suspecting or reasonably knowing' that the proceeds in question are from unlawful sources. Instances of suspicious transactions are enunciated in the Financial Intelligence Act (FI Act) and are defined to mean transactions that give rise to a reasonable suspicion that it may involve a financial offence or a transaction that is made on behalf of a person whose identity has not been established to the satisfaction of the person with whom the transaction is made.[20]

The POSCA lays down the duties of designated bodies whose business appears to the Minister of Finance and Economic Development to be susceptible to be used for committing or facilitating the commission of serious offences.[21] These designated bodies include a bank, a building society, a collective investment undertaking, a savings bank, a post office, a registered stock broker, a long-term insurance business, a

[16] Section 15(1) POSCA.
[17] Section 15(1) POSCA.
[18] Section 14(1) and section 15(1) POSCA.
[19] Section 15(4) POSCA.
[20] Section 2, Financial Intelligence Act, 2009, Laws of Botswana.
[21] Section 17(1) POSCA.

foreign exchange business, an international financial services centre certification committee and any other body as might be prescribed by the Minister from time to time.[22]

The POSCA is specifically aimed at regulating certain business relationships, transactions and services listed in its schedule which might be used for the commission or facilitation of serious offences.[23] Some of the services under the schedule include lending, financial leasing, issuing and administering means of payment, guarantees and commitments, trading for own account or for customers in money market instruments, foreign exchange, financial futures and options, exchange and interest rate instruments, transferable securities, money broking, all types of direct life assurance and portfolio management.[24]

When concluding business relationships, transactions and such related services, the designated bodies are required to take reasonable steps to obtain a proof of identity of the person or third party with whom it purports to conclude business transactions with or to whom it purports to provide services.[25] The designated bodies are further mandated to keep records of the identification of their customers; proof of authority of the customer to conclude such transactions; original documentation of the nature of the business relationship established or transaction concluded; and the identity particulars of all accounts involved in such a business transaction or service.[26] These records are to be kept in a prescribed manner for a period of at least five years from the date of the termination of the business relationship or completion of the execution of a transaction.[27]

When it is a party to the transaction, a designated body is required to report, within ten days, to the Directorate of Public Prosecutions (DPP) and to the Financial Intelligence Agency (FIA) any transactions suspected of being tainted with the proceeds of a serious crime.[28] When it intends to transfer any amount or foreign currency exceeding the

[22] Section 17(1) POSCA.
[23] Section 17(2) POSCA.
[24] Schedule to the POSCA.
[25] Section 17(4) and 17(7) POSCA.
[26] Section 17(10) POSCA.
[27] Section 17(11) POSCA.
[28] Section 17(15) POSCA.

prescribed amount into or out of the country, then the purported transfer should be reported before the transfer takes place.[29] After either of these two disclosures, a designated body may proceed to carry out the transaction unless directed otherwise by the Directorate of the Regulatory Authority.[30] The POSCA is very clear that the obligation to disclose suspicious transactions by the designated bodies overrides any restrictions on the disclosure of the customer's information by a designated body, whether imposed by statutory law, common law or even contract.[31]

A designated body should, when carrying out its business, enforce internal measures to prevent and detect the commission of a serious offence in terms of the POSCA.[32] Such measures include putting in place procedures to be followed by directors, officers and employees in the conduct of their business; instructions to the officers on the prevention of the use of the financial system for the purpose of engaging in activities of money laundering; and training of all relevant officers to enable them to identify transactions which may relate to the commission of a serious offense under the POSCA.[33]

In summary, the POSCA was enacted to regulate the day-to-day business of banks in as far as it relates to the fight against money laundering. The POSCA does not, however, cover the Bank of Botswana (the central bank) in its scope, which, although it is a bank, is explicitly excluded. The Act seeks to punish those engaged in serious offences by deterring them from benefiting from or being rewarded with the proceeds of such financial crimes. Money laundering and terrorism financing are not defined in the POSCA. In fact, the POSCA is silent on terrorist financing. Actions that would constitute money laundering and that are punishable under the Act are enumerated in chapter V of the POSCA, which is the only section that specifically refers to money laundering.

The POSCA was repealed with the introduction of the Proceeds and Instruments of Crime Act (PICA), 2014.[34] Notwithstanding the POSCA being repealed, it still applies

[29] Section 17(16) POSCA.
[30] Section 17(17) POSCA.
[31] Section 17(18) and 17(23) POSCA.
[32] Section 17(19) POSCA.
[33] Section 17(20) POSCA.
[34] Section 74(1) PICA.

to offences within its meaning where criminal proceedings had already commenced before PICA came into effect, irrespective of whether the conviction of the offense occurs before or after the introduction of PICA.[35] Furthermore, the POSCA would still be applicable to forfeiture offences where criminal proceedings started after PICA was enacted.[36] It would also apply with respect to serious offenses or foreign serious offenses related to Chapter II and VI, and which are alleged to have been committed after the commencement of PICA.[37]

4.2.3 Bank of Botswana Act

The Bank of Botswana Act[38] provides for the establishment of the Bank of Botswana, its constitution, objectives and powers, the regulation of the issuance of bank notes and coins and certain matters connected with banking, currency and coinage.[39] The primary objective of the Bank is to promote and sustain monetary stability, an efficient payment system, the liquidity, solvency and a sound fiscal environment in Botswana.[40] Therefore, the Bank of Botswana is the country's central bank. At the core of the Bank's roles is the supervision of banks, which is mainly risk-based. Such risk-based supervision is achieved through the monitoring of monthly and quarterly returns of banks, on-site inspections and consultative meetings with the banks.[41]

For instance, in 2017, in terms of the Bank's Annual Report, full-scope on-site prudential and AML/CFT examinations were conducted in certain banks.[42] Accordingly, where shortcomings were found, banks were ordered to put in place corrective measures.[43] Indeed, in 2017 a number of banks and other financial entities embarked on robust measures to ensure the thorough identification of their customers through the so-called 'Know Your Customer' approach.

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[35] Section 74(2)(a) PICA.
[36] Section 74(2)(b) PICA.
[37] Section 74(2)(c) PICA.
[38] Chapter 55:01, 1996, Laws of Botswana.
[39] Preamble Bank of Botswana Act.
[40] Section 4(1) Bank of Botswana Act.
[41] Bank of Botswana *Bank of Botswana Annual Report* (2017) 20.
[42] Bank of Botswana *Bank of Botswana Annual Report (*2017) 28.
[43] Bank of Botswana *Bank of Botswana Annual Report* (2017) 28.

Although the Bank of Botswana Act does not have specific provisions on AML and CFT, the Bank of Botswana is at the forefront of and spearheading the fight against money laundering and terrorism financing in the country. For instance, it works closely with regional bodies, such as the ESAAMLG, when its national AML/CFT legislative framework has to be assessed.[44] In fact, the Bank remains a useful reference for all matters related to AML/CFT. The Bank is also a member of the National Coordinating Committee on Financial Intelligence, which committee will be discussed further below.[45]

4.2.4 Banking Act

The Banking Act[46] was enacted to provide for the licencing, control and regulation of banks and other related matters.[47] As with POSCA, the Banking Act does not attempt to define money laundering. The Banking Act therefore regulates banks, which are identified as one of the designated bodies under the POSCA.[48] It does, however, contain clauses aimed at the prevention and control of money laundering. These include the obligation to keep records; the obligation to report suspicious transactions; and due diligence requirements.

Each bank is required to keep records necessary to exhibit clearly and accurately the state of its affairs and to explain its transactions and financial position so as to enable the central bank to determine whether the bank concerned complies with the provisions of the Banking Act.[49] As is required under the POSCA, it is mandatory for banks to preserve all records for at least five years from the date of the last entry therein.[50] The Bank of Botswana is also bestowed with the power to issue directives from time to time relating to the standards of financial records to be followed.[51] The failure to

[44] Bank of Botswana *Annual Report* (2017) 29; ESAAMLG *Botswana Mutual Evaluation Report* (2017) 7.
[45] Section 6(3) FI Act.
[46] Chapter 46:04, 1995, Laws of Botswana.
[47] Preamble Banking Act.
[48] Section 17(1) POSCA.
[49] Section 18 Banking Act.
[50] Sections 18(1) and section 44(4) Banking Act.
[51] Section 18(2) Banking Act.

comply with the financial records requirement attracts a fine of P 1 000.00 for each day on which the offence persists.[52]

The Banking Act mandates banks to notify the Bank of Botswana when it suspects that money laundering has been committed.[53] Should banks fail to report any suspicious acts of money laundering, they shall be guilty of an offence and liable to a fine of P 10 000.00. Banks are further required to exercise due diligence and reasonableness in renting out safe deposit boxes, opening bank accounts and accepting deposits.[54] Where the true identity of the customer has not been satisfactorily established, the bank should take the necessary steps forthwith to rectify this failure.[55] Should the bank fail to identify its customers satisfactorily as per the Banking Act, it shall be guilty of an offence and liable to a fine of P 10 000.00.[56]

The Banking Act gives the Minister of Finance and Economic Development, in consultation with the Bank of Botswana, the power to make regulations from time to time to strengthen the effectiveness and enforcement of the Banking Act.[57] In accordance with section 51, the Minister promulgated the Anti-Money Laundering Regulations in 2003. These will be discussed below. It is worth noting that the Banking Act is silent on terrorism financing.

4.2.5 Banking (Anti-Money Laundering) Regulations[58]

Money laundering is defined in the Banking Act as having the meaning assigned to it in section 14 of the POSCA.[59] Over and above the definition set out in the POSCA, the Regulations stipulate that money laundering includes the conduct of a natural person who fails, without reasonable excuse, to take steps to ascertain whether or not the property is derived or realised directly or indirectly from unlawful activities.[60]

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[52] Section 18(3) Banking Act.
[53] Section 21(4) Banking Act.
[54] Section 44(1) Banking Act.
[55] Section 44(2) Banking Act.
[56] Section 44(3) Banking Act.
[57] Section 51 Banking Act.
[58] 2003.
[59] Regulation 3 Banking Regulations.
[60] Regulation 3 Banking Regulations.

Furthermore, a bank would be deemed to engage in money laundering activities if it fails to implement or apply anti-money laundering measures and practices.[61] Anti-money laundering measures and practices are defined as ideal procedures and controls established and adopted by banks to prevent money laundering.[62]

In an attempt to combat money laundering, banks are required to identify their customers adequately by requesting verification of their customers' names and addresses from their employers in the case of nationals or, in case of foreigners, references from their foreign banks where possible.[63] This verification approach is commonly referred to as 'know your customer'. Should the bank not be satisfied with the identification of a certain customer, the bank is required to call for the re-identification of the customer in question.[64] Banks are also obliged to ensure that corporate bodies and trusts are verified by confirming the legal existence of the corporate body and identifying the directors and beneficial owners.[65] These measures are strengthened by the stipulation that it is illegal to open or keep anonymous accounts or accounts in fictitious names.[66]

Over and above the customer identification obligation, banks are required to adhere to the provisions in the Banking Act on record keeping alluded to above.[67] Records are to be kept as hard copies of the original documents or by electronic storage devices.[68] Banks must moreover report any suspicious activities by its customers, such as any transaction which involves large amounts, to the Bank of Botswana and the FIA.[69]

The Regulations also mandate that every bank should have a money laundering Reporting Officer at management level who shall be a contact person on money laundering issues between the Bank of Botswana and the FIA.[70] The role and responsibilities of the money laundering reporting officer ("Reporting Officer") include keeping a

[61] Regulation 3 Banking Regulations.
[62] Sections 3 and 4 of the Regulations.
[63] Regulation 5(1) and 6 Banking Regulations.
[64] Regulation 5(2) Banking Regulations.
[65] Regulation 7 Banking Regulations.
[66] Regulation 10 Banking Regulations.
[67] Regulation 12(1) Banking Regulations.
[68] Regulation 12(2) Banking Regulations.
[69] Regulation 14 Banking Regulations.
[70] Regulation 15(1) Banking Regulations

register of all reports made to him by other employees of the bank and compiling reports for the Bank of Botswana and the FIA.[71]

The Reporting Officer is required to evaluate the reports promptly to ascertain whether or not there are reasonable grounds to believe that a customer is engaged in illicit activities and, if so, the Reporting Officer must immediately report it to the Bank of Botswana and the FIA.[72] The Officer is also expected to prepare an annual compliance report indicating changes in legislation relating to money laundering as well as compliance deficiencies in respect of money laundering.[73]

Banks have to ensure that their Board of Directors and principal officers put in place vigorous anti-money laundering programs, which should include the establishment of internal policies, procedures and controls to prevent risks emanating from money laundering, as well as the training of all employees to empower them to identify suspicious money laundering transactions.[74] Banks should also train all staff on money laundering and the importance of reporting suspected money laundering activities.[75] Banks are further required to present refresher courses annually to sensitize employees on any changes in legislation and policies.[76]

Bank staff are prohibited from disclosing any ongoing money laundering investigations to the customers.[77] Should the bank breach the duty of confidentiality, it will be liable for a fine of P 10 000.00.[78] If an employee of the bank is found guilty of disclosing such information to the customers, he or she will be liable to a fine of P 15 000.00 and to imprisonment for five years.[79] Should a bank be convicted of money laundering, its licence may be revoked.[80] However, banks are protected from liability in cases where they cooperate with law enforcement agencies and report any money laundering

[71] Regulation 15(2) Banking Regulations.
[72] Regulation 15(4) Banking Regulations.
[73] Regulation 19 Banking Regulations.
[74] Regulations 17 Banking Regulations.
[75] Regulation 20 Banking Regulations.
[76] Regulation 21(2) Banking Regulations.
[77] Regulation 22 Banking Regulations.
[78] Regulation 25(a) Banking Regulations.
[79] Regulation 25(b) Banking Regulations.
[80] Regulation 25(c) Banking Regulations.

transactions.[81] As is the case with the Banking Act, the Banking Regulations are also silent on terrorism financing.

4.2.6 Corruption and Economic Crime Act

The Corruption and Economic Crime Act[82] (CECA) was enacted to establish the Directorate on Corruption and Economic Crime (DCEC or the Directorate) to serve the goal of preventing corruption and to give the DCEC powers to investigate suspected cases of corruption and economic crime.[83] The Directorate is a public office comprising of the Director, Deputy Director and any other officers that may be appointed.[84] However, the Director of the Directorate is appointed by the President on any terms he deems fit.[85]

The functions of the Directorate are clearly enumerated. These include receiving and investigating alleged corruption complaints in any public body; investigating any alleged and suspected violation of fiscal and revenue laws of the country; supporting any law enforcement arm of the Government in investigating offences involving dishonesty or cheating of the public revenue; educating the public on the effects of corruption; as well as trying to win public support for the fight against corruption.[86]

The Director of the Directorate is also endowed with powers to order an officer of the Directorate to investigate any alleged offences under the CECA.[87] The Director may also in writing require any person to tender, within a certain period, all records, books, returns, electronically stored data or any other relevant documents associated with the functions of that public body.[88] The failure to comply with the above request or the provision of false information attracts the penalty of a fine not exceeding P 10 000.00 or imprisonment for not more than five years or both.[89]

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[81] Regulation 16(2) Banking Regulations.
[82] Chapter 08: 05, Laws of Botswana, 1994.
[83] CECA Preamble.
[84] Section 3 CECA.
[85] Section 4 CECA.
[86] Section 6 CECA.
[87] Section 7(1)(a) CECA.
[88] Section 7(1)(b) and (c) CECA.
[89] Sections 7 and section 18(2) CECA.

During any investigations, the Director may also require any person to make a written statement stating all movable and immovable property belonging to that person, both locally or abroad, as well as when and how such property was acquired.[90] Moreover, the Directorate is clothed with powers to arrest, without a warrant, any person suspected of committing any crime under the Act.[91] The officers may even use force in arresting any suspect or when entering any premises.[92] Indeed, the Directorate may exercise its powers of search and seizure with or without warrants.[93] However, a search and seizure without a warrant should only be exercised in rare cases where the circumstances of a case so demands.[94]

Part IV of the CECA outlaws any practices amounting to the bribing of public officers to do certain acts in their capacity as public servants.[95] These practices include the bribery of any public officer to provide assistance or influence in procuring any contract by a public body[96] and the giving of a bribe in exchange for procuring the withdrawal of a tender by a public officer.[97] In addition, public officers are required to declare their private interests when procuring government tenders.[98] This therefore means that it would be unlawful to solicit, whether directly or indirectly, a public officer to contravene the provisions of CECA. The public officer would also be guilty of an offence should he or she receive any valuable consideration from anyone as an enticement or reward for influencing the tender and/or contract to be awarded to that individual or influencing the withdrawal of a tender.

Although the CECA empowers the Directorate to investigate corruption, the Directorate does not have the power to prosecute any offences.[99] Once the investigations are completed and there is a reasonable belief that an offence has been committed, the Director should refer the matter to the DPP for his decision.[100] The DPP will assess

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[90] Section 8(1) CECA.
[91] Section 10 CECA.
[92] Section 10(5) CECA.
[93] Sections 13 and 14 CECA.
[94] Section 14 CECA.
[95] Section 27 CECA.
[96] Section 29 CECA.
[97] Section 30 CECA.
[98] Section 31 CECA.
[99] Section 39 CECA.
[100] Section 39 CECA.

the docket to determine if indeed there is a case or not. The ultimate decision whether or not to prosecute lies with the DPP. This arrangement has been criticised. For instance, it has been observed that the DPP may actually hinder justice to prevail against those found to have committed corruption, since he or she effectively decides which cases to take up and because the DPP is not compelled by law to furnish any reasons for not prosecuting a particular case.[101]

As with the Banking Act, any officer of the Directorate who informs any person of the impending investigation against them, shall be guilty of an offence and shall be liable, on conviction, to imprisonment for not more than a year or a fine of not more than P 2000.00 or both.[102] The CECA contains provisions that cushion and shield whistle blowers.[103] In terms of the CECA it shall not be mandatory to reveal the name of the informer during a trial or disclose any information which may lead to their identification.[104] In my view, this is a welcome development because it would encourage the public to report those engaged in corruption activities. Notwithstanding, this protection should be guarded jealously lest it be abused by the public to wilfully make material statements which they know to be false.[105]

The CECA also covers corruption committed by citizens outside the country.[106] Consequently, offences committed outside the country by citizens may be dealt with under the CECA as if they were committed locally.[107] The President is also empowered to make regulations giving effect to the provisions of the CECA.[108] However, no such regulations have been promulgated thus far.

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[101] 'DPP may be blocking criminal prosecutions against big fishes' *Sunday Standard* 22 May 2016. http://www.sundaystandard.info/dpp-may-be-blocking-criminal-prosecutions-against-big-fishes (accessed 30 November 2018).
[102] Section 44 CECA.
[103] Section 45 CECA.
[104] Section 45 (1) CECA.
[105] See section 45 (3) CECA.
[106] Section 46 CECA.
[107] Section 46 CECA.
[108] Section 47 CECA.

4.2.7 Mutual Assistance in Criminal Matters Act

The Mutual Assistance in Criminal Matters Act[109] (MACMA) was enacted to provide for and procure international assistance when it comes to criminal matters.[110] In essence, the MACMA focusses on assistance relating to search and seizure by either the Government of Botswana or a foreign government;[111] arrangements for persons to give evidence or assist in investigations requested by the Government of Botswana or a foreign government;[112] custody of persons in transit to other countries;[113] and proceeds of crime situated in Botswana or in a foreign country.[114] However, arrests and extraditions do not fall within the purview of the MACMA.[115]

The most striking part of the MACMA for present purposes is part VI, which concerns the proceeds of crime. It provides for the obtaining of a confiscation, forfeiture or restraining order against any property located in a foreign country which may be sought by the DPP from the relevant foreign authority if the order was made in relation to a serious offense.[116] The definition of a serious offence as well as examples of what would constitute a serious offence were discussed above.[117] This therefore means that the fact that a serious crime is committed outside the country does not restrict the Government from applying for the seizure of property obtained through illicit means.

It is worth noting that the provisions of the MACMA are couched in reciprocal terms. As the name of the Act suggests, it is premised on the concept of mutual assistance between Botswana and other foreign countries. This means that the assistance that is given to Botswana by another country is also extended to that country in a similar fashion.[118]

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[109] Chapter 08: 04, Laws of Botswana, 1990
[110] MACMA Preamble.
[111] Section 11 MACMA.
[112] Sections 13-23 MACMA.
[113] Sections 24-26 MACMA.
[114] Sections 27-32 CECA.
[115] Section 38 CECA.
[116] Sections 27 and 28 CECA
[117] See 4.2.2 above.
[118] Sections 29 and 30 CECA, which is the converse of sections 27 and 28.

This piece of legislation seems well intended. Among the money laundering cases, which will be discussed later in this chapter, one example involves a situation where properties were apparently bought in several countries – hence, possibly implicating the operation of this statute. However, it is yet to be seen whether the provisions of this MACMA will be invoked to request for the confiscation, restraint or information relating to the property in that case.[119]

4.2.8 Financial Intelligence Act (the FI Act)

4.2.8.1 The original Act

The principal objective of the Financial Intelligence Act[120] (the FI Act) is the establishment of the Financial Intelligence Agency (FIA or the Agency) and the National Coordinating Committee on Financial Intelligence (NCCFI). The Act also provides for the reporting of suspicious transactions as well as for mutual assistance with similar bodies abroad with regard to financial information.[121] The FIA is headed by a Director appointed by the Minister of Finance and Economic Development.[122] Prior to appointment, both the Director and the other officers of the Agency must go through security screenings to ensure that the personnel hired would not be prejudicial to the objectives and roles of the Agency.[123]

The Agency was established as a public office and as a cardinal point for the requisition, receipt, analysis and dissemination of financial information to any investigatory or supervisory bodies.[124] The information could relate to suspicious transactions[125] or the financing of any activities or terrorism related transactions.[126] The Agency is tasked to collect, process, analyse and interpret all information disclosed and obtained by it in

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[119] Director of Public Prosecutions v Kgori Capital (Proprietary) Limited UCHGB-000065-18, unreported.
[120] 2009, Laws of Botswana.
[121] FI Act Preamble.
[122] Section 3 FI Act.
[123] Section 5 FI Act.
[124] Section 4(1) FI Act. Supervisory authorities are listed in the Second Schedule of the Act. This is the Bank of Botswana, Registrar of Companies, the Real Estate Advisory Council, Law Society of Botswana, Non-Bank Financial Institutions Regulatory Authority, Registrar of Societies and the Botswana Institute of Accounts.
[125] Section 4(1)(a) FI Act.
[126] Sections 4(1)(b) and (c) FI Act.

terms of this Act.[127] It should advise as well as collaborate with any investigatory body, such as the DCEC mentioned above, or other supervisory bodies.[128] The Agency should also conduct examinations of specified parties to determine their compliance (or lack thereof) with the provisions of the Act.[129] After assessing the specified parties, the Agency should provide guidance as to how they can remedy the identified shortcomings, if any.[130] In addition, the Agency may share information with a comparable body in a foreign country.[131]

The FI Act further creates the NCCFI, whose members are the DCEC, the Botswana Police Service, the Attorney General's Chambers, the Bank of Botswana, the Botswana Unified Revenue Services, the Ministry of Foreign Affairs and International Cooperation, the Department of Immigration, the Non-Bank Financial Institutions Regulatory Authority (NBFIRA), the DPP, the Directorate of Intelligence and Security (DIS) and the Ministry of Defence, Justice and Security.[132] The FIA Director is the secretary to this Committee.[133] The Committee meets at least once every quarter.[134]

The role of the Committee is to assess the efficacy of the measures in place to combat financial crimes.[135] After assessing the laws and regulations in place, the Committee should also propose legislative and administrative reforms to the Minister.[136] The Committee is moreover expected to aid and foster coordination and cooperation between the investigatory and supervisory authorities with a view to enhance measures aimed against the illicit flow of finances.[137] Additionally, the Committee should ensure that

[127] Section 4(2)(a) FI Act.
[128] Section 4(2)(b) FI Act.
[129] Section 4(2)(d). A specified party is not defined but those who qualify as such are listed in the First Schedule of the Act. These include attorneys, accountants, banks, bureau de change, building societies, casinos, non-bank financial institutions, postal services, precious stones dealers, savings banks, the Citizen Entrepreneurial Development Agency, the Botswana Development Corporation, the National Development Bank, car dealerships and money remitters.
[130] Sections 4(2)(e) and (f) FI Act.
[131] Section 4(2)(g) FI Act. FIA is the only entity which is allowed to seek recognition of the Egmont Group for exchange of financial information (section 31 of the Act).
[132] Section 6 FI Act.
[133] Section 6(3) FI Act.
[134] Section 8(1) FI Act.
[135] Section 7(a) FI Act.
[136] Section 7(b) and (e) FI Act.
[137] Section 7(c) FI Act.

the policies in places protect the international reputation of the country as far as financial crimes are concerned.[138]

Similar to the requirement placed on banks by the Banking Act, the FI Act mandates the specified parties to ensure that they have internal controls in place, such as programmes, policies and procedures to prevent financial crime.[139] Specified parties should have a compliance office ("Compliance Officer") at management level whose role it is to oversee all issues regarding the execution of all the internal processes and keeping of records[140] and to report any suspected transactions.[141] This Officer should be provided with all the relevant information to ensure that their duties are fulfilled.[142] In addition, the Compliance Officer should develop measures to ensure compliance with the FI Act as well as have audit functions.[143]

The FI Act requires that all employees of the specified parties should be trained on internal procedures, policies and programmes adopted to ensure that they are not left behind and are able to detect financial crime with ease.[144] The training programmes should include training on which records are to be kept, the identification of suspicious transactions and the obligations of the specified party imposed by the FI Act.[145] Should a specified party fail to put the abovementioned measures in place, it shall be liable to a charge not exceeding P 100 000.00. This charge is more punitive compared to the fine imposed by the Banking Act as the charge is P 90 000.00 more in fine amount.

A specified party has a duty to ensure that customers are adequately identified prior to establishing any business relationship or concluding any business transactions with them.[146] The identity of customers should be established by using national identity cards or, in the case non-citizens, passports.[147] Without the necessary identification

[138] Section 7(d) FI Act.
[139] Section 9(1) (a) FI Act.
[140] Section 11 FI Act.
[141] Section 9(1)(b) FI Act.
[142] Section 9(1)(c) and (d) FI Act.
[143] Sections 9(1) (e) and section 27 FI Act.
[144] Section 9(2) FI Act.
[145] Section 9(2)(a) and (b) FI Act.
[146] Section 10(1) FI Act.
[147] Section 10(3) FI Act.

documents, no business transaction should be concluded.[148] Should it be discovered that the customer produced fake identity documents, they would be guilty of an offence and will be subject to a fine not exceeding P 100 000.00 or imprisonment for not more than five years or both.[149] A specified party who concludes business transactions without identifying the customers would be liable for a fine of P 250 000.00 or less.[150]

Records for all transactions should be safely kept for at least five years unless an investigatory body has requested that they should be kept for a longer period.[151] The specified parties may outsource the record keeping function to third parties.[152] However, the third party's particulars should be registered with the Agency in the prescribed manner.[153] In the event that the third party fails to fulfil the record keeping mandate, the specified party would still be liable for the lack of adherence with the provisions of the Act.[154] In other words, the record keeping function can be outsourced but not the ultimate responsibility of keeping the relevant records. For the failure to keep records as prescribed in the FI Act, the specified party can be fined a maximum of P 100 000.00.[155] A person who destroys records kept in accordance with this Act can be fined not more than P 100 000. 00 or be imprisoned for a maximum period of five years or both.[156]

Suspicious transactions should be reported within a stipulated time.[157] The reporting of suspicious transactions is also extended to attorneys who cannot plead attorney-client confidentiality for their failure to report.[158] It is interesting to note that there is also a general obligation to report suspicious transactions by members of the general public.[159] Transactions to be reported are those that exceed the prescribed threshold

[148] Section 10(2) FI Act.
[149] Section 10(4) FI Act.
[150] Section 10(5) FI Act.
[151] Section 12 FI Act.
[152] Section 13(1) FI Act.
[153] Section 13(2) FI Act.
[154] Section 14 FI Act.
[155] Section 15(1) FI Act.
[156] Section 15(2) FI Act.
[157] Section 17(1) FI Act.
[158] Section 17(2) FI Act.
[159] Section 19(1) FI Act.

when cash or electronic transfers are made into or out of a local account.[160] Failure to report excess cash transactions can attract a maximum fine of P 100 000.00.[161]

Once an entity has reported a suspicious transaction, it may proceed to process the client's instructions unless the Agency orders it in writing to halt the transaction.[162] Reporting made in good faith pursuant to the FI Act shall bar any civil or criminal proceedings against a person who makes such a report.[163] Supervisory authorities are mandated to supervise and regulate the specified parties to ensure overall compliance with the provisions of the FI Act.[164] They are also empowered to penalise and issue directives and guidelines to the specified parties under their jurisdiction.[165] The idea is that supervisory authorities should work hand in hand with the Agency to detect and curb the commission of financial offences.[166] For instance, both may refer to and share with one another financial information relating to suspicious transactions.[167]

The Director and all employees of the Agency are held to the highest standard of confidentiality.[168] They are even required to take an oath prior to assuming office.[169] The obligation to maintain confidentiality is imposed during and even after they leave the Agency, and thus it is a continuing obligation.[170] Over and above the confidentiality obligation, the Director and all employees are supposed to file a declaration of assets with the DCEC not more than thirty days after being appointed and again when the contract of employment terminates.[171] Employees of the Agency are also indemnified and held harmless for all the acts done or omitted during the course of performing their services for the Agency.[172]

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[160] Sections 18(1) and 21 FI Act.
[161] Section 18(2) FI Act.
[162] Sections 23 and 24 FI Act.
[163] Section 26 FI Act.
[164] Section 27(1) FI Act.
[165] Section 27(2) FI Act.
[166] Sections 28 and 30 FI Act.
[167] Section 29 FI Act.
[168] Section 34(1)(a) FI Act.
[169] Section 34(1)(b) FI Act.
[170] Section 31(1) (b) FI Act.
[171] Section 35 FI Act.
[172] Section 36 FI Act.

4.2.8.2 Financial Intelligence (Amendment) Act 2019[173]

The FI Act was amended in 2019 to revamp it with provisions which would effectively ensure the more robust enforcement and monitoring of money laundering, terrorism financing as well as financing of the proliferation of arms of war. The FI Amendment Act also introduced a provision on conflict of laws, which ensures that the provisions of the FI Act prevails over any law that conflicts with the FI Act.[174]

The FI Act previously stated that the Director General would be appointed by the Minister of Finance and Economic Development.[175] This has since been altered by the Amendment Act, which instead provides that the power to appoint the Director General shall lie with the President on the recommendation of the Minister.[176] The Director General should be experienced in finance, law, law enforcement or any other related discipline.[177] The Director General shall hold office for a five year renewable term.[178]

The functions of the Agency have been altered to include the receiving, analysing and dissemination of information relating to the financing of an act of terrorism and proliferation financing to the investigatory, supervisory and similar regulatory entities in other countries.[179] The latter provision replaced and deleted the role of the Agency concerning the dissemination of information on the financing of any activities or transactions related to terrorism.[180] It should be admitted that the previous provision, as originally couched, made it difficult to comprehend what the function of the Agency was in respect of that provision. Conversely, the new wording has brought terrorism financing and financing of the proliferation of weapons of war under the purview of the FI Act in a clearer way.

The Amendment Act has also enhanced and tightened the obligations of specified parties. Instead of the specified parties merely implementing and maintaining

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[173] 2018.
[174] Section 4 FI (Amendment) Act.
[175] Section 3(2) FI Act. This section was deleted by the Amendment Act.
[176] Section 5(1) FI (Amendment) Act.
[177] Section 5(2) FI (Amendment) Act.
[178] Section 5(3) FI (Amendment) Act.
[179] Section 6(1)(c) FI (Amendment) Act.
[180] Section 4(1) (c) FI Act.

compliance programmes as was the case before,[181] specified parties are now required to implement and maintain specific programmes for AML/CFT as well as risk management systems and compliance systems.[182] The implementation of these programmes should also be thoughtful in the sense that they should relate to the size of the business itself and be relevant for all branches and primary subsidiaries of the business.[183] Originally, the failure of specified parties to meet their obligations attracted a fine of P 100 000.00.[184] This amount has been increased to P 1 000 000.00 to foster adherence and deter violations of the FI Act.[185]

In addition, a specified party is required to carry out risk assessments on business relationships and transactions, pre-existing products, practices, technologies and delivery mechanisms, new products, practices, technologies and delivery mechanisms before they are introduced to the market, also for life insurance services.[186] The original Act required that specified parties should engage Compliance Officers at management level without necessarily specifying what qualifications those officers should possess.[187]

However, the FI Act now requires that certain conditions must be met before a person can be appointed as a Compliance Officer of a specified body.[188] Compliance Officers should be fit and proper; have no criminal records in Botswana or elsewhere; be solvent; not be under any investigation by any supervisory or investigatory body; and not have held a senior position in a company barred from conducting business by any professional body or supervisory body.[189]

Furthermore, specified parties are mandated to carry out continuous and vigorous due diligence exercises with respect to existing and new customers as well as beneficial owners in the case of companies.[190] The failure to conduct continuous due diligence

[181] Section 9(1)(d) FI Act on obligations of specified party.
[182] Section 12 FI (Amendment) Act.
[183] Section 13(1) FI (Amendment) Act.
[184] Section 9(3) FI Act.
[185] Section 12(4) FI (Amendment) Act.
[186] Section 11(1)(a)-(d) FI (Amendment) Act.
[187] Section 9(1)(b) FI Act.
[188] Section 12(2) (FI (Amendment) Act.
[189] Section 12(2)(a)-(f) FI (Amendment) Act.
[190] Sections 14-16 FI (Amendment) Act.

can attract a fine of P 1 500 000.00.[191] Where a specified party is unable to complete the due diligence process with respect to any customer, that business relationship should be ceased and STR filed with the Agency.[192] All transactions deemed complex, unusual and high risk should be monitored closely, and the contravention of this obligation carries a fine of P 1 500 000.00.[193]

Section 10 of the FI Act, which concerns the identification of customers, has been revamped extensively.[194] Instead of identifying and verifying the identity of the 'customer' only, specified parties must now also verify the identity of the beneficial owners or beneficiaries of life insurance and similar investment products.[195] This shows that the FI Act recognises that the category of customers of a specified party is actually so wide in scope as to include legal persons and life insurance businesses and therefore the actual beneficiaries should be known.

The Amendment Act introduced certain new provisions as well. For instance, the FI Act now requires that specified parties should carry out enhanced due diligence when dealing with customers from high risk jurisdictions, international organisations and high risk businesses.[196] Specified parties should moreover request more information from all their customers, including information on the occupation of the customer, the source of the funds involved, the purpose of the intended business relationship and whether the required authority has been obtained to establish business relationships, especially for companies.[197]

The identification process should also be followed in the case of prospective customers.[198] With respect to prospective customers, a specified party should establish what kind of business relationship the parties are to have; the purpose of the business relationship; where the funds will come from; and whether the executive management of the business have authorised the conclusion of that business relationship,

[191] Section 15(2) FI (Amendment) Act.
[192] Section 16(10) FI (Amendment) Act.
[193] Section 17(2) FI (Amendment) Act.
[194] Section 12(a) FI (Amendment) Act.
[195] Section 19(1)(b) FI (Amendment) Act.
[196] Section 17(1)(b) FI (Amendment) Act.
[197] Section 16(1)(5) FI (Amendment) Act.
[198] Section 16(1) FI (Amendment) Act.

especially for high risk businesses.[199] In addition, the certificate of incorporation or registration as well as a deed of trust and such other identity documents as may be prescribed by the Minister, should be submitted.[200]

The FI Act previously provided that the identification of customers should take place through a National Identity Card for citizens and a passport for non-citizens.[201] Additional documents are now required to be produced by the customers for purposes of identification.[202] In this regard, the request for additional documents should ensure that customers are adequately identified.

The identification database should be updated and refreshed periodically, and where there is a need to request for additional information on any business transaction, such information should be obtained.[203] Under the original Act, transacting with fake documents attracted a fine to a maximum of P 100 000.00 or imprisonment not exceeding five years.[204] This amount has been raised to P 500 000.00.[205] A specified party that failed to identify its customers in terms of the Act initially was liable to a fine not exceeding P 250 000.00.[206] Currently, any violation of the customer identification processes carries a fine of not more than P 1 000 000.00.[207]

The Amendment Act has introduced another important provision that was not found in the original Act. The new provision deals with the treatment of prominent influential persons, commonly referred to as 'PIPs'.[208] When dealing with PIPs, specified parties or accountable institutions should get authorisation from senior management before a business relationship can be established.[209] The specified party should also take steps

[199] Section 16(1)(a)-(d) FI (Amendment) Act.
[200] Section 16(5) FI (Amendment) Act.
[201] Section 10(3) FI Act.
[202] Section 16(c) FI (Amendment) Act.
[203] Section 12(a) FI (Amendment) Act.
[204] Section 10(4) FI Act.
[205] Section 16(7) FI (Amendment) Act.
[206] Section 10(5) FI Act.
[207] Section 14(4) FI (Amendment) Act.
[208] Section 18 FI (Amendment) Act.
[209] Section 18(2)(a) FI (Amendment) Act.

to establish the source of the PIP's funds.[210] Lastly, once the business relationship exists, it must be monitored continuously and intensively.[211]

The FI Act prohibits the opening and maintaining of anonymous, fictitious or false name accounts by specified parties.[212] A violation of this provision is punishable by a fine of a maximum of P 10 000 000.00, suspension or cancellation of the licence or to both punishments, as may be determined by the supervisory body.[213] It would also be unlawful to operate or have any relationship with a shell bank in Botswana.[214] Similarly, a specified party cannot operate or manage a shell bank within Botswana or on behalf of a foreign shell bank.[215] A specified party that contravenes these provisions could be liable to a fine of not more than P 20 000 000.00, to a suspension or revocation of its trading licence or both, as the supervisory authority may deem fit.[216]

It would be unlawful for a specified party to have a business relationship of any kind with a terrorist or terrorist group declared as such in terms of section 12 of the Counter-Terrorism Act[217] unless authorisation has been obtained from the National Counter-Terrorism Committee.[218] In addition, it is a violation of the law to create and maintain or manage a correspondent account in Botswana on behalf of the terrorist or terrorist group listed in terms of section 12 of the Counter-Terrorism Act, unless they are acting with consent obtained from the National Counter-Terrorism Committee.[219] A contravention of these provisions is punishable by a fine of a maximum of P 20 000 000.00, suspension of the licence or cancellation or a combination of these penalties.[220]

Before providing correspondent banking services, a local financial institution is now also required to exert special effort to fully understand how the correspondent bank in question actually operates, know the reputation of that bank and conduct intensive

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[210] Section 18(2)(b) FI (Amendment) Act.
[211] Section 18(2)(c) FI (Amendment) Act.
[212] Section 21(1) FI (Amendment) Act.
[213] Section 21(2) FI (Amendment) Act.
[214] Section 22(1) FI (Amendment) Act.
[215] Section 22(2) FI (Amendment) Act.
[216] Section 22(3) FI (Amendment) Act.
[217] See 4.2.9 below.
[218] Section 23(1) FI (Amendment) Act.
[219] Section 23(2) FI (Amendment) Act.
[220] Section 23(3) FI (Amendment) Act.

customer due diligence on the correspondent bank. Furthermore, the correspondent bank should not allow shell bank accounts, while it should also be able to provide customer due diligence information on request. The correspondent bank should also be supervised and regulated as far as AML/CFT is concerned.[221]

In the case of life insurance services, specified parties are required henceforth to carry out due diligence, risk management and compliance activities with respect to the beneficiaries of such insurance products.[222] As a result, the identity of the beneficiary or beneficial owner in the case of legal persons should be sufficiently disclosed before the disbursements of funds.[223]

The original Act required the due diligence documents to be kept for at least five years.[224] However, the FI Act now prescribes that this information should be kept up to a period of twenty years from the date of the transactions or termination of business relationship.[225] The records should be refreshed every two years following the business transaction or after the business relationship has ceased.[226]

A person who destroyed or concealed any records or documents initially was liable to a fine not exceeding P 100 000.00 or to imprisonment for a maximum of five years, but this has been increased to a fine of not more than P 500 000.00 and a jail term not exceeding ten years.[227] Additionally, any person who failed, without reasons, to comply with the requests for records and documentation by any examiner or the supervisory authority, originally was liable to a fine not exceeding P 100 000.00 or to imprisonment for not more than five years.[228] The penalty has now been substituted for an amount not exceeding P 500 000.00 or imprisonment for a maximum of ten years.[229]

[221] Section 20 FI (Amendment) Act.
[222] Section 19(1) FI (Amendment) Act.
[223] Section 19(1)(c) FI (Amendment) Act.
[224] Sections 11 and 12 FI Act.
[225] Section 28(1) FI (Amendment) Act.
[226] Sections 27(3) FI (Amendment) Act.
[227] Section 31(2) FI (Amendment) Act.
[228] Section 16(5) FI Act.
[229] Section 32(5) FI (Amendment) Act.

Previously the FI Act was brief on the reporting of suspicious transactions to the Agency.[230] The Amendment Act has now deleted the previous provision and replaced it with a new provision that requires specified parties and accountable institutions to report, within a specified period, any suspicious transactions that occur when a business transaction is established, during the existence of the business relationship or when random business transactions are concluded.[231]

The obligation to report suspicious transactions also applies to attorneys, who must notify the Agency when concluding financial transactions, such as buying and selling real estate; managing a client's money, securities or assets; managing bank savings or securities accounts; managing companies; establishing, operating and managing legal persons; or arrangements with respect to trusts and disposal of shares.[232] Attorneys are also mandated to report suspicious transactions irrespective of whether they acquired that information under privileged circumstances.[233] The failure to report suspicious transactions attracts a maximum penalty of P 5 000 000.00.[234]

The specified party or accountable authorities are required to report all transactions entered into with their customers when the transaction exceeds the prescribed amount.[235] Should they violate this provision, they might be charged a maximum fine of P 1 000 000.00 as opposed to the P 100 000.00 that was levied before the amendments.[236] With respect to the failure to report suspicious transactions by other business owners, the fine has been increased from P 50 000.00 or a maximum of three years imprisonment to P 250 000.00 or imprisonment not exceeding five years.[237]

In addition, a specified party or accountable institution that omits to report the electronic transfer of money in excess of the prescribed amount into or out of Botswana shall be charged P 5 000 000.00 and no longer P 1 000 000.00, as was the case

[230] Section 17 FI Act.
[231] Section 33 FI (Amendment) Act.
[232] Section 33(2)-(3) FI (Amendment) Act.
[233] Section 33(4) FI (Amendment) Act.
[234] Section 33(5) FI (Amendment) Act.
[235] Section 34(1) FI (Amendment) Act.
[236] Section 34(2) FI (Amendment) Act.
[237] Section 35(3) FI (Amendment) Act.

before.[238] The previous provision on interruption of transactions that are deemed or suspected to involve financial crimes have been replaced with the requirements that the specified party shall be directed not to process such a transaction for not more than ten working days, closely monitor the account and submit a report within ten working days.[239] This is done to give the Agency the opportunity to assess the transaction or to inform and advise the investigatory authority if necessary.[240]

A specified party that proceeds with an interrupted transaction shall be liable to a fine of not more than P 5 000 000.00, a licence suspension or withdrawal or both sanctions may be imposed.[241] These are hefty penalties compared to the previous one, which was P 50 000.00 or revocation of the licence.[242] Penalties are also imposed on the officers who proceed to process the suspended transactions.[243] The penalty for such an officer is an amount not exceeding P 3 000 000.00 or imprisonment for a maximum of twenty years or both.[244]

This is in sharp contrast with the previous fines, which were P 50 000.00 or imprisonment for a term not exceeding three years or both. It is clear that the aim here is to deter any violation of the Act. The fines have also been increased with respect to an officer who notifies the person that their transaction is being investigated.[245] The fine for disclosing to the customer or any unauthorised third party is now P 2 000 000.00 or imprisonment for a term not exceeding fifteen years or both.[246] It was previously P 50 000.00 or less and/or imprisonment for a term not exceeding three years.[247]

The Amendment Act also introduced a new provision that speaks to non-compliance by those who are duty-bound to act.[248] It provides that any person who oversees a specified party or accountable institution and who is lax to punish compliance

[238] Section 37 FI (Amendment) Act.
[239] Section 40 FI (Amendment) Act.
[240] Section 40 FI (Amendment) Act.
[241] Section 41 FI (Amendment) Act.
[242] Section 25(1) FI Act.
[243] Section 41(2) FI (Amendment) Act.
[244] Section 41(2) FI (Amendment) Act.
[245] Section 41(3) FI (Amendment) Act.
[246] Section 41(4) FI (Amendment) Act.
[247] Section 25(4) FI Act.
[248] Section 43 FI (Amendment) Act.

violations, commits an offense and shall be charged a maximum of P 250 000.00 or be imprisoned for a term not exceeding five years or both, if found guilty.[249] Over and above the supervision obligations placed on the supervisory authorities, the Act is now clear that the supervision of specified parties or accountable institutions should be risk-based when it comes to money laundering, financing of terrorism and proliferation financing.[250]

The Amendment Act further introduces the notion of an 'accountable institution'.[251] It lays down what an accountable institution would be expected to do to combat money laundering, financing of terrorism and proliferation financing. It provides that each accountable institution shall keep information concerning its intended purposes and objectives.[252] Such an institution is also required to keep proper records of its income and expenditure and to ensure that there are internal controls for accountability on the usage of funds in line with the institution's objectives, and this includes a record of all its domestic and international transactions.[253]

The original Act was not clear whether a specified party that is unable to submit the information requested by the Agency within the prescribed period could request for an extension.[254] It is now expressly stated that the Agency may grant an extension at the request of the person or body required to provide information.[255] Furthermore, a person who refused to provide information requested by the Agency was originally liable to a fine of a maximum of P 100 000.00 or imprisonment for not more than five years or both but the sentence has been escalated to P 1 000 000.00 or fifteen years imprisonment or both.[256]

A person who discloses information held or obtained by the Director is liable to a fine not exceeding P 50 000.00 or imprisonment for a term not exceeding three years or to

[249] Section 43 FI (Amendment) Act.
[250] Section 44 FI (Amendment) Act.
[251] Section 45 FI (Amendment) Act.
[252] Section 45(a) FI (Amendment) Act.
[253] Section 45(b) FI (Amendment) Act; See also Schedule 3 of the Act.
[254] Section 28(2) FI Act.
[255] Section 46(3) FI (Amendment) Act.
[256] Section 46(4) FI (Amendment) Act.

both.[257] The obligation not to disclose information is now also imposed on third parties.[258] A third party who violates the non-disclosure obligation shall be charged not more than P 1 000 000.00 or imprisonment for a maximum of five years or both.[259]

The FI Act previously recognised the indemnity of the Director General and officers of the Agency only for acts done or omitted in the course of their work.[260] The immunity has now been extended to the accountable institution, specified party, their respective senior management and directors who breach the duty of confidentiality either by receiving or disclosing information in furtherance of and in compliance with the FI Act.[261]

The Minister's powers to amend schedules to the FI Act have also been enlarged.[262] Not only may the Minister list or delete an entity in Schedule I, but now he may also do so with reference to Schedule III.[263] Schedule III is a new addition to the FI Act and consists of a list of accountable institutions. An accountable institution is defined as 'any legal entity which is registered or incorporated under any law'.[264] However, the schedule has not been updated with a list of specific entities yet.

New entries were introduced to the First Schedule, which contains the list of specified parties.[265] The newly added specified parties include mobile money service providers, company secretaries, international financial services providers, precious metal dealers and cooperative societies.[266] Schedule II of the Act, which contains a list of supervisory bodies, was also amended to widen the scope of supervisory bodies for the specified parties. This meant that most service providers with the potential to be used for money laundering, terrorism and proliferation financing were brought within the scope of the FI Act, thus increasing the supervision and monitoring of specified parties.[267]

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[257] Section 52 (3) FI Act.
[258] Section 53(1) FI (Amendment) Act. This is a new provision which was previously omitted from the FI Act.
[259] Section 53(2) FI (Amendment) Act.
[260] Section 36 FI Act.
[261] Section 42 FI (Amendment) Act.
[262] Section 56(1) FI (Amendment) Act.
[263] Section 56(2) FI (Amendment) Act.
[264] Section 2 FI (Amendment) Act.
[265] Schedule I FI (Amendment) Act.
[266] Schedule I FI (Amendment) Act.
[267] Schedule II FI (Amendment) Act.

In summary, the amendments discussed above were made following the 2017 ESAAMLG mutual evaluation with a view to ensure that Botswana's regulatory framework is aligned to the FATF Recommendations on AML/CFT. The amendments were a step in the right direction as they also showed Botswana's commitment to adopting and implementing the internationally accepted standards on AML/CFT, which in turn could also bolster the position in luring foreign direct investors. Chapter 5 below will evaluate whether the amendments were adequate to bring Botswana into full compliance with the FATF Recommendations.

4.2.9 Counter-Terrorism Act

4.2.9.1 The original Act

The Counter-Terrorism Act[268] was enacted with the goal to prevent acts of terrorism and terrorism financing and to create the Counter-Terrorism Analysis and Fusion Agency (CFTAFA).[269] The CFTAFA comprises of the Coordinator; officers of the Botswana Police Service; officers of the Botswana Defence Force; officers of the Directorate of Intelligence and Security and officers from other departments dealing with counter-terrorism activities.[270] The CFTAFA is led by the Coordinator, who is appointed by the President.[271] The CFTAFA's principal role is to strategise with a view to bring terrorism down by tracking and constraining terrorist movements.[272]

The Coordinator's primary role is to lead, direct and spearhead the administration and expenditure of the CFTAFA.[273] His additional duties include being the President's primary advisor on intelligence operations relating to counter-terrorism.[274] For instance, he should recommend budget proposals for the counter-terrorism programs of the investigating authorities.[275] He is also responsible for the dissemination and coordination

[268] 2014, Laws of Botswana.
[269] Preamble Counter-Terrorism Act.
[270] Section 40 Counter-Terrorism Act.
[271] Section 42(2) Counter-Terrorism Act.
[272] Section 41 Counter-Terrorism Act.
[273] Section 42(1) Counter-Terrorism Act.
[274] Section 43(a) Counter-Terrorism Act.
[275] Section 43(b) and (k) Counter-Terrorism Act.

of all intelligence information to relevant national and international bodies.[276] Moreover, he is the custodian of the terrorist database.[277]

The Counter-Terrorism Act defines an act of terrorism as:

> 'any act or omission in or outside Botswana which is intended to advance a political, ideological or religious cause, or by its nature or context, may reasonably be regarded as being intended to intimidate or threaten the public or a section of the public, or compel a government or international organization to do or abstain from doing any act, or to adopt or abandon a particular position.'[278]

In simple terms, an act of terrorism is an act committed in or outside Botswana for a political, ideological or religious cause and the public or a section thereof should feel threatened or a government or an international organisation should be compelled to act or not to act in a certain manner. Examples of terrorist acts would be those that threaten the lives or freedom of the people either individually or as a group;[279] acts that cause or have the potential to inflict serious injury to persons;[280] threatening or damaging properties, the environment or heritage;[281] acts that interfere with the provision of essential services;[282] and the use of different weapons of war, amongst other things.[283]

The Counter-Terrorism Act criminalises the commission of terrorist activities.[284] A person who commits acts of terrorism is liable to the death penalty or life imprisonment.[285] Aiding and abetting in acts of terrorism is also a punishable offence and such a person may be committed to prison for a maximum period of thirty years.[286] A person who

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[276] Section 43(c)-(d),(i) and (g) Counter-Terrorism Act.
[277] Section 43(h) Counter-Terrorism Act.
[278] Section 2(1) Counter-Terrorism Act.
[279] Section 2(a) Counter-Terrorism Act.
[280] Section 2(b) Counter-Terrorism Act.
[281] Sections 2(c) and (m) Counter-Terrorism Act.
[282] Section 2(d) Counter-Terrorism Act.
[283] Sections 2(f) and (g) Counter-Terrorism Act. NBC weapon is defined in Section 2 of the FI Act as (a) nuclear explosive device as defined in the Nuclear Weapons (Prohibition) Act; (b) biological or toxin weapons as defined in the Biological and Toxin Weapons (Prohibition) Act; or (c) chemical weapons as defined in the Chemical Weapons (Prohibition) Act;
[284] Section 3(1) Counter-Terrorism Act.
[285] Section 3(2) Counter-Terrorism Act.
[286] Sections 4(1) and 8 Counter-Terrorism Act.

provides weapons or training in the making of weapons for terrorism purposes will also be liable for imprisonment for a maximum of thirty years.[287]

The coordination or directing of activities of terrorism attracts life imprisonment.[288] The same is true for a person who finances acts of terrorism directly or in part.[289] Someone who hides or conceals information about a person suspected of having committed acts of terrorism is liable to imprisonment for a maximum of twenty years.[290] Hoaxes are punishable with imprisonment for a term not exceeding ten years.[291] If someone reports suspected acts of terrorism in good faith, his identity is protected and he is not liable for any civil action.[292]

The powers to declare a person or a group as a terrorist or terrorist group lies with the President.[293] Such a declaration cannot be challenged before a court of law.[294] Terrorist groups declared as such by the Security Council of the United Nations, the African Union (AU) or the Secretariat of the Southern African Development Community (SADC) may be added to the national list of declared terrorist persons and groups.[295]

The investigating officer may apply *ex parte* to the relevant court for the immediate freezing of the funds of the person suspected of committing, attempting to or facilitating activities of terrorism.[296] A freezing order may also be obtained to compel a person to cease from engaging in any conduct which concerns any property owned or controlled by or on behalf of terrorist groups.[297] Furthermore, the cordoning off, stopping and searching of persons may be allowed where it is necessary to prevent the commission of acts of terrorism.[298]

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[287] Section 4(2) Counter-Terrorism Act.
[288] Section 4(3) Counter-Terrorism Act.
[289] Section 5 Counter-Terrorism Act.
[290] Section 6 Counter-Terrorism Act.
[291] Section 10 Counter-Terrorism Act.
[292] Section 11 Counter-Terrorism Act.
[293] Section 12(1) Counter-Terrorism Act
[294] Section 12 (4) Counter-Terrorism Act.
[295] Section 12 (5) Counter-Terrorism Act.
[296] Section 17 Counter-Terrorism Act.
[297] Section 18 Counter-Terrorism Act.
[298] Section 19 Counter-Terrorism Act.

The Coordinator is given the power to apply to the magistrate's court for the interception of any communication for the purpose of obtaining information concerning an offence committed under the Counter-Terrorism Act.[299] However, the order cannot be obtained for a period that exceeds ninety days initially but may, on application to a judge, be extended for a period not exceeding one hundred and eighty days.[300] The information so intercepted and certified by a judge shall be admissible in a court of law.[301]

Where it is proved that a person is suspected of or has committed an offence or is about to enter the country to commit an offense under the Counter-Terrorism Act, the President may make an exclusion order to declare such a person a prohibited immigrant under the Immigration Act.[302] A person who facilitates or gives shelter to a person who is subject to the exclusion order, commits an offence and is liable for imprisonment for a period not exceeding twenty years.[303]

A person who discloses to another person that an investigation will be carried out on them or that they suspect that an investigation will be carried out, is liable to an offence and shall pay a fine not exceeding P 150 000.00 or to imprisonment not exceeding five years or both.[304] The High Court shall have jurisdiction over all offences committed under the Act whether or not these took place in Botswana.[305]

In addition, controls are in place at the country's borders to determine whether or not those entering and leaving Botswana are terrorist suspects.[306] For instance, at the border there may be a search and examination of any person, ship or vehicle for purposes of determining if they are terrorist suspects.[307] If a person is to be detained for examination purposes, they should not be detained for more than seven days.[308] Examination includes the examination of goods that have entered or are about to leave

[299] Section 20 Counter-Terrorism Act.
[300] Section 20 Counter-Terrorism Act.
[301] Section 20 (5) Counter-Terrorism Act.
[302] Section 22 Counter-Terrorism Act.
[303] Section 24 Counter-Terrorism Act.
[304] Section 25 Counter-Terrorism Act.
[305] Section 26 Counter-Terrorism Act.
[306] Section 28 Counter-Terrorism Act.
[307] Sections 29(1) and 33 Counter-Terrorism Act.
[308] Section 29(4) Counter-Terrorism Act.

Botswana to determine any association with the commission or instigation of acts of terrorism.[309]

Not only are the officers at the border empowered to search persons, goods, vehicles, ships or aircrafts, but they are also given powers to seize anything for further examination or to use as evidence in criminal proceedings.[310] Any person who contravenes any rules relating to border controls commits an offense and is liable to a fine not exceeding P 80 000.00 or imprisonment for a term not exceeding ten years or both.[311] The Minister may also promulgate regulations from time to time to ensure that the objectives of the Act are carried out easily.[312]

4.2.9.2 Counter-Terrorism (Amendment) Act 2018[313]

Some provisions of the Counter-Terrorism Act were amended in 2018. Previously, the Act established a Coordinator who was responsible for the direction, control and administration of the CTAFA.[314] The Counter-Terrorism (Amendment) Act has substituted 'Coordinator' for 'Director General', which refers to the Director General of the Agency.[315] The Counter-Terrorism (Amendment) Act further reiterates the duties of the Director General albeit in an improved fashion in that they are clearer and simplified.[316]

Section 12, which empowered the President to declare any person or group as a terrorist or as a terrorist group without furnishing any grounds, has been repealed.[317] Instead, this power has now been granted to the Minister, who exercises this power on the recommendation of the Committee.[318] The Counter-Terrorism (Amendment) Act does not state whether the decision of the Minister to declare someone a terrorist would be final or whether it can be appealed, as was the case before with reference

[309] Sections 31 and 32 Counter-Terrorism Act.
[310] Section 34 Counter-Terrorism Act.
[311] Section 38 Counter-Terrorism Act.
[312] Section 45 Counter-Terrorism Act.
[313] July 2018 Amendments.
[314] Section 42 Counter-Terrorism Act.
[315] Section 10 Counter-Terrorism (Amendment) Act.
[316] Section 10 Counter-Terrorism (Amendment) Act.
[317] Section 7(a) Counter-Terrorism (Amendment) Act.
[318] Section 7(a) Counter-Terrorism (Amendment) Act

to the President's order.[319] Another change in section 12 is the deletion of the reference to groups declared as terrorist groups by the AU and SADC.[320] The Counter-Terrorism Act now recognises terrorist groups declared as such by the Security Council of the United Nations only.[321]

The Counter-Terrorism (Amendment) Act also established the National Counter-Terrorism Committee (NCTC).[322] This Committee is comprised of several stakeholders such as the permanent secretaries of key Ministries, the Director-General of the FIA, DIS, DCEC, the Governor of Bank of Botswana and the Commander of the Botswana Defence Force.[323] The primary mandate of the Committee is to ensure the implementation of the United Nations Security Council Resolutions as far as the suppression of terrorism and the financing of terrorism, as well as the prevention and disruption of proliferation financing.[324] The Committee is empowered to regulate its own proceedings and its meetings shall be held as and when the Chairperson determines.[325] At the meeting, a quorum would be formed if two thirds or more of the Committee members are present.[326]

Another noteworthy aspect of the Counter-Terrorism (Amendment) Act is the revised fines. For instance, the offences contemplated in the original sections 4, 5, 6, 7, 13 and 14 now have, as an alternative to imprisonment, a fine of P 5 000 000.00.[327]

4.2.9.3 Counter-Terrorism (Implementation of United Nations Security Council Resolutions) Regulations

Acting in accordance with section 45 of the Counter-Terrorism Act, the Minister promulgated the Counter-Terrorism (Implementation of United Nations Security Council

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[319] Section 7(a) Counter-Terrorism (Amendment) Act.
[320] Section 7(a) Counter-Terrorism (Amendment) Act.
[321] Section 7(a) Counter-Terrorism (Amendment) Act.
[322] Section 7(b) Counter-Terrorism (Amendment) Act. Previously there was no National Counter-Terrorism Committee.
[323] Section 7(b) Counter-Terrorism (Amendment) Act.
[324] Section 7(b) Counter-Terrorism (Amendment) Act.
[325] Section 7(b) Counter-Terrorism (Amendment) Act.
[326] Section 7(b) Counter-Terrorism (Amendment) Act.
[327] Section 3, 4, 5, 6, 8 and 9 Counter-Terrorism (Amendment) Act.

Resolutions) Regulations[328] (Counter-Terrorism Regulations) in 2018 to support the implementation of the main Act. The Counter-Terrorism Regulations were also made to ensure the smooth implementation of the United Nations Security Council Resolutions 1267 of 1999 and 1373 of 2001 as well as any successors to these two Resolutions.

Under the Regulations, the Minister is empowered to list any person or any group as a terrorist or terrorist group, at the recommendation of the Committee referred to above[329] or at the request of a foreign country.[330] A request made by a foreign nation should be channelled through an accredited diplomatic representative of Botswana in that country, and if there is no such representative, it may be made directly to the Government of Botswana through the Ministry of International Affairs.[331] Once this request is received by the Minister, he shall immediately forward it to the Committee, who will make a determination as to whether there are reasonable grounds for a national listing.[332]

Factors to be taken into consideration by the Committee include whether or not the person or group committed, attempted to carry out or participated in acts of terrorism.[333] They will also investigate whether the group is owned and/or controlled by a designated terrorist or a terrorist group in that foreign country[334] and whether the person or group is acting on behalf of or under the instruction of a designated terrorist or terrorist group of another country.[335] Should the Committee find that there are reasonable grounds to list a person or group nationally (in Botswana), a recommendation must be made to the Minister, who will make an order listing the person or group.[336] The international community will also immediately be notified of the listed person or group through the Ministry of International Affairs.[337]

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[328] 2018.
[329] See 7 (b) Counter-Terrorism (Amendment) Act.
[330] Regulation 4(1) Counter-Terrorism Regulations.
[331] Regulations 4(4) and (5) Counter-Terrorism Regulations.
[332] Regulation 4(6) Counter-Terrorism Regulations
[333] Regulation 4(7)(a) Counter-Terrorism Regulations.
[334] Regulation 4(7)(b) Counter-Terrorism Regulations.
[335] Regulation 4(7)(c) Counter-Terrorism Regulations.
[336] Regulation 4(8) Counter-Terrorism Regulations.
[337] Regulation 4(11) Counter-Terrorism Regulations.

Upon the declaration of any person or group as a terrorist or terrorist group, the Committee shall appoint an Investigating Officer[338] to obtain a court order freezing the funds, property and/or economic resources of that person or group.[339] Information will also be transmitted to all the supervisory authorities, financial institutions, specified parties, non-financial businesses and professions, directing them to immediately freeze the assets of the listed person or group in accordance with the Regulations.[340]

It is particularly interesting to consider that the Committee should, within a reasonable time after the national listing, issue a written notice to the listed person or group informing them that they have been nationally listed along with the reasons thereof.[341] The notice should also spell out the consequences of national listing.[342] In addition, the notice should state clearly what the review and de-listing process is.[343] Furthermore, the listed person or group should be informed about the probability of success when requesting the use of frozen assets in consonance with the Regulations.[344]

Third parties with legitimate rights to the frozen assets may apply to court for the exclusion of their assets from the order.[345] However, the application should be supported by an affidavit stating the nature and extent of their rights in the assets.[346] The applicant should also provide information as to when and how such assets were acquired.[347] Additional information that may assist in determining the applicant's rights and interests in the property or frozen funds may also be submitted.[348] Furthermore, a person or an entity whose property was frozen by mistake may apply to the Minister to unfreeze the property.[349] This is a welcome development, since it ensures that third

[338] The definition has the same meaning under the FI Act.
[339] Regulation 4(9) Counter-Terrorism Regulations.
[340] Regulations 4(9) and 7 Counter-Terrorism Regulations.
[341] Regulation 4(10)(a) Counter-Terrorism Regulations.
[342] Regulation 4(10)(b) Counter-Terrorism Regulations.
[343] Regulations 4(10)(c); Regulation 8 and regulation 9 Counter-Terrorism Regulations. This somewhat progressive regulation is in sharp contrast with the previous provisions of the main Act which did not allow for any review process after the president's order. It is yet to be seen if any person or group will take advantage of this provision.
[344] Regulations 4(10)(d); Regulations 14 and 15 Counter-Terrorism Regulations.
[345] Regulation 5(1) Counter-Terrorism Regulations.
[346] Regulation 5(2)(a) Counter-Terrorism Regulations.
[347] Regulation 5(2)(b) Counter-Terrorism Regulations.
[348] Regulation 5(2)(c) Counter-Terrorism Regulations.
[349] Regulation 13 Counter-Terrorism Regulations.

parties' assets are not frozen unnecessarily provided that they can satisfactorily prove ownership of such assets.

The Ministry of International Affairs may receive a list of designated persons or entities from the United Nations (UN).[350] This list should immediately be forwarded to the Minister of Presidential Affairs for onward transmission to the Committee.[351] On receipt of the list, the Committee should circulate it promptly to the supervisory bodies, investigating authorities and the FIA.[352] These entities are expected to disseminate the information to specified parties under their supervision and also to provide guidance as to how the designated person or entity's assets ought to be handled.[353]

Likewise, if the Committee is of the opinion that any person or entity should be included in the UN list, such request should be channelled through the Ministry of International Affairs in a manner prescribed by the UN.[354] Should a person or an entity be delisted either nationally or at the UN level, they may apply for the unfreezing of their funds and properties within twelve months of being delisted.[355] It is worth noting that the unfreezing application may still be refused when it is suspected that the released funds and properties will be used to advance terrorist acts.[356]

It is unlawful to deal in any way, either directly or indirectly, with funds held by a designated or nationally listed person or entity.[357] The Regulations also prohibit the making available of funds to a designated or nationally listed person or entity.[358] Designated persons or nationally listed persons may be prohibited from travelling either into, out of or through Botswana unless exempted by the UN Security Council Sanctions

[350] Regulation 6(1) Counter-Terrorism Regulations.
[351] Regulation 6(1) Counter-Terrorism Regulations.
[352] Regulation 6(2) Counter-Terrorism Regulations. It is interesting to note that, unlike requests from foreign countries, in this instance the Committee does not sit to consider whether or not to list a person or entity. Instead, upon receipt of the UN listing of a designated person or entity, the Committee should forthwith implement the list. This is due to the fact that Member States are bound by the Resolutions of the UNSC. The state should not have a discretion in adopting this list.
[353] Regulation 6(3) Counter-Terrorism Regulations.
[354] Regulation 6(4) Counter-Terrorism Regulations.
[355] Regulations 10 and 11 Counter-Terrorism Regulations.
[356] Regulation 12 Counter-Terrorism Regulations.
[357] Regulation 16 Counter-Terrorism Regulations.
[358] Regulation 17 Counter-Terrorism Regulations.

Committee or the local Committee.[359] It is also an offense to aid or facilitate the procurement or supply of weapons to any designated or listed persons or entities.[360] Any circumvention or failure to adhere to the obligations imposed by the Regulations, as captured above, attracts penalties as stipulated in the main Act.[361]

4.2.10 Proceeds and Instruments of Crime Act

The Proceeds and Instruments of Crime Act[362] (PICA) was enacted to ensure that persons convicted of certain crimes do not benefit from those crimes in terms of either money or property.[363] The Act also covers issues of money laundering, racketeering and related matters.[364] Essentially, the Act is aimed at the confiscation of either money or property emanating or gained from the proceeds or instruments of crime where a person has already been convicted and an order to confiscate has been obtained in terms of the PICA or where investigations are still ongoing.[365]

The PICA established the Office of the Receiver, which is a public office that comprises of the Receiver and any other officers as may be appointed.[366] Currently (and ever since it was established in 2015) the office only has three officers, namely the Receiver, a secretary and a driver.[367] The Receiver is appointed by the Minister of Presidential Affairs, Governance and Public Administration.[368] The Receiver's office is expected to preserve the value of the property that has been placed in the possession of the Office under the authority of an order under this Act or any other written law.[369]

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[359] Regulation 18 Counter-Terrorism Regulations.
[360] Regulation 19 Counter-Terrorism Regulations.
[361] Regulation 20 Counter-Terrorism Regulations.
[362] 2014.
[363] PICA Preamble.
[364] PICA Preamble.
[365] See *the Director of Public Prosecutions v Kgori Capital (Proprietary) Limited*, UCHGB-000065-18, unreported.
[366] Section 46(1) PICA.
[367] 'The Receiver recovers millions from proceeds of crime' *Weekend Post* 3 September 2018. http://www.weekendpost.co.bw/wp-news-details.php?nid=5557 (accessed 30 September 2019). It is worrisome that an office with such a huge mandate three years later is still not properly staffed. One can imagine that such an office requires some level of expertise to ensure that the value of the confiscated property is preserved and increased.
[368] Section 46(3) PICA.
[369] Section 46(4) PICA.

In preserving and taking control of the confiscated property, the Receiver may become a party to any civil proceedings with regard to the property in question;[370] maintain the property to conserve its value;[371] insure the property;[372] if the property is securities or investments, deal with it, and if it is shares, attach the shares as if it were the registered owner without the need to obtain the owner's consent;[373] and where the property is volatile, dispose of it and invest the proceeds.[374]

The DPP may apply to the High Court for a pecuniary penalty order against a person who has been convicted of one or more serious offenses.[375] A pecuniary order is defined by the Act as 'an order for the payment of penalty under Chapter II part I'.[376] A pecuniary order therefore relates to ensuring that criminals are stripped of illegally obtained profits. However, the application for the pecuniary order can only be granted if it is made within twelve months of the date of conviction of the offense.[377]

The granting of the pecuniary order does not bar the DPP from applying for the forfeiture or automatic forfeiture of an interest in the property.[378] The PICA allows for forfeiture and automatic forfeiture orders against the proceeds, property or instruments of crime of convicted persons.[379] This means that the Office of the Receiver can impound all immovable or movable property that a court has declared to be the proceeds of a crime.

Over and above the pecuniary, forfeiture and automatic forfeiture orders, the DPP may apply for a civil penalty order.[380] In terms of this order, an application is made to court to demand that a person who benefited from the proceeds of a serious crime pay to the Government a certain assessed amount by the Court, under circumstances where the criminal activity took place within twenty years before the application is made.[381]

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[370] Section 46(5)(a) PICA.
[371] Section 46(5)(b) PICA.
[372] Section 46(5)(c) PICA.
[373] Section 46(5)(d) and (e) PICA.
[374] Section 46(5)(g) PICA.
[375] Section 3(1) PICA.
[376] Section 2 PICA.
[377] Section 3(2) PICA.
[378] Section 5 PICA.
[379] Sections 18 and 22 PICA.
[380] Section 11 PICA.
[381] Section 11 PICA.

This is an interesting development in the sense that the PICA was enacted only in 2014 but applies retrospectively. However, it is a welcome move because it enables the Government to claim all amounts that were accumulated through financial crimes and hopefully this will deter perpetrators of financial crimes, such as money launderers.

When adjudicating over property restraining orders, the court has the discretion to make any other orders in relation to the property in question as it may deem necessary and fair.[382] Such orders include the variation of orders previously issued as well as the terms and conditions connected to the restraint orders.[383] In addition, the court may make a restraint order subject to the condition that reasonable living, legal and business expenses of the respondent are paid out periodically.[384] These expenses should only be provided for in circumstances where there is evidence that the respondent depends solely on the restrained property.[385]

The Court of Appeal in the *Director of Public Prosecutions v Khato Civils (Pty) Ltd and five others* had the occasion to consider an application for variation of the restraint-of-property order wherein the applicant sought to be allowed to access funds to meet their legal and business expenses. The court in granting the variation order reasoned as follows:

> '[T]he nature of the Order sought by the Appellant was an open ended one and it will be improper and not consistent with the requirements of proper dispensation of justice for the Respondents to be denied use of the money for undefined periods simply because there is an investigation which might lead to a criminal prosecution, a conviction of which may result in a confiscatory order.'[386]

Part V of the Act criminalises money laundering and any acts of aiding and abetting money laundering conducted knowingly and unknowingly, both locally and outside Botswana. A person found guilty under the latter section shall be liable for a fine not

[382] Section 43(1) PICA.
[383] Section 43(a) and (b) PICA.
[384] Section 43(5)(c) and section 35(4)(a)-(c) PICA.
[385] Section 43(d) PICA.
[386] Paragraph 87 CLCGB-020-17, unreported.

exceeding P 20 000 000.00 or for imprisonment for a maximum of twenty years or both.[387]

The DPP may apply for a search warrant in respect of any premises where it is suspected that information can be obtained in relation to money laundering offences or similar serious crimes.[388] The search warrant entitles the police officer to enter the premises to search and seize anything or any documents believed to contain information relevant to the offence and which may assist in tracking the proceeds of the crime.[389] The DPP may also apply for a production order where there are reasonable grounds to believe that someone has information relating to a serious crime or other related activities.[390]

An *ex parte* application may also be made to the magistrates or High Court for a monitoring order.[391] This order requires that a specified party should be requested to monitor the suspect's account and given specifications in terms of what and how to monitor the suspect's account.[392] The monitoring order shall not be valid for a period exceeding three months.[393] A contravention of the terms of the monitoring order shall attract a maximum fine of P 20 000 000.00.[394]

The PICA also established the Confiscated Assets Trust Fund in which all moneys collected in terms of the Act must be paid.[395] In addition, all profits derived from investments and sales made by the Receiver must also be paid into this Fund.[396] It was reported that in 2017 at the annual general meeting of the Asset Recovery Inter-network for Southern Africa (ARINISA), the former Minister of Presidential Affairs, Governance and Public Administration, Mr Eric Molale, stated that more than twenty million Pula have been recovered since 2015 when the Act commenced.[397]

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[387] Section 47(3) PICA.
[388] Section 67(1) PICA.
[389] Section 67(2) PICA. See also section 51 PICA.
[390] Section 51(1) PICA.
[391] Section 53(1) PICA.
[392] Section 54(1) PICA.
[393] Section 54(3) PICA.
[394] Section 55(2) PICA.
[395] Section 68(1) PICA.
[396] Section 68(2) PICA.
[397] 'The Receiver recovers millions from proceeds of crime' *Weekend Post* 3 September 2018. http://www.weekendpost.co.bw/wp-news-details.php?nid=5557 (accessed 30 September 2019)..

It was also reported that, while giving a presentation at the Third Ordinary Council full session at Phikwe Town Council in August 2018, the Receiver, Mr Bafi Nlanda, confirmed that his office had recovered millions of Pula within a short space of time and was in possession of several orders.[398] He also raised certain challenges that his office was facing, such as a lack of knowledgeable and qualified staff on property management to effectively execute the mandate of the Receiver's office.[399] He moreover noted that the Receiver's office did not have warehouses where they could keep the confiscated property or farms to keep the livestock.[400] The above challenges confirm that even if the legislation is properly drafted to combat financial crime, a lack of effective implementation could hamper the efforts to fight financial crime.

4.2.11 Non-Bank Financial Institutions Regulatory Authority Act[401]

For many years, non-bank financial institutions (NBFIs) were not effectively regulated in Botswana and this posed money laundering and terrorism financing risks. However, the Non-Bank Financial Institutions Regulatory Authority (NBFIRA) was established in 2016 as a body corporate to regulate and supervise NBFIs.[402] The NBFIRA is governed by a board comprising of eight members appointed by the Minister of Finance and Economic Planning.[403] The NBFIRA's mandate is basically to ensure the safety and soundness of NBFIs;[404] to set standards to be maintained by NBFIs;[405] to ensure fairness, effectiveness and order in the sector;[406] to foster stability of the financial system in general; and to fight financial crime.[407]

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[398] 'The Receiver recovers millions from proceeds of crime' *Weekend Post* 3 September 2018 http://www.weekendpost.co.bw/wp-news-details.php?nid=5557 (accessed 30 September 2019).
[399] 'The Receiver recovers millions from proceeds of crime' *Weekend Post* 3 September 2018 Tapela Morapedi. http://www.weekendpost.co.bw/wp-news-details.php?nid=5557 (accessed 30 September 2019).
[400] 'The Receiver recovers millions from proceeds of crime' *Weekend Post* 3 September 2018. http://www.weekendpost.co.bw/wp-news-details.php?nid=5557 accessed 30 September 2019).
[401] 2016.
[402] Section 4(1) PICA.
[403] Section 5 PICA.
[404] Section 4(1)(a) PICA.
[405] Section 4(1)(b) PICA.
[406] Section 4(1)(c) PICA.
[407] Sections 4(1)(d) and (e) PICA.

The NBFIRA seeks to achieve the above objectives by conducting routine inspections of NBFIs.[408] They are also empowered to conduct investigations where there are suspicions or evidence that a NBFI is flouting the laws regarding financial services.[409] NBIFIRA may collaborate with the Bank of Botswana and other Government agencies with financial services regulatory and supervisory functions.[410]

In 2017, the Botswana National Risk Assessment (NRA) Report on money laundering and terrorism financing was released.[411] For the NBFI sector, the findings were that money laundering risks were still prevalent in the insurance, securities, retirement funds, micro lending and capital markets arenas.[412] The NBFIRA is responsible to seek a reduction of these risks and, in so doing, to combat financial crime in the NBFI sector.[413]

4.3 An overview of the different role players within the AML/CFT framework

4.3.1 Introduction

Having looked at the various laws in place to combat money laundering and terrorism financing, this section is dedicated to discussing the different players who are tasked with pursuing the elimination (or, at least, reduction) of money laundering and terrorism financing in the country. The investigation and prosecution of money laundering and terrorism financing necessarily cuts across different institutions, which will be discussed below.

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[408] Section 47 PICA.
[409] Section 48 PICA.
[410] Section 55 PICA.
[411] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 9-13. https://www.nbfira.org.bw/sites/default/files/NRA%20SUMMARY%20FOR%20NBFIs.pdf (accessed 10 February 2020).
[412] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 1. https://www.nbfira.org.bw/sites/default/files/NRA%20SUMMARY%20FOR%20NBFIs.pdf (accessed 10 February 2020) 10.
[413] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 5. https://www.nbfira.org.bw/sites/default/files/NRA%20SUMMARY%20FOR%20NBFIs.pdf (accessed 10 February 2020) 5.

4.3.2 Directorate on Corruption and Economic Crime (DCEC)

The Directorate on Corruption and Economic Crime (DCEC) was established in September 2014 by the Corruption and Economic Crime Act.[414] It is believed that the DCEC's model and mandate is similar to Hong Kong's Independent Commission against Corruption.[415] The DCEC was established as a public office to fight corruption and economic crime.[416] It is manned by the Director, Deputy Director and other officers as may be appointed by the Directorate.[417] The appointment of the Director is the prerogative of the President and the Director is responsible for the direction and administration of the Directorate.[418]

In fulfilling its statutory mandate, the Directorate has adopted a three dimensional strategy, namely investigation, corruption prevention and public education.[419] The DCEC investigates any alleged corruption and economic crime in public bodies and when there is sufficient evidence, the case is referred to the DPP for further assessment and prosecution.[420] The DCEC is also empowered to conduct audits of public entities by examining their procedures and practices with a view to help them operate in conducive and corruption-free environments.[421] In addition, the Directorate conducts workshops around the country on corruption issues as well as to try to solicit public support against corruption activities.[422]

Over and above the criticism which has been levelled against the DCEC, such as that it is a 'toothless dog' because it can only investigate but not prosecute its own cases, the Directorate has also been condemned for focusing on small corruption issues and

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[414] Section 3(1) CECA.
[415] Michael Badham Overview of Corruption and Anti-Corruption in Botswana', Transparency International Report (2014) 6.
[416] Section 3(2) CECA; Michael Badham Overview of Corruption and Anti-Corruption in Botswana', Transparency International Report (2014) 6.
[417] Section 3(2) CECA.
[418] Section 4 CECA.
[419] Section 6 CECA; See also http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/About-the-DCEC1/Overview-of-the-DCEC/
[420] Section 39 CECA.
[421] Section 6 CECA.
[422] Section 6 CECA.

not on high profile issues.[423] Furthermore, the Government has been called to enhance the independence of the DCEC and similar institutions so that they can effectively execute their mandate.[424]

Recently, the DCEC seems to have taken a sterner position against high profile individuals. For instance, the former Directorate of Intelligence Services is being investigated for corruption and money laundering.[425] In fact, in 2018 the DCEC investigated a case deemed as the country's biggest money laundering scandal wherein certain big names, such as the former President and the sitting President, local businesses, a judge of the High Court, and a former Minister of Trade and Industry, are implicated.[426] The courts are currently seized with the case.

4.3.3 Directorate of Public Prosecutions and the Botswana Police Service

The DPP is an arm of the Attorney General and is mandated to prosecute criminal offences in Botswana. It is the ultimate decision maker when it comes to the prosecution of corruption cases investigated by the DCEC.[427] This means that the DPP may decide not to prosecute certain cases referred to it and, in fact, it has been openly condemned for the failure to prosecute the 'big guns' while mainly targeting petty crimes.[428]

The DPP appears to be facing a number of challenges, such as a lack of skilled and experienced prosecutors in the areas of money laundering and terrorism financing.[429] It is also short staffed, as many prosecutors tend to leave for greener pastures, which

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[423] 'DCEC toothless on 'big fish' corruption' *Mmegi Nespaper* 9 November 2012. http://www.mmegi.bw/index.php?sid=1&aid=229&dir=2012/November/Friday9 (accessed 12 November 2018).
[424] 'Stakeholders take stock of oversight institutions' *Sunday Standard Newspaper* 3 March 2011. http://www.sundaystandard.info/stakeholders-take-stock-oversight-institutions (accessed 12 November 2018).
[425] 'Here is Kgosi's prosecution file' *Weekend Post* 3 September 2018 http://www.weekendpost.co.bw/wp-news-details.php?nid=5490 (accessed 12 November 2018).
[426] 'Bakang Seretse & Co Clash With DCEC Over 'Dodgy' Court Order*' The Monitor* 20 August 2018. http://www.mmegi.bw/index.php?aid=77182&dir=2018/august/20 (accessed 12 November 2018).
[427] Section 39 CECA.
[428] 'DPP denies 'influence' to stall high profile corruption cases' *Mmegi*28 September 2018. http://www.mmegi.bw/index.php?aid=77791&dir=2018/september/28 (12 November 2018).
[429] ESAAMLG *Anti-money laundering and counter-terrorist financing measures –Botswana, Second Round Mutual Evaluation Report* (2017) 10.

usually results in cases being left hanging or dragging before the courts for a considerable period of time.[430] The DPP created an Asset Forfeiture Unit (AFU) in 2015, but it is still not operating at a level that is adequate to recover the proceeds of crime efficiently.[431] Money laundering and terrorism financing are specialised fields and therefore require some form of sophistication and speciality. However, a lack of sophistication and training at the DPP can lead to dire results, namely that criminal offenses may go unpunished as the criminals usually possess expertise and can engage the best attorneys to defend them.

4.3.4 Bank of Botswana

The Bank of Botswana was established in 1975 as the country's central bank, with the Government of Botswana as the only shareholder.[432] The Bank's principal statutory mandate is to:

> 'promote and maintain monetary stability, an efficient payments mechanism and the liquidity, solvency and proper functioning of a soundly based monetary, credit and financial system, and, in so far as it would be consistent with the monetary stability objective, to foster monetary, credit and financial conditions conducive to the orderly, balanced and sustainable economic development of the country.'[433]

In fulfilling this objective, the Bank supervises the banking sector's activities.[434] This includes ensuring that the sector is alive to money laundering and terrorism financing issues. For instance, as was stated in the discussion of the Banking Act above, banks are required to follow certain procedures and policies to ensure that financial crime is kept to the minimum. The Bank is also empowered to cancel licences or suspend banks that are found flouting the rules.[435] The Bank of Botswana is therefore a key player in fighting money laundering and terrorism financing as its regulatory provisions,

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[430] Michael Badham Overview of Corruption and Anti-Corruption in Botswana', Transparency International Report (2014) 9.
[431] ESAAMLG *Anti-money laundering and counter-terrorist financing measures –Botswana, Second Round Mutual Evaluation Report,* (2017) 10.
[432] The bank was established in terms of the Bank of Botswana Act, 1996, Chapter 55:01. See also Bank of Botswana website. http://www.bankofbotswana.bw/content/2009111815034-about-us (accessed 23 November 2019).
[433] Section 4(1) Bank of Botswana Act.
[434] ESAAMLG *Anti-money laundering and counter-terrorist financing measures –Botswana, Second Round Mutual Evaluation Report* (2017) 12.
[435] Section 25 Banking (Amendment) Act Regulations.

including those involving prudential supervision, are stringent and it has oversight over banks who are involved in financial intermediation.

4.3.5 Financial Intelligence Agency

The Financial Intelligence Agency (FIA) was established in terms of the Financial Intelligence Act.[436] It is responsible for requesting, receiving, analysing and disseminating (to investigatory authorities, supervisory authorities or other comparable bodies) financial information regarding suspicious transactions and the financing of any activities or transactions related to terrorism.[437] In essence, the FIA is tasked with coordinating money laundering and terrorism financing matters in cooperation with other stakeholders.

The FIA is housed under the Ministry of Finance and Economic Development. All its operations take place under the same roof as the Ministry. Some writers have argued that this lack of independence from the Government has handcuffed it to a certain extent from effectively discharging its obligations, as it is inextricably intertwined with the Government.[438] The FIA is also tasked with coming up with legislative, administrative and policy reforms.[439]

The FIA should ensure strict adherence to the provisions of the Act by the specified parties as listed in the First Schedule of the Act. The specified parties include attorneys, accountants, banks, bureau de change, building societies, casinos, non-bank financial institutions, postal services, precious stones dealers, savings banks, the Citizen Entrepreneurial Development Agency, the Botswana Development Corporation, the National Development Bank, car dealerships and money remitters.[440]

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[436] 2009.
[437] Section 4 FI Act.
[438] Michael Badham 'Overview of Corruption and Anti-Corruption in Botswana', Transparency International Report (2014) 10.
[439] ESAAMLG *Anti-money laundering and counter-terrorist financing measures –Botswana, Second Round Mutual Evaluation Report* (2017) 13.
[440] See First Schedule of the FI Act.

4.3.6 The National Coordinating Committee on Financial Intelligence

Over and above the FIA, the Preamble of the Financial Intelligence Act provides that the principal objective of the Act was to establish the National Coordinating Committee on Financial Intelligence (NCCFI) with the mandate to ensure the reporting of suspicious transactions as well as the provision of mutual assistance with like bodies externally with regard to financial information.[441] The members of this Committee are the DCEC, the Botswana Police Service, the Attorney General's Chambers, the Bank of Botswana, the Botswana Unified Revenue Services, the Ministry of Foreign Affairs and International Cooperation, the Department of Immigration, the NBFIRA, the DPP, the Directorate of Intelligence and Security (DIS) and the Ministry of Defence, Justice and Security.[442] The FIA Director is the secretary to this Committee.[443] The Committee meets at least once every quarter.[444]

The role of the Committee is to assess the efficacy of the measures in place to arrest those who commit financial crime.[445] After assessment of the laws and regulations in place, the Committee can also propose legislative and administrative reforms to the Minister.[446] The Committee is furthermore expected to aid and foster coordination and cooperation between the investigatory and supervisory authorities with a view to enhance anti illicit financial flow measures.[447] Additionally, the Committee should ensure that the policies in place protect the international reputation of the country as far as financial crime is concerned.[448]

4.3.7 Counter-Terrorism Analysis and Fusion Agency (CTAFA)

The Counter-Terrorism Analysis and Fusion Agency (CTAFA) was created in terms of the Counter-Terrorism Act.[449] The CTAFA comprises of the Director General, officers

[441] FI Act Preamble.
[442] Section 6 FI Act.
[443] Section 6(3) FI Act.
[444] Section 8(1) FI Act.
[445] Section 7(a) FI Act.
[446] Section 7(b) and (e) FI Act.
[447] Section 7(c) FI Act.
[448] Section 7(d) FI Act.
[449] Counter-Terrorism Act Preamble.

of the Botswana Police Service, officers of the Botswana Defence Force, officers of the Directorate of Intelligence and Security and officers from other departments dealing with counter-terrorism activities.[450] The CTAFA is led by the Director General appointed by the President.[451] The CTAFA's principal role is to strategise with a view to bring terrorism down by tracking and constraining terrorist movement.[452]

4.3.8 National Counter-Terrorism Committee

The National Counter-Terrorism Committee is a newly formed committee that was introduced by the Counter-Terrorism (Amendment) Act, 2018. The primary mandate of the Committee is to ensure the implementation of the UN Security Council Resolutions as far as the suppression of terrorism and prevention and disruption of financing of proliferation of arms of war are concerned.[453]

4.3.9 Non-Bank Financial Institutions Regulatory Authority (NBFIRA)

The NBFIRA's role is to ensure the safety and soundness of NBFIs;[454] to set standards to be followed by NBFIs;[455] to ensure fairness, effectiveness and order in the sector;[456] to foster stability of the financial system in general; and to fight financial crime.[457] It supervises insurance companies, pension funds and medical aid funds as well as asset managers, international financial services centre accredited companies, investment advisors, and stockbroking firms, among others, for compliance with both prudential and AML/CFT requirements.[458]

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[450] Section 40 Counter-Terrorism Act.
[451] Section 42(2) Counter-Terrorism Act.
[452] Section 41 Counter-Terrorism Act.
[453] Section 7(b) Counter-Terrorism (Amendment) Act.
[454] Section 4(1)(a) NBFIRA Act.
[455] Section 4(1)(b) NBFIRA Act.
[456] Section 4(1)(c) NBFIRA Act.
[457] Section 4(1)(d) and (e) NBFIRA Act.
[458] ESAAMLG *Anti-money laundering and counter-terrorist financing measures –Botswana, Second Round Mutual Evaluation Report* (2017) 14.

4.3.10 Law Society of Botswana

The legal fraternity is covered by the First Schedule of the FI Act, which lists all specified parties. The Second Schedule of the FI Act also lists the Law Society of Botswana (LSB) as a 'supervisory authority'. This therefore means that the LSB is obliged to foster compliance with money laundering regulations within its regulatory space. The importance of involving the LSB is evidenced by the fact that attorneys are often implicated in money laundering cases and therefore it is important that they too be required to adhere strictly to AML/CFT provisions.[459]

4.3.11 The judiciary

The Botswana judiciary system is a four-tier system. The hierarchy of the courts is as follows: Customary Courts, Magistrates Courts, the High Courts and finally the Court of Appeal. The powers and functions of the courts are enshrined in the Constitution of Botswana.[460] Former Chief Justice Mukwesu Nganunu described the objectives of the judiciary as 'to promote the resolution of disputes in Courts and to deal with committed crimes. By so doing, the judiciary is contributing to the maintenance of peace and tranquillity'.[461]

In as much as the judiciary is tasked with ensuring that crimes, including financial crimes, do not go unpunished, Botswana's judiciary might not be equipped to deal with sophisticated and specialised cases such as money laundering and terrorism financing.[462] In fact, the ESAAMLG report included a finding to the effect that, when it comes to money laundering, the Botswana judiciary has not really been tested yet. Therefore, Botswana's courts currently have neither the experience nor the required expertise in

[459] See for example 'Commercial banks and lawyers may be charged in NPF saga' *Sunday Standard Newspaper* 17 December 2018. This is one case where about three law firms might be charged for failure to report suspicious transactions under the FI Act.
[460] See section 95 of the Constitution.
[461] http://www.gov.bw/en/Ministries--Authorities/Ministries/Administration-of-Justice-AOJ/Background-Traditions-Court/Background-of-the-Judiciary/
[462] 'Botswana's judiciary untested in trying money laundering cases' *Sunday Standard Newspaper* 25 June 2018.

this area.[463] In an attempt to rectify this situation, a special court was established in 2012 to deal specifically with corruption cases.[464]

4.4 Money laundering and terrorism financing cases in Botswana

4.4.1 Introduction

This section seeks to highlight cases in which some of the statutes discussed above were tested before our courts. They will reveal the current level of understanding of the various laws that seek to curb money laundering, terrorism financing and the financing of the proliferation of arms of war.

4.4.2 Director of Public Prosecutions v Khato Civils (Pty) Ltd and Five Others[465]

The first series of cases under discussion can be called the 'Khato Civils cases'. Khato Civils is a construction company registered and domiciled in South Africa with some operations in Botswana. The litigants in this matter brought at least six different applications before both the High Court of Botswana and the Court of Appeal of Botswana in a space of a year. The applications raised interesting arguments regarding some provisions of the PICA. The context of these judgments is allegations of money laundering against the accused persons.

The matter also proffers a level of understanding concerning the application of sections on the need to balance interests of confiscation and restraining orders and ensuring that the respondents are not prejudiced by such orders. For ease of reference, the cases will be differentiated by the judgment dates, as they also have the same case number. The matter's journey before the courts is summarised below.

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[463] ESAAMLG *Anti-money laundering and counter-terrorist financing measures –Botswana, Second Round Mutual Evaluation Report* (2017) 8; 'Botswana's judiciary untested in trying money laundering cases' *Sunday Standard Newspaper* 25 June 2018. http://www.sundaystandard.info/botswana%E2%80%99s-judiciary-untested-trying-money-laundering-cases (accessed 23 November 2018).

[464] Michael Badham 'Overview of Corruption and Anti-Corruption in Botswana', Transparency International Report (2014) 11.

[465] UCHGB-000266-16, unreported.

4.4.2.1 15 September 2016 judgment before Justice Leburu

This judgment was a result of the DPP bringing an urgent application before the High Court of Botswana on 19 August 2016 seeking to restrain and freeze the accounts of Khato Civils and its directors with Stanbic Bank Botswana and Standard Chartered Bank Botswana.[466] The DPP argued that the restraint order was necessary to allow them to carry out their investigations for the confiscation offence in terms of sections 14 and 95 of the Customs and Excise Act and section 47 of the PICA.

The DPP was granted an order *nisi* returnable on 4 October 2016.[467] By consent, the parties also allowed Khato Civils to access an amount of P 1 000 000.00 to cover operational expenses.[468] The parties, however, were requested to attend court for a hearing on a much earlier date where they presented their arguments and a judgement was issued on 15 September 2016 discharging the order *nisi* previously granted on 19 August 2016.[469] Following the discharge of the rule *nisi*, Khato Civils proceeded to withdraw P 6 000 000.00 between 15 September 2016 and 26 October 2016.

4.4.2.2 3 November 2016 judgment before Justice Kebonang

Pursuant to the withdrawal of the abovementioned amount, the DPP on 19 September 2016 filed an urgent application for an interim interdict to the Court of Appeal challenging the decision of the High Court.[470] The application intended to restrain Khato Civils from accessing their accounts referred to above.[471] However, they did not file an interdict or stay of execution immediately but only filed it with the High Court on 26 October 2016 on an urgent basis.[472]

The application was vigorously opposed by Khato Civils, who argued that the matter was not urgent as they had known about the judgment on 15 September 2016 but only

[466] Paragraph 11 UCHGB-000266-16, unreported.
[467] Paragraph 12 UCHGB-000266-16, unreported.
[468] Paragraph 11 UCHGB-000266-16, unreported.
[469] Paragraph 13 UCHGB-000266-16, unreported.
[470] Paragraph 14 UCHGB-000266-16, unreported.
[471] Paragraph 8 UCHGB-000266-16, unreported.
[472] Paragraph 15 UCHGB-000266-16, unreported.

brought an interdict application on 26 October 2016, six weeks later.[473] They argued further that the application was brought as an afterthought and that, if there was any urgency, it was self-created.[474]

The issue for determination before the High Court was therefore whether or not the DPP's application for an interim interdict was urgent and if they had made a case for granting the interim interdict order.[475] When dismissing the application, the Justice Kebonang held that the application was not urgent, as the DPP had long known of the 15 September 2016 judgment but failed to act timeously.[476] The Court noted that, unlike in South Africa, lodging an appeal to the court of appeal did not serve as a stay of execution of the previous judgment.[477] It was further held that the DPP had failed to satisfy the requirements of an interim interdict, namely a *prima facie* right or clear right to stop the execution of the judgment.[478] It was held that the DPP had failed to establish the right that was being infringed and the application was accordingly dismissed.[479] The DPP appealed to the Court of Appeal and the original order *nisi* was restored.

4.4.2.3 28 February 2017 judgment before Justice Leburu

The urgent application was brought by Khato Civils who sought to vary the terms of the restraining order of 19 August 2016 in terms of section 43 (1) and 2(b) of the PICA.[480] They wanted to be allowed access to P 1 500 000. 00 per month for business and legal expenses for the period from February 2017 to June 2017.[481] They also requested for P 1000 000.00 to cover outstanding debts and other company obligations.[482]

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[473] Paragraph 16 UCHGB-000266-16, unreported.
[474] Paragraph 16 UCHGB-000266-16, unreported.
[475] Paragraph 17 UCHGB-000266-16, unreported.
[476] Paragraph 24 UCHGB-000266-16, unreported.
[477] Paragraph 24 UCHGB-000266-16, unreported.
[478] Paragraph 40 UCHGB-000266-16, unreported.
[479] Paragraph 36 UCHGB-000266-16, unreported.
[480] Paragraph 1 UCHGB-000266-16, unreported.
[481] Paragraph 3(2.1) UCHGB-000266-16, unreported.
[482] Paragraph 3(2.2) UCHGB-000266-16, unreported.

The DPP opposed the application by arguing that the application was not urgent, and that financial prejudice could not be a reason to move the court on urgency.[483] The DPP also argued that Khato Civils was not entitled to the restraint variation as it failed to account for the P 6 000 000.00 withdrawn pending the appeal case. The crisp and germane issue that the court was ceased with was whether or not Khato Civils had satisfied the requirements in section 43(1) and 2(b) of the PICA.[484] Following the arguments of both parties, the court noted that section 43 had to be read in conjunction with section 35(5) of the PICA.[485] Section 35(5) of the PICA provides as follows:

> 'A court shall not make provision of a kind referred to in subsection (4) unless it is satisfied that the person cannot meet the expense concerned out of property that is not subject to a restraining order.'[486]

Section 35(4), which is cross-referenced in subsection (5), states as follows:

> 'Where a restraining order has been granted over any person's property, the court may authorise the payment of -
> (a) ...
> (b) reasonable legal expenses in respect of any proceedings under the Act or any related criminal proceedings.
> (c) reasonable business expenses of the person against whom a restraining order has been granted.'[487]

The court noted that in determining the issue before it, it was called to engage in a balancing exercise of two competing rights.[488] The court found it had to balance the rights of Khato Civils against the protection of the interests enumerated in the PICA.[489] The court stated that:

> 'What is crucial in the reconciliation exercise is the extent of the limitation that is placed upon a particular competing interest (access to funds), on the one hand and the purpose, importance and effect of the restraint on the funds, on the other hand. Simply put, what is of significance is rather the benefit that flows from allowing the restraint order that is weighed against the loss and prejudice that the restraint order

[483] Paragraphs 4 and 36 UCHGB-000266-16, unreported.
[484] Paragraph 15 UCHGB-000266-16, unreported.
[485] Paragraph 52 UCHGB-000266-16, unreported.
[486] Section 43(5)(c) PICA.
[487] Section 35(4) PICA.
[488] Paragraph 54 UCHGB-000266-16, unreported.
[489] Paragraph 55 UCHGB-000266-16, unreported.

will entail. Cascaded to the facts in this case, I duly recognise the obvious tension between the need to prevent the dissipation of assets held under a restraint order and the need to ensure that a person under investigation has access to a legal representative of his/her choice and thus ensuring such person's right to a fair trial, if prosecuted.'[490]

The court made an assessment and held that Khato Civils was entitled to a once-off payment of P 500 000. 00 to cover the legal fees, which were reasonable in the circumstances.[491]

With regard to business expenses, section 35(4) (c) provides that:

'4. Where a restraining order has been granted over any person's property the court may authorise the payment of -
(a) ...
(b) ...
(c) reasonable business expenses of the person against whom a restraining order has been granted.'[492]

The court then held that P 500 000.00 per month from February 2017 to June 2017 was reasonable for business expenses.[493] The court also stated that allowing Khato Civils limited access to its account would prompt the DPP to conclude its investigations promptly and with due diligence.[494]

4.4.2.4 6 April 2017 judgment before Justice Leburu

This was an application for leave to appeal to the Court of Appeal. It was brought on an urgent basis by the DPP to appeal the decision of 28 February 2017 and also a stay of execution of the interlocutory orders made on the same date pending appeal of the matter.[495] The DPP argued that the High Court had erred in allowing the variation of the restraint order and thus giving Khato Civils limited access to its banking accounts for legal and business expenses, amongst other things.[496]

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[490] Paragraph 56 UCHGB-000266-16, unreported.
[491] Paragraph 66 UCHGB-000266-16, unreported.
[492] Section 35(4) PICA.
[493] Paragraph 84 UCHGB-000266-16, unreported.
[494] Paragraph 85 UCHGB-000266-16, unreported.
[495] Paragraph 5 UCHGB-000266-16, unreported.
[496] Paragraph 11 UCHGB-000266-16, unreported.

In dismissing both the leave to appeal to the Court of Appeal and the stay of execution applications, the High Court noted that the DPP would suffer no irreparable harm should execution of the interlocutory judgment be allowed to ensue and that Khato Civils, on the other hand, was likely to suffer irreparable harm if it was not allowed to take care of its monthly business obligations.[497]

The court summarised its decision thus:

> 'It is also trite law that a court should not permit, in appropriate cases, a litigant from frustrating a successful litigant from enjoying the fruits of its success; hence a need to carry out a delicate balancing exercise between the interests of the disputants.'[498]

4.4.2.5 9 May 2017 Court of Appeal judgment before Justice Lesetedi

The DPP approached the Court of Appeal on an urgent basis to seek leave to appeal to that court and a stay of execution order pending the appeal.[499] The DPP was successful in its application for leave to appeal the 27 April High Court judgment on the basis that, in refusing to grant the DPP leave to appeal, the High Court was not objective but seemed to have defended its position regarding the variation of the restraint order.[500] With regard to the stay of execution application, the Court of Appeal held that since the variation review was to be heard in two months, it was not necessary to interrupt it and therefore this application was denied.[501]

4.4.2.6 7 September 2017 judgment before Justice Leburu

This application was brought by Khato Civils for discharge of the restraint orders made on their bank accounts.[502] Khato Civils argued that they required substantial amounts of money to progress their business and that they were engaged in a legitimate business that required substantial cash flow to operate.[503] They also expressed concern

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[497] Paragraphs 54-55 UCHGB-000266-16, unreported.
[498] Paragraph 52 UCHGB-000266-16, unreported.
[499] Paragraph 6 CLCGB-020-17, unreported.
[500] Paragraphs 17-18 CLCGB-020-17, unreported.
[501] Paragraphs 20-21 CLCGB-020-17, unreported.
[502] Paragraphs 6-7 UCHGB-000266-16, unreported.
[503] Paragraphs 11-21 UCHGB-000266-16, unreported.

about the inordinate delays that the DPP was taking to conclude its investigations.[504] They argued further that they continued to suffer irreparable financial harm, as their funds were restrained and that it was difficult to obtain new business deals due to the reputational damage of being associated with money laundering.[505]

The DPP, on the other hand, opposed the application and argued that Khato Civils had no cause of action and that they would not suffer any prejudice should their funds continue to be restrained and frozen.[506] The DPP however failed to take the court into its confidence with regard to how far the investigations were and it was apparent that the DPP had not employed other money laundering investigation techniques that are usually used in similar investigations, including seeking mutual assistance from South Africa.[507] In addition, the DPP stated that their investigations revealed that Khato Civils obtained funds from a legitimate dealer in South Africa and that the amount was supposed to be used for travel purposes only, not business.[508]

In releasing the restrained Khato Civils funds, the court pronounced as follows:

> 'The 1st Respondent has failed to take the court into its confidence by explaining how far the investigation process has gone and any difficulties encountered. It has also failed to inform the court as to when the investigations are likely to be completed. Despite elapse of over a year, the 2nd Applicant has not been interviewed about the funds in question and this goes to show how half-hearted and lopsided the process has been. No cogent reasons for the delay have been placed before the court. It is not in the interest of justice that the Applicants funds should be restrained for an indefinite period, merely because of ongoing and indeterminate investigations. The Applicants have demonstrated the enduring prejudice they are suffering by such indefinite investigations; as alluded to above.
> After an evaluation of all the above factors, what is outstanding is for the court to strike a happy medium and then make a value judgment in making an appropriate decision; bearing in mind that courts have an overriding duty to promote justice and prevent injustice.'[509]

[504] Paragraph 22 UCHGB-000266-16, unreported.
[505] Paragraphs 22-23 UCHGB-000266-16, unreported.
[506] Paragraphs 36-58 UCHGB-000266-16, unreported.
[507] Paragraphs 81-85 UCHGB-000266-16, unreported.
[508] Paragraph 87 UCHGB-000266-16, unreported.
[509] Paragraphs 89-90 UCHGB-000266-16, unreported.

4.4.3 IRB Transport (Proprietary) Ltd and Others[510]

This is another case in which the provisions of the PICA were invoked. The application was brought on an urgent basis by the DPP against IRB Transport (Proprietary) Ltd (the first respondent), Thapelo Olopeng[511] (the second respondent) and Standard Chartered Bank Botswana (the third respondent).[512] The relief sought by the DPP was that two accounts belonging to the respondents should be restrained in terms of section 36 of the PICA and that they should not be allowed to deal with the funds in any manner pending finalisation of the prospective criminal prosecution.[513]

The DPP argued that the restraint order was sought for purposes of satisfying any pecuniary penalty order or civil penalty order, or forfeiture order or civil forfeiture order and/or an administrative forfeiture order pursuant to section 36(2) of the PICA.[514] They further prayed that the orders should operate as an interim interdict pending completion of the matter.[515] At the hearing of 1 October 2016, it was held that the matter was urgent and the court therefore granted an order *nisi*, which was to operate as an interim interdict, returnable on 24 October 2016.[516]

When the matter was heard on 24 October 2016, the respondents argued that the high court had no jurisdiction as the matter was *res judicata*.[517] They averred that the matter on the same facts was heard and disposed of in the magistrate's court, which brought finality on the matter.[518] The DPP was granted the order *nisi* for restraint orders against the respondents' account by the magistrates court on 9 June 2015, returnable on 25 June 2015.[519] The order was consequently confirmed on 2 October with a proviso that it should only run for sixty days, failing which it would lapse.[520]

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[510] UCHGB-000315-16.
[511] The former Minister of Tertiary Education.
[512] Paragraph 1 UCHGB-000315-16, unreported.
[513] Paragraph 2(1)-(6) UCHGB-000315-16, unreported.
[514] Paragraph 2(5) UCHGB-000315-16, unreported.
[515] Paragraph 2(6) UCHGB-000315-16, unreported.
[516] Paragraph 6 UCHGB-000315-16, unreported.
[517] Paragraph 11 UCHGB-000315-16, unreported.
[518] Paragraph 12 UCHGB-000315-16, unreported.
[519] Paragraph 13 UCHGB-000315-16, unreported.
[520] Paragraphs 14-15 UCHGB-000315-16, unreported.

In passing that judgment the magistrate stated that:

> 'I hereby confirm the *rule nisi* that was granted on 9th June 2015. Having done that, I now have to address myself to the obvious delay and prejudice to the respondents. I have earlier expressed my misgivings about the delay that has been occasioned in this matter. After 13 months any further delay is not simply prejudicial. It is perpetration of patent injustice. This ought to be mitigated so that the applicant will not only be adhered to carry out his investigations but also that the respondents will not continue to be subject to prejudice.'[521]

The DPP, on the other hand, asserted that the matter was not *res judicata* and that the application before the High Court was based on section 37(1) of the PICA, which empowered it to apply for restraining orders pending investigations.[522] Surprisingly, when questioned about the failure to conclude his investigations timeously, the DPP stated that, in terms of his rights under section 37 (1), he was at liberty to prolong the investigation for as long as it suits him.[523]

The High Court consequently held that the matter had been on-going for over two years and that the DPP's delays constituted gross abuse of court processes.[524] The court further held that any party that sought to rely on statutes for any relief should do so faithfully by complying with the requirements of the Acts.[525] The High Court ultimately held that the decision of the Magistrates' Court remained valid, since it was not challenged and thus the court discharged the order *nisi* granted on 1 October 2016.[526]

4.4.4 Director of Public Prosecutions v Kgori Capital (Proprietary) Limited[527]

This was an appeal case in which Kgori Capital (Pty) Ltd, an investment management company, and its directors who were found to have benefited from serious crime activities in the sum of P 10 525 768.79.[528] The respondents were ordered by the High Court to pay into the government's confiscated asset trust fund a sum of

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[521] Paragraph 19 UCHGB-000315-16, unreported.
[522] Paragraph 54 UCHGB-000315-16, unreported.
[523] Paragraphs 58-60 UCHGB-000315-16, unreported.
[524] Paragraph 61 UCHGB-000315-16, unreported.
[525] Paragraph 71 UCHGB-000315-16, unreported.
[526] Paragraph 76 UCHGB-000315-16, unreported.
[527] UCHGB-000065-18
[528] Paragraph 1 CLCGB-033-19, unreported.

P 9 081 382.15.[529] These civil penalties were ordered in terms of section 11 of the PICA, following an application by the DPP for the civil penalty to recover what they alleged the respondents had benefited from defrauding the National Petroleum Fund (NPF).[530]

The Respondents were charged with the following offences:

a. Abuse of office contrary to section 24;
b. Obtaining by false pretences contrary to section 308 of the Penal Code;
c. Cheating public revenue contrary to section 33 of the CECA; and
d. Money laundering contrary to section 47 PICA.[531]

On the charge of abuse of office, the High Court held that Kgori Capital benefited from serious crimes and was therefore liable for a civil penalty in accordance with section 12 of the PICA.[532] However, the Court of Appeal held that the High Court erred on this finding because what had to be determined was whether or not Kgori Capital 'engaged' in serious crime activities and the test was not about the 'benefit' derived from serious crime activities.[533]

With regard to the second charge of obtaining by false pretences, the Court of Appeal also found that there was no false representation portrayed by the company to anyone and that the DPP had in fact failed to prove Kgori Capital's fraudulent intent.[534] Kgori Capital hence also succeeded on this charge. On the charge of cheating the public revenue, the Court of Appeal held that since no fraudulent intent was found in Kgori Capital, this charge was unsustainable.[535] The money laundering offense also failed because the DPP failed to satisfy the section 47 elements for Kgori Capital to be charged with money laundering, especially the *mens rea* part.[536]

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[529] Paragraph 2 CLCGB-033-19, unreported.
[530] Paragraph 1 CLCGB-033-19, unreported.
[531] Paragraph 7 CLCGB-033-19, unreported.
[532] Paragraph 52 CLCGB-033-19, unreported.
[533] Paragraph 53 CLCGB-033-19, unreported.
[534] Paragraph 61 CLCGB-033-19, unreported.
[535] Paragraphs 62-63 CLCGB-033-19, unreported.
[536] Paragraphs 63-66 CLCGB-033-19, unreported.

4.4.5 Botswana's biggest money laundering scandal cases[537]

4.4.5.1 DPP v Welheminah Mphoeng Maswabi (commonly known as the 'Butterfly case')

This is a case where Welheminah Mphoeng Maswabi 'Butterfly', a suspended Director of Intelligence and Security Services, was arraigned before the Magistrate's Court for allegedly defrauding the Bank of Botswana with the sum of P 100 000 000 000.00 and distributing this amount to the former President, His Excellency Ian Khama, and a famous South African business woman, Bridgette Motsepe.[538] The charges against her included terrorism financing, carrying a false passport and possession of property beyond her means.[539]

As the case progressed before the Magistrate Court, Butterfly argued that the DPP had fabricated evidence against her and that the fact that the State did not oppose these averments in her affidavit, confirmed that the DPP was prosecuting her in bad faith.[540] The South African banks where it was alleged that the money was transferred to also refuted those allegations.[541] The Bank of Botswana also issued out a statement distancing itself from the allegations that some money went missing from its account.[542]

Following these new findings, the DPP requested more time to conduct some investigations and consequently Butterfly was granted bail.[543] The substantive case was expected to be heard on 17 August 2020. It is reported that the DPP engaged the services of the renowned South African lawyer, Gerrie Nel from Afriforum, to assist it with

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[537] Case number unavailable.
[538] *Welheminah Mphoeng Maswabi v the State*, UCHGB-000411-19 4 (bail application costs judgment); 'High Court clips "Butterfly" s wings' *The Business Weekly and Review* Friday10-16 July 2020.
[539] UCHGB-000411-19 13; 'State defies court order in Butterfly case' *The Voice* 21 November 2019.
[540] *Welheminah Mphoeng Maswabi v the State*, UCHGB-000411-19 14-15.
[541] 'Butterfly's attorneys uncover State's alleged lies' *Mmegi Online* 15 November 2019; 'SA Banks rubbish state evidence in "Butterfly" case' *The Weekend Post* 18 November 2019; 'Butterfly's charges a fabrication' *The Patriot* 25 November 2019.
[542] 'No missing funds at BoB' *The Patriot* 13 May 2019; 'Tracking the missing P4 billion' *The Patriot* 14 February 2019.
[543] UCHGB-000411-19 14.

facilitating a mutual legal assistance request from the government of South Africa.[544] At the time of writing this chapter, no further information regarding the outcome of this hearing was available.

4.4.5.2 DPP v Carter Morupisi and 2 Others

This case involves a former permanent secretary to the President (PSP) and his wife. The former PSP is accused of abuse of office and accepting a bribe whilst being a public servant. Both he and his wife are also charged with money laundering. The charges are in connection with the embezzlement of funds from the Botswana Public Officers Pension Fund (BPOPF). The two are currently out on bail and the case is pending.

4.4.6 Summary of the case discussions

The lessons to be learned from the above cases is simply that prosecution of financial crime, such as money laundering, terrorism and proliferation financing, is fairly new in Botswana and seems to be picking up momentum to bring to account those who are alleged to be engaged in illicit financial flows and corruption. A similar thread running across these cases is that only the provisions of the PICA have been tested thus far, and none of the other statutes dealing with money laundering, terrorism and proliferation financing. This means that Botswana's judiciary still has a long way to go in adjudicating matters related to these other financial crime matters.

Secondly, it has been alleged that the DPP has used the legislation in bad faith in that they do not seem to attend to their cases and investigations efficiently and effectively, with the result that they end up losing cases where there was potential to actually impute or find wrongdoing. In addition, the prosecution of these cases seems to take significant time, as most of them take over two years to be concluded, such as with

[544] 'DPP ropes in Adv. Gerrie Nel on P100 billion money-laundering case' *The Weekend Pos*t 23 June 2020; 'Botswana hires Gerrie Nel to pursue money laundering case against Bridgette Motsepe-Radebe' *Daily Maverick* 23 June 2020; 'Over $48m distributed to SA banks in Botswana money-laundering case' *The Citizen* 23 June 2020.

the Khato Civils case discussed above. At the moment, it also appears that the expertise of the DPP when it comes to prosecution of these financial crimes, is inadequate.

What is interesting is that, in all the discussed cases, the judiciary discharged their duties justly and fairly by balancing the competing acts of the parties. It was also noted that section 36 of the PICA did not clothe the DPP with powers to conduct investigations for a lengthy period without due regard to the accused's rights. This balancing exercise was succinctly put forward by Justice Lesetedi as follows:

> '[T]he nature of the Order sought by the Appellant was an open ended one and it will be improper and not consistent with the requirements of proper dispensation of justice for the Respondents to be denied use of the money for undefined periods simply because there is an investigation which might lead to a criminal prosecution, a conviction of which may result in a confiscatory order.'[545]

4.5 Conclusion

This chapter set out the various pieces of legislation which endeavour to bring an end to financial crimes like money laundering, financing of terrorism and proliferation in Botswana. It was further noted that the first generation of statutes on AML/CFT imposed lower fines and sanctions as opposed to the range of statutes that were enacted at a later stage, when the effects of money laundering and terrorism financing were being experienced increasingly by the global community. The last generation of statutes therefore imposes more stringent and robust measures on both the regulators and the regulated.

Money laundering and terrorism financing were originally grouped with other crimes and simply deemed as serious offenses under the repealed POSCA. Notwithstanding the prevalence of money laundering in the international arena, a formal definition for money laundering is still not forthcoming in Botswana law. Rather, the legislative drafters have preferred to enumerate examples of what should be deemed as money laundering. Similarly, terrorism, terrorism financing and proliferation financing were not mentioned in legislation until the introduction of the Counter-Terrorism Act in 2014.

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[545] Paragraph 87.

The chapter also discussed the supervisory and regulatory institutions responsible for curbing and eliminating financial crimes. It was noted that several of these entities lacked the required expertise to effectively meet their objectives. It was also noted that the FIA, as the central and primary unit affiliated to the Egmont Group, is charged with dealing with issues of money laundering and terrorism financing in Botswana.[546] This department is however housed under the Ministry of Finance and Economic Development. It was pointed out in the previous chapter that the latter might compromise the objectivity and transparency of the Agency in delivering on its mandate, as it is essentially a government entity.

The chapter also revealed that there are many pieces of legislation in place aimed at combating money laundering and terrorism financing in Botswana, resulting in a number of committees established in terms of these Acts. These committees tend to have overlapping roles, which is something that might require reconsideration. In addition, the chapter discussed a number of institutions whose role it is to help fight money laundering and financing of terrorism.

The handful of cases in which the provisions of PICA were invoked, were also discussed. The golden thread running through these cases involved the delicate exercise of balancing the competing interests of the parties. The lack of vigilance and expertise on the part of the prosecutors is potentially worrisome. In the cases discussed above, it was clear that the state lost cases simply because the prosecutors made big mistakes, which in turn led to the denial of restraint orders for the fruits and benefits of criminal activities. The judiciary too appear not to be adequately resourced and equipped to adjudicate these ever-changing international financial crime, which are often multi-transactional in nature. Financial crime perpetrators are usually highly qualified and skilled persons who need equal or better expertise to be caught.

The chapter concluded by proffering highlights on how money laundering and terrorism financing cases have been litigated in Botswana thus far. Only one statute, namely the PICA, seems to have been used by the prosecution team in money laundering and

[546] Egmont website 'The Egmont Group unites 164 FIUs around the world and is a platform for the sharing of expertise and information on money laundering and terrorism financing'. https://egmont-group.org/en/content/about. (accessed 15 August 2019).

terrorism financing cases up until now. The sections invoked most often are those dealing with confiscation and restraining orders. What seems to be popular though is the requests by the defendants for release of some of the confiscated funds to cover legal expenses and other reasonable expenses as per the PICA.

The next chapter embarks on a comparative analysis with the aim to determine to what extent Botswana's legislative regime is in sync with FATF standards on AML/CFT. This will be achieved by engaging in a comparative exercise with reference to the South African legislative regime as well as weighing Botswana's laws against the FATF Recommendations. It is intended that the comparative analysis will highlight where Botswana is lagging behind in the implementation of international standards, especially in light of the fact that it is currently considered as a money laundering high-risk country. This means that other countries would have to take heightened measures when conducting business transactions with Botswana and its nationals, which can deter direct foreign investment. This state of affairs, which is not ideal, therefore shows how important it is to identify and rectify the gaps that currently render Botswana a high-risk country.

Chapter 5
A comparative analysis of Botswana's AML/CFT regime against the South African legislative framework and the FATF standards

5.1 Introduction

Building on the previous chapter, Chapter 5 embarks on a comparative analysis with the aim to determine to what extent Botswana's legislative regime is in sync with the internationally accepted standards on combatting money laundering, terrorism financing and proliferation of arms of war. This goal will be achieved by weighing Botswana's AML/CFT legislative framework against the South African AML/CFT legislative regime and the FATF Recommendations.

It is intended that the comparative analysis will highlight how Botswana is faring in terms of implementation of the accepted international standards on AML/CFT especially because the country is currently grey-listed by the FATF as a money laundering high-risk country. This grey listing means that other countries would have to adopt enhanced measures and controls when conducting business transactions with Botswana, financial institutions and its nationals, which involves the possibility of deterring direct foreign investment and doing business with Botswana in general. It is presumed that, if gaps in the current legislative regime can be identified and addressed adequately, Botswana might eventually be removed from the grey list, which would be the ideal outcome.

South Africa has over the years progressively put in place legislative measures in response to the rapidly changing dynamics of international financial crime.[1] The country has continuously amended and enhanced its laws to align them to the international

[1] M. Kersop and SF du Toit, 'Anti-Money Laundering Regulations and the Effective Use of Mobile Money in South Africa – Part 1' (2015) 18 (*Potchefstroom Electronic Law Journal* 5. DOI: 10.4314/pelj.v18i5.12; See also ESAAMLG *South African ESAAMLG Mutual Evaluation* Report (2009) 6.

standards set by the FATF.[2] As discussed in chapter 1, there are a number of reasons for choosing South Africa as country of comparison. For example, South Africa has the most advanced AML/CFT frameworks in Africa. Not only is it the only member of the FATF on the continent, but it is also generally accepted that South Africa complies with global best practice on AML/CFT. The country has also been quick to respond to global developments and, when necessary, it has changed its laws to keep in step with international requirements.[3] South Africa therefore sets a good example for any African country on implementation of FATF standards.

The section below therefore gives a brief overview of the South African core legislative framework on AML/CFT. It discusses the strides made by South Africa to combat money laundering and terrorism financing. The purpose is not to discuss the South African regime in detail but to highlight the most salient features for purposes of comparing the South African framework with that of Botswana.

5.2 South African legislative framework on money laundering and terrorism financing

5.2.1 Drugs and Drug Trafficking Act

The first attempt at addressing money laundering in South Africa was through passing the Drugs and Drug Trafficking Act (DDT Act).[4] The DDT Act outlawed the use, possession, dealing, acquisition, manufacturing and supply of drugs.[5] It also prohibited the conversion of proceeds obtained from dealing with drugs.[6] This statute further obliged all persons to report all drug trafficking acts to any designated officer or the Attorney-General.[7] The DDT Act had general provisions on restraint,[8] forfeiture,

[2] Martha Johanna De Jager 'A Comparative study between anti-money laundering legislation of South Africa and international standards' LLM Dissertation, University of Pretoria, 2008, 50.
[3] See for example C Hugo & W Spruyt 'Money laundering, terrorist financing and financial sanctions: South Africa's response by means of the Financial Intelligence Centre Amendment Act 1 of 2017' 2018 *TSAR* 227-255.
[4] Act 140 of 1992.
[5] DDT Act Preamble.
[6] DDT Act Preamble.
[7] Section 9 DDT Act.
[8] Section 41 DDT Act.

confiscation[9] and seizure[10] of the proceeds of drug trafficking, including all property and any benefits incidental thereto.[11] Finally, the Act provided for mutual assistance for the enforcement of confiscation orders.[12]

In summary, this legislative enactment's provisions were narrow and limited as far as money laundering and terrorism financing is concerned and were specific to drug related offences.[13] It did not have any explicit provisions on AML/CFT and due to these shortcomings, it was difficult to subsume offences of money laundering and terrorism financing within the scope of the DDT Act, as it was specific to drugs related matters.[14] To address the aforementioned constraints, the Proceeds of Crime Act was enacted in 1996.

5.2.2 Proceeds of Crime Act

The Proceeds of Crime Act[15] ('PCA') was wide in breadth and scope, as all offences relating to any laundering offences were criminalised.[16] This means that any form of criminal activity and confiscation of the proceeds of crime could be prosecuted satisfactorily under PCA.[17] Chapter 5 of the PCA contained express clauses criminalising money laundering acts committed knowingly or when a person ought to have had reasonable belief that the property in question was the subject matter of money laundering activities.[18]

Although the PCA did not make specific reference to terrorism financing, it could be argued that the provisions were broad enough to prosecute this offence under this Act,

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[9] Section 35 DDT Act.
[10] Section 43 DDT Act.
[11] Chapter IV DDT Act.
[12] Sections 54-62 DDT Act.
[13] See the Preamble of the DDT Act; Louis de Koker 'Money Laundering Control: The South African Model (2012) 24 Asia *Pacific journal of Marketing and Logistics* 755; L. De Koker 'South African Money Laundering Legislation-Casting the Net Wider' (1997) 1 *Journal of Juridical Sciences* 25-26.
[14] De Koker 'South African money laundering legislation-casting the net wider' (1997) *Journal of Juridical Sciences*25-26.
[15] Act 76 of 1996.
[16] PCA Preamble; L. de Koker and J. L Pretorius 'Confiscation Orders in Terms of the Proceeds of Crime Act-some Constitutional Perspectives' (1998) *Political Science Journal* 2.
[17] Section 2 PCA.
[18] Sections 28-33 PCA; PCA Preamble.

as it outlawed all predicate offences.[19] This statute also enhanced the effectiveness of the prosecution of money laundering and other offences in South Africa.[20]

5.2.3 Prevention of Organised Crime Act

The Prevention of Organised Crime Act (POCA) was promulgated and came into force in January 1999.[21] POCA specifically repealed the Proceeds of Crime Act and further amended some laundering provisions contained in the Drugs and Drug Trafficking Act.[22] POCA contains special provisions regarding the prohibition of racketeering activities, money laundering and certain gang activities.[23] It sought to enforce the rights enshrined in the Constitution,[24] and in particular the Bill of Rights, by providing for the protection of people against intimidation, violence and fear committed either by a gang or individually.[25]

It also outlawed the recruitment or inducement of a person to participate in unlawful gang activities.[26] This new development effectively was aimed at protecting the public's fundamental human rights against the criminal activities of gangs. Like the PCA, POCA criminalised all laundering activities.[27] It is therefore not limited to serious or drug related crimes only, but extends to all other laundering offenses as well, whether committed in South Africa or elsewhere.[28] The Act also makes it an offense to assist someone in benefitting from the proceeds of criminal activities.[29] In addition, POCA has retrospective effect in that it is also applicable to offences that were committed in the ten years before it came into operation.[30]

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[19] See the general provisions of the PCA.
[20] L. De Koker 'South African Money Laundering Legislation-Casting the Net Wider' (1997) 1 *Journal of Juridical Sciences* 25-26.
[21] Act 121 of 1998.
[22] Section 79 POCA.
[23] POCA Preamble.
[24] 1996.
[25] Section 9 POCA. See also, Louis de Koker 'Money Laundering Control in South Africa-A South African Response to an American Comment (2001) *Financial Crime Review* 9-24.
[26] Section 9(2) POCA.
[27] Section 4-5 POCA.
[28] Section 4 POCA. Louis de Koker argued that the POCA contained ambitious clauses than the common international standards. See generally, Louis de Koker 'Money Laundering Control in South Africa-A South African Response to an American Comment' (2001) *Financial Crime Review* 9-24.
[29] Section 4 POCA.
[30] Section 2 POCA; the interpretation section of the POCA and POCA Amendment Act 38 of 1999.

A further development introduced by POCA is that, over and above committing any criminal activity or having actual knowledge of the unlawful acts committed by the perpetrators, the Act provides that an organised or laundering crime can be committed negligently.[31] This means that intention is not necessarily required, but persons can be found guilty of a laundering offence even if they were negligent, that is they failed to identify a laundering transaction as would be expected of a person in their position.[32]

POCA also introduced obligatory reporting of suspicious transactions by businesses. Failure to discharge this obligation attracts a fine of R100 million or imprisonment not exceeding thirty years.[33] It is worth noting that the reporting of suspicious transactions is confined to the business transactions that persons may encounter in the course of doing their work. This provision has limitations in that it excludes other categories of persons who might have information from reporting suspicious transactions if it is in the proximity of their line of work.

As with the previous legislative enactments discussed above, POCA has restraint order provisions,[34] seizure of property clauses[35] and forfeiture clauses.[36] The penalties for laundering offences were exponentially increased in that the maximum penalty for miscellaneous laundering offences was R100 000 000.00 or thirty years imprisonment[37] and in the case of racketeering the penalty would be a maximum of R1 000 000 000.00 or life imprisonment.[38] This shows the legislature's commitment to deterring and ending organised crimes.

POCA was further amended in 1999 to widen the scope of the duty to report suspicious transactions by extending the reporting obligation to other business employees.[39] It also provided for a defence against negligent laundering charges, namely by an employee showing that he or she indeed reported the suspicious transactions in terms of

[31] Section 2 POCA; the interpretation section.
[32] Section 20 POCA.
[33] Sections 7 and 8 POCA.
[34] Section 23 POCA.
[35] Section 27 POCA.
[36] Sections 48-58 POCA.
[37] Section 7 and 8 POCA.
[38] Section 3 POCA.
[39] POCA (Amendment) Act 24 of 1999.

POCA. POCA was subsequently amended for a second time to give the courts jurisdiction over unlawful activities committed before the Act came into effect in 1999.

5.2.4 Prevention and Combating of Corrupt Activities Act

Another important statute is the Prevention and Combating of Corrupt Activities Act[40] (PRECCA). Its legislative intention is to deter and fight corrupt activities and corruption in general.[41] It contains provisions relating to corruption by public officers, foreign public officials, agents, members of Parliament, the judiciary and the prosecution authority.[42] The Act further gives the office of the National Director of Public Prosecution the power to investigate unusual or suspicious corruption activities.[43]

PRECCA places an obligation on persons holding a position of authority to report transactions suspected to be tainted by corruption.[44] PRECCA has extraterritorial application, as the courts may exercise jurisdiction over offences committed outside South Africa by South Africans.[45] In conclusion, PRECCA defines a corruption offence widely, such that money laundering can be prosecuted under it.[46]

5.2.5 Protection of Constitutional Democracy against Terrorist and Related Activities Act

The Protection of Constitutional Democracy against Terrorist and Related Activities Act[47] (POCDATARA) criminalises engaging in terrorism and related activities either as an individual or a group.[48] The Act further affirms the commitment to align its provisions with the international conventions in prevention and combating of terrorism and related offences.[49] POCDATARA makes it an offence to hide a person or persons while

[40] Act 12 of 2004.
[41] PRECCA Preamble.
[42] Sections 4-9 PRECCA.
[43] Section 22 PRECCA.
[44] Section 34 PRECCA.
[45] Section 35 PRECCA.
[46] Section 6 PRECCA.
[47] Act 33 of 2004.
[48] Section 2 POCDATARA.
[49] POCDATARA Preamble.

knowing or suspecting that they have committed terrorist acts.[50] There is therefore an obligation to report any person or persons who commit or plan to commit terrorist activities.[51]

Furthermore, the Act criminalises direct or indirect terrorism financing.[52] The Act contains penalties for a person who or entity which intended that the property, funds, service or any economic support provided be used for terrorism financing.[53] It also punishes a person who or an entity which knew or ought to have reasonably known or suspected that the support provided would be utilised for terrorism financing in whole or in part.[54] The Act also criminalises entering into arrangements which are intended to assist terrorists to conceal the nature, source and location of the property, removing the property amongst others whilst knowing or ought reasonably to have known that the property would be used for financing terrorism.[55]

In addition, POCDATARA endows the National Director of Public Prosecutions with the powers to investigate[56] and obtain freezing orders for properties that are believed to have been used in the commission of a terrorism offence.[57] When a person is found guilty under POCDATARA, the property that is believed to have been involved in the commission of the offence may be forfeited.[58] The courts also have the powers to grant orders for cordoning off, stopping and searching of both vehicles and persons where it is necessary to stop terrorist activities.[59] The maximum penalty that may be imposed under POCDATARA is R100 000 000.00 or imprisonment for up to fifteen years.[60]

[50] Section 11 POCDATARA.
[51] Section 12 POCDATARA.
[52] Section 4(1) POCDATARA.
[53] Section 4(1)(i) POCDATARA.
[54] Section 4(1)(i) POCDATARA.
[55] Section 4(2)-(3) POCDATARA.
[56] Section 22 POCDATARA.
[57] Section 23 POCDATARA.
[58] Section 19 POCDATARA.
[59] Section 24 POCDATARA.
[60] Section 18(c) POCDATARA.

5.2.6 Financial Intelligence Centre Act

The Financial Intelligence Centre Act[61] (FICA) is the primary legislative framework on AML/CFT in South Africa. It contains comprehensive and robust provisions on the prevention and control of money laundering in South Africa. It was enacted to establish the Financial Intelligence Centre (FIC) and the Money Laundering Advisory Council (MLAC).[62] This Council however no longer exists post 2017 FICA amendments. FICA further made amendments to some provisions of POCA.[63]

The control measures to combat money laundering contained in FICA incorporate thorough identification of all customers, including beneficial owners and other persons;[64] record keeping[65] and the minimum period for which the records should be kept;[66] access to information;[67] and reporting of suspicious and unusual transactions.[68] In addition, FICA contains provisions on procedures for the handling of cash transactions;[69] cash in transit in and out of South Africa;[70] and transfer of funds electronically across borders.[71]

FICA further imposes continuing compliance obligations on the supervisory and accountable institutions.[72] For instance, it provides for the training of employees on AML issues to enhance compliance with FICA.[73] It also has provisions for the search, seizure and forfeiture of proceeds of crime.[74] Chapter 4 of FICA lists penalties that can

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[61] Act 38 of 2001. See also Izelde Louise Van Jaarsveld 'Aspects of Money Laundering in South African Law' PhD thesis University of South Africa, 2011 1. http://hdl.handle.net/10500/5091 (Accessed 12 January 2020).
[62] FICA Preamble.
[63] Schedule 4 which repealed section 7, deletion of section 8 (2) and amendment of section 77 of the POCA; see also the long title to the FICA.
[64] Section 21 of the FICA; Richard K. Gordon, 'Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing' (2011) 21:503 *Duke Journal of Comparative & International Law* 512-513.
[65] Section 22 FICA.
[66] Section 23 FICA.
[67] Section 27 FICA.
[68] Section 29 FICA.
[69] Section 28 FICA.
[70] Section 30 FICA.
[71] Section 31 FICA.
[72] Section 42 FICA.
[73] Section 43 FICA.
[74] Section 70 FICA.

be imposed on accountable institutions should they fail to comply with the Act.[75] The maximum fine that may be imposed is R10 000 000.00 or imprisonment for a maximum of fifteen years.

In 2017, the Financial Intelligence Centre Amendment Act (FICAA) was enacted.[76] The key developments brought about by this FICAA include bringing the control and prevention of terrorism financing under the ambit of the FICA as well.[77] The FICAA also introduced a risk-based approach to money laundering and terrorism financing.[78] It further expanded and strengthened the customer due diligence provisions to ensure that financial institutions fully know their customers and the beneficiaries of financial transactions.[79] Financial institutions are also required to establish implementable risk management and compliance mechanisms which involve an array of policies, processes and procedures that should be adopted by financial institutions to mitigate risks against money laundering and terrorism financing.[80]

It is arguable that the South African legislative framework on money laundering and terrorism financing is adequately laid out in POCA and FICA.[81] The latter position has been succinctly captured by De Koker as follows:

> 'POCA and FICA create a host of offences relating to money laundering. The majority of these offences relate to non-compliance with the money laundering control duties. However, there are a number of statutory provisions that give rise to offences that can be described as the core money laundering offences. These offences are those that are closely related to the money laundering concept.'[82]

[75] Sections 46-68 FICA.
[76] See FICAA 1 of 2017.
[77] FICAA 1 of 2017.
[78] FICAA 1 of 2017.
[79] FICAA 1 of 2017.
[80] FICAA 1 of 2017.
[81] Martha Johanna De Jager 'A Comparative Study Between Anti-Money Laundering Legislation of South Africa and International Standards' LLM Dissertation, University of Pretoria, 2018 50.
[82] L. de Koker 'South African Money Laundering and Terror Financing Law' (2014) 15 *Butterworths Online Publication* par 3.23.

5.2.7 Concluding remarks

The overview of South African statutes above is admittedly cursory, but some of them will be re-visited in more detail below when assessing Botswana's compliance against the South Africa framework and internationally accepted standards on money laundering and terrorism financing. The following section will therefore comprehensively assess Botswana's AML/CFT compliance against acceptable international standards on AML/CFT.

5.3 Assessment of Botswana's AML/CFT compliance against the South African and FATF standards

In this part of the chapter, the Botswana AML/CFT legislative regime shall be tested against the FATF Forty Recommendations as well as against the South African position. As explained in Chapter 1, the assessment will be confined to the AML/CFT technical compliance assessment.

The comparison with South Africa is to determine the extent to which South Africa has adopted the FATF Recommendations. South Africa is also chosen because Botswana often benchmarks itself against South Africa and because of their similar legal systems. As the only African member of the FATF and thus arguably the most compliant country on the continent, South Africa is also an ideal system for other African countries to rely on for comparative purposes. The way in which South Africa has incorporated the FATF standards into its systems, along with the challenges experienced by this system, can accordingly serve as an ideal example for countries like Botswana.

The proposed technical assessment will therefore be based on guidelines in the *FATF Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*. Reference will also be made to the Botswana ESAAMLG Mutual Evaluation Report.[83] The latter report contains an assessment of Botswana's compliance against AML/CFT international standards in 2017.

[83] 2017.

The assessment will therefore refer to those findings, while also positioning the country's compliance with the FATF Forty Recommendations today.

In undertaking the comparative analysis below and evaluating Botswana's compliance with the FATF Recommendations, a four-rating score will be adopted. That is, compliant, partially compliant, largely compliant and non-compliant. Compliant means that Botswana complies with all the requirements of that particular Recommendation. Partially compliant will be a case where there is evidence that there are efforts, albeit minimal, to comply with the requirements of the FATF Recommendations. Largely compliant is where there are significant efforts to comply with the requirements of the FATF Recommendations. Lastly, non-compliant is where there are no noticeable efforts to comply with the requirements of the FATF Recommendations. This way of scoring the country will assist in identifying areas in need of reform as well as the extent to which reforms are necessary.

A. AML/CFT POLICIES AND COORDINATION

5.3.1 Recommendation 1: Assessing risks and applying a risk-based approach

This Recommendation entails ensuring that decisions by countries, financial institutions and DNFBPs include assessment, evaluation and mitigation of risks as well monitoring of the controls put in place by the countries, financial institutions and DNFBPs.[84] The notion of ML/TF risks refer to the probability of money laundering and terrorist financing incidences happening as a consequence of threats and vulnerabilities present in a country, financial institution or DNFBPs.[85] These threats and vulnerabilities therefore make it difficult for countries, financial institutions and DNFBPs to detect ML/TF activities.[86] The RBA approach therefore requires that there should be risk management.

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[84] Interpretive Note to Recommendation 1 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 29-31.
[85] Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001) 8
[86] Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001) 9.

AML/CFT risk management has been defined as:

> 'A process that includes the identification of AML/CFT risks, the assessment of these risks, and the development of methods and measures to manage and mitigate the risks identified. The general principle of a risk-based approach to AML/CFT is that, where the risks are identified as high, financial institutions should take enhanced measures to manage and mitigate those risks; and that, correspondingly, where the risks are identified as lower, simplified measures may be applied.'[87]

The significance of the RBA is that it is not rules based, but flexible and therefore does not impose rigid requirements and enables accountable institutions to determine the appropriate due diligence measures to be taken in any ML/TF risk management process.[88] This means that accountable institutions will decide on the proportionate mitigation and preventative controls to be taken against ML/TF risks. It is believed that if the RBA is adopted correctly it can enhance efforts on combating ML/TF and promote financial inclusion as well.[89]

Recommendation 1 mandates that money laundering and terrorism financing risks for countries and institutions (both financial and DNFBPs) should be identified and updated regularly.[90] This means that countries and institutions should be aware of what their risks are and the level of severity as far as money laundering and terrorism financing is concerned. In addition, a dedicated authority should be appointed to coordinate the National Risk Assessment (NRA).[91] Furthermore, it is required that once these risk assessments are done, the findings should be shared with all stakeholders to raise awareness.[92] The findings should also include proposed measures to mitigate

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[87] Finmark *Applying the Risk Based Approach – Undertaking AML/CFT Risk Assessment of low-value remittance and banking products and services in South Africa- Discussions and guidelines* (2019) 1; FATF *Guidance for a risk-based approach-the banking sector* (2014) 9-10).
[88] Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) 13.
[89] Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) 13.
[90] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 23; ESAAMLG *Botswana ESAAMLG Mutual Evaluation Report* (2017)116.
[91] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013) 23.
[92] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013) 23.

the identified risks.[93] Commensurate measures should therefore be taken to address areas of exposure regarding money laundering and terrorism financing.[94]

In terms of Recommendation 1 countries can be exempted from requiring both financial institutions and DNFBPs to apply FATF Recommendations where there is evidence that the ML/TF risks are low.[95] This exemption however is not a general exemption as it is required that it should be applied in limited instances and only in justifiable instances.[96] In addition, where ML/TF risks are higher, financial institutions and DNFBPs should be required to employ enhanced measures to address the identified risks.[97] Countries should also ensure that the supervisory bodies and SRBs ensure adequate compliance with this Recommendation 1.[98]

Apart from the obligations for countries to adopt a risk-based approach and assessing their risks, financial institutions as well as DNFBPs are also required to assess and understand their risks.[99] In addition, they should apply proportionate measures against the identified risks.[100] Both financial institutions and DNFBPs should keep records of

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[93] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013) 23.
[94] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013) 23.
[95] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 23; FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2020) 10.
[96] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 23.
[97] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 24; FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2020) 10.
[98] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 24; FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2020) 10.
[99] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 24; FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2020) 10.
[100] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 24; FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2020) 10.

their risk assessments and ensure that the risk assessments are updated regularly.[101] Further to the risk assessment and recording obligation, financial institutions and DNFBPs should provide the latter information to the relevant or competent authorities and SRBs.[102]

Financial institutions and DNFBPs are obligated to put in place measure and controls authorised by their senior management against ML/TF risks identified by themselves or the courts.[103] They should also ensure monitoring and evaluation of the latter controls and improve them where applicable.[104] The financial institutions and DNFBPs are required to ensure enhanced controls where there are evident ML/TF risks.[105] Countries are to allow financial institutions and DFNBPs to adopt simplified measures only in the event that lower ML/TF risks have been identified.[106]

In simple terms, the risk-based approach (RBA) has obligations for both countries and financial institutions as well as DNFBPs which requires them to transact with known customers having conducted thorough and robust validations, due diligence and enhanced due diligence where circumstances warrant. In addition, the RBA requires that countries, financial institutions and DNFBPs should understand their risks as far as customers, products, technologies, services, transactions and other countries are concerned, amongst other things and employ mitigation measures against the identified risks with a view to curb money laundering and terrorist financing. Furthermore, risk management programmes that will adhere to the required customer due diligence requirements should be developed.

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[101]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 24; FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2020) 10.
[102] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 24.
[103] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 24.
[104] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 25.
[105] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 25.
[106] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 25.

Pursuant to the FICA amendment in 2017, South Africa moved away from the rule-based approach on AML/CFT to a risk-based assessment approach, particularly with respect to customer due diligence (CDD).[107] South Africa's legislation on the RBA complies with the FATF Recommendations requirements stipulated above. It is captured in part 1 of Chapter 3 of FICA.[108] FICA provides that financial institutions may not conduct business with anonymous customers,[109] nor should business accounts be opened without carrying out due diligence and enhanced due diligence where applicable.[110] This includes effectively identifying the customers and validating their identifies, and then establishing if they are entering into business transactions on their behalf or not, and if not, whether they have legal standing to enter into business transactions on behalf of others.[111]

In addition, financial institutions, in consonance with their risk management programmes, are required to obtain all the relevant information from their customers.[112] When dealing with legal persons such as trusts and companies, the due diligence measures should be robust enough to also obtain information on the directors, trustees and partners, source of funds, the nature of the relationship to be established and the actual beneficial owners.[113] The beneficial owner requirement is key because it lifts the veil for those persons who hide behind the directors while they are the actual beneficiaries. Customer due diligence is also an ongoing obligation for the financial institutions.[114]

The law provides that where financial institutions are doubtful of the information provided by the customers in terms of section 21 of the FICA, it should repeat the verification process.[115] Furthermore, where customer due diligence proves impossible, either with prospective or existing customers, the business transaction should be

[107]C Hugo & W Spruyt 'Money laundering, terrorist financing and financial sanctions: South Africa's response by means of the Financial Intelligence Centre Amendment Act 1 of 2017' 2018 *TSAR* 237; Finmark *Applying the Risk Based Approach – Undertaking AML/CFT Risk Assessment of low-value remittance and banking products and services in South Africa- Discussions and guidelines* (2019) 1.
[108] See the FIC (Amendment) Act of 2017.
[109] Section 8 FICAA (inserting section 20A FICA).
[110] Section 9 FICAA (amending section 21 FICA).
[111] Section 9 FICAA (amending section 21 FICA).
[112] Section 10 FICAA (inserting section 21A FICA).
[113] Section 10 FICAA Act (inserting section 21B FICA).
[114] Section 10 FICAA (inserting section 21C FICA).
[115] Section 10 FICAA (inserting section 21D FICA).

terminated immediately.[116] Moreover, there are additional requirements for conducting business with both foreign and local PIPs, which requirements include obtaining approval for the business transactions from senior management.[117]

The enhanced customer due diligence should also be extended to the close family members of PIPs and their business associates.[118] Both Botswana and South African legislation mandates that enhanced due diligence should be adopted when establishing business relationships with close family members and business associates of PIPs.[119] The law further defines who qualifies as a close family member and business associate.[120]

Two elements stand out in the above discussion and which are not found in the current Botswana legislation. Firstly, Botswana does not have a provision requiring financial institutions to repeat the validation exercise where they doubt whether customers provided them with correct information.[121] Secondly, both South Africa and Botswana legislation requires enhanced due diligence provisions regarding the treatment of foreign PIPs.[122] Although the legislation in Botswana makes it compulsory to conduct enhanced and robust due diligence when conducting business with customers from high risk countries, South Africa does not have this provision.[123]

At the time when the 2017 ESAAMLG Report was released, Botswana was rated non-compliant with Recommendation 1.[124] Botswana failed on Recommendation 1 because, at the time, no NRA was done, but a NRA was scheduled to be conducted that same year.[125] It was also identified that there were no requirements for financial institutions and DNFBPs to assess the money laundering and terrorism financing risks.[126] The FIA was nonetheless appointed to spearhead the NRA exercise.[127] There is

[116] Section 10 FICAA (inserting section 21E FICA).
[117] Section 10 FICAA Act (inserting sections 21F and 21G FICA).
[118] Section 10 FICAA (inserting 21H FICA).
[119] Section 10 FICAA (inserting 21H FICA); section 17-18 FI Act.
[120] Section 10 FICAA (inserting 21H FICA).
[121] Section 10 FICAA (inserting section 21D FICA).
[122] Section 10 FICAA (inserting sections 21F and 21G FICA).
[123] Section 17 (b) FI Act.
[124] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 116.
[125] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 116.
[126] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 117.
[127] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 116.

evidence that a NRA was conducted in Botswana, but unfortunately the report is not available for public consumption. However, it appears that the report was shared with some supervisory bodies.[128]

A summary of the assessment of the NBFIs and DNFBPs from the 2017 NRA was compiled by NBFIRA and the industry risks were rated medium high.[129] It was noted that the industry lacked awareness concerning AML/CFT issues.[130] It was also stated that employees mostly did not have adequate skills and competencies on AML/CFT.[131] In addition, it was noted that there was a lack of monitoring and evaluation by supervisory authorities, while the imposing of sanctions was also lacking.[132] DNFBPs were consequently encouraged to put in place mitigation measures to bridge the identified gaps.[133]

The amended Act does not define what risk management is so as to provide guidance and understanding to the financial institutions and DNFBPs. It rather defines risk management systems as measures and controls meant to provide indication of the different classes of risk on ML/TF and proliferation financing. In addition, the Act does not require that, at least in precise terms that financial institutions and DNFBPs should document their ML/TF risks and keep them updated.

In Chapter 4 it was noted that a specified party is required to carry out risk assessments on business relationships and transactions, pre-existing products, practices, technologies and delivery mechanisms, new products, practices, technologies and delivery mechanisms before they are introduced to the market.[134] The introduction of this requirement therefore remedied the above limitation regarding the lack of risks identification and assessments by specified parties. Different industries are now also

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[128] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 1. https://www.nbfira.org.bw/sites/default/files/NRA%20SUMMARY%20FOR%20NBFIs.pdf (accessed 10 February 2020).
[129] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 6.
[130] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 7.
[131] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 7.
[132] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 7.
[133] NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018) 8.
[134] Section 11(1) (a)-(c) FI Act.

mandated to be aware of the risks inherent in their fields, prioritise them and employ proportionate measures to combat any threatening risks.[135]

Recommendation 1 requires that there must be a designated authority for the assessment of national risks and in terms of the FI Act, the FIA has been established in Botswana as a central point for all financial information and dissemination of such information to the relevant supervisory and investigation authorities.[136] Although the FI Act does not expressly state that the FIA will coordinate the NRA, it seems to be the most compatible institution, hence it was designated to coordinate the assessment in 2017.

The NRAs should also be carried out regularly, but the FATF assessment methodology tool does not provide guidance on what the frequency of these assessments should be. Botswana has only had one in 2017. Three years later (2020), it is not known when the next assessment will be. In view of the rapid, dynamic and fast-paced way in which illicit financial flows occur, it is submitted that assessments should be carried out at least every three years, taking cost implications into consideration. With regard to the financial institutions and DNFBPs, the FATF requires that risk assessments should be conducted and that they should be updated regularly. This requirement, however, was not included in the FI Amendment Act.

The FATF methodology also requires that the findings for both the NRA and financial institutions and DNFBP's risk assessments should be disseminated to the relevant supervisory and investigative authorities to enable them to make the necessary compliance adjustments.[137] As stated above, the NRA report is not easily accessible to academic researchers, but in my view, the report should be shared with all the relevant stakeholders and dissemination should not be limited to the financial institutions and the DNFBPs. In addition, there is no requirement in the FI Amendment Act that financial institutions and DNFBPs should submit their findings to supervisory bodies.

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[135] Section 11(1) FI Act.
[136] Section 4(1) FI Act.
[137] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 26.

In light of the above discussion, it can be concluded that, due to some of the prevailing shortcomings highlighted above, notwithstanding amendments made to the FI Act, Botswana should be rated as partially compliant with Recommendation 1.

5.3.2 Recommendation 2: National cooperation and coordination

Recommendation 2 requires that countries should have AML/CFT policies in place that are meant to address the identified risks.[138] In addition, countries should designate an entity for coordination of AML/CFT policies, procedures and operational matters.[139] The local institutions, such as the country's FIU, decision makers, supervisory and accountable institutions and law enforcement agencies should collaborate on AML/CFT and financing of proliferation of arms of war issues to ensure seamless implementation of the policies.[140] Furthermore, whilst ensuring coordination and cooperation amongst all relevant stakeholders on AML/CFT, countries should be cognisant of the data protection and privacy rules and like provisions.

In South Africa, the designated office for coordination and dissemination of AML/CFT information is the Financial Intelligence Centre (the FIC or the Centre), which was established as a juristic person and does not fall within the public service.[141] The Centre's responsibilities include cooperating with local authorities such as the supervisory and investigative entities as well as providing guidance on AML/CFT matters to all relevant stakeholders.[142] In 2009, evaluations by the FATF and ESAAMLG found that

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[138] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 26; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 37.
[139] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 26; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 37.
[140] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 26; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 37.
[141] Section 2 FICA.
[142] Section 4 FICA; section 44 FICA (on the referral of cases to the investigating bodies and other relevant supervisory authority); section 49 FICA (which makes it an offence for failure to cooperate with the Centre). See also section 3 (b) FICAA.

there was effective cooperation and coordination on AML/CFT at national level amongst South Africa's investigative, supervisory and the law enforcement entities.[143]

In 2017, Botswana was rated partially compliant with Recommendation 2 primarily because of a lack of an effective coordination structure amongst the different national agencies.[144] The National Coordinating Committee on Financial Intelligence (NCCFI) was subsequently established in terms of the FI Act to assess the effectiveness of measures employed to combat illicit crimes in Botswana, including ML/TF and proliferation finance; make policy review recommendations; and promote and strengthen the coordination and cooperation amongst the different investigatory and supervisory agencies.[145] The FIA is also the designated body that can share information on money laundering with like institutions in other countries.[146]

The other limitation was that Botswana did not have AML/CFT policies which were informed by the identified risks.[147] This limitation could be remedied by developing policies that address the AML/CFT and proliferation financing gaps that were identified in the NRA. It is difficult to comment on whether or not this limitation was addressed as the author has not had sight of the latest NRA. In addition, the FATF recently introduced a requirement that countries, in ensuring cooperation and coordination of the AML/CFT, should be mindful of the relevant data protection and privacy considerations. This requirement has not been addressed in the latest FI Act amendment.

The striking difference between South Africa and Botswana is that in South Africa the Centre is established as a juristic entity and does not form part of the public service.[148] Conversely, in Botswana, the Agency is set up as a public office.[149] This striking difference notwithstanding, it should be noted that the limitation identified in 2017 relates to the effectiveness assessment and not the technical assessment, which is the

[143] ESAAMLG *South Africa Mutual Evaluation Summary Report* (2009) 9. https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20South%20Africa%20ES.pdf (accessed 19 April 2020).
[144] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 117.
[145] Sections 8 FI Act.
[146] Section 6(1)(g) FI Act.
[147] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 117.
[148] Section 2 FICA.
[149] Section 4 FI Act.

pinnacle of this study. Therefore, the law enabling cooperation and coordination amongst local institutions on AML/CFT matters is in place.

It is therefore submitted that due to the few limitations prevailing in the current legislation, Botswana should be rated as largely compliant with Recommendation 2.

B. MONEY LAUNDERING AND CONFISCATION

5.3.3 Recommendation 3: Money laundering offence

This Recommendation provides that money laundering should be criminalised.[150] It states that the offence of money laundering should be couched in the widest terms to include all forms of predicate offences unless that would be in violation of national law.[151] It provides further that predicate offences should at a bare minimum be classified as serious offences under domestic law, and that such offences should attract a minimum penalty of than six months imprisonment.[152]

In addition, money laundering should be applied to all properties that, either directly or indirectly represent the proceeds of crime.[153] It would not be necessary that the person is convicted of a predicate offence when proving that the property in question is as a result of the proceeds of crime.[154] Furthermore, countries should punish the conduct

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[150] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 26; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 38.
[151] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 26; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 38.
[152] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 27 Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 38.
[153] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 27; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 38.
[154] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 27 Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 38.

of its nationals which occurred externally and which would be an offence domestically.[155]

The Recommendation further provides that when imposing sanctions, it should be possible to have both criminal and civil proceedings running parallel, provided that it is allowed by national law.[156] Sanctions imposed should also be commensurate with the offence committed.[157] Lastly, there should be auxiliary offences to money laundering such as aiding and abetting, participation in, counselling or conspiring for the commission of the offence.[158]

As explained above, FICA is the primary legislative framework on AML in South Africa.[159] It contains comprehensive and robust provisions on the prevention and control of money laundering in South Africa. It imposes obligations and responsibilities on banks, supervisory bodies, accountable institutions and other stakeholders to ensure that they are not compromised as conduits for money laundering activities.[160]

In addition, POCA criminalises all laundering activities.[161] It is therefore not limited to serious or drug related crimes only but extends to all other laundering offenses

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[155] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 27; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 38.
[156] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 27 Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 38.
[157] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 27; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 38.
[158] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 28; Interpretive Note to Recommendation 2 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 39.
[159] Van Jaarsveld Izelde Louise 'Aspects of Money Laundering in South African Law' PhD thesis University of South Africa, 2011 1. http://hdl.handle.net/10500/5091 (Accessed 12 January 2020).
[160] See FICA generally; Van Jaarsveld Izelde Louise 'Aspects of Money Laundering in South African Law' PhD thesis University of South Africa, 2011 1. http://hdl.handle.net/10500/5091 (Accessed 12 January 2020).
[161] Sections 4-5 POCA.

whether committed in South Africa or elsewhere.[162] South Africa is also a party to the UN Convention against Transnational Organised Crime, which outlaws all forms of organised crime.[163] In addition to imposing civil and criminal sanctions for money laundering, administrative sanctions can also be imposed on accountable institutions.[164] The maximum penalty for a money laundering offence is R100 000 000.00.[165]

Money laundering as an offence is criminalised in Botswana in terms of PICA.[166] This is in accordance with the Vienna[167] and Palermo[168] Conventions, which Botswana has ratified and effectively implemented. Section 47(1) of PICA covers both the knowledge part and the actual wrongdoing, such as disguising, concealment, transfer and possession of proceeds of crime. This means that both the mental and the physical element must be present for one to be found guilty.[169] However, PICA extends this requirement by stating that even where a person ought to have known that the subject matter is proceeds of crime, that person can be found guilty for a money laundering offence.[170]

When POSCA was still in force, it covered offences carried out in other jurisdictions in line with Recommendation 3 and provided that sanctions should be proportional to the offences.[171] However, one of the weaknesses of PICA, which has been remedied, was that it did not have extraterritorial jurisdiction. The FI (Amendment) Act also increased the penalties for the perpetrators and other stakeholders, including financial institutions, regulators and other stakeholders. The maximum charge found under the Act is P20 000 000.00, which gives the judicial officers enough room to determine the

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[162] Section 4 POCA. Louis de Koker has argued that the POCA contained more ambitious clauses than the common international standards. See Louis de Koker 'Money laundering control in South Africa-A South African Response to an American Comment' (2001) *Financial Crime Review* 9-24.
[163] Palermo Convention 2000.
[164] Sections 46-49 FIC (Amendment) Act (amending sections 61-62 FICA); Regulation 29 of the Money Laundering and Terrorist Financing Control Regulations.
[165] For violation of sections 4,5 and 6 FICA; 'Anti-money Laundering Law Amendments Raise Penalties' *The Business Report* 5 May 2008. https://www.iol.co.za/business-report/opinion/anti-money-laundering-law-amendments-raise-penalties-710800 (Accessed 12 February 2020).
[166] See Section 47(1) PICA.
[167] Article 3(1)(b) Vienna Convention.
[168] Article 6(1) Palermo Convention.
[169] Section 47(1) PICA.
[170] Section 14(1) and section 15(1) PSCA.
[171] Section 14(1) PSCA; Section 46 Corruption and Economic Crime Act.

commensurate penalty for each particular case.[172] Botswana was scored partially compliant with Recommendation 3 in 2017, predominantly because the scope of offences was not wide enough to cover all predicate offences and also due to a lack of implementation of the money laundering regime.[173]

In comparison, legislation in both Botswana and South Africa contain provisions couched in the broadest terms to include all forms of crime as well as ancillary offences such as aiding and abetting, participating in and counselling and conspiring for the commission of money laundering within the purview of the ML/TF control.[174] The other similarity is that both jurisdictions impose criminal, civil and administrative sanctions for non-compliance.[175] The noteworthy difference lies in the penalties imposed by both countries.

In South Africa, the maximum fine that can be imposed for violation of money laundering provisions is R100 000 000.00 while in Botswana it is P20 000 000.[176] It cannot be gainsaid that the prospect of receiving an extremely high penalty can deter violations of money laundering provisions. It can be concluded therefore that the current monetary sanctions in Botswana are not deterrent or commensurate enough for the commission of the offense of money laundering as there is a potential risk that criminals may shift their activities from elsewhere to Botswana because the penalties are relatively lenient.

Botswana continues to enhance its legislation to cover all forms of predicate offences and organised crime. For instance, recently, the Electronic Payment Services Regulations were enacted to regulate the payment of services and products through online payment systems such as via electronic money or internet and mobile financial money (MFS).[177] However, Botswana is still lagging behind in terms of imposing an array of

[172] Sections 22-23 FI Act.
[173] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 118.
[174] POCA and PICA Preambles.
[175] Sections 46-49 FICAA (amending sections 61-62 FICA); see also Regulation 29 of the Money Laundering and Terrorist Financing Control Regulations.
[176] For violation of sections 4,5 and 6 FICA; See sections 22-23 FI (Amendment) Act.
[177] Statutory instrument no. 2 of 2019.

sanctions, including administrative penalties. This limitation means that Botswana should only be rated as largely compliant with this Recommendation.

5.3.4 Recommendation 4: Confiscation and provisional measures

Recommendation 4 stipulates that countries should have laws in place that enable them to confiscate, freeze and seize either property or proceeds of crime.[178] It requires that even property that is intended to be used for illicit crimes should be seized.[179] The relevant authorities should also be given guidance on how to deal with possession and disposal of the confiscated property.[180] In addition, third parties' properties should be protected.[181]

In South Africa, the confiscation, seizure, freezing and forfeiture provisions are set out in POCA, FICA and POCDATARA. POCA contains comprehensive clauses on restraint orders,[182] seizure of property,[183] confiscation and forfeiture orders[184] as well as preservation of confiscated property.[185] The Act also details the procedures to be followed when applying for the restraint, forfeiture and seizure of property relating to proceeds of crime and property intended to be used for criminal purposes.[186] All these orders may be applied for by way of *ex parte* application to expedite the process of

[178] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 29; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 40.
[179] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 29; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 40.
[180] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 29; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 40.
[181]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 29; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 40.
[182] Section 23-29 POCA.
[183] Section 41 POCA.
[184] Sections 48-62 POCA.
[185] Sections 38-40 POCA.
[186] Sections 23-62 POCA.

confiscating or seizing property suspected to be the proceeds of crime.[187] The proceedings for all the orders are strictly civil in nature.[188]

POCDATARA widened the breadth of the confiscation, seizure, freezing and forfeiture provisions by extending them to terrorist offences and associated activities.[189] POCDATARA also protects the interests of third parties in properties that have been seized and confiscated.[190] FICA has also clothed the investigatory and police officers or any other person as designated by the Minister with powers to search, seize and forfeit any cash or property used or suspected to be intended to be used for criminal purposes.[191]

Botswana was said to be largely compliant with this Recommendation in 2017.[192] The one limitation found was that there was no provision to demand property of corresponding value for the confiscated property.[193] PICA provides detailed provisions for seizure, freezing, confiscation and forfeiture of cash and property of proceeds of crime.[194] The law was amended to include confiscation of property of corresponding value.[195] What is surprising however is that the substitute property should be of the same nature and description, which therefore contradicts the concept of corresponding value. Botswana is therefore still in the same position as it was in 2017 and therefore remains only largely compliant with this Recommendation.

[187] Section 38 POCA.
[188] Section 37 POCA.
[189] Sections 19-24 POCDARARA.
[190] Sections 20-21 POCDATARA.
[191] Section 70 FICA.
[192] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 124.
[193] Section 21 of PSCA.
[194] Sections 18, 66 and 67 PICA.
[195] Section 20 PICA.

C. TERRORIST FINANCING AND FINANCING OF PROLIFERATION

5.3.5 Recommendation 5: Terrorist financing offence

Recommendation 5 provides for the criminalisation of terrorism financing.[196] This offence should be considered as a predicate crime and covers all persons who knowingly or intentionally contribute to or collect funds on behalf of terrorist organisations for terrorist activities.[197] Knowledge and intention are to be gleaned from the circumstances of each case.[198] Terrorist financing should be criminalised notwithstanding where the acts occurred.[199]

Aiding and abetting should be criminalised, such that persons who organise, compel and train others for terrorist acts can be held accountable.[200] An attempt to commit the offence of TF or participating as an accomplice should attract penalties.[201] It should not matter whether the funds were derived from a legitimate or illegitimate source.[202] Nor should it matter whether or not funds were actually used in the commission or

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[196] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[197] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 31; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[198] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[199] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 31; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[200] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[201] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[202] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.

attempt of the TF offence or that the funds or the assets should be associated with a particular terrorist act(s).[203]

Furthermore, the Recommendation requires that financing the travel to another country connected to training, planning and preparation of terrorist act(s) should fall under the ambit of the TF offence.[204] In addition, where possible, criminal, administrative and civil liabilities should be imposed on both natural and legal persons.[205] Finally, commensurate sanctions should be imposed.[206]

The main legislation for combating terrorism financing in South Africa is POCDATARA.[207] This Act is however supplemented by FICA and POCA.[208] POCDATARA makes terrorism financing and crimes associated with it a criminal offense.[209] In terms of the Act, terrorism can be committed by individuals and organisations or groups.[210] There is an array of offenses that are criminalised by POCDATARA, such as failure to report a terrorist suspect, hijacking of aircrafts, participation in hoaxes, conspiracy, and aiding and abetting acts of terrorism.[211]

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[203] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[204]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[205] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[206] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 30; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 41.
[207] POCDATARA Preamble.
[208] De Koker, Key terror financing and international financial sanctions offences, Chapter 4, paragraph 4.02.
[209] Sections 2 and 3 POCDATARA.
[210] Section 3 POCDATARA; Pieter Smit *Financial Intelligence Centre: South Africa* (20 November 2012).https://www.un.org/sc/ctc/wp-content/uploads/2016/10/spmtg_south_africa20nov12.pdf (accessed 14 March 2020).
[211] Sections 4-14 POCDATARA; Pieter Smit *Financial Intelligence Centre: South Africa* (20 November 2012).https://www.un.org/sc/ctc/wp-content/uploads/2016/10/spmtg_south_africa20nov12.pdf (accessed 14 March 2020).

POCDATARA also contains provisions on investigative powers, freezing, cordoning off, search and seizure.[212] The jurisdiction of South African courts on terrorism and related crimes is not limited to local activities but transcends beyond the borders, provided certain requirements are met, such as the perpetrator being a South African national or the offence having been committed on a ship registered under South African laws.[213] The same goes for non-South African terrorists who commit offences in South Africa.[214] POCDATARA is also supported by FICA in that the latter's objective is to fight terrorism financing and ensure the implementation of the resolutions passed by the UN Security Council on terrorism and related matters.[215]

In 2017 Botswana was rated as non-compliant with this Recommendation because terrorism committed by an individual was not criminalised in the country.[216] It was also noted that terrorist acts committed by accomplices were not criminalised.[217] The other factor was that terrorism was limited to natural persons and not juristic persons, and there were obviously no determined sanctions where terrorist acts were committed by legal persons.[218] All the above concerns were adequately addressed in the Counter-Terrorism (Amendment) Act 2018 and the Counter-Terrorism (Implementation of United Nations Security Council Resolutions) Regulations.

Over and above aligning and addressing the aforementioned matters, the National Counter-Terrorism Committee (NCTC) was established.[219] The Committee is tasked with ensuring effective implementation of the UN Security Council Resolutions as far as the suppression of terrorism and the prevention and disruption of proliferation financing is concerned.[220] In addition, the current Act states that it would not be necessary to determine whether or not the property was actually used in the commission of the TF offence or not.[221]

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[212] Chapter 4 POCDATARA.
[213] Section 15(1) POCDATARA.
[214] Section 15(1) POCDATARA.
[215] Section 2 FICAA (amending section 3 FICA).
[216] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 125.
[217] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 126.
[218] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 126.
[219] Section 7(b) Counter-Terrorism (Amendment) Act. Previously there was no National Counter-Terrorism Committee.
[220] Section 7(b) Counter-Terrorism (Amendment) Act.
[221] Section 5(5) Counter-Terrorism (Amendment) Act.

It is interesting to note that protection for third-party assets is provided for in the Counter-Terrorism (Implementation of United Nations Security Council Resolutions) Regulations, such that those with legitimate rights to the confiscated properties can have their properties excluded from the confiscation order.[222]

The only limitation observed is that the legislation does not criminalise providing finance for purposes of travelling to another jurisdiction for training, preparation or planning of terrorist acts. It is therefore concluded that Botswana has made great strides to comply with Recommendation 5 and should therefore be rated largely compliant.

5.3.6 Recommendation 6: Targeted financial sanctions related to terrorism and terrorist financing

Recommendation 6 covers three main areas, namely the identification and designation for UNSCRs; freezing; and delisting, unfreezing and providing access to frozen funds and other assets.[223] These will be discussed in detail below. The first criterion under identification and designation requires that, with regard to UNSC 1267/1989 and 1988 sanctions regimes discussed in Chapter 2, countries should identify relevant authorities or courts that would further propose entities or persons to the 1267/1988 and the 1988 Committees for designation.[224] This competent authority or court should have a measures in place for the identification of persons or entities for designation in accordance with the relevant UNSCRs.[225]

In addition, when making proposals for identification, they should adopt the evidentiary standard of proof of "reasonable grounds" or "reasonable basis." The designations

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[222] Regulation 5(1) Counter-Terrorism Regulations.
[223] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 32-35.
[224] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 32; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 44.
[225]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 32; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 44.

should be made irrespective of whether or not criminal proceedings are on-going.[226] Furthermore, when listing, countries should use the forms adopted by the 1267/1989 or the 1988 committees.[227] They should also ensure that all the relevant information on each designation is provided and also indicate whether or not their name should be made known as the designating state.[228]

With regard to the UNSCR 1373, the four requirements are similar to those found under UNSCR 1267/1989 and 1988 sanctions. These are the requirements for identifying a competent authority for designations under UNSCR 1373; identifying who to designate in consonance with criteria under UNSCR 1373; and applying the evidentiary standard of proof of "reasonable grounds" or "reasonable basis" when making designations which need not be based on the existence of criminal proceedings.[229] In addition, countries should provide sufficient information when requesting other countries to implement the actions under the freezing mechanisms.[230] Countries should also ensure that they have procedures and legal authorities in place for collection of necessary information for designation of entities and persons based on belief or suspicion and even reasonable grounds or basis.[231]

The second criterion is on freezing and obliges countries to ensure implementation of the targeted financial sanctions without delay.[232] Countries should also appoint a legal

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[226] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 32; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 44.
[227]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 32; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 45.
[228] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 32; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 45.
[229] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 32-33; Interpretive Note to Recommendation 4 and 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 45.
[230] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 33.
[231] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 33.
[232] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 33.

authority and identify relevant authorities for implementation of targeted financial sanctions.[233] When enforcing the targeted financial sanctions, countries should require that assets and funds of designated persons and entities are freezed without delay and without prior notice.[234]

Secondly, the freezing requirement should be applied to all funds and assets owned or controlled either directly or indirectly by the designated persons or entities; assets and funds that are jointly controlled or owned by the designated entities and persons; funds or assets that were derived from the assets and funds of the designated persons or entities; and funds and assets of those acting on behalf of designated persons and entities.[235]

Furthermore, countries should prohibit their citizens within their borders from availing funds, assets or any kind of assistance to designated entities and persons unless they are authorised to do so subject to the applicable UNSCRs.[236] Countries should communicate immediately to the entire financial sector, including DNFBPs, the actions taken with regard to targeted financial sanctions and also provide guidance in terms of their obligations on freezing requirements.[237] The financial institutions and DNFBPs are required to submit reports to the relevant authorities on the steps they took to implement the prohibitions under the applicable UNSCRs (including any frozen assets and attempted transactions).[238] In applying the targeted financial sanctions under this Recommendation, they should ensure protection of *bona fide* third parties.[239]

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[233] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 33.
[234] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 34.
[235] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 34.
[236] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 34.
[237] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 34.
[238] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 34.
[239] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 34.

The third criterion is on the de-listing, unfreezing and providing access to frozen funds or other assets which no longer satisfy the designation criteria.[240] The requirement is that procedures for de-listing, unfreezing and providing access to assets and funds should be made public and that the procedure should be in accordance with those adopted by the 1267/1989 and the 1988 Committees.[241] The legal procedures and procedures for de-listing and unfreezing should be applied to designations pursuant to UNSCR 1373 that do not satisfy the designation requirements.[242]

In addition, countries should make it possible for the 1988 Committee to review the procedures to be adopted by the countries which procedures should also be aligned to those of the Committee.[243] Regarding the Al-Qaida sanctions list, countries should also have procedures for notifying designated persons and entities of availability of the United Nations Office of the Ombudsperson, pursuant to UNSCRs 1904, 1989 and 2083 to receive of de-listing petitions.[244] It is required that countries should have public procedures for unfreezing funds and assets of people who were wrongly named as designated persons or entities after it has been verified that indeed they are not connected to the designated entity or person.[245]

There should also be mechanisms for communicating to the financial institutions and DNFBPs of de-listings and unfreezing of previously designated entities and persons and also providing guidance on what their obligations would be pursuant to the de-listing or unfreezing action.[246] Countries should allow access to frozen assets and funds where necessary for basic expenses subject to the procedures laid down in the

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[240] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 34.
[241] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 34.
[242] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 35.
[243] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 35.
[244] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 35.
[245] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 35.
[246]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 35.

UNSCR 1452 and successor resolutions.[247] Access to funds and assets should also be allowed where freezing measures were made by a (supra) national country in accordance with UNSCR 1373.

In South Africa, effect is given to the Resolutions of the UN Security Council through both POCDATARA and FICA.[248] POCDATARA provides that when a Security Council resolution is passed in terms of Chapter VII of the Charter of the United Nations, the South African President should publicise in the Government Gazette and other platforms the entity identified to have committed or attempted to participate in terrorism and the actions that the government should take against that entity.[249] It is compulsory that Parliament should consider and determine the appropriate actions for all such notices made in terms of POCDATARA.[250]

FICA also includes provisions for giving effect to the UN Security Council Resolutions.[251] The first obligation in accordance with Chapter VII of the Charter of the United Nations is to publish a notification of persons and entities that have been listed by the UN Security Council and make informed decisions on what actions to adopt.[252] Secondly, countries are mandated to prohibit listed persons and entities from entering into various business transactions, including the acquisition and disposal of property.[253]

It is also an offence for anyone to transact or conclude business deals on behalf of the listed persons and entities.[254] Lastly, listed persons and entities can be allowed limited and supervised access to financial services and their properties in limited circumstances, such as when they required money for food, rental, medical expenses, payment of insurance and legal fees.[255]

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[247] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 35.
[248] Sections 25-26 POCDATARA and section 17 FICAA (replacing the repealed section 26 FICA).
[249] Section 25(1) POCDATARA.
[250] Section 26 POCDATARA.
[251] Section 2 FICAA (amending Section 3 FICA); section 17 FICAA (inserting section 26A FICA).
[252] Section 17 FICAA (inserting section 26A FICA).
[253] Section 17 FICAA (inserting section 26B FICA).
[254] Section 17 FICAA (inserting section 26B FICA).
[255] Section 17 FICAA (inserting section 26C FICA).

Botswana was scored non-compliant with regard to this Recommendation in 2017 because it had no legislation on targeted financial sanctions on terrorism and terrorism financing in consonance with the UN Security Council Resolutions on terrorism and terrorism financing.[256] In response, the Counter-Terrorism (Amendment) Act was enacted to establish the National Counter-Terrorism Committee (NCTC).[257] The primary mandate of the Committee is to ensure the implementation of the UN Security Council Resolutions as far as the suppression of terrorism and the prevention and disruption of proliferation financing concerned.[258]

Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations were also introduced in 2018 to address the requirements of Recommendation 6.[259] Part I of the Regulations deals with the interpretation of terms and provides that the Regulations apply to the UNSCRs 1267 of 1999 and 1373 of 2001 and their successor resolutions.[260] It further defines a designated person or entity as a 'person or structured group that has been designated in the UN List or under authority of the Security Council as being subject to the United Nations sanctions.'[261]

The Regulations cover procedures for national listing and requests for listing from other countries as well as de-listing procedures from the United Nations List and national de-listing.[262] The Regulations also protect the rights of *bona fide* third parties who were affected by the freezing order or where the funds or assets were frozen in error.[263] The procedures to be followed pursuant to the designations made by the United Nations Security Council are also provided for and are consistent with

[256] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 128.
[257] Section 7(b) Counter-Terrorism Amendment Act. Previously there was no National Counter-Terrorism Committee.
[258] Section 7(b) Counter-Terrorism (Amendment) Act; Counter-Terrorism Regulations which were promulgated to give effect to the provisions of the Counter-Terrorism Act, in particular Regulations 6-8.
[259] 2018.
[260] Regulation 2 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[261] Regulation 2 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[262] Regulations 4, 8 and 9 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[263] Regulations 5 and 13 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.

requirements of Recommendation 6.[264] The Regulations provide guidance in terms of how freezing of funds of designated persons and entities should be carried out as well as applications to unfreeze requirements.[265]

Furthermore, the Regulations set forth conditions and procedures to be met for approval of usage of funds by nationally listed entities and persons.[266] It should be established that the funds are meant to meet necessary and basic needs and expenses including reasonable professional fees and settlement of expenses such as legal fees.[267] The Regulations also have sanctions for those who make available funds to the designated persons and entities and prohibit dealing with funds or property directly or indirectly owned and controlled by designated persons and entities.[268]

Designated or nationally listed persons are not allowed to enter Botswana or transit through Botswana unless entry is authorised by the NCTC or is exempted by the UNSCR.[269] Citizens are also prohibited from selling or supplying weapons to designated persons and entities and nationally listed persons or entities.[270] Finally, the Regulations capture how information on designated persons and entities as well as nationally listed persons would be circulated and updated.[271]

The difference between the two jurisdictions is that in Botswana the implementation of the UN Security Council Resolutions is done by the NCTC, which regulates its own proceedings,[272] while in South Africa, the task lies with the President and the Minister

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[264]Regulation 6 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[265] Regulations 7 and 10 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[266] Regulations 14 and 15 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations
[267] Regulation 14 (1) Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[268] Regulations 16 and 17 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[269] Regulation 18 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[270] Regulations 19 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[271] Regulations 21-29 Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations.
[272] Section 7(b) Counter-Terrorism (Amendment) Act.

for Safety and Security.[273] It is submitted that the approach adopted by Botswana is ideal as the Committee comprises of different role players, which enhances the quality of the discussions and the decisions and actions to be adopted.

With the introduction of the Counter-Terrorism (Implementation of the United Nations Security Council Resolutions) Regulations which specifically addressed Recommendation 6, it is apparent that Botswana should be rated as compliant with Recommendation 6.

5.3.7 Recommendation 7: Targeted financial sanctions related to proliferation

The UNSC has imposed sanctions to prevent and counter the proliferations of weapons of mass destruction and all United Nations members, Botswana included, are required to implement these measures. Against this background and the foundation laid in Chapter 2 above on the subject matter, Recommendation 7 of the FATF Recommendations sets obligations in respect of the UNSCRs targeted financial sanctions related to proliferation financing of weapons of war.

As with the previous Recommendation related to the financing of terrorism, Recommendation 7 requires of countries to implement targeted financial sanctions to comply with the UNSCRs relating to the prevention, suppression and disruption of proliferation of weapons of war and its financing.[274] These resolutions require countries to freeze without delay the funds and assets of, and to ensure that no funds and other assets are made available to and for the benefit of any person or entity designated or under the authority of the UNSCR pursuant to Chapter VII of the Charter of the United nations.[275]

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[273] Section 25 POCDATARA; Sections 26A-26A FICA.
[274] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 36-38; Interpretive Note to Recommendation 7 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 51-57.
[275] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 36-38; Interpretive Note to Recommendation 7 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 51-57.

As highlighted in Chapter 2, the UNSC adopted a two-tiered approach to counter proliferation financing through resolutions made under Chapter VII, thereby imposing mandatory obligations for UN members to:

> 'a. Adopt UNSCR 1540 to combat non-state actor involvement in the proliferation of weapons and mass destruction. The resolution requires countries to abstain from supporting non-state actors that attempt to develop, acquire, manufacture, process, transport, transfer or use nuclear, chemicals or biological weapons and their means of delivery. It also requires countries to adopt and implement appropriate effective laws which prohibit non-state actors' involvement in the proliferation of weapons of war in particular for terrorist purposes, as well attempt to participate in them as an accomplice, assist or finance them;[276] and
> b. Adopt UNSCR 1718 (2006) and 2231 (2015) against Democratic People's Republic of Korea (DPRK) and the Islamic Republic of Iran and their future successor resolutions.'[277]

An examination of the South African AML/CFT framework reveals that proliferation financing is not stated with precision in any of the relevant laws. The laws rather refer to money laundering, terrorism financing and other related offences.[278] It has been established above that the fact that South Africa couched its legislation to include all forms of related crimes, would make it possible to prosecute and implement UN Security Council Resolutions on proliferation financing.[279]

Botswana was rated non-compliant in this regard in 2017, as it had no legislation on targeted financial sanctions against proliferation financing.[280] In order to implement the Recommendation 7 requirements, Botswana enacted the Counter-Terrorism Act and the Counter-Terrorism (Implementation of the UNSCR) Regulations, which were both extensively covered in Chapter 4. The Regulations provide the legal framework for the

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[276] UNSCR 1540 (2004); FATF *Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 3.
[277] UNSCRs 1718 (2006) and 2231 (2015); FATF *Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018) 3.
[278] FICA, POCA and the POCDATARA Preambles.
[279] FICA, POCA and the POCDATARA Preambles; Pieter Smit *Financial Intelligence Centre: South Africa* (20 November 2012). https://www.un.org/sc/ctc/wp-content/uploads/2016/10/spmtg_south_africa20nov12.pdf (accessed 14 March 2020).
[280] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 128.

implementation of UN sanctions as adopted by the UNSC under Chapter VII of the UN Charter.

As alluded to in Chapter 4, the Counter-Terrorist Act establishes the NCTC (Committee) which is responsible for implementing the UNSCR relating to suppression of financing of terrorism and prevention of proliferation financing and successor resolutions.[281] The Counter-Terrorist Act and the Regulations should be read with the Chemical Weapons (Prohibition) Act,[282] Biological and Toxin Weapons (Prohibition) Act,[283] and the Nuclear Weapons (Prohibition) Act.[284] The Counter-Terrorism Act was therefore amended in 2018 to include proliferation financing.[285] This inclusion means that this category of activities should now be treated in the same way as terrorism financing, with the necessary modifications.[286]

It can therefore be concluded that Botswana is now compliant with Recommendation 7 as the targeted financial sanctions discussed above for terrorism financing apply *mutatis mutandis* to proliferation of arms of war.

5.3.8 Recommendation 8: Non-profit organisations

NPOs play a very significant role in uplifting our societies both socially and economically and therefore they should be cushioned from being used for financial crime. It has been noted that the primary aim of Recommendation 8 is to ensure that NPOs are not used as illegitimate entities or as conduits for terrorist financing and funds diversion.[287] The FATF has reported that its assessments have shown that at least 57 percent of countries were either non-compliant or partially complaint with this Recommendation, yet NPOs were more vulnerable to ML/TF.[288]

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[281] Section 12 Counter-Terrorist Act.
[282] 2018.
[283] 2018.
[284] 2018.
[285] Section 7(a) Counter-Terrorism (Amendment) Act (amending section 4 of the original Act).
[286] Regulation 19 Counter-Terrorism Regulations.
[287] Interpretive Note to Recommendation 8 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 59.
[288] FATF *Risk of Terrorist Abuse in Non-Profit Organisations Report (*June 2014) 2. Available at www.fatf-gafi.org (Accessed 13 March 2020); FIC Public Compliance Communication 41-Guidance on combating the financing of terrorism and anti-money laundering measures relating to non-profit organisations (2019) 2.

The FATF defines an NPO as 'a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works".'[289] It has also been observed that Recommendation 8 is only applicable to those NPOs which fall within the latter definition and does not cover all NPOs.[290]

Recommendation 8 provides that countries should determine which NPOs falls within the scope and purview of the FATF definition and identify which ones are vulnerable to the financing of terrorism.[291] Countries are also required to identify the threats posed by terrorist entities to the vulnerable NPOs. Countries should review the NPOs legislative framework with a view to determine gaps and put in place measures to mitigate identified risks.[292] This risk-based approach requires that the sector should be assessed from time to time to detect new potential terrorism risks and employ effective mitigation controls.[293]

Furthermore, countries should ensure that NPOs are accountable and transparent to ensure public confidence in their management and administration.[294] Countries are required to encourage NPOs to undertake sustained outreach and educational programmes regarding the financing of terrorism.[295] There should also be procedures to protect NPOs from the financing of terrorism and NPOs should be requested to conduct financial transactions through legitimate channels.[296]

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[289] FATF Glossary.
[290] Interpretive Note to Recommendation 8 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 58.
[291] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 39.
[292] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 39.
[293] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 39.
[294] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 39.
[295] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 39.
[296] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 39-40.

In addition, there should be targeted supervision of NPOs which is also risk-based.[297] This means countries should consistently monitor adherence of NPOs to Recommendation 8 requirements and enforce commensurate sanctions where there is a breach.[298] Countries also have to ensure that they have effective information gathering and investigation.[299] This means that there should be cooperation and information sharing amongst the relevant authorities.[300] Countries should also be able to investigate NPOs which are suspected to be involved in the financing of terrorism or are actually supporting terrorist activities.[301]

Countries should have full access to the NPOs financial, administrative and management records.[302] In addition, there should be established procedures to ensure that information regarding NPOs that are used as conduits for terrorist activities, are fronting or suspected to be involved in any form of support of terrorist acts is shared with the relevant authorities and the appropriate measures and controls are put in place.[303] Finally, countries should be capacitated to respond to international requests regarding a particular NPO suspected of involvement in terrorist acts.[304]

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[297] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 40.
[298] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 40.
[299] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 40.
[300] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 40.
[301] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 40.
[302] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 40; Interpretive Note to Recommendation 8 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 63.
[303] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 40-41.
[304] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 41.

Registered NPOs in South Africa are regulated by the Non-Profit Organisations Act (NPO Act).[305] The Act provides for registration and accounting requirements, keeping of records and submission of reports to the directorate.[306] The NPO Act defines an NPO as:

> 'A trust, company or associations of persons
> a) Established for a public purpose; and
> b) The income and property of which are not distributable to its members or office bearers except as reasonable compensation for services rendered.'[307]

In South Africa, the registration of an NPO is voluntary. Registered NPOs can be registered as trusts with the Master of the High Court and all registered NPOs should be registered with SARS for tax purposes.[308] Therefore, the NPO Act does not satisfy the requirements stipulated in Recommendation 8. However, section 8 of the NPO Act states that the Director of the Directorate for NPOs shall enforce the law as provided in the NPO Act and any other law. In addition, an NPO is not considered accountable in terms of FICA and POCDATARA and therefore not bound by the compliance sanctions regarding targeted financial sanctions.[309]

The FIC published the FIC Public Compliance Communication 41 *Guidance on combating the financing of terrorism and anti-money laundering measures relating to non-profit organisations* (FIC' s PCC 41) with the objective to ensure that NPOs are not used for ML/TF activities and to provide guidance to NPOs and regulators on how to effectively implement controls on AML/CFT.[310] The aforementioned FIC's PCC 41 states that it endorses FATF Recommendation 8 and goes on to stipulate measures which should be taken to comply with Recommendation 8 of the FATF standards.[311]

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[305] 1997.
[306] Sections 16-18 NPO Act 1997.
[307] Section 2 NPO Act.
[308] FIC Public Compliance Communication 41-Guidance on combating the financing of terrorism and anti-money laundering measures relating to non-profit organisations (2019) 2.
[309] FIC Public Compliance Communication 41-Guidance on combating the financing of terrorism and anti-money laundering measures relating to non-profit organisations (2019) 9.
[310] FIC Public Compliance Communication 41-Guidance on combating the financing of terrorism and anti-money laundering measures relating to non-profit organisations (2019) 2.
[311] FIC Public Compliance Communication 41-Guidance on combating the financing of terrorism and anti-money laundering measures relating to non-profit organisations (2019) 10-28.

Botswana was rated non-compliant with this Recommendation in 2017 because even though the Societies Act regulates non-profit organisations, it did not have adequate measures for the prevention and suppression of terrorism and terrorism financing.[312] The limitation alluded to above regarding the NPO Act in South Africa also applies in Botswana because the Societies Act does not serve as a gatekeeper to ensure that NPOs in Botswana are sanitised from money laundering and terrorism financing. However, with respect to the regulation of trusts, the Trust Property Control Act was introduced in Botswana.[313]

The Trust Property Control Act introduced controls in that it requires that the true beneficiaries of trusts should be disclosed.[314] It mandates that those appointed as trustees shall be required to furnish a security unless exempted by the Master of the High Court to ensure that they discharge their duties with due diligence and in good faith.[315] In addition, if any irregularities are detected in the administration of the trust, the perpetrators should be reported to the Master, who should take appropriate action.[316] The Trust Property Control Act makes it mandatory for each trustee to keep records of all activities of the trust, including contracts, acquisition and disposal of property and audited accounts.[317]

What is interesting is that the Trust Property Control Act has personal liability clauses for trustees who fail to discharge their duties and fail to act in terms of the Trust Property Control Act. The above controls will probably go a long way to ensure that trusts are not utilised as conduits for money laundering and terrorism financing. However, while acknowledging the efforts made by enacting the Trust Property Control Act, it is submitted that Botswana's legislation is still inadequate to combat ML/TF in NPOs because the legislation regulating societies under the Societies Act does not have watertight provisions to curb ML/TF or meet the standards as set out in Recommendation 8 of the FATF Recommendations. Furthermore, unlike in South Africa, the FIA

[312] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 130.
[313] Chapter 42:03, 2018.
[314] Section 7(2) and (3) Trust Property Control Act.
[315] Section 7(2) Trust Property Control Act.
[316] Section 16 Trust Property Control Act.
[317] Section 18 Trust Property Control Act.

has not released any guidance communication to assist NPOs to adopt preventative ML/FT controls. Botswana is therefore partially compliant with Recommendation 8.

D. PREVENTIVE MEASURES

5.3.9 Recommendation 9: Financial institution secrecy laws

This Recommendation provides that national laws should allow for the effective implementation of all the FATF Recommendations.[318] This means that domestic laws should not conflict with the FATF Recommendations thus impeding their implementation. FICA in South Africa is aligned to this Recommendation in that it prohibits the non-disclosure of customer information as far as reporting is concerned on the basis of any common law duty of confidentiality or any legislation.[319] The duty to disclose is not however extended to the attorney-client relationship for provision of legal advice or in litigation.[320]

It has been held that the relationship created between banks and their customers is effectively contractual.[321] This means that once that contract is established, customers expect banks to keep the information provided to them very confidential.[322] This bank-customer relationship was best enunciated in *Stevens v Investec Bank (Pty) Ltd* as follows:

> 'There is no doubt that a banker-client relationship requires the highest *uberrimae fides* and that confidentiality is one of the essential aspects of such relationship of trust as between banker and client. Privacy in financial and banking affairs is often an important aspect of successful business enterprise in a competitive economy.'[323]

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[318] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 42.
[319] Section 37(1) FICA.
[320] Section 37(2) FICA.
[321] *Standard Bank SA Ltd v Oneanate Investment (Pty)* Ltd 1995 4 SA 510(C).
[322] *Cambanis Buildings (Pty) Ltd v Gal* 1983 1 All SA 383 (NC); Hedley *Byre and Co. Ltd v Heller and Partners Ltd* 1924 AC 465; *Tournier v National Provincial and Union Bank of England* 1924 1 KB 471-472.
[323] *Stevens v Investec Bank (Pty) Ltd* 2012 ZAGPJHC 226 paras 10 and 11.

In light of the way in which the banker-customer relationship was deemed historically, most jurisdictions still observe the long-standing rule that customer information is privileged.[324] It is therefore no surprise that Botswana was rated non-compliant with respect to this Recommendation because the Banking Act prohibited the disclosure of customer information without the customer's consent, except under a few circumstances – thus conflicting with this Recommendation.[325]

The conflict alluded to above was settled by the FI Amendment Act, which introduced a conflict of laws clause.[326] It provides that in the event that any law is not in consonance with the law and spirit of the FI Act, the provisions of the FI Act shall prevail.[327] This means that the provisions of the Banking Act and other similar laws which inhibit the required disclosures are overridden by the FI Act. This legislative amendment therefore means that Botswana is now compliant with Recommendation 9.

E. CUSTOMER DUE DILIGENCE AND RECORD-KEEPING

5.3.10 Recommendation 10: Customer due diligence

Customer due diligence (CDD) is without a doubt the most significant and foundational element of any AML/CFT framework. CDD has been defined as the 'knowledge that an accountable institution has about its client and the institution's understanding of the business that the client is conducting with it.'[328] Its objective is to ensure that financial institutions adequately know their customers before establishing any business relationship.

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[324] *David v. Barclays Bank of Botswana and another* 2001 2 HC BLR 1-3.
[325] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 130; section 43 of the Botswana Banking Act.
[326] Section 3 FI Act.
[327] Section 3 FI Act; MA Mamooe 'Banking Confidentiality with Reference to Anti-Money Laundering and Terrorist Financing Measures in South Africa and Lesotho' LLM thesis, North-West University, 2018, 6-9. Available at https://repository.nwu.ac.za/bitstream/handle/10394/31330/Mamooe_MA.pdf?sequence=1&isAllowed=y (accessed 20 March 2020).
[328] Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001 28.

This Recommendation prohibits financial institutions from keeping fictitious and anonymous accounts.[329] Financial institutions are required to adopt CDD controls when establishing business relationships; on occasional transactions above (USD/EUR 15 000) (either as single transactions or several transactions that seem to be linked but add up to USD/EUR 15 000); on occasional wire transfers; where there is ML/TF suspicion notwithstanding any exemptions or set thresholds; and where the financial institution doubts the accuracy of the information it has on the customer.[330]

CDD should be applied to all customers whether permanent or ad hoc and whether they are natural or juristic persons.[331] They should effectively identify all customers by requesting for the relevant and reliable identification data.[332] CDD requirements should be extended to those acting on behalf of customers and ensure that they are actually authorised to so act.[333] The purpose and nature of the business relationship should be established and understood.[334] Financial institutions should also ensure that there is on-going CDD during the existence of the business relationship and regularly update and review the information obtained during the CDD process.[335]

In addition, financial institutions should establish the identity of the true beneficial owners. The beneficial owner is the natural person who actually owns (in case of legal entity) or controls the customer or the person who authorised transactions to be carried out on their behalf.[336] The concept of ultimate beneficial owner has been defined as 'situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.'[337]

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[329] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 43.
[330]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 43.
[331] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 43.
[332] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 43.
[333] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 43.
[334] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 43.
[335] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 44.
[336] FATF Glossary.
[337] FATF Glossary.

Specific CDD requirements are required for legal persons and other legal arrangements including ensuring that financial institutions appreciate the nature of the legal persons' business and its control structure.[338] Verification of the identity of legal entities should be conducted by requesting information on the name, structure and proof of existence of the legal persons.[339] The names of senior management in the legal persons and its registered office should also be requested.[340] The ultimate beneficial owners of the legal persons should be effectively identified to determine who actually has effective control of the legal person.[341]

There are also CDD requirements for beneficiaries of life insurance policies.[342] Financial institutions are required to undertake identity verification of the beneficiaries at the time of the funds disbursement.[343] They should also determine if the beneficiary is a high risk person such that enhanced CDD controls could be adopted.[344]

Identification of all customers should be carried out before or when a business relationship is being established or when occasional transactions are concluded.[345] The CDD obligations should also be conducted on existing customers.[346] A risk-based approach should be applied and enhanced CDD employed where ML/TF risks are higher.[347] It has been noted that the risk-based approach enables financial institutions to have a discretion to determine what and which information and documentation would be required for identification purposes from the customers in accordance with

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[338] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 44.
[339] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 44.
[340] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 44.
[341] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 45.
[342] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 45.
[343] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 45.
[344] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 45.
[345] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 46.
[346] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 46.
[347] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 46.

their risk management and compliance programmes.[348] Simplified CDD should only be applied where lower ML/TF have been identified and should not be permitted where there are higher ML/TF risks.[349]

Where financial institutions are unable to complete the CDD processes, they should not proceed with the business relationship or transaction and should end the business relationship.[350] Secondly, they should determine whether or not to file a Suspicious Transaction Report (STR) regarding that particular business relationship or transaction.[351] However, where the financial institution has ML/TF suspicions, it should be allowed not to conduct CDD but file an STR.[352] This is meant to avoid tipping-off the customer of identified ML/TF risks whilst conducting CDD.[353]

In South Africa, CDD controls are contained in Chapter 2 of FICA and in particular in section 21.[354] Section 21 obliges accountable institutions to identify prospective and existing clients (both natural and legal arrangements) by verifying their identity and establishing if they are conducting business in their own capacity or on behalf of other people and the beneficial owners.[355] FICA defines a beneficial owner as 'the natural person who, independently or together with another person, owns the legal person or exercises effective control of the legal person.'[356]

Commenting on the South African position, Simthandile Kholelwa Myemane posits that financial institutions can only report suspicious transactions if they know their

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[348] Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001 28-29.
[349] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 46.
[350] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 46.
[351] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 46.
[352] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 46.
[353] Interpretive Note to Recommendation 10 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 64.
[354] Section 21 FICA; Martha Johanna De Jager 'Comparative Study Between Anti-Money Laundering Legislation of South Africa And International Standards' LLM dissertation, University of Pretoria, 2018 46.
[355] Section 21(1) and (2) FICA.
[356] Section 2 FICA; Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001) 37.

customers.[357] She argues, and I concur, that banks can detect suspicious transactions only if they have effectively identified their customers.[358] Regarding CDD, significant developments took place in South Africa when the FIC (Amendment) Act introduced sections 21A, 21B, 21C, 21D, 21E, 21F, 21G and 21H in 2017.[359] These sections strengthened the provisions on customer due diligence by embedding the risk-based approach CDD in South Africa.[360] That Act now makes it mandatory for accountable institutions to conduct CDD consistent with their risk management programs.[361] In addition, clients should disclose the source of the funds and the objectives of the business relationship.[362]

The FIC (Amendment) Act imposes comprehensive, robust and enhanced due diligence requirements that is also risk based when business relationships are established with legal entities.[363] Accountable institutions should moreover conduct ongoing CDD that is aligned to their internal risk management programs.[364] The identification steps should be repeated where there is doubt that the information provided by the customer is accurate.[365] Where it is impossible to conduct CDD, the relationship should be terminated and reported to the FIC.[366] There are also additional requirements for both local and foreign PIPs together with their families and close business relations.[367]

Botswana was rated non-compliant with regard to this recommendation in 2017, as it was established that there was no law prohibiting the opening of anonymous accounts and there was no obligation on the financial institutions to effectively identify the

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[357] Simthandile Kholelwa Myemane, 'Customer due diligence and risk management and compliance programme' (December 2019) *De Rebus*. Available at http://www.derebus.org.za/customer-due-diligence-and-risk-management-and-compliance-programme/ (Accessed 23 March 2020); Louis de Koker 'Money laundering in South Africa' (1 September 2002) *Centre for the Study of Economic Crime* University, Johannesburg, South Africa 25.
[358] Simthandile Kholelwa Myemane 'Customer Due Diligence and Risk Management and Compliance Programme' (December 2019) *De Rebus*.
[359] Section 10 FICAA.
[360] Section 10 FICAA (inserting section 21A).
[361] Section 10 FICAA (inserting section 21A).
[362] Section 10 FICAA (inserting section 21A).
[363] Section 10 FICAA (inserting section 21B).
[364] Section 10 FICAA (inserting section 21C).
[365] Section 10 FICAA (inserting section 21D).
[366] Section 10 FICAA (inserting section 21E).
[367] Section 10 FICAA (inserting sections 21F, 21G and 21H).

beneficial owners of legal entities.[368] In addition, the law did not require that financial institutions should apply a risk-based approach when conducting customer due diligence.[369]

Sections 14 to 26 of the FI (Amendment) Act have arguably addressed all the shortcomings that were identified by the assessors.[370] Sections 14 to 26 of the FI (Amendment) Act creates a duty to conduct CDD; ongoing CDD; customer identification procedures; enhanced CDD on PIPs, life insurance beneficiaries and cross-border correspondent banking; prohibition of anonymous and shell accounts; controls on simplified CDD; monitoring of high risk transactions and measures to take when failing to complete CDD.[371] These sections are discussed in Chapter 4 above.

What is different, however, between South Africa and Botswana, are the threshold amounts for due diligence in the case of cash payments. In Botswana the threshold is P10 000 and above,[372] while in South Africa it is R5 000.00 for single transactions.[373] It is submitted that both these amounts are very low compared to the FATF requirement of USD/EUR 15 000. As a result, Botswana should be rated largely compliant with Recommendation 10.

E. CUSTOMER DUE DILIGENCE AND RECORD KEEPING

5.3.11 Recommendation 11: Record keeping

Records keeping is critical for any AML/CFT legislative framework as it provides the necessary evidential trail during AML/CFT investigations.[374] This Recommendation mandates financial institutions to keep records of all customer transactions carried out

[368] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 133.
[369] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 133.
[370] See the discussion on the FI (Amendment) Act in Chapter 4 above; see also Regulations 3-16 of the FIA Regulations 29, they are detailed in terms of the procedures and process to follow to effectively identify the different categories of persons applying a risk-based approach.
[371] Sections 14-26 FI (Amendment) Act.
[372] Regulation 3 FIA regulations.
[373] Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001 29-30.
[374] Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001) 57.

both locally and internationally.[375] The information should be stored for a period of at least five years after the transaction takes place or after the lapse of the business relationship.[376] The information should also be capable of being used as evidence before the courts of law.[377] In addition, the information to be kept includes all the documents used when conducting CDD.[378] Finally, the CDD information should be availed to national relevant authorities upon request by financial institutions.[379]

Section 22 to 26 of FICA lay down requirements for records keeping in South Africa. It is compulsory for accountable institutions to keep all the documentation for all transactions concluded with the customers for at least a period of five years after the business ends or after conclusion of the transaction.[380] This obligation includes keeping records even for single transactions.[381] The law permits the outsourcing of record keeping to third parties and keeping it in electronic form.[382] However, the accountable institution would still be answerable to the centre and should ensure that the third party complies with all the record-keeping obligations.[383] The records so kept shall be admissible as evidence in the courts of law.[384] The reports should be retrieved and submitted to the Centre when required within the prescribed timelines.[385]

Botswana was rated non-compliant with regard to this Recommendation because the law did not oblige financial institutions to verify information provided by the customers, while there was also no obligation to maintain records after the business relationship

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[375] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 48.
[376] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 48.
[377] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 48.
[378] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 48; ; FATF website *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (2012-2019) 14 www.fatf-gafi.org/recommendations.html (accessed 13 March 2020).
[379] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 48.
[380] Sections 22 and 23 FICA.
[381] Section 12 FICAA (inserting section 22A FICA).
[382] Section 24(1) FICA.
[383] Section 24(2) and (3) FICA.
[384] Section 25 FICA.
[385] Section 19 FIC (Amendment) Act (inserting section 27A FICA); Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001) 59.

has terminated.[386] However, the FI Act was amended and now prescribes that records should be maintained for twenty years after the business relationship ends.[387] The only current limitation is that the law does not have provisions for ensuring that records are availed swiftly to local competent authorities when requested from financial institutions.

It should be noted that Botswana law requires that reports submitted to the Agency should be kept for a period of twenty years whilst FICA's prescribed timeframe for the keeping of CDD records in South Africa is five years.

Taking the FI Act amendments into consideration and the shortcoming alluded to above, it is submitted that Botswana is now largely compliant with Recommendation 11.

F. ADDITIONAL MEASURES FOR SPECIFIC CUSTOMERS AND ACTIVITIES

5.3.12 Recommendation 12: Politically exposed persons (PEPs)

Three FATF definitions are important for purposes of understanding the concept of politically exposed persons (PEPs). These are definitions of local and foreign PEPs as well as officials who are appointed in senior management by international organisations.

The FATF defines local PEPs as follows:

> 'individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.'[388]

[386] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 134.
[387] Sections 28 and 29 FI (Amendment) Act; Regulations 17-18 FIA Regulations 2019.
[388] FATF Glossary.

It further defines foreign PEPs as:

> 'individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.'[389]

Finally, according to the FATF, persons who are or have been entrusted with a prominent function by an international organisation refer to 'members of senior management, i.e. directors, deputy directors and members of the board or equivalent functions'.[390]

This Recommendation stipulates that CDD in relation to foreign PEPs should be robust and intense.[391] Financial institutions should have processes to determine whether the customer or the beneficial owner is a PEP or not.[392] The decision whether or not business relationships or transactions are concluded or continued with PEPs should be sanctioned by senior management of the accountable institutions.[393] Where the relationship is established with a PEP, it should be adequately monitored throughout and enhanced CDD should be applied.[394] Financial institutions should also determine where the funds from the customers and beneficial owners were derived from.[395]

With respect to national PEPs and officials appointed in prominent offices by international organisations, financial institutions are required to identify them either as actual customers or beneficial owners and where high risk ML/TF is established, senior management should authorise their transactions, the source of funds should be established and ongoing enhanced CDD should be imposed.[396]

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[389] FATF Glossary.
[390] FATF Glossary.
[391] Interpretive Note to Recommendation 12 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 73.
[392] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 49.
[393] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 49.
[394] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 49.
[395] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 49.
[396] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 49.

These measures should be applicable to the family members and close associates of the PEPs as well.[397] In the case of insurance policies it should also be determined whether the beneficiaries are PEPs and this determination should take place at the latest during the payout process.[398]

South African law provides that enhanced due diligence should be conducted when dealing with Prominent Influential Persons (PIPs).[399] In this thesis, PIPs are used interchangeably with PEPs. The additional due diligence requirements for foreign and local PEPs together with their close families and business acquaintances are treated differently.[400] Domestic PEPs are not regarded as inherently high risk while foreign PEPs should always be regarded as high risk.[401] In addition, enhanced CDD should be applied where the nominated beneficiaries of an insurance policy are PEPs, family members or close associates of the PEP.[402] It is a further requirement that senior management should approve the latter transactions prior to the completion of the payout process as well as make a determination of the source of the funds.[403]

Botswana was rated non-compliant with this Recommendation in 2017 simply because the law was silent on the treatment of PEPs.[404] As a result, the law was amended and now adequately addresses the deficiencies, as accountable entities are now required to conduct ongoing enhanced due diligence in the case of both local and foreign PEPs.[405] The definition of PEPs is also aligned to that provided by the FATF.[406] Senior

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[397] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/ CFTCFT* Systems (2013) 53.
[398] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 49.
[399] Section 10 FIC (Amendment) Act (inserting Section 21F and 21G FICA); Christene Ahlers, 'The South African Anti-Money Laundering Regulatory Framework Relevant to Politically Exposed Persons' Mphil thesis, University of Pretoria, April 2013 62.
[400] Section 10 FICAA (inserting Section 21F and 21G FICA); C Hugo & W Spruyt 'Money laundering, terrorist financing and financial sanctions: South Africa's response by means of the Financial Intelligence Centre Amendment Act 1 of 2017' 2018 *TSAR* 247.
[401] C Hugo & W Spruyt 'Money laundering, terrorist financing and financial sanctions: South Africa's response by means of the Financial Intelligence Centre Amendment Act 1 of 2017' 2018 *TSAR* 247.
[402] Section 21H FICAA; Public Compliance Communication Number 48 on certain life insurance provider issues including customer due diligence and understanding of risk in relation to their client in terms of the Financial Intelligence Centre Act (38 of 2001) 8.
[403] Section 21H FICAA; Public Compliance Communication Number 48 on certain life insurance provider issues including customer due diligence and understanding of risk in relation to their client in terms of the Financial Intelligence Centre Act (38 of 2001) 8.
[404] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 135.
[405] Section 18 FI Act.
[406] Section 2 FI (Amendment) Act.

management must also decide whether or not to conclude business relationships with PEPs and their family members.[407] This means that the decision whether or not business will be conducted with PEPs should be made by senior management of the specified and accountable parties. To this end, Botswana is therefore compliant with Recommendation 12.

5.3.13 Recommendation 13: Correspondent banking

Correspondent banking has been defined as:

> 'provision of banking services by one bank (the "correspondent bank") to another bank (the "respondent bank"). Large international banks typically act as correspondents for thousands of other banks around the world. Respondent banks may be provided with a wide range of services, including cash management (e.g. interest-bearing accounts in a variety of currencies), international wire transfers, cheque clearing, payable-through accounts and foreign exchange services.'[408]

Recommendation 13 prohibits collaboration with correspondent banks or relationships of a similar nature without the financial institutions satisfying themselves of the integrity, reputation and AML/CFT structure and risk appetite of the correspondent bank.[409] The authorisation from senior management should also be sought before establishing these relationships.[410] In addition, it should be clear what the responsibilities and obligations of the parties are.[411] Furthermore, the correspondent banks chosen by financial institutions should not use shell banks in the course of their operations.[412] The financial institutions should ensure that correspondent banks apply CDD requirements on their clients and that they are able to provide such CDD information on request by the financial institutions.[413]

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[407] Section 18 FI Act.
[408] FATF Glossary.
[409] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 50.
[410] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 50.
[411] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 50.
[412] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 50.
[413] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 50.

With regard to South Africa, FICA does not contain provisions regarding correspondent banks. However, all the requirements for Recommendation 13 are adequately articulated in the Regulations relating to Banks.[414] Botswana failed the assessment on this Recommendation in 2017 because it did not have provisions on correspondent banks or similar structures.[415] This shortcoming was rectified in the FI (Amendment) Act, which mandates financial institutions to take special precautions when dealing with correspondent banks and incorporated some of the requirements stipulated above.[416] One of the notable limitations is that the legislation does not require that correspondent banking be authorised by senior management or that the AML/CFT climate of the correspondent bank be assessed prior to establishing a business relationship. In light of the aforementioned shortcomings Botswana is rated largely compliant with Recommendation 13.

5.3.14 Recommendation 14: Money or value transfer services (MVTSs)

Recommendation 14 provides that MVTSs should be regulated and appropriate measures should be taken against those that operate unlawfully.[417] This means that both persons and entities providing MVTSs should be licenced.[418] However, financial institutions shall not be required to have a separate licence or registration if MVTSs are already part of their existing licences.[419] The Recommendation further states that if agents are engaged by MVTS service providers, they too should be regulated, monitored and should operate in accordance with the MVTS service providers' AML/CFT programmes to reduce the risks of using the services for money laundering and terrorist financing.[420]

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[414] Regulations 36 (17)(b) (i) and 36 (17)(b)(iii) Regulations relating to Banks 2012.
[415] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 135.
[416] Section 18 FI Act.
[417] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 51.
[418] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 51.
[419] Interpretive Note to Recommendation 14 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 75.
[420] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 51.

The FATF defines MVTSs as:

> 'financial services that involve the acceptance of cash, cheques, other monetary instruments or other stores of value and the payment of a corresponding sum in cash or other form to a beneficiary by means of a communication, message, transfer, or through a clearing network to which the MVTS provider belongs. Transactions performed by such services can involve one or more intermediaries and a final payment to a third party and may include any new payment methods.'[421]

FICA does not contain explicit provisions on the regulation of MVTS service providers. However, to the extent that money remitters are included in Schedule 1 as accountable institutions, MTVS service providers fall within the scope of FICA.[422] MVTSs are mainly geared towards financial inclusion to ensure that all members of the community have access to financial services.[423] This includes mobile financial services.[424] In South Africa, the regulation of mobile financial services falls under the Banks Act.[425]

Botswana has failed to satisfy this Recommendation's requirements because there was no law that provided for the licencing of MVTS service providers and consequently no sanctions could be taken against those who operate unlawfully in this market.[426] MVTS service providers in Botswana are listed in Schedule 1 as specified parties.[427] This means that they fall under the scope and breadth of the FI Act. However, mobile financial services providers are licenced by the Bank of Botswana and are therefore subjected to dual regulation, namely by FIA and the Bank of Botswana.

The Electronic Payment Services Regulations 2019 were issued in accordance with the Bank of Botswana Act and they contain comprehensive AML/CFT controls for electronic payment services.[428] These Regulations provide for mandatory licencing of

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[421] FATF Glossary 134.
[422] Schedule 1 FICA.
[423] FATF *Guidance: Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion* (2013) para 17; M Kersop & Sf Du Toit 'Anti-Money Laundering Regulations and the Effective Use of Mobile Money In South Africa' (2015) 18 *PER / PELJ* 1617; see also Finmark *Trust Applying the Risk Based Approach – Undertaking ML/TF Risk Assessment of Low-Value Remittance and Banking Products and Services in South Africa* (September 2019) 8.
[424] Louis de Koker 'The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks within the New Standards Framework' (2013) 8 *Washington Journal of Law* 171.
[425] M Kersop & Sf Du Toit 'Anti-Money Laundering Regulations and the Effective Use of Mobile Money in South Africa' (2015) 18 PER / PELJ 1603-1604.
[426] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 136.
[427] Schedule 1 FI Act.
[428] Electronic Payment Services Regulations 2019.

MVTSs.[429] The general obligations of MVTS service providers, including governance, CDD requirements, internal controls, capital requirements and use of technologies, are encapsulated in Chapter III of the Electronic Payment Services Regulations 2019.[430]

Initially, MVTS service providers were neither regulated nor licensed in Botswana. However, the Electronic Payment Services Regulations issued by the Bank of Botswana regulates all forms of MVTSs, including mobile financial services by telecommunications companies. The Bank of Botswana also occasionally issues guidelines in terms of how Recommendation 14 should be applied. This therefore now renders Botswana compliant with Recommendation 14.

5.3.15 Recommendation 15: New technologies

As countries and financial institutions develop new products and services or introduce new technologies, they should – according to Recommendation 15 – engage in a risk assessment exercise to determine the extent to which those services, products and technologies can be utilised for money laundering and terrorist financing.[431] Risk assessments should be carried out for both existing and new products.[432] Where risks are identified, mitigation measures should be put in place.[433] This Recommendation also incorporates the CDD Recommendation discussed immediately above as it requires that where countries have Virtual Assets Service Providers (VASPs), they should be licenced and effectively identified and records of CDD information must be kept in accordance with Recommendation 11.[434]

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[429] Part II, Regulations 4-14 Electronic Payment Services Regulations 2019.
[430] Regulations 15-25 Electronic Payment Services Regulations 2019.
[431] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 52.
[432] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 53.
[433] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 53.
[434]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 53-54.

FICA does not contain explicit provisions for ensuring that the use of technologies does not compromise the South African financial system on ML/TF.[435] One can argue, however, that the general RBA requirements embedded in FICA by extension apply to new technologies and products developed or introduced by the country.

Botswana was scored non-compliant as there was no requirement for financial institutions to carry out money laundering and terrorist financing risk assessments on technologies and products.[436] However, the FI (Amendment) Act provides that risk assessment should be conducted on existing and new products and technologies used in delivering services to prevent ML/TF.[437] In addition, the FI (Amendment) Act provides that appropriate controls should be enforced to manage identified risks.[438]

Furthermore, with the introduction of the Electronic Payment Services Regulations 2019 by the Bank of Botswana, for each technology that is introduced, financial institutions have to notify the Bank of Botswana and get approval. This also applies to the operation of VASPs which are now monitored and supervised and are applying the risk-based approach.

In light of the above developments, it is submitted that Botswana is compliant with Recommendation 15.

5.3.16 Recommendation 16: Wire transfers

The objective of Recommendation 16 is to ensure that wire transfers are not abused and used to perpetrate financial crimes.[439] A wire transfer is:

> 'Any transaction carried out on behalf of an originator through a financial institution by electronic means with a view to making an amount of funds available to a

[435] SADC *Compliance & Risk Resources, AML/CFT and Financial Inclusion in SADC: Consideration of Anti-Money Laundering and Combating the Financing of Terrorism Legislation in Various Southern African Development Community (SADC) countries-South African Country Report* (March 2015) 26.
[436] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 136.
[437] Section 11 FI (Amendment) Act; Regulation 16 Electronic Payment Services Regulations 2019.
[438] Section 11(6) FI (Amendment) Act.
[439] Interpretive Note to Recommendation 16 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 78.

beneficiary person at a beneficiary financial institution, irrespective of whether the originator and the beneficiary are the same person.'[440]

Recommendation 16 has implications for several key players, that is, the originator, beneficiary, beneficiary financial institution, ordering financial institution and the intermediary financial institutions, all of which play a role in the wire transfer life-cycle. Understanding the role of each player makes it easier to appreciate Recommendation 16's obligations. An ordering financial institution is an accountable institution that receives an instruction to transfer funds electronically from the originator and instigates the request.[441] The originator then is the person who instructs the ordering financial institution to transfer funds electronically on their behalf.[442]

A beneficiary on the other hand is the recipient of the electronic funds.[443] The beneficiary financial institution is the accountable entity that receives electronic funds either directly or indirectly through an intermediary institution and avails the funds to the beneficiary.[444] An intermediary financial institution, as the name suggests, makes it possible for the ordering and the beneficiary institutions to transfer electronic funds through it.[445]

This Recommendation dictates that cross border wire transfers of USD/EUR 1000 and above are to be accompanied by the name of the originator, their account number or transaction reference number which can be easily traced, birthdates, their national identity number and address as well as the date of the transaction.[446] The information regarding the beneficiary of the wire transfer should also be provided and includes the name of the beneficiary, their account number or transaction reference which should be capable of being traced.[447]

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[440] FATF Glossary.
[441] SARB Directive 1 (2019) 3.
[442] SARB Directive 1 (2019) 3.
[443] SARB Directive 1 (2019) 2.
[444] SARB Directive 1 (2019) 2.
[445] SARB Directive (2019) 3.
[446] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 56.
[447] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 56.

In case where several cross-border wire transfers from a single originator are carried out and have a single transmission file, the information regarding the originator and the beneficiaries of the different wire transfers and account numbers or transaction reference numbers should be provided.[448] Where countries adopt a *de minimis* threshold instead of the latter threshold (less than USD/EUR 1000) for cross-border wire transfers, then the same information required above regarding both the originator and the beneficiaries would be applicable.[449]

There is no requirement to verify the accuracy of the information provided for both the originator and the beneficiaries.[450] However, where there is suspicion of ML/TF risks, the accuracy of the information provided should be verified.[451] With regard to the local wire transfers, the same information required for cross-border transfer wires should be provided, unless the beneficiary financial institution can still access it in alternative appropriate manner.[452]

In addition, for domestic wire transfers, where information can be shared through alternative appropriate means, the only information that can be requested from the ordering financial institution is the bank account number or transaction reference number, provided that when this information is used, the transaction can be traced to either the originator or the beneficiary.[453] It should be mandatory for the ordering financial institution to provide the required information within three working days upon request by relevant authorities.[454] The law should make it possible to compel production of the required data without delay.[455]

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[448] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 56.
[449] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 56-57.
[450] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.
[451] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.
[452] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.
[453] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.
[454] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.
[455] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.

The ordering financial should keep all records in accordance with Recommendation 11 obligations.[456] Where the ordering financial institution is unable to satisfy the obligations stipulated above, the wire transfer should not be executed.[457]

With regard to cross-border wire transfers, where intermediary financial institutions are used, they should ensure that all wire transfers are accompanied by all records of the transactions, including information pertaining to the originator and the beneficiaries.[458] Where it is impossible to instantly send the latter information with the wire transfers, the intermediary financial institutions should keep records of all wire transfer transactions for a period of at least five years.[459]

Intermediary financial institutions should have measures and controls to detect transfer wires that do not have the relevant originator or beneficiary information. They should also have risk-based processes and procedures that enable them to either accept, reject or suspend wire transfers that are not accompanied by the relevant information.[460] It should be clear from the processes and procedures what action would be taken in case where wire transfers are executed, rejected or suspended.[461]

Beneficiary financial institutions should also undertake due diligence on cross-border transfers devoid of the required originator or beneficiary information.[462] Where the beneficiaries' identities were not previously verified, it should be verified for cross-border transactions of USD/EUR 1000 and above and the information recorded in terms of Recommendation 11.[463] Just like intermediary financial institutions, beneficiary

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[456] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.
[457]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.
[458] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57.
[459] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 57-58.
[460] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 58.
[461] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 58.
[462] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 58.
[463] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 58.

financial institutions should have policies and processes that provide for execution, rejection and suspension of faulty wire transfers.[464]

MVTSs are obligated to adhere strictly to Recommendation 16 obligations that are applicable to them. In instances where an MVTS is both the ordering and the beneficiary service provider for the same wire transfer transaction, information from both sides should be considered to determine whether it would be necessary to file an STR.[465] All suspected wire transfers should be lodged in every country affected by the wire transfer and necessary information on the transaction should be shared with the FIU.[466] Finally, wire transfers for designated persons and entities should be subjected to targeted financial sanctions such as UNSCRs 1267 and 1373 and their successor resolutions.[467]

In South Africa, FICA does not have explicit provisions addressing the Recommendation 16 obligations. However, it provides for accountable institutions to issue directives and guidance for effective implementation of the Act.[468] As a result, the South African Reserve Bank (SARB) issued Directive 1 of 2019, *Directive for conduct within the National Payment System in respect of the Financial Action Task Force Recommendations for electronic funds transfer*.[469] The Directive is applicable to both domestic and cross-border wire transfers.[470]

The Directive is aligned to the Recommendation 16 requirements and stresses that information on both sides of the wire transfer should be verified in terms of section 21 of FICA and the financial institutions' risk management and compliance programmes.[471] Over and above the requirements stipulated in Recommendation 16, incoming wire transfers over R 5 000 and from FATF monitored jurisdictions should be

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[464] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 58.
[465] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 58.
[466] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 58.
[467] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 59.
[468] Section 43A(2) FICA.
[469] SARB Directive 1 of 2019.
[470] SARB Directive 1 (2019) 3.
[471] SARB Directive 1 (2019) 5.

verified for accuracy to determine the actual beneficiaries.[472] Lastly, to foster compliance with the Directive on this Recommendation, accountable entities are required to submit compliance declarations annually, stating achievements made to comply with the Directive obligations.[473]

At the time of the assessment in 2017, Botswana had no legislation requiring financial institutions to conduct AML/CFT considerations on wire transfers and was therefore rated non-compliant.[474] This defect in the law was remedied by the FI (Amendment) Act, which ensured that there is now continuous monitoring of the wire transfers cycle and that AML/CFT requirements are imposed on these transactions.[475] These requirements include reporting obligations of all wire transfers of P 10 000. 00 and above; obligations for financial institutions when making wire transfers; obligations for intermediary wire transfers; and obligations for beneficiary financial institutions.[476]

The amendment did not, however, give financial institutions the obligation to implement targeted financial sanctions in accordance with the UNSCRs on combating terrorist financing for wire transfers by persons blacklisted by the UN Security Council. The other limitation is that the provisions on wire transfers are not extended to MVTSs who may provide wire transfer services.

Botswana is therefore rated partially compliant with Recommendation 16.

F. RELIANCE, CONTROLS AND FINANCIAL GROUPS

5.3.17 Recommendation 17: Reliance on third parties

Recommendation 17 deals with obligations for situations of reliance on third parties. Third parties refer to financial institutions and DNFBPs that meet the requirements

[472] SARB Directive 1 (2019) 6.
[473] SARB Directive 1 (2019) 9.
[474] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 137.
[475] Section 37 FI Act; Regulations 24-27 FIA Regulations 2019.
[476] Regulations 24-27 FIA regulations 2019. See also the discussion on these obligations in Chapter 4.

under Recommendation 17 and are regulated by a competent authority.[477] The definition of third party is therefore not applicable to outsourcing or agency relationships.[478] This Recommendation provides that where countries permit engagement of third-party financial institutions and DNFBPs to satisfy CDD requirements, that is, customer identification; identification of the beneficial owners and understanding the nature of the business; or for business introduction, then the responsibility still rests with the financial institutions or DNFBPs to ensure that CDD obligations are met.[479] Financial institutions shall ensure that third parties collect the CDD information stipulated above and that they have copies of the identification of the customers and other necessary documentation and that the information can be made available by the third party swiftly upon request.[480]

The other requirement is that third parties used should be regulated and compliant with the Recommendation 10 and 11 requirements.[481] Countries should also consider the level of country risk from which the third parties operate.[482] In instances where a financial group third party is used, they must ensure that Recommendations 10 to 12 and 18 are satisfied.[483] In addition, a competent authority should be appointed to monitor the CDD and record-keeping obligations at group level.[484] Lastly, financial group mitigation measures should be enforced where any country is identified as high risk.[485]

In South Africa this Recommendation has always been governed through Public Compliance Communications and is now regulated in terms of the principles of the risk-

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[477] Interpretive Note to Recommendation 17 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 84; FATF Glossary.
[478] Interpretive Note to Recommendation 17 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019)84.
[479] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 60.
[480] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 60.
[481]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 60.
[482] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 60.
[483] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 60.
[484] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 60.
[485] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 60.

based approach. Public Compliance Communication 12A *Guidance on outsourcing of compliance activities to third parties* (PCC 12A) provides guidance on reliance on third parties by financial institutions and DNFBPs and notes that they do not promote or dissuade them from using third parties to discharge FICA obligations.[486] The guidance is consistent with the requirements provided under Recommendation 17 and also goes further to simplify what financial institutions and DNFBPs should do to comply with FICA obligations and FATF Recommendations 10 to 12 and 18.

PCC 12A further notes that, notwithstanding reliance on third parties, the financial institutions and the DNFBPs will remain fully accountable to the FIC for the acts and omissions of the third parties.[487] PCC 12A further states that it will not be necessary to conclude various separate agreements where third parties are engaged by group financial institutions, as they usually have centralised group risk management and compliance programmes.[488] In addition, third parties' work should be quality assured at various intervals by accountable institutions.[489]

In Botswana, financial institutions and DNFBPs cannot outsource record keeping. In the 2017 assessment, it was noted that this Recommendation was not applicable in Botswana as reliance on third parties for purposes of Recommendation 17 was prohibited.[490] The use of third parties to conduct customer diligence is still prohibited and therefore this Recommendation is not applicable to Botswana.

[486] Public Compliance Communication 12A Guidance on outsourcing of compliance activities to third parties (July 2020) 4.
[487]Public Compliance Communication 12A Guidance on outsourcing of compliance activities to third parties (July 2020) 4.
[488] Public Compliance Communication 12A Guidance on outsourcing of compliance activities to third parties (July 2020) 6.
[489] Public Compliance Communication 12A Guidance on outsourcing of compliance activities to third parties (July 2020) 12.
[490] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 137.

5.2.18 Recommendation 18: Internal controls and foreign branches and subsidiaries

Recommendation 18 provides for the implementation of ML/TF controls in financial institutions internally and in their foreign branches and subsidiaries.[491] These controls or measures should be determined with reference to the risk appetite of the financial institution and with the objective to identify and mitigate ML/TF risks within financial institutions, their foreign branches and subsidiaries.[492] These controls and measures are referred to as Risk Management and Compliance Programmes (RMCP).[493] Regarding internal controls, financial institutions should have procedures in place for screening potential employees, including the compliance officer, frequent training of staff on AML/CFT issues and constantly audit its AML/CFT processes and system.[494]

In addition, the controls discussed above should be extended to both local and external branches and subsidiaries of the business, and the measures put in place should depend on the size of the business.[495] There should also be procedures on information sharing and protection of confidential information exchanged amongst the branches and subsidiaries.[496] Financial institutions should ensure that AML/CFT programmes for foreign branches and subsidiaries are aligned to those of the home country.[497] They

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[491] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 61; Interpretive Note to Recommendation 18 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 85.
[492] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 61; Interpretive Note to Recommendation 17 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 85.
[493] Guidance note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) 62; Interpretive Note to Recommendation 17 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 85.
[494] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 61; Interpretive Note to Recommendation 17 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 85.
[495]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 61.
[496] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 61.
[497] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 61.

are required to adopt stricter or home AML/CFT measures where the host country AML/CFT obligations are less onerous.[498]

South Africa's response to the requirements of this recommendation is found in sections 42, 42A and 43 of FICA.[499] Section 42 effectively captures what an effective RMCP should achieve. Section 42(1) requires that accountable institutions should have RMCPs for AML/CFT issues. This RMCP programme is meant to assist the accountable institution to access, identify, monitor and control the ML/TF risks of the institution's services and products.[500]

FICA provides that accountable institutions should have in place internal processes and procedures for effective risk management that should be risk based.[501] These procedures should be contained in the accountable institution's AML/CFT risk management and compliance programmes.[502] It further provides that the risk management programmes should be clear on how the internal controls will be extended to subsidiaries, branches and its other operations in other countries.[503] The law demands that the board of directors of the accountable institutions should ensure adherence to FICA and internal controls.[504] All the employees of the accountable entities should furthermore be trained on the risk management and compliance programs and other FICA requirements.[505]

Although it was noted that Botswana's financial institutions had no external branches, the country was rated partially compliant in 2017 because it had no legislation that required accountable institutions to align their AML/CFT risk management programs to their subsidiaries and internal and external branches.[506] However, the FIA Regulations have comprehensive provisions regarding compliance with risk management

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[498] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 61-62.
[499] See the FICAA.
[500] Section 42(2)(a) FICA; Draft Public Compliance Communication 12A Guidance on outsourcing of compliance activities to third parties (July 2020) 6-7.
[501] Section 42(1) and (2) FICA.
[502] Section 42(2)(b) FICA.
[503] Section 42(2)(q) FICA.
[504] Section 42A (1) FICA.
[505] Section 43 FICA.
[506] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 138-139.

programmes and internal controls, and the law has been amended to oblige accountable institutions to extend these programs to their subsidiaries and branches.[507]

These compliance programmes and group-wide obligations include the implementation of risk-based compliance programmes; internal procedures on customer identification verification; processes for record keeping; reporting of suspicious transactions; extension of RMCPs to foreign branches and subsidiaries; and supervision and monitoring of RMCPs.[508] Botswana is therefore compliant with Recommendation 18.

5.3.19 Recommendation 19: Higher-risk countries

When dealing with persons and legal entities from high-risk countries, accountable institutions should conduct enhanced due diligence on business relationships and transactions as per Recommendation 19.[509] This includes detecting AML/CFT weaknesses in other countries and informing local financial institutions.[510] Countries are mandated to employ commensurate measures and controls when requested by the FATF or independently.[511] The FATF informs countries of the existence high-risk countries by constantly updating a database of all countries deemed to be ML/FT high-risk.[512]

It has been noted that measures that could be taken to mitigate risks from dealing with higher-risks countries include requesting that enhanced CDD, as outlined in Recommendation 10, be undertaken; barring financial institutions from operating branches or subsidiaries in higher-risk countries or using correspondent banks in higher-risk countries; and limiting business relationships and transactions from those countries amongst others.[513]

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[507] Regulations 28-32 FIA Regulations; section 13 FI Act.
[508] Sections 12-13 FI Act; Regulations 28-32 FIA Regulations.
[509] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 63.
[510] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 63.
[511] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 63.
[512] Interpretive Note to Recommendation 19 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 86.
[513] Interpretive Note to Recommendation 19 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 86.

FICA does not have explicit legislative provisions that require enhanced due diligence when concluding business with persons from high-risk jurisdictions. However the Guidance note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, provides guidance in this regard.[514] It provides that financial institutions should risk rate their businesses in relation to the products and services offered as well as consider geographical factors within which they conduct business.[515] It further provides that a larger institution which operates in different geographical locations will require enhanced and stricter ML/TF risk controls.[516]

The FATF regularly provides updates on countries that have AML/CFT deficiencies, or countries which are under strict monitoring and blacklisted countries.[517] When the names of such countries are published by the FATF, the FIC issues guidance regarding what actions should be taken by the financial institutions and these are usually published on FIC website as well.[518] Draft Public Compliance Communication 110 *Guidance on money laundering, terrorist financing and proliferation financing risk considerations relating to geographic areas* also recommends the measures stated in Recommendation 19 Interpretive Note, which provides that where necessary business relationships or transactions with higher risk countries should be prohibited or subjected to enhanced CDD controls amongst other things.[519]

Botswana was rated non-compliant with regard to this Recommendation in 2017 because it had no legislation requiring it to apply enhanced due diligence on high-risk countries and no obligation to inform its financial institutions of countries with weaker AML/CFT mechanisms.[520] Even though the law has been amended, and now requires that enhanced due diligence should be imposed when establishing businesses in high

[514] Guidance note 7 on the implementation of various aspects of the Financial Intelligence Centre Act (2020) 13-27.
[515] Guidance note 7 on the implementation of various aspects of the Financial Intelligence Centre Act (2020) 22.
[516] Guidance note 7 on the implementation of various aspects of the Financial Intelligence Centre Act (2020) 22.
[517] Draft Public Compliance Communication 110 guidance on money laundering, terrorist financing and proliferation financing risk considerations relating to geographic areas (November 2020) 5.
[518] Draft Public Compliance Communication 110 guidance on money laundering, terrorist financing and proliferation financing risk considerations relating to geographic areas (November 2020) 5.
[519]Draft Public Compliance Communication 110 guidance on money laundering, terrorist financing and proliferation financing risk considerations relating to geographic areas (November 2020) 8-9.
[520] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 139.

risk environments, the other requirements have not been satisfied.[521] These include advising financial institutions about weaknesses or deficiencies in other countries' AML/CFT controls. In addition, there are no effective countermeasures to guard against higher-risk countries such as a prohibition of conducting business relationships and transactions with higher-risk countries or limiting the number of business relationships and transactions that can be made with higher-risk countries.

Botswana is therefore rated partially compliant with Recommendation 19.

G. REPORTING OF SUSPICIOUS TRANSACTIONS

5.3.20 Recommendation 20: Reporting of suspicious transactions

The reporting of suspicious transactions involving funds emanating or suspected to be derived from the proceeds of criminal activities remains one of the fundamental elements of any AML/CFT framework.[522] It has been noted that the reporting of suspicious transactions should be a compulsory obligation for all countries.[523] As a result, financial institutions should be required to put adequate measures in place to detect unusual and suspicious transactions.[524] The obligation should be broad enough to cover business owners, those employed, and those who manage the business.[525]

Recommendation 20 requires that countries should oblige financial institutions to report all suspicious transactions, including attempts that are suspected to emanate from criminal activities, regardless of the amount and without delay.[526] The criminal activities envisaged by Recommendation 20 refers to all criminal acts deemed as predicate

[521] Section 17(1)(b) FI Act.
[522] Guidance Note 4 on suspicious transactions reporting (March 2008) 8.
[523] Interpretive Note to Recommendation 20 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 87.
[524] FATF *Anti-money laundering and terrorist financing measures and financial inclusion-FATF Guidance* (2013) 40.
[525] Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 8.
[526] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 64.

offences for money laundering, terrorist financing or in accordance with the provisions of Recommendation 3.[527]

In South Africa, section 29 of FICA provides that business owners or employees of accountable institutions should report all suspicious or unusual transactions, which may occur in the course of their business, within the stipulated times.[528] A Suspicious Transaction Report (STR) is a report submitted to the FIC pursuant to section 29(1) of FICA in relation to unlawful activities or money laundering transaction(s) between two or more parties whilst a Terrorist Financing Activity Report (TFAR) is filed in accordance with section 29(2) of FICA on terrorist financing or activities ancillary thereto which do not necessarily involve transactions between several parties as is the case with a STR.[529]

Section 29 of FICA further mandates those involved in a business, either as owners, managers or employees, to report their knowledge or suspicion through either a STR or a TFAR.[530] It has been observed that the unlawful activity or activities envisaged by section 29 is not broad, as it is limited to offences in relation to money laundering and financing of terrorism.[531] The report envisaged by section 29 of FICA should be filed electronically as soon as possible, and in terms of the MLTFC Regulations, it should be within fifteen days.[532]

In addition, with regard to filing a STR or TFAR with the FIC, no monetary threshold is required. What is required, instead, is that there should be a suspicion or knowledge of unlawful activity.[533] Financial institutions are therefore required to pay particular attention in dealing with their customers to determine if there are any sudden request

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[527] Interpretive Note to Recommendation 20 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 87.
[528] Section 29(1) and (2) FICA.
[529] Section 29(1) and (2) FICA; Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 4.
[530] Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 9.
[531] Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 10.
[532] Regulations 22-24 MLTFC regulations.
[533] Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 20.

for customer funds to be transferred elsewhere; paying for goods and services above market price; transactions being overly complicated or not matching the previous financial activities of the customer; cash deposits at different branches on the same day; and participation in offshore transactions amongst others.[534]

As to the question whether or not the closure of an account should be deemed suspicious, it has been noted that it should be deemed so in the event that the customer was requested to submit further information but instead of furnishing information, opted to close the account.[535] Financial institutions are also required to be alert in instances of unusual business activities by their customers, where the customer seems extremely knowledgeable about the reporting of suspicious transactions, money laundering and terrorist financing or where there are many incidences of submitting false identification documents, amongst others.[536]

Submission of the report does not bar the financial institution from proceeding with the transaction unless an intervention order is received from the FIC directing the financial institution to interrupt the transaction.[537] The latter order would only be valid for the period specified in it. The FIC may request additional information and documents in relation to the report and which should be furnished within a reasonable period or within the prescribed timeframes in the request for information.[538] Furthermore, there is legal privilege for those who submit and compile the reports to the FIC.[539] This means no legal action, either criminal or civil, can be brought against them.

It is unlawful to disclose the submission of a suspicious transaction report to anyone, including the person whose activities are being reported.[540] Disclosure can only be

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[534] Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 19-20.
[535] Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 21.
[536] Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 22-23.
[537] Section 33-34 FICA; Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 24.
[538] Section 32 FICA.
[539] Section 38 FICA.
[540] Section 29(3) and (4) FICA.

made under exceptional circumstances, such as pursuant to a court order.[541] Non-compliance with this provision attracts a penalty not exceeding R100 000 000.00 or fifteen years imprisonment as well as administrative sanctions.[542]

Botswana was said to be partially compliant with this Recommendation in 2017 because the prescribed period for reporting of suspicious transactions was not considered prompt or reasonable, especially in cases of terrorist financing.[543] However, the law is now clear as to when reporting should be made, namely that the reporting of suspicious transactions should be lodged no later than five days after the transaction occurs.[544]

The confidentiality veil has been lifted such that financial institutions can report suspicious transaction directly to FIA without violating section 43 of the Banking Act on confidentiality obligations which prohibits disclosure of customer information.[545] The penalty for non-compliance is an amount not exceeding P5 000 000.00, which is significant although quite low compared to the South African penalty of R100 000 000.00.[546] The other development is that the authorities in Botswana can now also impose administrative sanctions for non-compliance, such as the cancellation or suspension of licences.[547]

In terms of the technical assessment, which only requires that countries should report suspicious transactions on ML/TF activities, Botswana's legislation is rated compliant with Recommendation 20. The defences associated with reporting in terms of Recommendation 20 are discussed in Recommendation 21 below.

[541] Section 29(3)(d) and (4)(d) FICA.
[542] Regulation 29 Money Laundering and Terrorist Financing Control Regulations.
[543] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 139-140.
[544] Regulation 21 of the Financial Intelligence Regulations 2019.
[545] Section 3 FI (Amendment) Act; see also discussions on Recommendation 21 below.
[546] Section 18 FICAA (amending section 17 FICA).
[547] Section 41 FI Act; see also discussion on Chapter 4 on the FI Act and the subsequent Amendment Act on reporting of suspicious transactions.

5.3.21 Recommendation 21: Tipping-off and confidentiality

This Recommendation obliges countries to protect employees of financial institutions from both criminal and civil liability in cases where they file a suspicious transaction report with the FIUs in contravention of any laws on disclosure of customer information.[548] The protection should be available if the reporting was done in good faith, and it is not necessary that an act of money laundering or terrorist financing actually took place.[549] Employees, too, are barred from tipping off the perpetrators that suspicious transactions reports have been lodged against them.[550]

Tipping off basically entails divulging information to a third party or customer who is not a part of the internal chain of reporting of an entity which has the potential to jeopardise ML/TF investigations.[551] Tipping off does not, however, include instances where supplementary general information is sought from the customer.[552] Examples of tipping off would be where employees of the financial institutions knew or suspected that ML/TF investigations were about to be undertaken and they inform a customer.[553] This knowledge or suspicion arises because the employee is aware or suspects that a report is about to be made to the next person in the reporting line or a court order for production of information or documents has been submitted to the financial institution.[554]

In South Africa, section 37 of FICA provides that FICA would prevail over any law that is inconsistent with it and that restricts disclosure of information.[555] FICA also protects everyone who participates in the reporting of suspicious transactions in accordance

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[548] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 65.
[549] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 65.
[550] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 65.
[551] FICA Manual *to enable FSP to understand its obligations in terms of 2017 FICA amendments* (2018) 15.
[552] FICA Manual *to enable FSP to understand its obligations in terms of 2017 FICA amendments* (2018) 15.
[553] FICA Manual *to enable FSP to understand its obligations in terms of 2017 FICA amendments* (2018) 15.
[554] FICA Manual *to enable FSP to understand its obligations in terms of 2017 FICA amendments* (2018) 15.
[555] Section 37(1) FICA.

with the Act.[556] Moreover, FICA indemnifies the Minister and the Centre's employees against any wrongdoing done in good faith during the course of their employment.[557] It further provides that the identity of the persons who contributed to the report cannot be divulged, even as evidence in criminal proceedings.[558] FICA also bars employees of accountable institutions from tipping off those reported to the Centre.[559]

Botswana was scored non-compliant with this Recommendation in 2017 because the Banking Act prohibited disclosure of customer information by the employees of financial institutions.[560] There was also no over-arching provision in the FI Act protecting bank employees in cases where they reported suspicious transactions in good faith.[561] In addition, the FI Act only criminalised tipping-off by a person involved in the suspicious transaction report, but the prohibition was not extended to all the employees of the financial institution.[562]

The FI (Amendment) Act rectified the shortcomings highlighted above by ensuring that the tipping-off offence is not limited to the officer who is involved in the reporting of the suspicious transaction but includes even those who ought to have known or who suspected that a report was submitted to the Agency.[563] The conflict between the Banking Act and the FI Act was settled by the FI (Amendment) Act, which overrides any laws prohibiting its application to AML/CFT provisions.[564] One can therefore conclude that Botswana is compliant with Recommendation 21.

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[556] Section 38(1) and (2) FICA.
[557] Section 78 FICA.
[558] Section 38(3) FICA.
[559] Section 53(1) FICA; Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017) 25.
[560] Section 43(12) Banking Act.
[561] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 141.
[562] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 141.
[563] Section 41(3) FI Act.
[564] Section 3 FI (Amendment) Act; see also the discussion on Recommendation 9 above.

H. DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS

5.3.22 Recommendation 22: DNFBPs: Customer due diligence

This Recommendation provides that Recommendations 10, 11, 12, 15 and 17 (discussed above) apply *mutatis mutandis* to the DNFBPs.[565] These Recommendations should be applied in the following instances: gambling at a casinos, where a transaction is worth EUR/USD 3 000 or more; real estate transactions when purchasing or disposing of property; and transacting in precious metals and stones to the value of EUR/USD 15 000 or more.[566]

The thresholds referred to above include both single and several transactions which seem to be linked.[567] It would also be applicable in cases where attorneys and professional accountants are in charge of purchasing and disposing of property or companies holding clients' bank and securities accounts.[568] Due diligence should moreover be exercised with regard to trusts and company secretarial services to DNFBPs.[569]

FICA and the FI Act both include the DNFBPs in their respective schedules as accountable institutions. This means that the discussion above on Recommendations 10, 11, 12, 15 and 17 applies *mutatis mutandis* to the DNFBPs with regard to both countries.[570] These should, however, be read with the relevant Acts, such as the Trust and Property Control Act and the Legal Practitioners Act, even though it is not a requirement that countries should enact separate laws for all the DNFBPs in order to comply with Recommendations 22 and 23.[571]

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[565] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 66-67.
[566] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013,, updated in November 2020) 66.
[567]Interpretive Note to Recommendation 20 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 88.
[568] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 66.
[569] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 66-67.
[570] Interpretive Note to Recommendation 22 and 23 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 88.
[571]Interpretive Note to Recommendation 22-23 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 88.

In the previous assessment, notwithstanding the fact that the FI Act contains provisions on customer due diligence and record keeping, Botswana was scored non-compliant with regard to this Recommendation.[572] Botswana's legislation did not include company secretarial service providers as a specified party or due diligence in relation to PIPs and the introduction of new technologies and products as far as DNFBPs are concerned.[573] Subsequently, company secretarial services were added to the First Schedule to the FI Act, which contains a list of specified parties.[574] The Amendment Act also brought into its ambit the regulation of PIPs as well as the evaluation of new technologies and businesses in both financial institutions and DNFBPs for ML/TF risks.[575]

Botswana was rated compliant for Recommendations 10, 12 and 15, and largely compliant with Recommendation 11, whilst Recommendation 17 is not applicable in Botswana. In light of the discussions from the latter Recommendations and the limitations highlighted for Recommendation 11, Botswana is rated largely compliant with Recommendation 22.

5.3.23 Recommendation 23: DNFBPs: Other measures

This Recommendation provides that Recommendations 18 to 21[576] are also applicable to DNFBPs subject to the qualifications stipulated in Recommendation 22.[577] Recommendations 18 to 21 were discussed with regard to both jurisdictions above. It was also established above that DNFBPs are accountable bodies. What is worth highlighting, however, is that accountants, legal and other independent professionals are not obliged to file STRs in terms of Recommendation 20 where they obtain information through professional privilege.[578] In addition, these professionals may be allowed to

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[572] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 141-142.
[573] ESAAMG *Botswana Mutual Evaluation Report* (2017) 141-142.
[574] See schedule 1 FI Act.
[575] See discussions on recommendations 12 and 15 above.
[576] That is, internal controls and foreign branches and subsidiaries (R 18); higher risk countries (R19); reporting of suspicious transactions (R20) and tipping-off and confidentiality (R21); FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 68.
[577] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 68.
[578] Interpretive Note to Recommendation 22-23 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 90.

file STRs with their regulatory bodies provided there is some form of cooperation and coordination between the regulatory body and the FIU.[579]

South Africa's DNFBPs sector is large and highly established. DNFBPs are designated as accountable institutions in terms of FICA. This therefore means that the measures discussed above applicable to financial institutions also apply to DNFBPs.

Botswana was rated partially compliant with this Recommendation in 2017.[580] In response, Botswana has made steady progress in ensuring that it amends its law to match the agreed internationally accepted standards in this respect. In this regard, the FI (Amendment) Act and the FIA Regulations have ensured that Botswana is technically aligned to Recommendations 18 to 21. The only area that Botswana seems to be wanting is Recommendation 19 as discussed above. Botswana is therefore largely compliant with Recommendation 23.

I. TRANSPARENCY AND BENEFICIAL OWNERSHIP OF LEGAL PERSONS AND ARRANGEMENTS

5.3.24 Recommendation 24: Transparency and beneficial ownership of legal persons

Regarding transparency and beneficial ownership, the FATF provides as follows:

> 'Corporate vehicles—such as companies, trusts, foundations, partnerships, and other types of legal persons and arrangements—conduct a wide variety of commercial and entrepreneurial activities. However, despite the essential and legitimate role that corporate vehicles play in the global economy, under certain conditions, they have been misused for illicit purposes, including money laundering (ML), bribery and corruption, insider dealings, tax fraud, terrorist financing (TF), and other illegal activities. This is because, for criminals trying to circumvent anti-money laundering (AML) and counter-terrorist financing (CFT) measures, corporate vehicles are an attractive way to disguise and convert the proceeds of crime before introducing them into the financial system.'[581]

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[579] Interpretive Note to Recommendation 22-23 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 90.
[580] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 142-143.
[581] FATF *Guidance – Transparency and Beneficial Ownership (2014) 3.*

Recommendation 24 requires that countries should distinguish between the various forms of legal persons and that there must be clear procedures and processes for their creation, which involves gathering of information on the basic and true beneficial owners of those entities.[582] Legal persons have been defined as a structure or establishment other than a natural person that can establish long-term business relationships with financial institutions and can own property.[583] This includes companies, partnerships and foundations.[584] The information obtained through these processes should be easily accessible to the public.[585] In addition, ML/TF risks of all legal persons should be ascertained.[586] The concept of beneficial ownership has been defined above at Recommendation 10, and the information required for beneficial owners is that stipulated in Recommendation 10.[587] The objective of identifying beneficial owners is to enhance transparency of legal persons.[588]

With regard to the basic information to be requested, it includes information on the company names, the nature of its form, its registered addresses, proof of certificates of incorporation and registration and the list of directors, amongst others.[589] This basic information should be publicized.[590] Companies should be obliged to keep records of the basic information mentioned above as well as share registers clearly stipulating the number and nature of shares and voting rights controlled by each shareholder.[591]

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[582] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 69.
[583] FATF Glossary.
[584] FATF Glossary.
[585] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 69.
[586] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 69.
[587] Interpretive Note to Recommendation 24 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 91.
[588] Interpretive Note to Recommendation 24 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 91.
[589] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 69.
[590] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 69.
[591] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 69.

The information obtained from the companies should be kept in a companies registry and should be updated regularly.[592]

In addition, countries should ensure that information on the beneficial ownership of companies is maintained by companies or can be provided timeously upon request by competent authorities.[593] The latter objective can be achieved by requesting companies or company registries to continuously update their beneficial ownership information or by relying on existing information.[594] Existing information can be obtained through CDD in accordance with Recommendations 10 and 22, while legal and beneficial information can be obtained from other relevant authorities, information maintained by the company in terms of Recommendation 24 or from the stock exchanges for listed companies.[595] Countries are to ensure that the beneficial information provided is correct and updated regularly.[596]

The FATF has noted that when ascertaining the concept of beneficial ownership of legal persons, it should not be confused with the definition of legal ownership and control.[597] Legal ownership and control refer to the natural or legal persons who actually own the legal person and make decisions pertaining to that legal person.[598] Beneficial ownership, on the other hand, refers to the 'ultimate or actual' beneficiary in terms of the profits and the assets.[599] In this instance, the focus is on the natural

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[592] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 69; According to the Interpretive Note to Recommendation 24 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 91, a company registry is the register maintained by Registrar of companies in a country for incorporated or licensed companies. It does not refer to the register kept by the company itself.
[593] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 70.
[594]FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 70.
[595] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 70.
[596] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 70.
[597] FATF *Guidance on transparency and beneficial ownership* (2014) 9; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 37.
[598] FATF *Guidance on transparency and beneficial ownership* (2014) 9; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 37.
[599] FATF *Guidance on transparency and beneficial ownership* (2014) 9; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 37.

person and not the legal person.[600] Therefore, beneficial owner for purposes of this study should be understood as a natural person who ultimately owns and/or has effective control of the legal person.[601]

In promoting cooperation between companies and competent authorities for purposes of ascertaining beneficial ownership, countries should require that in cases of companies, at least one natural person should reside in the country and be responsible for providing both basic and beneficial ownership information to the competent authority.[602] DNFBPs should also be compelled to produce basic and beneficial information to the relevant authorities.[603] Both companies and DNFBPs should provide any further assistance to the competent authorities as and when called to do so.[604]

Companies, administrators or liquidators, as the case may be, should be mandated to keep records obtained in terms of this Recommendation for a minimum period of five years after the company has ceased operations or has been dissolved.[605] It is also required that law enforcement authorities should be empowered to compel timely production of basic and beneficial ownership information from companies and DNFBPs.[606] In countries where legal persons are allowed to issue bearer shares and share warrants, it should be ensured that the instruments are not used to commit ML/TF offences.[607] This can be attained by inhibiting the use of bearer shares or share warrants; encouraging the adoption of registered shares or share warrants in lieu of bearer shares and share warrants; mandatory requirements for bearer shares and

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[600] FATF *Guidance on transparency and beneficial ownership* (2014) 9; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 37.
[601] FATF *Guidance on transparency and beneficial ownership* (2014) 9; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 37.
[602] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 70.
[603] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 70.
[604] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 70.
[605] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 70. Interpretive Note to Recommendation 22-23 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 93.
[606] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.
[607] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.

share warrants; requiring companies to record the identities of controlling shareholders; and any other measures that a country may adopt.[608]

Countries that allow nominee shares and nominee directors should ensure that the identities of the nominators are included in the necessary register.[609] The identities of the nominated shareholders and directors as well as the nominators should be disclosed and maintained in the company register.[610] The latter information should also be availed to the competent authority.[611] Failure to comply with Recommendation 24 obligations should attract dissuasive and commensurate sanctions.[612]

Furthermore, countries should foster international cooperation with respect to basic and beneficial ownership information in accordance with Recommendations 37 and 40.[613] The international cooperation envisages coordination to allow external competent authorities access to national company registries, to share information on company shareholders and to use local investigative authorities to obtain information on beneficial ownership for external counterparts.[614] Countries are requested to assess and evaluate the quality of the assistance obtained from other countries with respect to basic and beneficial ownership information requests and tracing of beneficial owners in foreign countries.[615]

In South Africa, the general due diligence and enhanced due diligence provisions for legal persons and other legal arrangements are covered in section 21 of FICA. It provides the CDD requirements which should be adopted in accordance with the

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[608] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.
[609] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.
[610] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.
[611] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.
[612] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.
[613] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.
[614] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 71.
[615] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 72.

accountable institution's RMCP to identify customers when establishing a business relationship or business transaction. In particular, section 21B of FICA is applicable to legal persons, trusts and partnerships. It provides that enhanced due diligence should be taken to verify the nature of the customer's businesses, its ownership and control composition, and the beneficial ownership.[616]

The FIC (Amendment) Act defines a beneficial owner in relation to legal persons as follows:

> 'a natural person who, independently or together with another person, directly or indirectly owns the legal person; or exercises effective control of the legal person.'[617]

FICA further provides criteria for the determination of beneficial owners and notes that firstly, it should be established who the natural person(s) are that have a controlling stake in the legal person.[618] This can be done by considering the shareholding percentages with voting rights.[619] Secondly, if the ownership test is not indicative, the beneficial ownership should be determined by determining who actually controls the legal person through alternative means such as through various shareholder agreements.[620] Lastly, where the beneficial owner can still not be determined through the two criteria above, then it should be identified by looking at who oversees management of the legal person, including in their position either as an executive or non-executive officer or director or even as independent directors.[621]

Partnerships differ from companies in that they do not have legal personality, nor are they incorporated. Partnerships are therefore identified by their names.[622] FICA

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[616] Section 21B(1)-(2); Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 35.
[617] Section 2 FICAA.
[618] Section 21B(2) FICAA.
[619] Section 21B(a)(i) FICAA; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act (2020) 38.
[620] Section 21B(a)(ii) FIC (Amendment) Act; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 38.
[621] Section 21B(a)(iii) FICAA; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act (2020) 38.
[622] Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 39.

provides that in conducting CDD in terms of section 21 and financial institutions' RMCP, partnerships should be established by the name of the partnership where possible and the names of all the partners, identifying those with executive control and those who enter into business transactions, either single or multiple, on behalf of the partnership.[623] In addition, financial institutions should ensure that the information provided is verified and the identities of the natural persons should be adequately verified.[624]

Botswana failed the assessment on this Recommendation in 2017, as there was no legislation that sanctioned the disclosure of the actual beneficiaries of the company or DNFBPs.[625] In addition, there was no requirement to disclose who nominated the nominee directors and thus it was not easy to tell who owned and controlled the company or DNFBP.[626] The legislation also did not require the conversion of bearer shares to registrable shares where it was clear who the beneficiary was.[627]

In terms of the FI (Amendment) Act, a beneficial owner in relation to a company means:

> 'a natural person who directly or indirectly through any contract, arrangement, understanding, relationship or otherwise, ultimately owns or has a controlling ownership or exercises ultimate effective control through positions held in the incorporated body or is the ultimate beneficiary of a share or other securities in the body corporate.'[628]

Although the FI Act was amended to include the definition of beneficial ownership captured above, the FI (Amendment) Act does not provide sufficient guidance on this concept. It merely provides that when conducting CDD the beneficial owners should be identified.[629] It also does not have enhanced CDD obligations for legal persons as per the requirements of Recommendation 24.

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[623] Section 21B(3)(a)-(d) FICAA.
[624] Section 21B(3)(e)-(f) FICAA.
[625] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 143-146.
[626] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 143-146.
[627] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 143-146.
[628] Section 2 FI (Amendment) Act.
[629] Section 16(1)(b) FI (Amendment) Act.

The primary legislation for incorporation of companies and businesses in Botswana is the Companies Act.[630] It has provisions on formation, due diligence and incorporation procedures, compliance obligations and responsibilities of all involved in a company or business as well as procedures and processes to be followed after the company or business has ceased to exist.[631] The Companies and Intellectual Property Authority (CIPA) serves as the national company and business registry for all incorporated companies and registered businesses, and does not keep a dormant companies register.[632]

Companies are obliged to maintain a share register of all shareholders together with their addresses as well as of all persons who have been shareholders in the past seven years.[633] A copy of the share register should be shared with CIPA.[634] Foreign companies are also required to provide identification information pertain to their shareholders, including beneficial ownership information.[635] There is also a requirement for all companies to file annual returns, which includes the obligation to submit information on current directors and shareholders and the share allotment.[636]

Record keeping was discussed above under Recommendations 10 and 11. Records in terms of the FI Act should be kept for a period of twenty years after establishing the business relationship or concluding the business transaction and after the business relationship has ceased to exist.[637] International cooperation will be covered under Recommendations 37 and 40 below. Both Recommendations are rated largely compliant with the FATF standards.

Although both the FI Act and the Companies Acts were amended recently, they still do not fully address the requirements of Recommendation 24. For instance, the legislation does not have mechanisms or systems in place to ensure that the basic and

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630 2007.
631 See the general provisions of the Companies Act.
632 CIPA established in terms of Section 10 Companies Act; Section 489 Companies Act on dormant accounts was repealed.
633 Section 83 and 84 Companies (Amendment) Act (2018).
634 Section 43(3)(A) Companies (Amendment) Act (2018).
635 Section 347 Companies Act.
636 Section 217 Companies (Amendment) Act (2018).
637 Section 28(1) FI (Amendment) Act.

beneficial ownership information provided by customers is accurate. There is also no obligation for licencing of nominee directors and shareholders. Furthermore, the requirement for monitoring of the quality of assistance from foreign countries regarding basic and beneficial ownership information is not provided for in the legislation. Although the definition of beneficial owner is set out in both the FI Act and the Companies Act, unlike South Africa, neither Act provides guidance for determining who the ultimate beneficial owner is, which is a serious omission as such criteria could help promote transparency and ensuring that legal persons are not used for ML/TF activities.

Botswana does not have legislative framework governing partnerships. As a result, partnerships are governed by Roman-Dutch common law. Partnerships are established through verbal and formal agreements. However, there is little doubt that partnerships would also be subjected to the AML/CFT obligations imposed on company.

In light of the above limitations, Botswana is rated partially compliant with Recommendation 24.

5.3.25 Recommendation 25: Transparency and beneficial ownership of legal arrangements

This Recommendation relates to registered express trusts and similar arrangements.[638] Trusts can either be trusts *inter vivos* (created when the person is alive) or *mortis causa* trusts (created pursuant to a will and that only become effective after the death of the founder).[639] It stipulates that information should be obtained from all involved in the creation of a trust, including settlors, beneficiaries, trustees and all legal persons with effective control over the trust.[640] Trusts, like partnerships, are not incorporated. A trust has the following elements: they do not form part of the trustees' estates; trustees are empowered to deal with the trust assets as they deem fit within the

[638] Interpretive Note to Recommendation 25 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 96.
[639] Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 41.
[640] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 73.

confines of the law and conditions of the trust; and title to the trust assets are recorded in the name of the trustee or trustee representative.[641]

Trustees should ensure that they keep records of basic information on all trust service providers, including professionals like investment and tax advisors.[642] The information should be archived for at least five years.[643] The information pursuant to Recommendation 25 should be verified for accuracy and updated regularly.[644] When establishing a business relationship or conducting ad hoc transactions above the prescribed threshold, trustees should be required to notify financial institutions and DNFBPs of their trustee positions.[645] The law should also not prohibit financial institutions and DNFBPs from requesting beneficial ownership information and or any information relating to the trust or its assets.[646]

In addition, countries should ensure that information relating to beneficial ownership and control of the trusts, residential addresses of the trustees, assets managed by financial institutions and DNFBPs on behalf of the trustees is provided by financial institutions and DNFBPs to the law enforcement authorities timeously when required.[647] As is the case with legal persons, countries should promote and facilitate international cooperation in relation to the exchange of information regarding beneficial ownership, trusts and other legal arrangements in consonance with Recommendations 37 and 40.[648]

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[641] Hague Convention on the law applicable to trusts (1992); FATF Glossary.
[642] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 73.
[643] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 73; Interpretive Note to Recommendation 25 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 96.
[644] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 73; Interpretive Note to Recommendation 25 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 96.
[645] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 73.
[646] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 73.
[647] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 74.
[648] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 74.

The latter obligation entails ensuring that external competent authorities have access to the basic information held in the local authorities' registries, can exchange national information on trusts and other legal arrangements as well as can avail national investigative authorities to obtain beneficial ownership information for their external counterparts.[649] Furthermore, trustees should be held liable for failure to discharge their obligations and commensurate and dissuasive sanctions should be applied where they fail to comply with their obligations or where information regarding the trust is not provided to the competent authorities timely.[650] Lastly, all the Recommendation 25 obligations should be extended to all legal arrangements.[651]

The administration of trusts in South Africa is governed by the Trust Property Control Act.[652] A trust – or rather, a person who administers trust property within the meaning of the Trust Property Control Act – is listed in Schedule 1 of FICA as an accountable institution and therefore all the provisions of FICA apply to trusts that fall within the scope of Item 2 of Schedule 1 as well.[653] FICA's definition of a trust does not include trusts in respect of or pursuant to a testamentary disposition, court order, curatorship or payments due to beneficiaries in respect of retirement funds.[654]

Requirements for the identification and verification of trusts are set out in section 21B(4) of FICA. It provides that in addition to the general CDD steps, additional steps should be taken in line with the institutions' RMCP to identify trusts by their names, registration number and the Master of the High Court that registered the trust.[655] The person who founded the trust should also be identified as well as each trustee and any person authorised to transact or establish a business relationship on behalf of the

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[649] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 74.
[650] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 74; Interpretive Note to Recommendation 25 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 97.
[651] Interpretive Note to Recommendation 25 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 97.
[652] 1988.
[653] Schedule 1 FICA.
[654] Section 2 FICA; Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act, (2020) 41.
[655] Section 21B(4)(a)-(b) FIC (Amendment) Act.

trust.[656] The identities of all named and unnamed beneficiaries should also be identified.[657] Reasonable steps should be taken to verify the documents provided and the identities of all natural persons involved in trusts.[658] The above requirements are also applicable to foreign trusts.[659]

Botswana was rated non-compliant with regard to this Recommendation in 2017 because there was no legal requirement for conducting due diligence on trusts, obtaining information about them or identifying the beneficial owners.[660] The law also did not enable international cooperation to facilitate the sharing of information regarding national trusts with comparable bodies in other countries.[661] Overall, it was concluded that trust law in Botswana was weak.[662]

In response, the Trust Property Control Act was introduced in 2018 and contains measures and controls aimed at preventing ML/FT. It defines a trust as:

> 'an arrangement through which ownership in property of one person is by virtue of a trust instrument made over or bequeathed-
> (a) to another person, the trustee, in whole or in part, to be administered or disposed according to the provisions of the trust instrument for the benefit of the person or class or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument ; or
> (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the persons or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument…'[663]

Registered trusts are regulated by the Master of the High Court of Botswana, who keeps a register of all trustees.[664] All trustees are obliged to provide identification

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[656] Section 21B(4)(c)-(d) FIC Amendment Act.
[657] Section 21B(4)(e) FIC (Amendment) Act; if the beneficiaries are unnamed, then the particulars of how beneficiaries are to be established should be submitted.
[658] Section 21B(4)(f)-(g) FIC (Amendment) Act.
[659] Section 21B(5) FIC (Amendment) Act.
[660] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 147-148.
[661] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 147-148.
[662] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 147-148.
[663] Section 2 Trust Property Control Act
[664] Section 4 Trust Property Control Act.

information, including residential addresses as well as information of the beneficial owners.[665] Trustees are expected to discharge their duties and responsibilities with outmost due diligence, care and skills.[666] Trustees shall also keep trust information and documents for a period of ten years.[667] Trustees are obliged to furnish the Master of the High Court with any information or document requested, failing which the Master may apply for a court order to compel the trustees to provide the requested information.[668] The Master may also apply for the removal of a trustee where they fail satisfactorily to discharge their duties and obligations in terms of the Trust Property Control Act.[669]

The FI Act does not make specific reference to trusts or similar legal arrangements. However, the Master of the High Court is recognised in Schedule II as a supervisory body. Schedule III provides that any legal entity registered or incorporated under any law shall be deemed as an accountable institution. Trusts are established in terms of the Trust Control Property Control Act, which therefore means that they fall under the ambit and purview of the FI Act (incorporated though Schedule III thereof).

The Trust Property Control Act has limitations to the extent that it does not require that trusts should keep records of accurate information involving the identities of all those involved in the trusts. Nor does the Trust Property Control Act oblige trusts to keep basic information of all trust service providers. In addition, there is no obligation for trustees to disclose their status to financial institutions and DNFBPs when establishing business relationships or concluding business transactions over the prescribed amounts.

Although trusts are required to provide information to the Master of the High Court upon request, there is no obligation that the information should be provided timeously. The Trust Property Control Act does not impose commensurate dissuasive sanctions which can either be criminal, civil or administrative, as the maximum penalty is only

[665] Section 7(2) Trust Property Control Act.
[666] Section 10 Trust Property Control Act.
[667] Section 18 Trust Property Control Act.
[668] Sections 19-20 Trust Property Control Act.
[669] Section 21 Trust Property Control Act.

P 20 000.00 which does not seem deterrent enough to curb ML/TF offences. The law also does not require that obligations imposed on national trusts and trustees should be extended to foreign trusts.

In terms of exchanging information with comparable bodies in other countries, FIA is the designated body and there are other authorities empowered to do so as will be discussed at Recommendations 37 and 40 below. With regard to both of these Recommendations, Botswana is rated largely compliant with FATF standards.

It is therefore concluded that Botswana legislation does not meet most of the requirements of Recommendation 25 and is therefore rated only partially compliant with Recommendation 25.

J. POWERS AND RESPONSIBILITIES OF COMPETENT AUTHORITIES, AND OTHER INSTITUTIONAL MEASURES

5.3.26 Recommendation 26: Regulation and supervision of financial institutions

This Recommendation provides that financial institutions should be supervised effectively to check their compliance with AML/CFT laws and regulations.[670] There should be at least one designated regulator for the monitoring and supervision of financial institutions.[671] The supervision and monitoring should be risk-based.[672] Core financial institutions should be licensed whilst other financial institutions such as MVTS should either be licensed or registered.[673] Furthermore, the operation of shell banks should

[670] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 75.
[671] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 75.
[672] Interpretive Note to Recommendation 26 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 98.
[673] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 75.

be barred.[674] Countries should also ensure that criminals neither are majority shareholders nor hold executive positions in financial institutions.[675]

Financial institutions or groups should be supervised and monitored in accordance with the core principles on AML/CFT. The core principles referred to above include the BCBS principles,[676] IAIS principles[677] and the IOSCO principles[678] alluded to in chapter 3. Regarding other financial institutions, these should be monitored to ensure compliance with domestic AML/CFT laws, taking into account the ML/TF risks of each sector.[679]

The interval with which on-site and off-site AML/CFT supervision of financial institutions and groups are carried out should be determined by assessing at least three factors.[680] The first factor is the risk profile of the financial institution or group.[681] This means considering the policies, procedures and processes that a financial institution or group has in place. The second factor is the extent of ML/TF risks within the country.[682] The final factor to consider is the financial institution's or group's quality of compliance and the extent to which the risk-based approach is implemented.[683]

Countries should ensure that financial institutions' or groups' risk profile is assessed regularly, especially when there are significant developments in the financial institutions or group, such as a change in management and operations.[684] This requirement

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[674] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 75.
[675] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013,updated in November 2020) 75.
[676] Principles 1-3, 5-9, 11-15, 26 and 29.
[677] Principles 1, 3-11,18, 21 and 25.
[678] Principles 24,28, 29 and 31; and Responsibilities A, B, C and D.
[679] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 75; Interpretive Note to Recommendation 26 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 98.
[680] Interpretive Note to Recommendation 26 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 98.
[681] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 75.
[682] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 75.
[683] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 76.
[684] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 76.

includes the assessment of the financial institution's or group's human capital and technologies to ensure that professionals have the relevant skills and are allowed some discretion to operate independently.[685]

The South African banking system is governed by a robust and sound legal framework that is aimed at promoting the integrity and stability of the banking sector as well as protecting consumers.[686] The primary regulator of the banking sector in South Africa is the South African Reserve Bank (SARB). The South African Reserve Bank (SARB) regulates the country's banks and the national monetary system.[687] Its mandate is to ensure price stability in the country as well as protecting the stability of the national financial system.[688]

In 2011, the South African legislature approved a 'twin peaks' model for supervision and regulation of the financial services sector. This came with the enactment of the Financial Sector Regulation (FSR) Act.[689] Its objective is to attain financial inclusion, stability, efficiency and integrity while having regard to the protection of financial services consumers and ensuring a balanced and sustainable economic growth, amongst others.[690] Another objective is to foster and enhance coordination and cooperation among the different regulators, both nationally and with comparable foreign authorities.[691] The other objective is to ensure effective financial services regulation, which brought three major changes in the regulatory space.

Firstly, the FSR Act prescribes that the SARB should protect and improve the stability of the South African financial system.[692] Secondly, the FSR Act establishes the Prudential Authority, which is established as a juristic person, not as a public entity, but as an arm of the Reserve Bank.[693] Its mandate is to ensure the safety and soundness

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[685] Interpretive Note to Recommendation 26 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 98-99.
[686] SARB website https://www.resbank.co.za/en/home/what-we-do (accessed 31 January 2021).
[687] Section 3 SARB Act.
[688] Section 3 SARB Act 90 of 1989; SARB website https://www.resbank.co.za/en/home/what-we-do (accessed 31 January 2021).
[689] 2017.
[690] Section 7 FSR Act.
[691] FSR Act Preamble.
[692] FSR Act Preamble.
[693] Section 32(1) FSR Act.

of financial products and services emanating from financial institutions.[694] Thirdly, it ensures the security and integrity of the market infrastructures.[695] Fourthly, it should protect financial consumers from non-compliant financial institutions.[696] Lastly, it is responsible for the overall stability of the financial services system.[697]

The Prudential Authority is further expected to regulate and supervise the financial institutions and the market infrastructures.[698] It is required to collaborate with and assist the SARB, the Financial Stability Oversight Committee, the Financial Sector Conduct Authority (FSCA), the National Credit Regulator (NCR) and the FIC.[699] It is mandated to collaborate with the Council for Medical Schemes as well as the Competition Commission.[700] It should also promote financial inclusion.[701] The authority should constantly monitor the financial sector's compliance and adopt mitigation controls where risks have been identified.[702] Lastly, the authority should conduct and publish research aligned to its mandate, amongst other functions.[703]

The third change was the introduction of the Financial Sector Conduct Authority (FSCA).[704] The FSCA is a juristic person and a national public entity.[705] Its objectives overlap with those of the Prudential Authority in so far as the FSCA's aims are to ensure the promotion and integrity of the financial markets.[706] The other objective is to protect financial services customers and help ensure the stability of the financial services sector.[707]

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[694] Section 33(a) FSR Act.
[695] Section 33(b) FSR Act.
[696] Section 33(c) FSR Act.
[697] Section 33(d) FSR Act.
[698] Section 34(1)(a) FSR Act; the Prudential Authority regulates banks (commercial, mutual and co-operative banks), insurers, co-operative financial institutions, financial conglomerates and certain market infrastructures.
[699] Section 34(1)(b) FSR Act.
[700]Section 34(1)(c)-(d) FSR Act.
[701] Section 34(1)(e) FSR Act.
[702] Section 34(1)(f) FSR Act.
[703] Section 32(1)(g) FSR Act.
[704] See Chapter 4 FSR Act.
[705] Section 56(1)-(2) FSR Act.
[706] Section 57(a) FSR Act.
[707] Section 57(b)-(c) FSR Act; see further functions of the FSCA encapsulated in Section 58 FSR Act.

Other regulators include the FIC established in terms of the FICA, as discussed earlier in this chapters, which ensures compliance with the provisions of FICA with the objective of curbing ML/TF in the country. The other key regulator is the National Credit Regulator (NCR) established as a juristic and independent person by the National Credit Act (NCA).[708] Its primary objective is to ensure the registration of credit providers, monitor and regulate the consumer credit market and prevent and prosecute prohibited market practices.[709]

The National Consumer Commission (NCC), established by the Consumer Protection Act,[710] also plays a key role in ensuring the protection of consumers and ensuring compliance with the general provisions of the CPA. The other regulator worth noting is the Information Regulator, established in terms of the Protection of Personal Information Act (POPIA).[711] The Information Regulator is established as an independent juristic person with the mandate to protect personal information as well as the right to privacy.[712] Its other function is to ensure compliance with the obligations enumerated in the POPIA, amongst others.[713]

From the above discussion it is clear that South Africa's financial system is heavily regulated and that there is an array of supervisors for effective monitoring of financial risks.[714] Most of the statutes referred to above require that the financial institutions should be licensed to conduct operations.[715] They also require that professionals employed in the financial institutions, especially shareholders and those in executive and management positions, should be fit and proper. The supervisors are also to undertake frequent on- and off-site inspections to determine compliance with the various statutes and the directives published from time to time.[716] Furthermore, the supervisors are empowered to cooperate both nationally and with comparable authorities in

[708] Section 12 NCA, Act 34 of 2005.
[709] Preamble NCA; Section 13 NCA.
[710] Section 85 Consumer Protection Act 68 of 2008.
[711] Section 39 POPIA Act 4 of 2013.
[712] Section 2 POPIA.
[713] Section 40 POPIA.
[714] See for instance Section 12 FSR Act.
[715] Sections 111-124 FSR Act.
[716] See for instance Section 45(1) FICA; Sections 132-133 FSR Act.

other jurisdictions.[717] South Africa also incorporates some of the international banking principles, such as Basel III Principles.

The South African financial services regime is therefore succinctly summed up by the SARB statement below:

> 'the financial sector remains strong and stable, even with some headwinds from a challenging low domestic economic growth environment, persistent fiscal challenges, and increased policy uncertainty. The South African financial sector is also characterised by well-regulated, highly capitalised, liquid and profitable institutions, supported by a robust regulatory and financial infrastructure.'[718]

Botswana was rated non-compliant with this Recommendation.[719] This was because even though there were designated supervisors, namely the Bank of Botswana and the NBFIRA, the regulation and supervision of the specified parties were not risk-based but prudential.[720]

As discussed in Chapter 4 above, the primary regulator for the financial services sector is the Bank of Botswana, which is the Central Bank. Its mandate and responsibilities have already been captured in Chapter 4. The other main regulator is FIA, which has already been covered extensively in Chapter 4 as well. The aforementioned regulators are governed by the Banking Act and the FI Act respectively, which were also discussed in Chapter 4. Both statutes contain provisions on licensing requirements as well as ensuring that shareholders and executive or management officials are vetted prior to assuming office. The obligation to inspect financial institutions for compliance was also covered in Chapter 4 above.

In addition, the FI (Amendment) Act introduced further obligations on those regulating accountable bodies. For instance, the FI (Amendment) Act introduced punitive sanctions for any regulatory body that fails to act against a specified party that violates the FI (Amendment) Act.[721] The regulatory bodies are now also mandated to adopt a risk-

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[717] Section 76 FSR Act.
[718] Financial Stability Review second edition (November 2019) 5.
[719] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 148-151.
[720] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 148-151.
[721] Section 44(1)-(2) FI Act.

based approach when monitoring the specified parties.[722] The FI (Amendment) Act moreover ensured that only fit and proper officers with no criminal records hold management positions in financial institutions.[723]

The supervision of financial institutions is required to be risk-based.[724] The other elements required by this Recommendation, such as risk assessment of the financial group for compliance with AML/CFT controls, was covered in the discussion on Recommendation 18 above. Botswana therefore incorporates or implements the BCBS principles within its regulation of financial institution.[725]

The shortcoming of the legislation is that there is no requirement that the frequency of both on-site and off-site supervision of financial institutions or groups should be determined with reference to the risk level of the country or the risk profile of the financial institution or group. In addition, there is no obligation for supervisors to review AML/CFT measures of financial institutions or group periodically and when there are major developments in the management and operations of the financial institutions.

Botswana's financial services sector is not as heavily regulated as that of South Africa so as to ensure that no aspect concerning the financial services is left exposed, including ensuring maximum protection of the customers from the financial institutions. The banks are regulated by the central bank, which is also not clothed with ample powers as the ones discussed above for South Africa. Supervision is therefore not as robust when compared to South Africa.

Considering further the legislative amendments since 2017, it is submitted that Botswana is rated partially compliant with this Recommendation.

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[722] Section 44(1)(e) FI Act.
[723] See Section 12 FI Act.
[724] See the discussion on Recommendation 1 above.
[725] First National Bank Botswana *Basel Pillar 3 Disclosure* (for the Quarter Ended 31 December 2018) 3-12.

5.3.27 Recommendation 27: Powers of supervisors

As per Recommendation 27, supervisory and regulatory bodies should be equipped adequately to compel compliance by financial institutions.[726] The regulators should be empowered to request and compel production of any information and documentation required to fully monitor the specified parties' adherence to the set laws and regulations.[727] Furthermore, supervisors should be able to take disciplinary action against and impose an array of proportionate sanctions on non-complying specified parties.[728] Lastly, supervisors should be able to inspect financial institutions.[729]

In South Africa, FICA has endowed supervisory bodies with powers that would enable them to effectively foster compliance with the provisions of the Act. For example, FICA empowers the supervisors to enter and inspect the premises of licenced entities.[730] The FSR Act also empowers the regulatory entities to conduct inspections of financial institutions.[731] FICA also provides that a warrant can be issued by a court where the supervisors are denied entry.[732] The supervisors can furthermore order information and documents to be made available.[733] In addition, the supervisory entities are empowered to implement sanctions in accordance with Recommendation 35 to ensure compliance.[734] The obligations required by Recommendation 27 also run across many statutes such as the Banks Act and the NCA.

Although Botswana was rated largely compliant with this Recommendation, the law did not impose criminal sanctions on specified parties and there was no personal liability for the board of directors and executive officers of the financial institutions.[735]

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[726] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 77.
[727] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 77.
[728] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 77.
[729] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 77.
[730] Section 32 45B FIC (Amendment) Act (inserting section 45B FICA).
[731] Sections 132-133 and 208 FSR Act.
[732] Section 32 45B FICAA (inserting section 45B FICA).
[733] Section 32 45B FICAA (inserting section 45B FICA); Section 136 FSR Act.
[734] Section 32 45B FICAA (inserting section 45B FICA).
[735] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 152.

However, the law has been enhanced to ensure that sanctions for ML/FT are not only civil but also criminal.[736] Personal liability has been introduced across the financial institutions and now even covers officers who leak confidential information and compliance officers who fail to report suspicious transactions.[737] Therefore, it can be concluded that Botswana is now compliant with Recommendation 27.

5.3.28 Recommendation 28: Regulation and supervision of DNFBPs

This Recommendation requires that, just like financial institutions, casinos should be licensed.[738] DNFBPs other than casinos and all DNFBPs should be monitored effectively for AML/CFT compliance.[739] Supervisors of DNFBPs and casinos should ensure that only fit and proper individuals are engaged in their operations and that criminals are not allowed to hold key positions or stakes in the DNFBPs or casinos.[740] In addition, a self-regulatory body or competent authority should monitor DNFBPs' compliance and ensure that all involved in the operations of the self-regulatory body are fit and proper individuals and should be able to take appropriate sanctions against non-compliant DNFBPs.[741] The self-regulatory body should also be able to impose sanctions in accordance with Recommendation 35.[742]

Furthermore, the supervision of all DNFBPs should be risk based.[743] The intensity of the supervision should vary from one DNFBP to another depending on the level of

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[736] Sections 167-171 and 206 FSR Act.
[737] Section 41 FI Act.
[738] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 78.
[739] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 78.
[740] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 78.
[741] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 78.
[742] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 78; Interpretive Note to Recommendation 28 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 100.
[743] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 78; Interpretive Note to Recommendation 26 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 100.

ML/TF risks of each DNFBP, its products, services and customers.[744] The intensity of supervision should also be determined with reference to the risk profile of each DNFBP as well as the discretion the supervisor is allowed by the DNFBP when conducting AML/CFT assessments.[745]

DNFBPs as accountable bodies are regulated in terms of FICA in South Africa and the FI Act in Botswana. This means that the discussions under Recommendations 26 and 27 above are applicable here as well. Botswana was rated non-compliant in 2017 because it was noted that only casinos were effectively regulated through the Gambling Authority Act.[746] The report stated that other DNFBPs were not adequately monitored to ensure that criminals did not control the DNFBPs.[747] The other limitation was that other DNFBPs were not enabled by the legislation to conduct monitoring according to a risk-based approach.[748]

The FI (Amendment) Act widened the law in the sense that the list of DNFBPs in Schedule I was increased so that more entities were brought under the ambit and scope of the FI Act.[749] This means that the FI (Amendment) Act has enhanced the regulation of DNFBPs with regard to AML/CFT requirements, as less entities were left unregulated, which reduced the risks of ML/TF. The FI (Amendment) Act also provides that the regulation of all specified parties should be risk-based and that the officers for the DNFBPs should be vetted to ensure that people with criminal track records were not appointed.[750]

The one limitation, however, is that the legislation does not require that supervision of DNFBPs should be risk based and dependant on the DNFBPs' understanding of its

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[744] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 78; Interpretive Note to Recommendation 28 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 100.
[745] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 78; Interpretive Note to Recommendation 28 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 100.
[746] Section 9 Gambling Authority Act.
[747] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 152-153.
[748] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 152-153.
[749] Schedule II FI Act.
[750] See discussion under Recommendation 1 above; Section 12 FI Act.

risks, its risk profile or the discretion with which it allows the supervisors when being assessed.

Botswana is therefore rated largely compliant with Recommendation 28.

OPERATIONAL AND LAW ENFORCEMENT

5.3.29 Recommendation 29: Financial intelligence units

Countries are required to have FIUs where all the information relating to money laundering, terrorist financing and other similar offences can be centralised for analysis and dissemination to other relevant competent authorities.[751] The FIU should also be the primary entity to which suspicious transaction reports and other information is reported.[752] The FIU should have access to a wide range of information from reporting entities to enable it to effectively achieve its objectives.[753] The FIUs should conduct both operational and strategic analysis from the available information to detect ML/TF related trends.[754]

FIUs should furthermore protect the obtained information and have security and confidentiality processes and procedures in place for the handling of the information in its custody.[755] The FIU's personnel should also undergo security clearances and ensure that they are aware of their responsibilities in handling and disseminating the information.[756] FIUs should also limit access to both its information and its information technology systems.[757]

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[751] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 79.
[752] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 79.
[753] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 79.
[754] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 79.
[755] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 80.
[756] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 80.
[757] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 80.

The FIU should operate independently and be an autonomous body.[758] This means that the FIU should have the capability to carry out its mandate without external interference.[759] It should also be able to engage freely with like comparable entities in other jurisdictions.[760] If the FIU is housed as a department of an existing authority, it should have its own distinct functions.[761] The FIUs should be free from political, industry or government influence to protect their independence and integrity.[762] Finally, at a bare minimum, the FIUs should apply unconditionally for membership of the Egmont Group.[763]

In South Africa, the Financial Intelligence Centre was established in terms of FICA.[764] The mandate of the Centre is to assist in combating money laundering, terrorism financing and associated matters.[765] It is also responsible for the dissemination of information to relevant stakeholders.[766] South Africa's FIC became a member of the Egmont Group in 2003.[767] FICA provides for the functions and general powers of the FIC that are aligned to the requirements of Recommendation 29.[768] It also contains provisions on the protection, access and handling of confidential information held by the FIC.[769] Unlike in Botswana, the security screening obligations are not confined to the Director of the FIC but to other employees of the FIC.[770]

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[758] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 80.
[759]Interpretive Note to Recommendation 29 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 103.
[760] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 80.
[761] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 80.
[762] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 80; Interpretive Note to Recommendation 29 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 103.
[763] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 80; Interpretive Note to Recommendation 29 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 103.
[764] Section 2 FICA.
[765] Section 3 FICA.
[766] Section 3 (2) FICA.
[767] FIC website. https://www.fic.gov.za/
[768] Sections 4-5 FICA.
[769] Sections 26 and 40-41 FICA.
[770] Sections 12-13 FICA.

Botswana was rated non-compliant in 2017 because although the FIA was the FIU in that country, it could not be regarded as a place where all the financial information is concentrated in the sense that disclosure of banking information was prohibited by the Banking Act.[771] As a result, the FIA was hindered from requesting information from banks.[772] In addition, the other limitation was that, at the time of the assessment, the FIA had not applied for Egmont Group membership.[773]

In reaction, the FI (Amendment) Act extended the mandate of the FIA to include the receipt and dissemination of information pertaining to terrorism financing and the financing of proliferations of arms of war.[774] All financial information relating to money laundering, terrorism financing and financing of proliferation of arms of war is now centralised at FIA, which is also the sole national body designated for purposes of Egmont Group membership.[775] Botswana has now applied for admission as a member of the Egmont Group. In addition, the bottleneck that hindered disclosure of information by banks has been eliminated by a provision which now provides that, in the event of conflict between the provisions of the FI Act and any other statute, the FI Act shall prevail.[776]

The law does not have any requirement that the FIA should operate autonomously and independently to insulate it from political, government or political abuse. In addition, the security screening is limited only to the Director General of the Agency, which is in contrast to what Recommendation 29 provides, namely the screening of all staff members, not just one. There is also no requirement for strategic analysis of the information obtained from entities that report to the FIA and other competent authorities with the aim to detect ML/TF trends. Consequently, Botswana is rated partially compliant with Recommendation 29.

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[771] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 154-155.
[772] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 154-155.
[773] ESAAMLG *Botswana Mutual Evaluation* Report (2017) 154-155.
[774] See section 6(1)(c) FI Act.
[775] See section 49 FI Act.
[776] Section 3 FI Act.

5.3.30 Recommendation 30: Responsibilities of law enforcement and investigative authorities

Recommendation 30 provides that law enforcement agencies should be included in the domestic AML/CFT legislation and equipped with the powers to not only investigate ML/FT issues but also other predicate offences nationally in accordance with the prevailing AML/CFT legislative framework.[777] The investigators should be empowered to extend their AML/CFT investigations even beyond the borders of the country if the offence occurred outside the country.[778]

The Recommendation provides that there should at least be one institution tasked with powers to seize, trace, identify and confiscate immediately any property suspected or believed to be derived from the proceeds of crime.[779] The power to identify, trace and initiate freezing and seizure of assets should also be bestowed on anti-corruption enforcement authorities, provided that they are permitted to investigate ML/TF offences.[780] In addition, the Recommendation 30 requirements should be extended to other authorities that are not law enforcement agencies *per se* but are pursuing predicate offences investigations.[781]

In South Africa, one of the objectives of the FIC is to collaborate with investigative and law enforcement agencies on ML/TF issues.[782] These entities include the South African Revenue Service and the other intelligence services.[783] In accordance with the South African Constitution,[784] the South African Police Service (SAPS) is responsible for the investigation of ML/TF and other related matters in accordance with its mandate

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[777] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 81.
[778] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 81.
[779] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 81.
[780] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 81.
[781] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 81.
[782] Section 4(b) FICA.
[783] Section 4(b) FICA.
[784] Section 205 Constitution of the Republic of South Africa, 1996.

to combat and investigate crime in South Africa with a view to maintain public order, amongst other things.[785]

The SAPS has several divisions which are dedicated to fighting ML/TF and similar crimes. These divisions are the Detective Services, Crime Intelligence and the Counter-Terrorism Centre. In carrying out their investigatory functions, the police use a wide range of techniques including undercover operations.[786] They are also empowered to intercept suspects' conversations in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act.[787]

The Criminal Procedure Act (CPA) contains general provisions on the tracing, identifying and seizing of assets of proceeds of crime.[788] In very exceptional circumstances, searching without warrants may be allowed.[789] These functions are carried out by the Police. The National Prosecuting Authority (NPA) Act also endows the Director of the NPA with search and seizure powers.[790] With regard to forfeiting and tracing of property emanating from proceeds of crime, Asset Forfeiture Tracing Teams were introduced in accordance with the provisions of the POCA.

In the 2017 assessment, Botswana was rated partially compliant because it was noted that the definition of 'fiscal laws' was not included in the Corruption and Economic Crime Act (CECA) and therefore it was not clear if the Directorate on Corruption and Economic Crime had the powers to investigate ML/TF cases.[791] Another limitation was that there were no dedicated institutions responsible for timeously seizing, identifying, freezing, tracing and confiscating suspected and actual proceeds of crime.[792] It was also found that there was no dedicated office that coordinated the confiscation of the proceeds of crime.[793]

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[785] See also sections 63-70 POCA; United Nations Office on Drugs and Crime (UNODC) '*Seizure, confiscation and management of proceeds of crime in West Africa-Proposed Establishment of an Africa ARIN type network for West Africa*' UNODC Assessment Report (2014) 31.
[786] Section 252 CPA.
[787] 2002.
[788] Section 20 and 21 CPA.
[789] Section 22 CPA.
[790] Section 29 of the NPA Act 32 of 1998.
[791] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 155-157.
[792] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 155-157.
[793] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 155-157.

The Criminal Procedure and Evidence Act provides that financial offences may be dealt with simultaneously with other offences.[794] This means that even though there is no specific reference to ML/TF in the CECA, the Directorate has the power to investigate and refer ML/TF matters for prosecution. In fact, the Directorate has investigated ML/TF matters and no objections have been raised regarding its authority to do so.

With the enactment of PICA, persons convicted of illicit financial crimes, including money laundering, racketeering and other related matters, are restrained from benefiting from those crimes in terms of either money or property.[795] PICA established the Office of the Receiver, which is a public office.[796] This office is expected to confiscate and preserve the value of the property that has been placed in the possession of the Office of the Receiver under the authority of an order in terms of this Act or any other law.[797] PICA also established the Confiscated Assets Trust Fund in which all moneys collected under the Act must be paid.[798] In addition, all profits derived, or investments and sales made by the Receiver must also be paid into this Fund.[799] In 2017, it was reported that more than P250 000 000 has been recovered since 2015 when PICA commenced.[800]

It is therefore concluded that the limitation identified in 2017 may have been due to the lack of implementation of PICA, as the Office of the Receiver had just been set up.[801] In view of the amount of money that has been collected by the office so far, the improvements made are commendable. It is consequently submitted that Botswana is largely compliant with Recommendation 30.

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[794] Section 2(2) Criminal Procedure and Evidence Act.
[795] PICA Preamble.
[796] Section 46(1) PICA.
[797] Section 46(4) PICA.
[798] Section 68(1) PICA.
[799] Section 68(2) PICA.
[800] 'The Receiver recovers millions from proceeds of crime' *Weekend Post* 3 September 2018. http://www.weekendpost.co.bw/wp-news-details.php?nid=5557 (Accessed on 12 March 2020).
[801]'Office of the Receiver Explains Mandate' *the Daily News* 10 March 2019. http://www.dailynews.gov.bw/news-details.php?nid=47870 (Accessed 30 March 2020).

5.3.31 Recommendation 31: Powers of law enforcement and investigative authorities

This Recommendation stipulates that investigative entities should be empowered to access all the information relating to ML/TF and other predicate crimes to be used in investigations and prosecutions.[802] This means that all other institutions should cooperate with law enforcement and investigative authorities in the provision of information and records on ML/TF and predicate offences.[803] The investigative authorities should also be able to search any premises and for information and compel the production of records from any financial institution, DNFBPs and legal person.[804] This also entails the obtaining of witness statements and seizing of evidence.

In addition, in carrying out their investigative role, the investigative entities should employ an array of approaches ranging from communications interception, engaging in authorised secret operations, controlled delivery and access to computer systems.[805] Furthermore, these entities should have procedures in place to determine if both natural and legal persons hold bank accounts.[806] They should also be able to locate the property of the perpetrators without first seeking their cooperation or assistance in identifying such property.[807] Finally, FIUs should produce all the information when required to do so by the investigative entities.[808]

In South Africa, the Centre was set up to ensure that it shares information on AML/CFT with investigative entities.[809] It should also cooperate with investigative entities to

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[802] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 82.
[803] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 82.
[804] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 82.
[805] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 82.
[806] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 82.
[807] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 82.
[808] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 82.
[809] Section 3(2)(a) FICA.

combat ML/FT,[810] and investigative authorities are entitled to access information from the Centre.[811] The provision of information is however subject to the investigatory entity satisfying the Centre that the information is required for investigating a suspected case.[812] A written agreement should also be entered into prior to the release of the information to the investigative entity.[813] The Centre can also refer suspected cases to the investigatory authorities.[814]

In addition, the CPA provides for seizure and search of both natural persons and articles without a search warrant.[815] The CPA also provides for searching of premises and seizing of evidence found in the premises.[816] Section 21 of the CPA, however, enumerates instances in which a search can only be carried out with a search warrant. Police officers are also empowered to search without a search warrant any person, premises, vehicle, vessel, aircraft or any receptacle and seize any article found therein.[817] Furthermore, the National Prosecuting Act gives the Investigating Director and any authorised officer the power to inspect and search any premises, examine any object found in the premises, request for information and actually seize the object if it would be beneficial in the investigations.[818]

Botswana was rated partially compliant with this Recommendation in 2017, as PICA did not empower the investigative entities to undertake undercover operations and request information from FIA.[819] The other shortcoming was that investigative entities could not production orders *ex parte*, thus defeating the requirement that these institutions should be able to access the required and relevant information timeously.[820]

In Botswana, the Agency is the designated institution for dissemination of financial information to investigatory entities.[821] The Counter-Terrorism Act provides that

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[810] Section 4(b) FICA.
[811] Section 40(1)(a) FICA.
[812] Section 40(1)(a)(i) FICA.
[813] Section 40(4) FICA.
[814] Section 44 FICA.
[815] Section 23 CPA.
[816] Sections 24-26 CPA.
[817] Section 13(6) South African Police Service Act 68 of 1995.
[818] Section 29 National Prosecuting Act 32 of 1998.
[819] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 157-159.
[820] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 157-159.
[821] Section 6(1)(b) FI Act.

investigating officers may apply *ex parte* to the relevant court for the immediate freezing of funds and to stop and search the person suspected of committing, attempting to or facilitating terrorism activities.[822] The FI Act is silent on *ex parte* applications for the production of information from both legal and natural persons. However, both the High Court and Magistrates Court Rules have provisions for *ex parte* applications that can always be invoked by the investigative entities, in the same manner they do with other cases.[823]

Considering the foregoing, Botswana is largely compliant with Recommendation 31 but still falls short when it comes to ensuring that investigative authorities are able to conduct undercover operations. The difference between FICA and the FI Act is that FICA requires that the investigative authority should prove that the information required is necessary to carry out investigations. In addition, the information cannot be released without entering into a memorandum of agreement.

Botswana does not have these requirements and therefore there is arguably room for improvement with regard to the implementation of this Recommendation in Botswana.

5.3.32 Recommendation 32: Cash couriers

Recommendation 32 provides that all travellers across borders should declare and disclose money in their possession, including Bearer Negotiable Instruments (BNIs).[824] Cash couriers are 'natural persons who physically transport currency and BNI on their person or accompanying luggage from one jurisdiction to another.'[825] Different processes or procedures for declaration or disclosures may be adopted for the different types of transportation, either through mail or by cargo.[826] The objective of

[822] Section 17 Counter-Terrorism Act.
[823] See Order 29 (2) of the Magistrates' Court Rules and Order 12 rule (5)(1) of the High Court Rules on *ex parte* applications.
[824] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 83.
[825] FATF *International Best Practices: Detecting and Preventing the illicit cross-border transportation of cash and bearer negotiable instruments* (2010) 3.
[826] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 83.

this Recommendation is to curb ML/TF activities that occur through cross border transportation or BNIs.[827]

In addition, the declaration or disclosures can be done either orally or in writing, or can only be required for the travellers carrying amounts above the set limits.[828] However, declaring in advance should not be a requirement.[829] Where false declarations are perceived, further information should be sought from the travellers and commensurate sanctions should be imposed, whether criminal, administrative and/or even civil.[830] Recommendation 32 does not cover gold, precious metals and stones.[831]

Furthermore, countries should make sure that their FIUs have access to the information declared and/or disclosed at the borders.[832] This also means that cooperation between the immigrations and customs departments should be maintained for efficient implementation of this Recommendation.[833] Furthermore, relevant national authorities should have the power to confiscate for a reasonable period any currency or BNIs suspected of being intended for ML/TF or where false declaration is detected.[834] They should cooperate at regional and international levels to assist in instances of false disclosures and when there is a need to retain and seize proceeds of crime, in instances of false disclosure or in the case where the declaration is above the permitted threshold.[835]

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[827] Interpretive Note to Recommendation 32 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 106.
[828] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 83.
[829] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 83.
[830] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 83.
[831] Interpretive Note to Recommendation 32 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 108-109.
[832] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 83.
[833] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 83.
[834] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 84.
[835] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 84.

Countries should also ensure the strict security of the information collected through the declarations without inhibiting trade payments for goods and services between countries and free flow of capital. Travellers caught with physical cross border transportation of currency or BNIs related to ML/TF or predicate offences should be met with commensurate sanctions in accordance with Recommendation 4.

In South Africa, FICA stipulates that a report to the prescribed person should be submitted prior to the conveyance of cash exceeding the set threshold into and out of South Africa.[836] The authorised person should immediately forward a copy of the report to the Centre.[837] A certified copy of the report would be admissible as evidence in a court of law.[838] Persons who fail to report in terms of section 30(1) and (2) are guilty of an offence.[839] However, take note that section 30 is not in operation yet.

In order to enforce these measures, police officers or any authorized persons have search, seize and forfeiture powers.[840] The cash seized should be returned to the person if, after 90 days, there is no development in the investigation.[841] If the person is found guilty, the cash is forfeited to the government.[842] However, third parties' rights are protected if it is established that they had no knowledge that the cash would be conveyed in a manner contrary to the provisions of the Act.[843]

Regarding Botswana, the 2017 assessment indicated that although the country had met most of the requirements, it was still lagging in monitoring cash couriers, especially the monitoring of the transportation of BNIs.[844] It was noted that the Customs and Excise Duty Act (CEDA) did not include ML/TF in its scope and as a result, customs officers had no jurisdiction, including confiscation powers over ML/TF and other predicate crimes unless they were assisted by the Police.[845] In conclusion, it was

[836] Section 30(1) FICA.
[837] Section 30(2) FICA.
[838] Section 39 FICA.
[839] Sections 54-55 FICA.
[840] Section 70(1)-(3) FICA.
[841] Section 70(3) (a)-(d) FICA.
[842] Section 70(4) FICA.
[843] Section 70(6) FICA.
[844] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 159-161.
[845] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 159-161.

recommended that Botswana should consider strengthening this aspect by empowering the officers at the border to curb ML/TF and related predicate crimes.[846]

The FI (Amendment) Act now mandates the revenue service in accordance with the Customs and Excise Act to submit all records of transactions, including BNIs, that exceed the set threshold.[847] In addition, BNIs have been included in the Customs and Excise Act by subsuming them under the definition of 'goods' in the Act.[848] This means that the relevant officers are now empowered to search, seize and forfeit in accordance with the FI Act because the revenue service is designated as an accountable institution.[849]

It is submitted that Botswana's legislation is still weak in monitoring cash conveyance. Unlike in South Africa, in Botswana there are no explicit provisions on how cash conveyance above the prescribed limit should be reported by citizens, non-citizens and the customs officers. The FI (Amendment) Act is also silent in terms of when the revenue services should submit the report to the Agency. This means that it is possible that, by the time the report is submitted, many illicit activities might have gone undetected. In addition, there is no requirement to ensure security of information obtained during declarations and disclosures without inhibiting free flow of capital and trade payments between countries. Botswana is therefore rated partially compliant with Recommendation 32.

L. GENERAL REQUIREMENTS

5.3.33 Recommendation 33: Statistics

Recommendation 33 provides that countries should keep statistics relating to AML/CFT issues.[850] The information to be included in the statistics are those relating to STRs, ML/TF prosecutions and convictions, confiscated assets, mutual legal

[846] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 159-161.
[847] Sections 2 and 34(1) FI Act.
[848] Section 2 Customs and Excise (Amendment) Act 2018.
[849] Schedule 1 FI Act.
[850] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 85.

assistance and requests for international assistance.[851] Neither FICA nor the FI Act contain any explicit provisions requiring them to keep the information required by this Recommendation. It can be inferred, however, that the FIUs in these countries, as central units for collection of all AML/CFT related information, would have to keep all relevant statistics by implication.

Botswana was rated non-compliant with this Recommendation, as it did not have any legislation satisfying the requirements of this Recommendation.[852] In essence, Botswana's legislative framework did not mandate the keeping of statistics regarding STRs, confiscated assets, prosecuted cases and convictions as well as the number of requests for mutual and international assistance.[853] Unfortunately, no significant improvement has been made in this area since the last assessment. Botswana therefore retains the partially compliant rating.

5.3.34 Recommendation 34: Guidance and feedback

Recommendation 34 stipulates that financial institutions and DNFBPs should be given feedback and guidance with regard to AML/CFT processes and procedures relating to STRs and measures for the detection of ML/TF.[854] In South Africa, FICA provides that the Centre should provide guidance and feedback to accountable institutions to ensure compliance with the Act.[855] A number of guidance notes and directives with regard to the various FATF Recommendations have been issued by the FIC and some were referenced in this thesis. Botswana was rated partially compliant in 2017 because the supervisory authorities had not provided comprehensive guidance to the supervised institutions except for NBFIRA.[856]

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[851] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 85.
[852] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 86.
[853] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 86.
[854] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 86.
[855] Sections 4 (b) and (c) FICA.
[856] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 162-163.

The aforementioned limitation is an implementation issue, that is, it falls under the effectiveness assessment and not the technical scope covered by this thesis. However, with regard to technical compliance with this recommendation, the legislation requires supervisory bodies to provide feedback and guidance to the supervised entities.[857] The legislation is clear that both the Agency and the supervisory bodies should guide and give feedback to the supervised entities.[858] It is therefore submitted that Botswana is compliant with this Recommendation on a technical level, even though the implementation thereof is probably not on par.

SANCTIONS

5.3.35 Recommendation 35: Sanctions

This Recommendation provides that there should be commensurate sanctions imposed on both natural and legal persons who flaunt AML/CFT provisions, especially those in terms of Recommendations 6 and 8 to 23.[859] These sanctions should be either administrative, civil or criminal.[860] The Recommendation provides further that the sanctions should not be limited to the different regulated entities but should be extended to their executive and senior management as well.[861] The South African legislative framework on AML/CFT, as discussed throughout this thesis, imposes different sanctions with varying severity for non-compliance with the relevant Acts. It also imposes criminal, civil and administrative sanctions for both natural and legal persons.

Botswana was rated non-compliant with regard to this Recommendation in 2017, as it had no legislation covering proportionate sanctions against those who violate Recommendations 6 and 8.[862] As discussed above under the relevant headings, Recommendation 6 targets financial sanctions related to terrorism and terrorist financing while

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[857] Section 44(1)(b) FI Act.
[858] Sections 6 and 44(1) (b)FI Act.
[859] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 87.
[860] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 87.
[861] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 87.
[862] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 163-164.

Recommendation 8 speaks to NPOs.[863] Under the respective headings above, it was noted that Botswana is currently compliant with Recommendation 6 but only partially compliant with Recommendation 8.

As discussed under Recommendation 6 above, the Counter-Terrorism (Implementation of UNSC Resolutions) Regulations[864] provide for the immediate freezing of funds of the persons or organisations designated by the UN Security Council.[865] However, there are no penalties for failure to comply with these Regulations, which failure makes Botswana's position weak in enforcing measures to implement UN Security Council Resolutions. The Counter-Terrorism Act is also inadequate in that, even though different offences are clearly stated, the Act contains no corresponding sanctions.[866]

With regard to Recommendation 8, it was noted that some laws regulating NPOs, such as the Societies Act, are inefficient to curb ML/TF activities.[867] However, the Societies Act has not yet been amended to ensure compliance and application of proportionate sanctions for violations of the FI Act. Considering also the discussions from Recommendations 9 to 23 above on sanctions and the identified shortcomings thereof, Botswana is scored partially compliant with Recommendation 35.

INTERNATIONAL COOPERATION

5.3.36 Recommendation 36: International instruments

This Recommendation provides that countries should ratify and implement conventions on ML/TF.[868] These conventions include the Vienna Convention, the Palermo Convention, the UN Convention against Corruption as well as the Terrorist Financing conventions.[869] South Africa has ratified the international conventions and has

[863] See Recommendations 6 and 8 FATF Recommendations.
[864] 2018.
[865] Regulation 7(1) Counter-Terrorism (Implementation of UNSC Resolutions) Regulations.
[866] For instance, there is no penalty for violation of Regulations 19(1) and (2) of the Counter-Terrorism (Implementation of UNSC Resolutions) Regulations.
[867] See discussion on Recommendation 8 above.
[868] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 88.
[869] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 88.

incorporated them in domestic legislation on ML/TF. For instance, the country has ratified and implemented some provisions of the Palermo Convention,[870] the Terrorist Financing Convention 2003,[871] and the Vienna Convention on 14 December 1998. South African legislation also provides for the implementation of the UN Security Council Resolutions.[872] In this regard, FICA and POCDATARA provide for implementation of UN Security Council Resolutions after being notified by the Minister and the President, respectively.[873]

Botswana was rated partially compliant with this Recommendation because although it had ratified the four conventions, it did not incorporate the conventions' provisions fully.[874] In particular, Botswana had no provisions criminalising proliferation of weapons of war in relation to ML/TF.[875] In addition, the laws did not recognise that terrorism could be committed by an individual and therefore individual terrorism was not criminalised in Botswana.[876]

In response, therefore, the FI Act was amended to include regulation and monitoring of the financing of terrorism and proliferations of arms of war as well.[877] The laws have also been amended to criminalise acts of terrorism committed by individuals.[878] Botswana has moreover amended some of the statutes on predicate offenses to align the country to the requirements of the international conventions.[879] Finally, the Counter-Terrorism Regulations for implementation of the UN Security Council Resolutions were also passed.[880] In other words, the shortcomings identified in the 2017 assessment have been adequately rectified and Botswana is thus rated compliant with Recommendation 36.

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[870] February 2004.
[871] May 2003.
[872] See the FICA long title.
[873] Section 26A-26C FICA; section 25 POCDATA.
[874] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 164.
[875] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 164.
[876] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 164.
[877] Section 6(1)(b)-(c) FI Act; see also the discussions on Recommendations 6-7 above.
[878] Section 7(b) Counter-Terrorism (Amendment Act), 2018.
[879] For instance, the inclusion of the definition of 'funds' in the Counter-Terrorism (Amendment) Act to align the definition with the FATF definition; Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 2018; Arms and Ammunition Act.
[880] 2018.

5.3.37 Recommendation 37: Mutual legal assistance

This Recommendation mandates countries to have efficient and robust mutual legal assistance mechanisms on issues relating to ML/TF and other predicate crimes.[881] It also provides that there should be a designated authority that receives, transmits and monitors all requests for mutual legal assistance.[882] Requests should be monitored through a case management system.[883] Countries are mandated to ensure that mutual legal assistance is not unreasonably denied, including due to confidentiality restrictions or on the grounds that the matter was deemed a fiscal matter.[884]

In addition, the Recommendation mandates countries to promote the integrity of all requests by keeping them confidential in accordance with national laws and regulations.[885] Dual criminality, same categorisation of the offence or similar terminology should not be a pre-requisite for countries to extend mutual legal assistance to one another.[886] Investigative techniques and the collaboration of investigative authorities and law enforcement entities available at national level should also be extended to mutual legal assistance, if required.[887]

In South Africa, the International Co-operation in Criminal Matters Act stipulates measures for international cooperation in dealing with criminal activities.[888] Foreign requests are considered by the Director General (Justice) and ultimately approved by the Minister.[889] The assistance includes the examination of witnesses.[890] In addition, FICA contains provisions for exchanging information with like bodies with regard to

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[881] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 89.
[882] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 89.
[883] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 89.
[884] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 89.
[885] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 89.
[886] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 89.
[887] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 89.
[888] Act 75 of 1996.
[889] Section 7 ICCMA.
[890] Section 8 ICCMA.

ML/TF matters.[891] However, the provisions in both statutes fall short of the requirements of this Recommendation.

Botswana was rated largely compliant with this Recommendation in 2017.[892] The shortcomings were that Botswana law did not empower law enforcement and investigative officers to extend the investigative techniques and mechanisms used nationally to mutual legal assistance.[893] Furthermore, there was no law mandating Botswana to afford mutual legal assistance requests confidentiality.[894] In addition, the fact that dual criminality was required by Botswana to carry out requests meant that Botswana could not effectively extend mutual legal assistance.[895]

The FI Act provides for mutual cooperation and coordination on financial crimes between Botswana and other governments.[896] FIA is the designated body that can share information on money laundering with like institutions in other countries.[897] This is supported by the other statutes discussed in Chapter 4 above.[898] For instance, the Mutual Assistance in Criminal Matters Act was promulgated to foster and procure international cooperation in criminal matters, including search and seizure by either Botswana or a foreign government.[899]

Further, the Mutual Assistance in Criminal Matters (Amendment) Act provides that requests should be kept confidential.[900] However, the law has not been amended to ensure that mutual legal assistance is carried out in the same manner as the cooperation between national institutions to expedite responses to requests. Nor is there an obligation to use a case management system for monitoring of requests. Although the law lays out a procedure for extending mutual assistance, there are no timeframes for providing the requested assistance.

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[891] Section 3(2)(b) FICA.
[892] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 164-166.
[893] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 164-166.
[894] ESAAMLG *Botswana Mutual Evaluation* Report (2017) 164-166.
[895] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 164-166.
[896] FI Act Preamble.
[897] Section 6(1) FI Act.
[898] See for instance section 46 Corruption and Economic Crime Act; section 20 PSCA.
[899] Section 11 Mutual Assistance in Criminal Matters Act.
[900] Section 32A Mutual Assistance in Criminal Matters (Amendment) Act 2018.

Commenting on the murder case of Mr Vusi Mhlanzi, a South African business man who was suspected to have been killed by his business associate, Mr Bakang Seretse, a Botswana national, who is also before the Botswana courts for several counts on money laundering, the Gauteng Police Head of Corporate Communication, Brigadier Mathapelo Pieters said:

> 'Should a need arise at any stage of the investigation for collaboration between the SAPS and [the] law enforcement authorities of another country, the appropriate processes will be followed. There have been no arrests thus far'.[901]

From the above statement it is clear that the Head of Corporate Communications of a South African police department was confident that, should there be a need for collaboration, it would not be difficult for the Government of Botswana to come on board. The limitation, however, is that the law in Botswana does not provide for efficient responses to mutual legal assistance requests. This supports the conclusion that Botswana therefore retains the status of being largely, instead of fully, compliant with Recommendation 37.

5.3.38 Recommendation 38: Mutual legal assistance: Freezing and confiscation

Recommendation 38 provides that there should be mutual legal assistance between countries for the identification, seizure and freezing of property or proceeds or instrumentalities intended or used for ML/TF and other predicate offences.[902] Where it is impracticable to confiscate property or funds intended to be used or used for ML/TF, assets of corresponding value should be seized.[903] This means that countries should cooperate with regard to seizure, freezing and confiscation procedures in place as well as monitoring mechanisms pertaining to confiscated property and/or funds.[904]

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[901] 'Murder trail leads to Botswana' *Mail and Guardian* 18 February 2018. https://mg.co.za/article/2018-02-16-00-murder-trail-leads-to-botswana/ (accessed 24 March 2020).
[902] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 90.
[903] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 90.
[904] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 90.

In accordance with national laws, countries should allow mutual legal assistance for non-conviction requests, for instance, in cases where the perpetrators have died or their whereabouts are unknown.[905] In addition, sharing of confiscated property or funds should be allowed where there have been concerted efforts by countries, whether directly or indirectly, in confiscating property or funds.[906] Countries are employed to consider maintaining a forfeiture fund where the proceeds or part of it could be deposited for projects of national interest.[907]

As discussed under the previous Recommendation, the ICCA regulates mutual assistance in South Africa. It stipulates measures for international cooperation in dealing with criminal activities. The Act enables reciprocal assistance for obtaining evidence between countries.[908] It also provides that foreign documentation acquired pursuant to the Act is admissible in court proceedings.[909] The mutual assistance for enforcement of confiscation orders is also provided for and includes the sharing of proceeds of the confiscated property between states.[910] Furthermore, the ICCMA permits cooperation in the enforcement of restraint orders.[911] The provisions of FICA, in so far as they are mandated to share information with comparable authorities in foreign jurisdictions, are also applicable here.

The limitation noted during the 2017 assessment was that Botswana had no provisions for requesting corresponding value in lieu of confiscated property or funds used or intended to be used for ML/TF activities.[912] The other limitation was that the law made no provision for non-conviction based mutual assistance requests.[913] Furthermore, the

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[905] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 90.
[906] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 90; Interpretive Note to Recommendation 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 110.
[907] Interpretive Note to Recommendation 38 FATF *International Standards on Combating Money laundering and financing of terrorism- the FATF Recommendations* (2012-2019) 110.
[908] Section 7-8 International Co-operation in Criminal Matters Act.
[909] Section 30 International Co-operation in Criminal Matters Act.
[910] Section 19-22 International Co-operation in Criminal Matters Act.
[911] Section 23-26 International Co-operation in Criminal Matters Act.
[912] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 166-167.
[913] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 166-167.

law did not permit the sharing of confiscated property.[914] Botswana was accordingly rated partially compliant.

In response to the assessment, the Mutual Assistance in Criminal Matters Act was amended to give the Directorate of Public Prosecutions the power to determine on what grounds mutual assistance may be extended to other countries. This amendment therefore lifted the restriction that mutual assistance could not be extended in non-conviction matters.[915]

The law now also permits the sharing of confiscated property with similar authorities in other countries.[916] With regard to requesting for property of correspondent value, PICA gives the Office of the Receiver the power to do anything necessary to take control of the property in accordance with PICA.[917] This makes it possible for the Office of the Receiver to request for corresponding property in preserving the value of the property to be confiscated. Considering the progress made, Botswana is now rated compliant with Recommendation 38.

5.3.39 Recommendation 39: Extradition

As per Recommendation 39, countries are required to ensure that the implementation of ML/TF extradition requests is done efficiently and effectively.[918] This means, firstly, ensuring that the laws must permits extradition; secondly, ensuring that extradition requests are implemented timeously; thirdly, prioritizing extradition requests; and finally, eliminating unnecessary factors inhibiting the implementation of ML/TF extradition requests.[919]

In addition, countries should have the option to either extradite their citizens or, where it is prohibited by national law, timeously assist the requesting country with all the

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[914] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 166-167.
[915] Section 6 Mutual Assistance in Criminal Matters (Amendment) Act, 2018.
[916] Section 30A Mutual Assistance in Criminal Matters (Amendment) Act, 2018.
[917] Section 46(5) PICA.
[918] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 91.
[919] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 91.

information and records to allow it to prosecute the offence as stipulated in the request.[920] Furthermore, where dual criminality is required for extradition, it should be deemed to be waived for ML/TF offences.[921] Finally, countries should employ seamless procedures and processes for extraditions.[922]

The South African Constitutional Court in *President of the Republic of South Africa v Quagliani* defined extradition as follows:

> 'It involves three elements: acts of sovereignty on the part of two States; a request by one State to another State for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial and sentencing in the territory of the requesting State. Extradition law thus straddles the divide between State sovereignty and comity between States and functions at the intersection of domestic law and international law.'[923]

South Africa extends extradition and mutual legal assistance in terms of its Extradition Act[924] as well as the Mutual Legal Assistance in Criminal Matters Act. The country has entered into extradition agreements with several countries to facilitate extraditions and requests for mutual legal assistance.[925] The country has also signed regional and international conventions on extradition and mutual legal assistance.[926] For instance, it acceded to the Council of Europe's Convention on Extradition in 2003 and ratified the SADC Protocols on extradition.[927]

The ESAAMLG Mutual Evaluation sums up South Africa's extradition environment as follows:

> 'South Africa's extradition framework is comprehensive and flexible. The Extradition Act provides for extradition in respect of extraditable offences namely offences

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[920] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 91.
[921] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 91.
[922] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 91.
[923] *President of the Republic of South Africa v Quagliani* 2009 2 SA 466 (CC) para 1.
[924] Act 67 of 1962.
[925] Justice and Constitutional development website on South Africa's international obligations. Available at https://www.justice.gov.za/ilr/mla.html.
[926] Justice and Constitutional development website on South Africa's international obligation.
[927] Justice and Constitutional development website on South Africa's international obligations.

> in both states that are punishable with a sentence of imprisonment for a period of six months or more. This would include the money laundering offences and terrorist financing offences. There is no requirement for a treaty, and South Africa can also extradite its own nationals.'[928]

The Extradition Act stipulates processes and procedures to be adhered to when a request for extradition is received from other countries.[929] Unlike Botswana, dual criminality is not required for South Africa to attend to extradition requests.[930] It is required, however, that the offence should be extraditable.[931] Although other extradition requests may be denied for political reasons, extradition requests for terrorism and associated matters cannot be declined.[932]

Botswana was rated partially compliant with regard to this Recommendation in 2017 because it did not allow the extradition of its citizens, while the law also did not permit the timeous extradition, upon request, of fugitive criminals to the requesting country.[933] The other limitation was that requesting the extradition of a fugitive criminal in Botswana involved complex procedures, as the arrest of the fugitive criminal required endorsement of a magistrate as opposed to having seamless and special requirements for releasing fugitive criminals.[934]

The law has not been amended to meet the limitations stipulated above, which means that Botswana is still partially compliant when it comes to this Recommendation.

5.3.40 Recommendation 40: Other forms of international cooperation

Recommendation 40 requires that competent authorities are enabled to cooperate with like entities in other countries when it comes to ML/TF and other predicate

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[928] FATF *Mutual Evaluation Report of South Africa* (2009) 13.
[929] See the general provisions of the Extradition Act.
[930] Section 1 Extradition Act; Mudorch Watney 'A South African Perspective on Mutual Legal Assistance and Extradition in a Globalized World' (2012) 15 *PER / PELJ* 297/569.
[931] Mudorch Watney 'A South African Perspective on Mutual Legal Assistance and Extradition in a Globalized World' (2012) 15 *PER / PELJ* 397/569.
[932] Section 22 Extradition Act.
[933] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 167-168.
[934] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 167-168; see also sections 8-12 Extradition Act.

crimes.[935] The information exchange should either be spontaneous or on request. The cooperation of the competent authorities should be premised on the legal basis and they should have been authorised to cooperate with other competent foreign entities.[936] In addition, the competent authorities should have a prioritisation system for execution of requests as well as handle requests with the utmost confidentiality and the information only for the relevant purpose.[937]

Countries are encouraged to allow the exchange of information amongst competent countries and where national laws dictate that formal instruments should be signed prior to cooperation, it should be done without undue delay.[938] Requesting entities should also provide feedback with regard to the assistance received as well the usefulness of the information. Countries should eliminate all barriers for exchange of information. The fact that the request is deemed a fiscal matter or subject to the secrecy laws of the financial institutions and DNFBPs should not prohibit exchange of information. In addition, the fact that there is an ongoing or impending enquiry or investigation in the requested country should not impede exchange of information. The fact that the requesting comparable authority is different from the requested one should also not prohibit exchange of information.

Information exchanged should be protected in the manner that both competent authorities usually protect their information at a bare minimum. Competent entities should also conduct enquiries for external counterparts in the manner they would nationally. Furthermore, cooperation should be allowed between FIUs, financial supervisors, law enforcement authorities and non-counterparts.[939] FIUs should provide feedback to other FIUs with regard to the information exchanged and the outcome of the findings made based on the information received.[940] FIUs should be empowered to share

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[935] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 92.
[936] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 92.
[937] F FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 92.
[938] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 92.
[939] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 92.
[940] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 93.

information obtained either directly or otherwise by the FIU.[941] The FIUs should also share any other information that they are able to obtain at national level, subject to the reciprocity principle.[942]

With respect to the exchange of information between financial supervisors, these too should have a legal basis for coordinating with foreign comparable financial entities for the exchange of information on financial institutions supervision regarding AML/CFT.[943] They should be allowed to share with their foreign counterparts information available to them.[944] They should exchange regulatory, prudential and AML/CFT information of the regulated financial institutions.[945]

The financial supervisors should also be allowed to conduct inquiries for their foreign counterparts or, where possible, facilitate the way for the foreign counterpart to do so.[946] Financial supervisors should notify and seek consent from the requested financial supervisor prior to any dissemination of the exchanged information unless the requesting financial supervisor is under a legal obligation to share the information, in which case it should also be communicated to the requested financial supervisor.[947]

Recommendation 40 further provides that there should be cooperation between law enforcement authorities.[948] The law enforcement authorities should exchange with their foreign counterparts domestically available information regarding ML/TF and predicate offences.[949] They should also conduct inquiries in consonance with national

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[941] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 93.
[942] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 93.
[943] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 93.
[944] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 93.
[945] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 93-94.
[946] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 94.
[947] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 94.
[948] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 94.
[949] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 94.

law on behalf of their foreign counterparts.[950] The law enforcement authorities should moreover participate in joint investigative initiatives as and conclude bilateral and multilateral agreements where required.[951] Countries should also allow competent authorities to share information with non-counterparts, provided the requirements discussed above are met and that the reasons why the information is sought are provided.[952]

The position in South Africa with regard to all forms of cooperation with other countries has been mentioned several times across this thesis. For example, cooperation is found in FICA as one of its objectives.[953] The other forms of cooperation are discussed above under Recommendations 36 to 39.

Botswana was rated partially compliant with regard to this Recommendation in 2017.[954] The limitations found included that competent entities had no powers to exchange information with other like entities in foreign countries.[955] Another limitation related to the fact that there were no adequate measures in place to protect the exchanged information against misuse and ensuring its confidentiality.[956] In addition, it was noted that nothing prohibited competent authorities from arbitrarily refusing to share information with foreign counterparts.[957] Finally, competent authorities were prohibited from exchanging information with non-counterparts.[958]

FIA is the designated FIU in Botswana and the place where information relating to ML/TF and financing of proliferations of arms of war is centralised. FIA is also tasked with receiving and disseminating information, but not all competent authorities in the country are empowered to do the same.[959] In response to these shortcomings, one of the aims of the Mutual Assistance in Criminal Matters (Amendment) Act is to ensure

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[950] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 94.
[951] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 94.
[952] FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020) 94-95.
[953] Section 3 FICA.
[954] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 168-173.
[955] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 168-173.
[956] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 168-173.
[957] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 168-173.
[958] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 168-173.
[959] FI Act Preamble; sections 6(1) FI Act.

cooperation in criminal matters amongst countries.[960] This means that other competent authorities can now cooperate with comparable authorities in other countries, as there is no provision hindering them from doing so.

In addition, with regard to refusals to cooperate, the law now provides that the Directorate on Public Prosecutions should consider each case or request on its own merits.[961] The restrictions regarding refusals as contained in the Act are not onerous and thus it is possible to give assistance conditionally.[962] It is therefore submitted that Botswana is now largely compliant with Recommendation 40.

5.4 Other observations

5.4.1 Establishment of the FIUs

In South Africa, the FIC is established as a juristic person and does not form part of the public service.[963] This means that the FIC can operate as it deems fit, including acquiring and disposing of property; insuring itself; entering into agreements with other departments and foreign entities; can sue and be sued; and can do anything associated with its objectives under the Act.[964] In contrast, the FIA in Botswana is established as a public service entity and therefore is subject to the Public Service Act.[965] It is submitted that the structure adopted by South Africa gives the FIC some level of independence to carry out its objectives efficiently and eliminates bureaucratic red tape to a large extent. This approach is therefore arguably preferable to the approach adopted in Botswana.

5.4.2 Monitoring orders

In South Africa, FICA stipulates that a judge may be appointed by the Minister of Justice to issue an order to an accountable institution to report, on agreed terms, to the

[960] Section 4(k) Mutual Assistance in Criminal Matters (Amendment) Act, 2018.
[961] Section 32A Mutual Assistance in Criminal Matters (Amendment) Act, 2018.
[962] Sections 5 and 6 Mutual Assistance in Criminal Matters (Amendment) Act 2018.
[963] Section 2 FICA.
[964] Section 5 FICA.
[965] Section 3(3) FIC (Amendment) Act.

Centre all transactions of an identified person or entity where it is suspected that that person or entity may be transferring or receiving funds associated with money laundering and/or terrorist financing.[966] This provision essentially contemplates the monitoring of an identified person or entity's account movements to determine if they are involved in money laundering or terrorism financing.

This monitoring mechanism can serve as a way to prevent ML/TF before it actually happens or to deal with it at an early stage. In contrast to the South African approach, the FI Act currently does not have any provisions pertaining to monitoring orders. Instead, monitoring order provisions are contained in PICA.[967] In terms of PICA, the application for a monitoring order is made *ex parte* and is heard *in camera*.[968] Unlike in South Africa, the application for the monitoring order is made by the investigator to the court and not by a Minister who would have appointed a particular judge to hear matters in terms of FICA.[969]

The monitoring of a person or entity's account is only allowed for a maximum period of three months.[970] This means that investigators and prosecutors may invoke the provisions of the PICA in money laundering cases and related matters. The same cannot be said of terrorism or proliferation financing because PICA's objective is to prevent persons from benefiting from proceeds of crime. It is submitted that it may be difficult to apply monitoring orders in cases of terrorism and proliferation financing because proceeds in those cases do not always emanate from illegitimate sources.

5.4.3 Penalties

In South Africa, the penalties in FICA for non-compliance with several provisions of the Act tend to be more stringent compared to those in the FI Act in Botswana. The higher penalties and sanctions in South Africa may dissuade perpetrators from committing financial crimes. Secondly, it has been noted that the FI Act, when compared

[966] Section 35 FICA.
[967] Section 53-56 PICA.
[968] Section 53(1)-(4) PICA.
[969] Section 53(1) PICA.
[970] Section 54(1) PICA.

to FICA, does not impose criminal sanctions on accountable institutions.[971] Instead, the FI Act only imposes civil and administrative sanctions. It is submitted that the lack of criminal sanctions, such as civil imprisonment, may not be deterrent enough for accountable entities to discharge their functions effectively in combating ML/TF and related matters.

5.4.4 Organisation of the laws

Both jurisdictions have several pieces of legislation aimed at combatting ML/TF and related matters. The laws are spread across the different government departments, but both countries depend on cooperation between the different departments to ensure that ML/TF is curtailed. It is submitted that this approach may not be the most ideal mechanism to effectively combat ML/TF issues. This is so because having to refer to different pieces of legislation is not user friendly and some important legislation may be missed if one is not aware of them.

It is suggested that a compendium of AML/CFT laws would effectively enhance the current status and ensure that all laws relating to combating ML/TF are in one place, which would go a long way towards ensuring that all stakeholders can easily refer to the relevant legislation and there would not be any leakages in terms of missing out on the applicable legislation.

5.4.5 Botswana's lack of compliance

As established throughout this thesis, financial crime is volatile and keeps the global community on its toes. Not only that, but it also calls for AML/CFT measures and controls to constantly change to meet the challenges posed by ML/TF. This is also the reason why an international organisation such as the FATF consistently updates the FATF Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems. For instance, in 2019 the assessment methodology was updated and in November 2020 it was updated yet again,

[971] See for instance section 17 of the FI Act- sanctions imposed for failure to report suspicious transactions.

introducing some of the compliance requirements and obligations which were not there previously.

This means that in 2017, when Botswana was assessed, the country was assessed against different FATF compliance requirements that have also been updated twice since then. This therefore brings in the arguments made in Chapter 2 that Botswana, like most African developing countries, is experiencing challenges with complying completely with the FATF standards, which are constantly evolving. This is so, as also noted in Chapter 2, because compliance is not cheap; it is expensive to do a complete review of all legislation with the aim to comply with the FATF requirements, which requirements could change in future – thus rendering the country non-compliant once more. As a result, it is submitted that blacklisting countries, as the FATF does, is not ideal, especially where it is clear that the country is willing and continues to make strides towards compliance, as is the case with Botswana.

In addition, it is worth highlighting that most of the AML/CFT legislative amendments in Botswana were made between 2017 and 2019. However, as can be noted from the discussions above, the amendments were not robust enough to ensure compliance with the FATF Recommendations. This is because there is lack of expertise in this area in Botswana. AML/CFT is a very specialised and technical area that requires a certain set of skills to fully comprehend and to ensure that the necessary amendments are made. This is a challenge that most African countries are currently facing, and Botswana is no exception.

5.5 Conclusion

This chapter provided an overview of the South African AML/CFT regulatory framework and it was noted that POCA and FICA are the key statutes in this regard. These two statutes contain control measures, offences, sanctions and penalties that together are aimed at combating ML/TF in South Africa. It was noted that South Africa was last assessed in 2009, both by the FATF and the ESAAMLG. The country was also assessed in 2019, and the findings of this most recent assessment are expected to be published sometime in late 2020. In terms of the FATF report of 2009, it was noted

that South Africa has made progressive strides towards complying with the FATF Recommendations. It is yet to be seen how favourable the outcome of the 2019 assessment will be.

The chapter then embarked on a comparative study entailing a three-tier assessment in that Botswana was weighed against the South African legislation and the FATF Recommendations. The findings showed that South Africa has indeed made significant positive progress to comply with the FATF Recommendations. It was noted, however, that South Africa still has areas where it is lagging behind, such as a lack of pronouncements on how to deal with citizens from high risk jurisdictions. The FATF Recommendations provide that citizens from high risk countries should be subjected to enhanced and robust due diligence procedures. Therefore, a lack of regulatory provisions on this very important recommendation may compromise South Africa's financial system thus exposing it to ML/TF risks.

The assessment revealed that Botswana was not far off from complying with the technical FATF Recommendations in 2017. It was also noted that since the assessment in 2017, Botswana has made significant traction as evidenced by the promulgation of new laws and the amendment of existing statutes with a view to move towards compliance with the FATF Recommendations and also to ensure that Botswana is not seen as a haven for financial crimes. These efforts also have the potential to assure investors that Botswana is open to conduct business ethically and in a transparent manner.

The findings showed that Botswana has fewer non-compliant scores today than was the case after the 2017 assessment and that most of the scores that were rated partially compliant have, in my assessment, moved to largely compliant. This shows a steady movement towards compliance with the FATF Recommendations. As argued by some scholars, and as discussed in Chapter 2 above, compliance is expensive, but Botswana has made considerable efforts to be at par with other developing countries.

In fact, in some instances, Botswana has better provisions for combating ML/TF than South Africa. It is submitted that Botswana is faring well when compared to South Africa. It is not completely behind and as seen in the discussions above, in some areas

it has stronger provisions than South Africa. However, Botswana should continue to strive towards full compliance with the FATF Recommendations.

The next chapter will conclude this study while proffering recommendations for legislative reform to align Botswana's AML/CFT regulatory framework more closely to the FATF Recommendations.

Chapter 6
Recommendations and conclusions

6.1 Introduction

Money laundering, the financing of terrorism and proliferation financing are seen as threats to international financial security and integrity.[1] It has also been established that these crimes are very often transnational in nature. This has been exacerbated by technological advancements that link the international community, thus making it also easier for perpetrators to adopt sophisticated techniques.

The global community has therefore committed to respond to the threats posed by these financial crimes.[2] The response has been led by different international and regional institutions such as the FATF, the ESAAMLG, the World Bank, the IMF and the African Development Bank. The FATF is, however, recognised and accepted as the leading international organisation that has promulgated effective and comprehensive standards or recommendations on the prevention and suppression of money laundering, terrorism financing and proliferation financing.

These standards are accepted as the yardstick against which countries and the international financial system measure themselves in their quest to suppress and prevent money laundering, terrorism financing and proliferation financing.[3] The key strategy has been to ensure that all jurisdictions adopt and implemented the FATF recommendations to pursue uniformity in fighting money laundering, terrorism financing and proliferation financing.[4]

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[1] Louis De Koker & Nicola Jentzsch 'Financial inclusion and financial integrity: aligned incentives?' (2013) *World Development Journal* 4.
[2] Louis De Koker 'Money laundering and suppression of financing terrorism' (2006) *Journal of Financial Crime* 3.
[3] Paul Allan Schott 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) III-3; AfDB Bank Group Strategy for the prevention of Money Laundering and Terrorism Financing in Africa (May 2007) 8; Julie Walters *Anti-Money Laundering and Counter-Terrorism Financing Across the Globe: A Comparative Study of Regulatory Action Australian Institute of Criminology Report* (2011) xi-xii.
[4] Louis De Koker et al 'Implementing FATF standards in developing countries and financial inclusion: Findings and guidelines' World Bank Report (2008) 2.

International cooperation and coordination are key drivers in securing success in combating illicit financial flows.[5] It is also axiomatic that the international financial system should play a role in the success or failure of efforts against money laundering, terrorism financing and proliferation financing.[6] This sector is therefore required to actively participate in ensuring that it does not become a conduit for financial crimes.[7] With a view to foster and promote financial inclusion for marginalised groups, most countries have moved towards mobile financial services to also lessen the threat of cashless societies being used for money laundering, terrorism financing and proliferation financing.[8]

In light of the foregoing, countries such as South Africa started re-examining their legislation in a quest to meet international standards. The question of this study was whether Botswana's money laundering, terrorism financing and proliferation financing legislative regime is adequately crafted to curb these financial crimes. This investigation consequently sought to assess the extent to which Botswana's legislative framework on money laundering, terrorist financing and proliferation funding is on par with the international standards in effectively combating these activities. This broad question was answered throughout a number of chapters, summaries of which are provided in the following part. After summarising the conclusions reached in the different chapters, I provide specific recommendations as far as Botswana's law is concerned.

6.2 Chapter summaries

Chapter 1 introduced the study. The over-arching objective of the study is to determine whether Botswana's current legislation effectively ensured control and regulation of AML/CFT in Botswana. Money laundering and terrorism financing as well as other financial crimes disrupt the world economic and social order and therefore urgent attention is required to suppress these activities. In response to the debilitating impacts

[5] Humphrey P B Moshi 'Fighting Money Laundering: The Challenges in Africa' (2007) Paper 152 *Institute for Securities Studies* 2.
[6] Loius De Koker 'Money laundering and suppression of financing terrorism' (2006) *Journal of financial crime* 4.
[7] Loius De Koker 'Money laundering and suppression of financing terrorism' (2006) *Journal of financial crime* 4.
[8] Loius De Koker 'Money laundering and suppression of financing terrorism' (2006) *Journal of financial crime* 4.

of illicit financial flows the world over, countries such as South Africa have revisited their legislation to comply with the set international standards and principles on AML/CFT.

Chapter 2 introduced the concepts of money laundering, financing of terrorism and proliferation financing. It brought to the fore the definitions and the different ways through which money is laundered as well as the economic and social impacts of money laundering. It was noted that several money laundering definitions have been put forward. The common thread on the definition of money laundering is that 'dirty' money is 'sanitised' so that it could appear as if the money originated from legitimate sources.

It was also noted that money is laundered through three stages. The first stage is known as placement. This is the point of entry or when the illicit proceeds are introduced into the financial system.[9] The second stage is called layering, which entails a process whereby attempts are made to distance the proceeds from the criminal activities as far as possible.[10] This basically means to separate the 'dirty money' from its original source.[11] The last stage is known as integration, which entails a re-introduction of the funds into the legitimate economy.[12]

The financing of terrorism, on the other hand, is the financing of terrorist acts. However, legislation in countries such as Botswana have not defined terrorist financing but have only enumerated instances that would be considered as acts of terrorism, which includes threatening to endanger the life, physical integrity or freedom of any person or group of persons;[13] the likelihood of and/or causing the death or serious injury to

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[9] Directorate on Corruption and Economic Crime (DCEC) Botswana website. http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/Money-Laundering/What-is-Money-Laundering/ (accessed 17 June 2018); J.P Straub 'The Prevention of E-Money Laundering: Tracking the Elusive Audit Trail' (2001-2002) *Suffolk Transnational Law Review* 25.

[10] Jackson Madzima 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies 2.* www.issafrica.org (accessed 30 June 2018).

[11] J.P Straub 'The Prevention of E-Money Laundering: Tracking the Elusive Audit Trail' (2001-2002) *Suffolk Transnational Law Review* 25.

[12] Jackson Madzima 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies 2.* www.issafrica.org (accessed 30 June 2018).

[13] Section 2 (a) Counter-Terrorism Act.

any person;[14] threatening to or causing damage to natural resources, environmental or cultural heritage;[15] the disruption of any public or essential service;[16] the use and transportation of explosives, lethal devices and NBC weapons;[17] and causing or threatening to cause damage to a ship, vehicle, fixed platform, nuclear facility, aircraft or aerodrome.[18] Terrorism financing, then, would entail any funding channelled towards, or in support of, such terrorist activities. The lack of a definition could possibly result in a constitutional objection in criminal trials, since the Constitution of Botswana requires that a person should be tried for a criminal act defined by law.

With regard to proliferation financing, it was noted that the FATF defines it as follows:

> 'The act of providing funds or financial services which are used, in whole or in part, for the manufacture, acquisition, possession, development, export, trans-shipment, brokering, transport, transfer, stockpiling or use of nuclear, chemical or biological weapons and their means of delivery and related materials (including both technologies and dual use goods used for non-legitimate purposes), in contravention of national laws or, where applicable, international obligations.'[19]

The chapter revealed that, internationally, both money laundering and terrorism financing were criminalised but there was no consensus in criminalising proliferation financing. In addition, although these concepts differ in certain respects, they are interrelated. For instance, both thrive on secrecy and concealing the true sources, usage or destination of the proceeds and are all transnational in nature.

The different typologies of financial crimes were also discussed. Typologies are the various methods through which money is laundered or used for funding terrorism or proliferation. These include the use of both informal and formal financial services platforms; cash couriers and cash smugglers; money services businesses (MSB) and

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[14] Section 2 (b) Counter-Terrorism Act.
[15] Sections 2 (c) and (m) Counter-Terrorism Act.
[16] Section 2 (d) Counter-Terrorism Act.
[17] Section 2 (f) and (g) Counter-Terrorism Act. NBC weapon is defined in Section 2 of the Financial Intelligence Act as (a) nuclear explosive device as defined in the Nuclear Weapons (Prohibition) Act; (b) biological or toxin weapons as defined in the Biological and Toxin Weapons (Prohibition) Act; or (c) chemical weapons as defined in the Chemical Weapons (Prohibition) Act.
[18] Sections 2 (i), (j), (k) and (l) Counter-Terrorism Act.
[19] FATF *Combating proliferation Financing: A Status Report on Policy Development and Consultation* (February 2010) 5.

informal value transfer systems (IVTS) such as *hawala* and *mukuru*; trade-based money laundering; internet-based payment systems, like virtual currencies; non-profit organisations; correspondent banking; and casino and gambling activities.

The chapter noted that the sources of funds used in money laundering and terrorism and proliferation financing are diverse and include funds from drug and human trafficking, blood diamonds, proceeds obtained from the sale of stolen property and corruption. Money laundering and terrorism financing have acute economic and social effects. These financial crimes undermine the global financial order, erode public confidence of the financial systems and lead to poverty. Such consequences are particularly acute in developing countries and especially African countries. The challenges faced by especially African countries in implementing AML/CFT measures include corruption, a shortage of expertise and a lack of funds to foster compliance and effective implementation.

Chapter 3 was organised into two main parts and focused respectively on the international and regional responses and interventions with regard to illicit financial crimes. It cannot be gainsaid that financial crimes are not crimes for the first world only but should be a global concern. The chapter therefore firstly highlighted how the international community has responded to money laundering and financing of terrorism through several initiatives, in which regard the global community has put in place both binding and 'soft law' instruments. International organisations, such as the FATF and the IAIS, are regarded as setters of standards, policies and ethics.

However, even though some of these international instruments do not have the force of law, such as the Basel Committee Principles and the IOSCO, they cannot be ignored because they are perceived by the global community as authoritative in the AML/CFT space. They also involve sanctions that can be imposed on countries that fail to implement the set standards, an example being the recent grey-listing of Botswana by the FATF and the EU.

The chapter proceeded to examine what Africa as a region has achieved to curb these financial crimes. Regarding the African context, Chapter 3 discussed both the African regional legislative frameworks and the institutions assisting in the fight against

financial crime on the continent. This included considering the initiatives of sub-groups such as the SADC, North Africa, East Africa and West Africa in combating money laundering and terrorism and proliferation financing. The examination of the African initiatives revealed that efforts were initially channelled towards fighting corruption and then money laundering, while efforts were later expanded to also cover terrorism financing and more recently proliferation financing.

It was further noted that the AfCFTA, which seeks to ensure deeper intra-African trade, does not contain any AML/CFT measures. However, it is hoped that such provisions will be included in the Investment Protocol to the AfCFTA, which is yet to be adopted. It would have been beneficial for the African continent to also integrate and harmonise laws and policies on AML/CFT at an African level to avoid the different and overlapping initiatives across the African region.

Chapter 4 was dedicated to fleshing out the current AML/CFT legislative framework in Botswana. The various pieces of legislation, which in totality endeavour to bring an end to financial crime, were discussed. It was noted that the first series of laws in this respect did not contain stringent, comprehensive and robust enough provisions on fighting financial crime.

Initially, money laundering and terrorism financing were grouped with other crimes and simply deemed as serious offenses under the repealed POSCA. Notwithstanding the prevalence of money laundering in the international arena, a formal definition for money laundering is still not forthcoming in Botswana law. Rather, the drafters have preferred to enumerate examples of the activities that should be deemed as money laundering. Similarly, terrorism financing and proliferation financing were not mentioned in legislation until the introduction of the Counter-Terrorism Act in 2014.

The FI Act and PICA are currently the primary statutes on money laundering in Botswana. These Acts contain provisions on freezing, confiscation, restraint and production orders. They also allow for mutual legal assistance to ensure that acts that occur in and outside of Botswana's jurisdiction do not go unpunished. The statutes furthermore contain provisions that enable implementation of the UNSC resolutions.

Chapter 4 also discussed the supervisory and regulatory institutions responsible for curbing and eliminating financial crime in Botswana. The FIA is tasked with coordinating AML/CFT initiatives in cooperation with other stakeholders in Botswana. However, its level of independence was questioned, as the FIA is housed and operated under the Ministry of Finance and Economic Development. It was pointed out that this arguably compromises the objectivity and transparency of the Agency in delivering on its mandate, as it is essentially a government entity.

The chapter concluded by providing examples of how money laundering and terrorism financing cases have been litigated in Botswana thus far. Only one statute, namely PICA, seems to have been used in money laundering cases. The golden thread running through these cases involved a delicate exercise of balancing the competing interests of the parties. The sections invoked were often those dealing with confiscation and restraining orders. A relatively popular course of action is requests by the defendants for the release of some of the confiscated funds to cover legal expenses and other reasonable expenses as per PICA. It was further concluded that the State consistently lost AML/CFT cases, as it seemed that the State lacked the necessary expertise to prosecute these cases.

Building on the analysis in Chapter 4, Chapter 5 embarked on a comparative study with the aim to determine to what extent Botswana's legislative regime is in consonance with the internationally accepted standards of AML/CFT and proliferation financing. To this end, Botswana's AML/CFT legislative framework was weighed against the South African legislative regime and the FATF Recommendations. The comparison was limited to a technical assessment and did not consider the effectiveness of the legislative regime.

The objective of the comparative analysis was to highlight how Botswana was and is faring in terms of implementation of the accepted international standards on AML/CFT, especially in light of the fact that the country is currently grey listed by the FATF and the EU as a money laundering high-risk country. The impact of grey listing can be detrimental to the economy of Botswana as other countries may consider taking heightened due-diligence measures when conducting business transactions with

Botswana and its nationals, which state of affairs entails the possibility of deterring direct foreign investment.

Furthermore, the chapter provided an overview of the South African AML/CFT regulatory framework, whereby POCA and FICA were identified as the principal statutes implemented to prevent and suppress ML/TF in South Africa. These two statutes contain control measures, offences, sanctions and penalties that together are aimed at combating ML/TF in South Africa. South Africa was last assessed in 2009 both by the FATF and the ESAAMLG. The country was also assessed in 2019, and the findings of this most recent assessment are yet to be published. In terms of the FATF report of 2009, it was noted that South Africa was committed to complying with the FATF Recommendations.

The chapter then embarked on a comparative study entailing a three-tier assessment in that Botswana was weighed against the South African legislation and the FATF Recommendations. With regard to the Botswana-South Africa comparison, it was revealed that, although South Africa was ahead of Botswana in terms of putting in place a suitable AML/CFT framework, although there are still some areas of concern, such as its current lack of pronouncements on how to deal with citizens from high-risk jurisdictions. It was also noted that the financial services sector in South Africa is more heavily regulated than those in Botswana and that the FIC is proactive in that it constantly issues guidance notes and directives on how the financial services sector can effectively implement the FATF Recommendations as well as the national laws on AML/CFT.

Since the assessment by ESAAMLG in 2017, Botswana had made substantial progress, which is evidenced by the promulgation of new laws and the amendment of existing statutes with a view to move towards full compliance with the FATF Recommendations, while also aiming to ensure that Botswana is not considered as a haven for financial crime. These efforts have the potential to assure investors that Botswana is open to conduct business ethically and transparently.

The findings showed that Botswana had fewer non-compliant scores today compared to 2017 (when the assessment was published). It was concluded that most of the

indicators previously rated partially compliant have moved to being largely compliant. This shows a steady movement towards full compliance with the FATF Recommendations. In fact, in some instances, Botswana now has better provisions for combating ML/TF than South Africa.

The Chapter also argued that despite the legislative amendments made Botswana still fails to meet the FATF standards of technical compliance mainly due to lack of expertise to enact required laws. The other reason put forward as a challenge for Botswana was that trying to comply with the FATF technical compliance requirements is like chasing after a moving target as the requirements are constantly changing and therefore the consequences for non-compliance in some instances should not be dire, such as blacklisting a country, which can jeopardise its ability to lure investors and its financial institutions from establishing correspondent banking relationships.

However, Botswana should continue to strive towards full compliance with the FATF Recommendations. The following part of the chapter stipulates some recommendations in this regard.

6.3 Recommendations

6.3.1 Independence of the FIA

In South Africa, the FIC was established as a juristic entity and does not form part of the public service.[20] Conversely, in Botswana, the FIA is set up as a public office.[21] The fact that FIA is not set up as a juristic entity with its own powers and functions, indicates in my view that it is not independent enough to properly fulfil its mandate transparently, independently and without undue influence and fear. This is so because the FIA falls under the ambit of the Public Service Act, which means there is some level of influence and control from the government of the day in terms of what the agency can and cannot do.

[20] Section 2 FICA.
[21] Section 4(1) FI Act.

This lack of independence arguably has the potential to compromise the agency's mandate. The main reason for this is because corruption, which is mainly carried out by those in power or their associates, may go unpunished. This risk is acute considering how rampant corruption is in many African countries. It is therefore recommended that the agency should be clothed with powers and responsibilities to function independently so that it can effectively combat financial crimes. Should the agency be made independent, it would go a long way in prudentially regulating the specified and accountable parties, thus lower the risks of money laundering, terrorism financing and proliferation financing. The agency should also have offices outside the precincts of the Ministry of Finance, since there must be both a real and perceived notion of independence.

6.3.2 National risk assessment

At the time when the 2017 ESAAMLG Report was released, Botswana was rated non-compliant with Recommendation 1.[22] Recommendation 1 provides that there must be a designated authority for the assessment of national risks, but in terms of the FI Act, it is not explicitly stated that the FIA has responsibility for that function. Botswana failed at implementing Recommendation 1 because, at the time, no NRA had been done, although an NRA was scheduled to be conducted in 2017.[23]

Despite no statutory stipulation to this effect, the FIA was nonetheless appointed to spearhead the NRA exercise.[24] It is therefore recommended that the law should be amended to clearly designate the FIA as the body tasked with carrying out the NRA. NRAs assist countries in identifying gaps or opportunities for improvement in AML policies, procedures and processes. It also ensures that countries develop risk mitigation strategies that ultimately lower the country's residual risk exposure. The country would consequently be in a position deal with its unique risks and prioritise risks accordingly.

[22] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 116.
[23] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 116.
[24] ESAAMLG *Botswana Mutual Evaluation Report* (2017)116.

It is further submitted that in as much as the FI Act obliges specified and accountable institutions to conduct ongoing risk assessments, the country as a whole too should regularly assess its risks. The last NRA was conducted in 2017 and it is not known when the next one will be carried out. It is axiomatic that the nature and techniques employed by criminals in money laundering, terrorism financing and proliferation financing are not static and therefore it is imperative that continuous NRAs should be carried out to keep abreast with the changing typology. In light of this, it is recommended that Botswana should not only designate the FIA for conducting NRAs but the interval within which the NRAs are conducted should be frequent and made compulsory by statute.

6.3.3 Threshold transactions above prescribed limit

In Botswana, any cash transaction above P10 000.00 made by either a customer or a specified or accountable parties on behalf of the customer, should be reported to the FIA.[25] In South Africa, R24 999.00 or a series of smaller amounts which, when combined, add up to R24 999.00 or more, should be reported to the FIC.[26] It is submitted that the threshold in Botswana (and possibly in South Africa as well) is perhaps too low.

The other limitation is that the Botswana legislation, unlike that of South Africa, does not require that aggregated amounts of P10 000.00 should be reported. This omission may be used by perpetrators to launder money that may go unnoticed if, for instance, payments are made in smaller series of payments. It is therefore submitted that, considering the size of Botswana's economy, the prescribed limit should be increased to at least P50 000.00, in view of the fact that the FATF Recommendations prescribe 15 000 USD/EUR, which is approximately P 150 000.00,. In addition, a series of payments adding up to more than P50 000.00 should be treated as a single transaction and therefore be reported to the FIA as well for assessment.

[25] Regulation 3 FIA regulations; Section 34 FI Act.
[26] Regulation 22B Money Laundering and Terrorist Financing Control Regulations.

6.3.4 Leveraging technology for STRs

There is a significant challenge for financial institutions and DNFBPs to process, manage and validate data received from the customers, ensuring proper upkeep of records in line with the CDD requirements and ensuring that the information submitted by the customers is accurate. To guard against customers providing false information during the CDD process, Botswana could also leverage technology such as blockchain to improve the analytics for reporting and analysis of STRs.

Blockchain is a Distributed Ledger Technology (DLT) which can be used as a distributed database and verification system for financial institutions and DNFBPs. It is capable of recording and keeping track of all transactions. The other advantage of this technology is that the integrity of the data is preserved, as the information can only be available on the blockchain when the entire network involved has verified that the information provided is correct. In addition, it is almost impossible to tamper with the information once it has been loaded on the blockchain. This could therefore be used during the CDD process to improve both the efficiency and accuracy of the information as it is more secure and minimises human error.

6.3.5 Confiscation and provisional measures

During the 2017 ESAAMLG mutual evaluation, Botswana was said to be largely compliant with the FATF Recommendation on confiscation and provisional measures.[27] PICA contains sound provisions for seizure, freezing, confiscation and forfeiture of cash and property of proceeds of crime.[28] Surprisingly, however, unlike FICA, neither the FI Act nor its regulations contain any provisions on search, forfeiture, seizing and freezing of property suspected to be used for unlawful activities.

This means that the investigators and the prosecutors would always have to fall back on PICA in order to confiscate, seize and forfeit money laundering proceeds. The FATF Recommendations are clear that criminals should not be allowed to benefit from

[27] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 124.
[28] Sections 18, 66 and 67 PICA.

the proceeds of crime and therefore the proceeds of crime or property of corresponding value should be taken from the criminals. It is recommended that instead of only relying on PICA for confiscations and similar measures, the FI Act should be amended so that it contains such important provisions as well. It is submitted that including these provisions in the FI Act would greatly aid in the investigation and prosecution of predicate offences.

Confiscation must be considered when the DPP asks for it or the Court thinks that it may be appropriate. The aim of the confiscation should be to deprive defendants of the benefit that they have gained from the criminal conduct. It should be irrelevant whether the defendant has retained the benefit or not. The Court must address the following factors before making a confiscation order: (1) whether the defendant has benefited from the criminal conduct; (2) the value of the benefit obtained; and (3) the sum that is recoverable from the defendant.[29] A confiscation regime can be particularly harsh. The UK Supreme court has held that confiscation amounts should be proportionate, and restricted to the gross profit earned by the company together with any other pecuniary advantage flowing from corruption.[30] When calculating the gross profit, the approach is typically to 'add back' the amount of bribes paid which may have been deducted as an 'expense' before arriving at the gross profit.[31]

6.3.6 Disclosures by institutions

The disclosure of suspicious activity report between the corporate entities and FIAs is siloed. There is no shared intelligence between institutions that could lead to promptly establishing the suspicion constitutes a breach of financial crime legislation. This is contrary to the act of criminals who multi-bank to disguise their criminality. It may take a long time for the FIA to do a thorough assessment and connect separate suspicious reports from various financial institutions. The privacy laws limit disclosure.

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[29] *R v May* [2008] 1 AC 1028. Also see Seddon, J e.tal, Thee Practitioner's Guide to Global Investigations *Law Business Research Limited* (2016 London)338.
[30] *R v. Waya* [2012] UKSC 51.
[31] Seddon, J e.tal, Thee Practitioner's Guide to Global Investigations *Law Business Research Limited* (2016 London) 339.

Financial Crimes Enforcement Network (FinCEN) under section 314(b) of the USA PATRIOT Act provides financial institutions with the ability to share information with one another under a safe harbour that offers protection from liability, in order to better identify and report activities that may involve money laundering or terrorist activities. Participation in information sharing pursuant to section 314(b) is voluntary, and FinCEN strongly encourages financial institutions to participate. This could be adopted in Botswana to enhance cooperation and timely information sharing amongst the financial institutions and DNFBPs.

6.3.7 Self Reporting to the Authorities and Investigations by authorities

It is recommended that Botswana law should encourage self-reporting to the authorities by all the regulated entities. It must clearly set out the advantages of self-reporting, how the manner and timing of self-reporting can make a crucial difference to developing a coulter of compliance. The incentive should also be the difference to mitigating any potential penalties likely to be imposed. In 2009 the UK Serious Fraud Office (SFO) issued guidance (the 2009 Guidance) to encourage companies to self-report instances of overseas bribery by promoting the idea that 'in appropriate cases' such self-reports would receive a civil rather a criminal penalty. Before any external reporting is made, details of the breach should be reported to and considered by senior management. Companies should have procedures in place for the escalation of issues to board level.

Authorities should also establish a culture conducting corporate investigation to ensure compliance and personal accountability for officers who were negligent in financial crime compliance.

6.3.7 Monitoring cash conveyances

Botswana's legislation is still weak with regard to monitoring cash conveyances. Unlike in South Africa, in Botswana there are no explicit provisions on how cash conveyances above the prescribed limit should be reported by citizens, non-citizens and the customs officers. The FI (Amendment) Act is also silent in terms of when the revenue services should submit the report to the Agency. The Act simply provides that information regarding cash conveyances into and out of Botswana should be submitted to

the FIA.[32] This means that it is possible that, by the time the report is submitted, many illicit activities might have gone undetected.

Although the relevant provision is not in operation yet, FICA stipulates that a report to the prescribed person should be submitted prior to conveyance of cash exceeding the set threshold into and out of South Africa.[33] The authorised person should immediately forward a copy of the report to the FIC.[34] A certified copy of the report would be admissible as evidence in a court of law.[35] Furthermore, persons who fail to report in terms of sections 30 (1) and (2) are guilty of an offence.[36] Police officers or any authorised persons have the powers to seize and forfeit cash in transit if they suspect that it emanates from criminal activities.[37]

FICA further provides that cash so seized should be returned to the owner if after 90 days there is no development in the investigation.[38] If the person is found guilty, the cash is forfeited to the government.[39] Third parties' rights are protected if it is established that they had no knowledge that the cash would be conveyed in a manner contrary to the provisions of the Act.[40] Botswana's legislation currently lacks any such details in terms of when cash in transit should be reported and what should be done with it once it is confiscated. It is therefore recommended that Botswana should adopt the South African approach so that it is clear to all, especially the customers and the officers, what is expected of them in situations of cash in transit.

6.3.8 Freezing wire transfers for UNSC blacklisted persons

The 2019 amendments in Botswana ensured that there is now continuous monitoring of the wire transfers cycle and that AML/CFT requirements are imposed on these transactions.[41] The amendment did not, however, give financial institutions the power

[32] Section 36 FI Act.
[33] Section 30 (1) FICA.
[34] Section 30 (2) FICA.
[35] Section 39 FICA.
[36] Sections 54 and 55 FICA.
[37] Section 70 (1)-(3) FICA.
[38] Section 70 (3) (a)-(d) FICA.
[39] Section 70 (4) FICA.
[40] Section 70 (6) FICA.
[41] Sections 37-39 FI Act; Regulations 25-27 FIA Regulations 2019.

to freeze wire transfers by persons listed by the UN Security Council. It is therefore recommended that the law should be amended to ensure that Botswana is in a position to effectively give effect to the UN Security Council resolutions by not assisting criminals blacklisted by the UN Security Council.

Amending the law to allow for the freezing of wire transfers by persons blacklisted by the UN Security Council, would show Botswana's commitment to combating money laundering, terrorism financing and proliferation financing at an international level. If the law remains unchanged, Botswana could be deemed as uncooperative internationally and could even be used by criminals to launder money. It is submitted, therefore, that amending the law in this manner would bring Botswana closer to full compliance with this FATF Recommendations.

6.3.9 Extending efficient mutual legal assistance

The 2017 ESAAMLG mutual assessment found the Botswana legislation on extending mutual legal assistance wanting in that there were no provisions to keep the requests private and confidential. This issue was rectified by the Mutual Assistance in Criminal Matters (Amendment) Act.[42] However, the law has not been amended to ensure that mutual legal assistance is carried out in the same manner as the cooperation between national institutions to expedite responses to requests. Although the law lays out a procedure for extending mutual assistance, there are no timeframes for providing the requested assistance.

It is therefore recommended that the law should be reviewed and amended to ensure that Botswana law is clear in terms of the procedures for extending mutual legal assistance to other countries. This includes having prescribed timelines within which mutual legal assistance requests would be attended to promptly to ensure that financial crimes at both regional and international level are dealt with effectively. The recommended amendment would greatly assist Botswana in complying with the FATF recommendation on extending effective mutual legal assistance to other countries.

[42] Section 32A Mutual Assistance in Criminal Matters (Amendment) Act 2018.

The other factor noted in Chapter 2 was that African countries face compliance challenges due to a lack of deeper integration, which could help strengthen regional cooperation on issues of AML/CFT. It is therefore recommended that there is an opportunity with the recently launched AfCFTA to introduce AML/CFT controls, including ones which compel mutual legal assistance on AML/CFT matters. It should be ensured that provisions also require that mutual requests be prioritised and managed effectively and promptly by requiring that there be a central place where all requests from the continent and elsewhere are managed and the speed at which requests are executed. This would encourage countries to respond to requests timeously and in a diligent manner. This can also be extended to extradition requests and enhancing cooperation of law enforcement authorities within the region.

6.3.10 Extradition requests

The Extradition Act in South Africa stipulates processes and procedures to be adhered to when a request for extradition is received from other countries. Unlike Botswana, dual criminality is not required for South Africa to attend to extradition requests.[43] However, it is required that the offence should be extraditable.[44] Although other extradition requests may be denied for political reasons in South Africa, extradition requests for terrorism and associated matters cannot be declined.[45]

Botswana was rated partially compliant with regard to this Recommendation in 2017 because it did not allow the extradition of its citizens, while the law also does not permit the timeous extradition, upon request, of fugitive criminals to the requesting country.[46] The other limitation was that requesting the extradition of a fugitive criminal in Botswana involved complex procedures, as the arrest of the fugitive criminal required

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[43] Section 1 Extradition Act; Mudorch Watney 'A South African Perspective on Mutual Legal Assistance and Extradition in a Globalized World' (2012) 15 *PER / PELJ* 297/569. Available at https://www.researchgate.net/publication/317153659_A_South_African_perspective_on_mutual_legal_assistance_and_extradition_in_a_globalized_world/fulltext/592803e80f7e9b9979a18a60/317153659_A_South_African_perspective_on_mutual_legal_assistance_and_extradition_in_a_globalized_world.pdf?origin=publication_detail (Accessed on 20 March 2020).

[44] Mudorch Watney 'A South African Perspective on Mutual Legal Assistance and Extradition in a Globalized World' (2012) 15 *PER / PELJ* 397/569.

[45] Section 22 Extradition Act.

[46] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 167-168.

endorsement of the magistrate as opposed to having seamless and special requirements for releasing fugitive criminals.[47]

The law has not been amended to meet the limitations stipulated above, which means that Botswana is still partially compliant when it comes to this Recommendation. It is submitted that Botswana should enhance its extradition laws to ensure that it is at par with the FATF Recommendation on extradition, by adopting all the requirements stipulated therein to make its extradition procedures and laws simple and seamless. This also includes facilitating extradition requests timeously. In addition, the law should ensure that dual criminality is not a prerequisite for granting extradition requests.

6.3.11 Cooperation and coordination of law enforcement and investigative authorities

Regarding this Recommendation, the difference between FICA in South Africa and the FI Act in Botswana is that FICA requires that the investigative authority, when requesting information from other national entities, should prove that the information required is necessary to carry out investigations. In addition, the information cannot be released without entering into a memorandum of agreement.

Botswana does not have these requirements and therefore there is arguably room for improvement with regard to the implementation of this Recommendation in Botswana. It is submitted that although the level of domestic coordination and cooperation in Botswana is good, the law should be amended to improve shared understanding by stakeholders of money laundering, terrorism financing and proliferation financing risks by making it mandatory to use memoranda of agreement to facilitate information sharing. This has the potential of deterring information leakages by officers of the law enforcement and investigative authorities.

[47] ESAAMLG *Botswana Mutual Evaluation Report* (2017) 167-168; see also sections 8-12 Extradition Act.

6.3.12 Penalties

FICA's penalties for non-compliance with several provisions of the Act tend to be more stringent compared to those in the FI Act. In addition, the other supporting statutes in South Africa, such as POCA and POCDATARA, contain deterrent penalties going up to a maximum of R1 000 000 000.00. However, the maximum penalty in FI Act and its supporting legislation, such as the PICA, is P20 000 000.00.[48] It is submitted that the difference between the two countries is too wide and therefore Botswana should consider increasing its fines to deter and prevent financial crime. Indeed, the current lower fines in Botswana might even induce criminals to perform their activities in Botswana instead of South Africa, in an attempt to bypass the risk of much higher fines in South Africa.

6.3.13 Organisation of AML/CFT laws

Both South Africa and Botswana have several pieces of legislation aimed at combatting ML/TF and related matters. The laws are spread across the different government departments and both countries depend on cooperation between the different departments to ensure that ML/TF is curtailed. It is submitted that this approach may not be the most ideal mechanism to effectively combat ML/TF issues, as there may be leakage somewhere in the process when the law purporting to address the same thing is spread across different departments.

To mitigate this risk, it is proposed that Botswana should consider having a compendium of all AML/CFT laws. That is, all laws involved in combating money laundering, terrorism and proliferation financing should be consolidated in one document to ensure that it is easily accessible. In addition, the laws should have an organised index that stipulates which laws address the 40 FATF Recommendations. This would assist in showing areas of improvement in the law as well as areas that need attention to comply with the FATF Recommendations.

[48] See sections 36(2), 47(3) and 50 PICA; sections 22-23 FI Act.

6.4 Overall conclusion

The international community has gradually become a borderless world in many respects, which also makes it more prone to abuse by criminals. The veil that has underpinned state sovereignty has gradually been pierced to promote extraterritorial jurisdiction, thus paving the way for combating financial crime in a globalised and unified manner. The issue of financial crime is a global phenomenon, which dictates that nations should collaborate and cooperate both regionally and internationally. This then calls for a large degree of universal uniformity in the methods, laws and policies to be adopted by nations the world over.

It cannot be gainsaid that the international financial system is pivotal in the fight against money laundering, terrorism financing and proliferation financing. It is also an industry that is always evolving in terms of products and services as well as technologies employed to conduct business. This explains why this industry is constantly mandated to introduce and enforce measures aimed at combating financial crime that has the potential to destabilise and dent the integrity of the international financial system. As discussed in this thesis, the obligation to prevent ML/TF is not only placed on financial institutions but also on non-banking entities and all individuals.

Amongst the international principles, guidelines and standards that have been developed on money laundering, terrorism financing and proliferation financing, the FATF 40 Recommendations are considered the leading international framework on AML/CFT. The FATF Recommendations therefore represent a dedicated and comprehensive set of recommendations, which are largely risk based, to be adopted and implemented by all countries. Emphasis is placed on identifying, assessing and mapping business transactional risks and ultimately developing risk management strategies. This entails a robust approach that requires more than a mere tick box exercise.

The objective of these FATF guidelines and principles is that countries, including developing countries, should adopt these measures and recommendations in a flexible manner that is customised for their environments. It is axiomatic that the application of the FATF Recommendations cannot be a one-size-fits-all approach, since countries

differ in many respects. It was noted in Chapter 2 that countries, especially African countries, may face several challenges in implementing the FATF Recommendations due to several factors, such as the costs of fostering compliance.

The main purpose of this thesis was to test Botswana's AML/CFT legislation against those of South Africa and even more so against the standards set in the FATF Recommendations, which essentially serve as an international benchmark. In conducting this assessment, the study relied primarily on the results contained in the ESAAMLG Botswana Mutual Evaluation Report of 2017. The objective was to determine whether or not Botswana has improved its regulatory framework since the 2017 ESAAMLG Mutual Evaluation, especially when it comes to technical compliance by the laws concerned.

The overall conclusion of the 2017 mutual evaluation was that Botswana was not fully compliant with many of the FATF Recommendations and, indeed, was largely compliant with only three of the Recommendations. It was noted that generally most primary stakeholders lacked general understanding of the ML/TF risks in the country. Some of the major deficiencies revealed by the mutual evaluation report was that Botswana's AML/CFT regime was not fully developed and therefore the authorities were still grappling to understand their expected roles and responsibilities as far as prevention and detection of money laundering and terrorism financing were concerned.

The other major shortcoming was that, although there was good coordination and cooperation at a national level, this arrangement had to be facilitated in a formal and systemic manner through the use of MOUs. Another limitation was that Botswana's AML/CFT regulatory regime was limited in scope in that not all predicate offences were covered by the legislation. It was further noted that most supervisory institutions lacked the resources and expertise to effectively combat financial crimes. A related finding was that this lack of AML/CFT skillset and knowledge resulted in minimal implementation and enforcement of the laws. Furthermore, a significant limitation revealed by the 2017 assessment was that Botswana had not yet adopted a risk-based approach to AML/CFT prevention and detection.

The ESAAMLG report moreover found that the FI Act had no provisions on wire transfers, PEPs, correspondent banking and the introduction of new technologies, products and services. The other shortcoming was that the law did not criminalise certain organised crimes, such as terrorism acts conducted by an individual. It was also found that the law was weak in so far as it did not have dissuasive and commensurate sanctions against ML/TF crimes.

In light of the several legislative amendments that were made in response to the above shortcomings identified by ESAAMLG in 2017, the current state of the law was reviewed in this thesis to examine whether any progress has been made to rectify the shortcomings. The findings of this study have been summarised in Table 1 below.

FATF	2017 ESAAMLG RESULTS				2020 STUDY RESULTS			
Recommendations	Compliant	Largely Compliant	Partially Compliant	Non-Compliant	Compliant	Largely Compliant	Partially Compliant	Non-Compliant
1				✓			✓	
2			✓			✓		
3			✓			✓		
4		✓				✓		
5				✓		✓		
6				✓	✓			
7				✓	✓			
8				✓			✓	
9				✓	✓			
10				✓		✓		
11				✓		✓		
12				✓	✓			
13				✓		✓		
14				✓	✓			
15				✓	✓			
16				✓			✓	
17	N/A				N/A			
18				✓	✓			
19				✓			✓	
20			✓		✓			
21				✓	✓			
22				✓		✓		
23			✓			✓		
24				✓			✓	
25				✓			✓	
26				✓			✓	
27		✓			✓			
28				✓		✓		
29				✓			✓	
30			✓			✓		
31			✓			✓		
32			✓				✓	
33				✓			✓	
34			✓		✓			
35				✓			✓	
36			✓		✓			
37		✓				✓		
38			✓		✓		✓	
39			✓					
40			✓			✓		

Table 1-Study Results

The above table shows that Botswana's ratings have largely moved from non-compliant to compliant and largely compliant with regard to the FATF Recommendations. The lowest score achieved in some categories is partially compliant, which also shows that the country has made considerable progress since 2017 to ensure that it is

technically compliant with the FATF Recommendations. In fact, in my assessment, there is no category for which Botswana currently scores as non-compliant.

Therefore, the over-arching conclusion of this thesis is that Botswana has made significant progress and that its laws now largely conform to the FATF Recommendations. The re-rating shows that Botswana has twelve compliant scores, fourteen largely compliant scores and twelve partially compliant scores. One Recommendation is not applicable in Botswana's regulatory environment. It is submitted that in contrast to the 2017 ESAAMLG results, Botswana has shown serious commitment to adopt the internationally recognised standards and principles as espoused in the FATF Recommendations to thwart money laundering, terrorism financing, proliferation financing and other related financial crimes. Of course, there remains room for improvement and in this respect, recommendations were made as to how Botswana can improve its compliance with international best practice even further.

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Bibliography

1. Literature

1.1 Books

Cafferty D and Young S *Money Laundering Reporting Officer's Handbook* (2005)

Rose- Ackerman S *Introduction: The Role of International Actors in Fighting Corruption* in Susan Rose- Ackerman and Paul Carrington (ed) *Anti-Corruption Policy Can International Actors Play a Constructive Role?* (2013)

Saul B *Research handbook on International Law and Terrorism* (2014)

Turner JE *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud* (2011)

1.2 Journal articles

Alexander K 'The International Anti-Money-Laundering Regime: The Role of the Financial Action Task Force' (1993) *Money Laundering Control Journal* 231

Alford DE 'Core Principles for Effective Banking Supervision: An Enforceable International Financial Standard?' (2005) 28 *Boston College International and Comparative Law Review* 239

Bachus AS 'From Drugs to Terrorism: The Focus Shifts in the international fight against money laundering after September 11, 2001' (2004) *Arizona Journal of International & Comparative Law* 842

Beekarry N 'The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law' (2011) *Northwestern Journal of International Law & Business* 138

Brewer J 'The Financing of Nuclear and Other Weapons of Mass Destruction Proliferation (January 2018) *Centre for a New American Security* 4-5

Cook A and Sarkin J 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development' (2010) 19 *Transnational Law and Contemporary Problems Journal* 454

Cuellar FM ‘The Tremendous Relationship between the Fight Against Money laundering and Disruption of Criminal Finance’ (2003) 93 *Journal of Criminal Law and Criminology* 6

De Koker L & Jentzsch N ‘Financial inclusion and financial integrity: aligned incentives?’ (2013) *World Development Journal* 4

De Koker L ‘Anonymous clients, identified clients and the shades in between-perspectives on the FATF AML/CFT Standards and mobile banking’ (2009) *Social Sciences Research Network* 14

De Koker L ‘Client identification and money laundering control: perspective on the Financial Intelligence Act 38 of 2001’ (2004) *Journal of South African Law* 726

De Koker L ‘Money laundering and suppression of financing terrorism’ (2006) *Journal of Financial Crime* 3

De Koker L ‘Money Laundering Control in South Africa-A South African Response to an American Comment’ (2001) *Financial Crime Review* 9-24

De Koker L ‘Money Laundering Control: The South African Model (2012) *24 Asia Pacific journal of Marketing and Logistics* 755

De Koker L ‘Money laundering in South Africa’ (1 September 2002) *Centre for the Study of Economic Crime* 25

De Koker L ‘South African Money Laundering and Terror Financing Law’ (2014) 15 *Butterworths Online Publication* par 3.23

De Koker L ‘South African Money Laundering Legislation-Casting the Net Wider’ (1997) 1 *Journal of Juridical Sciences* 25-26

De Koker L ‘The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks within the New Standards Framework’ (2013) 8 *Washington Journal of Law* 171

De Koker L ‘The FATF’s customer identification framework: fit for purpose?’ (2014) 17 *Journal of Money Laundering Control* 281-295

De Koker L and Pretorius JL ‘Confiscation Orders in Terms of the Proceeds of Crime Act-some Constitutional Perspectives’ (1998) *Political Science Journal* 2

De Koker L et al ‘Implementing FATF standards in developing countries and financial inclusion: Findings and guidelines’ World Bank Report (2008) 2

Gilmour N and Ridley N (2015) ‘Everyday vulnerabilities – money laundering through cash intensive businesses’ (2015) 18 *Journal of Money Laundering Control*,.293 –303

Gordon RK 'Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing' (2011) 21:503 *Duke Journal of Comparative & International Law* 512-513

Goredema C 'Money Laundering in East and Southern Africa: An overview of the threat' (2003) *Institute for Security Studies* 2

Gurule J 'The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances –A Ten Year Perspective: Is International Cooperation Merely Illusory?' (1998) 22(1) *Fordham International Law Journal* 9

Hinterseer K 'Criminal Finance- The Political Economy of Money Laundering in a Comparative Legal Context' (2000) Kluwer *Law International* 1

Hugo C & Spruyt W 'Money laundering, terrorist financing and financial sanctions: South Africa's response by means of the Financial Intelligence Centre Amendment Act 1 of 2017' 2018 *TSAR* 227-255

Kassenova T 'Challenges with Implementing Proliferation Financing Controls: How Export Controls Can Help' (30 May 2018) *The Journal of Export Controls and Sanctions* 1

Kemal MU 'Anti-money laundering regulations and its effectiveness' (2014) 17(4) *Journal of Money Laundering Control* 1

Kersop M and Du Toit SF 'Anti-Money Laundering Regulations and the Effective Use of Mobile Money in South Africa' (2015) 18 *PER / PELJ* 1603-1604

Kerwer D and Hülsse R 'How International Organizations Rule the World: The Case of the Financial Action Task Force on Money Laundering' (2011) *Journal of International Organization Studies* 50-67

Levi M 'Unintended Consequences of anti-money laundering policies for poor countries' (2015) *Centre for Global Development* 25

Madzima J 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies* 1

Madzima J 'Money Laundering and Terrorism Financing Risks in Botswana' (2009) *Institute for Security Studies*

Moshi HPB 'Fighting Money Laundering: The Challenges in Africa' (2007) Paper 152 *Institute for Securities Studies* 3

Mugarura N 'The institutional Framework Against Money Laundering and its Underlying Predicate Crimes' (2011) 19 *Journal of Financial Regulation and Compliance* 177

Pieth M and Aiolfi G ‘The Private Sector becomes Active: the Wolsberg Process’ (2003) *Journal of Financial Crime* 2

Simonova A ‘The risk-based approach to anti-money laundering: problems and solutions’ (2011) 14 (4) *Journal of Money Laundering Control* 342

Simser J ‘ Money laundering: emerging threats and trends’ (2013) 16 *Journal of Money Laundering Control* 42

Simser J ‘Money laundering: emerging threats and trends’ (2013) 16(1) *Journal of Money Laundering Control* 1

Simwayi M and Guohua W ‘The role of commercial banks in combating money laundering’ (2011) 14(4) *Journal of Money Laundering Control* 322

Simwayi M and Haseed H ‘The role of Financial Intelligence Units in combating money laundering: A comparative analysis of Zambia, Zimbabwe and Malawi’ (2012) 15(1) *Money Laundering Control* 112-130

Stewart IJ, Viski A and Brewer J ‘Combating the financing of proliferation: challenges and new tools’ (2000) Journal *of Financial Crime* 5

Storm A ‘Establishing the Link Between Money and Tax Evasion’ (November 2013) 12 *International Business & Economics Research Journal* 1442

Turner JE *Money Laundering Prevention: Deterring, Detecting, and Resolving Financial Fraud* (2011) 6

Watney M ‘A South African Perspective on Mutual Legal Assistance and Extradition in a Globalized World’ (2012) 15 *PER / PELJ* 297/569

Weld JB ‘Current International Money Laundering Trends and Money Laundering Co-operation Measures’ *Resource Material Series (UNAFEI)* (2011) 2

Yazid bin Zul Kepli M and Nasir MA ‘Money Laundering: Analysis on the Placement Methods, International Journal of Business’ (December 2016) 11 *International Journal of Business, Economics and Law* 1

1.3 Reports and policy papers

African Currency Forum *African Cash Report* (2018)

African Development Bank ‘Bank Group Strategy for the prevention of money laundering and terrorist financing in Africa’ African Development Bank Strategy Report (May 2007)

African Development Bank *African Development Bank Group Annual Report* (2018)

African Development Bank *Policy on the Prevention of Illicit Financial Flows* (March 2017)

Badham M 'Overview of Corruption and Anti-Corruption in Botswana', Transparency International Report (2014)

BASEL Institute on Governance '*Basel AML Index Report'* (2017)

Bureau of International Narcotics and Law Enforcement Affairs *Countries/Jurisdictions of Primary Concern – Botswana* (2014) International Narcotics Control Strategy Report (INCSR)

Centre on Global Counter-Terrorism *Baseline Study on Anti-Money Laundering and Countering the Financing of Terrorism in the IGAD Subregion* (2012)

Egmont Group 'Egmont Annual Report' (June 2009-July 2010) 2

ESAAMLG '*Anti-money laundering and counter-terrorist financing measures – Botswana*' Second Round Mutual Evaluation Report (2017)

ESAAMLG *Annual Report* (1 April 2012-31 March 2013)

ESAAMLG *South Africa Mutual Evaluation Summary Report* (2009)

FATF 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation-The FATF Recommendations Adopted by the FATF Plenary' (February 2012, updated in June 2019)

FATF *ASIA/Pacific Group on Money Laundering, APG Typology Report on Trade Based Money Laundering* (2012)

FATF *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (2012-2020)

FATF *Combating proliferation Financing: A Status Report on Policy Development and Consultation* (February 2010)

FATF *Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction* (2018)

FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT* Systems (2013, updated in November 2020)

FATF *Combating proliferation Financing: A Status Report on Policy Development and Consultation* (February 2010)

FATF *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (2013)

FATF Guidance Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion, February (2013)

FATF *Guidance for a Risk-Based Approach, The Banking Sector* (October 2014)

FATF Guidance on Counter Proliferation Financing – The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction (2018)

FATF *Risk of Terrorist Abuse in Non-Profit Organisations Report* (June 2014)

FATF *The Role of the Hawala and other similar service providers in money laundering and terrorist financing Report* (October 2013)

FATF *Financial Reporting Authority Identifying Proliferation Financing-Why Should you be Concerned with the Prevention and detection of Proliferation Financing Report (February 2020)*

FATF *Vulnerabilities of Casinos and Gaming Sector Report* (March 2009)

Gilmore WC 'Money Laundering: 'The International Aspect' in David Hume Institute, *Money Laundering* (1993) 1 *Papers on Public Policy*

Ibrahim Index of African Governance report (IIAG) 2017

Institute on Governance *Basel AML Index Report* (2017)

Johanna P *European Union's Anti-Money Laundering Crusade- A Critical Analysis of the response by EU/EC to Money Laundering Police College of Finland Report*, (2009)

Julie Walter *Anti-money laundering and counter-terrorism financing across the globe: A comparative study of regulatory action (Australian Institute of Criminology Report* (2011)

NBFIRA *National Risk Assessment for the NBFI Sector Notice* (2018)

SADC *Compliance & Risk Resources, AML/CFT and Financial Inclusion in SADC: Consideration of Anti-Money Laundering and Combating the Financing of Terrorism Legislation in Various Southern African Development Community (SADC) countries-South African Country Report* (March 2015)

Schott PA 'Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX (2006) World Bank

1.4 Working papers, presentations and conference papers

European Union Horizon *Money Laundering and Tax Evasion Paper* (October 2017)

Ferguson A *Trinidad Money Laundering* (2014*) Inter-American Drug Abuse Control Commission Presentation*

Finmark Trust *Applying the Risk Based Approach – Undertaking ML/TF Risk Assessment of Low-Value Remittance and Banking Products and Services in South Africa* (September 2019)

Hamin Z, Omar N and Muaz Abdul Hakim M 'When Property is the Criminal: Proceeds of Money Laundering and Terrorism Financing in Malaysia' *Paper Presented at the International Accounting and Business Conference* (2015)

Klaudijo Stroligo 'Guidelines Regarding the necessary steps to be taken for effective implementation of the United Nations Security Resolutions on terrorism' (2007).

Krieger T and Meierrieks D'Terrorist Financing and Money Laundering' (June 2011) *University of Paderborn, Germany*

Léonard S., Kaunert C. (2012) Combating the Financing of Terrorism Together? The Influence of the United Nations on the European Union's Financial Sanctions Regime. In: Costa O., Jørgensen K.E. (eds) The Influence of International Institutions on the EU.

IMF 'Money laundering and Terrorism Financing: An overview.' https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/thony.pdf (accessed 30 December 2020).

Neale D 'Taking Stock of 2018's Money Laundering Scandals: When is Enough Enough? (6 January 2019) Global Financial Integrity

Nedelcu C 'Money Laundering Techniques Commonly Used-General Approaches' Lecturer PhD, Department of Criminal Law, Faculty of Law, Nicolae Titulescu University, Bucharest, 2011 3

Patel H and Thakkar BS 'Money Laundering Among Globalized World' (2012) Open access peer-reviewed chapter 1

Yepes CV '*Compliance with the AML/CFT International Standard: Lessons from a Cross-Country Analysis*' (2011) IMF Working Paper 7

1.5 Theses and dissertations

De Jager MJ ‘A Comparative Study Between Anti-Money Laundering Legislation of South Africa and International Standards’ LLM Dissertation, University of Pretoria, 2018

Livescu I ‘The link between Money Laundering and Corruption: Is the fight effective?’ LLM Thesis, Tilburg University, 2018

Van Jaarsveld IL ‘Aspects of Money Laundering in South African Law’ PhD thesis University of South Africa, 2011

1.6 Newspaper articles

‘Africa hits back against EU’s name and shame game’ *Euractive.com* 2 June 2020

‘Agency assesses money laundering and terrorism financing in Botswana’ *Sunday Standard* 20 July 2015

‘Anti-money Laundering Law Amendments Raise Penalties’ *The Business Report* 5 May 2008

‘Bakang Seretse & Co Clash with DCEC Over 'Dodgy' Court Order’ *The Monitor* 20 August 2018

‘Botswana placed on money laundering high risk list’ *Mmegi Newspaper* 26 October 2018

‘Botswana turns into giant dirty money Laundromat’ *Sunday Standard* 28 Aug 2017

‘Botswana’s judiciary untested in trying money laundering cases’ *Sunday Standard Newspaper* 25 June 2018

‘Botswana–US clash over money laundering’ *Sunday Standard* 28 July 2014

‘Butterfly’s attorneys uncover State’s alleged lies’ *Mmegi Online* 15 November 2019

‘Butterfly's charges a fabrication' *The Patriot* 25 November 2019

‘Commercial banks and lawyers may be charged in NPF saga’ *Sunday Standard Newspaper* 17 December 2018

‘DCEC toothless on 'big fish' corruption' *Mmegi Newspaper* 9 November 2012

‘DPP ropes in Adv. Gerrie Nel on P100 billion money-laundering case’ *The Weekend Pos*t 23 June 2020; ‘Botswana hires Gerrie Nel to pursue money laundering case against Bridgette Motsepe-Radebe’ *Daily Maverick* 23 June 2020

‘EU names 4 African nations to financial crimes watchlist’ *Africa Times* 9 May 2020

‘Here is Kgosi’s prosecution file’ *Weekend Post* 3 September 2018

‘High Court clips “Butterfly” s wings’ *The Business Weekly and Review* Friday10-16 July 2020

‘Mo Ibrahim gives Khama’s Presidency the thumbs down’ *Sunday Standard* 20 November 2017

‘Money laundering: The EU says Botswana poses a risk’ *Sunday Standard* 11 May 2020

‘Over $48m distributed to SA banks in Botswana money-laundering case’ *The Citizen* 23 June 2020

‘Prominence of Money Laundering in Africa – Ten things to know’ *Norton Rose Fulbright* February 2014

‘SA Banks rubbish state evidence in “Butterfly” case’ *The Weekend Post* 18 November 2019

‘Stakeholders take stock of oversight institutions’ *Sunday Standard Newspaper* 3 March 2011

‘State defies court order in Butterfly case’ *The Voice* 21 November 2019

‘The Receiver recovers millions from proceeds of crime’ *Weekend Post* 3 September 2018

Balima B ‘Economic 'game changer'? African leaders launch free-trade zone’ *Business News* 7 July 2019

Bisseker C ‘Will Africa’s Free-Trade Area Live up to the Hype?’ *Financial Mail* 20 June 2019

Mguni M ‘Botswana battles dirty money greylisting in Paris’ *Mmegi Newspaper* 24 May 2019

Myemane SK ‘Customer due diligence and risk management and compliance programme’ December 2019

Neale D ‘Taking Stock of 2018’s Money Laundering Scandals: When is Enough Enough? 6 January 2019

Pitse R ‘Al Qaeda setting upsleeper cell in Botswana-claim’ *Sunday Standard* 2 February 2009

2. Treaties and charters

1988 Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering

1997 Core Principles for Effective Banking Supervision

African Union Charter and the African Charter on Human and Peoples' Rights

Annex 12 (Anti-Money Laundering) to the SADC Protocol on Finance and Investment 2011

Basel Committee on Banking Supervision Charter 2013

Continental Free Trade Area (AfCFTA) Agreement 2019

Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption 2015

International Convention for the Suppression of the Financing of Terrorism 2002

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 1976

MOU of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) 2018

Nuclear Non-Proliferation Treaty (NPT) of 1968

OAU Convention on the Prevention and Combating of Terrorism 1999

Protocol to the African Union Organisation on the Prevention and Combating of Terrorism 2004

SADC Protocol on Finance and Investment 2010

UN Convention against Corruption and the International Convention for the Suppression of the Financing of Terrorism

UN Convention against Transnational Organized Crime (Palermo Convention) 2000

United Nations Assembly General Resolution 54/110, 9 December 1999

United Nations Charter

United Nations Convention on Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (Vienna Convention 1988

United Nations Security Council Resolution 1540 of 2004

United Nations Security Council Resolutions 1267 of 1999 and 1373 of 2001

United Nations Security Council Resolution 1330 of 2000.

United Nations Security Council Resolution on Non-Proliferation.

3. Legislation

3.1 Botswana

Bank of Botswana Act 19 of 1996

Banking (Anti-Money Laundering) (Amendment) Regulations, 2013

Banking (Anti-Money Laundering) Regulations 2003

Banking Act of 1995

Constitution of Botswana 1966

Corruption and Economic Crime Act 13 of 1994

Counter-Terrorism (Amendment) Act 2018

Counter-Terrorism (Implementation of United Nations Security Council Resolutions) Regulations 2018

Counter-terrorism Act 2014

Criminal Procedure and Evidence Act 1939

Customs and Excise Duty Act 1994

Electronic Payment Services Regulations 2019

Extradition Act 1990

Financial Intelligence (Amendment) Act 2018

Financial Intelligence Act 2009

Mutual Assistance in Criminal Matters (Amendment) Act 2018

Mutual Assistance in Criminal Matters Act 1990

National Security and Intelligence Act

Non-Bank Financial Institutions Regulatory Authority Act 2016

Penal Code 1964

Proceeds of Serious Crime Act 1990

Trust Property Control Act, Chapter 42:03, 2018

3.2 South Africa

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Drugs and Drug Trafficking Act 140 of 1992

Extradition Act 67 of 1962

Financial Intelligence Centre Act 38 of 2001

Financial Intelligence Centre Amendment Act 1 of 2017

Financial Sector Regulation Act 2017

International Cooperation in Criminal Matters Act 75 of 1996

Money Laundering and Terrorist Financing Control Regulations (GN R1595 in GG 24176 of 20 December 2002)

National Credit Act 2005

National Prosecuting Authority Act 32 of 1998

Non-Profit Organisations Act 71 of 1997

Prevention and Combating of Corrupt Activities Act 12 of 2004

Prevention of Organised Crime Act 121 of 1998

Proceeds of Crime Act 76 of 1996

Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004

Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002

3.3 Other regulatory instruments

FIC Guidance Note 4 on suspicious transactions reporting (March 2008)

FIC Guidance note 4A on reporting of suspicious and unusual transactions and activities to the Financial Intelligence Centre in terms of section 29 of the Financial Intelligence Centre Act, 2001 (2017)

FIC Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001 (ACT 38 OF 2001)

FIC Draft Public Compliance Communication 110 guidance on money laundering, terrorist financing and proliferation financing risk considerations relating to geographic areas (November 2020)

FICA Manual *to enable FSP to understand its obligations in terms of 2017 FICA amendments* (2018)

FIC Public Compliance Communication Number 48 on certain life insurance provider issues including customer due diligence and understanding of risk in relation to their client in terms of the Financial Intelligence Centre Act (38 of 2001)

Public Compliance Communication 12A Guidance on outsourcing of compliance activities to third parties (July 2020)

FIC Public Compliance Communication 41-Guidance on combating the financing of terrorism and anti-money laundering measures relating to non-profit organisations (2019)

FATF *Guidance – Transparency and Beneficial Ownership (2014)*

SARB Directive 1 (2019)

4. Case law

Cambanis Buildings (Pty) Ltd v Gal 1983 1 All SA 383 (NC)

David v. Barclays Bank of Botswana and another 2001 2 HC BLR 1-3

Director of Public Prosecutions v Kgori Capital (Proprietary) Limited UCHGB-000065-18 (unreported)

Director of Public Prosecutions v Khato Civils (Pty) Ltd and Five Others, UCHGB-000266-16, unreported

Hedley Byre and Co. Ltd v Heller and Partners Ltd 1924 AC 465

IRB Transport (Proprietary) Ltd and Others UCHGB-000315-16

Standard Bank SA Ltd v Oneanate Investment (Pty) Ltd 1995 4 SA 510 (C)

Stevens v Investec Bank (Pty) Ltd 2012 ZAGPJHC 226

Tournier v National Provincial and Union Bank of England 1924 1 KB 471

5. Websites

http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=5a0b3a53-502a-4921-8fe8-bd30193d3516&key=lX8br4yPgmOdAoaloRC9jA%3d%3d&issue=11062015111200000000001001

http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=ac379629-b7f1-451b-98f3-a4a9e252c8bd&key=pFdxt%2fqYx6%2bY33wBz885jA%3d%3d&issue=11062015112300000000001001

http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=07f862bc-1dc3-4c61-a941-f75b4d321bf7&key=AZyT%2bIG4hnpljwcUspRpUQ%3d%3d&issue=11062016020400000000001001
http://finmark.org.za/wp-content/uploads/2019/09/FMT_Product-Risk-Assessment_v4_final_18092019.pdf
http://finmark.org.za/wp-content/uploads/2019/09/FMT_Product-Risk-Assessment_v4_final_18092019.pdf
http://www.bdlive.co.za/business/financial/2016/02/02/banking-association-sa-unhappy-with-provisions-in-financial-bill
http://www.bdlive.co.za/business/financial/2016/02/03/banks-resist-tighter-surveillance-of-vips
http://www.derebus.org.za/customer-due-diligence-and-risk-management-and-compliance-programme/
http://www.esaamlg.org/reports/me.php
http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/ESAAMLG-MER-Botswana-2017.pdf
http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Banking-Sector.pdf
http://www.fin24.com/Companies/Financial-Services/SA-under-international-pressure-for-Fica-bill-20151106
http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/Money-Laundering/What-is-Money-Laundering/
http://www.moneyweb.co.za/news/south-africa/fica-set-to-gain-more-clout/
http://www.sundaystandard.info/agency-assesses-money-laundering-and-terrorism-financing-botswana
https://egmontgroup.org/en/content/about
https://egmontgroup.org/en/content/about.
https://www.afdb.org/en/about/corporate-information.
https://www.anti-moneylaundering.org/africa/Botswana.aspx
https://www.businesslive.co.za/fm/features/africa/2019-06-20-will-africas-free-trade-area-live-up-to-the-hype/
https://www.fatf-gafi.org/faq/moneylaundering/

https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20South%20Africa%20ES.pdf
https://www.giaba.org/about-giaba/index_656.html.
https://www.int-comp.org/careers/a-career-in-aml/what-is-money-laundering/
https://www.intechopen.com/books/globalization-approaches-to-diversity/money-laundering-among-globalized-world
https://www.intechopen.com/books/globalization-approaches-to-diversity/money-laundering-among-globalized-world
https://www.iol.co.za/business-report/opinion/anti-money-laundering-law-amendments-raise-penalties-710800
https://www.nbfira.org.bw/sites/default/files/NRA%20SUMMARY%20FOR%20NBFIs.pdf
https://www.nbfira.org.bw/sites/default/files/NRA%20SUMMARY%20FOR%20NBFIs.pdf
https://www.reuters.com/article/us-africa-trade/economic-game-changer-african-leaders-launch-free-trade-zone-idUSKCN1U20BX
https://www.standardbank.co.za/secure/applications/business_current/FICA_english.pdf
www.interpol.com/Public/FinancialCrime/MoneyLaundering/defaultasp
www.issafrica.org