

ANTI-MONEY LAUNDERING DEVELOPMENTS: A COMPARATIVE APPRAISAL

by

MARIA ELIZABETH (MARLIZE) SCHLEBUSCH

Student number: U22959646

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SUPERVISOR: PROF CM VAN HEERDEN

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List of Abbreviations

AML: Anti-money laundering

CDD: Customer due diligence

CDSA: Corruption, Drug Trafficking and Other Serious Crimes (Confiscation Benefits) Act 1992 (Cap 65A)

CFT: Combating the Financing of Terrorism

CPF: Countering Proliferation Financing

ESAAMLG: Eastern and Southern Africa Anti-Money Laundering Group

FATF: Financial Task Force

FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation

FIC: Financial Intelligence Centre

FICA: Financial Intelligence Centre Act 38 of 2001

FIU: Financial Intelligence Unit

FSB: Financial Stability Board

FSRBs: FATF-Style Regional Bodies

G20: The Group of Twenty

IMF: International Monetary Fund

ML: Money Laundering

PEP: Politically Exposed Person

POCA: Proceeds of Organised Crime Act 121 of 1998

STRO: Suspicious Transaction Reporting Office

UN: United Nations

UNODC: United Nations Office on Drugs and Crime

TF: Terrorist Financing

TSOFA: Terrorism (Suppressing of Financing) Act 2002

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Chapter One: Introduction

1.1 Introduction

“Everyone has a price, the important thing is to find out what it is.” - Pablo Escobar¹

The famous drug lord and master money launderer, Pablo Escobar, made so much money from his drug business he was said to have buried loads of cash as he could not launder it quick enough. His brother was quoted saying that they had so much dirty money that 10% of his earnings were written off due to rats eating it in storage, water damage or simply lost. They spent £2 000 on rubber bands to hold the money together. Pablo was eventually gunned down in 1993.²

Heinous and white-collar crimes are being committed across the globe and money laundering (“ML”), a process whereby criminals make “dirty money” appear clean to conceal the illegal origin of the money, is a means of keeping these crimes profitable by allowing criminals to enjoy the illicit proceeds from their crimes. The crimes that are being committed are wide ranging and so are the methods and sectors that are being used as conduits for ML.

1.2 Objective of the study

The objective of this study is to understand and explore the rapid pace at which ML has evolved and the global and local impact thereof through answering the research questions.

1.3 Research questions

In order to address the research objective the following questions will be considered in this study:

- (a) How has ML evolved and why?
- (b) Why is ML a problem and how is it being addressed internationally from a best practice/standards perspective?

¹ Good Reads “Pablo Escobar quotes” <https://www.goodreads.com/quotes/7409769-everyone-has-a-price-the-important-thing-is-to-find> (accessed 7 April 2023).

² Manger “Pablo Escobar buried gold and wads of cash from \$50 billion drug fortune in secret locations – then shot men who did it to keep locations secret” *Mirror* (12/12/2017) <https://www.mirror.co.uk/news/real-life-stories/pablo-escobar-buried-gold-wads-11675881> (accessed 7 April 2023).

- (c) Why is it important for uniformity in addressing ML and for jurisdictions to work together in combating ML and who are the role players?
- (d) How does South Africa fare in the fight against ML compared to international best practice and compared specifically to Singapore?

1.4 Comparative study

The FATF has played a pivotal international role in the fight against ML since its establishment. The FATF has set the international standards which its members have committed to implement to work towards a common objective. It is important to include and have an understanding of the *FATF's Recommendations* as part of this paper as it is the foundation against which South Africa and Singapore was measured in their *Mutual Evaluation Report*.

Unlike South Africa who has recently been greylisted, Singapore has excelled in their last *Mutual Evaluation Report*. Both countries are subject to the FATF's forty recommendations, but what are the factors that set the countries apart and what are Singapore's strengths that South Africa can leverage from?

1.5 Research methodology

The research undertaken in this dissertation will comprise a critical desk top study of relevant policy documents, standards, legislation, books, journal articles and internet sources.

1.6 Delimitation

The dissertation will not focus in any depth on terrorist financing ("TF"), but mention will be made of TF due the close link it shares with ML.

1.7 Chapter overview

Chapter One sets out the background to the study and provides the research question, research objectives, research methodology, motivation for the comparative study as well as the chapter layout.

Chapter Two explores the origin of ML the various definitions and stages of ML.

Chapter Three considers why there is a need for global alignment to address ML why it is problematic, the various role players and virtual currency as an example of a global challenge.

Chapter Four will focus on the functions and the role of the FATF and their recommendations and a brief look at the FATF and Basel Committee on Banking Supervision.

Chapter Five will focus on how South Africa as a country is faring measured against international standards, the primary legislation regulating ML, challenges unique to South Africa with a focus on the *Mutual Evaluation Report* conducted by the FATF and the country's subsequent recent greylisting.

Chapter Six will focus on Singapore, how they fare against international standards, primary legislation regulating ML, how they fared in their last mutual evaluation by the FATF, challenges unique to this country and finally the conclusions and recommendations drawn from the comparisons between South Africa and Singapore.

Chapter Two: Origin and definition of money laundering

2.1 Origin of money laundering

There are different views on the origin of ML and multiple definitions of ML, with slight variances. Numerous scholars support the view that ML is thought to have arisen from mafia group practices in the 1920s, when laundromats were used as a front to hide criminal activities and dirty money. Laundromats were acquired by the mafia groups to create the appearance of legitimate assets that were in fact derived from criminal activities. The proceeds of their crimes were declared as legitimate profits from the laundromats, creating a ML conduit. Some argue that in the absence of empirical evidence supporting the link between mafia groups and ML in the 1920s, that the belief that ML was done by means of acquiring laundromats could easily be the product of a myth.³ Whether a myth or not, it makes for a great story linking ML to the origin of laundromats.

There are authors who are of the view that ML is as old as money itself, but in the early years it was more the underlying crime that was receiving attention.⁴ This view is quite plausible seeing that crime has always been present in society, it has however evolved significantly along with the laws and measures to counteract these crimes and the proceeds derived therefrom. In the current times of advanced technology and access to information there is significantly more awareness and one can argue it is these very same resources that have delivered the very sophisticated criminals of today that are always on the prowl for loopholes and vulnerabilities to exploit in the financial systems of a country.

Al Capone, one of the most notorious gangsters in the USA, was interestingly not sent to prison for the multiple murders or other crimes committed by him and his gang, but for evading tax during 1925 to 1929. At the time, it was the closest an US attorney came to indicting someone for ML.⁵ Al Capone was sent to prison for 11 years and it

³ Durrieu *Rethinking Money Laundering and Financing of Terrorism in International Law : Towards a New Global Legal Order* BRILL (2013) 13–14 ProQuest Ebook Central.

⁴ Muller, Kalin, Goldsworth *Anti-Money Laundering: International Law and Practice* (2007) 3 <https://books.google.co.za/books?id=g2Bz0iuJ8WIC&lpg=PA1&ots=OYBldGhXUD&dq=money%20laundering%20history&lr&pg=PA3#v=onepage&q=money%20laundering%20history&f=false> (accessed on 12 March 2023).

⁵ As above.

quickly became evident that alternative methods had to be found for the mob to sustain a successful 'business' and mislead tax authorities.⁶

2.2 Various definitions of money laundering

The first legal definition of ML in international law dates back to the 1980s, which can be found in the *Vienna Convention (1988)*,⁷ although at the time it was limited to combating ML, the proceeds whereof were derived from drug trafficking. Criminal offences from which proceeds were derived during the 1990s were broadened substantially and no longer limited to offences associated with drugs. The terrorist attacks on Washington and New York on 11 September 2001, revealed the need for a new international law enforcement structure combating ML and FT.⁸ The two terms AML and CFT are so closely related today they have become synonymous. It is therefore inevitable that FT will feature in this paper, however, as indicated in the delimitation in Chapter One, the study is primarily focused on ML.

A few of the ML definitions are considered below:

<i>Vienna Convention (1988)</i>	<p>"i) The conversion or transfer of property, knowing that such property is derived from any offence or offences..." (relating to drug trafficking) "...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;</p> <p>ii) 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..." (relating to drug trafficking"</p>
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⁶ Muller, Kalin, Goldsworth *Anti-Money Laundering: International Law and Practice* (2007) 3 <https://books.google.co.za/books?id=g2Bz0iuJ8WIC&lpg=PA1&ots=OYBldGhXUD&dq=money%20laundering%20history&lr&pg=PA3#v=onepage&q=money%20laundering%20history&f=false> (accessed on 12 March 2023).

⁷ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 https://www.unodc.org/pdf/convention_1988_en.pdf (accessed 5 March 2023).

⁸ Durrieu *Rethinking Money Laundering and Financing of Terrorism in International Law : Towards a New Global Legal Order* BRILL (2013) 2 ProQuest Ebook Central, <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=1204118> (accessed 5 March 2023).

	“...or from an act of participation in such an offence or offences” ⁹
<i>Palermo Convention (2000)</i>	<p>“i) The conversion or transfer of property, knowing that such property is the proceed of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;</p> <p>ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.”¹⁰</p>
The Financial Action Task Force (FATF)	<p>“The goal of a large number of criminal acts is to generate a profit for the individual or group that carries out the act. Money laundering is the processing of these 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. Illegal arms sales, smuggling, and the activities of organised crime, including for example drug trafficking and prostitution rings, can generate huge amounts of proceeds. Embezzlement, insider trading, bribery and computer fraud schemes can also produce large profits and create the incentive to ‘legitimize’ the ill-gotten gains through money laundering.”¹¹</p>

⁹ *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* 3 https://www.unodc.org/pdf/convention_1988_en.pdf (accessed 10 July 2023).

¹⁰ *United Nations Convention against Transnational Organized Crime and the protocols thereto* Article 6 Criminalization of the laundering of proceeds of crime 8 <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (accessed 10 July 2023).

¹¹ FATF “Frequently Asked Questions” <https://www.fatf-gafi.org/en/pages/frequently-asked-questions.html#tabs-36503a8663-item-6ff811783c-tab> read with McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 6 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

Interpol	“Money laundering is concealing or disguising the origins of illegally obtained proceeds so that they appear to have originated from legitimate sources. It is frequently a component of other serious crimes such as drug trafficking, robbery or extortion.” ¹²
United Nations Office on Drugs and Crime (UNODC)	“Money-laundering is the method by which criminals disguise the illegal origins of their wealth and protect their assets, fueling in turn corruption and organized crime, terrorism and other illegal activities.” ¹³
World Bank and International Monetary Fund (IMF)	“It is the process by which proceeds from a criminal activity is disguised to conceal their illicit origins. Basically, money laundering involved the proceeds of criminally derived property rather than the property itself.” ¹⁴
United States Department of the Treasury – Financial Crimes Enforcement Network	“Money laundering is the process of making illegally-gained proceeds (i.e. ‘dirty money’) appear legal (i.e. ‘clean’). Typically, it involves three steps: placement, layering and integration. First, the illegitimate funds are furtively introduced into the legitimate financial system. Then, the money is moved around to create confusion, sometimes by wiring or transferring through numerous accounts. Finally, it is integrated into the financial system through additional transactions until the ‘dirty money’ appears ‘clean’. Money laundering can facilitate crimes such as

¹² Interpol “Money laundering” <https://www.interpol.int/Crimes/Financial-crime/Money-laundering> (accessed 10 July 2023).

¹³ UNODC “Anti Money Laundering” <https://www.unodc.org/rpanc/en/Sub-programme-2/Thematic-areas/aml.html> (accessed 10 July 2023).

¹⁴ The International Bank for Reconstruction and Development/The World Bank/The international Monetary Fund *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism* (2006) <https://documents1.worldbank.org/curated/en/558401468134391014/pdf/350520Referenc1Money010FFICIAL0USE1.pdf> (accessed 10 July 2023).

	drug trafficking and terrorism and can adversely impact the global economy.” ¹⁵
Financial Intelligence Centre Act 38 of 2001	“...an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds...” ¹⁶

It is evident that there are distinct similarities in the above definitions, most important being that ML is a criminal offence. Secondly, the majority of definitions acknowledge that a process is involved whereby criminals make dirty money appear clean to conceal the illicit origin of the money.

2.3 Stages of money laundering

Generally, there are three stages relevant to ML:

2.3.1 Placement

Placement refers to the stage of shifting illegally derived proceeds to a place that appears less suspicious.¹⁷ The illicit funds are moved into the financial system by making use of financial products such as bank accounts and insurance products. Criminals may deposit smaller amounts, known as “smurfing”, into multiple accounts over a period of time as opposed to depositing large sums of money that may attract attention.¹⁸

2.3.2 Layering

¹⁵ U.S. Treasury Financial Crimes Enforcement Network “History of Anti-Money Laundering Laws” <https://www.fincen.gov/history-anti-money-laundering-laws> (accessed 10 July 2023) read with McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 7 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

¹⁶ S1 of the Financial Intelligence Centre Act 38 of 2001.

¹⁷ <https://www.unodc.org/unodc/en/money-laundering/overview.html> (accessed 6 March 2023).

¹⁸ Durrieu, Roberto *Rethinking Money Laundering and Financing of Terrorism in International Law : Towards a New Global Legal Order*, BRILL (2013) 32 ProQuest Ebook Central, <https://secure-web.cisco.com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=1204118>.

Layering refers to the stage wherein criminals attempt to distance themselves from the illegally derived proceeds. The intention is to create anonymity and to prevent the illicit proceeds being linked to the criminal.¹⁹ This is achieved by creating complex layers, creating confusion, blurring the understanding of ownership, all of which make it difficult to trace transactions or link back to the criminal activity. Proceeds can be moved to foreign jurisdictions via shell companies, property purchases, funds can be transferred into various monetary instruments, movement of funds between accounts are all methods to complicate audit trails.²⁰

2.3.3 Integration stage

This final stage refers to the stage where the funds are converted into legitimate income.²¹ Should the placement and layering stage have been successful one would at this stage be unable to distinguish between illicit proceeds and legitimate income. Money can now be further integrated into the financial system through the purchase of luxury items, properties, businesses and other items or fund further criminal activities.²²

Franklin Jurado, a Harvard-educated Columbian economist, who laundered \$36 million on behalf of the Colombian drug lord Jose Santacruz-Londono,²³ illustrates the stages of ML quite well. Jurado wired money from Panama to Europe during the late eighties and early nineties concealing its origin through moving the funds to less suspicious looking entities, namely banks in Europe (placement). In an attempt to

¹⁹ UNODC “Money Laundering” <https://www.unodc.org/unodc/en/money-laundering/overview.html> (accessed 6 March 2023).

²⁰ Durrieu, Roberto *Rethinking Money Laundering and Financing of Terrorism in International Law : Towards a New Global Legal Order*, BRILL (2013) 33-34 ProQuest Ebook Central, <https://secure-web.cisco.com.uplib.idm.oc:c.org/lib/pretoria-ebooks/detail.action?docID=1204118>.

²¹ UNODC “Money Laundering” <https://www.unodc.org/unodc/en/money-laundering/overview.html> (accessed 6 March 2023).

²² Durrieu, Roberto *Rethinking Money Laundering and Financing of Terrorism in International Law : Towards a New Global Legal Order*, BRILL (2013) 34-35 ProQuest Ebook Central, <https://secure-web.cisco.com.uplib.idm.oc:c.org/lib/pretoria-ebooks/detail.action?docID=1204118>.

²³ Santacruz-Londono was a top leader of the Cali cocaine cartel who was gunned down by police in a gun battle, following his escape from a maximum security prison where he was in custody for murder and drug trafficking charges. <https://www.washingtonpost.com/archive/politics/1996/03/06/fugitive-colombian-drug-lord-killed/401fa9bb-da0e-44e5-b883-8ea7818516fc/>

avoid the funds being traced back to its origin, Jurado further transferred the funds into 100 accounts at 68 banks in 9 different countries across Europe and kept the account balances below €10 000 to avoid attracting suspicion (layering). European front companies were established and the “cleaned” money were invested into Santacruz-Londono’s companies. Ultimately it was a bank failure in Monaco²⁴ that exposed the multiple accounts linked to Jurado and a neighbour who alerted the authorities, following the ongoing noise from a money-counting machine in Jurado’s home. Jurado was sentenced in 1996 to seven and a half years imprisonment.²⁵

²⁴ Bank of Credit and Commerce International (BCCI) collapsed in July 1991 and was labelled history’s biggest bank fraud scandal. It resulted in huge financial losses, job losses and revealed the many deficiencies that led to the bank’s eventual demise. <https://www.latimes.com/archives/la-xpm-1991-07-11-mn-2869-story.html> (accessed 9 July 2023).

²⁵ McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 8 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023) read with United Nations General Assembly *Special Session on the World Drug Problem* (1998) <https://irp.fas.org/news/1998/06/laundry.htm> (accessed 6 March 2023).

Chapter Three – Global alignment and International Role Players

3.1 Introduction

With the advantages of globalisation there are unfortunately also disadvantages. Money launderers can move money with ease across jurisdictions and find loopholes and take advantage of jurisdictions with weak or ineffective regulations.²⁶ The observation that “The chain is only as strong as its weakest link”²⁷ is very relevant in this context and also provides the justification for jurisdictions to join forces to address this ever-evolving issue.

3.2 Role players

There are various international role players involved in AML and who play an integral part in global AML regulation.²⁸ These are briefly discussed below.

3.2.1 United Nations Office on Drugs and Crime (UNODC)

UNODC is a global standard setting body that assists its members in their struggle against illicit drugs, crime and terrorism and further assist members to implement obligations contained in various conventions.²⁹

3.2.2 Financial Action Task Force (FATF)

The FATF is an intergovernmental body, with the objective to safeguard the international financial system against ML, TF and the financing of proliferation of weapons of mass destruction.³⁰ The FATF play an integral role in combating ML and their functions and recommendations will be examined in the following chapter.

²⁶ Shiqing *Still Keeping Secrets? Bank Secrecy, Money Laundering, and Anti-Money Laundering in Switzerland and Singapore* IALS Student Law Review (2019) 20 <https://journals.sas.ac.uk/lawreview/article/view/4955/4895> (accessed on 2 April 2023).

²⁷ Quote from Thomas Reid *Essays on the Intellectual Powers of a Man* <https://www.goodreads.com/quotes/9585678-the-chain-is-only-as-strong-as-its-weakest-link> (accessed 2 April 2023).

²⁸ McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 6 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

²⁹UNODC “Southern Eastern Europe Overview” <https://www.unodc.org/southeasterneurope/en/overview.html#:~:text=UNODC%20is%20a%20global%20leader,illicit%20drugs%2C%20crime%20and%20terrorism> (accessed 25 April 2023).

³⁰FATF “Who we are” <https://www.fatf-gafi.org/en/the-fatf/who-we-are.html> (accessed 11 February 2023).

3.2.3 Egmont Group of Financial Intelligence Units

This is a global organisation that creates a platform for member financial intelligence units to “securely exchange expertise and financial intelligence to combat ML, TF, and associated predicate crimes.”³¹

3.2.4 World Bank

The World Bank houses the Financial Integrity Unit, who in turn houses the Stolen Asset Recovery Initiative (Star), a partnership between the World Bank and the UNODC. The objective is to assist countries and to provide tools that can enhance transparency and prevent and pursue illicit financial flows, support global efforts to bring safe havens for corrupt funds to an end, collaborating with developing countries in the fight against the laundering of proceeds of corruption and to facilitate stolen asset recovery for public use.³²

3.2.5 International Monetary Fund (IMF)

With regional and representative offices across the globe, one of its various functions is to assist countries to align their legal and governance frameworks to meet international standards in the fight against ML, corruption and TF.³³

3.2.6 Basel Committee for Banking Supervision

Situated at the Bank of International Settlements and with its primary focus on the prudential regulation of banks and providing a forum on banking supervisory matters, the Committee has provided numerous publications, one of which, the *Core Principles of Effective Banking Supervision* (“the *Core Principles*”).³⁴

The IMF and the World Bank make use of the *Core Principles* to evaluate the efficacy of countries’ banking supervision systems and practices through Financial Assessment Programmes. The 2012 revised Core Principles introduced a principle in

³¹ Connecting financial intelligence units worldwide <https://egmontgroup.org/> (accessed 9 April 2023).

³²The World Bank “Financial Market Integrity” <https://www.worldbank.org/en/topic/financialmarketintegrity> (accessed 9 April 2023).

³³ International Monetary Fund “About us” https://www.imf.org/external/np/ins/english/capacity_about.htm (accessed 9 April 2023).

³⁴ Basel Committee on Banking Supervision Core Principles for effective banking supervision (2019) https://www.bis.org/basel_framework/chapter/BCP/01.htm?inforce=20191215&published=20191215 (accessed on 23 April).

support of the Committee’s longstanding commitment to promote implementation of sound AML and countering TF.³⁵

Core Principle 29 pertains to the abuse of financial services and provides that “the supervisor determines that banks have adequate policies and processes” in place that includes stringent customer due diligence to ensure that ethical and professional standards are promoted in the financial sector and to ensure that banks are prevented from being used for criminal activities, whether intentionally or unintentionally.³⁶ The Committee acknowledges that different authorities are responsible for assessing compliance with laws and regulations pertaining to criminal activities in banks like fraud, ML and TF, across jurisdictions and it is suggested that “the supervisor” be regarded in the broad sense to include such other authorities and that, in these jurisdictions the banking supervisor and such other authorities co-operate to achieve compliance.³⁷

In 2014 the Committee published *Guidelines for the Sound management of risks related to money laundering and financing of terrorism* (“*Guidelines*”), which was revised in 2020. The connected relationship between the Committee and the FATF is evident from the *Guidelines* with the Committee’s objective to support the FATF in the national implementation of their *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (“*FATF Recommendations*”). The Committee has also considered the *Financial Inclusion Guidance* published by the FATF in 2013, in drafting the *Guidelines*.³⁸

3.2.7 Financial Stability Board (FSB)

³⁵ Basel Committee on Banking Supervision *Guidelines Sound management of risks related to money laundering and financing of terrorism* (revised in 2020) 1 <https://www.bis.org/bcbs/publ/d505.htm> (accessed 11 February 2023).

³⁶ Basel Committee on Banking Supervision *Core Principles for effective banking supervision* (2019) 11 https://www.bis.org/basel_framework/chapter/BCP/01.htm?inforce=20191215&published=20191215 (accessed on 7 February 2023).

³⁷ Basel Committee on Banking Supervision *Core Principles for effective banking supervision* (2019) 13 fn36 https://www.bis.org/basel_framework/chapter/BCP/01.htm?inforce=20191215&published=20191215 (accessed on 7 February 2023).

³⁸ Basel Committee on Banking Supervision *Guidelines Sound management of risks related to money laundering and financing of terrorism* [chrome-extension://efaidnbmnnnibpcajpcqlclefindmkaj/https://www.bis.org/bcbs/publ/d505.pdf](https://www.bis.org/bcbs/publ/d505.pdf) (accessed 9 April 2023).

The FSB monitors and provides recommendations pertaining to the global financial system, co-ordinating national financial authorities and international standard setting bodies to ensure robust regulatory, supervisory and other financial sector policies. The FSB aims to strengthen financial systems as well as the stability of international financial markets.³⁹

3.3 Why is money laundering problematic?

ML has socio-economic and political implications that result in negative short- and long-term effects.⁴⁰ These problems are analysed below:

3.3.1 Developing world

Research has revealed that the wealthier Western European countries are attractive for money launderers to invest in and that, during the period 1997 to 2005, money laundered globally occurred in 20 of the richest countries. It was also found that developing countries are more prone to be affected by the negative impact of ML than developed countries.⁴¹

3.3.2 Promotion of crime

As observed by McCarthy, ML promotes crime and is a means for crime to remain profitable. Reducing the profitability of crime naturally reduces the incentive for criminals to participate in criminal activities.⁴²

3.3.3 Harm the economy

Criminal investment distorts national income and wealth distribution statistics resulting in inaccurate data which is relied on for guidance on public policy decisions. Criminal investments thus lead to economic disruptions. Whilst regular investors seek to make a profit, criminals invest to conceal the origin of the illicit funds. In an attempt to avoid

³⁹ FSB “About the FSB” <https://www.fsb.org/about/> (accessed 9 April 2023).

⁴⁰ McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 12 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

⁴¹ McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 14 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

⁴² McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 12 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

detection this could result in capital being diverted from “solid, stable investments, with high return rates, to low-risk options”. In the property market this has the effect of increased property prices and pushing legitimate real estate investments out of the market. It furthermore creates volatility in the market resulting in “boom and bust periods”. Criminal investments skew import and consumption patterns. When criminals are unable to readily invest, they are likely to spend proceeds on high-value luxury goods. An increase in demand for luxury goods result in an increase in demand for imports which in turn impacts on the foreign trade balance. This can result in exchange rates being reassessed, decrease the country’s competitiveness and lead to the failure of legitimate businesses.⁴³

ML endangers the financial system as criminal investments creates volatility which can impact on the financial sector’s liquidity and solvency. The credibility of financial bodies and the systems within which they operate are called into question, which can potentially cause legitimate investors to disinvest.⁴⁴

Criminal investments lead to increased levels of corruption, and officials that are successfully bribed to assist in criminal investments contribute to a loss of credibility in a country’s institutions.⁴⁵

3.4 Virtual currencies

Virtual currencies are a prime example to demonstrate the interconnectedness of jurisdictions. Having entered the scene in approximately 2009,⁴⁶ virtual currencies are no longer a new concept and are very relevant when exploring the challenges faced with ML. A virtual currency (more recently referred to as “crypto asset”)⁴⁷ is a

⁴³ McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 12-13 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

⁴⁴ McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 13 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

⁴⁵ McCarthy *The Money Laundering Market: Regulating the Criminal Economy* (2018) 12-13 ProQuest Ebook Central <https://ebookcentral-proquest-com.uplib.idm.oclc.org/lib/pretoria-ebooks/detail.action?docID=5778697> (accessed 6 March 2023).

⁴⁶ Nakamoto “Bitcoin: A Peer-to-Peer Electronic Cash System” <https://bitcoin.org/bitcoin.pdf> (accessed 14 October 2023).

⁴⁷ Various naming conventions have been used over the years, central banks intentionally not referring to the term ‘currency’ as crypto assets are not legal tender. Legal tender is defined as “(1) A tender, including a tender by the Bank itself, of a note of the Bank or of an outstanding note of another bank for which the Bank has assumed liability in terms of section 15(3)(c) of the Currency and Banking Act or in terms of any agreement entered into with another bank before or after the commencement of this Act,

“digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account and/or a store of value but does not have legal tender status”⁴⁸ and/or “...a unit of account that is digitally or electronically created and stored.”⁴⁹

Globally the various jurisdictions have predominately followed three approaches to crypto assets, namely: permitting its use and trade; secondly, banning or restricting its use; and lastly, whilst not declaring it illegal, continuing to monitor it and issuing warnings to the public about the inherent risks related thereto.⁵⁰ Crypto asset trading is banned in China.⁵¹ Germany became the first jurisdiction to “*regulate*” and officially recognise crypto assets as financial instruments and private money.⁵² Japan regulates through their revised legislation and crypto assets was recognised as legal tender in March 2017.⁵³ With no comprehensive regulatory framework yet in place in South Africa it is, unlike legal tender, in the discretion of merchants to accept crypto assets as a payment medium.

Virtual currencies are a preferred payment method by some entities and individuals as they offer a high degree of anonymity and it is this very same reason that makes it so attractive to criminals, fraudsters and money launderers.⁵⁴ The “know-your-customer”-policy (KYC), one of the traditional measures used in countering ML, is what criminals

shall be a legal tender of payment of an amount equal to the amount specified on the note. (2) A tender, including a tender by the Bank itself, of an undefaced and un mutilated coin which is lawfully in circulation in the Republic and of current mass, shall be a legal tender of payment of money...”. S17(1)-(2) of the South African Reserve Bank Act 90 of 1989 read with IFWG Crypto Assets Regulatory Working Group *Position Paper on Crypto Assets* 12; 15 (11 June 2021) https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paper%20on%20crypto%20assets_Final.pdf (accessed 14 October 2023).

⁴⁸ *South African Reserve Bank National Payment System Department: Position Paper on Virtual Currencies* (3 December 2014) 2.

⁴⁹ National Treasury: *User Alert Monitoring of virtual currencies* (18 September 2014) https://www.treasury.gov.za/comm_media/press/2014/2014091801%20-%20User%20alert%20virtual%20currencies.pdf (accessed 16 March 2023).

⁵⁰ IFWG Crypto Assets Regulatory Working Group *Consultation Paper on Policy Proposals for Crypto Assets* 6 https://www.treasury.gov.za/comm_media/press/2020/20200414%20IFWG%20Position%20Paper%20on%20Crypto%20Assets.pdf (accessed 16 March 2023).

⁵¹ As above 43.

⁵² As above 45.

⁵³ As above 47.

⁵⁴ National Treasury: *User Alert Monitoring of virtual currencies* (18 September 2014) chrome-extension://efaidnbmnnnibpcajpcqlclefindmkaj/https://www.treasury.gov.za/comm_media/press/2014/2014091801%20-%20user%20alert%20virtual%20currencies.pdf (accessed 16 March 2023).

want to avoid in order to create distance between themselves and the illicit funds, which can be achieved when making use of virtual currencies.⁵⁵

As pointed out by Erasmus and Bowden, the speed and ease within which money can be moved across jurisdictions and the fact that there is no universal international regulatory framework makes the jurisdictions with little to no regulation vulnerable and lead to regulatory arbitrage.⁵⁶ Similar to tax havens and jurisdictions with strict secrecy laws, these will be the jurisdictions most attractive to criminals.

Due to virtual currencies' decentralised nature, third party intermediaries are obsolete and transactions occur directly between users. As a result, a virtual currency-based payment system can operate in any jurisdiction with weak AML frameworks. The traditional AML approach of monitoring intermediaries becomes impossible in the virtual currency framework thus posing a weakness for criminals to exploit.⁵⁷ The borderless nature of virtual currencies, the rapid pace at which it is evolving, lack of disclosure and reporting requirements which can be relied on and the limited resources at the disposal of regulators, attribute to the difficulty of regulation of these innovative financial products.⁵⁸

In 2012 the FATF published the *New Payment Products and Services (NPPS) Guidance* and in 2014 it published a report on *Virtual currencies Key Definitions and Potential AML/CFT*, suggesting a conceptual framework for understanding and addressing AML/CFT risks associated with virtual currencies, with a number of examples demonstrating how virtual currencies have been abused by criminals.

⁵⁵ Erasmus, Bowden "A critical analysis of South African Anti-money laundering legislation with regard to cryptocurrency" (2020) 313 https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532020000200007 (accessed 4 April 2023).

⁵⁶ Erasmus, Bowden "A critical analysis of South African anti-money laundering legislation with regard to cryptocurrency" (2020) 314 https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532020000200007.

⁵⁷ Erasmus, Bowden "A critical analysis of South African anti-money laundering legislation with regard to cryptocurrency" (2020) 313 https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532020000200007.

⁵⁸ <https://www.imf.org/en/Publications/fandd/issues/2022/09/Regulating-crypto-Narain-Moretti> (accessed 4 April 2023).

The *FATF Recommendations*, discussed in more detail in the following chapter, provide in Recommendation 15 that to mitigate against the associated risks of virtual assets:

“...countries should ensure that virtual asset service providers are regulated for AML/CFT purposes, and licensed or registered and subject to effective systems for monitoring and ensuring compliance with the relevant measures called for in the FATF Recommendations.”⁵⁹

Recommendation 15 pertaining to new technologies was revised by the FATF in 2018 and in 2019 the interpretive note to recommendation 15 was revised in terms whereof countries are required to implement preventative and other measures in respect of virtual assets and virtual asset services providers.⁶⁰ The corresponding revisions to the *Assessments Methodology*⁶¹ was agreed to by the FATF in October 2019, prior to its onsite visit to South Africa for purposes of the *Mutual Evaluation Report* which also commenced that same month, and countries were being assessed for compliance with these requirements with immediate effect.⁶² It is therefore no surprise that South Africa was rated non-compliant in respect of this recommendation in the *Mutual Evaluation Report* thus resulting in the recent amendments in the FICA. The definition of “accountable institutions” was broadened to include “business activities or operations for and on behalf of a client exchanging, transferring, the safekeeping or administration of, participation in and provision of financial services relating to crypto assets”.⁶³ It is evident that the FATF now intends to create international alignment by making it mandatory for jurisdictions to regulate virtual currency service providers. This is a

⁵⁹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations (February 2023) 17.

⁶⁰ FATF (2021), Anti-money laundering and counter-terrorist financing measures – South Africa, Fourth Round Mutual Evaluation Report, FATF, Paris 185-186 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

⁶¹ FATF Methodology for assessing technical compliance with the FATF recommendations and the effectiveness of AML/CFT systems adopted in February 2013 (June 2023) <https://www.fatf-gafi.org/content/dam/fatf-gafi/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> (accessed 14 October 2023).

⁶² FATF (2021), Anti-money laundering and counter-terrorist financing measures – South Africa, Fourth Round Mutual Evaluation Report, FATF, Paris 185-186 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

⁶³ S22 of Schedule 1 of the Financial Intelligence Centre Act 38 of 2001.

welcome progression, and time will tell how Recommendation 15 is implemented by the various jurisdictions and the effectiveness thereof.

3.5 Concluding remarks

The interconnectedness of jurisdictions has contributed to the fact that AML regulation evolve globally to combat ML and TF. Criminals are sophisticated and constantly on the lookout for new ways to outsmart authorities, whether it is internationally or unique to a specific jurisdiction. Although not exhaustive, financial institutions, real estate, attorney firms, casinos, and virtual currencies are common conduits for criminals to launder money. Virtual currencies were discussed as an example to illustrate the interconnectedness of jurisdictions, how criminals are constantly monitoring trends and weaknesses to exploit. Each conduit chosen by criminals as a means to launder money comes with challenges unique thereto and is further complicated by the challenges unique to the jurisdiction concerned. It is clear that ML is a global struggle that can only be combatted in a joint effort, a realisation that has already dawned many years ago if one has regard to the work performed by the global role players. In the midst of the challenges faced, the progress that has been made in this joint effort globally by the various role players is commendable.

Chapter Four – The FATF

4.1 The Financial Action Task Force

Established in 1989 and based in Paris, the FATF is an intergovernmental body with the objective to safeguard the international financial system against ML, TF and the financing of proliferation of weapons of mass destruction which is achieved through development of international standards and the promotion of policies. Countries and jurisdictions in excess of 200, have committed to implement the *FATF's Recommendations* in the international prevention of organised crime, corruption and terrorism.⁶⁴ The FATF consists of the plenary; the president assisted by the vice president, the steering group and the secretariat.⁶⁵

The FATF consults its members, associate members, international financial institutions, observer organisations and other stakeholders which includes the private sector, regarding the development of the *FATF Recommendations*, guidance and other policies. The FATF members, consisting of jurisdictions and organisations, have agreed to work together towards common objectives. Once a country becomes a member, such member commits to endorse and implement the *FATF Recommendations* for combating ML and TF and proliferation, making use of guidance and any other policy endorsed by the FATF; and undergo and actively participate in systematic “peer reviews” (mutual evaluations) and follow-up processes. Member organisations, similarly, commit to endorse and promote effective implementation of the *FATF Recommendations* among their member jurisdictions; and support mutual evaluations and any potential follow-up processes as agreed. Both member jurisdictions and organisations commit to develop the *FATF Recommendations*, guidance and any other policy for the combating of ML and the financing of terrorism and proliferation and any other threats to the integrity of the international financial system by participating in the work of the FATF; collaborating to achieve objectives and fulfil the FATF’s mandate; contributing to FATF outreach to the private sector and

⁶⁴ FATF <https://www.fatf-gafi.org/en/the-fatf/who-we-are.html> (accessed 11 February 2023).

⁶⁵ FATF Mandate (12 April 2019) P7 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 11 February 2023).

participating in the FATF initiatives with the private sector.⁶⁶ South Africa and Singapore alongside numerous other jurisdictions are FATF members.⁶⁷

Associate Members are FATF style regional bodies and their relationship is regulated by a high-level set of principles. The Associate Members commit to endorse the *FATF Recommendations*, guidance and any other policy determined by the FATF for combating ML and TF and proliferation; promote effective implementation of the *FATF Recommendations* in their member jurisdictions through the conduct of systematic mutual evaluations and follow-up processes, and once evaluations are completed, to publish same; take part in the development of the *FATF Recommendations*, guidance and any other policy combating ML and TF and proliferation and any other threat to the integrity of the international financial system.⁶⁸

International financial institutions, in particular, the IMF and the World Bank, play a special role to develop, promote and disseminate measures for combating ML and the financing of terrorism and associated threats, within and in developing their respective mandates to promote financial and economic stability and development.⁶⁹

Observers are international bodies and organisations that act in this capacity, subsequent to being reviewed as eligible by the Plenary on a periodic basis. Observers have a stated role and commit to endorse the *FATF Recommendations*, guidance and any other policy for combating ML and the financing of terrorism and proliferation; and they add value to the work of the FATF by contributing in accordance with their respective legal frameworks and policies.⁷⁰ The UN, the Egmont Group Financial Intelligence Units, the World Bank and the Basel Committee on Banking Supervision form part of the twenty two observers currently serving.⁷¹

⁶⁶ FATF Mandate (12 April 2019) P5-P6 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 11 February 2023).

⁶⁷ FATF Mandate (12 April 2019) Annexure A P12 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 11 February 2023).

⁶⁸ FATF Mandate (12 April 2019) P6 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 11 February 2023).

⁶⁹ FATF Mandate (12 April 2019) P6 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 11 February 2023).

⁷⁰ FATF Mandate (12 April 2019) P7 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 11 February 2023).

⁷¹ FATF Mandate (12 April 2019) Annexure C P14 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 11 February 2023).

4.2 FATF functions and tasks

4.2.1 The FATF has various functions and tasks to achieve its objectives. These include:

- 4.2.1.1 To identify and analyse ML, TF and any other threat to the integrity of the financial system. This will include methods and trends involved, analysing the impact of existing measures designed to combat abuse of the global financial system;
- 4.2.1.2 To continuously refine and develop the international standards for combating ML and TF and proliferation;
- 4.2.1.3 To assess and monitor its members;
- 4.2.1.4 To identify and engage with “high-risk, non-co-operative jurisdictions and those with strategic deficiencies”;
- 4.2.1.5 To promote effective implementation by all countries of the *FATF Recommendations*; ensure a good understanding of the *FATF Recommendations* and the “consistent application of mutual evaluation and follow-up processes throughout the FATF global network and strengthening the capacity of the FSRBs to assess and monitor their member countries, including through standards training and outreach”;
- 4.2.1.6 To take action against new and emerging threats in line with the identified requirements by the international community, which includes the United Nations Security Council, the G20 and the FATF; prepare guidance as required to facilitate implementing international obligations in line with the *FATF Recommendations*;
- 4.2.1.7 To assist the various jurisdictions to implement financial provisions of the United Nations Security Council resolutions on terrorism and non-proliferation, assess the degree of implementation as well as the effectiveness; prepare guidance as required to facilitate implementation of relevant international obligations that are in line with the *FATF Recommendations*;
- 4.2.1.8 To continuously engage with international organisations and bodies, especially the United Nations, to achieve the FATF’s objectives and increase the outreach of the activities;

4.2.1.9 To engage and consult with the private sector on matters pertaining to the work of the FATF as well as civil society, to achieve effective implementation of the *FATF Recommendations*;

4.2.1.10 To undertake new tasks within the FATF's mandate and as agreed by its members.⁷²

The FATF's mandate does not result in any legal rights or obligations, however the implementation of the mandate is carried out by the FATF members and the FATF secretariat.⁷³

4.3 International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation

ML trends and techniques have evolved along with many other aspects of the financial industry and, to effectively combat the misuse of the financial systems, it is imperative that policies and procedures are revised on a continuous basis to address new and emerging threats and to equally evolve to stay ahead of sophisticated criminals. The *FATF Recommendations* were initially published in 1990,⁷⁴ with the aim to combat the abuse of financial systems by individuals laundering drug money. The *FATF Recommendations* have since been updated on multiple occasions with a now much broader scope.⁷⁵

4.4 FATF Forty Recommendations

4.4.1 Recommendation 1 - AML/CFT Policies and coordination

It is recommended that jurisdictions identify, assess and understand their ML and TF risks and have an appointed authority or mechanism to assess and mitigate against these risks. A risk-based approach should be followed to ensure that the preventative measures are relative to the identified risks. This has the effect of allocating adequate

⁷² FATF Mandate (12 April 2019) 4 -5 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 11 February 2023).

⁷³ FATF Mandate (12 April 2019) 11 <file:///C:/Users/Home/Downloads/FATF-Ministerial-Declaration-Mandate.pdf> (accessed on 12 February 2023).

⁷⁴ FATF The Forty Recommendations of the Financial Action Task Force on Money Laundering 1990 <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%201990.pdf> (accessed 14 October 2023).

⁷⁵ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations (February 2023).

resources and measures in higher risk areas and less stringent measures where lower risks are identified.⁷⁶

4.4.2 Recommendation 2 - National co-operation and coordination

National AML/CFT/CPF policies are recommended to be in place by countries and should be reviewed on a regular basis and have a dedicated authority or mechanism responsible for these policies. Domestic cooperation and collaboration between authorities at policy making and operational levels, which includes but is not limited to, policy makers, the financial intelligence unit, law enforcement authorities and supervisors, are required and must have effective measures in place to achieve this objective. It must in addition also have measures to exchange information pertaining to the development and implementation of policies and activities to combat ML, TF and the financing of proliferation of weapons of mass destruction.⁷⁷

4.4.3 Recommendation 3 - Money laundering offence

It is recommended that ML should be criminalised by countries based on the *Vienna Convention (1988)*⁷⁸ and the *Palermo Convention (2000)*.⁷⁹

4.4.4 Recommendation 4 - Confiscation and provisional measures

It is recommended that jurisdictions adopt measures, similar to measures contained in the *Vienna Convention (1988)*, the *Palermo Convention (2000)*, and the *Terrorist Financing Convention (1999)* as well as legislation, to freeze or seize and confiscate laundered property, proceeds from ML or predicate offences,⁸⁰ property that is the proceeds of TF, terrorist acts or terrorist organisations, or property of similar value. It is recommended that measures pertaining to confiscating goods allow for this without

⁷⁶ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations (February 2023) 10.

⁷⁷ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations (February 2023) 11-12.

⁷⁸ See Chapter 2 par 2.2 read with fn 7.

⁷⁹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations (February 2023) 12.

⁸⁰ "Predicate offences may be described by reference to all offences; or to a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches." International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 38.

the need for criminal conviction, placing the onus on the offender to provide the lawful origin of property to be confiscated.⁸¹

TERRORIST FINANCING AND FINANCING OF PROLIFERATION

4.4.5 Recommendations 5 to 8 - Terrorist financing offence; Targeted financing sanctions related to terrorist and TF and related to proliferation; Non-profit organisations

Recommendations 5 to 8 pertains to TF and falls outside the scope of this study.⁸²

D Preventative Measures

4.4.6 Recommendation 9 - Financial Secrecy Laws

The financial institution secrecy laws of a jurisdiction should not hinder the implementation of the *FATF Recommendations*.⁸³

4.4.7 Recommendation 10 - Customer due diligence

Financial institutions should not be permitted to keep accounts that are anonymous or accounts in a self-evident fictitious name. Customer due diligence should be undertaken, when a business relationship is entered into; occasional transactions are carried out above the determined threshold (USD/EUR 15,000 thus equivalent to approximately R285 109.50/R299 721.21);⁸⁴ or that are wire transfers; when ML or TF is suspected; or the financial institution has reservations about the previously obtained customer identification data.⁸⁵

Customer due diligence measures includes identifying and verifying the customer's identity making use of reliable source documents, data or information. Members are required to identify and verify the beneficial owner⁸⁶ of a legal person, understanding

⁸¹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 12.

⁸² International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 13.

⁸³ FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 14.

⁸⁴ Exchange Rate
https://exchangerate.guru/eur/zar/15000/?utm_referrer=https%3a%2f%2fwww.google.com%2f
(accessed 15 October 2023).

⁸⁵ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 14.

⁸⁶ Natural persons exercising control of the legal person. Controlling shareholders may be determined utilising a threshold, for example based on the jurisdiction's assessment of risk with a maximum of 25%. FATF International Standards on Combating Money Laundering and the Financing of Terrorism &

the ownership and control structure of the customer. This required understanding the objective and nature of the business relationship and the collection of the relevant information to achieve this. Due diligence must be undertaken on a continuous basis throughout the existence of the business relationship and the transactions should be examined to ensure that transactions are in line with the institution's knowledge of the customer, their business and risk profile and where necessary, the source of funds.⁸⁷ The risk-based approach⁸⁸ must be followed when determining the extent to which these measures should apply. The failure to comply with these measures should result in accounts not being opened, termination of the business relationship, submitting a suspicious transaction report pertaining to the customer and business relations or transactions should not be commenced with. The requirements should not only be applicable to all new customers, but also be applied to existing customers based on materiality and risk at relevant times.⁸⁹

4.4.8 Recommendation 11 - Record keeping

Records on financial transactions should be kept at a minimum for a period of five years by financial institutions. The records kept, should allow to sufficiently reconstruct a transaction, if requested by authorities and serve as evidence in criminal prosecutions. Records obtained as a result of customer due diligence, account file and business correspondence, which includes the outcome of any analysis undertaken, should be kept at a minimum for five years subsequent to the business relationship being terminated, or subsequent to the occasional transaction.⁹⁰

ADDITIONAL MEASURES FOR SPECIFIC CUSTOMERS AND ACTIVITIES

4.4.9 Recommendation 12 - Politically exposed persons

Proliferation The FATF Recommendations 65 <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf>.

⁸⁷ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 14.

⁸⁸ A risk-based approach means jurisdictions, authorities and financial institutions must identify, assess and understand ML/TF risks and take appropriate measures in proportion to those risks to mitigate risks. FATF *Guidance for a risk-based approach The Banking Sector* (2014) 6 <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Risk-Based-Approach-Banking-Sector.pdf.coredownload.pdf> (accessed 14 October 2023).

⁸⁹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 15.

⁹⁰ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 15.

Whether a customer or the beneficial owner, a financial institution should be required, in addition to usual customer due diligence measures, to have in place adequate risk-management systems to establish if the customer is a politically exposed person (PEP);⁹¹ and if so, obtain approval from senior management, for these type of business relationships; take reasonable steps to determine the source of wealth and funds; and monitor the business relationship on an enhanced ongoing basis. Reasonable measures should be taken to establish whether a customer is a domestic PEP or a person assigned with a prominent function by an international organisation and in cases of a higher risk business relationship with such persons, all of the above measures applied to PEPs should be applied, with the exception of the first measure pertaining to risk-management systems to establish whether a customer is a PEP. The requirements for a PEP should extend to the family members or close associates of PEPs.⁹²

4.4.10 Recommendation 13 - Correspondent banking

In addition to customer due diligence, financial institutions should be required, for relationships pertaining to cross-border correspondent banking⁹³ and similar relationships, obtain information about such a correspondent, the nature of its business, quality of supervision; assess AML/CFT controls of the respondent institution; obtain approval from senior management, prior to entering into correspondent relationships; understand responsibilities of each institution; be satisfied that the correspondent bank has performed CDD on customers who have direct access to accounts of the correspondent bank and to have access to CDD information upon request, pertaining to “payable-through accounts”. Financial

⁹¹ “A politically exposed person (PEP) is an individual who is or has been entrusted with a prominent function.” PEP’s positions are at risk of being abused for laundering funds or other predicate offences such as corruption or bribery. It is for this reason that additional measures must be taken to mitigate the risks. FATF “FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)” [https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Peps-r12-r22.html#:~:text=FATF%20Guidance%3A%20Politically%20Exposed%20Persons%20\(Rec%2012%20and%2022\)&text=A%20politically%20exposed%20person%20\(PEP,such%20as%20corruption%20or%20bribery](https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Peps-r12-r22.html#:~:text=FATF%20Guidance%3A%20Politically%20Exposed%20Persons%20(Rec%2012%20and%2022)&text=A%20politically%20exposed%20person%20(PEP,such%20as%20corruption%20or%20bribery). (accessed 14 October 2023).

⁹² International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 16.

⁹³ Bank services that are provided by one bank to another bank, the banks referred to as the correspondent and respondent bank respectively. Large international banks typically act as correspondent banks for other banks across the globe. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations (2023) 122.

institutions should be satisfied that respondent institutions do not allow their accounts to be used by shell banks and relationships with shell banks should be prohibited.⁹⁴

4.4.11 Recommendation 14 - Money or value transfer services

Measures should be in place by countries to ensure that natural or legal persons providing money or value-added services are licensed or registered and subject to monitoring and compliant with *FATF Recommendations* and any failure should be subject to appropriate sanctions. License and registration requirements should also be extended to agents.⁹⁵

4.4.12 Recommendation 15 - New technologies

New products and new business practices and the development thereof and new or developing technologies for existing and new products, should be identified and assessed for potential ML or TF risks by countries and financial institutions. Financial institutions should conduct risk assessments before launching new products, business practices or implementing new technologies. Countries should ensure that virtual asset service providers are licensed or registered and regulated for AML/CFT to manage and mitigate against risks from virtual assets and that system are in place to effectively monitor and ensure compliance with applicable measures required in the *FATF Recommendations*.⁹⁶

4.4.13 Recommendation 16 - Wire Transfers

Financial institutions should include required originator and beneficiary information on wire transfers and related messages, which must remain throughout the payment chain. Wire transfers should be monitored and where information is lacking, steps

⁹⁴ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 17.

⁹⁵ As above.

⁹⁶ As above.

should be taken to rectify the situation. Financial institutions should be able to take freezing action⁹⁷ and prohibit transactions with designated persons and entities.⁹⁸

RELIANCE, CONTROLS AND FINANCIAL GROUPS

4.4.14 Recommendation 17 - Reliance on third parties

Reliance on third parties by financial institutions for purposes of the CDD measures as contained in Recommendation 10, are permitted, subject to the criteria being met and with the ultimate responsibility remaining with the financial institution.⁹⁹

4.4.15 Recommendation 18 - Internal controls and foreign branches and subsidiaries
Programmes against ML and TF should be implemented by financial institutions and group wide programmes where financial groups are concerned, which includes policies and procedures pertaining to information sharing for AML/CFT purposes. Foreign branches and majority owned subsidiaries should be required to apply AML/CFT measures that are consistent with local country requirements.¹⁰⁰

4.4.16 Recommendation 19 - High-risk countries

High-risk countries indicated as such by the FATF should be subject to enhanced due diligence measures when business relationships, transactions with natural and legal persons, and financial institutions are entered into. The extent of the enhanced measures should be effective and proportionate to the risks.¹⁰¹

REPORTING OF SUSPICIOUS TRANSACTIONS

4.4.17 Recommendation 20 - Reporting of suspicious transactions

⁹⁷ “In all cases, the frozen property, equipment, instrumentalities, funds or other assets remain the property of the natural or legal person(s) that held an interest in them at the time of the freezing and may continue to be administered by third parties, or through other arrangements established by such natural or legal person(s) prior to the initiation of an action under a freezing mechanism, or in accordance with other national provisions. As part of the implementation of a freeze, countries may decide to take control of the property, equipment, instrumentalities, or funds or other assets as a means to protect against flight.” FATF “Glossary - Freeze” <https://www.fatf-gafi.org/en/pages/fatf-glossary.html#accordion-a13085a728-item-121a8a2b0f> (accessed 14 October 2023).

⁹⁸ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 17 – 18.

⁹⁹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 18.

¹⁰⁰As above.

¹⁰¹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 19.

It should be required by legislation to report suspicious transactions, if a financial institution suspects or has grounds to suspect that funds are proceeds of a criminal activity or linked to TF.¹⁰²

4.4.18 Recommendation 21 - Tipping-off and confidentiality

Financial institutions and their employees should be safeguarded by law from criminal and civil liability pertaining to any restriction on disclosure of information, if suspicions are reported in good faith to the intelligence unit, irrespective of whether an illegal activity actually occurred or not; and prohibited by law from having to disclose the fact that a suspicious transaction report or similar information is filed with the financial intelligence unit.¹⁰³

DESIGNATED NON-FINANCIAL BUSINESS PROFESSIONS

4.4.19 Recommendation 22

The same CDD and record-keeping requirements contained in recommendations 10, 12, 15 and 17 should be applicable to designated non-financial business professions such as dealers in precious metals and dealers in precious stones, lawyers, notaries, casinos, real estate agents, other independent legal professionals and accountants, trust and company services providers, when involved in certain transactions.¹⁰⁴

4.4.20 Recommendation 23

The requirements contained in recommendations 18 to 21 are applicable to all designated non-financial business and professions, subject to certain qualifications.¹⁰⁵

TRANSPARENCY AND BENEFICIAL OWNERSHIP¹⁰⁶ OF LEGAL PERSONS AND ARRANGEMENTS

¹⁰² International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 19.

¹⁰³ As above.

¹⁰⁴ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 19 - 20.

¹⁰⁵ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 20 - 21.

¹⁰⁶ The natural person/s who ultimately owns or controls a legal person. Either through ownership interest or through exercising ultimate effective control through other means. FATF Beneficial ownership of legal persons (March 2023) 16 par 35 <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Guidance-Beneficial-Ownership-Legal-Persons.pdf.coredownload.pdf> (accessed 28 October 2023).

4.4.21 Recommendation 24 - Transparency and beneficial ownership of legal persons
Assessments and measures should be in place to prevent abuse of legal persons for ML or TF. This includes, but is not limited to, obtaining information that are up to date, on beneficial owners and control of legal persons.

4.4.22 Recommendation 25 - Transparency and beneficial ownership of legal arrangements

Assessments and measures should be in place to prevent misuse of legal arrangements for ML or TF, which include obtaining information that is accessible to authorities, accurate and in a timely fashion on express trusts, information on the settlor, trustees and beneficiaries. It is suggested that measures are considered to facilitate the access of beneficial ownership and control information and that the recommendations pertaining to due diligence (Recommendation 10 and 22) are followed by designated non-financial businesses and professions.¹⁰⁷

POWERS AND RESPONSIBILITIES OF COMPETENT AUTHORITIES, AND OTHER INSTITUTIONAL MEASURES

REGULATION AND SUPERVISION

4.4.22 Recommendation 26 - Regulation and supervision of financial institutions

Financial institutions should be subject to acceptable regulation and supervision and ensure that *FATF Recommendations* are effectively implemented. The establishment, or continued operation of shell banks should not be approved. Financial institutions to which the *Core Principles*¹⁰⁸ are applicable, the regulatory and supervisory measures applicable for prudential purposes, should similarly apply for AML/CFT purposes. Financial institutions should be licensed or registered, regulated and supervised or monitored for AML/CFT purposes, taking into account the risk of that sector pertaining to ML or TF.¹⁰⁹

4.4.23 Recommendation 27 - Power of supervisors

¹⁰⁷ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 22.

¹⁰⁸ See Chapter 3; par 3.2.6.

¹⁰⁹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 23.

Supervisors should have an adequate toolkit to monitor or supervise and ensure compliance is carried out by financial institutions to combat ML and TF, consisting of “disciplinary and financial sanctions, power to withdraw, restrict or suspend” the financial institutions’ license.¹¹⁰

4.4.24 Recommendation 28 - Regulation and supervision of designated non-financial businesses and professions

The various categories of designated non-financial businesses and professions should have category specific systems for monitoring compliance with AML/CFT requirements carried out on a risk-sensitive basis.¹¹¹

OPERATIONAL AND LAW ENFORCEMENT

4.4.25 Recommendation 29 - Financial intelligence units

A financial intelligence unit must be established, serving as a national centre where suspicious transactions can be reported and analysed along with other information relevant to ML and TF. Financial intelligence units should have the authority to obtain additional information from reporting entities and prompt access to financial, administrative and law enforcement information to equip it to carry out its functions adequately.

4.4.26 Recommendation 30 - Responsibilities of law enforcement and investigative authorities

Assigned law enforcement authorities should have the responsibility of ML and TF investigations pertaining to AML/CFT policies.¹¹²

4.4.27 Recommendation 31 - Powers of law enforcement and investigative authorities

¹¹⁰ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 23.

¹¹¹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 23 – 24.

¹¹² International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 24 to 25.

Designated law enforcement and investigative authorities should be sufficiently empowered to conduct effective investigations pertaining to ML, TF and associated offences.¹¹³

4.4.28 Recommendation 32 - Cash couriers

Measures should be in place for monitoring of cross-border transportation of currency and bearer negotiable instruments, through a declaration system and or disclosure system. Authorities should be empowered through legislation to stop or restrain currency or bearer negotiable instruments, if suspected to be in relation to ML, or where false declarations or disclosures are made. Legislation should allow for confiscation as set out in recommendation four.¹¹⁴

GENERAL REQUIREMENTS

4.4.29 Recommendation 33 - Statistics

Statistics should be maintained by countries pertaining to the effectiveness and efficiency of the AML/CFT systems; suspicious transactions reports; investigations conducted; prosecutions and convictions; frozen, seized and confiscated property; legal assistance of any other international requests for co-operation.¹¹⁵

4.4.30 Recommendation 34 - Guidance and feedback

Competent authorities, supervisors and self-regulatory bodies should have guidelines in place and provide feedback to assist financial institutions, designated non-financial businesses and professions in applying measures to combat ML and TF nationally and especially the reporting of suspicious transactions.¹¹⁶

4.4.31 Recommendation 35 - Sanctions

Criminal or civil sanctions should be implemented to effectively deal with natural or legal persons failing to comply with AML/CFT requirements. The sanctions should be

¹¹³ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 25.

¹¹⁴ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 25.

¹¹⁵ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 25-26.

¹¹⁶ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 26.

applicable, in addition to financial institutions and designated non-financial business and professions, to their directors and senior management.¹¹⁷

4.4.34 Recommendation 36 to 40

Recommendation 36 to 40 relates to important international cooperation. Recommendation is made for countries to become part of and implement conventions such as the *Vienna Convention (1988)*; *Palermo Convention (2000)*; *UN Convention against Corruption (2004)* and the *Terrorist Financing Convention (1999)*¹¹⁸ and it is also encouraged that other pertinent international conventions be endorsed and implemented. Mutual assistance is recommended between jurisdictions in relation to ML and, in order to be effective, emphasis is placed on swift action and providing a broad spectrum of constructive mutual legal assistance. Jurisdictions should have the necessary authority and measures in place to effectively deal with freezing and confiscation and extradition requests.¹¹⁹

4.5 Concluding remarks

The FATF plays a pivotal role in the fight against ML and its recommendations sets the international scene to mitigate regulatory arbitrage. In the 34 years since its establishment, the FATF has done commendable work and the assessment and monitoring of its members ensures the effectiveness of the international standards. In the following two chapters the implementation of the *FATF Recommendations* by South Africa and Singapore respectively, are explored and it is pointed out why the same set of standards are more effective in some respects than in other.

¹¹⁷ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 26.

¹¹⁸ United Nations “International Convention for the Suppression of the Financing of Terrorism” https://legal.un.org/avl/pdf/ha/icsft/icsft_e.pdf (accessed 14 October 2023).

¹¹⁹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations 27-30.

Chapter 5 – South Africa and AML

5.1 South Africa and international AML standards

On 14 December 1998 South Africa acceded to the *Vienna Convention (1988)*.¹²⁰ South Africa is furthermore a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), a regional body, following international standards for combating ML and TF and proliferation efforts.¹²¹ The most important aim of ESAAMLG is the adoption and implementation of the *FATF Recommendations*;¹²² applying AML measures to serious crimes; implementing measures to combat TF; and implementing measures that may be provided for in the multilateral agreements and initiatives relevant to prevention and control of ML of all serious crimes and TF and proliferation of weapons of mass destruction.¹²³

South Africa is a signatory of the *Palermo Convention (2000)*,¹²⁴ with the primary aim of setting standards for domestic laws to effectively deal with organised crime and with members having to commit to providing mutual legal assistance through information sharing and gathering of evidence. Signatories who have ratified the *Palermo Convention (2000)*¹²⁵ are obligated to criminalise ML and develop ML measures in line with the *Palermo Convention*. On 20 February 2004, the convention was ratified by South Africa.¹²⁶

In 2003 South Africa became a FATF member,¹²⁷ and is one of the over 200 jurisdictions who have committed to implement the FATF standards and who, like other jurisdictions, are subjected to assessments from time to time to ensure effective implementation of the standards.¹²⁸ The *Mutual Evaluation Report* is a comprehensive report that depicts a jurisdiction's position against international standards and

¹²⁰ United Nations Treaties Collections: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6 (accessed 3 May 2023).

¹²¹ ESAAMLG “Who we are” <https://www.esaamlg.org/index.php/about> (accessed 3 May 2023).

¹²² See Chapter 4; 4.1.

¹²³ <https://www.esaamlg.org/index.php/about> (accessed 22 February 2023).

¹²⁴ See Chapter 2; fn10.

¹²⁵ As above.

¹²⁶ Srivastava, Simpson and Powell *International guide to money laundering law and practice* (eds) (2019) 1307.

¹²⁷ FATF “South Africa” <https://www.fatf-gafi.org/en/countries/detail/South-Africa.html> (accessed 3 May 2023).

¹²⁸ FATF “What we do” <https://www.fatf-gafi.org/en/the-fatf/what-we-do.html> (accessed 3 May 2023).

highlights shortcomings.¹²⁹ Should a jurisdiction fail to comply with the *FATF Recommendations* it can be named a jurisdiction under increased monitoring or a high risk jurisdiction. South Africa was assessed in 2019 and the findings of the report are discussed further below.

To reflect and give effect to these international ML standards, South African ML legislation has evolved over time and some of the key pieces of ML legislation will be discussed below.

5.2 South African money laundering legislation history

In having to align itself with international standards, the need for effective ML legislation in South Africa increased rapidly. This gave rise to the *Drugs and Drugs Trafficking Act 140 of 1992*; the *Proceeds of Crime Act 76 of 1996*; the *Prevention of Organised Crime Act 121 of 1998* (“POCA”) which repealed the *Proceeds of Crime Act 76 of 1996*, and in 2001, the promulgation of the *Financial Intelligence Centre Act 38 of 2001* (“FICA”) and the amendments thereto.

5.2.1 Drugs and Drugs Trafficking Act 140 of 1992

The *Drugs and Drugs Trafficking Act 140 of 1992* mainly addressed ML, up until 1998. Although it made provision for the reporting of suspicious transactions relating to drugs and drugs trafficking and even though it was illegal to convert the proceeds of drug trafficking, the manipulation of proceeds of crime in general, was not identified as a crime at the time.¹³⁰

5.2.2 Prevention of Organised Crime Act 121 of 1998 (“POCA”)

The POCA came into effect on 21 January 1999 and sought to combat ML and to provide for the recovery of proceeds from unlawful activities, confiscation orders, restraint orders, seizure of property subject to restraint orders, preservation orders and forfeiture orders.¹³¹

¹²⁹ As above.

¹³⁰ Srivastava, Simpson, and Powell *International guide to money laundering law and practice* (eds) (2019) 1305.

¹³¹ Preamble and s15; s26; s27; 38 and s48 of the Prevention of Organised Crime Act 121 of 1998.

5.2.3 Financial Intelligence Centre Act 38 of 2001 (FICA)

The FICA came into operation on 1 February 2002 and established the Financial Intelligence Centre (FIC) and implemented a significant number of *FATF Recommendations*.

5.2.3.1 Financial Intelligence Centre

The primary objective of the FIC is the identification of proceeds arising from criminal activities, combating ML, TF and related activities and to impose financial sanctions.¹³² To achieve its objective the FIC must: process, analyse and interpret information received; inform, advise and co-operate with various authorities and bodies; monitor and provide guidance; retain information in accordance with the FICA; annually review and report on implementation of the FICA; implement a registration system for accountable and reporting institutions; supervise and enforce compliance of the FICA.¹³³

Notably, in 2007 one of the largest asset seizure orders were confirmed in the amount of R270 000 000, following a FIC investigation.¹³⁴

“How gold smugglers use top SA banks, bribes to launder money” a recent headline, wherein an Al Jazeera investigation on Gold Mafia¹³⁵ was reported on, wherein multiple gangs smuggled gold from Zimbabwe and used same to launder vast amounts of money. Mohamed Khan, going by the name of “Mo Dollars”, a money launderer laundered millions of dollars. The investigation revealed officers from major financial institutions, ABSA, Standard Bank and Sasfin were on the payroll of Khan. The officers would enable suspicious payments from Khan’s businesses and discard of evidence from the computer systems in turn for payment from Khan. Khan was reported to clean his dirty money by using a complicated web of front companies, fake invoices, bribery and gold. At the heart of this scheme are multiple companies with bank accounts in various parts of the world. In order to avoid raising any red flags, Khan bribed bank officers, which included payments, holidays and home renovations.

¹³² S3 Financial Intelligence Centre Act 38 of 2001.

¹³³ S4 Financial Intelligence Centre Act 38 of 2001.

¹³⁴ The Mail & Guardian “Court confirms R370m asset-seizure order” 22 March 2007 <https://mg.co.za/article/2007-03-22-court-confirms-r370m-assetseizure-order/> (accessed 7 May 2023).

¹³⁵ A four-part series showing how rival gangs have taken over the gold trade in Southern Africa and how they launder vast amounts of money. Al Jazeera Investigations <https://www.ajunit.com/article/how-zimbabwe-uses-gold-smuggling-to-evade-sanctions-choke/> (accessed 27 October 2023).

Hussain Choonara, who was in charge of Sasfin Bank's foreign exchange payments, allegedly received \$1 600 per month from Khan. Choonara pointed Khan in the direction of whom to bribe, which included an IT technician who wiped fraudulent transactions from the bank's system.¹³⁶

5.2.3.2 Accountable institutions, reporting institutions and businesses in general

To achieve the primary objective of the FICA, duties are imposed on accountable institutions for example banks, attorney firms, estate agents and businesses in general. Reporting institutions such as motor vehicle dealerships and businesses dealing in Kruger Rands, previously listed in Schedule 3, are now repealed.¹³⁷ The recent amendment¹³⁸ has broadened the list of accountable institutions and now make provision for crypto asset service providers; high value goods dealers, credit providers; the South African Mint Company (RF) (Pty) Ltd and a clearing system participant.¹³⁹ The core responsibilities imposed by the FICA are: customer due diligence; storage of transaction records; financial sanctions, reporting of certain transactions and the prohibition of financial services to certain persons identified by the Security Council of the United Nations.¹⁴⁰

5.2.3.3 Customer due diligence

CDD pertains to the information that an accountable institution is required to obtain in respect of its customers and its understanding of the customer's business structure. Prior to the amendment the focus was primarily to obtain a customer's proof of identity and address, where the focus has now shifted to understanding the customer's business structure;¹⁴¹ implementing additional due diligence measures relating to legal personas, partnerships and trusts;¹⁴² ensuring ongoing due diligence;¹⁴³ prohibiting

¹³⁶ News24 "How gold smugglers use top SA banks, bribes to launder money" 31 March 2023 <https://www.news24.com/fin24/companies/how-gold-smugglers-use-top-sa-banks-bribes-to-launder-money-20230331> (accessed 5 May 2023).

¹³⁷ Government Gazette 47596 Schedule 3.

¹³⁸ General Laws (Anti-Money Laundering and Combating the Financing of Terrorist) Amendment Act 22 of 2022.

¹³⁹ Schedule 1 Financial Intelligence Centre Act 38 of 2001.

¹⁴⁰ Part 1, 2, 2A, 3 and s26B Financial Intelligence Centre Act 38 of 2001.

¹⁴¹ S21A Financial Intelligence Centre Act 38 of 2001.

¹⁴² S21B Financial Intelligence Centre Act 38 of 2001.

¹⁴³ S21C Financial Intelligence Centre Act 38 of 2001.

entering into a business relationship with a customer or to terminate an existing business relationship, if unable to conduct customer due diligence;¹⁴⁴ enhanced requirements for foreign prominent public officials, domestic prominent influential persons and their family members as well as known close associates.¹⁴⁵

5.2.3.4 Duty to keep records

Accountable institutions must keep CDD records as well as transactional records for a period of five years, calculated from when the business has been terminated or from date on which the transaction is concluded, and in instances where a report of suspicious and unusual transactions is made to the FIC, five years calculated from the date the report was submitted to the FIC.¹⁴⁶ It is permitted to outsource the storage of records and they may be stored electronically, providing a practical solution for larger businesses.¹⁴⁷ On presentation of a warrant, the FIC may access records stored by accountable institutions.¹⁴⁸ It is an offence to destroy or tamper with CDD records or transactional records.¹⁴⁹

5.2.3.5 Reporting duty

Both accountable institutions and reporting institutions have a duty to report cash transactions made and received above the updated prescribed threshold of R49 999.99, within the prescribed period of 3 days, to the FIC.¹⁵⁰ In an attempt to prevent transactions that are structured to be below the reporting threshold (“*smurfing*”), to avoid reporting responsibilities, such conduct is declared an offence.¹⁵¹ It could be possible for a transaction to be reportable and fall within the scope of both a cash transaction over the prescribed limit and a suspicious and unusual transaction that would result in a reporting obligation in both scenarios in respect of the relevant sections in the FICA.¹⁵² If convicted of an offence, the consequences are quite severe

¹⁴⁴ S21E Financial Intelligence Centre Act 38 of 2001.

¹⁴⁵ S21F, G, H Financial Intelligence Centre Act 38 of 2001.

¹⁴⁶ S22 – 23 Financial Intelligence Centre Act 38 of 2001.

¹⁴⁷ S24 Financial Intelligence Centre Act 38 of 2001.

¹⁴⁸ S27A Financial Intelligence Centre Act 38 of 2001.

¹⁴⁹ S48 Financial Intelligence Centre Act 38 of 2001.

¹⁵⁰ S28 Financial Intelligence Centre Act 38 of 2001 read with Regulation 22B (updated 14 October 2022 GN2638 effective 14 November 2022); 22C and Guidance Notice 5B 8.

¹⁵¹ S64 Financial Intelligence Centre Act 38 of 2001.

¹⁵² Guidance Notice 5B 5.

with “imprisonment for a period not exceeding 15 years or to a fine not exceeding R100 000 000.”¹⁵³

It is important to note that not only accountable and reporting institutions have a duty to report suspicious and unusual transactions to the FIC, but all businesses have this duty, and any failure is an offence.¹⁵⁴ Reporting of suspicious and unusual transactions must be done within fifteen days of the incident.¹⁵⁵ The obligation of reporting transactions is not only for *known* suspicious and unusual transactions, but also for an individual who carries on business or who is in charge of the business and who *should have known* that a transaction is unusual or suspicious and any failure to report same constitutes an offence.¹⁵⁶

For enforcement purposes, the FIC has a wide array of powers at its disposal to assist in achieving its objectives which includes: monitoring orders; issuing of directives; referral of suspected contravention; inspections; administrative sanctions and to approach the court if the circumstances permit.¹⁵⁷

5.2.4 Financial Intelligence Amendment Act 1 of 2017

The 2017 amendments to the FICA came into effect on 13 June 2017¹⁵⁸ and addressed various deficiencies by broadening current requirements and ensuring further alignment with international standards. The amendments introduced the risk-based - approach, to be followed by an accountable institution when entering into a business relationship or when a single transaction is concluded with a customer.¹⁵⁹ The idea behind the risk-based approach was to steer away from the “prescriptive tick box-approach.”¹⁶⁰ It was acknowledged that ML cannot be prevented in its entirety by resources, controls and preventative measures. According to the FIC it made sense to separate the level or risk and for the focus to be shifted to high-risk areas. As a result, simplified or less stringent measures can be implemented where the risk is low,

¹⁵³ S68 Financial Intelligence Centre Act 38 of 2001.

¹⁵⁴ S29 read with S52 of the Financial Intelligence Centre Act 38 of 2001.

¹⁵⁵ Regulation 23, 23A and 24 of the FICA read with Guidance Note 4A.

¹⁵⁶ S29(2) read with s52(2) Financial Intelligence Centre Act 38 of 2001.

¹⁵⁷ S35; S43A; S44; 45B; 45C and 45F of the Financial Intelligence Centre Act 38 of 2001.

¹⁵⁸ Government Notice No. 563 in Government Gazette 40916 of 13 June 2017.

¹⁵⁹ S21 and S42 Financial Intelligence Centre Act 38 of 2001.

¹⁶⁰ National Treasury: *A new approach to combat money laundering and terrorist financing* 13 June 2017

<https://www.treasury.gov.za/legislation/regulations/FICA/A%20new%20approach%20to%20combat%20money%20laundering%20and%20terrorist%20financing.pdf> (accessed 3 May 2023).

which, would simultaneously address another object of the amendment to the FICA, by allowing for financial inclusion as it will be easier for low-risk customers to be compliant.¹⁶¹ The risk for each industry will be unique to that industry and accordingly the approach to risk should be unique to each sector or industry. The risk-based approach, importantly, does not exempt an accountable institution from applying effective ML controls.¹⁶² It is surprising that very little is contained in the FICA on the risk-based approach in relation to the comprehensive coverage in the *Guidance Note*.¹⁶³ The amendment furthermore introduced comprehensive customer due diligence measures; domestic prominent influential persons and foreign prominent public officials and their family members and known close associates, beneficial ownership requirements; freezing of property and transaction and sharing of information.¹⁶⁴

5.2.5 General Laws (Anti-Money Laundering and the Combating the Financing of Terrorist) Amendment Act 33 of 2022

The FICA was recently further amended by the *General Laws (Anti-Money Laundering and Combating the Financing of Terrorist) Amendment Act 22 of 2022*¹⁶⁵, in response to the FATF's *Mutual Evaluation Report* and in an effort to address the deficiencies that were identified, by the FATF in their *Mutual Evaluation Report*, discussed below.¹⁶⁶ Definitions were inter alia amended and inserted, the objectives, functions and powers of the FIC were amended, due diligence measures were enhanced; provisions were introduced relating to disclosure and access to information; amendments to the risk management and compliance programme and amendments

¹⁶¹ FIC in collaboration with the National Treasury; SARB and the then FSB: *Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001* 13.

¹⁶² FIC in collaboration with the National Treasury; SARB and the then FSB: *Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001* 24.

¹⁶³ FIC in collaboration with the National Treasury; SARB and the then FSB: *Guidance Note 7 on the Implementation of various aspects of the Financial Intelligence Centre Act, 2001* chapter 1 read with S42 of the Financial Intelligence Centre Act 38 of 2001.

¹⁶⁴ S3(2)(a) and 3(2)(Aa); S21A to 21H Financial Intelligence Centre Act 38 of 2001.

¹⁶⁵ S18-54 General Laws (Anti-Money Laundering and Combating the Financing of Terrorist) Amendment Act.

¹⁶⁶ National Treasury "Media Statement Cabinet approves Bill to strengthen fight against money laundering: Approval of General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill for Tabling in Parliament" https://www.treasury.gov.za/comm_media/press/2022/2022082901%20Media%20statement%20-%20General%20Laws%20Amendment%20Bill.pdf (accessed 28 October 2023).

to the schedules to the FICA .¹⁶⁷ This amendment act further amended other legislation like the *Trust Property Control Act, 57 of 1988*;¹⁶⁸ *Non-profit Organisations Act, 71 of 1997*;¹⁶⁹ *Companies Act 71 of 2008*¹⁷⁰ and the *Financial Sector Regulation Act, 9 of 2017*,¹⁷¹ the amendments whereof became effective on 31 December 2022 and 1 April 2023 respectively.¹⁷²

5.3 South Africa Mutual Evaluation Report

An assessment was conducted by the International Monetary Fund staff in 2019 wherein South Africa's compliance with the *FATF Recommendations* were analysed and the effectiveness of AML/CFT measures in South Africa as well as recommendations on areas requiring improvement, were provided. The assessment was adopted by the FATF in June 2021 and by ESAAMLG in September 2021 at their respective plenary meetings. The adopted *Mutual Evaluation Report* was published by the FATF in October 2021.¹⁷³

5.3.1 Key findings of the Mutual Evaluation Report

The following were key findings of the South African *Mutual Evaluation Report*:

- 5.3.1.1 The prime ML crime threats are comprehended by key authorities, but the understanding of their relative scale, ML vulnerabilities, and the threats from foreign predicates is limited and major risks remain to be addressed.
- 5.3.1.2 The extended period of state capture¹⁷⁴ resulted in generation of significant corruption proceeds and undermining of agencies tasked with combating these activities.

¹⁶⁷ Preamble of the General Laws (Anti-Money Laundering and Combating the Financing of Terrorist) Amendment Act 33 of 2022.

¹⁶⁸ S1-8 General Laws (Anti-Money Laundering and Combating the Financing of Terrorist) Amendment Act.

¹⁶⁹ S9-17 General Laws (Anti-Money Laundering and Combating the Financing of Terrorist) Amendment Act 33 of 2022.

¹⁷⁰ S55-61 General Laws (Anti-Money Laundering and Combating the Financing of Terrorist) Amendment Act.

¹⁷¹ S62-65 General Laws (Anti-Money Laundering and Combating the Financing of Terrorist) Amendment Act.

¹⁷² Proclamation Notice No 109 of 2022 in Government Gazette 47805 of 31 December 2022.

¹⁷³ FATF *Anti-money laundering and counter-terrorist financing measures – South Africa Fourth Round Mutual Evaluation Report (2021)* 1 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

¹⁷⁴ State capture, whereof corruption forms an element, is the process through which individuals or groups in the public and private sectors colluded for their own personal gain without any accountability. "In 2018, the President created the Judicial Commission of Inquiry to Inquire into the Allegation of State

- 5.3.1.3 The FIC provides operational financial intelligence for use by Law Enforcement Agencies in investigations, but law enforcement agencies do not possess adequate resources or skill to follow through on ML and TF investigations.
- 5.3.1.4 Although a reasonable number of ML convictions are achieved, they are not in proportion with South Africa's risk profile. The majority of cases consist of self-laundering and only a few cases that are prosecuted relate to third-party ML¹⁷⁵ and foreign predicate offences. Proactive identification and investigation of ML networks and professional enablers are basically non-existent. The majority of ML convictions are in respect of fraud cases and investigations and prosecutions in respect of other high-risk crimes such as serious corruption, narcotics and tax offences are few.¹⁷⁶ ML cases relating to state capture have not been pursued sufficiently.
- 5.3.1.5 South Africa has fared well with pursuing confiscation of criminal proceeds, in particular making use of civil forfeiture powers, but recovering assets from state capture and proceeds which have been moved to other countries have been less successful.
- 5.3.1.6 The detection and confiscation of false or undeclared cross-border movement of currency requires significant improvement and remains a challenge.
- 5.3.1.7 Accurate and updated beneficial ownership information about companies and trust information are not readily available to law enforcement which creates a challenge for effective ML investigation.
- 5.3.1.8 Whilst larger banks better understand ML risks and implement mitigating measures in proportion to those risks, the majority of smaller financial

Capture, Corruption and Fraud in the Public Sector Including Organs of State. It is chaired by Deputy Chief Justice, Raymond Zondo and commonly known as the Zondo Commission." FATF *Anti-money laundering and counter-terrorist financing measures – South Africa* Fourth Round Mutual Evaluation Report (2021) 19 footnote 12 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

¹⁷⁵ Self-laundering is the laundering of proceeds by a person who was involved in committing the predicate offences, whilst the laundering of proceeds by a person who was not involved in committing of the predicate offence, is referred to as third-party ML. FATF Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems (June 2023) 116 footnote 102 <https://www.fatf-gafi.org/content/dam/fatf-gafi/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> (accessed 28 October 2023).

¹⁷⁶ FATF *Anti-money laundering and counter-terrorist financing measures – South Africa* Fourth Round Mutual Evaluation Report (2021) 4 read with 8 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

institutions and designated non-financial businesses and professions are not identifying and understanding such risks and are more compliance driven. The risk-based approach is not implemented adequately. Whilst customer due diligence is conducted by many accountable institutions beneficial ownership requirements are only applied to some extent. Larger banks meet suspicious reporting obligations to a large extent, but other high-risk sectors fail to report as required. Besides the general reporting obligation, potential high risk-sectors of dealers in precious metals, stone and company service providers and virtual asset service providers are not AML/CFT regulated.

- 5.3.1.9 At the time of the analysis, risk-based AML/CFT regulation was relatively new and it was found that the majority supervisory activities occur for banks and authorised dealers with limited liability, whilst this was not the case for financial institutions and designated non-financial businesses and professions. Inspections in other sectors were found to be too infrequent with a focus on the presence of basic controls and not the soundness of AML/CFT programs. Market entry controls for screening criminal activity require significant improvement.
- 5.3.1.10 South Africa provides constructive mutual legal assistance which has assisted in resolving criminal cases in other countries, but it is sometimes slow. International assistance for local investigations was found not to be a priority which is not in proportion to South Africa's risk profile and following up on requests requires significant improvement.
- 5.3.1.11 Although South Africa has implemented targeted financial sanctions of the United Nations Security Council for proliferation financing since April 2019 fairly well, significant improvements are needed as the private sector's understanding is varied and supervision obligations are new.

In terms of the *Mutual Evaluation Report* the banking industry fared rather well in comparison to other role players. Unfortunately, all the moving parts to the "machine" for combating ML need to work well together in order for it to be a success locally, the same way co-operation is required internationally due to the interconnectedness of jurisdictions. The measures and rules are only effective if enforced adequately and the reporting of suspicious transactions is of no use, if the information is not utilised optimally. The evaluation revealed, for example, that only 2000 out of 5000 SAPS: DCI

special investigative unit positions were filled, not to mention the major resource and staff constraints suffered by the National Prosecuting Authority.¹⁷⁷ This is a shocking revelation given South Africa's high crime rate,¹⁷⁸ and explains in part why ML legislation is not effective in South Africa.

Following the October 2021 evaluation, South Africa was given a one year observation period to address the 67 recommended actions. In January 2023 it was found that although South Africa had made significant progress reducing the staggering 67 recommendations regarding gaps in the ML framework to 8 strategic deficiencies, it was not sufficient and resulted in South Africa being placed on the FATF's "grey list" on 24 February 2023.¹⁷⁹

5.3.2 FATF's grey list

Being placed on the grey list effectively means South Africa will be subject to increased monitoring by the FATF. The FATF distinguishes between a grey list and a black list, the black list referring to high-risk jurisdictions with significant strategic deficiencies relating to ML, TF and financing of proliferation,¹⁸⁰ whilst jurisdictions on the grey list are committed and are actively working with the FATF to address any shortcomings identified in their regimes to counter ML, TF, and proliferation financing within agreed time frames.¹⁸¹

5.3.3 Eight strategic deficiencies that require urgent intervention

Eight strategic deficiencies were identified by the FATF that need to be addressed by no later than January 2025, which requires South Africa to:

¹⁷⁷ FATF *Anti-money laundering and counter-terrorist financing measures – South Africa* Fourth Round Mutual Evaluation Report (2021) 7 - 8 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

¹⁷⁸ FATF *Anti-money laundering and counter-terrorist financing measures – South Africa* Fourth Round Mutual Evaluation Report (2021) 5 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

¹⁷⁹ National Treasury Fact Sheet: What does FATF greylisting mean for a country: [2023022501 FATF Grey Listing Fact Sheet.pdf \(treasury.gov.za\)](https://www.treasury.gov.za/2023022501/FATF%20Grey%20Listing%20Fact%20Sheet.pdf) (accessed 4 March 2023).

¹⁸⁰ <https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Call-for-action-February-2023.html> (accessed 4 March 2023).

¹⁸¹ <https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2023.html> (accessed 4 March 2023).

- 5.3.3.1 Show an increase in the requests for international mutual legal assistance that are in proportion with South Africa's risk profile, to assist with ML and TF investigations and with confiscation of different type of assets;
- 5.3.3.2 Improve risk-based supervision of designated non-financial business and professions and show that AML/CFT supervisors apply effective, proportionate, and effective sanctions;
- 5.3.3.3 Timeous access to accurate and up to date beneficial ownership¹⁸² information on legal persons and arrangements must be available to competent authorities and applying sanctions for breaches;
- 5.3.3.4 Show an increase in law enforcement agencies' requests for financial intelligence from the FIC for its ML/TF investigations;
- 5.3.3.5 Show an increase in investigations and prosecutions of serious and intricate ML and TF activities in proportion with South Africa's risk profile;
- 5.3.3.6 Improve its identification, seizure and confiscation of proceeds and instrumentalities that encompass more predicate offence that are in proportion to its risk profile;
- 5.3.3.7 Update its TF Risk Assessment to make known the implementation of a comprehensive national counter financing of terrorism strategy; and
- 5.3.3.8 Effective implementation of targeted financial sanctions and showing that individuals and entities that fit the criteria for domestic designations can be effectively identified.¹⁸³

5.3.4 Effect of grey listing

Reputational damage is top of mind as South Africa does not meet international ML and TF standards. Although the FATF does not necessarily require enhanced due diligence measures to be taken by other jurisdictions in respect of cross-border transactions, in particular correspondent banking services provided by foreign banks, selected institutions are foreseen to conduct enhanced monitoring possibly for own business reasons or as required by their respective legislation. In practice this will have the effect of vigorous processing and vetting of customers and understanding the

¹⁸² See Chapter Four fn 105.

¹⁸³ National Treasury: Media statement *Listing of South Africa by the Financial Action Task Force as a "Jurisdiction under increased monitoring"* [chrome-extension://efaidnbmnnnibpcajpcqlclefindmkaj/https://www.fic.gov.za/Documents/Media%20statement%20-%20Response%20to%20FATF.pdf](https://www.fic.gov.za/Documents/Media%20statement%20-%20Response%20to%20FATF.pdf) (accessed 4 March 2023).

source of their funds, with a consequential increased cost implication - a cost implication which Treasury is of the view, will be significantly lower in comparison to the long-term cost of permitting South Africa's economy to be continuously and further soiled by proceeds of crime and corruption.¹⁸⁴

5.4 Concluding remarks

South Africa has its own unique set of challenges set in its high unemployment rate¹⁸⁵ which in turns spurs on profitable crime. Limited resources in proportion to South Africa's size and population exacerbates the situation. In addition, the limited resources available cannot be depended on at full capacity due to corruption, state capture demonstrating this challenge in South Africa. South Africa did not fare very well in the *Mutual Evaluation Report*, state capture being a major feature. Government acknowledges the importance of addressing these deficiencies in that it will be in the best interest of South Africa and is committed to do so expeditiously which is a step in the right direction. The recent amendments by the *General Laws (Anti-Money Laundering and the Combating the Financing of Terrorist) Amendment Act* and the *Protection of Constitutional Democracy Against Terrorism and Related Activities Amendment Act* together amended six acts to address some of the deficiencies identified in the *Mutual Evaluation Report*.¹⁸⁶ In the view that South African legislation relating to ML is generally satisfactory, however the effectiveness thereof is lacking when it comes to enforcement, which can be directed at lack of resources and staff constraints as was outlined in the *Mutual Evaluation Report*. It is not all doom and gloom, and I am of the view, given South Africa's high volume and intensity of crime¹⁸⁷,

¹⁸⁴ National Treasury: Media statement *Listing of South Africa by the Financial Action Task Force as a "Jurisdiction under increased monitoring"* 2 - 4 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fic.gov.za/Documents/Media%20statement%20-%20Response%20to%20FATF.pdf> (accessed 4 March 2023).

¹⁸⁵ At the time of the Mutual Evaluation Report, the unemployment rate in South Africa was captured at an average of 26% for the period of 2014 to 2018. FATF Anti-money laundering and counter-terrorist financing measures – South Africa Fourth Round Mutual Evaluation Report (2021) 17 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

¹⁸⁶ National Treasury: Media statement *Listing of South Africa by the Financial Action Task Force as a "Jurisdiction under increased monitoring"* 2 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fic.gov.za/Documents/Media%20statement%20-%20Response%20to%20FATF.pdf> (accessed 4 March 2023).

¹⁸⁷ FATF Anti-money laundering and counter-terrorist financing measures – South Africa Fourth Round Mutual Evaluation Report (2021) 19 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

that increased monitoring is exactly what South Africa needs, to achieve expeditious focused resolve of the deficiencies.

Chapter 6 - Singapore and AML

6.1 Singapore money laundering legislation history

Singapore is party to the *Vienna Convention (1988)* and *Palermo Convention (2000)*¹⁸⁸ and joined the FATF as a member in 1992.¹⁸⁹ The FATF's president T. Raja Kumar is a Singaporean national and currently serving his two-year term which commenced on 1 July 2022.¹⁹⁰ Like South Africa, Singapore's legislation should reflect the international standards. The primary legislation governing ML in Singapore is the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation Benefits) Act 1992 (Cap 65A) (CDSA)* and the *Terrorism (Suppressing of Financing) Act 2002 (TSOFA)*.

6.1.1 *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation Benefits) Act 1992 (Cap 65A) (CDSA)*

In terms of the long title, the object of the CDSA is "...to provide for the confiscation of benefits derived from, and to combat, corruption, drug dealing and other serious crimes and for purposes connected therewith." The CDSA does not define ML, but focuses on the criminal offences and the proceeds derived therefrom. The CDSA criminalises acquiring, possessing, using, concealing or transferring property representing the accused person's criminal benefits arising from drug dealing or criminal conduct as well as concealing, disguising, converting, transferring, or removing from the jurisdiction someone else's criminal benefits arising from drug dealing or criminal conduct.¹⁹¹ The drug dealing offences and criminal conduct offences are contained in the first and second schedules to the CDSA.

6.1.2 *Terrorism (Suppressing of Financing) Act (TSOFA) 2002*

¹⁸⁸ Srivastava, Simpson, and Powell *International guide to money laundering law and practice* (eds) (2019) 1270.

¹⁸⁹ FATF "Singapore" <https://www.fatf-gafi.org/en/countries/detail/Singapore.html> (accessed 23 April 2023).

¹⁹⁰ FATF "President T. Taja Kumar" <https://www.fatf-gafi.org/en/the-fatf/fatf-presidency/Raja-Kumar.html> (accessed 23 April 2023).

¹⁹¹ S53 and S54 *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992*.

TSOFA was a result of increasing international terrorist threats, with the 11 September 2001 terrorist attacks on the USA, emanating from Singapore’s national borders. The TSOFA supplements the CDSA in countering terrorist financing.¹⁹²

6.1.3 Financial Intelligence Unit - Suspicious Transaction Reporting Office (STRO)

Singapore’s equivalent to South Africa’s financial intelligence centre, STRO, is Singapore’s financial intelligence unit and located within the Criminal Affairs Division of Singapore’s Police Force. STRO represents Singapore at international forums and regional bodies in global AML/CFT matters. Suspicious Transaction Reports, Cash Movement Reports and Cash Transaction Reports must be reported to STRO for analysis and to detect ML terrorism financing and other serious crimes.¹⁹³

6.2 Singapore *Mutual Evaluation Report*

In September 2016 the FATF published the *Mutual Evaluation Report* conducted on Singapore, revealing how they fared complying with the *FATF Recommendations*. The *Mutual Evaluation Report* on South Africa conducted in 2021¹⁹⁴ is very recent in comparison with the *Mutual Evaluation Report* of Singapore published in 2016. To have a better understanding of the comparative analysis, context is necessary. There are interesting facts and some striking differences between the two countries that are worth mentioning, as set out in the Table below:

	South Africa ¹⁹⁵	Singapore ¹⁹⁶
Location	Southernmost part of the African continent	Southern tip of the Malay Peninsula, in Southeast Asia

¹⁹² Srivastava, Simpson, and Powell *International guide to money laundering law and practice* (eds) (2019) 1271.

¹⁹³ <https://www.police.gov.sg/Advisories/Crime/Commercial-Crimes/Suspicious-Transaction-Reporting-Office> (accessed 1 April 2023).

¹⁹⁴ See Chapter 5; par 5.3.

¹⁹⁵ FATF (2021) Anti-money laundering and counter-terrorist financing measures – South Africa Fourth Round Mutual Evaluation Report Preface – 17 <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html> (accessed 1 March 2023).

¹⁹⁶ FATF and APG (2016) Anti-money laundering and counter-terrorist financing measures - Singapore, Fourth Round Mutual Evaluation Report 15 www.fatf-gafi.org/publications/mutualevaluations/documents/mer-singapore-2016.html (accessed 1 April 2023).

Land size	South Africa is much larger than Singapore covering an area of 1,219 million kilometres	Singapore covers 718 square kilometres;
Population	South Africa's population at the end of 2018 was recorded at 58 million	Singapore's population in 2015 was recorded at 5.470 million
Legal system	Unlike Singapore South Africa does not follow the Westminster system ¹⁹⁷ . There are however similarities in that the powers are separated between the law makers (legislative authorities), governments (executive authorities) and courts (judicial authorities), the extent of similarities and differences of which go beyond the scope of this paper.	Government in Singapore follows the Westminster system, consisting of the legislature, the executive and the judiciary. ¹⁹⁸
GDP	419.02 billion USD (2021) ¹⁹⁹	396.99 billion USD (2021) ²⁰⁰

6.2.1 Key findings of the *Mutual Evaluation Report*

The following were key findings of the Singaporean *Mutual Evaluation Report*:

¹⁹⁷ Pypers and Pothier Southern African Catholic Bishops' Conference Parliamentary Liaison Office *South Africa's Parliamentary System: From Westminster to Hybrid?* (May 2015) <http://www.cplo.org.za/wp-content/uploads/2015/02/BP-380-South-Africas-Parliamentary-System-May-2015.pdf> (accessed 2 April 2023).

¹⁹⁸ The legislature which comprises the President and Parliament makes the laws of the land. The executive which consists of cabinet ministers and office-holders, led by the Prime Minister, administers the law. The Judiciary interprets the law *via* the Courts. Parliament Singapore "System of Government" [https://www.parliament.gov.sg/about-us/structure/system-of-government#:~:text=The%20Government%20in%20Singapore%20is,Prime%20Minister\)%20and%20the%20Judiciary](https://www.parliament.gov.sg/about-us/structure/system-of-government#:~:text=The%20Government%20in%20Singapore%20is,Prime%20Minister)%20and%20the%20Judiciary) (accessed 2 April 2023).

¹⁹⁹ The World Bank "GDP – South Africa" <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=ZA> (accessed 2 April 2023).

²⁰⁰The World Bank "GDP – Singapore" <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=SG> (accessed 2 April 2023).

- 6.2.1.1 AML/CFT coordination was considered sophisticated. Singapore is not only focused on law and order, but the enforcement thereof and not afraid to make use of penalties as deterrent.
- 6.2.1.2 Singaporean authorities were considered to have a reasonable understanding of ML/TF risk. Transactional threats, weaknesses within their system, risks stemming from the fact that Singapore is considered one of the largest international financial centres, were highlighted as not adequately addressed in Singapore's National Risk Assessment;
- 6.2.1.3 Singapore demonstrated that identifying and addressing foreign predicate ML and transactional ML networks that are serious in nature would be improved through strengthening the understanding of the foreign predicate ML risks. Besides wire transfer fraud that includes money mules or shell companies, few foreign predicate ML cases have been prosecuted and confiscation of proceeds of crime were considered low. Although Singapore has a good understanding of TF risk, the risk methodology being used has thwarted its ability to comprehend TF risks linked to its geographical location and the global financial centre status it carries.
- 6.2.1.4 STRO is a well-functioning body, with systems and mechanisms that allow for FIU information to integrate into law enforcement authority processes. STR's are optimally utilised at the earliest stage of ML and predicate investigative by primary investigative agencies. However not all agencies to whom financial intelligence information is provided make use thereof in support of investigations.
- 6.2.1.5 While there is a good understanding of ML risks that impact domestic customers, the same is not true pertaining to risk of illicit movement into and out of Singapore. There is a massive gap in the level of TF understanding between the financial sector and the designated non-financial businesses and professions sector.
- 6.2.1.6 For the majority of financial institutions, AML/CFT supervision appear robust. Significant differences were identified in effective supervision of AML/CFT requirements amongst supervisory bodies. The financial penalty structure in the designated non-financial businesses and professions sector was considered diverse and concern was raised in the differences in approach pertaining to dissuasiveness and proportionality. Other than the casino and

trust service providers sectors, sanctions for non-compliance by designated non-financial businesses and professions have not been tested.

6.2.1.7 ML/TF risk assessment pertaining to legal persons and legal arrangements were found not to be adequately addressed. Whilst challenges exist, Singapore implemented preventative measures with the intention of preventing the misuse of legal persons and arrangements, which included collection of beneficial ownership information.

6.2.1.8 Singapore provides constructive and high-quality information and assistance when requested by international jurisdictions, although occasional challenges are faced in delivering certain mutual legal assistance requests timeously. Singapore's outgoing mutual legal assistance requests increased significantly from previous years. Informal channels are utilised and the law enforcement authorities, FIU and the financial supervisors are well coordinated in making and receiving requests. Whilst domestically available beneficial ownership information of legal persons and legal arrangements are shared, there was limited information under the domestic framework.²⁰¹

6.2.2 Priority actions recommended to Singapore

The following priority actions were recommended to Singapore by the FATF:

6.2.2.1 In order to identify risks and to address these risks, Singapore should conduct ML and TF risks assessments for all types of legal persons which includes private companies, public companies, foreign companies, etc);

6.2.2.2 Effective supervision should be ensured across designated non-financial businesses professions categories by making use of risk-based, targeted and prioritised outreach to, and inspection of, the non-financial professions. AML/CFT supervision should furthermore be extended to all dealers in precious stones and metals. Communication and information sharing by competent authorities and SRBs should be enhanced to achieve a better understanding of ML/TF risks by the designated non-financial businesses professions sector;

²⁰¹ FATF and APG (2016) Anti-money laundering and counter-terrorist financing measures - Singapore, Fourth Round Mutual Evaluation Report 3-4 www.fatf-gafi.org/publications/mutualevaluations/documents/mer-singapore-2016.html (accessed 1 April 2023).

- 6.2.2.3 Financial sector supervisors and financial institutions should engage to promote a better understanding of ML and TF risks, and focus on supervisory activity to ML/TF risks;
- 6.2.2.4 Measures should be implemented to improve the capability of Singapore's law enforcement authorities to proactively identify and investigate ML, particularly complex and predicate ML emanating from other jurisdictions. In addition to pursuing money mules and shell companies, Singapore should prioritise pursuing offenders involved in the laundering of proceeds of crime emanating from other jurisdictions;
- 6.2.2.5 The confiscation of proceeds of crime should be proactively pursued by law enforcement authorities, the seizure and confiscation powers in the *Corruption Drug Trafficking Crimes Act* should be utilised more often to pursue proceeds of crime that are not directly linked to offences being prosecuted;
- 6.2.2.6 When conducting the next national risk assessment Singapore should provide an improved explanation on the link between key threats and vulnerabilities to achieve a better understanding of how ML/TF risks faced by Singapore will materialise in the Singaporean context, in particular Singapore's geographic location and role in the international economy and Singapore's position as a financial centre;
- 6.2.2.7 A comprehensive sector review should be performed for a greater understanding of the types of organisations within the NPO sector that are vulnerable to TF abuse and create awareness of specific TF abuse risks;
- 6.2.2.8 Singapore should persist making use of mutual legal assistance to follow and restrain assets that have moved to other jurisdictions, pursue implicated people and improve on response times when responding to foreign requests;
- 6.2.2.9 The FIU should seek to obtain additional strategic information sources, such as international electronic fund transfer reports and trade data to supplement existing reports that provide insight into international ML/TF

threats, in light of Singapore's status as a global trade, finance and transportation hub.²⁰²

6.3 Bank secrecy

There are jurisdictions that have bank secrecy laws in place that prohibit banks from disclosing customers' personal account information to authorities. Bank secrecy is said to be common in countries such as Switzerland and Singapore.²⁰³ Bank secrecy however is not guaranteed and there are exceptions where the law permits disclosure or when a customer provides consent, but this varies in jurisdictions. It is attractive for criminals to launder money in a foreign jurisdiction where bank secrecy is strict as their account and personal information are more likely to be kept confidential and provide a means of escaping regulatory checks and legal sanctions. This "dirty money" leads to reputational risk and threatening the banking system.²⁰⁴ The *Financial Secrecy Index* ranked Singapore third globally in 2022, highlighting the most significant secrecy jurisdictions.²⁰⁵ The index can however be misleading as a bigger supplier of financial secrecy does not necessarily mean a more secretive jurisdiction. Panama is an example of a jurisdiction that is more secretive than the UK, but due to the UK being used far more as a destination for offshore wealth, the UK is a bigger supplier of secrecy in practice.²⁰⁶ Notwithstanding this ranking, Singapore was rated compliant with the FATF recommendation 9 in terms whereof jurisdictions are to ensure that secrecy laws should not hinder the implementation of the *FATF Recommendations*.²⁰⁷ It was found that secrecy laws in Singapore do not hinder law enforcement agencies investigations²⁰⁸ or the sharing of information and that financial institutions share

²⁰² FATF and APG (2016) Anti-money laundering and counter-terrorist financing measures - Singapore, Fourth Round Mutual Evaluation Report 10-11 www.fatf-gafi.org/publications/mutualevaluations/documents/mer-singapore-2016.html (accessed 1 April 2023).

²⁰³ Shiqing Yu "Still Keeping Secrets? Bank Secrecy, Money Laundering, and Anti-Money Laundering in Switzerland and Singapore" 2019 IALS Student Law Review 19 <https://journals.sas.ac.uk/lawreview/article/view/4955/4895> (accessed on 2 April 2023).

²⁰⁴ As above.

²⁰⁵ Financial Secrecy Index: <https://fsi.taxjustice.no/fsi/2022/world/index/top> (accessed 23 April 2023).

²⁰⁶ Financial Secrecy Index 2022: <https://fsi.taxjustice.net/> (accessed 4 May 2023).

²⁰⁷ FATF and APG (2016) Anti-money laundering and counter-terrorist financing measures - Singapore, Fourth Round Mutual Evaluation Report 12 www.fatf-gafi.org/publications/mutualevaluations/documents/mer-singapore-2016.html (accessed 1 April 2023).

²⁰⁸ FATF and APG (2016) Anti-money laundering and counter-terrorist financing measures - Singapore, Fourth Round Mutual Evaluation Report 57 www.fatf-gafi.org/publications/mutualevaluations/documents/mer-singapore-2016.html (accessed 1 April 2023).

information either with a customer's consent or as permitted in terms of legislation.²⁰⁹ Singaporean banks are expressly prohibited from disclosing any customer information, subject to the permissible exceptions.²¹⁰ Jurisdictions that may have hidden behind secrecy laws in the past will thus find it increasingly difficult today, given the international standards that need to be met.

6.4 Concluding remarks

In stark contrast to South Africa, Singapore maintains one of the lowest domestic crime rates in the world and the majority of ML risk emanates from offences committed abroad. Singapore has the status of a major global financial centre as well as an international trade/transportation hub, making Singapore vulnerable and appealing to serve as transit point for illicit funds from other jurisdictions. Singaporean authorities maintain that foreign predicate offences constituted 66% of ML investigations and 27% of the convictions from 2008 to 2014. Fraud, unlicensed money lending, criminal breach of trust, as well as foreign predicate fraud offenses are some of the common predicate offences identified in 2014 when Singapore published its *National Risk Assessment*.²¹¹ Banks, remittance agents, shell companies and individual money mules were identified as the main conduits. A staggering 77% of the funds managed in Singapore are not local, but sourced from foreign jurisdictions, the majority of assets emanating from the Asia-Pacific region. Singapore's ML/TF vulnerabilities are increased due to the size and foreign exposure of its private banking and asset management industry and, as mentioned above, its status as international trade/transportation hub adds to these vulnerabilities. The Singaporean banking and sub-sector are exposed to a higher level of ML/TF risk.²¹²

²⁰⁹ FATF and APG (2016) Anti-money laundering and counter-terrorist financing measures - Singapore, Fourth Round Mutual Evaluation Report 101 www.fatf-gafi.org/publications/mutualevaluations/documents/mer-singapore-2016.html (accessed 1 April 2023).

²¹⁰ S47 read with schedule 3 Banking Act 1970 (Singapore).

²¹¹ The National Risk Assessment (NRA) report is the result of a two year government wide exercise and considered Singapore's economic and geographical environment; its legal, judicial and institutional framework; as well as crime trends and identified emerging risks. The intention of the NRA is to assist authorities to maintain an effective risk-based regime to counter ML and TF in addition to prioritising and allocating public sector resources effectively. Singapore Police Force "National Risk Assessment" <https://www.police.gov.sg/Advisories/Crime/Commercial-Crimes/National-Risk-Assessment> (accessed 28 October 2023).

²¹² FATF and APG (2016), Anti-money laundering and counter-terrorist financing measures - Singapore, Fourth Round Mutual Evaluation Report, FATF, Paris and APG, Sydney P5 www.fatf-gafi.org/publications/mutualevaluations/documents/mer-singapore-2016.html (accessed 1 April 2023).

In comparison to South Africa, Singapore has however done much better in their last *Mutual Evaluation Report*. The two countries have demonstrated the interconnectedness of jurisdictions well and the importance thereof. Is it easier for criminals to commit and get away with crimes in South Africa and transfer the proceeds to jurisdictions like Singapore, given its status on the financial secrecy index, its status as a major global financial centre as well as an international trade or transportation hub and the percentage of funds sourced from foreign jurisdictions? This is a conclusion one can draw when looking at the statistics revealed above and the loopholes that criminals seek to exploit, however criminals will not be able to hide behind bank secrecy. It is clear from the *Mutual Evaluation Report* that Singapore has fared well in implementing international standards and has made significant efforts over the years to reach this stage.

In conclusion, given the risks posed by ML and TF, it is submitted that jurisdictions will continuously have to work at improving and strengthening AML measures, ensuring utmost compliance with international standards and leveraging and learning from each other's strategies and strengths.

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