Anti-money laundering and the changing face of public-private cooperation
Tackling the proceeds of smuggling
Dr. Benjamin Vogel
OVERVIEW

I. Sketching Anti-Money Laundering
II. Smuggling and AML
III. European law and the global framework
IV. The purpose of private sector reporting
V. The role of state intelligence
VI. The place of the Financial Intelligence Unit
I. SKETCHING ANTI-MONEY LAUNDERING
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- Criminal Justice
- Private Sector
  - Private sector customer due diligence
  - Private sector reporting obligations
- Financial Intelligence Units (FIUs)
- Supervisory authorities
II. SMUGGLING AND ANTI-MONEY LAUNDERING
II. SMUGGLING AND ANTI-MONEY LAUNDERING

• Smuggling as predicate offence: Article 2 para. 1 (p) of Directive (EU) 2018/1673 of 23 October 2018 on combating money laundering by criminal law.

• Smuggling as a means of laundering

• Financial Intelligence Units often close to customs authorities (in Germany integrated in the Customs Criminal Office)
III. EUROPEAN LAW AND THE GLOBAL AML FRAMEWORK
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- Financial Action Task Force International Standards, updated 2018
- Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing
- Emancipation of the EU legal framework (esp. beneficial ownership registries, EU list of high risk third countries)
III. EUROPEAN LAW AND THE GLOBAL AML FRAMEWORK

- Global AML architecture largely inspired by US legal concepts
- Tensions between common law instruments and continental systems
- Major points of contention:
  - Data protection law
  - Inquisitorial procedural systems
  - Institutional cultures of public authorities
III. EUROPEAN LAW AND THE GLOBAL AML FRAMEWORK

- The purpose of AML evolving over time through an expansion of predicate crimes
- Transnational definition of money laundering highly intent-focused
- Flexibility to the detriment of clearly defined criminal policy
IV. THE PURPOSE OF PRIVATE SECTOR REPORTING
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Status quo

• Trend towards an ever increasing amount of suspicious activities reports ("quantitative" approach)
• Relevant degree of suspicion remaining rather unspecific
• Reporting regularly leading to the suspension of a transaction
IV. THE PURPOSE OF PRIVATE SECTOR REPORTING

Deficits of the current regime

- Proportionality of data collection
- Low quality of suspicious activities reports
- De-risking of clients by private entities
IV. THE PURPOSE OF PRIVATE SECTOR REPORTING

Policy options

• Combining quantitative and qualitative approaches
• Unusual activities reports with low suspicion threshold without leading to a suspension of transactions
• Suspicious activities reports once obliged entity decides not to go ahead with a transaction or business relationship
• Making use of private sector as intelligence provider as well as gatekeeper
V. THE ROLE OF STATE INTELLIGENCE
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Status quo

- Private sector expected to identify money laundering largely on its own
- Beyond typologies only limited flow of intelligence from state to private sector
- Often conflicting political demands to prevent crime and facilitate business opportunities
V. THE ROLE OF STATE INTELLIGENCE

Deficits of the current regime

- Anonymity of clients and beneficial owners remains widespread
- Limited ability to understand origin of funds, especially when originating from abroad
- Often no legal basis to provide private sector with case-specific intelligence
V. THE ROLE OF STATE INTELLIGENCE

Policy options

- Allowing for the sharing of information from ongoing criminal investigations with private sector
- As a result more targeted customer due diligence by private sector
- Customer due diligence is essentially transformed from being a merely precautionary measure to become a monitoring of suspects
V. THE ROLE OF STATE INTELLIGENCE

Obstacles

- Need to effectively protect the secrecy of judicial investigations
- Need to protect citizens from being unjustly targeted and stigmatised on the basis of unreliable intelligence
- Need to prevent misuse of sensitive data by private sector
VI. THE PLACE OF THE FINANCIAL INTELLIGENCE UNIT
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Status quo

- Various institutional shapes from country to country
- Key tasks of FIU remain ambiguous
- Impossibility to analyse most private sector reports
VI. THE PLACE OF THE FINANCIAL INTELLIGENCE UNIT

Deficits of the current regime

• Ambiguity of the relationship between criminal justice and FIU
• Powers of FIUs remain insufficiently defined
• Evidentiary value of FIU reports unclear
VI. THE PLACE OF THE FINANCIAL INTELLIGENCE UNIT

Policy options

• Strengthening the FIUs ability to conduct operational analyses
• Limiting criminal justice access to FIU data
• Strengthening the FIUs autonomy as regards data exchange
VI. THE PLACE OF THE FINANCIAL INTELLIGENCE UNIT

Obstacles

• Proportionality of pre-criminal suspicion investigations
• Possible reluctance of criminal justice authorities to share data with FIU
• Judicial remedies against FIU data processing
THANK YOU FOR YOUR ATTENTION!