Editorial: The FATF criminalization of money laundering – much room for improvement

As the Financial Action Task Force (FATF) celebrates 34 years since its conception, we can critically examine its role as the international standard-setting body and cannot avoid the conclusion that while some achievements have been made on the preventative measures side, making it, for example, more difficult for criminals to open a bank account, when it comes to the effective detection investigation and prosecution of money laundering (ML) offenders, and the confiscating of the proceeds of crime, results are extremely modest. Most of those convicted of ML worldwide are in self-laundering cases (Adding little or nothing to the sentence) and complex international ML cases, especially with regard to professional enablers, are extremely rare and not always successful.

Moreover, when examining the results of the FATF mutual evaluations, there is an inverse correlation between the relatively good results most jurisdictions are achieving on the technical criminalization of ML (Recommendation 3) compared with the failing grades for effectiveness granted to most jurisdictions on actual investigations and prosecutions of ML in immediate outcome 7 (IO7). This all might suggest that the problem lies not only with government policy but also in the FATF standards themselves.

It is not surprising, therefore, that the FATF, embarking on its 5th round of mutual evaluations, has agreed on several amendments to its methodology. What is surprising, though, is that on the law enforcement side, the FATF has chosen to focus on confiscation rather than on the criminalization of ML, and no additional consideration has been given to amending Recommendation 3 or IO7.

The amendments regarding confiscation are most welcome. The FATF is now amending Recommendation 4 and embracing, as a minimal standard, nonconviction-based confiscation, which will apply to a very wide definition of criminal property. This positive amendment lowers the evidential threshold for confiscation to a balance of probabilities and will make it easier for investigators and prosecutors to confiscate ill-gotten property. This should dramatically improve the global confiscation results, which currently are extremely limited and cover only a fraction of the estimated proceeds of crime.

But FATF should additionally amend its methodology regarding the criminalization of ML. As a first step, it should inquire with investigators and prosecutors worldwide why is it, in their opinion, that results are so modest when it comes to criminal convictions of high-end ML cases? Looking around the table at the FATF plenary, only a few, if any, experienced investigators and prosecutors are actually taking part in the debate.

The FATF standards on the criminalizing of ML are outdated, based on the Vienna Convention [1] and the Palermo Convention [2] focusing on a predicate offence. The FATF has failed to even adopt the improved standard for criminalization of ML in the Warsaw convention [3], which criminalizes, for example, situations when the offender merely suspected that the property was proceeds derived from any criminal offence.

The FATF should urgently consider adopting an upgraded modern standard for the ML offence, considering the two rationales for criminalizing it. One is the protected value of punishing those aiding and abetting the offender of the predicate crime, as adopted by the international treaties in their definition of ML; society must criminalize activity which

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enables the laundering of the criminal proceeds and their future use by the perpetrators. This rationale would not justify the prosecution of self-laundering cases, accusing the offender of aiding and abetting himself. Another very important protected value justifying the criminalization of ML is the need to protect the integrity of the financial system, assuming that the infiltration of dirty money would endanger the stability of institutions and cause collateral damage to innocent creditors and investors.

This rationale is not entirely reflected in the current way we criminalize ML today, and thus dishonest representations made, for example, by a client during the CDD process as to beneficial ownership of a legal person or as to the beneficiary of a bank account, are not in themselves considered behavior which is mandated to be criminalized, and in fact is not in several jurisdictions. If ML is also about maintaining the integrity of the financial system, surely such fraudulent acts should be criminalized, or at minimum, they should shift the burden of proof as to the licit source of the property involved to the dishonest suspect. The FATF should, therefore, consider criminalizing the intentional provision of dishonest declarations, especially when violating AML preventative measures, when suspecting these might promote ML.

Another major issue to consider is the removal of the requirement to identify a specific predicate offence, which will no doubt regenerate prosecutorial efforts worldwide. FATF has justifiably put emphasis on "stand alone" or autonomous ML, which tackles professional money launderers. This refers, according to its methodology, to "the prosecution of ML offences independently, without also necessarily prosecuting the predicate offence." As a result, most FATF evaluators require that ML be proven without identifying a specific predicate offence. But this approach is not accurate, as FATF Recommendation 3 does not prohibit jurisdictions to require the identification of a specific predicate offence, and many, such as the USA and Israel, do actually require this. Once eliminating the predicate offence requirement, FATF should consider adding facilitating ML to its standards, criminalizing the creation of, or entering into. An arrangement for promoting the commission of a crime such as bribery or tax evasion, simultaneously or even prior to its commission.

Furthermore, the FATF has not amended its ML criminalization requirements to enable more effective investigation and prosecution of stand-alone ML cases. Should the FATF have conducted a study among investigators, prosecutors and judges as to why they are finding it difficult to convict ML when there is no direct link to a predicate offence, the results would probably reveal the need to criminalize various circumstances, as described above or at minimum require these to shift the burden of proof in several of the following instances.

Typically, a stand-alone ML case [4] would include several of the following elements: adverse information on links of the perpetrator to previous domestic criminality or to an investigation prosecution or conviction of a predicate crime abroad, deviation from normal business conduct, ML typology, unexplained wealth, unreported income, excessive fees demanded by the intermediary, breach of AML preventative measures obligations and no or dishonest explanations given by the suspect, with regard to their conduct.

The current FATF Recommendation 3 requires that circumstantial evidence be used to prove the mental element (Mens Rea) i.e. the intent and knowledge required to prove the ML offence, but criminalizing ML should additionally require legal systems to give weight to these types of circumstances, frequently based on financial intelligence, for the proving that the property is of "illicit origin", or at minimum to have the effect of shifting the burden of proof to the accused, once these are proven, to provide proof as to legal origin of the property.

The original FATF Idea was to outsource the task of detecting suspicions of ML to the financial institutions (and later to DNFBPS and VASPs). Under the (unproven) assumption that these are experienced in managing various risks (credit, operational, reputational, etc.) and could utilize this "know how" to assist law enforcement in managing their ML risk and report suspicious transactions to FIUs. FATF is now changing its definition of "financial intelligence" to refer to the product resulting from analysis adding value to raw data, but surprisingly FATF is not requiring that weight be given to this analysis of financial intelligence as circumstantial evidence in the criminalization requirements of ML.

As explained above, the current international standards on criminalization of ML are not sufficient. The AML/CFT regime bares a significant cost for business, and it is therefore of importance that the standards achieve results, not only on the preventative side but also on the oppressive one, ensuring that wrongdoers are detected, investigated and prosecuted for ML, and when convicted punished accordingly. Legal professionals must examine why results in this sphere have been so modest and upon the results of this research, and in line with the above observations, the FATF should urgently upgrade its standards in Recommendation 3 on the criminalization of ML to ensure higher effectiveness on IO7. Refraining to do so before embarking on a new round of evaluations, given the poor results so far, would seem absurd given the FATF's main goal is the combat against ML.

Yehuda Shaffer is an independent consultant, the former founder and head of the Israeli FIU and the deputy state attorney (financial crime) of Israel.

Yehuda Shaffer
Hebrew University of Jerusalem, Jerusalem, Israel

Notes

1. UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.
2. UN Convention against Transnational Organized Crime 2000.
3. Council of Europe Treaty Series-No. 198 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and omoney *n* the Financing of Terrorism* 2005.
4. See for example Zschüschen v. Belgium application no. 23572/07 the European Court of Human Rights.