Article

What's behind the Wolfberg principles?

by Toby Graham

The past few years have seen a plethora of anti money laundering initiatives. One of the latest are the so-called 'Global Anti Money Laundering Guidelines for Private Banking' formulated at a meeting in Wolfsberg, Switzerland ('the Guidelines'). Other initiatives have been Government-led. The Guidelines were formulated by representatives from the banking industry (in collaboration with Transparency International and Professor Mark Pieth). The Guidelines were launched on 29 October 2000. They have received a mixed reception in the press. Some have given them a warm welcome saying they 'fill a hole left by government regulators'. Others are less enthusiastic, dismissing the Guidelines as window dressing to reduce public and regulatory pressure on banks caught out in a series of embarrassing money laundering scandals such as *Salinas, Bank of New York* and most recently *Abacha.* There is little doubt that such pressure is part of the reason for the Guidelines and they seem to have generated an impression that banks are facing up to this issue, thus reducing pressure.

The other reason for the Guidelines is harmonisation of practice for dealing with public officials, particularly from high-risk countries (that is countries where there is a high risk of crime or corruption). Banks have resisted unilateral action, fearing their wealthy clients will switch to competitors. It is hoped that other banks will in time sign up to the Guidelines. Harmonisation of practices for dealing with such clients is important. Success depends on the uniform application of the guidelines, which in turn depends on the guidelines being free from ambiguity. By way of illustration, the requirement in Regulation 9(2) of the existing *Money Laundering Regulations* to take 'reasonable measures' to identify a principal for whom an agent is acting is thought to create a scope for uncertainty and variations in procedures between institutions.

Transparency International's Opening Statement on the Guidelines asserts, 'these guidelines are crystal clear. They are not ambiguous. They state unequivocally that banks agree they should not be used by corrupt crooks'. With the greatest respect, the language used in the guidelines is not free from ambiguity. For example:

(1) The primary purpose of the guidelines is stated to be a commitment to 'accept only those clients whose source of wealth and funds can be reasonably established to be legitimate'.

(2) Banks are required to take 'reasonable measures to establish the identity of [their] clients and beneficial owners'.

(3) They must also collect information regarding 'source of wealth (description of economic activity which has generated the net worth) and estimated net worth'.

Quite what is required of banks is not spelt out and references to 'reasonable measures' are obviously capable of different interpretation.

The 11 signatories claim the guidelines reflect internal best practise. It appears from the US Senate's Permanent Subcommittee on Investigations on Private Banking and Money Laundering that those banks whose procedures were scrutinised for the purposes of the four case studies had detailed procedures. Citibank's Public Figure Policy document dated June 1998 runs to four pages. This policy document would meet most if not all of the Guidelines. But these procedures did not prevent Citibank from becoming involved with Abacha's funds. It remains to be seen whether the Guidelines will be any more effective.

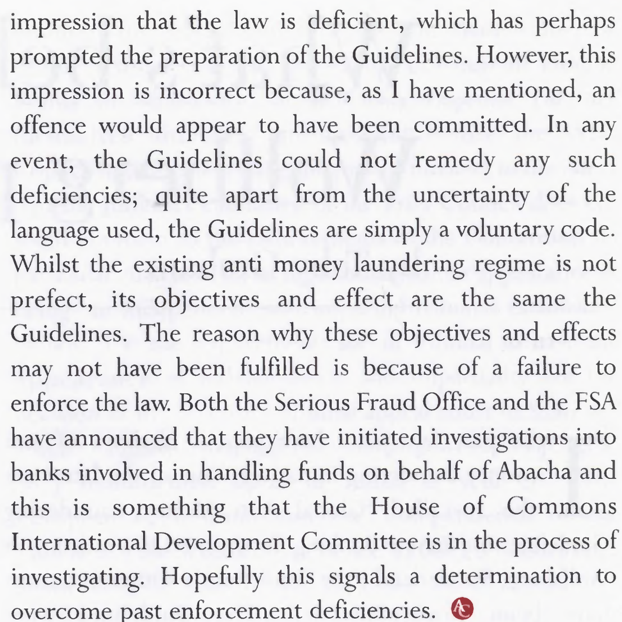
The Guidelines are a voluntary code. They have no force in law and no sanction will apply if they are breached. Press reports suggest the 11 banks considered but rejected the idea of sanctions for breach.

The Guidelines draw entirely from concepts introduced in the existing anti money laundering regimes found in the *Money Laundering Regulations* 1993 and *Criminal Justice Act* 1988 (as amended). In essence the Guidelines summarise key elements in the Joint Money Laundering Steering Group's Guidance Notes. This is not surprising, as the JMLSG's Guidance Notes will have informed procedures of the 11 signatory banks. Those procedures are reportedly considered by Transparency International to be 'technical and difficult to understand'. It is true that the JMLSG's Guidance Notes are technical. Such technicality is necessary to address the verification and disclosure requirements in a wide range of different situations. The danger is that in shunning such a detailed approach, the Guidelines will become difficult to implement at the coalface. The importance of the Guidelines is that they

dispel any lingering doubts that the existing anti money laundering requirements do not apply to dealings with possibly corrupt foreign officials.

The scale of fortunes acquired in recent cases like *Abacha* are so great there can be little scope for resisting the inference that they must have been acquired through some wrongdoing. A suspicious transaction is defined in the JMLSG Guidance Notes to be one, which is 'inconsistent with the customer's known legitimate business or personal activities'. The size of the transactions involved in such cases is so large that, absent an explanation, they were clearly inconsistent with the client's 'known legitimate business or personal activities' in which case the banks were (or at least ought to have been) suspicious. This means that all the elements of the offence under section 93A of the *Criminal Justice Act* 1988 (as amended) is present. It remains to be seen whether a disclosure report was made, giving the bank a defence to criminal liability. Of course, such a report would not provide a defence to civil liability.

The spate of recent money laundering scandals suggests intermediaries in this country have laundered the proceeds of foreign corruption. They have led to an



impression that the law is deficient, which has perhaps prompted the preparation of the Guidelines. However, this impression is incorrect because, as I have mentioned, an offence would appear to have been committed. In any event, the Guidelines could not remedy any such deficiencies; quite apart from the uncertainty of the language used, the Guidelines are simply a voluntary code. Whilst the existing anti money laundering regime is not prefect, its objectives and effect are the same the Guidelines. The reason why these objectives and effects may not have been fulfilled is because of a failure to enforce the law. Both the Serious Fraud Office and the FSA have announced that they have initiated investigations into banks involved in handling funds on behalf of Abacha and this is something that the House of Commons International Development Committee is in the process of investigating. Hopefully this signals a determination to overcome past enforcement deficiencies.

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Free speech and the Human Rights Act 1998

by Paul Kearns

Paul Kearns

The author considers the practical, constitutional and doctrinal implications for freedom of speech in the United Kingdom following the coming into force of the *Human Rights Act* 1998 on 2 October 2000.

The incorporation of most of the articles of the European Convention on Human Rights into English law by the *Human Rights Act* 1998 has involved the quasi-constitutional step of activating a rights-based offensive for citizens against the foe of public authorities without the fully constitutional step of entrenchment. Freedom of expression, including symbolic as well as cognitive speech, is arguably the most primary of freedoms but it is not as highly prized under the European Convention as some suppose. In conflicts between free speech and religious lobbies, for example, free speech has often been compromised by the preferred protection of threatened religious precepts, and, in general, the legitimate interferences with free speech are relatively broad despite the fact that in constitutional terms, in many national jurisdictions, freedom of expression is one of the most widely accepted rights, on which other rights, such as that of freedom of assembly, are frequently parasitic.

As McGoldrick and O'Donnell have lucidly pointed out, free speech has a powerful normative status which ensures that it generally receives a purposive interpretation, and the rationales for that special status have been the search