Money Cleansing and Effectiveness of FATF Coercive Measures: An Overview

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[A] INTRODUCTION

The advent of globalization and liberalization pushes both natural and legal persons to increase the profitability of their commercial interactions. However, there are potential problems where the modes of wealth creation are not compatible with orderly and lawful conduct, avoiding the regulatory radar in creating their wealth, often in a manner or by means tainted with corruption. For the culprits to enjoy the fruits of their labour, they have to be involved in the 'macabre dance' of money laundering or cleansing. The disguise and facilitation of economic misconduct through the processes of money laundering has a distorting effect on economies around the world and government policy-makers may find it difficult to plan effectively for economic growth.

It is not all illegally acquired money that goes through the money laundering or cleansing process.[1] Of course, corruption which is often accompanied by secrecy is considered as one of the predicate offences of money cleansing. Money laundering is a serious issue in criminal justice. As suggested above, its significance has grown in recent years *inter alia* as a result of globalization, and this has been reflected in a number of very high-profile cases in the past decade or so. A typical example is the case of James Ibori, a former governor of Nigeria's oil-rich Delta state, who received a 13-year jail sentence in Southwark Crown Court in London in 2012 for a range of offences relating to stealing substantial funds from Delta state, corruption and money laundering, In addition, Elias Preko, a former Goldman Sachs investment banker who had assisted in money laundering for the corrupt Nigerian state governor, was also jailed,

1 Money laundering or cleansing processes carry basically the same meaning. The intention by the culprits is to reuse the unlawfully obtained money legitimately without being caught by the law. There is no difference between the two terms.

receiving a jail sentence of four-and-a-half years for laundering at least £50 million, likely only a small fraction of the total amount stolen and laundered.[2]

Authorities such as the Financial Action Task Force (FATF)[3] have reacted accordingly to try to slow down the tempo of the cleansing scenario. In this write-up, the authors will focus on the efforts introduced by the FATF. The reader should be mindful of the fact that there are other anti-cleansing mechanisms[4] that were introduced as a result of the global reaction to money cleansing. But FATF coercive measures will be the primary focus. This is because of the characteristics of the body as a soft law organization and its ability to prudently and quickly cause countries to adhere to its recommendations. It commands a high compliance level among the global community in the fight against money laundering and, arguably, the 'best' compliance level amongst such organizations. This soft law body was primarily set up for the sole purpose of thwarting the damaging impact of money cleansing in the global financial space. Although the FATF has adopted a soft law posture, it has succeeded in introducing effective measures that a number of states have come to embrace in their fight against money cleansing and, by extension, against corruption.

[B] MONEY CLEANSING: HISTORY, MEANING AND PROCESSES

The fact is that the practice of money cleansing has been with us for much longer than some of the regulations fashioned to tackle the scourge. Interestingly, it has been referred to as the 'second oldest crime' and has been in existence even since before the first tax code came into play (Munshani 2009: 48): its purpose usually being the attempt to hide a financial transfer (Naylor 2002). It is also pertinent to note that the term 'money laundering' has been traced to the Mafia ownership of the

2 Over the years, writers have suggested that a three-pronged process of placement, layering and integration predominates in money laundering. However, it should also be pointed out that this is only a general observation, and money laundering can occur at any of one of these stages. See Section B below for further consideration.

3 This was established in 1989 by G7 countries specifically to fight the scourge of money laundering that was seen to cause significant damage to the global financial system if left unchecked.

4 There are other bodies like the OECD, International Chamber of Commerce, the IMF and the World Bank, alongside the United Nations Convention against Corruption 2003, to mention but a few. Much of the research for this Note was carried out whilst the first contributor was a PhD candidate of University of London. Special thanks go to Dr Amy Kellam and Professor Michael Palmer for their constructive comments. Any remaining errors are completely those of the authors.

Laundromats (Sneider and Windischbaur 2008) in the USA during the prohibition era. It was a period during which organized crime gangs profited massively from money generated through extortion, prostitution, kidnapping, gambling and the like. In order to obscure the source of their wealth or money, they would mix the cash yielded from their rackets with the legitimate funds earned from their various Laundromats (Giriraj and Mishra 2010). The scheme was supervised by their gang leader Al Capone. In October 1931 he was eventually prosecuted and convicted of tax evasion offences. Many people have wondered why he was not convicted of money laundering/cleansing. However, this would not have been possible because the offence of money laundering was not legislatively or statutorily known to law at that time.

Indeed, it has been argued that the notion that the term 'money laundering' has its origins in gangland Chicago in the 1930s is mistaken:

> Money Laundering is called what it is because that perfectly describes what takes place – illegal, or dirty money is put through a cycle of transactions, or washed, so that it comes out the other end as legal or clean money. In other words, the source of illegally obtained funds is obscured through a succession of transfers and deals in order that those same funds can eventually be made to appear as legitimate. (Robinson 1998: 3)

However, readers should note that definitions of money cleansing range from the authoritative language of statutes to the punchy comments of judges. Rider has indicated that it amounts to a process which obscures the origin of money and its source (1996). In fact, some definitions have tended to tie it to the massive drugs trade or trafficking that was happening on a global scale, and this was later reflected in the US anti-money laundering framework.

Interestingly, in England and Wales and other Common Law countries, as well as on continental Europe,[5] money cleansing is seen as activity that occurs with respect to any form of property derived from criminal acts that seeks to obscure the beneficial owners.[6] In the US, money cleansing is seen as engaging in financial transactions that usually conceal the identity, source, or destination of illegally acquired money.[7]

5 See Article 1 of the Council Directive 91/308/EEC definition.

6 This is the position in the common law in England and Wales, and the Money Laundering Regulation 2017 and Proceeds of Crime Act 2002, Part 7, are more expansive.

7 Deitz and Buttle (2008: 4). See also US key money laundering provisions in the US Code at 18 USC § 1957, which refers to 'specific unlawful activities'. See also USA Bank Secrecy Act 1970.

The truth of the matter is that because initially too much attention was directed to the issues of the drug trade, the topic of money cleansing was perceived to be somewhat synonymous with tracing the illicit gains acquired from those particular activities. However, this is problematic, as not all crimes involve a continuous enterprise.

It may be pertinent to point out that the term 'money laundering' as an expression gained prominence colloquially during the presidency of Richard Nixon in the Watergate Scandal of the 1970s. In fact, the expression was first accorded a judicial mark of approval in the Florida case involving money on deposit at Capital Bank—*United States v $4,255,625.39* (1982).[8]

Without the network of financial institutions, epitomized by the banks, to facilitate the three stages, and to lend an air of respectability to the process, money cleansing would be virtually impossible. It then follows that banks and other financial institutions have been positioned in the frontline to combat this (Ellinger et al 2011: 95). In addition, there is often a complicated set of activities mostly not evidenced just by a singular act. In an effort to present a more robust analysis of the phenomenon, in recent decades it has become academically expositional to present a three-pronged approach to the analysis. Indeed, a report from Australia indicated thus:

> Such a scheme would take raw proceeds of crime, held by the offender, manoeuvre them through a process that would conceal their source and confuse and break the money trail, and then return them to the offender legitimised and ready for further use. (National Crime Authority 1991: vii)

Placement is generally recognized as the first stage or step. Here, the culprit will attempt to put or deposit the illegal slush fund into the financial system. This process for transfer of funds starts in the informal economy and moves to the formal economy. The term 'informal' is employed by the authors to emphasise that the money was not legitimately acquired in the first place. And, for the loot to be enjoyed, there has to be a transition into the legitimate economy where the culprit will be in a better position to reap the benefits of the transaction. Therefore, for the transition to take place, the dirty money must begin its journey for legitimization from the placement stage to be later mixed with the legitimate money in the system.

It is good to point out that the placement stage comprises two segments—primary placement and secondary placement. In point of fact,

8 See also Gilmore (1993: 23).

the cleanser will initially try to deposit the money into the banking system. This is arguably the most difficult part of the process. The launderer runs a great risk of being caught at this stage. However, the launderer can be successful and evade the regulatory radar, possibly through conniving with corrupt bank officials and other gatekeepers who have been mandated to protect the system. Primary placement can *ipso facto* involve the use of 'structuring' or 'smurfing' methods, in banking jargon. Here, large quantities of money are usually broken down into small amounts (Lastra 2012: 37) and then deposited to evade reporting scrutiny from government agencies. The officials usually look the other way on account of the fact that they have been compromised. In the USA, any sum that is above $10,000 is mandatorily subject to reporting requirements.[9]

In Nigeria, many natural persons exemplified as top government officials and other legal persons have been able to evade the regulatory radar and deposit into the banking system unaccountably large sums of money, amassed through corrupt processes. Some of these individuals are well known politically exposed persons. Their activities were made possible because these individuals were able to bribe their way through, thereby circumventing the system.

Secondary placement involves converting money into different assets. This can include the use of front persons, the setting up of legal persons or, in some instances, the use of insurance policies (e.g. various professional gatekeepers have been identified who use their knowledge to circumvent the system). In these circumstances, it should be noted that the services of professionals, such as accountants and lawyers, are usually employed to achieve this. For example, a lawyer, Mr Badresh Gogil, was used by a former Nigeria governor James Ibori. The presiding judge described the lawyer as the 'architect'. The governor was later convicted for money laundering in the UK and has since served his term of imprisonment. In some instances, during this stage, the launderer might even purchase or own the said bank in order to continue with their illegal activities.

The second level of stratification is the laundering itself. This is made up of two basic parts—washing and layering. Washing refers to the process of removing the illegitimate toga of the loot or dirty money. There are three techniques that can be used here. First, the culprit or the launderer can mix the dirty fund with clean assets. This can be achieved by combining the lawfully derived money from a business with the

9 See US Bank Secrecy Act 1970 which contains the requirement for currency transaction report (CTR); see also 31 USC § 324.

unlawful proceeds of a cash-intensive operation like a pizzeria, or by under-invoicing the exports and over-invoicing the imports of an export/import business that has the hallmarks of an export commodity company. Secondly, the culprits can transform the medium of the money. For instance, cash can easily be exchanged with casino chips and then back into money. The essence is to make it very difficult to differentiate the dirty money from the legal funds. Lastly, the launderers can conceal the beneficial owners by formulating sophisticated financial vehicles designed to cheat the system. These can include fake mortgages and the use of solicitor trust accounts.[10]

Layering usually requires a systematic web of serial and possible parallel transactions that are designed in such a manner as to make it difficult to follow the paper trail. Offshore Financial Centres are involved here in a significant manner. The essence is that routing money via various jurisdictions makes it more difficult for the investigating and regulatory apparatus to trace the loot. Here, there can be a noticeable clash of bureaucratic red tape due to divergent jurisdictional legal undertones.

Integration is the last academic process in money cleansing. Here, illicit money is 'being brought home to rest' in the formal or main economy. This can include specific stocks or direct investments in real estate. There are various cases of individuals who have attempted to integrate their loot into the legitimate economy. For instance, Dr Erastus Akingbola was found guilty by a London court for buying a property in London worth £8.5 million with laundered funds. He had misappropriated depositors' money and cleansed it. For the records, he was a former managing director of a collapsed bank in Nigeria—InterContinental Bank plc, now known as Access Bank.[11]

There are other methods of integration. For instance, a loan-back technique can be used. In this method, the culprits will arrange for money they have in an offshore account to be given to them in an onshore account in the form of a loan to their company. This sum would be transferred completely free of taxes and in addition can be used to cut taxes that are due in domestic income. It may be noted that the borrower has a legal obligation to repay the loan once it is incurred, and with interest. This will generate a situation where the process can be repeated successfully many times with the consequent result that the money

[10] The Fourth EU Money Laundering Directive and, by transposition, the UK Money Laundering Regulations 2017 have made this difficult for the culprits.

[11] *Access Bank v Erastus Akingbola and Others* [2012] EWHC 2148 Comms. See the The Eagle Online.

cleansing integration would increase in expansive diameter (Blum, 1998). It has to be appreciated that money cleansing involves a series of stages and each has its own characteristics, the dynamics of which are not particularly well understood.

[C] GERMINATION OF FATF

Money cleansing is a situation that arises as a result of corruption or illegal activities. It is generally agreed among academics that there are various facets of corruption. It is only when the illegal money is generated that a way will be sought to put it back into the system. This, the authorities were quick to notice, has all the ingredients for disrupting and distorting the global financial system. It is as a result of this that various international bodies kicked against the money-cleansing operations. The International Monetary Fund (IMF) has indicated that money laundering is a problem of global concern (IMF 2001a) which threatens to undermine the stability and integrity of the financial markets. And it is one of the core responsibilities of the IMF to combat it (IMF 2001b). Of all the bodies concerned in this trade, it is only FATF, formed in 1989, that has been identified as the sole organization that was set up specifically to deal with money cleansing. It shares an office with the Organisation for Economic Cooperation and Development (OECD) in Paris.

It was as a result of the negativities associated with money cleansing that a group of countries known as G7 (FATF 1990) formed the FATF. These were Canada, France, Germany, Italy, Japan, the UK and the USA. As a background to the formation, the G7 mandated a task force:

> to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purposes of money laundering, and to consider additional preventive efforts in the field, including the adaptation of the legal and regulatory systems so as to enhance regulatory judicial assistance (G7 Information Centre 1989: para 52).

The consensus was that the problem 'has reached devastating proportions' (Nakajima 2016: 297-98). FATF's initial mandate was to examine money-laundering techniques and trends. As terrorist financing has risen up the international agenda, the FATF role has naturally and incrementally extended to encapsulate counter-terrorism financing. As of 2012, its remit was extended to include the proliferation of weapons of mass destruction (Packman 2015: 25). It should be noted that the cleansing of money that FATF is tackling involves illegitimate *sources* of funds, whilst terrorist financing is concerned with the illegitimate *use* of the funds.

[D] SOURCES OF FATF COERCIVE MEASURES

We should bear in mind that FATF is seen as a soft law body and, therefore, legally, does not possess coercive force. Soft laws are those laws that are legal norms, principles, codes of conduct and transactional rules of state practice which are recognized in either formal or informal multilateral agreements (Wellens and Borchardt: 1989). It is acknowledged that soft law has the characteristics of presuming consent to the basic standards and norms of state practice but generally without the necessary *opinio juris* required to form binding obligations under customary international law. However, FATF has always been taken very seriously, principally due to the support it enjoys amongst important global financial institutions, notably exemplified by the IMF and the World Bank. These two international financial institutions are, of course, especially important players in the global economy.

For instance, the IMF Articles of Agreement (Article IV of IMF) empower it to oversee the international monetary system to ensure its proper and efficient operation. It does this by exercising surveillance over the exchange rate policies of its members. On the other hand, the World Bank's Articles of Agreement permit it to promote economic development amongst its members by making loans available to them. These loans may be directed towards the following: economic adjustment programmes; the rule of law; and improving both public and private-sector accountability, including prudent governance that has an impact on reducing corruption.

The reality on the ground is that countries that are members of the IMF and the World Bank do come to them for loans. In summary, both organizations will inform countries that, for them to have access to the requested facilities, they must as part of the conditions comply with certain international benchmarks. And one of these is adherence to the FATF Recommendations that are seen as the antidote to money cleansing and, by extension, corruption. You can now appreciate how this soft law body's recommendations suddenly transform it into a 'hard law' organization on account of the IMF and World Bank's 'carrot-and-stick' approach to access their facilities. This can be said to be a source of FATF powers.

Since the formation of FATF, one of the coercive tactics it has used is to classify countries as Non-Cooperative Countries and Territories (NCCTs). This is one of its internal mechanisms. It is a fact that countries do not want their names on this list. We should not forget that FATF membership is made up of not less than 130 countries, and all the members of the OECD are automatically also members of FATF. The truth of the matter is that, once a country is designated an NCCT, it follows that it will find it extremely difficult to conduct financial transactions with the other members of FATF and the OECD. The impact is colossal. It is on account of the above that countries try as far as possible to adhere to FATF recommendations against money cleansing. From a critical perspective, FATF later decided that the use of NCCT classification was not diplomatically encouraging and rather too blunt and moved its functions to a working group known as the International Cooperation Review Group (ICRG). The ICRG uses a more diplomatic approach to make countries comply (Packman 2015: 271).

Another coercive measure that FATF can employ is the threat of expulsion. However, since its formation, this has not been utilized as countries try as hard as possible not to test the limits of FATF patience on this matter (FATF 1996a). Instead, FATF can use a recommendation that notifies other members to closely monitor any financial transaction from the erring member and put it under close scrutiny.[12]

We are minded readily to recall that, when FATF recommendations were initially emerging, some countries actually experienced the full weight of FATF's influence. In 1996, Turkey got a dose of what it would be like to go against the wishes of FATF. After FATF pressure to make Turkey pass a law to prohibit money cleansing had failed, FATF issued a press release condemning Turkey. The organization urged other members (and by implication OECD members also) to be wary about entering into any financial transaction with Turkey. In fact, members were advised to forensically scrutinize financial relationships with businesses and individuals that were based in Turkey (FATF 1996b). To say the least, this negatively impacted on Turkey. The adverse implications made Turkey not only enact a new anti-money cleansing law, but it also complied with the necessary FATF recommendations (FATF 1999c).

Additionally, as far back as 2000, it was the coercive effect of FATF that eventually made Austria ban the use of anonymous bank accounts, enacting a law that prohibited their use. It was FATF's threat to suspend the country from its membership and by implication from the OECD that made Austria comply (OECD 2000).

FATF coercive powers can even extend to non-members. If there are infractions of FATF recommendations, the body can signal to its members to avoid the jurisdiction involved. This was exactly what happened with the Seychelles, which was an offshore jurisdiction. It enacted legislation

[12] This involved the then Recommendation 21 before the 2012 recommendations.

known as the Economic Development Act in February 1995. The Act granted immunity from criminal prosecution to anyone willing to invest US$10 million or more in approved investment schemes. Their assets were to be protected from government compulsory acquisition schemes. On account of FATF warnings, the Seychelles government quickly changed its mind.

Indeed, there is little doubt that the tool of mutual evaluation that is periodically employed by FATF is a cohesive and coercive measure to put countries in check regarding money cleansing. Sansonetti points to this process as one of FATF's most potent tools and suggests that it is probably the most successful element of its activities (2000: 218). In truth, countries prepare for this evaluation and would not want to be caught off-guard, and they therefore try as hard as they can to abide by the recommendations. Interestingly, FATF visited the UK in October 2018 for a mutual evaluation. Prior to this, the UK had been subject to such an evaluation in 2007. In December 2018, FATF indicated that the UK has a robust and well-developed regime to effectively combat money cleansing and terrorist financing. However, it was quick to point out that the country still needs to strengthen its supervision and increase the resources of its financial intelligence unit (FATF 2018). Within the next five years, two more reviews are expected for the UK—a technical compliance review in 2021 and an effectiveness review in 2023.

The fact is that, after the mutual evaluations, countries usually try to correct the deficient areas identified by FATF as regards its recommendations. For instance, FATF indicated in January 2019 that Tunisia had tried to improve on the deficiencies noted in its 2016 visit. Tunisia has now been given some time to upgrade the rating of four recommendations: 6, 8, 26, and 34, from partially compliant to largely compliant. And FATF is expected to downgrade the rating of Recommendation 18 from largely compliant to partially complaint. Tunisia remained in an 'enhanced follow-up' on this until November 2019.

[E] CONCLUSION

Money cleansing is not good for the global financial system and can be very disruptive of economic order. This is the basic position of FATF and other leading international financial organizations like the IMF and the World Bank. Since its formation, FATF has played a very effective role in getting states to adhere to its recommendations. Although FATF has been identified as having soft law characteristics, the indirect power it has gathered from links with both the IMF and the World Bank has actually galvanized it into playing a cohesive and coercive role in the implementation of its recommendations. Presently, membership of this organization is seen as a positive sign of compliance to anti-money laundering issues and portrays a state as attractive for those wishing to engage in financial transactions with it. Of course, money cleansing cannot be completely eradicated, but the work of FATF is taking us in the right direction. In this Note, it has been shown that, irrespective of the soft law status accorded to FATF, the body has demonstrated sufficient mandatory energy in contributing to the reduction of financial crimes through its recommendations. It has shown that it has efficient teeth to bite when it is necessary to do so to reduce the scourge of money laundering and by extension corruption. This article has argued that the activities of the FATF should be seen as a significant contributory mechanism in the global financial template.

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