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Is money laundering legislation so draconian that it may breach a customer's human rights under the european convention on human rights 1950?!

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Annotation. In this article the authors examine the law of England against money laundering and its impact on human rights, and Concerto European Convention on Human Rights of 1950. As this legislation on money laundering is now very strict in the United Kingdom, which puts banks in a very difficult situation in which there is a suspicion about the sources and origins of client funds and that affects a significant loss of the client's business, when they do not know why their money were frozen. Indeed it can be argued that the legislation on money laundering as draconian may violate human rights under the European Convention on Human Rights in 1950 "

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Является ли законодательство против отмывания денег таким строгим, что может повлечь нарушение прав клиента, гарантированных Европейской конвенцией по правам человека от 1950 года?!

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Ключевые слова: Банк, банковская система, деньги, банковский сектор, инвестиция, отмывание денег.

Аннотация. В статье авторы рассмотривают закон Англии против отмывания денег и его влияние на права человека, а конкретно Европейской конвенцией по правам человека от 1950 года. Так как данное законодательство об отмывании денег сейчас является очень строгим в Соединенном Королевстве, что ставит банки в крайне тяжелое положение, в котором существует подозрение об источниках и происхождении средств клиента и что влияет на значительные потери бизнеса клиента, когда они не знают почему их средства были заморожены. Действительно, можно утверждать, что законодательство об отмывании денег так драконовски может нарушать права человека в соответствии с Европейской конвенцией о правах человека 1950 года.

Introduction.

'The European Union has made great efforts to keep up to speed with, if not abreast of, global initiatives to counter money laundering'. The United Kingdom as part of the EU implemented Money Laundering Directives.

The 'reality is becoming clearer that banks, even well established and respectable banks, are vulnerable to the consequences of… money laundering'. Criminals might use noncomplex ways to launder the proceeds of crime or 'highly complex schemes involving a web of international business investments'. Banking sector is regularly used by money launderers for several reasons as it offers numerous and diverse services. As a consequence, money laundering legislation ('MLL') focuses on banks 'because of the crucial role that they play in the economy'[1].

Nowadays, in the UK MLL is complicated as 'legislative framework is spread across a plethora of statutes'. Although 'The Governments assessment is that overall the Regulations are effective and proportionate at an aggregate level' some authors and facts are controversial. Additionally, MLL is too strict, therefore, imposes too much obligations on banks. Consequently, they 'face difficulties separating the costs of complying with the Regulations from other costs of doing business. Moreover, banks are threatened by financial sanctions for breaching of the legislation.

Strictness of MLL affects customers as if banks suspects money laundering ('ML'), they have to freeze accounts of suspected clients. Furthermore, although grounds for their suspiciousness might be unjustified banks do not have to justify them neither to the court nor to their customers. The statute is intended to protect those having a suspicion and reporting to competent authorities.

Banks must not disclose for customers reasons for freezing accounts. As a consequence, customers are totally unaware and might bear remarkable losses. Furthermore, they cannot claim losses and damages, because banks were complying with the strict law. Additionally, MLL might violate customers' human rights under the European Convention on Human Rights 1950 ('ECHR').

2. Strict Money Laundering Legislation.

MLL in the UK is criticized for several reasons. Firstly, MLL is troublesome and becoming stricter. Ryder stated that 'this type of legislative framework is overcomplicated. Indeed, there are the Money Laundering Regulation Act 2007 ('MLR'), the Proceeds of Crime Act 2002 ('PCA'), the Serious Organised Crime and Police Act 2005 and the Financial Services and Markets Act 2000 ('FSMA'). Ryder fairly recommended that 'the UK would benefit from a single money laundering act' [2]. Further, he critically commented on previous Money Laundering Regulations. He questioned the rationale behind the rule, 'because it created an additional level of regulation for an area of law which is complicated and fraught with practical difficulties' and stated that 'the obligations imposed… were burdensome'. Furthermore, the Third ML Directive was intended to unite and modernize the First and Second ML Directives. It introduced 'additional requirements and safeguards for situations of higher risk… and stricter checks'. Thus, the legislation became more 'complicated and fraught'.

Secondly, the central and important part of the Anti-Money Laundering practice is 'Know Your Customer' requirement or 'Customer Due Diligence' ('CDD') measures, which are not popular among neither bankers nor their clients. The former has to spend more money to employ and train staff, while the latter frequently has to go through identification process.

Finally, some authors criticize MLL for its ineffectiveness. For example, Ramage stated that it 'has been largely ineffective and counterproductive and has derogated the privacy rights of the majority of people'. However, the legislation might be more effective after applying of a risk-based approach, which 'enables a more targeted and focussed approach to assessing risks and applying resources to where they are most needed' [3].

The main counterargument for critics of the legislation should be that ML is crime 'committed when the proceeds of "criminal activity" are laundered'. Indeed, such activity could be drug crimes, corruption, people trafficking or even murder. For instance, in 2005 it was roughly calculated that $1.038 billion had been laundered only from drug trafficking. If numbers are high and illicit activities might be murderous, thus strict law could be appropriate and legitimate.

3. Banks in the United Kingdom under strict money laundering legislation.

'The strategic position and the role that commercial banks play in the economy make them highly vulnerable to money laundering'. Thus, strict MLL imposes obligations on banks therefore adding some difficulties and troubles for their work.

First, CDD standards require banks to identify their customers, to obtain information on the purpose and intended nature of the business relationship. These requirements have to be applied in the beginning of a relationship with client, during further relations and if there is a suspicion of ML. Some authors described these requirements as old-fashioned, calling them 'quaint' and 'bureaucratic' and questioned their necessity in modern era Mugarura gave a positive argument that banks' duty to know their customers does not permit 'anonymous accounts'. Indeed, competent authorities, at least, would know details of criminals laundering money. Further, if there is any suspicion that the client is 'a nominee' account holder, banks also have to identify the 'principals on whose behalf the accounts are conducted [4]. For example, it should be harder for politics to transfer corrupted money to his wife or relatives' accounts.

Second, banks are required to inform their workers of the law related to ML. Furthermore, they have to train employees to recognize and deal with transactions, which may be related to ML. Logically, all these measures bring to higher expenditure of banks. Otherwise a punishment could be imposed for breaching any of these legal obligations. For example, the Financial Services Authority ('FSA') has fined private banking houses 'Coutts & Company' ('Coutts') £8.75 million The FSA found that the 'failings at Coutts were serious, systemic and were allowed to persist for almost three years'[4]. The investigation showed that 'robust controls' were not applied in the beginning of relationships with high-risk clients and afterward such relationships were not monitored appropriately. In addition, anti-money laundering team at Coutts was unsuccessful at scrutinizing and challenging. This example should have warned other banks that they have to spend money on training staff or they will punished for failing to do so.

Additionally, pursuant to section 378 of the Proceeds of Crime Act 2002, banks have to create 'small 'vetted groups' of Money Laundering Reporting Officers' ('MLRO'). This is again additional burden on banks and their employees.

Third, banks have to record their findings. Records are the copies, the references and the evidence, which can show and prove that the customer's identity was obtained. Those and other supporting information have to be kept for 5 years. Such requirements could be burdensome for smaller banks because of lack of funds and experience. For example, the FSA fined a firm, which hire only 6 employees working with 23 clients. The company unintentionally failed to provide necessary information about their customers. Although there was not another real proof of ML, 'a fine was imposed. The conclusion for banks that might be drawn from this example should show possible problematic issues that could occur under MLL.

Fourth, if banks cannot apply CDD measures, they must cease transaction or terminate any existing relationship with the customer. These obligations place banks in an extremely difficult position. Contractual and reputational losses might be the ramifications. For example, the former 'may result when a key contract that underlies a financing is shown to have been procured by a bribe'. Consequent termination of the contract causes contractual losses. The reputational damage might occur when MLR 'would have made it impossible for the bank to maintain correct relationships'. For instance, customer was long-standing account holder. However, the bank was enforced by law to terminate relationship between them. Afterwards, the client and others having the same experience probably will choose another bank.

Finally, banks have to scrutinize transactions and to ensure that the transactions are consistent with the relevant person's knowledge of the customer, his business and risk profile. If something suspicious occurs, a bank has to act under Part 7 of the PCA 2002. If an employee suspects ML, he has to promptly inform MLRO, who also must immediately report to competent authorities. During this time the bank must freeze account and no further operations with it should be provided until getting permission. Failure to do so is criminal offence. For example, at this stage an unusual amount of money or irregular payment, which is not in agreement with client's income, could cause suspicion. Therefore the employee has to make an authorized disclosure. The bank would not commit offence after appropriate reporting and acting after getting permission. Furthermore, employees and MLROs are prohibited from disclosing any information to suspected customers or third persons in order to not prejudice ongoing investigation [5]. Otherwise it would be tipping-off offence.

Suspicious activity reports ('SARs') might be the most vital part of anti-money laundering process. MLROs after receiving and scrutinizing internal report must report to SOCA. SOCA ultimately determines 'whether or not to pass the information on to the police for further investigation'. Banks have criticized benefits of SARs regime, which could be avoided by criminals. For example, by dividing substantial amounts of money, since smaller quantity would not cause suspicion. Consequently, there was recommendation rather wasting funds on reports to direct them somewhere else. For instance, 'the British Bankers Association claims that their members annually spend £250m each year to comply with the regulations'. Thus, banks must complete difficult task by reporting on every suspicious transaction, while reports' effectiveness is doubtful.

There are some problems, which might interfere with bank's compliance with regulations. First, several questionable and suspicious transfers occur almost every day, while, immediate and appropriate reporting is tough assignment. Second, it might be difficult for MLROs to check every doubtful or

irregular transaction. However, inability to scrutinize suspicious transaction does not exempt from liability. For instance, pursuant to Section 206 of the FSMA, the FSA has competence to impose penalty on authorized person violating any requirements. The FSA has already fined a number of banks for breaching the legislation 'even where there was no evidence of money laundering'.

An ordinary threatening remark of financial sanctions by the FSA forces banks to conform to the ML requirements. Some authors described this as 'a heavy handed approach' and believed that it was 'having the desired effect'. Indeed, financial penalties compel banks to comply with the law, whilst they struggle with numerous suspicious transactions. Additionally, threat of sanctions increased number of 'defensive' and 'preventive' SARs. Thus, banks have done more work than it was required.

4. Freezing of bank accounts.

Some questions might arise related to a situation when banks freeze accounts of customers because of suspicious transfers. For example, if a client had legal and unsuspicious £10,000 on his bank account, in which money was transferred from another account. The amount was £3,000, which is higher than the level at which the financial institution must complete a SAR [5]. Therefore the transfer caused suspicion and the bank had frozen the account.

First question is can the customer still use his initial balance or it will be frozen with the transferred sum. It could be explained that the account is deemed to be a criminal property from the moment of reporting under SARs regime until the end of investigation by competent authorities. Thus, the both sums of money have to be frozen.

Peter de Verneuil Smith pursuant to ss. 340(3) and 340(8) found that 'a partial and indirect representation of a benefit obtained in connection with criminal conduct falls within the meaning of criminal property'. The solution according to him depends on whether the account is 'one mixed fund' or a number of segregated funds. In finding the answer he stated that 'a credit balance is a debt owed by the bank to the customer; a chose in action'. He continued that although the account might be considered as a number of different debts, 'as a matter of property law' there should be just one chose in action. Money that is raised for one purpose can easily be used for another. Therefore, if it is assorted, it changes and becomes part of 'indistinguishable fund'. In *Foskett v McKeown* case it was similarly stated by Lord Millett that 'There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder'[51]. If the account is one chose in action then it follows that illegal income 'into an account of criminal property will cause the account to represent 'in part' and 'indirectly' that criminal property'. Consequently, all expenditure from the account would make possible the use of criminal property. Indeed, if legal funds are assorted with illicit ones in one account, they lose their quality and become part of criminal property. Thus, in the last example, it will be impossible for the bank to separate £10,000 and £3,000 into legal and illegal funds and allow operate with the former one.

Some banks might disagree therefore allowing the customer to use the account and £10,000, while freezing only suspicious £3,000. However, such actions could be founded as breaching of MLL if court would decide that the account was one mixed fund and it was criminal property.

Second question is related to liability of banks for freezing accounts, if they were complying with MLL. Situation might be like in the last example when the suspicious amount was transferred in the account or converse, since banks, too, have to scrutinize funds withdrawing accounts. For example, the client ordered the bank to transfer £5,000 from his account in order to make payment. This time withdrawing transfer caused suspicion. In both situations freezing of the account might cause losses and damages.

The customers most likely allege that the bank is liable. The similar situations were in *Shah v HSBC Private Bank (UK) Lt [3]* and *K Ltd v National Westminster Bank Pl c* cases. However in *K Limited* case it was held:

'Where a statute makes it temporarily illegal to perform the contract, the contract will only be suspended until the illegality is removed. That still means that, during the suspension, no legal right exists on which any claim to an injunction must depend'[5].

Thus, if bank suspects ML and freezes the account, it complies with MLL. Further, it is not liable for future breach of contractual obligations for the reason that fulfilling of the contract in such circumstances is not allowed by the law. Accordingly, customer's claim for losses and damages will be rejected.

Sometimes, losses might be significant like in *Shah case*, where the claimant 'had lost the equivalent of around $331 million in loss of interest'.

Some authors commented that 'This provides comfort to banks'. Indeed, possibility to breach contractual obligations and to avoid liability might be very comfortable. This puts banks in a favorable position when they can cover its inability to perform contract with its statutory obligations. For example, a customer instructed to transfer a large sum of money, which was not suspicious. However, for some reasons a bank at that moment could not afford such amount. Further, in order to escape liability and gain additional time, the head of the bank in collusion with responsible for the transfer employee decided to report to competent authorities. During the next few days while SOCA was investigating the bank found necessary amount of money and completed the transfer promptly after permission. Consequently, court would find that the bank was complying with its statutory obligations under MLL. In the end the bank would not be liable, while the client suffered significant business losses.

It might be difficult to show bank's inability and that the SAR was initiated intentionally without suspicion like in the last example. Additionally, it would be problematic to prove that there were no grounds for suspicion. Here arises next issue.

Third question is related to suspicion and the grounds for it. Some authors described it as 'fanciful'. Indeed, employee might have overimaginative and unrealistic thoughts and ideas, however his suspicion would be doubtless and unquestionable. It was affirmed in *K Limited* and confirmed in *Shah v HSBC Private Bank*. Lord Justice Longmore stated that 'Once the employee confirmed that he had a suspicion, any judge would be highly likely to find that he did indeed have that suspicion. Claiming party submitted that 'it would be all too easy for banks to assert a suspicion which was in fact groundless'. The judge's answer was:

'The existence of suspicion is a subjective fact. There is no legal requirement that there should be reasonable grounds for the suspicion. The relevant bank employee either suspects or he does not. If he does suspect, he must… inform the authorities'.

Accordingly, the law does not require identifying the facts, on which banks rely their suspicion. Furthermore, in *K Limited* case Lord Justice Longmore stated that 'there is no provision enabling the relevant person to give evidence of his suspicion'. Thus, there is not need to recognize that the bank entertained any suspicion. Moreover, it is impossible to claim for negligence, as 'There can be no duty at common law since it would cut across and undermine the statutory duty to report a suspicion even if unreasonably held'.

Stated above facts show that according to MLL banks in the UK might suspect customers on fabricated or imaginative grounds and freeze their accounts. Further, they are free from obligation to explain reasons for such action. Thus, there are no civil remedies for customers in such cases. However, this is not unexpected fact, since 'It may well have been the intention of the statute to protect those having a suspicion and reporting that suspicion to the authorities from being identified' [6].

Fourth question is connected to another difficulty for the customers. Although their accounts are frozen, they are totally unaware of grounds for freezing. For example, in *K limited* case the Bank had suspicion that the client's payment might be use of criminal property. Therefore it refused to honor his instructions. The customer was merely informed that 'the Bank could not currently comply with his instructions and could not enter into any further discussion of the matter'. Clarification for such situation can be found within statutory obligations of the bank. If MLRO or a bank employee informs the customer about the reasons for suspicion or ongoing investigation they would therefore commit tipping-off offence under s. 333A of the PCA. This is difficult situation for banks as well as for their clients. The former does not give any explanation, whilst the latter can suffer losses. The bank might inquire SOCA to permit to explain circumstances to the customer. However, it is unlikely that it will receive the permission, as it is necessary to prevent the investigation from any prejudice.

Positive moment for customers is that there are time limits [5]. After completing SARs there are 7 working days, called notice period, within which bank must not do any prohibited act. If during this time bank does not receive refusal, it may act, for instance, transfer money. However if bank is noticed that consent is refused, it is again prohibited to act during next 31 days, called moratorium period. If nothing is heard within this time, the bank might act. Thus, customer will be totally unaware why their funds have been frozen for 7 working days or 31 days.

Another question is related to situations when customer instructs to transfer money and unable to prove that he has to do so, for instance, that he has contractual obligations. Client has shown necessary documents, for instance, a contract or invoices. Therefore bank employee does not find ground for suspicion and transfer is completed. However, what if customer had an oral agreement and therefore is not able to prove that he has contractual obligations. It might cause suspicion and squander time therefore client can bear losses.

5. Probability of violating of customer's human rights.

According to Article 1 of the ECHR the UK as a contracting party must 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I' of the Convention. However, MLL imposes some obligations on banks, which might breach customer's human rights.

Firstly, CDD measures could lead to a breach of human rights. Banks require physical identification of their customers. Identification procedures may be discriminatory. In practice it might happen that bank's customer could be discriminated for his background, country of origin, race, nation or religion. For example, a woman wearing hijab might probably increase attention and suspiciousness of bank workers. Consequently, next time in order to complete a transaction without suspicion she has to wear ordinary clothes. Thus, rights guaranteed by Articles 9 and 14 of the ECHR might be abused [6]. However, it should be argued that MLROs or any other bank employees do not breach human rights intentionally. The reason for possible breaches is requirements of draconian MLL, according to which every suspicious action must be reported.

Secondly, some authors commented that MLL might breach privacy rights under Article 8 of the ECHR . Ramage stated that 'some argue for the removal of the anti-privacy money laundering regulations'. For example, there were issues related to protection of data, which contained information about financial transactions. It was transferred from the EU to the United States. In 2006 there was leakage that since 2001, the inter-bank cooperative SWIFT had been providing the CIA with information of all inter-bank wire transfers. This caused public protest. The European companies had a suspicion that details of their financial transactions were used for purposes such as 'commercial espionage' and strengthen competitiveness of American companies. This example shows how information provided by banks to competent authorities might be used against their customers. Therefore breaching the rights guaranteed under the ECHR.

However, it should be argued that pursuant to Article 8 of the ECHR:

'There shall be no interference…with the exercise of this rights except such as is in accordance with the law and is necessary… in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

ML crimes undermine almost all listed above values. Thus there might be interference, if it is necessary to prevent the use of the financial system for the purpose of ML [7].

Finally, pursuant to Article 6 of the ECHR, everyone has right to fair trial; everyone charged with a criminal offence has rights to be informed promptly of the nature and cause of the accusation against him; to examine witnesses against him and to obtain their attendance and examination. Furthermore, pursuant to Article 13 of the ECHR customer has right to effective remedy. Thus, if account was frozen and client is suspected in ML, he has to be informed. Further, he has the right to know about grounds for suspicion and examine bank employee. Finally, if customer's rights are violated and therefore he bears losses, consequently, he must have an effective remedy. However, under MLL, the client must be unaware about accusations against him and cannot examine witnesses against him. Finally, banks have contractual obligations and if customer suffers losses and damages, he is deprived of right to effective remedy. In *K limited* case judge agreed that it is 'true that to intervene between a banker and his customer in the performance of the contract of mandate is a serious interference with the free flow of trade'. However, he continued that 'Parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of money-laundering to run rife in the commercial community'. Another argument that might justify strictness of MLL is that there limited time periods. Thus, 'interference lasts only for 7 working days in… the majority of cases and a further 31 days only' [7].

Conclusion.

MLL in the UK is probably draconian and imposes too strict obligations on banks. It is criticized for ineffectiveness and complexity. It is recommended that there should be a single act. Further, risk-based approach might increase effectiveness as it allows assessing risks and focusing on risky ones. However, there is a fact legitimizing strictness of MLL, which is that ML is 'the undoubted evil' [7].

Banks might struggle while complying with the strict legislation. They have to increase expenditure to train staff, scrutinize transactions and complete SARs. Additionally, there is threat of financial sanctions for breaching rules. Moreover, banks are required to cease suspicious transactions or even stop relationships with suspected clients.

Customers, too, suffer under MLL. They have to prove legitimacy of their funds. Otherwise, if their transaction causes suspicion, their account might be frozen from 7 to 31 days. During this period of time they will be totally unaware of reasons, as banks must not disclose any circumstances. Consequently, they might suffer significant losses, sometimes millions of pounds. Moreover, it is not possible to claim losses or damages, as there is statutory protection for banks obeying MLL. Thus, in such cases there is absence of civil remedies for customers.

Some issues arise related to suspicion and grounds for it. The former is a subjective fact, while the latter might be as real as over imaginative or unrealistic. Banks are free from obligation to explain or prove existence of suspicion, if they report to competent authorities. There are legislation and cases that give them such right.

Another difficulty is that customers' human rights under the ECHR might be violated. They might be discriminated and unfairly served by bank employee. Further, their rights for private right might be breached because of inappropriate use of information by competent authorities as in example with the CIA. Finally, if customers are deprived of right to effective remedy, this might mean that they are deprived from rights under Articles 6 and 13 of the ECHR.

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Ақшаны жылыстату заңнамасының қатаңдығы 1905 жылғы европалық конвенциямен тұтынушылардың кепілдендірілген құқықтарын шектуге негіз болама?!

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Негізгі сөздер: Банк, банк жүйесі, ақша, банк секторы, инвестиция, ақшаны жылыстату.

Аннотация. Мақалада авторлар Англия елінің ақшаны жылыстату туралы заңнамасын талдап, оның адам құқығын шектеуге негіз болатындығы, нақты айтқанда 1950 жылғы адам құқығы туралы Европалық конвенцияға қайшылығын қарастырып, оған талдау жасаған. Бүгінде аталмыш заңнама Біріккен корольдікте өте қатал болып келеді, яғни ол клиенттің қаражаты пайда болу көздері туралы күдік тудырып, клиенттің бизнесінің ауқымды шығындары банктерді қиын жағдайға қалдырып отыр, сол себепті олар, олардың қаражаты не үшін тоқталғаны туралы бейхабар. Ақшаны жалтарту туралы заңнама 1950 жылғы адам құқығы туралы Европалық конвенциямен сәйкес адамнын құқығын бұзатыны ақиқат.

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