AMLC

Newsletter December 2020

Anti Money Laundering Centre

Dear colleague,

This is the December 2020 edition of our newsletter.

This newsletter contains news on mirror trading, a podcast on the activities of the Financial Action Task Force, and international public-private cooperation by way of the Europol Financial Intelligence Public Private Partnership.

We will also provide attention to the FATF report on Trade-Based Money Laundering. Over the past few months, our colleagues from AMLC and Public Prosecutors Service have played a leading role in drawing up the report. It is great to see that the experiences obtained in the Netherlands and abroad are shared on the global stage via this FATF report.

As always, we will conclude the newsletter by discussing recent case law.

Please let us know if you come across any money laundering structures you'd like to share. You are always welcome to send questions or comments AML.Centre_Postbus@belastingdienst.nl. Do you have any colleagues who would also like to receive the newsletter? They can use this e-mail address to sign up.

Kindest regards,
The AMLC

ANTI MONEY LAUNDERING CENTRE

News

Podcast tip
AMLC colleague Anne Strijker, together with Evert Houtman from the Ministry of Finance, was a guest in the podcast of Compliance Advises on the Financial Action Task Force (FATF). Many people in the financial sector are familiar with the concept of the FATF and have a broad idea of what it is about. But what exactly does the FATF do? How does the FATF make its country evaluations? What does the FATF information say about integrity risks that financial institutions should consider? The podcast also discusses the method used for the country evaluations, the latest developments in the field such as the focus on the effectiveness of the system, the background of grey and black lists and their use in day-to-day practice. It's fairly long (over an hour) but worthwhile! Listen to the podcast here (only available in Dutch).

Mirror trading
Minister Hoekstra of Finance recently informed the House of Representatives about mirror trading by way of a joint response by DNB and the AFM. The coverage on the FinCEN files regularly state that mirror trading can also be used in money laundering schemes. But how does this work? Read our analysis here.

Jurisdiction of Dutch nationals abroad
Money laundering outside of the Netherlands made a punishable offence
On 1 December 2020, an amendment of the Extraterritorial Jurisdiction (International Obligations) Decree entered into force. Because of this amendment, Dutch criminal law now also applies to Dutch nationals committing money laundering outside of the Netherlands. This amendment was based on Directive (EU) 2018/1673 of 23 October 2018 on combating money laundering by criminal law.

European public private partnership
EFIPPP stands for Europol Financial Intelligence Public Private Partnership. This is European partnership between investigative services, financial intelligence units and banking institutions which need to give insight into financial crime and money laundering. The EFIPPP currently involves fifteen countries, including eleven EU Member States and over twenty-five banking institutions such as UBS, Santander, ABN AMRO, Commerzbank, ING, Barclays, BNP Paribas and Citibank. FIU-NL and AMLC are also involved. Since the recent consolidation of this cooperation, the AMLC is member of the EFIPPP's Steering Group. You can read more about it here.

The EFIPPP's objectives are as follows:

- supporting national public-private partnerships, thereby also operating as a network
- developing shared intelligence images and understanding threats and risks
- facilitating tactical and operational information sharing
- exploring new possibilities in sharing information
- supporting, coordinating and initiating international actions
- promoting the use of new tools and technology.

If you have an interesting subject for this cross-border partnership, please contact us!

New trends and developments in Trade Based Money Laundering

By: Tamara Pollard-Maijer (AMLC), Don Claassen (AMLC) and Lisette de Zeeuw (National Public Prosecutor's Office for Financial, Economic and Environmental Offences)

The Financial Action Task Force (FATF) is an international watchdog that formulates standards that countries must meet to prevent money laundering. Also in the area of TBML: money laundering making use of trade flows. In cooperation with the Egmont Group, the organisation that unites the Financial Intelligence Units worldwide, a new TBML report has now been produced and published. And not before time: the most recent one came out 10 years ago. The Public Prosecutor's Office for Financial, Economic and Environmental Offences (FP) and AMLC played a leading in producing the report, as mentioned in a previous newsletter. This article explains the report and how it came about in more detail.

Gathering input

It became almost immediately clear that input from the private sector was needed. TBML is a fairly complex issue and, depending on the case, the private sector has a view of one or more important aspects of it. Together we mapped out the development of TBML from 2008 onwards by drawing up and distributing a questionnaire for both public and private organisations. This was met with a huge response and provided a solid foundation for writing the report. In this article we discuss the most important conclusions and two interesting cases.

Sectors susceptible to TBML

The report provides a clear insight into the developments and challenges inherent to the TBML approach. Our joint investigation has shown that TBML manifests itself in many sectors. We have seen great diversity in the cases we have examined. Use was made of goods with a low value in a high volume, but also goods with a high value in a low volume. But we also saw similarities:

- goods for which it is difficult to determine the price, because they are found in all kinds of qualities or because they are unique, for example. Examples include art, wine and shoes,
- Goods involving an extensive international network. These could be goods for which the parts are manufactured in country A, assembled in country B and exported worldwide.
- Goods that are difficult for Customs to examine.
- The flow of goods generally seems logical (hide in plain sight).

The investigation also showed that a wide variety of companies are involved. However, of all types of legal entities and companies, shell companies pose the biggest risk of TBML. We refer you to the report for the specific TBML risk indicators.
Uncovering TBML therefore called for a risk-based approach.

Methods and case studies

Case studies were used to gain more insight into the methods used worldwide. Of course, we came across methods that were already known and described, such as over and under invoicing and pricing, but the case studies also gave us an insight into methods that had not previously been described by the FATF, such as the frequently occurring third party payments and cash integration. In a third party payment we see that the goods ordered by A from B are paid for by C, which is a third party that has little to do with the transaction on paper but pays for the goods. The cash integration variant is one that occurs all over the world where goods are paid for in large cash sums, e.g. from the proceeds of drugs and/or human trafficking.

The case studies of New Zealand and Europol below neatly illustrate these third-party payments and cash integration methods.

Case 1:

The New Zealand FIU (NZFIU) received multiple SARs regarding payments to New Zealand fruit export companies which were being made from bank accounts in Eastern Europe, which were registered to shell companies based in high-risk jurisdictions. SAR reporting showed the New Zealand companies received approximately $1.5 million during an 18-month period from these overseas accounts.

NZFIU enquiries established that the transfers to the NZ companies were payments for legitimate exports of NZ fruit to a South-East Asian jurisdiction. When questioned, the company representatives could not explain why the payments were originating from shell company accounts, which had no known relation to the company actually receiving the exported goods.

The New Zealand banks processing the payments supplied the FIU with invoices which were provided to them as justification for the payments – these invoices were clearly fraudulent and depicted the transactions as payments for export of 'ceramic tiles' from the New Zealand company to a company in Eastern Europe. The invoices were 'signed' by the purported manager of the NZ company, but enquiries determined there was no one by that name employed at the company.

The NZFIU assessed these payments, (potentially in the tens of millions of dollars, based on the high-volume of account activity) formed part of a complex TBML scheme being operated out of Eastern Europe, in which illicit funds were converted to trade goods and shipped for resale in a different jurisdiction, generating clean funds.

Source: New Zealand

Case 2:

Investigation launched in France which was focused on the laundering of the proceeds of trafficking Colombian cocaine. For laundering the drug proceeds, the services of a separate criminal organization are used (professional money launderers).
In addition to a cash based money laundering techniques (physical transportation of cash) there was an identified TBML technique. The criminal cash is converted into high value goods (usually used cars, used excavators, heavy construction machineries, luxury watches, diamonds and jewellery). The purchased items are, then, exported to North Africa before being re-exported to Lebanon. Simultaneously, the same facilitators were smuggling luxury watches, diamonds and jewellery via air couriers directly into Lebanon. Once in Lebanese territory all these goods are sold to Middle Eastern countries and thus converted into clean cash. The remaining percentage of the proceeds (after the deduction of commission for the laundering services) was repatriated back to Central America using complicit Money Service Businesses and underground bankers (Hawaladars/Brokers).

Source: Europol

Challenges and best practices

Finally, the report also describes the challenges faced by private and public organisations in the fight against TBML and discusses best practices in detail. An important best practice that was frequently mentioned in the approach to TBML approach is public-private partnership (PPP). PPP is seen by many countries as the most important solution in tackling TBML. On the one hand, to square the circle, and on the other to bring all the problem owners to the table.

Up to now, however, only a few countries have a specific PPP on the theme of TBML theme, as in the case of the Netherlands. Where they are already in place, PPSs on TBML have often only just got underway. We in the Netherlands are a global leader with our PPP on the subject of TBML. The AMLC has been working with both public and private organisations in the fight against TBML since 2017. This cooperation was intensified at the beginning of 2020 by placing it under the auspices of the FEC Unit. There is a good chance that once this project is completed a further PPP project on TBML will be initiated: there remains much more to discover together.
And there's always something left to aspire to: in the area of TBML, this is international cooperation. The first exploratory steps within the European PPP EFIPPP are currently being taken to establish international cooperation in tackling TBML. This could enable us to make great strides.

If you have any questions about this article or something to share about signs of TBML that may be of interest, please contact Tamara Pollard at tw.pollard-maijer@belastingdienst.nl

Case law

Amsterdam Court of Appeal, 30 October 2020, Composite transactions: ECLI:NL:GHAMS:2020:2899
The suspect is accused of having failed, at multiple occasions, to report unusual transactions as referred to in the Money Laundering and Terrorist Financing (Prevention) Act. A number of the transactions found proven by the Court concern so-called composite transactions. These are transactions that exceed the threshold of EUR 15,000, because the close connection between those transactions mean the amounts of the separate transactions must be combined. The accused argued that these amounts were wrongly combined, because no, or at any rate insufficient, connection existed between the constituent transactions. Of relevance in this connection is that, at the time the transactions were made, the *General Guideline on the Money Laundering and Terrorist Financing (Prevention) Act* did not contain any indication on how to construe the term "composite transaction".

The objective of the Act is that institutions must meet certain obligations if the value of transactions exceeds a certain threshold. Transactions should not be split into multiple constituent transactions for reasons of not having to meet these obligations. Section 3(5)(b) of the Money Laundering and Terrorist Financing (Prevention) Act therefore provides that an institution must perform customer due diligence when performing two or more related transactions with a joint value of at least EUR 15,000.

The Court of Appeal found that the accused was right that differing opinions can exist in practice on the explanation of this criterion. Especially since the *General Guideline on the Money Laundering and Terrorist Financing (Prevention) Act* did not, at the time, provide such an explanation, the accused must be given the benefit of the doubt in this connection.

Nevertheless, if the connection between two transactions is sufficiently tight that the institution must suspect it considers a composite transaction, the institution can be expected to investigate whether the transactions have to be deemed a composite transaction. This is the case, for example, when the transactions:

a. are made at the same time or one after the other,
b. are made by the same person or by different but related persons,
c. relate to the same goods, and
d. individually do not exceed the statutory threshold, but do so jointly.

In such cases, the transactions must be assumed to be a composite transaction, unless an investigation conducted by the institution proves that they have to be deemed separate transactions.

The case concerned dealt with invoices for the sale of the same goods, for virtually the same amount, effected on the same date, with ascending order and/or invoice numbers. The identity of the buyers is not known and the invoices contain two different signatures. It cannot be established that the invoices relate to the same buyers or, should it concern different buyers, that a relationship exists between these buyers. This means that it is not proven that the transactions form a composite transaction and that the accused must be acquitted in this connection.

In its decision of the same date in a similar case, the Court of Appeal did judge that transactions formed a composite transaction (ECLI:NL:GHAMS:2020:2898). That case concerned invoices where the identity of the sellers was known. The invoices stated two different names that were manifestly related. The invoices concerned the sale of virtually the same goods, on the same date, and featured ascending order and invoice numbers. The invoice address was the same in both cases, and confirmation of receipt was signed at the same time. In addition, the invoice seems to state that both invoices were paid for, in cash, in one go. The fact that the confirmations of receipt bear two different signatures does not detract from the relationship between these invoices. Two other invoices, too, can be deemed to constitute a composite transaction. They concern the sale of the same goods, for the same amount, at the same date. The two persons have a similar family name and the invoice address and customer number are identical. The order and invoice numbers are ascending and the payment and shipping methods are identical.

Storage of customer data
Pursuant to Section 33 of the Money Laundering and Terrorist Financing (Prevention) Act, sellers acting in a professional or commercial capacity must store the data on a customer in an accessible fashion. According to the accused, at the time of the investigation, these data were stored on a digital disc. The accused was unable to provide the data at that time, meaning that the data were not accessible at that moment. The fact that the directors had been told that a meeting with the penalty official would still take place does not detract therefrom.

Wilful act
In its assessment of the charge, which was contested by the defence, the Court of Appeal found that the provisions of the Money Laundering and Terrorist Financing (Prevention) Act concern so-called regulatory law. Under regulatory law, for the court to arrive at a judicial finding of fact, it suffices that a "wilful act" was committed. This means that, while the accused must have had the intent to perform, or fail to perform, the act the charge relates to, it is not required for the accused to have had the intent to fail to comply with the statutory obligation referred to in the judicial finding of fact (cf. Supreme Court, 21 April 2009, ECLI:NL:HR:2009:BH2684). The lack of familiarity with the law therefore does not preclude a judicial finding of intent. The Court of Appeal therefore found it proven that the accused had committed the offences he was charged with.

Amsterdam Court of Appeal, 30 October 2020, Obligations of real estate broker under the Money Laundering and Terrorist Financing (Prevention) Act: ECLI:NL:GHAMS:2020:2900
The accused is a real estate broker who failed to conduct a customer due diligence (Section 3 of the Money Laundering and Terrorist Financing (Prevention) Act). He consequently also violated the obligation to retain data (Section 33 of the Money Laundering and Terrorist Financing (Prevention) Act).

Violation of Section 3 of the Money Laundering and Terrorist Financing (Prevention) Act
With respect to the violation of Section 3 of the Money Laundering and Terrorist Financing (Prevention) Act, the defence counsel argued that the accused should be acquitted. The accused is a real estate broker active in a small village where everyone knows each other. The customers the transactions included in the charge related to where the accused's family, friends, neighbours, and acquaintances. The accused therefore considered that a customer due diligence was not required. The accused verified the identity of his documents exclusively on the basis of documents like the deed of transfer of the real estate.

The Court of Appeal dismissed this defence. The fact that the accused is familiar with the customers is irrelevant. Under the Money Laundering and Terrorist Financing (Prevention) Act, the identity of customers must be verified on the basis of a proof of identity, such as a passport or driver's licence. Deeds of transfer do not suffice for the performance of customer due diligence. The Court of Appeal therefore deemed the violation of Section 3 of the Money Laundering and Terrorist Financing (Prevention) Act to be proven and convicted the accused of this offence.

Violation of Section 33 of the Money Laundering and Terrorist Financing (Prevention) Act
Section 33(1) of the Money Laundering and Terrorist Financing (Prevention) Act provides that the data obtained from the customer due diligence must be retained. According to the Court of Appeal, it follows from this section of law that the retention obligation only applies to institutions that have complied with the obligations arising from Section 3 of the Money Laundering and Terrorist Financing (Prevention) Act. For it is impossible to store data you do not possess. Even though the Court of Appeal deemed the offence to have been proven, the accused is not liable for punishment for it, and is therefore discharged from prosecution for violation of Section 33 of the Money Laundering and Terrorist Financing (Prevention) Act.

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