Legal Professionals as Dirty Money Gatekeepers: the Institutional Problem

Dr. Nathanael Tilahun

Assistant professor of public international law

Erasmus School of Law, Erasmus University Rotterdam

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Abstract

Recent reforms to the FATF-led international anti-money laundering and terrorist financing (AML/CFT) regime install legal professionals as 'gatekeepers' by requiring them, among others, to take due diligence measures and report suspicious transactions. These reforms have generated controversy within the national and international associations of legal professionals. This chapter analyses the discourse and policy activities of legal professional associations in order to uncover the roots of the discord between legal professionals and governments regarding gatekeeping obligations. This chapter shows that underneath the official narrative that depicts lawyers' resistance to gatekeeping as a fight for the preservation of liberal democratic values, the institutional priorities and characteristics of the profession play the key role in fueling the resistance. The chapter identifies two such institutional factors – public image and self-governance concerns of legal professionals – and highlights their distinctive implications for the implementation of AML/CFT rules by comparing them with contrasting concerns raised by other gatekeeping actors, namely bankers. The chapter illustrates that the specific institutional contexts of professional groups influence their gatekeeping role. Therefore, regulatory initiatives that enlist the services of professional actors need to take seriously and engage the institutional dimension of such actors.

Keywords: legal professionals, gatekeeping, resistance, self-governance, public responsibility

Introduction

A growing trend in global anti-money laundering and counter terrorism financing (AML/CFT) governance is the forced enlistment of business entities and professional groups as front-line enforcers, or 'gatekeepers',[1] of the regime. This 'responsibilization'[2] of businesses and professionals converts those actors into local interlocutors of a global regime, a role that manifestly falls outside of their ordinary corporate or professional functions.

The global AML/CFT regime, primarily developed by the Financial Action Task Force (FATF), requires professionals from both financial and non-financial sectors to serve as an 'army of professionals'[3] at the frontlines of rule enforcement. Financial institutions are defined as legal and natural persons that undertake, as business, one or multiple financial activities such as lending, depositing, transferring money, currency exchange, trading in money instruments and securities, portfolio management, and issuing and managing means of payment.[4] Non-financial institutions are businesses and professions that do not undertake any of the above-referenced thirteen financial activities as businesses but are particularly connected to the mobility of finances. The specific non-financial actors designated by the FATF are: casinos, real estate agents, dealers in precious metals, dealers in precious stones, trust and company service providers, lawyers, notaries, other independent legal professionals and accountants.[5]

The gatekeeping obligations of these professional actors under the FATF regime fall broadly into two types of function: the relatively passive role of conducting due diligence; and the role of active cooperation with the state.[6] These actors are required to take

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[1] Shepherd, K. L., 'Guardians at the Gate: The Gatekeeper Initiative and the Risk-based Approach for Transactional Lawyers' (2009) 43 *Real Property, Trust & Estate Law Journal* 607. On gatekeepers in general, see Kraakman, R. H., 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy' (1986) 2 *Journal of Law, Economics, & Organization* 53 at p.54.

[2] Garland, D., 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society', (1996) 36:4 *British Journal of Criminology* 445, at pp. 452-455; O'Malley, P. and Palmer, D., 'Post-Keynesian Policing' (1996) 25(2) *Economy and Society* 137.

[3] Sahl, J. P., 'Lawyer Ethics and the Financial Action Task Force: A Call to Action' (2014) 59 *New York Law School Law Review* 457 at p.476.

[4] For detailed definition, see Glossary of the 2012 FATF Recommendations, at p.117.

[5] *Ibid*.

[6] The 2012 FATF Recommendations, rec.22–23.

due diligence steps before entering into, and throughout the duration of, their engagement with a client or customer, including identifying and verifying the client/customer, identifying the beneficial (ultimate) ownership of financial transactions, understanding the nature and purpose of the business relationship with the client/customer, and continually monitoring this relationship.[7] The other type of gatekeeper role, where professionals are required to actively cooperate with the state, includes obligations of data collection, storage and transfer to the state ('record-keeping obligation'),[8] and submission of suspicious activity reports, with the accompanying no-tipping off rule ('reporting obligation').[9]

This chapter discusses how legal professionals perceive and react to their gatekeeping obligations, and what consequences for the AML/CFT legal regime flow from the nature of their perceptions and reactions. The departure point of this discussion is the assertion, further substantiated in the chapter, that there has been fierce resistance to gatekeeping duties from the legal profession. This observation invites us to investigate what motivation drives the said resistance. The chapter undertakes this investigation by stepping into the discursive and institutional elements of the resistance within national and international legal professional associations. The analysis deconstructs official legal narratives offered by these associations and introduces an alternative institutional factor to explain the resistance to gatekeeping. This factor is 'institutional consciousness'– a term developed in this chapter to refer to the prevailing perception and attitude within an organized professional group concerning its role and interests. To further amplify the role of institutional consciousness in lawyers' resistance to gatekeeping, contrast will be made with another institutional context (the banking sector) where gatekeeping rules have been met with a different kind of reaction. This comparison shows how AML/CFT rules are perceived and contested differently as they come into contact with various organized professional actors that have distinctive consciousness about their profession.

The first part of the chapter maps the dominant official self-narrative within the transnational legal professional community regarding gatekeeping. It shows that lawyers' resistance to gatekeeping is framed as a legal and political struggle for the preservation of liberal democratic values. The subsequent section elaborates the concept of institutional

[7] *Ibid.*, rec.10.

[8] *Ibid.*, rec.11.

[9] *Ibid.*, rec.20–21.

consciousness and deploys it to probe the official narrative of the resistance. In doing so, it reveals that the underlying drivers of lawyers' resistance to gatekeeping, particularly in North America where gatekeeping rules are still successfully staved off by lawyers, are institutional concerns – namely, concerns regarding the *public image* and *self-governance* of the profession. The last section will then contrast legal professionals' response to gatekeeping with that of banking professionals. This section will highlight the two diverging sets of concerns and perceptions generated by a common gatekeeping regime. It shows how institutional consciousness plays a critical role in the implementation of innovative AML/CFT initiatives– and how such an 'across-the-board' regulatory initiative could overlook such institutional nuances of its subjects at some cost to its effectiveness.

The findings of the chapter are drawn from qualitative textual data from organizational archives (particularly those of legal professional associations), academic publications by legal professionals, and independent quantitative surveys on institutional perceptions. The analysis has a socio-legal approach by combining discourse analysis of texts (such as policy documents and meeting records) with legal doctrinal interpretation of regulatory instruments. The discourse analysis helps uncover unarticulated (or not officially espoused) perceptions and strategic choices within legal professional associations through hermeneutical tools, such as analysis of word meanings, analogies, argumentative moves, context, and coherence between rhetoric and action.

Resistance to gatekeeping: the liberal democratic self-narrative

Legal professional associations across the world have generally resisted the implementation of the FATF gatekeeping regulations in a more ferocious manner than other financial and non-financial professional groups. The resistance has taken the form of academic and professional publications,[10] policy and advocacy activities by legal professional

[10] *See* Komárek, J., 'Legal Professional Privilege and the EU's Fight against Money Laundering' (2008) 27 *Civil Justice Quarterly* 13; Mitsilegas, V. and Vavoula. N., 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and Rule of Law' (2016) 23 *Maastricht Journal of European and Comparative Law* 261.

associations,[11] and constitutional review legal proceedings.[12] The aim was to make the FATF reconsider its policy and/or ensure that states do not (fully) implement FATF's lawyer regulation.

Legal professionals' resistance to gatekeeping is predominantly framed in legal and political terms that are built around liberal democratic premises. The legal argument is that gatekeeping obligations are incompatible with widely accepted legal rules related to the principle of the independence of the legal profession. Even when these concerns are not articulated into self-standing legal rules, the bigger picture of the liberal democratic values at stake should render gatekeeping obligations undesirable.

Legal professionals claim that the gatekeeping obligations threaten legal professional privilege (LPP) and, by implication, the administration of justice. Osborne argues that the "independence of lawyers and duties owed to citizens [encapsulated in LLP], are inherent aspects of a free and democratic society".[13] In states where LPP or the independence of the legal profession constitute a self-standing legal norm, such has been argued before courts of law. In states where that is not the case, the legal argument is crafted by resorting to other legal norms that are said to constitute building blocks or origins of LPP. The most common among these norms are the right to fair trial, the rights to privacy, and private and family life, and the relationship of fidelity between lawyers and clients.[14] The legal case against lawyers' gatekeeping duty is built on the premise that these norms are

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[11] Shepherd, K. L., 'The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers' (2010) *Journal of the Professional Lawyer* 83 at p.87; Osborne, D.E., 'The Financial Action Task Force and the Legal Profession' (2015) 60 *New York Law School Law Review* 421.

[12] See *Jamaican Bar Association* v. *The Attorney General and General Legal Counsel* [2014] JMSC Civ. 179; *Nigeria Bar Association* v. *Attorney General of the Federation & Central Bank of Nigeria,* reported in Ahiauzu, N., 'Applicability of anti-money laundering laws to legal practitioners in Nigeria: NBA v. FGN & CBN' (2016) 19 *Journal of Money Laundering Control* 329; *Canada (Attorney General)* v. *Federation of Law Societies of Canada* [2015] SCC 7, 1 S.C.R. 401 (hereinafter '*Federation of Law Societies* case').

[13] Osborne (fn 11 above), p. 426.

[14] Mitsilegas, V. and Vavoula. N., 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and Rule of Law' (2016) 23 *Maastricht Journal of European and Comparative Law* 261 at p.273. *See* also, Xanthaki, H., 'Lawyers' Duties under the Draft EU Money Laundering Directive: Is Confidentiality a Thing of the Past?' (2001) 5 *Journal of Money Laundering Control* 103 at pp.105–107.

fundamental in systems that have any claim to freedom and democracy, and LPP is merely a purpose-built repackaging of these norms within professional practice.

Politically speaking, the independence of the legal profession from the state is asserted as a value that should not be superseded by any other policy objective, including the need to fight financial crimes. It is argued that the imposition of the gatekeeping role makes lawyers 'insider' actors within the state's apparatus and the political system in general, while they should have been left 'outside' of it.[15] Consequently, gatekeeping rules are described as universal threats to the independence of the legal profession, which '…cannot and should not be sacrificed even in the face of a profound and global threat.'[16]

Linking LPP and the fundamentals of liberal democracy has been an argument commonly deployed by legal professionals before courts of law in different states with varying degrees of success. Successful legal challenges of this sort by legal professionals have in some states led to the suspension or revocation of national implementation of the FATF lawyer regulations.[17] The most publicised and consequential among these successful litigation approaches was launched by the Federation of Law Societies in Canada, which culminated in 2015 in the *Federation of Law Societies* case.[18] Less successful resistance was waged in Belgium,[19] France,[20] and the UK.[21]

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[15] Svedberg Helgesson, K. and Mörth, U., 'Involuntary Public Policy-Making by For-Profit Professionals: European Lawyers on Anti-Money Laundering and Terrorism Financing' (2016) 54 *Journal of Common Market Studies* 1216.

[16] Paton, P. D., 'Cooperation, co-option or coercion? The FATF lawyer guidance and regulation of the legal profession' (2010) *Journal of the Professional Lawyer* 165 at p.189.

[17] E.g. *Jamaican Bar Association* v. *The Attorney General and General Legal Counsel* [2014] JMSC Civ. 179; *Nigeria Bar Association* v. *Attorney General of the Federation & Central Bank of Nigeria,* reported in Ahiauzu, N., 'Applicability of anti-money laundering laws to legal practitioners in Nigeria: NBA v. FGN & CBN' (2016) 19 *Journal of Money Laundering Control* 329.

[18] *Federation of Law Societies* case (fn 12 above).

[19] *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres, European Court of Justice,* Case C-305/05, Judgment of 26 June 2007.

[20] *Michaud* v. *France,* 6 December 2012, ECtHR, App. No. 12323/11.

[21] *Bowman* v. *Fels* [2005] EWCA (Civ) 226, paras.41–42.

The key argument in most of these cases is that tampering with LPP, especially by requiring lawyers to make suspicious transaction reports about their clients, disrupts the administration of justice by making clients distrustful of their lawyers (hence no fair trial), by violating lawyers' own right to privacy of correspondence, or generally by subtracting from lawyers' loyalty to their clients.

However, a broader look at the engagement of legal professional associations with governmental gatekeeping initiatives reveals that the core of the resistance to these initiatives, particularly in North America, is not primarily driven by *legal* and *political* concerns. Instead, *institutional* concerns are at play. These institutional concerns are not necessarily self-serving or invalid, but instead intertwine with the legal and political concerns. The following section reveals this institutional dimension underneath the official narrative of legal and political concerns.

Resistance to gatekeeping: the institutional dimension

The institutional factor behind legal professionals' resistance to gatekeeping is one of attitude towards the legal regime in question. This shared awareness or perception among legal professionals regarding the impact of AML/CFT gatekeeping rules on the profession will be referred to henceforth as 'institutional consciousness'. This consciousness is institutional, as opposed to individual or societal, in that its concern is the impact of the law on the professional community as an organized group. The concept of institutional consciousness draws insights and analogy from the concepts of 'legal consciousness' and 'legal culture' developed extensively in the wider law and society literature.[22] The essential takeaway from these concepts is attentiveness to the study of law's interaction with social cognitive elements such as traditions, opinions, and ways of thinking. In other words, it is studying how the law is experienced and interpreted in a particular group; understanding the

[22] Friedman, L., 'Legal Culture and Social Development' (1969) 4 *Law & Society Review* 29; Cotterrell, R., *Living Law: Studies in Legal and Social Theory*, Oxford: Oxford University Press, 1997; Ewick, P., and Silbey, S., *The Common Place of Law: Stories From Everyday Life*, Chicago: University of Chicago Press, 1998.

law not according to the dictates of doctrinal rules of interpretation, but according to how people think and talk about it.

The institutional consciousness that animates legal professionals' resistance to gatekeeping pertains to the position and the interest of the profession vis-à-vis the disciplining state. In the AML/CFT regime the state has a policing role over regulated entities, including the legal profession. This policing role, executed both through punishment (including financial penalties) and engagement (such as information sharing), depicts a process of discipline, whereby the regulated entities are coerced or conditioned into obedience to the state.[23] Such a process of discipline creates a power relationship between the disciplining state and the regulated entities at the receiving end of discipline.

The unarticulated institutional consciousness that animates the resistance to gatekeeping is the legal professionals' need to extricate themselves from the prism of disciplinary power relationship between the state and regulated subjects. There arises a need to position the profession as neither in alliance with the state nor identifying with the subjects of state discipline, but as an outsider watchdog to the disciplinary process. This stance may appear identical to the official narrative that lawyers are fighting for professional independence as a defence of legal and political ideals of justice and democracy, as discussed in the preceding section. The key distinction here is, however, that professional independence is sought not (merely) as a pursuit of justice or democracy, but as a projection of group image and interests.

The following discussion substantiates this claim by revealing two specific manifestations of group concern underneath the resistance to gatekeeping. These are concerns for the (i) public image and (ii) self-regulation of the profession. The analysis is based on a qualitative archival study of the preparatory history of the FATF's guidance document for the legal profession on the implementation of FATF Recommendations (the 'Lawyer Guidance'), and on a discourse analysis of legal professional associations' response to that document. The data is gathered from publicly available organizational publications (policy statements,

[23] See Roele, I., 'Disciplinary Power and the UN Security Council Counter Terrorism Committee' (2013) *Journal of Conflict and Security Law* 1; Ali, N. T., *Regulatory Counter-Terrorism: A critical Appraisal of Dynamic Global Governance*, New York/London: Routledge, 2018 (chapters 6 & 7).

newsletters, press releases), first-hand accounts of meetings by legal professionals, and legal instruments between 2007 and 2015.

Public image of the profession

Legal professionals' resistance to gatekeeping is driven by a concern for the reputational status of the profession. There is a felt need to project an image of the profession as an independent guardian of the law, and not a mere subject of the law. The view emanates from a consciousness regarding the relative positioning of the profession vis-à-vis other professions or businesses – and not necessarily from a normative commitment to the positioning of the profession vis-à-vis the state, as officially espoused in the liberal democratic argument. The evidence for this proposition comes from observing the nature of the issues that were key points of contention between the legal professionals and the FATF.

During the preparation of the Lawyer Guidance, an important point of contention was the very need for the existence of the Guidance. The FATF categorized legal professionals in a group of regulated actors known as 'designated non-financial businesses and professions' (DNFBPs), which, in addition to lawyers and notaries, consists of casinos, real estate agents, dealers in precious metals and stones, trust and company service providers, and accountants.[24] In 2007, the FATF invited all DNFBPs to a series of meetings for the preparation of guidance documents on the implementation of FATF Recommendations. While all other DNFBPs proceeded to participate, legal professionals put forward demands at first, and engaged in substantive talks only in the second round of meetings.[25] The main demands were that legal professionals be treated separately from the other DNFBPs, and that the FATF produce empirical evidence on the AML/CFT vulnerability of lawyers and therefore justify the need for regulation.[26]

Legal professionals took the very fact of being regulated for AML/CFT purposes alongside commercial actors as a shocking offence to the 'unique role of lawyers' as

[24] Glossary of the 2012 FATF Recommendations, pp.116-124.

[25] Shepherd (fn.1 above), p.629. See same article for detailed history of the legal profession's engagement with the FATF.

[26] *Ibid*.

guardians of freedom and justice.[27] The painting of the legal profession with the same brush as casinos and banks appeared to reduce the profession to a mere business that provides services for a price and in need of watchful government eyes. They argued that lawyers '…and not casinos, serve to protect our citizens' freedoms and liberties'.[28] Representatives of the International Bar Association (IBA) and bar associations from North America, Europe, Japan, Australia, New Zealand, and Hong Kong engaged the FATF with letters and draft proposals for a lighter and more trusting treatment of lawyers due to their unique public role.[29] In response to this demand, the FATF agreed to the preparation of a separate guidance for the legal profession, the Lawyer Guidance.[30]

In subsequent meetings for the drafting of the Lawyer Guidance, the document was also criticized for having the wrong focus: that it aims to suppress bad lawyers, instead of empowering good lawyers.[31] A system focused on suppressing bad lawyers presumes a significant amount of bad lawyers, a claim which lawyers disputed. Duncan Osborne, vice-president of the International Academy of Estate and Trust Law, who took part in consultative meetings between FATF and lawyers, records that during these meetings lawyers repeatedly sought to establish that they do not pose an AML/CFT risk.[32] The FATF did not agree, and lawyers consequently accused the FATF of being not only 'misguided' on the facts[33] but also 'biased'[34] against the interests of the legal profession, driven by 'wilful

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[27] Osborne (fn 11 above), p.425; Terrill J.A., and Breslow, M.A., 'The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach' (2015) 60 *New York Law School Law Review* 433 at p.436.

[28] *Ibid* (Osborne), p.427.

[29] Shepherd (fn 1 above). *See* also, American Bar Association, American College of Trust and Estate Counsel, Council of Bars and Law Societies of Europe, Japan Federation of Bar Associations, Federation of Law Societies of Canada, Conseil National des Barreaux, Federation of European Bars, Self-regulatory Organisation of Swiss Lawyers and Notaries, *Joint Statement by the International Legal Profession on the Fight Against Money-Laundering* (2003) (http://www.ccbe.org/NTCdocument/signed_statement_0301_1183723072.pdf).

[30] FATF, 'Risk-Based Approach Guidance for the Legal Profession', Paris, 23 October 2008.

[31] Osborne (fn 11 above).

[32] *Ibid.*, p.428.

[33] *Ibid.*

[34] *Ibid.*, p.423.

obliviousness'[35] to fact. The fact is, according to lawyers, that there is no empirical evidence seriously or systematically implicating legal professionals in financial crimes.[36]

Although the involvement of lawyers in criminal finance is the subject of controversy and limited research,[37] the FATF has produced typologies of actual cases of lawyers' complicity, compiled from various national legal systems, as far back as 2003.[38] In addition, researchers and national and international regulatory bodies, such as the UK National Crime Agency, Europol, and the World Economic Forum, have since produced similar evidence.[39] Nevertheless, legal professionals insisted that a more extensive typology and indisputable evidence on their complicity be brought. They argued that if lawyers are at all implicated, it must be through unwitting vulnerabilities, and these can be tackled by adopting good practices and guidelines prepared by the professional associations themselves.[40]

Such documents were subsequently produced by legal professional associations. A key illustration is the so-called Lawyer Guide Report adopted by the American Bar Association (ABA), the Council of Bars and Law Societies of Europe (CCBE), and the IBA.[41] The Report provides guidance to help lawyers avoid violating AML/CFT rules *unwittingly,* showing how to reduce 'vulnerabilities of the legal profession to misuse by

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[35] *Ibid.,* p.431.

[36] Zagaris, B., 'Gatekeepers Initiative: Lawyers and the Bar Ignore It at Their Peril' (2008) 23 *Criminal Justice* 28 at p.32.

[37] Benson K., 'Money Laundering, Anti-Money Laundering, and the Legal Profession' in King, C., Walker, C., and Gurulé, J., *The Palgrave Handbook of Criminal and Terrorism Financing Law*, Cham: Palgrave Macmillan, 2018, pp.109-133.

[38] FATF, 'Report on Money Laundering Typologies 2003-2004', Paris, February 2004, pp 24-27.

[39] Benson (fn 3737 above), pp 112-113; Schneider, S., 'Testing the Limits of Solicitor-Client Privilege' (2006) 9 *Journal of Money Laundering Control* 27; He, P., 'Lawyers, Notaries, Accountants and Money Laundering' (2006) 9 *Journal of Money Laundering Control* 62; Cummings, L. P. and Stepnowsky, P. T., 'My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money Laundering through Commercial Transactions' (2011) *Professional Lawyer* 1; Middleton, D., and Levi, M., 'Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services' (2015) 55 *British Journal of Criminology* 647.

[40] The International Bar Association, American Bar Association, and the Council of Bars and Law Societies of Europe, 'A Lawyers Guide to Detecting and Preventing Money Laundering', October 2014; Osborne 2015 (fn 11 above), p.425.

[41] The International Bar Association, American Bar Association, and the Council of Bars and Law Societies of Europe, 'A Lawyers Guide to Detecting and Preventing Money Laundering', October 2014.

criminals'.[42] Such guidance is claimed to be '…sufficient to help lawyers avoid unwitting assistance to unlawful activities…'.[43] Underlying these moves is an assertion that because lawyers are self-driven guardians of the public interest, all that is needed is to enlighten them to the traps of dirty money, so they will not stumble into them.

Self-regulation of the profession

The resistance to gatekeeping obligations is fiercest in the United States and Canada, where legal professional associations have been able to block the countries' compliance with FATF standards. These two countries are repeatedly criticised for failing to implement customer identification, record keeping, suspicious transaction reporting, and no-tipping off obligations on the legal profession, and for failing to supervise the profession.[44] Canada has been particularly subjected to FATF's 'follow-up' procedure, a monitoring step triggered before severe countermeasures could be invoked for non-compliance.[45]

A survey of the policy documents and discourse of legal professional associations in these two countries reveals that the resistance to gatekeeping is also driven by a perceived threat to the self-regulation of the profession – hence it relates not just to *what* is being required but also to *who* is requiring it. This is evidenced by the fact that these associations, while resisting national implementation of FATF rules, adopted more or less similar AML/CFT standards into their self-governance documents.

In Canada, the Federation of Law Societies of Canada, which, together with the Canada Bar Association, launched the constitutionality challenge against Canada's implementation of lawyers' gatekeeping under the Proceeds of Crime Act,[46] later adopted

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[42] *Ibid.*, p.24.

[43] Osborne (fn 11 above), p.425.

[44] *See* FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States Fourth Round Mutual Evaluation Report*, (December 2016), *Third Round Mutual Evaluation Report*, (June 2006), *Anti-Money Laundering and Counter-Terrorist Financing Measures – Canada Fourth Round Mutual Evaluation Report*, (September 2016), *Third Round Mutual Evaluation Report*, (February 2008), all available at <www.fatf-gafi.org>.

[45] FATF, 'Mutual Evaluation of Canada – 6th Follow-Up Report' (2014).

[46] *Federation of Law Societies* case (fn 12 above).

internal rules which '…apart from mandatory secret reports on client activities, effectively replicated the substance of the FATF Recommendations.'[47] The Federation objected to the requirement under the Proceeds of Crime Act[48] of 2000 to report cash transactions of CAN$10,000 or more automatically, but it then adopted in 2004 model rules prohibiting lawyers (and Quebec notaries) from processing any cash amount above CAN$7,500.[49] The Federation further adopted in 2008 rules on client identification and verification that replicate the know-your-customer (KYC) requirements contained in FATF standards.[50] The KYC requirements adopted by the Federation are actually stricter than those of the FATF.[51] As Ronald MacDonald, then vice president of the Law Societies Federation, explained the Federation 'supports know your client regulation in principle and recognizes it as both necessary and appropriate.'[52] But, by adopting self-regulatory measures that essentially replicate the FATF requirements, legal professionals have 'eliminated the need for federal regulation of the legal profession.'[53] At the victorious conclusion of the *Federation of Law Societies' case*, MacDonald again remarked that the Federation does not have much objection to the substance of gatekeeping rules; instead, '…all we're saying is that…in order to protect the independence of the bar and solicitor-client privilege … we should be doing it'.[54]

In the United States, the ABA took steps to divert the Federal government from legislating the FATF standards into domestic law. The ABA established a taskforce to follow up on FATF and US government's policy and devise pre-emptive courses of action. Following the work of the task-force, the ABA adopted a Good Practices Guidance

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[47] Paton, P. D., 'Cooperation, co-option or coercion? The FATF lawyer guidance and regulation of the legal profession' (2010) *Journal of the Professional Lawyer* 165 at p.189.

[48] Proceeds of Crime (Money Laundering) and Terrorist Financing Act (S.C. 2000, c. 17).

[49] Federation of Law Societies of Canada, 'Model Rule on Cash Transactions', 2004, available at (https://flsc.ca/wp-content/uploads/2018/10/No-Cash-Rule.pdf).

[50] Federation of Law Societies of Canada, 'Model Rule on Client Identification and Verification', 2008, available at (https://flsc.ca/wp-content/uploads/2018/10/Client-Identification-and-Verification-Final-rule-2Oct2018.pdf).

[51] MacDonald (fn 11 above) p.146.

[52] *Ibid*, p.150.

[53] *Ibid*, p.149.

[54] Globe & Mail, 'Money-Laundering Rules Don't Apply to Lawyers: B.C. Court' 30 September 2011 (https://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/money-laundering-rules-dont-apply-to-lawyers-bc-court/article596286/).

document,[55] a Formal Opinion on client due diligence,[56] and, together with international lawyers' associations, a Lawyers Guide.[57] The Good Practices Guidance and Formal Opinion 463 contained most of the due diligence standards adopted by the FATF;[58] some representatives of ABA further stated that such standards are in fact already practiced informally by lawyers.[59] Reports documenting the preparatory history of these self-governance instruments note that the latter are conceived in response to legislative proposals being floated in the US Congress.[60] The chairperson of the taskforce, Kevin Shepherd, acknowledged that these documents were adopted with the hope that it 'would obviate the need for Congress to enact legislation designed to impose a rules-based system on US lawyers.'[61] Furthermore, the ABA adopted a resolution explicitly urging Congress to 'refrain from enacting federal legislation that would regulate the legal profession through AML initiatives'[62] even while endorsing the need for lawyers to undertake customer due diligence and other AML/CFT measures.

In the Canadian and American lawyers' resistance, the fight for self-governance is situated within the well-documented tradition of fierce legal professional independence in those countries,[63] compared to the relatively weak resistance staged by European and other (as in Japan and Australia) legal professional associations. Associations

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[55] ABA, *Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* (2013).

[56] ABA, *Formal Opinion 463* (2013) (https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf).

[57] ABA, IBA, and CBLSE, *A Lawyer's Guide to Detecting and Preventing Money Laundering* (2014).

[58] *See,* e.g., Formal Opinion 463, para.2; Good Practices Guidance, p.8.

[59] Terrill J.A., and Breslow, M.A., 'The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach' (2015) 60 *New York Law School Law Review* 433 at p.436, p.441.

[60] Healy, N.M., *et al*, 'U.S. and International Anti-Money Laundering Developments' (2009) 43 *International Lawyer* 795 at p.796.

[61] Shepherd (fn 11 above) at p.98.

[62] ABA, *Resolution 300* (11-12 August 2008).

[63] See Kronman, A.T., *The Lost Lawyer: Failing Ideals of the Legal Profession*, Cambridge/London: Harvard University Press, 1993; Gordon, R., 'A New Role for Lawyers?; The Corporate Counselor after Enron' (2002–2003) 35 *Connecticut Law Review* 1185; Gordon, R., 'The Return of the Lawyer-Statesman?' (2017) 69 *Stanford Law Review* 1731.

outside of North America took part in the initial resistance to gatekeeping.[64] However, their resistance largely faded away when met with strong push back from governments and judiciaries.[65]

The discussion so far shows that institutional factors, namely threats to the *image* and the *administration* of the legal profession, have fuelled lawyers' resistance to the gatekeeping initiative, lying beneath the official narrative of concern for liberal democracy. The self-image of legal professionals as guardians of public interest, and their need for administrative independence and self-governance of the profession, meant that both 'being regulated by' and 'working for' the government are anathema – ill-fitting for actors who claim to monitor the state's disciplinary power.

Implications of institutional consciousness for gatekeeping: banking v. legal professionals

Legal professionals' perception that gatekeeping rules threaten the status and self-governance of their profession, particularly within the North American context, affects how they apply AML/CFT rules. To see this even more clearly, legal professionals' perception towards gatekeeping can be contrasted with that of another professional group (the banking sector). Whereas legal professionals characterize the imposition of gatekeeping obligations as intrusive micro-management of the profession by governments, bankers see it as a burdensome entrustment of governmental power into their hands. Consequently, lawyers demanded greater implementation discretion and less collaboration with the state, while bankers pushed for less discretionary power, ever more defined tasks and greater collaboration with the state.

The professional service company, KPMG, undertakes global anti-money laundering surveys which provide key sources of insight into the perceptions of financial institutions regarding the implementation of AML rules.[66] These reports find that banks are

[64] Kirby, D., 'The European Union's Gatekeeper Initiative: The European Union Enlists Lawyers in the Fight Against Money Laundering and Terrorist Financing' (2008) 37 *Hofstra Law Review* 261.

[65] See Ali, N.T., 'States' Varied Compliance with International Anti-Money Laundering Standards for Legal Professionals' (2019) 88 *Nordic Journal of International Law* (forthcoming).

[66] The reports are generally available at the KPMG website (www.kpmg.com).

not comfortable when executing their gatekeeping role on a risk-based approach.[67] The report from 2014 identifies that the top three AML compliance costs for financial institutions are automated transaction monitoring systems, KYC exercises (creating, updating, reviewing data), and personnel recruitment and retention. This report underscores that risk-based control of dirty money is very expensive for banks; other commentators further claim that this regime would eventually force 'second-tier' banks out of the market.[68]

Bankers' problem with the risk-based approach in gatekeeping is not only its cost. The other crucial issue they face is lack of information and fear of exercising their independent judgment when the law is ambiguous. The risk-based approach leaves much of the information gathering and decision-making work to the ground-level executors, in this case banks. Unlike in the case of, for example, international sanctions lists where banks have to execute mechanically the freezing of assets of already specified individuals and entities,[69] the risk based approach requires banks themselves to decide when to act –to devise and apply various criteria corresponding with the varying degrees of risk posed by their clients.

Making such lists requires thorough customer due diligence work by banks. In doing so, one core element poses a great challenge: identifying beneficial owners. Bank officials consistently regard this element as the most difficult task as it is involves complex and time-consuming financial intelligence work.[70] The key difficulties raised by bankers are obtaining adequate information about clients and being able to identify risk and take measure against it.[71] Assessing risk requires (financial) intelligence on clients and their associations, for which banks are furnished less than perfect intelligence from official sources.[72]

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[67] In addition, *see* Gadinis, S. and Mangels, C., 'Collaborative Gatekeepers' (2016) 73 *Washington & Lee Law Review* 797.

[68] Simons, E.L., 'Anti-Money Laundering Compliance: Only Mega Banks Need Apply' (2013) 17 *North Carolina Banking Institute* 249.

[69] Even then, this involves a degree of human decision-making, e.g. names on sanctions lists have various aliases and involve linguistic and cultural insight to identify. E.g. if we enter the name "Sadam Hussein" into the Lexis Nexis © WorldCompliance sanctions database, it turns up six aliases and alternative spellings (English and Arabic) of the name that are in use.

[70] KPMG International, 'Global Anti-Money Laundering Survey' (2014), available at (https://assets.kpmg.com/content/dam/kpmg/pdf/2015/03/global-anti-money-laundering-survey-latest.pdf) (last accessed 30 January 2019), p.25.

[71] *Ibid.*, pp.26-27.

[72] See, e.g., UK Law Commission, 'Anti Money Laundering: the SARs Regime', Consultation Paper No. 236, 20 July 2018.

Furthermore, in identifying and tackling risk, banks increasingly report that automated risk management techniques fail to deliver adequate results. Consequently, banks have to rely more on human decision making, which actively positions their personnel on the frontlines of interpreting and policing crime.[73] Vanessa Iafolla has shown how front-office bank personnel engage in empirical and moral judgment starting from the very initial steps of suspicious activity report processing, whether by associating certain monetary instruments with particular AML/CFT risk or determining customers' vulnerability to predicate crimes by their spending habits and social status.[74] The responsibility that comes with such positioning as an interlocutor of the AML/CFT regime has often led banks to adopt a de-risking approach, which is risk avoidance altogether, instead of risk management, resulting in grave financial exclusion consequences on the global poor by disrupting remittances and trade.[75]

For both of these informational and risk-management needs, bankers seek the state's close collaboration. The KPMG survey shows that 63 percent of survey respondent bankers said that 'regulators should provide additional guidance' on how to execute risk-based AML, and 43 percent indicated that 'stronger relationship with regulators' is needed.[76] Yet, this demand goes against the very idea espoused by the risk-based approach of devolving decision-making power to local actors. Bankers are, in other words, demanding less regulatory responsibility and more detailed guidance from governments. When such detailed guidance from governments is not forthcoming, banks resort to a hyper-cautious execution of their gatekeeping role.[77]

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[73] *Ibid.*; Isa, Y.M., Sanusi, Z.M., Haniff, M.N., Barnes, P.A., 'Money Laundering Risk: From the Bankers' and Regulators Perspectives' (2015) 28 *Procedia Economics and Finance* 7.

[74] Iafolla, V., 'The Production of Suspicion in Retail Banking: An Examination of Unusual Transaction Reporting' in King et al. (fn 37 above), pp.81-107.

[75] Stanley, R. L. and Buckley, R. P., 'Protecting the West, Excluding the Rest: the Impact of the AML/CTF Regime on Financial Inclusion in the Pacific and Potential Responses' (2016) 17 *Melbourne Journal of International Law* 83; Ramachandran, V., Collin, M., and Juden, M., 'De-risking: An Unintended Negative Consequence of AML/CTF Regulation' in King et al., (fn 37 above), pp.237-271.

[76] KPMG International (fn 5670 above), p.36-38.

[77] Dean, A., Thompson, E. and Keatinge, T., 'Draining the Ocean to Catch one Type of Fish: Evaluating the Effectiveness of the Global Counter-Terrorism Financing Regime' (2013) 7 *Perspectives on Terrorism* 62; De Koker, L. and Jentzsch, N., 'Financial Inclusion and Financial Integrity: Aligned Incentives?' (2013) 44 *World Development* 267; Davies, H., 'The Dilemma of Defining Risk Appetite in Banking' *Financial Times* 9 September 2014.

This reaction from bankers starkly contrasts with that of lawyers. The latter position their profession as a public interest function, and hence in principle have less objection to assuming public responsibility. However, due to the institutional factors outlined earlier, lawyers object to detailed gatekeeping obligations as if 'mere businesses' and to close collaboration with the state. Therefore, lawyers have argued for the most expansive application of the risk-based approach in executing their gatekeeping role. At times, lawyers even explicitly stated their fear of governments imposing 'bank-style obligations' on lawyers.[78] Bankers, on the other hand, perceive the risk-based approach in gatekeeping as a burdensome commandeering by the government or being deputized to act in place of the government, while they profess to be mere businesses that should only be deployed as executors.

Conclusion

This analysis of the legal professionals' receptivity to the gatekeeping obligations shows how the international AML/CFT regime impacts the institutional consciousness of its professional interlocutors. In particular, the legal community's anxiety over gatekeeping revolves around the perceived threat to two specific institutional issues: one is the position or reputation of legal professionals as public-interest actors, and the other is the independence or self-governance of the profession. Consequently, the local reception, transposition and implementation of the FATF-led international gatekeeping rules has been negotiated and shaped by the legal profession's exceptional resistance, at least in the US and Canada. Elsewhere such strategies have not succeeded.

This chapter further shows how the institutional impact of the gatekeeping initiative is not uniform across professional sectors, as could be gleaned from the contrast between legal and banking professionals. While lawyers perceive gatekeeping obligations as unwelcome micro-management of the profession, bankers reflect an understanding of gatekeeping as an entrustment of public power or deputation into a governmental role, which they considered equally unwelcome. Upon realizing that resistance had failed and that

[78] Terrill J.A., and Breslow, M.A., 'The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach' (2015) 60 *New York Law School Law Review* 433 at p.454.

gatekeeping obligations are here to stay, legal professionals advocated for open-ended rules that would allow them greater discretion in implementation. Bankers, on the other hand, requested that the rules be as detailed as possible so that they, as private actors, bear less discretionary responsibility of interpreting a public law.

In order to enhance collaboration with professional, organized groups such as lawyers, therefore, governments and the FATF need to address the fit of new regulatory initiatives with the institutional cultures of those professions. In comparing lawyers and bankers, we see that lawyers' institutional consciousness resulted in a resistance to gatekeeping regulations that frustrated states' compliance with FATF standards, whereas bankers' response was an overzealous execution of gatekeeping regulations that resulted in a wave of financial exclusion to the global poor. This shows that professional gatekeepers indeed act as interlocutors of AML/CFT rules, meaning that they translate and shape the regulatory process on the ground, and that in doing so, their institutional context shapes the implementation and the consequences of such rules.

Key texts

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