CLEAN MONEY, SUSPECT SOURCE

TURNING ORGANISED CRIME AGAINST ITSELF

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Executive Summary

Money-laundering is performed to thwart the enforcement of criminal law by creating a justification for controlling or possessing money or property derived from any form of criminal activity. This includes all activities aimed at disguising or concealing the nature or source of, or entitlement to money or property derived from criminal activities. The process of money-laundering comprises:

- the placement stage where the illegitimate proceeds are placed in the financial system;

- the layering stage where numerous transactions are carried out with the proceeds; and
- the integration stage where the recycled proceeds are placed at the disposal of the criminal.

Organised criminal groups need to launder their illegal profits to avoid detection of the underlying criminal activity that generates the profits, while enjoying these profits or reinvesting them in future criminal activities.

By combating money-laundering, law enforcement authorities can disturb the cycle utilised by organised criminal groups to benefit from illegitimate profits. This can enable law enforcement authorities to disrupt the functioning of organised criminal groups through financial turmoil.

Globally, South Africa has one of the broadest ranges of money-laundering offences on its statute books. This is due to the fact that any underlying criminal activity can give rise to a charge of one of the money-laundering offences.

The money-laundering offences are contained in the Prevention of Organised Crime Act of 1998. These are money-laundering, assisting another to benefit from the proceeds of unlawful activities, the acquisition, possession or use of the proceeds of unlawful activities, and the failure to report suspicion regarding the proceeds of unlawful activities.

South Africa also has a structure for the recovery of the proceeds of criminal activity that is far advanced in terms of available models. The South African model comprises a conviction-based confiscation procedure, as well as a so-called civil forfeiture procedure without requiring a conviction.

The picture of South Africa's legal response to money-laundering is not yet complete. A system of administrative measures to control money-laundering and to facilitate its prevention, detection, investigation and prosecution is still lacking.

The elements of an administrative money-laundering control structure are customer identification, recordkeeping, reporting of information, and formulating internal policies on these elements by the institutions concerned.

Another element of crucial importance is the establishment of a financial intelligence unit. Such a unit should serve as a conduit for information from institutions in the private sector to law enforcement authorities. At the same time, the unit should add value to the information passed on to law enforcement authorities by performing an analysis of the reported information.

A bill on the establishment of a financial intelligence unit and money-laundering control measures is in process. Elements of this bill that will most probably find their way into the final statute are the establishment of a Financial Intelligence Centre, the money-laundering control measures referred to above, and the administrative enforcement of the bill.

The implementation of these measures is, broadly speaking, the task of the investigating and prosecuting authorities. Within these groupings, there are a number of institutions that can become involved in money-laundering investigations linked to organised crime.

In the South African Police Service, the investigation of organised crime is the task of the detective service. This service comprises a number of components. Of these components, it is mainly the Commercial Branch and the Component: Organised Crime that will deal with money-laundering investigations. Investigations of criminal activity linked to organised crime will mainly be carried out by the Component: Organised Crime, the Component: Specialised Investigations, the Component: Serious and Violent Crimes and the Commercial Branch.

The National Prosecuting Authority comprises offices of Directors of Public Prosecutions for each seat of the High Court. Any of these Directors may institute prosecutions concerning money-laundering and organised crime activities. Apart from the offices of the Directors of Public Prosecutions, there is also the office of the National Director of Public Prosecutions. This office includes the Investigating Directorates for Serious Economic Offences and for Organised Crime, the Asset Forfeiture Unit, and the Directorate for Special Operations.

Increased use is made of specialised, multidisciplinary investigative teams. These teams focus their investigations mainly on specific organised criminal groups, rather than specific criminal activities. This allows them to conduct their investigations proactively instead of only reacting to crimes that have already been committed. The South African Police Service, as well as some of the prosecuting authorities such as the Directorate for Special Operations use this approach. The teams involved in such investigations typically comprise investigators and public prosecutors and may also include other experts such as forensic accountants.

Legislation concerning money-laundering, organised crime and the confiscation or forfeiting of the proceeds of criminal activity contains a wide variety of instruments to address these phenomena. These measures compare favourably with international standards and with some of the most advanced examples of similar measures in other countries.

The law is still lacking with regard to administrative money-laundering control measures. South Africa's current provisions fall short of the international standard set by the 40 recommendations of the Financial Action Task Force. It is hoped that the enactment of the Financial Intelligence Centre Bill will go some way to address this shortcoming.

The introduction of the statutory provisions against money-laundering and organised crime has gone hand-in-hand over the past five years with the restructuring of the authorities concerned with their implementation. This restructuring has included the creation of new roleplayers such as the Asset Forfeiture Unit and the Director of Special Operations in the office of the National Director of Public Prosecutions, and the Component: Organised Crime in the SAPS detective service.

The fact that a variety of institutions will have overlapping responsibility for the same type of investigations holds an inherent danger of conflicts between the institutions concerned. This may lead to a duplication of efforts and spending of resources while reducing positive results. Careful co-ordination of activities and continuous communication between the roleplayers will be essential to avoid such conflicts. It may even be necessary to consider greater centralisation of the co-ordination of activities between these institutions.

Chapter 1
Introduction

Overview

The phenomenon of money-laundering and its links to organised crime and the response of the state are explored in this monograph. The combating of money-laundering is approached as a key component in the strategy against organised crime.

Questions about a number of issues are addressed:

- the relevance of money-laundering to organised criminal groups;
- the need to combat money-laundering in the fight against organised crime; and
- the necessary components of an effective strategy to combat money-laundering.

Although the focus of the monograph is on South Africa, some comparisons with the legislation and practices of other countries are also made. Certain international instruments against money-laundering are briefly considered.

Concepts

Money-laundering is explored in this monograph as a phenomenon relevant to the administration of criminal justice. Hence, the discussion considers money-laundering as a criminal act. Although the term ‘money-laundering’ is used throughout the monograph, it is understood to refer not only to the laundering of money, but of any type of asset.

The phrase ‘underlying criminal activity’ is often used in the monograph. Money-laundering is not an isolated criminal activity, but is always associated with some or other underlying profit-generating criminal activity. Such a criminal activity is sometimes referred to as the ‘predicate offence’. The underlying criminal activity is the source of the illegal proceeds. Crimes such as fraud, drug-trafficking and vehicle theft are examples of underlying activities from which the criminal obtains proceeds that need to be laundered.

The concept ‘organised criminal group’ is vague and not easy to define. In South Africa, organised criminal groups appear in many forms with varying levels of organisation and cohesion among their members. For this reason, it is necessary to clarify what is understood to be an organised criminal group.

For the purposes of this monograph, the term ‘organised criminal group’ is used in its widest sense without attempting to give a detailed and all-inclusive definition. An organised criminal group is understood to be a group of persons collectively involved in serious criminal activity with the view to make a profit on an ongoing basis.

Structure

The monograph deals with divergent issues such as the manifestations of money-laundering, the provisions of the relevant legislation on money-laundering and organised crime, and the implementation of the law. Each of these is dealt with in a separate chapter. This allows readers who are only interested in specific topics to refer directly to the relevant chapter.

Each chapter is preceded by an overview, which provides a basic understanding of the contents of the chapter without going into any detail. The overview presents the bigger picture against which the detailed information contained in the rest of the chapter should be seen.

Shaded text boxes throughout the monograph contain extracts from legislation and other instruments, as well as practical examples or conclusions reached from the preceding discussions.

The last chapter contains the overall conclusions on the efficacy of South Africa's legislative response to money-laundering linked with organised crime. This chapter deals with recommendations on ways to improve the legal position and the practical application of the law.

Collection of information

The information on the legal positions in South Africa and other countries was obtained from the relevant statutes and other literature, as well as from several sources on the Internet.

Information on the implementation of the relevant legislation, for example, was obtained from discussions with several persons. Special thanks and appreciation must be expressed to:

- Assistant Commissioner F C Truter, Head: Component Organised Crime of the detective service;

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- Mr W Hofmeyr, Special Director of Public Prosecutions and head of the Asset Forfeiture Unit.

Chapter 2
Money-Laundering

Overview

This chapter explores *money-laundering* as a phenomenon by defining the concept and describing the process employed to launder money and assets. The importance of money-laundering to organised crime is considered, as well as the scale of money-laundering globally and within the Southern African region.

Money-laundering aims to thwart the enforcement of criminal law by creating the justification for controlling or possessing money or property derived from any form of criminal activity. It is *defined* as all activities aimed at disguising or concealing the nature or source of, or entitlement to money or property derived from criminal activities. The process of money-laundering comprises:

- the placement stage where the illegitimate proceeds are placed in the financial system;
- the layering stage where numerous transactions are carried out with the proceeds; and
- the integration stage where the recycled proceeds are placed at the disposal of the criminal.

Organised criminal groups need to launder their illegal profits in order to *avoid the detection* of the underlying criminal activity that generates the profits *while enjoying* those profits or reinvesting them in future criminal activities.

By combating money-laundering activities, law enforcement authorities can *disturb the cycle* used by organised criminal groups to obtain benefit from illegal profits. Law enforcement authorities can *disrupt the functioning* of organised criminal groups through financial turmoil.

What is money-laundering?

There are many reasons why people become involved in criminal activity. It would be safe to say, however, that one of the main motivations to commit crime is financial gain. When criminals successfully commit crimes that generate returns, they obtain illegal earnings that cannot be explained. This can expose them to the detection of their criminal activities that generated the proceeds. This risk of detection is increased when these criminal activities yield large amounts of cash in relatively small denominations. For this reason, it is necessary for criminals to disguise the illegal source of their income or proceeds.

Several definitions for money-laundering are available, each designed to fit a specific set of circumstances where money-laundering takes place. For instance, the description given by the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the Vienna Convention) reads as follows:

The conversion or transfer of property, knowing that such property is derived from [drug trafficking in terms of the Convention], for the purpose of concealing or disguising the illicit origin of the property … [t]he concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property knowing that such property is derived from [drug trafficking offences].

This definition has been internationally accepted for money-laundering for more than ten years and has been used by most as a point of departure when defining the phenomenon. It must be noted that it only refers to the laundering of the proceeds of drug-trafficking. Experience since 1988 has shown, however, that money-laundering will occur whenever there is a need to conceal the source or nature of money or property.

In its simplest and broadest form, money-laundering can be described as the manipulation of money or property in order to misrepresent its true source or nature. Money-laundering in this form can be practised for legal or illegal purposes. Examples of legal purposes are to conceal income from the public, from competitors or from social and religious organisations, in order to protect a reputation, to gain a competitive advantage, or to discourage charitable solicitations. In such cases, no criminal conduct is involved. Such a description is clearly not appropriate for the purpose of this monograph.

Money-laundering acquires a criminal character when it is performed with the aim of thwarting the enforcement of criminal law by creating the justification for controlling or possessing money or property derived from any form of criminal activity. Money-laundering clearly entails much more than just concealing large amounts of cash obtained from the sale of drugs.

If the focus is on the criminal aspects of money-laundering, it can be described as all activities aimed at disguising or concealing the nature or source of, or entitlement to money or property derived from criminal activities.

The result of a successful money-laundering scheme is that proceeds from an underlying criminal activity are no longer associated with the activity. Illegally acquired proceeds appear to be legitimate income.

Money-laundering can refer to two basic processes. The first is simply the act of hiding or concealing the existence of money or property. The second is the more sophisticated process used to ‘clean’ money by disguising its source. In the latter case, the existence of the money or property is not denied, but its illegal source is misrepresented through acts to conceal the source.

How is money-laundering performed?

Money-laundering schemes vary from the most basic to extremely complex series of transactions. Three basic stages can be distinguished in most schemes: placement, layering and integration.

Placement

The placement stage in the money-laundering process entails the physical movement of cash or property away from the location where it was obtained and its placement in the legitimate financial system. Traditional smuggling methods are used to transport the cash or property. These include concealing money or property in luggage or cargo, swallowing it, or mailing it in express packages. In typical cases, money or assets are transported to other countries.

The most common method of placing money in the financial system is to deposit it into a bank account. During this stage, illegally obtained property is converted into money that can be placed in the financial system. The illegally obtained money is often commingled with the legitimate income of a cash-intensive business. When the money is deposited, it becomes indistinguishable from the legitimately earned income of the business.

The placement stage is often referred to as the 'splashdown point' for the proceeds of criminal activities. This is where the illegally acquired money or property comes into contact with the financial system. At this point, the money-laundering scheme is most vulnerable to detection. Large quantities of cash in small denominations have to be transported and infused into the financial system involving a considerable risk of detection by law enforcement authorities.

To overcome these difficulties, money launderers make use of a variety of techniques, for example, 'smurfing'. This method is used to reduce the volumes of cash that have to be transported and deposited. The cash that is obtained from whatever illegal activity, is distributed in small amounts among a large number of people who take the cash to financial institutions where it is deposited or converted into negotiable instruments.

Another approach used by money launderers is to make use of so-called parallel banking systems. The Financial Action Task Force against Money Laundering refers to these systems as alternative remittance systems.[1] These are systems for the movement of value from one location to another without physically moving any money.

The International Financial Action Task Force is an intergovernmental body with the purpose of developing and promoting policies, both at national and international levels, to combat money-laundering. The Task Force was established by the G-7 Summit in Paris in 1989 to examine measures to combat money-laundering.

The Financial Action Task Force has 29 member countries and territories and two regional organisations. Its membership includes the major financial centre countries of Europe, North and South America, and Asia. It is a multidisciplinary body that meets several times a year, bringing together the policymaking power of legal, financial and law enforcement experts.

The money launderer deposits money in one currency with an agent in a particular location. A token or special receipt is issued, which is then sent to the place where the money launderer wants to transfer the money. The token is presented there to another agent and exchanged for the amount of money in the required currency indicated on the token. This amount will be equal to the amount originally deposited, less certain fees and charges.

The advantage of this type of laundering scheme is that the money is never physically transported from one place to another. Furthermore, these systems operate largely outside regulated financial structures.

Some of the parallel banking systems came into existence before the introduction of western banking systems in other cultures. In the majority of cases, these systems are based on specific cultural, ethnic or historical factors. As a consequence, they are characterised by strong cultural and linguistic features and business or kinship ties that are difficult to penetrate.[2]

An example of a parallel banking system is the so-called *Chop* or *Chit* system, and similar systems such as *Hawalah* or *Hundi* systems, depending on where and by whom the system is operated. *Chop* or *Chit* systems are mainly found among East Asian communities while *Hawalah* or *Hundi* systems are found among Indian communities. However, these systems are not limited to specific geographic areas, but can be found among these communities throughout the world.

In South Africa, the *stokvel* can also be considered as an example of a parallel banking system. It presents unique challenges to law enforcement agencies that have to investigate money-laundering within the South African context.

The aim of the money launderer during the placement stage is to remove the proceeds of criminal activities from the place where they originated and to infuse these proceeds into the legitimate financial system.

Layering

The layering stage in the money-laundering process entails the transfer of funds between different locations and the continuous conversion of these funds from one type of instrument to another. During the layering stage, the funds or instruments are distributed through the financial system by using a series of transactions including electronic wire transfers, shell corporations, false invoicing, and fictitious import and export transactions.

Shell corporations (sometimes referred to as front companies) are legal entities, such as companies, created to establish a layer of anonymity between certain assets, funds or activities and the individuals with interests in those assets or funds, or who benefit from those activities. In most cases, such companies exist on paper only without true shareholders who have an interest in the profitability of the company. Shell corporations do not participate in the commercial sphere with a profit motive by carrying on some kind of business as is the case with normal commercial enterprises. Those that do business do so as a front to lend credibility in order to disguise their activities and assets.

False invoicing refers to a practice where false information is reflected in an invoice in order to create the appearance of a legitimate business transaction. This is used as a justification for the movement of funds or assets. In some cases, the goods or services indicated on the invoice will be completely fictitious. In other cases, goods or services will have been delivered, but the amounts payable in terms of the invoice will be substantially inflated (so-called over-invoicing).

In both these instances, the invoice will be used to provide an apparent reason for payment, in other words, for the transfer of funds. When goods are undervalued in an invoice (so-called under-invoicing) the invoice is used as an apparent reason for the transfer of the goods.

The layering stage is recognised by a large number of transactions concluded with the funds or instruments derived from the original proceeds of criminal conduct. These transactions are normally carried out through the facilities offered by institutions that are part of the legitimate financial sector.

The primary purpose with these transactions is not to make a profit, but to give the illegally acquired money or assets an appearance of having a legitimate source. To achieve this, the money launderer will be willing to suffer a loss from the transactions in the layering stage in most cases. This loss is regarded as part of the overhead investment in achieving the primary purpose of 'cleaning' the money or property. The transactions forming part of the layering stage are therefore not conducted according to normal market principles. If these transactions are examined objectively, they will often not make much economic sense.

This stage is referred to as layering because, traditionally, the transactions formed a layered construction. The transactions are performed in a sequential manner where one transaction is stacked on top of another. When the whole sequence of transactions is viewed retrospectively, it resembles a layered cake that can be disassembled to find the origin of the funds.

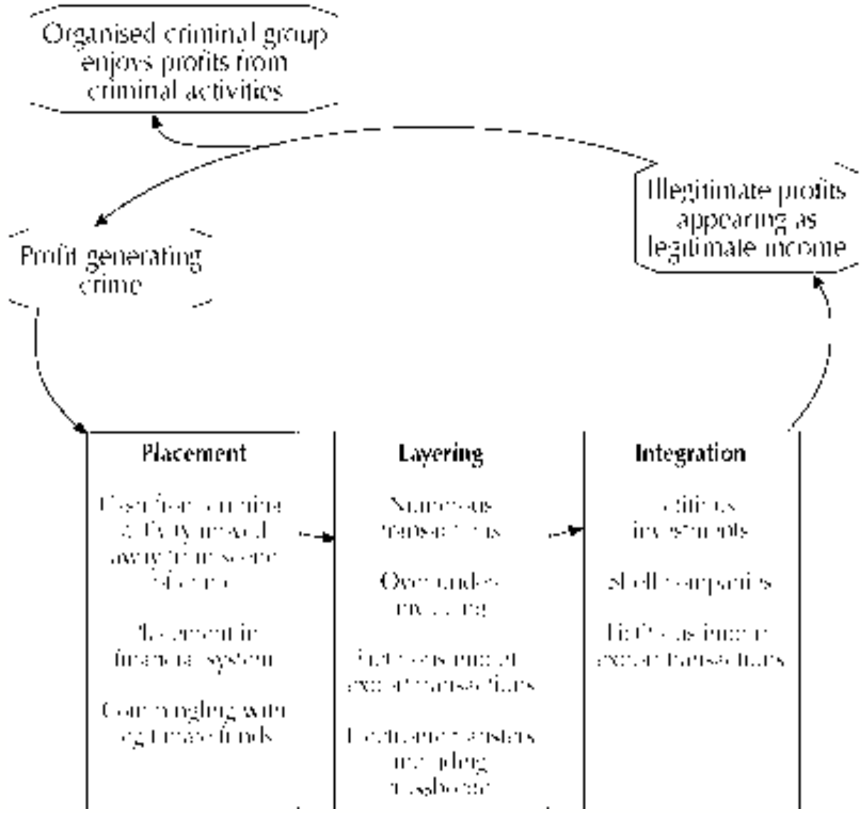
However, since the early 1990s, a new trend has emerged. More often than not funds are spread throughout the financial system by means of their division between a variety of transactions that are performed simultaneously. One part of the funds may be used to buy and sell property while another part is deposited in a financial institution and transferred between accounts and yet a third is used in investment schemes such as long-term insurance products or unit trusts.

During the layering stage, the money that is laundered becomes virtually indistinct from 'legitimate' money in the commercial sphere.

Integration

The integration stage of the money-laundering process entails that the money infused into the normal commercial sphere is collected and made available to criminals to be enjoyed or reinvested into their criminal activities. The funds that were processed during the layering stage are placed in apparently legal businesses. This is done by investing in shell corporations, buying stocks, real estate or art, or by using other avenues of investment. At this stage, it is virtually impossible to connect the funds to the original proceeds from the underlying criminal activity.

Figure 1: The money-laundering process



The integration stage is the culmination of a successful money-laundering scheme. It allows the criminal to regain control over the proceeds of the underlying criminal activities without fear of detection.

It must be borne in mind that the stages described above do not necessarily exist in the mind of the designer of a money-laundering scheme. They are generalisations based on the experience of investigators who have succeeded in uncovering such schemes. In no money-laundering scheme is there an exact and clearly defined delineation between these stages. Instead, the stages flow into each other creating an overlap between one stage and the next.

It is also not necessary for a successful money-laundering investigation to be able to indicate on which date a specific stage ended and the next one started. The relevance of distinguishing between these stages is simply to explain the basic structure of a money-laundering scheme and to be better equipped to recognise a certain activity as being part of such a scheme. People who are in a position to detect money-laundering transactions should therefore not be blinkered by these traditional perceptions of money-laundering schemes.

People should also not be misled by the traditional concept of the identity of a money launderer. Professional money launderers are not attached to a specific organised criminal group, but make their services and expert knowledge available on a ‘consulting basis’ to whomever is willing to pay. They are often involved in a profession, for example, accountants and lawyers.

The links between money-laundering and organised crime

The links between money-laundering and organised crime can be found in the reasons why organised criminal groups would engage in this practice. The processes to launder money or property can be expensive and are in themselves not free of risk. An organised criminal group will not go to the trouble of laundering the profits of its crimes unless there are external factors making it necessary to do so. There are mainly three reasons why organised criminal groups engage in money-laundering.

The first reason relates to the criminal organisation's ability to continue its activities. The primary purpose of an organised criminal group is to make profits. Just like a legitimate business, the members of an organised criminal group need to 'reinvest' the organisation's profits in future activity. The reinvestment of proceeds from criminal activities is necessary to sustain the future activities of the organised criminal group. This is similar to a legitimate business concern that needs to plough back a certain portion of its turnover in order to sustain the business. The proceeds from criminal activities become the lifeblood of the organised criminal group.

For the criminal engaged in organised crime, however, any profit close to the source of the crime represents a particular vulnerability. Unless the organised criminal group can effectively distance itself from the crime that generates the profit, it remains susceptible to detection and prosecution. Consequently, the very proceeds of an organised criminal group can pose a significant threat to its members.

In the majority of cases, organised criminal groups obtain cash, or assets that are converted into cash from their criminal activities. When an organised criminal group makes use of these proceeds without altering the appearance of their illegal source, it exposes itself to detection. In order to reduce this risk, organised criminal groups need to launder their illegitimate proceeds before reinvesting them. Hence, one reason why organised criminal groups launder their proceeds from criminal activities is to enable them to sustain and continue their criminal activities.

A second reason for organised criminal groups to engage in money-laundering is to ensure that crime pays. Apart from reinvesting the profits of an organised criminal group, those in control of the organisation would want to use its profits to improve their lifestyles. The risk of detection also exists and, in fact, increases when members of the groups use the unexplained wealth generated by their criminal activities to acquire luxury items.

Cleaning money or property acquired from illegal activities provides the avenue to enjoy it without revealing its illegal origin. As a result, members of an organised criminal group are able to use these proceeds without fear that the underlying criminal activity will be detected.

There is also a third important reason why organised criminal groups launder the proceeds from their criminal activities. Many countries have introduced, or are in the process of introducing procedures for the confiscation of the proceeds of criminal activities. A confiscation procedure adds to the risks faced by an organised criminal group. Apart from being prosecuted and punished for their criminal activities, groups also face the prospect of losing the profits they had hoped to gain from those activities. Organised criminal groups are no longer just facing a prosecution risk, but also a confiscation risk.

The possession and enjoyment of criminal profits can pose the danger not just of detection and prosecution, but also of confiscation. The added risk of losing the profits from their criminal activities serves as a further incentive to criminals to launder their ill-gotten gains. The third reason why organised criminal groups become involved in money-laundering is therefore to circumvent confiscation procedures and to retain the proceeds of their criminal activities.

What is the scale of the problem?

Money-laundering activities are secretive and misleading by nature. It is therefore only possible to provide figures on the incidence of money-laundering based on estimates and speculation. There are, however, a few indicators from which conclusions on the incidence of money-laundering can be drawn. These include the number of suspicious transactions identified by financial institutions, the number of organised criminal groups identified by law enforcement authorities, the number of prosecutions for money-laundering activities and forfeitures of the proceeds of criminal activities, and global economic trends concerning trade and the flow of funds.

According to one estimate, the annual worldwide value of laundered funds in 1997 was in the range of US $300 to $500 billion.[3] There are also a number of other estimates: the US Senate Foreign Relations Committee's Subcommittee on Narcotics and Terrorism, (1990) estimated that US $300 billion is generated annually through international drug-trafficking that needs to be laundered in some way. In 1989, the United Kingdom Parliamentary Home Affairs Committee estimated that around £1 800 million of drug-related money was flowing through the United Kingdom at the time.[4]

The development of a model to quantify global money-laundering flows (the Walker model) has been in process in Australia since 1998.[5] It is based on a similar model developed in 1995 for the Australian Financial Transactions Reports and Analysis Centre on internal money-laundering. According to early results obtained from applying this model to a number of international databases in 1998, a total of US $2 850 billion was laundered mainly in Europe and North America.

The question now arises what percentage of global money-laundering takes place in South Africa. At this stage, there are no statistics available on money-laundering incidences in South Africa. Furthermore, there have been no prosecutions for money-laundering activities in South Africa. It would be foolish, however, to assume from this that money-laundering does not occur in the country.

Despite the lack of statistics, there are indications that money-laundering is taking place in South Africa. These include the existence of some of the driving forces behind money-laundering such as the presence of organised criminal groups, a well developed financial infrastructure, and a procedure for the forfeiture or confiscation of the proceeds of criminal activities. All of these are present in South Africa.

One of the most influential driving forces giving rise to money-laundering is the presence of organised criminal groups. In 1994, there were 278 active criminal organisations known to the South African Police Service (SAPS).[6] By 1995, this number had grown to 481.[7]

Information published in 1997 by the Crime Information Analysis Centre (CIAC - then the Crime Information Management Centre) of the SAPS indicated that 192 organised criminal groups were known to be active in South Africa at the time.[8] Apart from these, another 500 so-called target groups had been identified. A target group is described as an organised criminal group that has come to the attention of the SAPS, but with the full extent of its criminal activities not yet known.

According to a report of the CIAC on the incidence of serious crime in South Africa between January and December 1999, there were at least 500 organised criminal groups operating in South Africa in 1999.[9] The following extract from the report provides an explanation for the apparent growth in organised crime in the country:[10]

- South Africa has very porous borders [long sea and land borders with little natural boundaries]. Contraband can be smuggled into the country by simply walking across the borders.

- South Africa's isolation of the past disappeared over the past decade and air, telecommunication and seaborne links to the outside world increased dramatically.

- South Africa is a country with both the natural resources and the markets needed to feed organised crime. Gold, diamonds, ivory, rhino horn, abalone, motor vehicles [especially luxury vehicles], originating from South Africa can be marketed in Africa and further afield, while it simultaneously presents a market for illegal firearms [partly as a result of high levels of insecurity caused by crime] and drugs.

- Until 1998, South Africa did not really have legislation and measures in place to really combat money laundering effectively. In a situation where organised crime can easily invest the illegal profits of crime in legal business concerns, organised crime will always flourish.

- The political transformation of South Africa, and especially the public service, has created conditions in which public servants [and especially those serving in the criminal justice system who came under much scrutiny for their links to apartheid in the past] are either very uncertain about their future [especially those who served in the pre-1990 era] or have unrealistic material expectations [some of those who are new in the public service]. Both these conditions may tend to make these public servants highly susceptible to bribery and corruption, because they may either consider filling their pockets before being kicked out or consider this a much quicker way to reach the top.

- During the years of political struggle [especially the 1980s and early 1990s] many members of the former security forces and liberation armies were trained in guerrilla warfare skills like intelligence gathering, ambush techniques, the handling of firearms and explosives, etc. Many of these combatants are now out of work and many of these skills can be used to commit hijackings, house and business robberies, bank robberies and robberies of cash in transit.

It is interesting to note the types of offences in which organised criminal groups are involved. A quarterly crime report of the CIAC for 1997 reflects that, of the offences committed by organised criminal groups during January to March 1997, drug-trafficking was by far the most important (96 out of a total of 394). This was followed by vehicle-related crimes excluding hijackings (69), commercial crime and fraud (46), diamond and gold-related crime (38), firearm-related crime (26) and murder and robbery (25).[11]

Crimes showing a surprisingly low level of involvement by organised criminal groups in this report are hijackings (10 out of a total of 394), corruption (8), gang-related crime (4), prostitution (3), and intimidation and other violent crimes (1).

From these indications of the presence and, more importantly, the growth of organised crime, it can be deduced that money-laundering is taking place in South Africa and is likely to be increasing.

Another indication of money-laundering taking place in South Africa is the work of the Asset Forfeiture Unit of the National Prosecuting Authority. The unit has initiated proceedings for the confiscation or forfeiture of the proceeds and instruments of criminal activity in 74 cases in the period March 1999 to September 2000. By the end of this period, proceedings were pending with respect to assets to the value of R165.7 million.[12] This is an indication that large volumes of proceeds of criminal activity are finding their way into the South African economy.

There are also international indications of the extent of money-laundering in South Africa. The Bureau for International Narcotics and Law Enforcement Affairs of the United States Department of State undertakes annual global assessments of money-laundering and rates countries based on, among others, concern about the flow of illicit money through their financial systems. In the 1996 *International Narcotics Control Strategy Report* of this Bureau, South Africa's priority rating was increased from a country about which there was low to medium concern to one raising medium concern.[13]

The Walker model for quantifying global money-laundering flows also produced figures for this activity in the Southern African region.[14] According to the results obtained with the application of the model for 1998, a total of US $22 billion was laundered through the financial system in the region. Of this, US $15 billion was generated within the region. An estimate US $7 billion infiltrated the region from other regions, including East Asia (US $1 billion), North America (US $5 billion) and Europe (US $1 billion).

Why combat money-laundering?

As illustrated above, money-laundering allows organised criminal groups to perpetuate their criminal activities without fear of punishment and with the prospect of enriching their members. In short, money-laundering is a major contributing factor that keeps organised criminal groups in existence and therefore allows criminal activity to continue. It allows organised criminal groups to weaken the social fabric, influence the collective ethical standards and undermine the democratic institutions of a country.[15]

One of the effects of disguising the source of illegal profits and creating the illusion that those assets represent legitimate earnings is to place economic power in the hands of organised criminal groups. This power is used, in turn, to open ways for expanding the criminal activities of the group. One of the most common ways of achieving this is through corrupting government and law enforcement officials, politicians and individuals within the business community. If this process of corruption is left unchecked, it will reach a point where it will become systemic and therefore very difficult to root out.[16]

The aim of the money launderer with this process is to gain enough control over the institutions of the financial system to ease the recycling of future profits from criminal activity. Apart from negative public reaction, an institution that becomes involved with money-laundering also faces the dangers of corrupt employees, fraud and the loss of control over the institution.

Money-laundering also has a more direct impact apart from the influence it bestows upon organised criminal groups over society. This impact affects the institutions of the commercial and financial sphere and can have a knock-on effect on economic development in a country.

To assess the impact of money-laundering upon the financial sector, consideration should be given to the consequences when institutions in the business community become involved in money-laundering activities.

One of the items on the shopping list of a money launderer is an efficient financial system. It is useful as a device to transfer and alter the appearance of the proceeds of criminal activity. Involving the financial system in money-laundering schemes necessarily means involving those institutions that can serve as intermediaries in such schemes. If control over access to the financial system is weak, it will make the system more attractive to the money launderer.

The integrity of institutions in the financial system is dependent upon, among others, the perception that they function within a framework of high legal, professional and ethical standards.[17] Involving these institutions in money-laundering activities can draw them into a relationship marked by complicity with organised criminal groups. This can take the form of employees or directors turning a blind eye to the criminal nature of money or property, or of accepting bribes from organised criminal groups. Public knowledge of such complicity will damage the attitudes of other institutions, regulatory authorities and customers towards such institutions.

The involvement of financial institutions in money-laundering schemes led the Basle Committee on Banking Regulations and Supervisory Practices to adopt a Statement of Principles in December 1988. In the statement, it is said that supervisory authorities "cannot be indifferent to the use made of banks by criminals." Indifference to this fact may cause banks to suffer losses through fraud and the adverse effects of being associated with criminals. The involvement of banks in criminal activity erodes public confidence and undermines the stability of the banking system.[18]

The statement of the Basle Committee is founded on the belief that "the first and most important safeguard against money laundering is the integrity of banks' own managements and their vigilant determination to prevent their institutions becoming associated with criminals or being used as a channel for money laundering." This statement is, of course, equally true of any intermediary in the financial system that becomes involved in criminal activity.

When the integrity of individual institutions in the financial system is affected, the financial services marketplace itself becomes affected. If money-laundering is allowed to become entrenched in a country's commercial and financial sectors, these sectors will be perceived to be under the influence of organised crime. This will eventually have a negative effect on foreign investment in the country.[19]

One answer to the question why money-laundering should be combatted is therefore that it serves to protect society and, in particular, the commercial and financial spheres and the institutions that function within those spheres.

This question can also be approached by considering the relevance of addressing money-laundering to attempts to combat organised crime.

As was shown earlier, there are a number of reasons why organised criminal groups become involved in money-laundering. These mainly focus on reducing the prosecution and confiscation risk associated with enjoying and reinvesting the proceeds of criminal activities. In fact, while attempting to reduce these two risks, organised criminal groups are exposing themselves to the risk that their money-laundering activities may be detected.

Money-laundering is not an isolated criminal activity, but is always associated with some or other underlying profit-generating criminal activity. This underlying criminal activity is often referred to as the predicate offence. The aim of the money launderer is to break the link between the underlying criminal activity and its proceeds by means of laundering money and/or other assets.

The reason for investigating money-laundering hinges upon the assumption that, if money-laundering can be identified, the link with the underlying criminal activity may be restored. When money-laundering is seen as an integral part of the activities of an organised criminal group, law enforcement authorities are placed in a better position to determine the involvement of the group in the underlying criminal activities which generate the proceeds to be laundered.

The investigative methods used to collect evidence to prove money-laundering offences include some that may not normally be used to investigate the underlying crimes. These are methods such as the tracing of assets or the reconstruction of transactions. These methods may allow investigators to trace the funds or property representing the original proceeds back to the underlying offence. This may enable investigators to establish the relations and connections between individuals that are created by the financial transactions of a money-laundering scheme. If successful, investigators may be able to determine the identity of those involved in the underlying criminal activity. This may include high-level members of the organised criminal group who cannot be readily connected to the underlying criminal activity itself.

The following example of a relatively simple scheme may illustrate this point:

Mr X is the leader of an organised criminal group that generates income through the sale of drugs. Mr X is the main beneficiary of this criminal activity, but never becomes involved in the actual purchase or sale of any drugs.

The purchase and sale of the drugs are undertaken by lower ranking members of the group. These members all have access to bank accounts. On Mr X's instructions, some members deposit payments from drug sales into these accounts, while others withdraw payments for drug purchases from these accounts.

The surplus funds in the accounts are periodically transferred to an account held by a shell corporation of which Mr X is the director. From this account, funds are transferred to an account held by Mr X under the guise of a salary paid to him. Apart from this, luxury items are bought in the name of the shell corporation for use by Mr X.

Normal investigative methods will link the lower ranking members of the group with drug-dealing. However, this will not expose Mr X's involvement in these activities. By extending the investigation beyond drug-dealing, it will be possible to establish where the funds go that are generated by the drug-dealing. Once these funds are traced to the shell corporation, it will be possible to establish the link between members dealing in drugs and the income of the shell corporation. If this is followed by investigation of the next step in the process, the link between Mr X and the shell corporation, and consequently the drug dealers can be established.

This investigation can also be approached from another perspective. By starting the process with an investigation of Mr X's lifestyle, his income and the property that ostensibly belong to him can be traced back to the shell corporation. Tracing the funds further will reveal the connection between the shell corporation and the accounts used by the members of the organisation for the operation of the criminal group. Once this is achieved, it will be possible to link the activities of the members of the group with the leader of the group.

Combating money-laundering provides law enforcement authorities with an additional weapon to fight organised crime. The efficacy of this weapon is increased substantially if it is used hand-in-hand with a system to enable the forfeiture of proceeds from criminal activity.

The continued existence of an organised criminal group is dependent upon its ability to recycle the proceeds of its criminal activities and to use these proceeds to sustain future criminal activity. If an effective forfeiture system enables the removal of the proceeds of an organised criminal group's activities, this cycle can be broken. This allows law enforcement authorities to use financial disruption as one more line of attack on organised criminal groups.

The aim of a money-laundering investigation is to identify the relationship between the funds or property representing the proceeds of criminal activity and the underlying criminal activity from which these proceeds had been acquired. If this type of investigation is carried out successfully, it will enable law enforcement authorities to identify the underlying criminal activity and to deprive organised criminal groups of their ill-gotten gains. The subsequent disruption of an organised criminal group will affect the members, including those who have sufficiently distanced themselves from the criminal activities of the organisation to avoid prosecution.

What are South Africa's international responsibilities?

Currently, the most widely recognised international legal instrument dealing with money-laundering is the Vienna Convention. The convention obliges states parties to criminalise the laundering of the proceeds of drug-trafficking. South Africa has acceded to the Vienna Convention in 1998.

The United Nations has embarked on a process to elaborate a Convention against Transnational Organised Crime. This convention contains a general obligation to criminalise the laundering of the proceeds of serious crime.[20] It obliges signatories to introduce a domestic regulatory control structure to combat money-laundering. This structure will have to contain elements such as identifying customers, recordkeeping and reporting of information.

The Convention against Transnational Organised Crime was adopted by the United Nations in November 2000 at a signing conference that took place in Palermo. It was opened for signature in December 2000. South Africa has participated in all the meetings to elaborate the convention and became a signatory to the convention at the signing conference in Palermo. When the South African parliament ratifies the signing of the convention, it will incur obligations to criminalise money-laundering and develop a domestic control structure in accordance with the convention.

The international intergovernmental Financial Action Task Force developed 40 recommendations on combating money-laundering in 1990 that were revised and updated in 1996. The recommendations cover a wide range of issues related to the combating of money-laundering, among others, the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation.[21]

The recommendations relating to the criminal justice system encourage states to criminalise money-laundering and establish procedures for freezing and confiscating the proceeds of crime. The recommendations relating to the financial system encourage states to introduce customer identification and recordkeeping rules, reporting requirements, increased diligence requirements for financial institutions, as well as the establishment of regulatory and other administrative authorities. The recommendations relating to international co-operation provide for the exchange of information between states and encourage states to co-operate with one another with regard to confiscation, mutual assistance and extradition. These recommendations are seen as a blueprint for action against money-laundering, and have been recognised almost universally as the standard for action against money-laundering.

South Africa is not a member of the Financial Action Task Force and is therefore not obliged to adhere to the 40 recommendations. However, the degree to which a country implements these recommendations is increasingly relevant when members of the Financial Action Task Force assess the risk associated with investing in the country. It is in South Africa's own interest to take note of the recommendations and to consider their implementation seriously. For this purpose, the country has embarked on a process that will bring its regime against money-laundering in line with the recommendations of the Financial Action Task Force, as will be discussed below.

In 1999, a regional body to combat money-laundering was established in Eastern and Southern Africa called the Eastern and Southern African Anti-Money Laundering Group. One of the objectives of the group is to ensure that each of its members implement the 40 recommendations of the Financial Action Task Force.

South Africa is not a member of this group, although it has participated in the meetings that led to the formation of the group.[22] If South Africa becomes a member of the group, it will be obliged to implement the recommendations of the Financial Action Task Force.

Chapter 3
Money-Laundering Legislation

Overview

This chapter deals with the law's response to the phenomenon of money-laundering. South African law makes provision for one of the broadest ranges of money-laundering offences in the world. This is mainly based on the fact that any underlying criminal activity can lead to a charge of one of the money-laundering offences. This is in contrast to most other jurisdictions where money-laundering offences relate only to a specified list of underlying criminal activities or, at the most to 'serious offences', in general.

The *development* of these provisions is explored by briefly considering the legislation that made provision for particular money-laundering offences. These include the offence referred to in the Drugs and Drug Trafficking Act of 1992, as the "conversion of the proceeds of a defined crime" and the money-laundering offences included in the Proceeds of Crime Act of 1996.

An analysis is made of the relevant offences included in of the Prevention of Organised Crime Act of 1998. These are money-laundering, assisting another to benefit from the proceeds of unlawful activities, the acquisition, possession or use of the proceeds of unlawful activities, and the failure to report suspicion regarding the proceeds of unlawful activities. In each case, the elements of the offence are discussed and a few examples of what may happen in practice are given.

South Africa also has a structure for the recovery of the proceeds of criminal activity that is advanced in comparison to other proceeds of crime models. The South African model comprises a conviction-based confiscation procedure, as well as a so-called civil forfeiture procedure without requiring a conviction.

This chapter also examines the procedures identified in the Prevention of Organised Crime Act for the recovery of the proceeds of criminal activity. The steps involved in these procedures are explained and the procedures are distinguished from one another.

A brief legal history

The manipulation of the proceeds of crime first drew the attention of the legislature in 1992. Since then, legislation dealing with money-laundering, as well as the forfeiture of the proceeds of criminal activities has undergone a number of changes in an ongoing process that has not yet reached a conclusion.

Drugs and Drug Trafficking Act

A specified money-laundering offence first appeared on South Africa's statute book in the Drugs and Drug Trafficking Act of 1992. The offence in the act read as follows:

Conversion of proceeds of defined crime

No person shall convert any property, while he knows or has reasonable grounds to suspect that any such property is the proceeds of a defined crime.

"Convert" was defined in section 1 of the act:

'convert', in relation to property, includes -

(a) any agreement or understanding in connection with the property, whether any such agreement or understanding is legally enforceable or not; or

(b) any other act in connection with the property, whether any such act is performed independently or in concert with other persons,

which has or is likely to have the effect -

(i) of concealing or disguising the nature, source, location, disposition or movement of the property or its ownership or any interest with respect thereto; or

(ii) of enabling or assisting any person who has committed or commits, whether in the Republic or elsewhere, a drug offence or an economic offence -

(aa) to avoid prosecution; or

(bb) to remove or to diminish any property, or any part thereof, realized directly or indirectly by him as a result of the commission of the said offence, or to use it in order to obtain funds, investments or other property …

A defined crime in terms of the Drugs and Drug Trafficking Act referred to a drug offence, or the conversion of proceeds derived from a drug offence.

The definition of "convert" in the act formed the basis for future descriptions of money-laundering that were to follow in South African legislation.

The scope of this first example of a money-laundering offence in South African legislation was limited to the laundering of the proceeds of drug offences. Laundering activities that fell outside this scope did not amount to an offence unless the methods used to bring about the misrepresentation of the source of the proceeds constituted another offence such as fraud or obstructing justice.

In order to combat money-laundering in these circumstances, investigating and prosecuting authorities were constrained to rely on individual fraudulent transactions or other criminal actions that made up a money-laundering scheme. However, the separate transactions that constitute a money-laundering scheme are usually designed to appear totally innocent when seen in isolation. This method was therefore inadequate to combat money-laundering.

The fact that money-laundering was not in itself an offence had the effect that investigators were precluded from devoting time and resources to the detection and investigation of such schemes. Consequently, very little resources, if any, were devoted to develop the skills and other resources needed to investigate money-laundering, even in terms of the conversion offence stipulated in the Drugs and Drug Trafficking Act.

There are no reported cases referring to prosecutions for the conversion offence under the act and, as far as could be established, no prosecutions were ever instituted in terms of this offence.

Apart from the conversion offence, the Drugs and Drug Trafficking Act also provided for the duty to report suspicious activities:[23]

If any director, manager or executive officer of a financial institution has reason to suspect that any property acquired by the financial institution from any person in the ordinary course of the financial institution's business is the proceeds of a defined crime, he shall -

(a) as soon as possible report his suspicion to any designated officer; and

(b) at the request of that designated officer, furnish the said officer with such particulars as he may have available regarding any such person.

This duty entailed the reporting of a suspicion that property acquired by an individual or institution in question is the proceeds of a drug offence. The report had to be made to a designated officer. The duty applied to directors, managers or executive officers of banks, insurers and unit trust management companies, as well as to stockbrokers.

Discussions with officials of the SAPS who dealt with reports in terms of this provision and employees in financial institutions indicated that it was applied in practice. Reports were mainly received from banks, a fact which is borne out by figures for 1994 given at a money-laundering seminar:

- Bank A reported 2 cases in terms of the Drugs and Drug Trafficking Act.
- Bank B reported no cases.
- Bank C reported 64 of which 54 cases were proven to be drug-related.
- Bank D reported 6 cases.[24]

The Drugs and Drug Trafficking Act also contained a procedure for the confiscation of the proceeds of drug-trafficking and of the conversion offence.[25] It could only be instituted after an accused was convicted of a drug offence. The confiscation order that the court could make was for the payment of a sum of money. The amount of this order, based on the court's belief, represented the accused's benefit from the offence. As far as could be established, this provision was applied once in April 1995 in the Pretoria Regional Court.[26]

The provision for the confiscation procedure was repealed by the Proceeds of Crime Act of 1996. The conversion offence and the reporting duty of the Drugs and Drug Trafficking Act were repealed by the Prevention of Organised Crime Act of 1998.

Proceeds of Crime Act

The next step in the legislative process was the introduction of a range of offences to deal with money-laundering activities as enacted in the Proceeds of Crime Act of 1996. The first of these was money-laundering[27], which is defined as follows:

Money laundering

28. Any person who, knowing or having reasonable grounds to believe that property is or forms part of the proceeds of crime -

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,
which has or is likely to have the effect -

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or its ownership or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere -

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly or indirectly as a result of the commission of an offence,

shall be guilty of an offence.

The Proceeds of Crime Act also introduced two new offences: assisting another to benefit from the proceeds of crime, and the acquisition, possession or use of such proceeds:[28]

Assisting another to benefit from proceeds of crime

29. Any person who knowing, or having reasonable grounds to believe, that another person has obtained the proceeds of crime, enters into any agreement with anyone or engages in any arrangement whereby –

(a) the retention or the control by or on behalf of the said other person of the proceeds of crime is facilitated; or

(b) the said proceeds of crime are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,
shall be guilty of an offence.

Acquisition, possession or use of proceeds of crime

30. Any person who acquires or uses or has possession of property knowing, or having reasonable grounds to believe, that it is or forms part of the proceeds of crime of another person, shall be guilty of an offence, unless such a person reports his or her suspicion or knowledge as contemplated in section 31.

The money-laundering offence as identified in the Proceeds of Crime Act can therefore be described as the performing of any act that may result in concealing the nature of the proceeds of crime, enabling a person to avoid prosecution, or diminishing such proceeds.

With the provision for the money-laundering offence, the Act introduced the principle that the laundering of proceeds from any type of underlying criminal activity should be punishable. This extended the scope of the money-laundering offence considerably in comparison to the conversion offence of the Drugs and Drug Trafficking Act.

This offence could be applicable, on the one hand, to a criminal who had committed some criminal activity and, after obtaining proceeds from the activity, entered into a transaction to launder these proceeds. On the other hand, it could also apply to an individual who did not initially obtain such proceeds, but who laundered the proceeds through a transaction with the criminal who acquired the proceeds.

The offences of assisting another to benefit from the proceeds of crime, and of the acquisition, possession or use of such proceeds were introduced to deal with individuals who became involved in some of the later stages, or some of the isolated parts of a money-laundering scheme.

There are no reported cases referring to prosecutions for the money-laundering offence or the two related offences under the Proceeds of Crime Act and, as far as could be established, no prosecutions were ever instituted in terms of these money-laundering offences.

The Proceeds of Crime Act also extended the reporting duty first introduced by the Drugs and Drug Trafficking Act:[29]

Failure to report suspicion regarding proceeds of crime

31(1) Any person who carries on a business or is in charge of a business undertaking who has reason to suspect that any property which comes into his or her possession or the possession of the said business undertaking forms the proceeds of crime, shall be obliged to report his or her suspicion and the grounds on which it rests, within a reasonable time to a person designated by the Minister and shall take all reasonable steps to discharge such obligation: Provided that nothing in this section shall be construed so as to infringe upon the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney so as to enable him or her to provide advice, to defend or to render other legal assistance to the client in connection with an offence under any law, of which he or she is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an investigation with a view to instituting criminal proceedings is being conducted against him or her.

(2) Any person who fails to comply with an obligation contemplated in subsection (1) shall be guilty of an offence.

(3)(a) No obligation as to secrecy and no other restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, shall affect any obligation imposed by subsection (1).

(b) No liability based on a breach of an obligation as to secrecy or any restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, shall arise from a disclosure of any information in compliance with any obligation imposed by subsection (1).

The duty in terms of section 31 of the Proceeds of Crime Act applied to every individual involved in or in charge of a business undertaking. The duty entailed that all such persons had to report their suspicions that property coming into their possession is the proceeds of crime.

Reports in terms of this provision were made to the Commercial Crime Branch of the SAPS. Similar to reports under the Drugs and Drug Trafficking Act, the majority of reports were received from banks.

The Proceeds of Crime Act also contained a procedure for the confiscation of the proceeds of crime.[30] This procedure is similar to that in the Drugs and Drug Trafficking Act. It could only be instituted after the conviction of an accused of a profit-generating crime such as fraud, theft, drug-trafficking and others. The court could make a confiscation order for the payment of a sum of money. The amount of this order, in the court's belief, represented the accused's benefit from the offence.

The confiscation procedure of the Proceeds of Crime Act was applied at least three times. In one of the cases the Durban and Coast Local Division of the High Court made an order for the confiscation of R1.2 million, representing the benefit derived from contraventions of import and export regulations.[31]

The law in other African countries

There are a number of African countries where money-laundering in one form or another is criminalised.

In Botswana, the Proceeds of Serious Crime Act, no 19 of 1990, criminalises the laundering of property derived from serious offences. The Zimbabwean Serious Offences (Confiscation of Profits) Act, no 12 of 1990, criminalises money-laundering in respect of property derived from serious offences. In Zambia, the Dangerous Drugs (Forfeiture of Property) Act, no 7 of 1989, criminalises money-laundering in respect of drug-trafficking. In Tanzania, the laundering of the proceeds of serious offences is criminalised in the Proceeds of Crime Act, no 25 of 1991. The Drug Control Act of 1993 in The Gambia criminalises the laundering of property derived from drug-trafficking. The same approach is followed in the Money Laundering Decree of 1995 of Nigeria that criminalises money-laundering in respect of the proceeds of drug-trafficking.

It is interesting to note that all of the money-laundering offences referred to above predate the definition of money-laundering offences of the South African Proceeds of Crime Act.

The current law in South Africa: Prevention of Organised Crime Act

The current provisions dealing with the manipulation of the proceeds from unlawful activities are contained in the Prevention of Organised Crime Act of 1998. With the promulgation of the act, the whole of the Proceeds of Crime Act was repealed. The majority of the provisions of the Proceeds of Crime Act were incorporated into the Prevention of Organised Crime Act, some with slight amendments.

Money-laundering

One of the provisions that has been included in the Prevention of Organised Crime Act is the offence of money-laundering.[32] The offence is defined in the act as follows:

Money laundering

4. Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and -

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect -

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere -

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence.

This laundering offence is generally applicable and widely defined. It is not limited by referring to the type of underlying criminal activity from which the laundered proceeds are obtained, nor to the method used to launder these proceeds.

The action, which is one of the elements of the offence, is either to enter into an agreement or arrangement in connection with certain property, or to perform another action in connection with the property. In short, this could be anything done in respect of the property in question.

The qualification of the action is that it must have a certain consequence, or it must be at least likely to have a certain consequence. The consequence can be one of three alternatives:

- to conceal or disguise the nature, source, location, disposition or movement of the property, or its ownership or any interest that anyone may have in it;
- to enable or assist an offender to avoid prosecution; or
- to enable or assist an offender to remove or diminish the proceeds of some criminal activity.

The agreement does not have to be legally enforceable. Even when a criminal wants to launder proceeds from a criminal activity through illegal gold transactions or unenforceable gambling transactions, for example, would the action be committed. Such cases would not constitute an attempt to commit money-laundering, but would be regarded as the actual offence.

The relevant consequences do not have to be realised, as long as it is likely that the agreement or arrangement could have resulted in one of those consequences. The court will have to determine what is likely to result from a specific agreement or arrangement. It is suggested that the court will do this by referring to what can be generally, and according to reasonable experiences, expected to result from an agreement or arrangement. The use of the word 'likely' indicates that it is not any result, however remote, that is intended here.

The fact that the agreement or arrangement does not have to be legally enforceable and that the relevant consequence does not need to have been realised means that in almost any circumstance will the actual offence be committed. It is only where the agreement or arrangement was initiated but not concluded where there would be room for a charge of attempt to commit money-laundering.

The individual performing the action can either be a person who had committed some criminal activity and obtained the proceeds from it, or a person who did not initially obtain the proceeds but who laundered the proceeds through a transaction with the criminal who had derived the proceeds.

The property that is involved in the action to be performed must be the 'proceeds of unlawful activities'. This phrase is defined as follows in the Prevention of Organised Crime Act:[33]

'proceeds of unlawful activities' means any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived …

The factors referred to in this definition can be objectively determined. The property in question must have been derived from unlawful activities. These could have taken place anywhere and at any time. Furthermore, the individual obtaining the property in question does not have to be the same person who committed the underlying unlawful activity that generated the proceeds.

The required form of guilt is expressed in the phrase 'knows or ought reasonably to have known'. To make sure that there can be no doubt about the meaning of this phrase, the knowledge element is described in section 1 of the Prevention of Organised Crime Act:[34]

(2) For purposes of this Act a person has knowledge of a fact if -

(a) the person has actual knowledge of that fact; or

(b) the court is satisfied that –

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) he or she fails to obtain information to confirm the existence of that fact.

(3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both -

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.

The description of the concept ‘knowledge’ is in accordance with the knowledge element of ‘intent’ as a form of guilt. It includes actual knowledge, as well as constructive knowledge of a fact. Constructive knowledge exists where a court is satisfied that a person believed that there is a reasonable possibility that a fact exists, but fails to obtain information to confirm the existence of the fact.

In practical terms, this means that an individual who believes that there is a possibility that the property dealt with is the proceeds of criminal activities, but turns a blind eye to the possibility, may expose him or herself to liability.

The description of ‘ought reasonably to have known’ is in accordance with the manner in which the knowledge element relates to negligence as a form of blameworthiness. The phrase refers to a fact of which a diligent and vigilant person would be aware. The general knowledge, skill, training and experience are attributed to such an individual in the position in question, as well as the actual knowledge, skill, training and experience of the person whose actions are under consideration.

To put this in practical terms, an individual ought to be aware of the fact that he or she is dealing with the proceeds of criminal activities if a reasonably diligent and vigilant person in his or her position, with the knowledge, skill, training and experience that may be expected of such a person, would have been aware of dealing with illegally obtained property.

The definition of the money-laundering offence in the Prevention of Organised Crime Act clearly includes both intent and negligence as required forms of guilt. These may appear to be technical or legalistic issues, but could have serious consequences for people or organisations that do not take due note of their inclusion in the Act.

The Prevention of Organised Crime Act now clearly defines the knowledge element to include facts that a person believes may possibly exist, without having actual knowledge of such facts. It means that there is more room for a court to conclude from the surrounding circumstances of a case that a person was aware of the existence of such facts. The effect is that whenever something appears to be out of the ordinary, a person can no longer ignore it and avoid liability in this manner.

Furthermore, by expressly describing negligence, the Prevention of Organised Crime Act places a duty of diligence on every person and organisation that are at risk of coming into contact with the proceeds of criminal activities. This duty entails that persons should acquire the knowledge, skill and experience and undergo the training that will be necessary to identify situations where they may be dealing with the proceeds of criminal activities. The duty also requires that persons should, in fact, constantly apply their knowledge, skill, training and experience to ensure that they are alert when coming across something out of the ordinary.

In short, the definition of the money-laundering offence makes it clear that a person will not be allowed to excuse him or herself by claiming, "I did not know."

It may be helpful to give an example of what may happen in practice to illustrate some of the points made above:

Mr X, a member of an organised criminal group, approaches an insurance agent for assistance in disguising an amount of cash in excess of R1 million. The cash was obtained by members of the group through the sale of contraband. The agent suggests that Mr X purchases a single premium endowment policy. Mr X uses the cash derived from the illegal activity of selling contraband to pay the premium on the policy.

Once the contract to sell the insurance policy is concluded and the premium is paid, the policy becomes an instrument representing the original proceeds of the criminal activity. In this way, the illegally derived cash is converted into a legal financial instrument. This instrument now conceals the nature and source of the illegally derived cash. It also serves to conceal the identity of those with an interest in the illegally derived property, since it is only Mr X’s name that is reflected in the contract.

Even if these consequences did not realise from the insurance contract, it is likely that any of them, or of the other consequences discussed above could realise from the contract.

Both Mr X and the insurance agent can be liable in terms of the money-laundering offence as defined in the Prevention of Organised Crime Act.

The cash used to pay the premium must be the actual proceeds of unlawful activities as defined in the act.

The accused must know or ought reasonably to have known that the cash is the proceeds of unlawful activities.

In Mr X’s case, this does not present a problem. Being a member of the organised criminal group, he will have actual knowledge of this fact.

The agent may have constructive knowledge of this fact. If circumstances such as the large amount in cash in small denominations used to pay the premium raised his suspicions over the legal source of the money and he chose to ignore this and continued to conclude the contract, he will be regarded as having knowledge of its illegal source.

If these circumstances did not raise any suspicions in the agent, but a reasonable person in the same circumstances would have become suspicious and desisted from entering into the contract, the agent will be regarded as being negligent.

Assisting another to benefit from the proceeds of unlawful activities

The Prevention of Organised Crime Act covers the offence of assisting another to benefit from the proceeds of unlawful activities:

Assisting another to benefit from proceeds of unlawful activities

5. Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby -

(a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

(b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,

shall be guilty of an offence.

The action described in this offence constitutes entering into an agreement or arrangement with another person regarding certain property. The agreement or arrangement is qualified by one of two consequences. The first consequence is that the retention or control of the proceeds of criminal activities by the other person is facilitated. The other is that the proceeds of the criminal activities are used in one of three ways:

- to make funds available to the other person;
- to acquire property on his or her behalf; or
- to benefit him or her in any other way.

In the first case, the facilitation of the retention or control of the proceeds of criminal activities must have been realised for the actual offence to be completed. If this consequence did not realise, the accused may be convicted of an attempt to commit this offence.

In the second case, it is important to note that the consequence is not that the funds are made available to the person in question, that the property is acquired on his or her behalf, or that he or she has benefited in some way. The required consequence of the agreement or arrangement entered into is only that the proceeds of the criminal activity have been put to use to achieve one of these purposes. The offence will have been completed once the proceeds are used with one of these purposes in mind, regardless of whether the purpose is in fact achieved.

The individual performing the action must be somebody other than the person who initially obtained the proceeds. It can be anyone who launders the proceeds by entering into a transaction with either the criminal who had derived the proceeds, or another person who has control over these proceeds or stands to benefit from them.

The property used to perform the action must be the 'proceeds of unlawful activities'. The definition of such in the Prevention of Organised Crime Act will apply in this respect.[35] This means that the court will have to refer to facts presented in evidence that can be objectively determined when considering the nature of the property involved. These facts would have to show that the nature of the property falls within the definition.

With regard to the property, it is important to note that the description of the offence does not require the terms of the agreement or arrangement directly to involve the property in question. This means that the agreement or arrangement does not have to refer in any way to the property that forms the proceeds of unlawful activities.

It may be helpful again to refer to the earlier example of what may happen in practice to illustrate the points made above about the relationship between the agreement or arrangement entered into and the proceeds of unlawful activities:

Mr X, a member of an organised criminal group, approaches an insurance agent for assistance in disguising an amount of cash in excess of R1 million. The cash was obtained by members of the group through the sale of contraband. The agent suggests that Mr X purchase a single premium endowment policy.

The agreement entered into between the agent and Mr X will be a standard form insurance contract. Its terms will not refer to the source from which the premium is to be paid. Mr X, however, will use the cash derived from the illegal activity of selling contraband to pay the premium.

Once the contract is concluded and the premium is paid, the insurance policy becomes an instrument representing the original proceeds of the unlawful activity. This instrument now facilitates Mr X's control over the proceeds.

The policy can be used to make funds available to Mr X, for example, by surrendering the policy. It can also be used to acquire property by using the policy as security for a credit agreement. The fact that the policy is offered as security is sufficient proof that it is used as required to be regarded as an offence, even if the credit is not extended on the security of the policy.

The required form of guilt is expressed in the phrase 'knows or ought reasonably to have known'. This is the same phrase that is used in the money-laundering offence in section 4 of the Prevention of Organised Crime Act. The descriptions of the knowledge requirement and the 'ought to have known' requirement that appear in section 1 of the act also apply to this offence.

The definition of this offence in the Prevention of Organised Crime Act clearly includes both intent and negligence as required forms of guilt. The remarks made above about the duties of diligence and vigilance placed on persons and organisations that are at risk of coming into contact with the proceeds of criminal activities also apply in respect of this offence.

Acquisition, possession or use of the proceeds of unlawful activities

The last of the money-laundering related offences contained in the Prevention of Organised Crime Act is that of acquiring, possessing or using the proceeds of unlawful activities:

Acquisition, possession or use of proceeds of unlawful activities

6. Any person who -

(a) acquires;

(b) uses; or

(c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.

This offence consists of one of three actions undertaken with the proceeds of unlawful activities:

- acquiring the proceeds of unlawful activities;
- using the proceeds of unlawful activities; or
- possessing the proceeds of unlawful activities.

The property must be the proceeds of unlawful activities as defined in the Prevention of Organised Crime Act. Somebody other than the person acquiring, using or possessing these proceeds must have committed the unlawful activities from which the property has been derived.

The required form of guilt is expressed in the phrase 'knows or ought reasonably to have known'. This is the same phrase used in section 4 and section 5 of the act. The descriptions of the knowledge and 'ought to have known' requirement that appear in section 1 of the act also apply to this offence.

As is the case with the money-laundering and assisting offences, the definition of this offence clearly includes both intent and negligence as required forms of guilt. The remarks made above about the duties of diligence and vigilance placed on persons and organisations that are at risk of coming into contact with the proceeds of unlawful activities also apply in respect of this offence. In fact, these remarks are probably more pertinent to this offence than to the money-laundering and assisting offences. Most organisations in the financial sphere will come into contact with proceeds of unlawful activities at some stage in their existence. They are therefore even more likely to fall victim to this offence than to the other two discussed above.

Reporting of information

The Prevention of Organised Crime Act also provides for a reporting duty.[36] The reporting duty defined in the Act is somewhat wider than its predecessor in the Proceeds of Crime Act:

Failure to report suspicion regarding proceeds of unlawful activities

7.(1) Any person who carries on a business or is in charge of, or manages a business undertaking or who is employed by a business undertaking and who suspects or ought reasonably to have suspected that -

(a) any property which comes into his or her possession or the possession of the said business undertaking is, or forms part of, the proceeds of unlawful activities;

(b) a transaction to which he or she or the business undertaking is a party will facilitate the transfer of the proceeds of unlawful activities; or

(c) a transaction to which he or she or the business undertaking is a party and which is discontinued -

(i) may have brought the proceeds of unlawful activities into possession of the person or business undertaking; or

(ii) may have facilitated the transfer of the proceeds of unlawful activities, had that transaction been concluded,

must report his or her suspicion and all available information concerning the grounds on which it rests, within a reasonable time to a person designated by the Minister and shall take all reasonable steps to discharge such obligation.

(2) A report under subsection (1) shall be accompanied by copies of documentation directly relevant to that suspicion and the grounds on which it rests.

(3) A person to whom a report may be made under subsection (1) may, in writing, require the person making the report to provide him or her or an official identified in the request with -

(a) particulars or further particulars of any matter concerning the suspicion to which the report relates and the grounds upon which it rests; and

(b) copies of all available documents concerning such particulars or further particulars.

(4) When a person receives a request under subsection (3) he or she shall furnish the person who made the request with the requested particulars or further particulars and copies of documents to the extent that such particulars or documents are available to him or her within a reasonable time.

(5)(a) No obligation as to secrecy and no other restriction on the disclosure of information as to the affairs or business of another, whether imposed by any law, the common law or any agreement, shall affect any obligation imposed under this section to report or disclose information or to permit access to any registers, records or other documents unless that obligation of secrecy or other restriction is based on the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney so as to enable him or her to provide advice, to defend the client or to render other legal assistance to the client in connection with an offence under any law in respect of which the client is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an investigation with a view to institute criminal proceedings is being conducted against him or her.

(b) No liability based on a breach of an obligation as to secrecy or any restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, shall arise from a disclosure of any information in compliance with any obligation imposed by this section.

(6) A person who is a party to a transaction in respect of which he or she forms a suspicion which in his or her opinion should be reported under subsection (1), may continue with that transaction and must ensure that all records relating to that transaction are kept and that all reasonable steps are taken to discharge the obligation under this section.

(7) Any person who fails to comply with an obligation contemplated in this section shall be guilty of an offence.

The reporting duty applies to all individuals engaged in a business, as well as persons managing or employed by a business.

This duty deals with three different scenarios where reporting must take place. The first is where property comes into the possession of the person or business concerned. In this case, a suspicion that the property was derived from unlawful activities must be reported.

The second is when a specific transaction involving the person or business concerned, takes place. In this case, the suspicion that the transaction will facilitate the transfer of the proceeds of unlawful activities must be reported.

The third is when a transaction that involves the person or business concerned has been discontinued. In this case, a suspicion that the transaction, had it been concluded, may either have brought the proceeds of unlawful activities into the possession of the person or business, or may have facilitated the transfer of these proceeds, must be reported.

In terms of the Prevention of Organised Crime Act, reporting must be directed to a person designated by the minister for Justice and Constitutional Development. The designation of the Commercial Crime Branch of the SAPS, made under section 31 of the Proceeds of Crime Act, remains in force.[37]

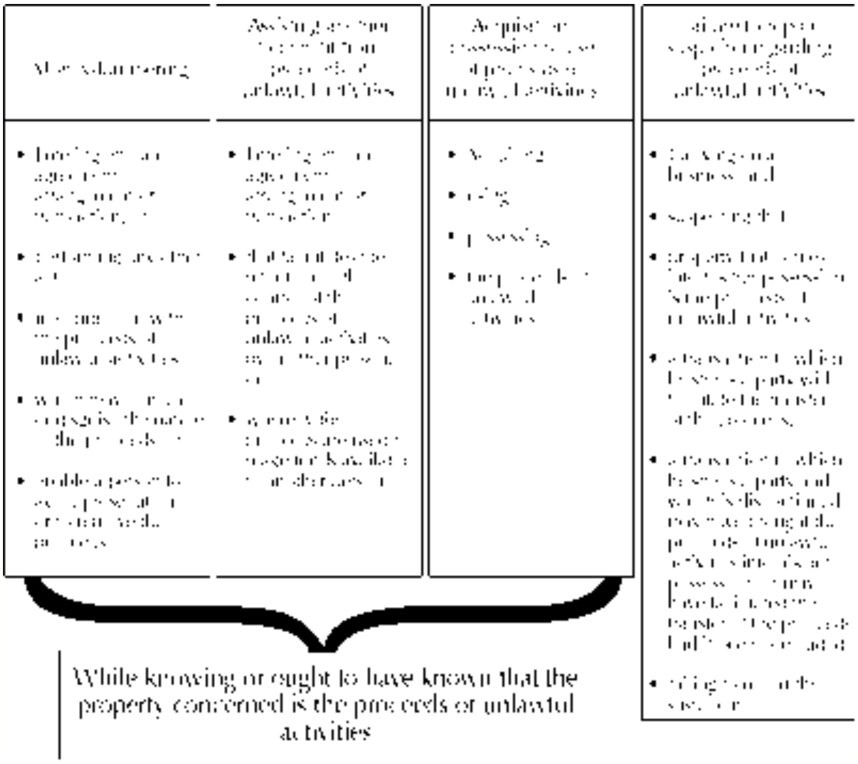
The reporting duty entrenched in the Prevention of Organised Crime Act also provides for procedural matters concerning the report. Copies of the documentation directly relevant to the suspicion and the grounds on which it rests must accompany the report. This will vary from case to case, but may typically include deposit slips, invoices, order forms, and other relevant documentation.

The person to whom the report is made, may request, in writing, that the person making the report furnishes particulars regarding the suspicion and the grounds upon which it rests, as well as copies of documentation containing these particulars.

A person disclosing any information in terms of this reporting duty is protected from liability based on a breach of confidentiality or secrecy. Conversely, an obligation of secrecy or confidentiality does not absolve any person from disclosing such information. The only exception to this is the common law privilege between a client and an attorney where the attorney is defending the client in criminal proceedings.

The Prevention of Organised Crime Act provides specifically that a person who has reported a suspicion about a transaction to which he or she is a party may continue with the transaction. He or she must then ensure that all records relating to the transaction are kept and that the obligations of this reporting duty are further discharged. The records referred to here are all those that would be created in the normal course of the business of the particular organisation where the transaction takes place. This provision does not create a new obligation on persons or organisations to create records of transactions.

Figure 2: Money-laundering offences in the Prevention of Organised Crime Act of 1998



Reporting defence

The Prevention of Organised Crime Act provides for the defence of persons making reports in terms of section 7 of the Act.38

Defence

7A. If a person is charged with negligently committing an offence under section 2 (1) (a) or (b), 4, 5 or 6, that person may raise as a defence the fact that he or she had reported a suspicion in terms of section 7.

The fact that a person has reported a suspicion that property may be the proceeds of unlawful activities will be a defence against a charge that he or she had negligently committed a money-laundering offence, and possibly also an offence of racketeering in terms of section 2 of the Prevention of Organised Crime Act.

If a person is charged with intentionally committing one of these offences, he or she will not be able to rely on the reporting defence of the Prevention of Organised Crime Act. If the accused's defence is based on an absence of intent, the fact that he or she had reported a suspicion may be tendered to support this claim. The mere fact that the report had been made, however, should not exclude the possibility that the court may find that the accused had nevertheless intended to commit the money-laundering offence.

Confiscation and forfeiture

The recovery of the proceeds of criminal activity can have a significant impact on the ability of organised criminal groups to perpetuate their criminal activities. For this reason, combating money-laundering, on the one hand, and recovering the proceeds of criminal activity, on the other, should form two components of a larger strategy to combat organised crime.

The Prevention of Organised Crime Act contains two separate procedures for depriving criminals of the proceeds of their activities: the confiscation procedure,[39] and the civil forfeiture procedure.[40]

The confiscation procedure may only be instituted once a person is convicted of an offence.[41] The procedure consists of an enquiry instituted by the trial court at the request of the public prosecutor. The purpose of the enquiry is to determine the benefit which the offender has derived from the offence of which he or she is convicted, as well as from other related unlawful activities. This enables the court to order the confiscation of property to the value of the benefit through issuing a confiscation order.[42] The confiscation order is similar to a judgment for the payment of a sum of money and is made in addition to any other sentence that the court may impose.

Although the confiscation enquiry may only be instituted after conviction, the procedure to be followed at the enquiry is a civil procedure.[43] This means that the rules of evidence applicable in civil proceedings apply at such an enquiry and that the burden of proof is one of a balance of probabilities.

For a confiscation order to function effectively, it must be supported by a proactive measure to obtain control over the offender's realisable property before issuing a confiscation order. This is necessary to prevent a person who may be subjected to a confiscation order from disposing of property that may be used to satisfy the order, or from diminishing its value before the confiscation order is issued. Such an order is referred to as a restraint order.[44] The aim of the restraint order is to freeze the financial position of the offender or suspected offender, and may be granted even if the investigation is still pending.

The civil forfeiture procedure allows for the forfeiture of property without first obtaining a conviction, or indeed instituting a criminal prosecution, against any person. It is a procedure based on the nature of the affected property itself and is therefore sometimes referred to as an action *in rem*. The property in question must be tainted, either by being the proceeds of unlawful activities, or being used in the commission of an offence.[45]

The procedure is initiated by issuing a preservation of property order.[46] This order serves to gain control over property that may have to be forfeited to the state, similar to a restraint order in the confiscation procedure.

A hearing to determine whether the property is indeed tainted follows the preservation of property order.[47] This must be proven during the hearing on a balance of probabilities. A person with an interest in the property concerned may participate in the forfeiture hearing in one of two ways. He or she may oppose the application on the basis that the property is not tainted. Alternatively, he or she may apply for the exclusion of his or her interest in the property on the basis that he or she was unaware that the property is tainted.[48] If the court finds that the property is tainted, it issues an order which declares the property forfeit to the state.[49]

This is potentially a very powerful tool with which to combat organised crime. Since the action is *in rem* (based on the nature of the property in question), the evidence in support of this type of forfeiture does not have to relate directly to the activities of a specific person. It is therefore possible to act against the illegally obtained property of the members of an organised criminal group without linking their activities directly to a specific offence.

The proceeds of criminal activities that are confiscated or forfeited in terms of the Prevention of Organised Crime Act are deposited into a special account of the National Revenue Fund, called the Criminal Assets Recovery Account.[50] The proceeds of criminal activities that are deposited into this account must be used for:

- the allocation of property and money from the account to specific law enforcement agencies; and
- the allocation of property and money to institutions, organisations or funds that render assistance in any manner to victims of crime.

Racketeering

Apart from the offences and other procedures dealing with the proceeds of criminal activities, the Prevention of Organised Crime Act also addresses the phenomenon of organised crime at a more direct level. This is achieved by addressing the way in which criminal activities are carried out by an organised criminal group. These activities are normally structured in such a way that the decisionmakers within the organisation are not connected directly with the activities of the rest of the organisation.

For this reason, the Prevention of Organised Crime Act contains a range of offences related to patterns of racketeering activity.[51] These offences are focused on the level of participation in criminal activities of the organised criminal group through control and direction, rather than the actual carrying out of those activities that are normally associated with the middle to high-ranking members of the group:

Offences

2(1) Any person who –

(a)(i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b)(i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(c)(i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(d) acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity; or

(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f), within the Republic or elsewhere, shall be guilty of an offence.

Although these provisions are all contained in one section, they actually constitute a number of offences. The action in each of these offences consists of different elements. However, two elements feature in all of the offences:

- the existence of an enterprise; and
- a pattern of racketeering activity.

Both these elements are defined in the Prevention of Organised Crime Act:[52]

'enterprise' includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity;

'pattern of racketeering activity' means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1 …

This means that, in respect of all racketeering offences, the existence of an enterprise has to be established. The enterprise can be one that operates legally or a criminal enterprise. In other words, the enterprise can be a legitimate business concern or an organised criminal group.

In the majority of cases where the enterprise is an organised criminal group, the establishment of an enterprise will hinge on an association or union of individuals. This means that the enterprise will consist of a group of persons with some structure or hierarchy in the relations between the persons associated with the group.[53]

It may be necessary to make use of a variety of investigative techniques in order to establish the existence of an enterprise and a particular person's association with such an enterprise. These techniques may include covert investigative techniques such as electronic surveillance, undercover operations and the use of informants.

The pattern of racketeering activity should be easier to establish, since the elements of such a pattern are widely defined in the Prevention of Organised Crime Act.

The advantage of the structure of the racketeering offences is that the persons who are normally removed from the actual execution of criminal activities by the organised criminal group can be connected to these offences through their involvement in the group. The two most important racketeering offences in this regard are the conducting of the enterprise's affairs through a pattern of racketeering activity while being associated with an enterprise,[54] and the managing of the operation of an enterprise knowing that other persons associated with the enterprise participate in its affairs through a pattern of racketeering activity.[55]

The racketeering and money-laundering offences included in the Prevention of Organised Crime Act are seen in a very serious light by the legislature. This is clearly demonstrated by the maximum penalties prescribed for these offences. The racketeering offences carry a penalty of R1 000 million or imprisonment for life.[56] This is the highest penalty ever prescribed in a South African statute. The penalty for any of the three money-laundering offences is R100 million or imprisonment for 30 years.[57] The penalty for the failure to report the suspicion that criminal proceeds are involved in a transaction is a fine of R300 000 or imprisonment for 15 years.[58]

Chapter 4
Future Measures Against Money-Laundering

Overview

The picture of South Africa's legal response to money-laundering has not yet been completely drawn. The part that is still missing is a *system of administrative measures* to control money-laundering and to facilitate its prevention, detection, investigation and prosecution.

This chapter explores the elements of an administrative money-laundering control structure. It includes customer identification, recordkeeping, reporting of information, and formulating internal policies on these elements by the institutions involved.

Another element of crucial importance is the establishment of a financial intelligence unit. Such a unit should serve as a conduit for information from the private sector to law enforcement authorities. At the same time, the unit should add value to the information passed on to law enforcement authorities by performing an analysis of the reported information.

Legislation on the establishment of a financial intelligence unit and money-laundering control measures is in the process of being promulgated. Elements of the bill being prepared that will most probably find their way into the final statute, are discussed, including the scope of the bill, the establishment of a financial intelligence centre or unit, the money-laundering control measures referred to above and the administrative enforcement of the bill.

Money-laundering control measures

The next step in the process of developing legislation to combat money-laundering is to introduce control measures to complement the criminalisation of money-laundering activities.

One of the items on the shopping list of a money launderer is an efficient financial system. Such a system can be used to move funds away from their place of origin, to perform numerous transactions with these funds and, finally, to make these funds available to the offender under the guise of being legitimate earnings. The importance of the financial system to the money launderer is that it is the device that enables criminals to retain control of and enjoy their illegally gained income. If the control over access to the financial system is weak, it will make the system more attractive to the money launderer.

The criminalisation of money-laundering activities alone will not provide an effective measure to combat money-laundering. However, the fact that a money-laundering scheme needs to involve the financial system to accomplish its objective can be turned to the advantage of law enforcement authorities. This is possible by introducing administrative control measures that apply to the organisations within the business community.

The aim of a system of administrative control measures should be to establish a manner of conducting business that will impede and deter money-laundering activities. This should facilitate the prevention, identification, investigation and prosecution of money-laundering activities. To accomplish this, a legislative framework comprising administrative control measures must be introduced.

Scope of control measures

The first issue is those persons or bodies which should be involved in an administrative control structure. The banking sector immediately comes to mind. It is true that banks are at risk of being abused for purposes of money-laundering schemes. But it will be naive to assume that the banking sector alone should carry the responsibility of guarding against money-laundering. In the interest of maximum effectiveness, the scope of an administrative framework should not be limited to the mainstream banking sector.

Elements of a control structure

The essential elements of a control structure must be in place to ensure its success. The starting point of an administrative system that would assist in combating money-laundering is an institution's ability to identify its customers. This is the cornerstone of a 'know your customer' policy.

A second element is effective recordkeeping, which is essential to the investigation of money-laundering schemes. The only way of identifying the transactions through which the proceeds of crime have been laundered and those who are involved, is to follow the so-called audit trail. By identifying the nature of the transaction and the true participants in the transaction, the money-laundering scheme can be exposed. This will only be possible if institutions involved have kept sufficient records of transactions. Mechanisms to ensure effective recordkeeping must therefore be part of an administrative control scheme.

The most important component of an administrative control structure is a duty to report specific information. The aim of a reporting system should be to identify transactions involving the proceeds of crime. Such transactions will probably, upon further investigation, appear to be part of a money-laundering scheme. It is therefore not expected of institutions to identify the money-laundering scheme itself, but to identify transactions that may involve illegally derived assets, or at least to report the suspicion that particular assets have an illegal origin.

When systems for reporting information are considered, three models are presented: a suspicion-based reporting system, a threshold-based reporting system and a combination of threshold and suspicion-based reporting.

Suspicion-based reporting has the advantage that the person within the institution making the report has had to apply his or her mind to the matter at hand. As a result, the investigating authority is provided with information on the grounds upon which the suspicion was founded on which to base an investigation. This leads to a better quality of disclosure of information to the investigating authority.

A system that ties the reporting requirement to criteria that can be easily ascertained, such as a cash amount exceeding a set threshold, should be less complicated for institutions to comply with. With such a system, the transactions that should be reported can be easily identified and relayed through the proper channels.

A major advantage of a threshold-based reporting system is that it can ensure that a transaction at a reporting institution that appears totally innocent when seen in isolation, is reported and may warrant investigation when compared with information reported by other institutions. Another advantage of a threshold-based system is that it tends to cause a variation in the behavioural pattern of criminals who want to launder the proceeds of crime. Such criminals will usually attempt to structure the transactions aimed at placing these proceeds in the financial system in order to avoid the threshold. In doing so, they may perform transactions that do not make any economic sense and will therefore immediately appear suspicious. In this way, threshold-based reporting can complement suspicion-based reporting.

An important issue in terms of reporting information is the protection of the person making the report. Such persons or institutions should be protected from any liability for the breach of confidential relationships or any other form of civil liability. This protection should override any privilege or obligation to secrecy or confidentiality, irrespective of the basis for its existence.

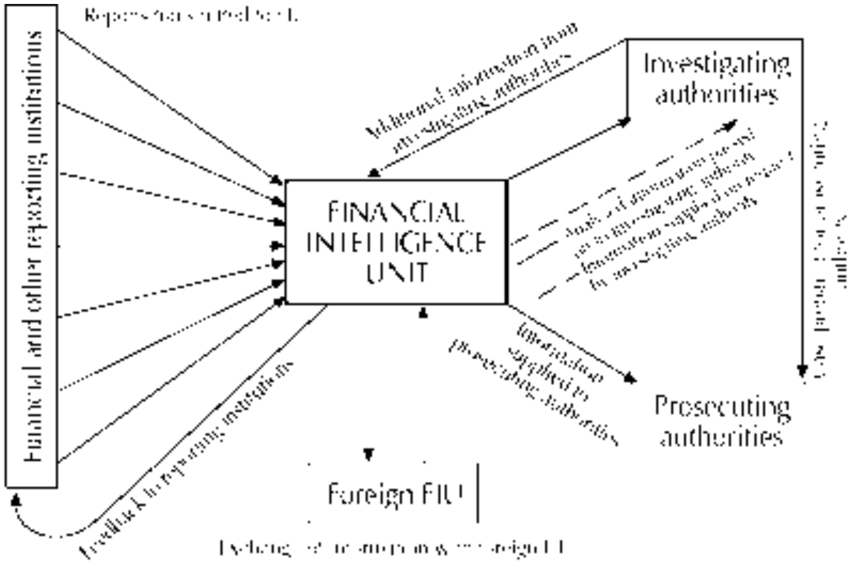
The protection of persons reporting information, especially in respect of suspect transactions, however, should go further than protection against liability. The identity of such a person and the fact that he or she has made such a report should be kept absolutely confidential for obvious reasons. This will mean that the investigating and prosecuting authorities will not be able to base their case on the fact that a report was made, or that the person who made the report was suspicious of the relevant transaction. The reporting of the relevant transaction will accordingly only serve as intelligence to identify an occurrence that should be investigated and will not in itself provide evidence of any criminal conduct. It will be the responsibility of the investigating and prosecuting authorities to build a case upon the relevant bank records and other evidence they may find.

In their approach to the implementation of a framework of administrative measures, institutions should follow procedures that are based on responsible business practices. This entails that institutions should develop internal policies to ensure the implementation of procedures to facilitate compliance with an administrative control structure.

Training is crucial to the success of a system of administrative control measures. Institutions should therefore develop training policies to ensure that staff at all levels are aware of the phenomenon of money-laundering and its effects. Staff should also be knowledgeable about the relationship between money-laundering and the proceeds of crime, and should receive guidance on the particular circumstances that should raise suspicion.

An essential element of a system to control money-laundering is the establishment of a body to record and utilise reported information. Such bodies are commonly known as financial intelligence units. The main task of a financial intelligence unit is to receive information through a reporting system, to analyse the information and to disseminate information that warrants investigation to the appropriate investigating authorities (figure 3).

Figure 3: Basic concept of a financial intelligence unit



A financial intelligence unit serves as a conduit for information between financial and other institutions in the private sector and law enforcement authorities. The information supplied to such a unit may relate to criminal activity, but may not be an absolute indication of such activity.[59] For this reason, value must be added to the information, typically referred to as intelligence, to increase its usefulness to investigating authorities. This value is added through the analysis of the reported information in relation to other information accessible to unit.

A bill on money-laundering control

The South African Law Commission published a report on money-laundering in 1996.[60] The report contained recommendations on the type of administrative control structure described above. Annexed to the report is a recommended bill to embody the commission's recommendations.

The Law Commission's report was submitted to the minister of Finance who appointed a team of advisors to consider the report and make recommendations on its implementation. Based on the advice of the team, the Department of Finance has produced the Financial Intelligence Centre Bill. At the time of writing, the bill has been published for comment. It is foreseen that it will be tabled in parliament during the 2001 parliamentary session.

Scope of application

The Financial Intelligence Centre Bill will apply to a number of institutions or classes of institutions that participate in the economic sphere. These institutions are thought to be particularly vulnerable to abuse as a result of money-laundering. The institutions to which the bill applies are listed in a schedule to the bill and are defined as "accountable institutions."[61] The following is a paraphrased extract of the schedule listing these institutions:

Schedule 1

An attorney

A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act of 1988

An estate agent

A financial instrument trader

A unit trust management company

A bank

A mutual bank

A person, other than a bank, who collects money from other persons into an account and deposits the money in the account into a bank account on behalf of those persons

A long-term insurer, an insurance broker and an agent of an insurer

A short-term insurer, an insurance broker and an agent of an insurer

A casino or gambling institution

A dealer in foreign exchange

A person who lends money against the security of securities

A person who renders investment advice or investment-brokering services

A person who sells or redeems travellers' cheques, money orders or similar instruments

The Post Office Savings Bank

A public accountant who provides investment advice or an investment service

A member of a stock exchange

A totalisator agency board or a person operating a totalisator betting service

An institution or body designated by the minister of Finance

A person who has been approved by the Registrar of Stock Exchanges

A person who has been approved by the Registrar of Financial Markets

Although this is a long and comprehensive list, it can, by nature, never be complete. Experiences as a result of the implementation of this bill will show which institutions, currently not listed, should be included. The effective implementation of the bill, and the consequent tightening of control measures at accountable institutions, may also have the effect that money launderers will alter the ways in which they conduct their activities. This will put other institutions at risk that will not be on the list when the bill is enacted.

For these reasons, the bill will allow the minister of Finance to include institutions or classes of institutions in the schedule through publication of a notice in the *Government Gazette*.[62] The bill will likewise allow the minister to remove institutions or classes of institutions from the list. The bill will provide further flexibility by allowing the minister of Finance to exempt an accountable institution or class of accountable institutions from any or all of its provisions.

Certain provisions of the bill will also apply to supervisory and regulatory bodies. These are listed in schedule 2 of the bill:[63]

Schedule 2

List of supervisory bodies

1 The Financial Services Board
2 The Registrar of Banks
3 The Registrar of Companies
4 Any law society
5 The Estate Agents Board
6 The Public Accountants' and Auditors' Board
7 The South African Revenue Service

The minister of Finance will also have the power to amend this list.[64]

The Financial Intelligence Centre

The bill provides for a number of measures that are aimed at improving the state's ability to address money-laundering. The first of these is the establishment of a financial intelligence unit called the Financial Intelligence Centre.[65]

The proposed functions of the Financial Intelligence Centre are described as follows:[66]

Functions

4(1) To achieve its objective the Centre must –

(a) collect, process, analyse and interpret all information disclosed to it and obtained by it in terms of this Act;

(b) inform, advise and cooperate with investigating authorities and the intelligence services;

(c) supervise compliance with this Act by accountable institutions;

(d) give guidance to accountable institutions to combat money laundering activities; and

(e) promote the appointment by accountable institutions and supervisory bodies of persons to specialise in measures to detect and counter money laundering activities.

It appears that the Financial Intelligence Centre is intended to have a dual function. On the one hand, it will collect information supplied through the reporting structures of the bill and supply intelligence on possible money-laundering activities to investigating authorities. On the other hand, it will participate in the enforcement of the bill by supervising compliance with its provisions and giving guidance in this regard to accountable institutions. These functions are in accordance with the functions generally associated with financial intelligence units across the world.[67]

Money-laundering control measures

The bill will introduce a number of control measures that will apply to accountable institutions. These can be divided into four categories:

- customer identification requirements;
- recordkeeping requirements;
- reporting of information; and
- developing internal rules.

Customer identification

The 'know your customer' requirements in the bill are mainly focused upon identifying clients or prospective clients at various stages of a business relationship.[68] The aim with these provisions is the elimination of anonymous accounts and the identification of hidden principals or beneficial owners. Accountable institutions should establish the actual ownership of accounts, and should refuse to enter into transactions with clients who fail to provide proof of their identity. For example, a bank will not be allowed to operate an account identified only by a number, under a pseudonym, or in the name of an agent.

The minister of Finance will prescribe the steps an accountable institution will have to take to identify a client through regulatory measures.[69] These steps may differ from one type of accountable institution to another.[70]

Recordkeeping

The requirement to keep records is closely related to the requirements to identify customers:[71]

Record to be kept of business relationships and transactions

23(1) Whenever an accountable institution establishes a business relationship or concludes a transaction with a client, whether the transaction is a single transaction or concluded in the course of a business relationship which that accountable institution has with the client, the accountable institution must keep record of -

(a) the identity of the client;

(b) if the client is acting on behalf of another person -

(i) the identity of the person on whose behalf the client is acting; and

(ii) the client's authority to establish that business relationship or to conclude that single transaction on behalf of that other person;

(c) if another person is acting on behalf of the client -

(i) the identity of that other person; and

(ii) that other person's authority to act on behalf of the client;

(d) the manner in which the identity of a person referred to in paragraph (a), (b) or (c) was established;

(e) the nature of that business relationship or transaction;

(f) all accounts at that accountable institution that are involved in -

(i) transactions concluded in the course of that business relationship; or

(ii) that single transaction; and

(g) the name of the person who obtained the information referred to in paragraphs (a) to (f) on behalf of the accountable institution.

(2) Records kept in terms of subsection (1) may be kept in electronic form.

This duty entails that an accountable institutions will have to keep record of the identities of persons involved in transactions and of the nature of transactions entered into. The records are to be kept for a period of five years after a business relationship is terminated, or a transaction concluded.[72]

The minister of Finance will prescribe the manner in which an accountable institution will have to keep the required records through regulatory measures.[73] This may differ from one type of accountable institution to another.[74]

Reporting of information

The bill contains a number of provisions dealing with the reporting of information. The first of these is the duty to report transactions involving cash amounts above a prescribed limit:[75]

Cash transactions above prescribed limit

28. An accountable institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount -

(a) is paid by the accountable institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or

(b) is received by the accountable institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.

The minister of Finance will prescribe the limit through regulatory measures. The bill envisages that the minister will be able to prescribe different limits for specific types of transactions and different types of accountable institutions.[76] The minister will also be able to adapt these limits to changing circumstances without having to effect legislative amendments.

A second reporting duty relates to the reporting of information on suspicious transactions:[77]

Suspicious transactions

29(1) If an accountable institution suspects or reasonably ought to have suspected that, as a result of a transaction concluded by it, it has received or is about to receive the proceeds of criminal conduct or has been used or is about to be used in any other way for money laundering purposes, it must, within the prescribed period after the suspicion arose or reasonably ought to have arisen, report to the Centre -

(a) the grounds for the suspicion; and

(b) the prescribed particulars concerning the transaction.

(2) If an accountable institution suspects or reasonably ought to have suspected that, as a result of a transaction which it is asked to conclude or about which enquiries are made, it may receive the proceeds of criminal conduct or in any other way be used for money laundering purposes should the transaction be concluded, it must, within the prescribed period after the suspicion arose or reasonably ought to have arisen, report to the Centre -

(a) the grounds for the suspicion; and

(b) the prescribed particulars concerning the transaction.

Two different scenarios are foreseen with this provision. The first is where an accountable institution has entered into a transaction with a client. The substance of the suspicion is that the accountable institution has received the proceeds of crime, or has been used in some way for money-laundering purposes as a result of the transaction.

The second is where a client approaches an accountable institution to enter into a transaction that subsequently does not take place or is discontinued. In this case, the substance of the suspicion is that the transaction would have caused the accountable institution to receive the proceeds of crime, or to be used for money-laundering purposes, had the transaction been concluded.

A third reporting duty relates to the electronic transfer of funds upon instructions of a client:[78]

Electronic transfers of money to or from the Republic

30. If an accountable institution through electronic transfer sends money in excess of a prescribed amount out of the Republic or receives money in excess of a prescribed amount from outside the Republic on behalf, or on the instruction, of another person that is not a bank, it must, within the prescribed period after the money was transferred, report the transfer together with the prescribed particulars concerning the transfer to the Centre.

An accountable institution will have to report the electronic transfer from South Africa of funds exceeding a prescribed limit. Likewise, an accountable institution will have to report the fact that it has received funds exceeding a prescribed limit from outside South Africa by means of electronic transfer. The duty will not apply if the instructing client is a bank. The minister of Finance will prescribe the limit through regulatory measures.

The reporting duties referred to above will all apply to accountable institutions. The bill also contains reporting duties that will not apply to accountable institutions. The supervisory bodies listed in schedule 2 will be required to report certain information.[79]

Reporting by supervisory bodies

31. If a supervisory body suspects that an accountable institution, as a result of a transaction concluded by the institution, wittingly or unwittingly has received or is about to receive the proceeds of unlawful activities or has in any other way been used for money laundering purposes, it must -

(a) within the prescribed period, report to the Centre -

(i) the grounds for the suspicion; and

(ii) the prescribed particulars concerning the transaction; and

(b) retain the records held by it which relate to that report, for such period as the Centre may reasonably require.

This duty will entail that supervisory bodies will have to report suspicions that accountable institutions have received the proceeds of crime or have been used for money-laundering purposes.

The bill provides for a general reporting duty relating to the conveyance of cash to or from South Africa:[80]

Conveyance of cash to or from the Republic

32(1) A person intending to convey an amount of cash in excess of a prescribed amount to or from the Republic must, before that person conveys the cash into or out of the Republic, report the prescribed particulars concerning that conveyance to a person authorised by the Minister for this purpose.

(2) A person authorised in terms of subsection (1) must without delay send a copy of the report to the Centre.

This duty applies to every person who conveys cash in excess of the prescribed limit across South African borders. The minister of Finance will determine the limit through regulatory measures.

The bill contains a definition of ‘cash’ that is relevant to the reporting duties relating to cash transactions and the conveyance of cash:[81]

The reports in terms of all the reporting duties, except for the reports relating to the conveyance of cash, will be made to the Financial Intelligence Centre. Reports relating to the conveyance of cash will have to be made to a person designated for this purpose by the Minister of Finance. This person will then forward the report to the Financial Intelligence Centre.

An important factor concerning the reporting of information is the effect it may have on the duties of secrecy or confidentiality. The bill will provide that no such duty will affect the duty to report information in terms of the bill:[82]

Reporting duty not affected by confidentiality rules

37(1) No duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance with a provision of this Part.

(2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client.

It is important to note that a general exception is made concerning the privilege between an attorney and a client.

The bill will offer protection to persons or institutions making reports to the Financial Intelligence Centre:[83]

Protection of persons making reports

38(1) No action, whether criminal or civil, lies against an accountable institution, supervisory body or person complying in good faith with a provision of this Part, including any director, employee or other person acting on behalf of such accountable institution, supervisory body or person.

(2) A person who has made, initiated or contributed to a report in terms of a provision of this Part is competent, but not compellable, to give evidence in criminal proceedings arising from the report.

(3) No evidence concerning the identity of a person who made a report in terms of a provision of this Part or the contents of such a report, or the grounds for such a report, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.

(4) No evidence concerning the identity of a person who initiated or contributed to a report in terms of a provision of this Part is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.

The person who makes or initiates a report to the Financial Intelligence Centre will be protected from criminal and civil liability arising from the fact that a report has been made. More importantly, such a person's identity will also be protected. The bill will go so far as to exempt a person making or initiating a report from any obligation to testify in subsequent criminal proceedings arising from the report to the Financial Intelligence Centre.

Internal rules

In order to be able to comply with the control measures discussed above, an accountable institution will have to ensure that its employees are aware of the requirements of the bill and how they affect the way in which they perform their duties. For this reason, the bill will place an obligation on accountable institutions to formulate and implement internal rules concerning the control measures provided for in the bill. The following extract from the bill gives an indication of the matters to be addressed in internal rules:[84]

Formulation and implementation of internal rules

42(1) An accountable institution must formulate and implement internal rules concerning-

(a) the establishment and verification of the identity of persons which the institution must identify in terms of Part 1 of this Chapter;

(b) the information of which record must be kept in terms of Part 2 of this Chapter;

(c) the identification of reportable transactions; and

(d) the training of employees of the institution to recognise and handle suspected money laundering activities.

(2) Internal rules must comply with the prescribed requirements.

(3) An accountable institution must provide a copy of the internal rules to each of its employees involved in transactions to which this Act applies.

The minister of Finance will be able to prescribe through regulatory measures the aspects that accountable institutions will have to address in their internal rules.[85] These may differ from one type of accountable institution to another.[86]

Enforcement

As has been pointed out earlier, one of the expected functions of the Financial Intelligence Centre will be to participate in the enforcement of the bill by supervising compliance by accountable institutions. This will be done by means of administrative inquiries held by the Financial Intelligence Centre about the conduct of an accountable institution that may constitute an offence in terms of the bill:[87]

Administrative inquiries

43(1) If the Centre has reasonable grounds to suspect that an accountable institution has committed an act (including an act of omission) which may constitute an offence in terms of this Act, it must institute an inquiry to establish whether an offence has been committed if -

(a) the institution agrees to submit itself to the inquiry and to abide by any findings made in terms of section 46; and

(b) the institution -

(i) deposits with the Centre an amount determined by the Centre, not exceeding the maximum fine which may be imposed by a court for the alleged offence; or

(ii) makes such other arrangements or complies with such conditions with regard to securing payment of an appropriate penalty as the Centre may determine.

The inquiry can only take place with the co-operation of the accountable institution in question. The amount that an accountable institution deposits with the Financial Intelligence Centre will be used to levy a penalty against the institution if the inquiry results in a finding that the institution, in fact, did contravene a provision of the bill.

Apart from the penalty that will be imposed on an accountable institution, the institution will also face public exposure of its contravention of the bill. The bill will require all findings of inquiries by the Financial Intelligence Centre and the penalties that are imposed to be made public.

Regulatory measures

Many of the effects of the bill will only become apparent when the minister of Finance defines the regulatory measures applicable to the bill. Issues such as the determination of thresholds for reporting of information, steps to be taken to identify customers and ways in which records must be kept have the potential to affect the business of accountable institutions seriously. Consequently, the bill envisages a process of consultation with representatives of accountable institutions, as well as other interested parties before regulatory measures are defined.[88]

Chapter 5
Implementation of Legislation to Curb Organised Crime and Money-Laundering

Overview

The current implementation of legislation against money-laundering and organised crime is considered in this chapter. Broadly speaking, this is the task of the investigating and prosecuting authorities. Within these groupings, there are a number of institutions that may be involved in money-laundering investigations linked to organised crime.

In the SAPS, the investigation of organised crime is the task of the detective service. This service comprises a number of components. Of these components, it is mainly the Commercial Branch and the Component: Organised Crime that will deal with money-laundering investigations. Investigations of criminal activity linked to organised crime are carried out primarily by the Component: Organised Crime, the Component: Specialised Investigations, the Component: Serious and Violent Crimes and the Commercial Branch.

The National Prosecuting Authority comprises offices of Directors of Public Prosecutions for each seat of the High Court. Any of the Directors of Public Prosecutions may institute prosecutions concerning money-laundering and organised crime activities. Apart from the offices of the Directors of Public Prosecutions there is also the office of the National Director of Public Prosecutions. It includes the Investigating Directorates for Serious Economic Offences and for Organised Crime, the Asset Forfeiture Unit, and the Directorate for Special Operations (nicknamed the ‘Scorpions’).

Increasing use is made of specialised, multidisciplinary investigative teams. These teams focus their investigations mainly on specific organised criminal groups, rather than on specific criminal activities. This allows them to conduct their investigations proactively instead of only reacting to crimes that have already been committed. The SAPS and some of the prosecuting authorities such as the Directorate for Special Operations use this approach. The teams involved in such investigations typically include investigators and public prosecutors, as well as other persons such as forensic accountants, when appropriate.

Implementation of the law

The money-laundering and racketeering offences defined in the Prevention of Organised Crime Act form part of the statutory criminal law of South Africa. This means that incidences of these offences, just like any other, are to be investigated by the SAPS and prosecuted by the relevant prosecuting authority. The same applies to the many other forms of criminal activity in which organised criminal groups may become involved.

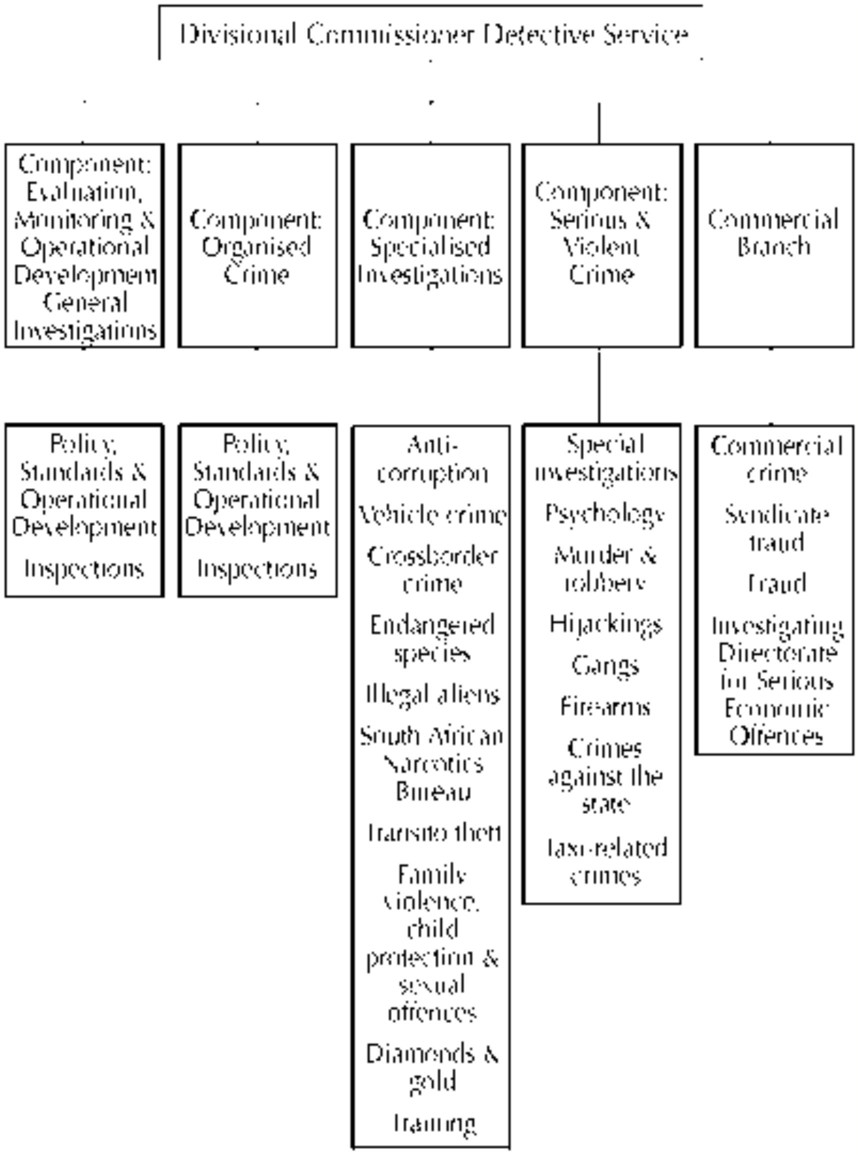
This is a very simplistic view of the matter. Since the elements of a money-laundering scheme are by design misleading, the investigation and prosecution of such a scheme are normally very complex tasks. Other criminal activities of organised criminal groups often take place on a level far removed from the persons who receive the bulk of the proceeds from these activities. These factors make the investigation and prosecution of organised crime activities, and especially money-laundering, tasks for highly skilled and well-resourced investigators and prosecutors.

South African Police Service

The investigation of organised crime activities, including money-laundering, is the responsibility of the detective service of the SAPS.[89] The SAPS has been involved in investigations of organised criminal activities on a professional basis since 1991. Organised Crime Investigation Units at provincial level have been in operation since 1994. Since May 2000, a component within the detective service at the level of the national head office has been responsible for the management functions associated with the investigation of the criminal activities of organised criminal groups.

At national level, the detective service consists of eight components. Of these eight components, five are responsible for the investigation of crime. The remaining three provide support services to the investigative components. The investigative components are Evaluation, Monitoring, & Operational Development; General Investigations; Organised Crime; Specialised Investigations; Serious & Violent Crime; and the Commercial Branch (figure 4).

Figure 4: The investigative components of the Detective Service



Organised crime investigations can be carried out by any of the investigative components of the Detective Service. However, the bulk of the organised crime investigations are carried out by the Component: Organised Crime, the Component: Specialised Investigations and the Commercial Branch. The Commercial Branch and the Component: Organised Crime carry out the majority of money-laundering investigations associated with organised criminal groups. The relation and division of functions between these components will become clear from the discussion below.

The South African Police Service Act of 1995 provides an indication of what should be considered as 'organised crime':[90]

National prevention and investigation of crime

16(1) Circumstances amounting to criminal conduct or an endeavour thereto, as set out in subsection (2), shall be regarded as organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof.

(2) Circumstances contemplated in subsection (1) comprise criminal conduct or endeavour thereto -

(a) by any enterprise or group of persons who have a common goal in committing crimes in an organised manner;

(b) (i) by a person or persons in positions of trust and making use of specialised or exclusive knowledge;

(ii) in respect of the revenue or expenditure of the national government; or

(iii) in respect of the national economy or the integrity of currencies;

(c) which takes on such proportions or is of such a nature that the prevention or investigation thereof at national level would be in the national interest;

(d) in respect of unwrought precious metals or unpolished diamonds;

(e) in respect of the hunting, importation, exportation, possession, buying and selling of endangered species or any products thereof as may be prescribed;

(f) in more than one province or outside the borders of the Republic by the same perpetrator or perpetrators, and in respect of which the prevention or investigation at national level would be in the national interest;

(g) in respect of which the prevention or investigation requires the application of specialised skills and where expedience requires that it be prevented or investigated at national level;

(h) which a Provincial Commissioner requests the National Commissioner to prevent or investigate by employing expertise and making resources available at national level and to which request the National Commissioner accedes;

(i) in respect of which the investigation in the Republic by the Service is requested by an international police agency or the police of a foreign country; and

(j) in respect of which the prevention or investigation by members under the command of a Provincial Commissioner will detrimentally affect or hamper the prevention or investigation of circumstances referred to in paragraphs (a) to (i).

This description, coupled with descriptions of an organised criminal group included in international instruments are used as the criteria upon which criminal activity is judged to determine whether it can be described as organised crime. An example of one such international instrument is the draft United Nations Convention against Transnational Organised Crime:[91]

(a) 'Organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit …

The identification and institution of organised crime investigations happen both proactively and reactively. Reactive investigations are carried out when a crime has been committed and the investigation falls within the responsibility of any of the following components: Evaluation, Monitoring, & Operational Development; General Investigations; Specialised Investigations; Serious & Violent Crime; and the Commercial Branch.

Proactive investigations are identified on the basis of national or provincial organised crime threat analyses that are carried out by the SAPS. Organised crime threat analyses are derived from the national and provincial crime threat analyses as the case may be. The crime threat analyses, in turn, are determined from reports on crime from station level upwards via the provincial structures of the SAPS. Crime threat analyses and organised crime threat analyses are therefore important tools in determining priorities and applying resources with regard to organised crime investigations.

Proactive investigations focus on the higher ranking members of the organised criminal group who are removed from the actual commission of crimes by their subordinates. These investigations are conducted on a project management basis. This means that, for each investigation of this nature, a project plan is developed comprising descriptions of starting and closing dates, intermediate target dates and personnel, as well as the budgetary and other resource implications of the project.

The National Organised Crime Secretariat undertakes the prioritisation and allocation of projects at national level. All the component heads of the detective service are represented in the secretariat. As a consequence, the managements of the investigative components of the detective service jointly undertake the prioritisation and allocation of projects concerning organised crime. This ensures that the correct priority, in accordance with the national organised crime threat analysis, is accorded to each project and that each project is investigated by the most appropriate investigating unit. The National Organised Crime Secretariat is mirrored by provincial counterparts that perform the same function at provincial level.

Single dimensional investigations concerning organised criminal groups (where only one type of criminal activity is involved) are allocated to the unit or component responsible for this type of activity. In the majority of cases, this will be the Commercial Branch or one of the units within the Component: Specialised Investigations such as Vehicle Crime, Illegal Aliens or the SA Narcotics Bureau.

Multidimensional investigations (where a variety of criminal activities are involved) are allocated to the Component: Organised Crime. The objective of the component is to investigate organised crime effectively through the gathering, management, use and dissemination of information concerning organised crime.

Certain criteria must be met before the National Organised Crime Secretariat will allocate a project to the Component: Organised Crime. The criminal activity concerned must consist of the systematic commissioning of serious crimes by an organised criminal group with the view to obtain profit or power. It must extend across the responsibilities of more than one of the investigative components of the Detective Service or across provincial or national borders. All conventional investigative techniques must have been exhausted without success.

Projects allocated to the Component: Organised Crime are undertaken as long-term operations. These operations are aimed at identified organised criminal groups as opposed to the uncovering of specific crimes. In the course of an operation, the Component: Organised Crime makes use of the investigating capacity of provincial Organised Crime Investigating Units. It may also make use of the specialised knowledge of members of other investigating units or components.

The Component: Organised Crime interacts with institutions outside the SAPS in the course of its operations. These institutions include the prosecuting authorities, the Department of Home Affairs, the South African Revenue Service and the various intelligence agencies. The relevance of involving the prosecuting authorities is in the fact that investigations are primarily prosecution-oriented. Investigating teams therefore include members of the local prosecuting authorities or of components of the National Prosecuting Authority such as the Directorate of Special Operations, the Investigating Directorate for Serious Economic Offences and the Asset Forfeiture Unit.

Prosecuting authorities

The National Prosecuting Authority comprises Directors of Public Prosecutions for each seat of the High Court.[92] In practice, a Director of Public Prosecutions is appointed for each provincial seat of the High Court and one for the Witwatersrand Local Division. Apart from these structures, the National Director of Public Prosecutions includes offices of Investigating Directors for Serious Economic Offences and Organised Crime, the office of the Director for Special Operations and the Asset Forfeiture Unit.

The aim of the Asset Forfeiture Unit is to ensure that the confiscation and forfeiture of criminal assets are used effectively. This is in accordance with international experience that has shown that forfeiture provisions will not be applied on a large scale unless a dedicated unit is created for this purpose. The main reason is that a confiscation and forfeiture system normally consists of a complex mixture of criminal and civil laws, as well as a range of concepts that are new to both criminal and civil law. This requires the employment of forfeiture specialists to build up the necessary expertise in order to ensure the effective application of the relevant laws.[93]

The Asset Forfeiture Unit focuses on the application of the confiscation and civil forfeiture provisions included in the Prevention of Organised Crime Act. In this regard, the unit plays an active role by drafting papers used in the course of court proceedings under the at and, occasionally, appearing in such proceedings. The unit also plays a facilitating role, lending assistance in the course of investigations with the aim of effecting confiscation or forfeiture of criminal proceeds.[94]

The office of the Investigating Director for Organised Crime and Public Safety has as its main focus the prosecution of certain violent crimes that are associated with organised crime. These crimes include vehicle hijackings, political violence and gang violence. The office of the Director for Special Operations comprises investigative teams consisting of intelligence personnel, investigators and public prosecutors. The approach of this office is to identify the organised criminal groups that present the most serious threat and to conduct proactive investigations on a project basis into the activities of these groups. These projects will be undertaken in the form of prosecution-driven investigations. This means that the investigative team will function under the guidance of a prosecutor. The prosecutor will be responsible for orchestrating the efforts of the multidisciplinary team in order to gather evidence that can be presented in a court of law.

None of the money-laundering offences that have been on South Africa’s statute book since 1992 have been applied in a money-laundering prosecution. The type of expertise needed to conduct a money-laundering investigation and effect prosecution is similar to that needed for a successful confiscation or forfeiture procedure. In both cases, thorough financial investigations are required to track the assets in question, as laundered assets will almost inevitably also be the object of forfeiture proceedings.

For this reason, the Asset Forfeiture Unit may become involved in future money-laundering investigations and prosecutions, albeit in a facilitating capacity only. The type of assistance that the Asset Forfeiture Unit will be able to render mainly concerns financial investigations and advice on the requirements of the money-laundering provisions of the Prevention of Organised Crime Act.

Prosecutions for money-laundering activities can be carried out by any provincial Director of Public Prosecutions, as well as any of the directorates in the office of the National Director of Public Prosecutions. The prosecution of an underlying criminal activity will almost always occur when there is a money-laundering prosecution. Therefore, it will usually be the task of the prosecuting authority that is conducting the prosecution for the underlying criminal activity to conduct the money-laundering prosecution, possibly with the assistance of the Asset Forfeiture Unit as indicated above.

Investigations of organised criminal groups performed by the office of the Director of Special Operations will also invariably uncover money-laundering activities. The investigative team concerned will be responsible for the investigation and possibly also the prosecution of the relevant money-laundering offences. In this regard, the Asset Forfeiture Unit may also become involved in a supportive capacity, lending assistance with financial investigations and confiscation or forfeiture proceedings.

Chapter 6
Evaluation and Conclusion

Overview

This chapter presents an evaluation of the legal position with regard to money-laundering in South Africa, as well as the implementation of current legislation. Conclusions are drawn regarding the elements in South Africa’s response to money-laundering linked to organised crime that will have to be addressed in future, and where problems may be expected.

Legislation on money-laundering, organised crime, and the confiscating or forfeiting of the proceeds of criminal activity contains a wide variety of instruments with which to address these phenomena. These measures compare very favourably with international standards.

The law is still lacking in terms of administrative money-laundering control measures. South Africa’s current provisions fall short of the international standard contained, for example, in the 40 recommendations of the Financial Action Task Force. It is hoped that the enactment of the Financial Intelligence Centre Bill will go some way in addressing this shortcoming.

Since the mid-1990s, the introduction of statutory provisions against money-laundering and organised crime has gone hand-in-hand with the restructuring of the authorities concerned with their implementation. This restructuring has included the creation of new roleplayers such as the Asset Forfeiture Unit and the Directorate of Special Operations in the office of the National Director of Public Prosecutions, and the Component: Organised Crime in the SAPS’s detective service.

The fact that a variety of institutions will have overlapping responsibility for the same type of investigations inherently holds the danger of conflicts arising between them. This may lead to a duplication of efforts and spending of resources while reducing positive results. Careful co-ordination of activities and continuous communication between roleplayers will be essential to avoid such conflicts.

Evaluating South Africa's ability to combat organised crime

When evaluating South Africa's ability to combat organised crime and particularly to use efforts to curb money-laundering as a weapon against organised crime, both the content of the law and its implementation have to be considered. Only then will it be possible to conclude where future action should be directed in order to bolster the country's ability to curtail organised criminal activity through the use of measures that focus on the illegitimate profits generated by this activity.

The legal position

Systems for the confiscation of the proceeds of criminal activities have come into being throughout the world over the past two decades. These developments can be viewed as a process evolving through a series of at least three models at different levels.

An elementary model comprises the following elements:

> money-laundering offences relating to the proceeds of drug-trafficking;
>
> the guilt element of money-laundering offences requiring proof of subjective knowledge that the property is the proceeds of criminal activity;
>
> confiscation of the proceeds of criminal activities only after conviction;
>
> confiscation of the proceeds of criminal activities only with regard to the proceeds of drug-trafficking;
>
> statutory presumptions that property in the possession of the defendant is the proceeds of criminal activity; and
>
> the absence of specialised proceeds of crime units among prosecuting and law enforcement authorities.

The model at the next stage of the evolutionary scale comprises the following elements:

> money-laundering offences that may be committed in relation to a wide range of offences;
>
> the guilt element of money-laundering offences that may be inferred from an objective indication that the property is the proceeds of criminal activity;
>
> confiscation of the proceeds of criminal activities still only after conviction;
>
> confiscation of the proceeds of criminal activities possible in connection with the proceeds of a wide range of offences;
>
> statutory presumptions that property in the possession of the defendant is the proceeds of criminal activity; and
>
> specialist units within investigating and prosecuting authorities to conduct investigations

and confiscation proceedings.

An advanced model to address money-laundering and the proceeds of criminal activity comprises the following elements:

a conviction-based confiscation procedure and a civil forfeiture procedure;

taxation of criminal proceeds;

sharing of information among state agencies; and

a multidisciplinary agency with centralised responsibility for proceedings to address money-laundering.

Measured against these criteria, it can be said that South Africa has a well-developed model to address the issue of the proceeds of criminal activities. In fact, South Africa's model resembles some of the most advanced models currently available worldwide.

South Africa's offences with regard to money-laundering and racketeering are equally well-defined by international standards.

The question may be raised which improvements are still required to complete the state's legislative arsenal to respond to money-laundering, especially when linked to organised crime.

On the level of the legislative response, the one major shortcoming is the lack of money-laundering control measures, such as those required by the 40 recommendations of the Financial Action Task Force. It is hoped that this will be addressed, as a matter of urgency, by the promulgation and enactment of the Financial Intelligence Centre Bill.

Implementation of the law

Once the legislation establishing the Financial Intelligence Centre is in place, the success of its implementation will be largely determined by the functioning of the centre. It is therefore of crucial importance that the Financial Intelligence Centre will be equipped with the best possible resources to perform the tasks expected of it including analysing information and communicating with roleplayers. Underlying the issue of resources, of course, is the issue of budget allocation. It is in this regard that the state's sincerity to combat money-laundering will be judged by its private sector partners whose co-operation is vital to the success of this initiative.

Apart from the issue of resources, the structure and placement of the Financial Intelligence Centre are also important. Statutorily, the centre will be an independent body. This notwithstanding, the Financial Intelligence Centre will have to resort administratively under one of the government departments. This will probably be the Department of Finance. The level of identification with the relevant department will have a bearing on the ability of the centre to perform its functions effectively.

The department that will have the administrative responsibility for the Financial Intelligence Centre will have to ensure that its own priorities for the centre are in line with the expectations of the centre's 'clients' in the law enforcement community. Furthermore, the correct balance will have to be found with the placement of the Financial Intelligence Centre within the state's structure in order to promote co-ownership of its functioning by both institutions in the private sector and law enforcement agencies alike.

On the level of the implementation of the current law, there are a number of issues that must be considered. Almost all of these revolve around effective communication between different organs of government during the course of money-laundering investigations.

The first issue is that of the ability to conduct multidisciplinary investigations. This implies the sharing of information and pooling of resources in the interest of the successful investigation of a money-laundering scheme.

As pointed out above, a money-laundering investigation entails both criminal and financial investigations. In this regard, the South African Revenue Service can be an invaluable partner in the majority of investigations. The Income Tax Act of 1962 protects the information obtained by the South African Revenue Service. The following is an abbreviated extract from the Act:

Preservation of secrecy

4(1) Every person employed in carrying out the provisions of this Act shall preserve ... secrecy with regard to all matters that may come to his knowledge in the performance of his duties ... and shall not communicate any such matter to any person whatsoever other than the taxpayer concerned or his lawful representative nor suffer or permit any such person to have access to any records in the possession or custody of the Commissioner except in the performance of his duties under this Act or by order of a competent court ...

(1A) ...

(1B) ...

(a) Every person so employed shall, before acting under this Act, take and subscribe before a magistrate or justice of the peace or a commissioner of oaths, such oath or solemn declaration, as the case may be, of fidelity or secrecy as may be prescribed.

A recent trend showed a legal relaxation of the strict adherence of the past to the duty of secrecy entrenched in the Income Tax Act. This is evident from the Prevention of Organised Crime Act that allows the National Director of Public Prosecutions access to certain information, including information under the control of the South African Revenue Service:

Access to information

71(1) The National Director may request any person employed in or associated with a Government Department or statutory body to furnish him or her with all information that may reasonably be required for any investigation in terms of this Act and such person shall notwithstanding anything to the contrary contained in any law which prohibits or precludes him or her -

(a) from disclosing any information relating to the activities, affairs or business of any other person; or

(b) from permitting any person to have access to any registers, records or other documents, or electronic data which have a bearing on the said activities, affairs or business, furnish the National Director with such information and permit the National Director to have access to any registers, records, documents, and electronic data, which may contain such information.

This provision has allowed the South African Revenue Service to share information under its control, especially in investigations concerning commercial crime and the proceeds of criminal activity. This trend needs to be enhanced to the point where the South African Revenue Service can become a fully-fledged partner participating in almost every investigation of money-laundering or the proceeds of criminal activity.

Another important aspect of the ability to conduct multidisciplinary money-laundering investigations is the co-ordination of the actions of different investigating authorities. The possible fragmentation of the responsibility to investigate money-laundering linked with high-level organised crime, is an issue of concern.

From the discussion in the previous chapter, it is clear that a number of bodies in the SAPS and the prosecuting authorities will be tasked with the investigation of organised crime, including money-laundering, as part of their duties. This overlap in responsibilities holds great potential for conflict between these bodies that can be to the detriment of the successful combating of money-laundering.

A number of institutions in the office of the National Director of Public Prosecutions that will participate in investigations of organised criminal groups and their activities are new structures. This means that their functioning and co-operation with other newly established, as well as with existing structures are still uncertain. It is hoped that sound law enforcement practice will dictate the manner in which this co-operation will evolve. Effective communication at all levels will be of crucial importance to avoid situations where two or more bodies are inadvertently investigating the same organised criminal group or criminal activity without being aware of each other. Such a duplication of efforts and application of resources with the risk of reducing positive results should be avoided at all cost.

Depending on the direction this evolution will take, it may be that a greater need for centralising the investigations of money-laundering involving high-level organised criminal groups is appropriate. If this is the case, it may be worthwhile to consider the possibility of extending the operation of institutions such as the national and provincial Organised Crime Secretariats of the SAPS to co-ordinate investigations with bodies outside the SAPS. In the meantime, it may be possible to avoid the conflicts referred to above by allowing a body such as the Asset Forfeiture Unit to serve in a facilitating capacity that will combine the different areas of expertise of the relevant investigating bodies.

An area where there is still a great need is training and the enhancement of skills. Since no money-laundering or racketeering prosecutions have been completed, there is still an obvious lack of experience among investigators and prosecutors in this area. Another area where there is an obvious lack of experience in the application of the relevant statutory provisions is with the judiciary. This situation is not unique to South Africa. In fact, similar development problems have been experienced in each jurisdiction where a regime to curb money-laundering coupled with the confiscation of the proceeds of criminal activities has been introduced.

The lack of skills and experience at the investigative level can be addressed by making use of foreign assistance in training programmes. Offences similar to South Africa’s money-laundering and racketeering offences are defined in a number of jurisdictions. The techniques to investigate these offences are more or less similar, irrespective of where the investigation takes place.

Foreign assistance can also be used in the training of prosecutors, albeit to a lesser extent. Although money-laundering and racketeering offences in South Africa appear similar to those of other jurisdictions, they are applied in a different legal environment. The backdrop of the South African criminal law, criminal procedure, law of evidence and constitutional law against which these provisions are to be applied makes in-depth training by foreign practitioners impossible.

In the area of judicial orientation, foreign assistance has a very limited role to play. The judiciary is required to apply the provisions of South African law in the legal environment described above. The only value that foreign experience can have in this regard is to demonstrate the importance of money-laundering and racketeering prosecutions and the significant effect that these can have on organised crime.

Apart from foreign assistance in training programmes, the enhancement of skills and experience among prosecutors and judicial officers alike will be a long process. This process will go hand-in-hand with the establishment of precedents by the courts. Over time, these precedents will become a body of law that may be used as guidelines for prosecutors and judicial officers.

The success of the implementation of the current provisions against money-laundering and organised crime will ultimately depend on the attitude of investigators and prosecutors towards investigations and prosecutions involving the proceeds of criminal activity. As long as these attitudes are primarily focused on the underlying activities that generate illegitimate profits, the money-laundering and racketeering provisions will not be used to their full potential.

It seems that the number of investigations which deal with the proceeds of criminal activities are increasing. This, together with the initiatives within the different components of the law enforcement society to address organised crime and money-laundering, are indicative of a positive change of attitude towards investigations that aim to connect the proceeds of crime to their origin.

If this trend is continued, the full value of current and future measures to combat money-laundering will be attained. This value lies, on the one hand, in using these provisions as alternative investigating routes that may lead to the uncovering of the underlying criminal activity, and on the other, in the ability to disrupt the functioning of organised criminal groups through financial devastation. In this way, these measures will contribute in reducing the threat held by organised criminal groups.

Notes

1. Financial Action Task Force on Money Laundering (FATF), *Report on money laundering typologies, Financial Action Task Force*, 1999-2000, p 4.

2. Ibid, p 8.

3. Bureau for International Narcotics and Law Enforcement Affairs, *United States Department of State International Narcotics Control Strategy Report*, 1997, <www.state.gov/www/global/ narcotics_law/1997_narc_report/money.html>, (31 August 2000).

4. N South, *On 'cooling hot money': Transatlantic trends in drug-related money laundering and its facilitation*, <www.alternatives.com/crime/SOUTH.HTML>, (10 October 2000).

5. J Walker, *Modelling global money laundering flows: Some findings*, <www.ozemail.com.au/ born1820/m/method.htm>, (10 October 2000).

6. P Gastrow, Main trends in the development of South Africa's organised crime, *African Security Review* 8(6), 1999, p 59.

7. Ibid.

8. Crime Information Analysis Centre (CIAC) The incidence of serious crime between 1 January and 31 March 1997, *Quarterly Report 2/97,* South African Police Service, Pretoria, <www.saps.co.za/8_crimeinfo/297/organised.htm>, (2 October 2000).

9. Crime Information Analysis Centre (CIAC), The incidence of serious crime in South Africa between January and December 1999, *Semester Report 1/2000,* South African Police Service, Pretoria, <www.saps.co.za/8_crimeinfo//2000/semester01_2000.htm>, (2 October 2000).

10. Ibid.

11. CIAC 1997, op cit.

12. W Hofmeyr: Special Director of Public Prosecutions, Asset Forfeiture Unit, Interview, Pretoria, 16 October 2000.

13. Bureau for International Narcotics and Law Enforcement Affairs, *United States Department of State International Narcotics Control Strategy Report 1996,* Washington, DC, March 1997, <www.state.gov/www/global/narcotics_law/1996_narc_report/money96.html>, (10 October 2000).

14. Walker, op cit.

15. Organisation for Economic Co-operation and Development (OECD), *Policy Brief*, July 1999, p 3.

16. J Hogarth, Beyond the Vienna Convention: International efforts to suppress money laundering, paper read at the *International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: a Global Approach*, Courmayeur, Mont Blanc, Italy, 17-21 June 1994.

17. OECD, op cit, p 2.

18. EU Savona & MADefeo, Money trails: International money laundering trends and prevention/control policies, paper read at the *International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: a Global Approach*, Courmayeur, Mont Blanc, Italy, 17-21 June 1994.

19. OECD, op cit, p 2.

20. A serious crime in terms of the *Convention against Transnational Organised Crime* is one that is punishable by a maximum penalty of imprisonment for four years or more.

21. OECD, op cit, p 4.

22. It is unclear exactly why South Africa has not become one of the initial subscribers to the Eastern and Southern African Anti-money Laundering Group. The reason for this is presumably related to the fact that South Africa's own regime against money-laundering is not yet complete.

23. *Drugs and Drug Trafficking Act*, no 140 of 1992, section 10(2).

24. A N D Toms, Bank's concerns regarding measures in South Africa to combat money laundering, paper read at a money-laundering seminar, South African Reserve Bank, Pretoria, 28 July 1995. These figures were disputed at a later seminar by a spokesperson from the SAPS's Narcotics Bureau who indicated that only 51 cases were reported in the relevant period, and all by one bank. Of these, two were proven to be drug-related, 33 were still under investigation and 16 were not drug-related.

25. *Drugs and Drug Trafficking Act*, chapter V.

26. The *Pretoria News* of Thursday, 6 April 1995, reported that a convicted drug dealer was ordered to pay R100 000 and was also sentenced to an effective 10 years' imprisonment. The vehicle in which the drugs were found was also forfeited to the state in terms of section 25(1)(b) of the *Drugs and Drug Trafficking Act* that provides for the forfeiture of any vehicle in which drugs are conveyed.

27. *Proceeds of Crime Act*, no 76 of 1996, section 28.

28. Ibid, sections 29 and 30.

29. Ibid, section 31.

30. Ibid, chapters 1 to 4.

31. *Daily Dispatch*, 22 July 1999, <www.dispatch.co.za/1999/07/22/southafrica/SPOILS.htm>, (9 October 2000). This case is currently under appeal.

32. *Prevention of Organised Crime Act*, no 121 of 1998, section 4.

33. Ibid, section 1(1).

34. Ibid, section 1(2).

35. Ibid, section 1(2), discussed above.

36. Ibid, section 7.

37. Ibid, section 80(1).

38. Ibid, section 7A.

39. Ibid, chapter 5.

40. Ibid, chapter 6.

41. Ibid, section 18.

42. Ibid.

43. Ibid, section 13.

44. Ibid, section 26.

45. In the *Prevention of Organised Crime Act,* this is referred to as an ‘instrumentality". See section 1(1).

46. Ibid, section 38.

47. Ibid, section 50.

48. Ibid, section 52.

49. Ibid, sections 48 and 50.

50. Ibid, section 63.

51. Ibid, section 2.

52. Ibid, section 1(1).

53. The number of persons required to form a group is not prescribed. The international standard according to the *United Nations Convention against Transnational Organised Crime* is three or more persons to form a group.

54. *Prevention of Organised Crime Act*, section 2(e).

55. Ibid, section 2(f).

56. Ibid, section 3(1).

57. Ibid, section 8(1).

58. Ibid, section 8(2).

59. Egmont Group, *Information paper on financial intelligence units and the Egmont Group,* <www.oecd.org/fatf/Ctryorgpages/orgegmont_en.htm>, (10 October 2000).

60. South African Law Commission (SALC), *Report on money laundering and related matters*, Project 104, SALC, Pretoria, 1996.

61. *Financial Intelligence Centre Bill,* clause 1(1) read with schedule 1, <www.polity.org.za/

govdocs/bills/2000/financialintell.html>, (29 September 2000).

62. Ibid, *c*lause 18(2).

63. Ibid, *s*chedule 2.

64. Ibid, clause 20(2).

65. Ibid, clause 2.

66. Ibid, clause 4.

67. Such as the Australian Transaction Reports and Analysis Centre and the US Financial Crimes Enforcement Network.

68. *Financial Intelligence Centre Bill,* clauses 21 and 22.

69. Ibid, clause 53(1)(f).

70. Ibid, clause 53(2).

71. Ibid, clause 23.

72. Ibid, clause 24.

73. Ibid, clause 53(1)(e).

74. Ibid, clause 53(2).

75. Ibid, clause 28.

76. Ibid, clause 53(2).

77. Ibid, clause 28.

78. Ibid, clause 30.

79. Ibid, clause 31.

80. IIbid, clause 32.

81. Ibid, clause 1(1).

82. Ibid, clause 37.

83. Ibid, clause 38.

84. Ibid, clause 42.

85. Ibid, clause 53(1)(d).

86. Ibid, clause 53(2).

87. Ibid, clause 43.

88. Ibid, clause 53(1).

89. The information concerning the structure and functioning of the SAPS and the approach to the investigation of organised crime was obtained from Assistant Commissioner F C Truter, Head: Component Organised Crime of the Detective Service, and Director J Oosthuizen, Director: Policy, Standards and Operational Development in the Component Organised Crime, Interviews, Pretoria, 12 October 2000.

90. *South African Police Service Act*, no 68 of 1995, section 16(1) and (2).

91. *United Nations Convention against Transnational Organised Crime*, article 3(a).

92. *National Prosecuting Authority Act*, 1998, section 6.

93. W A Hofmeyr, The importance of asset forfeiture in the war against crime, paper read at a seminar on asset forfeiture and money-laundering, Institute for Security Studies, Pretoria, 11 May 2000.

94. The information concerning the functioning of the Asset Forfeiture Unit and its approach to the investigation of proceeds from criminal activity and money-laundering was obtained from W A Hofmeyr, Special Director: Asset Forfeiture Unit, Interview, Pretoria, 16 October 2000.

95. RE Bell, An evolving series of proceeds of crime models, *Journal of Financial Crime* 8(1), 2000, p 21.

96. *Income Tax Act*, 1962, section 4.

97. *Prevention of Organised Crime Act*, section 71(1).

98. Statistics of the Asset Forfeiture Unit indicate an average of 2.4 new cases per month during 1999, compared to an average of six new cases per month over the period July to September 2000.