CHAPTER 5

LEGISLATIVE FRAMEWORK FOR ANTI-MONEY LAUNDERING UNDER THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT 2001

1 Introduction

This chapter examines the efficacy of the legislative framework for combating and preventing money laundering in the banking sector of Zambia. The chapter is a corollary to the discussion in the preceding chapter, chapter 4, on the efficacy of the Bank of Zambia Anti-Money Laundering Directives 2004. An evaluative and exploratory study is undertaken in this chapter, identifying some weaknesses in the legislative framework. And proposals are made to strengthen the said framework, especially with regard to its applicability to the banking sector. To illustrate, an argument is made that, in the case of money laundering, Zambia should consider introducing techniques such as shifting the burden of proof from the prosecution to the accused and lowering the standard of proof from beyond reasonable doubt to the preponderance of probability.

Although focusing primarily on Zambia, the chapter also examines critical aspects of the common law, as they apply to many other common law jurisdictions, in the fight against money laundering. Zambia’s Prohibition and Prevention of Money Laundering Act 2001 provides for the country’s principal legislative framework for combating and preventing money laundering.619 This statute also provides for the constitution of the Anti-Money Laundering Authority and the Anti-Money Laundering Investigations Unit.620 Other areas covered by the statute include the disclosure of information pertaining to a suspicion of money-laundering activities by supervisory authorities and regulated institutions; the forfeiture of property of persons convicted of money laundering; international cooperation in investigations, prosecution and other legal processes of prohibiting and preventing money laundering; and, matters connected with or incidental to the foregoing.621 Under the

620 As above.
621 As above.
Prohibition and Prevention of Money Laundering Act 2001, property that can be caught up by statutory provisions against money laundering include ‘moneys and all other property, real or personal, movable or immovable including things in action and other intangible or incorporated property wherever situated and includes any interest in such property’.  

2 Supervisory authorities and regulated institutions

Whereas the definition of ‘regulated institutions’ in the Prohibition and Prevention of Money Laundering Act 2001 refers to an institution regulated by a supervisory authority, such a bank or financial institution, the definition of a ‘supervisory authority’, under the same statute, refers to the Bank of Zambia through the office of the Registrar of Banks and Financial Institutions as well as to the Registrar of Building Societies, the Registrar of Co-operatives, the Registrar of Insurance, the Commissioner of the Securities and Exchange Commission, the Registrar of Companies, the Commissioner of Lands, the licensing authority for casinos in Zambia, and any other authority that may be established by law as a Supervisory Authority.

3 The Anti-Money Laundering Authority

The Anti-Money Laundering Authority, established under section 3 of the Prohibition and Prevention of Money Laundering Act 2001, is composed of the following eight members: (a) the Attorney-General (who is the Chairperson); (b) the Inspector-General of the Zambia Police Force; (c) the Commissioner of the Anti-Money Laundering Investigations Unit; (d) the Director-General of the Anti-Corruption Commission; (e) the Governor of Bank of Zambia; (f) the Commissioner-General of Zambia Revenue Authority; and (g) two other persons. Each of the eight members is appointed by the Minister pursuant to statutory powers vested in the Minister under the Prohibition and Prevention of Money Laundering Act 2001.

A thin statute, laid out in 14 pages, the Prohibition and Prevention of Money Laundering Act 2001 does not explain whether a member of the Anti-Money Laundering Authority can be asked to step down in cases where he or she is found guilty of gross misconduct or having

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623 As above.
624 As above.
625 As above.
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committed serious offences such as money laundering or corruption. Neither does the statute spell out the professional and academic qualifications of the other two persons that the Minister can appoint as members of the Anti-Money Laundering Authority. What about the remuneration of each of the eight members of the Anti-Money Laundering Authority? Are they to be paid salaries or are they to be paid sitting allowances? And where does the budget for such remuneration come from? All these matters are not covered in the Prohibition and Prevention of Money Laundering Act 2001. And who chairs meetings of the Anti-Money Laundering Authority when the Chairperson is absent? The Prohibition and Prevention of Money Laundering Act 2001 is silent on such issues. The statute provides only for the position of Chairperson, and not that of Vice- or Deputy-Chairperson. And the statute is silent on how the Anti-Money Laundering Authority is supposed to conduct its meetings and how it should arrive at decisions when faced with a deadlock of votes.

In general, the main functions of the Anti-Money Laundering Authority are twofold. First, the Authority provides general or specific policy directives to the Commissioner of the Anti-Money Laundering Investigations Unit and the Commissioner gives effect to such directives. Secondly, the Authority advises the Minister on measures required to prevent and detect money laundering in Zambia. A report on efforts to combat money laundering in Zambia reads in part:

The Bank of Zambia (BOZ) and the Drug Enforcement Commission (DEC) are increasingly concerned that money laundering is rampant in the banking industry. They have proposed tightening banking standards through legislative action. The government publicly denounces drug trafficking and supports the ongoing efforts of the autonomous DEC. The DEC has used strengthened narcotics laws this year to confiscate the property of traffickers. The head of the DEC collaborates with his counterparts in the sub-region to improve regional anti-trafficking efforts. Zambia ratified the 1988 UN Convention in 1993. The DEC has increasingly used its legal authority to confiscate property of suspected drug traffickers and money launderers. The courts have not, however, always sustained these confiscations. The DEC and the Ministry of Legal Affairs co-operate with their counterparts in the Southern African Development Council (SADC). The DEC has received training from British anti-narcotics teams and works closely with their British counterparts. Germany, South Africa, and the US have also provided limited assistance to the DEC. Zambia's anti-narcotics master plan was developed in co-operation with the United Nations drug control programme. The Zambian Anti-Corruption Commission (ACC) investigates allegations of

corruption, some of which has touched even the ministers of the government … corruption allegations have focused on embezzling state funds and not on narcotics related corruption. It is alleged that drug traffickers are taking advantage of the weak enforcement of banking laws and launder drug money in a number of banks and foreign exchange houses.\textsuperscript{630}

Increasingly, the scourge of money laundering is becoming notorious in Zambia. As another report shows:

The Zambian Drug Enforcement Commission’s investigations have revealed the use by drug traffickers of bank accounts opened with fictitious identity documents to facilitate outgoing laundering. The case of \textit{The People v De Souza and Others} (unreported) (CCR SSP/8/2001) revolves around the opening of several bank accounts using a false name, between 1 January 1999 and 28 February 2001. The prosecution alleged that, acting in concert, the accused opened several bank accounts in Kitwe and Ndola on the Copper Belt, using fraudulently obtained documentation. Using these accounts, the accused externalised a total of US $1 158 533.20 to the USA and Taiwan.\textsuperscript{631}

4 The Anti-Money Laundering Investigations Unit

The Anti-Money Laundering Investigations Unit shares the same commissioner with the Drug Enforcement Commission.\textsuperscript{632} And the Anti-Money Laundering Investigations Unit comprises the commissioner and officers appointed by the said commissioner.\textsuperscript{633} However, the Drug Enforcement Commission is itself a department within the Ministry of Homes Affairs of the Republic of Zambia.\textsuperscript{634} Section 4 of the Narcotics Drugs and Psychotropic Substances Act 1993 provides:

(1) The Drug Enforcement Commission established under the Dangerous Drugs (Forfeiture of Property) (Special Organisations) (Drug Enforcement

\textsuperscript{633} See Narcotics Drugs and Psychotropic Substances Act 1993, sec 5.
\textsuperscript{634} See Narcotics Drugs and Psychotropic Substances Act 1993, sec 4.
Commission) Regulations, 1989, is hereby continued as if established under this Act.

(2) The Commission shall be a department in the Ministry responsible for home affairs and shall be under the control and supervision of the Minister responsible for Home Affairs.

Typologies of how to structure a financial intelligence unit (FIU), such as Zambia’s Anti-Money Laundering Investigations Unit, or where to locate the FIU have differed from one country to another, depending on a host of factors, including the legal system of a country, the size and state of the financial sector, the politics and political climate in a country, the most common predicate offence leading to the offence of money laundering, the availability of financial resources, the availability of housing to accommodate the FIU, the availability of information technology, the availability of properly qualified personnel to run the FIU, and the policy objectives underpinning the regulatory and institutional framework for fighting money laundering. Also, in many countries, the powers and functions of FIUs have differed significantly. Some FIUs only have powers to investigate. Thereafter, the FIU will report any case of money laundering to a law enforcement agency so that the latter institution can prosecute. Such FIUs have no powers to prosecute. Other FIUs have both investigative and prosecuting powers, and a few FIUs end up with administrative powers only or with a hybrid of administrative and investigative powers. FIUs can also have functions which relate to a supervisory and regulatory role, or a consulting and training role.

In some countries, an FIU may be housed within the Ministry of Justice, whereas in other countries, the FIU may be housed within the Ministry of Home Affairs or within the central bank. Various countries have adopted different models. In Zambia, the FIU,

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635 PA Schott Reference guide to anti-money laundering and combating the financing of terrorism (2003) VII-3, observes that the Egmont Group adopted the following definition of an FIU in November 1996: ‘A central, national agency responsible for receiving (and, as permitted, requesting), analysing, and disseminating to the competent authorities, disclosures of financial information (i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation, in order to counter money laundering.’ The Egmont Group is an informal organisation of financial intelligence units named after the location of the group’s first meeting at the Egmont-Arenberg Palace, Brussels. The goal of the group, as Schott observes, is to provide a forum for FIUs to improve support to their respective national anti-money laundering programmes.

636 See J Thony ‘Various FIU models’ a power-point presentation at a World Bank conference, Building a Financial Intelligence Unit to Meet International AML/CFT Standards, Moscow, Russia, 3-5 December 2002).

637 As above.

638 As above.

639 Schott (n 637 above) VII-7 VII-9.

640 Thony (n 638 above).

641 As above.
though operating somewhat like an affiliate of the Drug Enforcement Commission, has its own investigative and prosecuting powers.\footnote{See above. See also the Prohibition and Prevention of Money Laundering Act 2001, sec 6(1).} Generally, the four common models of FIUs recognised by the Egmont Group are as follows: the Law Enforcement Model; the Judicial Model; the Administrative Model; and the Hybrid-Administrative Model.\footnote{See World Bank (n 638 above).}

In Zambia, as noted earlier, the Commissioner of the Anti-Money Laundering Investigations Unit is also the Commissioner of the Drug Enforcement Commission.\footnote{See World Bank (n 638 above).} But why should the Commissioner of the Drug Enforcement Commission serve also as Commissioner of the Anti-Money Laundering Investigations Unit?\footnote{As above.} It is clear that, while the Drug Enforcement Commission is regulated by a separate statute from that which regulates the Anti-Money Laundering Investigations Unit and that, while the Drug Enforcement Commission, unlike the Anti-Money Laundering Investigations Unit, falls under the administrative wing of the Minister of Home Affairs, the Anti-Money Laundering Investigations Unit is regulated by a different statute and does not fall under the administrative wing of the Minister. That said, under the Narcotics Drugs and Psychotropic Substances Act 1993, the Commissioner of the Drug Enforcement Commission is appointed by the Republican President.\footnote{See Narcotics Drugs and Psychotropic Substances Act 1993, sec 4. See also the First Schedule to the Narcotics Drugs and Psychotropic Substances Act 1993.} But then, by simple cross-referencing, section 2 of the Prohibition and Prevention of Money Laundering Act 2001 states that the Commissioner of the Anti-Money Laundering Investigations Unit is ‘the person appointed as Commissioner under the Narcotics Drugs and Psychotropic Substances Act’. It is not, however, clear, under the Narcotics Drugs and Psychotropic Substances Act 1993, what qualifications the Commissioner should hold. The Prohibition and Prevention of Money Laundering Act 2001 does not spell out the minimum professional and academic qualifications of the Commissioner of the Anti-Money Laundering Investigations Unit or the grounds upon which the Commissioner can be removed from office. It is not good enough to state simply that, since the Commissioner of the Anti-Money Laundering Investigations Unit is also the Commissioner of the Drug Enforcement Commission and is appointed by the President under the Narcotics Drugs and Psychotropic Substances Act 1993,\footnote{See Prohibition and Prevention of Money Laundering Act 2001, sec 2.} that statute reposes the powers to define and determine qualifications and terms of appointment of the Commissioner in the Republican President. What happens if the President, in his ‘infinite wisdom’, appoints a crooked relative of his to the position of Commissioner of the Drug Enforcement Commission?
Should such an abuse of power extend to the Anti-Money Laundering Investigations Unit so that the appointee proceeds, without question, to head the Anti-Money Laundering Investigations Unit? And who can question the powers of the President to appoint, and on what grounds, especially if parliament, with the ratification powers, consists mainly of members of the ruling party?

It should not be forgotten here that our main concern is with qualifications and terms of appointment of the Commissioner of the Anti-Money Laundering Investigations Unit. Although the person serving as the Commissioner of the Anti-Money Laundering Investigations Unit is the same person serving as the Commissioner of the Drug Enforcement Commission, these two roles, as noted above, are regulated by two different statutes. Should the Commissioner, in his role as head of the Anti-Money Laundering Investigations Unit, serve also, like the Commissioner of the Drug Enforcement Commission, at the pleasure of the Republican President? The First Schedule to the Narcotics Drugs and Psychotropic Substances Act 1993 provides as follows:

(1) There shall be a Commissioner of the Commission (ie the Drug Enforcement Commission), whose office shall be a public office, and who shall be appointed by the President on such terms and conditions as the President may determine.

(2) The Commissioner shall not, while he holds the office of Commissioner, hold or discharge the duties of any other office of emolument in the Republic.

(3) The Commissioner may resign upon giving three months’ notice, in writing, to the President or may resign with immediate effect upon paying to the government three months’ basic salary in lieu of notice and the President may, subject to the same conditions, terminate the services of the Commissioner.

(4) The Commissioner may resign upon giving three months’ written notice to the President or paying one month’s salary in lieu of notice.

Paragraphs 2 and 3 of the First Schedule go on to establish the offices of Deputy Commissioner and Acting Commissioner of the Drug Enforcement Commission.

2 Deputy Commissioner

(1) There shall be a Deputy Commissioner of the Commission (ie the Drug Enforcement Commission), whose office shall be a public office and who shall be appointed by the President on such terms and conditions as the President may determine.

(2) Subject only to the powers of the Commissioner, paragraph 1 of this Schedule shall apply, with necessary modifications, to the Deputy Commissioner.
3 Acting Commissioner

(1) If the office of Commissioner falls vacant or the Commissioner is absent from duty or is unable for any reason to perform the functions of his office, the Deputy Commissioner shall act as Commissioner.

(2) If both the Commissioner and the Deputy Commissioner are absent from duty or are unable for any reason to perform the functions of their offices, the President may appoint any other senior officer of the Commission to act as Commissioner or Deputy Commissioner: Provided that, where it is in the public interest, the President may appoint any person who is not an officer of the Commission to act as Commissioner or Deputy Commissioner.

But how can the Anti-Money Laundering Investigations Unit, acceptable as it may be that the Anti-Money Laundering Investigations Unit should co-ordinate and collaborate with the Drug Enforcement Commission, be independent of the Drug Enforcement Commission? Should the Anti-Money Laundering Investigations Unit be piggybacking on resources of the Drug Enforcement Commission, especially that there are no statutory provisions in the Prohibition and Prevention of Money Laundering Act 2001 on the funding of the Anti-Money Laundering Investigations Unit? And would the absence of these statutory provisions not affect the independence of the FIU since the government can use this legal and institutional weakness to manipulate the Anti-Money Laundering Investigations Unit? These are some of the thorny issues that present themselves as lacunas in the institutional and regulatory framework.

Schott observes that countries must assure the independence of their FIUs from political influence, as well as from the competent or other supervisory authority in deciding which transactions to analyse or what information to disseminate. In Zambia, the Anti-Money Laundering Investigations Unit does not have much political independence since, by close association with the Drug Enforcement Commission, it somewhat shelters under the umbrella of the Ministry of Home Affairs. Although the concept of independence is not that absolute but relative, the independence of a regulatory body should be accompanied by the regulatory body’s accountability. The independence of an FIU should provide a measure of protection against the abuse or misuse of financial disclosures. In turn, such developments will ensure the trust between the FIU and the reporting financial institutions and banks in the prevention and detection of money laundering and terrorist financing. And to strengthen the

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648 Schott (n 637 above) VII-15.
649 See generally Mwenda (n 5 above).
650 Schott (n 637 above) VII-15.
651 Schott (n 637 above) VII-16.
regulatory and institutional framework for fighting money laundering in Zambia:

On 18 June 2004, the Bank of Zambia Anti-Money Laundering Directives were approved by the Anti-Money Laundering Investigations Unit of the Drug Enforcement Commission as per the requirement of section 12(4) of the Prohibition and Prevention of Money Laundering Act of 2001. The Bank of Zambia is in the process of distributing the Directives to all stakeholders, and commercial banks should expect to receive their copies ... The challenge is now on the banking sector, and indeed all other sectors affected by these Directives, to fully implement them. The Bank of Zambia is available for consultation on how to proceed with the implementation of the Directives. 652

Generally, whenever the Anti-Money Laundering Authority requests a periodical or other business-related report from the Anti-Money Laundering Investigations Unit, the Commissioner of the Anti-Money Laundering Investigations Unit is required to make such report available to the Authority concerning activities of the Anti-Money Laundering Investigations Unit. 653 However, without specifying whether officers or employees of the Anti-Money Laundering Investigations Unit can be held liable for wrongs, acts or omissions they commit while in the course of business, though acting in good faith, the Prohibition and Prevention of Money Laundering Act 2001 goes on to spell out the following statutory functions of the Anti-Money Laundering Investigations Unit:

(a) to collect, evaluate, process and investigate financial information including that from regulated institutions and Supervisory Authorities, relating to financial and other business transactions suspected to be part of money laundering for the purpose of preventing and suppressing money laundering offences;
(b) to conduct investigations and prosecutions of money laundering offences;
(c) to liaise with other law enforcement agencies in the conduct of investigations and prosecutions of money laundering offences;
(d) to supervise the reporting requirements and other administrative obligations imposed on regulated institutions and Supervisory Authorities under the Prohibition and Prevention of Money Laundering Act 2001;
(e) to assist in developing training programmes for use by regulated institutions and Supervisory Authorities in the implementation of the Prohibition and Prevention of Money Laundering Act 2001; and

(f) to co-operate with law enforcement agencies and institutions in other jurisdictions responsible for investigations and prosecution of money laundering offences.\(^{654}\)

Expounding on offences of money laundering reflected in section 2 of the Prohibition and Prevention of Money Laundering Act 2001,\(^{655}\) Part IV of that very statute spells out various wrongs that constitute offences of money laundering. These wrongs include offences committed by a body of persons; attempts, or aiding and abetting, or conspiring to commit the offence of money laundering, falsification of relevant documents, and divulging relevant information to unauthorised persons.\(^{656}\) Let us now take a closer look at offences of money laundering under the Prohibition and Prevention of Money Laundering Act 2001.

5 Statutory offences of money laundering

In Zambia, statutory offences of money laundering are covered by the Prohibition and Prevention of Money Laundering Act 2001.\(^{657}\) Where an individual, such as a bank employee, after the coming into force of the Prohibition and Prevention of Money Laundering Act 2001, engages in money laundering, he or she will be guilty of an offence and liable, upon conviction, to a fine not exceeding 170 000 penalty units or to imprisonment for a term not exceeding ten years or both.\(^{658}\) The term ‘money laundering’ is defined in the Prohibition and Prevention of Money Laundering Act 2001 as (a) engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime; (b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realised directly or indirectly from illegal activity; or (c) the retention or acquisition of property knowing that the property is derived or realised, directly or indirectly from illegal activity.\(^{659}\) In essence, there are three types of activities that can lead to money laundering, and these are spelt out above. But, then, what are ‘proceeds of crime’?

\(^{654}\) Prohibition and Prevention of Money Laundering Act 2001, sec 6(1).

\(^{655}\) Sec 2 of the Prohibition and Prevention of Money Laundering Act 2001 states that “money laundering” means (a) engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime; (b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realized directly or indirectly from illegal activity; or (c) the retention or acquisition of property knowing that the property is derived or realized, directly or indirectly from illegal activity’.

\(^{656}\) Prohibition and Prevention of Money Laundering Act 2001, secs 7, 8, 9, 10 & 11.

\(^{657}\) Prohibition and Prevention of Money Laundering Act 2001, secs 7, 8, 9, 10, 11, 12, 13, 21, 24, 26, 27, 29 & 30.


Section 2 of the Prohibition and Prevention of Money Laundering Act 2001 defines ‘proceeds of crime’ as ‘any property, benefit or advantage, within or outside Zambia realised or derived, directly and indirectly from illegal activity’. This definition brings us to an inquiry on the meaning of illegal activities. We shall examine the statutory definition of illegal activities in a moment. Here, suffice it to say the statutory definition of proceeds of crime is very broad. Indeed, all the three categories of money laundering noted above stress the fact that there should be evidence of some underlying illegal activity for there to be the offence of money laundering. Two possible interpretations are possible here. First, it could be argued that the offence of money laundering covers all benefits derived from any illegal activity, irrespective of whether the benefits are located abroad or in Zambia. Sections 2 and 7 of the Prohibition and Prevention of Money Laundering Act 2001 stress only that there should be some illegal activity. Where this illegal activity takes place is not covered in the statute. Section 2 simply adds that the term illegal activity means ‘any activity, whenever and wherever carried out which under any written law in the Republic (of Zambia) amounts to a crime’. In essence, this means that Zambia has an ‘all crimes’ criteria of determining predicate offences of money laundering. Anything and everything falling within the statutory definition of illegal activity can predicate the offence of money laundering in Zambia.

While the word whenever, in the definition of illegal activity under section 2 of the Prohibition and Prevention of Money Laundering Act 2001, is qualified by section 7 of the Prohibition and Prevention of Money Laundering Act 2001 — that is, qualified by the phrase that reads, ‘a person who, after the coming into force of the Prohibition and Prevention of Money Laundering Act 2001, engages in money laundering — and it points only to offences that were committed anytime after the coming into force of the Prohibition and Prevention of Money Laundering Act 2001, the word wherever is not qualified. The only qualification in section 2 is that the illegal activity should be seen to be illegal by reference to Zambian law even if the activity took place outside Zambia. Again, this confirms that Zambia has an ‘all crimes’ criteria of determining predicate offences of money laundering. Elsewhere, I have examined the issue of extraterritorial criminal jurisdiction in the fight against money laundering. Here, suffice it to say, section 25 of Zambia’s Prohibition and Prevention of Money Laundering Act 2001 provides that an offence under the said statute is deemed to be an extraditable offence under provisions of the Extradition Act (Cap 94) of Zambia. It matters less, under the Prohibition and Prevention of Money Laundering Act 2001, that the proceeds of crime were obtained in an indirect manner or that the

660 See Mwenda (n 535 above) 35-43.
predicate offence took place outside Zambia.\textsuperscript{661} As long as the underlying activity, whether it took place abroad or in Zambia, is illegal when viewed under the microscope of Zambian law then the proceeds of crime will be caught by the Zambian law on money laundering. A good example here is bringing into Zambia money derived from the sale of marijuana in a country such as The Netherlands where the sale and use of marijuana is legal,\textsuperscript{662} or bringing into Zambia money derived from prostitution or pornography from a country where such practices are legal. Admittedly, the ‘single criminality’ test applies in Zambia. The Financial Sector Compliance Advisers Ltd observes that:

\begin{quote}
A single or dual criminality test: A dual criminality test requires a client’s actions to be recognised as a crime both in the country where it is committed and the country where a possible laundering offence takes place. A single criminality test simply requires the country in which the laundering activity takes place to regard the activity that generated the relevant property as criminal irrespective of whether it is criminal in the country where it took place. In practice, almost all serious crimes including drug trafficking, terrorism, fraud, robbery, prostitution, illegal gambling, arms trafficking, bribery, corruption, and in some cases tax evasion, are capable of predicating money laundering offences.\textsuperscript{663}
\end{quote}

The single criminality test applies also in countries such as the United Kingdom,\textsuperscript{664} Bermuda,\textsuperscript{665} the Isle of Man,\textsuperscript{666} Jersey\textsuperscript{667} and Guernsey.\textsuperscript{668} Arguably, in Zambia, one school of thought postulates that the Prohibition and Prevention of Money Laundering Act 2001 does not restrict itself to offences of money laundering whose predicate offences transpired in Zambia only. The illegal activity could have been committed anywhere in the world, but if that same activity would constitute a criminal offence if it were committed in

\textsuperscript{661} See above.
\textsuperscript{664} In the United Kingdom, the test of ‘single criminality’ still applies under the new law against money laundering, the Proceeds of Crime Act 2002. However, this test of single criminality is no longer limited by reference to indictable offences, but has been expanded to include all offences recognised under the laws of the United Kingdom. The Proceeds of Crime Act 2002 has overhauled the previous distinction between drug-related and ‘all crimes’ money laundering offences, although the Terrorism Act 2000 continues to regulate the laundering of money relating to the funding of terrorist activities.
\textsuperscript{665} See Bermuda’s Proceeds of Crime Act 1997 of Bermuda, sec 3.
\textsuperscript{666} See Isle of Man’s Criminal Justice Act 1990, sec 17.
\textsuperscript{667} See Jersey’s Proceeds of Crime (Jersey) Law 1999, art 1.
\textsuperscript{668} See the Criminal Justice (Proceeds of Crime)(Bailiwick of Guernsey) Law 1999, sec 1(1).
Zambia then the conduct can predicate an offence of money laundering in Zambia irrespective of whether or not it is deemed lawful elsewhere. A useful analogy here could be drawn from the US Patriot Act 2001, regarding the extension of extraterritorial criminal jurisdiction of the United States of America over any person outside of the United States’ jurisdiction who engages in any act which, if it had been committed in the United States, would constitute an offence.669 The International Compliance Association observes:

The provisions extending the long arm civil jurisdiction and extraterritorial criminal jurisdiction of the United States within the Patriot Act could, however, have severe consequences for institutions and employees outside of the United States, even where such institutions do not have a physical or representative presence within the United States. Section 317 of the Patriot Act amends the pre-existing money laundering offences in the United States under sections 1956 and 1957 of Title 18 of the United States Code. Sections 1957 has been broadened such that jurisdiction is now granted over any foreign person, including any financial institution authorised under the laws of a foreign country in circumstances where such a person commits an offence under Section 1957 involving a financial transaction that occurs either in whole or in part in the United States. This means that any foreign person who conducts a transaction involving US dollars is subject to the jurisdiction of the US courts in respect of US anti-money laundering offences within Sections 1956 and 1957 of Title 18 of the US Code. Given that the US dollar is used in the majority of the world’s financial transactions, the risks posed by these provisions of the Patriot Act are significant.670

In Zambia, a second school of thought supports the ‘single criminality’ test, but argues instead that the predicate offence should have been committed in Zambia and must be illegal by reference to Zambian law only. Indeed, if an approach were taken that the predicate offence should be illegal in Zambia, and by reference to Zambian law, and that the predicate offence should also be illegal in a foreign country in which the offence was committed, and by reference to the law of that country, then Zambia would be applying a ‘dual criminality’ test. But such is not the case in Zambia. As noted above, Zambia applies a ‘single criminality’ test, and the ‘all crime’ criteria of determining a predicate offence of money laundering rests in the broad definition of illegal activity.671 The only question outstanding is: Which of the two schools of thought on the single criminality test applies in Zambia? It would appear that, in the absence of words such as ‘in Zambia’ after the phrase ‘illegal activity’, and given the growing acquiescence of many states in the state practice of the United States regarding

669 See International Compliance Association (n 518 above) 27.
670 As above.
671 As above.
extraterritorial criminal jurisdiction, the first school of thought is more persuasive. Moreover, section 29 of Zambia’s Prohibition and Prevention of Money Laundering Act 2001 puts it clearer and resolves the polemics by stating:

29 Any act:
(a) carried out by a citizen of Zambia anywhere; or
(b) carried out by a person on a ship or aircraft registered in Zambia; shall, if it would be an offence by that person on the land in the Republic, be an offence under this Act.

30 A person who commits an offence under this Act, for which no penalty is provided shall be guilty of an offence and shall be liable upon conviction to a fine ... or to imprisonment for a term ... or to both.

5.1 What constitutes ‘knowing’ in the statutory definition of money laundering?

Whereas the first two offences of money laundering listed in section 2 of the Prohibition and Prevention of Money Laundering Act 2001 — that is, (a) engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime; and (b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realised directly or indirectly from illegal activity — do not import the subjective test of ‘knowing’, the third activity, ‘the retention or acquisition of property knowing that the property is derived or realised, directly or indirectly from illegal activity’ retains that test. But how can we determine if a person knowingly retained or acquired the property derived or realised from an illegal activity? And should we apply a criminal law standard or a civil law standard in defining the term knowing? In Zambia, money laundering is a criminal offence. Therefore, the term knowing should be understood from a criminal law point of view.

Although no statute can be readily cited as an example of a foreign piece of legislation in which the term ‘knowledge’ has been fully defined, that argument alone does not defeat the view that clarity in the law, regarding the meaning of terms such as knowing, would facilitate a smooth interpretation of the statute. In Zambia, the term knowing is not defined anywhere in the Prohibition and Prevention of

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672 At least, there is not much evidence of ‘persistent objectors’ to this norm. Although it is possible in some instances for a state to object persistently to a rule of customary international law (or state practice), and thus not be subject to it, successful persistent objection is rare and can be a high standard in terms of required action for a state to meet. See DA Colson ‘How persistent must the persistent objector be?’ (1986) 61 Washington Law Review 957 967.

673 As above.
Money Laundering Act 2001. However, in *Selanghor v Craddock (No 3)*, Ungood-Thomas J, defining the term ‘knowledge’ in a civil law case, was of the view that ‘knowledge’ meant ‘circumstances which would indicate to an honest and reasonable man that such design was being committed, or would put him on inquiry’. The test applied by Ungood-Thomas J is an objective test of a ‘reasonable’ man. In *Re Montagu’s Settlements*, another civil law case, it was held that ‘knowledge’ is not confined to actual knowledge, but includes actual knowledge that would have been acquired but for shutting one’s eye to the obvious, or wilfully and recklessly failing to make such inquiries as a reasonable man would make. Again, the objective test of a ‘reasonable’ man is applied here. And in *Baden Delvaux and Lecuit v Societe Generale*, a civil law case, it was pointed out that:

... knowledge can comprise any one of five different mental states ...:

(i) actual knowledge;
(ii) wilfully shutting one’s eye to the obvious;
(iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;
(iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man;
(v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

The ruling in *Baden Delvaux and Lecuit v Societe Generale* imports both an objective test and a subjective test of ‘knowledge’. To satisfy the subjective test, unlike in the objective test, the intention of the accused to launder money must be proved. Paragraphs (i) and (ii) relate to the subjective test which requires the prosecution to show that the accused had ‘actual knowledge’ or that he ‘wilfully shut his eyes to the obvious’. By contrast, paragraphs (iii), (iv) and (v) relate to the objective test of how a reasonable man, when placed under similar circumstances, would be expected to act. Some commentators have argued, however, that money laundering offences containing objective...
elements of *mens rea* impute a civil ‘negligence’ based test into the determination of criminal offences.\(^{679}\)

In contrast to the civil law position, the criminal law position was spelt out in *Nelson v Larholt*\(^ {680}\) where it was held that ‘knowledge’ meant more than constructive knowledge in the sense of shutting one’s eyes to the obvious. In *Warner v DPP*,\(^ {681}\) Lord Reid held that knowledge could include ‘wilfully shutting one’s eyes to the truth’. Willful, on the other hand, could mean deliberate or reckless acts or omissions.\(^ {682}\) In the American case of *US v Jewell*,\(^ {683}\) Jewell drove, into the United States, a car containing a substantial cargo of marijuana. The argument there was that if the circumstances suggested the probability of the presence of marijuana and Jewell purposely refrained from investigating in order not to know, then Jewell was guilty of ‘knowingly’ importing a controlled substance, and ‘knowingly’ possessing with intent to distribute a controlled substance. However, the mere fact that circumstances suggested the presence of marijuana was not enough. Jewell could not be convicted of ‘knowingly’ importing, and so forth, on the basis that Jewell should have known because a reasonable person would have known. But if the circumstances made Jewell aware of the probability of the presence of marijuana, and Jewell deliberately ‘shut his eyes’, so to speak, in order not to see what was there to be seen, then Jewell had the *mens rea* concept,\(^ {684}\) which goes under the name of ‘knowledge’.

The English may have a ‘corner’ on the label *wilful blindness*, but the underlying doctrine is as firmly established in the United States of America as in England.\(^ {685}\) Indeed,

[a] doubtful suggestion ... is this: ‘One problem with the willful blindness doctrine is its bias towards visual means of acquiring knowledge.’ Such phrases as ‘deliberately shutting his eyes’ and ‘wilful blindness’ have always been employed as metaphors to indicate a conscious effort to

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\(^{679}\) See International Compliance Association (n 518 above) 198.

\(^{680}\) [1948] 1 KB. 339 344.

\(^{681}\) (1968) Cr App 373 398.


\(^{684}\) The term *mens rea* is a Latin expression, meaning ‘guilty mind’. In criminal law, except in cases of strict liability, often the *mens rea* must be accompanied by an *actus reus* if there has to be a crime committed. In short, *mens rea* means ‘guilty mind’ and *actus reus* means the ‘thing done’. Generally, a crime is committed when a person commits a guilty act accompanied by a guilty mind. In the United States of America, eg, the US Model Penal Code does not use the Latin terms *mens rea* and *actus reus*. The Code uses the following terms to describe a culpable person’s state of mind: (a) purpose; (b) knowledge; (c) recklessness; or (d) negligence.

\(^{685}\) Bowie (n 685 above).
avoid learning the truth, by whatever means knowledge is to be obtained. In a case that illustrates this point, *State v Farnes*, 171 Mont 368, 558 P 2d 472 (1976), the defendant was convicted of theft of a horse for having ‘knowingly’ sold it for the purpose of depriving the owner of his property. The state statute provides that ‘when knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence’. There was evidence to the effect that the defendant was aware of a high probability that the horse was stolen. This was held sufficient to support the conviction.686

6 Other offences relating to money laundering

6.1 Offences committed by a body of persons such as a company or partnership

As a general rule, where an offence under provisions of the Prohibition and Prevention of Money Laundering Act 2001 is committed by a body of persons, whether corporate or unincorporated, such as a bank or financial institution, that body is guilty of an offence and liable upon conviction to a fine.687 Also, every person who, at the time of the offence, acted in an official capacity for or on behalf of such a body of persons, whether as a director, manager, secretary or other similar capacity, or was purporting to act in such capacity and who was involved in the commission of that offence is guilty of the said offence and liable, upon conviction, to a fine or a term of imprisonment, or both.688

The above statutory rule covers both shadow directors and *de facto* directors in Zambia. Under Zambia’s Companies Act 1994, ‘a person not being duly appointed director of a company, on whose directions or instructions the duly appointed directors are accustomed to act shall be deemed to be a director for the purposes of all duties and liabilities imposed on directors’.689 The statutory provision in the Zambian Companies Act 1994 introduces the concept of a shadow director in that country. Under the repealed Zambian Companies Act 1921, which preceded the Zambian Companies Act 1994, the concept of shadow director was not covered to the same extent as it is covered under English law.690 Goode observes that a shadow director, in contrast to a *de facto* director, normally acts through someone.691

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686 As above.
687 See the Prohibition and Prevention of Money Laundering Act 2001, sec 8(a).
689 Companies Act 1994, sec 203(4).
690 See the English Companies Act 1985, sec 741(2) on shadow director.
facto director, on the other hand, holds out and acts in person.\textsuperscript{692} While the concept of \textit{de facto} director, based on the common law, has always been there in Zambia, the Zambian Companies Act 1994 has made improvements to the law by introducing a statute-based concept of shadow director in Zambia.\textsuperscript{693}

### 6.2 Attempts, aiding and abetting or conspiring to commit an offence

In general, any person who attempts, aids, abets, counsels or procures the commission of the offence of money laundering is guilty of an offence and liable, upon conviction, to a fine or a term of imprisonment, or to both.\textsuperscript{694} And any person who conspires with another to commit the offence of money laundering is guilty of an offence and liable, upon conviction, to a fine or a term of imprisonment, or to both.\textsuperscript{695} Does this therefore cover the position of lawyers and accountants who, allegedly acting in a professional capacity, end up aiding, abetting, counseling, conspiring or procuring a client to commit an offence of money laundering? The Prohibition and Prevention of Money Laundering Act 2001 is silent on such matters.

A further weakness of the Prohibition and Prevention of Money Laundering Act 2001 can be seen in the absence of statutory provisions to protect whistle blowers such as employees of a bank or financial institution who confide in the institution's Money Laundering Reporting Officer about suspicious transactions and suspicious activities. Whistle blowers must be protected to save them from possible vendettas from law offenders and to provide whistle blowers with some confidence and trust that their execution of duty is not only supported by the law, but by management as well. And although the Prohibition and Prevention of Money Laundering Act 2001 does not define the term 'Money Laundering Reporting Officer', a Money Laundering Reporting Officer is often understood as a senior officer within the regulated institution whose duty includes, among things, receiving reports from fellow employees regarding suspicious transactions and suspicious activities. Where a good case exists to report these suspicions to the FIU, the Money Laundering Reporting Officer should prepare and transmit to the FIU a suspicious transactions report or a suspicious activities report. Also, the Money Laundering Reporting Officer could have other functions which include compliance and risk management and the preparation and

\textsuperscript{692} As above.
\textsuperscript{693} Companies Act 1994, sec 203(4).
\textsuperscript{694} Prohibition and Prevention of Money Laundering Act 2001, sec 9(1).
\textsuperscript{695} Prohibition and Prevention of Money Laundering Act 2001, sec 9(2).
implementation of an anti-money laundering training and awareness programme for the institution.

6.3 Falsification of documents

As a general rule, any person who knows or suspects that an investigation into money laundering has been, is being or is about to be conducted, falsifies, conceals, destroys or otherwise disposes of, causes or permits the falsification of material which is likely to be relevant to the investigation of the offence, is guilty of an offence and liable, upon conviction, to a fine or a term of imprisonment, or to both.\(^\text{696}\) The question here is: What constitutes knows or suspects? We have already examined the jurisprudence underpinning the word knowing. But, what does the word suspect mean? Lord Devlin in the English Court of Appeal decision in Hussein v Chong Fook Kam\(^\text{697}\) defined suspicion as follows: ‘Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: “I suspect but I cannot prove.”’\(^\text{698}\)

Suspicion must not be confused with speculation or a hunch, or gut feeling, because suspicion may sometimes take a while to formulate and it falls only short of proof based on firm evidence.\(^\text{699}\) It seems that, in the case of suspicion, there must be a factual basis upon which it can be founded.\(^\text{700}\) But, of course, there is a subjective test and an objective test of suspicion. The objective test is usually formulated as \textit{where a person has reasonable grounds to suspect}.\(^\text{701}\) Akin to the objective test of knowing or knowledge, the objective test of suspect or suspicion imports the concept of a reasonable man and how this reasonable man would have reacted. In the American case of US v Arvizu,\(^\text{702}\) decided in 2002, the United States Supreme Court held as follows:

Considering the totality of the circumstances and giving due weight to the factual inferences drawn by Stoddard and the district court judge, Stoddard had reasonable suspicion to believe that the respondent was engaged in illegal activity. Because the ‘balance between the public interest and the individual’s right to personal security’, United States v Brignoni-Ponce 422 US 873, 878, tilts in favour of a standard less than probable cause in brief investigatory stops of persons or vehicles, the


\(^{697}\) [1970] AC 942 948.

\(^{698}\) As above.

\(^{699}\) International Compliance Association (n 518 above) 118.

\(^{700}\) As above.

\(^{701}\) n 518 above, 119.

Fourth Amendment is satisfied if the officer’s action is supported by reasonable suspicion to believe that criminal activity ‘may be afoot’, *United States v Sokolow* 490 US 1, 7. In making reasonable-suspicion determinations, reviewing courts must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularised and objective basis’ for suspecting legal wrongdoing. See, eg, *United States v Cortez*, 449 US 411, 417-418. This process allows officers to draw on their own experiences and specialised training to make inferences from and deductions about the cumulative information available.703

The United States Supreme Court noted further:

The Ninth Circuit’s methodology departs sharply from these teachings, and it reached the wrong result in this case. Its evaluation and rejection of certain factors in isolation from each other does not take into account the ‘totality of the circumstances,’ as this Court’s cases have understood that phrase. The court appeared to believe that each of Stoddard’s observations that was by itself susceptible to an innocent explanation was entitled to no weight. *Terry v Ohio* 392 US 1, however, precludes this sort of divide-and-conquer analysis. And the court’s view that it was necessary to clearly delimit an officer’s consideration of certain factors to reduce troubling uncertainty also runs counter to this Court’s cases and underestimates the reasonable-suspicion standard’s usefulness in guiding officers in the field. The *de novo* standard for appellate review of reasonable-suspicion determinations has, *inter alia*, a tendency to unify precedent and a capacity to provide law enforcement officers the tools to reach the correct decision beforehand. *Ornelas v United States* 517 US 690, 691, 697, 698. The Ninth Circuit’s approach would seriously undermine the ‘totality of the circumstances’ principle governing the existence *vel non* of ‘reasonable suspicion’. Here, it was reasonable for Stoddard to infer from his observations, his vehicle registration check, and his border patrol experience that respondent had set out on a route used by drug smugglers and that he intended to pass through the area during a border patrol shift change; and Stoddard’s assessment of the reactions of respondent and his passengers was entitled to some weight. Although each of the factors alone is susceptible to innocent explanation, and some factors are more probative than others, taken together, they sufficed to form a particularised and objective basis for stopping the vehicle.704

On the other hand, and closely matching the subjective test of *knowing or knowledge*, the subjective test of *suspicion or suspects* requires the prosecution to prove that the accused *actually suspected*705 that an investigation into money laundering had been, was being or was about to be conducted, but chose instead to falsify, conceal, destroy or otherwise dispose of, cause or permit the

704 As above.
705 See International Compliance Association (n 518 above) 117-119.
falsification of material which was likely to be relevant to the investigation of the offence.

6.4 Divulging information to an unauthorised person

As a general rule, any person who knows or suspects that an investigation into money laundering has been, is being or is about to be conducted, without lawful authority, divulges that fact or information to another person, is guilty of an offence and liable, upon conviction, to a fine or a term of imprisonment or both. We have already examined the meaning of the terms knows and suspects. So, an employee of a bank who knowingly tips a suspected bank customer that some law enforcement officers have been to the bank to ask questions about suspicious activities relating to his bank account is only inviting the wrath of the law. The statutory rule here introduces the offence of tipping off a suspected money launderer. In many jurisdictions, the requirement to report suspicious transactions or suspicious activities is of not much use if the suspected person is tipped off to the fact that he or she is under investigation. Thus, in order to preserve the integrity of an investigation, the offence of ‘tipping off’ usually occurs where information or any other matter which might prejudice the investigation is disclosed to the suspect of the investigation (or anyone else) by someone who knows or suspects ... that: a police investigation into money laundering has begun or is about to begin, or the police have been informed of suspicious activities, or a disclosure has been made to another employee under internal reporting procedures.

In the United Kingdom

It is an offence to tell — or ‘tip off’ — a suspect that a report is being made (or has been made). This could happen when an individual tips off a suspect in a way that would prejudice an investigation, when they know or suspect that an internal or external report has been made or will be made in the case of terrorism offences. The tipping off could

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707 See also Royal Brunei Airlines v Philip Tan Kok Ming [1995] 2 AC 378; C v S & Others The Times 5 November 1998.
take the form of a direct statement or more indirectly, a hint.710

So, banks and financial institutions should be very careful when providing information, say, to the media or other public relations outlets regarding a suspicious transaction or activity. If not properly handled, the issuance of statements here could lead to the tipping-off of a suspect.

In the United Kingdom, unlike in Zambia, the legal framework provides also for the offence of failure to disclose a suspicion or knowledge of money laundering.711 Failure to disclose the suspicion or knowledge of money laundering is, by itself, an offence.712 This English law statutory rule establishes a mandatory ‘defensive’ requirement for disclosure on all parties affected by the requisite knowledge or suspicion. What this means is that employees of banks and financial institutions in the UK are under a statutory obligation not to fail to report their knowledge or suspicion of a suspicious transaction or activity pertaining to a bank customer or fellow employee. However, where the employee should have reported but had no knowledge or suspicion and was not provided with ‘specified’ training by his employer, he or she has a defence for not making the disclosure of the suspicious transaction or activity.713 The ‘specified’ training referred to here is the training required to be provided under regulation 5(1)(c) of the Money Laundering Regulations 1993 of the United Kingdom. Regulation 5(1)(c) requires that a person carrying out relevant financial business must provide employees whose duties include the handling of relevant financial business with training from time to time in the recognition and handling of transactions carried out by, or on behalf of, any person who is, or appears to be, engaged in money laundering. The only defence to the offence of failure to disclose applies where the employee does not actually know or suspect that another person is engaging in money laundering.714 But, the employee will be liable if he is found to have had reasonable grounds for knowing or suspecting that another person was engaged in money laundering.715


711 See the Proceeds of Crime Act 2002 of the United Kingdom, sec 330.

712 As above.


714 As above.

715 n 713 above.
6.5 Obstructing an authorised officer, and failure or refusal to disclose information to the authorised officer

Under Zambia’s Prohibition and Prevention of Money Laundering Act 2001, it is a criminal offence for any person to:

(a) obstruct, assault, hinder or delay an authorised officer in the lawful exercise of any powers conferred upon the officer by any law;

(b) refuse to furnish to an authorised officer, on request, any particulars or information to which the authorised officer is entitled to by or under the Prohibition and Prevention of Money Laundering Act 2001;

(c) fail to comply with any lawful demand of an authorised officer under the Prohibition and Prevention of Money Laundering Act 2001;

(d) wilfully or recklessly give to an authorised officer any false or misleading particulars or information with respect to any fact or particulars to which the authorised officer is entitled to by or under the Prohibition and Prevention of Money Laundering Act 2001;

(e) fail to produce, conceal or attempt to conceal any property, document or book in relation to which there is reasonable ground to suspect that an offence has been or is being committed under the Prohibition and Prevention of Money Laundering Act 2001, or which is liable to seizure under the Prohibition and Prevention of Money Laundering Act 2001;

(f) before or after any seizure, destroy anything to prevent the seizure or securing of that property or article; or

(g) wilfully fail or refuse to disclose any information or to produce any accounts, documents or articles to an authorised officer during an investigation into an offence under the Prohibition and Prevention of Money Laundering Act 2001.\textsuperscript{716}

In all but the offence listed in paragraph (g) above, the Prohibition and Prevention of Money Laundering Act 2001 prescribes only the sanction of imprisonment without the option of a fine.\textsuperscript{717} Only in situations covered under paragraph (g), which involve the wilful failure or refusal to disclose information or to produce accounts, documents or articles to an authorised officer during an investigation, does the Prohibition and Prevention of Money Laundering Act 2001 provide sanctions that cover a fine and/or a term of imprisonment.\textsuperscript{718}

\textsuperscript{716} See the Prohibition and Prevention of Money Laundering Act 2001, secs 26 & 27.
\textsuperscript{717} As above.
\textsuperscript{718} As above.
Can tax evasion by banks lead to the offence of money laundering?

To start with, what is tax evasion and how does it differ from tax avoidance? Dishonesty is often present in tax evasion schemes, which either involves some form of deliberate misrepresentation or deceitful concealment. Tax evasion schemes may either be a specific statutory criminal offence within the tax laws of a particular jurisdiction, or be capable of constituting a common law offence of fraud or forgery, false accounting or cheat. By contrast, the traditional approach to tax avoidance in many common law jurisdictions was summarised in a decision of Lord Tomlin in *IRC v the Duke of Westminster*. The principle established in that case, now popularly known as the Duke of Westminster principle, is contained in the following words of Lord Tomlin:

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however inappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

In some countries, such as Belgium, Finland, France, Ireland, Italy, The Netherlands, New Zealand, Norway, Spain, Sweden and the United Kingdom, violations of tax laws are considered a predicate offence of money laundering. In Austria, only customs fraud and evasion of import and export duties are considered a predicate offence of money laundering. In Germany, tax evasion constitutes

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719 In general, tax evasion, unlike tax avoidance, is a criminal offence (and sometimes a civil wrong as well) in many countries. Tax evasion can be described as the intentional avoidance of tax payment usually by inaccurately declaring taxable income. By contrast, tax avoidance entails the minimisation of tax liability by lawful methods. However, in some countries, including New Zealand, Australia and the United Kingdom, the modern approach to tax avoidance has shifted somewhat with the enactment of a number of anti-avoidance provisions that are designed to strike down any arrangements that have no commercial benefit other than the avoidance of tax. See, eg, the following cases: *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311; *Oakley v FCT* (1984) ALR 291; *WT Ramsay Ltd v IRC* [1982] AC 300; *Mangin v CIR* [1971] 591 PC; *CIR v BNZ Investments Ltd* [2002] 1 NZLR 450 CA; *CIR v Peterson* [2003] 2 NZLR 77 CA; *Aspro Ltd v CT* [1932] AC 683 PC. See also H Flight ‘Taxation and money laundering: A personal view’ (2002) 5 Journal of Money Laundering Control. 323-324.
720 International Compliance Association (n 518 above) 53.
721 As above.
723 As above, 19-20.
725 As above.
a predicate offence of money laundering if it is committed by a member of a criminal association.\textsuperscript{726} Turkey considers only tax fraud as a predicate offence of money laundering, while countries such as Australia, Brazil, Canada, Denmark, Japan, Luxembourg, Portugal, Singapore, Switzerland and the United States of America do not consider tax offences as serious offences of money laundering.\textsuperscript{727}

For many years, tax evasion has been excluded from the legislative framework for fighting money laundering in several countries.\textsuperscript{728} However,

... taking conscience of the entanglement of the criminal activities and the use of sophisticated techniques to hide and launder the proceeds, international bodies and national governments changed their position on this matter. Many do recognise that money laundering is associated with all types of crime, tax evasion included. Given the fact that criminals often commit tax crimes in connection with their other illegal activities, drawing the line between both would be quite artificial. There is no moral difference between drug trafficking and other serious offences as the risks from both are great and this applies as much to tax offences as to any other crime. The ‘tax loophole’, if it existed, could only have a serious negative impact on the fight against money laundering, generally.\textsuperscript{729}

But, how is tax evasion treated under Zambia’s legal framework for combating money laundering? Given that the offence of money laundering, as established earlier, involves either (a) engaging, directly or indirectly, in a business transaction that involves property acquired with \textit{proceeds of crime}; (b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realised directly or indirectly from \textit{illegal activity}; or (c) retaining or acquiring property knowing that the property is derived or realised, directly or indirectly, from \textit{illegal activity} - and that tax evasion is, by itself, an \textit{illegal activity} in Zambia (including the fact that \textit{proceeds of crime}, as we saw earlier, arise from \textit{illegal activity}), there is no doubt that tax evasion will predicate the offence of money laundering in Zambia. Indeed, since Zambia subscribes to the ‘all crimes’ approach in determining

\textsuperscript{726} As above.  
\textsuperscript{727} As above.  
\textsuperscript{728} As above.  
\textsuperscript{729} Spreutels (n 726 above) 2. See also P Burrell ‘Preventing tax evasion through money laundering legislation’ (2000) 3 \textit{Journal of Money Laundering Control} 304-308.
predicate offences of money laundering, tax evasion by banks and financial institutions will, therefore, not be spared.

7.1 Tax evasion of foreign taxes

At common law, the starting point for a sound analysis of the treatment of foreign tax evasion is the principle enunciated in the English case of *Government of India v Taylor*. In that case, the Court of Appeal confirmed the legal position that an English court will not entertain any action brought in England to collect taxes that are owed by an accused person to a foreign government. This principle is based on the common law and on the public international law doctrine of state sovereignty.

Although the aforesaid common law position applies in Zambia, like in many other common law jurisdictions, section 29 of Zambia’s Prohibition and Prevention of Money Laundering Act 2001 has made some adjustments to the rule in *Government of India v Taylor*. We explained earlier that Zambia applies a ‘single criminality’ test. And we observed that section 29 of the Prohibition and Prevention of Money Laundering Act 2001 stipulates clearly that any act carried out by a Zambian citizen, whether in Zambia or outside Zambia, or any act carried out by any person on a ship or an aircraft registered in Zambia, is considered an offence under the Prohibition and Prevention of Money Laundering Act 2001 if such an act would constitute an offence by that person in Zambia. Let us take a more reasoned look at this statutory provision.

As noted above, the definition of illegal activity in sec 2 of the Prohibition and Prevention of Money Laundering Act 2001 is so wide that it includes any crime. The term ‘illegal activity’ is defined as any activity, whenever and wherever carried out, which under any written law in Zambia amounts to a crime. So, where a person commits a crime not covered by the Prohibition and Prevention of Money Laundering Act 2001, and that crime is proven to predicate the offence of money laundering, he or she will be liable for money laundering under the Prohibition and Prevention of Money Laundering Act 2001. Indeed, the statutory definition of illegal activity shows that Zambia has an all-crimes approach to controlling money laundering. And since tax evasion is a crime too, it is captured as a predicate offence of money laundering in Zambia.

As above.

In *Regazzoni v KC Sethia* (1944) Ltd, [1956] 2 QB 490, 515-516 (CA) aff’d, [1957] 3 All ER 287, (HL), Lord Denning explained: ‘These courts will not enforce [revenue or penal] laws at the instance of a foreign country. It is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws, ... at least to this extent, that if two people knowingly agree to break the laws of a friendly country or to procure some one else to break them or assist them in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement.’
In the first scenario, the accused person must be a Zambian citizen. The accused need not be a foreigner who, although housed in Zambia, is evading taxes in a foreign country. Foreign tax evasion by foreigners is not the concern of section 29 of the Prohibition and Prevention of Money Laundering Act 2001. That said, it matters less that the accused Zambian committed the offence of tax evasion within or outside Zambia. Equally, it is immaterial that the act in question was lawful in the jurisdiction where it took place. As long as the act would have constituted a crime in Zambia, even though it took place outside Zambia, section 29 of the Prohibition and Prevention of Money Laundering Act 2001 will be triggered. In short, where a predicate offence of foreign tax evasion takes place in a foreign jurisdiction, and that act when examined under the tax laws of Zambia (the assumption here is that the offence is taking place in Zambia) turns out to be tax evasion in the Zambian context, then section 29 of the Prohibition and Prevention of Money Laundering Act 2001 is triggered. But it is doubtful that the Zambian courts will go so far as to order that the accused should pay the foreign taxes he or she owes to a foreign sovereign because legislation in Zambia has not reversed the common law position enunciated in the Government of India v Taylor case. The accused may simply face criminal sanctions under the Prohibition and Prevention of Money Laundering Act 2001. To that extent, the reasoning in Government of India v Taylor is retained in Zambia.

In the second scenario, any act carried out by any person, whether or not he or she is a Zambian, on a ship or an aircraft registered in Zambia is an offence under the Prohibition and Prevention of Money Laundering Act 2001 if such an act would constitute an offence by that person in Zambia. So, an act of tax evasion taking place on any ship or aircraft registered in Zambia, irrespective of whether the ship is in foreign waters or the aircraft is in foreign air space, and irrespective of whether the tax evader is a Zambian citizen or a foreigner, will be caught up by section 29 of the Prohibition and Prevention of Money Laundering Act 2001. But, here, these two statutory rules apply only to offences under the Prohibition and Prevention of Money Laundering Act 2001.

In the American case of Attorney-General of Canada v RJR Tobacco Holdings Inc, an action was brought before the US 2nd Circuit Court of Appeals by the Attorney-General of Canada (Canada) on behalf of the government of Canada for damages based on lost tax revenue and additional law enforcement costs. Canada alleged that these damages resulted from a scheme facilitated by defendants to
avoid various Canadian cigarette taxes by smuggling cigarettes across the United States-Canadian border for sale on the Canadian black market. Under the Racketeer Influenced and Corrupt Organisations Act (RICO) 18 USC paragraphs 1961 et seq, Canada sought to recover revenue that it lost ‘from the evasion of tobacco duties and taxes’, and from the ‘[d]efendants’ conduct [that] compelled [Canada] to rollback duties and taxes’, as well as monies spent ‘seeking to stop the smuggling and catch the wrongdoers’. The Court ruled as follows:

The revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns. It has been defended on several grounds, including respect for sovereignty, concern for judicial role and competence, and separation of powers ... Although the United States Supreme Court and this Circuit have not ruled on the precise scope of the rule, they have acknowledged its continuing vitality in the international context. See Sun Oil Co v Wortman 486 US 717, 740 (1988) (Brennan, J concurring) (noting the rule’s continued existence in the nation-to-nation setting); Banco Nacional de Cuba v Sabbatino 376 US 398, 413-14 (1964) (noting the view that many courts in the United States have adhered to the principle that ‘a court need not give effect to the penal or revenue laws of foreign countries’); Oklahoma v Gulf, Colo & Santa Fe Ry Co 220 US 290, 299 (1911) (‘the rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties’) (quoting Wisconsin v Pelican Ins Co of New Orleans 127 US 265, 290 (1888), overruled in part by Milwaukee County v ME White Co 296 US 268, 278 (1935)); United States v First Nat’l City Bank, 321 F.2d 14, 23-24 (2d Cir 1963) (‘It has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim.’), rev’d on other grounds, 379 US 378 (1965); cf United States v Trapilo 130 F.3d 547, 551-53 (2d Cir 1997) (appearing to recognise the endurance of the revenue rule in the international context but finding it ‘inapplicable to the instant case’), cert denied, 525 US 812 (1998); United States v Pierce 224 F.3d 158, 167 (2d Cir 2000) (describing this aspect of Trapilo).

The rule has its origin in eighteenth-century English court decisions seeking to protect British trade from the oppressiveness of foreign customs. In Boucher v Lawson 95 Eng Rep 53 (KB 1734) (Lord Hardwicke, CJ), the court specifically acknowledged that its concerns with promoting British trade led it to uphold a transaction that violated Portuguese export laws. Chief Justice Lord Hardwicke stated that to do otherwise ‘would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade’. Since then, the rule has entered United States common law, international law and the national law of other common law jurisdictions. We note that the international acceptance of the revenue rule extends to Canada's Supreme Court and provincial courts ... In defence of the revenue rule, some courts have observed that the rule prevents foreign sovereigns from asserting their
sovereignty within the borders of other nations, thereby helping nations maintain their mutual respect and security.735

Against this background, we now turn to examine the burden of proof in cases of money laundering in Zambia.

8 The burden of proof in offences of money laundering

Which party should shoulder the burden of proof in money laundering cases under the Prohibition and Prevention of Money Laundering Act 2001, and what is the required standard of proof? Let us first take a look at some related developments in Hungary.

In 2000, the government of Hungary established a criminal investigation bureau within the Tax and Financial Inspection Service to help spur tax and money laundering prosecutions.736 According to the US Department of State, the government of Hungary initiated ten money laundering investigations in 2003 and only two individuals were apprehended and arrested, resulting in two prosecutions — one acquittal and one conviction.737 In these cases, the predicate offense was fraud.738 However, recent legislative changes, including one that clarifies that money laundering convictions can be obtained without conviction on the predicate offence, are expected to increase the number of money laundering prosecutions and convictions.739

In June 2003, a money laundering scandal broke involving a Hungarian subsidiary of a Dutch-owned bank.740 A broker apparently skimmed funds from some clients in order to pad the returns of other, more favoured clients. Money was laundered through several banks as well as some foreign nationals.741 Hungary’s FIU, the Anti-Money Laundering Section (AMLS), was, by March 2004, still investigating the case, which had expanded to 12 suspects with financial damages estimated at US $45 million. As one report shows:

With the organisational changes in AMLS, it is unclear how long it will take to conclude the investigation. It also is not clear whether Hungary’s financial regulatory body, the Hungarian Financial Supervisory Authority

735 As above.
737 As above.
738 As above.
739 As above.
740 As above.
741 As above.
could be held responsible for improper reporting, as it warned the bank of improper recording procedures as early as 2000. The prosecution has denied the AMLS request to call the Head of PSzAF as a witness and has not responded to repeated requests for supporting evidence. Act CXXI of 2001 provides for reversal of the burden of proof in cases of confiscations from persons part of a criminal organisation; however, this provision has not been used in practice. Hungary’s confiscation regime is also defined by Act CXXI of 2001, which came into force on April 1, 2002, and considers all benefits or enrichment originating from a criminal act to be illegal. The present provision in force contains no reference to the knowledge of the origin of assets as a condition of asset confiscation from third parties, although assets obtained by a third party in a bona fide manner may not be confiscated.

In Zambia, like many other common law jurisdictions, the burden of proof in criminal law cases, including offences of money laundering, lies on the prosecution. In other words, if someone accuses you of committing the offence of money laundering, the burden of proof requires them (i.e. the prosecution team) to prove that you have, indeed, violated the law and committed the offence in question. The general rule is that ‘he who asserts must prove’. And the standard of proof here is such that the prosecution must prove beyond reasonable doubt that you have committed the offence. By contrast, although the burden of proof in civil law cases, like in criminal law cases, still lies on the party bringing an action, the standard of proof is lighter and only requires the plaintiff to prove against the defendant on the balance of probabilities.

The problems associated with a higher standard of proof in criminal law cases and with the requirement that the burden of proof should fall on the prosecution inevitably point to a subtle necessity that the prosecution should comprise a team of competent and professional lawyers and investigators if they have to get a good chance at winning the case. In Zambia, the chambers of the Director

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742 As above.
743 Woolmington v DPP [1935] AC 462; Rex v Stoddart (1909) 2 Cr App R 217 244; Rex v Davies (1913) 29 Times LR 350; 8 Cr App R 211; Rex v Abramovitch (1914) 31 Times LR 88; Rex v Aubrey (1915) 11 Cr App R 182; Rex v Grinberg (1917) 33 Times LR 428; Rex v Sanders (1919) 14 Cr App R 11; Lawrence v The King. [1933] AC 699.
744 See Woolmington v DPP [1935] AC 462.
745 As above.
746 See Miller v Minister of Pensions (1947), 2 All ER 372.
Legislative framework for anti-money laundering under the Act

of Public Prosecution (DPP) and the Attorney-General’s chambers, though having very well-qualified professional lawyers, are understaffed. There is a need to attract more lawyers to the public service. Most young lawyers prefer practising law in small mushrooming law firms to serving in the DPP’s or the Attorney-General’s chambers. There are also not enough lawyers on the bench and in such public offices as the Anti-Money Laundering Investigations Unit. It is issues like these that pose a great challenge to the efficacy of the regulatory and institutional framework for fighting money laundering in Zambia. Law policing and law enforcement arms, together with the judiciary, should be allocated more resources if they are to attract adequate numbers of well-qualified people. It is worth noting that, even if there are very good laws in the statute books, as long as the implementation of those laws is weak, partly due to weak enforcement and weak investigative measures, the fight against money laundering will remain a pipedream. A possible way out of this conundrum, we propose, would be to introduce legislative changes that shift the burden of proof from the prosecution to the accused so that the accused should now prove beyond reasonable doubt how, where and when he acquired his seemingly dubious wealth. Indeed, the accused should show that he amassed his wealth in a lawful and legal manner. This proposal has in it a deterrent element. The idea is that the law offender and all would-be offenders should be discouraged from ever committing money laundering offences. And once the burden of proof has been shifted to the defence, it would no longer be a question for the prosecution to prove beyond reasonable doubt that the accused committed the offence of money laundering. Rather, the accused would have to show, beyond reasonable doubt, that he or she legally and lawfully acquired the wealth and did not engage in any offence of money laundering.

Admittedly, if implemented, the above proposal would attract strong criticism. However, we are awake to this fact. A notable criticism here could be that implementing such a proposal would have disastrous effects on the rule of law and the constitutionally guaranteed presumption of innocence. Of course, there is a little

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749 See R v Wholesale Travel Group Inc (1991) 67 CCC (3rd) 193; Scagell v Attorney-General of the Western Cape & Others 1996 2 SACR 579 (CC); S v Coetzee, Coetzee, De Bruin & Marais 1997 3 SA 527 (CC); McKnight v NZ Biogas Industries Ltd [1994] 2 NZLR 664; Attorney-General of Hong Kong v Lee Kong-Kut [1993] AC 951 (Privy Council). Also, in the case of Constitutional Reference No 3 of 1978; Re Inter-Group Fighting Act 1977 [1978] PNGLR 421, the Papua New Guinea Supreme Court had to deal with a reverse onus of proof. In that case, sec 10(3) of the...
water in this argument recognising that, in some cases, especially where the drafting of legislation is not properly carried out or where there is no due regard to the full spectrum of provisions in the Republican Constitution, shifting the burden of proof from the prosecution to the accused could be struck down by the courts (under judicial review of legislative action) as an unconstitutional measure. But, then, is it not a precept of the law that to every general rule there can be an exception? Indeed, what wrong would there be in enshrining in the Republican Constitution an exception to the general rule, stating therein, unequivocally and explicitly, that, notwithstanding whatever is contained in the Bill of Rights, the exception applies only to offences of money laundering, corruption and drug trafficking? As the European Court ruled, in a matter involving continued pre-trial detention, such detention can only be justified ‘if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty’.

A second proposal for law reform would be to lower the standard of proof in criminal law cases of money laundering from beyond reasonable doubt to the civil law standard of balance of probabilities.

Inter-Group Fighting Act 1977 provided that ‘[a] person charged with an offence against this section is guilty of that offence unless he proves to the satisfaction of the Court that he did not take part in the actual fighting’. But sec 37(4) of the Constitution of Papua New Guinea provided for a presumption of innocence in the following words: ‘A person charged with an offence: (a) shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge.’ In deciding over this case, the Supreme Court of Papua New Guinea examined, inter alia, whether the participation in an inter-group fight was, within the language of the Constitution, ‘peculiarly within the knowledge of the person charged. By a majority, it was found that the provision violated the constitutional presumption of innocence. The Supreme Court observed that the statutory provision could not be severed so as to retain the rest of the section. One of the judges, among the majority, observed: ‘It might be thought that as all that sub-section 11(3) does is to provide a bonus by enabling an accused person to secure his acquittal if he can prove that he did not take part in the actual fighting that there has been no serious erosion of the right to the protection of the law. I am of the opinion, however, that it is a bad precedent, the thin end of the wedge. The Supreme Court has been appointed the guardian of the people’s fundamental rights and freedoms as defined in the Constitution. It should be vigilant to ensure that there is not the slightest infringement of any of these rights and freedoms’ (431). Commenting on this ruling, D Freestone ‘The burden of proof in natural resources legislation: Some critical issues for fisheries law’ FAO Legislative Study 63 (Rome: FAO, 1998) 17 observes as follows: ‘Although it (the Supreme Court) did not determine the matter conclusively for the purposes of the meaning of the term in the Papua New Guinea Constitution, it was recognised that the term “peculiarly within the knowledge of” the accused had acquired a certain meaning in the common law, referring to such circumstance as requiring the accused to prove that he or she possessed a licence, etc. The decision is a straightforward illustration of what can be expected in countries with a system of constitutionally-guaranteed fundamental rights which include the presumption of innocence.’

Such a measure would remove the onerous and strenuous task on the prosecution — especially given the fact that law policing and criminal investigation offices in Zambia are understaffed and have limited resources at their disposal — to prove beyond reasonable doubt that the accused committed the offence of money laundering. Indeed, there are a number of cases in Zambia where an individual cannot even account for the wealth he or she has amassed over a relatively short period of time. Zambia has seen a number of poverty-stricken individuals enter politics and suddenly emerge as some of the wealthiest citizens of that country. However, given the rigidity in the law, insisting on the presumption of innocence as an absolute and fundamental right, and requiring that 'he who asserts must prove' beyond reasonable doubt, such individuals have never been charged or prosecuted. And where prosecutions have been instigated, these individuals have often been acquitted by the courts partly due to the unprofessional manner in which the prosecution has handled some of these cases.

9 Civil liability in cases of money laundering

Under the Prohibition and Prevention of Money Laundering Act 2001, civil liability of money launderers arises mainly in regard to statutory provisions dealing with the seizure and forfeiture of property. That said, caution should be exercised when applying concepts of civil liability to cases of money laundering. As Burrell and Cogman observe:

A recent decision of the Commercial Court considers the position of institutions which suspect that funds in their possession are the proceeds of crime. Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit and Others [2003] EWHC 703 (Comm) is a warning of the pitfalls of adopting the wrong procedural route when attempting to resolve the conflicts between the money laundering regime and the imposition of civil liability. It also adopts the theme, notable in the earlier Bank of Scotland decision, that institutions must bear some of the commercial risks that arise when money laundering is suspected ... There are a number of options open to financial institutions when faced with a dilemma regarding possible money laundering. It is easier to deal with the criminal issues and avoid liability for tipping off than it is to avoid possible civil liability and legal costs. It is therefore important that in any such situation, a clear strategy is identified from the outset, so that costs are not wasted on unnecessary court applications.  

9.1 Seizure of property

As a general rule, an authorised officer is under a statutory duty to seize property which he has reasonable grounds to believe was derived or acquired from money laundering.\(^ {752}\) We have already examined the concept of reasonable grounds to believe when we looked at the ruling of the United States Supreme Court in \textit{US v Arvizu}.\(^ {753}\) In that case, the test of totality of the circumstances and factual inferences was laid out. Here, the authorised officer cannot turn a blind eye if he has reasonable grounds to believe that the property in issue was either derived or acquired from money laundering activities. And section 2 of the Prohibition and Prevention of Money Laundering Act 2001 defines an authorised officer as an officer authorised by the Commissioner of the Anti-Money Laundering Investigations Unit to perform functions under the Prohibition and Prevention of Money Laundering Act 2001.

9.2 Release of seized property

Generally, where property is seized under the Prohibition and Prevention of Money Laundering Act 2001, the authorised officer who effected the seizure may, at any time before it is forfeited under that Act, order the release of the property to the person from whom the property was seized if the officer is satisfied that the property is not liable to forfeiture under the Prohibition and Prevention of Money Laundering Act 2001 and is not otherwise required for the purpose of any investigations or proceedings under the said statute or for the purpose of any prosecution under any written law.\(^ {754}\) The officer effecting the release is required by law to record in writing, specifying in detail the circumstances of, and the reasons for, the release.\(^ {755}\) And when the property is released, the officer who effected the seizure, or the state or any person acting on behalf of the state, will not be liable to any civil proceedings by any person unless it is proved that the seizure and the release were not done in good faith.\(^ {756}\) But what is good faith?\(^ {757}\) The concept of good faith may have different meanings to different people. However, in day to


\(^{754}\) Prohibition and Prevention of Money Laundering Act 2001, sec 16(1)


\(^{757}\) See Vallejo v Wheeler 98 Eng Rep 1012; \textit{Banque Financiere de la Cité} SA v Westgate Insurance Co Ltd (unreported, Court of Appeal of England, 28 July 1988); \textit{Allen v Flood} 1898 App Cas 1 46 (PC 1897); \textit{The ICC Arbitration Case} 8611 of 1997.
day ordinary parlance, the term good faith may be understood as complying with some standards of decency and honesty.

Keily argues that good faith is not a principle which can be adequately defined and that it has been described vaguely as a rechristening of fundamental principles of contract law and a phrase with no general meaning but which operates to exclude various forms of bad faith. Good faith is also seen as a discretionary standard preventing parties from recapturing opportunities that were foregone when contracting. In addition, good faith has been compared with unconscionability, ‘fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, a spirit of solidarity, community standards of fairness’ and ‘honesty in fact’, indicating that good faith is an extremely versatile concept. Commenting on good faith, Keily observes:

[[Its versatility is an essential characteristic because, as stated by Aristotle, ‘there are some cases for which it is impossible to lay down a law, so that a special ordinance becomes necessary. For what is itself indefinite can only be measured by an indefinite standard.’ However, good faith is not an obligation to act altruistically. Regretfully, Lücke writes, ‘one must leave the universal adoption of such a noble motive to some far-distant and much more enlightened age.’ Good faith does not require the abandoning of self-interest as the governing motive in contractual relations. However, it may prevent a party from abusing a legal right ...]]

9.3 Forfeiture of property

As a general rule, any property which has been seized under the Prohibition and Prevention of Money Laundering Act 2001, and which is in the possession or under the control of a person convicted of a money laundering offence and which property is derived or acquired from proceeds of that crime, is liable to forfeiture by a court of law. Here, subject to any statutory limitations in the criminal procedural laws and the civil procedural laws of Zambia, the subordinate courts and the High Court, respectively, have jurisdiction

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759 See Farnsworth (n 186 above) 59-61.
761 See generally Kelly (n 760 above).
762 As above.
763 As above.
764 Prohibition and Prevention of Money Laundering Act 2001, sec 17(1)
to hear cases of forfeiture of property. However, where a person whose property has been forfeited dies before or after the order of forfeiture by a court has been made, the order will have effect against the estate of the deceased.

Where property is seized and no prosecution for any offence under any written law is instituted with regard to the property, including where no claim in writing is made by any person and where no proceedings are commenced within six months from the date of seizure, the Commissioner of the Anti-Money Laundering Investigations Unit can apply to a court of law, upon the expiration of the six months period, for an order of forfeiture of the property. The court will not make an order of forfeiture unless the Commissioner meets two statutory conditions: first, that he has given notice by publication in the Gazette and in one national newspaper that the seized property is liable to vest in the state if it is not claimed within three months; and, secondly, three months after giving this notice the property remains unclaimed.

However, where a claim in writing is made by a person that is lawfully entitled to the property, indicating that the property is not liable to forfeiture under the Prohibition and Prevention of Money Laundering Act 2001, the Commissioner may order the release of the property to the claimant if satisfied that there is no dispute regarding the ownership of the property and that it is not liable for forfeiture. By contrast, where a claim is made against property seized under the Prohibition and Prevention of Money Laundering Act 2001 and the Commissioner finds that there is a dispute over the ownership of the property, or that there is insufficient evidence to determine the ownership of the property, or that the Commissioner is unable to ascertain whether the property is liable to forfeiture or not, the Commissioner will refer the claim to the High Court. Here, subordinate courts have no jurisdiction over such matters.

In determining whether any property belongs to, or is in the possession or under the control of any person — that is, a ‘claimant’ — the High Court can, upon an application by the Commissioner, make two types of orders. These orders can either run concurrently or be sequential. The High Court can also choose to make one order only or

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769 As above.
772 As above.
none at all. One order would require that any document relevant to
(i) the identification, the location or the quantification of the
property, or (ii) the identification or the location of any document
necessary for the transfer of the property of the claimant be delivered
to the Commissioner.\textsuperscript{774} The other order would direct a regulated
institution\textsuperscript{775} to produce to the Commissioner all information
obtained by that institution about any business transaction conducted
by or for the claimant with the institution before or after the date of
the order as the court may direct.\textsuperscript{776}

However, where the Commissioner is satisfied that an individual
or a person is failing to comply with, or is delaying, or otherwise
obstructing the court order, an authorised officer can enter the
premises of that person, search the premises and remove any material
document or other thing therein for the purpose of executing the
court order.\textsuperscript{777} And such premises include a workplace such as a bank
or financial institution. Where property is forfeited, say, from a bank
or financial institution, pursuant to provisions of the Prohibition and
Prevention of Money Laundering Act 2001, it will vest in the state.\textsuperscript{778}
And any person who tampers with that property or with seized
property will be guilty of an offence and liable, upon conviction, to a
fine or a term of imprisonment.\textsuperscript{779}

9.4 Investigations and power to arrest and search

As a general rule, every offence under the Prohibition and Prevention
of Money Laundering Act 2001 is a cognisable offence for purposes of
the Criminal Procedure Code.\textsuperscript{780} Thus, where a person arrested under
the Prohibition and Prevention of Money Laundering Act 2001 is
serving a sentence of imprisonment, or is in lawful custody, that
person should, upon an order by a magistrate, be brought before that
magistrate at such a place as would be specified in the order for the
purpose of investigations into the matter in respect of which the

\textsuperscript{774} As above.
\textsuperscript{775} See above for the statutory definition of the term ‘regulated institution’, as
provided for in sec 2 of the Prohibition and Prevention of Money Laundering Act
\textsuperscript{777} Prohibition and Prevention of Money Laundering Act 2001, sec 19(2).
\textsuperscript{780} Prohibition and Prevention of Money Laundering Act 2001, sec 22(1). Sec 28 of the
Prohibition and Prevention of Money Laundering Act 2001 adds that the Mutual
Legal Assistance in Criminal Matters Act 1993 applies to offences under the
Prohibition and Prevention of Money Laundering Act 2001 except where the
provisions of the Mutual Legal Assistance in Criminal Matters Act 1993 are
inconsistent with the provisions of the Prohibition and Prevention of Money
person is liable to be arrested under the Prohibition and Prevention of Money Laundering Act 2001.781

Also, whenever an authorised officer has reasons to believe that there is *reasonable cause to suspect*782 that in or on any premises there is concealed or deposited any property liable to seizure or forfeiture under the Prohibition and Prevention of Money Laundering Act 2001, or to which an offence under that Act is reasonably suspected to have been committed, or any book or document directly or indirectly relating to, or connected with, any dealing or intended dealing, whether within or outside Zambia, in respect of any property liable to seizure or forfeiture under the Act, or which would, if carried out, be an offence under the said Act, the authorised officer can, with a warrant issued by a court of competent jurisdiction, do any one or more of the following:

(a) enter the premises and search for, seize and detain any such property, book or document;
(b) search any person who is suspected or connected with the offence, in or on the premises, and take that person into custody in order to facilitate the investigations;
(c) arrest any person who is in or on the premises in whose possession any property liable for seizure or forfeiture under the Prohibition and Prevention of Money Laundering Act 2001 is found, or whom the officer reasonably believes to have concealed or deposited the property;
(d) break, open, examine, and search any premises, article, container or receptacle suspected or connected with the offence; or
(e) stop, search and detain any conveyance.783

Again, this statutory provision applies to banks and financial institutions. An authorised officer can therefore have access to bank records or records of any financial institution regulated by the Bank of Zambia. Let us now turn to the statutory duties of supervisory authorities and regulated institutions complementing the Bank of Zambia Anti-Money Laundering Directives 2004.

10 Statutory duties of the Bank of Zambia in fighting money laundering

Under the Prohibition and Prevention of Money Laundering Act 2001, where a supervisory authority, such as the Bank of Zambia, obtains

782 See above for an insightful discussion regarding the meaning of ‘reasonable cause to suspect’.
information that a business transaction indicates that a person has or may have been engaged in money laundering, the supervisory authority should disclose or cause to be disclosed that information to the Anti-Money Laundering Investigations Unit.\footnote{Prohibition and Prevention of Money Laundering Act 2001, sec 12(1).} Section 2 of the Prohibition and Prevention of Money Laundering Act 2001 defines a ‘business transaction’ as ‘any arrangement, including opening of a bank account, between two or more persons where the purpose of the arrangement is to facilitate a transaction between the two or more persons’.

As a general rule, a supervisory authority, such as the Bank of Zambia, should not obstruct any investigation into money laundering that may be instituted by the Anti-Money Laundering Investigations Unit.\footnote{Prohibition and Prevention of Money Laundering Act 2001, sec 12(2).} And any officer of the supervisory authority who is responsible for or causes such supervisory authority to obstruct the investigation will be guilty of a criminal offence and liable, upon conviction, to a fine or a term of imprisonment, or to both.\footnote{Prohibition and Prevention of Money Laundering Act 2001, sec 12(4).}

Also, supervisory authorities are required by law to issue such directives as may be approved by the Anti-Money Laundering Investigations Unit and which may be necessary for regulated institutions to apply in preventing and detecting money laundering.\footnote{See ch 4.} So far, only the Bank of Zambia has issued these directives.\footnote{See Association of Certified Anti-Money Laundering Specialists (ACAMS) (n 541 above) 35.}

As argued below, other supervisory authorities should also issue directives and ensure that those directives are adhered to by the institutions they regulate. The issuance of such directives would help to strengthen the legal and regulatory framework for fighting money laundering in Zambia. Complex money laundering schemes, such as smurfing, cannot be easily captured by legislation alone. The Association of Certified Anti-Money Laundering Specialists observes:

Smurfing is a commonly-used money laundering method. It is a term widely used to describe a laundering scheme that involves criminals making multiple transactions of less than the reporting threshold in order to cause financial institutions to avoid filing currency transaction reports.\footnote{See Association of Certified Anti-Money Laundering Specialists (ACAMS) (n 541 above) 35.} Given that the reporting threshold in different segments of the financial sector will obviously be different, and that these thresholds will normally be determined not only by legislation, but also by different types of regulations set by the respective regulators in the
respective segments of the financial sector, it is only best that the regulators themselves issue regulatory rules to fight sector-specific activities of money laundering. And these activities could involve smurfing. Relying solely on legislation as the only weapon to fight smurfing is not good enough. Indeed, the reporting thresholds in various segments of the financial sector tend to differ. For example, the banking sector may have different reporting thresholds from the insurance and pension fund sectors. Also, the securities industry may have its own reporting thresholds, as determined by the securities regulator. So, in addition to what is contained in principal and secondary legislation, supervisory authorities issue their own directives to fight such activities of money laundering as are related to the type of businesses and financial institutions they regulate.

11 Statutory duties of regulated institutions in the prevention of money laundering

In Zambia, there are two major statutory duties owed by an institution regulated by such supervisory authority as the Bank of Zambia. First, the regulated institution is under a statutory obligation to prevent offences of money laundering.\(^\text{790}\) In pursing this goal, the regulated institution should:\(^\text{791}\)

(a) keep an identification record\(^\text{792}\) and a business transaction record\(^\text{793}\) for a period of ten years after the termination of the business transaction so recorded;

(b) report to the Anti-Money Laundering Investigations Unit where the identity of the persons involved, the circumstances of any business transaction or where any cash transaction, gives any officer or employee of the regulated institution reasonable grounds to believe\(^\text{794}\) that a money laundering offence is being, has been or is about to be committed;

(c) comply with any directives issued to it by the supervisory authority with respect to money laundering activities;

(d) permit any authorised officer with a warrant, upon request to enter into any premises of the regulated institution during working hours and inspect records suspected of containing information relating to money laundering;

(e) permit an authorised officer with a warrant to make notes or take any copies of the whole or any part of the record referred to in paragraph (d) above; and

\(^{790}\) Prohibition and Prevention of Money Laundering Act 2001, secs 13 & 2.\(^{791}\) Prohibition and Prevention of Money Laundering Act 2001, sec 13(1).\(^{792}\) See ch 4, as well as below, on what constitutes an ‘identification record’.\(^{793}\) See ch 4, as well as below, on what constitutes a ‘business transaction record’.\(^{794}\) See above for a fuller discussion of the phrase ‘reasonable grounds to believe’.
(f) designate an officer in each branch or local office to be responsible for reporting all transactions suspected of being related to money laundering.

Secondly, it is a requirement that a regulated institution should not obstruct any investigations into money laundering that may be instituted by the Anti-Money Laundering Investigations Unit.\(^\text{795}\) A regulated institution that does not abide by the two statutory duties will be guilty of an offence and liable, upon conviction, to a fine.\(^\text{796}\) Also, where a regulated institution is guilty of an offence under the Prohibition and Prevention of Money Laundering Act 2001 any officer or employee of the institution who is responsible for, or causes, the regulated institution to commit the offence will be guilty of an offence and liable, upon conviction, to a fine or a term of imprisonment, or to both.\(^\text{797}\) In determining whether a regulated institution, officer or employee of a regulated institution has complied with the two statutory duties described above, a court can take account of the directives issued by a supervisory authority and which directives apply to that regulated institution, officer or employee of the regulated institution.\(^\text{798}\)

Further, the statutory obligations spelt out above are also found in the Bank of Zambia Anti-Money Laundering Directives 2004, although the Bank of Zambia Directives, as noted in chapter 4, apply only to institutions regulated by the central bank.\(^\text{799}\) The Prohibition and Prevention of Money Laundering Act 2001 is, however, broader in scope and scale, though, like the Bank of Zambia Anti-Money Laundering Directives 2004,\(^\text{800}\) it also provides as follows:

A regulated institution shall, with the assistance of the Unit (Anti-Money Laundering Investigations Unit) provide employees with training:

(i) on the enactments and regulations on money laundering;

(ii) in mechanisms for preventing money laundering; and

(iii) in the recognition and handling of business transactions carried out by or on behalf of any person who is or appears to be engaged in money laundering.\(^\text{801}\)

\(^{795}\) Prohibition and Prevention of Money Laundering Act 2001, sec 13(2).

\(^{796}\) Prohibition and Prevention of Money Laundering Act 2001, sec 13(4).

\(^{797}\) Prohibition and Prevention of Money Laundering Act 2001, sec 13(5).

\(^{798}\) Prohibition and Prevention of Money Laundering Act 2001, sec 13(6).

\(^{799}\) See ch 4.

\(^{800}\) See above.

\(^{801}\) Prohibition and Prevention of Money Laundering Act 2001, sec 13(3).
12 Conclusion

As a corollary to the discussion in the preceding chapter on the Bank of Zambia Anti-Money Laundering Directives 2004, this chapter has examined the efficacy of the main legislative framework for combating money laundering in Zambia. The chapter focused on Zambia’s banking sector. The Anti-Money Laundering Investigations Unit was identified as the country’s FIU. Zambia has an FIU typology which vests both investigatory and prosecuting powers in the FIU. And while the FIU shares the same commissioner with the Drug Enforcement Commission, the latter institution is part of the Ministry of Home Affairs of the Republic of Zambia. An argument was made that the FIU’s independence might be compromised by this ‘political’ organisational set-up, especially that the Commissioner and Head of Zambia’s Drug Enforcement Commission is also the Commissioner and Head of Zambia’s Anti-Money Laundering Investigations Unit.

Following on the discussion in chapter 4, regarding the directives of the Bank of Zambia on combating money laundering, a submission was made that there is need for other supervisory authorities, including those organisations responsible for regulating gatekeepers, to issue directives on money laundering. Also, it was pointed out that, where banks or financial institutions engage in tax evasion, such conduct could trigger the offence of money laundering. Tax evasion, as an illegal activity, is a predicate offence of money laundering in Zambia. And there is also a need to specify in Zambia’s Prohibition and Prevention of Money Laundering Act 2001 that officers or employees of that country’s Anti-Money Laundering Investigations Unit should not be held liable for wrongs, acts or omissions committed in good faith while in the course of business.