



**UNIVERSITY of the
WESTERN CAPE**

FACULTY OF LAW

SOUTH AFRICAN-GERMAN CENTRE FOR TRANSNATIONAL CRIMINAL JUSTICE

**Examining the Effectiveness of the Malawian Financial Intelligence Authority in the
Fight against Money Laundering**

Research Paper Submitted in Partial Fulfilment of the Requirements for the Award of the LLM



By
**UNIVERSITY of the
WESTERN CAPE**
FELISTERS FRANCISCO

3857496

Supervisor

Professor Lovell Fernandez

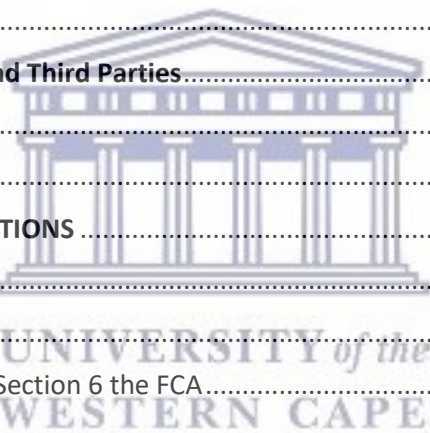
NOVEMBER 2018

TABLE OF CONTENTS

Declaration	iv
Dedication.....	v
Acknowledgements.....	vi
List of Acronyms and Abbreviations.....	vii
Key Words.....	ix
CHAPTER ONE.....	1
INTRODUCTION AND OVERVIEW OF THE STUDY	1
1.1 Introduction.....	1
1.2 Background to the Study.....	2
1.3 Background Statement to the Research Problem.....	4
1.4 Study Hypothesis.....	6
1.5 Research Questions.....	6
1.6 Research Methodology	7
1.7 Scope of the Study.....	7
1.8 Overview of the Chapters	7
CHAPTER TWO	9
THE INTERNATIONAL LEGAL FRAMEWORK REGULATING FINANCIAL INTELLIGENCE UNITS IN THE FIGHT AGAINST MONEY LAUNDERING.....	9
2.1 Introduction.....	9
2.2 Stages of Money Laundering	9
2.2.1 Placement.....	9
2.2.2 Layering.....	10
2.2.3 Integration.....	11
2.3 FIUs	11
2.3.1 Types of FIUs.....	12
2.3.1.1 Administrative-Type FIUs.....	12
2.3.1.2 Law-Enforcement-Type FIUs	13
2.3.1.3 Judicial or Prosecutorial-Type FIUs.....	13
2.3.1.4 Hybrid FIUs	14
2.4 International Bodies Regulating FIUs in the fight against Money Laundering	14
2.4.1 The FATF	14

2.4.2	Functions of the FATF.....	15
2.4.2.1	Setting Standards	15
2.4.2.2	Ensuring Implementation.....	16
2.4.2.3	Studying the Techniques and Typologies of Money Laundering	17
2.4.2.4	Conducting Outreach Activities	17
2.4.3	The FATF’s Recommendations on FIUs.....	17
2.4.4	The Effect of Non-Compliance with FATF Standards	19
2.5	Observer Members of the FATF	21
2.5.1	The World Bank	21
2.5.2	The IMF	21
2.5.3	The Wolfsberg Group	22
2.6	The Egmont Group of FIUs	23
2.7	The ESAAMLG and its Relationship to the Malawian FIA	24
2.8	International Legal Instruments Regulating International Anti-Money Laundering Law.....	25
2.9	Conclusion	27
CHAPTER 3		29
A COMPARATIVE ANALYSIS OF MALAWI’S FINANCIAL INTELLIGENCE AUTHORITY		29
3.1	Introduction.....	29
3.2	Institutional set up of Malawi’s FIA.....	29
3.2.1	The Powers of the FIA	29
3.2.1.1	Overall Analysis of the Powers of the FIA	31
3.2.2	The Core Functions of Malawi’s FIA	33
3.2.3	Other Functions of Malawi’s FIA.....	34
3.2.4	Funding of the FIA	35
3.2.5	The Recruitment Process of the Director General of the FIA	35
3.2.5.1	Overall Analysis of the Recruitment Process of the Director General of the FIA	37
3.2.6	The Recruitment Process of the Deputy Director General and other Staff of the FIA.....	39
3.3	Malawi’s Experience where the FIA was arguably seen to be compromised.....	40
3.3.1	Allegation of Fraudulent Transactions in Ration Packs Contracts between Malawi Police Service (MPS) and Pioneer Investments.....	40
3.3.2	Malawi’s Cashgate Scandal	43
3.4	Comparative Law Perspectives	47

3.4.1	An Overall Analysis of the Legal and Institutional Framework of SAFIC compared to Malawi’s FIA	47
3.4.2	Analysis of the Legal and Institutional Framework of NFIC.....	50
CHAPTER FOUR.....		54
THE MONEY LAUNDERING TYPOLOGIES THAT THE MALAWIAN FINANCIAL INTELLIGENCE AUTHORITY HAS SO FAR IDENTIFIED		54
4.1	Introduction.....	54
4.2	The Significance of Studying the Different Money Laundering Typologies	54
4.3	Money Laundering Typologies Identified by the Malawian FIA and the Action Taken.....	55
4.3.1	Public Sector Fraud.....	55
4.3.2	Over-Invoicing and Under-Invoicing of Goods and Services.....	56
4.3.3	Use of Personal Accounts to Evade Tax.....	57
4.3.4	Use of Alternative Remittance Systems- <i>Hawala</i> system	58
4.3.5	Forex externalisation	59
4.3.6	Use of Bank/Transfers and Third Parties.....	62
4.4	Conclusion	63
CHAPTER 5		64
CONCLUSION AND RECOMMENDATIONS		64
5.1	General Conclusion	64
5.2	Recommendations	65
5.2.1	Amending Section 5 and Section 6 the FCA.....	65
5.2.1.1	Section 5 of the FCA.....	65
5.2.1.2	Section 6 of the FCA.....	67
5.2.2	Improved Coordination between Malawi’s FIA and other LEAs.....	68
5.2.3	Regular Parliamentary Oversight Meetings with the FIA	68
LIST OF REFERENCES.....		69



Declaration

I, Felisters Francisco, declare that *‘Examining the Effectiveness of the Malawian Financial Intelligence Authority in the Fight against Money Laundering’* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signature.....

Date.....

Supervisor: Professor Lovell Fernandez



UNIVERSITY of the
WESTERN CAPE

Signature.....

Date.....

Dedication

I dedicate this paper to God Almighty, for always being my pillar. Thank you Lord for bringing me this far and beyond my expectations. You have made everything possible in realising my goals.

I also dedicate this paper to my beloved parents for always being there for me.

My most sincere gratitude goes to my father Mr Amadi Francisco who has always been my hero. Sometimes am filled with tears of joy knowing that I have come this far because of your endless support.

I also dedicate this paper to my sisters, brothers and nieces namely Maria Francisco Chikabadwa, Yacinta Francisco, Frank Francisco, Francis Francisco, Silvester Francisco, Antony Francisco, Patrick Luka, Alinafe Chikabadwa and Philomena Francisco. You people gave me the reason to keep on fighting hard even, even when times were rough. You are the best and surely this work shows that together we can triumph.

In a special way, I also dedicate this paper to my eldest brother Frank Francisco (chief) a person to whom no words could ever satisfactorily express my gratitude for everything he has done for me. Truly, you are my second father and a true source of inspiration.

"I love you all and thank you for always supporting my career."

Acknowledgements

My sincere gratitude should go to my supervisor, Professor Lovell Fernandez, for his support and guidance throughout the writing of this paper. I feel honoured to have a supervisor who was kind and always willing to assist.

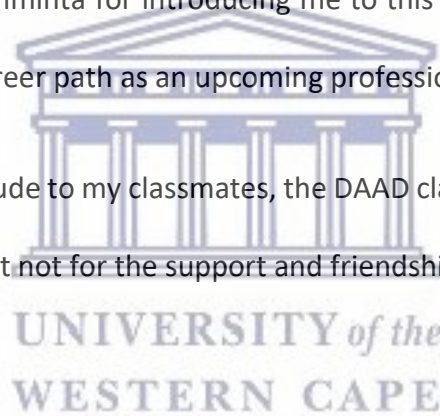
Special appreciation also goes to DAAD for the scholarship afforded to complete my LLM.

I am grateful to Professor Werle, Professor Koen, and Dr Marshet for their kindness in sharing their knowledge in their respective areas of expertise.

I am also grateful to Dr Jean Priminta for introducing me to this LLM DAAD program which has completely transformed my career path as an upcoming professional.

Lastly, I must express my gratitude to my classmates, the DAAD class of 2018. This journey would have been more difficult were it not for the support and friendship you provided.

“Vielen Dank”



List of Acronyms and Abbreviations

ACB:	Anti-Corruption Bureau
ALFOD:	Alliance for Democracy
AML:	Anti-Money Laundering
BRP:	Business Resident Permit
CCP:	<i>Chipani Cha fuko</i>
DPCI:	Directorate of Priority Crime Investigation
DPP:	Democratic Progressive Party
ESAAMLG:	Eastern and Southern African Anti-Money Laundering Group
FATF:	Financial Action Task Force
FCA:	Financial Crimes Act
FIA:	Financial Intelligence Authority
FIU:	Financial Intelligence Unit
FSRB:	FATF-Style Regional Bodies
G7:	Group of Seven
IMF:	International Monetary Fund
LCTRs:	Large Currency Transaction Reports
LEAs:	Law Enforcement Agencies
MCP:	Malawi Congress Party
MK:	Malawi Kwacha
ML:	Money laundering
MPS:	Malawi Police Service



MRA:	Malawi Revenue Authority
NFIC:	Namibia's Financial Intelligence Centre
NFICA:	Namibia's Financial Intelligence Act
PAC:	Public Appointments Committee
PP:	People's Party
RBM:	Reserve Bank of Malawi
SADC:	Southern African Development Community
SAFIC:	South Africa's Financial Intelligence Centre
SAFICA:	South Africa's Financial Intelligence Centre Act
TBML:	Trade-based Money laundering
UDF:	United Democratic Front
UNODC:	United Nations Office on Drugs and Crime
UNSC:	United Nations Security Council



Key Words

Anti-Money Laundering

Effectiveness

FATF Recommendations

Financial Crimes Act

Financial Intelligence Authority

Financial Intelligence Units

Malawi

Money Laundering

Namibia

South Africa



UNIVERSITY *of the*
WESTERN CAPE

CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Introduction

Money laundering (hereafter ML) is a multidisciplinary topic which has become important since the late 1980s.¹ The term 'laundering' literally means 'washing' or 'removing dirt'.² It has been defined as the conversion of criminal income into assets that cannot be traced back to the underlying crime.³ Criminals use ML as a way of keeping control over the proceeds of crime and to provide, ultimately, a cover for their income and wealth. ML occurs every time any transaction takes place, regardless of whether it involves any form of property or benefit, whether tangible or not tangible, which is derived from criminal activity.⁴

ML is regulated at the global, regional and national levels. To combat ML and other financial crimes, Malawi enacted the Financial Crimes Act (hereafter FCA).⁵ The FCA establishes the Financial Intelligence Authority (hereafter FIA) as an institution whose objectives include collecting financial intelligence regarding suspicious transactions.⁶

¹ Unger B & Linde DVD *Research Handbook on Money Laundering* (2013) 3, Edward Elgar Publishing Limited, Cheltenham, United Kingdom.

² Mtonga E M A *Critical Appraisal of the Current Anti-Money Laundering Laws of Malawi with Specific Focus on Trust* (2015) 1, unpublished LLM Research Paper, University of the Western Cape. Mtonga quotes Serafini J "Money Laundering" (2004) 41 *American Criminal Law Review* at 887. Available at <http://www.lexisnexis.com.ezproxy.uwc.ac.za/hottopics/Inacademic/?shr=t&csi=168966&sr=TITLE%> (last visited on 31 March 2015).

³ Reuter P & Truman EM *Chasing Dirty Money: The Fight against Money Laundering* (2004) 1, Institute for International Economics, Washington DC, United States of America.

⁴ Hopton D *Money Laundering: A Concise Guide for all Business* (2009) 1-2, second edition, Gower Publishing Limited, England.

⁵ No 14 of 2017.

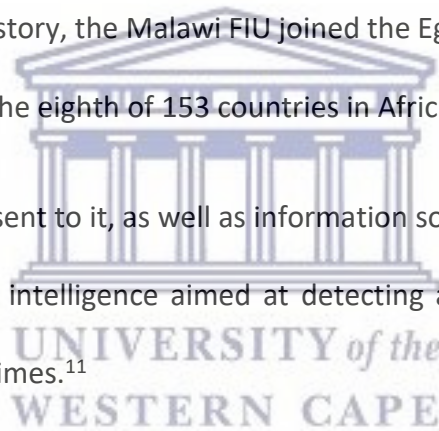
⁶ Section 3(1) of the FCA.

1.2 Background to the Study

Before the FCA came into force in the year 2017, the FIA was known as the Financial Intelligence Unit (hereafter FIU), which started its operations in July 2007. It was established in terms of Section 11 of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (hereafter ML Act)⁷ which has been repealed under section 141(1) of the FCA.

Since its establishment in 2007, the FIU was housed in the Reserve Bank of Malawi (hereafter RBM) building in Lilongwe⁸ where it analysed cases relating to the illegal remittance of funds through the use of false importation documents.⁹ The FIU functioned under a comprehensive framework. Despite its short history, the Malawi FIU joined the Egmont Group, the international association of FIUs. It became the eighth of 153 countries in Africa to attain membership.¹⁰

Malawi's FIU analysed reports sent to it, as well as information sourced from databases of other institutions to gather financial intelligence aimed at detecting and investigating ML, terrorist financing and other financial crimes.¹¹



⁷ Chapter 8:07 of the Laws of Malawi of 2006.

⁸ Musonda S & Muhammed H "The role of Financial Intelligence Units in combating money laundering: A Comparative Analysis of Zambia, Zimbabwe and Malawi" (2011) 15, *Journal of Money Laundering Control*. Available at www.emaralddinsight.com/doi/pdfplus/10.1108/13685201211194754 (last visited on 4 March 2018).

⁹ Malawi FIU Annual Report (2015/2016), 6. Available at <http://www.fiumalawi.gov.mw/FIU%20ANNUAL%20REPORT%20FOR%202015%20-%202016.pdf> (last visited on 5 March 2018).

¹⁰ Musonda S & Muhammed H (2011: 21).

¹¹ Malawi FIU Annual Report (2015/2016: 8).

The Malawian FIU was set up as an administrative agency, whose function was not to investigate or prosecute ML or other financial crimes. It disseminated financial intelligence to law enforcement agencies (hereafter LEAs) for investigation and prosecution.¹²

The FIU was mandated to share information with foreign FIUs for fighting ML.¹³ It maintained a good working relationship with other domestic agencies through various Memoranda of Understanding to ensure the sharing of information to help accomplish its obligations. In addition, it liaised with LEAs during the prosecution of ML cases. For example, the FIU continued to provide financial intelligence to the LEAs regarding the investigation and prosecution of cases related to Malawi's notorious Cashgate scandal, which involved the systematic looting of public money and corruption at Capital Hill, the seat of Government.¹⁴

To encourage financial institutions to take ownership of implementing the anti-money laundering (hereafter AML) laws and regulations, the FIU ran training programmes for various reporting entities at their request. To promote AML awareness among the public, it distributed leaflets, posted articles on its website on key developments in AML efforts, and used billboards in Malawi's cities of Blantyre, Lilongwe and Mzuzu to advertise its existence and why it was created.¹⁵ A key component of its strategy was to coordinate its work with that of other domestic units, as well as with its international counterparts.¹⁶

¹² Malawi FIU Annual Report (2015/2016: 7).

¹³ Malawi FIU Annual Report (2015/2016: 8).

¹⁴ Malawi FIU Annual Report (2015/2016: 9).

¹⁵ Malawi FIU Annual Report (2015/2016: 14).

¹⁶ Malawi FIU Annual Report (2015/2016: 17).

Despite its successes, the FIU encountered hurdles that hampered its progress. For example, it was poorly funded, which impacted negatively on its operational effectiveness in matters such as educating the public on AML measures and conducting on-site examination of financial institutions. The FIU operated from rented premises, and it was usually in arrears in paying the rent.¹⁷

1.3 Background Statement to the Research Problem

In 2008, the Eastern and Southern African Anti-Money Laundering Group (hereafter ESAAMLG) published its *Mutual Evaluation Report of the Republic of Malawi on Anti-Money Laundering and Combating the Financing of Terrorism*.¹⁸ The report made several findings and recommendations on Malawi's repealed law, that is, the ML Act which dealt with ML and with the combating of the crime of financing acts of terrorism.

Malawi's AML framework was revised radically as a result of the report. For instance, during the period that the ML Act was in operation, ESAAMLG found that Malawi did not have a legislative or regulatory framework to implement United Nations Security Council Resolutions (hereafter UNSCR's) 1267 and 1373. It was also noted that the authorities were not disseminating the UNSCR 1267 lists to financial institutions. However, certain provisions in the ML Act could have been utilised to freeze terrorist assets, although this would have required a longer judicial process to accomplish. This was found to be inconsistent with the UNSCR's requirement to freeze the assets without delay. It was therefore recommended that Malawi establish an appropriate

¹⁷ Malawi FIU Annual Report (2015/2016: 21).

¹⁸ Eastern and Southern Africa Anti-Money Laundering Group *Anti Money Laundering & Combating the Financing of Terrorism* (2008) 4, Mutual Evaluation Report Executive Summary, Republic of Malawi.

legislative or regulatory framework for the freezing of terrorist assets.¹⁹ This recommendation by ESAAMLG was implemented under Part VI of the newly-enacted 2017 FCA, which provides for civil forfeiture, seizure, detention, freezing and preservation of assets.

ESAAMLG also found that Malawi had no LEA specifically charged with the responsibility of ensuring that ML offences are properly investigated. However, the Anti-Corruption Bureau (hereafter ACB) and the Malawi Police Service (hereafter MPS) had already begun to consider aspects of ML as part of their day-to-day investigations. Moreover, the FIU disseminated reports to LEAs.²⁰ Under section 5(c) of the newly-enacted FCA, the FIA has the authority to investigate any matter in relation to the implementation of the Act.

ESAAMLG further found that Malawi had no statutory or regulatory framework dealing with shell banks. While the ML Act did not regulate shell banks, a shell bank could be set up subject to the discretionary issuing of a licence. ESAAMLG recommended that Malawi should consider specifically prohibiting the establishment of shell banks.²¹ As a result, Section 30(2) of the FCA presently prohibits correspondent banking relationships with shell banks.

Although Malawi now has a more improved FIA in view of the newly enacted FCA, this study will argue that there is much that still needs to be done to make the FIA more effective in combating ML. For example, the newly enacted FCA does not grant the FIA the express powers to prosecute

¹⁹ ESAAMLG report on Malawi (2008: 6).

²⁰ ESAAMLG report on Malawi (2008: 6).

²¹ ESAAMLG report on Malawi (2008: 8).

cases of ML besides the investigative role provided under section 5(c) of the FCA. This study will contend that lack of express prosecutorial authority for the FIA hampers its fight against ML.

1.4 Study Hypothesis

The study proceeds from the assumption that the effectiveness of the FIA in fighting ML does not solely rely on the availability of material resources for its day-to-day operations, but depends also on the degree of independence enjoyed by the institution. The assumption is that, for the institution to operate effectively, its employees should be able to work free of outside interference that would compromise its integrity and public image. The potential danger of political interference is real, given the fact that the Director General, who heads the FIA, is a political appointee. The chances that the appointee might cherish his or her indebtedness to the President more than any other work-related consideration can therefore not be ignored. Thus, in deciding whether to investigate suspicious ML transactions, it is likely that the Director General would not want to incur the displeasure of the President unto whom he or she is beholden. In effect, this means that external considerations violate the spirit and the letter of the law.

1.5 Research Questions

This research paper seeks to answer the following three questions:

- a. Does the lack of express powers to prosecute under the Malawi's FCA hamper the FIU in combating ML?
- b. How does the Malawian FIA deal with the various typologies of ML?
- c. Is there any possibility of executive or political influence over the Malawian FIA which would undermine the institution's ability to combat ML?

1.6 Research Methodology

This is a pure desktop study. It will compare Malawi's AML laws with those of South Africa and Namibia in so far as they relate to the title of this work. The comparison arises from the fact that, like Malawi, the two comparators share three important characteristics. First, they are all common law jurisdictions. Second, they all belong to the Southern African Development Community (hereafter SADC) countries. Third, all three countries are members of ESAAMLG. The comparison will concentrate on the key features of FIUs, which are their respective mandates, powers, structures, and appointment procedures for the heads of the FIUs.

1.7 Scope of the Study

The study will confine itself to looking into the enabling laws governing FIUs in the countries compared, but with the emphasis on the Malawian law as Malawi is the focus of this paper. In addition, the paper will measure the effectiveness of the Malawian FIA against the standards set by the Egmont Group, which is an international group of FIUs that meets regularly to enhance their cooperation in information exchange, training and sharing of expertise.

1.8 Overview of the Chapters

Chapter One

Chapter One introduces the topic and gives an overview of the study.

Chapter Two

Chapter Two briefly looks at the stages of ML and the various types of FIUs that exist in the international community. Most importantly, the chapter looks at how the Financial Action Task Force (hereafter FATF), which is the international standard setting AML body based in Paris,

enforces its standards. The chapter also discusses the two observer members that attend the FATF meetings, namely, the IMF and the Wolfsberg Group, which will be briefly described below. The chapter also briefly discusses the Egmont Group. Finally, the chapter will look at the ESAAMLG, which is an AML regional grouping of which Malawi is a member.

Chapter Three

This chapter focuses on the legal and institutional framework of Malawi's FIA and its mandate under the FCA in the fight against ML. Since the study attempts to measure the effectiveness of Malawi's FIA against that of South Africa and Namibia, the paper will also study the respective enactments of the latter two countries, namely, South Africa's Financial Intelligence Centre Act (hereafter SAFICA) and Namibia's Financial Intelligence Centre Act (hereafter NFICA).

Chapter Four

This chapter will study the different typologies of ML that the Malawian FIA has so far dealt with under both domestic law and international law.

Chapter Five

This chapter, the concluding one, will point out the main weaknesses in Malawi's FIA, especially with regard to executive interference in the work of the FIA, and will recommend what could be done about the flaws.

CHAPTER TWO

THE INTERNATIONAL LEGAL FRAMEWORK REGULATING FINANCIAL INTELLIGENCE UNITS IN THE FIGHT AGAINST MONEY LAUNDERING

2.1 Introduction

In 1989, the Finance Ministers of the G7 countries, which constitute the world's most developed economies, established the FATF, a body created to combat ML. Its mandate was "to assess the results of cooperation already undertaken, to prevent the utilisation of the banking system and financial institutions for ML, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems to enhance the multilateral judicial assistance."²²

This chapter briefly introduces the stages of money laundering which FIUs encounter in money laundering cases. It also discusses the various types of existing FIUs and how the FATF enforces its Recommendations, particularly in relation to FIUs. In addition, the chapter takes a brief look at the Egmont Group of FIUs and ESAAMLG.

2.2 Stages of Money Laundering

2.2.1 Placement

Placement is usually the first of three steps in laundering illicit proceeds. It involves changing the money derived from criminal activities into a more portable and less suspicious form, then

²² World Bank *Combating Money Laundering and the Financing of Terrorism: a Comprehensive Training Guide*, (2009) 23, the International Bank for Reconstruction and Development / The World Bank 1818 Washington DC.

introducing the proceeds into the mainstream financial system. It is the most difficult and vulnerable step, because most illegal activity generates profits in the form of cash, and cash is bulky, difficult to conceal. Furthermore, carrying large amounts of money attracts the suspicion of bank tellers and casino employees.²³

Placement requires finding a solution to the problem of how to blend the illicit proceeds into the lawful financial system. The methods used to do so know no bounds, and may vary from simply placing the illicit cash into cash-intensive businesses to converting the cash into negotiable instruments such as cashier cheques or money orders.²⁴

2.2.2 Layering

Layering is the second of the three steps of laundering illicit funds. It involves making a series of financial transactions that, in their frequency, complexity and volume, often resemble legitimate financial activity. Typically, layering involves the wire transfer or movement of funds placed in the financial or banking system by way of numerous accounts in an attempt to hide the criminal provenance of the proceeds. The most common method of layering is to wire transfer funds through offshore-banking havens. Once the funds are out of the country and are in countries with strong bank-secrecy laws, their origins become even more obscure. The difficulty of tracing the source of the criminal money is compounded by the various complex devices available to the

²³ Richards JR *Transnational Criminal Organisations, Cybercrime, and Money Laundering: A Handbook for Law Enforcement Officers, Auditors, and Financial Investigators* (1999) 47-48, CRC Press LLC, Washington, D.C United States of America.

²⁴ Richards JR (1999: 48).

launderer to confound investigators. The sheer volume of wire transfers adds to the problem of tracking the origins.²⁵

2.2.3 Integration

Integration involves the integration of the layered funds into the legal economy by using a variety of financial instruments, such as letters of credit, bonds, securities, bank notes, bills of lading and guarantees. Some of the largest seizures of laundered funds occur where integration fails and the entire account is or accounts are seized.²⁶

2.3 FIUs

Given the sophisticated ways of laundering criminal money, the need for a modern AML strategy has become widely accepted internationally. A critical component of this strategy are FIUs. The Egmont Group, an informal international gathering of FIUs, defines an FIU as “a central, national agency responsible for receiving (and as permitted, requesting), analysing and disseminating to a competent authority, disclosures of financial information concerning proceeds of crime and potential financing of terrorism; or required by national legislation or regulation, to counter ML and terrorism financing.”²⁷

FIUs increase their probability of success by constantly updating technology, hiring personnel with relevant work experience and training them to keep up with the latest trends in financial

²⁵ Richards JR (1999: 49).

²⁶ Richards JR (1999: 49-50).

²⁷ Musonda S, Muhammed H (2011: 112-113).

crime.²⁸ FIUs have been described as ideally suited to provide reporting entities with training and guidance to reinforce their participation in counteracting ML. Simonova states that FIUs are:

“In an ideal position of collecting valuable data on money laundering techniques from all over the world. At the national level, they are a link between financial institutions and law enforcement agencies having useful contacts to each side. There is no other institution which is better suited for educating financial institutions in preventing and detecting money laundering... It would be more appropriate if national FIU’S took a more active role in educating financial institutions in anti-money laundering law techniques through regular publication of updated typologies and other guidance.”²⁹

2.3.1 Types of FIUs

FIUs differ from one another in structure and reporting authority. There are three types of FIUs.

2.3.1.1 Administrative-Type FIUs

Administrative-type FIUs are usually part of an existing structure, under the supervision of an administration or an agency other than the law-enforcement or judicial authorities. They sometimes constitute a separate agency, placed under the substantive supervision of a government ministry. The main rationale for such an arrangement is to establish a link between the financial sector (and, more generally, entities and professionals subject to reporting

²⁸ Souza JD *Terrorist Financing, Money Laundering, and Tax Evasion: Examining the performance of Financial Intelligence Units* (2012) 143, CRC Press, United States of America.

²⁹ Alhosani W *Anti-Money Laundering: A Comparative and Critical Analysis of the UK and UAE’S Financial Intelligence Units* (2016) 24, Macmillan Publishers Ltd, London. Quoting Simonova A, “The Risk-Based Approach to Anti-Money Laundering: Problems and Solutions” (2011) 346, 14(4), *Journal of Money Laundering Control*.

obligations) and the law-enforcement authorities in charge of financial crime investigations and prosecutions.³⁰

2.3.1.2 Law-Enforcement-Type FIUs

The law-enforcement type FIU is an FIU which is part of a law-enforcement agency. It is easier to establish as it does not require a new entity and a new legal and administrative framework. This type of FIU is close to other LEAs, such as a financial crimes unit. The law-enforcement type FIU enables the institution to benefit from the expertise and sources of information of the other LEAs. In return, information received by the FIU is accessed more easily by LEAs and could be used in any investigations. Exchange of information is expedited through the use of existing national and international criminal information exchange networks.³¹

2.3.1.3 Judicial or Prosecutorial-Type FIUs

These fall under a country's judiciary. They are suited to jurisdictions where strong bank secrecy laws make it necessary to seek the help of judicial or prosecutorial authorities to secure the cooperation of financial institutions. Such an arrangement is typically found in civil law jurisdictions, where the public prosecutors are part of the judicial system.³²

³⁰ World Bank *Financial Intelligence Units: An Overview* (2004) 10, International Monetary Fund Publication Services, Washington, D.C. Available at <https://www.imf.org/external/pubs/ft/FIU/fiu.pdf> (last visited on 30 July 2018).

³¹ World Bank (2004:13-14).

³² D'Souza J *Terrorist Financing, Money Laundering, and Tax Evasion: Examining the performance of Financial Intelligence Units* (2012) XII, Taylor & Francis/CRC Press, Boca Raton, Introduction at XII.

2.3.1.4 Hybrid FIUs

Hybrid FIUs combine elements of the FIUs described above in order to benefit from their advantageous elements.³³ For example, some FIUs combine the features of administrative-type and law-enforcement-type FIUs.³⁴

2.4 International Bodies Regulating FIUs in the fight against Money Laundering

2.4.1 The FATF

The FATF began its work in Paris in 1990 and since then it has produced the most comprehensive set of AML standards, known as the FATF Forty Recommendations. As more countries accepted the FATF Recommendations, they became the global minimum standard for an effective AML system.³⁵

In 2001, after the 9/11 terrorist attacks in the United States, the FATF adopted Nine Special Recommendations on Terrorist Financing. The first eight were adopted in October 2001, and the ninth in October 2004. In 2012, the FATF introduced risk management as its first Recommendation. The revisions of 2012 combined the Nine Special Recommendations into the 40 Recommendations.

Besides the FATF, the United Nations Convention against Transnational Organised Crime³⁶ (hereafter the Palermo Convention) also contains provisions that target ML.

³³ D'Souza J (2012: XII).

³⁴ World Bank (2004: 17).

³⁵ World Bank (2009: 23).

³⁶ United Nations Convention against Transnational Organised Crime and the Protocols thereto, United Nations Office on Drugs and Crime (2004) Vienna, United Nations, New York. Available at

Apart from the Palermo Convention which deals with the criminalisation of the proceeds of illicit drug trafficking, but which makes no mention at all of the term 'money laundering', there are no instruments dealing with AML at international level, or rather a world treaty, that deals with international AML law.

The FATF does not administer a treaty, and its Recommendations are not legally binding, for they are classed as soft law. The FATF is an international task force that functions as an inter-governmental policy-making body with the specific purpose to establish international standards, and develop and promote policies, both at the national and international levels, to combat ML and terrorist financing. The FATF reviews its operations regularly.³⁷

The FATF has four core functions: setting standards, ensuring their implementation in member countries, studying the techniques and typologies of ML and terrorist financing, and conducting outreach activities that aim to spread the Recommendations globally.³⁸



2.4.2 Functions of the FATF

2.4.2.1 Setting Standards

The first product of the FATF was the first edition of the Forty Recommendations in 1990, which provided the first comprehensive international AML framework. Throughout its history, the standard-setting function continued to be very important. FATF standard-setting activities are not confined to setting the general standard in the form of broad recommendations. The group

https://www.unodc.org/documents/middleeastandnorthafrica/organisedcrime/United_Nations_Convention_against_Transnational_Organised_Crime_and_the_Protocols_thereeto.pdf (last visited on 9 July 2018).

³⁷ World Bank (2009: 23-24).

³⁸ World Bank (2009: 23-24).

continually issues interpretive notes and guidance on best practices aimed at promoting the uniform implementation of the Recommendations across the world.³⁹

The standard-setting role of the FATF was acknowledged internationally when the Boards of the World Bank and the IMF agreed to recognise the FATF Forty Recommendations as the standard for combatting ML. The FATF has the mandate to instruct financial institutions and non-financial institutions to take steps to use the Recommendations in their activities.⁴⁰

2.4.2.2 Ensuring Implementation

The FATF not only sets standards to combat ML, but also implements rigorous internal review procedures that aim to ensure that countries comply with its Recommendations.⁴¹ The FATF uses two types of review mechanisms, namely, self-assessment exercises and mutual evaluation.⁴²

The self-assessment exercise is based on a standard questionnaire designed by the FATF and used by its members to report on their AML systems on an annual basis. The FATF secretariat then uses the answers to compile reports on the level of compliance with the Recommendations and on the specific successes and failures in each reporting country's system.⁴³

A mutual evaluation consists in one country's AML laws and policies being evaluated by a team of experts drawn from other member countries. The team uses a standard questionnaire and is guided by a pre-set list of issues in assessing the level of the examined country's compliance with

³⁹ World Bank (2009: 24-25).

⁴⁰ World Bank (2009: 25).

⁴¹ World Bank (2009: 25).

⁴² World Bank (2009: 25)

⁴³ World Bank (2009: 25).

FATF standards. Based on the reports compiled, the assessed countries are required to rectify shortcomings in their AML laws. Each evaluated country is also given an opportunity to respond to the first draft of the report before it is published.⁴⁴

2.4.2.3 Studying the Techniques and Typologies of Money Laundering

The third main role of the FATF is to provide a forum for sharing information on ML techniques and typologies, and best policies and measures to counter them. The FATF uses multidisciplinary experts who meet in working groups to study and analyse the latest laundering methods. The FATF then publishes a typology based on this information. “Typology” in this case means the systematic classification of crimes with a common trait. These typologies are based on the crimes experienced by member countries.⁴⁵

2.4.2.4 Conducting Outreach Activities

The FATF attaches much importance to publicising its work and reaching out not just to the public and governments, but also to institutions and professional people that are vulnerable as conduits for ML, such as financial institutions and certain designated non-financial businesses and professions.⁴⁶

2.4.3 The FATF’s Recommendations on FIUs

The FATF Recommendations set out the essential measures that countries should have in place to identify the risks and develop policies and domestic coordination among institutions. Countries are advised to apply preventive measures for the financial sector, including other

⁴⁴ World Bank (2009: 25).

⁴⁵ World Bank (2009: 26).

⁴⁶ World Bank (2009: 26).

designated sectors, and to establish powers and responsibilities for the competent investigative, law enforcement and supervisory authorities. Countries are also tasked with other institutional measures that help to enhance the transparency and availability of beneficial ownership information of legal persons and arrangements, and to facilitate international cooperation.⁴⁷

Recommendation 29 of the FATF provides that countries should establish an FIU that serves as a national centre for the receipt and analysis of suspicious transaction reports (hereafter STRs); and other information relevant to ML. FIUs are also required to disseminate the results of the analysis of the information that they receive.⁴⁸

The FATF further requires FIUs to obtain additional information from reporting entities, and that it should have access on a timely basis to the financial, administrative and law enforcement information it requires to undertake its functions properly.⁴⁹

The FATF emphasises the need for the FIU to conduct operational analysis, which uses available and obtainable information to identify specific targets, to follow the trail of particular activities or transactions, and to determine links between those targets and possible proceeds of crime.⁵⁰

The FATF also recommends that a country's FIU should be able to disseminate, spontaneously and upon request, information and the results of its analysis to relevant competent authorities, and should use dedicated, secured and protected channels for the dissemination.⁵¹

⁴⁷ The FATF Recommendations *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (2016) 7, Paris Cedex 16, France.

⁴⁸ FATF *Methodology for Assessing Technical compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (2013-2017) 75, Paris, France.

⁴⁹ FATF (2013-2017: 75).

⁵⁰ FATF (2013-2017: 75).

⁵¹ FATF (2013-2017: 76).

In addition, the FATF also recommends that an FIU protects its information by having rules in place governing the security and confidentiality of information, including procedures for handling, storage, dissemination, and protection of and access to information. The FATF also requires the FIU staff members to have the security clearance levels and understanding of their responsibilities in handling and disseminating sensitive and confidential information; and also ensuring that there is limited access to its facilities and information, including information technology systems.⁵²

The FATF lays much store by an FIU being operationally independent and autonomous by having the authority and capacity to carry out its functions freely, including the autonomous decision to analyse, request or forward or disseminate specific information.⁵³

2.4.4 The Effect of Non-Compliance with FATF Standards

Although the FATF's Recommendations have no formal legal status, they have significant practical force. The FATF monitors member and non-member states' compliance with its Recommendations. A jurisdiction that fails to comply with the FATF's Recommendation may, after a period of dialogue and engagement, face adverse reputational consequences.⁵⁴

According to Ben Saul, the FATF can publicly urge all states to advise their financial institutions to consider the risks posed by various financial dealings.⁵⁵ In February 2011, the FATF published

⁵² FATF (2013-2017: 76).

⁵³ FATF (2013-2017: 76).

⁵⁴ Jenkins D, Jacobsen A & Henriksen A *The Long Decade: How 9/11 Changed the Law* (2016) at 124, New York: Oxford University Press.

⁵⁵ Jenkins D, Jacobsen A, Henriksen A (2016: 124).

a list of “high-risk and non-cooperative jurisdictions.” In relation to the non-cooperative jurisdictions, it warned:

“The FATF is not yet satisfied that the following jurisdictions have made sufficient progress on their action plan agreed upon with the FATF. The most significant action plan items or the majority of their action plan items have not been addressed. If these jurisdictions do not take sufficient action to implement significant components of their action plan by June 2011, then the FATF will identify these jurisdictions as being out of compliance with their agreed action plans and will take the additional step of calling upon its members to consider the risks arising from the deficiencies associated with the jurisdiction.”⁵⁶

For Saul, the FATF has a powerful influence on the conduct of all states, because the consequences of non-compliance and exclusion are costly, given that the FATF comprises the most powerful economies in the world. Providing member states with technical assistance makes compliance easier to achieve even when capacity is lacking. The FATF works not only with states, but also with financial institutions in enhancing its influence on the practices of financial institutions around the world.⁵⁷

⁵⁶ Jenkins D, Jacobsen A, Henriksen A (2016: 124).

⁵⁷ Jenkins D, Jacobsen A, Henriksen A (2016: 124).

2.5 Observer Members of the FATF

2.5.1 The World Bank

The World Bank is not a standard setter in AML law; rather, its main role is to help countries in meeting the standards set by the FATF Recommendations. Specifically, the World Bank helps to prevent and to suppress ML by providing technical assistance on risk management. It assists in building stronger legal, institutional and governance frameworks. It encourages countries to undertake legislative and institutional reforms, to adopt changes in mind-sets and institutional culture, and to strive for better governance. The World Bank also encourages close cooperation among state institutions, and exhorts countries to establish AML networks with one another in the sphere of law enforcement, FIUs and financial supervision.⁵⁸

2.5.2 The IMF

The IMF's efforts to combat ML have helped to shape domestic and international AML policies. It conducts financial sector assessments and enhances personnel capacity in countries by way of providing financial integrity advice. Furthermore, it evaluates how countries comply with international AML standards and develops programmes to help them address identified shortcomings. In line with a growing recognition and importance which the IMF attaches to issues related to financial integrity, it has created several AML programmes over the years. In 2004, the Executive Board of the IMF agreed to make AML assessments and capacity development activities a regular part of the IMF's work. The IMF addresses financial integrity issues in specific

⁵⁸ Republic of Serbia *World Bank & the fight against Money Laundering and Terrorism Financing*. Available at <http://www.apml.gov.rs/eng200/saradnja/World-Bank.html> (last visited on 22 September 2018).

circumstances. It provides a framework to deal with cases where ML and related serious crimes threaten domestic stability, balance of payments stability, the effective operation of the international monetary system and the stability of the domestic financial system.⁵⁹

2.5.3 The Wolfsberg Group

The Wolfsberg Group is an association of thirteen global banks.⁶⁰ The Group is named after Château Wolfsberg where the banks held their first meetings and where they continue to hold their annual forum. Having started out to address ML risks in private banking, the Wolfsberg Group has since developed a broad range of standards and diverse programmes of activities. These address not only its original focus on AML, but also other financial crime risks within the financial industry, such as corruption, terrorist financing and sanctions.⁶¹

The Wolfsberg Group was the first body to recommend to the banking industry ways of improving its ability to combat the financing of terrorism, highlighting areas where banks could do better and where there was room for better cooperation with the public sector. The Wolfsberg Group has neither a written constitution nor any formalised set of rules or statutes. It has developed its

⁵⁹ International Monetary Fund Factsheet *The IMF and the fight against Money Laundering and the Financing of Terrorism* at 2-3. Available at <https://www.imf.org/external/np/exr/facts/pdf/aml.pdf> (last visited on 22 September 2018).

⁶⁰ The members of the Wolfsberg Group are Banco Santander, Bank of America, Bank of Tokyo- Mitsubishi UFJ, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, Société Générale, Standard Chartered Bank and UBS. Available at <https://uk.practicallaw.thomsonreuters.com> (last visited on 22 September 2018).

⁶¹ Aiolfi G & Bauer *The Wolfsberg Group* at 2. Available at <https://www.wolfsbergprinciples.com/sites/default/files/wb/pdfs/The-Wolfsberg-Group.pdf> (last visited on 22 September 2018).

practices and procedures over the course of its existence although it has not put in place monitoring mechanisms or sanctions for omissions by its members.⁶²

2.6 The Egmont Group of FIUs

In 1995, a group of national FIUs came together at the Egmont Arenberg Palace in Brussels, Belgium, to establish the Egmont Group, which is an informal network of FIUs created with the common goal of increasing inter-FIU cooperation. The Egmont Group has since evolved into a network of 139 member FIUs from around the world, and is recognised for its work by the FATF.⁶³ The network consists of the Heads of FIUs, the Egmont Committee, the Egmont Group Secretariat, Regional Groups and Working Groups. The Egmont Committee is composed of all member FIUs and appoints the governing Head of FIU for a two-year term.⁶⁴

The most important document issued by the group is the *Egmont Group of Financial Intelligence Units Principles for Information Exchange between Financial Intelligence Units*, which was adopted by the heads of FIUs in July 2013. These principles are binding on all members and in case a member does not comply, it will be subject to the “Egmont Group Support and Compliance Process.” Under the Principles for Information Exchange, member FIUs are expected to cooperate and share information based on mutual trust and reciprocity.⁶⁵ The Egmont principles encourage international cooperation between FIUs in ML cases, based on trust and flexibility.

⁶² Aiolfi G & Bauer HP at 5.

⁶³ Petruzzi R & Spies K *Tax Policy Challenges in the 21st Century* (2014) at 268, Series of International Tax Law Volume 86 LLM Vienna.

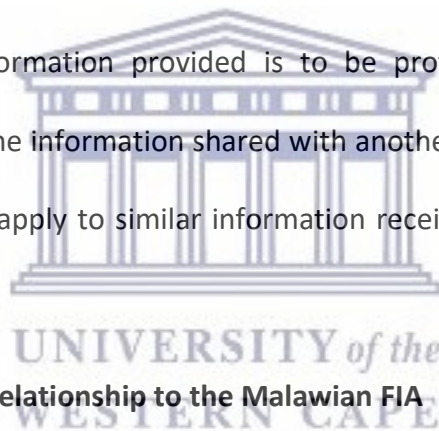
⁶⁴ Petruzzi R & Spies K (2014: 268).

⁶⁵ Petruzzi R & Spies K (2014: 268).

They emphasise that FIUs should be able to provide one another with financial intelligence upon request or spontaneously.⁶⁶

Further, it is taken that any member FIU of the Egmont Group will co-operate with other FIUs across national borders. Equally, membership of the Egmont Group encourages FIUs to be vigilant, hence assisting in the global fight against ML.⁶⁷

Information exchanged by FIUs may be used only for the specific purpose for which the information was requested or provided. It may not be transferred to another authority, including for use as evidence in a court case, without the prior consent of the disclosing FIU. In addition, the confidentiality of the information provided is to be protected by strict controls and safeguards. At the minimum, the information shared with another FIU is protected by the same confidentiality provisions that apply to similar information received from domestic sources by the receiving FIU.⁶⁸



2.7 The ESAAMLG and its Relationship to the Malawian FIA

ESAAMLG was established in 1999 as an FATF-style Regional Body (hereafter FSRB). It consists of 14 countries. It monitors the implementation of AML international standards in its member countries through self-assessment exercises and mutual evaluation. ESAAMLG also conducts

⁶⁶ Egmont Group *Egmont Group of Financial Intelligence Units Charter* (2013) at 4, approved by the Egmont Heads of Financial Intelligence Units.

Available at [file:///C:/Users/User/Downloads/1%20Charter%20-%20Nov%2028%202013%20\(1\).pdf](file:///C:/Users/User/Downloads/1%20Charter%20-%20Nov%2028%202013%20(1).pdf) (last visited on 6 August 2018).

⁶⁷ Egmont Group (2013: 6).

⁶⁸ World Bank (2004: 69).

technical analysis and publishes reports of ML and typologies.⁶⁹ One such typology concerned money laundering through the real estate sector.

ESSAMLG published its first mutual evaluation report on Malawi in 2008. As discussed in the previous chapter, Malawi has tried to meet most of the recommendations made in the ESAAMLG report by enacting the 2017 FCA.

2.8 International Legal Instruments Regulating International Anti-Money Laundering Law

The Palermo Convention is the first binding international instrument that deals with organised crime in a comprehensive manner.⁷⁰ Article 1 states that the aim of the Convention is to promote cooperation to prevent and combat transnational organised crime more effectively. Additionally, the Convention contains what has become the internationally accepted definition of the offence of ML, although the term ‘money laundering’ does not appear anywhere in the text.⁷¹

Furthermore, article 6(1)(a) of the Palermo Convention provides that each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish criminal offences.

Article 7 of the Palermo Convention requires each State Party to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies susceptible to ML, within its competence, to deter and detect all forms of ML.

⁶⁹ World Bank (2009: 33).

⁷⁰ World Bank (2009: 30).

⁷¹ World Bank (2009: 29-30).

States Parties are to ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating ML (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information. This could be done at the national and international levels within the conditions prescribed by the State's domestic law. The Convention encourages States to consider the establishment of an FIU to serve as a national centre for the collection, analysis and dissemination of information regarding potential ML.⁷²

States Parties are required to implement workable measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital.⁷³ In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of the Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organisations against ML.⁷⁴

Another important Convention is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (also known as the Vienna Convention). Article 3(1)(b)(I) of Vienna Convention criminalises the conversion or transfer of property, with knowledge that such property is derived from any offence or offences established under the Convention, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the

⁷² Article 7(1)(b) of the Palermo Convention.

⁷³ Article 7(2) of the Palermo Convention.

⁷⁴ Article 7(3) of the Palermo Convention.

illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions.⁷⁵

The Vienna Convention also criminalises the concealment or disguise of the true nature, source, location, disposition, movement, rights, regarding ownership of property, with knowledge that such property is derived from an offence or offences established under the Convention or from an act of participation in such an offence or offences.⁷⁶

The UN Office on Drugs and Crime (hereafter UNODC) coordinates the main efforts of the UN regarding ML control and prevention. The UNODC implements the Global Program against ML, which is a research and technical cooperation initiative that aims to increase the effectiveness of international efforts against ML.⁷⁷

2.9 Conclusion

This chapter has looked at the international legal framework that regulates FIUs and AML law. Whilst AML law is not governed by any formal Convention, the FATF Recommendations are soft law regulating ML and enforced through a self-assessment and mutual evaluation process. Despite their formally non-binding nature, any country that ignores the Recommendations could be subjected to economic reprisals as a result of the FATF's placing it on the list of non-cooperative jurisdictions. The economic reprisals express themselves in the form of a lack of direct foreign investment, a state of affairs that works to the particular detriment of developing countries. This chapter also discussed the crucial role of FIUs in combating ML in pursuance of

⁷⁵ Adopted in December 1988.

⁷⁶ Article 3(1)(b)(ii) of the Vienna Convention.

⁷⁷ World Bank (2009: 28-29).

FATF Recommendation 29. The chapter looked also at the importance of FATF Regional Bodies in fighting ML. The next chapter takes stock of Malawi's FCA.



UNIVERSITY *of the*
WESTERN CAPE

CHAPTER 3

A COMPARATIVE ANALYSIS OF MALAWI'S FINANCIAL INTELLIGENCE AUTHORITY

3.1 Introduction

As already stated in Chapter One, AML in Malawi is regulated by the FIA, which is an institution established under the FCA. Section 3(1) of the FCA establishes an independent and autonomous FIA whose aim, as stated in the preamble, is to improve the prevention, investigation and the combating of financial and related or consequential crimes; to enable the tracing, identification, tracking, freezing, seizure or confiscation of proceeds of crimes; and to provide for connected and incidental matters.

This chapter discusses the legal and institutional framework under which Malawi's FIA operates. It compares the laws regulating the South African and Namibian Financial Intelligence Centres. However, the chapter will concentrate on Malawi.

3.2 Institutional set up of Malawi's FIA

3.2.1 The Powers of the FIA

The FIA is a body corporate with perpetual succession and a common seal with the power to enter into contracts, and is capable of suing and being sued in its own name.⁷⁸ In performing its functions, the FIA is not to be subject to the direction, control or influence of any other person, authority or entity which may compromise its operational independence.⁷⁹

⁷⁸ Section 3(1) of the FCA.

⁷⁹ Section 3(2) of the FCA.

The FIA has the authority to issue directives, guidelines or rules to reporting institutions as it may consider necessary for the better carrying out of its functions.⁸⁰ It also has the authority to impose and enforce administrative sanctions and penalties against a party in breach of the FCA.⁸¹ In addition, the FIA has powers to investigate any matter related to implementing the FCA.⁸² The FIA may compel the production of or access to any record, document or information and may make notes and take copies of the whole or any part of the record, document or information.⁸³

Where appropriate, in consultation with a supervisory authority or self-regulatory body, the FIA may issue instructions, directions, guidelines or rules to a supervisory authority or self-regulatory body as it may consider necessary for the better carrying out of its functions. The FIA may also delegate its powers to a supervisory authority or self-regulatory body to issue instructions, directions, guidelines or rules regarding the application of the Act, provided that a supervisory authority or self-regulatory body consults the FIA before issuing any instructions, directions, guidelines or rules.⁸⁴

The FIA may access the widest range of financial, administrative and law enforcement information from any supervisory authority, financial regulatory authority, fiscal or tax agency, competent authority or fraud investigations agency. The authority may also request and receive information from any person, institution or agency, whether local or international, in the discharge of its functions. It may request and receive progress and outcome reports from law

⁸⁰ Section 5(a) of the FCA.

⁸¹ Section 5(b) of the FCA.

⁸² Section 5(c) of the FCA.

⁸³ Section 5(d) of the FCA.

⁸⁴ Section 5(e)(i) and (ii) of the FCA.

enforcement or prosecutorial agents on matters referred to them. The FIA also has the authority to instruct a reporting institution to take such steps as may be appropriate to facilitate any anticipated investigations and the power to enter any agreements or arrangements with any local institution or agency regarding the exchange of information.⁸⁵

3.2.1.1 Overall Analysis of the Powers of the FIA

As discerned from the above-stated provisions of the FCA, the provisions do not confer prosecutorial powers upon the FIA. The FIA is entrusted with wider powers to investigate and disseminate financial intelligence. This paper argues that, for the fight against ML to show results in Malawi, a hybrid type of FIA is required, vested with the powers to investigate and prosecute cases of ML.

As mentioned above, the FIA's role is to disseminate financial intelligence to help in the prosecution of financial crimes such as ML. Similar powers are conferred upon other state law enforcement institutions such as the ACB, the MPS and the Director of Public Prosecutions. Looking at the offence of ML, its complexity requires special technical expertise for it to be effectively investigated and prosecuted.

In Malawi, most ML offences are committed by public officials involved in corruption. For over three years now, Malawi has been in the throes of a corruption scandal unprecedented in its scope and scale. The Cashgate scandal, which involved huge sums of money discovered in the homes and cars of civil servants and business people, implicated scores of senior public officials,

⁸⁵ Section 5(f)-(j) of the FCA.

many of whom have been convicted for systematically embezzling huge amounts of government funds.⁸⁶

A string of investigations and criminal trials were launched, and 13 civil servants and business people have so far been found guilty of theft and ML. They are serving jail sentences ranging between three and eleven years of imprisonment with hard labour. However, some main players have yet to be convicted.⁸⁷

Since 2014, Malawi's public prosecutors and the ACB have achieved more than a dozen convictions. But this is just a fraction of the hundreds of people under investigation. Meanwhile, some trials, including the one against Paul Mphwiyo⁸⁸ and his 17 co-accused, have been dragging on for years, with frequent adjournments.⁸⁹

Progress in disposing of the cases is hamstrung by Malawi's limited experience in dealing with ML cases and criminal trials involving grand corruption. For judges and lawyers alike, this is uncharted territory and they have proceeded only haltingly. The frequent frictions between the MPS, the ACB, and the Director of Public Prosecutions have also not helped to speed up the disposal of cases. From the beginning, the relationship between the three agencies has been characterised by rivalry, mistrust and miscommunication.⁹⁰

⁸⁶ Anders G *Malawi faces toughest, most high-profile trial yet in massive Cashgate scandal* (2017) at 2. African Studies- International Development Centre, University of Edinburg. Available at <http://africanarguments.org/2017/02/08/malawi-faces-toughest-most-high-profile-trial-yet-in-cashgatescandal> (last visited on 3 August 2018).

⁸⁷ Anders G (2017: 2).

⁸⁸ Paul Mphiyo is Malawi's former Budget Director who worked in the Ministry of Finance under the Treasury. Mphiyo, together with other accused persons, is among other offences answering charges of money laundering.

⁸⁹ Anders G (2017: 3).

⁹⁰ Anders G (2017: 3).

It is submitted that the role of Malawi's FIA should not end at the investigation stage, but should include the prosecution of ML cases. The fact of the matter is that Malawi's FIA is the most competent institution to be vested with the authority to prosecute cases of ML. This is because lawyers working in the FIA are more experienced in handling economic crimes like ML than ordinary public prosecutors, who have little or no expertise in this field. The risk is that, if the prosecutors lack the knowledge and expertise, they will struggle to secure a conviction on the ML charges.

3.2.2 The Core Functions of Malawi's FIA

Financial intelligence services are vital to the survival of nations. Effective financial intelligence services help nations anticipate and prevent attacks, thereby protecting themselves from forces detrimental to the security and stability of the country.⁹¹

Section 4 of the FCA provides for the functions of the FIA. More particularly, section 4(d) provides that the functions of the FIA, among others, are to conduct research into trends, techniques and developments in financial crimes, including ML, tracing proceeds of crime and terrorist financing, in order to improve the detection, prevention and deterrence of ML and terrorist financing. The FIA is also mandated to cooperate with local and international institutions, organisations or agencies in realising its objects. It may also advise and apprise the Minister of Finance on trends, patterns and developments emerging in relation to what the Act seeks to combat. The FIA may offer training and support on any matter, conduct public awareness on matters relating to the

⁹¹ D'Souza J (2012: 12).

offences pursuant to the objectives of and in compliance with the Act. The FIA may also design, develop and implement internal systems, controls, policies and procedures regarding security of its personnel, documents and information, including procedures for handling, storage, dissemination, and protection of and access to information.⁹²

3.2.3 Other Functions of Malawi's FIA

Although all FIUs affiliated to the Egmont Group have the three core functions of receiving, analysing and disseminating information on STRs, some FIUs are also entrusted with other functions.⁹³ This is particularly true for the Malawian FIA which is entrusted with such other functions under the FCA.

Malawi's FIA is vested with supervisory authority over financial institutions by ensuring that all reporting institutions comply with the FCA.⁹⁴ The FIA is entrusted with the authority to monitor the compliance of financial institutions to ensure that they adhere to international AML standards.⁹⁵



The supervisors and regulators working under Malawi's FIA have an extensive knowledge of the sectors concerned. They can integrate the ML risk in their general risk analysis, and are experienced supervisors. Moreover, they are often well-resourced.⁹⁶

⁹² Section 4(e)-(l) of the FCA.

⁹³ International Monetary Fund, World Bank *Financial Intelligence Units: An Overview* (2004) 70, Washington, D.C. International Monetary Fund, Legal Dept., Monetary and Financial Systems Department. Available at <https://www.imf.org/external/pubs/ft/FIU/fiu.pdf> (last visited on 23 July 2017).

⁹⁴ Section 35(1) of the FCA.

⁹⁵ Section 36(4) (f) of the FCA.

⁹⁶ International Monetary Fund, World Bank (2004: 71).

Furthermore, whenever the FIA has reasonable grounds to suspect that funds in a particular customer's account at any reporting institution may be proceeds of an offence, the FIA may direct the reporting institution within one working day, not to proceed with the carrying out of the suspicious transaction. Where appropriate, the FIA may freeze any funds or reverse any transaction in respect of the funds affected by suspected proceeds of an offence for a period not exceeding 90 working days. This timeframe affords the authority an opportunity to make necessary inquiries concerning the transaction; and, if deemed appropriate, to inform and advise the appropriate competent authority.⁹⁷

3.2.4 Funding of the FIA

Malawi's FIA derives its funds through the money appropriated annually by the National Assembly. Other funds include the penalties the authority may impose for breach of the FCA; fees charged by the authority; grants, gifts and donations made to the authority with prior approval of the Minister.⁹⁸ The FIA is required to prepare an annual budget of revenue and expenditure which is submitted to the Minister at least three months prior to the commencement of the financial year.⁹⁹

3.2.5 The Recruitment Process of the Director General of the FIA

The FIA is headed by a Director General who is appointed by the President for a five-year term, renewable once, upon terms and conditions specified in the instrument of appointment.¹⁰⁰ The Director General is the chief executive officer of the FIA and is also a public officer, whose

⁹⁷ Section 23(4)(a) and (b) of the FCA.

⁹⁸ Section 12(1)(a)-(d) of the FCA.

⁹⁹ Section 13 of the FCA.

¹⁰⁰ Section 6(1) of the FCA.

appointment is subject to confirmation by the Public Appointments Committee (hereafter PAC) of the National Assembly.¹⁰¹

In case of a vacancy in the office of the Director General, the Minister is required to advertise the position in the *Gazette* and at least two newspapers of widest circulation in Malawi, and to shortlist and interview the candidates. A minimum of two and a maximum of three candidates are selected for the position. The Minister sends the list of shortlisted candidates to the President for the appointment of one of them as Director General. The shortlisted candidates go through security clearance and vetting procedures. The President, subject to a confirmation by the PAC of the National Assembly, appoints the Director General only from the names on the list recommended by the Minister. If the President rejects all the names put forward, he must send the list back to the Minister, stating the reasons for his refusal of the nominated names. Where the President rejects all the nominated names for the appointment of a Director General, the position is advertised again, which entails another round of interviews.¹⁰²

A person appointed as Director General may not hold any position as a parliamentary deputy, cabinet minister, or serve as a member of the judiciary, neither may such a person hold any office in a political party or its affiliate.¹⁰³ A person whom a court has removed on account of misconduct in the exercise of his duties is not eligible to be appointed or remain Director General of the FIA.¹⁰⁴ It is further required that the Director General be a person of integrity with

¹⁰¹ Section 6(2)-(3) of the FCA.

¹⁰² Section 7(1)-(4) of the FCA.

¹⁰³ Section 4(a)-(d) of the FCA.

¹⁰⁴ Section 4(g) of the FCA.

recognised, relevant qualifications, and experience in matters of finance, law or law enforcement.¹⁰⁵

3.2.5.1 Overall Analysis of the Recruitment Process of the Director General of the FIA

The recruitment process of the Director General of the FIA indicates that the FIA is not independent of the government. The President has too much power over the appointment of the Director. For example, one wonders why the President should appoint a person from a list of nominated candidates over whose interviews he did not preside. If the President rejects the names put forward, then this would reflect his mistrust of the interviewing committee. Here, there is a high probability that the President would exercise his powers arbitrarily. He is likely to appoint someone who is politically loyal to him. This paper argues that section 7 of the FCA, which empowers the President to choose a Director of the FIA from a list of nominees, be repealed as the provision is open to potential abuse.

Can someone appointed at the pleasure of the President exercise his powers to the detriment of the appointing instance, in this case the President? The legal arrangement regulating the appointment does not rule out that such pandering can occur. A counter-argument would be that the President's decision is subject to the approval of Parliament. The problem, though, is that Malawi's Parliament consists mostly of members of the same political party as the President.

Of the 193 members of Parliament, 50 belong to the President's Democratic Progressive Party (DPP), 48 to the Malawi Congress Party (MCP), 26 to the Peoples Party (PP), 14 to the United

¹⁰⁵ Section 6(5) of the FCA.

Democratic Front (UDF), and one to each of the Alliance for Democracy and the *Chipani Cha fuko* (CCP). There is one vacant seat and there are 52 independent members of parliament.¹⁰⁶ Besides the 50 elected members of the DPP, some independent, PP, CCP and the UDF parliamentarians joined the government side of the National Assembly. Practically, these parliamentarians would not frustrate the interests of the President to whom they owe allegiance. This means that, even if the parliamentary opposition votes against the President's appointment, this would not have any practical effects as the majority would have voted in support of the President's appointment. This is because the President's DPP has many parliamentarians on its side, meaning that the opposition parliamentarians are automatically outnumbered.¹⁰⁷

It is against the above background that this study argues that the whole process under which the Director General of the FIA is appointed in Malawi infringes upon the independence and autonomy of the institution. This violates Recommendation 29 of the FATF, which requires that the FIU should be operationally independent and autonomous. Independence guarantees that an FIU has the power to work freely and to make autonomous decisions based on STRs it receives. Recommendation 29 of the FATF furthermore requires that an FIU must decide for itself to whom it disseminates financial intelligence. Any interference in these functions from outside would compromise its functional independence.¹⁰⁸

¹⁰⁶ Eisa: African Democracy Encyclopaedia Project "Malawi 2014 National Assembly seat distribution by party and gender." Available at <https://www.eisa.org.za/wep/mal2014results2.htm> (last visited on 3 August 2018).

¹⁰⁷ Reference is again made to Section 48(3) of the 1994 Republic of Malawi Constitution.

¹⁰⁸ The Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (2016), 99 available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (last visited on 3 August 2018).

In Malawi, the offence of ML is commonly perpetrated by public officials and politically exposed persons. In most cases, the public officials and the politically exposed persons are allies of the President in practice. Invariably, in a case involving the President's ally, it is highly probable that the Malawian FIA would be reluctant to follow up an investigation if this would harm the President's public image.

3.2.6 The Recruitment Process of the Deputy Director General and other Staff of the FIA

The Minister, in consultation with the Director General, is vested with the authority to appoint the Deputy Director. A person appointed to this position must have integrity and must have the relevant qualifications and experience in matters of finance, law, or law enforcement. The Director General appoints the candidate for the position of the Deputy Director and determines the conditions of employment, including the salary of the appointee, subject to ministerial approval.¹⁰⁹

The procedure governing the appointment of the Deputy Director of Malawi's FIA under section 9 of the FCA requires the Minister to make such an appointment in consultation with the Director General. Again, this executive appointment is open to criticism, given that in Malawi, where Ministers are appointed by the President,¹¹⁰ there is no way the Minister would by himself or herself make an appointment of the Deputy Director of Malawi's FIA without consulting the President. This process too undermines the independence of the FIA in the eyes of the public.

¹⁰⁹ Section 9(1)-(2) of the FCA.

¹¹⁰ Section 92(1) of the 1994 Republic of Malawi Constitution provides that there shall be a Cabinet consisting of the President, the First Vice-President, the Second Vice-President and such Ministers and Deputy Ministers as may from time to time be appointed by the President.

Regarding other staff members, the FCA requires that the new appointees to the FIA undergo security clearance, vetting procedures and understanding of their responsibilities in handling and disseminating sensitive and confidential information. The personnel are public servants.¹¹¹ The Director General or the Deputy Director General or any employee of the FIA or any person acting under the direction of the FIA is immune from action for anything done in good faith in the administration or discharge of any powers, duties or functions under the FCA.¹¹²

3.3 Malawi's Experience where the FIA was arguably seen to be compromised

3.3.1 Allegation of Fraudulent Transactions in Ration Packs Contracts between Malawi Police Service (MPS) and Pioneer Investments

The ACB investigated a Malawi police food supply contract that was awarded to a firm called Pioneer Investments, owned by businessman Zameer Karim. The political standoff began after a report by the ACB leaked onto the internet around June 2018.¹¹³ Malawi's President Peter Mutharika was under pressure to resign after the leaked report accused him of receiving a kickback from the MK2.8 billion (about \$3.9 million) contract to supply food to the MPS.¹¹⁴

The report alleges that the head of finance of MPS, Innocent Bottomani, and Mr Karim had connived to award Pioneer Investments a contract to provide 500,000 food ration packs. Days

¹¹¹ Section 9(3)-(5) of the FCA.

¹¹² Section 11 of the FCA.

¹¹³ Anti-Corruption Bureau Investigations Report *Allegation of fraudulent transactions in Ration Packs contract between Malawi Police Service and Pioneer Investments* (Ref No: CR/LL/200/2017). Available at <https://malawi24.com/wp-content/uploads/2018/06/Malawi-Police-Peter-Mutharika-Corruption-ACB.pdf> (last visited on 1 October 2018).

¹¹⁴ *Malawi's President Muntharika and the Police Food Scandal* (4 July 2018) British Broadcasting Corporation News. Available at <https://www.bbc.com/news/world-africa-44714224> (last visited on 1 October 2018).

after the contract was signed, Pioneer Investments allegedly asked for a change to the agreed price from MK2.3 billion to nearly MK2.8 billion. The report states that the head of finance of MPS fraudulently approved the change.¹¹⁵

When Mr Karim of Pioneer Investments was paid for supplying the food ration packs in 2016, he allegedly deposited MK145 million (about \$200,000) into the DPP's Standard Bank Account Number 014003192200 which is reportedly managed by President Mutharika as he is the sole signatory of that account.¹¹⁶

Relevant to note for purposes of ML and the FIA is that the President withdrew and used MK65 million of the MK145 million to purchase an office building for his political party.¹¹⁷ As civil society organisations and members of the general public intensified their attacks on the President for receiving the proceeds of Karim's corrupt conduct, President Muntharika's Democratic Progressive Party announced that it was returning to Karim the MK145 million it received. Immediately after the money was returned to Mr Karim's account, the Anti-Corruption Bureau announced that the FIA had frozen the account to prevent Karim from tampering with the funds until further legal determinations of the matter.¹¹⁸

¹¹⁵ Malawi ACB Investigations Report (Ref No: CR/LL/200/2017: 4).

¹¹⁶ Malawi ACB Investigations Report (Ref No: CR/LL/200/2017: 6).

¹¹⁷ *Faiti O ACB Concludes Probe into Malawi Police Food Rations Scandal: Arrests Looming* (7 August 2018) Nyasa Times Malawi Breaking Online News Source. Available at <https://www.nyasatimes.com/acb-concludes-probe-into-malawi-police-food-rations-scandal-arrests-looming/> (last visited on 1 October 2018).

¹¹⁸ *DPP returns MK145 million to Karim* (23 August 2018) Malawi 24. Available at <https://malawi24.com/2018/08/23/dpp-returns-k145m-to-karim/> (last visited on 1 October 2018).

The question is why the Malawian FIA froze only the returned MK145 million. Ideally, if the FIA was autonomous, as required by the FATF Recommendations, it was equally duty bound to seize the office building which the President bought using the alleged proceeds of corruption. The role of the FIA in this matter is questionable. The FIA's failure to act shows that the institution is compromised when dealing with ML, depending on who is involved. This case clearly shows that Malawi's FIA is only theoretically but not practically independent, for in theory section 93(1) of the Malawian FCA mandates the FIA to seize any property that it believes, on reasonable grounds, to be tainted property.

From the outset, the office building which was purchased from the proceeds of corruption brings into focus the offence of ML. The purchase of the office building may have been for purposes of concealing or rather disguising the illegal nature of the funds obtained. This paper therefore submits that the DPP's office building purchased from the proceeds of alleged corruption, is property that the Malawian FIA was required to seize in the execution of its duties under the FCA. Furthermore, the ACB's leaked investigation report recommended that Karim of Pioneer Investments and Bottomani of MPS be charged and prosecuted for ML and other criminal offences. The ACB, however, could not recommend prosecuting President Muntharika for any of the criminal offences since section 91(2) of the 1994 Republic of Malawi Constitution grants him immunity as a sitting head of State.¹¹⁹ Contrary to the investigation report that implicated the President and others, the ACB Director General, Rayneck Matemba, recently announced that the

¹¹⁹ Malawi ACB Investigations Report (Ref No: CR/LL/200/2017: 9-10).

President was cleared of any criminal charges as he did not personally benefit from the MK145 million.¹²⁰

Karim and Bottomani have alleged connections with Muntharika's government. But no law enforcement agency has yet arrested or charged the two suspects, neither has any trial against them begun. This remains the case despite the ACB's report that investigations on the matter are concluded. It is therefore submitted that, just as the FIA appears to be compromised due to political interference, the ACB may also be compromised and hamstrung in its AML efforts. This raises serious concerns about whether Malawi's FIA and other law enforcement institutions are up to the task of fighting ML.

3.3.2 Malawi's Cashgate Scandal

"Cashgate" is a financial scandal involving the looting, theft and corruption that happened at Capital Hill, the seat of the Government of Malawi. The scandal was uncovered during the Presidency of Joyce Banda, although it is believed to have begun before her taking office.¹²¹

Cashgate first came to light when an assistant accountant in the Ministry of Environment was found with several thousand US dollars in his car. A week later, the Budget Director in the Ministry of Finance was shot outside his house. Several other civil servants were found hiding huge sums of money, thus unravelling what came to be known as the "Cashgate" scandal.¹²²

¹²⁰ Faiti O (7 August 2018).

¹²¹ Anders G (8 February 2017).

¹²² Anders G (8 February 2017).

Following the Cashgate revelation, the British government sponsored an independent audit focusing on transactions made through the Malawi government's electronic financial management system. The audit found that an estimated \$32 million were stolen during the six-month period under review. In October 2013, more than 70 people were arrested in connection with Cashgate, many of whom were subsequently tried and convicted.¹²³

In October 2014, Baker Tilly, a public accounting and consulting firm headquartered in Chicago, provided the Malawi government with a report summarising individual case files from its original audit of Malawi's Cashgate. The report named the individuals and companies involved in the illicit Cashgate-related transactions.¹²⁴

The report further drew a sample of 501 suspicious transactions believed to have occurred between April and September 2013. The auditors found that around MK6.1 billion (about \$14.5m) were paid out to 16 companies for services that had not been supplied. Payments with no further documents accounted for a further MK4 billion. It was also reported that the supply of government contracts had been inflated by MK3.6 billion.¹²⁵

Baker Tilly's audit report also revealed that Malawi's financial banks suffered from a "significant control failure". Particularly, Standard Bank Malawi is reported to have processed MK3.8 billion of the Cashgate payments, a much larger sum than any other institution. For instance, auditors

¹²³ Anders G (2017: 3).

¹²⁴ Tilly B *Cashgate: A Summary Report on the Findings arising from work carried out into Fraud and Mismanagement of Malawi Government Finances* (September 2014) National Audit Office of Malawi. Available at <https://rebeccachimjeka.files.wordpress.com/2014/10/cashgate-national-audit-office-of-malawi-cashgate-short-report-final-to-ag.pdf> (last visited on 6 October 2018).

¹²⁵ Malawi's Cashgate Scandal: The \$32 million heist (27 February 2014). Available at <https://www.economist.com/baobab/2014/02/27/the-32m-heist> (last visited on 6 October 2018).

pointed out that a MK150 million withdrawal was made on a single day from Standard Bank's *Balaka* District Branch. As *Balaka* District is a regional operation with low commercial activity, the scale of such a transaction would have been unusual. Internal mechanisms such as paywalls and passwords were overturned, probably because of management overrides. It is argued that the withdrawal of huge sums of cash, should have raised suspicions among bank staff. The banks, however, sparingly reported suspicious transactions to the FIU.¹²⁶

This paper does not intend to discuss the individual Cashgate cases. Rather, the intention is to look at the role that the FIA could have played to ensure that Cashgate was prevented. Malawi's AML law requires financial institutions to report certain monetary and any suspicious transactions to the FIU. An intentional reporting violation by an officer of a financial institution was punishable by up to two years' imprisonment, and for the institution a fine and loss of business authority under Malawi's AML repealed law. Although, at most, only 50 STRs were annually sent to the FIU, no bank was ever investigated for failure to generate such reports. In fact, the AML law was never used to prosecute anyone.¹²⁷

Malawi's Ministry of Tourism's Chief Officer, Leonard Kalonga, who has already been convicted of Cashgate-related offences claimed that the Governor of the Reserve Bank of Malawi instructed managers at commercial banks to cash all government cheques without question. Whether that was true or not, it appears the banks violated the rules by turning a blind eye and not raising any

¹²⁶ Mail Guardian *Malawi theft balloons to R540 million*. Available at <https://mg.co.za/article/2015-02-12-malawi-theft-balloons-to-r540m> (last visited 6 October 2018).

¹²⁷ Strasser PG & McCall C "An Anti-Corruption Bureau's Inexorable Endeavour: A Study of Malawi's Cashgate Scandal" (October 2016) 328, *Washington and Lee Law Review Online*, Volume 73 Issue 1 Article 11. Available at <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1054&context=wlulr-online> (last visited on 6 October 2018).

concerns at the large sums deposited and withdrawn. It is alleged that on the rare occasions that banks generated STRs, the Monitoring and Analysis Manager of Malawi's FIU suppressed the reports.¹²⁸

The Malawi ACB investigator also alleged that the FIU was a beneficiary of Cashgate as it received MK100 million (about \$134,000) to pervert the course of justice.¹²⁹ The ACB investigator argued that Malawi's Accountant General and the FIU were tasked with ensuring that organised theft went through the system undetected.¹³⁰ The investigator gave this testimony whilst testifying in the MK2.4 billion Cashgate case involving the former budget director, Paul Mphwiyo, and others. Malawi's FIA, an institution responsible for detecting and preventing ML was in this regard found to be in a compromised situation in dealing with Cashgate cases.¹³¹

This paper argues that the FIA's alleged involvement in Cashgate compromised its mandate to combat ML. Had the FIA been serious about preventing ML, there would not have been such huge sums of money withdrawn from government accounts through commercial banks without detection. Top government officials influenced the FIA not to react to suspicious transactions. Surely, the FIA was compromised and could not effectively handle the Cashgate scandal, considering that the FIA's top employees were involved in manipulating the system.

¹²⁸ Strasser PG & McCall C (2016: 329).

¹²⁹ Chilunga Z *ACB Investigator testifies in court on Cashgate beneficiaries* (16 May 2018) Nyasa Times: Malawi Breaking Online News Source. Available at <https://www.nyasatimes.com/acb-investigator-testifies-in-court-on-cashgate-beneficiaries/> (last visited on 5 October 2018).

¹³⁰ Raviv S *Cashgate: How a scandal started with a poor housemaid and ended up taking down the most powerful Woman in Africa*, Atlanta. Available at <https://medium.com/latterly/cashgate-2e6628549bf5> (last visited 6 October 2018).

¹³¹ Chilunga Z (16 May 2018).

3.4 Comparative Law Perspectives

South Africa's Financial Intelligence Centre (hereafter SAFIC) derives its mandate to combat ML from the Financial Intelligence Centre Act 1 of 2017. Similarly, Namibia's Financial Intelligence Centre (hereafter NFIC) derives its mandate to combat ML from the Financial Intelligence Act 13 of 2012.

3.4.1 An Overall Analysis of the Legal and Institutional Framework of SAFIC compared to Malawi's FIA

The SAFIC is an institution outside the public service but within the public administration.¹³² Similar to the objectives of Malawi's FIA, the SAFIC's principal objectives are to assist in the identification of the proceeds of unlawful activities as well as to combat ML activities and the financing of terrorist and other related activities. In addition, it is required to implement financial sanctions pursuant to Resolutions adopted by the UNSC, under Chapter VII of the UN Charter.¹³³

Other objectives of the SAFIC include making information collected by it available to the commercial police, the prosecuting authorities, the intelligence agencies, the South African Revenue Service, the Independent Police Investigative Directorate, the Intelligence Division of the National Defence Force, and the Office of the Public Protector an investigative division in an organ of State, or a supervisory body.¹³⁴

The SAFIC is furthermore required to administer measures requiring accountable institutions to freeze property and transactions pursuant to financial sanctions that may arise from Resolutions

¹³² Section 2 of the SAFICA.

¹³³ Section 2(1) of the SAFICA.

¹³⁴ Section 3(2)(a)(i)-(x) of the SAFICA.

adopted by the UNSC.¹³⁵ The SAFIC may exchange intelligence with AML bodies in other countries.¹³⁶

The SAFIC is headed by a Director who is appointed by the Minister of Finance. A person appointed as the Director holds office in the SAFIC for a term not exceeding five years, which is renewable. The terms and conditions of employment are set out in a written employment contract. They include conditions governing measurable performance standards.¹³⁷

No person may be appointed as the Director of the SAFIC unless the information regarding that person has been gathered in a vetting investigation by the State Security Agency. After evaluating the gathered information, and if satisfied that such a person has little possibility of being a security risk, the Minister may proceed to appoint such person as a Director.¹³⁸

If the Minister is satisfied, a certificate is issued certifying that such person has successfully undergone a security clearance.¹³⁹ The Minister may withdraw the certificate if he or she obtains information from an investigation which, after evaluation, causes the Minister to believe that the Director could be a security risk or could possibly act in any manner prejudicial to the objectives or functions of the SAFIC.¹⁴⁰ Once the certificate is withdrawn, the Director may not perform any functions of the Centre and the Minister is required to discharge him or her from the position.¹⁴¹

¹³⁵ Section 2(a) of the SAFICA.

¹³⁶ Section 2(b) of the SAFICA.

¹³⁷ Section 6(1)-(2) of the SAFICA.

¹³⁸ Section 13(1)(a) and (b) of the SAFICA.

¹³⁹ Section 13(2) of the SAFICA.

¹⁴⁰ Section 13(4) of the SAFICA.

¹⁴¹ Section 13(5) of the SAFICA.

Funding of the SAFIC is obtained through the moneys appropriated annually to it by Parliament, any government grants made to it, as well as any other money legally acquired by it through donations, but only with the approval of the Minister.¹⁴² As is the case with Malawi's FIA, there is an executive power which is indirectly derived from its Director General being appointed by the Minister who is appointed by the President.¹⁴³ In reality, the President is the final arbiter as to who is appointed as it is hardly conceivable that the Minister can act without the imprimatur of the President. Similarly, political influence over the SAFIC makes it vulnerable to political interference, just as is the case with Malawi's FIA.

However, unlike Malawi, that has placed the primary responsibility of investigating cases of ML on the FIA, the Directorate of Priority Crime Investigation (hereafter DPCI) has the primary responsibility for investigating ML cases in South Africa. The DPCI's mandate includes the investigation of organised crime, serious commercial crime (including ML), crime against the state (including terrorism), serious corruption, and other serious crimes selected by the head of DPCI or referred by the Commissioner of South African Police Service.¹⁴⁴

It bears noting also that the IMF has found that the SAFIC has been operating effectively by providing support to the investigatory and prosecutorial efforts to combat ML. Apart from the SAFIC, South Africa has also strengthened its law enforcement efforts within the South African

¹⁴² Section 14(1)(a)-(c) of the SAFICA.

¹⁴³ Under section 91(2) of the 1995 Constitution of the Republic of South Africa, the President in South Africa has the power to appoint the Deputy President and Ministers, and may dismiss them.

¹⁴⁴ International Monetary Fund *South Africa Financial Sector Assessment Program: Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Technical Note* (2015) 17-18, International Monetary Fund Publication Services, Washington D.C. Available at <https://www.imf.org/external/pubs/ft/scr/2015/cr1551.pdf> (last visited on 8 August 2018).

Police Service to investigate ML offences.¹⁴⁵ Arguably, this would mean that the SAFIC is an administrative type of FIU as its duty is to disseminate financial Intelligence to investigative and prosecutorial bodies like the DPCI. This arrangement seems to have worked well for South Africa as the country has a specialised department dealing with AML activities. In contrast, an administrative type of FIU may not yield AML successes in Malawi given that there is no other specialised AML department apart from the FIA. Hence, a hybrid type of FIU which is authorised to investigate and prosecute might be better suited to Malawi, which has no other specialised AML department outside the FIA.

3.4.2 Analysis of the Legal and Institutional Framework of NFIC

The NFIC is responsible for combating ML in Namibia. It executes its duties in collaboration with the other LEAs.¹⁴⁶ It is empowered to collect, request, receive, process, analyse and assess all reports, requests for information and information received from persons, accountable institutions, reporting institutions, government offices, ministries, agencies or any other competent authorities and any foreign agencies.¹⁴⁷ The NFIC is also mandated to collect statistics and records of STRs and requests from appropriate authorities for information received and intelligence disseminated.¹⁴⁸ The NFIC is further tasked with the duty of coordinating the activities of the various persons, bodies or institutions involved in combating ML.¹⁴⁹ It is required

¹⁴⁵ International Monetary Fund (2015: 8).

¹⁴⁶ Section 8 of FICA 13 of 2012.

¹⁴⁷ Section 9(1)(a) of NFICA.

¹⁴⁸ Section 9(1)(e)(i)-(ii) of NFICA.

¹⁴⁹ Section 9(1)(f) of NFICA.

to conduct research into trends and developments in ML and to improve the detection, prevention and deterrence of ML.¹⁵⁰

The NFIC is led by the Director who is appointed by the Minister of Finance after consultation with the Anti-Money Laundering and Combating the Financing of Terrorism Council.¹⁵¹ The incumbent holds office for five years which may be subject to renewal.¹⁵² The Director is, among others, responsible for the dissemination of intelligence involving suspected proceeds of crime, ML, terrorist property or financing of terrorism, to competent authorities and foreign agencies with powers and duties similar to that of the Centre.¹⁵³ The Director may, with the approval of the Governor of the Bank of Namibia, appoint the Centre's personnel.¹⁵⁴

As in Malawi and South Africa, the NFIC utilises the funds appropriated to it annually by Parliament. The NFIC may also utilise any government grants or money made available to it and any other money legally acquired by the Centre.¹⁵⁵ The NFIC may also, with the approval of the Minister, accept financial donations or contributions from any other source.¹⁵⁶

In essence, NFIC's mandate is similar to that of its counterparts. However, the manner of appointing the Director of the NFICA is unique as the Director of NFIC is appointed by the Minister of Finance after consultation with the AML Council. The involvement of the AML Council suggests that there is an independent non-political body overseeing the appointment of the Director. The

¹⁵⁰ Section 9(2)(f) of NFICA.

¹⁵¹ Section 11(1) of NFICA.

¹⁵² Section 11(2)(a) of NFICA.

¹⁵³ Section 12(1)(f) of NFICA.

¹⁵⁴ Section 13(1) of NFICA.

¹⁵⁵ Section 14(1)(a)-(d) of NFICA.

¹⁵⁶ Section 14(2) of NFICA.

procedure affords an independent body the opportunity to review the Finance Minister's appointment of the Director.

Despite the involvement of an independent body in the appointment process, it cannot be said that the Director of the NFIC is wholly free of political or executive interference in the execution of his or her duties. As in Malawi, the NFIC Director could be prone to compromise his or her duty to investigate and gather financial intelligence in a ML case if it involves a senior government official or someone considered to be an ally of the President or Minister. This conclusion is drawn given that, although the appointment by the Minister of Finance is made in consultation with the AML Council, the NFICA does not provide the criteria which the Minister and the AML Council must follow in appointing the Director of the NFIC.

3.5 Conclusion

An overview of Malawi's FIA, the SAFIC and the NFIC illustrates that the FIU's in the three countries have the same underlying principal function. Despite the similar mandates, the three financial intelligence institutions differ in several other important ways. For example, while Malawi has placed the primary responsibility of investigating cases of ML on the FIA, the DPCI has the primary responsibility for the investigation of cases of ML in South Africa. Unlike South Africa that has a specialised institution to investigate ML and other economic crimes, Malawi assigns the primary responsibility of disseminating financial intelligence and the investigation on ML to the FIA.

An examination of the appointments procedure In Malawi shows how vulnerable the Director is to political manipulation. Namibia shows itself to be the exemplar on this front, as the Director's appointment, though made by the Minister, takes place in consultation with the AML Council.



UNIVERSITY *of the*
WESTERN CAPE

CHAPTER FOUR

THE MONEY LAUNDERING TYPOLOGIES THAT THE MALAWIAN FINANCIAL INTELLIGENCE AUTHORITY HAS SO FAR IDENTIFIED

4.1 Introduction

Malawi's FIA's most recent report on the typologies of ML identifies the various methods used by criminals to disguise the illegal origin of funds.¹⁵⁷

Section 4 of the FCA empowers the Malawian FIA, *inter alia*, to conduct research into the trends, techniques and developments of ML in order to improve the detection, prevention and deterrence of ML. Since its establishment, the FIA has been writing official reports on ML. This chapter discusses some ML typologies that the FIA has identified as affecting Malawi.

4.2 The Significance of Studying the Different Money Laundering Typologies

ML in Africa is rife. Given the hugely cash-based and often informal economies, criminals in Africa are able to move dirty money across borders, concealing its source and making it appear to be clean. As many African countries are rich in either oil or precious stones, these commodities are frequently used to move funds around the continent. Considering that typologies of ML are ever changing, criminals become more innovative, finding ways to blindside the regulators and LEAs.¹⁵⁸

¹⁵⁷ Financial Intelligence Unit *Typologies on money laundering in Malawi* (2016) 13, Republic of Malawi. Available at <http://www.fiumalawi.gov.mw/Malawi%20Typologies%20%20Report%202016.pdf> (last visited on 5 March 2016).

¹⁵⁸ Norton Rose Fulbright *Prominence of money laundering in Africa: Ten things to know* (2014) at 2. Available at www.nortonrosefulbright.com/knowledge/publications/chapter5_preview/381/3iie3075.pdf (last visited on 4 March 2018).

ML cripples the economies of developing states as financial institutions lose the esteem of their customers and of foreign investors. Several initiatives have been launched to minimise ML, both in the world and in Africa specifically.¹⁵⁹

4.3 Money Laundering Typologies Identified by the Malawian FIA and the Action Taken

4.3.1 Public Sector Fraud

Sophisticated fraud in the public sector continues to rear its ugly head, and in the case of Malawi it involves criminal elements within the public sector and other people who exploit the government system for their personal gain. Criminals deliberately produce fake documentation to perpetrate fraud on the government and to get their hands on taxpayers' money.¹⁶⁰

The FIA has discovered that incorrect and dishonest payments are being made out to small and medium-sized enterprises (hereafter SMEs) and individuals as payments for goods and services. The SMEs and individuals involved usually have direct links to the perpetrators at the office effecting the payments. The SMEs and individuals involved do not trade with the Malawi government, neither have they in the past rendered any service or delivered any goods to the government. Bank accounts of companies and individuals are used to place illegitimate funds into the lawful economy, after which the money is withdrawn in the form of various instruments or moved around the financial system.¹⁶¹

¹⁵⁹ Norton Rose Fulbright (2014: 2)

¹⁶⁰ Typologies on ML in Malawi (2016: 14).

¹⁶¹ Typologies on ML in Malawi (2016: 14).

As a part of its mandate, the FIA relies on STRs and Large Currency Transaction Reports (hereafter LCTRs) received from financial institutions as some platforms to help uncover the syndicates and other irregular activities in government.¹⁶²

4.3.2 Over-Invoicing and Under-Invoicing of Goods and Services

Trade-based Money Laundering (hereafter TBML) is another activity that undermines the economy of Malawi, contributing to the illicit flows out of the country. TBML is the process of disguising the proceeds of crime through the use of what appears to be legitimate trade transactions. This is usually achieved by misrepresenting the price, quantity or quality of imported or exported goods. In Malawi, examples of TBML include over-invoicing or under-invoicing of goods and services.¹⁶³

The key driver of this technique is the misrepresentation of the price of goods or services to transfer additional value between an importer and exporter. A Malawian importer would collude with a supplier in another jurisdiction to over-charge on the invoice in order that the additional value remains in that jurisdiction. The additional sum could also be transferred elsewhere in another jurisdiction on behalf of the importer. Some of the Malawi Cashgate cases had characteristics of this nature for the purchase of high value items for security establishments.¹⁶⁴

The under-invoicing technique is used to benefit exporters by setting very modest prices for their goods in order that the difference be transferred to another jurisdiction. Both over- and under-

¹⁶² Typologies on ML in Malawi (2016: 14).

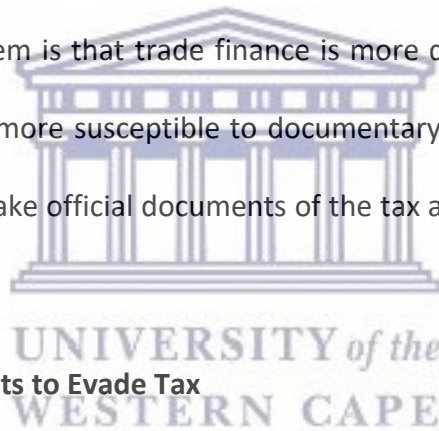
¹⁶³ Typologies on ML in Malawi (2016: 19).

¹⁶⁴ Typologies on ML in Malawi (2016: 19).

invoicing negatively affect the foreign exchange regime and tax collections by the Malawi Revenue Authority (hereafter MRA).¹⁶⁵

Under TBML, criminals also use multiple invoicing of goods and services. This technique involves issuing more than one invoice for the same transaction thereby justifying multiple payments. Companies have multiple bank accounts in the financial system and they use several financial institutions to make these additional payments, which makes these transactions even harder to detect.¹⁶⁶

The Reserve Bank of Malawi has set measures to curb the malpractice of over-invoicing and under-invoicing, but the problem is that trade finance is more document-intensive than many banking activities. Invoicing is more susceptible to documentary fraud, which can be linked to ML.¹⁶⁷ Money launderers use fake official documents of the tax authorities and freight agencies to ply their trade.



4.3.3 Use of Personal Accounts to Evade Tax

There are cases where a businessman registers a business but opens the account in his own name instead of the name of the business. All the proceeds from the business are deposited into the personal account. It becomes difficult for the authorities to assess the tax obligations of the business because the account is not in the name of the business.¹⁶⁸

¹⁶⁵ Typologies on ML in Malawi (2016: 19).

¹⁶⁶ Typologies on ML in Malawi (2016: 20).

¹⁶⁷ Typologies on ML in Malawi (2016: 20).

¹⁶⁸ Typologies on ML in Malawi (2016: 23).

In addition, foreign nationals are required to possess a Business Resident Permit (hereafter BRP) in order to do business in Malawi. They are also allowed to jointly register a business and obtain a BRP under the registered business name. However, although the business is jointly registered the foreigners do business individually. Though this may have been done to facilitate the acquisition of the BRP, it is also a way of avoiding tax obligations because the account of the registered business is usually less active than the personal accounts of the partners.¹⁶⁹

In dealing with cases where personal accounts have been used to evade tax, the FIA has in the past disseminated the cases to the MRA for further investigations. The MRA calculates the taxes and penalties payable to those found to have contravened the law.¹⁷⁰

4.3.4 Use of Alternative Remittance Systems-*Hawala* system

Hawala is an informal system for transferring money, especially across borders, in which local agents disburse or collect money or goods on behalf of friends, relatives or other agents without legal protection or supervision, trusting that all remaining obligations will be settled through future transactions. *Hawala* can also be referred to as an underground banking system based on trust among the parties concerned in the remitting of the money value. What is moved is the value of the money, not the money itself. Terrorists are known to be extensive users of the system.¹⁷¹

¹⁶⁹ Typologies on ML in Malawi (2016: 23).

¹⁷⁰ Typologies on ML in Malawi (2016: 23).

¹⁷¹ Typologies on ML in Malawi (2016: 26).

In Malawi, *hawala* has manifested itself in various forms. It is used mainly by ordinary persons transferring modest monetary value. However, recent cases show that huge sums of money (value) are being exchanged using this system.

What is worrying is that some local businesses, usually foreign owned, operate as agents, paying out funds in Malawi Kwacha and getting the foreign currency equivalent paid into their foreign accounts. This practice is detrimental to accounting for remittances from Malawians in the diaspora, which could contribute to Malawi's foreign currency reserves. The practice robs the revenue authorities of the taxes due to them. Local companies that are involved in under-declaration of turnover and profits to the MRA use this method to externalise their profits.¹⁷²

4.3.5 Forex externalisation

Between January and November 2017, Malawi lost MK5.4 billion (about \$7.4 million) due to illegal foreign exchange externalisation. Forex externalisation is taking of money, which is not the legal tender of that country, outside the country.¹⁷³ A transaction analysis conducted by the FIA and the RBM on business accounts maintained by some non-Malawian nationals revealed that huge sums of illicit funds are laundered through Malawi's banks. The illicit funds move under the guise of import payments being made by what appears to be legitimate businesses.¹⁷⁴ In the

¹⁷² Typologies on ML in Malawi (2016: 26-27).

¹⁷³ *Externalisation: Legal Instruments needed to enforce, clarify amnesty* (9 March 2018), The Independent in Main News, Politics. Available at <https://www.theindependent.co.zw/2018/03/09/externalisation-legal-instruments-needed-enforce-clarify-amnesty/> (last visited 1 November 2018).

¹⁷⁴ Phiri G *Forex Externalisation Costs Malawi MK5.4 billion* (27 April 2018), The Nation Online Media. Available at <https://mwnation.com/forex-externalisation-costs-malawi-k5-4bn/> (last visited on 9 October 2018).

process of the unscrupulous externalisation, companies also shun paying dividends and corporate taxes to the MRA.¹⁷⁵

Most of the companies involved in forex externalisation make huge cash deposits followed by immediate requests for funds transfers to firms in various jurisdictions. The requests for funds transfers are mostly supported by forged or fake customs importation documents, the aim being to circumvent RBM Exchange Control Regulations.¹⁷⁶

The RBM has conceded that Malawi loses huge sums of money through forex externalisation. It recently disclosed that Malawi lost about MK719.32 billion (about \$980 million) to illegal foreign currency externalisation and transfer pricing.¹⁷⁷ This prompted the RMB to initiate ways of curbing the malpractice. The RBM is working on bringing about a new foreign exchange system which will require companies to obtain approval from the central bank before making huge payments for goods obtained outside Malawi. It is believed that such a requirement will help to monitor companies and hold them accountable.¹⁷⁸

The RBM avers that all cases involving illegal externalisation of forex in Malawi involve Pakistani nationals, causing speculation that some of the money laundered is used to fund terrorist groups.

¹⁷⁵ Kumwembe W *Reserve Bank of Malawi worried over externalisation* (1 March 2018), The Times Group. Available at <https://www.times.mw/reserve-bank-of-malawi-worried-over-externalisation/> (last visited on 9 October 2018)

¹⁷⁶ Phiri G (27 April 2018).

¹⁷⁷ Transfer pricing is where an entity conducting economic activity in two countries uses internal transfer prices to shift taxable income from countries of high taxation to countries of low taxation. (McSkimming S "Trade Based Money Laundering: Responding to an Emerging Threat" (2010) at 44 *Deakin Law Review* Volume 15 No 1).

¹⁷⁸ Phiri G (27 April 2018).

The FIA and the RBM have taken to court about 13 cases against Indian companies operating in Malawi, all involving forex externalisation.¹⁷⁹

In practice, it seems as though the FIA and RBM do not have a clue as to how to stop the frequent illegal externalisation of foreign currency. Huge sums of money continue to leave the banking industry to Asian countries and elsewhere. It is therefore questionable if the FIA and the RBM have really taken stringent exchange control measures to curb the malpractice. About a decade ago, a commercial bank in Malawi was shut down due to flouting exchange control regulations, illegal externalisation of forex and ML activities. Since then, there has never been any action by the RBM or the FIA against commercial banks to stop the malpractice.¹⁸⁰

Some argue that the banks and traders involved in ML and the illegal externalisation of forex need to face the full brunt of the law as these criminal acts are ruining the Malawian economy. The FIA and the RBM need to work together to ensure that criminals are put behind bars.¹⁸¹

It is submitted that the FIA and the RBM are not doing enough to curb the externalisation of forex. What is needed is efficient coordination and intelligence exchange on suspicious transactions among the FIA, RBM and other financial agencies. The study recommends a review of Malawi's Exchange Control Act so that it provides stringent measures to make forex

¹⁷⁹ Mtika C *Asians risk lengthy jail in Forex Externalisation cases involving MK58 billion* (21 August 2018), Nyasa Times. Available at <http://investigative-malawi.com/498/4-asians-risk-lengthy-jail-in-forex-externalisation-case-involving-k5bn/> (last visited 9 October 2018).

¹⁸⁰ Mtonga L *Hold Malawi Commercial Banks Accountable for Illegal Externalisation of Forex* (last visited 7 October 2018), Nyasa Times Malawi breaking online News Source. Available at <https://www.nyasatimes.com/hold-malawi-commercial-banks-accountable-for-illegal-externalisation-of-forex/> (last visited 9 October 2018).

¹⁸¹ Mtonga L (7 October 2018).

externalisation difficult. The law should provide for hefty fines against commercial banks involved in illicit forex transactions. Furthermore, legislation should ensure that companies involved in such practices are not allowed to proceed with business as usual.

4.3.6 Use of Bank/Transfers and Third Parties

Another emerging trend is the use of bank cheques to distance money launderers from proceeds of crime. Banks need to know of the potential for ML through the use of bank cheques. Many individuals and businesses have legitimate reasons for using bank cheques for their transactions, but these cheques can be used to launder illicit funds or proceeds of crime.¹⁸²

There has been a rise in the use of bank cheques for transactions that would ordinarily have used other instruments, such as personal cheques, to conduct the transaction. A bank cheque is attractive to criminals as it shields the persons conducting the transaction. Bank cheques have a tendency of only showing up at the banks that have drawn the cheque. The receiving bank normally registers them as a deposit from another bank with the assumption that Know Your Customer and other due diligence measures have been duly done by the drawer bank. Money launderers may buy bank cheques to pay into their own accounts maintained at other banks.¹⁸³

Furthermore, unwitting third parties may also be used to receive wire transfers and, in turn, order bank cheques or transfers to other banks for the benefit of the perpetrators. Usually, there will be a sudden, unexplained increase in account activity, both from cash and from non-cash transactions. An account may be opened with a nominal balance that subsequently increases

¹⁸² Typologies on ML in Malawi (2016: 28-29).

¹⁸³ Typologies on ML in Malawi (2016: 29).

rapidly and significantly. There may be many small or large incoming wires or multiple monetary instruments deposited into an account. The customer then requests a large outgoing wire to another bank account. The customer may also order bank cheques in favour of a third party.¹⁸⁴

4.4 Conclusion

This chapter's principle focus was to discuss the ML methods that the FIA has identified as affecting Malawi. Considering that launderers makes use of increasingly sophisticated methods to avoid being caught, it is crucial for Malawi's FIA to be continuously abreast of the new techniques and find the most effective way of dealing with the issues. Despite the various ML typologies that have crippled Malawi's economy, the chapter has focused on public sector fraud, use of personal accounts to evade tax, over/under invoicing goods and services, forex externalisation, the use of alternative remittance systems (*hawala*) and the use of bank cheques/transfers and third parties. The chapter, however, has established that Malawi's FIA and related LEAs are at sixes and sevens when it comes to coping with, especially, TBML. As a result, criminals continue to defraud the country's financial system.

¹⁸⁴ Typologies on ML in Malawi (2016: 29).

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 General Conclusion

FIUs have proved to be important in the fight against ML globally. Their importance cannot be dispensed with if AML laws are to be successfully enforced in all countries. However, countries may differ on the model type of FIU, depending upon what the various FIUs are meant to achieve under their respective enabling laws. Regardless of the form that an FIU may take, the core function of any FIU is to receive and analyse STRs and disseminate the resulting financial intelligence to other LEAs.

The study examined the effectiveness of the Malawian FIA in combating ML. It discussed the FIA's mandates, the process for appointing the Director General and Deputy Director and the funding for the FIA. One of the findings is that Malawi's FIA's powers are restricted to the investigation and dissemination of financial intelligence that it receives. It has no authority to prosecute ML cases.

This paper has also revealed that Malawi's FCA makes the FIA amenable to political or executive interference, given that the Minister of Finance and the President are key in the appointment of the Director General. What is more, there is overt political interference in the workings of the FIA, as has become evident in the Malawi Police Food Supply Contracts and the Cashgate Scandal. For example, as has already been noted in the preceding chapters, the Malawi FIA failed to seize the office building meant for the DPP which President Muntharika purchased using alleged proceeds of corruption. Malawi's experience from the two case studies is proof of violation of

Recommendation 29 of the FATF, requires that FIUs be operationally independent. Independence is indispensable for the effective operation of FIUs as it guarantees that the institution has the power to work freely and to make autonomous decisions based on the STRs it receives.

Malawi's FIA was compared with analogous South African and Namibia bodies. Although the FIUs in all three countries showed similarities and vulnerabilities to political interference, the Namibian FICA is singled out for being the most trustworthy in its workings. The NFICA is applauded because the NFIC's Director is appointed by the Minister of Finance after consultations with the AML Council. The involvement of the AML Council suggests that there is an independent non-political body, with the power to oversee the appointment of the Director.

In view of the weaknesses pointed out above, the following recommendations are made with respect to Malawi's FIA:



5.2 Recommendations

5.2.1 Amending Section 5 and Section 6 the FCA

5.2.1.1 Section 5 of the FCA

Section 5 of the FCA gives the Malawi FIA wide-ranging powers, which is a commendable improvement on the repealed ML Act of 2006. As noted, the FCA does not vest the FIA with prosecutorial powers, only investigatory authority. Another deficit revealed in this paper is that most of the Malawian prosecutors in the other LEAs are ill-equipped to prosecute ML cases. As a result, most ML charges either fall away or take an excessively long time to be prosecuted.

Malawi's ACB has the power to investigate and prosecute corruption cases.¹⁸⁵ Similarly, MRA also has the authority to investigate and prosecute tax related offences in Malawi. This paper advocates that section 5 of the FCA be amended to empower the FIA to prosecute ML offences in cases it finds it appropriate to prosecute with prior authorisation from the office of the Director of Public Prosecutions.

The study further proposes that the FIA should have a prosecution department through which completed investigations of ML will be handed over to the prosecutors for further action. This will ensure finality to ML cases as coordination within the FIA will be easier. Furthermore, there will be speedy prosecutions as perpetrators will be prosecuted by staff who are well trained in the law of financial crimes, particularly in AML law.

In the alternative, the study recommends that the FCA should compel the Malawi Ministry of Justice and Constitutional Affairs under the office of the Director of Public Prosecutions to have a specialised department of a team of prosecutors responsible for the prosecution of economic crimes, particularly ML cases. The Director of Public Prosecutions should ensure that the team of prosecutors in the financial crimes department are adequately trained in ML cases. The FIA must ensure that it makes thorough investigations, so that when the file is submitted for prosecution to the specialised team of prosecutors, a conviction of ML is sustained.

Where the FIA's role ends at investigations by passing on the ML file to other LEAs, it is doubtful that the FIA ever has a chance to follow up on the progress of the case. In that regard, this paper recommends that section 5 of the FCA further mandates the FIA to facilitate the enforcement of

¹⁸⁵ Section 4(d)-(f) of the Corrupt Practices Act.

the law against ML by empowering the FIA to follow up cases before the court and see why, for example, the ML charges are not being pressed by the prosecutors, and if they are being sustained, why the accused was acquitted. This insight could help the FIA hand over cases to the prosecutor that have a high prospect of success. Furthermore, the money launderer cannot escape punishment simply because a court might not convict him. One way of preventing this from happening is to subject judges, too, to training in handling ML cases. Another way is to proceed by way of civil asset forfeiture, where the standard of proof is proof on a balance of probabilities. This would make it easier for the LEAs to punish money launderers who would otherwise not be brought before a criminal court.

Malawi should engage a team of experts from ESAAMLG to train prosecutors on the required skills for a successful prosecution of ML cases. This will ensure that there is speedy prosecutions of ML as perpetrators will be prosecuted by staff who are well trained in the prosecution of financial crimes, particularly in AML law.

If many ML cases are prosecuted in Malawi, potential money launderers will be deterred from engaging in economic crimes, thus saving Malawi from incurring further economic losses through the unscrupulous conduct of money launderers.

5.2.1.2 Section 6 of the FCA

For the FIA to be independent, it is important that the President should not be given the authority to appoint the Director General. Empowering the President to make such an appointment invariably places the Director General under an obligation to implement decisions which favour him or his allies. In Malawi, where most money laundering crimes are perpetrated by politically

connected people, it is even more important for the President not to appoint the Director General of the FIA single-handedly. An objective appointment made by a politically independent body would ensure that the Director implements the dictates of the FIA without fear or favour, and then be required to account and respond to questions put to him or her.

5.2.2 Improved Coordination between Malawi's FIA and other LEAs

Since the FCA places the primary duty to combat ML upon the FIA, the FIA should assume an active role by participating regularly in meetings and conferences with the other LEAs so that knowledge is shared among all the relevant institutions. Obviously, the FIA cannot combat ML by itself. Scheduling regular meetings with other role players would help to lessen the mistrust among the institutions. This would help to improve the flow of communication, thus enhancing transparency on the kind of financial intelligence received from the reporting entities.

5.2.3 Regular Parliamentary Oversight Meetings with the FIA

The study recommends that Malawi's Parliament, through the PAC and the Parliamentary Committee on Finance, conduct regular accountability checks on the FIA. Parliament, together with the proposed AML Council, would need to ensure that the various departmental managers of the FIA are made to appear before it to answer questions regarding the manner in which it deals with STRs reported to it by banks and other reporting entities. Frequent monitoring of the work of the FIA would help to ensure that the FIA's employees refrain from neglecting their statutory duties.

LIST OF REFERENCES

A. Primary Sources

International and Regional Instruments

African Union Convention on Preventing and Combating Corruption of 2003. Adopted on 11 July 2003, came into force on 5 August 2006.

Council Directive 2005/60/EC of the European Parliament and of the Council of the European Union on the Prevention of the Use of the Financial Systems for the Purposes of Money Laundering and Terrorist Financing of 26 October 2005.

United Nations Convention against Transnational Organised Crime and the Protocols thereto, United Nations Office on Drugs and Crime, Vienna (United Nations New York, 2004). Available at

[https://www.unodc.org/documents/middleeastandnorthafrica/organisedcrime/UnitedNations Convention against Transnational Organized Crime and the Protocols thereto.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organisedcrime/UnitedNationsConvention%20against%20Transnational%20Organized%20Crime%20and%20the%20Protocols%20thereto.pdf)

(last visited on 9 July 2018).

Laws of Malawi

Constitution of the Republic of Malawi of 1994.

Corrupt Practices Act, Chapter 7:04 of the Laws of Malawi.

The Financial Crimes Act No 14 of 2017.

The Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act. Chapter 8:07 of the Laws of Malawi of 2006 (repealed).

Laws of South Africa

Constitution of the Republic of South Africa of 1995.

Financial Intelligence Centre Act 38 of 2001.

Financial Intelligence Centre Act No 1 of 2017.

Laws of Namibia

Financial Intelligence Act, 2012 No. 13 of 2012.

Official Reports

Anti-Corruption Bureau Investigations, Report *Allegation of fraudulent transactions in Ration Packs Contract between Malawi Police Service and Pioneer Investments* (Ref No: CR/LL/200/2017). Available at <https://malawi24.com/wp-content/uploads/2018/06/Malawi-Police-PeterMutharikaCorruption-ACB.pdf> (last visited on 1 October 2018).

Eastern and Southern Africa Anti-Money Laundering Group, *Anti –Money Laundering & Combating the Financing of Terrorism* (August 2008) Mutual Evaluation Report Executive Summary, Republic of Malawi. Available at http://www.esaamlg.org/evaluationreports/Malawi_Report.pdf (last visited on 13 March 2018).

Republic of Malawi, *Financial Intelligence Unit Annual Report* (2015/2016). Available at <http://www.fiumalawi.gov.mw/FIU%20ANNUAL%20REPORT%20FOR%202015%20-%202016.pdf> (last visited on 5 March 2018).

Financial Intelligence Unit, *Typologies on money laundering in Malawi* (2016) Republic of Malawi. Available at

<http://www.fiumalawi.gov.mw/Malawi%20Typologies%20%20Report%202016.pdf>

(last visited on 5 March 2016).

International Monetary Fund Factsheet, *The IMF and the fight against Money Laundering and the Financing of Terrorism*. Available at <https://www.imf.org/external/np/exr/facts/pdf/aml.pdf>

(last visited on 22 September 2018).

International Monetary Fund, *South Africa Financial Sector Assessment Program: Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Technical Note* (2015).

International Monetary Fund Publication Services, Washington D.C. Available at

<https://www.imf.org/external/pubs/ft/scr/2015/cr1551.pdf> (last visited on 8 August 2018).

International Monetary Fund, World Bank *Financial Intelligence Units: An Overview* (2004).

Washington, D.C. International Monetary Fund, Legal Department, Monetary and Financial

Systems Dept. Available at <https://www.imf.org/external/pubs/ft/FIU/fiu.pdf> (last visited on 23 July 2017).

Republic of Serbia, *World Bank & the fight against Money Laundering and Terrorism financing*.

Available at <http://www.apml.gov.rs/eng200/saradnja/World-Bank.html> (last visited on 22

September 2018).

The Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (2016). Available at

[http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF Recommendations.pdf](http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (last visited on 3 August 2018).

Tilly B, *Cashgate: A Summary Report on the Findings arising from work carried out into Fraud and Mismanagement of Malawi Government Finances* (2014) National Audit Office of Malawi. Available at <https://rebeccachimjeka.files.wordpress.com/2014/10/cashgate-national-audit-office-of-malawi-cashgate-short-report-final-to-ag.pdf> (last visited on 6 October 2018).

B. Secondary Sources

Books

Alhosani W, *Anti-Money Laundering: A Comparative and Critical Analysis of the UK and UAE'S Financial Intelligence Units* (2016) Macmillan Publishers Ltd, London.

FATF, *Methodology for Assessing Technical compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (2013-2017) Paris, France.

Hopton D, *Money Laundering: A Concise Guide for all Business* (2009) second edition, Gower Publishing Limited, England.

Jenkins D, Jacobsen A, Henriksen A, *The Long Decade: How 9/11 Changed the Law* (2016) Oxford University Press, 198 Madison Avenue, New York.

Petruzzi R and Spies K, *Tax Policy Challenges in the 21st Century* (2014) Series of International Tax Law Volume 86 LLM Vienna.

Reuter P and Truman EM, *Chasing Dirty Money: The Fight against Money Laundering* (2004) Institute for International Economics, Washington DC, United States of America.

Souza JD, *Terrorist Financing, Money Laundering, and Tax Evasion: Examining the performance of Financial Intelligence Units* (2012) CRC Press, United States of America.

Richards JR, *Transnational Criminal Organisations, Cybercrime, and Money Laundering: A Handbook for Law Enforcement Officers, Auditors, and Financial Investigators* (1999) CRC Press LLC, Washington, D.C United States of America.

Unger B and Linde DVD, *Research Handbook on Money Laundering* (2013) Edward Elgar Publishing Limited, Cheltenham, United Kingdom.

World Bank, *Combatting Money Laundering and the Financing of Terrorism: a Comprehensive Training Guide* (2009). The International Bank for Reconstruction and Development / the World Bank 1818 H Street NW, Washington DC 20433.



Articles

Anders G, *Malawi faces toughest, most high-profile trial yet in massive Cashgate scandal* (2017) African Studies- International Development Centre, University of Edinburg. Available at <http://africanarguments.org/2017/02/08/malawi-faces-toughest-most-high-profile-trial-yet-in-cashgatescandal> (last visited on 3 August 2018).

Egmont Group, *Egmont Group of Financial Intelligence Units Charter* (2013) approved by the Egmont Heads of Financial Intelligence Units. Available at

[file:///C:/Users/User/Downloads/1%20Charter%20-%20Nov%2028%202013%20\(1\).pdf](file:///C:/Users/User/Downloads/1%20Charter%20-%20Nov%2028%202013%20(1).pdf)

(last visited on 6 August 2018).

McSkimming S, "Trade Based Money Laundering: Responding to an Emerging Threat" (2010) 37-63, Volume 15 No 1 *Deakin Law Review*.

Mtonga EM, *A Critical Appraisal of the Current Anti-Money Laundering Laws of Malawi with Specific Focus on Trusts* (2015) (Research paper submitted in partial fulfilment of the requirements for the award of the LLM degree, Faculty of Law, The University of the Western Cape. Available at <file:///C:/thesis/Articles/LLM%20Thesis%20for%20Madalo%20Mtonga.pdf>

(last visited on 13 April 2018).

Musonda S, Muhammed H, "The role of Financial Intelligence Units in combating money laundering: A comparative analysis of Zambia, Zimbabwe and Malawi" (2011) 15 *Journal of Money Laundering Control*, 112-134. Available at

www.emaralddinsight.com/doi/pdfplus/10.1108/13685201211194754

(last visited on 4 March 2018).

Simonova A, "The Risk-Based Approach to Anti-Money Laundering: Problems and Solutions," (2011) 14 (4) *Journal of Money Laundering Control*.

Strasser PG & McCall C, "An Anti-Corruption Bureau's Inexorable Endeavour: A Study of Malawi's Cashgate Scandal" (2016) *Washington and Lee Law Review Online*, Volume 73 Issue 1 Article 11.

Available at

<https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1054&context=wlulr-online>

(last visited on 6 October 2018).

World Bank, *Financial Intelligence Units: An Overview* (2004) International Monetary Fund Publication Services, Washington, D.C, USA. Available at

<https://www.imf.org/external/pubs/ft/FIU/fiu.pdf> (last visited on 30 July 2018).

Electronic and Other Sources

Eisa: African Democracy Encyclopaedia Project “*Malawi 2014 National Assembly seat distribution by party and gender.*” Available at <https://www.eisa.org.za/wep/mal2014results2.htm>

(last visited on 3 August 2018).

DPP returns MK145 million to Karim (2018) Malawi 24. Available at

<https://malawi24.com/2018/08/23/dpp-returns-k145m-to-karim/>

(last visited on 1 October 2018).

Malawi’s President Muntharika and the police food scandal (2018) British Broadcasting Corporation News. Available at <https://www.bbc.com/news/world-africa-44714224> (last visited on 1 October 2018).

Norton Rose Fulbright *Prominence of money laundering in Africa: Ten things to know* (2014).

Available at

www.nortonrosefulbrightt.com/knowledge/publications/chapter5_preview/381/3iie3075.pdf

(last visited on 4 March 2018).

Aiolfi G & Bauer HP, *The Wolfsberg Group*. Available at

<https://www.wolfsbergprinciples.com/sites/default/files/wb/pdfs/The-Wolfsberg-Group.pdf>

(last visited on 22 September 2018).

Chilunga Z, *ACB Investigator testifies in court on Cashgate beneficiaries* (2018) Nyasa Times Malawi Breaking Online News Source. Available at

<https://www.nyasatimes.com/acb-investigator-testifies-in-court-on-cashgate-beneficiaries/>

(last visited on 5 October 2018).

Externalisation: legal Instruments needed to enforce, clarify amnesty (9 March 2018), the Independent in Main News, Politics. Available at

<https://www.theindependent.co.zw/2018/03/09/externalisation-legal-instruments-needed-enforce-clarify-amnesty/> (last visited 1 November 2018).

Faiti O, *ACB concludes probe into Malawi Police food rations scandal: Arrests looming* (2018) Nyasa Times Malawi Breaking Online News Source. Available at

<https://www.nyasatimes.com/acb-concludes-probe-into-malawi-police-food-rations-scandal-arrests-looming/> (last visited on 1 October 2018).

Gwede W, *Malawi Parliament passes Financial Crimes Bill: Changes to the anti-financial crime landscape* (2017) Nyasa Times. Available at <https://www.nyasatimes.com/malawi-parliament-passes-financial-crimes-bill-changes-anti-financial-crime-landscape/>

(last visited on 6 March 2018).

Kumwembe W, *Reserve Bank of Malawi worried over externalisation* (2018) the Times Group. Available at <https://www.times.mw/reserve-bank-of-malawi-worried-over-externalisation/> (last visited on 9 October 2018).

Mail Guardian, *Malawi theft balloons to R540 million*. Available at <https://mg.co.za/article/2015-02-12-malawi-theft-balloons-to-r540m> (last visited 6 October 2018).

Malawi's Cashgate Scandal: The \$32 million heist (2014). Available at <https://www.economist.com/baobab/2014/02/27/the-32m-heist> (last visited on 6 October 2018).

Mtika C, *Asians risk lengthy jail in Forex Externalisation cases involving MK58 billion* (2018) Nyasa Times. Available at <http://investigative-malawi.com/498/4-asians-risk-lengthy-jail-in-forex-externalisation-case-involving-k5bn/> (last visited 9 October 2018).

Mtonga L, *Hold Malawi Commercial Banks accountable for illegal externalisation of forex* (2018) Nyasa Times Malawi breaking online News Source. Available at <https://www.nyasatimes.com/hold-malawi-commercial-banks-accountable-for-illegal-externalisation-of-forex/> (last visited 9 October 2018).

Phiri G, *"Forex externalisation Costs Malawi MK5.4 billion"* (2018) the Nation Online Media. Available at <https://mwnation.com/forex-externalisation-costs-malawi-k5-4bn/> (last visited on 9 October 2018).

Raviv S, *Cashgate: How a scandal started with a poor housemaid and ended up taking down the most powerful Woman in Africa* Atlanta. Available at <https://medium.com/latterly/cashgate-2e6628549bf5> (last visited 6 October 2018).



UNIVERSITY *of the*
WESTERN CAPE