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Quo Vadis legal profession participation in anti-money laundering

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Abstract

Purpose – This paper aims to explore the obstacles that the ethical guidelines of legal professionals pose in the implementation of an effective anti-money laundering regime, established in the law on anti-money laundering in Indonesia. Some compliance schemes have been developed to integrate the participation of gatekeepers in anti-money laundering efforts, but the solution to mitigate the challenges must be implemented through the participation of the legal profession.

Design/methodology/approach – The study uses a qualitative research methodology, including a triangulation of interviews with relevant experts, literature review and analysis of regulations. A deductive approach is employed to analyse the data.

Findings – The legal profession's ethical regulations and laws were considered to be the cause for the Indonesian Government's inability to implement the anti-money laundering regime. The findings show two practical solutions that could be implemented: A government policy for the amendment of the anti-money laundering law and organizational policy to increase support for the anti-money laundering regime; and active participation of legal professionals in an effective anti-money laundering regime in Indonesia.

Originality/value – This study provides insight into the participation of the legal profession in anti-money laundering efforts.

Keywords Anti-money laundering, Indonesia, Law, Participation, Legal profession, Legal professionals

Paper type Research paper

Introduction

Money laundering is an ancillary or derivative offence, distinct from but predicated upon the crime that produces the money, the predicate offence. It involves an action that occurs after the commission of a predicate crime and depends on the offense itself. Money laundering legitimates the proceeds of a previous, distinct, predicate criminal activity (Leong, 2007, p. 30). It is called a *sui generis* crime. While there may be evidence of a crime, there is often no necessity or possibility for a conviction of money laundering. Money laundering is a part of transnational crime, and it increases with the proliferation of transnational crimes.

Boister (2012, pp. 101-102) argues that the crime of money laundering has negative impact on the economy, society, and security of a nation. As such, money laundering is harmful for the governance of a nation. Money laundering can lead to the destabilization of the financial system, crime re-funding, and the unpredictable movement of vast profits.



Money laundering has been considered the ultimate crime, as it enables offenders to gain benefits while ignoring laws and regulations. Due to the negative impact of money laundering, the international community has developed instruments to fight it through recommendations to the financial and business professions as well as other reporting parties. The legal profession is considered a reporting party in preventive organized crime, such as money laundering, according to the international standards recommended by the Financial Action Task Force (FATF, 2012) and the international community.

Holmes (1897/2009, p. 26) argued for the strengthening of the function of criminal law in society as a way of rethinking the function of punishment, in terms of how punishment deters crime, and designing more prevention effort. According to Holmes, criminal law is not the only way to punish criminals. The criminal law can be operated to tackle serious crimes as well through developing some standards of prevention and eradication. Holmes's approach, which has been extensively developed, is a risk-based approach. Each profession must know the risk of money laundering. Legal professionals are required to be actively responsible because they are vulnerable to abuse by money launderers and perpetrators of organized crime.

The Australian Transaction Reports and Analysis Centre (AUSTRAC, 2015, p. 4) of the Australian Government, in their Strategic Analysis Brief, explored the negative impact of money laundering and the development of the crime itself. According to the report, money laundering has become increasingly complex and sophisticated. It is categorized as an organized crime, with the support of skills and advice from professionals, including legal professionals or practitioners. Furthermore, professionals have been used as facilitators in money laundering schemes and the perpetrators' "entry point" to misuse financial systems and the structure of corporations to do money laundering. In this position, they are known as the "gatekeepers."

As AUSTRAC's (2015) report states, money launderers have undertaken complex and sophisticated schemes to process their illicitly gained money. This has made legal professionals vulnerable, as money launderers seek safety under the umbrella of the legal profession. At the same time, legal professionals are gatekeepers in the construction of money laundering. Money launderers reflect what Mitsilegas (2003, pp. 10-11) calls, "a 'dangerous person' rather than a 'dangerous offense' philosophy" because it is the characteristic of the offenders themselves. As such, the offender of money laundering should be treated as an offender of a serious crime that carries heavy punishment. Money laundering in its characteristic as serious crime needs more attention. The appearance of a "dangerous person" in this perspective is "Gatekeeper" is dangerous as the offense itself.

In the money laundering process, professionals, including legal professionals, are facilitators or middle-men who are the gatekeepers. As a result, there has been a shift in the way criminal law can intervene in the process of prevention and eradication. Unfortunately, it is difficult to integrate the participation of the legal profession in this process. All legal professionals are bounded by professional ethics and obligations to secrecy that must be obeyed. Thus, the obligation to report clients is considered an action against the ethics and secrecy of their profession. This paper explores the *quo vadis* of legal professionals in their obligation to report on money laundering; and how the law on anti-money laundering can address their professional ethics and obligation to secrecy, so they can avoid the possibility of being sued by their clients.

Part I: lessons learned in the banking industry and the secrecy obligation in anti-money laundering

The banking sector is one large industry that is obliged by the law to comply with anti-money laundering regimes. As designed, banks are fully protected by law to maintain the secrecy of their customers. Banks, as founded, are safe places for money launderers to hide their illicit money. *Suspect* customers used their right to privacy to avoid the obligation to report

their financial resources. However, the banking sector has found that their secrecy compliance is a significant obstacle in the protection of their existence as an industry. The banking sector is now assessed for their compliance to report on their customers' activities. In earlier stages, banks implemented *know your customers* principles, as their strategy to create less risk in the money laundering of their customers. In recent developments, as part of international prevention efforts for money laundering, international standards have been implemented, including Customer Due Diligence (CDD) and enhanced due diligence (FATF, 2012).

CDD is a process of identification, verification and monitoring. According to Article 10 of the FATF recommendations for combatting money laundering (FATF, 2012), the process of CDD should be undertaken to ensure the protection of the reporting parties. All financial institutions are required to ensure that the documents, data, or information collected under the CDD process are kept up-to-date and relevant by reviewing existing records, particularly for customers in the higher-risk categories. The same process is required for individuals identified as at-risk politically. The FATF requires the banking sector to use detailed identification and verification methods, called *enhanced due diligence*, in high-risk business relationships. Enhanced due diligence is a process of obtaining more detailed information from the customer, including the customer's occupation, assets' volume and source, intended nature of the business relationship, reasons for intended or performed transactions, and the availability of information through public databases and the internet. In addition, the following is required:

- regular updates to identification data (both of the customer and the beneficiary);
- assessment of the business relationship, whether to continue or stop the relationship with the customer, and its approval by senior or top-level management; and
- enhanced monitoring of the business relationship, including transaction patterns, multiple times and through a number of control methods.

The banking sector has been faced with the biggest task in implementing anti-money laundering reporting obligations. The FATF recommendations have regulated the record-keeping obligations and those of implementing risk-based approaches with the relevant customers. The FATF requires "Financial Institutions to keep all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities. . . all records obtained through CDD measures, account files, and business correspondence, including the results of any analysis undertaken, to maintain records on transactions and information obtained through the CDD measures" (FATF, 2012, p. 14).

Esoimeme (2015) discusses the importance of the implementation of the CDD measure by financial institutions or other reporting parties. Esoimeme recommends that if the CDD process is not complete because the financial institution, and/or other reporting parties, was unable to do so, they should terminate the business relationship with customer. These are considered and categorized as *suspicious circumstances*. Esoimeme warns all the financial institution and/or other designated non-financial institution to end their relationship with the customer under such circumstances. These responsibilities are not easy meet, but the banking sector was established and has survived without fear of being sued by their customers. The banking sector has established compliance divisions in their institutions to meet their responsibilities by reducing customers' non-compliances.

Part II: ethics and the obligation to secrecy of notaries and advocates as reporting parties of client information: Indonesian law cases

The new obligations identified by the international standards to reduce money laundering (FATF, 2012), and the role of the legal profession as known gatekeepers, raise important

issues for professional ethics and the obligation to secrecy regarding client information. Husein (2017, p. 4) states that specific professions can be used as gatekeepers to hide the proceeds of crime. These professions can be abused by criminals and should be categorized as reporting parties to prevent and eradicate predicate crimes and money laundering and to protect and secure their professions. Hussain's assertions are in line with Recommendation 22(d) of the FATF (2012) that states that CDD and record keeping should be implemented by "designated non-financial and business professions", including:

Lawyers, notaries, other independent legal professionals and accountants – when they prepare for or carry out transactions for their client concerning the following activities:

- real estate transactions (buying and selling);
- management of client money, securities, or other assets;
- management of bank, savings, or securities accounts;
- organization of contributions for the creation, operation or management of companies; and
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities (FATF, 2012, p. 20).

In its note on Recommendation 22, the FATF states that countries do not need to stipulate laws concerning the participation of legal professionals, accountants and designated non-financial institutions as long as the law on anti-money laundering includes articles, regulations and/or specific tools to address the underlying activities of the legal professionals, accountants, and other non-financial institutions mentioned by the FATF. In other words, each country must meet the requirement to establish within the law articles, regulations and/or specific tools to regulate the participation of "gatekeepers" and or other non-financial institutions.

Indonesia established a law on anti-money laundering in 2010, entitled [Law Number 8 of 2010 \(2010\)](#) concerning Law on Prevention and Eradication of Money Laundering. Reporting parties are mentioned in Article 17 of the law, but the law has yet to discuss explicitly the designated non-financial businesses and professions. Article 17, sub paragraph (2), states that additional reporting parties will be arranged through government regulation. [Government Regulation 43 of 2015 \(2015\)](#) identifies the legal profession as one of the reporting parties appointed by the law. Unfortunately, in practice, the implementation of the legal profession as a reporting party runs into difficulties as the law precedes government regulations.

The main Indonesian law on notaries and advocates explicitly prohibits them from revealing any information regarding their clients. As such, legal professionals are effectively unable to fulfil their new duty to report on their clients. The parties would fully comply with the obligation to report as long as it is required by the law. But the government regulation to report is not the law. A debatable interpretation could be presented here, if only to view the perspective of the law, that it regulates the obligation, from narrow or broad perspectives. One large issue concerns how money laundering prevention could affect legal professionals' existence professionally as "gatekeepers" and negatively impact the economic life of a country, although the risk they may face with clients must be considered as well.

According to Indonesian law on anti-money laundering (2010), all professionals obliged to report must conduct due diligence (customer and/or enhanced) and record keeping. Records must be kept of every client transaction, including:

- clients' property transactions (selling and/or buying);
- activities related to the management of money; property (assets); and other financial products of clients;

- management of clients' bank accounts, bank deposits and securities;
- management and operations of corporations; and
- processes of establishing, managing and operating business entities.

When the legal professional's dealings with a client are related to such activities, they are obliged report the identity of the client as required by the law. Article 10 Indonesian [Law Number 8 of 2010 \(2010\)](#) states that the obligation to secrecy does not apply in the context of the prevention and eradication of money laundering. The problems begin here. Some legal professionals find the legal arrangements related to anti-money laundering unacceptable, as their designation as reporting parties is regulated by a government regulation. It is not *mutatis mutandis* implemented by the regulation in the Law Number 8 of 2010. Legal professionals are afraid that they are prohibited by their main law to comply.

Rae (2017, p. 5) recommends that governments try to educate reporting parties on the nature of information to ensure that all the parties know whether they are conducting a violation of the main law. Information can be viewed from two perspectives. One perspective views information as *private goods* and the other as *public goods*. As private goods, information that is personal or private is categorized as private rights entitled that need confidentiality by transaction, rights protected by the law and regulations. It is acceptable by society, and industrial characteristics of trust are acceptable as *lex specialis*. But from the public goods perspective, any information that compromises the general public's interests, as regulated in the law and regulations, must be considered information that can be shared limitedly. As such, legal professionals must consider the public goods perspective rather than the private goods perspective, without ignoring the importance of the information. Thus, the information that must be reported is limited to the process of suspicious transaction reports, related to the five transactions stated in [Law Number 8 of 2010 \(2010\)](#) presented above. This will assist the efforts to prevent and eradicate money laundering.

Part III: the direction of anti-money laundering laws for notaries and advocates

Results of interviews with members of legal professional associations, show that legal professionals fully support the need to work with the law enforcement to stop money laundering that may be related with their profession. However, this requires proper supports and legal protection to ensure that legal professionals (e.g. notaries and advocates) do not violate their professional ethics and the obligation to secrecy regarding their clients' information as required by their main law. Legal protection for legal professionals is needed.

Some of the members of legal professional associations recommended ensuring that legal professionals are protected by the law from any possibility of being sued by their clients and from any disparity that can be applied by law enforcement, whereas creating uncertainty in the field. One law enforcement professional may apply different legal action to that of another law enforcement professional, due to their perspectives on the law and lack of knowledge in this regard. Thus, policy making (legislative) bodies must proceed with revisions to the law on anti-money laundering. The revised law could include the regulation of legal professionals as reporting parties in anti-money laundering in Article 17. Previously, inclusion of the legal profession in Article 17 of the law on anti-money laundering was rejected.

Another suggestion made by members of legal professional associations was to develop public awareness of the necessity to prevent and eradicate money laundering by legal professionals working hand in hand with law enforcement. In this context, government should disseminate the law on anti-money laundering to the public. This would be helpful in building effective methods to prevent and eradicate money laundering. Building public

awareness will benefit the legal profession by avoiding any threat of being sued by clients as they will know that this obligation is mandated by the law. Establishing a mechanism for simple reporting will be helpful for the legal profession.

Another important recommendation is to establish a regulatory and supervisory body to monitor the compliance of legal professionals and to act as a reporting party for the law on anti-money laundering. A fixed internal regulation, reward and punishment mechanism will allow legal professionals to obey the new obligation as a reporting party. In the end, legal professionals can be active and make effective contributions to combat money laundering along with their ethical and secrecy obligations as mandated by the main law. They must be fully protected from the possibility of being sued by their clients and other legal protections must be guaranteed. Finally, it is important to note that legal professionals are fully aware of the danger of money laundering, whenever they reflect on the possibility of abuse by their clients that place them as gatekeepers. Legal professionals need the certainty of legal protection by law, not only government regulations.

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