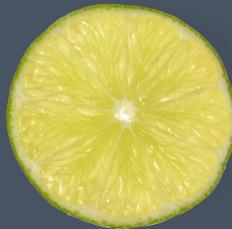




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fresh thinking*

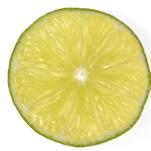
a breakfast seminar by Oraro &
Company Advocates

EMERGING ISSUES IN ANTI-MONEY LAUNDERING AND PROCEEDS OF CRIME - EVENT HIGHLIGHTS

22nd November 2019 | Fairview Hotel

Rapporteur: Eva Mukami, Associate





ABOUT THE EVENT

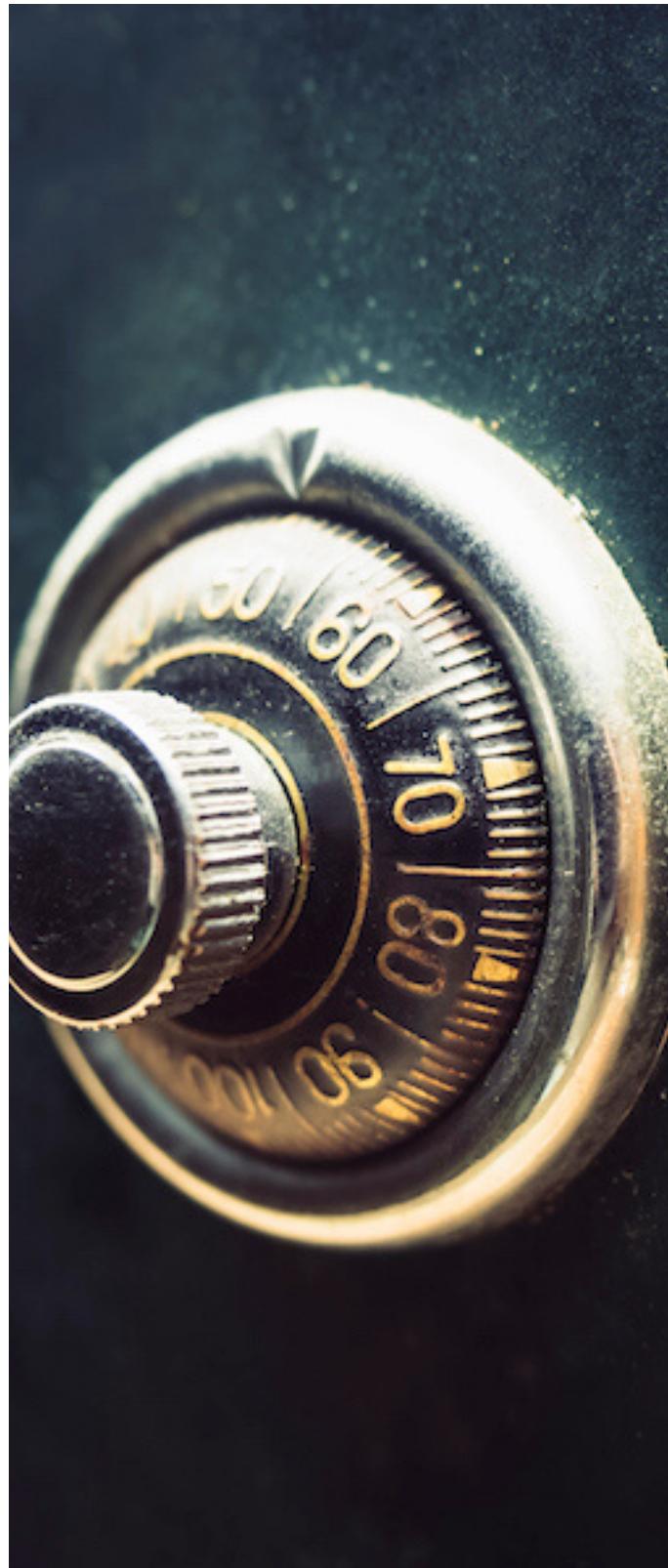
EMERGING ISSUES IN ANTI-MONEY LAUNDERING AND PROCEEDS OF CRIME

Kenya being East Africa's financial hub, remains vulnerable to money laundering and financial fraud. The country has been listed among the hotspots for money laundering in a [2019 report](#) released by the federal government of the United States. The implication of this is that any payment involving entities within the country will be subjected to additional scrutiny by global financial players, investors and banks. Government regulators have been putting in place measures and issuing directives which are aimed at sealing the available loopholes.

The event facilitated dialogue, discussion and sharing of legal and industry experience with a focus on money laundering and the provision of the Proceeds of Crime and Anti-Money Laundering Act.

The seminar highlighted:

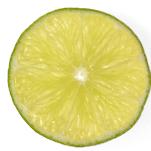
- the salient issues stipulated in the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017;
- anti-money laundering obligations of financial institutions;
- legal implications and remedy measures; and
- emerging issues in the fight against money laundering.



Venue: Fairview Hotel



Date: 22nd November 2019



HIGHLIGHTS

EXECUTIVE SUMMARY

Oraro & Company Advocates is honoured to have hosted its second Fresh Thinking Breakfast Roundtable was held on Friday, 22nd November 2019 at the Fairview Hotel, Nairobi. The event was attended by business professionals and thought leaders with the discussions focusing on the emerging issues in anti-money laundering and proceeds of crime with industry experts from the banks, telcos, legal and accounting firms locally and from a global perspective.

The Panel consisted of; Mr. George Oraro, Sc – Senior Partner at Oraro and Company Advocates; Mr. Jonathan Huth – Lawyer at Kobre & Kim LLP; Ms. Wangechi Gichuki – Head of Legal at Telkom Kenya; Mr. John Kamau, Associate Director, Forensics at PwC Kenya; and Mr. Zivanai Muchenje – Head of FCC Governance, Kenya & East Africa – Standard Chartered Bank Kenya.

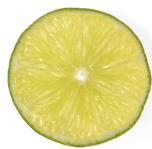
Mr. Geoffrey Muchiri – Partner at Oraro & Company Advocates served as the panel moderator.

The purpose of this report is to summarise the main points made during the #freshtthinking event on the emerging issues in anti-money laundering and proceeds of crime. Here are the key highlights:

The systemic risk posed by cryptocurrencies in the fight against money laundering

1. Ms. Wangechi Gichuki noted that cryptocurrencies such as bitcoin and Ethereum are by their very nature ‘concealed’. Therefore, there are certain issues around cryptocurrencies that currently pose a systemic risk in the fight against money laundering such as;
 - a. Lack of understanding of cryptocurrencies; what are cryptocurrencies? Cryptocurrencies are very volatile – for example, how do we measure the value?
 - b. Lack of pro-active regulation; the general attitude of the regulator is to allow users to use it at their own risk;
 - c. Difference in description of cryptocurrencies - is it a taxable asset? Is it a security? In the event that a cryptocurrency is generated in Kenya and transferred to another country, how would this difference in description be addressed?

She therefore agreed that cryptocurrencies indeed pose a systemic risk. She recommended that the technology behind the cryptocurrencies be understood, used responsibly and regulated.



HIGHLIGHTS

The global fight against money laundering

1. Mr. Jonathan Huth noted that we live in a global village, and therefore money laundering is a global issue. The fight against money laundering begins with willingness to fight it; from all sectors including governments, and not just banks. The fight consists of both an international and national aspect.

On the international aspect, there are several bodies currently involved in the fight, such as the UN commissions and resolutions, the Financial Action Taskforce, mutual monitoring and evaluation between countries, committees of the World Bank and the IMF.

On the national front, he gave the example of the US Department of Justice having the mandate to prosecute parties for wire fraud both at an individual and corporate level. He also noted the UK Serious Fraud Office that is currently involved in the fight against money laundering.

The same techniques used to launder money, are the same ones used in terrorism financing. He noted that in the US Department of Justice, there is a department that specifically deals with terrorism financing.

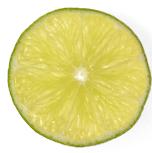
2. The second way of fighting money laundering is by using banks as gatekeepers. Banks are not only obligated to know their customers, but also to have robust money laundering and compliance departments to catch suspicious transactions. However, he noted that we can't always rely on banks to catch suspicious transactions. It comes down to account managers at the account opening stage, and to banks applying global standards recognising different cultural issues.

Evolution of the global fight against money laundering

1. Mr. Jonathan Huth pointed out emerging trends such as;

- Challenges involved in money payment technologies such as Mpesa. Without proper AML standards and KYC compliance at the company, the company may be liable for money laundering either through investigations or indictment;
- Use of third-party utilities such as shared service utility models;
- From an enforcement perspective, the shift to a global fight against money laundering such as increased involvement of the US and the UK;
- Financial deregulation allowing less compliance;
- Cryptocurrencies and black markets.

The main challenge is keeping up with technology and hiring the right people to address the emerging issues.



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Challenges faced by financial institutions with regard to compliance with anti-money laundering regulations

1. Mr. Zivanai Muchenje noted the following challenges;

- **The Practical implementation challenge;** He gave the example of section 44(2) of Proceeds of Crime and Anti- Money Laundering Act (POCMLA) which requires banks to report suspicious transactions and activity on an account within 7 days of the date of transaction. However, he noted that banks process more than 200,000 transactions per day. The financial institution is also required to review the transactions and report the suspicious transactions to avoid malicious reporting. This he also pointed out is coupled with the fact that the bank is also required to provide sufficient information such as account opening mandates while reporting. Therefore, the obligation is difficult on financial institutions.

- Section 45A of POCMLA requires banks to provide enhanced due diligence for clients from high risk nations. However, **the regulations are unclear on what should happen when countries are dropped from the high-risk countries list.**

- **Confidentiality.** He gave the example of legal professional privilege and certain state organs, which poses a challenge to financial institutions in obtaining supporting documentation when reporting suspicious activity.

- He also noted lack of coordination between financial institutions and regulators.

If a bank terminates a client relationship based on money laundering concerns, the client is free to open an account with a different bank. There is no central repository where banks can list clients.

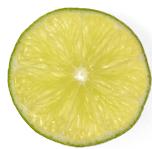
Comments on the US Senate committee report on Angola and HSBC

1. Mr. Jonathan Huth noted that is generally the responsibility of every sector to tackle money laundering.

2. The senate report focused on four cases;

a) The OBN case from 2004-2008.

It involved a case where the son of the Equatorial Guinea president used lawyers to move 110 million dollars into the US. There was use of law firms as conduits. At least 35 million USD was siphoned off by the son from an account held by the Embassy at Riggs bank. The US Department of Justice fined Riggs 16 M dollars for violating US bank secrecy laws. The issue was on politically exposed persons. All banks are required to look at. However, of course this must be weighed against a bank's profit objective.



b) The Bongo case from 2003 – 2007.

This case involved the Gabon president who employed a US lobbyist to purchase armoured vehicles and cargo aircrafts from Saudi Arabia. Over 18 million dollars was transferred from Gabon to US accounts. In that case, there were no enhanced monitoring efforts despite the fact that they were on the list of politically exposed persons.

c) The Abubakar case.

An individual named Jennifer Douglas was the 4th wife of the former vice president of Nigeria. She helped her husband bring 40 million dollars plus suspected funds through wire transfers to the US using offshore jurisdictions. 25 million dollars was transferred to more than 30 US bank accounts. 14 million was transferred to the American University in DC. In that case the university failed to enquire about the source of funds.

d) The HSBC-Angola.

Three Angola politically exposed persons were involved; an arms dealer, a government official and a private bank. The individuals exploited weak anti money laundering systems to launder money. HSBC ignored issues that would be considered suspicious and continued to engage the client.

The fight against money laundering from accountants' perspective

1. Mr. John Kamau noted that accountants are reporting institutions as per POCAMLA – and fall

between the financial institutions and the lawyers. As such they have the same obligations as financial institutions.

2. He also noted that there are 2 broad reporting institutions: financial institutions and designated non-financial institutions.

3. On specific obligations;

- He was of the view that the major role for accountants is on due diligence. Due diligence is required at the client engagement stage. Where there are money laundering concerns at the due diligence stage, accounting firms will simply not engage the client. Once a customer has been engaged, the obligation shifts to monitoring of transactions. However, if the due diligence is properly conducted, then there are few money laundering concerns.

- There is a reporting function. He indicated that, at PwC, there is a designated official charged with monitoring suspicious transactions.

- Also play an advisory role in advising financial institutions on AML concerns.

On investigation and tracing of funds by accountants

1. Mr. John Kamau pointed out that investigation of money laundering has shifted from simply assigning



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blame to now tracing the funds.

2. There are also advancements in the tools employed to trace the money such as digital forensics.
3. Once the money is traced, the investigator's role is to give the facts. The role then shifts to the prosecutors/lawyers to prosecute the suit.

On whether legal practitioners should be made reporting institutions? – Mr. Oraro, SC

1. Mr. Oraro, SC pointed out that the discussion should begin with where the law is currently and everyone's responsibility – prior to the current statutory regime, the emphasis was in dealing with the crime.

He noted that there is a lot of legislation dealing with each type of crime and corresponding institutions e.g. corruption, organised crime, drugs, human trafficking and terrorism. There is however little to show for it in terms of convictions.

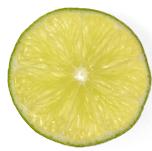
2. He pointed out that lawyers have 2 roles; as long as you are acting for a client as a lawyer, there is a relationship based on confidentiality. If the confidentiality is taken away, lawyers can no longer discharge their function. This would take away the whole basis of the relationship. However, confidentiality is limited. If the relationship involves crime, there is no confidentiality. He therefore noted that it would be

unfortunate if that relationship is done away with and law firms made reporting entities. Clients would have no reason to instruct lawyers.

2. POCAMLA binds everyone to report a suspicious transaction. This has been used as an avenue to investigate lawyers' accounts. Although there is protection under POCAMLA, it is being abused.
3. The confidentiality relationship between advocates and clients is protected under the constitution. The burden is therefore on the investigator to show that there is crime involved, and therefore that it is necessary to lift the confidentiality.

On whether the current legislation on money laundering is sufficient, and recommendations

1. Mr. Oraro pointed out that the fight against money laundering is now targeted elsewhere; towards financial payment systems. Following the EU treaty, it was discovered that all these activities are oiled by financial institutions. Hence the enactment of POCAMLA. All financial institutions, other reporting entities and individual persons have been brought into the fight against money laundering. Therefore, now, the obligation is on everyone; including brokers, estate agents and insurance agents to ensure they are not caught by the reporting obligation of POCAMLA. In summary, there is sufficient legislation, and in Kenya, very strictly enforced; particularly as against financial institutions. He noted that the current problem is



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enforcement. There is therefore no need to increase legislation.

2. He recommended tightened KYC processes on account opening and individual accounts for banks; making decisions whether transactions are suspicious. When in doubt, better to report. Not leaking information to customers under investigation. Independence to money laundering reporting officers in banks.

On what financial institutions can do to limit liability under legislation

1. Mr. Zivanai Muchenje suggested implementation of an effective and sustainable anti-money laundering program. On effectiveness; conduct an evaluation of whether the current regime is achieving its objectives. On sustainability; tailoring a regime that is able to adapt to the changing trends or typologies faced.

2. He proposed to give his recommendation by looking at the life cycle of a financial institution's client.

• Preventing entry of certain clients

Having a customer acceptance policy; covering clients that can/cannot be engaged. To implement a watchlist into the system that can allow efficient screening.

• Efficient due diligence systems

Understanding clients' risk profiles. Having the ability to have a view of related parties. The systems should tell

existing relationships of clients e.g. a director of various entities. This will influence periodic reviews/updated information.

• Better monitoring of transactions

Through monitoring system generated alerts, production orders, court orders, media reports. These avenues give leads.

• Reporting obligations

Through sufficient reporting; including related parties of the client in order to give a holistic view.

• Termination of client relationships through preventing re-entry of the client into the system, e.g. watchlists that are linked.

DISCLAIMER

These insights are of a general nature; these are the highlights of the discussions during our event and counts as expert opinion but not professional advice. This is not intended to address the circumstances of any particular individual or entity. While the information is accurate as at the date hereof, there can be no guarantee that the information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice and after a thorough examination of the particular situation.

If you require specific advice on this matter, please write to us on insights@oraro.co.ke or legal@oraro.co.ke



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