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Anti-Money Laundering Law: Socio-Legal Perspectives on the Effectiveness of German Practices

Verena Zoppei



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Verena Zoppei

Anti-Money Laundering
Law: Socio-Legal
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on the Effectiveness
of German Practices



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Abbreviations and Acronyms

BAFIN	Die Bundesanstalt für Finanzdienstleistungsaufsicht (German Federal Financial Supervisory Authority)
BCBS	Basel Committee on Banking Supervision
BGBI.	Das deutsche Bundesgesetzblatt (German Federal Law Gazette)
BGH	<i>Bundesgerichtshof</i> (German Federal Court)
BKA	<i>Bundeskriminalamt</i> (Federal Criminal Police Office)
BMF	<i>Bundesministerium der Finanz</i> (German Federal Ministry of Finance)
BMI	<i>Bundesministerium des Innens</i> (German Federal Ministry of Interior)
BMJV	<i>Bundesministerium der Justiz und für Verbraucherschutz</i> (German Federal Ministry of Justice and consumer protection)
BO	Beneficial Owner
BR-Drucks.	<i>Bundesrat Drucksache</i> (German federal parliamentary records)
BT-Drucks.	<i>Bundestag Drucksache</i> (German federal parliamentary records)
BverfG	<i>Bundesverfassungsgericht</i> (German Federal Constitutional Court)
CDU	Christlich Demokratische Union Deutschlands (Christian Democratic Union of Germany)
CoE	Council of Europe
CSU	Christlich-Soziale Union in Bayern e. V. (Christian Social Union in Bavaria)
DM	<i>Deutsche Mark</i> (German Mark)
EC	European Community
ECB	European Central Bank
EEC	European Economic Community

EU	European Union
FATF	Financial Action Task Force
FDP	Freie Demokratische Partei (Free Democratic Party)
FIU	Financial Intelligence Unit
G7/G8/G20	Group of 7/Group of 8/Group of 20
Gcc	German Criminal Code
GDP	Gross Domestic Product
GFG	<i>Gemeinsame Finanzermittlungs Gruppe</i> (Common financial investigative group)
GFI	Global Financial Integrity
GG	<i>Grundgesetz</i> (German Constitution)
GwG	<i>Geldwäschegesetz</i> (German Anti-Money Laundering Act)
IMF	International Monetary Fund
LKA	<i>Landeskriminalamt</i> (German State Criminal Police)
MEP	Members of the European Parliament
MER	Mutual Evaluation Report
ML	Money Laundering
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
MP	Member of the Parliament
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Union
Palermo Convention	United Nations Convention against Transnational Organised Crime
PEP	Politically Exposed Person
PKS	<i>Polizeiliche Kriminalstatistik</i> (German police statistic)
SPD	<i>Sozialdemokratische Partei</i> (German Social Democratic Party)
STR	Suspicious Transaction Report
TFEU	Treaty on the Functioning of the European Union
TI	Transparency International
TJN	Tax Justice Network
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime
US	United States
Vienna Convention	United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
WB	World Bank
WEED	World Economy, Ecology & Development

Chapter 1

Introduction

La politica, l'eterna madre dell'accadere umano, è rimasta inceppata nell'economia e nel mercato [...].¹

(Mujica 2014, p. 109).

In a time of excessive legislation, questioning the effectiveness of a law helps lawmakers in assessing whether the law fulfils the purpose for which it was enacted, and thus in drafting more effective reforms. This book focuses on the money laundering offence; yet it surveys also the rules governing the prevention of money laundering.

Against the background of events such as the Panama Papers, the FIFA scandal, the Lux leaks, the Swiss leaks, and the Bahama leaks, which brought to the fore the role played by offshore financial centres in complex international money laundering schemes, there has been a universal call for the formulation and implementation of effective anti-money laundering regulations. What is more, in recent times the world has witnessed prominent individuals, such as Russian Mikhail Borisovich Khodorkovsky and Boris Berezovsky, South African former African National Congress Youth League leader Julius Malema, Brazil's President Lula da Silva being collared for money laundering. It has, therefore become urgent to ascertain what the boundaries of anti-money laundering law are—what can they accomplish and what not in order to avoid an arbitrary use of the offence.

Money laundering is the process of imparting an appearance of legality to the proceeds of crime. When the ill-gotten gains intermingle with legitimate monies, it becomes almost impossible to distinguish the lawful from the unlawful. While the motives for engaging in the practice of making ill-gotten gains look legal have remained the same throughout the ages, the conduct was first criminalised under international law in 1988. Money laundering was criminalised specifically to prevent the proceeds of crime from infiltrating the lawful economy. Since then scholars have devoted themselves to this subject irregularly but continually. The scholarly debate peaked in the period following the 9/11 attacks in the US and again recently after the global 'leaks' came to light. A considerable part of the international

¹ Own translation: Politics, the eternal creator of human development, has got stuck in the economy and in the market.

anti-money laundering legal framework addresses also the financing of terrorism; however, this book deals only marginally with the financing of terrorism, and focuses instead on money laundering as a phenomenon related to organised and economic crime. For over a quarter of a century the official rhetoric has been that money laundering was criminalised to prevent and combat organised and serious crime and to protect the soundness of the world's financial system. But scholars have been strongly critical of the anti-money laundering laws, contending that they have not achieved their goals. It is especially the vague definition of the crime of money laundering that has been the subject of relentless scholarly attack.

While most assessments have measured the outcomes of the anti-money laundering policies against declared official purpose of the law, this book questions instead, the underlying motives for criminalising money laundering. The aim is to see whether lawmakers had ulterior motives, or as they say, hidden agendas, that could rationalise the existence of a policy despite its apparent ineffectiveness. In addition, whereas the literature has thus far sought to simplify the complexity of the matter by measuring effectiveness quantitatively, this study opts for qualitative method, using empirical investigations, thereby underlining the involvedness and multifaceted nature of the issue at hand. This methodological approach does not presume the rationality of those who make, implement, or enforce the law. This book, therefore, seeks to fathom the perceptions, expectations, and opinions of those actors in the law, who are referred to in the book as legal actors. The definition of effectiveness used in the book is indeed a socio-legal operational definition, which goes beyond considerations bearing on technical quality, deficiencies and the formal, potential adequacy of the 'law in books', and assesses instead the concrete impact of the 'law in action', and of the law 'inaction'. The book hence connects to the vibrant discussion on the concept of legal effectiveness. It does this by proposing a methodological definition, which is then applied to the empirical research. Thus, the study contributes to the existing body of scholarly research that analyses the effectiveness of criminal laws that are meant to tackle illicit financial flows or target white-collar criminality as well as economic and organised crime.

The genesis of the anti-money laundering legal regime and the subsequent most significant developments are traced at the international, European and domestic level. The implementation of the law is conducted by way of a case study of the money laundering offence in a national context. In particular, the book focuses on the money laundering offence of the German criminal code and on the preventive regulations adopted in Germany to the extent that the latter impact on the effectiveness of the criminal provision. I have chosen Germany as an arena of investigation because the country seems to be at the same time less vulnerable to organised crime than other neighbouring countries² but at the same time particularly prone to

² Yet, it seems that the country is getting more and more susceptible to organised crime and corruption. See also 'Dirty Money. The Rise of Organized Crime in Europe'. In Deutsche Welle, 15/11/2015, 19.15; Schnaust R, Korruption in Deutschland steigt unaufhörlich an. Neopresse, 12/11/2015.

money laundering. Especially since the publication of a report on the implementation of anti-money laundering standards in 2010, which stated that Germany had ‘a higher risk profile for large scale money laundering than many other countries’,³ the media have continually reported the country as an ideal place or even a paradise for money launderers.⁴ According to most recent studies, the amount of money laundering in Germany is estimated to be between 50 and 100 billion Euros per year.⁵ In comparison: the federal budget for 2016 amounts to 316,9 billion Euros. Renowned banks such as Commerzbank, Deutsche Bank, and Hypovereinsbank have been the focus of recent scandals because of their involvement in money laundering schemes, investigated mostly by foreign law enforcement agencies.⁶ The issue has been already satirised, for instance in 2016 by the German *Greenpeace* magazine (see Fig. 1.1).⁷

Against this situation, the legal framework for combating money laundering has been often criticised. In 2007 and 2010 the European Commission initiated two proceedings against the German government for its contravention of the European treaty by failing to transpose effectively into national law the European legal provisions regulating money laundering and terrorist financing.⁸ In 2010 the IMF, the

³ FATF 2010.

⁴ The latest news at the time of writing is that Germany is second only to Luxembourg as country facing the risk money laundering risk, according to a report published by Eurodad; *See Eurodad 2015. See also Crisp J, Deutschland belegt bei Geldwäsche Platz zwei hinter Luxemburg. Viel getan hat sich nach der Luxleaks-Steueraffäre nicht bei den EU-Ländern, so das Ergebnis einer Analyse des Netzwerks Eurodad. Der Tagesspiegel, 04/11/2015; OECD: Deutschland ist Geldwäsche-Paradies. Deutsche Wirtschafts Nachrichten, 18/01/2013; Dick W, Germany, a safe haven for money laundering. Deutsche Welle, 30/10/2012; Rimpel K, Geldwäsche-Paradies Deutschland. Nummer acht unter den Steueroasen. Tz-online, 07/11/2013; Ramthum C. OECD: Deutschland versagt im Kampf gegen Geldwäsche. Wirtschaftswoche, 26/04/2014; ‘Steueroase Deutschland ist Eldorado für Geldwäsche’. In Handelsblatt, 07/11/2013; Deutschland ein “Eldorado für Geldwäsche”? Deutsche Welle, 07/11/2013; Netzwerk Steuergerechtigkeit, Deutschland ist ein Eldorado für Geldwäsche. Frankfurter Allgemein, 07/11/2013. On the estimated amount of money laundering, see Grabitz M, Geldwäsche floriert in Deutschland. 50 Milliarden Euro illegale Zahlungen. General Anzeiger Bonn, 01/06/2015. The FATF/OECD and IMF estimated the amount of proceeds of crime that could be potentially laundered in the country to be between 43 and 57 billion Euros. FATF 2010, p. 24.*

⁵ *See Unger et al. 2013, and Bussman 2015. For a critical study on these estimates, see Schneider 2016.*

⁶ *Crisp J, Deutschland belegt bei Geldwäsche Platz zwei hinter Luxemburg. Viel getan hat sich nach der Luxleaks-Steueraffäre nicht bei den EU-Ländern, so das Ergebnis einer Analyse des Netzwerks Eurodad. Der Tagesspiegel, 04/11/2015; Rosbasch J, Deutschlands Problem mit der Geldwäsche-Bekämpfung. Deutschlandfunk, 06/08/2015; Geldwäsche Affäre in Russland. Deutscher Bank drohen Milliarden Bußgelder. In Spiegelonline, 14/08/2015.*

⁷ *Keine Anzeige. With the permission of www.greenpeace-magazin.de.*

⁸ *On 14th October 2004, European Commission was addressed with a complaint against the German government with reference to a report published by the IMF (International Monetary Fund), the OECD (Organisation for Economic and Commercial Development), and the FATF (Financial Action Task Force) to argue that Germany was contravening the Second European Anti-Money Laundering Directive (Directive 2001/97/EC). Andreas Frank, an expert in the field of*



Fig. 1.1 Keine Anzeige. With the permission of www.greenpeace-magazin.de. Source Greenpeace Magazine

OECD and the FATF were sharply critical of the fact that German legal system was not fully compliant with international anti-money laundering standards. In response to this wave of criticism, some important changes have been made.⁹ With specific regard to criminal law, the legislature has amplified the scope of the money laundering offence and the sphere of criminal liability in order to improve the effectiveness of the existing legislation.¹⁰ Yet the continual expansion process has raised legal challenges that could constitute an obstacle for the effective enforcement of the measure. In fact, at present Article 261 of the GCC continues to be subjected to a welter of attacks from abundant literature on this topic.

The structure of the book is as follows: Part I presents the theoretical socio-legal framework and provides an operational definition of the concept of effectiveness that informs this empirical study. The Part concludes with a description of the methodology of the qualitative research. The subsequent Parts are developed on the basis of a set of variables suggested in Part I. Part II traces the genesis of the money laundering offence at an international, European and domestic level. The Part, as a desktop study, analyses legislative intents, parliamentary debates and other outside contributions as declarations of intents and opinions. Part III is dedicated to the doctrinal debate on the money laundering offence as regulated in the GCC. The Part highlights, in particular, the controversial issues that have come out of the profuse body of scholarly writings with regard the anti-money laundering provisions. Parts IV and V present the empirical research. Part IV analyses the quantitative data of the implementation of the money laundering offence from a qualitative perspective. The last Part presents the results of the interviews.

(Footnote 8 continued)

anti-money laundering, filed the complaint, which was particularly focused on the lack of regulations in respect of casinos, which were not sanctioned pursuant to the German legal system in case they did not report a suspicious transaction. On 21 March 2007, the European Commission, on the basis of Frank's complaint, initiated a proceeding against Germany for violation of the EU treaty. On 16 July 2007 the Ministry of Justice declared that the legislative process to close the loopholes was in progress. The process concluded with the enactment of the 'law to fight money laundering and terrorist financing' (*Gesetz zur Bekämpfung der Geldwäsche und der Terrorismusfinanzierung, Geldwäschebekämpfungsergänzungsgesetz, GwBerkErgG*) on 13 August 2008, which discharged the complaint, according to the EU Commission. But Frank was not satisfied with the transposition of the Third Anti-Money Laundering Directive into German law and filed another complaint in 2009, after the Ministry of Finance declared that implementation at a state level of international standards against money laundering and terrorist financing was considered to be very critical. For more details on the proceeding, *see* Roth et al. 2007, pp. 287 ss.

⁹ *See* the FATF 2014; IMF 2016.

¹⁰ The main amendments to the money laundering offence recently approved are introduction of the elimination of the exemption of punishment for persons who participated in the predicate offence, and the introduction of the newly created offence of terrorist financing as a predicate offence for money laundering. For a more detailed overview, *see* Part II.

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Part I

Instructions for the Socio-Legal Research

[...] Quelle gride, ripubblicate e rinforzate di governo in governo, non servivano ad altro che ad attestare ampollosamente l'impotenza de' loro autori; o, se producevan qualche effetto immediato, era principalmente d'aggiunger molte vessazioni a quelle che i pacifici e i deboli già soffrivano dà perturbatori, e d'accrescer le violenze e l'astuzia di questi. L'impunità era organizzata, e aveva radici che le gride non toccavano, o non potevano smovere.¹

Manzoni 1840, p. 21

¹ Own translation: 'Notwithstanding this, or, it may be, in consequence of this, these proclamations [grida], reiterated and reinforced from time to time, served only to proclaim in pompous language the impotence of those who issued them; or, if they produced any immediate effect, it was that of adding to the vexations which the peaceful and feeble suffered from the disturbers of society. Impunity was so organised that the proclamations were powerless'.

Chapter 2

The Socio-Legal Framework

Abstract This chapter proposes an operational definition of socio-legal effectiveness that is then applied for the empirical research. It first discusses different approaches to the definition of legal effectiveness provided not only by socio-legal studies, but also by other disciplines, such as administrative sciences, economic theories of law, and political sciences. Secondly, it outlines the preferred definition, and presents the variables chosen to assess empirically the effectiveness, according to the chosen definition, and the different methods used. Thirdly, based on the theoretical framework illustrated, it formulates a hypothesis on the effectiveness of the money laundering offence.

Keywords Legal effectiveness • Symbolic function of law • Law (in)action • Legal implementation • Law-making process • Discourse analysis • Criminal statistics • Semi-structured interviews • Qualitative research • Empirical research

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Embarking on a study of the effectiveness of a law is a complex task, because the definition of legal effectiveness itself has been the subject of intense debate. Legal theorists, political scientists, political sociologists, administrative experts, and economists, have added their respective views to this debate. Legal effectiveness might depend too on the impact the law has on areas of human life outside the