

Editorial: The Financing of Terrorism – Criminal and Regulatory Reform

1. The first shock of 11 September, the disbelief and the emotional turmoil, led many politicians and experts to conceptualize the events of that day as something totally new, different from anything experienced thus far. Accordingly, reactions had to be phrased in superlatives. The use of the imagery of an all-out 'War against Terrorism' did not immediately generate the sceptical reactions that the much abused formula of 'War on Drugs' is currently provoking – especially amongst Europeans. And at least for a month or so after the event, one even accepted a drastic step-up in security measures. Many legislators hastily enacted new laws, some of which have primarily symbolic value; others, however, will seriously restrict civil rights, especially those of foreigners. Gradually over time, once things had settled down and 'normality' had been restored, it became evident that politics and political interest groups took over the discourse on terrorism as they tend to do on all issues. It appeared logical at first to fight terrorism with all available means including controlling and blocking access to the financial markets and institutions. Eventually, it became evident that fighting terrorism was to be set apart in a different category from other topics of equal gravity. This became particularly apparent when the US and some US-inspired international fora requested international support to combat terrorism whilst, at the same time, the former attempted to block serious efforts to create a standing International Criminal Court for war crimes and crimes against humanity. Of course, all the issues at stake are much more complex, yet the public discussion in the media does beg the question why one should be tough on terrorism and rather less than consistent on genocide.

Returning to our topic concerning the financing of terrorism, the cracks in the coalition against terrorism have become more and more visible over the last few months. First, the states leading the fight against terrorism refused to give an abstract definition of terrorism, instead they preferred to blacklist individuals and organizations in an *ad hoc* fashion and solely on the basis of information supplied by intelligence agencies, thereby by-passing any democratic discussion. National financial supervisors mirrored this abstention by refusing to give

financial institutions appropriate guidance on what they regarded as terrorism: the banks have been required to carry the risks and distinguish between freedom fighters and terrorists. To illustrate this with a complicated example, how – for instance – should the banks deal with a charity fund for family members of jailed IRA members? Is such a fund now to be considered support for a terrorist cause or a legitimate charity? Refusing to give clear guidance and then to criticize financial institutions for not having taken precautions seems unfair. The Financial Action Task Force against Money Laundering (FATF), the UN, the EU and other organizations have recently enacted binding instruments and recommendations to combat the financing of terrorism; however, professional bankers in particular are doubtful whether the ‘red flag’-lists are of any real practical assistance.

Even if it is clear that money laundering and the financing of terrorism should not be confused, one post-September 11 outcome has been the political compulsion finally to enact legislation against financial crime and money laundering even in countries and territories that have so far fallen short of international standards. And here I am not only talking about the so-called ‘non co-operative countries and territories’ defined by the FATF, but also the rather reluctant countries within the FATF, like the US, who are now using the so-called ‘Patriot Act’ to fill the gaps in their ‘KYC’-policy.

2. It is therefore no coincidence that this volume, in the context of the financing of terrorism, addresses some of the traditional core issues established in 1990 to combat money laundering with the emergence of the first set of rules by the FATF. Just how far are the existing rules against money laundering helpful in preventing the financing of terrorism?

- **Armand Kersten**, Senior Compliance Officer of a bank that is active worldwide, warns us that it would be unwise to mix the issues of the financing of terrorism and money laundering. However, he does not doubt the logic of identifying funds related to terrorism, and rightly points out the difficulties of so doing when examining transactions.
- **Charles Freeland**, Deputy Secretary General of the Basel Committee on Banking Supervision and co-author of the new Customer Due Diligence guidelines of the BCBS, rightly indicates that ‘CDD’ and ‘KYC’ procedures are a key component in preventing the misuse of the financial sector by terrorists. The package offered by the BCBS – a long outstanding supplement to the AML standards – is an antidote to a broad array of risks confronting the commercial banker.
- **Ernesto Savona**, Professor at the University of Trento (Italy), founder and director of Transcrime, focuses on another issue that for an astonishingly long time was left on the back-burner: the use of ‘corporate vehicles’ (including IBC’s and trusts) as a much-used means to evade identification of beneficial ownership and a handy tool for money launderers to frustrate legal and administrative co-operation in anti-money laundering investigations.

- **Michael Levi**, Professor at the University of Cardiff (UK) and expert on financial crime, and **Bill Gilmore**, Professor at the University of Edinburgh, critically explore the mechanisms of peer pressure (monitoring) that have enabled the expansion of international standards on money laundering to the world of financial centres over the last decade. Similar monitoring mechanisms are now being used to enforce compliance with the rules against the financing of terrorism within the world community.
- **Myself**, I locate the reactions to September 11 within the development of regulations in the financial sector and raise a few critical questions regarding the direction that the most recent moves are taking.
- **Jonathan Winer's** text, the first in this volume, could also appropriately be placed at the end. Even if the different aspects of macro-crime (e.g. organized crime, terrorism, money laundering, grand corruption and embezzlement of State funds by dictators) raise diverse legal issues, they are accurately set in context. The standards gradually developed into a global body of rules, attempting to regulate multinational financial institutions, since national regulators are no longer able to oversee the worldwide business of transnational corporations located in their territory. He offers a series of concrete suggestions to be picked up in the current discourse on banking regulation, sparked off by the BCBS, the FATF and also by a group of private banks, the 'Wolfsberg-Initiative'.

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