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Forfeiture of criminal proceeds under anti-money laundering laws: A comparative analysis between Malaysia and United Kingdom (UK)

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Forfeiture of criminal proceeds under anti-money laundering laws

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Abstract

Purpose – Money laundering has been a focal problem worldwide. Governments constantly come up with initiatives to fight against this offence. To clean proceeds of corruption, the laundering of money is utilised, as it transforms "dirty" money into "clean" ones. A comparative analysis between Malaysia's Anti-Terrorism Financing and Proceeds of Unlawful Activities Act (AMLATFPUAA) and United Kingdom's Proceeds of Crime Act (POCA) is performed on the basis of the similarities and differences of both legislations, in terms of forfeiture provisions. The purpose of this paper is to investigate whether the current forfeiture regime in both jurisdictions is effective in fighting against money laundering.

Design/methodology/approach – This paper is based on a doctrinal research where reliance will mainly be on relevant case laws and legislations. AMLATFPUAA and POCA are key legislations which will be utilised for the purpose of analysis.

Findings – Strengths and weaknesses of both AMLATFPUAA and POCA are identified through a comparative analysis where findings show that POCA is more comprehensive than AMLATFPUAA in terms of offences covered by it and standard of proof. With that, the anti-money laundering (AML) laws can further be improvised by being a better and efficient regime where Malaysia and United Kingdom will be able to discharge their duties effectively on forfeiting benefits from criminals.

Originality/value – This paper offers some guiding principles for academics, banks, their legal advisers, practitioners and policy makers, not only in Malaysia but also elsewhere.

Keywords United Kingdom, Malaysia, Money laundering, Comparative analysis, Proceeds of crime, Forfeiture, AMLATFPUAA, Criminal, POCA

Paper type Research paper

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Introduction

Many authors have done their research to address the problem of money laundering activities globally and have proposed means to combat them. Although the literature covers a wide range of such research, this paper focuses on two major issues, namely, an overview of money laundering and forfeiture in general and their nature, and specifically into the issue of forfeiture of criminal proceeds under AML laws in Malaysia and United Kingdom. By and large, this paper gives importance to the legal framework of both countries in relation to AML laws.

In essence, for bankers, enforcers and policymakers, money laundering raises significant issues with regard to prevention, detection and prosecution. Different techniques used to launder money add to the complexity of these issues. Such techniques may entail many

different types of financial institutions and many different financial transactions using different channels.

Historically, the US Mafia have established money laundering as a channel to clean dirty money obtained from illegal activities such as prostitution, gambling and extortion. This is done to cover up the illegitimate businesses and to show honest cash flows (Shanmugam *et al.*, 2003). It is worth mentioning that money laundering is relatively a simple concept where it "covers all procedures that aim to change the true identity of illegally obtained money so that it appears to have originated from a legitimate source" (Magliveras, 1991).

Since then, the illegal activities brought up by the Mafia have allowed the growth of money laundering activities to the other parts of the world. This is reasoned as when a crime generates substantial profits, the involved party must find a way to control the funds without attracting attention to the underlying activity. The individual does this by concealing the sources, changing the form or even transferring the funds gained to a place where he is less likely to catch the attention of bankers or law enforcers for the matter of fact.

The stages of money laundering activity involve a few stages and they include placement, layering and integration. During the first stage, the illegal money will be transferred into the financial system; the funds will be broken into smaller amounts and here, the launderers deposit in a smaller amount to avoid suspicious transactions which may be spotted by the bank. At the layering stage, the launderer then transfers the illegal funds into bearer shell's account in a country which has less strict regulations and finally, the "dirty money" will be transformed into "clean one" (Mohamed and Ahmad, 2012):

> Each stage of money laundering will have its uniqueness and the implication of a process which have been carefully designed and structured with the aim of not getting exposed to any attention needs to be understood by those charged with the detection as well as investigation such issues.

Law makers have failed to notice the nature of money laundering activities which is complex (Rider, 1999). The characters and hidden agendas are part of money laundering as a channel to legalise the "dirty money".

With knowing the complexity and seriousness of money laundering activities in most countries, the effects of money laundering activities as a crime can be a national threat:

> Legislations are enacted with the ultimate objective of depriving one's benefit of having the proceeds from laundering and here, it is for sure relates to forfeiture under AML laws being the device in doing so. To reassert, proceeds of crime will normally be derived, directly or indirectly from the serious crimes which, of course, involves the laundering process.

Scrutinising into the issue of forfeiture, it is best described as "the power of a court of law to take from a person any benefit derived from criminal activities". It includes proceeds of crime or any movable or immovable property purchased using those criminal proceeds. This is where the term "confiscation" comes in and these two terms are viewed as to having the same meaning.

Forfeiture can simply be defined as the power of the court to immediately dispossess the property associated with offences while confiscation is a tool to deprive an offender's benefits from the crime. However, it was recognised by the United Kingdom's Hodgson Committee that there is no usual terminologies to describe certain situations. The committee believed that own vocabulary has been created to accommodate discrete meanings and they are used in daily lives synonymously (Pieth and Aiofli, 2004):

> In recovering the proceeds of crime, forfeiture laws are viewed as a vital tool. To a large extent, most countries should have the aptitude to put together a confiscation order in a criminal case. It

is stressed that there is a major and crucial part to be played by civil forfeiture actions focused at the property itself. Many countries have enacted such laws recently (Cassella, 2008).

Malaysia and its AML laws

Malaysia has moved towards forming an effective anti-money laundering (AML) regime and AML Act (AMLA) was first enacted in 2002 where the Financial Action Task Force (FATF) 40 recommendations were codified. With this Act coming into force in 2007, Malaysia has taken its first move in criminalising money laundering as well as giving recognition for banking secrecy.

With high regards given to the FATF 9 Recommendations, the Malaysian AMLA were amended in 2003 and renamed as Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA). This was undertaken to include combating instruments against terrorist financing. In 2015, it was further amended to include the forfeiture of proceeds of an unlawful activity and instrumentalities of an offence. It was then renamed as Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA, 2001). AMLATFPUAA comprises instruments such as the investigation of money laundering and terrorism financing offences as well as the freezing, seizure and forfeiture of criminal proceeds (AMLATFPUAA, 2001).

The main objectives of AMLATFPUAA are as follows: (AMLATFPUAA, 2001)

- endow with offence for money laundering;
- measures for fighting against money laundering as well as terrorist financing; and
- provide for forfeiture of property and proceeds derived from money laundering and terrorist financing.

AMLATFPUAA has 93 sections which are classified as nine parts, namely, Part 1: Preliminary; Part 2: Money laundering offences; Part 3: Financial intelligence; Part 4: Reporting obligation; Part 4A: Cross-border movements of cash and bearer negotiable instruments; Part 5: Investigation; Part 6: Freezing, seizure and forfeiture; Part 6A: Suppression of terrorism financing offences and freezing, seizure and forfeiture of terrorist property and Part 7: Miscellaneous (AMLATFPUAA, 2001).

United Kingdom and its AML laws

The progress of the English AML regime has been a continuing process. Ever since, before the enactment of Proceeds of Crime Act 2002 (POCA, 2002), there have been a few other legislations enacted in the view to combat money laundering. It started off with the Misuse of Drugs Act 1971 where the effort in confiscating proceeds of crime from drugs activities was ineffective. Moving into the year 1986, the Criminal Justice Act 1988 and the Prevention of Terrorism (Temporary Provisions) Act 1989 were enacted as a further attempt in improving the AML regime (Pieth and Aiofli, 2004).

Prior to the new POCA coming into force, POCA 1995 were in effect. It needed more strengthening amendments and therefore, in 2002, the POCA came into force, bringing some new dimensions into the AML regime in the United Kingdom. The changes include a new Asset Recovery Agency (ARA), widen the scope for confiscation law, new rights on civil forfeiture of criminal proceeds as well as removal of distinction between drug and nondrug money laundering offences (Pieth and Aiofli, 2004).

It is noteworthy that depriving criminal's benefit obtained through illegal activities relating to money laundering remains one of the prime objectives of POCA. Forfeiture or rather known as confiscation is used to do so.

POCA has 426 sections classified into 12 parts, namely (POCA, 2002):

- *Part 1:* The Assets Recovery Agency;
- *Part 2:* Confiscation in England and Wales;
- *Part 3:* Confiscation in Scotland;
- *Part 4:* Confiscation in Northern Ireland;
- *Part 5:* The civil recovery proceedings in the United Kingdom and provisions for the search, seizure and forfeiture of cash;
- *Part 6:* Powers the Director of ARA to exercise functions of the Inland Revenue;
- *Part 7:* Consolidation, updates and reforms of the criminal law in the United Kingdom in relation to money laundering;
- *Part 8:* Powers for use in criminal confiscation, civil recovery and money laundering investigations;
- *Part 9:* Confiscation and insolvency proceedings;
- *Part 10:* The disclosure of information to and by the Director of ARA and the Scottish ministers;
- *Part 11:* Co-operation in investigation and enforcement between the jurisdictions of the United Kingdom and overseas authorities; and
- *Part 12:* Miscellaneous and general matters.

POCA consolidated, updated and reformed the criminal law relating to money laundering to cover all criminal offences including any dealing in criminal property. POCA applies to everyone, although certain offences relating to the failure to report (except in relation to a nominated officer) and "tipping off" only apply to those operating in the regulated sector.

Under POCA, Section 1 sets up the ARA to look into criminals and, in certain circumstances, seize their assets even when the suspect has not been convicted of a significant offence (POCA, 2002, s.1). A group of investigators, lawyers and accountants will be able to seize money and property if they are able to assert that those assets were obtained dishonestly. The standard of proof will be a civil standard of proof as opposed to the higher standard applied in criminal cases.

POCA operates as a catch-all Act where it covers various offences which relate to forfeiture or cash recovery proceedings. It makes even better with the introduction of civil forfeiture where depriving of one's benefit from money laundering activities can be carried out even without conviction under criminal division. Alternatively, ARA is another new instrument under this Act where the key aim of the government is to deprive the criminals from the profits made by confiscating the "dirty" money. ARA is one of the major aspects of POCA.

Comparative analysis

This paper aims at analysing the substantive provisions of AMLATFPUAA and POCA, respectively, on their strengths and weaknesses. The focus is also on the adequacy of the provisions within these laws in tracing and forfeiting criminal proceeds. With the UK law as a benchmark legislation, the paper also strives to learn some lessons and give some recommendations based on the comparative analysis in the view of developing and improving the current law of forfeiture in Malaysia.

Crimes such as money laundering, tax crimes and other financial crimes can intimidate the strategic, political and economic regime of both developed and developing countries.

Citizens' confidence is less on their governments' ability to put the criminals behind bars for the crime committed. Laws are formed to overcome these problems and that is where AMLATFPUAA and POCA exist mainly in combating money laundering activities in respective countries.

With both legislations being used to make comparative analysis, the similarities and differences between them are identified. The offences, standard of proof, civil forfeiture as well as the problems faced by legal enforcers from both countries shall be the base for comparisons.

Looking at offences covered by both the legislations, AMLATFPUAA and POCA give room for various offences. Under AMLATFPUAA, it is noteworthy that Section 4 of the Act provides the ambit of money laundering offences where any person who engages or attempts to engage in money laundering activities will be deemed to be committed an offence. A person may be charged for money laundering alongside another conviction (AMLATFPUAA, 2001, s.4).

Under AMLATFPUAA, Section 3 clearly defines money laundering. Scrutinising into forfeiture, Sections 3 and 4 of AMLATFPUAA have to be read together with all provisions under Part 6 of the AMLATFPUAA which relates to forfeiture (AMLATFPUAA, 2001, ss. 3, 4). Similarly, POCA offers its own understanding of money laundering in Part 7 of the Act (POCA, 2002, Part 7).

However, AMLATFPUAA has a more general explanation on money laundering offences which applies to forfeiture provisions as compared to POCA. In this sense, the definition of money laundering under POCA can be related to an act which deems to fall as an offence under Sections 327, 328 and 329 of POCA. They include conspiracy, attempt, counselling, aiding or abetting or procuring of such an offence. These acts are applied across the board, which means that for forfeiture of criminal proceeds, based on aforementioned provisions, it is easier for prosecutors to determine on whether an act constitutes a money laundering offence to apply for forfeiture proceedings.

Hence, in view of thoroughness, AMLATFPUAA clearly trails as it only acts as a platform which covers the general grounds of money laundering offences and does not specify related offences, as opposed to POCA.

Both AMLATFPUAA and POCA are comprehensible in their own manner. They catch all acts which relate to money laundering and, hence, allow enforcers to forfeit criminal proceeds. Although comparable, it has to be implicit that they were enacted based on the nature of each jurisdiction and they work on their strengths and weaknesses in their own rights. Legal enforcement in both countries has to be innovative and focus into amendment to accommodate possible acts which may come under the regime of money laundering. Forfeiture of criminal proceeds can only be applied once it has been determined that an act is an unlawful one and it falls under the definition given by both legislations.

In the legal world, the standard of proof for civil is "on the balance of probabilities" while criminal is "beyond a reasonable doubt". The difference in standards exists because civil liability is considered less blameworthy and because the punishments are less severe. For civil cases, the decision is often based on witnesses' moral values. The loss of liberty and the stigma set on a criminal record need a higher standard of proof prior to a criminal conviction.

Under Section 55 (3) of AMLATFPUAA, the general standard of proof for forfeiture proceedings is "on the balance of probabilities"; however, the Act specifies that, for money laundering offences, the criminal standard of proof shall be applied. While AMLATFPUAA still requires the criminal standard of proof to be applied for money laundering offences, POCA also entails the same standard of proof although it did not state it explicitly.

As the standard of proof for criminal forfeiture does not allow the prosecutors to forfeit criminal proceeds effortlessly due to the high standard of proof, it is the new regime-civil forfeiture which rescue or mitigate the burden of prosecutors in successfully forfeiting criminal proceeds from money laundering. In the UK, there are separate provisions for forfeiture under civil proceedings.

Recoverable property and cash are defined under Sections 304 to 310 and Section 289 (6), (7), respectively. By applying for civil forfeiture, the possibility of the criminal proceeds being forfeited is higher than going for criminal forfeiture on the basis that the standard of proof is on the balance of probabilities and here, there need not be any criminal convictions for civil forfeiture to be commenced.

The provisions mentioned supra are viewed as a distinct feature of POCA and under AMLATFPUAA, Section 56 (1) also allows prosecutors to opt for civil forfeiture when there is no prosecution and the standard of proof is provided under subsection (4). The only difference from POCA is that it is not overtly provided under AMLATFPUAA. It is given as an alternative for forfeiture under criminal proceedings. Civil forfeiture is considered as a new regime which is applied for money laundering offences.

In Malaysia, in the Attorney General's Annual Report of 2010-2011, it is reported that only 26 civil forfeiture cases were filed under AMLATFPUAA and out of 26, 21 cases were successful. The total amount of monies that were forfeited to the Federal Government of Malaysia was RM9,165,304.46. Despite monies, properties such as vehicles and houses were also forfeited. These imply that the rate of success for civil forfeiture cases in Malaysia is considerably high as civil forfeiture regime is newly introduced into the jurisdiction.

In general, one of the major problems faced by any enforcement authorities when the circumstances call for forfeiture of criminal proceeds is lack of evidence and this may be said to be a problem faced by legal enforcers in Malaysia as well as the United Kingdom. The nature of offence is such and this is reasoned, as mentioned earlier in this study, money laundering activities are carried out in many different ways possible, where criminals ensure that the proceeds of crime are not easily detected and if so, they somehow cover the trail on which the proceeds were moving.

Furthering into the impact of cross-border nature of money laundering offences, it is also difficult to obtain evidence from another country as the differences in each countries' definitions of money laundering and the scope of this crime has led to difficulties for judicial and police co-operation and cross-border investigations. Other than that, the penalty for money laundering offences may also differ. Countries involved must find common grounds to successfully collect relevant evidence. This will incur high costs and also it is time consuming for legal enforces who are involved in such investigation.

When it involves criminal forfeiture, prosecutors are unable to prove the case, as the standard of proof is high and it requires strong and reliable evidences which can be employed in proving the case. Besides, as civil forfeiture is a new regime for both jurisdictions, enforcers are not willing to go for civil forfeiture, as money laundering is considered as a serious offence, they would possibly want to prosecute the accused.

Moreover, looking at forfeiture laws in both Malaysia and UK, the focus is on public order or organised crimes and those with the greatest potential for profit. Enforcement agencies are drawn to forfeiture due to the potential to receive proceeds. This could discourage them from channelling resources into areas where the potential to receive forfeiture proceeds is zero. In the lowest margin, by employing generous forfeiture laws, it appears to increase agencies' enforcement activities in areas where the chances of receiving proceeds are greatest. To overcome these problems, legal enforcers, especially in Malaysia, should possibly look into other type of offences where forfeiture regime could be employed.

Due to the nature of forfeiture being complex, Governments in both Malaysia and UK should be equipped with mechanisms or channels which would first detect money laundering activities. Rather than putting pressure on the enforcement authority, governments should advise banks and other financial institutions to improve on their system as transactions can be traced beforehand on the basis that the accused has made transfers of money using a banking system, which may not be a conventional way of dealing with money laundering nowadays.

In addition, international cooperation is needed to carry out forfeiture proceedings. This is when the laundering of money goes international, involving two or more countries. Constant engagement between governments should exist to gain information on the unlawful activities. As UK is regarded as the benchmark for AML regime, it can be suggested that Malaysia can work hand in hand in the view of fighting against money laundering.

Automatically, everything else will follow suit if there is cooperation between countries with AML regime. Overall, it is stressed that forfeiture of criminal proceeds is one regime where every enforcement authorities may reluctantly employ, as, again, it is believed to be one of the best way to ensure that criminals do not easily get away without having to face the consequence for the crime they have committed.

Conclusion

In short, a crime based on money laundering is a serious concern which has always been associated with underground, organised crime. Findings show that Malaysia and UK have taken measures in fighting against money laundering and, hence, the enactment of AMLATFPUAA and POCA, especially forfeiture provisions as tools to deprive one's benefits derived from illegal activities. Alongside legal enforcement agencies, as money laundering involves mainly on transfers of money, it seems that banks and financial institutions in both countries also have to ensure that their AML regime is useful in combating money laundering.

Forfeiture regime is indeed one of the most powerful regimes in the view to take away all illegal proceeds and assist in striking at the economic base of a crime in both Malaysia and UK. Legal enforcers in these jurisdictions should readily employ forfeiture provisions when it is necessary. However, it is undeniable that the success on forfeiting illicit proceeds from suspects depends on the proofing of case based on the evidence collected by the enforcers.

With the introduction of civil forfeiture into the regime and a lower burden of proof, enforcement agencies have all the opportunities to attack suspects and target on the illegal proceeds from illegal acts. Malaysia and UK should also consider in utilising civil forfeiture whenever situation calls for. Although forfeiture regime exists mainly to take away illegal money, enforcers ought to promote fairness. They should not blindly apply forfeiture provisions. Legitimacy of the money or property must be investigated thoroughly. It is suggested that this is done to avoid wrongful convictions.

Moreover, when crimes involve cross-border transactions, legal enforcers in both Malaysia and UK should come with an effective system or a common ground on how to implement the forfeiture regime. The need to address multiple legal systems, languages and time zones can significantly complicate challenges faced by them. Relevant evidence and fluent cooperation are highly required in the view to identify and apply forfeiture provisions on crimes involving money laundering internationally.

The comparative study between Malaysia and UK indicates that Malaysia may lag behind UK as POCA entails more detailed provisions of forfeiture as compared to AMLATFPUAA. Malaysia should possibly take POCA as the benchmark and make further amendments on forfeiture provisions by undertaking more research and study. This can be

carried out to ensure that Malaysia prepares itself to face more possible scenarios involving money laundering.

The research and amendments on forfeiture provisions based on UK's provisions can be employed on the basis that these two countries possess similar legal system. Comparisons are effortlessly done. On the whole, there should be a proper and consistent check and balance on the effectiveness of AMLATFPUAA as well as POCA in the view to increase the likelihood of forfeiting individuals the benefits derived from illicit acts.

Notes

1. The FATF 40 Recommendations have been recognised by the International Monetary Fund and the World Bank as the international standards for combating money laundering and the financing of terrorism. In 1990, 40 Recommendations were first adopted, revised in 1996 and 2003.
2. In 2001, 9 Special Recommendations were first adopted, where it is a set of counter-measures against money laundering and the financing of terrorism, covering the required legal, regulatory and operational measures.

References

AMLATFPUAA (2001), *Anti-Money Laundering, anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, (Act 613)*, International Law Book Services, Petaling Jaya.

Cassella, S.D. (2008), "The case for civil forfeiture: why in rem proceedings are an essential tool for recovering the proceeds of crime", *Journal of Money Laundering Control*, Vol. 11 No. 1, pp. 8-14.

Magliveras, K.D. (1991), "The regulation of money laundering in the United Kingdom", *Journal of Business Law November*, Nos 0021/9460, pp. 525-535.

Mohamed, Z.M. and Ahmad, K. (2012), "Investigation and prosecution of money laundering cases in Malaysia", *Journal of Money Laundering Control*, Vol. 15 No. 4, pp. 421-429.

Pieth, M. and Aiofli, G. (2004), *A Comparative Guide to anti-Money Laundering: A Critical Analysis of Systems in Singapore*, Edward Elgar Publishing, pp. 289-290.

POCA (2002), "The proceeds of Crime Act 2002", available at: www.gov.uk/government/publications/the-proceeds-of-crime-act-2002-poca

Rider, B.A.K. (1999), "The limits of the law: an analysis of the interrelationship of the criminal and civil law in the control of money laundering", *Journal of Money Laundering Control*, Vol. 2 No. 3, p. 209.

Shanmugam, B., Nair, M. and Suganti, R. (2003), "Money laundering in Malaysia", *Journal of Money Laundering Control*, Vol. 6 No. 4, p. 373.

Further reading

Bank Negara Malaysia, available at: http://bnm.gov.my/documents/act/en_amlatfa.pdf

Malaysian Institute of Accountants, available at: http://mia.org.my/handbook/guide/AMLA/AMLA_guidance.htm

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