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Fighting Financial Crime: Who Designs Global Governance and Who Does The Work?

Eleni Tsingou

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Abstract

Fighting financial crime is a highly institutionalised global governance task. At a time of crisis for many of the institutions of global governance, tackling money laundering and combatting terrorist financing through global cooperation continues to be a priority for public officials. The global regime, if anything, is intensifying. This essay provides an overview of the regime’s development and addresses questions of design and implementation. It is structured around three sets of questions: (1) What does the regime look like and what is it for? (2) Who does the work? (3) And, in conclusion, what can we say about winners and losers?

Keywords Compliance · Financial Action Task Force · Financial crime · Money laundering · Terrorist financing

Fighting financial crime has become a highly institutionalised global governance task. ‘Criminals respect no borders’ is a common refrain, and ever since the 1980s, public authorities have sought to disrupt criminal activity through one of the most globalised sectors, that of finance. Starting with attempts at curtailing bank secrecy in the USA in the 1970s, there have been successive initiatives to keep the proceeds of crime away from the financial system and to do so through global standards. With anti-money laundering (AML) at its centre, a global anti-financial crime regime emerged and rapidly became a pillar of global governance. This essay offers a review of the key steps in the building of the regime and addresses some tensions between formal regime design and the content of its day-to-day workings. It is structured around three sets of questions: (1) What does the regime look like and what is it for? (2) Who does the work? (3) And, in conclusion, what can we say about winners and losers?

1 The Global Fight Against Financial Crime - Purpose and Design

Policy initiatives about targeting financial crime in general and money laundering in particular developed in relation to public policy objectives of law and order. The regime was established as a framework to address the drugs trade and evolved to incorporate broad organised crime concerns including all types of illegal trafficking. The list of so-called predicate offences associated with money laundering has continued to grow and now includes all offences determined to be serious in national law, including when committed in other countries. The regime has also formalised responsibilities in combatting the financing of terrorism (CFT) and the financing of the proliferation of weapons of mass destruction. A public policy of ‘following the money’ ensued, bringing financial institutions, their regulators and concerns about financial integrity in the mix. The regime is also closely linked to foreign policy considerations as it is relied upon for the enforcement of economic sanctions and the targeting of economic activity of both non-cooperating countries and politically exposed persons.

As a result, the global fight against financial crime covers a large set of policy goals and includes a wide range of professional knowledge and responsibilities. It brings together different types of public and private actors, some global in orientation and activity, others less so. These actors have diverse goals and capacity, which is reflected in both their role as potential financial crime fighters and their attitude towards the usefulness of the regime as a whole. While no one disputes that the crimes are real and important, there is a distinct lack of data to help determine the extent to which combatting money laundering can help. The secretive and illegal nature of these issues means that data are scarce, incomplete and generally unreliable (Levi, Reuter and Halliday 2018). The regime may have noble goals but its effectiveness and successes cannot be assessed. Yet at a time when many global governance institutions are in crisis, global coordination on financial crime continues to intensify and standards to harmonise. The regime is now thickly institutionalised across the global, regional and national levels.

To explain some of this institutionalisation, it is worth focusing on the global framework of norm- and rule-makers and takers led by the Financial Action Task Force (FATF)[1] and its network of regional bodies. FATF, a specialist organisation with an explicit AML mandate, was established as a task force by the Group of Seven in 1989 to coordinate global action following the criminalisation of money laundering in the 1980s in several OECD countries. FATF is based in Paris and issues regularly updated recommendations and guidance, promoting legislative and regulatory AML standards to be applied across the globe. FATF counts 37 members, including OECD countries, but also major economies and financial centres outside the OECD, as well as two member regional organisations.[2] It is a small institution, operating with a limited number of staff, with most of its work being done in con- junction with relevant experts in the ministries of member countries and with funding from those countries. FATF is explicit about the politics of membership, stating on its website that to become a member, 'the country should be strategically important', a criterion assessed through quantitative and qualitative indicators. This conforms with common assessments of FATF as a 'club-IGO' (International Governmental Organisation), which allowed Group of Seven states to 'cajole, coerce and enforce a global anti-money-laundering standard into existence' (Drezner 2007: 145). It is also reflected in the funding structure which relies on financial size-related membership fees and donations.

The regime, through FATF, has four key characteristics: (1) It produces principles and standards; (2) it develops implementation methodology; (3) it engages in peer review through mutual evaluations; and (4) it engages in diffusion and learning of best practice through regional networks.

FATF recommendations aim to provide a comprehensive framework for address- ing financial crime (money laundering, terrorist financing and proliferation financing). They offer regulatory and legislative guidance for an appropriate AML governance structure at the national level and for international cooperation, as well as specifying the detail in the content of rules. Specifically, the recommendations pro- vide standards in seven distinct categories: AML and CTF policies and coordination; money laundering and confiscation; terrorist financing and financing of proliferation; preventive measures; transparency and beneficial ownership; competent authorities and institutional measures; and international cooperation.

FATF issued its first set of 40 recommendations in 1990. In the early years, the recommendations provided general guidance and afforded a degree of flexibility. In time, the recommendations became more precise and prescriptive and FATF issued Special Interpretative Notes in support of its work. Following the terrorist attacks of 11 September 2001, the recommendations were revised and a further nine were eventually added, focusing on CFT. The recommendations were again amended in 2012 (FATF 2012). FATF moved to regroup and consolidate its recommendations which are now 40 once again. The recommendations have regular minor revisions and FATF issues assessment methodology documents and guidance both on ongoing issues such as the so-called risk-based approach (more on which later) and relatively new topics such as fintech and virtual assets.

FATF recommendations are not formally binding, but with the consolidation of the regime, there is an expectation that they will be widely adopted by member countries. In Europe, they form the basis for the European Commission's AML directives. Comprehensive monitoring activity of the implementation of the recommendations takes place through a mutual evaluation procedure, whereby on- site visits by legal, financial and law enforcement experts from other jurisdictions are conducted. But the expectation of compliance goes beyond the FATF membership. FATF standards are to be adopted on a global scale, and all regime members submit to mutual evaluation exercises. This broad participation in the regime is coordinated through a series of regional task forces and agencies that mirror FATF practice and evaluation processes (Jakobi 2013).[3] The mutual evaluation process itself, while accepted in principle, is increasingly fraught. The regime is coming towards the close of the fourth round of evaluations, now assessing both technical compliance and effectiveness. It is criticised for not being flexible enough to prioritise what is most important, as well as for the seeming unwillingness of the FATF 'club' to grade too harshly one of its own, especially as the regional bodies have been stricter (Keatinge 2019).

Some scholarship sees this diffusion less as policy learning and more as an exercise of power (Sharman 2008). This was especially seen in the more coercive approach used in the earlier phase of the regime. In 1999, FATF embarked on a 'naming and shaming' exercise which identified countries and territories seen as guilty of non-cooperation. FATF published a 'Non-Cooperative Countries and Territories' report in 2000, regularly reviewed at first but ultimately wound down. In time, FATF took the seemingly softer approach of targeting High-Risk and Non- Cooperative Jurisdictions, a list which has mostly included Iran and North Korea.[4] .

Several additional actors are part of the global regime. Some like the International Monetary Fund and the World Bank engage in diffusion through the adoption of AML standards. Others enable peer professional networks to develop. The Egmont Group brings together national AML officials on an annual basis. These officials are affiliated with and represent a country's Financial Intelligence Unit (FIU), a special office with assembled AML expertise, often housed within a law enforcement agency. FIUs receive and deal with suspicious transaction reports led by financial institutions. The Egmont Group has provided a framework for sharing experiences and negotiating practices of information sharing. Others yet, like the United Nations Office on Drugs and Crime, offer capacity building. There is also cooperation on a more explicitly law enforcement basis through Interpol (and at the European level, Europol).

In summary, the regime can be said to have a 'club' mentality in the production of rules, based on technical expert but also political input from FATF members. It relies on peer review for monitoring, uses diffusion dynamics (some coercive) to promote standard implementation and has global and regional diffusion mechanisms. At first glance, this makes the global governance of fighting financial crime a state-driven and mostly state-focused a air. This is a view embraced by some of the academic literature on money laundering. Work by Drezner (2007) focuses on the intergovernmental and club-like character of FATF, with FATF seen as a location and mechanism for coordination among core like-minded states which impose standards on jurisdictions outside the club in a manner that would face more obstacles were the organisation one with universal membership or a large secretariat. Earlier work by Simmons (2001) emphasises the role of the hegemon in ensuring compliance with nonbinding standards and sustaining momentum. A focus on hegemons can also be found in the literature on global prohibition regimes and the role of the USA in their development, including on money laundering (Andreas and Nadelmann 2006). This literature is useful in explaining the role of powerful states in the development, adoption and implementation of specific prohibition norms and how global acceptance and, in turn, compliance processes produce a regime. A focus on the interstate character of the global regime is also central to work focusing on legitimacy ques- tions, including the legitimacy of the global diffusion of standards and the politics of listing (Hüllse 2008). A concern with legitimacy is also at the heart of Sharman's work (Sharman 2011), which shows that global diffusion takes place because states want to be part of the global system but not necessarily willingly; it is their concerns about the consequences of being left out that are the key incentive.

Other work has focused on how states work together when they cooperate on fighting global financial crime. Nance (2018b) highlights the dynamics of the work public offcials undertake on AML and other financial crime in the FATF frame- work and finds features such as participatory standard setting, contextualised implementation, diagnostic monitoring but also updating routines to take experience into account. Amicelle (2017) looks at how the construction of AML as a problem has brought together elements of finance and security that are often treated separately. Finally, work taking states as its starting point has also addressed the effects of coordinated global governance action on state compliance. Morse (2019) shows how on terrorist financing, FATF's pronouncements influence bank activity which in turn drives compliance across different jurisdictions. These authors all acknowledge that the dynamics of the regime are nuanced and that state interests, preferences and policies are not monolithic.

2 The Global Fight Against Financial Crime—Who does all the Work?

In order to understand the patterns of responsibility for implementation, considering who does the work takes us both inside the state and away from its public actors. In the first instance, the fight against financial crime is both about prevention and enforcement and different actors are in charge. Prevention is addressed through regulatory tools, assessment of the precise and effective adoption of regulatory and supervisory rules and standards, consistency of reporting practices, the strict adoption of policies and the application of procedural standards. Enforcement, on the other hand, is about legal tools, investigations, confiscations and prosecutions. Prevention privileges procedures and enforcement worries about results. Yet the process is most institutionalised and the policies clearest on the prevention side. Enforcement as a notion is always there but only makes a noticeable appearance when something has gone publicly wrong. This brings to focus that both regulators and law enforcement officials are in charge but also that their roles are somehow blurred. AML expertise among regulators and supervisors on the prevention side is still linked to finance but now also includes law, as well as specialist forensic and investigative skills. At the same time, enforcement no longer belongs in the realm of law enforcement alone, with regulatory and supervisory agencies increasingly employing their authority to impose fines to both scare and punish transgressors. Those regulators and supervisors in charge of monitoring the adoption of anti-financial crime regime principles and practices are also less comfortable with some of the norms underlying traditional regulation and supervision work. This is most apparent when considering the so-called risk-based approach that is touted as important in AML/CFT.[5] According to the approach, compliance demands regarding the activities of a financial institution should be risk-sensitive. At a basic level, this would entail that a small financial institution with local customers and limited cross-border activity will be less exposed to the risk of money laundering and terrorist financing than an institution in a border area or a high-crime area, or a sophisticated global conglomerate with a global presence and large volume of cross-border transactions. These two financial institutions are in principle expected to allocate resources differently when putting in place their respective AML/CFT programmes and procedures, reflecting their different risk exposure. In practice, regulators and supervisors have been conservative in how they have judged risk assessments, often taking a legal rather than a financial expert take in their understanding of risk.

A focus on who does the work also takes us away from public actors and onto the role of the private sector which is tasked with practising AML/CFT on a day-to- day basis and where banks (and nonbanks) bear the brunt of the responsibility for failures. While many accounts of the financial sector focus on its structural power and ability to lead or pre-empt regulatory initiatives, financial institutions have been more reluctant followers in the fight against financial crime. The thick institutionalisation of the regime, however, has left them with strong incentives to participate, if only to manage reputational issues and legal requirements (Simonova 2011).

For some in the private sector, the regime has been a business opportunity. There is a growing consultancy industry in this field, as well as data specialist companies which data-mine and produce 'lists' (de Goede and Sullivan 2016) that help identify who and what should remain outside the financial sector. These firms are what Liss and Sharman (2015) have called 'global corporate crime fighters': they provide intelligence, software and support but they report to no one and carry no liability for errors or wrongdoing. For financial institutions, the costs are higher. These costs in dollar terms are continuously being surveyed but overall, it is the uncertainty around resources, high workloads and sufficient personnel and training that trouble financial institutions the most (Dow Jones and ACAMS Dow Jones 2016). The cost of AML/CFT compliance may be high but the general increase in the number of compliance functions makes it harder to single out costs linked solely to the global regime for fighting financial crime. That said, the costs are borne differently across different types of institutions in the financial sector. The major actors in the financial industry have both the resources and the organisational capacity to adjust. They have also identified a common cause and some shared interests and have sought to be at the helm of some parallel standard-setting initiatives, most notably by establishing the Wolfsberg Group of Banks.[6] The group was created in 2000 and promotes the idea of a voluntary code of conduct (Pieth and Aiol 2003). It has issued specialist guidelines for international private banks on a range of global financial crime matters, from AML to tax evasion.

Much of the work, however, takes place within financial institutions. In parallel to the intensification of the global regime for fighting financial crime since the early 2000s, a global AML/CFT compliance industry has also taken shape. This has been a gradual development. In the early phase of the regime and FATF, the AML compliance function alone was unlikely to lead to a full time position. Slowly, it developed into a more established position but still very much a back office one. Over the past twenty years, however, the role has been transformed. AML compliance officers are now the ones who essentially *do* the AML/CFT work. They have diverse skills and the task to not only assess, prevent and pre-empt but also manage expectations and persuade of the necessity and robustness of their programme, both within their institution and during supervisory inspections (Favarel-Garrigues et al. 2008; Verhage 2009).

With more work, and with defined work content, comes professionalisation. Professionalisation in AML/CFT compliance has come about in part through investment in AML/CFT infrastructure and also, by making organisational changes to compliance departments that have created top-level AML/CFT management positions. For some time, financial institutions have been bringing in knowledge and skills from other fields, engaging in 'revolving doors' hiring and recruiting retired or senior law enforcement officials familiar with financial crime and the judiciary, regulators with expertise in risk assessment, or forensic accountants from the 'Big 4' professional services firms who can make sense of the investigative elements of the AML/CFT compliance function.

With the regime and FATF now in its fourth decade, however, and its ambitions still undiminished, financial institutions are neither complacent, nor playing catchup. Professionalisation of AML/CFT compliance is now a matter for the junior and mid-level staff populating ever larger AML/CFT compliance departments. This is not a professional group that emerged through formal university training. Instead, seeing a gap, the early practitioners self-organised. A growing number of AML compliance offcers now have a certification, the vast majority of them through one organisation, the Association of Certified Anti-Money Laundering Specialists (ACAMS). ACAMS was established in 2001 and is headquartered in Florida, USA. It is a membership organisation, counting over 75,000 members globally (a third of which joined in the past 5 years). Though stronger in the USA, it now operates chapters in all world regions, offering local, national, regional and global community building. It offers specialised training through seminars, workshops and online activities. It also organises multiple events, from an annual bash focusing on the USA and regular conferences in Europe, Asia, Latin America and the Middle East, to thematic conferences on risk management, public policy and fintech. Most participants to these events are compliance officers in training or certified. The training is expensive but the cost is ordinarily borne by employers. Certification requires commitment but the level of difficulty is set so as to be accessible, with courses and discussions deliberately practical. ACAMS certification (Certified Anti-Money Laundering Specialist or CAMS), or the willingness to be certified, is now a com- mon recruitment requirement.[7] The qualification is both globally harmonised in that the examination and related professional skills are uniform and also customised in that training and examinations are offered in different languages.

Membership associations in general and ACAMS in particular play an important role in the professionalisation process not only through recognised qualifications but also through socialisation. ACAMS provides a venue which delimits the boundaries of the function, sets parameters for what is permissible, highlights behavioural expectations and responsibilities and helps foster a professional identity, including by building peer networks. ACAMS, in short, helps thicken institutionalisation on the private sector side (Tsingou 2018).

This matters for several reasons. In the first place, it helps to partly overcome the image of the AML/CFT compliance officer as a mere obstacle to profit-making. It offers authoritative 'certified' expertise. It also provides the tools for dealing with senior management within a financial institution and for making the case for compliance. AML/CFT compliance professionals have used the professionalisation process to introduce their own ways of working, secure the boundaries of their work and command respect, internally, for what they do. This need not mean that the position is consolidated or that persuading top management is a given. But it has the effect of bulking up the AML/CFT function even as the shift in the compliance culture in a financial institution as a whole may still be lagging behind. It also helped sustain investment in AML/CFT compliance activity through the financial crisis, making becoming an AML/CFT compliance professionals a viable and lucrative career.

The institutionalisation project matters for the professionals and their place within financial institutions but it also matters for the content of global governance. Indeed, by doing the work, AML/CFT compliance professionals are not only responsible for following rules and regulations; they also affect the content of governance. In defining their tasks and methods, AML/CFT professionals interpret rules, shape standards and expand the scope of the global regime against financial crime. They develop skills in predicting and preempting regulatory expectations, they learn to anticipate regulatory reactions to failures and they are reliably at the forefront of reputation management when things go wrong. In having these strategies at hand, AML/CFT compliance officers engage in regulatory creep. They might make strategic decisions about new issues before any regulatory consensus has been formed and explicit expectations set out. They might also respond very conservatively to regulatory guidance and increase requirements by playing it (too) safe. One such example is the aforementioned risk-based approach. The approach is intended to promote discretion and better targeting of resources, but places responsibility on the judgement of national supervisors and compliance officers for determining risk. Within the private financial sector too, the idea of risk as something to be managed according to a predefined risk appetite profile, not something that is inherently bad, has been challenged. AML/CFT compliance departments have no credible incentive structures for undertaking a sophisticated risk assessment task. Often times, their modelling (over-relying on geographical factors) calculates the risk in one way, deemed too conservative by the business lines of the financial institution, yet possibly queried by supervisors during an examination visit. Heavy investment in a sophisticated risk- based approach thus fails to satisfy both the management and the supervisors. The result, in recent years, has been a trend towards de-risking, and the refusal of service to individuals, businesses and other actors, as well as severance of correspondent banking relationships (World Bank 2015).

Perhaps surprisingly, failures and enforcement actions, and the continuous scan- dals[8] in the field of AML/CFT, are not bad news for AML/CFT compliance professionals. For a long time, to make their case, they had to appeal to management in reputational terms, though reputational risk is hard to assess and quantify. As enforcement actions have become more severe, however, fines (and expected forthcoming fines) are making cost-effectiveness arguments more compelling. It is often claimed in AML/CFT professional circles that the best time to approach top management with requests for resources, training and access is the period following an important enforcement action, especially if a competitor is involved. This tends to also be a good time for regulatory creep as enforcement actions can formalise practices that are not official requirements, especially concerning issues that touch upon personal liability.

3 Conclusions—Where are the Winners? Where are the Losers?

Fighting financial crime is a global governance a air. As many of the institutions of global governance of the post-war era are facing challenges, the AML/CFT regime continues to receive strong support. This is an issue area where shared standards are welcome, more information-sharing practices and cooperation encouraged, and where we are observing more, not less, pooling of sovereignty. So we may be looking at the regime design features, with a core and periphery, and a nimble institution with a narrow mandate and a small secretariat as potential winners.

Yet the AML/CFT regime with FATF at its heart has entered its fourth decade despite the lack of clear success criteria. This is not a story of inertia—the regime is intensifying and addressing new issues as they come along. It offers public action while enabling the big and strong players to set the rules, be they the powerful states that are members of the FATF club or the financial institutions whose compliance departments also shape the content of global governance. This need not make these actors winners but it definitely gives them a better understanding of what the game is and how to play it.

Is it easier to identify the losers? Scholarship has shown how detrimental the regime is for countries who are participants but who did not join just because they believed in the cause but to ward against the consequences of not joining in (Sharman 2011). The lists of countries on monitoring status suggest that some types of country are made to suffer more than others, even when their financial sector has been relatively unperturbed by the type of money laundering scandal breaking in several FATF members. And once you consider the effects of sanctions on access to the financial system, the list of targets becomes more political. This need not make these countries and their financial institutions losers but they are not winners.

And what about values? The global governance of the fight against financial crime sees crime as a global public bad and financial integrity as a global public good but is less clear-cut with values that challenge its aims and its methods. The function of finance as a public utility turns to good words about financial inclusion; concerns about privacy and the use of personal data become a technology challenge. There are some likely winners and losers among these values as well.

[1] For a comprehensive empirical overview and conceptual analysis of different aspects of the regime and the role of FATF in particular, see Nance (2018a) and the special issue of *Crime, Law and Social Change*.

[2] Member countries: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong (China), Iceland, India, Ireland, Israel, Italy, Japan, Republic of Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Portugal, Russian Federa- tion, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, UK, USA. Member regional organisations: European Commission and Gulf Cooperation Council. A full list of members and observers can be found at: https://www.fatf-ga.org/about/membersandobservers/#d.en.3147.

[3] There are nine regional task forces: Asia/Pacific Group on Money Laundering; Caribbean Financial Action Task Force; Eurasian Group; Eastern and Southern Africa Anti-Money Laundering Group; GABAC (covering Central Africa); Financial Action Task Force of Latin America; Inter-

Governmental Action Group against Money Laundering in West Africa; Middle East and North Africa Financial Action Task Force; Committee of Experts on the Evaluation of Anti-Money Laundering Measures (part of the Council of Europe).

[4] A number of jurisdictions are also on a monitoring list: this is a more varied list, covering, in early 2020, countries as diverse as Iceland, Mongolia and Syria.

[5] For more on the risk-based approach and the interplay between the regulatory/supervisory side and law enforcement, see the FATF guidance document (FATF 2017).

[6] The Wolfsberg Group of 13 banking leaders: Banco Santander, Bank of America, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, J.P. Morgan Chase, MUFG Bank, Société Générale, Standard Chartered Bank and UBS.

[7] ACAMS recently introduced an additional certification, that of Certified Global Sanctions Specialist.

[8] There is no shortage of money laundering scandals, and many of the world's largest financial institutions have been found to have lax procedures at one time or another. In the past couple of years, a number of institutions have been implicated in jurisdictions that are usually assessed to have reasonably robust systems in place, such as in Scandinavia and the Baltics.

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