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The Effectiveness of the Law Enforcement Agencies in Investigating Money Laundering Cases: An Evaluation of Mutual Evaluation Report of Malaysia and Australia.

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Abstract

This study conducts a comparison on the effectiveness of the Law Enforcement Agencies (LEAs) of Australia and Malaysia based on the Mutual Evaluation Report (MER) provided by the Financial Action Task Force (FATF). The results show both countries have the power needed to investigate money laundering and terrorism financing under their respective anti-money laundering act. However, they are facing difficulties in increasing the number of prosecutions for money laundering and terrorism financing cases. Therefore, improvements are needed in curbing this issue. The result suggests that these countries should strengthen the cooperation, coordination and capacity among LEAs to ensure effective targeting, investigation and prosecution of money laundering. The government should also revise money laundering investigation time frame and broaden the power of the LEAs in retrieving information during the investigation process. Unlimited power in gathering evidence is prominent in order to charge the money launders, since it helps to gather information required for the prosecution.

Keywords: Law Enforcement Agencies, money laundering, FATF Mutual Evaluation Reports

1. INTRODUCTION

Money laundering is a serious problem that is widely discussed by various countries in the world due to its negative implication toward the global economy. International Monetary Fund (IMF) estimated the extent of money laundering to be between 2 to 5 percent of global Gross Domestic Product (GDP), which may involve around \$500 billion to \$1 trillion (Simsler, 2013). Money laundering refers to the process of concealing the proceeds from unlawful activities so that the fund is seen to come from a legitimate source of fund (Sanusi, Sabri, Isa, & Nassir, 2014). As various methods are involved in money laundering process, the actual extent of money laundering is difficult to measure since both have been integrated with legitimate source of fund. The growth of international trade, expansion of global financial system and technological advancement provide the source, opportunity and means for criminals to launder money. The assessment on effectiveness of Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) Regime is thus difficult, because activities involving regulating, enforcement, and reporting agencies need to be constantly updated, reviewed, and improved to effectively curb money laundering nationally and globally. These changes present challenge to ensure their effectiveness in protecting the economy from money laundering threats (ICFCTF, 2014). The FATF has responded to this issue by including the elements of effectiveness element as part of FATF evaluation. The

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revised evaluation methodology includes an examination of two evaluation criteria, which are the technical compliance and its effectiveness (FATF, 2013).

One of the assessment is to look into the number of money laundering prosecutions, which is the biggest challenges faced by the member countries. This results due to insufficient evidence to support the cases and based on AML/CFT Regime, Law Enforcement Agencies (LEAs) are the responsible party for money laundering investigation. They are facing difficulties because longer period is required to collect evidence to present in court. It also incur higher cost for the investigation and judiciary process (Choo, Amirrudin, Ahmad Noruddin, & Othman, 2014; FATF & APG, 2015; Shanmugam, Nair, & Suganthi, 2003; Shanmugam & Thanasegaran, 2008; Thanasegaran & Shanmugam, 2007). The paper trail created through layering process complicates the law enforcement's task in determining which funds within the legitimate economy are illegal (Buchanan, 2004). Prior studies emphasised on the importance of comprehensive training and establish good cooperation among task force (reporting entities, financial intelligence unit (FIU), LEAs, and prosecuting agencies) to educate and guide the task force on recent money laundering threats (Shanmugam et al., 2003; Zolkafilil, Omar, Abdullah, & Syed Mustapha Nazri, 2015).

Result from the FATF Mutual Evaluation Report is one of the indicators that are helpful in ensuring the compliance and effectiveness of the AML/CFT Regime of a country. Since prior study had mostly focused on the effectiveness of financial institutions and FIU, limited attention was given in determining the effectiveness of LEAs in investigating money laundering. Therefore, this study looks into the compliance and effectiveness of the LEAs of Malaysia and Australia in investigating money laundering. A comparison is made on technical compliance of FATF Recommendation 30 and 31 and the effectiveness assessment for Seventh Immediate Outcome (IO) of these two countries. The comparison will determine challenges that they are facing and suggestions for future improvement. The result of this study would determine the current weaknesses and assist the task force in detecting, investigating and prosecuting money laundering activities, which will result to an increment in the number of prosecution.

2. LITERATURE REVIEW

2.1 FATF Evaluation Methodology

The FATF Evaluation Methodology had been improvised in 2013 by including assessment on the effectiveness of AML/CFT Regime as its second criteria. Based from FATF Evaluation Methodology (2013), assessing effectiveness is just as important as assessing technical compliance. It helps to improve the effectiveness of AML/CFT Regime, determine the capability of the countries in achieving the objectives of FATF standards, and identify any systemic weaknesses; also enable countries to prioritise measures in improving their current AML/CFT system (FATF, 2013). The assessors refer to the eleven immediate outcomes given by the FATF in assessing the effectiveness of countries' AML/CFT Regime. The FATF Effectiveness Assessment Framework was introduced to ensure that country's economy is protected from the threats. It is important for the country to ensure that the threats are detected and disrupted, criminals are prosecuted and subjected to effective and dissuasive sanctions, which is in accordance to the seventh IO. This includes conducting parallel financial investigations and cases. The component parts of the regime (investigation, prosecution, conviction, and sanctions) should be functioning coherently to mitigate the money laundering risks. Based on the assessment, the assessors then summarizes their conclusion and provide evaluation in the form of rating, which is High, Substantial, Moderate and Low (FATF, 2013). This functions as a platform to determine the weaknesses and ways for improvement.

2.2 FATF Recommendations 30 & 31

In assessing the compliance and effectiveness of the law enforcement agencies, the assessors also look into FATF Recommendations 30 and 31. The recommendations apply to all competent authorities, including LEAs and investigative authorities who are responsible for pursuing money laundering investigations. Recommendation 30 covers the responsibilities of LEAs while Recommendation 31 covers their power in ensuring that money laundering risk, associated predicate offences and terrorist financing offences are properly investigated (FATF, 2012, 2013). Recommendation 30 requires countries to designate competent authorities who are responsible for ensuring that money laundering, and terrorist financing offences are properly investigated within the framework of AML/CFT policies. The LEAs must be authorised to pursue investigation during parallel financial investigation or able to refer the case to other agencies to follow up on the investigations. There must also be one or more designated competent authorities who are responsible to identify, trace, and initiate freezing and seizing of property that is, or may become, subject to confiscation, or is

suspected of being proceeds of crime. Meanwhile, Recommendation 31 requires the competent authorities to have sufficient powers to perform their task. They must be able to access to all necessary documents and information for investigations, prosecutions and related actions. The financial intelligence unit (FIU) must be able to provide information when required by them. Competent authorities must also have the power to; (a) obtain records kept by reporting institutions, (b) search of persons and premises; (c) record witness statements; and (d) seize and obtain evidence. Wide range of investigative technique must also be used; including (a) undercover operations; (b) intercepting communications; (c) accessing computer systems; and (d) controlled delivery. The country must also ensure that competent authorities have standard procedures to identify assets without prior notification to the owner. Sufficient power enables competent authorities to perform their task effectively.

2.3 Anti-Money Laundering Framework in Malaysia

The fight against money laundering and terrorist financing has become a priority for all countries including Malaysia. Participation in Asia Pacific Group of Money Laundering (APG) in 31st May, 2000 indicates Malaysia's intention to counter money laundering. In the same year, Malaysia established National Coordination Committee (NCC) to ensure that Malaysia's AML/CFT framework is consistent with international standards and the country is able to efficiently counter money laundering and terrorism financing activities. NCC is an independent body which consists of 16 ministries and government agencies. The NCC is led by the Financial Intelligence Unit (FIU), a unit in Bank Negara Malaysia (BNM).

Anti-Money Laundering Act (AMLA) 2001 was then enacted in July 2001 as a guideline for relevant agencies in confronting money laundering activities. The act covers a set of rules that provide provision for prevention, detection, investigation and prosecution of money launderer, and lifting bank secrecy provisions for criminal investigations involving more than 150 predicate offences (Shanmugam & Thanasegaran, 2008). AMLA 2001 and FIU requires all reporting entities such as banks, insurance companies, stock-broking firms, money changers, and future brokerage firms to have proper recording on their customers, and report on suspicious transactions which are above a specific threshold amount (Shanmugam et al., 2003). All records are required to be maintained and kept for six years. In 2003, the Act was revised and renamed as Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA 2001). The amendment included suppression of terrorism financing, also freezing and forfeiture of terrorist property (Hamin, Wan Rosli, Omar, & Pengiran Mahmud, 2013). In 2015, the act was revised again with an inclusion on recognition of proceeds from unlawful activities, and subsequently renamed to Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA 2001).

The current act covers the offence of money laundering, measures to be taken for prevention of money laundering and terrorism financing offences, investigation powers and the forfeiture of property involved in or derived from money laundering and terrorism financing offences, as well as terrorist property, proceeds of an unlawful activity and instrumentalities of an offence. There are seven parts included in the act, including offences of money laundering, financial intelligence, reporting obligations of the reporting institutions, investigation of money laundering activities, and freezing, seizure and forfeiture of property. The First Schedule contains a list of reporting institutions under the AMLATFPUAA 2001, which are required to perform certain obligations designed to prevent money laundering and terrorism financing offences. Meanwhile, the Second Schedule lists serious offences from various legislations, which if committed, are likely to result in a person benefitting or deriving proceeds from the offence. The act also promotes a collaborative and multi-agency approach by setting out powers and functions of competent authority, enforcement agencies, supervisory and regulatory authorities. The Financial Intelligence and Enforcement Department (FIU) of BNM are responsible to perform BNM's functions as the competent authority under AMLATFPUAA 2001.

2.4 Anti-Money Laundering Framework in Australia

Australia, like many other jurisdictions, has responded since 1980s due to cases on tax evasion, fraud, organised crime and money laundering techniques. These issues led to introduction of the Proceeds of Crime Act 1987, the Mutual Assistance in Criminal Matters Act 1987 and the Cash Transaction Reports Act 1988, which was then renamed to Financial Transaction Reports (FTR) Act 1988. FTR Act imposes an obligation on cash dealers and solicitors on requirement to report to Australian Transaction Reports and Analysis Centre (AUSTRAC), or formerly known as Cash Transaction Reports Agency (CTRA), on any suspicious transaction and cash transaction of AUD 10,000 or more. CTRA was established in 1989 being among the first FIU established in OECD countries. FIU refers to central agencies responsible for collection, evaluation, analysis and dissemination of financial information (Sathye & Patel, 2007). After few decades, Anti-Money Laundering and

Counter-Terrorism Financing Act 2006 (AML/CTF) was then introduced on December 12, 2006 to deter and monitor money laundering and terrorism financing in Australia. The AML/CTF Act 2006 aims to create an environment which is hostile towards money laundering and terrorism financing in Australia, and ensure increments in competitiveness and security of financial markets (AUSTRAC, 2011; Jensen, 2008).

The AML/CTF Act applies to all reporting entities who are involved in designated services such as opening or transacting on an account, accepting an electronic funds transfer instruction and exchanging money for gaming chips or tokens. The act requires them to have proper recording on identification and verification of customers, conduct ongoing customer due diligence, record-keeping obligations, and report on suspicious matters. All reporting entities are required to comply with the act and they are overseen by AUSTRAC. AUSTRAC is also responsible to provide financial transaction information to law enforcement and revenue agencies for them to successfully prosecute money laundering cases. AUSTRAC was previously known as CTRA. Although there are FIU units to assist law enforcement agencies, AUSTRAC's authority is limited to collection of information from reporting entities and its analysis to develop intelligence (Sathye & Patel, 2007). AUSTRAC does not have enforcement powers. Therefore, only law enforcement agencies have the power to proceed with investigations and prosecutions of money laundering cases.

3. RESEARCH METHODOLOGY

Looking into the role and effectiveness of the LEAs in investigating and prosecuting money laundering, this study reviews the latest mutual evaluation reports of two countries, Malaysia and Australia. They are selected because they are among the few countries which were assessed using the latest FATF Evaluation Methodology. Up to September 2015, FATF had issued six mutual evaluation reports (i.e. Malaysia, Ethiopia, Belgium, Australia, Norway and Spain). From the six countries, only two of them fall under the APG regional body, which are Malaysia and Australia. This study compares the technical compliance of FATF Recommendation 30 and 31, also effectiveness assessment for IO 7 between these countries. It replicates the method used by Omar et al., (2014) and Zolkafil et al., (2015) that investigated on compliance characteristics of member countries on Special Recommendation VIII and Special Recommendation IX respectively, by reviewing member countries' mutual evaluation reports.

4. RESULTS

This study compares LEAs in Malaysia and Australia on their technical compliance for FATF Recommendation 30 and 31 as well as effectiveness assessment for immediate outcome 7. The LEAs and investigative authorities are the entities responsible in investigating ML/CFT offences. Therefore, this comparison is conducted to determine their compliance in accordance to FATF Evaluation Methodology introduced in 2013 to ensure the LEAs effectiveness in conducting investigation. This study will provide comparison based on three criteria; which are investigation and prosecution, severity of sanction, also power and responsibilities of the LEAs. A summary of these comparisons is outlined in Table 1 .

Table 1. The Effectiveness of the Law Enforcement Agencies

Criteria	Malaysia	Australia
Rating for FATF Immediate Outcome 7	Moderate level of effectiveness	Moderate level of effectiveness
Money Laundering Investigation and Prosecution	Low number of money laundering prosecution and conviction.	High number of money laundering conviction.
Money Laundering Sanctions Responsibilities and Power of the Law Enforcement Agencies	Low sanctions Compliant	High sanctions Largely Compliant

4.1 Money Laundering Investigation and Prosecution

Malaysia and Australia have sound money laundering investigation and prosecution framework, and both received moderate level of effectiveness for IO 7. Malaysia's legal and institutional frameworks for ML/CFT investigation and prosecution show high degrees of compliance. Each LEAs have specialized AML units with well-trained staff. Over 320 investigators have completed Malaysia's "Certified Financial Investigators Program". Malaysian LEAs has conducted many investigations; however the number of money laundering prosecutions and convictions are lower compared to Australia. The reason for low number of prosecution in Malaysia is due to insufficient evidence collected by the LEAs to be used in court. Due to that, most cases ended up as predicate offences instead of money laundering offences. Improvements are needed by strengthening

Attorney-General's Chamber (AGC) capabilities, while improving cooperation, coordination and capacity among LEAs to ensure effective targeting, investigation and prosecution of ML (FATF & APG, 2015). LEAs is responsible for the investigation stage, having the power to investigate serious offences, and ML/CFT offences (Bank Negara Malaysia, 2016). Different from Malaysia, the LEAs in Australia performed well in combating organized crime. The money laundering convictions for the year 2012/2013 had increased by more than twenty cases as compared to the total convictions in year 2011/2012. Australia's main objective is to disrupt and deter predicate crime. All investigations related to economic crime component are examined from a money laundering perspective and assessed as to whether a concurrent financial investigation is warranted. Money laundering investigations are conducted with an aim to disrupt money laundering activity, which is in accordance to the policy objective. The LEAs works together in investigating predicate and other serious offences. The Australia's Crime Commission (ACC) has significant intelligence gathering capabilities and investigative capacity. When money laundering activity is identified, the case is then passed to respective authorities depending on the type of offence and its responsible authority.

4.2 Money Laundering Sanctions

This study then look into the second criteria under IO 7, which is the severity of sanction. The sanction imposed by Malaysia is not as severe as Australia. Sentences with a maximum of 5 years imprisonment shows inefficient use of finite resources to pursue money laundering cases. With limited evidence, LEAs prefers to proceed with predicate offence with higher sentences. Unlike Malaysia, Australia has higher sanction for money laundering offences. So far, Australia has applied sanctions on natural persons but no prosecution was conducted on corporations. For natural persons, 33 percent of money laundering cases was prosecuted. The data provided indicates that natural persons are jailed in 58 percent of all cases involving ML conviction, with one person receiving a sentence of 14 years, which seems to be dissuasive. Malaysia is seen to have lower sanction in comparison to Australia.

4.3 Responsibilities and Power of the Law Enforcement Agencies

Looking into FATF Recommendation 30 and 31, Malaysia managed to comply with the requirement for responsibilities and powers of LEAs, and received compliant (C) rating while Australia received largely compliant (LC) rating. The power and responsibilities of the LEAs are included in the act. For example, in Malaysia, the responsibilities and powers of the LEAs are included in AMLATFPUAA 2001. The act provides clear guideline on investigation powers of LEAs and the forfeiture of property involved in or derived from ML/CFT offences, as well as terrorist property, proceeds of an unlawful activity and instrumentalities of an offence. Malaysia's LEAs also has powers to access all necessary documents and information for use in investigations, prosecutions and related actions. They are also permitted to use wide range of investigative techniques including undercover operations, interception of communication, access of computer systems and controlled deliveries. However, only the Royal Malaysian Police (RMP) have the power to investigate any offence under any of the laws in Malaysia as stipulated under section 20 of the Police Act 1967 and section 23 of the Criminal Procedure Code. During the onsite visit the BNM had advised that the RMP assistance should be requested to help enforce their respective Acts. On the other hand, Australia received largely compliant ratings. The Australian Federal Police (AFP) is the primary law enforcement agencies for the investigation of federal offences, including money laundering associated predicate offences, and terrorism financing. In addition, Australia's LEAs has the power to identify, trace, and initiate the freezing and seizing of property. Overall, the LEAs and investigative authorities in both countries have the power needed to investigate money laundering and terrorism financing. They are given the power for gathering information under AML/CTF Act 2006 and AMLATFPUAA 2001, and are able to ask for information needed in gathering evidence.

5. DISCUSSION

The comparative study of LEAs of two countries shows that there are some commonalities and differences in the organization and functioning of the LEAs. The similarities include: both countries received a moderate level of effectiveness for IO 7, the responsibilities and power of the LEAs are included in the regulation (i.e. Australia AML/CTF Act 2006 and Malaysia AMLATFPUAA 2001) and both countries are struggling to increase the number of prosecutions. However, there is a difference on LEAs ways of performing tasks. For Australia, all investigations are examined from a money laundering perspective and assessed as to whether a concurrent financial investigation is warranted. Money laundering investigations are conducted with an aim to disrupt money laundering activity which is in accordance to Australia's policy objective. Meanwhile, there is no specific explanation of Malaysia's objective policy, but all money laundering cases are built from predicate offenses. The LEAs in Malaysia will identify the predicate offence before proceed with evidence collection,

where the evidence will ensure whether LEAs should proceed with money laundering charges or not. In addition, Malaysia is seen to have lower sanction compared to Australia. Prior to September 2014, Malaysia imposes sentences with a maximum of 5 years imprisonment for money launderers, which is less dissuasive as compared to Australia. Australia has a history of a person receiving a sentence of 14 years in prison due to money laundering, which shows that Australia has dissuasive sanction. However, higher sentence was imposed on the amendment of AMLA in September 2014. The new maximum penalty in Malaysia is 15 years imprisonment and fine can be five times the value of the money laundered.

6. CONCLUSION

LEAs is an agency responsible for the investigation stage of serious offences, money laundering and terrorism financing offences (Bank Negara Malaysia, 2016). They should have the power to gather all information related to a case before the case can proceed with the prosecution. Insufficient information and evidence has been one of the factors causing low number of prosecution. This shows an importance of having effective and powerful LEAs in a country. Due to its important role in AML/CFT framework, this study compares the LEAs in Malaysia and Australia on their technical compliance for FATF Recommendation 30 and 31, also on effectiveness assessment for IO 7. Referring to the comparison made, this study suggests few recommendations to be considered by the Malaysian Government to have more effective LEAs. The recommendations are; regulators should revise on the investigation time frame, especially when it involve complex cases, the power to investigate offences should be broadened to other LEAs and not only limited to the Royal Malaysian Police (RMP). Malaysia should also emphasize on the requirement of providing information to LEAs by the reporting entities as their cooperation in providing information is still low. Since insufficient evidence is one of the issues faced by the LEAs and prosecutors, there should be improvement made on FIU's function to collect information from reporting entities and maintain a database to keep this information to ensure that the information is always available upon request. This study also suggests for both countries to conduct comprehensive training for all entities involved in AML/CTF framework, to equip them with current threats and ways to manage them. This will enhance their professional competency and increase their understanding on current trend of money laundering and terrorism financing. The study contributes for better understanding about money laundering in Australia and Malaysia. Future research should look into each law enforcement agencies on their effectiveness in investigating money laundering, such as the Royal Malaysian Police. Future researcher may refer to 12 questions outlined in the FATF Effectiveness Assessment Framework by the FATF (2013) to construct the survey in determining AML/CFT Regime effectiveness in managing money laundering activities.

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