

Aligning Compliance Efforts with Law Enforcement Objectives

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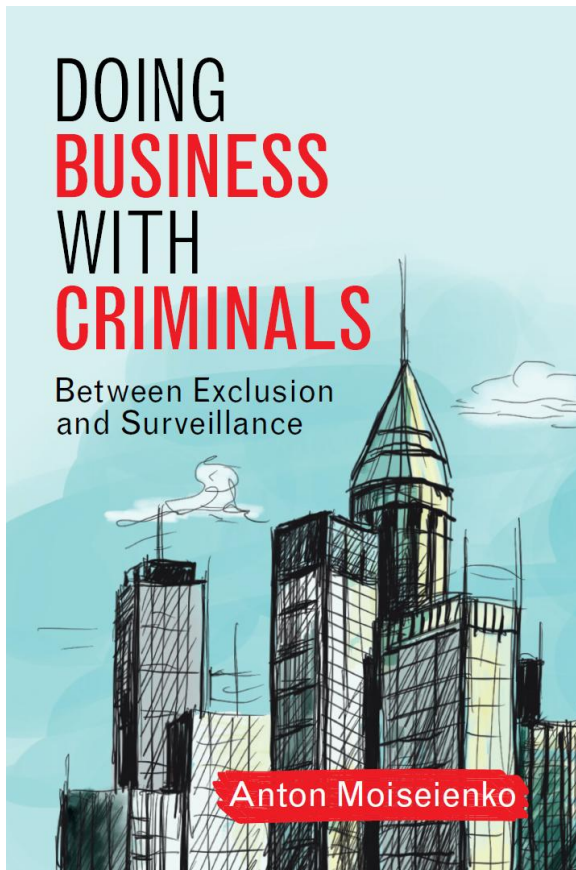
Australian National University

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- Why is today's AML/CTF regime the way it is?
 - Intrusive?
 - Ineffective?
 - Inefficient?
- Could it look any different?
- What are its objectives?
- How can compliance efforts be aligned with those objectives?

THE (FORGOTTEN) HISTORY OF AML



It would be an extreme, if not an extravagant, application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point, he should have tested it in the return, so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.

US v Sullivan 274 US 259 (1927)



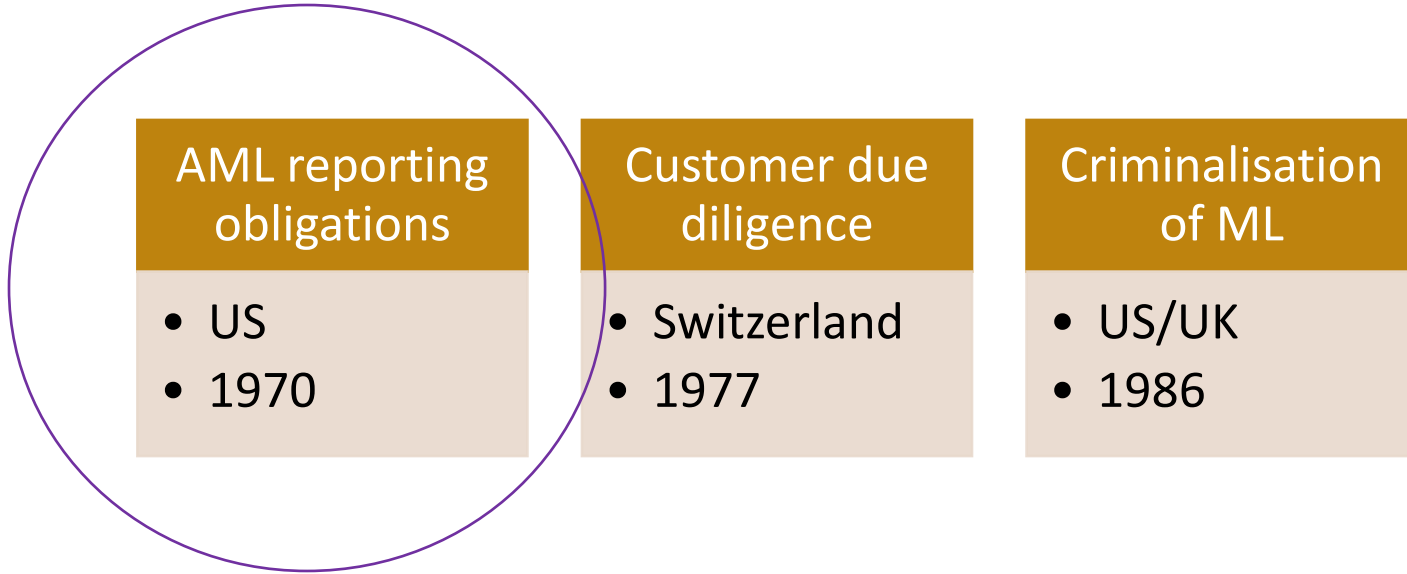
That Al Capone is shrewd, there is no doubt, which, together with his native Italian secretiveness, has made this case a most difficult one to handle. Al Capone never had a bank account and only on one occasion could it be found there he ever endorsed a check, all of his financial transactions being made in currency.

Internal Revenue Service, 'In re: Alphonse Capone', 8 July 1931



- President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 1967
 - No financial crime recommendations
- US Senate Committee on Banking and Currency, Subcommittee on Financial Institutions, *Foreign Bank Secrecy* (US Government Printing Office, 1970)
 - Focus on money laundering





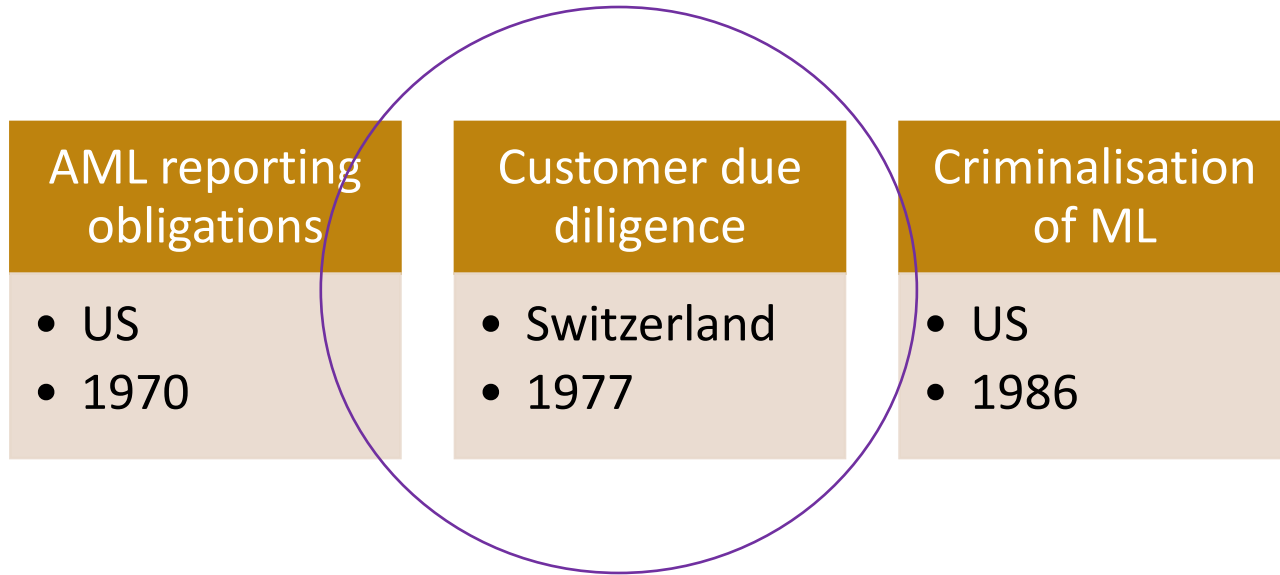


‘Chiasso scandal’ in 1977 involved a branch of Credit Suisse facilitating large-scale tax evasion

Led to the adoption of a Due Diligence Agreement between the Swiss National Bank and Swiss banks:

The banks undertake not to open bank accounts and securities deposits, not to effect fiduciary investments and not to provide safe-deposit facilities unless they have ascertained with such care as, according to circumstances, can reasonably be expected who the beneficial owner of the funds to be credited or to be invested or who the renter of the safe deposit box is. (Article 3)







My Lords, is it not the case that the huge proceeds of bank robberies and airport robberies are spirited abroad almost at once and that, to use an expressive Americanism, they are laundered through the banks so as to make them apparently clean and are then brought back by the rogues and put into the hands of apparently innocent people? Is it not time that legislation was introduced to freeze those proceeds, to prevent the rogues from making use of them and to confiscate them?

Lord Denning, 21 May 1986

AML reporting obligations

- US
- 1970

Customer due diligence

- Switzerland
- 1977

Criminalisation of ML

- US/UK
- 1986

How the FATF started...

As Michel Camdessus, former president of the IMF, told me at a dinner in Paris, the French president Mitterrand had asked him in 1988, what could be a topic worthy of the inauguration of the new building in the honor of President Mitterrand, the “Arche de la Défense”. M. Camdessus suggested “fiscal paradises” as the topic of a high-level conference termed “le Sommet de l’Arche”. The United States agreed in principle, but insisted that it be drug-money laundering. President Mitterrand did not mind, as long as the new group was chaired by his finance minister and was initiated in Paris.

(Mark Pieth)



How the FATF started... (2)

Amongst the original group of twelve participant countries everyone threw their hobby horse into the discussion: the United States suggested **cash controls**, the UK **notification of suspicious transactions**, and the Swiss wanted their newly invented concept of **identification of customers** to be internationalized. Overall, the elements were stitched together in the so-called “40 Recommendations” and frankly – at the time (in 1989) – no one believed they would survive the next three months.

(Mark Pieth)



OBJECTIVES





Exclusion

Surveillance

DOING BUSINESS WITH CRIMINALS

Between Exclusion
and Surveillance

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During the Q&A session, an audience member mentioned the UK government's then-estimate that around 5,000 organised crime groups were active in the UK. He asked why UK law enforcement or intelligence agencies could not share information about suspected members of those groups with banks on a confidential basis so as to generate better, more targeted intelligence.

The speaker, a senior bank compliance officer with extensive prior law enforcement experience, said this would not produce the desired result: any bank's instinct would be to 'derisk', that is, drop all customers with organised crime links. Substantially the same observation has been repeated by scores of compliance professionals I have spoken to since, including interviewees for this book.

Doing Business with Criminals, p. 88



Integrity of
the economy

Presumption
of innocence

Financial
surveillance

Financial
privacy

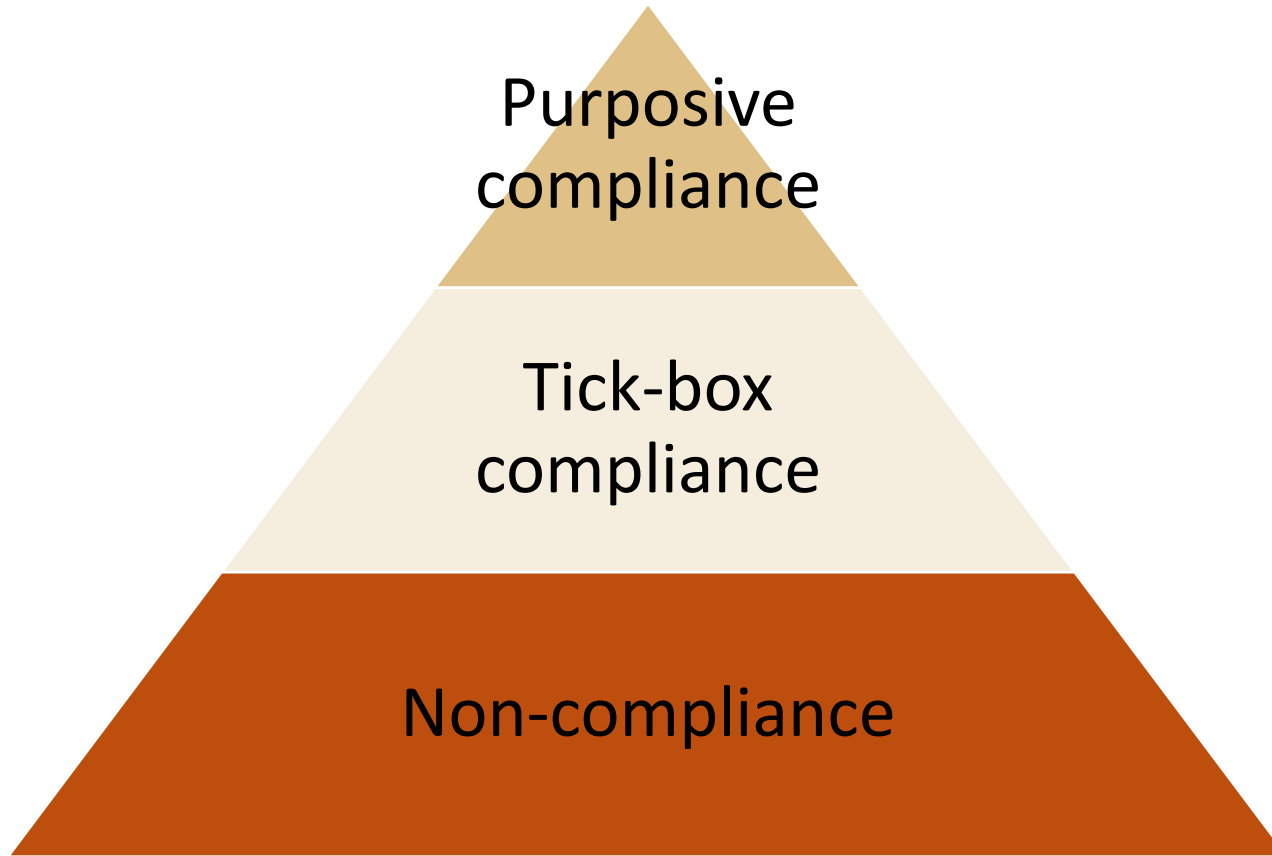


- The AML regime is not seeking to achieve one single objective but involves a balancing of competing values.
- Who does the balancing?
- Regulated businesses.



- Should you keep customers who are citizens of a higher-risk country?
- Should you keep customers in higher-risk businesses (e.g. cryptocurrency, gambling etc)?
- Should you keep customers who continuously trigger Suspicious Matter Reports?
- Surely these decisions should be informed by law enforcement objectives?





Achieving Alignment

Existing	Potential
Public-private partnerships [AU; UK; US; etc]	Special rules for categories of regulated services (e.g. basic bank accounts)
'Keep open' laws [AU; EU]	Rewards for high-quality reporting
Targeted reporting regimes (e.g. geographic targeting orders) [US]	Regulatory praise
Informal interactions	



Tranche 2 involves not just an increase in entities who need to comply.

It also means an increase in entities that make societally important decisions about exclusion (should I serve this client?) and surveillance (should I report this client?).

All incentives are to do what is cheapest and easiest.

How does one align these incentives with law enforcement objectives?



THANK YOU

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