

Current Situation and Existing Insufficiency of Anti-money Laundering in Financial System of China and Corresponding Measures

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Abstract

Money laundering has becoming the public hazards in the International communities so that many counties pay high attention to fight money laundering crime. The paper aims at introducing current situation and existing problems of Anti-money laundering in financial system of China and corresponding measures, in order to promote the mechanism of Anti-money laundering in China and give the reasonable comments including the strength and weakness to the situations of China.

Keywords

Anti-money Laundering; Financial Supervision; Confiscation of Property.

1. Introduction

With the international trade developments, it is no doubt that money laundering is increasing rampant. And money laundering has become the public hazards in the international communities so that many counties pay high attention to fight money laundering crime. Through the efforts for many years, China have become the member of FATF in 2007. In February 2013, the FATF passed a new evaluation method and would apply in the fourth round of mutual Assessment. And the significant gap for China is that financial market fully opened is coming. In addition, the financial institutions are most easily to be utilized by the people who attend money laundering, and it is no doubt that the work of Anti-money laundering should pay particular emphasis on the financial system. So, how to learn other's advantages and experience especially the developed countries like UK, Australia, America? How to perfect the Anti-money laundering system of China in financial industries?

Through this paper, it would introduce the status of Anti-money laundering in China and the existing problems of Anti-money laundering in China comparing with other excellent mechanism in different counties or other regions. Then the paper would suggest some proposals in order to promote the mechanism of Anti-money laundering in China. Due to the pages, maybe in not deeply analysis.

2. The Current Situation of Anti-money Laundering Work in China

It is no doubt that the PRC has built up many mechanisms including the corruption areas through these years' efforts, in order to catch the international trend. These shows that the PRC has abide the international agreements and shows the strong determination to Anti-money laundering work.

2.1. The Basic Composition of Laws and Regulations System has Built Up

The Anti-money Laundering Law of the People's Republic of China was promulgated and came into force on 2007. This law is the first specific regulations of Anti-money laundering in China. In order to coordinate with Anti-money laundering law, the Rules for Anti-money Laundering by Financial Institutions and Administrative Measures for the Financial Institutions' Report of

Large-sum Transactions and Doubtful Transactions was promulgated by the People's Bank of China. And Measures on the Administration of Client Identity Identification and Materials and Transaction Recording of Financial Institutions was also promulgated in the past. All of these mentioned before make up the gap that no legal provisions to refrain the Anti-money laundering in the perspective of domestic law, as well as clearing the scopes of money-laundering and its pre-crime of money-laundering. And this legal system of Anti-money laundering can guide the work no matter financial institutions or the administrations or the judicial authorities.

2.2. Use the Up-bottom Method to Internal Coordination

The administrative department of Anti-money laundering of the State Council shall take charge of the Anti-money laundering supervision and administration throughout the country. The Leader group of Anti-money laundering was authorized by the People's Bank of China. At the same time the coordinate group of Anti-money laundering has built up by China banking regulatory commission, China securities regulatory commission, China insurance regulatory commission. And the banks inside at all levels of the People's Bank of China and all levels of commercial banks shall set up Anti-money laundering department and train the technical people on a regular time.

2.3. The Information System has Built Up

The China Anti-money Laundering Monitoring and Analysis Center undertake the responsibilities to receive and analyze reports of large-value transactions and suspicious transactions both in RMB and foreign currencies. Moreover, The China Anti-money Laundering Monitoring and Analysis Center shall establish a national Anti-money laundering databases and properly store large-value and suspicious transactions reports submitted by financial institutions, as well as to report the analysis results to the People's bank of China. What shall pay attention is the analysis center can own enforcement functions to require financial institutions to promptly supplement and revise reports of large-value and suspicious transactions in RMB and foreign currencies.

According to the Anti-money laundering provision of financial institutions, it is certain that the People's Bank of China shall monitor fund flow in both RMB and foreign currencies for Anti-money laundering purposes. At the same time, it also shall supervise and inspect the fulfilling of Anti-money laundering obligations by financial institutions. If transactions suspected of money laundering crime is investigated within its competence, the People's Bank of China shall report to law enforcement agencies.

2.4. Participate in International Cooperations of Anti-money Laundering Actively

In 2013, the people's bank of China initiated the exploring travel of Anti-money laundering bilateral cooperation on supervision between the states and regions, and negotiated the memorandum of understanding of Anti-money laundering supervision with Argentina's central bank, Singapore, Hong Kong SAR, and macau SAR. As the presidency of Asia-pacific Anti-money laundering organization, the PRC hosted the 16th plenary session of APG successfully in Shanghai. In order to formulate and internal governance the Anti-money laundering in a more positive way, the PRC had held the bilateral and multilateral consultations to the Anti-money laundering activities utilizing the platform of annual meeting, playing a role in the regional Anti-money laundering organizations.

The ministry of Foreign Affairs constantly improves the international cooperation legal network, to provide legal basis for cooperation in combating transnational money laundering crime. In 2013, the PRC had initialed the confiscation assets and return the property agreement with Canada, finished the effective procedure of extradition treaty ratification with Angola, signed

the extradition treaty with Argentina and with Afghan, and completed the judicial assistance treaty in criminal cases with UK, with Ethiopia and with Albania.

As the central authorities of the judicial assistance in PRC to the United Nations Convention Against Transnational Organized Crime, the ministry of Foreign Affairs actively conducted International Anti-money laundering cooperation, with satisfaction a remarkable achievements of cooperation in various areas in 2013.

Requested by the judicial authorities of the USA, France, and Korea, the central authorities of the judicial assistance in PRC have handled 17 transnational criminal judicial assistance cases. And the PRC has requested 4 cases to foreign states for Anti-money laundering judicial assistance. At the same time, the central authorities of the judicial assistance in PRC also actively developed the overseas stolen money recover work under the international convention, and it has deal with a batch of overseas corruption assets recovered cases. The ministry of public security assisted the overseas police investigation in the whole year of 2013 for 404 suspected to money-laundering cases, and to achieve effective enforcement cooperation in the aspect of joint investigation, recover stolen money, information exchange etc.

In August 2013, the state administration of taxation on behalf of the official government of PRC has signed the multilateral tax collection and management and assistance treaty launched by the OECD and the European Council, in order to create a fair and transparent tax environment.

In addition, Client identity identification (KYC system) has built up. The preservation system of clients' identity materials and transactional records has built up. the reporting system of large sum transactions and doubtful transactions has built up.

3. The Insufficiency of Anti-money Laundering Work in China and Corresponding Measures

As mentioned above, the Anti-money laundering system including the corruption areas has built up in PRC and it achieves some good results. But through the analysis of the law and practice, it can be pointed out the limitations of the current system of Anti-money laundering. So do the measures to the insufficient of Anti-money laundering work, purpose for fighting to protect the financial losses of domestic state.

3.1. The Scope of the Criminal Offence of Money Laundering is Narrow

It is well known that The Forty Recommendations of FATF (2003) plays the role as soft law which member states can obey the law voluntary and flexible, even the recommendations have the significant impacts on around the world of Anti-money laundering. Unlike hard law, soft law doesn't have mandatory and binding. If states breach these recommendations, the effective way is FATF would publish Non-cooperative Countries and Territories (NCCTs) for promoting states to pass the score of Anti-money laundering supervision.

According to the recommendation 1 of The Forty recommendations of FATF (2003), about the scope of the criminal offence of money laundering, countries should apply the crime of money laundering to all serious offenses, with a view to including the widest range of predicate offenses. Predicate offenses may be described by reference to all offenses, or to a threshold linked either to a category of serious offenses or to the penalty of imprisonment applicable to the predicate offence, or to a list of predicate offenses, or a combination of these approaches. However, the article 191 of Criminal Law of PRC stipulates the predicate offenses are including that, where anyone who obviously knows that any incomes are obtained from any drug-related crime, organizational crime of any gangland, terrorist crime, crime of smuggling, crime of corruption or bribery, crime of disrupting the financial management order, crime of financial fraud.

On the one hand, the scope of the criminal offence of money laundering in China much narrower than the international standard of FATF. Because many member states almost have applied the crime of money laundering to all serious offenses while just seven kinds of crime are stipulated in criminal law of PRC. And these crimes are just part of serious offenses. Other countries prefer choosing the attractive business partner who has accepted the Forty Recommendations of FATF (2003) rather than they don't.

On the other hand, the subjective fault of money laundering crime in PRC only defines as obviously knowing. That means that if someone doesn't know or ought to know the illegal income of earnings, someone wouldn't be charge of money laundering crime. But FTAF stipulates that money laundering crime is neither the subject intentional nor the default as the deciding factor.

In addition, from the perspective of criminal procedures law in China, this law forbids default judgments. It means the court cannot initiate the proceedings if the criminal suspect has dead or escape so as that the court cannot recover the crime property for a long time, as well as damage the interests of the nation, the public and the victims.

To sum up, the scope of the criminal offence of money laundering in PRC generally follows the Forty recommendations of FATF (2003). But maybe the legislative can expand the crime of money laundering to all serious offenses in the amendment of criminal law of future, in order to adapt the international trend.

3.2. The Confiscation of Property Mechanism is Narrower than International Trend

Recently money laundering person and corrupt officials are constantly transferring their illegal moneys to overseas through different approaches in order to avoid corruption investigation or criminal investigation as well as property declaration requirements. Due to the close relationship with the world, it developed many new ways to escape abroad or decriminalization of black money. It must increase the difficulty of investigation and take more time to held accountability for crimes. It must aggravate financial risks and waste more judicial resources. Viewed the data by media, the number of escaping officials is 4000 and withdrawing money is about 50 billion dollars. Viewed the report of corruption assets by the People's bank of China, illegal outflow money in 2003 is 183.53 billion while in 2012 is 862.13 billion, and the corruption assets is 5% of the illegal outflow money (These submissions are available at http://www.360doc.com/content/13/0117/19/232916_260776208.shtml). The investment immigration policies in some countries like America, Canada, Australia offer convenient ways of money laundering and escape. Therefore, anti-corruption is the important link of Anti-money laundering work.

According to the article 64 of Criminal Law of PRC, all articles of property illegally obtained by the criminal element shall be recovered or he shall be ordered to make restitution or pay compensation for them. The legitimate property of the victims shall be promptly returned. Contraband and articles of the criminal's own property used for committing the crime shall be confiscated. Articles of confiscated property and fines shall be handed over to the national treasury and shall not be diverted or otherwise disposed of.

It shows the mechanism of recovering money and the all articles of property illegally obtained by the criminal element include illicit money or cash illegally. But maybe it is not enough. Firstly, if the criminal suspect has dead or he has escaped or he has disappeared, the court cannot convict which results in fail to recover the cash income of crime in time. Secondly, this regulation doesn't specific stipulate how to confiscate. Thirdly in practice, law enforcement institutions in China cannot in time find out the data of money laundering or the path analysis of money laundering. In addition, though the new criminal procedure law has come into effect in 2013 and sets up a new confiscation of property mechanism when criminals have dead or

escaped. But it just limits in corruption and bribery crimes and terrorist crimes. This new mechanism excludes the money laundering crime, drug-related crimes, smuggling crime and other serious crimes. Moreover, this new mechanism initiates by people's procuratorate only, then file an application with a people's court for confiscation of illegal income. If public security organs find the emergency to start confiscation of property, such as criminal escaped, the public security organs must wait for agreement sign by Courts after people's procuratorate files the application to Courts. It takes more time and lower the judicial efficiency as well as enhancing lawsuit costs if public security organs need to initiate confiscation of property.

Comparing with acts of other country, UK have published The Proceeds of Crime Act 2002 and The Money Laundering Regulations 2003.

On the one hand, The Proceeds of Crime Act 2002 focus on criminal components and criminal judicial procedure. According to article 327, 328 and 329, money laundering crime had made a further detail stipulated into three kinds of crimes. The first is a person conceal, disguise, convert, transfer or remove criminal property, including concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it. The second is a person enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person. The third is a person acquire, use or has possession of criminal property. With the mechanism of confiscation of property, this act has expanded the authority of criminal court to issue confiscation. And it has enhanced the power by court to the confiscation of property after the conviction. Moreover, it created the civil confiscation procedure in the high court, so that the high court can confiscate the property if specific assets related to crime with the reasonable suspicion, based on the standard of preponderance of probability. In other words, even though one case hasn't gone into the criminal procedure, the court can, through civil procedure, confiscate relevant assets including goods or cash which prepare for illegal acts. Confiscation of property and prevention of money laundering can help to curb potential criminal motives, to weaken the continuity or the expansion of economic foundation crime.

On the other hand, The Money Laundering Regulations 2003 (These submissions are available at <http://www.legislation.gov.uk/ukxi/2003/3075/contents/made>.) is a comprehensive legal document, which focus on the legal obligations of Anti-money laundering by relevant institutions and set the legal liability, especially the criminal responsibility. Traditional money laundering relies on financial system, but nowadays money laundering crime expands to non-financial field due to fast development of technology. It is the legislative production of change of money laundering. The scope of obligation subject expanded from traditional financial institutions to non-financial institutions according to article 2. Then, the new Money Laundering Regulations 2007 came into effect on 2007 and replaced the 2003 regulations. All relevant businesses must apply Anti-money laundering system. It is no doubt that Money Laundering Regulations play a crucial role in safeguarding the UK financial system from criminals and terrorists.

About the mechanism of confiscation of property of PRC, the legislation of China could adopt the model of UK---Confiscation of property aren't on the ground of convicted verdict---The court can confiscate the specific assets related to crime with the reasonable suspicion, based on the standard of preponderance of probability. Add the civil confiscation of property to recover illegal assets at the extreme. Expand the scope of confiscation of property into including money laundering crime. Expand the subjects of Confiscation Procedures for Illegal Income in Cases Where a Criminal Suspect or Defendant Escapes or Dies so as that public security organs have the authorities for initiating this confiscation procedures in emergency circumstances, and public security organs shall report to Courts in regulatory period. According to the article 54 of United Nations Convention against Corruption, states parties shall take necessary measures so

that the criminal suspect who has dead or escape or death shall be confiscated the crime income even though without a criminal conviction. (Article 54 Mechanisms for recovery of property through international cooperation in confiscation: 1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party; (b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and (c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases. 2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; (b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and (c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.).

3.3. non-financial Institutions are under Insufficient Supervision

Based on the Anti-money laundering provision of financial institutions, financial institutions and their branch offices have established internal control system such as establishing a specialized unit or designate a unit to be responsible for Anti-money laundering tasks. And many commercial banks have formulated internal operational procedures and control measures for Anti-money laundering tasks, as well as carrying out their staff training on Anti-money laundering to strengthen their working capacities.

But what about the non-financial institutions, such as P2P that positioned itself as investment platform for the public and companies that need source of finance? Nowadays, the Internet finance is quite popular in recent years due to the fast development of Internet technology which causes that many new methods of financing are starting to appear in China, like Peer to Peer, Crowd Funding which has appeared in foreign countries for many years. It is a pity that the Anti-money laundering legislations in China are not as synchronous development as the Internet finance.

Firstly, there is no sufficient legislation to restrain the business activities of non-financial agencies and to require non-financial agencies for Anti-money laundering. According to the article 2 of the Anti-money laundering provision of financial institutions by the People's bank of China, it has stipulated those financial institutions including the commercial banks, security companies, futures brokerage companies, capital management companies, insurance companies, insurance assets management companies, trust and investment corporations have their obligations to abide the Anti-money laundering regulations. But no relevant provisions about non-financial institutions.

Secondly, non-financial institutions have the potential to become the new path for money laundering especially for the small-value transactions. On the one hand, the new financing takes shorter time to apply and they are more convenient and more efficient than traditional financial institutions for accessing to money. So small and medium-size enterprises are always attracted by non-financial institutions. On the other hand, with the higher interest's rate than commercial banks, the public prefer saving money or doing some investments in these new Internet-finance institutions. In addition, these new methods of financing are directly facing with the public from different regions so that it will increase the investigation difficulty for relevant enforcement agencies, and criminal suspects can have more ways to money laundering. To sum up, it is a blank way and secret way to corruption and the money laundering.

About the suspicious transactions identity and reporting system of large sum transactions and doubtful transactions, the PRC can use suspicious transaction's identity methods for KFIU. At first to screen that whether the client is the crime or terrorists and whether their activities are belong to their background or the identity. Then ask some questions skillful in order to find out whether exists special reaction. Next to find client records to ensure trade categories and activities level in the past. As last they can evaluate whether belongs to suspicious transaction. About the supervision approach, the PRC shall adopt the risk-based approaches to enhance the efficiency of Anti-money laundering. The risk-based approaches mean taking more comprehensive and more details for high-risk regulatory targets while low risk regulatory targets will be supervised with simply regulatory measures. Like the supervision institutions in HK, they utilize the risk identification, risk classification and risk evaluations to enforce their authority. It is a trend to adopt this approach especially in developed countries. In accordance with article 5 of The Forty Recommendations of FATF (2003), financial institutions in China may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction. The measures that are taken should be consistent with any guidelines issued by competent authorities. For higher risk categories, financial institutions should perform enhanced due diligence. In certain circumstances, where there are low risks, countries may decide that financial institutions can apply reduced or simplified measures.

4. Conclusion

Money laundering activities in financial markets have been increasingly serious recently years, and more and more players have become involved in the fight against money laundering, corruption and terrorist financing. The PRC is one of the key players in regulating Anti-money efforts. The situation of legal framework consists of the stipulations on the prevention of the financial system for the purpose of money laundering. Obviously, the strengths and weaknesses of the Anti-money legal work can be found as well. The PRC has taken amounts of methods to step up Anti-money laundering to compose the supervision mechanism of Anti-money laundering, including KYC system, transaction report system, material record system and the criminal assets recovery mechanism etc. Through the analysis to the current situations of Anti-money laundering work, the legal developments in PRC especially related to the International Anti-money laundering will be better and better with the respect with the principle of *pacta sunt servanda*.

References

- [1] Dennis Cox, Introduction to money laundering deterrence, Risk Reward Ltd, London,UK:A John Wiley & Sons, Ltd.,Publication, 2011.
- [2] Prof. Dr. Patrick Low Kim Cheng, Anti-money Laundering + Knowing Your Customer = Plain Business Sense, Franklin Business & Law Journal,November 1, 2010.

- [3] Victor Dostov Pavel Shust, Customer loyalty programs: money laundering and terrorism financing risks, *Journal of Money Laundering Control*, Vol. 17 Iss 4 pp. 385 - 394.
- [4] Emile van der Does de Willebois & Jean-Pierre Brun, Using Civil Remedies in Corruption and Asset Recovery Cases, *Case Western Reserve Journal of International Law*, March 1, 2013.
- [5] Ruan fangmin, Comparing legislation of Anti-money laundering with China and England, *China criminal law journal*, No.5, 2005.(In Chinese).
- [6] Liu bowen, legislation improvement of money laundering of China, *Role of Law and Society*, No.12, 2011.(In Chinese).
- [7] Wang wenhua, Improvement on Anti-Transnational Money Laundering Criminal Law in China, *Journal of Henan University(Social Science)*, Vol.52, No.6, Nov.2012.(In Chinese).
- [8] Xu hanming, Jiajidong, Zhao hui, *Legislation research of Anti-money laundering of China*, (Beijing: Law Press China 2005).(In Chinese).
- [9] Information on http://www.360doc.com/content/13/0117/19/232916_260776208.shtml.
- [10] Information on <http://www.legislation.gov.uk/uksi/2003/3075/contents/made>.