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The Challenges of Implementing Anti-Money Laundering Regulation: An Empirical Analysis

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Abstract

For over three decades, money laundering has been an area of concern for policymakers and law enforcement, with significant efforts undertaken at national and international levels to combat it. Recently, laundering of criminal proceeds using real property has attracted increased attention amongst policymakers. Various efforts are now being undertaken to tackle money laundering in the UK property market, but there are still significant difficulties in its practical implementation. Drawing upon semi-structured interviews with estate agents and compliance officials, this study identifies critical aspects of AML compliance that are particularly problematic for those involved in it. In so doing, this article delivers a new perspective, by analysing data gathered with the first empirical study on the implementation of AML obligations in practice (in the UK property market) since the introduction of the 2017 Money Laundering Regulations.

Keywords: anti-money laundering, real estate, compliance, UK, regulation

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Introduction

The creation of any anti-money laundering (AML) regime brings with it expectations as to its outcomes[1] and specific issues with its implementation in practice, including the need to have a robust set of rules and obligations that can be relied upon by public and private actors.[2] In this context, the development of AML in the UK has seen a varied approach where, although the regulation and provisions are the same for all regulated sectors (e.g. financial, real estate, luxury goods), there are different levels of engagement with AML rules and mixed results for their implementation. Moreover, despite the comprehensive nature of the UK AML regime, which applies to all designated subjects with no distinction as to the regulatory burden imposed on them, some sectors show more variations than others as to their compliance approaches and responses.[3] This is partly due to the existence of multiple subjects within a single sector that share the same AML obligations,

[1] For wider discussion about effectiveness, see K. Getz, 'The Effectiveness of Global Prohibition Regimes: Corruption and the Antibribery Convention' (2006) 45 *Business and Society* 254. In the specific context of AML see, for instance, R.F. Pol, 'Anti-money laundering effectiveness: assessing outcomes or ticking boxes?' (2018) 21 *Journal of Money Laundering Control* 215; B. Unger et al, *The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy* (Edward Elgar, 2014).

[2] On the compliance activities of actors in the AML regime, see A. Verhage, *The Anti Money Laundering Complex and the Compliance Industry* (Oxon: Routledge, 2011).

[3] On AML compliance in different sectors and countries, see C. Verdugo Yepes, 'Compliance with the AML/CFT International Standard: Lessons from a Cross-Country Analysis' (2011) *IMF Working Papers* 1; A. Verhage, *The Anti Money Laundering Complex and the Compliance Industry* (Oxon: Routledge, 2011).

but that in fact represent very distinctive positions and, therefore, have quite dissimilar functions.

These elements of difference (and perhaps inconsistency) across and within sectors play an important role in the implementation of AML regulation, and they are particularly evident when considering the real estate sector. Indeed, estate agents are a particularly apt case study given the expanding AML demands imposed on these actors.[4] Further, compared to other sectors, the real estate sector includes many subjects who perform very different functions (such as buying, selling, letting). As such, the real estate sector provides important insights as to the challenges of implementing AML regulation. However, despite the potential for investigation, the literature has considered the real estate sector only marginally, with no empirical analysis of the challenges that UK AML regulation creates for those operating in the sector.

Drawing upon semi-structured interviews with estate agents and compliance officials, this study provides a better understanding of the dynamics of AML within the UK real estate sector, and it identifies critical aspects of AML compliance that are particularly problematic for those involved in it. In so doing, this article delivers a new perspective, by analysing data gathered with the first empirical study on the implementation of AML obligations in practice (in the UK property market) since the introduction of the 2017 ML Regs.[5] The rationale underpinning this analysis, namely the

[4] For an overview of the current framework and how it relates to estate agents, see HMRC, *Estate agency business guidance for money laundering supervision* (Updated October 2020).

[5] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

focus on lived realities, draws upon research that demonstrates that compliance with the law is influenced by people's (subjective) perceptions about the fairness of procedures.[6] Thus, there is significant value in considering the views of those who have personal experiences of the AML regime.[7] Given significant concerns as to the effectiveness of AML regulation,[8] exploring such experiences is timely.

From the foregoing, this study represents a significant examination of AML implementation, specifically in the UK real estate sector, which relies upon original empirical data and identifies key aspects of AML regulation, including its limitations and more challenging features for compliance. In this sense, this research provides relevant

[6] T.R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990); J. Sunshine and T.R. Tyler, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) 37 *Law & Society Review* 513. For scepticism on whether there is correlation between procedurally just treatment and perceived legitimacy/compliance, see D. Nagin and C. Telep, 'Procedural Justice and Legal Compliance' (2017) 13 *Annual Review of Law and Social Science* 5. In response, Tyler affirms that procedural justice is the 'best available model' and is supported by empirical research. He argues that from a policy perspective widespread reliance on procedural justice is justified: T.R. Tyler, 'Procedural Justice and Policing: A Rush to Judgment?' (2017) 13 *Annual Review of Law and Social Science* 29.

[7] A related consideration is whether people question the legitimacy of relevant laws, such as AML. For wider discussion, see K. Murphy, T.R. Tyler, and A. Curtis, 'Nurturing Regulatory Compliance: Is Procedural Justice Effective When People Question the Legitimacy of the Law?' (2009) 3 *Regulation and Governance* 1.

[8] P. Alldridge, *What Went Wrong with Money Laundering Law?* (London: Palgrave Macmillan, 2016); A. Verhage, 'Great Expectations But Little Evidence: Policing Money Laundering' (2017) 37 *International Journal of Sociology and Social Policy* 477; P. van Duyne, J. Harvey, and L. Gelemerova, *The Critical Handbook of Money Laundering: Policy, Analysis and Myths* (London: Palgrave Macmillan, 2018).

inputs into the discourse on AML implementation in the UK (even beyond the real estate sector) and for future legislative and policy-oriented initiatives that need to take into account the practice of AML.

This article is divided into five parts. The next three sections set out, respectively, the theoretical and legislative context of AML in relation to the real estate market, the methodology used in the study, and the provisions regulating estate agents and the UK AML regime. Then, the article provides a critical examination of two themes that emerged from the interviews relating to the implementation of AML obligations: (i) Customer Due Diligence; and (ii) reporting suspicions. The analysis of these themes provides important insights into the operation of AML in practice. Without wishing to advocate that the views of regulatees be determinative,[9] it is nonetheless valuable to consider the challenges associated with the implementation of regulation from the perspective of these actors. This article demonstrates that practical issues arise in central aspects of the AML regime and, in so doing, it illustrates the (negative) impact of AML obligations on businesses, which creates discrepancies in AML implementation and a sense of frustration among

[9] In the AML context, it is increasingly recognised that private actors 'are not only responsible for implementing AML rules but also affect the content of governance'. See E. Tsingou, 'New Governors on the Block: The Rise of Anti-Money Laundering Professionals' (2018) 69 *Crime, Law and Social Change* 191. Moreover, there have been some concerns that regulators have adopted a light-touch approach in supervision and enforcement (though contrast recent activity, partly as a response to such criticism and concerns regarding the property sector: HMRC, *Estate agents targeted in money laundering crackdown* (March, 2019)). While it is important that policymakers and regulators do take into consideration the experiences of regulatees, not least to ensure legitimacy of the AML regime, the views of such actors ought not necessarily be determinative.

regulatees. These discrepancies also point out key differences between the law on paper and the law in action, and they reinforce concerns as to the legitimacy of the UK AML regime. In this regard, the practical issues encountered by regulatees could lead to resistance to AML compliance by estate agents who would otherwise comply with the AML regime.

Contextualising AML in the Real Estate Sector

AML regulations have been in force for over three decades, yet there is still scepticism as to such efforts and their success. The modern AML regime is widely considered to exist since the establishment of the Financial Action Task Force (FATF) in 1989,[10] and the issuing of the FATF 40 Recommendations a year later.[11] In 1991, the EU issued its First Money Laundering Directive (MLD),[12] choosing a twin-track approach based on criminalisation and prevention of money laundering. When the Second MLD was adopted

[10] G7, *Economic Declaration*, Paris Summit (16 July 1989), para 53. Examples of earlier AML efforts include, *inter alia*, the US Money Laundering Control Act 1986; the Vienna Convention 1988; and the Basel Committee, *Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering* (December 1988).

[11] These Recommendations were subsequently revised, and their current form is: FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (2012-2020).

[12] European Council, Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, 91/308/EEC, OJEC L166/77, 28 June 1991.

in 2001,[13] AML obligations were extended beyond credit and financial institutions to non-financial businesses and professions. In particular, Article 1 of the Second MLD also included auditors, external accountants and tax advisors; real estate agents; notaries and other independent legal professionals (in defined circumstances); high-value dealers; and casinos.[14] These obligations encompassed carrying out customer due diligence (CDD) and know-your-customer (KYC) checks. Further, there are obligations to file suspicious activity reports (SARs) in certain circumstances.

Two decades on from the extension of the AML regime to estate agents (EAs), there continue to be developments. At various times, AML efforts have been driven by the fight against drugs and organised crime (more generally), but also by anti-corruption and anti-terrorism plans (particularly after 9/11). For example, the global anti-kleptocracy agenda[15] has resulted in significant advancements, particularly amongst developed jurisdictions. As Sharman argues,

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[13] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ L344/76, 28 December 2001.

[14] The list of regulated sectors continues to expand. For example, the Fifth MLD extends AML obligations to, *inter alia*, letting agents, art dealers, providers engaged in exchange services between virtual and fiat currencies, and custodian wallet providers. See Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L156/43, 19 June 2018, Art 1.

[15] See, for example, UN Office on Drugs and Crime, United Nations Convention against Corruption, UN GA Res 58/4, 31 October 2003, entered into force 14 December 2005.

> Although many more corrupt leaders get away with their crimes than face justice, the rise of the expectation from shortly after the turn of the century that host countries have a duty to take action to block or seize their illicit funds is a new and in many ways remarkable development.[16]

Confronting the question as to why focus on developed jurisdictions (such as the UK), rather than on countries that are the source of corruption, Sharman states: 'The best guess is that the bigger the financial center, the more dirty money flows through it, including the proceeds of foreign corruption'.[17] Therefore, it is axiomatic that any attempt to tackle grand corruption cannot merely focus on the source, but must also encompass destination (or 'host') countries.

The anti-corruption agenda is strikingly evident in recent AML developments. For example, at the 2016 Anti-Corruption Summit, the then-UK Prime Minister called for a global movement to tackle illicit financial outflows, in his words the problem of 'people stealing from poor countries and hiding that wealth in rich ones'.[18] He specifically identified the property market as a problematic sector, saying that the UK should 'clean up our property market and show that there is no home for the corrupt in Britain'.[19] His

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[16] J. Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Ithaca: Cornell University Press, 2017) 6-7.

[17] *ibid*, 17.

[18] D. Cameron, Anti-Corruption Summit 2016: PM's Closing Remarks (12 May 2016) at https://www.gov.uk/government/speeches/anti-corruption-summit-2016-pms-closing-remarks (last accessed 8 May 2020).

[19] *ibid*.

comments followed claims that at least £100 billion is laundered through the UK every year,[20] and that corrupt capital is widely used to buy property in the UK.[21] The same year, the Home Affairs Select Committee on the *Proceeds of Crime* suggested that 'supervision of the property market is totally inadequate, and that poor enforcement has laid out a welcome mat for money launderers'.[22]

More recently, there have been notable legal and policy responses to address, *inter alia*, money laundering in the UK property market. These include the expansion of the 'Flag It Up' campaign to the property sector;[23] the enactment of unexplained wealth orders (UWOs);[24] the introduction of new Money Laundering Regulations (ML Regs);[25] a greater focus on professional enablers;[26] and updates to the People of Significant

[20] Home Affairs Select Committee, *Proceeds of Crime*, HC 25 (2016-17). This claim was based on figures suggested by Transparency International during oral evidence. However, it must be acknowledged that it is virtually impossible to identify precisely the extent of money laundering. See M. Levi, P. Reuter and T. Halliday, 'Can the AML System Be Evaluated Without Better Data?' (2018) 69 *Crime, Law and Social Change* 307.

[21] Transparency International UK and Thomson Reuters, *London Property: A Top Destination for Money Launderer*s (TI-UK, 2016).

[22] Home Affairs Select Committee, *Proceeds of Crime*, HC 25 (2016-17), para 61.

[23] Home Office, HM Revenue and Customs, and Ben Wallace MP, 'Campaign to Prevent Properties Being Bought With Dirty Money' (26 October 2018).

[24] Criminal Finances Act 2017, Part 1. For consideration of the first UWO, see *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108.

[25] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017; Money Laundering and Terrorist Financing (Amendment) Regulations 2019.

[26] See National Crime Agency, *Annual Plan 2018-19*, 12.

Control (PSC) Register.[27] Clearly, significant efforts are being undertaken to tackle money laundering in relation to the UK property market,[28] and similar efforts are being made in other jurisdictions (e.g. Australia, Canada, and the US).[29]

The amount of money involved in property transactions and the inherent vulnerabilities of the real estate sector to money laundering have given rise to concerns that it is all too easy to launder money through property.[30] In this sense, unsurprisingly the property market has been seen as a key area for AML regulation. This fact accords with the view that 'the intersection of licit and illicit markets, and the dependence of illicit markets on the former, have invited regulatory intervention in furtherance of crime

[27] Department for Business, Energy & Industrial Strategy, *Register of People with Significant Control: Guidance for Registered and Unregistered Companies, Societates Europaeae, Limited Liability Partnerships, and Eligible Scottish Partnerships (Scottish Limited Partnerships and Scottish Qualifying Partnerships). Version 4* (June 2017).

[28] See M. Harris, 'Anti-Money Laundering and Property: The Government Has Upped the Ante', *Estate Agent Today* (14 April 2018).

[29] See, for example, Austrac, *Strategic Analysis Brief: Money Laundering Through Real Estate* (Austrac, 2015); M. Maloney, T. Somerville, and B. Unger, *Combating Money Laundering in BC Real Estate* (Expert Panel on Money Laundering in BC Real Estate, 2019); Financial Crimes Enforcement Network, *News Release – FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas* (15 May 2019).

[30] Transparency International UK, *Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market* (TI-UK, 2017).

control'.[31] Regulatory strategies cannot, however, be viewed in isolation: regulation 'operates in a world where the law is imperfect, enforcement and compliance costly, resources limited, and the regulator has discretion'.[32] So, while the AML regime might have laudable objectives,[33] there are significant difficulties in its practical implementation. Furthermore, there has been criticism that the AML regime imposes onerous and uncertain obligations on private actors and that there is a lack of proper support for them by national agencies and institutions.[34] In the same sense, concerns have been expressed as to the fact that AML regulation has resulted in private actors engaging in de-risking (and de-banking) of customers.[35]

Given this context, an extensive literature exists on AML, mainly focusing on the financial sector.[36] Moreover, as already recalled, international and national legislations

[31] P. Grabosky, 'On the Interface of Criminal Justice and Regulation' in H. Quirk, T. Seddon, and G. Smith (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge: CUP, 2010) 83-84.

[32] C. Veljanovski, 'Strategic Use of Regulation' in R. Baldwin, M. Cave, and M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford: OUP, 2010) 87.

[33] However, in practice there is confusion as to the purpose of AML: see J. Ferwerda, 'The Effectiveness of Anti-Money Laundering Policy: A Cost-Benefit Perspective' in C. King, C. Walker, and J. Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (London: Palgrave Macmillan, 2018).

[34] M. Bergstrom, K. Svedberg Helgesson, and U. Morth, 'A New Role for For-Profit Actors? The Case of Anti-Money Laundering and Risk Management' (2011) 49 *Journal of Common Market Studies* 1043.

[35] V. Ramachandran, M. Collin, and M. Juden, 'De-Risking: An Unintended Negative Consequence of AML/CFT Regulation' in C. King, C. Walker, and J. Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (London: Palgrave Macmillan, 2018).

[36] See n 2 above.

have increasingly imposed obligations on different sectors and the actors involved in them, including lawyers, accountants and estate agents.[37] However, policymakers often overlook the practical difficulties in implementing AML regulation. Amidst concern as to the extent of and vulnerabilities to money laundering in the UK property market, this article focuses on the implementation of AML regulation in the UK real estate sector, examining the obligations imposed upon estate agents and their implementation in practice.

Methods

There is an extensive literature on regulation and compliance, traditionally looking at the perspective of regulators (and how they might ensure compliance[38]) and regulatory failures.[39] A less investigated aspect is the conceptual 'flipside' of traditional regulatory

[37] For instance, see K. Benson, *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and its Control* (Oxon: Routledge, 2020); B. Unger and J. Ferwerda, *Money Laundering in the Real Estate Sector: Suspicious Properties* (Cheltenham: Edward Elgar, 2011).

[38] A classic example is the regulatory pyramid: I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: OUP, 1992). See also H.E. Jackson, 'Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications' (2007) 24 *Yale Journal on Regulation* 253.

[39] See, for example, S.L. Schwarz, 'Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown' (2008) 93 *Minnesota Law Review* 373.

studies,[40] namely 'how individuals within organizations who enact compliance day-to-day actually interpret and respond to regulation'.[41] However, there is increased realisation of the learning value gained from the experiences of private actors in the implementation of regulation in practice, considering the pressing issues affecting compliance. Indeed, compliance is 'fundamentally linked with the social and structural contexts of individual compliance agents'.[42] In the context of AML, an example of this is Iafolla's research on how bank employees exercise discretion in deciding whether a particular transaction is 'risky'.[43] With this research, she demonstrates how personally-held ideas can influence the decision of whether to report a transaction to the compliance department.[44] Similarly, in analysing the views of money laundering compliance officers, Verhage shows how compliance 'remains a battle between commercial interests on the one hand, and rule

[40] Though there are notable exceptions such as C. Parker and V. Lehmann Nielson, 'Do Businesses Take Compliance Systems Seriously – An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia' (2006) 30 *Melbourne University Law Review* 441.

[41] G.C. Gray and S.S. Silbey, 'The Other Side of the Compliance Relationship' in C. Parker and V. Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar, 2011) 123.

[42] *ibid*, 127.

[43] V. Iafolla, 'The Production of Suspicion in Retail Banking: An Examination of Unusual Transaction Reporting' in C. King, C. Walker, and J. Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (London: Palgrave Macmillan, 2018).

[44] *ibid*. For consideration of profiling and SARs in the context of counter-terrorism finance, see N. Ryder and U. Turksen, 'Banks in defence of the homeland: Nexus of ethics and suspicious activity reporting' (2013) 12 *Contemporary Issues in Law* 311.

observance on the other',[45] and it does not necessarily aim at preventing money laundering risks.[46]

By focusing on the UK real estate sector, this article offers new insights into the operation of AML. There are advantages to looking at AML compliance from the perspective of the regulated. Indeed, EAs can offer practical insights and suggestions for improving the AML regime. However, it should be recognised that the narratives presented here must be approached critically. Indeed, there is a widely portrayed view of EAs as self-interested actors who will do anything for their own benefit and who must be held accountable.[47] Almost invariably, such reports reinforce views that there are weaknesses in regulation, such as the AML regime, and that more needs to be done. Nonetheless, it is essential to consider grievances expressed by EAs (and other private actors) as to the practical difficulties involved in AML compliance. Indeed, 'Ignoring an individual's grievances or concerns is unlikely to foster a sense that the authority has used procedural justice'.[48] Moreover, private actors are more likely to comply where they feel that they are treated fairly in the operation of the AML regime.[49]

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[45] n 2 above, 68.

[46] *ibid*.

[47] For recent media reports related to money laundering, see BBC News, 'Countrywide Fined £215,000 Over Money-Laundering Failings' (4 March 2019); J. Evans, 'UK Estate Agents Hit by Crackdown on Money Laundering', *Financial Times* (9 March 2019).

[48] K. Murphy, 'Procedural Justice and Its Role in Promoting Voluntary Compliance' in P. Drahos (ed), *Regulatory Theory: Foundations and Applications* (Acton: ANU Press, 2017) 47.

[49] T.R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime & Justice* 283.

This article employs a mixed methodology that includes doctrinal and empirical research. In particular, the article presents an analysis of the existing UK AML legislation and relevant policies alongside a critical examination of qualitative data. In this regard, seventeen semi-structured interviews were conducted with EAs and compliance officials.[50] To ensure diverse perspectives, we contacted a range of potential participants, from large, multi-office agencies to smaller local agencies, including both buying and selling agents. We recognise that seventeen interviews are not generalisable to the entire industry, however, alongside the caveats mentioned below, this number did enable us to gain some practical insight into the operation of AML obligations by private actors who are seen as 'the first line of defence'.[51] The interviews lasted an average of one hour. Twelve interviews were audio-recorded and transcribed, while for the other five interviews, the interviewer took detailed notes. The interviews' content was subsequently analysed using NVIVO, focusing on both specific aspects peculiar to each interview and shared key themes that emerged from the whole sample of interviews.[52]

[50] Ethical approval was granted by the University of Sussex (reference: ER/CK298/3).

[51] Home Office and HM Treasury, *Action Plan for Anti-Money Laundering and Counter-Terrorist Finance* (April 2016) 12.

[52] A number of themes arose in this analysis, including money laundering red flags; awareness and understanding of AML obligations; implementation and compliance; specific activities of real estate professionals; opinions on the AML regime; views of, and engagement with, regulators and law enforcement; and emerging issues (e.g. Brexit; cryptocurrencies). For discussion of some of these themes not covered in this article, see I. Zavoli and C. King, 'Preventive AML in the UK property market: inside views from the sector' in P. van Duyne et al (eds), *Criminal defiance in Europe and beyond: From organised crime to crime-terror nexus* (Eleven International Publishing, 2020); I. Zavoli, 'The use of

We deliberately decided not to interview law enforcement officials or regulators for this project,[53] as the focus was on the perspectives of those subject to regulation and how they apply AML rules. Two further caveats must be acknowledged: access and bias/validity.[54] First, it was not entirely straightforward to gain access to potential interviewees. While contact details of estate agencies are available online, the topic of AML-research tends to arouse suspicion. Some agencies that we contacted did not respond to our emails, while others responded but declined to take part.[55] Second, the fact that a particular agent did/did not participate in this study does not imply that they are/are not compliant with AML obligations. In this regard, it must be recognised that where a particular individual is knowingly involved in ML, then that person would be unlikely to be willing to participate in this study.

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cryptocurrency in the UK real estate market: An assessment of money laundering risks' in K. Benson et al (eds), *Assets, Crime and the State: Innovations in 21st Century Legal Responses* (Oxon: Routledge, 2020).

[53] However, these backgrounds are represented on our Advisory Board. The Advisory Board consisted of an investigator in the National Crime Agency; a financial intelligence officer in the Metropolitan Police; a barrister; an official in an NGO; and a senior (international) academic.

[54] For wider discussion, see N. Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) 8 *The Qualitative Report* 597.

[55] For example, a typical reply would come from a PA saying: 'I have spoken with XXX regarding your request and regretfully he is unable to participate at this time but thanks you for your interest in our company.' Others replied directly to say, for example, 'Thank you for contacting me but unfortunately I do not have the time to commit to this interview.'; or 'Over the years I have spent many hours participating in government surveys and my experience has been that they listen politely but do not take any notice whatsoever. As a consequence, I have stopped participating - Sorry'.

Regulation of estate agents and the UK anti-money laundering framework

There are many reasons why regulation in a particular sector or profession might be desirable.[56] For example, where a situation calls for skill or expertise in dealing with a task, then insistence upon a certain standard of skill might be necessary. The medical profession is an obvious example: it makes sense to regulate the profession to ensure high standards and quality of care for patients. On the other hand, there are also reasons not to require regulation, such as, for instance, entry restrictions into a sector or increased costs. Debates as to the regulation of EAs[57] (or 'estate agency work', which is the term used in the Estate Agents Act 1979) have been ongoing for quite some time, and they have demonstrated motivations of regulatory capture, public interest, and/or asymmetric

[56] For consideration of what 'regulation' is, see J. Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; B. Orbach, 'What is Regulation?' (2012) 30 *Yale Journal on Regulation Online* 1.

[57] For recent review, see Regulation of Property Agents Working Group, *Final Report* (July 2019) 11. Chair: Lord Best.

information.[58] Nowadays, EAs are subject to a myriad of regulations[59] (although some still describe this sector as a 'Wild West' habited by 'rogues'[60]).

One aspect of regulation that is particularly relevant for the work of EAs is AML. As noted earlier, there is a significant focus on the property market as a destination for laundering criminal proceeds.[61] Here, public interest aspects of regulation are strikingly evident. For example, it can be argued that EAs are at the front line and are well-positioned to contribute to AML efforts; EAs are under a moral obligation to do so; and the importance of AML justifies the imposition of legal obligations. Such arguments are

[58] For consideration of historical efforts, see M. Latham, '"A Fraud, a Drunkard, and a Worthless Scamp": Estate Agents, Regulation, and Realtors in the Interwar Period' (2017) 59 *Business History* 690; P. Shears, 'Hang Your Shingle and Carry On: Estate Agents – The Unlicensed UK Profession' (2009) 27 *Property Management* 191. For wider consideration of motivation and regulation, see M. Law and S. Kim, 'Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation' (2005) 65 *Journal of Economic History* 723.

[59] See, for example, Estate Agents Act 1979; there is also other legislation not specific to estate agents, but which is applicable, such as the Consumer Protection from Unfair Trading Regulations 2008. A further avenue of regulation is industry self-regulation, for example through the various representative bodies (such as NAEA Propertymark (the National Association of Estate Agents)), though 'it is not clear that there is an effective self-regulatory system for the sector as a whole'. Regulation of Property Agents Working Group, *Final Report* (July 2019) 11. Chair: Lord Best.

[60] BBC News, 'Government to Crack Down on 'Rogue' Estate Agents' (8 April 2018); M. Hunt, 'Got an Issue with Your Rogue Estate Agent or Letting Agent? Here's How You Can Claim compensation', *The Telegraph* (20 November 2019).

[61] See n 21 above.

prevalent and indeed are also extended to other sectors.[62] This article thus considers the perspective from the other side,[63] to examine practical obstacles to the implementation of AML in practice. Before considering the empirical findings of this study, it is important to recall some aspects of the applicable AML regime that will also be critical for the analysis of our data.

The UK AML regime encompasses both a repressive (i.e. criminal law) and a preventive approach.[64] The key criminal law legislation today is the Proceeds of Crime Act 2002 (POCA).[65] The principal money laundering offences are: concealing, disguising, converting, transferring or removing from the jurisdiction criminal property;[66] entering into or becoming concerned in an arrangement which she knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person;[67] and acquiring, using, or having possession of criminal property.[68] In addition, there are secondary offences concerned with 'failing to disclose' and 'tipping off'.[69] Alongside POCA, another important piece of legislation

[62] S. Hufnagel and C. King, 'Anti-Money Laundering Regulation and the Art Market' (2020) 40 *Legal Studies* 131.

[63] See n 41 above.

[64] G. Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge: CUP, 2000) 108.

[65] Earlier legislation also dealt with money laundering. For example, the Criminal Justice Act 1988, Part VI. On the historical development, see *R v Montila* [2004] UKHL 50.

[66] POCA, s 327. S 340 defines 'criminal property'.

[67] POCA, s 328.

[68] POCA, s 329.

[69] POCA, ss 330-333.

is the ML Regs 2017.[70] These Regulations contain key provisions concerning the AML regime, including: identifying the 'relevant persons' that the Regulations apply to;[71] specifying risk assessment steps and policies, controls and procedures that must be taken or put in place by 'relevant persons';[72] providing for training requirements;[73] requiring customer due diligence (CDD) measures;[74] and providing for reliance on third-party CDD checks[75] as well as for maintaining records.[76] There are also specific provisions concerning supervision and registration;[77] information gathering and investigatory powers;[78] and enforcement.[79]

As previously indicated, the objective of this article is to examine how the AML regime operates in practice, informed by experiences of estate agents and compliance officials. This focus is deliberate: in recent years, there has been significant policy discourse emphasising the role of professional enablers or gatekeepers in facilitating money laundering. For example, the 2017 UK National Risk Assessment (NRA) noted

[70] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The 'relevant persons' subject to the Regulations are set out in Reg 8. The supervisory authority for estate agency businesses is HM Revenue and Customs (HMRC).

[71] ML Regs, Part 2. Estate agents are specifically identified in Regs.8(2)(f) and 13.

[72] ML Regs, Regs 18-21.

[73] ML Regs, Reg 24.

[74] ML Regs, Part 3.

[75] ML Regs, Reg 39.

[76] ML Regs, Reg 40.

[77] ML Regs, Part 6.

[78] ML Regs, Part 8.

[79] ML Regs, Part 9.

the threat of money launderers 'exploiting UK and overseas financial and professional services industries'.[80] Specifically, in relation to EAs, the NRA identified key risks such as being used to help buy and sell property to launder criminal funds; complicit agents helping criminals buy or sell property; perceived low understanding of risks in the sector, and low compliance with the ML Regs.[81] The FATF expressed similar sentiments in its 2018 Evaluation: 'Estate agent businesses do not have a significant understanding of their risks or how to effectively mitigate them',[82] although it did also note that compliance standards have improved.[83]

When examining the UK AML framework, a key aspect that emerges is the role of and the function attributed to private actors. Indeed, alongside other private actors, estate agents have been enlisted in 'policing' activities (specifically 'following-the-money' strategies to tackle crime).[84] This is particularly evident in the AML context, where private actors are expected to conduct checks on their clients and to report

[80] HM Treasury and Home Office, *National Risk Assessment of Money Laundering and Terrorist Financing 2017* (October 2017) 19.

[81] *ibid*, 54.

[82] FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures - United Kingdom, Mutual Evaluation Report* (December 2018) para 288.

[83] *ibid*, para 312.

[84] On such responsibilisation of private actors, see P. O'Malley and D. Palmer, 'Post-Keynesian Policing' (1996) 25 *Economy and Society* 137; D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: OUP, 2001) 126; G.C. Gray, 'The Responsibilization Strategy of Health and Safety: Neo-liberalism and the Reconfiguration of Individual Responsibility for Risk' (2009) 49 *British Journal of Criminology* 326.

suspicions to law enforcement agencies.[85] For many, AML requirements are seen as a form of government outsourcing of regulatory responsibility,[86] or, as the UK AML/CTF Action Plan puts it, the private sector is 'the first line of defence'.[87] Thus, the rest of this article examines how this 'first line of defence' operates in practice, from the perspective of those doing AML.

Customer Due Diligence

Doing CDD

The role of private actors is starkly evidenced in obligations to conduct CDD checks and to report any suspicions (concerning customers or specific transactions) to the authorities. For example, where a relevant person is required to conduct CDD checks,[88] the obligations are to:

[85] See M. Egan, 'The Role of the Regulated Sector in the UK Anti-Money Laundering Framework: Pushing the Boundaries of the Private Police' (2010) 6 *Journal of Contemporary European Research* 272, 285 who contends that 'the implementation of AML measures by the regulated sector increases the amount of intelligence available to policing agencies and thereby assists the public police in making appropriate operational choices'.

[86] See n 2 above, 79-80.

[87] Home Office and HM Treasury, *Action Plan for Anti-Money Laundering and Counter-Terrorist Finance* (April 2016) 12.

[88] As provided for by ML Regs, Reg 27(1).

(a) identify the customer unless the identity of that customer is known to, and has been verified by, the relevant person;

(b) verify the customer's identity unless the customer's identity has already been verified by the relevant person; and

(c) assess, and where appropriate obtain information on, the purpose and intended nature of the business relationship or occasional transaction.[89]

In addition, the relevant person must conduct ongoing monitoring of a business relationship, including scrutiny of transactions and undertaking reviews of records and keeping documentation up-to-date.[90] Thus, this level of scrutiny can change the relationship between the company and its clients, with a shift from 'trust' to 'suspicion'[91] and with potential client alienation.[92]

As a consequence, it is unsurprising that CDD requirements impact EAs' practice and their business. Our data shows that there was some disquiet among EAs about asking for relevant documentation from people that they know well, sometimes for many years.[93] To avoid jeopardising their business, some interviewees referred to methods they adopted to balance the need for checks with the maintenance of a trustworthy relationship with their clients. For instance, one EA spoke of exercising discretion to use a more light-touch

[89] ML Regs, Reg 28(2).

[90] ML Regs, Reg 28(11).

[91] n 34 above, 1050.

[92] M. Gill and G. Taylor, 'Preventing Money Laundering or Obstructing Business? Financial Companies' Perspectives on "Know Your Customer" Procedures' (2004) 44 *British Journal of Criminology* 582, 587.

[93] eg Interview 14.

approach (or simplified due diligence) where, for example, 'the lady is 92 and we've got evidence of the fact she's lived in that house for 42 years'.[94] Another interviewee stated that they still go through relevant checks with someone that they have known, personally or professionally, for many years, but that this person would be 'in a different category' and would not set off alarm bells.[95] Moreover, even when EAs require more details on a customer, alternative approaches are used. For instance, some interviewees spoke about the use of internet searches and LinkedIn (and even Facebook) to find further information.[96] Thus, EAs appear to adopt a pragmatic, indeed flexible, approach depending on the circumstances of particular situations.

Nonetheless, it was stressed that CDD must still be done,[97] and that legitimate buyers would usually do their utmost to provide all requested information.[98] In this regard, some EAs mentioned the fact that the prevalence of CDD checks nowadays means that most people understand that AML checks are being carried out and that some clients (e.g. those who work in financial services) might consider it peculiar if they were not asked for relevant documentation.[99] However, difficulties might arise in doing CDD checks, especially with specific categories of customers, like foreign buyers. Indeed, some interviewees mentioned difficulties with doing CDD checks on foreign buyers, for

[94] Interview 1.

[95] Interview 2.

[96] eg Interviews 3; 12.

[97] eg Interview 2.

[98] eg Interview 3.

[99] eg Interviews 8; 14.

example, because there might be no face-to-face contact.[100] A related difficulty is where documentation might be fake: 'It is absurd to put the obligation on estate agents to check whether a passport is fake. What if it is Russian and it is in Cyrillic'.[101] Therefore, EAs seem to be placed in a position of vulnerability[102] because they are required to conduct CDD checks but are confronted with significant practical obstacles to compliance. Practical obstacles were a recurring theme in this research; while many participants expressed positive support for the AML regime, such support is impacted by its operation in practice, and the expectations imposed on private actors. Not only do practical obstacles make it more challenging to comply with legal obligations, there are additional costs, and also opportunity costs, for businesses (as will be discussed in later sections).

One particular difficulty relates not necessarily to a person's identity or proof of funds, but rather to the source of funds.[103] By definition, a money launderer would have money available to launder. Thus, it will often require a judgement call by EAs:

> Often they'll see a bank statement which has got a couple million quid in it, but of course there's no evidence to suggest where that money came from. It may have gone in 5 minutes before you saw it, it might go out 5 minutes afterwards. It's really building up a picture, carrying out a risk assessment as to whether this person you're dealing with, you think they are likely to have 2

[100] eg Interview 1.

[101] Interview 6.

[102] See M. Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251.

[103] eg Interviews 3; 9.

> million legitimate pounds in their pocket and that of course is a judgment call.[104]

This focus on making judgement calls aligns with previous research conducted by Gill and Taylor. They state that regulated companies have to assess the evidence available to them and to make 'a very difficult judgment' (especially in the context of financially excluded individuals).[105] Moreover, as Gelemerova notes, judgement calls are inherently subjective and often involve considerations of striking a balance, as part of a risk assessment/ risk management approach.[106] Furthermore, the judgement can be influenced by broader considerations, like the perception of a person as 'out of place' in a particular transaction.[107] This multifaceted sway is particularly important in the context of risk-management, given the potential for false positives (i.e. wrongly identifying a risk and acting upon that) and false negatives (i.e. failing to identify a risk and failing to take appropriate action).[108] Moreover, the costs of a wrong judgment call can be significant: losing commission on, say, a £2 million transaction (as alluded to in the above quote) in

[104] Interview 3.

[105] n 92 above, 588.

[106] L. Gelemerova, 'On the frontline against money-laundering: the regulatory minefield' (2008) 52 *Crime, Law and Social Change* 33, 47.

[107] M. Levi, 'Money for Crime and Money From Crime: Financing Crime and Laundering Crime Proceeds' (2015) 21 *European Journal on Criminal Policy and Research* 275.

[108] R. Ericson, 'Ten Uncertainties of Risk-Management Approaches to Security' (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 345, 348.

the case of a false positive, or being caught up in a money laundering investigation and/or media scandal in the case of a false negative.

Finally, amongst our interviewees a significant criticism of how CDD operates concerns the doubling- or tripling-up of checks - for example, CDD being done by a bank, a solicitor, and an EA,[109] costing time and money every time. As suggested by some interviewees, if there were a central place (or process) for AML checks, that would reduce the cost for clients.[110] However, there are practical difficulties with such a suggestion, for example, in relation to privacy and security concerns.

CDD in practice: Politically Exposed Persons

A PEP is an individual who is (or has been) entrusted with a prominent public function.[111] Given this status, there is the possibility of abuse of position. Indeed, there are many situations where government officials, or their families and associates, have engaged in corruption. Notable examples include the Marcos family in the Philippines and the Abacha family in Nigeria.[112] In many instances, PEPs (whether foreign or domestic) will try to launder their corrupt proceeds.[113] Thus, AML requirements are regarded as playing an important role to tackle these criminal activities, and the operation of such obligations, such as CDD checks, offers interesting insights into practical realities.

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[109] eg Interviews 4; 11; 12; 13.

[110] eg Interview 9.

[111] FATF, *FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)* (June 2013) 3.

[112] For discussion of kleptocracy, see n 16 above.

[113] For wider consideration, see FATF, *Laundering the Proceeds of Corruption* (July 2011).

Of course, the mere fact that a person is a PEP does not necessarily mean that that person is engaged in criminal activities, nor should it automatically arouse suspicion. As a precaution, however, the AML regime provides for specific guidelines and principles that apply when EAs enter into a business relationship with PEPs. As the FATF Guidance points out,

> When considering whether to establish or continue a business relationship with a PEP, the focus should be on the level of ML/TF risk associated with the particular PEP, and whether the financial institution or DNFBP has adequate controls in place to mitigate that ML/TF risk so as to avoid the institution from being abused for illicit purposes should the PEP be involved in criminal activity.[114]

Under the UK ML Regs 2017, a 'relevant person' must apply enhanced CDD checks and enhanced ongoing monitoring when dealing with PEPs (or family or known close associates).[115] For example, Regulation 35(3) requires an assessment of '(a) the level of risk associated with that customer, and (b) the extent of the enhanced customer due diligence measures to be applied in relation to that customer'.

[114] n 111 above, 7.

[115] See ML Regs, Regs 33 and 35.

An obvious point in this regard is whether a PEP is identified as such by private actors.[116] In our study, difficulties in identifying someone as a PEP were noted. For example, it was suggested that a person involved in bribery or corruption in a developing country is unlikely to be forthcoming with their role as, say, a judge or senior civil servant.[117] Indeed, there was scorn for the oft-asserted view (for example in training courses) that the best way to identify a PEP is to ask them: 'Well, if I'm a dodgy PEP who's using bribery from my Russian foreign deal, am I really gonna say, "Yeah, I'm a PEP"'.[118] Given the requirements of enhanced CDD and monitoring of PEPs, it is essential that EAs can identify such a person. Difficulties in this area were aptly summed up by one interviewee when discussing a lack of AML compliance:

> I don't think it's from much around customer due diligence, it's around that understanding of the PEPs and the financial sanctions, and I think it's a case of if you went in and started a talk to a negotiator on the front desk and said to them, "Explain to me what a PEP is. Explain to me when you look at financial sanctions". I don't know whether they could really, fully, go into those details as to what they're looking for. I think they all have a really, really good understanding of, "I need to confirm somebody's identity and where

[116] On the challenges of identification, see Z. Miltina et al, 'Model for Identification of Politically Exposed Persons' in B. Johansson et al (eds), *Perspectives in Business Informatics Research* (Cham: Springer, 2017).

[117] eg Interview 1.

[118] Interview 9.

> they live", I think it's the other ancillary bits to the money laundering regulations.[119]

Similarly, another interviewee stated: 'PEP is something that the majority of the industry don't understand and don't know how to deal with'.[120] The issue here relates not to the legislation itself, but to its operation in practice. If regulated actors are unable to identify those individuals where enhanced checks ought to be conducted, then – irrespective of what is specified in legislation – there will be a lacuna in practice.

To mitigate the risks associated with a transaction involving a PEP, some EAs have adopted the approach of automatically conducting enhanced checks where they think that someone is involved in politics (whether in the UK or abroad).[121] Risk management is thus evident; however, such a blanket approach is an example of regulatory over-compliance. In other words, when faced with uncertainty, regulated actors are going beyond the requirements of the AML regime to manage the risks involved.[122] This then runs counter to the risk-based approach and is reminiscent of a rules-based approach whereby secondary risk management strategies are adopted as additional protection by regulated actors.[123] Some interviewees mentioned certain nationalities and how their behaviour can be confusing, but then stated that that might

[119] Interview 13.

[120] Interview 9.

[121] eg Interview 1.

[122] For similar argument in the context of financial institutions, see E. Tsingou, 'New Governors on the Block: The Rise of Anti-Money Laundering Professionals' (2018) 69 *Crime, Law and Social Change* 191.

[123] M. Power, 'The Risk Management of Everything' (2004) 5 *Journal of Risk Finance* 58.

simply be 'a cultural thing'.[124] A difficulty in practice, though, is that individual (mis)conceptions as to what is *normal* or *unusual* can influence how AML rules are applied in practice. As Iafolla points out in the context of the banking sector, 'clients who do not conform to preconceived social roles may be viewed with increased suspicion and subject to further risk analysis and scrutiny, whether or not their transactions are legitimate'.[125]

In contrast to efforts where PEPs themselves are involved in a transaction, some interviewees expressed disquiet about doing AML checks on PEP family members,[126] even though such reluctance runs counter to perceptions of vulnerability to ML.[127] This is a significant finding given that perceptions of legitimacy can influence compliance; as Valerie Braithwaite points out in her research on tax compliance, 'compliance may be thought of as framing the analysis of how authorities might go about eliciting public cooperation within a regulatory field. Legitimacy is broader, framing the analysis of whether or not the existence of the regulatory field is justified'.[128] Given the emphasis on PEP family members and associates being involved in laundering proceeds of

[124] Interview 14.

[125] n 43 above, 101.

[126] eg Interview 13.

[127] See n 92 above, 589.

[128] V. Braithwaite, 'Resistant and Dismissive Defiance Towards Tax Authorities' in A. Crawford and A. Hucklesby (eds), *Legitimacy and Compliance in Criminal Justice* (New York and London: Routledge, 2012) 93.

corruption,[129] the lack of *commitment*[130] in relation to an apparent vulnerability for money laundering demonstrates that the legitimacy of the particular rules is questioned.

A further aspect of the operation of AML rules in the PEP context is third-party checks. Some EAs rely on outside companies (such as Experian and Smart Search) for AML checks against PEPs.[131] The 2017 Regulations do permit reliance on third-party CDD checks, but they explicitly provide that: 'notwithstanding the relevant person's reliance on the third party, the relevant person remains liable for any failure to apply such measures'.[132] Curiously, some interviewees suggested that reliance on outside companies might absolve them of liability if anything goes wrong: 'they take on the responsibility. So, if something slips through it's on them not on us'[133] (reliance on third-party checks is discussed further in the next section).

From the data above, it seems that the operation of AML rules in practice is haphazard given a lack of clarity - not so much as to *what* is required (i.e. checking identity and address), but rather *when* the rules apply and *how* best to apply them. Given this context, then, it is unsurprising that - in their survey of MLROs - Gill and Taylor

[129] See FATF, *Laundering the Proceeds of Corruption* (July 2011).

[130] As Braithwaite notes, commitment 'conveys a belief that the regulatory purpose is sound and that the regulatory system should be valued and supported by everyone'. V. Braithwaite, 'Resistant and Dismissive Defiance Towards Tax Authorities' in A. Crawford and A. Hucklesby (eds), *Legitimacy and Compliance in Criminal Justice* (New York and London: Routledge, 2012) 97.

[131] eg Interview 8.

[132] ML Regs, Reg 39(1).

[133] Interview 8.

concluded that 'A very clear majority of respondents felt that KYC procedures would not prevent money laundering by PEPs, either in the UK or abroad'.[134]

Reliance on third-party checks

A recurring issue in our interviews was whether EAs could rely on CDD checks by a third-party.[135] As already noted above, such third-party reliance is permitted under the Money Laundering Regulations.[136] Our empirical findings concerning this issue can be grouped into three approaches: 1. those that actively embrace the option and collaborate with trusted colleagues; 2. those that rely upon checks done by others as a means of absolving themselves; and 3. those that do not rely upon checks done by others out of an abundance of caution.

With the first approach above, some interviewees noted that they are relying upon checks done by others and that a group of different agencies have come together to set up a best practice forum.[137] It was said that they are willing to rely upon checks done by each other, but not information received from other agencies.[138] This fact lends support to the idea of a 'club' spirit, where competition is put aside, and a common approach is adopted

[134] n 92 above, 589.

[135] To rely on checks by a third-party, that third-party must fall within the requirements specified in ML Regs, Reg 39(3).

[136] ML Regs, Reg 39.

[137] eg Interview 11.

[138] eg Interview 11.

against dirty money.[139] In other instances – the second approach - it emerged that some EAs attempt to rely upon checks by others as a way of relieving themselves of responsibility under the Money Laundering Regulations. One interviewee described a particular EA who has a standard form with a section for the conveyancer to complete to say that AML checks have been completed: 'So, they were automatically trying to pass the buck without any dialogue at all, no knowledge of whether that conveyancer was solid themselves, anything like that'.[140] This approach seems to confirm the idea that 'much compliance is multifaceted'[141] and, therefore, various (sometimes very different) reasons can drive compliance and the obliged subjects' approaches to AML.[142] Thus, this second approach represents a middle-ground position between acting and non-acting, trust and suspect, where EAs' compliance is driven by a formal fulfilment of their obligations rather than a direct commitment.[143] Other interviewees spoke about being careful to comply with AML rules, and that they have not yet had any concerns that prompted the filing of a SAR. One person argued that the reason for this is that she already knows many

[139] G. Favarel-Garrigues, T. Godefroy, and P. Lascoumes, 'Reluctant Partners? Banks in the Fight Against Money Laundering and Terrorism Financing in France' (2011) 42 *Security Dialogue* 179, 189.

[140] Interview 9.

[141] A. Bottoms, 'Understanding Compliance with Laws and Regulations: A Mechanism-Based Approach' in M. Krambia-Kapardis (ed), *Financial Compliance: Issues, Concerns and Future Directions* (Cham: Palgrave MacMillan, 2019) 32.

[142] *ibid*.

[143] On this ambivalence, see A. Verhage, 'Between the Hammer and the Anvil? The Anti-Money Laundering-Complex and Its Interactions With the Compliance Industry' (2009) 52 *Crime, Law and Social Change* 9, 23.

of her clients. If she did not know the person, and it involved 'a top-end purchase' then, she said, she would 'ask them to be qualified by their lawyer or by their bank'.[144] She continued: 'So, we sort of don't really have a need to be concerned, 'cause you sort of know who they are. And, you can Google them, and you can check them up on, you know, the internet, these days, so…'.[145] What is evident from this approach is a sense of self-justification, particularly where there is ambiguity about the correct way to behave: 'The greater the ambiguity of the situation, the more people will feel confident in their own ethicality'.[146] Finally, under the third approach, some interviewees noted that although the Regulations permit the use of third-party CDD checks, EAs remain liable if something goes wrong.[147] Therefore, they will not rely upon CDD checks by others on that basis.[148] In this regard, once again, we see evidence of regulatory over-compliance, whereby – to minimise risk – regulated actors are cautious in application of AML rules, instead preferring to strictly comply so as to maintain control and certainty.

Impact on business

Where regulation impacts upon businesses/individuals, it is unsurprising that regulatees might reflect upon how are impacted. In this study, interviewees reflected upon how AML

[144] Interview 12.

[145] Interview 12.

[146] Y. Feldman, *The Law of Good People: Challenging States' Ability to Regulate Human Behavior* (Cambridge: CUP, 2018) 195. We thank Liz David-Barrett for this point on behavioural ethics.

[147] eg Interview 10: 'whether you rely upon somebody else to do the CDD and then provide it to you, you still remain liable under the current regulations'. See ML Regs, Reg 39(1).

[148] eg Interview 8.

obligations affect them. When discussing the implementation of CDD checks, for example, there was criticism of how AML can impact upon the sale process. Indeed, CDD checks can impact both customers and EAs negatively. For example, if an EA experiences a delay when doing AML checks upon a potential buyer, that impacts upon the transaction. So, the client is inconvenienced. Moreover, such delays might open up the possibility of another agent coming along with a different buyer and thus causing the initial agent to lose a sale.[149] In this sense, concerns were expressed that a firm that complies with AML requirements might be regarded as 'kind of a pain for people to buy through' simply because they do AML checks, thus putting those firms at a disadvantage compared to others that are not doing the same checks.[150] Thus, there can potentially be a disincentive to compliance. Some sales EAs have tried to manage the risk of losing a transaction by doing AML checks at an early stage (before putting an offer to their client, the vendor).[151] In other words, they pre-emptively conduct CDD checks to ensure that everything is in order so that, if the transaction does proceed, it reduces the risk of it collapsing at a later stage due to AML discrepancies.

It was noted that if an EA asks too many questions, then a person trying to launder money through that agency can simply withdraw with no consequences, by merely saying that they have changed their mind and no longer want to purchase the particular

[149] eg Interview 12.

[150] Interview 8. For wider consideration, see S. Shapiro and R. Rabinowitz, 'Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA' (1997) 49 *Administrative Law Review* 713.

[151] eg Interview 8.

property.[152] Thus, the very act of asking questions and seeking to comply with AML obligations could impact an EA's business, potentially making them less likely to comply. Indeed, an EA might well develop an unfavourable, or defiant, attitude towards AML obligations where those obligations impact their business, even where they are generally supportive of the aims of the AML regime.[153] That said, the risk management strategy noted earlier, namely conducting CDD checks at an early stage, allows for such instances to be weeded out. Such a strategy will not always work, however. For example, in previous studies, concerns have been expressed about the negative impact of AML requirements on one-off or time-sensitive products (e.g. stocks and shares).[154] In our research, similar misgivings were evident for some EAs. For example, there can be difficulties where there is pressure to exchange contracts quickly; in such instances, it might not be possible to conclude full AML checks before completion.[155] The EA is thus faced with a conundrum: comply and potentially lose a commission, or do not comply and risk prosecution.

[152] eg Interview 9.

[153] For wider discussion on defiance, see n 128 above.

[154] See n 92 above, 590.

[155] eg Interview 11.

Reporting suspicion

Process

The concept of 'suspicion' has been described as the 'keystone' of the AML regime, and it underpins the suspicious activity reports (SARs) process.[156] The obligation to report arises under POCA, which provides for 'required disclosures'[157] and 'authorised disclosures'.[158] In both instances, a failure to report can result in criminal prosecution. Authorised disclosures have an additional role in that they provide intelligence to law enforcement authorities. According to Donald Toon of the National Crime Agency (NCA), 'the financial intelligence contained within SARs and UKFIU international requests enhances the intelligence picture against money laundering and all serious and organised crime threats'.[159] Such intelligence, however, stems from EAs doing 'spying and detective work'[160] or 'being asked to be the eyes and ears of the State'.[161] Some interviewees suggested that they do not have the skill nor expertise to carry out such a

[156] Law Commission, *Anti-Money Laundering: The SARs Regime* (HC 2098, June 2019), para 5.2. For consideration of suspicion, see *R v Da Silva* [2006] EWCA Crim 1654, paras 16-17.

[157] POCA, ss 330-332.

[158] POCA, ss 327-329.

[159] NCA, *Suspicious Activity Reports (SARs) Annual Report 2018*, 'Statement by the Chair of the SARs Regime Committee'. See A. Verhage, 'Great Expectations but Little Evidence: Policing Money Laundering' (2017) 37 *International Journal of Sociology and Social Policy* 477, 480 where the AML reporting system is described as 'a coalition of public and private partners involved in all-inclusive surveillance'.

[160] Interview 12.

[161] Interview 3.

role. For example, it was said that checking identification documentation is fine, but investigating the source of funds involving overseas trusts might be beyond the understanding of EAs.[162] Moreover, obligations to report may undermine relationships of trust and confidentiality with a client.[163]

From the foregoing, an important question arises as to how EAs approach decisions to file a report. Some interviewees spoke of different methods that they adopt, such as the 'smell test': if something appears 'a little bit odd' you should take a step back and ask whether that should be reported to the MLRO.[164] A traffic-lights system was also suggested: if everything is right, then it is green; if there is something wrong, but not a criminal offence (e.g. a form has not been completed correctly), then it is amber; and if something is a 'fail' under the ML Regs, then it is a red.[165] Filing SARs becomes, therefore, an activity which relies upon individual perceptions and choices, and there is no common approach. Not only does this result in a scattered and (possibly) inconsistent approach to potential suspicious activities, but it also emphasises different levels of experience and, therefore, capacity to detect and 'smell' such activities.

There is extensive literature that suggests that process-based regulation significantly influences people's reactions to their experiences with authorities.[166] It is useful, then, to consider EAs attitudes towards the SARs filing process. SARs are reported

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[162] eg Interview 7.

[163] J. Ayling and P. Grabosky, 'Policing by Command: Enhancing Law Enforcement Capacity through Coercion' (2006) 28 *Law and Policy* 417, 426-427.

[164] eg Interview 1.

[165] eg Interview 1.

[166] See J. Braithwaite and T. Makkai, 'Trust and Compliance' (1994) 4 *Policing and Society* 1.

to the UK Financial Intelligence Unit (UKFIU), which is based within the NCA. Theoretically, filing a SAR ought to be relatively straightforward,[167] but our data suggests that this is not always the case. One criticism mounted against the SAR system concerned its design: it is a system designed for the banking sector, and it does not fit well into other sectors.[168] As one person succinctly puts it: 'It is cumbersome'.[169] Others suggested that even if there is some suspicion, it might not be possible to file a SAR as there is not enough information for that system to accept the SAR.[170] There was also disapproval for the registration process and its complexity. Indeed, an EA has an HMRC 'gateway', but if they want to file a SAR, they must do that through the NCA portal, which is not linked to the HMRC gateway. As one interviewee puts it, 'it's more complicated than it need be. … If I want to tip off the State, that I think something's dodgy going on, why not make it easy for me to do so?'.[171] It was also suggested that it should be possible to submit SARs anonymously: 'If I think one of my competitors is up to no good, I might prefer to

[167] A. Campbell and E. Campbell, 'Solicitors and Complying with the Anti-Money Laundering Framework: Reporting Suspicions, Applying for Consent and Tipping-Off' in N. Ryder, U. Turksen, and S. Hassler (eds), *Fighting Financial Crime in the Global Economic Crisis* (Oxon: Routledge, 2015). See also National Crime Agency, *Obtaining consent from the NCA under Part 7 of the Proceeds of Crime Act (POCA) 2002 or under Part 3 of the Terrorism Act (TACT) 2000* (October 2013).

[168] eg Interview 1.

[169] Interview 1.

[170] eg Interview 4.

[171] Interview 15.

anonymously tip off the state …, because I might not trust the state reassurances that I would receive anonymity anyway'.[172]

Given the value attached to the quality of interpersonal treatment by authorities,[173] it is significant that there was a perception of not being supported by AML authorities when engaging with the SAR process. Concerning the support from the State, one participant stated: 'It wasn't terribly responsive. … They didn't give me any advice. It was more like I'd ticked the box, that was the experience'.[174] Research in the banking sector demonstrates the importance of positive rapport and informal partnerships/ engagement between (AML) regulated actors and law enforcement.[175] While the relationship between (major) banks and financial institutions in the UK might be more engaging (perhaps unsurprising given the percentage of SARs that they submit[176]), other sectors do not necessarily experience the same support and engagement. In that regard,

[172] Interview 15.

[173] T.R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime & Justice* 283, 298.

[174] Interview 6.

[175] C. Eren, 'Cops, Firefighters, and Scapegoats: Anti-Money Laundering (AML) Professionals in an Era of Regulatory Bulimia' (2020) *Journal of White Collar and Corporate Crime*. Advance Access Online. DOI: 10.1177/2631309X20922153

[176] For a breakdown by sector, see NCA, *UK Financial Intelligence Unit Suspicious Activity Reports Annual Report* 2020, 9.

enhancing the process (and engagement therewith) may positively promote compliance.[177]

Linked to the lack of support is the lack of feedback: there is (generally) a unidirectional flow of information. Such a lack of two-way engagement can affect how the process operates because, for example, private actors do not develop knowledge as to what works or what is useful.[178] A recurring issue in this study was whether EAs should receive any update on SARs submitted. As one interviewee stated: 'It's a bottomless pit and you never get anything out'.[179] That person went on to say that 'it would be helpful to have feedback, to have pointers as to what to look for, because we are very much in the dark. We can't even talk to anyone else about it because of tipping off concerns'.[180] Others, however, thought that once a SAR is submitted, that is the end of the matter and there is no need to hear any more (unless the NCA asks for clarification).[181]

Feedback loops can be important in ensuring proper functioning of regulation, though there can be obstacles in practice. For instance, in the AML context, providing general, anonymised feedback on all the SARs submitted in a particular year by a large bank - that submits a substantial number of SARs - might well be unproblematic (albeit

[177] M. Rorie et al, 'Examining Procedural Justice and Legitimacy in Corporate Offending and Beyond-Compliance Behavior: The Efficacy of Direct and Indirect Regulatory Interactions' (2018) 40 *Law & Policy* 172.

[178] A. Verhage, 'Great Expectations but Little Evidence: Policing Money Laundering' (2017) 37 *International Journal of Sociology and Social Policy* 477, 482.

[179] Interview 11.

[180] Interview 11. Separately, there was considerable disquiet about the tipping off offence: eg Interview 5.

[181] eg Interview 15.

time-consuming for law enforcement), given the volume of SARs involved. In contrast, where a firm (whether estate agent or otherwise) submits a small number of SARs in a given year, it is almost impossible to fully maintain anonymity. Moreover, there are further considerations where an AML investigation is still ongoing. Nonetheless, there are benefits where regulated actors are able to see the benefits or outcomes of their particular contribution (in this instance, the filing of a SAR) to an investigation. This can take the form of direct communication from law enforcement or even seeing the outcome in the news;[182] indeed, seeing media reports of AML enforcement relating to the estate agent sector was positively commented upon by some interviewees, even if that was not related to their own actions.[183]

Interestingly, some noted the difficulties in maintaining confidentiality when filing a report. Whereas the only people who ought to know are the individual EA (who reports suspicion to the money laundering reporting officer (MLRO)) and the MLRO; the reality is otherwise. As one interviewee stated: this type of business

> mainly works in open plan offices as a team and therefore the whole team is going to know about the situation, particularly in the market now where we're fairly low volume of transactions so everybody is going to know, and therefore the risk of something getting out is far greater than it perhaps would be indicated by the regulations.[184]

[182] n 175 above.

[183] eg Interviews 1; 2; 4; 9.

[184] Interview 3.

This person went on to say that the ML Regs 'weren't written by someone who operates in the front-line of estate agents'.[185] This comment suggests a disconnection between the creation of AML rules on paper and their implementation into practice, with a criticism towards law-making and policy-making processes that do not align the theoretical expectations of the legislator with the reality on the frontline. This regulatory 'detachment' emerges both in relation to AML general principles and obligations, and their imposition on EAs, and the theoretical understanding of the practice of EAs and how they can implement AML regulation in their daily practice. This is a common thread that has emerged from our interviews and raises the question of the need to have a better understanding of the practices of different sectors when creating AML regulation.

Self-protection

A recurring theme in AML (particularly as regards CDD and reporting suspicions) is self-protection, which in many instances leads to a box-ticking approach. This theme arises from an AML regime that is 'designed in a way that inevitably provokes fear of penalties and reputational damage'.[186] Thus, there is an evident preference for a more rules-based approach on the part of private actors, or a 'desire for a totally automatic detection system that would obviate the need for individual decision making'.[187] Yet, such an approach

[185] Interview 3.

[186] n 106 above, 48.

[187] G. Favarel-Garrigues, T. Godefroy, and P. Lascoumes, 'Sentinels in the Banking Industry: Private Actors and the Fight against Money Laundering in France' (2008) 48 *British Journal of Criminology* 1, 11.

goes against the rationale underlying the risk-based approach in the AML regime. The rules-based approach accords, however, with the adoption of secondary risk management strategies to avoid potential blame should something go wrong.[188] Again here, EAs felt to be placed in a position of vulnerability.[189] In this regard, a key concern for private actors is to 'do whatever they can to protect themselves rather than do what they are expected to do'.[190] As a consequence, EAs do not act as a filter for suspicious activities; instead, often the approach adopted is that it is better to be safe than sorry and to report anything out of the ordinary. This emphasis, however, runs counter to the intentions of the risk-based approach, which was introduced to enhance the quality of reports from the

[188] See M. Power, 'The Risk Management of Everything' (2004) 5 *Journal of Risk Finance* 58, 63. For consideration of rules- and risk- based approaches in the context of AML, see G. Sinha, 'Risk-Based Approach: Is it the Answer to Effective Anti-Money Laundering Compliance?' in K. Benson. C. King, and C. Walker (eds), *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Oxon: Routledge, 2020).

[189] For wider discussion, see A. Grear, 'Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject' in M. Albertson Fineman and A. Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate, 2013). For consideration in other contexts, see E. Oakley and S. Vaughan, 'In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms (2019) 46 *Journal of Law and Society* 83.

[190] A. Bello, *Improving Anti-Money Laundering Compliance: Self-Protecting Theory and Money Laundering Reporting Officers* (Cham: Palgrave Macmillan, 2016) 48.

private sector. Thus, the result has been legal uncertainty for those subject to the AML regime,[191] whose focus is (usually) primarily on compliance with the law.[192]

In this study, such considerations were evident for many interviewees. Some spoke about doing the minimum that is required to be compliant,[193] and conducting checks simply 'to tick a box'[194] because EAs often 'want to be on the safe side'.[195] To this end, some interviewees spoke about having processes in place 'to cover their own backsides'.[196] Others have policies in place whereby if a person is still 'live' on their system (i.e. they are still dealing with that person), they will run AML checks on an annual basis.[197] Moreover, some interviewees put significant focus on covering themselves against future action:

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[191] V. Mitsilegas and N. Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23 *Maastricht Journal of European and Comparative Law* 261, 274; cf A. Bello and J. Harvey, 'From a Risk-Based to an Uncertainty Based Approach to Anti-Money Laundering Compliance' (2017) 30 *Security Journal* 24.

[192] B. Coombs-Goodfellow and M. Eshwar Lokanan, 'Anti-Money Laundering and Moral Intensity in Suspicious Activity Reporting: An Application of Jones' Issue Contingent Model' (2018) 21 *Journal of Money Laundering Control* 520; A. Verhage, 'Great Expectations but Little Evidence: Policing Money Laundering' (2017) 37 *International Journal of Sociology and Social Policy* 477.

[193] eg Interview 14.

[194] Interview 9. Also Interview 14.

[195] Interview 10.

[196] Interview 3.

[197] eg Interview 8.

> My main concern is to get the SAR in, to have it documented so that if it ever does go off I can then sit back and say, "We made a SAR on that date. That's not our problem, we've done what we are required to do in law, with a SAR. What you do with it, is up to you".[198]

Another stated that once a SAR is filed and received by the NCA,

> then it's not the agent's problem then if something happens. They've done their bit, it's up to the authorities then - whether that's the tax authorities, the police - to do their bit. The agent has flagged it. If the agent doesn't flag it, then obviously there's the risk that somebody could come back to the agent and say, "You should've spotted this".[199]

A recurring theme was that EAs err on the safe side and submit a report if there is any suspicion,[200] in order to satisfy (and be protected from) regulators.[201] Inevitably, defensive reporting becomes an embedded approach 'understandably so, with a few hours spent submitting a SAR being infinitely preferable to the prospect of more than a few

[198] Interview 1.

[199] Interview 3.

[200] eg Interview 13.

[201] A. Amicelle, 'Towards a "New" Political Anatomy of Financial Surveillance' (2011) 42 *Security Dialogue* 161, 168.

years' incarceration for a substantive laundering or failure to disclose offence'.[202] Our findings fit with a broader emphasis on precaution and security, or in some instances 'even being cautious about how one is being cautious'.[203] Therefore, the focus on 'box-ticking' places significant emphasis on the 'norm of compliance'.[204] As Svedberg Helgesson and Morth state,

> seemingly technical procedures entail more complexity when they are to be handled in practice. Private actors need to make decisions that the legislator has not regulated, or foreseen, when the procedures are to be translated into practice. We argue that the room for manoeuvre for private actors to make decisions and policies is to a large extent dependent on how the balance between box-ticking and human judgement is designed in the legislation.[205]

For most interviewees in this study, the inclination was to focus on box-ticking rather than to exercise their judgement on a case-by-case basis. This approach was motivated by an abundance of caution; however, it does run counter to the risk-based approach. Notwithstanding that finding, however, not all interviewees adopted such an approach. A

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[202] S. Kebbell, 'The Law Commission: Anti Money-Laundering and Counter-Terrorism Financing – Reform of the Suspicious Activity Reporting Regimes' [2018] *Criminal Law Review* 880, 890.

[203] n 108 above, 353.

[204] K. Svedberg Helgesson and U. Morth, 'Involuntary Public Policy-making by For-Profit Professionals: European Lawyers on Anti-Money Laundering and Terrorism Financing' (2016) 54 *Journal of Common Market Studies* 1216, 1220.

[205] *ibid*.

small number of interviewees highlighted that they only submit a SAR where there is a genuine concern.[206] Indeed, there was some scepticism as to whether EAs do simply file SARs just to be safe. If that were the case, it was suggested, then there would be a lot more SARs from the sector.[207]

Impact on Business

Our interviews reveal that the decision whether or not to report a potential client or potential customer is a significant one. Moreover, there is a cost of doing so, even if only with the time involved.[208] A further potentially problematic issue is that if there is a suspicion on the part of the EA, and they file a SAR, then the EA cannot proceed with that transaction without consent from the NCA (or until the expiration of the relevant time period[209]), nor can they inform their client about the reason for the delay. If the EA proceeds with the transaction, they are exposed to potential criminal liability; if they explain the reason for the delay to their client, again they are subject to potential criminal liability.[210] The conundrum with filing a report is summed up by one interviewee as follows:

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[206] eg Interview 8.

[207] eg Interview 10.

[208] Interview 3, who suggested that 'it's probably a couple of hour process to actually make a report. And, time is money'.

[209] POCA, ss 335-336.

[210] For consideration of practical scenarios where such difficulties can arise, see A. Campbell and E. Campbell, 'Solicitors and Complying With the Anti-Money Laundering Framework: Reporting Suspicions,

> We are told, once you report it, you can't deal with him until he's been cleared. So, you've lost the impetus of any sale you might be doing because by the time they've come back and cleared him, he's long gone.[211]

It was stressed that this problem conflicts with the role of EAs: 'Your job as the agent is to get the deal through'.[212] This concern for EAs' incentives is heightened given the nature of the sector, often working on a no-sale-no-fee basis, which might discourage EAs from making reports. As one EA stated, 'They should do it absolutely correctly, but in some instances I'm thinking, "Well if the fee's large enough, I might not look so carefully at the CDD because I have bills to pay"'.[213] Thus, willingness to comply can be distorted by the nature, or reality, of business. Similar considerations are evident in other areas of regulation, where regulatees 'struggled to disentangle normative from instrumental motivations, and wrestled with the temptation to backslide when legally mandated improvements proved very expensive'.[214] For instance, it was noted that some EAs do not consider filing a SAR when a transaction falls through which runs counter to

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Applying for Consent and Tipping-Off' in N. Ryder, U. Turksen, and S. Hassler (eds), *Fighting Financial Crime in the Global Economic Crisis* (Oxon: Routledge, 2015).

[211] Interview 12.

[212] Interview 12.

[213] Interview 10.

[214] N. Gunningham, 'Enforcement and Compliance Strategies' in R. Baldwin, M. Cave, and M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford: OUP, 2010) 123.

what the AML rules provide. While some did understand this requirement,[215] not all EAs do. Economic factors appear to be an influence here: as one interviewee (who did draw attention to this requirement) noted, the issue for many EAs is that:

> If you don't exchange contracts, you don't get paid. So, if your client pulls out because they think you've rumbled them, well, why would you spend time now submitting a SAR when the evil that you're involved in has stopped and you're not going to get paid for that work?[216]

Monetary considerations, unsurprisingly, affect decisions as to whether or not to fully comply with AML regulations; this is significant given that probability of detection influences the likelihood of compliance.[217] Significantly, then, HMRC appears to have increased enforcement action against estate agents.[218] A further point here is that – given monetary considerations do play a part in compliance – questions arise as to whether there is a 'sham' of commitment to AML.[219] It was suggested that given this aspect of the role of EAs, 'we're expecting the wrong people to be the gatekeepers'.[220] However, if HMRC's increased enforcement action is sustained, and there is a likelihood of publicity

[215] eg Interview 9.

[216] Interview 9.

[217] D. Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 *Crime and Justice* 199.

[218] J. Evans, 'UK Estate Agents Hit by Crackdown on Money Laundering', *Financial Times* (9 March 2019).

[219] n 187 above, 15.

[220] Interview 9.

and reputational damage,[221] then a 'normative climate' towards compliance might develop.[222]

Designing future AML initiatives in the UK real estate market: key insights from the sector

The data analysed in our study reveals some relevant aspects that should be considered in future initiatives and policies involving the real estate sector and the fight against money laundering. First, the quasi-policing role of private actors and their expanding involvement in AML strategies as fundamental gatekeepers[223] has resulted in an evident sense of duty amongst those regulatees towards AML. In other words, the new regulation implemented in the UK has helped to create a community of regulatees that is, at least from a real estate perspective, informed and aware of its responsibilities within the AML regime. Therefore, the expansion of the list of subjects obliged under the ML Regs and the imposition of new obligations has strengthened the sense of belonging of EAs to a set of rules that cannot be disregarded or bypassed. This was an unexpected finding; indeed, at the outset of this study, we hypothesised that there would be resistance to AML compliance.

[221] For example, D. Byers, 'Purplebricks fined after money-laundering breach' *The Times* (18 August 2020); BBC News, 'Countrywide Fined £215,000 Over Money-Laundering Failings' (4 March 2019).

[222] n 141 above, 17.

[223] On responsibilisation, see n 84.

This view held by EAs towards the AML regime, however, does not indicate the absence or the overcoming of issues emerging in AML compliance. In this regard, a recurring complaint in our interviews related to the *burden* of compliance: as one interviewee stated, 'it's a huge cost to the business, you know, absolutely huge'.[224] As previously recalled, the financial, logistical, and administrative costs associated with AML compliance are seen to impact the business of EAs and their approach to AML heavily, with potentially disruptive effects for the entire regulatory regime. This finding is in line with the idea that 'The costs of compliance seem to outweigh the risks'[225] and, in the long term, there is a real danger of losing the support of gatekeepers. This is not a problem confined to the real estate sector; it has also been observed in other sectors (e.g. banking) where financial and reputational interests have influenced AML compliance.[226]

Another finding of our study is that the AML regime is perceived by EAs as being flawed by what can be described as a lack of commitment by national authorities towards regulatees. Indeed, as emerges from various interviews, there is a general frustration amongst EAs for the lack or inconsistency of guidelines provided by HMRC and NCA regarding fundamental aspects of their AML obligations, such as CDD checks and SARs.[227] It is evident that there is a need for better guidance and information for EAs.

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[224] Interview 9.

[225] A. Veng Mei Leong, *The Disruption of International Organised Crime: An Analysis of Legal and Non-Legal Strategies* (Oxon: Routledge, 2007) 134.

[226] n 143 above.

[227] In its 2019 review of SARs, the Law Commission recognised the reality of fragmented and conflicting guidance: Law Commission, *Anti-Money Laundering: The SARs Regime* (HC 2098, June 2019) 52 *et seq.*

While there is, admittedly, some sector-specific guidance,[228] the terminology used is often vague, and there is a tendency to adopt a broad-brush approach that can be applied to different sectors. This might be a reasonable method to promote general consistency *across* regulated sectors, but EAs criticise the lack of detail or sector-tailored policies and provisions which they would need to cope with specific issues encountered *within* the real estate market. Some interviewees particularly lament the 'one-size-fits-all' approach in relation to SARs.[229]

From the foregoing, it emerges that, despite the good disposition of many in the sector, EAs denounce the limits of the governance imposed on them, and they struggle to reconcile their new responsibilities with the limited engagement from national authorities. As an interviewee told us, 'I think the guidance which HMRC issued is okay, but if you ever go to them to say, "What would we do in this situation?" Their advice is always, "It's up to you, it's your business, you need to make your own decision". […] They're very non-committal on helping firms. I think it's always a case of "Read the guidance, it's there"'.[230] This discrepancy in the authorities' approach risks widening the gap between EAs and governing bodies, rather than reducing it, and it resembles the findings of studies carried out on other AML regulated sectors.[231] Indeed, the lack of support and

[228] HMRC, *Anti-Money Laundering Supervision: Estate Agency Businesses* (June 2017). While this article was being finalised, updated guidance was issued. However, it remains to be seen whether this addresses concerns that guidance is not sufficiently tailored for the sector. See HMRC, *Estate agency business guidance for money laundering supervision* (Updated October 2020).

[229] eg Interview 1 when saying that 'the SAR system is not really a good system because it's designed really for SARs in the banking sector'.

[230] Interview 13.

[231] See, for instance, n 2 above, 94-95 in relation to the banking sector.

guidance for EAs affects the relationship between regulators and regulatees negatively. Furthermore, once EAs are subject to the AML regime, and the associated obligations, so too are there expectations on their part – and these expectations of support and guidance are not being met.

The misalignment between obligations and support has contributed to the spread of a 'do-it-yourself' approach among EAs, which now applies to various obligations, including CDD checks and SARs. From the analysis of our interviews, it is clear that EAs have tried to fill in the gaps themselves by adopting flexible methods of compliance and finding alternative solutions to problems emerging in their daily practice. For instance, the need to take into account well-known customers or the variety of clients involved in property transactions has pushed EAs to implement diverse compliance strategies that are not provided by national authorities. This phenomenon is not necessarily a negative outcome per se. On the contrary, it can be a positive development for the real estate sector, and the AML regime as a whole, because it reinforces the idea of a 'community' of subjects that works to achieve AML purposes. Moreover, the direct initiatives of EAs show the risk-based approach in action, and they demonstrate the effects of an independent undertaking by private actors. This finding is in line with research by Tsingou on compliance officials, where it is said that 'professionalization has led to an extension of governance functions, from implementation, to active interpretation of rules, to shaping the content of governance through regulatory creep'.[232]

The multiple compliance methods and approaches adopted by EAs, however, can also be detrimental to the AML regime. This is particularly true if we look at the

[232] n 122 above, 192.

justifications given by EAs for their compliance strategies and the outcomes of these choices. As already recalled, EAs quite often seem to rely on self-justification and self-protection when coping with challenges in implementing their AML obligations. In so doing, EAs choose to apply 'passively' AML provisions without exercising the necessary level of critical assessment required by the risk-based approach. In other words, they do not always evaluate actively the risks associated with a transaction, but they prefer to count on subsequent evaluation made by national authorities, such as the NCA. This approach frustrates the objectives of the multilevel AML regime, and it might also overload the system, most evidently with overly defensive reporting. The result is 'a burdensome bureaucracy for the innocent, whilst providing scant deterrent for the launderer'.[233] Moreover, by adopting an 'automated' response to ML risks or suspicious transactions, EAs can create risks of false positives or false negatives that impact the regulatory regime negatively.[234] Indeed, if regulatees do not implement AML regulation with a correct judgement,[235] the filtering obligations imposed on them would have no effect, and the AML system would be undermined. This is particularly evident when looking at EAs' views on identification checks and how they deal with PEPs.

The consequences of poor implementation of AML regulation by EAs are not limited to the discovery of 'bad practices' and practical issues. They are also linked to the

[233] M. Killick and D. Parody, 'Implementing AML/CFT Measures That Address the Risks and Not Tick Boxes' (2007) 15 *Journal of Financial Regulation and Compliance* 210, 210. See also G. Sinha, 'To Suspect or Not To Suspect: Analysing the Pressure on Banks to Be 'Policemen'' (2014) 15 *Journal of Banking Regulation* 75, 79.

[234] n 108 above, 348.

[235] n 43 above.

question as to whether EAs can conduct their business and pursue transactions without being affected negatively or unduly influenced by AML compliance. As recalled previously, some EAs argue that the nature of their business and the negative impact on their relationship with customers play a crucial role in the extent of their compliance with AML obligations. From the analysis of our interviews, it might be said that in various cases, the first victims of compliance are compliant EAs. In this sense, two important aspects must be considered when designing AML regulation. The first is to avoid possible disadvantages for those private actors who are compliant with AML. In other words, there is a need to provide clear, consistent guidance to whole sectors and to facilitate compliance responses, for instance, when filing SARs or conducting CDD checks. The second aspect pertains the need for the legislator to recognise the potential impact of compliance on the business of EAs. Indeed, some commentators suggest that there may be a need for the State to incentivise compliance.[236]

Having discussed the meaning and relevance of the findings obtained in this study, it is possible to make some final considerations on the value of this contribution and possible future research on the topic.

Alongside the extension of the AML regime to encompass non-financial businesses and professions as additional gatekeepers, a vast, critical literature has

[236] N. Tilley, 'Privatizing Crime Control' (2018) 679 *The Annals of the American Academy of Political and Social Science* 55. For a discussion of how 'material considerations' influence decision-making, see S. Simpson and M. Rorie, 'Motivating Compliance: Economic and Material Motives for Compliance' in C. Parker and V. Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar, 2011).

emerged. Notwithstanding the global evaluations undertaken by the FATF,[237] which purport to measure the 'effectiveness' of AML in different jurisdictions, it is not possible to say whether AML works or not. Notwithstanding various anecdotes, 'there is still very little scientific knowledge about the effectiveness and efficiency of the countermeasures adopted to combat the phenomenon'.[238] Indeed, 'a huge amount of money (we do not know how much) is now being spent on a global surveillance and reporting system, and we do not know whether and to what extent the system works or not'.[239] Moreover, the AML regime 'exhibits many deficiencies and imposes extensive costs on the private and public sectors, and harms upon the public'.[240]

Thus, rather than expansion of the AML regime (which continues unabated – as evident in recent Money Laundering Directives;[241] various FATF efforts;[242] and domestic

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[237] See, for instance, FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures - United Kingdom, Mutual Evaluation Report* (December 2018). For critical comment of the FATF MER process, see P van Duyne, J Harvey and L Gelemerova, 'A "risky" risk approach: proportionality in ML/TF regulation' in C. King, C. Walker, and J. Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (London: Palgrave Macmillan, 2018).

[238] B. Vettori, 'Evaluating the Anti-Money Laundering Policies: Where Are We?' in B. Unger and D. van der Linde (eds), *Research Handbook on Money Laundering* (Cheltenham: Edward Elgar, 2013) 474.

[239] P. Alldridge, *What Went Wrong With Money Laundering Law?* (London: Palgrave Macmillan, 2016) 3.

[240] T. Halliday, M. Levi, and P. Reuter, 'Anti-Money Laundering: An Inquiry into a Disciplinary Transnational Legal Order' (2019) 4 *UC Irvine Journal of International, Transnational, and Comparative Law*, Art.3, 3.

[241] Directive (EU) 2018/843; Directive (EU) 2018/1673.

[242] For example, the FATF Standards are regularly updated, most recently in October 2020; FATF itself is undertaking a 'strategic review' which 'aims to strengthen the efficiency and effectiveness of the FATF

legislative amendments[243]), it is timely to reflect upon operation in practice. To put it bluntly, the extant AML regime is problematic and does not work well in practice because, as an old adage says, 'if you always do what you've always done, you'll always get what you've always got'.[244] Thus, this article has aimed to reflect upon the experiences of EAs tasked with implementation of AML in practice.

First of all, our research reinforces concerns as to the operation of 'suspicion'. While the broad-brush approach in POCA requires a report to be made where a person knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering,[245] this has proved problematic in practice. Moreover, as the Law Commission highlighted in its 2019 review, 'there is currently no means of ensuring that the burden of reporting is proportionate to the gravity of the offence, the value of the criminal property and the benefit to law enforcement agencies of this intelligence'.[246] Thus, the burden of compliance is often ignored in policy development, whereas - as our study shows - considerations of burden (and opportunity lost) significantly influence compliance. Further, the risk-based approach is undermined by the desire for self-protection and, consequently, anything remotely suspicious being reported, which overwhelms law enforcement capacity to analyse SARs.

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and make the assessment and monitoring processes more timely, effective and risk-based': FATF, *Outcomes FATF Plenary, 19-21 February 2020* (FATF, 21 February 2020).

[243] See the ML Regs 2017 and 2019.

[244] There is uncertainty as to who originally coined this phrase. See 'Quote Investigator' at https://quoteinvestigator.com/2016/04/25/get

[245] See, for instance, POCA, s 330(2).

[246] Law Commission, *Anti-Money Laundering: The SARs Regime* (HC 2098, June 2019) para 1.55.

Second, our study focuses on the operation of AML within one sector. A recurring complaint was the differences inherent in that sector and the need for sector-specific guidance. The Law Commission has acknowledged the need for a sector-tailored approach, but it has also stressed that 'There remains a strong argument for having a single, accessible, interpretation of universal legal concepts common to all sectors'.[247] Such a stand-alone document encompassing the various legal concepts (such as 'suspicion') would be valuable but should be accompanied by supervisor-approved guidance for individual sectors. This combination would result in greater clarity and consistency for EAs (and other regulatees). It remains to be seen whether updated guidance issued in October 2020 will address practical concerns in the sector.[248]

Third, the burden of compliance is compounded by ambiguity. While the legislation itself is relatively straightforward, practice evidences many instances where regulatees determined to comply are confronted with uncertainty. Given the absence of clear, sector-tailored guidance, the tendency is, again, to report as a means of self-protection. The lack of engagement from enforcement agencies when such uncertainty arises reinforces the sense of vulnerability amongst EAs and can result in poor-quality reports. Further, the process of reporting is hindered (and burden of compliance increased) as a result of difficulties with the SARs reporting system and the lack of a joined-up gateway/portal for both HMRC and the NCA, which adds unnecessary complexity.

Fourth, AML compliance impacts upon the business of regulatees, most obviously in terms of costs and time, but it can also affect the relationship with clients. Moreover,

[247] *ibid*, para 3.13.

[248] See n 228.

compliance can unduly delay transactions. Inevitably, those EAs that seek to ensure that they comply are adversely affected, with concerns that those who are laxer with their obligations would be advantaged. In this sense, any system of regulation that results in compliant regulatees losing out risks inherently undermining itself.

Finally, our study demonstrates a relevant finding concerning support for the AML regime, at least in principle. Contrary to our initial expectations, there was significant support for AML obligations and the role of EAs as important gatekeepers. Many interviewees felt that they had an important role to play as part of 'the first line of defence'.[249] Thus, criticism of the AML regime related more to practical hurdles and/or burdens, rather than the issue of whether EAs have a role to play in AML. Notably, the one-size-fits-all approach was criticised, and a recurring theme was that obligations imposed upon EAs do not adequately take account of the lived realities of how estate agency business operates. This final quote aptly sums up the feeling of many: 'it's a drag, it's horrible, it's aggravation, but I get it and we do it - we have to do it'.[250]

Future research on the topic of AML implementation, and associated challenges, in the UK real estate market could focus on two aspects that are not within the scope of this article, but that could be investigated as independent streams of research. First, the question of self-regulation of EAs (and indeed other sectors) persists. It would be especially interesting to evaluate the role of self-regulation for compliance purposes and to what extent this might have an impact on the implementation of AML regulation by private actors. Indeed, as demonstrated in our study, EAs are often left to decide the best

[249] n 51 above, 12. Though there was also discontent by others, with AML requirements described by one interviewee as 'an absolutely pointless exercise': Interview 12.

[250] Interview 3.

approach to fulfil their AML obligations, and this creates a quite scattered picture with many variations in the sector and initiatives adopted independently from legislative requirements. Second, attention could be given to the existence of possible differences among EAs in relation to reputational incentives based on their role as buying, selling, or letting agents. In this sense, future research might analyse if and how AML compliance varies when different types of EAs are involved in a property transaction, especially looking at the effects that the fulfilment of AML obligations might have on the relationship with customers. However, this type of research would require a large data set with many interviews and opinions gathered from the sector. Indeed, only with an extensive amount of data would it be possible to identify significant findings and make relevant considerations as to the topic.