aml

From: Anton Moiseienko <Anton.Moiseienko@anu.edu.au>
Sent: Friday, 3 December 2021 1:30 pm
To: aml
Subject: AML/CFT inquiry submission
Attachments: Moiseienko - AMLCFT Review Submission - 03.12.2021.pdf

Dear AML/CFT consultation team,

Please find my submission attached.

Best wishes,
Anton

Anton Moiseienko
Lecturer

ANU College of Law
The Australian National University
anton.moiseienko@anu.edu.au
M +
Please note that I am currently AEDT -9 hours

Submission to New Zealand's Ministry of Justice
Review of the AML/CFT Act

Anton Moiseienko
Lecturer in Law
Australian National University

3 December 2021

Introduction

Thank you for the opportunity to respond to the consultation.

I teach law at the Australian National University (ANU) and specialise in the law of economic crime and international law. Prior to joining ANU, I was a research fellow at the Centre for Financial Crime and Security Studies at the Royal United Services Institute (RUSI) in the UK, where I am currently an associate fellow. This submission is made in a personal capacity.

In this response I address the territorial scope of the AML/CFT Act. The consultation document asks whether the Act should define its territorial scope and, if so, how this should be done.

The Need for Clarification

In my view, a clarification of the scope of the Act is highly desirable. As the consultation document rightly suggests, cross-border operations of certain businesses are likely to raise questions as to whether they fall within New Zealand's regulatory regime. This, in turn, has direct and significant implications for regulators/supervisors and relevant businesses alike.

This is particularly true in view of the extension of AML/CFT regulations to virtual asset service providers (VASPs). For instance, at one point the consultation document states:

> We do not anticipate that there would be significant compliance costs as a result of [proposed regulatory changes]. There are a small number of virtual asset service providers operating in New Zealand, and we are not aware of any business which only offers safekeeping or administration of virtual assets.

This appears to be premised on a particular understanding of what it takes for a VASP to be within – or, by extension, outside – New Zealand's regulatory regime. For instance, if all VASPs with customers in New Zealand were required to comply with the Act, the ramifications of the proposed regulatory changes vis-à-vis VASPs could be more far-reaching.

This is but one example of the difficulties engendered by the existing lack of clarity. In any case, there seems to be little tangible benefit in maintaining the current ambiguity.

Options for Clarification

There are two extremes. One is to only extend the scope of the Act to businesses incorporated in New Zealand. This, for instance, is the minimal approach that the FATF Recommendations mandate in relation to VASPs. The other is to capture all businesses that have any customers in New Zealand. As an example, this is what the UK does in relation to online gambling operators.[1]

[1] Anton Moiseienko and Kayla Izenman, *From Intention to Action: Next Steps in Preventing Criminal Abuse of Cryptocurrency*, September 2019, p. 5.

Each of these 'pure' alternatives comes with its drawbacks. Limiting AML/CFT regulation to businesses incorporated in or otherwise strongly connected to New Zealand is apt to overlook money laundering and terrorist financing risks that overseas businesses pose. For instance, BTC-e, an exchange notorious for facilitating money laundering before its takedown by U.S. authorities, was incorporated in the Seychelles and Cyprus but provided services all over the world.[2] On the other hand, imposing obligations on overseas businesses may remain no more than a symbolic assertion in the absence of effective enforcement mechanisms.

There are also several intermediate options. These include, for instance, stipulating that carrying on business 'wholly or in substantial part' in the respective country gives rise to AML/CFT obligations;[3] capturing businesses that actively market their services to customers in the respective country;[4] or designating a monetary threshold.

With the exception of a monetary threshold, these alternatives entail a degree of open-endedness. In a sense, they replace the uncertainty of having no standard at all with the uncertainty of having a vague standard. There are, however, likely to be situations sufficiently clear-cut to be resolved even on the basis of an imprecise standard. Conversely, a monetary threshold is straightforward in application but essentially arbitrary in origin.

The primary policy choice, it would appear, is not about the precise wording to be used but about the end of the spectrum that New Zealand wishes to gravitate towards. In other words, should its AML/CFT regime only apply to New Zealand-based businesses or should it capture businesses from anywhere in the world as long as they come into contact with New Zealand?

In my opinion, the answer to this ought to be informed by two major considerations:

- The first and most important of these is the extent of relevant overseas threats that affect New Zealand. For example, it would be futile to purport to regulate offshore businesses with trivial numbers of customers in New Zealand absent any indication that they pose a financial crime threat to New Zealand.
- The second factor is the actual capacity to enforce AML/CTF regulation against overseas businesses, such as through cooperation with foreign regulatory agencies, or at least limit the exposure of New Zealand-based customers to them, for instance through engaging with banks to prevent respective transactions from happening.

I would stop short of recommending any particular outcome in the absence of a solid grasp of how these two factors play out, but in my view exploring them is likely to help arrive at a suitable solution.

[2] U.S. Department of Justice, 'United States Files $100 Million Civil Complaint Against Digital Currency Exchange BTC-e And Chief Owner-Operator Alexander Vinnik', 26 July 2019.
[3] The U.S. approach to regulating money service businesses. See 31 C.F.R. § 1010.100 – General Definitions.
[4] This approach is consistent with the three supervisors' guidance on New Zealand's current regime.