

AML architecture post-Brexit and Trump

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Bankers and crime after Brexit and Trump

At first sight, 2017 looks set to be a year of change for banking [...] or at least of a return to minimum regulation. Newly inaugurated President Trump has promised to gut the Dodd–Frank Act and throw out the Volcker Rule. In the UK, Brexit, when Article 50 is activated, looks set to change the relationship between banking in London and banking in the rest of the European Union (EU), calling into question the implementation of the Fourth Money-Laundering Directive and other European regulatory instruments of regulation.

These appear to be victories for lobbyists who have been trying to “free” bankers from the framework brought in as a consequence of the financial crash of 2008. Nevertheless, general popular hostility towards bankers continues to exist. Lobbyists argue that all these regulations are costly, reducing profits and, of course, the prospects for “wealth creation”. The same argument will be used to lobby for a reduction in anti-money laundering (AML). Bankers are unhappy at having to be an arm of the police.

Criminal bankers?

But Manhattan prosecutors are pursuing individual bankers in the courts. Deferred prosecution agreements (DPAs) are seen as punishing customers rather than the banks. Bonuses continue to be paid and there is no punishment for the individuals who broke the law or the top managers who either turned a blind eye or even authorised the activity. Bankers have conspired to fix LIBOR, laundered money for Mexican drug cartels and falsified SWIFT account numbers to conceal sanctions-busting. DPAs do not seem to be deterring bankers from misbehaviour, at least when we consider the cases of 2016. Prosecutors are turning to identifying and bringing criminal prosecutions against individuals in an attempt to change behaviour.

Can the Trump administration rein in the Manhattan prosecutors? As most of the accused appear to be foreigners, “British” and “European” banks being the main victims from the point of view of the European media, which may of course be turning a blind eye to prosecution of “American” banks. The inverted commas are because all these institutions are multi- or trans-national rather than national. A Trump administration may be happy to continue prosecuting “foreign” banks, while giving freedoms to “US” banks in the name of “America First”.

In fact, change is all going to take time to come to fruition. The legislative process in the USA and the negotiation process in the EU could take a couple of years, with Easter 2020 looking to be a date at which the new financial architecture will emerge. So 2017 may turn out to be a year of smoke without much fire.

The UK Government only started consultation for transposition of the Fourth Money-Laundering Directive in late Autumn 2016 with doing nothing as one of the options, although there is a financial action task force (FATF) Assessment of the UK coming up soon. The City of London’s heart is not in the creation of a highly regulated environment, and Chancellor Hammond’s threat to create an offshore haven for hot money may be music to the ears of merchant bankers and law firms. The treasury’s project fear may have failed to win the referendum, and a similar approach may not be the most rational negotiating strategy for the preservation of “passport rights” for City



institutions. All of these initiatives are neither wholly good nor wholly bad. There is a cost to every change just as much as there is a benefit. Negotiators also need remember the Law of Unintended Consequences as well as the old admonition “be careful what you wish for [...] you might actually get it!”.

Banks as witnesses for the prosecution

It will prove difficult for the banking fraternity to break their partnership with the police. Fighting the money laundering regime may turn out to be fighting the last war. Fraud and financial crime against citizens are becoming more important than property crime. Banks have to be part of the policing response, as they are the venue for the criminal activity. Coming over the horizon, organised crime is developing a cybercriminal threat to the banks. In addition, there is the growing potential for a threat from state-related groups. The alternative is that banks develop their own investigative apparatus, but this is unlikely to lead to prosecutions because banks like to keep their problems confidential in case it scares customers away.

It has been difficult to create a partnership between police, investigators and banks against drug trafficking. Equally identifying and confiscating the proceeds of money laundering by politically exposed persons (PEPs) has been problematic. Bankers want money and to them, “money has no odour”. A great deal of the drive against money laundering has been a smokescreen for the pursuit of tax avoidance. Demolition of banking secrecy has been a goal of finance ministries around the world, but not to benefit police investigation of drug trafficking, people trafficking, cigarette smuggling or any of the big illicit business of organised crime. A serious fight against these will require a different architecture and genuine international cooperation as opposed to a return to nationalism, which appears to be the fashion of the moment.

Investigation of terrorist financing could have provided a halfway house, but is more about pursuing state financing and PEPs again. The same problems will arise in creating a partnership between police investigators and banks to combat fraud against citizens. The scale of offences and the change in criminal priorities now being exposed by the latest British Crime Victim Survey (BCS) will require serious funding for investigation, or at the very least newer more intrusive software. As algorithms take over investment decisions, they are also going to be taking over investigatory decisions too. The system already cannot investigate and prosecute more than a small proportion of suspicious transaction reports. A new system is going to be required to deal with the change in criminal *modus operandi*. Evidence of criminal activities will be revealed by an examination of transactions between bank accounts rather than interviews of suspects, victims and witnesses.

Chipping away at the fringes rather than looking at the big picture

Political parties used to lobby for the citizens, articulating their problems and aggregating responses to their problems into policy packages. The lobbying process is supposed to consist of opposing interests being reconciled into compromise policies. The public is disillusioned with “experts” because what they are being told does not square with their personal experience. Crime statistics are a classic example of this. They show crime as going down, but in fact, crime is moving from classic burglary and theft from the person or the dwelling to theft directly from the bank account. Fraud and financial crime is growing and the first BCS victimisation survey has demonstrated this to be true. Police cannot patrol electronic banking to prevent crime, so newer forms of policing and investigation need to be developed. Concepts developed to fight money laundering need to be extended to fight financial crime on a broad basis, not reduced.

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Movement, however, is in the opposite direction. Deregulation is the name of the day, in the name of job creation for a disillusioned precariat. Yet the next generation of automation and artificial intelligence is going to reduce employment, not create it. Security for the public will increasingly be something for the banks to provide. Can they change their “bankster” image into something more reassuring, even recreate their one-time avuncularity? Or when the smoke clears, will the world be heading for a replay of 2008? I wonder if they discussed this at Davos?

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