1. Introduction and operationalization

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1.1 INTRODUCTION

How effective is anti-money laundering policy and is it worth the money spent? This book aims at giving an overview and evaluation of the economic and legal effectiveness of anti-money laundering policies in the 27 EU Member States.

It is based on the ECOLEF project, a more than 500-page study on the legal and economic effectiveness of anti-money laundering and combating terrorist financing policy in the 27 EU Member States. This EU Action Grant project was commissioned by the EU DG Home Affairs. The project has taken from December 2009 until December 2012. An interdisciplinary team of administrative and criminal law experts, economists, and criminologists, mostly located at Utrecht University, the Netherlands, guaranteed both diversity of disciplines and a homogeneous team of researchers to compare the countries in an identical way.

This book aims to give a compact overview of the major threats, hindrances, and positive examples of a successful anti-money laundering policy in the EU Member States from **both** a legal and an economic perspective. Given the still meagre results on combating terrorist financing (most countries still have had no convictions for terrorists and law enforcement takes place mainly in secret service-like organizations to which we did not have access), we do not treat terrorist financing in this book.

Member States differ in the degree to which they are threatened by money laundering – some with big financial centres like the UK or the Netherlands are gateways for laundering money, whereas others, like the Southern Member States, have a large cash economy and attract cash-intense forms of laundering.

Member States also differ in the way in which they respond to this threat. Policy responses to laundering activities can range from the implementation of the Third (and soon to be Fourth) EU Directive on anti-money laundering and combating terrorist financing to the criminalization of money laundering, the enforcement of preventive policy and prosecution and, ultimately, the conviction of launderers.
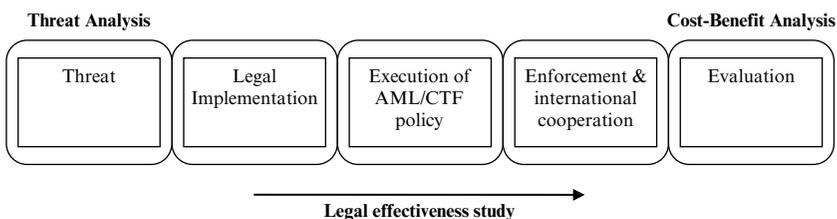
Figure 1.1   Building blocks of the ECOLEF Study

Our study comprises five steps of anti-money laundering policy, starting with the threat of laundering, followed by the implementation of the EU Directive, the execution of the Directive, enforcement and international cooperation up to the conviction of launderers. It ends with a cost-benefit analysis of the entire policy. Is anti-money laundering policy worth the effort and money?

1.2   EFFECTIVENESS STUDY

Many hindrances can appear in the long process between drafting the law and finally convicting launderers, potentially affecting the effectiveness of anti-money laundering policy.

Questions relevant for the legal effectiveness study are the following: how well does the EU Directive fit into the national legal system? Which authority in the Member State is responsible for implementing the Third Directive? (On implementation, see Chapter 4.) How and where is money laundering defined? What is the scope of predicate offences? (On criminalization, see Chapter 6.) Which customer due diligence measures are in place? How are the FIUs working? Which reporting obligations exist? (On the execution of preventive measures, see Chapter 3.) Which supervisors exist? What are their supervising and sanctioning powers? (On supervision, see Chapter 5.) What is the number of suspicious (or unusual) transaction (or activity) reports? What is the number of prosecutions and convictions? (On repressive enforcement, see Chapter 8.) How well does international cooperation work? Is money laundering an extraditable offence in the country? What possibilities exist for information exchange, how often is it used, how well does it work? What is the role of feedback in achieving compliance with law enforcement, the FIUs and the private sector? (For FIUs and international cooperation, see Chapters 7 and 9 respectively.)

In order to be able to identify best practices among Member States' policies in combating money laundering, we have gathered information

as to how, from a legal, economic and practical perspective, this anti-money laundering and combating terrorist financing policy works in each Member State.

As a starting point we prepared a working document consisting of 201 questions to be answered for each Member State, covering the whole anti-money laundering policy process from facing a laundering threat and drafting laws against money laundering to the conviction of launderers.

In order to answer these 201 questions per country, as a first step we studied publicly available information from, inter alia, the Financial Action Task Force (FATF) and MONEYVAL Mutual Evaluation Reports, from the Annual Reports of FIUs and from national legislation for each country. This desk study was used to identify missing information which could only be obtained from the Member States themselves. Those questions that could not be answered with publicly available information were put into online surveys that were directed to relevant actors in combating money laundering at the national level. For this purpose, we created and circulated five online surveys, one for each type of institution important for AML/CTF policy: Ministry, FIU, Public Prosecutor, Supervisor and Obliged Entities (see ECOLEF Report, Annex 1.1). For further clarification we also travelled to the Member States and conducted over a hundred, mostly face-to-face, interviews with officials in these key agencies (see ECOLEF Report, Annex 1.2).

After carrying out desk studies, online surveys and face-to-face interviews in the countries, we organized four regional workshops. We chose, as far as possible, to focus on regional groupings of Member States, since the available evidence shows that most AML/CTF interaction – and indeed most money laundering – takes place between neighbouring countries. We invited financial intelligence units (FIUs), Ministry and Public Prosecution Office (PPO) representatives from all EU Member States. The results were presented at a final dissemination conference in December 2012 in Amsterdam where Member States had the opportunity to comment on our findings. This book includes their suggested revisions.

Some restrictions we faced concern the availability of data. In several parts of our study we criticize the lack of quality in the data and the fact that the data are not comparable across countries (e.g. the number of reports). We nevertheless use these data in the empirical part of the study, though we are aware of the fragile database. However, we make some suggestions for data improvement and managed to improve some of the EUROSTAT statistics on anti-money laundering policy.[1] We did not deal

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[1] EUROSTAT (2010).

with matters of asset confiscation, an important part of fighting financial crime, since data collection is being carried out by the Asset Recovery Organization Working Group of the EU DG Home. A final restriction is that the last part of the anti-money laundering policy chain, namely judges and the courts, could not be studied. The link between public prosecution and judges would be worth investigating in a separate study, since even if the whole anti-money laundering policy chain fits perfectly but ends up reaching a judge who does not convict, all efforts would be deprived of success.

1.3   OPERATIONALIZATION OF LEGAL AND ECONOMIC EFFECTIVENESS IN THE ECOLEF STUDY

The AML/CTF policy responses of the Member States are studied from the perspective of the legal and economic effectiveness of the AML/CTF policies of the European Member States. Figure 1.2 shows how legal and
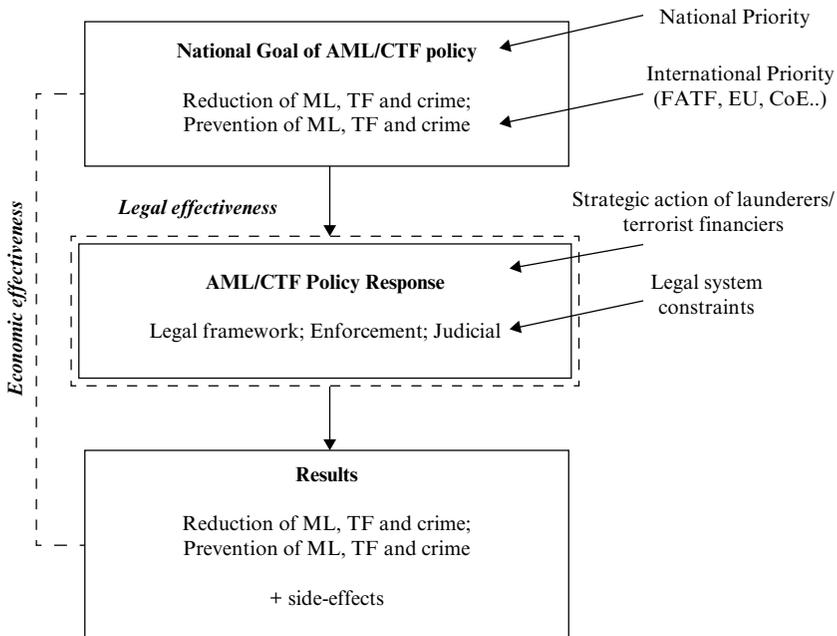
Figure 1.2   Visual representation of legal and economic effectiveness

economic effectiveness relate to each other. We then explain these concepts briefly and how we will operationalize the two.

1.4   ECONOMIC EFFECTIVENESS

In our study, the economic effectiveness of AML policy means that the goals of the AML policy – which can be the reduction and prevention of money laundering, or crime in general – are reached by producing results. Such results can be less money laundering or crime in general, as well as the prevention of money laundering or crime in general. The goals of AML policy may be more or less important in the Member States, depending on international and national priorities. Some countries might make money laundering policy a national goal because international organizations such as the FATF push it, for others it might be a domestic necessity in order to maintain the reputation of financial markets (see first box and arrows in Figure 1.2). In order to reach the goals, all kinds of policy responses are used. The legal framework, law enforcement, the judiciary all have to respond to the national anti-money laundering policy goal. This can be done more or less effectively (see section on legal effectiveness below, and the middle box in Figure 1.2). The results of this policy may be a reduction in laundering or crime, or the prevention of money laundering and future crime. Also side-effects can occur which have been unplanned (see the third box in Figure 1.2). Achieving the results of a policy goal we call economic effectiveness. When the goals are reached with the lowest costs possible, we speak of economic efficiency instead of effectiveness. Chapters 10 and 11 discuss different statistics which could indicate economic effectiveness as well as efficiency. In this study, we test for economic efficiency in Chapter 12. This chapter contains a cost-benefit analysis of Member States' AML/CTF policies using data concerning their AML/CTF policy responses.

1.5   LEGAL EFFECTIVENESS

In the present research, legal effectiveness is understood as follows. First, a policy is legally effective when the norms are applied and obeyed. Legal effectiveness is understood narrowly and as a functionality: if a rule is in force (and applied/obeyed), it functions and therefore a norm is effective.[2]

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[2]   Navarro and Moreso (1997); Addink (2010); Addink et al. (2010), pp. 80–95.

An important element is the meaningfulness of the norms. Legal norms must be meaningful; they should contribute to the goals of the AML/CTF policy.

In general, the main goals[3] of the AML/CTF policy are:

- the prevention of money laundering and terrorist financing and crime in general – by developing systems that make it difficult for potential launderers and financiers of terrorism to actually launder or finance terrorism – and
- the reduction of money laundering, terrorist financing or crime in general.

If a particular norm is not considered meaningful by those who should comply with or enforce it, it is highly likely that the norm will not be applied (in full) or adhered to.

Second, a broader and more qualitative view of legal effectiveness allows us to go beyond the mere question of non-application of or non-adherence to the norms. On this view, a policy is legally effective when there are neither legal hindrances that make reaching the goal more difficult, nor other factors with legal consequences that negatively influence the application of the law.[4] Such legal hindrances might be that the norms conflict within a policy or that norms conflict with norms belonging to another policy at the same level ('horizontal' conflicts) or that the norms conflict with norms set at a different level, for example the international or European level ('vertical' conflicts). One can also think of gaps in legislation or where legislation provides insufficient powers to the authorities that should ultimately enforce the norms. Factors that negatively influence the application of the law include institutional factors; insufficient resources in obliged institutions, FIUs or supervisors in terms of capacity, money and organization to comply with or enforce the legal norms in place; insufficient awareness or support in obliged institutions to comply with the legal norms, and insufficient de facto cooperation between supervisors or between obliged institutions and supervisors. This framework of legal effectiveness allows us to look at Member States' law in the books, as well as whether the law is actually applied ('law in action').

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[3]   Although, as is made clear in Section 1.4 the goals may be more or less important in the Member States, depending on international and national priorities.

[4]   Stouten (2012), pp. 22 et seq.

1.6 REMARKS CONCERNING THE OPERATIONALIZATION

In discussing the effectiveness of AML/CTF policies, we have focused on what we found to be interesting and relevant for this purpose. In this sense, we have built on what has been done before – sometimes by correcting other work, if it was fundamental to our research and otherwise by elaborating on the core message and expanding its field of application – and we have tried to refer to all other relevant research that we do not specifically target in this work. In this report, we have built on the substantive work of the FATF, MONEYVAL, and the reports of the EU-FIU Platform, the papers of the IMF, the reports of EUROSTAT and the reports of the Egmont Group. We have also made use of the annual reports of the EU FIUs and of the reports commissioned by the EU.

Next to this, there is a large body of literature upon which we have not built, which we have not discussed and yet which is, nevertheless, undoubtedly important in the AML/CTF context. There are several reasons why we have not done so. First of all, other research groups and professionals have already targeted the subject, and, in our view, have done consistent research which, given the time and resources we had available, we could not improve on. Just to name a few, in the matters of asset freezing and confiscation – the work of the national Asset Recovery Offices and of the CARIN group is substantive. We have also left aside matters of mutual legal assistance in judicial matters (including extradition) as the latter are taken up to a great extent by EuroJust and by the European Judicial Network.

1.7 CROSS-COUNTRY COMPARABILITY

The aim of the present study is to compare economic and legal effectiveness on a cross-country or cross-model basis in order to establish their levels of effectiveness. This is done with respect to various aspects from each of the building blocks shown in Figure 1.1, for example implementation delays, supervisory models, money laundering definitions (as applied in practice), models of information flows and types of FIUs.

However, sometimes a cross-country comparison cannot be made. This is particularly the case for the substantive norms in the preventive AML/CTF policy. The non-comparability of (legal) effectiveness in this area is the result of two important factors. First, there is a significant data asymmetry between the Member States. For some Member States there is a lot more information available than for other Member States. Additionally,

the data sets available suffer from a time lapse. Some information on Member States is more outdated than for other Member States. This is especially the case for data obtained from FATF Third Mutual Evaluation Reports and MONEYVAL Reports on Fourth Assessment Visits. While some Member States were last assessed in full in 2006, other countries were assessed as recently as last year. Moreover, this study progressed in groups of countries. Therefore, interviews with Member States' representatives were held at different times over a period of 1.5 years. Second, comparability between Member States is made difficult due to the fact that the legal hindrances identified differ in importance – such that a mere quantitative calculation would not reflect reality – and that the importance that must be attached to it depends on the country-specific context. As to the weight that must be given to the legal hindrances identified, we believe, for example, that gaps in the scope of coverage of obliged institutions are more detrimental to the effectiveness than the fact that the requirement that third parties from third countries on which reliance is placed must be subject to a mandatory registration system and supervision is not implemented in legislation. Where cross-comparability appears impossible, we provide an overview of the state of affairs within the Member States.

In the following, the book includes a threat analysis (Chapter 2), a study on the implementation of AML policy (Chapters 3 and 4), the execution of this policy (Chapters 6 and 7) and its administrative and repressive enforcement (Chapters 5 and 8), including issues of international cooperation (Chapter 9). In addition, we have attempted to improve the statistics on anti-money laundering policy as initiated by EUROSTAT (Chapter 10) and to do initial calculations for the costs and benefits of anti-money laundering policy (Chapter 12). In Chapter 11 we measure the effectiveness of anti-money laundering policy in the 27 EU Member States. We draw all these together in a concluding chapter, where we also summarize the results (Chapter 13).