

China's AML criminal legislation and judicial effectiveness

Since 1990, China has gradually established a criminal legislative system to crack down on money laundering. In view of the increasingly concern about money laundering in China and in the face domestic and foreign pressure to integrate into the international community's AML co-operation framework, China has passed new laws amending the existing legislation. This expands the scope of predicate offenses for the offense of money laundering. On March 1, 2021, *the Amendment to the Criminal Law (XI)* came into effect and revised the law relating to self-laundering, behavior, "knowledge" and the pecuniary penalty. Among these, criminalizing self-laundering is the highlight of this revision. This legislative amendment aims to implement the government's policy statement in 2017 to see that the law works more effectively to and to complete the follow-up revision tasks after the fourth round of mutual evaluation by FATF on China with reference to the prevailing international AML standard that China has agreed to.

China's commitment to criminalizing money laundering has been influenced by three primary issues. Given the severe condition of drug crimes and due to the China's international obligations under the 1988 *United Nations Convention Drug Conventions*, the Standing Committee of the National People's Congress passed the *Decision on the Prohibition Against Narcotic Drugs* in December 1990, creating the crime of "purchasing or acquiring dishonestly obtained property (as opposed to concealment or disguise) constitutes a ML activity" in Article 4. This was the first time that China criminalized money laundering but limited only to drug money laundering. In 1997 the criminal law was revised to expand the number of predicate crimes. Article 191 provides:

"Whoever commit any of the acts below to cover up or withhold the source or nature of what one knows is obtained from narcotics crimes, organized crimes of the underworld, or crimes of smuggling, or gains obtained through such crimes, are to be sentenced to not more than five years of fixed-term imprisonment or criminal detention and are to be in addition or exclusively sentenced to a fine not less than 5% and not more than 20% of the amount of money laundered and the gains obtained through committing the crimes mentioned above are to be confiscated; when the circumstances are serious, the sentence is to be not less than five years and not more than 10 years of fixed-term imprisonment and a fine not less than 5% and not more than 20% of the amount of money laundered: providing funds accounts; assisting to turn money and goods into cash or financial instruments; assisting to transfer funds through transferring accounts, or other ways of settling accounts; assisting to remit funds abroad; and other ways to cover up and withhold what is illegally obtained through committing crimes, and the nature and sources of such gains. Institutions which commit a crime mentioned in the preceding paragraph are to be sentenced to a fine, and personnel in charge directly responsible for the crime and other personnel directly responsible for the crime are to be sentenced to not more than five years of fixed-term imprisonment or criminal detention."

Just three months after the 9.11 Article 7 of *Amendment (III) to the Criminal Law* (passed in December 2001) added terrorism crimes as predicate offenses for money laundering. *Amendment (III)* (passed in June 2006) added as predicate offenses corruption and bribery, crimes of disrupting the order of financial institutions and financial fraud, thus forming the current seven predicate offense framework for money laundering crimes. To be complaint with FATF standards the specific AML offenses were complemented by amendments to Article 312 of the Criminal Law providing "purchasing or acquiring dishonestly obtained property (as opposed to concealment or disguise) constitutes a ML activity." With regard to China's legislative measures for the criminalization of money laundering, FATF affirmed in



the third round of evaluation (FATF, First Mutual Evaluation Report on AML and Combating the Financing of Terrorism on the People's Republic of China, 29 June 2007), that while Article 191 is a money laundering offense applicable to specific serious crimes the gap is filled by Article 312 which regards all crimes as predicate offenses.

After establishing the overall national security outlook in 2014, China began to put AML into national security plans. In 2017, the General Office of the State Council issued the *Opinions on Improving the Regulatory Systems and Mechanisms of Combating Money Laundering, Financing of Terrorism, and Tax Evasion*, requiring the authorities “to study to expand the scope of predicate offenses for money laundering crimes and bringing the offenders of predicate offenses into the main scope of money laundering crimes.” At the same time, in April 2019, after the fourth round of mutual evaluation of China's AML&CTF, the FATF announced the results for technical compliance. Among the 40 assessment items, 6 items in China were “non-compliant” and 12 items were “partially compliant.” FATF determined that the substance of many of China's laws relating to money laundering is compliant or at least partially compliant. However, FATF took the view the lack of self-laundering criminalization is a “major deficiency” in technical compliance, so the third core recommendation criminalization of money laundering is rated only as “partially compliant” (FATF, AML&CTF Measures – People's Republic of China, Fourth Round Mutual Evaluation Report, April 2019, Summary of Technical Compliance – Key Deficiencies, para. 105, Criterion 3.7, Conclusion). Additional pressure to amend the law was added at the fourth round of mutual evaluation. Consequently, China concerned to be internationally compliant and co-operative, passed into law *Amendment (XI)* implemented in March 2021. The law now provides in Article 14 of the Amendment (XI) to the Criminal Law that Article 191 of the Criminal Law is amended to read: “Whoever commits any of the following conduct to cover up or conceal the origin and nature of any proceeds of a drug crime, organized crime of a gangland nature, terrorist crime, crime of smuggling, crime of corruption or bribery, crime of disrupting the order of financial administration, or crime of financial fraud as well as any gains accrued by such proceeds shall, in addition to the forfeiture of the aforesaid proceeds of crime and gains accrued by such proceeds, be sentenced to imprisonment of not more than five years or limited incarceration and a fine or be sentenced to a fine only; or if the circumstances are serious, be sentenced to imprisonment of not less than five years nor more than ten years and a fine: Providing any account for the aforesaid funds; converting property into cash, negotiable instruments, or denominated securities; transferring funds by bank transfer or in any other manner of payment and settlement; transferring assets across the border; otherwise purchasing or acquiring dishonestly obtained property (as opposed to concealment or disguise). Where an entity commits a crime provided for in the preceding paragraph, the entity shall be sentenced to a fine, and its directly liable executive in charge and other directly liable persons shall be punished in accordance with the provision of the preceding paragraph.” This important amendment to China's anti-money laundering law greatly facilitates the effective policing of serious crime and the pursuit of criminal assets (see report of the Constitution and Law Committee of the National People's Congress on Amendment (XI) to the Criminal Law of the People's Republic of China (Draft), published on the China People's Congress (2020) webs <http://www.npc.gov.cn/npc/c30834/202012/5f7b2d0e41ef44f6ba84ed6eda5cf6c3.shtml>)

Between the enactment of the law in 1997 and 2006 there were only 3 cases and 4 defendants convicted of money laundering in China. This is in sharp contrast to China's increasingly severe money laundering situation. Accordingly, the FATF believes that China's judicial effectiveness in regard to AML has major shortcomings and has strongly recommended China to improve judicial enforcement (see the FATF, First Mutual

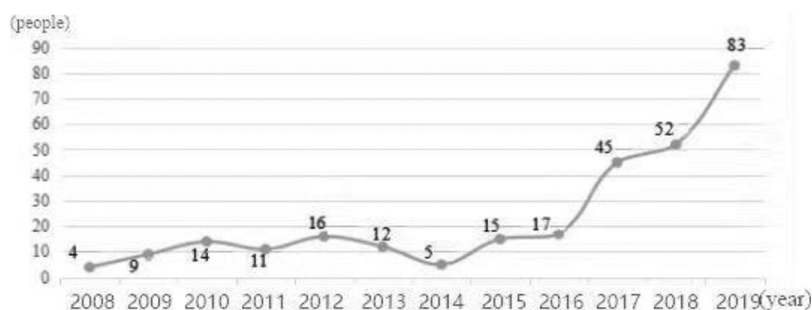


Figure 1.

Evaluation Report on AML and Combating the Financing of Terrorism on the People's Republic of China, 29 June 2007, paras. 93, 107). The author produced the following graph of the number of people convicted of money laundering (Figure 1) based on the *China AML Report* published by the People's Bank of China (PBC) every year and the data from FATF's fourth round mutual evaluation report of China (FATF, AML&CTF Measures – People's Republic of China, Fourth Round Mutual Evaluation Report, April 2019, Risks and General Situation, para. 179) (Figure 1).

In the fourth round of mutual evaluation, 11 assessments were conducted and their effectiveness rated. For the seventh item – “investigation and prosecution of money laundering”, the FATF assessment team analyzed convictions for money laundering crimes in China from 2013 to 2017 and rated China's effectiveness as “medium” because while the number of convictions for money laundering crimes in China is increasing, it is still small compared to the larger number of predicate offenses (FATF, AML&CTF Measures – People's Republic of China, Fourth Round Mutual Evaluation Report, April 2019, para. 196). In order to fulfill FATF's requirement in the follow-up processes, China needs to take and implement more effective measures to improve the situation before the second pronged mutual evaluation occurs.

Until very recently the data shows that the number of money laundering cases while gradually increasing remains minute. According to the analysis of relevant agencies the reasons related to this legislation are the strict standard of *Mens Rea* and hitherto non-criminalization of self-laundering. There are also problems related to implementation such as the procuratorial and judicial agencies' lack of criminal investigative experience of money laundering crime and the tendency of attaching importance to predicate offenses whilst neglecting money laundering crime. In response to these obstacles, the Supreme People's Court and the Supreme People's Procuratorate have jointly issued judicial interpretations of AML offenses to guide prosecutors and judges. In March 2021, the Supreme People's Procuratorate and the Peoples Bank of China jointly published a document describing typical AML cases. With this impetus in 2020, procuratorial agencies across China prosecuted a total of 707 persons for money laundering crime. Therefore, we might optimistically forecast that after *Amendment (XI)*, money laundering cases and convictions will mushroom and the concerns of the FATF as to judicial effectiveness will be a thing of the past.

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