A Magic Formula which can do away with Terrorism?

The attacks in the USA on the 11th of September breathed new life into the debate about money laundering in Germany, as elsewhere. If the flow of illegal funds could be stemmed or even dried up completely, then that would have the effect of pulling the rug from under the feet of international terrorism - these were the views expressed by the politicians and the media alike. The expert, however, has a somewhat different view: MICHAEL KILCHLING, *senior researcher at the* MAX PLANCK INSTITUTE FOR FOREIGN AND INTERNATIONAL CRIMINAL LAW *in Freiburg (Department of Criminology), is convinced that the legal instruments in the field of money laundering are not sufficient to gain control over the problem of international terrorism.*

The control of financial transactions and seizure of illegal or suspicious assets are at the centre of (legal and) political debate which has recently been stimulated in Germany immediately following the terror attacks on New York and Washington on September the 11th. For the past fifteen years this issue has formed the central starting point for international efforts to combat so-called organised crime, and it is now being picked up once more. This penal approach (or perhaps more accurately: strategy) originated largely in the United States and has since then been adopted by all the important international bodies (UN, Council of Europe, European Union) and also implemented in a large number of multilateral legal acts, contracts and agreements. The central idea of this is to penalise money laundering. The term "money laundering" is used as a kind of magic formula - and this is also reflected in the most recent debate between politicians and in the media. It is a generally-held view that if such laws were applied consistently, then the defeat of international terrorism would be no more than a question of time.

But this view should be approached with a certain degree of scepticism. This is borne out by a scientific analysis carried out by the Freiburg-based Max Planck Institute for Foreign and International Criminal Law, in which researchers evaluated the money laundering cases that have so far resulted in convictions in the Federal Republic: the relevant penal regulations (most importantly §261 StGB), fail completely to cover the "big" organised crime cases which the legislature had in mind

PHOTO: STOCKMARKET

when enacting the money laundering laws. What, in any case, is hidden behind the term "money laundering"? Put simply, this offence is intended to render punishable every accumulation or use of assets obtained through criminal activity, thereby making them more difficult or, if possible, putting a complete stop to them. Money laundering should therefore be regarded as an offence subsequent to a predicate offence that has produced profits. There nonetheless remains a question mark over what exactly the illegal aspect of money laundering is. Apart from the illegal origins of the funds in question, the punishable offence defined in §261 StGB covers dealings which may even appear to be quite normal financial management. What, then, is the particular aspect of money laundering which deserves punishment?

What is Money Laundering?

It may be desirable from a moral perspective to make sure that wrongdoers do not make any profits from their criminal activities. In a legal system founded on the rule of law, of course, this does not provide adequate justification for making such behaviour a criminal offence. This is all the more the case in view of the fact that §261 StGB prescribes rather severe sentences: money laundering is one of the relatively small number of criminal offences in the German penal code, for which the minimum sentence is always imprisonment. A fine - which is otherwise usually an option - is ruled out in this case; the criminal sanction for money laundering is thus even more severe than that for some of its predicate offences. With regard to the ultima ratio character of criminal law, according to our understanding of the law it is imperative that a specific legal interest be protected by a statutory offence. But to this day it is not yet clear which legally-protected interest or interests can actually be protected by classifying money laundering as a criminal offence. Commentators offer the view that such legally-protected interests are not even apparent with the best will in the world; some advocates believe that the legitimate circuits in the economy and the financial world must be protected from infection by "dirty money". For one thing, it is debatable whether money - intrinsically neutral - can in any sense be "prone to infection" by individual assets. Indeed, if this were the case, then all the money flowing around the international financial circuit and mixed up in the millions of transactions carried out every day would be "infected" in next to no time - and this is a completely absurd idea.

On the other hand, the idea that the (international) financial system as a technical service infrastructure could be affected by whether the source of the money being moved around in it is legal or illegal appears equally naïve. What is genuinely affected, however, is the reputation of the individual financial institutions - this is why respectable banks go to great lengths to protect their institutions from being used by criminals to launder money, where possible going even beyond the measures stipulated in the legislation on money laundering.

If any specific legally-protected interest at all appears appropriate for money laundering, then that is state interest - on the one hand in criminal prosecutions and on the other hand in siphoning off the profits to the benefit of the either state or affected third parties, especially victims. This interpretation best matches the actual (original) character of money laundering as an offence of concealment and exploitation. The strategic aim of the money laundering control concept can also be seen here: the criminal offence of money laundering is intended to reach beyond the sentencing of individual offenders - by tracing back along so-called paper trails - to produce as much detailed knowledge as possible about others involved in the offences and to afford access to their assets with the aim of confiscating them.

This is why the view has already been expressed that the offence of money laundering does not actually aim to punish money laundering as such at all. There is a lot of truth in this view. This can be seen in the efforts that have been made since the September 11th attacks to trace back through transfers of funds - including the presumed stock exchange transactions in the period immediately before the attacks - in the search for useful trails leading to Osama bin Laden's Al-Qaida network: it is hard to imagine that the people involved, if apprehended, would be tried for money laundering. So it really is a largely technical offence which can and should form the basis of criminal investigations if there is no further-reaching, concrete evidence available relating to activities before the offence.

In some cases this has also been used in the past. Thus, the Federal Court of Appeals (BGH), the highest criminal court in Germany, sentenced a defendant in 1995 to the maximum term of 5 years for "laundering" the sum of 20,000 marks; the sum in question was a fraction of one percent of the ransom from a kidnapping. The defendant was presumed to have been involved in the kidnapping, but this could not be proven. This suggests the assumption that the extremely harsh sentence in the context of the German penal system reflects not only the money laundering but also the unprovable involvement of the defendant (who had, by the way, no previous criminal record) in the preceding offence. Incidentally, this phenomenon is best known from the area of vehicle-related offences; when sentencing for failure to stop at the scene of an accident, a fictional additional charge of drunkenness is regularly introduced - on the assumption that the most likely motive for a driver to fail to stop at the scene of an accident lies in the fact that s/he has been consuming alcohol, which is no longer possible to prove at a later stage.

The offence of money laundering, moreover, is of considerable significance for the prosecuting authorities even at the early stage of an investigation. Unless there are concrete grounds for suspecting specific predicate offences, then suspicion of money laundering is required in order to embark on any investigation process at all, not to mention special investigative measures such as telephone tapping. By transferring the money laundering strategy to the fight against terrorism, it is indeed possible to look forward to a certain gain, particularly with a view to the investigation and tracking of useful leads.

It is nonetheless useful to clear up some of the other misunderstandings which arise from time to time in public debate on the fight against terrorism. So it can be assumed that the financial transactions which were presumably carried out in the run-up to the September assaults may well have been largely legal. In any case, there is no firm evidence to the contrary: bin Laden is said to have inherited his means, and/or earned them by honest means in the road-building industry. Unlike the RAF, whose strategy for procuring funds was based on criminal offences such as bank robberies, or the PKK, whose methods of raising funds, according to investigations carried out by the Bundeskriminalamt, tend to be mafia-like, the money being used in this case had not been raised from criminal offences. At that point in time the money involved could not be initially described as "dirty money". The idea that Al-Qaida money was merged with the state assets of the Taliban, which are believed to come partly from drug money, does not appear possible on the basis of a priori knowledge and in the absence of further information. The idea that stricter legislation and controls targeting money laundering might have been able to prevent the September attacks is therefore misleading. Money laundering is a repressive approach rather than a preventative one. And what's more, preliminary investigations into terrorist activity were, at that time, not possible: this is because we had not yet enacted a special statutory offence targeting foreign organisations - a loophole which our earlier research report had expressly pointed out. The corresponding paragraph (§129b StGB) was only introduced with the so-called "first security package", implementing at the same time an EU obligation.

The fact that until now there have been no specific offences to give rise to any significant suspicion of money laundering (in particular illegal raising of money by bin Laden) also shows that seizure of the funds in question cannot be as straightforward as it is sometimes portrayed - in any case not using the means of the criminal justice system or criminal proceedings. Cases in the past in which accounts linked with bin Laden were frozen were handled on the basis of the EU legislation which - interestingly - had already been enacted in March and July 2001 and was based on Articles 60 and 301 of the EU contract (GASP). They therefore stem from foreign trade boycott measures against the state of Afghanistan, but do not represent criminal proceedings against specific individuals. Any purely preventative confiscation of assets is not possible under German law.

The Myth of Bank Secrecy

There are, on the other hand, certain instruments which have already been developed, tried, and tested, and which offer clearly viable starting points for efforts to bring criminal prosecutions arising from the events of the 11th of September. Initial efforts are, of course, of a purely investigative nature at this point in time. It could prove useful to trace back through suspicious financial flows. This has been feasible for a considerable time now, and is already practised in the context of financial investigations - with increasing success: in 1999 the police in Germany seized suspicious assets to the value of around 430 million marks; in the year 2000 this figure rose to around a thousand million marks, and preliminary estimates for 2001 suggest that up to two thousand million marks will have been "frozen". The myth of all-embracing bank secrecy has long since ceased to correspond to reality.

Having said all this, it should always be remembered that tracing suspicious money can only form an additional component of an investigation. In the fight against organised crime it has already become clear that the targeting of money laundering in no way represents the ideal solution which it was first hoped that it might be. This will presumably be confirmed in the context of new measures being introduced for combating terrorism. The investigation, the criminal prosecution, and the envisaged simultaneous confiscation of the assets in question are in practice hindered by many different problems. These have been clearly illustrated by our re-

search in the area of money laundering. One major problem, albeit only a secondary one, is how to link suspicious assets with specific individuals. It is quite possible, with the relevant investigative effort, to identify the people behind "straw-man accounts" (a contemporary practice in the criminal world). This was clearly shown recently by the investigations of the Geneva prosecuting authorities in the so-called Leuna affair. The results of these investigations were depicted in the form of a diagram which became known as "Tapete" (wallpaper), and they featured prominently in the press in the summer of 2001. It is, on the other hand, far more difficult to link suspicious assets with specific crimes - which is the absolute pre-requisite for criminal proceedings.

The Main Problem is Complexity

The problems lie not so much in legislative weaknesses as in the complexity of the subject. The idea in the mind of the legislature when the money laundering strategy was conceived - namely, that an investigation would pass smoothly on from the suspicious assets to the crimes from which they had originated ("suspicion-free" financial investigations) - proved to be too optimistic. Of the 78 money laundering trials examined in the course of our research project, in only seven cases did the investigation originate from suspicious transaction reports according to the money laundering act. Nearly all the other cases were linked to investigations of concrete (predicate) offences and, in other words, were picked up through the "conventional" investigative route (i.e. from a specific crime to the proceeds associated with it).

Against such a background it is no great surprise that the number of successful prosecutions in Europe has so far remained extremely low. Thus, in 1999 in the Federal Republic there were 604 money laundering suspects, yet the number of people actually prosecuted is no more than 20 to 25 per year. From the introduction of the offence of money laundering in 1993 up until the end of 1999 just 143 prosecutions were recorded - and the money involved was only confiscated from 26 of those people. These low prosecution rates in Germany are, incidentally, entirely in line with the trend in Europe. Significantly higher numbers are recorded only in Switzerland; there, 243 people were convicted of such offences between 1991 and 1997 alone, many of these cases following applications for legal assistance from abroad. This provides a very good illustration of the special situation in Switzerland, the centre for international banking. In the struggle against money laundering, as in other areas, the potential for increased success might therefore be found in increased international co-operation. The justice and interior ministers of EU member states thus agreed to strengthen relevant measures just a few weeks after the September attacks. Until now, authorities dealing with money laundering have operated mainly on a national rather than an international basis; plans to create a European body - be it a sub-department or a sister authority of the Council of Europe - seem to be eminently logical. The Federal Republic, on the other hand, has not even managed to set up a national money laundering bureau along the lines of those in other countries; reasons of federalism lie behind this failure. Only now is a new attempt being made to establish such a body. With all the optimism over the appropriateness of the strategy to control money laundering even when linked with terrorism - which appears to some extent to be justified - it is important to remember that this strategy has so far only been applied in the area of organised crime. With the exception of a very small number of countries like Spain, terrorism has in fact (and for good reasons from the point of view of definition) been regarded as a phenomenon which cannot be equated with organised crime. This is because - unlike organised crime - terrorism is not geared towards generating profits. Money is the raison d'être of organised crime, and if it had no recourse to its profits and could not make use of the worldwide financial system, then it would be deprived of its driving force and indeed its lifeblood.

For terrorism, on the other hand, money is merely the means to an end: sources of money are developed in order to finance attacks. Simply removing financial means or specific finance channels cannot remove the original danger, namely the commission of further acts of terror. The preventative component, which also underlies the strategy for tackling money laundering and confiscating profits, could thus be seen as largely ineffective where terrorist organisations are involved.

Measures for combating money laundering will thus serve as a useful addition to traditional criminal approaches, but cannot take their place. ●

StGB = Strafgesetzbuch (the German penal code)
Rote Armee Fraktion (Red Army Faction) = the West German leftist terrorist group which was active especially in the 1970s and 80s.
PKK = (Kurdish Workers Party)
Bundeskriminalamt = (Federal Criminal Investigation Agency)