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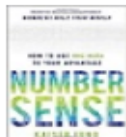
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CASH COURIER IN MONEY LAUNDERING: CRIME OPPORTUNITY APPROACH

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ABSTRACT

This paper follows a normative research methodology of law, and will combine through a collaboration with business economic approach in the analyze process in order to expose the opportunity of conducting money laundering through cash courier. The proper detection mechanism of cash courier will plays an important role to prevent money laundering. There are two mechanisms that use in cash courier, declaration system and disclosure system. In some countries, which are using custom declaration as its mechanism will lie on the honesty of person. The mechanism of treating cash courier in money laundering and considering whether it is an administrative violation, or a criminal violation, or a civil violation will be important to be criticized. It should be reconsidered that cash courier in money laundering is a crime, thus should not put it as merely an administrative scope of violation. The administrative sanction would not be proper to handle it. The problem of cash courier would not be a simple problem to be solved. It needs ideal concept and framework to be constructed which is based on objective methods for what law can do to handle, and further will assist to prevent and eradicate money laundering. This qualitative research paper that follows content analysis method provides better insight into cash courier in money laundering and the role to be ensured in detecting mechanisms.

Keywords: Cash Courier, Anti Money Laundering, Crime Opportunity Approach

INTRODUCTION

Money laundering as proceeds of crime process has been put its existence into sophisticated crime. It develops in quantity and quality. Money laundering is also associated with more predicate crimes of financial sector. Powis (1996) mention that “Money laundering has been used to dispose of the proceeds of a variety of criminal offences that involved payments for contraband goods or illegal services... There are considerable amount of mystique and mystery about money laundering activity...” Money laundering is difficult to be understood in its nature. Even though

money laundering is proceeds of crime, but it is sui generis. In this perspective, there are several difficulties to prosecute money laundering in practice. Modus operandi and techniques of money laundering has been developing more and more. One of them is cash courier problem as a typology of money laundering.

One of globalization impact is the increasing of goods and services trading, which means also increase the money circulation as an instrument of its payment. Trading on goods and services is not in local scope only but also cross border. Cash is sometime plays an important role more than funds transfer, especially if it relate with money laundering regime. Funds transfer is traceable since bank as one of reporting parties should comply with the prudential principles such as know your customer principles, or other goods and services provider through Customer Due Diligence principles. Trader will choose cash to do their business. The payment mechanism of goods and services trading through cash courier has impacting a cash courier in and out of customs of a country. Cash payment is still attracting people. Jeffrey Robinson (1996) mentions: "For anyone confident enough to entrust cash to the evolving nations of Africa, the Dark Continent offers a legion of possibilities. There, hard currency is king. And unlike many other fragile economies...". The Kenyan Government determined in late 1994 that anyone can export up to \$500,000 without official approval". The opinion mentioned above shows that currency will remain be an attractive instrument of payment and possible to smuggling it. Other important notice of money laundering is mentioned by Mc Dowell (2001) that "money laundering is the criminal's way of trying to ensure that, in the end, crime pays". Criminals pay for their crime.

This paper will analyze why cash courier is effective way to money laundering from the crime opportunity theory approach, and construct a conceptual framework how to handle the problems of cash courier in order to build an effective anti-money laundering regime, and to be a further research ground in other problem, such as voucher gift or game card courier as a part of cash courier in money laundering problems. Money laundering as a part of white-collar crime will bring some opportunity in creates possible exploration from offender side. Thus, Benson and Simpson (2009) explain about white collar crime from opportunity perspectives. Cash courier can be advantage for offender to conduct money laundering as an opportunity perspective.

LITERATURE REVIEW

In a common way, it is easy to understand that money laundering is a follow up crime, with special position as proceeds of crime. Otherwise it is a complicated stage to define since it mixes with other activities of crime. Money laundering can be understood as a process of hiding or concealing the nature, existence, or sources of illicit proceeds of crime. The process will make ill-gotten funds will appear legitimate and ready to be circulate. Money laundering also can be understood as a life blood of crime. Therefore, offender of predicate crimes should conduct other ways to hide and conceal the proceeds of their illegal gain. Schroeder (2001) give explanation further about the reasoning why criminals conducting money laundering, as below:

“Criminals engage money laundering for three reasons. First, money represents the lifeblood of the organization that engages in criminal conduct for financial gain because it covers operating expenses, replenishes inventories, purchase the services of corrupt officials to escape detection and further the interests of the illegal enterprise, and pays for an extravagant lifestyle. To spend money in these ways, criminals must make the money that derived illegally appear legitimate. Second, a trail of money from an offense to criminals can become incriminating evidence. Criminals must obscure or hide the source of their wealth or alternatively disguise ownership or control to ensure that illicit proceeds are not used to prosecute them. Third, the proceeds from crime often become the target of investigation and seizure. To shield ill-gotten gains from suspicion and protects them from seizure, criminal must conceal their existence or, alternatively, make them look legitimate”. Hence criminals will expensively doing money laundering techniques to conceal their illicit gain, and developing modus operandi only to hide their sources of money and gain “seem legitimately” money.

Further Asian Development Bank (ADB) in its report (2003) explains that there is benefit of conducting money laundering, as below:

“Money laundering reduces criminal’s cost of crime, thereby increasing the level of crime. Interestingly, just as an efficient financial sector is a key “input” to other productive processes in a developing economy – such as manufacturing – an efficient money laundering channel is a key “input” to crime because the financial proceeds of crime as less valuables to the criminal (in a sense, an “unfinished product”) than are laundered funds. The less expensive the money laundering “input” to crime is as a result of lax anti money laundering policies, the more “productive” (active) the

criminal element will be, just as in any industry or business”. In this matter, considering money laundering as a crime will put attention to prevent and eradicate it. All the techniques and modus operandi will consider as a key input to money laundering. Hence, cash courier could be a key input to the effective money laundering.

Commonly there are three stages or processes in money laundering. There are placement, layering, and integration. Placement is a process where offender places some cash money into a financial system. It is a physical placing stage. Schroeder (2001) explains that Placement as “a first stage involves the placement of proceeds derived from illegal activities – the movement of proceeds, frequently currency – from the scene of the crime to a place, or into a form, less suspicious and more convenient for the criminal”. Placement will commonly connect to a financial institution in order to place the illicit money. Second stage is layering. This phase of money laundering is a process in transferring the illicit money and/or illegal funds as a result of placement. It can conclude transferring funds from and to bank account. It can include several complex transactions also, which is purposively to hide or conceal the process of audit trail. In other words, layering is complex stage more than placement. The third stage called as Integration, which is understood as an effort to use the funds or money after the successfulness of placement and layering into the process. Through integration, illicit money and/or funds has completely “legitimate” appear. Offender can invest, and/or buy a luxury cars and/or houses and/or apartments, etc. In different perspective, Schap (1998) has mention that under the legislation in Netherlands Antilles and Aruba, there are 5 (five) stages. In complete, Schap explains as below:

“The above phases are by no means sufficient to make the money laundering process waterproof. At some stage, legitimization has to be added in order to be able to have such an amount of money available in the legal upper-world... This leads us to distinguish the following five phases in the process of money laundering: the exchange phase; the placement phase; the layering phase; the integration phase; and the legitimization phase.”

These three stages are elaborated differently in national legislation of country. In general, there are two perspectives on money laundering stage, which is cumulative process and other is not cumulative process. As a cumulative process, it puts placement, layering and integration as one stage that will be happen in a process. Other is not cumulative process means money laundering can be happen in one or two or three of them.

In fact, Stephen R. Kroll, as quoted by J.E. Sahetapy (2003), mentions:

“Money Laundering is fundamentally simple. It involves disguising the existence, the amount, provenance, or ownership of funds and other assets in an attempt to avoid (1) detection of illegal activity, (2) evidence of illegal activity, (3) taxation, (4) restriction on profitable uses the proceeds of illegal activity whether to fund additional illegal activity or to re-invest the proceeds of illegal activity”. Further, it mentioned that there are three elements that should be understood, as below:

- Act – conversion, transfer, or concealment of the true elements of ownership of property, or acquisition or use of property, or assisting or counseling such an act;
- Knowledge – that the property is derived from one or more specified types of underlying criminal activity;
- Objective – to conceal the illicit origin of the property or to assist a person involved in the underlying criminal activity in evading the consequences of discovery of the activity

Thus in anti-money laundering formulation of each nation should consider these three elements of money laundering (act, knowledge, and objective). In this sense, each of stages can be happen in cumulative or in a single stage, but it should be in charge to meets the requirement of those three elements.

Bucy (1998) explains that there are two types of money laundering offenses. They are the reporting offenses; and “transportation” offenses which forbid moving illegally-obtained money into, out of, or among bank accounts, or moving legally-obtained money out of or among bank accounts to avoid tax or reporting obligations.

Cash courier however can be significantly instrument to assist money laundering offence. Financial Action Tasks Force mention in its new FATF recommendation (2012) Number 32 reminds:

“Countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including through a declaration system and/or disclosure system. Countries should ensure that their competent authorities have the legal authority to stop or restrain currency or bearer negotiable instruments that are suspected to be related to terrorist financing, money laundering, or predicate offences, or that are falsely declared or disclosed. Countries should ensure that effective, proportionate and dissuasive sanctions are

available to deal with persons who make false declaration(s) or disclosure(s). In cases where the currency or bearer negotiable instruments are related to terrorist financing, money laundering, or predicate offences, countries should also adopt measures, including legislative ones consistent with Recommendation 4, which would enable the confiscation of such currency or instrument”. The new FATF recommendation has stress out the position of cash courier in the context of money laundering. Currency and bearer negotiable instruments which will be moved to another areas through customs both in the domestic context or abroad context, should considered as an instrument. This indicates that cash courier of currency and/or bearer negotiable instruments are related to money laundering, and it doesn't mean as money laundering crime itself.

Inter alia with Recommendation 32, then Recommendation 4 mention:

“Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of bona fide third parties: (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for money laundering or predicate offence, (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations, or (d) property of corresponding value. Such measures should include the authority to: (a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer, or disposal of such property; (c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation, and (d) take any appropriate investigative measures”. From this perspective, it should be rethinking, that any violation of cash courier physical transportation should be proceeds to such legal process as mention as forfeited mechanism.

Here is a construction of making any kind of cash courier violation to money laundering offence as an instrument which intended for money laundering, should be assumed as a criminal instrumentalities, and therefore it become a subject to be forfeited. Thus, currency and/or other bearer negotiable instrument are a part of criminal when the person who carry currency and/or other bearer instruments are profiling purposively conducting money laundering. Other type is unintended to do money

laundering which is the person conducting cash courier did not know the regulation.

Benson and Simpson (2009) explain an opportunity perspective in white collar crime, as below:

“An account is a statement made by someone to explain unanticipated or untoward behavior (Scott and Lyman, 1968). There are two general forms of accounts: excuses and justifications. In making an excuse, the person admits that he or she did something wrong but denies having full responsibility for the actions. For example, someone who is convicted of income tax evasion might try to excuse their behavior by saying that they were confused by the complexity of the tax codes and their violation was just an accident. The second general form of accounts – the justification – is important for understanding white-collar crime from an opportunity perspective. In justifying untoward behavior, the person accepts responsibility for the act but denies its pejorative content.... White-collar crime opportunities have a cognitive dimension in the sense that offenders must conceive of the opportunity in such a way that they can maintain a non-criminal identity”. Cash courier and money laundering can be problematic in account and justification problems. Thus opportunity perspective for cash courier in money laundering offence will be important to be analyzed.

METHODOLOGY

The paper is a normative legal research, and it follows a normative legal research methodology. It based on law and regulation in regards with cash courier problem in money laundering. Statute approach and conceptual approach will be using in this paper. In order to answer the research question of this paper to figure out the conceptual framework of cash courier as a key instrument for money laundering which should be handle by regulation. The sources of this research based on any law and regulation regarding with Money Laundering. All sources have been collected from any sources like from countries' law and regulation, International Standards, books and/or other sources from internet that is relating with money laundering topics, cash courier. The concept that have been built in the law, convention, or regulation will be operated to reconstruct concept as a solution in the end, and give basic concept to the problem which may appear in the further situation. As a qualitative research, this paper will finds some key instruments to understand social reality in cash courier and money laundering problem and how to handle the problems even though the regulation is already exist. This paper will

include descriptive analytically to the implementation of cash courier regulation regarding with the possibility to exploring money laundering, especially from the crime opportunity theory approach.

CRITICAL ANALYSIS

The first analysis will explain about the existence of cash courier transportation in money laundering area. Through the New FATF Recommendation and other regulation, it can be understood that cash courier is a currency and/or bearer negotiable instruments such as Cheque, Travellers Cheque, Promise, etc. In the previous FATF Recommendation called as a Special Recommendation, there are definitions about currency, bearer negotiable instruments, and also physical cross-border. According to the Special Recommendation No. IX (before the new FATF is implemented), there is definition of several terms:

“The term bearer negotiable instruments includes monetary instruments in bearer form such as travelers cheques; negotiable instruments (including cheques, promissory notes and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery; incomplete instruments (including cheques, promissory notes and money orders) signed, but with the payee’s name omitted.

The term currency refers to banknotes and coins that are in circulation as a medium of exchange.

The term physical cross-border transportation refers to any in-bound or out-bound physical transportation of currency or bearer negotiable instruments from one country to another country...”. Thus, both currency and bearer negotiable instruments can be defined as an instrument of payments also with different characteristic. For bearer negotiable instruments, there are two types of instruments. It is bearer form of money which is endorsed without restriction, and other is signed bearer money but with the payee’s name omitted. Currency is including banknotes and coins only. The loop hole in sense is when connected with development of new payment products and systems. The regulation is just mention about physically currency and/or bearer negotiable instruments.

This is the limit of cash courier definition as mentioned in the New Recommendation No. 32. In comparative perspective, the Special Recommendation No. IX has given an interpretative note on its recommendation. The objective is as below:

“FATF Special Recommendation IX was developed with the objective of ensuring that terrorist and other criminals cannot finance their activities or launder the proceeds of their crimes through the physical cross-border transportation of currency and bearer negotiable instruments. Specifically, it aims to ensure that countries have measures: 1) To detect the physical cross-border transportation of currency and bearer negotiable instruments, 2) To stop or restrain currency and bearer negotiable instruments that are suspected to be related to terrorist financing or money laundering, 3) To stop or restrain currency or bearer negotiable instruments that are falsely declared or disclosed, 4) To apply appropriate sanctions for making a false declaration or disclosure, and 5) To enable confiscation of currency or bearer negotiable instruments that are related to terrorist financing or money laundering. Countries should implement Special Recommendation IX subject to strict safeguards to ensure proper use of information and without restricting either: (i) trade payments between countries for goods and services; or (ii) the freedom of capital movements in any way”. That Special Recommendation even though is not exist anymore, could give a way to think that the importance to regulate cash courier in the context of money laundering was not only endangering nation through physical cross border of currency itself, but also other problems which may appear such as the problem of money or currency flowing, capital flight, etc. based on history perspective, since that Special Recommendation IX was not exist anymore, it can be understood Cash Courier problem was designed in order to stop further criminal activities such as terrorist, or other criminals to get financing for their activity. *Mutatis mutandis*, cash courier is just an instrumentalities for money laundering whether the source of money laundering is coming from illegal activity. In this perspective, it should be analyzed whether cash courier can be crime of money laundering itself or only an instrument or just a violation in the perspective of administrative, and not a criminal.

The regulation of cash courier is already exist in some law and regulation, including in Indonesia, but it still needs further comprehensive analyzes in the perspectives of supervision and implementation of cash courier in related with Anti Money Laundering Regime. In summary, Sutedi (2008) then explain that the control mechanism of cash courier in and out of Customs area is important. The reason is not only to create the stability of exchange rate of IDR and preventing the internationalization of IDR, but also in the context of prevention and eradication of Money Laundering and Financing of Terrorism. Cash courier out of Customs without permission is a part of money laundering at least the effort to evade tracing will relate to criminal activity. Powis (1992), in his books explain some cases happen regarding with the problem of cash smuggling into and

out of USA. The case that conducts by Amendolito by moved \$500,000 to Nassau on a chartered flight. While at Nassau Branch of BSI, Amendolito met the manager, Peter Albisser. He learned that there were no restrictions on bringing US currency into the Bahamas, and no need to declare any of the money. Form the case mention by Powis, it tends to what Amandelito did not know about the obligation to report, or in intend to avoid reporting obligation. Robinson (1996) gives some cases, such as the case of Dung Cong Ta, metamphetamine dealer. On January 25, 1994, he and his wife left San Diego for Minneapolis, and was changed his scheduled to London. Before boarding, he tried to check a gray suitcase through to Jersey, but was told it couldn't be done and that he would have to clear customs in London. The suitcase was seized by U.S. Customs agents in Minneapolis, who then stopped Dung Ta and his wife. The officer asked them whether they carry more than \$ 10,000 in cash. The officer was also asked whether they had filled out a customs declaration. The search process said that they were lie. A search produced \$3,300 on his person, \$8,600 on hers, and \$90,000 in the suitcase. Dung Ta maintained the money was paid to one of his businesses for damage done by Los Angeles Earthquake. His wife claimed her \$8,600 was a gift from a friend whose name she couldn't remember, and her sister, whose address she didn't know. Then Dung Ta was in custody.

The problem of money laundering which can arising negative impact for economic of a country as a part of Illicit Capital Flight, is easily can be done through Cash Courier cross border transportation. In this matter, Asian Development Bank (2003) has mention: "Money Laundering can be seen as a key element in Illicit capital flight from throughout the developing world..." The cash courier in and out of area of Customs can be a modus of money smuggling. Siahaan (2008) explains in summary that the modus of cash money smuggling or parallel bank system to other country. This modus is smuggled physical money to abroad. Sutedi (2008) then give explanation that the truth doubtfulness of cash courier is the practice of money laundering. It means cash courier is a problem of money laundering, and further through deep analyzing, offender of cash courier cross-border transportation (and also smuggling) can be analyzed has been conducting money laundering in general ways.

Regarding with the use of cash and bearer negotiable instruments, Eurasian Group (2012) in its plenary meeting on December 2012, report that:

"According to the data obtained in the course of the study, a majority of respondent countries have lately been recording an increase in the volume

of cash in their economies. A growth in the demand for cash in the economy triggered by the rising national output, price increases or other reasons results in the need for a corresponding increase in the money supply by banks. However, it should be noted that any increase in the volume of cash in the economy also increases the risk of its use for criminal purposes.

Among the key factors encouraging the use of cash are:

- The availability of financial instruments, such as bills of exchange, traveler's checks, bearer shares, bank checks, etc, that allow payments to be made in cash;
- The existence of the shadow economy;
- Low level of non-cash payments among individuals paying for goods and services;
- Population's informal income, which is derived and stored in the form of cash.

A growing use of cash in settlement transactions and business results in such negative consequences as:

- Lower budget revenues caused by the shrinking tax base;
- A shift in the money supply balance in favor of cash, which greatly complicates the
- Planning and management of the economy and, as a consequence, undermines economic
- Stability and social well-being of the state;
- Contributes to the growth of the shadow economy and development of the gray market, given that the monitoring of cash flows is much more difficult;
- Increases the risk of creation of illegal "centers" for extremist and terrorist financing activities, which in turn, pose a threat to public safety.

Once again, the problem of cash courier will not only impacting one problem, but in some areas either.

ESAAMLG (2008) explain some trends of cash courier money laundering that include:

- Financial centers serving as destination points for the movement of cash through couriers;
- Connections between currency smuggling and casino operations;

- Use of cash couriers to support underground foreign exchange operations;
- Use of cash couriers by criminal grouping transporting proceeds of crime; and
- The use of complex transactions further obscures the money trail and complicates detection.

Red flag indicators, include:

- False declarations
- False compartments
- Suspicious movements (across border)
- Fake cheques or negotiable instruments
- Suspicious behavior and appearance
- Request of large bank transfers within a short space of time
- Unjustified frequency of movement across borders
- Bulk cash on a person body
- Failure to declare the right amount of cash to Customs Authorities
- Travel documents discrepancies
- Travelers who leave the country with more cash than they first entered.

Those reports explain in some way that anyone who transporting cash (currency and/or bearer negotiable instruments) related with money laundering. Some indicators as the red flag are developed to identifying whether it is money laundering scheme or not. It is important to rethinking and reconsidering whether cash courier is just an instrument of supporting money laundering, cash courier related money laundering, or it is one of money laundering itself. From the construction itself, money laundering is any ways to conceal or hide the sources or nature of money or assets that is derived from crime. In the context of cash courier and money laundering, it tends to occurring crime better than an illegal behavior. It tends to endangering of money laundering than to illegal activity itself. It should reconsider related to crime than to administrative violation.

Further discussion will be analyzing the crime opportunity approach that has been developed. The definition of Crime Opportunity theory is “a theory that suggests that offenders make rational choices and thus choose targets that offer a high reward with little effort and risk. The occurrence of a crime depends on two things: the presence of at least one motivated offender who is ready or willing to engage in a crime, and the conditions of the environment in which that offender is situated, to wit, opportunities

for crime. All crimes require opportunity, but not every opportunity is followed by crime. Similarly a motivated offender s necessary for the commission of a crime but not sufficient...” (Wikipedia, 2015).

Money laundering is a crime. As mention in the earliest of this paper, money laundering is not an easy construction to be understood. It involves more understanding and conscience whether it is a crime or just an illegal behavior. Even though Conventions related with money laundering, and all national legislation have been criminalized money laundering, the problem of money laundering is remaining appear as an illegal act. It is become more bias when technically mixed with other modus and techniques of crime. Otherwise, law enforcement on its challenge remain face some difficulties to handle it. In specific, the problem of cash courier in money laundering will be in debatable position, whether it is money laundering crime itself, or an illegal activity which may affect money laundering.

To answer this problem, it should be analyzed from the Conventions and/or other national legislation on money laundering itself. Article 3 b of United Nations against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (Vienna Convention 1988) mention money laundering as a form of crime, as below:

- i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph *a)* of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
- ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph *a)* of this paragraph or from an act of participation in such an offence or offences

United Nation Convention against Transnational Organized Crime as called as Palermo Convention introduces Money Laundering through Article 6, as below:

“... as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system: (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.”

Both Conventions has mentions that money laundering is a crime committed intentionally. It can be main perpetrator and/or in the context of participation or association with or conspiracy to commit, attempts to commit and aiding, abetting, even facilitating and counseling the commission of money laundering.

Proceeds of Crime Act 2002, as quoted from Rees and Fisher (2005), explain Money Laundering as below:

“The term ‘money laundering’ applies to the process by which funds derived from illicit activity are given apparent legitimacy. Although the term is said to have derived in origin from the use of “Laundromats” by organized crime syndicates in the United States to process of their illegitimate “businesses” through legitimate business, in a colloquial sense the term conveniently lends itself to describe the process of ‘cleaning’ the criminal proceeds... It can range from the unsophisticated physical transportation of cash in a suitcase across borders and then seeking to integrate it at its destination, to the placement of the criminal...”

Indonesian Law Number 8 of 2010 concerning Prevention and Eradication Money Laundering criminalized money laundering into three articles, as:

Article 3: Anyone, who places, transfers, forwards, spends, pays, grants, deposits, takes to the abroad, changes the form, changes to the currency or securities or other deeds towards the Assets of which are recognized or of which are reasonably alleged as the result of criminal action, as set forth in Article 2 section (1) with the purpose to hide or to disguise the origin of

Assets, shall be subject to be sentenced due to the criminal action of Money Laundering....

Article 4: Anyone, who hides, or disguise the origin, source, location purpose, transfer of right or the truly ownership of the Assets that are known by him or of which are reasonably alleged as the result of criminal action, as set forth in Article 2 section (1), shall be subject to be sentenced due to the criminal action of money laundering...

Article 5 (1): Anyone, who receives or who takes the control on placement, transfer, payment, grant, deposit, exchange, or utilize the Assets of which are known by him or of which are reasonably alleged as the result of the criminal action, as set forth in Article 2 section (1), shall be subject to be sentenced with...

These Articles explains about 3 (three) kinds of perpetrator. The first perpetrator is called as active perpetrator (in the context that the perpetrator is both predicate crimes and money laundering). The second one is active perpetrator in the context of someone who facilitating the process of money laundering. The perpetrator in Article 4 is not the perpetrator of predicate crimes. Article 5 is about passive perpetrator where the perpetrator is just receiving or takes control on its placement, transfer, payment, etc. of the perpetrator of predicate crimes.

Article 10 states: “Anyone who are in or outside of the territory of the Republic of Indonesia who participates in committing the attempts, assistances, or conspiracy to commit criminal action of Money Laundering shall be subject to be sentenced with the equal sentence as set forth in Article 3, Article 4, and Article 5”.

Articles 3, 4, 5 versus Article 10 implicitly mention that there are main perpetrators; other is anyone who participates in committing Money Laundering.

In the context of Cash Courier violation, the perpetrator should has intention to do any process of hiding, disguising, or anything in order to conceal the origin, source, location of proceeds of crime which is derived from predicate crimes. As mentioned in the previous page, it should be a prudent way to recognize the type of cash courier offender, whether he or she has intention to do money laundering or unintended and not understand the reporting obligation which should comply by anyone who has carrying currency and/or other bearer negotiable instruments in and/outside customs of one territory. Thus to know the willing or intention

of the perpetrator will be very important in order to classify he or she is a perpetrator of money laundering itself in the context of Article 10 that will be punished under criminal law regime, and other is he or she has no intention to do money laundering, but his or her action related to money laundering. In this case he or she will be imposed through administrative or civil sanctions. As mention in the New FATF Recommendation Number 35, “Countries should ensure that there is a range of effective, proportionate and dissuasive sanctions, whether criminal, civil, or administrative, available to deal with natural or legal persons covered by...”. The recommendation number 35 is covering all the recommendation as mention in the New FATF Recommendation, which is impacting to the problem of Cash Courier itself. Further Bucy (1998) then mention: “the reporting statutes contain both civil and criminal penalties for “willful” violations. The transportation statutes, 18 U.S.C §§ 1956, 1957, impose criminal liability only... ‘Willful’ this Court has recognized is a “word of many meanings”, and “its construction [is] often ... influenced by its context... to require both “knowledge of the reporting requirement” and a “specific intent to commit the crime,” i.e. “a purpose to disobey the law””. Cooter and Ulen (1988) mention that: “there are crimes in which fault with intentionally is sufficient for prosecution. There are even crimes in which fault is unnecessary for prosecution – so called “strict liability” crimes.... Guilt in criminal law should not be confused with guilt in psychiatry. In psychiatry, guilt is the feeling that one is blameworthy; it is usually accompanied by regret and remorse. In law, guilt concerns the intention to commit a crime. A guilty intent often causes guilty feelings, but not always...” In stressing out the problem of Cash Courier in Money Laundering, it should be reminded about the ultimate goal of any money laundering. Further, Stessens (2000) remind that “the ultimate goal of any money laundering operation is twofold: to conceal the predicate offences from which these proceeds are derived and to ensure that the criminals can ‘enjoy’ their proceeds, by consuming or investing them in the legal economy”.

It is important to reconsider Cash Courier has significant role to arising money laundering, not only to consider cash courier as an illegal action but also a crime itself. From the context of Crime Opportunity theory, through key concept of Rational Choice, it can be said that conducting cash courier and money laundering is an opportunity and rational to be choose. Wikipedia (2015), quoted from Cornis & Clarke (1986) and Barnes (1995), mention:

“The rational choice perspective tries to understand crime from the perspective of the offender. It is directly concerned with the thinking

processes of offenders, how they evaluate criminal opportunities, why they decide to do one thing rather than another, and why they choose to obtain their ends by criminal and not legal means. This perspective has helped to explain why displacement does not always occur and has helped develop different ways to reduce opportunities for crime.” Inter alia with the problem of Cash Courier will occur when the perpetrator think about the opportunities to conduct any illegal activity related with money laundering.

There are two major systems that is used in the cash courier, that is declaration system and disclosure system, and other is mixed systems. According to the New FATF Recommendation, both of systems which choose by countries are depend to the country itself. FATF Guidance Document (2010) further gives some International Best Practices on Detecting and preventing the Illicit cross border transportation of cash and bearer negotiable instruments. This document is actually an implementation document of Special recommendation IX that has been replaced by the New FATF Recommendation. In its document, FATF explains that “declaration system refers to a system whereby persons are required submit a truthful declaration to the designated competent authority”, and “disclosure system refers to a system whereby persons are required to make a truthful disclosure to the designated competent authorities upon request”. One system starts from declaration mechanism, while other is put disclosure as it request. Which one is better, is not only depend on the system itself, but how to follow up with the ability of designated competent authority when the ideal declaration and/or disclosure fails to achieve. Sense and knowledge should be building. In example, here is Singapore Law and Indonesian Law which mentioning their own systems. Singapore in its regulation (www.cad.gov.sg) regulates that:

“Any person, who moves into or out of Singapore Cross Border Movements of Physical Currency and Bearer Negotiable Instruments (CBNI) exceeding SGD 20,000 (the prescribed amount) or its equivalent in a foreign currency, is required to give a report in respect of its movement.”

“Any person who receives CBNI exceeding the prescribed amount from outside Singapore is also required to give a report within five business days upon receipt.”

Any person who enters or leaves Singapore is required to give a report if he carries with him CBNI exceeding the prescribed amount. He shall hand

the report to any immigration officer at the Customs Red Channel on Arrival in Singapore, and at the immigration counter on departure from Singapore”. The punishment as mention in Singaporean Regulation, a failure to give a full and accurate report is an offence under the act. The punishment is a fine not exceeding SGD 50,000, or an imprisonment term not exceeding 3 years, or both. The cash may also be seized if the person fails to give report.

Indonesian Regulation through Article 34 (1) of the Law Number 8 of 2010 concerning Prevention and Eradication on Money Laundering regulates:

“Anyone who transports cash in the currency of Rupiah and/or foreign currency, and or other payment instrument in the form of cheques, traveler cheques, promissory note to pay, bank draft at least Rp. 100.000.000,00 (one hundred million rupiahs) or the equal, into the inside or to the outside of the Customs Area, shall be obliged to be notified to the Directorate General of Customs”. Further, Article 35 (1) then mention “Anyone who does not report the transportation of cash and/or other payment instrument as set forth in Article 34 section (1) above, shall be subject to administrative penalty in the form of fine as much as 10% (ten percent) from the overall amount of the transported cash and/or other payment instrument with the maximum amount Rp. 300.000.000,00 (three hundred million rupiahs)”.

In the section (2) there is a regulation to anyone who has notified the transportation of cash and/or other payment instruments but the amount is larger than the amount which has been notified. In this sense, that person will be administratively penalty as 10% (ten percent) from excess amount of the transported cash and/or the other payment instrument with the maximum amount as much as Rp. 300.000.000, 00 (three hundred million rupiahs).

From both example of regulation regarding with cash courier cross border transportation above, it can be seen that there are two regimes, administrative and criminal regimes. The important thing is to understand that Cash Courier can endanger and relate to money laundering. Then considering it as a part of offender of money laundering will bring advantage, by remain considering the intention elements of crime. The opportunity perspective that has been explained by Benson and Sally give some important basic understanding on how excuse and justification plays an important role to justify about the person who commit cash courier cross border transportation. Some excuses might occur as primary reason

to valuing whether he or she commits a violation in cash courier which related with money laundering. Further they will use any kinds of justification just to deny that they are responsible in causing some problems on money laundering, or further in its predicate offense. Cooter and Ulen (1988) explain one dimension of an economic theory of crime and criminal law, which is in its sub chapter mention about an economic account of the decisions as below:

“At a first step toward such a theory, we will develop an economic account of the criminal mind. As represented in economic theory, decision makers are rational, and that includes criminals. So we begin with an account in this section of the most rational type of crime: a crime deliberately committed for material gain. Crimes can be ranked by seriousness, and punishments can be ranked by severity...” Cash courier committed by intended offender of money laundering will give material gain. At least through the opportunity of committing violation on Cash Courier cross border which based on people who do not know the procedure and sanction which may impose to them. Money laundering is ubiquitous in its existence, and some of people take advantage on it, while other is not.

Both declaration systems and disclosure systems impacting a positive ways to tackling money laundering through cash courier, but it should followed by a good detection mechanism, not only reporting mechanism through declaration and/or disclosure systems. All designated responsible officer should upgrade their knowledge in detecting the violation of cash courier in money laundering. All institution in cross border should have a good coordination, since there is remain loop holes to detect abusive methods of money laundering through cash courier.

In order for that, Eastern and Southern Africa Anti Money Laundering Group (ESAAMLG) in its report on Cash Courier – Based Money Laundering (2008), give recommendation specifically to upgrading the ability of such competent officer such as Customs agencies, law enforcement agencies, tax authorities, and other inter agencies. The recommendation is about Training and awareness raising to identify and combat cash courier based money laundering and the financing of terrorism techniques.

RECOMMENDATION

Implementing the provision of participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences of money

laundering to the problem of cash courier cross border transportation will give some opportunity to handle the increases of money laundering crime. It should be reconstructed that anyone who transport currency and/or bearer negotiable instruments is not only related with money laundering, but will occurring money laundering itself. For further research, it should be solve the problem about cash courier problems and money laundering which involve new payments products and systems.

CONCLUSION

The problem of cash courier cross border transportation has the same level of difficulties with the problem of money laundering itself. In one perspective, cash courier violation is just an opportunity to support money laundering crime since cash courier becomes one of its key elements. Cash courier cross border transportation just an instrument related with money laundering, terrorist financing, and/or predicate crimes itself. But in other perspective, cash courier can be just seemly “an illegal” act, not a crime. In this perspective, the person who commit cash courier with “unintended” meaning to do violation will try to find their justification. Conceptual framework which should be build in this sense is reconsidering to make reconstruction on the role of offender who has opportunity to commit cash courier cross border transportation of currency and/or bearer negotiable instruments, and related with money laundering. It is important to reconstruct it as a part of money laundering offender itself, at least in the perspective of anyone who is facilitating or aiding or attempting to conduct money laundering.

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