When Context Matters - Application and Potential of Financial Crime Risk Indicators in Selected African Jurisdictions

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Abstract

This article explores the application and potential of financial crime risk indicators in international banking and mercantile transactions. Special emphasis is placed on lists of financial crime risk indicators which are circulated or have been drafted by governments and public institutions in sub-Saharan Africa. This article investigates *inter alia* whether such financial crime risk indicator lists created by African institutions differ noticeably – regarding content, drafting style, and availability – from other well-established indicator lists, and whether African financial crime risk indicator lists appropriately represent African commercial realities and thus meaningfully contribute to fighting financial crime on the continent and beyond.

Keywords

International financial crime; risk indicator; suspicious transaction; commercial fraud; money laundering; corruption; international economic sanctions; illicit capital flows; illicit financial flows; de-risking; banking law; international trade finance.

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1 Introduction

This article is part of a *Festschrift* in honour of Professor Charl Hugo on the occasion of his 65th birthday in July 2022. The collection of essays pays tribute to Professor Charl Hugo and appreciates the career he has had in legal practice and – most importantly – in academia. His enormous influence on the teaching of banking law and the law of trade finance in South Africa, and his remarkable personal support for students and emerging researchers is gratefully acknowledged.

This article explores the application and potential of so-called financial crime risk indicators in the international banking and mercantile sector to combat international financial crime. Special emphasis is placed on lists of financial crime risk indicators which are circulated or have even been drafted by governments and public institutions in sub-Saharan Africa. The potential of financial crime risk indicators to detect and prevent financial crime, and thus to foster the development and advancement of societies on the continent, is examined.

Financial risk indicator lists enable banks and other commercial parties to focus on transactions and customers that probably represent higher risks and therefore deserve particular and enhanced scrutiny. Several African governments and public bodies have drafted and published specific financial crime risk indicator lists. This article investigates *inter alia* whether such financial crime risk indicator lists created by African institutions differ noticeably – regarding content, drafting style, and availability – from other well-established indicator lists, and whether African financial crime risk indicator lists appropriately represent African commercial realities and thus meaningfully contribute to fighting financial crime on the continent and beyond. The article is not a quantitative study, but a concise assessment of the existing and widely available financial crime risk indicator lists issued by select sub-Saharan African institutions. The article refers to the importance of the local context in which the risk indicators are to be used and highlights the problem of de-risking in international banking that follows from (perceived) financial crime compliance shortcomings on the African continent.

2 Indicators as useful tools

In general, indicators play a major role in determining the relevance and implications of certain occurrences, circumstances or behaviour, or the need to implement measures or to react in a particular manner. The use of indicators is recognised in many disciplines and areas – from cancer research to environmental models where they help to assess the state of ecological systems, and from primary school literacy development to harvest yield relating to subsistence farming. Indicators are also used in finance and economics, where various financial indicators (such as commodity prices, gross domestic product, the current-account balance of a country, etc.) play an integral part in the generation of reliable forecasts or the creation of economic models. As has been mentioned above, this article concerns itself with select financial crime risk indicators for the international banking and mercantile sector aimed at combatting international financial crime as drafted and used on the African continent.

2.1 The challenge of international financial crime

Financial crime is a phenomenon encountered in various instances and forms, ranging from commercial fraud to cases of embezzlement or corruption, from tax evasion, violations of international economic sanctions and illicit capital movements to money laundering. The perpetration of financial crimes hurts nation states, government and public institutions as well as society – and thus actual people. Nation states and their governments require *inter alia* revenue generated from taxable transactions, levies and other payments due to them (such as royalties from the exploitation of natural resources, the sale of commodities, or other business ventures in which the state has a business interest). Year after year, however, treasuries and societies around the world suffer from financial crime that is cheating state coffers of the opportunity to generate income, legitimately, from business transactions taking place within their jurisdiction. This deprivation of public revenue and potential income, particularly through corruption and illicit capital flows, impacts negatively on the development of countries and societies, as less money is available for the improvement of infrastructure, basic services and other societal expenses or services.[1]

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1 Stuart *Trade-Based Illicit Financial Flows in Africa* 1; Lauriol and Raynaud *Oil, Gas and Mining Law* 14-15; Kar and Cartwright-Smith *Illicit Financial Flows from Africa* 17; Anzanilufuno "Fourth Industrial Revolution" 185 *et seq*; Moyo *Dead Aid* 50 *et seq*; Latif 2022 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4080273 22 *et*

States and societies that belong to the group of so-called developing countries are impacted on particularly hard by financial crime, as their already insufficient public financial resources are strained further through financial crime and illegal financial transactions. This intensifies the shortage of the financial resources that governments have at their disposal to improve, potentially, domestic infrastructure or to allow spending on other projects for the public good and development.[2] Furthermore, with an increase in financial crime, societies potentially lose confidence in governmental structures, the justice system and the rule of law in general,[3] and suffer from market distortion and damaged market integrity,[4] all fuelled by illicit conduct. Kamga argues, convincingly and with a specific focus on South Africa, that "issues of development, political economy, and transformation in South Africa cannot neglect the effects of corruption and [illicit financial flows]",[5] and thus stresses the need to recognise the unfortunate link between financial crime and its challenges to development.

In order to combat financial crime and illegal financial transactions, laws and regulations[6] recommend or require the scrutiny of banking and commercial transactions. Most (international) financial transactions are conducted and facilitated by private actors such as commercial banks and privately organised service providers. Although some public institutions, such as certain public financial clearing bodies, central banks or their public subsidiaries, may play an indirect role in the process, private actors are usually involved more intensely in the transaction processes. This is due to the fact that these private actors typically represent both the starting point of the transactions (e.g., initiating an international electronic transfer on the instructions of a local customer, accepting cash to be deposited into a bank

seq; see also Fofack and Ndikumana *Potential Gains from Capital Flight Repatriation* 19, who stress the need to intensify efforts to repatriate to African countries moneys that were illicitly removed from the continent in order to "accelerate growth and fight against poverty in Africa".

2 Ayogu and Gbadebo-Smith "Governance and Illicit Financial Flows" 278; Yikona *et al Ill-Gotten Money and the Economy* 5; for critical remarks regarding the very concept of "development" or, respectively, "développement" in its original French, see Sarr *Afrotopia* 21 *et seq*.

3 For a concise treatment of the impact of transnational organised crime – to which certain cases of international financial crime may belong – on the rule of law, see Feltes and Hofmann "Transnational Organised Crime" 60-62.

4 Carr and Stone *International Trade Law* 676.

5 Kamga "Introduction and Overview" 2 (alteration by author).

6 These laws and regulations originate from domestic, international and supranational bodies and organisations, so that internationally-active banks and financial institutions need to pay attention to various sources and legal regimes which may apply to their commercial activities; see Byrne *et al Trade Based Financial Crime Compliance* 82, 86.

account, receiving transport documents from a customer for documentary collection purposes to support an international purchase, etc.) as well as the concluding stage of the transaction (receiving a transferred sum of money on behalf of a customer who keeps an account, crediting an account after a deposit was received, receiving money from the correspondent collecting bank on behalf of a customer after a successful documentary collection, etc.).

Private actors such as the above-mentioned commercial banks, therefore, engage customers and clients directly when financial transactions are initiated and executed. Banks which facilitate these commercial transactions with their handling of payment, trade finance services and financial flows are in a much better position to detect financial crime than any government agency could (and should) ever be – because transactional insight accrues in the banks. As a result, private actors have far greater actual insight, or at least the potential to acquire such insight, into financial transactions that are affected each day. Therefore, compliance expectations are primarily aimed at banks and other professional groups that facilitate banking and commercial transactions such as (international) trade and trade finance, commercial transactions, and money transfers.

2.2 Needles in a haystack – focussing on relevant transactions and customers

Given the integrated and globalised economies of the modern world, the number of financial transactions has risen considerably. Where in the past bank clerks manually checked, entered and executed transactions on behalf of their employers (banks) and their respective customers (merchants, trading companies, manufacturers), today's world of international trade and corresponding banks relies on electronic and computerised transaction execution to cope with the increased numbers of commercial transactions and subsequent movements of funds. It is an undeniable fact that thousands of banking transactions taking place every day in a single country cannot all be checked thoroughly for signs of financial crime. The significant volume[7]

[7] For example, First National Bank in South Africa (a division of FirstRand Bank), reported almost 175 million internet banking transactions through its systems between July 2020 and June 2021 (FirstRand Bank 2021 https://www.firstrand.co.za/media/investors/annual-reporting/firstrand-bank-annual-report-2021.pdf); the British bank HSBC executes 139 payment transactions per second (Halpin 2020 https://www.gbm.hsbc.com/-/media/gbm/insights/attachments/iso-20022.pdf); the credit card provider Visa reported a total of 164 billion transactions on its network between October 2020 and September 2021 (Visa 2022 https://s29.q4cdn.com/385744025/files/doc_downloads/Visa-Inc_-Fiscal-2021-Annual-Report.pdf).

and complexity of (international) financial transactions prohibit that every transaction is investigated in depth; there are neither sufficient resources (especially qualified personnel) available to do so without inconveniencing or delaying international world trade and finance, nor would it be justified – most transactions are arguably entirely legitimate and within the boundaries of the law. Instead, jurisdictions with modern and robust compliance regimes apply a so-called risk-based approach.[8]

The risk-based approach is based on the notion that transactions or customers pose different levels of risks (likelihood and potential impact) and thus require different levels of inquiry and scrutiny.[9] While some transactions or customers may need additional, heightened or enhanced due diligence checks, others may be treated as insignificant, less likely, or even negligible regarding their potential or likeliness to cause harm through financial crime.[10] Therefore, this approach has been termed, appropriately it is submitted, the risk-based approach. However, to implement and follow a compliance approach guided by the potential severity and likelihood of risk, an effective process has to pre-select transactions and customers based on reasonable and tested criteria.

3 Financial crime risk indicators

To identify the transactions and customers that potentially pose significant risks of financial crime, and thus merit additional enhanced scrutiny, banks and other professionals need practical guidance and references as to which behaviour or circumstances must been seen as suspicious. Financial crime risk indicator lists serve these exact purposes – they describe scenarios or particular personal behaviours by clients and customers which, because they have "been associated with financial crime so regularly as to justify a suspicion that [their] presence is not a coincidence but an element or aspect of the crime itself",[11] may indicate that a financial crime could be in progress. This enables banks and financial institutions to direct and apply their attention and compliance resources in a targeted manner.

Examples of such descriptions contained in financial crime risk indicator lists in use in Sub-Saharan African countries, are:

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8 Regarding the application of the risk-based approach in South Africa, see Spruyt "Financial Intelligence Centre Amendment Act" 19 *et seq*.

9 Heimann and Pieth *Confronting Corruption* 131; Marxen "Traditional Trade Finance Instruments a High Risk?" 171 *et seq.*

10 See Byrne *et al Trade Based Financial Crime Compliance* 155 *et seq*.

11 Byrne *et al Trade Based Financial Crime Compliance* 178 (insertion by me).

- "A customer provides insufficient, vague or suspicious information concerning a transaction",[12]
- "Transaction lacks business sense",[13]
- Occurrence of "Transactions in which unusual or unnecessarily complex legal structures are used without any economic logic",[14]
- "Large cash withdrawals from a previously dormant/inactive account, or from an account which has just received an unexpected large credit from abroad",[15]
- "Transaction involves a country known for highly secretive banking and corporate law",[16]
- "Customer makes unusually large cash payments in relation to business activities which would normally be paid by cheques, bankers draft, etc.",[17]
- "Multiple transactions are carried out on the same day at the same branch but with apparent attempt to use different tellers",[18]
- "Client uses notes in denominations that are unusual for the client or industry, when the norm in that business is either much smaller or much larger denominations",[19]

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12 Financial Intelligence Centre (South Africa) *Guidance Note 4B on Reporting of Suspicious and Unusual Transactions and Activities to the Financial Intelligence Centre in Terms of Section 29 of the Financial Intelligence Centre Act (Act 38 of 2001)* (March 2019) 24.

13 Nigerian Financial Intelligence Unit *AML/CFT Operational Guidance for Dealers in Precious Metals and Stones (Jewellers)* (date unknown) 12.

14 Financial Reporting Centre (Kenya) *Guidance to Reporting Institutions on Suspicious Transaction and Activity Reporting* (May 2017) 25.

15 Financial Intelligence Unit (Tanzania) *Anti-Money Laundering Guidelines to Banking Institutions – Guidelines No 2* (April 2009) 13.

16 Financial Intelligence Authority (Uganda) *Guidelines on Identifying Suspicious Transactions* (April 2016) 12.

17 Financial Intelligence Centre (Zambia) *Suspicious Transactions Reporting Guidelines – Banking Sector* (2015) 29.

18 Financial Intelligence Authority (Uganda) *Guidelines on Identifying Suspicious Transactions* (April 2016) 10.

19 Financial Reporting Centre (Kenya) *Guidance to Reporting Institutions on Suspicious Transaction and Activity Reporting* (May 2017) 24.

- or "Customer is known to have a criminal background".[20]

Financial crime risk indicators are referred to by several names and terms,[21] among them red flags, red-flag indicators, crime indicators, risk indicators, and warning signs. Crime risk indicator lists enable banks and other parties to focus on transactions and customers that likely represent higher risks and thus employ electronic resources and compliance personnel in a more concentrated and targeted fashion. Even though the presence of a single indicator cannot be treated as definitive evidence of financial crime, it indicates a need for further, or more intense, investigation and due diligence procedures.[22] As Kenya's Financial Reporting Centre put it:

> A single indicator is not necessarily indicative of reasonable grounds to suspect money laundering or terrorist financing activity. However, if a number of indicators are present during a transaction or series of transactions, then you might want to take a closer look at other factors in order to make the determination as to whether the transaction must be reported. The indicators have to be assessed in the context in which the transaction occurs.[23]

Risk indicator lists are issued by governmental, inter-governmental, or even private bodies, and subsequently circulated and offered to relevant persons and institutions as guidance and directions to shape their compliance checks and procedures. Several African governments and public bodies have drafted and made available specific financial crime risk indicator lists, among them the Financial Reporting Centre of Kenya,[24] the Financial Intelligence Unit of Tanzania,[25] the Bank of Ghana and Financial Intelligence Centre Ghana,[26] the Nigerian Financial Intelligence Unit,[27] the

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20 Nigerian Financial Intelligence Unit *AML/CFT Operational Guidance for Dealers in Precious Metals and Stones (Jewellers)* (date unknown) 12.

21 Byrne *et al Trade Based Financial Crime Compliance* 177.

22 Cassara *Trade-Based Money Laundering* 169. Also, see the note of caution contained in Financial Intelligence Unit (Tanzania) *Anti-Money Laundering Guidelines to Banking Institutions – Guidelines No 2* (April 2009) 18.

23 Financial Reporting Centre (Kenya) *Guidance to Reporting Institutions on Suspicious Transaction and Activity Reporting* (May 2017) 19 (stylistic alteration by me).

24 Financial Reporting Centre (Kenya) *Guidance to Reporting Institutions on Suspicious Transaction and Activity Reporting* (May 2017).

25 Financial Intelligence Unit (Tanzania), *Anti-Money Laundering Guidelines to Banking Institutions – Guidelines No 2* (April 2009).

26 Bank of Ghana and Financial Intelligence Centre (Ghana) *Anti-Money Laundering/Combating the Financing of Terrorism & the Proliferation of Weapons of Mass Destruction Guideline* (July 2018).

27 Nigerian Financial Intelligence Unit *Money Laundering Indicators* (date unknown); or Nigerian Financial Intelligence Unit *AML/CFT Operational Guidance for Dealers in Precious Metals and Stones (Jewellers)* (date unknown).

Financial Intelligence Authority of Uganda,[28] the Government of Botswana,[29] the Financial Intelligence Centre of South Africa,[30] and, for example, the Council of Ministers of the East African Community Securities Market.[31] These lists vary in length, some containing just about ten indicators while others stretch over several pages. Some of these lists seem to have been drafted "from scratch" and thus contain indicators truly originating from African public institutions, while others derive from well-known indicator lists compiled by international organisations as a blueprint (with the occasional subsequent amendment to suit the domestic African markets and needs).

When assessing African indicator lists it is argued that two questions are particularly interesting – first, whether these financial crime indicator lists as issued and used by African institutions differ noticeably from other well-established indicator lists and secondly, whether African financial crime risk indicator lists appropriately represent African commercial realities and thus meaningfully contribute to fighting financial crime on the continent and beyond.

3.1 Content, style, and availability – noticeable differences?

A review of available indicator lists shows that the content of financial crime indicator lists circulated by African public bodies and institutions, overall, does not differ noticeably from such indicator lists devised, published and used outside the continent.[32] While the examples of possibly suspicious activities and circumstances aggregated in these lists are not always exactly corresponding or congruent with lists in use outside of Africa, they share

28 Financial Intelligence Authority (Uganda) *Guidelines on Identifying Suspicious Transactions* (April 2016).

29 Botswana's *Banking Act (Anti-Money Laundering) Regulation,* 2003 (Statutory Instrument No 17 of 2003), First Schedule.

30 Financial Intelligence Centre (South Africa) *Guidance Note 4B on Reporting of Suspicious and Unusual Transactions and Activities to the Financial Intelligence Centre in Terms of Section 29 of the Financial Intelligence Centre Act (Act 38 of 2001)* (March 2019); as well as Financial Intelligence Centre (South Africa) *Guidance Note 7 on the Implementation of Various Aspects of the Financial Centre Act, 2001 (Act 38 of 2001)* (October 2017).

31 Council of Ministers of the East African Community Securities Market *Directive EAC/CM/35/Directive 17, Anti-Money Laundering in the Securities Market, Schedule "Suspicious Indicators for Money Laundering or Financing of Terrorism"* (April 2017).

32 An example to the contrary is to be found in the Bank of Zambia *Anti-Money Laundering Directives* (2004), First Schedule, where a rather peculiar indicator reads: "Costumer claims to be a law enforcement agent conducting an undercover operation where there are no valid indications to support that". Incidentally, this particular crime indicator seems to have been lifted from the Botswana *Banking Act (Anti-Money Laundering) Regulation,* 2003 (Statutory Instrument No 17 of 2003).

naturally the same trait of describing behaviour, corporate arrangements or situations which deviate from the "expected", the "common" or the "usual". Some of the financial crime risk indicators in Africa form part of legislative acts as an annexed schedule to statutory laws[33] or directives,[34] a drafting technique that is, internationally speaking, not common.[35] Another stylistic deviation is found in one financial crime risk indicator list issued in South Africa by its Financial Intelligence Centre. The South African *Guidance Note 7 on the Implementation of Various Aspects of the Financial Centre Act, 2001 (Act 38 of 2001)* contains detailed questions such as, for instance: "Is the client known to be subject to financial sanctions?", "Is the product an industry regulated product?", or "Is there adverse information about the client available from public or commercial sources?"). This drafting style differs from most crime risk indicator lists, also in Africa, which instead introduce a specific commercial scenario or behavioural pattern of a customer, for example: "Intended transaction is unusual for this type of client or industry", "Client engages in complex transactions without sufficient explanation", or "Customer requests transfer of funds irrespective of costs/fees". However, designing crime risk indicators as a series of questions (rather than statements relating to factual scenarios) is not an entirely unusual approach and has been followed by non-African institutions before.[36]

3.1.1 Countries and jurisdictions designated "high risk"

Another deviation from the conventional drafting of financial crime risk indicators is evident in Botswana's *Banking Act (Anti-Money Laundering) Regulation*, 2003, where countries perceived as high-risk destinations regarding wire transfer transactions ("secrecy havens") are expressly listed.[37] While the express reference to "high-risk jurisdiction", "tax havens", "secrecy havens", "uncooperative jurisdictions" or similar expressions is a

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33 For example, the Botswana *Banking Act (Anti-Money Laundering) Regulation,* 2003 (Statutory Instrument No 17 of 2003).

34 For example, the Bank of Zambia *Anti-Money Laundering Directives* (2004); as well as the Council of Ministers of the East African Community Securities Market *Directive EAC/CM/35/Directive 17, Anti-Money Laundering in the Securities Market, Schedule "Suspicious Indicators for Money Laundering or Financing of Terrorism"* (April 2017).

35 Usually, financial crime risk indicators are published in guidelines, memoranda, "white papers" or other documents; including them directly in statutory law is less common.

36 See, for example, European Banking Authority *Final Guidelines (Joint Guidelines under Artt. 17 and 18(4) of EU-Directive 2015/849)* (June 2017) 14 *et seq*.

37 See the "First Schedule" annexed to the Botswana *Banking Act (Anti-Money Laundering) Regulation*, 2003 (Statutory Instrument No 17 of 2003).

wide-spread practice internationally, it is usually not done so in lists which form part of statutory law. Instead, it is common practice to reference such "high-risk" jurisdictions, countries, or regions in authoritative guidance notes, advisory papers or other non-statutory lists so that entries, after reassessment procedures or relevant political or legal developments, can be erased (if compliance efforts have improved) or added (if compliance efforts have decreased) with ease. If lists of "high-risk" countries are captured in, and published as formal, statutory law then any subsequent amendments to these lists – which may be necessary occasionally – will be cumbersome as they require parliamentary approval and activity. The better approach, it is respectfully submitted, is to refrain from utilising statutory acts to circulate names of "high-risk" jurisdictions. Instead, imposing in statutory law a duty to apply enhanced due diligence when dealing with "high-risk" jurisdictions or countries coupled with a specific list, which is effortlessly updated as it is not statutory law but "merely" an authoritative guidance note or governmental advisory note that elaborates which countries/jurisdictions must be considered "high-risk" would be preferable.

3.1.2 Specialised indicators

Generally, drafters of crime risk indicator list regularly sort or cluster potentially suspicious scenarios or customer behaviour with a view towards particular commercial sectors (for example, dealers in precious stones, real-estate agents, commercial banking), particular commercial transactions (international trade finance, international wire transfers), particular types of customers (non-profit organisations or trusts), or particular types of financial crime. Examples of such an approach are found in several African countries and respective financial crime risk indicator lists:

- the *Botswana Banking Act (Anti-Money Laundering) Regulation*, 2003 (Statutory Instrument No 17 of 2003) differentiates in its First Schedule *inter alia* between "Safe Deposit Box Activity", "Trade Financing Transactions" or "Investment Activity";

- the Financial Intelligence Authority of Uganda identifies specific crime indicators regarding "Electronic Funds Transfers", "Non-Profit Organizations", and "Life Insurance Companies, Brokers and Agents" in its *Guidelines on Identifying Suspicious Transactions* (April 2016);

- the Financial Intelligence Centre of South Africa publishes crime indicators with a particular view towards "geographic locations" or "delivery channels" in its *Guidance Note 7 on the Implementation of Various Aspects of the Financial Centre Act, 2001 (Act 38 of 2001)*;

- the *East African Community Directive on Anti-Money Laundering in the Securities Market* lists specific crime indicators *inter alia* for particular transactions such as "Bearer Securities" or "Fund Transfers or Deposits";

- the *Anti-Money Laundering/Combating the Financing of Terrorism and the Proliferation of Weapons of Mass Destruction Guideline* (July 2018) issued by the Bank of Ghana and the country's Financial Intelligence Centre contains specific crime risk indicators relating *inter alia* to "Trade-Based Money Laundering" and "Lending Activity";

- Tanzania's Financial Intelligence Unit references specific money laundering indicators with a view towards "Cash Transactions", "Investment Related Transactions" or "Groups of Companies and/or Trusts" in its *Anti-Money Laundering Guidelines to Banking Institutions – Guidelines No 2* (April 2009);

- and in Kenya the Financial Reporting Centre adheres to this approach by including risk indicators regarding specific commercial actors such as "Deposit Taking Institutions", "Casinos", and "Dealers in Precious Metals and Stones" in its *Guidance to Reporting Institutions on Suspicious Transaction and Activity Reporting* (May 2017).

The classification and grouping of financial crime risk indicators to fit specific transactions or types of customers has the potential to increase their effectiveness as it offers banks, financial institutions and other professional groups and their respective personnel more nuanced and tailored warning signs that fit a specific commercial environment. The above examples of African indicator lists that indeed differentiate and address specific commercial sectors or transactions, types of customers, or specific crimes are therefore a laudable development. If appreciated and applied properly, these specialised crime risk indicators can be powerful tools to identify more accurately transactions and customers which require more enhanced due diligence checks.

Although this article has not applied or referenced quantitative methods, studies or reports, it can be observed, generally, that financial crime risk indicator lists which are drafted and used in sub-Saharan Africa do not differ noticeably in terms of content and style from many of the available indicator lists that were created and used outside the continent. In line with their intentions, the indicator lists both on the African continent and elsewhere capture suspicious conduct, behaviour or situations that merit further investigation to ascertain their legitimacy. Overall, the assessed lists of crime risk indicators of African origin show varying levels of comprehensiveness, details and currentness.

3.1.3 Availability of indicator lists – serious deficiencies

Noteworthy and unfortunate, however, is the fact that indicator lists issued by African governments and public institutions are in several cases not as accessible and conveniently found as indicator lists issued by many governments or their public institutions (such as financial intelligence units) outside the continent. Many public African internet repositories or webpages are in this regard hopelessly dated and contain broken links or slow/inactive download facilities.[38] Some African financial intelligence units, the respective domestic public bodies designated to deal with financial crime and receive suspicious transaction reports, do not appear to operate a (functional) website at all.[39] If the aim is to spread awareness for effective compliance in the commercial and banking sector, information must be made available in a convenient and reliable way to all stakeholders, bank personnel and other interested members of the public. Making interested parties rely on printed government gazettes, memoranda, or publications circulated by regular mail to a select audience only, if at all, is certainly inadequate.

3.2 Accurate representation of commercial realities?

Even though financial crime risk indicators developed in, or implemented by, African governments and public institutions may not deviate substantially from such indicators developed in or applicable in developed countries, their actual application can arguably vary considerably. This is owed to the fact that financial crime indicator lists regularly rely on vague clauses, flexible terms and broad descriptions that require interpretation. Thus, the Bank Supervision Department of the Central Bank of Kenya advised local commercial banks and non-bank financial entities in a guidance note[40] regarding the filing of suspicious transaction reports that

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38 Out of respect, the author refrains from expressly naming governments or institutions.

39 Again, no express reference is made that would identify a governmental or public institution in particular.

40 Central Bank of Kenya (Bank Supervision Department) *Guidance Note No 1 of 2011 – Suspicious Transaction Reporting* (July 2011).

"Suspicious transactions have many broad characteristics. However, as a general rule, a suspicious transaction is one that departs from the normal patterns of account activity that has been noted on a customer's account. Any complex, unusually large transaction(s), or, any unusual pattern of transaction(s) absent of any apparent economic, commercial, or lawful purpose may be considered to be a suspicious transaction."[41]

Vague and flexible clauses are contained in many crime risk indicators, and typical examples are the following excerpts from different African indicator lists: "Client is accompanied and watched in a manner that is inconsistent with *local practices and norms*",[42] or "Customer is involved in activity *unusual for that individual or business*",[43] or "Transactions do not appear to be in keeping with *normal industry practices*".[44] Wishing to apply these crime risk indicators, one has to interpret the meaning of the words and phrases "local practices and norms", "unusual for that individual or business", and "normal industry practice" in the particular context in which the transaction takes places. Such an interpretation in a manner that reflects – on a regional, domestic, local or personal level – the reasonable and common expectations, traditions, customs and socially-acceptable behaviour, will vary greatly depending on where and in what specific context the transaction occurs. Accordingly, it is important that compliance personnel always assess situations and customer conduct in the light of the appropriate specific context and "norms" that apply where the transaction takes place.[45]

3.2.1 Context matters

It should be obvious to any culturally sensitive person that even a routine banking transaction, such as the personal deposit of the day's proceeds of a grocery shop owner, can be facilitated in ways that differ based on local customs and interpersonal expectations. In some countries or regions, such a deposit transaction will be done in an almost impersonal manner without much personal interaction, i.e., filling-in the required bank slip and

41 Central Bank of Kenya (Bank Supervision Department) *Guidance Note No 1 of 2011 – Suspicious Transaction Reporting* (July 2011) 1.

42 Financial Reporting Centre (Kenya) *Guidance to Reporting Institutions on Suspicious Transaction and Activity Reporting* (May 2017) 22 (emphasis added).

43 Financial Intelligence Centre (Zambia) *Suspicious Transactions Reporting Guidelines – Banking Sector* (2015) 27 (emphasis added).

44 Financial Intelligence Centre (South Africa) *Guidance Note 4B on Reporting of Suspicious and Unusual Transactions and Activities to the Financial Intelligence Centre in Terms of Section 29 of the Financial Intelligence Centre Act (Act 38 of 2001)* (March 2019) 23 (emphasis added).

45 Cassara *Trade-Based Money Laundering* 169.

surrendering it, accompanied by the cash, to the bank clerk, which may not even elicit a verbal response. In other countries or regions, it may be inconceivable that even such a brief, routine transaction could be conducted without personal interaction between the individual depositing the cash and the bank clerk receiving it. Accordingly, it very much depends on the particular, local context in which a transaction is conducted, so that behaviour or personal conduct during the depositing of cash can be determined to be either appropriate and common (thus not triggering a risk indicator of financial crime), or inappropriate and suspicious (thus triggering a risk indicator of financial crime).

Financial crime risk indicators such as "Client appears nervous or furtive"[46] or "The customer's background is questionable or does not meet expectations based on the customer's business activities"[47] offer additional examples. In both cases the labelling of personal conduct as "nervous", or a personal "background" as "questionable" requires sound judgment, interpersonal skill, and sensitivity, bearing in mind local and cultural dynamics and expectations. Likewise, the amount of an average deposit or the usual denominations of bank notes used in such a routine transaction will be influenced and determined by local and regional factors. Similarly, purchase prices, business margins, transaction structures or transaction executions are shaped by, and subject to, local practices and customs. All this must be considered when deciding, aided by financial crime risk indicators, whether conduct appears legitimate or suspicious.

Thus, if financial crime risk indicators containing flexible and broad terms in need of interpretation are to be applied meaningfully and effectively, the person or organisational unit doing so must be cognisant of and appreciative of norms and expectations that apply in the respective local, regional and cultural environment. Taking these considerations into account appropriately when assessing customer behaviour and transaction structures against financial crime risk indicators is a prerequisite for these indicators to represent African commercial realities sufficiently and accurately. Consequently, if this contextual aspect is neglected or overlooked, the usefulness of crime risk indicators declines significantly. Therefore, financial crime risk indicator lists formulated by, and used in,

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46 Financial Reporting Centre (Kenya) *Guidance to Reporting Institutions on Suspicious Transaction and Activity Reporting* (May 2017) 21.

47 Council of Ministers of the East African Community Securities Market *Directive EAC/CM/35/Directive 17, Anti-Money Laundering in the Securities Market, Schedule "Suspicious Indicators for Money Laundering or Financing of Terrorism"* (April 2017) Schedule para 1(h) (ill-placed comma in the original omitted by me).

African countries represent African commercial realities aptly – and thus meaningfully contribute to fighting financial crime on the continent and beyond – if and when their content is applied with regard for regional and local expectations and norms.

3.2.2 The threat of de-risking and the importance of compliance

Because compliance laws and regulations aimed at preventing international financial crime are a complex and ever-evolving field, the satisfaction of compliance expectations is expensive and cumbersome.[48] So why should banks strive to comply with domestic and international compliance expectations as much and as far as possible? There are many compelling reasons to adhere to domestic and international banking regulations and other compliance expectations: first of all, violations can lead to substantial administrative fines, revocation of a required licence, criminal prosecution of individual executives and officers, and significant damage to the reputation of a bank or commercial entity.[49] Importantly, as was argued above, failing to ensure proper compliance procedures when facilitating international transactions will aid the perpetration of financial crime, reduce government revenue generation, erode further the rule of law and, overall, impede the development of societies and people. Also, the negative impact of insufficient compliance efforts of a country or region can be felt in several other ways too, one of which relates to the practice of "de-risking" regarding international trade and banking relationships. When the compliance procedures of local (African) banks or (African) trading partners are considered weak or unreliable, international banks and companies will need to apply stronger and enhanced due diligence and compliance checks if and when engaging with their African counterparts and partners. Otherwise, these international institutions and companies themselves run the risk of compliance violations with the above-indicated negative consequences. Introducing and maintaining high-quality compliance programmes obviously demands technological and personnel investments,[50] so that many international banks and companies have in the past evaluated and subsequently reconsidered their financial and trade-based exposure relating to African banks and other African mercantile parties. When the costs and risks (driven by compliance concerns, among others) do not

48 Marxen "Traditional Trade Finance Instruments a High Risk?" 178-179.

49 Yap 2021 *DCW* 29; Byrne *et al Trade Based Financial Crime Compliance* 86-88.

50 The International Chamber of Commerce, for example, has estimated that the maintenance of a "basic relationship" between international correspondent banks rose five-fold recently due, in part, to changing and stricter compliance expectations, see ICC *Rethinking Trade and Finance 2017* 51.

match the expected financial returns and benefits, these international parties may ultimately "de-risk" by reducing or terminating their financial and mercantile transactions and relationships (especially the so-called correspondent bank relationships) with their African counterparts.[51] Overall, banks and merchants in developing regions or countries are currently facing difficulties due to the declining numbers of international counterparts that are willing to facilitate and support banking and trade transactions because of their compliance concerns and the associated costs and risks.[52] In this regard, the importance of financial crime risk indicators becomes clear: when a bank is regarded internationally as reliable and is viewed as implementing and executing a sound and effective crime prevention and compliance regime, then it is possible for its international counterparts to keep their compliance costs low. In order to be perceived as a reliable bank and commercial partner, however, African banks and companies need to show that they have implemented and at all times are continuing to execute a robust and efficient compliance programme aimed at preventing international financial crime, part of which is the educated, considered and professional use of financial crime risk indicators to identify questionable customers and transactions.

4 Conclusion

Risk indicator lists contribute to the proper application of a risk-based approach and thus the fight against international financial crime. These crime risk indicators are preferably tailored to fit specific types of customers, commercial sectors or transactions, so that they indicate suitable examples of situations and circumstances more appropriately which may carry a risk of financial crime and thus require enhanced due diligence checks. Having these lists drafted and circulated by local public bodies and governments can ensure their appropriate wording and the incorporation of useful, realistic local or regional examples and customised scenarios. If the users of crime risk indicator lists, such as compliance staff and bank personnel, are appreciative of regional and local expectations and able to apply the said knowledge when interpreting crime indicators, these lists may prove to be effective tools.

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51 For the important and complex issue of "de-risking" with regard to international trade and trade finance, see Marxen "Traditional Trade Finance Instruments a High Risk?" 175 *et seq*.

52 Cranston *et al Principles of Banking Law* 229-230, 235.

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List of Abbreviations

AML	anti money laundering
CFT	combating financing of terrorism
DCW	Documentary Credit World
EAC	East African Community
EU	European Union
ICC	International Chamber of Commerce
TBML	trade-based money laundering