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REGULATING AND COMBATING UNDERGROUND BANKING

ABSTRACT. In combating and regulating underground banking, a choice can be made of roughly two models, the risk model and the assimilation model. The risk model comes down to a complete prohibition of underground banking combined with an active investigation and prosecution policy. In the assimilation model, underground banking is recognised as a form of financial services but at the same time, all rules that generally apply to financial services are declared applicable to underground bankers. An effort is made simultaneously to lower the threshold of the formal banking system. The international recommendations and legislation—in particular of the Financial Action Task Force and the European Union—take the assimilation model as their starting point, albeit that no or hardly any attention is paid to the role of the formal banking system. With that, relatively little account is taken as yet in the international community of the historic and socio-economic backgrounds of informal banking systems, their embedment in different cultures and the advantages of the services offered.

I INTRODUCTION

Attention for underground banking has increased sharply since the attacks of 11 September 2001. Since then, not only national legislators, but also international institutions such as the International Monetary Fund, the World Bank and the Financial Action Task Force on Money Laundering (FATF), and researchers have thought about the most appropriate way to regulate and/or combat underground banking. Several initiatives have in the meanwhile been developed on that level and the necessary rules and regulations have been enacted. This paper is devoted to such regulation and combating of underground banking and centres on two questions. Which points for attention should be taken into account

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in the regulation and combating of underground banking in general? Which enforcement and combating policy will be chosen in the international recommendations and legislation on that level? These questions are discussed consecutively in sections 2 and 3 and answered as far as possible. The findings are summarised in Sect. 4 and provided with some brief concluding observations.

Several comments need to be made in advance on the terminology used. In this paper, 'underground banking' refers to so-called informal value transfer systems. According to the broad definition given to this by Passas, the core of such systems relates to the transfer of sums of money or other objects of a certain value from one place to another by a person or organisation not considered as a bank or financial institution.[1] It therefore concerns the conduct of financial transactions—in particular exchanging money and having it paid to another person—outside the formal financial system defined and regulated by the government. I will henceforth refer to these transactions as informal money transactions or money transfers. Characteristic of underground banking is that it evades government supervision.[2] The question can be raised whether the term 'underground banking' is the most appropriate. An objection to this could be that this manner of conducting financial transactions is not always underground, in the sense of taking place in secret.[3] The extent to which persons who provide informal financial transactions provide their services in public mainly depends on the geographic location as well as the prevailing enforcement and combating policy. Something similar holds for the connotation of 'underground' with the criminal environment. Even though informal financial transfer systems are vulnerable to use or abuse by criminals and terrorists, the emergence of such systems is not based on an effort to facilitate criminal

[1] Nikos Passas, Informal Value Transfer Systems and Criminal Organizations; a study into so-called underground banking networks 10 (WODC 1999); Nikos Passas, Informal Value Transfer Systems and Criminal Activities 3–4 (WODC 2005).

[2] Marieke de Goede, *Hawala discourses and the war on terrorist finance*, 21 Environment and Planning D: Society and Space 513, 514 (2003); Divya Sharma, *Historical Traces of Hundi, Sociocultural Understanding, and Criminal Abuses of Hawala*, 16 International Criminal Justice Review 99, 108 (2006); Henk van de Bunt, The Role of Hawala Bankers in the Transfer of Proceeds from Organised Crime, in *Organized Crime. Culture, Markets and Policies* 113 (Dina Siegel & Hans Nelen eds., 2008).

[3] De Goede (2003), *supra* note 2, 513–514.

activities.[4] That the term 'underground banking' is used nevertheless in this paper is connected with the fact that the term is established and is also used in official documents.

II DIFFERENT APPROACHES TO REGULATING AND COMBATING UNDERGROUND BANKING

2.1 *Two Models*

It is an established fact that underground banking is the subject of regulation and combating in very many countries. The reasons for this are actually expressed in the comments made in the introduction in relation to the terminology used. Underground banking is characterised by its evasion of government supervision, which is a primary reason for the government to take action against underground bankers. Furthermore, underground banking may be related in some way to the commission of criminal acts and terrorist activities. That is also a reason to take measures against underground bankers.

This observation does not say much about the way in which underground banking is regulated or combated. A choice can roughly be made from two models. First of all, there is the option of completely prohibiting underground banking in combination with an active investigation and prosecution policy. The choice of this model is logical mainly when the elimination of all possible risks involved in underground banking, such as the facilitation of crime and terrorism, is placed first and foremost. In addition, an approach can be chosen in which underground banking is allowed, provided that certain requirements are met. In that model, underground banking is recognised as a type of financial services, but at the same time all rules and regulations that generally apply to financial services are declared applicable to underground bankers. In this model as well, therefore, the 'pure' form of underground banking, whereby the rules and regulations generally applicable to financial services are not observed, is prohibited. But unlike in the first model, the total exclusion of

[4] Passas (1999), *supra* note 1, 37–45; Nikos Passas, *Hawala and Other Informal Value Transfer Systems: How to Regulate Them?*, 5 Risk Management 49, 50 (2003); Rachana Pathak, *The obstacles to regulating the Hawala: A cultural norm or a terrorist hotbed?*, 27 Fordham International Law Journal 2007, 2009–2010, 2028 (2003); Maryam Razavy, *Hawala: An underground haven for terrorists or social phenomenon?*, 44 Crime, Law and Social Change 277, 288 (2005); Abdullahi Y. Shehu, *The Asian Alternative Remittance Systems and Money Laundering*, 7 Journal of Money Laundering Control 175, 183 (2003); Sharma, *supra* note 2, 107, 109.

underground banking is not first and foremost. This mainly concerns bringing about a process of inclusion or assimilation. I will refer to the first model henceforth as the risk model and the second as the assimilation model.

In order to make a choice of one of these models—and also in giving further shape to the chosen approach—numerous points of view are relevant. This does not only concern the arguments in favour of curbing underground banking, but precisely the problems and dilemmas that governments can face in regulating and combating it are relevant. In the following, I intend to give an overview, albeit a rough one, of the range of points of view.

2.2 *A Closer Look at the Risk Model*

In the risk model, as stated, the central issue is to prevent the risks involved in underground banking as far as possible. The model is in keeping with the risk-based approach to money laundering and the financing of terrorism described by De Goede, which has been fashionable since the attacks of 11 September 2001. In this approach, attention is paid not only to transactions which are themselves illegal in nature, but also to transactions which are not illegal in themselves but whereby the amount transferred could be used for illegal purposes some time in the future.[5] In specific terms: even though nothing is necessarily wrong with funds transferred by way of underground banking, if there is a chance that such funds—or at any rate part of them—will end up in the hands of criminals or terrorists, that is sufficient reason to combat underground banking in its entirety.

An illustration in this context is the offensive launched in the United States of America against underground banking since the attacks of 11 September 2001. The main reason for this was the suspicion that the funds used to prepare those attacks were obtained with the aid of underground banking. At the time, not only did the American government enact the legislation necessary to combat underground banking—within the framework of the controversial *Patriot Act*—but large-scale actions were also launched against underground bankers, including the Somali conglomerate Al-Barakaat.[6] Afterwards, however, it could not be established that underground banking had played

[5] Marieke de Goede, *Financial Regulation and the War on Terror, in* Global Finance in the New Century. Beyond Regulation 193, 196 (Libby Assassi et al. eds., 2007).

[6] Pathak, *supra* note 4, 2041–2050.

a significant part in preparing these attacks, whereas it did emerge that the formal banking system had been used.[7]

It should therefore be realised that underground banking has been surrounded by a lot of myth formation in the media, in which underground banking is portrayed as a more harmful phenomenon than can be justified on the basis of the facts.[8] This, of course, does not mean that the fact that underground banking evades government supervision does not attract criminals and terrorists to some extent. But those groups of persons also use the formal banking system.[9] The sustainability of the above-mentioned rationale of the risk model can therefore be called into question.

It is important as well that combating underground banking in its entirety can have undesired social side effects. Closing down informal money transfer systems results, for example in cutting off the flows of money from migrants staying in the West to family in the country of origin. Those flows of money cannot always be rerouted to the formal banking system, particularly not if the country of destination does not have a properly operating banking system.[10] The American action against Al Barakaat has shown that taking action against underground banking can have very far-reaching consequences for residents of poor countries who rely for their subsistence on funds transferred by family members staying in the West.[11]

Finally, the feasibility and effectiveness of the use of the risk model can be questioned. Underground banking almost always relates to cross-border transactions. This international dimension means that it is difficult to combat underground banking successfully if other countries do not take similar measures.[12] It is also quite possible that a rigorous approach to underground banking would drive underground bankers (even) further underground, in the sense that

[7] Passas (2003), *supra* note 4, 50; Pathak, *supra* note 4, 2028; Passas (2005), *supra* note 1, 36; Razavy, *supra* note 4, 290; Sharma, *supra* note 2, 101–102; Van de Bunt, *supra* note 2, 114.

[8] De Goede (2003), *supra* note 2, 518; Razavy, *supra* note 4, 278, 286; Sharma, *supra* note 2, 109.

[9] De Goede (2003), *supra* note 2, 517.

[10] Pathak, *supra* note 4, 2022.

[11] De Goede (2003), *supra* note 2, 520; Pathak, *supra* note 4, 2007, 2051–2052; Razavy, *supra* note 4, 277–278.

[12] Pathak, *supra* note 4, 2054–2056; Razavy, *supra* note 4, 289.

underground bankers and their customers would make (even) more of an effort to keep their operations out of sight of the government.[13] Moreover, as stated in the literature, the underground banking system is extremely resilient. The system proves able to recover time and time again after government actions to combat it.[14] This shows that the policy for combating underground banking is not very effective. Governments could also burn their fingers with a stringent approach to underground banking. If a suspicion exists that transactions which have been or will be conducted by underground bankers are relevant to a criminal investigation, it would be more difficult to perform the necessary investigative actions if those transactions were to take place (even) more in secret. Regulating and combating can therefore have repercussions on the possibilities for investigation.[15]

2.3 *A Closer Look at the Assimilation Model*

In the assimilation model, underground banking is not totally prohibited, but possibilities are sought to allow underground banking to continue to exist subject to certain preconditions. The first order of importance in this model is to bring about government regulation and supervision of underground banking. This model is based on the idea that regulation of underground banking can be effective only if account is taken of the historic and cultural backgrounds of informal banking systems and also of the advantages such systems still have nowadays for its customers. It is therefore meaningful to deal further, although briefly, with several characteristics of underground banking.

First of all, trust plays a very important role. Underground banking takes place on the basis of customers' trust that the underground banker, together with those with whom he works, will settle their transactions properly. Such trust is embedded in the cultures of ethnic groups within which underground banking has already been an acceptable and common type of financial services for a long time. The social ties between bankers amongst themselves as well as in their relationship to the customers are an important safeguard against

[13] Razavy, *supra* note 4, 291.

[14] Matthias Schramm & Markus Taube, *Evolution and institutional foundation of the hawala financial system*, 12 International Review of Financial Analysis 405, 418 (2003); Walter Perkel, *Money Laundering and Terrorism: Informal Value Transfer Systems*, 41 American Criminal Law Review 203–204 (2004); Nikos Passas, *Dirty money? Tracing the misuse of hawala networks*, Jane's Intelligence Review 42 (March 2008).

[15] Perkel, *supra* note 14, 198; Passas (2008), *supra* note 14, 45.

dysfunctioning of those services.[16] Trust is also vital to the formal banking system,[17] but this is a different type of trust. In the Western world, government supervision as well as the collective facilities provided with a view the possible dysfunctioning of financial institutions (for example through the insolvency of a bank), are a major component of the public's trust in financial institutions.

Furthermore, it is important that the services underground bankers provide—currency exchange and money transfers—are also carried out by the institutionalised financial institutions. A series of reasons can be given why certain groups prefer the services of underground bankers. Passas summarised the advantages of underground banking in the catchwords: fast, cheap, reliable, easy, discrete and accessible.[18] I will not discuss these advantages further here; they have already been described many times in the literature.[19] What is concerned here is that any strategy for regulating and combating underground banking will have to compete against its advantages. In this regard, it should be borne in mind that the formal banking system—and the same holds for legal money transaction chains such as Western Union and MoneyGram—do not have a good reputation as providers of cheap, fast and reliable worldwide transfers of relatively small sums of money for the public at large.[20] Besides the relatively high costs charged for transfers, it is also problematic, for example that countries to which people want to have money transferred do not always have a good and reliable formal banking system. In that case, there is not enough certainty that the money will arrive at its destination. This is regularly a reason for migrants to choose underground banking. Groups of people can also be pointed out who have no access to the formal banking system—particularly, for example, persons who are staying illegally in a country, for whom underground banking is actually the only option for conducting financial transactions.[21]

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[16] Pathak, *supra* note 4, 2017; Perkel, *supra* note 14, 200; Razavy, *supra* note 4, 285; Van de Bunt, *supra* note 2, 115–118, 121–122.

[17] De Goede (2003), *supra* note 2, 516–517.

[18] Passas (2008), *supra* note 14, 42.

[19] Passas (1999), *supra* note 1, 29; De Goede (2003), *supra* note 2, 521–522; Passas (2003), *supra* note 4, 51–52; Pathak, *supra* note 4, 2015–2018; Perkel, *supra* note 14, 198–200; Sharma, *supra* note 2, 113.

[20] De Goede (2007), *supra* note 5, 203.

[21] Razavy, *supra* note 4, 287; Sharma, *supra* note 2, 101.

The strong trust of customers in the reliability of underground bankers—and not in regulation and supervision by the government—as an advantage of underground banking can be considered as an important starting point in developing and implementing the regulation and combating policy. Assimilation of underground banking into the formal banking system is central to this. It means first of all that underground bankers should be offered the possibility to participate in regulated financial transactions. In view of the fact that underground banking is in principle limited to making money transfers, an attempt could be made to simplify the rules and regulations for this type of financial services as far as possible. A certain minimum degree of regulation will have to apply nevertheless, in the form of a registration or licensing system, prescribing identification and reporting obligations and providing for government supervision. For assimilation, it is also important for the formal banking system to provide money transfer services having advantages similar to the same services of underground bankers. The main concern in that case is that global transfers are possible, with few costs attached, which are conducted quickly and open to the public at large.

The assimilation described here thus comes down to the fact that underground bankers will have to look more like ordinary bankers and vice versa, subject to the precondition that compliance with the relevant rules and regulations and government supervision are guaranteed. The purpose of this is not to eliminate underground banking as an institution based on trust, but 'only' to modify it, while offering the customers of underground bankers a real alternative on the money transfer market.

The proposed assimilation is not based only on the idea that the interests of the persons involved in underground banking may not be ignored. It is based also on a more instrumental idea related to the possibility of abuse of underground banking by criminals and terrorists. By providing a legal form of underground banking which lowers the threshold of the formal banking system, one attempts to reduce the volume of money transferred by way of illegal underground banking. Precisely a large volume of transactions with which nothing is usually wrong prevents transactions connected with illicit purposes from being easily noticed.[22] The idea is that reducing the volume will make it more difficult for criminals and terrorists to use underground banking as a financial *safe haven*. In that case, the flows of money still transferred outside the regulated channels can

[22] Schramm & Taube, *supra* note 14, 418.

relatively easily be considered as suspect. One then apparently has something to hide and therefore chooses a form of financial services in which the underground banker concerned does not comply with the prescribed obligations, according to the reasoning. Viewed in this light, the assimilation model could help to prevent the use or abuse of underground banking by criminals and terrorists, although the model does not provide a rock-hard guarantee that such use or abuse will not occur any more. But the risk model cannot provide that guarantee either.

All in all, the assimilation model sounds rather promising, but this does not mean that it is a panacea. The approach advocated results precisely in formalisation of the core of underground banking, namely an *informal* system that functions on the basis of trust. This could lead to mistrust among the users of underground banking and it cannot be ruled out that underground banking will continue to evade government regulation.[23] It is doubtful as well whether the advantages of underground banking for customers can be achieved just as easily within the formal financial system.[24] The reservations made with respect to the feasibility and efficacy of the use of the risk model therefore apply to a certain extent to the assimilation model as well. Nevertheless, because it takes account of the historical and socio-economic backgrounds of informal banking, its embedment in different cultures and the advantages of the services offered, the assimilation model has more guarantees of success than the risk model. For that reason, the literature frequently advocates the use in one way or another of (elements of) the assimilation model described here.[25] It can be added that the assimilation model appeals to underground bankers' own—or if you like: social—responsibility to provide their services in a transparent manner. Offering the possibilities to provide their services legally—in accordance with all rules

[23] Razavy, *supra* note 4, 291.

[24] Smriti S. Nakhasi, *Western Unionizing the Hawala? The Privatization of Hawalas and Lender Liability*, 27 Northwestern Journal of International Law and Business 475–496 (2007).

[25] Passas (1999), *supra* note 1, 67–70; De Goede (2003), *supra* note 2, 528; Passas (2003), *supra* note 4, 57–58; Pathak, *supra* note 4, 2059–2060; Perkel, *supra* note 14, 206–210; Rob McCusker, *Underground Banking: Legitimate Remittance Network or Money Laundering System?*, Trends & issues in crime and criminal justice 4–5 (July 2005); Razavy, *supra* note 4, 288, 291; Sharma, *supra* note 2, 117–118; Shima Keene, *Hawala and Related Informal Value Transfer Systems. An Assessment in the Context of Organised Crime and Terrorist Finance*, The Defence Academy Journal 1, 18 (2007).

and regulations applicable to financial service providers—would actually enable underground bankers to assume that responsibility. If this offer is ignored, this would justify taking measures aimed at ending the activities of the underground bankers in questions.

III POLICY FOR REGULATING AND COMBATING UNDERGROUND BANKING

3.4 *FATF*

A major international body in the field of combating money laundering and terrorist financing is the FATF, an alliance of 32 countries and two regional organisations. The FATF has developed 40 recommendations to combat money laundering and nine special recommendations to combat terrorist financing. The recommendations are so authoritative that they can be referred to as the 'gold standard'. Compliance with these recommendations is actively monitored by a system of mutual evaluation by the FATF members.[26] One of the special recommendations to combat terrorist financing reads as follows:

> 'Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.'[27]

The core of this recommendation is clear: informal transfer systems do not have to be prohibited in themselves, but should indeed be subject to a regulation system that also sees to it that (also) underground bankers comply with various obligations to combat money laundering and terrorist financing. One of those obligations should encompass the identification and registration of customers, fulfilment of various administrative obligations and reporting of unusual transactions.[28]

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[26] William C. Gilmore, *Dirty money. The evolution of international measures to counter money laundering and the financing of terrorism* 89–158 (Council of Europe Publishing 2004).

[27] Special Recommendation VI: Alternative Remittance.

[28] Anand Ajay Shah, *The international regulation of Informal Value Transfer Systems*, 3 Utrecht Law Review 204–215 (2007).

With that, the FATF has not chosen the risk model, but it has not yet fully embraced the assimilation model either. The approach chosen is, after all, one-sided because nothing is said about any efforts to be made by the formal banking system. Otherwise as well, the text of the recommendation does not give the idea that account has been taken of the backgrounds and advantages of underground banking. In a subsequently published document of the FATF—*Combating the Abuse of Alternative Remittance Systems: International Best Practices*[29]—such points of view are indeed put forward. A recommendation is made, for example that governments should choose to take a flexible attitude, whereby effective measures are taken to regulate underground banking but attention is also paid to the risk that too stringent regulation could result in underground banking being carried on even more covertly. For that reason, the compliance burden should not be too heavy. In this document, attention is also devoted to the importance of the provision of information by the government to the providers of informal money transfers on the obligations resting on them and how they can comply with those obligations. If the recommendation discussed here is viewed in the light of this document, it appears that the assimilation model is already being much more strongly embraced, even though the role of the formal banking system still remains undiscussed.

That the recommendations of the FATF in general and the recommendation on informal money transfers in particular are authoritative is evident from the fact that many other international organisations subsequently proposed similar measures. The *Abu Dhabi Declaration on Hawala* of 16 May 2002 underscores that underground banking should be the subject of government regulation in accordance with the recommendations of the FATF. The declaration emphasises that informal money transfer systems have many positive aspects and that the transactions are usually related to legal activities. It also warns about the risks of too restrictive regulation. The recommendations in two reports by staff of the International Monetary Fund and the World Bank follow the same line. Those reports also advocate regulation of underground banking in a form that takes account of the backgrounds of underground banking,

[29] <http://www.fatf-gafi.org/dataoecd/32/15/34255005.pdf>.

while pointing out as well the desirability of changes to the formal banking system.[30]

3.5 *European Union*

In the European Union, the recommendations of the FATF are reflected mainly in the (successive versions of) the Money Laundering Directive.[31] Pursuant to this Directive—stated briefly—the Member States must provide rules relating to customer due diligence, obligations to report and administrative obligations. These rules should apply, for example to 'financial institutions', by which the Directive also means an undertaking which carries out 'the operations (…) of currency exchange offices or money transmission or remittance offices'.[32] This places the operations of underground bankers within the scope of the Money Laundering Directive, thus the Member States must allow the aforementioned rules to apply to those operations. Member States must monitor compliance with those rules and, where necessary, take action against their violation.[33]

Another important Directive is the recently enacted Payment Services Directive, which partly pertains to carrying out payment transfers.[34] This Directive provides an extensive standardisation of payment services carried out in the European Union. The Member

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[30] Mohammed El Qorchi et al., *Informal Funds Transfer Systems. An Analysis of the Informal Hawala System* 27 (IMF-World Bank Paper, 222) (IMF 2003); Cheng Sung Lee et al., *Approaches to a Regulatory Framework for Formal and Informal Remittance Systems: Experiences and Lessons* 23–29 (IMF 2005); R. Barry Johnston, Work of the IMF in Informal Funds Transfer Systems, in *Regulatory Frameworks For Hawala and Other Remittance Systems* 1–6 (IMF Monetary and Financial Systems Department ed., 2005).

[31] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, *OJ* 1991, L 166/77; Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, *OJ* 2001, L 344/776; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, *OJ* 2005, L 309/15.

[32] Article 3, paragraph 2a, Directive 2005/60/EC.

[33] Articles 36–39 Directive 2005/60/EC.

[34] Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, *OJ* 2007, L 319/1.

States must have implemented this Directive in their national legislation by 1 November 2009 at the latest. Among other things, the preamble refers to the special recommendation of the FATF on informal transfer systems:

'Given the desirability of registering the identity and whereabouts of all persons providing remittance services and of according them all a measure of acceptance, irrespective of whether they are able to meet the full range of conditions for authorisation as payment institutions, so that none are forced into the black economy and bring all persons providing remittance service within the ambit of certain minimum legal and regulatory requirements, it is appropriate and in line with the rationale of Special Recommendation VI of the Financial Action Task Force on Money Laundering to provide a mechanism whereby payment service providers unable to meet all those conditions may nevertheless be treated as payment institutions. For those purposes, Member States should enter such persons in the register of payment institutions while not applying all or part of the conditions for authorisation. However, it is essential to make the possibility of waiver subject to strict requirements relating to the volume of payment transactions. Payment institutions benefiting from a waiver should have neither the right of establishment nor the freedom to provide services, nor should they indirectly exercise those rights when being a member of a payment system.'[35]

This passage expresses the idea that providers of money transfer services can be exempted in some cases from the obligation to be authorised, together with the corresponding obligations which are central to the Payment Services Directive. In this way, an attempt is made to prevent stringent regulations from actually causing the providers of such services to evade government regulation. At the same time, those providers of payment services are required to register and the government is required to monitor their operations. These providers are not allowed to offer their services in other Member States.[36] The Payment Services Directive provides as well for a toughening of the Money Laundering Directive, whereby it is explicitly stated that money transfer services are to be brought within the scope of the latter Directive.[37] With this set of measures, the European Union intends to strike a balance 'between safeguarding legitimate use of the [alternative remittance] systems and combating their abuse for terrorist financing activities' and, as can be added, for laundering the proceeds of crime. The rules in the Payment Services Directive are also expected to 'facilitate the gradual migration of

[35] Preamble, paragraph 15, Directive 2007/64/EC.

[36] Article 26, Directive 2007/64/EC.

[37] Preamble, paragraph 58, and article 91, Directive 2007/64/EC.

these [alternative remittance] services from the unofficial economy to the official sector.'[38]

IV SUMMARY AND CONCLUSIONS

In summary, it can be stated that the FATF primarily starts from the assimilation model. It is striking, however, that the role of the formal banking system remains undiscussed. Because the recommendations of the FATF are very authoritative, the approach chosen by the FATF can also be recognised in other international documents. Within the European Union, the recommendations have been developed into binding rules. These rules provide first and foremost that providers of financial services, including underground bankers, must comply with obligations relating to customer due diligence, obligations to report and administrative obligations. This means that underground bankers are expected to meet the requirements set by the government on financial services. At the same time, the recent Payment Services Directive shows that it has been borne in mind that providers of money transfer services should not be confronted with very stringent and comprehensive rules and regulations or, in other words: that it should be relatively simple to enter the regulated market of those services. Here, too, one recognises the assimilation model, even though once again, no attention is paid to the role of the formal banking system. This does not mean that the formal banking system is not developing any initiative at all to provide cheap and fast money transfers.[39] The fact is that international recommendations and regulations hardly give governments any impetus to devote attention to and stimulate such initiatives.

When one reviews these findings, the impression is strengthened that the assimilation advocated primarily entails that underground bankers have to comply with the general rules developed for the formal banking system. There is no objection to this in itself, but it does give rise to the question of the extent to which such an approach can actually start a movement whereby underground bankers and their customers can conduct money transfers in accordance with the applicable rules. All in all, the threshold for entering the regulated market is still relatively high, even though this could change as a

[38] Counter-Terrorism Coordinator, Revised Strategy on Terrorist Financing, 11 July 2008, Council Document 11778/08.

[39] Keene, *supra* note 25, 15–16.

result of implementation of the Payment Services Directive. Furthermore, few initiatives have been developed as yet by governments that express the advantages offered by underground banking in the formal banking system as well. On closer analysis, the international community still take relatively little account of the historic and socio-economic backgrounds of informal banking systems, their embedment in different cultures and the advantages of the services offered. The regulation of underground banking can achieve gains in terms of effectiveness and legitimacy only if (even) more attention is devoted to these aspects.