

## Article

# Public-Private Partners Against Crime: Governance, Surveillance and the Limits of Corporate Accountability

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### Abstract

Recent risk-based regulation on anti-money laundering emphasises the need for private business actors to be more actively engaged in preventative efforts. This proposed public-private partnership against crime raises important questions of how to balance values and interests as it situates business actors in an intricate position at the centre of conflicting claims and attributions. Based on an interview study of the banking industry in Sweden, this article analyses how surveillance for the state in relation to anti-money laundering is implemented into the business-as-usual of business actors. The findings support the initial assumption that the role of agent of the state is in conflict with the role of being an agent for private principals. However, a complementary tentative conclusion is that the demands of one principal could also be beneficial for promoting the interests of the other principal. Finally, it is suggested that making oneself more accountable may, in fact, be a means to limit corporate accountability.

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### Introduction

Private actors within the banking sector play an important role in crime prevention. In recent years, their ‘policing’ tasks have been expanding (Favarel-Garrigues et al. 2008). This expansion is related to developments within transnational anti-money laundering regulation. Money laundering can be defined as the process through which illegal gains and their sources are made to appear legitimate (Braithwaite and Drahos 2000). Access to laundered money is a pre-requisite for criminals to more freely employ the financial rewards of criminal activities. Anti-money laundering (AML) efforts are therefore important preventive measures in the fight against crime. Technological development and the emergence of electronic transfer systems have provided new means to launder money, as well as new forms of white-collar crime (c.f. Mitchell et al. 1998). From a societal perspective, it is important to prevent money laundering as this crime hinders the proper workings of the financial system and threatens to undermine public trust in state authority. AML is further important in inter-state relations and in relations between states and other organisations. Proof of a good grip on criminal elements and activities is one of the pre-conditions for being defined as a modern, democratically governed state in control of its economy.

Money laundering was previously a crime to be managed on the national level. During the last decades, it has become framed as an important problem on the international agenda (Hülsse 2007). Here, the 9/11 attacks in 2001 became a ‘focusing event’ (Kingdon 1995) that helped promote intensified regulatory efforts, including incorporating anti-terrorism issues into the definition of AML. What is further striking is that contemporary transnational regulation of AML emphasises the need for private business actors to be

more actively engaged in crime prevention, notably as expressed by the ‘risk-based approach’ (Directive 2005/60/EC) to AML. The risk-based approach has been described as a means to transfer responsibility for crime prevention from public agencies to private agents (Ross and Hannan 2007). In particular, it requires firms to closely scrutinise their clients in search of terrorist funders and money launderers. In so doing, it raises important questions of how to balance values and interests between and across the public-private divide.

The proposed public-private partnership against money laundering situates business actors in an intricate position at the centre of conflicting claims and attributions. One concern is to do with the aims and functions of surveillance. In the realm of business, surveillance is intertwined with systems of corporate governance and control. This means that there are definite restrictions on how, why, and for what purposes corporate surveillance is to be performed. Corporate surveillance – of managers and employees, but also of customers – is first and foremost a means to protect and promote the economic interest of the owner. Systems of corporate accountability and governance are constructed accordingly, much to the detriment of other interests (Shearer 2002). By contrast, as party to the quest against money laundering, corporate surveillance serves a different master, and a very public interest. Crime prevention and crime detection is a core activity of the state. One might therefore reasonably ask to what extent business actors are able and willing to take on this task. In addition, as underlined by Martin et al. (2009), engaging in surveillance measures on behalf of the state involves high reputational risks for the private actors if these measures are controversial.

Against this background, the present article analyses how the risk-based approach to AML is implemented into the business-as-usual of business actors. The analysis is centred round the dilemma that the interests of business are not necessarily compatible with the interests of public authorities. It elaborates on how an accountable corporate actorhood is being constructed in this setting of imposed boundary blurring. Can the interests of the principals involved be aligned? If not, which principal, and what interests and values, are being privileged? Empirically, the article is based on an interview study of AML in Sweden with a focus on actors in the banking industry.

The article is structured as follows. The next section outlines the theoretical frame of reference. It uses the problems of accountability stemming from principal-agent relationships as a starting point for showing that surveillance and audit can be defined as partly overlapping concepts. In this way, instances of more surveillance can be said to further the development of an ‘audit society’ (Power 1997). Next the contents of recent transnational risk-based regulation on AML are discussed, with an emphasis on how these frame the roles and responsibilities of the private agents. The following section provides an account of AML in Sweden, where revised legislation came into force in March 2009, and discusses primarily how the risk-based approach to AML is implemented in the banking industry. The final section discusses a set of conclusions. One finding is that that the role as agent of the state for business actors did indeed conflict with their role as agent for private principals, and that this caused problems and dilemmas. Yet, a complementary tentative conclusion is that the demands of one principal could also be beneficial for promoting the interests of the other principal. It will further be suggested that actively making oneself more accountable may, in fact, be a means to limit corporate accountability.

### **AML and the Audit Society**

Haggerty and Ericson (2006) use a rather wide definition of surveillance. They define surveillance as involving ‘the collection of information about populations in order to govern their activities’ (Haggerty and Ericson 2006, 3). This means that surveillance can take place in a multitude of forms and locations, and a large range of actors, networks and assemblages can be expected to be involved in the attempts to control others. In this article, the focus is on the role of business actors as agents of surveillance.

### *Agents, Audit and Surveillance*

Defining a relationship as involving principals and agents has implications for the constitution of that same relationship. In particular, it emphasises the need, and the right, for principals to hold agents to account (Woodward et al. 2001). The need for control of accountability is founded on the prevalent assumption that agents are naturally inclined to do what is best for them, rather than to act in accordance with the interests of their principals. For instance, Luo (2005) emphasises that strict monitoring and control is necessary to ensure that self-interested agents behave in line with corporate goals.

Problems of accountability thus appear inherent to principal-agent relationships. On this note, Power (1994) has suggested that the invocation of the roles of agents and principals are privy to the institutionalisation of problems of accountability, and of (more) auditing as their solution,

Indeed, an appeal to the categories of ‘principal’ and ‘agent’ makes possible the very problems of accountability which demand to be solved by audit. (Power 1994, 301)

The need for more control is exacerbated by the tendency to distrust agents, but it is also related to the lack of confidence in the persons and systems that control agents. As a result, increased monitoring and control cannot fully re-establish confidence in the relationship between principals and their agents, nor can such solutions reduce the need for control. Rather, these processes of control create additional needs of ever more surveillance, monitoring, and audit. What Power (1997) identified was thus a growing number of multiple and intertwined layers of control. Taken to the extreme, this amounted to what he termed the ‘audit society’:

... a society engaged in constant checking and verification, an audit society in which a particular style of formalized accountability is the ruling principle? (Power 1997, 3-4)

For clarity, it should be noted that Power (1997) distinguishes between audit and surveillance. As compared to surveillance, audit is a form of control once or twice removed. Audit focuses ‘the organization and its sub-systems of control’ (Power 1997, 128). Surveillance, by contrast, tends towards having the individual as its ‘primary object’ (op cit.). Moreover, audit and surveillance originate in different programmatic ideals for maintaining order, where surveillance can be found ‘... at the more coercive end of the programmatic spectrum’ as compared to audit (Power 1997, 129). Consequently, the audit society is not the same as the surveillance society, in Power’s view.

However, as Haggerty and Ericson (2006) underline, contemporary politics of surveillance include efforts to induce individuals to disclose information about themselves right at the point where they may be willing to do so. Rather than being forced onto the individual, they argue surveillance is what the individual has to give in to in order to enjoy various benefits:

Surveillance becomes the cost of engaging in any number of desirable behaviours or participating in the institutions that make modern life possible. (Haggerty and Ericson 2006, 12).

With this aspect of surveillance as a point of reference, surveillance moves closer to conceptions of more unobtrusive forms of control such as those Power (1997) associates with audit. Therefore, in the following, surveillance and audit will be regarded as partly overlapping concepts. They share the characteristic of being, often unobtrusive, means to collect information as part of attempts to control others.

A further consequence of emphasising the similarities between surveillance and audit is, I would argue, that the proliferation of surveillance might also be considered a driver of audit society. The more actors,

and fields of practice, that are engaged in surveillance – that are being scrutinised, and that are watching others – the more audit we are likely to get. In other words, engaging private actors as agents of the state can be regarded as a means to strengthen the audit society aspects of modern society. In line with this reasoning, Power (1997) has noted that fraud detection and the quest for perfection in the development of financial auditing systems was one of the drivers of audit society.

#### *Agents of the State, and/or for Private Profit?*

In the case of businesses, surveillance and auditing revolve around the problems of whether and to what extent agents contribute to corporate goals. The idea that businesses are the agents of profit-interested principals has become a yardstick for the construction and development of management and control systems (Lubatkin et al. 2005; Roberts 2005), and contemporary accounting systems are centred round micro-economic ideas of the firm and its privileging of economic interest (Shearer 2002). As indicated in the introduction, in relation to risk-based AML this raises questions of how surveillance on behalf of the public principal is to be integrated with that of the private principal. Private business firms may be well-versed in the practices of monitoring and control for business purposes, but the implementation of the risk-based approach raises questions of if and how the interests of the public principal can be promoted by existing practices and systems. As will be further explicated in the next section, one main concern is how the relationship to customers is affected when private actors are to be increasingly accountable for securing that clients are not criminals.

For business actors, it is essential to have knowledge about the tastes and preferences, and purchasing power, of customers. A, if not the, principal marketing problem is how to figure out what the needs and demands of customers may be, in order to develop and produce goods with appropriate attributes that will be liked and bought by the targeted segments (Kotler 2003). One means to make individual consumers surrender private data is through surveys of customer satisfaction. Other popular forms include customer cards and firm membership programs where details about transactions and types of products are saved in order to provide offerings adapted to individual preferences and life styles.

Monitoring and data-mining in the context of customer relations can be seen as a form of ‘... surveillance of consumers in the name of trust’ (Turow 2006, 280). If customers surrender the information the company asks for, then customers will get the products they crave in return, so the marketing argument goes. In this way, the collecting and storing of personal data, and corporate monitoring of individual transactions, can be legitimated as means for the company to better serve the interests of the customers. In line with Haggerty and Ericson’s (2006) description of surveillance as a cost to be paid in order to enjoy certain behaviours in modern society, being watched by business actors is a cost many customers willingly, or least unwittingly, pay in order to get products and services better adapted to their preferences.

But when corporations are to be agents of the state the type of ‘win-win’ argument of the customer-relationship described above does not necessarily hold. Crime prevention places new demands on customer relationships. In this principal-agent relationship, customers are to be monitored due to their being potential criminals, and one may ask what’s in it for them. For every customer may not consider it a good idea for an agent outside the realms of democratic control to be involved in monitoring and surveillance of sensitive personal data. Thus it may well be that customers are not willing to freely give up information in this new context as the expected benefits to them are unclear. This, in turn, would serve to limit the extent to which business actors are able to make themselves accountable to public principals.

#### **AML Directive 2005/60/EC and the Partnership Approach**

AML is a field characterised by multi-sector and multilevel governance, with a mix of hard law and soft (Bergström et al. 2011). Internationally, several organisations and actors from various sectors are involved in producing new rules and regulations. Among these, the OECD group of FATF (the Financial Action

Task Force) stands out as a powerful rule maker and promoter of best practice (Jakobi 2010). Another major actor is the Wolfsberg Group, representing large corporations in the financial sector. At the European level, EU directives are also important. However, the focus and content of these regulations tend to reflect the substance of FATF recommendations, including the current focus on a risk-based approach to AML.

Risk management in a regulatory state makes more room for private actors but also creates additional needs to constrain and control them (King 2007). This is because risk management in the public domain is often based on intensified public-private collaboration, a mode of governance that has become increasingly popular within the EU and internationally (Bexell and Mörth 2010). The field of anti-money laundering is illustrative of such a partnership approach.

The risk-based approach to AML (Directive 2005/60/EC) is based on ideas of risk assessment and risk-management, as a contrast to the previous rule-based approach (Unger and van Waarden 2009). Compared to a detailed rule-based approach, the risk-based approach constitutes more of an obligation for the private sector. They are expected to survey, assess and manage a range of risks.

The regulations instruct private business to report transactions that *they* consider suspicious of possible money laundering, i.e. it gives them vaguer criteria as to what transaction to report. (Unger and van Waarden 2009: 954, emphasis in original)

As indicated by the above quotation, firms have to construct part of the rules of engagement that control whether they are accountable or not, and that constitute the basis for monitoring of supervisory authorities. Based on their own knowledge of clients, business actors are to decide what individual firms or persons, and which transactions, are risky. It is thus not enough to be reactive and compliant; what is expected is a partnership against crime. Banks, and other private actors, are to make their knowledge, time and resources work in the interest of the public good of AML.

A reason provided in the Directive for the merits of a partnership approach is that business actors have knowledge about clients that is not available to the regulator. Thus, in line with arguments put forth in favour of self-regulation (Boddewyn 1985), the idea is to make better use of the particular expertise of regulatees.

Notably, businesses are expected to make risk assessments of their customers and divide them into low- and high-risk segments respectively. Risk assessment is to be an ongoing process. The evaluation of what individuals, and what types of transactions, are to be categorised as high or low risk is not to be done once only. Rather, businesses are to be:

(d) conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and the risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information kept are up to date. (Directive 2005/60/EC, Chapter II, article 8)

In short, banks are expected to 'know the customer', and if they do not know, they have to find out. This places demands on actors to establish new systems and procedures for surveillance. The private sector is expected to pay an increasing share of the bill for crime prevention in the form of systems development, education of personnel etc.



Risk assessment is further to be carried out in accordance with particular pre-specified procedures. Not only is risk assessment and analysis to be continuous, it is to include and re-evaluate already established relationships. A number of customer due-diligence measures have been specified. These include questions and documentation of identity, identification of the owner structure and ‘beneficial owner’ of organisations as well as a recognition of the client's objectives with the relationship, and its ‘intended nature’ (Directive 2005/60/EC, Chapter II, article 7).

In summary, the risk-based approach is rather flexible, but also responsabilising. It places private agents more centre stage in crime prevention, thereby transferring responsibility from public agencies to private agents (Ross and Hannan 2007). It allocates more of the risk associated with making risk assessments, such as risk associated with false- or over- reporting, to the private actors (Unger and van Waarden 2009). At the same time, the risk-based approach is likely to be less influential if the proposed partnership is not fully recognised by the private actors. Private businesses have their own agendas, and these do not necessarily coincide with the calls for a more pro-active corporate citizenship in crime prevention. Moreover, there may exist regulatory limits as to what surveillance measures corporations can legitimately, and law abidingly, undertake. But it should also be noted that the partnership approach does not allow private actors to opt out. If they do not behave in accordance with the interests of the public principal, they risk severe fines or even criminal charges.

In the following, the implementation of the risk-based approach, and the possible conflicts between different values, interests, and principals, is discussed in relation to the Swedish case. In particular, it discusses how the private actors in the banking industry handled the new demands for corporate accountability implied by the partnership. First, however, I will provide a brief description of the methodology of the empirical study.

## **Methodology**

The description presented in the next section is based on empirical work that was carried out in Sweden during 2008-2010.<sup>1</sup> Semi-structured interviews were conducted with key informants in the public and private sector respectively. An important selection criterion was that interlocutors should be working actively with regulation and/or implementation of AML efforts relating to Directive 2005/60/EC. Interlocutors were found through established contacts with managers in each sector, and by using a snowballing system of referral where informants pointed towards their own contacts within and across sectors.

The Financial Police is the unit in charge of AML within Swedish law enforcement. Being a central actor in the field, the head of this unit was selected for an interview. The unit manager in charge of asset recovery at the Swedish Economic Crime Authority (ECA) was also interviewed. The ECA was included in the study in spite of this authority not being explicitly responsible for AML issues. However, issues of asset recovery are related to some of the so-called pre-crimes, like tax evasion, leading on to money laundering.

Turning to state regulation of AML, the Ministry of Justice is represented by the Legal Adviser at the Division of Criminal Law, and the Ministry of Finance by the Director of Financial Institutions and Markets. The latter also held the position of head of the Swedish delegation to FATF at the time of the interview. In addition, The Unit Manager for the Legal Department at the Swedish Financial Services

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<sup>1</sup> In this case, adaptation in relation to the risk-based approach started well in advance of the revised legislation in Sweden, and was thus ongoing throughout the period 2008-2010. One reason for this was that international risk-based regulation, such as the 3<sup>rd</sup> Directive, was already in place. A contributing factor was that the new proposed law served as the kind of large anticipated event Joerges (1990) analysed, that is, as an event that called for organising in preparation of its occurrence.

Authority was interviewed. The FSA is the supervisory authority for the financial services industry, including issues of AML.

In Sweden, the banking sector is dominated by the big four group of SEB, Handelsbanken, Swedbank and Nordea. In addition, there is a range of smaller banks. The present study includes representatives of two of the large banks as well as informants from two niche banks. In these banks, managers responsible for issues relating to money laundering were interviewed. In addition, the Chief Legal Officer of the Swedish Bankers' Association (SBA), the main industry association in the financial services industry was approached. The SBA is an important arena for discussion and information exchange on current practices, problems and preferences within the sector. It also serves as an intermediary on regulatory matters between the banks, state agencies and the police.

<b>Public Sector Actors</b>	<b>Position</b>
The Economic Crime Authority	Unit Manager (ECA)
The Financial Services Authority	Unit Manager, Legal Department (FSA)
The Ministry of Finance	Director, Financial Institutions and Markets (F)
The Ministry of Justice	Legal Adviser, Division of Criminal Law (J)
The National Police	Head of the Financial Police (P)
<b>Private Sector Actors</b>	
Forex Bank	Compliance Officer (FB1) AML Officer (FB2)
Handelsbanken	Vice President, Legal Department (HB1) Head of Corporate Money Laundering (HB2)
Skandiabanken	Operating Risk Manager (SkB)
Swedbank	Legal Adviser (SB)
The Swedish Banker's Association	Chief Legal Officer (SBA)

**Table 1. Informants**

A summary of the informants in the study is presented in Table 1. In all, 12 individuals were interviewed (of whom SBA was interviewed twice). Interviews lasted from around one hour up to one and a half hours. During the first three interviews (P, F and FSA), extensive notes were taken by the author, as well as by two research collaborators. All the other interviews were tape-recorded by the author. The accounts of informants were then structured thematically and analysed in relation to the research questions.

The author has translated all excerpts from the interviews that appear in the next section. The source of an individual quote can be identified by the abbreviations supplied in Table 1, for instance, (HB1) denotes the Vice President of the Legal Department at Handelsbanken.

In addition to the interviews, the author attended a three-hour training session on news in Swedish AML-regulation in the spring of 2008, where the demands of the risk-based approach were presented. This seminar was directed towards employees in reporting industries, and was arranged by the FSA in co-operation with the Financial Police. Public sources have also been used in order to construct the empirical account in the next section. These are referenced where applicable.

## **AML in Sweden**

A network of actors across the public-private divide are involved in AML-efforts in Sweden. Before turning to the private actors, some of the major public actors and their respective roles will be discussed.

### *The Division of Roles Among Public Agencies*

Several ministries may be involved in particular problems relating to money laundering. Judicial matters are part of the jurisdiction of the Department of Justice. In accordance, the Ministry of Justice has been

engaged in translating the 3<sup>rd</sup> EU Directive and in incorporating it into Swedish legislation. The Ministry of Finance has a co-ordinating function for AML and is further engaged in AML through the Swedish Financial Services Authority. Unlike the British FSA, the Swedish FSA is a public authority that serves under the Ministry of Finance. The amended Swedish legislation on AML somewhat extended the supervisory tasks of the FSA by giving the agency a coordinating role in relation to organisations supervising other industries on AML. This includes, for instance, the industry association of FAR/SRS that oversees the auditing and accountancy professions.

As mentioned in the previous section, the Financial Police is responsible for the policing parts of AML. Suspicious transaction/activity reports (STRs/SARs) are to be sent to the Financial Police by banks and other reporting actors (such as casinos and accountancy firms). The Financial Police then screens the reports and makes analyses of whether the intelligence provided is useful or not – and for whom. Thereafter, a prosecutor, and agencies like the Economic Crime Authority, may become involved.

In relation to other actors, notably the banks in this study, the National Police and the Ministry of Finance were regarded as drivers and promoters of AML. The National Police and the Ministry of Finance also presented their own efforts in line with such a proactive view. Our informant at the Ministry of Finance further emphasised that AML was an issue that was high on the agenda of the present right-wing government:

This government has said: ‘Prioritise questions to do with AML!’ (F)

And so they did. Similarly, whilst awaiting the new legislation on AML, the FSA was active in promoting change. It revised its own recommendations to the financial services industry to be more in accordance with those of FATF and the content of the 3<sup>rd</sup> EU directive. The FSA further arranged seminars, together with the Financial Crimes Sector of the National Police, in order to spread information and suggestions for best practice to banks and other organisations where the legislation was applicable.

By contrast, the Ministry of Justice appeared more passive in the accounts of informants. Banks seldom referred to this Ministry. The representatives of the other public actors tended to be somewhat disappointed in it, as the Ministry of Justice was said to be stalling possibilities for improvement in AML. In part, this view can be related to the Ministries having been designated different roles by the Government. The Ministry of Justice was not intended to be as proactive in the national AML-network as the Ministry of Finance that ‘owned’ the question. In part, the conceptualisation of the Ministry of Justice can be related to the existence of diverging views on the importance of having ‘self-laundering’ as a separate offence in order to prevent ML, and to be better able to prosecute.

#### *The Lack of a Separate Offence*

Sweden differs from several countries in the EU, including the UK, in that money laundering is not deemed a separate criminal offence. In Sweden, one cannot be charged with money laundering only. According to Swedish law and established praxis, the crime of self-laundering is subsumed under the larger, pre-ceding crime, such as a narcotics crime or an armed robbery.

A majority of the private actors considered the lack of a separate money laundering offence as problematic. From the perspective of the Bankers’ Association, it made it more difficult to see the effects of AML-efforts within the industry.

Banks are taking a lot of action but there are hardly any convictions of money crimes and money laundering. (SBA)



The interviews with most bank representatives confirmed this point. Three of the four banks in the study emphasised that the lack of a separate offence made AML more difficult in practice. The exception was Handelsbanken, where the issue of self-laundering was deemed 'not important' (HB2), as it was not believed to affect reporting practices either way. At the same time, the informants at this bank did agree with the other actors in the sector that they would like to get more, and more positive, feedback on the results of their increasing efforts at preventing AML.

Among the public actors, there was also criticism. The National Police referred to the lack of a separate money laundering offence as something of a 'catch 22' (P) in crime prevention. If and when one got as far as to prosecute, the money involved tended to be gone, he argued. The unit manager at ECA stated that they had really tried to draw attention to the need for reform, but so far it had been 'rather futile' (ECA). At the other hand of the spectrum was the Ministry of Justice. The legal adviser (J) did not believe that having access to self-laundering as a separate offence would make much of a difference for the prosecution of ML-crimes. There already existed valid substitute offences that could be used, she stated. Yet, there had been discussions within the Ministry that something probably needed to be done in future, she said.

Here, it can be mentioned that there exist certain indications that change might already be under way. In the autumn of 2009, the Swedish Minister of Justice, Ms Ask, made a call for the need to look into the possibility of changing the established view of ML in Sweden, with the aim of making the formulation of Swedish ML-offences more in line with international templates (DN 2009). At the time of writing there is an investigation of how this could be accomplished on its way (Dir. 2010:80).

#### *Implementing the Risk-Based Approach in the Banks*

The informants from the banks agreed that AML was an area that had grown in importance. It had been assigned additional resources in all their organisations. Taking responsibility for AML was an expensive obligation, they concurred. One reason was that many older, and less comprehensive, manual procedures had to be exchanged for computerised ones.

It's not manageable to have all this in a stack of paper. We have to get it into the system. And then we have to reconstruct the system. (HB2)

In order to comply with risk-based regulation, new computerised systems for customer surveillance had to be implemented. The investments needed were estimated to millions of SEK, not to mention the additional cost of assigning personnel to work with implementation, information, education, and with various kinds of surveillance activities.

Here, there were many similarities across banks in that they all worked with computerised systems, education, scenarios and similar. There were also indications that standard judgements of what was a risky scenario were being established, although the banks made their own assessments. What was considered a suspicious transaction or person in one bank was likely to be deemed one in another bank, the informant at Swedbank concluded.

The majority of the scenarios we think about, we have worked out ourselves. But then I don't think there are that many different versions, really. Most banks probably have about the same ideas about what they want to look at. I mean, a suspicious transaction at our (bank) is about the same as if you were to look at SEB or Handelsbanken. Or Den Danske Bank... At least if you talk about 'retail banking', I think it's the same. (SB)

Yet, applying a risk-based approach to AML in the Swedish was considered an ambiguous task. A governing principle of the risk-based approach was to make risk assessments in order for resources and

efforts to be deployed where they were most needed and where risk was the highest. In practice, however, this was easier said than done. One problem was how to distinguish between suspicious and simply unusual transactions. Forex Bank told of explicitly choosing to make a lot of SARs, and rather too many than too few, in the period immediately following it being fined by the FSA. Revised AML procedures had not yet been implemented at that time, but Forex still wanted to be compliant (FB1).

Another concern was how to deal with taken-for-granted conceptions of normalcy. In Sweden, cash payment is not the preferred form of payment in most situations. Nor is it common for firms to do business in cash. Therefore, a large number of cash transactions to and from an account are likely to raise suspicion, it was argued. But then other countries, and different ethnic groups in Sweden, may have other preferred ways of doing business. Should these be automatically categorised as suspicious – or just unusual, it was asked.

It is difficult for us to say what's normal in another country. Where they deal in cash. ...  
Where they do business in a different way as compared to Sweden (HB1).

Apart from these complications, there were additional demands to take into consideration, not least the restrictions on data storing and data processing. In Sweden, the storing of personal data in computerised systems is strictly regulated by law. This means that banks cannot store sensitive information about their clients at will. Nor are they allowed to store information about usual suspects and the like. This was a cause of frustration for the banking industry:

You're supposed to have a risk-based approach and then you're not allowed to look at the big risk. (SBA)

Another restriction was that knowledge on AML could not be easily transferred between the banks. Swedish law explicitly prohibits the sharing of sensitive information about individuals across banks. This made risk assessments more problematic. One informant said in relation to a case where somebody he suspected of ML had wanted to cash a cheque from another bank:

You would like to be able to have an exchange – when it comes to individuals suspected of money laundering. What's your view of this customer? ... When it's us handing out the cash. (FB2)

In practice, one way to get around the limits on information sharing was the involvement of the Financial Police. If a bank had already sent in a SAR, it was possible for other banks to become indirectly informed about the matter, and the company or person involved, through questions posed by the police authority (P). But this was still on a question and answer basis.

Another topic of ambiguity concerned the division of roles. The SBA argued that 'banking is about doing business', and not about 'being an authority'. However, which practice was which was a matter of interpretation. In the everyday context, it was not always easy to know when the banking task of information provision ended and the policing task of evidence collection started, the Head of ML at Handelsbanken commented. In relation to clients, this could cause problems.

Traditionally, the information demanded by banks from customers on opening accounts had been comparatively limited, although it has long been customary in Sweden to show your driver's licence or identity card when dealing with a bank or similar institution. In addition, customers were now asked to supply answers to a range of questions concerning intensity and types of transactions, types of recipients and recipient countries etc.

As banking was referred to as a trust business, using the information supplied as part of a business transaction for the purposes of crime prevention was not a straightforward issue. In accordance, the banks and the SBA told of how the asking of questions and related measures could make, and had made, clients apprehensive. Though banks did supply certain information to the authorities for taxation purposes and the like, such reporting was considered different from reporting suspect clients as the result of a continuous monitoring and screening of their financial behaviour. Clients expected the information they supply to banks to be regarded as privileged information, the bank informants argued.

Several informants referred to incidents where clients had been upset by being asked questions, in their own bank and in other firms. Some of these cases had received a lot of media attention. One illustrative example from the business press is the case of Mr Karlsson, who had been asked to account for the origin of his funds going back twenty years. The institution sending the letter asking questions was portrayed as quite unreasonable.

What they are writing is that I could be suspected of supporting terrorism. That's pretty harsh with nothing to go on. (DI 2009)

Incidents like these caused discomfort not only among clients of the reporting actors but also among employees that had to deal with people being upset. For instance, a survey conducted on behalf of the union organising many bank clerks, Finansförbundet, indicated that one in ten members had been threatened by abusive clients as a consequence of their being more inquisitive about their identity and/or the reasons for their transactions (Finansförbundet/Finansvärlden 2008).

The banks further struggled with the demand that customer data had to be preserved to enable future control of its veracity.

We need to be able to continue to show it. Ten years is not enough (anymore). We need to be able to show that we have done this know-your-customer ... for 100 years. (HB2)

Storage requirements implied that information had to be in a certain format. Just 'to know' the customer in an everyday sense of the word, was not enough. The knowledge of the customer had to be validated.

If I cannot, in retrospect, account for what he (the customer) said, it is of no use. (FB1)

Yet, the banks also commented that many customers did understand that the banks were obliged to ask questions.

It should also be stressed that the implementation of a stricter law in accordance with transnational regulation was not without benefits for the private actors. One such benefit was to do with business networks. Several bank informants made the reflection that they needed to be able to show international partners, not least in the US, that they were up to their standards in dealing with AML-issues.

Our correspondence banks around the world say that: 'in order for us to do business with Swedbank, we presume that you have AML procedures in place that comply with various demands.' ... And that's primarily the FATF-regulations. (SB)

From that standpoint, having stricter regulation in line with the 3<sup>rd</sup> Directive and the FATF-recommendations had a positive impact on the company brand. It helped provide a framework for benchmarking AML efforts, and made good practice among the Swedish banks more visible to their international counterparts.

There was also an incentive for banks to engage in AML in the interest of promoting their image in relation to their customers. AML was not only about upsetting the customer and risking the brand name. It could be a way to protect the good name of the bank, it was argued. As mentioned above, banking is a trust business and customers were expected to appreciate a trustworthy bank. Hence, in relation to ML, it was important:

... that customers feel that you take these issues seriously. And that you have the ability to manage these issues. For who wants to be the customer of a bank who gets a reputation for supporting severe crimes or terrorism? (SkB)

Finally, there was an element of reputational risk management in relation to the FSA. The banks were very aware of the risk of investigation, and sanctions, from monitoring authorities. Being investigated was not good for the image of bank. The threat of investigation was considered as one aspect of the reputational risk interviewees associated with AML. The fate of Forex Bank, that had suffered bad publicity as well as a severe fine in 2008, was a point in case. After a review by the FSA (FI 2008), the bank was charged to pay the maximum fine of 50 million SEK (approximately 5 million Euro) for not adhering to regulation. Thereafter, a large overhaul of routines was made at this bank. Several new managers were appointed, a unit for AML was formed, and an extensive education programme was being put into practice. Having been a peripheral issue, AML was now high on the agenda at Forex.

The niche banks have to figure out what their businesses can be hit by. And for Forex, having our business in cash management and foreign exchange, money laundering is the largest risk in relation to being compliant to laws and so on. And that's where we should make an effort. (FB1)

## Concluding Remarks

Though it could well be argued that the partnership approach contributed to boundary blurring, this was a blurring within limits. As regards the roles of the public and private actors respectively, what was in a role only changed for one of the parties – the private actors. For the public agencies, their ascribed roles remained basically the same – with or without risk-based AML.

As such, the main difference was in the role and accountabilities ascribed to the private actors. Here, the findings of the empirical study indicate support for the initial assumption that the role of agent of the state was potentially in conflict with the role of being an agent for private principals. What the risk-based approach stated and what was in the best interests of the private principals created problems and dilemmas. For private actors to engage in a partnership against money laundering was a multifaceted problem that was not always easy to resolve.

First, it was quite evident that the role of agent for the state did entail considerable efforts and costs for the private actors. Existing systems and practices for surveillance and control did not suffice. Personnel had to be educated and a lot of new information had to be collected. It further had to be categorised and stored in a proper way in order to ensure the visibility of an audit-trail. New systems for the purpose of surveillance of customers were being put into place, and new practices were constructed around these. Here, a question posed by the banking industry was in what ways this really benefitted the private actors.

In addition, the ambiguity of the risk-based approach made it difficult for the private actors to know how to behave fully accountably, even when they tried to. As underlined by Unger and van Waarden (2009), the risk-based approach places the responsibility of filling in the details of what specifically to do, in order to do the right thing, on the private actors. In relation to this responsibility, one dilemma in the present study was how the banks were to separate the suspicious from the simply unusual. This was not an easy

task, nor one that was resolved by regulation. This is a finding in line with Harvey (2004) who observed a tendency for firms to report what was unusual rather than suspicious.

The dilemma of suspicious vs. unusual was further linked to the question of promoting, or hindering, other important values. As mentioned in the study, a problem with conflating unusual and suspicious could lead to discrimination of minority groups. Related to this, there were clashes between AML-regulation and other regulation, notably with legislation protecting personal integrity. Clashes also occurred between corporate interest and the interests of crime prevention in relation to issues of integrity. The trust between banks and clients that allowed corporate surveillance to take place was based on the premise that surveillance was in the interest of the customer. Furthermore, banks were known to keep privileged information to themselves, as illustrated by the expression that banks were a trust business. The role of agent for the state challenged this agreement between banks and their clients. Rather than surveillance based on mutual trust, surveillance on behalf of the state was based on distrust. Thus a client risks being categorised as potentially guilty until processed as innocent. This finding is in accordance with Geiger and Wuensch's (2007) argument that the risk-based approach risks transforming an increasing range of customers from white to grey. The benefit for the individual customer of this change was not easy to identify. As a consequence, many customers were quite unwilling to disclose information. This further made it more complicated for the banks to simultaneously be good agents to all its primary principals.

But these results are only part of the picture. The empirical account has shown how the demands of the risk-based approach and those of business could sometimes be aligned. Mutual benefits were particularly noticeable in relation to issues of reputation management. The study has illustrated how the stricter regulation served to reduce three aspects of reputational risk. The first aspect concerned reputation in the eyes of the customers: though many clients were upset, it was still argued that stricter regulation was beneficial in that it helped establish that the banks were not involved in terrorism and the like. A similar reasoning was present in relation to business networks, where it was actually argued that the role of agent for the state helped the banks appear better corporate partners internationally. Finally, as the last point of this article, the study implies that risk-based regulation can be party to improving the relative reputation of, at least some, of the agents in relation to public principals. This is to do with the comparatively large degrees of freedom of the risk-based approach.

As mentioned above, the risk-based approach is rather ambiguous, which caused problems of how to live up to its intentions. However, this same ambiguity opens up possibilities for the private actors to choose how they want to construct themselves as agents of the state. Thus, by choosing to be proactive – to invest in expensive AML-systems for surveillance of customers, and by filing a large number of SARs etc. – the private actors show that they do take their role of agents seriously, and that they have widened their accountability. But, I would argue, by providing all this evidence of their being good agents to the state, they also delimit their accountability 'for what'. In principle, the risk-based approach demands that all relevant knowledge be used, and all relevant risks be assessed. Hence, when private actors make themselves auditable along certain very visible trails, they simultaneously set the limits for what the risk-based approach, and monitoring agencies, can demand in terms of corporate accountability (c.f. the discussion of levels of investment and deniability in Canhoto and Backhouse 2007). In this way, rather than being accountable for all AML-risks, the private actors become accountable for certain particular identified aspects of some of these risks. Extending the argument beyond the boundaries of the present study, this tentative conclusion would suggest that auditing, apart from being a control device in audit society, might have an empowering function for the agents.

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