

## The Discrepancy Between the Object of Reporting Obligation for Banks Under Anti Money Laundering Law and That Which Must Be Kept Confidential Under Anti-Tipping Off Provisions

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### Abstract

Based on anti-tipping off provisions, the object that must be kept confidential by the reporting party (inter alia, the Bank) is information related to Suspicious Transactions Report (STR). Meanwhile, things that become the object of reporting obligations for banks also include cash financial report (CTR), and international funds transfer instructions (IFTI). This paper will discuss the legal problems that arise and the paradigm that needs to be formed regarding the discrepancy between objects of reporting obligations for banks based on AML laws and objects that must be kept secret under anti-tipping off provisions. This paper was formed using normative research methods with conceptual, statutory, and comparative approaches. In this paper it is concluded that: (a) the legal problems that arise related to the issues discussed in this paper are that there are no specific provisions that expressly can be appointed if there is a disclosure of the fact related to CTR or IFTI; and (b) The paradigm that needs to be formed regarding the issues discussed in this paper is that Article 12 of the AML Law (anti-tipping off) is applied to violations of disclosing STR. Meanwhile, for the disclosure of CTR and IFTI, the provision that was applied was Article 11 of the AML Law.

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## Introduction

The Bank is a business entity that is oriented towards improving the standard of living of many people by collecting public funds in the form of deposits, to be further channeled back to the community into the form of credit and/or other forms.<sup>1</sup> Because the Bank conducts activities to collect and distribute public funds, the main foothold for each bank to continue to exist and

<sup>1</sup> Lihat Pasal. 1 angka 1 UU Nomor 7 Tahun 1992 jo UU Nomor 10 Tahun 1998 tentang Perbankan

develop is customer trust in the bank.<sup>2</sup> If the bank loses its customers' trust, the bank will experience a downturn sooner or later.<sup>3</sup> In order to maintain customer trust in the bank, the term bank secrecy was introduced in the administration of banking affairs.<sup>4</sup>

Based on the provisions of Article 47 paragraph (2) jo Article 40 of UU Law No 7 of 1992 jo UU Law No 10 of 1998 concerning Banking (hereinafter referred to as the 'Banking Law'), it is stated that the parties who must uphold the principle of bank secrecy are: (a) members of the bank's board of commissioners; (b) members of the bank's board of directors; (c) bank employees (all employees who have access or do not have access); and (d) other parties affiliated with the Bank.<sup>5</sup>

Throughout the country, there is a tendency that the provision of bank secrecy is not absolute.<sup>6</sup> This means that bank secrets can still be breached by some reason or exception regulated in a limited manner or by order specified in regulations or court decisions. Generally, such regulations can be breached if: (a) grounds for tax purposes; (b) in the interest of the criminal justice process; (c) There is a civil dispute between the bank and the customer; (d) For interbank exchange of information; (e) Approved by the customer; (f) There are compulsory laws, i.e., there are special provisions requiring the breach of bank secrecy; (g) There is an obligation in the prevention of criminal acts; (h) There is a subpoena or examination by the Government; or (i) The summons of the Federal Grand jury Subpoena.<sup>7</sup>

One of the reasons that can cause the breach of bank secrecy provisions is the existence of compulsory laws, namely other provisions that require disclosure of bank secrets. It is understood that everyone's right to privacy is a right that the bank must protect in implementing banking activities.<sup>8</sup> However, if there are provisions in the law that require banks to breach these provisions, then it is not a violation.

In the context of the enforcement of UU Law No. 8 of 2010 concerning the Prevention and Eradication of Money Laundering (hereinafter referred to as the 'AML Law'), there are provisions governing the breach of banking secrecy, namely: (a) Article 28, in the context of implementing the reporting obligations of the reporting party (inter alia, Bank); (b) Article 45, in the context of the implementation of the duties, functions, and authorities of PPATK; and (c) Article 72, in the context of requests for information from law enforcement to the reporting party (inter alia, Bank) on the financial transactions of suspects, defendants, or parties who PPATK has reported.

Referring to these provisions, it can be concluded that in implementing the AML Law, specifically reporting parties (inter alia, banks) must be excluded from confidentiality provisions in the context of carrying out their legal obligations under the AML Law.<sup>9</sup> It has also

<sup>2</sup> Dadang Husen Sobana, *Hukum Perbankan di Indonesia*, (Bandung: CV Pustaka Setia, 2016), hlm. 149. Lihat juga: Miftah Idris, "Kerahasiaan Bank Suatu Tinjauan Dalam Aturan Hukum Perbankan Syariah Di Indonesia," *Al-Amwal: Journal of Islamic Economic Law*, 1(1) (September 2016), hlm. 3. DOI:10.24256/alw.v1i1.624. Lihat juga: Akhmad Yasin, "Keterkaitan Kerahasiaan Bank dan Pajak: Antara Kepentingan Negara dan Pribadi," *Jurnal Konstitusi*, 16(2) (Juni 2019), hlm. 214. DOI: <https://doi.org/10.31078/jk1621>.

<sup>3</sup> Gabriel C. Singson, "Law and Jurisprudence on Secrecy of Bank Deposits," *Ateneo Law Journal*, Vol. 46, (2001), hlm. 673.

<sup>4</sup> Hakam Ahmad, Sri Anggraini, dan Gesang Iswahyud, "Perlindungan Hukum Terhadap Keamanan Rahasia Bank dalam Menjaga Kepentingan Nasabah Perbankan," *Al-Manhaj: Jurnal Hukum dan Pranata Sosial Islam* 4(2) (Desember 2022), hlm. 346. DOI: 10.37680/almanhaj.v4i2.1800

<sup>5</sup> Rahmi Ayunda dan Rusdianto, "Perlindungan Data Nasabah Terkait Pemanfaatan Artificial Intelligence dalam Aktivitas Perbankan di Indonesia," *Jurnal Komunikasi Hukum* 7(2) (Agustus 2021), hlm. 671. DOI: <https://doi.org/10.23887/jkh.v7i2.37995>

<sup>6</sup> Ghina Rossana, "Penafsiran Pasal 40 Undang-Undang Nomor 10 Tahun 1998 Mengenai Kerahasiaan Bank," *Lambung Mangkurat Law Journal* 1(2) (2016), hlm.121. DOI: <https://doi.org/10.32801/lamlaj.v1i2.13>

<sup>7</sup> Muh Afdal Yanuar, "Anti-Tipping off Perspective to Target Company Bank's Suspicious Transaction Report in Merger Activity," *Lambung Mangkurat Law Journal* 6(2), 2021, hlm. 148. DOI: <https://doi.org/10.32801/lamlaj.v6i2.266.g238>

<sup>8</sup> Rizky Fahrurrozi, Tarsisius Murwadi and Mien Rukmini, "Problematisasi Pengungkapan Rahasia Bank Antara Kepentingan Negara Dan Perlindungan Kepada Nasabah," *Jurnal Esensi Hukum* 2(1) (Juni 2020), hlm. 78. DOI: <https://doi.org/10.35586/esensihukum.v2i1.22>

<sup>9</sup> Muh. Afdal Yanuar, *Tindak Pidana Pencucian Uang dan Perampasan Aset*, (Malang: Setara Press, 2021), hlm. 51-52.

become a global understanding that countries must ensure that privacy laws from financial services providers do not hinder the implementation of the FATF Recommendations.<sup>10</sup> This is as stated in Recommendation 9 of the FATF Recommendations. FATF Recommendations manifests the framework countries must apply to combat money laundering worldwide.<sup>11</sup> In the context of Indonesian law, the framework in question is manifested in the AML Law. This is strengthened through the ratio legis of establishing the AML Law a quo to comply with the provisions of international standards in the FATF Recommendations and international best practices related to the anti-money laundering regime.<sup>12</sup> Based on this explanation, it can be concluded that the AML Law should guarantee that laws governing the confidentiality provisions of financial service providers (inter alia, confidentiality provisions in the Banking Law) do not hinder the implementation of the AML Law.

In the AML Law, it is a legal obligation for banks as reporting parties<sup>13</sup> financial service providers, including reporting on: Suspicious Transaction Report (STR) Cash Transaction Report (CTR) for at least IDR 500,000,000 or with foreign currencies of equivalent value, carried out either in one Transaction or several Transactions in 1 (one) working day); and International Fund Transfer Instruction (IFTI).<sup>14</sup> Especially related to suspicious financial transactions, there are criminal provisions that expressly prohibit the disclosure of facts or information related to suspicious financial transactions that are being identified/compiled or related to Suspicious Transaction Reports that have been reported to PPATK. These provisions are as stipulated in Article 12 paragraph (1) of the AML Law. Which, the provision is also referred to as the anti-tipping off provision.<sup>15</sup>

One of the legal issues surrounding anti-tipping-off provisions in the banking sector is the difference between the object of reporting obligations for financial service providers and reports that banks must keep confidential based on anti-tipping-off provisions. Which, based on the provisions of Article 23 of the AML Law, states that the scope of reporting obligations for financial service providers (inter alia, banks) to be reported to PPATK includes: (a) STR; (b) CTR; and (c) IFTI. However, juridically, of all types of financial transactions, only STR is used as an object that must be kept secret based on anti-tipping off provisions. This is as stated in Article 12, paragraph (1) of the AML Law, which states:

“The Board of Directors, commissioners, administrators, or employees of the Reporting Party are prohibited from notifying Service Users or other parties, either directly or indirectly, in any way regarding the Suspicious Financial Transaction report that is being prepared or has been submitted to PPATK.”

Referring to these provisions, it can be understood that although the reporting obligations of financial service providers (inter alia, banks) include STR, CTR, and IFTI.<sup>16</sup> However, of all reported financial transactions, only STR that is 'disclosed/notified/leaked' will be subject to

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<sup>10</sup> Normah Omar, “FATF Recommendations Related to DNFBPs on Anti Money Laundering Assessment,” *Journal of Economics, Business and Management* 3(2) (February 2015), hlm. 159, DOI: 10.7763/JOEBM.2015.V3.173

<sup>11</sup> Ronald F. Pol, “Anti-money laundering effectiveness: assessing outcomes or ticking boxes?,” *Journal of Money Laundering Control* 21(2) (2018), hlm. 215 DOI: 10.1108/JMLC-07-2017-0029

<sup>12</sup> Muh Afdal Yanuar, *Permasalahan Hukum Seputar Perampasan Aset dalam Undang-Undang Nomor 8 Tahun 2010 Tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang dan Upaya Pengoptimalisasiannya*, Jakarta: PPATK, 2022, hlm. 5-6.

<sup>13</sup> Pihak Pelapor adalah adalah Setiap Orang yang menurut Undang-Undang ini wajib menyampaikan laporan kepada PPATK. Lihat Pasal 1 angka 11 UU Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang.

<sup>14</sup> Lihat Pasal 23 ayat (1) UU Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang.

<sup>15</sup> Filep Wamafma, Enni Martha Sasea, dan Andi Marlina, “Upaya Bank Indonesia Menanggulangi Money Laundering Dalam Perbankan Online,” *Jurnal USM Law Review* 5(1) (2022). hlm. 372

<sup>16</sup> Ayu Putu Mira Fajarini, et al, “Peran Pusat Pelaporan dan Analisis Transaksi Keuangan (PPATK) Dalam Pencegahan dan Pemberantasan Tindak Pidana Pendanaan Terorisme,” *Jurnal Konstruksi Hukum* 3(1) (Januari 2022), hlm. 108. DOI: <https://doi.org/10.22225/jkh.3.1.4408.104-109>

violations of anti-tipping off provisions. This certainly raises the question of why related to other financial transactions (CTR and IFTI), which are also part of the reporting obligations of financial service providers (in casu, banks), are not qualified as objects of anti-tipping off violations if 'notified/leaked' by the bank. Therefore, the author raises a title in this paper: **"Discrepancy Between the Object of Reporting Obligations for Banks Under the Money Laundering Law and Those That Must Be Kept Secret Based on Anti-Tipping Off Provisions."**

This paper is prepared with the aim of answering problems in the form of (a) the legal problems arising from the discrepancy between the object of reporting obligations for banks under money laundering laws and those that must be kept confidential under anti-tipping off provisions and (b) what paradigm needs to be formed regarding the discrepancy between the objects of reporting obligations for banks under the money laundering law and those that must be kept confidential under anti-tipping off provisions. Before this writing, there was a journal that discussed anti-tipping off, entitled "Anti-Tipping off Perspective to Target Company Bank's Suspicious Transaction Report in Merger Activity".<sup>17</sup> In the journal, the object of analysis is the contextualization of anti-tipping off in interbank merger activities. Meanwhile, in this paper, the object of analysis will be the issue of discrepancy between the object of reporting obligations for banks under the AML Law and objects that must be kept secret based on anti-tipping off provisions.

In compiling this paper, the author uses a form of normative research, using conceptual, statutory, and comparative approaches.<sup>18</sup> The conceptual approach used theories/concepts related to anti-tipping off as the main analysis knife. The approach to legislation is manifested through the use of the AML Law and Banking Law in analyzing the problems in this paper. The comparative approach was applied by comparing anti-tipping off provisions in Indonesia and other countries (in casu, Sweden, and Pakistan).

## Discussion

### **Legal problems arising from discrepancies between the objects of reporting obligations for banks under the Money Laundering Law and those that must be kept confidential under anti-tipping off provisions**

The bank is one of the financial service providers.<sup>19</sup> Therefore, the bank is made a reporting party based on Article 17 paragraph (1) letter a of the AML Law. The reporting parties based on Article 1 number 11 of the AML Law are parties who, under the AML Law are required to submit reports to PPATK. As a financial service provider, the Bank's reporting obligations to PPATK are regulated in Article 23 paragraph (1) of the AML Law, which includes suspicious financial transaction report (STR), cash transaction report (CTR); and international fund transfer instruction (IFTI). Specifically related to STR, if the reporting party (in casu, the Bank) discloses the information to 'customers' or 'other parties'<sup>20</sup>, then the party who disclosed it violated the anti-tipping off provisions under Article 12 paragraph (1) of the AML Law.

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<sup>17</sup> Muh Afdal Yanuar, "Anti-Tipping off Perspective," hlm. 150.

<sup>18</sup> Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)*, Cetakan ke-9, Jakarta: Kencana, 2014, hlm. 133-135.

<sup>19</sup> Fajar Iman Nugraha dan Rani Apriani, "Tinjauan Hukum Tentang Pengawasan Bank Dan Perlindungan Nasabah Dalam Menggunakan Fintech (Financial Technology) Oleh Otoritas Jasa Keuangan," *Gorontalo Law Review* 4(2) (Oktober 2021), hlm. 237. DOI: <https://doi.org/10.32662/golrev.v4i2.1491>

<sup>20</sup> Pihak lain merupakan:

- a. pihak yang berada diluar institusi pihak pelapor; atau
- b. pihak yang berada di dalam institusi pihak pelapor, tetapi tugas dan fungsinya tidak terkait dengan pelaksanaan kewajiban pihak pelapor berdasarkan ketentuan di bidang anti-pencucian uang dan pencegahan pendanaan terorisme (APU-PPT).

Lihat: Muh Afdal Yanuar, "Anti-Tipping Off Perspective," hlm. 158.

According to Adrian Sutedi, the essence of the anti-tipping off provision prohibits financial service providers from divulging/notifying data and/or information on suspicious financial transactions being compiled or reported to the financial intelligence unit.<sup>21</sup> Simultaneously, Maria G. Christofi, suggested that the anti-tipping-off provision is a provision that prohibits the practice of tipping off. Tipping-off itself is the act of someone notifying another party or persons who are suspected of being involved with an alleged money laundering crime in such a way as to hinder or interfere with the investigation process.<sup>22</sup> The concepts mentioned above show that the essence of setting anti-tipping off provisions is, on the one hand, intended to protect customer data information that is being traced in the context of analysis and/or examination at PPATK for financial transactions allegedly related to money laundering and/or other crimes, so as not to be known by other parties. However, on the other hand, it is so that the customer concerned cannot realize that his transactions are being monitored and/or analyzed to be reported as suspicious financial transactions, thus making it easier for banks, PPATK, or investigators, to monitor, analyze, and/or investigate customer transactions that tend to be reported as suspicious financial transactions.

If the anti-tipping off provisions in Indonesia are reviewed with a comparative approach with other countries, it can learn specific lessons. For example, in Pakistan, related objects of obligation for the Reporting Party to report to the Financial Intelligence Unit include suspicious financial and cash financial transactions.<sup>23</sup> The scope of reporting obligations is simultaneous with the scope of information or transaction facts that must be kept confidential by the reporting party. Which, under the provisions of Sec. 34 para. 1 Anti Money Laundering Act, 2010 states that "The directors, officers, officers, and agents of any reporting party or intermediary, who report STR or CTR pursuant to this law or any other regulation, shall not disclose, directly or indirectly, to any person that such transactions have been reported, except in the case of a disclosure agreement for a corporate group (conglomerate) finance) following the regulations made under this law."<sup>24</sup> In addition, in Sweden, the scope of objects that must be kept confidential under the provisions of Ch. 3, Sec. 4 Anti-Money Laundering and Countering Financing Terrorism Law, includes information referred to in Sec. 1 that is being or has been done is identified or that the reporting party has submitted the information.<sup>25</sup> Regarding the object of reporting obligations of the reporting party, under Ch. 3 Sec. 1 Anti-Money Laundering and Countering Financing Terrorism Law, covering suspicious financial transactions.<sup>26</sup> This shows that the lesson learned from the comparison with other countries (Pakistan and Sweden) is that in these countries (Pakistan and Sweden), there is a simultaneous between the object of reporting obligations of the reporting party (inter alia, Bank) and the object that must be kept secret based on anti-tipping off provisions. The question then arises why, in Indonesia, there is a discrepancy between the object of reporting obligations of the reporting party (inter alia, Bank) and objects that must be kept secret in the anti-tipping off provisions.

In understanding why only information related to suspicious financial transactions is disclosed, which is the object of anti-tipping off provisions, it is necessary to first understand the ratio legis of establishing the AML Law, which contains the legal basis for anti-tipping off provisions. In the formation of the AML Law a quo, several things become the ratio legislature, namely:

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<sup>21</sup> Adrian Sutedi, *Tindak Pidana Pencucian Uang*, Bandung, PT. Citra Aditya Bakti, 2008, hlm. 65.

<sup>22</sup> Maria G. Christofi, et al, *Anti-Money Laundering Policy 2022/23*, London: ELWA Members, 2022, hlm. 3.

<sup>23</sup> Pakistan, *Anti-Money Laundering Act, 2010*, Act No. VII of 2010, Sec. 6 para 4.(a).

Lihat juga: Nasir Sultan and Norazida Mohamed, "Financial intelligence unit of Pakistan: an evaluation of its performance and role in combating money laundering and terrorist financing," *Journal of Money Laundering Control* 25(1) (June 2022), hlm. 6. DOI 10.1108/JMLC-04-2022-0060

<sup>24</sup> *Ibid.*, Sec. 34.

<sup>25</sup> Swedia, *Lag om åtgärder mot penningtvätt och finansiering av terrorism*, Lag No 62 of 2009, Ch. 3 Sec. 4

<sup>26</sup> *Ibid.*, Ch. 3 Sec. 1

- a. ensure the maintenance and maintenance of the integrity and stability of the national financial system from money laundering crimes;
- b. Optimizing efforts to prevent and eradicate criminal acts related to assets with a significant nominal, and so that these crimes are not repeated and expanded;
- c. Create improved effective coordination among law enforcement to prevent and eradicate money laundering crimes;
- d. Realizing an increase in state revenue by maximizing the confiscation and confiscation of proceeds of crime, and
- e. complying with the provisions of international standards as contained in the FATF Recommendations and international best practices related to the anti-money laundering regime.<sup>27</sup>

From the explanation above, it can be understood that one of the spirits that animates the formation of the AML Law is the will of the framer of the law to harmonize the provisions of the FATF Recommendations with the AML Law a quo (Law Number 8 of 2010). Thus, it can be understood that the anti-tipping off provision, which is part of the provisions in the AML Law a quo, is required by the framer of the law to be harmonized with the FATF Recommendations. The FATF Recommendations governing anti-tipping-off provisions are contained in Recommendation 21. Recommendation 21 of the FATF Recommendations, which guide the implementation of the anti-money laundering regime related to anti-tipping off provisions, states that "Financial Service Providers, their directors, officers, and employees shall be prohibited by law from disclosing ('tipping off') the fact that suspicious transaction reports (STR) or related information are being submitted to the Financial Intelligence Unit." <sup>28</sup>

Based on this explanation, an explanation can be drawn that Senior Officers (Board of Directors and Board of Commissioners) or Employees of the Reporting Party financial institution / financial service provider (inter alia, Bank) are protected by law in order to submit suspicious transaction reports (STR) to PPATK.<sup>29</sup> However, simultaneously, the Reporting Party (inter alia, Bank) is prohibited from disclosing facts related to Suspicious Transaction Reports reported to PPATK (tipping off). That is, what is meant by anti-tipping off, in this case, is the prohibition of tipping-off actions.<sup>30</sup> Tipping off itself is an action by senior officers (Board of Directors and Board of Commissioners) or Management or Employees of the Reporting Party (inter alia, Bank) to disclose (disclose) information or facts that are or have been stated in suspicious financial transactions that are being identified or reports of suspicious financial transactions that have been reported to PPATK.<sup>31</sup>

The explanation above is further criticized and manifested in the provisions of Article 12 paragraph (1) of the AML Law, which states that "The directors, commissioners, management or employees of the Reporting Party are prohibited from notifying Service Users or other

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<sup>27</sup> Direktorat Hukum PPATK, *Modul Workshop Terpadu Penanganan Tindak Pidana Pencucian Uang*, Jakarta: PPATK, 2015, hlm. 65-66.

<sup>28</sup> Financial Action Task Force, *The FATF Recommendations: International Standards On Combating Money Laundering And The Financing Of Terrorism & Proliferation*. Paris: FATF/OECD, 2012 (Updated April 2022).

<sup>29</sup> Ada dua aspek imunitas. **Pertama**, undang-undang yang mewajibkan pelaporan transaksi keuangan mencurigakan harus menjelaskan bahwa mereka yang membuat laporan dikecualikan dari persyaratan hukum kerahasiaan dan kerahasiaan profesional (jabatan). **Kedua**, para pihak yang membuat laporan yang diwajibkan dengan itikad baik juga harus dilindungi dari kemungkinan tanggung jawab kepada orang-orang yang disebutkan di dalam laporan. Yang mana, mereka apabila mereka mengetahui pengungkapannya, mungkin berusaha untuk mendapatkan ganti rugi dari orang-orang yang membuat laporan tersebut.

Lebih lanjut lihat: International Monetary Fund, *Financial Intelligence Unit: An Overview*, Washington DC: Financial Market Integrity Div. World Bank, 2004.

<sup>30</sup> International Monetary Fund, "2 Establishing an FIU," June 2004, available online: <<https://www.elibrary.imf.org/view/IMF069/02365-9781589063495/02365-9781589063495/ch02.xml?language=es&redirect=true>>, terakhir kali diakses pada 29 Desember 2022.

<sup>31</sup> Yanuar, "Anti-Tipping Off Perspective," hlm. 154.

parties, either directly or indirectly, in any way regarding the Suspicious Financial Transaction report that is being prepared or has been submitted to PPATK." In this context, the Terms indicate that:

- a) the subject of the anti-tipping off provision is 'Board of Directors, Commissioners, Management, or Employees of the Reporting Party (Bank)'; and
- b) b) the act/object prohibited in the anti-tipping off provision is 'notifying Service Users or other parties about STR that is being prepared or has been submitted to PPATK.'

Based on the matters described above, it can be the answer to why only disclosing information related to STR is qualified as a violation of the anti-tipping off provision. The answer to this question is that the framer of the law intends to harmonize the recommendations of the 21 FATF Recommendations as an international standard related to anti-tipping off arrangements and anti-tipping off provisions in the AML Law. In addition to this normative description, the philosophy of why only information related to STR is the object of the anti-tipping off provision is because STR is the result of judgment from the reporting party (inter alia Bank), which can only be known by customers or other parties if the bank discloses it. Unlike the case with CTR (which is based on transaction thresholds) and IFTI (which records all fund transfer transactions to and from abroad). Especially for CTR and IFTI, if the customer knows the provisions of Article 23 paragraph (1) of the AML Law, without having to be notified/disclosed by the bank, the customer will automatically know that the transaction will be reported to PPATK. However, information that CTR or IFTI has been reported to PPATK, must still be kept confidential to parties who are not entitled / authorized by the bank. The question that then arises is, what if what is disclosed (disclosed) by directors, commissioners, officers, or employees of the bank is information related to Cash Transaction Reports (CTR) and financial transaction reports of fund transfers from and to abroad (IFTI)? If what is to be applied is an anti-tipping-off provision, the answer is no. This is because CTR and IFTI are not contained in the formulation of the offense in the anti-tipping off provision.

Article 28 of the AML Law states, "The implementation of reporting obligations by the Reporting Party is exempt from the confidentiality provisions applicable to the Reporting Party concerned." This means that the implementation of reporting obligations by financial service providers (inter alia, Bank), which includes STR, CTR, and IFTI, is exempt from the principle of confidentiality. Based on this, it can be concluded that the actions of the bank that disclose information related to STR, CTR, and IFTI to other than PPATK or other than those allowed under the provisions of anti-tipping off is a form of violation of the principle of confidentiality. Especially if it is disclosed to those who are not entitled/authorized to STR, there are anti-tipping off provisions that can be applied. However, if what is expressed is CTR and IFTI, no specific provision expressly qualifies this.

The explanation above shows that the form of legal problems that arise related to discrepancies between objects that the Bank must report under the AML Law and objects that must be kept confidential based on anti-tipping off provisions is the existence of different treatments between 3 (three) objects of reporting obligations from the bank (STR, CTR, and IFTI). In addition, there is no special provision that expressive verbs can be appointed if there is a disclosure of the fact that CTR and IFTI related to customer transactions have been reported to PPATK, even though information or facts pertaining to CTR and IFTI are things that must also be kept confidential by the reporting party (inter alia, Bank).

**The paradigm that needs to be formed is related to the discrepancy between the objects of reporting obligations for banks under the Money Laundering Law and those that must be kept secret based on anti-tipping off provisions**

Related to this legal issue, the main instrument needed to be able to analyze it further is related to the ability to interpret or analyze a provision of a legal norm. In interpreting or analyzing a provision of legal norms, it is necessary to have the capacity of interpreters/reviewers in interpreting the law itself. The meaning of law can be obtained by the interpreter/reviewer through the process of interpretation and/or legal construction of a legal norm itself. To realize this, legal reasoning is needed for the law enforcement concerned.<sup>32</sup> Legal reasoning itself is a series of thinking actions by searching, analyzing, and developing a legal issue using ratios or reason.<sup>33</sup>

In legal reasoning, according to MacCormick, there are several basic elements in legal reasoning for a rule or decision, namely: (a) Consistency; (b) Coherence; and (c) Consequences.<sup>34</sup> With these elements of interpretation fulfilled, every decision can make sense in a legal system. A decision or regulation satisfies consistency requirements, if and only if, it does not conflict with other norms in the legal system. Furthermore, a decision or regulation is said to satisfy the requirements of coherence if and only if it makes sense in the legal system. Finally, if the rule or decision produces the best consequence, a decision or regulation satisfies the consequence requirement.<sup>35</sup> In the end, legal reasoning is indispensable as a postulate to justify a decision on the interpretation of norms.<sup>36</sup> These three elements (consistency, coherence, and consequences) will be used as an 'analytical knife' for the paradigm construction that will be produced later.

Based on the ratio legis of the establishment of the AML Law a quo, it is stated that one of the souls underlying the formation of the law is inter alia, complying with the provisions of international standards as contained in the FATF Recommendations and international best practices related to the anti-money laundering regime.<sup>37</sup> In the FATF Recommendations themselves, provisions related to anti-tipping off are manifested in Recommendation 21, which specifies that the object that must be kept secret by Financial Service Providers, their directors, officers, and employees in the context of anti-tipping off is the fact that suspicious transaction reports (STR) or related information are being submitted to the Financial Intelligence Unit.

As for some countries used as objects of comparison in this paper as described in the previous subdiscussion, it can be understood that there is a simultaneity between the object of

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<sup>32</sup> Miftahul Qodri, "'Benang Merah' Penalaran Hukum, Argumentasi Hukum dan Penegakan Hukum," *Jurnal Hukum Progresif* 7(2) (2019), hlm. 182.

<sup>33</sup> Aditya Yuli Sulistyawan, Aldio Fahrezi Permana Atmaja, "Arti Penting Legal Reasoning Bagi Hakim Dalam Pengambilan Putusan Di Pengadilan Untuk Menghindari "Onvoldoende Gemotiveerd,"" *Jurnal Ius Constituendum* 6(2) (Oktober 2021), hlm. 486.

<sup>34</sup> Anthony U. Ezebuio, Remigius M. Obiora, and Anthony C. Ojimba, "The Limit of Deductive Reasoning In Law And A Study Of Neil MacCormick's Second-Order Justification," *Journal of Economics and Allied Research* 6(2) (June 2021), hlm. 67.

<sup>35</sup> Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon, 1978, hlm. 103-104.

Khusus mengenai persyaratan *konsekuensi*, ada dua jenis argumen yang memenuhi persyaratan konsekuensi dalam teori *legal reasoning* MacCormick. *Pertama*, berkaitan dengan kapan penafsir mengantisipasi konsekuensi faktual dari keputusan yang mereka pilih. *Kedua*, berkaitan dengan kapan penafsir menunjukkan konsekuensi logis dari keputusan, dan khususnya konsekuensi hipotetis yang dapat terjadi jika aturan diterapkan dalam kasus atau keadaan yang serupa. Tidak memperhitungkan argumen dari konsekuensinya, menurut MacCormick, akan mengarah pada kesimpulan yang tidak dapat diterima karena absurditasnya.

Lebih lanjut lihat: MacCormick, *Legal Reasoning*, hlm. 148.

<sup>36</sup> Michał Sopiński, "Neil McCormick's Theory of Legal Reasoning and Its Evolution," *Archiwum Filozofii Prawa I Filozofii Społecznej Journal of the Polish Section of IVR* 1 (2019), hlm. 3. DOI: <https://doi.org/10.36280/AFPiFS.2019.1.63ENG>

<sup>37</sup> Direktorat Hukum PPATK, *Modul Workshop Terpadu*, hlm. 65-66.



reporting obligations of the reporting party (inter alia, Bank) and objects that must be kept confidential. For example, Sweden whose reporting duty domain only covers suspicious financial transactions (STR), simultaneously with objects that must be kept confidential in the country's anti-tipping off provisions, namely only suspicious financial transactions. Furthermore, in Pakistan, where the object of reporting obligations for the reporting party includes suspicious financial transactions (STR) and cash financial transactions (CTR), this is simultaneous with the scope of violations in the provisions related to the provisions of the obligation to keep confidential information submitted by the reporting party, which includes suspicious financial transactions (STR) and cash financial transactions (CTR) as well.

In the anti-tipping-off provisions based on the AML Law in Indonesia itself, at this time, the scope of objects that must be kept secret includes STR only. Even though the scope of reporting obligations by the reporting party of the financial service provider includes STR, CTR, and IFTI. So it can be concluded that there is a discrepancy between the scope of the reporting obligation of the reporting party and the obligation to keep information or facts confidential based on anti-tipping off provisions. However, in some countries, the provisions related to anti-tipping off coincide with the provisions of reporting obligations by the reporting party.

As an international standard related to the AML-CTR regime, the provisions in the FATF Recommendations must be simultaneous with the provisions in the AML Law,<sup>38</sup> as long as it does not conflict with the principles of domestic law in Indonesia. Therefore, disclosing information or facts related to suspicious financial transactions only as an anti-tipping off domain is the most representative of the 21 FATF Recommendations.

Related to this, the legal question that needs to be resolved is about what provisions can be applied if the reporting party (inter alia, Bank) discloses/leaks information or facts that CTR and IFTI transactions from its customers have been reported to the financial intelligence unit (in casu, PPATK). In the AML Law a quo itself, there is currently another provision related to the obligation to keep information confidential, namely the provisions of Article 11 of the AML Law, which gives the obligation to everyone who obtains documents or information in the context of carrying out their duties to keep the document or information confidential. If these provisions are violated, they will be threatened with a maximum penalty of 4 (four) years in prison, as part of the object of reporting obligations by the reporting party, information or facts (information) related to CTR and IFTI are part of the information that must be kept confidential under the AML Law.<sup>39</sup> Thus, the reporting party (inter alia, Bank) who discloses information or facts (information) that transactions from their customers have been reported to PPATK as CTR and IFTI, can be threatened with a crime as stipulated in Article 11 of the AML Law.

Based on the matters described above, it is necessary to submit accurate recommendations to clarify the provisions that should be applied to any violation of the obligation to keep information or facts confidential from each object of reporting obligations of the reporting party (inter alia, Bank). The paradigms that need to be formed in understanding problems related to the discrepancy between the objects of reporting obligations of the reporting party and objects

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<sup>38</sup> Yuni Priskila Ginting, dan Astrid Athina Indradewi, "Transaksi Keuangan Mencurigakan dari Uang Elektronik Pada Masa Pandemi Covid-19," *Seminar Nasional Hukum Universitas Negeri Semarang*, 7(2) (2021), hlm. 458. DOI: <https://doi.org/10.15294/snhunnes.v7i2.724>

<sup>39</sup> Berdasarkan Pasal 28 UU TPPU dinyatakan bahwa "Pelaksanaan kewajiban pelaporan oleh Pihak Pelapor dikecualikan dari ketentuan kerahasiaan yang berlaku bagi Pihak Pelapor yang bersangkutan." Hal tersebut menunjukkan bahwa pada dasarnya melaporkan transaksi nasabah (TKM, TKT, dan TKL oleh pihak pelapor penyedia jasa keuangan) merupakan bentuk pelanggaran atas ketentuan kerahasiaan. Akan tetapi, ketentuan kerahasiaan tersebut harus dikecualikan dalam konteks pelaksanaan kewajiban pelaporan oleh pihak pelapor tersebut. Adapun pihak yang dapat memperoleh laporan terkait transaksi nasabah dari pihak pelapor dalam pelaksanaan kewajiban pelaporan tersebut adalah PPATK (*vide* Pasal 1 angka 11 UU TPPU). Sehingga apabila informasi atau fakta (keterangan) terkait transaksi tersebut diungkapkan/diberitahukan selain kepada PPATK, hal tersebut merupakan pelanggaran terkait kewajiban merahasiakan informasi atau fakta (keterangan) yang wajib dirahasiakan berdasarkan UU TPPU.

that must be kept secret in the anti-tipping off provisions based on the AML Law, are as follows:<sup>40</sup>

- a) If what is revealed or leaked by the Board of Directors, Commissioners, Officers, or Employees of the Reporting Party (inter alia, Bank) is facts or information related to suspicious financial transactions, such actions are qualified as part of a violation of the anti-tipping off provisions under Article 12 of the AML Law; and
- b) If what is disclosed or leaked by the Board of Directors, Commissioners, Officers, or Employees of the Reporting Party (inter alia, Bank) is facts or information (description) related to cash financial transactions or financial transactions of fund transfers from and to abroad, such actions are qualified as part of a violation of the confidentiality provisions of the position under Article 11 of the AML Law.

The constructed paradigm is a novelty introduced in this paper that has never been introduced before.

The constructed paradigm shows synchronization between the content of the anti-tipping off regulation of Article 12 of the AML Law and international standards, which are also the soul underlying the provision's content. In addition, there is also synchronization with each other between the provisions of Article 11 and Article 12 of the AML Law. In addition, the recommendation shows the creation of legal certainty, both between the material of Article 12 of the AML Law and the ratio legis of the AML Law, as well as between Article 12 of the AML Law and Article 11 of the AML Law. Legal certainty itself is a constitutional right contained in the basic norms of the state, namely as stipulated in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that everyone has the right to fair legal certainty. The above explanation is a concrete manifestation of the elements of 'consistency' and 'coherence', as MacCormick argues earlier.

Furthermore, with the creation of legal certainty between each other between the provisions covering each object of information or facts (information) that must be kept confidential by the reporting party (inter alia, Bank), it shows the clarity of operationalization of each article, especially related to the obligation of the reporting party (inter alia, Bank) to keep every customer transaction information confidential. This suggests that the above recommendations represent the element of 'consequences', as MacCormick argued earlier.

## Conclusion

The legal problem that arises related to the discrepancy between objects that the Bank must report under the AML Law and objects that must be kept confidential based on anti-tipping off provisions is that there is a different treatment between 3 (three) objects of reporting obligations from the bank (CTR, STR, and IFTI). In addition, there is no special provision that expressive verbs can be appointed if there is a disclosure of the fact that CTR and IFTI related to customer transactions have been reported to PPATK, even though information or facts related to CTR and IFTI are things that must also be kept confidential by the reporting party (inter alia, Bank).

The paradigm that needs to be built regarding the discrepancy between objects that the Bank must report under the AML Law and objects that must be kept secret based on anti-tipping off provisions is if what is revealed or leaked by the Bank is facts or information related to STR, such actions are a violation of the anti-tipping off provisions under Article 12 of the AML Law. However, if it is related to facts or information related to CTR and IFTI, then the mixture is a

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<sup>40</sup> Muh. Afdal Yanuar, *Kerahasiaan Bank dan Anti-Tipping Off di Sektor Perbankan*, Jakarta: Kencana, 2023, hlm. 189-190.

violation of Article 11 of the AML Law.

The suggestions that can be conveyed include: (a) In the short term, it is necessary to make a PPATK Regulation that regulates anti-tipping off provisions, which regulate the inter alia of each scope of enforceability of Article 11 and Article 12 of the AML Law; and (b) In the long term if changes are made to the AML Law, it is necessary to include in the explanation of Article 12 of the AML Law a quo, that this provision only applies if what is disclosed by the reporting party is information or facts related to STR. As for the case disclosed by the reporting party as information or facts related to CTR and IFTI, it is part of a violation of the confidentiality provisions of the position as stipulated in Article 11 of the AML Law a quo.

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