

COMBATING MONEY LAUNDERING: THE FINANCIAL SERVICES IMPLICATIONS

Summary: In order to combat money laundering effectively, different efforts are being made at the world-wide and EU level. From a global perspective, the core body responsible set up in response to mounting concern over money laundering, is the Financial Action Task Force on Money Laundering (FATF). In its 40 Recommendations, it sets out the measures national governments should take to implement effective anti-money laundering programmes. On the EU side, the main piece of legislation is Directive 91/308. Its current modification is identified as one of the priority goals of the Financial Services Action Plan. These changes relate to the concept of serious offences, the scope of the Directive, non face-to-face operations and co-operation between the Commission and the national authorities. In conjunction with these efforts, the financial services industry is collaborating intensively with law-makers and police bodies in order to combat money laundering.

INTRODUCTION

The laundering of money is the processing of criminal proceeds to disguise their illegal origin, a process of critical importance as it enables the criminal to enjoy these profits without jeopardizing their source. Since money laundering is an international problem, international co-operation is of the utmost importance in the fight against it.

In response to mounting concern over money laundering, the G7 Summit established in 1989 the Financial Action Task Force on Money Laundering (FATF) to develop a co-ordinated international response. One of the first tasks of the FATF was to develop 40 Recommendations, which set out the measures national governments should take to implement effective anti-money laundering programmes.

The European Commission is a full member of the FATF, representing the European Communities (there are 29 other member countries). In 1991, the Commission adopted Directive 91/308 of 10 June 1991 relating to the prevention of the use of the financial system for the purpose of money laundering, which is frequently quoted as one of the major international instruments in the field of the fight against money laundering.

I. THE WORK OF THE FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING

The FATF is an intergovernmental body, which develops and promotes policies, both at the national and international levels, to combat money laundering. Its primary goal is therefore to generate the political will necessary for setting up national legislative and regulatory reforms in this area.

It has drawn up a "blacklist" of countries considered non-co-operative (Bahamas, the Cayman Islands, the Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, the Marshall Islands, Niue, Panama, the Philippines, Russia, St. Kitts and Nevis, St. Vincent and the Grenadines) and a "grey-list" of countries which, without being deemed non-co-operative, have insufficient means against money laundering. (Antigua and Barbuda, Belize, the Bermudas, the British Virgin

Islands, Cyprus, Gibraltar, Guernsey, the Isle of Man, Jersey, Malta, Mauritius Island, Monaco, Samoa, St. Lucia).

The FATF reports encouraging progress made by certain countries on the blacklist (Bahamas, the Cayman Islands, the Cook Islands, Israel, Liechtenstein, the Marshall Islands and Panama) that may lead to their removal from the list. It also reports a worrisome delay in countries such as Lebanon, the Philippines, Nauru and Russia. It is possible that, in its next meeting of June 2001, it may modify these lists and recommend boycott measures against the countries on the blacklist.

The 40 FATF recommendations

The FATF has published 40 Recommendations, which are a comprehensive scheme for action against money laundering. They cover the criminal justice system and law enforcement, the financial system and its regulation and international co-operation. FATF members have made a firm political commitment to combat money laundering based on these recommendations. They have their implementation of the 40 Recommendations monitored through a two-pronged approach: an annual self-assessment exercise and the more detailed mutual evaluation process under which each member country is subject to an on-site examination. In addition, the FATF carries out cross-country reviews of measures taken to implement particular Recommendation.

Some of the basic obligations contained in the Recommendations are:

- the criminalization of the laundering of the proceeds of serious crimes (Recommendation 4) and the enactment of laws to seize and confiscate the proceeds of crime (Recommendation 7).;
- the obligation for financial institutions to identify all their clients, including all beneficial owners of property, and to keep appropriate records (Recommendation 10 to 12);
- a requirement for financial institutions to report suspicious transactions to the competent national authorities (Recommendation 15), and to implement a comprehensive range of internal control measures (Recommendation 19);
- an adequate system for the control and supervision of financial institutions (Recommendation 26 to 29);
- the need to enter into international treaties or agreements and to pass national legislation, which will allow countries to provide prompt and effective international co-operation at all levels (Recommendation 32 to 40).

The development of certain money laundering methods is emphasised: utilisation of on-line banking services, trusts and other structures not constituted in companies, and involvement of lawyers, notaries, accountants and other professionals. Concerning trusts, FATF proposes several solutions: establishing a system of certification of the professionals involved in the formation of trusts, regulating the formation of trusts (e.g. having access to information and authorizing the prohibition of certain trusts), imposing registration formalities.

II. PROPOSAL FOR AMENDING DIRECTIVE 91/308 RELATING TO THE PREVENTION OF THE USE OF THE FINANCIAL SYSTEM FOR THE PURPOSE OF MONEY LAUNDERING

Directive 91/308 came into force in 1991. The amendment of the directive is identified as one of the priority goals of the Financial Services Action Plan (FSAP). These modifications relate to the concept of serious offences, the scope of the Directive, non face-to-face operations and co-operation between the Commission and the national authorities.

a) The concept of “serious offences”

The main changes to the 91/308 Directive under the amending directive are the extension of its scope to the whole organized crime and not only to drugs trafficking. The Commission proposes that this prohibition should apply to activities linked to the organised crime or activities damaging the European Communities financial interests, with possibility for Members States to extend their national anti money laundering legislation to any other form of criminal activity.

The Council proposes to enlarge the scope proposed by the Commission. Its draft aims at excluding unintentional or innocent involvement from the scope of the Directive and then defines which crimes must be considered serious. Finally, as proposed by the Commission, it allows Member States the option of enlarging the scope in national legislation by defining any other offence as a criminal activity in the light of the Directive.

During the European Parliament second reading, the proposal of the Rapporteur, Mr Lehne, to restrict the definition of money laundering to organized crime was not adopted. The European Banking Federation (EBF) considers this vote as prejudicial.

b) The coverage of financial sector activities and activities outside the financial sector

⇒ Financial sector activities

The 91/308 Directive applies to credit institutions and to financial institutions in the widest sense. However, there are doubts about the scope of the directive, notably concerning bureaux de change, money remittance offices and investment firms. The Commission proposes to widen the definition of a financial institution (it has to be ascertained that this wider definition would apply for the sole purpose of this Directive).

⇒ Activities outside the financial sector

The 91/308 Directive allows Member States to extend the application of the directive in whole or in a part to professions and to categories of undertakings, other than the credit and financial institutions referred to in article 1, “*which engage in activities which are particularly likely to be used for money laundering purposes*”. However, the stronger the money laundering defences of the banking sector have become, the more money launderers have sought alternative ways of disguising the criminal origin of their funds.

The Commission proposes therefore that the directive should apply to most of other activities and professions, which should be obliged to properly identify their clients: real estate sector, accountants, auditors and casinos; some activities of notaries and other independent legal

professionals (specific financial or company law activities). Conversely it proposes also that lawyers should be exempted from any identification or reporting requirement in any situation connected to the representation or defense of their clients in legal proceedings.

Concerning this last point, the Council Common Position proposed to clarify that lawyers should be submitted to the Directive when participating in financial or corporate transactions, including providing tax advice: here is the greatest risk for these services to be misused for the purpose money laundering. However, these professions should be exempted from the reporting obligation when the information is obtained before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. On the second reading, the Parliament accepted the Council position.

c) The identification of customers (physical persons) by credit and financial institutions in non face-to-face financial operations

To face up to the means of payment transactions, such as direct banking and pre-paid cards, that also provide new opportunities for money laundering, the European Commission has introduced in its proposal an annex about the identification of customers in a distance transaction.

The objective is that the institutions and persons subject to this directive shall take the specific and adequate measures necessary to compensate for the greater risk of money laundering which arises in non face-to-face transactions. It is necessary to take account of future developments in the field of electronic financial services, for example electronic signatures.

On the second reading, the Parliament rejected the proposal for an amendment setting forth strict procedures to be followed by banks for the identification of their customers in a distance transaction. The EBF considers that the solution ends up with the proposition of the Council: *“a general provision in the directive imposing on bank the requirements to put in place adequate measures of identification at a distance, but leaving some margin for manoeuvre concerning the choice of the measures”*.

d) Co-operation between the European Commission and National Authorities

The Commission considers that an exchange of information concerning money laundering is essential for the effectiveness of the anti-money laundering effort. It has proposed such an exchange in case of illegal activities related to the European Communities' financial interests. But the Council considers that the question of co-operation between the Commission and national authorities should not be regulated in this directive and has requested that the Commission presents a new proposal.

On the second reading, the Parliament has adopted an amendment calling for Member States and the Commission to cooperate when the financial interest of the Communities are affected.

CONCLUSION

It is clear from the above that both at the world-wide and the EU level, there is a firm commitment to combat money laundering under all its present forms. However, the criminal world is always devising new ways of laundering its illicit funds and the fight against these activities is an on-going and evolving process. In particular, the financial services industry has much to say: it is in its utmost interest to collaborate intensively with law-makers and police bodies in order to combat money laundering, and it broadly supports the actions of the FATF and the EU's modernization of its money laundering directive. Not only is it the health and reputation of the financial services industry which is at stake, but ultimately the ones to benefit most from a decisive fight against money laundering are the legitimate customers of the system.

Briefing notes are prepared by the Industry Advisory Committee to the European Parliamentary Financial Services Forum. For further information on the subjects raised in the briefs please contact the Chairman, Members or Secretariat of the Advisory Committee.

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