

Interaction between money laundering and tax evasion.

Belgian and international measures

in the fight against money laundering.

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Jean SPREUTELS

Avocat général, Cour de cassation (Belgium)
Chairman of the Belgian Financial Intelligence Unit (C.T.I.F.-C.F.I.)
Lecturer at the University of Brussels (U.L.B.)

And

Caty GRIJSEELS

Legal Advisor
Belgian Financial Intelligence Unit (C.T.I.F.-C.F.I.)

Introduction

Some time ago, money laundering essentially drew attention when being associated with illicit drug trafficking. However, times have changed and numerous cases showed the world that criminals main concern is the laundering of proceeds stemming from any possible serious offence, and this, irrespective whether these proceeds are associated with illicit drug trafficking, tax evasion¹ or any other form of criminal conduct.

Although money laundering and tax evasion are different crimes, there is a link between both. The success of each crime depends on the ability to hide the financial trail of the income. Money launderers seek to transform illegally earned income into legal income, while tax evaders seek to conceal income, either legally or illegally earned, from detection and collection by the tax authorities. Although tax evasion and money laundering are operationally quite distinct processes, they share the same sophisticated techniques of fund dissimulation, they furthermore mutually support each other and are often perpetrated through offshore locations². Since offshore financial centres and tax havens offer high levels of secrecy as well as a variety of financial mechanisms and institutions guaranteeing anonymity for the beneficial owners, they attract criminals for a wide variety of reasons including the protection they offer for money laundering and various exercises in financial fraud³. The most significant difference in their use is that in tax evasion cases, the funds usually move to a single location where they are sheltered from the home country's tax authorities. In cases involving criminally generated funds, the tendency is for the funds to move rapidly through several offshore locations⁴.

For many years tax evasion has been excluded from the legal provisions specifically dealing with money laundering. However, taking conscience of the entanglement of the criminal activities and the use of sophisticated techniques to hide and launder the proceeds international bodies and national governments changed their position on this matter. Many do recognise that money laundering is associated with all types of crime, tax evasion included. Given the fact that criminals often commit tax crimes in connection with their other illegal activities, drawing the line between both would be quite artificial. There is no moral difference between drug trafficking and other serious offences as the risks from both are great and this applies as much to tax offences as to any other crime. The "tax loophole", if it existed, could only have a serious negative impact on the fight against money laundering generally⁵.

¹ Understood as an action by the taxpayer that involves breaking the law and which was wilfully undertaken with the intent of escaping payment of tax. "Fraude fiscale" in French.

² W.F. BRUTON, "Money Laundering - Is it now a corporate problem ?", *European Financial Services Law*, June 1999, p. 210; S.M. FROOMKIN, "Offshore centres and money laundering", *Journal of Money Laundering Control*, 1999, Vol. 1, n° 2., p. 167, Henry Stewart publications; M.A. ROWAN BOSWARTH-DAVIES, *The Impact of International Money Laundering*, FT Financial publications, 1997, Pearson Professional Limited, p. 69-85.

³ J.A. BLUM, M. LEVI, R.T. NAYLOR, Ph. WILLIAMS, *Financial Havens, Banking secrecy and money-laundering*, United Nations Office for Drug Control and Crime Prevention, New York, 1988, p. 2.

⁴ A. COURTENAY, "Offshore Secrecy Statutes, The heart of the money laundering problem", *The Money Laundering Bulletin*, February 1999, p. 9.

⁵ P. BURRELL, "Preventing tax evasion through money laundering legislation", *Journal of Money Laundering Control*, Vol. 3, n° 4, 2000, pp. 304-308.

Consequently, for a global economy to succeed, governments realised the need to intensify their co-operation and provide international frameworks for the effective management of global issues, of which taxation and money laundering are no exception.

I. TAX EVASION AS PREDICATE OFFENCE FOR MONEY LAUNDERING

A. The international context in the combat against money laundering and tax evasion.

The United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, adopted in Vienna on 20 December 1988, was the first international convention focusing on money laundering. This convention essentially focuses on drug trafficking in general, including drug money laundering, and requires the signatories to make money laundering a criminal and extraditable offence. The purpose of this convention is also to promote international co-operation among the parties. Article 3, 10^o of this convention provides that the offences established in accordance with this convention shall not be considered as tax offences in order to refuse co-operation. Does such mean that the proceeds of tax evasion are also covered under this convention ? Since this convention is limited to drug money laundering, such is certainly not the case. However, since many arrangements for international co-operation do not extend to tax offences, the drafters of this convention wanted to restrict the possibility for Member States to invoke the tax excuse in order to refuse co-operation.

Nearly two years later, aware of the phenomenon that money laundering was developing far beyond the drug trafficking offence, the Council of Europe adopted in Strasbourg the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. It expanded the definition of money laundering beyond its 1988 association with drug trafficking to the proceeds derived from any underlying criminal activity ("predicate offence"). However, article 18 of this convention provides in the possibility to refuse co-operation if the offence to which the request relates is a tax offence. In this respect, special attention should be drawn to the additional protocols of two European conventions. First, the Second Additional Protocol to the European Convention on Extradition of 13 December 1957, signed by the Member States in 1978, provides that extradition can not be refused on the ground that the offence involves tax evasion rather than some other species of economical fraud. And secondly, the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, signed by the Member States in 1978, provides that international mutual assistance in the gathering of evidence for the use in criminal matters should not be refused solely on the ground that the request concerns an offence which the requested party concerns a tax offence.

Since 1990 a firm trend has emerged in favour of decoupling money laundering from drug trafficking and this was increasingly reflected in many domestic legislation. Step by step governments enlarged the application field of their provisions on money laundering to a whole range of serious offences. Not solely the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, but more in particular, the strengthened version in 1996 of the *Financial Action Task Force*⁶ ("FATF") 40 Recommendations played a considerable role in this regard. FATF

⁶ The FATF was established by the G7 Summit in Paris in July 1989 to examine measures to combat money laundering. The FATF currently consists of 29 countries, representing the world's major financial markets, and two international organisations, the European Commission and the Gulf Co-operation Council. It is a multi-

Recommendation 4 indeed clearly endeavours that each country should take measures to criminalise money laundering and to extend the offence of drug money laundering to one based on serious offences. This corresponded to a growing trend based on the dramatic increase in non-drugs related organised crime and on the realisation that having a wide range of predicate offences should improve suspicious transaction reporting and above all facilitate international co-operation between judicial and police authorities in different countries. Since 1999 all FATF member countries have money laundering legislation in place based on a range of serious offences. However, many countries were reluctant for the inclusion of tax evasion as a predicate offence for money laundering due to the long tradition on international instruments providing for reserves in this respect. Furthermore, the question of inclusion of tax evasion as predicate offence became even more delicate in the preventive approach to counter money laundering. Financial institutions, and since recently non-financial professional service providers (notaries, accountants, auditors, casino's, real estate agents, ...), are indeed requested to report to the competent authorities any transaction which they suspect of money laundering. Based on these reports investigations can be started if the suspicions seemed to be correct. FATF Recommendation 2 and 3 further require that the financial institutions secrecy laws should be conceived so as not to inhibit implementation of FATF Recommendations, and that an effective money laundering enforcement program should include increased multilateral co-operation and mutual legal assistance in money laundering investigations, prosecutions and extraditions.

A significant development which reinforced international co-operation in the fight against tax evasion took place in Paris on 27-28 April 1998 when the results of the OECD's Committee of Fiscal Affairs project on harmful tax competition were presented to its Member States in its report *on "Harmful Tax Competition: An Emerging Global Issue"* (the "1998 Report"). Governments would find it increasingly difficult to collect taxes in the face of globalisation and the opportunity for international distortions which had developed. The project concluded that the political climate was now ripe for a common approach against harmful tax practices. The first stage in implementing the 1998 Report was the publication on 26 June 2000 of the *"Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs - Process in Identifying and Eliminating Harmful Tax Practices"* ("the 2000 Report"). The 2000 Report identifies, among others, a list of 35 countries that were found to meet the tax haven criteria of the 1998 Report^{7 8}. These jurisdictions should make the commitment to eliminate the harmful tax practices by 31 July 2001, otherwise they will be included in a list of uncooperative tax havens. The US government is furthermore working with other nations to develop procedures to prevent the internet from becoming

disciplinary body bringing together policy-making power of legal, financial and law enforcement experts. The FATF adopted its 40 Recommendations in 1990 and updated them in 1996. These are the measures covering the areas of criminal justice and law enforcement, the financial system and its regulation and international co-operation, which the FATF members have agreed to implement and which all countries are encouraged to adopt.

⁷ The four key factors for identifying a tax haven are : 1) there is no or nominal tax on the relevant income (from geographically mobile financial and other service activities); 2) there is no effective exchange of information with respect to the regime; 3) the jurisdiction's regimes lack transparency e.g. the details of the regime or its application are not apparent, or there is inadequate regulatory supervision or financial disclosure; and 4) the jurisdiction facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy.

⁸ Tax havens according to the OECD 2000 Report : Andorra, Anguilla, Antigua and Barbuda, Aruba, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Samoa, Seychelles, St. Lucia, St. Kitts & Nevis, St. Vincent and the Grenadines, Tonga, Turks & Caicos, US Virgin Islands, Vanuatu.

an offshore tax haven⁹. It becomes indeed increasingly easy for e-commerce companies to set up websites in jurisdictions that are unwilling to share taxpayer information, allowing them to sell their goods world-wide without any scrutiny from international tax agencies.

The OECD Council Meeting was followed on 8 May 1998 by a meeting of the Finance Ministers of the G7 countries in London. Taking into account that globalisation of business had facilitated international tax crime through the use of tax havens and preferential tax regimes, the G7 Finance Ministers agreed that strong and practical measures had to be taken to tackle this growing threat to the stability of the domestic economies¹⁰. In addition to reinforce the report of the OECD Committee on Fiscal Affairs, the G7 ministers decided to address a potential weakness in international anti-money laundering systems in two different ways :

(i) First, it was agreed that domestic regulatory authorities should ensure that financial institutions report suspicions about the movement of criminal assets regardless of whether they believe that the criminality is tax related. Criminals were indeed evading anti-money laundering systems by representing their affairs as tax-related in efforts to reassure their bankers, brokers and professional advisors that the proceeds of organised crime were not involved. FATF took the lead on this objective. At its June 1999 Plenary meeting in Tokyo, the FATF members adopted an interpretative note to FATF Recommendation 15¹¹ that called for the reporting of suspicious transactions “regardless of whether they are also thought to involve tax matters”. This note effectively closes the tax loophole and thus also accomplished the first of the G7 suggested objectives in improving the ability of anti-money laundering systems in dealing with tax related crimes. In June 1998, the UN Office for Drug Control & Crime Prevention presented the results of its report called *Financial Havens, Banking Secrecy and Money-laundering* which demonstrates how criminals are making wide use of the opportunities offered by offshore centres to launder criminal assets. This report concluded among others that “one of the key remaining facilitators of crime has been the tax avoidance/evasion exemption in the laundering regulations of many countries. It may not be essential for tax evasion to be a predicate offence for money laundering charges (...). But if financial and other institutions are permitted not to pass information about conduct that otherwise would be suspicious on the grounds that they think (or say they think) that the funds are “only” tax money, this offers both them and their customers an easy way of rationalising doing business for themselves and representing to a court or regulators in future that they did not think the funds were proceeds of crime but rather tax “dodges”, thereby evading conviction and/or severe regulatory action¹².”

(ii) Secondly, money laundering authorities should be permitted, to the greatest extent possible, to pass information to their tax authorities to support the investigation of tax related crimes, and such information should be communicated to other jurisdictions in ways which would allow its use by their tax authorities. The OECD Committee on Fiscal Affairs took the lead on this initiative and undertook a country survey to determine the extent of access by tax authorities to anti-money laundering information in order to determine what information could be useful for the investigation of

⁹ P. SPIEGEL, “US seeks to stop net becoming an offshore tax haven”, Financial Times, 11 July 2000.

¹⁰ J. FISHER & J. BEWSEY, “Laundering the proceeds of fiscal crime”, (2000) Journal of International Banking Law, Issue 1, Sweet & Maxwell Ltd (and contributors)

¹¹ Recommendation 15 : “If financial institutions suspect that funds stem from a criminal activity, they should be required to report their suspicions to the competent authorities.”

¹² J.A. BLUM, M. LEVI, R.T. NAYLOR, Ph. WILLIAMS, Financial Havens, Banking secrecy and money-laundering, United Nations Office for Drug Control and Crime Prevention, New York, 1988, p. 51.

tax related crimes. Such information should be used in a way which does not undermine the effectiveness of anti-money laundering systems. The OECD Committee on Fiscal Affairs furthermore published on 12 April 2000 its report on *Improving access to bank information for tax purposes*¹³. In this report, which was endorsed by all 29 OECD Member countries, the OECD Committee on Fiscal Affairs considers ways to improve international co-operation with respect to the exchange of information in the possession of banks and other financial institutions for tax purposes. The OECD Committee on Fiscal Affairs is of the view that, “ideally all Member countries should permit access to bank information, directly or indirectly, for all tax purposes so that tax authorities can fully discharge their revenue raising responsibilities and engage in effective exchange of information.” Many OECD Member countries will therefore be required to review their policies on exchanging information with other countries in both criminal and civil tax cases. Such will equally be the case when the Directive COM (98)295/FINAL, proposed by the EU Commission, will be adopted by the Member States requiring them to adopt one of the two options : to withhold tax on cross-border interest paid to EU resident individuals at a rate of 20% or to provide information on such interest payments to the tax authorities on an automatic basis.

The interaction between money laundering and tax crimes, and the importance of fighting these types of financial crimes, was also highlighted in the G7 Communiqué of 25 September 1999. The G7 expressed their deep concern about the growth in illicit international financial transactions, including money laundering, broad scale tax evasion, and other financial crimes. The G7 will therefore ensure that their experts on such matters will co-ordinate and actively seek to contribute to ongoing efforts to address these problems through mutually reinforcing initiatives with the FATF and the OECD. The fact that serious economic crime has increasingly tax and duty aspects was also recognised in the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999. The European Council therefore called upon all Member States to provide full mutual legal assistance in the investigation and prosecution of serious economic crime, and this without invoking the tax excuse¹⁴. One of the priorities of the French Presidency to the European Union (1 July - 31 December 2000) is, among others, the proposal for the adoption of a convention on mutual assistance in legal matters where the possibility to invoke the tax excuse would be excluded¹⁵.

Since the end of 1998, the FATF embarked on substantive work on the problems raised by countries and territories which do not co-operate in the combat against money laundering. To tackle this problem, FATF established during its Plenary session of 22-24 September 1998 the Ad Hoc Group on Non-Co-operative Countries and Territories, of which Belgium, as member of the FATF, assumes the presidency. It has become evident to the FATF through its regular typologies exercises that as its members have strengthened their systems to combat money laundering the criminals have sought to exploit weaknesses in other jurisdictions to continue their laundering activities. In order to reduce the vulnerability of the international financial world to money laundering, the removal of any detrimental rules and practices which obstruct international co-operation against money laundering is crucial. In this context, on 14 February 2000, the FATF published its *Report on Non-Co-operative Countries and Territories* outlining the procedure to identify non-co-operative jurisdictions and territories in the international fight against money laundering and to encourage them

¹³ DAFPE/CFA(2000)4/FINAL.

¹⁴ Presidency Conclusion, European Council of Tampere, 15-16 October 1999, SN 200/99, n° 49.

¹⁵ [Http://www.diplomatie.fr/euroep:precidence:programme/fue.gb.html](http://www.diplomatie.fr/euroep:precidence:programme/fue.gb.html); European Council, 29 June 2000, COPEN 47, COMIX 515, 9843/00.

to implement international standards¹⁶. The report provides twenty-five criteria to identify detrimental rules and practices which impede international co-operation in the fight against money laundering. The practical result of this exercise was the publication on 22 June 2000 of a list of 15 countries to be considered as non-co-operative^{17 18}. These jurisdictions are strongly urged to adopt measures to improve their rules and practices as expeditiously as possible in order to remedy deficiencies identified in the reviews. Pending adoption and implementation of appropriate legislative and other measures, the FATF recommends, in accordance with the FATF Recommendation 21, that financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from the non-co-operative list of countries and territories.

At the same time, the Financial Stability Forum, an organisation set up in 1999 by the G7, investigated the possible impact on global markets of badly or dishonestly run offshore financial centres¹⁹. The Financial Stability Forum is concerned about the ripple effect of fraud and financial collapse in the centres. Offshore financial activities are not inimical to global financial stability provided they are well supervised and supervisory authorities co-operate. Offshore financial centres that are unable or unwilling to adhere to internationally accepted standards for supervision, co-operation and information sharing create a potential systemic threat to global financial stability. Those offshore financial centres constitute weak links in an increasingly integrated international financial system and hinder broader efforts to raise standards of soundness and transparency in the global financial system. The practical result of this exercise was the publication on 26 May 2000 of a list of 26 jurisdictions considered to have significant financial offshore activities and grouped into three categories reflecting their perceived quality of supervision and perceived degree of co-operation²⁰. The Financial Stability Forum concluded that it would be in the public interest to publish this list, since such would encourage all offshore financial centres to take appropriate steps to raise the quality of their supervision and their degree of co-operation as quickly as possible.

On 30 and 31 March 2000, a United Nations Offshore Forum was held in the Cayman Islands which brought together 45 jurisdictions. The aim of the Forum, a part of the UN Offshore Initiative

¹⁶ The report is available at the following website : <http://www.oecd.org/fatf>.

¹⁷ FATF Review to identify Non-co-operative countries and territories : Increasing the world-wide effectiveness of anti-money laundering measures, 22 June 2000 (<http://www.oecd.org/fatf>).

¹⁸ Non-co-operative countries and territories : Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russia, St. Kitts and Nevis, St. Vincent and the Grenadines.

¹⁹ Report of the Working Group on Offshore Financial Centres, April 2000.

²⁰ Group I. The jurisdictions of this category are generally perceived as having legal infrastructures and supervisory practices, and/or a level of resources devoted to supervision and co-operation relative to the size of their financial activities, and/or a level of co-operation that are largely of a good quality and better than in other offshore financial centres : Hong Kong, Luxembourg, Singapore, Switzerland, Dublin, Guernsey, Isle of Man and Jersey.

Group II. The jurisdictions of this category are generally perceived as having legal infrastructures and supervisory practices, and/or a level of resources devoted to supervision and co-operation relative to the size of their financial activities, and/or a level of co-operation that are largely of a higher quality than Group III, but lower than Group I : Andorra, Bahrain, Barbados, Bermuda, Gibraltar, Labuan, Macau, Malta, Monaco.

Group III. The jurisdictions of this category are generally perceived as having legal infrastructures and supervisory practices, and/or a level of resources devoted to supervision and co-operation relative to the size of their financial activities, and/or a level of co-operation that are largely of a lower quality than Group II : Anguilla, Antigua and Barbuda, Aruba, Belize, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Cyprus, Lebanon, Liechtenstein, Marshall Islands, Mauritius, Nauru, Netherlands Antilles, Niue, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Samoa, Seychelles, The Bahamas, Turks and Caicos and Vanuatu.

launched in March last year by the Vienna based UN Office for Drug Control & Crime Prevention, is to ensure that each jurisdiction has appropriate anti-money laundering measures in place and that they reflect the supervisory and regulatory regimes. The UN Offshore Forum has identified and drawn up basic performance standards that should be achieved by all offshore financial centres. These are no additional requirements but constitute a compliance objective that incorporates core principles and standards promulgated by the FATF, the Basle Committee on Banking Supervision and other international bodies. The UN Offshore Forum focuses on all jurisdictions providing international cross-border services, and not only on those jurisdictions commonly identified as “offshore centres”. All international financial services centres are invited to enter - as soon as possible, and no later than 30 September 2000 - into a formal governmental commitment to adhere to the internationally accepted standards of financial regulation and anti-money laundering measures. The practical application of this commitment would be supported by a programme of technical assistance, training and mentoring programmes.

The G7 Ministers of Finance fully endorsed the results of the foregoing initiatives during their summit held on 7-8 July 2000 in Fukuoka (Japan). They furthermore announced severe sanctions against countries and territories that were not ready to co-operate in the battle against money laundering and tax evasion. The G7 could consider either to condition, to restrict, or even prohibit financial transactions with such jurisdictions²¹. Those countries could furthermore no longer benefit from financial assistance from the World Bank and the IMF.

B. Situation on European level

1. The European directive on money laundering

Recognised as one of the most important instruments in the fight against organised crime, the Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering 91/308/EEC (the “Directive”)²² has been the European Union’s main weapon in its endeavours to ensure that the liberalisation of the financial markets and the consequent freedom of capital movements were not used for undesirable purposes such as money laundering.

Although the Directive only targets, explicitly, capital deriving from drug-related offences, it does however not exclude the laundering of other criminal proceeds. In fact, in its preamble, the Directive recommends the Member States to extend the effects of the Directive to include the proceeds of such activities (i.e. organised crime and terrorism) to the extent that they are likely to result in laundering operations justifying sanctions on that basis. Additionally, Article 1 of the Directive defines the “criminal activity” including, besides “drug offences”, as “any other criminal activity designed as such for the purposes of the directive by each Member State”. Since not all Member States agreed that money laundering, as defined in the Directive, should include the proceeds of criminal activity

²¹ Actions Against Abuse of the Global Financial System, Report from the G7 Finance Ministers to the Heads of State and Government, Okinawa, 21 July, 2000 (<http://www.g8kyushu-okinawa.go.jp/e/documents/action.html>).

²² Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (91/308/EEC) - See OJ L166, 28 June 1991, p. 77.

other than drug trafficking, the extension of this definition to include other crimes was left to the discretion of each Member State²³.

The Directive imposes different obligations to the credit and financial institutions in order to protect itself against money laundering. The main duties essentially concern : customer identification, record keeping of identity documents and of transactions in order to preserve an audit trail for use in any subsequent investigation, due diligence in relation to suspicious transactions, set up of adequate procedures of internal control and communication. Credit and financial institutions are moreover required to fully co-operate with the authorities for combating money laundering by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering, and by furnishing them, at their request, with all necessary information. This is commonly referred to as the mandatory “suspicious transaction reporting” obligation. In this context these institutions cannot invoke the principle of bank secrecy to withhold information from the money laundering authorities. This is expressly mentioned in the preamble of the Directive. Since the Directive does not contain any further specification regarding the nature and function of such authorities, the matter has been left to the discretion of the Member States. This has resulted in the establishment in the Member States of a diversity of either independent administrative, police or judicial units, referred to as financial intelligence units, responsible for the gathering and processing of the suspicious transactions reports²⁴.

In order to render the preventive approach in the combat against money laundering more efficient the European Commission has introduced on 13 September 1999 a proposal to amend the current Directive²⁵.

The Commission’s proposal, which is currently still under discussion, focuses essentially on three main topics :

- the extension of the definition of money laundering to cover not only drugs offences, but all organised crime activities, as well as fraud, corruption and any other illegal activities affecting the financial interests of the Communities;

- the expansion of its field of application to cover the vulnerable professions, namely the non-financial professions such as accountants, auditors, notaries, real estate agents, lawyers and other independent legal professionals when assessing or representing clients in respect of property, financial or company formation matters; and

²³ W.C. GILMORE, *Dirty Money : The Evolution of Money Laundering Measures*, Council of Europe Publishing, Second Edition, May 1999, p. 156 and following; E.U. SAVONA, *European Money Trails*, Harwood Academic Publishers, 1999, p. 20 and following.

²⁴ For more information on financial intelligence units see : V. MITSILEGAS, “New Forms of Transnational Policing : The Emergence of Financial Intelligence Units in the European Union and the Challenges for Human Rights : Part 1 & 2, *Journal of Money Laundering Control*”, Vol. 3, n° 2 /3, 1999, Henry Stewart Publications.

²⁵ Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on preventing the use of the financial system for the purpose of money laundering. The Commission considered the necessity to modify the Directive in the 1997 Second Commission Report on the implementation of the 1991 Directive. See European Commission, “Second Commission Report to the European Parliament and the Council on the Implementation of the Money Laundering Directive, COM (98) 401 final, also see the “First Commission Report”, COM (95) 54 final.

- an obligation for the money laundering authorities to exchange information concerning money laundering in case of illegal activities related to the European Communities' financial interests.

With respect to the first topic, the Commission draws in its proposal a clear distinction between the penal law treatment of money laundering and the specific anti-money laundering obligations imposed on the financial sector and other vulnerable activities and professions. On 3 December 1998 the Council adopted a Joint Action on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing freezing, seizing and confiscation of instrumentalities and the proceeds of crime²⁶. In this Joint Action Member States agreed that no reservations should be made or upheld in respect of Article 6 of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in so far as serious offences are concerned. Serious offences are defined in terms of maximum or minimum prison sentences attached to them. This definition is widely drawn - offences with a maximum sentence of more than one year or with a minimum sentence of more than six months. Consequently all Member States agreed to criminalise the laundering of the proceeds of all "serious offences". The Commission, however, considers that it would not be appropriate to base the prohibition of money laundering contained in the Directive on the same concept of "serious offences", but rather on activities linked to organised crime or damaging the European Communities financial interests. The Commission concluded that "for the purposes of the Directive, and its extension to certain non-financial activities, a reporting obligation based on serious offences might be too broad." One may not forget that the anti-money laundering defences depends to a large extent on the goodwill and efforts of the financial institutions and professions subject to the Directive. The inclusion of a very wide range of offences might trigger the active involvement and commitment of the vulnerable activities and professions which have hitherto not been involved in the fight against money laundering in most Member States. In addition, it may be easier for the persons and institutions subject to the Directive to develop a suspicion of and report on the possible involvement of an organised crime group than to assess the seriousness of the underlying criminal activity and its precise criminal law treatment in terms of the related maximum or minimum prison sentence.

Since the concept of "organised crime" seemed to be considered as too vague, it was proposed to make reference to Article 1 of the Joint Action of 21 December 1998 defining the activities of criminal organisations.

The willingness to extend the concept of money laundering in EC Law in order to cover proceeds of fraud as well as passive and active corruption was also highlighted by the European Council in its explanatory report on the Second Protocol to the Convention on the protection of the European Communities' financial interests of 12 March 1999²⁷. Furthermore, Recommendation 26 of the Action Plan on Organised Crime of the High Level Group on Organised Crime, endorsed by the Amsterdam European Council on 16-17 June 1997 provided also that "fiscal authorities should be subjected in the national law to a similar reporting obligation for transactions connected with organised crime, at least for transactions relating to VAT and excise." In its Recommendation 29 the High Level Group on Organised Crime furthermore encouraged the development of legislation to

²⁶ OJ L 333,9/12/1998, p.1.

²⁷ C. STEFANO, H. XANTHAKI, The new EU draft money laundering directive : a case of inter-institutional synergy, *Journal of Money Laundering Control*, Vol. 3, n° 4, 2000 pp. 325-335, Henry Stewart Publications.

combat organised crime linked to tax fraud, and recommended that tax fraud linked with organised crime should be treated as any other form of organised crime, even if tax laws may contain special rules on recovering the proceeds of tax fraud²⁸.

2. Legislation in the European and FATF member countries²⁹

2.1 Violation of tax laws as a predicate offence of money laundering

Although FATF countries are obliged to criminalise money laundering for serious offences, it was left up to each member to determine what constituted a serious offence within its jurisdiction. There is therefore some difference among the members as to whether tax offences are included as a serious offence for money laundering. In some countries such as Belgium, Finland, France, Ireland, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom violations of tax laws are considered a predicate offence of money laundering. In Austria only customs fraud and evasion of import and export duties are considered a predicate offence of money laundering. In Germany tax evasion constitutes a predicate offence of money laundering if it is committed by a member of a criminal association. Turkey only considers tax fraud³⁰ as a predicate offence of money laundering. In other countries such as Australia, Brazil, Canada, Denmark, Japan, Luxembourg, Portugal, Singapore, Switzerland and the United States tax offences are not included as a serious offence for money laundering.

2.2 Exchange of money laundering information with tax authorities

(i) domestic exchange of money laundering information

a. Direct exchange

Within the FATF membership, direct exchange of money laundering information may be divided into two categories, that is, those jurisdictions where tax authorities have direct access to a centralised database containing suspicious transactions and those where tax authorities may be furnished with this information from the anti-money laundering authority. In Australia and in the United States tax authorities have direct access to the disclosures database. In the second category, the anti-money laundering information is provided spontaneously or on request. Brazil, Canada, Denmark, Hong Kong, China, Ireland, the Netherlands, New Zealand, and the United Kingdom all permit their anti-money laundering authorities to pass relevant information to their respective tax authorities. Finland, Germany, Norway and Sweden permit the information to be passed once formal pre-trial investigations have begun. Austria allows information to be provided to tax authorities directly, however, only as related to customs or excise tax fraud.

²⁸ OJ C 251, 15 August 1997.

²⁹ FATF- XI, Plen/28, Communicating information to tax authorities.

³⁰ Only violations of tax laws by destroying and concealing records of books and replacing destroyed pages by other false pages in the books or by drawing up false documents and using tampered documents are considered a predicate offence for money laundering.

b. Indirect exchange

A group of jurisdictions within the FATF does not allow the exchange of money laundering information directly. In these jurisdictions among which are Belgium, France, Italy, Japan, Spain and Switzerland, however, the public prosecutor or a law enforcement agency (Japan) may, upon receipt of a case from the money laundering authority, transmit the relevant information to the tax authority.

c. No exchange

In Greece, Ireland, Iceland, Portugal and Turkey there is no possibility for money laundering information to be provided to tax authorities. The other way round, the situation is quite the opposite for many of these countries. Unlike in Portugal, the tax authorities of Greece, Ireland, Iceland and Turkey must provide information to the competent money laundering authorities. Such is the same in Austria, Belgium, Denmark, Finland, France, Germany, The Netherlands and Sweden.

(ii) International exchange of money laundering information

The situation among FATF members with regard to exchanges of money laundering information on the international level is substantially different from the situation on the domestic level.

a. Direct exchange

Only a few countries may exchange information directly with the tax authorities of other jurisdictions for the purpose of supporting tax investigations. In Australia, for example, such an exchange may take place in the context of mutual legal assistance arrangements. Denmark may provide information on a case by case basis, and Germany may only provide information related to cross-border cash movements.

b. Indirect or no exchange

The majority of FATF member countries fall into this category. The anti-money laundering authorities may pass information to foreign anti-money laundering authorities, which may with prior consent, provide this information to their respective tax administrations.

A large number of FATF countries, Belgium, Brazil, Canada, Greece, Finland, France, Hong Kong, China, Italy, Japan, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, Turkey, the United Kingdom, and the United States, permit the international exchange of money laundering information primarily or exclusively between their respective anti-money laundering authorities. Certain of these jurisdictions, with the exception of Italy, the Netherlands and the United Kingdom, further restrict such exchanges to those for the purpose of anti-money laundering investigation only.

C. Belgian country profile

1. The repressive approach to counter money laundering

Money laundering is a criminal offence pursuant to article 505 of the Penal Code. Article 505 of the Penal Code incriminates the laundering of the proceeds of any predicate offence, tax offences included³¹. Money laundering is furthermore an autonomous offence, thus including the author of the predicate offence. Subject to dual criminality, foreign offences are also covered by this provision. The penalty for money-laundering is imprisonment of 15 days up to 5 years and/or a fine of 5.200 BEF up to 20.000.000 BEF. All capital gains or advantages directly derived from the predicate offence, together with the goods and securities that have replaced them, and the investment yields from these assets are subject to confiscation.

2. The preventive approach to counter money laundering : serious and organised tax fraud

In terms of preventive legislation, Belgium implemented the European Directive 91/308 of 10 June 1991 with the law of 11 January 1993 on preventing the use of the financial system of purposes of money laundering. This law aims at the most serious forms of criminality³². In this respect, its scope is narrower than that of the criminal offence pursuant article 505 of the Penal Code. The Belgian government stated that the reporting obligations were restricted in this matter in order to limit the burden on financial institutions, and by the same to guarantee the workability of the preventive system

³¹ “A penalty of 15 days to 5 years in prison and/or a fine of 26 to 100,000 francs shall be imposed on the following individuals:

1° Those who have unlawfully received some or all of the items taken, diverted or obtained by means of a crime or other offence;

2° Those who have purchased, received in exchange or free of charge, held in their possession or custody or managed the items referred to in Article 42(3), when they knew or should have known their origin;

3° Those who have converted or transferred the items referred to in Article 42(3), in order to conceal or disguise their illicit origin or to help anyone involved in the commission of the offence from which the items are derived, to avoid the legal consequences of his actions;

4° Those who have concealed or disguised the nature, origin, location, use, movement or ownership of the items referred to in Article 42(3), when they knew or should have known their origin.

The offences referred to in (3) and (4) of this Article exist even if the perpetrator is also, as applicable, the perpetrator of, accomplice to or an accessory to the offence from which the items referred to in Article 42(3) are derived.

The items referred to in (1), (2), (3) and (4) of this Article constitute the object of the offences referred to in these provisions, within the meaning assigned by Article 42(1), and shall be confiscated, even though the property does not belong to the person convicted, without prejudice, however, to the rights of third parties to the property that may be subject to confiscation.

The penalty for attempting to commit the offences referred to in (2), (3) and (4) of this Article shall be 8 days to 3 years in prison and/or a fine of 26 to 50,000 francs.

Persons punished under these provisions may, in addition, come within the prohibition specified in Article 33.”

³² For the purposes of the preventive law of 11 January 1993 the origin of the money or property is illicit when originating from a criminal activity related to : terrorism; organised crime; illicit traffic in narcotics; illicit traffic in weapons, goods and merchandise (e.g. contraband); illicit traffic in labour (black market labour); illicit traffic in human beings; exploitation of prostitution; illegal use of or trade in hormonal substances; illicit traffic in human organs and tissues; *defrauding the budget of the European Union*; *serious and organised fiscal fraud*; bribery of public officials; stock-market related offences (i.a. insider trading and manipulation of share price) and illicit public appeal for savings; financial fraud; hostage-taking; robbery or extortion; fraudulent bankruptcy.

to counter money laundering. The preventive system indeed obliges all institutions and persons, subject to the law of 11 January 1993, to inform an independent administrative authority, the *Belgian Financial Intelligence Processing Unit* (“Cellule de Traitement des Informations Financières/Cel voor Financiële Informatieverwerking”, hereinafter “Unit”) of any presumption or fact providing indications of money laundering of which they may become aware in the execution of their professional activities.

According to the law of 11 January 1993, money is considered having an illicit origin when it is, among others, derived from serious and organised tax fraud using complex mechanisms or procedures with international dimension. The seriousness of the tax fraud can result out of the manufacturing of or the use of false documents, or the recourse to bribery, but also and more essentially out of the importance of the damage caused to the Treasury and to the social-economic system in general. The organisation of the fraud can result out of the use of shell-companies, men of straw, complex legal constructions, and the use of various bank accounts for international money transfers.

It belongs to the Unit to determine whether it is confronted with a case of serious and organised tax fraud. In order to strengthen its opinion, the Unit is not only authorised to query the institutions and persons subject to the law of 11 January 1993, but also all police and administrative services, tax services included. Those different services are however not authorised to question the Unit, subject to strict professional secrecy. This one-way information transmission model constitutes the guarantee of a relation of trust between the institutions and persons subject to the law of 11 January 1993 and the Unit.

The Unit will only inform the public prosecutor’s department about tax offences when presenting the above mentioned characteristics. This limitation is due to the fact that the Unit is only competent for serious forms of criminality, which moreover justifies why the institutions and persons subject to the law are obligated to active co-operation for such crimes.

Belgian government has furthermore intensified its measures to counter tax crimes and to help tax authorities to establish and to collect taxes, by informing them of the existence of documents being likely of interest in that respect and of which they could ignore the existence. The Belgian Banking and Finance Commission and the Belgian Insurance Control Office, are since 1999 obliged to inform the judicial authorities as soon as they have knowledge of particular mechanisms, conceived by an institution under their control with the aim to favour tax evasion³³. Officers of the public prosecutor’s department with the courts, when taking cognisance of a penal case which investigation concludes to indices of direct or indirect tax fraud, must also inform immediately the Ministry of Finance³⁴. The administrative services of the State, including the public prosecutor’s department with the courts, the regional administrations, and public institutions and casino’s are required to provide the tax authorities, upon their request, with all documents and information in their possession in order to

³³ Law of 28 April 1999, “*Loi complétant, en ce qui concerne la lutte contre la fraude fiscale, l’arrêté royal n° 185 du 9 juillet 1935 sur le contrôle des banques et le régime des émissions de titres et valeurs et la loi du 9 juillet 1975 relative au contrôle des entreprises d’assurances*”, *Belgian Official Gazette (Moniteur belge)* of 25 June 1999; *Laws of 15 and 23 March 1999 on the reform of the Belgian tax procedure*, *Belgian Official Gazette (Moniteur belge)* of 27 March 1999.

³⁴ Article 2 of the Law of 28 April 1999, see previous footnote.

correctly establish or perceive the taxes due to the government. The communication of these documents is subject to the authorisation of the general prosecutor³⁵.

II. THE BELGIAN PREVENTIVE ANTI-MONEY LAUNDERING SYSTEM AND THE COMBAT TO COUNTER SERIOUS AND ORGANISED TAX FRAUD³⁶

A. The Belgian Financial Intelligence Unit

The Unit, established by the Law of 11 January 1993, is an independent administrative authority with legal personality, charged with processing and transmitting information with a view to combating money laundering.

Without prejudice to the powers of the judicial authorities, the Unit is designed to receive and analyse the information transmitted by the institutions and individuals specified by the Law of 11 January 1993, by the supervisory, regulatory or disciplinary authorities of these institutions or individuals, by the foreign institutions fulfilling functions similar to those of the Unit, within the framework of mutual co-operation, and by the European Anti-fraud Office (OLAF).

As soon as and only when the review of the information submitted to it reveals a serious indication of money laundering, this information is turned over by the Unit to the competent public prosecutor. The Unit therefore acts as a filter between the institutions and persons subject to the Law of 11 January 1993 and the judicial authorities.

Composed of financial experts, it is placed under the supervision of the Ministers of Justice and Finance and headed by a magistrate or his deputy, detached from the Public Prosecutor's Office. The Unit's Bureau, composed of the President and the Vice President, organises its activities.

As already mentioned earlier the Unit can demand, not only from the institutions and individuals specified by the law, but also from the police and administrative departments of the State, any additional information which it deems useful for accomplishing its assignment, within the time period it determines. The Unit may furthermore obtain originals or copies of all additional information which it deems useful. In addition, it may consult on site the documents useful for accomplishing its legal assignment which belong to the institutions or individuals specified by the law or which are in their possession.

The members of the Unit, its staff, as well as the external experts upon whom it calls, are bound to observe a very strict duty of professional secrecy. With the exception of the transmission of information, under the legally stipulated conditions, to the competent public prosecutor, to the supervisory, regulatory or disciplinary authorities of the institutions or professions³⁷, to the foreign

³⁵ Article 327, § 1 and 7 Income Tax Code, article 93*quaterdecies* VAT Code.

³⁶ Detailed information is available in the Unit's Annual Reports, available on its website : <http://www.ctif-cfi.be>.

³⁷ When the Unit identifies a violation of the law of 11 January 1993, it can inform the supervisory or regulatory authorities or the disciplinary authorities so as to enable them to take appropriate measures, and notably to impose administrative sanctions. In case of failure to respect the law, these authorities may : publish the decisions and measures they have adopted; impose an administrative fine of not less than 10,000 BEF and not more than 50 million BEF. These sanctions, specifically provided by the anti-money laundering legislation, exist without

institutions fulfilling similar functions, to European Anti-Fraud Office³⁸ and - unless they are called upon to testify in court - they may not disclose, even in the case referred to in Article 29 of the Code of Criminal Procedure³⁹, the information collected in the performance of their duties.

2. The results

The Belgian system to counter money laundering has proven to be efficient. From 1 December 1993 to 30 June 2000, i.e. in six years and seven months of activities, the Unit turned over to the public prosecutor's offices 2,580 case files, representing 32 % of all the case files it had opened and 62 % of the 42,302 suspicious transaction reports sent to it.

Until 30 September 1999 the case files bear on 4.9 billion euros (200 billion Belgian francs), i.e. 80 % of all the suspicious amounts detected. Of the 1,863 case files turned over by the Unit to the public prosecutor's offices as at 30 June 1999, 182 had given rise to criminal sentences, 91 formed the object of a procedure in the criminal courts, and 16 had been transferred to foreign judicial authorities for handling. 280 persons were sentenced to a total of 588 years of imprisonment and 7 million euros (282 million Belgian francs) in fines. Confiscations worth more than 164 million euros (6.6 billion Belgian francs) were pronounced. The case files turned over to the public prosecutor's offices by the Unit relate principally to the following basic crimes : narcotics trafficking (60 %), illicit trafficking in goods or merchandise (10 %), organised crime (10 %), serious and organised fiscal fraud, notably fraud of the VAT carousel type (7 %), financial fraud (4 %) and exploitation of prostitution (3 %).

B. Detection and typologies of serious and organised fraud

The case files analysed by the Unit involving the laundering of money derived from serious and organised tax fraud utilising complex or international mechanisms went from 13 case files in 1994/1995 up to 187 case files at the end 30 June 2000. The suspicious transactions reports linked to VAT frauds in the sectors of GSM's, cars, computer hardware, textiles and petroleum products are constantly growing.

The Unit experienced that the money-laundering circuits already detected earlier continue to develop, but that the financial transactions shift towards new intermediaries. These intermediaries, who seem to play solely the role of straw man or dummy company in the execution of such transactions, often have no police record and at first sight do not appear to be participating directly in VAT fraud. In

prejudice to other administrative or disciplinary sanctions imposed on the basis of the supervisory legislation. These sanctions can also be imposed by the Minister of Finance on the institutions or individuals referred to by the law which are not subject to any supervisory or regulatory authority, nor to any disciplinary authority.

³⁸ When it transmits information relating to the laundering of money deriving from the commission of an offence relating to defrauding the financial interests of the European Union, the Unit can inform the European Commission's European Anti-Fraud Office (OLAF).

³⁹ This Article specifies that "every constituted authority, every public servant or officer, who, in the discharge of his duties, learns of a crime or a misdemeanour, will be obliged to immediately inform the Crown Prosecutor (...) and to transmit to this magistrate all relevant information, reports and documents".

effect, parallel to the VAT fraud system, they develop an illicit trade involving the goods and merchandise with which the VAT fraud was committed. The complexity of the financial set-ups makes it ever harder to detect laundered funds deriving from VAT unduly reimbursed by the States. These funds are mixed with the revenue from the commerce in merchandise coming from the fraud circuits, as well as with that deriving from regular activities in the same sector.

The Unit experienced following topological characteristics in this form of criminality with European dimensions :

- the use of dormant accounts which suddenly become active and on which a large number of both credit and debit transactions are performed in a short space of time;
- the purchase of foreign currency from foreign exchange offices using bank cheques or certified cheques drawn on the account of persons and companies involved in a VAT fraud. The foreign currencies thus purchased are, in some cases, used for international payments performed via the bank account of the foreign exchange office maintained at a Belgian or foreign financial institution;
- the dummy companies in Belgium and abroad often have as partners companies established in tax havens or offshore financial markets;
- the registered office is often a simple post office box;
- intermediaries already active abroad in this type of fraudulent activity, but not yet having any links with Belgium, come to Belgium in order to perform dubious financial transactions there.

It was also emphasised that a request by the financial institutions concerned for substantiating documentation of a commercial nature (invoices) or further explanation about the nature of the transactions quite often leads to the client abruptly cutting off the relationship. The financial institutions are obviously becoming increasingly effective with regard to detection in this area. The Unit is thus receiving more reports in which a breaking off of the relationship with the clients is reported. As of the moment when the bank suspects that its client is participating in a system of fraud and that its services are being used for laundering funds deriving from this fraud, it refuses all co-operation for such transactions. Therefore, reports relating to the same intermediaries and bearing on similar transactions but issuing from different financial institutions often follow one another in rapid succession.

C. International Co-operation

The world-wide spread of money laundering mechanisms, the complexity of devices set up by criminal organisations and the extreme fluidity of financial transactions makes the exchange of information between countries an absolute necessity in order to combat money laundering efficiently.

Beside regular contacts with the international institutions active in the field of combating money laundering (FATF, European Community, Council of Europe, United Nations, INTERPOL, EUROPOL, ...) the Unit is increasingly co-operating with disclosure units abroad, and participates actively in the Egmont Group⁴⁰ of FIUs.

⁴⁰ The Egmont group is an informal international grouping of financial intelligence units, i.e. anti-money laundering authorities. It was created in June 1995 by the joint effort of the Belgian and US financial intelligence units, i.e. the Belgian Unit and FINCEN. It has become an essential element in the international fight against money laundering.

The strict confidentiality to which the Unit is subject does not apply to exchange of information with foreign counterpart agencies, on condition of analogous secrecy obligations. This exchange is possible on the basis of international treaties of which Belgium is signatory or on the basis of reciprocity. It is the policy of the Unit to lay down the rules of co-operation in a memorandum of understanding or by way of exchange of letters.

According to the law of 11 January 1993 any request from a counterpart unit on specific cases is considered equal to a disclosure of a suspicious transaction, which enables the Unit to use its investigative prerogatives upon receipt of such foreign request.

The Unit has established a cooperation with the financial intelligence units of more than thirty countries.

The Unit furthermore co-ordinates the Belgian delegation to the Financial Action Task Force (FATF) and chairs the Egmont legal working group. It is also actively involved in the PC-R-EV Committee of the Council of Europe and the Phare "Money Laundering" Project of the European Union.

III. CONCLUSION

Governments around the globe are grappling with the issue of how to best maximise the benefits of increasing globalisation and at the same time minimise the potential for abuse by criminals of the financial liberalisation and technological advancements that have fostered globalisation. New technologies, the removal of exchange controls and increased access to foreign financial institutions have reduced the cost of capital but also increased opportunities for tax evasion and money laundering. The support for increased financial liberalisation could be undermined if such liberalisation were to become a means of facilitating criminal activities. For this reason excellent national and international initiatives have been taken to reduce these risks to a maximum. However, efforts with the same aim must continue.

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