COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Conclusions of the third typologies meeting of the PC-R-EV Andorra (5-7 June 2001)

CONCLUSIONS OF THE WORKING GROUP I WHICH EXAMINED IN DETAIL SPECIFIC PROBLEMS OF APPLYING DUE DILIGENCE PRINCIPLES TO TRUSTEES AND OTHER ELIGIBLE INTRODUCERS

(BY MR SILVIO CAMILLERI/MALTA – PRESIDENT OF PC-R-EV)

The main issues addressed in the course of the workshop could be conveniently summed up under three headings:

1) Trustees
2) Other eligible business introducers
3) Internet banking.

1) Trustees

- The core problem with trusts is that of identifying the beneficiary and real owner of funds with the trustee shielding the identity of the beneficiary.
- The impossibility to identify the beneficiary owner of funds creates serious difficulties to the administrative and judicial authorities seeking to distinguish between legitimate and criminal financial activity.
- While trusts complicate the life of investigators they need not necessarily represent an insurmountable obstacle to a successful money laundering investigation.
- Where it has been possible to determine the identity of the persons behind the trustees, in particular the settler as well as the beneficiary, it has been found possible to pursue investigations successfully.
- Major problems arise where behind a trust you have a whole chain of other trusts since in such cases it becomes practically impossible either to determine the real beneficiary or the legitimacy or otherwise of the activity at source.
- Consideration needs to be given to measures which will allow the identification of settlers and beneficiaries behind the trustees.
- Having a register of trusts identifying the settlers and beneficiaries in each case would be a step in the right direction. Speedy access to such a register by competent administrative and judicial authorities has to be ensured. The scope and extent of such access will have to be determined.
- Because of the particularly insidious nature of the problems posed by trusts when they operate within the financial system consideration should be given to placing restrictions on their operation in certain financial transactions in which case the nature of these restrictions and the particularly vulnerable financial transactions in question need to be identified.
- To make the keeping of the register of trusts a worthwhile proposition the creation of trusts should be more strictly regulated and some documentation evidencing the creation of a trust should be imposed for a trust to have any legal effect.
- The need to identify the parties to a trust at all times gives rise to the requirement that changes in the identity of the parties should be notified and registered.

- Because of the uncertainty and lack of transparency that trusts generate financial operations in which their involvement is detected should arouse a great degree of alertness and greater attention to due diligence procedures.
- It is not a viable proposition that a register of trusts should be completely accessible to the public since this would completely undermine a fundamental feature of trusts leading to their abolition which, even if desirable in an anti-money laundering context, is not a realistic objective in present circumstances.
- Access to such a register should therefore be restricted but it should be accessible under conditions consonant with the requirements of money laundering investigations not only to judicial but also to investigative, prosecutorial and administrative authorities.
- Consideration should be given to some kind of limitation on the establishment of trusts which have another trust behind them.

2) Other Eligible Introducers

- Among eligible introducers lawyers appear to pose a greater problem than others such as accountants and auditors because of their professional mind-set geared to the defence of their clients which is seen to demand strict confidentiality of the communications exchanged between lawyer and client which are therefore protected by strict professional secrecy rules.
- The applicability and scope of these professional secrecy rules tends to become questionable when lawyers act more as business introducers rather than legal advisers.
- It should be possible to apply certain, if not all, of the standard preventive measures developed to fight money laundering when lawyers and similar professionals such as accountants and auditors act as financial business introducers.
- Attention should be given to identify the professional qualities, conditions and circumstances which render business introducers eligible to act in that capacity so as to ensure that these are persons sensitised to the problems of money laundering.
- Consideration should be given to placing eligible introducers under the scrutiny of a supervising authority which in dialogue with them could provide them with guidance as to the manner of the exercise of their functions.

3) Internet Banking

- Although perhaps strictly not falling within the precise scope of the theme of the workshop some attention was also given to the special problems raised by Internet banking and the application of the "Know your Customer" principle.
- Problems of transparency similar to those described in relation to trustees and eligible introducers were identified in this area as well.
- Due to the very nature of Internet banking dispensing the client from the need to be physically present at the bank at the moment of the transaction, problems of determining the real identity of the client at the moment of the transaction arise.
- Notwithstanding what might be seen as the very essential nature of the Internet the initial face-to-face contact at least at the beginning of the business relationship should remain an indispensable preventive requirement.
- Consideration should be given to introducing other technical measures to verify the identity of the client in the execution of internet transactions in the course of the business relationship e.g. electronic signatures, passwords and combinations of them: automatic client profiling, software applications allowing the system to automatically generate red flags which allow the continuous monitoring of electronic transactions.
- Consideration should also be given to the periodic renewal of face-to-face contact and of documentation to keep track of the identity and existence of the client.
- A purely cost-benefit approach to the measures required to monitor internet transactions is not appropriate if the high standard of anti-money laundering measures achieved with great effort and extensive international co-operation is to be maintained.
- In the long run, the laying down of clear rules, even at some cost of sacrifying some of the undoubted benefits of the possibilities offered by the internet, should prove better from a cost-benefit perspective than avoiding to lay down such rules.

Finally, the suggestion was made that company formation agents could be one of the useful topic(s) for the next Typologies meeting.

CONCLUSIONS OF THE WORKING GROUP II WHICH EXAMINED IN DETAIL THE UTILITY AND RELIABILITY OF MONEY LAUNDERING INDICATORS FOR REPORTING SUSPICIOUS OR UNUSUAL TRANSACTIONS

(BY MRS VIDA ŠEME-HOCEVAR/SLOVENIA)

Three main areas of concern were discussed: creation, implementation and revision of indicators.

1) Creation

The various representatives of the PC-R-EV countries described their different systems of creation, ranging from totally liberal approaches (leaving the creation to the obliged entities themselves) to the obligatory lists issued by the regulatory bodies. To summarise the opinions of the participants, all preferred the development of a mixed approach, involving the obligated entities, the associations of interest, the supervisory authorities, the Police representatives, the FIU representatives (and other bodies). In addition to this, different sectorial approaches should be applied taking into consideration all the regional and other specifics of each particular sector and country. The process of creation should be based upon specific sectorial needs which should be prioritised. Attention should be paid in the creation of guidance to ensuring a level playing field regarding obligations within individual sectors.

2) Implementation

Various methods of education, training and assistance were presented which help the obliged entities to implement the list of indicators for suspicious transactions: leaflets, presentation of typologies and cases, videos and regular sectorial co-operation. The active involvement of associations of interest, FIUs and other involved bodies helps a better implementation of the indicators. Feedback from Police, Prosecution and FIUs is essential. Communication and attitude problems within the financial sector still present a challenge to most participating countries. To counter this, it was suggested that international pressure through prepared lists of suspicious indicators by international groups may prove to be of great assistance.

Bad examples (non-compliance) could also be used to stimulate implementation even in most problematic sectors which have no supervision (through the media, meetings with top management or educational training sessions). In a sound financial and non-financial environment ethics present an important issue which stimulates the implementation of the list of suspicious indicators.

Compliance should be regularly checked by supervisory institutions for particular sectors or regions. More attention will be needed to the sector of securities and the capital market.

The important role of compliance officers, their training, their internal positions and their decision-making was also stressed. In particular where there are national compliance officers for undertakings they have a role in checking the spread of reports within their group and taking proactive remedial action. Also the issue of administrative sanctions and criminal sanctions (negligent money laundering) was considered helpful and important. Training of Prosecutors by the financial sector and the FIU was also considered to bring great benefits to the process. In this regard it was questioned how many prosecutors in individual jurisdictions had access to, or, indeed, were aware of, the list of indicators used by the financial sector, when considering prosecutions for negligent money laundering.

The need for national co-ordination on all these issues was strongly felt. This could be undertaken by an FIU or national co-ordinating committees, as recommended in PC-R-EV reports.

3) Revision of Indicators

The revision of indicators has not yet been undertaken by the majority of the participating countries with the exception of Portugal. Nevertheless it is necessary regularly to undertake this process with the inclusion of all the above mentioned regulatory supervisory and other bodies, bearing in mind Recommendations of international organisations and other findings concerning new typologies (FATF etc…). New types of money laundering and new types of predicate offences should be taken into consideration (high-tech crime, cyber-crime and other new types

of crimes). In majority of cases it is expected that the revision will bring new additional indicators and keep the existent ones valid.

RECOMMENDATIONS OF THE WORKING GROUP:

A) The PC-R-EV should prepare a working blue print for and overarching list of suspicious indicators, leaving sufficient flexibility for the reflection of local problems.

B) The PC-R-EV should as part of this process conduct an evaluation/analysis of best practice in the PC-R-EV member countries concerning the creation, implementation and revision of indicators of suspicious transactions.

C) The PC-R-EV should consider whether the result of this work should be reflected in formal Recommendations of the Committee and/or the Council of Europe.