



Strasbourg, 5 March 2008

MONEYVAL (2007) 20 - II

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE EVALUATION OF ANTI-MONEY LAUNDERING MEASURES
(MONEYVAL)

THIRD ROUND DETAILED ASSESSMENT REPORT
ON LIECHTENSTEIN¹

ANTI-MONEY LAUNDERING
AND COMBATING THE FINANCING OF TERRORISM

COMPLIANCE WITH THE EUROPEAN UNION ANTI-MONEY LAUNDERING DIRECTIVES

Memorandum
prepared by Boudewijn VERHELST

¹ Adopted by MONEYVAL at its 24th plenary session (Strasbourg, 10-14 September 2007).

All rights reserved. Reproduction is authorised, provided the source is acknowledged, save where otherwise stated. For any use for commercial purposes, no part of this publication may be translated, reproduced or transmitted, in any form or by any means, electronic (CD-Rom, Internet, etc) or mechanical, including photocopying, recording or any information storage or retrieval system without prior permission in writing from the MONEYVAL Secretariat, Directorate General of Human Rights and Legal Affairs, Council of Europe (F-67075 Strasbourg or dg1.moneyval@coe.int).

I. INTRODUCTION

In accordance with the procedures agreed by the Committee MONEYVAL and the International Monetary Fund (IMF) for the third round evaluation programme of MONEYVAL under the New Methodology, was evaluated by an IMF expert team as part of its FSAP programme between /dates/ Country and the IMF agreed that a representative of MONEYVAL joins the IMF team for part of the evaluation exercise to examine compliance with the European Union anti-money laundering directives where these differ from the FATF 40-Recommendations and therefore fall within the remit of the MONEYVAL examinations

II. COMPLIANCE WITH THE EU AML SECOND COUNCIL DIRECTIVE

1. Prior to the on-site visit MONEYVAL had identified seven Articles in the EU AML Second Council Directive that differed, mostly in their mandatory aspect, from the FATF 40-Recommendations:
 - (i) Article 2a on the applicability of the AML obligations;
 - (ii) Article 3 on identification procedures;
 - (iii) Article 6 on reporting suspicious transactions and facts which might be an indication of money laundering;
 - (iv) Article 7 on suspected transactions and the authority to stop/suspend a transaction;
 - (v) Article 8 on tipping off;
 - (vi) Article 10 on reporting of facts that could contribute suspicious transactions by supervisory authorities;
 - (vii) Article 12 on extension of AML obligations.

2. The following sections address the findings of the on-site examination. They first describe the differences between the identified articles of the EU AML Second Council Directive and the relevant FATF 40-Recommendations. Following an analysis of the findings of the on-site visit and conclusions on compliance and effectiveness, recommendations and comments are made as appropriate.

6.1 Article 2a: Applicability of AML obligations

<p><i>Description</i></p>	<p>Article 2a of the EU AML Second Council Directive lists the types of institutions and legal or natural persons, acting in the exercise of certain professions and businesses, that are subject to the Directive. The Article specifies the type of activities of the legal profession for which the obligations become applicable. In the case of auditors, external accountants and tax advisors the obligations are applicable to their broad activities in their respective professions.</p> <p>FATF Recommendation 12, which extends the AML obligations to designated non financial businesses and professions (DNFBP), excludes applicability to auditors and tax advisors whilst it limits the applicability to external accountants under circumstances similar to those applied to the legal profession. Indeed FATF Recommendation 16(a) <i>strongly encourages</i> countries to extend the <i>reporting</i> requirement (note the further limitation) to the rest of the professional activities of accountants, including auditing – but makes no reference to tax advisors.</p> <p>Also, the applicability of the AML obligations to dealers in high value goods under the EU AML Second Council Directive, in giving some examples, lends itself to a broader interpretation of application. Again, FATF Recommendation 12 limits the application to dealers in precious metals and precious stones. This is further confirmed in the definition of DNFBP in the Glossary.</p>
<p><i>Analysis</i></p>	<p>According to Articles 3 and 4.4.a of the Due Diligence Act (hereafter: DDA) following financial market players are subject to the AML/CFT obligations when they conduct financial transactions:</p> <ul style="list-style-type: none"> a) banks and finance companies holding a license pursuant to the Banking Act, e-money institutions holding a license pursuant to the E-Money Act, as well as Liechtenstein branches of foreign banks, finance companies, and e-money institutions; b) asset management companies holding a license pursuant to the Asset Management Act and Liechtenstein branches or establishments of foreign securities firms; c) investment undertakings holding a license pursuant to the Investment Undertakings Act; d) insurance undertakings holding a license pursuant to the Insurance Supervision Act which offer direct life insurance, as well as equivalent Liechtenstein branches of

	<p>foreign insurance undertakings; e) the Liechtenstein Postal Services (limited company);</p> <p>f) casinos; g) natural and legal persons holding a license pursuant to the Professional Trustees Act; h) natural persons holding a confirmation pursuant to article 180a PGR; (<i>i.e.</i> company and service providers) i) exchange offices; k) lawyers registered on the Lists of Lawyers in accordance with the Lawyers Act, and legal agents within the meaning of article 67 of the Lawyers Act; l) natural and legal persons holding a license pursuant to the Law on Auditors and Auditing Companies as well as auditing offices subject to special legislation; m) real estate agents; n) dealers in high-value goods and auctioneers o) insurance brokers holding a license pursuant to the Insurance Mediation Act for the mediation of life insurance policies and other services for the purpose of investment.</p> <p>Moreover, a catch-all clause subjects all persons to the DDA who in a professional capacity accept or keep third-party assets or help to invest or transfer them.</p> <p>Financial transactions are defined as (Article 4.2 DDA):</p> <ul style="list-style-type: none"> a) every acceptance or safekeeping of the assets of third parties, as well as assistance in the acceptance, investment, or transfer of such assets; or b) establishing a legal entity on the account of a third party that does not operate commercially in the domiciliary State, or acting as an organ of such legal entity (a legal entity that does not operate commercially in the domiciliary State is in particular a legal person, company, trust, or other association or asset entity – regardless of its legal structure – that does not conduct any trade, manufacturing, or other commercial operation in the domiciliary State). <p>With respect to lawyers and legal agents (there are no notaries in Liechtenstein) the DDA defines in Article 4 Para. 3 lit. c the cases in which lawyers and legal agents have to apply the due diligence obligations along the lines of Article 2a No. 5 of the Second Anti-Money Laundering Directive.</p> <p>Tax advisors and external accountants are not listed in art. 3 as such. These activities are exercised by the auditors</p>
--	--

	<p>and professional trustees (external accountancy), or by lawyers and professional trustees (tax advise).</p> <p>So all EU Directive targeted professions are included in the objective list of Article 3 DDA. However, as stated above, they are only subject to the AML/CFT rules if they conduct financial transactions as defined in Article 4 DDA, not when they conduct their business as such. Where there is an overlap in the professional activities of lawyers and professional trustees targeted by both the Directive and the DDA, the limitation to the auditor's activities goes against the EU Directive rule.</p> <p>As for the high value dealers, the DDA is not specific, but neither is it limited to certain trades. The only objective limitation is the cash threshold of 25.000 CHF (approx. 15.000 euro), under which there are no DDA obligations (Article 4.4a DDA). In 2006 37 high value dealers were listed with the FMA, namely jewelers and goldsmiths, dealers in art, antiques and cars.</p>
<p><i>Conclusion</i> PC</p>	<p>Liechtenstein is not in compliance with Article 2a. of the EU Directive, insofar the auditors and auditing companies are concerned.</p>
<p><i>Recommendations and Comments</i></p>	<p>The auditors and auditing companies should be subjected to all DDA obligations, including the reporting of SARs, when they exercise their profession as such, including auditing the financial intermediaries as part of the supervisory process.</p>

6.2 Articles 3(3) and 3(4): Identification requirements - Derogation

<p><i>Description</i></p>	<p>By way of derogation from the mandatory requirement for the identification of customers by persons and institutions subject to the Directive, the third paragraph of Article 3 of the EU AML Second Council Directive removes the identification requirement in cases of insurance activities where the periodic premium to be paid does not exceed eurouro 1,000 or where a single premium is paid amounting to eurouro 2,500 or less. Furthermore, Paragraph 4 of the same Article 3 provides for discretionary identification obligations in respect of</p>
---------------------------	---

	<p>pension schemes where relevant insurance policies contain no surrender value clause and may not be used as collateral for a loan.</p> <p>FATF Recommendation 5, in establishing customer identification and due diligence, does not provide for any similar derogation. It however provides for a general discretionary application of the identification procedures on a risk sensitivity basis. Therefore, in certain circumstances, where there are low risks, countries may allow financial institutions to apply reduced or simplified measures. Indeed, the Interpretative Note to Recommendation 5 quotes the same instances as the EU AML Second Council Directive as examples for the application of simplified or reduced customer due diligence.</p>
<i>Analysis</i>	<p>Article 6 and Article 8 DDA contain exceptions to the identification obligation. With reference to the examples laid down in Article 3.3 of the 2nd Money Laundering Directive Liechtenstein has adopted following options:</p> <p>Life insurance policies:</p> <p>According to article 6.1.c & d DDA there is no identification obligation if:</p> <p>(c) the amount of the yearly insurance premium is less than 1,500 CHF (ca. 1.000 euro), or</p> <p>(d) the single insurance premium is less than 4,000 CHF (ca. 2.500 euro), or less than 4,000 Swiss francs is paid into a premium deposit.</p> <p>Insurance policies for pension schemes:</p> <p>Pension schemes may, according to the Article 12 and 18 of the Law on Occupational Benefits (Liechtenstein Legal Gazette 1988, No.12) only be used for retirement provisions. A cash payment of the accrued coverage capital is only permissible in limited cases defined in the law (no surrender clause). In addition a future pension can not be ceded and it is prohibited to make a stake in insurance benefits subject to pledge.</p>
<i>Conclusion</i>	COMPLIANT
<i>Recommendations and Comments</i>	

6.2.1 Articles 3(5) and 3(6): Identification requirements - Casinos

<i>Description</i>	<p>Paragraph 5 of Article 3 of the EU AML Second Council Directive requires the identification of all casino customers if they purchase or sell gambling chips with a value of 1,000 euro or more. However, Paragraph 6 of the same article provides that casinos subject to State Supervision shall be deemed in any event to have complied with the identification requirements if they register and identify their customers immediately on entry, regardless of the number of gambling chips purchased.</p> <p>FATF Recommendation 12 applies customer due diligence and record keeping requirements to designated non-financial businesses and professions. In the case of casinos, these requirements are applied when customers engage in financial transactions equal to or above the applicable designated threshold. The Interpretative Note to Recommendation 5 establishes the designated threshold at euro 3,000, irrespective of whether the transaction is carried out in a single operation or in several operations that appear to be linked. Furthermore, in the Methodology Assessment, under the Essential Criteria for Recommendation 12, the FATF defines, by way of example, <i>financial transactions</i> in casinos. These include the purchase or cashing in of casino chips or tokens, the opening of accounts, wire transfers and currency exchanges. Identification requirements under the FATF - 40 Recommendations for casinos are likewise applicable to internet casinos.</p>
<i>Analysis</i>	<p>Article 3.1.f DDA subjects the casinos to due diligence.</p> <p>Article 4 DDA stipulates that the Act shall only apply to the professional conduct of financial transactions. According to Par. 4.b of this article granting admission to a casino, regardless of whether the visitor actually takes part in gaming activities or not, or buys or sells gaming tokens, is equivalent to a financial transaction in the meaning of the DDA, so identification needs to take place at the entrance. At present there are no casinos in Liechtenstein.</p>
<i>Conclusion</i>	COMPLIANT
<i>Recommendations and Comments</i>	

6.3 Article 6: Reporting of Suspicious Transactions

<i>Description</i>	<p>Further to the reporting of suspicious transactions paragraph 1 of Article 6 of the EU AML Second Council Directive provides for the reporting obligation to include facts which might be an indication of money laundering. FATF Recommendation 13 places the reporting obligations on suspicion or reasonable grounds for suspicion that funds are the proceeds of a criminal activity.</p>
	<p>Furthermore, paragraph 3 of Article 6 of the EU AML Second Council Directive provides an option for member States to designate an appropriate self-regulatory body (SRB) in the case of notaries and independent legal profession as the authority to be informed on suspicious transactions or facts which might be an indication of money laundering. FATF Recommendation 16 imposes the reporting obligation under Recommendation 13 on DNFBPs but does not directly provide for an option on the disclosure receiving authority. This is only provided for in a mandatory manner in the Interpretative Note to Recommendation 16. Also, probably because the FATF identifies accountants within the same category as the legal profession, the Interpretative Note extends the option to external accountants.</p> <p>Finally, the same paragraph 3 of Article 6 of the EU Directive further requires that where the option of reporting through an SRB has been adopted for the legal profession, Member States are required to lay down appropriate forms of co-operation between that SRB and the authorities responsible for combating money laundering. The FATF Recommendations do not directly provide for such co-operation but the Interpretative Note to Recommendation 16, although in a non-mandatory manner, makes it a condition that there should be appropriate forms of co-operation between SRBs and the FIU where reporting is exercised through an SRB.</p>
<i>Analysis</i>	<p>Article 15 <i>juncto</i> Article 16 DDA provide for due diligence examinations and reporting obligations that relate not only to financial transactions, but also to circumstances that might be indicative of money laundering and terrorism financing.</p> <p>Lawyers and other legal professions (there are no notaries in Liechtenstein) have to report directly to the FIU, without any intermediary step.</p> <p>.</p>
<i>Conclusion</i>	COMPLIANT

<i>Recommendations and Comments</i>	
-------------------------------------	--

6.4 Article 7: Suspected Transactions – Refrain / Supervision

<i>Description</i>	<p>Article 7 of the EU AML Second Council Directive requires that institutions and persons subject to the Directive refrain from carrying out transactions which they know or suspect to be related to money laundering until they have apprised the authorities who may stop the execution of the transaction. Furthermore where to refrain from undertaking the transaction is impossible or could frustrate efforts of an investigation, the Directive requires that the authorities be informed (through an STR) immediately the transaction is undertaken.</p> <p>FATF Recommendation 13, which imposes the reporting obligation where there is suspicion or reasonable grounds to suspect that funds are the proceeds of a criminal activity, does not provide for the same eventualities as provided for in Article 7 of the EU Directive. FATF Recommendation 5 partly addresses this matter but under circumstances where a financial institution is unable to identify the customer or the nature of the business relationship. However, whereas Recommendation 5 is mandatory in this respect, it does not provide for the power of the authorities to stop a transaction. Furthermore, the reporting of such a transaction is not mandatory. Paragraph 1- 3 of the Interpretative Note to Recommendation 5 seem to be more mandatory in filing an STR in such circumstances.</p>
<i>Analysis</i>	<p>Article 16.1 DDA stipulates that if the suspicion arises that a connection with money laundering, a predicate offense of money laundering, organized crime, or the financing of terrorism exists, the persons subject to due diligence must immediately submit a report to the FIU.</p> <p>Article 16.4 DDA stipulates that until the judicial authorities intervene with a seizure order within a maximum of five days, counting from the receipt by the FIU of the SAR, the filing entity must refrain from all actions that might obstruct or interfere with any orders pursuant to article 97a of the STPO (seizure), unless such actions have been approved in writing by the FIU.</p> <p><i>In concreto</i> this obligation installs an automatic freezing of the relevant transactions, accounts, assets and values for a maximum of five days, and effectively ensures that these will not disappear before the judiciary can step in.</p>

	<p>This is not entirely in line with the EU Directive: there is no principal and formal obligation to disclose before executing the transaction. The nuance is a fine one and it must be acknowledged that in practice the “immediately” requirement results in an “<i>a priori</i>” disclosure, but the softer wording may give rise to interpretation issues.</p> <p>More importantly, in terms of efficiency there is a serious concern that this automatism tends to put an excessive burden on the reporting entities that might keep them from reporting, except if they are very sure that this is crime related. This has an undeniable restraining effect and by all accounts increases the suspicion threshold. It is very significant that this is one of the reasons why the reporting entities have developed the practice to evaluate the situation with the FIU before taking the decision to file a report, thus sharing the responsibility with the FIU.</p>
<p><i>Conclusion</i> PC</p>	<p>There is no full compliance in respect of the <i>a priori</i> reporting obligation. The system of automatic freezing for a period of maximum 5 days is no valid alternative.</p>
<p><i>Recommendations and Comments</i></p>	<p>The DDA should expressly and unequivocally state the obligation of disclosing before a suspect transaction is executed. Concurrently, the automatic freezing obligation should be substituted by a decision process that puts this responsibility with the FIU.</p>

6.5 Article 8: Tipping off

<p><i>Description</i></p>	<p>Article 8(1) of the EU AML Second Council Directive prohibits institutions and persons subject to the obligations under the Directive and their directors and employees from disclosing to the person concerned or to third parties either that an STR or information has been transmitted to the authorities or that a money laundering investigation is being carried out. Furthermore Article 8(2) provides an option for Member States not to apply this prohibition (tipping off) to notaries, independent legal professions, auditors, accountants and tax advisors.</p> <p>FATF Recommendation 14 imposes a similar prohibition on financial institutions, their directors, officers and employees. Recommendation 16 extends this prohibition to all DNFBPs. However, the prohibition under Recommendation 14(b) is limited to the transmission of an STR or related information. It does not therefore</p>
---------------------------	--

	cover ongoing money laundering investigations. Furthermore, the FATF Recommendations do not provide for an option for certain DNFBPs to be exempted from the “tipping off”. The Interpretative Note to Recommendation 14 exempts tipping off only where such DNFBPs seek to dissuade a client from engaging in an illegal activity.
<i>Analysis</i>	<p>Article 16.5 DDA stipulates that until an order from the judicial authorities arrives, but at most until the conclusion of twenty business days from receipt by the FIU of the report pursuant to paragraph 1, the persons subject to due diligence may not inform the contracting party, the beneficial owner, or third parties that they have submitted a report to the FIU. No exception is made for the legal professions or anybody else subjected to the DDA.</p> <p>Consequently the “tipping off” prohibition falls short of the EU Directive on two aspects:</p> <ul style="list-style-type: none"> - it does not extend to the fact that a ML/TF investigation is going on, and - it limited the prohibition to twenty days, where the obligation under the EU Directive is unrestricted in time. <p>The stubborn adherence to the twenty-day limit is quite disturbing, as it was already criticized in the previous evaluation round. Anyway the whole purpose of the prohibition rule to avoid alerting the suspect and jeopardizing the ensuing law enforcement action is put at risk here</p>
<i>Conclusion</i> NC	NON COMPLIANT
<i>Recommendations and Comments</i>	The DDA should be brought fully in line with the EU rules by extending the tipping off prohibition to the fact of an ongoing investigation and by abolishing the twenty-day restriction.

6.6 Article 10: Reporting by Supervisory Authorities

<i>Description</i>	Article 10 of the EU AML Second Council Directive imposes an obligation on supervisory authorities to inform the authorities responsible for combating money laundering if, in the course of their inspections carried out in the institutions or persons subject to the Directive, or in any other way, such supervisory authorities discover facts
--------------------	--

	<p>that could constitute evidence of money laundering. The Directive further requires the extension of this obligation to supervisory bodies that oversee the stock, foreign exchange and financial derivatives markets.</p> <p>In providing for the regulation and supervision of financial institutions and DNFBPs in Recommendation 23 and in providing for institutional arrangements (Recommendations 26 –32) the FATF-40 do not provide for an obligation on supervisory authorities to report findings of suspicious activities in the course of their supervisory examinations.</p>
<i>Analysis</i>	<p>Article 16.1 DDA stipulates that all offices of the National Administration as well as the responsible authority shall be subject to the obligation to report to the FIU.</p> <p>Article 36.1 DDA provides that the Liechtenstein authorities, in particular the courts, the Office of the Public Prosecutor, the FMA, the FIU, the National Police, and other authorities responsible for combating money laundering, organized crime, and the financing of terrorism are required to give all information to and exchange all records with each other, that are necessary for the enforcement of this Act.</p> <p>As a national administrative authority the FMA consequently is under the reporting obligation to the FIU, and in fact has already done so. Although the level of suspicion is the same as for all other entities, as a rule the FMA reports only in really clear cases, particularly on the basis of the audit report. It has also done so after an extraordinary inspection resulting from the intervention of an investigating judge.</p>
<i>Conclusion</i>	COMPLIANT
<i>Recommendations and Comments</i>	Even if the FMA complies with the reporting obligations under the EU Directives, the effectiveness of the system would really benefit by extending the obligations to the auditors as such, as it should be anyway according to the EU Directive.

6.7 Article 12: Extension of AML obligations

<i>Description</i>	Article 12 of the EU AML Second Council Directive provides for a mandatory obligation on Member States to ensure that the application of the provisions of the Directive are extended, in whole or in part, to professions
--------------------	--

	<p>and categories of undertakings, other than the institutions and persons listed in Article 2a, that are likely to be used for money laundering.</p> <p>FATF Recommendation 20 imposes a similar obligation but in a non-mandatory way by requiring countries to consider applying the Recommendations to categories of businesses or professions other than DNFBPs.</p>
<i>Analysis</i>	<p>According to article 3.2 DDA all persons, legal or physical, that do not fall within the scope of par.1 listing all financial businesses and professions and DNFBP, are nevertheless subject to due diligence if they carry out financial transactions on a professional basis.</p> <p>This catch-all clause may be considered to cover all other professional activities vulnerable to money laundering.</p>
<i>Conclusion</i>	COMPLIANT
<i>Recommendations and Comments</i>	

III. Conclusions:

Compliance with the 2nd EU Directive is generally satisfactory, with some important deficiencies noted, however:

- There is no full coverage of the entities and professions that should be subjected to the AML obligations according to the Directive.
- The substitution of the *a priori* disclosure obligation leaving the decision to intervene to the competent authority (FIU), by an automatic freezing obligation where such responsibility is totally incumbent on the reporting party, is not in accordance with the Directive and jeopardizes the efficiency of the reporting system.
- The restriction in time and circumstance of the “tipping off” prohibition is unjustified

Boudewijn Verhelst
MONEYVAL expert