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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Select Committee of Experts on the Evaluation
of Anti-Money Laundering Measures
(PC-R-EV)

FIRST MUTUAL EVALUATION REPORT ON THE REPUBLIC OF SAN MARINO

SUMMARY

1. A PC-R-EV team of examiners, accompanied by colleagues from the Financial Action Task Force (FATF) visited the Republic of San Marino between 21-24 February 2000.

2. Due to the small size of the country, San Marino does not experience the common forms of domestic organised crime, such as drugs trafficking or alien smuggling. Crime rates are rather low compared to other European countries. Nevertheless, its open borders with Italy and its developed financial system, combined with a very attractive business sector, make San Marino vulnerable to money laundering operations, e.g. by international organised crime.

3. The relevant policy objectives of the San Marino Government in the area of money laundering control at present include the ratification[1] of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime [the Strasbourg Convention], as well as the adoption of corresponding domestic legislation in the area of criminal procedural law. San Marino also contemplates stepping up its efforts to enhance international police and judicial co-operation and, in this context, it plans to sign and ratify the relevant Council of Europe treaties on mutual assistance in criminal matters[2] and extradition[3].

4. Though San Marino has not yet ratified the Strasbourg Convention[4], nor the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [the Vienna Convention][5], it has taken steps to criminalise money laundering by adopting the Law N°123/1998 Against Money Laundering and Usury [Law 123], which introduced the offence of money laundering in the Criminal Code as Article 199 bis.

5. The scope of application of the money laundering offence under Article 199 bis of the Criminal Code is broad: it penalises any person who conceals, substitutes, transfers, co-operates or intervenes in order that others may conceal, substitute or transfer money obtained by others, for the purpose of concealing its true origin, derived from the commission of a non-negligent and non-contraventional offence, knowing or being evident that such money is proceeds. It also penalises those who use, co-operate or intervene to obtain the use, in economic or financial activities of money obtained by others from the commission of a non-negligent and non-contraventional offence, knowing or being evident that such money is proceeds. The predicate offences under Article 199 bis include any intentional criminal offences, i.e. criminal offences which are not involuntary or contraventional in nature. The list of predicate offences is therefore an open one. The examiners were advised that fiscal offences are also predicate offences, provided that the fiscal dues and relative administrative fine have not been previously paid, because such a payment extinguishes punishability for the offence. The laundering of "own-funds" is excluded from the scope of the offence, since the text refers to "money obtained by others". The money laundering offence remains punishable even if the predicate offence has been committed in a foreign jurisdiction, provided the fact constituting the predicate offence is criminally actionable in San Marino. The examiners observe that there have so far been no convictions obtained under Article 199 bis of the Criminal Code. The examiners recommend that consideration be given to the introduction of

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1 San Marino signed the Strasbourg Convention on 16 November 1995 and ratified it on 12 October 2000.

2 San Marino signed the European Convention on Mutual Assistance in Criminal Matters on 29 September 2000.

3 San Marino signed the European Convention on Extradition on 29 September 2000.

4 See footnote 1.

5 San Marino signed the Vienna Convention on 10 October 2000 and acceded to it on the same date.

negligent money laundering. The possibility of introducing corporate criminal liability also deserves close consideration.

6. Confiscation in general is provided for in Article 147 of the Criminal Code. As a rule, confiscation is a consequence of the offender's conviction for an offence and it applies to the instrumentalities and intended instrumentalities of the offence, being the property of the offender. It also applies to things which represent the price, the product or "the profit" of the offence. Special confiscation provisions apply with respect to money laundering offences under Article 3 of Law 123, which provides that conviction for an offence established under Law 123 results in the confiscation of the money and other assets or proceeds derived from the offence, without prejudice to the other provisions on confiscation in the Criminal Code. The examiners were told that property acquired with money derived from a criminal offence is also liable to confiscation, provided a sufficient link with the predicate offence is proved. Where confiscation is not possible, then the judge imposes an obligation on the offender to pay a sum of money, up to the value of the proceeds. Money laundering-related confiscation can therefore be property-based and value-based.

7. There are no special provisional measures provided for in the Anti-money Laundering Law. The applicable provisions are therefore the general provisions in the Code of Criminal Procedure. The provisions especially pointed out to the examiners in this context were Articles 59 (arrest and seizure), 68 (search) and 78 (seizure) of the Code of Criminal Procedure. Coercive measures require a warrant from a judge or law commissioner under Article 53 of the Code of Criminal Procedure. Decisions concerning arrest and seizure may be contested within ten days from service or execution, but in cases of urgency, the police may seize the *corpus delicti*, instrumentalities and related objects. Such seizures are notified within 48 hours to a law commissioner, who must validate the measure within the next 96 hours, failing which, the measure is deemed revoked. These measures allow the identification, tracing and evaluation of assets subject to confiscation.

8. As far as international co-operation is concerned, San Marino has not yet ratified[6] either the Strasbourg or the Vienna Conventions, nor the European Convention on Mutual Legal Assistance in Criminal Matters[7] or the European Convention on Extradition[8]. The examiners were informed that San Marino was seeking to accede to the Vienna Convention as soon as possible and that this had not been done yet not for lack of will but because of the limited human resources available. It was pointed out that San Marino has been a member of the United Nations only since 1992.

9. San Marino can, however, co-operate with other countries, on the basis of bilateral treaties or reciprocity. Bilateral extradition treaties exist with a limited number of States, including the United States of America, Belgium, the Netherlands, the United Kingdom, France and Italy. All these treaties, with the exception of that with Italy, take the "list approach" to extraditable offences. Therefore, extradition for money laundering offences under these treaties does not appear possible. The treaty with the United Kingdom does contain a provision which allows extradition at the discretion of the requested country for other unlisted offences, provided the offence is extraditable, according to the laws of both States. The treaties with Italy and France also contain provisions on mutual legal assistance in criminal matters. Neither of them is

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6 See footnotes 1 and 5.

7 See footnote 2.

8 See footnote 3.

specifically concerned with money laundering.

10. In the absence of bilateral or multilateral mutual assistance treaties, San Marino's judicial authorities may provide general investigative assistance in criminal matters to other states provided they receive the go-ahead from the political authorities, which, in the absence of a treaty or other agreement, make a political assessment of whether the request should be processed or not. A similar position exists as regards extradition: in the absence of an extradition treaty, a person may still be extradited to the requesting country, subject to the necessary political authority to proceed. However, the extradition of nationals is in general prohibited, unless it is otherwise expressly agreed by treaty. In so far as existing treaties are concerned, the extradition of own nationals is only prohibited by the treaty with Italy, but in this case, there is an obligation to prosecute. In the other treaties, the extradition of own nationals is discretionary and, in the case of France, there is an obligation to prosecute if extradition is refused.

11. The authorities of San Marino can also provide legal assistance to foreign states seeking the production and seizure of records of financial institutions, legal persons, and private persons, and for searches in the offices or homes of such persons. Assistance may also be given where the foreign state is seeking the identification, freezing, seizure and confiscation of the proceeds of money laundering, of a predicate offence or of property corresponding in value to such proceeds. With respect to confiscation, San Marino can only co-operate in the enforcement of confiscation orders, if they are based on a conviction. San Marino, however, does not have the legal means to share with another country the assets confiscated as a result of a co-operative investigation, nor does it have the legal means to receive shared assets from another country.

12. The San Marino authorities can spontaneously and upon request pass on suspicious transaction information to competent foreign authorities. Such information is channelled through the Office of Banking Supervision (the OBS) to the FIUs of other States subject to a Memorandum of Understanding having been concluded between them. Even if the wording of Article 10(4) of Law 123 explicitly provides that the Office of Banking Supervision may collaborate "with the supervising authorities of other States to mutually facilitate the prevention of and the fight against money laundering", San Marino authorities assured[9] the examiners that the OBS could exchange information with such foreign FIUs, without a supervisory function over banks but with a supervisory function over anti-money laundering activities. The examiners recommend to put this beyond doubt through a legislative amendment.

13. On the preventive side, all credit and financial institutions[10], whether bank or non-bank, subject to the supervision of the OBS ("authorised intermediaries") are obliged, under Law 123, to identify customers when opening an account, accepting deposits or entering into business relations with them (including the rental of safety boxes), transferring or using of payment instruments for amounts exceeding ITL 30 million, or when carrying out, in a given

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[9] Such an assurance was given during the on-site visit, but in its comments to the draft of Report, the San Marino Government could not support the above language, as it suggests firmly that the OBS already has the capability of exchanging information with any type of foreign FIU. As a result of this situation, a new recommendation has been added in the report by the evaluation team so as to ensure that San Marino "removes all obstacles to the OBS exchanging information with any foreign FIU, even if it might not have a supervisory function over banks."

[10] The non-financial sector is not covered by Law 123. Insurance companies are therefore not subject to the supervision of OBS, but those which operate in San Marino are all foreign (Italian) branches, which through their mother companies are subject to Italian supervision. There are no casinos in San Marino.

period of time, a series of transactions below this threshold, but considered as part of a single transaction. If such transactions are carried out on behalf of a third party, the latter has to be identified. Customer identification data and data relating to the above transactions have to be recorded and kept for 5 years. In addition, "authorised intermediaries" are legally bound to report suspicious transactions to the OBS. Law 123 also provides a limitation on the use of cash, as transactions exceeding ITL 30 million (15,500 euros) have to be carried out through the "authorised intermediaries". According to Article 10 of Law 123, the OBS is granted supervisory powers over the banking sector and, as such, is responsible for ensuring compliance, e.g. with the anti-money laundering regulations. It is also authorised to issue implementing circulars in respect of Law 123. Thus, Circular N°26 of the OBS, issued on 27 January 1999, further specifies the "due diligence" obligations imposed upon "authorised intermediaries", particularly as far as customer identification, recording and record-keeping, reporting of suspicious transactions and issuing bank drafts and cheques are concerned. Sanctions for non-compliance with the "due diligence" obligations under Law 123 include administrative fines imposed by the OBS.

14. The OBS is the main supervisory authority responsible for the implementation of Law 123. In this capacity, it is empowered to carry out general or sectorial inspections in all credit and financial institutions subject to its supervision, including inspections related to the implementation of anti-laundering regulations. In consideration of the many functions of the OBS under the legislation in force, the examiners deem it necessary to strengthen this body, most of all with a view to creating a unit specifically responsible for carrying out anti-money laundering inspections. The OBS is also the disclosure-receiving agency and, as such, is obliged, under Law 123, to report to the Civil and Criminal Court any facts that may constitute a crime under this law. The OBS has a duty to ascertain that the disclosure is "well-grounded" and obtain further information for its investigations. Since 1996[11], the OBS has received 5 disclosures, but they were all received after the entry into force of Law 123 (January 1999). Three of these disclosures are likely to be transmitted to the judicial authorities. No conviction for money laundering has yet occurred in San Marino, nor were any proceeds confiscated. The examiners consider that the OBS's multiple functions prevent it from playing effectively its role as an FIU, and either a separate FIU should be set up, or the OBS's powers and resources should be strengthened with regard to its anti-money laundering functions.

15. On the law enforcement side, the three different law enforcement agencies do not seem to be sufficiently involved in the fight against money laundering and in this context have a rather passive attitude. Police powers are not specifically tailored to helping financial investigations and there seem to be co-ordination problems as no specific agency is designated to deal with money laundering.

16. In the light of the above, the examiners consider that the overall San Marino anti-laundering system has a solid legislative basis, but it so far has produced rather limited operational results in terms of number of disclosures (in total 5, out of which 3 were likely to be transmitted to the judicial authorities). These rather limited operational results are partly due to the recent introduction of the relevant legislation in San Marino, together with the rather high level of suspicion required to trigger a disclosure, the limited financial intelligence work and reactive policing in the field of economic crime. International co-operation, which is still subject to political control in the area of non-treaty based mutual assistance, is hampered by San

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[11] Under Decree N°71 of May 1996, credit and financial institutions subject to the OBS supervision were required to "report, under specific circumstances, on transactions" carried out in cash or bearer instruments exceeding ITL 80 million.

Marino's lack of adherence to multilateral treaties and to the small number of bilateral treaties. The San Marino authorities therefore need to take stock of the existing arrangements, machinery and legal provisions under the current anti-laundering regime. While many building blocks for a sound anti-laundering regime are in place, there is a need to take positive action in each sector to develop a system which works as a whole, both to meet the challenges San Marino faces and to fully conform to the applicable international standards. In this regard, the recent ratification[12] by San Marino of the Strasbourg Convention is welcomed by the examiners.

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[12] See also footnote 6.