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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 ROMANIA

SUMMARY

Views expressed do not represent official views of the Commission of the European Communities.

1. A PC-R-EV team of examiners, accompanied by colleagues from the Financial Action Task Force (FATF) visited Romania between 26-29 April 1999.

2. Romania, as a state in South Eastern Europe which is bordered by the Black Sea, is strategically positioned between East and West. It is an important part of the "Balkan Route" particularly for the traffic of drugs from outside Europe and for arms trafficking. Since the political changes in 1989 and the transition to a market economy the crime rate has increased significantly. Organised Crime groups are believed to operate in Romania and are thought to launder proceeds in the country (primarily, though not exclusively, through the banking system). The main sources of illicit proceeds are currently considered to be: trafficking in drugs, arms and radioactive substances; alien smuggling; smuggling of cigarettes, coffee and alcohol; trafficking in counterfeit bank notes and in vehicles stolen in the West.

3. There was no anti-money laundering law before 1999. Recognising its vulnerability internally and the need to fight money laundering on an international level, the central policy objective of the Romanian authorities has been to create a legal framework to fight money laundering. To this end Law 21/99, *Law on the prevention and punishment of laundering money,* was passed in January 1999 and came into effect on 22 April 1999. Thus, at the time of the on-site visit, the law had only just come into force. While there is much in Law 21/99 to be commended, the legal structure as a whole contains some potentially serious anomalies and ambiguities, which need addressing to ensure the anti-money laundering regime put in place can actually become operational.

4. The law creates the National Office for the Prevention and Control of Money Laundering (the office) as a multi disciplinary unit, to act as a filter between those with reporting obligations under the Act and the Public Prosecutor's office. It was unclear why the office had not commenced operations on the day the law came into effect. For the sake of its credibility the office needs to be up and running very quickly. It is intended that the office should receive, analyse, and process information about suspicions of money laundering, transactions in cash (Lei or foreign currency) above 10,000 Euro, and information about unusual transactions from a very comprehensive range of banking and financial institutions and persons (including lawyers, notaries and accountants). Those with reporting obligations are required to report suspicions of money laundering on the basis of "firm evidence". The examiners consider that the "firm evidence" requirement is too high and could discourage reporting. It should be replaced by a test based on suspicion. In the meantime, while the requirement remains, clear guidance should be given by the office as to what "firm evidence" means.

5. Once a report has been made the office will then transmit information to the Public Prosecutor where the office considers there is "solid data". The Romanian authorities need to ensure that the cumulative effect of the "firm evidence" and "solid data" requirements does not in practice lead to few reports being made to the office and even fewer reports being passed to the prosecutor[1].

6. Romania ratified the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) on 30.12.92. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the Council of Europe Convention) was signed in January 1999. Its speedy ratification is

[1] The examiners have been advised that since the on-site visit 138 STRs have been received by the office, 43 of which have been passed to the Public Prosecutor.

urged. Notwithstanding that the Council of Europe Convention has not yet been ratified, A.23 of Law N°21/99 (which came into force on 12.4.98) criminalises money laundering for a range of enumerated predicate offences in addition to drugs, as well as offences "committed by persons belonging to offender associations". Though the list of predicate offences appears wide the Romanian authorities should satisfy themselves that all offences that generate significant proceeds are covered. The level of proof required for the A. 23 offence may prove problematic. In proving the predicate offence, the list approach, in some cases, adds a layer of complexity which may prove to be an obstacle to successful money laundering prosecutions. It is recommended that this is reviewed and serious consideration should be given to the "all crimes" approach of the Council of Europe Convention. The mental element of the offence could also raise practical difficulties. It may be desirable to introduce a lower standard than knowledge or intent, such as reasonable suspicion. Consideration should be given to the introduction, as envisaged in the Council of Europe Convention, of the concept of negligent money laundering. This is important also in the context of the international assistance which Romania can provide. At present they cannot provide assistance on a "should have known" or negligence standard. Consideration should be given at the same time to making failure to report a suspicious operation a separate criminal offence with clearly dissuasive criminal penalties.

7. It was noted that consideration is being given to corporate criminal liability and this is encouraged.

8. Article 25 of Law N°21/99 appears to provide a mandatory confiscation regime which is both property and value based for laundered property. It has not, as yet, been tested. There were, however, concerns that the special confiscation regime under A. 118 of the Criminal Code, as it was explained, while covering instrumentalities and intended instrumentalities, failed to provide an effective regime for the confiscation of the proceeds of crime, with the wide meaning that is attached to proceeds under the Council of Europe Convention. There was also concern that the pre-existing regime for provisional measures under A. 163 of the Criminal Code, while apparently capable of securing compensation for victims' losses, may be less capable of securing actual proceeds from crime. This should be reviewed to ensure that the range of provisional measures available is comprehensive and cannot be frustrated by transfer of property to third parties. The level of proof required under the confiscation regime also needs reconsidering as, at present, the evidential burden which the prosecutor has to discharge is very high.

9. Strict banking secrecy has a long history in Romania. In summary the relevant parts of the *Banking Law* and the *Law on the Status of the National Bank of Romania* (which have not been amended since the passage of Law 21/99) oblige bankers to keep banking information secret until a comparatively late stage of the criminal process (an application to the court can be made at the request of the prosecutor when a criminal trial has been set in motion). The examiners were advised that Law 21/99 takes precedence, but this would appear to depend on goodwill rather than any legal foundation. This anomaly needs urgent rectification. There should be an explicit exemption in the Banking Law from banking secrecy in the case of reporting transactions under Law 21/99. It is also desirable to make it clear that the National Bank of Romania is caught by the reporting obligations under Law 21/99.

10. The ratification of the Vienna Convention and other important international instruments (such as the European Convention on Extradition and its Protocols and the 1959 European Convention on Assistance in Criminal Matters and its first Protocol) is a very positive signal

of Romania's commitment to international co-operation. However it is unclear whether there is a conflict between Romania's bank secrecy provisions and the implementation of A. 7(5) Vienna Convention. In the ratification process of the Council of Europe Convention, Romania should ensure that bank secrecy is not an obstacle to the provision of the widest possible measure of investigative assistance in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation. The Romanian authorities pointed to existing legislative provisions which they consider will enable them to act on behalf of foreign states in enforcing foreign confiscation orders and to take provisional measures on their behalf. A review of these provisions would assist to ensure that their use by Romania cannot be successfully challenged where the assistance requested relates to enforcing foreign confiscation orders based on an assessment of all the proceeds of crime or relates to taking provisional measures to secure proceeds of crime. It would also assist if the Romanian authorities satisfy themselves that there is adequate legal provision for the enforcement of civil confiscation orders made abroad.

11. Customer identification requirements are provided in Law 21/99 for any single cash or non-cash operation in Lei or foreign currency equivalent to 10,000 Euro or where there is information that the purpose of a transaction is the laundering of money. The threshold for the Customer identification requirement applies only to legal persons and the obligation should apply also to natural persons subject to Law 21/99. The threshold of 10,000 Euro appears rather high for the Romanian economy. It would be advisable if the figure was reconsidered generally, and for bureaux de change in particular, where most transactions presently undertaken would be likely to avoid the identification requirements entirely. When reviewing threshold requirements the Romanian authorities might also reconsider the current limits on cross border money movement (US $ 10,000), which also appear high for the Romanian economy.

12. While Law 21/99 provides for some sanctions to be taken by the office for non-compliance, no authority or institution is tasked explicitly with checking compliance with Law 21/99. The office is not given that role so it was unclear how it might be in a position to issue sanctions. The examiners consider that the National Bank of Romania and the other relevant supervisory authorities need to become actively involved in the supervision of anti-money laundering measures and that a workable regime for sanctions for infringement of the law needs developing, with meaningful penalties that will have a real deterrent effect.

13. The success of the new office will be critical to the success (or otherwise) of Romania's whole anti-money laundering effort. The office appears to have a solid organisational basis and the potential for being effective in the future, assuming the uncertainties in the law are satisfactorily resolved. Three further examples of legal uncertainties and imprecisions are given. It was, firstly, unclear to the examiners whether it was intended that there should be two reporting obligations – one based upon suspicion under A.3 (which requires "firm evidence") and one based upon "unusual" transactions under A.14 (which does not appear to require "firm evidence"). Without precise supplementary guidance on this issue (and, as has been indicated, on the meaning of "firm evidence") there is a real danger that the office may actually receive very few reports in practice[2]. Secondly, the office has legal power to obtain

[2] The examiners have subsequently been advised that though two different words are used to describe the reporting obligation in the Romanian text of A. 3 and A.14 of Law 21/99 they mean the same and the office has now clarified this by issuing a standard report form based only on suspicious transaction reporting.

further information from "any competent institution". The office considered this provision entitles it to obtain information from all institutions – and not just those that make a suspicious or unusual report. A common interpretation between the banks and the office needs developing quickly on this and then could be put on a formal legal footing. Thirdly, the office has the formal power to suspend transactions but the examiners were concerned that the civil responsibility for any resulting financial loss, which according to the law is to be borne by the office, may inhibit the office's use of the power.

14. The office has a legal responsibility under Law 21/99 for organising, at its own cost, education and training programmes for the employees of institutions subject to Law 21/99. On the other hand, legal persons are also supposed to arrange their own training. This double obligation appeared to cause institutions to wait for the office to start its own training programmes before acquainting their staff with the new law. At the time of the on-site visit the office had not been allocated a budget, and so training had not commenced. It needs to do so urgently. Then, in due course, guidance notes on what might be suspicious and/or unusual transactions in the Romanian context need to be drawn up for all sectors by the supervisory authorities, co-ordinated as necessary by the office, building (so far as the banking sector is concerned) on the helpful work in this area begun by the Banking Association.

15. There needs to be a clear political commitment to the success of the office through proper resourcing of it. This is vital in order to ensure that all the office's many functions can be undertaken including, critically, the commencement of training, based on a common understanding of what the law means.

16. The passage of the formal law is an encouraging first step in Romania's fight against money laundering. However there is much to do. Romania needs to build on this and develop an operational system which will generate appropriate numbers of reports, and which are in turn transmitted to the prosecutor in sufficient numbers. Thereafter, at the penal stage, levels of proof should not be so high that they make the achievement of convictions and confiscation of proceeds very difficult in practice.

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