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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 PRINCIPALITY OF LIECHTENSTEIN

SUMMARY

1. A PC-R-EV team of examiners, accompanied by colleagues from the Financial Action Task Force (FATF) visited Liechtenstein between 6-9 September 1999.

2. Due to the small size of the country, Liechtenstein 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, the geographical location of Liechtenstein, its highly developed financial services industry and "offshore" business sector, combined with strict professional secrecy rules, make Liechtenstein an attractive target for money laundering operations, e.g. by international organised crime.

3. The relevant policy objectives of the Liechtenstein Government in the area of money laundering control at present include the establishment of a special police unit for dealing with economic offences, including money laundering, the prevention of the abuse of the Liechtenstein banking sector and economic life for money laundering purposes as well as the education and training of government officials dealing with money laundering cases.

4. Liechtenstein has not yet ratified the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime [the Strasbourg Convention][1] or the 1988 UN Convention against illicit traffic in narcotic drugs and psychotropic substances [the Vienna Convention][2]. Nonetheless, Liechtenstein has taken steps to criminalise money laundering. Initially, this was done in respect of the laundering of the proceeds of drug offences (Article 20 a, paragraph 1 of the Law on Narcotic Drugs). Subsequently, the scope of the money laundering offence was broadened by the Law of 21 March 1996, which created a new money laundering offence (now Article 165 of the Criminal Code).

5. The scope of application of the money laundering offence under Article 165 of the Criminal Code is broader than under the Narcotics Act: it penalises any person who hides or conceals the origin of assets which stem from crime committed by another person. It also penalises those who knowingly take possession of such parts of the offender's assets or takes them into custody, converts, exploits or assigns such assets to a third party. The predicate offences under Article 165 include any crime, i.e. criminal offences punishable by imprisonment of up to not less than 3 years. Misdemeanours (such as fiscal offences, e.g. tax evasion) are therefore excluded from its scope. Likewise it excludes « own-funds » laundering. If the total value of laundered assets exceed CHF 150.000 or if the offence is committed by a member of a gang whose purpose is to commit money laundering, the penalties are more severe. Under the Narcotics Act, money laundering covers the proceeds of any drug-related offences, whether misdemeanours or crimes, as criminalised by Article 20 of the Narcotics Act. In addition, it covers the laundering of someone's « own-funds ». Both offences can only be committed intentionally. The examiners consider these legislative steps as positive ones. Nevertheless, the differences between the two money-laundering offences seem unnecessary and the examiners recommend that early consideration be given to bringing Article 165 of the Criminal Code fully in line with the approach taken under the Narcotics Act. They also draw attention to the fact that there have so far been no convictions obtained under either of the two legislative provisions criminalising money laundering. The examiners observe in this context

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[1] Liechtenstein signed the Strasbourg Convention on 29 June 1995.

[2] Given that Liechtenstein has had a customs union and an open border with Switzerland since 1923, it claims that its drugs-policy has to follow that of Switzerland. The ratification of the Vienna Convention is therefore conditioned upon Switzerland's ratification of the Convention.

that the « knowledge » standard applied by both money laundering offences is given a rather strict interpretation, as a result of which it is difficult to prove the criminal origin of proceeds derived from predicate offences typically committed overseas. The examiners believe that money laundering should therefore be made an autonomous offence by not requiring a formal proof of the specific predicate offence and consideration should also be given to the introduction of negligent money laundering. The possibility of introducing corporate criminal liability also deserves close consideration.

6. Liechtenstein law contains several provisions dealing with the confiscation of criminal proceeds and the application of provisional measures. The Law of 21 March 1996 brought about significant amendments to the Criminal Code in this respect. Article 20a of this Law (Absorption of illicit enrichment) provides that if an offender unlawfully enriched himself by committing one or more offences, he shall be condemned to pay an amount of money corresponding to the scope of the enrichment obtained, if this exceeds the amount of CHF 150.000. The examiners were informed that this provision could cover the proceeds of both crimes and misdemeanours. The absorption of illicit enrichment (hereafter confiscation) is conviction-based and Liechtenstein law does not allow civil forfeiture. The existing confiscation regime however can also be applied to corporations. There has so far been no confiscation ordered on the basis of Article 165 of the Criminal Code. Given the above-mentioned difficulty of proving the origin of the assets, which in most cases are thought to originate from extraterritorial predicate crimes, the examiners believe that the current confiscation regime needs to be revisited. The planned ratification of the Strasbourg Convention provides a unique opportunity to assess the adequacy of the existing confiscation regime and make the necessary adjustments. The examiners particularly recommend in this context that the CHF 150.000 threshold for confiscation (Article 20 a of the Criminal Code) be deleted, whereas the applicability of seizure and confiscation to all kinds of criminal proceeds, including property, instrumentalities, substitute assets and profits generated by proceeds, should be clearly provided for by law.

7. Provisional measures (freezing and seizure) related to assets subject to confiscation were allowed by judicial rulings on the basis of Article 253, paragraph 2 of the Code of Criminal Procedure, until a Supreme Court decision made this impossible. The Law of 22 October 1998, filled this gap by introducing Article 97a into the Code of Criminal Procedure. This new provision provides, in the event of suspected unjustified enrichment, for the possibility of seizure, safekeeping, administration, prohibition of alienation or other types of disposal, of assets considered to be subject to confiscation, under judicial control.

8. Liechtenstein, though it has not yet ratified either the Strasbourg or the Vienna Convention, is a party to other relevant bilateral and multilateral treaties on international judicial co-operation. It has in particular been a Party since 1970 to the European Convention on Mutual Legal Assistance in Criminal Matters. This, in conjunction with the applicable domestic legislation (Law of 11 November 1992 on international legal assistance in criminal matters) provides the basis for collaboration with foreign states in the area of criminal justice. The Law, however, does not provide specifically for international assistance in the identification, tracing, freezing, seizure or the confiscation of the proceeds of crime and practice shows that Liechtenstein authorities are currently not in a position to give effect to a foreign request of confiscation. This problem should also be addressed in the context of the planned ratification of the Strasbourg Convention.

9. On the preventive side, the Due Diligence Act of 22 May 1996 and a related Executive Order of 18 February 1997 have established a suspicious transactions reporting mechanism and introduced a number of « due diligence » obligations. Thus, those subject to the Act (banks and other financial institutions, lawyers, trustees, investment undertakings, insurance companies, legal agents, branches in Liechtenstein of foreign investment firms and postal services) are under an obligation to identify the contracting party as well as the economically entitled persons when entering into business relations (e.g. accepting assets for transfer, safekeeping, management and investment). However, the Due Diligence Act does not apply to exchange offices[3] and the duty of identification applies to cash transactions only when they exceed CHF 25 000. Institutions or persons subject to the Act are also obliged to keep documents or references on customer relations, identification of contracting party and the establishment of the economically entitled person for a period of 10 years after the termination of the relationship or the execution of a transaction. The Act also requires internal controls to be carried out concerning compliance with its provisions, through independent auditing procedures.

10. If after clarifying the economic background, purpose of transaction and the origin of the assets, the institutions and persons subject to the Due Diligence Act have a "strong" suspicion that the transaction is related to money laundering, they have to report it to Financial Services Authority (FSA). They can also notify the prosecution service at the same time. The notion of « strong » suspicion is, however, not easy to define in concrete terms, even if guidelines of general application have been worked out under the auspices of the FSA by the relevant associations (accountants, trustees and lawyers). Yet, institutions or persons subject to the Due Diligence Act have to establish for themselves if a given suspicious transaction is "strong" enough to be reported. In so doing, they are actually required to carry out tasks that usually fall under the responsibility of law enforcement bodies. One frequently used method to substantiate or dissipate suspicion is to clarify the economic background etc. of transactions, which in Liechtenstein practice often involves consultations with the customer. The examiners fail to see how "tipping off" in such circumstances can be avoided. Institutions and persons subject to the Due Diligence Act are confronted here with an open conflict between loyalty towards their clients and the obligation to report and concern was expressed in this regard by the trustees that the obligation to disclose the identity of clients might easily lead to liability for breach of secrecy. The Due Diligence Act imposes penalties in case of wilful non-compliance with its provisions (e.g. non-reporting to the FSA), but the requirement of « wilfulness » might in many situations be very difficult to prove and may challenge the effectiveness of the above-mentioned Act. The examiners therefore believe that the current system may inhibit financial intermediaries from reporting rather than encourage them to do so and this situation urgently needs addressing. They recommend in particular that a specific and unequivocal provision be introduced in Liechtenstein law for exonerating persons who report suspicious transactions in good faith from the consequences of any breach of secrecy or disclosure rules.

11. As far as supervision is concerned, the FSA is the main supervisory authority responsible for the implementation of the Due Diligence Act. In this capacity, it is empowered to order inspections - through independent auditors - in the institutions under its supervision, order supplementary checks for customer identification, prohibit entering into business relations with customers, ask other supervisory authorities (e.g. Insurance supervision) to take

[3] According to the Liechtenstein authorities, there are only two exchange offices operating outside the regulated banking sector.

disciplinary measures and request information necessary for its supervisory functions. The examiners noted with concern, that in practice the FSA - which has only 5 members of staff - is neither required, nor is in a position to carry out such control procedures and confines its task to supervising formal compliance with the Due Diligence Act. The controls are in the hands of private audit firms, contracted by the Government, but paid by the controlled entities, which are supposed to verify compliance with all obligations arising out of the Due Diligence Act, including the duty to report strong suspicions. Although financial institutions are audited every year, the 250 trustee companies and 40 individuals registered as trustees (managing all together approximately 78 000 entities) are audited at least every five years. These auditing procedures are rather formal. They do not extend to the checking of actual transactions. The examiners therefore recommend that audits be carried out more frequently and that they be extended to random checking of transactions carried out by supervised entities, in particular trustee companies; in this context the examiners consider that it would be necessary to include also auditors within the scope of the Due Diligence Act to oblige them to report suspicious transactions discovered during audits.

12. The FSA is also the disclosures receiving agency which verifies within 8 days, on the basis of the documents submitted to it and its own investigations, whether the "strongly" suspicious transaction declared is confirmed and has to be reported to the public prosecution services. The FSA has no backlog and systematically informs the reporting entities about the transmission of the case to the public prosecution services. The public prosecution can also receive the declaration of suspicion directly but in practice this is rather rare. Between 1 January 1997 and 31 December 1998 a total of 45 cases were reported (47 reports) and 33 proceedings have been instituted. However, among the 45 cases, only 3 cases were initiated on the basis of spontaneous suspicious transaction reports, while 22 cases resulted from requests for legal assistance, 11 from criminal proceedings pending abroad, 3 from press reports and 6 from criminal proceedings pending in Liechtenstein. Direct international co-operation between the FSA and foreign Financial Intelligence Units seems problematic. The examiners therefore recommend that the FSA be given a clear mandate to carry out analytical work on suspicious transactions, clear powers to access all information (intelligence) necessary for such work and be able to co-operate and exchange information with all relevant foreign counterparts.

13. On the law enforcement side, the police do not seem to be sufficiently involved in the fight against money laundering. This impression might well be due to the fact that the mission did not obtain as much specific information as it wished regarding, *inter alia*, the predicate offences from which proceeds are believed to be derived, the mechanisms used to launder money and the amounts estimated to be involved. During the discussions, mention was made of a new police co-operation treaty signed this summer with Switzerland and Austria, which will provide for reinforced co-operation once it is ratified.

14. In the light of the above, the examiners consider that the overall Liechtenstein anti-laundering system is rather reactive and needs to improve, both on the preventive and repressive side. The Liechtenstein authorities need to take stock of the existing arrangements, machinery and legal provisions under the current anti-laundering regime. While many building blocks of 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 Liechtenstein faces and to fully conform to the applicable international standards. In this regard, the forthcoming ratification by Liechtenstein of the Strasbourg Convention is welcomed by the examiners.

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