MONEY LAUNDERING - The EU and Malta

Author: George Farrugia

Background
The new Prevention of Money Laundering Regulations 2003, which have just been published in August, implement the second European Union directive on measures against money laundering, which directive, however, itself gives effect to the most recent international anti-money laundering trends. Before embarking on an examination of the main changes of the Regulations it is important to understand the whole international effort that has culminated in the new international standards.

The first international effort to criminalise money laundering is attributed to the United Nations. In 1988 the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the “Vienna Convention”) was signed by the G-7 and European Union countries. The signatories to this Convention agreed to join their efforts together to fight against the laundering of the proceeds of drug trafficking by making the laundering of the proceeds of drug trafficking an illegal activity. They also agreed to enhance their co-operation and committed themselves to secure that the laws of their respective countries should be aligned accordingly.

In December of that same year the Basle Committee on Banking Supervision (BCBS) issued the Statement of Principles for the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering (Basle Statement of Principles). This statement recommended four principles to be adopted by the financial institutions regulated by the supervisory authorities participating in the BCBS and expected them to comply. The Basle Statement of Principles treated customer identification, compliance with legislation, co-operation with law enforcement agencies and the adaptation of policies in line with the Statement of Principles.

Additional to this the G-7 Summit in Paris in 1989 established the Financial Action Task Force (FATF), which had to become the leading anti-money laundering organisation worldwide. The aim of the FATF was not only to monitor the implementation of the principles of the Vienna Convention but also to examine the measures to combat money laundering throughout its members, which at that time comprised 26 governments together with the European Union and the Gulf Co-operation Council, and extended them into preventive measures by establishing standards for global implementation. Then in 1990 the FATF published the 40-Recommendations which extended the crime of money laundering to include the proceeds of other serious offences. These Recommendations were designed to provide a model for action against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation. The Forty Recommendations addressed four general themes, namely:

The overall context, in which the recommendations urged member countries to ratify the Vienna Convention;

Mr. George Farrugia is an Analyst with the Financial Intelligence Analysis Unit, Malta. He holds a Masters degree in Business Administration and has over 20 years of financial services experience. The views expressed in this paper do not necessarily reflect the views of the Malta FIAU.
The **legal framework**, which the recommendations required should criminalise the laundering of the proceeds of drug-related crimes, encouraged the coverage of all serious crimes or all crimes that generated large proceeds;

The **role of the financial system**, in which the recommendations defined roles for banks, life insurance companies, and other non-bank financial institutions, as well as financial regulatory authorities to identify their customers, maintain records and make these records available to the authorities for criminal investigations and prosecutions;

The **strengthening of international cooperation**, in which the recommendations encouraged authorities to exchange information on currency flows and money laundering techniques and on suspicious transactions or operations

The 40-Recommendations were reviewed in June 1996 as part of the FATF follow-up and monitoring process in response to money laundering trends. Following the 11 September 2001 terrorist attacks, eight new Special Recommendations for the combating of the financing of terrorism were issued by the FATF. In June 2003 the 40-Recommendations and the Eight Special Recommendations were revised and now together with the criteria for non-co-operative countries and territories (NCCT) form the internationally accepted FATF regime on anti-money laundering and the combating of financing of terrorism (AML/CFT).

In October 1992 the International Organization of Securities Commissions (IOSCO) adopted a technical report and resolution encouraging its members to take necessary steps to combat money laundering in the securities and futures markets. A working group of IOSCO’s Consultative Committee has been set up to collect information from IOSCO members’ self-regulatory organizations and exchanges in their efforts to encourage their own members to fight money laundering in the securities and futures markets.

**The 1991 European Union Directive**

The ongoing international initiatives described above prompted the appropriate environment for the European Commission (at that time) to propose a directive on the prevention of the use of financial systems for the purpose of money laundering.

The EU first collective initiative was taken up prior to the 1991 Directive. In November 1990 the Strasbourg Convention, through the policies of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation on the Proceeds of Crime were adopted. The Convention established a common criminal policy on money laundering, set a common definition of money laundering and common measures for dealing with it. Thus, the principles for international co-operation were laid down by this Convention.

Then in June 1991 the European Union Directive 91/308/EC introduced measures for the prevention of the use of financial systems for the purpose of money laundering. The main objectives of this Directive were the funds derived from drug related crimes. The Directive, which came into force on the 1st January 1993, obliged credit and financial institutions to;

- identify customers when opening an account, starting a relationship or even a one-off transaction for the equivalent of EUR15,000 or more;
- keep appropriate records;
- establish compliance procedures;
- provide training to staff; and
- inform the authorities of any transaction or action where money laundering was suspected.
The Directive also required the suspension of bank secrecy whenever transactions, including those below the EUR15,000 threshold, were required to be reported to the authorities.

The 1991 Directive was an important step in the fight against criminally tainted money and its negative effects on financial systems and on economies as a whole. The Directive has also provided the guidelines for non-EU member countries to take their own measures to counter money laundering. In 1994 Malta, which at that time had already applied for membership in the EU, enacted the Prevention of Money Laundering Act and published the relevant Regulations which were based on the Vienna Convention and the EU Directive of 1991.

In 1996 in Dublin the European Council created a High Level Group within the Third Pillar to draw up an Action Plan with specific recommendations. Thirty Specific Recommendations were proposed which were approved by the Amsterdam European Council in April 1997 mainly recommending that:

- Measures should be developed to shield lawyers and accountants from being exploited or getting involved in organised crime (Recommendation 12).
- Mechanisms should be established to mutually evaluate the application and implementation at national level of instruments and undertakings in criminal matters (Recommendation 15).
- The criminalisation of laundering of the proceeds of crime should be made as general as possible (Recommendation 26(b)).
- The reporting obligations of the Directive should be extended to all offences connected with serious crime and to persons and professions other than the financial institutions mentioned in the Directive (Recommendation 26(e)).

Additional to this the European Parliament, through two reports and resolutions, has called for the strengthening and broadening of the scope of EU efforts against money laundering.

As governments, almost all over the world, have legislated and strengthened their jurisdictions’ financial systems, money launderers continued to find alternative routes and methods to hide the criminal origins of their money by now turning their attention to non-financial services which at the time were not caught by anti-money laundering legislation and measures. New methodologies of laundering money have been reported by both the FATF and the United Nations in their typologies studies. Such studies frequently imply the misuse of the services of lawyers, accountants and other professions to launder criminal money. Additionally, it was also reported that the real estate sector has been used by money launderers to clean their spoils.

The Specific Recommendations have been addressed by two Joint Actions adopted by the European Council. The December 1997 Joint Action has analysed and evaluated the countries’ application and implementation of the fight against crime. The 1998 Joint Action’s main achievements were the criminalisation of the laundering of the proceeds of all serious crimes and to ensure that the appropriate legislations and procedures were in place to permit further co-operation.

**The 2001 EU Directive on Money Laundering**

In July 1999 the European Commission submitted an updated and extended directive to amend the 1991 directive. In November 2001 the EU Council of Ministers has approved the
proposed amendments and Directive 2001/97/EC, amending EU Directive 91/308/EC, came into effect to be adopted by member states and accession countries by June 2003. Some of the member states and accession countries are yet in the process of complying with this directive. Malta has recently published the revised Prevention of Money Laundering Regulations in August 2003, which, in complying with the EU amended directive, have replaced the 1994 Regulations.

Directive 2001/97/EC has obliged member states to criminalise the laundering of proceeds of all organised crime and fraud against the budget of the European Union and extended the inclusion of anti-money laundering obligations to a range of non-financial activities and professions which might be misused by money launderers. The Directive has thus extended the obligations to external accountants, auditors, real estate agents, notaries and lawyers carrying on financial and other related activities, high value dealers, transporters of funds, and casinos. Thus while the first directive has served as a landmark in the combat against money laundering in both the member states and non-members the second directive is expected to bring about better co-ordination and international co-operation in the ongoing pursuit of money laundering. Furthermore, the second directive has extended the battle front against money laundering by recruiting the assistance of non-financial businesses to join ranks with the financial services providers.

The second EU Money Laundering Directive adopted in December 2001 calls on the Commission to present a proposal for a further Directive before 15 December 2004. This third directive would harmonise and consolidate what has been done up to now and put up new preventive gateways to other types of money laundering and ‘reverse money laundering’ (when clean money goes to finance a criminal or terrorist act). The main areas of possible change are expected to include:

- terrorist financing;
- predicate offences;
- institutions subject to money laundering legislation;
- customer due diligence;
- reporting of suspicious transactions on terrorist financing;
- safeguarding of reporting persons and institutions;
- transparency of legal entities; and
- supervision and monitoring.

These possible changes have to be considered also in view of an “all crimes” money laundering offence (which could include tax evasion) which most EU member states, in line with the international trend, are already in favour of adopting. This latter change would bring about a more drastic change than the second directive as offences which currently are not considered as money laundering predicate offences will become predicate offences and thereby extend considerably the reach and scope of the money laundering offence.

Prevention of Money Laundering Regulations 2003

Legal Notice 199 published on 12 August 2003 has brought about the significant changes required by Directive 2001/97/EC of the European Union. The most significant change is contained in Regulation 2. Whereas the previous Regulations defined only “relevant financial business” the new Regulations include an additional definition: “relevant activity.” This is taken to mean the activity carried on by a number of identified professions or businesses. These newly added non-financial professionals or businesses are:

i. Auditors, external accountants and tax advisors;

ii. Real estate agents;
iii. Notaries and other independent legal professionals in relation to assisting in the planning or execution of financial transactions for their clients;

iv. Nominee companies and licensed nominees acting as nominee shareholders or trustees, authorised under the Malta Financial Services Authority Act;

v. Dealers in precious stones or metals, or works of art or similar goods and auctioneers whenever payment is made in cash in an amount equal to Lm5,000 (five thousand Maltese liri) or more; and

vi. Any activity which is associated with of the activities falling within the above professions.

It must be noted that the obligations under the anti-money laundering Regulations were extended to casinos through the Gaming Act Regulations of 1998.

Another significant change in the new Regulations is the addition of a definition of a “subject person” which is set to include persons carrying out either “relevant financial business” or “relevant activity.”

The new regulations brought about an important change with regards to introduced business. Regulation 7 now requires that the introducer of a business must disclose the identity of the beneficial owner or beneficiaries of a qualifying shareholding which is defined as 10% or more of the equity shares. It is further specified that when an applicant for business is acting as a nominee shareholder, trustee or under any fiduciary arrangement, the applicant shall disclose the identity of the beneficial owners of shareholders held by him or the trust beneficiaries or of his/her principal and provides the relevant identification documents. According to Regulation 8 the identification procedures are exempted on two occasions: when business is introduced to a subject person by a person who is authorised to carry out “relevant financial business;” and when the applicant for business is him/herself an authorised person to conduct “relevant financial business.” “Relevant activity” operators are not exempted from disclosing identification of beneficial owners when they introduce business to a subject person.

Other than complying with the EU Directive and aligning Malta with the international requirements the new Regulations extend existing anti-money laundering obligations to a range of activities and persons who are now being embraced by the new regulations. Thus the new regulations are expected to enhance the tools to combat money laundering in Malta and to protect our jurisdiction from attempts of money launderers to use our services to launder their money. Upgrading our rules and regulations means that our country has the highest protection levels to ward off money launderers and keep our operators vigilant. When the subject persons comply with the Regulations they are protecting their businesses, their industry, the economy and the good name of Malta.

References:

European Union Directive 91/308/EC

European Union Directive 2001/97/EC


Prevention of Money Laundering Regulations 2003

Prevention of Money Laundering Act 1994