1 Use of Information Exchange in Criminal Matters to Combat Money Laundering and Financing of Terrorism

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1. Introduction

1.1. Countries recognize that strong regional and international cooperation on cross-border transactions, including the implementation of best practices concerning information sharing in criminal matters, are needed if they are to be successful in combating money laundering (ML) and the financing of terrorism (FT).

1.2. All international instruments on international cooperation in criminal matters include legal provisions to facilitate or organize information exchange among authorities in charge of investigations or prosecution. Experience has shown that sharing intelligence and evidence swiftly and smoothly is key to conducting successful investigations and also, and even more importantly, to preventing and detecting criminal schemes before they are carried out. The international norms and standards on information exchange in criminal matters usually address the issue by devising three different frameworks for information exchange: (1) informal communication channels, (2) the financial intelligence unit (FIU) channels, and (3) mutual legal assistance (MLA) mechanisms. The norms and standards are necessary to provide them with a legal basis, and to set up processes to speed up the exchange of information (direct transmissions, acceptable language, etc.).

1.3. Each approach has its own advantages, and it is up to each country to decide how to proceed on a case-by-case basis, depending on its own needs and objectives, and on the degree of rapidity and reliability required. The challenge is to get information quickly and, where necessary, to be able to use it in a court of law.

2. Sources of International Norms and Standards on Information Exchange in Criminal Matters

2.1. The main sources of international obligations and standards related to the information exchange in criminal matters are the United Nations (UN) Conventions, the UN Resolutions adopted by the Security Council, and the Financial Action Task Force (FATF) 40 Recommendations (combined with the 9 Special Recommendations) that contain provisions on information exchange in criminal matters concerning anti-money laundering and combating the financing of terrorism (AML/CFT). In 2001, the Egmont Group of financial intelligence units also developed its "Principles for Information Exchange Between Financial Intelligence Units for Money Laundering Cases."[1]

2.2. The sources of international law on information exchange in AML/CFT criminal matters are contained in a series of international conventions and resolutions. In addition to harmonizing legal frameworks, the substantive provisions of these conventions and resolutions aim at organizing exchange of information, mutual legal assistance procedures, and law-enforcement cooperation among member states. The main international instruments in this respect are

- 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: *Articles 7 and 9.1.*
- 1990 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime: *Articles 7–10, 23, and 24.*
- 1999 UN Convention for the Suppression of the Financing of Terrorism: *Articles 12, 18.3, and 18.4.*
- 2000 UN Convention Against Transnational Organized Crime: *Articles 7.1.b., 18, and 27.*
- 2001 UN Security Council Resolution (UNSCR) 1373.
- 2003 UN Convention against Corruption: *Articles 14, 46, 47, 48, and 58.*
- FATF 40 Recommendations + 8 Special Recommendations: *Recommendations 34, 36, 37, 38, and 40. Special Recommendations I and V.*

2.3. UN/IMF/World Bank model legislation does not set a standard per se, but translates the existing norms and standards into legal provi-

[1]Adopted in The Hague, June 13, 2001. See *www.egmontgroup.org.*

sions. The Model Legislation on Money Laundering and the Financing of Terrorism, civil law ("continental") legal system[2] developed by the United Nations, the International Monetary Fund, and the World Bank is worth mentioning here, since it proposes a comprehensive set of provisions to not only implement but also complement the international instruments and provide a legal basis for organizing international cooperation and information exchange.

3. Information Exchange Channels

Informal Channels of Communication

3.1. Information exchange in criminal matters is usually sought, at the initial stage of investigation, by means of police-to-police contact, which is faster, cheaper, and more flexible than the formal route of mutual legal assistance. Such information exchange can be carried out through contacts developed and maintained within the framework of the International Criminal Police Organization (ICPO)/Interpol, the World Customs Organization (WCO), Europol, and other networks that have been established for this purpose, such as bilateral or multilateral task forces.

3.2. The term "informal" is used, since information is exchanged on an ad hoc basis, using individual (sometimes personal) contacts or nonbinding agreements, rather than through legal treaties or agreements. As a result, the information has no legal value and could not, for example, be used as evidence against someone. Nevertheless, any information exchange, including informal exchanges, must be conducted within the law. In particular, the information exchange must be consistent with privacy, confidentiality, or secrecy laws, or laws prohibiting the transmission of sensitive information to foreign authorities.

3.3. These informal means of information exchange are used to share intelligence and information obtained voluntarily[3] (such as statements of witnesses) or public records or other information or data from publicly available sources.

3.4. In addition to spontaneous contacts, this informal exchange of information can be organized through memoranda of understanding

[2]Such model laws will also be developed in the near future for common law and Islamic law systems.

[3]Informal sharing of information excludes the use of coercive measures.

(MoUs) or bilateral or multilateral treaties. For example, the 1988 United Nations (UN) Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances has established a UN directory of competent national authorities that lists the designated authorities to whom requests for exchange of information can be directed. These channels are also used to establish joint investigation teams comprised of officers of two or more states where cross-border surveillance of operations related to money-laundering or drug-trafficking cases is needed. Whenever law-enforcement authorities want, for example, to set up a controlled delivery in a foreign country, the UN directory of competent authorities allows them to easily identify a direct contact there with whom they can get in touch. This directory is a good example of a simple and concrete measure taken by an international convention to speed up the informal information-sharing process between countries.

3.5. These informal channels of communication are fast, easy, and cheap. They have proved essential material to support law-enforcement agencies in financing of terrorism cases. Such information has, in many cases, led investigators to target surveillance on specific individuals or networks, and allowed them to trigger investigations that could not have started otherwise. But there are three caveats to this approach:

3.5.1. the information cannot be obtained using coercive measures normally requiring judicial authority and control;

3.5.2. confidential information cannot be shared with foreign counterparts, especially information that is covered by bank secrecy or by bank confidentiality.

3.5.3. the information cannot serve as evidence in court, because it was not gathered with the required due-process guarantees.

Financial Intelligence Unit Channels

3.6. In money-laundering and financing of terrorism cases, most of the raw material for investigators is financial information held by banks and other financial institutions. This information is in essence confidential. Until the development of AML/CFT laws, the only way to get access to this information was to get a court order allowing the investigator to receive this confidential information from banks. But the court orders could be granted only when the investigator was already aware of the crime and needed ex post evidence. Money-laundering crimes would have continued to be as confidential as the financial transactions on

which they were based if banks and other financial institutions had not been required to report transactions deemed suspicious and therefore susceptible of hiding a criminal laundering operation. The objective was to make law-enforcement efforts more proactive. But a filter was needed, because suspicion does not mean crime. Financial intelligence units were established, in response to the need for this filtering mechanism, to receive and analyze the large quantity of suspicious reports before identifying those that genuinely add to intelligence information and disseminating that information to law-enforcement agencies when suspicion is substantiated during the analysis process.

3.7. A variety of types and models of FIUs[4] have been set up by various countries, depending on the legal and administrative traditions of the state. In general, however, they all carry out similar core functions:

3.7.1. receiving, analyzing, and disseminating disclosures from the financial sector;

3.7.2. receiving and responding to requests for information from other FIUs;

3.7.3. serving as a clearinghouse to coordinate the AML/CFT activities of other agencies;

3.7.4. serving as a repository, a central location of strategic and operational information useful in the fight against ML/FT, that may be consulted by other law-enforcement agencies (database function);

3.7.5. performing research and strategic analysis in support and/or at the request of other domestic agencies or ministries;

3.7.6. advising the authorities on ML/FT issues and legislation;

3.7.7. in some cases, supervising compliance with the AML/CFT provisions, often with the power to impose sanctions or other coercive measures; and

3.7.8. in a few cases, carrying out regulatory responsibilities, such as issuing rules, regulations, or guidelines covering suspicious currency transactions reporting and other AML/CFT requirements.

[4]See International Monetary Fund and World Bank Group, 2004, *Financial Intelligence Units: An Overview* (Washington: International Monetary Fund).

3.8. To carry out their functions, FIUs have access to two kinds of information:

3.8.1. information and/or records that are "spontaneously" provided by the reporting institutions, such as banks and financial institutions, through suspicious transaction reports (STRs) and other types of reports that AML laws require them to file; and

3.8.2. information that FIUs, at their request, can obtain from any public authority or from reporting agencies, either to augment information received through suspicious transaction reports or at the request of a foreign financial intelligence unit responsible for receiving and processing reports of suspicions.

3.9. Because money laundering and the financing of terrorism imply the cross-border transmission of confidential financial information, the detection of money laundering and financing of terrorism operations depends on information sharing among FIUs in different countries and on their ability to cooperate, speedily and efficiently, with their foreign counterparts.

3.10. To this effect, FIUs must be empowered by law to share information with foreign counterparts. This is not always possible, because, in many cases, laws establishing FIUs prevent the sharing of confidential information except in certain specified cases and, even in those cases, strictly limit the conditions under which information can be shared with, and the uses to which it can be put by, foreign FIUs. These restrictions are designed to avoid any abuse and, in particular, to protect the constitutional or civil rights of the individuals who are the subjects of the information. Indeed, such individuals are, in most cases, innocent of any crime (the number of STRs that end up in criminal investigations is very limited across the board). It is therefore critical to ensure that STRs and other financial information handled and processed by the FIU remains confidential all along the way.

3.11. The problem is that, depending on the type of foreign FIU, the confidentiality requirements and standards governing the use of the information may not be the same as those of the providing FIU. To overcome this difficulty, FIUs, within the Egmont Group, are negotiating and signing MoUs to harmonize the conditions under which financial information can be shared, with a view to maximizing the extent to which information can be shared, while ensuring that confidentiality will not be breached and limiting the use that the foreign FIU can make of such information.

3.12. Sometimes, the sharing of information between FIUs is not made spontaneously but at the request of a foreign FIU. In this case, the FIU must be specifically empowered by law to act on the basis of foreign requests. In other words, when the FIU receives a request by a foreign counterpart to look for information, there must be a legal power given to the FIU to search for that information in financial institutions, even if the financial institution has not filed an STR.

3.13. To summarize, the exchange of information among FIUs is premised on a threefold legal requirement:

3.13.1. the general power given by law to the FIU to use the information received within the purview of the law for other purposes than its transmission to law-enforcement or judicial authorities;

3.13.2. the power to exchange information with foreign counterparts; and

3.13.3. the power to request banks to provide financial information at the request of a foreign counterpart.

3.14. Within these limits, the FIU channel provides a means for quick and efficient exchange of information. It is flexible, while allowing the use of coercive measures. The legal value of the information obtained is stronger, but, even so, the information has to remain confidential and, in particular, cannot be used in open court and therefore cannot be used in a prosecution.

The Mutual Legal Assistance Process

3.15. In most countries, cooperation between justice systems for the investigation and prosecution of offenses requires very complex procedures called mutual legal assistance. MLA arrangements are governed by treaties or bilateral agreements that usually contain a number of restrictive conditions. Such conditions, which may inhibit the comprehensive and rapid exchange of information, are necessary to protect the sovereignty of states and ensure that evidence gathering undertaken in the MLA process abides by due-process principles.

3.16. The protection of sovereignty is fundamental because MLA requests imply the use of coercive powers in a country for the benefit of a foreign country, and states usually want to ensure that the mutual legal assistance request would not infringe on or violate its sovereign powers. For example, a warrant of arrest sent by foreign authorities may be used in a way that effectively interferes in the political process in another country, or may be used by a country to exercise constraint over another country.

3.17. This is the reason why, before a request for mutual legal assistance is forwarded to the appropriate authority (namely the court), this request will be reviewed by the executive branch (despite the principle of separation of powers) to examine whether there is an impediment of a political or diplomatic nature that would prevent the execution of the foreign request. It is worth noting that such impediments arise only rarely and are especially unusual where two countries have a bilateral MLAT. Some argue that the damage done by the delays in the investigation and prosecution process caused by the administrative procedures designed to prevent such rare occurrences are disproportionate to the benefits gained in the tiny number of instances where political or diplomatic issues are detected. There would be advantage in seeking ways to minimize the number of instances where such case-by-case review was necessary.

3.18. Due-process requirements, which are enforced by the courts themselves, aim at ensuring that prosecutions and coercive powers are used in a way that protects the rights of accused persons and, more generally, of citizens. For example, in most countries, before granting the MLA request, courts will check whether the facts for which a person is being prosecuted and the request is being made are considered a criminal offense by law in both the requesting and the requested states. Such requirement, called the "dual criminality" requirement, is based on a basic principle of criminal law ("*nullen crimen, nullen poena, sine lege*" or "there is no crime, there is no punishment, without law"). When MLA is sought in money laundering offense cases, things are much more complicated, since the offense itself is very complex, and very often defined in different terms from one country to another. In addition, the predicate offenses do not necessarily have the same definition, and the scope of predicate offenses varies from one country to another. The dual criminality test in AML cases therefore becomes very tricky: both the money-laundering offense and the predicate offense must be defined in the same terms in each law, and, in addition, the predicate offense must be one in the laws of both the requested and the requesting states. For this reason, FATF Recommendation 37 encourages a flexible interpretation of the dual criminality principle by requesting members to grant MLA when the underlying conduct is the same, even if the terms used to define the offense are different or the offense is not listed in the same category of offenses.

3.19. The MLA approach, which is based on respecting due-process requirements, is the only way to ensure that the information gathered during the investigation will be admissible in court as evidence. The informa-

tion gathered from informal or FIU channels could not be used for evidentiary purposes. Therefore, since the final objective of AML/CFT enforcement is precisely to get people convicted—and their assets confiscated—by a court, there will be a need at some point to use formal means of circulation of information. But because of the political review (sovereignty) and the legal review (due process) of MLA requests, the process is very long and complex.

3.20. Mutual legal assistance requests can be granted on the legal basis of (1) a multilateral treaty, such as the UN Convention on Drug Trafficking or the UN Convention on Transnational Organized Crime, or (2) a bilateral mutual legal assistance treaty (MLAT). It can also be settled on the principle of reciprocity, however, when there is no preexisting agreement between the countries: mutual legal assistance is then granted if the requesting state commits to grant the same assistance if it is requested to do so in similar circumstances.

4. Speed or Power

4.1. When an authority wants to determine how best to proceed in requesting information, it will have to strike a balance between speed and power. Basically, what is the information to be used for? If it is for intelligence purposes, but will not be used as evidence in court, then informal communication channels or the medium of financial intelligence units would suffice. When this information is covered by a confidentiality requirement or entails the need to compel a bank or other financial institution to provide the information, the FIU channel would be preferred if the FIU has such powers. As the gathering of intelligence becomes a part of a criminal investigation for money laundering or the financing of terrorism leading to a prosecution, or when information cannot be obtained otherwise than through enforcement measures, then the collection of information requires the channel of a mutual legal assistance request.

5. Conclusion

5.1. In an environment where financial transactions and electronic transfers allow money to be laundered or funds to be channeled to terrorists at the click of a mouse, the need for rapid transmission and exchange of information between law-enforcement agencies is critical. International instruments have strived, over the years, to make this flow of intelligence smoother and more efficient. The traditional channels of communication between states, a complex mixture of diplomacy and

justice, have failed to enable a rapid response to money-laundering techniques. Criminal organizations have long since taken advantage of the shortcomings of the MLA procedures. Originally designed to protect the interests of states and their citizens, they have wound up protecting criminal networks. In response, law-enforcement agencies have developed parallel channels of communication, notably through Interpol, and have used computer technology to speed up the exchange of information.

5.2. When the first FIUs were created, one of their first endeavors within the Egmont Group was to set up an information exchange system, in parallel to the law-enforcement and judicial ones. Some experiments such as FIUNET, a computer network of FIUs among some European countries, are designed to further increase the speed and efficiency of information exchange by allowing a 24/7 sharing of information among multiple partners. The information shared through these more informal channels is not legally reliable enough, however, to allow for its use as evidentiary material. These channels must therefore be complemented by the use of more formal communication channels when information is to be used in court. This allows the ultimate conviction, and the confiscation of the assets, of criminals who engage in money laundering and the financing of terrorism. The need for parallel information channels will fade when mutual legal assistance procedures are reviewed with a fresh perspective, to limit the procedural requirements to those strictly needed for the protection of individuals, and when justice systems set up direct communication channels for mutual legal assistance like the newly created Eurojust[1] within the European Union.

[1]Eurojust is a European Union body established in 2002 to enhance the effectiveness of investigations into serious cross-border and organized crime.