REFLECTION GROUP ON THE ADVISABILITY OF AN ADDITIONAL PROTOCOL TO THE CONVENTION ON LAUNDERING, SEARCH, SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CRIME.

Financial Intelligence Units and International Cooperation

Analysis

Boudewijn Verhelst
Deputy Attorney General
Deputy Director CTIF/CFI, Belgium

---

1. Background

Roughly since the beginning of the nineties an ever-increasing number of countries set up a preventive anti-money laundering system, imposing specific detecting and reporting duties on persons and/or institutions that are deemed vulnerable to be used - wittingly or unwittingly - for money laundering purposes. Obviously the first and main attention in this area of prevention focused on banks and non-bank financial institutions.

The impetus to such measure was mainly given by the Financial Action Task Force who in its recommendation n° 15 advocated that *"if financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities."*

Similarly, Articles 6 and 7 of the European Union Council Directive 91/308/EC of 10 June 1991, on prevention of the use of the financial system for the purpose of money laundering, established the principle of co-operation between the financial sector and the law enforcement authorities, which is made mandatory in both the passive and active sense: banks and other financial institutions not only are obliged to provide the necessary information if so requested by the *"authorities responsible for combating money laundering"* but also must inform *"those authorities, on their own initiative, of any fact which might be an indication of money laundering."*

At that time these were basically the only international instruments dealing with the establishment and organisation of a reporting system. Only the European Directive had a direct and mandatory impact, limited to the EU member states however, even if in the meantime it has become an international reference document. As for the mutual cooperation between the anti-money laundering authorities, only the non-mandatory FATF recommendation nr. 32 made any reference to it. The European Directive even contained no provisions on cross-border exchange of information.

No definition or description was given of these *"(competent) authorities responsible for combating money laundering"*, as the domestic implementation of that concept was left at the discretion of the national legislator. This accounts for the diversity

between the reporting systems that have been introduced since. However, the term "Financial Intelligence Unit" or "FIU" for the authorities designated to receive the disclosures in the context of an anti-money laundering system is now generally accepted.

2. Models

Based on the statute of the disclosure receiving authority, there are 4 basic concepts to be distinguished among the reporting systems established worldwide *(source: the Egmont Group)*:

2.1. Intermediary (administrative) model

Reporting institution ? disclosure receiving agency ? law enforcement authority (police/prosecutor)

Disclosures are made to a specifically designated (and mostly newly created) administrative authority to be analysed and processed before being passed on for investigation and prosecution. This type of disclosure receiving agency is a typical "financial intelligence unit" and generally performs a buffer and selecting function.

Examples: Australia (AUSTRAC); Belgium (CTIF/CFI); Brazil (COAF), Czech Republic (FAU); France (Tracfin); Netherlands (MOT); Slovenia (OMLP); U.S.A. (FinCEN) …

2.2. Police model

Reporting institution ? police agency ? public prosecutor/judicial authority

Reports are made directly to a police authority for investigation. This is mostly a specially created or designated unit within the police force, sometimes with a mission comparable to that of an intermediary FIU, or a police agency with a general law enforcement mission.

Examples : Austria (EDOK); Finland (MLCH); Germany (LKA of some *Länder*); Hungary (Money Laundering Department); Slovakia (OFiS); Sweden (NFIS); U.K. (NCIS) …

2.3. Judiciary model

Reporting institution ? public prosecutor ? investigation ? prosecution

There is no intermediary step. Here the disclosures are addressed directly to the public prosecutor, who then charges the police with the investigation.

Examples: Germany (in some *Länder*); Iceland; Luxembourg …

2.4. Mixed

Reporting institution ? joint police/prosecution unit

The disclosures are analysed, investigated and prosecuted by the same unit.

Examples: Cyprus (MOKAS); Denmark (Money Laundering Secretariat); Norway (? kokrim) …

3. International cooperation initiatives and instruments: state of affairs

An immediate consequence of this plethora of different and divergent statutes of the various disclosure units, each with their own rules and restraints, was the counterproductive effect on the substance and extent of co-operation, as advocated by FATF recommendation n° 32.

Indeed, with the introduction of the mandatory reporting systems new protagonists in the form of administrative units with a predominant analytical function were introduced in a domain that until then had always been reserved for the traditional law enforcement authorities, sometimes causing confusion - if not antagonism - and serious adjustment problems.

Police units and judicial authorities for instance found no difficulty in collecting police information from other countries, since they have the international police communication systems (like IP) at their disposal or can make use of the existing mutual assistance treaties. On the other hand most administrative FIU databases remained closed to them. The same problem applied to the administrative authorities, who may have access to the national police records and to the information held by counterpart intermediary FIUs, but face problems when they want to consult foreign police registers as they do not fit into the international police communication system.

More importantly in many jurisdictions domestic legal considerations and restraints were inhibiting an effective exchange of information, either because the legal basis simply wasn't there or because it prohibited cooperation with units of a different statute[1].

3.1. Egmont Group

The identification of international co-operation at FIU level as one of the main challenges affecting the efficiency of the anti-money laundering effort led to the creation of the Egmont Group[2], an informal initiative addressing FIUs all over the world, whose main purpose it is to stimulate and promote cross-border information exchange between the agencies responsible for receiving and processing financial disclosures.

[1] For instance, until 2000 the Panama FIU was not allowed to give assistance to their foreign counterparts. 2 Egmont FIUs (Aruba and Netherlands Antilles) still cannot cooperate with non-intermediary units.

[2] Named after the Egmont-Arenberg Palace in Brussels, where the first meeting was organised on 9 June 1995 on the initiative of the Belgian (CTIF/CFI) and US (FinCEN) FIU.

One of its immediate objectives was to eradicate the obstacles to mutual cooperation resulting from the differences between the FIUs in statute, competence and mission. The Egmont Group approach was based on the fact that, whatever the divergences, all FIUs have one common ground and function: they all receive disclosures under the anti-money laundering legislation and in a first stage submit the incoming information to analysis. Precisely in this pre-investigative stage all units should be able to talk directly to each other.

In this respect it advocates mutual cooperation following some basic rules covering both the efficiency and the confidentiality of the exchange of information:

- direct cooperation on the basis of reciprocity;
- free exchange of information for purposes of analysis at FIU level;
- no dissemination or use of the information for any other purpose without previous consent of the supplying agency;
- protection of the confidentiality of the information.

The results of a recent Egmont survey show a distinct and increased willingness of the member FIUs for a flexible cooperation with a minimum of formalities on the basis of the above rules. Formal legal restraints (such as the treaty condition) are however still perceived as an obstacle.

3.2. Proposed revision of the European Money Laundering Directive 91/308/EC

Conscious of unsatisfactory level of cooperation between the EU agencies, the European Commission proposed in its draft Article 12.2 to impose such cooperation not only between the EU FIUs but also with the European anti-fraud unit OLAF, limited to cases where the financial interests of the EU are at stake[3]. This proposal has been dropped however because of formal reasons ('first pillar' versus 'third pillar'). The idea is now being pursued through other initiatives, such as:

3.3. European Union Council Decision of 17 October 2000

As a result of recommendation 26(e) of the Action Plan against Organised Crime 1997 indicating the need for improved cooperation between the authorities receiving suspicious transaction reports pursuant to the Council Directive 91/308/EEC of 10 June 1991, the Multidisciplinary Group on Organised Crime identified some real deficiencies in the exchange of information between the EU anti-money laundering agencies[4] and elaborated a set of rules aimed at making such cooperation mandatory and effective. These were incorporated in the European Union Council Decision of 17 October 2000.

[3] Article 12.2: *"In the case of fraud, corruption or any illegal activity damaging or likely to damage the European Communities' financial interests, the anti-money laundering authorities referred to under article 6 and, within its competencies, the Commission, shall collaborate with each other for the purpose of preventing and detecting money laundering. To this end they shall exchange relevant information on suspicious transactions. Information thus exchanged shall be covered by rules of professional secrecy."*

[4] For instance Germany interpreted the *BKA Gesetz* in such way that cooperation with non-law enforcement FIUs was excluded

3.4. United Nations Convention against Transnational Organized Crime 2000

The United Nations Convention against Transnational Organized Crime, adopted by the General Assembly on 15 November 2000, was opened for signature in Palermo on 12 December 2000. It comes into force as soon as 40 countries have signed and ratified it. The Convention contains some specific measures to combat money laundering, including the establishment and cooperation between FIUs [art. 7.1(b)].

4. Definition

The first - and thus far only - attempt to define the concept of "Financial Intelligence Unit" was made in 1996 by the Egmont Group (see *3.1.*). The definition aimed to take into account all the different forms and statutes of the disclosure receiving agencies worldwide and focused on the basic functions of such unit that were recognised as common to all FIUs, notwithstanding the other functions and missions they might be charged with[5]. Following definition was accepted, which in the meantime has acquired broad recognition:

" A central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information
(i) concerning suspected proceeds of crime, or
(ii) required by national legislation or regulation,
in order to counter money laundering."

Presently 58 agencies are recognised by the Egmont Group as meeting the definition[6]. Also, this definition has been transposed and incorporated in the European Decision of 17 October 2000 (see *3.3*). It is clear that the uniformity of the definition should in any event be maintained in other international documents to avoid any ambiguity and confusion.

5. Incorporation of provisions governing international FIU cooperation in the additional protocol to Convention n° 141

5.1. Principle and extent of cooperation

Mutual assistance between Financial Intelligence Units is conspicuously absent in the Strasbourg Convention n°141. Preventive anti-money laundering mechanisms in 1990 still being in the very early stages and scarcely known, the Convention focused on cooperation at law enforcement and judicial level. The global expansion of reporting systems since then calls for a reconsideration of the situation as to the necessity/advisability to bring the Convention back in balance with the introduction of provisions specifically covering this issue.

It must be acknowledged that the situation in respect of international cooperation at FIU level has greatly improved over the years. This is mainly due to the increasing

[5] Report Egmont Group Plenary, Rome, June 1996.
[6] See Annex 1

awareness of the operational prerequisite to be able to communicate with each other when dealing with a phenomenon that is predominantly transnational in nature and impact. The fact remains however that this cooperation is still frequently based on the common sense of the FIU protagonists themselves, who explore the limits of the domestic legislation to achieve at least some extent of operational cooperation (*e.g.* if it is not *"contra legem"*, then it is allowed…).

Obviously the signal sent by authoritative international legal instruments, such as the Strasbourg Convention, will greatly contribute in (re)drafting adequate legislation, particularly in those jurisdictions that still have not set up a functioning anti-money laundering system.

Different international *fora* have taken various initiatives towards that goal in the meantime, as stated above. It is therefore important to examine if there is still need to regulate what might already have been regulated in other international instruments, and if partial or total duplication can be avoided.

Even if it has gained substantial "moral" authority, the Egmont Group initiative can be disregarded in this respect, being purely an informal operational forum with no binding (legal) consequences for its members, except a personal/moral commitment to contribute to the enhancement of efficient cooperation. A lot of profit can be gained though in taking advantage of its pioneering work and experience in the area of Financial Intelligence Units and the interaction between them, particularly when considering the FIU definition and the rules of information exchange.

The European Council Decision of 17 October 2000 is an international instrument with a definite operational value. However its binding character is limited to the EU FIUs, obviously to be extended to the present candidate accession countries whose compliance with the European anti-money laundering standards - and consequently this decision - is one of the accession criteria. Largely inspired by the practices advocated by and applied within the Egmont Group, it is recommended to equally take the provisions of the Decisions into account for the purpose of the proposed Additional Protocol.

The 2000 United Nations Convention against Transnational Organized Crime ('TOC') on the other hand is a global instrument, principally unlimited in terms of the possibility of adherence, and as such covers the same field of participation as the open Convention n° 141.

On the substantial issue of cooperation between FIUs the TOC Convention also coincides with the purpose of the Additional Protocol in this respect, where it broadly states in its Article 7.1(b) that *"each State Party <u>shall</u> ..... ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money laundering ..... have the ability to cooperate and exchange information at the national and international levels ..... and, to that end, shall consider the establishment of a financial intelligence unit ....."*. It also gives a simplified functional definition of a FIU, obviously drawn from the Egmont Group definition: *"... to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering"*. This approach gives some impression of ambiguity, as on the one hand it makes the international

cooperation mandatory (" *shall ensure"*), but otherwise leaves the creation of a FIU optional ("*shall consider"*).

The scope of application of the TOC Convention however deserves special attention:
- Article 3.1 narrows the application of the Convention to *"... the prevention, investigation and prosecution of*
(a) the offences established in accordance with articles 5 (participation in an organized criminal group), *6* (money laundering), *8* (corruption) *and 23* (obstruction of justice)*; and*
(b) serious crime as defined in article 2 of this Convention;
where the offence is transnational in nature and involves an organized criminal group." except as otherwise stated in the Convention.
- Beside the definition of the transnational nature in Article 3.2, Article 2(b) defines *"Serious crime"* as *"... an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;"*
- The definition of an *"Organized criminal group"* in Article 2(a) is also very specific: *"... a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes of offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;"*

In short, the TOC Convention is binding in respect of the prevention, investigation and prosecution of transnational serious criminality perpetrated by a criminal organisation. These restrictive criteria do not apply however to the criminalization of the offences targeted in article 5, 6, 8 and 23 (art. 34.2.). Where money laundering is concerned (article 6) the Convention *expressis verbis* leaves open the possibility for each State Party to *"... seek to apply ..."* the criminalization of the laundering of proceeds of crime *"... to the widest range of predicate offences;"* [Article 6.2(a)]. At a minimum all serious crimes have to be included as predicate offences [Article 6.2(b)].

It is debatable if the cooperation advocated in article 7 (b) of the TOC Convention falls under the restrictions set by article 3.1. Information exchange at FIU level is genuinely viewed as part of the preventive and/or investigative measures, so on this assumption the limitation would apply. On the other hand article 3.1 does not expressly refer to article 7, while the formulation of article 7 (b) does allow for a broader interpretation. All in all the question is largely academic: once a state party has established an FIU with the ability to cooperate internationally on suspected money laundering, it is difficult to imagine that it will not do so to the greatest extent possible.

Taken as a whole the Strasbourg Convention evidently has a much larger and general scope of application at all levels in that it does not require the condition of:
- the transnational nature of the offence;
- the involvement of a criminal organisation;
- "serious" criminality.

The proposed addition to Convention n°141 consequently carries the distinct advantage of unequivocally postulating the creation of FIUs with the widest ability for cross-border cooperation

5.2. Modalities of cooperation

It goes without saying that the cooperation between FIUs does not follow the same rules mutual legal assistance is subjected to. The primary purpose of the information exchange is not the collection of evidence, but relates mainly to information gathering in the pre-investigative phase. FIUs basically deal with analysis and intelligence, law enforcement authorities with investigation and evidence.

So apart from establishing the principle of cooperation, it makes sense to have the Additional Protocol regulate the basic modalities and procedure rules of the FIU information exchange. This would be consistent with the general set-up of the Convention which under Chapter III, Section 7 already contains specific provisions on the procedural rules governing the mutual assistance between the investigative and judicial authorities. It would also serve to streamline the mechanisms of cooperation by setting a uniform framework ensuring both the efficiency and confidentiality of the information exchange.

The European Council Decision having set precedent in this respect, some overlapping would be unavoidable. Deviation from these precedent rules would however only cause confusion and conflicting interests.

Consideration could thus be given *i.a.* to the

- principle of using direct (and secured?) exchange channels (deviation from art. 23 and 24 of the Convention);
- rule of free exchange of information at FIU level;
- prior consent rule in case of dissemination or investigative use;
- confidentiality regime;
- formal conditions for the requests (adapted application of the rules set by art. 27 of the Convention?).

CONCLUSION

Even if some degree of duplication with other international instruments is inevitable, it still does make sense to provide for and regulate cooperation at FIU level. Convention n° 141 is the reference convention on money laundering. It calls for a global approach and a comprehensive anti-money laundering system, and as such the Financial Intelligence Units should be included as important (new) players in that field.

In this respect it is advisable to at a minimum incorporate in Convention n° 141:

- the Egmont FIU definition;
- the requirement to establish such FIU;
- the rules of information exchange.

* * * * * * * * *

Brugge, 4 July 2001

EGMONT LEGAL WORKING GROUP

SURVEY
ON INTERNATIONAL COOPERATION
BETWEEN FIUS
(excerpt)

I. Effective exchange on Egmont conditions[1] possible with *all* counterparts on a case by case basis:

1. **EDOK** *(Austria)*
2. **FIU** *(Bahamas)*
3. **CTIF-CFI** (*Belgium*)
4. **Financial Investigation Unit** (*Bermuda*)
5. **COAF (***Brazil)*
6. **Reporting Authority** *(British Virgin Islands)*
7. **B.F.I.**. *(Bulgaria*)
8. **FRU** *(Cayman Islands)*
9. **Departamento de Control Trafico Ilicito de Estupefacientes** *(Chile)*
10. **Unidad de Información y Análysis Financiera** *(Colombia)*
11. **CICAD** *(Costa Rica)*
12. **Anti-Money Laundering Department** (*Croatia*)
13. **MOKAS** (*Cyprus*)
14. **Money Laundering Secretariat of the Public Prosecutor for Serious Economic Crime** (*Denmark*)
15. **Unidad de Inteligencia Financiera** *(Dominican Republic)*
16. **Unidad de Investigacion Financiera** *(El Salvador)*
17. **Rahapesu Andmeburoo** *(Estonia)*
18. **Money Laundering Clearing House** (*Finland*)
19. **TRACFIN** (*France*)
20. **Competent Committee** (*Greece*)
21. **Guernsey Joint Police and Customs Financial Investigation Unit** (*Guernsey*)
22. **Joint Financial Intelligence Unit** (*Hong Kong*)
23. **Garda Bureau of Fraud Investigation** *(Ireland)*
24. **Fraud Squad** *(Isle of Man)*
25. **UIC** (*Italy*)
26. **Joint Financial Investigation Unit** (*Jersey*)
27. **KD** (*Latvia*)
28. **EFFI** *(Liechtenstein)*
29. **Anti-Money Laundering Service, Parquet de Luxembourg** (*Luxembourg*)
30. **MOT** (*Netherlands*)

[1] *- free exchange of information for purposes of analysis at FIU level;*
- no dissemination or use of the information for any other purpose without previous consent of the supplying agency;
- protection of the confidentiality of the information.

31. **NZ Police** (*New Zealand*)
32. **SEPRELAD** *(Paraguay)*
33. **DCITE – BIB** *(Portugal)*
34. **ONPCSB** *(Romania)*
35. **OfiS UFP** (*Slovakia*)
36. **Office for Money Laundering Prevention** (*Slovenia*)
37. **SEPBLAC** (*Spain*)
38. **MROS** (*Switzerland*)
39. **Money Laundering Prevention Center** (*Taiwan*)
40. **AIC – AMLO** *(Thailand)*
41. **Financial Crimes Investigation Board** (*Turkey*)
42. **NCIS/ECU** (*United Kingdom*)
43. **FinCEN** (*United States*)

II. <u>Other conditions</u>

1. **MOT Aruba** (*Aruba*)	Treaty
2. **Austrac** (*Australia*)	MOU
3. **FAU** (*Czech Republic)*	Treaty / Strasbourg Convention
4. **UIF** *(Bolivia)*	MOU
5. **Economic Crime Department, National Police** (*Hungary*)	Bilateral Gov. Agreement
6. **Ríkisssaksóknari** *(Iceland)*	Exchange of letters
7. **JAFIO** *(Japan)*	Note Verbale between Gov. + MOU
8. **MLPD** (*Lithuania*)	Treaty/MOU
9. **DGAIO/UIF** (*Mexico*)	Gov. agreement/Treaty
10. **SICCFIN** *(Monaco)*	MOU
11. **MOT NETH. ANT**. *(Netherlands Antilles)*	Treaty
12. **ÖKOKRIM** *(Norway)*	Unclear
13. **Unidad de Analisis Financiero** *(Panama)*	MOU
14. **NFIS** *(Sweden)*	Not specified
15. **UNIF** *(Venezuela)*	MOU