Summary of the discussions
Second Council Working Group Meeting on the proposal for the third directive on money laundering and terrorism financing.

20 July 2004

- **Simplified customer due diligence: article 10**

Upon request from the presidency, the Commission explained that governments and public companies are not included in this article to avoid inconsistencies because of the enhanced due diligence obligations for the politically exposed persons who are likely to be heading governments and/or public companies.

As to the exemption from customer due diligence for e-money transactions regardless of any threshold (Article 10(3)(d)), the Commission explained that, before adopting its position on this, it is awaiting the results of the a survey currently carried out by DG INFSO in which one of the questions relates to the threshold for e-money transactions form the money laundering perspective.

- **Enhanced due diligence: article 11.**

Discussion focused on inter-banks relations. The Commission recalled that the text was in conformity with FATF Recommendations, but that a difference in the treatment of EU banks and third countries banks could be justified if required. Although France was in favour of applying the obligations to the intra-Community relations, there was a large support (at least Germany, Portugal, Spain, Italy, Luxembourg and the Czech Republic expressed) for exempting intra-Commmunity banks relations from the enhanced customer due diligence obligation. As to the possibility to exempt relations with third country banks too in case similar/equivalent rules exist (suggested, inter alia, by the Czech Republic), the Commission expressed opposition as this would create confusion as to what is equivalent: same rules or same application of the rules ?

Slovenia made a remark about the cost of the due diligence obligations for banks, in particular with respect to payable through accounts, as correspondent banks can easily invoice the requesting institution. Italy made a remark concerning terminology in the draft. Austria showed some problems with the request to banks to assess the respondent institution's anti-money laundering controls and would prefer that banks are not obliged to "assess" them. The Commission indicated that we were following the text of the FATF Recommendations.

In relation to Article 11(2), Portugal, supported by Italy, suggested that the text in relations to "shell banks" should copy the one of the FATF Recommendations in order to make it more flexible and easy to apply.

Concerning politically exposed persons (PEPs), it was unclear whether the text is referring to domestic PEPs, non-domestic PEPs or both. Several countries were against covering domestic PEPs. France asked to replace in "ongoing monitoring" in (c) by "surveillance renforcée", as provided for in the FATF Recommendations, and stated that in relations to the establishment of the "source of wealth and source of founds" it will propose new drafting to adapt the text to the non financial professions.

- **Implementing measures (Commitology): articles 37/38.**

In connection to enhanced customer due diligence, UK, Germany and Finland expressed their support for a Committee without powers to adopt implementing measures and therefore limited to exchange best practices etc.

The Commission, supported by Spain, Czech Republic, Slovenia, France, Portugal, Ireland and Italy, explained that commitology was needed to bring clarity to some necessarily vague provisions and therefore help industry, without changing the scope of application of the proposal.

- **Performance by third parties: articles 12 to 16.**

Confronted with the confusion of some MS, the Commission had to explain that, in connection with the responsibility for the customer due diligence conducted, the provisions of Article 12, second paragraph, and Article 16 correspond to two different legal situations and that neither of the two provisions can be deleted.

Concerning the definition of third party in article 13, the Commission highlighted the need to avoid that anybody can be considered a third party without proper control. It suggested that commitology for this definition could be foreseen. Some MS (Germany, France, Italy) indicated that reference to mandatory professional registration was not enough and that supervision was needed (cf. FATF Recommendations).

Concerning mutual recognition (article 15), some MS (Slovenia, France, Portugal) had problems with the mandatory character of the mutual recognition provision. In addition, France and Portugal highlighted that this article was introducing, through the back door, a kind of mutual recognition of national identity card without establishing some common minima criteria on those (i.e. the existence of photographs etc), which was unacceptable. The Commission indicated that it is the result of the activities that counts, not the documents used in the identification and that no harmonisation of those is being done.

Italy also signalled a possible contradiction between the conditions in article 15 (mutual recognition of customer due diligence conducted by a third party) and the due diligence requirements when the customer is not physically present (article 11(1)).

Slovenia requested that third parties are also subject to reporting obligations as long as they are obliged institutions under article 2 (cf. article 13(1)(b)).

- **Supervision: articles 32 and 33.**

Two main issues were discussed. First, the registration/licence system with a previous "fit and proper test" (which already exists in other directives, as highlighted by the Commission) for currency exchange offices, trust/company service providers and casinos. MS agreed on the need to conduct a test prior to registration/licence delivery, although for some MS (Spain, Italy, Slovenia), such test would be difficult to apply given the high number of practitioners or the nature of the registration/licence system. UK suggested not to go beyond FATF Recommendations. Commission offered clarification through commitology.

Secondly, discussion focused on the need to distinguish between credit & financial institutions on the one hand and the other persons on the other hand in connection with

the supervision/monitoring powers of the competent authorities. Some MS (France) suggested that for some professions/persons, FATF Recommendations allow a more flexible regime. This would take into account the fact that there is a very high number of practitioners in some professions, like currency exchange offices. The UK, Finland and Sweden also indicated that the existing text goes beyond FATF Recommendations, in particular regarding the need to have a competent authority for all kind of professions (i.e. no need to have an authority to monitor cash payments etc). Concerning the definition of "competent authority" and after the explanations by the Commission there was a large consensus that absence of definition amounts to flexibility (Germany then suggested to have a reference in the preamble to allow for an interpretation permitting self-regulatory bodies to be competent authority). Other MS (Spain, Slovenia) requested that the authority to conduct on site inspection is mentioned in the text (cf. FATF Recommendations) with relation to credit & financial institutions, Finland was opposed. The Commission replied that it was difficult to harmonise through a directive because in some/most cases the intervention of judges is needed.

At the end, some consensus emerged as to the need to distinguish the supervisory powers in connection to credit & financial institutions (more extended) from those in connection with other persons.

- **Penalties: articles 34-36**

There was no problem with article 34 (already existing in the present directive), but the explicit references to the liability of legal persons in articles 35 and 36, despite its direct inspiration from the Council Framework Decision 2004/68/JHA, were not welcome. Many MS (Austria, Germany, Spain, Belgium, Sweden) contested the right of the Commission to propose this kind of provision in the first pillar and would prefer to treat it in the third pillar. The Council legal service, however, recalled that this issue had been discussed already at the time of the first directive on money laundering and the conclusion was that nothing prevents the legislative from imposing MS to create criminal sanctions (without harmonising them) if needed to ensure the efficacy of the directive.

Other MS (Germany, Austria, Sweden) wanted to modify the language ("sanction" instead of "penalties") to ensure that criminal sanctions are not required. Commission insisted in maintaining existing text ("penalties"), though ensuring that the purpose is not to impose criminal sanctions.

As regards the drafting of article 35 on the liability of legal persons, some MS (Spain, Slovenia) indicated that it is too restrictive and does not serve the purpose of ensuring that legal persons respect the administrative obligations under the directive. In particular, the reference to the "benefit" of the legal person was found confusing. Germany claimed a subsidiarity problem and insisted that we should not be explicit about the liability of legal persons. Article 34 would be enough. The Commission accepted to modify the draft.

Concerning the list of possible penalties in article 36 that MS should apply, despite the opposition to the mandatory list, some MS (Luxembourg, UK, Slovenia etc) expressed that they could accept an indicative one (UK propose to replace "shall" by "may"). On the list itself, France proposed some language to avoid that they look as implying criminal sanctions.

- **Record keeping: articles 26-29.**

On article 26, MS asked that the scope of paragraph (c) should be clarified to avoid confusion with paragraph (b). Commission accepted to do so.

The coverage of foreign branches of credit and financial institutions (article 27) in case of law conflict gave rise to discussion. Spain and Germany suggested that we should ensure that parent companies can exchange information with their branches abroad so that the parent company knows enough. The Commission insisted that in some cases, this would be impossible because of the conflict of laws.

Concerning the mechanism of article 28 (rapid information disclosure), some MS (Slovenia, Cyprus, Italy) asked to extend it to other persons (such as accountants) than credit and financial institutions, while some other MS recalled that the aim of this mechanism is to find (and eventually freeze) assets, so only in the case of credit & financial institutions it is a workable mechanism. The idea floated around to explicitly ask for a database solution (cf. similarly to the central account registry), but in the end, no MS really supported the idea of imposing this obligation, though they were open to an indicative list of means. Commission said it was not opposed to enlarge the scope of the obligation and imposing particular means and not only a result to achieve. Other MS were more restrictive: Germany asked for the records to be kept for 3 years only, instead of 5. Germany also asked for deletion of the obligation to inform about the nature of the business relationship.

In this regard, the reporting obligations of article 19 were recalled, and some (UK) suggested that they cover the concerns expressed in connection with the non financial institutions. Another problem arose in connection with the impossibility in some MS (Portugal) for the lack of competence of the financial intelligence units to require general information.

The consensus was to limit article 28 to the credit & financial institutions on the one hand, and to redraft article 19 on the other hand, to take into consideration the legal problems of some MS.

- **Reporting obligations: articles 17-24.**

MS agreed to have a financial intelligence unit (article 18), though Germany mentioned federalism problems with the concept of a central unit. Some (Slovenia, Cyprus) requested that it shall have the powers to require general information and not just financial information. In that sense, they mentioned that the FATF Recommendations are not limited. The Commission said that the text of the directive is identical to that of the Council Framework Decision 2000/642/JHA.

Italy mentioned that the reference to "proceeds of crime" in article 18 should be modified to take into account terrorist finance. Spain and Slovenia asked for deletion of "to the extent permitted" in order to avoid inconsistencies with article 19 (a non blocking minority was opposed).

On article 19, some delegations (Slovenia) suggested first the deletion of "further" in 19(1)(b) to ensure that the information transmitted is not limited in scope (i.e. that administrative and law enforcement information can also be received). Secondly, it was also suggested (Portugal) that parties should be able to inform not just the financial intelligence units, but also any other competent authority designated by law, without

prejudice of the right of the FIUs to receive the information (Spain). Thirdly, a delegation (Spain) asked for the deletion of "where applicable" in 19(1).

On article 20, Germany requested that tax advisors, auditors and accountants were also added to the list of regulated professions able to have recourse to self regulatory bodies. The Commission indicated that if the problem presented by Portugal in connection with Article 19 is solved, there is no need to modify article 20.

Concerning the suspension of the transactions in article 21, for at least one MS (Denmark) a public approval is needed, in particular in case of terrorism (cf. Security Council resolution on financing of terrorism). Italy signalled the link between article 19 and 21 and the need to modify it in case 19 is modified following the Portuguese suggestions. Germany and Portugal joined the argument and insisted that what we need is something that works. Spain was in favour of limiting the intermediate steps before reaching the FIUs.

The presidency accepted that the organisation varies from MS to MS and that some rely on the FIUs while others rely on different authorities. The Commission accepted to study the issue, but asked for at least a right of FIUs to require the other authorities to take the suspension measures.

Concerning article 24 (protection of employees), no opposition at this stage was signalled.

- **General drafting comments.**

France insisted several times during the meeting that there is a difference of scope between "ensure" (used in the old directive) and "require" (used in the new directive), "require" being for the French less compelling.

- **Portuguese comment on article 2.**

In the margins of the meeting, the Portuguese delegation asked to check the definition of trust/company service providers against the one in the FATF Recommendations.