

Chapter VIII

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Organized crime and other large and highly profitable criminal activities are increasingly being perpetrated on a cross-border basis. This is particularly the case for money-laundering operations, where criminals use the open international financial system to benefit from free movement of capital throughout the world in order to hide the illicit origins of the proceeds of their crime and further their illicit activities. In the context of fighting money laundering from the global standpoint, rapid exchanges of information and effective international cooperation among the various agencies in countries throughout the world have become a prerequisite to success.

International cooperation is needed more and more at all stages (i.e., the financial intelligence gathering, investigative and prosecution stages) of anti money laundering (AML), investigations. At the financial intelligence gathering stage of a money laundering case, for instance, financial intelligence units (FIUs) need to exchange information with their foreign counterparts in order to be able to analyze properly suspicious activity reports and other financial

disclosures. The same can be said for the investigating stage in order for the police to investigate successfully money laundering cases. The ability to exchange rapidly information with their foreign counterparts, without undue obstacles or delay, is increasingly becoming a key feature of any FIU, law enforcement or prosecution authority.

In addition, having in mind that money launderers are always looking for safe havens with lax, ineffective or corrupt AML and combating the financing of terrorism (CFT) regimes, or those with limited international cooperation capabilities, countries will find that having a proper international cooperation framework in place helps them to prevent, detect and prosecute money laundering in their own domestic financial system.

A. Prerequisites for Effective International Cooperation

In order for countries to be able to use the existing channels of international cooperation, they need to meet several prerequisites, including: (1) building a comprehensive and efficient domestic capacity; (2) ratifying and implementing the international conventions regarding money laundering and terrorism financing; and (3) complying with the recommendations of the Financial Action Task Force on Money Laundering (FATF), i.e. *The Forty Recommendations on Money Laundering (The Forty Recommendations)*¹ and the eight *Special Recommendations on Terrorist Financing (Special Recommendations)*,² as well as with other sector-specific international standards.

1. Prerequisite Conditions for International Cooperation: Building a Comprehensive and Efficient Domestic Capacity

Naturally, putting in place all the necessary authorities and providing them with all the necessary powers, responsibilities, staffing and budget so that

1. *The Forty Recommendations* at http://www.fatf-gafi.org/pdf/40Recs-2003_en.pdf. Reprinted in Annex IV of this Reference Guide.

2. *Special Recommendations* at http://www.fatf-gafi.org/pdf/SRecTF_en.pdf. Reprinted in Annex V of this Reference Guide.

they can perform efficiently their duties is a prerequisite for a country to be able to cooperate at the international level with its partners.³

Among others, in order to have an effective AML/CFT framework, a country should have established administrative supervisory authorities to oversee financial institutions in each sector, as well as an FIU—that is, a central authority charged with receiving and analyzing suspicious transaction activities (STA) and other types of mandatory reporting (such as cash transaction reports) for the purpose of fighting money laundering and terrorist financing.

Similarly, on the criminal justice system side, countries should have effective police services with specialized skills and training in money laundering and terrorist financing investigations, as well as a functioning, non corrupt judicial/prosecutorial system.

Properly building and staffing these authorities provide the foundation for an effective and comprehensive framework for fighting money laundering and terrorist financing at both the domestic and international levels.

2. Ratifying and Implementing the International Conventions

All countries should sign and ratify the relevant conventions adopted by the United Nations (UN): In particular, countries should sign and ratify the *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988) (*Vienna Convention*),⁴ the *UN Convention for the Suppression of the Financing of Terrorism* (1999),⁵ and the *UN Convention Against Transnational Organized Crime* (2000) (*Palermo Convention*).⁶ These actions are part of FATF's recommendations.⁷

In addition, countries should sign and ratify the other AML and CFT conventions adopted by organizations in their respective region, such as the Council of Europe's Convention on Laundering, Search, Seizure

3. *The Forty Recommendations*, Rec. 36.

4. The *Vienna Convention*, <http://www.incb.org/e/conv/1988/>.

5. UN Convention for the Suppression of the Financing of Terrorism, <http://www.un.org/law/cod/finterr.htm>.

6. The *Palermo Convention*, <http://www.unodc.org/palermo/convmain.html>.

7. *The Forty Recommendations*, Rec. 1, and Special Recommendations, Spec. Rec. I.

and Confiscation of the Proceeds from Crime (1990) (the Strasbourg Convention).⁸

Countries should implement fully all of the provisions of these conventions in their domestic laws, including those related to the criminalization of money laundering and international cooperation, which will enable them to take part in the mutual legal assistance arrangements provided by these conventions.⁹

3. Complying with the FATF Recommendations and Other Sector Specific International Standards

Countries should comply with the existing international standards for fighting organized crime, money laundering, and combating the financing of terrorism. These standards include the FATF recommendations, which apply to all aspects of a country's laws and regulations against money laundering and the financing of terrorism. It includes as well the Core Principles for Effective Banking Supervision adopted by Basel Committee on Banking Supervision (the Basel Committee), and its the Customer Due Diligence Principles; Other standards have been set by the International Association of Insurance Supervisors (IAIS), the International Organization of Securities Commissions (IOSCO) and the Egmont Group.

Each of these standard setters requires that each country establish international channels of cooperation with their foreign partners. For instance, FATF recommends that "each country should make efforts to improve a spontaneous or upon request international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities."¹⁰ In addition to general principles on international cooperation against money laundering, specific conditions apply to the international cooperation between FIUs, financial supervisory authorities, and between law enforcement and judicial authorities.

8. *The Forty Recommendations*, Rec. 35.

9. *Id.*, at Rec. 36.

10. *Id.*, at Rec. 40.

B. General Principles of International Cooperation Against Money Laundering

According to the relevant international standards, the following general principles should be implemented by countries in order to ensure that effective gateways for the exchange of information and the provision of international cooperation exist at each stage of a money laundering or terrorist financing investigation:

- When an authority in country A has information officially requested by an authority in country B, the requested country-A authority should be in a position to provide the information promptly to the requesting authority in country B.
- When an authority in country A has information it knows would be useful for an authority in country B, the country-A authority should be able to provide the information spontaneously and promptly to the country-B authority.
- When an authority in country A is requested by a country-B authority to obtain information or a document, or to conduct an investigation or an inquiry, or to perform a particular action useful in the context of an analysis, investigation, or prosecution of money laundering, the requested country-A authority should be in a position to perform the requested action (naturally if this action is permitted by rules regulating the performance of its duties at the domestic level).¹¹

This exchange of information with, or provision of assistance and cooperation to, a foreign authority should not be subject to unduly restrictive conditions. It is generally accepted however that the requested authority can subject its assistance to certain conditions. For example, the requested authority could subject its assistance to the following conditions and stipulate that the requesting authority:

- Perform similar functions as the requested authority (specialty principle);
- Describe in its request the purpose and the scope of information to be used, and the information, once transmitted by the requested authori-

11. *Id.*, at Recs. 36 and 40.

ty, should be treated by the requesting authority according to the scope of its request (transparency);

- Is subject to confidentiality provisions similar to those applicable to the requested authority (confidentiality); and
- Is itself in a position to exchange information with the requested authority (reciprocity).

C. International Cooperation Between FIUs

Because money laundering is a cross-border activity, the detection of money laundering operations often depends on information sharing among FIUs in different countries and on their ability to cooperate, efficiently and speedily, with their foreign counterparts. In addition, countries should be aware of the possible consequences of choosing a particular organizational structure when establishing their FIU.

1. The Core Features of FIU International Cooperation

An FIU's ability to cooperate at the international level depends on a principle of mutual recognition among entities performing the same duties and on a foundation of mutual trust.¹² The consequence is that each FIU should possess certain core features in accordance with the Egmont Group definition and act in accordance with the Egmont principles. This would enable the entity to qualify and to be treated as an FIU by other FIUs. These features are described in Chapter VII, the Financial Intelligence Unit.

In addition, each FIU should be authorized by law to share financial information and other relevant financial intelligence with its foreign counterparts. In particular, the FIU should be able to cooperate and exchange information either on its own initiative or upon request. This could be achieved on the basis of reciprocity or formal mutual agreement, such as memorandum of understanding (MOU). Finally, the requested FIU should

12. Revised Statement of Purpose, The Egmont Group (July 123, 20031), http://www.egmont-group.org/statement_of_purpose.pdf.

be authorized to produce, and be capable of producing, promptly any available information or analysis that may be relevant to an investigation by the requesting FIU.

2. Conditioning the FIU's Ability to Cooperate at the International Level

The FIU's ability to cooperate at the international level should not be subject to unduly restrictive conditions (see Part B of this Chapter for legislative restrictions). Adequate safeguards—including confidentiality provisions—should be in place to ensure that information exchanges between FIUs are consistent with fundamental domestic and internationally agreed-on principles of privacy and data protection.¹³ At a minimum, every country should ensure that information received from a foreign FIU is treated with and protected by the same confidentiality provisions that apply to similar information obtained from domestic sources.¹⁴

3. The Relationship Between Different Organizational Models and International Cooperation

An FIU should be authorized to cooperate at the international level with all its foreign counterparts, regardless of their internal and organizational structure. This point is particularly important in light of the diverse organizational structures that exist among FIUs worldwide. Indeed, while most FIUs, as financial intelligence gathering bodies, are attached to administrative authorities, such as ministries of finance, treasury departments, regulatory/supervisory authorities, or other ad hoc administrative structures, other FIUs are attached to police units. Some are even attached to prosecutors' offices. In addition, even if most FIUs share the same responsibilities, there could be some other structural differences among them, as well as certain legal/procedural differences. Therefore, the rules governing the ability of a particular FIU to cooperate to the fullest extent at the international level have to take

13. *The Forty Recommendations*, Rec. 40.

14. Principles for Information Exchange Between financial Intelligence Units for Money Laundering Cases, Annex to Statement of Purpose, The Egmont Group.

this diversity into account. In other words, the rules need to be sufficiently flexible so that FIUs can exchange information with all its counterparts, regardless of their nature or organizational structure.¹⁵

The question for a country is (1) whether there are or should be restrictions on sharing financial information; (2) if so, how much information should be shared; and (3) what type of information should be shared. Thus, policy makers must be aware that choosing a particular organizational model may have direct and/or indirect consequences on the FIU's ability to cooperate at the international level. For instance, creating a purely judiciary-based FIU may hamper international cooperation with non-judicial FIUs. Indeed, in many countries, fundamental or constitutional legal principles do not allow judicial authorities to have access to the same international cooperation or information-exchange channels as the administrative authorities or the police. In certain countries, these legal principles oblige the judicial authorities to cooperate at the international level only in accordance with the judicial cooperation procedures (mutual legal assistance mechanisms), which are governed by treaties and principles that may contain a number of restrictive conditions. Such conditions may inhibit the comprehensive and rapid exchange of information with other FIUs at the intelligence stage.

D. International Cooperation Between Financial Supervisory Authorities

It is widely recognized that financial supervisors (banking insurance and securities) should be authorized to cooperate—spontaneously or upon request—with their foreign counterparts with respect to AML/CFT analysis and regulatory investigations. The general principles of international cooperation, as described above in Part B, apply to these particular information exchange channels. In the supervisory context, this cooperation takes place in each specific sector between the relevant supervisors.

15. *The Forty Recommendations*, Recs. 40.

1. Cooperation Between Banking Supervisors

With respect to information sharing, the Basel Committee has issued additional principles, which apply to all banking supervisors. These principles have been established in the Customer Due Diligence paper, issued by the Basel Committee in October 2001. In particular, branch supervisors of banking groups should not be constrained from sharing consolidated reports pertaining to deposits, “borrower concentration,” or notification of funds under management if the home country supervisor needs this information.¹⁶

The host jurisdiction should permit foreign home-country supervisors or auditors to carry out on-site inspections to verify compliance with home country “Know Your Customer” (KYC) procedures and policies at the local branch level and among subsidiaries of foreign banks. This will require a view of customer files and random sampling of accounts.¹⁷

Foreign home-country supervisors, or auditors, should have access, in the host jurisdiction, to information on individual customer accounts, to the extent necessary. This is to say, to the extent that permits supervisors to properly evaluate the due diligence standards being applied to customer identification, as well as to evaluate the risk management practices in place.¹⁸

Finally, supervisors should have safeguards in place to ensure that information regarding individual accounts obtained through cooperative arrangements is used exclusively for lawful supervisory purposes, and can be protected by the recipient in a satisfactory manner.¹⁹

2. Cooperation Between Securities Supervisors

IOSCO has issued additional principles that apply to all securities supervisors. The securities supervisor should have authority to share both public and nonpublic information with domestic and foreign counterparts.²⁰

16. Basel Committee on Banking Supervision, *Customer Due Diligence, for Banks*, October 2001, para. 68. <http://www.bis.org/publ/bcb85.pdf>.

17. *Id.*

18. *Id.*

19. *Id.*

20. International Organization of Securities Commissioners (IOSCO), Core Principle No. 11. <http://www.iaisweb.org/358coreprinciplesmethodologyoct03revised.pdf>. For further information, see the IOSCO Multilateral MOU (May 2002).

Cooperative mechanisms should be in place at the international level to facilitate the detection and deterrence of cross-border misconduct and assist in the discharge of licensing and supervisory responsibilities. Among these are memoranda of understanding.²¹

International cooperation can provide assistance in: (1) obtaining public or nonpublic information, for example, about a license holder, a listed company, shareholder, beneficial owner, or a person exercising control over a license holder or company; banking, brokerage, or other records; (2) arranging for voluntary cooperation from those who may have information about the subject of an inquiry; (3) procuring information under compulsion—either or both the production of documents and oral testimony or statements; (4) providing information on the regulatory processes in a jurisdiction; or (5) securing court orders, for example, or other urgent court injunctions.²²

Information-sharing arrangements, whether formal or informal, should consider providing assistance in obtaining or providing (1) public or nonpublic information, for example, about a license holder, listed company, shareholder, beneficial owner or a person exercising control over a license holder or company; (2) banking, brokerage or other records; (3) voluntary cooperation from those who may have information about the subject of an inquiry; (4) information under compulsion—either or both the production of documents and oral testimony or statements; and (5) information on the regulatory process in a jurisdiction, or in obtaining court orders, for example, urgent injunctions.²³

3. Cooperation Between Insurance Supervisors

Insurance supervisors have no formal rules governing cooperation with each other for specific AML purposes. This does not mean that they do not share information to the extent permitted by their respective jurisdictions. In any

21. IOSCO, Principles, Sec. 9.4. See also IOSCO Principles, Sec. 11.10, and IOSCO Public Document No. 52, Discussion Paper on International Cooperation in Relation to Cross-Border Activity of Collective Investment Schemes, IOSCO Technical Committee, June 1996.

22. IOSCO Principles, Sec. 9.4; IOSCO, “Report on Issues Raised for Securities and Futures Regulators by Under-regulated and Uncooperative Jurisdictions,” Public Document No. 41, IOSCO Technical Committee, October 1994.

23. IOSCO, Principles, Sec. 9.3.

event, the general principles of international cooperation, as described above, should apply in the insurance sector.

E. International Cooperation Between Law Enforcement and Judicial Authorities

International cooperation among prosecutorial and judicial authorities is vital to any framework that hopes to be comprehensive and efficient against money laundering activities. Almost no prosecution of money laundering can succeed without the support of a foreign jurisdiction at one point of the investigation.²⁴

International cooperation depends upon the signing and ratification of all the relevant conventions agreed by the United Nations and other regional international organizations. Indeed, these conventions often provide the necessary legal basis to exchange information with and undertake actions on behalf of foreign judicial authorities.

The general principles in this area are the same as those described in Part B, above. The unique nature of judicial international cooperation means that a number of additional and/or entirely specific principles have been established in this area. These principles come from the various United Nations conventions, as well as from the FATF recommendations.

It should be emphasized that varying constitutional requirements should be respected and addressed when negotiating arrangements among sovereign judicial authorities. In addition, care has to be taken not to allow suspects to take refuge in the non-extraditable category of “political crimes” in AML/CFT cases, especially when influential persons are involved.

1. Basic Principles

Laws and procedures should encourage and facilitate mutual legal assistance in AML/CFT law-enforcement matters, particularly with regard to the use of compulsory measures. These include the production of records by financial institutions and other persons; the search of persons and premises; the track-

24. *The Forty Recommendations*, Rec. 36.

ing of property and the identification of assets; and the seizure of assets and obtaining evidence for use in AML/CFT investigations and prosecutions and in related actions in foreign jurisdictions.²⁵

Appropriate laws and procedures must provide for effective mutual legal assistance in AML/CFT investigations or proceedings where the requesting jurisdiction is seeking: (1) the production or seizure of information, documents, or evidence (including financial records) from financial institutions, other entities, or natural persons; (2) searches of financial institutions, other entities, and domiciles; (3) the taking of witnesses' statements; and (4) the tracking, identifying, freezing, seizure, and confiscation of assets laundered or intended to be laundered, the proceeds of money laundering and assets used for or intended to be used for the financing of terrorism, as well as the instrumentalities of such offenses, or assets of corresponding value.²⁶

Treaties or other formal arrangements (and informal mechanisms) must be in place to support international cooperation; such as through the use of bilateral or multilateral mutual legal assistance.²⁷ Institutional and other arrangements should permit law enforcement authorities to exchange information with their international counterparts regarding the subjects of investigations; such arrangements should be based on agreements in force and by other mechanisms for cooperation. In addition, national authorities should record the number, source, and purpose of requests for such information exchange, as well as its resolution.

Countries should provide its relevant law enforcement and judicial authorities with adequate financial, human, and technical resources so that they can ensure adequate oversight, conduct investigations, and respond promptly and fully to requests for assistance received from other countries.

25. *Id.*, at Rec. 40.

26. *Id.*, at Rec. 38.

27. *Id.*, at Rec 27.

2. Additional Principles

To the greatest extent possible, differing standards in the requesting and requested jurisdictions concerning the “mental intent” of the offense under domestic law should not affect the ability to provide mutual legal assistance.²⁸

Assistance should be provided in investigations and proceedings where persons have committed both laundering and the predicate offenses, as well as in investigations and proceedings where persons have committed money laundering only.

Authorities should be authorized to conduct cooperative investigations (including controlled delivery of confidential information) along with other countries’ appropriate competent authorities; assurance should be offered that adequate safeguards are in place.²⁹

Arrangements should permit the effective cross-border coordination of seizure and forfeiture, including, where permissible, authorizing the sharing of confiscated assets with other countries when confiscation is directly or indirectly a result of coordinated law enforcement actions.³⁰

Finally, procedures should allow for the extradition of individuals charged with a money-laundering, terror-financing, or related offense or for prosecution of the accused domestically when he or she is not extraditable.³¹

F. Considerations for Fiscal Matter Offenses

In general, countries should ensure that their competent authorities provide the widest possible range of international cooperation to their foreign counterparts. As noted above (Section B), countries are entitled to place certain conditions on their assistance, although they must avoid placing unduly restrictive conditions upon their assistance. A condition that may be applied to mutual legal assistance or extradition is dual criminality, although countries are encouraged to render such help even in the absence of dual criminality.

28. *Id.*, at Rec 36.

29. *Id.*, at Rec 27.

30. *Id.*, at Rec 38.

31. *Id.*, at Rec 39.

Some countries do not criminalize certain fiscal offenses, such as tax evasion, as offenses for money laundering predicate and, thus, may not be able to provide assistance if another country requests it in the context of an enquiry concerning the laundering of the proceeds of a fiscal crime. However, if fiscal matters are only a part of the request and it has a non-fiscal component as well, provided the non-fiscal component includes a money laundering predicate, the requested country should provide assistance.