



The Law Society

**Obligations to report money laundering:
The consent regime**

The Law Society's response to the Home Office Consultation

March 2008

supporting
solicitors

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The Law Society's response to the Home Office Consultation on the Obligations to report money laundering: The Consent Regime

This response has been prepared by the Law Society, the representative body for over 100,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession and lobbies regulators, government and others.

The Law Society has been advised by the Chair and members of the Money Laundering Task Force. We also endorse the comments put forward by the City of London Law Society who are submitting a separate response.

1. Introduction

- 1.1 The Law Society is committed to seeking practical and legislative changes to the consent regime and other aspects of the operation of Part 7 of the Proceeds of Crime Act 2002 ("POCA"), where these are necessary, and to making constructive proposals to achieve such change. We welcome the full involvement of stakeholders such as regulated sector bodies in the development of proposals for change. The response of the Law Society to the consultation questions is set out below, but there are a number of general points about the consent regime and possible changes to it that are dealt with in section two of this document.
- 1.2 The pre-consultation discussions were helpfully initiated by the Serious Organised Crime Agency ("SOCA"). The discussions, involving SOCA, law enforcement and the regulated sector, were lengthy and detailed. Since those discussions, the Home Office has taken some time to develop its own proposals which are contained in this consultation paper. The length of this process is noted not as a criticism, but as demonstrating the difficulty and complexity of the issues and concerns arising from the operation of the consent regime. The proposals now put forward by the Home Office seek to address some of those concerns, in particular those expressed by the banking sector. The Home Office proposes to do so partly by legislative changes and partly by extra-statutory means.
- 1.3 There is substantial goodwill and commitment on the part of the regulated sector (and others in the private sector) to resolving the problems over the consent regime. However, it remains open to question how far the problems identified by the regulated sector can be solved by any of the proposals contained in the consultation paper since adopting any of them would only result in a tweaking of the regime.
- 1.4 The proposals do not address our substantial concern that the reporting defence in sections 327 to 329 and the related consent provisions create a frequent need to submit 'consent reports'¹ that are trivial and/or technical in nature. Such reports do not provide any information of use to law enforcement. This is a particular difficulty for solicitors because of the nature of the work that they conduct. Further, given the fungibility of criminal property, there is frequently the necessity for multiple consent reports relating to a single, non-serious technical offence. The practical problems encountered by solicitors and the consequent waste of resources are well illustrated in the detailed and helpful response from the City of London Law Society ("CLLS").

¹ For convenience we use the term commonly used by SOCA to refer to authorised disclosures accompanied by a request for consent.

- 1.5 The Law Society is disappointed to note that there is no attempt to analyse the problems and look at the source, in the legislation itself, of the continuing difficulties with the consent regime. Nor is there any real acknowledgement in the consultation paper of the substantial practical difficulty of achieving compliance with the legislation by solicitors who are the joint most frequent users of the consent regime. We believe that the consultation paper represents a missed opportunity to address the real problems that underlie the operational difficulties in the consent regime.
- 1.6 We are very concerned by the extent to which the proposals treat the criminal law, particularly serious criminal offences carrying a maximum penalty of 14 years' imprisonment, as an intelligence-gathering mechanism for the benefit of law enforcement. Serious criminal offences should be created and defined for the proper purpose of tackling serious criminal behaviour. We recognise that there are other important criminal intelligence and law enforcement objectives, but believe that these can be better achieved through separate provisions in Part 7 of POCA. This approach would also have the benefit of aligning UK law more closely with the requirements of the 3rd Money Laundering Directive.

2. Background to problems with the consent regime

- 2.1 Part 7 of the Proceeds of Crime Act 2002 was brought into force on 24 February 2003. Since then, the regulated sector has worked with the National Criminal Intelligence Service ("NCIS"), SOCA and law enforcement to try to resolve practical problems that have arisen from implementation of the consent regime and make the whole SARs regime work as well as possible within the terms of the legislation.
- 2.2 As is clear from the Home Office consultation paper itself there remain substantial and deep-seated problems with the consent regime. More than five years on from commencement date, it is now, in the view of the Law Society, the right time for a review of this aspect of the legislation which looks not just at effects, but at causes. We return to this point in sections 5 to 7 inclusive.

3. The Home Office: options on the way forward

- 3.1 Paragraphs 5.1 suggests that: "*In deciding what approach to adopt we need to take account (sic) the criteria which we believe the regime should fulfil.*" It then sets out these criteria in five bullet points. The Law Society agrees that it is important to establish the criteria but is concerned at the approach taken by the Home Office.

- 3.1.1 *Present opportunities to law enforcement both to secure useful early intelligence and to restrain criminal property before it can be dispersed or removed from the jurisdiction etc.*

As noted above, the consultation paper, in a number of places, confuses the regulated sector duty to report with the separate reporting regime arising from a need, in connection with the money laundering offences, to make authorised disclosures and seek consent to transact. It is this latter regime, and in particular the provisions relating to appropriate consent, that is the subject matter of this consultation.

The consultation relates, therefore, to the proper scope and definition of three serious money laundering offences which carry a maximum penalty of 14 years' imprisonment. The criterion in the first bullet point in paragraph 5.1 is not appropriate for this purpose - see paragraph 1.5 above. The law

enforcement objectives contained in it are proper objectives under POCA, but not in this context.

- 3.1.2 *Make it straightforward to prosecute those in the regulated sectors and beyond who collude with criminals, for example by concealing their activities or legal profits.*

This is agreed. We believe that criminal offences should be tightly defined and clearly expressed. We note that this criterion is expressed to include criminal intent in its reference to offences of money laundering and agree that this is appropriate to the objective.

- 3.1.3 *Avoid criminalising normal business activity or trivial or technical fouls by reporters, or creating disincentives to compliance with money laundering requirements, or related collaboration with the authorities.*

The Law Society believes that despite the efforts and goodwill of SOCA and of the Home Office, this desirable objective is still not given due weight and is substantially undermined by the nature and scope of the money laundering offences in Part 7.

- 3.1.4 *Be sufficiently flexible to address the very different needs and problems of different parts of the regulated sector, notably banks on one side and other reporting bodies on the other.*

This criterion would be appropriate to a consideration of duties and powers relating to the regulated sector but does not assist in the context of the consent regime.

- 3.1.5 *Protect the reporters from civil action by their clients in respect of fulfilment of their POCA obligations, including the provision of additional information to the authorities on request.*

This criterion seems to do no more than restate and reaffirm the statutory protection accorded to those who make disclosures under both POCA and the Terrorism Act 2000.

- 3.2 The Law Society believes that the consent regime needs to be reconsidered in the wider context of the SARs regime and should be assessed against the broader aims of anti-money laundering measures as expressed in Financial Action Task Force ("FATF") documents. These are:

- 3.2.1 To prevent criminals from laundering the proceeds of their crimes.
- 3.2.2 To prevent others from deliberately assisting in the laundering of criminal funds.
- 3.2.3 To prevent criminals and money launderers from being able to misuse the legitimate services of banks, accountants, lawyers and others to launder criminal funds.

- 3.3 In the view of the FATF, these anti-money laundering measures, if successfully implemented, should help, firstly, to deprive criminals of their ill-gotten gains and, secondly, to deter others from acquisitive or financial crime and prevent or reduce the incidence of crime.

- 3.4 The FATF notes that, as an additional benefit of anti-money laundering measures, financial transaction reports often provide an audit trail that yields evidence not only against money launderers, but also against the criminals from whose crimes the criminal funds are ultimately derived.

4. Response to the consultation questions

- 4.1 *Question 1: In the light of your experience and the discussion in this paper, do you believe the consent regime as it stands is workable?*

At best, the consent regime is just workable.

The consent regime has been made to work by the efforts of the regulated sector since the introduction of POCA and it has been made more workable since the helpful recommendations of the Lander Report and determined action by SOCA.

The continuing practical problems with the consent regime, however, are inherent in the legislative provisions that create the regime. Insofar as the consent regime has been made to work, it does so at very considerable and disproportionate cost in time and money, particularly cost to the private sector. In practice, most authorised disclosures and requests for consent are made by persons working in the regulated sector, but the relevant provisions apply to everyone subject to the criminal law.

It is unfortunate that the consultation paper itself does not clearly distinguish between the two distinct reporting regimes: the duty under sections 330, 331 and 332 to disclose knowledge or suspicion that another person is engaged in money laundering ('required disclosures') and the need (but not duty) to make a disclosure about criminal property that is generated by the terms of sections 327 to 329 inclusive ('authorised disclosures'). (See, for instance, paragraphs 3.2, 5.6, 5.22, 5.29 and 5.30 of the consultation document.)

- 4.2 *Question 2: Do you believe the additional measures proposed in option 1 can strengthen confidence in the existing regime?*

No.

Paragraph 5.2 does not make clear what, if any, evidence there is for the statement that "...law enforcement and prosecutors have adopted a pragmatic approach to the reporting and consent regimes...". In our view, the attempt to mitigate the defects of the legislation by extra-statutory measures is neither appropriate nor workable. We share with the CLLS their concern about the proposal in Option 1 and agree with their comment in paragraph 2.4 about the need for certainty in the criminal law.

- 4.3 *Question 3: Do you believe Option 2 provides a viable alternative to the current consent regime?*

In the short term, the Pre-Event Notification ("PEN") system may prove of some practical use, but, in the view of the Law Society, it does not provide a viable alternative to the current consent regime.

At best, it addresses one of the symptoms of the disease but not the disease itself. It may provide the means to lessen the problems faced by the banks and may assist others in the regulated sector, but its impact could only be assessed when the detailed provisions of how it would work are known.

- 4.4 *Question 4: Is it your view that it is worth continuing with the current consent regime as an option if the Pre Event Notification system and the new restraint power are introduced?*

Yes, for the foreseeable future at least.

Unless and until there is a more fundamental review of the structure and purpose of the consent provisions in Part 7 of POCA, it is the view of the Law Society that the current consent regime should remain in place. Whatever merits the Pre Event Notification system may have, it is untested, and does not offer the same degree of certainty within a short timescale. It may be that for legal transactions, the consent regime will remain preferable to the PEN system.

- 4.5 *Question 5: Do you have specific views on the new powers suggested in Option 2?*

Yes.

The Law Society is concerned by the proposal to grant to a senior officer the power to make a freezing or restraint order, albeit a temporary one, and that it is proposed that this power should be available generally and not simply as part of the PEN procedure. The Law Society believes that such a power should be subject to judicial control and supervision.

- 4.6 *Question 6: Do you believe Option 3 provides a viable refinement to Options 1 and 2 as regards resolving difficulties around the operation of the consent regime?*

No.

The suggestions made in this part and in particular in paragraphs 5.27 and 5.28 are examples of attempts to tweak the mechanism rather than address the problems of the consent regime. What is suggested in paragraph 5.27 would appear to encourage persons who may be liable to prosecution for an offence of money laundering to deliberately fail to take advantage of the statutory defence in subsection 2(a). Paragraph 5.28 shows how decisions on forming a “reasonable picture” would be fraught with difficulty and with danger for any person considering whether they need to make a report.

The Home Office is right to express concern (in paragraph 5.29) that the approach suggested would create additional uncertainty. The Law Society believes that the proposal would create a degree of uncertainty that is wholly unacceptable and which could not be resolved even by careful drafting.

In any event, the whole of this section is undermined by a confusion between the two different reporting regimes. The problem of multiple reports does not relate to the regulated sector duty to report (see, in particular, paragraphs 5.29 and 5.30). The duty on those in the regulated sector² to report knowledge or suspicion that another person is engaged in money laundering does not generate multiple reports, although on occasions there will be a need - and properly so - for supplementary reports. This can occur when the reporter comes into possession of additional relevant information about the person known or suspected to be engaged in money laundering.

² The duty to make disclosures is placed on the regulated sector by sections 330 and 331. The same duty is also placed on MLROs outside the regulated sector by section 332.

- 4.7 *Question 7: Do you have any alternative approaches which you think might contribute to resolving any problems?*

Yes. See below.

5. An alternative approach: analysis, review and reform of Part 7

- 5.1 The source of the problems with the reporting regime lies in the construction of Part 7 of the Proceeds of Crime Act, in particular the drafting of the money laundering offences and the creation of the two separate and distinct reporting regimes. It is a measure of the extent of these problems that this consultation paper itself confuses the two reporting regimes, and its conclusions are, in part, undermined by this confusion.
- 5.2 The Law Society believes that the only solution to these problems lies in fundamental reform of the statutory provisions. Tinkering with these provisions and attempting to refine the process by extra-statutory arrangements will not resolve the problems.
- 5.3 Tackling the problems of the consent regime is not an impossible task, but it does require a clear understanding of the present legislation and needs to be based on an analysis of the problems, the source of the problems, and the objectives that the legislation ought reasonably to be expected to achieve. Such an analysis would need to include consideration of a number of significant features of UK anti-money laundering law, including those set out below. The Home Office consultation paper does not attempt any such analysis, but the Law Society believes that task should now be undertaken.

6. Analysis and review

- 6.1 A striking feature of UK anti-money laundering law is the lack of criminal intent in the serious offences of money laundering under sections 327 to 329 inclusive. (Compare the FATF Recommendations and EC Directives on this point: see Appendices 1 and 2.)
- 6.2 Because of the lack of intent in the money laundering offences and the breadth of these offences, (derived from the terms of sections 327 to 329 and the terms of sections 340(2) and 340(3)), references to 'money laundering' as defined in Part 7 of POCA are to something wholly different from 'money laundering' as defined in the FATF Recommendations and in the EC Directives. (See Appendix 3). It is essential to bear this in mind when relating the POCA provisions to the FATF Recommendations and to the Directives.
- 6.3 The principal money laundering offences in POCA apply to a wide variety of neutral actions carried out with no criminal intent and where the relevant property may well not in fact be proceeds of crime at all.
- 6.4 The 'consent' defence is, in part, made necessary by the creation of serious criminal offences that are so widely drawn as to criminalise much activity that should not be treated as criminal and should not be subject to intervention by law enforcement. It is important to note how this operates in practice in relation to consent reports. Although proof of the offence in Court may require proof that the property is in fact the benefit of criminal conduct, the way it operates on potential reporters creates a need to invoke the 'consent report' defence on the basis of mere suspicion.

- 6.5 Some of the practical difficulties in relation to consent reports arise from the inclusion in criminal offences that are ostensibly about unlawful dealing in actual criminal property of the deeming provisions in sections 340(6) and (7). These provisions, which are identical to those in section 76(4) and (5) of POCA, are appropriate to confiscation (which is about assessment of the value of benefit and of recoverable amount) but not to the criminal offences of money laundering. There are arguments both of principle and practice for the view that criminal offences of money laundering (i.e. the offence of dealing in some way with property that is the benefit of crime) should not apply to notional property, but only to actual and identifiable property.
- 6.6 In paragraphs 3.1 and 3.2 of the consultation paper, at the start of an overview of the consent regime, the Home Office refers to the operation of the consent regime as one of the unique features of the UK's (anti-money laundering) regime. More specifically, paragraph 3.2 states:
- “What is unusual about the UK system is that the regulated sector is required not only to report before the event suspicious transactions that they become aware of, but to desist from completing these transactions until a specific consent is received. This is the ‘consent regime’ in section 335 of POCA. A person does not commit one of the principal money laundering offences in sections 327-329 of POCA if he makes a disclosure before the ‘prohibited act’ takes place and obtains the appropriate consent. ...”*
- 6.7 The first sentence of paragraph 3.2 is an inaccurate and unfortunately misleading description of the consent regime. It does not apply only to the regulated sector and is not any part of the requirements placed on the regulated sector as such. The provisions of sections 327 to 329 of POCA, including the ‘authorised disclosure’ and ‘appropriate consent’ provisions in the defence under subsection 2(a) of each of the sections, apply to everyone subject to the criminal law, not just to the regulated sector. In addition, there cannot be any duty or requirement on anyone to take advantage of any particular defence to a substantive criminal offence.
- 6.8 The consent regime provides the means by which the law enforcement authorities in the UK can intervene and stop transactions. In this context, it is worth looking more closely than paragraph 3.1 of the consultation document does at the related reporting provisions in both the FATF Recommendations and the 3rd EU Directive. (The relevant parts of both documents are set out in Appendices 1 and 2.) Provisions giving power to the authorities to intervene in and/or freeze suspicious activities are absent from the FATF 40 Recommendations but, as noted in the consultation paper, appeared in the first EU directive and have been retained, as amended, in the 3rd Directive.³ It is important to note that the intervention/prohibition provisions in Article 24 of the 3rd Directive relate to the regulated sector and to intentional money laundering, as defined in Recommendation 1 of the FATF Recommendations.
- 6.9 The terms of Article 24(2) are significant in recognising the practical realities that face those in the regulated sector and in giving a discretion to institutions and persons in the regulated sector to make responsible decisions according to the circumstances of particular cases as to whether or not to refrain from a transaction. The 3rd Money Laundering Directive gives weight to the preventive approach as both separate from and additional to the criminal law approach to implementing anti-money laundering

³ In particular see Article 24 as well as paragraph 30 of the preamble to the 3rd Directive.

measures. (See, for instance, paragraph 1 of the preamble to the Directive and Article 34(1).)

7. Reform of Part 7 of POCA

- 7.1 This section notes some of the statutory provisions that would need to be reconsidered in the course of a review of the anti-money laundering regime and briefly summarises some possible amendments to Part 7:
- 7.1.1 Inclusion of specific intent in sections 327 to 329 inclusive.
 - 7.1.2 Removal of the consent defence from sections 327 to 329 inclusive.
 - 7.1.3 Insertion, in the sections dealing with required disclosures, of provisions relating to law enforcement intervention/prohibition on transactions or consent provisions in line with article 24 of the 3rd Money Laundering Directive.
 - 7.1.4 Amendment of the definition of criminal property to remove pecuniary advantage in sections 340(6) and (7). (Separate consideration would need to be given to specific provisions in relation to the reporting of tax evasion and benefit fraud.)
 - 7.1.5 Amendment and/or extension of the 'adequate consideration' provision in section 329(2)(c) in order to resolve the uncertainty over activity that falls squarely under section 329(2)(c) but may also come within section 327 and/or section 328.

8. Conclusion

- 8.1 The present law on money laundering, as contained in the already much amended Part 7 of POCA, is over-complex. There is an urgent need to simplify the law and to focus it better on anti-money laundering objectives. Nowhere is this more true than in relation to the two separate disclosure regimes created by Part 7 which are, understandably, not well understood by many of those who are affected by them. The relevant law is not properly focussed on the objectives which those in law enforcement and in the private sector share, and it creates disproportionate burdens that fall mainly on those in the regulated sector. The Law Society fears that the present Home Office proposals would only add further complexity and uncertainty to the regime.
- 8.2 The problems with the consent regime can be solved and the reasonable concerns and interests of law enforcement can be met, though in a different way to the present consent regime. This can be done in a way that substantially reduces the burden of unproductive and wasteful effort on the part of the regulated sector, is truly proportionate to the anti-money laundering objectives, and is better aligned with the UK's international obligations.
- 8.3 The Law Society is firmly of the view that the present unsatisfactory anti-money laundering regime can be radically improved to make it:
- Simple
 - Focussed
 - Proportionate

- Effective

The Law Society would be happy to join with the Home Office and other stakeholders to achieve this objective.

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Appendix 1

Extracts from the Financial Action Task Force (“FATF”)

40 Recommendations

Recommendation 1

Countries should criminalise money laundering on the basis of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).

Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches.

Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one year's imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punished by a minimum penalty of more than six months imprisonment.

Whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences [a term defined in the Glossary].

Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically.

Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.

Recommendation 2

Countries should ensure that:

- a) The intent and knowledge required to prove the offence of money laundering is consistent with the standards set forth in the Vienna and Palermo Conventions, including the concept that such mental state may be inferred from objective factual circumstances.
- b) Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such

forms of liability are available. Legal persons should be subject to effective, proportionate and dissuasive sanctions. Such measures should be without prejudice to the criminal liability of individuals.

Recommendation 13

If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit (FIU).

Recommendation 14

Financial institutions, their directors, officers and employees should be:

- a) Protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the FIU, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.
- b) Prohibited by law from disclosing the fact that a suspicious transaction report (STR) or related information is being reported to the FIU.

Appendix 2

Extracts from The Directive 2005/60/Ec of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

Article 1

1. Member States shall ensure that money laundering and terrorist financing are prohibited.
2. For the purposes of this Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:
 - (a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;
 - (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;
 - (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;
 - (d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points.
3. Money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country.
4. For the purposes of this Directive, 'terrorist financing' means the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (1).
5. Knowledge, intent or purpose required as an element of the activities mentioned in paragraphs 2 and 4 may be inferred from objective factual circumstances.

Article 3(4) and (5)

- (4) 'criminal activity' means any kind of criminal involvement in the commission of a serious crime;
- (5) 'serious crimes' means, at least:

- (a) acts as defined in Articles 1 to 4 of Framework Decision 2002/475/JHA;
- (b) any of the offences defined in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- (c) the activities of criminal organisations as defined in Article 1 of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (5);
- (d) fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the Protection of the European Communities' Financial Interests (6);
- (e) corruption;
- (f) all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

Article 21

1. Each Member State shall establish a FIU in order effectively to combat money laundering and terrorist financing.
2. That FIU shall be established as a central national unit. It shall be responsible for receiving (and to the extent permitted, requesting), analysing and disseminating to the competent authorities, disclosures of information which concern potential money laundering, potential terrorist financing or are required by national legislation or regulation. It shall be provided with adequate resources in order to fulfil its tasks.
3. Member States shall ensure that the FIU has access, directly or indirectly, on a timely basis, to the financial, administrative and law enforcement information that it requires to properly fulfil its tasks.

Article 22

1. Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully:
 - (a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted;
 - (b) by promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.
2. The information referred to in paragraph 1 shall be forwarded to the FIU of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated in accordance with the procedures provided for in Article 34 shall normally forward the information.

Article 24

1. Member States shall require the institutions and persons covered by this Directive to refrain from carrying out transactions which they know or suspect to be related to money laundering or terrorist financing until they have completed the necessary action in accordance with Article 22(1)(a). In conformity with the legislation of the Member States, instructions may be given not to carry out the transaction.
2. Where such a transaction is suspected of giving rise to money laundering or terrorist financing and where to refrain in such manner is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money laundering or terrorist financing operation, the institutions and persons concerned shall inform the FIU immediately afterwards.

Appendix 3

A note on the element of intention in offences of money laundering

[Extracted from “The UK Law Against Money Laundering”, Hong Kong Lawyer, May 2005]

In most jurisdictions across the world, money laundering offences have their origins in the Task Force Recommendations and the United Nations Conventions of Vienna and Palermo (UN Conventions).

The 40 recommendations

Recommendation 1 states that countries should criminalise money laundering on the basis of two United Nations Conventions: the Vienna Convention of 1988 and the Palermo Convention of 2000 and that they should apply the crime of money laundering to all serious offences. It requires that ‘... each country should at a minimum include a range of offences within each of the designated categories of offences’.

These 20 designated categories all relate to serious crime. Offences such as:

- Organised crime and racketeering;
- Terrorism, including terrorist financing;
- Trafficking in human beings;
- Drug trafficking; and
- Corruption.

The Task Force clearly envisaged in Recommendation 1 the creation of a new and serious criminal offence that consisted of the laundering of criminal funds derived from other serious criminal offences. Generally, and for good reason, serious offences require knowledge and criminal intent on the part of an offender.

Recommendation 2 states that countries should ensure that ‘the intent and knowledge required to prove the offence of money laundering is consistent with the standards set forth in the Vienna and Palermo UN Conventions ...’.

The Vienna Convention

From the Vienna Convention of 1988 to the Palermo Convention of 2000, the justification for strong measures against money laundering is expressed in terms of serious and organised crime and its harmful effect on society. The criminalisation of money laundering was seen as a significant additional means of combating serious and organised crime.

It is instructive to note the mental element contained in the offences proposed under Article 3 of the Vienna Convention.

The proposed offences of money laundering are framed in terms of intentional dealings with the proceeds of certain serious criminal offences (mainly drug trafficking) by a person who knows that relevant property is derived from such an offence or offences.

In addition:

- (1) the first offence, of converting or transferring such property, is only committed by a person whose actions are done ‘for the purpose of concealing or disguising the illicit origin of the property’.

- (2) the second offence of 'concealment or disguise' contains – implicit within that phrase – the same requirement for a criminal intent.

Both of these offences require knowledge of the criminal origin of the property. They are what might be termed classic money laundering offences, typically committed by a person who may well have had no involvement in the drug trafficking or other predicate offences but who is fully aware of the source of the money or property and who assists serious criminals to conceal or disguise, or otherwise launder, the cash or other proceeds derived from their crimes.

- (3) the third proposed money laundering offence criminalises acquisition, possession or use of property where a person knows, at the time of receipt, the criminal origin of the property.

The Palermo Convention

The criminal offence of money laundering in the Palermo Convention 2000 is, in substance, the same as the offence under art 3 of the Vienna Convention, and the requirement for criminal intent is unaltered. The scope of the money laundering offence, however, is greatly extended. Whereas the money laundering offence under the Vienna Convention related to the laundering of the proceeds of drug trafficking offences, the Palermo Convention applies it to the proceeds of serious crime.

Comparison of the provisions relating to the criminal offence of money laundering in the Task Force 40 Recommendations, the two UN Conventions and the two EU Directives demonstrates a consistent approach to the definition of the offence and the state of mind required for the offence to be committed.