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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE EVALUATION OF ANTI-MONEY LAUNDERING MEASURES
(MONEYVAL)

THIRD ROUND MUTUAL EVALUATION REPORT ON MALTA[1]

ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM

SUMMARY

Memorandum
prepared by the Secretariat
Directorate General of Human Rights and Legal Affairs

[1] Adopted by MONEYVAL at its 24th Plenary meeting (10-14 September 2007).

1. Background information

1 This report provides a summary of the AML/CFT measures in place in Malta as at the date of the third on-site visit from 13 to 19 November 2005, or immediately thereafter. It describes and analyses the measures in place and provides recommendations on how certain aspects of the system could be strengthened. It also sets out Malta's levels of compliance with the FATF 40 + 9 Recommendations (see the attached table of Ratings of Compliance with the FATF Recommendations).

2 The second evaluation of Malta took place in January 2002. In general Malta's crime situation has not changed since the second round. Fraud and drug trafficking are still considered as the main sources of illegal proceeds. In recent years illegal immigration and human trafficking have increased among profit-generating activities.

3 Approximately 95% of account holders in Malta are Maltese residents and 5% non-residents. The team were advised that the majority of business conducted by Maltese financial institutions involves non-complex financial transactions focused on residents of Malta.

4 Since the last evaluation Malta has moved to an all crime approach regarding predicate offences. Separate criminal offences for terrorist financing were introduced in June 2005. Furthermore the Maltese authorities have introduced corporate liability, which should also assist in money laundering investigation and prosecution. Mandatory confiscation orders can now be made in relation to all offences carrying imprisonment for more than one year. Overall, therefore, the legal base to prosecute money laundering is now quite sound but effective implementation could be improved.

5 The results in term of convictions for money laundering at the time of the on-site visit remain disappointing. The lack of convictions for money laundering means that there is currently a lack of jurisprudence to assist prosecutors and investigators on issues of proof.

6 The Malta Financial Services Authority (MFSA) is the single financial regulator for credit and financial institutions. It ensures that the financial sector maintains adequate anti-money laundering controls. Customer due diligence, record keeping and reporting obligations in respect of suspected money laundering for the DNFBP have been introduced since the last evaluation.

7 The Financial Intelligence Analysis Unit (FIAU) has been established since the second round. The FIAU is an administrative FIU. Since the Unit was established there has been an increase in STRs. The majority of STRs are from the financial sector.

2. Legal Systems and Related Institutional Measures

8 On the criminal side, money laundering is still criminalised by a number of laws. The Prevention of Money Laundering Act (PMLA) criminalises money laundering offences in

general, while two earlier ordinances (Dangerous Drugs Ordinance, and Medical and Kindred Professions Ordinance) criminalise drug-related money-laundering.

9 Malta extended in 2005 the money laundering criminal provision under the PMLA to any criminal offence, including the offence of terrorist financing. All the designated categories of offences under the Glossary to the FATF Recommendations are covered. The Prevention of Money Laundering Regulations (PMLR), which supplement the AML Law did not at the time of the on-site visit require reporting of suspicious transactions related to the financing of terrorism[2].

10 Some differences remain in the physical and mental elements of the various money laundering offences. The language in the offence under PMLA closely reflects the international standards. Drug money laundering can be prosecuted on the basis of suspicion as well as knowledge, whereas the "all crimes" money laundering offence requires knowledge that the proceeds are derived from criminal activity. While the extension of the predicate base under the PMLA offence to "all crimes" may make the knowledge standard easier to prove under the general money laundering offence the introduction of the suspicion standard in this offence would assist the prosecutorial effort. Such an amendment could be particularly helpful, given that there are still no plans to introduce the negligence standard in any of the money laundering offences.

11 Unfortunately no final money laundering convictions had been secured since the second evaluation, although the legal basis to prosecute money laundering is quite sound[3]. However, it lacks effective implementation so far in certain respects. It was nonetheless encouraging to note that ten cases were currently before the courts. While one case invokes a foreign predicate, the Maltese authorities may nonetheless wish to consider in future affording more priority to the investigation and prosecution of money laundering based on foreign predicates. In this respect there appeared to be some lack of financial expertise and a hesitation to address this time and cost-intensive field of money laundering.

12 Since the form of criminal liability of legal entities, recently introduced in February 2002 for serious offences including money laundering, appears only to occur upon the conviction of a natural person, criminal sanctions for a criminal activity of a legal person do not apply even in the case of clear evidence. This approach means that the confiscation or the forfeiture of assets cannot occur in such cases. While it may be too early to evaluate the effectiveness of the implementation of this provision, the Maltese authorities are urged to consider whether criminal liability for corporations not based solely on vicarious liability might prove to have greater utility. At the very least, it would be helpful to provide for the confiscation of assets of a legal entity where it is shown to have benefited from money laundering.

[2] The reporting of knowledge or suspicion of TF was introduced in the 2006 revision to the Prevention of Money Laundering Regulations.

[3] The Maltese authorities indicated that a judgment was delivered by the Criminal Court in March 2007 concerning a Maltese national, convicting her for money laundering and falsification of documents, sentencing her to 6 years and ordering the confiscation of all her assets, subject to the defendant's right of application to the civil courts to establish that certain of her assets were not criminally obtained and should not be subject to the confiscation order.

13 Separate criminal offences of terrorist financing were introduced in June 2005. The criminalisation of terrorist financing is largely inspired by the 1999 UN Convention for the Suppression of the Financing of Terrorism and detailed provisions appear reasonably comprehensive. They also provide for confiscating of terrorist funds from natural and legal persons upon conviction.

14 No prosecutions or investigations of the funding of terrorist activities have taken place yet. Given that there is no jurisprudence and the difficulties in relation to courts being prepared to draw inferences from facts and circumstances in money laundering cases, it is unclear how willing the courts will be to draw the necessary inferences in respect of the intentional element of the terrorist financing offence. The Maltese authorities consider that the courts would more readily draw such inferences in these cases.

15 The confiscation regime appears to be legally sound. It is expressed in generally mandatory terms. It now applies to all offences subject to over one year's imprisonment. Property and proceeds are widely defined. The laundered proceeds can be forfeited in autonomous money laundering prosecutions. Value confiscation is provided for and there are now reverse onus provisions. These require the defendant to demonstrate the lawful origin of alleged proceeds. These are all very positive features. There are statutory provisions which make reference to property under the control of third parties to whom property has been transferred, possibly to defeat confiscation or for undervalue. The Maltese authorities advised that decisions would be made on a case by case basis by the courts as to whether control is actually retained by the accused. The Maltese authorities were not able to point to examples in practice of the courts making such decisions in the case of any third party transfers. The Maltese authorities advised the evaluators that they have not come across a situation as yet where the issue of transferring assets to third parties would need to have been raised during confiscation proceedings. The prosecution would seek to establish that the property remained under the control of the accused. The Maltese authorities may wish to consider more detailed provisions covering these issues or at the least clear prosecutorial guidance on this point.

16 The number of confiscation orders for all proceeds generating cases is unknown, and, therefore, there is insufficient data on which the overall effectiveness of confiscation generally in proceeds generating offences can be judged. No confiscations had been achieved at the time of the on-site visit in money laundering cases and the actual number of attachment orders in these cases was unclear[4].

17 Malta has the ability to freeze funds in accordance with S/RES/1373 and under 1267 under European Union legislation. However, the definition of funds in the Regulations does not fully cover the terms in SR.III. They have the legal capacity to act in relation to European Union internals and on behalf of other jurisdictions but it is unclear whether they have done so in the latter case. Malta needs to develop guidance and communication mechanisms with all the non-financial sector and DNFBP and a clear and publicly known procedure for de-listing and unfreezing in appropriate cases in a timely manner.

[4] See footnote 2

18 The Financial Intelligence Analyses Unit (FIAU) was established in 2001 and in 2002 the FIAU became fully operational. The FIAU is an agency under the Ministry of Finance for budgetary purposes but the law recognises its independence from the Ministry in its operations. The FIAU has an important central role in the anti-money laundering system in Malta.

19 Although the FIAU is responsible for receiving suspicious transaction reports on funding of terrorism, according to the Maltese legislation the obliged entities were not (at the time of the assessment) required to report suspicions of financing of terrorism to the FIAU. The Unit has a wide range of responsibilities but focuses on its analytical function. The Unit has started to provide some training to the industry. In order for the Unit to carry out its functions fully it needs additional staff and IT resources. The FIAU has sufficient legal powers. It can access relevant information from subject persons but it does not have any power to impose sanctions when information is not provided. This does not appear, so far, to have had an impact on the Unit's effectiveness. The Unit has the power to prevent a transaction proceeding for 24 hours and this power has been used on 2 occasions. The Maltese authorities may wish to consider whether the 24 hours period is adequate.

20 Since the last evaluation a small unit within the police Economic Crime Division dedicated to the investigation of money laundering reports received from the FIAU and other money laundering cases (and which would investigate terrorist financing as necessary) has been established.

3. Preventive measures – financial institutions

21 The Maltese Prevention of Money Laundering regime is based on three levels. The first is the Prevention of Money Laundering Act, 1994 (PMLA), which has been amended several times since the first round evaluation. The PMLA is supplemented by the Prevention of Money Laundering Regulations, 2003 (PMLR)[5], which further elaborate the preventive obligations under the Maltese anti-laundering regime. These cover obligations required by Law or Regulation under the Methodology. The Regulations are supported at the third level by more detailed Guidance Notes. There are Guidance Notes for credit and financial institutions (issued by the MFSA in 2003), for money or value transfer service operators, for insurance firms, investment firms and trustees. These provide instructions on the steps subject persons should take to comply with the Regulations. In the examiners' view the Guidance notes are enforceable means.

22 The PML Regulations provides for identification requirements in the financial sector and determination of ownership of funds and determination of whether the customer acts on his own behalf.

[5] These Regulations were being revised at the time of the on-site visit and revisions were brought into force in February 2006 by Legal Notice 199 of 2003, as amended by Legal Notice 42 of 2006. The implementation of the amended Regulations was more than 2 months after the on-site visit.

23 Customer identification requirements provide that no business relationship is established or any transaction undertaken between two parties one of whom is a "subject person" unless there is a proper and effective customer identification process in place and implemented. In terms of the identification this implies that financial institutions cannot keep anonymous accounts or other types of accounts where the owner is not identified and known.

24 The concept of beneficial owner is addressed in Regulation 7 of the 2003 Regulations. The Regulations require reasonable measures to be taken to identify the person on whose behalf the applicant for business is acting. This is in addition to identifying the applicant for business. The Regulations furthermore provide measures for the identification of the beneficial owner.

25 Evaluators assess that the implementation of the CDD requirements is effective in the financial sector. Firms have a good understanding of their obligations. The meetings with the industry suggested that these obligations are generally implemented. The industry's understanding and implementation appears to be the result of the focus given to AML by the MFSA.

26 Identification is mandatory before conducting a one-off transaction equal to or in excess of LM 5000 (app. 11 646 Euro).

27 The Regulations require credit and financial institutions to seek satisfactory evidence of identity at the time of establishing a business relationship or carrying out a one-off transaction. It follows from the Regulations that evidence of identity is deemed satisfactory if it establishes that the applicant is the person who he claims to be. Therefore, evidence should be in such a form as to be able to provide undoubted identification should an investigation be undertaken at any further time. There is, however, no clear rule in an act of primary or secondary legislation concerning verification using reliable and independent source documents. The Guidance notes set out the details of how the requirements of the Regulation should be met for personal customers (by reference to a valid identification document with a photograph – the best source being a valid ID card or a passport). Non resident personal accounts can be applied for by post but verification details must also be sought from a reputable credit or financial institution in the applicant's country of residence. The requirements for identification of legal persons are set out in the Regulations and complemented by the Guidance Notes. In summary the institution needs to obtain satisfactory identification of the principal (the company), directors, and all other officers representing the principal.

28 Ongoing due diligence throughout the course of the business relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customers, their business and risk profiles, and where necessary, the sources of funds should be provided for in law or regulations.

29 The general identification limit of MTL 5000 (EURO 11 650) applies to occasional wire transfers. Maltese authorities should introduce in Law or Regulation a limit which is in line with the Interpretative Note to SR.VII.

30 Evaluators assess that the implementation of the CDD requirements is effective in the financial sector. Firms have a good understanding of their obligations. The meetings with the industry suggested that these obligations are generally implemented. The industry's understanding and implementation appears to be the result of the focus given to AML by the MFSA.

31 The Regulations do not currently address a risk based approach. The issue was to be addressed in the amended version of the Regulations. Firms are not permitted currently to use simplified or reduced CDD measures. The Maltese authorities should introduce more guidance on high risk customers and a specific requirement should be implemented for firms to understand the purpose and nature of business relationships.

32 Malta has not implemented adequate AML/CFT measures concerning the establishment of customer relationships with politically exposed persons (PEPs). Malta intends to adopt new provisions in the context of the Third European Union Directive. The AML Law and the Act on Banks are silent on this issue.

33 Correspondent banking relationships were not addressed under the Regulation at the time of the on-site visit. The team understood banks generally have internal policies for correspondent banking relationships. When enacting the Third Directive correspondent banking will be addressed.

34 The evaluators found that identification procedures for third parties and introduced business were in compliance with the FATF Recommendation, as are the rules on record keeping.

35 There is no specific mention in the legislation of the need for firms to pay special attention to business relationships and transactions from jurisdictions that do not, or insufficiently, apply the FATF recommendations. This issue is covered by the Guidance Notes and the examiners were informed that this issue will be covered in the revised Regulations.

36 The Regulations require financial institutions that suspect or have reasons to believe that a transaction could involve money laundering or that a person has or may have been involved in money laundering to report to the FIAU. Specifically, it should clearly be reflected that attempted transactions and terrorist financing should be covered by the reporting obligation. Since the FIAU was established there has been a steady number of STRs received. However, the majority of STRs are from the credit sector and the examiners would have expected to see more reporting from lawyers, accountants, nominees & trustees and casinos.

37 At the time of the on-site visit the mandatory obligations for filing STRs had not been expanded to cover reporting to the FIAU of suspicious transactions linked to terrorism financing. The examiners were informed that the Regulations are due to be amended.[6]

[6] Reporting of transaction suspected to be related to the financing of terrorism is now provided for under the February 2006 revisions for the Prevention of Money Laundering Regulations.

38 There is no specific legally binding prohibition on financial institutions on entering into or continuing correspondent banking relationships with shell banks. Nor is there any obligation on financial institutions to satisfy themselves that a respondent financial institution in a foreign country does not permit its accounts to be used by shell banks.

39 Sanctions which may be proportionate and dissuasive are available for AML breaches and may be imposed by the FIAU and the MFSA, but the effectiveness of the overall sanctioning regime, at present, is questioned.

40 The arrangements for supervision on AML/CFT for all licensed institution are found to be satisfactory. The MFSA keeps detailed statistics covering on site examinations of AML.

41 Money remittance activities must be appropriately licensed by the MFSA in order to provide such services. Being "subject persons" the MVT service providers are bound by the PMLR, including the regulations on identification, record keeping and internal reporting procedures. MVT service providers are supervised by the MFSA.

4. Preventive Measures – Designated Non-Financial Businesses and Professions

42 The coverage of DNFBP is almost complete and in line with both international standards and the EU Directive. It comprises auditors, external accountants, tax advisors, real estate agents, notaries and other independent legal professionals, nominee companies and licensed nominees acting as nominee shareholders or trustees, dealers in precious stones and metals or works of art or similar goods and auctioneers. Additionally, any activity which is associated with an activity mentioned above, has been included. Casinos are also covered by the DNFBP rules. A small number of trust service providers not being a nominee company or licensed nominee, however, were still not covered at the time of the on-site visit. The CDD requirements, so far as they go, are applicable to DNFBP more or less the same as those applicable to financial institutions, since the core obligations for both DNFBP and financial institutions are based on the same Regulations (PMLR, 2003). Guidance notes have not yet been developed. However, the same concerns in the implementation of the core obligations apply equally to obliged financial institutions and DNFBP.

43 The same deficiencies in the implementation of the reporting regime in respect of financial institutions apply equally to DNFBP. The number of reports coming from DNFBP is very small, which appears to indicate a low level of effectiveness of the AML regime in this area so far.

44 The requirement to develop training programmes against money laundering and terrorist financing should apply equally in relation to DNFBP. There are some programmes against money laundering by some DNFBP, particularly casinos and a number of large accounting firms. As far as internet casinos, lawyers, notaries, other independent legal professionals and accountants such programmes do not exist or they are at different stages of development but not in place yet. Programmes and drafts do not cover terrorism financing.

45 The same comments concerning the implementation of the sanction regime apply equally to obliged financial institutions and DNFBP. The level of monitoring given the size of the sector is considered tiny and it is difficult to see how sanctioning for AML breaches would be imposed. No power to sanction for CFT.

46 More resources are needed for monitoring and ensuring compliance by DNFBPs other than casinos.

5. Legal Persons and Arrangements & Non-Profit Organisations

47 Companies and other commercial partnerships are registered with the Registrar of Companies. The Registrar is a public official appointed by the Minister of Finance in terms of the Companies Act 1995. Malta has one national registry of companies and this is situated within the MFSA.

48 Trusts, trustees and other fiduciary relationships are regulated by the Trusts and Trustees Act. Persons providing trustee or other fiduciary services require an authorisation from the MFSA under the said Act and are supervised by the MFSA.

49 All subject persons are required by the Regulations not to enter into a business relationship with any person unless they obtain the identity and identification documentation of the applicant for business. Where an applicant for business appears to be acting on behalf of another the Regulations require the subject persons to obtain the identity and identification documents of principals, settlors, beneficial owners or trust beneficiaries. This is a continuing obligation and applies also where there are changes.

50 Although Maltese authorities advised that NPOs established in Malta are mainly organisations operating on a national level, the adequacy of the laws and regulations in respect of entities that can be abused for financing of terrorism has not been reviewed since SR.VIII was introduced.

51 The evaluators found that Maltese authorities should review and if necessary adopt a clearer legal framework, both for charities and NPOs, which covers registration/licensing and requires financial transparency and reporting at least annually to a designated authority on their activities. Programme verification and direct field audits should also be considered in identified vulnerable parts of the NPO sector. Consideration might usefully be given as to whether and how any relevant private sector watchdogs (if such exist) could be utilised. It would be helpful also to raise awareness of SR VIII within the Police, as the Commissioner is currently the licensing authority.

6. National and International Co-operation

52 The Maltese authorities have undertaken commendable work in bringing together the competent authorities in Malta anti-money laundering framework. The evaluators, however,

urge the Maltese authorities to allocate more human resources to the FIAU in order to carry out its tasks as main AML policy co-ordination body more effectively.

53 The Vienna and Palermo Conventions are broadly implemented. However, the implementation of the Terrorist Financing Convention and the UNC Resolutions are not complete. There are still uncertainties about the effectiveness of implementation in some instances, particularly the scope of the terrorist financing criminalisation and some aspects of the provisional measures regime.

54 While Malta has the ability to freeze funds in accordance with the United Nations Resolutions a comprehensive system is not yet fully in place. In particular they need to develop guidance and communication mechanisms with the non-financial sector and DNFBP. A clear and publicly known procedure for de-listing and unfreezing needs to be developed.

55 The Attorney General's Office has been designated as the central judicial authority in all major agreements dealing with mutual legal assistance. This is also the case for purposes of the receipt and implementation of European Arrest Warrants.

56 The mutual legal assistance framework, both in money laundering and in terrorism financing cases, is comprehensive. It has been effective, so far, and assistance has been granted in a timely manner.

57 The examiners advise that Malta keep more detailed statistics in order to allow them to assess the effectiveness of their system.