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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

SECOND ROUND EVALUATION REPORT[1] ON

MALTA

Memorandum prepared by
the Secretariat
Directorate General I (Legal Affairs)

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[1] Adopted at the 11th Plenary meeting of Committee Moneyval (Strasbourg, 7 - 10 April 2003).

SUMMARY

I. Malta was the 7th Moneyval (PC-R-EV) member State whose anti-money laundering regime was assessed in the framework of the second round of mutual evaluations conducted by the Committee. A team of four examiners, including a colleague from a Financial Action Task Force (FATF) member State, visited Valetta from 14th to 17th January 2002. The purpose of this evaluation visit was to take stock of developments that occurred since the first round evaluation (in September 1998) and to assess the overall effectiveness of the Maltese anti-money laundering system in practice.

II. In general, Malta's crime situation has not changed since the first round, though in recent years illegal immigration and trafficking in human beings have increased among profit-generating activities. There are no locally based organised crime groups in Malta, but Maltese citizens and companies registered in Malta may be involved in the activities of international criminal groups, including money laundering operations. Fraud and drug trafficking are still considered as the main sources of illegal proceeds.

III. While money laundering is still a potential threat, the overall risk for Malta has reduced with the process of phasing out the offshore sector by September 2004 and the reform of the nominee regime. Nevertheless, exposure to risk still remains in the financial sector, considered as the most vulnerable to money laundering, but laundering operations could possibly involve the real estate sector, companies and financial services providers as well.

IV. The central piece of legislation in the Maltese anti-money laundering regime is the Prevention of Money Laundering Act, 1994 (PMLA 1994), which has been amended several times since the first round evaluation, including in December 2001 by the Prevention of Money Laundering (Amendment) Act, No. XXXI of 2001 for the purpose of setting up the Financial Intelligence Analysis Unit (FIAU). The PMLA 1994 is supplemented by the Prevention of Money Laundering Regulations, 1994 (PMLR 1994), which sets forth the preventive obligations under the Maltese anti-money laundering regime, and legally binding Guidance Notes. These elements constitute together a comprehensive and robust legal framework, which is commended by the examiners.

V. On the criminal law side, money laundering is still criminalised by a number of laws: while the PMLA 1994 criminalises money laundering offences in general, based on a wide list of predicate offences, two earlier ordinances (Dangerous Drugs Ordinance, 1939 and Medical and Kindred Professions Ordinance, 1901) criminalise drug-related money laundering. The list of predicate offences under the PMLA 1994 was further expanded in 1999 to include any serious crimes, though these do not cover tax offences. Negligent money laundering has not been criminalised. While this broader list of

predicate offences under the PMLA 1994 is welcome, the examiners recommended that Malta consider harmonising drug and non-drug money laundering offences as well as changing the general definition currently based on a list of predicate offences to an "all-crime" one.

VI. During the period of 1998 – 2001, the Maltese authorities have initiated 6 prosecutions for money laundering, none of which resulted - at the time of the second round visit - in convictions. In this regard, the examiners expressed concern about the potential impact of a preliminary judicial decision, handed down in November 1999 by the Court of Criminal Appeal and quashing the by then only indictment for money laundering for lack of evidence. Bearing in mind that the number of money laundering investigations during this period was over 100, the examiners felt that the criminal justice system was not producing the expected results, despite the high-quality of the legal framework. This was believed to be partly due to the Court's interpretation of evidentiary requirements for prosecutions to succeed, which the examiners recommended for further consideration, possibly through the Prevention of Money Laundering Joint Committee. They also recommended training for all criminal justice personnel on money laundering-related issues and that prosecutors should seek to impress upon judges the autonomous nature of money laundering as well as the need to draw the necessary inferences from the evidence produced.

VII. Controlled delivery and purchase of drugs are provided for under the ordinances and require the prior consent of either the Attorney General's Office or a magistrate. These techniques can be used by the Police in money laundering investigations, but all other types of special investigative powers, such as telephone interception or other surveillance activities, can only be carried out by the Security Services for the Police. A wider use of special investigative techniques by the Police was therefore recommended in order to improve the rate of successful money laundering investigations, and the authorities were also invited to consider how to improve the use of information gathered through the use of such techniques in judicial proceedings. The evaluation team welcomed the setting up of a special unit within the Police to deal with money laundering investigations, in particular as it noted serious difficulties in gathering the necessary evidence for money laundering investigations and a backlog of cases pending or finished without prosecution. It further noted that this situation was expected to change with the setting up of the Financial Intelligence Analysis Unit (FIAU), which since 2002 has taken over from the Police the STR-related intelligence work. The evaluation team has also recommended a more asset-oriented approach in law enforcement, e.g. in relation to financial crime.

VIII. At the time of the second round visit, there was no change in the legal regime of provisional measures and confiscation but the results of the current regime were found to be rather disappointing: while the number of investigations ordered in money laundering cases, including those based upon international

cooperation, has been systematically growing since 1998, no similar tendencies could be observed as to the provisional measures taken. Even if considering the size of Malta, such measures do not seem to be applied frequently enough and neither could any remarkable development be observed in terms of the amount of the property seized or frozen. In addition, as the Maltese confiscation system is conviction-based, there were no confiscations obtained in relation to money laundering cases. Therefore, the examiners welcomed that at the time of the second round visit, Malta was already in the process of amending its Criminal Code that would also bring changes in this field, e.g. through the extension of freezing and forfeiture orders to all offences punishable by imprisonment of at least one year and the amendment of the PMLA 1994 providing for the shifting of the burden of proof on to the accused with respect to proof of the lawful origin of proceeds in the absence of a reasonable explanation by the accused, in relation also to offences of money laundering under the said Act, and providing for the forfeiture of proceeds from legal persons.

IX. With regard to corporate liability, the examiners noted with satisfaction that the Maltese authorities were in the process of amending the Criminal Code to introduce a specific provision enabling the application of criminal penalties (fines up to 500,000 Liri) to corporate entities in relation to serious crimes, and that a similar provision would be made to the PMLA 1994 concerning money laundering.

X. For enhancing international cooperation, Malta has signed a number of bilateral agreements and ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (the "Strasbourg Convention") on 19 November 1999, which came into force in March 2000. In this context, the examiners recommended that the Maltese authorities keep under review the reservations made to this Convention and consider the possibility of revoking them. In general, the examiners noted the positive and helpful attitude of the Maltese authorities in international cooperation, which during the review period involved 22 rogatory letters sent to Malta – all of which have been answered – and the sending of 1 request by Malta. The examiners pointed out the potential limiting effect on international cooperation of Malta's list-based money laundering offence, but noted that that even in cases related to fiscal offences, assistance could be provided under certain circumstances, though this assistance would not enable the application of coercive measures.

XI. On the preventive side, several important changes occurred since the first round, such as the abolition of bearer accounts from 30 June 2000 by decision of the Central Bank of Malta and the issue of a directive by the latter and identical directives by the Malta Stock Exchange (MSE) and the Malta Financial Service Centre (MFSC) in March 2001 for all banks, stockbrokers and other investment and financial institutions to refrain from undertaking transactions in which nominee shareholding is involved unless they obtain the

full disclosure of the beneficial owners. Malta also continued the phasing out of its offshore sector, in accordance with the decision taken in 1994 to close down this sector by 2004. At the time of the visit, around 300 offshore companies remained of the 2600 that had existed.

XII. The examiners also noted that the sectoral Guidance Notes issued by the various regulators under statutory authorisation will be amalgamated into a single comprehensive set, but have not been issued at the time of second round on-site visit.

XIII. The examiners also welcomed the setting up of a single financial regulator, the Malta Financial Services Authority (MFSA), which will license and supervise all activities related to financial services (banking, insurance, investment services and securities) in Malta, while the supervision of compliance with the anti-money laundering legislation will be vested with the new Financial Intelligence Analysis Unit (FIAU), also set up in 2002. The range of regulated entities has not changed since the first round: the PMLR 1994 still cover business related to banking, financial, life assurance, investment and stockbroking activities, casinos, and under certain conditions, auditors, lawyers, notaries and accountants, who are in general not considered as subject persons.

XIV. The examiners noted with satisfaction that in general, since the first round, money laundering has been an area of attention for all supervisors. This was in particular visible in the insurance sector, which was previously criticised for poor supervision. It was however noted that certain sectors still needed further attention, such as investment services and the securities market, despite recent efforts by the MFSC to enhance supervision in these areas.

XV. In the financial sector, compliance with the PMLR 1994 has been in general found satisfactory, but vigilance was recommended with regard to non face-to-face transactions. The examiners also recommended further clarification in the Guidance Notes for the current customer identification procedures under Regulation 5 so that financial institutions understand better that they have to obtain satisfactory evidence of the prospective customer's identity always prior to establishing a business relationship or conducting a transaction.

XVI. The examiners noted that the management of the company Registry was transferred to the MFSA, which was not expressly required to control the authenticity of the information submitted to it.

XVII. As far as the reporting of STRs is concerned, the examiners noted that while there was a modest increase since 1999 (1999: 19; 2000: 28; 2001: 31), the bulk of the STRs was still filed by onshore banks (1999: 68.4%; 2000: 82.1%; 2001: 67.7%), that no STRs were filed by insurance companies or other non-bank financial institutions. The examiners recommended an increased supervisory vigilance when inspecting supervised entities as to the observance

of their reporting obligations, including the documentation on any non-reported case, and that the FIAU keep the under-reporting sectors under close scrutiny and apply the appropriate measures to trigger better reporting behaviour if necessary.

XVIII. In general, the examiners concluded that Malta had made substantial progress since the first round in consolidating its legal framework and preventive regime against money laundering. Though some of these reforms have not yet been fully implemented in practice at the time of the on-site visit, the evaluation team welcomed the commitment of the Maltese Government to continuously upgrade and perfect the overall anti-money laundering regime. Malta now has a robust criminal legislation in place and a particularly well-regulated financial sector. However, certain sectors still need to be brought under the remit of the PMLR 1994 and the new supervisory arrangements have to prove their efficiency in practice. The results of the criminal enforcement at the current stage are disappointing, both in terms of money laundering convictions and confiscations. The police and the judiciary particularly need training to understand the challenges posed by money laundering investigations and prosecutions. With the rapid implementation of the recommendations in this report, the evaluation team believes that Malta will be able to improve the results soon.

I. INTRODUCTION

1. Malta voluntarily agreed to participate in the second round of mutual evaluations to be conducted according to the procedures agreed by Committee PC-R-EV. It was the 7th country to be evaluated in the second round. The examiners were as follows: Mr Andres PALUMAA, Financial Auditor, Banking Supervision Department, Bank of Estonia, Estonia (PC-R-EV financial expert), Dr Lajos KORONA, Prosecutor, Metropolitan Chief Prosecutor's Office, Hungary (PC-R-EV legal expert) and Mr Drago KOS, State Undersecretary, Office of the Government of the Republic of Slovenia for the Prevention of Corruption, Slovenia (PC-R-EV law enforcement expert). The PC-R-EV team was assisted by an associate examiner from a country representing the Financial Action Task Force (FATF), i.e. Mrs Adelaide MORAIS CAVALEIRO, Senior Economist, Bank of Portugal, Portugal (financial expert). The team, accompanied by members of the Secretariat, visited Valetta for four days from 14 to 17 January 2002. Prior to the visit, the examiners had received from the Maltese authorities a comprehensive reply to the mutual evaluation questionnaire and the relevant legislation. In this context, the examiners appreciated that various Maltese legal sources were readily available online through the website of the Maltese Government (www.justice.magnet.mt), including the official English version of the relevant laws.

2. The examination discussions with the Maltese authorities included meetings with officials of the following Government departments: Attorney General's Office, Ministry of Justice. The examiners also met with the representatives of the Malta Financial Services Centre (MFSC), the Gaming Board for Malta (Department of Lotto), the Central Bank of Malta (CBM), the Malta Stock Exchange, the Malta Police (MP), the Customs Department Head Office, the Security Services and the FIU Working Group. In addition, the evaluation team held discussions with representatives of the private sector, including the College of Stock-broking Firms, the Malta Institute of Accountants, the Institute of Financial Services Practitioners (IFSP), the Chamber of Advocates, the Insurance (Life) Association, the Malta Bankers' Association (MBA), the Association of Licensed Foreign Exchange Dealers (ALFED) and Money Laundering Compliance Officers of commercial banks (Bank of Valetta, HSBC, Lombard Bank, APS Bank). Finally, the examiners had the opportunity of meeting with several legal practitioners, including prosecutors from the Attorney General's Office and senior trial judges from the Law Courts.

3. Following the on-site evaluation visit, the PC-R-EV examiners, in consultation with their FATF associate, submitted to the Secretariat their individual observations, from which this report has been prepared. The report, naturally, takes account of the situation as it was at the time of the evaluation, but major changes that occurred in the meantime are indicated in footnotes. The FATF examiner agrees with the content and shares the conclusions of this report.

II. THE MONEY LAUNDERING SITUATION AND ANTI-MONEY LAUNDERING POLICY IN MALTA

A. Developments and Trends in Money Laundering

4. The crime situation has not changed significantly since the first round evaluation. Drug trafficking and fraud are still considered to be the main sources of illegal proceeds to be laundered. However, recent law enforcement information indicates that there have been cases of prostitution, cigarette smuggling and trafficking in human beings (for the purpose of illegal immigration into other countries), which may have also generated significant amounts of illegal proceeds.

5. Drugs are imported into Malta mostly for local consumption. In 1998, there were 98 offences of drug trafficking, which in 1999 increased to 109, in 2000 to 127 and in 2001 decreased to 101. In 2001, there were 25 seizures of heroin (less than 3 kilograms seized) and 13 seizures of cocaine (4,5 kilograms seized). Through a joint police operation (controlled delivery) set up with two other countries, several tons of herbal cannabis were also seized in 2001.

6. In 1998, there were also 679 offences of fraud, which in 1999 decreased to 599 offences, in 2000 increased to 607 offences and in 2001 again decreased to 520 offences. There were 115 offences connected with immigration in 1999 and the number increased to 137 in the year 2000.

7. Taken in the traditional sense of Mafia-type criminal organisations, no large-scale international organised criminal groups have so far been detected in Malta. The most common form of criminal association is the ad-hoc type of association, noticed especially in the field of drug trafficking and illegal migration, which however may have international connections. When Maltese citizens are involved in organised crime activities, this is usually in connection with such activities, including money laundering, taking place abroad and not in their own country. For example, in 1999 and 2000, the police investigated two large-scale smuggling/contraband operations run by foreign criminal groups, which involved Maltese citizens and locally registered companies. These investigations later revealed that the same groups were also involved in drug trafficking abroad and that Maltese companies could have been used for laundering the proceeds.

8. It is believed that money laundering involves currency exchange operations and cash deposits into bank accounts in the placement stage and wire transfers via bank accounts in the layering stage. In the integration phase, proceeds are believed to be invested in immovable property in Malta. In some known cases the laundering operations took place totally outside Malta.

9. Malta had an offshore financial sector which used to consist of 2600 companies registered between 1989 and 1996. In 1994 the Government decided to phase out this sector and at the time of the second evaluation only 300 companies

remained. The existence of a nominee regime prior to the issue of the directives referred to below in March 2001 and the remaining offshore companies represented a risk for money laundering operations as the Maltese system until recently allowed beneficiary owners in offshore and onshore companies to remain totally unknown to the financial institution under certain circumstances. Such companies provided covering for their shareholders who were represented by a nominee, the only person acting on behalf of the company.

10. Many commercial transactions in Malta are still done cash, though the use of non-cash payment methods is increasing. The examiners were informed that large cash-payments for high-value purchases, for example for buying cars or real-estate, are still regarded as normal. Such ease of high-value purchases in cash may also become attractive for small-scale money laundering operations.

B. Present Anti-money Laundering Policy and Priorities

11. There have been some significant changes in Malta's anti-money laundering policy since the first round. The Maltese authorities have made serious efforts to address most of the legal and institutional deficiencies identified in the anti money-laundering regime during the first round evaluation. The following important developments should in particular be mentioned:

- The ratification of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (the "Strasbourg Convention") on 19 November 1999, which came into force in March 2000;

- The extension of the list of predicate offences through Law LN 71/99 of 1999 to include also crimes affecting public trust, crimes related to prostitution, pornographic or obscene material, decency, morals in public, kidnapping or concealment of an infant, theft and fraud, crimes against the Customs Ordinance, against the Official Secrets Ordinance, against the Arms Ordinance, against the Exchange Control Act and offences of forgery or counterfeiting of currency, malversation, bribery, extortion, embezzlement, private interest in adjudication or in the issuing of orders, and the malicious violation of official duties (see the detailed list below);

- The adoption of the Prevention of Money Laundering (Amendment) Act, No. XXXI of 2001 (see Annex 2), establishing the Financial Intelligence Analysis Unit (FIAU) as an independent Government Agency reporting to Parliament through the Ministry of Finance;

- The abolition of bearer accounts from 30 June 2000 by decision of the Central Bank of Malta of 20 December 1999;

- The issue of a joint directive by the Central Bank of Malta, the Malta Stock Exchange and the Malta Financial Service Centre (MFSC) in March 2001 for all banks, stockbrokers and other investment and financial institutions to

refrain from undertaking transactions in which nominee shareholding is involved unless they obtain the full disclosure of the beneficial owners;

12. It is also worth mentioning that Malta has prepared a Bill called the Criminal Code (Amendment) Act 2001 (see excerpts at Annex 3), which was expected[2] to be adopted in the first half of 2002 and which includes some significant changes in the field of money laundering, such as the extension of freezing and forfeiture orders to all offences punishable by imprisonment of at least one year, the extension of the notion of "conspiracy" to all crimes in general punishable by imprisonment, the creation of new definitions of some offences (various forms of criminal association, new forms of corruption, usury, trafficking in persons, etc.), simplified procedures in international legal assistance and a simplified extradition procedure. In addition, this Act will directly amend the 1994 Prevention of Money Laundering Act by :

- shifting the burden of proof on to the accused with respect to proof of the lawful origin of proceeds in the absence of a reasonable explanation by the accused in relation also to offences of money laundering under the said Act;

- creating corporate criminal liability for offences under the said Act and providing for the forfeiture of proceeds from legal persons;

- extending the jurisdiction of the Maltese courts over money laundering offences as they are defined in the new Criminal Code;

- explicitly introducing the technique of controlled delivery of proceeds of crime.

III. DEVELOPMENTS OF THE ANTI-MONEY LAUNDERING SYSTEM

A. Bodies that play a role in combating money laundering

13. There have also been some major developments since the first round in the field of organisational resources engaged in combating money laundering and in the roles and responsibilities of the various governmental and non-governmental organisations having functions in this area. In general, it is worth mentioning the following:

- Malta has established new institutions, such as the FIU and the Gaming Board;

- the Malta Police have established a specialised unit for the fight against money laundering;

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[2] Subsequent to the on-site visit, this Bill was passed by the House of Representatives on 9.04.2002 and entered into force on 1.05.2002.

- the financial regulatory and supervisory responsibilities will be united in a restructured Malta Financial Services Centre as the single regulatory agency which will be renamed as the Malta Financial Services Authority (MFSA).

(i) Financial regulatory and supervisory agencies

Malta Financial Services Centre (MFSC)

14. The MFSC currently regulates insurance and investment services operators, collective investment schemes and remaining offshore companies. In the financial sector, the MFSC issues licenses and may suspend, cancel or restrict licenses in case of wrongdoing, carry out investigations and issue public statements. It carries out on an ongoing basis both on-site and off-site compliance inspections. In fact, as many operators in Malta in this field are branches or agents of international companies, they are also subject to international regulation via their parent companies.

15. However, it is envisaged that the financial regulatory and supervisory functions will be centralised into a single regulator during 2002. The restructured MFSC will assume full regulatory and supervisory responsibilities within the financial sector. The current MFSC Act is to remain in force until September 2004 to deal with off-shore business only. The number of off-shore enterprises was reduced from 2600 to 300 by the end of 2001.

16. Under the new Act – the MFSA Act[3] – establishing the Malta Financial Services Authority (MFSA), the MFSA will become the single financial services regulator, taking over the current regulatory framework of the three regulatory bodies: the Central Bank of Malta (CBM), the MFSC and the Malta Stock Exchange. The objectives of the MFSA are to regulate, monitor and supervise financial services in Malta as well as to promote the general interests and legitimate expectations of consumers of financial services, to monitor the working and enforcement of laws that directly or indirectly affect the financial services consumers in Malta.

17. The types and number of licence holders falling under the current regulatory competence of the MFSC is as follows:

- locally based collective investment schemes (15),
- investment services licence holders (95),
- life insurance principals (5),
- agent for life insurance (1),
- brokers for life insurance (20),
- sub-agents for life insurance products (277),
- nominees (111, 40 of which managed off-shore companies).

[3] Subsequent to the visit, this Act became effective in July 2002

18. Since the first evaluation the MFSC reinforced its activities of on-site supervision of investment services licence holders. It is also implementing now a comprehensive on-site supervision programme with regard to insurance business and nominees.

Central Bank of Malta (CBM)

19. The Central Bank of Malta (CBM) has been responsible to regulate and supervise credit and financial institutions up to 31st December 2001. The regulatory and supervisory responsibility was transferred to the MFSA since January 2002. The CBM has retained responsibility to operate exchange controls, to oversee payment systems and to ensure financial stability. The CBM has been responsible for the supervision and regulation of the banking sector in Malta since the coming in to force of the Banking Act in 1970. In this role, it has issued a number of important regulations, binding on credit and financial institutions, such as those on the removal of bearer accounts or on the identification procedures concerning business conducted through nominees.

20. The bank and non-bank financial institutions falling within the current supervisory competence of the CBM are composed of:

- domestic deposit taking institutions (5) including one mortgage subsidiary (1);
- subsidiaries of foreign banks (5);
- branches of foreign banks (6);
- locally registered/foreign owned banks (2);
- non-bank financial institutions operating in foreign exchange, factoring and lending (13); and
- one representative office (1).

21. The CBM fulfilled its supervisory responsibilities through its Banking Regulation and Supervision Department (BRSD). Among other duties the BRSD also assumed responsibility for monitoring the implementation of anti-money laundering measures in the banking system. On-site examinations as well as evaluations of anti-money laundering measures were carried out according to the Guidance Notes[4] for Credit and Financial Institutions (see Annex 4). Since these responsibilities were assumed by the MFSA as the single regulator just prior to the visit, the Examiners based most of their assessment on the work done by the CBM since the first evaluation.

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[4] Prevention of Money Laundering Guidance Notes for Credit and Financial Institutions issued by the CBM in August 1996 and supplemented in 2001.

22. During 2001 the BRSD has carried out on-site inspections as follows:

- 13 in credit institutions (17 in 2000)
- 5 in financial institutions (4 in 2000)

On-site examinations devoted to issues of prevention of money laundering:

- 6 in credit institutions (10 in 2000)
- 3 in financial institutions (4 in 2000)

Other on-site examinations including money laundering issues:

- 3 in credit institutions (1 in 2000)
- 2 in financial institutions (4 in 2000)

23. There have been no major or specific changes since the first round in the supervisory regime practised by the CBM in supervising the banking sector.

The Malta Stock Exchange

24. The Malta Stock Exchange (MSE), which was set up in 1992, operates on the basis of bye-laws and regulations issued under the authority of the Council of the Malta Stock Exchange in 1996, including all amendments issued up to October 2001. It is a regulator, licensing authority and a financial operator at the same time, though its regulatory and licensing functions will be transferred to the MFSA once it is set up. It is therefore expected that it will stop licensing brokers in 2002. All traders must otherwise be registered with the MSE since trading is done only on line.

(ii) Ministerial or interministerial bodies

The Attorney General's Office (AG)

26. At the end of 2001, the Attorney General's Office started using a special software program for money laundering cases, which includes many useful details for each case of money laundering dealt with by the AG's Office.

Gaming Board for Malta (Department of Lotto)

27. The Gaming Board (GB) has been appointed under the authority of the Ministry of Finance for licensing, regulating and supervising casinos and lotteries. To operate a casino in Malta, the companies have to apply for a concession from the Ministry of Finance and then apply for a licence from the Board's Licensing Commission. The licensing procedure covers the fit and proper test, know-how requirements for management and staff and conditions for the establishment. There are currently three casinos on the island. These are licensed and regulated by the Gaming Board and are subject to the Prevention of Money Laundering

Regulations of 1994. The Gaming Board has so far not issued any specific guidance notes, however it can provide *ad hoc* guidance if necessary.

(iii) Law enforcement agencies

Financial Intelligence Analysis Unit (FIAU)

28. The Financial Intelligence Analysis Unit (FIAU) was formally established as an independent Government Agency reporting to Parliament through the Ministry of Finance by the Prevention of Money Laundering (Amendment) Act No. XXXI of 2001, approved by the House of Representatives on 19 December 2001. At the time of the visit the Governing Board was due to be appointed by the Minister of Finance with the Unit due to become operational following the recruitment of the Director and other permanent staff by the Governing Board[5]. It will be responsible for the collection, collation, processing, analysis and dissemination of information with a view to combating money laundering.

29. The main functions and powers of the Unit will be, among others, to :

- receive reports of transactions suspected of involving money laundering, supplement such reports with additional information, analyse the completed information and draw up an analytical report on the results of such analysis;
- send any such analytical report to the Commissioner of Police for further investigation if there are reasonable grounds for suspecting that the transaction is suspicious and could involve money laundering;
- monitor compliance by subject persons with the obligation to co-operate and to liase with supervisory authorities to ensure such compliance;
- give instruction to any subject person to take steps for facilitating specific money laundering investigations;
- gather statistics and information for analytical purposes with a view to detecting areas of activity which may be vulnerable to money laundering;
- make recommendations, issue guidelines and advise the Minister of Finance on all matters and issues relevant for anti–money laundering policies;
- promote and provide training for personnel employed by any subject person in respect of all matters relevant for the prevention of money laundering;
- upon request or on own initiative, exchange information with any relevant foreign body or any domestic supervisory authority, when that information may be relevant to the processing or analysis of information or to investigations regarding financial transactions related to money laundering and the natural or legal persons involved;

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5 The Governing Board was appointed in February 2002 with the Director and other permanent staff being recruited in October 2002.

- report to the Commissioner of Police any activity which it suspects involves money laundering and of which it may become aware in the course of the discharge of any of its functions;
- delay the execution of a suspicious transaction for 24 hours.

30. The Unit will consist of a Board of a maximum of six members and its Director. Four members of the Board will be appointed by the Minister of Finance from among persons nominated respectively by the Attorney General, the Governor of the Central Bank, the Chairman of MFSA and the Commissioner of Police. Not more than two additional members will be appointed at the request of the Board, all of them for a term of three years. Members of the Board will remain employees of their original institutions and will not be posted at the premises of the FIAU. The Director, as the head of the permanent staff, will be appointed or recruited by the Board. The formal head of the Unit will be the Chairman, appointed by the Prime Minister after consultation with the Minister of Finance from among the members of Board. There will also be a Deputy Chairman, appointed in the same way. There will be a police officer not below the rank of Inspector to act as a liaison officer to liase with the Unit. The permanent staff of the Unit will initially consist of four employees: the Director and three experts with financial, legal and accountancy backgrounds, excluding supporting administrative staff.

31. The Board will determine the policy to be adopted by the Unit and to be implemented by the Director. The Director will not only be responsible for the execution of the policy established by the Board but also for carrying out all other functions related to the operation of the Unit. All the decisions of the Board will have to be adopted in a quorum consisting of the Chairman or Deputy Chairman and not less than two other members. In case of emergency there will have to be a quorum consisting of at least two members of the Board, one of whom must be the Chairman or Deputy Chairman. Any document purporting to be an instrument made or issued by the Unit will have to be signed by the Chairman or Deputy Chairman. The Board will have to meet as often as necessary, but in no case less frequently than ten times in each year.

32. Tipping off by the officials or employees of the Unit will be an offence, liable on conviction to a fine or/and to imprisonment for a maximum of five years.

The Police

33. The Police as an organisation is headed up by the Police Commissioner, who is assisted by 5 assistant Commissioners. One of them supervises the investigation area, including the Drugs department, the Criminal investigation department and the Security branch. The Maltese Police have overall 1800 employees, spread around the country in 10 districts. As in other countries with a common law tradition, the police may also prosecute crimes and bring charges before magistrate's courts.

34. The Economic Crime Squad are responsible to investigate 17 types of economic crimes, including extortion, bribery, corruption, computer crime, fraud, violations of intellectual property rights, foreign exchange violations, forgery of documents, currency counterfeiting and embezzlement. They also investigate money laundering offences.

35. The number of staff of the Economic Crimes Squad has increased since the first round and currently is 28. Thus the Squad consists of :

- Superintendent : 1
- Inspectors : 7
- Sergeants : 6
- Constables : 14

36. A new unit for the fight against money laundering was formally established within the Economic Crimes Squad in November 2001. It consists of four police officers headed by an Inspector who deal only with money laundering cases and are currently undergoing training to acquire the knowledge necessary for their work.

The Security Service

37. Security Services Act No. XVII of 1996, amended by Act No. XVI of 1997, came into force in the year 2000. Under this Act, the Security Service was established as an independent body under the authority of the Minister of Home Affairs. The National Drugs Intelligence Unit was incorporated into the Security Service in the year 2000.

38. Although the Security Service has no special competence in money laundering cases, it is authorised to act in the interests of public safety, in particular for the prevention or detection of serious crime. This is defined as including offences that result in substantial financial gain or are conducted by a large number of persons in pursuit of a common purpose. That also includes possible cases of money laundering.

39. Since the Security Service has no executive/investigative powers, it may only act as an information-source for the police. That also includes carrying out special investigative measures, e.g. intercepting telecommunications, for the police, at their request and after the approval of the Minister of Home Affairs.

Customs

40. The Customs department, much like the Security Service, has no general executive/investigative powers and only assists the police in their investigations, but has limited executive/investigative powers in customs areas and in specific circumstances. If a criminal offence comes to its notice, it is obliged to hand over the case to the police, though in theory it could participate at their request

in controlled delivery operations (it has not happened so far). The Customs department has recently detected significant cases of contraband of cigarettes and alcohol on the basis of foreign intelligence (from other customs authorities and OLAF). If it detects a crime, the Customs department must seize the instruments used for its commission, such as ships or cargos. Following an official notification to the owner, it has the power to forfeit and sell such property.

41. The Customs department is expected to participate in the implementation of the planned currency transaction reporting regime, which is ought to be put in place in 2002. It is expected that the Customs will keep a database of all imports/exports of currency. The database will be made available to the Police authorities and the FIAU.

(iv) The private sector and professional organisations

The Malta Bankers' Association

42. The Malta Bankers' Association represents the interest of credit institutions. It participates in discussions through the Prevention of Money Laundering Joint Committee on issues related to credit institutions. In 2001 it was involved in a number of issues such as the identification procedures on third party accounts/transactions and the complete closure of the existing bearer accounts. The association has taken an active role in discussing the relevant regulatory issues, but has no powers of monitoring compliance.

The Association of Licensed Foreign Exchange Dealers (ALFED)

43. The Association of Licensed Foreign Exchange Dealers (ALFED) represents the interest of its nine members, all licensed by the CBM and involved in foreign exchange. The members of the association follow the recommendations of the CBM as set out in the Guidance Note.

The Insurance (Life) Association

44. The Insurance (Life) Association represents the interests of life assurance companies.

(v) Co-ordination

The Prevention of Money Laundering Joint Committee

45. This Committee is chaired by a representative of the Central Bank and comprises, among others[6], representatives of the financial regulators, law

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[6] The full Committee is made up from representatives of:
- credit institutions operating on the Maltese market;
- the Malta Bankers' Association;

enforcement authorities and the Attorney General's Office. It meets regularly to co-ordinate Malta's anti-laundering policy. After the creation of the FIU, the Joint Committee will continue to ensure its function of coordination but will be reconstituted, headed by the Director of the FIAU, and will cover a wider spectrum of activities subject to anti-money laundering measures. Investment companies and the insurance sector are currently not represented on the Committee.

46. A sub-committee established under the Prevention of Money Laundering Joint Committee is currently in the process of revising all Guidance Notes issued to the financial sector with the objective of amalgamating them into one set[7]. The subcommittee consists of representatives of the Central Bank, the Malta Financial Services Centre, the Malta Stock Exchange and the Malta Bankers' Association. In its review, the subcommittee takes also into consideration the document on Customer Due Diligence for Banks issued by the Basle Committee in October 2001. In the meantime, banks have been asked to consider the document as guidance for the customer identification process.

B. Anti-money Laundering Measures in Place

(i) Legal measures

The Criminal Offence of Money Laundering

47. There a number of laws criminalising money laundering in Malta. Drug money laundering was first criminalised under the Dangerous Drugs Ordinance (Ordinance XXXI of 1939) as well as under the amended Medical and Kindred Professions Ordinance (Ordinance XVII of 1901, hereafter "the Ordinances"). The definition of money laundering provided in these Ordinances is very similar: it covers the use, transfer, possession of, sending or delivering, acquisition, receipt, transportation, transmission, alteration, disposal or any other dealing with money, property or any proceeds derived from the sale or dealing in substances described respectively in the Ordinances. In both cases, the mental element of the offence is either knowledge or suspicion. The applicable maximum penalty under both provisions is life imprisonment. No

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- the Central Bank of Malta;
- the MFSC;
- the Malta Stock Exchange;
- the Association of Licensed Foreign Exchange Dealers;
- the Malta Police;
- the Attorney General's Office.

[7] Subsequent to the on-site visit, the examiners have received a preliminary draft of the consolidated version of the Guidance Notes, which at the time of the on-site visit had not yet been formally issued. Where appropriate, references to this preliminary draft document entitled the "Prevention of Money Laundering Guidance Notes for License Holders Operating in the Financial Sector" will be made in the later parts of this report as the "draft amalgamated Guidance Notes".

change occurred in relation to these original laundering offences since the first round evaluation.

48. Since 1994, the principal legislation, which criminalises money laundering in relation to a broader list of predicate offences, is the Prevention of Money Laundering Act (Act XIX of 1994, hereafter "the 1994 Act", see Annex 5). The definition of money laundering under this legislation closely follows the provisions of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the "Vienna Convention") and as such seems more comprehensive than that provided in the Ordinances. This definition has not changed either since the first round. The applicable maximum penalty in respect of this money laundering offence is 14 years imprisonment and/or a fine up to 1 million Lm[8].

49. As seen above, since the first round evaluation (in 1999), the Maltese Government has extended the list of predicate offences under this legislation and included therein, for example, fraud offences. The inclusion of fraud offences was expressly recommended in the first round report. The full and updated list of the predicate offences under the 1994 Act is as follows (the new offences are in italics):

a First Schedule

- drug crimes listed under article 3 (1) (a) of the Vienna Convention

a Second Schedule

- An offence against the law relating to dangerous drugs or narcotics
- Illegal dealing in arms and armaments
- Procuring, or trafficking in men, women or young persons for immoral purposes
- Dealing in slaves
- Piracy
- Illegal arrest, detention or confinement of a person
- Wilful homicide
- Wilful grievous bodily harm
- Blackmail
- *Any crime affecting public trust*[9]
- *Any of the crimes under articles 197, 204, 205, 208 and 210 of the Criminal Code*[10]

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8 1 US Dollar is approximately 0,37 Maltese Liri (Lm)

9 Title V of the Criminal Code – forgery of papers, stamps, seals or other public or private writings.

10 The offences under sections 197, 204 and 205 of the Criminal Code consist in offences of prostitution, the offences under sections 208 and 209 of the Criminal Code relate to

- *Theft*[11]
- *Any crime of fraud under the Criminal Code*[12]
- *Any crime against the Customs Ordinance*
- *Any crime against the Official Secrets Act*
- *Any crime against the Arms Ordinance*
- *Any crime against the Central Bank of Malta Act*[13]
- *Any crime against the Exchange Control Act*
- *Any crime which constitutes a "corrupt practice" as defined in the Permanent Commission Against Corruption Act*[14]

50. As far as the physical and mental elements are concerned in the provisions defining the offence of money laundering in the 1994 Act, there have not been any changes since the first round evaluation. Thus, money laundering is still punishable only if committed wilfully, though intent can be inferred from objective circumstances. Negligent money laundering is still not a criminal offence in Malta.

51. The money laundering offence explicitly covers extraterritorial predicate offences, both under the Ordinances (sections 22 (1C)ii and 120A (1D)ii) and the 1994 Act (section 2 (1), definition of "criminal activity"). In such cases, dual criminality applies because the predicate offence must constitute one of the conduct listed in the Ordinances or in the Act and such conduct must constitute a criminal offence in Malta.

52. As far as the proof of the predicate offence is concerned, the 1994 Act makes explicit provision for the possibility of convicting someone for money laundering "in the absence of a judicial finding of guilt in respect of the underlying criminal activity" on the basis of circumstantial or other evidence. There is no similar provision in the Ordinances, but the Maltese authorities explained that there is nothing in the definition of the money laundering offence under the Ordinances which requires a preceding conviction for the predicate offence and therefore it would be sufficient to prove that the predicate offence has been committed even if the author is not identifiable.

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pornographic or obscene articles and offences against decency or morals in public. The offence under section 210 is the offence of kidnapping or concealment of an infant.

11 Title IX sub-title I of the Criminal Code – Various sorts of theft and aggravated thefts (including robbery etc.)

12 Sub-title III ibid. – A large variety of criminal activities characterized by fraud (for example: misappropriation, barratry, commercial or industrial fraud, fraudulent access to telecommunications systems, violation of copyright etc.)

13 These essentially concern offences of forgery or counterfeiting of currency/coinage.

14 The offences amounting to "corrupt practices" are offences of malversation, bribery, extortion, embezzlement, private interest in adjudications or in the issuing of orders etc, malicious violation of official duties.

53. Self-laundering is also explicitly covered by the 1994 Act (section 2 (2) a). The Ordinances do not deal with this offence, but the Maltese authorities explained that there is nothing in the definition of the money laundering offence under the Ordinances which excludes the laundering of one's own proceeds.

Corporate Criminal Liability

54. During the first round evaluation, the examiners found that there was no corporate criminal liability as such in Maltese law, whether for money laundering or for criminal offences generally, though there was a "half-way house" solution found in section 3 (2) of the 1994 Act whereby a director, manager or secretary of a company could be prosecuted for a money laundering offence.[15] Subject to what is said in paragraph 55 below, this situation has not changed at the time of the second round on-site visit. The above provision of the 1994 Act, which focuses on the vicarious responsibility of directors rather than that of the legal entity itself, has also remained the same.

55. That said, the examiners were advised by the Maltese authorities that a Bill, which at the time of the on-site visit had already been published and submitted to the House of Representatives[16], would amend the Criminal Code in this area and introduce a specific provision on corporate criminal liability. Under the amendment, a new subsection (4) would also be added to section 3 of the 1994 Act, which would provide as follows:

> *"Where the person found guilty of an offence of money laundering under this Act is an officer of a body corporate as is referred to in article 121D of the Criminal Code or is a person having a power of representation or having such authority as is referred to in that article and the offence of which that person was found guilty was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this Act be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine (multa) of not less than 500 liri and not more than 500,000 liri."*

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15 "Where an offence against the provisions of this Act is committed by a body of persons, whether corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence."

16 Subsequent to the second round on-site visit, this Bill was adopted on 9.04.2002 and entered into force on 1.05.2002.

56. Another subsection, also to be inserted by the amending legislation, would introduce a new provision for the forfeiture of proceeds as an additional penalty to the punishment to which the physical person was sentenced or to the penalty which could apply to the legal entity under the previous subsection.

57. The amending Bill will also bring about similar changes in the Criminal Code, where corporate criminal liability will be introduced not in general terms but with respect to certain serious crimes (promotion of a criminal organisation, trafficking in human beings, crimes against the administration of justice and other public administrations).

58. The examiners note that no similar changes are planned to be introduced in the two Ordinances with regard to corporate liability[17].

Provisional Measures and Confiscation

59. The relevant provisions in Maltese law on provisional measures and confiscation have not changed up to the time of the second round on-site visit.

60. It is recalled that the 1994 Act provides for the freezing of assets and property during the investigation and prosecution stages and for the confiscation of assets upon the finding of guilt. If there are indications of money laundering in financial investigations requiring the disclosure of information protected by banking or other professional secrecy, the Attorney General can apply in writing to the Criminal Court for the issue of an investigation order. Together with or independently from an investigation order the Attorney General may also apply to the Court for the issue of an attachment order whereby any assets, movable or immovable, may be temporarily attached or frozen. The two Ordinances also contain provisions on investigation orders and attachment orders along the lines of the 1994 Act. In addition, when the Attorney General receives a request for the confiscation of assets, it may apply to the Civil Court to take precautionary measures, i.e. prohibiting injunctions (immovable) or seizure orders (movables). The assets seized or otherwise secured will be under the control of a custodian appointed by the Court to that effect. In civil proceedings, it is the Court which will hold the seized items.

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17 The Maltese authorities explained that for them it does not appear useful to add corporate criminal liability under the Ordinances as well since in such a case the terms of imprisonment (which goes up to life imprisonment) are of no use against a corporate entity as the more severe pecuniary punishment is laid down in the Prevention of Money Laundering Act, which provides for a potential maximum fine of a million Maltese liri, and the maximum fine under the Ordinances is fifty thousand liri. Therefore, it is the Act which provides for the more appropriate punishment in corporate money laundering

61. Under the current legal regime, criminal confiscation is in general conviction-based in Malta. However, in contrast to criminal confiscation, the MFSC has the authority to forfeit property through an administrative procedure which does not require any conviction. It has recently used this power and successfully forfeited USD 1,5 million.

62. In the area of money laundering, specific provisions apply to confiscation: in addition to a term of imprisonment or fine, upon conviction, any property of or in the possession or under the control of the convicted person shall, unless proved to the contrary, be deemed to be derived from money laundering and liable to confiscation or forfeiture by the court. The convicted person (or any other interested person) may bring an action before the civil court to show that any or all of the property forfeited is not profits or proceeds from the predicate offence or is otherwise involved in the offence of money laundering, nor property acquired or obtained, directly or indirectly, by or through any such profits or proceeds. The two ordinances provide for the same confiscation and forfeiture procedures as in the 1994 Act. It is therefore clear that the current confiscation and provisional measures regime can be used for money laundering offences, whether under the 1994 Act or under the Ordinances.

63. The second round evaluation team was also advised that the Bill[18] referred to earlier will also introduce certain changes in the field of provisional measures and confiscation. The new provisions amending the Criminal Code will extend the existing freezing and forfeiture orders to all offences carrying a maximum punishment of more than one year imprisonment (new sections 23A and 23B), as well as to offences committed outside Malta which would meet the same threshold if committed in Malta (new sections 435 B – 435 D). The Bill will also bring about substantial changes in the field of confiscation and will modify not only the Criminal Code but also other laws relevant within the anti-money laundering framework, especially the 1994 Act. The main changes contemplated are the following:

- provide for the forfeiture of proceeds received by a body corporate or of substitute assets;
- for all offences of money laundering create a legal presumption that all assets in the possession or under the control of any person or body corporate held criminally liable are derived from money laundering unless the contrary is proved;
- shift the burden of proof on to the accused with respect to the lawful origin of proceeds in the absence of a reasonable explanation by the accused as to the lawful provenance of the proceeds.

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[18] Subsequent to the on-site visit, this Bill was enacted on 9.04.2002 as Act III. of 2002

64. The new Bill will also provide for the direct applicability of certain provisions of the Dangerous Drugs Ordinance under the 1994 Act, thus promoting a harmonisation process between the relevant laws in this field, particularly by extending the effect of the usually more severe measures of the said Ordinance. Such direct applicability will be achieved by inserting some connecting clauses into the 1994 Act, such as the amended section 3(3) that refers to section 22(1C)(b) of the said Ordinance. The amended text of section 3(3) reads as follows: "*In proceedings for an offence of money laundering under this Act the provisions of article 22(1C)(b) of the Dangerous Drugs Ordinance shall mutatis mutandis apply.*"

65. Section 22(1C)(b) of the Ordinance provides that *"In proceedings for an offence under paragraph (a) of this sub-article, where the prosecution produces evidence that no reasonable explanation was given by the person charged or accused showing that such money, property or proceeds was not money, property or proceeds described in the said paragraph, the burden of showing the lawful origin of such money, property or proceeds shall lie with the person charged or accused."* As a result, a uniform and more concrete legal presumption will be in place for all offences of money laundering that all assets in the possession or under the control of any person or body corporate held criminally liable are derived from money laundering, unless the contrary is proved. This provision will thus allow the reversal of the burden of the proof onto the defendant as a matter of course.

66. As a consequence of the introduction of corporate criminal liability, the Bill provides also for the forfeiture of proceeds received by a body corporate, in the new article 3(4) of the 1994 Act. The apparent discrepancy between the 1994 Act and the Ordinances in this area was already mentioned above[19].

67. As for the question of value confiscation it has to be emphasised that while under the previous system all assets of the convicted person were deemed to be derived from money laundering, the new subsection 3(5) of the 1994 Act explicitly provides for the possibility of forfeiting property the value of which corresponds to the value of the proceeds:

> *"(5) Without prejudice to the provisions of article 23 of the Criminal Code the court shall, in addition to any punishment to which the person convicted of an offence of money laundering under this Act may be sentenced and in addition to any penalty to which a body corporate may become liable under the provisions of sub-article (4), order the forfeiture in favour of the Government of the proceeds or of such property the value of which corresponds to the value of such proceeds whether such proceeds have been received by the person found guilty or by the body corporate referred to in the said sub-article (4) and any property of or in the possession or under the control of any person found guilty as aforesaid or of a body corporate as mentioned in this sub-article shall, unless proved to*

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[19] See footnote 18.

the contrary, be deemed to be derived from the offence of money laundering and liable to confiscation or forfeiture by the court."

68. As for the application of the above subsections, a more precise definition of "proceeds" was introduced by the adoption of the corresponding definition, which the Dangerous Drugs Ordinance had already contained in article 24D, thus also including income and benefits from illegal property: "*'proceeds' means any economic advantage and any property derived from or obtained, directly or indirectly, through criminal activity and includes any income or other benefit derived from such property".*

Special investigative powers and techniques

69. Controlled delivery and purchase of drugs are provided for by Section 30 B of the Dangerous Drugs Ordinance, 121 C of the Medical and Kindred Professions Ordinance and require the prior consent of either the Attorney General's Office or a magistrate. They are done by the Police. All other types of special investigative powers, such as telephone interception or other surveillance activities, are carried out by the Security Services, which used to be part of the Police structure until November 2001. The Minister of Home Affairs can order the Head of the Security Services to implement a special investigative technique, though the Security Services are not a law enforcement body as such. Entry into or interference with property and interception of communications in cases of serious crime are regulated by Section 6 of the Security Service Act, requiring again the prior consent of the Minister of the Home Affairs. Undercover operations are not specifically regulated, but appear to be possible. In view of the small number of inhabitants of Malta, undercover agents are not commonly used.

70. Only the Security Service can perform special investigative measures for the police. In the last two years, the Security Service has conducted two operations in the money laundering field on behalf of the police. However, recent judicial experience shows that the intelligence thus collected is not often directly used in evidence before the Courts, though the law does not exclude it explicitly. As it was brought to the attention of the examiners, in a recent case[20] the Court

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20 The Maltese authorities explained that at the time of the second round evaluation the Court had already accepted as admissible the fruits of interception and that the fact of having to prove the authenticity of the tapes had nothing to do with the admissibility of the tapes. The tapes were declared admissible subject to prove of their authenticity. Even in the case mentioned by the examiners the tapes were admitted in evidence. The issue concerning article 18 is a separate issue. The defence was seeking from the court the production of those persons who had actually carried out the interception and the prosecution insisted that this was not permissible under the said article 18. Of course, in order to reduce the need of exposing Security Service personnel in court proceedings which could prejudice the performance of their duties in the future since the nature of their work requires them to keep as low a profile as possible, it is desirable that as far as possible the police should seek to transform intelligence information into direct evidence independently from the information supplied to them by the Security Services. But this is an issue relating to a wise and prudent use of the information supplied but does not impinge on the

required that the authenticity of the tapes be shown in a case which involved telephone interception despite the fact that Section 18 of the Security Service Act does not allow any questions or other actions by the courts towards disclosure of performers of investigative measures or any similar details. This judicial decision was not positively responded to by the authorities as it would have required that an agent of the Security Services gives a testimony about the way the interception was conducted, which in turn could have resulted in disclosing his identity. The current *status quo* which seems to be accepted by all authorities is that the police should produce regular evidence out of the intelligence collected by the Security Services if they intend to use in a case that goes to trial so that the results of special investigative measures are not presented in court in the form of direct evidence.

71. The measure of controlled delivery of the cash or other proceeds of crime is currently not explicitly allowed, though in practice this does not seem to pose insurmountable problems and the Maltese authorities insisted that its use was lawful. As mentioned earlier, the Bill, which was due to amend the Criminal Code[21] with regard to money laundering-related issues will also explicitly authorise the technique of controlled delivery of cash.

(ii) International Cooperation

International conventions generally

72. Since the first evaluation, Malta ratified the Strasbourg Convention on 19 November 1999. The Convention came into force in March 2000. Reservations were entered to articles 2, 6, 14, 21, 25 and 32 of the Convention but they are currently being reviewed. Malta has also signed - among the first countries - the UN Convention Against Transnational Organised Crime.

Mutual Legal Assistance

73. The Maltese authorities claim that they have always been able to extend mutual legal assistance to other countries even in the absence of a treaty, though under the conditions and to the extent possible under domestic law. This means that in general terms only the measures available under Maltese law can be applied in response to requests from foreign jurisdictions. If the latter involve the use of coercive powers, the Attorney General must be involved and the test of dual criminality is routinely applied.

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admissibility of the results of special investigative measures as evidence in court in the form of direct evidence.

[21] Subsequent to the on-site visit, this Bill was passed by the House of Representatives on 9.04. 2002.

74. Since 1998 Malta has received 22 requests for mutual legal assistance related to money laundering (including supplemental requests for assistance) and all of them have been answered. During the same period of time, Malta submitted only one such request to another jurisdiction. The information requested from Malta is generally intended for investigation purposes. The requested assistance generally involves the tracing of assets, identification of individuals and their associates or business relations. When only investigative measures by the police are requested, which are usually obtained through the issue of investigation orders by the Criminal Court upon application by the Attorney General, requests are executed within an average of 1-3 months. When the request involves summoning of witnesses, its execution takes a longer time.

75. In money laundering cases in which the laundering offence in the requesting country has a wider scope than in Malta, only certain forms of mutual legal assistance are possible (investigation, hearing of witnesses), but for others, especially coercive measures, the act of money laundering committed abroad must amount to an act of money laundering in Malta. Since in such cases the dual criminality test applies, formal international assistance is only possible if the offences committed abroad involve any act which is a predicate offence under Maltese law.

76. In case of fiscal offences, where coercive measures are requested, Malta would normally deny the provision of assistance, since this type of conduct is not criminalised as such by Malta. However, the Maltese authorities asserted that if the conduct could also qualify as fraud or a financial crime under Maltese law, they would offer assistance. Where coercive measures are not required Malta is able to extend legal assistance even in respect of fiscal offences.

Bilateral treaties

77. Furthermore, Malta has signed bilateral agreements with a number of countries, especially those belonging to the Mediterranean region[22]. In general terms, these agreements are designed to provide for the exchange of information and co-operation in fighting international organised crime, including money laundering.

78. Three of the above mentioned agreements were made available to the evaluation team during the on-site visit. This sample indicates a certain degree of diversity among these documents, not only in the detail of their provisions but also in what importance they seem to attach to the phenomenon of money laundering. Two of the examined agreements are about international police co-operation in general, with no special relevance to money laundering (i.e. treating it as one among many, similarly serious criminal activities). The third one, concluded with Italy, is more elaborated and aims expressly at the fight against money laundering. In the absence of precise statistical figures on their application, the

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22 These countries are: Cyprus, Egypt, France, Greece, Hungary, Israel, Italy, Libya, Slovakia, Sweden, Tunisia and Turkey. All these agreements entered into force after the first round evaluation.

evaluation team could not form a judgment about the use and effectiveness of these bilateral agreements. It would however seem that these treaties responded to a real demand of bilateral co-operation and that the third treaty mentioned above brought some new solutions with regard to assistance in fiscal matters, so far considered problematic in Maltese mutual assistance practice: under this text, if a person is judicially investigated for money laundering and also for fiscal offences, Malta will be able to provide assistance regarding the fiscal offence as well.

International co-operation with regard to freezing and confiscation

79. As for international mutual legal assistance concerning confiscation and provisional measures, there have been no changes in this area since the first round and neither was any problem indicated about the implementation and applicability of Article 13 (1) of the Strasbourg Convention. This provision is implemented in such a way that upon receipt of a request for the enforcement of a foreign confiscation order, which may emanate from a criminal or civil court, the Attorney General may apply to the Civil Court demanding enforcement of the order. A copy of the foreign confiscation order and all documents in support thereof are filed with the application, which in turn is served on the person whose property the foreign confiscation order seeks to confiscate. This person is entitled to respond. The court is required to set the application for hearing without delay and in any case no later than thirty days from the date of the filing of the application. The court shall not order the enforcement of the foreign confiscation order if the respondent had not been notified of the proceedings which led to the making of the foreign order, if the order was obtained by fraud, if it contains any disposition contrary to the public policy or the public law in force in Malta or if the order contains contradictory dispositions. In order to secure the property the confiscation of which had been ordered pending the proceedings in Malta, the Attorney General may obtain the issue of certain interlocutory orders and injunctions provided for in the civil law of Malta.

80. No requests have so far been made to Malta for the execution of foreign confiscation orders, nor any requests for the seizure or freezing of assets. At the time of the second round visit, only one request dealing with tracing of proceeds has been sent abroad by the Attorney General - in May 2000 - and it has not yet been responded to.

Asset-sharing

81. No change occurred with regard to the legal basis of asset-sharing since the first round. Malta has already experienced one case of sharing a total of USD 1,5 million in connection with the laundering of proceeds from commercial piracy offences committed outside Malta.

Exchange of Information between Police Authorities

82. The Maltese Police have received the following number of requests dealing with money laundering from foreign police forces since 1998 :

Year	1998	1999	2000	2001
Number of requests	32	19	43	43

83. Except three cases, which are still pending, the Maltese Police have answered all requests. These cases all concern the taking of investigative measures which do not involve use of coercive power. The requests are usually submitted through diplomatic channels or national Interpol offices (NCBs).

84. If the Maltese Police are requested to disclose information to a foreign authority for the purpose of its investigation, they have to obtain the prior authorisation of the Attorney General, but only when the assistance requested is governed by a treaty in respect of which the Attorney General has been designated as the Central Authority in terms of the treaty or administratively. For example, the Police do not require such authorisation to co-operate with a foreign police force, or with Interpol, or with other outside authorities although the Police do tend to seek the advice of the Attorney General in case of doubt. Information on companies is provided free of charge, but if the request concerns immovable property, the requesting foreign authority must pay a fee. This exchange of information is likely to improve with the setting up of the FIU, which will have ready access to these data-bases and correspond with foreign FIUs directly or through other channels (e.g. the EGMONT secure Web).

FIU to FIU co-operation

85. At the time of the on-site visit, the FIU was not yet operational and could not exchange information with other FIUs.

86. The bilateral mutual assistance agreement referred to above between Italy and Malta also enables the exchange of information on STRs, though it does not mention FIU-to-FIU cooperation. It is therefore assumed that such information exchange would be done through police or judicial channels[23].

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[23] The Maltese authorities explained that while the agreement does not expressly mention FIU to FIU co-operation, the agreement also foresees the designation of the competent contact points for the purposes of the agreement and therefore there is nothing which precludes the designation of the respective FIU's for the purpose if so deemed opportune. At the time the FIU's could not be referred to explicitly because Malta did not yet have an operational FIU. Moreover, co-operation would be through direct contact between the designated contact points.

Exchange of Information between Supervisory Authorities

87. Under the applicable financial services legislation the Maltese supervisory authorities may exchange information with foreign regulatory/supervisory agencies. There have indeed been a few occasions in which the Maltese authorities exchanged general information which could have been required by their counterparts to counter money laundering. Such exchanges occurred in two or three instances, where the Central Bank received requests for mostly regulatory information from the supervisory authorities of foreign banks operating in Malta concerning possible suspicions of money laundering. The MFSC similarly has had very few requests from foreign competent authorities. These requests have been fulfilled.

88. In specific cases, where requests emanate from an authority other than a foreign regulatory authority, although to date such a case has never arisen, the request would be directed to the Attorney General's Office for consideration and necessary action.

(iii) Measures Concerning the Financial Sector

Financial Sector - in general

89. The composition of the financial sector has been described above. Within the financial sector, the Maltese banking sector is dominated by private institutions and is characterised by a fairly high level of stability. There are large share of capital and reserve inflows from foreign banks to their Maltese subsidiaries with very limited commercial activities in domestic economy. Interest rates were fully liberalised in 2000 but significant quantitative controls on transactions on the financial account have remained. In January 2001, restrictions on lending between residents and non-residents were removed.

90. The Maltese Government has made substantial progress in the early stages of the privatisation programme through the privatisation of the banking sector. However, no major privatisation deal has taken place in 2000 or in the first nine months of 2001. Unexpected delays have held back the privatisation of Malta Freeport, the management of the public Lotto and the remaining government stake in Bank of Valletta.

91. As from January 2002, exchange control was liberalised, so that restrictions on capital transactions were further relaxed or removed. However, at the time of the on-site visit the Government was also planning to introduce an obligation to declare the import or export of foreign currency notes in excess of Lm 5,000.

92. Although cash still plays an important role in some areas of the economy and in particular transactions, the use of alternative payment systems has increased. These systems include the use of cheques, debit and credit cards, direct debit, etc.. The Banking Act is currently being amended to introduce electronic money issuance.

The non-financial sector

93. Two new casinos were opened since the first round so that now there are 3 casinos in total which operate on the island. These new casinos are owned by commercial groups, which also involve foreign shareholders, and were licensed for 10 years by the Gaming Board after a "fit and proper" checking procedure (regarding shareholders owning over 5 % of shares) and obtaining a concession-grant from the Ministry of Finance. They are also supervised by the Gaming Board.

94. There are 13 exchange offices in Malta, all member of the Association of Licensed Foreign Exchange Dealers (ALFED). No change occurred in this sector since the first round.

The supervisory structure

95. Section 2 of the Prevention of money Laundering Regulations, 1994 refers to several supervisory authorities which are required to report suspicious transactions identified in the course of their activities. These include the MFSC, the CBM, the Registrar of Companies, the Malta Stock Exchange and the Gaming Board. The main regulatory and supervisory responsibilities in the financial sector are therefore split up between the MFSC, the CBM and the Malta Stock Exchange. These responsibilities are planned to be merged within the new Malta Financial Services Authority (MFSA) in 2002, which will become the single authority to license, monitor and supervise all activities related to financial services.

96. The planned merger of the general regulatory and supervisory responsibilities will also concern the anti-money laundering supervision. The MFSA will become the main financial services regulator, covering banking, insurance, investment services and securities, and the FIAU will be the main anti-money laundering supervisor. The MFSA will also run the public registration system for companies. A Memorandum of Understanding will be signed by the Central Bank and the MFSA, not only to manage interim issues, but also to govern the exchange of information in the future. In principle, there will remain a sectoral approach to regulation and supervision, although in a more co-ordinated way.

97. As mentioned hereafter, auditors, accountants and lawyers are also indirectly subject to the 1994 Regulations under certain conditions, but currently are not subject to anti-money laundering supervision because they are not subject persons under the Regulations.

The regulatory framework

98. In accordance with section 9 of the Prevention of Money Laundering Act, 1994, the measures concerning the financial sector were further elaborated in the Prevention of Money Laundering Regulations, 1994 (see Annex 6), issued by the Minister of Finance, and the various guidelines and guidance notes issued by the supervisory authorities expanding and developing issues covered by the Regulations. The Regulations aim to provide rules and obligations for subject persons carrying out relevant financial business to prevent them from being used for money laundering purposes and, unlike the 1994 Act itself, were specifically addressed to the financial sector. This is done by the application of the Regulations to all those carrying out "relevant financial business".

99. There are various guidance notes, issued under statutory authorisation[24] and therefore legally binding, which aim at enhancing compliance with the obligations under the Prevention of Money Laundering Regulations in the financial sector. They are planned to be amalgamated into a single set of guidelines by the Prevention of Money Laundering Joint Committee in 2002. Some differences between the sectorial guidance notes will continue to exist, to the extent that they apply to different activities.

100. Section 2 of the 1994 Regulations sets out the financial activities covered:

- any business of banking carried on by a person or institution who is for the time being authorised, or required to be authorised, under the provisions of the Banking Act;
- any activity carried on by a person or institution who is for the time being authorised, or required to be authorised, under the provisions of the Financial Institutions Act, 1994;
- life assurance business carried on by a person or institution who is for the time being authorised, or required to be authorised, under the provisions of the Insurance Business Act;
- investment business carried on by a person or institution licensed, or required to be licensed, under the provisions of the Investment Services Act, 1994;
- a collective investment scheme licensed, or required to be licensed, under the provisions of the Investment Services Act, 1994;
- any activity carried on by a person pursuant to a valid stockbroker's licence issued under the provisions of the Malta Stock Exchange Act;

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[24] E.g. the Banking Act, Cap. 371, the Financial Institutions Act, Cap. 376, the Investment Services Act, Cap. 370, the Insurance Business Act, Cap. 403, the Malta Financial Services Centre Act, Cap. 330, and the Malta Stock Exchange Act, Cap. 345

- any activity which is associated with a business falling within the scope of the paragraphs above.

101. Auditors are also subject to the 1994 Regulations, but only when acting as auditors for a person that is itself subject to the Regulations, for example auditors of financial institutions. Accountants, lawyers and notaries are equally subject to the Regulations to the extent required by Regulation 7 in connection with the declarations they are required to make to persons carrying on financial business.

102. The Regulations require all relevant institutions to establish and maintain basic procedures for customer identification, record-keeping, internal controls and communication, recognition and reporting of suspicious transactions, and staff training. They require subject persons to establish and to maintain specific systems and procedures both for one-off transactions and for on-going business relationships to guard against their business and the financial system from being abused for the purposes of money laundering. In essence these procedures are designed to achieve two objectives: first to ensure that, through appropriate identification procedures, apart from the underlying know-your-client concept, if a customer comes under investigation in the future the institution can provide its part of the audit trail; second, to enable suspicious customers and transactions to be recognised as such and reported to the authorities.

103. Each of the subjects addressed by the Regulations is also covered by separate sections of the various guidance notes as indicated above.

104. The 1994 Regulations were revised in 2000. The main amendments include: exchange of information between reporting officers belonging to the same financial group; definition of a reputable jurisdiction; clarification of a one-off transaction for record-keeping purposes.

Identification requirements

105. Persons carrying out financial business in Malta are bound by Regulation 3 to maintain appropriate identification procedures. Such procedures are described by Regulation 5 and include a general obligation of production by the applicant for business of satisfactory evidence of his/her identity. Such evidence should satisfy the institution that it is reasonably capable of establishing that the applicant is the person who he/she claims to be. The Regulations provide also for the obligation to identify both applicant for business and beneficiary where these are not the same person. Identification is mandatory before establishing a business relationship or conducting a one-off transaction equal to or is in excess of Lm5,000 or a series of structured transactions below the minimum Lm5,000 and meant to avoid enquiries for identification. In addition, identification procedures are mandatory when there is a suspicion concerning the source or provenance of funds.

106. The draft amalgamated Guidance Notes contain two separate sections on identification procedures, one general [Section D (i)] applicable to all obliged institutions and a specific one [Section D (ii)] destined to credit and financial institutions. In the general section, paragraph 2 of the document offers further guidance as to the procedures to be followed in obtaining satisfactory evidence of identification, the best source of which would be a valid identity card, passport or other document bearing a photograph and other personal details/information of the applicant.

107. Under paragraph 6 of Section D (i), the text further clarifies that licence holders may be faced with a situation where the introducer is a foreign institution which is not a Licence Holder. Licence Holders are cautioned not to carry out business if they cannot ascertain that the introducer:

- is based or incorporated in a country with anti-money laundering legislation largely complying with internationally accepted standards such as the FATF Forty Recommendations particularly in respect of identification procedures and record keeping;

- operates a financial services business that is properly regulated (i.e. the level of regulation is equal or higher than that exercised in Malta); and

- operates under a rigorous anti-money laundering policy which is equivalent or of a higher standard than anti-money laundering measures in force in Malta.

108. Under Regulation 8, a certain number of exemptions are allowed from the identification procedures. Exemptions of identification appear to apply for example to customers of institutions subject to equivalent preventive laundering measures: they would apply if the introducer provides the name of the applicant and gives assurance that evidence as to the identity of the applicant has been obtained. The section concerning investment and insurance businesses (Section D (iii), paragraph 15) of the draft amalgamated Guidance Notes repeats the same principle of reliance on another regulated person concerning the identification of customers, if the regulated person is incorporated in a reputable jurisdiction[25]. Moreover, under the section that deals with identification procedures for licensed stockbrokers (Section D (iv), paragraph 4), it is established that "where it is reasonable for stock exchange business to be effected relative to payment through the mail, telephone or any electronic means capable of transferring funds, and details in respect of such payments to be likewise given, the normal identification procedures can be waived as long as such payment is debited from a bank account held in the applicant's name".

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[25] Defined in accordance with a set of criteria - see the revised 1994 Regulations, Section 2.

However, all these exemptions do not apply when the transaction is considered suspicious.

109. The requirement to "know-your-customer" also includes knowledge of the relevant business profile. This requirement is regarded as a continuous duty for persons carrying out financial business to monitor the business and personal (identification) process of their customers. Hence, they are required to re-identify their customers where there are doubts as to whether there has been a change in beneficial ownership. This aspect is particularly applicable in the case of third party accounts.

110. "Jumbo accounts" (omnibus custodian accounts) are allowed in Malta, there being generally a written undertaking whereby (i) if any customer acquires more than 5% of a bank's equity his/her identity should be disclosed, and (ii) if the banking regulator has any suspicion, the identity of the "sub-accounts" holders should be disclosed.

Electronic Banking and Financial Activities

111. As a consequence of these regulations on customer identification, currently it is not possible in Malta to open accounts and operate it in banks through the Internet without face-to-face contact. Any Licence Holder offering any type of financial service on the Internet should implement procedures to identify the customer and should ensure that there is sufficient communication to confirm the personal identity and address. They must take care to ensure that the same supporting documentation is obtained for Internet customers as for other postal/telephone customers. The e-banking facilities offered by banks to their existing customers are therefore rather limited and aim at providing convenience to customers in limited transactions. These mainly relate to account enquiries, transfers to specified accounts and, possibly, the ordering of foreign currency for travelling purposes. In the latter case the order is placed because there is still a face-to-face contact for delivery purposes. There are no banks that operate solely on the Internet.

Bearer accounts

112. In order to comply with international requirements, at the end of 1999 the CBM issued instructions to credit institutions to prohibit[26] the opening of any new bearer accounts and the acceptance of deposits for the credit of existing accounts. Credit institutions were also required to take measures either to close or transfer the existing ones to named accounts by 30 June 2000. All withdrawals are subject to the identification procedures as laid down in the Prevention of Money Laundering Regulations, 1994. However, in order to control better withdrawals from these accounts , the Central Bank of Malta has

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26 As from 20 December 1999.

directed the banks in July 2000 to put procedures in place whereby any requests for withdrawal equal to or in excess of Lm 5,000 shall be first referred to the Money Laundering Reporting Officer for his/her considerations with full details of identification of the claimant. The MLRO will then decide to authorise the withdrawal, or if there are grounds for suspicion, file an STR.

113. The number of bearer accounts still in existence at the time of the on-site visit was approximately 2000 at a value of about Lm 2,2 million (USD 5,2 million) i.e. an average of Lm 1,100 (USD 2,640) per account. It is expected that banks would continue to draw public attention to the closing down of these accounts after their maturity. Furthermore, the following procedures were put in place: term deposits were not renewed upon maturity; the claimant has to be identified in any withdrawals equal to or in excess of Lm 5,000 before the funds are released; the track of all withdrawals and identifications has to be kept and recorded.

Identification requirements concerning business conducted by nominees

114. The 1994 Regulations (Regulation 7) require the identification of both the applicant for business and also his/her principal where the applicant acts as agent. The Regulations require the taking of "reasonable measures" for the purposes of establishing the identity of the principal. Regulation 7(3) lays down that, in any particular case, in order to determine what constitutes reasonable measures, one must have regard to the best practice which is normally followed in the relevant field of business (i.e., in the case of a stockbroker, the business of a stockbroker) and which is applicable to the circumstance of the particular case. The draft amalgamated Guidance Notes clarify [Section D (iv)] that it suffices that the License Holder (the person providing the financial service) obtains from the client (i.e., the agent) a written declaration satisfactorily disclosing the identity of his principal.

115. Where there are fiduciary arrangements, the intermediary is required to provide a number of declarations to the License Holder. Nominees in particular are required to disclose the identity of their beneficiaries. In March 2001, the financial regulators clarified the identification procedures (see Annex 7) in respect of business carried out with corporate customers having nominee shareholders or when conducting business with nominees acting on behalf of beneficial owners. The basic principle is that credit and financial institutions must require the disclosure of identification data when opening new accounts or undertaking business through nominees so as to be able to assess the risk involved. The identification data in such cases should include the names of the ultimate beneficiaries, their nationality, date of birth as well as other information which the credit or financial institution deems necessary. All disclosures in relation to beneficiaries of accounts opened or transactions undertaken through nominees need to be retained in a separate database, meant only for internal use and subject to professional secrecy unless waived by law.

116. Under the financial regulators' instruction, the nominees will be responsible for all disclosures provided, which will be ensured through the signing of a declaration. Credit and financial institutions should not accept business unless the nominee provides the required disclosures and takes responsibility for their veracity by the signing of a declaration.

117. However, Regulation 7 (1) provides for exemptions from identification procedures where a transaction is carried out with a third party pursuant to an introduction by another person who in turn is bound by the Regulation or similar requirements. In such cases the introducer has to provide the name of the third party and an assurance that he/she (the introducer) has obtained and held evidence of identity of the third party. The draft amalgamated Guidance Notes provide an example for this situation: paragraph 73 of the Section [Section D (iii)] concerning investment and insurance businesses refers to "instances where the applicant for business is an advocate, notary, certified public accountant or certified public accountant and auditor, established and practising in Malta who is acting on behalf of an undisclosed principal". In such cases, Licence Holders should obtain from these persons a signed declaration in accordance with Regulation 7(5) to the effect, inter alia, that the advocate, etc. has obtained satisfactory evidence of identity of the principal and maintains a record of such identity.

Record keeping

118. Regulation 9 provides for the procedures to be followed by an obliged institution in retaining records of identification and transactions for a minimum period of five years after completing the transaction or terminating the business relationship. The draft amalgamated Guidance Notes provide useful details of the kinds of introductions, copies of documents and references to be retained for the 5-year period and they do so in respect of the each category of obliged institution. These record keeping rules apply to any business relationship or to one-off transactions and require that evidence of the person's identity is obtained in accordance with Regulations 5 or 7 and a record is made thereof.

119. The record must indicate the nature of the evidence and comprise a copy of the evidence of identity or provide such information authenticated by the applicant for business as would enable a copy of the evidence of identity to be obtained. In case where it is not reasonably practicable to comply with these requirements, Regulation 9 provides that the identification records must contain sufficient information to enable the details as to a person's identity contained in the relevant evidence to be re-obtained.

120. Section E (paragraphs 17 and 18) of the draft amalgamated Guidance Notes recalls that record-keeping rules apply to wire-transfers as well and may require additional customer identification measures in this area. In particular, it refers to the SWIFT system, which has directed all users of its system to ensure that when sending messages for customer transfers, the fields for the ordering and

beneficiary customers must be completed with either their respective names and addresses or their respective account numbers. The draft Guidance Notes emphasise the importance of including this information for all credit transfers made by electronic means, both domestic and international, regardless of the payment message system used. The records of electronic payments and messages must be treated in the same way as any other records in support of entries in the account and kept for a minimum of five years.

121. The Maltese legislation provides for full access to all information by financial regulatory authorities. Once an STR is filed, the law enforcement authorities will have access to all information relating to that STR. In all other instances, the law enforcement authorities need an investigation order in terms of Section 4 of the 1994 Prevention of Money Laundering Act. The judicial authorities can have access to all information through court orders. In the law establishing the FIU, provision has been made to give direct full access to all information required by the FIU.

Internal reporting

122. Regulations 10 and 11 oblige bank and non-bank financial institutions to establish procedures for internal reporting and eventual disclosure to the competent authority. The draft amalgamated Guidance Notes also define the role of the Money Laundering Reporting Officer, who should be of sufficient seniority in the institution. They also establish feedback procedures both within the financial institution, to keep all those involved in an internal report informed of developments, as well as setting out that the enforcement authority should provide information on request. The Money Laundering Reporting Officer is responsible for ensuring that internal reporting procedures are established.

123. The draft amalgamated Guidance Notes further clarify that the Money Laundering Reporting Officer is required to determine whether the information or other matters contained in an internal suspicious transaction report he/she has received do give rise to a knowledge or suspicion that a customer is engaged in money laundering. He/she is not expected to investigate the transaction other than internally or to determine whether the funds are the proceeds of criminal activity. The use of a standard format in the internal reporting of suspicious transactions is required. The MLRO should ensure that such internal reporting format contains all the necessary information. It is recognised that reporting in a standard format to the enforcement authority would be of assistance in an investigation process and in determining possible connections to any separate reporting. The use of this report does not however stop a license holder from disclosing any other information or from submitting backing documents which, in his/her opinion, are of relevance to the suspected transaction.

Guidance

124. As mentioned earlier, the Prevention of Money Laundering Joint Committee has been entrusted with revising all Guidance Notes issued to the financial sector with the objective of amalgamating them into one set. This substantial work has virtually been completed at the time of the second round visit, though at this stage the draft has not been published yet. Given its importance and the fact that its has been made available to the examiners, reference was made to this text in this report where appropriate.

125. If the draft amalgamated Guidance Notes are put aside, it appears that since the last evaluation there have been no particular changes to the various Guidance Notes in force in the financial sector, nor was any new one issued in the non-financial sector. That said, as it has already been mentioned above, in March 2001 the financial supervisory authorities (MFSC, MSE and CBM) issued a joint instruction to all persons carrying on financial business on "the Identification of beneficial owners where business is carried out through nominees". This notice requires institutions not to undertake any business through nominees unless there is full disclosure of the beneficial owners.

Training

126. Regulations 3(1)(b) and 3(1)(c) require Licence Holders to take appropriate measures to make their employees aware of : (i) the policies and procedures put in place to prevent money laundering including those for identification, record keeping and internal reporting; (ii) the legal requirements of both the Prevention of Money Laundering Act and the 1994 regulations; (iii) their personal obligations under the legislation; and their personal liability for failure to report information or suspicions in accordance with internal procedures. Moreover, the Regulations require that the obliged institutions provide relevant employees with on-going training on the recognition and handling of suspicious transactions.

127. The draft amalgamated Guidance Notes clarify that the nature of training to be given is at the discretion and responsibility of each institution. However, the institution is at minimum expected to establish a programme of continuous training for staff such as senior management, including directors, branch/office managers and other senior officers, front office or counter staff, new employees at all levels and other staff in general. Special arrangements should be made to ensure that the Money Laundering Reporting Officer is fully familiar with the prevention of money laundering legislation, the reporting and feedback arrangements with the law enforcement officers and the typology of money laundering.

128. Accordingly, the financial supervisory authorities have since the first round continued with their efforts to provide training both internally and externally to the financial sector. Thus, since the evaluation, the Central Bank has organised

25 training sessions for its own staff, the financial institutions, the Gaming Board and its Casino Inspectors and other institutions/officials as appropriate. The MFSC has also organised training sessions for staff, addressed the employees of obliged institutions (license holders) and held a full day conference on the subject.

129. Officers from the Attorney General have also addressed representatives and employees of obliged institutions on the nature of the phenomenon of money laundering, the nature and need of preventive measures, reporting duties and the entire anti-money laundering legal regime.

Supervision

130. All the supervisory authorities have an obligation to ensure compliance with the Regulations. Compliance is supervised through on-site examinations, whether specific anti-money laundering inspections or general supervisory examinations, which however may include specific anti-money laundering modules. These examinations assess the internal procedures of the institution for identification, record keeping, training and reporting. The examinations also include an assessment of the effectiveness and compliance by relevant staff through substantive test programmes. In this regard, the examiners recall that the first round report noted a more proactive approach to on-site visits by the Central Bank and urged the MFSC to undertake on-site visits with regard to the insurance sector. In fact the MFSC has been undertaking on site visits in the insurance sector since the first quarter of 1999 as was planned and reported in Malta's progress report.

131. There have been no specific changes since the first round evaluation in the current regime practised by the Central Bank in supervising the banking sector: 9 inspections exclusively targeted at money laundering were carried out as well as 5 inspections with a money laundering component. No major non-compliance has been found. The MFSC started an on-site examination program in the insurance sector in the first quarter of 1999 and each broker, agent and insurance company has been visited. No serious problems of compliance have been detected in this sector either, although only one STR has been filed by the sector. Among the possible reasons, the Maltese authorities have indicated that life insurance contracts are mostly related to house loans, that unit-linked insurance products are not very widespread and that insurance premiums may not be paid in cash.

132. The MFSC is carrying out a special programme for the inspection of nominee companies by using a checklist for assessment of money laundering prevention activities. Each license holder was due to be inspected at least 2 times a year. The MFSC examines if financial institutions obtain from the nominees involved information on ultimate beneficial owners when establishing a business relationship with a corporate customer having nominee shareholders (or when establishing a business relationship with nominees acting in respect of shares,

on behalf of beneficial owners). For the implementation of these inspections, additional staff were employed within the various regulatory units of the MFSC so as ultimately to strengthen the regulatory regime practised by the MFSC.

133. During 2001, stockbrokers have been inspected by the Malta Stock Exchange and no material problems have been found as regards compliance with anti-money laundering measures.

Reporting of suspicious transactions[27]

134. Under Regulation 11, where a person or supervisory authority bound by the anti-money laundering regulations obtains any information, and is of the opinion that the information indicates that any person has or may have been engaged in money laundering, he/she should as soon as reasonably practicable disclose that information to the Police. An institution is bound to report even if they refrain from carrying out a transaction.

135. The draft amalgamated Guidance Notes, again, offer very useful guidance as to how suspicious transactions should be recognised. Paragraph 1 of Section F explains that "the first key to recognition is .. knowing enough about the customer and his business to recognise that a transaction, or series of transactions, is unusual. A suspicious transaction will often be one which is inconsistent with that customer's known legitimate business or personal activities or with the normal business for that type of account". The draft Guidance Notes also provide examples applicable to the various institutions of what might constitute suspicious transactions and suggest that "the possible identification of any of the types of transactions listed .. should prompt further investigation and be a catalyst towards making at least initial enquiries about the source of funds."

136. The draft Guidance Notes require that all institutions adopt a system whereby unusual or suspicious transactions are reported. The draft Guidance Notes clarify that the notion of "suspicious" also includes "unusual" for the purpose of identifying and recognising the transactions which ought to be reported under Regulation 11.

137. Regulation 13 exonerates the reporting person and institution from any liability for breach of professional secrecy, if a communication or disclosure has been bona fide or otherwise made by an advocate, notary, accountant, auditor, nominee etc. under Regulation 7 (5) on the identity of the principal (beneficiary), or as part of the internal reporting procedure under Regulation 10.

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[27] As at the time of the second round visit STRs are - still - submitted to the Police, recent practical experience with the operation of the STR regime is analysed in the subsequent part on law enforcement issues.

Anti-laundering measures in the non-bank financial and non-financial sectors

Insurance

138. Insurance companies or agents are licensed and supervised by the MFSC, including supervision concerning their compliance with the 1994 Regulations. Bearing in mind that some criticism was expressed by the first round report about the lack of on-site inspections in this sector, the examiners were told during the second round visit that supervision had since become tighter and on site supervision is now taking place regularly. This was said to respond also to the requirements of the new 1999 Insurance Act. The MFSC also issued new guidance notes to insurance license holders and made sure that a Money Laundering Reporting Officer was appointed by each licensed institution. Moreover, it organised training seminars for license holders and encouraged them to set up in-house training as well.

Stockbrokers

139. Stockbrokers, also subject to the 1994 regulations, must identify their clients, as well as the beneficial owners of their transactions since the issue in 2001 of a directive by the various financial supervisory authorities, including the MSE, to their supervised institutions directing them to refrain from undertaking transaction where nominee shareholding is involved, unless they obtain a full disclosure of the beneficial owners. The Stock Exchange does not identify clients, only brokers do. The Stock Exchange would however rely on the identification done by foreign-owned brokers if they come from a reputable jurisdiction. Brokers need to retain business record for a period of 5 years. As a supervisor, the MSE carried out 3 on-site inspections in each of the 12 licensed stock broking firms operating on the stock market in 2000, which included anti-money laundering aspects as well.

Foreign exchange offices

140. In terms of the Financial Institutions Act 1994, 13 institutions are licensed to transact in foreign exchange. Up to December 2001 these were supervised by the Central Bank of Malta as financial institutions, whose activity is though limited to foreign exchange, including trade finance related payments, and international fund transfers. Through their association, the Association of Licensed Foreign Exchange Dealers (ALFED), they take part in the work of the Prevention of Money Laundering Joint Committee. Most exchange offices only do exchange operations, but some of them also perform money transfers (Western Union and Money Gram). They are required to fully identify the customer for any exchange above Lm 250 and also check the origin of the funds for transfers. Any material deviation of the usual volume of business may trigger an on-site inspection. Exchange offices must also keep records of all transactions, regardless of the amount of money exchanged or transferred. These records are

inspected by the Central Bank inspectors during on-site inspections, which recently examined the documentation on payments abroad linked to imports.

141. Awareness in this sector is said to have increased : the examiners were informed that the Guidance notes related to exchange offices are widely known by ALFED members, who also participated recently in anti-money laundering training organised by the Central Bank.

Casinos

142. As mentioned earlier, the Gaming Board licenses and supervises the casinos on the island. They conduct a fit and proper test for all qualifying shareholders, i.e. those owning over 5% of the shares, including background checks based on bank references and Interpol information. Under the applicable regulations, equity may not be represented by bearer shares. Any change in the ownership structure involving transfer of shares over 5 % must also be approved by the Gaming Board.

143. The Gaming Board has a rather strict policy for casinos to hire employees: prospective candidates must undergo a screening, which includes checking local police information and criminal records. For non-Maltese nationals, Interpol information is obtained. When a casino is licensed, on-site surveillance is ensured by inspectors, who must attend the premises during the operating hours. There are 2-3 inspectors in each casino and there is also a Money Laundering Reporting Officer. However, no STR has so far been submitted by any of the casinos.

144. Due diligence measures include identification and record-keeping. New gamblers are identified on the basis of an identity card or passport. This takes place at the entrance and at the cash desk whenever transactions exceed Lm 2,000. Gamblers are given a magnetic card with a photo. Casinos must keep record of all transactions involving foreign exchange, done at the cash desk, as well as of all transactions made at the table. These records are kept for 5 years. Casinos can thus assess the volume or quantity of gaming carried out by each individual. Each casino is required to provide a central point were chips may be bought. E-casinos are prohibited in Malta.

145. Any breach of the due diligence obligation is subject to sanctions, ranging from fines (up to 100,000 Lm) to license withdrawal. The annual accounts of casinos need to be certified by external auditors.

The legal and accounting professions

146. As it has been mentioned earlier, auditors, lawyers, notaries and accountants are indirectly subject to the 1994 Regulations. As they are not considered “subject persons” under the Regulations, they are currently not supervised for anti-

money laundering compliance[28]. Both lawyers and accountants can act as directors of nominees companies which have been engaged since 1989 in managing offshore companies. As directors of these companies, they were required by law to report any crimes that came to their attention and also to identify the beneficial owners of the companies. The accountants have received special anti-money laundering training organised by the Institute.

Formation and registration of companies and business entities

147. The formation and registration of commercial companies and partnerships is based on a 1995 Companies Act. This legislation was modelled on the UK Companies Act 1985 and UK Insolvency Act 1986 and in general is in line with the EU Company Law Harmonisation Directives. Companies are registered since 1965 in a national Registry. Registration requires the submission of a request, accompanied by the future company's memorandum of association, the validity of which must be verified. However, the documents submitted by the applicants do not need to be approved by a notary public. Once registered, the company is legally set up. The registration process does not require that lawyers or accountants be involved, though in practice companies are often set up by law or accounting firms.

148. Names, address and identification is required for directors, shareholders, company secretaries and legal representatives. Company information filed with the Registry includes copies of annual audited accounts. All companies in Malta need to file audited accounts annually. Equally, company information needs to be updated as required by law and penalties are imposed where the relevant information is not updated with the Registry. The companies data-base and all registered information therein is available on the Internet.

149. The management of the company Registry and oversight of company activities are within the MFSC's remit in Malta since 1997 and will remain within the restructured MFSA. 24 employees of the MFSC deal exclusively with company registration. As regards the information inputted into the Registry, the latter is not expressly required to control the authenticity of the data, but in practice it does. However, the liability for entering correct information and the authenticity of the documents presented lies with the person submitting the information.

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28 The Maltese authorities explained that advocates, notaries, accountants, auditors are subject to the 1994 regulations to the extent that they are applicants for business i.e. when, as principal or agent, they seek to form a business relationship, or carry out a transaction with a person acting in the course of relevant financial business. In these circumstances, when the advocate, notary, accountant or auditor is not acting on his behalf he may be required to give a declaration in writing to the effect provided by regulation 7(5) of the 1994 Regulations. That regulation provides that the person who makes the declaration must, *inter alia*, inform the person with whom he enters into a business relationship if his powers are revoked or otherwise terminated or if any statement in the written declaration ceases to be true. Among the statements which he has to make in his written declaration is that he is not aware of any fact that indicates that, or causes him to suspect that, the assets or transaction involved is or will be derived from criminal activity (Regulation 7).

150. Companies that are inactive, e.g. because they do not file their returns, can be declared by the Registrar of Companies "defunct" and struck off within 3 months. It would seem that the process to strike off a significant number of dormant companies (around 3,000) was commenced in 2002 for not filing their returns.

151. The setting up of banks in Malta follows the Basel Concordat and Minimum Standards. No person or group of persons either local or foreign can set up a bank in Malta unless they have an active participation by an already established bank of repute. Moreover, there are specific statutory and regulatory requirements, such as:

- a minimum capital of Lm 2 million (US$5 million);
- four eyes principle;
- fit and properness of shareholders, directors and senior management.

152. A detailed directive covers the licensing process, which begins with a series of meetings and discussions with the prospective applicants before the submission of a formal application. In the process, the regulator undertakes a thorough screening process on the persons involved and the source of capital funds. A bank can only be set up as a limited liability company. The process for the establishment of a non-bank financial institution (including investment services and insurance business) follows closely the one applicable to banks. The capital cannot be represented in either case by bearer shares.

153. If a foreign bank wishes to set up a subsidiary in Malta, then the fit and proper criteria and the origin of funds are checked through the respective home country authority. If the financial regulatory authorities are not satisfied for any reason with the results of their due diligence exercise, they have the right to refuse the issue of a license. They can also withdraw license, once issued, should such instances ever occur. Moreover, the Maltese financial services legislation requires that changes in qualifying shareholdings in licensed institutions cannot be effectively registered unless authorised by the competent authority. Where such authorisation is not obtained, any transaction not so authorised becomes null and void and the competent authority may apply sanctions accordingly.

Nominee companies and the offshore sector

154. Among the 30,000 companies that are registered in Malta, around 2600 used to be registered as offshore companies. A number of these offshore companies had nominee shareholders. The purpose of these nominee companies was to provide anonymity for their shareholders through the nominees who were the only persons acting on behalf of the company. These offshore companies were run by nominees, who are locally licensed agents, regulated and supervised by the Malta Financial Services Centre. It is recalled that these companies with

nominee shareholders have been specifically identified by the first round evaluation report and also by other international fora as a weakness in the Maltese anti-money laundering regime because in general the nominee company system made it difficult to prevent money laundering in cases where they were involved, as the identity of the beneficial owners and shareholders could only be disclosed to the authorities by the nominee in the context of a money laundering investigation under a Court Order. This system of nominees acting on behalf of offshore companies was clearly an obstacle for financial institutions to identify the beneficial owners.

155. The Maltese Government had legislated in 1994 to phase out offshore business by 2004 and no offshore companies were registered after 1996. The Maltese Government intends also to phase out the nominee system and will review and upgrade the current legislation on trustees. Legislation exists in draft form. The Maltese Government has addressed the weaknesses of the nominee system (until this is fully phased out) by the directive issued in March 2001 whereby all financial institutions are to obtain the identity of beneficial owners from nominees who have to take responsibility for the veracity of the information provided.

156. During the second round evaluation visit, the examiners were informed that about 300 offshore companies (143 trading companies and 139 non-trading companies) still existed but these were also bound to disappear by the end of 2004. No new offshore company was registered ever since 1996. There also remain 2 offshore banks in Malta, which will be transformed into regular onshore banks by 2004 as well. Since Malta has decided to phase out its offshore sector, it has left the OGBS.

(iv) Operational Matters

Investigations into money laundering

157. Money laundering is investigated by the Police usually on the basis of STRs, foreign requests or drug-related information. Based on this, the police have conducted or at least initiated the following number of money laundering investigations in the past four years, with the results as indicated :

Year	1998	1999	2000	2001
Number of investigations	9	23	32	35
Pending investigations	2	11	18	25
Concluded investigations without prosecutions	4	6	8	1
Prosecutions for money laundering offences	2	1	1	1

158. This chart refers to cases investigated by the Economic Crimes Unit of the police in the period from 1998 to 2001. Knowing that every STR was investigated it is quite striking that in 1998, 22 % of all investigated cases ended with a prosecution, in 1999 this percentage was 4.4 %, in 2000 3.1 % and in 2001 2.9 %. It clearly transpires from these data that the police in many cases had serious difficulties in gathering the necessary evidence for money laundering investigations. The rate of successful investigations is therefore rather modest, while the number of pending investigations is high and increases over the years. This situation, according to Maltese officials, is related to the fact that the police must investigate upon each STR and in a number of investigations the available evidence is not enough to sustain the case. These cases currently cannot be dropped, so further information or intelligence is expected, either from domestic sources or from overseas. It was unclear to the examiners whether this expectation to obtain, often after long periods of time, further evidence is realistic or not. It may actually indicate a lack of resources or experience. It may also point to the need of setting up the FIU which will have more filtering power in the initial phase of the investigation than the police currently do.

159. On the basis of the concluded police investigations, the Attorney General's Office has so far brought charges in 5 prosecutions, 2 of them being adjudicated on the merits in court. Both cases were self-laundering cases of proceeds deriving from illegal drug trafficking. The Economic Crimes Unit within the Police of Malta will remain the agency authorised to receive suspicious transaction reports until the FIAU becomes fully operational and thus at present all STRs are filed with the Police for investigation. Once a report is filed, the confidentiality of data is lifted and the police can obtain all other information required - on the person and his/her accounts and transactions – from the institution filing the report. In other cases, an investigation order has to be issued by a Court, on the basis of which all information required can be collected from all institutions.

160. Other sources of information available to the Unit for the purpose of investigating into money laundering offences are the following :

- MFSC data-base (in relation to company records, available on line)
- police criminal records (available on line)
- the public registry concerning the transfer of immovable property (on line but accessible only on request)
- the registry of motor vehicles, including information on ownership of (on line)
- the police data-base on immigration concerning the movements of persons.

161. The police maintain close personal contacts with a considerable number of institutions, such as the Central Bank of Malta, MFSC, Ministry of Foreign Affairs, Gaming Board, from which they can usually obtain other information as well, as necessary.

Suspicious transaction reporting

162. After receiving STRs, the police are completely independent in conducting an investigation until the stage of judicial enquiry. A police investigation is conducted after every STR. Formally, the Attorney General's Office cannot issue binding instructions to the police before an investigation order has been issued. However, the complexity of certain cases frequently leads the Police to seek the advice of the Attorney General's staff and financial specialists from financial supervisory authorities.

163. Since 1998, the police have received the following number of STRs :

Organisation	1998	1999	2000	2001*
Onshore Banks	5	13	23	21
Non-bank financial institutions	1	-	-	-
Financial Regulator	-	1	-	-
Offshore Banks	2	4	4	9
Investment Services	-	1	1	1
Insurance Companies	1			
Totals	**9**	**19**	**28**	**31**

**Data up to mid-December 2001.*

164. STRs are mostly associated with cash transactions, which may constitute an indication that the detection of suspicious transactions, in the layering and integration stages proves to be more difficult. It should be noted that the representatives of the Malta Bankers' Association have stated that non-bank financial institutions did not report STRs because they do not carry out cash transactions. This may be another – anecdotal - evidence of the difficulties of detecting illicit transactions during the layering and integration stages.

165. There has been only one case in which an STR was not filed by one of the banks when, in the opinion of the Central Bank, there should have been a report. The reason for the failure was not negligence, but the non-availability of complete information to the money laundering reporting officer (MLRO). The report was filed after the completion of the file. In principle, such non-compliance with preventive measures is sanctioned with fines, although a banking employee that fails to file an STR is only subject to disciplinary actions.

166. Currently there is no process in place for the postponement of a transaction unless this is done on an informal basis. As the police currently cannot postpone a transaction, it would seem that banks do it when they consider it necessary. The proposed amendments to the Prevention of Money Laundering Act will empower the future FIU to postpone the execution of a transaction for 24 hours.

167. There is usually *ad hoc* feedback from the police to reporting institutions on the quality and usefulness of their information. The CBM receives a copy of each reported STR, but it does not analyse the reports received nor prepares typologies based on them. However, the CBM regularly evaluates the internal procedures of credit institutions and carries out sample checks on the movement of information related to STR inside credit institutions.

168. Although the police do not have the power to freeze any transaction, there has been a case in which the reporting institution - the bank - did it by itself. Since 1998, the following number of seizures has been asked for by the police and granted by the Attorney General's Office:

Year	1998	1999	2000	2001
Applications	7	2	4	9
Attachments	3	2	1	0

Declaration of Cross-border Movements of Funds

169. Until the second round on-site visit, there have been no changes in this field. The import of cash or other means of payment to Malta is still free and there is no statutory obligation to make any report. If a passenger on his or her own initiative reports the import of cash exceeding the value of Lm 3000, the Customs file a report to the police and the Security Service. In the year 2000, the Customs received 1562 import declarations, in 2001 the number of declarations was 1081.

170. In terms of the Exchange Control Act, the export of physical cash exceeding 10,000 Lm is to be reported. This obligation now is formally presented as a measure against the financing of terrorism as well. In addition to the declaration, the owner of the cash must prove the source of the money. If he/she is not able to do so, the money is seized for violation of the exchange control requirements and the person is handed over to the police for further investigation. Although the import is not formally subject to such a reporting requirement, it is often reported if the owner means to re-export it.

171. The data on these cash movements is transferred by Customs to the Security Service for analytical purposes. It is expected that this data will eventually be made available to the FIAU once established. Furthermore, transfers through the banking system are reported to the Central Bank although on an aggregate basis. In November 2001, in his 2002 budget speech, the Minister of Finance has

announced the introduction of an obligation to declare to the Customs all import and export of cash in foreign currency above the equivalent of Lm 5,000 (USD 12,000). This information will be reported to the Central Bank for exchange control purposes and eventually to the FIAU once established.

IV. EVALUATION OF THE EFFECTIVENESS OF THE ANTI-MONEY LAUNDERING SYSTEM AND SUGGESTIONS FOR IMPROVEMENTS

(i) Overview

172. Overall, since the first round evaluation, Malta has continued to consolidate its anti-money laundering regime. It has positively responded to most of the recommendations made in the first round evaluation report and a number of important legislative and preventive measures have been taken: the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime has been ratified, the definition of the offence of money laundering has been broadened, bearer accounts have been abolished, financial operations with nominee shareholders have been considerably restricted, the possibilities of international co-operation have continued to expand. Malta now has a comprehensive and robust legal framework, which is commended by the examiners.

173. These legal and preventive efforts raise expectations, which so far were not fully met by results. In the area of criminal justice, the practical work of law enforcement and the actual results in terms of convictions and confiscations are disappointing. Bearing in mind the high-quality of the legal framework and the unrelenting commitment of the main Government authorities in charge of the anti-laundering regime, in particular the Attorney General's Office and the Central Bank of Malta, it is unfortunate to see that the system is not producing the expected results. Investigations into money laundering linger on without bringing more charges, only a few prosecutions get to the judicial phase because prosecutors feel discouraged by the evidentiary requirements set by the judiciary, laundering-related confiscations do not occur because they suppose a conviction first. *The examiners therefore consider that the efforts made to perfect the anti-money laundering legislation have not been accompanied by sufficient practical measures in the law enforcement and administrative set-up and the judicial follow-up.*

174. There seem to be two crucial problems: 1) lack of experience and resources at the level of law enforcement, which may undermine the anti-laundering efforts of the whole criminal justice system; 2) the nature and degree of proof required to prove the offence of money laundering, which may have led to an overcautious attitude of the prosecution authorities. The proof requirements set by the judiciary are the consequence of a their reluctance to draw the necessary conclusions from circumstantial evidence, which is very often the only available evidence in money laundering prosecutions, concerning the existence of the

predicate offence and its link to the laundering of related proceeds. *The examiners consider that a thorough analysis has to be conducted by all criminal justice authorities concerned in order to identify ways and means for improving the success rate of their money laundering investigations and prosecutions.* The examiners are convinced that by improving the quality of police efforts in this field the number of prosecutions will be increase, which would eventually enable the courts to familiarise themselves better with the nature of money laundering and the operating methods of money launderers.

175. In the area of prevention, much progress has been made since the first round evaluation in the area of supervision and compliance control, particularly in those sectors (insurance and nominees) where enhanced supervision was recommended. Thus, the MFSC and the MSE have taken measures to enhance compliance in their area of supervision, e.g. by the issue of the directives and guidance notes as well as more regular inspections. In the banking sector, the CBM continued its anti-money laundering supervision programme. In terms of customer identification, a particular mention should be made of the joint instruction issued by the financial supervisors to stop transactions with corporate clients having nominee shareholders or with nominees acting on behalf of beneficial owners, unless the identity of the ultimate beneficial owner is disclosed. This measure and the gradual phasing out of the nominee regime are likely to make Malta's corporate sector much less attractive for potential illegal activity than before.

(ii) The legislative framework

The Prevention of Money Laundering Act, 1994 and the Prevention of Money Laundering Regulation, 1994

176. The 1994 Regulations have a large scope of application, as they cover, besides the banking sector, a range of non-bank financial and non-financial businesses as well. However, certain types of businesses and related professions, some of which are particularly relevant in the Maltese context, are not covered: real estate services, car, jewellery and other high-value item dealings. The 1994 Regulations need to be supplemented in this regard, whether they will be incorporated into the 1994 Act or remain a separate set of legal provisions. The examiners suggest that the implementation of the 2nd European Directive (2001/97/EC) into Maltese law offers a good opportunity to prepare a consolidated anti-laundering legislation, which covers both prevention and criminal enforcement aspects. This would allow the inclusion of the businesses mentioned above in its scope as well as the revision of the provisions currently applicable to lawyers and accountants, who are not explicitly covered. Other intermediaries and related professions could also be specifically included on the same occasion, such as notaries, tax advisors, company formation agents, nominees, trustees and fiduciaries.

Penal Aspects

Money Laundering offences

177. As seen, the criminalisation of money laundering is still based upon a list of predicate offences, an approach that was already criticised in the first round evaluation report because of the narrowness of the list. After 4 years, the list is still in place, but the list of predicate offences has been enlarged impressively, to such an extent that a manual is almost necessary to be able to decide whether a certain offence is predicate or not to money laundering. However the main weaknesses of the "list approach", that is the lack of comprehensiveness of the list, has completely remained.

178. As for comprehensiveness, in spite of the enlargement, the evaluation team has some doubts whether the amended list covers all relevant proceeds-generating offences that can be found in the Criminal Code. It seems easy to find one or more examples for criminal offences that would not qualify as predicates, for instance among those that constitute „corrupt practice". According to the Permanent Commission Against Corruption Act, these are in general terms the acts or omissions which constitute the offences under sections 112 to 118, 120, 121, 124 to 126, and 138 of the Criminal Code. Interestingly, section 127 on embezzlement[29] – a crime that is rather likely to generate proceeds – has not been expressly included in the list of predicate offences. Some economic and fiscal crimes, especially tax evasion, have been left out from the list of predicate offences.

179. The evaluation team refers to the recent Bill[30] amending *inter alia* the Criminal Code, which modernized the 1994 Act by introducing corporate criminal liability and new rules on the forfeiture of proceeds and, on the other hand, amended the Criminal Code by establishing a host of new criminal offences to keep pace with modern criminality: the promotion of a criminal organisation, various offences related to the trafficking in persons, computer misuse, etc. All these new provisions have been designed to guard against criminal phenomena which pose a new threat to society, some of which are particularly relevant in the Maltese context, for example the trafficking in illegal immigrants, which was mentioned to the evaluation team on-site and also in the reply to the Questionnaire[31] as a serious problem for the Maltese authorities. Against this

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29 *"Any public officer or servant who for his own private gain, misapplies or purloins any money, whether belonging to the Government or to private parties, credit securities or documents, bonds, instruments, or movable property, entrusted to him by virtue of his office or employment, shall, on conviction, be liable to imprisonment for a term from two to six years, and to perpetual general interdiction."*

30 This bill was in the committee stage before the House of Representatives during the second round on-site visit and was subsequently adopted as Act III of 2002.

31 *"(…) there have been cases of traffic in persons for the purpose of illegal immigration into other countries (especially into Italy) involving foreigners resident in Malta as well as the*

background, the examiners found it more than surprising that the amending Bill omitted to update the list of predicate offences, as a result of which these new crimes cannot be considered as predicates, nor can the proceeds derived from those crimes be subject of money laundering. *Taking these considerations into account, the evaluation team recommends that Malta consider changing its definition of money laundering from one based on the "list approach" to one based on "all crimes".*

180. The examiners understand that the money laundering offence covers extraterritorial predicate offences as well. However, as dual criminality applies, the "list approach" limits the range of extraterritorial offences as well, because the predicate conduct must constitute an offence listed in the Act. So far, this impediment has been rather theoretical as there have been no court decisions on this point since the first round evaluation.

181. The Maltese anti-money laundering regime still does not cover any form of negligent money laundering. This was already pointed out in the first round report, which expressly recommended that the Maltese authorities consider integrating the criminalisation of negligent money laundering into their legislation. As a matter of fact, "consideration" was given by Malta to this question[32] but since the first round, no legislative steps have been taken: neither the Progress Report, nor the Reply to the second round questionnaire could mention any sign of development in this field. *The evaluation team therefore reiterates the recommendation made in the first round that Malta should consider the criminalisation of negligent money laundering.*

182. The examiners note that there does not seem to be any conflict caused by the coexistence of parallel definitions of money laundering, as long as they can be distinguished by the different predicate offences. The only point that may require some clarification is the multiple criminalisation of drug money laundering. This crime is primarily defined in and penalised by the Ordinances - by the Dangerous Drugs Ordinance as regards classic drugs and by the Medical and Kindred Professions Ordinance as regards psychotropic substances. However, drug money laundering is also criminalised under the 1994 Act. Among the predicate offences listed in the schedules attached to the Act, a direct reference is made to section 3(1)(a) of the 1988 Vienna Convention that defines various sorts of drug crimes. In addition, the schedules also include

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involvement of Maltese citizens in smuggling activities abroad (again into or via Italy) and this activity is being closely monitored for its possible impact on the money laundering situation in Malta. In fact an anti money laundering agreement and a re-admission agreement have been concluded with Italy during 2001."

32 Progress Report (1999) *"Negligent money laundering and failure to report or disclose knowledge or suspicion of money laundering have been given due consideration. There are no definite plans on the issues as yet."* Replies (2001) *"Negligent money laundering is not covered although the issue is under consideration."*

"offence[s] against the law relating to dangerous drugs or narcotics" among the predicate offences. In the absence of other specific laws "relating to dangerous drugs or narcotics", the latter phrase necessarily refers to the Ordinances. The scope of application of the 1994 Act was thus extended to all drug-crimes, including those defined in the Ordinances, while the laundering of drug proceeds had already been criminalised by the Ordinances. This apparent overlap between the 1994 Act and the Ordinances raises issues in terms of priority, particularly since they operate on the basis of distinct substantive and procedural criminal law provisions, but also because the 1994 Act contains significantly lighter sanctions than the Ordinances.

183. In order to achieve the harmonisation of the competing laws, Maltese legislators have inserted more and more connecting clauses in the 1994 Act to allow for the direct applicability of various provisions, e.g. on coercive powers, of the Dangerous Drugs Ordinance. This process was already initiated before the second round of evaluation, extending the applicability of special court orders designed originally for drug and drug money laundering cases only[33] and this tendency has continued ever since. While such connecting clauses are able to resolve most problems that may occur because of the multiple criminalisation of drug money laundering, the examiners are still uncertain about the effect of the reference in the Second Schedule of the 1994 Act to a "law relating to dangerous drugs or narcotics". This reference could have perhaps led in other jurisdictions to juridical insecurity as to which law should be taken exactly as a basis of criminal liability. However, the examiners were advised that the discretionary power delegated to the Attorney General is the clue to the situation. It is understood that the AG is practically free to decide, motivated principally by the seriousness of the given case, on the exact charges included in an indictment i.e. whether to accuse a drug money launderer on the basis of the Ordinances or the 1994 Act. As far as the Ordinances are concerned, a further decision has to be made as to whether the defendant be tried in the Criminal Court or before the Magistrate's Court, as the choice of the forum determines the range of punishment too. The Court thus appointed could further reduce the potential of a "formal concurrence" between the 1994 Act and the Ordinance by using the money laundering offence which carries the highest penalty and could increase it further if necessary.

184. Therefore, from a practical point of view, drug money laundering cases are not likely to be adjudged on the basis of the 1994 Act as long as the Ordinances provide for more robust measures and more severe sanctions in this field. However, the above-mentioned direct reference still causes uncertainty in relation to the new provisions of the 1994 Act on the Financial Intelligence Analysis Unit: it is unclear whether the money laundering offences defined by

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33 Q.v. for example article 10 on freezing of property of person accused with offences cognizable by courts outside Malta (added by Act II. of 1998) that refers to the *mutatis mutandis* application of article 22a of that Ordinance dealing with a special freezing order that was not applicable previously but in cases under the scope of that Ordinance.

the Ordinances would fall within the competence of the Unit. *To put this beyond doubt, the examiners suggest that another connection clause to the Ordinances be inserted in the 1994 Act.*

185. As far as the application of money laundering offence is concerned, the evaluation team found that the existing jurisprudence still lacked clarity, in particular as to the requirements of proof of the predicate offence of money laundering. It is also rather disappointing that there has not yet been a single conviction for money laundering. Out of two cases that have reached the criminal court, in one the prosecutor subsequently withdrew the charge of money laundering as part of a plea bargain, while the other case was quashed in the preliminary stage. The evaluation team reviewed this decision[34], the only one ever handed down by the Maltese judiciary in a money laundering case, and noted that the court went into further definition of the level of proof that is required to establish a money laundering offence, by highlighting the need to establish a link between the proceeds allegedly laundered and the underlying criminal activity. Although the decision was made in a case based upon the 1994 Act, its wording does not exclude its reference as to drug money laundering cases based upon the Ordinances. According to the decision, the court has apparently no doubt that in terms of article 2 (2)(a) of the 1994 Act it is not necessary that the person should have been found guilty of the crime which constitutes the (underlying) criminal activity for it to be possible that that person is accused and found guilty of the crime of money laundering. The Attorney General may consequently accuse a person of money laundering without having a conviction for what is alleged to be the underlying criminal activity. The court however expresses the opinion that whatever may be the case, if the Attorney General decides to accuse someone of money laundering on the basis of the above paragraph, he/she must in the bill of indictment indicate the link between the particular underlying criminal activity which he/she alleges to be the source from the object of money laundering and the charge of money laundering. If on the other hand the Attorney General does not rely, at least from what appears from the bill of indictment, on this paragraph, but relies on a well-specified criminal activity, then there is the pressing need to describe in unequivocal terms the link between the underlying criminal activity and the alleged money laundering.

186. During the on-site visit, the examiners were given diverging interpretations of the above requirement. The representative of the judiciary did not attach great importance to the decision and particularly its guiding nature, denying that the court ever had the intention to go to questions of evidence at this stage. He stated that in the given case the bill of indictment suffered from some formal deficiencies because the means of evidence had not been duly described therein, so the indictment had to be quashed owing to the fact that the prosecution

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[34] This is a preliminary decision of 26 November 1999, taken by the Court of Criminal Appeal quashed the indictment against the defendant and revoked the judgment of first instance. Subsequent to the evaluation visit, the examiners were informed that a conviction had been obtained for money laundering in first instance, but it is subject to appeal.

simply had not paid enough attention to this problem. On the other hand, the prosecution had a completely different view. They criticised the above decision claiming that the court had practically overstepped its competence by adopting a strict interpretation of the law and the rules of evidence. As a result, the level of proof defined in this decision is remarkably higher than what is required by the wording of the law. The prosecutors were convinced of the guiding nature of this decision fearing that other courts would follow this position in similar cases. As a matter of fact, the wording of the decision seems to support the latter opinion. What is more worrisome, the attitude of the court shows express aversion to the criminalisation of money laundering in general. The decision states that the 1994 Act "*is an extraordinary law which introduces radical concepts into our system and which must be applied with the greatest scruple and care in order that it is not rendered an instrument of injustice, more reminiscent of the times of the inquisition than of the modern era of human rights.*"

187. In this context, it is not surprising that prosecutors seemed rather reluctant to bring more charges for money laundering. *The examiners feel concerned that this tendency may continue in the future and therefore recommend that the relevant Maltese authorities collectively examine the question of proof, possibly through the Prevention of Money Laundering Joint Committee, and determine the legal avenues susceptible to allow successful money laundering prosecutions. It would be helpful if the judiciary were also involved in this effort.* A possible way to explore might be a legislative amendment like the one the Maltese Government described in the Replies to the Questionnaire. According to this, "consideration has been given to expressly laying down in the law that proof that assets are the proceeds of criminal activity in general is to be deemed as discharging the prosecution's duty to prove the link between the proceeds in question and the predicate offence upon a charge of money laundering". However, this proposal, although it perfectly complies with the spirit of the 26/11/1999 decision, may not be the best solution of the problem. It is obvious that the above-mentioned requirement that the court has determined is not in line with the wording[35] of article 2 (2)(a) of the 1994 Act. The very "link", on the proof of which the court insists, is not prescribed in the said article. Not even the wording of that paragraph would lead to such an inference by necessity. Instead, the court decision seemed to demand a further condition that had not been previously required by law. Consequently, the adoption of an additional requirement such as contemplated by the proposed amendment would not promote the efficiency of the anti-money laundering regime but rather support one specific interpretation of the law. Furthermore, the above proposal does not seem to offer more clarity as to what is the meaning of that very "link" the prosecutor would have to prove. It is even more surprising since the question of the link, i.e. the required level of proof was not clear in the court

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35 *"A person may be convicted of a money laundering offence under this Act even in the absence of a judicial finding of guilt in respect of the underlying criminal activity, the existence of which may be established on the basis of circumstantial or other evidence without it being incumbent on the prosecution to prove a conviction in respect of the underlying criminal activity."*

decision either. By the simple adoption of this court opinion the Maltese legislators would just conserve the insecurity and ambiguity of the present situation.

188. During the on-site visit, the Maltese government also advised the evaluation team that while the above option was under consideration, no definite conclusion had yet been reached, especially since this issue was linked with the adoption of an "all crimes" money laundering offence as a possible solution to the problem. *Considering the implementation of an "all crimes" approach is unquestionably welcomed by the examiners. They note however that this conversion will not be enough in itself to resolve the problem of proof discussed above.*

189. Whatever option the Government will eventually chose, it does not seem to be necessary to follow a single court decision unconditionally. *The examiners therefore encourage the prosecution authorities not to over-react to the above-mentioned judgement*. The more cases they produce the more court decisions will be delivered, which will definitely result in further development of the present position of the judiciary. In addition, *the examiners believe further training of all criminal justice personnel should be organised and made available to judges as well. Prosecutors should also seek to impress upon judges the autonomous nature of the money laundering offence and the need to draw the necessary inferences from the evidence presented by the prosecution as to the underlying criminal activity and its link to the laundering offence. In particular, prosecutors should seek to impress upon judges that they don't need to establish precisely the criminal offence(s) from which the proceeds originated, but should satisfy themselves with a more general indication about some of possible criminal activities involved in the generation of the proceeds that were laundered.*

Corporate liability

190. It is not perfectly clear for the examiners whether the introduction of corporate criminal liability also relates to drug money laundering cases. A possible solution may be that drug money laundering cases can also be dealt with under the 1994 Act, the Second Schedule of which qualifies "an offence against the law relating to dangerous drugs or narcotics" as a predicates offence. Nevertheless, taking into account the "multiple criminalisation" of money laundering in the Ordinances and the 1994 Act in relation to natural persons, there seems to be some disconnection between the two regimes.

Confiscation and provisional measures

191. Since at the time of the on-site visit Malta's confiscation regime has been conviction-based in general terms and given the lack of convictions for money laundering, the relevant provisions have not been applied yet.

192. As has been explained, a new Bill[36] was also under consideration, which was expected to introduce substantial changes in the confiscation regime, both under the Criminal Code and the 1994 Act, by providing for the forfeiture of proceeds received by a body corporate or of substitute assets, by creating a legal presumption with respect to offences of money laundering that all assets in the possession or under the control of any person or body corporate held criminally liable are derived from money laundering unless the contrary is proved and by shifting the burden of proof on to the accused with respect to the lawful origin of proceeds in the absence of a reasonable explanation by the accused as to the lawful provenance of the proceeds. While these changes do not challenge the principle that conviction is necessary before confiscation can be applied, they may facilitate prosecutors' work to actually obtain confiscation when criminal proceeds are available in money laundering cases. *The examiners welcome these amendments and look forward to their effective implementation.*

193. The examiners were also given to understand that Malta was considering the possible introduction of a procedure, criminal or civil, allowing forfeiture of proceeds independently of a conviction. *They encourage further reflection in this direction and suggest that the recent legislative reform in other common law jurisdictions aiming to implement a strategy of criminal asset-recovery be taken into account.*

194. As to the functioning of the provisional measures, a chart was provided by the Maltese authorities in attachment to the Replies to the Questionnaire the examination of which shows that while the number of investigations ordered in money laundering cases (though including those based upon international cooperation) has been systematically growing since 1998, no similar tendencies can be observed as to the provisional measures. Even if considering the size of Malta, such measures do not seem to be applied frequently enough and neither can any remarkable development be observed in terms of the amount of the property seized or frozen.

195. In this context, the examiners note that the way the Maltese authorities prepare statistics on provisional measures is of some concern. First of all, no figures were provided at all as to the number of orders for provisional measures and confiscation relating to the proceeds of serious domestic offences, other than money laundering, as apparently no systematic records are kept in this area. As regards money laundering, the data on local criminal cases were simply commingled with those relating to the performance of foreign requests and a significant number of erroneous figures were included. For instance, the chart

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36 Subsequent to the on-site visit, this Bill was enacted on .. as Act III. of 2002

indicated that in a case USD 1,5 million was the value of theproperty "confiscated or forfeited where there has not been a conviction": taking into account that, as discussed before, confiscation is exclusively conviction based in Maltese law, the evaluation team was mislead by this statement that this was a conviction-based confiscation. In fact this was a measure of forfeiture, applied by an administrative authority. *The examiners therefore recommend that the Maltese authorities take measures to improve collection of statistical data on provisional measures and confiscation, including the setting up of a comprehensive automated procedure for data-collection in the Attorney General's Office.*

International co-operation

196. The evaluators welcome the fact that the Strasbourg Convention has been ratified since the first round evaluation. The ratification, which took place on 19 November 1999, was also in compliance with the recommendations made in the first round report. Nevertheless, the relatively large number of reservations entered under various articles of the Strasbourg Convention may adversely impact on its full application. Apparently, the Maltese authorities emphasised in the Replies that these reservations were "currently being reviewed". *Bearing in mind the number of reservations to the Strasbourg Convention, the Maltese authorities should keep under review these reservations and consider the possibility of revoking them.*

197. The statistics about the fulfilment of foreign requests indicate a positive and helpful attitude from the side of the local authorities. The evaluators appreciate not only the fact that Maltese authorities fulfilled all the requests they had received in cases involving money laundering but also the relatively short time it took to provide a response to the requesting country. Considering these statistical data, it nevertheless seems useful to further analyse why did Malta receive much more (22) rogatory letters than they sent to a foreign jurisdiction (1). Due to lack of detailed information about the cases in question, no immediate conclusions could be drawn from this. The Maltese authorities might also wish to carry out an analysis of these requests in order to determine whether they could be the result of the possible use of the financial or corporate facilities offered by this jurisdiction for sheltering criminal assets in relation to foreign predicate offences.

198. Referring to the fact that no foreign request has ever been refused, Maltese authorities declared firmly that there was not any significant impediment to international co-operation, which could have resulted from their domestic legislation. Although further broadened, the restricted list of predicate offences still remains in the examiners' view a potential obstacle in the fight against money laundering that could inhibit full international cooperation in this field. Currently, Malta can provide the full range of formal international assistance only in cases, which meet the dual criminality test, i.e. where the money laundering offence committed abroad amounts to an act of money laundering in

Malta. As certain forms of international legal assistance, especially coercive measures, are connected to dual criminality, certain forms of assistance, particularly the enforcement of attachment orders, seizure or confiscation will not be available in money laundering cases where the money laundering offence in the requesting country is wider than under Maltese law, because the underlying criminal activity committed abroad cannot be qualified as a predicate offence according to the Maltese law.

199. This potential weakness, which is particularly manifest with respect to certain fiscal offences, could be a significant impediment to effective international cooperation. The list method of defining predicate offences also restricts the range of provisional measures and enforcement of confiscation judgements that can be provided on request of other countries. In order to overcome this obstacle, the first round report recommended that careful consideration be given to extending the list of predicate offences. *While Malta did extend the list of predicate offences, the examiners believe that this extension is not enough to enable full international co-operation and therefore suggest a conceptual change by embracing the "all crimes" approach instead of the present list of predicate offences.*

200. Considering however that there have been neither external confiscation orders submitted to Malta, nor requests for the enforcement of Maltese confiscation orders abroad since the first round evaluation, there is no practical experience for the moment that could lead to further conclusions as to the effectiveness of the system. Since no requests for the enforcement of foreign confiscation orders have been received by Malta, it is not possible to make an assessment of the manner in which such requests are being dealt with by the courts. There is a similar lack of practice in the field of international assistance with provisional orders too, e.g. as far as seizure and freezing of assets is concerned. Currently, the legal possibilities the Maltese law provides for international cooperation are mostly under-utilised, with the sole exception of the tracing of assets: 13 of the above-mentioned 22 requests submitted to Malta as well as the single one Malta made to another jurisdiction were aimed at tracing proceeds.

201. Since the first round of evaluation, Malta has stepped up its efforts for the signature and ratification of both multilateral and bilateral conventions and agreements in the area of co-operation in criminal matters and, in particular, has ratified the Strasbourg Convention, although with reservations to articles 2, 6, 14, 25 and 32. No requests for the enforcement of foreign confiscation orders have yet been received by Malta and so it is not possible to make an assessment of the manner in which such requests are dealt with by the courts. Nevertheless, the procedures for the enforcement of foreign confiscation orders, with all the necessary elements, are in place.

202. The evaluation team welcomes the fact that since the first round visit, there has been one case of sharing assets in connection with commercial piracy offences, the amount of which exceeded USD 1,5 million. However, since neither the domestic legal background seems to be sufficiently regulated, nor specific asset sharing agreements were negotiated in this respect. *The Maltese authorities are therefore encouraged to conclude asset-sharing agreements with other interested Governments and satisfy themselves that their current legislation provides sufficient basis for sharing confiscated assets .*

(iii) The Financial Sector

General

203. In general, the examiners note with satisfaction that since the first round, money laundering has been an area of attention for all supervisors. This is in particular visible in the insurance sector, which was previously criticised for poor supervision. However, as the banking system is usually the most vulnerable part of the financial system for money laundering, it is the BSRD of the CBM which has played the dominant role not only in setting up rules and regulations, but also in introducing them in supervisory practice. In addition, certain sectors still need further attention, such as investment services and the securities market, despite recent efforts by the MFSC to enhance supervision in these areas.

204. As mentioned earlier, it is envisaged that the financial regulatory and supervisory functions will be centralised into a single regulator (MFSA) during 2002. The MFSA will thus assume full regulatory and supervisory responsibilities in the financial sector. The examiners welcome this development, as it may contribute to the consolidation of uniform supervisory practices, which will also contribute in the area of anti-money laundering supervision.

205. The draft amalgamated Guidance Notes will provide a sound and comprehensive basis for anti-money laundering prevention in the financial sector and is seen as a positive step by the evaluation team. It is particularly appreciated that even as the amalgamated Guidance Notes will allow a coherent anti-laundering preventive regime to develop across the financial sector, they will also enable flexibility where necessary, for example as regards sector-specific customer identification rules. In this context, the Prevention of Money Laundering Joint Committee has proved to be not only a useful forum for discussions about anti-money laundering regulations, but also a body able to draft regulations with all the interested parties involved.

206. The financial regulatory authorities currently seem to have adequate resources to fulfil their regulatory and supervisory responsibilities including those related to the prevention of money laundering and the monitoring of licence holders. It is assumed that once the MFSA assumes full responsibility as the single regulator for financial services, the current expertise available within the

supervisory authorities, for example at the CBM, will be used to its best to ensure continuity.

207. Against this positive background and subject to specific comments below, there are a few issues in the financial sector which Malta needs to monitor carefully and take corrective action as necessary. For example, the evaluation team had the impression that co-operation and information exchange between the financial supervisory and law enforcement authorities for some reason did not function as well as it should, in spite of the increase in quantity and number of the STRs submitted to the police since the first round. This situation may well change with the setting up of the FIAU[37], but it still needs continued attention by the Government.

Supervisory arrangements and regulatory scope

208. As seen, the supervisory structure is about to change, as from 2002 the Malta Financial Services Authority will be the sole supervisor for banking, insurance, investment services and securities sectors as well as will be running the companies registry. In the non-financial sector, the sectoral supervision will remain: the Gaming Board will continue its supervisory functions with regard to casinos and the MFSC will supervise nominee companies until the offshore regime is phased out in 2004. *The examiners consider it important to ensure that inspections with regard to the implementation of the 1994 Regulations are carried out by all supervisors entrusted with oversight responsibilities in this area with the same quality, insightfulness and regularity.*

209. It is presumed that the lawyers, notaries, accountants and auditors will be under the supervision of the FIAU, when it is set up, and file STRs. *The examiners urge that these professions, once brought under the umbrella of the 1994 Regulations, be subject to a full compliance control by their supervisor(s), including in particular customer identification rules, and not only with regard to their reporting obligations.*

210. Some professions involved in real estate services, car, jewellery and other high-value item dealings at this stage are not covered by the 1994 Regulations and therefore are not properly supervised either. *Once again, the examiners consider that it is necessary that all entities and professions, which may be involved in laundering operations in one way or in another, be subject to the 1994 Regulations and thoroughly supervised.*

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37 The Maltese authorities advised that the creation of the FIAU will further enhance and facilitate the exchange of such information.

Customer identification

211. While Regulations 5 – 7 contain comprehensive rules on customer identification for all regulated entities. However, on a close reading of the 1994 Regulations, the examiners note that under the Section (1) of the Regulation 5, business apparently may be initiated without satisfactory evidence of identity being established. This text provides that "unless satisfactory evidence of identity is obtained as soon as it is reasonably practical after contact is first made", the business cannot proceed or can only proceed in accordance with any direction of the police or on condition that this is reported. On the other hand, as a rule, licence holders are expected to obtain the evidence of identity prior to entering into commitments with the applicant for business. It would therefore seem that paragraph 6 of Section D (ii) of the draft amalgamated Guidance Notes, which provides that "under no circumstances therefore should a licence holder open non-resident accounts without prior positive identification" might go beyond the Regulations.

212. Paragraph 4 of Section D (i) of the same document explains that "what constitutes a reasonable time span must be determined in the light of circumstances connected with the transaction (…)", including the nature of the business or transaction, perhaps the geographical location of the customers, and whether it is possible to obtain the evidence before commitments are entered into or money change hands. There may be instances where it is appropriate for the license holder to start to process the business provided that it promptly takes appropriate steps to establish the customer's identity. *The examiners consider this practice at minimum risky and possibly contrary to the spirit of the FATF Recommendation 10. They believe that license holders, whether financial institutions or not, should obtain satisfactory evidence of the prospective customer's identity always prior to establishing the business relation or conducting the transaction. They recommend that Regulation 5 be amended to require to license holders to complete the identification before engaging in any manner with the prospective customer.*

213. The draft amalgamated Guidance Notes contain similar provisions but also contain exemptions and stress that the duplication of identification should be avoided[38]. For example, as regards the identification procedures for licensed stockbrokers, it is established that "where it is reasonable for stock exchange business to be effected relative to payment through the mail, telephone or any electronic means capable of transferring funds, and details in respect of such payments to be likewise given, the normal identification procedures can be waived as long as such payment is debited from a bank account held in the applicant's name".

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[38] See for example Section D (iii), paragraph 32: "*Verifying identity is often time consuming and expensive and can cause inconvenience for prospective customers. It is therefore desirable that as far as possible, procedures are simplified and standardised and duplication of identification requirements is avoided where it is reasonable and practicable to do so".*

214. The examiners welcome the clarification offered by the directive and the draft amalgamated Guidance Notes, but consider nevertheless that reliance on identification done by other license holders is in general risky, in particular when the intermediary (introducer) is not a credit or financial institution. *Hence, they recommend that the Maltese authorities ensure that in all cases where business relations are established or transactions carried out on behalf of customers who are physically not present for identification purposes (non-face to face operations), additional measures be taken to compensate the greater risk of money laundering arising out of such operations. In particular, they recommend that copies of relevant documents be obtained as a matter of course to allow verification, not only for new relations or transactions, but to the extent possible, for already accepted customers as well.*

Anonymous accounts

215. The examiners are content that the measures taken in this area will eventually lead to the total phasing out of anonymous accounts and that pending this increased diligence has been required from credit and financial institutions in handling these accounts. *They however recommend that extra vigilance be maintained until all these accounts are completely closed down.*

Record keeping

216. The examiners welcome the comprehensive guidance provided through the draft amalgamated Guidance Notes to license holders on record keeping and in particular the inclusion of directives on the use of the electronic fund transfer systems system, whereby license holders must ensure that when sending messages for customer transfers that the fields for the ordering and beneficiary customers are completed "with either their respective names and addresses or their respective account numbers" for all credit transfers made by electronic means, both domestic and international, regardless of the payment message system used. *The examiners recommend however that the requirement of including information on the ordering customer be amended so that his/her name, address and account number must be routinely indicated in future transfers. In addition, enhanced scrutiny should be conducted by license holders for all transfers which currently do not contain such information.*

Internal controls

217. Again, the examiners welcome the clarity of the draft amalgamated Guidance Notes with regard to internal controls, the recognition of suspicious transactions and the role of the Money Laundering Reporting Officer. They note that under the 1994 Regulations an MLRO is expected to determine[39] whether the internal report gives rise to knowledge or suspicion of money laundering and that under

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[39] The Maltese authorities explained that the MLRO's *determination* may be either to accept or to negate an internal report, nothing else. They consider that what is being recommended is already in place.

the draft Guidance Notes this "does not necessarily imply that he must give his reasons for negating, and therefore not reporting, any particular matter, but it is clearly prudent, for his own protection, that only written reports are submitted to him and that he should record his determination in writing".

Guidance Notes

218. As previously stated, the evaluation team appreciates the amount of work that has gone into the amalgamated Guidance Notes, which now constitute a very robust and comprehensive set of regulations for the financial sector. This is also in line with the merger of financial supervisory authorities into the MFSA and the setting up of the FIAU. However, as it has been pointed in this report, there are some issues which still need further clarification in the Guidance Notes, either because they contradict or at least seem to contradict the 1994 Regulations or because they need to reflect the latest international standards and trends in best practice related to anti-money laundering and counter-terrorist financing matters. *The examiners therefore recommend that the Guidance Notes be kept under permanent revision so as to ensure their full conformity with the domestic laws and international standards. In addition, they urge that the existing guidance notes for the non-financial sector be updated accordingly or issued where necessary.*

Training

219. As seen, since the first round, the financial supervisory authorities have continued with their efforts to provide training both internally and externally to the financial sector. The evaluation team particularly appreciates the efforts of the Central Bank, which has organised 25 training sessions for its own staff, the financial institutions, the Gaming Board and Casino Inspectors and other institutions. Similar training sessions were organised also by the MFSC, though with less frequency. *The examiners recommend that training seminars be organised for all entities and professions covered by the 1994 Regulations and that these events be open to criminal justice personnel, including judges.*

Reporting of suspicious transactions

220. The examiners note that in practice, the number of STRs has been increasing modestly since 1999 (1999: 19; 2000: 28; 2001: 31), while the bulk of the STRs was filed by onshore banks (1999: 68.4%; 2000: 82.1%; 2001: 67.7%), and no STRs was filed by insurance companies or other non-bank financial institutions. As regards non-bank financial institutions, reporting is practically non-existent. The reporting patterns are examined by supervisors during on-site inspections. It would seem that there has been only one instance where an STR was not filed by one of the banks when, in the opinion of the Central Bank there should have been a report. Although the report was not filed, it was not out of negligence but because certain information was not completely available to the bank's reporting officer. To date, the MFSC has not detected instances where a subject

person failed to make a report. *The examiners think on the basis of information provided by the Maltese law enforcement authorities, that there could have been cases in the non-bank financial and non-financial sectors, which escaped the attention of both the license holder and the supervisory authority. They recommend therefore an increased supervisory vigilance when inspecting supervised entities as to the observance of their reporting obligations, including the documentation on any non-reported case.*

221. Suspicious transaction reports are filed through an established format that includes all relevant information. In submitting STRs subject entities also submit a brief summary of why the suspicion was raised together with details of the customer's financial and business profile. The examiners note with satisfaction that the quality of the STRs has improved since the first round with the addition of information on customer business and financial profile, though the number of investigations based on STRs is still rather modest. It is expected that STR regime will be improved even further once the FIAU is set up. *They however recommend that the FIAU keep the under-reporting sectors under close scrutiny and apply the appropriate measures to trigger better reporting behaviour if necessary.*

222. Currently there is no process in place for the postponement of reported transactions, unless this is done on an informal basis. The latest amendments to the Prevention of Money Laundering Act will empower the FIU to postpone the execution of a transaction for 24 hours. The examiners noted however that the representatives of the banking industry were not overly enthusiastic about this possibility. *The examiners therefore recommend that further explanation be given to all entities subject to the 1994 Regulations about the advantages of this power vested with the FIAU, for example through additional guidance notes on the circumstances in which this power will applied.*

Feedback

223. In terms of the Prevention of Money Laundering Guidance Notes for the Financial Sector, feedback is required to be provided to the reporting institution. Under the draft amalgamated Guidance Notes, it is expected that the officers of the relevant authority (FIAU) will provide information on request to a disclosing license holder in order to establish the current status of a specific investigation.

224. It would appear that currently feedback is limited in most cases to general information and thus reporting institutions have a real difficulty to measure the usefulness of STRs submitted. However, the examiners noted that Maltese authorities were convinced that feedback to the financial sector would be useful, particularly for creating more awareness of the importance of filing reports where there is a suspicion. Furthermore, feedback would enable an institution to monitor better those customers/accounts upon whom a report is filed. It is in particularly important in the examiners' view that there is immediate written

communication between the reporting institution and the authority (FIAU) where an investigation is discontinued or, conversely, a business relationship would be terminated.

225. In this context, it is unclear to the examiners whether the decision to pursue or terminate a business relationship will be solely vested with the license holders, as it seems to be the case under the draft amalgamated Guidance Notes, whereby licence holders are authorised to ".. terminate relationship with the customer for commercial or risk containment reasons." Furthermore, the Guidance Notes recommend "close liaison with the Enforcement Authority in such situations is important not to frustrate efforts of any possible investigation".

226. The examiners note with satisfaction that the issue of feedback has now been explicitly addressed through the amendments to the Prevention of Money Laundering Act, 1994 in the provisions establishing the FIU.

Company registration

227. As it has been noted earlier, the MFSC is not responsible for controlling the authenticity of the data when registering companies. At present, the liability for entering correct information and the authenticity of documents presented lies with the company wishing to register. *The examiners consider that the current registration regime can be misused and therefore recommend that an explicit legal basis be provided for enabling a preliminary control of the veracity of the data to be registered (activities, purpose, financial background, etc.) before registration, if necessary through checking domestic and overseas sources of information.*

(iv) Operational matters

In general

228. In general, the evaluation team had rather mixed impressions of the Maltese law enforcement sector. Taking into account its activities and results over the period of 1998 – 2001, one cannot say that there have been no efforts to improve the situation in the field of money laundering. Owing to an increasing number of STRs, the number of investigations into money laundering cases has increased, but the results of the whole system are still below expectations. There are several reasons for that: the setting up of a specialised unit within the police, dedicated solely to problems of money laundering, took place in Autumn 2001, only two months before the evaluation visit; the police officers in this field are young and inexperienced, they do not have the required financial knowledge and no computerised analytical support; they have started, as is required, an investigation into each and every STR, but in many cases could not obtain the necessary evidence for completing the investigation. In addition, despite significant efforts in the field of money laundering prosecutions, the Attorney

General's Office has been unable to change much this situation, given the problems already mentioned with regard to the proof of the predicate offence. The examiners however trust that after the establishment of the FIAU, all institutions necessary for developing an effective regime against money laundering will be in place.

229. The examiners note that while STRs are taken in hand immediately, investigations can be quite lengthy and some investigations have been ongoing for more than six months and in some cases have even remained open for years. It seems to be the current practice of the police that although all avenues of investigation may have been exhausted, investigations tend not to be closed if money laundering is not definitely excluded, even if they cannot identify the origin of the proceeds.

Asset recovery

230. Bearing in mind the aforementioned, it is clear that law enforcement is still predominantly crime-oriented. *The evaluation team believes that there is a need for a more asset-oriented approach in law enforcement, in particular in relation to financial crime. This would require a systematic effort of training in this respect, for prosecutors and especially for the police.*

231. There is definitely room for improvement in the area of asset-tracing and management. One of the main criteria, if not the most important, characterising the efficiency of any anti-money laundering regime lies in the successful recovery of criminal proceeds. The statistics in Malta are quite disappointing in this respect. This is not only a question of raising the awareness of the law enforcement authorities of the need to give more emphasis to the financial aspects of crime, but is also an organisational and management issue. There is scope for improvement in this field, especially after the creation of the FIAU, which will take over some present tasks of the police in this field and thus reduce the burden of everyday police work. *The evaluation team therefore recommends some police officers specialise in the field of tracing and detecting criminal proceeds and thus assist other police officers with the financial aspects of all investigations into serious crime and in providing good management of seized assets.*

Operative Measures

232. The requirements for applying special investigative measures are prescribed by the Dangerous Drugs Ordinance, the Medical and Kindred Professions Ordinance and by the Security Service Act. Only some measures are explicitly mentioned: controlled delivery and purchase of drugs, entry to or interference with property and interception of communications in cases of serious crime. Controlled delivery and purchase may be performed at this stage only in relation to drugs. The money laundering offence has to be recognised as a serious offence in accordance with Section 2 of the Security Services Act if use of entry

to or interference with property and interception of communications are necessary. That might not always be the case. The list of possible special investigative measures in relation to money laundering offences is therefore not satisfactory. *The evaluation team recommends that the Maltese authorities ensure that all possible special investigative measures are applicable to money laundering offences.*

233. The examiners recall that while the measures of controlled delivery and purchase of drugs can be performed by the police, the measures of entry to or interference with property and interception of communications can only be performed by the Security Service. The Security Service is authorised to perform these methods for police use, but despite the excellent co-operation between the Security Service and the police there have been almost no cases of such co-operation in the field of money laundering. Moreover, the Security Service has its own priorities and will not always be in position to act in the interests of the police. *The evaluation team therefore recommends that the Maltese authorities ensure that all possible special investigative measures are applicable to money laundering offences.*

234. The results of special investigative measures are not often used as direct evidence in court proceedings. Despite the legal solution in the Security Service Act, which prohibits any action towards disclosure of details of these measures, there has been only one case in which the results of these measures have been directly applied in court. In other countries, it is quite common that special investigative measures are applied in this way. Bearing in mind all the problems which may arise in Malta because of its small number of inhabitants, the danger of recognition of and therefore jeopardising field officers of the police and Security Service, special investigative measures are still the strongest tool against organised crime if their results serve as evidence in court. *The evaluation team therefore recommends that the Maltese authorities give serious consideration to extending the use of special investigative measures in criminal proceedings, if necessary by introducing additional safeguards in the appropriate legislation for preventing possible misuse by defendants.*

The Financial Intelligence Analysis Unit

235. The FIAU was not yet operational at the time of the evaluation visit, so it is not possible to evaluate its operational capabilities in practice.

The Police

236. While the examiners appreciate the efforts that the police have made in the area of money laundering, they consider that the police have lost much time dealing with every STR, partly owing to their lack of financial expertise. The police are well aware of these problems and they seem to doing their best to solve them. The setting up of a new unit, dedicated only to money laundering problems, is a positive step in this direction. In addition, the evaluation team was informed that

there was only *ad hoc* feedback from the police to the reporting institutions. Since the role of the police is about to change and the receiving authority for STR/UTRs will be the FIAU, there will be some changes in this field, too. *Nevertheless, the evaluation team recommends that the Maltese authorities ensure that regular feedback and other forms of data-exchange takes place within this new anti-money laundering structure, involving especially the police, the FIAU and the reporting institutions.*

Training and Staff Continuity

237. The examiners note that one of the most frequently mentioned issues during the evaluation visit was the lack of satisfactory knowledge within the police in the field of money laundering. Despite some training sessions organised by the Central Bank, the MFSC, the Attorney General's Office, the Malta Banks Association, the Accountancy Institute, it appears that those sessions, with some exceptions (i.e. the Attorney General's Office, the Accountancy Institute) were intended for internal use only. There have been cases in which different institutions, i.e. the Malta Banks Association, have asked for additional and joint education, but this has not resulted in any improvement. There has also been a problem of discontinuity of staff, mainly within the police. This has been improved with the establishment of the specialised unit for anti-money laundering and the assignment of permanent staff, and will be additionally solved with the setting up of the FIAU. However, the problems of proper and joint education remain open. *The evaluation team therefore strongly recommends the setting up of regular joint training programmes, covering all relevant money laundering-related issues, for all involved institutions.*

Suspicious Transaction Reports

238. The number of STRs is slowly but constantly rising, from 5 in 1998 to 21 in 2001. As it has been pointed out, the police must investigate every STR, so the processing is rather slow in general. While the police do not have a computerised system of handling STRs, the Attorney General's Office has just obtained one. On the basis of such a small number of reports, it is impossible to draw realistic conclusions about the general features of money laundering in Malta. Proper data-bases and regular feedback, neither of which exist, are preconditions for an effective use of STRs. There examiners trust that with the setting up of the FIAU the situation will be improving. *The evaluation team recommends that the Maltese authorities continue raising awareness of the problems of money laundering within the reporting entities as well as provide an efficient computerised system for the FIAU, which will enable it to receive and analyse STRs speedily, including through accessing on-line data from the necessary data-bases.*

Customs

239. During the evaluation visit it was obvious to the examiners that the customs department does not follow the concerns of other institutions in the field of money laundering. To date, customs officers have not reported a single suspicious trans-border movement of cash. In addition to the problem of a very low awareness within the customs authority, the main loophole is the lack of clear statutory provisions on the obligation to declare movements of cash and other bearer negotiable instruments across the state border. *The evaluation team therefore recommends that the Maltese authorities significantly raise the level of anti-money laundering awareness within the customs authority and introduce as soon as possible the statutory obligation to declare all trans-border movements of cash and other bearer negotiable instruments above a certain limit, as announced by the Minister of Finance.*

V. FOLLOW UP TO THE FIRST MUTUAL EVALUATION REPORT

Money laundering offence

".. to consider integrating [negligent money laundering] into their legislation."

240. Malta has not implemented this suggestion.

Corporate liability

".. consideration should also be given to the complete introduction of corporate criminal liability for money laundering offences."

248. Malta has largely implemented this recommendation through the Bill, which at the time of the on-site visit had already been published and submitted to the House of Representatives[40] and was due to amend the Criminal Code to introduce a specific provision on corporate criminal liability.

International Co-operation

"To assist the range of international co-operation that can be provided by Malta, very careful consideration needs also to be given to extending the list of predicate offences."

241. This recommendation has been implemented : the list of predicate offences has been widely extended and the situation in relation to possibilities of effective international co-operation has improved, although Malta has not introduced the "all-crime" model. In particular, fiscal offences are not included in the current

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40 Subsequent to the second round on-site visit, this Bill was adopted on 9.04.2002 and entered into force on 1.05.2002.

list. Malta is said to be considering the possibility of introducing the all-crime model in the future.

Financial and non-financial sectors

" .. transactions related to real estate, precious articles and high value assets such as cars and boats should be considered for coverage as these undertakings could well be attractive to a potential money launderer in the Maltese context. Consideration should also be given to extending coverage to lawyers, notaries and accountants"

242. This suggestion has not been implemented : the 1994 Regulations do not cover commercial activities related to real estate, precious articles or high-value assets and only in very limited circumstances lawyers, notaries and accountants.

Cross Border Movement of Cash

" The examiners consider that it would be helpful to have a clear system of mandatory declarations at the customs control of both incoming and outgoing cash and other bearer negotiable instruments. A consequence of this would be the creation of a consistent database of cross border cash movements which would be available to the enforcement authorities.

243. At the time of the on-site visit, there was no mandatory system of two-way cross-border declaration of cash, though the political intention to set it up has been announced. Therefore, this suggestion has not been implemented.

Reporting of suspicious transactions

"The examiners encourage the Maltese authorities to continue to build upon the mutual trust that is developing between law enforcement agencies and financial institutions through regular contact between reporting officers and supervisory authorities and the regular provision of feedback from law enforcement authorities. The continued regular monitoring of the overall spread of suspicious transaction reporting by the Joint Steering Committee is also recommended."

244. The Maltese authorities have taken some actions in this respect, for which the driving forces have been especially the Attorney General's Office, the Central Bank of Malta and the Joint Committee. There is still room for improvement in the relations between law enforcement agencies and some financial institutions. Contacts between MLROs and the police are not regular and they are tied only to concrete STRs. There is an impression that awareness in the field of money laundering could be further improved, and some institutions and professions could be engaged more in this field.

Training and development

"Joint training initiatives, where they do not already exist, will assist this process and are recommended."

245. There have been some joint training initiatives but this is a task which will remain important in the future, especially following the setting up of the FIAU as a new player in the fight against money laundering. The examiners encourage developing new programmes involving institutions which have not yet been involved (associations of lawyers, accountants, the Gaming Board).

Operational issues

"The examiners consider that much can be achieved at a comparatively low cost by establishing an FIU. However such a unit should be independent and act as the only receiving point for suspicious transaction reports and, preferably, its remits should consist of gathering, completing, analysing and disseminating intelligence."

246. The Prevention of Money Laundering (Amendment) Act, No. 31 of 2001 formally established the Financial Intelligence Analysis Unit within the Ministry of Finance, with the powers and tasks which adequately respond the recommendation above. However it remains to be seen how the FIAU will function in practice, since at the time of the visit is was not yet operational.

VI. COMPLIANCE WITH THE 25 OTHER (NCCT) CRITERIA

247. The FATF itself in October 2000 conducted an evaluation of Malta concerning the 25 criteria defining non-cooperative countries or territories. The evaluation finished with the conclusion that criteria 5, 7, 8 and 13 are met by Malta. Since then, given the recent changes of the Maltese anti-money laundering system, the FATF has found that the four criteria were no longer met. The evaluation team shares this position (See Annex 1).

VII. CONCLUSIONS

248. As indicated in previous parts of this report, Malta has made substantial progress since the first round in consolidating its legal framework and preventive regime against money laundering. Though some of these reforms have not yet been fully implemented in practice at the time of the on-site visit, the evaluation team welcomes the commitment of the Maltese Government to continuously upgrade and perfect the overall anti-money laundering regime. Malta now has a robust criminal legislation in place and a particularly well regulated financial sector. However, certain sectors still need to be brought

under the remit of the 1994 Regulations and the new supervisory arrangements have to prove their efficiency in practice. The results of criminal enforcement at the current stage are disappointing, both in terms of money laundering convictions and confiscations. The police and the judiciary particularly need training to understand the challenges posed by money laundering investigations and prosecutions. With the rapid implementation of the recommendations in this report, the evaluation team believes that Malta will be able to improve the results soon.

LIST OF ANNEXES[41]

ANNEX 1: CHART SHOWING COMPLIANCE BY MALTA WITH THE 25 OTHER (NCCT) CRITERIA

ANNEX 2: PREVENTION OF MONEY LAUNDERING (AMENDMENT) ACT, 2002

ANNEX 3: BILL TO AMEND THE CRIMINAL CODE, 2002

ANNEX 4: DRAFT (AMALGAMATED) PREVENTION OF MONEY LAUNDERING GUIDANCE NOTES FOR THE FINANCIAL SECTOR, 2002

ANNEX 5: PREVENTION OF MONEY LAUNDERING ACT, 1994

ANNEX 6: PREVENTION OF MONEY LAUNDERING REGULATIONS, 1994

ANNEX 7: DIRECTIVE OF THE CENTRAL BANK OF MALTA ON BUSINESS CONDUCTED THROUGH NOMINEES

[41] Annexes 2 – 7 appear in APPENDIX 1 to the draft Report

ANNEX 1

CHART SHOWING COMPLIANCE BY MALTA WITH THE 25 OTHER (NCCT) CRITERIA

CRITERIA NUMBER	MET	PARTIALLY MET	NON MET
1			√
2			√
3			√
4			√
5			√
6			√
7			√
8			√
9			√
10			√
11			√
12			√
13			√
14			√
15			√
16			√
17			√
18			√
19			√
20			√
21			√
22			√
23			√
24			√
25			√