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Anti-Money Laundering: International Law and Practice.
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Introduction

This chapter sets out in general terms the framework of Luxembourg anti-money laundering laws and regulations. It is not meant to constitute a detailed guide of the rules as applicable to each profession separately and it is not a substitute to specific advice on the subject.

Anti-money laundering rules are of two types: those aiming at repression which consist of the criminal offences punishing anyone who commits or participates in an act of money laundering or financing of terrorism and those aiming at prevention which set out the measures which certain specified professionals[1] more likely through their activity to be involved in money laundering or financing of terrorism have to observe.

The law of 19 February 1973 on the sale of drugs and the fight against drug addiction as amended[2] (article 8-1) and the Luxembourg criminal code (article 506-1 to 506-7) define the concept of 'money laundering'. The definition refers to laundering of money originating from drug trafficking as well as from a large number of serious crimes and extends to the financing of terrorism. Those criminal provisions punish by fines (from €1250 to €1 250 000) and/or imprisonment (from one to five years) anyone who commits or participates knowingly in an act of money laundering.

The legal framework for preventive anti-money laundering obligations is set out by the law of 12 November 2004 relating to the fight against money laundering and against financing of terrorism (the '2004 Law')[3] which implements the second money laundering directive 2001/97/EC of 4th December 2001.[4] The 2004 Law sets out general obligations as applicable in the same manner to a large number of professionals ranging from banks, other professionals of the financial sector, insurance companies and investment funds to lawyers, notaries, auditors, real estate agents and high value goods merchants.

Anti-money laundering rules have historically been closely linked to the development of Luxembourg as a financial sector.

By essence, financial sector professionals are among the most exposed professions to be used to reinject monies of criminal origin into the economy and officially benefit of it thereafter.

Naturally therefore, the first rules relating to the fight against money laundering applied to financial sector professionals. And today the rules fixed by the Commission for the Supervision of the Financial Sector ('*CSSF*') still set the standard for a large range of professionals which are subject to the same duties.

Given the importance of Luxembourg as a financial sector we will thus often focus on obligations applicable to financial sector professionals. For those professionals, their supervisory authority *CSSF* has over time, following changes in law, issued circulars[5] describing in detail the applicable obligations tailored to the specific needs or features of the various professions it regulates.[6]

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[1] Mainly banks and other professionals of the financial sector but also insurance companies, investment and pension funds, lawyers, notaries, auditors, chartered accountants, real estate agents, casinos, etc.

[2] Law of 7th July 1989 (Mémorial A, p. 923).

[3] Mémorial A, p. 2766.

[4] The present article does not take into account any anticipated changes upon the implementation of the third money laundering directive 2005/60/EC of 26th October 2005.

[5] All circulars on the fight against money laundering issued by the supervisory authority for the financial sector (*CSSF*) are available on www.cssf.lu.

[6] Banks, investment firms, commissioners, investment managers, professionals acting for their own account, UCI distributors, underwriters, financial instrument custodians, transfer agents and registrars, participants in an investor

For most of the other professionals which are subject to anti-money laundering by law, their relevant professional supervisory or regulatory body will have issued rules specific to the particular profession.[7]

Over the years Luxembourg has gradually built up a solid set of measures composed of criminal law rules defining money laundering by reference to an extensive list of underlying crimes (ranging from drug trafficking to serious and organised crime and financing of terrorism), legal provisions set out in the 2004 Law defining preventive professional obligations applicable to a large number of professionals which are completed by a complex set of regulatory and professional regulations. Together they aim at efficiently combating money laundering and financing of terrorism and preserve the good reputation of Luxembourg as a financial sector.

1 The money laundering and terrorist financing offences

The money laundering and terrorist financing offences are defined in the criminal code in article 506-1 to 506-7 and in article 8-1 of the law of 19 February 1973 on the sale of drugs and the fight against drug addiction.

In general terms the offence consists in either (i) helping to justify the untrue origin of the subject or the proceeds of certain criminal activities, or (ii) helping to place, convert or hide the subject or proceeds of such activities, or (iii) acquiring, detaining or using the subject or proceeds of such activities.

The underlying criminal activities concerned are: drugs trafficking, organised crime, kidnapping of minors, sexual offences against minors, prostitution, arms and munitions offences, corruption in public office or in private life, fraud against the financial interests of the state or of international bodies or offences of terrorism or of terrorist financing.[8]

The offence of terrorist financing consists in providing or collecting funds or other property with the intention that they are used, or in the knowledge that they will be used with a view to committing one or more terrorist offences.

The fact to launder money from or linked to any of these underlying criminal activities is punishable by terms of imprisonment of one to five years and/or a fine from €1250 to €1 250 000. Pursuant to these provisions, both the author, the co-author or accomplices are liable to these sanctions.

The legal definition of money laundering which we have summarised above in general terms is broad in scope and refers to a wide range of devices all of which are designed to falsify the source of the property which constitutes the subject or the proceeds of such underlying criminal offences.

As for any other criminal offence the breach of money laundering may only constitute a criminal offence if a 'tangible element' and an 'intentional element' coexist.

compensation scheme, investment advisers, brokers, market makers, operators of payment systems or securities settlement systems, exchange agents, claim recovery agents, professional lenders, securities lenders, fund transfer professionals, savings funds administrators, fund managers, domiciliary agents, client communication agents, administrative agents, IT systems and financial communication network operators, trust businesses.

[7] A list of the most important current rules is set out at the end of the chapter.

[8] A precise legal analysis of underlying offences under criminal law would exceed the scope of this article. Professionals will find indications and references in the relevant regulations governing their profession (see the list at the end of the chapter).

The tangible or material element requires that there is evidence of an underlying offence and indication that money which is the subject or the proceeds of the underlying offence was received or used by the professional or that he has benefited therefrom. It is to be noted that the breach of professional obligations referred to under 3.5 below which is separately punishable by a criminal fine does not require the evidence of the underlying offence to money laundering but could exist independently by the mere failure to comply with professional obligations such as identification duties.

As for any criminal offence however it exists only if the participation in the money laundering offence has been made intentionally. The offence will be committed only if there is evidence of intent. A mere negligence therefore does not constitute a criminal offence if the breach was done without the professional being conscious that he was participating in a money laundering activity. The requirement for the prosecutor to bring evidence of the 'intentional element' applies both to the offence of money laundering as well as to the offence consisting of a breach of professional duties referred to under 3.5 below.

The interpretation of what is intentional is left to the courts and may vary according to the different criminal offences existing under Luxembourg law. If it is established that the professional committed the breach knowing that he was committing the criminal offence of money laundering, i.e. having knowledge of the criminal origin of the funds, regardless of the intention or the goal for which the breach was committed, the intention should be duly evidenced and the sanctions will apply.

2 The professionals concerned

Anti-money laundering obligations aimed at prevention (as opposed to the repressive criminal rules referred to above) are solely imposed upon 'professionals'.

Private persons are obviously expected to act honestly but they are not subject to specific obligations when carrying out for example financial transactions. However, they could be liable under the provisions of the criminal code as author or accomplice if they knowingly participate in any punishable money laundering transaction.

The Luxembourg rules aimed at preventing money laundering apply to specific categories of professionals where it is considered that they would be the most likely involved in money laundering activities: among those are mainly regulated professionals but since the 2004 Law also unregulated professionals.

2.1 The regulated professions

The regulated professions are those which are regulated by a specific law which organises the supervision of the professionals concerned, sets out rules of conduct applicable to them and possibly establishes representative bodies which sometimes have the power to apply disciplinary sanctions upon its members.

2.1.1 Banks and professionals of the financial sector

Banks and professionals of the financial sector which are authorised to exercise their activities in Luxembourg on the basis of the 1993 Financial Sector Law. The professions concerned comprise

mainly banks, investment managers, investment fund distributors, investment advisers, brokers, broker dealers, underwriters, domiciliation companies, etc.[9]

2.1.2 Insurance companies

Insurance companies authorised to act as such in Luxembourg pursuant to the law of 6 December 1991 relating to the insurance sector but only in respect of life insurance activities.

2.1.3 Pension funds

Pension funds which are subject to the supervision of the insurance commission, persons authorised to manage such pension funds and insurance brokers which are authorised to exercise their activities in Luxembourg.

2.1.4 Undertakings for collective investment ('UCI')

Undertakings for collective investment established under Luxembourg law comprising both those UCIs which are distributed among the public and those UCISs the sale of which is restricted to institutional investors.

2.1.5 Management companies of UCIs

Management companies of UCls (more commonly referred to as UCITS III investment companies) which have additional activities to the common responsibilities for the management and administration, or which are distributing Luxembourg UCIs.

2.1.6 Pension funds

Pension funds subject to *CSSF* supervision.

2.1.7 Professionals who carry out an activity of the financial sector

Professionals who carry out an activity of the financial sector but who, for a specific reason, are excluded from the scope of the 1993 Financial Sector Law. They comprise inter alia professionals which render financial services exclusively to their parent undertakings or subsidiaries, exclusively to undertakings forming part of the same group, or exclusively consisting in administration of employee-participation schemes.

2.1.8 Independent auditors

Independent auditors (*réviseurs d'entreprises*) within the meaning of the law of 28th June 1984, relating to the organisation of the professional independent auditors.

2.1.9 Chartered accountants

Chartered accountants (*experts comptables*) within the meaning of the law of 10th August 1999 relating to the organisation of the profession of chartered accountants.

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[9] For a complete list see hereabove footnote 3.

2.1.10 Notaries

Notaries (*notaires*) within the meaning of the law of 9 December 1976 relating to the organisation of the profession of notary.

2.1.11 Lawyers

Lawyers (*avocats*) within the meaning of the law of 10 August 1991 on the profession of lawyers but limited to situations where they act for clients in the preparation or realisation of financial or real estate operations or of transactions such as the sale or purchase of real estate or commercial businesses, asset management opening of bank accounts, creation or management of companies or similar structures. Lawyers are not subject to any such professional obligations where they merely act in a capacity as legal advisers and in particular in relation to the preparation of the conduct of judicial proceedings.

2.1.12 Casinos

Casinos and gambling institutions within the meaning of the law of 20 April 1977.

2.2 The unregulated professions

Unregulated professions are those which are not subject to ongoing supervision even though certain obligations may be imposed upon them by specific laws or the access to the profession may be regulated.

Among those, the following professions are subject to professional obligations in respect of money laundering:

- Real estate agents established or acting in Luxembourg.
- Tax advisers or advisers in economic affairs.
- Merchants in high value goods where payment is made in cash for a sum in excess of €15 000 comprising in particular businesses dealing in jewellery, watches, cars, ships, airplanes, gold, other precious metals, diamonds, art, antiques, furs and carpets, electronic equipment, etc.

Luxembourg law in addition to enumerating those professionals which are subject to anti-money laundering obligations, provides that each of the professionals concerned must make sure that the same obligations as imposed upon them by Luxembourg law are observed within their branches or subsidiaries either in Luxembourg or abroad except if such branches or subsidiaries are subject to equivalent anti-money laundering obligations in their country of establishment. Similarly the law provides that the obligations shall apply to branches in Luxembourg of foreign businesses.

3 The professional obligations

The 2004 Law sets out in general terms professional obligations aimed at avoiding money laundering which, subject to limited exceptions referred to below, equally apply to each of the above referenced category of professionals. They are grouped under three headings: (i) know your customer, (ii) adequate internal organisation and (iii) cooperation with the authorities.

These general obligations which have force of law have, for most of the professions concerned, been separately explained and/or completed by regulations or recommendations setting out in further details what is expected from the professionals. Each of such regulations is referred to in the list set out at the end of the chapter.

3.1 Know your customer

The '*know your customer*' obligation starts with the requirement for a professional to identify his contractual counterpart but goes well beyond this mere identification and extends to the obligation to identify the beneficial owners and the obligation to request further information on the client in particular vis-à-vis specific types of clients or where a suspicion of money laundering arises.

3.1.1 Identification of the client – general

The client is defined by the 2004 Law as the person with whom the professional enters into a business relationship and in particular for certain types of professionals when they open an account or a savings book or offer safe custody services.

Occasional clients are not subject to identification except where the transaction exceeds in value €15 000[10] (regardless of whether the transaction is carried out in a single transaction or in several linked transactions) or where for such an occasional client there is a suspicion of money laundering (see Subsection 3.1.6).

The identification of the client has to be made on the basis of documentary evidence.

For natural persons the professional will normally take a copy of an official document certifying the identity of his clients (although the regulations of the *CSSF* also allow to transcribe the most important elements thereof instead of taking a copy). Specific regulations from certain professional bodies[11] specify further that the professional is obliged not only to take a copy or transcribe the data but also has to ensure that the document produced matches the client by comparing the signature and photos etc. A reasonable verification is required.

Where the client is not physically present, those documents have to be certified by an authority (police, notary, embassy . . .).[12]

For legal entities the identification will be made on the basis of the documents establishing the due incorporation and existence of the legal entity mainly through copies of articles of association and proof of registration in a local commercial register. Further, details of the representatives of the legal entity (directors and/or senior management) and in particular of those who have power on the account opened with the professional will have to be identified in the same way as for individuals.

The identification shall be made before business relationship actually starts, i.e. before a transaction is carried out with the relevant client. For banks however it is possible to give clients an account number on which moneys may be received before the identification review is completed but such moneys have to remain blocked in the account and may only be used for banking transactions once the bank has completed its know your customer procedure to its satisfaction.

Although it is not expressly set out in the 2004 Law the mere identification of the client on the basis of documentary evidence is not deemed sufficient to fulfil the '*know your customer*' obligation. The professional rules set out by the specific regulatory bodies in particular the *CSSF*

[10] See however in Subsection 3.1.7 for casinos the threshold is lowered to €1000.
[11] See *CSSF* circular 2005/211 or *IRE* circular of 20.06.2006.
[12] See 3.1.2(a) below.

and the circulars issued by the prosecutor leave no doubt that professionals have to go beyond such identification.

In a recent circular which the prosecutor's office has addressed to all merchants in high value goods[13] it is specified that clients have to be interrogated on the origin of the funds and assets which are the subject of the transaction. Where there is doubt on this origin the professional must take reasonable measures to levy all doubt and where the doubt cannot be levied the professional shall not carry out the transaction. Such circular specifically requires the merchant to obtain the address and the profession of each client.

Similarly the *CSSF* circular 05/211 specifies that the professional of the financial sector must make sure to receive complete and satisfactory answers to all his questions which he may ask the client and which relate to the client, the client affairs and the purpose of the business relationship which is sought.

3.1.2 Identification of clients – special cases

For certain types of operations or specific types of clients the 2004 Law or applicable professional regulations impose additional obligations or grant derogations.

(a) Client relationship at distance

Where the client is not physically present at the time when the business relationship is entered into, the 2004 Law requires that the professional must take specific and adequate measures which are necessary to face the increased risk existing in relation to money laundering. In practice the professional has a choice between two possibilities: either the identification documents are certified by a competent authority (embassy, notary, police, etc.) or by a financial institution subject to equivalent money laundering rules or where the professional only receives a copy of the identification document the first payment has to be made in a transaction from an account opened in the name of the relevant client with another financial institution subject to equivalent money laundering obligations. In this respect it is important to stress that it is not sufficient to receive payment from such other financial institution but the professional shall receive proof that the relevant client has an account opened with the financial institution who transferred the money.

The *CSSF* circular 05/211 provides that depending on the risk associated with the relevant type of client or relationship it is recommended that further justifying evidence is received by the professional such as: reference letter from a financial institution, justification of the professional activity of the client, evidence of the origin of funds or confirmation of the address of the client.

(b) Politically exposed persons

Specific measures have to be taken with respect to politically exposed persons. The *CSSF* circular 05/211 provides that professionals must have adequate procedures in place to determine whether the client (or the beneficial owner, see below) is a politically exposed person, i.e. a person who holds or has been entrusted with prominent political public functions including family members and partners[14] (but excluding specifically persons holding only intermediary or lower level

[13] Circular to merchants of high value goods of 13.03.2006 by the Luxembourg prosecution office (*Parquet du Tribunal d'Arrondissement*), financial intelligence unit (*cellule de renseignements financiers*).

[14] Heads of State or of Government, Senior Politicians, Senior Government members, members of parliament, senior members of large regional or municipal bodies or organisations, Judicial or Military Officials, Senior Executives of State corporations or important political party officials.

functions). An enhanced verification of the origin of funds must be carried out and such clients must be subject to a special continuous supervision during the business relationship.

Whereas the *CSSF* regulations merely refer to politically exposed persons the recent circular of the prosecutor addressed to all merchants in high value goods goes beyond the politically exposed persons concept and includes among 'sensible clients' even managers of the private sector. Such extension would appear to go beyond the scope which national and international law makers have set. Due to its vagueness it is particularly difficult to apply in practice and professionals will not be easily able to determine who to categorise as 'sensible' client. In reality such provision indicates no more than what the 2004 Law anyhow already provides, i.e. that professionals have to examine with specific attention transactions likely to be linked to money laundering because inter alia of the personality of the client (see hereafter Subsection 3.1.5). Rather than requesting specific vigilance in respect of such types of client, the emphasis should be put on the concept of corruption. It is only where a professional deals with a client and cannot exclude the possibility of corruption which constitutes a primary offence which can give rise to money laundering that the professional obligations as laid down by the 2004 Law in relation to politically exposed persons will apply and may trigger a denunciation to the prosecutor.

(c) Professionals holding third-party moneys

Another category of clients that requires specific attention are those which have a professional activity which implies the transfer of third-party funds where the relevant professional is not a licensed and supervised financial sector professional. This is for instance the case for lawyers or notaries. For such clients the professional must determine whether the relevant client acts for his own account (for example where he receives professional fees on his account) or for account of his own third-party clients (for example where a lawyer or a notary receives money which is used to incorporate a company). In the latter case, the professional must identify not only his client (lawyer or notary) but also the beneficial owner for whom such client acts. In any case the professional must specifically ensure that the relationship is not used for purposes of money laundering or financing of terrorism.

(d) Non-cooperative country clients

Any client from a country which is considered by the *FATF* as a non cooperative territory must be subject to a specific perusal at the time the relationship is entered into and thereafter as long as the relationship exists.[15]

3.1.3 Exemptions from identification obligation

(a) Financial institutions

However where the client is itself a national or foreign financial institution subject to equivalent money laundering obligations no identification must be made at all neither of the client nor of the beneficial owners whose money such client may hold. Nevertheless the professional must make sure that the relevant client is indeed a duly authorised financial institution in a country submitting such professionals to equivalent money laundering rules. All countries which are members of the EU, EEA or *FATF* are recognised as imposing such equivalent obligations

[15] For an updated list see http: \\www.fatfgafi.org\index\fr\htm.

to its financial institutions. The equivalent requirements condition is also satisfied in the case of branches or subsidiaries of financial institutions established in one of the aforementioned countries, irrespective of the country in which such branches or subsidiaries are located provided that the financial institutions require their branches and subsidiaries to ensure compliance with the provisions applicable to them, either by virtue of law or group rules.

Even where the professional is exempt from identifying such customer, he has to discharge its monitoring obligations generally and in particular to report on suspicious transactions. It may indeed not be ruled out that even under cover of a licensed professional of the financial sector money laundering activities may be carried out.

(b) Undertakings for collective investments

According to the 2004 Law only those UCIs which market their shares or units are subject to the relevant anti money laundering rules. The *CSSF* Circular 2005/211 specifies that a UCI shall not be subject to the 2004 Law where it markets its shares or units via an intermediary (distributor) who is himself a domestic or foreign financial institution subject to equivalent money laundering obligations (see (d) above). However where the relevant intermediary is not subject to such equivalent obligations or where the UCI markets its shares or units in direct contact to its clients, the responsibility for identification lies with the UCI itself.

3.1.4 Identification of beneficial owners[16]

The 2004 Law obliges the professionals not only to identify their contractual counterpart but also, if different, the person on whose behalf they act.

The requirement to proceed to identifying beneficial owners applies equally to natural persons and legal entities. Where there is any doubt as to whether clients subject to identification procedures are acting on their own behalf or where there is certainty that they are not acting on their own behalf, reasonable care must be taken in order to obtain evidence of the actual identity of the person on whose behalf the customer is acting.

The *CSSF* circular 05/211 specifies that beneficial owner identification is '*a key component of the KYC [know your customer] profile*'.

In its circular, the *CSSF* specifies that where, as part of the exercise of the know your customer obligation, the professional is informed that the client is not himself the beneficial owner he should seek to get confirmation in writing from the beneficial owner directly in support of the statements made by the client. He should further identify the beneficial owner on the basis of documentary evidence in the same way as for the client.

If the client is a legal entity the question arises whether the company could itself be regarded as the beneficial owner or whether the owners of the shares of the company have to be identified.

In this respect *CSSF* circular 05/211 invites the professional to a basic distinction between shell companies which simply act as a screen to preserve the anonymity of the beneficial owners for which identification of the beneficial owners is required and other companies.

In the first case the identification shall be required for persons holding as beneficial owners a controlling interest in the company currently deemed to be more than 25% of the share capital.

[16] For an indepth study see Pit Reckinger/Myriam Pierrat 'Le Banquier face à l'ayant-droit économique', Droit bancaire et financier au Luxembourg, ALJB, volume 2, Larcier, 2004.

Where this interest is held indirectly ownership must be traced back to the natural person beneficially owning the interest.

The *CSSF* circular 05/211 specifies that distinguishing features of a shell company include the limited number of shareholders, the absence of a stock market listing and the lack of any trading activity.

A listing is in general a criteria which is used to conclude that the company may be regarded as the beneficial owner. It is however not an absolute guarantee and it should not necessarily be the only criterium to be used by the professional. An analysis should be made on the basis of the entire presentation of the company in particular its commercial activity.

Further difficulties arise in respect of specific types of clients such as trusts where in each case the identification procedure should cover the ultimate beneficial owner, i.e. the beneficiary of the trust. Given that for certain types of trusts the beneficiary may change over time, professionals should also identify the originator and will have to identify the beneficiary at the latest at such time where moneys are paid out to him.

The determination of the beneficial owner may be a time-consuming and delicate exercise. Such is the case in respect of entities which are set up by private equity funds to structure their investments. Although the manager of the private equity fund will be easy to identify, such manager may be reluctant or even sometimes be prohibited under local rules to provide a list of investors in the fund or even more produce identification documents of such persons. Further, a full identification would because of time constraints not allow the transaction to take place within the timeframe required and investment opportunities could be lost. In such cases practical solutions need to be found on a case-by-case basis. Very often the managers of the fund concerned will be subject to equivalent identification requirements as those required by the 2004 Law. A certificate from such person that he has identified all investors in the fund in accordance with applicable money laundering provisions should then be obtained as part of the know your customer exercise.

3.1.5 Delegation of the identification duties

The 2004 Law has introduced the possibility for professionals to delegate (by way of a mandate) to other professionals in Luxembourg or abroad which are active in the same sector of activity and which are subject to equivalent money laundering obligations the duty of identifying clients. Such possibility which existed previously among financial sector professionals has been extended to all professions subject to the 2004 Law. Such delegation is allowed only to the extent that a written agreement exists between the two professionals which guarantees at all times access to the identification documents during the term of the agreement and provided that the Luxembourg professional receives a copy of the documents for each client. Notwithstanding the fact that technical identification duties may thus be delegated, the responsibility for the identification remains with the professional in Luxembourg as if no delegation had taken place.

3.1.6 Careful perusal of certain transactions where a suspicion of money laundering arises

The 2004 Law obliges each professional to examine with particular attention every transaction which is likely to be linked to money laundering because of its nature, the circumstances surrounding it or the personality of the persons involved. In this respect many professional supervisory or regulatory bodies refer to lists setting types of transactions which are deemed suspicious. It is in fact impossible to draw up a complete list of suspect transactions. The most

important for every professional will be to exercise a good faith judgment in order to determine whether the transaction is reasonable and to refuse to carry out any transaction which he would not understand or which he could not explain or justify.

3.1.7 Continuous supervision

Although the know your customer obligations must be carried out at the time the business relationship is entered into the 2004 Law imposes on professionals a continuous supervision duty of the relationship with their client and enhanced obligations depending on the degree of risk associated with the relevant clients. In particular the special clients referred to above such as politically exposed clients must be subject to an enhanced supervision.

3.1.8 Retention of documents

The 2004 Law obliges professionals to safekeep underlying documentation to serve as evidence for a period of at least five years starting from the end of the relationship for copies of all identification documents and with respect to the documentation relevant to specific transactions for a period of at least five years starting from the execution of the transaction.

3.2 Obligation to have an adequate internal organisation

Each professional shall have internal control and communication procedures which are adequate to prevent money laundering transactions.

Professionals shall set up written procedures which have to be followed in respect of any client relationship at inception and during the business relationship.

Further, each professional shall take appropriate measures to educate its employees to money laundering provisions and help them to recognise suspicious information and give them appropriate training.

For most professions, regulatory bodies impose that a specific person is designated as the responsible person for money laundering. Such person is responsible vis-à-vis the supervisory authorities and is also designated as the link between the relevant professional and the judicial authorities for purposes of the cooperation. It is that person or his delegate who makes decisions within the organisation whether and when suspicious transactions are notified to the prosecutor.

3.3 Cooperation with the authorities

Professionals, their management and employees are obliged to fully cooperate with Luxembourg authorities in charge of the fight against money laundering and against the financing of terrorism. In that respect any professional secrecy or confidentiality duties to which a professional may be subject to are lifted.

Passively this general obligation obliges professionals to respond to requests from the prosecutor (or its own supervisory authority if such authority has by law the power to intervene) and provide upon request all necessary information in accordance with the procedures applicable by law.

Actively the 2004 Law obliges each professional to inform on its own initiative the prosecutor of any fact which might be in indication of money laundering or financing of terrorism inter alia by reason of the profile of the client, his evolution, the origin of the funds, the nature, the purpose or the proceedings of the transaction.

The transmission of information to the prosecutor is done by the person designated within the professional's organisation as responsible for anti-money laundering. For financial sector professionals a copy must be sent to the supervisory authority. The obligation to inform the *CSSF* may be deemed contrary to the legal prohibition of tipping-off. Indeed, article 5(5) of the 2004 Law provides that no communication may be made to the client or third parties that information was passed to the prosecutor (see 3.4 below). Given that the supervisory authority anyhow has unlimited investigatory powers over professionals it regulates, it is anyhow in a position to request that such information is transmitted to it. The justification of this general request is obviously the need to properly exercise its prudential supervision.

For lawyers a derogatory regime applies as set out below.

In practice banks are frequently faced with a situation where published general information (for example in newspapers) indicate that a client is to some extent involved in a criminal investigation abroad (with often only limited information or details) but where the bank's file on the client and the transactions which were carried out by the client on his accounts have been duly justified and do not show any element which might be an indication of money laundering. The Luxembourg prosecutor has taken the unjustified view that in such case a banker should always proceed to the denunciation of his client.

If however it is found later that the information was wrong and that indeed the suspicion against the client was unfounded, a declaration by the banker to the prosecutor may have caused serious harm to the client. Indeed, for the least the prosecutor may have seized all assets or the account remained blocked for the period of the investigation. Very often however, especially where the client is a resident of another country, the prosecutor will share his findings with the authorities of the country where the client is resident with the risk that the client is thus subject to different proceedings in his home country which may not be considered punishable as money laundering in Luxembourg.

A mere indication of a suspicion of a criminal activity published in a newspaper article cannot, in our opinion, by itself be an element which is sufficient for the denunciation obligation of the professional to come into existence. The lower court and the court of appeal have in a recent case confirmed our view by ruling that such an indication in a newspaper, having regard to the information available to the Bank, was not in itself sufficient to trigger the requirement for a denunciation.

The obligation of denunciation imposed by law exempts the professional from professional secrecy duties.

Not only is the professional (whether a bank, a lawyer, etc.) relieved from professional secrecy he is also exempted from any liability where he has made a denunciation in good faith. Article 5(4) of the 2004 Law provides that a disclosure in good faith to the Luxembourg authorities in charge of money laundering by a professional or an employee or manager of such professional of informations which in their opinion constitutes a suspicion of money laundering may not be deemed to constitute a violation of a contractual restriction to disclose information or of a professional secrecy and does not entail for the person concerned any liability of any sort. In other words where a declaration has been made in good faith on the basis of elements which the professional may reasonably have considered as constituting money laundering but which in fact turned out to be wrong, such professional as well as his employees will not be subject to any liability of any sort, either civil, criminal or disciplinary.

The obligation to inform the authorities even applies when on the basis of an element of suspicion the professional refuses to enter into a relationship with a potential client.

Following an information to the prosecutor, the prosecutor may block and seize funds or assets which are held by the professional for or from the client. An oral instruction from the prosecutor must be confirmed in writing within three days failing which the blocking instruction will cease to have effect on midnight of the third day. Such a measure may not be challenged in civil or urgency courts. However any such blocking or seizure is limited in time for a maximum period of three months.

3.4 No tipping off

Professionals or their managers or employees may not communicate to the client concerned or to any third person that information has been transmitted to the prosecutor or that an investigation has been started.

This does obviously not prevent the professional, where he discovers an element or circumstance which could constitute a suspicion of money laundering to contact the client and ask for explanations or underlying documentary evidence. Where a professional is part of a financial group the question often arises whether there can be discussions or concertations with other group companies or with the internal group controller. Similarly the question arises whether correspondents and auditors (who themselves are subject to own denunciation obligations) may be contacted for additional information or advice. As long as the professional has not with certainty determined whether a suspicion has arisen and is still at a preliminary point in his investigation, any such discussions or requests for clarification remain possible. Conversely, where the auditor as part of its audit mission discovers facts which could result in forming a suspicion but still need further investigation or explanation, he shall consult with his client to form a view. Only, if the professional does not receive the anticipated satisfactory responses and an element of suspicion remains which leads the professional to make a declaration to the prosecutor, does the prohibition to communicate this fact to the client or third parties apply. One formal derogation to the prohibition of tipping off exists under the 2004 Law, allowing a branch or a subsidiary of a financial group to communicate to the internal group auditor that the information has been so transmitted but then only under the express condition that the prior authorisation from the public prosecutor was received.

However, beyond the state of fact searching by the prosecutor where a criminal investigation is commenced by an investigating magistrate and judicial measures are taken such as an official seizure of the assets or documents held by the professional (often in the context of an international rogatory commission), the client must be informed forthwith in order to enable him to take recourse against such a measure. The rights of defence warrant that through receiving the information thereon, the client is put in a position to challenge in court the measures taken.

3.5 Sanctions for breach of the professional obligations

The non observance of the professional obligations set out in the 2004 Law is punished by a fine between €1250 and €125 000.

The breach of professional obligations relating to fight against money laundering is a criminal offence. It is a separate offence to the money laundering offence itself or the underlying offences

which may give rise to money laundering. It may be pursued even in the absence of an underlying money laundering offence.

At the time of the discussions on the bill of law which became the 2004 Law there was a very lively debate on the subject whether the criminal offence of non observance of the professional obligations in respect of money laundering would require the intention of the relevant professional or whether such offence would be punishable even where the non observance of the obligation would have been unintentional i.e. where a professional would have unknowingly accepted money derived from criminal activity.

Before the 2004 Law the prosecutor's office considered that the non-observance of the professional rules imposed on the professionals of the financial sector was an unintentional offence where the mere breach of the '*know your customer*' obligation triggered criminal sanctions for the banker.

This position was very much criticised.

The debate was closed by the 2004 Law confirming the position that the offence of non cooperation or a breach of professional obligations as any other criminal offence needed a criminal intent. Today it is clear that only those who intentionally contravene to the professional obligations could be subject to a criminal offence.

The question remains how courts will define the intentional element in respect of a breach of professional obligation. For lack of court cases it is not possible to have certainty on the subject. It is however likely that courts will concentrate their analysis on the question whether a person knew or should have known and is thus deemed to have been knowledgeable that it was breaking its professional duties.

3.6 The legal profession

Notaries are among the professionals subject to know your customer and identification procedures in the same fashion as banks or other professionals of the financial sector.

With respect to the obligation to cooperate with the authorities and in particular inform the prosecutor specific provisions have been introduced in the 2004 Law for the legal profession.

Lawyers are not subject to any obligation to cooperate with criminal authorities with respect to information which they hold from clients as part of the legal consultation or as part of defending their clients and representing them in judicial proceedings. This is a fundamental guarantee for the rights of defense and for the right of every person including criminals to obtain a legal assistance.

Outside this limited exemption where lawyers may become subject to an obligation to denounce certain facts to the prosecutor, such denunciation is made not to the prosecutor directly but to the *Bâtonnier de l'Ordre des Avocats* (the chairman of the Bar) who will verify whether the circumstances are such that a denunciation is compulsory pursuant to the 2004 Law. Only then would the *Bâtonnier* transmit the declaration to the prosecutor.

Again this additional layer is meant to constitute a special guarantee that the rights of defense are preserved.

3.7 The casinos

Casinos are professionals which are specifically exposed to receiving monies originating from criminal activity. It is therefore specified that for every client buying or selling play money in

Casinos the identification obligations apply for an amount of €1000 or more (as opposed to the general threshold of €15 000 applicable to the other profession).

List of important supervisory or professional body rules for specified professionals

Financial sector

CSSF Circular 05/211 relating to the fight against money laundering and terrorism financing and the prevention of the use of the financial sector for the purpose of money laundering and terrorism financing; for undertakings for collective investment (UCI): Recommendation of 17 March 2000 by the ALFI on prevention of the use of UCIs for the purpose of money laundering as well as usages and recommendations by the Luxembourg banking association (*ABBL*) of July 2000.

Life Insurance companies

Circular letter 01/9 of 30 November, 2001 by the Insurance Commissariat relating to the scope of professional duties, to the prevention of the use of the insurance sector for the purpose of money laundering; notification of 9 December 1997 by the *ACA* (Association of Insurance Companies) relating to money laundering; amended law of 6 December 1991 on the insurance sector.

Independent auditors (réviseurs d'entreprises)

Recommendation by the institute of independent auditors (*IRE*) of 20 June 2006 on the legal and professional duties of independent auditors relating to the fight against money laundering and terrorism financing; amended law of 28 June 1984 relating to the organisation of the professional independent auditor.

Lawyers (avocats)

Circular Nr 03 – 2004/2005 (by the Luxembourg bar) and the amended law of 10 August 1991 on the profession of lawyers.

Notaries (notaires)

Amended law of 9 December 1976 relating to the organisation of the notarial profession and circular issued by the chamber of notaries to its members which is not publicly available.

High value goods merchants

Circular for merchants in high value goods by the Prosecutor (financial intelligence unit); article containing explanations on the circular published on page 72, Merkur Nr 5/2006 (monthly by the chamber of commerce).

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Abbreviations

1993 Financial Sector Law	Law of 5 April 1993 relating to the financial sector
2004 Law	Law of 12 November 2004 relating to the fight against money laundering and against financing of terrorism
ABBL	Luxembourg Banking Association
ACA	Association of Insurance Companies
CSSF	Commission for the Supervision of the Financial Sector
FATF	Financial Action Task Force (see footnote 8)
IML	Luxembourg Monetary Institute and predecessor of the *CSSF*
IRE	Institute of independent auditors
Mémorial	Official gazette of the Grand Duchy of Luxembourg
UCI	Undertakings for Collective Investment

Valery V. Tutykhin was born in 1973 in Russia. Graduated with honors from the Law Faculty of Moscow State Institute for Foreign Relations in 1995, holds a Candidate degree in Economics (2003). Practiced as lawyer with Watson, Farley & Williams, then Partner at John Tiner & Partners (Moscow). Advocate, Chairman of the bar chambers as of 2003. Author of 4 books and over 70 articles on Russian law and economy. Main practice areas include Finance and Tax Law, Mergers and Acquisitions, Securities, Asset Protection for Russian-based clients.

Firm's profile

John Tiner & Partners was established in 1995 as a joint venture between Russian and foreign lawyers. The firm specializes in Tax and Finance law, M&A, Litigation, Asset Protection and Corporate law.