1996

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Latin American Money Laundering Options and the European Model

George A Walker

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I. Introduction

The development and enforcement of adequate laws and administrative provisions in connection with the prevention, investigation and prosecution of all areas of financial crime are clearly of crucial importance at the present time. Particularly acute difficulties, however, arise with regard to the prohibition and prevention of the use of the new global financial markets for the purpose of money laundering.

Although this has been a matter of increasing concern in a number of countries for some time, the problems associated with money laundering have recently become of particular importance at the international level with the explosive growth in the size and complexity of global financial markets over the last two decades and the corresponding opportunities created for their abuse. It is essential that effective national and global solutions are developed in early course.

The continued stability of the new world economy clearly depends upon the safe and effective operations of national and international financial markets. This order could,
however, be unsettled by either extensive money laundering operations being carried out on the legitimate markets involved or by the development of underground banking markets or secondary currency markets. Again, apart from any regulatory or monetary arguments involved, it is also even more essential from the perspective that organized crime should not be allowed to protect and then benefit from its illicit gains.

It is accordingly essential that complete and effective solutions are developed in early course to eliminate all forms of money laundering in national and international markets.

With regard to Latin America, in particular, the International Narcotics Control Board [INCB] in Vienna has recently stated that South America and Central America are amongst the areas currently most vulnerable to money laundering abuse along with Asia, Russia and the Caribbean. While the prevention of money laundering presents a challenge to all developed and developing counties, particularly serious issues arise with regard to such fragile or vulnerable economies as they can easily come under the economic and political pressure, or even control, of criminal groups if criminally defined capital has free access into their economies especially as such capital has a strong potential for exacerbating corruption in both the government and private sector. The weak banking and financial structures of most countries in Central America also make them prime targets for money laundering activities.

The INCB Report also notes that drug trafficking is so pervasive that it has triggered money laundering operations on a global scale and that the amount of money involved has now assumed such proportions that it is capable of destabilizing global financial markets. In addition to drug trafficking, however, it is essential that all types of market abuse are eliminated to prevent the laundering of all forms of criminally derived funds from whatever source.


4. In connection with the damage caused in Latin America by drug trafficking and money laundering in terms of inflation and higher living and housing costs and related loss see generally, *Latin America: War on Drugs is Being Lost: Bishops Warn*, INTER PRESS SERVICE, Sept. 9, 1993; and Amelia Obregon, *Cocaine Riches No Help to Columbia*, S.F. CHRON., Nov. 17, 1992, at A1, A13.

As the difficulties created by money laundering operations are clearly global in nature and effect, coordinated international or, at least, regional responses as well as effective national implementation programmes must be developed in early course.\(^6\)

At the regional or multinational level, the two most important models which have been adopted to date are the 1992 Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Related Offences [the OAS Model Regulations]\(^7\) and the 1991 European Council Directive on Money Laundering.\(^8\) The OAS Model Regulations had been prepared over a two year period by the Inter-America Drug Abuse Control Commission [the CICAD] under the auspices of the Organisation of American States [OAS].\(^9\) These two sets of regional models, however, do not have any direct legal effect and must still be implemented by all participating states in the laws of each of their respective countries.\(^10\) For this reason, appropriate national or local models must also be considered, the two most developed are currently those of the United States and the United Kingdom.


\(^{7}\) See, Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and related Offences, OAS/Ler.I/XIV.2, CICAD/INF.58/92 (July 9,1992). For comment, see infra section 3.


\(^{9}\) The CICAD was established as an autonomous regional organisation within the OAS pursuant to an OAS conference on drug trafficking in Rio de Janeiro, April 22-26 1986, OEA/Ser. K/XXXI.1, CICAD/1986. See infra section 3.

\(^{10}\) The difference between the two sets of regional measures is that the OAS member states are placed under no obligation to implement the Model Regulations in their national laws while the European Directive is addressed to all Member States and must be implemented under Article 189 of the Treaty of Rome. For comment on the distinction between soft law and hard law in the money laundering area, see Zagaris and Papavizas, supra note 5, at 452.
While a number of Latin American countries have taken a significant amount of action to control money laundering, at least, in relation to drug related criminal activities, few comprehensive responses have been adopted to date with only very limited action having been taken in many areas.11

For those Latin American countries which have not yet adopted any controls in this area or are considering developing their existing basic provisions into more comprehensive codes, the most relevant national model may remain that of the United States. Although the very substantial public and industry reporting, investigation and enforcement costs involved make it inherently unsuitable as an initial implementation model for use in less developed economies. Of more value in creating both a control and cost effective local response to the difficulties created may be the programme of measures adopted within the United Kingdom to implement the provisions contained in the European Money Laundering Directive. Whether a United States or United Kingdom model is used, it is imperative that an effective set of measures is adopted early in all countries to deal with the very serious difficulties which arise in combating money laundering in the global financial markets of the 1990s. Following a short note on the nature and size of

11. Ecuador adopted comprehensive money laundering controls including amendment of its bank secrecy laws in 1990; see Zagaris and Catisilla, supra note 5, at 922-925. Uruguay has also begun to take action in this area especially since 1993. id., at 922-926. Although a large amount of action has been taken in a number of Latin American countries this has often not followed the OAS Model Regulations; see, Solomon, supra note 5, and note 97. For comment on the measures adopted, in particular, in Venezuela in 1993, which had be that time become the new money laundering capital of Latin America, see Victoria Colliver, Venezuelan Law Aims to Dent Drug Business, Christian Sci. Monitor, Aug. 20, 1993, 2. Mexico has most recently become the most important centre for the initial placement of U.S. drug cash into the world's financial system with only very limited action having been taken to limit abuse due to the enormous profits earned by the Mexican banking system; see U.S. State Department views on laundering in select countries", ALERT INTERNATIONAL, April, 1996. An extended package of measures has, however, subsequently been agreed between the United States and Mexico; see Daniel Dombey, News: The Americas: Mexico-US Accords Made, THE FINANCIAL TIMES, May 9, 1996, at 11. Although Columbia had been making progress against illegal drug trafficking it has since been removed from the list of countries maintained under the Foreign Assistance Act of 1961 (as amended) which will result in economic sanctions being imposed including the withdrawal of foreign aid and lending privilege; see Nancy Dunne and Sarita Kendall, Columbia faces US sanctions over failure to combat drug trafficking, THE FINANCIAL TIMES, March 2, 1996, at 3. Bolivia and Peru were, however, added to approved list under Presidential Determination No. 96-13 of March 1, Federal Register, Vol. 61, No. 48; FR 9891; see infra notes 24 and 175. Chile made money laundering a criminal offence in 1994 and Argentina has very recently introduced new reporting requirements to control money laundering abuses; see Argentina Introduces Money-Laundering Controls, Reuters, May 16, 1996. For a general review of recent developments in Latin America, see Lee Brown, Director, National Drug Control Policy, The Drug Czar Discusses His Recent Trip to Latin America, News Conference (August 29, 1995) available on LEXIS; see also, Remarks of Treasury Secretary Robert E Rubin on the Buenos Aires Money Laundering Conference and Argentina/Brazil Trip, to the Carnegie Endowment for Democracy, Brookings Institution and Inter-American Dialogue (Dec 7, 1995); and International narcotics control efforts in Western Hemisphere, US Dept. Of State Dispatch, Vol. 6, no. 16, (April 17, 1995).
the current global problem, the purpose of this article is to note the general content of the OAS Model Regulations and then to contrast these with a more detailed review of the nature and effectiveness of the alternative adoption models currently available for Latin American development.

II. Nature and Scope of Problem

A. Money Laundering Operations

Money laundering is concerned with the recycling of criminally derived funds through normal financial system operations with a view to making the funds available for future legitimate (or illegitimate) use while, at the same time, disguising their true source to protect them from seizure or forfeiture and the parties involved from criminal or civil prosecution.

The Financial Task Force on Money Laundering [FATF], which was established by the Group of 7 leading industrialised countries in 1989 to examine the flow of illegal money and of money laundering methods, agreed as its working definition, that money laundering consisted of either the conversion or transfer of property, the concealment or disguise of its true nature or source or the acquisition, possession or use of property knowing it to be criminally derived.

Following an examination of how money laundering was effected in practice, FATF stated that money laundering involved three general stages of operation, namely, placement, layering and integration of the funds. While placement involved the physical dispos-

12. See, G7 Economic Declaration of 16 July 1989 and 1990 Report, supra note 2. After a seven month study, the final Report was issued in April 1990 which contained a 40-point programme to deal with money laundering and asset forfeiture on a global basis. The Report also contained detailed annexes which examined money laundering operations in each of the 15 participating countries involved and the statutory and regulatory responses adopted to date. The study undertaken by a group of 130 experts from the countries involved focused, in particular, on the extent and nature of the money laundering process, the analysis of the national laws and regulations of each of the countries involved and a compilation and review of the existing international instruments and agreements relevant to money laundering. For comment see, CHARLES INTRIAGO, International Money Laundering (1991), Ch 3.2; and Lisa Barbot, Money Laundering: An International Challenge, TULANE J. OF INT'L & COMP. LAW 163 [1994]. The commitment of the G7 to control global money laundering was most recently restated at its Halifax, Nova Scotia Summit in October 1995; see World money laundering control effort given new impetus, MONEY LAUNDERING ALERT, Oct. 1995.

13. The FATF defined money laundering as follows:

1. The conversion or transfer of property, knowing that such property is derived from a criminal offence, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

2. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from a criminal offence, and

3. The acquisition, possession or use of property, knowing at the time of receipt that such property was derived from a criminal offence or from an act of participation in such offence.
al of bulk cash proceeds from their location of acquisition to avoid attention\(^{14}\) layering was the separation of illicit proceeds from their source through the use of complex financial transactions to disguise their audit trail.\(^{15}\) Integration then involved the conversion of the proceeds into apparently legitimate business earnings through normal financial or commercial operations in the real economy.\(^{16}\)

It is clear from the FATF analysis that money laundering operations can take many complex forms and that it is accordingly not possible to adopt a simple definition or criminal sanction-based response. A more comprehensive but integrated programme of measures must accordingly be developed which involves a wide variety of civil, criminal and administrative sanctions and penalties. In addition, the establishment and maintenance of effective internal investigation and reporting procedures on the part of all of the financial institutions concerned must also be required.

B. CRIMINAL VALUE

In terms of the growth in the size of the money laundering problem, it was estimated in 1990 that the revenues generated from global drug trafficking were in excess of US$300 billion of which US$100 billion, at least, was from trafficking activities in the United States.\(^{17}\) The Department of Justice estimated that the figure was potentially as high as 2% of the gross national product [GNP] in the United States which was larger than the entire US automobile market.\(^{18}\)

By 1993, it was estimated that world-wide profits from organised crime stood at US$1 trillion\(^{19}\) which compared with an aggregate total profit figure of the top fifty Fortune 500 companies in the United States of US$33.923 billion.\(^{20}\)

By 1995, it was estimated by United States federal law enforcement officials that between US$100 billion and US$300 billion was laundered in the United States alone each

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14. Examples include, structuring of cash transactions to avoid currency reporting laws, the complicity of individual bank personnel, correspondent banks or even central bank deposits and the creation of false paper trails through the use of false documentation.
15. Layering may involve the conversion of cash into other monetary instruments, such as traveller’s cheques, letters of credit, money orders, cashiers cheques, or bonds and stocks, the sale or conversion of material assets purchased with the proceeds or electronic fund transfers with all of the advantages of speed, distance, anonymity and lack of audit transparency involved.
16. The FATF noted the following examples of integration: real estate acquisitions, front companies and sham loans, foreign bank complicity and the use of false import or export invoices.
18. Ibid. The GNP of the United States is around $6.2 trillion; see, infra note 17.
year. The Secretary-General of the International Police Organisation in Paris [Interpol] also stated in 1995 that global drug trafficking alone may be worth as much as US$400 billion a year which was the second most lucrative business in the world after the arm's trade which generated US$800 billion annually. Only a few countries in the world had GNP figures in excess of this amount with almost all developing and newly industrialised countries being well below this figure. Even these estimates may now be inaccurate with the total figure possibly being as high as US$500 billion.

Even if these figures still appear relatively insignificant against an estimated total global market for financial services of US$50 trillion, the money laundering figures alone only take into account of the amount actually cleared each year and not the value of the total amount of cash or assets which have been successfully laundered to date and are still available for use by organised criminal organisations or networks.

The true size of the problems created by the continued failure to deal with the difficulties which arise in connection with money laundering can only be understood in terms of the long term value of laundering channels to criminal operations in the protection and consolidation of criminal wealth.

Although the problem has also historically not been understood to be as serious in Europe and the United Kingdom, following the recent action taken by the Clinton Administration under Presidential Decision Directive 42 it is now expected that much of the US$300 billion laundered in the United States will flow over the next year from the United States into the London and European financial markets.


22. See Deen, supra note 4. The countries with GNP in excess of $400 trillion include the United States ($6.2 trillion), Japan ($4.2 trillion), Germany ($1.4 trillion), France ($1.2 trillion), the United Kingdom ($819 billion) and China ($425 billion).

23. See, Prepared Statement by Edward W, Kelly, Jr., Member of Board of Governors of the Federal Reserve System, Before the House Committee on Banking and Financial Services (Feb 28, 1996).

24. Under the interim arrangements, agreed in Brussels on 26 July, but without the full support of the United States, 90% of world financial services, in more than 90 countries, will be covered by the new trade liberalisation measures which will last until the end of 1997. This market is estimated to be worth $20,000bn in terms of world banking assets and a further $20,000bn of deposits, $10,000bn of world stock market capitalisation, $10,000bn of listed bonds and $2,000bn of world insurance premiums; for an initial report see, FINANCIAL TIMES, July 27 1995, p 6; and World Trade Organisation, WTO Director-General Hails Financial Services Accord Press Release 18, July 26, 1995.

III. The OAS Model Regulations

The OAS Model Regulations were adopted at the Twenty Second General Assembly of the OAS in the Bahamas on 23 May 1992 following two years of work by a series of national experts working under the CICAD. The programme had initially been set up in 1990 by the CICAD to develop a model money laundering law which was based on the Vienna Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, but revised to ensure that it could be adopted and applied by all participating states. Although none of the countries involved were obliged to adopt the Model Regulations, a series of regional conferences were established to encourage enactment of appropriate national laws.

As the Model Regulations were based on the Vienna Convention they are only applied to the laundering of the proceeds from illicit drug trafficking with money laundering being defined as the transfer of proceeds from the trafficking of narcotics or related

26. The OAS was established in Bogota in 1948 to solve legal problems common to its member states. See Charter of the Organisation of American States, T.I.A.S. No. 2361. The Charter came into force on December 13, 1951. For a restatement of the commitment of the OAS to the control of drugs trafficking and money laundering see Combating the Problem of Illegal Drugs and Related Crimes, Summit of the Americas, Plan of Action, section 1.6 (reprinted in NAFTA: REV, Dec (1995), at 166-193). For recent comment by Robert E. Rubin, Treasury Secretary, on the importance of the work of the OAS in the combating of money laundering see, Diana I. Gregg, Rubin Says Ministers of the Americas Need to Move Growth, Reform Forward BNA International Business & Finance Daily, May 17, 1996.

27. See Solomon, supra note 5, at 446.


29. Following the establishment of the initial programme by the CICAD, a Declaration and Programme of Action was issued by the OAS General Assembly at Ixtapa in 1990 which declared drug trafficking a crime against humanity and agreed to devote resources to eliminate it. An agreement was then signed by delegates from 32 of the member states approving this intent and a working group of representatives set up to draft appropriate rules. The drafting of the provisional rules followed an examination of the existing laws and practices in each of the relevant territories to ensure that the proposed draft provisions were prepared as a possible model for use or adoption by all countries and not simply based on the laws of a single state; see Solomon, supra note, at 445-446. The draft regulations were considered on January 24, 1992 at a conference in San Jose, Costa Rica after two years of preparation with representatives in attendance from Argentina, the Bahamas, Brazil, Canada, Chile, Columbia, Costa Rica, Jamaica, Mexico, Peru, the United States, Uruguay and Venezuela. At the final session in Punta del Este, Uruguay in March 1992 additional representatives attended on behalf of Antigua and Barbuda, Guatemala, Nicaragua, Panama and Paraguay. Nineteen anti-drug recommendations were made which were subsequently adopted as the OAS Model Regulations by the OAS General Assembly on May 23, 1992. Id.

30. See supra note 10.
offences). Any person who converts, transfers, acquires, possesses or uses property knowing that it was derived from illicit trafficking or any related offence shall be guilty of a criminal offence. Courts of OAS member states are to have jurisdiction in all cases where an offence has been committed irrespective of where the drug trafficking actually occurred, although this is without prejudice to any rights of extradition. Although these provisions are significant, the scope of the OAS rules are considerably more limited than those of the European Directive both in terms of the types of criminal activities and financial institutions covered.

The Regulations also provide for the imposition of freezing and seizure orders prior to conviction and for the forfeiture of property and any proceeds related to the offence following conviction subject to the rights of bona fide third parties.

Financial institutions are defined to include all publicly or privately owned banking or related financial institutions, although this does not include insurance undertakings. Under the Regulations, financial institutions must not maintain anonymous accounts or accounts in fictitious or incorrect names and must verify and record identifying information of all clients. Records must be kept for at least five years. All information must also be made available to relevant competent authorities on request, while information must not otherwise be exchanged with any other persons nor anyone notified that an information request has been made. The Regulations also provide for a specific disapplication of any relevant bank secrecy laws in the event of a valid information request having being made.

In connection with cash transactions over a certain size, the Regulations only impose a requirement to record all relevant transactions, rather than a full reporting obligation. Although this is extended to include multiple transactions, but only if the employees, officers or agents involved have actual knowledge of the connected nature of the transactions concerned. In place of the full reporting obligation on all transactions over a certain size, the Regulations adopt a separate suspicious transaction requirement which is extended to include a careful examination of all complex, unusual or large transactions.

A programme of sufficiently penal sanctions must be adopted in respect of all violations with financial institutions being vicariously liable for the acts of their directors, employees and owners. Specific criminal penalties are also imposed for wilful breach of the

31. OAS Model Regulations, art 1.
32. Id. art. 2.
33. Id. art. 3.
34. See infra section 4.2(b) and (c).
35. OAS Model Regulations, arts 4, 5 and 6.
36. The Regulations apply to all commercial banks, trust companies, savings and loan associations, building and loan associations, savings banks, industrial banks, credit unions and any other institution or establishment authorized to do business under domestic banking laws whether publicly or privately owned. Id. art 6.
37. Id. art. 10.
38. Id. art. 11.
39. Id. art. 12.
40. Id. art. 13. This also applies to all unusual patterns of transactions as well as to insignificant but periodic transactions which have no apparent economic or lawful purpose. This provision clearly corresponds with the extension of the recording obligator to include all multiple transaction.
prohibition on secret accounts and the suspicious reporting requirements.\textsuperscript{41} Financial institutions must establish appropriate internal programmes to ensure the ethical conduct of their employees and full compliance with the terms of the Regulations.\textsuperscript{42}

Although the OAS Model Regulations are important insofar as they establish a set of common provisions which are based on the Vienna Convention but adjusted to reflect the existing laws and practices of all of the participating territories, they suffer from a number of important limitations. The most significant single defect, however, is the non-obligatory nature of the Regulations. It is essential that all of the participating territories adopt appropriate measures, especially in Latin American, and very unfortunate indeed that more implementation progress has not been possible.

With regard to the scope of the Regulations, serious difficulties arise in that they are only applied to drug connected trafficking activities and only to bank related financial institutions.\textsuperscript{43} In light of the increasing global and integrated nature of all financial markets, it is essential that money laundering of all forms of criminal proceeds are covered and that the relevant rules are applied to all types of financial institutions including banks, securities firms and insurance undertakings.\textsuperscript{44}

Information is also only exchanged in response to specific requests from other member states of the OAS. A more comprehensive system of mutual exchange of information would clearly be more appropriate between all OAS countries which should also be supplemented and operated with information sharing arrangements with other non-OAS territories under suitable bilateral or multilateral arrangements.\textsuperscript{45}

To facilitate the receipt of information by the relevant authorities from reporting institutions and the exchange of information between authorities, efficient computer and telecommunications networks will have to be established in all of the countries involved. Although this will create no difficulties in the more developed member states of the OAS, serious information gathering, processing and transferring difficulties will arise in other less developed participating countries which will dearly undermine the effectiveness of the operations set up in each territory as well as the overall effect of the system of controls adopted within the OAS.

With regard to internal compliance programmes, although the Regulations require that appropriate programmes should be established, no further assistance is provided in connection with the nature or content of such programmes. The effective operation of all financial institutions' internal customer identification, record keeping and reporting systems is ultimately the most important control on the prohibition of money laundering activities in all countries. It is absolutely essential that appropriate and effective systems are established and maintained by all financial institutions.\textsuperscript{46}

\textsuperscript{41} Id. art. 14.
\textsuperscript{42} Id. art. 15.
\textsuperscript{43} For comment on the content of the Regulations see, Model Regulations, Recommendations of the Group of Experts to CICAD (Solomon, supra note 5, and note 128.)
\textsuperscript{44} Contrast infra section 4.2(b) and (c).
\textsuperscript{45} For recent comment on the need to develop specialised financial information units within the OAS area, see Robert E. Rubin, supra note 25.
\textsuperscript{46} See infra section 5.3 and note 170.
A number of other objections may also be raised with regard to the use of specific United States' legal concepts in drafting the Regulations, the possible use or inclusion of appropriate incentive structures, the imposition of more severe penalties for offences committed by public officials and the establishment of co-ordinated sentencing policies for each country as well as the provision of foreign investment as part of larger regional support programmes.  

Despite these limitations, the Regulations do provide a valuable regional model which may be revised and developed by particular countries to create their own system of appropriate controls specifically adjusted to reflect their existing laws, enforcement structures and resources as well as their general state of economic and market development. Although an important regional model has been created for the OAS area, however, the most important determining factor of the ultimate success of any system of money laundering controls will always be the content of the implementing measures adopted and the degree to which they are properly enforced within each country.

In the following section, the provisions of the Money Laundering Directive are reviewed as an alternative regional model for Europe. This is followed by a more detailed examination of the content of the programme of measures established within the United Kingdom as a possible implementation model for consideration by Latin American countries presently creating or revising their own money laundering controls.

IV. European Community Response: A Possible Model

While a large amount of action in the area of financial crime has been taken at the inter-governmental or inter-departmental level within Europe intervention by the European Community as such has been limited to adopting single measures on money laundering and insider dealing. The main reason for this has been the disputed authori-

47. See Solomon, supra note 5, at 451-453.
48. Under Article G.A(1) of the Maastrict Treaty, all references in the Treaty of Rome to the European Economic Treaty are to replaced by the references to the European Community. The European Union is created under Article A of the Maastrict Treaty and additional powers conferred on it in respect of Common Foreign and Security Policy (Article J) and Home Affairs and Justice Policy (Article K). The Union is, however, founded on the European Communities, that is the European Community, the European Coal and Steel Community and the European Atomic Energy Community; Article A, para 3. The basic provisions with regard to the European Single Market and, in particular, capital and financial services remain within the renamed European Community Treaty, as amended by the Treaty Amending Certain Financial Provisions, the Single European Act, the Merger Treaty, the Greenland Treaty, the Acts of Accession and the Maastrict Treaty, references in this paper are to the European Community and not to the European Union.
49. See, supra note 1 and supra section 4.1.
ty of the Community in the criminal area

Although the measures adopted by the Community are modest in themselves, they are important in that they oblige all Member States to adopt necessary implementation laws at the national level. The effect is to create a minimum common response across Europe to the difficulties identified. National implementation measures may also be in considerably more stronger terms than the European Directives upon which they are based such is the case of the United Kingdom’s implementation of the Money Laundering Directive.

Following a review of the historical development of the money laundering response in Europe, the principal provisions contained in the European Community Money Laundering Directive are noted.

51. In connection with the authority of the Community in relation to criminal matters; see generally, Harris Criminal Sanctions under EC Law (1990) New Law Journal, 1323; and Dine European Community Criminal Law? (1993) CRIM L Rev 246. As a result of strong German objections, the earlier proposal for a Directive on insider trading had to be amended only to require that Member States shall determine appropriate penalties to be applied in respect of infringements rather than criminal penalties; see final Article 13, Council Directive 89/592 coordinating regulations on insider dealing, OJ 1989 L334/30. Despite this, however the European Court of Justice subsequently ruled on the validity of Council Regulation 3483/88 on control measures in the fisheries sector which had imposed an obligation on Member States to adopt penal or administrative actions effectively to discourage violations under Article 11(C)(1); see Council Regulation 343/88, OJ 1988 L306/2 adopted under Council Regulation 2241/87, OJ 1987 L207/1. On the basis of this ruling, the Legal Services of the Commission and the Council had advised that the original terms of Article 2 of the Money Laundering proposal were within the competence of the Community, although the upper house of the German Parliament, the Bundesrat, still unreservedly rejected the original terms of Article 2 despite its recognition of the Commission’s efforts to control organised crime; see Bundesrat, Drucksache 288/90 (Beschluss) adopted on its 616th Sitting of 6 July 1990, cited in K.D. MagLiveras Money Laundering and the European Communities in Joseph J. Norton (ed), Banks: Fraud and Crime, ch 9, at p.179. As a result, Article 2 was amended although separate undertakings were taken from the Member States to ensure that the criminal provisions would be adopted. Although Member States are also required to take appropriate measures in respect of infringement under Article 14 of the Directive, restrictive provisions may still be adopted under Article 15; see, Directive 91/308, op. cit. The limited nature of the Community’s intervention to these two specific instances of financial crime is, however, unfortunate in that if a minimum programme of intervention in the area of financial crime was to be initiated it should have considered all the possible issues of criminal prohibition, investigation and prosecution which arise. An attempt could have been made to formulate a coordinated financial crime programme. Even though a number of important aspects of criminal investigation and prosecution have been left to national determination or separate national or international cooperation procedures, an integrated programme could still have been constructed which could have been developed with these other initiatives in this area.

52. See, infra section 5.
A. HISTORICAL DEVELOPMENT

A package of five Resolutions had originally been adopted by the European Parliament in September 1985 in connection with the setting up of a Committee of Enquiry on "The Drug Problem" and "The Role that the Drug Trafficking Played in Spreading Crime and Destabilising the Established Authority".53

The recommendations of the Committee of Enquiry were accepted by the Parliament on 13 October 198654 in which the Council of Ministers was urged to adopt a resolution on concerted action to tackle the drug problem. This was followed by a declaration being issued by the Community's Justice Ministers on 30 October 1986 in which it was proposed that practical guidelines should be established for freezing and confiscating the enormous assets of drug traffickers in an effective fashion.55

At the London Summit in December 1986, a seven-point action programme was endorsed which included provisions for the prosecution of those involved in illegal narcotics trade and for a system of drug asset confiscation which was to be applied throughout the Community.56 The International Conference on Drug Abuse and Illicit Trafficking was then held in Vienna, Austria in June 1987, in which the Community actively participated. This led to the adoption of the Vienna Convention in December 1988.57 The Convention was concerned with, inter alia, criminalisation of the laundering of drug proceeds through the financial system and made a specific provision for the extradition of money launderers, mutual legal assistance, the transfer of laundering proceeds, the lifting of bank secrecy in criminal investigations and the confiscation of laundered property.58 Ratification of the Convention was concluded in October 1990.59

Following this, the European Parliament adopted a resolution calling upon the Commission to work together with national governments in connection with the development of efficient measures to combat organised crime drastically.60 The G7 also separately


55. See supra note 27.

56. See, arts. 6, 7, 8, 5(6) and 9.

57. See, supra note 27.

58. See, supra note 27.

59. See, supra note 27.

60. See, supra note 27.
set up the FATF at the Economic Summit in July 1989. The FATF was, in particular, established to assess the results of the co-operation which had already been unofficially undertaken between the participating states in order to prevent the utilisation of the banking system and of unsuspecting financial institutions for money laundering operations and to come up with effective recommendations.

The FATF published its report in June 1990 which contained 40 recommendations including a requirement that national criminal laws adopt a specific “money laundering” offence, the development of the role of the banking system to prevent abuse by the money laundering industry and the strengthening of international co-operation based on the facilitation of extradition of suspected criminals and proper ratification and implementation of the Vienna Convention. At the meeting of EC Justice Ministers on 18 December 1990, the possibility of agreeing on European anti-mafia legislation was discussed which included special reference to banking institutions involved with money laundering and concluded that financial centres have an increased responsibility in the fight against money laundering.

Despite the importance of these international measures, it was considered essential that a Community initiative was also undertaken in this area to ensure the soundness and stability of the liberalised financial system within the Community. A proposal for a money laundering Directive was accordingly issued by the Commission on 22 March 1990, which the European Parliament delivered its opinion in November 1990 and the Economic and Social Committee (ESC) in September 1990.

As a result of the amendments proposed by the Parliament and comments received from the ESC, an amended proposal was issued on 30 November 1990. A Common Position was arrived at by the Council under the co-operation procedure provided for in Article 149 of the Treaty on 14 February 1991. The Second Reading of the amended proposal was given by the Parliament on 17 April 1991 after which the Directive was formally adopted by the Council on 10 June 1991.

61. See supra section 1 and note 11. This establishment of FATF was preceded by the Declaration of the Basle Committee on Banking Supervision on The fight against money laundering through the banking system (the Declaration of Basle), 12 December 1988.

62. During the Paris Summit 7 more Member States with Australia agreed to join FATF in addition to the original signatories, United Kingdom, Germany, France and Italy.

63. For comment on the three subsequent annual reports, see Magliveras, supra note 50, at 174.


68. OJ 1990 C332/86.


B. **EUROPEAN MONEY LAUNDERING DIRECTIVE**

The basic purpose of the Directive is to prevent money laundering through the exploitation of the Single Market in financial services which, in particular, involves the free movement of capital within the Community\(^73\) and freedom to provide banking services under the banking and financial services programme.\(^{74}\) It is significant that the Community did not attempt to deal with money laundering as an ancillary problem to drug trafficking or organised crime, but as an integral part in the securing of the effective operation of the Single Market in financial services.\(^{75}\)

1. **Objective**

   The principal objective of the Directive is to secure the standards and stability of credit and financial institutions and confidence in the financial system as a whole which would otherwise be seriously jeopardised through the activities of money launderers.\(^{76}\) This objective is to be achieved by ensuring that all Member States ensure that money laundering as defined in the Directive is prohibited,\(^{77}\) by the establishment of systems to ensure that credit and financial institutions carry appropriate customer identification procedures and keep adequate records of all suspicious transactions (which may be made available to relevant authorities)\(^{78}\) and by allowing Member States to extend the scope of the Directive to all professions and entities involved in unregulated large cash transaction areas.\(^{79}\)

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74. See supra section 4.1.
75. For comment see, MagLiveras, *supra* note 50, at 175-176. The complete liberalisation of capital transactions and the full integration of banking and other financial markets is, in particular, seen as one of the principal features of Economic and Monetary Union under the draft Treaty on Economic and Monetary Union which was signed on February 1992 and came into force on 1 November 1993; see, Report of the Delors Committee for the study of EMU, *Report on EMU in the European Community*, Luxembourg, (1989) at p.19. The free movement of capital is an indispensable part of Stage I of EMU. Free movement of capital within the Community was, in fact, secured on 1 July 1990 except with regard to Greece, Ireland, Spain and Portugal which had to secure free movement of capital by December 1992. Greece and Portugal had retained the right to postpone the complete liberalisation of capital movements until the end of 1995, although Portugal secured full compliance in October, 1992.
77. See, art. which requires that money laundering is prohibited and separate protocols signed by each of the Member States confirming that money laundering will be made a criminal offence; see, *supra* note 50 and *infra* section 4.2(d).
78. Articles 3-11.
79. Article 12; such areas may include art dealers and dealers in precious stones and metals, real estate agents, accountants, casinos, bureaux de changes and travel agencies.
2. Application

The Directive applies to all credit institutions as defined under the First Banking Directive and other financial institutions which consist of undertakings, other than credit institutions, which carry on any of the additional activities listed in the Annex to the Second Banking Directive as well as all duly authorised insurance undertakings within the Community.

3. Money Laundering

Money laundering is defined under the Directive as including:

The conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of his action;

The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity; and

Participating in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.

It is clear that the definition follows that contained in the FATF Report with an express separate provision being added with regard to assistance and complicity.

Property includes assets of every kind, both corporeal and incorporeal, moveable or immovable, tangible or intangible and documents or instruments evidencing title to or interest in such assets.

Criminal activity includes any crime specified in Article 3(1)(a) of the Vienna Convention and any other criminal activity designated as such for the purposes of the Directive by each Member State. The difficulty which arises with regard to the definition of criminal activity and the corresponding scope of the Directive is that its particular application in each Member State is left to the discretion of the local authorities through the designation of the appropriate criminal activity to be covered by the Directive. This is

82. Article 1 of Directive 90/308 following Article 3(1)(b) of the Vienna Convention.
83. See, supra note 12.
84. Article 1.
85. Id.
particularly unfortunate, especially in light of the already limited degree of harmonisation achieved in criminal matters within Europe.  

4. Prohibitions

Although the original proposal had required that Member States ensure that money laundering was made a criminal offence, this had to be amended only to require that money laundering be prohibited although separate undertakings were given by each of the Member States to the effect that money laundering would be made a criminal offence by 31 December 1992.  

5. Identification Requirements

Member States are to ensure that credit and financial institutions require identification of customers by means of supporting evidence when entering into business relations especially when opening accounts, saving accounts or safe custody facilities. Identification also applies with regard to any transaction involving a sum amounting to ECU 15,000 or more whether carried out in a single operation or several linked transactions.  

Identification is exempt, however, with regard to insurance policies where the periodic premium is less than ECU 1,000 or where the single premium is less than ECU 2,500 and in relation to occupational pension schemes. Where the real identity of the customer may be in doubt, reasonable measures must be taken to confirm this and identification is necessary in all cases where money laundering is suspected, whether the transaction is below the listed threshold or not.  

The Directive also exempts from identification amounts received from another credit or financial institution and direct debit transactions involving credit institutions already subject to the terms of the Directive. Identification and transaction records are to be kept for at least five years after the customer has left a particular institution or the execution of

88. Article 3(1). These requirements are referred to as "Know Your Customer" or KYC rules in the United States. Following the introduction of suspicious transaction reporting requirements in additional to fixed value transactional reporting obligations, most banks in the United States have adopted KYC policies to assist in the identification of suspicious transactions. See infra section 5.2 (b) and 5.3 (b) and section 6 and note 172.  

89. Article 3(2).
90. Article 3(3) and (4).
91. Article 3(5) and (6).
92. Article 3(7) and (8).
a transaction. Credit and financial institutions are also placed under a specific obligation to examine carefully all suspect transactions which may involve money laundering activities.

6. Reporting Obligations

Any information which may indicate money laundering must be reported to the relevant competent authorities by the directors and employees of credit or financial institutions on their own initiative and all other necessary information provided at the request of the authorities. Adequate procedures of internal control and communication must be set up within all credit and financial institutions and all employees made aware of the requirements of the Directive with regard to identification and reporting requirements. Any information supplied may only be used for the purposes of money laundering investigation and prosecution.

Suspect transactions must not be effected until the relevant authorities have been properly informed unless this would be impossible or frustrate efforts to pursue the beneficiaries of the suspected operation. Credit and financial institutions and their directors and employees are placed under a specific obligation not to inform their customers or any third party that any information has been reported to the authorities or that a money laundering investigation is being carried out. Disclosure in good faith under the terms of the Directive is exempt from any liability for breach of disclosure of confidence.

Any other information discovered by competent authorities responsible for the regulation or supervision of credit or financial institutions which indicates money laundering must also be reported to the money laundering authorities. The provisions of the Directive may also be extended to apply to professions or other categories of undertakings, in whole or in part, other than credit and financial institutions, which engage in activities which may be used for money laundering purposes.

7. Contact Committee

A Contact Committee was also set up to facilitate the harmonised implementation of the Directive and consultation between Member States on more stringent or additional conditions and obligations as well as to advise the Commission on any supplements or amendments to the Directive and to examine whether the Directive should be extended to any particular profession or category of undertaking. The Committee is not, however,
to be responsible for considering the merits of individual decisions taken by competent authorities in particular cases. The Committee is to be composed of persons appointed by the Member States and of representatives of the Commission.

8. Implementation

Member States were required to take appropriate measures to ensure full application of the provisions of the Directive especially with regard to penalties for infringement although stricter provisions may be adopted or retained in force. Implementation was to have occurred by 1 January 1993 at the latest. The Commission was required to draw up an implementation report on the Directive which must be updated every three years and submitted to the European Parliament and Council for examination.

9. Comment

The Directive is clearly an important measure in the development of crime controls against money laundering within the Community. The extension of the application of the Directive to include all possible forms of criminal activity is particularly welcome; although the discretion left to Member States' governments in this regard is unfortunate. The identification requirements provided for in the Directive are clearly sound and attempt to achieve a fair compromise between only reporting suspicious transactions as provided for in Article 3(6) and the fifteen day reporting requirement in the United States of any withdrawal or transfer of currency in excess of $10,000.

Although the use of separate undertakings to secure the adoption of criminal penalties across Europe was unfortunate, if such a procedure is to be used in connection with the development of other areas of financial crime, the procedure might be formalised and in this particular case, extended to include agreement on the range of criminal activities to be covered under Article 1, professional and trade extensions of the Directive under Article 12, penalties under Article 14 and stricter provisions under Article 15. The lack of authority given to the Contact Committee set up under the Directive is also unfortunate and should be subject to review.

Despite the limitations of particular provisions of the Directive, this is a significant measure in the development of general regulatory and, in particular, criminal responses to the challenges of the integrated financial markets being created in Europe under the Single Market Programme.

104. Article 13(2).
105. Article 13(3).
106. Articles 14 and 15.
107. Article 16(1). Member States were to communicate to the Commission the text of the main provisions of national law which were adopted to implement the Directive for the purposes of examination of compatibility. In the event of failure to adopt the particular Member State may be brought before the European Court of Justice under Article 169 of the EC Treaty.
108. Article 17.
109. See infra note 172.
110. For a review of the most recent action proposed following the Madrid Summit in December 1995 see, Agence Europe, EU: Council indicates vast range of measures to fight drug trafficking, Reuters Textline, January 10, 1996.
IV. An Example of EC Implementation: The Case of the United Kingdom

The European Money Laundering Directive was implemented in the United Kingdom by the Criminal Justice Act 1993 by adding additional offenses to the Criminal Justice Act 1981 and by the issuance of separate Money Laundering Regulations in 1993. While the basic criminal offenses were created under the Criminal Justice Act 1993, the specific requirements with regard to financial institutions contained in the Money Laundering Directive were given effect to under the Money Laundering Regulations.

While there were existing Common Law offenses in England and Wales, and separate offenses in Scotland, which covered money laundering activities before the adoption of the 1993 Criminal Justice Act, specific statutory provisions were introduced under the 1986 Drug Trafficking Offenses Act (DTOA) and the 1989 Prevention of Terrorism Act.

112. Criminal Justice Act 1988, §§ 93A, 93B, 93C, 93D, 93E and 93F with further amendments being made to sections 94 and 95.
114. Under the Theft Act 1968 in England and Wales, a range of offenses are set out which include the dishonest handling of stolen goods or the proceeds of stolen goods, such as blackmail and property obtained by deception or fraud; see, Theft Act, §§ 13, 21 and 22. Under § 24(4) theft is defined to include blackmail and fraud.
115. Under § 24 of the DTOA, the offence of assisting another to retain the benefit of drug trafficking is created which is defined to include the following:
(a) to enable a drug trafficker to retain or exercise control over the proceeds of drug trafficking, by concealing them, removing them from the jurisdiction or transferring them to nominees; (b) to use the proceeds of drug trafficking in order to place funds at the disposal of the drug trafficker; (c) to use such proceeds in order to acquire property by means of investing the proceeds for the direct benefit of a drug trafficker. On summary conviction, the sentence may include imprisonment for a term not exceeding six months or a fine up to the statutory maximum of £2,000 or both and, on indictment, a term of imprisonment not exceeding 14 years or a fine or both.

Under § 24 (3) bank officials, investment and financial advisers and lawyers are exempt from civil prosecution for breach of confidentiality. Persons who participate in money laundering operations only to facilitate police investigations are also exempt from prosecution.

The money laundering offences created under the DTOA are extended by the Criminal Justice (International Cooperation) Act 1990 [CJ(IC)] which was adopted following ratification by the United Kingdom of the 1988 Vienna Convention. Under § 14(1) of the CJ(IC), it was made a criminal offence for a person to conceal, disguise, convert or transfer the proceeds of narcotics in order to avoid prosecution for a drug trafficking offence, while under § 14(2) it is an offence for a person to carry out any of the activities listed in subsection (1), if he knows, or has reasonable grounds to suspect, that such proceeds are another person's proceeds and if it was done for the purpose of assisting such person to avoid prosecution for a drug trafficking offence. Under § 14(3), it is also an offence to acquire another person's narcotics proceeds from them or their inadequate consideration, if the person has knowledge, or reasonable grounds to suspect, that the property concerned was criminal proceeds.
These particular offenses in connection with drug and terrorist activities were extended under the Criminal Justice Act 1993.

A. CRIMINAL JUSTICE ACT 1993


Under §§ 16-19 of Part II of the Criminal Justice Act, a number of amendments are made to the DTOA 1986 which generally include expanding the existing offense and providing two additional defenses with regard to adequate consideration and knowing disclosure. A new offense is also created in connection with anyone who, acting in the course of any trade, business or profession, becomes aware or suspects that another person is engaged in money laundering operations and of tipping-off suspected offenders.

The provisions with regard to money laundering and other offenses not involving drug trafficking proceeds are contained in Part III of the Criminal Justice Act. Three specific offenses are created with regard to assisting, acquisition and concealment of criminal proceeds and the offence of tipping-off.

1. Assistance

Under § 93A of the Criminal Justice Act 1988, a person is guilty of an offence if he enters into an arrangement to facilitate the retention or control of criminal proceeds, whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise, or to secure that the funds are placed at the other person's disposal or invested on his behalf, in both cases knowing or suspecting that the person has been engaged in criminal activities. Reference to the proceeds of criminal conduct include any property which, in whole or part, directly or indirectly represent the proceeds of criminal conduct.
A person is not, however, guilty of an offence if he can establish that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct or that the arrangement facilitated the retention or control of the criminal proceeds.\textsuperscript{123} It is also a defence if the person intended to disclose his suspicions to a constable but had reasonable excuse for failing to do so.\textsuperscript{124} A person disclosing their suspicion or belief that funds or investments may be invested with criminal activities are exempt from any breach of confidentiality obligations and from prosecution under the Act if the act was done with the consent of a constable or notified to a constable as soon as reasonably possible.\textsuperscript{125} A person is also guilty of an offence if he acquires, uses or possesses property belonging to another, knowing that the property, in whole or in part, directly or indirectly, represents the proceeds of criminal conduct.\textsuperscript{126} It is, however, a defence to establish that the property was acquired for adequate consideration.\textsuperscript{127}

2. Concealment

It is also an offence to conceal or disguise property derived from criminal proceeds or convert or transfer that property or remove it from the jurisdiction for the purpose of avoiding prosecution under the Act\textsuperscript{128} or to assist another person in doing so.\textsuperscript{129} In all cases, a person guilty of an offence is liable on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both, or, on indictment, to imprisonment for a term not exceeding fourteen years or a fine or both.\textsuperscript{130}

3. Tipping

With regard to tipping-off, a person is guilty of an offence if he knows or suspects that a money laundering investigation is being conducted and notifies any other person to the prejudice of the investigation.\textsuperscript{131} Tipping-off of any disclosure to the authorities or to an employer is also prohibited.\textsuperscript{132}

B. The Money Laundering Regulations 1993

The Money Laundering Regulations were published on 28 July 1993 following a Consultative Paper from HM Treasury in November 1992.\textsuperscript{133} The Regulations give effect

\textsuperscript{123} § 93A(4)(a) and (b).
\textsuperscript{124} § 93(4)(c).
\textsuperscript{125} § 93B(1).
\textsuperscript{126} § 93B(2).
\textsuperscript{127} § 93C(1).
\textsuperscript{128} § 93C(2).
\textsuperscript{129} § 93C(3).
\textsuperscript{130} § 93B(6), 93B(9) and 93C(4).
\textsuperscript{131} § 93C(4).
\textsuperscript{132} § 93D(2) and (3).
\textsuperscript{133} Money Laundering Regulations 1993, SI 1993/1933 made under the European Communities Act 1972 § 2(2).
to the identification and reporting requirements contained in the European Community

1. Financial Business

The Regulations apply to all relevant financial business which includes deposit-taking
businesses authorised in the United Kingdom or elsewhere within the Community, building
societies, investment businesses, any of the other activities referred to in the Annex to the
Second Banking Co-ordination Directive134 and insurance business.135

Where business relationships are foreign or only a one-off transaction is carried out,
in the course of a relevant financial business, the persons carrying on that business are
required under the regulations to maintain proper identification, record-keeping and internal
control and communications procedures for the purposes of preventing money
laundering.136 Such persons must also ensure that all employees are aware of the relevant
procedures and money laundering laws as well as properly trained in the recognition and
handling of money laundering transactions.137

Any person who fails to maintain appropriate procedures or carry out the required
training is guilty of an offence.138 Where the offence is committed by a body corporate,
partnership or unincorporated association, any director, manager, secretary or other simi-
lar officer shall also be guilty of the offence and subject to prosecution.139

2. Identification Requirements

Except where an appropriate exemption is available, satisfactory evidence of the identi-
ity of an applicant for business must be obtained in each of four specific case circum-
cstances.140 Case one applies where the parties form or resolve to form a business relation-

134. These include: acceptance of deposits and other repayable funds from the public; lending;
financial leasing; money transmission services; issuing and administering means of payment
(e.g. credit cards, travellers' cheques and bankers' drafts); guarantees and commitments; trading
for own account or on behalf of customers in (a) money market instruments (cheques,
bills, CDs etc), (b) foreign exchange, (c) financial futures and options, (d) exchange and inter-
est rate instruments, (e) transferable securities; participation in share issues and the provision
of services related to such issues; advice to undertakings on capital structure, industrial strate-
gy and related questions and advice and services relating to mergers and the purchase of
undertakings; money broking; portfolio management and advice; safekeeping and administra-
tion of securities; credit reference services; and safe custody services. See, Second Council
Directive 89/646/EEC on the Co-ordination of laws, Regulations and Administrative
(OJ L 386, 30.12.89, 1).

135. Money Laundering Regulations, para. 4(1). The Regulations exclude societies registered under
the Industrial and Provident Societies Act 1965, the Bank of England and those exempt under
§ 45 of the Financial Services Act 1986 (Miscellaneous Exemptions for holders of certain judi-
cial and other offices). Id, para. 4(2).

136. Id, Regulation 5(1)(a).

137. Regulation 5(1)(b) and (c).

138. Regulation 5(2).

139. Regulation 6(1).

140. Regulation 7(1). See supra note 87.
ship between them. Case two applies in any circumstance where, in respect of any one-off transactions, any person handling the transaction knows or suspects that the applicant for business is engaged in money laundering or that the transaction is carried out on behalf of another person engaged in money laundering. Case three applies to any one-off transactions involving payment by or to the applicant for business in excess of ECU15,000. Case four applies where it is clear at the outset, or at any later stage, that two or more transactions are linked and that the total amount involved is in excess of ECU15,000.

3. *Agency Relationships*

Where an applicant for business is, or appears to be, acting otherwise than as principal, reasonable measures must be taken to establish the identity of the person for whom the applicant proposes to be acting. What constitutes a reasonable measure in any particular case will depend on all of the circumstances and, in particular, the best practice followed at the time in the relevant field of activity.

It is, however, sufficient for the person making the application for the business to provide a written assurance that the proper identity of the person for whom he is acting has been obtained and recorded under his own procedures. Payment from a bank or building society account may be acceptable evidence of a person's identity where it is reasonable for the payment to be made by post, telephone or any other electronic means of transfer.

4. *Exemptions*

Compliance with the Regulations is not required where the applicant for business is already bound by the provisions of the Regulations, where the applicant for business is already covered by the Money Laundering Directive, one-off introductions in connection with which adequate identification and record procedures are already maintained, cases involving reinvestment of the funds involved, occupational pension schemes, insurance premia of not less than ECU2,500 and annual insurance business where the total payable in any one calendar year does not exceed ECU1,000.

Evidence of identity is satisfactory if it is reasonably capable of establishing that the applicant is the person he claims to be and the person who obtains the evidence is satisfied that the applicant's identity is properly established in accordance with the procedures maintained under the Regulations. Whether the identity of the applicant is satisfied within a reasonable time will depend upon the nature of the business relationship or one-off transaction concerned, the geographical location of the parties and whether it is practical to obtain the evidence before commitments are entered into between the parties or money passes and the earliest stage at which it is reasonable to believe that the total amount of business involved is ECU15,000 or more.

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141. Regulation 9(1) and (2).
142. Regulation 9(3).
143. Regulation 9(4).
144. Regulation 8(1).
145. Regulation 10.
146. Regulation 11(1).
147. Regulation 11(2).
5. **Records**

Records of all identification evidence obtained and of all transactions with applications for business must be kept for a period of at least five years from the date on which either the relevant business was completed or the final transaction in a series of activities was completed.148

6. **Reporting Procedures**

Each relevant financial business must ensure that it has adequate internal reporting procedures which require that a person is identified as the person to whom all reports are to be made of any information that gives rise to the knowledge or suspicion that money laundering was taking place, that such reports are properly considered on available information and that appropriate reports are made to the police.149

All supervisory authorities are also required to obtain all necessary information indicative of money laundering and to make an appropriate report to the police.150 Inspectors and certain other persons who work with supervisory authorities under specific statutory provisions are also required to report any such information to the relevant supervisory authority or the police.151

C. **MONEY LAUNDERING GUIDANCE NOTES**

A joint Money Laundering Steering Group was subsequently established to assist in the development of appropriate practices for United Kingdom financial institutions to secure proper compliance with the requirements of the relevant money laundering legislation.152

The Steering Group produced a first set of Money Laundering Guidance Notes for Banks and Building Societies in December 1990. These were revised in October 1993 to accommodate the European Money Laundering Directive and United Kingdom implementing measures under the Criminal Justice Act 1993 and the Money Laundering Regulations 1993. A revised set of Guidance Notes was issued in February 1995 following revision of the Notes in light of the experience and additional clarification which was provided on the basis of enquiries and comments received from banks and other financial institutions.

148. Regulation 12.
149. Regulation 14.
150. Regulation 16. The relevant supervisory authorities involved are set out in Regulation 15(2).
151. Regulation 16(3) and (6).
152. The work of the Steering Group is carried on through four committees: Mainstream Banking Sub-Committee, Investment Sub-Committee, Insurance Sub-Committee and Education and Training Sub-Committee. The Steering Group is made up of representatives of the Association of British Insurers, the Association of Private Client Investment Managers and Stockbrokers, Association of Unit Trusts and Investment Funds, British Bankers' Association, Foreign Banking and Securities Houses' Association, IFA Association, Institutional Fund Managers' Association, London Investment Banking Association, National Criminal Intelligence Service, Society of Pension Consultants and Wholesale Market Brokers' Association.
Four final sets of Guidance Notes are now available for Mainstream Banking, Lending and Deposit Taking Activities (the Red Book), Insurance and Retail Investment Products (the Green Book), Wholesale, Institutional and Private Client Investment Business (the Yellow Book) and Receiving Bankers (the Blue Book).

The explanatory Foreword to the Notes states that the guidance given only illustrates good industry practice and is not mandatory. To this extent, failure to comply with the Guidance Notes will not mean that a financial institution has automatically breached the regulations, although it may be necessary to demonstrate the adequacy of any alternative procedures adopted.

Each of the sets of Guidance Notes contains background information, an outline of the relevant United Kingdom law, notes on internal controls policies and procedures, identification procedures, record keeping, recognition and reporting of suspicious transactions as well as additional provisions on education and training.

1. **Internal Controls**

With regard to internal controls, and policies and procedures, the Regulations recommend that all banks and building societies introduce procedures for the prompt validation of suspicions and subsequent reporting to the national Criminal Intelligence Service, appoint a Money Laundering Reporting Officer who has access to all relevant systems and records and establish close co-operation and liaison with the relevant law enforcement agencies.\(^\text{153}\)

The roles of Prevention Officer and the Reporting Officer may be combined depending on the scale and nature of the business. As a matter of good practice, policy procedure and control compliance should be verified on a regular basis which arrangements may be undertaken by the internal audit or compliance departments in larger institutions.\(^\text{154}\)

Although the Regulations recognise that there is a statutory obligation to establish and maintain procedures for the purpose of deterring and recognising money laundering in the ordinary course of business, it is noted that this does not require financial institutions to install specific systems to detect money laundering activities.\(^\text{155}\)

2. **Identification Procedures**

In connection with identification procedures, it is noted that the requirement to verify identity is not retrospective and only applies to new one-off transactions and business relationships.\(^\text{156}\) Despite the availability of exceptions under Regulations 7, 8 and 10 of the Money Laundering Regulations, it is noted that customer identity must be verified in all cases where money laundering is known or suspected and that the details be reported in compliance with the relevant procedures.\(^\text{157}\)

\(^{153}\) Part III, para. 33.

\(^{154}\) Id., para. 35.

\(^{155}\) Id., para. 36.

\(^{156}\) Part IV, para. 39.

\(^{157}\) Id., para. 42.
The Guidance Notes contain detailed provisions with regard to the maintenance and operation of appropriate identification procedures.\textsuperscript{158} This was considered necessary as the Regulations do not specify what may or may not represent adequate evidence of identity. The Notes contain a number of specific recommendations with regard to account opening procedures for UK resident and non-UK resident customers, clubs, societies and charities, unincorporated businesses, trust nominee and fiduciary accounts, accounts opened by intermediaries and UK and non-UK registered companies.\textsuperscript{159} The Notes also make certain recommendations with regard to the verification of other regulated credit and financial institutions, the acceptance of wholesale sterling and foreign currency deposits and the provision of safe custody and safety deposit boxes.\textsuperscript{160}

As the Regulations do not specify what constitutes satisfactory supporting evidence of customer identification enquiries, certain recommendations are also made to ensure that the investigating authorities are able to compile a satisfactory audit trail for suspected laundered money and to establish a financial profile of any particular suspect account. Transaction information should include the beneficial owner of the account, the volume of funds flowing through the account and, in connection with selected transactions, the origin of the funds, the form in which the funds were offered or withdrawn, the identity of the person undertaking the transaction, the destination of the funds and form of instruction and authority.\textsuperscript{161}

It is, however, recognised that some prioritisation of record keeping is acceptable as it is unrealistic to require copies of all material to be maintained indefinitely. Although the principal objective must retrieve relevant information to the extent that it is available without undue delay,\textsuperscript{162} Where on-going investigations are involved, records should be retained until it is confirmed by the relevant law enforcement agency that the particular case has been closed.\textsuperscript{163}

3. Records

Record retention may be by way of original document, or some form of microfiche, computerised or electronic filing system. Although the Regulations do not require that original documents are retained, if original vouchers are available it is noted that their retention would be of assistance to law enforcement agencies for at least one year to assist forensic analysis.\textsuperscript{164}

With regard to computer generated records, a certification procedure has to be complied with under s 69 of the Police and Criminal Evidence Act 1984 which will involve, in particular, either oral evidence or the tendering of a written certificate in accordance with

\textsuperscript{158} Section IV, paras. 37-105.
\textsuperscript{159} Paras. 60-93.
\textsuperscript{160} Paras. 94-105.
\textsuperscript{161} Id., paras. 111-113.
\textsuperscript{162} Para. 114.
\textsuperscript{163} Para. 115.
\textsuperscript{164} Para. 117.
the requirements of the Act.\textsuperscript{165} Documents may also be proved by the production of an enlargement of the microfilm copy of the document, or of a material part of it, authenticated in such manner as a court may approve.\textsuperscript{166}

With regard to wire transfer transactions, SWIFT now requires that all systems users ensure that when sending SWIFT NT100 messages, that is customer transfers, the fields for the ordering and beneficiary customers should be completed with the respective names and addresses. Subject to any technical limitations, ordering customers should be encouraged to include such information in all domestic or international credit transfers in connection with all electronic payment or message systems. Where this is not done, full records of the ordering customer and the address should be retained by the originating financial institutions.\textsuperscript{167}

4. Reporting

With regard to the recognition and reporting of suspicious transactions, it is noted that a suspicious transaction will generally be one which is inconsistent with a customer's known legitimate business or personal activities or with the normal business for the particular type of account involved. A number of examples of suspicious transactions are set out in Appendix G to the Notes with additional guidance concerning the reporting of suspicious transactions.\textsuperscript{168} The reception point for disclosure of suspicious transactions in

\textsuperscript{165} Information as to the authentication of computerised records is set out in Appendix F of the Guidance Notes; see, para. 119 and Appendix F. A written certificate of authentication of computerised records must be in accordance with the terms of paragraph 8 of Schedule 3 to the Police and Criminal Evidence Act 1984. Such a certificate must, in particular, identify the document containing the statement and describing the manner in which it was produced, give particulars of any production device, such as a printer model, note that there are no reasonable grounds for believing that the statement is inaccurate because of improper use or unauthorised access, and be signed by an appropriate officer of the company. A statement or document may also be admissible in criminal proceedings as evidence of any fact in connection with which direct oral evidence would be admissible if the document was created or received by a person during the course of a trade, business profession or other occupation or as the holder of a paid or unpaid office and the information was supplied by a person who had, or may reasonably be, supposed to have had personal knowledge of the matters dealt with; see, § 24 of the Criminal Justice Act 1988.

\textsuperscript{166} See Police and Criminal Evidence Act 1984.

\textsuperscript{167} Paras. 121-123.

\textsuperscript{168} Section VI, paras. 124-146 and Appendix G. The examples provided include the following with regard to cash transactions: unusually large cash deposits, substantial increases in cash deposits, the use of numerous credit slips, unusual forms of commercial payment, frequent cash deposits to cover transfer payments, high volumes of low denomination notes and the frequent exchange of cash into other currencies, unusually high branch balances, counterfeit notes and forged instruments, foreign payments being settled in cash and large cash deposits using nightsafe facilities. Other examples are provided with regard to the use of bank or building society accounts, investment related transactions, offshore international activities, financial institutions employees and agents and secured and unsecured lending. A number of specific money laundering schemes uncovered are also set out in Appendix A which include account opening with drafts, bank deposits and international transfers, bogus property companies, theft of company funds, Jersey deposits and sham loans, the Cocaine Lab Case, currency exchange, cash deposits and bank complicity; see Appendix A, paras. 1-10.
the United Kingdom is the Economic Crime Unit (Financial Desk of the National Criminal Intelligence Service).

The Guidance Notes are clearly of value ensuring that all principal forms of financial institutions maintain effective internal control and reporting procedures to ensure that they comply with all of the relevant European and detailed United Kingdom implementation requirements in this area. The Notes will also be of indirect use in advising or, at least, reminding certain institutions of their proper responsibilities and potential liabilities in this area.

There are, however, as yet, no effective supervision or enforcement mechanisms in connection with compliance and it is unclear whether United Kingdom financial institutions are taking the Notes as seriously as banking compliance programmes are in the United States, especially in the absence of the same judicial support for the legislative initiatives adopted in the States.169

It is clearly essential that at all stages in the development of national money laundering control laws, that all relevant financial institutions establish adequate internal compliance programmes. In connection with this, it is also clear that one very effective way to achieve this result is to use separate secondary legislation to establish the basic requirements to be imposed on financial intermediaries and then to expand the content of these provisions through non-enforceable guidance notes as the United Kingdom has done with the Notes issued by its joint Money Laundering Steering Group. The use of this tripartite system of initial statutory prohibition with more detailed secondary legislative requirements and then the separate preparation and issuance of separate guidance notes to assist financial intermediaries develop appropriate internal compliance programmes is obviously an efficient but cost effective way to proceed.

Even if a number of Latin American countries do not have the financial or personnel resources to implement a control system based on the full United States model, they could begin to develop, at least, an adequate minimum level of control through this simple three part model which ultimately relies on the development of effective internal institutional identification and reporting requirements.

V. A Note on the United States Response.

In the United States, a very detailed and extensive programme of statutory requirements has been constructed with regard to financial market regulation generally and economic crime specifically. Federal authorities have also traditionally been able to adopt a wide range of prosecutory actions in response to all forms of financial crime generally and against money launderers, in particular, through both criminal statutes and the development of various express and implied causes of action under civil statutes as well as through various civil administrative and enforcement remedies.170


A number of important revisions have also been made to the operation of these basic provisions within the last year. These include new Bank Secrecy Act\(^1\) [BSA] reporting requirements and revised suspicious transaction reporting obligations under the Money Laundering Forfeiture Law\(^2\) [MCLA]. There have also been a number of important forfeiture and comity decisions taken by the United States courts.\(^3\)

Of more important current interest, however, is the anticipated effect of the Clinton Administration's recent high profile proposals to combat money laundering contained in a speech by the President on October 22, 1995 to the United Nations following an outline of the policy in a classified executive order of the previous day.\(^4\)

Under this Presidential Decision Directive 42, government agencies are to be required to identify Colombian drug traffickers, their associates and front companies, and to freeze all of their assets in the United States.\(^5\) Government agencies are also to collect evidence about additional major international criminal organizations which may include Russian organized crime groups.\(^6\) The most flagrant overseas sanctuaries for illegally obtained money are

171. FinCEN published an extensive list of proposed amendments to the Bank Secrecy Act regulations in November, 1995. These include the revision of certain definitions to extend the application of the Act to include, in particular, to securities firms; to require firms to comply with new customer identification procedures, record-keeping and related training programmes; to delegate authority to relevant federal banking agencies authority to impose civil penalties for breach of BSA requirements; introduce new registration procedures for certain businesses which transmit money; exempt certain transactions from existing CTR reporting requirements; and require reporting of cross-border transfers of certain types of financial instruments in addition to cash payments. See US Treasury-FinCEN 1996 Regulatory Agenda, 60 Fed. Reg. 60, 452 (1995); see also, Treasury and FinCEN Issue Agendas For Fiscal year 1996 Regulatory Action, BNA Banking Daily, Dec 1, 1995. FinCEN is also expected to finalise in early course the new United States know your customer or KYC rules for suspicious transactions identification and reporting; see supra note 87. For comment on the need to improve the collection and use of reported information see, United States General Accounting Office, Money Laundering - Needed Improvements For Reporting Suspicious Transactions Are Planned, Report to the Ranking Minority Member Permanent Subcommittee on Investigations, Committee on Governmental Affairs.


173. For general comment on recent developments in the United States see Kelly, Jr., supra note 19; and Prepared Statement by Jayetta Z Hecker, Associate Director of International Relations and Trade Issues, Before the House Committee on Banking and Financial Services, U.S. Efforts to Combat Money Laundering Overseas (1996).


175. For a critical comment of the measures see, David Ignatious, supra note 24.

176. In connection with the recent developments in Russia see, supra note 4.
identified and negotiations to be commenced with regard to ending their safe haven status.177

In connection with the individuals targeted, a list of eighty (80) names has been prepared which includes four (4) drug barons, forty-three (43) associates and thirty-three (33) businesses. United States banks and financial institutions involved with the persons listed are required to monitor all account records, wire transfers and other data to identify any assets or transactions involving the named parties. It is expected that as a result of these measures some $300 billion in drugs receipts will be transferred to the United Kingdom and Europe for money laundering purposes.

While the United States authorities have been able to develop a substantial programme of measures to combat the development of the laundering of financial proceeds with the assistance of the legislature and courts, it remains to be seen what impact PDD-42 will have in this regard. The effect or threat of local seizure will clearly compel criminal organisations to remove their funds and laundering operations from the United States to other more amenable territories. This will reduce the total amount of criminal proceeds laundered in the United States, although the status of the funds may simply be legitimised elsewhere with no reduction in the total amount of global money involved.

Although it was clearly the Administration's intention to close the gaps in the international control of money laundering activities, in the absence of international agreement on the specific measures to be adopted, the effect will simply be to transfer the problems experienced in the United States to the other principal or more minor financial centres concerned. Once the funds have been laundered elsewhere, however, it has to be expected that they may then simply return to the originating criminal organisations involved in the United States.

Rather than deny criminal organisations the use of the laundered proceeds which could otherwise have been traced by regulatory agencies within the United States through the extensive filing requirements imposed, the recent proposals may simply delay or postpone the laundering process, but to do so in such a way that the authorities concerned will not be able to take any subsequent action against the parties involved.

177. Approximately 50 money laundering centres were listed which included the British dependent territories of Cayman Islands and Turks and Caicos Islands, the Bahamas and Aruba. Determinations on the status of a large number of territories in terms of their commitment to take adequate steps on their own or in co-operation with the United States to implement the goals and objectives of the 1988 United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances had already been issued in February 1995; see, Presidential Determination No. 95-15, Federal Register, Vol. 60, No. 46; 60 FR 12859. A revised Presidential Determination 96-13 was subsequently issued on 1 March 1996; see, Presidential Determination No. 96-13, Federal Register, Vol. 61, No. 48; FR 9891.
Although directed at territories which do not support international efforts to control laundering activities, it has to be hoped that the recent measures will not simply export the problems involved to countries which do not have the resources, experience or political will to respond to the problems identified adequately. In such a case, the total volume of global proceeds laundered would simply remain the same but be processed through territories where United States enforcement officers would not be able to effect any control. In the absence of a complete set of effective bilateral or multi-lateral information, investigation and extradition arrangements between all of the countries concerned, the total global effect may be significantly to increase rather than decrease the difficulties which arise in controlling national and international money laundering activities.\textsuperscript{178}

VI. Conclusions

A considerable amount of work has clearly been undertaken within the OAS and Europe in connection with the development of appropriate prohibitions on the laundering of criminal proceeds through the new global financial markets of the 1990s.

The OAS has created a very useful regional control model in the area of money laundering, although it is limited particularly in terms of enforceability, scope of application, information exchange and content of internal compliance programmes.

As a national or implementation model, the United States has developed a very substantial arsenal of criminal and civil statutory and judicial sanctions against all types of laundering activity. While the onerous filing requirements imposed have proven to be of value in the investigation and securing of prosecutions in a large number of instances, it has to be hoped that the recent efforts in this area to make more co-ordinated and efficient use of the results obtained may be of value. The more recent suspicious transaction reporting requirements and new KYC rules will also have a significant impact on the control of laundering activities in the United States. It is important, however, that the costs imposed on legitimate business and financial markets should not be completely uncontrolled.

\textsuperscript{178} For comment on recent developments in connection with the conclusion of appropriate international memoranda of understanding and similar arrangements see, Hecker, \textit{supra} note 174. For a note of the success of earlier Kerry Agreements following enactment by Congress of the 1988 Kerry Amendment which required the Treasury Department to negotiate bilateral agreements with countries suspected of laundering large sums of proceeds from illicit drug sales in the United States. See Solomon, \textit{supra} note 5, at 442-444.
The recent initiatives within the European Community in this area have also been impressive especially insofar as they have created a significant common response across the whole of Europe to the very serious threats created by money laundering activities in modern financial markets.

Of substantially more importance, however, are the detailed implementation programmes adopted in the Member States of the Community and, in particular, within the United Kingdom. Again, however, the criminal sanctions imposed are of no use without rigorous and effective enforcement within the United Kingdom while appropriate systems must be established to ensure that the Guidance Notes developed are fully implemented and complied with by all financial institutions as part of their internal compliance procedures. Despite these limitations the implementation measures adopted within the United Kingdom may provide some assistance as an alternative implementation model for use by other countries and especially those in Latin America in the creation, or revision, of effective local money laundering control provisions.

It is, however, still unclear whether a European/United Kingdom suspicious transactions only or the more comprehensive United States full disclosure and suspicious transaction model is more appropriate and effective in practice. Against the disadvantages of the cost and administrative inconvenience involved, the United States model does provide a powerful prosecutorial tool and will consequently be of considerably more deterrent effect. The European United Kingdom suspicious transaction model is more administratively efficient although it places a higher investigatory burden on financial institutions themselves with arguably less deterrent value and less certain results in practice.

It is nevertheless still questionable to what extent the full United States model is appropriate for immediate adoption in developing or less developed countries in light of the sophisticated level of financial market development assumed and the onerous internal investigation and reporting costs imposed on financial institutions as well as high degree of public investigatory and enforcement resources required. In selecting a suitable implementation model for less developed economies, it is necessary to consider the competitive effects of imposing onerous burdens on the development of the local financial industry and economy generally. While a sufficient degree of control on abuse must be introduced and maintained, this does not necessarily have to involve imposing the costs of a full United States model on all other territories.

In terms of deterrence and redress, in addition to the continued development of appropriate criminal and civil sanctions for active participation and knowing complicity, the most effective response must be seizure and confiscation of all effected assets. As well as closing existing laundering opportunities, this will, over time, deny criminal operations of their illegitimate income. The United States has taken a clear legislative and judicial lead in this area which it has to be hoped that all other countries will follow.

With regard to future developments, internal industry compliance programmes and codes of conduct must be introduced or extended in all countries and a complete network of comprehensive mutual legal assistance treaties constructed at the international level. All remaining bank secrecy or confidentiality laws which prevent the detection and investigation of illegitimate laundering operations must also be removed.

The residual area of very considerable difficulty which remains, however, is the existence and continued expansion of wide-spread and very deep-rooted corruption in many parts of the world. In the absence of responsible and judicious legal development and committed law enforcement in all countries in support of the proper operation and con-
continued development of legitimate financial markets as well as of legitimate democratic processes generally, any measures adopted to control money laundering or any other forms of financial crime must ultimately be unsuccessful.

Although the United States PDD 42 will place a considerable amount of pressure on territories which until now have not supported international efforts to control money laundering activities, in particular, following the earlier PD 95-15 and subsequent PD 96-13, it must be hoped that this does not backfire and simply result in the export of criminal proceeds from the United States with their subsequent import in the form of legitimate income streams, or other assets, with United States officials not being able to trace and prevent their receipt by the original criminal organisations involved.

While a great deal of important work has been done to date, these efforts must continue until a complete and effective programme of integrated national and international civil, criminal and administrative measures is developed to prevent the abuse of the global financial system for the purposes of legitimising illegally obtained funds. Insofar as it remains possible to launder such funds, criminal organisations will be able to protect their accumulated wealth and continue to develop their nefarious activities in all parts of the world.

Latin America must follow the lead established by other countries, although clearly their efforts must take into account the realities of local market conditions and available resources. The Latin American countries must, however, accept their responsibilities in this area and properly participate in the development of a complete and integrated response to the very serious threats created to the stability and continued growth of all national and international markets though the abuse of legitimate financial operations for the concealment and protection of criminal wealth.