How the French are fighting money laundering & financial terrorism

Hervé Ballone outlines the specific obligations of the French specialists in restructuring & liquidation

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The fight against illicit financial flows is a priority for the French authorities. Money laundering is at the heart of criminal activities and represents a threat to the economic and political stability of States.

Faced with this reality, political action has significantly improved the tools to fight against fraud, money laundering and terrorist financing. France also has a legal arsenal and therefore is actively involved in improving standards in this field, both internationally, within the framework of the Financial Action Task Force work (FATF), and at regional level, taking part in the legislative work undertaken by the European Commission and in the conventions of the Council of Europe.

The main actors in the fight against money laundering and terrorist financing are, according to Article 561-2 of the French Monetary and Financial Code, the financial institutions (banks, manual exchange offices, insurance companies, investment firms), as well as the accountants, auditors, bailiffs and certain non-financial professionals (notaries, real estate agents, casino managers, auctioneers and dealers in high value goods). At the end of the transposition process of the third Money Laundering Directive of 26 October 2005, new business areas were integrated in the device, such as lawyers, bailiffs, directors and legal representatives.

> **POLITICAL ACTION HAS SIGNIFICANTLY STRENGTHENED THE TOOLS TO FIGHT AGAINST FRAUD, MONEY LAUNDERING AND TERRORIST FINANCING**

Reminder about money laundering and terrorist financing

The French system for fighting against money laundering and terrorist financing is primarily based on the definition of a general laundering offence in the French Penal Code (art. 324-1), applicable to revenues related to a crime and to the financing of terrorism.

Thus, money laundering is an intentional offence (*mens rea*): "*the act of facilitating by any ways the false justification of the origin of property or income of the perpetrator of a crime or offence that has provided him/her direct or indirect profit. Money laundering also means providing assistance to investing, concealing or converting the direct or indirect product of a crime or misdemeanor*"(*actus reus*).

Money laundering is punished by five years of imprisonment and a €375,000 fine. In special cases, however, money laundering is punished by ten years of imprisonment and a €750,000 fine:

- If it is committed habitually or by using the facilities afforded by the exercise of a professional activity,
- If it is committed by an organised gang.

Attempted offences provided under this section is are subject to the same penalties.

The French system

During the Arche Conference of 14-16 July 1989, the G7 had recommended the creation of financial intelligence units able to fight against money laundering and terrorist financing. France has chosen to adopt a financial intelligence unit called TRACFIN.

TRACFIN is a national service, under the supervision of the Ministry of Finance and Public Accounts. It is an administrative financial intelligence processing service. Its mission is to fight against clandestine financial circuits, money laundering and terrorist financing.

To this purpose, this unit collects, analyses, puts together and processes all information leading to establishing the origin or the destination of criminal financial transactions, starting from the statements made by tax-paying professionals.

Upon receipt of the information, TRACFIN first analyzes, then starts an investigation and finally sends the information, in under the form of notes, to the judicial authorities (Prosecutor) and to foreign financial intelligence units.

The obligations imposed on AJs / MJs (Insolvency Office Holders)

1. Vigilance

Insolvency Office Holders (IOH) have a duty of vigilance concerning the assets, liabilities, number of employees, real beneficiary, transactions, and potential buyers of the debtor company they are dealing with. Thus, appropriate procedures and internal control measures must be carried out for purposes of identification.

Three types of vigilance duty can be implemented by these professionals, depending on the nature and the level of risk:

- normal vigilance exercised when appointed, focusing on identification elements concerning the debtor and the potential buyer, and on the procedure applied or the proposed transactions;
- lightened vigilance if the risk is considered low during the relationship with the debtor company;
- reinforced vigilance if the risk is considered high. Additional vigilance measures must be taken if the debtor company's manager is not physically present for identification, or is politically implied, a.s.o.

2. Reporting to TRACFIN

The IOH are obliged to declare to TRACFIN the amounts or transactions which they "know, suspect or have reasonable grounds to suspect that are coming from an offence punishable by a term of imprisonment exceeding one year, or that they are financing terrorism".

The declaration must be made prior to the execution of the suspect transaction in order to allow Tracfin to exercise its right of opposition in advance.

However, the IOH's declaration may be made after the end of the transaction in the following three cases:

- a stay is impossible to grant,
- a postponement is recommended, which could hinder the smooth running of ongoing investigations,
- suspicion is arising after the end of the transaction in question.

Note that the number of declarations made by the IOH has exploded in 2014, that is to say 100 statements were made and a 22% increase was seen compared to 2013.

Warning criteria & several examples of risks

Suspected fraud in judicial liquidation

Following the liquidation of Company A, the production equipment, the stock and the brand were sold in favour of Company B. The investigation showed that the manager of Company B was actually one of the shareholders of a new entity, Company C, set up by the former manager of Company A, under liquidation proceedings. Thus, the assets are in fact put at the disposal of Company C.

The alert criteria:

- liquidation proceedings which seem to aim at the continuation of the activity through another structure;
- purchase of the assets by a newly set company,
- purchase of the assets by a person connected to the former manager.

Suspicion of misuse of company assets following an asset disposal plan

Following the insolvency proceedings of Company A, the Court approved an asset disposal plan for one symbolic euro in exchange for maintaining employment and the continuation of the activity. The buyer receives a government grant. Following poor results, the company is forced to make redundancies only a few months after the first release of the said grant.

Following the insolvency proceedings of Company B, the Court approved an asset disposal plan for a symbolic nominal amount to the benefit of Company C, in exchange for maintaining employment and the continuation of the activity.

A few months later, Company C sells the assets to Company D. Companies C and D have both the same managers.

A few months later, Company D resells the assets to Company E with a high added value.

A few days after the receipt of the sale price, Company D performs a transfer to an account held abroad in the name of its manager, without any identified reason.

The alert criteria:

- the takeover of a company for a token amount,
- obtaining a state aid,
- resale of the assets in a short time with a high added value.

Fraud to the "A.G.S." (The Employee Claim-Guarantee Management Association)

A.G.S. aims to guarantee the payment of debts due to employees under the employment contract in the event of restructuring or liquidation proceedings and, under certain conditions, in case of sauvegarde (rescue) proceedings. A.G.S. may challenge the payment asking for proof that the contractual basis of the debt is the result of fraud.

Recurring scenarios:

- fictitious employment contract or the absence of subordination,
- massive hiring of temporary employees previous to the opening of insolvency proceedings,
- increase of the reference wages previous to the opening of the insolvency proceedings,
- disproportionate wages in comparison to the size of the company and the kind of job performed,
- lack of economic activity of the company.

No doubt that the fight against money laundering and financing of terrorism is the struggle of the 21st century. Indeed, the 4th Directive about the fight against money laundering and financing of terrorism, launched on February 5, 2013, was passed by the European Parliament on May 20, 2015. It includes several legal innovations, including the creation of a national central register. Its application is likely to be effective in 2017. ■

> **TRACFIN'S MISSION IS TO FIGHT AGAINST CLANDESTINE FINANCIAL CIRCUITS, MONEY LAUNDERING AND TERRORIST FINANCING**

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