



COMBATING MONEY LAUNDERING AND RECOVERING LOOTED GAINS

RAISING THE UK'S GAME

TRANSPARENCY INTERNATIONAL

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- We raise awareness about corruption
- We advocate legal and regulatory reform at national and international levels
- We design practical tools for institutions, individuals and companies wishing to combat corruption
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GLOSSARY

AFWG	Asset Freezing Working Group	MSB	Money service business
AML	Anti-money laundering	NAO	National Audit Office
ARA	Assets Recovery Agency (now absorbed into SOCA)	NCIS	National Criminal Intelligence Service (absorbed into SOCA)
BBA	British Bankers Association	NI	Northern Ireland
CARIN	Camden Assets Recovery Inter-Agency Network	NTFIU	National Terrorist Financial Investigation Unit
CD	Crown Dependency	OACU	Overseas Anti-corruption Unit of the City of London Police
CDD	Customer due diligence	OECD	Organisation for Economic Cooperation and Development
CFT	Combating the financing of terrorism	OFC	Offshore financial centre
CICA	Crime (International Cooperation) Act (2003)	OT	Overseas territory
CNCP	Commonwealth Network of Contact Persons	PACE	Police and Criminal Evidence Act 1984
COSP	Conference of States Parties	PEP	Politically exposed person
CPS	Crown Prosecution Service	POCA	Proceeds of Crime Act 2002
DFID	Department for International Development	POCU	Proceeds of Corruption Unit of the Metropolitan Police
EEA	European Economic Area	RCPO	Revenue and Customs Prosecuting Office
ECHR	European Convention on Human Rights	Requested state	The state receiving requests for mutual legal assistance in criminal investigations and criminal proceedings (or civil forfeiture proceedings).
FATF	Financial Action Task Force	Requesting state	The state requesting mutual legal assistance in criminal investigations and criminal proceedings (or civil forfeiture proceedings).
FCLOS	Fiscal Crime Liaison Officers	SAR	Suspicious Activity Report
FCO	Foreign and Commonwealth Office	SFO	Serious Fraud Office
FIU	Financial Intelligence Unit	SOCA	Serious Organised Crime Agency
FPO	Foreign Public Official	SOCPA	Serious Organised Crime and Police Act 2005
FSRB	FATF-Style Regional Body	SRA	Solicitors Regulation Authority
FSA	Financial Services Authority	STAR	The Stolen Asset Recovery Initiative
HMRC	Her Majesty's Revenue & Customs	TCSPs	Trust and company service providers
HMT	Her Majesty's Treasury	TI-UK	Transparency International UK
ICAR	International Centre for Asset Recovery	UKCA	UK Central Authority for mutual legal assistance
ICAEW	Institute of Chartered Accountants of England and Wales	UNCAC	United Nations Convention Against Corruption
JMLSG	Joint Money Laundering Steering Group	UKFIU	UK Financial Intelligence Unit
KYC	Know your customer	UNODC	United Nations Office on Drugs and Crime
KYCB	Know your customer's business		
ML	Money laundering		
MLA	Mutual legal assistance		
MLR	Money Laundering Regulations (2007)		
MPS	Metropolitan Police Service		

PREFACE AND ACKNOWLEDGEMENTS

As an anti-corruption body, Transparency International UK (TI-UK) is concerned with preventing money laundering since the facility to launder the proceeds of corruption gives rise to the commission of bribery and corruption offences in the first place. TI helped international banks to establish the Wolfsburg Principles (the global anti-money laundering guidelines for private banking) in 2000. Reports by TI-UK in 2003 and 2004 focused on corruption and money laundering in the UK and the regulation of trust and company service providers, respectively.

This report focuses on the following main areas:

- Strengthening the UK's defences against dirty money with particular emphasis on improving due diligence by financial and other institutions and organisations required to conduct due diligence on Politically Exposed Persons;
- Criminal and civil mechanisms for the recovery of assets that are the proceeds of corruption; and
- Bolstering the efforts of the UK's law enforcement agencies and improving the UK's ability to help developing countries in identifying and recovering stolen assets through more efficient processes and procedures.

In preparing this report, TI-UK drew on the valuable expertise and advice of the following experts: Martin Polaine and Arvinder Sambei, Amicus Legal Consultants Ltd; Alan Bacarese, International Centre for Asset Recovery in Basel; James Maton, Edwards Angell Palmer & Dodge UK LLP (formerly Kendall Freeman); and Richard Pratt, formerly with the Jersey Financial Services Commission and Her Majesty's Treasury. TI-UK is extremely grateful to them for contributing so much of their time to this project on an entirely voluntary basis. The views expressed and the recommendations made in this report should not in any way be attributed to them, but rather to TI-UK. We are grateful to the Department for International

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Acknowledging the debt TI-UK owes to all those who have contributed to and collaborated in the preparation of this report, we should make clear that TI-UK alone is responsible for the content of the report. While believed to be accurate at this time, the report should not be relied on as a full or detailed statement of the subject matter.

John Drysdale, Chairman, TI-UK



Chandrashekhar Krishnan, Executive Director, TI-UK



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EXECUTIVE SUMMARY AND MAIN RECOMMENDATIONS

- i. Corrupt leaders of poor countries steal as much as US \$40 billion each year and stash these looted funds overseas. UK financial institutions have been used as repositories, and other UK institutions and organisations used as intermediaries for stolen funds from several countries. Money launderers find it easier to mingle their dirty funds in a large financial centre like London. The UK's defences against money laundering (ML) should be robust enough to prevent corrupt money from finding sanctuary in the UK. When those defences are breached, the UK must cooperate promptly to enable stolen assets to be repatriated to requesting states.
- ii. The UK has a wide range of anti-money laundering (AML) powers to deal effectively with ML and to counter the financing of terrorism (CFT), as well as asset recovery (AR). At every stage of the process of AML and AR there is a multiplicity of UK agencies involved but none has overall responsibility. International cooperation appears to be frustrated at times because some foreign governments are apparently unable to access the right UK authorities for help with investigations and AR. Often this is because of a lack of understanding of UK processes.
- iii. What is needed is a more coordinated proactive approach that: makes the best use of the powers the UK has; strengthens the identification and monitoring of Politically Exposed Persons (PEPs); ensures AML obligations are implemented consistently and effectively across different institutions; identifies the countries that need help with investigations and AR; strengthens the UK Central Authority's (UKCA) capacity to respond quickly and helpfully to requests for assistance; and removes obstacles that impede criminal and civil processes for AR.

The UK and International Context

- iv. The UK is a member of the Financial Action Task Force (FATF), the international body that oversees AML worldwide. It is a party to the AML/AR instruments and initiatives adopted by the United Nations (UN), the European Union (EU), the G7 and G8, the Organisation for Economic Cooperation and Development (OECD), the World Bank and the Commonwealth. The UK has ratified the UN Convention Against Corruption (UNCAC), which includes a comprehensive framework for mutual legal assistance (MLA) and AR. Because of its key international connections, its position as a leading international financial centre and its links with many of the world's offshore centres, the UK should be prepared to take a lead in implementing AML standards and in assisting victim countries to recover stolen assets and the proceeds of corruption.
- v. The UK implements the current AML standards of FATF through the Proceeds of Crime Act (POCA) 2002 and the 2007 Money Laundering Regulations (MLR). The Financial Services Authority has published Rules on AML, and guidance for the financial sector and the relevant professions is provided by the Joint Money Laundering Steering Group (JMLSG). Other enforcement agencies have provided guidance for other sectors subject to the Regulations.
- vi. Particular challenges arise in respect of some of the UK Overseas Territories (OTs) that are offshore financial centres. They are constitutionally not part of the UK and in some of them, the Governor-General is accountable for financial services. All the OTs have implemented AML regimes. However, some of the smaller OTs have very limited regulatory and law enforcement capacity making it difficult to address ML risks effectively. This vulnerability has serious implications for the UK's reputation. Recent allegations of fraud and corruption in Turks and Caicos have underlined the need for urgent action to mitigate risks.

TI-UK recommendations on overseas territories:

- *In respect of the smaller OT financial centres, where regulatory capacity is particularly weak and where the UK Government has responsibility for financial affairs, the UK Government makes a clear decision either to wind down the financial centres or to support an increase in capacity for regulation, policy analysis, law enforcement and international cooperation; and*
- *The UK Government should continue to work with the smaller OT financial centres to ensure that their Financial Intelligence Units (FIUs) and regulatory authorities have capacity commensurate with their financial centre operations; and that practical training and technical assistance are provided for this purpose.*

The Prevention of Money Laundering

- vii. Much has been done lately to improve the effectiveness of the mechanisms upon which the UK's AML regime relies, particularly through the 2007 MLR. Some 200,000 Suspicious Activity Reports (SARs) are received each year by the UK Financial Intelligence Unit (UKFIU), which is based in the Serious Organised Crime Agency (SOCA). A project to deliver IT-enabled changes to the SARs regime is underway.
- viii. The prevention of ML depends crucially on the diligence of reporting institutions¹ in knowing their customers, especially PEPs. PEPs are defined broadly in the UK as persons (and their immediate family members and close associates) who are, or at any time in the preceding year have been, entrusted with prominent public functions by a state other than the UK. The majority of PEPs are legitimate customers. It is the activities of a minority of corrupt PEPs that are of concern to reporting institutions and UK law enforcement. The 2007 mutual evaluation of the UK's adherence to the FATF Recommendations stated that, while there was a high level of awareness of PEPs issues and of compliance with the JMLSG Guidance, there remained some gaps. Some of these have been addressed but, in the opinion of TI-UK, there are weaknesses. The Guidance provided by the JMLSG does not make it an absolute requirement for reporting institutions to determine if a person is a PEP and thus fails to meet the

terms of FATF Recommendation 6, which requires enhanced due diligence on PEPs.

- ix. There is also a weakness when it comes to identifying the beneficiaries of a trust. Corrupt PEPs often hide behind complex structures, involving anonymous trusts and companies, including offshore trusts and shell companies. Although FATF requires this, the 2007 MLR do not require reporting institutions to identify a beneficiary of a trust as a matter of routine.
- x. Reporting institutions should be satisfied that a PEP is legally entitled under his or her domestic laws to establish a business relationship in the UK, and should know any limits on that business relationship. TI-UK welcomes the establishment by SOCA of a unit to supervise PEPs-related SARs and hopes it will be sufficiently resourced to maintain its international information-sharing capacity while continuing to improve the quality and quantity of PEPs transaction reporting.
- xi. Although Trust and Company Service Providers (TCSPs) are now subject to AML requirements, TI-UK is concerned about the adequacy of regulation and monitoring of TCSPs, who are vulnerable to abuse for the purpose of laundering stolen assets and the proceeds of corruption. The 'fit and proper test' for TCSPs does not require any proof of competence and it is therefore doubtful whether the registration system operated by Her Majesty's Revenue and Customs is effective in addressing AML/CFT concerns.
- xii. Increased transparency and stronger regulation in financial markets will have a positive impact on AML efforts, particularly in relation to tax havens and those financial centres that refuse to cooperate in the exchange of tax and other information relevant to regulatory, law enforcement and AML/CFT investigations.

TI-UK recommendations on strengthening money laundering prevention:

- *The MLR and the JMLSG guidance should make it unambiguous that a reporting institution should always have systems in place to detect and identify PEPs;*
- *The MLR should require beneficiaries to be identified and their identity verified, at least before a payment is made. If*

1. Financial institutions and certain other professional bodies, organisations and institutions that are required to conduct due diligence are referred to in this report as reporting institutions.

this cannot be established, the payment should not be made and the account should be closed;

- *The Financial Services Authority (FSA) and other enforcing bodies should ensure that each reporting institution maintains an up-to-date list of PEPs with which it has established a business relationship;*
- *A database² should be created and maintained detailing by country the legal, criminal and other restrictions on PEPs holding assets outside their own countries, or being involved in paid employment. The database could also detail which jurisdictions require asset declarations, and from what PEPs and whether the contents are in the public domain. This country database should be made available for use by reporting institutions and other professionals;*
- *The JMLSG Guidance should be amended to require reporting institutions to ask PEPs about any limitation on their ability to hold assets outside their home country, to obtain copies of any asset declaration and to have regard to the legal obligations on PEPs when deciding whether or not to accept the account and when establishing their monitoring procedures;*
- *The resources devoted to the PEPs unit in SOCA should be reviewed and this unit should work with the FSA and other supervisory agencies to establish key data on PEPs and to use the data obtained from time to time from reporting institutions to analyse trends and aggregates;*
- *MLR 14 should require PEPs identification as part of risk management and it should be normal practice to have specified measures defined in an institution's AML policy for establishing whether or not any customer is a PEP;*
- *The effectiveness of ML regulation by HMRC of TCSPs should be independently reviewed and reported upon no later than 2011; and*
- *The UK should work with other members of the G20 to establish clear criteria for the identification of non-cooperative tax havens and financial centres. Such criteria should result in a distinction between those who cooperate and those that do not. Those that continue to refuse to meet international standards and refuse to exchange information should be subject to sanctions as long as they continue to act in this way.*

Asset Recovery and Money Laundering

- xiii. In merging the Assets Recovery Agency (ARA) – established under POCA 2002 – with SOCA, the Government has sought to create a 'one-stop shop' for AR work, with financial investigation, ML enquiries at home and overseas, the SARs regime and criminal and civil recovery all coming under one roof (although the Crown Prosecution Service (CPS) and Serious Fraud Office (SFO) have also been granted civil recovery powers). TI-UK is pleased that an atmosphere of positive cooperation exists between the various departments and agencies involved in work related to the proceeds of corruption, AML and PEPs. However, with as many as 14 departments/agencies engaged in this work, it remains unclear how and in what way this cooperation is expected to function. It is also not clear whether the relatively new Proceeds of Crime Unit (POCU) of the Metropolitan Police Service (MPS) and Overseas Anti-Corruption Unit (OACU) of the City of London Police, which are funded separately from mainstream law enforcement funding, are seen as permanent features of the UK's AR/AML regime. Both Units are performing well. The POCU has had some notable successes in securing criminal assets in the UK from corrupt PEPs.
- xiv. Under POCA, the UK has comprehensive and effective powers to restrain, confiscate and recover the proceeds of crime. POCA permits the freezing of assets that are suspected of being the proceeds of crime, in support of domestic or foreign criminal investigations or prosecutions, or domestic civil recovery proceedings. However, at present, the UK cannot freeze assets in support of foreign civil recovery (civil forfeiture) proceedings because this is dealt with through requests for MLA in criminal matters and civil recovery is not a criminal process.
- xv. The UK has introduced legislation permitting the civil recovery (civil forfeiture) of the proceeds of unlawful conduct in the absence of a criminal conviction³. Originally vested only in the ARA, the Serious Crime Act 2007 extended these civil recovery powers to main prosecution agencies in England and Wales and Northern Ireland, namely the CPS, the Revenue and Customs Prosecuting Office (RCPO), SFO and the Public Prosecution Service for Northern Ireland (PPS)⁴. The prosecution authority exercising these powers has to establish that on the balance of probabilities the assets claimed derive from unlawful conduct. It is encouraging that SOCA and the CPS hope to use civil recovery powers to a

2. The idea for this database derived from one of the law enforcement agencies TI-UK met during the preparation of this report, and it was thought that it could assist considerably in deterring ML in the UK by PEPs.

greater extent than in the past, with corruption cases likely to feature strongly, although they will need additional funding and resources properly to do so.

- xvi. The UK is able to enforce non-conviction based civil forfeiture orders and criminal confiscation orders made by foreign courts following conviction for serious or complex fraud⁵, which includes corruption offences. Enforcement is not dependent on treaty arrangements although foreign orders are enforced at the discretion of the Home Secretary. PEPs are likely to mount vigorous challenges to the enforcement in the UK of such foreign orders and English courts need to deal with such challenges expeditiously and fairly. Consistent with Article 53 of UNCAC, the UK also allows foreign states to bring private civil proceedings in the English High Court to recover the proceeds of corruption.
- xvii. Basic and accurate information that identifies asset location and ownership is vital to facilitate asset recovery. The registration of land ownership by PEPs deserves more attention. The land registry in England and Wales has not always included the place of incorporation of a foreign company or trust owning property, which helps those corrupt PEPs who often hold property in the UK through offshore vehicles (as evidenced by the majority of recent cases).

TI-UK recommendations on boosting asset recovery:

- *Cross-departmental and cross-agency cooperation in AML and AR should be spelt out in a Memorandum (along the lines of that which covers investigation and prosecution of foreign bribery);*
- *The POCU and the OACU should be made permanent, with adequate levels of human and financial resources;*
- *Legislation should be introduced to permit the UK authorities to restrain assets in support of foreign civil forfeiture proceedings. This will require amendments to the Crime (International Cooperation) Act 2003 (CICA) and/or POCA;*
- *If enforcement of foreign confiscation or civil forfeiture orders fails or is likely to fail, where the evidence justifies*

action, the Government should assist foreign governments to recover assets, either through stand-alone proceedings brought by the main prosecution agencies with the relevant powers under Part 5 POCA powers, or through assisting or encouraging the foreign government to bring private civil proceedings; and

- *Trusts and similar organisations acquiring property in England and Wales should provide the names and addresses of the trustees for inclusion on the Land Registry. If a case is made for not including these details in the public part of a register, they should still be filed and be available to law enforcement agencies conducting criminal investigations. The identity of ultimate beneficial owners should also be available to law enforcement agencies conducting criminal investigations.*

Enhancing Asset Recovery Processes

- xviii. Requests by states to the UK Government for help with AR are made by means of either 'formal' MLA or 'informal' mutual assistance. The UK Central Authority (UKCA) within the Judicial Cooperation Unit in the Home Office is responsible for UK policy on MLA and for handling incoming and some outgoing requests. It exercises discretion on behalf of the Secretary of State to: determine whether an incoming request can be acceded to; provide assurance that a request is properly made; forward an incoming request to the relevant executing agency; and transmit outgoing requests. UK prosecutors are directly involved in these functions in relation to incoming requests for restraint and confiscation under POCA.
- xix. In response to the concern expressed in the June 2007 FATF mutual evaluation report about the ability of the UK authorities to handle MLA requests in a timely and effective manner, the UKCA has recently been restructured. It is led by an experienced criminal lawyer with casework prosecution experience, and it has two evidential request teams, each headed by an experienced prosecutor from the CPS and SFO respectively. Under this new structure, deficiencies in requests will be highlighted to requesting states at the earliest opportunity so that amendments can be made to

3. Under Part 5 of POCA.

4. The Act also provided for the merger of the operational element of ARA with SOCA, a merger that took effect on 1 April 2008.

5. Proceeds of Crime Act 2002 (external requests and orders) Order 2005 section 18.

enable the fullest range of assistance to be given quickly. It is understandable that it will take some time for the organisation to settle down and there should be a reasonable period of time in which to demonstrate the impact of the restructuring.

- xx. SOCA has also announced that in accordance with EU Framework Decision 2007/845/JHA, it will house the UK's Asset Recovery Office (ARO). The primary purpose of the ARO is to "facilitate the tracing and identification of proceeds of crime or other crime related property which may become the object of a freezing, seizure or confiscation order made by a competent judicial authority".
- xxi. While AROs are EU-based entities, they have, in effect, formalised and extended the previous informal agreements that were created by the Camden Asset Recovery Inter-Agency Network (CARIN). In practical terms, no reasonable request for assistance in AR tracing matters from another jurisdiction would be refused, and SOCA's legal gateway under S32-35 could be used to pass information.
- xxii. With the exception of incoming requests for restraint and confiscation, the CPS does not play a formal role in dealing with incoming letters of request. However, the CPS and other key prosecution agencies have established networks with other jurisdictions and have assisted a range of developing states in making requests to the UK, both through Secretary of State referrals and also through proactively identifying early-stage needs from some states. The value of informal assistance of this type is considerable.
- xxiii. There is no doubt that following its restructuring, the services provided by the UKCA will be much enhanced and it would be reasonable to look forward to several improvements including: a reduction of the accumulated caseload; swifter decision making on incoming requests and referrals to executing agencies; provision of assistance at the earliest stages to requesting states in drafting letters of request; and the known availability of a 24/7 facility to deal with urgent requests.
- xxiv. With these improvements, the UKCA could over time come to be recognised as a global leader and centre of excellence in MLA. However, TI-UK believes that there could be positive advantages in having arrangements which could harness, in support of the MLA process, additional practical and specialised prosecutor experience, particularly in areas such as public interest immunity, covert surveillance, financial investigations and cases where treaty knowledge would be helpful.
- xxv. There is a perception in some developing states that UK authorities and institutions are reluctant to assist them with AR. UK police and prosecutor practitioners do not share this view pointing out that, often, problems arise because of insufficient awareness of UK procedures and a lack of capacity in requesting countries. There is a wide range of programmes run by the United Nations Office on Drugs and Crime (UNODC) and other international bodies to help developing countries with AR, notably the Stolen Asset Recovery (StAR) Initiative. However, the UK could help to fill gaps in international programmes and establish bilateral relationships with those countries where assistance with AR would be of greatest value. TI-UK endorses SOCA's suggestion that the UK mount a "road show" to explain how the UK might assist in particular cases. The creation of the UK's ARO, detailed above, also creates some opportunities to develop an enhanced engagement with developing countries and possibly contribute to an increasingly proactive role through the EU/ARO and CARIN network platforms.
- xxvi. It is important to coordinate criminal and civil mechanisms. When criminal prosecution is not possible and civil recovery powers are not exercised, a developing country can bring private civil proceedings in the High Court in England. The UK authorities can inform a foreign state that it has evidence gathered during a criminal investigation that a PEP has corruptly acquired assets in the UK, enabling the state to make an application for disclosure of that evidence for use in civil proceedings.
- xxvii. As far as possible, structural, financial and judicial hurdles to AR processes need to be removed. Better coordination among the various agencies that are involved is essential. The cost of retaining foreign lawyers and accountants is a significant barrier to successful AR claims. Private sector third party litigation funding companies are a costly option as they often demand an unacceptably high proportion of recoveries. There is therefore a need to find funding from public sources.
- xxviii. In civil recovery cases, the duty of the claimant applying for a freezing injunction to provide "full and fair disclosure" can often lead to significant escalation of costs. If assets could be promptly frozen in support of criminal investigations, a victim state might not need to incur the costs of applying for a freezing injunction, should civil proceedings subsequently prove necessary to recover assets, and a defendant would have a reduced opportunity to engage in spoiling tactics.

xxix. Article 53 of UNCAC requires signatories to permit states to initiate civil proceedings in their courts to establish ownership of assets acquired through corruption. Typically, however, PEPs challenge the jurisdiction of the UK Courts to determine claims against them, even when the assets in issue are located in the UK.

TI-UK recommendations on improving asset recovery processes:

- *The restructured UKCA should be independently evaluated by 2012 to assess the extent to which the objectives envisaged for it have been achieved. A related evaluation should look particularly at cases of restraint and confiscation referred to SOCA, the CPS or SFO, in accordance with the POCA (External Requests and Orders) Order 2005, and consider whether that precedent could advantageously be extended to other applications. If the above evaluations indicate that changes should be considered, the Home Office should consider the future policy for the direct involvement of suitably qualified and experienced prosecutors in the MLA process;*
- *DFID should consider developing a targeted programme of assistance to help requesting states in several areas related to AR and MLA, including: implementation of UNCAC and the drafting of provisions to permit confiscation orders that do not require convictions; training and protection of judges who specialise in making domestic confiscation orders; establishment of asset recovery units; identification of the key jurisdictions where stolen assets are believed to be held; and training of core staff in the techniques of asset tracing;*
- *Private civil proceedings should be considered as one of the mechanisms through which corruptly acquired assets are recovered and assistance should be given as far as reasonably possible to foreign states that wish to pursue this route;*
- *The Government should ascertain and provide the funding required by one or more of the CPS, SFO and SOCA to use their civil recovery powers to recover proceeds of corruption located in the UK, where criminal prosecution and confiscation is unavailable. Where this is not possible, it should assist with coordination of criminal and civil mechanisms to recover assets to the fullest permissible extent;*
- *The Government should consider making grants or loans (repayable from recoveries) to developing countries for civil proceedings to recover the proceeds of corruption;*
- *The Government should explore ways of preventing challenges to the jurisdiction of the Court to determine claims to assets located in the UK (save where a claim is demonstrably an abuse of process), and to make it more difficult for defendant PEPs to challenge jurisdiction in other cases;*
- *The rules of jurisdiction should be amended to make it easier for foreign states to bring cases in the UK against PEPs; and*
- *The Government should remove the right of defendants⁶ to challenge the jurisdiction of the UK Courts to determine claims in respect of assets located within the UK. This could also be dealt with by introducing a statutory cause of action for foreign governments in relation to the proceeds of corruption located in the UK.*

6. Wording would be required to ensure that this covered relatives, associates, companies and trusts holding assets for PEPs.

INTRODUCTION

1. According to the World Bank, corrupt leaders of poor countries steal as much as US \$40 billion each year, looted funds they then stash overseas. Once removed, these funds are extremely difficult to recover, as states such as Nigeria⁷ and the Philippines⁸ have discovered: indeed, to this day both countries are involved in efforts to recover the proceeds of corruption from a number of international jurisdictions. On a national level, too, it has been estimated that £15 billion of dirty money is laundered in the UK each year⁹. While it is not possible to determine what proportion of this figure represents financial proceeds from bribery and corruption, concerns remain that the sums are substantial and embrace both looted state assets and the proceeds of procurement bribery.
2. The laundering of the financial proceeds of corruption, and the identification and repatriation of corruptly-acquired assets, are problems that can only be addressed fully and effectively through international cooperation. However, in seeking a global solution, it has to be stressed that even at a unilateral level an individual country can still make a significant and durable contribution.
3. UK institutions and organisations have been used as repositories or intermediaries for stolen funds from several countries, including Bangladesh, Kenya, Nigeria, Pakistan and Zambia. As a leading financial centre, the UK has a singular duty to deal with this problem. Like many other countries, the UK must operate within the framework of its obligations under international arrangements and conventions to which it is a party, notably the Financial Action Task Force (FATF) and the UN Convention against Corruption (UNCAC).
4. In our view, however, the UK has an added responsibility arising from its unique status. London's international reputation has often attracted money launderers who find it easier to mingle their dirty funds in a larger centre with substantial flows of legitimate money. Moreover, once laundered, these funds will then benefit from having an apparent provenance in a well-regarded centre. As a member of the Commonwealth with close connections to many developing countries, the UK is a natural haven for corrupt Commonwealth politicians wishing to stash their looted funds. In many respects, the UK is itself an offshore financial centre in addition to being the mother country for many small jurisdictions that are more generally regarded as offshore financial centres (the Crown Dependencies (CDs) and the Overseas Territories (OTs) – mostly in the Caribbean). Because of this, the UK has become a natural conduit for those who think (often wrongly) that offshore centres are a good place through which to divert funds in transit to London.
5. It is essential therefore that the UK's defences against money laundering (ML) are robust enough to prevent corrupt money and assets from finding sanctuary within its jurisdiction. However, if those defences are breached, the UK must cooperate promptly to enable stolen or corruptly-acquired assets to be repatriated to requesting states.
6. What is needed is a more coordinated proactive approach that: makes the best use of the powers the UK has; strengthens the identification and monitoring of politically exposed persons (PEPs); ensures anti-money laundering (AML) obligations are implemented consistently and effectively across different institutions; identifies the countries that need help with investigations and asset recovery; strengthens the UK Central Authority's (UKCA) capacity to respond quickly and helpfully to requests for assistance; and removes obstacles that impede criminal and civil processes for Asset Recovery (AR).

7. Nigeria has spent five years recovering half a billion looted dollars from Swiss banks and £110 million through further proceedings brought in the UK.

8. It took the Philippines 18 years to get back the US \$624 million stolen by former President Ferdinand Marcos.

9. International Narcotics Control Strategy Report, March 2008, Bureau of International Narcotics and Law Enforcement Affairs, United States Department of State.

7. This report is organised as follows. Part 1 looks at the international and domestic legal and regulatory environment in which the UK AML and asset recovery initiatives operate. Part 2 considers whether further measures, proportionate to risk, might be considered for strengthening the prevention of ML, particularly as respects the provision of banking services in the UK for PEPs. Part 3 reviews and assesses the range of criminal and civil mechanisms for the recovery of assets and proposes ways in which the process of recovery may be assisted. Finally, Part 4 discusses ways in which further improvements could be made to the operations of relevant law enforcement agencies and where hurdles to progress could be lowered.
8. For the most part, the report will emphasise those measures that can be taken in the UK rather than through bilateral or multilateral understanding or convention. This report only considers law and practice applying in the UK, excluding Scotland¹⁰. However, as those in other countries dealing with the UK see it as a single nation, it is hoped that the devolved Government in Scotland will put into practice any worthwhile changes implemented in other parts of the UK.
9. In this report, the term money laundering should be understood to include transactions for the financing of terrorism, and measures to counter money laundering should be understood to include measures to counter the financing of terrorism.

10. Much of the relevant legislation applies to England, Wales and Northern Ireland (NI) (eg POCA and the Crime (International Cooperation Act) and comments will in many circumstances be applicable to NI as well, although we have not studied NI practice as such. The UKCA is the central authority for NI as well as England and Wales. POCA and the MLA legislation each have Scottish provisions, but Scottish processes (eg MLA through the Crown Office) have not been explored and are not referred to in this report.

PART 1

THE UK AND INTERNATIONAL CONTEXT

Introduction

10. In assessing the UK's anti-money laundering (AML) regime today it is essential to look also at the recovery and repatriation of assets. Indeed, the logic of adopting such an approach within an international context is compelling. In spite of the current circumstances, the UK's financial services sector and markets, centred in the City of London, have historically achieved a reputation, scale and level of sophistication which respond closely to the legitimate needs of international trade and commerce. All these factors, but especially the volume of legitimate transactions conducted daily, make the sector an attractive proposition to those with an incentive to conceal the illegal origin of funds. Laundering 'dirty money' successfully through the UK achieves the maximum 'cleansing effect' and allows the laundered proceeds to be transferred out of the UK and into other financial systems very quickly or invested in the UK. As already noted, the UK's connections with Commonwealth countries and offshore centres are good reasons for the UK to take a lead position in combating money laundering and recovering stolen assets.
11. While an effective AML regime has to accord with international standards and expectations, it is very much in the UK's interests to do whatever can be done to deter and expose those whose operations, if unchecked, will further damage the reputation of its financial services sector and markets.
12. The most specific AML international grouping is the Financial Action Task Force (FATF). The UK was among the countries that promoted the establishment of the FATF. In asset recovery and mutual legal assistance (MLA), the UK is a party to other important instruments and initiatives

adopted by the United Nations (UN), the European Union (EU), the G7 and G8, the Organisation for Economic Cooperation and Development (OECD) and the Commonwealth.

The UK and the Financial Action Task Force

13. The global response to ML is focused on the FATF, an inter-governmental policy-making body established by the G7 in 1989 which periodically reviews its mission. In 2001, the FATF ML mandate was expanded to include combating the financing of terrorism (CFT). This mandate was again revised in April 2008 to cover the period until 2012.
14. The FATF currently comprises 32 countries, although some 170 countries have joined the FATF or a FATF-Style Regional Body (FSRB) and are committed to having their systems of AML/CFT assessed. The original FATF 40 Recommendations have since been added to, mainly to embrace the CFT measures. Now fully revised and supplemented by interpretative notes, these are known as the 40+9 Recommendations (the so-called 9 Special Recommendations being specifically aimed at CFT¹¹).
15. As a member of the FATF the UK has always played a full part in the development of its policies. The FATF has a working group on Evaluation and Implementation which monitors, coordinates and reviews the mutual evaluation processes designed to improve implementation of FATF standards by member countries, FSRBs and international financial institutions. Two rounds of mutual evaluation have been undertaken and the third is presently underway. The UK was last evaluated in 2007¹².

11. FATF provides guidance on specific areas of activity and reports on types of laundering activities. It has also issued a methodology for assessing compliance with its Recommendations that gives detailed practical guidance, including the implementation of financial prohibitions to combat the threat of proliferation of weapons of mass destruction (UN Security Council Resolution 1737) and support for the effective operation of the FATF standards in 'low capacity countries'. FATF has also worked closely with the private sector, enabling it to promote its recommended risk-based approach (RBA) to AML/CFT regulation and practices. Guidance was issued in this regard in 2007 (High Level Principles and Procedures). Further work has led to RBA advice for accountants, dealers in precious metals and stones, real estate agents and TCSPs.

12. FATF – GAFI – Third Mutual Evaluation Report – AML/CFT – UK.

16. While the list of offences enacted in the UK's Proceeds of Crime Act 2002 (POCA) and its regime to confiscate criminal proceeds were described in this latest evaluation as 'comprehensive', concerns were raised regarding the lack of enforceable obligations to meet the requirements of FATF Recommendation 6 requiring a measure of enhanced due diligence and monitoring of PEPs. The Evaluation also addressed the MLA regime and, although it was found to be generally compliant, it did observe that 'there are concerns about the ability of the UK authorities (excluding Scotland) to handle routine or non-urgent mutual legal assistance requests in a timely and effective manner'.

UK, EU and the Domestic Anti-Money Laundering Regime

17. There are some AML/CFT provisions that apply to all citizens. However, at the heart of the FATF Recommendations is the principle that certain kinds of institution – those that serve as gatekeepers to the financial sector – have a particular obligation. These require that they have in place thorough Customer Due Diligence (CDD) programmes that allow them to know who their customers are, what their business is and what ML risks might arise as a result. The institutions are then required to have internal policies and procedures in place that are designed to address those risks. This is achieved in part by building profiles of expected account activity by customers which monitor actual activity against that profile to enable the reporting of anything that gives rise to a suspicion that ML has occurred. Staff must be trained appropriately.
18. The EU member states and the Commission formally recorded their belief that the revised FATF Recommendations should be applied in a coordinated way at EU level¹³. This is logical, as the creation of the Single Market has provided further opportunities for financial crime. The current FATF standards are implemented within the EU through the Third AML Directive (2005/60/EC) and are in turn intended to be embodied in national legislation. In the UK, this was primarily enacted through the 2002 POCA and the 2007 Money Laundering Regulations (MLR)¹⁴, with provisions applying to a wide range of reporting institutions¹⁵. The POCA, in addition to defining the ML offences, contains a range of measures for restraining, confiscating and recovering the proceeds of crime, which meet the relevant FATF Recommendations.
19. The Financial Services Authority (FSA) has issued high-level rules and guidance on financial crime and anti-money laundering in its Senior Management Systems and Controls Handbook (for example, SYSC 3.2.6 and equivalent provisions in SYC 6.3). These rules and guidance are outcome-focused in recognition of the fact that the FSA supervises firms with very different exposure to AML risk, and that much of the practical detail on how to meet legal and regulatory AML obligations is set out in the Joint Money Laundering Steering Group (JMLSG) Guidance – which the FSA's rules refer to explicitly. The FSA's rules provide useful regulatory back up to the Guidance but because much of the detail is in the latter, this report refers mainly to the Guidance as well as the MLR which embody the statutory obligations on all reporting institutions. The FSA has also taken enforcement action in respect of failures in AML/CFT systems and has made statements about the importance of proper due diligence on PEPs.
20. In the UK, the legislative and regulatory basis for the AML regime is supplemented by industry and professional guidance which, in the case of the financial sector especially, is provided by JMLSG¹⁶. Known simply as the Guidance, good industry practice in AML/CFT procedures is established through a proportionate, risk-based approach¹⁷. In an ideal world, financial services organisations should follow the Guidance strictly (or document and explain why they need not) but experience in specific cases shows that this is not always the case.
21. Professional services are indispensable to any of the more sophisticated ML mechanisms and the services available in London and the UK are pre-eminent in the world. Although the UK regulatory authorities have been enforcing AML/CFT procedures for several years, for many of the institutions more recently covered by the Regulations, the experience is new and the risk management procedures relatively

13. *Introduction to the Directive 2004/0137 (COD)*.

14. *SI 2157*.

15. *These include banks and building societies, money services businesses (such as money transmission agents and bureaux de change), other financial institutions, lawyers and accountants (including auditors, insolvency practitioners, tax advisers etc), casinos, TCSPs, estate agents and dealers in high value goods.*

underdeveloped and untested. While the FSA and some of the professional regulatory bodies have gained considerable experience, other supervisory authorities have relatively little experience of enforcing the regulatory requirements and undertaking the investigations and intrusive examinations that are necessary for this purpose.

United Nations Convention against Corruption (UNCAC) – Chapters IV and V – International Cooperation and Asset Recovery

22. The UNCAC should, in essence, provide a remarkable opportunity to develop an international strategy and programme for tackling corruption¹⁸. In Article 51 it states that "the return of assets is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard."
23. In the Convention's Preamble, corruption is portrayed as being no longer a local issue, but rather a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential. At present, MLA between countries continues to present intractable problems. Rules, treaties, conventions and practices intended to facilitate MLA can result instead in protracted processes that appear to be motivated more by a desire to defend national sovereignty than by the pursuit and sanctioning of international criminals.
24. Chapters IV (International Cooperation) and V (Asset Recovery) of UNCAC offer states a series of measures that, if adopted and implemented comprehensively, could lead to a significant breakthrough in the enforcement of international corruption crimes and related asset recovery. Yet, like so much of UNCAC, while some Articles contain mandatory provisions, others impose obligations that are discretionary or heavily conditioned by existing domestic law and practice. To be successfully implemented, states will need to embrace the objectives and regard these Chapters as a framework for continuous improvement of cooperation.

25. The asset recovery Articles of the Convention rely also on the international cooperation provisions. All MLA involves a requesting and a requested state, where each is required to afford the other the widest measure of MLA in investigations, prosecutions and legal proceedings in relation to offences covered by UNCAC (which include corruption and ML offences).
26. The purposes for which MLA should be afforded are varied¹⁹. In practice, though, meaningful international cooperation can often best be achieved informally and between agencies that have grown to trust each other and to respect confidentiality. UNCAC recognises this in Articles 43 – 50 which, variously, require state parties to consider assisting each other in criminal, civil and administrative matters related to corruption and to ensure, in criminal matters, law enforcement cooperation²⁰. In addition, it encourages direct administrative, or informal, cooperation prosecutor-to-prosecutor, or investigator-to-investigator.
27. Where existing bilateral and multilateral treaties also cover MLA these remain paramount. However, should no treaty exist, UNCAC provides a basic framework which obliges each state to designate a central authority to receive requests for MLA and to specify acceptable languages for communication. Additional elements included in the code are as follows:
 - o A warning against general requests for confidential personal data unrelated to a particular investigation – so-called "fishing expeditions";
 - o Information obtained through MLA for particular investigations or proceedings may be relevant to other investigations, but there should be proper consultation with the jurisdiction that provided the information before it is passed on in connection with other investigations or proceedings;
 - o Confidentiality may be demanded by the requested state as a condition for release of the information and this is reasonable except where the release of the information

16. JMLSG – Prevention of ML/CTF – Guidance for the UK Financial Sector – Parts I and II – December 2007. The JMLSG comprises the British Bankers Association (BBA) and 17 other finance sector representative bodies.

17. Note that the POCA requires a Court to take account of JMLSG guidance. Furthermore, the FSA has a duty to determine if a firm has followed relevant provisions of the JMLSG when considering action including prosecutions.

18. Signed by 143 countries and ratified or acceded to by 129 countries, the UK ratified the Convention on 9 February 2006.

19. See Article 46.

20. Article 46(4) encourages states to provide information without prior request.

is required by law or necessary in order to fulfil a proper public duty to report evidence of illegal activity to the appropriate authority;

- o A safeguarding of the rights of persons transferred to the jurisdiction of the requesting state; and
- o A requested state may refuse to comply with a request if it is deemed to prejudice its sovereignty, security or other essential interests. Domestic law remains paramount. However, as there is no guidance as to what amounts to 'prejudice its sovereignty, security or other essential interests,' domestic law could be open to abuse by those states that are less than sincere about tackling corruption and ML. Requested states are required to consult before refusal and to give an explanation.

28. UNCAC also has a number of aspirational clauses to guide states, which, if followed in good faith, would make MLA a truly effective tool for international cooperation²¹.

G8 Initiatives

29. The UK is a member of the G7 and G8. Measures to stem ML and promote asset recovery are subjects of obvious and recurring interest. At the Gleneagles summit in 2005, for instance, states were encouraged to establish procedures for enhanced due diligence on PEPs, and to obtain and implement the highest international standards of transparency and exchange of information. They were also pressed to create effective mechanisms to recover and return (stolen) assets and to promulgate rules to deny safe haven to those found guilty of public corruption. Subsequent meetings also urged the highest international standards of transparency and the implementation of FATF-related CDD, and the exchange of information to assist the fight against ML.
30. Yet, despite these fairly strong commitments, progress in translating them into action has been slow.

The Stolen Asset Recovery (StAR) Initiative

31. In September 2007, the World Bank and the United Nations launched the StAR initiative, which is intended to help developing nations recover looted funds. The World Bank estimates that between US \$1 trillion and US \$1.6 trillion are lost each year to various illegal activities including corruption, criminal activity such as drugs, counterfeit goods and money, the illegal arms trade, and tax evasion. More specifically, the StAR Initiative, which is supported by a number of bilateral development agencies, including the DFID, will help to:

- o Enhance capacity in developing countries to respond to and file international MLA requests²²;
- o Adopt and implement effective confiscation measures, including non-conviction based confiscation legislation²³;
- o Promote transparency and accountability of public financial management systems;
- o Create and strengthen national anti-corruption agencies; and
- o Monitor the recovered funds if requested by the countries.

32. The StAR Initiative also requires the mobilisation of political will, legal reform and enhancement of investigative capacity in developed countries, not just the developing countries. However, neither the World Bank nor the United Nations Office on Drugs and Crime (UNODC) would get directly involved in the investigation, tracing, law enforcement, prosecution, confiscation and repatriation of stolen assets; in short every practical step necessary for the successful application of the initiative to specific cases. This was felt to be best suited for government-to-government assistance or private sector assistance, working with the relevant

21. For example, where criminal proceedings can take place in more than one jurisdiction, states should consider the possibility of transferring the proceedings to another jurisdiction in the interests of the administration of justice and with a view to concentrating the prosecution where it will be most effective. Similarly, states are called upon to cooperate closely with one another to enhance the effectiveness of law enforcement action; particular attention is focussed upon establishing channels of communication directly between agencies for the rapid exchange of information.

22. For example, the UNODC Legal Advisory Programme has produced a MLA Request Writer Tool to help practitioners draft effective requests, receive more useful response and streamline the process.

23. For example, the World Bank has produced a "how to" book on Non-Conviction Based Forfeiture (about to be published).

government authorities. Everything therefore depends on the will of individual governments.

33. Given the support of member countries, the G8 should now be able to make a greater impact on asset recovery and repatriation. The UK Government, for its part, has expressed its strong support by contributing to the resources needed to implement StAR and will be expected to step up its efforts to assist countries in the recovery of stolen assets.

The International Centre for Asset Recovery (Basel Institute on Governance)

34. The UK is a strong supporter and core funder of the recently created International Centre for Asset Recovery (ICAR) at the Basel Institute on Governance. ICAR specialises in the development and implementation of capacity building, training and mentoring programmes that enable law enforcement agencies in developing countries to investigate and prosecute complex corruption and ML cases. The Centre also provides policy advice to both requesting and requested countries, in particular in the legal and institutional reform processes, and offers strategic advice to requesting countries in international bribery or ML cases with an asset recovery angle. The ICAR team of experts consists of investigators and prosecutors with a wide range of experience in international cases, MLA and AR.

UK Responsibility for Haven Jurisdictions

35. The term offshore financial centre (OFC) is usually taken to refer to relatively small states (many of which are islands), which have developed financial services centres primarily designed to offer services to non-residents. There are at least 50 such centres in the world. The UK has a constitutional relationship with a number of OFCs in the Crown Dependencies (CDs) and Overseas Territories (OTs).
36. The three CDs are Guernsey, Jersey and the Isle of Man. Each of them has long established and well-developed financial centres. A 2007 National Audit Office report (NAO report) on managing risk in the OTs²⁴ referred to seven OTs that were OFCs. Some are of considerable importance, such as the

Cayman Islands, Bermuda, the British Virgin Islands (BVI) and Gibraltar, while others, such as Montserrat, Turks and Caicos and Anguilla are very much smaller.

37. The three CDs are not part of the UK or the EU. They are accountable for their own domestic affairs with the UK responsible for their foreign affairs and defence. The UK also has responsibility for entering into international treaties and extending them to the CDs (although it will not do so without their consent). The UK Government appoints a Governor-General although in practice the CDs have sole control of policy and legislation concerning financial services, international mutual cooperation, AR and ML. On matters of international cooperation for financial services regulation, the CDs can and do enter into agreements, such as memoranda of understanding, in their own right.
38. The OTs are also constitutionally not part of the UK. Each has its own, separate, constitution and most have elected governments. However, they all have a Governor-General who represents HM the Queen, with responsibility for external affairs, internal security, defence, and, for most OTs, the public service²⁵. In the case of some of the smaller OTs, the Governor-General is accountable for financial services, and in the others, retains a degree of control over the appointment of regulatory Commissions and for approving laws and regulations. Like the CDs, the OTs can and do enter into agreements on financial services cooperation in their own right. Gibraltar is in a special position as a member of the European Union and is therefore subject to its legislation.

Crown Dependencies

39. Each of the CDs has very substantial offshore business with several hundred billion dollars of bank, insurance, trust and other assets managed from institutions within their jurisdiction.
40. The OECD Convention²⁶ was extended to the Isle of Man in 2001, while UNCAC is likely to be extended in due course. Similarly, Jersey and Guernsey are likely to have the OECD Convention and UNCAC extended to each of them in the near future.

24. *Report by the Comptroller and Auditor General [HC Session 2007 – 2008] 16 November 2007 FCO – Managing risk in the OTs*

25. *For a fuller description, see the Foreign and Commonwealth Office website. www.fco.gov.uk*

26. *The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)*

41. They make and execute MLA requests to and from other states directly, although on occasion there is a level of facilitation undertaken by the UKCA. There are differences in the degree to which the law and practice in each CD are compliant with best international standards on ML and UNCAC (Chapters IV and V).
42. All three CDs have been independently assessed as having a high degree of compliance with the FATF Recommendations regarding their AML/CFT regimes. The NAO report notes that the 2003 IMF assessments rated them as "compliant" with 81 per cent of the FATF Recommendations and "largely compliant" with the remainder. Each has AML legislation that establishes ML offences and creates a framework for proper CDD and the generation of Suspicious Activity Reports (SARs)²⁷. The regulators have also made substantial efforts to produce consistent guidance²⁸ that is FATF-compliant for their financial institutions, which they implement through active examinations and other enforcement measures.
43. On international cooperation in general, and in respect of MLA and extradition in particular, Jersey complies with Chapter IV of UNCAC. Although there is a dual criminality requirement in relation to MLA requests for search and seizure, this is not inconsistent with UNCAC, notwithstanding the international preference for states to have as permissive an assistance regime as possible. The Criminal Justice (International Cooperation) (Jersey) Law 2001²⁹ also provides MLA for all criminal investigations and proceedings. When it comes to assisting asset recovery, the Proceeds of Crime (Cash Seizure) (Jersey) Law, 2008, does not address indirect enforcement but provides for the direct enforcement of external confiscation orders, which accords with Article 54 (1)(a) of UNCAC.
44. Guernsey has the mechanisms for MLA in place as well. The Proceeds of Crime and Drug Trafficking Law assert that dual criminality has to be satisfied in respect of all requests for assistance which involve coercive powers, and in respect of the search and seizure provisions under the Criminal Justice (International Cooperation) (Bailiwick of Guernsey) Law 2001. However, for corruption and money laundering-related

investigations this is unlikely to be a practical problem as Guernsey's criminalisation legislation is UNCAC compliant. Guernsey also appears to have provisions in place that comply with Chapter V of UNCAC. The Criminal Justice (International Cooperation) (Bailiwick of Guernsey) Law 2001 also provides for a range of assistance, including service of summons/process received, search and seizure, and enforcement of overseas forfeiture orders.

Overseas Territories

45. Some of the OTs have very substantial business. The Cayman Islands is the world's fifth largest banking centre with over one and a half trillion US dollars of assets (much of which consists of overnight "sweep accounts" from the US)³⁰. It is the legal home to 85 per cent of the world's hedge funds. Bermuda is a very important insurance and reinsurance centre, while the BVI is the world's most important registration centre for offshore companies with some 400,000 companies registered there. Gibraltar is smaller in terms of assets but has a broad spread of banking and insurance business along with trust and company support services. The other OTs in the Caribbean have very much smaller offshore businesses.
46. All of the OTs have implemented AML/CFT regimes which have been assessed by the IMF. The NAO report shows that the IMF reports (mostly conducted in 2003-2005) show the following results for Bermuda and the Caribbean OTs:

Per cent of recommendations

Rating	Anguilla	Montserrat	BVI	Bermuda	Cayman
1	41	38	53	59	63
2	34	28	38	19	37
3	22	31	6	22	0
4	3	3	3	0	0

1=compliant; 2=largely compliant; 3=partially compliant; 4=non compliant

27. This has been amplified by regulations and guidance issued by the Financial Services Commissions (Financial Supervision Commission in the case of the Isle of Man).

28. The UK JMSLG Guidance accepts that the AML/CFT provisions in the CDs should be regarded as equivalent to that in the UK.

29. The 2001 Law also includes provisions on the restraint and forfeiture of assets in the island, which are subject to an external confiscation order. In practice, although the 2001 Law appears to be compliant, it is the provisions in the Proceeds of Crime (Jersey) Law, 1999 and Drug Trafficking Offences (Jersey) Law 1988 which are usually used to restrain and confiscate assets subject to an external confiscation order.

47. Notwithstanding the implementation of the AML/CFT regimes, the NAO report goes on to state that the level of SARs remains low, given the size of the jurisdictions, suggesting a limited level of awareness of ML risks. The report also suggests that some OTs have limited capacity to deal with those SARs that are still outstanding, or to investigate and prosecute financial crime. Each of the OTs would argue that its regime had been substantially strengthened since the time of the IMF assessments on which the NAO report was based.
48. It is understood that, at present, the FCO and DFID are working with at least some of the OTs to review their legislation with a view to extending UNCAC and the OECD Convention to these jurisdictions. This is encouraging given that the Lead Examiners in the OECD Phase 2 Evaluation of the UK expressed concern at the low priority afforded to the implementation of the OECD Convention by the OTs.
49. Again, there are wide disparities in the capacity of the OTs to make and execute MLA requests and to recover assets. Encouragingly, though, the more significant financial centres, such as the Cayman Islands, have legislation in place that enables MLA to be given, and which provides at least partial compliance with UNCAC asset recovery measures. Nevertheless, there are some OTs where the foreign bribery offence has yet to be criminalised.

The Application of International Standards in the Crown Dependencies and Overseas Territories

50. A series of initiatives in the late 1990s by the OECD (on tax) and the FATF (on money laundering), along with pressure from the UK and decisions by the CDs and OTs themselves, brought about an improvement in the actual as well as the perceived adherence to international standards.
51. At that time, the particular concern of many international organisations and countries was related to the reluctance of the CDs and OTs to share information on ML (and

subsequently terrorist financing), tax and other law enforcement matters, whether for reasons of policy or capacity. This reluctance was on occasion explained by the absence of information on the beneficial ownership of companies and trusts, bank accounts etc in offshore centres; and even if the information was available, it could not always be shared because these CDs and OTs had established as their primary *raison d'être* the provision of services to non-residents with accompanying bank secrecy legislation³¹. While some of the criticisms relating to the strength of legislation and cooperation could have been levelled at many other centres, and the position was not always as bad as was painted, there were instances of poor cooperation with tax investigations, and, in some cases, fraud and ML. The intention of the international organisations and the UK was to bring pressure to enhance regulatory standards, so that critical information was available in the islands and could be shared with other legitimate foreign authorities.

52. In the case of information on tax evasion, pressure from the OECD, the EU and the US has resulted in the signing of a number of tax information exchange agreements bilaterally between CDs and their main trading partners and, in some cases, between OTs and trading partners. However, progress has not always been as fast as some of those countries would have liked, prompting the UK to launch a fresh review of OTs and CDs³².
53. While tax evasion is not the subject of this report, it remains the case that the same techniques for avoiding the payment of tax can also be used to hide money laundered by corrupt officials. Institutions that are prepared to assist in tax evasion are unlikely to balk at performing the same services to corrupt officials. Those in the CDs and OTs who have been driving the enhancements in performance understand this and have achieved some success in finding and returning money that had been stolen. However, while reports issued by the IMF and others have indicated improvements, it is clear that in the case of some offshore centres there is still a fair way to go.

30. According to the Basel Committee on banking supervision, sweep accounts are used because, under US law, banks are not permitted to pay interest on US-based commercial checking accounts. In order to be able to pay interest to their corporate customers, available customer funds are swept at the end of every business day from the customer's US checking account to a booking branch account. The funds stay in the booking branch account overnight, and are moved back to a US account the next day. There is no restriction on the ability of US banks to pay interest on such overnight foreign deposits.

31. In the case of some OTs but not the CDs.

32. Michael Foot, who is not only a former very senior Bank of England and FSA official, but also a former banking supervisor in the Bahamas, will conduct this review.

54. The CDs and larger OTs maintain substantial capacity in their regulatory authorities, their Financial Intelligence Units (FIUs) and prosecuting departments. These they should be encouraged to expand still further, which in some cases they are doing. Again, according to the NAO report, there is a need to do more to ensure that the regulatory authorities raise ML standards so as to increase the rigour of reporting and enhance the efforts of law enforcement authorities to deal more effectively with both the current and the expected volume of reports.
55. One particular matter revealed by the IMF reports is that in some of the smaller OFCs there are only a handful of professional staff in the regulatory authorities and the FIUs. An OFC regulatory authority with very few staff will always find it difficult to keep up with the material issued by the various standard setting bodies, be they the Basel Committee on banking supervision, the International Organization of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS), the FATF or OECD, or to maintain its commitments within the Egmont Group of which its FIU is a member. Moreover, small regulatory and law enforcement authorities can find it hard to respond when there is a major international investigation requiring a substantial amount of material.
56. In these OTs it may be impossible for the very small financial sector to sustain an adequately sized regulatory and law enforcement capacity. Where this is so, and the UK is responsible for the OT's financial affairs, the UK has a clear choice either to close down the offshore financial services business or to support a sufficiently large authority. In the view of TI-UK it is inappropriate and potentially risky for the UK passively to accept that the smaller OT OFCs should remain with an inadequate number of professional regulatory, law enforcement and other staff, simply hoping that nothing untoward will happen.
57. In these circumstances:
- *TI-UK recommends that in respect of those smaller OT financial centres, where regulatory capacity is particularly weak and where the UK Government has responsibility for financial affairs, the UK Government makes a clear decision either to wind down the financial centres or to support an increase in capacity for regulation, policy analysis, law enforcement and international cooperation; and*
 - *TI-UK also recommends that the UK Government continues to work with the smaller OT financial centres to assist them to ensure that their FIUs and regulatory authorities have a capacity that is commensurate with their financial centre operations. An irreducible minimum number of professional staff is necessary to maintain familiarity with international standards. Furthermore, a legislative framework needs to be put in place which is both UNCAC and OECD Convention-compliant and that tackles the ML and other risks that those operations present, as well as providing the capacity at a practical level to cooperate effectively on MLA and asset recovery.*
 - *TI-UK further recommends that the UK Government should proactively offer practical training and technical assistance to law officers, prosecutors and investigators in OTs on both UK and international 'best practices' as regards detection, investigation and prosecution of corruption, ML and asset 'stealing/looting' cases³³.*

33. A particular example is the lack of preparedness that was witnessed recently with the Turks and Caicos.

PART 2

THE PREVENTION OF MONEY LAUNDERING

Introduction

58. As has been previously noted, it is estimated that some £15 billion of dirty money is laundered through the UK each year³⁴. Although very large in absolute terms, this figure is actually relatively modest within the context of the total amounts of money flowing through the UK in general and the City of London in particular. Nevertheless, this illicit tide of laundered money does continue to exert a considerable reputational risk.
59. London has become the largest international financial centre in the world. Among its many and varied financial activities are banking and foreign exchange, securities and commodity trading, asset management, insurance, legal and accountancy services and others. However, all are susceptible to ML, making an effective AML regime vital to the maintenance and promotion of London's position in the global financial markets, both now and in the future.
60. Laundering of funds by PEPs is only one form of money laundering and defences against it form part of an institution's more general AML/CFT defences. PEPs are one risk factor – the one on which this report is focused. Much has been done lately to improve the effectiveness of the mechanisms upon which the UK's AML/CFT regime relies. Law, regulation and enforcement have been revised and promoted. Guidance and outreach to those affected have been increased and improved. Critical to this success has been the 2002 POCA. This has been instrumental in making a broad range of new weapons available to prosecutors and investigators involved in the fight against money laundering and the recovery of illegally acquired assets, both domestically and also on behalf of overseas countries, when requests and orders are made where assets are found to be obtained through criminal conduct. POCA also established the Assets Recovery Agency (ARA). In April 2008, ARA was

merged with SOCA and the application of some of its more proactive powers, particularly in civil forfeiture, has been extended to the key prosecution agencies such as the Crown Prosecution Service (CPS), Revenue and Customs Prosecuting Office (RCPO), SFO and, in Scotland, the Crown Office.

61. Of equal value has been the implementation of the 2007 MLR, the extension of reporting obligations to a wider group of institutions and the modernisation of the JMLSG in December 2007 – though none of this would function without an effective FIU. While this report commends the progress that is being made, major gaps remain, particularly in relation to identifying and monitoring PEPs and assisting in related asset recovery.
62. The UK's policies on AML/CFT are dictated by three principal objectives: to deter, through the establishment of enforceable safeguards and supervision; to detect, using financial intelligence generated by money laundering safeguards and controls to identify and target criminals, money launderers and financiers of terrorism; and to disrupt, by maximising the use of available penalties such as prosecutions or asset seizures. For its part, the FSA has emphasised that it seeks to work in partnership with the regulated community to assess risk and prevent ML, using enforcement as a last resort.
63. In the last three years the UK has prioritised the domestic implementation of the Third EU Money Laundering Directive; the reform of suspicious activity reporting in the light of a full analysis of the reporting system carried out by Sir Stephen Lander, the so called "SARs Review" or "Lander Review"³⁵; and the development of an enhanced regulatory framework for those businesses that are recognised as potentially significant in facilitating money laundering and in the financing of terrorism.

34. This total would include the proceeds from bribery and corruption deriving from looted state assets and the bribes paid to secure public sector procurement contracts.

35. Review of the SARS Regime – Sir Stephen Lander – March 2006 – SOCA

The 2007 Money Laundering Regulations, the Financial Services Authority Rules and the Joint Money Laundering Steering Group Guidance

64. The implementation of the Regulations, Rules and Guidance has resulted in the following changes:
- o Increasing the types of businesses that have to maintain AML procedures;
 - o Applying a risk-sensitive basis to CDD, distinguishing between standard, simplified and enhanced CDD measures³⁶;
 - o Placing added emphasis on the identification of 'beneficial ownership' of customers³⁷;
 - o Insisting that credit or reporting institutions with branches or subsidiaries in non-European Economic Area (EEA) states maintain AML procedures;
 - o Establishing, where appropriate, information on the anticipated level and nature of the activity (the detail of which is then subject to a risk assessment) in addition to CDD at the commencement of a business relationship and the reporting of suspicious transactions;
 - o Conducting on-going monitoring throughout the lifetime of the relationship to ensure that transactions are consistent with the knowledge of the customer and his/her business; and
 - o Prohibiting anonymous accounts and correspondent banking relationships by credit institutions with 'shell banks'³⁸.
65. It is worth emphasising that the MLR are secondary legislation and have the force of law. FSA rules are also enforceable in that breaches of the rules can attract sanctions. JMLSG Guidance is, as its name implies, guidance only, although the FSA will take into account adherence to

the Guidance when determining if its own rules (or the Regulations) have been met. JMLSG Guidance and certain other guidance issued by other bodies is approved by Her Majesty's Treasury. In the event of a prosecution, the court must take compliance with the Guidance into account. An organisation need not necessarily comply with the Guidance if its circumstances were such that the Guidance was not appropriate, but it would have to explain (to the FSA, in the case of financial institutions) how its actions were at least as effective as the measures in the Guidance.

66. For reasons explained in paragraphs 132-137 below, TI-UK remains concerned that the AML supervisory regime established by the 2007 Regulations for Trust and Company Service Providers (TCSPs) will prove to be inadequate to deal with the high ML risk presented by activities in which they engage.

Suspicious Activity Reports and the UK Financial Intelligence Unit

67. SARs are one of the Government's principal weapons in the battle against money laundering and a wide range of other financial crimes. It is through these that the UK is able to obtain much of the financial intelligence that is used to inform investigative activities aimed at tackling criminal finances and profits, and in turn, asset recovery. The SARs regime also generates intelligence and investigative leads for the UK's law enforcement agencies.
68. Clearly a SAR cannot be filed without grounds for suspicion, which is why it is so important that the underlying CDD is undertaken by reporting institutions. Not only must a reporting institution know who its customer is, but it must also know the details of the customer's business; who might reasonably be expected to be associated with that business; and what account activity to expect. Only then can the institution identify what is suspicious and what should be reported as such.

36. Enhanced CDD is to apply in higher risk areas, e.g. where the customer is a PEP, a customer is not physically present or there is a correspondent banking relationship with an institution in a non-EEA state.

37. Attempts to define this term have resulted in a two-page definition because of the variety of trusts, entities and legal arrangements that are encountered.

38. This is defined as a bank incorporated in a jurisdiction in which it has no physical presence involving meaningful decision making and management and which is not affiliated with a regulated financial group.

69. Generally SARs will be filed with SOCA when the reporting institution knows or suspects that the funds come from illegal activity, the transaction is structured to evade suspicion or regulated sector requirements, or that it appears to serve no known business or apparently lawful purpose³⁹. The reporting obligations on the regulated sector to submit SARs are comprehensive.

70. As a general rule, SARs received by SOCA are not processed according to certain categories per se but rather according to the statute under which they are submitted – either under the Terrorism Act or under Part 7 of the Proceeds of Crime Act 2002. All SARs are stored on the ELMER database and the reporting entity is then encouraged, where possible, to insert a code (of specified letters and numbers), from a glossary prepared by the UK Financial Intelligence Unit (UKFIU), to help categorise SARs according to the predicate (underlying) offence⁴⁰.

71. The UKFIU is housed within SOCA, in a dedicated operational division called the Proceeds of Crime Department. The UKFIU is also a full member of the Egmont Group of Financial Intelligence Units of the World, an informal grouping of specialist agencies in over 100 countries that receive, analyse and disseminate disclosures of financial information made in accordance with AML/CFT arrangements. Internationally, it has strong and established links with FIUs in all regions. Given that SOCA is itself a 'gateway' for other states, as well as Interpol and Europol, there is real potential in developing its role further to ensure it plays a part in encouraging ever more proactive information sharing by states to counter money laundering and to facilitate asset recovery.

72. Furthermore, SOCA has been designated as the new home of the Asset Recovery Office (ARO), which is located within the International and PEP Team of the UKFIU. The creation of AROs follows the EU Framework Decision⁴¹, which decreed

that each member state would, by the 18th December 2008, implement a national Asset Recovery Office⁴². The creation of AROs across Europe is an interesting development particularly as they are supposed to "facilitate the tracing and identification of proceeds of crime or other crime related property which may become the object of a freezing, seizure or confiscation order made by a competent judicial authority".

73. To date, however, while only a small number of AROs have been formally announced by the EU Member States, and decisions are awaited as to the structure, location and governance arrangements of the remaining offices, in effect, most EU states have some form of ARO in place. It is to be hoped that these offices are not simply a reincarnation of existing structures and that some prominence is given to the structures to ensure that they become as effective as the Framework Decision envisages.

The Receipt and Analysis of Suspicious Activity Reports

74. POCA and the Terrorism Act 2000 require that an institution designate a 'nominated officer'⁴³ who is then responsible for sending a SAR to SOCA when he or she knows or suspects that a person is engaged in ML or terrorist financing. In effect, any SAR then goes directly to the UKFIU where it is processed, analysed and disseminated within SOCA and to other law enforcement partners.

75. Should a reporting entity wish to proceed with the transfer once it has sent a SAR to the UKFIU, then it may apply to SOCA for consent to do this – perhaps to assist with the gathering of evidence, to follow a money trail or to avoid alerting a suspect or to enhance the prospect of making a cash seizure. An investigation may commence or continue notwithstanding the granting of consent. POCA also gives the UKFIU up to seven working days to give or refuse

39. The legislation does provide immunity from prosecution for anyone who reports suspicions to the UK FIU in good faith; however, "tipping off" is an offence, as is "prejudicing an investigation."

40. The UKFIU applies handling codes to received SARs in order to identify which SARs can be made generally available to law enforcement, through the 'MoneyWeb' portal, and to protect those which require a higher degree of sensitivity – for example, corruption or terrorist related submissions.

41. 2007/845/JHA.

42. The UK has two such offices; one within the SCDEA which has responsibility for Scotland, and one within SOCA with responsibility for England, Wales and Northern Ireland.

43. Frequently described as the Money Laundering Reporting Officer (MLRO).

consent⁴⁴. A discrete team within the UKFIU will then analyse those SARs seeking consent to proceed, checking criminal databases and liaising with a range of law enforcement agencies⁴⁵.

76. The UKFIU focuses its attention only on those SARs that have the greatest impact on reducing risk or harm to the UK. However, all SARs are made available to law enforcement and other end-users for analysis. When there are reasonable grounds to suspect criminal ML activity or the financing of terrorism, the UKFIU has the power to disseminate financial intelligence to a range of domestic and foreign law enforcement authorities for investigation or action⁴⁶.
77. The interface between the UKFIU and law enforcement agencies is worthy of attention. Increasingly, specialist units or teams are being relied upon to address specific types of criminality. One example is the Overseas Anti-Corruption Unit of the Economic Crime Department of the City of London Police (OACU), tasked with the investigation of foreign bribery involving UK nationals or companies and related proceeds of crime⁴⁷. The OACU seemed generally satisfied with the way SOCA is handling SARs. Certainly the UKFIU appears to have a strong awareness of corruption issues, SARs reports involving overseas corruption are now sent directly through to OACU from SOCA and SOCA reports some successful outcomes as a result.

Suspicious Activity Reports Projects

78. Since 2005, the UKFIU has made the bulk of its SAR database, called ELMER, available to law enforcement agencies via Money.web.
79. As a rule there is a seven-day period between the receipt of a SAR onto the full ELMER database and the SAR then being made available via Money.web. This delay is to allow particularly sensitive SARs to be filtered out⁴⁸. Once a designated contact within a law enforcement agency has access to a SAR, and analysis on it has begun, the wider database can be interrogated. On the face of it, the present system has taken account of the need to ensure maximum dissemination of information from SARs to the law enforcement community, whilst at the same time seeking to protect the integrity of particularly sensitive information⁴⁹.
80. Naturally, the value of the SAR is only as good as the information included in it. It is therefore encouraging to note that SOCA, through the UKFIU, is regularly engaged with reporting entities and with user groups established for all reporting sectors – for example, banks and financial institutions, lawyers, accountants and gaming institutions – with the objective of promoting better practice. SOCA seeks the same effect through regular meetings with the regulatory authorities.

44. If consent is granted then the reporting entity has a statutory defence to any subsequent charge of failing to disclose suspicious activity from the same customer. If consent is refused, then the investigators have 31 days to examine the evidence and, if appropriate, obtain a restraining order. If no such action occurs by the end of 31 days, the reporting entity is deemed to have the appropriate consent. It would be useful to know in how many cases refusal of consent has led to the seeking and/or obtaining of restraint orders.

45. In 2006/7, the FIU received and analysed approximately 780 'consent' SARs per month, with each being acted upon within two and a half working days. Given the time constraints, it is usual to disseminate consent requests directly to the relevant law enforcement agency.

46. This includes any UK police force, domestic or foreign law enforcement agencies, and any other person it considers appropriate in connection with the prevention, detection, investigation or prosecution of offences or the reduction of crime and/or the mitigation of its circumstances. That last category includes agencies that discharge any of the prescribed functions in other jurisdictions.

47. In August 2008, the OACU achieved the UK's first successful prosecution of foreign bribery. A UK company, CBRN Team Ltd, was found guilty of bribing a Ugandan government official, Ananais Gweinho Tumukunde, to secure a contract to provide security services to the Ugandan army in connection with the Commonwealth Heads of Government Meeting in November 2007. See also Part 3.

48. It should be noted that this filtering relates to terrorism financing, corruption and SARs received from foreign FIUs.

49. Home Office Circular 53/2005 provides useful guidance on the use and handling of SARs by police forces, and other law enforcement agencies. It was drawn up in order to respond to concerns from the financial services industry and other sectors and professions about the need to protect the identity of members of staff who make SARs and the firms they represent.

81. The UKFIU states that more than 200,000 SARs are received each year, with over 90 per cent arriving electronically⁵⁰. Once intelligence has been received, the UKFIU is hoping to make even better use of it than at present. In the wake of the Lander Report, work has begun on major IT/business process development, which aims to achieve widespread interconnectivity between all relevant databases. There is still much scope for the information collected via SARs to be used for a variety of purposes such as detection, intelligence development, knowledge building as well as key law enforcement outcomes such as prosecution, convictions and asset recovery, and harm reduction.
82. Indeed, this is recognised by SOCA, which has posted an annual SARs Report on its website and has also set up a Vetted Group comprised of representatives from the banking, accountancy, legal and law enforcement sectors. This means that key sectors will have their concerns addressed and broader interests will be identified by these representatives to examine ways that SARs data can be made available for industry alerts via, for instance, information notices. The Vetted Group meets quarterly to assess areas of interest, with a remit to discuss sensitive casework and reporting issues and to clear the distribution of SOCA guidance.
83. Work continues on a SOCA-led project to develop a methodology for receiving and analysing SARs and intelligence-based data, supplemented by information gathered through SARs stakeholders. As this work progresses, it should help to predict behaviour of PEPs in regard to the laundering of the proceeds of crime and contribute to an improved model for assessing risk and improving AML measures.

The Lander Review

84. In July 2005, Sir Stephen Lander, then chair designate of SOCA, was commissioned to undertake a broad-ranging review of the SARs regime, determining its strengths,

weaknesses, costs and benefits and to make recommendations for its future operation under SOCA. The Review was designed to take account of the views and interests of the regulators, the regulated sectors and of UK law enforcement.

85. The SARs regime had been under pressure for some time, its weaknesses well documented. Despite some improvements under NCIS there was little organisational focus about its work, an absence of dialogue between the reporting sectors and users, a lack of results-based feedback from law enforcement and poor access for other interested agencies.
86. The recommendations from the Review fall into a number of groups, namely those concerned with SOCA's discharge of its responsibilities as the FIU; those that bear on the responsibilities of the reporting sectors; and those concerned with the exploitation of SARs by the regime's end users. These are examined more fully in Annex 4.

The UK's Suspicious Activity Reports Regime since 2006

87. In the first SARs Annual Report prepared by the independent SARs Regime Committee⁵¹ it was shown that the UKFIU had performed well, both with regard to its bureau functions (including the processing of international requests, consent requests and terrorism related SARs) and in relation to the intelligence activities and leads generated for domestic law enforcement. The second Annual Report stated that the UKFIU had continued to perform well, and that a more proactive and innovative approach had contributed to good results with end users able to extract value from the data supplied through SARs. It also stated the UKFIU was now recognised by international partners as an example of best practice globally⁵². In addition to this, the Government has recognised that SARs are capable of making a greater contribution to AR and this should assist in the delivery of targets in the Asset Recovery Action Plan⁵³.

50. In the case of the new electronic arrivals, the screening process upon receipt is also conducted electronically, supplemented by manual analysis.

51. The SARs Regime Annual Report 2007.

52. The SARs Regime Annual Report 2008.

53. Stephen Webb (head of OFCU at Home Office) quoted in the SARs Regime Annual Report. The Asset Recovery Action Plan is the subject of a Home Office consultation launched in May 2007 and closed in November 2007.

88. SOCA is determined to receive its SARs in a prescribed electronic format so as to ensure speed and efficiency in the processing of the information⁵⁴. The Home Office has now reviewed the reporting procedures and, following advice from SOCA, is no longer pursuing the original intention to lay down a prescribed form for making manual reports⁵⁵.
89. The UKFIU appears to have a regime of regular feedback in place to update the regulated sector and others of progress and action on SARs. It has achieved this through its sector specific seminars, internet guidance, conference attendance, and the UKFIU-chaired Regulators' Forum⁵⁶ that aims to improve electronic submission rates. Indeed, private sector representatives across the board noted a welcome improvement in outreach and feedback from the UKFIU since it was transferred to SOCA in April 2006.

The UK Suspicious Activity Reports Regime and the UK Financial Intelligence Unit

90. The SARs Regime Committee carries out independent oversight of the regime. The Committee comprises representatives from all regime participants and is chaired by Paul Evans, the Executive Director of Intervention at SOCA. In its 2008 annual assessment produced for Home Office and Treasury Ministers, the Chair states that it is intended that the UKFIU and the SARs regime more broadly become a global leader in maximising the value of financial intelligence to reduce crime and terrorism.
91. The Committee commented favourably on the more innovative and proactive approach adopted to bulk matching of data against the SARs database on behalf of 'partners' and the more targeted approach to UKFIU 'dialogue'. While some progress has been made with IT procurement and more is planned, its full introduction looks likely to involve a longer time span than originally envisaged. It is now to be developed within a wider programme of information management work in SOCA. TI-UK is unable to comment on the merits of this step, but the independent Committee has been assured that this work retains its high priority for SOCA and the UKFIU.

92. The UKFIU seeks feedback from end users of SARs information through a twice-yearly feedback questionnaire. The positive feedback received and applications for Money.web suggest that SARs are now an aspect of all law enforcement agencies' work. The report contains information about the value of restraint orders, confiscation orders and cash forfeitures in cases where SARs featured and this confirms solid progress. Particular successes are claimed in the use of SARs to assist and initiate ML investigations, based on SARs from all sectors subject to the 2007 MLR.
93. The UKFIU continues to focus effort on producing information based on SARs intelligence for those reporting sectors that would most benefit from it and hopes that that will improve the quality and quantity of reports, particularly from those reporting within the more vulnerable sectors. Some of this is done by formal 'alerts', but this can be restricted by the need to use secure methods of delivery. Because of the global nature of ML, knowledge must also be shared between international partners, which will continue to take place through "the tried and tested Egmont channel", as well as the international forums such as the Camden Assets Recovery Inter-Agency Network (CARIN), EU FIUs and EU ARO plenary and platform meetings.
94. TI-UK welcomes the progress being made in this vital work of the UKFIU.

The Use of Suspicious Activity Reports by the Serious Organised Crime Agency

95. SOCA's work on improving the SARs regime should make a particular contribution to improving the way SARs are used when dealing with PEPs, in turn resulting in feedback through the existing reporting mechanisms to improve the reporting by institutions.
96. TI-UK welcomes the fact that SOCA has established a unit to supervise PEP-related SARs. It is hoped this unit will be sufficiently resourced to enable it to maintain its international information sharing capacity whilst continuing to improve the quality and quantity of PEP transaction

54. This is line with one of the recommendations made in the Lander Report. Handwritten reports increase the likelihood of errors in transcription, and if they are in the non-standard format, they are time consuming to process and therefore limit SOCA's ability to prioritise and investigate in 'real time'.

55. JMLSG consultation on Chapter 6 of Guidance 27 August 2008.

56. The Regulators' Forum is in line with a recommendation of the Lander Review. The service that the FIU provides to each Regulator is subject to formal agreement.

reporting. In this connection, we also welcome the PEP unit's developing relationships with reporting institutions, where it discusses ways to improve the effectiveness of the PEP-related SARs regime.

97. Nevertheless, we note that:

- o The SOCA PEP unit told TI-UK in discussion that it was unable to estimate how many PEPs had accounts with either FSA-regulated or non-regulated reporting institutions, but TI-UK understands that SOCA is now seeking to address this through a benchmarking exercise;
- o The PEP unit was also unable to supply the TI-UK team with an estimate of the proportion of around 210,500 SARs received in 2008 that related to PEPs, although SOCA now state that the information can be easily retrieved;
- o The unit did not have databases detailing the limitations on overseas bank accounts and business relationships, or the requirements for asset declarations imposed on PEPs in their own countries; and
- o The number of reports from company formation agents in the 2008 Report remains very low (48 of the 210,500 reports), although some TCSPs may be classifying themselves as company formation agents.

98. As a result, TI-UK recommends that:

- *The resources devoted to the PEP unit are reviewed;*
- *The PEP unit works with the FSA and other supervisory agencies to establish key data on PEPs and to use the data obtained from time to time from reporting institutions to analyse trends and aggregates. In particular, it focuses on the number of PEPs, the nature of their accounts, the extent to which there are limits on legal business relationships outside their home country, the existence of asset declaration requirements and other information on the complexity of the market in the UK;*
- *The PEP unit's terms of reference specifically include a responsibility to improve the quality and quantity of reporting; and*
- *SOCA should commit to publishing assessments of typologies for laundering the proceeds of corruption,*

together with focused alerts where possible, with a view to alerting potential reporting institutions of the methods likely to be used and intelligence about what may be current practice.

Politically Exposed Persons Guidance Requirements

99. There is a problem with PEPs going from reporting institution to reporting institution to find those with the weakest due diligence. In order to contain this problem a mechanism needs to be found to circulate to reporting institutions details of PEPs attempting to open accounts in circumstances that appear suspicious, thereby reducing the danger that a PEP finds the weakest gatekeeper into the financial system. To avoid any potential breaches of confidentiality, it would be best to employ the existing SAR system, which enables SOCA to circulate details of PEPs and others who appear to be seeking to open accounts where banks are suspicious. Some have told TI-UK that the Guidance already provides for this but others disagree and there are few examples of reports arising from decisions to turn down customers in suspicious circumstances.

100. The best way forward, therefore, would be to clarify (in the MLR or JMLSG Guidance as necessary) that, where a bank refuses to open an account for a PEP because of concerns that the PEP may be likely to use the account for money laundering, the attempt to open an account should be regarded as a suspicion of attempted money laundering and reported as such.

101. SOCA then needs to adopt a system for filtering SARs related to unsuccessful account opening attempts by PEPs and circulating this information to banks. If for reasons of confidentiality or other legal constraints this cannot be made to work, then alternative means to achieve this should be explored. A similar problem could arise where a PEP might not only go from one bank to another in the same jurisdiction, but might also switch jurisdictions, in which case the mechanism would need to have a capacity for individual FIUs to communicate with each other, presumably through the Egmont arrangements (see paragraph 71).

102. As has been discussed previously⁵⁷, the UK possesses a variety of bodies with responsibility for issuing AML/CFT guidance and enforcing compliance. However, this variety also provides for uneven or inconsistent application. TI-UK

57. Part 1.3.

accepts that it would probably be impractical to seek to give a single body overall responsibility, and it would also be wrong to suppose that one set of guidance would be appropriate for all. Nevertheless, the Lander Review noted the uneven pattern of reporting by different sectors⁵⁸. Moreover, a number of bodies have told TI-UK that there are variations in the definitions of PEPs among institutions, and experience shows that different institutions have different approaches to what kinds of activities may be regarded as suspicious when conducted by a PEP.

- *TI-UK recommends the instigation of a review to examine the consistency of the guidance that applies to PEPs, and its enforcement, and then to establish whether or not the uneven pattern of reporting applies to PEPs-related SARs. If the review identifies areas for improvement, these matters should be addressed.*

Politically Exposed Persons and Customer Due Diligence

The Coverage of the Politically Exposed Persons Regime

103. PEPs are defined by the FATF as follows:

"Individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle-ranking or more junior individuals in the foregoing categories."

104. The Third Money Laundering Directive defines PEPs as:

"Natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons;"

The EU has also issued "Level 2" implementing measures on PEPs, on which the UK has drawn. In the UK, a PEP is defined in the MLR as:

"An individual who is or has, at any time in the preceding year, been entrusted with a prominent public function by

- o A state other than the United Kingdom;
- o A Community institution; or
- o An international body."

105. The MLR add the immediate family members and close associates of such individuals to the definition and define those who are entrusted with prominent public functions as including:

- o Heads of state, heads of government, ministers and deputy or assistant ministers;
- o Members of parliaments;
- o Members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not generally subject to further appeal, other than in exceptional circumstances;
- o Members of courts of auditors or of the boards of central banks;
- o Ambassadors, charges d'affaires and high-ranking officers in the armed forces; and
- o Members of the administrative, management or supervisory bodies of state-owned enterprises;

106. The FATF Recommendations define PEPs as being foreign persons, although the Interpretative Note encourages countries to extend the requirements to domestic residents holding prominent public functions. The EU Directive definition includes both domestic and PEPs but only applies the due diligence obligations to the latter. As noted above, the UK definition excludes domestic PEPs. There are sometimes sound practical grounds for permitting such a concession – it would be very costly to extend the requirement for enhanced due diligence to all domestic PEPs. However, in some states domestic politicians are also the most significant ML risk and it is ironic therefore that the EU, by taking the action it has, has effectively handed corrupt politicians the world over a pretext to claim that, in excusing themselves from the PEP definition (thereby making it easier

58. While banks are responsible for 65% of reports, solicitors, for example, are responsible for only 5%, even though many transactions of the type that might fall into the category of 'suspicious' would almost certainly involve legal services.

to launder stolen funds), they are merely following the example of the EU. We understand that, in practice, most institutions make little distinction between domestic and PEPs.

107. Moreover, it should be noted that the UK definition of a PEP includes an official of an international body, whereas it is not entirely clear that this is required by the FATF definition. The UK approach appears to be correct in this regard.

- *TI-UK recommends therefore that the UK should encourage the FATF and the EU to conduct a review of the position of domestic PEPs in order to address this problem.*
- *TI-UK also recommends that the UK should encourage the FATF to extend the definition of PEPs to include officials of international organisations.*

The Obligations Imposed by the Financial Action Task Force Recommendations

108. In 2000, the world's largest banks, prompted by TI, adopted a set of principles designed to assist them to discover and deal with PEPs. Known as the Wolfsberg principles, these standards have influenced international requirements and are, to a considerable extent, reflected in the FATF Recommendations that were revised in 2003.

109. The FATF Recommendations establish the basic requirements to ensure that financial institutions and certain specified non-financial institutions (referred to in this report as 'reporting institutions') are able to make effective reports on suspicious transactions and activity. FATF requires a reporting institution to be able to:

- o Establish and verify the identity of the customer, including the beneficial owner of the customer where the customer is a company, trust or other legal arrangement, or in any case where the customer appears to be acting for someone else;
- o Determine the nature and purpose of the account;
- o Monitor the customer's account and the operation of the relationship and compare the activity with the expected profile;
- o Keep proper records of all CDD, transactions and investigations; and
- o Investigate unusual or suspicious activity and report suspicions without tipping off the customer that such a report has been made.

110. The FATF Recommendations also accept that the extent of the work to be done to fulfil these requirements should be determined on the basis of the risk assessment. Moreover, enhanced due diligence should occur where the customer is or might be a PEP. Recommendation 6 requires that there should be appropriate risk management systems to ensure that the reporting institution knows that its customer is a PEP; measures to ensure that the source of wealth and funds are known; controls that ensure that there is senior management responsibility for taking on the PEP as a customer; and enhanced monitoring of the customer's activity.

UK Compliance with the Financial Action Task Force Recommendations

111. In 2007, the FATF Review of the UK deemed the UKFIU to be 'generally effective', with a high degree of independence. The UK was found to be compliant or largely compliant with 36 of the 40+9 Recommendations of the FATF, a result that compared favourably with other countries. The UK was found to be non-compliant in respect of the recommendation on PEPs. It is fair to say that this was due, in large part, to the UK approach at that time of setting out detailed requirements in the form of guidance issued by the JMLSG. The FATF evaluation team noted that the Guidance was broadly comprehensive and was regarded by many reporting institutions as, in effect, compulsory. Because the evaluation team concluded that the Guidance could not be regarded as being "law, regulation or other enforceable means", it was obliged to mark the UK down in a number of areas, including compliance with Recommendation 6, which requires enhanced due diligence in respect of PEPs notwithstanding its assessment of general effectiveness in practice.

112. On the other hand, the Law Society stated that the JMLSG Guidance did no more than simply "highlight best practice" and that because there was no obligation to conduct enhanced due diligence on PEPs prior to the implementation of the MLR, the AML/CFT regime in the UK should be regarded as very different now to what it was at the time of the evaluation. This undermines the assumption that the regime applying to PEPs was effective, throughout the regulated sector, prior to the enactment of the MLR.

113. As is often the case, the evaluators had to make an assessment, knowing that the UK was preparing new regulations and could not take them into account unless implemented during the course of the assessment. Since the evaluation, the UK has implemented the EU Directive and has issued new MLR. These have created legally binding

obligations which meet the terms of the FATF requirement that the obligations on reporting institutions should be imposed using law, regulation or other enforceable means. The JMLSG Guidance has been substantially updated and reflects the new legal obligations.

114. The JMLSG Guidance remains in place and provides, for the most part, a comprehensive and practical guide to the measures a reporting institution should take. Nevertheless, TI-UK continues to believe that there are weaknesses in UK compliance with the FATF Recommendations in areas that affect the due diligence on PEPs.
115. While the Regulations and the JMLSG Guidance are reasonably comprehensive, there is a significant weakness in UK regulation regarding PEPs which may affect the level of reporting. FATF Recommendation 6 states that a reporting institution should have appropriate risk management systems to determine whether a customer is a PEP. Different bodies take different views on the meaning of this recommendation and on the precise effect of the corresponding provisions in the MLR and JMLSG Guidance. Given the degree of contradiction on this point, the Guidance and the MLR need to be amended to make this clear. The issue is discussed in more detail at Annex 5.
116. There is also a weakness when it comes to identifying the beneficiaries of a trust. PEPs who are seeking to conceal their identity will often do so by hiding behind complex structures, involving anonymous trusts and companies, including offshore trusts and shell companies. In the UK, as in many other countries, it is not a requirement that the beneficial owner of a company be named in the public share register; the registered owner may well be a nominee company, which may in turn be an offshore company registered in a jurisdiction that does not require any information about the shareholders to be on the public record.
117. Alternatively (or in addition) the nominee company may be owned by a trust which is then established by a dummy settlor (a service offered in some offshore jurisdictions) with professional trustees. The professional trustees may themselves be companies (with ownership further obscured); and even if they are named professionals, they may have the right to make distributions to unnamed persons. In such circumstances, it is quite possible for the name of the real motivating force behind an arrangement to be absent from any public documentation, or even from private official documents, such as trust deeds.
118. In the case of companies, it should be possible, by dint of assiduous enquiry by a bank or other reporting institution (and refusal to open an account until the information is obtained) to establish whether a PEP has a substantial beneficial interest. A person either owns shares in a company (or a holding company) or he or she does not. With trusts, though, the position is more difficult. Because a trust is a contractual relationship rather than a legal vehicle, PEPs may be in effective control without being named in a trust deed.
119. The key issue in piercing these obscure structures is to ascertain the identity of beneficiaries of trusts. Ultimately, a PEP who is using a structure like this to hide assets will usually wish to gain the benefit of the assets, and to achieve this he or she must benefit from the trust. The PEP may not be a named beneficiary, but at some point there will usually be a distribution of assets to the benefit of the PEP. In its recently published report, 'Undue Diligence', Global Witness has urged all countries to publish an online registry of the beneficial ownership of all companies and trusts, and an income and asset declaration base for their government officials⁵⁹. While we would not necessarily go so far as to advocate an on-line registry, and we recognise that our own proposals may not catch all PEPs that seek to benefit others through trust structures, we believe that there would be advantage in ensuring that all beneficiaries were identified at least at the point of distribution. As is the case with PEPs, there are different interpretations of the meaning of the MLR and JMLSG provisions. TI-UK considers that there is a need for more clarity and makes specific proposals below, which are discussed in more detail in Annex 5.
 - *TI-UK recommends that the MLR and the JMLSG guidance should make it unambiguous that a reporting institution should always have systems in place to detect and identify PEPs. The risk-based approach can then be applied to the measures to be taken to conduct due diligence on the PEPs, once identified.*
 - *TI-UK recommends that when an opportunity arises MLR 14 should require PEP identification as part of risk management and it should be normal practice to have specified measures defined in an institution's AML policy for establishing whether or not any customer is a PEP.*

59. 'Undue Diligence – How banks do business with corrupt regimes', Global Witness, March 2009.

- *TI-UK recommends that MLR should require beneficiaries to be identified and their identity verified, at least before a payment is made. If this cannot be established, the payment should not be made and, if necessary, the account should be closed (as should be the case now according to the MLR, where due diligence cannot be performed).*

Identifying and Monitoring Politically Exposed Persons

120. One frequent objection to the requirements relating to PEPs is that a PEP who is determined to lie will evade any reasonable efforts to detect and monitor his or her activity. TI-UK accepts that this is true for the most determined and skilful PEPs, but would argue that this does not invalidate the imposition of requirements to detect and monitor PEPs.

121. In the first place, there is a range of international databases now available that provide information on PEPs and their associates. There is also a considerable amount of public information that can be gleaned simply by referring to internet search engines that are available to any reporting institutions. Many of these will reveal that a customer is a PEP. It is essential that staff are trained to recognise the factors that may reveal the likely use of an account by a PEP. Where institutions have staff specialising in customers from specific countries or regions, they should be able to identify additional factors that may reveal a PEP.

122. Secondly, it is very important that a reporting institution should insist on an answer to specific and unambiguous questions. These might relate to the nature of any political role the customer has, or any relationship, family or business he or she may have with a person who holds a political role. A PEP seeking to conceal identity will know that a lie could well be revealed by the international databases.

123. Thirdly, if an account is being opened by a third party, on behalf of a hidden PEP, the normal process of building an account profile will help in identifying the true nature of the account since, if it is really being used for a PEP, the pattern of activity may well depart from that which the original account opener has suggested and this should be picked up by the normal monitoring systems of the reporting institution. Of course, unusual activities may have no

connection with PEPs but a departure from the predicted profile could well prompt an investigation which, in turn, could reveal the deception.

124. Fourthly, even if the PEP is determined to lie, the fact is that false information has to connect with the real world at some stage, and it is never a straightforward matter for a PEP to maintain an elaborate lie, consistently, over time. Even if the reporting institution does not discover the false information, the giving of false information by a PEP will be an added piece of evidence available to the prosecuting authorities in the event of a subsequent investigation.

125. The identification of PEPs is vitally important and TI-UK considers that, to reinforce this, the FSA and other bodies responsible for enforcing the obligations of reporting institutions should insist that a current list of all PEPs should be held by the institution at any one time. This would not only reinforce the importance of identification but would also provide a source of data for analysis by the FSA and SOCA in respect of trends, aggregates and other activities of PEPs. The PEPs Strategic Group, which has been established to review intelligence on corrupt PEPs, has an important role to play in this area.

126. Another powerful resource at the disposal of conscientious reporting institutions are the sources of data that make public the laws, regulations and practice which affect PEPs in their own countries. In some states, as in Nigeria⁶⁰, Bangladesh and Venezuela, it is illegal for serving PEPs, or particularly defined PEPs, to hold foreign bank accounts or other assets, or to hold any other office or paid employment⁶¹. Moreover, asset declarations are required of certain PEPs. While these prohibitions are fully in the public domain, it seems that banks and other professionals providing services to PEPs pay little or no regard to non-compliance as a likely indicator of criminal activity or money laundering, or as something that should trigger a SAR. In a 2007 survey of the 148 countries eligible to receive World Bank assistance, 104 insisted that senior officials disclose their income and assets. Of these, just under a third are required to declare their assets to an anti-corruption body or other government entity as well as publishing the details publicly⁶².

60. *Where such measures are even included in its constitution.*

61. *Restrictions of this type may apply generally to nationals or to some defined category of PEP; they may also restrict the holding of accounts in excess of a defined level or for more than a stated period.*

62. *The remaining two-thirds are required merely to divulge their assets to some official body without opening themselves up to public scrutiny.*

127. TI-UK believes that a database of such legal requirements should be established. Much of the information is probably already available on existing databases, and to bring that together in a user-friendly format should be quite feasible in a 'Google world'⁶³. If a universal local law database proves to be too difficult, then a risk-based approach could be adopted, confining the database to those countries with lower scores in the TI Corruption Perceptions Index, as these countries would also correlate closely to those presenting the highest risk of ML.

128. Reporting institutions should be satisfied that a PEP is legally entitled under his or her domestic laws to establish a business relationship in the UK, and should know any limits on that business relationship. In particular, if the domestic legislation of a country were to require asset declaration, the UK institution should take reasonable steps to confirm that all assets of which it was aware were included within that declaration⁶⁴. Activity inconsistent with the asset declaration or local legal requirements should prompt consideration of a SAR.

- *TI-UK recommends that the FSA and other enforcing bodies ensure that each reporting institution maintains an up-to-date list of PEPs with whom it has established a business relationship;*
- *TI-UK recommends that a database⁶⁵ is created and maintained, detailing by country, criminal, legal and other restrictions on PEPs (and their immediate families) holding assets outside their own countries, or being involved in paid employment. The database could also detail which jurisdictions requires asset declarations, and from what PEPs and whether the contents are in the public domain. This country database should then be made available for use by reporting institutions and other professionals, and steps should be taken to ensure that the existence of the information is visibly and proactively brought to the attention of reporting institutions and other professionals (for example, by regulators or SOCA writing to MLROs, compliance officers of reporting institutions, and/or referred to in the MLRO guidance).*

- *TI-UK recommends that the JMLSG amends its Guidance to require reporting institutions to ask PEPs about any limitation on their ability to hold assets outside their home country, to obtain copies of any asset declaration and to have regard to the legal obligations on PEPs when deciding whether or not to accept the account and when establishing their monitoring procedures.*

129. There is a further myth that the risk of money laundering by PEPs applies only to high-profile corrupt politicians who steal large amounts of money. The argument is made that small businesses need not make any special effort to identify or monitor PEPs because this risk would not apply to them and the cost would be disproportionate. TI-UK would fundamentally disagree with this view. Firstly, it is by no means the case that high-profile PEPs operate through large institutions. In many cases, they seek to establish the trusts and companies through which they wish to hide their identity, using smaller law firms and TCSPs to establish such structures. Smaller firms are often more likely to be targeted as they may well not have sophisticated mechanisms designed to detect PEPs. Some of the money looted by Sani Abacha of Nigeria, for example, was laundered through small branch offices in London suburbs.

130. Moreover, it is sadly the case that the theft of public assets is not confined to high profile cases. Lesser-known PEPs are equally likely to steal public assets and to seek to launder the funds using firms that they perceive (possibly correctly) as being less vigilant. Those firms that may have ignored the PEP guidance prior to the implementation in the UK of the Third ML Directive could easily be vulnerable to such attacks.

131. In each case, whether high-profile, or lesser-known, whether funds are extensive or modest, the key features of the PEP ML techniques remain the same and the essential features of the defence are the same – as set out in the FATF Recommendations, the POCA, the MLR and the JMLSG (and some other) Guidance. There is no alternative to proper due diligence on customers, to insisting on answers to questions and to careful monitoring of client activity. It is therefore vital that smaller firms, subject to guidance from the Law

63. Likely sources would include official websites of business requirements in each country, the BERR or TI country information sites, client briefing sites or publications maintained by large international accountancy or law firms, international business advisory and risk control companies, and the country profiles in the Business Anti-Corruption Portal maintained by the Global Advice Network. Also see www.business-anti-corruption.com. The Bretton Woods institutions should also be a fruitful source.

64. This second stage would be easier with PEPs from countries where the asset declarations are already in the public domain.

65. The idea for this database derived from one of the law enforcement agencies TI-UK met during the preparation of this report, and it was thought that it could assist considerably in deterring ML in the UK by PEPs.

Society, the ICAEW and the JMSLG, should not consider their small size to mean that they need not identify and monitor PEPs.

Trust and Company Service Providers

132. TI-UK has previously issued a report recommending that TCSPs be brought into regulation on the lines of financial services businesses. This was reinforced in a subsequent submission to Her Majesty's Treasury (HMT) in response to a consultation document on implementing the EU Third ML Directive⁶⁶, which emphasised the central role of TCSPs in creating the kinds of company and trust structures described above. The following is a paragraph in that submission:

"Abuse of trusts and company structures to conceal assets and the proceeds of corruption and other crimes is well known and extensive. It calls for commensurate and effective regulation of TCSPs. That will underpin the probity and long-term competitiveness of the City of London and be in the long-term best interests of the majority of practitioners. HMT has overall responsibility for ensuring the long-term reputation, prosperity and thus the effective regulation of the City."

133. HMT adhered to its original proposal of assigning registration to HMRC and selected a 'fit and proper test' that demanded no more of an applicant than compliance with a list of negative criteria involving the non-conviction of the applicant of a number of offences. The MLR also included a 'test' that said that an applicant would not be a fit and proper person if he or she was "otherwise not a fit and proper person with regard to the risk of money laundering or terrorist financing". The application form for registration as a TCSP lists the negative criteria, but directs no questions to the "otherwise not a fit and proper person" requirement. There is no requirement of qualification, experience or competence. This was the lightest of 'light touches' at a time when the mantra for introducing regulations was that it should be 'light touch', a concept that is now being abandoned as it is becoming appreciated that many of the reported abuses of the financial system could well have resulted from inappropriate regulation.

134. In truth, while the HMRC became the supervisory body for TCSPs, the requirement was one of registration rather than regulation. HMRC would not want registration to be regarded as a seal of approval.

135. It is of course welcome that TCSPs are now subject to AML requirements. However, experience shows that, without effective supervision and monitoring, compliance can easily degenerate into routine photocopying of identification documents. The prevention of ML requires systematic and repeated supervision – albeit on a risk-based approach as would be feasible from financial services regulators – to ensure that businesses make a proper risk assessment, establish appropriate policies, undertake effective and relevant training and adopt adequate internal control systems.

136. HMRC is the 'default supervisor' not only for TCSPs, but also for Money Service Businesses (MSBs), High Value Dealers (HVDs) and Accountancy Service Providers (ASPs). MSBs have to comply with Money Transfer Regulations as well as the MLR, and HMRC is empowered under counter-terrorism legislation. Because of the high priority accorded to CFT, the major supervisory and law enforcement effort by HMRC is concentrated on MSBs rather than TCSPs. To respond to the high risk of abuse in the MSB sector, HMRC recently published The MSB Action Plan, a strategy to contribute to the deterrence, disruption and detection of money laundering and terrorist financing. It is stated that the measures laid out in the Action Plan will be implemented in the context of TCSPs, HVDs and ASPs.

137. So far as the TCSPs are concerned, the MLR only required registration and a fit and proper test and those have been diligently implemented by HMRC, although it has used the same register for all four categories of supervised bodies. Registration will have had some positive results, in that those unable to meet the fit and proper test will have been excluded. Registered TCSPs will come within the scope of the compliance visits regime, to which end, AML specialists, rather than generalists, are increasingly undertaking visits. There is scope for further increasing awareness of MLR requirements and encouraging training. HMRC law enforcement staff are able to access the SOCA SARs database and there is scope for the building of relevant intelligence. Persistent non-compliance with MLRs would result in law enforcement and prosecution by the Revenue and Customs Prosecuting Office (RCPO).

- *Because of the high vulnerability of companies and trusts to abuse by those who launder the proceeds of crime, TI-UK remains concerned by the lack of effective regulation of TCSPs and recommends that the effectiveness of ML supervision by HMRC of TCSPs should be independently reviewed and reported upon no later than 2011.*

Addressing the Issue of Tax Havens

138. In the current global financial and economic crisis, there is growing demand for transparency and stronger regulation in financial markets. This will have a positive impact on AML efforts, particularly in relation to tax havens and those financial centres that refuse to cooperate in the exchange of tax and other information relevant to regulatory, law enforcement and AML/CFT investigations.
- *TI-UK recommends that the UK should work with other members of the G20 to establish clear criteria for the identification of non-cooperative tax havens and financial centres. Such criteria should result in a distinction between those who cooperate and those who do not. In order to encourage reform, those financial centres that are cooperative should remain clear of any blacklist, but those that continue to refuse to meet international standards and refuse to exchange information should be subject to sanctions as long as they continue to act in this way.*

The Role of Professional Services in the UK

139. The UK Threat Assessment of Serious Organised Crime 2008/9 looked at specific risk areas where the legitimate and criminal economies intersect. Although this was referring to organised crime, the risk areas are generally those that concern AML/CFT. The point is made that "most criminal organisations do not themselves have ready access to the more sophisticated means of laundering the proceeds of crime. They make use of witting or unwitting 'gatekeepers' such as solicitors and accountants, who are well-placed to facilitate ML due to their knowledge and expertise⁶⁷."

This assessment reflected that of the FATF in its publication, "The Misuse of Corporate Vehicles, including Trust and Company Service Providers", published in October 2006. It was for this reason that TI-UK raised concerns with HMT regarding their proposal to assign supervision of solicitors and accountants to their respective professional bodies without first ensuring that such supervision would be real and effective in relation to AML⁶⁸.

140. Our impression is that the legal and accountancy professional bodies are taking the issue seriously, but AML will always be a relatively small part of any regular routine practice reviews, unless particular ML or other criminal risks have been identified. Although the Law Society is the named regulator in the MLR, the duty has been delegated by the Society to the Solicitors Regulation Authority (SRA) that also has the Practice Standards Unit. Increasingly, as it becomes fully established, the newly created independent Legal Services Board will set standards to be followed by its approved regulator. The SRA carries experienced and qualified investigatory staff in its Forensic Department, but its major preoccupation at present is with mortgage fraud.
141. ICAEW is the regulator under the MLR for chartered accountants and is subject to the independent Professional Oversight Board, part of the Financial Reporting Council established following the Enron corporate scandal. ML is one of the principal areas of statutory regulation looked at as part of regular practice reviews.
142. Both professional bodies thought that large firms with investment in compliance functions were less vulnerable to those laundering the proceeds of crime than smaller firms. Both are planning new awareness initiatives targeting smaller firms.
- *TI-UK recommends that the effectiveness of ML regulation by professional bodies under the MLR should be independently reviewed and reported upon no later than 2011.*

67. See also "PROBLEM PROFILE 2" on page 26 of the Government's AML Strategy of October 2004.

68. Response to Her Majesty's Treasury Consultation Document on Implementing the EU Third ML Directive – October 2006.



PART 3

ASSET RECOVERY AND MONEY LAUNDERING

Government Policy

143. The recovery of the proceeds of crime remains a high priority for the UK Government as demonstrated by the enactment of POCA and the Serious Organised Crime and Police Act 2005 (SOCPA)⁶⁹.

144. Apart from legislation, there have been a number of important policy papers. The more recent have emphasised the increasing importance that the Government attaches to asset recovery:

- o AML Strategy⁷⁰
- o HMRC's Criminal Finances Strategic Framework⁷¹
- o Asset Recovery Action Plan Consultation Document⁷²

145. These policy papers point to the need for increased cooperation and partnership between agencies.

Asset Recovery

146. Until the introduction of POCA in 2002, despite provisions for criminal confiscation in the 1994 Drug Trafficking Act and the 1988 Criminal Justice Act, it was still largely possible for criminals (especially those engaged in 'organised' crime) to benefit from their ill-gotten gains despite a conviction for serious criminal offences. However, in June 2000, a Cabinet Office report set out to improve the asset recovery regime for all those involved in the pursuit of criminals and their assets. One of the main proposals to emerge was the consolidation of the existing confiscation and money laundering laws into a single piece of legislation – POCA. This effectively broadened the scope of the legislation

relating to the seizure of cash by introducing an all-crimes approach to money laundering. It also increased the investigative agencies' powers of restraint and simplified the confiscation procedure.

147. By 2007, however, it was clear that the ARA, established by POCA with new powers of asset recovery, had not really delivered on the high expectations that had been vested in it⁷³. Significant problems had plagued the Agency from the outset. There had, for example, been some confusion regarding its role and competency, in conjunction with a number of bad quality referrals. There was also a barrage of human rights-based defence applications (which the ARA was able to resist, leading to the development of important jurisprudence in this area) as well as some recognised weaknesses in the ARA's internal processes. To address these shortcomings, the Government recognised that a merger between SOCA and the ARA, that would harness synergies between the two in the areas of organised crime and the expansion of civil forfeiture powers to a wider prosecutorial audience, would lead to a unified command and the creation of a 'one-stop shop' for AR work. Financial investigation, ML enquiries at home and overseas, the SARs regime, the taxation of criminal income/gain and criminal and civil recovery would all come under one roof.

148. There are other agencies involved in the work of asset recovery – the Revenue and Customs Prosecuting Office (RCPO) and the CPS⁷⁴. Despite improved performance over the last five years, in 2007 the Home Office outlined plans⁷⁵ for the future of asset recovery in the UK with a commitment to recover £250 million by 2009-10, although this figure does not include any recovery of the proceeds of corruption.

69. See also *The Serious Crime Act 2007* which provided for the functions and powers of the ARA to be absorbed by SOCA.

70. *AML Strategy* – October 2004

71. *Criminal Finances Strategic Framework* 24 May 2007.

72. *Asset Recovery Action Plan – A Consultation Document* – Home Office – May 2007.

73. See the *National Audit Office Report on the ARA* of February 2007.

74. Given its wide remit over criminal activity and prosecutions in the UK, the CPS is largely responsible for the growth in the numbers of orders and enforcements. In 2006-7 the CPS secured confiscation orders with a value of over £85 million.

149. Critically, however, in order for the profit element to be effectively removed from criminal activity, cooperation between the various agencies has to improve. If the Home Office plans are to be realised, therefore, lessons must be learnt from the demise of the ARA. Furthermore, the extended new civil recovery powers (in the hands of SOCA, the CPS, RCPO and SFO) have to be used effectively, with adequate resources and time given to the enforcement agencies. Nevertheless, it is hoped that the various agencies will avoid a simple numbers game that sets out to achieve target figures by pursuing separate and individual plans.

150. To make good the deficiencies first noted in the 2000 Cabinet Office report, this important work needs to be placed into the mainstream of the daily tasks of prosecutors and law enforcement agencies. As regards TI-UK's interest, we need to see how the newly empowered agencies can become fully effective in recovering the proceeds of corruption. Much remains to be achieved.

151. In many ways the problems that beset the ARA are indicative of the problems faced by all agencies involved in AR. Hence, there needs to be a cohesive plan for all to follow, and it remains to be seen whether the Home Office AR Action Plan (2007) fulfils the need for such a plan.

152. While it is encouraging to note that the Government has created a number of high-level policy and enforcement cooperation groups, such as the Asset Recovery Working Group and the International Corruption Group (with its sub-groups), a genuine commitment to more than just the sharing of data and good practice is also required. Indeed, an opportunity exists for the various agencies equipped with new and powerful weapons to take the whole AR agenda forwards.

153. The challenges faced by SOCA are clear if it wishes to avoid a situation where the various agencies largely disregard the disparate powers available to them.

154. *TI UK recommends that SOCA should now:*

- *Pursue the agenda on civil asset recovery to the next level by ensuring that there is cooperation among all the new agencies to share the skills and knowledge gathered in ARA's short history in order to make these innovative powers work⁷⁶;*

- *Maintain and collate proper records on the different aspects of its work – for example, the different uses of civil recovery, taxation and criminal confiscation powers – to ensure that proper assessments of effectiveness take place; and*
- *Ensure that the units dealing with the various aspects of the work are adequately resourced. The Select Committee Report noted that the absence of a time recording system for staff meant that the costs of pursuing individual cases and the productivity of staff could not be easily assessed by management, hindering effective decision making on the prioritisation of cases and the most effective deployment of staff resources.*

155. It should be noted, of course, that the ARA was already turning a corner in terms of performance when it was subsumed into SOCA. Hopefully, SOCA will be able to apply its combined financial intelligence and law enforcement capacity to the AR regime and continue the positive work begun in such difficult circumstances by the ARA.

Cooperation Between Agencies and Departments

156. TI-UK is pleased that an atmosphere of positive cooperation exists between the departments and agencies involved in work related to the proceeds of corruption, AML and PEPs. However, it remained unclear quite how and in what way this cooperation was expected to function; indeed, with the exception of DFID, the various agencies were unable to produce a single document to explain the overall operation. DFID did produce a schematic which showed one work stream focussing on those agencies most concerned with AML implications, and the other looking at the arrangements for reporting, investigating and prosecuting foreign bribery.

157. One agency in each stream is funded separately from mainstream law enforcement funding. DFID funds both the POCU and the City of London OACU⁷⁷, underlining the importance that Government attaches to tackling foreign bribery and international corruption. And yet, there persists a lingering concern that the functions of these units are still not seen as being sufficiently central to the pursuit of criminals and criminal financing to be established as permanent features of the UK's AML and AR regimes.

75. *The UK's Asset Recovery Action Plan (Consultation Document – May 2007).*

76. *SOCA has convened a Board-level Asset Recovery Committee, to which public and private sector representatives are invited and at which issues related to asset recovery powers are discussed.*

77. *The Department of Business Enterprise and Regulatory Reform (BERR) also contributes some funding to the OACU.*

In view of the undoubted success of both these agencies, it is unthinkable that either one could be disbanded or under-resourced. Given the links between foreign bribery and ML, the work of the OACU should be seen as an important component of the AML regime.

158. Among the agencies concerned with one or more aspects of ML, AR and corruption are:

- o City of London Police, including the OACU
- o CPS
- o DFID
- o FCO
- o FSA
- o HMRC
- o HMT
- o Metropolitan Police Service, including the POCU
- o RCPO
- o SFO
- o SOCA
- o UKCA

159. *TI-UK recommends that:*

- *Cross-departmental and cross-agency cooperation in AML and AR should be spelt out in a Memorandum (along the lines of that which refers to investigation and prosecution of foreign bribery). Furthermore, all the departments and*

agencies that are parties to the Memorandum should be made aware of the levels of cooperation expected and the ways in which each of them can assist in the attainment of the general objectives and goals;

- *The POCU and the OACU should be made permanent, with adequate levels of human and financial resources.*

Mechanisms to Recover Assets Laundered in the UK

160. The UK has available the range of criminal and civil mechanisms envisaged by UNCAC to restrain and recover the proceeds of corruption:

- o Criminal restraint orders in support of domestic or foreign criminal investigations or prosecutions, and interim receiving orders in support of domestic civil recovery proceedings (but not in support of similar foreign proceedings)⁷⁸;
- o Confiscation orders consequent on criminal conviction⁷⁹;
- o Non-conviction based civil recovery proceedings⁸⁰ (known in other jurisdictions as civil forfeiture, civil asset forfeiture or in rem confiscation);
- o A separate non-conviction based forfeiture mechanism for cash⁸¹;
- o Enforcement of foreign criminal or civil recovery orders (civil forfeiture)⁸²; and
- o Private civil proceedings brought by the claimant state (including the ability to obtain injunctions freezing assets pending outcome of the proceedings).

78. Under Part 2 of POCA, sections 40 and 41 – criminal restraint order, domestic proceedings; Proceeds of Crime Act 2002 (external requests and orders) Order 2005 – criminal restraint order, foreign criminal proceedings; and Part 5 of POCA section 246 – interim receiving orders.

79. Under Part 2 of POCA, sections 6 to 91.

80. Under Part 5 of POCA, sections 243 to 288.

81. Under Part 5 of POCA, sections 289 to 303.

82. Under the Proceeds of Crime Act 2002 (external requests and orders) Order 2005. POCA also permits orders depriving an offender of anything used to commit an offence, plus power to tax the proceeds of crime. These are probably not of relevance to recovery of the proceeds of overseas corruption.

161. Further, the FSA and other regulators have powers to investigate and take enforcement action including fines against regulated individuals or entities that are found to have participated or assisted in corrupt activity, or which have failed to maintain procedures, systems and controls to prevent it⁸³. It is to be hoped that the recently strengthened prosecution arm of the FSA (through the recent recruitment of an expert on fraud and prosecutions) will be able to accord sufficient priority to ML for effective enforcement proceedings to be taken.

162. TI-UK believes that under POCA the UK has comprehensive and effective powers to restrain, confiscate, and recover the proceeds of crime, a conclusion also reached in the 2007 FATF evaluation of the UK. The range of mechanisms is described in more detail below, with examples given of recent specific cases involving PEPs of which TI-UK is aware. Some of these cases are amplified in Annex 1.

Criminal Restraint Orders and Freezing of Property

163. POCA permits the freezing of assets that are suspected of being the proceeds of crime, in support of domestic or foreign criminal investigations or prosecutions, or domestic civil recovery proceedings. Freezing orders are known as 'restraint orders' (criminal) or 'interim receiving orders'/'property freezing orders' (civil recovery). The Serious Organised Crime and Police Act 2005 (SOCPA) made provision for a Property Freezing Order (s98) to allow for the freezing of property in civil recovery cases without recourse to a receiver.

164. However, at present the UK cannot freeze assets in support of foreign civil recovery (civil forfeiture) proceedings. This is because the restraint of assets is dealt with through requests for MLA in criminal matters, and by its very nature civil recovery is not a criminal process. To secure assets in the UK

in the absence of a continuing UK or overseas criminal investigation, a foreign state has to bring private civil proceedings, with a civil freezing injunction obtained at their commencement.

- *TI-UK recommends that legislation is introduced to permit the UK authorities to freeze assets in support of foreign civil forfeiture proceedings. This will require amendments to the Crime (International Cooperation) Act 2003 (CICA) and/or POCA.*

Confiscation Orders Consequent on Conviction

165. POCA contains detailed procedures for the recovery of the proceeds of crime in the UK following criminal conviction. According to the Act, confiscation is permitted not only of benefits from the specific crime for which a conviction has been secured, but also of other assets if it is established that the defendant has a 'criminal lifestyle', which is presumed in certain circumstances including conviction for money laundering offences. Confiscation proceedings are conducted on the civil standard of proof (i.e. the 'balance of probabilities', whereas the criminal standard is 'beyond all reasonable doubt').

166. Confiscation was used successfully in the criminal proceedings brought against Mrs Joyce Oyebanjo who, between July 2003 and March 2004, laundered through her English bank accounts £1.16 million of Nigerian public money misappropriated by Chief Dariye, the then Governor of Nigeria's Plateau State. A confiscation order for £1.54 million was also obtained against Nigerian businessman Mr Terry Waya⁸⁴ and £52,800 of bribes was also recovered from Ananais Gweinho Tumukunde, a Ugandan government official who pleaded guilty to accepting corrupt payments following an investigation by OACU.

83. For example, on 6 January 2009, Aon Limited was fined £5.25million by the FSA for failing to take reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption by overseas third parties (OTPs) that assisted it to win reinsurance business. That failure was a breach of Principle 3 of the FSA's Principles for Business which state that "[a] firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems".

84. See Annex 1.

Non-Conviction Based Civil Recovery

167. Legal proceedings for civil recovery that is not conviction-based are sometimes referred to in other jurisdictions as an action in rem (against property) to distinguish them from criminal conviction which is necessarily in personam (against a person). Their aim is to recover assets of a criminal origin in the absence of a criminal conviction where the evidence is insufficient to meet the criminal standard of proof, or because of the death or flight of the suspected criminal.
168. The UK has introduced legislation permitting the civil recovery (civil forfeiture) of the proceeds of unlawful conduct in the absence of a criminal conviction⁸⁵. Originally vested only in the ARA, the Serious Crime Act 2007 extended these civil recovery powers to SOCA, the CPS, the SFO, and others⁸⁶. The authority exercising these powers has to establish that on the balance of probabilities the assets claimed derive from unlawful conduct. In doing so, the authority must also prove that a criminal offence was committed, and that the property derives from that offence. Evidence of a specific offence is unnecessary, but the authority must at least prove the class of crime said to constitute 'unlawful conduct' (for example robbery, theft, fraud)⁸⁷. It is not enough simply to demonstrate that a defendant has no identifiable lawful income. Such cases are brought in the High Court.
169. The SFO has already exercised its civil recovery powers in a case that involved alleged overseas corruption. Discussions TI-UK has had with both SOCA and the CPS (Central Confiscations Unit) suggest that these agencies intend to use civil recovery powers to a greater extent than in the past, with corruption cases likely to feature strongly. SOCA has a key role in the UK's response to the StAR Initiative and expects to make full use of its civil recovery powers. However, one year after the introduction of the powers, no cases have been brought by the CPS, no additional funding has been allocated to this work and specific training has not commenced. On 6 October 2008, it was announced that Balfour Beatty plc had

agreed to pay £2.25 million to settle civil recovery proceedings brought by the SFO in relation to "inaccurate accounting records" maintained by a subsidiary "arising from payment irregularities" in relation to a contract for the construction of the Bibliotheca Project in Alexandria, Egypt.

- *TI UK would like to have seen more activity from the newly empowered agencies following the introduction of the civil recovery powers in 2007 and welcomes the determination to extend these further. It recommends that, where the evidence justifies action, they are used by the CPS, SFO and SOCA to recover assets deriving from corruption where criminal conviction and confiscation cannot proceed. This includes cases where the evidence does not satisfy the criminal standard of proof for a criminal prosecution leading to confiscation, but would satisfy the civil test. The review of suspected cases of ML by corrupt PEPs for potential civil recovery referral should also apply to recent historical cases.*
- *TI-UK hopes that the newly empowered agencies will be fully resourced with funds and personnel to implement these powers effectively.*

Forfeiture of Cash

170. It is possible for cash derived from criminal conduct to be seized by law enforcement agencies and forfeited by court order in the absence of a criminal conviction. The procedure is simpler than that used for other assets, such as properties or bank balances, and is initiated in a magistrates' court. The applicant has to prove, again on the balance of probabilities, that the seized cash represents the proceeds of crime.
171. These powers are regularly exercised by the UK's law enforcement agencies including in at least two cases involving PEPs⁸⁸, both Nigerian state governors, where the cash was successfully forfeited and returned to Nigeria.
172. However, in one of the cases, it was shown that weaknesses exist in cash forfeiture procedures which can be exploited by defendants seeking to cause substantial delay.

85. Under Part 5 of POCA.

86. The Act also provided for the merger of the operational element of ARA with SOCA, a merger that took effect on 1 April 2008.

87. See *Green* [2005] EWHC Admin 3168 and *Szepietowski* [EWCA] Civ 766.

88. See the *Dariye* and *Alamiyeseigha* cases outlined in Annex 1

- *TI-UK therefore recommends that the scope for abusing the process be reviewed in order to examine measures that might in future limit the power to exploit appeal and rehearing applications in a way that is held to be without merit, for example, by requiring permission to appeal or apply for a rehearing.*

Enforcement of Foreign Criminal or Civil Forfeiture Orders

173. The UK is able to enforce non-conviction based civil forfeiture orders and criminal confiscation orders made by foreign courts following conviction for serious or complex fraud⁸⁹, which includes corruption offences. Enforcement is not dependent on treaty arrangements although foreign orders are enforced at the discretion of the Home Secretary.
174. To qualify for enforcement, a criminal confiscation order must be consequent on conviction, be in force and not subject to any appeal, be based on a finding that the UK assets derive or are believed to derive from criminal conduct, specify the property against which enforcement is sought⁹⁰, and be compatible with the European Convention on Human Rights (ECHR).
175. The criteria that apply are similar to non-conviction based civil forfeiture orders, although a defendant is given more opportunity to challenge the order.
176. TI-UK is unaware of any examples of the enforcement of foreign confiscation or civil forfeiture orders in a case concerning a PEP. Where available within a realistic time frame, enforcement of foreign orders is potentially a cheap and effective route to the recovery of assets. However, it is first necessary for a foreign state to obtain a binding and final domestic criminal conviction and confiscation order (or civil forfeiture order). These may not be easy to obtain, particularly against powerful and influential defendants, or against absconding defendants, or against foreign companies, trusts or associates that hold the assets but which may not be susceptible to domestic criminal action, or in jurisdictions where the appeal process can last many years.
177. Furthermore, PEPs are likely to mount vigorous challenges to the enforcement in the UK of foreign criminal confiscation or non-conviction based forfeiture orders, alleging among other things that domestic proceedings against them were

politically biased, or that the trial that led to the making of the order against them was unfair, or was otherwise inconsistent with the ECHR.

178. Fairness dictates that such challenges cannot (and should not) be excluded, since it remains necessary that foreign confiscation and civil forfeiture orders liable for enforcement in the UK comply with the ECHR.
- *TI-UK recommends that the Government should ensure that the scope for challenges amounting to abuse of the process is narrowed as far as possible, and that the efficiency of enforcement of foreign orders, particularly in relation to PEPs, should be kept under review as cases come through.*
179. The task for the English Courts will be to deal with such challenges expeditiously and fairly, with particular importance attached to ensuring that they are robust in ruling upon time-wasting delays by PEPs.
180. In addition, where MLA is provided in support of foreign criminal investigations or prosecutions which could lead to criminal confiscation or civil forfeiture orders against assets in the UK, the government (either through the UKCA or the CPS) should be proactive in ensuring that the foreign authorities understand the requirements for enforcement in the UK and then assist where necessary in ensuring that orders are made in the requisite manner. The objective should be to minimise the risk of technical challenges to enforcement (particularly where the UK assets are held not by the PEP but indirectly by companies or trusts or associates that have no obvious reason to exist, other than to obscure the assets or their ownership). The government should also offer proactive assistance in cases where formal MLA is not given even when it becomes evident that corruption proceedings might result in the request for enforcement of a foreign order.
- *If enforcement of foreign confiscation or civil forfeiture orders fails or is likely to fail, TI-UK recommends that where the evidence justifies action, the Government should assist foreign Governments to recover assets, either through stand-alone proceedings brought by the main prosecution agencies with the relevant powers under Part 5 POCA powers, or through assisting or encouraging the foreign Government to bring private civil proceedings.*

89. *Proceeds of Crime Act 2002 (external requests and orders) Order 2005 section 18*

90. *Although enforcement is permitted against assets acquired using cash specified in a foreign confiscation order.*

Civil Proceedings Brought by a Claimant State

181. Article 53 of UNCAC requires signatories to permit other states to bring private civil proceedings to recover assets acquired through the commission of offences under the convention. The UK has always allowed foreign states to do this.
182. Civil proceedings are distinct from civil recovery proceedings described above, despite the confusing similarity of name, and are not dependent on government-to-government cooperation using MLA. They are private claims made by a government to recover the proceeds of corruption, analogous to some extent to claims made by a liquidator of an insolvent company to recover misappropriated company assets from directors, employees or third parties.
183. While there is a duty on claimants in civil proceedings that make allegations of corruption or dishonesty to be precise and avoid vague allegations, in corruption cases the evidence is nearly always incomplete, obliging a court to infer corruption from the available facts. In complex cases it is sometimes difficult to identify the boundary between material justifying an inference of corruption, and material that is too vague to prove a case. There is however greater scope in private civil proceedings to ask a Court to infer corruption. Furthermore, the assets of defendant PEPs often derive from a mixture of legitimate and illicit activities, with private civil proceedings offering claimant states the possibility that damages for corrupt activities can be enforced against assets which have been obtained legitimately (or, more often, against assets which cannot be proved to have been obtained illicitly). This is not possible in criminal or civil forfeiture cases.
184. There have been a number of recent examples of states bringing civil proceedings in the English High Court to recover the proceeds of corruption⁹¹.

Asset Discovery and Recovery

185. It follows that before criminally financed assets can be recovered, there has to be some basic information to hand that identifies asset location and ownership. Clearly, where the information is not already available, investigation is required. To assist overseas 'victims' to locate UK-based assets, TI-UK has looked at ways in which appropriate intelligence could be made available or the investigation could be

facilitated. Those relating to improvements to international cooperation and MLA are dealt with in Part 4. Here, we shall refer only to the effective registration of title to real estate.

Registration of Land Ownership and Foreign Politically Exposed Persons

186. In England and Wales, real estate is registered at the Land Registry, which both places ownership in the public domain, and makes it easy and inexpensive to obtain a search on an individual property in order to identify its legal owner. Records of beneficial ownership are not maintained on this public register.
187. In the past, the register has not always included the place of incorporation of a foreign company owning property, which helps those PEPs who often hold property in the UK through offshore vehicles (as evidenced by the majority of recent cases). In investigating assets it is helpful to know the place of incorporation of the company that owns property, as obtaining this sort of information through international company searches is time-consuming and costly.
188. At present, in order to transfer ownership of property, a foreign company purchasing property has to provide the Land Registry with its place of incorporation.
- *TI UK recommends that this requirement needs to be rigorously enforced. It should be necessary for trusts and similar organisations acquiring property to provide the names and addresses of the trustees for inclusion on the register. If a case is made for not including these details in the public part of a register, they should still be filed and be available to law enforcement agencies conducting criminal investigations.*
189. TI-UK has also considered whether the register held by the Land Registry should record the ultimate beneficial owner of companies, trusts and entities acquiring property in the UK (which would require notification) when ownership of property by ordinary UK citizens is already publicly available. Significant resistance to such a move could be expected.
- *TI-UK recommends that the identity of ultimate beneficial owners should be available to law enforcement agencies conducting criminal investigations. Conveyancing solicitors acting on property transactions may be taken to have access to this information (as otherwise it is difficult to see how they could have complied with their regulatory and ML obligations).*

91. See cases in Annex 1.

PART 4

ENHANCING ASSET RECOVERY PROCESSES

Introduction

190. The decision to undertake this study had its origins in reported difficulties encountered by foreign states in recovering the proceeds of corruption or theft when those moneys were either deposited in the UK or had been used to purchase UK assets. Cross-border process is always complex – from initial suspicion to locating and tracing assets, investigation, charging with criminal offences or launching civil proceedings, through to recovery and repatriation of assets. Overall it is an enormous subject area and a report such as this can only hope to offer a few pointers about possible improvements to ensure that the authorities and procedures in the UK become fully part of the solution. TI-UK is satisfied that much effort has been applied in recent years towards this objective and commends everyone involved. However, it is felt that there remains much room for further improvement.

191. The challenges in international cooperation and its procedures described below are widespread. Most countries, including the UK, face these challenges. In particular, the countries that most need international assistance to recover stolen assets are often those that do not have mechanisms in place, or, where they do, often do not meet international standards. This study concentrates on what is being and might be achieved in the UK. It is felt that the MLA process would be greatly assisted by the further development of networks, assisted where necessary by additional bilateral instruments.

International Cooperation: Mutual Assistance and Mutual Legal Assistance

192. Corruption and ML are, increasingly, transnational crimes and, as such, require investigators and prosecutors to gather evidence across borders. Equally, in a world of financial networks that may span many states, a domestic corruption case will often demand evidence from foreign jurisdictions.

193. The UK provides a full range of legal assistance to judicial and prosecuting authorities in other states for the purpose of criminal investigations and criminal proceedings. The UK is able to assist any country or territory, whether or not that other country or territory is able to offer assistance in return – that is without insisting on reciprocity.

194. Unlike some states, the UK is able to provide most forms of assistance without a bilateral treaty or multilateral instrument forming the basis of a request.

195. The UK does not usually require dual criminality to be satisfied when asked to execute a request. Thus, the criminal conduct set out in a letter of request to the UK need not constitute an offence under UK law had it occurred in the UK. Again, there are exceptions relating to requests involving the exercise of search and seizure powers, restraint and confiscation requests, or requests made for banking evidence under the Protocol to the EU Convention on Mutual Assistance in Criminal Matters. But in cases where dual criminality is not satisfied, the requesting states are encouraged to consider informal or administrative assistance to obtain the necessary results.

196. The framework and procedures for formal assistance (often referred to as “mutual legal assistance” (MLA)) and informal cooperation (often referred to simply as “mutual assistance”) are bewildering and can depend on attitudes and opinions of those on the ground to whom requests are made.

197. As is the case with most states, requests by and to the UK are made by means of either MLA or mutual assistance. To avoid confusion, mutual assistance will in this report be referred to as “informal” assistance. As a general principle, evidence is sought or provided by the formal, MLA channel, whilst information or intelligence is provided informally. However, to that general rule needs to be added another principle, namely that many states, the UK included, will gather and provide evidence through the informal route, when it is non-contentious or does not require the exercise of a coercive power (such as search and seizure). The fact that a piece of evidence has been obtained informally does not

mean that it is any less admissible, providing, of course, that the evidence is in an appropriate evidential form. The label 'informal' simply refers to the method of making and executing the request.

198. In relation to MLA, the UK is able to make requests and to provide a full range of legal assistance in criminal matters under Part I of the Crime (International Cooperation) Act 2003 (CICA), along with sections 5 and 6 of the earlier Criminal Justice (International Cooperation) Act 1990⁹².

The Mutual Legal Assistance Structure

199. There are subtle distinctions between the legal and administrative structures for MLA in different parts of the UK. As for the remainder of this report, the text will concentrate exclusively on the situation in England and Wales.

200. Powers and duties in the CICA are those of the Secretary of State. In practice they are exercised and fulfilled by the UK Central Authority (UKCA) within the Judicial Cooperation Unit in the Home Office. The powers and duties of 'central authorities' in various countries differ enormously, depending partly on the government department responsible (for example, the Home Office has responsibility for policing but not for the courts) and partly on the domestic law of each country. The UKCA is responsible for UK policy on MLA and for handling incoming and some outgoing requests. It exercises discretion on behalf of the Secretary of State to:

- o Determine whether an incoming request can be acceded to, taking account of bi-lateral and multi-lateral treaties and grounds of refusal⁹³;
- o Provide assurance that a request is properly made;
- o Select and nominate the relevant executing authority to deal with a request. Generally the execution of requests will be handled by the police services, HMRC, SOCA or a court nominated to receive evidence; and
- o Transmit outgoing requests.

201. UK prosecutors are directly involved in the above functions as follows:

- o Incoming requests for restraint and confiscation under the POCA (External Requests and Orders) Order 2005 will be referred to prosecutors, the objective being to provide the same level of international cooperation in freezing and confiscating proceeds of crime as is available in domestic cases; and
- o Prosecutors can send requests directly to overseas authorities, although the UKCA must be notified of such a request being made.

202. Incoming requests in respect of cases of serious or complex fraud may be referred by the UKCA to the SFO which has an important role in regard to MLA, particularly having regard to its coercive powers to obtain evidence. HMRC also has MLA functions in regard to matters within its remit; in respect of VAT, customs duties and other indirect taxes, it can receive letters of request direct from the requesting authority, and that facility will shortly be extended to include direct taxation matters.

203. The UKCA facilitates and expedites the way requests are made and executed. It handles over 5,000 new requests annually – of which around two thirds are incoming requests – with a current caseload of about 13,000.

204. The UKCA has recently been restructured and expanded. According to the UKCA, this followed the development of a measured and costed business case. This involved the creation of two incoming evidential request teams and was accompanied by a wholesale change in working practices, including priority ranking of cases by complexity and urgency. This will be reinforced by a new IT database management system which should greatly improve the service provided. Preparations are also being made to equip the UKCA to deal with the European Evidence Warrant that is due to come on stream in the next two years.

205. The department is now led by an experienced criminal lawyer with casework prosecution experience. In addition, each of

92. Other domestic legislation, such as the PACE is also relevant to processes of evidence gathering, even when that takes place at the request of a foreign state.

93. Experience has shown that requests are rarely declined. Apart from criteria arising under a relevant treaty, the UK may decline a request that affects national security or other essential interests or where it would run contrary to the UK's public policy. It will also decline a request where a trial in the requesting country would involve double jeopardy. Apart from declining a request, there is also a discretion to delay or prioritise the execution of requests if execution would prejudice on-going investigations or prosecutions in the UK.

the evidential request teams is now led by one of two newly appointed lawyers, each an experienced prosecutor from the CPS and the SFO respectively. As team leaders, their role is to examine every new request for assistance to determine whether the assistance requested can be given and if so to whom it should be referred. This would include incoming requests for asset recovery matters. Each team leader is supported by experienced casework managers.

206. Under this new regime deficiencies in requests will be highlighted to the requesting state at the earliest opportunity to enable amendments to be made quickly and the fullest range of assistance offered.
207. The UKCA continues to receive support from the Home Office Legal Advisers Branch and occasional advice from in-house lawyers in the MPS, SOCA, HMRC and the prosecution agencies.
208. There is no doubt that much innovative work has been initiated and is being developed, although the UKCA recognises that this will inevitably need time to settle down and become fully effective. It is entirely sensible that a restructuring so recently implemented should have a reasonable time in which to demonstrate its effectiveness, but this has to be looked at in the light of experience over recent years of looking for improvements in the service provided. At the time of the Cabinet Office report in June 2000, entitled "Recovering the Proceeds of Crime," there were concerns as to whether the UKCA would be able to respond to likely increases in calls upon its resources, whether it needed to increase legal expertise and what scope there might be to increase the speed with which requests could be processed. To an outsider, the Home Office guidance on handling times at that time did not appear to be demanding.
209. The UK's performance in responding to incoming requests has not enjoyed nor merited an outstanding reputation, although it was not alone in this regard among central authorities. More recently, the June 2007 FATF mutual evaluation report expressed concern about the ability of the UK authorities to handle mutual legal assistance requests in a timely and effective manner. It is understood that within the relevant

Home Office policy directorate, the FATF assessment is accepted. The recent restructuring is a response to that assessment. It is recognised that time would be required, staff were only now being trained and the aim is to have cleared all cases received pre-July 2008 by autumn 2010. However, it is fair to assume, given the task, that there will be an element of 'drift' on certain cases. Communications have been sent to other central authorities explaining the steps now in place and demonstrating that the UKCA takes very seriously the speeding up of the process and looks to have good relations so that the other authorities would deal speedily with the UK's outgoing requests⁹⁴.

210. TI-UK welcomes the restructuring of the UKCA. However, if it is to progress towards the greater leadership role that TI-UK proposes for it over time, it needs to be open to constructive ideas for further enhancement. The UK should recognise that its common law derived system does not fit comfortably with the civil law systems that apply in continental Europe and in many other jurisdictions around the world where there is a very different understanding of how, for example, evidence obtained from overseas is adduced and in what format. This is a challenge that calls for even more effort and should not be seen as an excuse for what others might see as under-performance.

Building Working Relationships in Mutual Legal Assistance and Informal Assistance

211. The extent to which states are willing to assist even with formal requests may vary. In many instances, although the willingness of a state to execute a formal request is dependent on that state's own domestic laws and on the nature of its relationship with the requesting state, a key determinant is too often the attitude and helpfulness of those "on the ground" in the requested state. For there to be reliable, timely and effective MLA or informal assistance, it is therefore very important that solid transnational working relationships are built up and maintained. Many developing countries, both Commonwealth and non-Commonwealth, complain that they find it difficult to build up effective one-to-one relationships with UK practitioners, particularly in

94. Based on an uncorrected transcript of proceedings of a Sub-committee of a House of Lords Committee.

England and Wales⁹⁵. The size and complexity of the UK's criminal justice system would make this difficult, but other factors would include the differing structures and systems between requesting states and the UK and a lack of knowledge of the agency whose functions most closely correspond with those of the agency responsible for issuing the request.

212. The Home Office supports the use of informal mechanisms wherever possible, but it is the police and investigating agencies that are currently competent to deal with informal requests for evidence and assistance. Indeed, there already exist a number of well-established police-to-police (or investigator-to-investigator) informal channels that can be utilised quite successfully in this regard.

213. With the exception of incoming requests for restraint and confiscation as described above (paragraph 201), in the UK the prosecuting agency (the CPS) does not play a formal role in dealing with incoming letters of request. Of course, general guidance may be sought, and indeed is sought from CPS Headquarters, particularly in relation to specialist areas such as covert deployment. Where the formal role exists, (as it does for the CPS in restraint and confiscation and for outgoing requests) it is much easier to establish day-to-day working relationships. There are examples of good practice in developing such relationships, as is also the case with the SFO and RCPO. The solution chosen for dealing with incoming requests for restraint and confiscation was to refer them to prosecutors. If the record for dealing with these requests is found to be good, there might be a case for considering a similar route for requests in other categories.

214. The key prosecution agencies have established networks with other jurisdictions, and have assisted a range of developing states in making requests to the UK, both through the Secretary of State referrals, and also through proactively identifying early stage needs from some states. The value of

informal assistance of this type, which is encouraged by the UKCA in the specialist cases referred to, is twofold:

- o An informal request which can be executed informally (but which will provide admissible evidence) tends to be much speedier than the formal process and will not clog an already overloaded MLA transmission network; and
- o An informal dialogue acts as a useful prelude to a subsequent formal request and may even result in the requested state assisting in the drafting of the letter of request itself.

215. The Home Office encourages requesting states to submit draft letters of request in more complicated and difficult cases, but it is noteworthy that this service is seldom used by developing countries which are often most in need of it, in recovering looted funds and the proceeds of corruption. In some cases there could be a risk in a draft being submitted for approval before it has been determined whether or not the request, when formally made, can be acceded to. Cases raising issues that could lead to a request being declined would be better dealt with at the early stage by the UKCA acting for the Secretary of State, rather than a prosecuting agency, to avoid expectations being raised and then disappointed by the request itself being declined with potentially damaging consequences for bilateral relations.

216. It is apparent that prosecutors and law enforcement personnel, both in the UK and in the requesting jurisdictions, could make more use of the informal approach to AR and ML investigations. While there is no definitive list of the types of enquiries that may be dealt with informally, some general observations can be made:

- o If the enquiry is a routine one and does not require the requested state to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request;

95. *There is a perception by other States, and particularly within the Commonwealth, that the UK has also failed to make effective strides towards building informal networks of communication with prosecutors and investigators in other jurisdictions. It is notable that the Commonwealth Network of Contact Persons (CNCP) has been set up to provide a network for facilitating cooperation in criminal matters, and yet the perception remains that the UK contact points have not been proactive. The purpose of the Network is to facilitate international cooperation in criminal cases between Commonwealth Member States, including in counter-terrorism and anti-corruption investigations. The Network is geared towards enhancing the operation of countries mutual legal assistance and extradition regimes, through Contact persons providing legal and practical information necessary to the authorities in their own country and Commonwealth States wishing to invoke international cooperation. The Network, which does not replace the Central Authorities, provides an informal structure which will allow for quick access to practical advice and guidance on issues relating to international cooperation in criminal matters.*

- o Public records such as Land Registry documents and registration of companies' documents should offer information about directors and shareholders and provide filed accounts. These records may often be obtained informally and, indeed, may be available openly on the internet;
- o Potential witnesses may be contacted to see if they are willing to assist the requesting authorities voluntarily;
- o A witness statement may be taken from a voluntary witness, particularly in circumstances where the evidence is likely to be non-contentious; and
- o Basic subscriber details from communications and service providers that do not require a court order may also be dealt with in the same, informal way.

217. Equally, prosecutors and investigators should bear in mind the sort of requests where a formal letter of request is required:

- o Obtaining testimony from a non-voluntary witness;
- o Seeking to interview a suspect under caution;
- o Obtaining account information and documentary evidence from banks and other financial institutions (see paragraphs 236-237);
- o Requests for search and seizure;
- o Internet records and contents of emails; and
- o Transferring consenting persons into custody in order for testimony to be given.

Causes of Delay in Mutual Legal Assistance

218. One of the concerns most frequently expressed by representatives of the competent authorities in other states is of delays in execution, or refusal of requests for inconsistent reasons. From discussions with sources outside the UK and from the UKCA itself, it is apparent there are a number of causes for delay or refusal. Among these are:

- o Letters of request transmitted which lack precision, or in respect of which there is no nexus between summary of the facts and the assistance being requested;
- o Poor quality of translation into English;

- o The evidence requested being, in fact, unavailable or delayed because, for instance, it is in the hands of a third party such as a bank, or is "historical" and the records have been destroyed;
- o An absence in the letter of request of the contact details of those undertaking the investigation in the requesting state; and
- o The likely effect of executing a request where, in the UK, an ongoing investigation is taking place.

219. Some of these commonplace errors reflect inexperience or poor practice, mistakes that could be rectified within an active network of practitioners.

Further Enhancement of the UK Central Authority for Mutual Legal Assistance

220. Certain states have traditionally regarded MLA and the passing of information or formal evidence to another country as being almost tantamount to a surrender of sovereignty. The whole process of reform in international cooperation would benefit greatly if one or two (preferably G8) countries were willing to take the lead to promote a new vision of what can be achieved by a fully resourced and highly motivated MLA service. The UK has particular interests in providing that lead, not least in the area of ML and AR and other economic crimes.

221. There is no doubt that following the current restructuring, the service provided by the UKCA will be much enhanced. It would be reasonable to look forward to:

- o Reduction of the accumulated caseload outstanding at any one time;
- o On incoming requests, much reduced times for decisions as to whether a request can be acceded to and referred to executing agencies;
- o Assistance at the earliest stages to requesting states in drafting letters of request;
- o Further quality assurance in relation to incoming requests;
- o Deficiencies in requests to be highlighted to requesting states at the earliest opportunity with offers of assistance to remedy them;

- o All cases categorised according to complexity and urgency with response times indicated to executing agencies and UKCA follow-up;
- o The known availability of a 24/7 facility to deal with really urgent requests;
- o Encouragement of informal assistance whenever appropriate; and
- o Commitment to developing and maintaining contacts and networks built up with other jurisdictions and sharing this information with other UK agencies as appropriate.

222. With this and doubtless other improvements in place, the UKCA could over time come to be recognised as a global leader and centre of excellence in MLA. It is right that current measures should be allowed to settle down and consolidate.

223. Following the restructuring and with established mechanisms and working arrangements for collaboration with the Home Office and other lawyers in place, the UKCA may find itself with exactly the right level of expertise and capacity in order to meet its objectives. However, TI-UK thinks that there could be positive advantages in an arrangement which could harness, in support of the MLA process, practical and specialised prosecutor experience (including knowledge of MLA mechanics). Prosecutors, at least those specialists working at the CPS headquarters or in some area offices, and other prosecutor agencies, are the authors and issuers of many outgoing requests and will have quality assured many others. Some have had experience of negotiating MLA treaties with other States and have spent time in other countries as part of the MLA process or in increasing MLA capacity in other countries. Much of this experience is not of course unique to prosecutors (e.g. many at the UKCA have themselves been prosecutors or engaged in the negotiation of MLA treaties), but TI-UK can see no reason why this additional resource should be denied to the UKCA and requesting states. Over time it would be likely to be valued by the UKCA and requesting authorities.

224. If implemented, it would be necessary to define those cases where the specialist knowledge and experience of prosecutors would assist the process. In addition to those cases which are already referred to the CPS (restraint and confiscation) it is thought that this resource could be particularly valuable, for example, in issues around public

interest immunity, covert surveillance and other urgent covert deployments, instances where there may be a related UK investigation, financial investigations, specialist areas where treaty knowledge would be helpful and circumstances involving some of the more difficult points of evidence gathering (e.g. video link evidence and child witnesses).

TI-UK therefore recommends that:

- *The restructured UKCA should be independently evaluated by 2012 to assess the extent to which the objectives envisaged for it have been achieved, such evaluation to include a sounding of levels of satisfaction achieved among requesting states and partner agencies that have made use of UKCA's services;*
- *A related evaluation should look particularly at cases of restraint and confiscation referred to prosecutors in accordance with the POCA (External Requests and Orders) Order 2005 and consider whether that precedent could advantageously be extended to other applications; and*
- *Should the above evaluations indicate that changes should be considered, the Home Office consider future policy for more direct involvement of suitably qualified and experienced prosecutors in the MLA process.*

The UK Central Authority for Mutual Legal Assistance: Building Capacity in Requesting States

225. Building capacity in requesting states, particularly Commonwealth states, is in the interests of the UK. Effective international cooperation is key to AR. States parties to UNCAC have, hitherto, been unable to advance implementation of the Convention's asset recovery provisions in a practical and meaningful way. The UK has the opportunity to give a powerful lead to other states by initiating a proactive 'outreach' programme aimed at building the capacity of developing states to make and receive both formal MLA and informal requests.

- *TI-UK recommends that a group of 'priority' states be identified and that each be offered targeted and practical capacity building, technical assistance and mentoring by a multi-agency specialist 'team'. The objective will be to build 'in-state' expertise which is sustainable and which, in turn, can both disseminate skills and knowledge nationally and build working relationships regionally and internationally with other specialists⁹⁶.*

226. Such a capacity building programme should aim to:

- Address the deficiencies often found in letters of request from developing states seeking the tracing and returning of assets⁹⁷;
- Create cadres of specialists in the priority states;
- Promote the efficient execution of MLA requests in developing states (including, of course, requests from the UK);
- Build skills and confidence amongst those practitioners being mentored which should in turn better enable them to investigate and prosecute those crimes which are usually transnational in nature (including corruption, money laundering, trafficking and organised crime);
- Enhance network building and regional cooperation;
- Result in greater, appropriate, use of informal channels; and
- Improve information sharing, particularly within regions and with the UK; and
- Assist in building capacity to combat money laundering if one or more OTs are included. This will in turn fulfil obligations under UNCAC (the Convention being extended incrementally to the OTs).

Her Majesty's Revenue & Customs and Mutual Legal Assistance

227. HMRC is a competent authority for incoming letters of request in respect of criminal matters concerning both indirect and direct taxation. Because it handles a relatively small number of requests and they are all in a specialist area, the situation is not comparable with that of the UKCA. An example of what might be achieved is provided by the experience of HMRC lawyers, who have a lawyer/client relationship with HMRC investigators but no prosecutorial

function⁹⁸. Incoming letters of request are generally drafted by foreign competent authorities with real specialisation and understanding of tax offences and are therefore usually of an acceptable standard.

228. It is clear that HMRC has developed contacts with those states around the world that regularly make tax-related requests. Furthermore, its network of fiscal crime liaison officers (FCLOs) has proved to be a valuable resource as a first point of enquiry/clarification for a requesting state when a query or point of uncertainty arises in advance of a letter being sent. We also understand that FCLOs from foreign states based in the UK have been effective in, for instance, ascertaining on behalf of their own domestic authorities what is needed for, or what powers may be used in, the execution by the UK of an incoming request.

Asset Recovery

229. Given that the asset recovery provisions of UNCAC are viewed as a breakthrough in the international response to corruption, the UK's ability to receive and execute requests from states whose assets have been stolen needs to be considered.

230. Once a request is made, evidence relating to financial institutions and bank accounts is usually obtained by means of testimony or a witness statement from a member of the financial institution's staff⁹⁹. However, the lack of a central record of bank accounts in the UK presents a requesting state with difficulties. Not only do the UK authorities need as much identifying information as possible if they are to identify where a particular account is being held, but the retention policies of financial institutions may also vary¹⁰⁰.

96. DFID and TI-UK organised an intensive two day seminar in 2002 in the UK to which MLA practitioners from developing countries were invited. Furthermore, UKCA has led a delegation to China and hosted Vietnam, China and Kenya in the last year. The Justice Assistance Network, a network of 22 government departments and agencies and the wider justice sector, has also established a corruption group. The purpose of this is to achieve a sustainable impact in supporting locally owned capacity development. It has become a successful tool to coordinate, facilitate and develop information sharing.

97. One approach could be to promote the MLA Request Writer Tool developed by the UNODC's Legal Advisory Programme to help practitioners draft effective requests, receive more useful responses and streamline the process.

98. Prosecutions are conducted by RCPO.

99. They may also produce relevant documents as exhibits.

100. It is common practice though for records to be kept for about five years.

231. Under CICA, requests for information on bank accounts are subject to additional restrictions not applicable to many other aspects of MLA requests. These requests are dependent on a dual criminality requirement. They may only be executed if the request comes from a state that was a member of the EU on 1 November 2006 (this also includes Romania and Bulgaria designated after accession to the EU in 2007) and is a party to the protocol to the EU Convention on Mutual Assistance in Criminal Matters, or a state which has been explicitly designated by the UK, such as the US, and is able to provide reciprocal assistance. Sometimes, however, requesting states provide insufficient reasons why the requested information is of substantial value for their investigation.

232. An investigation that seeks to identify and recover assets will inevitably touch upon the issue of search and seizure. Since a UK Court has to be satisfied that it is appropriate to issue a search warrant, it is not sufficient for a request to be accompanied by a search warrant issued by an authority in the requesting state; rather, the full requirements under the Police and Criminal Evidence Act 1984 (PACE) must be satisfied.

233. When there is a request to freeze or confiscate assets¹⁰¹, the UK is able to provide assistance at the investigative stage on an MLA request in line with Part 11 of POCA. The majority of confiscation requests are executed by the CPS, which has further indicated that the timeliness and effectiveness of the procedure is enhanced if self-contained confiscation requests are made which do not include requests for other forms of evidence, such as the taking of witness testimony. On the face of it, therefore, a requesting state needs to issue two separate requests if confiscation or freezing is required and other evidence is still to be gathered.

234. It is noted elsewhere¹⁰² that confiscation in rem (that is to say, non-conviction based asset forfeiture) can be a vital anti-corruption and AR tool¹⁰³. It is important for states to ask, therefore, whether a request in relation to confiscation in rem can be made through MLA channels. The position varies from state to state. In the UK, where POCA provides for a system of civil recovery even in the absence of a conviction, there are circumstances when a request may be made¹⁰⁴. Assistance rendered by the UK in this regard is not provided on the basis of any mandatory bilateral or multilateral agreement, but rather on the basis of reciprocity alone, with the UK able to exercise its discretion and refuse a request.

235. In addition, although civil recovery/confiscation can be enforced in the UK once a request has been made, at present the UK is unable to execute a request to freeze assets following confiscation through in rem proceedings. Although the request may come via the Central Authority of the requesting state or from any one of a requesting state's competent authorities, it must correspond to an order made in the requesting state. Consequently, the UK is currently unable to seek a civil order in the UK through MLA channels where no actual order exists even though the evidence supports the making of an order on behalf of the requesting state.

Procedures for Obtaining Banking/Financial Evidence

236. In England and Wales and in Northern Ireland the UKCA usually nominates a Court to receive evidence. In the case of a bank or financial institution, an official will then provide a statement under oath along with documentary exhibits. A bank is under no obligation to inform the account holder that it has been ordered to disclose information¹⁰⁵. However, there may be circumstances where an account holder is notified¹⁰⁶.

101. *Where the qualifications of requesting States as outlined above are applicable.*

102. *Section 3.7.*

103. *Article 54 of UNCAC requires States Parties to consider whether such a system of recovery should be introduced. The Commonwealth Expert Group on Asset Recovery also recommended that all Commonwealth States should adopt legislative measures to enact confiscation in rem within their jurisdiction.*

104. *Such a request must be sent to the Secretary of State for the Home Office (for England and Wales and Northern Ireland) or to the Civil Recovery Unit in the Crown Office (for Scotland).*

105. *This is reinforced by an offence of disclosure. Section 42 CICA.*

237. POCA permits the monitoring of bank accounts in support of confiscation, ML or civil recovery investigations, although this provision has not yet been implemented. If implemented, the powers would also be available through MLA channels, although requesting states would need to be more aware of this facility. In the event that a monitoring order is granted, the period of monitoring will not exceed 90 days.

- *TI-UK therefore recommends the implementation of this provision of POCA.*

Requests to the Crown Dependencies and UK Overseas Territories

238. It is apparent that a degree of confusion exists regarding requests to a CD or OT; indeed, from time to time requests are sent to the UKCA in error. Clearly more has to be done among those responsible for international cooperation to make requesting states aware of the correct channels. The CDs and OTs are not part of the UK; rather, each dependency or territory is responsible for executing requests for its jurisdiction¹⁰⁷.

Improving Mutual Legal Assistance in Asset Recovery and Anti-Money Laundering Investigations

239. There is a perception in some developing states that the UK is reluctant to trace and recover funds illicitly obtained from state coffers by PEPs and then held in UK accounts. However, this view is not widely shared by UK police and prosecutor practitioners; in fact the initial identification and location of assets within the UK appears to proceed relatively smoothly, and it is only later on that difficulties seem to arise. For example, in a case where a PEP was being held in custody in the UK, although SOCA alerted the PEP's own state to the existence of recoverable assets, this state declined to take any action. Further liaison revealed that those dealing with the matter in the other state were unaware of the measures that could be taken through international cooperation. Insufficient awareness and lack of capacity are a problem in several countries.

240. A solution might be forthcoming if the UK mounted a concerted awareness raising programme to enable states to gain a better understanding of how much can be achieved to trace, restrain and recover stolen assets. However, cooperation from the requesting state is always vital. The UK, like Switzerland, is able to use its own investigative powers, even where there is relatively little evidence arising from the state which is actually seeking the asset recovery. In making this suggestion TI-UK is conscious that, on the ground, all law enforcement agencies have performance indicators and targets which prioritise other crimes.

241. *As a practical way forward, TI-UK recommends that:*

- *The UK Government considers entering into memoranda of understanding with those states, which, it is believed, have claim to considerable stolen assets and proceeds of corruption presently in the UK or passing through UK financial institutions. While there are misgivings about the value of entering into memoranda of understanding, a practical document which is capable of ready implementation between the UK and, in this context, a key state, would have every chance of improving international cooperation;*
- *Restraint and confiscation in the international context should feature in the performance targets of certain branches of law enforcement; and*
- *Consideration is given to the UKCA's role in such an awareness raising exercise. Outreach efforts might also be usefully pursued in conjunction with DFID and SOCA.*

International Cooperation Mechanisms

242. TI-UK is concerned to ensure that value is obtained by the UK through international cooperation mechanisms. One such mechanism is the CARIN, which is an informal grouping of contacts dedicated to improving cooperation in all aspects of tackling the proceeds of crime¹⁰⁸ and increasing the effectiveness of members' efforts through cooperative inter-agency cooperation and information sharing. Full

106. *For instance, if he/she is an innocent third party to the offence being investigated and there is no risk that the suspect or target will be put on notice or the investigation otherwise jeopardised.*

107. *Oddly, however, Interpol London is the relevant Interpol office for the CDs and for some of the OTs (the Falkland Islands and Saint Helena). MLA requests, therefore, should usually be sent to the Attorney General of the CD or OT concerned.*

Membership of the CARIN network is open to EU Member States and to those states, jurisdictions and third parties who were invited to the CARIN launch congress in 2004. Each Member may nominate two representatives, one from a Law Enforcement Agency and one from a Judicial Authority to be their CARIN contacts. Assets Recovery Offices may represent either law enforcement or the judiciary¹⁰⁹.

243. In principle, CARIN should be a key entity in facilitating MLA. This can be achieved if CARIN is well-resourced and participating states commit their most able practitioners to it. Similarly, every indication suggests that Eurojust and Europol are not being used to their fullest potential. Eurojust is certainly adept at resolving, for instance, multi-jurisdictional issues which might arise during the course of a case or an investigation; however, it is well placed to play a bigger part in facilitating broader international cooperation than it does at present.

244. Internationally, the system of liaison magistrates has been highly successful. This resource, which assigns prosecutors to a different jurisdiction in order to assist international cooperation between their state and the other jurisdiction, is a process worthy of replication elsewhere¹¹⁰. This system could also benefit developing states on a regional footing by providing both an enhanced level of cooperation to assist mutual cooperation and liaison further afield, particularly with European states. Indeed, in the longer term, regional networks would find themselves able to "plug in" to other existing mechanisms such as Eurojust and the CNCP.

245. It should not be forgotten that UNCAC requires states to afford each other the widest measure of assistance (Article 51). However, this needs to be translated into a practical international response. For example, it should be relatively straightforward for states to agree upon the need for the requesting state to give specific deadlines for execution, the value of joint investigations (Article 49), the practical use of oral transmission in urgent cases (Article 46(14)) and the practical circumstances where transfer or consolidation of

proceedings would be in the interests of the proper administration of justice (Article 47).

- *TI-UK recommends that the UK continues to offer assistance to networks for AML/AR in regions such as East and West Africa and South America and extend such assistance to South Asia. It should also facilitate regional cooperation networks of liaison magistrates/prosecutors, working with the CNCP in the case of Commonwealth countries.*

Assistance to Requesting States

246. UNCAC provides a sound basis for better cooperation on asset recovery. Article 51 requires states to provide each other with the widest measure of cooperation and assistance, while other Articles require states to ensure that they can recognise and give effect to confiscation orders made outside their borders. They are also required to consider taking steps to allow confiscation without conviction. They should be able to seize and freeze assets where there are sufficient grounds for taking that action and for believing that a proper confiscation order will be forthcoming¹¹¹.

247. Notwithstanding these and other provisions of the Convention, the recovery of assets remains a complex and difficult process.

248. In this regard, the UK has taken a strong and proactive stance that, in most respects, is commendable. Indeed, the anti-corruption agencies in a number of states have noted the good relationships they enjoy with the British authorities, particularly the police, and the high degree of assistance they receive in making investigations. While clearly there have been some successes, weaknesses do remain in the UK's approach.

249. Countries seeking to recover assets fail to take full advantage of the remedies available to them by submitting requests that do not contain the necessary evidence, or in other ways fail to meet the requirements of the requested state.

108. *The CARIN permanent secretariat is based in Europol headquarters at the Hague. CARIN members meet regularly at an Annual General Meeting (AGM). Access to the CARIN network and its website is restricted to members of the network. The organization is governed by a Steering Committee of nine members and a rotating Presidency.*

109. *However, observer status is available to states, jurisdictions and third parties which can not be Members. Several international organizations, including the Egmont Group and Observer status does not entitle the state, jurisdiction or third party to a vote at any plenary meeting or to membership of the Steering Group.*

110. *It is noted that the UK currently has a successful liaison magistrate presence in France, Italy, Pakistan, Spain and the USA.*

111. *Other practical measures proposed by UNCAC are referred to in Part 1.*

Furthermore, countries that are victims of corruption themselves may have ratified the Convention, but have not always implemented its provisions. While admitting that these deficiencies do exist, it is also necessary for the UK to recognise that the relevant criminal justice and judicial systems are unlikely to be as developed as those in the UK or other developed countries. Assistance with the mechanics of tracing assets from the act of corruption to their present holder, identifying their whereabouts, and framing actionable requests for assistance is as important as the willingness to respond to requests.

250. There are a wide range of programmes funded by the UNODC and other international bodies that are designed to assist in implementing anti-corruption measures and retrieving stolen assets (such as StAR). However, the UK authorities might want to identify those countries where assistance would be of greatest value and to establish bilateral relationships with them to ensure that assets can be recovered from the UK. As a minimum, the UK authorities could offer to fill the gaps in the internationally funded programmes and establish bilateral relationships to assist the process of asset recovery.

251. Having spoken to a number of authorities in the UK, TI-UK is satisfied that a genuine will exists at all levels to assist in the recovery of stolen assets. There are a number of practical reasons for this:

- o At a political level, there is an overriding imperative to support reforming governments who are seeking to enhance governance;
- o At the level of law enforcement authorities, there is a clear understanding that in assisting asset recovery it is in the UK public interest to convict those intermediaries who facilitate the laundering since these same individuals are also likely to be involved in laundering funds acquired from UK criminal activity;
- o At the level of the financial services regulator, there is advantage in using the investigations designed to trace the movement of stolen assets from abroad to determine which institutions are failing to implement AML requirements properly.

252. Even among the reporting institutions themselves there is little reluctance about returning stolen funds. For a start, these funds will not necessarily be found in simple bank accounts that earn interest for the bank; rather, they are

frequently held in the form of other assets, which often need managing. While a reporting institution would expect to be reimbursed for the costs of managing the assets, the process of freezing and seizure means that this is not always the case. In addition, there is the likelihood that they might face a series of legal demands from official agencies and, perhaps, conflicting demands from the nominal owners of the assets, which will all need expensive legal assistance to resolve. Moreover, they stand to lose an important source of profit from the former presumed owners of the funds – the selling of fee-based services to them as high net worth customers. These practical matters are in addition to any reputational damage that might accrue to a major reporting institution seen to be holding looted funds. It is suggested therefore that banks and others would rather be rid of any assets that are the subject of international requests for investigation.

253. This is why it is so important to dispel the impression that authorities and institutions in the UK are deliberately obstructing asset recovery. So long as potential requesting states retain this belief, they may consider that their best hope for retrieving assets lies in making representations at the political level, rather than in accepting technical assistance and making the domestic changes that will enable them to make effective requests. The real problem lies at the technical level, which is why effective technical assistance needs to be made available on a much larger scale.

254. As a demonstration of its willingness to return stolen assets, SOCA suggested that the UK mount a "road show" which could also explain how the UK might assist in particular cases as well as providing advice on the best ways to navigate the UK system for responding to international requests.

- *TI-UK would support such an initiative and recommends that DFID considers a targeted programme of assistance, building upon existing initiatives.*

255. This would bring together different experts from within the UK with the aim of addressing the following issues in the requesting states:

- o The implementation of the UNCAC and particularly the drafting of provisions to permit domestic confiscation orders that do not require convictions;
- o The training and protection of judges who specialise in making confiscation orders to enable these cases to

proceed without improper influence being exerted over the judges themselves and the court timetable;

- o The drafting of legislation to allow countries to recover and return assets that are the property of other states found within their jurisdiction;
- o The implementation of AML provisions that are focussed on recognising the proceeds of corruption and identifying the main methods of laundering, particularly the use of informal money transmission techniques for moving the funds (often in cash) to international centres where they can be integrated into the financial system prior to their progression to other centres (such as London);
- o The establishment and training of a single asset recovery unit that develops expertise in framing requests;
- o The identification of the key jurisdictions where stolen assets are believed to be held, and the development of a database of information on the precise requirements that have to be met in these jurisdictions in order to retrieve stolen assets;
- o The development and maintenance of close relationships with the key officials in the jurisdiction where assets are believed to be held so as to facilitate informal contacts and assistance on a case by case basis; and
- o The training of core staff in the techniques of asset tracing.

256. Sadly, though, a lingering concern remains about asset repatriation, which is shared by civil society organisations in requesting states, that the removal of one corrupt leader can so easily be followed by the installation of another who is equally corrupt, increasing the risk that recovered assets will be stolen again. However, it would be quite wrong for the UK or any other country to decline to recover and return assets simply because they fear they might be stolen again; indeed, nothing should alter the fact that the assets have been stolen in the first place, and have found sanctuary in a developed country because of a lack of due diligence on the part of its reporting institutions.

Coordination of Criminal and Civil Process

257. This Report has already considered both criminal and civil mechanisms for AR of the proceeds of corruption, where it was shown that the two routes are not mutually exclusive. For the reasons given below, it is TI-UK's belief that reasonable and appropriate coordination of criminal and civil procedures will assist in the recovery of the proceeds of corruption from PEPs. Where justified by the evidence, the objective must be to ensure that action is taken to recover corruptly acquired assets by whichever route is best in the circumstances, whether or not criminal prosecution and confiscation are feasible.

258. Of the available mechanisms for the recovery of assets, TI-UK believes that the generally preferred mechanism of asset recovery is criminal confiscation of assets following criminal investigation and prosecution. Corruption, after all, is a criminal activity.

259. The UK, and in particular the POCU, has recently had success prosecuting PEPs and/or their associates. However, in the majority of cases a successful UK prosecution of a PEP for laundering the proceeds of corruption will be difficult. Reasons for this may be several and varied, and they are examined in detail elsewhere in this report (see Part 3).

- *TI-UK recommends that in cases where it proves impossible to prosecute PEPs and obtain confiscation orders, through the PEP Coordination Group process, prompt but careful consideration should be given as to how best to recover their UK assets .*

260. The UK has two key weapons at its disposal:

- o Information about the assets and activities of PEPs, (for example through the SARs data-base and through investigations by law enforcement agencies such as the Metropolitan Police and the SFO); and
- o The Part 5 POCA civil recovery powers.
- *TI-UK recommends that consideration should be given to tasking a specific team in one or more of these agencies with asset recovery from PEPs, and ensuring that the team is adequately resourced and funded.*

261. A team at the Central Confiscation Unit of the CPS, SOCA or the SFO or any combination thereof could undertake this role, using POCA Part 5 civil recovery powers to recover the assets of PEPs not susceptible to prosecution where POCA permits these agencies to use evidence gathered in criminal investigation in civil recovery claims.

262. If these civil recovery powers are not exercised¹¹², an alternative is to assist or encourage the victim foreign state to bring private civil proceedings in the High Court in England. Where necessary, information and documents initially obtained during criminal investigations by UK law enforcement agencies (and which would otherwise have formed the evidence in criminal prosecutions and confiscation proceedings) might be used.
263. This raises the important question of whether, and to what extent, it is permissible and desirable to allow the use of evidence gathered during a criminal investigation in private civil proceedings. Whilst it would be inappropriate for evidence to be gathered using criminal powers for the purpose of private civil proceedings, TI-UK sees no reason why this evidence should not be made available for use by a state wishing to recover misappropriated assets when a prosecution either cannot proceed or is unsuccessful. This is consistent with the principle that it is a legitimate objective of the criminal justice system to recover assets obtained through criminal activity. The alternative is the waste of evidence justifying recovery and repatriation of corruptly acquired assets, evidence that is likely to have been costly to obtain.
264. Such coordination of criminal and civil procedures is not viewed as problematic in some civil law jurisdictions, notably Switzerland, which in some circumstances permits victims of crime to be civil parties to a criminal investigation and prosecution. This has been used in a number of high-profile corruption cases, most famously in proceedings against the Abacha family of Nigeria: as a civil party to the criminal case the claimant state has access to the documents on the court file, the right to participate in the examination of witnesses, the right to make submissions to the investigating magistrate and the standing to seek repatriation of corruptly acquired assets. This seems to allow for a logical separation of rights and responsibilities of the parties, but all in the context of a single process.
265. The gathering of evidence during a criminal investigation is governed by PACE, including powers for the police to obtain evidence by compulsion¹¹³. Production orders are also routinely used in fraud cases to obtain documents held by third parties such as banks and other reporting institutions, and indeed even non-privileged information held by solicitors.
266. Law enforcement officers owe a duty of confidence to the owners of documents obtained during criminal investigations that preclude them from voluntarily disclosing those documents to a foreign state for use in private civil proceedings. This creates a significant problem, however, as a foreign state will often need the evidence that has been gathered in the UK to be able to commence a claim.
267. When this issue was examined by the English Courts¹¹⁴ in fraud cases, it was determined that law enforcement agencies are permitted to reveal information disclosing fraud to a victim of that fraud¹¹⁵, but that ordinarily they should not provide copies of documentary evidence gathered using compulsory powers unless a Court permits disclosure of that evidence (i.e. on the application of a claimant in civil proceedings).
268. These decisions furnish a mechanism to make evidence gathered in criminal investigations into corruption and money laundering by PEPs available to states that wish to bring private civil proceedings to recover corruptly acquired assets. The UK authorities can inform a foreign state that it has evidence gathered during a criminal investigation that a PEP has corruptly acquired assets in the UK, enabling the state to make an application for disclosure of that evidence for use in civil proceedings¹¹⁶. However, it would be preferable if the UK at least took a proactive approach to notifying foreign countries of potential claims, where the UK authorities have information giving rise to a claim, and where there is evidence of corruption but no realistic prospect of a prosecution. Naturally, the information would only be provided where it would be unlikely to jeopardise an ongoing criminal investigation or prosecution.

112. For example, because of difficulties in linking evidence of corrupt activities to specific assets in the UK.

113. For example, production orders can be obtained from magistrates courts compelling third parties holding relevant evidence to disclose it to the investigating officers.

114. We have not investigated the position in Scotland or Northern Ireland

115. See for example the Court of Appeal cases of *Marcel v Commissioner of Police of the Metropolis and others* [1992] Ch 225, *Preston Borough Council and McGrath* 12 May 2000 and *Frankson and others v Secretary of State for the Home Department* [2003] 1 WLR 1952

116. For recent examples of this mechanism in use, refer to the *Alamiyeseigha* case in Annex 1.

269. Consideration needs to be given whether the information is provided proactively or in response to formal requests.

- *TI-UK recommends that private civil proceedings should be considered as one of the mechanisms through which corruptly acquired assets are recovered, and that assistance should be given as far as reasonably possible to foreign states that wish to pursue this route.*

Lowering the Hurdles to Successful Process

Legal and Judicial Process Hurdles

270. There are a number of hurdles to successful process in UK laws and in criminal process that have recently been the subject of attention in the context of evaluation of the UK in regard to its failure to comply with some aspects of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Corporate Liability and Individual Liability

271. There is a serious omission in the law that effectively precludes the prosecution of companies for certain criminal offences with the result that only natural persons can be charged. Although technically companies may be criminally liable, in practice it is difficult for this to operate save in the case of very small companies. Currently the fault element of a criminal offence needs to be shown to be located in a 'directing mind' of the corporation; this is known as the identification doctrine and is only capable of being fulfilled in respect of small companies. The Law Commission is reviewing the law in this area but the reform process is likely to take years to complete and implement in legislation.

Plea Bargaining

272. Current thinking at the SFO in the context of fraud and corruption is that there should be an established framework for a transparent system of discussing pleas at an early stage to reduce delays and costs and achieve successful AR. There seems to be support for this within government, as is evident from the National Fraud Strategy recently published by the National Fraud Strategic Authority indicating that new guidelines are to be issued.

The Prosecution's Disclosure Obligation

273. In the circumstances of complex economic crime, the rules of disclosure are a huge burden to the prosecution. In conducting an investigation, the prosecutor is required to pursue all reasonable lines of inquiry and has to retain all relevant material and to record all information relevant to the investigation in durable or retrievable form. The prosecution then has to disclose to the defence all the material it uses and all unused material that might reasonably be considered capable of undermining the prosecution's case. A failure to meet these obligations can result in a stay of the proceedings for abuse of process.

274. The current disclosure regime has been criticised as being unsuitable for complex crimes involving large volumes of hard copy and computer-based records. However, the Attorney General has for the present rejected proposals for reform but stated that the regime would be kept under review.

- *Consistent with preserving a fair trial, TI-UK would like to see any process or reform that would reduce costs fully examined and steps taken to minimise unnecessary burdens on prosecutors.*

Structural Hurdles

Multiple agencies and coordination

276. As discussed earlier, there is a need for greater clarity regarding the specific roles and functions of the agencies and departments engaged in AML and AR, and for a continued improvement in the level of cooperation between all the agencies involved in the AR process.

277. The number of agencies and organisations involved in the prosecution of ML and corruption-related offences and the subsequent recovery of illegally acquired assets remains somewhat bewildering to those outside the system; indeed, some within the system had difficulty in explaining how each part inter-connected with other parts. Most of those who met with TI-UK seemed more focused on goals and results than on boundaries, creating a good measure of practical cooperation. Although the division between investigation and prosecution is beginning to blur, certainly in serious cases, which is welcomed, there remain a number of questions as to how the prosecuting agencies interact to ensure effectiveness. The manner in which the ARA was created – almost side by side with existing prosecutorial structures – and its subsequent failure in many

fundamental areas of asset recovery, is a salutary lesson to those who believe that another new agency is the answer. In what is already a fairly crowded field, the existence of multiple agencies (both investigative and prosecutorial) requires a tightly coordinated approach and a clear and effective structure.

278. Currently the UK has a framework in place to identify and investigate allegations of money laundering by corrupt PEPs. DFID partly funds the POCU, which investigates allegations of money laundering by corrupt PEPs and to date has had some notable successes in identifying and securing criminal assets from corrupt individuals, particularly those of former Nigerian State Governors. DFID also funds the OACU which works largely with SOCA, SFO and other units of the City of London Police. The remit of this Unit is the investigation of foreign bribery (and thus ML) by UK nationals and companies.
279. The high level of cooperation that exists between many of the agencies involved at the operational level is also seen at a policy and coordination level. We note that there are structures such as the Money Laundering Advisory Committee, which develops AML policy, the Asset Freezing Working Group (AFWG), which is chaired by HMT and agrees the handling of individual asset freezing cases as well as the architecture of the UK's asset freezing regime, the International Corruption Group (ICG) (with its tactical and strategic sub-groups), and now there are to be more strategic groups under the terms of the comprehensive Fraud Review which will concentrate on data sharing.
280. SOCA remains central to much of this work. Since its merger with the ARA, asset recovery skills and structures have been brought together to prioritise and act on financial and corruption intelligence. In this sense, SOCA's coordination of regular intelligence meetings between the ICG partners to increase the effectiveness of financial intelligence submitted by the regulated sector is a critical step in the process of streamlining efforts. This helps to improve the effectiveness of the UK's response to threats to the country posed by ML and other corruption-related offences.
281. The various agencies thus appear to be increasingly well structured, with improving levels of resources and funding. However, the high dependency of two of these units upon DFID funding remains a concern since it suggests that the work is not seen as being intrinsic to general policing in the UK.

Multiple police forces

282. There are still a large number of law enforcement agencies with a role in the investigation and/or prosecution of ML offences and AR in the UK. The police are a prime example, with an organisational structure based on 43 separate forces which focus heavily on local concerns. In this context it is difficult to see how ML and AR can play major roles, particularly as resources dedicated to fraud and economic crime at a local level have shrunk substantially in recent years. The recent Fraud Review has been a welcome development, however. It is an acknowledgment in so many ways that fraud, and fraud-type offences, have been given a lower level of priority in recent years. The appointment of the City of London Police as the National Lead Force on Fraud and its possible impact upon the investigation of ML in particular, is a development worthy of further attention.
283. Among the UK's police forces, the Metropolitan Police Service (MPS) stands apart. As the largest police force in the UK it has a team of officers within its Economic and Specialist Crimes Department that deals exclusively with international ML and overseas corruption. The MPS and the City of London Police remain essentially local police forces, and without recognised lead roles would be confined to investigating fraud and corruption within their own police areas. And yet lead status is surely only an interim solution, pending a comprehensive review of the structure of policing in the UK which provides for crimes of national concern (such as major international, financial and economic crime) to be dealt with by dedicated and suitably qualified personnel. Meanwhile, it remains paramount that the POCU, which has made a visible impact on international corruption in a short period of time, continues to be funded both by DFID and also by the 'Met' itself. In an age of competing resources it would be a major setback to the UK's efforts in this difficult field if the initiative were now to struggle for funding.
284. Promoted by the Home Office some years ago, the Memorandum of Understanding (MOU)¹¹⁷ that exists between the various UK investigative and other agencies is an important guide to activity in the complex area of foreign bribery, spelling out who does what in terms of investigation and prosecution. Although born out of a necessity to address concerns expressed by the OECD's Working Group on Bribery in connection with the investigation of foreign bribery offences, the MOU has been modified on two or three occasions to extend to other important players, such as the Ministry of Defence Police, and also to eliminate requirements of disclosure of specific foreign bribery

investigations to non-investigatory Government departments (notably the FCO and the MOD). The most recent version was issued in January 2008. Such a formal model of cooperation might be a sensible idea in the rapidly expanding field of ML and AR.

Cost

Civil proceedings

285. Bringing civil claims in the English courts requires legal and forensic accounting expertise, services which (at English charge-out rates) can be prohibitively expensive for developing countries. The cost of retaining foreign lawyers and accountants is therefore a significant barrier to successful asset recovery claims.

286. Funding should only be a short-term difficulty, provided that cases are selected where there is not only good evidence of corruption, but also identified funds or assets (ideally frozen at the outset of the case) available to meet a judgment in the claimant's favour. Recoveries in these circumstances should considerably exceed costs. However, identifying funding for foreign lawyers from stretched budgets is problematic for developing countries, particularly as estimating the costs of proceedings is often difficult with much depending on the manner in which claims are defended. Spoiling tactics by defendants inevitably escalate costs.

287. Funding for asset recovery claims is available for states from private sector third party litigation funding companies, a rapidly growing market in the UK. These companies will meet all legal costs of asset recovery cases, and insure against adverse costs orders, but generally in return for receiving 30 – 50 per cent of recoveries made. This is an unacceptably high proportion for most states to contemplate.

- *TI-UK recommends that the Government ascertains and provides the funding required by one or more of the CPS, SFO and SOCA to use their civil recovery powers to recover the proceeds of corruption located in the UK, where criminal prosecution and confiscation is unavailable. Where this is not possible, it should assist coordination of criminal and civil mechanisms to recover assets to the fullest permissible extent.*

- *TI-UK also recommends that the Government considers making available funding for developing countries for civil asset recovery cases brought in the UK (where action is not taken by UK law enforcement agencies either through criminal confiscation or civil forfeiture mechanisms), either by way of grants or as loans repayable from recoveries.*

288. From time-to-time the international community has discussed creating a trust fund with donations from governments to pay for claims brought by developing countries to recover the proceeds of corruption¹¹⁸. Funding for specific asset recovery cases is not presently available from the StAR initiative.

- *TI-UK therefore recommends that the Government promotes and supports international efforts to establish a trust fund with donations from states and international agencies to pay for claims by developing countries to recover the proceeds of corruption. Since contributions to such a fund would be regarded as a form of official development assistance, it would be appropriate for donors to secure agreement with governments and civil society in the requesting states on safeguards to ensure that recovered assets are used for legitimate purposes.*

Judicial

Civil proceedings – the cost and difficulties of freezing injunctions

289. Courts are able to make freezing injunctions that prevent a defendant from dealing with his assets, pending the outcome of a claim on them. These injunctions are typically obtained without the defendant's knowledge (for the obvious reason that a fraudulent defendant is likely to try to move and conceal his assets if he has notice of an application for an injunction). Typically they secure assets to the value of the claim (plus anticipated costs); however, where the full extent of corrupt activities is unknown, as in cases of 'grand corruption', the injunction may have no monetary limit.

290. The value of a freezing injunction lies not so much in its effect on the behaviour of corrupt defendants, but rather on third parties with control over the targeted assets, in particular financial institutions. It is a contempt of court for anyone with knowledge of a freezing injunction to assist in

117. Revised Memorandum of Understanding on Implementing Part 12 of the Anti-terrorism, Crime and Security Act 2001 (revised January 2008).

118. The Netherlands made such a proposal in 2006 at the first conference of the states parties to UNCAC. It was not adopted.

or permit its breach, including banks which allow funds to be transferred away from frozen accounts under their control. Furthermore, freezing injunctions can be registered with the Land Registry on the registered title of a property, thereby preventing its sale.

291. A freezing injunction is a draconian order, normally obtained without the defendant having an opportunity to make representations, preventing them from dealing with assets without any adverse findings against the defendant. A claimant applying for a freezing injunction in these circumstances has a duty of "full and fair disclosure" – that is a duty to investigate properly the facts that give rise to the claim, and fairly presenting the evidence on which it relies. The claimant must fully disclose to the Court all matters relevant to the application, including all matters of fact or law detrimental to its case. In effect, a claimant must do its best to anticipate and explain any potential defences to the claim, and any gaps in the evidence. And any breach in this regard may lead to the injunction being discharged, with a costs sanction, even if the injunction would have been granted had the full facts been disclosed.

292. States often find it demanding to comply with the duty of full and fair disclosure since documents and information are not only spread across different agencies of government, but there is also a culture of secrecy in the civil service of many countries. Moreover, a balance has to be struck between launching a thorough investigation and the need to move promptly to secure assets.

293. A significant amount of work will usually have to be undertaken by a state and its lawyers before a claim can be brought and a freezing injunction is sought, causing substantially increased costs from the outset. Avoiding an application for a freezing injunction (or rather an application for a freezing injunction without the knowledge of the defendant) could produce significant costs savings.

294. However, states are regularly faced by diversionary / spoiling tactics from a defendant, including challenges to a freezing injunction on the basis that the claimant has failed to comply with its duty of full and fair disclosure. These will inevitably increase costs to a claimant state.

295. TI-UK understands the rationale behind the duty of full and fair disclosure, and agrees that this duty should not be

weakened. However, its adverse impact on costs suggests that some coordination of criminal and civil mechanisms could bring benefits. If assets could be promptly frozen in support of criminal investigations, a victim state might not need to incur the costs of applying for a freezing injunction should civil proceedings subsequently prove necessary to recover assets (and a defendant would have reduced opportunity to engage in spoiling tactics).

Civil proceedings – legal obstacles

296. For a claimant state to succeed in civil proceedings to recover the assets of PEPs, it has to demonstrate that the assets represent the proceeds of corruption and that it has a legal right under its own law to recover those assets. This is not always as straightforward as it sounds. Where, for instance, corruption occurs not in central government, but in local or regional governments or public authorities with their own legal identity, it is not obvious that a central or federal government has the right to bring civil proceedings to recover the looted assets. Moreover, the defrauded entity may not have the resources or appetite to bring its own proceedings, or it may be under the control or influence of the wrongdoers.

297. The existence or otherwise of the right to bring proceedings (and other legal obstacles) will usually be a question of the law of the country in which the corruption has taken place. Questions of foreign law are decided by the Courts on the basis of experts' reports provided by practitioners or academics from the relevant country. There may be significant room for debate on these issues, either because defendant PEPs are usually able to find compliant expert witnesses to construct an argument on their behalf, or because the issue is untested in the jurisprudence of what are often developing legal systems.

298. However, it would be unfortunate if a PEP was able to defeat a civil claim brought against him merely on the basis that the central government has no legal right to bring proceedings. Having to deal with technical objections of this nature is an obstacle to efficient asset recovery cases. The real question should be whether the evidence demonstrates that the assets derive from corrupt activities.

299. Furthermore, in relation to bribes paid for the award of a contract, there is a dispute in English law as to whether a claimant has a "proprietary right" to the bribe, or whether it has a claim only to damages¹¹⁹. The concept of a proprietary right is complex, but effectively it constitutes ownership of the asset in question. Establishing a proprietary right can assist enormously in tracing funds that have passed through various bank accounts, resisting claims by third parties to assets and recovering not only the amount of the bribe but the profits earned on it. For example, if a bribe is used to acquire a property, and property prices have risen, a claimant with a claim to a proprietary right can assert that it is entitled not just to the amount of the bribe but also to the entire value of the property.

- *TI-UK believes that it is worth considering whether these various difficulties can be alleviated in private civil proceedings (the issues do not arise in relation to civil recovery claims brought by the relevant UK authorities under Part 5 of POCA). One way to address the issues arising would be to introduce legislation that gives foreign states a statutory cause of action to bring civil proceedings in the High Court for the recovery of assets looted by their PEPs that are located in the UK. This could make such claims less complex (and indeed prevent or at least inhibit jurisdictional challenges to those claims).*

300. Article 53 of UNCAC requires signatories to permit states to initiate civil proceedings in their courts to establish ownership of assets acquired through corruption. Typically, however, PEPs challenge the jurisdiction of the Courts to determine claims against them, even where the assets in issue are located in the UK. These challenges invariably fail, but cause significant expense and delay. The rules of jurisdiction are reasonably complex¹²⁰.

- *TI-UK recommends that the government explores ways of preventing challenges to the jurisdiction of the Court to determine claims to assets located in the UK (save where a claim is demonstrably an abuse of process), and to make it more difficult for defendant PEPs to challenge jurisdiction in other cases. This is necessary to assist foreign states to recover the proceeds of corruption.*
- *TI-UK also recommends that the rules of jurisdiction should be amended to make it easier for foreign states to bring cases in the UK against PEPs.*

301. Defendants may argue that doing so would, in effect, remove the ability of the Courts to decline to deal with claims that should properly be dealt with in another country, or to deal with perceived oppression of defendants where a multitude of overlapping claims are brought against them in different jurisdictions. However, the Court has separate powers to strike out or stay a claim for an abuse of process, or in the interests of justice, and therefore would retain the ability to protect defendants where necessary.

302. Furthermore, TI-UK believes that there is no justification to allow defendants to challenge the jurisdiction of the UK courts to determine claims brought by states to recover assets located in the UK.

- *TI-UK recommends that the government removes the right of defendant PEPs¹²¹ to challenge the jurisdiction of the UK Courts to determine claims in respect of assets located within the UK. This could also be dealt with by introducing a statutory cause of action for foreign governments in relation to the proceeds of corruption located in the UK.*

303. That leaves claims where assets are not located in the UK, but where a claim brought by a state against a PEP would be permissible under English jurisdictional rules.

119. The dispute arises in English law because of a conflict between the decision of the Privy Council in *A-G for Hong Kong v Reid* [1994] 1 AC 324 (PC) that bribes belong to a defrauded principal, and a nineteenth century decision to the contrary by the Court of Appeal in *Lister v Stubbs* (1890) 45 Ch D 1. Under the English system of precedent, *Lister v Stubbs* is binding on the Courts unless overruled by the House of Lords (although in practice courts considering the issue have to date found a way to avoid applying the decision).

120. An analysis of those rules in the context of AR cases against PEPs and proposals for change are contained in Annex 2.

121. Wording would be required to ensure that this covered relatives, associates, companies and trusts holding assets for PEPs.

122. See the summaries of the civil claims aspects of the *Chiluba* and *Dariye* cases in Annex 1

304. It is in the public interest that foreign states should be permitted to bring such claims in the UK if they wish to do so.

- *TI-UK therefore recommends the removal of the right of defendants to challenge the jurisdiction of the Courts in these circumstances. Alternatively, the burden of proof should be reversed so that a defendant PEP to a corruption case would have the onus of establishing that the relevant UK jurisdiction is clearly not the most suitable jurisdiction to hear the claim.*

Civil proceedings – attempts to delay and disrupt

305. Experience in the UK and elsewhere demonstrates that PEPs without a substantive defence to the claims made against them tend to deploy spoiling tactics to delay and disrupt the determination of the claim, either in the hope that it will lead to a more beneficial settlement, or because they think the political leadership of a country will change and be less inclined to pursue corruption cases, or for no other reason than a stubborn refusal to allow judgment to be entered against them.

306. It is important that the proceeds of corruption and related cases are determined quickly. Judges in the High Court have been robust in this respect of late, proactive and innovative in progressing cases and dealing with defendants who fail properly to participate in proceedings¹²².

307. Efficient but fair determination of such cases must be a key objective of the Courts, whether cases are brought as private civil proceedings, civil forfeiture proceedings or criminal confiscation proceedings. Defendants must of course be given the opportunity to participate properly in the proceedings and to have any defences tested.

- *TI-UK recommends that courts should be encouraged, as they have already proven willing to do, to use their powers to bring cases to a conclusion when a defendant PEP repeatedly chooses not to take that opportunity. Examples of judges doing so may give comfort to judges in other jurisdictions considering whether to apply similar measures.*

ANNEX 1:

SUMMARIES OF RECENT CRIMINAL AND CIVIL CASES AGAINST POLITICALLY EXPOSED PERSONS IN THE UK

- **General Sani Abacha**, former federal President of Nigeria
- **Chief D S P Alamieyeseigha**, former Governor of Bayelsa State, Nigeria
- **Joshua Chibi Dariye**, former Governor of Plateau State, Nigeria
- **Frederick Jacob Titus Chiluba**, former President of Zambia.

General Sani Abacha

The extent of the misappropriation of public funds by General Sani Abacha, the military dictator of Nigeria between 1993 and 1998, is notorious. In the Global Corruption Report for 2004 issued by TI, Abacha was ranked fourth in the list of all-time political kleptocrats behind Suharto, Marcos and Mobutu, but ahead of Milosovic, Duvalier and Fujimori. A total of US \$1.3 billion is believed to have passed through accounts in British banks controlled by the Abacha family.

The Nigerian authorities have made substantial recoveries – most notably from Switzerland, which has repatriated over US \$500 million, and also from the return of funds during the initial domestic investigation into the misappropriations¹²³. However, there has also been a significant recovery through proceedings brought in the UK, and MLA in support of Nigerian criminal investigations¹²⁴.

Civil proceedings: Approximately £110 million was recovered from the UK in civil proceedings brought by Nigeria, proceedings that arose from the buy-back of debt owed by Nigeria for the financing of the construction of the Ajaokuta Steel Plant in Nigeria's Kogi State. The Abachas exploited the buy-back transaction corruptly to enrich themselves, using an offshore company to acquire the debt from Russian entities who then sold the debt to the Nigerian Government for twice the sum it had

paid. The Abachas' profit was approximately DM 500 million (£166 million), held in a London bank account.

The case was complicated by a claim by a third party that it had in fact been the true owner of the debt having, it was said, acquired it from the Russian entities prior to its purported sale to Nigeria.

Settlement discussions: At the conclusion of a series of meetings, Nigeria believed that the case had been settled and that the Abachas would pay the bulk of Nigeria's claim. Within days, however, disputes arose as to whether and on what terms the parties had settled. This led to a trial before the English Commercial Court to decide whether the actions had been settled, and if so, on what terms. That trial lasted for six months and led to judgment in Nigeria's favour¹²⁵, a decision upheld on appeal¹²⁶.

Mutual legal assistance: The United Kingdom also provided MLA in support of the Nigerian criminal investigation into the Abachas, albeit at a slower pace than would be expected today. A request for assistance was made by Nigeria in June 2000 and evidence gathered by the SFO was sent to Nigeria in 2004, following a legal challenge by the Abachas to the decision to assist the Nigerian authorities¹²⁷.

Further civil proceedings: In September 2001, Nigeria brought civil proceedings in London against about 120 defendants alleged to be involved in the misappropriation of funds by the Abachas. The proceedings started with applications for disclosure of documents and information by a number of banks, and an application for a worldwide freezing injunction against the Abachas. On 25 September 2001, the Court granted the orders sought by Nigeria. However, although US \$1.3 billion passed through London banks, only a relatively small sum is believed to have remained. The proceedings have not progressed, although the worldwide freezing injunction remains in place.

123. An account of the various cases across the world is given in two chapters in the publication "Recovering Stolen Assets", edited by Doctor Mark Pieth and published in January 2008 by the Basel Institute on Governance.

124. Substantial recoveries were also made in Jersey.

125. Citation: *The Attorney-General of the Federal Republic of Nigeria & Another v Mrs Maryam Abacha and Mr Mohammed Sani Abacha as the Personal Representatives of General Sani Abacha Deceased* 27 February 2001 Rix, LJ

126. Citation: *The Attorney-General of the Federal Republic of Nigeria & Another v Mrs Maryam Abacha and Mr Mohammed Sani Abacha as the Personal Representatives of General Sani Abacha Deceased* [2003] 2 All ER (Comm); [2003] EWCA Civ 1100

Diepreye Solomon Peter Alamieyeseigha

Nigeria is a federal republic comprising 36 states, each with its own state Government headed by an elected Governor. D P S Alamieyeseigha was elected as the Governor of Bayelsa State in May 1999 and re-elected in 2003. His term of office was intended to run until May 2007, but was cut short by impeachment for corruption in December 2005.

While in office Chief Alamieyeseigha corruptly accumulated (outside Nigeria) properties, bank accounts, investments and cash exceeding £10 million in value. His portfolio of assets included accounts with five banks in the UK; four London properties acquired for a total of £4.8 million; and about £1 million in cash hidden in one of his London properties.

A variety of criminal and civil mechanisms were used in England to recover Chief Alamieyeseigha's assets.

Criminal proceedings. In September 2005, following an investigation by what is now the POCU, Chief Alamieyeseigha was arrested in London, questioned and charged with three counts of money laundering. The CPS obtained a worldwide criminal restraint order covering his assets.

Chief Alamieyeseigha was initially remanded in custody after failing to persuade the Court that he should be permitted to return to Nigeria to attend to the affairs of Bayelsa State. After three weeks in custody he was released on bail on conditions including the surrender of his passport, the payment of £1.3 million into Court by sureties and daily reporting to the police.

He then sought to challenge his arrest and prosecution on the basis that, as a Nigerian state governor, he enjoyed state immunity under English law. That argument was robustly rejected both by the Crown Court and on appeal by the High Court¹²⁸.

In November 2005, despite his bail restrictions, Chief Alamieyeseigha managed to abscond and return to Nigeria. His flight led to the confiscation of the bail monies put up by his associates. Subsequent scrutiny of the financial affairs of one of those sureties – Terry Waya, a Nigerian businessman who had come to the attention of the police by posting bail of £500,000 – led to his conviction in the UK for mortgage fraud and the confiscation of his £1.54 million London property.

Chief Alamieyeseigha was impeached and dismissed from office in December 2005, and charged with numerous money laundering and corruption offences. In 2007, he eventually pleaded guilty to charges of making false declaration of assets, and caused his companies to plead guilty to charges of money laundering.

Cash Confiscation Proceedings under section 298 of POCA:

Following Mr Alamieyeseigha's flight, the Metropolitan Police applied to confiscate his seized cash, which Nigeria later applied to have returned. The Police did not oppose the application and the cash was returned in May 2006.

Civil proceedings: Chief Alamieyeseigha's flight from the UK triggered private civil proceedings by Nigeria in the High Court against Chief Alamieyeseigha, his wife, his companies and an associate for the recovery of bank balances and properties in London, Cyprus and Denmark.

The civil proceedings commenced with an application by Nigeria for a court order requiring disclosure by the Police of the evidence it had collated to enable Nigeria to bring its claim. This application was made without the knowledge of Chief Alamieyeseigha and was not opposed by the Police. The judge ordered the documents to be disclosed, agreeing that it was in the public interest for the documents to be provided to Nigeria to assist it to recover the proceeds of corruption.

Nigeria applied for summary judgment, a process intended to bring a swift end to proceedings without the need for a full trial on the basis that there was no genuine defence to a claim. This hearing was delayed for some time on the grounds of Chief Alamieyeseigha's alleged illness. When heard, it initially failed¹²⁹, the judge decided that Nigeria had a strong case, and that Chief Alamieyeseigha "had a lot of explaining to do". However, he decided that allegations of corruption against an elected public official were so serious that Chief Alamieyeseigha should be given the opportunity to "confront his accusers" at a trial following the exchange of all material evidence.

Following the guilty pleas in the Lagos trial, Nigeria reapplied for summary judgment in relation to those assets deriving from the criminal conduct that had been admitted by Chief Alamieyeseigha and his companies. That application succeeded in December 2007¹³⁰.

127. Citation: *R v Secretary of State for the Home Department, ex parte Mohamed Abacha and another* [2001] EWHC 707.

128. Citation: *R (on the application of Diepreye Solomon Peter Alamieyeseigha) v CPS* [2005] EWHC 2704 (Admin).

129. *Federal Republic of Nigeria v Santolina Investment Corporation and Others* [2007] EWHC 437(Ch).

130. *Federal Republic of Nigeria .v. Santolina Investment Corporation and others* [2007] EWHC 3053 (Ch).

In February 2008 Nigeria obtained an order requiring Chief Alamiyeseigha to comply with various orders requiring him to disclose documents and provide further information and documents, with the sanction that his defence would be struck-out if he failed to do so. The required information and documents were not provided, and on 2 July 2008 Nigeria obtained judgment over the remaining assets in London, and elsewhere¹³¹.

Joshua Chibi Dariye

Between May 1999 and May 2007 Chief Dariye was the elected Governor and Chief Executive of Plateau State in Nigeria¹³².

There were various asset recovery and related proceedings arising from corruption on the part of Chief Dariye.

Criminal proceedings: The CPS obtained a worldwide criminal restraint order against the assets of Chief Dariye in support of a criminal investigation into his activities. This secured the assets at an early stage. However, Chief Dariye fled the jurisdiction for Nigeria before charges were brought against him in the UK. An international arrest warrant was issued by Bow Street Magistrates but could not be executed whilst Mr Dariye was in office because of immunity provisions in the Nigerian Constitution. Criminal proceedings in Nigeria are ongoing.

Cash Confiscation Proceedings under section 298 of POCA: in February 2005 the Metropolitan Police applied to confiscate £116,812.90 in cash seized from Chief Dariye and his associates. Nigeria then intervened seeking the return of the cash to it. The Police did not oppose the application and the money was eventually forfeited and repatriated despite substantial delays caused by Chief Dariye.

The Metropolitan Police first applied for forfeiture of the seized cash in February 2005. At first, Mr Dariye simply denied that the cash represented the proceeds of crime, without elaboration, thereby delaying the hearing of the case until 12 December 2005. At this subsequent hearing, he advanced no evidence except the state immunity from proceedings he enjoyed under the Nigerian constitution. His claim was rejected and the cash was forfeited.

However, Chief Dariye appealed that decision, which he could do as of right, on the basis that it was against the weight of the evidence, despite having himself produced no evidence of the source of cash. He also separately applied to challenge the rejection of state immunity in judicial review proceedings. The High Court refused Chief Dariye permission to do so, but he asked for an oral rehearing of that refusal, which he then managed to delay until January 2007. A few days before the rehearing, he withdrew his application for judicial review and announced that he would instead simply press ahead with the appeal on the facts, indicating that he intended to call up to eight witnesses and that the appeal would last one week. The appeal was therefore scheduled for July 2007.

Chief Dariye then decided not to serve any evidence, and did not instruct lawyers to represent him at the appeal. The appeal was dismissed, although a rehearing of the evidence put forward by the Metropolitan Police was still required, and the cash was finally returned to Nigeria. However, the Metropolitan Police, CPS and the Government of Nigeria incurred unnecessary costs dealing with the challenges to the forfeiture, despite the fact that Chief Dariye at no time put forward a positive defence.

Civil proceedings, in relation to a property: High Court civil proceedings were brought by Nigeria to recover a London property acquired using stolen federal funds channelled to the UK through a contractor to Plateau State. Nigeria relied on evidence gathered by the Metropolitan Police to prove its case (the bulk of these documents entered the public domain through the cash confiscation proceedings, and others were disclosed by the Police under a Court Order made in the civil proceedings after the Police confirmed that disclosure would not prejudice any ongoing investigation or prosecution). Judgment was obtained by Nigeria for the proceeds of sale and rental monies received by Chief Dariye, following his failure to comply with various orders requiring him to provide information and disclose documents or be debarred from defending the claim.

Civil proceedings, in relation to bank accounts: Separate High Court civil proceedings were brought by Nigeria against Chief Dariye and his wife to recover £2.85 million of public funds

131. *Federal Republic of Nigeria v Santolina Investment Corporation and others* 2 July 2008 (Ch).

132. *Save for two interruptions – the first for 9 months in 2004 after declaration of a state of emergency in Plateau State due to ethnic violence, and the second between 13 November 2006 and 27 April 2007, following his impeachment for misconduct and corruption by the Plateau State House of Assembly. The impeachment was over-turned by the Supreme Court of Nigeria in April 2007 on the basis that it was not carried out in accordance with the procedural requirements of the Nigerian Constitution, but his tenure ended on 29 May 2007.*

transferred by him to accounts at two London banks. Chief Dariye unsuccessfully sought to challenge the jurisdiction of the English Court to hear the dispute¹³³. Judgment was obtained by Nigeria for £4 million (inclusive of interest), following Chief Dariye's failure to serve a defence properly explaining the source of his wealth, again in the face of an order requiring him to do so or be debarred from defending the proceedings.

Subsequently, Plateau State has brought proceedings asserting that the Federal Government of Nigeria had no right in Nigerian law to bring civil proceedings to recover the proceeds of corruption occurring at a state level, and seeking the payment of recoveries to it. Those proceedings are ongoing.

Criminal prosecution of Joyce Oyebanjo: Mrs Oyebanjo, an associate of Chief Dariye, was prosecuted for knowingly laundering the proceeds of Chief Dariye's crimes. She received £1,165,964.87 from Chief Dariye in a nine-month period. On 22 February 2007, following an investigation by the POCU, she was convicted of assisting Chief Dariye to retain the benefit of criminal conduct contrary to section 93A(1)(a) of the Criminal Justice Act 1988 and subsequently sentenced to 3 years imprisonment. Her benefit from the crimes of Chief Dariye was assessed at £1,467,135.97, and the Court decided that she had remaining assets of £198,045.00. She was ordered to pay that sum to Nigeria in compensation or serve a further term of imprisonment.

Frederick Jacob Titus Chiluba

Dr Chiluba served as the President of Zambia from 1991 to 2002. In February 2003, he was charged along with his former intelligence chief, Xavier Chungu, and several former ministers and senior officials, with 168 counts of theft totalling more than \$40m.

Civil proceedings were brought by Zambia in the High Court against Dr Chiluba and nineteen of his alleged associates. The case in the London civil courts concerned three separate claims:

- o The Zampotrop Conspiracy: This claim centred on an account which was set up and effectively controlled by the head of the Zambian Security Intelligence Services. The account received approximately \$52,000,000 purportedly in payment of debts owed to contractors.
- o The MOFED Claim: MOFED was a Zambian owned property company based in the UK. The claim concerned an alleged breach of fiduciary duty by a former Zambian ambassador in improperly obtaining a consultancy agreement in relation to the letting of a property owned by MOFED, which paid him £100,000 per annum. The claim ultimately failed.
- o The BK Conspiracy: This claim was for in excess of \$20,000,000 that had been transferred from the Ministry of Finance pursuant to an arms deal with a Bulgarian company and paid into accounts in Switzerland and Belgium. At least some of the money made its way to the defendants.

The case was notable for proactive case management by the Judge to ensure that the case was brought to trial without delay, despite the best efforts of some of the defendants to derail it¹³⁴. First, the judge sat in Zambia to hear the evidence of witnesses who were unable to travel to London as they awaited trial on criminal charges. Second, the judge protected the right of those defendants to avoid self-incrimination by obtaining an undertaking from the Zambian Attorney General that documents and evidence disclosed in the civil proceedings would not be deployed in Zambian criminal proceedings, and third, part of the trial was held in private to maintain that confidentiality. Further, a live video link from London of the trial and daily transcripts were provided to the defendants based in Zambia.

On 4 May 2007 Zambia obtained judgment against Dr Chiluba and some of his co-defendants for about US \$46 million¹³⁵. Judgment was obtained against Mr Chiluba's lawyer Iqbal Meer. His law firm had handled US \$10m of the stolen money (a second London law firm, Cave Malik & Co, was also found to have illegally handled \$3m). However, on 31 July 2008 Mr Meer successfully appealed the judgment against him, persuading the Court of Appeal that he had not known or suspected the dishonesty of his clients¹³⁶.

133. *Federal Republic of Nigeria v Joshua Dariye and another* [2007] EWHC 708 (Ch).

134. Citation: *AG of Zambia v Meer Care & Desai and others* [2006] EWCA Civ 390 CA and [2005] EWHC2102 (Ch).

135. Citation: *AG of Zambia v Meer Care & Desai and others* [2007] EWHC 952 (Ch) & [2007] EWHC1540 (Ch).

136. Citation: *AG of Zambia v Meer Care & Desai and others* [2007] EWHC 708 (Ch).

ANNEX 2:

CIVIL PROCEEDINGS – JURISDICTIONAL CHALLENGES

Corruption cases involving PEPs with assets in the UK or which have passed through the UK will, by their nature, involve events and individuals, companies and trusts in various countries.

This raises the question of what is the correct jurisdiction in which to bring a claim to recover the assets. Article 53 of UNCAC requires signatories to permit states to initiate civil proceedings in their courts to establish ownership of assets acquired through corruption. Whilst England permits (and has always permitted) foreign states to do that, the English rules of jurisdiction can hinder the swift resolution of claims and cause unnecessary delay and expense. At worst, it could prevent a claim being determined at all. Ideally, criminal and civil proceedings against PEPs would be fairly and quickly determined in their own courts (and orders arising from those proceedings for the confiscation of assets efficiently enforced in foreign countries). The present reality is that this cannot be achieved in many countries that have suffered endemic corruption.

For the reasons given below, TI-UK believes that states should have the automatic right to bring proceedings in the UK to recover assets located in the country (open to challenge only where the defendant can show that the proceedings are an abuse of process or intended to be oppressive). That should be extended, TI-UK believes, to cases where the assets were located in the UK but were subsequently transferred to another country. Further, TI-UK believes that it should be easier for states to bring claims in England against PEPs in circumstances where the assets claimed are not located in the UK, but the corrupt scheme giving rise to their acquisition has some connection to the jurisdiction, for example where steps to launder the assets were taken in the jurisdiction.

The rules as to when proceedings can be brought in England against foreign individuals and entities are technical. Broadly speaking, a claim can be brought if the foreign defendant agrees to the proceedings being determined in England, or if it can be served with the proceedings in England (service means being

formally provided with the legal documents commencing the claim, ordinarily a prerequisite for the proceedings to be progressed), or if the court gives permission for service of proceedings overseas¹³⁷. Permission will typically be required in cases against PEPs, unless (and unusually) their assets are held by an English associate, company or trust, which will then be the defendant to the claim.

The Court does not have an unfettered discretion to permit proceedings to be served on a foreign defendant. A claimant must demonstrate a 'good arguable case' that its claims falls within one of the grounds specified in paragraph 3.1 of Practice Direction B to Part 6 of the Civil Procedure Rules 1998 (as amended). Grounds that commonly apply in asset recovery cases against PEPs include:

- o The claimant state seeks an injunction ordering the defendant to do or refrain from doing acts within the jurisdiction¹³⁸;
- o The claim is against defendants located both in England and overseas, and the overseas defendants are necessary and proper parties for the determination of the claim (this could for example be the case where a relation or associate of the PEP lives in England and holds corruptly acquired assets, and other assets in England deriving from the same or similar acts of corruption are held by foreign entities)¹³⁹;
- o The whole subject matter of the claim relates to assets located within England¹⁴⁰; and
- o Wrongful acts giving rise to the claim have been committed within England – for example the use of an English bank account to receive or launder bribes or stolen funds, the use of such funds to acquire property in England, payment or solicitation of the bribe in England or the use of English advisers to manage offshore funds¹⁴¹. International fraud involves acts and

137. *There are special rules for individuals or entities within the European Union, which will not be considered here.*

138. CPR6.20(2)

139. CPR6.20(3)

140. CPR6.20(10)

141. CPR6.20(14) and CPR6.20(15)

actors in various jurisdictions, and there is a continuing debate as to the extent to which the wrongful acts founding the claim have to be committed within England. The preferred view is that it is not required that every act necessary to create liability should have taken place in England (as this would rid the rule of practical utility), but that acts of sufficient materiality should have taken place here.

Demonstrating that a claim falls within one of these grounds is not the end of the matter. A judge will not give permission to bring proceedings against a foreign defendant unless the Court is satisfied that England is the proper place to determine the claim, namely "the forum in which the case can most suitably be tried in the interests of all the parties and the ends of justice"¹⁴².

Permission is obtained on a "without notice" basis - that is an application is made to a judge and is decided without the defendant having the opportunity to respond to the evidence submitted in support of the application, put in its own evidence or make arguments to oppose the application.

In these circumstances a defendant has the right to challenge the decision that the case can proceed in England on the basis that the case should instead be brought and determined in another jurisdiction (usually the defendant's home country). Applications were made challenging the jurisdiction of the English High Court, for example, by Mr Zardari in civil proceedings brought against him by the Government of Pakistan, and by Chief Dariye in one of the civil claims brought by the Federal Government of Nigeria¹⁴³.

In determining whether there is another forum clearly or distinctly more appropriate than England for the trial of the action, the court is entitled to take into account all factors connected to the parties, the claim or the action, including the residence of the parties; the factual connections between the dispute and the courts, such as the place where the relevant events occurred, the location of the documentary evidence and the residence of the witnesses; the law which will be applied to resolve the dispute; the existence or possibility of related proceedings and the ease with which a judgment of the foreign court could be enforced in England.

Whilst an application challenging the jurisdiction of the English Court is pending (and that includes a pending application for

permission to appeal a judgment dismissing the application), a defendant will not be required to serve a defence to the claim, or indeed take any other step in the proceedings.

It is unsurprising that the suspicion of practitioners acting for foreign states bringing proceedings to recover assets is that an application challenging the jurisdiction of the English Court is typically made with the objective of delaying or avoiding determination of the claim, or in having the case transferred to a court where the defendant is confident of improperly influencing the court or delaying the outcome of the case.

A challenge to jurisdiction has the very welcome consequence, in the eyes of the defendant, of at least delaying the need to answer the allegations of corruption made against him, and therefore of delaying the determination of the claim. Such delay can be substantial, particularly where the defendant exhausts his or her right to seek permission to appeal an adverse decision. For example, the jurisdictional challenge in the English proceedings brought by the Government of Pakistan against Mr Zardari and three Manx companies controlled by him delayed the time for service of a defence by over a year.

Defendants may argue that doing so would, in effect, remove the ability of the English Courts to decline to deal with claims that should properly be dealt with in another country, or to deal with perceived oppression of defendants where a multitude of overlapping claims are brought against them in different jurisdictions. However, the Court has separate powers to strike out or stay a claim for an abuse of process, or in the interests of justice, and therefore would retain the ability to protect defendants where necessary.

In particular, TI-UK believes that there is no justification to allow defendants to challenge the jurisdiction of the UK courts to determine claims brought by states to recover assets located in the UK.

That leaves claims where assets are not located in the UK, but where a claim brought by a state against a PEP falls within one of the grounds founding jurisdiction, in England for example in Rule 6.20 of the Practice Direction B of the Civil Procedure Rules 1998. TI-UK believes that it is in the public interest that foreign states should be permitted to bring such claims in the UK if they wish to do so.

142. See for example *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC460, at 481

143. The judgments rejecting those applications and permitting the claims to proceed in London are reported as [2006] EWHC 2411 (Comm) and [2007] EWHC 708 (Ch) respectively.

ANNEX 3:

THE COMMONWEALTH DIMENSION AND CHALLENGES FOR SMALL STATES

The member states of the Commonwealth, three-fifths of whom may be classed as small states (mostly with populations of less than 1.5 million), share many common values – from their constitutional principles to their tradition of law and legal challenges – that together should assist to create an individual and collective response to asset recovery and AML measures. The UK meanwhile is host to the Commonwealth Secretariat and plays a major role in harnessing the strengths of this unique grouping. These connections place a specific and substantial responsibility on the UK to take a lead in assisting these countries to develop capacity to prevent ML and to recover assets, as well as acting decisively to provide practical help in individual cases.

Over the years Commonwealth heads of Government have adopted a number of documents that enshrine good governance and help the fight against corruption¹⁴⁴. All the same, Commonwealth states have continued to be blighted both by the siphoning or looting of state assets by ministers or senior officials, and the widely varying legislative and procedural effectiveness of their anti-corruption measures.

The Commonwealth Heads of Government meeting in Vancouver in 1987 endorsed the Harare Scheme for Mutual Assistance in Criminal Matters within the Commonwealth which had been agreed the previous year. The purpose of the Scheme was to increase the level and scope of assistance rendered between Governments regarding a fairly comprehensive range of actions, many of which would now be covered in the UNCAC. However, the Scheme is a voluntary arrangement, and not a formal

instrument, and there is the expectation that a Commonwealth state will render assistance to another based simply on its provisions. All the same, some states, notably Canada and Singapore, continue to insist on a bilateral treaty.

One of the main hindrances faced by AR and ML investigations is the inability of some states to make or execute MLA requests in a timely and effective way. This implies that a level of specialisation in international cooperation matters needs to be developed within small states, as well as the establishment of international networks between prosecutors and investigators that will enable requests, both formal and informal, to proceed without delay. The Commonwealth grouping should be well suited to creating and nurturing such networks, as has been done with the Commonwealth Network of Contact Persons¹⁴⁵.

Many of the small and developing Commonwealth states have grave financial and human resource constraints, giving rise to severe difficulties of implementation, which in turn become a real hurdle to effective regulatory mechanisms, whether domestically or trans-nationally¹⁴⁶. In addition, there has been opposition in some of these states to the establishment of FIUs, with discussion around the implementation of legislation becoming on occasion highly politicised.

Further encouragement is needed to ensure that small states recognise the need to have a robust AML regime in place that incorporates effective risk management systems¹⁴⁷.

144. The 1991 Heads of Government Meeting adopted the Harare Commonwealth Declaration which was followed in 1999 by the endorsement of a Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption.

145. The purpose of the Commonwealth Network of Contact Persons (CNCP) is to facilitate international cooperation in criminal cases between Commonwealth Member States including mutual legal assistance and extradition. Each State has nominated one or more person (usually a Law Officer or Ministry of Justice representative) to provide legal and practical information necessary to the authorities in the requesting State or to any Commonwealth Member State or international judicial cooperation network wishing to invoke or facilitate international cooperation.

146. When it comes to implementing effective AML measures, for instance, only 28 members of the Commonwealth and the UK OTs and CDs are members of the Egmont Group of FIUs.

In 2005 the Commonwealth convened a Working Group on Asset Repatriation which reported the same year to Commonwealth Heads of Government¹⁴⁸. The expert group was set up with the objective of seeking a pan-Commonwealth approach to asset tracing and recovery and to enable smaller Commonwealth jurisdictions to be fully involved in the discussion and development of core principles. In total, the expert group made 58 recommendations.

- *TI-UK recommends that the UK Government should encourage Commonwealth members to implement the following ten key recommendations made by the Expert Group (summarised below with comments):*

- 1) Commonwealth countries should sign, ratify and implement UNCAC as a matter of urgency.

Comment: At present only 29 of the Commonwealth's 53 members have ratified UNCAC.

- 2) Commonwealth Heads of Government should commit themselves to take active steps to ensure the removal of immunities from Heads of Government, Government Ministers and other public officials in relation to domestic prosecution.

Comment: Domestic immunity, so called jurisdictional privilege, remains an impediment to prosecution and, by extension, recovery of assets, in those countries where confiscation is conviction-based.

- 3) In cases involving allegations of corruption by serving Heads of State/ Government, the Commonwealth should put in place an ad hoc peer review mechanism.

Comment: Sadly, this remains profoundly difficult if those in power are continuing to loot assets and launder funds when very little has been done to address the problem at an international level.

- 4) Commonwealth countries that have yet to do so should promptly enact legislation and procedures for criminal conviction-based asset confiscation, including the power to confiscate in circumstances where the accused has absconded or died. They should also put in place

comprehensive laws and procedures for non-conviction-based asset confiscation.

Comment: Many Commonwealth states, particularly small states, still do not have comprehensive asset restraint and confiscation provisions, and even where such provisions are in place, the accused might have absconded, died, or is able to avail him/herself of a jurisdictional privilege; in such circumstances, non conviction-based confiscation, so called confiscation "in rem" or "civil forfeiture", is essential.

- 5) MLA between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty in order to render mutual legal assistance should consider removing such a requirement.
- 6) Commonwealth countries that have not yet done so should promptly adopt legislation which establishes a direct enforcement system to provide for restraint and confiscation of assets in response to a foreign request. Those with such legislation already in place should review their provisions and procedures to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If current law does not permit the enforcement of non-conviction based orders, then it should be amended to do so.

Comment: UNCAC provides for both indirect and direct enforcement of foreign requests for asset restraint and confiscation. In the case of small states, in particular, resources may not allow for the effective compliance with a foreign request by indirect means, since an order sought in the requested state's courts may require analysis of a huge quantity of material provided by the requesting state. It would therefore be preferable for a small state to have available an effective direct enforcement procedure, whereby a foreign restraint or confiscation order may be transmitted to the requested state and registered within the requested state enabling it to be executed as if it was a domestic order. Few Commonwealth states have legislation for direct enforcement in place¹⁴⁹.

147. *Those States that have been less than robust in tackling ML have typically had insufficient regard to the FATF Recommendations, in particular those relating to customer due diligence (CDD) and record keeping by banks including identification of beneficial ownership, know your customer's business (KYCB), and ongoing due diligence and enhanced scrutiny.*

148. *Report of the Commonwealth Working Group on Asset Repatriation (LMM(05)23 – Meeting of Commonwealth Law Ministers and Senior Officials in Accra, Ghana, October 2005.*

149. *There is a concern among some States that by introducing such a mechanism they would be forced to give effect to an order from a foreign court in circumstances where there may be no real guarantee about due process in the requesting State, or that human rights considerations were taken into account before the order was granted.*

- 7) Commonwealth countries should provide by law for the return of stolen or illicitly acquired funds, minus reasonable expenses. This could be accomplished either through judicial process or executive discretion. Moreover, this obligation should extend to public funds that have been misappropriated, unlawfully taken or laundered, where the requesting state reasonably establishes prior ownership, or where the requested state recognises damage to the requesting state.

Comment: There remains much disquiet on the part of Commonwealth states and those states from which public funds have been taken that requested states sometimes impose conditions on the return of funds. Recommendation 7 from the Expert Group mirrors the general thrust of Article 57 of UNCAC. On a wider issue, the majority of the smaller Commonwealth states have no express provision in law for the return of funds¹⁵⁰.

- 8) Commonwealth countries should ensure that the law expressly prescribes how public funds may be used, including by Heads of State/Government. There also has to be criminal offences in place to address the misuse of those funds.

Comment: This highlights a fundamental problem that many Commonwealth states have paid insufficient heed to the steps that can be taken to avoid misuse of public funds before they can be misappropriated and put beyond the jurisdiction of the state. Very few states have a specific law setting out how public funds may be used by ministers and/or senior public officials.

- 9) Commonwealth countries should allocate sufficient resources to establish and properly fund central authorities and law enforcement and other agencies dealing with asset confiscation and management.

Comment: For most Commonwealth states, the establishment of a central authority to handle MLA requests, including requests relating to asset recovery, is a valuable step. A central authority can ensure consistency of standards and quality, and can help improve timeliness when it comes to both the issuance and execution of requests. In addition, centralised or specialist units of law enforcement and prosecutors will be appropriate for most states¹⁵¹. In the context of both domestic and international requests, an effective FIU is essential.

- 10) Commonwealth Heads of Government should keep asset repatriation on the agenda for future meetings and commit themselves to periodic review of the implementation of the present recommendations.

150. Although many States see themselves as “victim” States rather than “recipient” States, nonetheless some will occasionally find that they are holding stolen or illicitly obtained funds, even if only temporarily as they pass through their jurisdiction. In any event, it is better to legislate for return of funds and thereby demonstrate fully reciprocal rights and obligations;

151. Even a small State with very limited resources should be in a position to build expertise within a small group of practitioners.

ANNEX 4:

THE LANDER REVIEW – PRINCIPAL FINDINGS AND RECOMMENDATIONS

SOCA as the UKFIU: SOCA should take over day-to-day responsibility for the effective functioning of the regime; and new governance arrangements (involving an annual report to Ministers, a management committee, a vetted consultation group and regular regime wide meetings) should be introduced to oversee and support the discharge of that responsibility.

The Review also identified that there should be significant further investment in the timeliness of operation of the UKFIU and also in its database of SARs. Outsourcing of the operation of the database was one possibility. It was also recommended that SOCA should deliver regular reporting on the functioning of the regime, instigate dialogue with reporting institutions and end users, assist regime participants with guidance and support for their training, and develop and propose a performance measurement framework for the regime as a whole.

The Reporting Sectors: The Review identified that it would be inappropriate to seek to suppress the overall number of SARs, but that SOCA should help reporters address uneven volumes of reporting and poor quality reporting. A risk-based approach to supporting the weaker performers should be devised with the relevant regulators. Problems with the consent regime needed addressing, but separately from the Lander Review.

The End-Users: The Review recommended that all end-users should accept the obligation of confidentiality in their handling of SARs and that obligation should be reinforced by further administrative measures. SOCA should manage the SARs database so as to provide a value-added service of information, intelligence and leads to end-users. All end-users should report twice a year to SOCA on their use of SARs. H M Inspectorate of Constabulary should include SARs and proceeds of crime work generally in its inspections.

The Serious Fraud Office (SFO) should have on-line access to the SARs database¹⁵², in addition to those who already enjoy such access. Each police force should nominate a senior officer to oversee its SARs work, and should seek to integrate such work into mainstream policing so as to secure “all acquisitive crime” benefits and to avoid over reliance on the limited available number of trained Financial Investigators. Regulators should not have direct access to the SARs database, but each should agree with SOCA the reporting it requires to be derived from that data. SOCA should be responsible for ensuring that Government Departments receive the intelligence reporting and SARs regime performance data they need.

Given the large and diverse participant community and the often-complex nature of the enforcement work, the Review recognised the need for realism in judging what could be delivered to improve the SARs regime in the short term. Nevertheless, it was acknowledged that it was realistic to expect improvements in performance against a timetable covering eighteen months from 1 April 2006.

152. Implemented in October 2006

ANNEX 5:

IDENTIFICATION OF POLITICALLY EXPOSED PERSONS AND BENEFICIARIES OF TRUSTS

This report recommends that the MLR and the JMLSG Guidance should be unambiguous in requiring reporting institutions to have systems in place designed to identify those of their customers who are PEPs. It also recommends that reporting institutions should be required to identify the beneficiaries of trusts, at least before any payment is made.

The reason for these recommendations is that a reporting institution cannot apply enhanced due diligence to its customers who are PEPs if it does not know which of its customers are PEPs. Moreover, there is a risk that those PEPs who are seeking to conceal their identities will be able to do so more easily, if they are beneficiaries of trusts and if there is no requirement to identify those beneficiaries.

Comments received by TI-UK on both these recommendations have included the following points:

- o There is no FATF Recommendation that there should be systems in place to identify PEPs in every case or to identify beneficiaries of trusts;
- o The MLR and JMLSG Guidance already require PEPs to be identified and beneficiaries of trusts to be identified; and
- o The MLR and JMLSG Guidance do not require PEPs or trust beneficiaries to be identified and it would be impractical and/or disproportionate to do so.

The basis of the TI-UK recommendation is set out below.

Politically Exposed Persons

As regards PEPs, FATF Recommendation 6 states that a reporting institution should:

"Have appropriate risk management systems to determine whether the customer is a politically exposed person".

Hence, it is clear that the systems the reporting firm has in place to deal with risk must be capable of identifying PEPs. Some have argued that the use of the word "risk" in this sentence in Recommendation 6 somehow means that it does not always

apply, or only applies in high risk circumstances. However, the natural meaning of this sentence is that there should always be systems in place (i.e. the systems a reporting institution has to manage its risks) to determine if customers are PEPs. Moreover, it is clear from Recommendation 6 and the methodology published by the FATF for assessing compliance with that Recommendation that senior management of a reporting institution must approve the acceptance of a customer who is a PEP and that there should be enhanced due diligence.

This could not be complied with if the institution did not know which of its customers were PEPs. Of course, the systems designed to identify PEPs should be established according to the circumstances of an individual institution and should be based on the real risks – bearing in mind that PEPs have, in the past, used smaller institutions to establish trusts, in the expectation (correct in some cases) that the institutions chosen would be less alert to the risks of dealing with PEPs. Any risk-based system may fail to identify all PEPs and this is accepted. Nevertheless, the FATF recommendation is clear that all reporting institutions should have a system, calibrated to their circumstances, that is reasonable – i.e. that it could reasonably be expected to identify most PEPs.

The MLR 14 states that a reporting institution must apply enhanced due diligence to a PEP and ensure that the acceptance of a PEP as a customer has the approval of senior management. It does not actually say that the reporting institution must have systems designed to identify PEPs, but this would be a reasonable assumption, since, without identifying a PEP, a reporting institution could not comply with the requirement for applying enhanced due diligence. Reasonably, the MLR requires that the enhanced due diligence is applied on a risk-sensitive basis.

The JMLSG Guidance states that a firm should have, on a risk-sensitive basis, risk-based procedures to determine if a customer is a PEP. It is not entirely clear what this means. Some have argued that it means that all reporting institutions should have systems, but that they should be risk-based. Others have argued that the need for the very existence of any system should be judged on a risk-sensitive basis and, if a reporting institution

could convince itself there was no risk of any of its customers being PEPs, there would be no need for any system for detecting them.

TI-UK believes that, although the MLR appears to carry the implicit assumption that all reporting institutions must have systems for identifying PEPs, the JMLSG Guidance appears to envisage that a firm may elect to have no such procedures. Since the Treasury must approve the Guidance, it must be assumed that the JMLSG Guidance is correct. Of course, once an institution had made a decision that it need have no procedures for detecting PEPs, its ignorance of its customers' PEP status would reinforce its opinion that it had no need of any procedures. PEPs have already shown themselves to be alert to the possibility of exploiting naive institutions who do not consider there to be a risk that any of their customers may be PEPs.

It is because of the ambiguity in the UK Guidance that TI-UK believes that, in accordance with the FATF Recommendation 6, all reporting institutions should have systems in place for detecting which of their customers are PEPs.

Trust Beneficiaries

It has to be recognised that the FATF Recommendations were drafted by the FATF, many of whose members come from civil law countries that do not recognise the concept of a trust. The FATF, when drawing up the Recommendations in 2003, was determined to ensure that the true beneficial owner of companies and other vehicles was established by reporting institutions. When it came to trusts, the position was more difficult because trusts are not legal vehicles (like companies) but are relationships between various parties, including settlors, trustees and beneficiaries. The simple concept of beneficial ownership, as applied to companies could not apply. Rather than create a separate set of rules designed for trusts, the FATF dealt with this problem by defining "beneficial owner" as being:

"the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement".

The first half of the definition includes the terms "the person on whose behalf a transaction is being conducted." This must be assumed to include the beneficiaries of trusts, since trustees act on behalf of the trust and ultimately its beneficiaries. "Legal arrangement" is the term used by the FATF to encompass trusts. The second sentence in the definition therefore includes the trustees who have legal control over a trust. Where settlors (or any other person, including beneficiaries) have effective control over a trust, then they, too must be identified. To reinforce the interpretation that beneficiaries are included amongst those who should be regarded as "beneficial owners" for the purposes of Recommendation 5, the FATF, in its methodology for assessing compliance, gives an example of the identification of a trust beneficiary (along with settlor and trustee).

Some have argued that it is unnecessary to identify the beneficiary of a trust because it is the trustee who exercises control over the trust. This argument assumes a model trust structure, with a settlor paying funds into the trust but having no further control over it, the trustees being responsible for the trust and beneficiaries being passive recipients of the benefit of the assets. However, like all companies and legal arrangements, trusts are capable of being abused. Professional firms will act as trustees, in some cases, acting under the instructions of a third party, who may be the settlor, beneficiary or someone not named on the trust deed at all. Some professional firms will even act as a "dummy settlor" ostensibly putting some funds into the trust, with the real assets being settled into the trust later by a different person. A PEP who sought to hide his/her identity could use such firms, so that his or her name did not appear as settlor, trustee or named beneficiary.

Provided the trust gave discretion to trustees to make distributions to unnamed beneficiaries at their discretion (as a trust deed could easily do), a PEP could benefit from a trust while having no formal connection with it, until a payment is made to him or her. While some PEPs may never receive the benefits of assets in trusts they establish, it seems unlikely that any corrupt PEP would take the trouble to steal assets and use them only for other people. It is for this reason that TI-UK considers that the identification of beneficiaries, at least before a payment is made, is essential. This view appears to be shared by the FATF, given the terms of Recommendation 5.

In the UK, the MLR also follows the FATF convention in defining "beneficial owner" to include a trust beneficiary. It states that, in the case of a trust, the beneficial owner includes:

- (a) any individual who is entitled to a specified interest in at least 25 per cent of the capital of the trust property;
- (b) as respects any trust other than one which is set up or operates entirely for the benefit of individuals falling within sub-paragraph (a), the class of persons in whose main interest the trust is set up or operates;
- (c) any individual who has control over the trust.

This clearly includes trustees and may include settlors. It certainly includes major named beneficiaries with a 25 per cent claim on the capital of the trust property. The provision does not, however, include an unnamed beneficiary who happens to receive major distributions at the apparent discretion of the trustees (although in practice there may be little discretion involved).

The JMLSG Guidance pursues a similar approach. It provides further helpful guidance on the risks of trusts and emphasises the need to identify beneficial owners – but naturally defines this term in the same way as the MLR, so as to exclude those who receive distributions at the apparent discretion of the trustees. In a letter of June 2007 to the President of the Law Society, the then Chief Secretary of the Treasury explicitly stated that it was the Government's intention to exclude discretionary beneficiaries from the due diligence requirement, even at the point of distribution.

TI(UK considers that this was a mistake and that this creates a significant money laundering risk of the kind described above.

The consequences of failure to conduct due diligence

The TI-UK recommendation is that, if beneficial ownership cannot be established in the terms described, the distribution should not be made and the account should be terminated. Some have suggested that this is draconian and an affront to human rights. It is, however, precisely the outcome envisaged by MLR 11 when a reporting institution cannot apply due diligence measures and it is difficult to see why the same principle should not apply to the due diligence measures envisaged by TI-UK in line with the FATF Recommendations.

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