

B. Talking Points Submitted by the Panellists of Panels 2 and 4

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As a law enforcement officer I make the following observations and comments on measures to combat economic crime including money laundering.

Investment Fraud embraces a number of methods used by serious and organised criminals to defraud investors, typically involving non-existent companies or fictitious commodities. The value of these frauds can be very large. A well planned investment fraud might generate around €500,000 while one bogus investment company, the organisers of which are now serving prison sentences, defrauded customers of €3 million between 1995 to 1997. An investment fraud may involve individuals acting under the umbrella of a genuine investment company or through wholly fictitious or fraudulent investment brokers. Generous returns from money invested in the scheme are promised, the initial investors may be paid dividends out of the money received from later investors prolonging the life of the fraud, the deception is often elaborate, meetings are held in good hotels, fine restaurants or even in offices located within bank premises. The criminals are well dressed and carry one or two mobile phones which are constantly ringing during a meeting. Some fraudsters operate only via the telephone or email and discourage or continually cancel pre-arranged meetings. Victims are often encouraged to join by other investors (who turn out to be in league with the fraudsters).

The Use of Information Technology in Economic Crime

From my own experience in the investigation of 419 frauds, also known as West African or Nigerian letter frauds; this type of fraud involves the victim being asked to facilitate the transfer of significant funds, usually from an account belonging to someone who has been forced to leave their country following political unrest. The fraudsters/conmen are willing to exploit any opportunity to achieve their aims and letters and emails have been noted asking for assistance to access money belonging to victims of September 11. Publicity in early 2003 raised local awareness in Ireland of this type of fraud and the Irish Police had a steady stream of reports throughout the latter part of the year amounting to nearly 300 reports. I am aware most internet service providers also now encourage their email account holders to report to them examples of 419 emails received, in order that they can bar the sender from sending such correspondence. Therefore, Information Technology is a means of creating an awareness in the general public to safeguard them against fraud.

The Use of Whistle-blowers i.e. Bank Employees

My own experience in the investigation of Money Laundering and the concept of suspicious transaction reports to encourage staff/people to come forward, is that they should have some protection. Under Irish legislation i.e. the Criminal Justice Act 1994, Bank Employees who make unusual/suspicious transaction reports are given protection under the legislation to make such reports. In this hypothetical case the Bank Employee, if the legislation was in place, could have made a suspicious transaction or an unusual transaction report to a Senior Compliance Officer in their headquarters bypassing the Bank Manager if protection/safeguards were in place.

Information Technology Used by Organised Crime

New Technology is used in crime, such as fraud, blackmail and extortion as well as paedophilia and child pornography. The national high-tech crime unit defines this type of crime as

- A. New Crimes New Tools - New crimes committed against computers and IT networks which present new opportunities to criminals and new challenges to law enforcement agencies, e.g. hacking and viruses, denial of service attacks and spoof websites; and
- B. Old Crimes New Tools - Traditional crimes supported by the use of the internet and new technology such as fraud, blackmail and extortion. Paedophilia, pornography, identity theft and cyber stalking.

High-tech crime has become a rapidly growing phenomenon over recent years, computers and in particular the internet provide great benefits for our society; however, there is a real threat that criminals will exploit these mediums, turning a tool designed to benefit society into a tool to help them commit crime.

Prevention by Law Enforcement Officials of Schemes Prior to Victims Incurring Loss

In practical terms, if this situation existed in Ireland and from a practical case point for law enforcement to identify large amounts of money in Ireland, there is a law, the civil restraint powers under the Proceeds of Crime Act, 1996 which enables law enforcement officers in Ireland to obtain a freezing order against all monies held in the bank accounts. This is done by the sharing of information from within the jurisdictions where the victims have transferred monies from and where law enforcement investigations are active and alive. The freezing order can then remain in force until the principals are apprehended in due course and the monies are therefore protected and safeguarded for the safe return to the victims.

Additionally, under our money laundering legislation, provisions are available in some jurisdictions for a restraint order to be placed over monies such as in this example. However, also there are provisions in money laundering legislation in Europe and in Ireland, whereby the financial institutions identified in this hypothetical case are alerted to a money laundering investigation proceeding in their country or an adjoining country and thereby a letter indicating that if they deal or transmit any of these monies, they are then involved in the conspiracy or involved in aiding and abetting money laundering and the accounts can be locked by means of a letter to the bank which will have the effect of freezing any monies held there.

The Common Law Approach - Tracing and Confiscation of Assets

Based on the Proceeds of Crime Act, 2002 in the United Kingdom and the Criminal Justice Act, 1994 as amended in 1999 in Ireland.

Common law systems of criminal confiscation focus on the prosecutor applying to a designated court or the court of trial for the investigation in the court as to the extent of the benefit which a convicted person made from criminal activity. In drug related cases the investigation can extend beyond the particular offence to all associated drug related crime. Where crime other than drug related crime is involved, the investigation is likely to be limited to a specific crime of which the person was convicted. The investigation aims at imposing on the convicted person, a legal obligation to pay to the State the sum assessed as the value of the benefit. The order does not focus on any one particular property and the defendant can decide on which steps are needed to discharge the obligation. If he fails to do so he runs the risk of imprisonment in default.

While the benefit investigation aimed at the confiscation order can only take place after conviction, assets may be restrained prior to the trial to ensure that they are not dissipated. The restraint is likely to be against all the assets of the defendant, though cases of assets are likely to be identified. Assets in the name of third parties which are believed to be the property of the defendant can also be restrained. Restraint orders will usually allow money to be paid out for living expenses even for the carrying out of a business. The prosecutor might ask the court to appoint a receiver or manager to preserve the restrained assets.

During the investigation the prosecution will have the advantage of certain presumptions. These include a presumption that property acquired by the defendant after a certain date in the statute, usually 6 years before the charge or after conviction, was obtained as a result of the criminal conduct and that any expenditure incurred by the defendant after a certain date was met from property obtained as a result of the criminal conduct. These presumptions can be rebutted by evidence from the defendant. At the confiscation hearing the standard of proof is the lower balance of probabilities test rather than the higher beyond reasonable doubt test which is the one generally applied to criminal matters. Thus the court starts from the position that the defendant's property was obtained illegally and that it is up to him to show that it is, or part of it was obtained legitimately.

The confiscation hearing will probably not follow immediately after the conviction, there could be a number of adjournments while the prosecutor or agency collects evidence of benefit. The confiscation order will not be for the entire amount of the benefit but will be limited to a sum which can be realised in the hands of the defendant. However, there is usually a power to re-open the assessment of benefit even after the conviction order has been made if new information about the size of the benefit or of the assets available to the defendant comes to light.

Civil Forfeiture and the use of Tax Powers

The modern use of legal processes focusing on the assets produced by the criminal activity rather than on the guilt or innocence of specific offenders started with US developments in the 1980's, powers of civil confiscation had existed since the 18th Century and the US Customs Laws. The concept of civil forfeiture has withstood constitutional challenges in the US Supreme Court. The court decided that civil forfeiture was not a criminal

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sanction and was constitutionally acceptable so long as the individual case was not grossly disproportionate to the gravity of the offence.

Parallel to the US developments was the introduction in Italy in 1982 of a law which allowed the courts to seize the assets of persons belonging to a mafia conspiracy and of relatives or associates suspected of holding assets for them. These provisions were later challenged before the European Court of Human Rights and were found that they were acceptable as proportionate preventative measures. In *N - V - Italy* in 1991, the applicant argued that civil forfeiture was punishment without a conviction and thus breached Article 6, subsection 2 of the European Convention of Human Rights but the Commission on Human Rights said that the proceedings did not include a finding of guilt and thus the applicant never acquired the status of an accused person.

Special legislation was introduced in Ireland in 1996 to serve the civil restraint of assets which are believed to be the proceeds of crime and if they are not claimed by a legitimate owner within 7 years they can be transferred to the State. The court must accept that the belief in criminal origin is reasonable. The process is run by an agency made up of police, revenue and social welfare officers. The Irish legislation is unusual in that the same agency uses Revenue powers to tax the income accumulated by criminals from criminal activity.

The Proceeds of Crime Act 1996 introduced a new cause of action of a freezing order leading to eventual civil forfeiture. Asset focused in *rem* rather than in *personam*. It is a freezing process with a confiscation application after seven years, limited to property over €13,000. Civil standard of proof, no conviction needed. See the UK case of *McCann 2002* on what the civil balance of proof means in an anti-social behaviour case. The applicant's belief can go into evidence. Limited but significant exception to the hearsay rule. Must be reasonably grounded. Shifts or shares the burden of proof when the CAB makes a *statable* case. Payment out applications for legal services, etc. Use of receivership orders. Ireland sells the assets rather than manages.

The tax approach used in Ireland and in the latter UK law has the advantage of incorporating heavy revenue penalties and interest and provisions for reversing the burden of proof which have long been considered acceptable in tax cases. This approach is only feasible in States with elaborate and well resourced tax enforcement systems and where virtually all the population are recorded on the tax system. The law can provide that a citizen with a mysterious income must show that all tax obligations have been met. The tax authorities are only interested in the existence of income whether its origin is legal or illegal should be irrelevant. There is no need to trace particular assets or associate them with particular crimes.

Some tax codes include powers to freeze and seize assets while the tax obligations are clarified. The tax approach has the advantage that it is morally neutral while, through the collection of substantial arrears interest and penalties, it can effectively remove the criminal profits and get the income and indeed the tax payer into the legitimate economy. This approach has fewer human rights and constitutionally difficulties except that the special revisions for criminal profits will constitute a form of discrimination requiring a rational justification. In addition civil tax enforcement powers can be used in combination with criminal penalties for tax offences. In order to make it effective, special provisions had to be introduced to allow for the sharing of information from tax records with the officers investigating the assets.

In Ireland, a special agency called the Criminal Assets Bureau was set up in order to tackle and deprive organised crime of their profits.

Suspicious Financial Activity Reporting and the Scale of Activity

The scale of Money Laundering activity is very difficult to estimate on a global spectrum. As well as making extensive use of cash, serious and organised fraudsters will often go to great lengths to avoid arousing suspicion with the regulated financial sector and suspicious financial transactions, including cash payments, to aid disclosure regime. However the use of the regulated sector is unavoidable if serious and organised fraudsters wish to legitimise their criminal proceeds (like in our hypothetical case).

One way of laundering money, particularly at the layering stage is to invest in financial products with a view to selling them quickly. The use of insurance policies, share portfolios or high yield savings accounts to launder funds often involve incurring penalties for the early withdrawal of savings or the closing of policies or the selling of shares at a loss. Serious and organised criminals, particularly major fraudsters may and are prepared to bear such costs if they perceive that the overall risk of detection is lower than other money laundering methods. Given

that some level of financial expertise may be needed to launder money effectively in this way, this is an area where criminal fraudsters may look to corrupt a financial professional in helping them, as occurred in this hypothetical case with the Manager, Mr. A.

Banks & Financial Services Providers who are at Risk by Money Launderers

All banks and financial service providers are at risk of being used to facilitate money laundering. Large banks and financial service providers which provide a wide range of financial products and services and which also have operations in both high and low risk jurisdictions may be particularly at risk. Although the money launderer faces the challenge of due diligence checks being carried out by those larger institutions, they are attractive to money launderers because their size and reputation mean that receiving institutions in other countries are likely to ask fewer questions about transfers of money. As with what happened in this hypothetical case where money is being transferred from a major bank to a number of minor banks in another jurisdiction.

Mr. A in the hypothetical case, who is the bank manager, allowed himself to be the victim of serious and organised criminals, as in this case fraudsters to assist them to launder monies by providing the expertise and inside information in respect of the activities of the bank. Mr. A may well have carried out his activities as a result of a lack of awareness or curiosity amongst bank managers who may be used to launder money, some may turn a blind eye or there may be a degree of collusion. In the latter instance, the professional may not be an entirely willing accomplice, as Mr. A may not be in this case, since serious and organised criminals are often prepared to use intimidation as well as other inducements to obtain the help they need.

The Use of Front Companies and High Cash Businesses

Serious and organised criminals frequently launder cash through legitimate and quasi-legitimate businesses. These businesses are often owned or part-owned by criminals or their associates, although legitimate businessmen may also be duped into providing means for laundering criminal proceeds. The businesses typically have a high cash turnover, this makes it easier for criminally acquired cash to be mixed in with legitimate funds, e.g. restaurants, nightclubs, fast food outlets, tanning salons, taxi firms, car sales or repair companies.

These are my observations and comments on economic crime with some references to the exposures in the hypothetical cases.