

GROUP 3

CURRENT SITUATION, PROBLEMS AND SOLUTIONS FOR SPECIAL INVESTIGATIVE TOOLS IN COMBATING MONEY LAUNDERING

Chairperson	Mr. Ahmed Nasim	(Pakistan)
Co-Chairperson	Mr. Takashi Itoyama	(Japan)
Rapporteur	Ms. Ronel Van Wyk	(South Africa)
Co-Rapporteur	Mr. Saidi Ally Mwema	(Tanzania)
Members	Mr. Soeparno Adi Soeryo	(Indonesia)
	Mr. Mitsuru Nishikori	(Japan)
	Mr. Pisan Mookjang	(Thailand)
	Mr. Peter H Wilkitzki	(Germany)
	Director Mikinao Kitada	(UNAFEI)
Visiting Expert Advisors	Prof. Hiroshi Iitsuka	(UNAFEI)
	Prof. Hiroshi Tsutomi	(UNAFEI)

I. INTRODUCTION

Money laundering, which briefly means “making dirty money look clean”, occurs in every crime where there is a financial motive. The problem of laundering money derived from illicit trafficking in drugs, as well as other serious crimes, has become a global threat to the integrity, reliability and stability of financial and trade systems and even government structures. This growing threat requires countermeasures by the international community as a whole, in order to deny safe havens to criminals and their illicit proceeds. The proceeds of crime, particularly cash, are laundered for reinvestment. This involves a series of complicated financial transactions i.e. wire transfers, purchase of money orders or cashiers cheques, underground banking etc, which ultimately results in criminal money become “clean” and accepted for legitimate business purposes.

Over the past few years, we have witnessed the benefits of industrialization and globalization of transport and

communication. However, on the negative side we see criminals crossing borders with an ease unknown in the past and are expanding their area of criminal activity and become ever more intelligent and organized. To meet the threats posed by domestic and transnational organized crime and to enhance law enforcement's ability to succeed in combating money laundering, we need national and international combined efforts.

It may also be noted that the newly emerging forms of multilateral cooperation among law enforcement agencies is, on the one hand, necessitated by globalization of crime, but, on the other hand, it encounters problems due to the insufficiency of laws and regulations which would enable fuller application of modern technology as an instrument of special investigation techniques.¹

In proving money laundering offences it is important to prove the link between the money laundering offence and the fact that the criminal was aware that the proceeds

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had been obtained illegally. Through the continuous surveillance of these offences we will also be able to effectively investigate and prove the money laundering offences.

In this paper we intent to examine the three special investigation techniques namely (i) controlled delivery (ii) electronic surveillance (wiretapping etc.); and (iii) undercover operations as effective weapons in combating money laundering. In this regard our discussion will cover a brief analysis of each of the three investigative techniques. We shall also explore the legal framework and identify current problems encountered in the use of these tools in facilitating the investigation of money laundering. Finally, we shall recommend albeit briefly, the use of the above mentioned investigation techniques and call for change of provisions of domestic laws.

II. CONTROLLED DELIVERY

A. Introduction

In terms of Article 2(i) of the United Nations Convention Against Transnational Organized Crime, controlled delivery shall mean the technique of allowing an illicit or suspect consignment to pass out of, through or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.² This is done for the purpose of furthering the investigation of an offence and the possible identification of persons involved in the commission of the offence.

It is an investigative technique which has been known for years as an internationally and domestically accepted method for the monitoring and the combating of crimes including money laundering and predicate offences such as drug trafficking, illegal firearms, smuggling, stolen motor vehicle etc.

There are two methods of controlled delivery namely live control delivery and clean controlled delivery. If the illegal goods or surrogates, at least in part, arrive at their final destination it is called live control delivery. Where the circumstances of the detection and concealment are as such, that it is possible to remove all or most of the illegal goods and substitute counterfeit illegal goods before allowing the consignment to proceeds, a clean controlled delivery can be made. If the final destination of the consignment is within the frontiers of the country in which the initial detection occurred, "Internal Controlled Delivery" is possible. If the intended final destination of the consignment is in a country other than that where the initial detection was made, there is the potential for an "External Controlled Delivery".³

An example of a clean control delivery in a money laundering investigation can be found in 'Operation Mule Train', an undercover operation which was conducted in the United states. On July 1, 1998, the Chief Financial Officer, President, and Vice President of Supermail International, Inc., cheque cashing company, were arrested on money laundering charges stemming from a two-year investigation conducted by the Los Angeles office of the FBI and the Los Angeles Police Department. According to corporate filings, the company was one of

¹ Statement of Slawomir Redo at the Central Asian Seminar on TOC, 22-23 March 2000.

² Art 2 of the UN Convention against Transnational Organized Crime: September 2000

³ PD Curring: The technique of controlled delivery as a weapon in dealing with illicit traffic in narcotic dugs and psychotropic substance: 2000/06/07/

the largest cheque enterprises operating in the western U.S., and purported to be one of the leading U.S. money transfers agents providing services to Mexico and Latin America. It was considered a significant and growing company among the increasing number of independent non-bank financial institutions operating in many inner-city neighborhoods where banks have reduced their presence.

The three executives, along with six other employees and associates, were arrested after a federal grand jury returned a 67-count indictment against 11 defendants, including the Supermail corporation, charging multiple conspiracies, money laundering, evading currency reporting requirements, aiding and abetting, and criminal forfeiture. The initial target of the investigation was a company store in Reseda, California. Investigators, working in an undercover capacity, approached the manager, who agreed to launder “drug” money in exchange for a cash fee. The undercover officers then delivered cash which he represented to be drug proceeds to the managers and he converted the cash into money orders issued by the company. As larger sums were launched, the manager sought the assistance of his associates working at other store locations. When a new manager took over operations at the Reseda store in April 1997, he brought in the company’s corporate officers, including the CEO, the President and the Senior Vice President. Pocketing the cash fee, the corporate officers authorized the issuance of money orders and the wire transfers of large sums of “drug” money to a secret bank account in Miami, Florida while the cash was used to maintain operations at the company stores.

To avoid detection by law enforcement, no Suspicious Activity Reports (SAR) forms of Currency Transaction Reports (CTR)

were filed by the company for any of these transactions; however, SAR forms and CTR’S were filed by the banks into which the cash deposits were made, and these filing significantly enhanced the value of other information received. In total, the defendants laundered over \$3.2 million dollars of “drug” money. The investigation is believed to be one of the largest money laundering “sting” operations targeting a cheque cashing business in U.S. history.⁴

B. Common Issues and Problems

In many countries the controlled delivery technique is used as a method for conducting criminal investigation but there is no specific legal authorization provided in the domestic laws. In those countries, controlled delivery operations are conducted in accordance with departmental guidelines in the relevant law enforcement agency i.e. police, prosecutors, customs etc. These authorities have employed the technique mainly in the fight against money laundering, drug trafficking, illegal firearms, stolen properties trafficking and human trafficking. However, as criminals employ modern technologies to assist in their criminal activities, there is a need to enact new laws which allow law enforcement to use the same modern technologies in their investigative techniques.

Due to the economic and technological gap between developed and developing countries, there is often a lack of resources such as skilled personnel and modern investigation equipment for evidence collection. This, in a way, affects the efforts made in combating money laundering. Certainly combating money laundering requires resources both physical and human. Controlled delivery as an effective investigative tool is being used in many

⁴ Susan L Smith: Money Laundering: Trends and Techniques: February 2, 2001

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countries. However, law enforcement agencies are reluctant to reveal their use of this investigative technique as not to tip off criminals.

C. Proposed Solutions

Money laundering and other predicate offences such as drug trafficking, fire arms smuggling, corruption, fraud, extortion etc. are extremely difficult to detect. It, therefore, requires not only a high level of skill, professionalism, team work and cooperation, but also as a special investigative technique. In this regard, the following points may be considered in a controlled delivery operation :

- (1) Those controlling the operation must make sure the information does not leak as premature publicity will render controlled delivery operation useless.
- (2) Whenever possible, removal of illegal goods such as drugs, firearms etc should be made and a harmless substance substituted. It should be noted that "clean controlled delivery" eliminates not only the risk of illegal goods being lost but also gives greater freedom in organizing surveillance and reduces the risk of alarming the criminals who may have arranged counter surveillance.
- (3) The ultimate delivery of the consignment should be made with the cooperation of the firm that would normally make such a delivery. A law enforcement officer posing as a driver's assistant should travel with the delivery vehicle which should be monitored by other operation team members who will take the necessary evidence such as fingerprints, photographs etc.

(4) In case there will be need for external control delivery there are additional factors which will have to be considered including:

- (i) The legal provisions in force in the detecting country and the country of destination.
- (ii) Whether there is sufficient time to develop an acceptable action plan between the law enforcement agencies in the detecting country and the country of destination.
- (iii) Whether the authorities in the country of destination are able to launch an operation given the identification and detection principles.⁵

II. ELECTRONIC SURVEILLANCE

A. Introduction

Criminal investigations are becoming increasingly more difficult as criminals use advanced technologies and more sophisticated methods to commit their crimes. In order for investigators to keep pace, they must use sophisticated investigative techniques. One extremely successful technique has been electronic surveillance, both silent video surveillance and interception of wire, be it oral or electronic communication. In fact, recording criminals talking about their crimes in their own voice not only helps to prove a case against them but also enables law enforcement authorities to learn of conspirator's plans to commit crime and lay a trap to prevent the occurrence of violent crimes.

Electronic surveillance can be defined simply as the interception of oral or

⁵ See Footnote 3, supra P4

electronic communication through wire, telephone, computer etc. in order to listen and record information by using technical means. Electronic surveillance can effectively be used in cases such as money laundering, drug trafficking and extortion.

B. Common Issues and Problems

The major problem in the use of this technique is the need to strike a balance between the investigation of the criminal activity and the constitutional rights of the individual i.e. a persons' reasonable expectation of privacy. In an effort to strike such balance the domestic legislation of various countries prohibits any unauthorized electronic surveillance.

However, there are established requirements for obtaining authority to make such interceptions. A warrant authorizing electronic surveillance of oral, wire- and electronic communications as well as silent video can only be issued by a judge. For example in the United States, law enforcement officers are required to confine their surveillance to only relevant conversations or activities, specify the length of time the technique will be used and certify that normal investigative techniques have either been tried and failed or are reasonably unable to succeed, or too dangerous to attempt.

In other words, before obtaining an interception warrant, law enforcement officers are required to exhaust normal/traditional investigation techniques unless such techniques will alert the criminal of an investigation. Another traditional method is to search a person's home under the authority of a search warrant while the owner is present, but again it is not necessarily true that criminals will hide or keep valuable information of their criminal activities in their homes. Even if the law enforcement officers use an informer or undercover officer, the target can choose

not to divulge information assuming any information will be given to law enforcement authorities. From the foregoing, it would appear that the court will issue a warrant after evaluating the following points:

- (i) Traditional/normal investigative techniques have been tried and failed,
- (ii) Traditional investigative techniques are reasonably likely to fail, or
- (iii) Traditional investigative techniques are too dangerous to try.⁶

C. Proposed Solutions

While we see electronic surveillance is an effective investigative tool as the criminals are not aware that their words or actions are being recorded by law enforcement agencies because of its extraordinary invasiveness, the use of electronic surveillance should be limited to only those times when it is necessary. The necessary requirements can be shown if investigators can satisfy the court that traditional investigation techniques have been tried and failed and can explain how each traditional technique i.e. interrogation, physical surveillance, search warrants etc. would be futile or dangerous in their particular investigations. Certainly, as electronic surveillance can be conducted across border, the necessity of having multilateral and bilateral agreements between member states cannot be ignored.

In analyzing the use of electronic surveillance among the participating countries, there are countries, which have,

⁶ T D Colbridge : Electronic surveillance. A matter of necessity: February 2000

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and those which have no legal provisions governing electronics surveillance. For example, Germany,⁷ Japan, Pakistan, South Africa and the United States of America South Africa etc, have laws concerning interception of communications for the purpose of criminal investigation. However, there are countries that do not have legislation but still use the technique as a criminal investigation tool.

Lastly it should be noted that as money laundering offences are more likely to be cross-border crimes there should be international cooperation in the use of electronic surveillance just as it is true for other special investigative techniques. A minimum requirement for the admissibility of cross-border surveillance should be that the conditions for applying the methods are met under the law of either State.

III. UNDERCOVER OPERATIONS

A. Introduction

Money laundering takes place in a myriad of ways. A small-time criminal might launder stolen money by purchasing a valuable item in one country and selling it at a later stage in another country. A criminal with more funds to wash and criminal organizations whose activities generate large amounts of illicit profits cannot rely with safety on one laundering transaction only. They usually require a more complex money laundering scheme which might utilize shell companies and an intricate web of international financial transactions.

The methods used by criminals in their trade, whether it is narcotics, organized crime, money laundering etc., have become more advanced and are sometimes

extremely complex and difficult to detect. Undercover policing is proving to be one of the most successful investigative tools in combating money laundering. The use of undercover investigative techniques requires extensive planning, preparation and handling. This investigative technique also imposes heavy demands on police officers on a professional as well as ethical level. They are faced with certain problems which are not encountered in any other type of enforcement activity. Undercover work is a useful technique for obtaining information regarding the activities of criminal elements. The information obtained is virtually indispensable in the development of intelligence that leads to the identification, arrest and conviction of offenders and recovery of stolen property, and is also one of the most effective means of detecting or preventing criminal activity.

An undercover operation is a method of investigation where substantial information and evidence on money laundering activities are gathered over a period of time, involving the use of lawful measures by law enforcement and by using undercover agents to obtain such information and evidence.

Law enforcement agencies rely on these undercover agents to infiltrate criminal organizations to gather information to dismantle them. Undercover assignments come in many varieties. They include everything from short-term, buy-bust scenarios to longer-term investigations lasting months or years. There are two dimensions within undercover operations. One being the utilization of a confidential informant who provides insight and information concerning the activities of criminals, and the other is the utilization of undercover police officers (agents) that assume a different identity in order to obtain information and evidence. These two dimensions are normally used

⁷ German Code on Criminal Procedure: Guidelines set by the Prosecutions Service

simultaneously in an effort to address the threat effectively.

Undercover operations conducted in a proper manner are very expensive and in some instances, can be a controversial investigative method. It is furthermore a dangerous investigative technique which may involve innocent members of the public. Proper measures should therefore be put into place in respect of the sensitivity of the information, the involvement of the public, the security of the agent(s) and the informant and the evidence gathered during the operation.

A good example of a successful undercover operation with regard to money laundering is 'Operation Casablanca'. The United States Customs Service concluded the operation in May 1998. It was the largest, most comprehensive and significant drug money laundering case in the history of the United State law enforcement. This undercover money laundering investigation resulted in the seizure of more than \$98 million in cash from drug traffickers, more than 4 tons of marijuana and two tons of cocaine. The indictment, which was issued in United State District court in Los Angeles, charged 26 Mexican bank officials and three Mexican Banks, CONFIA, SERFIN, and BANCOMER with laundering drug money. Additional, bankers from two Venezuelan banks, BANCO INDUSTRIAL DE VENEZUELA and BANCO DEL CARIBE were charged in the money laundering scheme. In 'Operation Casablanca', undercover agents were introduced to financial managers from drug cartels, and they obtained contracts to "pick up" drug proceeds on the streets of major United States cities. The agents were later introduced to Mexican bankers who opened bank accounts for them. Funds that were "picked up" were transported back to Los Angeles, California where it was deposited

in United State Customs Services-controlled undercover bank accounts. Funds were then wire transferred to accounts opened by the Mexican banking officials. After taking out their commission, the officials then issued Mexican bank drafts drawn on the U.S. accounts of the Mexican banks. These bank drafts were delivered back to the undercover agents in the U.S. either in person or via courier. The funds were then disbursed at the direction of the money launderers.

Court orders were obtained allowing for the seizure of the total amount of drug money laundered through the accounts and the amount of commissions paid to the bankers. Because the Mexican bank drafts were drawn on the U.S. accounts of the Mexican banks, court orders were obtained allowing for the seizure of the aforementioned funds from those U.S. accounts. As a result of the investigation, BANCOMER and SERFIN each pled guilty to criminal money laundering violations and together forfeited a total of \$16 million to the government. Each bank was also fined \$500,000. CONFIA settled the indictment with a civil plea and forfeited \$12 million.

Twenty individuals, including 12 Mexican bankers and their associates, have pled guilty to money laundering and/or drug smuggling charges. Three Mexican bankers were convicted after a jury trial, and three Mexican bankers were acquitted. Three Venezuelan bankers were convicted in December 1999 on money laundering charges. An amount of \$64 million of the \$98 million originally seized during this investigation has been forfeited to the government of the United States.⁸

B. Common Issues and Problems

The most common problem that countries have to deal with is the question of whether an undercover operation is

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justifiable and whether it has been executed within the boundaries of the law. Furthermore, the methods employed during the operation should not infringe on the constitutional rights of the person(s) involved. The Supreme Court in the United States has long upheld the validity of undercover and reverse sting operations as long as outrageous governmental conduct is avoided. Four factors can be considered in determining whether outrageous conduct exists: (i) the need for the type of conduct in relationship to the criminal activity; (ii) the preexistence of the criminal enterprise; (iii) the level of discretion or control of the criminal enterprise by the government; and (iv) the impact of the government activity creating the commission of the criminal activity.⁹

Additionally it is important that an undercover operation be approved and monitored. The approval must require written documentation, stating supporting facts and circumstances, that: (i) initiation of investigative activity regarding the alleged criminal conduct or enterprise is warranted under applicable departmental guidelines; (ii) the proposed undercover operation appears to be an effective means of obtaining evidence or necessary information; (iii) the undercover operation will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner; (iv) approval for the use of an informant or confidential source has been obtained as required by Attorney Generals or National Public Prosecutors; and (v) any foreseeable participation by an undercover employee in illegal activities is justified.¹⁰

⁸ Susan L Smith: *The Fight against Money Laundering: The U.S. Perspective*: February, 1 2000

⁹ William P Schaefer: *Combating organized crime: the legislative and regulatory framework*

Another issue which is the subject of a legal debate is the question of the role of the undercover agent. Instead of preventing crime there is some possibility that a police agent may further and facilitate the commitment of crime. In money laundering cases, the agent has to participate. The involvement of the agent in this case is not a question of committing the offence, but of intent. The agent does not help the money laundering offence, but he rather assists in preventing further crimes. A line should be drawn between the legal participation of an undercover agent in illegal activities and the legal inducement of a crime during the operation. The courts of the countries should in terms of their own legal frameworks deal with this matter.

Undercover operations as a method of investigation have proved successful in the United States and in other countries. The participating countries have also acknowledged the importance of these investigative techniques. A majority of the countries represented have employed the technique of undercover operations for investigating crimes which include drug and firearms trafficking, money laundering, stolen properties, woman trafficking etc. Japan (for narcotics and firearms trafficking only) and Malaysia have some special laws or regulations pertaining to conducting undercover operations.

The German Code on Criminal Procedure makes provision for the use of undercover investigators where there is sufficient factual indications showing that a criminal offence of considerable importance has been committed and if clearing up this using other means would offer no prospects of success or be much

¹⁰ US Attorney General Guidelines on FBI Undercover Operations Revised: 11/13/93

more difficult. Some problems with undercover agents and the due process requirements have led to stringent court practice concerning the sentencing of offenders that have been induced by undercover agents to commit the offence, but not to a broad questioning of the tactic itself. In the United States and in many other countries the use of this method of investigation is not regulated by law but is considered a valuable investigative tool.

Countries should not permit undercover operations where agents are required to commit violent acts. In cases where this cannot be avoided, necessary measures should be taken to prevent the violence from occurring. Countries should, however, consider the regulation of investigative techniques such as undercover operations, by law in day to day judicial practice.

Law enforcement agencies often find it necessary to use information provided by individuals of less than sterling character and reputation, who live and function within the criminal element itself. Although a multitude of factors may motivate these individuals to provide information to the police, the use of informants remains one of law enforcement's oldest and most essential investigative tools. The rights and obligations of the informant should be protected and an assurance of confidentiality should be given. Proper records on informants should be maintained and the identity of each informant should be concealed.

Informants should have an explicit understanding of what they may and may not do while working for a law enforcement agency. By granting limited and specific authority, law enforcement agencies can effectively control the activities of the informant. It, however, often becomes necessary for informants to visit locations

where criminal activities, such as the buying and selling of narcotics takes place, where they are subjected to arrests by other agencies and prosecuted for the offences. The officer in charge of the informant should therefore effectively control the activities of the informant and times should be limited where informants can become involved in such activities.

C. Proposed Solutions

In this regard countries should consider and adopt the recommendations made by the United Nations to create an obligation under international law to criminalize money laundering. Article 4 of the Council of Europe Convention on Laundering, Search and Seizure and Confiscation of the Proceeds of Crime (1990) refers to special investigative powers and techniques. It places an obligation on the member states to consider adopting legislative and other measures as may be necessary to enable it to use special investigative techniques.

The approach of courts when presenting evidence, which was obtained during undercover operations, is very important. Courts must recognize the importance of not disclosing certain information on the persons involved and the techniques used. The disclosure of this information can lead to the endangerment of the lives of law enforcement officers, the persons who allow their properties to be used and will reveal the methods used during undercover operations, thus making it difficult to use the methods in the future.

In terms of article 14 of the Convention on Mutual Assistance in Criminal Matters between the Members States of the European Union (2000), member countries may agree to assist one another in the conduct of investigations into crime by officers acting covertly or with a false identity.

IV. CONCLUSION

It is our considered view that special investigative techniques such as controlled delivery, electronic surveillance and undercover operation should be included in domestic laws with a view of strengthening enforcement of money laundering laws and to intensify law enforcement efforts in detecting money launderers and prosecute them. This action will, however, not eradicate traditional investigation techniques but will supplement detection efforts.

As global communications and world trade agreements are increasing due to technological development, the ability to investigate money laundering cases is something that will continue to challenge law enforcement officers for the foreseeable future. It is therefore, important that as criminals employ modern technologies to assist their criminal activities, there is a need to enact new laws which allow law enforcement agencies to use such modern technologies in their investigating techniques.

Money laundering techniques will make progress as technology advances. We should make joint efforts worldwide to establish anti-money laundering laws and systems. We must also combat money laundering through training and exchange of information among countries. Additionally, each country should continue to work closely with its international partners in bilateral and multilateral assistance agreements to promote further actions to effectively address money laundering and other criminal activities and to win the fight against money laundering.