
8. Banking in an international and European framework: the case of Liechtenstein

Georges S. Baur

I. Introduction

As indicated by the title of this volume and as clear from the dominant context after 11 September 2001, security in the world of banking and finance is defined as relating essentially to terrorism and financial crime. This chapter therefore makes only brief reference to other important issues, such as Internet security, arms deals and war crimes, and does not attempt to establish a definition of terrorism.¹

What changes has the current security agenda brought for banking and more generally the financial industry? In recent years, particularly after the terrorist attacks of September 2001, financial intermediaries such as banks, professional trustees and to some extent asset managers have been exposed to an important change in the attitude to their work. This is also, of course, the case for the banks and other financial intermediaries in Liechtenstein. Money has been discovered to be a good tool for tracing, blocking, and fighting crime and criminals.²

The notion of crime has also changed. Money laundering as well as trans-border corruption and tax fraud have recently been included in Europe's criminal codes.³ While the most important issue has been the fight against money laundering and organized crime, terrorism has kept everyone on the alert and preoccupied with it for over two years. If financial intermediaries in earlier

¹ See, e.g., Raymond Aron's definition: 'une action violente est dénommée terroriste lorsque ses effets psychologiques sont hors de proportion avec ses résultats purement physiques' (an act of violence is a terrorist act when its psychological effects are out of proportion to its purely physical effects). Aron, R., *Paix et Guerre entre les Nations* [Peace and war among nations], 6th edn (Calmann-Lévy: Paris, 1968), p. 176. Note also the comment on the notion of 'war' against terrorism in section VI below.

² See Financial Action Task Force on Money Laundering (FATF), *Report on Money Laundering Typologies 2002–2003* (FATF: Paris, 14 Feb. 2003), Introduction, para. 1, available at URL <http://www1.oecd.org/fatf/pdf/TY2003_en.pdf>.

³ See, e.g., the legislation in France—Loi no. 96-392 du 13 mai 1996 relative à la lutte contre le blanchiment et le trafic des stupéfiants et à la coopération internationale en matière de saisie et de confiscation des produits du crime (1) (Law no. 96-392 of 13 May 1996); in Belgium—Law of 11 January 1993 on Preventing Use of the Financial System for Purposes of Laundering Money; in Germany—Act on the Detection of Proceeds from Serious Crimes (Money Laundering Act), 25 Oct. 1993; in Switzerland—Amended Criminal Code of 1 August 1990 (Articles 305bis and 305ter) and Federal Act on the Prevention of Money Laundering in the Financial Sector (Money Laundering Act) of 10 October 1997; in the United Kingdom—Money Laundering Regulation 1993; and in Liechtenstein—Amended Law on Narcotics of 12 November 1992 (Article 20a), Law of 21 March 1996 on the Amendments to the Criminal Code (Absorption of Enrichment, Money Laundering and Prevention of Abusive Exploitation of One's Position as an organ for Unfair Stock Exchange Dealings, and Law of 22 May 1996 on the Professional Due Diligence when Accepting Assets (Due Diligence Act).

times were inclined not to worry too much about what was happening around them as long as business went well, the new international political agendas have increasingly heightened their concern.

II. International initiatives

The initiatives of international organizations and the ad hoc working groups they have established are described in detail elsewhere in this volume.⁴ Noteworthy among them are the Group of Seven/Group of Eight (G7/G8) industrialized nations;⁵ the Organisation for Economic Co-operation and Development (OECD) and the Financial Action Task Force on Money Laundering (FATF);⁶ the Financial Stability Forum (FSF);⁷ the United Nations and its Office on Drugs and Crime (UNODC)⁸ and Counter-Terrorism Committee (CTC);⁹ the European Union (EU); the Council of Europe and its Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL)¹⁰ and Group of States against Corruption (GRECO);¹¹ the Organization for Security and Co-operation in Europe (OSCE); and the International Monetary Fund (IMF). They all deal with issues which are security-relevant in one way or another.

III. New developments in international law

Since the early 1990s there has been a new development in international law. The old system was based purely on intergovernmental negotiations and conferences which sometimes led to bi- or multilateral agreements, primarily binding on states or member states. This system has changed in four important ways.

⁴ See especially chapters 4 and 5 in this volume.

⁵ See URL <<http://www.g8.fr/evian/english/home.html>>.

⁶ The FATF is an intergovernmental body, established by the Group of Seven in 1989. The seat of its Secretariat is at the OECD, in Paris. It has 33 member states. The development of standards in the fight against terrorist financing was added to the FATF mission in 2001. The FATF works to generate the political will to bring about national legislative and regulatory reforms in the areas of money laundering and terrorist financing. See URL <<http://www1.oecd.org/fatf/>>; and chapter 4 in this volume.

⁷ The FSF was convened in Apr. 1999 to promote international financial stability through information exchange and international cooperation in financial supervision and surveillance. See URL <<http://www.fsforum.org/home/home.html>>.

⁸ See URL <<http://www.unodc.org/unodc/index.html>>.

⁹ The CTC, consisting of representatives of all 15 members of the Security Council, was created through UN Security Council Resolution 1373, 28 Sep. 2001, available at URL <<http://www.un.org/documents/scres.htm>>. The CTC monitors the implementation of the resolution by all states and tries to increase the capability of states to fight terrorism. See URL <<http://www.un.org/Docs/sc/committees/1373/>>; and chapter 5 in this volume.

¹⁰ See URL <http://www1.oecd.org/fatf/Ctry-orgpages/org-pcrev_en.htm>.

¹¹ GRECO was set up in May 1999 as a flexible mechanism to monitor, through a process of mutual evaluation and peer pressure, the observance of the Twenty Guiding Principles for the Fight against Corruption (adopted on 6 Nov. 1997 by the Committee of Ministers of the Council of Europe and available at URL <<http://cm.coe.int/ta/res/1997/97x24.htm>>) and the implementation of international legal instruments of the Council of Europe adopted in pursuance of the Programme of Action against Corruption. See URL <<http://www.greco.coe.int/>>.

1. *Globalization*. Since the early 1990s, after the fall of the Berlin wall and the exponential increase in activity on international markets (i.e., globalization in the true sense of the word), issues of financial crime and security have increasingly become international ones. This has happened not least because organized crime became fully globalized before those who fought it did. Of course, where there is money, crime is close at hand. Security in the financial context used to relate to ‘simple’ crimes: a bank robbery, or hiding the receipts of a fraud. Furthermore, such crimes were seen as something national: even the question of what happened to the money that was stolen, whether obtained through blackmail or produced in another manner by the Mafia, for example, was seen by others as a problem purely for Italy or perhaps the United States.

2. *Action groups*. With the end of the cold war, ideological issues no longer dominated, political blocs were not in opposition to each other, and the most powerful and influential countries have been able to solve many problems in a cooperative manner. The G7/G8 provides the clearest illustration of this. With a view to greater efficiencies, detailed policy making—for instance in the field of standard setting and assessment—has been increasingly handed over to closed ‘action groups’ with no standing in classic international law.

3. *‘Soft law’*. There is a growing role for so-called ‘soft law’ which does not necessarily respect, and in certain circumstances consciously disrespects, out-moded principles of international law such as the notion of equal application and applicability, peer review, non-discrimination and action on a level playing field—in short, equal treatment in general as well as transparent rules and procedures.

4. *Influence on the private sector*. The above-mentioned rules and activities are, if not formally applicable, at least highly influential for the private sector. As their authors intended, they have a high degree of influence on everyone’s behaviour. Remarkably enough, this is mainly not because of any legal threat, but because of such instruments as ‘name and shame’—the fear of losing good reputation—and because of plain political pressure.

IV. Liechtenstein as an example

Which laws are particularly important for the private sector with respect to security issues today, and what has Liechtenstein accomplished?

The security question cannot be separated from the general issue of a well-designed system to control the financial centre. The principal issues of diligence and control are generally the same. Nevertheless, in technical terms a whole new dimension has been added with the development of the fight against money laundering and organized crime. The original question was ‘where does the money stem from?’, whereas now the question must be added ‘where does the money go?’¹² In the first case it was a question of turning

¹² FATF (note 2), chapter 1, paras 8 and 9.

money obtained from illegal sources into legal funds, whereas in the second case money obtained from perfectly legal sources is often used for illegal purposes.

When the security issue came to the fore, essentially and in its most globally influential form after 11 September 2001, it became vital for countries' financial systems to be able to react quickly and cooperate in a meaningful manner. Liechtenstein was already acting to fight money laundering: all the necessary authorities were in place and sufficiently alert to be able to take up the fight against the financing of terrorism immediately.

At the end of the 1990s, however, Liechtenstein's financial sector was regarded by foreign authorities as insufficiently regulated and was thus black-listed by groups such as the FATF and the FSF. As an example for similar jurisdictions, it is interesting to note what Liechtenstein has in general terms done to overcome the shortcomings in its financial centre since its inclusion in the FATF's list of Non-Cooperative Countries or Territories (NCCT) for the year 2000.¹³

Liechtenstein has amended and brought up to state-of-the-art standards its legislation on the duty of diligence of financial intermediaries, on the prevention of money laundering,¹⁴ and on mutual legal assistance in criminal matters¹⁵ as well as with respect to the seizure and forfeiture of money of criminal origin.¹⁶ The 1959 European Multilateral Mutual Legal Assistance Treaty¹⁷ has been given more substance in its application, and a Mutual Legal Assistance Treaty was concluded with the United States in 2002.¹⁸ The staffs of the responsible national authorities, such as the police, the prosecutor's office, the courts and the financial surveillance authority, have all been enlarged. New authorities have been created, such as the special police to combat economic crime (*Einsatzgruppe zur Bekämpfung der Wirtschaftskriminalität und organisierte Kriminalität, EWOK*), the Due Diligence Unit (DDU) and, most important, the Financial Intelligence Unit (FIU).

All these 'formal' acts would not have led to any significant change, however, if Liechtenstein had not made active efforts to apply the new laws, through real-life investigations and proceedings against people who misuse the financial system. Many of the cases involved have been reported in the media,

¹³ See Financial Action Task Force on Money Laundering (FATF), 'Review to identify non-cooperative countries or territories: increasing the worldwide effectiveness of anti-money laundering measures', 22 June 2000, URL <http://www1.oecd.org/fatf/pdf/NCCT2000_en.pdf>.

¹⁴ Law of 22 May 1996 on the Professional Due Diligence when Accepting Assets (Due Diligence Act), *Liechtensteinsches Landesgesetzblatt* (hereafter *Liechtenstein Legal Gazette*), no. 116 (22 Aug. 1996), also available at URL <<http://www.jeeves-group.li/files/pdf/FLduediligenceact.pdf>>.

¹⁵ The Mutual Legal Assistance Act of 11 Nov. 1992; see *Liechtenstein Legal Gazette*, no. 68 (1993).

¹⁶ Criminal Code §20 in its original version of 24 June 1987; see *Liechtenstein Legal Gazette*, no. 37 (22 Oct. 1988), URL <<http://www.recht.li/sys/1988037.html>>.

¹⁷ The European Convention on Mutual Assistance in Criminal Matters, *European Treaty Series*, no. 030 (20 Apr. 1959), available on the Council of Europe Internet site at URL <<http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>>.

¹⁸ Treaty between the United States of America and the Principality of Liechtenstein on Mutual Legal Assistance in Criminal Matters, document 107-16, 8 July 2002, URL <http://www.amicc.org/docs/Liechtenstein_mutualassistance.pdf>. The treaty entered into force on 1 Aug. 2003.

and in general the FIU's statistics are very encouraging.¹⁹ All this goes along with an intense actual usage of mutual legal assistance, which has helped the country regain credibility with foreign authorities. This has clearly had an impact on the reviews by international organizations such as the FATF and MONEYVAL, and in 2003 by the IMF.²⁰

The IMF's report is probably the most complete recent report: it is based on objective criteria, and follows a transparent procedure and the principle of equal treatment. The IMF remarked on Liechtenstein's high level of compliance with international standards for anti-money laundering and combating the financing of terrorism. With respect to the international supervisory and regulatory standards, it noted that financial-sector supervision and regulation were underpinned by a good foundation of modern legislation and regulations that derive from Liechtenstein's membership of the European Economic Area (EEA). The one substantial criticism made by the IMF is that the authorities responsible for bank supervision and supervision of investment companies in particular, but also the supervision of insurance, are in part understaffed. The recommendations it makes for a reorganization of the supervision of the financial market, which should lead to the establishment of an integrated supervisory authority that is independent of the government, are in line with work that has been under way in Liechtenstein since 2001.²¹ Liechtenstein has also established a working group on the development of the financial centre, with aims reaching far beyond the limited issues of fighting crime.

Especially with respect to the fight against terrorism, it has proved to be of the utmost importance that a small country like Liechtenstein should be embedded in a solid international network. On the one hand, as a member of the EEA, Liechtenstein is associated with and partly included in relevant activities of the EU, although it is not an EU member state.²² On the other hand, Liechtenstein has established direct relations with the USA, and these have proved to be very helpful. With respect to fighting terrorism, representatives of the US Administration have praised Liechtenstein highly.²³

¹⁹ See *Annual Report 2002 of the Financial Intelligence Unit (FIU) of the Principality of Liechtenstein* (FIU: Vaduz, 2003), available at URL <http://lvweb.liechtenstein.li/picli/poze_liechtenstein/Staat/newsletter/FIU%20Jahresbericht%202002%20englisch.pdf>.

²⁰ International Monetary Fund (IMF), *Liechtenstein: Assessment of the Supervision and Regulation of the Financial Sector*, IMF Country Report 03/289, vols 1 and 2 (IMF: Washington, DC, Sep. 2003), URL <<http://www.imf.org/external/pubs/ft/scr/2003/cr03289.pdf>>.

²¹ International Monetary Fund (note 20), vol. 1, *Review of Financial Sector Regulation and Supervision*, p. 7.

²² See, e.g., *The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats* (European Network of Experts on Fundamental Rights (CFR-CDF), European Commission: Brussels, 2003), URL <http://europa.eu.int/comm/justice_home/cfr_cdf/doc/obs_thematique_en.pdf>; Commission Regulation (EC) no. 244/2003 of 7 February 2003 amending for the 11th time Council Regulation (EC) no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the al-Qaeda network and the Taliban, and repealing Council Regulation (EC) no. 467/2001; *Official Journal of the European Communities*, L 033 (8 Feb. 2003), pp. 28–29; and Council Framework Decision of 13 June 2002 on combating terrorism, *Official Journal of the European Communities*, L 164 (22 June 2002), pp. 3–7.

²³ See, e.g., the letter of US Undersecretary of the Treasury for Enforcement Jimmy Gurulé of 5 Nov. 2002 to the editor of *The Observer*: Gurulé, J., 'Side by side', *The Observer*, 17 Nov. 2002 (responding

Cooperation between Liechtenstein and the United Nations is also close. As soon as the CTC started its activities by asking for reports on the implementation of Security Council Resolution 1373,²⁴ Liechtenstein's authorities cooperated by handing in their report ahead of time. Subsequently, Liechtenstein strengthened its efforts to implement this resolution fully, which clearly contains the most important UN directive with respect to Liechtenstein's situation. Moreover, its implementation of the FATF's Eight Special Recommendations to prevent the financing of terrorism is largely complete.²⁵ A 'package' of anti-terrorism amendments to the Criminal Code, the Criminal Procedure and the Due Diligence Act has been introduced in the Liechtenstein Landtag (Parliament).²⁶

Currently, the national system for listing suspicious individuals and/or corporate entities, charities and so forth is based on Article 3, paragraph 1, of the Law of 8 May 1991 on sanctions relative to commercial relations with foreign countries²⁷ and UN Security Council Resolutions 1076 and 1267.²⁸ The lists can be found in annex 2 to the Liechtenstein Government ordinance of 10 October 2000 on sanctions against persons and organizations related to Osama bin Laden, al-Qaeda or the Taliban,²⁹ which is based on the above-mentioned law. The monitoring of these lists and the individuals or institutions listed is undertaken by an ad hoc group which comprises, among others, the Office for Foreign Affairs, the FIU and the Prosecutor's Office. The lists and all the amendments are immediately made known to the relevant associations, and after amendment of the ordinance they are made available to the public. As soon as such a list is conveyed to the financial intermediary, it triggers the duty to report to the FIU or the Prosecutor's Office according to Article 9 of the Due Diligence Act.

V. The private sector

Turning to the private-sector viewpoint, what additional burdens does all this impose on financial intermediaries? There is, of course—and this must not be underestimated—a huge load of formalities, paperwork and extra controls to be carried out, as well as increased costs. For example, where it was enough

to the article: Walsh, C., 'Trouble in banking paradise as Uncle Sam's sheriffs ride in', *The Observer*, 27 Oct. 2002, URL <<http://observer.guardian.co.uk/business/story/0,6903,819815,00.html>>).

²⁴ See note 9.

²⁵ Financial Action Task Force on Money Laundering, 'Special recommendations on terrorist financing', 31 Oct. 2001, URL <http://www1.oecd.org/fatf/pdf/SRecTF_en.pdf>.

²⁶ Act on Amendments to the Criminal Code, the Code of Criminal Procedure and the Due Diligence Act (the 'Anti-Terrorism Package'), in force as of 10 Dec. 2003. *Liechtenstein Legal Gazette*, nos 236, 237 and 238 (2003).

²⁷ *Liechtenstein Legal Gazette*, no. 41 (1991).

²⁸ UN Security Council Resolution 1976, 22 Oct. 1996, and Resolution 1267, 15 Oct. 1999, available at URL <<http://www.un.org/documents/scres.htm>>.

²⁹ *Liechtenstein Legal Gazette*, no. 186 (2000).

simply to present a passport when travelling in the past, this is no longer sufficient.³⁰ At least in Liechtenstein, the financial intermediary must establish and maintain a client profile:³¹ in addition to the address and other such information, the profile must contain details about the purpose of the financial relationship. Furthermore, financial intermediaries are required to monitor relationships and accounts on an ongoing basis, and to monitor transactions for unusual or suspicious activity which indicates that there could be a connection to money laundering, a prima facie offence or organized crime. Information on indications of money laundering are provided by the guidelines of the Due Diligence Unit, which financial intermediaries are expected to follow and which require implementation of procedures for the monitoring of relationships—preferably through the use of information technology systems—clarification of activities that raise doubts, and mandatory reporting of transactions and activities when doubts remain. For example, if an account previously used for payments for the teaching of a child is suddenly used to transfer payment for huge quantities of cotton, this should trigger the attention if not the suspicion of the financial intermediary.

In future, financial intermediaries will have to be more than well educated: they will also have to take an interest in international policy, for example, in order to identify a political figure (Politically Exposed Person, PEP); to check whose money the person is being asked to manage; or to establish whether a charity the person is being asked to set up is really just charitable and where its money is going and coming from.

To put it bluntly, more security for the financial centre leads to more insecurity for the individual financial intermediary. On the one hand, financial intermediaries have to be more alert than ever before and they must try to obtain as much information as they can about facts related to their clients, even while they can never be sure that this will suffice. On the other hand, they have to accept that anything can happen, any day, and that they will have to prove that they have fulfilled all their duties. This entails a further erosion of the principle according to which the burden of proof is on the accuser—once a legal tradition of this continent. The new legal order will not accept ‘I didn’t know’ or ‘I have been told’. Financial intermediaries—in order not to be put out of business—must scrutinize their clients and their businesses all over again.

Assuming that many of the financial intermediaries in Liechtenstein are trustees which survive not least thanks to the trust of their clients, the basis of that trust may be increasingly in danger. This is especially the case in a jurisdiction such as Liechtenstein, where privacy is well protected. Clients have to be better scrutinized. The spirit of Lenin is now hovering over every one of

³⁰ The Due Diligence Act (see note 14) requires that before establishing a relationship the financial institution must verify the identity of the customer through official documentation and identify and document the ultimate beneficial owner of the account.

³¹ Article 6 of the Due Diligence Ordinance, *Liechtenstein Legal Gazette*, no. 236 (2000).

these capitalist dealings: while trust is good, control is better. Moreover, because of the ‘name and shame’ effect, financial intermediaries may increasingly find themselves exposed in the media regardless of whether a suspicion has or has not been proved correct.

VI. Future developments

What is to come? The fight against terrorism, organized crime and international crime in general continues. Liechtenstein is about to start implementing the second money laundering directive of the EU.³² At its meeting at Evian, France, on 1–3 June 2003, the G7/G8—alongside the continuing fight against terrorism—focused on weapon trafficking. Some governments have already started to use for other purposes the new legal tools they were given in order to fight terrorism, for instance, to work against certain groups with political agendas or to fight tax fraud.³³

Without going into detail here, it may be noted that the term ‘war against terrorism’³⁴ is a highly questionable one if it is used for more than mere public relations. As important as it is to fight terrorism—whether old or new—the approach associated with this ‘war’ is likely to mean that a further step is taken away from the rule of international law and will, as seen in numerous cases since 11 September 2001, increasingly undermine not only essential human rights but also civil rights.

Every day there are stories in the media about political crimes, wars, terrorism and so on. Every day financial intermediaries have to carefully assess the impact that such news could have on their work: for instance, one of their clients may be under scrutiny, or money linked to such an action may be paid into an account for which they are responsible. Today, no one dealing with money (and increasingly with commodities, real estate, art and other valuable objects) can ignore what is happening in the world. The dealer does not want to be involved in a criminal investigation. On the other hand, the client’s rightful interests need to be protected, and there should still be a presumption of innocence. Involvement in a criminal action and guilt should need to be proven to establish guilt. Many decisions are imposed on financial intermediaries today which put either their reputation or their client’s confidence at risk.

³² Directive 2001/97/EC of the European Parliament and of the Council of 4 Dec. 2001, amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, *Official Journal of the European Communities*, C 316 (27 Nov. 1995), pp. 49–57, available at URL <<http://www.imolin.org/EUdir01e.htm>>.

³³ See, e.g., the new German anti-money laundering legislation (Geldwäschekämpfungsgesetz: Money Laundering Act in the version of the Act on the Improvement of the Suppression of Money Laundering and Combating the Financing of Terrorism (Money Laundering Act) of 8 Aug. 2002, *Bundesgesetzblatt*, vol. 1, no. 57 (14 Aug. 2002), pp. 3105–10.

³⁴ See, e.g., Lugar, R. G., ‘Strengthen diplomacy for the war on terror’, *Foreign Service Journal*, July/Aug. 2003, URL <<http://www.afsa.org/fsj/jul03/lugar.pdf>>.

Life, and business, has definitely not become easier. This may be the price that has to be paid for more security. However, as important as it is to crack down on terrorism, we need to be aware of this price: in terms not only of economic restrictions, but also of our freedom.³⁵ For the sake of credibility as well as in order to gain the support of citizens and the business community, we must ensure that there is no opening for political abuse.

³⁵ See Andersson, T., Cameron, I. and Nordback, K., 'EU blacklisting: the renaissance of imperial power, but on a global scale', *European Business Law Review*, vol. 14, no. 2 (2003), pp. 111–41.