

EMPOWERING ANTI-CORRUPTION AGENCIES: DEFYING INSTITUTIONAL FAILURE AND STRENGTHENING PREVENTIVE AND REPRESSIVE CAPACITIES

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THE ORIGIN OF THE FINANCIAL INTELLIGENCE UNIT IN THE LEGAL FRAMEWORK

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The Financial Intelligence Unit is, at national level, the entity that is competent to collect, centralise, collate and disseminate information relating to the prevention of the money laundering offence. It is a Central Department of the Criminal Police, created by Decree-Law No. 304, of 13 December 2002, and it started its activity in 2003.

Before that, the FIU had as predecessor the Money Laundering Investigation Squad, under the Drugs Trafficking Department. Its separation within the Criminal Police, through the amendment in the respective organizational law, was due to the evolution of the approach to the money laundering phenomenon as an offence inherent to the concealment and application of the proceeds, not only of the drugs trafficking anymore, but also of other offences considered, both internationally and by the national legislator, as predicate to money laundering.

In 1995, with Decree-Law No. 325, of 2 December, the national legislation, following the Directive 91/308/2001, had already enlarged the criminalisation of money laundering to the offences of terrorism, arms trafficking, extortion, kidnapping, incitement to prostitution, corruption, embezzlement and other economic and financial fraud.

Currently, the offence of money laundering is typified in the Penal Code and, since 2004, it comprehends the benefits – assets, products or rights relating to them – deriving from the trafficking of influences, in addition to others.

The FIU and the prevention of corruption

The Financial Intelligence Unit, as far as the offence of corruption is concerned, as with the other predicate offences, has a role in the prevention of the laundering of the proceeds of crime. Although the FIU does not directly deal with the specific prevention or even with the investigation of corruption offences, it is adequate to say that the analysis and the tracking of the transactions that are reported to the unit pursuant to the law, and which may lead to the detection of situations involving corruption, integrate a general framework of prevention against the phenomenon of corruption.

Objectives of the FIU

Since the FIU should help in the detection of situations involving money laundering, terrorism financing and tax-related fraud, it is up to the unit to interpret all the financial transactions reported by the legally authorised operators and to diagnose its possible unlawfulness.

Based on the information that is received and generated, it is up to the FIU to present reports that may help to interpret the evolution of the phenomena at issue. For this purpose, some statistics are also produced, on a monthly, quarterly, half-yearly and yearly basis. These reports show the breakdown of the offence that is predicate to the money laundering, the reporting entity, the number of the reported transactions, the volume of the requests sent to and received by our counterparts, the number of

proposals for freezing and the respective amounts, the countries involved in the suspicious transaction and its functioning.

It is also an objective of the FIU to cooperate with the other entities involved in the prevention against money laundering and terrorism financing.

Domestic and International Cooperation

At the domestic level, the pursuit of the objectives of the FIU determines a straight connection with the entities investigating money laundering, terrorism financing and tax-related offences, Public Prosecution (DCIAP), the competent departments of the Criminal Police and the Tax and Customs Administrations. Within the framework of its competences, the FIU also keeps institutional relations with the control and supervising authorities, as well as with the financial and non-financial operators. The role of the FIU in relation to the financial institutions, and others, that are obliged to report is worth mentioning, since the FIU provides them with training and guidelines on the way the suspicious transactions should be reported. As to the follow-up of reports aiming at the confirmation of the suspicion, although these are channelled through the Public Prosecution Department (DCIAP), the FIU directly contacts, both formally and informally, the reporting entities in the sense of obtaining additional information.

In 1999, the Money Laundering Investigation Squad, which gave birth to the FIU as already explained, joined the Egmont Group and it has remained an active member ever since. It is in the framework of this Group, through a dedicated network called Egmont Secure Web, that the majority of requests for information is exchanged, specifically with our foreign counterparts. In those cases in which the countries we need to obtain information from have no FIU, the requests are channelled through international bodies of Law Enforcement Cooperation, mainly the Interpol, since the existence of the FIUs is common to all states belonging to the Europol.

Activity

The FIU receives, through a body of the Public Prosecution (DCIAP), the suspicious transactions that are reported by the entities legally obliged to do so, financial and non-

financial entities, in addition to the reports from the respective supervising and control bodies.

In a first phase, the intelligence is subject to computer collation, aiming at matching any common element in the criminal information database. Next, the analysts research other databases, private and public, so they can produce a report supporting the evaluation of the reported transaction. The evaluation may determine the ending of the collation in those cases where it is clear that no money laundering or other wrongdoings have occurred, or otherwise the forwarding of the initial information, together with the elements produced by the analysis, to a research sector. There, the Inspectors (it should be recalled that the Portuguese Financial Intelligence Unit belongs to a law enforcement body) carry out a certain number of preventive law enforcement measures in search of any clues of criminal or tax-related offences. For this purpose, they can do some reconnaissance of places, make contacts with third parties, get in contact with the reporting entity or with others, as well as request additional information to foreign FIUs or even do some surveillance in public places.

In this phase, we are dealing with financial information that has not been confirmed yet. Therefore, we are not working within the framework of a criminal proceeding, the activity of the FIU is not to gather evidence, and so questionings, hearings, searches, wiretappings or any other methods involving the target person, legally provided for in terms of evidence in an enquiry, are forbidden.

After the research has been completed, the suspicious transaction report can be closed, where the elements obtained do not indicate any wrongdoing, or where these are not conclusive in that sense or, on the contrary, the information may be disseminated to the department of the Criminal Police competent to investigate the predicate offence. This department will open an enquiry, or the matter is instead sent to other authorities competent to investigate the offence in question, such as the General Directorate for Taxes as far as tax evasion and fraud are concerned, or indirectly to the Public Prosecution -DCIAP- which is always informed on the results of the findings.

It should be stressed that, within the framework of its preventive activity, it is up to the FIU to collect and evaluate within two days all the elements that, where they indicate money laundering, will constitute the grounds for a recommendation to the Judicial Authorities in order to freeze the suspicious transaction. Within this context, the case becomes a criminal enquiry and the investigation is given to the department of the Criminal Police that is competent to investigate the predicate offence.

Instruments

In its activity of analysis and follow up of the reports, the FIU may resort to data held by the Criminal Police in its Integrated System of Criminal Information, or directly access the databases of Population, Legal Persons, Vehicles and Prisoners. Through protocols with various private entities, such as the MOPE and D&B, the FIU also uses open sources of commercial-type information.

Within the FIU there is the Liaison Standing Group (GPL), created in 2003 by Decree-Law No. 93, of 30 April, which also rules the reciprocal access to the databases of the entities with competence to investigate tax-related fraud: the Criminal Police, the General Directorate for Taxes and the Customs. Nonetheless, the tax and customs information, only accessible via GPL and through an official of each of the mentioned entities, can only be used for the investigation of tax-related offences and money laundering within the framework of a criminal enquiry, pursuant to the law, which as we have already seen is beyond the role of the Financial Intelligence Unit.

Difficulties in the detection of money laundering where corruption is the predicate offence.

In this field, the difficulties of detection are not different, generally speaking, from those involving other predicate offences, but it is worth stressing the transactions involving individuals who are, or have been, holders of important public functions in countries commonly known to have widely spread corruption. According to the national legislation, that has integrated the international recommendations and directives, money laundering is typified and punishable since 2004, regardless of whether the predicate offence has been committed in the country or abroad.

In those situations in which the suspicious funds come from countries with no effective control mechanisms against corruption, and with the involvement in transactions on the national territory of persons that hold or have held public functions, or others closely

related, it is not reasonable to expect any response from the part of those States to any request aiming at characterising a situation as money laundering.

Thus, prevention against money laundering having corruption as predicate offence, mainly in situations such as the previously mentioned, has to reinforce the domestic due diligence measures over the transactions carried out by the so-called “politically exposed persons” -PEP- regardless of whether they reside in our country or in another Member State of the European Union.

In this sense, on the 25th March, a Bill was approved transposing to the national legal system the Directives 2005/70/EC and 2006/60/EC, which among other preventive measures, defines the categories of those functions included in the concept of PEP, and imposes on the reporting entities a general diligence duty in the business relations with politically exposed persons residing in the national territory, meaning:

- a) Having adequate procedures based on risk to determine if the customer can be considered a politically exposed person;
- b) Obtaining permission from the immediate superior before establishing business relations with such customers;
- c) Taking the necessary measures so as to determine the origin of the property and of the funds involved in the business relations or in the occasional transactions;
- d) Following closely and continuously the business relationship.