The Offshore & International Taxation Review

MONEY LAUNDERING INITIATIVE IN GUERNSEY

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1. Introduction

Following the lead in the UK and elsewhere, Guernsey introduced legislation to deal with the proceeds of drug trafficking in 1988,[2] and subsequently in connection with funds arising from or in connection with terrorism.[3] Both laws dealt with, *inter alia,* the confiscation, whether by forfeiting or otherwise, of funds arising from these activities. Both pieces of legislation, for obvious reasons, followed closely their English counterparts and despite the concerns expressed by the finance sector at the time have worked well in practice. During the late 1990's the authorities for obvious reasons, came under increasing pressure to implement a wider form of legislation to cover "all crimes" including tax evasion. Indeed although the measure was introduced to the legislature at an early stage, as compared to other offshore jurisdictions, Guernsey is one of the last ones to actually implement the legislation.

When the legislation was first mooted grave concern was expressed about the future of the finance sector in Guernsey and no doubt this was echoed elsewhere. The initial reaction by some institutions was to threaten a "scorched earth" policy, leaving the jurisdiction like a retreating army. There was also a good deal of confusion about the scope of the legislation as it was argued by some notable commentators, such as Michael Brindle[4] QC, that it did not extend to tax

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2 Drug Trafficking Offences (Bailiwick of Guernsey) Law 1988. There was also an amendment in 1992.

3 Prevention of Terrorism (Bailiwick of Guernsey) Law 1990.

4 It has been suggested that in the case of a fiscal crime it is difficult to identify the proceeds of crime. In practice much will depend on the interpretation given by the Courts to the phrase "proceeds of crime".

offences. Subsequently this was dismissed by a widely circulated opinion by Claire Montgomery QC which had been obtained in relation to the scope of the provisions in the UK. Whether the finance sector would disappear in the wake of the introduction of the Law was and still is a function of the Island's dependency (this also applies to other jurisdictions) on structures dominated by tax evasion. This author is sceptical for a number of reasons, the most cogent of which is the fact that as a trust and tax specialist of many years standing, most work he has ever had to deal with is entirely legitimate. The other point is that service providers on the Island often operate in ignorance of any possible violation of another country's laws and most certainly don't form them with the intention of so doing.

2. The June 1997 Policy Letter

Before a law affecting the international relations of the Island can be enacted a policy letter must, in the first instance, be brought before the legislature and the legislation proposed by the letter passed by them and then presented to the Privy Council for approval. In June 1997 such a letter was first presented by the committee which initiates such legislation, the Advisory and Finance Committee ("A and F"). The main terms of the letter are set out below. In addition the letter set out a scheme for the law, including a discussion of the scope of the law as it would affect service providers in Guernsey.

ALL CRIMES MONEY LAUNDERING LEGISLATION

"Money laundering is the transfer of funds so as to conceal their illegal origin.

The Guernsey authorities and local financial institutions have tried hard, particularly since 1988 when drug trafficking legislation was introduced to prevent money laundering. At the time that the drug trafficking legislation was enacted money laundering was seen primarily as a drug-related activity. The proceeds of drug trafficking posed an obvious threat world-wide.

Experience has shown, however, that whilst money laundering is, of course, associated with drugs-related crimes it is also associated with all other types of serious crime. It is, therefore, unrealistic and gives rise to legal difficulties, to attempt to draw a distinction between different types of criminal activity.

Criminals look world-wide for vulnerable jurisdictions in which to launder the proceeds of crime. As the threat of international crime grows, the more

important it becomes to increase the ability of law enforcement agencies to pursue those who benefit from it. Attacking the disposal of the proceeds of all serious crime strikes at the heart of criminal activity.

It is more important than ever for the Bailiwick to show that it stands at the forefront of those jurisdictions who are committed to take firm and effective action to protect their economies and societies, to ensure their financial centres remain competitive and continue to attract and retain high quality business, and to play their proper part in tackling international crime. The Committee is pleased to have been assured by the Home Office that all the Crown Dependencies and Dependent Territories have enacted or will be enacting equivalent all crimes money laundering legislation so that, together with the United Kingdom, a common and consistent front will be established.

As a first, albeit minor, step, pending the introduction of comprehensive Bailiwick legislation, the Money Laundering (Disclosure of Information) (Guernsey) Law 1995 was enacted which conferred legal immunity (in spite of any obligation of secrecy or confidence to the contrary) on any person who discloses reasonable suspicion or belief concerning the proceeds of criminal activity. That is, any activity which constitutes a criminal offence under the law of Guernsey or which would constitute such an offence if it were to take place in Guernsey.

The matter of comprehensive Bailiwick all crimes money laundering legislation must now be addressed.

The Committee has liaised closely with the authorities in Jersey and the Isle of Man where similar measures are being proposed. Likewise the Attorneys-General of the three Islands have similarly liaised regarding the drafting of legislation.

H M Procureur has written to me regarding this matter in the following terms:

1. Money laundering legislation, or at any rate the UK model thereof, essentially comprises the following concepts:

   (i) that the Courts be empowered upon convicting an offender within their own jurisdiction of a serious crime to confiscate his proceeds of, or benefits derived from, such criminality;

   (ii) that the Courts be empowered, on proper application, to confiscate assets which are within their jurisdiction and which

have been identified as being the proceeds of serious crime belonging to an offender who has been convicted of that crime in a foreign jurisdiction, with the local authorities having similar reciprocal rights to seek the assistance of overseas Courts; and

(iii) the creation of specific money laundering offences (to which I will be referring later, but which in essence relate to persons knowingly assisting another, whether resident locally or abroad, in the retention, transfer, etc., of the proceeds of criminal conduct.

It will be seen from this brief synopsis that money laundering legislation can operate on two levels, firstly to deal with one's own serious criminals, and secondly, to be able to provide and seek assistance internationally. The objective of the power of confiscation, most evident perhaps in respect of the benefits of drug trafficking but equally relevant in respect of other major crime, is not merely to punish the offender for any particular offence or offences, but to try and ensure that, in due course, he or others will not be able to benefit therefrom. The international perspective of the legislation clearly recognises the international nature of, and link between, many different types of serious criminal activity and the ease with which assets may be moved and hidden around the world. It might be thought that the international aspect is as important to Guernsey as the domestic one, in view of the island's proper determination to retain and even improve its standing as an international finance centre of repute.

2. The Committee has requested my advice as to the form which any new Bailiwick All Crimes Money Laundering legislation might take. May I say at the outset that my understanding is that the other two islands will be proposing legislation generally along the lines which I summarise below; and that such legislation is based largely upon the current United Kingdom legislation (i.e. that contained in the Criminal Justice Act 1988 as amended by subsequent legislation), subject to such modifications as are either desirable or necessary as far as this Bailiwick is concerned. An initial draft of our possible local legislation has already been forwarded through the Financial Services Commission to representatives of the finance industry for comment. For the benefit of the Committee and, perhaps in due course, members of States, I enclose a copy of the proposed "Arrangement of Sections" in order to give a very broad outline of the scope of the intended legislation and upon some of the sections whereof I shall comment in detail.

In relation to the Guidance Notes a document which is similar to the UK Rainbow book it was stated:

> "As the Committee is aware Guidance Notes for the Bailiwick (the "Rainbow Book") were recently published by the Joint Money Laundering Steering Group, a body which comprises the Director General of the Commission and representatives of the various sectors of the industry. May I personally comment that the Commission and the industry deserve due credit for this publication, such guidance and the observance thereof being central to the problems of money laundering. I would recommend that these Guidance Notes should have a legislative basis to the extent, and only to the extent, that compliance or non-compliance with them *could be taken into account* by the Royal Court when considering whether a specific money laundering offence had been committed, i.e. offences under sections 38, 39 and 40. Section 41A is intended to reflect this recommendation.
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> It is the firm view of the Committee that this legislation is necessary and desirable. Without it we cannot hope to remain in the first division (perhaps the President meant the premier league) of international finance centres. Further, we would be falling short of our international obligations if we failed to enact it. The Advisory and Finance Committee therefore strongly recommends the States to enact all crimes money laundering legislation on the lines set out in this report.
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> I have the honour to request that you will be good enough to lay this matter before the States with appropriate propositions, including one directing the preparation of the necessary legislation.
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> I am, Sir,
>
> Your obedient Servant,
>
> L C Morgan,
>
> President,
> States Advisory and Finance Committee"

3. The Policy Letter of the 9th February 1999

The first five paragraphs largely repeat the earlier policy letter. In paragraph 5 of the letter it is noted that:

> "The policy letter which led to the States' resolution (Billet d' Etat XVI of 1997 p.1093) quoted extensively from advice received from H M Procureur. As regards the process of preparing the detailed legislation he advised, as follows:
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> 'I must, however, give the unequivocal warning that whatever legislation the States may in due course approve will necessarily have to be approved by the Home Office in order for it to be recommended for sanction by Her Majesty. As the legislation is to form part, rightly in my view, of a united approach by the United Kingdom and all the dependencies to international crime, logic suggests that the Home Office may insist that uniformity of legislation is in fact achieved throughout those territories. This may well mean that certain aspects of the legislation now being proposed for the Bailiwick will not find favour with the Home Office as I know, or believe, that they differ from the legislation enacted, or to be enacted, in other jurisdictions'.

6. H M Procureur has drawn the Committee's attention to certain changes of substance from the position envisaged in the Committee's original policy letter which it has been felt necessary to include in the projet de loi. These changes have been made following further extensive consultations resulting in the inclusion of matters not encompassed within the 1997 Resolution of the States.

> The principal aim of the Committee has been to ensure that our legislation is, for all practical purposes, in line with that of the other Crown Dependencies".

The policy letter also made reference to a number of other points which arose from the first draft of the legislation (which in any event is very similar to the final draft). These are set out below:

'The definition of criminal conduct

(i) The first change relates to the definition of "criminal conduct" in clause 1. The test is now whether the conduct amounts to an offence which could be tried on indictment in Guernsey, or which could be so tried if

the conduct had taken place here. This obviously removes the previous proviso that such offence would carry potentially more than 2 years imprisonment in Guernsey Law'.

(This is unaltered from the original text and presumably should read that to fall within the proviso it would have to carry a sentence of more etc.)

'The reality is that the position has not effectively changed, in that all of the indictable offences which might be relevant will carry sentences of well in excess of 2 years. Relevant examples include offences under the Theft (Bailiwick of Guernsey) Law 1983 - False Accounting (7 years), theft (10 years), obtaining pecuniary advantage by deception (5 years).

(ii) Section 201 of The Income Tax (Guernsey) Law 1975, as amended provides that any person who knowingly makes a false statement or representation in any return may be prosecuted before the Royal Court and, on conviction, shall be liable to a term of imprisonment not exceeding 12 months and/or to a fine not exceeding the maximum penalty which the Administrator could have imposed.

(iii) For all practical purposes, section 201 has been superseded by the false accounting offence in the 1983 Theft Law but its existence as an indictable offence would mean that our legislation would be out of line with that in other comparable jurisdictions. It is, therefore, proposed to amend section 201, so that the proceedings envisaged in that section could only take place before either the Ordinary Court or the Magistrate's Court, thereby no longer making it an indictable offence. It should be remembered that a prosecution for false accounting (and consequently defrauding the public purse) can be instituted either before the Magistrate's Court or the Royal Court on indictment; the venue will depend upon the prosecution's view (after consultation with the Income Tax Administrator) as to the seriousness of the offence, and whether the Magistrate's powers would be sufficient. It should also be remembered that the Administrator can take "penalty" proceedings under the 1975 Law, which power would remain. Hence in H M Procureur's view, and as already indicated, the "downgrading" of section 201 should not, practically, have any serious consequences. This amendment would bring our legislation in line with other comparable jurisdictions'.

The offence of tax evasion is a controversial one in offshore jurisdictions, some of which don't have such an offence and some do not levy direct taxes as such, i.e. Cayman Islands, whilst others have direct taxation but no specific offence of

tax evasion, i.e. Isle of Man, and in others it is not an indictable offence, e.g. Jersey. As is clearly noted by A and F any change in the income tax law would be cosmetic as most, if not all, tax evasion offences constitute false accounting. Furthermore, because of time constraints on the Royal Court prosecutions were rare although it is understood the Income Tax Authority would have liked to prosecute more people. In the events which have happened the proposed change to the income tax law will not be implemented on advice from the Home Office.

'Disclosure of information

(iv) The Criminal Justice legislation in Jersey and the Isle of Man contains certain statutory procedures with regard to the disclosure of information received from an institution, and particularly in relation to the disclosure of that information to overseas agencies, for which the Attorney-General's consent will be required. Whilst H M Procureur is of the view that such provisions are not required for the effective operation of the Law, it is proposed that a parallel provision should be included in our Law, together with a reserve provision that the procedure will be capable of amendment or rescission by Ordinance of the States.

Section relating to the obligations to be imposed upon "Financial services businesses"

(v) The Committee's original policy letter envisaged that the Money Laundering Guidance Notes issued under the authority of the Guernsey Financial Services Commission (the "Rainbow Book") would be given a legislative basis only to the extent that compliance, or non-compliance, with them could be taken into account by the Royal Court when considering whether a specific money laundering offence had been committed.

(vi) It is now considered appropriate to go further and for duties and requirements to be complied with by financial services businesses for the purposes of preventing money laundering to be set out in Regulations to be made by order of the Advisory and Finance Committee.

(vii) This approach is in line with that being taken anyway in Jersey and the Isle of Man (as well as in the United Kingdom), would allow additional time for the appropriate Regulations to be prepared, and for the necessary amendments to be made to the "Rainbow Book". It would also facilitate future changes to the Regulations should they prove necessary'.

The Guidance Notes will undoubtedly define the parameters financial institutions are expected to follow and govern the expectations of the judiciary in assessing whether an institution has failed to comply with any of the substantive provisions of the new law.

'The role of H M Procureur in initiating prosecutions for Money Laundering offences

(viii) No criminal prosecution in Guernsey can be instituted by anyone other than H M Procureur. The position is the same in Jersey and the Isle of Man. However, it is considered helpful that the role of H M Procureur in relation to the Money Laundering offences (see sections 38-41 of the draft Project) be specifically stated within the law to ensure uniformity of approach and for the avoidance of doubt by foreign enforcement agencies'.

4. The Present Position

At the time of writing this article the law has been registered at the Greffe (it was registered on 17th August 1999 as Law VIII of 1999), and the States legislature passed the relevant commencement Ordinance in November 1999. As a consequence the law will be effective on the 1st January 2000.

On this date A and F under section 49 of the Law issued the Regulations, referred to in section 4 above, and the Guernsey Financial Services Commission ("the Commission") issued the Guidance Notes. It follows that both documents are now in force.

In essence the Guidance Notes ("GN") are an updated version of the previous GN issued by the Guernsey Joint Money Laundering Steering Group in March 1997. The GN have been commented on by a steering group which comprises representatives of the finance sector including the Banks, Trustee associations, the Bar, Accountants as well as the Financial Investigation Unit itself. However, there have only been minor amendments as would be expected from a document which draws heavily on the GN produced by the JMLG in the UK. The notes deviate from those in the UK in only non-material ways.

5. Conclusions

As stated above Guernsey is one of the last jurisdictions to implement an "All Crimes Law". Experience to date in other jurisdictions, such as the Isle of Man, Jersey and the Carribean suggests that the effect was not so draconian as originally contemplated. However, the wide ranging nature of the provisions and penalties in the form of confiscation orders will serve to increase the risks on the criminal who seeks to exploit the jurisdiction and hopefully deter him setting up structures in the Island, and indeed, elsewhere. On this basis it is expected that whilst international competition will increase in the offshore jurisdictions the effect of the law will be to improve the quality of work. It will also increase the quantum as local jurisdictions step up their monitoring policies and by definition, the number of prosecutions.