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NOTE

from : The Secretary General/High Representative and the Commission
to : European Council

Subject : The fight against terrorist financing

Introduction

1. The European Council on 17-18 June 2004 called for the development by the Council by December 2004 of a coherent overall approach for further strengthening the fight against terrorist financing. This strategy, which has been drawn up by the Council on the basis of proposals made jointly by the Secretary-General/High Representative and the Commission, responds to this request.
2. The EU has already undertaken a significant body of work aimed at countering terrorist financing, both at its own initiative and in implementation of UN Conventions and resolutions and of the recommendations of the Financial Action Task Force (FATF). Further details of what has been accomplished, as well as additional proposals for EU action, can be found in the Commission Communications on the Prevention of and the Fight against Terrorist

Financing¹ and on Measures to be taken to Combat Terrorism and other forms of Serious Crime² and in the information note submitted by the Counter-terrorism Co-ordinator to the ECOFIN Council³. There is also a separate report before the European Council on implementation of the revised EU action plan against terrorism which includes relevant action against terrorist financing⁴.

3. The aim of the present strategy is to give a critical overview of our actions to date against a background of changing trends in terrorist financing (in part as a result of EU and international action). On the basis of this overview, a number of recommendations are made on how EU action against terrorist financing might be further strengthened, on a horizontal basis, in accordance with the mandate given by the European Council as set out above. The seminar on terrorism financing held by the Dutch Presidency on 22 September 2004 provided important input for the development of the strategy.

EU action in the fight against terrorist financing

4. Identifying and disrupting the mechanisms through which terrorism is financed are key elements in our overall efforts to combat terrorism. As well as reducing the financial flows to terrorists and disrupting their activities, action to counter terrorist financing can provide vital information on terrorists and their networks, which in turn improves law enforcement agencies' ability to undertake successful investigations. The effectiveness of such action cannot therefore be judged purely in terms of amounts frozen or confiscated. The impact it has had on terrorist networks and their methods of operation needs also to be taken into account, as does the political impact of a decision taken by the EU as a whole to declare a group or an individual as terrorist.

¹ Communication from the Commission to the Council and the European Parliament on the Prevention of and the Fight against Terrorist Financing through measures to improve the exchange of information, to strengthen transparency and enhance the traceability of financial transactions. COM(2004)700 of 20.10.2004

² Communication from the Commission to the Council and the European Parliament on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information presented together with a proposal for a Council Decision on the exchange of information and co-operation concerning terrorist offences. Doc. 8200/04 (COM(2004)221)

³ Doc. 10971/04

⁴ Doc. 16090/04

5. The initial focus of international action post 9/11 was on large flows of money through the official financial sector and on terrorist groups and individuals, as well as on the non-governmental organisations that were suspected of sponsoring terrorism under cover of charity. In accordance with resolutions adopted by the UN Security Council, the EU has established lists of individuals or groups designated as being involved in terrorist acts whose assets must be frozen¹. Financial transactions to or from those on the list are prohibited. Listing - especially of groups - clearly has an important political and psychological impact. Furthermore, sanctions measures have reduced the possibilities for terrorists and terrorist organisations to misuse the financial sector and have made it more difficult for certain organisations to raise and move funds. However, implementation of freezing measures requires considerable effort on the part of financial institutions. At the same time, it is not easy to establish whether measures of this kind have a significant impact on terrorists' ability to carry out attacks.
6. It should also be noted that listing is not the only possible response to suspicions of involvement in terrorist acts. In certain cases, governments will have to make a choice between public designation of groups or persons and tracking their activities (including financial transactions). That choice will depend on an appraisal of which action would be most effective with respect to the fight against terrorism in the particular situation. The information gained from tracking may be more useful than the political or financial impact of designation. Obviously, freezing and tracking are not mutually exclusive.

¹ There are two EU lists. Common Position 2002/402 and Council Regulation (EC) No 881/2002 (OJ L 139, 29.5.2002, p. 9) concern the list established pursuant to S.C. Resolution 1267 (1999); Council Common Position 2001/931/CFSP (OJ L 344, 28.12.2001, p. 93) and Council Regulation (EC) 2580/2001 (OJ L 344, 28.12.2001, p. 70) concern the list established by the Council following the adoption of UNSC Resolution 1373 (2001).

7. The transition from applying asset freezing measures primarily as a political measure against governments or persons linked to them (the original aim of most UN and EU sanctions regimes prior to 9/11) to freezing as a preventive measure, targeting terrorist individuals and groups, has led to a series of legal questions. These questions range from the criteria which should be applied and the evidence which is needed for administrative freezing, the relation of administrative freezing to judicial freezing, seizure and confiscation, to matters of due process, availability of de-listing procedures and the role of intelligence in the designation process. These questions need to be further studied, including the question as to the limits of the powers of the Community and the Union to act in these areas. Further improvements to the designation process will be considered.

8. As well as action in compliance with restrictive measures agreed by the UN or the EU, there is a wider role for the financial sector in combating terrorist financing. The provision of information by financial institutions concerning suspicious or unusual activities that could be an indication of terrorist financing transactions is an important element of an effective system of combating terrorist financing. The adoption and implementation of a new Directive to combat money laundering, extending the scope of reporting obligations also to transactions which could be related to the financing of terrorism (the 3rd Money Laundering Directive, which aims to protect the integrity of the financial system and the functioning of the internal market) is a priority for the Council.

9. It is worth noting, however, that there are differences between money laundering and the financing of terrorism, and therefore in the methodologies likely to be successful in correctly identifying relevant suspicious transactions. For terrorists, the acquisition of funds is not an end in itself but a means of committing a terrorist attack. Analysis shows that the amounts required to carry out even a major attack are relatively small. 9/11 is estimated by the US Government's 9/11 Commission to have cost between \$400,000 and \$500,000, while the Madrid attacks are estimated to have cost about \$10,000¹. Money laundering usually involves

¹ Report of the UN Sanctions Monitoring Team established pursuant to UNSCR 1526 (S/2004/679) page 12

much greater sums than financing of terrorism and it is the laundering of the funds that is the ultimate goal since it allows free use of the proceeds of crime. An investigation into a suspicious transaction may well provide a trail to the criminal. But in the fight against terrorist financing it may not be possible to identify a specific transaction as potentially terrorism related. In order to make reporting an effective instrument and ensure that investigations are appropriately targeted, the importance of feedback and input on terrorist financing issues from intelligence and security services should be recognised. Financial Intelligence Units (FIUs) as well as law enforcement authorities, intelligence and security services and organisations such as Europol and Eurojust can play an important role in this respect.

10. In part as a result of increased international attention on the banking sector and enhanced regulation thereof more generally following the action of FATF, the methods involved in the financing of terrorism appear to have changed since 9/11. Intelligence indicates that there is now less use of the regular banking system. This implies that terrorists may be seeking alternative means of moving funds, for example cash couriers and alternative remittance systems such as Hawala. The Commission is preparing a draft Directive on a New Legal Framework for Payments in the Internal Market which will, amongst other things, ensure implementation of FATF Special Recommendation VI into Community law. The planned regulatory regime for money remitters will foresee registration of the transmitter by introducing a special licence and will take into account the risk profile of providers by establishing tailor-made supervisory requirements.
11. Another method of moving funds for terrorist financing is via individuals who carry cash and other equivalent instruments across borders. Technology for detecting this phenomenon should be developed and deployed. There is also a pressing need to ensure that an appropriate EU instrument is adopted to address the use of cash couriers. The political agreement on the Commission proposal for a Regulation on cash movements¹, in the ECOFIN Council of 16 November 2004 is an important step forward on this issue and the adoption of the regulation is a priority for the Council.

¹ European Commission proposal for a regulation of the European Parliament and the Council on the prevention of money laundering by means of customs cooperation. Doc. 10404/02 (COM(2002)328).

Use of large-scale cash payments to transact business constitutes another vulnerability to terrorist financing, which has so far been largely unaddressed. Care must however be taken that any measures restricting the free movement of capital are proportionate and justified. The proposal for a third Money Laundering Directive extends the preventive mechanism of the anti-money laundering system to all cash payments for goods with a value in excess of €15,000 and should be adopted as soon as possible.

12. Improved transparency and traceability will be important, as will enhanced efforts in developing law enforcement agencies' financial investigation capabilities and enhanced co-operation. Member States must ensure that law enforcement services have the resources to develop financial investigative skills allowing them to follow money trails backwards to the person providing finance and forwards to terrorist cells. Financial investigation must be prioritised in the Member States and should become a routine part of all law enforcement investigations of terrorist suspects. Intelligence indicates that many terrorist cells are less reliant on financial support from outside financiers but are self-financing, either through small-scale criminal activity (eg. drugs crime, credit card fraud, counterfeiting, mobile phone and benefit fraud) or legal means such as income from employment or benefits. Continuing analysis of terrorist financing patterns and the links with criminal activity will therefore be essential, in particular through the full use of the analysis capabilities of Europol and its Counter-terrorism Task-Force.

13. The need to protect the non-profit sector against possible abuse by ensuring, among other things, appropriate transparency and accountability measures has been emphasised by FATF and other international bodies. There are increasing indications that vulnerabilities of the non-profit sector have been abused for the purpose of terrorist financing. Since non-profit organisations in general and charities in particular frequently have an international profile, it is necessary to find international solutions, notably at EU level, as a complement to domestic measures. Further work in this area should take into account the work already undertaken by FATF. It should be noted in this context that the risks of misuse are not limited to the non-profit sector but are more general and concern all legal entities.

14. In addition to exploring the need for new instruments, it is also necessary to monitor the effectiveness of existing ones, in particular those set out in the revised EU Action plan on combating terrorism. The EU has put in place a solid legal framework governing law enforcement co-operation within the EU which makes an important contribution to our ability to combat terrorist financing. But some Member States still need to take the necessary action to enable full use to be made of this framework. For example, the Protocol to the 2000 Convention on Mutual Legal Assistance sets up a regime for requests for information on bank accounts and banking transactions and provides for rules relating to the monitoring of banking transactions but this Protocol has only been ratified by 4 Member States so far. The draft Framework Decision on confiscation of crime-related proceeds received political agreement in June 2002 but has still not been formally adopted. A number of Member States have not adequately implemented the Framework Decision on Combating Terrorism, as indicated by the recent Commission report¹. The 28 February 2002 Eurojust Decision has not been implemented effectively in all Member States. Furthermore, some Member States still need to ratify the UN Convention on the suppression of the financing of terrorism. Ratification by all Member States would strengthen the EU's credibility when calling for implementation by third countries.

The way forward

15. Against this background, it is clear that, notwithstanding progress achieved in countering terrorist financing, EU policies and practices must be kept under constant scrutiny to ensure that they continue to be appropriate in the face of actual terrorist financing trends. It may be necessary to fine-tune existing instruments, or to develop new ones to counter new trends. It is clearly necessary to ensure that the right legal framework is in place, to facilitate co-operation

¹ Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism. Doc. 10528/04 (COM(2004)409)

– and that the necessary steps are taken at national level to enable this framework to be used. In this context it is necessary to ensure rapid progress is made on legal instruments now under discussion in the EU; for example, the Draft Framework Decision on Confiscation orders (adoption foreseen for the end of 2004) as well as timely implementation of decisions already adopted such as the Framework Decision on freezing of assets (deadline August 2005).

16. It is also necessary to ensure that our action is intelligence-based. The right information sharing mechanisms must be in place at national, EU and international level to allow better targeted and more effective financial investigations. The proposal for a Council Decision on the exchange of information and co-operation concerning terrorist offences enabling Member State services engaged in the fight against terrorism, as well as Europol and Eurojust, to have access to the most complete and up-to-date information, as well as the draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States, in particular as regards serious offences including terrorist acts, are priorities for the European Council. The Council will do its best to ensure that these are adopted rapidly. Work conducted in the gathering of electronic evidence is of vital importance to the successful prosecution of terrorist financing. A European funded project, “CTOSE”¹, aims to develop a framework of best practices for collecting, analysing, storing and presenting electronic evidence in order to facilitate the use of electronic evidence in legal proceedings.
17. Financial institutions play a central role in facilitating the fight against terrorist financing, notably through verifying the identity of customers. It is necessary to consider what further steps could be taken to guard against persons opening accounts or otherwise transacting business using false identities. There may be benefit in particular for financial institutions in having access, one way or another, to information held in databases and other information on sample EU (and other) identity documents, including examples of forged documents. A cross-check of documents presented could help authorities and businesses to have possible forgeries identified. Current work in the United Nations on so-called identity theft should be followed closely.

¹ Cyber Tools On-line Search for Evidence; <http://www.ctose.org>

18. An important part of EU policy on terrorist financing now emanates from the Financial Action Task Force. The EU should pursue an active role in FATF, with a view to ensuring that FATF work is in accordance with EU priorities. Following enlargement, only 15 of the Member States of the EU are members of the FATF. This creates an even greater need to ensure a high level of co-ordination within the EU on matters under discussion in FATF.
19. It should also be borne in mind that, as controls tighten in Europe, terrorists will seek to use channels where regulation or scrutiny is weakest. The EU therefore needs to give increased attention to the international dimension of the fight against terrorist financing. It must continue to work towards universal ratification and implementation of the relevant UN Conventions and resolutions, in particular the Convention against terrorist financing, providing increased assistance to third countries to help them with this task.

Recommendations

Action to counter terrorist financing needs to be better targeted, based on an intelligence-led approach and improved information sharing within and between government and private sector.

20. The EU should adopt an intelligence-led approach to the fight against terrorist financing. Exchange of information with and between national FIUs and other competent bodies should be enhanced, including through the FIU-NET, allowing FIUs and other competent authorities to give more feedback to financial institutions on appropriate targets for suspicious or unusual transaction reporting and providing FIUs and other competent authorities access to relevant data of financial institutions, taking account of appropriate data protection issues and in accordance with national law. All Member States should become fully functioning members of the FIU-NET by end 2005.

21. Member States should ensure that appropriate national structures are in place to allow the necessary co-ordination and exchange of information between intelligence/security services, FIUs and other competent government bodies, public prosecutors and other law enforcement bodies, financial supervisors and private sector financial institutions. Such interaction is essential to ensure that investigations are properly targeted and lead to effective combat of terrorist financing. The Commission is invited to undertake a study of existing European best practice in this area and to prepare a report on possible improvements to co-ordination structures in the light of this study. .
22. The Commission and Europol are invited to examine, in consultation with industry, possible additional co-operation and information sharing mechanisms to facilitate data exchange between law enforcement/intelligence services and the private sector. Any such co-operation should not weaken the role of FIUs in their contacts with the private sector and should take into account the relevant data protection issues. A report should be made to the Council by end 2005.
23. The Commission is invited to assess the feasibility of allowing, one way or another, access by law enforcement authorities and the private sector to existing EU sources of information on sample EU (and other) identity documents, including examples of forged documents. The purpose of such access would be to allow a cross-check of documents presented to help authorities and businesses to have possible forgeries identified.
24. The Commission is invited to accelerate its work in connection with the gathering of electronic evidence and to report to the Council by end 2005.

Mechanisms for designation of terrorists and asset freezing should be kept under constant review with a view to improving their effectiveness.

25. Effective freezing action will require from all Member States efforts to prepare designations that are based on solid intelligence and information from competent authorities which comply with the criteria the EU uses for freezing, drawing on the enhanced information sharing recommended above, while respecting legal safeguards. There should be greater focus on front organisations, non-profit organisations and individuals as well as on problems relating to the re-naming of organisations. The Council, together with the Commission, will examine whether the legal framework can be strengthened with regard to these issues.
26. The EU must continue to monitor the implementation at national level of the restrictive measures for freezing in order to improve their effectiveness. The recommendations contained in the best practices paper being developed in the Foreign Relations Counsellors Group¹ concerning national rules and procedures for implementing asset freezing measures will be relevant in this context and should continue to be kept under review in the Group. Dialogue, as well as co-operation, where appropriate, with private sector financial institutions and other relevant economic actors should be continued. The successful establishment of the electronic consolidated targeted EU financial sanctions list is an example of such co-operation. Work on improving the identifying information for persons and entities targeted by freezing measures should continue.
27. Legal issues related to freezing, such as the criteria for freezing, the most effective relation between preventive freezing by designation and judicial freezing/seizure with a view to confiscation as a sanction under criminal law, questions relating to due process and legal safeguards and delisting procedures should be further studied and improvements made to the freezing procedures where this is found to be appropriate.

¹ Doc. 13851/3/04

Tools should be developed for improving traceability and transparency with respect to the movement of funds in order to reduce the vulnerability of legitimate economic or charitable activity to misuse by terrorists, terrorist organisations and those who finance terrorism, especially with respect to transactions through the informal banking sector and via non-profit organisations.

28. Member States should promote and ensure appropriate legislation, expertise and funding for financial investigation as a law enforcement technique and an integral part of all law enforcement and/or judicial investigations of terrorist suspects.
29. The Commission and Europol are invited to accelerate their work on promotion of common minimum training standards in financial investigation in the EU. CEPOL should be fully engaged in this process.
30. The Council undertakes to reach, as soon as possible, a common position on the proposal for a directive on money laundering including terrorist financing and invites the European Parliament also to prioritise consideration of this directive.
31. The Council will seek to adopt, as soon as possible, a common position on the proposal for a regulation on controls of cash movements and invites the European Parliament to finalise its second reading of this regulation as soon as possible.
32. The Commission is invited to present, as soon as possible and taking into account the work of FATF, a proposal for a regulation on funds transfers implementing Special Recommendation VII of the Financial Action Task Force. This proposal should take into account, in particular with respect to data required, the mounting evidence that terrorist attacks may be organised with relatively small sums of money. The final adoption of the regulation should be a priority matter.

33. The Commission is invited to present as soon as possible and at the latest by mid 2005 a proposal for a Directive on a New Legal Framework for Payments in the Internal Market to ensure, inter alia, implementation of Special Recommendation VI into Community law.
34. With a view to the full implementation of Special Recommendation VIII of the FATF, and as a follow up to the conclusions of the combined ECOFIN/JHA Council of October 2001, the Commission is invited to assess the need for measures at the EU level, in addition to those taken at national level, in particular with regard to the transparency of legal entities in the non-profit sector with a view to reducing the vulnerabilities of this sector to abuse for terrorist financing. A report should be made to the Council by the end of 2005.

There should be an ongoing analysis of current trends in actual terrorist financing, including links with criminal activity with a view to developing/adapting appropriate counter-measures.

35. The Sitcen is invited to report on trends in terrorist financing by May 2005 to enable the Council to update its strategy against terrorist financing, if necessary, by June 2005.
36. Europol, and in particular its Counter-terrorism Task Force, is invited to report to the Council by May 2005 on links between terrorist financing and other criminal activity to enable the Council to update its strategy against terrorist financing, if necessary, by June 2005.

Working closely with the United Nations and other international bodies, the EU should strengthen the international dimension of its fight against terrorist financing, in particular through enhanced dialogue and increased technical assistance.

37. The EU should continue to work to ensure universal adherence to, and full implementation of, the Convention for the Suppression of the Financing of Terrorism, UNSCR 1373 and other relevant conventions and resolutions. This subject should be raised in political dialogue at all levels with those countries which have not ratified or fully implemented these instruments. The Council undertakes to prepare “master messages” on terrorist financing issues for relevant political dialogue meetings, particularly those with the priority countries identified by the CFSP Working Group on terrorism (COTER).

38. The EU should continue to co-operate closely with the Financial Action Task Force on all issues regarding the financing of terrorism, as well as with FATF style regional bodies to ensure that FATF standards are adopted worldwide. The Presidency and the Commission are invited to ensure that a co-ordinated EU position on terrorist financing issues is presented in FATF.
39. Cooperation with the US and other global partners in preventing terrorist financing remains essential. Action to implement the EU-US Declaration on Combating Terrorism of 26 June 2004 should be continued.
40. Technical assistance will be critical to increase the counter-terrorist capacity of key countries, in particular the priority countries identified by the CFSP Working Group on terrorism (COTER). Assistance may be required in establishing and implementing effective freezing regimes and in setting up Financial Intelligence Units, training of their staff and development of IT systems and investigation methods. Member States and the Commission are invited to devote increased resources to enhancing capacities for countering terrorist financing, in co-operation with other donors, notably the UN, the IMF and the World Bank.
41. The Council will consider, in consultation with the Commission, the possibility of commissioning an independent scrutiny of the EU's efforts in the fight against terrorist financing and how the current strategy will enhance those efforts, in relation to the 9 FATF special recommendations on terrorist financing.
42. The Counter-terrorism Co-ordinator should, in co-operation with the Commission, ensure follow up of the above strategy on a cross pillar basis, reporting on a 6 monthly basis to Coreper (or more frequently if necessary). He should present his first report to Coreper by the end of June 2005.
