反洗钱金融行动特别工作组《40 条建议》(2003)

The Forty Recommendations (2003)

背景：反洗钱金融行动特别工作组（Financial Action Task Forces on Money Laundering）简称 FATF 于 1989 年成立，是一个独立的专门进行国际反洗钱的政府间组织。现有 31 个国家和地区成员和两个国际组织（欧洲委员会和海湾合作委员会）成员。其宗旨是制定和推动反洗钱政策。该工作组希望借助推行反洗钱政策，防止利用犯罪收益进一步犯罪，以及避免洗钱活动影响合法经济活动。

为了打击个人滥用金融系统进行毒品洗钱，FATF 在 1990 年拟定了《40 条建议》。该建议为反洗钱工作奠定了基本框架，是为全球而设计的。内容涉及刑事司法制度和法律执行，金融制度及其规章，以及国际合作事宜。为了适应新形势下洗钱手段的发展，1996 年 FATF 对该建议进行了首次修订。2003 年 6 月，FATF 在对洗钱方法和技术的年度评估基础上，对《40 条建议》做了进一步修订。此次修订结合《打击恐怖融资 8 条特别建议》，对原有的《40 条建议》进行了重大修订，建立了一个更加广泛，统一和有力的反洗钱和反恐融资的国际框架。

下面将要介绍的就是 2003 年修订以后与反洗钱直接相关的 6 条建议。

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Introduction

Money laundering methods and techniques change in response to developing counter-measures. In recent years, the Financial Action Task Force (FATF) has noted increasingly sophisticated combinations of techniques, such as the increased use of legal persons to disguise the true ownership and control of illegal proceeds, and an increased use of professionals to provide advice and assistance in laundering criminal funds. These factors, combined with the experience gained through the FATF's Non-Cooperative Countries and Territories process, and a number of national and international initiatives, led the FATF to review and revise the Forty Recommendations into a new comprehensive framework for combating money laundering and terrorist financing. The FATF now calls upon all countries to take the necessary steps to bring their national systems for combating money laundering and terrorist financing into compliance with the new FATF Recommendations, and to effectively implement these measures.

The review process for revising the Forty Recommendations was an extensive one, open to FATF members, non-members, observers, financial and other affected sectors and interested parties[5]. This consultation process provided a wide range of input, all of which was considered in the review process.

The revised Forty Recommendations now apply not only to money laundering but also to terrorist financing, and when combined with the Eight Special Recommendations on Terrorist Financing[6] provide an enhanced, comprehensive and consistent framework of measures for combating money laundering and terrorist financing. The FATF recognizes that countries have diverse[7] legal and financial systems and so all cannot take identical measures to achieve the common objective,

especially over matters of detail. The Recommendations therefore set minimum standards for action[8] for countries to implement the detail according to their particular circumstances and constitutional frameworks[9]. The Recommendations cover all the measures that national systems should have in place within their criminal justice and regulatory systems[10]; the preventive measures to be taken by financial institutions and certain other businesses and professions; and international co-operation.

The original FATF Forty Recommendations were drawn up in 1990 as an initiative to combat the misuse of financial systems by persons laundering drug money. In 1996 the Recommendations were revised for the first time to reflect evolving money laundering typologies[11]. The 1996 Forty Recommendations have been endorsed by more than 130 countries and are the international anti-money laundering standard.

In October 2001 the FATF expanded its mandate to deal with the issue of the financing of terrorism, and took the important step of creating the Eight Special Recommendations on Terrorist Financing. These Recommendations contain a set of measures aimed at combating the funding of terrorist acts and terrorist organizations, and are complementary[12] to the Forty Recommendations.

A key element in the fight against money laundering and the financing of terrorism is the need for countries systems to be monitored and evaluated, with respect to these international standards. The mutual evaluations conducted by the FATF and FATF-style regional bodies, as well as the assessments conducted by the IMF and World Bank, are a vital mechanism for ensuring that the FATF Recommendations are effectively implemented by all countries.

LEGAL SYSTEMS

Scope of the criminal offence of money laundering[13]

Recommendation 1

Countries should criminalize money laundering on the basis of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[14], 1988 (the Vienna Convention[15]) and United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention)[16].

Countries should apply the crime of money laundering to all serious offences, with a view to

including the widest range of predicate offences. Predicate offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches.

Where countries apply a threshold approach, predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences which are punishable by a maximum penalty of more than one year's imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, which are punished by a minimum penalty of more than six months imprisonment.

Whichever approach is adopted, each country should at a minimum include a range of offences within each of the designated categories of offences[17].

Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically.

Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.

Recommendation 2

Countries should ensure that:

a) The intent and knowledge[18] required to prove the offence of money laundering is consistent with the standards set forth in the Vienna and Palermo Conventions, including the concept that such mental state may be inferred from objective factual circumstances.

b) Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude[19] parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Legal persons should be subject to effective, proportionate[20] and dissuasive[21] sanctions. Such measures should be without prejudice to the criminal liability of individuals.

Provisional measures and confiscation

Recommendation 3

Countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to: (a) identify, trace and evaluate property which is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

MEASURES TO BE TAKEN BY FINANCIAL INSTITUTIONS AND NON-FINANCIAL BUSINESSES AND PROFESSIONS TO PREVENT MONEY LAUNDERING AND TERRORIST FINANCING

Recommendation 4

Countries should ensure that financial institution secrecy laws[22] do not inhibit[23] implementation of the FATF Recommendations.

Customer due diligence and record-keeping

Recommendation 5

Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names.

Financial institutions[24] should undertake customer due diligence measures, including identifying and verifying the identity of their customers, when:

- establishing business relations;

- carrying out occasional transactions: (i) above the applicable designated threshold[25]; or (ii) that are wire transfers in the circumstances covered by the Interpretative Note[26] to Special Recommendation VII;

- there is a suspicion of money laundering or terrorist financing; or

- the financial institution has doubts about the veracity[27] or adequacy of previously obtained customer identification data.

The customer due diligence (CDD) measures to be taken are as follows:

a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.

b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions taking reasonable measures to understand the ownership and control structure of the customer.

c) Obtaining information on the purpose and intended nature of the business relationship.

d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile[28], including, where necessary, the source of funds.

Financial institutions should apply each of the CDD measures under (a) to (d) above, but may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction. The measures that are taken should be consistent with any guidelines[29] issued by competent authorities. For higher risk categories, financial institutions should perform enhanced due diligence. In certain circumstances, where there are low risks, countries may decide that financial institutions can apply reduced or simplified measures.

Financial institutions should verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers[30]. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering risks are effectively managed and where this is essential not to interrupt the normal conduct of business.

Where the financial institution is unable to comply with paragraphs (a) to (c) above, it should not open the account, commence business relations or perform the transaction; or should terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.

These requirements should apply to all new customers, though financial institutions should also apply this Recommendation to existing customers on the basis of materiality [31]and risk, and should conduct due diligence on such existing relationships at appropriate times.

(See Interpretative Notes: Recommendation 5 and Recommendations 5, 12 and 16)

Recommendation 6

Financial institutions should, in relation to politically exposed persons[32], in addition to performing normal due diligence measures:

a) Have appropriate risk management systems to determine whether the customer is a politically exposed person.

b) Obtain senior management approval for establishing business relationships with such customers.

c) Take reasonable measures to establish the source of wealth and source of funds.

Conduct enhanced ongoing monitoring of the business relationship.

Recommendation 7

Financial institutions should, in relation to cross-border correspondent banking[33] and other similar relationships, in addition to performing normal due diligence measures:

a) Gather sufficient information about a respondent institution[34] to understand fully the nature of the respondent's business and to determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subject to a money laundering or terrorist financing investigation or regulatory action.

b) Assess the respondent institution's anti-money laundering and terrorist financing controls.

c) Obtain approval from senior management before establishing new correspondent relationships.

d) Document the respective responsibilities of each institution[35].

e) With respect to "payable-through accounts[36]", be satisfied that the respondent bank has verified the identity of and performed on-going due diligence on the customers having direct access to accounts of the correspondent and that it is able to provide relevant customer identification data upon request to the correspondent bank.

Recommendation 8

Financial institutions should pay special attention to any money laundering threats that may arise from new or developing technologies that might favour anonymity[37], and take measures, if needed, to prevent their use in money laundering schemes. In particular, financial institutions should have policies and procedures in place to address any specific risks associated with non-face to face business relationships or transactions.

Recommendation 9

Countries may permit financial institutions to rely on intermediaries or other third parties to perform elements (a) (c) of the CDD process or to introduce business, provided that the criteria set out below are met. Where such reliance is permitted, the ultimate responsibility for customer identification and verification remains with the financial institution relying on the third party.

The criteria that should be met are as follows:

a) A financial institution relying upon a third party should immediately obtain the necessary information concerning elements (a) (c) of the CDD process. Financial institutions should take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to the CDD requirements will be made available from the third party upon

request without delay.

b) The financial institution should satisfy itself that the third party is regulated and supervised for, and has measures in place to comply with CDD requirements in line with Recommendations 5 and 10.

It is left to each country to determine in which countries the third party that meets the conditions can be based, having regard to information available on countries that do not or do not adequately apply the FATF Recommendations.[38]

Recommendation 10

Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal activity.

Financial institutions should keep records on the identification data obtained through the customer due diligence process (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence[39] for at least five years after the business relationship is ended.

The identification data and transaction records should be available to domestic competent authorities upon appropriate authority.

Recommendation 11

Financial institutions should pay special attention to all complex, unusual large transactions[40], and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities and auditors.

Recommendation 12

The customer due diligence and record-keeping requirements set out in Recommendations 5, 6,

and 8 to 11 apply to designated non-financial businesses and professions[41] in the following situations:

a) Casinos when customers engage in financial transactions equal to or above the applicable designated threshold.

b) Real estate agents - when they are involved in transactions for their client concerning the buying and selling of real estate.

c) Dealers in precious metals and dealers in precious stones - when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.

d) Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities:

• buying and selling of real estate;

• managing of client money, securities or other assets;

• management of bank, savings or securities accounts;

•organisation of contributions for the creation, operation or management of companies;

• creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

e) Trust and company service providers[42] when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.

Reporting of suspicious transactions and compliance

Recommendation 13

If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit (FIU).[43]

Recommendation 14

Financial institutions, their directors, officers and employees should be:

a) Protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the FIU, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.

b) Prohibited by law from disclosing the fact that a suspicious transaction report (STR) or related information is being reported to the FIU.

Recommendation 15

Financial institutions should develop programmes against money laundering and terrorist financing. These programmes should include:

a) The development of internal policies, procedures and controls, including appropriate compliance management arrangements, and adequate screening procedures to ensure high standards when hiring employees.

b) An ongoing employee training programme.

c) An audit function to test the system.[44]

Recommendation 16

The requirements set out in Recommendations 13 to 15, and 21 apply to all designated non-financial businesses and professions, subject to the following qualifications:

a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in Recommendation 12(d). Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants, including auditing.

b) Dealers in precious metals and dealers in precious stones should be required to report suspicious transactions when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.

c) Trust and company service providers should be required to report suspicious transactions for a client when, on behalf of or for a client, they engage in a transaction in relation to the activities referred to Recommendation 12(e).

Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.[45]

Other measures to deter money laundering and terrorist financing

Recommendation 17

Countries should ensure that effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, are available to deal with natural or legal persons covered by these Recommendations that fail to comply with anti-money laundering or terrorist financing requirements.

Recommendation 18

Countries should not approve the establishment or accept the continued operation of shell banks[46]. Financial institutions should refuse to enter into, or continue, a correspondent banking relationship with shell banks. Financial institutions should also guard against establishing relations with respondent foreign financial institutions that permit their accounts to be used by shell banks.

Recommendation 19

Countries should consider: [47]

a) Implementing feasible measures to detect or monitor the physical cross-border transportation of currency and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

b) The feasibility and utility of a system where banks and other financial institutions and intermediaries would report all domestic and international currency transactions above a fixed amount, to a national central agency with a computerized data base[48], available to competent authorities for use in money laundering or terrorist financing cases, subject to strict safeguards to ensure proper use of the information.

Recommendation 20

Countries should consider applying the FATF Recommendations to businesses and professions, other than designated non-financial businesses and professions, that pose a money laundering or terrorist financing risk.

Countries should further encourage the development of modern and secure techniques of money management that are less vulnerable to money laundering.

Measures to be taken with respect to countries that do not or insufficiently comply with the FATF Recommendations

Recommendation 21

Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures[49].

Recommendation 22

Financial institutions should ensure that the principles applicable to financial institutions, which are mentioned above are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply the FATF Recommendations, to the extent that local applicable laws and regulations permit. When local applicable laws and regulations prohibit this implementation, competent authorities in the country of the parent institution should be informed by the financial institutions that they cannot apply the FATF Recommendations.

Regulation and supervision

Recommendation 23[50]

Countries should ensure that financial institutions are subject to adequate regulation and supervision and are effectively implementing the FATF Recommendations. Competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution.[51]

For financial institutions subject to the Core Principles[52], the regulatory and supervisory measures that apply for prudential[53] purposes and which are also relevant to money laundering, should apply in a similar manner for anti-money laundering and terrorist financing purposes.

Other financial institutions should be licensed or registered and appropriately regulated, and subject to supervision or oversight for anti-money laundering purposes, having regard to the risk of money laundering or terrorist financing in that sector. At a minimum, businesses providing a service of money or value transfer, or of money or currency changing should be licensed or registered, and subject to effective systems for monitoring and ensuring compliance with national requirements to combat money laundering and terrorist financing.

Recommendation 24

Designated non-financial businesses and professions should be subject to regulatory and supervisory measures as set out below.

a) Casinos should be subject to a comprehensive regulatory and supervisory regime that ensures that they have effectively implemented the necessary anti-money laundering and terrorist-financing measures. At a minimum:

- casinos should be licensed;
- competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest, holding a management function in, or being an operator of a casino
- competent authorities should ensure that casinos are effectively supervised for compliance with requirements to combat money laundering and terrorist financing.

b) Countries should ensure that the other categories of designated non-financial businesses and professions are subject to effective systems for monitoring and ensuring their compliance with requirements to combat money laundering and terrorist financing. This should be performed on a risk-sensitive basis. This may be performed by a government authority or by an appropriate self-regulatory organisation, provided that such an organisation can ensure that its members comply with their obligations to combat money laundering and terrorist financing.

Recommendation 25

The competent authorities should establish guidelines, and provide feedback which will assist financial institutions and designated non-financial businesses and professions in applying national measures to combat money laundering and terrorist financing, and in particular, in detecting and reporting suspicious transactions.

INSTITUTIONAL AND OTHER MEASURES NECESSARY IN SYSTEMS FOR COMBATING MONEY LAUNDERING AND TERRORIST FINANCING

Competent authorities, their powers and resources

Recommendation 26[54]

Countries should establish a FIU that serves as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR and other information regarding potential money laundering or terrorist financing. The FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STR.

Recommendation 27[55]

Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations. Countries are encouraged to support and develop, as far as possible, special investigative techniques suitable for the investigation of money laundering, such as controlled delivery, undercover operations and other relevant techniques. Countries are also encouraged to use other effective mechanisms such as the use of permanent or temporary groups specialised in asset investigation, and co-operative investigations with appropriate competent authorities in other countries.

Recommendation 28

When conducting investigations of money laundering and underlying predicate offences, competent authorities should be able to obtain documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence.

Recommendation 29

Supervisors should have adequate powers to monitor and ensure compliance by financial institutions with requirements to combat money laundering and terrorist financing, including the authority to conduct inspections. They should be authorised to compel[56] production of any information from financial institutions that is relevant to monitoring such compliance, and to impose adequate administrative sanctions for failure to comply with such requirements.

Recommendation 30

Countries should provide their competent authorities involved in combating money laundering and terrorist financing with adequate financial, human and technical resources. Countries should have in place processes to ensure that the staff of those authorities are of high integrity.

Recommendation 31

Countries should ensure that policy makers, the FIU, law enforcement and supervisors have effective mechanisms in place which enable them to co-operate, and where appropriate co-ordinate domestically with each other concerning the development and implementation of policies and activities to combat money laundering and terrorist financing.

Recommendation 32

Countries should ensure that their competent authorities can review the effectiveness of their systems to combat money laundering and terrorist financing systems by maintaining comprehensive statistics on matters relevant to the effectiveness and efficiency of such systems[57]. This should include statistics on the STR received and disseminated; on money laundering and terrorist financing investigations, prosecutions and convictions; on property frozen, seized and confiscated; and on mutual legal assistance or other international requests for co-operation.

Transparency of legal persons and arrangements

Recommendation 33

Countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares[58] should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures. Countries could consider measures to facilitate[59] access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.

Recommendation 34

Countries should take measures to prevent the unlawful use of legal arrangements by money launderers. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts[60], including information on the settlor, trustee and beneficiaries[61], that can be obtained or accessed in a timely fashion by competent authorities. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.

INTERNATIONAL CO-OPERATION[62]

Recommendation 35

Countries should take immediate steps to become party to and implement fully the Vienna Convention, the Palermo Convention, and the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries are also encouraged to ratify and implement other relevant international conventions, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[63] and the 2002 Inter-American Convention against Terrorism.[64]

Mutual legal assistance and extradition[65]

Recommendation 36

Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering and terrorist financing investigations,

prosecutions, and related proceedings. In particular, countries should:

a) Not prohibit or place unreasonable or unduly restrictive conditions on the provision of mutual legal assistance.

b) Ensure that they have clear and efficient processes for the execution of mutual legal assistance requests.

c) Not refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

d) Not refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality.

Countries should ensure that the powers of their competent authorities required under Recommendation 28 are also available for use in response to requests for mutual legal assistance, and if consistent with their domestic framework, in response to direct requests from foreign judicial or law enforcement authorities to domestic counterparts.

To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue[66] for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country.

Recommendation 37

Countries should, to the greatest extent possible, render mutual legal assistance notwithstanding the absence of dual criminality.

Where dual criminality is required for mutual legal assistance or extradition, that requirement should be deeme to be satisfied regardless of whether both countries place the offence within the same category of offence or denominate the offence by the same terminology[67], provided that both countries criminalise the conduct underlying the offence.

Recommendation 38

There should be authority to take expeditious[68] action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission

of these offences, or property of corresponding value. There should also be arrangements for co-ordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets. [69]

Recommendation 39

Countries should recognize money laundering as an extraditable[70] offence. Each country should either extradite its own nationals, or where a country does not do so solely on the grounds of nationality, that country should, at the request of the country seeking extradition, submit the case without undue delay to its competent authorities for the purpose of prosecution of the offences set forth in the request. Those authorities should take their decision and conduct their proceedings in the same manner as in the case of any other offence of a serious nature under the domestic law of that country. The countries concerned should cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.

Subject to their legal frameworks, countries may consider simplifying extradition by allowing direct transmission of extradition requests between appropriate ministries, extraditing persons based only on warrants of arrests or judgments, and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings.

Other forms of co-operation

Recommendation 40

Countries should ensure that their competent authorities provide the widest possible range of international co-operation to their foreign counterparts. There should be clear and effective gateways to facilitate the prompt and constructive exchange directly between counterparts, either spontaneously or upon request, of information relating to both money laundering and the underlying predicate offences. Exchanges should be permitted without unduly restrictive conditions.[71] In particular:

a) Competent authorities should not refuse a request for assistance on the sole ground that the request is also considered to involve fiscal matters.

b) Countries should not invoke laws that require financial institutions to maintain secrecy or confidentiality as a ground for refusing to provide co-operation.

c) Competent authorities should be able to conduct inquiries; and where possible,

investigations; on behalf of foreign counterparts.

Where the ability to obtain information sought by a foreign competent authority is not within the mandate of its counterpart, countries are also encouraged to permit a prompt and constructive exchange of information with non-counterparts.[72] Co-operation with foreign authorities other than counterparts could occur directly or indirectly. When uncertain about the appropriate avenue to follow, competent authorities should first contact their foreign counterparts for assistance.[73]

Countries should establish controls and safeguards to ensure that information exchanged by competent authorities is used only in an authorized manner, consistent with their obligations concerning privacy and data protection.

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[1] Customer due diligence:客户尽职审查，简称 CDD。这是反洗钱活动中的一个审慎性原则，它要求金融机构对其客户进行审查，包括客户的身份、住址、职业和收入等等。

[2] Reporting of suspicious transactions and compliance:对可疑交易和经营合规性的报告，这是反洗钱活动的一个重要措施，通过向 FIU 报告,可以发现并打击洗钱活动，这要求所有的金融机构都遵守这个规定。

[3] Transparency of legal persons and arrangements:法人和法律协议的透明度。法人是指法人团体、基金、合伙公司、协会或其他任何类似的能够与金融机构建立一种永久性客户关系或拥有财产的组织；法律协议是指书面信托和其他类似的法律协议。这主要是保证在反洗钱活动中，主管部门能够及时获得有关法人以及法律协议的受托人、委托人以及受益人充分、准确的信息。

[4] Mutual legal assistance and extradition:司法互助和引渡。随着洗钱活动范围的扩大，反洗钱活动的顺利开展需要各国进行有关方面的合作，司法互助和引渡就是这方面的合作。

[5] interested parties:利益主体

[6] Eight Special Recommendations on Terrorist Financing:《打击恐怖融资 8 条特别建议》，相关内容见本书相关章节

[7] diverse[dai5vE:s] 不同的，各种各样的

[8] minimum standards for action:行动的最低标准

[9] circumstances and constitutional frameworks:现实情况和制度性体系

[10] criminal justice and regulatory systems:刑事司法和监管体系

[11] typologies[tai5pClEdVist] 类型，在这里可以理解为洗钱的手段，方式或形势

[12] complementary[kRmplE5mentErI] 补充的

[13] Scope of the criminal offence of money laundering:洗钱犯罪的范围

[14] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:联合国《禁止非法贩运麻醉品和精神药物公约》相关内容见本书的其他章节

[15] The Vienna Convention:简称《维也纳公约》，相关内容见本书的其他章节。

[16] United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention):联合国《打击跨国有组织犯罪公约》也简称《巴勒莫公约》，具体内容见本书的有关章节。

[17] designated categories of offences:指定的犯罪类型。FATF 在《40 条建议》中指出 “指定的犯罪”指以下 20 类犯罪: 1)参加有组织犯罪集团和进行敲诈活动; 2)恐怖主义活动, 包括恐怖融资; 3)贩卖人口及偷渡; 4)利用、组织他人进行色情活动,包括利用儿童进行色情活动; 5)非法贩卖毒品和精神性药品; 6)非法贩卖军火;7)非法贩卖盗窃所得及其他物品; 8)贪污和贿赂; 9)诈骗; 10)伪造货币; 11)伪造和非法复制产品; 12)环境方面的犯罪; 13)杀人、重伤害; 14)绑架、非法监禁和劫持人质; 15)抢劫或盗窃; 16)走私; 17)勒索; 18)伪造文件; 19)盗版; 20)内幕交易和操纵市场。

[18] intent and knowledge:故意和明知

[19] preclude[pri5klu:d] 排除

[20] proportionate[prE5pC:FEnit] 相称的

[21] dissuasive[di5sweisiv] 劝戒的

[22] financial institution secrecy laws:金融机构保密法。一般来说, 金融机构有对客户信息进行保密的义务,但是《40 条建议》要求各国应确保金融机构保密法并不妨碍反洗钱活动的顺利实施。

[23] Inhibit[in5hibit]: 阻止

[24] financial institutions:金融机构。在本建议中，金融机构系指为客户或代表客户从事以下一种或多种业务的任何人或个体：(1)接受公众存款及其须支付的款项(这也包括私营银行业)；(2)借贷(主要包括:消费品信用贷款; 抵押贷款; 有追索权或无追索权的应收款项收购; 贸易融资(包括福费廷))；(3)融资租赁(不包括消费品的融资租赁协议)；(4)货币或价值的转移(既适用于金融机构也适用于金融机构的金融交易,如替代性汇款活动. 不包括仅为金融机构提供资金转移的信息或其他支持体系的任何人员或实体)；(5)发行和管理支付手段(如贷记卡

和借记卡,支票,旅行支票, 邮政支票, 银行汇票, 电子货币)；(6)融资担保和委托；(7)从事下列交易:a.货币市场工具(支票、汇票、存款凭证和金融衍生品) b.外汇 c.汇兑 、利率和指数票据 d.可转让证券 e.商品期货交易；(8)参与证券发行或提供与此有关事宜的金融服务；(9)个人或集体的投资组合管理；(10)代表他人进行现金或流动证券的保管；(11)代表他人投资、管理或经营资金或货币；(12)人寿保险的承销和分保以及与保险有关的其他投资(既适用于保险公司，也适用于保险中间商)；(13)现金和货币交易。

[25] designated threshold:规定金额。在《40 条建议》中, 金融交易中的规定金额系指： 1. 金融机构(针对第 5 条建议中规定的非经常性客户): 1.5 万美元； 2. 赌场,包括网络赌场(针对第 13 条建议): 3000 美元； 3. 贵金属和宝石交易商进行的任何现金交易(针对 12 至 16 条建议): 1.5 万美元。超过规定金额的金融交易既包括超过规定金额的单笔交易，也包括看似关联的连续多笔交易。

[26] Interpretative Note：注释

[27] veracity[vE5rAsiti] 真实性，准确性

[28] profile [5prEufail] 概况

[29] guidelines[^aIdlains] 指导方针

[30] occasional customers:非经常性客户

[31] materiality[mE7tiEri5Aliti] 现实情况

[32] politically exposed persons:政治公众人物。系指那些在外国履行重要公共职能的人员,如国家或政府首脑、 高层政要、资深的政府、司法或军事官员、国有企业的高级主管和政党要员。同政治公众人物的家庭成员或关系密切者发生商业关系所产生的风险, 与同政治公众人物自身发生商业关系所产生的风险类似。此定义不涵盖中层或较低层次的官员。

[33] cross-border correspondent banking:海外代理银行的业务

[34] respondent institution:回复机构

[35] document the respective responsibilities of each institution:用文件明确记录每个机构各自应负的责任

[36] payable-through accounts:可通过账户支付。系指可直接被第三方用以自行交易的代理银行账户

[37] anonymity[7AnE5nimiti] 匿名

[38] 本建议不适用于外部采购和机构间商业关系, 也不适用于金融机构之间为客户进行的商业关系,账户来往和其他交易.

[39] correspondence[7kCris5pCndEns] 函件

[40] transactions[trAn5zAkFEns] 在第 10 条和第 11 条建议在适用于保险业时，“transactions”一词系指保险产品本身,以及保险金支付和收益。

[41] designated non-financial businesses and professions: 指定的非金融行业和职业。在<<FATF40 条建议>中，指定的非金融行业和职业都有特定的内涵,对此下文中有详细的列示。

[42] trust and company service providers:信托和公司服务提供者

1 本建议中提到的犯罪活动系指:1)在司法区可能构成洗钱犯罪上游犯罪的所有犯罪活动. 2)至少应包括第一条建议中所规定的构成洗钱犯罪上游犯罪的犯罪. 大力鼓励各国采用上述第 1)条规定. 包括未遂交易在内的所有可疑交易,无论其交易金额的大小,都应该报告. 2. 在执行本建议时,无论可疑交易是否还涉及到税务问题，金融机构都应该报告. 为阻止金融机构报告可疑交易，洗钱者有时会声称交易涉及到税务问题，各国应对此加以关注。

[44] 为执行每一条建议的规定而采取的措施的类型和强度应与存在的洗钱和恐怖融资风险大小及交易的规模相适应。金融机构实行的合规管理体制中，应包括在管理层任命一名合规官员。

[45] 关于交易是否与法定的行业特权与职业秘密有关，由各国自行决定。这通常包括律师、公证人或法律职业工作者在进行以下活动时从一个或多个客户那里收到或获取的信息: (1)在确定其客户法律地位时; (2) 在司法程序、行政程序、仲裁程序、调解程序或与这些法律程序有关的业务活动中履行代理其客户或为客户辩护的指责时。 如果会计受到同时的保密或特权义务的约束,他们也不必报告可疑交易。2. 如果本国的律师和会计自律组织与金融情报中心之间存在适当的合作机制,各国可允许律师和会计将可疑交易报告递交给其相应的自律组织。

[46] shell banks:空壳银行。系指在某司法区成立，但在该司法区内没有实际注册也不是受监管金融机构成员的银行。

[47] 为了便于发现和监控现金流动,同时又不影响资金的自由流动,成员可考虑对所有超过一定限额的越境资金转移进行查证、行政监控、申请和记录保存。 2. 如果某国发现一个不平常的货币，货币工具,名贵金属或宝石的国际船运,其应考虑在适当的时候将此情况通报船运的起运和/或目的国的海关或其他主管部门,并且在核查此次船运的来源、目的地和目的以及采取适当措施方面进行合作。

[48] computerized data base:电脑数据库

[49] countermeasure [5kauntE7meVE] 对策，制裁措施

[50] 该条建议只是强调了 FATF 希望各国对金融机构中的控股股东进行审慎审查的愿望，并

不要求仅仅为了反洗钱目的而在金融机构中建立一个对注册的控股股东进行定期审查的机制。因此，如果存在一个测试股东适当性(或 “准确性与正当性”)的机制，监管者的注意力应集中在其体制是否足以应对洗钱活动。

[51] holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution:持有金融机构的有影响的或控股的投资股份，或成为有影响或控股的投资股份的收益人，或在金融机构中担任管理职务。

[52] Core Principles:核心原则。系指巴塞尔银行监管委员会发布的《有效银行监管的核心原则》，国际证券委员会组织发布的《证券管理的目标和原则》以及国际保险监管机构协会发布的《保险监管原则》。

[53] prudential[pru(:)5denFEl] 审慎的

[54] 如果某国已建立情报中心，那么应争取使其成为埃格蒙特集团的成员．各国应重视《埃格蒙特集团的声明和目标》及《金融情报中心之间交换洗钱案件情报的原则》。这两份文件在金融情报中心的任务和功能方面提供了重要的指导，并规定了各国金融情报中心情报交换的机制。

[55] 为了识别参与反洗钱活动的人员的身份或搜集证据,各国应该考虑在全国范围内采取立法在内的措施,以使其调查洗钱的主管部门能够推迟逮捕犯罪嫌疑人及/或没收黑钱。没有这样的措施，则无法采取控制下交付和秘密调查等措施。

[56] compel[kEm5pel] 强迫，迫使

[57] 事实上从国际经验来看，当局或政策制定者对 FIU 的工作不应有过多的干预，但其可以对 FIU 的运作效率提出质疑，当然即使 FIU 的效率低下,这也不能成为当局或有关当局对 FIU 活动进行干预的理由.

[58] bearer shares:不记名股票

[59] facilitate[fE5siliteit] 有利于，有便于

[60] express trusts:书面信托

[61] settlor, trustee and beneficiaries:委托人，受托人和收益人

[62] 合作对反洗钱活动来说特别重要，而随着洗钱活动跨境的进行，洗钱手段的电子化，国际合作对于打击和防范洗钱活动具有愈来愈重要的意义。

[63] the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime:1990 年欧洲委员会《清洗、搜查、查封和没收犯罪收益的公约》

[64] the 2002 Inter-American Convention against Terrorism: 2002 美洲《反恐怖主义公约》

[65] 司法互助包括司法协助和司法当局间的合作。司法协助主要指刑事司法互助. 刑事司法协助是作为引渡的附随形式发展起来的,现已发展成为防范和打击跨国犯罪不可或缺的重要手段, 成为国家间打击刑事犯罪的重要工具。引渡是指一国的主管机关应有管辖权的另一国主管机关的请求,依据国际法或双边协定的相关规定, 将被指控或判决犯有可引渡之罪的域内之人送交有管辖权的请求国进行惩处。引渡是在近代通过双方或多边条约或协定发展起来的, 是一种国际司法协助形式。

[66] venue[5venju:] 审判地, 犯罪地点

[67] terminology[7tE:mi5nClEdVi] 术语

[68] expeditious[ekspI5dIFEs] 迅速的

[69] 各国应考虑: 1)在本国范围内建立一个资产没收基金, 将所有被没收的资产或其中一部分存入其中, 以用于执法,医疗卫生、教育或其他适当的目的。 2)采取必要的措施, 以使其能够和其他一个或多个国家共享没收的财产,尤其是当没收的财产来源于联合执法行动时.

[70] extraditable[5ekstrEdaitEbl] 可引渡的

[71] 根据有关主管部门的类型及合作的性质和目的, 有多种可进行情报交换的适当方式,包括通过双边或多边协议和框架、谅解备忘录及基于互惠基础上的互换以及通过适当的全球性和区域性国际组织等。然而, 本建议不涵盖与双边司法互助和引渡有关的合作。

[72] 本建议中提到的与外国部门间进行的非对口部门间的间接性情报交换包括下列情形: 通过一个或多个国内和外国部门, 将国外请求提供的情报最终传到提出申请的部门。

[73] 金融情报中心应能代表外国对口部门进行与金融交易分析相关的调查。这种调查至少包括: 1)搜索其包括与可疑金融报告相关信息在内的数据库。2)搜索其他能够直接或间接登陆的数据库, 包括: 执法数据库, 公共数据库, 行政管理数据库和商业性质的可用数据库。在经允许的情况下, 金融情报中心还应与其他主管部门和金融机构联系, 以获得相关的信息。