

CASE STUDY

“Improper use of exchanged information between FIUs in the field of international cooperation and taken measures”

Introduction

Most of the money laundering schemes, as the money flows related with the financing of terrorism, share the same trait: the utilization of international financial systems and the general employment, by the persons and organizations that pursue the laundering of proceeds of crime, of the opportunities offered by the financial havens and offshore banking centers.

In this context of international growing, the information exchange between Financial Intelligence Units (FIUs) is an information source of greatest interest for the prevention of money laundering and the financing of terrorism. In consequence, its utilization must be a habitual practice in the FIUs' daily work. However, this information exchange between FIUs must be prepared and endowed with enough experience to successfully tackle the problems that may arise, as evidenced in the case study described below:

Description of the case

The Financial Intelligence Unit of a country (hereinafter requesting FIU) submitted an information request, through the secure network of the Egmont Group, to the Financial Intelligence Unit of another country (hereinafter required FIU), concerning a group of citizens of other nationalities, as well as of the companies that they controlled and their commercial and financial operations. Moreover, the requesting FIU could have known that these citizens could be linked to organized crime and that this organization was being investigated by the police and judicial authorities of its country.

The request was made in accordance with the Principles for Information Exchange between Financial Intelligence Units of the Egmont Group, and in conformity with the standards emanated from the Financial Action Task Force. The request said:

- There was a judicial proceeding in course and the judicial authority of the requesting country had solicited information to the FIU of its country.
- An authorization was requested to transfer the information obtained to this judicial authority. This authorization would be considered as approved, unless the contrary was indicated.
- A description of the facts that originated the request was made, and the relation between the people involved and the operation developed with the country of the required FIU was indicated.

The required FIU gave an answer to the request, facilitating an extended report about that group of citizens, the companies linked with them, the financial operations that they had realized in both countries, as well as all the commercial and police information available.

Once this information was obtained, the requiring FIU transferred that report, without modifications, to the judicial authority that had requested it, indicating that the information could be used just for intelligence purposes.

After a while, the requested FIU knew some facts that could have shown a possible improper use by the requiring FIU of the information that was transferred before. What happened was that an European bank had contacted them regarding the operations contained in the report transferred to the requiring FIU. The bank had had knowledge of such operations –exactly the same that the report had- through a client's legal representative, precisely one of the persons involved in the operations described above, who said that the information was obtained from a judge of the requiring FIU. All of this was originated for a communication of a suspicious operation that the bank had sent to the required FIU regarding that client, so it was a very embarrassing situation.

The required FIU contacted the requiring FIU, claiming for an explanation about how this information was leaked to the legal representative of the persons who were analyzed, alerting on the possible consequences.

The requiring FIU informed to the required FIU that the information was acknowledged by the persons involved in the operation because of the existence of an open trial, so the legal representatives of the parts had access to the information and documents incorporated in it. In these cases, once the information is transferred to the judicial authority and incorporated to the process, the FIU can control neither the use of the information nor the access of the parts to it.

In spite of the explanations provided, the required FIU stated in writing to the requiring FIU that, according to its procedures, they had taken the decision of suspending the information exchange, requiring at the same time the clarification of some concrete points.

Issues

As it can be seen in the description of the case, and having taken all the relevant precautionary measures and followed both FIUs the usual procedure relating the information exchange, it is evident that there was a breach on the confidentiality of the exchange, because of the knowledge that the persons involved in the supposed money laundering cause that was analyzed had about the information facilitated by the required FIU, due to the incorporation of the report made by it to the judicial process followed in the country of the requiring FIU.

Thus, the channels from where the information obtained in the country of the requiring FIU's flows are evident, damaging the trust and kindness of the exchanges. The good relationship and cooperation between FIUs are disrupted and damaged.

Possible solution

Different solutions can be adopted to guarantee the confidentiality of the information exchanged and to prevent events like the one described. The possible courses of action would be the following:

1. Regulatory changes

In the country of the requesting FIU there has been a change in its legislation on money laundering and financing of terrorism, according to which the nature of the reports that the FIU generate is specifically contemplated, giving them the status of *financial intelligence reports*. In this sense, that article establishes:

- The information and documentation available to the FIU, and the financial intelligence report that it makes, shall be confidential, and any authority or officer who has access to their content shall maintain confidentiality on them.
- In particular, the identity of the analysts who have been involved in the preparation of the reports, or the employees, officers or agents who have reported the existence of evidence to the internal control bodies of the subject bound, shall not be disclosed in any case.
- The financial intelligence reports will not have probative value.
- The financial intelligence reports can not be directly incorporated into the judicial or administrative proceedings.

With the elaboration of this legislative change is evident that confidentiality is predicated not only to financial intelligence reports, but also in relation to all the information and documentation available to the FIU. It is also noteworthy that this confidentiality obligation also extends to any authority or officer who access to the content of that information.

The prevention system is based on trust. This trust is what permits a fluid exchange of information between obligated subjects that catch the existence of possible signs of money laundering or financing of terrorism in a transaction and the FIU. The same happens in the field of international cooperation.

For the existence of that trust is an essential requirement that the obligated parties and the FIUs of other countries know with certainty that the information that they provide will not circulate or be used for purposes other than the prevention of money laundering and the financing of terrorism.

The intention of this legislative change is that the information be transferred and treated in a particular way, according to the nature of the information handled by the FIU, which is *financial intelligence*. The concept of intelligence is, in this sense, opposed to administrative information.

2. Utilization of police channels. Awareness of the judicial authorities

The FIUs are very important organs in the prevention area, but they are a cog in the whole mechanism, which is the prevention system of a country. Through this process, the information flows from the obligated parties, comes to the FIU for further financial analysis and from there it goes to the law enforcement agencies or to the prosecutors, who apply their techniques to finish, if there is a reason for it, in the courts, which are the final part of the process, which ends with the sentences and the confiscation of property, if is applicable.

The intelligence reports produced by the FIUs contain certain information that may be considered particularly sensitive. It would be advisable that, in most cases, law enforcement agencies were the main recipients of the reports of FIUs. They know perfectly well how to treat intelligence information and incorporate it in their reports without revealing the sources, while pointing out the need to request certain information through formal channels, with the appropriate judicial authorization.

Another line of action is that the FIU develops in its country a plan to raise awareness of the nature of its reports, holding meetings with its judicial authorities, judges and prosecutors, who generally receive reports from the FIU.

3. Changes in the internal procedures of the FIU in relation to information processing

Because of such incident, the requesting FIU decided to redesign its internal procedures, particularly those relating to the use of information received from another FIU when judicial authorities have requested it.

The new procedures basically provide the same controls and filters that would be applied generically in regard to all the information received from other FIUs in the framework of international information exchange. The checks or filters would be the following:

- Removal of the information contained in the reports, leaving only a record of the significant events in connection with the purpose for which the information was requested, and eliminating the source of information as far as possible.
 - Elimination of irrelevant information and sensitive information, such as names of analysts, number of files, etc.
 - Express authorization from the requested FIU to submit the information to the competent judicial authority.
 - It has to be spelled out to the recipient that the information submitted is intelligence information and, therefore, may not be incorporated into judicial proceedings.
4. Establishment of special clauses in the Memorandum of Understanding (hereinafter MOU) between the two FIUs, which contemplate and avoid the problem

Redesign of the MOU that regulates the information exchange between FIUs and that reflects in its content, in addition to matters already covered in the model established by the Egmont Group, the following:

- The requiring FIU shall indicate in advance the possible recipients of the information that will be obtained from the required FIU.

- The disclosure of information to recipients other than those specified in the original petition shall obtain the consent of the required FIU.
- Both FIUs shall warn the third parties recipients of the reports that the information provided may not be disclosed to any other party without prior consent of the FIU, and that it may not, under any circumstances, be used as evidence in court. The FIUs assume as their own responsibilities those arising from the misuse of the information provided by other FIU.
- The internal procedures that every FIU has established shall be shown in the sense indicated in the preceding paragraph.
- Both FIUs shall undertake to provide each other with a copy of the report that will be forwarded to the judicial authorities and that incorporates information provided by the other within the framework of the international information exchange, in order that the report be validated by the required FIU.
- In the event that one of the FIUs is subject of a request from the judicial authority that requires forwarding the information which has been supplied by the other FIU, the first FIU shall immediately communicate that circumstance and make the necessary and reasonable efforts to limit the extent and possible significance of such disclosure.