

WEDNESDAY 25 MARCH 2009

Present

Garden of Frogmal, B.
Hannay of Chiswick, L.
Henig, B.
Jopling, L. (Chairman)

Witnesses: **Mr Philippe Pellé**, Deputy Head, Company Law, Corporate Governance and Financial Crime, **Mrs Agnete Philipson** and **Mr Mariano Fernandez Salas**, Directorate General for the Internal Market and Services (DG MARKT), **Mr Jakub Boratyński**, Head of Unit on Organised Crime, **Mr Sebastiano Tiné**, Head of Financial Crime Sector, and **Mr Mickael Roudaut**, Directorate General for Justice, Freedom and Security (DG JLS), examined.

Q269 Chairman: Welcome. As you know, this Committee is doing a study on money laundering and the financing of terrorism. We have been taking evidence in London and this is our day to be in Brussels. We talked to the Council this morning and we are delighted that so many of you have turned out in force. You may think that we have not turned out in such force but there are important votes in the House of Lords tonight and I am afraid the Whips have decimated our delegation rather, but I can assure you that our view (it may not be yours) is that what we lack in quantity we make up for in quality. You are most welcome and thank you very much. What in the view of the Commission are the major challenges presently facing European and international efforts to combat effectively money laundering and the financing of terrorism? That is an extremely broad question. Some of you may feel the questions are directed to one side or the other but if any of you want to chip in and follow the main answer we would welcome that very much. Finally, the evidence, as you realise, will be put on to the parliamentary web immediately and if, after this meeting, you have any

additions that you think would be helpful to us we would welcome supplementary evidence on paper.

Mr Pellé: I will kick off if I may by introducing myself. My name is Philippe Pellé. I am the Deputy Head of the Unit in charge of Company Law, Corporate Governance and Financial Crime and that unit belongs to DG Internal Market and Services. Our Directorate General is in charge of EU regulation for financial services in general and the free movement of capital. I chair the Committee for the Prevention of Money Laundering and Terrorist Financing. That is a committee on which Member States sit. We have 27 representatives of Member States and the task of the committee is to assist the Commission in its regulatory task. I also lead the Commission's delegation to the FATF. I am accompanied today by two colleagues from our department – Agnete Philipson and Mario Fernandez Salas. We would like to thank you for giving us the opportunity to present the views of the Commission Services. We are not in a position to speak for the College of Commissioners because none of us is a commissioner, so we are speaking on behalf of the Commission Services. Also, none of us is a native English speaker either so we crave your indulgence in this respect.

Q270 Chairman: You are doing very well.

Mr Pellé: We will do our best to provide you with further information in relation to the written evidence we submitted at the end of January.

Mr Boratyński: My name is Jakub Boratyński. I am the Head of the Unit on the Fight against Organised Crime, which is part of Directorate General Justice, Freedom and Security. I am accompanied today by Sebastiano Tiné, Head of our Financial Crime Sector, and Mickael Roudaut, who joined us very recently and who deals specifically with money laundering. To give you a little bit of background in the area of money laundering and terrorist financing and why DG Markt is focusing on the preventive side, we focus our efforts on the law enforcement side. We are responsible in general for harmonisation of penal

legislation of the Member States and for law enforcement issues. In that context we are responsible for implementation of the Council's Decision on FIU cooperation as well as dealing with EU legal texts on confiscation of the proceeds of crime. We are also engaged in improving co-operation between FIUs and in particular there is an FIU.NET project and your questions focus on this as well. Finally, thanks to the generosity of the Member States, we have quite some money to spend and our fight against organised crime programme allows us to support numerous efforts in this field.

Mr Pellé: Your question is indeed a challenging one because it is relatively broad and I do not pretend to know the full answer to this. Also, any answer we may give will be a bit speculative because the challenges are many and we have challenges in terms of future threats and some of those challenges we know; others we do not. Some may be in relation to threats we barely perceive at this stage; others relate to the fact that we might need to and should improve the existing systems, and some challenges may be of an organisational nature. In this respect one real challenge is to ensure that different actors and parts of the EU policies do function in a very joined-up and effective way. It is not a secret: even at Member State level, organisations are fighting with this realisation. As to future and existing threats, I would only note that the spring European Council, which took place not long ago, in the context of the current crisis, called for the G20 in London to fight with determination tax evasion, financial crime, money laundering and terrorist financing as well as, and I am quoting, "any threat to financial stability and market integrity". This is a clear political mandate for the Commission, and it will also give us a real impetus in the fight against money laundering and terrorist financing. It is true that the European Council requested proposals from the FATF but we will come back to this later in response to the questions you have raised. As for the threats, all in all the Commission does not have a very different vision from the Member States or the FATF; we are all in the same boat. What I would like to underline is that the Commission as

such has no operational activities. In Member States you have the police and you have operational services. We have no judicial authority as such. We have the European Court of Justice but it is not the Commission. We have no judicial authority to deal with money laundering and terrorist financing. The only operational activity the Commission has is the fight against VAT carousel fraud because VAT is the source of revenue for Community budgets and we want to protect our financial interests. However, things may evolve over time because Europol and Eurojust are soon to become Community agencies and we believe that this operational activity of the Commission will increase over time when we look at it globally.

Mr Boratyński: As Philippe has said, the competence of the Commission on security matters is rather limited. We do have some tools at EU level as regards assessment of threats relating to money laundering and terrorist financing, and this is the activity carried out by Europol and the Joint Situation Centre, which are part of the Council of the European Union Secretariat-General. As far as Europol is concerned, with whom we co-operate very closely, Europol publishes every year an Organised Crime Threat Assessment where money laundering is assessed and part of that report becomes public. The part that is confidential, obviously, is shared only with the Member States. In addition, Europol issued in 2008 a situation report on terrorist financing. If I may come to the challenges, the money launderers and terrorists involved in terrorist financing are using increasingly sophisticated techniques these days, for example, the use of shell companies to avoid detection. Many gatekeepers consider that identifying the beneficial owner of the company is a challenge for them, and we will come back to this in a later question. Therefore, there may be the need to improve the existing tools and procedures in order to increase the transparency of legal entities, and here we mean companies, legal persons in general, foundations and legal arrangements such as trusts. An area which is a challenge and is also an area for possible action is enhancing the capacity of

Member States related to financial investigations. This is obviously a horizontal issue which does not specifically deal exclusively with money laundering but also concerns financing organised crime in general, and in that respect the use of financial expertise as part of the investigation undertaken by law enforcement and judicial authorities is very important. Secondly, there is the question of co-operation between FIUs, law enforcement and judicial authorities inside the EU and internationally. Then it is a question of identifying new potential vulnerabilities and adapting measures in view of the fight against financing terrorism. More generally, the private sector needs to remain alert to the risk of being used for terrorist financing and this concerns not only financial institutions but also non-profit organisations. Quite recently in Brussels we had an interesting event, with the participation of the non-profit and private sector, on how, in the general effort of the third sector, we could increase transparency and accountability to take account of possible threats related to terrorist financing. In mentioning these specific issues related to money laundering and financial crime, there is in a way a horizontal fundamental challenge at the EU level that we all face in developing the areas of justice, freedom and security as described by the treaties and by the multi-annual programme. The whole concept is based on the idea of mutual recognition. The most recent development, an issue which is not related so much to what we are discussing today but is certainly very well known in the UK, is the European arrest warrant. What is more relevant to what we are discussing here is the European evidence warrant and we have made an impressive effort collectively in the EU to build this kind of legal edifice but at the same time in the day-to-day reality there are numerous obstacles and it comes down basically to the question of mutual trust. Therefore, addressing the question of trust among Member States, among law enforcement services, among judicial authorities, and talking about this among FIUs, is probably at the very core of the challenges we are speaking about.

Q271 Lord Hannay of Chiswick: In the course of our evidence taking we have identified a reasonably new source of illegal money laundering, which is rather large sums of money being transferred to Somali pirates as a result of the hijacking of ships and then their release and yet it does not seem to be on anybody's radar screen at the moment. We talked about it to the British Treasury representatives and to FATF and they said no, FATF had not done anything about that. We talked to your colleagues in the Council Secretariat this morning and they said no, the EU has not really looked at that. Is this something that is of concern to you? It seems to us that there is a fairly anomalous set of issues raised by this. For example, there is nothing illegal, in most Member States at any rate, about transferring large sums of money to people who are known to be criminals in order to obtain the release of ships and their crews, nor does there seem to be any process by which the money is subsequently identified with the criminals and therefore the proceeds may or may not find their way one day to terrorists but in any case it will certainly be a case of money laundering. Do you have any feel for this subject at all?

Mr Pellé: As we said, this is not an issue that has come up on our radar screen, nor at FATF. As far as the Council Secretariat is concerned, I understand that you met with Professor de Kerchove this morning. I do not know whether they are aware of this or whether Europol mentioned it. It seems to me, as you hinted, that the issue would be in the second phase, the recycling of proceeds. For the time being the issue is one of the payment of ransom to those pirates, and indeed it is something we have no position on as Commission officials, and for us at least that is not yet money laundering. If there is a question as to when these funds are recycled, and indeed could end up in hands one would not like to see them in... I think we can only take note of the point, discuss it internally and also probably with the UK Treasury. It may be worth having a look at it in the FATF. The FATF does conduct tactical exercises regarding new ways of money laundering, if I may put it like that. It did conduct a very

substantial exercise on trade-based money laundering two years ago. It may be a point worth raising with them.

Q272 Lord Hannay of Chiswick: There is after all an ESDP mission of quite an expensive and extensive kind operating in the seas off the Horn of Africa to try to prevent the acts of piracy. It seems slightly odd, to put it mildly, that no effort is being made to squeeze another part of this cottage industry which seems to have been growing rather rapidly until the naval operation was undertaken, that is to say, the side which enables them to get their hands on large sums of money and thereafter make it disappear into thin air.

Mr Pellé: You raise a very interesting point because we are basically dealing with a non-state. Because Somalia is not a state any more. There is no possibility of having a government-to-government talk to ensure that there are appropriate anti-money laundering rules on the spot. Therefore the issue would be for our banks, let us say, in Europe to ensure that funds coming from certain individuals were properly screened. We do not have our colleagues from DG External Relations here, so I do not know at this stage whether there are sanctions against some individuals in Somalia; it is a bit speculative, but it is certainly an issue that would be worth examining.

Chairman: We have sown a seed in your minds.

Q273 Baroness Garden of Frognal: The European Commission and 15 Member States are members of FATF. Could you tell us what procedures and processes exist to co-ordinate an overall EU position in advance of FATF plenary meetings and whether these have proved satisfactory in practice?

Mr Pellé: The factual description is relatively easy. The second question is more complicated and more difficult for us. On the factual question, only 15 Member States, not the 27, are members of the FATF, plus the Commission. The European Union is not a

member, nor the European Community, which indeed is an issue. It is an issue we looked at four or five years ago and we took it into account on the basis that we did not want to overhaul the whole system. We are in a situation where we have 15 Member States in the FATF and 12 Member States in MONEYVAL, which is an FATF-style regional body set up under the aegis of the Council of Europe, so we have a *de facto* divide at international level. How do we try to remedy this asymmetry? We do it at Community level and the Commission does it by making use of the Committee for the Prevention of Money Laundering and Terrorist Financing on which all 27 Member States sit. Every time there is an FATF plenary, a week before that meeting we organise a meeting of the Committee for the Prevention of Money Laundering and Terrorist Financing with the 27 Member States. It is a matter of feedback but we discuss major issues that could be of interest to all 27 Member States, or to one Member State (it does not need to be a common issue), but there is this platform meeting a week before the FATF plenary. In addition, as I said, the 12 other Member States are members of MONEYVAL, and MONEYVAL is represented at the FATF through its chairman and its executive secretary plus three members of MONEYVAL. It does not necessarily mean that they will be three of the 12 Member States but often we will have one of them in the delegation, so there is access. We have MONEYVAL for the 12 Member States and there is reasonable access indirectly through the Commission, the CPMLTF, the committee I was referring to earlier. What do we do when there are major issues for Member States and for us? We try to get a common line for the Community that we can present to the FATF. That was the case when we had to debate Special Recommendation 9 on cash control operations at the border, where we had very divergent views with the FATF and particularly some federal states which do not belong to the EU, so there we used the committee for that purpose. It does not mean that there is a single EU voice. Member States are autonomous at the FATF so they can speak, and sometimes they do speak in a different way. Most of the

time they do not but it can happen. As to whether it has proved satisfactory in practice, that is a question we should ask Member States.

Q274 Baroness Garden of Frognal: We understand there are a number of working parties as well within this process and we are just wondering if you could explain how the views all become co-ordinated. What is the process of communication between the working parties?

Mr Pellé: You are referring to the working parties at the FATF?

Q275 Baroness Garden of Frognal: Yes.

Mr Pellé: It is a matter of resources. You see here almost all the resources of the Commission dealing with anti-money laundering and terrorist financing and most of those resources are only dedicated part-time to that issue, so it is also a matter of human resources. Therefore, when we have the committee meeting we only tackle very major points, which may be points relating to the work of those working parties you were referring to or issues that will be dealt with by the plenary itself; it all depends. On SR9 we were co-ordinating issues that were debated in the working group on terrorist financing and money laundering and then it moved to the plenary, so it really depends. It is thematic more than in relation to a particular working group. That is an issue that is being examined at the FATF where there is a clear willingness to associate more jurisdictions in the world with the work of the FATF, not only those who are members of the FATF but also the other countries, and particularly through regional bodies like MONEYVAL or the Asian-Pacific Group and others throughout the world that apply the FATF standards and do some work. If you like, the FATF is the holding company and the subsidiaries follow instructions from the parent company. There is certainly a willingness at the FATF to involve the regional bodies more in the work of the FATF, including working groups. There was even consideration as to whether or not they could co-chair some of those working groups - this may not be completely ripe at the FATF -

to try to associate those regional bodies more and more. Certainly it is the view of the Commission that we do not want to have two divisions like in football, the first division being the FATF members and the second division those who do not belong to the FATF.

Q276 Lord Hannay of Chiswick: A major purpose of European legislation in the anti-money laundering and terrorist financing sphere is, of course, to give effect to these FATF recommendations once they are agreed by the FATF. Have problems arisen in, as it were, transposing the FATF recommendations into European decisions and law, and how are they being addressed?

Mr Pellé: I will give you two examples and they go in different directions. The first one is not really a problem *per se*. The FATF's motive has always been to ensure better implementation of those standards, but at the last FATF plenary, which took place in February, the emphasis for better global implementation was on those standards related to confiscation and legal entities and legal arrangements, trusts, for instance, and also on mutual legal assistance where there were a number of recommendations. Perhaps in the past it was very much on the finance aspect and now there is a willingness to rebalance a bit and have another look at those standards on confiscation and mutual legal assistance. They wanted to devote more attention and more time to this, but this is in line with the work that the Commission is carrying out. The Commission recently issued a Communication on confiscation of the proceeds of crime, so it is very much in line with the work that has been happening and is ongoing at Community level. That is why I would not say it is a problem. On the contrary, it is an opportunity for us to contribute to the international standard-setting process. Conversely, we have had some problems with the FATF because in some instances the standards are first of all addressed to nation states and therefore they fail to take into account the EU dimension. For our Member States belonging to the European Union we have had some friction in the interpretation of the standards and the way they should apply to the

European Union. There was a case with regard to Special Recommendation 7 where the EU applies the standard in its relation with third countries and has, let us say, a simplified way of applying it within the European Union, but we considered that we had complied with the spirit of the standard. Nevertheless we had to make a demonstration of it. It was a bit of a painstaking exercise but in the end it was recognised by the FATF and language was adopted at FATF level to recognise the specificity of the European Union. The same applied in respect of Special Recommendation 9 on cash controls at the border where some of our Member States were assessed very strictly (too strictly in our opinion) because they did not have controls at what we call the intra-EU border, which is basically the border between two Member States, e.g. between Finland and Sweden. Our reading of the application of the international standard is that it should apply at the external border of the European Union and not start cutting through the economic and political integration process. We had tremendous difficulties in making this understood and accepted by federal states who are not members of the European Union. It took us two years. In the end we managed to get their support and convince the non-EU Member States of the FATF that there were more proportionate means of reaching the same objective than requesting our Member States to re-establish controls at the border as far as cash movements are concerned. That was more the problem and similar problems may still occur because the EU has some specificity. But we accept, in so doing, that we have to demonstrate that we respect the spirit of international standards.

Q277 Lord Hannay of Chiswick: What I understand you to be saying is that you have had quite a struggle getting the non-EU FATF members to accept the specific way the EU implements the recommendations.

Mr Pellé: Yes.

Q278 Lord Hannay of Chiswick: But you have not had any trouble from the EU Member States who are not members of FATF at the necessary EU decisions to implement the recommendations?

Mr Pellé: No, because that is done through the negotiation at Community level of a directive, which was again the Third Anti-Money Laundering Directive and all 27 were part of the process – 25 at the time.

Q279 Lord Hannay of Chiswick: And then the follow-up is done through a management committee procedure?

Mr Pellé: Yes. You have raised a question as to which Member States have not fully transposed the directive, and out of the new Member States only one is late.

Q280 Baroness Henig: In June 2008 the United Kingdom, Brazil and The Netherlands proposed a review of the FATF recommendations and the mutual evaluation process. To what extent, if any, do you think the global financial crisis has made the need for a review more pressing, and also could you tell us what has been the stance of the Commission in relation to this initiative?

Mr Pellé: I am smiling because I would have liked FATF members to respond to your second question as the global financial crisis has made the need for such a review more pressing. That was the view we expressed at the February FATF plenary meeting, but there were very few who shared it. I will come back to this and explain why. We had no support to speed up the process. Basically, the three countries mentioned were the past, current and future presidencies of the FATF and they worked together to prepare what was called a three-presidencies paper which was discussed in June last year. The thing is that the objective was to review the FATF standards and also in the perspective of the fourth round of mutual evaluation. However, Member States of the FATF were not ready to support that project

because they thought it was too ambitious at a time when a number of them were still being assessed. Some of them were afraid that they would be assessed on the more demanding criteria. They were not opposed to the idea but it was more a matter of timing, so the FATF basically decided that this work should be delegated to one of its working groups, the working group on evaluation and implementation, that would examine a series of issues that might or might not warrant a review of the standards. This process was launched at the last February FATF meeting, so now Member States of the FATF are invited to comment on the paper from the FATF. In relation to the crisis, I would like to say that at the last FATF meeting this group agreed to examine a number of issues, particularly, for instance, the issue of bank secrecy laws, and also to consider the merits and difficulties of considering tax crimes (people meant tax evasion) as a predicate offence to money laundering. These certainly reflect the language of the expectations of the G20. In this respect the global financial crisis is already influencing the thought processes of the FATF and the Commission is contributing to this. We are contributing to the G20 and we are contributing to the FATF process. The Netherlands will have the next Presidency of the FATF. They take over in July the Presidency of the FATF. They tabled a paper in February for an interim report in June and a final report in October. The objective is to analyse the impact of the financial crisis on AML issues in general, of course, the mandate of the FATF, and to have a particular look at non-transparent and non-co-operative jurisdictions. That is where we are. As I said, we, the Commission, would have liked the process to be quicker but many FATF members were waiting for the outcome of the G20 meeting in April.

Q281 Baroness Henig: Can you give any idea of the balance? You said that only a few countries shared your view.

Mr Pellé: Two.

Q282 Baroness Henig: Two?

Mr Pellé: Three.

Q283 Baroness Henig: Three?

Mr Pellé: Counting the Commission.

Q284 Baroness Henig: I see, so it really is quite a problem.

Mr Pellé: Yes. To be clear, people considered that money laundering was not one of the root causes of the crisis so we should take our time examining the issues.

Q285 Chairman: Looking at page 9 of the memorandum you kindly sent us, you were talking about Member States not ratifying various matters, and in that particular section you pointed out to us that seven Member States had still not fully transposed the Third Anti-Money Laundering Directive. I wonder if you would bring us up to date on that, and what steps have been taken to encourage or require timely implementation by the Member States concerned? Perhaps I can add to that. We heard this morning from the Council. We got the sense of a very significant amount of exasperation because of some Member States not ratifying decisions by the Council. This seems most concerning and it does seem to leave the European Union rather toothless. You say in this paragraph that procedures “have long lead times and often lack teeth”. Could you talk us through this situation as well as the specific matter of the seven Member States and the Third Anti-Money Laundering Directive? This does seem to me a major weakness in the whole of this field.

Mr Pellé: The conversation you had this morning relates, I suppose, to Council decisions. They belong to the Third Pillar and, if I may use that word, a deficiency in the Third Pillar is that the European Court of Justice has no power. There is no enforcement power. It is based on the law of suasion and the ability of, let us say, European institutions and also Member

States who adhere to the Council decisions to persuade the others that it would be good for them and for the European Union to implement those Council decisions. That is one point. As far as Community legislation, the First Pillar, is concerned, indeed there is the European Court of Justice, but, as we said in our written evidence, the procedures are very long and this is a reality. Regarding transposition, we are as exasperated as the people you may have met this morning in this respect. Member States may tend to play with the rules and it is not particular to this field. It is indeed hard for citizens to understand, when Member States agree on a piece of legislation at Community level and also on a date for the implementation of a piece of legislation at national level, that when the date arrives one way or another they avoid the rule when they have had 18 or 24 months, the usual period that is granted for Members, to implement it.

Q286 Chairman: Or nine years, as we heard this morning.

Mr Pellé: That is an issue we have been addressing and we have not yet been successful. We have this example of the Third Anti-Money Laundering Directive. We work upstream with Member States, for instance, by organising what we call transposition meetings that take place between the time of the adoption of a directive and before the date for implementation at national level. On this particular directive we had two transposition meetings, but on more complex issues we may have many more. On the Services Directive a very complex mechanism has been put in place to ensure that Member States implement it and implement it properly. In this case it is even more surprising because Member States do agree on the international standards and 15 of them are members of the FATF so you would assume that once those standards were translated into Community legislation it would be fairly easy to translate them into national legislation. As a matter of fact, the situation has improved since we gave you our written evidence where we indicated that seven Member States were late. Two of them have now adopted the required legislation. Some are late for various domestic

reasons. It is still unacceptable; I do not want to apologise for them. They agreed to a deadline and they should have implemented it, but one of them wanted to improve its AML system in line with the results of the mutual evaluation they had at the FATF, so they wanted to align. Another one had difficulty with having a stable government that would then be in a position to validate the national law and push it to parliament. There are different circumstances. Nevertheless, whatever the circumstances, what the Commission has been doing besides the transposition meeting is to use this Committee for the Prevention of Money Laundering and Terrorist Financing to remind Member States of their obligations. Senior officials of the Commission attended the meeting to pass that message to Member States. What our Commissioner did was to send letters to ministers of finance of the laggard Member States. In June last year, he sent 15 letters underlining the importance of the implementation of the Anti-Money Laundering Directive. As for the seven Member States we referred to, obviously, those that have transposed will be off the hook but they were all referred to the European Court of Justice. Still, when the procedure is launched before the European Court of Justice, once the Court has adopted its opinion, Member States still might not comply or decide to take more time, for whatever reason. It is only when there is a second procedure that pressure comes to bear because there are pecuniary sanctions. That is why we cannot really rely on the sanctioning tool, the stick, but more on the carrot to invite Member States to do what is needed and work upstream. Currently our Directorate General is working on what is called enforcement partnerships. I am not in a position to describe this very fully because it is in the process of being discussed with our Commissioner to see how we can further improve implementation of the legislation. But it is a very sore point for the Commission to admit that the situation is not as optimal as it should be.

Q287 Chairman: You say though that discussion is going on on how to improve things. Just give us a rough timetable for when they may see the light of day.

Mr Pellé: Within the year. As I said, it is based on the willingness of Member States. We need to show the advantage for all of us in building the European Union – in complying with some rules, basically, rules we have agreed.

Chairman: As I said this morning, milk quotas are written upon my heart. We had great problems with those 25 years ago.

Q288 Baroness Garden of Frognal: Following on from that, what are the implications for EU and international co-operation which flow from this delay in transposition and could you also say if the Member States in question are to be treated as “equivalent” for the purposes of the Third Directive in advance of its transposition into international law?

Mr Pellé: This is always an embarrassing question for the Commission.

Q289 Chairman: That is why we are here.

Mr Pellé: The fact is that there are clear time lines in the implementation of the directive and that should definitely be a source of concern. It is a source of concern for the Commission but we would like it to be a source of concern also for Member States, particularly when they want Community legislation because the desire is to achieve a level playing field among those who have to abide by the rules agreed at European level. Therefore, that is your first motivation, to adopt Community legislation when you could go national. You could dwell on Community competences versus domestic ones but that was clearly the message we got from Member States when we were talking about the Anti-Money Laundering Directive: “We want to achieve a level playing field”, yet here we are with a third of them not on time and the banking industry complaining that that imposes on them a higher cost of compliance because there are some differences between the national systems. To be fair, there will still be differences because the directive is a minimum requirement directive, so Member States can

have stricter rules. Still philosophically there is a problem here. We have to impress on Member States the need to correct this as quickly as possible.

Q290 Baroness Garden of Frognal: Are there practical examples you can give of how this lack of co-operation has had a negative impact?

Mr Pellé: Funnily enough, it is a bit theoretical. For us it is a very embarrassing situation, but for the time being it is a bit theoretical, although our partners outside the EU are using those arguments to say that the EU is not as homogeneous as it pretends – “Look at the transposition of some texts, so how can you defend a global harmonious EU approach when you have those differences?”. That is an argument that belongs more to the realm of argumentation than constituting practical difficulties. We have not met difficulties but this point was underlined at the last FATF meeting, particularly regarding the issue of equivalence. Italy in its report explained very well at the FATF how that should be read. Basically, what we mean by the notion of equivalence in the Third Anti-Money Laundering Directive is that there is a presumption that all Member States will be compliant with the requirements of the directive once it has been fully transposed by all of them into international law. This is a peculiar area because Member States are not starting from scratch. We have already had two directives but the third will present a substantial improvement in the AML/CFT defensive system. Nevertheless, we want all Member States to comply with the directive on time because of the perception issue by partners of the European Union.

Q291 Lord Hannay of Chiswick: Could I follow that up? Are you saying that the fact that not all Member States have transposed the Third Anti-Money Laundering Directive means that the playing field looks uneven but is actually not uneven, and, secondly, is there therefore no material disadvantage to a state in delaying implementation at all over a state that has implemented and transposed quickly?

Mr Pellé: No. That would be denying the value of having a directive, basically. There are a few Member States whose national legislation is relatively solid and whose banks are already complying with the requirements set out in the Third Anti-Money Laundering Directive. That does not mean that this is a general case for all Member States lagging behind the deadline. On top of this, those who are lagging behind the deadline are depriving the banks of the facility of applying the risk-based approach, for instance, so they are in fact applying more rigid rules compared to the ones they could have access to through the application of the Third Anti-Money Laundering Directive. It is all a bit complicated because we are now going from legislation to practical application. In some instances that is an issue and there is an uneven playing field for some parts of industry besides the financial industry. It may be an issue for the non-financial actors, the gatekeepers. It certainly should not be taken as an excuse by Member States not to abide by the deadline.

Q292 Lord Hannay of Chiswick: In its memorandum of 30 January 2009 on page 13 the Commission noted that in the spring of 2008 Member States agreed on a Common Understanding of third country equivalence for the purposes of the directive. Can you say how, if at all, this process differs from what is laid down in the text of the directive and what powers, if any, the Commission possesses in regulating any such matters?

Mr Pellé: That is relatively clear. The Common Understanding that was shared by Member States on third country equivalence is a voluntary one. It is not based on legal powers that would be granted to the Commission through the directive. The directive does not foresee that. The powers of the Commission in respect of third countries under the directive in relation to Article 40, paragraph 4, are that if the Commission finds that a third country does not have an anti-money laundering regime equivalent to that set by the directive it could propose to adopt the application of a decision-making source, we would say blacklisting, or it

could veto a third country which Member States might at national level consider as having an equivalent regime.

Q293 Lord Hannay of Chiswick: And this has never been used?

Mr Pellé: It has not been used for the time being.

Q294 Lord Hannay of Chiswick: And you do not see any cases on the horizon where it might need to be used?

Mr Pellé: This is an issue to do with our stipulation of the risk-based approach, basically. In this respect the directive is of a hybrid nature, as characterised by the FATF. In some instances, we take on board the risk-based approach and we keep some flexibility, but in other instances we define specific requirements, for the application, for instance, of simplified due diligence or, conversely, strengthening customer due diligence. Taking such a decision of blacklisting a third country would be of the same nature as defining enhanced customer due diligence for any customer coming from that jurisdiction. For the time being there has been no debate at the committee, nor any request from Member States to proceed like this.

Q295 Lord Hannay of Chiswick: So you are saying it is a kind of nuclear option?

Mr Pellé: It is a bit. On the other hand, the FATF uses advisories in respect of some third countries. It is no secret that recently a series of advisories have been taken by the FATF regarding Iran or Uzbekistan and a few other territories. For the time being what has been agreed by Member States and what Member States apply is the positive list, which is fairly reduced and we will see how it works.

Q296 Lord Hannay of Chiswick: So it would be very unlikely in your view that the EU would even contemplate blacklisting a third country which FATF was not contemplating blacklisting?

Mr Pellé: That I cannot say. At this stage I do not know. This power that is enshrined in the directive is an autonomous one. If Member States wanted to blacklist a country we would start the process, so if one Member State or a group of Member States were to come to the committee and say, “Here is an issue we have. What are the views of the committee’s twenty-six other Member States?”, and we considered that it might be worth applying the powers granted under Article 40(4), we would consider the issue.

Q297 Baroness Henig: The Commission memorandum on page 11 notes that discussions have taken place with national FIUs and the Member States on the December 2007 report from the Commission on the implementation of Council Decision 2000/642/JHA on FIU co-operation. I am sure this is all very familiar to you, much more familiar than it is to me. What are the prospects that the Council Decision will be updated? What are the most significant changes under consideration, and is there a time frame within which the current process of “reflection” will be brought to a conclusion?

Mr Boratyński: Thank you very much for this question and for noting the report on the implementation of the Council Decision from December 2007. Let me first make a general remark. The report is generally positive as far as legal compliance is concerned but it then points to a number of operational problems. Again, it is not a unique situation that a Framework Decision, therefore a Third Pillar instrument which is relatively modest in its ambitions, reflects a readiness by Member States to go only as far as a given moment, which results in instruments that are fairly general and again not as prescriptive as a First Pillar instrument. However, I think there is generally a good atmosphere and understanding that a follow-up is needed to the decision which by now is over eight years old. There was a discussion on the basis of the report in a Multidisciplinary Group on organised crime which is the main Council Working Group that deals with organised crime, where Member States were asked to provide comments first of all, and it seems the majority of Member States were

willing to have time lines which would serve a better exchange of information; therefore they would complement the fairly general provisions of the current decision. Also, there is a readiness to examine the possibility of exploring the possible added value of such amended decisions in the future. What stems from that is that at the moment we can talk about a two-pronged approach which foresees firstly in the short term operational guidelines which would aim at a better and more coherent implementation of the existing Council Decision from 2000, and in the longer term recasting the Council Decision. At this stage it is very difficult to be specific, but generally speaking the recasting could address the current shortcomings, for example, the inclusion of the fight against terrorist financing, and what I have already said, the lack of sufficiently detailed provisions which often result in a lack of legal clarity for Member States and also an uneven implementation. In any event, the updating would have to take into account the consequences of the initiative which was about simplifying the exchange of information and intelligence between law enforcement entities of Member States. To sum up, if you are interested we could try to go into more detail, but roughly speaking we would like to have discussions and preparations on possible guidelines with the view of having them adopted in the year 2010, and again develop reflection on whether, in addition to the guidelines, recasting is possible. Discussion about timing at this stage is difficult but it is on the agenda without specific timing.

Q298 Baroness Henig: Your short term sounds to me like a year to 18 months.

Mr Boratyński: Yes.

Q299 Baroness Henig: And your longer term sounds to be anything from 18 months.

Mr Boratyński: Yes, depending basically on the readiness of the Member States. Just to give one example, the current decision stipulates that requested FIUs shall provide all relevant information, including available financial information requested, law enforcement data. This

information is based on the material that was gathered as a result of preparation of the report of December 2007. It is quite clear that there is a high degree of diversity in terms of FIUs having access to specific type of information and various databases, FIUs also may be able to communicate openly with one type of authority but not with another. Indeed this diversity across the EU does not serve our purpose.

Q300 Baroness Henig: So in the next year or two basically what you are saying is that it is guidance that you are going to be focusing on and that that will then lay the foundations?

Mr Boratyński: Yes, but again that may not be sufficient, for obvious reasons, because we are talking about law enforcement and the context in which there is a limit to what can be achieved through soft law measures or guidelines in particular, again, depending on specific national traditions. There are some countries which have effective law enforcement without very explicit provisions while others may need specific hard core law when regulating these issues.

Q301 Chairman: Could I now turn to the FIU.NET system of information exchange? In what manner and to what extent does that system reinforce operational co-operation within the EU and could you tell us what further developments in the view of the Commission are required if it is to achieve its full potential?

Mr Boratyński: There is a long story to FIU.NET because it came in to implement directly one of the specific provisions of the Council Decision of 2000. Currently, as you know, this is a project. It is not any specific agency, it is just a project hosted by the Dutch Ministry of Justice and receives considerable financial support from the Commission under the funding programme Prevention and Fight against Crime. Again, there is progress in terms of subsequent Member States joining the system. In 2009 we expect that 22 Member States will be connected. As of the end of 2008 there were 18. There is going to be a new release of the

software for FIU.NET as the core element of the system is a secure platform for communication, so the new version will be fully operational this year. In comparison with previous versions and other existing systems it will allow not just the exchange of information by email but also the sharing of information at the same time with all FIUs connected to the system. There are a number of technical details which I do not want to bore you with but there is indeed an expectation that the practical possibilities for operational co-operation in FIUs will be extended and therefore FIU.NET as such will become more attractive as a platform of choice for FIUs exchanging information. Under a new funding application that is being developed we expect to focus increasingly on co-operation between FIU.NET and third countries and this is very much related to the goal of ensuring compatibility with the Egmont Secure Web system which is international, unlike FIU.NET which is linked to the EU. For us it is obviously a priority project. It is getting a grant so we are going to spend money on this. There is an ongoing discussion among the Member States represented on the FIU board on the future for FIU.NET in terms of FIU.NET as an entity. We expect some decisions to be taken by the end of 2009. As for the Commission, we are neutral on the end result because there is a discussion on which option should be followed and as long as it is effective we will be happy with whatever entity is eventually the FIU approach.

Q302 Baroness Garden of Frognal: You touched on this in your opening remarks, but to what extent have discussions taken place in the EU FIU Platform on enhancing feedback to the private sector, and what improvements, if any, have resulted from the discussions to date? Could you also say what the scope is of the ongoing Commission study of this subject and when that is due to be completed?

Mr Pellé: Just to remind ourselves of a few facts, the Platform was set up not long ago in 2006 in connection with the FIU.NET project because we thought that with the FIU.NET project being an IT system there was a need for a platform where FIUs could exchange views

and discuss how to improve that co-operation. So now we have this platform which covers most FIUs from the Member States and, as I said, the objective is to facilitate co-operation among them. They participate on a voluntary basis. Until recently not all of them attended. However, at the last FIU platform meeting on 10 March, all of them were present. They discussed – because we are only the Secretariat, although we chair the meeting (failing the FIU volunteering for that) – feedback in 2007 and 2008 and they adopted a report on feedback on money laundering and terrorist financing. This report is accessible on the website of the Commission and there you can see what it was about. What is striking for me is that the report is about good practice, not best practice, because FIUs were very hesitant in moving that step further from good to best in starting to benchmark their respective practices. Therefore, we have these discussions on the FIU Platform and their subsequent report. Whether this has led to an improvement in the way they function is hard to say. What we noticed at the time, and I think it is still the case today, was that many FIUs were reluctant to provide case specific feedback to the private sector, targeted feedback, as we call it, because what they are afraid of is that it could undermine pending investigations or, even worse, judicial procedures. On the other hand, we know there is tension here because the private sector, notably banks, would like to get this case specific information in order to improve or validate their own systems. If you have an intelligent system you want feedback so that you can improve it, so we understand that. This tension is very difficult to manage and I think that was recognised in the report, but for the time being the private sector has to make do with the general annual reports from the FIUs on their activities.

Mr Boratyński: Building on what Philippe has said, there are some good practices. We are not sure whether they are best practice but there are some good practices, so to move forward on this the Commission again asked for a very detailed study which would analyse the question of feedback, and we are talking here about the channels of FIUs and reporting

entities and law enforcement. The purpose of the study was to assess feedback structures and practices in all Member States and there has been a major effort in getting a lot of evidence and interviews; it was quite a big exercise, and then trying to identify what could be the best practices and at the same time what were the shortcomings and obstacles, and, finally, what type of recommendations, both legislative and non-legislative, could be proposed to improve the feedback. The report is now in the process of being finalised and there will be a meeting involving FIUs, then reporting entities, which is, as you know, a very wide pool of financial institutions, banks, et cetera. This meeting is going to take place at the end of April and following that, probably before summer, we should be able to make this report publicly available. As you will have noticed in the written evidence, we made a short reference to the outcome, saying prudently, obviously, that while the study has not been finalised there are indications that feedback is not provided to the private sector in a timely manner. The structural case-by-case feedback, in other words specific feedback, is provided only in a limited number of instances. The study goes to some lengths to define the types of feedback, distinguishing between general feedback, which is easier to get, which is about methodology, and specific feedback, which is basically on cases reported by reporting entities to FIUs and further on to law enforcement. What is very interesting in the study is that it examines not only the practices but also the perceptions and expectations. For example, it identifies the clear need of the private sector to be more involved, to be more trained. There were some examples which I was quite pessimistic about. Some interlocutors were, for example, saying that in some Member States, and one cannot really generalise, this commitment of government structures to develop the training programmes is diminishing, so it is not necessarily that we are always progressing. However, I think the study will provide a very balanced and detailed view of where we are and we are looking forward to it being a good basis for further action.

Chairman: Lord Hodgson, who is a member of this Committee, would have had a great deal to say about the impact of all of this on the private sector. Sadly, he is not here with us today, but the Committee is concerned about this and Lord Hannay would like to pursue this a little further.

Q303 Lord Hannay of Chiswick: I wonder if you could tell us a little bit about the extent and frequency of what you call “trustful dialogue” between the Commission and the banking industry and the legal profession on page 12 of your memorandum. We were slightly surprised that you did not mention the accountancy profession because when we took evidence – we took evidence from the three trade associations – the bankers, the lawyers and the accountants, and the accountants, certainly in Britain, seemed to be very prominent in the work against money laundering and very involved, so perhaps you could say a little bit about that and whether there are any plans to deepen or otherwise improve the dialogue with the private sector. Could you also cover the point which the Chairman has just mentioned? In the context in which you had the “trustful dialogue”, have any of these entities – the bankers or the lawyers, made representations to you that the burdens imposed on them by this legislation are disproportionate to the benefits which the European Union is getting from these systems? I am sure none of them said that they were in favour of terrorism or anything like that, but have any of them suggested that there could be better ways of doing this than the way the European Union, and indeed the FATF, have identified so far, that a slightly smaller sledgehammer could still crack a nut?

Mr Pellé: It is a fair point. I will go to the question in a minute, but, just to bounce back on your latest comments, none of the directives on anti-money laundering was accompanied by an impact assessment, the first and second because at the time it was not a requirement when issuing Community legislation. This came up with the concept of better regulation at Community level some two or three years ago and now, any time we come forward with a

piece of legislation, and sometimes even with what we call soft law recommendations, it is a usual practice to accompany it with an impact assessment. It was not the case at the time of the adoption of the third directive. Therefore, we have not assessed, if you like, the proportionality and the requirements of the instrument in the light of the results. It is true that the legal profession, certainly the lawyers, any time we meet them are making that representation, that there is a certain disproportion in the instrument. That may have been particularly the case also in the UK, where not long ago the lawyers were one of the major providers, alongside the financial industry, of suspicious transaction reports because the penalties in the UK are extremely severe against any person who fails to lodge an STR. It is something like five years' imprisonment or a very significant sanction, so you have what you could call defensive filing of suspicious transaction reports just to protect yourself. That is a general remark. What we are not trying to push at the FATF and certainly the Commission, the UK and also The Netherlands, is for the FATF to come up with some sort of impact assessment also when coming forward with new recommendations. Hopefully that should also apply to major guidelines that the FATF might issue. I do not think we are yet at that stage and at the last meeting there was an agreement on having short written statements, a cost/benefit analysis, if you like, on any future measures that may be proposed by the FATF. It is an element of your concern that could be taken into account for that exercise. To go back more specifically to your question and the trustful dialogue we are having with the banking industry and legal professions and not with the accounting profession, it is because I think there was, and is, an appetite from the financial industry and legal professions to speak to us on those issues, which is perhaps not shared so much by the accountancy professions at the European level. We have had contacts with the European organisation that represents auditors and chartered accountants. They know they have obligations and I understand they have even organised one or two seminars on those issues, but I think for them it is a

requirement, they comply with it, they apply it and they do not complain very much about it. The legal professions do apply it to some extent. We produced a report some time ago which is available on our website on the impact of the Second Anti-Money Laundering Directive on the legal professions, lawyers and notaries in particular. They comply and complain, perhaps rightly so, certainly any time we have a debate, but we have a trustful debate also with them. We have regular contacts with the CCBE, which is the European Association of Bars and Law Societies, and also with the Law Society of England and Wales. I took part with some colleagues in a joint meeting with them last June. We understand that we have diverging views but we understand that and it does not prevent a dialogue. The dialogue is more intense probably with the banking industry because there is a large representation of banking organisations at European level and there is also a real pool of expertise located here in Brussels. We tend to meet twice a year, in spring and autumn usually, to do a *tour d'horizon* for issues related to AML/CFT. I believe the last meeting was in December when our colleagues from DG JLS were present and also colleagues from DG External Relations dealing with sanctions. Besides those two meetings we have had focussed meetings on specific issues with the banking industry. There was one organised not long ago on sanctions regarding Iran and there was a previous one regarding Burma. We want to encourage this because if ever we were to come up with a fourth directive, which I hope will not be immediately, we would have to accompany it with an impact assessment, so we also want the feedback and opinion from those who have to apply the requirements. It is the best way to have a tool that works. I would also like to add to something Jakub has already mentioned, that we also have this dialogue with the not-for-profit associations. We have had two conferences with them regarding the risk of abuse of their organisations. As we said, the objective is to increase awareness of the sector and to ensure that we are aware of the risk and that we can take measures to establish the necessary transparency. There are codes of conduct

at national level and we also have in the Communication a code of conduct and guidelines at Community level.

Mr Tiné: We are trying to work around the concept of guidelines with them at the moment.

Mr Pellé: Beyond what we can do at European level, it may be presumptuous to say this but we also try to push through the FATF the need for this dialogue. The UK Presidency of FATF did it even better than we did. Sir James Sassoon, when the UK had the Presidency of the FATF in 2007/2008, changed the attitude at the FATF by promoting the partnership with the private sector. Taking the UK model as an example, we have this joint partnership at the FATF, like, the UK Joint Steering Group on Money Laundering, with the public authorities and the private sector working together on devising practical guidelines on how to comply with anti-money laundering and counter-terrorism financing requirements. The FATF has produced a series of guidelines by profession on the risk-based approach for and with the financial services industry, lawyers, accountants, real estate agents, casinos and so on. This is a change and it is certainly a welcome one. As far as your comments are concerned, we are always open to dialogue in the Commission.

Q304 Lord Hannay of Chiswick: Thank you very much. Our brief experience on this rather mirrors your own, that is to say, of the three professions who gave evidence to us the bankers and the accountants were the most positive about the dialogue and the feedback and the lawyers the least, so it mirrors exactly your own experience, although in our case certainly it seems that in Britain the accountants welcome very much the chance to be consulted and want to be consulted both at the national and the EU level. It seems to me that you are now in a system whereby any new legislation would have to have an impact assessment. But is not what is needed an impact assessment of the system overall, all three directives as they impact now, since, as you say, none of the previous three had an impact assessment done? It is not really going to be sufficient just to have an impact assessment for some new bit of legislation.

You need surely to be able to gauge whether the whole system is proportionate and achieving results and so on, and that would be, of course, hugely valuable.

Mr Pellé: Yes, it is work that is being contemplated. This year we will have a study on the application of the Third Directive which replaces the previous two and we are contemplating as the next exercise what we call an ex-post evaluation, which is also nowadays a requirement for legislation after some time to review whether the objectives pursued and as defined by the impact assessment were achieved. We are moving towards an ex-post evaluation probably in 2010/2011.

Q305 Baroness Henig: In its Communication of November 2008 on the *Proceeds of Organised Crime* the Commission concludes that the overall number of confiscation cases in the EU is relatively limited and the amounts recovered from organised crime are modest. I wonder whether you could elaborate on the data or other indications of practice which have brought you to that conclusion.

Mr Boratyński: As mentioned in the written evidence, there is again a standard under preparation on the practice of assets confiscation and recovery in Member States and to call into question (and again this is our horizontal weakness) the lack of data and comparable data amongst Member States in a variety of areas of criminal law and law enforcement. Having said that, there are a couple of case studies in the report that have been analysed, and we were able to come up with a few examples. This is the data for 2007 and the figures in the report are €140 million for the UK, €60 million for France, €83 million for Spain, €145 million for Italy. These are, as I said, just examples. This partial and imperfect data still gives us an extremely important message, which is basically the disparity between the quantity of assets seized and the estimates of the scale of the problem. We used as some degree of reference a study by Confesercenti published in Italy in November 2008 which estimated the revenues of Italian organised crime in all its forms at over €130 billion per year. According to the same

study, official law enforcement statistics indicate, and again this is a conservative estimate, that in the 15 years from 1992 to 2007 we can talk about €900 million of confiscated assets.

Q306 Chairman: Can we go back and make sure we have got these figures right?

Mr Boratyński: Absolutely; I am sorry. €130 billion is the report estimate of yearly revenue as far as the revenues of organised crime groups in Italy are concerned, while the estimate, based on a different quality of statistics from law enforcement about the quantity of confiscated assets for the 15-year period between 1992 and 2007, is €900 million. This is basically what we can say about the scale of the problem.

Q307 Chairman: In that same Communication, paragraph 3 on page 6, you express the wish to explore various concepts and rules with a view to improving the situation, including measures relating to civil confiscation. Could you tell us what are the prospects for making timely progress with these discussions, and which of the options in your view holds out the greatest prospects for success?

Mr Boratyński: As you have noted, this most recent Communication makes quite a strong case for new legislative action at the EU level and paragraph 3 sets out a number of elements that could be considered. Our intention is indeed, based on that report, to develop the discussion with Member States on this subject. What is very helpful from our point of view is that an informal EU Asset Recovery Offices Platform has been put into operation. Again, to give some examples, reversal of the burden of proof from a law enforcement point of view could be a very effective action, and indeed we see this applied in some Member States, or at least it is in legislation in some Member States, not necessarily applied. Obviously, there is a very important consideration regarding the protection of fundamental rights and the core principles of criminal law, but it is certainly a promising area to explore further. Another one is civil recovery of the proceeds of crime. This does exist in some national legislation but it is

very limited. We are just talking about several Member States. We have mentioned that it is being specifically used in the UK, in Ireland and in Bulgaria, and, as I said, while it does exist, that form of the reversal of the burden of proof, in 17 Member States, in many of them it is rarely or never used in practice, again, for the reason that it is very much against the traditional principles of the criminal law – the presumption of innocence, et cetera. As I said, we want to use that here in order to take the discussion forward. The next occasion will be the next meeting of the EU Asset Recovery Offices Platform in Brussels and this will be in May. If there is a favourable mood we will be considering this in the next two years in order to come up with proposals, but we have to reflect on the readiness of Member States to move on. The Commission has expressed its quite strong preference for the adoption of this Communication.

Mr Tiné: Perhaps I could complement this by reminding you where we are coming from. We are coming from an assessment coming from the analysis of the implementation of different legal acts in the Third Pillar, so framework decisions, which shows how the existing instruments, both on substantive law and on acts aimed at facilitating the mutual recognition of judgments, are implemented in a relatively flawed way, either not transposed or simply not applied in practice, so our immediate objective is to decide whether we need at all a recasting of the new legislation, taking into account that there is legislation which is somewhat contradictory, unclear perhaps at European level, which means it could be better specified in order to allow also the national legislature to implement better rules at national level. This is our starting point. In the Communication we say that this recasting may give us an opportunity to go further and enhance the perspective and the possibilities for confiscation, and in this sense we are exploring a number of options, which include the one on civil confiscation, on reversal of burden of proof, but, of course, our immediate objective is to put

the question to the Member States, “What are we doing? Are we still pursuing the right objective by having a legal framework which is not fully operational?”.

Q308 Chairman: Can I just try to clarify that? When you talk about the reversal of the burden of proof does that mean you reverse what the man in the street would understand as the concept of somebody being innocent till proved guilty? I see nods. If that is what you mean could you just go further and tell us to what extent there is support among Member States for a reversal of that sort?

Mr Boratyński: This is really related to the confiscation of assets, so we are talking about a situation which is understandable to the man in the street. If someone does not have a legitimate revenue which can be documented and at the same time that person has three yachts and five villas and whatever else, then the reversal of the burden of proof would foresee that it is on the person to prove the sources of revenue.

Q309 Lord Hannay of Chiswick: But you would still have to have a crime committed.

Mr Boratyński: Yes.

Q310 Lord Hannay of Chiswick: It is not sufficient to prove why they have got four yachts. There would have to be at the bottom of it a crime, and on the crime you would not be reversing the burden of proof.

Mr Tiné: Yes, indeed, Lord Hannay, you have made a very pertinent comment. All these facts would be analysed within the context of criminal investigations where the person not only has an income or assets which are disproportionate to his or her declared revenues but also has strong links with known exponents of organised crime, so in the national legislation that we have analysed so far which has these instruments this concept is applied in a relatively targeted and focused way, and normally, as we know, is also the subject of high court

decisions which have found that fundamental rights, such as the right to defence and the right to property, were not violated. Indeed, there should be a link with serious crime, such as drug trafficking or other crime, which would justify the application of this measure. Another point that was raised before in the discussion is that many Member States already have some form of reversal of burden of proof according to the study. I believe we have given the figures already that about half of the Member States have it in their rule books but do not apply it often. It is more, as we were speaking before, about the nuclear option.

Lord Hannay of Chiswick: I am an amateur in these matters but I would suggest to you that using the words “reversal of the burden of proof” is extremely dangerous.

Chairman: So would I.

Lord Hannay of Chiswick: You have described a concept that is much more complex than a simple reversal of the burden of proof.

Chairman: That is right.

Q311 Lord Hannay of Chiswick: It is putting up a big red flag if you start using those words.

Mr Boratyński: The meeting in May would be an excellent opportunity to map out the preferences and sensitivities. The point is definitely well taken; we must be extremely prudent, because at the end of the day we are talking about the fundamental principles of the legal system.

Chairman: You will observe that Lord Hannay and I both immediately thought, “Good gracious; what are they up to now?”, when you started talking about reversing the burden of proof. Let us move on.

Q312 Baroness Garden of Frognal: Could you tell us what evidence and experience you have of Hawala and other alternative remittance systems and how you think they may or may not pose particular problems in relation to money laundering and financing terrorism?

Mr Pellé: I have little personal experience of Hawala. What I know is based on what I have read in the press and also the concerns expressed by Member States and FATF that have knowledge about that. The problem is that Hawala is a system used in the Islamic world to provide the same services as a bank. The difference is that there is little or no documentation. The cost of it is usually less and it ensures faster delivery. Money does not necessarily move and it provides anonymity and security for the customer. All those characteristics, especially the last one, create issues in respect of the anti-money laundering rules and the customer due diligence obligations. What we have in our legislation, as we indicated in our written evidence, is that Hawala, or any alternative systems that operate in the territory of the EU, should be registered or licensed according to complex requirements defined in the Payment Services Directive, and if that were not to be the case they would be infringing the law. Then we come to the next issue, which is, who is taking care of this? In our view this is an issue that has to be looked at with particular attention by both supervisors and law enforcement authorities because that is the situation. I cannot say more in this respect. What I can add is that the European Union, certainly the Council, is having a regular dialogue with some third countries where Hawala represents a classical or usual form of money transfer. The objective of dialogue is to impress on the authorities of those states the importance of exercising appropriate control over the legality of those Hawalas and those activities in their territory and for it to be fully transparent. This action is not Hawala oriented; it is more a bilateral relation with the region rather than the Union pursuing that policy all across the world regarding Hawalas. It is an opportunistic dialogue, if you like, with the region and on top of this we discuss the Hawala issue.

Q313 Lord Hannay of Chiswick: I am sure you have a regular dialogue with the British authorities but the answer which they gave to this was that the Hawalas in Britain are now all regulated and are filing reports, including SARs, as necessary, and that they therefore believe that they have some handle on this, but whether that is true of all Member States I do not know. I was not quite sure whether you said that it was obligatory on all Member States.

Mr Pellé: It is.

Q314 Lord Hannay of Chiswick: Their answer was that the system does not pose insuperable problems so long as they are all regulated and they submit accounts, which the accountants say is now the case. Then the situation can be managed perfectly well. It is after all in many cases a very beneficial system and helps an enormous amount of remittances to go back to very poor countries, but equally it is open to abuse, like every system.

Mr Pellé: Like every system, as you say.

Q315 Lord Hannay of Chiswick: It probably has some special characteristics which need to be taken into account.

Mr Pellé: It is perhaps because we are not familiar enough with the system that we have some prejudiced view about it but also because of some of those characteristics, it may be more prone to abuse than other systems.

Q316 Chairman: But even if you were able, as you say you are, to have legislation to register and control it within the EU, there is nothing you can do to control the movement of funds round the periphery of the EU to places which could be a base for serious terrorist attacks or drug funding and so on. There is really nothing you can do about that.

Mr Pellé: That is a classic problem of global governance. It is an issue for the FATF and members of the FATF and its regional affiliates to impress on their members the need to

ensure that those sorts of systems are properly regulated, but we come back to the issue of the non-states.

Q317 Lord Hannay of Chiswick: But the FATF have not so far grasped this issue at all?

Mr Pellé: No, they have, because there is Special Recommendation 6 based on alternative remittance systems that addresses the issue, and basically we mirror that recommendation in our legislation at Community level.

Q318 Lord Hannay of Chiswick: At several points in your memorandum you noted the absence or unavailability of certain types of statistical data which you said would have been appropriate and useful. I wonder what steps, if any, are being made to address this, considering that there are a number of obligations set out in Article 33 of the Third Directive. What are the implications of the absence of this statistical material for any future policy making at EU level?

Mr Pellé: Here again I think I will start and then Jakub or his colleagues can come in perhaps to shed light on what we may have written and supplement what we have said. It is not the lack of data; there are a number of data existing. The requirement of the directive for Member States is to provide statistics, for instance, the number of suspicious transaction reports, the follow-up given to these, the number of cases investigated, the numbers of persons prosecuted and convicted. This information is available. It is available, for instance, in the FIU annual report. It is available through the mutual evaluations of our Member States for sure. They have evaluations conducted by the FATF or by MONEYVAL. In this respect Member States can already comply with the requirements of the directive because they have information. We are trying to consolidate in Community law a practice that already exists because we thought it would be useful, so it is not so much the issue of the availability of the data as of the comparability and homogeneity of the existing data. We realised that some four

years ago when we conducted a little probe of Member States and asked them to provide us with some statistics. We realised fairly rapidly that we were comparing apples and pears. At national level, for instance, the way one Member State counts suspicious transaction reports may be different from another. For instance, in one Member State they become suspicious activities reports and so a suspicious activity may be one that is related to a transaction or multiple transactions or none at all. Therefore, the data we receive from a number of Member States are simply not comparable. That may be an issue, to measure the relative efficiency of the systems in place in Member States or the FIU efficiency, if you want, or the whole chain. That is why we need homogeneous data and a more intimate knowledge of the machinery, because we need to be able to read beyond the statistics. I should say that when we did that exercise we were relatively surprised because some Member States did not even want to provide us with that data, although they are fairly innocuous. Why? Because they were afraid that we would start interpreting the raw data in a way that would be inappropriate and we would compare them against each other in inappropriate ways. As I said, the Commission has not given up hope and maybe Jakub can tell you what we do in this respect.

Mr Boratyński: It is a part of the general effort to have more evidence-based policies in the area of the fight against crime and criminal justice that the Commission has adopted the action plan called Developing a Comprehensive View of Strategy to Measure Crime and Criminal Justice, which again treats horizontally the issue of criminal statistics across the EU, and indeed money laundering has been identified as one of two priority areas, the second one being trafficking in human beings. In this context a financial crime sub-group was set up in order to determine the list of indicators that would allow comparability of data among Member States, therefore addressing exactly these practical obstacles that Philippe was describing. The whole idea was to draw these indicators from Article 33 of the Third Directive. Anyway, we will not talk any more about these problems with comparability

because Philippe has already given a sufficient number of examples to make you aware of what it is about. In practical terms what do we intend to do now? We are at the stage where these indicators are being discussed. We propose to refine the questionnaire and give additional guidelines to Member States, to national authorities that will be collecting this data. We are also providing our statistical arm of the European Commission, Eurostat, with the list of specific contact points with Member States among other entities that provide relevant data. If everything goes well we hope to have the first batch of comparable data, however imperfect it is, by the end of the year. That is quite ambitious but we hope we will get there, and obviously we are always stressing that this is a gradual process. It is not that we will have completely reliable statistics but it is an important step and for us the exercise is money laundering. It is also a very important exercise in our overall effort to increase the availability of comparable criminal statistics across the EU.

Q319 Baroness Henig: At page 11 of your memorandum of 30 January 2009 there is mention of a 2008 study on alternative methods to identify beneficial owners which “provides the first example of cost-benefit analysis carried out on a pan-European scale (although on a single topic)”. I just wondered whether you could elaborate on the relevant findings of the study and what the anticipated time-frame would be for the major cost-benefit analysis of AML/CFT systems in all 27 Member States which has been submitted for co-financing.

Mr Boratyński: Indeed there are two issues. One is the study which, while it has not been published, has been extensively discussed with Member States with specific authorities. I will elaborate a bit on the findings of the study. The study is divided into two parts, the first compares the cost or benefit arising from two models of the disclosure system of beneficial ownership of private and public companies. This is the so-called Model Zero, the model that reflects the world as construed by the Third Directive where the critical role is played by intermediary institutions. The possible new model, Model One, is an up-front and ongoing

disclosure system based on the obligation first on a beneficial owner to notify the company and then for each company to publicly declare their beneficial owners, so with less burden on intermediary institutions, but, of course, they would still play an important role. This cost/benefit analysis concludes that while Model Zero duplicates a number of anti-money laundering operations and tools and therefore costs, Model One, the new model, can ensure a higher degree of information sharing among the subjects involved in the anti-money laundering effort, therefore also increasing the efforts undertaken by specific entities. One of the elements of the Model One system would be a publicly available central register. The study really goes into great detail. It is quite impressive in terms of the effort which has been invested in taking into account a variety of factors and variables in coming up with conclusions, but it speaks in favour, with all sorts of caveats, of Model One. The second part of the study aims to identify the EU measures that may be taken against those facilitating anti-money laundering and how to improve the regulations of charities, trust associations and foundations. On the first aspect the study concludes that some professions are not supervised and that monitoring is indeed occasional, that the models of self-regulation are not necessarily very effective and the sanctions are either absent or not properly implemented and they formulate some recommendations on how to address such shortcomings. On the second aspect the study concludes that the risk that trusts will be exploited for money laundering or terrorist financing reasons is indeed quite high. On the other hand, foundations, associations and charities in the European Union seem to be sufficiently well regulated from that perspective, and again the study comes up with some formulations. The second element of your question was about a specific project which is part of an open call for proposals announced by the Commission, again in the context of our prevention and fight against crime programme. This is a confidential procedure so we will only know whether the project is going to be financed by the fall of this year. If the decision on that specific project, which

could be compared with a variety of other projects, is positive the project could start at the end of 2009 but, given the status of this project, we cannot say more about its content.

Mr Pellé: I just want to add something about a study we recently conducted on the cost of compliance of a number of directives in the field of financial services. We conducted that study in relation to six key directives in the field of financial services, including the Third Anti-Money Laundering Directive. The study should be published soon, hopefully, and so we will put it on our website probably by this summer, if not earlier. The study focused on what we call incremental compliance costs originating from the new regulation. As far as the AML Directive was concerned for banks, financial conglomerates and investment banks, what is called a one-off cost of compliance represented approximately ten per cent of all the financial services regulatory costs borne by the banks. On an ongoing basis, because this was a one-off on, let us say, investing in the IT and the training of staff, the cost of compliance represented about 13 per cent of the total regulatory compliance costs as an approximation. We have some figures for a number of banks, absolute figures. It is a bit complicated but nevertheless it might be of interest to you and, as I said, it should become public between now and the summer.

Q320 Lord Hannay of Chiswick: But will you also be analysing the compliance costs of the 27 national regulations which were superseded by the European one?

Mr Pellé: The problem, as I said, is that the Community legislation as far as the Anti-Money Laundering Directive is concerned is a minimum requirement, as we say in our jargon, which does not prevent Member States adding requirements. It is for them to decide whether or not to have additional requirements because by doing this they recreate an uneven playing field for industry when the whole objective of having Community legislation in this field was indeed to establish a level playing field. My colleague has some notes on that. Gold-plating was not mentioned in this exercise. There was a debate on it and it was decided not to take

gold-plating into consideration. We were looking only at the impact of the Community legislation, not the way it is implemented.

Q321 Lord Hannay of Chiswick: The question I was asking also related to cases like the original basic Banking Directive which superseded every Member State having its own banking directive, so that the compliance cost of the EU Banking Directive should properly be netted out to take away the removal of compliance costs of all the national varieties.

Mr Pellé: Yes, I see your point. I do not know whether we studied the displacement of the national legislation by the Community one and the related savings, but that is a fair point.

Q322 Lord Hannay of Chiswick: Otherwise the figures get misused by people who say that this is in all circumstances an additional burden.

Mr Pellé: Indeed, yes, fair point.

Q323 Chairman: If there are no more questions that any of my colleagues want to ask let that be the end of this meeting. You have been exceptionally helpful to us in two ways: first, the document you kindly sent us which we appreciate very much, and, secondly, the helpful way in which you have answered really rather a lot of questions this afternoon. This has been of very serious help to us and we shall be carrying on a number of other witness sessions in the next few weeks. We hope to produce a report before Parliament rises for the summer in mid July and we shall, of course, send you copies of our report as soon as we have published it. It has been a very useful afternoon indeed. Thank you all very much. It seems the burden of answering our questions has fallen in the centre of the panel and we have not heard terribly much from those on the outside but I am sure they were full of all sorts of useful information which we might have had.

Mr Boratyński: It is a collective work.

Q324 Chairman: No doubt they put a lot of the briefs together.

Mr Pellé: Yes.

Chairman: Thank you very much.