

## RESEARCH PAPER

### Terrorism and financial supervision

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#### 1. Introduction

Ever since the 9/11 hijacks in the United States, it is evident that our Western society is a target for terrorist attacks. The attacks in Madrid of 11 March 2004 proved the threat for Western Europe. With the murder of the Dutch film director Theo van Gogh and the London attacks Europe was confronted with the presence of Muslim terrorists who are prepared to die in suicide bombings. Europe faces a special risk due to the presence of armed units of several European countries in Iraq, its close ties with the United States and the presence of certain Muslim groups which are susceptible to radicalization. An important development in present-day terrorism is that terrorists no longer exclusively direct their attacks at vital (military or economic) targets, but aim to claim as many random victims as possible.<sup>1</sup> Another development is the fact that terrorists are not centrally organized but are split up into autonomic cells which are spread all over the world, including European countries.

The central question in this article is: Are the Dutch regulations regarding the prevention of money laundering and the financing of terrorism effective, proportional and mutually harmonious? And if not, how can this be improved?

Since many regulations in this field emanate from international sources it will be interesting to examine how these regulations are further elaborated in the national systems. In this article, I will therefore start by studying the global and European legislative initiatives and examine the elaboration of those initiatives in the Netherlands. The Dutch situation is an interesting legal example since the Netherlands has many internationally operating corporations, a well-organized market and legal system, a very open economy and Amsterdam is one of the major European financial centres with a great deal of financial institutions and expertise.

As a result of the attacks in the United States, governments are giving even more priority to the fight against terrorism, generally resulting in a considerable package of measures concerning both

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1 Middle Eastern Area Institute, *Terrorism Unveiled, Commentary on the War on Terror*, 2004.

the reinforcement of existing policy and new emphases and priorities as well as focusing on both prevention and the speedy investigation and successful prosecution of terrorist crimes. The relationship between capital flows and terrorist activity is of vital importance in the fight against terrorism. Several governments intend to put a halt to the supply of funds to terrorist groups. Combating the financing of terrorism requires an international approach. International forums have taken initiatives in which the Netherlands participates. This includes the implementation of recommendations in the fight against money laundering by the Financial Task Force on Money Laundering (FATF), the obligation of states to make the provision of financial funds for terrorist activity an offence and a proposal by the European Council that would enable, for example, the Netherlands to issue a court order to freeze assets in the event of serious suspicions against citizens of EU Member States.

The measures with respect to the financial sector can be divided into two groups.

It concerns the financial supervision legislation and enforcement and the investigation of suspect flows of funds. The first group relates to the reinforcement of the supervision of compliance with the Disclosure of Unusual Transactions Act (*Wet MOT*), the Identification (Financial Services) Act (*Wet identificatie bij financiële dienstverlening*) and the Sanctions Act (*Sanctiewet*) and a reporting obligation for independent (financial/legal) professionals and trust offices as well as regulations on the supervision of trust offices and money transfer institutions. The second group of measures focuses on the reinforcement of the financial investigation, the improvement of the exchange of information and an efficient way of reporting information to the Unusual Transactions Reporting Office with respect to terrorism-related subjects.

As said, I will start by focusing on the United Nations, FATF, the United States of America, the Council of Europe and the European Union and conclude with the Dutch legislative situation. After considering the Dutch measures to prevent financial aid to terrorists, I will consider whether those measures result in effective prevention or whether other measures may be required or desirable.

## 2. The United Nations

The United Nations has done much to address the threat of terrorism. What follows is a sample of its recent establishment of a regime of international treaties and conventions. It is these international treaties that provide the legal framework for the suppression of terrorist acts and the pursuit of perpetrators of terrorism, and set out ways to limit illicit access to the tools which terrorists need. The UN anti-terrorism treaty that predates 11 September 2001 and covers financial aspects, is the International Convention for the Suppression of the Financing of Terrorism, drafted in 1999.<sup>2</sup>

This Convention applies to the offence of direct involvement or complicity in the intentional and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the offences described in the Conventions listed in the Annex, or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act. The provision or collection of funds in this manner is an offence whether or not the funds are actually

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<sup>2</sup> International Convention on the Suppression of Financing of Terrorism, adopted by the General Assembly in Resolution 54/109 of 9 December 1999, entered into force on 10 April 2002 (UN Doc. A/RES/54/109 (1999)).

used to carry out the proscribed acts. The Convention does not apply where an act of this nature does not involve any international elements as defined by the Convention.

The Convention requires each State Party to take appropriate measures, in accordance with its domestic legal principles, for the detection and freezing, seizure or forfeiture of any funds used or allocated for the purposes of committing the offences described. The offences referred to in the Convention are deemed to be extraditable offences and States Parties have obligations to establish their jurisdiction over the offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings. The offences referred to in the Convention are deemed to be extraditable offences between States Parties under existing extradition treaties, and under the Convention itself.

The most important achievement of the UN Security Council, the 15-member body charged with the maintenance of international peace and security, is a resolution which obliges states to criminalize the provision of funds to terrorists, freeze the financial assets of people who commit terrorist acts and prohibit the provision of services to those who participate in terrorism.<sup>3</sup> Another important resolution is Resolution 1390<sup>4</sup> which extended and strengthened the sanctions against Osama bin Laden which the Council had imposed in 1999.

Resolution 1373 also set up a Counter Terrorism Committee, under the Chairmanship of Ambassador Jeremy Greenstock, the Permanent Representative of the United Kingdom to the United Nations, which is charged with offering support to individual states. The Committee, which is composed of all 15 members of the Security Council and is advised by a body of experts, has received reports from 160 states on their efforts to implement the measures which the Resolution prescribes. The Committee has begun to identify areas where each country can improve its legislation and administration to better address the financing of terrorism, and has established a roster of states prepared to provide technical assistance to those states seeking help in effectively implementing the Resolution.<sup>5</sup>

### **3. Financial Action Task Force on Money Laundering (FATF)**

The Financial Action Task Force (FATF) which was created in 1989 is an intergovernmental body whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing.<sup>6</sup> The Task Force is therefore a 'policy-making body' that works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. The FATF has published 40 + 9 Recommendations<sup>7</sup> to combat money laundering and the financing of terrorism which it calls on all countries to adopt and implement. Implementing these special recommendations will deny access to the international financial system for terrorists and their supporters. The agreement on the Special Recommendations commits members to:

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3 UN Doc. S/RES/ 1373 (2001).

4 UN Doc. S/RES/1390 (2002).

5 Although no hard facts are available, according to the United Nations Secretary-General, Kofi Annan, the Counter Terrorism Committee is a success: 'The work of the Counter Terrorism Committee and the cooperation it has received from Member States have been unprecedented and exemplary.'

6 Some countries run a special risk of money laundering. See: G. Stessens, 'The FATF Black-List on Non-Cooperative Countries or Territories', 2001 *Leiden Journal of International Law*, p.199.

7 All recommendations can be found on the website of the FATF: <http://www1.oecd.org/fatf/index.htm>.

1. take immediate steps to ratify and implement the relevant United Nations instruments;
2. criminalize the financing of terrorism, terrorist acts and terrorist organizations;
3. freeze and confiscate terrorist assets;
4. report suspicious transactions linked to terrorism;
5. provide the widest possible range of assistance to other countries' law enforcement and regulatory authorities for terrorist financing investigations;
6. impose anti-money laundering requirements on alternative remittance systems;
7. strengthen customer identification measures in international and domestic wire transfers; and
8. ensure that entities, in particular non-profit organizations, cannot be misused to finance terrorism.

On 24 April 2002, a guide for financial institutions in detecting terrorist financing was issued, which has since become a well-used handbook for banks.<sup>8</sup> The work of the FATF focuses on three principal areas: (1) Setting standards for national anti-money laundering and countering terrorist financing programmes; (2) evaluating the degree to which countries have implemented measures that meet those standards; and (3) identifying and studying money laundering and terrorist financing methods and trends. The FATF membership is currently made up of 31 countries and territories and two regional organizations. The FATF also works in close co-operation with a number of international and regional bodies involved in combating money laundering and terrorist financing, like, for instance, the UN Office for Drug Control and Crime Prevention. The Netherlands is a member as well.

#### 4. The United States of America

Due to its economic power and political influence, the United States is also an interesting country to examine in the framework of this article. Traditionally, US actions against terrorists' financial means were focused on state sponsors of terrorism, leading to sanctions against states accused of collaborating with terrorists or terrorist organizations. Though state-sponsored terrorism is still of concern, US attention is now focused on other methods used by terrorists to finance their operations. Financial actions against terrorists are taken by the US Government to deny terrorists access to financial resources and to expose and incapacitate terrorists' financial networks. The means by which terrorists acquire funding include state-sponsorship, narcotics trafficking, money laundering, and establishing front businesses or 'charity' organizations.

On 24 September 2001 President Bush issued an order<sup>9</sup> to authorize the seizure of assets that belong to terrorists or terrorist supporters as designated on the State Department Office of Counterterrorism's list of Foreign Terrorist Organizations.<sup>10</sup> Since this order was issued, the US has become a party to or reaffirmed its commitment to several international agreements/conventions aimed at preventing the financing of terrorism (listed below). Congress has also enacted legislation towards this end. US policy on this point has been elaborated in two Acts:

– The Patriot Act.<sup>11</sup> This Act<sup>12</sup> includes provisions to strengthen US measures to prevent, detect, and prosecute terrorist financing and money laundering; it allows financial institutions to share

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8 Financial Action Task Force, *The War on Terrorism: a guide*, 2004.

9 Office of the Press Secretary, Executive Order 13224 on Terrorist Financing, 24 September 2001.

10 List available at the US Department of State: <http://www.state.gov/s/ct/rls/fs/2002/9014.htm>.

11 Patriot Act: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Act of 3 January 2001, HR 3162.

12 For more information concerning the Patriot Act, see J. Podesta, 'The USA Patriot Act, Human Rights', 2002 *Journal of the Section of Individual Rights & Responsibilities*, p. 3.

information with one another upon notifying the Treasury Secretary, which may help to identify attempts at money laundering or terrorist activities.

– The Anti-Terrorism and Effective Death Penalty Act. This Act<sup>13</sup> establishes penalties for people who finance terrorism. The Act details the procedures for declaring groups as Foreign Terrorist Organizations, which enables any of their assets within the United States to be frozen and/or seized.<sup>14</sup>

## **5. The Council of Europe**

Within two months of the terrorist attacks in the United States, the Council of Europe began to implement a plan of action. Developments in the area of legal action against terrorism began with the work of the Multidisciplinary Group on International Action against Terrorism (GMT), which is a intergovernmental committee of experts. The GMT identified a number of priority areas for action by the Council of Europe and elaborated an Amending Protocol updating the 1977 European Convention on the Suppression of Terrorism.<sup>15</sup> The Council of Europe's action is threefold: (1) strengthening legal action against terrorism; (2) safeguarding fundamental values; and (3) addressing the causes. In 2003, the Council of Europe set up the Committee of Experts on Terrorism (CODEXTER), which was made responsible for coordinating and following up the counter-terrorist activities of the Council of Europe in the legal field. The latest version of the CODEXTER draft of a European Convention on the prevention of terrorism<sup>16</sup> was adopted at the eighth meeting of the CODEXTER, taking into account the opinions provided by the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights and civil society.

## **6. The European Union**

The main objective of the European Union in this respect is to intensify cooperation in combating the financing of terrorist groups. Shortly after the 9/11 attacks, the Heads of State or Government approved an action plan including enhanced police and judicial cooperation between the Member States, the development of international legal instruments, and measures to put an end to terrorist funding. On 19 November 2001 the EU welcomed a new proposal of the EU money laundering Directive.<sup>17</sup> In particular, this obliged Member States to combat the laundering of the proceeds of all serious crime (including fraud against the EU budget), whereas the former Directive<sup>18</sup> only applied to the proceeds of drug offences. The amendment<sup>19</sup> also extended the scope of the current Directive (limited to the financial sector) to a series of non-financial activities and professions that are vulnerable to misuse by money launderers. Requirements as regards client identification, record keeping and the reporting of suspicious transactions are therefore extended to external accountants and auditors, real estate agents, notaries, lawyers, dealers in high value goods such as precious stones and metals or works of art, auctioneers, transporters of funds and casinos.

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13 'Anti-Terrorism and Effective Death Penalty Act: A Bill to Prevent and Punish Acts of Terrorism, and for Other Purposes', 1996 *Public Law*, pp. 104-132.

14 See for further details: A. Thomas, 'Penalty Box', 1998 *National Review*, p. 40.

15 European Convention on the Suppression of Terrorism of 27 January 1977, 90 *European Treaty Series*.

16 Council of Europe, Committee of Experts on Terrorism, Codexter (2004), 27 final.

17 Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, *OJ L* 344, 28.12.2001, p. 76.

18 Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, *OJ L* 166, 28.06.1991, p. 77.

19 The text was agreed in a conciliation procedure between the Parliament and the Council (see RAPID doc. no. IP/01/1441) and was endorsed by the Parliament at its November Plenary (see RAPID doc. no. IP/01/1580).

However, the current arrangements for combating organized crime in the EU need to be reinforced. Therefore several measures have been adopted which are summed up in a Communication from the Commission.<sup>20</sup> The Commission proposes the following step-by-step approach:

- Establishing a link between measures to combat organized crime and terrorism; even if this link is not always immediately obvious, there are similarities between the methods and financing arrangements and, in some cases, between the actual groups involved in criminal and terrorist activities. Since the facilities available for combating organized crime can be used to combat terrorism as well, the European Union must equip itself with a high-performance arsenal to combat organized crime and, consequently, terrorism too, in conjunction with other forms of crime.
- Drawing up an electronic list of persons, groups and entities to whom restrictive measures taken to combat terrorism apply or who are under investigation for criminal offences. This consolidated list, permanently updated and available to banks, would enhance the scheme's effectiveness as the data could be processed more quickly; bodies concerned, as well as Europol and other competent bodies within the EU,<sup>21</sup> could then benefit from the list combining information published in the Official Journal and data on persons, groups and bodies under criminal investigation for terrorist offences.
- Setting up a national system for registering bank accounts in the Member States; centralizing bank accounts could help to improve the traceability of capital movements in the context of criminal investigations, in particular as regards financing of terrorism and money laundering. Whether such systems should be set up is already being considered as part of preparations for a proposal for a third money laundering Directive.<sup>22</sup> The Commission will pursue its review to determine whether there is a need for a specific legal instrument enabling legal aid applications to be processed.
- Devising an effective mechanism for gathering and forwarding information with a view to preventing terrorist groups and criminal organizations from infiltrating legitimate activities and increasing the transparency of legal persons, including non-profit organizations. The Council recommends that national security services should exchange information on a regular basis on the structures and modus operandi used for financing terrorist groups operating in more than one Member State. The confidential information should be transmitted through Bureau de Liaison channels.<sup>23</sup> Europol should participate in this cooperation as far as possible. The Commission is debating with the Member States on the feasibility and cost-effectiveness of an appropriate scheme compatible with fundamental rights, in particular personal data protection as well as on practical arrangements and the time that would be needed to put such a scheme in place.
- Introducing a European criminal record.<sup>24</sup> This mechanism would be an efficient way of exchanging information on convictions and disqualifications and would also facilitate the enforcement of the disqualifications applicable throughout the European Union and the confiscation of convicted persons' property or assets. The purpose of this record would be to identify repeat offenders and to draw appropriate conclusions for sentencing purposes throughout the

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20 Communication from the Commission to the Council and the European Parliament on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information, COM (2004) 221 final.

21 Council Act of 28 February 2002, amending the Council Act of 12 March 1999 adopting the rules governing the transmission of personal data by Europol to third states and third bodies, *OJ C* 76, 27.03.2002, p. 1.

22 Directive 2001/97/EC, see *supra* note 17.

23 Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorist groups, *OJ C* 373, 23.12.1999, p. 1.

24 Decision 2003/48/JHA of 23 January 2003 to strengthen police and judicial cooperation in criminal matters in the area of preventing and combating terrorist acts involving the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP.

European Union; it would also allow the courts to apply the *ne bis in idem* principle where the accused has already been convicted of the same offence in another Member State, and it could also help prevent terrorist groups and organized crime from infiltrating the legitimate public and private sectors.

– Improving the exchange of information between the Member States and EU bodies. Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism<sup>25</sup> could be improved by expanding such information exchange to include all terrorist offences. The information - concerning investigations, prosecutions and convictions for terrorist offences - should be sent to Europol and Eurojust.

– Keeping an updated list of individuals, groups and entities on whom there is accurate information proving that they have committed, are attempting to commit or are facilitating the commission of terrorist acts. ‘Terrorist acts’ are defined as intentional acts which may seriously damage a country or international organization by intimidating a population, exerting undue compulsion of various types or by destabilizing or destroying its fundamental political, constitutional, economic or social structures. The list is drawn up on the basis of investigations carried out by the competent judicial and police authorities in the Member States; it may be added to and revised every six months, so as to keep it up to date. Besides individuals and groups associated with Osama bin Laden, the list includes the ETA (Basque Fatherland and Liberty), the IRA (Irish Republican Army), GRAPO (the First of October Anti-Fascist Resistance Group), the terrorist wing of HAMAS, Palestinian Islamic Jihad and other revolutionary activist groups, as well as the names of individuals belonging to such groups. Individuals, groups and entities registered on this list are liable to have their funds and other financial assets frozen so that they can no longer gain access to them.

The 1991 EU Directive on money laundering was extended in 2001 to cover the proceeds of a much wider range of criminal activities and a number of non-financial activities and professions, including lawyers, notaries, accountants, estate agents, art dealers, jewelers, auctioneers, and casinos.<sup>26</sup> In 2004 the Commission proposed a new amendment<sup>27</sup> of the Directive on prevention of the use of the financial system for the purpose of money laundering. This proposal will ensure that the definition of money laundering includes not only concealing or disguising the proceeds of serious crimes, as defined within the framework of police and judicial cooperation between Member States, but also the financing of terrorism with either criminal or legally acquired money. It would also ensure the coherent application in all Member States of the latest Recommendations of the Financial Action Task Force (FATF), of which the EU is a member. As part of the co-decision procedure, the proposal has now been sent to the European Central Bank for advice.

The above measures should be regarded as part of an overall drive by the European Union, acting together with the Member States and within the framework of UN Security Council resolutions, to combat terrorism. EU Member States are obliged to implement the measure in their national legislation. This may require a new act and/or the amendment of existing legislation. I will now examine how the Dutch legislator combats the financing of terrorism and what conclusions can be drawn from this approach.

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25 Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism, *OJ L* 16, 22.01.2003, p. 68.

26 Directive 91/308/EEC, see *supra* note 18.

27 COM (2004) 448.

## 7. The Netherlands

The Dutch government has taken several measures<sup>28</sup> to combat the financing of terrorism. Those measures can be divided into two groups.

The first group relates to the reinforcement of the supervision of compliance with several acts. Relevant acts are the Disclosure of Unusual Transactions Act, the Identification (Financial Services) Act and the Sanctions Act as well as a reporting obligation for independent (financial/legal) professionals and trust offices and also regulations on the supervision of trust offices and money transfer institutions.<sup>29</sup>

The second group of measures focuses on the reinforcement of the financial investigation, the improvement of the exchange of information and the prevention of abuse by legal entities with respect to terrorism-related subjects.

On 1 February 1994, the Identification (Financial Services) Act and the Disclosure of Unusual Transactions Act entered into force. The former obliges certain financial service providers to identify all clients. When a client transacts in an unusual way, this transaction has to be reported on the basis of the Disclosure of Unusual Transactions Act. Both acts are the result of the international discussion concerning the integrity of the financial system. Through both Acts the Dutch legislator tries to prevent 'dirty' money from being laundered. The legal obligations imposed have a preventive as well as a repressive goal. The legislation in question should have a preventive and deterrent effect on criminals who are planning to abuse the financial system to launder the proceeds of their crimes. The wide range of investigative powers and possible penalties are intended to achieve the goal of repression. These measures are essential to ensure the integrity of the Dutch financial system and as a consequence public confidence in the proper functioning of the financial system.

Until recently, the abuse of the financial system or institutions has only been studied in respect of the laundering of criminal proceeds. These days, however, there is an acute awareness of the fact that the financial system can also be abused for financing terrorism. Such abuse does not exclusively affect the integrity of the financial system, but is potentially destructive for society as a whole.

Money laundering and the financing of terrorism are different forms of crime.<sup>30</sup> Money laundering involves money that has been obtained illegally and that has to be 'cleansed' in order to use it in a regular fashion. Money used to finance terrorism may have a legal origin, for instance money that is collected for a(n) (apparent) charity fund. However, the money may also have an illegal origin.<sup>31</sup> Essential is the fact that the money will be used in order to finance illegal goals. As the same methods are used in both money laundering and financing terrorism, the approach to both offences can be linked, which has led to both being countered by the two abovementioned acts. Below, the content and function of these Acts in the 'War on terrorism' will be examined.

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28 Most measures taken by the Dutch government have been described by J. Wiarda et al., *Law on Terror*, 2003. As said, I will only focus on measures to prevent the financing of terrorism.

29 For more information see: E. van der Does de Willebois et al., *Bestrijding van witwassen en terreurfinanciering: De toenemende rol van de Wid en de Wet MOT, Onderneming & Strafrecht*, 2004, p. 6.

30 For more information about money laundering see, P. Reuter et al., *Chasing Dirty money: The Fight against Money Laundering*, 2004.

31 Bureau of International Narcotics and Law Enforcement Affairs, *The International Narcotics Control Strategy Report*, 2002, available at <http://www.estandardsforum.com/servlet/home>.

### **7.1. Supervision**

The Dutch Central Bank (*De Nederlandsche Bank, DNB*)<sup>32</sup> is the supervisory body for credit institutions (financial institutions, private banks etc.) in the Netherlands. The DNB sees to it that the institutions carry on their business in a (financially) responsible manner. Through its licensing system, the DNB ensures that banks meet certain minimum requirements, while it also monitors compliance. The regulator furthermore supervises the integrity of the financial system and of its directors. The DNB has prudential supervision, monitoring the reliability and credibility of financial institutions and the financial sector, whereas the Authority for the Financial Markets (*Autoriteit Financiële Markten, AFM*) supervises the conducting of business under the securities legislation and regulates institutions' behaviour in the markets.

The supervision of financial institutions is regulated through quite a few Acts, depending on the financial sector. There are separate Acts for credit institutions, insurance companies, securities, trust companies and investment institutions. The licensing system for private credit or banking institutions is based on the Act on the Supervision of Credit Institutions (*Wet toezicht kredietwezen*). The two main objectives of this Act are:

- to protect the interests of the public and the clients; and
- to protect the stability of the financial system.

This Act and other supervisory legislation in future (probably in 2006) be replaced by new legislation in the shape of an umbrella Financial Supervision Act (*Wet financiële toezicht*). This Act is intended to serve a general 'framework' of combined legislation for prudential supervision as well as legislation for supervising business conduct.

### **7.2. Disclosure of Unusual Transactions Act**

The Dutch Government is determined to stop the influence of criminal money in society. One of the main objectives is to avoid money laundering.<sup>33</sup> Therefore, banks and other financial institutions such as insurance companies, credit card companies and casinos are obliged to report unusual transactions. Since 1994 they have been subject to the Disclosure of Unusual Transactions Act. Since December 2001 this Act also applies to high-value trading and since 1 June 2003 lawyers, accountants, notaries, real estate brokers and tax advisors are subject to it as well.<sup>34</sup> The abovementioned institutions have to report unusual transactions to the Unusual Transactions Reporting Office (*Meldpunt Ongebruikelijke Transacties*).<sup>35</sup> Whether a transaction is unusual will be decided on the basis of a list of indicators, assessed by the Dutch Financial and Legal Department.<sup>36</sup> A reporter cannot be successfully sued based on the reported information. From a civil law point of view, the reporter cannot be held liable for the damage which may be occasioned to a third party as a result of the report, unless it is plausible that the reporter has acted unreasonably by reporting the transaction. If possible, the report has to contain the following elements:

- the identity of the client;
- the number of the client's identity document;
- the nature, time and place of the transaction;

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32 For more information see the excellent site of the Dutch Central Bank: <http://www.dnb.nl/dnb/homepage.jsp>.

33 For more information see: D. Kolkman et al., 'WID/MOT: van witwassen tot terrorismefinanciering', *WPNR* 6633, p. 675.

34 See for more information: D. van der Landen, 'Recente anti-witwas-wetgeving', 2003 *Onderneming & Strafrecht*, p. 1.

35 For more information on the MOT see: W. Faber et al., *Uit onverdachte bron, evaluatie van de keten ongebruikelijke transacties*, WODC, 2004.

36 MOT Reporting procedure: Indicators: [http://www.justitie.nl/mot/Meldprocedure/Melders/Handelaren\\_in\\_zaken\\_van\\_grote\\_waarde/Indicatoren/](http://www.justitie.nl/mot/Meldprocedure/Melders/Handelaren_in_zaken_van_grote_waarde/Indicatoren/).

- the amount of the transaction;
- the origin and destination of the money or other valuables involved; and
- the circumstances that make the transaction unusual.

The reporting office can oblige the reporter to provide additional information concerning the transaction. If a reporter does not comply with the obligations mentioned in the Disclosure of Unusual Transactions Act, he commits an economic crime. The duty to report will be supervised by one of the supervisors. The supervisor for financial institutions is the Dutch Central Bank. The supervisor for high-value trading is the Fiscal Intelligence and Investigation Department (*Fiscale Inlichtingen en Opsporingsdienst*). The supervisor of the liberal professions is the Agency for Financial Supervision (*Bureau Financieel Toezicht*). The liberal professions include lawyers, notaries, accountants, estate agents, art dealers, jewellers, auctioneers and casinos. The supervisors have the authority to visit companies and institutions in order to supervise them and to control the relevant information and trading history of their clients. The Dutch Public Prosecutor's Office is competent to collect information concerning certain transactions and to determine whether a transaction by a suspect would qualify as unusual. This last provision can be an important accessory in the investigation of facts that may be related to the financing of terrorism.

### **7.3. Identification (Financial Services) Act**

In order to report an unusual transaction, a provider of financial services has to be aware of its customer's identity. Therefore he is legally obliged to require that his client provide means of identity. This obligation is laid down in the Identification (Financial Services) Act which imposes a duty on the provider to require that the client proves his identity before performing a service. As far as identification is concerned, it does not matter whether the client is a legal or a physical person. The provider of financial services has to collect all the relevant information and to retain such information in an orderly manner for a period of at least five years. If there is a suspicion that a client is acting for someone else, the provider of financial services has to clarify for whom the client is acting. If a client has provided the necessary identification, such identification does not have to be provided on the client's return visit(s). This is only allowed when it is absolutely clear that it concerns the same client and the provider has to administer his return visit(s). When the financial institution has reason to doubt the authenticity of the identification, or when it is obvious that the identification is false, the financial institution is obliged to refuse to perform the requested service. In 2003 the FATF recommendations were reviewed and elaborated upon with extra requirements. Since the Identification (Financial) Services Act is based on those recommendations, it is necessary to amend this Act as well. The Dutch legislator has published a Bill for consultation.<sup>37</sup> For the Netherlands the most important modifications<sup>38</sup> are that financial institutions will be obliged to require that the beneficial owner provides proof of identity and to examine the structure of the group, to control the client during the provision of the service and to take appropriate measures when services are provided to a politically exposed person. The basis of the FATF recommendations is the risk approach. This means that certain measures only apply when there is a described risk. Because such an approach requires rules which are very specific and directed towards concrete cases, such an obligation is not described by the Bill for

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<sup>37</sup> Reactions to this proposal were possible until 24 December 2004 on the Financial Department's website [www.minfin.nl](http://www.minfin.nl).

<sup>38</sup> For more information see the opinion of the Council of State (*Raad van State*) of 12 November 2004, no. W06.04.0495/IV, the actual text of the proposal and the Explanatory Memorandum (*Memorie van Toelichting*), all available at [www.minfin.nl](http://www.minfin.nl).

the new Identification (Financial Services) Act, but will be dealt with in lower legislation. This concerns particularly the obligation to identify the beneficial owner, the structure of the group and the duty to monitor the client during the course of the business relationship.

In addition to what has been said, this proposal also aims to diminish the administrative burden for companies, by erasing certain verification demands and by neutralizing the identification duty for certain entities who are less inclined to or do not pose a risk of being used for money laundering, like public listed companies and Government bodies. The Bill offers the opportunity for legal entities based in the Netherlands to provide means of identification on the basis of an electronic supplement supplied by the Dutch Chamber of Commerce. The Bill will probably be approved during the summer and its entry into force can be expected in the autumn or winter.<sup>39</sup>

#### **7.4. Sanctions Act**

Another important instrument in the fight against the financing of terrorism is the possibility to freeze the assets of terrorists and terrorist groups. Along with this instrument, it is prohibited to supply activities or perform financial services to those persons or groups. The possibility to freeze assets is based on the Sanctions Act of 1977. Several international commitments,<sup>40</sup> like UN Resolution 1373, are made effective through the Sanctions Act.

Although freezing may be a very effective instrument in the fight against the financing of terrorism, the tracing of assets can be a useful tool in order to trace the supporters of international terrorism as well. Therefore financial institutions are obliged to report (future) transactions which point to the financing of terrorism.<sup>41</sup> When certain persons, groups or entities are related to international terrorism all transactions have to be reported.

#### **7.5. Penal law**

The International Convention for the Suppression of the Financing of Terrorism and the FATF require the financing of terrorism to be criminalized. Criminal proceedings may be instituted against anyone engaged in criminal forms of collecting funds to aid and abet terrorism. This can be effected along three lines.

First, the financing of criminal offences can be defined as preparing for a crime as defined in Article 46 of the Criminal Code. This offence, which carries a penalty of eight years' imprisonment or more, is defined as one in which the perpetrator has intentionally acquired, imported, transported, exported, or kept in his possession certain objects (including money or means of payment) such as materials, information carriers, premises or means of transport, which are manifestly intended for the purposes of committing that crime. Hence financing or supporting acts of terrorism falls within the definition of preparation for a crime.

Second, financing or supporting terrorism may also be a criminal offence if it can be classified as the joint perpetration of or complicity in an offence, or procuring its commission, or the attempt thereof. Thus, anyone who intentionally procures the commission of an offence by making a donation or a pledge, or by making resources available, is liable to prosecution. Besides attempting to commit a terrorist attack, attempting to procure the commission of a terrorist attack is also a criminal offence under Article 46a of the Criminal Code.

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<sup>39</sup> The Bill has been submitted to Parliament. The Standing Parliamentary Committee for Finance advised on the Bill on 5 April 2005.

<sup>40</sup> European Freezing Regulation, Regulation (EC) no 2580/2001, *OJ L* 344, 28.12.2001, p. 70.

<sup>41</sup> The Netherlands has implemented the FATF recommendation by a Decision of 11 October 2002 regarding reporting transactions which could be implicated with the financing of terrorism (*Stb.* 2002, 553). This Decision obliges financial institutions to report requests by suspended listed persons or organizations and to refuse this service.

Third, the financing of terrorism may also be a criminal offence under Article 140 of the Criminal Code on participation in an organization whose purpose is to commit crimes. Legislation is currently being prepared that will explicitly criminalize membership of a terrorist organization. Acts of terrorism are almost always financed through the channels of some specific organization.

### **7.6. Reinforcement of the financial investigation**

The capacity for investigating and prosecuting terrorist crimes will be expanded considerably. The National Police Agencies, General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst, AIVD*) and the Public Prosecutor's Office are reinforced by criminal investigators and analysts. In view of the fact that terrorist organizations often use modern technology, the Government will also take measures in this field, for example, by the introduction of satellite interception capacity, the expeditious introduction of the National Action Plan on Digital Criminal Investigators and the modernization of police wire-tapping capabilities. The basis of the action plan concerns measures to prevent acts of terrorism. It concerns, first of all, preventive measures such as improving the information obtained by the police and intelligence and security services, and more capacity for the protection and security of vulnerable persons and objects. In order to deal effectively with new types of terrorism, the intelligence and security services are provided with extra resources. New agreements are made with other EU Member States to exchange information. These agreements can make the relevant authorities more effective in cutting the flow of finance to terrorism. The General Intelligence and Security Service would like to be given the authority to survey all telephone and data traffic. Nowadays this is only permitted when a suspicion is raised. On 14 July 2005, the European Ministers of Justice decided to require the saving of all data traffic for one year.

### **7.7. Abuse of legal entities**

On 11 April 2005, the Dutch Ministry of Justice published a draft document on avoiding the abuse of legal entities.<sup>42</sup> The Netherlands has a preventive anti-abuse system.<sup>43</sup> The main limitation of such a system is that there is only one controlling moment, which is when the BV (Dutch private company) or NV (Dutch public company) is founded. Before the legal entity can be founded, the Minister of Justice has to provide the founders with a declaration of no objection. However, ownership can change with the transfer of the share capital as soon as one day after the declaration was issued and the entity established. Furthermore, the required declaration can easily be avoided by purchasing an existing entity. It is therefore not surprising that a well-developed trade in BVs exists on the Internet. Finally, it is also possible to avoid national rules by establishing a foreign legal entity.

The preventive system places administrative burdens on 'good' companies and the 'bad' companies can easily escape control. This does not lead to a transparent situation, since it is not clear who is the ultimate beneficiary. This problem has been compounded by the *Inspire Art*<sup>44</sup> case, by which entrepreneurs may choose whatever legal entity of an EU Member State they would like to use. Member States may not impose legislation on those EU Member State entities, because this would erect a *de facto* entry barrier that may hinder the free movement of services.

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<sup>42</sup> *Een lichtere doch effectievere toets op rechtspersonen*, doc. no. just050263, published on 11 April 2005.

<sup>43</sup> J. Dijkstra et al., 'PPS en het toezicht op het gebruik van privaatrechtelijke rechtspersonen', 1990 *Tijdschrift voor openbaar bestuur*, no. 20, p. 500.

<sup>44</sup> Case C-167/01, *Inspire Art Ltd*, [2003] ECR I-10155.

Dutch legislation only applies in a very restricted way to the legal entities of other EU Member States.

According to the Inspire Art case, measures to avoid fraud can be a justification for diminishing the freedom to choose one's domicile, if those measures are activated due to a repressive, case-by-case approach.<sup>45</sup> From an administrative point of view, a repressive approach may be fairer as the burden of proof is only borne by those legal entities which are suspected of abusing the system.

For some high risk activities special measures have already been taken. On 1 March 2004, the Act on the Supervision of Trust Agencies (*Wet Toezicht Trustkantoren*)<sup>46</sup> entered into force.<sup>47</sup> Trust agencies control trust entities on behalf of other companies. These flowing structures are attractive for laundering money. The purpose of this Act is to enhance the integrity of the financial system by regulating the trust sector. Trust agencies have to be reliable, sophisticated and possess integrity. As a result of this Act, Dutch trust agencies need a license from the Central Bank and they are also controlled.

For other specific risk groups, for instance non-profit institutions like charitable foundations special steps are to be expected. The Financial Expertise Centre pointed out in its report the urgent need to increase the transparency and the control of the use of received funds.<sup>48</sup> Information about any abuse for terrorist or criminal purposes can only be reviewed via the AIVD and the Unusual Transactions Reporting Office. Intensive controls are proposed for organizations that profit from the attractive fiscal regime pertaining thereto. One can also think of additional measures, for instance a general obligation to register gifts and donations and their destination and measures to review the reliability of non-profit institutions' boards of directors.<sup>49</sup> In exchange for better transparency and control foundations are rewarded with a lower tax rate: 8% instead of 11%. The Association of Foundations in the Netherlands,<sup>50</sup> the FIN, welcomes these initiatives as long as the regulation pays attention to the important role which foundations play in Dutch society: the rules must be based on a real understanding of the nature and diversity of the sector.<sup>51</sup> What is also needed is a network to cover all legal entities, both high risk as well as low risk. This network should cover national as well as foreign legal entities and should only impose costs on suspicious legal entities. In relation to this plan, it should be examined whether the current preventive checking system has any remaining grounds for justification. The new obligation could be that if a legal entity is suspected of abuse, this entity should provide information on persons with a substantial interest, in order to finally divulge the ultimate beneficial owner. It might be necessary to improve the judicial position (e.g. the burden of proof) of the investigation authorities and to elaborate possibilities for the personal liability of abusers. Occasionally a prohibition to sit on a company's board of directors should be issued and this should be effective in other EU countries. To achieve these goals a working group has been established by the Department of Finance, Justice and Economic Affairs. Within a year, it will emerge with a specific plan. The purpose of that plan will be:

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45 For more information see: H.de Kluiver, 'Verboden rechtspersonen: betekenis en beperkingen van een privaatrechtelijk perspectief', *WPNR* 6633, p. 641.

46 For more information on the Supervision of Trust Agencies Act see: K. Frielink, *Toezicht Trustkantoren in Nederland*, 2004.

47 Published *Stb.* 2004, 9.

48 This report was published in January 2004 and can be viewed at: <http://www.fecinfo.nl>

49 For more information see: W. van Veen, 'Toezicht op rechtspersonen, in het bijzonder stichtingen', *WPNR* 6633, p. 656.

50 For more information see: <http://www.verenigingvanfondsen.nl>.

51 See the speech by M. van Gendt, Director of the Van Leer Group Foundation, at the General Meeting of Members on 8 October 2004 entitled: *Anti-Terrorismewetgeving in Internationaal Perspectief*, at <http://www.verenigingvanfondsen.nl/pagina's/archief/artikelen/art04alvterrorisme.htm>.

- combating the abuse of legal entities in order to camouflage criminal activities;
- increasing the effectiveness of the control system in relation to the current prevention checks;
- increasing the controllability and transparency of foreign legal entities; and
- complying with international standards at the lowest administrative levels possible.

## 8. Conclusion

On 11 September 2001, the world was made shockingly aware of the threat posed by terrorism. Since then, the threat has materialized several more times.

Terrorism not only imposes costs on society; it is in itself a costly business. Especially training, long-term indoctrination and preparations are expensive. Therefore it is important to cut off the cash flow to terrorism and to confiscate existing funds.<sup>52</sup> The United Nations and the European Union have recognized this and have established legislation to achieve these goals. In their efforts, the organizations found support in the recommendations of the Financial Action Task Force (FATF), which have to be applied by all FATF members, among which the European Union. As a result of the EU's membership of FATF, FATF recommendations are enforced in all EU Member States. The Netherlands has been combating money laundering and unusual transactions since the mid-1990s and has used the same instruments for combating the financing of terrorism. These instruments are or will be elaborated upon in FATF recommendations. In order to control the financial system the Dutch Central Bank and the Financial Markets Authority will supervise all financial institutions. The Identification (Financial Services) Act requires all clients to be identified. If they request an unusual transaction to be carried out, this has to be reported on the basis of the Disclosure of Unusual Transactions Act. On the basis of the Sanctions Act the assets of terrorist groups can be frozen. In the meantime the Dutch legislator attempts to avoid the abuse of legal entities. Through the use of legal entities it is easier to launder money, to spirit money away in a clandestine fashion or to finance terrorism. The current preventive system will be replaced by a proposed repressive control system.

The central research question is: Are the Dutch regulations regarding the avoidance of money laundering and the financing of terrorism effective, proportional and mutually harmonious? We may conclude that measures have been taken or are proposed in order to avoid or at least to reduce the financing of terrorism. These measures will probably be effective to prevent abuse of our financial system. On the other hand, it will enhance the use of underground or illegal methods, which are even more difficult to control.<sup>53</sup> It will also promote the use of cheaper ways to terrorize society. For instance, in the London attack, local Muslims were trained in Arabic Madrassa's (religious schools) and sent back to England to do their deadly job. The bomb was made from tri-aceton-tri-peroxyde, which is available without restrictions at any chemist's, and was exploded in the course of a suicide mission.<sup>54</sup> When compared to the disaster in New York, the damage and the number of people who died can be said to have been limited, but the bombing still brought home clearly how little money is actually required to be able to commit acts of terror. Unfortunately, therefore, we cannot conclude that the measures taken will make the financing of terrorism impossible. However, what we can conclude is that the measures have made it very difficult to use the Dutch financial system to finance terrorism.

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52 For more information see G. Raaijmakers, 'Bestrijding van terrorismefinanciering', *WPNR*, 6633, p. 671.

53 As was also concluded by the WODC in its report of 19 July 2005 entitled: *Informal Value Transfer System and Criminal Activities*. Especially the Hawala banks, which are informal good faith money transfer organizations, can be used to transfer (illegal) money.

54 As declared by Scotland Yard. For more information: <http://www.met.police.uk/>.

Now that the European rules have been implemented in the Member States, it is time to focus on how they function within each Member State, i.e. are they effective, proportional and well-aligned? Above, I have focused on the situation in the Netherlands. It is only possible to give a solid answer for the whole of Europe after thorough examination of the situation in all the Member States. For this reason, it is very important that scholars from other Member States provide precise information on how the rules have been implemented in their national system. I hereby call upon such academics to join in this discussion and make their useful contribution to the legal situation in their respective countries. Only then will we be able to conclude whether Europe is successfully preventing the financing of terrorism.