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Panel One: Unfunding Terror -- Perspectives on Unfunding Terror

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Commentary by Dr. Gerhard Wegen*

Good afternoon. Today I plan to offer the European corporate commercial sectors perspective of the impact of anti-terrorism and anti-money laundering sanctions and restrictions on the conduct of business.

Money laundering has been big business in Europe. For the last ten to fifteen years there has been a virtual shadow economy of mafia and Russian money. However, over the last decade Europe has been somewhat successful in getting a handle on the situation. The European Union, like the United States., has taken steps to freeze assets and develop centralized bureaucracies to collect and channel information. The question we need to focus on is what effect these efforts have on business, the financial services sector and lawyers.

Terrorism has created a scenario where the old methods of crime prevention have become obsolete. Traditional thinking dictated that law enforcement first investigates criminal behavior and later, executes various prevention schemes. However, when it comes to terrorists, we have been unable to consistently anticipate their activity, and thus, we cannot meaningfully implement effective prevention schemes. As a result, law enforcement agencies have begun to impose regulations upon the private sector. These regulations are designed to extract, audit and monitor all available information in an attempt to detect criminal activity.

One of the drawbacks to this approach is that issues regarding data protection and civil rights have yet to be addressed. In addition, the effect of this approach has meant that the private sector is paying for the cost of law enforcement. The German government alone spent 3 billion Euros in 2002 on its latest anti-terror legislation. This is on top of the money spent by the private sector. In fact, how much did the private sector have to invest to keep up the IDP, invent new IDP systems, storage systems, internal controls and management systems to cope with obligations of the new laws?

Another underestimated effect of these regulations is the extent to which collaboration with government could potentially endanger a business' customer base and reputation. For example, under the German anti-terrorist legislation, criminal law enforcement agencies have the right to demand, from telecommunications providers, any and all information relating to unusual calls, including the lengths of the calls and call participants. The implications from this could be quite serious. Will customers switch providers if they believe their current provider is not doing enough to protect their privacy?

Germany also seeks to have business at large perform security checks of all employees. Typically, only individuals working in airports or in the security industry underwent security checks. Undoubtedly, company wide security checks

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would burden any personnel department. For example the German Rail has 150,000 employees. How can German Rail efficiently check each of these employees? Regardless, today there are security check requirements on a major part of German industry.

The financial services sector has also been greatly affected. In securities trading there is a concept of market supervision. This means that European Stock Exchange regulators have access to all bank and trader records and reports relating to transactions on the market. The authorities will usually investigate unusual developments such as takeovers. The banking industry is also experiencing the development of a quasi-market supervision system. Banks are now required to store information pertaining to virtually all transactions for up to ten years. These records must be readily retrievable, identifiable and the authorities have complete access to the records. Germany has a new Banking and Insurance Act that allows authorities to check any and all acquisitions of bank participations or insurance equity participations to see whether the acquisitions were completed with money gained unlawfully. The authorities may intervene and stop the sale if there is a danger that the payment came from an unlawful activity. The Act also requires all financial institutions to establish internal systems to protect against money laundering and financial fraud.

Individual European countries are also establishing market supervision principles by installing bank account information exchanges with the national banking agency. Banks and financial institutions deliver information detailing facts concerning the originator, the contents, and the destination of all financial transactions. Law enforcement authorities have the right to access the central storage facility and download any the information without having to request specific information on a suspicious individual. Germany and many other EU countries have developed centralized financial intelligence units. These units act as conduits through which similar units in other countries may communicate and share information. In addition, many countries have instituted the “know your customer” principle. This principle is an important part of market supervision. Among other things, this principle requires banks to ask for appropriate identification when a customer opens a new bank account.

An interesting novelty concerning lawyers occurred in the last amendment to the EU money laundering laws. The amendment enlarged obligations to comply with the money laundering acts were enlarged from banks, financial services providers, branches of foreign banks and insurance companies to, “persons acting in the exercise of their professional activities and auditors, external accountants, tax advisors, real estate agents, notaries, and other independent legal professionals,” which means lawyers, “when they participate by assisting in the planning or execution of transactions for the client . . .;” Assisting in the planning and execution is a typical function of a lawyer. “. . . Buying and selling of your property or business entities . . .;” I am a lawyer. I buy and sell. I assist my clients on a daily basis in selling and buying. “. . . Merging client moneys, securities, or other assets,” that is not typically a lawyer activity. “. . . Opening or

management of bank savings or securities accounts . . . ,” lawyers open accounts for clients all the time. “. . . Organization of contributions necessary for the creation, operation, or management of companies,” lawyers do organize the creation and contribution of companies. Lawyers are also subject to the money laundering law when they perform acts of creation, operation, or management of companies or some of the structures. I create companies on a daily basis.

The point I am trying to get across is that the co-activity of professionals, such as lawyering, on a daily basis is subject to the money laundering rules in Germany, which means that the lawyer must “know their customer.” This can create practical difficulties for international lawyers. For example, if I get a call from a New York law firm asking me to perform the German side of an acquisition, I have no clue who the client is. I do not see an individual. I just work with the lawyer in the United States. Do I get an exemption perhaps because the other lawyer may be subject to similar rules? But, the U.S. lawyer is not under the same obligation as I am. These are the types of questions that come up. Without clear answers, lawyers are expending time and money to develop protocols that ensure they are fully compliant with their regulatory obligations. The question that needs to be asked is whether such broad responsibilities are necessary.

In conclusion, I want to take the opportunity to illustrate precisely what is happening in Europe. First, the state is shifting anticipatory prevention schemes and their financial burdens to the private sector. This translates into a multibillion dollar cost item for business. Second, we need to re-think where the rule of law comes in, where civil rights come in, and where protection schemes come in. In particular, I am concerned with how the European Union developed its list of individuals who were to be named as terrorists, and thus, have their assets frozen. Perhaps the risk of terrorism requires us all to swallow those risks for the time being. Unfortunately, experience tells us that the enlargement of investigative powers of state authorities, given in the name of a specific goal, will be used for other purposes. Finally, the European Union will be facing even greater money laundering challenges in the future if it continues to expand. There are a whole host of countries with shadow economies whose services, capital, and money could flow freely across borders. This prospect will require every EU state to have the same understanding of how to implement the laws. However, to have a law is one thing; to administer and enforce it is another. There lies the serious challenge for the European Union. Thank you.

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