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Regulation and Supervision of the IFS Industry in Mauritius

8.1 The pre-2001 regulatory framework

Introduction

As indicated earlier, prior to 2001 regulation of financial services was fragmented in Mauritius. Regulatory/supervisory responsibilities were shared by the Bank of Mauritius (BoM; for banks) and the Ministry of Finance (MoF), which had a dedicated department for the supervision of insurance services. In 1988, the Securities and Exchange Commission of Mauritius was set up to regulate the stock exchange and the securities industry, including authorised mutual funds and unit trusts. Offshore finance came under the purview of MOBAA, established in 1992. The idea of a single regulator for financial services was mooted in the 1994/5 Budget Speech and was studied by the Financial Services Reform Steering Committee in 1996. The idea was implemented partially in 2001, but went no further.

In 2001, as a response to the several pressures exerted by a variety of international agencies, the decision was taken to move toward dividing regulatory responsibility between two main pillars: i.e. the BoM for banks and a single regulator – the Financial Services Commission (FSC) – for all non-bank financial institutions. Alongside, new organisations were created with specific ancillary functions: viz. the Financial Reporting Council set up in 2005 and the Financial Intelligence Unit established in 2002 under the Financial Intelligence and Anti-Money Laundering Act. This section discusses the responsibilities of these institutions prior to 2001, before the new AML/CFT regulatory regime came into force.

The Bank of Mauritius (BoM)

Pre-2001, the Bank of Mauritius adhered to customer due diligence and confidentiality protection standards established under the 1988 Basel Concordat issued by the Basel Committee on Banking Supervision (BCBS). Since its establishment, the BoM has been the sole licensing, regulatory and supervisory authority for the banking sector, including offshore banking since its introduction in Mauritius in 1989. In addition, the BoM regulates foreign exchange dealers, money changers and non-bank deposit taking institutions.

Apart from being the banking regulator, the BoM is also the island's central bank. In that capacity it formulates and implements monetary and exchange rate policy. It is the government's banker and the banker of last resort for the domestic financial system. It issues currency and derives seigniorage. It maintains and monitors in real time a payment, settlement and clearing system between banks, and manages public debt and foreign currency reserves. It also advises the government on financial matters.

With the abolition of exchange controls in July 1994, and open market determination of exchange and interest rates, the Bank has moved from direct to indirect monetary control. Through transparent open market operations it buys/sells foreign currencies when there is a need to stabilise the exchange rate market and buys/sells instruments in money and treasury markets to achieve the desired level, term structure and yield curve for domestic interest rates at any given time. In doing so, it attempts to function in a predictable manner to avoid introducing risk premiums that reflect excessive market uncertainty about the future predictability of interest rates and exchange rates. The role of monetary management and the regulatory/supervisory role of the BoM are inextricably intertwined.

As far as the supervision of commercial banks is concerned, the Bank of Mauritius is required to: (a) maintain the stability and soundness of the financial system; (b) ensure that adequate and reasonable banking services are always available to the public; (c) impose a high standard of conduct and integrity in the management of the banking and credit systems; (d) ensure that banks maintain a solid financial structure in line with the minimum risk capital adequacy ratios prescribed by the Basel Committee; and (e) protect the interests of depositors and consumers of banking services. The BoM derives its regulatory authority and supervisory charter from the Banking Act of 1988, passed when the Basel-1 capital adequacy regime came into force. The 1988 Act replaced the Banking Act of 1971 with a view to strengthening and modernising the regulatory and supervisory system as well as to providing for the legal framework for the establishment and operations of offshore banks domiciled in Mauritius. The 1988 Act incorporated principles of prudential regulation and supervision of banks, namely: licensing, capital adequacy, good governance, liquidity control, risk diversification, onsite and offsite monitoring and due diligence.

The Insurance Division

Before 2001, a Controller of Insurance with the status of a public officer supervised the insurance industry. The Insurance Act of 1987 provided the legal framework for the registration of insurers and intermediaries and the prudential regulation of insurance companies. That statute allocated to the Minister of Finance the regulatory responsibility for insurance services, gave the office a number of decision-making powers, as well as appellate jurisdiction over the regulatory decisions of the Controller. Before the Financial Services Commission (FSC) was created in 2001, the Insurance Division was manned by a Controller and a staff of about six inspectors. Due to staffing problems, onsite inspections conducted during that time were limited in frequency and scope.

The Controller and his/her staff were recruited through the Public Service Commission (PSC) and the office was financed out of the Consolidated Fund. The insurance department was a member of the International Association of Insurance Supervisors (IAIS), but had too few resources and appeared to lack the motivation to ensure that the insurance core principles developed by the IAIS were applied properly in Mauritius.

The Securities and Exchange Commission (SEC)

Prior to 2002, no special rules existed in connection with customer due diligence or AML/CFT in the conduct of the securities business in Mauritius. The Securities and Exchange Commission (SEC) was set up in 1988 to regulate the stock exchange, the market's clearing and settlement facility (CDS), stockbrokers and approved investment institutions i.e. unit trusts, investment trusts and investment companies. SEC was a parastatal body financed partly from fees levied on stock exchange transactions and partly from the Consolidated Fund. It was managed by a board of directors and run by a chief executive. Recruitment of staff was carried out by the SEC independently subject to ministerial approval. It had no mandate in the fight against money laundering and did not undertake inspection visits to the exchange or to stockbrokers. Neither the SEC nor the exchange or market operators (e.g. stockbrokers) had any mandate to verify client information or exercise customer due diligence based on know your customer (KYC) principles.

The Mauritius Offshore Business Activities Authority (MOBAA)

The structure of the Mauritius Offshore Business Activities Authority (MOBAA) when it was set up incorporated a fundamental conflict of interest. Its mandate combined a promotional role with a regulatory function. MOBAA was set up to encourage the rapid expansion of, and at the same time regulate/supervise, the non-bank offshore sector with a predominately developmental perspective. In parallel, tax incentives were provided to add impetus to the growth of offshore finance. MOBAA had to establish a fine balance between the stringency of its regulation and its mission to develop offshore business as rapidly as possible. Consequently, MOBAA adopted a 'pragmatic' regulatory approach. It was managed by a board of governors appointed by the minister responsible for financial services. The Authority was administered by a Director appointed by the board and funded by licensing fees paid by registered companies. The MOBAA Act (passed at the same time as the Offshore Trusts Act) provided the legislative framework for overcoming problems constraining the growth of the offshore sector. It provided for the registration of offshore companies and offshore management companies after full investigation of applicant qualifications. The Offshore Trusts Act, on the other hand, required only that a declaration of trust be registered with the Authority. The MOBAA Act allowed for two types of corporate vehicles, i.e. ordinary and exempt offshore companies. The regime applicable to exempt companies was more flexible and provided greater confidentiality as these companies dealt with private or personal assets. However, ordinary companies were taxable entities and could therefore avail themselves of double tax treaty benefits.

The International Companies Act of 1994 was passed to revamp legal provisions relating to exempt offshore companies, previously treated in the same way as any company registered under the Companies Act of 1984. The new international company had attributes that gave it more flexibility as an offshore business vehicle. It allowed for maximum confidentiality with minimal filing and reporting requirements and bearer shares provision. However, the OECD's 1998 report on *Harmful Tax Competition* forced this accommodating supervisory framework to be restructured in order to bring more transparency, accountability and supervision to the activities of offshore and international companies. Departing from the stereotype provisions of International Business Companies (as in the British Virgin Islands), requirements to file the company's share register and register of members and directors were made mandatory. The requirement to file accounts and the power of MOBAA to site-inspect all offshore service providers was introduced in 2000. Bearer shares were prohibited and the Economic Crime and Money Laundering Act (ECAMLA) that was passed in 2000 made amendments to provide gateways for the full disclosure of confidential information in cases of enquiry into money laundering.

The new tax approach

Exemption from domestic tax was a *sine qua non* for the development of the offshore sector, along with a flexible framework for 'light-touch' regulation. In addition to exemptions from domestic tax, key provisions in double tax treaties were exploited fully and the treaty network was expanded to gain a competitive advantage in maximising the range of cross-border tax optimisation opportunities that could be offered. Initially in 1990, offshore companies had been taxed on a par with offshore banks, i.e. at flat rate of 5 per cent; this was until offshore companies were permitted in 1994 to elect a rate of tax between 0 per cent and 35 per cent. This regime endured till 1998, when offshore companies were to be treated for tax purposes as 'incentive companies' taxed at a flat rate of 15 per cent with a generous provision for foreign tax credit. The previous tax regime was grandfathered so that existing offshore companies in operation before 1 July 1998 could choose between the sliding scale of tax or move to the new regime. Repeal and reform of the tax exemptions previously offered to the offshore sector was undertaken by Mauritius in response to pressures from the international community, more specifically the OECD, which declared, as part of its avowed fight against harmful tax practices, some jurisdictions offering fiscal advantages and secrecy regimes to attract business to be 'tax havens'.

The Economic Crimes Office

The Economic Crime and Anti-Money Laundering Act (ECAMLA) was the precursor of the present Financial Intelligence and Anti-Money Laundering Act (FIAMLA). It criminalised money laundering and established the Economic Crimes Office (ECO) as an investigatory and enforcement agency. The main function of ECO was to investigate economic offences and suspicious transaction reports (STRs) involving money laundering. Additionally, ECO was responsible for gathering and processing

information related to suspicious transactions, analysing it, and disseminating it to law enforcement agencies. The mandate of ECO included co-operation with foreign authorities in the fight against money laundering and economic offences involving serious or complex fraud requiring expert investigators. Under ECAMLA, money laundering offences extended to any crime under the Criminal Code. The Act further defined an economic offence as any offence or fraud in respect of which money or other property at risk, gained or lost, exceeded MRs500,000 in value and whose investigation required specialised financial, information technology, accounting or legal expertise. The ECAMLA provided for a parallel two-tier system of STRs. STRs from banks were referred to the BoM, whose assessment was required before the report was passed to ECO. Other financial institutions not regulated by the BoM were required to report directly to ECO.

The director of ECO had the power to obtain permission from a judge in chambers to search banks or financial institutions when there were reasonable grounds for believing that these institutions had failed to keep proper business records or to report suspicious transactions. The director could obtain a judge's order to search any premises or place of business when he/she had reasonable grounds to believe that an offence had been, or was about to be, committed. ECO was headed by a director with a staff comprising a team of four accountants, an assistant superintendent of police, fourteen police officers and nine other public officers as investigators as well as customs officers, tax officers and VAT officers. There was no trained lawyer on ECO's staff. Legal advice was sought from the State Law Office. The ECAMLA also enabled the director of ECO to commandeer the services of police officers or other public officers designated by the commissioner of police or the head of the civil service. This in practice proved to be a source of conflict between the various persons involved.

Offshore Group of Banking Supervisors mutual evaluation

In early 2001, Mauritius was subject to an evaluation of its AML environment conducted by the Financial Action Task Forces' (FATF) Offshore Group of Banking Supervisors (OGBS). The evaluation report identified areas of concern, including the absence of a level playing field in the regulatory regime in the financial services sector. In the absence of regulations and guidelines, the report found there were no common standards to prevent money launderers shopping around and placing their business with the operator who applied the lowest standards. Moreover, evaluators found that the parallel, two-tier system adopted under the ECAMLA, whereby reports of banks were required to be made first to the BoM, impeded the speed with which action could be taken by the director of ECO. The evaluation team recommended that all STRs should be directed to ECO. Additionally, the evaluation team identified weaknesses in international co-operation and recommended that an Extradition Act be introduced as soon as possible to enable Mauritius to ratify the Vienna Convention. Further, it recommended that comprehensive AML training should be provided throughout the entire finance industry. The report also recommended that each supervisory authority

conduct on-site inspections to ensure that institutions subject to its supervision complied with ECAMLA and that an AML officer be appointed for each.

8.2 The post-2001 regulatory framework for the IFS industry

FIAMLA

The Financial Intelligence and Anti-Money Laundering Act of 2002 (FIAMLA) replaced the ECAMLA and is now the centrepiece of post-2001 AML/CFT legislation in Mauritius. It established the Financial Intelligence Unit (FIU) (in place of ECO) to deal with AML offences, STRs and to exchange information on AML/CFT.

The Financial Intelligence Unit (FIU): is the principal intelligence gathering agency for anti-money laundering and countering the financing of terrorism (AML/CFT), acting as an independent interface between reporting institutions and law enforcement agencies. It receives and analyses all STRs from financial institutions and, if it judges appropriate, passes on its findings to law enforcement agencies for further action. Information is disseminated to the two supervisory bodies, namely the FSC and the BoM, for follow-up regulatory action. The statutory functions of the FIU include exchanging information with overseas FIUs and comparable bodies. The FIU became a member of the Egmont Group of FIUs in July 2005 and was appointed regional representative of Africa on the Egmont Committee for 2003–2005[1] . All technical staff of the FIU are trained in the AML/CFT framework of Mauritius, security awareness and the protection of information. Key members of staff are given specialised training overseas on the global AML/CFT regime.

Matters in which the FIU establishes a *prima facie* case are referred for investigation and prosecution to the Independent Commission against Corruption (ICAC), which has extensive powers of investigation and enforcement in the AML/CFT field. It can investigate any matter concerning the laundering of money or suspicious transactions referred to it by the FIU, institute criminal proceedings and can collaborate with international enforcement agencies. It has powers of arrest, search and seizure. FIU and ICAC share a common objective, although there is a clear distinction in their respective roles.

Legislative features of FIAMLA: The new Act criminalises money laundering and imposes high criminal sanctions for money laundering offences. It has a net of 'predicate' offences that include any crime (in the widest sense) with provisions that permit conviction for both the money laundering offence and the predicate offence. Under the Act, the offence of money laundering may still be established in the absence of conviction for a predicate offence. The Act requires all financial firms to have an internal framework for coping with AML/CFT risks. Banks and other financial institutions must, under threat of severe fines and imprisonment of key managers, put into place the measures necessary to ensure procedural and substantive AML/CFT compliance. They are expected to have internal controls, other AML/CFT measures including programmes for assessing AML /CFT risk and enhanced due diligence

measures, with respect to their dealings with high-risk entities and with legal persons in jurisdictions that do not have adequate AML/CFT systems. The critical obligations of banks and financial institutions are: verification of identity of all customers and other persons with whom they conduct transactions; verification and keeping of identity records, transaction records and staff training records; appointment of a money laundering reporting officer; reporting of suspicious transactions to the FIU; training of employees; and documentation of the compliance procedures. Together these are known as know your customer (KYC) and due diligence (DD) requirements. The FSC and BoM have issued additional guidelines on the AML/CFT preventive measures that their respective licensees must put into place. These supervisory bodies conduct regular on-site compliance visits to their respective licensees to ensure that they are complying with their AML/CFT obligations.

Adapting to new international standards

A detailed assessment of the AML/CFT regime in Mauritius was conducted by a joint IMF/World Bank mission in late 2002 under the Financial Sector Assessment Program (FSAP). An Anti-Money Laundering (Miscellaneous Provisions) Act was passed in 2003 to remedy weaknesses identified by that mission to bolster the AML/CFT regime. The 2003 Act amended the FIAMLA of 2002, the Banking Act of 1988 and the FSD Act of 2001 to allow the disclosure of information to the FIU and eliminate impediments to the transmission of information by supervisory authorities to the FIU. Additionally, the Act widened the supervisory mandate of the FSC and BoM, making them responsible for ensuring that their respective licensees complied fully with AML/CFT preventive measures. It formalised officially the status of the National Committee for AML & CFT, which had previously been operating on an informal basis to ensure co-ordination between intelligence gathering, investigation, law enforcement and policy-making. In the later half of 2003, two other pieces of legislation were enacted: (a) the Mutual Assistance in Criminal and Related Matters Act, which provides for mutual legal assistance between Mauritius and a foreign state or an international criminal tribunal in relation to serious offences; and (b) the Convention for the Suppression of the Financing of Terrorism Act which ratified the same UN International Convention.

Based on the recommendations of the IMF/WB mission, Mauritian legislation was further enhanced by enactment of: (a) The Bank of Mauritius Act of 2004; (b) the Banking Act of 2004; (c) the Insurance Act of 2005; and (d) the Securities Act of 2005. These enactments embrace international standards set up by the BCBS, IAIS and IOSCO. Mauritius has signed, ratified and implemented UN Conventions against (a) Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 i.e. the Vienna Convention; and (b) Transnational Organised Crime 2000 (the Palermo Convention).

The Financial Services Commission

As an international financial centre (IFC), Mauritius is perceived (in generic rather than specific terms, substantiated by a proper AML/CFT risk assessment) as facing

major money laundering and terrorist financing risks. One of the functions of the Financial Services Commission (FSC) is to take measures to suppress illegal, dishonourable and improper practices, market abuse and financial fraud in relation to any activity in the financial services sector. Money laundering and terrorist financing have been identified as crimes that can affect adversely the soundness and stability of the financial system and damage the reputation of Mauritius.

In exercising its licensing authority, the FSC seeks to be satisfied that applicants for global business company (GBC) and management company (MC) licenses are 'fit and proper' persons. Its guide to meeting the 'fit and proper person test' is extremely comprehensive. It has been designed to deter the abuse of Mauritius and its financial markets and also to deter dishonest, incompetent, unskilled or otherwise inappropriate operators in Mauritius. In processing applications for GBCs, the FSC works on the assumption that the MC (as a licensee of the FSC) has fulfilled pre-licensing customer due diligence requirements and that requisite information on the beneficial owners and promoters of their clients are in the possession of all MCs.

The FSC has introduced a compliance testing regime that involves on- and off-site inspection of all MC licensees, to ensure compliance with licence conditions and with AML/CFT obligations. In cases of non-compliance, the FSC is empowered to apply a variety of graduated sanctions including revocation of the licence. It can make inquiries into the business of licensees when the FSC receives a complaint or where it has reasonable suspicion that a licensee has or may carry out any activity that prejudices the integrity, soundness and stability of the financial system or damages the reputation of Mauritius.

In line with international trends, the enforcement powers of the FSC have been enhanced to give it 'sharper teeth'. It can now impose a range of disciplinary sanctions apart from license revocation. Under new powers, the FSC can impose administrative fines on any person licensed by it and to any person who is a present or past director, manager, partner or shareholder or controller of a licensee. Appropriate mechanisms for the protection of human rights and rights of appeal have been incorporated as well. All administrative fines collected by the FSC are to be paid into a Financial Services Fund, which will be used partly to promote the education of consumers of financial services and partly to fund a compensation scheme for those who have, upon appeal, been found to be wrongly treated.

New powers of the Bank of Mauritius (BoM)

A new Banking Act was passed in 2004 implementing recent international developments in the prudential supervision of banks. Apart from adhering to international standards set out by BCBS in its 25 Core Principles for Effective Banking Supervision[2], and evolving towards risk-based regulation and supervision of banking institutions, the BoM is also responsible for monitoring AML/CFT compliance by banks. Its AML Guidance Notes were updated in 2003 to meet the requirements of the FIAMLA and new FATF recommendations. The on-site inspection programme of the Bank of Mauritius

includes monitoring compliance with AML/CFT requirements. Any weaknesses in a bank's AML internal system is identified and the bank is required to take remedial action within a specific time frame.

The BoM has also acquired new powers of regulation and supervision under the 2004 Act. It is entitled to impose fines, among the other sanctions, for dealing with breaches of banking rules and regulations. Its role in the protection of consumers of banking services has been enhanced and an Ombudsman for banking services has been provided for. The BoM's powers to exchange information with other banking supervisors were also clarified under the 2004 Act. It has always participated actively in central bank fora at global and regional levels and is a member of the Offshore Group of Banking Supervisors (OGBS). The new legislation builds clear gateways for exchange of information with local institutions (such as the FSC and FIU) engaged in financial supervision and with an AML/CFT mandate, as well as with foreign supervisors. To eliminate ring-fencing between onshore and offshore banking activities, the BoM's licensing procedures have been streamlined and a single licence is issued to banks with no distinction between domestic and offshore business except in their accounting presentation of foreign transactions.

The AML National Committee

The National Committee for Anti-Money Laundering and Combating Terrorist Financing was set up in the wake of the IMF/World Bank mission report, which recommended the setting up of a task force to map out the workflow plan and to prepare written procedures and guidelines for investigating and prosecuting money laundering and terrorist financing. The National Committee ensures co-ordination in law enforcement efforts and policy-making. It formulates the national strategy and advises government on policy and legislative actions. With the assistance of the FIRST Initiative, the National Committee engaged the services of a US consultant to prepare a money laundering investigation and prosecution handbook to assist those involved in investigating and prosecuting money laundering and terrorist financing.

Notes

1. See Egmont Group website: http://www.egmontgroup.org/ [accessed 15 February 2008].
2. BIS (2001). Available at: http://www.bis.org/pub/bcbs30a.pdf [accessed 15 February 2008].