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Briefing paper on Emerging Capital Partners case and review of European law on money laundering

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Introduction on ECP and EU money laundering review

The EU recognised the damage that massive flows of dirty money can do to the reputation and stability of its financial system and, in 1991 introduced its first anti-money laundering directive aimed at preventing the financial system from being used for money laundering.¹ However, money laundering is a highly rewarding criminal enterprise with very low risks, because the cross-border element makes it a difficult crime to investigate and prosecute. Consequently money launderers are constantly looking to subvert the financial system in order to continue engaging in this highly lucrative criminal enterprise. The EU has therefore had to keep upgrading its anti-money laundering directive in its efforts to stem the flow of illicit capital into the financial system. The last revision took place in 2005 when the EU introduced its third anti-money laundering directive known as Directive 2005/60/EC.² Unsurprisingly, the EU is presently considering proposals for a further upgrade with the introduction of a fourth anti-money laundering directive (“AMLD”).

By way of a brief background, in its early days the EU anti-money laundering efforts were initially focused on tackling the laundering of money derived from organised crime and in particular drug trafficking, and as such the provisions applied only to credit and financial institutions. This was because the EU recognised that tackling money laundering was one of the most effective ways of opposing this form of criminal activity, which constituted a particular threat to EU societies. The second AMLD³ widened the focus to include all proceeds of organised crime, fraud and corruption and a wider range of obliged entities. This was because the tightening of

¹ . First EU anti money laundering directive 91/308/EEC available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1991:166:0077:0082:EN:PDF>

² . Commission Directive 2005/60/EC available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:EN:PDF>

controls in the financial sector had led money launderers to using non-financial businesses as alternative methods for concealing the origin of the proceeds of crime. The entities obliged to apply the AMLD were therefore increased to include those such as real estate agents, accountants, legal professionals and art dealers.

The use of non-financial businesses is also one of the preferred ways in which corrupt politically exposed persons (“PEPs”) in the developing world like Africa launder their illicitly acquired wealth. This invariably involves state assets that had been illicitly acquired through front persons being laundered through a series of transactions involving offshore shell companies, before being returned as the legitimate assets of the corrupt PEP. This type of criminal activity posed a particular threat to societies in the developing world.

However, there is evidence to suggest that the EU is more focused on implementing anti-money laundering provisions that target criminal activities such as organised crime and drug trafficking that are considered a particular threat to EU societies and less focused on implementing anti-money laundering provisions that target those criminal activities such as the laundering of illicitly acquired state assets that are considered a particular threat to the societies in the developing world and perceived to be a benefit to the developed world into which such illicit capital flows. This is because the flow of illicitly acquired capital out of the developing world and into the developed world has continued to increase despite the EU anti-money laundering efforts.⁴

This paper sets out to review some of the key proposals being considered for the fourth AMLD against lessons learned from a specific money laundering case originating from Nigeria and involving European countries. There are concerns that money laundering through non-financial businesses may now be a preferred route for transferring illicitly acquired wealth out of the developing world and into the developed world. The evidence in this paper may also offer an insight into why this is the case.

The EU’s commitment towards preventing its financial system from being used for the laundering of capital illicitly acquired from the developing world, has been seriously thrown into question by a case of the gamekeeper turning poacher. In this particular case, the European Investment Bank (“EIB”) and several EU development finance institutions (“EDFIs”) have shown an irresponsible attitude and arguably

³ . Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001

⁴ . A May 2013 joint report by the African Development Bank and Global Financial Integrity, “Illicit Financial Flows and the Problem of Net Resource Transfers from Africa: 1980 – 2009” revealed an upward trend in illicit financial flows from Africa during the period between 1980 and 2009. The report is available at http://www.gfintegrity.org/storage/gfip/documents/reports/AfricaNetResources/gfi_afdb_iffs_and_the_problem_of_net_resource_transfers_from_africa_1980-2009-web.pdf

breached several EU directives, including the AMLD, in their handling of credible allegations that one of the private equity funds in which they are invested had been involved in the laundering of capital illicitly acquired in Nigeria. The fund manager had invested in several companies that had been reported to be fronts for the laundering of money said to have been illicitly acquired by a corrupt Nigerian PEP, James Ibori. The EIB and the EDFIs repeatedly denied the existence of any links between Ibori and several of their investee companies despite the overwhelming publicly available evidence provided to them and despite one of them having knowledge of the links.

However, after several years of counterfactual denials, Ibori has now been linked to the investee companies of the EDFIs and the EIB by the UK Crown Prosecution Service, in what has been described as *“one of the biggest embezzlement cases seen in Britain and a rare example of corruption in Africa's second biggest economy being punished”*.⁵ This raises the question of whether it was incompetence or insouciance that caused the EDFIs and the EIB to blindly deny the existence of the links in the face of overwhelming publicly available evidence. Independent of the actions of the EDFIs and the EIB, this case also highlights several deficiencies in existing anti-money laundering measures and the current European Commission proposals for a fourth anti-money laundering directive.

The firm at the centre of the money-laundering allegations is a US Securities and Exchange Commission (“SEC”) registered private equity firm known as Emerging Capital Partners (“ECP”). One of the funds managed by ECP is the ECP Africa Fund II which in 2006, achieved a final closing of US\$523 million with commitments from various state funded investors including US\$ 48 million from the European Investment Bank (“EIB”). Other investors included EDFIs such as: the UK’s CDC (US\$47.5 million); Swedfund, the Swedish DFI; IFU, the Danish DFI; and Proparco, the French DFI. Non-EU investors included the US Overseas Private Investment Corporation (“OPIC”) with a US\$70 million debt facility and the African Development Bank. Through the Africa Fund II, ECP invested in three Nigerian companies, Oando, Notore and Intercontinental bank⁶ which had been reported to have been used for the laundering of money said to have been obtained corruptly by the former Governor of Nigeria’s oil rich Delta State, James Ibori.

Summary of the case

Since 2009, I and several concerned NGOs, including Re: Common, Corner House and Counterbalance have brought it to the attention of the EIB and a number of the EDFIs invested in ECP Africa Fund II (namely, CDC, IFU and Swedfund) that the three

⁵ . “Nigeria's Oando falls for a second day on Ibori allegations”, 18 Sep 2013, Reuters available online at <http://uk.reuters.com/article/2013/09/18/nigeria-oando-idUKL5N0HE1EB20130918>

⁶ . See ECP website at <http://www.ecpinvestments.com/portfolio.xml?media=history&d=1048&p=1012>

Nigerian companies had been reported to be involved in Ibori's money-laundering⁷. This appeared to us to be evidence that ECP had either not conducted adequate due diligence before investing in the companies or was deliberately closing its eyes to the links to Ibori's corruption and money laundering for its own benefit. Our allegations against ECP rested primarily on an October 2007 affidavit in which the Nigerian Economic and Financial Crimes Commission ("EFCC"), Nigeria's principle anti-corruption enforcement agency, had linked the ECP investee companies to James Ibori's corruption.⁸ This affidavit was widely reported on and published in Nigeria shortly after ECP's investment in Notore and Intercontinental bank in March and June 2007 respectively, but before ECP's investment in Oando in December 2007.

The EFCC affidavit revealed amongst other matters that: 1) Ibori used a front company to acquire the assets of the privatised National Fertiliser Corporation of Nigeria ("NAFCON") and the front company was subsequently renamed Notore; 2) An Ibori associate and Notore director who was named as a co-conspirator in the UK Southwark Crown Court charges which Ibori plead guilty to and, is currently a fugitive from the law in the UK and Nigeria, was moving funds through Intercontinental bank, Oando and Notore on behalf of Ibori; 3) ECP was introduced to the Notore deal by Ibori's UK lawyer who was convicted alongside Ibori in the UK trial; 4) Copex a Mauritius management services provider that was used to move funds that had been seized by the UK authorities as proceeds of Ibori's corruption had been used by ECP to move its payment for Notore from Mauritius to Nigeria.

Our ECP allegations were also supported by other earlier media reports of a court case dating back to 2003 in which directors of Notore and Oando prior to ECP's investment in those companies, were being accused of acting illegally on behalf of Delta State during Ibori's tenure as governor.⁹

⁷ . July 2010 memorandum to the President of the EIB titled, "Concerns over alleged corruption in EIB-backed companies in Nigeria", available at www.counterbalance-eib.org/wp.../EIB-Memorandum-on-Nigeria.pdf

June 2010 memorandum to the Secretary of State for International Development titled, "Concerns over alleged corruption in CDC-backed companies in Nigeria", available at www.thecornerhouse.org.uk/sites/...org.../CDC%20Memorandum_0.pdf

⁸ . October 2007 EFCC affidavit available online at <http://www.saharareporters.com/report/how-ibori-looted-delta-state-efcc-releases-details-sworn-affidavit>

⁹ . Media reports accusing Imasekha (Notore) and Tinubu (Oando) of acting illegally on behalf of Delta State:

"Tinubu, Delta Govt, Sued Over CELTEL Shares", 22 February 2007, This Day available at <http://allafrica.com/stories/200702220146.html>

Econet Sues Founding Partner in S/Africa, 20 November 2003, This Day available at <http://news.biafranigeriaworld.com/archive/2003/nov/20/003.html>

At the time of our initial submissions to the EIB and the UK, Danish and Swedish EDFIs in 2009, Ibori was under investigation by the EFCC and the London Metropolitan Police Proceeds of Corruption Unit (“POCU”). After a protracted struggle with the Nigerian EFCC to avoid extradition to the UK, Ibori fled from Nigeria to Dubai in 2010¹⁰. However, he was extradited from Dubai to the UK in 2011¹¹ and, in 2012, pleaded guilty in a London court, to using the UK financial system to launder part of his illicitly acquired wealth.¹² In 2013, the UK commenced confiscation proceedings against Ibori and, significantly, the Crown Prosecution Service (“CPS”) argued that Ibori was a hidden beneficiary in two companies Oando and Notore.^{13,14} In the case of Oando the CPS alleged that Ibori used the founding members of the company to hide a 30% interest in the company. In the case of Notore, the allegation was that Ibori used front people to acquire the company.

In the period between 2009 and 2013, CDC, Swedfund, IFU and the EIB, on receiving our submissions, simply referred the allegations against ECP to ECP for its response. When ECP counterfactually denied the allegations (including the links between the ECP portfolio companies and James Ibori and the timing of when the EFCC affidavit was widely reported and published) the CDC and the EIB claimed they were unable to decide whether publicly available evidence trumped ECP’s counterfactual assurances. The EIB and the EDFIs continued their business relationship with ECP and in effect dismissed our allegations. In so doing the EIB and the EDFIs showed themselves relatively unconcerned about the possibility that they could be

¹⁰ . “Nigeria ex-Governor James Ibori arrested in Dubai,” 13 May 2010, BBC available at <http://news.bbc.co.uk/1/hi/world/africa/8680569.stm>

¹¹ . “Ibori Is Charged In London With Money Laundering And Fraud, Ending His Escape Plots”, 15 April 2011, Sahara Reporters news article available online at <http://www.saharareporters.com/news-page/ibori-charged-london-money-laundering-and-fraud-ending-his-escape-plots>

¹² . “Nigeria ex-Delta state governor James Ibori guilty plea”, 27 February 2012, BBC <http://www.bbc.co.uk/news/world-africa-17181056>

¹³ . “Nigerian fertiliser firm linked to jailed ex-governor”, 18 Sep 2013, Reuters available online at <http://www.reuters.com/article/2013/09/18/britain-nigeria-ibori-idUSL5N0HE2PA20130918>

¹⁴ . “Ibori Has Hidden Assets In OANDO Plc, Says London Prosecutors At Confiscation Hearing”, 17 Sep 2013, Sahara Reporters available online at <http://saharareporters.com/news-page/ibori-has-hidden-assets-oando-plc-says-london-prosecutors-confiscation-hearing>

“Ibori owns 30 per cent of Oando – Swiss Bank document reveals”, 18 Sep 2013, Premium Times available online at <http://premiumtimesng.com/news/144843-ibori-owns-30-per-cent-oando-swiss-bank-document-reveals.html>

beneficiaries of capital illicitly acquired in Nigeria through the allegedly corrupt activities of their fund manager.

After several years of repeated blind denials, the ECP and the investors in Africa Fund II have now been affirmatively linked to Ibori by the ongoing CPS asset recovery proceedings. Portions of a selection of denials by the EIB, EDFIs and ECP are provided in **Annex 1** for ease of reference. It is further astonishing that in the wake of the CPS proceedings the EIB and the EDFIs are still standing by the ECP's claims that there is no link between Ibori and their investee companies, Notore and Oando. This is despite the fact that in October 2009, CDC had had been informed of the Southwark Crown Court case (naming the fugitive Notore principal as a co-conspirator) by the London Police.¹⁵ The Police also informed CDC at a subsequent meeting in April 2010, that there was evidence linking Ibori to the ECP investee companies.¹⁶ A recent investigation by the UK's Parliamentary Ombudsman into a complaint about DFID's handling of the allegations made against ECP also notes that CDC had established that ECP's due diligence had failed to pick up these links dating back prior to the investment.¹⁷ The shocking denial of the links to Ibori by those ultimately charged with the responsibility of tackling money-laundering seriously undermines the EU commitment to stemming the inflow of illicitly acquired capital from the impoverished developing world.

Recommendations of European civil society groups on AMLD review

A review of the ECP/Ibori case underscores the need to include some of the recommendations that European civil society groups are pushing to be included in the fourth anti-money laundering directive ("AMLD"). The ECP/Ibori case also raises serious questions about the EU's commitment to preventing the inflow of illicitly acquired capital into the financial system.

¹⁵ . Page 25/26 of a November 2010 memorandum from CDC to DFID in response to the allegations

"In late October 2009, CDC and members of DFID's anti-corruption department met officers from the Metropolitan Police Proceeds of Corruption Unit (POCU) in relation to the Allegations. During that meeting CDC was made aware of a money laundering case currently proceeding at Southwark Crown Court against various associates of Ibori....."

¹⁶ . Paragraph 42 of a report by the Parliamentary Ombudsman into Mr Oloko's complaint about DFID's handling of his allegations against ECP noted that at an April 2010 meeting the Police told CDC that, "a director of one of the portfolio companies was linked to the corrupt politician".

¹⁷ . Paragraph 43 of the report by the Ombudsman noted that

"CDC say that...there is evidence of links between [them] (i.e. Ibori and a director of the DFID investee company, Notore), prior to 2007 and that therefore he could have been acting as a front man for the [politician]. This was not picked-up in the integrity checks commissioned by the Fund Manager at the time of the investment in [the portfolio company]....."

Reporting suspicions of money laundering

Article 6 of Directive 91/308/ECC, requires “obliged entities” (that is, firms and individuals covered by the Directive) to “*cooperate fully with the authorities responsible for combating money laundering by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering*”. The EIB and the EDFIs are all entities obliged to apply the EU anti money-laundering directives. However, despite acknowledging the seriousness of the allegations against a fund manager operating in Nigeria, a country known to be the leading exporter of illicit capital out of Africa,¹⁸ and despite CDC having knowledge that the ECP’s claim that its investee companies could not be linked to Ibori was false, it chose to accept the uncorroborated and counterfactual assurances of ECP and failed to refer the allegations to the competent authorities responsible for investigating financial crimes including money laundering. EIB, Swedfund and IFU similarly failed to report the ECP allegations.

The CDC claims to have “*alerted the Metropolitan Police and investigators at the Serious Fraud Office*”¹⁹ about the ECP allegations. But CDC has been unable to provide a copy of the referral note. Moreover, we strongly dispute CDC’s claim that it reported the allegations because the Corner House and I were the ones who first alerted the London Metropolitan Police (“Met”) and the Serious Fraud Office (SFO). Based on our dealings with the CDC, the CDC has at all material times attempted to represent our allegations that ECP was directly involved in Ibori’s money laundering as allegations that Ibori can be linked to the ECP investee companies. This would appear to us to have had the effect of shielding ECP from investigation by a law enforcement agency rather than reporting ECP itself to a law enforcement agency on the basis of the allegations that had been made expressly against ECP.

The EIB similarly claimed to have reported the allegations concerning ECP to the European Fraud Office (“OLAF”) but has declined to provide a copy of the referral note.²⁰ Again this was a misleading claim: after failing to get a substantive response

¹⁸ . A May 2013 joint report by the African Development Bank and Global Financial Integrity, “Illicit Financial Flows and the Problem of Net Resource Transfers from Africa: 1980 – 2009” revealed an upward trend in illicit financial flows from Africa during the period between 1980 and 2009. The report is available at http://www.gfintegrity.org/storage/gfip/documents/reports/AfricaNetResources/gfi_afdb_iffs_and_the_problem_of_net_resource_transfers_from_africa_1980-2009-web.pdf

¹⁹ . “CDC is linked to Ibori fraud scandal” 16 April 2012, FT, available at <http://www.ft.com/cms/s/0/1814303c-87d4-11e1-b1ea-00144feab49a.html#axzz28eM5flxc>

²⁰ . In a letter dated 11th October 2012, the EIB advised Dr Caroline Lucas MP that, “EIB discussed with OLAF on a number of occasions Mr Oloko’s concerns relating to the ECP funds during 2009 and 2010 and a formal note was sent to OLAF on 30 August 2010”.

When Dr Lucas asked for a copy of the note, the EIB advised on 27th November 2012, that, “As we are not at liberty to share such note due to its confidential nature and because it

from the EIB, I made contact with Counterbalance through the Corner House and as a result of the efforts of Counterbalance, an initial meeting with OLAF and the EIB took place in London in March 2011. At that meeting attended by myself, Counterbalance and our legal representative, the EIB opened discussions by informing us that they had been unable to prove or disprove the allegations as the ECP had denied them and that they had come to London as a courtesy to inform us that the case was closed pending any substantive new information. However, after we made our submissions, the OLAF representative overruled the EIB representative and advised us that this was a matter that the OLAF needed to consider. This suggests that the nature of the discussions that the EIB had been having with OLAF prior to our meeting did not include ECP's alleged involvement in wrongdoing. It is significant that following preliminary enquiries after our London meeting, OLAF subsequently opened a formal investigation into our allegations against ECP in June 2011, on the basis of the same evidence that the EIB had deemed inconclusive.

For its part, Swedfund informed me that my allegations against ECP were forwarded to ECP for its response, *"after a decision by the shareholders to act upon and respond to your queries jointly via our Fund Manager"*.²¹ The evidence therefore suggests that none of the EDFIs to which the allegations that ECP was complicit in Ibori's money laundering were made reported them to any competent authority as required by the directive.

The failure to report goes beyond the individual EDFIs. In both the UK and Sweden, the government departments with oversight responsibilities also failed to refer the ECP allegations to the prosecutorial authorities. The UK Department for International Development ("DFID"), which is the sole shareholder of CDC and a shareholder in the EIB and the African Development Bank, was the first government department to receive my allegations against ECP. In concert with CDC, DFID has publicly claimed that it reported the allegations to the London Metropolitan Police and the Serious Fraud Office but has been unable to provide any evidence to support this claim, which we strongly dispute. As stated earlier we were the ones who reported the matter to the Police and the SFO after the report had been provided to DFID, not the other way around. In response to a freedom of information request by the Corner House for copies of the correspondence that DFID used to report the ECP allegations to the Met and the SFO, DFID replied that it did not hold such information.²²

pertains to an on-going investigation, we would kindly invite you to address any questions you might have concerning such information directly to Mr Giovanni Kessler, the Director General of OLAF".

²¹ . 16 August 2011 letter from Swedfund to Dotun Oloko

²² . 19th September 2012, Freedom of Information disclosure from DFID to the Corner House

The other member state government department that was informed of the ECP allegations and failed to report the matter to the competent authority was the Swedish Ministry of Foreign Affairs. For its part the Swedish Ministry of Foreign Affairs made the astonishing declaration in a letter to me dated 8 August 2012 that, *"The Swedish Government has no obligation to refer the case to a Swedish Prosecutor"*. I subsequently reported the matter to the Swedish Prosecutor but there has been no response.

The failure of the EIB, the three EDFIs and the Swedish and UK governments to report the ECP allegations is a clear indication of a poor commitment by member states and EU institutions to preventing the EU financial system from being used for the purposes of laundering capital illicitly acquired as a result of grand corruption in the developing world. It would appear that some EU member states are prepared to breach EU directives and flout their own national laws implementing those directives in order to receive capital illicitly acquired in the developing world.

In conclusion, there are certain aspects of the duty to report suspicions of money laundering that the fourth AMLD should clarify: namely whether government departments (not just "obliged entities") are required to report suspicions of money laundering and what form a report of suspicions or allegations of money laundering should take.

Effective supervision of financial institutions backed up with appropriate sanctions

One of the issues addressed in the EC proposals for the fourth AMLD was the subject of supervision and sanctions. It has been proposed that Member States should *"ensure that obliged entities can be held liable for breaches of the national provisions adopted pursuant to this Directive"*. However, as evidenced by the preceding paragraphs, reports of suspicions about financial crime can be made to beneficial owners of obliged entities particularly when those owners are Member states. Consequently there is a need to ensure that beneficial owners of obliged entities, in addition to the obliged entities themselves, can be held liable for breaches of the national provisions pursuant to the AMLD. The ECP/Ibori case has highlighted the fact that for the supervision and sanction principle to work it is critical that no-one be deemed to be above the law and as such entities obliged to apply the directive and their beneficial owners should feel the threat of credible deterrence from AML supervisory authorities.

The third AMLD charges competent authorities with the responsibility of ensuring compliance and grants these authorities *"enhanced supervisory powers, notably the possibility to conduct on-site inspections"*. In the case of financial institutions, the competent authority is the national financial regulatory authority. It is therefore a matter of concern that the ECP which is a financial institution as defined by the AMLD, has an office in Paris and is making multi-million dollar investments with EU

funds but is not registered with any financial regulatory authority in the EU.²³ Consequently there is no “*competent authority*” in the EU that has “*supervisory powers*” over ECP. This is not an isolated example. Other fund manager are investing EU funds without any competent EU authority having supervisory powers over the fund manager.²⁴

As highlighted in fuller detail in a later section, our experience of the Ibori-ECP case is that co-operation between national financial regulatory authorities has so far proved ineffective in bringing about proper investigations of the serious allegations that have been made against these two firms.

In the case of ECP, only the US authorities have supervisory power. But cooperation among supervisory authorities from different countries has so far proved ineffective. This is an outstanding problem that should be seriously addressed in the AMLD review as well.

Indeed in the case of ECP, when we approached various EU criminal investigation agencies and financial regulatory authorities we were informed by the latter that they were unable to act as the ECP was not registered with them while the former informed us that they were unable to act unless the ECP’s clients reported the matter to them directly, which as noted earlier they failed to do. It is therefore self-evident that there is a loophole which allows investment firms to locate within the EU and invest EU funds while being outside the jurisdiction of the AMLD.

It is the ultimate irony that EU individuals, civil society and non-governmental organisations that are committed to contributing to the efforts to prevent the financial system from being abused for the purpose of money laundering and had information about possible wrongdoing on the part of a financial institution in the EU which was investing EU funds could not find a “*competent authority*” that had jurisdiction over the investment firm in the EU. The OLAF informed us that their jurisdiction was limited to the EIB. The UK FSA informed us that their jurisdiction did

²³ . In the Form ADV that ECP is required to file annually with the SEC in the US, the firm has repeatedly stated that it is not registered with any foreign financial regulatory authority.

²⁴ . The South African registered fund manager Ethos has also invested in companies alleged to have been involved in Ibori’s money-laundering. Ethos Fund V had invested in an Ibori linked bank, Oceanic Bank, which subsequently became distressed under the weight of illegal loans and had to be rescued by the Central Bank of Nigeria. In its response to the allegations, Ethos claimed that its due diligence investigation prior to investing in Oceanic Bank which was conducted in March and April 2007 found that Delta State was a 5% shareholder in Oceanic bank. However, it has been publicly reported that in January 2007, Delta State pledged 820,000,000 (7.04%) shares in Oceanic bank as collateral for Henry Imasekha. Paragraph 7.2 of Ethos memorandum to CDC dated 15 November 2010 states that “*Ethos was as a result of its due diligence, aware that Delta State was a 5% shareholder in Oceanic bank.*” However, the Nigerian media reported the Delta state pledge in 2009. See, “*Ibori’s govt used shares as collateral for private loan to buy Wilbros*” 9 September 2009, Punch newspaper available on line at <http://saharareporters.com/news-page/ibori-%E2%80%99s-govt-used-shares-collateral-private-loan-buy-wilbros-punch>

not extend to ECP, but conducted a two-day visit to the CDC. The SFO informed us that they lacked jurisdiction unless the CDC reported the matter to them directly and as the CDC did not do so they could not act. The Swedish Prosecutor did not respond.

The obvious recommendation is that investment firms with offices in any EU state and/or making investments on behalf of EU member states and multilateral financial institutions should be registered with an EU financial regulatory authority in order to ensure that they are in compliance with the AMLD and subject to supervision and sanction.

Minimum sanctions for non-compliance by Obligated Institutions

Article 56 of the EC proposal puts forward minimum sanctions that can be applied in *“situations where obliged entities demonstrate systematic failings in relation to”* specified requirements of the AMLD including: customer due diligence; suspicious transaction reporting; record keeping; and internal controls. It is a matter of concern that the EIB and the EDFIs breached several provisions of the AMLD with regard to the four areas listed above.

On the matter of customer due diligence, article 8 of the third AMLD imposed a duty on obliged entities to conduct ongoing monitoring and verification. However, in response to our allegations against ECP, the EIB and CDC constantly referred without any supporting evidence to the due diligence that was done at the time that they invested in the ECP Africa Fund II and at the time that the ECP Africa Fund II made its investment in the Nigerian companies, and claimed they were unable to prove or disprove the allegations. However, under the AMLD they had a duty to conduct their own investigation rather than accept the uncorroborated and counterfactual assurances of the ECP. For instance the simplest internet searches, or enquiries to the EU or national delegations in Nigeria, would have verified the time that the EFCC affidavit was publicly reported and exposed ECP's false claim in this regard.

The failure to refer suspicions of money laundering and record keeping has already been highlighted in earlier paragraphs. It is self-evident that the failure to report suspicions of money laundering, keep proper records of alleged reports of the allegations to competent authorities and conduct own due diligence investigations is tantamount to a failure of internal controls and put together constitute evidence of a systemic failure to apply the AMLD.

However, to date we are not aware that any sanctions have been applied to the EIB or any of the EDFIs despite the obvious breaches of the provisions of the AMLD. On the contrary in the only instance, in which we were able to get a regulatory authority to act, that authority professed itself satisfied with the response of the EDfI in question. This was the case with the UK's Financial Services Authority (“FSA”) with which CDC was registered. The FSA after a concerted effort on our part,

paid a two day visit to CDC in May 2012 in response to the ECP allegations, and concluded that *“they were broadly satisfied that CDC had responded appropriately and promptly, as soon as the firm became aware in March 2008, of any Ibori related allegations.”*²⁵

It is a matter of concern that the FSA reached this conclusion despite the fact that CDC

- failed to report suspicions of money laundering to the appropriate agencies while falsely claiming that it had done so
- has not provided any evidence to support its claim that it referred the allegations against ECP to a competent investigation agency including the Police and/or the Serious Fraud Office (“SFO”). It should be noted that failure to hold documentary evidence of reporting of allegations is a breach of Article 4 of Directive 91/308/EEC which requires obliged entities to keep evidence for use in any money laundering investigation.
- falsely claimed that there was no evidence to link its investee companies to James Ibori, when it knew that there was²⁶
- advised DFID on 20 February 2009, that it had carried out a quality assurance on the due diligence conducted by ECP prior to ECP’s investment in Notore, but subsequently informed DFID on 26 February 2009 that ECP was *“probably not contractually obliged to provide”* its due diligence to CDC.²⁷

It is not clear whether the FSA had noted the fraudulent misrepresentations and false claims made by CDC, but it is clear that CDC has not suffered any sanctions for

²⁵ . 18 December 2012 letter from the FSA to Dr Caroline Lucas MP

²⁶ . Paragraph 43 of the report by the Parliamentary Ombudsman into the complaint made by Mr Oloko against DFID

“CDC say that...there is evidence of links between [them] (i.e. Ibori and a director of the DFID investee company, Notore), prior to 2007 and that therefore he could have been acting as a front man for the [politician]. This was not picked-up in the integrity checks commissioned by the Fund Manager at the time of the investment in [the portfolio company] as it appears that [the director] came into the...deal at the eleventh hour and after the checks had been done. The checks were not re-done and anyway [the director] was apparently below the mandatory threshold for such checks (he was not classed as a ‘major beneficiary’ and as such was effectively ‘off the radar’.”

²⁷ . Paragraph 33 of the Ombudsman’s report, *“In the same exchange, the Global Funds and Development Finance Institutions Directorate said that CDC had said that the fund manager was, ‘probably not contractually obliged to provide this information [about their due diligence] to CDC’. The response from the Counter Fraud Unit noted that this was contrary with CDC’s claim (paragraph 30) that they conducted a quality assurance of the fund manager’s due diligence.”*

the above breaches. It is also clear that none of the other EDFIs to which we reported the allegations against ECP or the EIB have suffered any sanctions for their own breaches. Consequently the obvious recommendation is that to ensure the credibility of EU efforts to prevent its financial system, and in particular public financial institutions, from being used for money laundering, there should be a minimum level of administrative sanctions that financial regulatory authorities must apply in cases where there have been breaches of the AMLD and erring entities should be named and shamed.

As stated earlier, no-one should be above the law. We therefore support the minimum sanctions proposals contained in article 56 of the AMLD proposals. The ECP/Ibori case has highlighted the possibility that there may be instances in which those public agencies and officers charged with upholding the AMLD may fail to live up to their duties. We have made every effort to bring our allegations against ECP to competent authorities, however, we have not been told anything meaningful about why ECP is not under any investigation beyond lack of jurisdiction. ECP itself has stated in its latest filings with the Securities and Exchange Commission that it is not subject to any regulatory proceedings.²⁸ It is in the public interest that the public understand why there has been no regulatory action or criminal investigation of ECP. We therefore propose that, there should be an accountability mechanism that allows the public to compel the authorities to act when presented with credible evidence of wrongdoing by an obliged entity or advise their reasons for not acting. If those reasons are unsatisfactory, then it should be possible to take the matter to a court of competent jurisdiction for a final determination.

Beneficial ownership information

One of the areas in which the EC is proposing to strengthen the AMLD is on the subject of beneficial ownership information. This is because money-launderers tend to hide their ownership or control of corporate or legal entities. The EC proposal is for corporate or legal entities to hold information on their beneficial ownership and for member states to ensure that the information can be accessed in a timely manner by “*competent authorities and by obliged entities.*” However, many European civil society groups argue that this proposal should go further and require that the information on beneficial ownership be made publicly available. This would enable any interested party in any jurisdiction to access the information easily and quickly.

The ECP/Ibori case illustrates starkly why publicly available information on beneficial ownership would be a strong asset in reducing the extent to which the EU financial system can be used for money-laundering. One aspect of this case was that the asymmetry of information between jurisdictions was ruthlessly exploited to conceal

²⁸ . In Section 11 of the Form ADV that ECP is required to file annually with the SEC in the US, the firm has stated in its March 2013 filing that it is not the subject of any regulatory proceedings.

and confuse the beneficial ownership of Notore. Indeed it was only by being able to compare the beneficial ownership information registered in two of the affected jurisdictions namely Nigeria and Mauritius that we were able to establish the significant inconsistencies between the records in the two jurisdictions that provided evidence to suggest wrongdoing on the part of ECP.

The offshore tax haven of Mauritius was introduced into the Notore deal by ECP who by their own admission insisted on the formation of the parent offshore shell company, Notore Mauritius, through which ECP and the Nigerian shareholder group held their shares in Notore Nigeria. ECP's claim was that this arrangement offered ECP "*better minority shareholder protection rights*"²⁹ to those that existed in Nigeria.

In this particular instance the members of the Nigerian shareholder group that were represented as the beneficial owners in Notore Nigeria were conflictingly represented as nominee shareholders in the Mauritius parent company.

It should be noted that the United Nations Convention Against Corruption ("UNCAC") recognised that the prevention and eradication of corruption was a responsibility of all States which required cooperation between States and the "*support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective.*"

Making beneficial ownership records publicly available would provide a valuable opportunity for civil society groups and members of the general public to contribute to the anti-corruption battle and increase the chances of detecting wrongdoing. The public access can prove particularly valuable in cases such as the ECP/Ibori case where the competent authorities appeared unwilling and/or unable to act on information related to ECP's alleged involvement in Ibori's money-laundering.

²⁹ . November 3 2010 letter from ECP to CDC in response to the allegations made by the Corner House and other concerned NGOs to the UK Secretary State for International Development

"ECP invested in the Mauritius entity primarily due to better minority shareholder protection rights that exist in Mauritius as compared to Nigeria, and better vehicles to enforce those rights".

January 22 2010 email from Thomas Gibian, the then CEO of ECP in response to a request for the beneficial ownership information of Notore from Dotun Oloko

"As shown below, please note that Okoloko, Imasekha, Osime, and Herb all own shares through Notore Mauritius, which was established at the time of the Fund's investment based on ECP's insistence on being accorded stronger minority shareholder rights which are available under Mauritius law as compared to Nigerian law."

Identification of beneficial owner

The EC proposal for the fourth AMLD also touches on the subject of the identification of a beneficial owner and opted to keep the current approach which defines a beneficial owner as someone who directly or indirectly owns 25% or more of a company. However, members of the European civil society have argued that a 25% threshold or any threshold for that matter is specious and does not represent the reality of money-laundering. This is because it is possible to exert control over a corporate or legal entity irrespective of the shareholding of those claiming to be the beneficiaries. This was the scenario in the ECP/Ibori case where the UK Crown Prosecution Service has argued that Ibori used front persons to acquire his interests in Oando and Notore and must therefore have exercised control over them by other means.

Introducing a threshold into the concept of beneficial ownership is a red herring which distracts from what the current directive has recognised is the need to establish whether there are grounds for suspecting that someone other than the stated shareholder can reasonably be held to be exerting influence or control over a company. Instead of identifying beneficial owners by an abstract threshold, there should be a duty on those covered by the EU anti-money laundering laws to adopt a risk-based approach to understanding their clients. This should include looking at the profile of the shareholders and the structure of the particular company. In the case of Notore, there were strong grounds for suspecting that all of the listed founding shareholders were “fronts”. This was because none of them had actually paid a dime for their shares in Notore and the NAFCON assets were acquired with 100% unsecured bank loans. The front company did not have any history of a previous relationship with the banks that granted the 100% unsecured loans. Consequently there were strong grounds for suspecting that there was a hidden entity behind the acquisition of the company and it is the position of the Nigerian EFCC and the UK CPS that the person is James Ibori. The two banks that had provided the 100% unsecured capital to acquire Notore were Delta state owned or controlled banks during Ibori’s tenure as governor.

Ironically what the threshold concept does is to provide money launderers with a ruse for avoiding detection by representing that there are no beneficial owners above the threshold limit in their companies and thereby absolve themselves of the duty to conduct anti-money laundering checks on those shareholders below the threshold in circumstances where further scrutiny could reasonably be expected to uncover red flags. Indeed the dangers of adopting a threshold approach are evident in the ECP/Ibori case. CDC has acknowledged that ECP’s due diligence report prior to investment in Notore failed to note that Imasekha was a close associate of James Ibori. But CDC appears to have accepted an explanation that this was because Imasekha came late into the deal and the due diligence was not re-done because Imasekha, whom the CDC knew had been named as a co-conspirator in Ibori’s UK Southwark Court trial, “*was apparently below the*

mandatory threshold for such checks (he was not classed as a 'major beneficiary' and as such was effectively 'off the radar')." ³⁰

Entities that are obliged to apply the EU anti-money laundering directive

The EC proposal also extends the range of entities that are obliged to apply the EU anti-money laundering directive. However, European civil society groups have noted that there are significant loopholes which could mean that a multilateral investment bank like the EIB, which is obliged to apply the AMLD, may be able to claim exemption from applying the AMLD with regard to activities conducted on an occasional or very limited basis such that the risk of money-laundering is minimal. If that is the case, this argument is comprehensively undermined by the ECP/Ibori case which suggests that those that would seek to engage in money laundering may seek protection from prosecution by monetarising their stolen wealth through vehicles backed by the very countries that are charged with implementing the anti-money laundering laws.

Furthermore, the EIB and the EDFs are charged with the responsibility of operating in developing countries where private financiers are less willing to invest because of the high risk of grand corruption and weak social and legal infrastructures. Consequently the EIB and the EDFs are more susceptible to the high risk of involvement in the laundering of capital illicitly acquired as a result of grand corruption and should therefore be subject to the AMLD to protect themselves from being used for money laundering, regardless of the level of their involvement in an investment.

High level multilateral financial institutions like the EIB should not be able to claim any exemptions from any aspects of the AMLD because of their high risk of being used as cover for money-laundering activities by other financial services providers and the reputational damage that can result from being linked (for instance) to *"one of the biggest embezzlement cases seen in Britain"* or similar cases.

³⁰ . Paragraph 43 of the report by the Ombudsman into the complaint made by Mr Oloko against DFID

"CDC say that...there is evidence of links between [them] (i.e. Ibori and a director of the DFID investee company, Notore), prior to 2007 and that therefore he could have been acting as a front man for the [politician]. This was not picked-up in the integrity checks commissioned by the Fund Manager at the time of the investment in [the portfolio company] as it appears that [the director] came into the...deal at the eleventh hour and after the checks had been done. The checks were not re-done and anyway [the director] was apparently below the mandatory threshold for such checks (he was not classed as a 'major beneficiary' and as such was effectively 'off the radar')."

Information sharing within multinational financial institutions, and between governments

It is universally recognised that money laundering is a transnational financial crime, which therefore requires cooperation between States parties to tackle. In addressing this aspect the EC proposal appears to have focused on strengthening the cooperation between financial intelligence units (FIUs). It is unclear as to why the focus has been restricted to FIUs when the evidence of the ECP/Ibori case is that information about financial crime can come from those outside the financial industry including government agencies. Consequently, there needs to be increased information sharing between the competent authorities, including the financial regulatory agencies or any other government agencies within and between national boundaries. Widening the range of institutions that are obliged to harvest and share information would self-evidently increase the cooperation between State parties and strengthen the efforts to tackle the abuse of the financial system for money-laundering.

As mentioned briefly in an earlier section, our experience from the ECP/Ibori case is that the competent authorities do not feel obligated to share information and indeed we had to push for our allegations against ECP to be referred to competent authorities in other jurisdictions. In the course of deciding what to do with my ECP allegations, the UK's DFID made preliminary enquiries with the Police (it would appear that this was with regard to the links between Ibori and some of the directors of the investee companies but not on the matter of ECP's own involvement in Ibori's money-laundering crimes) in February 2009 and was informed that *"they had evidence that three of the people Mr Oloko alleged to be linked to the politician could be linked to him from 2001"*³¹.

If the information provided by the UK Police to the DFID had been shared with others in the EU or if the other EDFIs had made their own enquiries with the London Police who they had been informed was investigating Ibori for laundering his money through the UK, then they would have known that the ECP's denials of any links to Ibori were false.

There is also a concern that the only credible explanation for the UK's FSA professing itself satisfied with CDC's response is that they are not aware of the evidence held by the UK Police (and put forward in the UK asset recovery case) which exposes the false denial of links to Ibori that the CDC was proclaiming at the time of the FSA visit.

It would also appear that the Swedish Prosecutor has not seen fit to contact the UK Police on this matter.

³¹ . Paragraph 31 of Parliamentary Ombudsman's report into complaint made by Mr Oloko against DFID

EC proposals on information sharing should therefore be strengthened to include measures to encourage the co-operation within and between a wider range of competent national authorities. It should also be compulsory for national authorities to refer cases that they become aware of but consider to be outside their jurisdiction to the competent authorities in the relevant jurisdictions. This would help to prevent case like the ECP/Ibori case where poor information sharing within the EU has allowed ECP to make fraudulent representations in order to conceal evidence of possible involvement in Ibori's money-laundering.

Risk-based approach

The EC proposals also recognise the need to apply a more risk-based approach to tackling financial crime and money laundering. The general thrust is to identify those cases where the risk is higher and focus more attention on them. This is a welcome departure from the "tick-box" approach, which required all cases to be treated in exactly the same manner. Nonetheless, EU member states that were invested alongside the EIB in the ECP Africa Fund II repeatedly stated (without any supporting evidence) that they were satisfied with the due diligence conducted in a period prior to the introduction of a risk based approach when there was evidence to suggest that the due diligence was minimal at best and obviously inadequate especially given that it missed the reported links to Ibori. Given that the Financial Action Task Force (FATF) had identified Nigeria as having "strategic deficiencies" in money laundering and anti-corruption measures and as a country where extra vigilance needs to be applied when doing business,³² the public had a right to expect the EIB and the EU member states to recognise that Nigeria was a high risk country and insist on proving or disproving the ECP allegations rather than proceeding with business as usual with ECP and run the risk of the allegations being proven at a later stage.

When customer due diligence should be carried out

On the subject of customer due diligence, the EC proposal introduced a requirement for "Member States to ensure that enhanced due diligence must be conducted in certain situations of high risk, while allowing them to permit simplified due diligence in lower risk situations". This is to be welcomed. The EIB and the EDFIs are all entities obliged to apply the AMLD and as earlier advised Article 8 of the third AMLD requires obliged entities to "conduct ongoing monitoring of the business relationship" during the lifetime of that relationship. However, in response to the allegations made against their fund manager, the EIB and the EDFIs repeatedly asserted without providing any supporting evidence that they were satisfied that the due diligence carried out by ECP prior to its investment in Notore and Oando

³² . "High Risk and non-cooperative jurisdictions" 16 February 2012, FATF Public statement available at <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/fatfpublicstatement-16february2012.html>

was in keeping with the standards that were in place at the time. This would therefore suggest these obliged entities are of the opinion that customer due diligence is only required to be carried out at the point of establishing a business relationship.

However, regardless of the quality of the due diligence conducted by ECP at the time of its investment in Notore in 2007 and the standards applicable at that time, at least one EDFI, the UK CDC, had knowledge that this due diligence had failed to pick up evidence of links between the company and Ibori. Consequently when in 2010, ECP again declared that it had reviewed the due diligence that it had carried out prior to investment and made further enquiries which established that Ibori could not be linked to any of its investee companies, this should have raised significant red flags with CDC and CDC should have under the AMLD conducted its own due diligence investigation into ECP. It is therefore astonishing to note that CDC not only failed to conduct its own independent due diligence investigation but continued to insist that there were no links to Ibori on the basis of ECP 's due diligence (which, to recall, CDC claimed to have quality assured despite, it would appear, not having access to the relevant documentation).

Conclusion

The evidence of the ECP/Ibori case would appear to suggest that obliged entities and government departments are not fully aware of the provisions of the AMLD. We therefore support the provisions in the fourth AMLD for the introduction of a compliance officer. However, we believe the recommendations should go further and make it clear that government departments handling development funds are also obliged to apply the AMLD and in particular the requirement to report suspicions of money laundering.

We would also recommend that in order to ensure that no-one is above the law there should be a minimum level of sanctions that should automatically be triggered for breaches of the AMLD. Furthermore a list of those sanctioned and the applicable sanction should be published periodically and fuller details should be available on request. It is a matter of concern that when EU member states, government departments and obliged institutions making investments on their behalf became implicated in money laundering there was collective failure to take responsibility for a full and proper investigation. Indeed, the CDC and its sole shareholder, the UK DfID, both falsely represented that they had seen no concrete evidence of the links between Ibori and the ECP investee companies, when the police had alerted them to such links. The fourth AMLD should contain provisions to prevent this type of situation from recurring in the future. In this regard it should be possible for those who have reported suspicions of money laundering to competent authorities to be provided on request to the authorities with their reasons for failing

to act on the report. In the event that those reasons are disputed then it should be possible to refer the matter to a court of competent jurisdiction for determination.

Furthermore all beneficiaries of EU funds and public investments that are obliged to apply anti-money laundering legislation in their home country should be registered with an EU financial regulatory authority to ensure that their adherence to the AMLD can be properly supervised. In addition, steps should be taken to strengthen the quality of the supervision by member states, the rigour of which has been called into question by the failure of the UK's Financial Services Authority (FSA) to establish that CDC had been making what appear, on the basis of the evidence in the UK Parliamentary Ombudsman's report, to be fraudulent misrepresentations and false statements in respect of its quality assurance of ECP's due diligence.

Apart from the loopholes in the AMLD highlighted in this paper, the ECP/Ibory case has also highlighted the possibility that Member states, competent authorities and obliged entities are not fully committed to preventing the inflow of capital illicitly acquired from the developing world through the use of non-financial businesses. In this regard, it is a matter of extreme concern that in the wake of the successful trial and prosecution of Ibory in London, the UK DFID that had funded the Police investigation estimated that Ibory had embezzled some US\$250 million³³. However, by comparison Oando is a multi-billion dollar company and as such the 30% which the CPS have alleged Ibory corruptly acquired is significantly greater than the sum of all the cash and assets that DFID has estimated. At the time of investment, the ECP-led consortium paid US\$56,350,000 for their 39% share in Notore, effectively providing Ibory and his fronts with the opportunity to monetise the 39% that the Nigerian EFCC and the UK CPS have alleged belonged to Ibory.

In the ECP/Ibory case the amount of illicit capital being laundered through non-financial businesses significantly outstrips that laundered through banks and other conventional financial institutions. In this regard it emerges that non-conventional financial institutions, such as private equity funds directly investing in corporations, are a potential ideal vehicle for money laundering. This is of particular concern given that EIB and EDFIs tend to rely more and more on financial intermediaries in their business, and in particular private equity funds – such as in the ECP case.

The EU commitment to preventing the inflow of illicitly acquired capital from the developing world into the EU financial system can best be illustrated by the fact that at the time that the UK CPS is seeking to recover Ibory's assets in Oando and Notore, the EIB and the EDFIs are maintaining that there is no evidence to link their two investee companies to Ibory, because their fund manager who has been accused of involvement in Ibory's money-laundering has denied the links. In the wake of the ECP allegations, the Swedfund CEO declared that ECP was the best fund

³³ . *"Nigeria: Ibory jailed in fight against corruption"*, 17 April 2012, DFID available at <https://www.gov.uk/government/news/nigeria-ibory-jailed-in-fight-against-corruption>

manager operating in Africa. Such institutional culture of denial of risks associated with the use of private equity funds require urgent and bold action by European decision-makers committed to curbing money laundering in Europe and elsewhere. The proof of EU commitment in this fight is in the pudding!



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