

Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering

(2000/C 177 E/03)

COM(1999) 352 final — 1999/0152(COD)

(Submitted by the Commission on 19 July 1999)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47 (2), first and third sentences, and Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure referred to in Article 251 of the Treaty

- (1) Whereas Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (hereinafter referred to as 'the Directive' was adopted on 10 June 1991 ⁽¹⁾;
- (2) Whereas in two reports presented to the European Parliament and the Council pursuant to Article 17 of the Directive the Commission has reported on the implementation of the Directive and on progress in the fight against money laundering ⁽²⁾;
- (3) Whereas in its Reports and Resolutions in response to the Commission's two reports the European Parliament called for an updating and extension of the 1991 Directive ⁽³⁾;
- (4) Whereas the Action Plan of the High Level Group on Organised Crime endorsed by the Amsterdam European Council on 16-17 June 1997, and in particular recommendation 26, called for additional efforts to combat money laundering ⁽⁴⁾;
- (5) Whereas it is appropriate that the Directive, as one of the main international instruments in the fight against money laundering, should be updated in line with the conclusions of the Commission and the wishes

expressed by the European Parliament and the Member States; whereas in this way the Directive should not only reflect best international practice in this area but should also continue to set a high standard in protecting the financial sector and other vulnerable activities from the harmful effects of the proceeds of crime;

- (6) Whereas the GATS allows Members to adopt measures necessary to protect public morals and to adopt measures for prudential reasons, including for ensuring the stability and integrity of the financial system; whereas such measures should not impose restrictions beyond what is justified to safeguard those objectives;
- (7) Whereas the Directive does not establish clearly which Member State's authorities should receive suspicious transaction reports from branches of credit and financial institutions having their head office in another Member State nor which Member State's authorities are responsible for ensuring that such branches comply with Article 11 of the Directive;
- (8) Whereas this question has been discussed in the Money Laundering Contact Committee established by Article 13 of the Directive; whereas the authorities of the Member States in which the branch is located should receive such reports and exercise the above responsibilities;
- (9) Whereas this allocation of responsibilities should be set out clearly in the Directive by means of an amendment to the definition of 'credit institution' and 'financial institution' contained in Article 1 of the Directive;
- (10) Whereas the European Parliament has expressed concerns that the activities of currency exchange offices ('bureaux de change') and money transmitters (money remittance offices) are vulnerable to money laundering; whereas these activities should already fall within the scope of the Directive; whereas to dispel any doubt in this matter the coverage of these activities should be clearly confirmed in the Money Laundering Directive;
- (11) Whereas to ensure the fullest possible coverage of the financial sector it should also be made clear that the Directive applies to the activities of investment firms as defined in Council Directive 93/22/EEC (the Investment Services Directive) ⁽⁵⁾;

⁽¹⁾ OJ L 166, 28.6.1991, p. 77.

⁽²⁾ COM(95) 54 final and COM(1998) 401 final.

⁽³⁾ Doc. A4-0187/96 and OJ C 198, 8.7.1996, p. 245; Doc. A4-0093/99 and OJ C...

⁽⁴⁾ OJ C 251, 15.8.1997, p. 1.

⁽⁵⁾ OJ L 141, 11.6.1993, p. 27.

- (12) Whereas the Directive only obliges Member States to combat the laundering of the proceeds of drugs offences; whereas there has been a trend in recent years towards a much wider definition of money laundering based on a broader range of predicate or underlying offences, as reflected for example in the 1996 revision of the 40 Recommendations of the Financial Action Task Force (FATF), the leading international body devoted to the fight against money laundering;
- (13) Whereas a wider range of predicate offences facilitates suspicious transaction reporting and international co-operation in this area; whereas, therefore, the Directive should be brought up to date in this respect;
- (14) Whereas in the Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on money laundering, the identification, tracing, freezing, seizure and confiscation of instrumentalities and the proceeds from crime ⁽¹⁾ the Member States agreed to make all serious offences, as defined in the Joint Action, predicate offences for the purpose of their criminalisation of money laundering;
- (15) Whereas the Directive imposes obligations regarding in particular the reporting of suspicious transactions; whereas it would be more appropriate and in line with the philosophy of the Action Plan to Combat Organised Crime for the prohibition of money laundering under the Directive to be extended to cover not only drugs offences but all organised crime activities, as well as fraud, corruption and any other illegal activities affecting the financial interests of the Communities, as referred to in Article 280 of the Treaty;
- (16) Whereas, in the case of such fraud, corruption and other illegal activities, the Member States authorities responsible for combating money laundering and the Commission should cooperate with each other and exchange relevant information;
- (17) Whereas on 21 December 1998 the Council adopted a Joint Action on the basis of Article K.3 of the Treaty on European Union on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union ⁽²⁾; Whereas this Joint Action reflects the Member States' agreement on the need for a common approach in this area;
- (18) Whereas, as required by the Directive, suspicious transaction reports are being made by the financial sector, and particularly by the credit institutions, in every Member State; whereas there is evidence that the tightening of controls in the financial sector has prompted money launderers to seek alternative methods for concealing the origin of the proceeds of crime;
- (19) Whereas there is a clear trend towards the increased use by money launderers of non-financial businesses; whereas this is confirmed by the work of the FATF on money laundering techniques and typologies;
- (20) Whereas Article 12 of the 1991 Directive already provides for the extension of the obligations of the Directive to other vulnerable professions and categories of undertakings outside the financial sector;
- (21) Whereas the question of vulnerable non-financial activities has been discussed on a number of occasions in the Money Laundering Contact Committee;
- (22) Whereas the obligations of the Directive concerning customer identification, record keeping and the reporting of suspicious transactions should be extended to a limited number of activities and professions which have been shown to be vulnerable to money laundering;
- (23) Whereas notaries and independent legal professionals should be made subject to the provisions of the Directive when performing a limited number of specific financial or corporate transactions where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of drugs trafficking or organised crime;
- (24) Whereas, however, where an independent lawyer or law firm is representing a client in formal legal proceedings it would not be appropriate under the directive to put the lawyer under an obligation to report suspicions of money laundering;
- (25) Whereas the Directive makes reference to 'the authorities responsible for combating money laundering' to which reports of suspicious operations must be made; whereas in the case of independent lawyers and to take proper account of the professional duty of discretion owed by the lawyer to his client Member States should be allowed to nominate the bar association or other lawyers' professional organisation as the responsible authority; whereas the rules governing the treatment of such reports and their possible onward transmission to the police or judicial authorities and in general the appropriate forms of cooperation between the bar associations or professional bodies and the authorities responsible for combating money laundering shall be determined by the Member States;

⁽¹⁾ OJ L 333, 9.12.1998, p. 1.

⁽²⁾ OJ L 351, 29.12.1998, p.1.

(26) Whereas there is a growing trend for financial services to be ordered and provided using means (such as post, telephone, computer) which limit or avoid direct contact between the supplier and the purchaser; whereas even in such cases the rules of the Directive on customer identification must be respected; whereas the Money Laundering Contact Committee has examined such non-face to face operations and has agreed principles and procedures that should govern customer identification; whereas those principles and procedures should be incorporated in the Directive in an annex,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 91/308/EEC is hereby amended as follows

1. Article 1 shall be replaced by the following:

'Article 1

For the purpose of this Directive

A. "Credit institution" means a credit institution, as defined as in the first indent of Article 1 of Directive 77/780/EEC⁽¹⁾ and includes branches within the meaning of the third indent of that Article and located in the Community, of credit institutions having their head offices inside or outside the Community,

B. "Financial institution" means

1. an undertaking other than a credit institution whose principal activity is to carry out one or more of the operations included in numbers 2 to 12 and number 14 of the list annexed to Directive 89/646/EEC; these include the activities of currency exchange offices ("bureaux de change") and of money transmission/remittance offices,

2. an insurance company duly authorised in accordance with Directive 79/267/EEC⁽²⁾, in so far as it carries out activities covered by that Directive,

3. an investment firm as defined in Article 1 of Directive 93/22/EEC;

This definition of financial institution includes branches located in the Community of financial institutions whose head offices are inside or outside the Community,

C. "Money laundering" means the following conduct when committed intentionally:

— the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action,

— the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity,

— the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity,

— participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.

Knowledge, intent or purpose required as an element of the above-mentioned activities may be inferred from objective factual circumstances.

Money laundering shall be regarded as such even where the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country.

D. "Property" means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interests in such assets.

E. "Criminal activity" means means

— a crime specified in Article 3(1)(a) of the Vienna Convention⁽³⁾,

⁽¹⁾ OJ L 322, 17.12.1977, p. 30.

⁽²⁾ OJ L 63, 13.3.1979, p. 1.

⁽³⁾ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic substances adopted on 19 December 1988 in Vienna.

- participation in activities linked to organised crime,
- fraud, corruption or any other illegal activity damaging or likely to damage the European Communities' financial interests and
- any other criminal activity designated as such for the purposes of this Directive by each Member State.

F. "Competent authorities" means the national authorities empowered by law or regulation to supervise any of the institutions or persons subject to this Directive.'

2. The following Article 2a shall be inserted:

'Article 2a

Member States shall ensure that the obligations laid down in this Directive are imposed on the following institutions:

1. credit institutions as defined in point A of Article 1;
2. financial institutions as defined point B of Article 1;

and on the following legal or natural persons acting in the exercise of their professional activities:

3. external accountants and auditors;
4. real estate agents;
5. notaries and other independent legal professionals when assisting or representing clients in respect of the:
 - (a) buying and selling of real property or business entities
 - (b) handling of client money, securities or other assets
 - (c) opening or managing bank, savings or securities accounts
 - (d) creation, operation or management of companies, trusts or similar structures
 - (e) execution of any other financial transactions
6. dealers in high-value goods, such as precious stones or metals
7. transporters of funds
8. the operators, owners and managers of casinos.'

3. Article 3 shall be replaced by the following:

'Article 3

1. Member States shall ensure that the institutions and persons subject to this Directive require identification of their customers by means of supporting evidence when entering into business relations, particularly, in the case of the institutions, when opening an account or savings accounts, or when offering safe custody facilities.

2. The identification requirement shall also apply for any transaction with customers other than those referred to in paragraph 1, involving a sum amounting to Euro 15 000 or more, whether the transaction is carried out in a single operation or in several operations which seem to be linked. Where the sum is not known at the time when the transaction is undertaken, the institution or person concerned shall proceed with identification as soon as it is apprised of the sum and establishes that the threshold has been reached.

Where an institution establishes business relations or enters into a transaction with a customer who has not been physically present for identification purposes ("non-face to face operations") the principles and procedures laid down in the Annex shall apply.

3. By way of derogation from paragraphs 1 and 2, the identification requirements with regard to insurance policies written by insurance undertakings within the meaning of Directive 79/267/EEC, where they perform activities which fall within the scope of that Directive shall not be required where the periodic premium amount or amounts to be paid in any given year does or do not exceed Euro 1 000 or where a single premium is paid amounting to Euro 2 500 or less. If the periodic premium amount or amounts to be paid in any given year is or are increased so as to exceed the Euro 1 000 threshold, identification shall be required.

3a. By way of derogation from paragraph 2 identification shall be required of all customers of casinos purchasing or exchanging gambling chips with a value of Euro 1 000 or more.

4. Member States may provide that the identification requirement is not compulsory for insurance policies in respect of pension schemes taken out by virtue of a contract of employment or the insured's occupation, provided that such policies contain no surrender clause and may not be used as collateral for a loan.

5. In the event of doubt as to whether the customers referred to in the above paragraphs are acting on their own behalf, or where it is certain that they are not acting on their own behalf, the institutions and persons subject to this Directive shall take reasonable measures to obtain information as to the real identity of the persons on whose behalf those customers are acting.

6. The institutions and persons subject to this Directive shall carry out such identification, even where the amount of the transaction is lower than the threshold laid down, wherever there is suspicion of money laundering.
7. The institutions and persons subject to this Directive shall not be subject to the identification requirements provided for in this Article where the customer is a credit or financial institution covered by this Directive.
8. Member States may provide that the identification requirements regarding transactions referred to in paragraphs 3 and 4 are fulfilled when it is established that the payment for the transaction is to be debited from an account opened in the customer's name with a credit institution subject to this Directive according to the requirements of paragraph 1.'

4. In Articles 4 and 5 the words 'credit and financial institutions' shall be replaced by 'the institutions and persons subject to this Directive'.

5. Article 6 shall be replaced by the following:

'Article 6

1. Member States shall ensure that the institutions and persons subject to this Directive and their directors and employees co-operate fully with the authorities responsible for combating money laundering:

- (a) by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering,
- (b) by furnishing those authorities, at their request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the authorities responsible for combating money laundering of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated by the institutions and persons in accordance with the procedures provided for in Article 11 (1) shall normally forward the information.

3. In the case of the independent legal professionals referred to in point 5 of Article 2a, Member States may designate as the authority referred to in paragraph 1 of this Article the bar association or appropriate self-regulatory body of the profession concerned and in such case shall lay down the appropriate forms of cooperation between them and the other authorities responsible for combating money laundering.

Member States shall not be obliged to apply the obligations laid down in paragraph 1 to such legal professionals with

regard to information they receive from a client in order to be able to represent him in legal proceedings. This derogation from the obligations laid down in paragraph 1 shall not cover any case in which there are grounds for suspecting that advice that advice is being sought for the purpose of facilitating money laundering.

4. Information supplied to the authorities in accordance with paragraph 1 may be used only in connection with the combating of money laundering. However, Member States may provide that such information may also be used for other purposes.'

6. Article 7 shall be replaced by the following:

'Article 7

Member States shall ensure that the institutions and persons subject to this Directive refrain from carrying out transactions which they know or suspect to be related to money laundering until they have apprised the authorities referred to in Article 6. Those authorities may, under conditions determined by their national legislation, give instructions not to execute the operation. Where such a transaction is suspected of giving rise to money laundering and where to refrain in such manner is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money-laundering operation, the institutions and persons concerned shall apprise the authorities immediately afterwards.'

7. In Article 8 the words 'Credit and financial institutions' shall be replaced by 'The institutions and persons subject to this Directive'.

8. Article 9 shall be replaced by the following:

'Article 9

The disclosure in good faith to the authorities responsible for combating money laundering by an institution or person subject to this Directive or by an employee or director of the information referred to in Articles 6 and 7 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the institution or person or its directors or employees in liability of any kind.'

9. In Article 10 the words 'credit or financial institutions' shall be replaced by 'the institutions and persons subject to this Directive'.

10. In Article 11 the words 'credit and financial institutions' shall be replaced by 'the institutions and persons subject to this Directive'.

11. Article 12 shall be replaced by the following:

'Article 12

1. Member States shall ensure that the provisions of this Directive are extended in whole or in part to professions and to categories of undertakings, other than the institutions and persons referred to in Article 2a, which engage in activities which are particularly likely to be used for money-laundering purposes.

2. In case of fraud, or corruption or any illegal activity damaging or likely to damage the European Communities' financial interests, the anti-money laundering authorities referred to under article 6 and, within its competences, the Commission, shall collaborate with each other for the purpose of preventing and detecting money laundering. To this end they shall exchange relevant information on suspicious transactions. Information thus exchanged shall be covered by rules of professional secrecy.

3. When independent legal professions are concerned, Member States may exempt bar associations and self-regulatory professional bodies from obligations under paragraph 2.'

Article 2

Three years after the adoption of this Directive the Commission shall carry out a particular examination, in the context of the report provided for in Article 17 of Directive 91/308/EEC, of aspects relating to the specific treatment of independent legal professionals, the identification of clients in non-face to face transactions and possible implications for electronic commerce.

Article 3

1. Member States shall bring into force the laws, regulations and administrative decisions necessary to comply with this Directive by 31 December 2001 at the latest.

2. Where Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field governed by this Directive.

Article 4

This Directive is addressed to the Member States.

ANNEX

IDENTIFICATION OF CUSTOMERS (PHYSICAL PERSONS) BY CREDIT AND FINANCIAL INSTITUTIONS IN NON FACE-TO-FACE FINANCIAL OPERATIONS

Within the framework of the Directive, the following principles should apply to the identification procedures for non face-to-face financial operations:

- (i) The procedures should ensure appropriate identification of the customer.
- (ii) The procedures may apply provided there are no reasonable grounds to believe that face-to-face contact is being avoided in order to conceal the true identity of the customer and there is no suspicion of money laundering.
- (iii) The procedures should not apply to operations involving the use of cash.
- (iv) The internal control procedures stipulated in Article 11(1) of the Directive should take specific account of non-face-to-face operations.
- (v) When the counterpart of the institution undertaking the operation ('contracting institution') is a customer, identification may be carried out by the following procedures:
 - (a) Using the contracting institution's branch or representative office which is nearest the customer in order to carry out a face-to-face identification
 - (b) If the identification is carried out without a face-to-face contact with the customer:
 - A copy of the customer's official identification document or the official number of the identification document should be required. Special attention should be paid to the verification of the customer's address when this is indicated on the identification document (e.g. documents concerning the operation to be sent by registered mail with advice of receipt to the customer's address).

- The first payment of the operation should be carried out through an account opened in the customer's name with a credit institution located in the European Union or in the European Economic Area. States may allow payments carried out through reputable credit institutions established in third countries which apply equivalent anti money laundering standards.
 - The contracting institution should carefully verify that the identities of the holder of the account through which the payment is made and of the customer, as indicated in the identification document (or ascertained from the identification number) are one and the same. In the case of doubt in this regard, the contracting institution should contact the credit institution with which the account is opened in order to confirm the identity of the account holder. If the doubt still remains a certificate from the credit institution should be required attesting to the identity of the account holder and confirming that the identification was properly carried out and that the particulars have been registered according to the Directive.
- (c) In the case of certain insurance operations, identification requirements may be waived when the payment is 'to be debited from an account opened in the customer's name with a credit institution subject to this Directive' (Article 3(8)).
- (vi) When the counterpart of the contracting institution is another institution acting on behalf of a customer:
- (a) If the counterpart is located in the European Union or in the European Economic Area, identification of the customer by the contracting institution is not required. (Article 3(7) of the Directive).
 - (b) If the counterpart is located outside the European Union and the European Economic Area, the institution should check the identity of its counterpart (unless it is well known), by consulting a reliable financial directory. In the case of doubt in this regard, the institution should seek confirmation of its counterpart's identity from the third country supervisory authorities. The institution should also take 'reasonable measures to obtain information' on the customer of its counterpart (beneficial owner of the operation) (Article 3(5) of the Directive). These 'reasonable measures' could go from simply requesting the name and address of the customer, when the country applies equivalent identification requirements, to requesting a counterpart's certificate stating that the customer's identity has been properly verified and registered, when in the country in question the identification requirements are not equivalent.
- (vii) The above-mentioned procedures do not preclude the use of other ones which, in the opinion of the competent authorities, may provide equivalent safety for the identification in non-face-to-face financial operations.
-