

DIRECTIVE 2001/97/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 4 December 2001****amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering**

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 ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾, in the light of the joint text approved by the Conciliation Committee on 18 September 2001,

Whereas:

- (1) It is appropriate that Directive 91/308/EEC ⁽⁴⁾, herein-after referred to as '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. 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.
- (2) The General Agreement on Trade in Services (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. Such measures should not impose restrictions that go beyond what is necessary to achieve those objectives.
- (3) 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 the Directive. The authorities of the Member States in which the branch is located should receive such reports and exercise the above responsibilities.
- (4) 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'.
- (5) 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. These activities should already fall within the scope of the Directive. In order to dispel any doubt in this matter the Directive should clearly confirm that these activities are covered.
- (6) 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 of 10 May 1993 on investment services in the securities field ⁽⁵⁾.
- (7) The Directive obliges Member States only to combat the laundering of the proceeds of drugs offences. 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.
- (8) A wider range of predicate offences facilitates suspicious transaction reporting and international cooperation in this area. Therefore, the Directive should be brought up to date in this respect.
- (9) In Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime ⁽⁶⁾, the Member States agreed to make all serious offences, as defined in the Joint Action, predicate offences for the purpose of the criminalisation of money laundering.
- (10) The suppression of organised crime in particular is closely linked to measures to combat money laundering. The list of predicate offences should therefore be adapted accordingly.

⁽¹⁾ OJ C 177 E, 27.6.2000, p. 14.

⁽²⁾ OJ C 75, 15.3.2000, p. 22.

⁽³⁾ Opinion of the European Parliament of 5 July 2000 (OJ C 121, 24.4.2001, p. 133), Council Common Position of 30 November 2000 (OJ C 36, 2.2.2001, p. 24) and Decision of the European Parliament of 5 April 2001 (not yet published in the Official Journal). Decision of the European Parliament of 13 November 2001 and Decision of the Council of 19 November 2001.

⁽⁴⁾ OJ L 166, 28.6.1991, p. 77.

⁽⁵⁾ OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).

⁽⁶⁾ OJ L 333, 9.12.1998, p. 1.

- (11) The Directive imposes obligations regarding in particular the reporting of suspicious transactions. It would be more appropriate and in line with the philosophy of the Action Plan to Combat Organised Crime⁽¹⁾ for the prohibition of money laundering under the Directive to be extended.
- (12) On 21 December 1998 the Council adopted Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union⁽²⁾. This Joint Action reflects the Member States' agreement on the need for a common approach in this area.
- (13) 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. 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.
- (14) There is a trend towards the increased use by money launderers of non-financial businesses. This is confirmed by the work of the FATF on money laundering techniques and typologies.
- (15) 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.
- (16) Notaries and independent legal professionals, as defined by the Member States, should be made subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity.
- (17) However, where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.
- (18) Directly comparable services need to be treated in the same manner when practised by any of the professionals covered by the Directive. In order to preserve the rights laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Treaty of the European Union, in the case of auditors, external accountants and tax advisors who, in some Member States, may defend or represent a client in the context of judicial proceedings or ascertain a client's legal position, the information they obtain in the performance of these tasks should not be subject to the reporting obligations in accordance with the Directive.
- (19) The Directive makes reference to 'the authorities responsible for combating money laundering' to which reports of suspicious operations must be made on the one hand, and to authorities empowered by law or regulation to supervise the activity of any of the institutions or persons subject to this Directive ('competent authorities') on the other hand. It is understood that the Directive does not oblige Member States to create such 'competent authorities' where they do not exist, and that bar associations and other self-regulatory bodies for independent professionals do not fall under the term 'competent authorities'.
- (20) In the case of notaries and independent legal professionals, Member States should be allowed, in order to take proper account of these professionals' duty of discretion owed to their clients, to nominate the bar association or other self-regulatory bodies for independent professionals as the body to which reports on possible money laundering cases may be addressed by these professionals. The rules governing the treatment of such reports and their possible onward transmission to the 'authorities responsible for combating money laundering' and in general the appropriate forms of cooperation between the bar associations or professional bodies and these authorities should be determined by the Member States,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 91/308/EEC is hereby amended as follows:

- 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 in Article 1(1) first subparagraph of Directive 2000/12/EC (*) and includes branches within the meaning of Article 1(3) of that Directive and located in the Community, of credit institutions having their head offices inside or outside the Community;

⁽¹⁾ OJ C 251, 15.8.1997, p. 1.

⁽²⁾ OJ L 351, 29.12.1998, p. 1.

(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 set out in Annex I to Directive 2000/12/EC; 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 (**), insofar as it carries out activities covered by that Directive;
3. an investment firm as defined in Article 1(2) of Directive 93/22/EEC (***);
4. a collective investment undertaking marketing its units or shares.

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 indents.

Knowledge, intent or purpose required as an element of the abovementioned 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 carried out 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 any kind of criminal involvement in the commission of a serious crime.

Serious crimes are, at least:

- any of the offences defined in Article 3(1)(a) of the Vienna Convention;
- the activities of criminal organisations as defined in Article 1 of Joint Action 98/733/JHA (****);
- fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the protection of the European Communities' financial interests (*****);
- corruption;
- an offence which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State.

Member States shall before 15 December 2004 amend the definition provided for in this indent in order to bring this definition into line with the definition of serious crime of Joint Action 98/699/JHA. The Council invites the Commission to present before 15 December 2004 a proposal for a Directive amending in that respect this Directive.

Member States may designate any other offence as a criminal activity for the purposes of this Directive.

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

(*) OJ L 126, 26.5.2000, p. 1. Directive as amended by Directive 2000/28/EC (OJ L 275, 27.10.2000, p. 37).

(**) OJ L 63, 13.3.1979, p. 1. Directive as last amended by Directive 95/26/EC of the European Parliament and of the Council (OJ L 168, 18.7.1995, p. 7).

(***) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).

(****) OJ L 351, 29.12.1998, p. 1.

(*****) OJ C 316, 27.11.1995, p. 48.

2. The following Article 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 in point B of Article 1;

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

3. auditors, external accountants and tax advisors;
4. real estate agents;
5. notaries and other independent legal professionals, when they participate, whether:
 - (a) by assisting in the planning or execution of transactions for their client concerning the
 - (i) buying and selling of real property or business entities;
 - (ii) managing of client money, securities or other assets;
 - (iii) opening or management of bank, savings or securities accounts;
 - (iv) organisation of contributions necessary for the creation, operation or management of companies;
 - (v) creation, operation or management of trusts, companies or similar structures;
 - (b) or by acting on behalf of and for their client in any financial or real estate transaction;
6. dealers in high-value goods, such as precious stones or metals, or works of art, auctioneers, whenever payment is made in cash, and in an amount of EUR 15 000 or more;
7. 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 EUR 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 or he is apprised of the sum and establishes that the threshold has been reached.

3. By way of derogation from the preceding paragraphs, the identification requirements with regard to insurance policies written by insurance undertakings within the meaning of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regula-

tions and administrative provisions relating to direct life assurance (third life assurance Directive) (*), 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 EUR 1 000 or where a single premium is paid amounting to EUR 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 EUR 1 000 threshold, identification shall be required.

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. By way of derogation from the preceding paragraphs, all casino customers shall be identified if they purchase or sell gambling chips with a value of EUR 1 000 or more.

6. Casinos subject to State supervision shall be deemed in any event to have complied with the identification requirement laid down in this Directive if they register and identify their customers immediately on entry, regardless of the number of gambling chips purchased.

7. 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.

8. 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.

9. 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 or a credit or financial institution situated in a third country which imposes, in the opinion of the relevant Member States, equivalent requirements to those laid down by this Directive.

10. 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.

11. Member States shall, in any case, ensure that the institutions and persons subject to this Directive take specific and adequate measures necessary to compensate for the greater risk of money laundering which arises when establishing business relations or entering into a transaction with a customer who has not been physically present for identification purposes ("non-face to face" operations). Such measures shall ensure that the customer's identity is established, for example, by requiring additional documentary evidence, or supplementary measures to verify or certify the documents supplied, or confirmatory certification by an institution subject to this Directive, or by requiring that the first payment of the operations is carried out through an account opened in the customer's name with a credit institution subject to this Directive. The internal control procedures laid down in Article 11(1) shall take specific account of these measures.

(*) OJ L 360, 9.12.1992, p. 1. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27.)

4. In Articles 4, 5, 8 and 10 the terms '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 cooperate 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)(a) shall normally forward the information.

3. In the case of the notaries and independent legal professionals referred to in Article 2a(5), Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed of the facts referred to in paragraph 1(a) and in such case shall lay down the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering.

Member States shall not be obliged to apply the obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.'

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. The current text becomes paragraph 1 and the following shall be added to Article 8:

'2. Member States shall not be obliged under this Directive to apply the obligation laid down in paragraph 1 to the professions mentioned in the second paragraph of Article 6(3).'

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 such an institution or person 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. The following paragraph shall be added to Article 10

'Member States shall ensure that supervisory bodies empowered by law or regulation to oversee the stock, foreign exchange and financial derivatives markets inform the authorities responsible for combating money laundering if they discover facts that could constitute evidence of money laundering.'

10. Article 11 shall be replaced by the following:

'Article 11

1. Member States shall ensure that the institutions and persons subject to this Directive:

- (a) establish adequate procedures of internal control and communication in order to forestall and prevent operations related to money laundering;
- (b) take appropriate measures so that their employees are aware of the provisions contained in this Directive. These measures shall include participation of their relevant employees in special training programmes to help them recognise operations which may be related to money laundering as well as to instruct them as to how to proceed in such cases.

Where a natural person falling within any of Article 2a(3) to (7) undertakes his professional activities as an employee of a legal person, the obligations in this Article shall apply to that legal person rather than to the natural person.

2. Member States shall ensure that the institutions and persons subject to this Directive have access to up-to-date information on the practices of money launderers and on indications leading to the recognition of suspicious transactions.'

11. In Article 12 the words 'credit or financial institutions referred to in Article 1' shall be replaced by 'institutions and persons referred to in Article 2a.'

Article 2

Within three years of the entry into force 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 implementa-

tion of the fifth indent of Article 1(E), the specific treatment of lawyers and other 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 provisions necessary to comply with this Directive by 15 June 2003 at the latest. They shall forthwith inform the Commission thereof.

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.

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

Article 4

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, 4 December 2001.

For the European Parliament

The President

N. FONTAINE

For the Council

The President

D. REYNERS

Commission Declaration

The Commission reiterates the commitment made in its work programme 2001 to launch a proposal before the end of this year for a Regulation of the European Parliament and of the Council establishing a cooperation mechanism between the competent national authorities of the Member States and the Commission in order to ensure the protection of the Communities' financial interests against illegal activities, including Value Added Tax (VAT) fraud and money laundering. This commitment has been confirmed in the Communication from the Commission concerning the Action Plan for 2001-2003 on protecting the Communities' financial interests — Fight against fraud — of 15 May 2001 ⁽¹⁾.

⁽¹⁾ COM(2001) 254 final: see paragraph 2.2.1.