

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;