



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 26 September 2000

**Interinstitutional File:
1999/0152 (COD)**

**11366/1/00
REV 1**

LIMITE

**EF 64
ECOFIN 236
CRIMORG 120
CODEC 655**

SUBMISSION

to : the Permanent Representatives Committee

No. prev. doc. : 11366/00 EF 64 ECOFIN 236 CRIMORG 120 CODEC 655

No. Cion prop. : 10541/99 EF 27 ECOFIN 139 CRIMORG 117 CODEC 460 – COM(99) 352 final

Subject : Proposal for a Directive of the European Parliament and of the Council 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

Please find below a revised version of the Presidency compromise text concerning the above-mentioned proposal with the positions and observations by delegations set out in footnotes.

**DRAFT DIRECTIVE OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL 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**

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 Article 1 (1) 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,
- (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, 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,
 - (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 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 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 the Joint Action of 21 December 1998;
- 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;¹
- 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.²

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."

¹ Reservation by D on the reference to Article 2. A would also prefer to delete this reference.

² Reservation by UK, D, A and I which preferred basing the definition on the Joint Action of 3 December 1998 (98/699/JHA). Within the framework of a compromise these delegations could accept the corresponding text set out in 6911/00:

"An offence which generates substantial proceeds and which is punishable by deprivation of liberty or a detention order of a maximum of [4] years or more, or, as regards those States which have a minimum threshold for offences in their legal systems, offences punishable by deprivation of liberty or a detention order of a minimum of more than [6 months]/[1 year]."

(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 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;³
4. real estate agents;⁴

³ Reservation by D and A which felt that accountants, auditors, notaries and independent legal professionals should be treated in the same point.

⁴ UK preferred deleting point 4 and suggested alternatively adding "where they handle clients' money". D wanted to exclude "renting of property for residential purposes" from the scope but D could also accept the UK suggestion.

- 5.⁵ notaries and other independent legal professionals when they participate, whether by providing legal advice or in the planning or execution of transactions for their client concerning the: ⁶
- a) buying and selling of real property or business entities;
 - b) managing of client money, securities or other assets;
 - c) opening or management of bank, savings or securities accounts;
 - d) organisation of contributions necessary for the creation, operation or management of companies;
 - e) creation, operation or management of trusts, companies or similar structures;
 - f) execution of any other financial or real estate transactions;
6. dealers in high-value goods, such as precious stones or metals, whenever payment is made in cash, and in an amount of Euro 15.000 or more;
- [7. transporters of funds;] ⁷
8. casinos.”

⁵ In order to make the text more clear the Presidency suggests the following drafting :
"5. notaries and other independant legal professionals, when they participate, whether :
- by providing legal advice in the planning or execution of transactions for their client concerning the
a) buying and selling of real property or business entities;
b) managing of client money, securities or other assets;
c) opening or management of bank, savings or securities accounts;
d) organisation of contributions necessary for the creation, operation or management of companies;
e) creation, operation or management of trusts, companies or similar structures;
- or by acting on behalf of and for their client in any financial or real estate transaction"

⁶ Reservation by D and A on including legal advice. D stressed in this respect that its opposition was motivated by constitutional reasons. Scrutiny reservation by E and P.

DK suggested adding a new point g): "taxation" and the following new recital: "whereas directly comparable services, such as providing tax advice, a priori must be subject to the same substantive provisions in the Directive, whether provided by any of the professions included in this Directive;"

⁷ Point 7 supported by B, D, I and DK.

(3) Article 3 shall be replaced by the following:

“Article 3

- (1) Member States shall ensure that the institutions and persons⁸ 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.
- (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.⁹

⁸ D wanted to exempt 'new' professions from the identification requirement set out in (1), see also the position of D set out in footnotes relating to Article 6 (3).

⁹ D and A suggested reviewing these figures.

- (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.
- (4a) By way of derogation from paragraphs 1 and 2, Member States shall ensure that identification is required either when a customer enters a casino or when a customer pays in cash for the purchasing of gambling chips with a value of Euro 2.500 or more, or exchanges gambling chips for a casino cheque of such a value.
- (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 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 required 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.

(9) 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 the requiring of 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.”

(4) In Article 4 the words “credit and financial institutions” shall be replaced by “the institutions and persons subject to this Directive”.

(4A) In Article 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.

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(3) ¹¹In the case of the notaries and independent legal professionals referred to in point 5 of Article 2a, ¹² 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 co-operation between that body and the authorities responsible for combating money laundering.

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New recital 24:

"Whereas, however, where an independent lawyer or law firm is representing a client in legal proceedings it would not be appropriate under the directive to put the lawyer under an obligation to report suspicions of money laundering; whereas to guarantee the necessary maintenance of individuals' rights to defence or representation, there must be exemption 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;"

New recital 24a:

"Whereas directly comparable services need to be treated in the same manner whether practised by any of the professionals included in this Directive; thus members of the accounting professions may in certain Member States defend or represent a client in the context of judicial proceedings and the information they obtain in the performance of these tasks is, therefore, not subject to the obligations of this Directive;"

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Reservation by D and A, see also the positions of D and A set out in footnotes relating to Article 2a.

Reservation by I which found the derogation for legal advice too extensive. I suggested in this respect deleting in the second subparagraph, first indent: "in the course of ascertaining the legal position for their client" and "including advice on instituting or avoiding proceedings,"

Scrutiny reservation by E and P.

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I, D and A suggested deleting "legal" and referring to point 3 as well.

Member States shall not be obliged to apply the obligations laid down in paragraph 1 to

- notaries and independent legal professionals with regard to information they receive from one of their clients 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

- auditors, external accountants and tax advisors where they are engaged in the defence or representation of a client in judicial proceedings;¹³

[This exemption from the aforementioned obligations shall not cover cases in which there are reasonable grounds to suspect that, in the context of defence or representation, advice is being sought for the purpose of facilitating money laundering.]¹⁴

- (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.”

¹³ New text aiming at ensuring equal treatment of legal and accounting professions:
" 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 one of their clients 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;"

¹⁴ Reservation by D, A, FIN, DK, P, S, IRL, I and E which wanted deletion of this provision. Other delegations (B, LUX, UK, EL, NL) wanted to maintain it. S could accept the text, but preferred deletion. Reservation by the Commission.

(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”.¹⁵

(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.”

¹⁵ Reservation by D which found that legal professionals should not be subject to Article 8.

(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 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 points 3 to 8 undertakes his professional activities as an employee of a legal person, the obligations in Article 11 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 evidence 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 subject referred to in Article 2a”.¹⁶

¹⁶ Reservation by the Commission representative on the deletion of the proposed new Article 12 (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 implementation 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 decisions necessary to comply with this Directive by¹⁷ 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.

¹⁷ [6-18] months after the entry into force of the Directive.

ANNEX

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

Deleted.