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**NOTE**

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From:	General Secretariat of the Council
To:	Delegations
No. Cion doc.:	15782/16
Subject:	Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law - Examination of the proposal

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**I. Introduction**

1. On 22 December 2016 the Commission submitted a proposal for a Directive on countering money laundering by criminal law.
2. At its meeting of 11 January 2017, the Working Party on Substantive Criminal Law (DROIPEN) completed a first examination of the proposal<sup>1</sup>. In general, delegations expressed support for the objectives of the proposal, while a certain number of specific issues were raised that would need further consideration.
3. At the next DROIPEN meeting on 20 February 2017, the Presidency would like therefore to focus discussions on those issues and to complete a second examination of the revised text.

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<sup>1</sup> Written comments provided by delegations after the meeting are found in doc. 6050/17.

## II. Specific issues

### 1. Link with the draft PIF Directive (Article 1)

4. Money laundering of property derived from PIF offences is excluded from the scope of the Directive. Article 1(2) of the proposal provides that:

*"This Directive shall not apply to money laundering as regards property derived from offences affecting the Union's financial interests, which is subject to specific rules as laid down in Directive 2017/XX/EU".*

5. Article 4(1) of the political agreement between the Council and the EP on the draft PIF Directive, endorsed by the two institutions envisages that:

*"Member States shall take the necessary measures to ensure that money laundering as defined in Article 1(3) of Directive 2015/849 of the European Parliament and of the Council<sup>2</sup> involving property derived from the offences covered by this Directive, constitutes a criminal offence."*

6. At the last DROIPEN meeting some delegations were of the opinion that one single regime on money laundering should be in place and therefore this Directive should apply also to draft PIF offences.
7. COM explained that the rules in the proposed Directive have been aligned with those in the draft PIF Directive to ensure coherence. COM also confirmed that this does not prevent MSs from having one single regime on money laundering at national level.
8. In addition, it should be taken into account that the PIF Directive will set out the scope of the material competence of the future European Public Prosecutor's Office (EPPO). It seems therefore appropriate that rules on AML, related to PIF offences are included in the PIF Directive itself in line with the objective of legal certainty concerning the mandate of EPPO.

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<sup>2</sup> Article 1(3) of Directive 2015/849 (the 4th Anti-money laundering directive) sets out for the purposes of that Directive a definition for money laundering, which is broadly in line with the definition provided under the CoE Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism of 2005, CETS No198 ("the Warsaw Convention") (Article 9 (1)). This definition is also replicated in Article 3(1) of the current proposal and covered by Article 4, insofar as letter "d" is concerned.

9. Based on this general understanding, the Presidency suggests coming back to this issue once the discussion on the substantive elements of the current proposal advances sufficiently.

**MSs are invited to indicate whether they agree with the proposed approach.**

## **2. Definitions - Article 2**

### *"Proceeds" and "predicate offence"*

10. Some delegations requested that a definition of “proceeds” and “predicate offence” be included in the Directive. While various international instruments provide for such definitions, the EU legislation has adopted a slightly different approach ensuring, at the same time, consistency with international standards.
11. The established definition of “proceeds” in various international instruments (the CoE Warsaw Convention, FATF Recommendations, UN Convention against Transnational Organised Crime, UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the UN Vienna Convention), etc.) ultimately always refers to “property” which is already defined in Article 2 (2) of this proposal. Furthermore, Article 3(1) integrates the core element of these definitions: ***“property derived from criminal activity”***. To ensure that this EU Directive includes all elements of the international standards, in particular from the current definition of “proceeds”, including as it stands in EU legislation <sup>3</sup>, the wording ***“directly or indirectly”*** is proposed to be included in Article 3(1).
12. Article 2(1) defines the range of offences to which anti-money laundering rules under this Directive apply. The COM proposal does this by defining the term "criminal activity" instead of the term "predicate offence", as in the Warsaw Convention. The approach of the COM proposal, although different, is fully in line with the international standards, as well as the 4th AMLD, and therefore, it is the view of the Presidency that it would not be necessary to provide for a specific definition of a predicate offence.

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<sup>3</sup> Article 2(1) of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime:  
"‘Proceeds’ means any economic advantage **derived directly or indirectly from a criminal offence**; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits;"

***"Criminal activity"***

13. As explained by the COM at the meeting, the aim of Article 2(1) is to ensure that EU legislation covers the range of predicate offences that can generate the property that could then become the subject of money laundering in line with Recommendation 3 of FATF and Article 9 (4) of the Warsaw Convention. To respond to the objective of harmonisation of definitions, a reference to the existing EU acquis is made wherever such is available. The COM proposal aims to ensure that all of the offences defined in this EU acquis are considered as predicate offences for the purposes of money laundering. COM submitted that the fact the EU has legislated on an offence demonstrates a certain seriousness of that criminal conduct.
14. At the last DROIPEN meeting, a group of MSs referred to the need of a stronger emphasis on the serious nature of the offences that could constitute predicate offences to money laundering and suggested introducing a “serious offence” criterion. Another group of MSs argued that money laundering is a serious offence in its own right and that the seriousness of the predicate offence as such is therefore irrelevant. So, they opposed the introduction of such a reference.
15. It is reminded that in line with the existing international standards the COM proposal does allow for discretion on the part of the MSs to maintain different approaches in defining the scope of predicate offences at national level: choosing between an all-crime approach, lists of predicate offences, threshold approach, etc.
16. Taking into account the minimum nature of the rules set out by this instrument, the Presidency suggests exploring a solution based on a more threshold centred approach, while leaving untouched the list of categories of offences that should in any event be covered by the national definitions in line with Article 9 (4) of the Warsaw Convention.
17. In this respect, it is suggested that a point of departure in defining the scope of the Directive is the so called catch-all clause, current letter "v", which envisages a penalty threshold. Such a threshold approach would thus allow for a more precise delimitation of the predicate offences that will fall within the scope of the Directive and would exclude cases which are considered at national level to be less serious in nature.

18. Furthermore, to ensure that EU legislation covers the minimum required categories of offences, it is suggested to maintain the list proposed by the Commission, subject to the penalty threshold in the catch-all clause. It is also noted that in general the majority of delegations expressed support to include cybercrime as one of the categories of offences that should be covered in the list.

**A drafting suggestion is contained in the Annex.**

### **3. Money laundering offence - Article 3**

19. The main issues raised by delegations concerned in particular paragraph 2 - on the modalities of application of Article 3 and paragraph 3 - on self-laundering.

20. To address the various concerns expressed by delegations regarding **Article 3(2)**, including on the precise scope of the obligation arising from the current text or on the evidentiary standard for the predicate offence, the Presidency suggests aligning this provision as much as possible to the respective provisions of the Warsaw Convention - Article 9 (5), (6) and (7).

21. **Article 3 (3)** introduces a provision on self-laundering, which is only limited to conversion and transfer and respectively concealment or disguise of property derived from criminal activity. At the DROIPEN meeting in January, the majority of delegations took a position that in principle they can support including self-laundering in the scope of the Directive.

22. One of the main concerns raised by delegations related to the need to delimit in a more precise manner the scope of this provision to ensure that it only covers conduct that violates another legal interests than the one already infringed by the predicate offence itself.

**Drafting suggestions intended to address the concerns outlined above are found in the Annex.**

#### 4. Penalties - Article 5

23. A number of delegations had difficulties with the reference to *serious cases* in Article (2), the latter being subject to various national approaches and definitions. The Presidency shares these concerns and for this reason, the reference to serious cases is being deleted.
24. Some MS suggested defining *seriousness* by reference to a threshold. It is our view, however, that the “amount” being laundered, although *indicative*, should not be the only factor in determining the seriousness of the laundering offence<sup>4</sup>. Moreover the definition of seriousness by reference to a threshold would strongly suggest that ML is an offence against *property*; in our view, however, it is primarily and first and foremost an offence against the *culture of legality*<sup>5</sup>.
25. It is recalled that Article 2 of FD 2001/500/JHA envisages that the offences referred to in Article 6(1)(a) and (b) of the 1990 CoE Convention on laundering, search, seizure and confiscation of the proceeds from crime are punishable by deprivation of liberty for a maximum of not less than 4 years. Article 6(1)(a) and (b) of the 1990 Convention is reflected in Article 3(1)(a) and (b) of the Commission proposal.
26. It is therefore important to ensure that as a minimum the draft Directive does not fall short of the standards of existing EU legislation. In this respect, it is proposed to limit the application of Article 5(2) to Article 3(1)(a) and (b) in line with the FD 2001/500/JHA.

**See drafting suggestion in the Annex.**

#### 5. Aggravating circumstances - Article 6

27. Delegations requested that this provision should be aligned with the wording of other substantive criminal law EU instruments in order to define in a more precise manner the scope of obligation arising from this article.

**See drafting suggestion in the Annex.**

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<sup>4</sup> The *amount of money laundered* has been referred to merely as a ‘relevant factor’ in determining penalties for money laundering - one of the 5 ‘relevant considerations’ identified by their Lordships in *Monfries* at para.7 of the judgement, that has been followed in a number of other Court of Appeal decisions, quoted in *Blackstone’s Guide to the Proceeds of Crimes Act 2002*, Fifth Edition, page, 163.

<sup>5</sup> “*The criminality in laundering is the assistance, support and encouragement it provides to criminal conduct*”: *Idem*.

Proposal for a

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

**on countering money laundering by criminal law**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Money laundering and the associated financing of terrorism and organised crime remain significant problems at the Union level, thus damaging the integrity, stability and reputation of the financial sector and threatening the internal security and the internal market of the Union. In order to tackle those problems and also reinforce the application of Directive 2015/849/EU<sup>6</sup>, this Directive aims to tackle money laundering by means of criminal law, allowing for better cross-border cooperation between competent authorities.
- (2) Measures adopted solely at national or even at Union level, without taking into account international coordination and cooperation, would have very limited effect. The measures adopted by the Union in countering money laundering should therefore be compatible with, and at least as stringent as, other actions undertaken in international fora.

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<sup>6</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p.73).

- (3) Union action should continue to take particular account of the Financial Action Task Force (FATF) Recommendations and instruments of other international bodies active in the fight against money laundering and terrorist financing. The relevant Union legal acts should, where appropriate, be further aligned with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation adopted by the FATF in February 2012 (the ‘revised FATF Recommendations’). As a signatory to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), the Union should transpose the requirements of that Convention into its legal order.
- (4) Council Framework Decision 2001/500/JHA<sup>7</sup> lays down requirements on the criminalisation of money laundering. That Framework Decision is not comprehensive enough, however, and the current incrimination of money laundering is not sufficiently coherent to effectively combat money laundering across the Union, thus leading to enforcement gaps and obstacles in the cooperation between the competent authorities in different Member States.
- (5) The definition of criminal activities which constitute predicate offences for money laundering should be sufficiently uniform in all the Member States. Member States should include a range of offences within each of the categories designated by the FATF. Where categories of offences, such as terrorism or environmental crimes, are set out in Union law, this Directive refers to such legislation. This ensures that the laundering of the proceeds of the financing of terrorism and wildlife trafficking are punishable in the Member States. In cases where Union law allows Member States to provide for other sanctions than criminal sanctions, this Directive should not require Member States to establish those cases as predicate offences for the purposes of this Directive.
- (6) Tax crimes relating to direct and indirect taxes should be included in the definition of criminal activity, in line with the revised FATF Recommendations. Given that different tax offences may in each Member State constitute a criminal activity punishable by means of the sanctions referred to in this Directive, definitions of tax crimes may diverge in national law. However no harmonisation of the definitions of tax crimes in Member States' national law is sought.
- (7) This Directive should not apply to money laundering as regards property derived from offences affecting the Union's financial interests, which is subject to specific rules as laid down in Directive 2017/XX/EU<sup>8</sup>. In accordance with Article 325(2) TFEU, the Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

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<sup>7</sup> Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001).

<sup>8</sup> Directive 2017/XX/EU of the European Parliament and of the Council of x x 2017 on the protection of the Union's financial interests by means of criminal law (OJ x L, xx.xx.2017, p.x).



- (8) Where money laundering activity does not simply amount to the mere possession or use, but also involves the transfer or the concealing and disguise of property through the financial system and results in further damage than that already caused by the predicate offence, such as damaging the integrity of the financial system, that activity should be punished separately. Member States should thus ensure that such conduct is also punishable when committed by the perpetrator of the criminal activity that generated that property (so-called self-laundering).
- (9) In order for money laundering to be an effective tool against organised crime, it should not be necessary to identify the specifics of the crime that generated the property, let alone require a prior or simultaneous conviction for that crime. Prosecutions for money laundering should also not be impeded by the mere fact that the predicate offence was committed in another Member State or third country, provided it is a criminal offence in that Member State or third country. Member States may establish as a prerequisite the fact that the predicate offence would have been a crime in its national law, had it been committed there.
- (10) This Directive aims to criminalise money laundering when committed intentionally. Intention and knowledge may be inferred from objective, factual circumstances. As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent criminal law rules for money laundering. Member States may, for example, provide that money laundering committed recklessly or by serious negligence constitutes a criminal offence.
- (11) In order to deter money laundering throughout the Union, Member States should lay down minimum types and levels of penalties when the criminal offences defined in this Directive are committed. Where the offence is committed within a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA<sup>9</sup> or where the perpetrator abused their professional position to enable money laundering, Member States should provide for aggravating circumstances in accordance with the applicable rules established by their legal systems.
- (12) Given the mobility of perpetrators and proceeds stemming from criminal activities, as well as the complex cross-border investigations required to combat money laundering, all Member States should establish their jurisdiction in order to enable the competent authorities to investigate and prosecute such activities. Member States should thereby ensure that their jurisdiction includes situations where an offence is committed by means of information and communication technology from their territory, whether or not based in their territory.
- (13) This Directive should replace certain provisions of Framework Decision 2001/500/JHA<sup>10</sup> for the Member States bound by this Directive.

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<sup>9</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, (OJ L 300, 11.11.2008, p. 42)

<sup>10</sup> Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001).

- (14) Since the objective of this Directive, namely to subject money laundering in all Member States to effective, proportionate and dissuasive criminal penalties, cannot be sufficiently achieved by Member States but can rather, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (14) [In accordance with Article 3 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Directive.
- (15) AND/OR
- (16) In accordance with Articles 1 and 2 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption and application of this Directive and are not bound by it or subject to its application.]
- (17) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Framework Decision 2001/500/JHA<sup>11</sup> shall continue to be binding upon and applicable to Denmark,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

*Subject matter and scope*

1. This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of money laundering.
2. [This Directive shall not apply to money laundering as regards property derived from offences affecting the Union's financial interests, which is subject to specific rules as laid down in Directive 2017/XX/EU.]<sup>12</sup>

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<sup>11</sup> *Idem.*

<sup>12</sup> This provision will be discussed at a later stage.

*Article 2*  
*Definitions*

For the purposes of this Directive, the following definitions apply:

(1) "criminal activity" means any kind of criminal involvement in the commission of ~~the following crimes:~~ all offences, ~~including tax crimes relating to direct taxes and indirect taxes as defined in the national law of the Member States,~~<sup>13</sup> which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

**Where no offences under any of the categories listed hereunder are captured by these thresholds, Member States shall include a range of offences under that category, so as to ensure that each of the following categories is covered:**

- (a) participation in an organised criminal group and racketeering, including ~~any of the~~ offences set out in Council Framework Decision 2008/841/JHA;
- (b) terrorism, including ~~any of the~~ offences set out in Directive 2017/XX/EU<sup>14</sup>;

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<sup>13</sup> View new letter "pa"

<sup>14</sup> Directive 2017/XX/EU of the European Parliament and of the Council of X X 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (OJ x L, xx.xx.2017, p. x.).

- (c) trafficking in human beings and migrant smuggling, including ~~any of~~ the offences set out in Directive 2011/36/EU<sup>15</sup> and Council Framework Decision 2002/946/JHA<sup>16</sup>;
- (d) sexual exploitation, including ~~any of~~ the offences set out in Directive 2011/93/EU<sup>17</sup>;
- (e) illicit trafficking in narcotic drugs and psychotropic substances, including ~~any of~~ the offences set out in Council Framework Decision 2004/757/JHA<sup>18</sup>;
- (f) illicit arms trafficking;
- (g) illicit trafficking in stolen goods and other goods;
- (h) corruption, including ~~any of~~ the offences set out in the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union<sup>19</sup> and in Council Framework Decision 2003/568/JHA<sup>20</sup>;
- (i) fraud, including ~~any of~~ the offences set out in Council Framework Decision 2001/413/JHA<sup>21</sup>;

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<sup>15</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.04.2011, p.1).

<sup>16</sup> Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1).

<sup>17</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ 335 L, 17.12.2011, p. 1).

<sup>18</sup> Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 335 L, 11.11.2004, p. 8).

<sup>19</sup> Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

<sup>20</sup> Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2004, p. 54).

<sup>21</sup> Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ 149 L, 2.6.2001, p. 1).

- (j) counterfeiting of currency, including ~~any~~ of the offences set out in Directive 2014/62/EU<sup>22</sup>;
- (k) counterfeiting and piracy of products;
- (l) environmental crime, including ~~any~~ of the offences set out of Directive 2008/99/EC<sup>23</sup> or in Directive 2009/123/EC<sup>24</sup>;
- (m) murder, grievous bodily injury;
- (n) kidnapping, illegal restraint and hostage-taking;
- (o) robbery or theft;
- (p) smuggling (~~including in relation to customs and excise duties and taxes~~);
- (pa) tax crimes relating to direct taxes and indirect taxes, as defined in the national law of the Member States<sup>25</sup>**;
- (q) extortion;
- (r) forgery;
- (s) piracy;
- (t) insider trading and market manipulation, including ~~any~~ of the offences set out in Directive 2014/57/EU<sup>26</sup>;
- (u) cybercrime, including ~~any~~ of the offences set out in Directive 2013/40/EU<sup>27</sup>;
- (v) ~~all offences, including tax crimes relating to direct taxes and indirect taxes as defined in the national law of the Member States, which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months;~~

<sup>22</sup> Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA (OJ L 151, 21.5.2014, p. 1).

<sup>23</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (OJ L 328, 6.12.2008, p. 28).

<sup>24</sup> Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (OJ L 280, 27.10.2009, p.52).

<sup>25</sup> Tax crimes have been integrated in the list

<sup>26</sup> Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (OJ L 173, 12.6.2014, p. 179).

<sup>27</sup> Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218, 14.8.2013, p. 8).

- (2) "property" means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form including electronic or digital, evidencing title to or an interest in such assets;
- (3) "legal person" means any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

### *Article 3*

#### *Money laundering offences*

1. Each Member State shall ensure that the following conduct shall be a punishable criminal offence, when committed intentionally:
- a) the conversion or transfer of property, knowing that such property is derived **directly or indirectly**<sup>28</sup>, from criminal activity or from an act of participation in such activity<sup>29</sup>, 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 an activity to evade the legal consequences of that person's action;
  - b) 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 **directly or indirectly** from criminal activity or from an act of participation in such an activity;
  - c) the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived **directly or indirectly** from criminal activity or from an act of participation in such an activity.

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<sup>28</sup> Element introduced from the definition of "proceeds" in international conventions (vide para. 12 of the covering note). Wording further aligned with the definition of proceeds in Directive 2014/42/EU.

<sup>29</sup> Some delegations have requested deletion of this phrase. It originates from the 1998 UN Vienna Convention and has been part of the EU legislation since 1991 (1st AMLD).

2. **Each Member State shall take the necessary measures to ensure that<sup>30</sup>:**
- (a) a prior or simultaneous conviction for the criminal activity **from which the property was derived, is not a prerequisite for a conviction for the offences, referred to in paragraph 1;**
  - (b) **a conviction for the offences, referred to in paragraph 1 is possible where it is established that the property has been derived from a criminal activity, without it being necessary to establish all the factual elements relating to such activity;**
  - (c) **the criminal activity from which the property was derived extends to conduct that occurred** in the territory of another Member State or in that of a third country, when the relevant conduct constitutes a criminal offence under the national law of the other Member State or that of the third country and <sup>31</sup> **would constitute a criminal activity had it occurred domestically.**
3. The offences referred to in points (a) and (b) of paragraph 1 shall also apply to persons who committed or participated in the criminal activity from which the property was derived, **whenever the conversion, transfer, concealment or disguise result in the property being brought into circulation, including through economic, financial or commercial activities, in a way that hinders the detection of the property's illicit origin.**

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<sup>30</sup> Wording largely aligned with Article 9 (5), (6) and (7) of the Warsaw Convention

<sup>31</sup> Some delegations expressed doubts on the feasibility of checking double criminality with regard to third countries. Furthermore, the Warsaw Convention implicitly encourages parties to avoid using this condition.

## Article 4

### *Incitement, aiding and abetting, and attempt*

Each Member State shall ensure that inciting, aiding and abetting and attempting an offence referred to in Article 3 shall be punishable.

## Article 5

### *Penalties for natural persons*

1. Each Member State shall ensure that the conduct referred to in Articles 3 and 4 shall be punishable by effective, proportionate and dissuasive criminal penalties.
2. Each Member State shall ensure that the offences referred to in Article 3 **(1) (a) and (b)** shall be punishable by a maximum term of imprisonment of at least four years, ~~at least in serious cases.~~

## Article 6

### *Aggravating circumstances*

Member States shall ensure that the following circumstances ~~shall~~ **may, in accordance with national law**<sup>32</sup>, be regarded as aggravating circumstances, in relation to the offences referred to in Articles 3 and 4 when:

- (a) the offence was committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841<sup>33</sup>; or
- (b) the offender has a contractual relationship and a responsibility towards an obliged entity or is an obliged entity within the meaning of Article 2 of Directive 2015/849/EU and has committed the offence in the exercise of their professional activities.

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<sup>32</sup> Wording aligned with recent substantive criminal law instruments, e.g. the Terrorism directive. The accompanying recital will be also aligned at a later stage.

<sup>33</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, (OJ L 300, 11.11.2008, p. 42).



*Article 7*  
*Liability of legal persons*

1. Each Member State shall ensure that legal persons can be held liable for any of the offences referred to in Articles 3 and 4 committed for the benefit of those legal persons by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:
  - (a) a power of representation of the legal person;
  - (b) the authority to take decisions on behalf of the legal person; or
  - (c) the authority to exercise control within the legal person.
2. Member States shall ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offences referred to in Articles 3 and 4 for the benefit of that legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who incite the commission of or are perpetrators of , or are accessories to any of the offences referred to in Articles 3 and 4.

*Article 8*  
*Sanctions for legal persons*

Each Member State shall ensure that a legal person held liable for offences pursuant to Article 6 shall be punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

- (1) the exclusion of that legal person from entitlement to public benefits or aid;
- (2) the temporary or permanent disqualification of that legal person from the practice of commercial activities;
- (3) the placing of that legal person under judicial supervision;
- (4) judicial winding-up;
- (5) the temporary or permanent closure of establishments which have been used for committing the offence

Article 9  
Jurisdiction

1. Each Member State shall establish its jurisdiction over the offences referred to in Articles 3 and 4 where:

- (a) the offence is committed in whole or in part in its territory;
- (b) the offender is one of its nationals.

2. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 3 and 4 committed outside its territory where:

- (a) the offender is a habitual resident in its territory;
- (b) the offence is committed for the benefit of a legal person established in its territory.

*Article 10*

*Investigative tools*

Each Member State shall ensure that effective investigative tools, such as those used in countering organised crime or other serious crimes are available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 3 and 4<sup>34</sup>.

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<sup>34</sup> Aligned with the approach in Art. 20 (1) in the new Counter terrorism Directive.

## *Article 11*

### *Replacement of certain provisions of Framework Decision 2001/500/JHA*

1. This Directive replaces point (b) of Article 1 and Article 2 of Framework Decision 2001/500/JHA in respect of the Member States bound by this Directive, without prejudice to the obligations of those Member States relating to the date for transposition of that Framework Decision into national law.
2. For the Member States bound by this Directive, references to Framework Decision 2001/500/JHA shall be construed as references to this Directive.

## *Article 12*

### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after adoption] at the latest. They shall immediately communicate the text of those provisions to the Commission.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

*Article 13*

*Reporting*

The Commission shall, by [24 months after the deadline for implementation of this Directive], submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures to comply with this Directive.

*Article 14*

*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in *the Official Journal of the European Union*.

*Article 15*

*Addressees*

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*