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From: Presidency
To: Council
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Subject: Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law [First reading]
- General approach

1. On 21 December 2016, the Commission submitted a proposal for a Directive on countering money laundering by criminal law. Since January 2017, the Working Party on Substantive Criminal Law (DROIPEN) has been working on the proposal with a view to preparing a compromise text as a basis for reaching a general approach at the Council in June.
2. The consolidated compromise text of the proposed Directive, as resulting from these discussions and confirmed at COREPER on 24 May 2017 is set out in the Annex¹. The text seeks to reflect the balance of positions expressed by delegations in a global compromise framework².

¹ Changes to the COM proposal are marked in **bold**.

² NL has a parliamentary scrutiny reservation.

3. The Council is invited to reach a general approach on the text, as set out in the Annex, which will constitute the basis for future negotiations with the European Parliament in the context of the ordinary legislative procedure.
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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 **related** 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/EU³, this Directive aims to tackle money laundering by means of criminal law, allowing for better cross-border cooperation between competent authorities.

³ 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).

- (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.
- (3) Union action should continue to take particular account of the Financial Action Task Force (FATF) Recommendations and instruments of other international **organisations and** 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/JHA⁴ 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.

⁴ 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).

- (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 **apply the crime of money laundering to all offences that are punishable with imprisonment of a level defined in this Directive. Moreover, to the extent that the application of these penalty thresholds does not already do so, Member States should include a range of offences within each of the categories designated by this Directive. In this case, Member States may decide how to delimit the range of offences within the respective categories.** Where categories of offences, such as terrorism or environmental crimes, **include offences** set out in Union law, this Directive refers to such legislation. **Member States should, consistent with the delimitation mentioned above, consider any offence set out in this EU legislation as predicate offence. The expression “any offence” does not necessarily require that all offences defined in the existing EU instruments should be considered predicate offences. (...). Any kind of punishable involvement in the commission of a predicate offence, as criminalised in accordance with national law is also to be considered as a criminal activity for the purposes of this Directive.** 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/EU⁵. **This is without prejudice to the possibility for Member States to transpose the two directives through a single comprehensive framework at national level.** 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.
- (8) **Member States should ensure that certain types of money laundering activities are also punishable when committed by the perpetrator of the criminal activity that generated that property (self-laundering).** Where, **in such cases**, the money laundering activity does not simply amount to the mere possession or use, but also involves the transfer, conversion, concealing or disguise of property and results in further damage than that already caused by the predicate offence, (...) **for instance by bringing the property derived from criminal activity into circulation and, by doing so, concealing its unlawful origin, that activity should be punishable.**
- (9) In order **for the countering of money laundering by criminal law measures to be effective (...), a conviction should be possible without it being necessary to establish precisely which predicate offence generated the property**, let alone require a prior or simultaneous conviction for that crime. **Member States may, in line with their national legal system ensure this through other means than legislation.** 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, **subject to the conditions set out in this Directive.**
(...)

⁵ 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).

- (10) This Directive aims to criminalise money laundering when committed intentionally **and with the knowledge that the property has been derived from criminal activity. In this context it does not make a difference whether the property has been derived directly or indirectly from such activity, in line with the broad definition of "proceeds", as laid down in Directive 2014/42/EU.** 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 **ensure that this conduct is punishable by a maximum term of imprisonment of at least four years. This obligation is without prejudice to the individualisation and application of penalties and execution of sentences in accordance with the concrete circumstances in each individual case.** (...)⁶.
- (11a) Member States should ensure that the judge or the court can take the aggravating circumstances as defined in this Directive into account when sentencing offenders, although there is no obligation to increase the sentence. It remains within the discretion of the judge or the court to determine whether to apply the specific aggravating circumstance, taking into account all the facts of the particular case. Member States are not obliged to provide for an aggravating circumstance, where national law provides for the criminal offences as defined in Framework Decision 2008/841/JHA to be punishable as a separate criminal offence and this may lead to more severe sanctions.

⁶ FI, AT and DE have a reservation on the deletion of the last sentence.

- (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.
- (12a) To ensure the success of investigations and the prosecution of money laundering offences, those responsible for investigating or prosecuting such offences should have the possibility to make use of effective investigative tools such as those which are used in combating organised crime or other serious crimes. The use of such tools, in accordance with national law, should be targeted and take into account the principle of proportionality and the nature and seriousness of the offences under investigation and should respect the right to the protection of personal data.**

- (13) This Directive should replace certain provisions of Framework Decision 2001/500/JHA⁷ for the Member States bound by this Directive.
- (14) Since the objective of this Directive (...) 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.
- (...)
- (15) 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 application⁸.
- (16) 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/JHA⁹ shall continue to be binding upon and applicable to Denmark,

⁷ 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).

⁸ Recital 15 reflects the position of UK and IE on this Directive after the expiry of the notification period under Protocol (No21).

⁹ *Idem.*

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/EU¹⁰.

¹⁰ DE has a reservation on this provision.

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 all offences, (...), which in accordance with national legislation 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.

Member States shall take the necessary measures to ensure that a range of offences within the categories listed hereunder shall be considered a criminal activity for the purposes of this Directive:

- (a) participation in an organised criminal group and racketeering, including **any offence** set out in Council Framework Decision 2008/841/JHA;
- (b) terrorism, including **any offence** set out in Directive 2017/XX/EU¹¹;
- (c) trafficking in human beings and migrant smuggling, including **any offence** set out in Directive 2011/36/EU¹² and Council Framework Decision 2002/946/JHA¹³;
- (d) sexual exploitation, including **any offence** set out in Directive 2011/93/EU¹⁴;
- (e) illicit trafficking in narcotic drugs and psychotropic substances, including **any offence** set out in Council Framework Decision 2004/757/JHA¹⁵;

¹¹ 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.).

¹² 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).

¹³ 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).

¹⁴ 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).

¹⁵ 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).

- (f) illicit arms trafficking;
- (g) illicit trafficking in stolen goods and other goods;
- (h) corruption, including **any offence** set out in the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union¹⁶ and in Council Framework Decision 2003/568/JHA¹⁷;
- (i) fraud, including **any offence** set out in Council Framework Decision 2001/413/JHA¹⁸;
- (j) counterfeiting of currency, including **any offence** set out in Directive 2014/62/EU¹⁹;
- (k) counterfeiting and piracy of products;
- (l) environmental crime, including **any offence** set out of Directive 2008/99/EC²⁰ or in Directive 2009/123/EC²¹;

¹⁶ Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

¹⁷ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.20004, p. 54).

¹⁸ 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).

¹⁹ 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 151 L, 21.5.2014, p. 1).

²⁰ 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 328 L, 6.12.2008, p. 28).

²¹ 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 280 L, 27.10.2009, p.52).

- (m) murder, grievous bodily injury;
 - (n) kidnapping, illegal restraint and hostage-taking;
 - (o) robbery or theft;
 - (p) smuggling (...);
- (pa) tax crimes relating to direct taxes and indirect taxes, as defined in the national law of the Member States;**
- (q) extortion;
 - (r) forgery;
 - (s) piracy;
 - (t) insider trading and market manipulation, including **any offence** set out in Directive 2014/57/EU²²;
 - (u) cybercrime, including **any offence** set out in Directive 2013/40/EU²³;
 - (v) (...)
- (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.

²² 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 L, 12.6.2014, p. 179).

²³ 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).

Article 3
Money laundering offences

1. Member States shall **take the necessary measures to** 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 from criminal 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 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 from criminal activity (...);
 - c) the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from criminal activity (...).
2. **Member States shall take the necessary measures to ensure that:**
 - (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, referred to in Article 2 (1), without it being necessary to establish all the factual elements or all circumstances relating to such activity;**

- (c) the offences referred to in paragraph 1 extend to property derived from conduct that occurred in the territory of another Member State or in that of a third country, when the relevant conduct would constitute a criminal activity had it occurred domestically. Member States may further require that the relevant conduct constitutes a criminal offence under the national law of the other Member State or that of the third country²⁴.
3. Member States shall take the necessary measures to ensure that the conduct, referred to in points (a) and (b) of paragraph 1 shall be a punishable criminal offence when committed by persons who committed or were involved in the criminal activity from which the property was derived²⁵.

Article 4

Incitement, aiding and abetting, and attempt

Member States shall take the necessary measures to ensure that inciting, aiding and abetting and attempting an offence referred to in Article 3 shall be punishable.

²⁴ EL has a reservation on this provision.

²⁵ DE has a reservation on this provision.

Article 5
Penalties for natural persons

1. Member States shall **take the necessary measures to** ensure that the **conduct** referred to in Articles 3 and 4 shall be punishable by effective, proportionate and dissuasive criminal penalties.
2. Member States shall **take the necessary measures to** ensure that the **conduct** referred to in Article 3 shall be punishable by a maximum term of imprisonment of at least four years (...).

Article 6
Aggravating circumstances

1. Member States shall **take the necessary measures to** ensure that **when** the offence was committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841²⁶, **this may, in accordance with national law**, be regarded as an aggravating circumstance, in relation to the **conduct** referred to in Articles 3 and 4.
2. **Member States may provide that when** 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, **this may be regarded as an aggravating circumstance, as referred to in paragraph 1.**

²⁶ 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. Member States shall **take the necessary measures to** ensure that legal persons can be held liable for any of the **conduct** referred to in Articles 3 and 4 committed for **their** benefit 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 **one of the following**:
 - (a) a power of representation of the legal person;
 - (b) **an** authority to take decisions on behalf of the legal person; or
 - (c) **an** authority to exercise control within the legal person.
2. Member States shall **also take the necessary measures to** ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 **of this Article** has made possible the commission of any of the **conduct** 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 **of this Article** shall not exclude criminal proceedings against natural persons who (...) **are perpetrators, inciters or accessories in**, (...) any of the **conduct** referred to in Articles 3 and 4.

Article 8
Sanctions for legal persons

Member States shall **take the necessary measures to** ensure that a legal person held liable (...) pursuant to Article 7 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

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

Article 9
Jurisdiction

1. Each Member State shall **take the necessary measures to** establish its jurisdiction over the **conduct** 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 **conduct** 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 **conduct** referred to in Articles 3 and 4.

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