

CCBE Comments on the Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law COM(2016) 826 final 2016/0414 (COD)

31/03/2017

A. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 32 countries (including the 28 EU Member States and Norway, Iceland, Liechtenstein and Switzerland) and a further 13 associate and observer countries, and through them more than 1 million European lawyers

The CCBE is thankful for the opportunity to provide comments in response to the Commission proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law. The CCBE aims to assist the Commission through constructive suggestions and observations.

B. General Comments

1. Money laundering and core principles of the rule of law

The CCBE supports the fight against money laundering and welcomes any proposal that enhances international cooperation and closes gaps between different national laws in order to enhance such an objective. However, based on an assessment of the proposal, it appears to the CCBE, and it can be assumed that any impartial observer will also share the view, that the objective of the proposed provisions go far beyond the goal of fighting money laundering, and seek to address minor crimes and to additionally increase tax revenues.

Governments and supranational and international authorities claim that strict rules are needed to strengthen the fight against terrorism and organized crime.

At the same time, we need to constantly remind ourselves that fundamental rights and the rule of law are the cornerstones of democracy. Any new proposals must provide clear, workable and proportionate rules and respect the rights of the accused. In the view of the CCBE, the trend to extend the scope of the crime of money laundering undermines its core objectives and affects important fundamental rights, such as the presumption of innocence and defence rights, as well as general principles of criminal law, such as certainty of law, the principle of proportionality and of the subsidiarity of criminal law as last resort.

2. Existing international legal framework

The existing international obligations, in particular the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005, CETS No 198 (“the Warsaw Convention”)¹, the UN Convention Against Transnational Organized Crime (the “Palermo Convention”) of 2001 and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the “Vienna Convention”) of

¹ Signed by 26 EU Member States, ratified by 17 EU Member States so far.

1988 have already created an international legal framework which is observed by most Member States and will be implemented by all parties to the convention. The relevant recommendations from the Financial Action Task Force (FATF) have also contributed to the international harmonisation. Therefore, there is already a common minimum level of harmonisation accepted by the Member States.

The CCBE is disappointed that the proposal does not demonstrate which “*significant differences in the respective definitions of what constitutes money laundering, on which are the predicate offences – i.e. the underlying criminal activity which generated the property laundered – as well as the level of sanctions*” exist, which may “*affect cross-border police and judicial cooperation between national authorities and the exchange of information.*”² It would have been very helpful if the Commission had made available the results of the Member States consultation in October 2016, about “*their existing provisions at national level regarding the criminalisation of money laundering, by requesting updated information on the basis of a country fiche for each Member State.*” There may be “*different approaches to aspects such as the predicate offences, the requirement of prior conviction or establishment of the predicate offence, the criminalisation of self-laundering and the level of sanctions*”,³ but there is no comparative study available as regards those differences.

B. Specific comments

1. Reference to FATF Recommendations (Recital 3, 5, 6)

Proposed provisions:

Recitals 3, 5, 6, of the proposal refers to “International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation adopted by the FATF in February 2012” (the revised FATF Recommendations).

Description of concern:

FATF Recommendation 3 provides:

Countries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.

Some more consideration – in particular to the types of predicate offences – is given in the Interpretative Note to Recommendation 3. A list of predicate offences is provided in the glossary to the FATF Recommendations.

In many aspects, the current proposal from the Commission goes beyond the FATF Recommendations, e.g. as regards the predicate offences. The CCBE would welcome information to illustrate how any departure from the International standards is justified as being necessary and proportionate (Recital 14).

Recommendation:

The CCBE recommends that the Commission maintains the scope of the proposal to the international obligations as provided by international conventions which are binding for most Member States (i.e. the Warsaw, Vienna and Palermo Conventions).

2. Definition of “criminal activity” (Article 2(1))

Proposed provision:

In Article 2(1) the Commission proposal defines “criminal activity” as any kind of criminal involvement in the commission of a list of crimes.

² C.f. Explanatory Memorandum, s. 1.

³ C.f. Explanatory Memorandum, s. 3.

Description of concern:

Predicate offences may be described by reference to all offences (catch-all), to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), to a list of predicate offences (list approach) or a combination of these approaches. The proposal chooses a combination of the list and the threshold approach.

The list of predicate offences (“criminal activities”) goes beyond both national and international lists as it includes “cybercrime, including any of the offences set out in Directive 2013/40/EU”. Cybercrime is usually not considered a predicate offence, as cybercrime by itself does not generate criminal property; moreover, cybercrime is a very general description and may cover very different activities (e.g. “hacking”; fraud using online tools; insulting somebody online etc.).

There are further criminal activities which should not be listed, even though the Appendix the Warsaw Convention contains the same categories:

- Environmental crime as well as tax crimes usually do not generate criminal property either, as the perpetrator usually does not derive property from such an activity but just reduces spending of property already lawfully earned (e.g. by not paying disposal costs or taxes).
- Murder and grievous bodily injury are astonishing predicate offences as well, as such a crime by its nature does not generate any criminal property which might be susceptible to money laundering activities.

Tax crimes never concern funds that should not be injected in to the economy, but funds that are already in the legitimate economy and have a perfectly legal origin. Moreover, it is impossible to assess if an amount of money in possession of a person derives from tax evasion or from legal activities. This provision has nothing to do with the fight against terrorism or against organized crime, but only intends to increase tax revenue by reinforcing the punishment of tax crimes, which may even cause a double punishment that can impact on the *ne bis in idem* principle. Using money laundering provisions to strengthen the punishment of tax crimes is disproportionate, in particular as long as the dividing line between illegal tax evasion and legal tax avoidance is not made clear.

Furthermore, the proposal does not significantly reduce national differences as regards the definition of predicate offences. Article 2 (1) does not take a new approach, as the provision mainly reiterates the FATF list and the Appendix of the Warsaw Convention. Only in exceptional cases, more details on certain criminal activities are provided by referring to Union legislation already in force. Therefore, the proposal will not achieve its most important goal: reducing national differences in order to enhance cross border cooperation and to reduce the incentive for perpetrators to abuse such differences.

In particular, the reference to tax crimes is vague and may not contribute to the harmonisation of national provisions; moreover, we doubt that there is sufficient competence for the EU to harmonise the notion of “tax crimes” and to determine tax crimes as predicate offences, as taxation is still within the exclusive competence of Member States.

Recommendations:

We recommend to review the FATF list of designated categories of offences as well as the Appendix to the Warsaw Convention in order to assess if the listed categories are useful. We recommend to reduce the list to activities which are a) serious crimes and b) may generate criminal property. In particular, environmental crimes, tax crimes, murder and grievous bodily injury must be deleted from the list of predicate offences.

3. Money laundering activities: acquisition, possession or use (Article 3(1))

Proposed provision:

Article 3(1) defines money laundering activities, i.e.:

- the conversion or transfer of property derived from criminal activity with the purpose of concealing or disguising its illicit origin (a),
- the concealment or disguise of its true nature, source, location, disposition, movement, rights with respect to, or ownership of the property (b) and

- the acquisition, possession or use of the property derived from criminal activity (c).

Article 3(1)(c) establishes that the acquisition, possession or use of property, knowing that this property comes from a predicate offence, is a crime of money laundering.

Description of concern:

Point (c) goes beyond the FATF Recommendations and the Warsaw Convention and will cause enormous difficulties in practice: While point (a) and point (b) describes activities which are usually not part of the daily operation of business or of day-to-day life, point (c) concerns common and perfectly legal activities, such as being paid for services rendered. The broadness of the provision is not proportionate and is not in line with the core of the crime of money laundering.

The mere possession of criminal proceeds is not considered money laundering in most Member States. It is obvious that “possessing” is not laundering. The mere fact of “possession” or “use” does not imply that property derived from a criminal activity is injected into the “legitimate” economy. Moreover, there is no need to penalise “possessing”, as the suggested provision only concerns actions when the perpetrator, knows “at the time of receipt, that such property was derived from criminal activity”. Therefore, possessing can only be a criminal activity if the acquisition (= receipt) was already a criminal activity by the perpetrator.

The difference between illegal and legal activities is only the knowledge that such property was derived from criminal activity or from an act of participation in such an activity. In practice, knowledge is assumed and inferred from circumstances (as provided for by Recital 10). Therefore, there is the risk that people who carry out otherwise perfectly legal activities are convicted on the mere assumption of knowledge, which might be inferred by judges from circumstances. Experience shows that such an “assumption of knowledge” can hardly be challenged, as the burden of proof is very low. Hence, it must be stated that Article 3(1)(c) is in conflict with the presumption of innocence as stated by national and international principles.⁴

National laws therefore made an effort to reduce the scope of the criminalisation of such day-to-day activities to socially inadequate activities. Activities are socially inadequate if they cause a social disturbance which needs to be addressed by criminal law, i.e. if the goal of the criminal provision is to prevent such a behaviour. It is fair to say that criminalising any “acquisition” goes far beyond the essence of the crime by criminalizing many legal activities. Architects, plumbers, barbers etc could be charged for money laundering if they know (or in many cases should have known) that the adequate consideration that they have received for their services comes from a crime.

English law, for example, contains in Section 329 of the Proceeds of Crime Act 2002 (POCA) the so called “adequate consideration doctrine”:

“But a person does not commit such an offence if [. . .] (c) he acquired or used or had possession of the property for adequate consideration; [. . .].”

Subsection 3 defines inadequate consideration:

“For the purposes of this section

(a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;

(b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;

(c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.”

Article 6 of the European Convention of Human rights reveals a particular problem, which may arise in connection with the criminalisation of the mere “acquisition” of property:

“3. Everyone charged with a criminal offence has the following minimum rights: [...] (c) to defend himself in person or through legal assistance of his own choosing or, if he has not

⁴ C.f. Article 11 of the United Nations Universal Declaration of Human Rights; Article 6 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and many other provisions.

sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

According to this provision, the suspect has the fundamental right to retain a defence lawyer, which includes the right to pay for a defence lawyer. Only if he has not sufficient means to pay for legal assistance, he has the right to be provided with it for free. However, in case of a suspect who is accused or suspected of a crime which – if convicted – makes it likely that the means are in fact proceeds of crime, the suspect may be unable to pay for legal assistance, as the defence lawyer may run the risk of being prosecuted himself for money laundering. In fact, under Article 3(1)(c) of the proposal, a lawyer who gets legal fees for defending a client of any of the offences listed in Article 2 could be committing the crime of money laundering. The problem is even more obvious if the mandate of the defence lawyer is limited to obtain a low penalty for the suspect. In such a case, the suspect has financial means, but must demonstrate to the court that he cannot use those means to pay for legal assistance; in order to do so, he must confess, an obvious violation of the principle of “*nemo tenetur se ipsum accusare*”, i.e. the right that no suspect has to incriminate himself, which also stems from Article 6.⁵

Therefore, the criminalisation of the acquisition of money laundering could affect fundamental rights, namely the right of access to a lawyer and the right to freely choose (and pay for) legal counsel, which is a fundamental right of the accused and recognized in every international convention dealing with the rights of the accused facing a criminal trial (e.g. art. 6.3 ECHR; art. 14.3 (b) ICCPR; 8.2 (d) ACHR; 7.1 (c) ACHPR), as well as in all important legal systems around the world, such as in the United States of America⁶ and in all Member States of the European Union⁷.

The goal of the criminalisation of money laundering is not to deprive the suspect of his right to legal assistance. Therefore, it is socially adequate that the suspect mandates and pays for a defence lawyer. It is an imperative that such a defence lawyer must not be prosecuted for money laundering if he acquires property from the suspect for adequate consideration, i.e. for his services rendered in the interest of justice and the rule of law.

Recommendations:

We therefore recommend to omit the criminalisation of “possession” from Article 3(1)(c) of the proposal. The acquisition, possession or use shall only be punishable if the perpetrator acts with the intention to hide assets.⁸ Furthermore, we urge to reduce the scope of “acquisition” and “use” to socially inadequate behaviour. In any case, legal fees for exercise of the right to be assisted by a lawyer in court (both in civil or criminal proceedings), and, generally speaking, any adequate consideration shall not be deemed to be an act of money laundering, e.g. by introducing a “adequate consideration doctrine” as provided for by Section 329 of the English Proceeds of Crime Act.

4. Property derived from criminal activity (Article 3(1))

Proposed provision:

Article 3(1) uses the wording “derived from” criminal activity as a necessary element of the crime of money laundering.

Description of concern:

The expression “derived from” is too vague. What does it mean in practice?

One of the problems arising is this concept may include property *indirectly* derived from criminal activity. What happens if the property is converted, transferred, acquitted, possessed or used in the legitimate economy after the injection by somebody else? Does it still mean that after such a first

⁵ ECtHR, 25 Feb 1993, Application no. 10828/84, *Funke v. France*, § 44; ECtHR 20 June 2007, Applications nos. 15809/02 and 25624/02, *O'Halloran and Francis v. the United Kingdom* [GC], § 45; ECtHR 17 Dec 1997 20 June 1996, Application no. 19187/91, *Saunders v. the United Kingdom*, § 60.

⁶ Sixth Amendment to US Constitution.

⁷ C.f. Report on EU Procedural Rights in Criminal Proceedings, European Commission, 2009.

⁸ E.g. following the doctrine issued by Spanish Supreme Court in the Judgment n° 265/2015 of 29 April 2015.

act having no connection whatsoever to the second act (e.g. if the first act was committed by other persons or was committed some years ago), any further person may still commit the crime of money laundering, i.e. does it mean that contaminated funds will be contaminated forever?

German law contains a very useful provision in § 261 (6) Criminal Code, which reads as follows:

“Die Tat ist nicht nach Absatz 2 strafbar, wenn zuvor ein Dritter den Gegenstand erlangt hat, ohne hierdurch eine Straftat zu begehen.“

The provision roughly translates as *“The act is not punishable according to subsection 2 [acquisition, possession or use], if a third person has acquired the property without committing a crime.”*

According to German law, the property thus loses its qualification as “criminal” property once it is “cleaned” by a legal and licit act. The provision therefore makes sure that property must be directly derived from a criminal act.

Another problem arises if criminal property and legal property are mixed (e.g. by paying illegal funds into a banking account with other funds). Does the notion of “derived from” mean that all the property is now derived from a criminal activity, as the property cannot be traced anymore? Or is all the property legal now?

Recommendation:

The CCBE recommends that the terms “Property derived from criminal activity” be accurately defined. In our understanding, it should only include property *directly* derived; once the property is injected in the legitimate economy, it should not be the object of the crime of money laundering any more. Moreover, blending of illegal funds with legal funds should not contaminate all the funds; criminal property must be limited to funds traceable to a criminal activity.

5. Breach of the presumption of innocence regarding the existence of the predicate offence (Article 3(2)(a), (b))

Proposed provision:

Article 3(2)(a) sets out that it is not necessary to establish a conviction regarding the predicate offence in order to consider that this offence exists. Paragraph (b) further provides that there is no requirement to identify the person who has committed the predicate crime.

Description of concern:

These two provisions allow convictions based on mere suspicion or, in a best case scenario, on grounds where it is suspected (in both cases, not tried) that a predicate offence has been committed. The provision breaches the right to be presumed innocent until proved otherwise, as set out in Article 3 of Directive 2016/343 on the strengthening of certain aspect of the presumption of innocence, and is a basic principle according to international standards (such as the ECHR and ICCPR). Other defence rights and general principles which govern any criminal procedure are also affected, such as the right to a fair trial, the right to be heard, the right to be informed about the accusation and the rules regarding the burden of proof.

These rights could be breached in at least two ways:

- (a) From the perspective of the alleged perpetrator of the predicate offence, the provision violates the right to be heard, to be present at the trial and, obviously, to be presumed innocent, because they will be indirectly tried in a case where they cannot defend themselves.
- (b) From the perspective of the person accused of money laundering, it violates the right to be presumed innocent, because the person could be convicted on the bases of the existence of a predicate offence that hasn't been proved beyond the threshold of the presumption of innocence; it also affects the right to a fair trial because, in some cases, the accused person will be obliged not only to prove his own innocence, but also to prove the innocence of a third person (the alleged perpetrator of the predicate offence). It also breaches the right to be

informed about the accusation because of the possible vagueness (what, where, when, how, who) about the predicate offence which is the basis of the alleged act of money laundering.

The proposal refers to the “difficulties” which investigative authorities have experienced arising from the requirement that national legislation requires a previous conviction for the predicate offence. However, this must not be a reason to undermine fundamental procedural rights: The prosecution authorities have to find another solution to overcome such “difficulties”. In history, the application and effectiveness of fundamental procedural rights was always seen as a “difficulty” by some authorities in charge of criminal investigation. It has to be highlighted that all totalitarian regimes argue with “difficulties” to prosecute alleged criminals to justify the violation of fundamental rights. The leniency in applying the standard of the presumption of innocence in case of money laundering procedures will lead, for sure, to unfair and unjust convictions, which is not acceptable even if it concerns only a minority of cases.

Recommendation:

The existence of the predicate offence must have been established by a prior and binding judgment or, at least, must be tried in the same procedure jointly with the money laundering by providing the alleged offender with the opportunity to defend himself as regards the charge of the predicate offence. If this is not possible, a stay of the proceedings must be granted. Any other provision gravely violates the fundamental rights of the accused.

6. Self-money laundering (Article 3(3))

Proposed provision:

Article 3(3) criminalizes self-money laundering, except for cases of acquisition, possession or use.

Description of concern:

Even in the case of Article 3(1)(a) and (b), the punishment of self-money laundering *could* affect the *ne bis in idem* principle and affect the right not to incriminate oneself:

- (a) *Ne bis in idem*: The action of conversion or transfer of property or the concealment or disguise of the true nature of property could be considered the last stage of the predicate crime. If this activity is punished, it could mean punishing the same act twice. The contrary position as proposed in the directive is that there are two different offences (the predicate offence and the money laundering), so that there is no risk to be punished twice for the same act.
- (b) Right not to incriminate oneself: It must not be punishable to conceal a crime committed by oneself. However, acts of money laundering are usually committed to conceal the predicate offence. Therefore, the criminalization of self-money laundering is in direct contradiction with the fundamental right to not incriminate oneself.

Moreover, if the Commission refers to our concerns expressed with respect to Article 3(2)(a) and (b) of the proposal, , the risk of violation of those two fundamental principles is even more obvious and grievous.

Recommendation:

It is suggested that Article 3(3) be deleted. At a minimum, the Directive should specify that self-money laundering can only be punishable (a) if there is a previous conviction or if the predicate offence is tried at the same time, and (b) if the actions have the clear intention to hide the illegal origin of the property.

D. Conclusion

The CCBE believes that the impact on fundamental rights and proportionality requirements need to be assessed. A legislative proposal which seeks to criminalise behaviour which is at the borderline of day-to-day life and the daily operation of businesses must be thoroughly reviewed as regards fundamental rights and the principle of proportionality. In particular, the proposed offence in Article 3(1)(c) (the acquisition, possession or use of property) can be differentiated from perfectly legal activities only by establishing the knowledge that such a property was derived from criminal activity; however, the proposals points out that it shall not be necessary to establish a conviction of the criminal activity that generated the property nor the identity of the perpetrator (Article 3(2)).

Another difficult issue in practice is the blending (mixing) of criminal property with legal property, e.g. by paying criminal property into a banking account. Furthermore, the goal of anti-money laundering provisions is not to prevent any possible use of criminal property, but only the use of criminal property for social inadequate purposes.

Therefore, we recommend and urge to carefully assess and test the proposed provisions as regards the fundamental principles common to national laws and European law and to request the opinion of European Union Agency for Fundamental Rights on these aspects of the proposal.

The CCBE is alarmed that about the widespread examples of “legal activism” in the field of legislation in the field of anti-money laundering and terrorist financing and therefore urges the Commission, the Council and the Parliament to seriously review the need and the consequences of any such type of legislation.

The CCBE hopes the above comments are of assistance and the CCBE is happy to elaborate on any aspect of the above, or related aspects, should this be of assistance.



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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on countering money laundering by criminal law

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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/EU¹, 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.
- (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.

¹ 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).

- (4) Council Framework Decision 2001/500/JHA² 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/EU³. 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) 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.

² 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).

³ 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. 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/JHA⁴ 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/JHA⁵ for the Member States bound by this Directive.
- (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.]

⁴ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, (OJ L 300, 11.11.2008, p. 42)

⁵ 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).

- (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/JHA⁶ 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.

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:

- (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/EU⁷;
- (c) trafficking in human beings and migrant smuggling, including any of the offences set out in Directive 2011/36/EU⁸ and Council Framework Decision 2002/946/JHA⁹;
- (d) sexual exploitation, including any of the offences set out in Directive 2011/93/EU¹⁰;
- (e) illicit trafficking in narcotic drugs and psychotropic substances, including any of the offences set out in Council Framework Decision 2004/757/JHA¹¹;
- (f) illicit arms trafficking;

⁶ Idem

⁷ 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.).

⁸ 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).

⁹ 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).

¹⁰ 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).

¹¹ 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).

- (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 Union¹² and in Council Framework Decision 2003/568/JHA¹³;
- (i) fraud, including any of the offences set out in Council Framework Decision 2001/413/JHA¹⁴;
- (j) counterfeiting of currency, including any of the offences set out in Directive 2014/62/EU¹⁵;
- (k) counterfeiting and piracy of products;
- (l) environmental crime, including any of the offences set out of Directive 2008/99/EC¹⁶ or in Directive 2009/123/EC¹⁷;
- (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);
- (q) extortion;
- (r) forgery;
- (s) piracy;
- (t) insider trading and market manipulation, including any of the offences set out in Directive 2014/57/EU¹⁸;
- (u) cybercrime, including any of the offences set out in Directive 2013/40/EU¹⁹;
- (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

¹² Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

¹³ 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).

¹⁴ 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).

¹⁵ 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).

¹⁶ 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).

¹⁷ 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).

¹⁸ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (OJ 173 L, 12.6.2014, p. 179).

¹⁹ 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).

in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months;

- (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 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 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 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 from criminal activity or from an act of participation in such an activity.
2. In order for an offence referred to in paragraph 1 to be punishable, it shall not be necessary to establish:
 - (a) a prior or simultaneous conviction for the criminal activity that generated the property;
 - (b) the identity of the perpetrator of the criminal activity that generated the property or other circumstances relating to that criminal activity;
 - (c) whether the criminal activity that generated the property was carried out in the territory of another Member State or in that of a third country, when the relevant conduct is a criminal offence under the national law of the Member State or the third country where the conduct was committed and would be a criminal offence under the national law of the Member State implementing or applying this Article had it been committed there;
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.

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 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 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 2008/841²⁰; 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.

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.

²⁰ 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 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.

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