COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 23 March 1990

Proposal for a

COUNCIL DIRECTIVE

on prevention of the financial system for
the purpose of money laundering

(presented by the Commission)

Com 2006.

EXPLANATORY MEMORANDUM

I. GENERAL CONSIDERATIONS

1. Laundering of proceeds from criminal activities (in short "money laundering") is a phenomenon which concerns national and international authorities. Indeed, it is an activity becoming more and more widespread every day and it has an evident influence on the rise of organised crime in general and drug trafficking in particular. Internationalisation of economies and financial services are opportunities which are seized by money launderers to carry out their criminal activities, since the origin of funds can be better disguised in an international context.

2. Nowadays, several events and initiatives at various levels show the increase of international awareness of the necessity to combat money laundering especially in the field of drugs, although the phenomenon is far from being controlled. At a national level, some Community and non Community countries have adopted criminal legislation against laundering of proceeds from drug related offences or terrorism and some others have started the discussion of bills of laws in this sense.

3. Concerning the international instruments focused on a repressive approach towards money laundering, reference should be made to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted the 19th December 1988 in Vienna (hereinafter the Vienna Convention).

This Convention - in the discussions of which the Commission has participated, and of which the EEC is one of the signing parties - provides, among other points, that the States adhering to it shall criminalize a series of conducts related to drugs as well as money laundering related to such offences. In addition, it contains a set of provisions which afford important help to combat money laundering such as those concerning confiscation and seizure of criminal proceeds, international judicial assistance and prohibition of invoking banking secrecy in order to avoid investigations in the scope covered by the Convention.

4. With respect to the international developments focused on a preventive approach, mention should be made of the Recommendation of the Council of Europe of the 27th June 1980 and of the Declaration of Principles adopted in December 1988 in Basle by the banking supervisory authorities of the Group of Ten, both of which constitute major steps towards preventing the use of the financial system for purposes of money laundering.

   Most recently, the Financial Action Task Force against Money Laundering established in July 1989 by the Paris Summit of the Seven Most Developed Countries, in which the Commission has actively participated, together with fifteen Community and non-Community countries, has carried out important work in this area, particularly in the aspects of laundering methods and statistics, judicial assistance, and administrative and financial cooperation. The final report of the Task Force, which incorporates up-to-date information about the existing situation concerning these points, as well as a list of recommendations, was completed in February 1990 and submitted to the Governments for approval.

II. NECESSITY OF COMMUNITY ACTION IN THIS FIELD

1. Money laundering must mainly be combated, by penal means (criminal legislation), and in the framework of international cooperation among law enforcement agencies and judicial authorities. This has been the approach, for example, in the above mentioned Vienna Convention.

2. However, a penal approach should not be the only strategy to combat money laundering since, as credit and financial institutions are frequently used to carry out these kinds of activities, the soundness and stability of the particular institutions involved as well as the prestige of the financial system as a whole could be seriously jeopardized, thereby losing the confidence of the public. The Community, which is responsible for adopting the necessary measures to ensure the soundness and stability of the European financial system, cannot be indifferent to the involvement of credit and financial institutions in money laundering.

   In a similar way to that in which the Community directives in the financial sector try to guarantee that persons who effectively direct the business of credit institutions have "good repute" (Article 3, paragraph 2 of the First Banking Coordination Directive) as well as the "suitability" of the shareholders (Article 5 and Article 11, paragraph 1 of the Second Banking Coordination Directive), Community legislation must ensure the integrity and cleanliness of the financial system.

3. Moreover, the financial system itself can play a highly effective preventive role in the struggle against money laundering.

4. At the same time, the Community has the responsibility to impede launderers from taking advantage of the single financial market, and of the freedoms of capital movements and supplying of financial services which this financial area involves to facilitate their criminal activities. Lack of Community action against money laundering could lead Member States, with the purpose to protect their financial system, to adopt measures which could be inconsistent with the completion of the Single Market.

5. Finally, it is important to consider the public demand throughout the Community for measures which can help to reduce the scourge of drugs. The resolutions of the European Parliament of the 18th January 1989, which requested the Commission to establish a global Community program to combat drug trafficking, including provisions on prevention of money laundering, are relevant in this respect.

III. CONTENT OF THE DIRECTIVE

The content of the Directive is as follows:

1. General coverage of the whole financial system (Article 1, first and second indents, and Article 8)

   Since a partial coverage of the financial system could provoke a shift in money laundering from one to another kind of financial institutions, the Directive covers not only banks but all kinds of credit and financial institutions.

   Credit institutions are defined according to the Community banking legislation (Article 1 of the First Banking Coordination Directive). The concept of financial institutions is defined in a very broad meaning as an undertaking other than a credit institution whose principal activity is to carry out one or more of the activities included in the Annex of the Second Banking Coordination Directive. This annex contains a list of virtually all kinds of financial services. Since insurance, however, is not included in this annex, a special reference has been made in the definition of financial institutions to insurance companies so that this important part of the financial sector is covered by the Directive.

"Non-formal financial institutions" are not directly covered by the Directive due to the difficulty of establishing who these are and to the fact that they do not usually have any supervisory authorities. Nevertheless Article 8 provides that Member States shall extend its provisions, where applicable, to professions and undertakings which "because of their involvement with cash transaction business, may be particularly susceptible to being used for money laundering purposes". These would include casinos, money changers, etc.

2. Definition of money laundering including proceeds from all serious criminal offences (Article 1, third indent)

The definition of money laundering is literally taken from Article 3, 1, b) of the Vienna Convention. The only difference is that instead of being limited to drugs related offences, as in the Convention, it covers laundering of proceeds from drugs related offences, terrorism and any other serious crimes (including particularly organised crime), as defined by Member States. Indeed, in spite of the importance that laundering of proceeds from drug trafficking has in the context of money laundering in general it would not have been appropriate to exclude laundering of other serious crimes from the scope of the Directive. The soundness of the financial system is also jeopardized in these cases. Moreover, even if financial institutions have reasons to suspect that certain funds come from criminal activities, it is practically impossible for them to know from what kind of crime the money to be laundered proceeds.

3. Criminalizing money laundering by Member States (Article 2)

Criminalizing money laundering by Member States is not only a necessary repressive means of combating money laundering, but also a previous prerequisite for cooperation between financial institutions and judicial or law enforcement authorities.

According to legal principles existing in most Member States bank secrecy must be lifted in cases of Criminal Law. Criminalization therefore becomes a precondition for such a cooperation.

In this respect, the Directive requires that Member States make laundering of proceeds from serious crimes, regardless whether they are related to drugs or not,a criminal offence.

4. Identification of customers and beneficial owners (Article 3)

Prevention of use of the financial system for money laundering, as well as effectiveness in any eventual criminal enquiry, demand as an essential measure, that credit and financial institutions require identification of their customers when entering into business relations. Besides this general obligation, credit and financial institutions must take reasonable measures to establish the real identity of the persons on whose behalf an operation is carried out or an account is opened (beneficial owner) in the case of doubts whether customers are acting on their own behalf. Because of the difficulties which this identification of beneficial owners could involve in some circumstances, credit and financial institutions are exhorted to take "reasonable measures".

The obligation of keeping records of the identity for an established period is a necessary condition for the effectiveness of the identification requirement.

5. Due diligence of credit and financial institutions (Article 4)

This principle encompasses two related obligations for credit and financial institutions: careful examination of any unusual transaction and refraining from entering into any suspected operation.

This provision is a consequence, expressed in a negative way, of the principle of cooperation which will be dealt with in the following paragraph, as well as an exigency of the financial institutions' responsibility in order to preserve their own soundness and integrity.

6. Cooperation between credit and financial institutions and judicial or law enforcement authorities competent for criminal matters (Article 5)

This cooperation encompasses two different obligations for credit and financial institutions and their directors and employees:

- to inform the judicial or law enforcement authorities competent for criminal matters on their own initiative, of any facts they discover which could be related to a money laundering offence;

- to furnish these authorities all information, documents or records requested on this subject.

Both obligations lie on the principle, already mentioned, that bank secrecy must be lifted in cases of Criminal law.

The first of the above mentioned indents establishes a mandatory system of reporting suspicious transactions, involving an active cooperation of financial institutions and their directors and employees on preventing money laundering.

A special clause has been forseen in Article 5 paragraph 2 of the Directive to exempt employees and directors from responsibility by breaching restrictions on disclosure of information. This is an important provision to encourage personnel of credit and financial institutions to cooperate with the judicial authorities.

7. Cooperation between financial supervisors and judicial or law enforcement authorities competent for criminal matters (Article 6)

The supervisor's obligation to inform the judicial authorities of any facts that they discover which could constitute a criminal offence is completely coherent with the supervisor's duties of preserving the soundness and stability of the financial system.

8. Establishing procedures of internal control and training programs by credit and financial institutions (Article 7)

These complementary measures should play an important role,however. Since they must be according to the particular circumstances of the different institution the Directive only enunciates them, without providing for the details. Member States shall establish the necessary guidelines in this respect.

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 57(2), third sentence, thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Whereas when credit and financial institutions are used to launder proceeds from criminal activities (hereinafter money laundering), the soundness and stability of the particular institution concerned and confidence in the financial system as a whole could be seriously jeopardized, thereby losing the trust of the public;

Whereas lack of Community action against money laundering could lead Member States, with the purpose of protecting their financial system, to adopt measures which could be inconsistent with the completion of the Single Market; whereas, in order to facilitate their criminal activities, launderers could try to take advantage of the freedom of capital movements and freedom to supply financial services which the integrated financial area involves, if certain coordinating measures are not adopted at Community level;

Whereas money laundering has an evident influence on the rise of organised crime in general and drug trafficking in particular; whereas there is more and more awareness that combating money laundering is one of the most effective means of opposing this form of criminal activity, which constitutes a particular threat to Member States' societies;

Whereas money laundering must be mainly combated by penal means and within the framework of international cooperation among judicial and law enforcement authorities, as has been undertaken, in the field of drugs, by the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted on 19 December 1988 in Vienna (hereinafter the Vienna Convention);

Whereas a penal approach should, however, not be the only way to combat money laundering, since the financial system can play a highly effective role; whereas reference must be made in this context to the Recommendation of the Council of Europe of 27 June 1980 and to the Declaration of Principles adopted in December 1988 in Basle by the banking supervisory authorities of the Group of Ten, both of which constitute major steps in order to prevent the use of the financial system for purposes of money laundering;

Whereas money laundering is usually carried out in an international context so that the criminal origin of the funds can be better disguised; whereas measures exclusively adopted at a national level, without taking account of international coordination and cooperation, would have very limited effects;

Whereas any measures adopted by the Commission in this field should be consistent with other action undertaken in other international fora; whereas the Commission, to this end, has participated, together with fifteen Community and non-Community countries, in the important work carried out by the Financial Action Task Force on money laundering, established in July 1989 by the Paris Summit of the Seven Most Developed Countries;

Whereas the European Parliament has requested the Commission, in several resolutions, to establish a global Community programme to combat drug trafficking, including provisions on prevention of money laundering;

Whereas, in order to avoid the difficulties of establishing a generally accepted definition of money laundering it is appropriate to follow the definition adopted by the Vienna Convention; whereas, however, since the phenomenon of money laundering not only affects proceeds from drug offences, but also those from any serious crimes, this definition should be extended to include laundering of proceeds of serious criminal offences, as defined by the Member States;

Whereas making money laundering a criminal offence in the Member States, although it goes beyond the scope of the financial system, constitutes a necessary condition for any action to combat this phenomenon and in particular to permit cooperation between financial institutions or banking supervisors and judicial authorities; whereas, in this context, ratification and implementation by the Member States of the Vienna Convention is an essential measure to oppose money laundering in the field of drugs;

Whereas ensuring that credit and financial institutions require identification of their customers when entering into business relations or conducting transactions, and that they keep records of the identity documents required, are necessary to avoid launderers' taking advantage of anonymity to carry out their criminal activities; whereas such provisions must also be extended, as far as possible, to any beneficial owners;

Whereas ensuring that credit and financial institutions examine with special attention any unusual operation not having an apparent economic or lawful purpose and that they refrain from entering into any suspected money-laundering transaction is necessary in order to preserve the soundness and integrity of the financial system as well as to contribute to combating this phenomenon;

Whereas preserving the financial system from money laundering is a task which can not be carried out by the judicial and law enforcement authorities without the cooperation of credit and financial institutions and their supervisory authorities; whereas banking secrecy must be lifted in criminal cases; whereas a mandatory system of reporting suspicious transactions is the most effective way to accomplish such cooperation; whereas a special protection clause is necessary to exempt employees and directors from responsibility by breaching restrictions on disclosure of information;

Whereas establishment by credit and financial institutions of procedures of internal control and training programs in this field are complementary provisions without which the other measures contained in this Directive could become ineffective;

Whereas, since money laundering can be carried out not only through credit and financial institutions but also through other types of professions and undertakings involving cash transaction business, Member States must extend, where applicable, this Directive to include these professions and undertakings,

HAS ADOPTED THIS DIRECTIVE:

ARTICLE 1

For the purpose of this Directive

- "credit institution" is defined in accordance with the first indent of Article 1 of Council Directive 77/780/EEC[1].

- "financial institution" means an undertaking other than a credit institution whose principal activity is to carry out one or more of the operations included in numbers 2 to 12 and 14 of the list annexed to Council Directive 89/646/EEC[2], as well as an insurance company duly authorized according to Council Directives 73/239/EEC[3] and 79/267/EEC[4].

- "money laundering" means:

  . the conversion or transfer of property, knowing that such property is derived from a serious crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in committing such an offence or offences to evade the legal consequences of his action, and

  . 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 a serious crime.

(1) OJ No L 322, 17.12.1977, p. 30.
(2) OJ No L 386, 30.12.1989, p. 1.
(3) OJ No L 228, 16.8.1973, p. 3.
(4) OJ No L 63, 13.3.1979, p. 1.

- "property" means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.

- "serious crime" means a crime specified in Article 3, paragraph 1 (a) and (c), of the Vienna Convention, terrorism and any other serious criminal offence (including in particular organised crime), whether or not connected with drugs, as defined by the Member States.

- "competent authorities" means the national authorities empowered by law or regulation to supervise credit or financial institutions.

ARTICLE 2

Member States shall ensure that money laundering of proceeds from any serious crime is treated as a criminal offence according to their national legislation.

ARTICLE 3

Member States shall ensure that credit and financial institutions require identification of their customers when entering into business relations or conducting transactions, and in the case of doubt whether customers are acting on their own behalf, that these institutions take reasonable measures to establish the real identity of the persons on whose behalf a transaction is carried out or an account is opened. Credit and financial institutions shall keep records of the identity documents required until at least five years after relations with their clients have ended.

ARTICLE 4

Member States shall ensure that credit and financial institutions examine with special attention any unusual transaction not having an apparent economic or visible lawful purpose, and that such institutions refrain from entering into any transaction which they have reason to suspect may have any relation to money laundering.

ARTICLE 5

Member States shall ensure:

1. That credit and financial institutions and their directors and employees cooperate fully with the relevant judicial or law enforcement authorities competent for criminal matters:

   - by informing these authorities, on their own initiative, of any facts they discover which could be related to a money laundering offence;

   - by furnishing these authorities with all information requested in the case of any criminal inquiry or rogatory commission on money laundering carried out according to the applicable legislation.

2. That the disclosure in good faith to the relevant judicial or law enforcement authorities competent for criminal matters by any employee or director of a credit or financial institution of any suspicion or belief that an operation is aimed at or connected to money laundering, shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve for such employees and directors any civil or penal responsibility of any kind.

ARTICLE 6

Member States shall ensure that if, in the course of inspections carried out in credit or financial institutions by the competent authorities, or in any other way, these authorities discover facts that could constitute evidence of money laundering, they inform the relevant judicial or law enforcement authorities competent for criminal matters.

ARTICLE 7

Member States shall ensure:

1. That credit and financial institutions establish adequate procedures of internal control in order to prevent, detect and impede their engaging in operations related with money laundering.

2. That credit and financial institutions take the appropriate measures so that their employees are aware of the provisions contained in this Directive, and that they also establish special training programs for their employees, to help them detect operations which may be related with money laundering as well as to instruct them as to how to proceed in such cases.

ARTICLE 8

Member States shall extend the provisions of this Directive, where applicable, to professions and undertakings, other than credit and financial institutions, which because of their involvement with cash transaction business, may be particularly susceptible to being used for money laundering purposes.

ARTICLE 9

1. Member States shall take the measures necessary to comply with this Directive by 1 January 1992 at the latest.

   The provisions adopted pursuant to the first subparagraph shall make express reference to this Directive.

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

ARTICLE 10

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

FINANCIAL SHEET

The proposal will not give rise to any costs in the budget of the European Communities.

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