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DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a European Parliament and Council directive on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing
(COM(2004)0448 – C6-0143/2004 – 2004/0137(COD))

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SHORT JUSTIFICATION

The Commission's proposal for a directive of the European Parliament and of the Council on the prevention of the use of financial system for the purpose of money laundering, including terrorist financing is the third Directive in this field following those of 1999 and 2001. This directive comes against an international backdrop of concern about terrorism and its financing; accordingly the political imperative for further legislation is strong. In this respect it is entirely regrettable that the second directive has only recently been implemented in some Member States, with the Commission still having to take enforcement action against one Member State. In these circumstances there has been little or no opportunity to properly reflect on and or examine the effectiveness of the earlier legislation.

The motives for a further directive are clearly the wish to deal effectively with the financing of terrorist activities and to respond to the latest recommendations of the FATF. Your draftsman acknowledges the need to strengthen EU legislation in this respect and welcomes the extension of the scope of the directive to all service providers dealing with corporate and trust matters, omitted from the 2001 directive and identified by FATF as being vulnerable to money laundering.

However the proposed Directive again deals with the position of legal professionals in respect of whom the Commission has not, it appears, taken steps to carry out the review provided for by Article 2 of the 2001 directive in relation to the specific treatment of lawyers and other independent legal professionals. This failure combined with the lack of any legislative impact assessment of the proposal or analysis of the effectiveness of the earlier two directives raises serious concerns about process. In addition to which this proposal is now subject to the co-decision procedure and a political agreement has been reached without awaiting the Parliament's opinion.

Your rapporteur feels that these problems about process are compounded by the serious constitutional and fundamental rights issues which have been raised in some jurisdictions about the extent to which legal professionals should be covered by anti-money laundering legislation, having regard to the lawyer-client confidentiality principle. Your draftsman would urge caution with regard to further immediate legislation in this particular area covered by the proposal, given the uncertainty of the current legal and constitutional situation. Obligations arising from the second directive are being challenged through the courts by Bar Associations in both Belgium and Poland. There are also outstanding legal cases with regard to issues surrounding legal professionals in other Member States. It is also noted that in Canada, a FATF country, members of the legal profession have been excluded from the scope of similar anti-money laundering legislation pursuant to the ongoing constitutional challenge by their Bar Association and Law Societies. Indeed, it is noteworthy that despite its active stance against terrorism the USA has so far not felt it appropriate to impose reporting obligations on legal professionals mainly as a result of representations from the American Bar Association raising constitutional issues. Regard should also be had to the petition presented to the Petitions Committee of the European Parliament by a number of Member State bar associations (petition 693/2003).

In this situation extreme care needs to be taken in respect of the position of legal professionals and amendments are proposed by your rapporteur accordingly. Further, in order to keep this

area under tight review amendments are also proposed to the activities of the Money Laundering Committee and to the Final Provisions.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission ¹	Amendments by Parliament
Amendment 1 Recital 4	
<p>(4) In order to respond to these concerns, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering was adopted. It required Member States to prohibit money laundering and to oblige the financial sector, comprising credit institutions and a wide range of other financial institutions, to identify their customers, keep appropriate records, establish internal procedures to train staff and guard against money laundering and to report any indications of money laundering to the competent authorities.</p>	<p>(4) In order to respond to these concerns, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering was adopted. It required Member States to prohibit money laundering and to oblige the financial sector, comprising credit institutions and a wide range of other financial institutions, to identify their customers, keep appropriate records, establish internal procedures to train staff and guard against money laundering and to report any indications of money laundering to the competent authorities.</p> <p><i>That directive as amended has only recently been implemented in some Member States and still remains unimplemented in one Member State. In these circumstances and in compliance with the commitment of all of the Community institutions to undertake a legislative impact assessment it would be appropriate to conduct a detailed assessment of whether Directive 91/308/EEC has achieved its aim of reflecting best international practice in this area and setting a high standard in protecting the financial sector and other vulnerable activities from the harmful effects of the proceeds of crime. Such assessment should also ascertain the</i></p>

¹ Not yet published in OJ.

effectiveness of reporting and other enforcement mechanisms contained in the directive so as to inform current and future legislation.

Amendment 2

Recital 12

(12) Directive 91/308/EEC, as amended, brought notaries and independent legal professionals within the scope of the Community anti-money laundering regime; this coverage should be maintained unchanged in the new Directive; these legal professionals, as defined by the Member States, are subject to the provisions of the Directive when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity.

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Amendment 3

Recital 13

(13) Where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of

(13) Where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of

money laundering. There *should* be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice *should remain* subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes

money laundering. There *must* be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice *remains* subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes. ***It should be ensured that these provisions are monitored for compliance with the principle of respect for fundamental rights as set out in the Charter of Fundamental Rights and in accordance with the recommendation contained in the European Parliament resolution of 14 October 2004.***

Justification

Recital 12 claims that the coverage in respect of legal professionals should be 'maintained unchanged'; if this is indeed to be the case the wording should be exactly the same as in the previous directives rather than appearing to introduce changes which soften the protection of legal professional privilege.

In its report (A6-0010/2004) adopted in the plenary by the European Parliament on 14 October 2004, (P6_TA(2004)0022) the Parliament recommended that, when defining the area of justice, security and freedom, the European Council and the Council should base their actions, among other things, on 'promoting fundamental rights and freedoms through policies linked to the area of freedom, security and justice'. The list of detailed actions under this criterion includes the following: 'calling for prior monitoring for respect for fundamental rights (as laid down by the Charter of Fundamental Rights of the Union) of any legislative act of the Union or of the Community'.

Amendment 4

Article 2, paragraph 1, point (3), point (b)

(b) notaries and other independent legal professionals, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the:

(b) notaries and other independent legal professionals, ***whenever payment is made in cash and in an amount of EUR 15 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked, but only*** when they participate, whether by acting on behalf of and for their client in any

financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the:

Justification

The amendment brings notaries and legal professionals into line with the generality of service providers.

Amendment 5
Article 2, paragraph 2

2. Member States may decide not to apply this Directive in the case of financial institutions which engage in a financial activity on an occasional or very limited basis and where there is little risk of money laundering occurring.

2. Member States may decide not to apply this Directive in the case of financial institutions which engage in a financial activity, ***or notaries and other independent legal professionals who engage in an activity listed in Article 2(1)(3)(b)(i) – (v)***, on an occasional or very limited basis and where there is little risk of money laundering occurring.

Justification

In order to place legal professionals on an equal footing with financial institutions Member States should be able to decide not to apply the Directive to legal professionals who are engaged in the activities mentioned in Article 2(1) only on an occasional or limited basis and where there is little risk of money laundering.

Amendment 6
Article 2, paragraph 2 a (new)

2a. Member States shall not apply this Directive to notaries and other independent legal professionals in the exercise of their professional activity where the same is subject to professional secrecy or legal professional privilege, in particular when they obtain information in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in or in relation to judicial, administrative, arbitration or mediation proceedings, including advice on instituting or avoiding such proceedings, whether such information is received or

obtained before, during or after such proceedings.

Justification

The ambit of the third Directive is strictly limited to lawyers as natural persons when they are acting for their client or when assisting him/her in the planning or execution of transactions concerning five definite items (Article 2(1 (3)(b))). Therefore, lawyers should not be subject to due diligence or reporting of suspicious transactions falling outside the above-mentioned ambit of the provision.

In addition, since one of the reasons advanced to justify the 3rd Directive is to bring EU legislation into line with the Forty Recommendations of the Financial Action Task Force (FATF) on Money Laundering certain words need to be added to properly bring the directive into line with these Recommendations.

The amended wording of Article 20(2) has been moved to Article 2 because it is felt to be confusing to have the ambit of lawyers' reporting duties in two different places in the Directive.

Amendment 7

Article 3, point (7), point (f)

(f) all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which 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.

(f) all offences which ***fall under the areas listed in (a) to (e) above*** and are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which 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.

Justification

The current proposed definition of a serious crime founded on the length of the sentence of imprisonment is unworkable on an EU-wide basis and will not provide an appropriate level of harmonisation or application of the directive. In addition the widening of the scope in the manner proposed would potentially overwhelm the system. The amendment seeks to concentrate on the key offences likely to be related to money laundering.

Amendment 8

Article 3, point (12 a) (new)

(12a) "independent legal professional"

means a member of a profession providing legal advice which is legally recognised and controlled, such as lawyers.

Justification

In the proposal this definition is contained only in the recitals. In view of the importance attached to it it seems appropriate that it should also appear in the main text with all the other definitions.

Amendment 9
Article 8, paragraph 2

2. Member States shall require that, where the institution or person concerned is unable to comply with points (a), (b) and (c) of Article 7(1), it may not open the account, establish a business relationship or perform the transaction, or shall terminate the business relationship, and shall consider making a report to the financial intelligence unit in accordance with Article 19 in relation to the customer.

2. Member States shall require that, where the institution or person concerned, ***not being an independent legal professional***, is unable to comply with points (a), (b) and (c) of Article 7(1), it may not open the account, establish a business relationship or perform the transaction, or shall terminate the business relationship, and shall consider making a report to the financial intelligence unit in accordance with Article 19 in relation to the customer.

Justification

It should be for a legal professional to decide when to terminate a client/ lawyer relationship and not the State; the lawyer will still be subject to the consequences or his or her action under the Directive.

Amendment 10
Article 10, paragraph 1, point (a)

(a) credit and financial institutions from the Member States, or from third countries provided that they are subject to requirements to combat money laundering consistent with international standards and are supervised for compliance with those requirements;

(a) credit and financial institutions ***and independent legal professionals*** from the Member States, or from third countries provided that they are subject to requirements to combat money laundering consistent with international standards and are supervised for compliance with those requirements;

Justification

The amendment equalises the position as between credit and financial institutions and legal

professionals which would otherwise be discriminatory. There is absolutely no reason why a lawyer should not be allowed to rely on due diligence carried out by another legal professional in a third country that complies with international standards.

Amendment 11
Article 11, paragraph 1, point (b)

(b) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by an institution covered by this Directive;

(b) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by an institution **or person** covered by this Directive;

Justification

There is no reason why only institutions and not persons can render confirmatory certificates.

Amendment 12
Article 12, paragraph 1

Member States may permit the institutions and persons covered by this Directive to rely on third parties to perform the requirements laid down in Article 7(1)(a), (b) and (c).

Member States may permit the institutions and persons covered by this Directive to rely on third parties **that are also covered by this Directive** to perform the requirements laid down in Article 7(1)(a), (b) and (c).

Justification

The amendment seeks to deliver some real benefits from the possibility of third compliance; as currently proposed those subject to the Directive would clearly have to duplicate compliance in order protect themselves from liability thus negating any advantage from such a system.

Amendment 13
Article 14, paragraph 2

Relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner shall immediately be forwarded by the third party to the institution or person to which the customer is being referred on request.

Relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner shall immediately be forwarded by the third party to the institution or person to which the customer is being referred on request, **save that this and the preceding paragraph shall apply to independent legal professionals only when their client has consented.**

Justification

It would be a breach of the client/lawyer professional relationship for legal professionals to pass on information without the permission of the client.

Amendment 14

Article 19, paragraph 1, point (a)

(a) by directly and promptly informing the financial intelligence unit, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering is being committed or attempted.

(a) by directly and promptly informing the financial intelligence unit, on their own initiative, where the institution or person covered by this Directive knows, **reasonably** suspects or has reasonable grounds to suspect that money laundering is being committed or attempted.

Justification

The introduction of the word 'suspects' is a novelty in this Directive in this context and accordingly it would be prudent to prefix such suspicion with the word reasonable to stop unreasonable suspicions having to be reported.

Amendment 15

Article 25, paragraph 1

The institutions and persons covered by this Directive and their directors and employees shall not disclose to the customer concerned nor to other third persons that information has been transmitted to the financial intelligence unit in accordance with Articles 19, 20 and 21 or that a money laundering investigation is being or may be carried out.

The institutions and persons covered by this Directive and their directors and employees, **not including independent legal professionals in connection with the giving of legal advice to a client or to any person in connection with or in contemplation of legal proceedings**, shall not disclose to the customer concerned nor to other third persons that information has been transmitted to the financial intelligence unit in accordance with Articles 19, 20 and 21 or that a money laundering investigation is being or may be carried out.

Justification

The right to inform the client should be retained for legal professionals in order to recognise their special duties to their clients.

Amendment 16

Article 38, paragraph 1

1. The Commission shall be assisted by a Committee on the Prevention of Money Laundering, hereinafter “the Committee”.

1. The Commission shall be assisted by a Committee on the Prevention of Money Laundering, hereinafter “the Committee”, ***which Committee shall with the Commission deliver an annual report on its activities and deliberations to the European Parliament and the Council.***

Justification

The issues to be dealt with by the Committee are not just technical and reflect on the overall functioning and content of the Directive. There should therefore be some democratic oversight.

Amendment 17
Article 39

Within two years of the entry into force of this Directive, and at least at three yearly intervals thereafter, the Commission shall draw up a report on the implementation of this directive and submit it to the European Parliament and Council.

Within two years of the entry into force of this Directive, and at least at three yearly intervals thereafter, the Commission shall draw up a report on the implementation of this directive and submit it to the European Parliament and Council. ***The first such report will in particular focus on the areas set out for review in Article 2 of Directive 2001/97/EC.***

Justification

In view of the failure to implement the review foreseen in the second Directive, it is critical that this should be carried out in relation to the third Directive.