

COMMON POSITION (EC) No 5/2001**adopted by the Council on 30 November 2000****with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of ... amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering**

(2001/C 36/02)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2), first and third sentences, and Article 95 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down referred to in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) It is appropriate that Directive 91/308/EEC ⁽⁴⁾, hereinafter referred to as 'the Directive', as one of the main international instruments in the fight against money laundering, should be updated in line with the conclusions of the Commission and the wishes expressed by the European Parliament and the Member States. In this way the Directive should not only reflect best international practice in this area but should also continue to set a high standard in protecting the financial sector and other vulnerable activities from the harmful effects of the proceeds of crime.
- (2) The General Agreement on Trade in Services (GATS) allows Members to adopt measures necessary to protect public morals and to adopt measures for prudential reasons, including for ensuring the stability and integrity of the financial system. Such measures should not impose restrictions that go beyond what is necessary to achieve those objectives.
- (3) The Directive does not establish clearly which Member State's authorities should receive suspicious transaction reports from branches of credit and financial institutions

having their head office in another Member State nor which Member State's authorities are responsible for ensuring that such branches comply with the Directive. The authorities of the Member States in which the branch is located should receive such reports and exercise the above responsibilities.

- (4) This allocation of responsibilities should be set out clearly in the Directive by means of an amendment to the definition of 'credit institution' and 'financial institution'.
- (5) The European Parliament has expressed concerns that the activities of currency exchange offices (bureaux de change) and money transmitters (money remittance offices) are vulnerable to money laundering. These activities should already fall within the scope of the Directive. In order to dispel any doubt in this matter the Directive should clearly confirm that these activities are covered.
- (6) To ensure the fullest possible coverage of the financial sector it should also be made clear that the Directive applies to the activities of investment firms as defined in Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field ⁽⁵⁾.
- (7) The Directive obliges Member States only to combat the laundering of the proceeds of drugs offences. There has been a trend in recent years towards a much wider definition of money laundering based on a broader range of predicate or underlying offences, as reflected for example in the 1996 revision of the 40 Recommendations of the Financial Action Task Force (FATF), the leading international body devoted to the fight against money laundering.
- (8) A wider range of predicate offences facilitates suspicious transaction reporting and international cooperation in this area. Therefore, the Directive should be brought up to date in this respect.

⁽¹⁾ OJ C 117 E, 27.6.2000, p. 14.

⁽²⁾ OJ C 75, 15.3.2000, p. 22.

⁽³⁾ Opinion of the European Parliament of 5 July 2000 (not yet published in the Official Journal), Council Common Position of 30 November 2000 and Decision of the European Parliament of ... (not yet published in the Official Journal).

⁽⁴⁾ OJ L 166, 28.6.1991, p. 77.

⁽⁵⁾ OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).

- (9) In Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime⁽¹⁾, the Member States agreed to make all serious offences, as defined in the Joint Action, predicate offences for the purpose of the criminalisation of money laundering.
- (10) The Directive imposes obligations regarding in particular the reporting of suspicious transactions. It would be more appropriate and in line with the philosophy of the action plan to combat organised crime⁽²⁾ for the prohibition of money laundering under the Directive to be extended.
- (11) On 21 December 1998 the Council adopted Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union⁽³⁾. This Joint Action reflects the Member States' agreement on the need for a common approach in this area.
- (12) As required by the Directive, suspicious transaction reports are being made by the financial sector, and particularly by the credit institutions, in every Member State. There is evidence that the tightening of controls in the financial sector has prompted money launderers to seek alternative methods for concealing the origin of the proceeds of crime.
- (13) There is a trend towards the increased use by money launderers of non-financial businesses. This is confirmed by the work of the FATF on money laundering techniques and typologies.
- (14) The obligations of the Directive concerning customer identification, record keeping and the reporting of suspicious transactions should be extended to a limited number of activities and professions which have been shown to be vulnerable to money laundering.
- (15) Notaries and independent legal professionals, as defined by the Member States, should be made 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.
- (16) However, where a notary, independent lawyer or law firm is 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 professionals under an obligation to report suspicions of money laundering. There must be exemption 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.
- (17) Directly comparable services need to be treated in the same manner when practised by any of the professionals covered by the Directive. In order to preserve the rights laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Treaty on European Union, in the case of auditors, external accountants and tax advisers who, in some Member States, may defend or represent a client in the context of judicial proceedings or ascertain a client's legal position, the information they obtain in the performance of these tasks should all not be subject to the reporting obligations in accordance with the Directive.
- (18) The Directive makes reference to 'the authorities responsible for combating money laundering' to which reports of suspicious operations must be made on the one hand, and to authorities empowered by law or regulation to supervise the activity of any of the institutions or persons subject to this Directive ('competent authorities') on the other hand. It is understood that the Directive does not oblige Member States to create such 'competent authorities' where they do not exist, and that bar associations and other self-regulatory bodies for independent professionals do not fall under the term 'competent authorities'.
- (19) In the case of notaries and independent legal professionals, Member States should be allowed, in order to take proper account of these professionals' duty of discretion owed to their clients, to nominate the bar association or other self-regulatory bodies for independent professionals as the body to which reports on possible money laundering cases may be addressed by these professionals. The rules governing the treatment of such reports and their possible onward transmission to the 'authorities responsible for combating money laundering' and in general the appropriate forms of cooperation between the bar associations or professional bodies and these authorities should be determined by the Member States,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 91/308/EEC is amended as follows:

⁽¹⁾ OJ L 333, 9.12.1998, p. 1.

⁽²⁾ OJ C 251, 15.8.1997, p. 1.

⁽³⁾ OJ L 351, 29.12.1998, p. 1.

1. Article 1 shall be replaced by the following:

'Article 1

For the purpose of this Directive:

A. "credit institution" means a credit institution, as defined in Article 1(1) first subparagraph of Directive 2000/12/EC ⁽¹⁾ and includes branches within the meaning of Article 1(3) of that Directive and located in the Community, of credit institutions having their head offices inside or outside the Community;

B. "financial institution" means:

1. an undertaking other than a credit institution whose principal activity is to carry out one or more of the operations included in points 2 to 12 and point 14 of the list set out in Annex I to Directive 2000/12/EC; these include the activities of currency exchange offices (bureaux de change) and of money transmission/remittance offices;
2. an insurance company duly authorised in accordance with Directive 79/267/EEC ⁽²⁾, in so far as it carries out activities covered by that Directive;
3. an investment firm as defined in Article 1(2) of Directive 93/22/EEC ⁽³⁾;
4. a collective investment undertaking marketing its units or shares.

This definition of financial institution includes branches located in the Community of financial institutions, whose head offices are inside or outside the Community;

C. "money laundering" means the following conduct when committed intentionally:

- 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 activity to evade the legal consequences of his action,
- 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 activity,

- 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 activity,

- participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing indents.

Knowledge, intent or purpose required as an element of the abovementioned activities may be inferred from objective factual circumstances.

Money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country;

D. "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 interests in such assets;

E. "criminal activity" means any kind of criminal involvement in the commission of a serious crime.

Serious crimes are, at least:

- any of the offences defined in Article 3(1)(a) of the Vienna Convention,
- the activities of criminal organisations as defined in Article 1 of Joint Action 98/733/JHA ⁽⁴⁾,
- fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the protection of the European Communities' financial interests ⁽⁵⁾,
- corruption,
- an offence which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State.

Member States shall before ... amend the definition provided for in this indent in order to bring this definition into line with the definition of serious crime of Joint Action 98/699/JHA. The Council invites the Commission to present before ... ⁽⁶⁾ a proposal for a Directive amending in that respect this Directive.

Member States may designate any other offence as a criminal activity for the purposes of this Directive;

F. "competent authorities" means the national authorities empowered by law or regulation to supervise the activity of any of the institutions or persons subject to this Directive.

⁽¹⁾ OJ L 126, 26.5.2000, p. 1. Directive as amended by Directive 2000/28/EC (OJ L 275, 27.10.2000, p. 37).

⁽²⁾ OJ L 63, 13.3.1979, p. 1. Directive as last amended by Directive 95/26/EC of the European Parliament and of the Council (OJ L 168, 18.7.1995, p. 7).

⁽³⁾ OJ L 141, 11.6.1993, p. 27. Directive as amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).

⁽⁴⁾ OJ L 351, 29.12.1998, p. 1.

⁽⁵⁾ OJ C 316, 27.11.1995, p. 48.

⁽⁶⁾ Three years from the entry into force of this amending Directive.'

2. The following Article 2a shall be inserted:

'Article 2a

Member States shall ensure that the obligations laid down in this Directive are imposed on the following institutions:

1. credit institutions as defined in point A of Article 1;
2. financial institutions as defined in point B of Article 1,

and on the following legal or natural persons acting in the exercise of their professional activities:

3. auditors, external accountants and tax advisors;
4. real estate agents;
5. notaries and other independent legal professionals, when they participate, whether:
 - (a) by assisting in the planning or execution of transactions for their client concerning the:
 - (i) buying and selling of real property or business entities;
 - (ii) managing of client money, securities or other assets;
 - (iii) opening or management of bank, savings or securities accounts;
 - (iv) organisation of contributions necessary for the creation, operation or management of companies;
 - (v) creation, operation or management of trusts, companies or similar structures;

b) or by acting on behalf of and for their client in any financial or real estate transaction;

6. dealers in high-value goods, such as precious stones or metals, whenever payment is made in cash, and in an amount of EUR 15 000 or more;

7. casinos.'

3. Article 3 shall be replaced by the following:

'Article 3

1. Member States shall ensure that the institutions and persons subject to this Directive require identification of their customers by means of supporting evidence when entering into business relations, particularly, in the case of the institutions, when opening an account or savings accounts, or when offering safe custody facilities.

2. The identification requirement shall also apply for any transaction with customers other than those referred to in paragraph 1, involving a sum amounting to EUR 15 000 or more, whether the transaction is carried out in a single operation or in several operations which seem to be linked. Where the sum is not known at the time when the transaction is undertaken, the institution or person concerned shall proceed with identification as soon as it or he is apprised of the sum and establishes that the threshold has been reached.

3. By way of derogation from paragraphs 1 and 2, the identification requirements with regard to insurance policies written by insurance undertakings within the meaning of Directive 79/267/EEC, where they perform activities which fall within the scope of that Directive shall not be required where the periodic premium amount or amounts to be paid in any given year does or do not exceed EUR 1 000 or where a single premium is paid amounting to EUR 2 500 or less. If the periodic premium amount or amounts to be paid in any given year is or are increased so as to exceed the EUR 1 000 threshold, identification shall be required.

4. Member States may provide that the identification requirement is not compulsory for insurance policies in respect of pension schemes taken out by virtue of a contract of employment or the insured's occupation, provided that such policies contain no surrender clause and may not be used as collateral for a loan.

5. By way of derogation from paragraphs 1 and 2, Member States shall ensure that identification is required either when a customer enters a casino or when a customer pays in cash for the purchasing of gambling chips with a value of EUR 2 500 or more, or exchanges gambling chips for a casino cheque of such value.

6. In the event of doubt as to whether the customers referred to in the above paragraphs are acting on their own behalf, or where it is certain that they are not acting on their own behalf, the institutions and persons subject to this Directive shall take reasonable measures to obtain information as to the real identity of the persons on whose behalf those customers are acting.

7. The institutions and persons subject to this Directive shall carry out such identification, even where the amount of the transaction is lower than the threshold laid down, wherever there is suspicion of money laundering.

8. The institutions and persons subject to this Directive shall not be subject to the identification requirements provided for in this Article where the customer is a credit or financial institution covered by this Directive or a credit or financial institution situated in a third country which imposes, in the opinion of the relevant Member States, equivalent requirements to those laid down by this Directive.

9. Member States may provide that the identification requirements regarding transactions referred to in paragraphs 3 and 4 are fulfilled when it is established that the payment for the transaction is to be debited from an account opened in the customer's name with a credit institution subject to this Directive according to the requirements of paragraph 1.

10. Member States shall, in any case, ensure that the institutions and persons subject to this Directive take specific and adequate measures necessary to compensate for the greater risk of money laundering which arises when establishing business relations or entering into a transaction with a customer who has not been physically present for identification purposes ("non-face-to-face operations"). Such measures shall ensure that the customer's identity is established, for example, by requiring additional documentary evidence, or supplementary measures to verify or certify the documents supplied, or confirmatory certification by an institution subject to this Directive, or by requiring that the first payment of the operations is carried out through an account opened in the customer's name with a credit institution subject to this Directive. The internal control procedures laid down in Article 11(1) shall take specific account of these measures.'

4. In Articles 4, 5, 8 and 10 the terms 'credit and financial institutions' shall be replaced by 'the institutions and persons subject to this Directive'.

5. Article 6 shall be replaced by the following:

'Article 6

1. Member States shall ensure that the institutions and persons subject to this Directive and their directors and employees cooperate fully with the authorities responsible for combating money laundering:

(a) by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering;

(b) by furnishing those authorities, at their request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the authorities responsible for combating money laundering of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated by the institutions and persons in accordance with the procedures provided for in Article 11(1)(a) shall normally forward the information.

3. In the case of the notaries and independent legal professionals referred to in Article 2a(5), Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed of the facts referred to in paragraph 1(a) and in such case shall lay down the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering.

Member States shall not be obliged to apply the obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisers with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

4. Information supplied to the authorities in accordance with paragraph 1 may be used only in connection with the combating of money laundering. However, Member States may provide that such information may also be used for other purposes.'

6. Article 7 shall be replaced by the following:

'Article 7

Member States shall ensure that the institutions and persons subject to this Directive refrain from carrying out transactions which they know or suspect to be related to

money laundering until they have apprised the authorities referred to in Article 6. Those authorities may, under conditions determined by their national legislation, give instructions not to execute the operation. Where such a transaction is suspected of giving rise to money laundering and where to refrain in such manner is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money-laundering operation, the institutions and persons concerned shall apprise the authorities immediately afterwards.'

7. Article 9 shall be replaced by the following:

'Article 9

The disclosure in good faith to the authorities responsible for combating money laundering by an institution or person subject to this Directive or by an employee or director of such an institution or person of the information referred to in Articles 6 and 7 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 the institution or person or its directors or employees in liability of any kind.'

8. Article 11 shall be replaced by the following:

'Article 11

1. Member States shall ensure that the institutions and persons subject to this Directive:

- (a) establish adequate procedures of internal control and communication in order to forestall and prevent operations related to money laundering;
- (b) take appropriate measures so that their employees are aware of the provisions contained in this Directive. These measures shall include participation of their relevant employees in special training programmes to help them recognise operations which may be related to money laundering as well as to instruct them as to how to proceed in such cases.

Where a natural person falling within any of Article 2a(3) to (7) undertakes his professional activities as an employee of a legal person, the obligations in this Article shall apply to that legal person rather than to the natural person.

2. Member States shall ensure that the institutions and persons subject to this Directive have access to up-to-date information on the practices of money launderers and on indications leading to the recognition of suspicious transactions.'

9. In Article 12 the words 'credit or financial institutions referred to in Article 1' shall be replaced by 'institutions and persons referred to in Article 2a'.

Article 2

Within three years of the entry into force of this Directive, the Commission shall carry out a particular examination, in the context of the report provided for in Article 17 of Directive 91/308/EEC, of aspects relating to the implementation of the fifth indent of Article 1(E), the specific treatment of lawyers and other independent legal professionals, the identification of clients in non-face-to-face transactions and possible implications for electronic commerce.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... (*) at the latest. They shall forthwith inform the Commission thereof.

Where Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

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

Article 4

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 5

This Directive is addressed to the Member States.

Done at...

For the European Parliament
The President

For the Council
The President

(*) Eighteen months after the entry into force of the Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 20 July 1999 the Commission forwarded to the Council a proposal for a Directive amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering based on Article 47(2), in particular the first and third sentences thereof, and Article 95 of the EC Treaty.

The European Parliament delivered its opinion on the first reading of the proposal on 5 July 2000. The Economic and Social Committee delivered its opinion on 26 January 2000.

On 30 November 2000, the Council adopted its Common Position pursuant to Article 251 of the Treaty.

II. OBJECTIVE

The purpose of the proposal is to amend the existing Directive on prevention of the use of the financial system for the purposes of money laundering, Directive 91/308/EEC, by broadening the prohibition of money laundering to cover not only drug trafficking but also other serious crimes and by extending the obligations of the Directive to certain non-financial activities and professions, including lawyers and accountants. The proposal also aims at clarifying certain aspects of the 1991 text.

III. ANALYSIS OF THE COMMON POSITION

The changes contained in the Common Position in comparison with each Article of the Commission proposal are set out below.

Article 1

Article 1(A) is unchanged against the Commission proposal except that the reference to the definition of credit institution has been adapted, in this provision as everywhere in the text, to take into account the recent codification of the banking legislation. This definition clearly includes electronic money institutions, since Directive 2000/28/EC⁽¹⁾ amends the definition of credit institutions to include electronic money institutions⁽²⁾. The Common Position thus includes the substance of amendment 9 proposed by the European Parliament.

Article 1(B) enlarges the scope of the institutions covered by the Directive as compared with the Commission proposal and even as compared with amendment 10 proposed by the European Parliament, by including all collective investment undertakings marketing their units or shares. The Common Position thus includes the substance of amendment 10 proposed by the European Parliament. The Common Position does not include amendment 11 proposed by the European Parliament, since the Council considers it inappropriate to define supervisory authorities as financial institutions.

Article 1(C) and (D) remain unchanged.

Article 1(E), the definition of criminal activity, has been amended to enlarge the scope proposed by the Commission.

⁽¹⁾ OJ L 275, 27.10.2000, page 37.

⁽²⁾ 'Credit institution' shall mean:

- (a) an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account; or
- (b) an electronic money institution within the meaning of Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit and prudential supervision of the business of electronic money institutions.

Firstly, it has been made clear that criminal activity means any kind of criminal involvement in the commission of a serious crime. This drafting aims at excluding unintentional or innocent involvement from the scope of the Directive. The provision then defines which crimes must be considered serious for the purposes of the Directive and finally, as proposed by the Commission, allows Member States the option of enlarging the scope in national legislation by defining any other offence as criminal activity for the purposes of the Directive.

Serious crimes are defined in five indents:

- the first indent is, apart from minor drafting changes, the same as that proposed by the Commission and covers drug-related offences,
- the second indent covers participation in organised crime, as proposed by the Commission, but in a more precise wording, which is based on the activities of criminal organisations as defined in the Joint Action of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (98/733/JHA), adopted within the framework of the third pillar. The Common Position thus gives a more precise definition of organised crime than that proposed by the Commission, which is the intention behind amendment 12 proposed by the European Parliament. The Council has, however, not deemed it appropriate to establish a definition of 'organised crime' in this Directive, adopted within the framework of the first pillar. The Common Position thus takes account of the spirit of amendment 12 proposed by the European Parliament,
- the third indent covers fraud (corruption is dealt with in the fourth indent, see below) as defined in Article 1(1) and Article 2 of the Convention on the Protection of the European Communities' Financial Interests. The wording aims at a more precise definition than that proposed by the Commission. This text is differently drafted than the text proposed by the European Parliament in amendment 13, but read together with the fourth indent, which covers corruption, the Common Position is largely in line with the approach of amendment 13 proposed by the European Parliament,
- the fourth indent covers corruption, whether or not it is damaging to the financial interests of the European Communities, and has been included in an explicit manner to underline the seriousness of this offence,
- the fifth indent aims at covering all serious offences that may generate substantial proceeds. To be considered serious in this context an offence must be punishable by a severe sentence of imprisonment in accordance with national penal law. The Council considered it appropriate, at this stage, to allow Member States a certain degree of flexibility in implementing this provision and in evaluating what constitutes a severe sentence of imprisonment. The Commission is, however, invited to present within three years from the entry into force, a proposal for a Directive amending Directive 91/308/EEC in order to bring this definition into line with the definition of serious crime set out in the Joint Action of 3 December 1998 (98/699/JHA). That definition defines serious offences more precisely in terms of the duration of the deprivation of liberty which can be imposed on anyone found guilty of the offence.

Article 1(F) is amended to make it clear that the object of the supervision is the activities carried out and not the institutions and persons covered by the Directive. It is made clear in recital 18 that this provision must not be interpreted as imposing on Member States an obligation to create any new authorities or assign new responsibilities to existing authorities, and that bar associations and other self-regulatory bodies for independent professionals do not fall under the term 'competent authorities'. The Common Position therefore does not include amendment 14 proposed by the European Parliament.

In Article 2a the range of institutions and persons covered by the Directive has been amended:

- in point 3 a new category, 'tax advisers', has been added taking into account the first part of amendment 16 proposed by the European Parliament. The Common Position, however, maintains the structure proposed by the Commission where the professions providing accounting and tax advice are separated from the legal professions and therefore does not include amendment 15 proposed by the European Parliament,

- point 5 has been amended to cover lawyers where they participate in two functions:
 - the first function covers assisting in the planning or execution of transactions for their client concerning a number of specified categories of activities. The specified categories are largely identical to those proposed by the Commission, except that a new category has been added, namely organisation of contributions necessary for the creation, operation or management of companies,
 - the second function covers acting on behalf of and for their client in any financial or real estate transaction.

The scope is thus narrower for the assisting and advisory function than for the acting function. The Common Position does not exclude legal advice given in the context of legal proceedings from the scope of the Directive. This aspect is covered in Article 6(3) where Member States have the option of excluding information obtained in the context of legal proceedings or in the course of ascertaining the legal position for their clients from the information obligations of the Directive (see below). The Common Position thus does not include a part of amendment 16 proposed by the European Parliament,

- in point 6, which concerns dealers in high value goods, the scope has been narrowed to cover only those cases where money laundering is most likely, in order to avoid undue administrative burdens on dealers. It has thus been added to the text proposed by the Commission that the obligations of the Directive apply only when dealers receive payments in cash of EUR 15 000 or more. The Common Position thus does not include amendments 17, 18 and 19 proposed by the European Parliament,
- point 7 of the Commission proposal has been deleted as it was considered superfluous,
- points 1, 2, 4 and 7 (point 8 of the Commission proposal) remain unchanged against the Commission proposal. The Common Position does not include amendment 20 proposed by the European Parliament, since the Council considers it inappropriate to extend the scope of the Directive to the officials set out in amendment 20.

Article 3(1) and (2) of the Common Position, which subject all institutions and persons covered by the Directive to the requirements in these provisions, remain unchanged against the Commission proposal. The Council considers that the wording of these provisions allows sufficient flexibility to avoid undue burdens on commercial activities. For example a real estate agent will not be obliged to require identification according to the Directive of a person who merely enquires about the possibility of renting an apartment or a house for residential use when there is no grounds for suspicions of money laundering. The Common Position thus does not include amendments 21 and 22 proposed by the European Parliament.

The Annex setting out the identification requirement for customers in non-face-to-face financial operations and the reference thereto in the second subparagraph of Article 3(2) in the Commission proposal have been deleted. These requirements are now set out in a new Article 3(10) (see below). In deleting the Annex the Common Position includes amendment 33 proposed by the European Parliament.

The Common Position does not change Article 3(3) and (4) proposed by the Commission, which are identical to the existing 1991 Directive, and amendment 24 proposed by the European Parliament is thus not included in the Common Position.

The provisions relating to casinos are set out in a new Article 3(5). This provision combines the Commission proposal and amendment 25 proposed by the European Parliament. The text makes it clear that identification is required either when a customer enters a casino or when a customer pays in cash for the purchase of gambling chips with a value of EUR 2 500 or more or exchanges gambling chips for a casino cheque of such a value. The Common Position thus includes the substance of amendment 25 proposed by the European Parliament.

Article 3(6) and (7) (Article 3(5) and (6) in the Commission proposal) remain unchanged compared to the Commission proposal.

Article 3(8) (Article 3(7) in the Commission proposal) extends the scope of the exemption from the identification requirement to a credit or financial institution situated in a third country which, in the opinion of the concerned Member States, imposes requirements equivalent to those of this Directive. The Council considers that to set out a detailed description of the requirements third countries should impose in this respect would introduce unacceptable rigidity into the text and make it difficult to take future developments into account. It must, however, be noted that the Council considers that the way Member States apply this provision is a subject which could be discussed by the Contact Committee set up by the 1991 Directive, in order to avoid any discrepancies in the application.

Article 3(9) (Article 3(8) in the Commission proposal) remains unchanged against the Commission proposal.

The new provision in Article 3(10) replaces the requirements originally set out in the Annex to the Commission proposal. The provision sets out the aim of the provision, namely that the institutions and persons subject to this Directive shall take specific and adequate measures necessary to compensate for the greater risk of money laundering which arises in 'non-face-to-face operations'. Examples are given of what such measures may consist of, for example that the first payment of the operation is carried out through an account opened in the customer's name with a credit institution subject to this Directive; this is also proposed by the European Parliament in amendment 23. The Council considers that the wording of the Common Position best ensures the flexibility that is needed and allows the authorities as well as the institutions and persons concerned to take account of future developments in the field of electronic financial services, for example electronic signatures. As proposed by the European Parliament in amendment 23, it is stipulated that the internal control procedures laid down in Article 11(1) shall take specific account of these measures. Thus the Common Position partly includes amendment 23 proposed by the European Parliament.

The Common Position includes, in slightly different words, the technical changes to Articles 4, 5, 8 and 10 proposed by the Commission. The Common Position thus does not include amendment 28 proposed by the European Parliament.

Article 6(3) has been amended in comparison with the Commission proposal. Minor changes have been made to the wording of the first subparagraph to make the text clearer.

The scope of the second subparagraph, which sets out the option for Member States to exempt certain professions from the information obligations of Article 6(1), has been extended. The provision now includes auditors, external accountants and tax advisers, for the reasons set out in recital 19. The provision also includes information received not only in the course of judicial proceedings, but also in the course of ascertaining the legal position for a client. Finally a number of changes have been made to the wording to make it clear that the provision concerns all aspects of judicial proceedings. The last sentence of the second subparagraph in the Commission proposal, containing a derogation from the option, has been deleted as proposed by the European Parliament in amendment 26. The Common Position thus partly includes amendment 26 proposed by the European Parliament.

Article 6(4) remains unchanged against the Commission proposal, which again is unchanged against the drafting of the last sentence of Article 6 in the existing 1991 Directive. The Common Position thus does not include amendment 27 proposed by the European Parliament.

Articles 7 and 9 are unchanged against the Commission proposal, apart from a minor technical change to the wording of Article 9. The Common Position therefore does not include Amendment 29 proposed by the European Parliament.

Article 11 has been amended in comparison with the Commission proposal. The range of persons and institutions covered by the provision remains unchanged, but the Common Position adds a sentence making it clear on whom the obligation in the first subparagraph of Article 11(1) rests. The Common Position also includes a new paragraph 2 as proposed by the European Parliament. The Common Position thus partly includes amendment 30 proposed by the European Parliament.

The Council has chosen to maintain Article 12 in the same form as in the 1991 Directive, introducing only a technical amendment made necessary by the extension of the scope of the Directive. The Council considers that matters relating to the exchange of information and cooperation between the

Commission (OLAF) and the national authorities should not be regulated in this Directive and has invited the Commission to present a new proposal concerning these matters. The Common Position therefore does not include amendments 31 and 32 proposed by the European Parliament.

The recitals have been adapted following the changes made to the Commission proposal and to conform to Guideline No 10 of the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p. 1). The recitals include amendments 3 and 34 proposed by the European Parliament, while amendments 1, 41, 4, 5, 7, 45 and 35 have not been included.

IV. CONCLUSION

The Council considers that all the amendments made to the Commission proposal are fully in line with the objectives of the Directive. Where the Common Position amends the Commission proposal it has been done with a view to extending the scope of the Directive and thus rendering it more effective, while bearing in mind the need to ensure that the individuals' right to legal defence or representation or ascertain one's legal position is upheld. The Council believes that the Directive thus amended will constitute an important weapon in the fight against money laundering.
