

CM1704

Comment on the proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law

12 May 2017

The Meijers Committee would like to comment on the European Commission's proposal for a Directive on countering money laundering by criminal law.¹

1. The Meijers Committee wishes to express its support for the idea of reviewing existing EU instruments in order to clarify obligations and achieve more coherence in the criminalisation of money laundering. However, the Meijers Committee considers that some elements of the Commission's proposal deserve reconsideration in light of the principle of proportionality (article 5(4) TEU) and the ideas about criminalisation at EU level that the European Commission, the Council and the Parliament have expounded.² The Meijers Committee holds that safeguards for suspects and defendants should be improved in the directive, inter alia because such harmonisation is important to enhance the effectiveness of cooperation between Member States.
2. The Meijers Committee deplores the fact that the Commission has not made an impact assessment of this proposal. The Commission reasons that the Directive mainly incorporates existing international obligations. Yet criminalisation of this behaviour at EU level, with its particular legal order, is more far-reaching than most existing international obligations. Moreover, as will be shown below, the proposal does go further than existing international obligations in some important aspects and it concerns a sensitive topic. Therefore, an impact assessment is necessary.
3. In the Commission's proposal, the definition of criminal activity from which the property is derived (the 'predicate offences') has a wide scope. Whereas the Commission explains the necessity of the proposal mainly from the viewpoint of countering (financing of) terrorism, this is in reality only a small part of the proposal. Besides the list of EU-criminal offences, the proposal deals with 'all offences 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 in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months' (article 2(1)(v)). This may include possession of a small amount of property from a minor theft. As the German delegation proposed, 'a

¹ 21 December 2016, COM(2016) 826 final.

² Council Conclusions on model provisions, guiding the Council's criminal law deliberations, 2979th JHA Council meeting, 30 November 2009; European Parliament, Resolution 'An EU approach to criminal law', 22 May 2012 (2010/2310(INI)); European Commission Communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', 20 September 2011, (COM(2011)0573).

mandatory criminalisation of money laundering without any limitation to serious crimes could be disproportional'.³ Especially in purely national cases, which will be affected by the directive as well, having such a wide definition of the predicate offence may lead to unjustified outcomes. According to the Meijers Committee, this element of the proposal could be improved by including a requirement that Member States are only obliged to criminalise money laundering with regard to 'particularly serious criminal activity', which could include serious criminal activity with a cross-border element.

4. The Meijers Committee finds it questionable whether it is necessary and proportionate to oblige EU Member States to criminalise 'self-laundering' (article 3(3)), even though it should be welcomed that this offence only applies to conversion, transfer, concealment and disguise, and not to acquisition, possession or use. The Commission does not convincingly state why an EU-wide obligation to criminalise this behaviour, which is only optional in other instruments such as the Warsaw Convention, should be necessary to achieve the objective of the directive. In many EU Member States, self-laundering is not criminalised because it is thought to lead to violations of the right not to be tried or punished twice for the same offence.⁴ The directive's explanatory memorandum does refer to the *ne bis in idem* principle laid down in article 50 of the Charter of Fundamental Rights; however, this only applies to persons who have been finally acquitted or convicted and not to cases in which simultaneous prosecution takes place. Thus, the directive still leaves a gap in the protection for the defendant. Moreover, confiscation of the proceeds is already possible (see Directive 2014/42).
An option could be to limit the obligation to criminalise self-laundering to actions (of conversion, transfer, concealment and disguise) that cause further damage to the integrity of the financial system, in addition to the damage already caused by the predicate offence. Another option could be to oblige states to limit the criminalisation of self-laundering (with regard to conversion, transfer, concealment or disguise) to situations where a person cannot be held criminally responsible for the predicate offence.
5. Even when there is no self-laundering involved, in some countries the prosecution of behaviour such as acquisition, possession or use of the property, when there is also a prosecution of the predicate offence, leads to problems of double jeopardy. As explained in par. 4, these problems cannot simply be solved by referring to article 50 of the Charter. It is exactly issues like these that, according to the Meijers Committee, necessitate an impact assessment of the proposal.
6. The Meijers Committee recommends putting in place more safeguards in relation to article 3(1), as these obligations potentially cover a wide range of conduct. There is a risk that states could use the money laundering offence as a 'catch-all' offence that also covers conduct which is not (or only very remotely) related to the rationale of protecting the integrity of the financial system. The Meijers Committee considers that

³ Council of the EU, Comments by delegations on the proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, 10 February 2017, 2016/0414 (COD), 15782/16, 6050/17.

⁴ Council of the EU, Comments by delegations on the proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, 10 February 2017, 2016/0414 (COD), 6050/17.

this rationale of protecting the integrity of the financial system should be at the heart of the Directive, because that is what makes money laundering a serious crime and distinguishes it from other forms of assistance or encouragement of criminal conduct. The latter forms should not be the subject of EU criminal law regulation, because the EU's competences in article 83(1) TFEU are limited to particularly serious crime with a cross-border dimension.

This element could be improved by requiring that the conduct in article 3(1) - under a, b and c (not only under a) - is carried out with the *purpose* of concealing or disguising the illicit origin of the property. Also, the proposal would be improved if the offence definition would require that the conduct is *suitable* for concealing or disguising the illicit origin of the property.

7. The Meijers Committee recommends amending article 3(2)(b), which states that it shall not be necessary to establish other circumstances relating to the criminal activity. If requirements with regard to establishing the predicate offence are too loose, Member States' criminal law systems may focus on prosecuting for money laundering in order to evade the problems they may have in prosecuting the predicate offences. The wording proposed by the Council Presidency could provide a solution to this: 'a conviction for the offences, referred to in paragraph 1 is possible where it is established that the property has been derived from a criminal activity, without it being necessary to establish all the factual elements relating to such activity'.⁵