New Directive on Criminalisation of Money Laundering

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European Law Forum: Prevention • Investigation • Prosecution

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News

On 12 November 2018, Directive 2018/1673 on combating money laundering by criminal law was published in the Official Journal of the EU (O.J. L 284/22). The Directive aims at closing loopholes in the definition and sanctioning of money laundering across the European Union. Furthermore, the new legal framework facilitates judicial and police cooperation to combat money laundering and terrorist financing.

As a result, the criminalisation of money laundering has been "lisbonized" and replaces the respective provisions of Framework Decision 2001/500/JHA on money laundering, which had been adopted as a third pillar instrument under the Treaty of Amsterdam. The Framework Decision was not considered comprehensive enough and the current criminalisation of money laundering and terrorist financing not sufficiently coherent to effectively combat money laundering across the EU. This also resulted in enforcement gaps and obstacles to cooperation between the competent authorities in different Member States. For further background information, see the 2016 Commission proposal for the Directive and eucrim 4/2016, pp. 159-160. For the negotiations in the EP and Council, see eucrim 1/2018, pp. 14-15.

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Published in
2018, Vol. 13(3) eucrim pp 150 – 151
ISSN: 1862-6947
https://eucrim.eu

The main elements of the new Directive are as follows:

- Criminal activities that constitute predicate offences for money laundering have been uniformly defined. The Directive provides for a two-layered system: first, Member States are obliged to consider predicate offences if a certain penalty threshold is met. Second, Member States are obliged to recgonize 22 categories of offences listed in the Directive as criminal activity that constitutes predicate offences for money laundering. The Directive here partly refers to offences as set out in other legal acts of the Union;
- Member States are obliged to include virtual currencies under "property" that may be subject to money laundering;
- The conduct (if committed intentionally) that is punishable as money laundering is defined. This includes the conversion or transfer of property; the concealment or disguise of the true nature, source or ownership of property; and the acquisition, possession or use of property that was derived from criminal activity;
- Member States are obliged to make punishable certain types of "self-laundering," i.e., if the money laundering is committed by the perpetrator of the criminal activity that generated the property;
- Certain factors that may hinder conviction have been excluded. In this context, the Directive foresees that conviction should be possible (1) without a prior or simultaneous conviction for the criminal activity from which the property was derived, (2) without it being necessary to establish precisely the

factual elements or circumstances relating to that criminal activity, including the identity of the perpetrator, and (3) irrespective of the fact that the criminal activity was committed in another country.

- Requirements for “knowledge” of the money launderer have been lowered. The Directive does not distinguish whether the property has derived directly or indirectly from the criminal activity and whether any intentions or knowledge of the proceeds can be inferred from objective, factual circumstances.
- Member States are obliged to punish aiding and abetting, inciting, and attempting a money laundering offence as defined in the Directive;
- Member States must ensure that the money laundering offences are punishable by a maximum term of imprisonment of at least four years;
- Member States must also provide for additional sanctions or measures against natural persons, e.g., fines; temporary or permanent exclusion from access to public funding, including tender procedures, grants, and concessions; temporary disqualification from practising commercial activities; and temporary bans on running for elected or public office;
- The Directive sets out aggravating circumstances, which the Member States must take into account when persons are sentenced. They apply to cases linked to criminal organisations or to the exercise of certain professional activities. Furthermore, Member States are entitled to define aggravating circumstances based on the value of laundered property or the nature of the offence (e.g., corruption, sexual exploitation, drug trafficking, and terrorism);
- Conditions are also set out for the liability of legal persons and possible sanctions against them;
- Member States must take the necessary measures to ensure the freezing or confiscation of the proceeds of crime in accordance with Directive 2014/42/EU;
- Finally, clearer rules define which Member State has jurisdiction and how conflicts of jurisdiction can be resolved.

The EU Member States must transpose the Directive by 3 December 2020. Denmark, Ireland, and the United Kingdom are not bound by it.

The Commission must provide an implementation report to the European Parliament and to the Council by 3 December 2022. Another report to the EP and the Council, assessing the added value of the Directive with regard to combating money laundering and its impact on fundamental rights and freedoms, is due on 3 December 2023. On the basis of the latter report, the Commission shall decide whether legislative amendments to the present Directive are necessary.

The Directive on combating money laundering by means of criminal law complements the 4th and 5th AML Directives (see, for the latter, eucrim 2/2018, pp. 93-94), which address *prevention* of the use of the financial system for the purpose of money laundering or terrorist financing. It also reinforces the EU’s efforts to build up a security Union that includes several measures to strengthen the EU’s fight against terrorist financing and financial crimes.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union