

Date
11 October 2004

Le Président

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Comptables
Européens
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Commissioner Frits Bolkestein
DG Internal Market
European Commission
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cc Dr Alexander Schaub
Mr David Wright
Mr Philippe Pellé
Mr Joeb Rietrae

Dear Commissioner Bolkestein,

Re: Proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing

As the representative organisation of the European accountancy profession, FEE welcomes the opportunity to comment on the proposed Directive on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing (the “proposed Directive”).

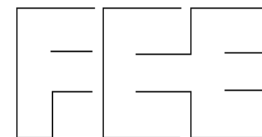
FEE is supportive of the proposed Directive, as it allows for further convergence with countries where the recommendations of the Financial Action Task Force on Money Laundering (FATF) of the Organisation for Economic Co-operation and Development (OECD) have been or will be applied. We also welcome the consolidation of the requirements of the first and second European money laundering directives. Our comments are aimed both at enhancing the applicability of the proposed Directive to institutions and professions that were recently added to the scope of the European money laundering legislation and at facilitating the process by which it may be implemented to achieve the objectives of the Directive.

In addition to our main comments on the proposed Directive, this letter also includes comments on specific paragraphs.

Main Comments

Applicability of the proposed Directive

Unless otherwise defined, all the systems requirements included in the proposed Directive are applicable to all institutions and persons as defined in Article 2 of the proposed Directive. We suggest that it would be more cost effective, and in keeping with the risk related emphasis of the Directive, for requirements to be imposed on each sector covered by the Directive only where they are appropriate to that sector. In addition, the situation of institutions or professions whose activities are only partly covered needs clarification as to how they are to apply the provisions of the Directive to relevant parts, and not other parts, of their business.



It is unclear why Article 2 extends the applicability of the proposed Directive to notaries and other independent legal professionals only when carrying out certain activities. The over-arching requirements for confidentiality in the interests of justice are sufficiently guarded by the provisions of Article 20. To further limit the applicability of the Directive to the legal profession looks like special arrangements for this profession alone, which would not be appropriate under the European Union (“EU”) provisions on equal treatment. Further, it should be clear that the provisions of the Directive should apply to legal professionals when they are acting as a tax advisor, trust or company service provider, or any other categories within Article 2.

Application of terminology and phraseology

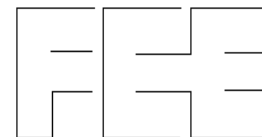
In part, the terminology and phraseology used in the proposed Directive comprises terms and language predominantly used by credit and financial institutions. Conceptually, the terms and language used in the proposed Directive should be understandable for all parties falling under the application of the proposed Directive, including the *non*-financial institutions. The latter are not necessarily familiar with the terms and language used and will need to interpret it for their own use and understanding which might result in departures from the original intention of the proposed Directive. An example is the term “customer due diligence” which is commonly understood in the world of financial institutions but which is less clear and lacks specification for other sectors including auditors and external accountants. Additional examples are included below in our comments on specific paragraphs.

Therefore, we invite the European Commission (“EC”) to explore the possibility of including two distinct chapters in the proposed Directive, one applicable to credit and financial institutions and the other to non-financial institutions.

Additionally, it will be necessary to carry out a thorough review of the terminology and phraseology of the proposed Directive to ensure that it is universally comprehensible. Comprehension would be enhanced by the provision of clear definitions of all the terms that are used.

Article 1, 1 (c) of the second European money laundering Directive (repeated in Article 1, 2 (c) of the proposed Directive) is unclear. It provides that “money laundering” includes “the acquisition, possession or use of property, knowing at the time of acquisition that such property was derived from criminal activity ...”. Some Member States have provided that this definition includes the possession of the proceeds of a criminal’s own crime, without any further transaction having been necessary. Other Member States have maintained a more conventional definition of money laundering, involving transactions carried out with the intention of the concealment of criminal proceeds. This can be an important distinction in a commercial context, where serious crimes can be committed which result in “proceeds” which are “acquired” because of failure to pay an amount which is due, or failure to incur costs which must necessarily be borne in order to prevent the criminal offence from being committed. One example would be serious tax fraud, of sufficient criminality to come within the definition of “serious crime”, where the “proceeds”(that is, the tax that should have been paid) may not be concealed in any way but merely retained in the taxpayer’s possession. Another might be such serious breaches of Member State requirements to guard the health and well-being of employees that a criminal charge of corporate manslaughter could arise. The “proceeds” in such circumstances would be the costs that should have been borne, in installing appropriate health and safety procedures.

We do not have an opinion as to which definition is more appropriate. However, as we believe that it is important for a consistent definition of “money laundering” to be employed across Europe, the meaning of this Article should be clarified.



Fair competition in the European Union

In recital (23) on page 11, as well as in Article 27, it is suggested that Community standards should be applied in third countries where Community credit and financial institutions have branches and majority owned subsidiaries and where legislation in the area of money laundering and terrorist financing is found to be deficient.

We are concerned that such application may render Community credit and financial institutions branches and majority owned subsidiaries unable to operate effectively and competitively in certain countries where money laundering laws have yet to advance to comparable status. In particular, the detailed requirements for customer due diligence may prove a barrier to doing business in certain locations. Clearly, it is desirable that high standards are used throughout and application of Community standards should be encouraged “in third countries where Community credit and financial institutions have branches and majority owned subsidiaries” but we feel that an absolute requirement for application overseas may be premature.

In third countries where it is judged that money laundering and terrorist financial legislation is deficient, we suggest that the proposed Directive encourages as a minimum requirement the application of the recommendations of the Financial Action Task Force on Money Laundering (FATF) of the Organisation for Economic Co-operations and Development (OECD), the international body leading the global effort in this field.

Also, as it is not clear how deficiencies in those jurisdictions will be determined or how the degree of departure from the required standard will be established, we request that the proposed Directive provides further clarification on these issues.

Finally, we also invite the EC to consider a further legal analysis of the responsibility and liability of company directors, external accountants and auditors in branches as compared to subsidiaries.

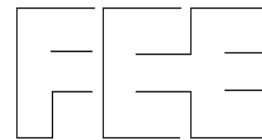
Serious crimes

We welcome that Article 3 (7) attempts to define what “serious crimes” mean. Unfortunately, for persons not qualified in the criminal law, these definitions are not comprehensive enough in order to identify all activity or transactions which might fall within the definition of “serious crimes”. It is not practical for all regulated persons to have a detailed knowledge of all crimes relevant to the Directive, and so we recommend it is made clear that a regulated person is expected simply to apply the knowledge and skill of a reasonable person of his professional standing in reporting money laundering. This allows professionals to operate in a normal way without fear that they will be held to account for failure to spot something completely outside of their normal professional skill and experience.

“Serious crime” is defined to include “at least” the activities listed in Article 3 (7) and the definition appears therefore to be the minimum requirements but which can be further extended by Member States. We are concerned that providing Member State choice in this regard will continue to result in an uneven application of money laundering related EU directives, risking the targeting by criminals of less stringent Member States for commission of crimes covered in one Member State but not in another. At the other end of the scale, valuable resource may, in our view, be misdirected if an “*all crimes*” approach to implementation is taken. We strongly support consistent implementation across all Member States and would, therefore, prefer to limit Member State extensions to areas where Member State choices are necessary to reflect specific local conditions.

Differences in the definition of “serious crime” in different Member States could also damage the single market, by giving service providers in Member States with a less rigorous definition a competitive advantage compared with those in Member States with a more rigorous one.

Article 3 (7) lists a number of crimes which are to be considered as “serious” but is not specific about tax crimes. We believe that the proposed Directive should also explicitly state which tax crimes are



serious crimes. This is crucial to facilitate fulfilment by external accountants and auditors of their reporting obligations.

Definition of beneficial owner

We have material concerns in this area.

First, the definition as given in Article 3 (8) refers to a natural person who ultimately, directly or indirectly, owns or controls 10% or more of the shares or the voting rights of a legal person or the property of a foundation, a trust or a similar legal arrangement or who otherwise exercises comparable influence, for instance over management. We consider this to be unduly prescriptive in that it takes no account of any risk-based evaluation of the customer and its ownership.

Whilst FEE considers it important for accountancy professionals to make reasonable enquiry to understand and document their understanding of the ownership and control structure of its clients, we would prefer to see a definition of a beneficial owner without a percentage holding attached and a requirement on Member States to implement, either directly or by allowing representative professional bodies to produce guidance, a risk-based system of identification requiring varying levels of identification of beneficial owners depending on circumstances.

If a risk based approach is not permitted, we have significant concerns about the extent of work that may be required in respect of the identification of complex corporate and trust structures. Whilst we can understand the EC's motivation for such requirements, in practice their universal application tends to penalise legitimate businesses through additional cost, effort and potential loss of commercial confidentiality for the client, whilst having little or no effect on illegal activities.

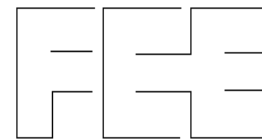
Finally, we believe that the exemption for a company listed on an official stock exchange that is subject to disclosure requirements consistent with Community legislation or subject to equivalent international standards should refer to "equivalent *national* standards" rather than equivalent *international* standards as the identification of the beneficial owner would result from national listing rules.

Member State option for stricter provisions

Article 4 allows for Member States to adopt or retain in force stricter provisions in the field covered by the proposed Directive to prevent money laundering.

As explained earlier in our main comments on "Serious crimes", material differences in the toughness of provisions from one Member State to another might harm the principle of the single market, result in a disruption of fair competition, or might, last but not least, encourage criminals to migrate their money laundering activities to less stringent Member States.

Consequently, FEE questions the necessity of the provision for Members States to adopt or retain stricter provisions to prevent money laundering. FEE suggests to give consideration to the implementation of similar provisions to prevent money laundering and we would, therefore, prefer to limit the discretion made available to Member States to adopt stricter provisions to areas where Member State choices are necessary to reflect specific local conditions and where Member States can demonstrate the need for change to the EC.



Customer due diligence

Article 6 requires that the institutions and persons covered by the proposed Directive apply customer due diligence procedures on the basis of reliable independent source documents, data or information in specified circumstances.

“Customer due diligence” is a good example of our earlier remarks as noted in our main comments on “Application of terminology and phraseology”. We would also suggest that terms such as “due diligence”, “scrutiny” and “verification” may be open to varying interpretations and need defining in clear language to enable a common understanding across all Member States and all institutions and professions.

We strongly recommend that the Directive adopts a principles based approach to “customer due diligence”, allowing for the application of reasonable professional judgement and clearly distinguishing between, on the one hand, the need to “know your customer” in order to provide sufficient knowledge to facilitate identifying unusual or suspicious activity and on the other hand, the need to “identify” customers and their beneficial owners where applicable, that is to say, in order to collate and certify documentation to show that the customer/owner is who or what it purports to be.

Both elements of customer due diligence need to be expressed as obligations to be fulfilled according to a risk-based approach. Each Member State should be responsible for defining, or causing representative professional bodies to define, what reliable independent source documents are considered appropriate to establish identity. This will assist those persons from one Member State to conduct customer due diligence on legal or natural persons resident in another Member State.

Reporting obligations

Article 17 requires that the institutions and persons covered by the proposed Directive *examine with special attention* any activity which is likely to be related to money laundering.

The requirement to examine such activity with special attention could result in the performance of substantial additional procedures by the institutions and persons covered by the proposed Directive, in that way extending the duty to become a form of investigation.

We are of the opinion that it should not be the task of auditors and external accountants to perform *investigations* in the sense as meant in Article 17, but to be alert to the need to form suspicions on the basis of *information* which came to them during the normal course of rendering professional services and to report on such information. We propose that Article 17 be modified to accommodate our concerns.

If auditors, external accountants and tax advisers are required to carry out additional procedures to examine activities likely to be related to money laundering, this would impose considerable additional burdens on these sectors which might divert their attention from their main objectives. It could also be counter productive to the aims of law enforcement, since the mere taking by accountants of steps additional to their normal work may well alert money launderers that suspicions had been formed.

Additionally, where professions other than lawyers are allowed to provide legal services, the exception as stated in Article 20.1 to in the first instance inform an appropriate self-regulatory body of the profession rather than the financial intelligence unit should not only be available to notaries and other independent legal professionals referred to in Article 2 (3) (b) but also to auditors, external accountants and tax advisors as referred to in Article 2 (3) (a).

Comments on specific paragraphs

1. Article 1, 2 (c) regards as money laundering 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.

We are of the opinion that consideration received by professionals for advice and services rendered in connection with the defence or representation of a client in the context of judicial proceedings or ascertainment of a client's legal position or otherwise in the provision of professional services, assuming, of course, that the professional is not implicated in the furtherance of any criminal purpose, should not fall under the provisions of Article 1, 2 (c).

2. Article 2, 1 (3) provides that the Directive shall apply to "... legal or natural persons acting in the exercise of their professional activities". We suggest that this is amended, to clarify that professional activities are not covered where they are supplied other than in the course of a professional practice, by way of business. For example, accountants should not be covered where they are supplying their expertise voluntarily on a charitable or other public interest basis – it would not be in the interests of Member States to impose additional obligations on professionals acting in a personal capacity without remuneration, in the public interest.

3. Article 3 would be improved by defining the following terms:

- We are of the opinion that the use of the term "due diligence" is not clear in the context of Article 11, 1 and suggest that it be removed or that further detail be included to clarify what is meant by "due diligence" in the context of this Article;
- We make the same recommendation for better specification in respect of the meaning of "third parties" in Article 13, 1 by adding "third parties, *in accordance with the Third Directive or equivalent*"; and
- We make a similar recommendation for better specification in respect of the meaning of "prohibition" as quoted in the first part of Article 25, by altering the Article simply to make explicit the fact that disclosure is prohibited where this may tip-off a suspect or prejudice a money laundering investigation. In addition, the "third persons" referred to in this Article need to be understood as distinguishable from the "third parties" referred to in Article 13.

4. Article 3 (9) defines "trust and company service providers". The definitions included in Articles 3 (9) (b) and (c) are very broad and will cover a wide range of service providers. We would suggest a more precise definition, such as "those who form, operate or manage companies or trusts when this activity is provided as a service by way of business". If the definition is not refined, the proposed Directive may be thought applicable to some service providers, such as employment agencies, which should be exempted given the nature of their business.

5. Article 3 (11) defines the meaning of a "business relationship". We encourage improvement of this definition. For external services providers, "duration" might not be a sufficient criterion for establishing the existence of a business relationship and we suggest the adding of an element of repetition by introducing "and/or repetition" at the end of the definition. We also recommend removing the circular reference that a "business relationship" means a "business ... relationship" from the definition.

6. Article 6 (b) requires that customer due diligence is applied when carrying out transactions of a certain size for clients. The wording in 6 (b) is an example of phraseology and terminology that is not directly understandable for auditors and external accountants. Auditors and external accountants do not, in the course of an audit, carry out transactions for clients and do not have close business relationships with a client. The relevant situation for the auditor and external accountant is that he becomes aware of transactions in the clients business that could be money laundering. This situation is covered by the provisions in article 17. FEE requests that this is clarified in the introductory comments of the directive.

7. Article 6 (c) requires the application of customer due diligence procedures when there is a suspicion of money laundering, regardless of any derogation, exemption or threshold.

We would like to point out that performing such procedures, including customer identification, might put the suspected party or parties on notice about the suspicion which might harm all further investigation. Therefore, we believe that the stipulations in Article 6 (c) should be qualified and indicate that such procedures should be performed in a way and to the extent possible without alerting the suspected parties.

8. Article 8, 2 provides that, in case compliance with article 7.1 (a), (b) and (c) cannot be achieved, the institution or person concerned shall consider making a report to the financial intelligence unit in accordance with Article 19. We recommend that such report should not only be made with regard to Article 19 but also Article 20 and suggest to add a reference to Article 20 in Article 8, 2.
9. In respect of the simplified customer due diligence procedures as specified in Article 10, 3 (c), we recommend modifying the latter part of these products as follows: “a pension, superannuation or similar scheme that provides retirement benefits to employees, where contributions are made by way of deduction from wages *and/or contributions from employers.*”
10. As FEE believes that no distinction should be made between legal and natural persons, we suggest that Article 11.1 (b) is not only applicable to institutions but also “persons” covered by the proposed Directive.
11. Article 12 permits reliance on third parties for the performance of customer due diligence procedures but indicates that the ultimate responsibility for such procedures remains with the institutions or persons covered by the proposed Directive.

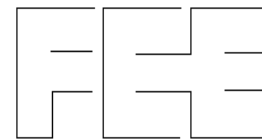
We recommend removal of the latter part of Article 12, related to “the ultimate responsibility shall remain with the institution or person covered by this Directive which relies on the third party” and its replacement by the principle included in recital (20) on page 11 of the proposed Directive (avoiding duplication of work by relying on customer identification procedures performed by third parties that are regulated). Unless reliance is permitted, once reasonable measures have been undertaken to establish the bona fide nature of the third party, this provision will not avoid duplication of work.

12. As a consequence of our earlier recommendation to remove the latter part of Article 12, we believe that the practicability of the proposed Directive would be further enhanced by also removing article 14 as we have some doubts about the compatibility of the provisions of that Article with the privacy regulations in certain Member States.

Alternatively, the term “immediate” should be removed from Article 14 and the issue of obtaining a client consent should be addressed. In normal circumstances, the transfer of confidential information requires a client consent. In circumstances as described in Article 14, exemption from the requirement to obtain a client consent is necessary.

13. We are of the opinion that the second part of Article 18 would be improved by adding that the financial intelligence unit shall also be responsible “for giving feedback to the reporting organisation, to the extent that can be done without undermining any investigation which follows the report”. Feedback is useful as it promotes better and more effective future compliance in applying the legislation.
14. Article 19, 1 (b) requires that the institutions and persons covered by the proposed Directive furnish the financial intelligence unit with all necessary further information in accordance with applicable legislation.

We would like to point out that the law enforcement perception of “*all necessary* further information” might be very far reaching and therefore, we recommend to replace the term “all necessary” with “available” further information.



15. The provision of Article 23 that the disclosure in accordance with the proposed Directive shall not constitute a breach of any restriction on disclosure of information seems to have omitted that such disclosure is made “in good faith” as was stipulated in the second European money laundering Directive. We recommend to add that such disclosure is made “in good faith” to prevent the institution or person covered by the proposed Directive to be prosecuted for breach of confidentiality and data protection rules which results in criminal sanctions in certain Member States.
16. The first part of Article 25 prevents the institutions and persons covered by the proposed Directive, as well as their directors and employees, from disclosing to other, third persons that information has been transmitted to the financial intelligence unit.

We would like to point out that in certain Member States, for example in France and the UK, there is a national obligation not only to report to the financial intelligence unit but also to other competent authorities, in some circumstances. Article 25 would prevent such reporting to other competent authorities. Therefore, we recommend explicitly including the possibility to also report information to other competent authorities.

17. We welcome the second part of article 25 and we suggest that it be further enhanced by adding the following: “Where independent legal professionals, notaries, auditors, accountants and tax advisors, acting as independent legal professionals seek to dissuade a client from engaging in illegal activity *or in order for clients to improve controls or prevent them being used for criminal purposes*, this shall not constitute a disclosure within the meaning of the first paragraph.”
18. Concerning Article 26 (b) and the retention of records and working papers in general terms, it is usual in the profession to retain documents for a period sufficient to meet the needs of the practice and in accordance with legal requirements of records retention.

If you have any further questions about our views on these matters, please do not hesitate to contact us.

Yours sincerely,

David Devlin
President