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**NOTE**

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From:	Presidency
To:	Delegations
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Subject:	Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law - Examination of the revised text

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1. At its meeting of 20 February 2017, the Working Party on Substantive Criminal Law (DROIPEN) continued the examination of the proposed Directive and discussed the drafting suggestions presented by the Presidency.
2. Further to this discussion, the Presidency noted three main issues that would need closer consideration by the working party, namely the definition of criminal activity (Article 2(1)), the offence of self-laundering (Article 3(3)) and penalties (Article 5).
3. At the next DROIPEN meeting on 15 March 2017, the Presidency would like to continue discussion on those issues and to complete another round of examination of the revised text <sup>1</sup>.

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<sup>1</sup> Changes to the COM proposal are marked **in bold**. Changes to the previous version are marked in **bold underlined**.

## A. DEFINITION OF "CRIMINAL ACTIVITY"

4. At the previous meeting the Presidency presented a drafting proposal concerning the definition of “criminal activity” based on a “catch-all” approach, linked to penalty thresholds (max. 1 year+ /min. +6months imprisonment periods). The Presidency noted broad support for this first paragraph of the definition of “criminal activity” and is therefore retaining it, except for a minor clarifying addition.
5. The second paragraph, however, raised a number of questions. In this respect, the second paragraph has been redrafted, in simpler and clearer terms, while its scope (namely, that of ensuring that all the Warsaw/FATF categories are covered) has been retained .
6. The current proposal consists of “2 rules”<sup>2</sup>:
  - **A general clause:** the “catch-all”, general rule for predicates<sup>3</sup> (unchanged);
  - **An exhaustive clause:** ensuring coverage of all categories and therefore compliance with international standards <sup>4</sup>.

Under this “exhaustive” clause MS are required to ensure that **all the Warsaw/FATF categories of predicate offences are covered**. This is an international standard we cannot go below: *vide* footnote 4 (below) and also Article 9(4) of the Warsaw Convention <sup>5</sup>.

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<sup>2</sup> Based on the **two main rules** stipulated in international conventions (*vide* the following two footnotes).

<sup>3</sup> “Countries should apply the crime of money laundering to all serious offences, with a view to **including the widest range of predicate offences**”: FATF. INTERPRETIVE NOTE TO RECOMMENDATION 3 (MONEY LAUNDERING OFFENCE), point 2 (first sentence): this is the general obligation under FATF.

<sup>4</sup> “Whichever approach is adopted, each country should, at a minimum, include a range of offences within each of the designated categories of offences”. *Idem*, point 4 (first sentence).

<sup>5</sup> “Provided that paragraph 1 of this article applies to **the categories of predicate offences** in the appendix to the Convention [...]”.

## 7. But how are MS to fulfil this obligation in practice?

The fulfilment of this obligation starts with the “catch-all” clause at the top (first paragraph). Since this provision is “catching-all”, it should in principle capture also offences falling under the listed categories.

So one might rightly ask: if we are “catching-all”, why do we require a further paragraph?

We have to keep in mind that the **“catch-all” general rule** is linked to the max. +1 year/min. +6 month thresholds. So it is possible not to capture **any offence** for a particular category . This will be the case when the level of imprisonment, for domestic offences, in relation to a given category, carries imprisonment periods which **fall below** the established max. +1 year/min. +6 month thresholds <sup>6</sup>.

This would fall short of international standards (the fact, that is, that any of the categories are left void of a range of offences). The second paragraph ensures that this does not happen. It stipulates:

**“[...], Member States shall ensure that a range of offences within the categories listed hereunder shall be considered a criminal activity for the purposes of this Directive [...].”**

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<sup>6</sup> For instance Article 5 of Directive 99/2008 on the protection of the environment through criminal law only states that: “Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by **effective, proportionate and dissuasive criminal penalties**. Since this directive gives discretion to MS, due to the fact that it establishes **no specific thresholds**, it is possible for imprisonment periods, transposed under this directive, to carry levels of imprisonment that are inferior to the “max. 1 year+ /min. +6months” (that is, the level established by our “catch-all” clause). In fact, it would be legitimate for this penalty clause to be transposed into domestic law by an imprisonment level of, for instance, 5 months, with the risk, therefore, that the “environment category” remains uncaptured. **Hence the necessity of specifically requiring MS to ensure, that all categories are covered by a range of offences.**

8. **So how will this obligation be satisfied, in practice? That is, if any category remains “uncaptured”?**

At that point, it will be up to the particular MS to select any range of offences, from its domestic legislation, to cover that particular category. The question might also arise as to what constitutes “*a range*”. International conventions do not stipulate a *specific number* of offences in this respect, however FATF states clearly that ML should be criminalised “with a view to including the *widest range* of predicate offences”. These words, which are merely *indicative* rather than *prescriptive*, give a certain discretion to States which we believe should also be retained under this directive<sup>7</sup>.

9. **How do the “European offences” fit in?**

The only requisite imposed by the “criminal activity” definition is that: the *selected range* must be *inclusive* of “at least one offence” transposed by virtue of the *acquis* instruments (where this occurs). “*At least one*” would, of course, be satisfied even with the inclusion of a “*single*” offence: this is the *minimum standard*. However MS are free to include “*a number of*” such offences or “*all of*” these offences.

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<sup>7</sup> The term “range” is left undefined at international level. The *appropriateness* of the “range” could depend on the particular “category” in question: it might be reasonable to have “five” offences under “murder”, but probably not for the *tax* category [judging by FATF reports]. Moreover, the appropriateness of the range could also be subjective to the “particular MS”: a MS offering financial services, might be expected by FATF to give very extensive coverage to certain categories, but not necessarily to others. We believe that **MS should draw from their own personal experiences of MER’s (Mutual Evaluation Reports) to ensure that the respective categories are covered appropriately by their domestic legislation.**

For instance:

“[...]”

(a) **participation in an organised criminal group and racketeering, *including at least one offence* set out in Council Framework Decision 2008/841/JHA [...]**”.

Therefore in so far as “EU offences” are concerned, there is a *mandatory* obligation to include “**at least one**” offence [a “*single*” offence]; however the obligation is *facultative* when it comes to the “*actual selection*” of this offence [or offences, if MSs decide to include more than 1 offence]. **As long as “the selected range” includes “1 EU offence”, the obligation is fulfilled.**

If MSs agree with this proposal, a recital/recitals along the lines of the above clarifications could be added.

## 10. **Resumé**

The obligations of MS for “criminal activity” are satisfied with: (a) the inclusion of **all offences** that carry imprisonment periods of max. 1 year+ /min. +6months + and (b) the coverage of all the listed Warsaw/FATF categories by a ***range of offences***, which range ***must*** include at least “**1 EU offence**”.

**See drafting suggestion in the Annex.**

## **B SELF-LAUNDERING - ARTICLE 3(3)**

11. At the last meeting, a majority of delegations took the view that the drafting proposal presented by the Presidency is too prescriptive and could result in a limited interpretation of this provision. They indicated that they would not be in a position to support this text.

12. Some others supported the proposal, since it introduced specific delimiting factors allowing to take into account the principle of *ne bis in idem*.

13. With a view to finding a compromise, the Presidency would like to explore with delegations a solution based on the understanding that the offence of self- laundering should cover conduct that harms *another legal interest* than the one already infringed by the predicate offence itself. The idea was inspired from the current Recital 8 of the Directive which speaks of “further damage”, which recital was unopposed by MS.
14. The specific elements that should be put in place to satisfy the requirement that the specific conduct violates a protected legal interest other than the one protected by the predicate offence, will be left to the discretion of the Member States, when implementing this provision.

**See drafting suggestion in this sense in the Annex.**

### **C. PENALTIES - ARTICLE 5**

15. Regarding penalties, at the last meeting delegations discussed a Presidency proposal aiming to ensure that as a minimum the Directive does not fall short of the standards of existing EU legislation. In this respect, it was proposed to limit the application of Article 5(2) to Article 3(1)(a) and (b) in line with the FD 2001/500/JHA<sup>8</sup>.
16. Various views were expressed by delegations. Some had a preference to extend the scope of the provision to Article 3(1)(c), while others could accept the proposed scope while extending the penalty threshold to a maximum term of imprisonment of at least five years. One delegation also proposed introducing a minimum penalty threshold. Some delegations had preference for introducing a monetary threshold for triggering the envisaged penalties. Another group of delegations expressed support for the Presidency text.

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<sup>8</sup> Article 2 of FD 2001/500/JHA reads:  
"Each Member State shall take the necessary steps consistent with its system of penalties to ensure that the offences referred to in Article 6(1)(a) and (b) of the 1990 Convention, as they result from the Article 1(b) of this framework Decision, are punishable by deprivation of liberty for a maximum of not less than 4 years."

17. Further to the reasoning presented at the last meeting, the Presidency would like to point out that since Article 5 does not set out a minimum threshold, this would allow MSs to cater at national level for “less serious” ML cases. The *maximum threshold*, on the other hand, is set *at least at 4 years*, in line with the existing *acquis* standard, but it is our understanding that MSs may go *well beyond* this threshold (the directive, is only setting minimum rules<sup>9</sup>).
18. So, since in practice, Article 5 could be transposed by the implementation of an imprisonment period, for instance, between 6 months and 6 years – there would be ample flexibility to cater for an appropriate imprisonment period for *any level* of gravity of *any* laundering offence.
19. It will be up to the MS to transpose, and up to the national courts to apply, *depending on the facts/factors/circumstances of the particular case*. In this respect and taking into account the support that this option received by a number of delegations at the last meeting, the Presidency suggests including Article 3 (1)(c) in the scope of Article 5(2).

**See drafting suggestion in the Annex.**

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<sup>9</sup> MSs are free to provide higher penalties in their national law, as also stipulated in the 2002 Council conclusions on the approach to apply regarding approximation of penalties (Doc. 9141/02)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on countering money laundering by criminal law**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Money laundering and the associated financing of terrorism and organised crime remain significant problems at the Union level, thus damaging the integrity, stability and reputation of the financial sector and threatening the internal security and the internal market of the Union. In order to tackle those problems and also reinforce the application of Directive 2015/849/EU<sup>10</sup>, this Directive aims to tackle money laundering by means of criminal law, allowing for better cross-border cooperation between competent authorities.
- (2) Measures adopted solely at national or even at Union level, without taking into account international coordination and cooperation, would have very limited effect. The measures adopted by the Union in countering money laundering should therefore be compatible with, and at least as stringent as, other actions undertaken in international fora.

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<sup>10</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p.73).



- (3) Union action should continue to take particular account of the Financial Action Task Force (FATF) Recommendations and instruments of other international bodies active in the fight against money laundering and terrorist financing. The relevant Union legal acts should, where appropriate, be further aligned with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation adopted by the FATF in February 2012 (the 'revised FATF Recommendations'). As a signatory to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), the Union should transpose the requirements of that Convention into its legal order.
- (4) Council Framework Decision 2001/500/JHA<sup>11</sup> lays down requirements on the criminalisation of money laundering. That Framework Decision is not comprehensive enough, however, and the current incrimination of money laundering is not sufficiently coherent to effectively combat money laundering across the Union, thus leading to enforcement gaps and obstacles in the cooperation between the competent authorities in different Member States.
- (5) The definition of criminal activities which constitute predicate offences for money laundering should be sufficiently uniform in all the Member States. Member States should include a range of offences within each of the categories designated by the FATF. Where categories of offences, such as terrorism or environmental crimes, are set out in Union law, this Directive refers to such legislation. This ensures that the laundering of the proceeds of the financing of terrorism and wildlife trafficking are punishable in the Member States. In cases where Union law allows Member States to provide for other sanctions than criminal sanctions, this Directive should not require Member States to establish those cases as predicate offences for the purposes of this Directive.
- (6) Tax crimes relating to direct and indirect taxes should be included in the definition of criminal activity, in line with the revised FATF Recommendations. Given that different tax offences may in each Member State constitute a criminal activity punishable by means of the sanctions referred to in this Directive, definitions of tax crimes may diverge in national law. However no harmonisation of the definitions of tax crimes in Member States' national law is sought.
- (7) This Directive should not apply to money laundering as regards property derived from offences affecting the Union's financial interests, which is subject to specific rules as laid down in Directive 2017/XX/EU<sup>12</sup>. In accordance with Article 325(2) TFEU, the Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

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<sup>11</sup> Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001).

<sup>12</sup> Directive 2017/XX/EU of the European Parliament and of the Council of x x 2017 on the protection of the Union's financial interests by means of criminal law (OJ x L, xx.xx.2017, p.x).

- (8) Where money laundering activity does not simply amount to the mere possession or use, but also involves the transfer or the concealing and disguise of property through the financial system and results in further damage than that already caused by the predicate offence, such as damaging the integrity of the financial system, that activity should be punished separately. Member States should thus ensure that such conduct is also punishable when committed by the perpetrator of the criminal activity that generated that property (so-called self-laundering).
- (9) In order for money laundering to be an effective tool against organised crime, it should not be necessary to identify the specifics of the crime that generated the property, let alone require a prior or simultaneous conviction for that crime. Prosecutions for money laundering should also not be impeded by the mere fact that the predicate offence was committed in another Member State or third country, provided it is a criminal offence in that Member State or third country. Member States may establish as a prerequisite the fact that the predicate offence would have been a crime in its national law, had it been committed there.
- (10) This Directive aims to criminalise money laundering when committed intentionally. Intention and knowledge may be inferred from objective, factual circumstances. As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent criminal law rules for money laundering. Member States may, for example, provide that money laundering committed recklessly or by serious negligence constitutes a criminal offence.
- (11) In order to deter money laundering throughout the Union, Member States should lay down minimum types and levels of penalties when the criminal offences defined in this Directive are committed. Where the offence is committed within a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA<sup>13</sup> or where the perpetrator abused their professional position to enable money laundering, Member States should provide for aggravating circumstances in accordance with the applicable rules established by their legal systems.
- (12) Given the mobility of perpetrators and proceeds stemming from criminal activities, as well as the complex cross-border investigations required to combat money laundering, all Member States should establish their jurisdiction in order to enable the competent authorities to investigate and prosecute such activities. Member States should thereby ensure that their jurisdiction includes situations where an offence is committed by means of information and communication technology from their territory, whether or not based in their territory.
- (13) This Directive should replace certain provisions of Framework Decision 2001/500/JHA<sup>14</sup> for the Member States bound by this Directive.

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<sup>13</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, (OJ L 300, 11.11.2008, p. 42)

<sup>14</sup> Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001).

- (14) Since the objective of this Directive, namely to subject money laundering in all Member States to effective, proportionate and dissuasive criminal penalties, cannot be sufficiently achieved by Member States but can rather, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (14) [In accordance with Article 3 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Directive.
- (15) AND/OR
- (16) In accordance with Articles 1 and 2 of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption and application of this Directive and are not bound by it or subject to its application.]
- (17) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Framework Decision 2001/500/JHA<sup>15</sup> shall continue to be binding upon and applicable to Denmark,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

*Subject matter and scope*

1. This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of money laundering.
2. [This Directive shall not apply to money laundering as regards property derived from offences affecting the Union's financial interests, which is subject to specific rules as laid down in Directive 2017/XX/EU.]<sup>16</sup>

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<sup>15</sup> *Idem.*

<sup>16</sup> In principle it was agreed that this provision will be discussed at a later stage.

*Article 2*  
*Definitions*

For the purposes of this Directive, the following definitions apply:

(1) "criminal activity" means any kind of criminal involvement<sup>17</sup> in the commission of all offences, (...), **which in accordance with national legislation** 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.

**In any event, a range of offences within the categories listed hereunder shall be considered a criminal activity for the purposes of this Directive:**

- (a) participation in an organised criminal group and racketeering, including ~~any of the~~ **at least one** offences set out in Council Framework Decision 2008/841/JHA;
- (b) terrorism, including ~~any of the~~ **at least one** offences set out in Directive 2017/XX/EU<sup>18</sup>;

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<sup>17</sup> Some delegations would like removing the reference to "any kind of criminal involvement". Article 9 (1)(a) of the Warsaw Convention envisages for example that the offence covers an act of "*assisting a person who is involved in the commission of predicate offence*". Since the definition of criminal activity for the purposes of this Directive aims to regulate the same concept expressed as a "predicate offence" in the Warsaw Convention, in view of the Presidency the COM proposal seems to be in line with the standard.

<sup>18</sup> Directive 2017/XX/EU of the European Parliament and of the Council of X X 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (OJ x L, xx.xx.2017, p. x.).

- (c) trafficking in human beings and migrant smuggling, including ~~any of the~~ **at least one** offences set out in Directive 2011/36/EU<sup>19</sup> and Council Framework Decision 2002/946/JHA<sup>20</sup>;
- (d) sexual exploitation, including ~~any of the~~ **at least one** offences set out in Directive 2011/93/EU<sup>21</sup>;
- (e) illicit trafficking in narcotic drugs and psychotropic substances, including ~~any of the~~ **at least one** offences set out in Council Framework Decision 2004/757/JHA<sup>22</sup>;
- (f) illicit arms trafficking;
- (g) illicit trafficking in stolen goods and other goods;
- (h) corruption, including ~~any of the~~ **at least one** offences set out in the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union<sup>23</sup> and in Council Framework Decision 2003/568/JHA<sup>24</sup>;
- (i) fraud, including ~~any of the~~ **at least one** offences set out in Council Framework Decision 2001/413/JHA<sup>25</sup>;

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<sup>19</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.04.2011, p.1).

<sup>20</sup> Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1).

<sup>21</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ 335 L, 17.12.2011, p. 1).

<sup>22</sup> Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 335 L, 11.11.2004, p. 8).

<sup>23</sup> Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

<sup>24</sup> Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2004, p. 54).

<sup>25</sup> Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ 149 L, 2.6.2001, p. 1).

- (j) counterfeiting of currency, including ~~any of the~~ **at least one** offences set out in Directive 2014/62/EU<sup>26</sup>;
- (k) counterfeiting and piracy of products;
- (l) environmental crime, including ~~any of the~~ **at least one** offences set out of Directive 2008/99/EC<sup>27</sup> or in Directive 2009/123/EC<sup>28</sup>;
- (m) murder, grievous bodily injury;
- (n) kidnapping, illegal restraint and hostage-taking;
- (o) robbery or theft;
- (p) smuggling (~~including in relation to customs and excise duties and taxes~~);
- (pa) tax crimes relating to direct taxes and indirect taxes, as defined in the national law of the Member States<sup>29</sup>**;
- (q) extortion;
- (r) forgery;
- (s) piracy;
- (t) insider trading and market manipulation, including ~~any of the~~ **at least one** offences set out in Directive 2014/57/EU<sup>30</sup>;
- (u) cybercrime, including ~~any of the~~ **at least one** offences set out in Directive 2013/40/EU<sup>31</sup>;

~~all offences, including tax crimes relating to direct taxes and indirect taxes 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;~~

<sup>26</sup> Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA (OJ 151 L, 21.5.2014, p. 1).

<sup>27</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (OJ 328 L, 6.12.2008, p. 28).

<sup>28</sup> Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (OJ 280 L, 27.10.2009, p.52).

<sup>29</sup> Tax crimes have been integrated in the list

<sup>30</sup> Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (OJ 173 L, 12.6.2014, p. 179).

<sup>31</sup> Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218, 14.8.2013, p. 8).

- (2) "property" means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form including electronic or digital, evidencing title to or an interest in such assets;
- (3) "legal person" means any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

### *Article 3*

#### *Money laundering offences*

1. Each Member State shall ensure that the following conduct shall be a punishable criminal offence, when committed intentionally:
- a) the conversion or transfer of property, knowing that such property is derived, **whether directly or indirectly**<sup>32</sup> from criminal activity or from an act of participation in such activity<sup>33</sup>, 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 an activity to evade the legal consequences of that person's action;
  - b) 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, **whether directly or indirectly** from criminal activity or from an act of participation in such an activity;
  - c) the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived, **whether directly or indirectly** from criminal activity or from an act of participation in such an activity.

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<sup>32</sup> Wording aligned with the definition of proceeds in Directive 2014/42/EU. It has been further adjusted to point out the broad scope of the existing definition of "proceeds" incorporated in the text, while not imposing further requirements in terms of evidentiary standard.

<sup>33</sup> Some delegations have requested deletion of this phrase. It originates from the 1998 UN Vienna Convention and has been part of the EU legislation since 1991 (1st AMLD).

2. Each Member State shall take the necessary measures to ensure that<sup>34</sup>:
- (a) a prior or simultaneous conviction for the criminal activity **from which the property was derived, is not a prerequisite for a conviction for the offences, referred to in paragraph 1;**
  - (b) 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, referred to in Article 2 (1), without it being necessary to establish all the factual elements or all circumstances relating to such activity;
  - (c) the offences referred to in paragraph 1 extend to property derived from conduct that occurred in the territory of another Member State or in that of a third country, when the relevant conduct constitutes a criminal offence under the national law of the other Member State or that of the third country and would constitute a criminal activity had it occurred domestically<sup>35</sup>.
3. The offences referred to in points (a) and (b) of paragraph 1 shall also apply to persons who committed or participated in the criminal activity from which the property was derived, whenever a legal interest is harmed other than the one infringed by the criminal activity referred to in Article 2(1)<sup>36</sup>.

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<sup>34</sup> Wording largely aligned with Article 9 (5), (6) and (7) of the Warsaw Convention

<sup>35</sup> The text has been adjusted in accordance with the views expressed by majority of delegations

<sup>36</sup> The following accompanying recital based on recital 8 of the COM proposal is suggested:  
**Member States should ensure that certain types of money laundering activities are also punishable when committed by the perpetrator of the criminal activity that generated that property (self-laundering).** ~~does not simply amount to the mere possession or use, but also~~ **Notably, any** money laundering activity involving **the transfer or the concealment and disguise of property through the financial system that results in further damage than that already caused** **harming a protected legal interest other than the one harmed** by the predicate offence, such as damaging the integrity of the financial system **by the reintegration of property of illicit origin, should be considered self-laundering.** ~~that activity should be punished separately. Member States should thus ensure that such conduct is also punishable when committed by the perpetrator of the criminal activity that generated that property (so-called self-laundering).~~



*Article 4*

*Incitement, aiding and abetting, and attempt*

Each Member State shall ensure that inciting, aiding and abetting and attempting an offence referred to in Article 3 shall be punishable.

*Article 5*

*Penalties for natural persons*

1. Each Member State shall ensure that the conduct referred to in Articles 3 and 4 shall be punishable by effective, proportionate and dissuasive criminal penalties.
2. Each Member State shall ensure that the offences referred to in Article 3 shall be punishable by a maximum term of imprisonment of at least four years (...).

## Article 6

### Aggravating circumstances

Member States shall ensure that the following circumstances **may, in accordance with national law**<sup>37</sup>, be regarded as aggravating circumstances, in relation to the offences referred to in Articles 3 and 4 when:

- (a) the offence was committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841<sup>38</sup>; or
- (b) the offender has a contractual relationship and a responsibility towards an obliged entity or is an obliged entity within the meaning of Article 2 of Directive 2015/849/EU and has committed the offence in the exercise of their professional activities.

## Article 7

### Liability of legal persons

1. ~~Each~~ Member States shall **take the necessary measures to**<sup>39</sup> ensure that legal persons can be held liable for any of the offences referred to in Articles 3 and 4 committed for ~~their~~ **benefit of those legal persons** by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on **one of the following**:
  - (a) a power of representation of the legal person;
  - (b) ~~the~~ **an** authority to take decisions on behalf of the legal person; or
  - (c) ~~the~~ **an** authority to exercise control within the legal person.

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<sup>37</sup> Wording aligned with recent substantive criminal law instruments, e.g. the Terrorism directive.

The following accompanying recital is proposed:

**Member States should ensure that certain circumstances may in accordance with national law be regarded as aggravating circumstances. They should ensure that judges can take this circumstance into account when sentencing offenders, although there is no obligation on judges to increase the sentence. It remains within the discretion of the judge to assess that circumstance together with the other facts of the particular case.**

<sup>38</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, (OJ L 300, 11.11.2008, p. 42).

<sup>39</sup> On request of delegations Article 7, 8 and 9 have been brought in line with the standard wording used in other EU legislation to avoid confusion about its meaning.

2. Member States shall **also take the necessary measures to** ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 **of this Article** has made possible the commission of any of the offences referred to in Articles 3 and 4 for the benefit of that legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 **of this Article** shall not exclude criminal proceedings against natural persons who ~~incite the commission of or~~ **are perpetrators, inciters or accessories in,** ~~or are accessories to~~ any of the offences referred to in Articles 3 and 4.

#### *Article 8*

#### *Sanctions for legal persons*

~~Each~~ Member States shall **take the necessary measures to** ensure that a legal person held liable ~~for~~ offences pursuant to Article 7<sup>40</sup> ~~shall be~~ **is** punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

- (1) ~~the exclusion of that legal person~~ from entitlement to public benefits or aid;
- (2) ~~the temporary or permanent disqualification of that legal person~~ from the practice of commercial activities;
- (3) ~~the placing of that legal person~~ under judicial supervision;
- (4) **a** judicial winding-up **order** ;
- (5) ~~the temporary or permanent closure of establishments which have been used for committing the offence~~

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<sup>40</sup> Technical error

*Article 9*  
*Jurisdiction*

1. Each Member State shall **take the necessary measures to** establish its jurisdiction over the offences referred to in Articles 3 and 4 where:
  - (a) the offence is committed in whole or in part in its territory;
  - (b) the offender is one of its nationals.
2. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 3 and 4 committed outside its territory where:
  - (a) the offender is a ~~habitual~~ resident in its territory;
  - (b) the offence is committed for the benefit of a legal person established in its territory.

*Article 10*  
*Investigative tools*

Each Member State shall ensure that effective investigative tools, such as those used in countering organised crime or other serious crimes are available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 3 (...) <sup>41</sup>.

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<sup>41</sup> On request of delegations, the following accompanying recital in line with similar provisions in recent EU legislation, e.g. recital 21 of the Counter Terrorism Directive:  
**To ensure the success of investigations and the prosecution of money laundering offences, those responsible for investigating or prosecuting such offences should have the possibility to make use of effective investigative tools such as those which are used in combating organised crime or other serious crimes. The use of such tools, in accordance with national law, should be targeted and take into account the principle of proportionality and the nature and seriousness of the offences under investigation and should respect the right to the protection of personal data.**

## *Article 11*

### *Replacement of certain provisions of Framework Decision 2001/500/JHA*

1. This Directive replaces point (b) of Article 1 and Article 2 of Framework Decision 2001/500/JHA in respect of the Member States bound by this Directive, without prejudice to the obligations of those Member States relating to the date for transposition of that Framework Decision into national law.
2. For the Member States bound by this Directive, references to Framework Decision 2001/500/JHA shall be construed as references to this Directive.

## *Article 12*

### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after adoption] at the latest. They shall immediately communicate the text of those provisions to the Commission.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

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

*Article 13*

*Reporting*

The Commission shall, by [24 months after the deadline for implementation of this Directive], submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures to comply with this Directive.

*Article 14*

*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in *the Official Journal of the European Union*.

*Article 15*

*Addressees*

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*