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Position of the Council of the Bars and Law Societies of the European Union (CCBE) on the requirements on a lawyer to report suspicions of money laundering and on the European Commission Proposal for a Third EU Directive On Money Laundering Regulations

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Conseil des Barreaux de l'Union européenne – Council of the Bars and Law Societies of the European Union
association internationale sans but lucratif
Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel. +32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.org – www.ccbe.org

CCBE position on the requirements on a lawyer to report suspicions of money laundering and on the European Commission Proposal for a Third EU Directive on Money Laundering.

Introduction

1. The Council of the Bars and Law Societies of the European Union (CCBE), which through its member Bars represents more than 700,000 European lawyers, submits these comments on the requirements on a lawyer to report suspicions of money laundering, and on the European Commission Proposal for a Third EU money laundering Directive.

2. In November 2001, the European Parliament and the Council of Ministers agreed on a text for amending Directive 91/308/EEC, the principal EU money laundering Directive. The new text, the 2001 Directive (Directive 2001/97/EC), resulted in new money laundering obligations which were to be incorporated into national legislation before 15 June 2003.

3. The 2001 Directive obliged Member States to combat laundering of the proceeds of all serious crime. This was in contrast to the 1991 Directive, in which obligations applied only to the proceeds of drug offences.

4. Of great concern to the CCBE, the 2001 Directive extended the coverage of the 1991 Directive, which was limited to the financial sector, to a series of non-financial activities and professions, including lawyers.

5. The 2001 Directive imposed upon financial institutions and professionals obligations with regard to client identification, record keeping and the reporting of suspicious transactions.

6. The European legal profession has continuing and serious concerns with regard to the reporting of suspicious transactions and other obligations under the 2001 Directive.

7. It now appears as if the general principle will be for lawyers to be subject to disclosing suspicions, with the exception being that only some information will be exempted from this obligation. Even if the recital of the directive provides that legal advice remains subject to the obligation of professional secrecy (recital 17), this general principle infringes upon professional secrecy, as the lawyer is *de plano* subject to disclose suspicions, and the exception does not concern lawyers themselves but only some information obtained in some circumstances which are more limited than legal advice.

8. The requirements on a lawyer to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence is in the view of the CCBE a violation of a fundamental right. As a result, the essence of the lawyer/client relationship has in our view now been infringed upon as a result of the 2001 EU money laundering Directive.

9. For this reason the CCBE, on behalf of all European Bars and Law Societies, continues to call for the removal of the reporting requirement in relation to members of the legal profession.

Current developments – general reporting obligations of lawyers

10. There are a number of developments taking place, all of which lend support to the seriousness of the current obligations:

(a) Petition submitted by the French Bars to the European Parliament:

On Thursday 30th September 2004, a hearing took place in the European Parliament, before the Committee on Petitions. The hearing was a result of a petition submitted by the French Bars in May 2003. This petition concerned the reporting obligations contained in the 2001 EU money laundering Directive.

The Petitions Committee agreed to refer the issue to the European Parliament Committee on Civil Liberties, Justice and Home Affairs and the European Parliament Committee on Legal Affairs. The Committee has also asked the Legal Service of the European Parliament for its opinion. This outcome illustrates in our view that a real concern has been raised by the legal profession, a concern that has been recognised at this stage by the European Parliament Committee on Petitions.

(b) Challenge mounted in Belgium by the Belgian Bars against the 2001 Money Laundering Directive:

In August 2004, the Belgian Bars mounted a challenge in Belgium before the Belgian Constitutional Court against certain provisions of the 2001 Money Laundering Directive. This challenge has been made by the French and German speaking bars on the one hand (Ordre des Barreaux Francophones et Germanophones and the Ordre français des Avocats du barreau de Bruxelles) and the Flemish speaking bars on the other hand (Vereniging van Vlaamse Balies and the Nederlandse orde van advocaten bij de balie te Brussel).

In its challenge, the Belgian Bars have included a request to the Belgian Constitutional Court to refer a preliminary question to the European Court of Justice on the expansion of the scope of the first money laundering Directive to lawyers, and thereafter to annul various provisions of Belgian law.

The Belgian Bars have put forward four arguments. One of these arguments is based, among other grounds, on Article 6 of the Human Rights Convention (the general principles of law in connection with rights of the defence), Article 6, § 2, of the European Union Treaty and Article 8, § 2, of the Charter on Fundamental Rights. It is argued that the expansion of the scope of the first Directive to lawyers infringes upon the principles of independence and professional secrecy of lawyers, which lie at the very heart of the rights of the defence, the importance of which has been acknowledged by both the Court of Justice of the European Communities and by the European Court of Human Rights.

It is expected that a decision will be issued by the Belgian Constitutional Court before the end of 2004. The CCBE is intervening in support of the Belgian Bars.

(c) Canada:

In November 2001, certain parts of the Proceeds of Crime (Money Laundering) Act came into force in Canada. The obligations imposed under Part 1 of the Act included the recording and reporting requirements respecting suspicious, large cash and terrorist financing related transactions, and the requirement to implement a compliance regime.

This Act required lawyers to secretly report suspicious transactions of their clients to the Canadian federal government. The Federation of Law Societies of Canada, on the same day as the Act came into force, commenced legal proceedings in the Supreme Court of British Columbia with a view to obtaining a declaration of nullity and /or unconstitutionality of the relevant provisions of the Act.

The Canadian federal government, in March 2003, repealed several regulations, relieving Canadian lawyers from Part 1 of the Act, and there will be a hearing on the constitutional challenge in November 2004. The CCBE believes that the outcome of this case will have wide implications for the obligation on lawyers to report suspicions.

Additional observation

11. The CCBE would like to refer to Article 2 of the 2001 Directive. This Article refers to an examination by the Commission on the implementation of the Directive with regard to the specific treatment of lawyers.

12. The Article provides as follows:

> *"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."*

13. In December 2004, three years will have passed since the 2001 Directive entered into force. The CCBE believes that no such report has been produced by the Commission on the implementation of the Directive with regard to the specific treatment of lawyers, and no such report is expected to be produced by the Commission. The CCBE deplores both that such important provisions have been introduced without discovering their impact, and that the Commission has ignored one of the articles in a directive.

Proposal for a Third Money Laundering Directive

14. In June 2004, despite the limited period of time that has elapsed since the deadline for implementation of the 2001 Directive (June 2003), the European Commission published a proposal for a third EU money laundering Directive.

15. The CCBE informed the Commission that an insufficient period of time would have elapsed between the implementation of the second directive and a proposal for a third directive.

16. The CCBE member bars had already raised a number of preliminary concerns with regard to the obligations that arise under the provisions of the 2001 directive. In addition, the CCBE raised before the Commission the question of how the Commission is evaluating the implementation of the second money laundering Directive in each of the old Member States and accession States.

17. The CCBE has deep concerns as to the timing of this Directive, and above all, the fact that the validity of the reporting obligations under the 2001 Directive are now being called into question and will be soon tested (see previous section on Current Developments).

18. Without prejudice to the CCBE objection to the requirements on a lawyer to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence, the CCBE believes that it is necessary to make the following comments on the draft proposal for a Third EU Money Laundering Directive.

CCBE Comments on the proposal for a Third Directive

General:

The CCBE believes that non-regulated professions, that might provide legal advice and possibly assist their clients or represent them in judicial matters in some European States, are not subject to any reporting obligation. Only regulated professions that are subject to deontological obligations are obliged to disclose professional secrecy, whereas non-regulated professions do not have any such obligation imposed upon them.

Article 2.1. : The ambit of the third Directive is strictly limited to lawyers as natural persons when they participate for their client or when they assist him/her in the planning or execution of transactions concerning five definite items[1] (Article 2.1.(3)(b)). Therefore, lawyers should not be subject to due diligence or reporting of suspicious transactions falling outside the above mentioned ambit of the provision. Thus, one could:

- *Either* insert Article 20 into Article 2.1 and specify that "*Member States shall not be obliged to apply the obligations laid down in this Directive to independent legal professionals (...), who are subject to the present Directive under Article 2 § 1 (b) in the exercise of their professional activity, 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 ".*

- *Or* modify Article 20 of the proposal for a Directive as follows : " *Member States shall not be obliged to apply the obligations laid down in Chapter II, Articles 17 and 19 § 1, 21, 2 6, 2 7 and 28 to independent legal professionals (…) who are subject to the present Directive under Article 2 § 1 (b) in the exercise of their professional activity, 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 ".*

Without prejudice to the above-mentioned comments, the CCBE would also like to make the following observation in relation to Article 2 and in particular Article 2 (1) (3) (b)

The Directive applies to lawyers when they participate on behalf of their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client. This is regardless of whether a payment in made in cash and regardless of whether the amount is EUR 15.000 or more. To other persons trading in goods or providing services the Directive only applies if the payment is made in cash and in an amount of EUR 15.000 or more. The Directive therefore only applies for example to luxury goods if payment is made in cash or in an amount of EUR 15.000 or more. The buying and selling of real property or business entities or the managing of client money, securities or other assets by the lawyer, however, falls in every case within the scope of application of the Directive, even if only EUR 1.000 is managed or if an agricultural crop land shall be sold for EUR 5.000.

In the opinion of the CCBE, the Directive should only apply to lawyers if the mentioned transactions exceed the amount of EUR 50.000 and if they are made in cash. There is no empirical evidence that money laundering appears particularly during the buying or selling of real property below the amount of EUR 50.000. The discrimination between lawyers or notaries on the one hand who are supposed to be particularly susceptible to money laundering and jewellers on the other hand is not justified. It seems incorrect to consider the profession rather than the real transaction to be crucial for scrutinising whether or not there are money laundering activities and obligations.

[1] Buying and selling of real property or business entities; managing of client money, securities or other assets; opening or management of bank, savings or securities accounts; organisation of contributions necessary for the creation, operation or management of companies; creation, operation or management of trusts, companies or similar structures.

- **Article 3.2.**: Member States should be able to decide not to apply the Directive to lawyers who are engaged in activities mentioned in Article 2.1 on an occasional or limited basis and where there is little risk of money laundering. This provision currently applies to financial institutions:

  "2. Member States may decide not to apply this Directive in the case of financial institutions which engage in a financial activity on an occasional or very limited basis and where there is little risk of money laundering occurring. "

- **Article 3 (7) (f):** The definition of serious crime with reference to the penalty does not appear appropriate. The European judicial area requires homogeneity of the underlying offences. Some offences exist in some countries which do not exist in others, or the same offences are punishable by different penalties, some above the threshold of one year of deprivation of liberty and some below. It appears that the criterion of the penalty will not achieve harmonization of the national legislations, which is the aim of the directive.

  " (7)"serious crimes" means, at least:

  (f) all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which 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 3 (11) This Article provides as follows:**

  " Business relationship" means a business, professional or commercial relationship which is expected, at the time when the contact is established, to have an element of duration".

  Concerning this definition, the CCBE believes that the definition of *"businesss relationship"* under Article 3 (11) is confusing with regard to the activities of lawyers because the provision regarding the element of duration is not an accurate guide to the establishment of a lawyer client relationship).

  In this regard, it might be useful to make a distinction between the concept of a business relationship - banks and financial institutions (sometimes lawyers) - and the concept of a professional relationship.

  The business relationship could be defined as in Article 3 (11), but for a professional relationship there should be a definition of a client (as opposed to a consumer in a business relationship) as follows:

  "Any individual who has a professional relationship under a mandate providing for the provision of services".

- **Article 7:** Article 7 provides as follows:

  "1. Customer due diligence procedures shall comprise the following activities:

  (a) identifying the customer and verifying the customer's identity;

  (b) identifying, where applicable, the beneficial owner and taking reasonable measures to verify the identity of the beneficial owner such that the institution or person is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking reasonable measures to understand the ownership and control structure of the customer;

(c) obtaining information on the purpose and intended nature of the business relationship;

(d) conducting ongoing due diligence on the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date.

2. *The institutions and persons covered by this Directive shall apply each of the customer due diligence requirements in paragraph 1, but may determine the extent of such measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction. "*

The CCBE welcomes the Commission's attempts towards making the customer due diligence provisions of the Third Directive more risk sensitive. This approach is preferable to prescriptive requirements which are overly burdensome and disproportionate when weighed against the potential benefit to law enforcement. The CCBE believes that prescriptive legislation in this area is not appropriate for businesses and activities. The danger of legislating on specific know-your-customer procedures is that it produces an inflexible minimum standard which will not be appropriate to all businesses and activities and which cannot be changed easily to meet new demands and situations that may arise in the global fight against money laundering.

The CCBE is also concerned by the obligation to carry out 'ongoing due diligence' as set out in Article 7 (1) (d) of the draft Directive. Although the CCBE would encourage ongoing due diligence as a matter of best practice, we do not think it should be mandatory, as this would be unduly onerous for smaller firms. We note with approval however that the customer due diligence requirements have been made more risk-based. Article 7 (2) provides that "*the institutions and persons subject to the Directive shall apply the customer due diligence requirements … but may determine the extent of such measures on a risk-sensitive basis….."*

- **Article 8 (2)**:

1. *"Member States shall require that the institutions and persons covered by this Directive apply customer due diligence before or during the course of establishing a business relationship or executing a transaction for occasional customers.*

2. *Member States shall require that, where the institution or person concerned is unable to comply with points (a), (b) and (c) of Article 7(1), it may not open the account, establish a business relationship or perform the transaction, or shall terminate the business relationship, and shall consider making a report to the financial intelligence unit in accordance with Article 19 in relation to the customer.*

3. *Member States shall require that institutions and persons covered by this Directive apply the customer due diligence procedures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis*".

The CCBE would have a strong objection under Article 8.2 to the restriction on a lawyer establishing a client relationship where he may not have carried out a due diligence exercise. This is the responsibility of the lawyer concerned and he will

have to accept the consequences. Under no circumstances should the State dictate for whom a lawyer may or may not act.

- **Article 10 (1) (a):** This Article provides as follows:

> *1. " By way of derogation from Articles 6, 7 and 8(2) Member States may allow the institutions and persons covered by this Directive not to apply customer due diligence in respect of customers who represent a low risk of money laundering, such as:*
>
> *(a) credit and financial institutions from the Member States, or from third countries provided that they are subject to requirements to combat money laundering consistent with international standards and are supervised for compliance with those requirements; "*

This Article provides that the requirement to apply customer due diligence may not be applied to credit and financial institutions who are credit and financial institutions in another Member State or in a third country where similar anti money laundering procedures exist. However this relaxation of the due diligence requirements is not extended to lawyers and law firms where they are acting on behalf of another lawyer or law firm in another Member State or in a third country. Apart from being discriminatory it could be of practical significance as there will be occasions where in a referral situation a lawyer may only wish to act solely on behalf of the lawyer in the other Member State and bill that lawyer / client accordingly.

- **Article 10.1 (c):** Lawyers should be entitled not to apply due diligence procedures with regard to clients' funds for a transaction where the funds are deposited in accounts guaranteeing a secured management of the movement of capital by the lawyer for their clients (i.e. the CARPA system in France, where the president of the bar manages all the lawyers' client funds for lawyers who are members of that bar). For this reason, this Article could be amended as follows: *"Lawyers may [be allowed] not [to] apply due diligence in respect of customers who represent a low risk of money laundering (...) such as the beneficial owners of accounts held directly or indirectly for them by an independent legal professional established in a Member State or in a third country provided they are subject to anti-money laundering requirements meeting international standards and that the respect of such requirements is controlled.*

- **Article 11 (1) (a):** Article 11 says that the customer's identity is established by additional documentary evidence. It is not obvious what is meant by "additional documentary evidence". It should be sufficient if the identification of the customer is proven by documentary evidence.

> *1. "Member States shall require the institutions and persons covered by this Directive to apply, on a risk-sensitive basis, enhanced customer due diligence measures, in addition to the measures referred to in Articles 6, 7 and 8(2), in situations which by their nature can present a higher risk of money laundering, and at least in the following situations in accordance with the second, third and fourth subparagraphs of this paragraph.*
>
> *Where the customer has not been physically present for identification purposes, Member States shall require those institutions and persons to apply one or more of the following measures:*
>
> *(a) measures such as ensuring that the customer's identity is established by additional documentary evidence;"*

- **Article 11 (1) (b):** In Article 11 (1) (b), the words *"and persons"* should be added after *"requiring confirmatory certification by an institution".* There is no reason why only institutions and not persons can render confirmatory certifications.

  "(b) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by an institution covered by this Directive;"

- **Article 12**: Article 12 provides as follows:

  "Member States may permit the institutions and persons covered by this Directive to rely on third parties to perform the requirements laid down in Article 7(1)(a), (b) and (c).

  However, the ultimate responsibility shall remain with the institution or person covered by this Directive which relies on the third party."

  Without prejudice to the CCBE comments on Article 14, the CCBE has concerns about Article 12 which appears to undermine the whole concept of introduced business by placing ultimate responsibility, and therefore liability, upon the person subject to the Directive who is relying upon the introducer. In order to be confident in carrying out their business activities without fear of prosecution, persons in the regulated sector will still need to repeat the identification procedures. Unless persons subject to the Directive can gain comfort from a declaration that the introduced business has been identified according EU standards, it is pointless to have the concept of performance by third parties.

- **Article 14:** Article 14 provides as follows:

  "Third parties shall make information based on the requirements laid down in Article 7(1) (a), (b) and (c) immediately available to the institution or person to which the customer is being referred.

  Relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner shall immediately be forwarded by the third party to the institution or person to which the customer is being referred on request."

  The CCBE is opposed to this provision as a lawyer cannot be expected to pass on information without the permission of the client.

- **Article 19**: Lawyers' staff (whether lawyers are natural or legal persons) should not be covered by the ambit of the requirements laid down in this Directive because, not being lawyers, they are subject neither to lawyers' professional ethics, nor to the exceptions within the Directive applicable to lawyers.

  "Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully"

- **Article 19(a)**: Article 19 (a) provides as follows:

  "Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully:

  (a) by directly and promptly informing the financial intelligence unit, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering is being committed or attempted. "

The CCBE believes that, for the first time, an EU Money Laundering Directive has now introduced the word *"suspects"* into the main text by using the expression *"suspects or has reasonable grounds to suspect*". It would appear to the CCBE that these are two mutually exclusive tests. The CCBE also believes that such a provision is at risk of being applied in an inconsistent manner.

- **Article 21 § 3**: There should be no ambiguity with regard to the attitude of the lawyer when confronted with a suspicious transaction. The following words should therefore be deleted: *"or is likely to frustrate efforts to pursue the beneficiaries of a suspected money laundering operation".*

  "Member States shall require the institutions and persons covered by this Directive to refrain from carrying out transactions which they know or suspect to be related to money laundering until they have informed the financial intelligence unit.

  The financial intelligence unit may, under conditions to be determined by the 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 financial intelligence unit immediately afterwards."

- **Article 24:** Member States are not in a position to ensure the safety of natural persons who report suspicions of money laundering. Thus, no effective measure can be taken by the Member States which will then be held responsible for the lethal consequences or the injuries caused. Since the Member States have no technical possibility nor human means to protect the persons covered by this Directive from any threat or hostile actions, these persons should only be subject to due diligence requirements and not to reporting suspicions. For this reason, it is appropriate to wait for the assessment of the 2nd Directive on this very point in order to give the European Parliament the possibility to assess the opportunity of keeping natural persons subject to the reporting of suspicions:

  "*Member States shall take all appropriate measures in order to protect employees of the institutions or persons covered by this Directive who report suspicions of money laundering either internally or to the financial intelligence unit from being exposed to threats or hostile action. "*

- **Article 25:** The right to inform the client should be preserved (i.e. *tipping off*). In order to give effect to lawyers' special duties to their client, Article 25 must include a carve out which enables lawyers to make a disclosure to a client or a representative of a client in connection with the giving of legal advice to the client or to any person in connection with legal proceedings or contemplating legal proceedings.

  "*The institutions and persons covered by this Directive and their directors and employees shall not disclose to the customer concerned nor to other third persons that information has been transmitted to the financial intelligence unit in accordance with Articles 19, 20 and 21 or that a money laundering investigation is being or may be carried out.*

  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, this shall not constitute a disclosure within the meaning of the first paragraph. "

- **Article 30:** Because of the obligations on lawyers arising out of professional secrecy, the internal control procedures should not be applied to natural persons nor delegated to third parties. Generally, the procedures imposed on lawyers should be proportionate in order to take into account the fact that they are organised by and applied by natural persons.

  "*Member States shall require that the institutions and persons covered by this Directive establish adequate policies and procedures of customer due diligence, reporting, record keeping, internal control, risk assessment, risk management and communication in order to forestall and prevent operations related to money laundering. "*

- **Article 33:** The monitoring by the Presidents of the Bars and of the Law Societies should be exercised within their current disciplinary powers. Thus, the control should not be exercised a *priori* but a *posteriori,* as happens with current disciplinary powers. This will allow compliance with the Financial Action Task Force Recommendations and a distinction to be made between *monitoring* and *supervising.*

  1. *"Member States shall require the competent authorities to effectively monitor compliance with the requirements of this Directive by all the institutions and persons covered by this Directive.*

  2. *Member States shall ensure that the competent authorities have adequatepowers, including the possibility to obtain information, and have adequate resources to perform their functions."*

- **Section 3**: In the case of a regulated profession such as lawyers, disciplinary sanctions should be the appropriate penalty, and should be applied only to natural persons.

Conclusion

19. The CCBE urges that the above recommendations be taken into account. The CCBE can not stress enough that requirements on a lawyer to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence is a violation of a fundamental right.

20. The CCBE requests that the Commission, Council and the Parliament bear in mind that a lawyer is a member of a regulated profession, is part of the process which ensures the rule of law, and has the duty to apply the law and have it applied. The CCBE emphasises that when lawyers actually provide legal advice on money laundering, they are party to an offence and should not benefit from any exemption.

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21. On behalf of European Bars and Law Societies, the CCBE calls for the removal of the reporting requirement in relation to members of the legal profession. Without prejudice to that, we would also like to see the changes mentioned above brought into the draft of the third money-laundering directive.