Evaluation

of the

Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime

on the basis of the

Manifesto for a European Criminal Policy

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1. On the requirement of a fundamental legal interest worthy of protection and on the legal basis of the proposal

a) What interest does the legal instrument in question aspire to protect?

The instrument is relatively short containing only 8 articles, four of which have a substantive nature regarding the fight against money laundering. There is one article on criminalisation, one on penalties, one on confiscation and one on mutual legal assistance.

Concerning the fundamental legal interest worthy of protection, the instrument is not quite specific. The instrument is proposed by France and there seems to be no explanatory report.

In the preamble of the instrument there are references to the Council Joint Action 98/699/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime should protect against. Furthermore, there is a reference to the European Council meeting in Tampere on 15 and 16 October 1999, and of the Presidency conclusions of the European Council meeting in Vienna on 11 and 12 December 1998.

From these statements as well as further remarks in the preamble, it is made clear that money laundering is a serious problem especially regarding tax evasion and organised crime.

Apart from these statements it is commonly accepted that fighting money laundering is necessary to combat for example drug related crime and terrorism. Money laundering may also jeopardize the financial system in the EU and disturb the internal market.

b) Is the protected interest fundamental in terms of its nature?

The assumption that combatting money laundering is necessary to combat tax evasion, organised crimes and various other serious offences is generally and globally accepted. This assumption is often used as a point of departure for a number of international instruments on money laundering issued by for example UN, Council of Europe, FAFT and EU.

Although the instrument in question is not quite specific on the interests protected it seems reasonable to accept the general assumption that money laundering must be defeated in order to combat these kinds of crimes. Thus, the instrument is meant to protect interest fundamental in terms of its nature.

Furthermore, the requirements on criminalisation in the instrument are restricted to offences covered by article 6 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. In addition, the instrument does only require the abolition of reservations made by the Member States to the 1990 convention. And finally, the requirement to abolish reservations to the 1990 convention is limited to certain serious offences.

c) Is the protected interest anchored in the primary law of the EU?

Money laundering is one of the “Euro crimes” mentioned in art. 83(2) of the TFEU and thus today it is at the core of the EU aim to combat serious, transnational crime.

At the time of the adoption of the instrument, money laundering was not mentioned directly in the Treaty. However, the instrument has been adopted with reference to art. 31 of the EU Treaty which at that time mentions organised crime, terrorism and drug related crime.

Thus, the protected interests are anchored in EU primary law.

d) Is the protected interest possible to reconcile with the constitutional traditions of the Member States and the EU Charter on Fundamental Rights?

The above mentioned protected legal interests reconcile with the constitutional traditions of the Member States. Although, the instrument is demanding of the Member States to abolish reservations made to the 1990 convention, the protected interests – to avoid terrorism, organised crime and drug related crime – are fundamental to a modern society and criminalisation of certain criminal penalties are not conflicting with constitutional traditions and fundamental rights.

e) In what way is the impact of the proscribed conduct on the protected interest especially harmful to the society?

See above under a)-d).

f) Does the EU legislator deal with the question of a legal interest worthy of protection, and is there any explicit and detailed justification as to whether a legitimate interest of this kind actually exists?

The fact that the instrument refers to and is largely limited to the interests included in the 1990 convention makes the proposal legitimate in this regard.

A provisional conclusion: Although not quite specific on the interests protected by the instrument, and with no explanatory report to explain the reasoning of the instrument, it seems – on the basis of the general, global effort to combat money laundering and the fact that the instrument is closely linked to the 1990 convention – fair to say that the instrument does concern fundamental legal interest worthy of protection.

2. On the *ultima ratio* principle

a) Are there for the protection of the legitimate interest (according to 1) alternative protection mechanisms –unrelated to the imposition of criminal sanctions – available to the EU?

The instrument is a follow up on the 1990 convention, demanding that the Member States do not make or uphold (some) reservations to the convention. This is true for reservations concerning art. 2 of the 1990 convention. However, art. 2 concerns confiscation measures and is not dealt with here.

First and foremost the Member States have to abolish reservations concerning art. 6 of the convention:

Article 6 – Laundering offences

1. *Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:*

    a. *the conversion or transfer of property, knowing that such property is proceeds, 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 the predicate offence to evade the legal consequences of his actions;*

    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 proceeds;*
    and, subject to its constitutional principles and the basic concepts of its legal system;

    c. *the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;*

    d. *participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*

2. *For the purposes of implementing or applying paragraph 1 of this article:*

    a. *it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;*

    b. *it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;*

    c. *knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.*

3. *Each Party may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the acts referred to in paragraph 1 of this article, in any or all of the following cases where the offender:*

    a. *ought to have assumed that the property was proceeds;*

    b. *acted for the purpose of making profit;*

    c. *acted for the purpose of promoting the carrying on of further criminal activity.*

> 4. *Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to predicate offences or categories of such offences specified in such declaration.*

The instrument requires that no reservations are made or uphold regarding serious offences. Such offences shall in any event include 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, offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

Because art. 6(3) and 6(4) are both optional ("may adopt") the requirement of the EU-instrument to abolish reservations seems to be linked only to art. 6(1).

Because the Member States are already legally bound by the requirements of the 1990 convention and because the instrument is restricted to art. 6(1) and furthermore, because it is limited to serious offences, the approach of the EU in this situation must be characterised as restrained and the ultima ratio principle is not violated.

b) Can the European legislator demonstrate the inadequate effectiveness of alternative, non-penal/criminal measures in practice?

It seems fair to assume that abandoning the reservations to the 1990 convention could be helpful for mutual legal assistance between the Member States in some situations, where money laundering has to be fought transnationally.

c) Does the EU legislator deal with the question of alternative protective measures, and is there an explicit and detailed explanation as to whether resort to criminal law (of member States, where appropriate) is necessary?

EU has today a relatively comprehensive law program to combat money laundering. The program contains alternative protective measures (cf. directive 2005/60/EC). The instrument in question is only a follow up on the criminal law measures already in force (and legally binding on the Member States according to the 1990 convention).

d) Do the proscribed types of conduct in the Commission's proposal indeed call for criminal sanctions as a last resort?

See above under c).

3. On the principles of guilt and proportionality

a) Does the punishment provided for the instrument relate in a proper way to the actual responsibility of the individual?

Because the Member States are only required to abolish reservations on art. 6(1) all the proscribed conducts refer to *intentional* acts (see art. 6(1)). Thus the principle of guilt is, as far as this general requirement is concerned, safeguarded.

b) Do these sanctions correspond to individual guilt in terms of their type and gravity?

According to the instrument 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, are punishable by deprivation of liberty for a maximum of not less than 4 years.

The requirements according to the instrument are fairly flexible. Thus, each Member State is able to adopt sanctions which correspond to the individual guilt in terms of their type and gravity.

A maximum penalty of 4 years seems to be a quite high penalty scale at least for some Member States. On the other hand the instrument is restricted to serious offences and therefore 4 years maximum does not seem excessive.

c) Does the legislator explicitly deal with the question whether these sanctions are appropriate having regard to the guilt of the individual?

See under b).

4. On the principle of legality

a) If the proposed legislative act aims at the introduction of a supranational criminal offense:

aa) Do the elements of crimes (objective and subjective) clearly emanate from the text of the proposed directive itself?

Not relevant

bb) Are the sanctions provided for foreseeable?

Not relevant

b) If the legislative act aims at harmonising national criminal law provisions:

No, the instrument does not – in itself – harmonise the criminal law provisions of the Member States.

The instrument refers to the 1990 convention. In the convention the concept of money laundering is widely conceived, thus leaving it to the Member States to create legislation in conformity with the principle of legality.

c) Does the proposed directive introduce retroactive rules, or does it compel member States to introduce such rules?

No

d) Is any potential retroactivity justified with reference to the principle of *lex mitior*?

Not relevant

5. On the principle of subsidiarity

a) Why is it not enough with criminal law measures at Member State level?

Transfer of money across borders is easy, exposing the Member States to money laundering with transnational character.

b) Why is the objective of each measure – whether in terms of its scope or its impact – better served on a European level?

It seems fair to assume that getting rid of the reservations to the 1990 convention might facilitate the police and judicial cooperation in the field. It might facilitate investigation and prosecution of money laundering with a transnational character – at least in some cases.

c) Does the EU legislator deal with the question of subsidiarity and is there an explicit and detailed evaluation of the fulfilment of this requirement in Union acts – taking into account all the alternatives and weighing all circumstances?

Not possible to verify

d) Have national Parliaments expressed their views as to the preservation of the subsidiarity principle and, if so, what was their opinion? Has the EU legislator explicitly considered these arguments?

Not possible to verify

6. On the coherence of domestic criminal justice systems

a) Do the criminal law provisions of the framework decision undermine the coherence of the criminal justice system of one or more member States?

No, the instrument is generally lenient and leaves a wide margin of manoeuvre to the Member States.

The requirement of 4 years of maximum penalty might be somewhat high for some Member States. However, it is restricted to serious offences and considering the fact that the required criminalisation is within the core of the criminal law of all the Member States it is therefore hardly in violation of the principle of coherence.

b) In terms of systematicity and substantive content, is the proposed directive in line with other EU legislative acts related to criminal law?

Not relevant

c) Does the EU legislator deal with the question of horizontal and vertical coherence, and is there an explicit and detailed explanation as to whether the proposed directive does not undermine the coherence of domestic criminal justice systems or at least whether any such undermining is inevitable – particularly in view of the obligation to respect the national identity of each member State?

The instrument does not contain any specific thoughts or arguments referring to horizontal or vertical coherence. However, the fact that the instrument is only a follow up of the 1990 convention and the requirements of the instrument is fairly flexible, there are no problem of horizontal and vertical coherence.

OVERALL EVALUATION

❒ The legislative act **fully complies with** the requirements of the Manifesto on European Criminal Policy.

☒ The legislative act **satisfies essentially** the requirements of the Manifesto on European Criminal Policy. Alterations or improvements are required only on certain points (see recommendations).

❒ The legislative act meets **only partially** the requirements of the Manifesto on European Criminal Policy. Significant alterations or improvements are required (see recommendations).

❒ The legislative act **does not substantially meet** the requirements of the Manifesto on European Criminal Policy. Extensive and structural alterations are required (see recommendations)**.**

❒ The legislative act **does not meet at all** the requirements of the Manifesto on European Criminal Policy. The proposal/enactment of such a legal instrument must be wholly reexamined (see recommendations).

The above analysis of the rules concerning the criminalization of money laundering, allows us to draw the conclusion that **the 2001 framework decision satisfies essentially** the requirements of the Manifesto on European Criminal Policy.

The purpose of the instrument and the substance seems legitimate. At the same time the instrument leaves sufficient room for national implementation.

However, the evaluation of the instrument is limited due to the fact that there is no explanatory report easily accessible to the public. Thus, issues such as reasoning of instrument, research on necessity and effectiveness cannot be evaluated.

RECOMMENDATIONS FOR THE AMENDMENT OF SPECIFIC PROVISIONS OF THE PROPOSED DIRECTIVE

It would have been preferable if there had been preparatory work made public available at the internet. The reasoning behind the instrument and the research on the necessity and effectiveness is not possible to evaluate properly.