

Explanatory Memorandum (EM) on a European Union Document

PROPOSED DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA

Submitted by the Home Office on 12 June 2018.

Subject matter

This EM relates to the European Commission proposal for a European Parliament and Council Directive on facilitating the use of financial and other information to tackle certain criminal offences. The Directive seeks to address the threat from money laundering and associated predicate offences by ensuring that competent authorities in Member States have access to information to support investigations and prosecutions, and in particular to information held in bank account registers, to allow effective cooperation across the EU to tackle these threats.

1. The Directive repeals (but does not replace) the Council Decision concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information (2000/642/JHA). The UK re-joined the Council Decision as part of the 2014 process.
2. **Article 1** seeks to establish the subject matter of the Directive, namely the measures to facilitate access by competent authorities to financial information and bank account information for the prevention, detection, investigation or prosecution of serious criminal offences.
3. **Article 2** defines the terms used throughout the Directive.
4. **Article 3** sets out the requirement for Member States to designate the competent authorities empowered to access the national bank account registries. Member States are required to include the Europol National Units and Asset Recovery Offices.
5. **Article 4** requires Member States to provide powers to competent authorities to allow them to access and search bank account information

when necessary to tackle serious criminal offences and trace assets related to such offences.

6. **Article 5** requires that access to, and searching of, such information should only be carried out by those designated to do so.
7. **Article 6** requires that access and searches of bank account register information must be recorded.
8. **Article 7** requires that national Financial Intelligence Units (FIU) reply to requests for financial information or analysis from competent authorities where that information is required to tackle serious criminal offences.
9. **Article 8** requires that competent authorities reply to requests for financial information or analysis from FIUs where that information is required to tackle serious criminal offences.
10. **Article 9** sets out the requirement for national FIUs to exchange information with FIUs in other Member States, and to do so within specified timeframes.
11. **Article 10** sets out the requirement for access by Europol to bank account information through Member States FIUs, and that Member State FIUs respond to such requests.
12. **Article 11** sets out the data protection requirements for access to bank account information.
13. **Article 12** sets the scope of the provisions relating to the processing of personal data.
14. **Article 13** provides that the processing of sensitive information may only be allowed where it is strictly relevant to a case.
15. **Article 14** requires that Member States ensure that requests for information, and responses, are recorded.
16. **Article 15** requires Member States to restrict a data subject's right of access to their data where it is necessary for the FIU to fulfil its tasks.
17. **Article 16** requires that Member States maintain statistics, and provide them to the Commission on an annual basis.

18. **Article 17** permits Member States to continue to apply bilateral or multilateral arrangements for the exchange of information, providing that these are compliant with the Directive.

19. **Article 20** repeals the Council Decision 2000/642/JHA from the date of transposition of the Directive.

20. **Articles 18, 19, 21 and 22** are procedural, and relate to the transposition of the proposed Directive, reporting arrangements, entry into force and addressees.

Scrutiny history

21. None for this Directive.

Ministerial responsibility

22. The Secretary of State for the Home Department has responsibility for policy on money laundering and terrorist financing. These proposals are of interest to the Chancellor of the Exchequer, as the Treasury has responsibility for the EU Money Laundering Directives and the Money Laundering Regulations.

Interest of the Devolved Administrations

23. The Scottish Government and the Department of Justice in Northern Ireland have been consulted in preparing this EM.

Legal and procedural issues

(i) Legal basis

24. Article 87(2) of the Treaty on the Functioning of the European Union ("TFEU"). Accordingly, the UK's opt-in set out in Protocol 21 to the Treaties has been triggered and the UK will need to decide whether to participate. (see paragraph 32).

(ii) European Parliament procedure

25. Ordinary legislative procedure.

(iii) Voting procedure in the Council

26. Qualified Majority Voting.

(iv) Impact on UK law

27. The Government considers that the UK largely meets the requirements of the Directive with potential exceptions that are identified below. These may require legislative action to meet the standards of the Directive.

(v) Application to Gibraltar

28. The Directive would be binding on Gibraltar if the UK opts in.

(vi) Fundamental Rights Analysis (FRA)

29. The draft Directive seeks to improve the mechanisms for accessing and exchanging financial information, by permitting direct access (by competent authorities) to nationalised centralised bank account registries, or data retrieval systems (assuming 5AMLD comes into force in current form, Member States will be required to establish centralised bank account registers). "Competent authorities" includes Asset Recovery Offices, tax authorities and anti-corruption authorities. In addition, it seeks to enhance the exchange of information between Financial Intelligence Units (FIUs) and competent authorities, by requiring each to reply to requests for information from the other, by imposing time limits for the exchange of information between FIUs from different Member States, and requiring FIUs to share information with Europol

30. These measures potentially have an impact on fundamental rights, with the right to the protection of personal data (Article 8 of the Charter on Fundamental Rights ('the Charter')) and the right to respect for private and family life (Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') and Article 7 of the Charter) being particularly relevant.

31. The requirement to allow competent authorities to access centralised bank-account registries will constitute a new form of data processing, which engages the rights above. The registries to which the measures relate were established under a previous Directive, so this constitutes a further interference with those rights only to the extent that it allows competent authorities to access the information. This can be justified on the basis that it is compatible with the Union's stated aims to enhance the investigation of serious crime (including financial crime and terrorism) and the freezing and recovery of the proceeds of crime; the measures are proportionate as only designated and authorised persons within each competent authority will be able to access the information, and Member

States are required to keep logs of any access by competent authorities to the information.

32. The provisions relating to exchange of information between FIUs, and between FIUs and competent authorities, build on measures in the 4th Anti-Money Laundering Directive which established FIUs and the processes by which they cooperate, for the purpose of the overall aim of combatting crime and recovery of assets (as above). The measures in the draft Directive, if taken at their highest (see paragraph 37 below), would remove the discretion of an FIU to determine for itself whether to share information with a competent authority, where the request related to certain specified criminal offences (and the requests were made on a case by case basis). This constitutes a potential further interference with the fundamental rights above, in that it would compel the exchange of information and so make sharing more likely. The further interference can be justified on the basis of the stated aims, and that the requirement is restricted to specific cases under investigation (and only for certain types of crime). In addition, the measures impose safeguard relating to the security measures to be taken when exchanging information. Similar arguments arise in respect of the measures which allow FIUs to exchange information with Europol. The imposition of time limits for FIUs to exchange information with other FIUs does not appear to constitute a further infringement upon the relevant fundamental rights of the individuals involved.

Application to the European Economic Area

33. Not applicable. This instrument only applies to the Member States.

Subsidiarity

34. The Commission considers that since the instrument deals with crime of a cross-border nature, the objectives proposed under the proposal cannot be sufficiently achieved by the Member States acting alone. We believe that it is appropriate for action to be taken in this area at the level of the EU.

Policy implications

35. The measures contained within the Directive are broadly in line with existing UK legislation and practice on the sharing of financial information. Combating serious crime forms a major part of the Government's approach to tackling serious and organised crime, as set out in the 2013 Serious and Organised Crime Strategy.

36. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.
37. As the draft Directive cites a legal base in Title V TFEU, in accordance with Protocol No 21 on the position of the UK and Ireland in respect of the area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, the UK's opt-in applies to the Directive. The Council Secretariat has not yet confirmed the date of publication of the last language version of the proposal. We will inform the Committees when this date is confirmed, and therefore the deadline for the UK to opt-in to the measure.
38. The Government is committed to taking all opt-in decisions on a case-by-case basis, putting the national interest at the heart of the decision making process. In making the opt-in decision on this proposal, the Government will have particular regard to:
- a. The result of the EU referendum on 23 June 2016 and the decision to leave the EU
 - b. That the UK is broadly compliant with the Directive, with the exception of needing to develop and implement the bank account register.
 - c. That the UK rejoined the 2000 Council Decision as part of the 2014 Decision.

Detailed analysis of Directive

39. The Government strongly supports international cooperation to tackle serious crime, as we made clear in the 2013 Serious Organised Crime Strategy.
40. The Directive seeks to address the threat from money laundering and associated predicate offences by ensuring that competent authorities in Member States have access to information to support investigations and prosecutions, and in particular to information held in bank account registers, to allow effective cooperation across the EU to tackle these threats.

41. The requirement for the UK to have a national register of bank accounts is set out in the Fifth Anti-Money Laundering Directive. The Government anticipates that the Fifth Anti-Money Laundering Directive will enter into force at EU-level in the summer of this year, with a transposition deadline of late 2019. This will be during the Implementation Period, and the UK will therefore transpose this Directive. HM Treasury will consult on the transposition of the Directive in due course, and will include the national register of bank accounts in that consultation.
42. We have a concern regarding the proposal (Article 10.2) that Member State FIUs would be required to provide bank account details to Europol, and to their domestic agencies. While the UK FIU could provide the information, we will need to decide whether in fact we wish to be required to do so. The proposal may conflict with Recommendation 29(2) of the Financial Action Task Force, and Article 32(4) of the Fourth Anti-Money Laundering Directive (4AMLD), which require that FIUs should have autonomy in making decisions on whether to share information. We will seek clarification of this during negotiations.
43. We also have concerns regarding the proposed arrangements under which Member State FIUs would be required to provide information to the FIUs of other Member States. The timescales provided for FIU to FIU responses at Article 9.2 are shorter than existing standards for such exchanges. Additionally, we have concerns with the approach where an EU request has to be treated, by law, more urgently than a non-EU request, as this may not reflect the specific circumstances. We will seek clarification during negotiations.
44. We are in the early stages of discussions with the EU and with Member States in relation to the draft Directive, and we intend to negotiate the text of the Directive to ensure that the measure reflects the needs of the UK.

Consultation

45. No UK consultation has taken place on this Directive.

Impact Assessment

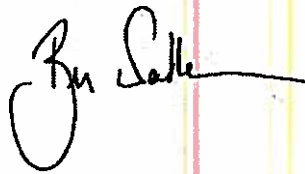
46. The Commission has developed an impact assessment, and this draft Directive corresponds to the findings of the Impact Assessment.

Financial implications

47. Were the UK to have to accept the Directive as it stands, we do not believe that there would be significant costs or other financial implications.

Timetable

48. It is anticipated that the Bulgarian Presidency will put this dossier to the June JHA Council for consideration.

A handwritten signature in black ink, appearing to read 'Ben Wallace', with a large, stylized initial 'B'.

Rt Hon Ben Wallace MP