

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

Secretariat

p.o. box 201, 3500 AE Utrecht/The Netherlands
phone 0031 30 297 43 28
fax 0031 30 296 00 50
e-mail cie.meijers@forum.nl
<http://www.commissie-meijers.nl>

To (by email)

European Parliament
Civil Liberties, Justice and Home Affairs Committee
Rue Wiertz
B-1047 BRUSSELS

Reference Regarding

CM1314
Note Meijers Committee on the proposal for a Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM(2013) 45 final)

Date

20 August 2013

Dear Members of the Civil Liberties, Justice and Home Affairs Committee,

The Meijers Committee has taken note of the legislative proposal for a Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM(2013) 45 final).

While the Meijers Committee supports activities of the Union with regard to the prevention of money laundering and financing of terrorist activities, the Committee is concerned that the present proposal lacks safeguards against discrimination on the basis of nationality or ethnic origin.

The Meijers Committee therefore suggests to amend Article 16(3) of the proposal, so that safeguards against discrimination are ensured.

Background

The proposed Directive is aimed at enhancing and refining the existing legislation with regard to anti-money laundering and terrorist financing, as laid down in Directive 2005/60/EC. The proposal introduces a number of amendments to the existing Directive, such as an extended scope of service providers and transactions, requirements for Member States to carry out a risk assessment at national level and to take measures to mitigate risks. Moreover, Member States are called upon to ensure that due diligence is conducted in certain situations of high risk, while allowing Member States to permit simplified due diligence in lower risk situations. Finally, European Supervisory Authorities are given more prominent tasks.

The Meijers Committee notes that the risk based approach in Directive 2005/60/EC is also included in the proposed text. According to this approach, credit institutions, financial institutions and other financial providers as defined by the Directive, will have to perform customer due diligence investigations (CDD) in certain cases. The institutions will have to carry out a CDD based on a risk assessment, in which three factors are relevant: the type of transaction, the type of client and the country of origin of the client. If a single factor applies, the institution is required to check other factors as well. In situations of high risk, enhanced due diligence must be performed, whereas simplified due diligence is required in low-risk situations. Annexes to the Directive should provide guidance for financial institutions on situations of high and low risk.

Discrimination?

The Meijers Committee recognizes that financial institutions as well as national supervisory bodies are supported by the standardisation and guidelines of a more general nature as provided by the Directive. However, the Committee is concerned about the application of the CDD and, more specifically, the use of the risk factor related to the country of origin of the client. The Meijers Committee is of the view that this may lead to (indirect) discrimination on the grounds of nationality and/or ethnic origin.

According to the proposed Directive, geographical factors indicating a higher risk are:

1. countries identified by credible sources, such as public statements by the inter-governmental body Financial Action Task Force (FATF), mutual evaluation or detailed assessment reports or published follow-up reports, as not having effective anti-money laundering/combating terrorist financing systems;
2. countries identified by credible sources as having significant levels of corruption or other criminal activity;
3. countries subject to sanctions, embargos or similar measures issued by, for example, the United Nations;
4. countries providing funding or support for terrorist activities, or that have designated terrorist organisations operating within their country.

The Committee is of the opinion that the discriminatory effect lies in the circumstance that an institution, which has the duty to assess a risk, is required to take into consideration the fact that a client originates from a country that is characterized by the above mentioned criteria. Of the three risk factors (the type of transaction, the type of client and the country of origin of the client), the latter is the most objective and easily

verifiable indicator for institutions. If the geographical factors as mentioned above are applicable, the other two factors will be more carefully checked and an enhanced CDD investigation is carried out. In such a situation, the nationality of the client will be the decisive factor in taking further steps – i.a. an enhanced CDD investigation- which will not be carried out for clients from other countries.

Furthermore, the kind of countries mentioned above, and especially those who are mentioned in public statements of the FATF, are mostly non- Western countries, whose citizens in most cases have a different ethnic origin than Europeans. The effect is that citizens of those countries are placed at a particular disadvantage as compared to citizens of other countries, which may lead to indirect discrimination. Moreover, the Committee fears the additional effect of the proposed provision that a measure with such a general scope will add to stereotyping and increased prejudices of citizens of the countries affected.

According to European Union law and case law, discrimination is forbidden. Directive 2000/43/EC, based on Article 19 TFEU, requires Member States to apply equal treatment irrespective of racial or ethnic origin in the access to and supply of goods and services. In its Article 21(1), the Charter of Fundamental Rights prohibits discrimination on any ground as well. This prohibition applies both to the Union and to the Member States. Moreover, Article 21(2) provides that within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Furthermore, the Directive itself refers to the prohibition of discrimination; in recital 47 of the preamble of the proposed Directive it is stated that Member States have to ensure that the Directive is implemented, as regards risk assessments in the context of customer due diligence, without discrimination. This indicates that the drafters of the Directive, the Parliament and the Council, are aware of the potential discriminatory effect of the measures. An equivalent Article to recital 47 is, however, not included in the text of the Directive.

European law indicates that indirect discrimination can be objectively justified if there is a legitimate aim and the means of achieving that aim are appropriate and necessary.

The Meijers Committee is of the view that combating money laundering and financing of terrorism can be qualified as legitimate aims. It remains to be seen, however, whether the means to achieve that aim, namely the requirement to take into account the country of origin of the client, is appropriate and necessary. This will depend among others on the quality (reliability, correctness and seriousness) of the information on the country of origin. Ultimately, it is for the European Union Court of Justice to decide on that question.

Reduce discriminatory effect

In order to reduce the potential discriminatory effects of the proposed Directive, the Meijers Committee suggests to change Article 16(3) of the proposed Directive. In the proposed text, the three above mentioned factors have a similar weight. Instead, the Meijers Committee proposes that the country of

origin is not taken as a decisive factor, but that first and foremost the factors *customer* and *product or service* are taken into account.

The Meijers Committee suggests to change the proposed text of Article 16(3) as follows:

'When assessing the money laundering and terrorist financing risks, Member States and obliged entities shall take into account at least the factors *relating to customer and product, service, transaction or delivery channel* as potentially higher risk situations set out in Annex III.'

An alternative, but less effective solution would be to add after the words "*shall take into account*" in the proposed text of Article 16(3) the words: "*serious information from reliable sources on*".

Finally, the Meijers Committee suggests to add in the preamble a new recital after recital 48 reading:

"Member States and obliged entities, when applying this directive or national law implementing this directive, are bound by Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin."

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman