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## NOTE

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From:	Presidency
To:	Permanent Representatives Committee
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing - preparation for the next informal trilogue

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### I. INTRODUCTION

1. The above-mentioned Commission proposal was transmitted to the Council on 7 February 2013, together with the proposal for a Regulation of the European Parliament and the Council on information accompanying transfers of funds (AML Regulation). Its main objective is to further strengthen the EU's system for prevention of money laundering and terrorist financing, by bringing it in line with the Recommendations issued by the Financial Action Task Force (FATF) of February 2012, thus ensuring the soundness, integrity and stability of the financial system.
2. In its Conclusions of 22 May 2013, the European Council called for rapid progress and, *inter alia*, stated that the "revision of the third Anti-Money Laundering Directive should be adopted by the end of the year".
3. On 18 June 2014, Coreper adopted a general approach, as set out in doc. 10970/14. Since October 2014, the Presidency has engaged in trilogue negotiations with the European Parliament on the AML Directive and Regulation with a view to possible agreement at early second reading.

4. As a result of the negotiations to date, the Presidency considers that, save on the open issues which are further outlined in this note and on which it is seeking a final negotiation mandate from Coreper, there is already a very broad convergence of views between the Council and the European Parliament, on the delineation of the final political agreement for the AML package (the last trilogue is scheduled on 16<sup>th</sup> December 2014).
5. The Presidency has identified the key open issues set out below on which, for a successful conclusion of trilogue negotiations, agreement on an updated mandate is necessary. The suggested mandate for each of those issues is set out below.

## **II. KEY OPEN ISSUES**

### **A. Storage of beneficial ownership information**

6. The FATF Recommendations leave flexibility to the countries as to the choice of the most appropriate mechanism for storing the information on the beneficial owner (BO) of companies. In particular, countries should ensure access to BO information by competent authorities and they should consider measures to facilitate access to beneficial ownership information by financial institutions and other obliged entities undertaking the customer due diligence duties.

The FATF Guidance on beneficial ownership of October 2014 mentions that BO information on beneficial ownership may be publicly accessible, but recognises that this may raise, and needs to be balanced with, privacy issues.

7. The original Commission proposal followed the logic of the FATF standards and did not prescribe any specific mechanisms for storing BO information. The General Approach of the Council represents already an improvement with respect to the FATF standards, in that it provides for a specific set of conditions which the national mechanisms selected have to meet: in particular, they have to ensure timely and unrestricted access by competent authorities and Financial Intelligence Units (FIUs), without alerting the entity concerned. These principles ensure that the mechanism chosen by a country is of a high quality. Access to the information stored may also be granted to the obliged entities.

8. The European Parliament, on the other hand, advocates for the use of a centralised and fully public register of BO information, interconnected at the EU level, so that any citizen can access the information on the BO of any company in any country.
  
9. At the last trilogue on 25<sup>th</sup> November the Presidency - supported by a large majority of MS - proposed as a compromise to accept a centralised register - for example the business register or another register or a central database - as the only mechanism for storing BO information. This proposal goes well beyond the FATF standards, because it proposes an effective storage mechanism allowing competent authorities to access information from a single source and it gives access also to obliged entities and to all those persons and organisations which have a legitimate interest. In the Council working party a strong majority of MSs believes that allowing for full public access to any person would be disproportionate relative to the goals of the Directive, could raise privacy issues and would most probably be outside of the legal base of the Directive (art. 114 TFEU), as stated by the Commission Legal Service in the trilogue. Finally, the Presidency proposal does not prevent MSs from going further and making BO information fully public, if they so wish, on the basis of national law. As for the interconnection of the registers at the EU level, the Presidency compromise proposal also provides for the Commission to review and assess whether and how interconnection of national registers should be realised.
  
10. However, the Presidency's compromise proposal was not acceptable to the Parliament, in particular by one co-Rapporteur from the LIBE Committee who insists on the need for full public access to BO information. The main motivation for the request for full public access is the fight against tax evasion. However, this Directive can only address tax evasion to the extent that it constitutes a predicate offence in the context of money laundering. In the trilogue, the discussion focused only on Article 29 and did not cover Article 30 concerning BO information for trusts.

11. The Commission has proposed a further compromise proposal on Article 29. The proposal builds on the Presidency compromise proposal but, for the third layer of access, qualifies the concept of legitimate interest by explicitly mentioning certain categories of parties such as journalists and NGOs. The new proposal was discussed in the Council working party held on December 2nd. While recognising the efforts put forward by the Commission to bridge the gap between the positions of the Council and the EP, a very broad majority of MSs showed strong concerns on the approach proposed. In particular, they would prefer to retain flexibility so as to determine who, apart from authorities and obliged entities, has a legitimate interest in accessing BO information. For some MSs, this is necessary to respect the different national regimes with respect to privacy issues. Other MSs who would like to be able to make BO information fully public think the Commission's proposal is too restrictive. The overall view was that the previous Presidency compromise was a better solution.
12. The Presidency considers therefore that its compromise proposal for both Articles 29 and 30 should be the basis for the final compromise between the Council and the Parliament, and asks Coreper to confirm this mandate for the last trilogue negotiations.

## **B. Data protection**

13. The original Commission proposal included references to data protection provisions in 4 recitals. In particular, while reconfirming that Directive 95/46 on individual data protection applies to the processing of personal data for the purposes of the AML Directive, it recognised the fight against money laundering as an important public interest. Therefore, limitations to the right of the data subject to access the personal data processed for the purposes of the AML Directive in accordance with Article 13 of Directive 95/46 may be justified, in particular when dealing with a suspicious transaction report.
14. The Council General Approach confirmed this framework . The European Parliament has instead included in its position several additional recitals and Articles. In the first trilogue, the Presidency expressed the unanimous concern of the Council that the additional provisions introduced would undermine the anti-money laundering objectives of the Directive. The Council and the European Parliament agreed to consolidate the various data provisions in a few recitals and Articles. The Commission volunteered to provide a compromise proposal.

15. The updated Commission proposal has significantly improved. Nevertheless, two serious concerns remain. First, the Council would like to avoid any risk of "tipping off" the customers by revealing information contained in suspicious transaction reports, as this would disrupt the functioning of the anti-money laundering system. Secondly, as regards the retention period for personal data, there is a need to ensure that ongoing legal proceedings are not undermined.
16. The Coreper is invited to mandate the Presidency to revise the last compromise proposal in order to address the abovementioned issues, in order to put forward a final draft for the negotiations with the Parliament.

#### **IV. CONCLUSION**

17. Against this background the Permanent Representatives Committee is invited to:
  - agree the final negotiating mandate for the Presidency on the topics delineated in points 6 to 16 above;
  - invite the Presidency to continue, and bring to a rapid close, negotiations with the European Parliament on the key open issues, in line with the mandate set out above.