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Bundesrat

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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

COM(2013) 45 final

At its 910th session on 7 June 2013, under §§ 3 and 5 of the Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG), the Bundesrat adopted the following opinion:

1. The Bundesrat welcomes the Commission's intention to improve the effectiveness of measures to combat money laundering by amending the legal framework, and to complement the Recommendations of the Financial Action Task Force on Money Laundering (FATF), revised in 2012, with the new Directive.

2. It regrets the fact that the proposal for a Directive still fails to take a differentiated approach in respect of the non-financial sector. Rules which were originally tailored specifically to the financial sector are again being directly transposed to the non-financial sector. Essential adaptations to take account of structural differences and the wide diversity of obliged entities in the non-financial sector have not been made. The Bundesrat proposes that not all of the undertakings listed in Article 2(1) should be subject to the same due diligence, reporting and record-keeping requirements, but that rules based on the money laundering risk and specifically tailored to the respective sector and its role within the economy should be adopted.

   The Bundesrat points out that the requirements must, in particular, still be manageable from the point of view of, and able to be implemented by, small enterprises and micro-enterprises. An excessive administrative burden on such businesses must be avoided. Otherwise, it is to be feared that the rules will not be applied and observed with the necessary rigour, making them less effective than intended.

   In this connection, the Bundesrat would draw attention to the Commission's objective of reducing the administrative burden on small and medium-sized businesses and of examining proposed EU legislation in terms of its SME-friendliness (Small Business Act).

3. The Bundesrat proposes that the threshold in respect of trading in goods should not be reduced from the current level of € 15 000 to € 7 500, as provided for in Article 10(c)

of the proposal for a Directive. Already under the current rules as set out in Article 7(b) and (c) of Directive 2005/60/EC, the thresholds do not apply when there is a suspicion of money laundering or terrorist financing, while the due diligence requirements also apply where an amount is split into several small amounts.

4. According to the FATF Recommendations (Recommendations 22 and 10), there is a risk of money laundering where dealers in gold, precious metals and precious stones accept payments in cash of € 15 000 or more. The Bundesrat sees no reason why the Commission's proposal for a Directive should go far beyond this international recommendation and further extend the already very wide scope of Directive 2005/60/EC It therefore proposes that, at least in accordance with the wording of Directive 2005/60/EC, it should be further clarified that traders in goods are obliged entities as defined in the Directive only when accepting cash at the level of the specified threshold. If this threshold is not reached, none of the provisions of the Directive (including the requirements to carry out an internal risk analysis, to establish internal safeguards and to report suspicious transactions) will be applicable.

   The Bundesrat also proposes that the concept of 'trading in goods' should be defined, in order to ensure that this is uniformly interpreted throughout the EU, for example on the basis of the NACE codes. According to the German interpretation, only undertakings which buy and subsequently resell goods may be covered by the term 'trader' with the necessary legal certainty.

5. The Bundesrat also proposes that Article 2(1)(3)(d) of the proposal for a Directive should be worded more precisely, making it clear that real estate agents are obliged entities as defined in the Directive only when involved in financial transactions in connection with the buying or selling of real estate as referred to in the FATF Recommendations (Recommendation 22).

6. It also proposes that Article 2(1)(3)(f) of the proposal for a Directive should be worded more precisely, making it clear that providers of gambling services are obliged entities as defined in the Directive only when accepting amounts of € 2 000 or more.

7. The Bundesrat points out that the requirements in respect of the identification of beneficial owners are very comprehensive and not feasible for many obliged entities in the non-financial sector. If the necessary data are not made available — for a reasonable charge — in publicly accessible registers, as is often the case in trade with non-EU countries, the only possibility available to obliged entities is to ask their clients for information and relevant documents. The proposal for a Directive should make it clear that, as a rule, this will suffice.

8. The Bundesrat welcomes, in principle, the strengthening of the risk-based approach. However, it points out that it may simply be too much for a large number of obliged entities in the non-financial sector to carry out an internal risk analysis, as reliable information regarding the risk of money laundering is not available in many areas of

the non-financial sector. Furthermore, it makes sense to carry out a costly internal risk analysis only if there is the possibility, where the risk of money laundering is shown to be low, of a longer-term easing of the burden of due diligence and documentation requirements and internal safeguards. The proposal for a Directive lacks the necessary downward flexibility here. It must be possible, for example, contrary to Article 11(2) of the proposal for a Directive, to completely dispense with compliance with individual due diligence requirements. The provisions in Article 8 (4) of the proposal for a Directive also fail to allow for any clear easing of the burden.

9. Particularly in relation to the very diverse group of gambling service providers, precise differentiation is needed. Some types of gambling, such as Internet gambling, carry a higher risk of being used for money-laundering purposes, while others are designed in a way that makes them unsuitable for money laundering, because, for example, the stakes are small and there is a cap on winnings or because they are charity lotteries. Lottery-linked savings accounts (*Gewinnsparen*), for example, are unsuitable for money-laundering (see point 4 of BR official document 459/12 (Resolution)). The comprehensive approach taken in the Fourth AMLD, extending the provisions to all gambling sectors, risks leading to relativisation and a levelling down of protection even in higher-risk sectors.

   In the light of this, the Commission is asked to re-examine whether all types of gambling should be covered by the Directive and be subject to the risk-based approach.

10. On the basis of recitals 21 and 22, which are worded so as to refer to the financial sector and institutions, it is unclear to the Bundesrat whether or not Articles 18 and 19 are directed solely at the financial sector. The Bundesrat points out that, for the majority of undertakings in the non-financial sector, it is not feasible to implement the rules on 'politically exposed persons'. The majority of obliged entities could not afford to use the commercial databases available on the market, and, at least for trading in goods, the procedures involved in using a database of this kind (reconciliation of data overnight) would not be practicable. In addition, the use of — privately set-up — databases of this kind raises concerns relating to the rule of law.

11. With regard to the response by FIUs to requests for information, as provided for in the second sentence of Article 31(4) of the proposal for a Directive, the Bundesrat considers that a more precise definition of 'requests for information' needs to be given in order to differentiate them from judicial requests for assistance.

12. Article 31(5) of the proposal for a Directive provides that the Member States must ensure that the FIU has certain powers to suspend or withhold consent to a transaction going ahead when money laundering or terrorist financing is suspected. In Germany the FIU is the Bundeskriminalamt (Federal Criminal Police Bureau) in Wiesbaden, which collects and analyses information but has no investigatory powers of its own. In addition, the decision to allow a transaction to go ahead is not a matter for the police,

but for the public prosecutor's office (under §11(1a) of the Money Laundering Act (GwG)). The Bundesrat therefore considers that the wording should be amended so as to provide that Member States must ensure that the competent law enforcement authority takes urgent action, either directly or indirectly, when there is a suspicion that a transaction is related to money laundering or terrorist financing, to suspend or withhold consent to a transaction going ahead in order to analyse the transaction and investigate the suspicion.

13. The Bundesrat points out that the introduction of a requirement for all trust or company service providers to be licensed or registered and for checks on their fitness to be carried out (under Article 44(1) and 2 of the proposal for a Directive) will entail considerable red tape, which is disproportionate to the objective pursued. In the light of the freedom to provide services, and the EU Services Directive, this rule should therefore not be adopted.

14. The Bundesrat also rejects the proposed restriction on access to professions under Article 44(3) of the proposal for a Directive as too vague and disproportionate. With a view to preventing money laundering, it is not necessary to carry out criminal record checks on all members of the professions referred to — including all traders in goods, in so far as they are covered by the scope of the Directive — and, if they have a criminal record, to prohibit them both from pursuing the profession in question and from holding an interest in an undertaking in the sectors in question or holding the position of chief executive or of another senior manager of such an undertaking. It is also unclear on the basis of what criteria the obliged entities referred to in Article 44(3) have been selected.

15. The Bundesrat welcomes the fact that the Commission expressly proposes a risk-sensitive approach to supervision (Article 45(6) of the proposal for a Directive), but, with regard to the supervision of obliged entities in the non-financial sector, it strongly rejects provisions on the specific way in which supervision is to be organised. For reasons of efficiency and effectiveness, this must be adapted to the respective particular national and regional situation. Sectoral harmonisation is not appropriate here. In particular, the requirement to carry out an individual risk assessment of each obliged entity, as mentioned in Article 45(6) and 7 of the proposal for a Directive, is — in view of the resources that this would require — disproportionate in relation to both the undertakings concerned (on which extensive reporting requirements would have to be imposed, in part relating to sensitive internal data) and the supervisory authorities.

16. Articles 49 and Article 50(1) of the proposal for a Directive lay down extensive obligations as regards cooperation between FIUs, irrespective of the provisions in national legislation and taking account of the principle of availability. In contrast to the current rules under Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member

States in respect of exchanging information (OJ L 271 of 24 October 2000, p. 4–6), domestic restrictions on the transmission of information, including any that may be imposed on constitutional grounds, no longer stand in the way of transmission. In the Bundesrat's view, this could lead to FIUs in other countries being better placed with regard to the transmission of information than domestic recipients. It is not clear from the explanatory memorandum to the proposal for a Directive why the current cooperation on the basis of Council Decision 2000/642/JHA is not considered adequate and such far-reaching new rules are needed.

17. The Bundesrat has reservations regarding the rules proposed in Article 55(3) on the imposition of sanctions on members of the management body in the event of breaches of the obligations on legal persons. For reasons relating to the rule of law, this provision should be worded more precisely, making it clear that the imposition of sanctions always presupposes blameable conduct on the part of the persons sanctioned themselves, either through their action or a failure to act where there is a duty to act.

18. The Bundesrat also has objections to the rules in Article 56(2), first sentence, point (a), and Article 57(1) of the proposal for a Directive, in so far as they provide for fines imposed to be published, as a rule, automatically, with the personal details of the persons sanctioned also generally being given.

    Apart from the fact that the 'naming and shaming' of persons in this way is currently, for good reason, a largely alien concept in German law, as, under constitutional law, taking account of general privacy and personality rights in conjunction with the proportionality principle, it can only be permissible under certain stringent conditions, such rules would be irreconcilably contrary to the rules in force on the provision of information relating to administrative fine proceedings under the legislation on administrative offences. §§ 49a and 49b of the Administrative Offences Act (OwiG) refer to the relevant provisions of the Criminal Procedure Code (*Strafprozessordnung* — StPO), under which information is not automatically transmitted to private individuals not involved. Under § 49b OWiG in conjunction with § 475(1) and (4) StPO, private individuals may, on request, obtain information contained in files, if they can show a legitimate interest therein. However, the information will be refused if the person affected has an interest warranting protection in its being refused.

    It would not be consistent with this carefully balanced, tried-and-tested system for the outcome of administrative fine proceedings to be published automatically in a way that is accessible to all, with, as a rule, the name of the person sanctioned also being given and only allowed to be omitted if publication of the name would cause 'disproportionate damage' to the parties involved.

19. Article 56(2), sentence 1, point (e), of the proposal for a Directive provides, in the case of sanctions on legal persons, for fines based on turnover. As far as can be established, provisions of this kind are currently to be found in German law only in the second sentence of § 81(4) of the Restrictions on Competition Act (GWB).

Apart from the fact that a fines framework based purely on turnover, without a maximum rate determined by the legislator, raises constitutional concerns (cf. Göhler, OWiG, 16th edition 2012, § 17, paragraph 48c), the maximum administrative pecuniary sanction to be imposed on a legal person should not be calculated on the basis of 10 % of the total turnover 'in the preceding business year', as this wording leaves open whether the business year referred to is that preceding the act, that preceding the decision by the authorities or that preceding the (if applicable, most recent) court of first instance proceedings.

20. The Bundesrat also has objections to the rules in Article 56(2), sentence 1, point (g), of the proposal for a Directive, under which administrative pecuniary sanctions of up to twice the amount of the profits gained or losses avoided because of the breach, where those can be determined, are to be provided for. Such provisions would confuse the issues of sanctions and seizure of profits, contrary to the well-established rules in German law distinguishing, under § 17(4) OwiG, between the sanction part and the seizure part of a fine, and should therefore be omitted. In the light of the maximum fine of € 5 million (to which, if applicable, is added the — simple — gain derived from the act, under § 17(4)(2) OwiG), the Bundesrat can, furthermore, see no practical need for such provisions in respect of natural persons.

21. Article 57(3) of the proposal for a Directive provides that the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) must issue guidelines addressed to competent authorities on types of administrative measures and sanctions and the level of administrative pecuniary sanctions. Article 16(3) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331 of 15 December 2010, p. 12), Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331 of 15 December 2010, p. 48), and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331 of 15 December 2010, p. 84) respectively provide that the competent authorities must make every effort to comply with such guidelines. If a competent authority does not comply or does not intend to comply, it must inform the EBA, EIOPA or ESMA, stating its reasons, within two months. The EBA, EIOPA or ESMA must publish the fact that a competent authority does not comply or does not intend to comply and may also decide, on a case by case basis, to publish the reasons.

In so far as Article 57(3) of the proposal for a Directive also applies to administrative

authorities and public prosecutor's offices in administrative fine proceedings, the provision is to be rejected. The Bundesrat can see no reason why the competent authorities responsible for prosecuting administrative offences in Germany should be accountable to the EBA, EIOPA or ESMA in respect of the way in which they deal with individual matters coming under the rules on sanctions.

Above all, however, there are strong considerations of principle that argue against such accountability. The existing division of competences between the EU and its Member States in respect of the prosecution of administrative (and criminal) offences in a particular case must be maintained. It is not the task of the EU and its authorities to influence the interpretation and application of the legislation in force by the German law enforcement authorities in particular cases by means of guidelines and recommendations.

22. The Bundesrat points out that the measures proposed by the Commission, in Article 58, to encourage the reporting of breaches to the competent authorities (whistle blowing) touch on an issue that is not only relevant to the prevention of money laundering, but also has horizontal relevance across many sectors. Sectoral harmonisation at the European level risks resulting in an inconsistent approach being taken, and is therefore to be rejected. Furthermore, the Bundesrat points out that the procedures which all obliged entities must have in place, under Article 58(3), to enable breaches to be reported internally through a specific, independent and anonymous channel will not be feasible for the SMEs concerned, in view of their size alone.

23. It rejects the extension to all obliged entities, under Article 40, of the requirement currently applying only to credit and financial institutions, under Article 32 of Directive 2005/60/EC, to set up information systems relating to their clients. In contrast to financial institutions, obliged entities in the financial sector are mainly SMEs, very few of which have the administrative capacity to operate a system of this kind. It is unclear, moreover, on which group of persons information has to be provided.

24. The Bundesrat is sending this opinion directly to the Commission.