EUROPEAN COMMISSION

Brussels, 10.10.2013
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Dear President,

The Commission would like to thank the Bundesrat for its Opinion concerning the 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}.

With respect to a differentiated approach for the non-financial sector, the extension of the obligation to all obliged entities to set up information systems relating to their clients and the obligations regarding politically exposed persons, the Commission would like to point out that in the proposal there is a clear recognition of the proportionality of the measures to be carried out by SMEs. To ensure this proportionality, Recital 18 states that "when applying the provisions of this Directive, it is appropriate to take account of the characteristics and needs of small obliged entities which fall under its scope, and to ensure a treatment which is appropriate to the specific needs of small obliged entities, and the nature of the business". Furthermore, according to Article 8 of the proposal, the steps taken by obliged entities to carry out an assessment of the risk shall be proportionate to their specific risks, to their nature and size. As for the internal policies, controls and procedures shall be proportionate as well.

With respect to the threshold of trading in goods the Commission would like to stress that there is evidence of money laundering/terrorism financing (ML/TF) risks in this sector: Member States indicate that the current relatively high threshold is being exploited by criminals and EUR 7 500 is closer to the approach in several Member States.

With respect to letting agents the Commission has been provided with evidence that suggests that this sector is also vulnerable to money laundering and that there is a need to impose obligations when they are involved in financial transactions in connection with the buying or selling of real estate. However, discussions in the legislative process on this particular provision indicate that a number of Member States are sceptical about the inclusion of all letting agents and the Commission is taking into account their arguments.

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With respect to providers of gambling services, the Commission would like to underline that consultations have indicated evidence of ML/TF risks in this sector. From the Commission's analysis it appears that the most effective way to address these new threats is to extend the scope of the Directive, based on a broad definition of gambling. This proposal would entail additional costs only for those higher risk gambling businesses not currently caught by the existing anti-money laundering/combating the financing of terrorism (AML/CFT) framework (e.g. sports betting, betting shops, lotteries, etc.). However, those costs should not be overestimated – gambling operations already have in place substantial security measures to guard against fraud. It is also important to note that the proposal provides for a significant threshold of EUR 2000 before customer due diligence measures have to be taken, which is particularly relevant for lotteries and excludes them to a large extent from AML requirements.

With respect to the requirements for the identification of beneficial owners, the Commission would like to point out that it appears from its analysis that imposing on all companies the requirement to hold information on their beneficial owner is relatively straightforward to achieve. Companies are best placed to know their ownership structure and would in any event be the primary source of information relating to their beneficial owner.

With respect to the strengthening of the risk based approach, we would like to point out that as it is based on a need to focus efforts on areas where their resources will be effectively utilised, the risk-based approach promotes a more efficient use of resources for both businesses and AML supervisors, and acknowledges that the response to threats will vary according to the risks that businesses face, as opposed to imposing unnecessary compliance burdens.

With regard to the obligation on Financial Intelligence Units (FIUs) to respond to requests for information, under Article 31(4) of the proposal for a Directive, this amounts to a general obligation to reply to requests. This does not prevent application of Member States procedural rules in the context of formal judicial requests for assistance. Concerning Article 31(5) of the proposal for a Directive providing that the Member States must ensure that the FIU has certain powers to suspend or withhold consent to a transaction the Commission would like to stress that this has been a main request from the FIUs themselves and it appears to be supported by a large number of Member States.

Regarding the introduction of a requirement for all trust or company service providers to be licensed or registered under Article 44, the Commission would like to indicate that there is a need for such an obligation in order to allow for effective supervision of compliance with the AML legislation.

With respect to the risk sensitive approach to supervision the Commission fully agrees that for reasons of efficiency and effectiveness, this must be adapted to the respective particular national and regional situation. The Commission believes that a combination of assessments by Member States and sectorial supra-national assessments will provide good coverage of risks at EU level.

Concerning the cooperation between FIUs, it is the Commission's view that there is a clear need to enhance the exchange of information in the EU and also at national level and the Commission believes that advantage should be taken of the available tools, especially the electronic platform "FIUnet" which is already producing good outcomes and can be used in other ways of collaboration.

Regarding sanctions the Commission would like to indicate that in line with its policy of reinforcing sanctioning regimes in the financial services sector, the draft proposal contains a range of administrative sanctions and measures that Member States should ensure are available for systematic breaches of key requirements. These common rules on sanctions shall apply taking into account the differences between obliged entities, in particular between financial institutions and other obliged entities, and having regard to their size, characteristics and areas of activity. As regards the publication of the sanctions, the Commission wishes to draw the Bundesrat's attention to Article 57 which requires that "where publication would cause a disproportionate damage to the parties involved, competent authorities shall publish the sanctions on an anonymous basis" and which requires that competent authorities take into account notably the gravity and duration of the breach, the degree of responsibility, and the financial strength of the natural or legal person.

Furthermore, Recital 41 indicates that the range of administrative sanctions should be "sufficiently broad to allow Member States and competent authorities to take account of the differences between obliged entities, in particular between financial institutions and other obliged entities, as regards their size, characteristics and areas of activity". As regards the encouragement of reporting of breaches to the competent authorities, the Commission would like to draw the Bundesrat's attention to Article 58 according to which "Member States shall ensure that competent authorities establish effective mechanisms to encourage reporting of breaches of the national provisions implementing this Directive to competent authorities" with a high degree of flexibility about the measures to fulfil this obligation.

The Commission hopes that these clarifications address the concerns raised by the Bundesrat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

Maroš Šefčovič
Vice-President