

21 September 2018**Decision
of the Bundesrat****Proposal for a Regulation of the European Parliament and of the Council
on the establishment of a framework to facilitate sustainable investment
COM(2018) 353 final; Council doc. 9355/18**

At its 970th session on 21 September 2018, the Bundesrat adopted the following position pursuant to Sections 3 and 5 of the Act on Cooperation between the Federation and the *Länder* in European Union Affairs (EUZBLG):

1. The Bundesrat generally welcomes the proposal for a Regulation on the establishment of a framework to facilitate sustainable investment insofar as it will serve to implement the EU Action Plan on Financing Sustainable Growth which the Bundesrat supports (see Bundesrat Document 67/18 (Decision)). Implementing the proposal for a Regulation may considerably help to further develop a sustainable European financial area and to reach a common understanding of sustainability in Europe.
2. In the Bundesrat's opinion, it is important to steer financial flows towards sustainable development. In this way, finance may be able to make an important contribution to implementing the EU's climate and sustainable development agenda. Overall, fresh investment prospects and new opportunities for raising funds will be generated.
3. The Bundesrat supports the proposed introduction of a harmonised EU classification system (taxonomy) in order to achieve the necessary transparency for sustainable investments and to prevent 'greenwashing'. The proposed harmonisation of the definition/concept of environmentally sustainable investments will probably facilitate and support sustainable investment, including investment by foreign market participants. The rules for a common sustainability taxonomy should thus, as proposed, reflect the views of the various stakeholders and the outcome of the talks with financial institutions, whilst also taking

appropriate cost-effectiveness into account.

4. The Bundesrat notes that, according to the proposal, a future EU standard for green bonds is to be based on the EU sustainability taxonomy. Investors will thus expect the issuance proceeds to be used by the issuers to fund climate change mitigation and environmental protection projects. There are some voluntary initiatives in this field that are very promising. At present there are no statutory obligations as to how the funds raised are to be used. The Bundesrat is therefore of the opinion that easily understandable and verifiable exclusion criteria are particularly necessary in this investment sector. A labelling system based on this approach would provide clarity for investors and prevent ‘greenwashing’.
5. Looking further ahead, the Bundesrat advocates an approach to sustainability that encompasses not only environmental but also social aspects, given that sustainability should be understood in a broad sense. In the medium term, an EU taxonomy should thus also address sustainable development goals of a social nature.
6. In its Action Plan on Financing Sustainable Growth of 8 March 2018 (Bundesrat Document 67/18) the Commission stated that it would explore the feasibility of easing capital requirements for banks and insurance companies (the ‘green supporting factor’). A supporting factor of this kind would have to be introduced gradually at the same time as the EU taxonomy was being developed. With regard to this proposal, the Bundesrat would therefore once again ask the Federal Government to work towards ensuring that for sustainable financing too the capital requirements may be eased only in cases where the risk is in fact low. The Bundesrat has already set out its position on this in detail in its Opinion of 27 April 2018 (Bundesrat Document 67/18 (Decision)).
7. The Bundesrat welcomes the fact that the Commission is implementing its Action Plan on Financing Sustainable Growth (see Bundesrat Document 67/18) at the same time as it is tabling a proposal for a taxonomy for determining environmentally sustainable economic activities. A taxonomy of this kind is indispensable as a basis for sustainable finance and could lead to further action in keeping with Environmental, Social and Governance (ESG) factors. By introducing a common definition for the term ‘environmental sustainability’, it creates transparency and thus market confidence in sustainable finance. That is necessary in order to achieve the desired goal of promoting investments in

sustainable economic activities, including cross-border activities.

8. The Bundesrat also welcomes the partnership approach of the setting-up of a 'Platform on sustainable finance'. Here too, it must be ensured that Member States can exercise sufficient influence. The Bundesrat therefore calls upon the Federal Government to ensure, firstly, that not only European authorities are represented on this platform but also Member States. Secondly, Article 15 of the proposal for a Regulation should be worded in such a way as to ensure that the platform has a balanced representation of experts from the various Member States. They should include experts on processes in the real economy and from bodies with particular expertise in the field of sustainable finance.
9. The Bundesrat would point out that the proposal for a Regulation thus leads to a binary system: an economic activity is either sustainable or it is not. The Bundesrat would ask the Federal Government to ensure that environmental sustainability - whilst retaining the strict conditions of Article 3(a) to (d) of the proposal for a Regulation - is specified in terms of the individual environmental targets and defined in a manner that differentiates between progressive levels of sustainability. This may further increase transparency, which is important for the markets, in that it will enable an economic activity's specific aims and degree of sustainability to be properly assessed. Furthermore, such differentiation may prevent unjustified intervention in other policy areas of the Member States.
10. The Bundesrat would advocate evaluating the impact of the Regulation once it has come into force and involving financial market participants in the further development of the framework conditions for sustainable investments.
11. The Bundesrat criticises the large number of authorisations to adopt delegated acts set out in Articles 4, 6, 7, 8, 9, 10 and 11 of the proposal for a Regulation. The legislator should settle all the relevant legal issues in the Regulation and not transfer substantial parts of the law-making *a priori* to the Commission.

According to this proposal for a Regulation, the taxonomy is to be developed by means of delegated acts (Article 16 of the proposal). The intention is that a system will gradually be put in place for determining the activities that are to be regarded as sustainable. On the one hand, it should be borne in mind here that, under primary law, delegated acts are to be restricted to non-essential elements of a legislative act (Article 290(1) TFEU). On the other, the legislative method used must not *de facto* rule out any possibility for the Member States of exercising

influence. The fact is that pinning down what ‘environmental sustainability’ means inevitably encroaches to a considerable extent on sensitive policy areas that lie within the competence of the Member States - for example, the issue of phasing-out the use of nuclear power in energy policy.

The Bundesrat therefore asks the Federal Government to seek amendments to the proposal in order to ensure that all essential decisions will be taken at Level 1. In addition, authorisations are needed for adopting Level-2 rules in order to make the taxonomy sufficiently flexible to cope with future technical developments and advances in scientific knowledge. In the case of these secondary legislative acts, in order to address fundamental issues of Member State policy areas a procedure should be ensured that allows for much stronger Member State influence, perhaps through the adoption of implementing acts that flesh out the Regulation as necessary.

The Bundesrat asks the Federal Government to work towards having the proposal for a Regulation amended along these lines.

12. It also calls upon the Federal Government, in the future advisory procedure, to work towards clarifying the text relating to the term ‘substantial contribution to climate change mitigation’ in Article 6(1)(e) of the proposal for a Regulation. This term should primarily include economic activities that help to prevent or reduce greenhouse gases insofar as they prevent or reduce the use of fossil fuels and thus contribute to energy transition. It should therefore not be possible for increased use of carbon capture and storage to be unconditionally regarded as an environmentally sustainable investment *per se*, as this technology does not reduce fossil fuel use. Furthermore, there continue to be concerns about the long-term safe storage of captured carbon and the possible adverse environmental impact. Carbon capture and storage should therefore be recognised as an environmentally sustainable investment only where it is carried out in conjunction with other economic activities that make a substantial contribution to reducing the use of fossil fuels.

13. The Bundesrat is transmitting this opinion directly to the Commission.