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COVER NOTE

from: Mario DRAGHI, President of the European Central Bank
date of receipt: 21 May 2013
to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union

Subject: OPINION OF THE EUROPEAN CENTRAL BANK
of 17 May 2013
on a proposal for a directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and on a proposal for a regulation on information accompanying transfers of funds (CON/2013/32)

Delegations will find attached the above mentioned opinion.

Encl.:

OPINION OF THE EUROPEAN CENTRAL BANK

of 17 May 2013

on a proposal for a directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and on a proposal for a regulation on information accompanying transfers of funds

(CON/2013/32)

Introduction and legal basis

On 27 February 2013, the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a 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 (hereinafter the ‘proposed directive’)¹. On 28 February 2013, the ECB received another request from the Council, on this occasion for an opinion on a proposal for a regulation of the European Parliament and of the Council on information accompanying transfers of funds (hereinafter the ‘proposed regulation’)² (hereinafter collectively referred to as the ‘proposed Union instruments’). The ECB also received requests from the European Parliament for an opinion on the proposed Union instruments, namely on 2 April 2013 in respect of the proposed directive and on 3 April 2013 in respect of the proposed regulation.

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, since the proposed Union instruments contain provisions falling within the ECB’s fields of competence. In addition, the ECB’s competence to deliver an opinion is based on Articles 127(2) and (5) and 128(1) of the Treaty and Articles 16 to 18 and 21 to 23 of the Statute of the European System of Central Banks and of the European Central Bank, as the proposed Union instruments contain provisions which have implications for certain European System of Central Banks’ tasks. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has therefore adopted this opinion.

¹ COM (2013) 45 final.

² COM (2013) 44 final.

1. Purpose and content of the proposed Union instruments

1.1 Proposed directive

The proposed directive aims to update and amend the Union anti-money laundering and counter-terrorist financing regime to take account of recent revisions to applicable international standards, namely the Financial Action Task Force (FATF) Recommendations, which were adopted in February 2012¹, as well as several reports and assessments by the European Commission regarding the application of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing². The proposed directive, when adopted, will repeal and replace Directive 2005/60/EC and Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC³.

The proposed directive takes a more risk-based approach to measures⁴ to combat money laundering and terrorist financing. It strengthens the ‘customer due diligence’⁵ requirements so that certain categories of clients and transactions⁶ will no longer be exempted from simplified customer due diligence requirements and so that ‘obliged entities’⁷ will henceforth have to assess the level of risk before deciding whether to conduct customer due diligence. In addition, the European Supervisory Authorities (ESAs)⁸ will be required to provide a joint opinion on the money laundering and terrorist financing risks affecting the internal market within two years from the date the proposed directive enters into force, whilst Member States will be required to conduct and maintain updated national risk assessments to identify those areas where enhanced customer due diligence⁹ is required. The proposed directive also expands the scope of the Union anti-money laundering regime, notably by reducing the threshold for the application of the regime to traders in high value goods dealing with cash payments from customers from EUR 15 000 to EUR 7 500.

¹ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations, Paris, 16 February 2012, available on the FATF’s website at www.fatf-gafi.org.

² OJ L 309, 25.11.2005, p. 15.

³ Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of ‘politically exposed person’ and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis (OJ L 214, 4.8.2006, p. 29).

⁴ The proposed directive requires obliged entities, *inter alia*, to carry out customer due diligence, maintain records, have internal controls and file suspicious transaction reports in relation to money laundering and terrorism financing.

⁵ See Chapter II, Sections 1 and 2, Articles 9 to 15, of the proposed directive.

⁶ For example, customers who are regulated businesses, such as credit and financial institutions established in the Union and companies listed on regulated public securities markets.

⁷ See Article 2(1) of the proposed directive which lists the ‘obliged entities’ to which the proposed directive applies, notably including credit institutions and financial institutions as further defined.

⁸ The ESAs are the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA).

⁹ See Articles 16 to 23 of the proposed directive.

The proposed directive will raise the level of customer due diligence to be conducted in respect of ‘politically exposed persons’ (PEPs)¹, notably by requiring that enhanced customer due diligence² be conducted in respect of such persons as well as their family members and close associates. PEPs will now include not only ‘foreign’ individuals but also ‘domestic’ individuals entrusted with prominent public functions³.

The proposed directive provides stronger and more well-defined rules and procedures for identifying beneficial owners⁴ of corporate or other legal entities and trusts, although the definition of beneficial ownership remains unaltered. In addition, corporate or other legal entities and trusts will be required to maintain records in regard to the identity of their beneficial owners. Moreover, the proposed directive introduces some changes to record-keeping requirements in respect of customer due diligence and transactions, as well as to obliged entities’ internal policies and procedures, attempting to strike a balance between facilitating robust money laundering and terrorist financing controls and respecting the principles of data protection law and the rights of data subjects.

The proposed directive also strengthens the cooperation between the Member States’ financial intelligence units whose tasks are to serve as national contact points to receive, analyse and disseminate to competent authorities reports about suspicions of money laundering or terrorist financing.

Finally, the proposed directive puts greater emphasis on enforcement and sanctions than previous directives. Member States must ensure that businesses can be held liable for breaches of the money laundering and terrorist financing rules and competent authorities may take appropriate measures and impose administrative sanctions in respect of such breaches. The types of administrative sanctions that can be applied are set out in the proposed directive.

1.2 *Proposed regulation*

The proposed regulation is closely linked to achieving the aims of the proposed directive. It is essential for financial institutions to report adequate, accurate and current information in respect of transfers of funds carried out for their clients to enable the competent authorities to effectively counteract money laundering and terrorist financing.

¹ See definitions in Article 3(7) as well as obligations on such persons provided for in Article 11 and Articles 18 to 22 of the proposed directive.

² See Articles 16 to 23 of the proposed directive.

³ See Article 3(7)(b) of the proposed directive. In this respect, ‘domestic’ means when the PEP has been entrusted by a Union Member State with prominent public functions, and ‘foreign’ means when the PEP has been entrusted by a third country with such functions.

⁴ See Articles 3(5), 29 and 30 of the proposed directive.

The proposed regulation¹ aims to tighten the existing legal obligations for money laundering and terrorist financing as regards funds transfers and those providing payment services in the light of developing international standards². In particular, it aims to enhance the traceability of payments by requiring payment service providers to ensure that transfers of funds are accompanied by information also on the payee for the competent authorities. For that purpose, it will require payment service providers to verify the identity of beneficiaries of payments originating outside the Union for amounts over EUR 1 000³. It will require payment service providers to have risk-based procedures in place to assess when to execute, reject or suspend funds transfers and to maintain records of payments for 5 years. The proposed regulation also clarifies that the requirements will cover credit and debit cards, mobile phones and other electronic devices, if they are used to transfer funds.

2. General observations

The ECB welcomes the proposed Union instruments. The ECB strongly supports a Union regime which ensures that Member States and Union resident institutions have effective tools in the fight against money laundering and terrorist financing, in particular against any misuse of the financial system by money launderers and financiers of terrorism and their accomplices. The ECB considers that the proposed Union instruments correctly and effectively address the weaknesses identified in the current Union regime and update it to take account of identified threats from money laundering and terrorist financing to the Union and to its financial system and the evolving international standards on how to deal with those threats. The ECB also considers that the proposed Union instruments will improve the clarity and consistency of the applicable rules across the Member States, for example in key areas such as customer due diligence and beneficial ownership.

¹ The proposed regulation will repeal Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds (OJ L 345, 8.12.2006, p. 1).

² Principally FATF Recommendation 16 on enhancing the transparency of cross-border wire transfers.

³ See Article 6 of the proposed regulation.

3. Specific observations

- 3.1 As regards the proposed directive, the ECB notes that its legal basis is Article 114 of the Treaty and that it accordingly aims to approximate relevant national provisions and minimise inconsistencies between them across the Union. Member States may decide therefore to further lower the thresholds set by the proposed directive for the application of its obligations or to take even stricter measures¹. For example, in the case of transactions between dealers in high value goods and non-business customers amounting to EUR 7 500² or above, it appears that Article 5 of the proposed directive would permit Member States to choose to apply stricter measures than merely requiring the dealer to satisfy the customer due diligence, reporting and other relevant obligations under the proposed directive. Any such measures should be carefully weighed against the expected public benefits.
- 3.2 Whilst the ECB notes the definition of ‘payment service provider’ in Article 2(5) of the proposed regulation, it also notes that, pursuant to recital 8 of the proposed regulation and recital 35 of the proposed directive, it is not the Union legislators’ intention to include within the scope of the regulation ‘persons who provide[s] credit or financial institutions solely with a message or other support systems for transmitting funds or with clearing and settlement systems’ such as the ECB operated TARGET system. The ECB supports this approach and stresses the importance of maintaining this exemption for the continued smooth functioning of payment systems in Europe. Imposing this requirement on the providers of clearing and settlement systems could lead to significant difficulties and delays in processing payments between the banks and other entities providing payment services. This in turn would potentially have a severe impact on the banks’ liquidity planning and ultimately on the smooth functioning of the financial markets. For this reason, and in the interests of legal certainty and transparency, the ECB recommends providing for this exemption in the enacting terms of the proposed Union instruments, rather than in the recitals. Moreover, it should be carefully considered whether other related Union legal acts which currently use the same approach and drafting technique for this type of exemption³ should follow this recommendation.

¹ See Article 5 of the proposed directive that provides that Member States may adopt or retain in force stricter provisions in the field covered by the proposed directive to prevent money laundering and terrorist financing.

² See Article 10(c) of the proposed directive.

³ See Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010, OJ L 88, 24.3.2012, p. 1.

3.3 Further, the ECB notes that several of the concepts defined in Article 2 of the proposed regulation are also defined in other Union legal acts closely related to the proposed regulation, e.g. Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC¹ (hereinafter the ‘Payment Services Directive’ (PSD)), Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001² and Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009³. Since the use of established definitions would improve consistency and facilitate the understanding of Union legal acts as a whole, the ECB suggests that Article 2 of the proposed regulation be amended where appropriate, namely:

- (a) The definitions of ‘payer’ and ‘payee’ should be aligned with the definitions of these terms in the PSD;
- (b) ‘Payment service provider’ is a concept established by the PSD and limited to six different categories of providers of such services listed in the PSD; accordingly the definition of this concept in the proposed regulation should refer to the PSD;
- (c) The definition of “‘a person-to-person” transfer of funds’ should be more clearly defined as a transaction between two natural persons, both acting in their personal capacity outside the scope of their business, trade or profession.

This opinion will be published on the ECB’s website.

Done at Frankfurt am Main, 17 May 2013.

The President of the ECB

Mario DRAGHI

¹ OJ L 319, 5.12.2007, p. 1.

² OJ L 266, 9.10.2009, p. 11.

³ OJ L 94, 30.3.2012, p. 22.