



**Fighting money laundering effectively**  
**Maintaining self-administration and professional secrecy**

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**Position paper of German Tax Advisers on the**  
**European Commission's anti-money laundering package 2021**

The German Tax Advisers are a cooperation of the Federal Chamber of Tax Advisers (Bundessteuerberaterkammer, BStBK) and the German Tax Advisers Association (Deutscher Steuerberaterverband, DStV). We jointly represent the interests of the profession vis-à-vis the European institutions, preserve and promote professional competencies and actively shape the future environment for tax advisers in Germany and in Europe.

On 20 July 2021, the European Commission published a comprehensive legislative package to combat money laundering and terrorist financing (hereinafter: AML/CFT) with a total of four legislative proposals. In particular, important areas of the existing AML/CFT Directive shall be transferred to a directly applicable regulation (hereinafter: AML/CFT-RE), a European supervisory authority to combat money laundering shall be established and the coordination of financial intelligence units (hereinafter: FIU) in the Member States improved.

Due to the implementation of the *existing* European legislation in the area of AML/CFT, tax advisers belong, among others, to the group of *obliged entities*. The supervision of tax advisers and tax agents is, in Germany, is to be conducted under the responsibility of the Chambers of tax advisers by means of self-administration. On the basis of a professional law focused on compliance, the Chambers of tax advisers fulfill a legal obligation with their supervisory function acting as corporations under the public law. They are also responsible for imposing sanctions in the event of violations of anti-money laundering obligations.

## A. Basic considerations

1. Money laundering and financing of terrorism (hereinafter: ML/FT) jeopardize the security of our societies and the financial stability of the economy. In particular, the organised crime acting across borders exploits existing loopholes which are available due to the different implementation of the current European legislation in the area of AML/CFT by the Member States.

- ➔ The German Tax Advisers therefore support the European Commission in its effort to replace the existing patchwork of different regulations in Europe by common rules.
- ➔ However, this must take place under consideration of the different national structures, legal cultures and the existing diversity of professional law in Europe.

2. Effective responses in the area of AML/CFT for the fight against organised cross-border criminality require close coordination and a constant exchange of experiences between the competent public authorities including the national supervisory authorities and the FIUs.

- ➔ The German Tax Advisers therefore support the European Commission's plan to promote close cooperation and exchange between the control bodies and the FIU. This can be achieved through the creation of an appropriate EU body.
- ➔ Such a cooperation must, however, consider the national and where applicable federal structures and competencies of the Member States as well as the existing right of self-administration of the national self-government bodies. In addition, the EU authority to be established should concentrate on cases with cross-border implications which are committed by the organised criminality.

3. ML and FT are present worldwide and must therefore be combated on the *global* level. The establishment, expansion and maintenance of international cooperations and networks will contribute significantly to the success of AML/CFT in Europe and worldwide. It will enable to detect, trace and block international money flows including flows of cryptocurrencies and e-money related to ML/FT.

- ➔ The German Tax Advisers suggest therefore that the tasks of the European AML/CFT authority (AMLA) should focus more on the international cooperation with *third* countries and networks.

4. Cryptocurrencies are increasingly used as a means of ML/FT. According to the German Federal Government, the number of transaction reports with a ML-suspicion related to

cryptocurrencies has risen only within the German FIU from 570 cases in 2018 to 2050 cases in 2020<sup>1</sup>.

- ➔ The German Tax Advisers therefore explicitly welcome the European Commission's proposal to expand AML/CFT measures to the crypto sector. We consider the proposal as an effective instrument for curbing tax evasion within the European Union and thus a valuable contribution to a boost of the European economy.

5. The revelations of the so-called Pandora Papers by the International Consortium of Investigative Journalists (ICIJ) are a major success in the fight against global tax avoidance, tax evasion and ML. The schemes of international service providers to aid tax evasion and ML cause great damage to the reputation of the tax advisers who are acting in full compliance with the law and make their daily contribution to the fight against ML/FT.

- ➔ The German Tax Advisers therefore welcome the efforts of the European Parliament to improve the existing provisions through the resolution "Pandora Papers: implications for the efforts to combat ML, tax evasion and tax avoidance (2021/2922(RSP))" adopted on 21 October 2021. At the same time, German Tax Advisers are concerned that tax advisers in Germany could be placed under general suspicion for no reason due to these incidents. After all, according to the ICIJ, the "14 professional offshore corporate service providers" mentioned in the resolution (No. 66) are companies "based in the Caribbean, Persian Gulf or South China Sea<sup>2</sup>". In Germany, on the other hand, a tax adviser must report such criminal activities if he or she becomes aware of them.
- ➔ Against this background, the reference in No. 69 of the resolution that "self-regulation and supervision of these professions has not been effective in ensuring compliance and sanctioning breaches of the law" is also unacceptable. The German Tax Advisers vehemently oppose such a sweeping and unfounded assertion, which discredits Germany's firmly anchored and proven self-government.
- ➔ We are also very concerned that No. 75 of the resolution directly links professional secrecy to illegal practices. Professional secrecy is a core element of the rule of law, which is indispensable for the protection of trust between tax advisers and clients and must continue to be protected.

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<sup>1</sup> Answer of the German Federal Government to a small parliamentary question on 24 August 2021 (2021/091762)

<sup>2</sup> [Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak - ICIJ](#)

## **B. Specific considerations**

### **1. Establishment of a European AML/CFT Authority (AMLA)**

#### a) Areas of responsibility of the AMLA in international ML/FT

The challenges of international ML/FT require close cooperation on an international level<sup>3</sup>. The European Commission has therefore stated in its action plan<sup>4</sup> that ML and TF are global threats against which the EU intends to take decisive action in cooperation with its international partners.

A European Authority for AML/CFT can be an important element in strengthening international cooperation, improving coordination of international networks and being a contact and information point for the supervisory authorities of the Member States. As a specialized authority for AML/CFT, the AMLA would be ideally suited to cooperate with the Financial Action Task Force (FATF) in the further development of international standards and to improve the dealings with the third countries who have strategical shortcomings in the area of AML/CFT.

#### b) AMLA as the European supervisory authority

The differentiation of the tasks and competencies of the AMLA in its function as a supervisory authority between the financial sector on the one hand, and the non-financial sector on the other hand, is fundamentally appropriate and as such to be welcomed. The non-financial sector has multi-layered economic sectors and thus different obliged entities, so that a comprehensive supervision through the AMLA would be disproportionate in this area. The supervision in the non-financial sector must remain decentralized at the level of Member States, since they can act much faster, more effectively and more appropriate.

Nevertheless, according to the Commission's proposal, the AMLA shall be given far-reaching powers over the *supervisory authorities* in the non-financial sector: According to Art. 5 paragraph. 4 b) in conjunction with Art. 31 of the draft for the establishment of an EU authority to combat ML/FT (hereinafter: AMLA draft regulation), the AMLA shall monitor these supervisory authorities through peer reviews by examining and evaluating the adequacy of the competencies, the human resources, the independence and the effectiveness of the supervisory practice as well as the application of EU law. As a result of this review, the AMLA

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<sup>3</sup> See European Council Conclusions on Strategic Priorities in the Fight against Money Laundering and Terrorist Financing, 5 December 2019.

<sup>4</sup> Communication from the Commission on an Action Plan for a comprehensive Union policy on the prevention of money laundering and terrorist financing (2020/C 164/06)

shall issue guidelines and recommendations to the relevant authority in accordance with Art. 43 of the AMLA draft regulation.

In addition, Art. 32 of the AMLA draft regulation suggests that the AMLA can investigate whether the specific supervisory activity of the supervisory authority in the non-financial sector has been carried out in accordance with EU law or national law or whether it has deficiencies. If the AMLA claims deficiencies, a multi-stage procedure is planned in which the AMLA or the European Commission shall be able to issue binding guidelines directly to the national authorities and shall even be given the possibility of issuing a binding decision vis-à-vis the national supervisory authority in the case where the supervisory authority oversees a self-governing body. Like this, previous decisions made by the self-governing bodies entrusted with supervisory powers could be revised.

The German Tax Advisers consider that this proposal represents a disproportionate and unnecessary interference with the competencies of the Member States.

The proposal is not necessary because the control of self-governing institutions, such as the Chambers of tax advisers in Germany as the supervisory authorities of AML/CFT, is *already* provided for by the highest state authorities responsible for the financial administration and is carried out in a *well-functioning* manner.

In addition, according to the Treaties of the European Union, the CJEU *alone* decides on the interpretation and application of Union law. It can be called upon to do so by way of infringement proceedings (Art. 258 TFEU). Under these circumstances, would the AMLA be granted such comprehensive rights and the possibility of direct intervention in decisions of national authorities, this would mean a significant prolongation of the legal process and make it considerably more difficult to obtain legal interpretation.

But there are other legal consequences of such a model which should not be underestimated either: if the AMLA were authorized to issue binding decisions, the *burden of proof* would, in the further proceedings, be reversed to the Member States to *their* detriment. Then, the AMLA would not have to explain and prove the unlawfulness of the national action in detail - as it is fundamentally laid down in the Treaties - but the Member State in question would have to act against the Commission's decision and refute the AMLA's allegations in a substantiated manner.

Such a direct power for the AMLA to issue guidelines or even decisions vis-à-vis the national supervisory authorities would ultimately lead to the situation that the AMLA would *de facto* enjoy technical and subject-specific supervision powers, which would constitute an unacceptable erosion of the self-governing rights of the regional Chambers of tax advisers and

which would break the fundamental and meaningful differentiation between the financial sector and the non-financial sector.

The German Tax Advisers decisively reject an erosion of self-governing rights by a *de facto* technical supervision of the AMLA. The competencies of the AMLA in the non-financial sector have to be limited to a coordinating and advisory function. Direct supervisory powers are neither necessary nor proportionate.

## **2. Further national supervisory bodies for supervising the self-governing institutions (supervision-supervision)**

The proposal of the European Commission for a 6<sup>th</sup> AML/CFT Directive (hereinafter: AML/CFTD draft) expressly foresees the transfer of supervisory powers in the area of AML/CFT to self-governing institutions. Thereby, the proposal considers existing administrative structures and legal cultures in some Member States. This is to be welcomed. According to the experience gained by the German Chambers of Tax Advisers as supervisory bodies in the area of AML/CFT, the supervision by means of self-administration has proven itself to be a practical and effective model.

For these activities, the self-governing institutions are themselves subject to supervision by a public authority. For the Chambers of tax advisers in Germany, for example, it's the highest state authority responsible for financial administration who is competent to oversee the Chambers of tax advisers<sup>5</sup>.

With the proposal to set up a national supervisory authority, it is yet *another* national authority who is supposed to ensure, among other things, that the self-governing bodies fulfill their tasks according to the highest standards (Art. 38 (2) c 6th AML/CFTD draft) and to review the exceptions of the obligation to prepare an individual risk analysis which were granted by the self-governing body (Art. 38 paragraph. 1d 6th AML/CFTD draft). In addition to that, this national supervisory authority shall be able to issue instructions to the self-governing bodies in accordance with Article 38 (3) b) of the AML/CFTD draft.

The introduction of such a national supervisory authority with such far-reaching powers, which include a review of the appropriateness and the risk-related proportionality of the supervisory activity, would go *far beyond* the review of compliance with the legal requirements and thus represent a real subject-specific technical supervision of the self-governing institutions.

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<sup>5</sup> See. § 88 paragraph 2 of the German Tax Advisory Act.

The establishment of a technical supervision over self-governing institutions must, however, **be firmly rejected**. The introduction of a technical supervision in the area of the supervisory activities of self-governing institutions in Germany, such as the Chambers of tax advisers, would represent a significant and unjustified interference in the core area of functional self-administration by the professional Chambers. This would disregard the basic principles of the legal culture of Member States such as Germany.

The implementation of such a proposal for the establishment of an *additional* national supervisory authority would also disproportionately interfere with the existing national administrative structures, in particular those of the Member States with a federal structure.

Indirectly, the instalment of a technical supervision could also invalidate the existing professional secrecy for example if an authority could request the surrender of documents or information relating to the confidentiality obligation of the professional secrecy holder.

After all, the establishment of an additional national supervisory authority would entail considerable costs for taxpayers in Germany.

In this context, the criticism expressed in recital No. 69 of the AML/CFTD draft stating that the controls of self-governing institutions were inadequate and were not subject to public control or only to a little extent, is incomprehensible and unacceptable.

The professional Chambers in Germany are corporations of public law which are subject to the legal supervision by the responsible ministries. This ensures that the professional Chambers fulfill their supervisory tasks in accordance with the legal requirements. Against this, the unsubstantiated statement of a lack of control puts the conscientious work of the competent authorities and self-government institutions in a bad light for no reason. In this context, it is doubtful whether the European Commission has the necessary competencies and the necessary expertise to carry out such an assessment of the self-governing institutions. The said paragraph should therefore urgently be removed from the legal text.

The German Tax Advisers are calling for Article 38 of the proposed Directive to be deleted. Alternatively, a clarification is necessary that the supervision of professional self-government institutions is limited to legal supervision.

### **3. The professional secrecy must be sufficiently safeguarded**

In Germany, the profession of tax adviser is anchored in the law as the independent body of the tax law administration. In this context, tax advisers in Germany, such as doctors or lawyers, are subject to professional secrecy, which is protected by criminal law.

The German Tax Advisers therefore welcome that the proposal for an EU money laundering regulation - in accordance with the 4th EU Anti-Money Laundering Directive (Art. 34 paragraph. 2 and Art. 51 paragraph. 2) - foresees an exception for tax advisers to the obligation to submit a report for suspicion of ML as long as they are holders of professional secrecy.

However, the wording proposed in the 6th AML/CFTD draft shows a *regulatory gap* and therefore does not meet the requirements for an adequate protection of professional secrecy. According to the AML/CFTD draft, persons who are subject to professional secrecy are exempt from filing a suspicious transaction report, but according to Art. 32 (1) of the AML/CFTD draft, this is not the case for the competent supervisory authority. However, the obligation of the supervisory authority to submit a report for suspicion of ML inevitably limits the protection of those who are subject to professional secrecy. In order to close this loophole, the German legislator has amended paragraph 44 (1) of the GwG with effect from 1 August 2021, so that the supervisory authority is **not** obliged to submit a suspicious transaction report if the person under supervision is subject to paragraph 43 (2) of the GwG and thus, exempt from the reporting obligation (paragraph 44 (1) sentence 2 of the GwG). This regulation should also be included in the 6th AML/CFTD draft in order to protect the professional secrecy.

Furthermore, the 6th AML/CFTD draft does not foresee an exception for persons who are subject to professional secrecy regarding the report for discrepancy found in the transparency register (so-called "discrepancy reports"), as opposed to the report for suspicion. This contradicts, on the one hand, the case law of the European Court of Justice<sup>6</sup> and the European Court of Human Rights<sup>7</sup> on the protection of professional secrecy in the field of legal advice and, on the other hand, the statements in recital No. 9 of the proposal for an AML/CFT regulation:

*"However, there must be exemptions from any obligation to report information obtained before, during or after judicial proceedings, or in the course of ascertaining the legal position of a client, which should be covered by the legal privilege. Therefore, legal advice should remain subject to the obligation of professional secrecy, ... "*

Accordingly, within the framework of the implementation of the 5th EU AML directive, the German legislator has foreseen an exception to the reporting obligation also for the report for discrepancy when it comes to persons with professional secrecy in paragraph 23a (1) sentence 2 in conjunction with paragraph 43 (2) of the GwG. This exception should also be anchored in the 6th AML draft.

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<sup>6</sup> ECJ, Case 26 June 2007 – C-305/05.

<sup>7</sup> ECHR, Case 6 December 2012 – 12323/11.

In order to avoid undermining the professional secrecy, it should be clarified in the 6th AML/CFTD draft that the supervisory authority is exempt from the obligation to report a suspicious transaction if the tax adviser is not obliged to report a suspicious transaction himself.

For reasons of coherence of the present money laundering package and to protect the professional secrecy, the 6th AML/CFTD draft should also provide for an exception to the reporting obligation for *discrepancy* for persons subject to professional secrecy.

#### **4. Additional requirements for obliged entities**

As part of the 'obliged entities' according to the AML/CFT draft, tax advisers have to check their client's identity by virtue of Art. 18. The draft expands the information to be collected to the extent that the tax identification number and, in the case of natural persons, the employment or the occupation shall also be recorded. However, the previously most important sources of information such as official documents, ID cards or excerpts from the commercial register, will no longer be sufficient for the collection and the verification of this data. For the obliged entity, this means a disproportionate and additional effort in identifying and verifying the identity, whereby it is not clear if this additional burden brings added value.

The above-mentioned statements apply even more to the collection and verification of information regarding the beneficial owner. The draft of the AML/CTF regulation lists considerable extensions of the information to be collected. In contrast to the existing regulation, the draft no longer differentiates whether the beneficial owner actually represents an increased risk with regard to ML/FT. Some of the information requested in the draft about the beneficial owner, such as the national identification number or the tax identification number, e.g. in the case of the residence or company headquarters abroad, cannot be collected at all and often cannot be checked with the necessary care.

Instead of expanding the data collection at the expense of the obliged entities, it would be necessary to carry out and publish a comprehensive *assessment* of the added value of the previous data collection for combating AML/CFT since the 5th AML/CFTD came into force. Then, a reasonable consideration could be made as to which data shall be collected from contractual partners or beneficial owners.

The German Tax Advisers advocate to refrain from expanding the obligation to collect and verify the information and identity for the time being, and instead rather carry out an

assessment of the benefits of the previous data collections and then adopt an effective, proportionate and workable obligation on this basis.