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FOURTH EU ANTI-MONEY LAUNDERING DIRECTIVE:
Final agreement between EU Parliament and Council

Background of the revision of the Anti-Money Laundering Directive

Background and timetable

On 05.02.2013, the EU Commission (***EU Commission***) published a proposal for a Fourth Anti-Money Laundering Directive. This proposal took into account the 40 new recommendations adopted by the Financial Action Task Force (***FATF***) on 16.02.2012, which the EU Member States have committed to implementing. At its first reading on 11.03.2014, the EU Parliament adopted a legislative resolution in this respect and the Committee of Permanent Representatives agreed on a general approach. The subsequent trilogue negotiations have now been successfully completed.

Both the proposal for the New Anti-Money Laundering Directive and the proposal for the revised Funds Transfer Regulation still have to be adopted by the Plenary of the EU Parliament. Adoption is scheduled for March or April. The Council then has to formally declare its approval. After publication in the Official Journal of the European Union, the Member States will have two years to implement the New Anti-Money Laundering Directive. The implementing act will therefore probably come into effect in Germany in the middle of 2017. As a regulation, the EU Funds Transfer Regulation does not have to be transposed into German law, but will apply directly.

Key changes of the New Anti-Money Laundering Directive

Emphasis on a risk-based approach

A risk-based approach has already increasingly been pursued in the past for the prevention of money laundering and terrorism financing, for example with the German Act on the Optimiza-

Dear Reader,

On 27.01.2015, the European Parliament (***EU Parliament***) and the Council of the European Union (***Council***) reached agreement on the 4th Anti-Money Laundering Directive during the "trilogue negotiations" on a final version of the new Directive (***New Anti-Money Laundering Directive***). The final barrier to adoption by the EU Parliament and the Council has now therefore in principal been removed. The EU Parliament and the Council have also reached agreement on the adoption of a revised version of the EU Funds Transfer Regulation.

We would like to inform you in this newsletter about some important points which were the subject of controversial discussion in the proceedings for an agreement on the New Anti-Money Laundering Directive and which will have an impact on the future structure of the anti-money laundering law compliance organisation.

We trust you will enjoy reading this newsletter.

We would be glad to receive any suggestions or questions you may have.

Yours sincerely,

Jens H. Kunz and
Matthias Schirmer

tion of Money Laundering Prevention (*Gesetz über die Optimierung der Geldwäscheprävention – GWPräOptG*) This trend continues with the New Anti-Money Laundering Directive in that a key role is being accorded to risk analysis and corresponding adequate safeguards. Both the EU Commission and jointly the European supervisory authorities EBA, EIOPA and ESMA (***ESAs***) are to conduct an analysis of money laundering and terrorism financing risks. The EU Commission is to send its findings and its recommendations based on these to the Member States and the obliged entities under the Directive so that these can better understand the relevant risks and counter these more effectively. The Members States and the obliged entities under the Directive (the latter with respect to their specific situation) also have to analyse these risks. The obliged entities are to establish which specific simplified or enhanced measures are to be taken to reduce or prevent the identified risks. The ESAs will, however, establish guidelines for the Member States and the obliged entities with respect to the required analysis and measures. The New Anti-Money Laundering Directive itself also contains annexes which list indicators of reduced and increased risk.

It is therefore not yet possible to conclusively assess how strong the impact of this increased emphasis on the risk-based approach will be on Germany. The changes are not, however, expected to be drastic, since already today simplified due diligence requirements may only be applied subject to a specific risk assessment.

Extended scope of anti-money laundering legislation requirements

The New Anti-Money Laundering Directive will also provide for an extension of the scope of anti-money laundering legislation requirements: for example by reducing the threshold for cash transactions above which persons trading in goods qualify as obliged entities and in particular in which an obligation to identify the customer is triggered. This threshold will be reduced from EUR 15,000.00 to EUR 10,000.00. Since the threshold for the obligation to identify the customer in the German Anti-Money Laundering Act (*Geldwäschegesetz – GwG*) is currently higher, the German Anti-Money Laundering Act will have to be changed accordingly.

The New Anti-Money Laundering Directive also includes providers of gambling services as obliged entities. The Member States can, however, during transposition into national law remove these providers – with the exception of casinos – partially or completely as obliged entities if a low money laundering risk is evidenced. The inclusion of gambling service providers is of practical relevance because pursuant to the German Anti-Money Laundering Act only organisers and brokers of online gambling (besides casinos, which already fall in the category of obliged entities in accordance with the current Anti-money Laundering Directive) are obliged entities as defined by the German Anti-Money Laundering Act. This can therefore result in an extended application of the German Anti-Money Laundering Act to other providers of gambling services – based on a corresponding risk assessment of the German legislator.

The scope of the New Anti-Money Laundering Directive is also extended in that obliged entities will not only include real estate agents involved in the purchase or sale of real estate properties, but also those involved in the letting of real estate properties. This will have to be made clear in the German Anti-Money Laundering Act, which will probably not cause enthusiasm on part of the concerned professional group even if the requirements triggering an obligation to identify the customer will not be met every time a property is let.

Beneficial ownership registers

According to currently applicable law, obliged entities pursuant to the German Anti-Money Laundering Act have to clarify when identifying their contractual partner whether it is a beneficial owner and if this is the case, likewise identify such beneficial owner. The contractual partner has to provide the obliged entity with the information and documents required for this.

The New Anti-Money Laundering Directive for the first time will now oblige the EU Member States to create central registers containing information on the beneficial ownership of corporations, including Anglo-American trust structures. The commercial register is given as an example of such a register, to which the relevant information then has to be added. The proposal of the EU Commission did not initially contain the obligation to create a central register and it was included in response to pressure from the EU Parliament. Whilst obliged entities pursuant to current legislation rely on the statements of corporations and the information provided by them, a central register will considerably increase the quality of the available data used to identify the contractual party of the beneficial owner and therefore also meet the demand of the FATF for a higher level of transparency with respect to beneficial ownership.

However, the New Anti-Money Laundering Directive does not go so far that the obliged entity can rely solely on the information in the central register. The obliged entity will in fact be still obliged within the scope of customer due diligence requirements to identify the beneficial owner using a risk-based approach, which does not appear consistent with the usual purpose of the public registers and will limit the legal certainty desired by obliged entities.

The new Directive will provide that the competent national authorities in each case (in Germany these include, for example, the Federal Financial Supervisory Authority *BaFin* (*Bundesanstalt für Finanzdienstleistungsaufsicht*) and the Financial Intelligence Unit based at the German Federal Criminal Police Office (*Bundeskriminalamt*)) and obliged entities under anti-money laundering legislation, when meeting their customer due diligence obligations, are to have access to the central register. Persons and organisations

capable of evidencing a "legitimate interest" in this information are also to be granted access to the central register. This interest must be related to money laundering, terrorism financing and related acts such as corruption, tax offences and fraud. The Member States will, however, be entitled to restrict this access to information regarding beneficial owners completely or partially in exceptional cases. A differently worded provision applies for trust structures, according to which the relevant information likewise has to be entered in a central register, but only has to be made accessible for authorities, whilst access rights for other obliged entities when complying with their customer due diligence obligations can according to the wording of the provision only be granted by the Member States.

The introduction of the register is in principle to be welcomed since it is intended to reduce the time and effort required to trace and identify the beneficial owner. How much work this will in future still involve in practice will essentially depend on how the obligation not to rely exclusively on the register is transposed into national law and administrative practice. It will also be interesting to see how quickly the Member States create the required registers and how they ensure that the legal entities can meet their obligation to obtain the necessary information regarding beneficial owners.

Special obligations for the treatment of politically exposed persons

The German Anti-Money Laundering Act provides that obliged entities have to meet stricter due diligence obligations with respect to politically exposed persons (***PEP***). These obligations have to be met irrespective of whether the PEP is resident in Germany or a foreign country. The German Federal Financial Supervision Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* (***BaFin***)) therefore interprets this obligation such that the clarification of PEP status does not constitute any stricter due diligence obligations, but applies with respect to all customers. The New Anti-Money Laundering Directive likewise no longer differentiates between PEPs resident in Germany and in other countries, although the initial proposal of the EU Commission provided for a different set of requirements. In light of the stricter legal situation which has been in force in Germany since the German Act on the Optimisation of Money Laundering Prevention came into effect, this change will probably not have any material impact on obliged entities resident in Germany. The New Anti-Money Laundering Directive does, however, expand the category of PEPs to include members of the governing bodies of political parties, which will mean that existing PEP lists will have to be updated.

The EU Parliament on the other hand was unsuccessful with its proposal to oblige the EU Commission in collaboration with the Member States and international organisations to draft a list which includes domestic PEPs and persons resident in Germany, who hold a prominent position in an international organisation. A corresponding list would have made it easier for obliged entities to identify PEPs and would have led to a reduction in the costs associated with this. Obliged entities will therefore, as to date, have to use fee-based databases to obtain this information.

Due diligence obligations in connection with electronic money

The New Anti-Money Laundering Directive also contains its own regime for electronic money, which was included in the Directive in this form on the initiative of the EU Parliament and deviates from the regulations of the Anti-Money Laundering Directive which have applied to date. Accordingly, Member States may on the basis of their own appropriate risk assessment allow obliged entities not to apply certain due diligence measures in respect of electronic money. This exemption requires, however, that all of the following risk-mitigating conditions are fulfilled:

- the payment instrument is not reloadable, or has a maximum monthly payment transactions limit of EUR 250 that can only be used in that one particular Member State;
- the maximum amount stored electronically does not exceed EUR 250. Member States may increase this limit up to EUR 500 for payment instruments that can only be used in that one particular Member State;
- the payment instrument is used exclusively to purchase goods or services;
- the payment instrument cannot be funded with anonymous electronic money;
- the issuer carries out sufficient monitoring of the transactions or business relationship to enable the detection of unusual or suspicious transactions.

The Member States must also ensure that the above specified exemption in relation to customer due diligence requirements is not applicable in case of redemption in cash or cash withdrawal of the monetary value of the electronic money where the amount redeemed exceeds EUR 100.

The thresholds are therefore more generous that those in accordance with the currently applicable German Anti-Money Laundering Act, which only provides for an exemption from the fulfilment of customer due diligence obligations, for example, if a maximum amount of EUR 100 per calendar month cannot be exceeded. In view of the fact that the provisions of the German Anti-Money Laundering Act relating to electronic money are already stricter than those of the current Anti-Money Laundering Directive and that the risk of money laundering in connection with electronic money is considered to be increased anyway, it is not, however, to be expected that the German legislator deviates from its current policy and increases the applicable maximum amounts. Rather, it remains to be seen whether the Ger-

man legislator will address the vaguely defined obligation to monitor transactions and business relationships sufficiently and define this more precisely.

Third countries

With respect to third countries, the New Anti-Money Laundering Directive will provide that the EU Commission can adopt delegated acts to identify high-risk third countries. The corresponding list will eliminate the legal uncertainty for obliged entities with respect to when they must apply enhanced customer due diligence and will prevent the risk of supervisory arbitrage with respect to the identification of the relevant countries by the authorities of the Member States.

On the other hand, the New Anti-Money Laundering Directive will not contain any fundamental privileged status for countries which have anti-money laundering standards which are comparable to the EU standards. This may be seen as unfortunate by obliged entities, but is ultimately in line with the risk-based approach. This change will also require an amendment to German law because, although the equivalence of the third country currently does not automatically open up the possibility of simplified due diligence, this fact is accorded a key role for the applicability of simplified due diligence obligations. Admittedly, the New Anti-Money Laundering Directive will, however, in its Annex II recognise amongst other things that the geographical factor still constitutes an important indication for a low risk of money laundering and/or terrorism financing.

Group-wide safeguards

Whilst the obligation for group-wide compliance with due diligence requirements relating to money laundering for banks and certain companies in the finance sector is already known, this obligation will in future also apply to other obliged entities under the Directive. This obligation also applies to branches and majority owned subsidiaries in foreign countries, which can ultimately lead to the consequence that a company has to discontinue its business operations in another country if money laundering and terrorism financing risks cannot be effectively combatted there.

Sanctions

The New Anti-Money Laundering Directive is following an approach which can also be observed in recent European legislation of calling for specific and far-reaching powers of the Member States with respect to the sanctions imposed on non-compliance with the requirements of the Directive. The Member States must for example ensure in the event of serious, repetitive or systematic failings on the part of obliged entities with respect to certain key requirements of the New Anti-Money Laundering Directive that the permissible sanctions include maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach where that benefit can be determined or at least EUR 1,000,000. In the case of banks and financial services providers, the maximum administrative fine must even be not less than EUR 5,000,000 or 10% of the total annual turnover according to the latest available accounts approved by the management body.

The approach of "*naming and shaming*", which can likewise be observed more frequently in recent European legislation, is also being pursued, i.e. demanding the publication of decisions based on breaches of the requirements laid down by the New Anti-Money Laundering Directive, unless overriding reasons require anonymous publication.

Summary

With this now final draft of the New Anti-Money Laundering Directive, the EU is, amongst other things, implementing the stricter requirements of the FATF and intensifying its efforts for an effective combatting of money laundering and terrorism financing. Both the objective and the path being pursued to achieve it deserve approval, even if one could question whether certain details have been dealt with in the optimal manner. Whether, for example, it is really necessary to impose minimum requirements on Member States with respect to the level of their sanctions and to then link these to turnover, appears questionable. In general, the changes will probably not be that drastic for obliged entities in Germany because German anti-money laundering legislation has been revised and tightened several times in recent years. This applies, for example, for the equal treatment of domestic and foreign PEPs.

It is already clear that continued attention has to be paid to the regulations on the prevention of money laundering and terrorism financing. This is partly due to the fact that the New Anti-Money Laundering Directive lays down (as in the past) only a minimum standard and it cannot be ruled out that the German legislator will use its discretion to impose stricter standards. Attention is, however, also necessary because not only the EU Commission has been instructed to carry out a risk assessment, but also the European supervisory authorities EBA, ESMA and EIPOA are assuming an important role because they have been requested to draw up guidelines for the national supervisory authorities and obliged entities, in which requirements with respect to the relevant risk factors and the measures to be taken are to be laid down for the situation of simplified and enhanced customer due diligence. It is therefore apparent that although the New Anti-Money Laundering Directive will not achieve full harmonisation, the Euro-

pean requirements will gain increasing importance. This is also to be welcomed since this is expected to lead to increased harmonisation within the EU.

For additional information please contact:

Dr. Jens H. Kunz, LL.M. (UT Austin)
Rechtsanwalt
T +49 69 971477 252
jens.kunz@noerr.com

Matthias Schirmer, LL.M.
(College of Europe, Bruges)
Rechtsanwalt
T +49 69 971477 446
matthias.schirmer@noerr.com

Noerr LLP
Börsenstraße 1
60313 Frankfurt/Main