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Anti-money laundering measures in real estate transactions

Austria

The implementation of the fourth Anti-Money Laundering Directive has tightened up the current situation – lawyers have to carry out even more detailed and costlier risk assessments than they had to in the past – but it is permitted to make use of risk assessments that have already been performed by banks or other consultants in connection with real estate transactions. However, obliged entities, such as lawyers, cannot avoid liability for those transactions; the ultimate responsibility for meeting the requirements remains with the obliged entity that 'relies' on the third party. For this reason, the assessment has to be performed by every obliged entity that is subject to this Directive, but the entities can rely on the documents collected by other obliged entities.

The reporting obligations that are applicable to lawyers in the case of a reasonable suspicion of money laundering or terrorist financing are a highly questionable rule with regard to human rights. Moreover, the fact that even a domestic citizen can now be qualified as a politically exposed person (PEP) is an excessive measure.

In general, the following scenarios can be applied to every transaction that is prone to money laundering ('*geldwäschegeneigt*') or terrorist financing, provided that every lawyer is only legally representing one person involved (every other person involved has to be legally represented by another lawyer), an anti-money laundering (AML) risk-assessment has been worked out and the lawyers are highly experienced in carrying out those kinds of transactions:

Scenario 1: no PEP is involved, the transaction is neither complex nor suspicious

In this scenario, the following apply:
- no PEP, nor a 'close associate' nor 'close family' of a PEP is involved (ie, negative PEP screening);
- the transaction is plausible and the source of funds does not have to be checked;
- the customer or ultimate beneficiary has been identified and verified;
- ongoing monitoring of business relationships must be conducted; and
- every measure must be documented and sufficient in accordance with the established potential risk.

Scenario 2: no PEP is involved, the transaction is complex

Generally, this is the ame as scenario 1, but additionally:
- background and purpose of the transaction must be considered in accordance with the established potential risk and the ongoing monitoring of business relationships must be reasonable; and
- if necessary, the identity of further persons involved or ultimate beneficiaries must be established.

Scenario 3: PEP is involved

In this scenario:
- the customer is identified as a PEP or a 'close associate' or 'close family' of a PEP;
- a managing director of a law firm/a lawyer with the same power must approve of taking over the mandate;
- reasonable measures must be taken to check the source of funds;
- every measure must be documented and sufficient in accordance with the established potential risk;
- ongoing monitoring of business relationships must be conducted; and
- every measure must be documented and sufficient in accordance with the established potential risk.

At this point, it is important to underline once again that lawyers only have to screen the client they are representing if the transaction is neither complex nor suspicious; they are only representing one person involved; every other person involved is legally represented by another lawyer; and they are not acting as a trustee.

Transactions that are prone to money laundering (‘*geldwäschegeneigt*’) S8a Regulated Activities Order (RAO)

It is assumed that certain kinds of transactions carry a higher risk with regard to money laundering. Those transactions include:

- the carrying out of financial or real estate transactions on behalf of and for the account of the lawyer’s client; or
- the participation in the planning or carrying out of financial or real estate transactions for the lawyer’s client, if the transactions include:
  - the purchase or sale of real estate or companies;
  - the management of money, securities or other valuables;
  - the opening of bank, savings or securities accounts; or
  - the founding, operation or management of trusts, corporations, foundations or similar structures.

Hence, if ‘the case’ does not fulfil these prerequisites, the case is, in general, not prone to money laundering. In that case, the scenarios 1, 2 and 3 are not applicable and lawyers do not have to take the aforesaid extensive measures.

Lawyers must identify and verify their clients and the ‘beneficial owners’ with regard to transactions that are prone to money laundering:

- when starting a long term contractual relationship;
- if the contract value is at least €15,000;
- if the lawyer is certain or has a suspicion or legitimate reason to believe that the transaction is used for the purpose of money laundering or terrorist financing; or
- if the lawyer doubts the authenticity or the adequacy of the proof of identity provided.

It follows that if those conditions are not fulfilled, lawyers do not have to meet said identification and verification obligations and their obligation of professional secrecy and the duty of loyalty are not affected.

Lawyer or notary escrow accounts

Lawyer or notary escrow accounts usually hold a low risk for money laundering – that is why simplified due diligence procedures are applied to those transactions. If available information indicates that the risk connected to the transaction is not low, enhanced due diligence has to be applied.

Regardless of whether the transaction is prone to money laundering, lawyers must identify and verify their customer (ultimate owner) and report it to the bank every time they perform an escrow service through an escrow account. However, with regard to collective escrow accounts, lawyers are only obliged to identify the customer if the transaction is prone to money laundering.

Substantial amendments to the fourth Anti-Money Laundering Directive

The European Council, the European Parliament and the European Commission agreed on some substantial amendments to the fourth Anti-Money Laundering Directive in tripartite negotiations on the 15 December 2017.

The most important changes in the context of real estate transactions will be illustrated briefly in the following:

- authorities must have access to information on property owners – by the end of 2020, the European Commission will evaluate whether national information systems will be connected (Austria is complying);
- the equal treatment of European PEPs and third country PEPs will be continued in the application of enhanced due diligence in the context of customer identification (including the review of the source of funds and the ongoing monitoring);
- registers of beneficial owners of companies operating within the European Union will be made publicly accessible and national registers will be better interconnected to facilitate cooperation between Member States;
- registers of beneficial ownerships of trusts and similar structures will only be publicly accessible (where there is a legitimate interest); and
- information on national bank accounts and safe deposit boxes will be registered.

However, the discussed reduction of the threshold for the identification of the beneficial owner from 25 per cent to ten per cent has not been a component of the amendment.

Summary

The implementation of the fourth Anti-Money Laundering Directive has led to an increase in the obligations for lawyers all over Europe. In general, they are happy to contribute to the prevention of money laundering; nevertheless, there are some aspects of the directive they refuse to accept – the infiltration of fundamental rights is one of them.