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Guidance Notes

Due Diligence laws and processes in Liechtenstein

1. Introduction

In order to implement the 4th EU Anti-Money Laundering Directive (Directive (EU) 2015/849) the Due Diligence Law *(Sorgfaltspflichtgesetz or ''SPG'')* was most recently substantially amended by Law dated 4 May 2017. The changes, together with Due Diligence Ordinance *(Sorgfaltspflichtverordnung or ''SPV'')* dated 22 August 2017, came into force on 1 September 2017 (with transitional periods until 1 March and 1 June 2018 for certain aspects).

The SPG/SPV in their present format cover not only banks and financial institutions but attorneys, trustees and trust companies as well as representatives or members of the management of trust companies who are licensed under art.180a of the PGR; investment funds, insurance companies engaged in direct life insurance; branches of foreign stock companies; the Liechtenstein Postal service; and bureaux de change. Furthermore, the SPG also governs persons who do not fall within the above professional groups but who, nevertheless, acting in a professional capacity, accept or hold foreign assets or help to invest or transfer them (so-called ''para trustees'').

The declared aim of the SPG is to protect the reputation of Liechtenstein as a financial centre by combatting money-laundering and underlying offences, organised crime or financing of terrorism and to guarantee compliance with proper due diligence requirements for financial transactions.

The main due diligence duties provided for in the SPG comprise:

- the duty to identify the contractual partner (art. 6 SPG),
- the duty to ascertain the beneficial owner by means of risk-based and adequate measures (art.7 SPG); and
- the duty to establish a profile of the business relationship including information about source of wealth and purpose (art. 8 SPG).
- Risk-adequate monitoring of the business relationship (art. 9 SPG)

2. Identifying Contractual Partners

Professionals subject to the SPG have positively to identify their contractual partners (including name, nationality, date of birth and place of residence) who may be the same person as the beneficial owner. The identification can be carried out by way of personal meeting by viewing the contractual partner's original passport (and taking a copy) or by correspondence provided that a duly certified passport copy is obtained in original.

3. Identifying Beneficial Owners

Beneficial owners in terms of the SPG are natural persons on whose instruction or in whose interest a transaction, activity or a business relationship is ultimately established (art.2(e)).

The process of ascertaining the identity of the beneficial owner(s) must be documented and the correctness of the particulars given must be confirmed by the contractual partner in writing. The SPG prescribes the use of certain forms for this purposes (predominantly Form T, Form C and Form D as set out in Annexes I and II of the SPV).

In principle, companies, trusts, foundations or establishments do not qualify as beneficial owners but one must rather look through to any individual(s) who is/are the ultimate beneficial owner(s).

In the case of companies, one must identify all individuals who directly or indirectly hold or control more than 25% of the share or voting rights in or otherwise exercise control over the company. If this first leg of the determination of beneficial owner does not identify a beneficial owner, then one must look at the members of the executive body of the company. If the company is directly held by a natural person, the details of such person are provided on Form C. If, however, the company is owned by a trust, foundation or establishment structured similar to a foundation, then Form T must be used, which looks through to the beneficial owner of the trust, foundation or establishment.

For trusts, foundations and establishments structured similar to a foundation, beneficial owners include the effective settlor(s)/founder(s), natural or legal persons who are members of the board of the trust/foundation/establishment, protectors, beneficiaries or those in whose interest the trust/foundation/establishment was primarily established or generally those persons who are ultimately in a position to exercise control. The nature of beneficial ownership and the details of the beneficial owner are provided in Form T.

Similarly, as soon as a distribution is made to a beneficiary of a trust, foundation or establishment, such beneficiary must be identified as a beneficial owner on Form D.

The strict rules concerning the identification of individuals as beneficial owners, however, do not apply to associations and societies without legal personality pursuing charitable or non-commercial objectives pursuant to art.2(1)(b) of the SPG. For such unincoporated accociations only the individuals who are members of the executive body are to be recorded using Form C. Beneficial owners of entities listed on the stock exchange or condominium associations, co-ownership associations registered in the Land Register and other legal associations with a similar objective are exempt from the requirement to determine a beneficial owner.

4. Risk-based approach and Business Profile

Risk-adequate monitoring of the business relationship requires the categorisation of business relationships into different levels of risk with reference to the risk factors stipulated in appendices 1 and 2 of the SPG. The result of this risk-based approach is that enhanced due diligence must be performed for cases classified in the higher risk categories.

The duty to establish a profile of the business relationship requires the licensed fiduciary to obtain detailed information on origin of assets transferred, including the economic background of the contributor's total wealth, the occupation and business activity of the contributor 's and the purpose of the structure (art. 20 SPV). The level of detail must be proportionate to the risk categorisation.

Business profiles and the appropriateness of the monitoring approach must be reviewed on a regular basis.

4. AML provisions

The SPG provides (art.17) for special clarification to be undertaken if suspicious circumstances exist that indicate money- laundering or an underlying offence preceding it or if suspicious circumstances in relation to organised crime or terrorist financing arise or in the event of other unusual transactions. Some light has to be shed on the economic background, the purpose of the transaction has to be clarified and the source of funds has to be ascertained. Above all, clarification has to be undertaken where a transaction does not tally with the familiar economic background or customary business activities of the provider of assets or if other circumstances during the business relationship appear to be implausible, unviable or pointless.

If the suspicions cannot be allayed, the Financial Intelligence Unit has to be notified, which then decides whether further action is necessary. Contractual partners, beneficial owners and third parties may not be informed of such notification or possible investigations. In cases where there is an obligation to report under art.17, financial intermediaries must refrain from executing any transactions until they have filed the report although the FIU may suspend the execution of a transaction for a maximum of two days.

Persons subject to the SPG are explicitly exempted from all liability if they make an unjustified report to the FIU, provided that they have not acted deliberately, i.e. with intent to harm.

5. Documentation

The SPG contains stringent requirements to document business activities and to keep such documents safe. If the Liechtenstein party decides to terminate a business relationship he must carefully document what happens to the assets previously under his control.

6. Regulatory supervision

The Finacial Market Authourity (‘‘FMA’’) was established in 2005. The FMA is an independent, integrated financial market supervisory authority operating as an autonomous institution under public law. It reports exclusively to the Liechtenstein Parliament, and is thus independent of the Government and the financial market participants.

It is the controlling body in respect of compliance with due diligence requirements. The FMA itself or duly appointed audit firms on its behalf carry out regular audits of financial intermediaries’ due diligence files. Severe criminal and financial penalties can be imposed for failure to comply with the provisions of the SPG.

As a result of the revised SPG’s stronger risk-based approach, risk- based supervision now also extends to the professionals themselves. The FMA must draw up a risk profile for each professional person subject to the SPG. Among other things, this must be based on the risk of each professional’s business activities. These risk profiles are particularly important for the extent of audits that are carried out, which will be tailored according to the respective risk profiles. The information required to compile the risk profiles are obtained annually through a new electronic reporting system (for the first time from 2018) to which professionals must adhere.

7. Data Protection law

From 25 May 2018, the EU General Data Protection Regulation (‘‘*GDPR’’*) will be directly applicable in all EU and EEA Member States affecting all companies processing data of EU/EEA subjects as well as companies doing business in the EU/EEA. Liechtenstein’s Data Protection Act (*Datenschutzgesetz*) and Data Protection Ordinance (*Datenschutzverordnung*) will be revised to cater for the GDPR and the Liechtenstein Data Protection Supervision Authority will be tasked with ensuring that Liechtenstein companies are com- pliant with the law. In circumstances, however, where decisions for processing data are made in an associated company in another EU or EEA state, the authority of that state may be responsible.

The GDPR concerns only data of natural persons and requires a systematic and at least partially automated processing of personal data.

With the threat of sanctions up to EUR 20 million, the regulation requires professional service providers such as trust companies to obtain express consent and actively inform affected parties as to which data is processed, of the purposes for which they are processed, for how long the data is kept and of their rights under the GDPR.

Each company that processes personal data must appoint a data protection officer who acts as liaison between clients and supervisory authorities.

The new law requires the rolling out of a raft of new documentation and improving processes in order to adhere to the principles of data protection by design and data protection by default as explained in art. 25 of the GDPR.