Deutsches Aktieninstitut

Prospective EU-Framework on preventing Money laundering and Terrorism financing

EU-regulation yes, but only where absolutely necessary

Comments of Deutsches Aktieninstitut on the EU action plan for a comprehensive Union policy on preventing money laundering and terrorism financing, 26. August 2020

Introduction

Deutsches Aktieninstitut represents non-financial companies and follows national and European legislation on the prevention of money laundering and terrorism financing with a focus on traders in goods. Our comments below on the EU action plan reflect the views of numerous heads of compliance/senior legal counsels of multinational non-financial companies being member in our working committees.

1 General Remarks

➢ Targeted improvement of current EU anti-money laundering framework welcomed

It can be observed that currently within the EU, a patchwork of different anti-money laundering rules exists - especially for non-financial companies. This makes it difficult for non-financial companies operating in several European countries or their European subsidiaries to establish a group-wide, uniform concept of money laundering prevention. Having to follow different rules in each member state is burdensome, often legally uncertain and last also counter-productive for effective money laundering prevention.

To remedy the current situation, we recommend that EU and Member States enhance their efforts to better coordinate their respective rules and supervisory practices. In this context, they should also agree on common focus points of combatting money laundering in the non-financial sector.

In addition, the adoption of an EU-regulation can help improving the current situation. It should however be avoided that new bureaucratic burdens are being created. The EU-regulation should therefore pursue a targeted approach and only cover areas that are crucial for the combat of money laundering. More details can be found below.

➢ Current patchwork of rules not only results from insufficient transposition of EU-directives, but also from «gold plating» transposition

We call on the EU-Commission not to take the German transposition as a blueprint for new legislative proposals the EU-Commission envisages to publish.

It can be seen that the above mentioned difficulties not only arise because of a lack of transposition of EU directives, but also because of transposition efforts that went far beyond of what was required by the EU directives, thereby „gold plating" the EU requirements.

To name an example, the transposition of the 5th anti-money laundering directive into German national law led to legal uncertainties and considerable additional bureaucratic burdens for German companies compared to competitors in the EU and beyond. The new rules even run in parts counter the objective of sound and effective money laundering prevention stipulated in the EU directive.

- An example of this is the inclusion of all goods traders in the group of obliged entities, so that they have to comply with at least part of the provisions of the German implementation act, while for goods traders in other EU countries this is not the case.

- The transposition of the 5th anti-money laundering directive into German national law limits the permission to exchange information on suspicions of money laundering within the group to a limited number of obliged entities, primarily of the financial sector, see article 47 Paragraph 2 of the "Gesetz zur Umsetzung der Änderungsrichtlinie zur Vierten EU-Geldwäscherichtlinie". Such information exchange is however imperative to ensure that suspected cases do not remain undetected and that criminals won`t be able to seek advantage of a lack of information exchange within the group to try to launder money elsewhere in the group. The present information exchange practice constitutes a crucial pillar of anti-money laundering prevention for the non-financial sector.

2 Scope of application (with a focus on non-financial companies)

➢ Focus on actors of risk sensitive business activities

- A clear focus should be placed on risk sensitive business activities (e.g. cash transactions above the thresholds, luxury goods, gambling, real estate, etc.). There is no need to oblige entities in non risk sensitive areas who perform non-cash activities or activities below the respective cash thresholds. Otherwise, new bureaucratic box ticking requirements would be created without benifit for the fight against money laundering.

- When defining risk sensitive business activities, it should be ensured that they are clearly defined and existing categories in EU law should be used wherever possible.

- The obligations under the new rules should be confined to the risk sensitive business activity of a given company and not go beyond. Other parts of the companies with non risk sensitive activities should thus not be affected, i.e. not fall under the scope of the EU rules.

➢ Thresholds for traders in goods

Following the various EU-directives on combatting money laundering as well as the requirements of the FATF, non-financial companies trading in goods should only be deemed as obliged entities if they undertake cash transactions of 10 000 € or 2000 € in the case of trading precious metals.

➢ Transparency register: Beneficial owner should be required to reveal its situation

In our opinion, the transparency register follows a flawed approach:

- It does not resort to existing registries and hence leads to duplicative reporting for obliged entities.

- Secondly, it does not oblige the beneficial owner to reveal its situation, but the entity from which he derives his beneficial ownership position. The latter one does often not have the necessary data on the beneficial owner`s status/situation.

In order to obtain full transparency, the beneficial owner (also foreign ones) should be obliged to reveal its data.

- Streamline KYC (Know Your Customer) requirements

The obligation to perform a KYC check has become a burdensome bureaucratic excersise (especially in an international context) that even at times hinders conducting business properly. Requirements should be streamlined and harmonised.
It should in particular be discussed to allow individuals and companies to register at a centralized plattform with the required KYC data. Obliged entities would thereby be put in the position to not having to repeat the excercise multiple times.

- Inhouse-consultants should not fall under the scope of the EU Rules

A new legislative act should clearly state that inhouse-consultants (e.g. inhouse lawyers; inhouse tax advisors; inhouse patent attorneys) are not included in the list of obliged persons. They do have the contractual obligation to support the activities of their employers (obliged entities) to prevent money laundering. They however should not have to follow own risk management-, identification-, reporting duties.

3 Sanctions

As stated above, Deutsches Aktieninstitut strongly supports a risk based approach in fighting money laundering. In this context, trust in business internal risk assessments is key, for which it is important that regulators grant companies discretion. Companies will need to set priorities according to their company specific risk profile.

At the same time, it needs to be acknowledged that it will never be possible to always avert or detect each and every criminal activity. Companies have been entrusted by the state with public duties to prevent and pursue criminal activities, but they certainly also have their limits in terms of resources. Obliged entities therefore need certainly that not every minor error leads to sanctions against the company or the individual entrusted with corporate compliance duties. They should not become the “skapegoat” in cases the criminal perpetrator escapes public authorities.

4 Supervision

We are against the idea of a centralized EU anti-money laundering supervision when it comes to supervising the non-financial sector. We strongly believe that the current system of national competent authorities has ensured that national specificities and markets have been properly reflected on a local supervisory level. We doubt that a centralized EU supervision would be able to swiftly and effectively supervise e.g. the heterogeneous area of good traders.

For the same reasons we are opposing the creation of an EU-FIU. However, we are in favor of the EU supporting national FIUs in terms of coordination and information exchange.

5 Principles that should be taken into consideration for a prospective EU regulation

In our opinion, harmonization via an EU-regulation will only be successful, if the following general principles are followed:

- Quality of legal drafting

New requirements need to be legally certain for those being obliged, with an understandable system and precise definitions in order to avoid uncertainties and costs when evaluating the scope of duties.

- Limited margin of discretion/interpretation

A future EU-regulation should refrain to include high-level general principles, which do not present a sufficiently concrete basis to implement new rules within a non-financial company and can lead to ambiguity.

- Uniform interpretation and application of EU-rules

Beyond the adoption of a new EU-regulation, the uniform interpretation and application of said EU-legislation needs to be ensured. Otherwise, an EU-regulation will not serve its purpose when interpreted and applied differently in each member state.

Contact

Maximilian Lück, LL.M.
Head of EU Liaison Office
Deutsches Aktieninstitut e.V.
Rue Marie de Bourgogne 58
1000 Bruxelles
Phone +32 2 7894101
Fax +32 2 7894109
lueck@dai.de

Dr. Norbert Kuhn
Head of Corporate Finance
Deutsches Aktieninstitut e.V.
Senckenberganlage 28
60325 Frankfurt am Main
Phone + 49 69 92915-20
Fax + 49 69 92915-12
kuhn@dai.de
www.dai.de