Deutsches Aktieninstitut

No opt-in for Member States as regards to traders in goods

Position of Deutsches Aktieninstitut on the new EU Anti-money laundering framework, 13 December 2021

Introduction

Deutsches Aktieninstitut appreciates the opportunity to comment on the new EU anti-money laundering framework. We represent large German non-financial companies, more specifically traders in goods, whose perspective is taken in the response below.

Money laundering remains a global issue which requires regulatory measures and company actions alike to be reduced. The new EU anti-money-laundering framework includes numerous positive aspects to combat money laundering. At the same time, we ask for a more differentiated approach: Since the risk of money laundering varies tremendously between sectors, the requirements should mirror the different risk exposures accordingly. We also stress the importance for legal certainty as to the exact rules obliged entities have to follow.

1 Remarks on the proposal for a regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, COM(2021) 420 final (AMLR)

1.1 Definitions

1.1.1 Linked transactions

Art. 2 par. 17 determines what constitutes „linked transactions” according to the Regulation. Unfortunately it lacks a definition on what constitutes a „transaction” as such. This should be added to establish a common and uniform understanding of the term „transaction”.

1.1.2 Beneficial owner

The definition of „beneficial owner” in Art 2 para. 22 also comprises any natural person, on whose behalf or for the benefit of whom a transaction or activity is being conducted.

Taking the definition literally, also persons who are clearly not targeted by anti-money laundering legislation, would suddenly be deemed as beneficial owners (eg employees, who receive a salary for their work (transaction of the employer)).

We thus suggest to limit the scope of said definition to only cover persons relevant to anti-money laundering prevention. Inspiration could be drawn from other legal areas, eg the IAS Regulation.

1.2 Scope – obliged entities

1.2.1 Traders in goods:

Deutsches Aktieninstitut welcomes the removal of traders in goods from the scope of the EU AML framework. The proposed limits to large cash payments (Art. 59 EU AMLR) sufficiently mitigate the money laundering risks relating to traders in goods. It also reflects common practice of large companies: They regularly exclude on a group-wide basis payments or the acceptance of payments above 10 000 €.

We thus do not see the necessity to enable Member States to nevertheless apply the requirements of the Regulation to additional entities (Art. 3 AMLD): as stated above, the risks pertaining to traders in goods are sufficiently managed via the limit on cash payments. Moreover, leaving Member States the possibility to include

traders in goods would lead to fragmentation of anti-money laundering requirements in Europe. This would be particularly burdensome and confusing for groups of companies, which would have to apply divergent anti-money laundering rules across Europe. It would contradict the aim of the Regulation to enact one single framework in Europe to enhance efficiency in preventing money laundering. We thus suggest Art. 3 para. 1 AMLD to be removed.

Even more problematic is Art. 3 para 7 AMLD: The requirements of the Regulation may be applied to traders in goods, where Member States have already applied national provisions transposing Directive (EU) 2015/849 to traders in goods before.

First of all, we do not deem it proportionate to allow Member States to apply the requirements of the Regulation to traders in goods, where no risk assessment has been conducted if the inclusion is warranted. Secondly, the general application of all the requirements of the Regulation to traders in goods disregards the regulatory specificities Members States foresaw when transposing Directive (EU) 2015/849. Traders in goods are obliged entities in some Member States, but usually do not have to comply with exactly the same rules as other obliged entities, e.g. financial entities. National lawmakers differentiate according to exposure, which would be discarded if traders in goods had to comply with all the requirements of the Regulation. We thus strongly suggest to remove Art. 3 para 7 AMLD.

In addition to the removal of Art. Art. 3 para. 1 and para.7 AMLD, the directive should be amended by a prohibition for Member States to apply national/EU anti-money laundering requirements to entities that are not within the scope of obliged entities according to Art. 3 AMLR. Otherwise, regulatory requirements will differ from Member State to Member State, which leads to fragmentation and a lack of efficiency of money laundering prevention in Europe. The current situation would only be perpetuated. For instance, Germany „gold plated“ for years EU anti-money laundering directives to the detriment of traders in goods with a multinational presence. Traders in goods operating in several Member Sates were deprived from establishing uniform and coherent anti-money laundering compliance functions at group level. The additional German requirements even run counter the objectives of the European anti-money laundering directives: They for instance prohibit traders in goods to share information within the group for AML/CFT purposes (tipping off prohibition), which is counterproductive.

In case the removal of Art. Art. 3 para. 1 and para.7 AMLD does not find a political majority in the legislative process, we at least ask to reduce the scope of Art. 3 para. 7 AMLD. Where Member States have differentiated in their existing legislation between the requirements for traders in goods and those applicable to entities with higher risk exposure (eg financial institutions, real estate), the (lighter) existing national requirements should apply to traders in goods as opposed to the full spectrum of requirements of the EU regulation. Otherwise, traders in goods

would be treated as eg financial institutions, which is clearly not justified from an anti-money laundering risk perspective.

1.2.2 Dealers in precious metals and stones

According to Art 3 Para 3 e) AMLR, dealers in precious metals and stones are obliged entities. However, Art 2 does not define the terms „precious metals and stones". Clarification is therefore needed. We ask for an exhaustive list against the background of numerous existing (and often diverging) definitions.

The definition should only encompass precious metals/stones that are relevant for the combat against money laundering. Scrap metal should hence be excluded, even if it can be valuable. But the risk profile between a jeweler and a scrap metal trader are obviously not the same. It is also important to distinguish precious metals from mere alloy. Brass should for instance be considered alloy, whilst gold is clearly a precious metal.

1.2.3 Legal professionals

Art. 3 para 3 b) considers independent legal professionals as obliged entities, provided they carry out certain transactions. Since said legal professionals need to be independent, we trust that in-house lawyers do not fall under the scope. They are employees and thus under the supervision of the company executives. Further, in-house lawyers principally have only one client, meaning the employer and – if the employer is a larger company with affiliated companies – also the affiliated companies might be potential clients. In the absence of external third party clients, in-house lawyers are not persons which could contribute to minimizing money laundering and terrorism financing as attorneys-at-law and public notaries can do.

We believe this to be the right approach and encourage the EU legislator to stick to this assessment: If in-house lawyers were to be considered obliged entities, numerous labour law issues would arise, where those lawyers would be torn between the contractual fiduciary duty towards their employer on the one hand and on the other hand their duty to comply with anti-money laundering requirements. This conflict is particularly problematic when the employer is not an obliged entity.

1.3 Internal policies, controls and procedures

1.3.1 Compliance functions:

Art 9. Para 1 AMLR foresees that obliged entities shall appoint one executive member of their board of directors or, if there is no board, of its equivalent governing body who shall be responsible for the implementation of measures to ensure compliance with this Regulation ('compliance manager'). In addition, para 3

requires obliged entities to have a compliance officer, to be appointed by the board of directors or governing body, who shall be in charge of the day-to-day operation of the obliged entity's anti-money laundering and countering the financing of terrorism (AML/CFT) policies.

In our opinion, none of the above mentioned requirements are proportionate. Following the risk based approach of the Regulation (see Art 16 AMLR), obliged entities should only be required to appoint a compliance manager or compliance officer, if exposure to money laundering risks justifies such appointments. Companies that are not facing high money laundering risks should not be as a rule be obliged to those measures. A more gradual, risk based approach should be pursued.

1.3.2 Tipping-Off

Art. 13 AMLR allows obliged entities within the group to exchange information when such sharing is relevant for preventing money laundering and terrorist financing.

The sharing of information within the group shall cover in particular the identity and characteristics of the customer, its beneficial owners or the person on behalf of whom the customer acts, the nature and purpose of the business relationship and the suspicions that funds are the proceeds of criminal activity or are related to terrorist financing reported to FIU pursuant to Article 50, unless otherwise instructed by the FIU (Art. 13 para 2).

We very much welcome the EU Commission`s stance on the sharing of information within a group of companies. It is the only way to effectively prevent money laundering in a group with numerous legal entities. Otherwise, early warning systems could not be used, which would be to the detriment for the fight against money laundering.

1.3.3 Branches and subsidiaries in third countries

According to Art. 14 para 1 AMLR, where branches or subsidiaries of obliged entities are located in third countries where the minimum AML/CFT requirements are less strict than those set out in this Regulation, the obliged entity concerned shall ensure that those branches or subsidiaries comply with the requirements laid down in this Regulation, including requirements concerning data protection, or equivalent.

In our opinion, with this requirement the EU legislator oversteps its territorial competence. The obligation has extra-territorial effect and over-burdens obliged entities. If the EU legislator deems anti-money laundering rules in a given country as insufficient, it is up to the EU legislator to engage with the third country on international fora (FATF) for it to change its rulebook. To impose on EU companies

to indirectly remedy issues in third countries is not proportionate. It also over-estimates the powers EU companies can exert in third countries.

In addition, we do not agree with the provision in Art. 14 para 2, which states: *„Where the law of a third country does not permit compliance with the requirements laid down in this Regulation, obliged entities shall take additional measures to ensure that branches and subsidiaries in that third country effectively handle the risk of money laundering or terrorist financing, and the head office shall inform the supervisors of their home Member State. Where the supervisors of the home Member State consider that the additional measures are not sufficient, they shall exercise additional supervisory actions, including requiring the group not to establish any business relationship, to terminate existing ones or not to undertake transactions, or to close down its operations in the third country..."*

In our opinion the competencies conferred to the authorities are disproportionate. They constitute disproportionate interference with entrepreneurial freedom and property rights, especially with regard to the closure of operations. We believe that such a drastic measure cannot be justified by the mere risk of money laundering. The entrepreneurial discretion should give sufficient reliable leeway to assess the situation and take necessary steps to prevent money laundering.

In addition, it contradicts the principle of risk-oriented procedures taken by companies. How can the supervisory authorities be in a position to better assess the situation/risks than the company in question?

Also, the draft regulation unfortunately does not foresee legal provisions/remedies safeguarding the rights of companies against the mentioned supervisory actions.

Last, a less restrictive but equally effective measure would be to prohibit to carry out transactions that do not foresee sufficient preventive measures in conjunction with a threat of punishment in case of non-compliance with the prohibition.

1.4 Customer due diligence

We call for caution as to the granularity of technical standards to be developed by the AMLA (Art. 16 para 4 AMLR). Obliged entities should be left discretion as to their customer due diligence measures. This pertains in particular to technical monitoring. Obliged companies need flexibility on their approach and their monitor providers.

1.5 Detailed data

Art. 18 para 1 and 2 AMLR asks for a lot of detailed data for identification and verification of the customer’s identity (profession and the employment status of a

customer as well as the tax identification number and the legal entity identifier). We believe it to be sufficient for the obliged entity to check on the personal data based on an identity card or passport or a trade register excerpt. Additional requirements should only be warranted where higher risks are being identified. We therefore call on to legislators to take a risk-sensitive approach and to widen reporting requirements only for high-risk operations. Otherwise, the administrative burden to collect this information largely exceeds any potential benefits of disposing of this data. It also could potentially pose unnecessary risks for the customer`s safety, if his/her address are to be revealed. Even though the information is not going to be made public, there is always a risk of information leak. This risk should not be taken, especially against the background that the information provided by the identity card already serves as a sufficient means to identify and verify a customer`s identity.

Last, we do not understand Art. 18 para 1) b (iii): Obliged entities shall also verify that the legal entity has activities on the basis of accounting documents for the latest financial year or other relevant information. However, it is legal not to entertain activities. Eg, the mere administration of assets constitutes a legitimate business purpose. We thus suggest to strike the provision.

1.6 Beneficial Ownership

1.6.1 Exemption for companies listed on a regulated market

We support the EU legislator that the provisions of Chapter IV shall not apply to companies listed on a regulated market that is subject to disclosure requirements consistent with Union legislation or subject to equivalent international standards (Art 42 para 5 AMLR). In our understanding, this also includes Art. 45 AMLR.

The transparency requirements of EU capital markets regulation ensure that the composition and owners of the legal entity is revealed to a sufficient degree.

1.6.2 Control through an ownership interest

According to Art 42 para 1[1], ‘control through an ownership interest’ shall mean an ownership of 25 % plus one of the shares or voting rights or other ownership

[1] Brief remark on the German translation of Art. 42 para 1. It mentions „Bei Gesellschaften ist/sind wirtschaftliche(r) Eigentümer im Sinne von Artikel 2 Nummer 22 **die juristische(n) Person(en)**, die die Gesellschaft entweder über eine Beteiligung oder anderweitig direkt oder indirekt kontrolliert/kontrollieren.“ The translation needs however be **„natürliche Person“**- as it is in the English version: „In case of corporate entities, the beneficial owner(s) as defined in Article 2(22) shall be the **natural person**(s) who control(s), directly or indirectly, the corporate entity, either through an ownership interest or through control via other means.”

interest in the corporate entity, including through bearer shareholdings, on every level of ownership".

Depending on the reading of the provision, the requirement could mean that in a chain of shareholdership holdings, a natural person being a shareholder of a parent company needs to hold 25 % plus one of the shares or voting rights or other ownership interest on every level of the group of companies down the chain to be considered beneficial owner of eg a second or third tier subsidiary. This approach drops the existing requirement of actual control in a second or third tier subsidiary. It seems to be counterintuitive and too far stretched to recognize a person as being a beneficial owner if he/she does not have any actual influence on the executive management of a second or third tier subsidiary.

1.6.3 Requirements for senior management officials

Art. 45 para. 3 requires the same set of information for senior management officials of legal entities as for actual ultimate beneficial owners. We believe however that the all encompassing information requirements in Art. 44 para 1 a) do not have to be applied to senior management officials of legal entities that have executive powers. Information requirements on the latter ones should be confined to surname, first name, date of birth, place of birth and city of residence (not address). Any further information requirements would lead to unnecessary bureaucratic burden as the appointment of senior management officials is being registered in the respective commercial register. The registration includes sufficient comprehensive personal details, which is without problem accessible for the anti-money laundering authorities. Senior management officials can furthermore easily be reached at the companies headquarters.

1.7 Bearer shares

According to Art. 58 AMLR para 3, companies shall be prohibited from issuing bearer shares, and shall convert all existing bearer shares into registered shares by [2 years after the date of application of this Regulation]. However, companies with securities listed on a regulated market or whose shares are issued as intermediate securities shall be permitted to maintain bearer shares. Companies shall be prohibited from issuing bearer share warrants that are not in intermediate form.

Deutsches Aktieninstitut does not deem it appropriate to prohibit the issuance of new physical bearer shares. This especially not, if those bearer shares are issued by a company listed on a regulated market. We thus support the exemption mentioned above. Listed companies that issue bearer shares do not pose any specific elevated risk for money laundering activities. Those companies are submitted to rigid capital markets transparency/disclosure requirements that ensure adequate ownership information. For instance, in the realm of the

European Union, the Markets in Financial Instruments Directive (MiFID II), the Markets in Financial Instruments Regulation (MiFIR) and the Transparency Directive ensure that transparent information on the ownership structure is being provided on a constant basis. This most importantly via setting shareholding/voting rights thresholds that trigger notification obligations.

Against this background we also propose to clarify that the exemption for companies listed on a regulated market includes the issuance of new bearer shares. Otherwise, companies would have to shift to nominee shares for new issuance and would be compelled to establish a share registry.

Even if they are issued by a company that is not listed on a regulated market, we do not see the need of a prohibition. The same holds to true for the suggestion to immobilise or convert existing physical bearer shares.

We ask to reconsider especially the appropriateness of those measures for bearer shares of non-listed companies, if those shares are maintained in a collective securities account that is being held by a depository bank. Those bearer shares and its beneficial owner can be traced, if the shares are maintained in a collective securities account that is being held by a depository bank.

In particular Regulation (EU) No 909/2014[2] includes extensive requirements on so called central securities depositories (CSDs) that ensure traceabilty. Germany allows the issuance of bearer shares specifically with reference to this European Regulation under the condition that those bearer shares are being deposited at a CSD fulfilling the requirements of said regulation.

In addition, German law requires depository banks to submit information on the ultimate beneficial owner to tax authorities. This information is viable information under the anti-money laundering perspective and should hence be used in this context by the competent authorities.

The EU Commission should also consider cross-sectoral ramifications of the suggested measures. They would make the issuance of bearer shares less attractive for listed companies. Bearer shares are however classes of shares that are commonly used across various jurisdictions as they offer features that can benefit both issuers and shareholders. Before taking any steps, the impact of the suggested measures on the capital markets ecosystem should be assessed and more proportionate measures be envisaged.

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[2] Regulation (EU) No 909/2014 of 23 July 2014 on improving securities settlement in the European Union and on central securities deposito-ries and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0909 See Art. 10 para. 1 Nr. 2 Aktieningesetz (German stock corporation act).

2 Anti-money laundering authority[3] and non-financial sector

The regulation contains provisions (see Art. 32) that enable the AMLA to issue instructions to the national supervisory authorities as regards to the supervision of the non-financial sector.

Art. 32 foresees that the AMLA should be authorized to review the supervisory activities of a supervisory authority in the non-financial sector for compliance with legal requirements and the existence of possible deficiencies. If the AMLA detects violations of legal requirements or deficiencies, it is entitled to provide the supervisory authority with direct instructions to remedy the violations or deficiencies.

We are very concerned as to the conferral of said powers to the AMLA. It goes against procedural EU law enshrined in the EU treaties: violation of EU law (here: national supervisory authority fails to act in spite of EU obligation to do so) is usually sanctioned by infringement procedures (Art. 258 ff. TFEU). As the AMLA is empowered to impose direct requirements on the national supervisory authorities when they fail to act according to EU law, the provisions of Art. 258 ff. TFEU are practically circumvented.

In addition, there is a risk that the AMLA, contrary to the proposed outset (direct supervision only of certain obliged entities in the financial sector), will take over direct supervision of obliged entities in the non-financial sector via the competence to issue instructions to the national supervisory authorities. Against the background that the non-financial sector has a large number of different obligated entities, the AMLA should only take on a coordinating and advisory function in the non-financial sector. We therefore urgently suggest a revision of Article 32.

[3] REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010.

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