Bulletin

Allgemeines Treuunternehmen
No. 9 - December 2002

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The financial transaction as the legal object of the Liechtenstein law on due diligence and related matters

Anyone who enquires into the scope of application of Liechtenstein Law on Due Diligence will find two possible approaches to answer this question. Firstly, Art. 2 para. 1 of the Law on Due Diligence (SPG) lists the legal subjects which are directly governed by its provisions. Pursuant to Art. 2, para. 1, letter c SPG, these include trustees. This direct subordination to the law requires the legal subjects concerned at the very least to comply with the organizational, training and reporting obligations set out in the law and ordinance. Compliance with other obligations, namely those of identification, supervision, clarification and documentation, depends on the actual performance of financial transactions within the meaning of the Law on Due Diligence.

Indirect subordination to the provisions of the law and ordinance is the second approach which, pursuant to Art. 2, para. 2 SPG, covers professional activities connected with financial transactions: «Similarly, this law applies to persons who do not fall within the scope of para. 1 but accept third party assets by way of their professional activity or keep them in safe custody or help to invest or transfer them». Here the approach is based on the legal object of the Liechtenstein Law on Due Diligence, namely financial transactions. This indirect subordination is less clearly regulated. There is a need for interpretation because the concept of the «financial transaction» according to Art. 1, para. 1 of the ordinance on the duty to exercise due diligence (SPV) is couched in very broad terms: «A financial transaction within the meaning of Art. 1 of the law is any acceptance or safe custody by way of professional activity of third party assets and assistance with the acceptance, investment or transfer of such assets and activities as an official body of a legal entity which performs no business consisting of trade, manufacturing or any other commercial activity in the state of domicile».

The obligation to supervise business relations, which, until the end of 2001, was only regulated in very general terms in Art. 6 SPV was made more precisely binding and extended by Direc-

tive 2002/1 issued by the Office for Compliance with Due Diligence Requirements (SSP). In addition to the introduction of risk categories to determine the degree of intensity of supervision, the scope of the obligation to seek clarification is also explained. In this connection, the obtaining of bank account statements for supervision in compliance with the directive appears to be obligatory and is also explicitly required by the February 2002/1 Newsletter, p. 5 of SSP.

The trustee who, by reason of his direct subordination, must, as we have seen, comply with certain specific obligations regardless of his actual activity, has an interest in being able to establish a demarcation between activities and business relations which the law and ordinance require to be supervised and those which do not have to be so supervised, in order to optimise his own expenditure. This is where the second approach comes in to play as the trustee has no obligation to exercise due diligence within the meaning of SPG and SPV for business relations which do not constitute financial transactions and may therefore dispense with the identification procedure, the notification and critical scrutiny of bank documents and the compilation of due diligence documentation.

Art. 7, para. 1 of the Law on Trustees (TrHG) clarifies the many different professional activities, which a trustee may pursue on the basis of his licence. By no means all of them must be defined as financial transactions. Neither when he gives investment advice nor when he sets up legal entities – without performing the financial transactions necessary for their incorporation – does the trustee dispose of third party assets. His activity in this regard cannot be defined as assistance with the performance of a financial transaction. Still less is his activity as a legal advisor, tax consultant or economic advisor to be regarded as a financial transaction. Nor is bookkeeping as such a financial transaction if the bookkeeper cannot dispose of assets. The mere fact of forwarding mail is likewise not a financial transaction within the meaning of the law on the exercise of due diligence.

The exclusive action as a representative pursuant to Art. 239 ff of the Law concerning Persons and Companies (PGR) likewise does not, in the author's view, constitute a financial transaction within the meaning of the law on the due diligence as there is no authority to dispose of third party assets.

The reference to the concept of an official body of the legal entity is an interesting aspect. Certainly the position of the Liechtenstein financial intermediary as an official body always requires the exercise of due diligence at the company concerned, but it is questionable whether the operation of foreign subsidiary companies controlled by parent companies comes under the same heading if the Liechtenstein financial intermediary only has an official status in the parent company. In this regard, the Office for Compliance with Due Diligence Requirements (SSP) calls attention to the Swiss practice and wants to see the legal concept of a «de facto body» also applied in Liechtenstein. This means that an identification, supervision, clarification and documentation obligation arises for the Liechtenstein financial intermediary if his activity corresponds in fact to that of an official body, e.g. if he can give instructions on his own initiative. Here the SSP clearly bases its position on the actual exercise of the authority to grant instructions; the mere possibility of giving instructions does not trigger any obligation to exercise due diligence pursuant to SPG and SPV. On the other hand, if the Liechtenstein financial intermediary, as is altogether possible in the case of some legal entities, only passes instructions to the foreign subsidiary companies on the instructions of his contractual partner, this too does not trigger any obligation to exercise due diligence.

The existence of a de facto official body will not be easy to determine. In the interests of maintaining the attraction of Liechtenstein as a site for holding companies, a practice will have to develop which is guided by clearly verifiable criteria but nevertheless offers sufficient flexibility for internationally competitive services.

For further information, the reader should consult the new brochure listed in the attached «Specialized Bibliography» entitled «Rechtssubjekte und Rechtsobjekte im liechtensteinischen Sorgfaltspflichtrecht» (Legal subjects and legal objects in the Liechtenstein law on due diligence); this brochure is only available in German.

Transferring the registered office of a Liechtenstein company abroad

When he first sets up, every entrepreneur must decide what is the most appropriate legal form and place for the pursuit of his business. Political, fiscal, economic and social policy factors, in particular, play a special role. The geographical choice made initially may be reviewed when substantial criteria change and create a site advantage or disadvantage, so that the domicile of the company must be reviewed.

The Liechtenstein legislator has made provision in commercial law for the transfer of a registered office to Liechtenstein or from Liechtenstein to another country without liquidation.

The statutory provisions on the transfer of a registered office abroad place emphasis on the protection of creditors. This protection goes so far that no liabilities to third parties may exist at the time when the registered office is transferred. In practice, the outcome is that the transfer of a registered office greatly resembles the liquidation of a company. From the tax angle, the transfer of a registered office abroad is assimilated with liquidation so that accounts must be drawn up to settle the reserves of the company with the tax administration. In the case of a company limited by shares (AG), a withholding tax is levied on the taxable reserves at the rate of 4 % (coupon tax) when the registered office is transferred abroad.

Many corporate entities in the Principality of Liechtenstein are set up in the form of an Anstalt (establishment). The Anstalt under Liechtenstein law is a legal form which does not have any equivalent in most legal orders anywhere else in the world. For this reason when the registered office is transferred elsewhere, the conversion of the Anstalt into a different legal form, generally that of a company limited by shares, will be essential. The same applies to the trust enterprise (Trust reg.) in so far as it is organised as a trust enterprise with its own legal personality.

The procedure to transfer the registered office begins with an appropriate decision by the supreme body of the company concerned. In addition, a statement of accounts and a profit and loss account will be drawn up to determine the assets and liabilities and the tax payable. Where there are third party creditors, their written consent to the transfer of the registered office must be obtained. The actual procedure to transfer the registered office generally takes three to four weeks. The company is not struck off the register in Liechtenstein until the entry has been made at the new place where the registered office is situated. The procedure for registration at the new place will be guided by the particular local requirements, which may differ very widely from country to country. As a rule, in addition to the approval by the Liechtenstein authorities, evidence of the legal existence of the company (commercial register extract) will be required. For this purpose, an up-to-date balance sheet and profit and loss account must generally be presented. An amendment to the articles of incorporation is often also necessary before the registration is made at the place to which the company has been transferred.

When the administrative expenditure involved in the transfer of a registered office is considered, the question arises as to whether a liquidation and new incorporation at the new place of business would not be the better solution. However, the transfer of the registered office is facilitated by the fact that the liquidation period of six months required in the event of the liquidation of a company does not apply. Depending on whether a conversion of the corporate body into a new legal form is required before the registered office is transferred, and also as a function of the nature, extent and scope of the documents required for the registration of the company at the new place of business, the time needed to transfer a registered office may run into several months.

For further information, the reader should consult the new brochure listed in the attached «Specialized Bibliography» entitled «Die liquidationslose Sitzverlegung einer liechtensteinischen Verbandsperson ins Ausland» (Transferring the registered office of a Liechtenstein corporate entity abroad without liquidation); this brochure is only available in German.

Money Laundering Directive of the European Union [1] (EU-MLD)

At the end of 2001, the EU approved the new EU «MLD» which is due to enter into force on 15 June 2003. The Member States are required to transpose this directive into their domestic legislation by that date. This new directive goes much further than the existing text, which previously referred only to the proceeds of drug offences. In particular, the new directive also extends the notion of laundering to the proceeds of serious criminal acts, including fraud against the European Union budget. The scope of the new EU MLD is extended to a larger number of professions and activities, such as external accountants and auditors, estate agents, tax consultants, notaries, attorneys-at-law, art dealers, auctioneers, companies which transport funds and casinos. The members of these professions must therefore ascertain the identity of their customers, keep supporting documents and report suspect transactions.

The Liechtenstein banks and trustees should view this new directive in a positive light because it raises the provisions applicable in the EU to the Liechtenstein level (a good example is the inadequate regulation concerning the incorporation of the English companies without appropriate documentation). The new provision will be of particular importance for the identification of the entire customer relationship, if the customer to be identified acts as a trustee. It is an acknowledged fact that the activity of trustees is nowhere so comprehensively regulated, in terms of the obligation to exercise due diligence, as it is in Liechtenstein or Switzerland.

Holding shares in listed French companies

A new law adopted in France (Art. 119 NRE Law of 15 May 2001 and Art. 59 of Decree No. 2002-803 of 3 May 2002) requires all financial intermediaries, for instance banks in Switzerland and Liechtenstein, to inform the French company or securities manager in France (e.g. a bank in France at which a securities deposit is held) that they are holding shares for the account of third parties.

This refers to both bearer and registered shares in French companies which are listed on a stock market in France (admis aux négociations sur un marché réglementé).

The statutory provisions allow the French company to seek information from the registration agency provided for by law (be this the own share register or the deposit manager/payment agency for listed [bearer] shares) about the persons for whom the foreign financial intermediary holds the shares and the number of shares involved. However, this applies only if the French company has a clause embodying this requirement in its article of incorporation.

In so far as the shareholder named by the foreign financial intermediary is a legal entity and holds over 2.5 % of the capital or voting rights in the listed French company, the French company may require disclosure of the names of the persons who either directly or indirectly hold more than one-third of its capital or voting rights (i.e. the shareholders of this legal entity must be named).

[1]) Directive 2001/97/EC of the European Parliament and Council of 4 December 2001 amending Directive 91/308 EEC of the Council on the prevention of use of the financial system for the purpose of money laundering.

If the request for disclosure is not satisfied, the voting rights in the shares concerned will not be recognized in the French company and dividend payments will be suspended.

These new rules, which resemble the US «QI Provisions», may under certain circumstances infringe banking secrecy in Switzerland and Liechtenstein.

Professional secrecy in Liechtenstein trust activities

Bulletin No. 2 of December 1998 stated in Point 5 entitled «Preservation of Professional Secrecy in Court Cases» that attorneys-at-law, auditors and patent attorneys, as the bearers of professional secrets, are exempt from the requirement to make a witness statement on facts which have been disclosed to them by their principals in the exercise of their professional activity. No distinction was made here as to whether the professional activity included the actual forensic activity of attorneys-at-law or the task of asset management. In the meantime legal practice has evolved. A ruling of the Supreme Court found that the attorney or auditor is no longer released from the obligation to make witness statements on matters extending beyond his core activity (e.g. tax consultancy, asset management).

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This publication is also available in German, French and Italian.