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Client-Update on German AML-legislation

German Ministry of Justice plans to considerably extend criminal liability for money-laundering

Few areas of the law see such frequent changes as anti-money-laundering (AML) legislation. Just weeks after Germany finished implementing the fifth EU AML directive (5AMLD), the Federal Ministry of Justice has drafted a bill implementing the requirements of the sixth EU AML directive (6AMLD).

While 5AMLD mostly aimed to increase transparency, 6AMLD lays down minimum requirements for the definition of the crime of money laundering, effectively setting an EU-wide minimum standard for member states to combat money laundering using the criminal law.

A version of the Ministry's unofficial draft implementation bill dated 29 January 2020 has now been disclosed. The draft bill goes far beyond the minimum standard set out in 6AMLD. While the current criminal offence of money laundering in section 261 of the German Criminal Code (StGB) is primarily designed to criminalise acts in connection with organised crime and the handling of funds originating from serious predicate offences (a 'predicate offence' is the underlying crime that originally generated the incriminated funds), the draft bill sets out a much broader definition of money laundering.

As a result, for businesses operating in Germany, handling any funds which could originate from any crime may be punishable as money laundering in future.

Content of the draft bill

The draft bill contains multiple amendments to Germany's criminal code, criminal procedure code (StPO) and the courts constitution act (GVG). These changes (in the bill's own words) 'enormously' expand criminal liability for money laundering in Germany.

Extension of the crime of money laundering

Section 261 of the criminal code will be fundamentally revamped into a five-page behemoth. Under the new law, it will be a criminal offence, among other things, to intentionally conceal, exchange, transfer, procure, store or use the proceeds of a predicate offence.

The new, vastly extended catalogue of predicate offences in section 261 covers practically all conceivable white-collar (and other) crimes, and often merely lists entire parts and chapters of the criminal code as qualifying predicate offences to money laundering.

In addition, the draft bill removes an important limitation of the present definition of the offence of money laundering. Currently many criminal offences are only suitable predicate offences to money laundering if they are committed commercially or as part of a group whose purpose is the continued commission of crimes. But in future, money laundering will be an offence even if it involves the handling of proceeds from minor crimes.

The new law also lowers the threshold for proving the crime of money laundering. In future, for example, prosecutors will only have to prove that proceeds originated from any of the white-collar crimes set out in chapter 22 of the criminal code (fraud and embezzlement), ie they won't have to prove any specific underlying crime from which the proceeds originated.

Penalties

The draft bill lowers the minimum penalty for money laundering from three months' imprisonment to a fine. However, there will still be a minimum penalty of three months' imprisonment if the money-laundering violation is committed by someone obliged under the German Anti-Money Laundering Act (GwG).

Because Germany goes beyond the requirements of EU law, most companies doing business in Germany fall in this category. Obliged companies under the GwG, for example, are not only financial institutions but also any company that sells goods or services commercially in Germany. AML officers of such companies can thus face a significant personal risk if money-laundering allegations arise in

connection with their duties.

Intent

Crimes under the new money-laundering statute will always require intent. This means that reckless behaviour – punishable today – will be decriminalised. Recklessly failing to notice that certain funds resulted from an unlawful act will no longer constitute the crime of money laundering.

Asset confiscation

Confiscating assets connected to the new criminal statute of money laundering will be limited to cases in which the crime is carried out on a commercial or organised basis.

Criminal procedure

To deal with the vastly extended scope of the new criminal statute, the draft bill proposes some changes to the StPO. In money-laundering investigations, law enforcement will still be allowed to wiretap phones (StPO, section 100a), remotely search computers (StPO, section 100b) and gather traffic data (StPO, section 100g) – but only if the predicate offence falls within a more limited catalogue of serious predicate offences.

Court jurisdiction

Today, money laundering cases are treated as cases of general crime. In future, some of the more complex money-laundering offences will be treated as white-collar crimes. If a case is serious enough to fall under the jurisdiction of the regional courts (Landgericht), the case will be dealt with by specialised white-collar crime divisions at the regional court (Wirtschaftsstrafkammer), provided the case requires specialist knowledge of economics.

Practical impacts for companies doing business in Germany

If the draft bill became law, it would significantly increase the overall number of money laundering investigations in Germany and the number of 'successful' investigations leading to an indictment.

Naturally, the number of criminal proceedings increases once the scope of a criminal provision is extended.

The draft bill's explanatory memorandum furthermore states that the new law aims to 'bring money laundering more strongly into the focus of the criminal prosecution authorities and enable even more intense prosecution'. In fact, the Ministry expects such an increase in money-laundering investigations to entail 'considerable additional costs' for criminal law enforcement and the judiciary.

Furthermore, the new law would make it easier to prove the illegal origins of the proceeds of crime, thus making it easier for prosecutors to prove the crime of money laundering.

Today, we see quite a few money-laundering investigations fail to meet the requirements for an indictment as prosecutors are unable to provide evidence for a specific predicate offence from which the illicit funds allegedly originated. But in future, it will be enough to show that funds are the proceeds of a wide and rather vague group of offences. We thus expect more indictments under the new law.

Reassigning the more complex money-laundering trials in the jurisdiction of the regional courts to the specialised white-collar crime divisions seems appropriate. However, we already see proceedings before the somewhat overloaded specialised white-collar crime divisions of the regional courts queuing for a long time – sometimes years – before a trial date is set. Unless there is an increase in the resources of the criminal justice system in this area, affected individuals and corporations will have to be prepared for lengthy proceedings.

While it's welcome that the mere reckless disregard of the illegal origin of funds won't lead to criminal liability, this change may have limited practical effect. German criminal law sets a low bar for intent. With the scope of the new offence being broader, public prosecutors may well argue in future that the perpetrator must at least have thought it possible – and accepted – that the funds in question came from any economic crime. The courts would likely decide that this satisfies the requirement for intent under the new statute.

For companies doing business in Germany, this extension of the criminal liability for money laundering should be closely watched, particularly against the background of the currently discussed introduction of a German corporate criminal law. There is some concern that future proceedings will be initiated based on only vague suspicions and lead to potentially expensive settlements for the affected companies.

Businesses are therefore well advised to closely look at their AML-compliance systems, particularly their suspicious activity reporting (SAR) processes, which are mandatory for most corporations doing business in Germany. Under GWG, section 43, obliged companies must notify the German Financial Intelligence Unit (Zentralstelle für Finanztransaktionsuntersuchungen) of any suspicious transactions, ie transactions where there are indications an asset originates from a criminal offence that could constitute a predicate offence to money laundering. This ties in with the catalogue of predicate offences, which is to be extended significantly under the draft bill.

The draft bill's explanatory memorandum argues that, as companies are already obliged to report even rather vague suspicions, the effects of the draft bill on SAR-reporting

obligations are supposedly limited. But we expect prosecutors and regulators to apply even more scrutiny when investigating alleged violations of SAR-reporting under the new regime.

In this context, compliance officers and general counsels should know that there is already a very strict system of sanctions under the GwG for companies that fail to meet their AML obligations. For example, under section 56, a corporation can be fined up to 10 per cent of its previous fiscal year's turnover for certain more serious AML infringements.

Outlook

The draft bill has not yet been officially published on the Ministry of Justice's website and is likely to see some changes in the further legislative process.

However, EU member states must introduce their implementing legislation for the 6AMLD by 3 December 2020, so we expect to have a new criminal law provision for money laundering by the end of the year.

Regardless of any further changes to the draft bill, corporations – especially those obliged under the GWG – should assess the Ministry of Justice's plans and then check whether their current AML compliance systems are state of the art and up to what lies ahead.

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