Tax&Legal Highlights

Hungary

NGM position on the anti-money laundering obligations of real estate industry players

During the past month significant developments have occurred in the real estate industry regarding compliance with the anti-money laundering requirements. In January the Ministry for National Economy (NGM) prepared the reviewed national risk assessment and issued a position in response to the request of the Ingatlanfejlesztői Kerekasztal Egyesület (Real Estate Roundtable), and NAV also published its risk assessment and is expected to launch increased supervisory action.

NGM confirmed that the leasing of own or leased property is not subject to the AML Act; however, they stipulated that all companies engaged in the sale of real estate or the intermediation of the transfer or lease of third party property as a business activity qualify as suppliers subject to the requirements. If the management company of a real estate development or management group acts with respect to the real estate owned by the project company of the group, this activity again qualifies as real estate trading.

This means that real estate development and management companies whose activities fall under TEÁOR 6810 and TEÁOR 6831, i.e. they perform real estate agency activity (even for another firm within the group) or the sale of own property as part of their business, are required to fully comply with the anti-money laundering requirements. These requirements included regular client due diligence and continuous transaction monitoring, the development and maintenance of an internal audit and information system, a training programme as well as various other obligations that imposed an administrative and financial burden on the real estate companies.

Increased burden

In practice the first obligation is to perform due diligence when establishing business relations. According to the NGM position, real estate companies subject to the AML Act incur a client due diligence obligation based on each proposal as "in practice a contract is generally signed in case of a request for a proposal and the service is provided".

This client due diligence is a serious burden as it requires companies to take several measures (e.g. they are required to ask for personal ID and make copies, they need to request a beneficial owner's statement and public interest company statement as well as verify, administrate and document the data provided by clients), and in the absence of these measures the transactions – i.e. sale and purchase as well as lease contracts – may not be concluded.

Specific risk assessment

At the same time, NAV confirmed that individual risk assessment introduced by the AML Act has a special role in AML compliance as "client due diligence is risk based under the new AML Act".

Based on the guidance published by NAV, as of 1 February 2017 a summary of the National Risk Assessment on the risks of money laundering and terrorist financing is available for real estate companies.

Based on the industry specific risk assessment disclosed by NAV, in line with Section 65 of the AML Act, real estate companies subject to the AML Act are required to prepare an internal risk assessment policy and the related rules or procedure. This shall be finalised within 30 days following the entry into force of the NGM decree, which is currently available as a draft but may at any time be promulgated. However, companies should not postpone drafting the internal policy until the issuance of the NGM decree as in practice the development of solutions tailored to the supplier in line with the new regulations is a time consuming process. The amendment of the internal policy shall be reported to NAV.

Supervisory procedures

Based on the results of the new supervisory risk assessment under Section 67 of the new AML Act, NAV is obliged to initiate supervisory procedures adapted to the risks assessed. The AML Act expressly provides that NAV's supervisory activity also includes the review of the supplier's internal risk assessment and rules of procedures. This means that NAV will perform targeted reviews at suppliers concerned to check their internal rules of procedure and risk assessment. NAV may commence the supervisory procedures after a 30-day deadline to review compliance with the anti-money laundering regulations, and if they identify no breach, they will approve the internal policy in a supervisory procedure.

Penalties

If, however NAV identifies some irregularities, it will impose a penalty proportionate to the breach but up to HUF 400 million, which is 20 times higher than the former maximum amount.

In addition to increased supervisory activity and the increased penalty, the new regulation has introduced the personal responsibility of the supplier's managers and key employees. Accordingly, in case of a breach, NAV may initiate the suspension or withdrawal of the managerial position and the establishment of the person's responsibility. This means that the executive or responsible employee may be required to pay the potential penalty incurred due to non-compliance with the AML regulations.

Cost saving solutions

Rather than suffering the burden of the above mentioned stringent administrative requirements, suppliers could gain a competitive advantage. This can be achieved by way of a simplified due diligence through video chat. NAV, however emphasises that simplified client due diligence is only allowed if the scope of cases is defined in the internal policy, in line with the internal risk analysis. Supplier based risk assessment, simplified due diligence and the appropriate development of the related processes and systems may result in significant cost savings. Companies are advised to consult a qualified advisor for both defining the cases and procedures of the simplified client due diligence and the related individual risk assessment, as these tasks require significant professional skills and experience, efficient resource planning and specific background knowledge of the industry.

Deloitte has quick and ready made solutions to develop the individual risk assessment, the processes and internal IT systems, and prepare the related documents and policies. If you are interested in Deloitte's solutions to increase efficiency, please contact us.

The pitfalls of electronic procedures and the new procedural practice

The new statutory provisions on electronic communication effective as from 1 January 2018 have caused a number of surprises and difficulties for companies. Pursuant to the Act on the General Rules for Trust Services and Electronic Transactions (Act CCXXII of 2015), since 1 January 2018, communication with courts and authorities has been possible only by means of electronic communication, but experience suggests that neither companies nor courts nor authorities had been fully prepared. In addition to the act on electronic transactions, the new Act on Civil Procedure (Act CXXX of 2016) also entered into force at the beginning of the year, which posed additional challenges for those seeking compliance. This edition of our newsletter draws our clients' attention to the most common risks and practical experience.

In January, the news that, out of some 5,000 statements of claim filed in Budapest early in the year, only a few dozen were not refused caused great uproar. Although this was denied by the courts, it is still undoubtable that a large number of new cases were refused due to violations of the formal requirements set forth in the regulations introduced at the beginning of the year, typically the rules provided in Section 176 of the Act on Civil Procedure. Since the majority of the cases involve easily preventable formal errors, we advise our clients to ensure that their legal counsels acting as their

representatives in lawsuits pay close attention to the new formal requirements set forth in the Act on Civil Procedure.

Communication with authorities has also become more troublesome since the beginning of the year. This is due to the fact that, since 1 January 2018, communication with authorities has only been possible by electronic means, but many businesses are not adequately prepared to do so. Experience suggests that, in many cases, even the authorities are unable to effectively communicate through the electronic channels required by law. Therefore, to avoid unpleasant surprises, our clients should contact the relevant administrative authorities by phone in advance whenever possible to discuss the method of communication.

Most of the practical issues relate to communication with the National Tax and Customs Administration (NAV). Under the new rules, companies must communicate with the NAV primarily through the business e-filing system after 1 January 2018, with the concession that companies may communicate with the tax authority through their representatives' e-filing accounts until 31 December 2018.

This came as a surprise to most companies. For example, during the first two months of the year, most businesses filed their requests for legal remedy with the NAV by mail, unaware of the fact that, since 1 January 2018, submissions have been allowed by electronic means only. Despite the incorrect filing method, the NAV is doing its best to process these requests, acknowledging that many companies did not even have a business e-filing account at the start of the year.

In our experience, communication with the NAV is often stalled because the NAV is unable to accept the documents filed by companies. This often happens for the simple reason that the person filing the documents is not authorised to represent the company before the NAV. For instance, if a document is filed on behalf of a company by an accountant or an attorney who is not registered in the NAV's system as an authorised representative, the NAV will refuse to accept such filing in order to protect tax secrets. This can be avoided by notifying the NAV in advance that the representative is appointed as an authorised representative. Additionally, in such cases the NAV now allows representatives acting as ad hoc representatives to file their submissions in the so-called e-paper format, which the NAV is able to process without the involvement of an authorised representative.

Another notable point is that, if the company does not possess a business e-filing account, the tax authority will send the documents to the e-filing account of the company's representative. The presumption of delivery is deemed to apply when the representative opens the document delivered. This may cause problems if the company does not have a policy in place which would designate the person to whom the documents must be forwarded by the representative (e.g. a person responsible for another function, the attorney acting on the company's behalf, etc.). In such cases, it may easily happen that the deadline the company must meet has already passed when the company's competent employee or the person responsible receives the document. In order to avoid surprises of this nature, we advise our clients to address and, if required, regulate matters concerning the persons to whom the representatives must forward the documents received from the authorities and the deadlines for doing so.

Furthermore, the lack of sufficient regulation of access to the business e-filing system represents an issue for many companies. The reason why addressing and regulating access to the company's business e-filing system is critical is that all communication between a company and the authorities after 1 January 2018 must take place through the business e-filing system. The result is that everyone who has access to the company's business e-filing system may gain insight into certain confidential dealings of the company. This issue may typically be resolved by sharing and regulating access to the business e-filing system.

Another rule worth paying attention to in the future is that the deadlines to be met by companies are extended by the number of days when the authorities or courts suffer outages exceeding four hours. As a result, it may often be the case that even though a company believes it has missed a deadline, there is still an opportunity to file documents or requests by claiming that there had been outages suffered by the authority or court.

Although the future pitfalls of electronic communication cannot be foreseen as yet, experience from the first two months suggests that the regulations which entered into force at the beginning of the year have caused significant difficulties for both authorities and companies. Our law firm's professionals discuss issues involving electronic communication with the authorities on a daily basis and bring up-to-date and practical knowledge to the table to assist our clients in facing their day-to-day challenges.

Contacts Details

Marcell Nagy
Tax&Legal Business Partner
Tel: +36 1 428 6737
Mobile: +36 30 555 0501
Email: mnagy@deloittece.com