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Newsletter

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Act on the Prevention of Money Laundering and Terrorist Financing

Dutch regulation on money laundering and terrorist financing has through the years evolved from only being relevant to financial institutions to becoming compulsory in the context of customer due diligence (“**CDD**”) for financial institutions, insurance companies, casinos, exchange offices, real estate agents, lawyers, notaries and potentially anyone trading in precious goods (“**Institutions**”).

On 1 August 2008, the new Dutch Act on the Prevention of Money Laundering and Terrorist Financing (the “**Act**”) entered into force. The Act combines the 1993 Compulsory Identification Act

and the 1993 Act on the Disclosure of Unusual Transactions because the existence of two separate acts and the different approach in both acts was considered cumbersome. The Act also implements the EU Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing (2005/60/EC). Furthermore, the Minister of Justice issued two separate decrees implementing and specifying the obligations under the Act on 18 and 23 July 2008, respectively.

The Act prohibits specific entities and persons from entering into a professional relationship with a customer or performing certain services without prior CDD or in limited circumstances, without CDD for a restricted period of time. The purpose of CDD is to verify the identity of a customer and if applicable the ultimate beneficial owner behind the customer, the purpose and aim of the relationship between an Institution and its customer and to monitor this relationship during transactions.

The Act is based on a risk-oriented approach. This means that Institutions which have to conduct CDD can vary the depth based on the risk posed by a certain type of customer, relationship, product or transaction. For instance, services provided to the newly introduced category of politically exposed persons are considered especially suspect: enhanced CDD is mandatory for this new

category. However, because the new Act adopts a principle-based approach rather than the former rule-based approach, it is the obligation of Institutions themselves to come up with procedures to execute proper CDD. This new approach also provides Institutions with less guidance on how to conduct CDD. Because of the difficulties Institutions may encounter when implementing the Act, the joint supervisors have declared that they will be lenient regarding enforcement until 1 January 2009.

Audit Chamber report on Dutch government policy for combating money laundering and the financing of terrorism

In June 2008, the Netherlands Audit Chamber sent its report on the combating of money laundering and the financing of terrorism to the Second Chamber of the Dutch Parliament. The Audit Chamber had researched whether the previously established policy objectives regarding enforcement of the regulations on combating money laundering and the financing of terrorism were being met. The general conclusion is that the results are unsatisfactory.

The report shows that the prevention of money laundering and the financing of terrorism is not done adequately. There exists a low discovery probability and an even lower probability of being prosecuted. The Audit Chamber's opinion is that this is caused by the poor information exchange between the various parties involved in enforcement, including the Financial Supervision Office (*Bureau Financieel Toezicht*), the Public Prosecution Service (*Openbaar Ministerie*) and the police force, and their limited capacity, expertise and powers. Moreover, the current lack of measurable objectives and performance agreements makes it impossible to set a goal-oriented and integrated direction within the enforcement chain.

The Audit Chamber makes a number of recommendations to address these difficulties. In general, the responsible Ministers should more clearly take on a leading role. Furthermore, they should:

- determine realistic and measurable objectives based on risk analyses and adapt the capacity, expertise and prioritisation to these objectives,
- subsequently set up agreements within the enforcement chain for achieving these objectives,
- improve the information interchange within the enforcement chain and make it an explicit task of the Financial Expertise Centre ("**FEC**")¹ to improve this interchange. The most important parties in the enforcement chain are to be found in the FEC, and
- concentrate the expertise on different types of financial-economic criminality within the FEC and make information available about what is being accomplished and which role certain information played in achieving this result.

The Minister of Justice, Minister of Finance and Minister of the Interior have issued a joint response to the report. They are of the opinion that the report's general conclusion is based on improper standards. But they are also of the opinion that the capacity and expertise of the enforcement chain has to be increased. An extension of the tasks and objectives of the FEC is however not desirable.

The president of the Dutch Central Bank agrees in general with the conclusion of the report. He endorses the conclusion that the FEC needs to take a more leading and coordinating role in the enforcement chain.

EU directive on the protection of the environment through criminal law

On 9 February 2007, the European Commission proposed a directive that implements a list of

¹ The FEC is a cooperative effort between various Dutch investigative and enforcement agencies, such as the General Intelligence and Security Service ("**AIVD**"), the Dutch Central Bank ("**DNB**"), the Netherlands Authority for the Financial Markets ("**AFM**"), the Fiscal Intelligence and Investigation Service-Economic Inspection and Investigation Service ("**FIOD-ECD**"), the Public Prosecution Service ("**OM**"), the National Police Services Agency ("**KLDP**") and the Amsterdam-Amstelland Police Force.

environmental offences that must be criminally sanctioned by all Member States and whereby all Member States ensure that these acts are effectively penalised (“**Directive**”). On 21 May 2008, the proposal for the Directive was adopted at first reading under the co-decision procedure with the European Parliament.

The Directive follows from case law of the European Court of Justice (“**ECJ**”). The adoption of the Directive is important as it represents the first legislative act under the first pillar of the EU which contains criminal provisions. Traditionally, neither criminal law nor the rules of criminal procedure fall within the Community’s competence. However, in Case C-176/03, the ECJ decided that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community has the competence to adopt measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. Acting in line with the ECJ decision, the Directive contains mandatory criminal offences, which were previously at the sole discretion of the national legislatures.

The Directive provides that, among other activities, the following acts should be considered criminal offences in the area of environmental protection:

- the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants;
- the production, processing, handling, use, holding, storage, transport, import, export and disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage

- to the quality of air, the quality of soil, the quality of water, or to animals or plants;
- the killing, destruction, possession and taking of specimens of protected wild fauna or flora species, except for cases when the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; and
- any conduct which causes the significant deterioration of a habitat within a protected site.

Article 5 of the Directive provides that each Member State must take the necessary measures to ensure that the offences referred to are penalised by effective, proportionate and dissuasive criminal sanctions.

The Directive still needs formal approval by the EU Council, which is expected in the near future. When the Directive enters into force, Member States will have to comply within two years, meaning that they will have to bring their national criminal law in line with the Directive.

FEC report on real estate

The FEC (as mentioned before) completed a report in December 2007 on their research into real estate transactions and the potential risk of fraud which accompany these transactions. At first the FEC intended not to disclose their report, but in July 2008 the FEC made the report public because of the interest many had – including the Dutch Parliament – in the report.

The report is based on six completed criminal investigations and on supervisory investigations into six institutional investors. Its purpose is to identify the weaker spots of financial institutions and services. The general conclusion of the report is that at present the prevention of real estate fraud is unsuccessful. The report indicates that further attention is needed on many fronts to prevent fraud: by those parties involved in real estate transactions to signals of suspicious acts, and financial institutions and service providers concerned with real estate to

their integrity controls. Enclosure number 2 of the report specifies a number of risk factors – “red-flags” – that could indicate potential irregularities in real estate transactions.

In the Dutch newspaper *Het Financieele Dagblad* (“FD”) the report has been criticised.² According to a piece in the FD the conclusions of the report are insufficiently founded and contain no analysis of the effectiveness of the proposed measures.

Waiving the immunity from criminal prosecution of public bodies and their managerial staff

Members of the Dutch Parliament have set the stage to waive the immunity from criminal prosecution of public bodies and their managerial staff by introducing a bill concerning this issue (*Wetsvoorstel opheffen van de strafrechtelijke immuniteiten van publiekrechtelijke rechtspersonen en hun leidinggevers*). The bill is currently being discussed in Parliament. The reason for this initiative is twofold. The more principal aspect is the belief that a government may only appeal to a person’s sense of responsibility if the government itself can be held responsible for its acts or omissions to act. The practical aspect of this initiative is that the case law on this matter leaves almost no room for the criminal prosecution of public bodies and, by extension, their administrators. By virtue of this bill public bodies, like other legal persons, may be prosecuted for criminal acts. In addition to the prosecution of a public body, the Public Prosecutor may decide to prosecute its administrators. As a counterweight, the bill proposes a new statutory defence geared towards public bodies and their administrators, implying that criminal liability is excluded if the act of the public body or administrator is reasonably necessary for the performance of its statutory public duties. A public body or administrator may further appeal to the more

general statutory defences intended to exclude certain acts driven by force majeure, an official order or a statutory provision. Even though the practical consequences of the proposed changes will remain uncertain for some time, they will certainly equip the Public Prosecutor with more powers to respond to disasters such as the Schiphol fire, the café fire in Volendam, and the fireworks disaster in Enschede.

Judgment on corruption of public servants

In its judgment of 30 May 2008 (*LJN: BC8673*) on corruption of public servants, the Dutch Supreme Court ruled that the legislature has given a general description of the term “intent” (*opzet*), in which intent is coupled with the expression “knowing that” (*wetende dat*) in Sections 362 and 363 (former) of the Penal Code (*Wetboek van Strafrecht*). The legislative history does not give any reason to differ from this point of view.

The suspect in this case was a public servant employed with the Directorate General for Public Works and Water Management (*Rijkswaterstaat*). He was charged with corruption on the basis of Sections 362 and 363 (former) of the Penal Code by accepting gifts from a construction company, in this case airline flights abroad, amongst other things. The Court of Appeal acquitted him of the charge on 11 October 2006. The Court of Appeal did not find that it had been proven that the public servant had accepted gifts with the *knowledge* that his travelling expenses were paid in order to obtain a consideration contrary to his duty. The Public Prosecutor appealed the Court of Appeal’s judgment before the Supreme Court.

In its judgment of 30 May 2008, the Supreme Court set aside the judgment of the Court of Appeal because the Court of Appeal had applied a wrong criterion. The Supreme Court ruled that a public servant is not only guilty of corruption of public servants if he *knew* or *understood* that the gifts he accepted were meant to obtain a consideration contrary to his official duty, but also if he had *deliberately accepted the chance*

² C. van Bavel and D. Brouwer, ‘Rapport vastgoedfraude ondermaats’, *Het Financieele Dagblad*, 31 July 2008.

that the aim of the gifts was receiving a consideration.

Contact information

The Corporate Criminal Defence and Investigations practice group of De Brauw Blackstone Westbroek represents corporations and financial institutions in a wide range of criminal and regulatory matters.

This practice group also conducts internal investigations for our clients and advises them on preventative measures and compliance programmes.

For further information please contact one of our partners: Martijn Snoep, Marnix Somsen, Patrick Ploeger or associates: Roan Lamp and Vanessa Liem.

Martijn Snoep

T +31 70 328 5429

E martijn.snoep@debrauw.com

Marnix Somsen

T +31 20 577 1628

E marnix.somsen@debrauw.com

Patrick Ploeger

T +31 20 577 1955

E patrick.ploeger@debrauw.com

Roan Lamp

T +31 20 577 1964

E roan.lamp@debrauw.com

Vanessa Liem

T +31 20 577 1608

E vanessa.liem@debrauw.com

Amsterdam

Tripolis
Burgerweeshuispad 301
Postbus 75084
1070 AB Amsterdam
The Netherlands
T +31 20 577 1771
F +31 20 577 1775

Londen

5th Floor, East Wing
10 King William Street
London EC4N 7TW
United Kingdom
T +44 20 7337 3510
F +44 20 7337 3520

New York

650 Fifth Avenue, 4th floor
New York, NY 10019-6108
United States
T +1 212 259 4100
F +1 212 259 4111

The Hague

Zuid-Hollandlaan 7
Postbus 90851
2509 LW Den Haag
The Netherlands
T +31 70 328 5328
F +31 70 328 5325

www.debrauw.com

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