

Liechtenstein

Dr. Johannes Gasser, LL.M.
Mag. Markus Schwingshackl

Advokaturbüro Dr.Dr. Batliner & Dr. Gasser
Marktgass 21
9490 Vaduz
Principality of Liechtenstein

Tel +423 236 04 80
Fax +423 236 04 81
lawoffice@batlinergasser.com
www.batlinergasser.com

Anti-Money Laundering: International Law and Practice.
Edited by W.H. Muller, C.H. Kälin and J.G. Goldsworth
© 2007 John Wiley & Sons, Ltd

Contents – Liechtenstein

1	Introduction	343
2	Money laundering	343
3	Personal and substantive scope of application of the Due Diligence Act	343
3.1	Personal scope of application	343
3.2	Substantive scope of application	344
4	Obligations of due diligence	345
4.1	Identification of the contracting party	345
4.2	Identification of the beneficial owner	347
4.3	The monitoring	349
4.4	The FMA Guideline 2005/1	350
4.5	The reporting obligation	351
5	Supervision	352
	Address	352
	Abbreviations	352
	Bibliography	353

1 Introduction

The Liechtenstein *Due Diligence Act* (*Sorgfaltspflichtgesetz*, Act of 26 November 2004 on Professional Due Diligence in Financial Transactions) and the *Due Diligence Ordinance* (*Sorgfaltspflichtverordnung*), which are governing the application of due diligence in professional financial transactions and serve to combat money laundering, organized crime and the financing of terrorism, were totally revised in the year 2005 and today satisfy the highest international standards. They also serve to implement the Directive 91/908/EEC of the Council in the version of Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 on prevention of the use of the fiscal system for money laundering (Second Money Laundering Directive). At the same time the *Due Diligence Act* takes into account the newest international standards in the field of the prevention of money laundering as in particular the reviewed and updated Forty Recommendations of the *Financial Action Task Force on Money Laundering* (FATF).

2 Money laundering

According to §165 *Criminal Code* (*Strafgesetzbuch*) whoever conceals proceeds of a serious crime (i.e. any intentional act or omission punishable with more than three years' imprisonment), the financing of terrorism, certain corruption offences or offences according to the *Narcotic Act* (*Betäubungsmittelgesetz*) or disguises their source, in particular by making false statements in legal transactions as to the origin or true nature of such assets, their transfer or whereabouts, commits the criminal offense of **money laundering**. Concealing means any activity that may thwart or impede the discovery of such proceeds by defrauded persons, other victims of related crimes or law enforcement authorities. Punishment in such case may rise up to three years' imprisonment.

Also covered by the criminal offense of money laundering are the acquisition of assets derived from any serious crime, the financing of terrorism, bribery or drug offense committed by another person as well as the safekeeping, administration and management, conversion and exploitation of such assets and their transfer to a third party. Such offense may be punishable up to two years' prison term. Should the amount exceed Sfr. 75 000, courts may extend the term to five years.

3 Personal and substantive scope of application of the Due Diligence Act

3.1 Personal scope of application

The following legal and natural persons are subject to the *Due Diligence Act*:

- **Banks** and finance companies holding a license pursuant to the *Banking Act* (*Bankengesetz*), e-money institutions holding a license pursuant to the *E-Money Act* (*E-Geldgesetz*), as well as Liechtenstein branches of foreign banks, finance companies, and e-money institutions.
- Liechtenstein branches of foreign securities companies.
- Investment undertakings holding a license pursuant to the *Investment Undertakings Act* (*Gesetz über Investmentunternehmen*).

- Insurance undertakings holding a license pursuant to the *Insurance Supervision Act (Versicherungsaufsichtsgesetz)* which offer direct life insurance, as well as equivalent Liechtenstein branches of foreign insurance undertakings.
- The Liechtenstein Postal Services (limited company).
- Casinos.
- Natural and legal persons holding a license (*Treuhänderbewilligung*) pursuant to the *Professional Trustees Act (Gesetz über die Treuhänder)*.
- Natural persons holding a confirmation (*Bestätigung zur Übernahme von Verwaltungsmandaten*) pursuant to Article 180a *Law on Persons and Companies (Personen- und Gesellschaftsrecht)*.
- Exchange offices (*Wechselstuben*).
- **Lawyers** admitted to the Bar in accordance with the *Lawyers Act (Gesetz über die Rechtsanwälte)*, and legal agents.
- Natural and legal persons holding a license pursuant to the *Law on Auditors (Gesetz über die Wirtschaftsprüfer und Revisionsgesellschaften)* and Auditing Companies as well as auditing offices subject to special legislation.
- Real estate agents.
- Dealers in high-value goods and auctioneers.

Legal and natural persons that do not fall within the scope of the above mentioned subjects are nevertheless subject to the *Due Diligence Act* if they carry out financial transactions on a professional basis.

3.2 Substantive scope of application

The *Due Diligence Act* applies to the professional conduct on **financial transactions**. The following transactions are considered financial transactions or equivalent or financial transactions:

- Every acceptance or safekeeping of the assets of third parties, as well as assistance in the acceptance, investment, or transfer of such assets.
- Establishing a legal entity on the account of a third party that does not operate commercially in the domiciliary State or acting as an organ of such a legal entity. A legal entity that does not operate commercially in the domiciliary State is, in particular, a legal person, company, trust or other association or asset entity – regardless of its legal structure – which does not conduct any trade, manufacturing, or other commercial operation in the domiciliary State.
- Transactions by dealers in high-value goods and by auctioneers if payment is made in cash and the amount exceeds Sfr. 25,000, regardless of whether the transaction is made in a single step or in several steps that obviously appear to be linked.
- The granting of admission to a casino to visitors, regardless of whether the visitor actually takes part in gaming activities or buys or sells gaming tokens.

Business relationships of lawyers and legal agents are not considered as financial transactions, unless the lawyer or legal agent contributes to the planning and execution of financial or real estate transactions for his client, beyond forensic activities, with respect to:

- The purchase and sale of real estate or enterprises.
- The management of money, securities, or other assets of the client.
- The opening or management of accounts, deposits or safe deposit boxes.
- The obtaining of the means necessary for the formation, operation, or management of legal persons, companies, trusts, or other associations of asset entities.
- The establishment on the account of a third party of a legal entity that does not operate commercially in the domiciliary State or the performance of activities as an organ of such a legal entity.

4 Obligations of due diligence

4.1 Identification of the contracting party

4.1.1 The obligation to identify the contracting party

The **contracting party** is any natural person and/or legal entity that enters into a financial transaction in the above outlined meaning with a person subject to due diligence and must be identified by means of documentation with probative value when entering into a business relationship.

There is no obligation to identify the contracting party if:

- A spot transaction is made that does not exceed the maximum amount of Sfr. 25 000, regardless of whether the transaction is made in a single step or in several steps that obviously appear to be linked.
- Remittances or transfers are made which do not exceed the maximum amount of Sfr. 5000, regardless of whether the transaction is made in a single step or in several steps which obviously appear to be linked.
- The amount of a periodic insurance is less than Sfr. 1500 per year.
- A one-time insurance premium is less than Sfr. 4000, or less than Sfr. 4000 is paid into a premium deposit.
- The account in question is a rental deposit account for rental property located in an EEA Member State or in Switzerland.
- The account in question is an account for payment under subscription of capital during formation or for increase in capital of a legal person or partnership to be entered or already entered in the Public Register.
- The contracting party is a legal person admitted to official quotation at a stock exchange.

- The contracting party has already been identified in an equivalent way within the same group or enterprise, in such case, copies of the documents used for the original identification shall be included with the due diligence files.
- An application for insurance has been accepted by a person subject to due diligence which has already identified the contracting party in connection with other financial transactions. In such case, the person subject to due diligence shall include copies of the documents used for the original identification with the due diligence files.

4.1.2 The documents for identification

When initiating a business relationship by personal contact, the Liechtenstein parties are required to identify the other contracting party and to conduct due diligence enquiries to establish the identity of that other party by inspection of a document with probative value (i.e. original copy of a document that can be used in a court of justice for evidence, e.g. the passport) of that party and by collecting and documenting the following information:

- For natural persons: last name, first name, date of birth, address of residence, state of residence and citizenship.
- For legal persons, companies, trusts, other associations and asset entities: name or firm name, address of domicile, domiciliary state, date of formation, and, if applicable, place and date of entry into the Public Register.

When initiating a business relationship by correspondence the contracting party must be identified by obtaining the original or certified copy of the document with probative value and confirmation of the required information by signature or electronic signature.

For natural persons, a document with probative value shall be a valid official identity paper with a photograph, in particular passport, identity card, or driving license. If the contracting party is not in the position to provide such document from his home country, a confirmation of identity shall be provided by the authority responsible in its domicile.

For legal persons, companies, trusts, other associations and asset entities registered in the Public Register, a document with probative value shall be:

- An extract from the Public Register issued by the Public Register Authority.
- A written extract from a database maintained by the Public Register Authority.
- A written extract from trustworthy, privately managed registers and databases.

If they are not registered in the Public Register, a document with probative value shall be:

- An official certificate issued in Liechtenstein.
- The statutes, the formation documents, or the formation agreement.
- A certification of name or firm name, address of domicile, domiciliary state and date of formation by the chosen auditor of the annual accounts.
- An official license to conduct its activities.
- A written extract from a trustworthy, privately managed register or equivalent database.

The certificate on the authenticity of a copy of a document with probative value may be issued by:

- A branch or corporate affiliate of institutional persons subject to due diligence.
- Another institutional person subject to due diligence, a lawyer, a professional trustee, an auditor, or an asset manager subject to Directive 91/308/EEC in the version of Directive 2001/97/EC or an equivalent regulation and subject to appropriate supervision.
- A notary public or other public office that normally issues such certificates of authenticity.

If a business relationship is initiated by correspondence, the persons subject to due diligence must include the original of a certified copy of the document with probative value with the due diligence files. If a business relationship is initiated by personal contact, it shall be sufficient if the persons subject to due diligence make a copy of the original document or the certified copy, confirm on the copy that they have inspected the original or certified copy, put the date and their signature on the copy, and include it with the due diligence files. The documents necessary for identification must reflect the current circumstances. Certificates of authenticity, extracts from registers, and certificates by the chosen auditor of the annual account may not be older than 12 months.

4.2 Identification of the beneficial owner

4.2.1 The beneficial owner

The **beneficial owner** is the person who ultimately holds the economic rights to the assets in question. A legal entity which does not operate commercially in the domiciliary State can only be beneficial owner to the extent that:

- Its purpose is the safeguarding of the interests of its members in joint and mutual assistance or it is statutorily and actually pursuing political, religious, scientific, artistic, charitable, entertainment, or similar purposes.
- Is a holding company which serves as an instrument to form an operative group.

In the case of revocable structures such as an revocable trust, the effective founder is considered to be the beneficial owner. In case of insurance contracts, the person effectively paying for the insurance contracts is considered to be the beneficial owner.

4.2.2 The obligation to identify the beneficial owner

When entering into a business relationship the beneficial owner must be identified with care that is appropriate to the circumstances. In doing so, the assumption that the contracting party is identical to the beneficial owner is allowed. If, however, doubts arise whether this assumption is correct a written statement identifying the beneficial owner must be required from the contracting party.

Doubts concerning the assumption, that the contracting party and the beneficial owner are identical, are reasonable in particular if:

- A person who does not have sufficiently close relation to the contracting party possesses power of attorney.

- The financial situation of the contracting party is known and the assets presented or the insurance applied for are recognizably beyond the financial reach of the contracting party.
- The contact with the contracting party results in other unusual findings.

A written statement is always required if:

- A spot or insurance transaction or a remittance or transfer is made that exceeds the amount which triggers to obligation of identification of the contracting party.
- The business relationship is initiated with a natural person by correspondence.
- The contracting party is a legal entity that does not operate commercially in the domiciliary state.

4.2.3 Exceptions to the obligation to identify

There is no obligation to identify the beneficial owner:

- In cases where there is no obligation to identify the contracting party.
- If the beneficial owner is a legal entity that does not operate commercially in the domiciliary state and is admitted to official quotation at a stock exchange.
- For banks and postal institutions, in the case of accounts or deposits maintained in the name of lawyers admitted in an EEA Member State or in Switzerland on the account of their clients in the course of forensic activity or in their capacity as executors, escrow agents, or in a similar capacity.
- For institutional persons subject to due diligence, namely a bank, a postal institution, an investment undertaking, or an insurance undertaking, if the contracting party is either another institution of that kind domiciled in Liechtenstein or abroad or a securities trader subject to Directive 91/308/EEC in the version of Directive 2001/97/EC or an equivalent regulation and subject to appropriate supervision.
- If the contracting party is an occupational pension institution that is exempt from taxation.

The obligation to identify the beneficial owner is further eased if the contracting party is the representative of a collective form of investment or an associated company with more than twenty beneficial owners as investors. In such case, only the beneficial owner who alone or in joint agreement are entitled to at least 5% of the contributed assets must be established. If the number of beneficial owners does not exceed twenty, all beneficial owners must be identified. The obligation to identify the beneficial owners shall be waived entirely in the case of collective forms of investment admitted to official quotation at a stock exchange.

4.2.4 Repetition of identification

The persons subject to due diligence must repeat the identification of the contracting party or of the beneficial owner if any doubts arise concerning the identity of the contracting party or the beneficial owner in the course of the business relationship. They may discontinue the business relationship if doubts about the information supplied by the contracting party persist despite a

repetition of identification. They shall be prohibited from discontinuing the business relationship if the preconditions are met for the reporting obligation to the *Financial Intelligence Unit (FIU)*.

If, in an existing insurance contract, the insurance holder is replaced by another insurance holder, the contracting party shall be identified anew and, if applicable, the beneficial owner shall be identified anew. When a business relationship is discontinued because of persisting doubts about the information supplied by the contracting party the persons subject to due diligence must sufficiently document the outflow of assets.

4.3 The monitoring

It must be ensured that long-term business relationships are monitored in a way adequate to the risks involved. For this purpose, the persons subject to due diligence must establish criteria indicating higher risks and issue internal instructions on how such risks are to be limited and monitored. Banks with branches abroad or which lead a financial group with foreign companies must, at a global level, assess, limit, and monitor their risks connected with money laundering, organized crime, and the financing of terrorism.

4.3.1 The profile

For each long-term business relationship a profile must be compiled and kept updated. It shall contain the following information:

- the contracting party and the beneficial owner,
- authorized parties,
- the economic background and origin of the assets presented,
- the profession and business activity of the beneficial owner or the effective founder, and
- the intended use of the assets.

The degree of detail to the information shall take into account the risk involved in the business relationship.

4.3.2 The inquiries

Simple inquiries. If in the context of long-term business relationships circumstances or transactions arise which derive from the profile or which meet the established risk criteria simple **inquiries** with appropriate effort must be carried out. Such simple inquiries serve to access the plausibility of circumstances and transactions. In this context, the person subject to due diligence should obtain, evaluate and document the information that is suited to make the background of circumstances or transactions plausible and understandable.

Special inquiries. Special inquiries must be carried out if in the context of long-term business relationships circumstances or transactions arise which generate the suspicion that assets might be connected with money laundering, a predicate offense of money laundering, organized crime or the financing of terrorism. The results of the inquiries must be documented in the due diligence files. The person subject to due diligence shall obtain, evaluate and document the information that is suited to dispel or corroborate any arising suspicion.

4.4 The FMA Guideline 2005/1

The *Financial Market Authority (FMA)* in its Guideline 2005/1 has issued binding risk criteria which apply to all persons subject to due diligence. They may not misuse their foreign branches and foreign associated companies to circumvent the Guideline and must ensure that the FATF recommendations which apply to them are adhered to by associated companies and branches in countries which are not members of the FATF, except insofar as local regulations prevent them from doing so.

4.4.1 The risk criteria

Risk criteria are in particular:

- Physical presentation of assets to the equivalent value of more than Sfr. 100 000 in one step or stage when the business relationship is established.
- Business relationships with politically exposed persons as persons holding prominent public positions abroad: heads of state and heads of government, high-level politicians, high-level officials in administrative bodies, the courts, the military, and political parties, the highest decision-makers in state-owned enterprises, and enterprises and persons who are recognizably close to such persons.
- Indicators for money laundering according to the Annex of the Guideline. In their internal instructions, the persons subject to due diligence must specify the threshold amounts above which enquiries are obligatory, insofar as the indicators are measurable. They may specify different maximum values for differentiated risk categories.

4.4.2 The scope of the enquiries

In cases where inquiries are required, persons subject to due diligence are requested to obtain the information which enables them to evaluate the background adequately, and verify the plausibility of such information. The results of the inquiries must be documented in a report which must be kept in the due diligence files.

Depending on the circumstances of the individual case, information must be obtained and documented in particular on the following points, insofar as these points are not already covered by the profile of the business relationship:

- The purpose and nature of a given transaction.
- The financial circumstances of the contracting party or beneficial owner, insofar as the person subject to due diligence has knowledge of these circumstances.
- The professional or business activities of the contracting party, the beneficial owner, or the effective founder of a legal entity that does not operate commercially in the domiciliary state.
- The origin of the assets invested or deposited.

Obtaining of information from third parties and consultation of experts when conducting inquiries concerning the background is expressly permitted. Declarations of the client concerning the background of such transactions can not always be accepted at face value, but must be verified with respect to plausibility.

4.4.3 Action once inquiries have been carried out

Once inquiries have been carried out for the person subject to due diligence may face the following situations.

4.4.4 Continuation of the business relationship where no doubt exists

If the circumstances or transactions which are subject to simple or special inquiries can be explained in a plausible manner, the business relationship may be continued unchanged.

4.4.5 Continuation of the business relationship subject to special monitoring

If the person subject to due diligence continues the business relationship despite having doubts, but without a suspicion of a connection with money laundering, a predicate offense of money laundering, organized crime or the financing of terrorism the course of the business relationship must be monitored in more detail.

4.4.6 Discontinuation of the business relationship

If there are doubts, but not a suspicion of a connection with money laundering, a predicate offense of money laundering, organized crime or the financing of terrorism and therefore the person subject to due diligence discontinues the business relationship, it may only allow the assets to be withdrawn in a form which enables the prosecution authorities, if necessary, to continue to follow the paper trail; no money may be paid out in cash or no securities and precious metals may be released, unless the contracting party has fulfilled its obligations in full. The business relationship may not be discontinued and the withdrawal of large amounts may not be allowed if there are concrete indications that action by the authorities is imminent.

4.5 The reporting obligation

4.5.1 The obligation to report to the Financial Intelligence Unit (FIU)

If, as a result of simple or special inquiries or in connection with short-term business relationships by other means, the suspicion arises that a connection with money laundering, a predicate offense of money laundering, organized crime or the financing of terrorism exists, a report in writing must be immediately submitted to the *FIU*.

Until the conclusion of special inquiries or if the preconditions for the **reporting obligation** apply, the business relationship may not be discontinued. An unjustified report shall trigger no liability under civil or criminal law, unless there was intention. In the same way there shall be no civil liability for not discontinuing a business relationship even though the contracting party expressly wishes a discontinuation or termination of the business relationship. Until an order from the responsible prosecution authority arrives, but at most until the conclusion of five business days from receipt by the *FIU* of the above mentioned report, all actions that might obstruct or interfere with any orders issued to seize assets which may be subject to forfeiture or absorption of enrichment are prohibited, unless such actions have been approved in writing by the *FIU*.

The persons subject to due diligence may not inform the contracting party, the beneficial owner, or third parties that they have submitted a report to the *FIU*, until an order from the responsible

prosecution authority arrives, but at most until the conclusion of twenty business days from receipt by the *FIU* of the report.

Lawyers and legal agents as well as auditors, auditing companies, and auditing offices subject to special legislation are not required to submit a report to the *FIU* if they have received the information from or through a client in the course of assessing a legal situation for such client, or if they have received the information in the course of their activity as defense attorney or representative of that client in or concerning court proceedings, including advice on the pursuit or prevention of proceedings, before or after such proceedings, or during such proceedings.

4.5.2 The right to report to the FIU

If in connection with preparations for a business relationship, but without one actually being entered into, the suspicion arises that a connection with money laundering, a predicate offence of money laundering, organized crime, or the financing of terrorism exists, a report in writing may be submitted to the *FIU*. An unjustified report shall trigger no liability under civil or criminal law, unless there was intention.

5 Supervision

The execution of the *Due Diligence Act* is supervised by the **Financial Market Authority (FMA)** which carries out ordinary inspections on a regular, spot-check basis. Such inspections include both formal inspection concerning compliance with the documentation obligation as well as material inspection concerning the plausibility of the due diligence measures taken. The records and data of such inspection must be processed and stored exclusively in Liechtenstein and may be used for the sole purpose of combating money laundering, predicate offenses of money laundering, organized crime, and the financing of terrorism within the meaning of the *Criminal Code (Strafgesetzbuch)*. Inspections may also be carried out by auditors, auditing companies and auditing offices subject to special legislation mandated by the *FMA*.

Address

Financial Intelligence Unit

Äulestrasse 51
9490 Vaduz
Principality of Liechtenstein
Tel +423 236 61 25
Fax +423 236 61 29
info@sfiu.llv.li

Abbreviations

EEA	European Economic Area
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
FMA	Financial Market Authority

Bibliography

- Beat, P.:* Geldwäscherei Abwehr und berufliche Sorgfaltspflicht im Fürstentum Liechtenstein, Librarium Verlag, Werdenberg, 2001.
- Breuer, M.:* Die Bekämpfung der Geldwäsche im Völkerrecht, in der Europäischen Union und im Fürstentum Liechtenstein, ex jure Verlagsanstalt, Vaduz, 2003.
- Gasser, J.:* Die strafrechtliche Verantwortlichkeit von Vorgesetzten für Geldwäscherei ihrer Mitarbeiter, in: Liechtensteinische Juristen Zeitung, 2002.
- Heiterer, T./Gassner, A. et. al.:* SPG samt Nebenerlassen, GMG Verlag, Schaan, 2005.
- Ochsner, S./Süssli, D.:* Sorgfaltspflichten bei Tätigkeit als Organ einer Sitzgesellschaft, in: Marxer & Partner, Aktuelle Themen zum Finanzplatz Liechtenstein, Liechtenstein Verlag, 2004.

Dr Thomas Schirmer, LL.M. (Tulane) is a lawyer and partner of Binder Grösswang Rechtsanwälte. He studied law at, and graduated from, the Law School of the University of Innsbruck (Austria) and holds an economics degree of the Innsbruck Business School. After an LL.M. program at Tulane University Law School, Thomas Schirmer joined Binder Grösswang Rechtsanwälte in 1995 as an associate. He has been admitted to the Viennese Bar in 1998. His main areas of practice include mergers and acquisitions, corporate law, banking law and structured finance. He contributed to a number of international publications, amongst others to Neate Ed., ‘Bank Confidentiality’ (3rd edn, Butterworths, 2003). He is a member and officer of the International Bar Association (Committee E – Banking Law, Committee G – Business Organisations) and a member of DACH Europäische Anwaltsvereinigung.

MMag. Markus Uitz studied law at, and graduated from, the Law School of the University of Graz (Austria) and the Institut d’Etudes Politiques (Sciences-Po) in Paris. He also holds a master degree in History and Philosophy of the University of Graz. He joined Binder Grösswang Rechtsanwälte in 2006 as an associate after having gained experience in banks, industry and NGOs such as the European Training and Research Center for Human Rights and Democracy. His main areas of practice include mergers and acquisitions, corporate law, banking law and structured finance.

Firm’s profile

Binder Grösswang Rechtsanwälte is an independent full-service Austrian law firm with substantial international practice and has ranked among the leading business law firms in Austria for almost 50 years. The firm acts across the full spectrum of business activities in a wide range of business sectors with a strong focus on M&A and financing transactions, major arbitration and litigation and advice on corporate, commercial, banking, tax, public procurement, competition, IP, labor and real estate law.