Bulletin

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ASSET MANAGEMENT ACT

1. INTRODUCTION

The Liechtenstein Asset Management Act (VVG), LGBl. 2005 No. 278, and the Ordinance on the Act (VVO), LGBl. 2005 No. 289, came into force on 1 January 2006. These acts govern the requirements for the commercial rendering of and acting as intermediary for asset management services, the purpose of the acts being to provide protection for the client as well as to secure the confidence in Liechtenstein as a financial centre.

Up to now the tasks of asset management and investment advice have essentially been in the domain of the banks, financial companies and trustees. The new Asset Management Act led to the creation of a new and internationally recognised financial intermediary in Liechtenstein and removed classic asset management and investment advice from the job profile of the trustee.

The impetus to create a separate Asset Management Act came from the obligation of Liechtenstein to implement Directive 2004/39/EU (including the amendment to Directive 85/611/EEC and 93/6/EEC, 2000/12/EU and the cancellation of Directive 93/22/EEC) into national law. The profession of trustee is specific to Liechtenstein and unknown in this form in the EEA states. It is consequently also not one of the harmonised professions in the EEA and is unable to benefit from the four fundamental freedoms of the EEA Treaty, in particular the freedom of establishment and to provide services. As a result of the creation of the Asset Management Act commercial asset management now fulfils the requirements for the free movement of services within the EEA region under which asset management companies are able to render cross-border services in securities within the EEA.

The implementation of the 2nd Investment Services Directive will create the opportunity for enterprises other than banks to pursue activities within the framework of asset management on a cross-border basis without the service provider having to apply for a license in the corresponding EEA member country. Using the specified documents the company simply informs the Liechtenstein Financial Market Authority (FMA) in which EEA member state it wishes to establish a branch or wishes to operate within the framework of the free movement of services. The FMA forwards the details to the corresponding authorities in the admitting member state within three months following receipt of all the information.

2. SCOPE OF APPLICATION OF THE ACT

The Act covers the following services:
- portfolio management;
- investment advice;
- acceptance and forwarding of orders involving one or more financial instruments;
- securities and financial analysis.

At no point in time may asset management companies receive or hold third party assets. These transactions remain reserved for the banks and securities traders.

The Asset Management Act applies to those companies who render or act as intermediaries for asset management services for third parties on a commercial basis (asset management companies).

The asset management company can delegate one or more of its activities to

third parties for the purpose of an efficient management of the business. Approval from the FMA is required for such a delegation. The delegation to third parties does not release the asset management company from its liability.

The Act does for example not apply to:

- persons who render asset management services exclusively within the framework of a governing body mandate for legal entities, trusteeships, other associations or asset groups;
- persons who provide investment advice within the framework of another professional activity not covered by this Act, insofar as a separate payment is not made for such advice;
- asset management companies domiciled in a third party country (non-EEA member state) which render their services in Liechtenstein without establishing a branch, for example through third party powers of administration with a Liechtenstein bank for a bank account or bank custody account specific to individual clients. These companies are not permitted to actively canvass clients in Liechtenstein;
- banks and finance companies as understood by the Banking Act;
- insurance companies as understood by the Insurance Regulation Act.

3. LICENSES

The license entitles the asset management company to render and act as intermediary for the abovementioned services on a commercial basis.

An asset management company must fulfil the following requirements to be entitled to have a license:

- the asset management company must be established as a corporate entity or as a general or a limited partnership;
- the registered office and headquarter of the company must be located in Liechtenstein where the company must have suitable, local business premises and an organisation appropriate for fulfilling its purposes;
- the management of the company must comprise at least two persons who are competent to act and are trustworthy. Under certain conditions the management of the company can be restricted to one person (Art. 6 Para. 1 lit. d VVG);
- the asset management company must produce a viable business plan containing details on the organisation, marketing and market implementation as well as on the financial planning and the financing for the first three business years;
- external auditors must be appointed. These must satisfy the requirements in accordance with the Commercial Auditors and Audit Companies Act, the Banking Act or in accordance with the Law on Investment Undertakings;
- details of the ownership structure for the company must be available;
- the persons entrusted with the administration and management must guarantee the smooth running of the business activity at all times from a technical and personal viewpoint;
- the company must provide proof that it has appropriate own capital. The own capital (paid-up capital, profit and capital reserves, profit brought forward less intangible assets, own shares, losses) must equate to at least one quarter of the fixed operating costs shown in the last annual accounts. Where no annual accounts are available the fixed operating costs proposed in the business plan must be applied as the minimum capitalisation;
- the shareholders' equity at a minimum of CHF 100 000.00 or the equivalent in Euros or USD must be fully paid-up in cash;
- the company must not possess any other special statutory license in accordance with the Law on Trustees, Lawyers, Patent Lawyers or Commercial Auditors and Audit Companies.

A decision on the application for the issuance of a license will be made no later than six months after the complete documentation has been received.

4. MANAGING DIRECTORS

At least one of the managing directors must meet the following requirements on a cumulative basis:

- citizen of an EEA member state (Swiss citizenship is also sufficient on the basis of the state treaty);
- taking into account his/her other obligations, the organisation of the company and his/her place of domicile, he/she must be in a position to properly fulfil his/her duties in the asset management company;
- he/she must have corresponding training and professional experience of at least three years (fulltime);
- he/she must actually be working in the company and actively performing a management role;
- he/she must possess the competencies required for the management of the company (signatory authorisation and comprehensive authority to issue internal instructions);
- he/she must either be an associate or employee in a permanent employment relationship;

- he/she must actually fulfilling in Liechtenstein the corresponding number of working hours necessary to meet the company's requirements.

5. INVESTOR PROTECTION

The legislators have put in place a comprehensive set of rules on professional ethics. The asset management company is obliged to create a client profile to enable it to render the services which appear appropriate for the actual or potential client, or be able to recommend financial instruments. The (potential) clients must be in possession of appropriate information in comprehensible form (e.g. on proposed investment strategies and financial instruments, direct and indirect costs) so that they are in the position to understand what is being offered and consequently to make investment decisions on an informed basis. Where the asset management company is of the opinion that a specific financial product or a specific service is not suitable for the (potential) client, it must inform the client accordingly.

Once a year the asset management company is required to submit a statement of assets and income. This document provides information on the development of the assets and the costs. At the request of the client the company must issue details on the services it renders. The VVG also provides for a professional secrecy.

6. REVOKING, EXPIRY AND WITHDRAWAL OF LICENSES

If the asset management company has obtained the license through giving false information or by otherwise acting unlawfully, or if material circumstances were not known when the license was issued, the FMA is entitled to revoke the license.

The license expires for example if the business activity is not commenced within the period of one year, the business activity ceases to be pursued for a period of at least six months or if the asset management company is converted into a fund management.

The license is withdrawn if the requirements for its issuance are no longer being met, if there has been a serious breach of the statutory obligations or if the instructions of the FMA that the situation be restored so that it meets the legal requirements are not followed.

If a company offers services which require a license without actually owning a corresponding license the FMA can wind up the company. In urgent cases this can be done without prior reminder or giving a period of notice.

7. TRANSITIONAL PROVISIONS

As mentioned at the outset asset management and investment advice have been removed from the job profile of the trustee. However, for reasons of legal certainty and protection of vested rights, a number of (limited) special rules apply to trustees.

All persons who were authorised to carry out asset management in accordance with the law applicable prior to 1.1.2006 may continue to pursue these activities up to 31.12.2006.

For trustees (natural persons) provision is made for simplifications with regard to the requirements for managing directors. These are as follows: natural persons who were authorised prior to 1.1.2006 to carry out asset management on a commercial basis – in particular in accordance with the Law on Trustees or the Law on Lawyers – as well as persons who have successfully passed the trustee's examination or suitability examination for trustees by no later than 31.12.2006, do not have to possess either corresponding training or provide evidence of practical experience (at least three years fulltime, relevant practical experience in the area of asset management). Another simplifying factor is that the activity as a managing director in the asset management company poses no obstacle to the main professional activity as understood by the Law on Trustees. Consequently, the management of a trust company is not covered by the «other obligations» as understood by Art. 7 Para. 1 lit. b VVG (ability to actually carry out management activity offset against other obligations). If this person wishes to become a managing director of a second asset management company then the permission will depend upon whether the financial market authority is deemed to unconditionally fulfil the criterion of actual management of a second asset management company, taking into account the trustee's additional obligations.

Legal entities are granted a transitional period up to the end of 2007 to adapt their Articles and company purpose as well as any necessary change in the company name. If necessary, a change in the legal form may also be required.

8. RELATIONSHIP WITH THE EUROPEAN ECONOMIC AREA AND THIRD PARTY STATES

a) Activity abroad by domestic asset management companies

Asset management companies with registered offices in Liechtenstein and in possession of a license may offer their activities in another EEA member state. This can be done by establishing a branch or through the cross-border movement of services.

b) Activity in Liechtenstein by foreign asset management companies

For their part, foreign asset management companies with registered offices in an EEA member state can render services in the area of asset management in Liechtenstein through a branch or the cross-border movement of services without a Liechtenstein license, providing these companies have obtained the corresponding license in their member state of origin.

c) Asset management in Switzerland

In Switzerland there is no obligation to obtain a license in order to pursue the profession of asset manager nor is any federal certificate of competency required.

The Swiss Parliament recently concluded that there is currently no urgent demand for action in Switzerland for regulating asset management. Consequently Switzerland will not be drawing up any EU-compatible rules for the time being.

This decision means that the Swiss asset management companies remain excluded from the European market and may only offer their services exclusively in Switzerland and not on a cross-border basis. If the Swiss asset managers also wish to offer their services outside Switzerland in the future then in the long-term the only option for Switzerland is to draw up a set of EU-compatible rules.

Can Liechtenstein be an alternative for the Swiss market in the meantime?

To prevent Swiss asset management companies missing out on contact with the European market consideration would need to be given as to whether Liechtenstein could represent a suitable location for the processing of its, Switzerland's, international business. Liechtenstein is a close neighbour of Switzerland and essentially offers open access. Although it is difficult for Swiss citizens to obtain a residence permit in Liechtenstein, for many, particularly from the Zurich and St. Gallen region, commuting on a daily basis poses no problem.

In order to also open up the route via Liechtenstein for Swiss asset managers, they must apply to the Liechtenstein Financial Market Authority for a corresponding asset management company license (legal entity or general or limited partnership). It must be noted that on the basis of the treaty with Switzerland (the so-called «Vaduz Convention») Liechtenstein does not allow Swiss citizens who have no residence in Liechtenstein to act as the sole managing director/governing body in a Liechtenstein company. In other words, a Liechtenstein trustee must act as a co-managing director/governing body of the company and be recorded in the registers accordingly.

There are no regulations regarding the nationality or branch license for the associates.

From the aspect of taxation, for the Swiss asset management company it undoubtedly makes good sense for its transactions to be processed via a general or limited partnership. Namely if a Swiss citizen establishes a general or limited partnership in Liechtenstein then from the Swiss viewpoint the practise of the intercantonal tax return fundamentally applies. Participations in Liechtenstein commercial general or limited partnership and the income from these (interest on capital and share of profits) are taxed in Liechtenstein. In Switzerland this income is tax exempt but is taken into account for determining the tax rate.

If the Swiss asset manager is considered a commercial securities trader for his/her personal assets in Switzerland (which can happen relatively quickly on the basis of the new circular) he/she could consider investing his/her personal securities assets into the Liechtenstein asset management company. This procedure would result in this part being taxed at a lower rate. It must be noted that the asset management company should not serve the sole purpose of managing the individual's own assets but should primarily also offer these services to third parties, this is why the company requires a license.

9. COSTS

The following costs are incurred for an asset management company:

- commercial register fees: approx. CHF 800.00;
- the FMA license fees: between CHF 5 000.00 and CHF 10 000.00;
- stamp duty or issuance stamp duty (exemption up to CHF 1 million);
- coupon tax of 4 % on dividends, depending upon the legal form;
- annual supervision fees: CHF 2 000.00 to CHF 10 000.00 (dependent upon the amount of the client assets under management);
- changes in the management of the company, auditors etc. will in each case result in fees of CHF 250.00 to CHF 1000.00;
- taxes in Liechtenstein (between 7,5 % and 15 %), deposits by the partners may also be at a lower rate (possibly «flat rate tax» CHF 1 000.00 respectively 1 per mille);
- costs for renting business premises in Liechtenstein;
- audit costs.

Other current costs that should be mentioned would be the normal administration and distribution costs as well as salaries.

EU TAXATION OF SAVINGS INCOME

1. FIDUCIARY LEGAL TRANSACTIONS

We have noted in the past that companies as well as establishments, companies limited by shares, hold fiduciary bank accounts (for example «septo accounts»; reference accounts), stocks and assets of other kind . These matters are frequently governed within a so-called trustee agreement. In this case the corresponding company acts as a trustee of the foreign associate (natural person). In practice, the corresponding assets are not recorded either in the balance sheet or in a separate ledger but instead frequently in the notes, as an all-inclusive amount within the balance sheet total or not mentioned at all. This is correct under commercial law.

In conjunction with the EU taxation of savings income we would point out that a Liechtenstein company which for example holds fiduciary bank accounts for its associates domiciled within the EU and receives interest payments, is, as a trustee, simultaneously a paying agent. On the basis of the trustee agreement, concluded verbally or in writing, this paying agent is obliged to forward the interest income from the trust assets as such directly to the beneficiary (natural person) on a cross-border basis. The trustee, in other words the company, must then register as a paying agent at the statutory registered office. We definitely recommend that the clients concerned should contact the corresponding Liechtenstein trustee in order to discuss the problem and to reach a proper solution.

The same situation also applies to cases where a natural person, e.g. a Liechtenstein trustee (or another professional person) holds septo accounts or bank accounts with a bank for other natural persons domiciled within the EU.

2. SHAREHOLDER LOANS

Interest based on loan relationships between natural persons who do not act within the framework of a commercial activity, are exempt from the EU taxation of savings income.

Interest on loans granted to Liechtenstein companies by natural persons domiciled within the EU are subject to the EU taxation of savings income provided that the loans are granted after the agreement on the taxation of savings income came into force. A «grandfathering clause» was therefore introduced so if interest payments on new loans or possibly on loan increases have been received or accounted for since the 1.7.2005 then the Liechtenstein company must register itself as a paying agent. Any retrospective termination of a loan agreement is likely to be problematical.

Loans from natural persons to trust settlements are not excluded from the scope of the agreement on the taxation of savings income. These are not private loans as understood by Art. 7 Para. 1 lit. a FL-ZBStA (Liechtenstein agreement on the taxation of savings income). It is therefore irrelevant as to whether the trustee is a company or a natural person.

By contrast to Switzerland the place of residence of the interest debtor is always irrelevant for the EU taxation of

savings income. There are no exemptions such as those that apply to Switzerland (Swiss debtors are exempt for their interest payments there). The Swiss withholding tax is stated as the reason for this deviation between the Liechtenstein ZBStA and the Swiss Treaty. However, it is a known fact that these very shareholder loans are in fact not subject to withholding tax in Switzerland, consequently the differing approach in Liechtenstein does cause some confusion.

3. DELEGATION OF THE PAYING AGENT OBLIGATION

A Liechtenstein corporate entity does not have to register as a paying agent if he/she delegates the deduction of the tax deducted at source or the notification obligation to a bank. The obligations can be delegated to a Liechtenstein bank but not a foreign one. The delegating paying agent must register as a paying agent with the Liechtenstein Tax Administration. It should be noted once again that the registration as a paying agent must be carried out at the statutory registered office. The differing place of domicile for business purposes, respectively the foreign registered offices of the Board of Directors (for example where a majority of the governing bodies is located abroad with decisions reached abroad) is not decisive.

4. FROM PRACTICAL EXPERIENCE/OBSERVATIONS

Art. 10 of the agreement on the taxation of savings income between Switzerland and the EU (CH-ZBA) makes provision for an obligation to provide official assistance for tax fraud and similar offences. Art. 10 FL-ZBStA provides for an exchange of information in the case of offences which are considered as tax fraud or a similar offence under the legal regulations in Liechtenstein. In Liechtenstein the exchange of information is carried out by way of legal assistance.

Switzerland, in conjunction with the Italian Finance Ministry, has recently drawn up a sample list of the facts that could be considered as offences under the agreement, with regard to a review of the double tax agreement between Switzerland and Italy. These sample applications are also relevant for Liechtenstein, consequently they are individually summarised below:

- A physical person edits books (accounts or similar documents) and records the facts in such a way that interest income, covered under the agreement, is paid to a company. In reality however there is a trustee agreement under which the interest income is actually paid to the natural person. In this case the books do not reflect the true situation which is considered tax fraud under the obligation to exchange information. *(Comment by the author: It is interesting to note in the brackets that «other documents» can also be equated with accounts documents.)*
- The use of a false certificate of domicile is considered tax fraud within the framework of the agreement and will result in an exchange of information.

Should you require any further information the authors of the articles, Mrs. Véronique Risi-Bravin lic. iur., (Asset Management Act) and Mr. Roger Frick, certified accountant, business economist, (EU Taxation of Savings Income) at Allgemeines Treuunternehmen will be happy to assist you at any time.

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