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REPORT

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Dear Readers,

Our Financial Market Group at Setterwalls is pleased to release our winter 2015/16 newsletter. As always, our three offices in Stockholm, Gothenburg and Malmö have gathered articles covering a broad variety of subjects from our field of practise.

Just in time for the UN conference in Paris on climate change we are looking into the market for green bonds. A green bond differs from a regular bond in that the proceeds of an issue are directed towards activities with environmental benefits in areas such as renewable energy, clean transportation, sustainable waste management and sustainable land use in businesses such as forestry and agriculture.

From green bonds we turn to a more traditional Setterwalls subject: security in movable assets. This time we look at security in railway wagons engaged in international traffic where the wagons commute between countries. Of particular interest is how to secure financier and lender claims, which typically fall outside the COTIF (International Carriage by Rail of 9 May 1980) convention; i.e. claims other than those resulting from freight contracts regarding passengers or goods, and the like. This subject requires a study of both international private law and Swedish security rules on rights in rem.

Relevant for all financing today is the adherence to applicable anti-money laundering rules. We are thus reporting on new rules issued by the Swedish Financial Supervisory Authority (SFSA) relating to anti-money laundering, including broadening the scope of PEPs (politically exposed persons) and enhanced due diligence on PEPs. In this context we also look back at two earlier sanction cases this year, where the SFSA found that the bank Nordea had major deficiencies for several years regarding its work to meet its legal obligations to take measures to prevent money laundering and financing of terrorism. In terms of Swedish measures, SFSA´s intervention was as serious as such an action could be short of the SFSA revoking the bank's license. In the second case regarding Handelsbanken, the criticism was less severe, though the breaches were considered to be substantial.

This leads us automatically to a topic that has been widely discussed in Sweden this year: implementation of the CRD IV, especially the rules about pecuniary sanctions on certain natural persons up to an amount of EUR 5,000,000 (the sanction rules). These rules were implemented in Sweden in May this year. We report on topics currently under discussion: large amounts with Swedish standards, whether it is appropriate for the SFSA to be responsible for the investigation while also being the initial decisionmaker regarding administrative sanctions, and whether directors should be permitted to have insurance to cover the possible administrative sanction.

We look ahead at regulations that will come in early 2016 and then report on implementation of the UCITS V directive (Undertakings for Collective Investment in Transferable Securities), which will be implemented in March 2016 in Sweden. We present an overview of the main features of the update of existing UCITS IV rules, as well as the new rules on remuneration and related reporting, new rules and duties concerning parties acting as depositaries, rules on outsourcing, loss of financial instruments and whistleblowing rules. Rules on sanctions on physical persons will now also be introduced in this area.

Finally, we touch upon a topic familiar to all Swedish lawyers in the field of lending and security – the Swedish Financial assistance rules, essential information for anyone involved in this business.

All these new and old regulations in our field will ensure that 2016 will continue to be full of fascinating legal discussions and debates. We hope you enjoy the report.

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Swedish financial assistance rules – what to keep in mind when purchasing Swedish limited liability companies

The level of activity of acquisitions and acquisition financing is rising in Sweden. A string of international purchasers have joined in, partly due to the depreciation of the Swedish krona against major currencies such as the USD and EUR, causing some Swedish acquisitions to appear more affordable, and partly due to the growth, stability and relative health of the Swedish economy and its companies.

Since assets are usually owned by Swedish limited liability companies, compliance with Swedish financial assistance rules will be necessary when structuring and securing a leveraged acquisition of a Swedish limited liability company. A few hurdles must be cleared beforehand when and if the assets of a target company are to be used to secure an acquisition loan.

Generally speaking, a Swedish limited liability target company is not permitted to give an advance to secure or provide a loan in order for the purchaser to finance the acquisition of shares in such a target company. If the recipient acts in bad faith this ban may make the security void and may also entail criminal sanctions.

Consequently, the assets of the target company will not be available as security for acquisition financing at the time of closing. The target may secure other debt, such as its own debt, which is being refinanced in connection with the acquisition. The target may only serve as security after the acquisition, provided that the bank has taken a real credit risk and a waiting period of at least 30 days has passed. The purchaser will therefore need to take these rules into account early on in discussions with financing banks when making a leveraged and secured Swedish acquisition.

Another set of rules to keep in mind are the rules on value transfers in the Swedish Companies Act. These rules render security or a guarantee provided by a Swedish limited liability company void or voidable, if it leads to a reduction of the capital of the company and is not of a pure commercial nature for the company. A breach of this provision may also entail personal liability for persons who negligently have taken part in such value transfers. Upstream and cross-stream guarantees and security in particular may therefore often only be provided with appropriate limitation language.

Finally, the Swedish Companies Act generally prohibits providing security or guarantees to related parties. If the recipient acts in bad faith, the prohibition may make the security void and may also entail criminal sanctions. Security may be provided within the same group of companies, which is an important exception to that prohibition. It should be noted, however, that the definition of a group under Swedish company law has its limits, not least where the parent company of two Swedish limited liability companies is a non-EEA company. Another important exception is therefore that security is exclusively aimed at a loan for the business of the pledgee and that the pledgor provides the security for commercial reasons.

The above rules were adopted many years ago so, needless to say, Swedish market participants have worked out ways to properly address the rules. Since the sanctions, should one be found to be in breach of the rules, are severe and the available security at least initially may be limited, it is always advisable to bring lawyers on board early on.

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UCITS V – An overview from the Swedish perspective

Introduction

An overview of UCITS V

The UCITS Directive, which dates back to 1985, has been amended several times and was recast in 2009 (the UCITS IV Directive). The latter directive was later amended through a new directive in 2014.

The UCITS V Directive (UCITS V) entered into force on 17 September 2014 and must be implemented into Swedish law on 18 Mars 2016.

The main purpose of UCITS V is to increase investor protection and to harmonise the rules for management companies with the rules that apply in other parts of the financial markets in certain aspects. The rules aim to clarify the responsibilities of depositaries and to impose rules regarding remuneration and sanctions similar to those that other types of financial actors already face. Implementation of these rules into Swedish law will be described below.

The Swedish procedure for implementing the UCITS V Directive

In October 2014 a public commission ("the Inquiry") was tasked with investigating the need for necessary changes in

the existing Swedish UCITS Act (2004:46) (Swe. lagen om värdepappersfonder) as a consequence of UCITS V. The work and the conclusions of the Inquiry have thereafter been submitted to a number of respondents for consideration. The suggestions by the Inquiry and the submitted opinions from organisations and authorities serve as the basis for a government bill, which in turn will serve as the proposal for a decision by the parliament.

The Inquiry presented the results of its work on implementation of UCITS V this summer. No bill has yet been published. Consequently for the purposes of this article we can only rely on the proposals from the Inquiry.
UCITS V includes rules for which the Inquiry has no suggestions for implementation into Swedish law. The reasons vary; in some cases, the rules have already been implemented (see section 6), while in others the Inquiry found that the rules should be implemented through other types of legal acts. The rules in UCITS V that require the relevant authority to have effective procedures to receive and follow up on notifications of breaches by management companies or by depositaries are an example of the latter. The Inquiry concluded that such rules should not be implemented through law, but instead through a regulation issued by the government.

Remuneration and information regarding remuneration

UCITS V contains rules about remuneration that the Inquiry has proposed for incorporation into the Swedish UCITS Act.

According to the proposal, management companies must have a remuneration system that encourages sound and effective risk management. The term 'remuneration system' includes an actual written policy, as well as its application in practice. According to the Inquiry, the remuneration system may not conflict with the risk profile of the managed funds, or any other document that regulates the operations of the management company.

However, having such a system is not sufficient. The management company must also inform its stakeholders about this system through the prospectus, through a reference in the KIID-documentation, and through detailed information in the financial statements.

Duties and liabilities of depositories

Generally

One of the main objectives of UCITS V is to provide more detailed regulation of depositaries in response to their increased significance to the financial industry. The Inquiry suggests that these new rules should be implemented into Swedish law.

UCITS V stipulates that a management company is obliged to appoint one, and only one, depositary for each fund that the management company manages. The depositary must act honestly, fairly, professionally, independently and solely in the interest of the unit holders and the fund. Beside these general rules, the Inquiry suggests specific rules regarding the duties of the depositary as stipulated in the rules in UCITS V.

Duties of the depositary

The depositary must hold deposit operations separate from any other operations or activities that might conflict with the interests of the management company, the fund or the unit holders. According to the Inquiry, the management company must first assess whether the depositary fulfils these obligations prior to hiring a depositary. The unit holders must be informed about any conflicts of interests.

The depositary is also responsible for monitoring the cash flow of the fund and is obliged to adhere to some specific rules about actual custody holding and to register the fund assets in a separate account. A list of all fund assets must be provided to the management company on a regular basis. The depositary must specifically ensure that payments made by investors for investments in the fund are booked in a settlement account used solely for that fund.

According to the proposal, the depositary is also obliged to hold in custody all financial instruments of the fund and to ensure the management company´s, on behalf of the fund, proprietorship of other assets of the fund and to keep an updated register of those assets.

Outsourcing

The right of the depositary to outsource functions that the management company has engaged it to perform is strictly limited to certain specific duties, and may only be permitted under certain conditions.

Outsourcing to an agent may take place only if the depositary can show that there is an objective reason for doing so, and that there is no intention to supersede the Swedish UCITS Act. The depositary must also, on a regular basis, supervise the agent and the agent´s procedures with respect

to outsourced activities. The depositary shall also make sure that the agent i.a. has the structure and relevant knowledge that is needed for the assignment, and that the agent follows general rules, such as those related to handling conflicts of interests.

Some duties carried out by others, however, are not to be regarded as duties for which the depositary is required to apply the rules on outsourcing. Utilisation of clearing and liquidation are examples of such duties.

Furthermore, the agent may sub-outsource functions if all conditions related to outsourcing by the depository are met.

Loss of financial instruments

The Inquiry has proposed that, if the depositary loses financial instruments that have been under its custody, the depositary must, without unnecessary delay, retransfer a financial instrument of the same kind, or an amount corresponding to the value of that instrument, to the fund. The depositary will not be held liable if it can show that the loss occurred due to external factors beyond the reasonable control of the depositary. The consequences of the occurrence that led to the loss must also have been unavoidable despite all reasonable efforts to prevent it.

Whistleblowing

The supervisory powers of the SFSA have been extended as a result of UCITS V.

According to a proposal by the Inquiry, a management company must ensure that it has appropriate reporting systems that employees can use to report suspected violations of rules governing the activities of the management company. This rule is new for management companies, but has already been implemented in banking and investment firm regulations.

One rule that is new for the entire industry, however, is that the person who made the report may not be held responsible for disregarding rules regarding mandatory secrecy. The Inquiry has therefore suggested such a rule for several other types of companies as well.

Sanctions

General about the extended circle of persons

The Inquiry proposes rules that broaden the circle of individuals upon whom sanctions may be imposed. This extended group includes management company owners, the managing director and members of the board of directors of the management company and the depositary.

The Inquiry also proposes a rule that empowers the SFSA to impose a pecuniary sanction on a company that acts as a management company without due authorisation.

Sanctions on physical persons

Management companies

A new rule is proposed regarding intervention against the executive manager or the board of directors in the event that the management company is in breach of certain rules in the Swedish UCITS Act. The grounds for intervening against these individuals in the management company are defined under 11 different points, such as wilfully giving false information when applying for authorisation, not fulfilling fundamental requirements regarding organisation and conducting business, not fulfilling requirements on diversification and risk management, and others.

Of course some criteria must be met for the SFSA to intervene against a person. First of all, the intrusion by the company must be severe, and secondly the SFSA must prove that the breach is intentional or the result of gross negligence by the relevant person. The intervention may entail a decision to ban the person from serving on the board or acting as the executive director of a management company for a period of 3-10 years, or a decision to impose a pecuniary sanction. There is a list of what information must be included in the sanction order.

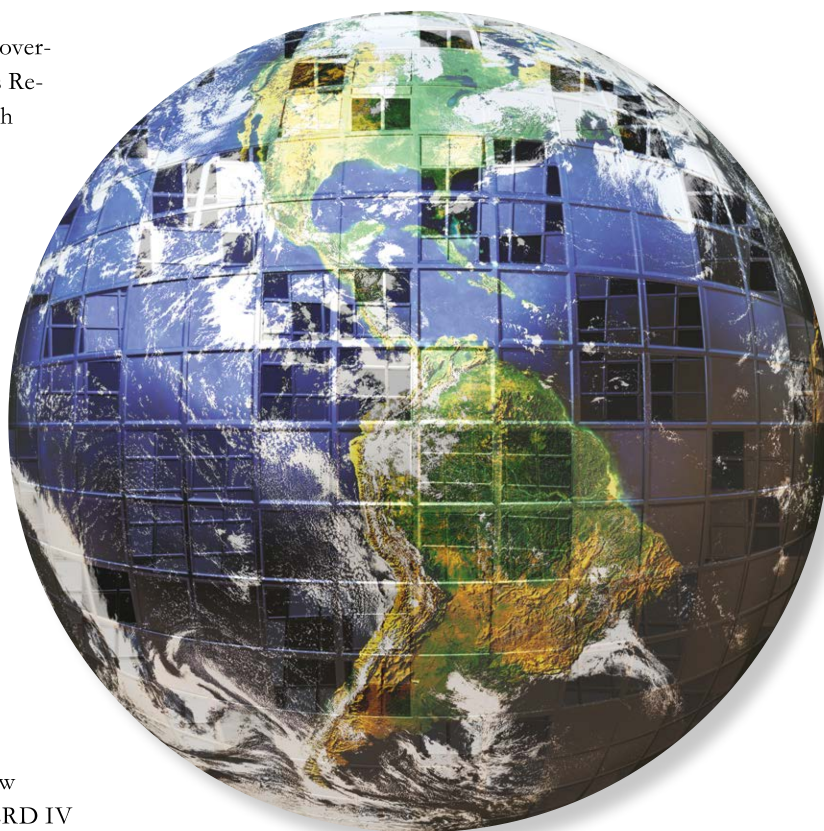
If a person upon whom such a sanction order has been imposed does not approve the order, the SFSA has a possibility to make an application to the Administrative Court for a decision on a sanction.

Depositaries

The Inquiry has also proposed an option to intervene against physical persons (the board of directors and the executive manager) of the depositary. The grounds for intervening against these persons are, of course, that the depository is in breach of rules that the depositary is required to fulfil.

Current position of the SFSA

The proposed legislation regarding sanctions imposed on the senior management of a management company and depositaries puts these individuals in a more exposed situation than is currently the case. This type of legislation is



relatively new in Sweden and is highly controversial. As can be seen in another article in this Report, similar rules have been introduced with respect to board members and managing directors in banks and investment firms. The SFSA has currently adopted a restrictive policy in actually applying these rules, stating that their main mission is to supervise companies rather than individuals.

Previously implemented rules

A few rules in UCITS V have not resulted in any proposals for changes in Swedish legislation because corresponding rules were previously implemented into laws other than the Swedish UCITS Act, most commonly the implementation of CRD IV. The duty of the SFSA to protect individuals who exercise their rights as whistleblowers has already been introduced into Swedish law in connection with the implementation of CRD IV and CRR in Sweden. These rules can be found in the Freedom of Information and Secrecy Act (SFS 2009:400). The right of the SFSA to demand information regarding data traffic records, based on article 98 of the UCITS V, is considered to be previously implemented into Swedish law.

Concluding remarks

As can be seen above, many new rules must be implemented and a considerable amount of work lies ahead for the Ministry of Finance. It now remains to be seen whether the timetable will hold. In addition to UCITS V, we are also awaiting implementation of MiFID II, MAD and other EU Directives next year, which will also demand considerable resources from the Ministry of Finance.

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A closer look at green bonds and the recent explosive development of the green bond market

Green bonds are the answer to growing investor demand for engagement in climate-related opportunities. But why green bonds and how do they work? What does the future hold for green bonds?

Since its first launch by the World Bank together with the Swedish bank SEB in 2008 as a response to increased investor demand for engagement in climate-related opportunities, rapidly growing interest from issuers and investors alike has sent the green bonds market soaring. In 2014 the market grew explosively with issuance of $36.6 billion green bonds – a tripling of the $11 billion issued in 2013. So far in 2015, we have seen issuance of $14 billion. Issuance is expected to ramp up in the remaining part of 2015 in the run-up to the UN Climate Conference in Paris at the end of the year. The Climate Bonds Initiative expects total issuance in 2015 to reach $70 billion, with a stretch target of $100 billion. SEB estimates issuance will hit $70 billion.

The "why" of green bonds is apparent to market actors, with green bonds providing opportunities for issuing companies to attract investors through a green label, and opportunities for investors looking to make sound investments that also carry environmental benefits. All other things being equal, there are few reasons not to go green.

The "what" of green bonds is less apparent, in part due to the pertinent question of what the green in green bonds really means? Companies looking to qualify their bonds as green may find guidance in the Green Bonds Principles, a set of voluntary process guidelines launched by 13 leading international banks in 2014 and updated in March 2015.

According to the Green Bond Principles, a green bond differs from a regular bond in that the proceeds of an issue are directed towards activities with environmental benefits. This is the cornerstone principle of the green bond. Potential eligible green projects for the use of proceeds include renewable energy, clean transportation, sustainable waste management and sustainable land use in businesses such as forestry and agriculture. Other Green Bond Principles concern the evaluation and selection of green projects, management of proceeds in terms of allocating received funds and reporting criteria. Business whose operations fall solely within the scope of eligible green projects can benefit from these principles when issuing corporate bonds, receiving a green label almost free of charge.

The "how" of green bonds is answered by Setterwalls, helping business navigate legal and regulatory complexities in connection with issuances of green bonds.

The future success of green bonds is still an open question. In light of falling electricity prices, the aim of reaching an issuance of green bonds amounting to $70 billion (with a stretch target of $100 billion) in 2015 may seem ambitious. Growing a deep and liquid green bond market requires not only a scale-up of the issuance, but also diversification in currencies and ratings. While the majority of green bond issuance continues to be in USD and EUR, we are pleased to see that development banks have increasingly been issuing smaller amounts of green bonds in a number of other currencies.

Looking at recent Swedish issuances of green bonds and the issuance estimates made by the Climate Bonds Initiative and SEB, among others, Setterwalls, approaches 2016 with cautious optimism.

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Security rights in railway wagons engaged in international traffic

Under Swedish law, unlike ships and aircraft, railway wagons are not subject to any registration rights. Such vehicles are considered movable goods for the purpose of Swedish law on creditors' rights. When such vehicles are utilized in international traffic, the question arises under what jurisdiction the rights of creditors should be determined.

I will use an example to illustrate the issue. Swedish company A owns sets of railway wagons and would like to finance them through a sale and lease-back. UK company B agrees to purchase the wagon sets and to lease them to A. The wagons are engaged in regular traffic between Sweden and Germany. A and B have agreed on UK law to be applicable to their contract.

Creditors' rights in relation to third parties

Swedish law discriminates between (a) the obligations between the parties to a contract that are largely governed by the agreement and (b) the impact of any agreement between two or more parties in relation to the creditors of the parties or other third parties which calls for certain specific criteria to be fulfilled in order to perfect the agreement. Thus, the transfer of title to goods may freely be agreed between a seller and a purchaser, but in order for the transfer of title to have effect in relation to the seller's creditors, the purchaser is normally required to take exclusive physical possession of the goods or to comply with the specific procedure of purchase of movables that remain in the possession of the seller. It is important to understand this specific feature under Swedish law where the requirement under (a) is subject to contract only whereas the requirement under (b) is not (since it is intended to protect the interests of third parties).

Swedish private international law will respect, with limited exceptions and in accordance with the Rome-I Regulation on the applicable law to contractual obligations, the parties´ choice of law in the contract (even in relation to non-EU countries) as far as the requirement under (a) is concerned. Regarding the requirement under (b), however, Swedish law will apply to goods situated in Sweden.

Under Swedish International private law, legal perfection of title to and third party rights in rem in relation to movable property will have to be established according to the lex rei sitae principle, which means that the relevant jurisdiction would be the one where the property is situated.

Wagons in international traffic

When wagons are engaged in international traffic, they will typically commute between countries. As for the railway wagons, they will have a "home state" in accordance with the Convention concerning International Carriage by Rail of 9 May 1980 in the version of the Protocol of Modification of 3 June 1999 (COTIF). Sweden is a party to COTIF, but the convention as such does not deal with creditors rights other than claims based on the convention (which basically comprises only claims resulting from freight contracts regarding passengers or goods, agreements on charter of

railway equipment, or on usage of railway infrastructure). However, it may be noted that railway wagons under COTIF (app. D, article 2, (d)) always have a home station for the purpose of the convention.

Goods moving from one country to another

Swedish doctrine generally holds that rights in goods initially situated abroad and later moved to Sweden will be subject to a double test. First, it will be tested if the right is valid in the foreign jurisdiction where it was established. When the goods are moved to Sweden, it will have to be tested to what extent the right could be upheld as continuing by Swedish law. It may be noted that this view is based on the assumption that the goods were originally situated abroad and subsequently transferred permanently to Sweden.

In the case NJA 1984 p. 693, the Swedish Supreme Court has seemingly adhered to the idea of a closest connection. In this case, a car (MB 280 SE) registered in former West Germany was attached in Sweden in order to settle the tax debts of a natural person domiciled in Sweden. The natural person also conducted business in West Germany where the car was used. In West Germany, the natural person had used the car as surety for a loan under West German law using a security transfer (Sicherungsübereignung). It should be noted that the surety arrangement would not have been validly perfected under Swedish law. The court noted that the car was not permanently situated in Sweden and concluded, based on the fair expectations of creditors, the need for stability in the credit market and reciprocity of acknowledgement of foreign sureties, that a surety in movable goods validly established in another jurisdiction should be recognised in Sweden when the goods had a considerable connection to the foreign jurisdiction. Thus, the Swedish attachment was not upheld.

The case is based on the fact that the car was permanently situated in Germany and that it was situated in Sweden only temporarily. It is quite clear from the facts of the case that the car had a considerable connection to Germany since the car was presumably used most of the time in Germany. This does not necessarily mean that the same would apply to railway wagons used regularly in several jurisdictions.

Goods commuting

It may be observed that the case referred to above does not necessarily clarify the standpoint of Swedish international private law when goods commuting between two or more countries are to be considered situated. It may be argued that this has to be assessed taking into account only the actual physical position of the goods at a given time.
A better view would be to take into account the closest connection of the goods to one country where such a connection can be assessed.
In the example described in the introduction:

- the company using the wagons is incorporated in Sweden;
- the wagons are probably – for the purpose of COTIF – marked as pertaining to the Swedish company;
- the business activity in which the wagons are engaged is operated from Sweden

The facts pinpointed suggest a connection to Swedish jurisdiction. However it is uncertain if those facts are prerequisite to rule out application of any rights established under a foreign jurisdiction. In the example, UK law is the law of the sale and lease-back contract, but there is no other connection to the UK other than the lessor being incorporated there. Thus we may add that the absence of any direct connection between the UK and the railway wagons would speak in favour of Swedish law on rights in rem to prevail in the law of the contract.

Finally, it remains to be tested whether the wagons are to be considered to have a close connection to Germany since they are in fact operating regularly both in Sweden and in Germany. In my view, it would be reasonable to consider the wagon units situated permanently in Sweden and intermittently, but temporarily, situated in Germany, since they are actually operated from Sweden by a Swedish company. This view is also supported by the premise – for purposes other than establishing a general connection to a jurisdiction – of a "home station" under COTIF.

Since that question has not yet been tried in Swedish case law, it would be advisable to uphold a "double test" even in this situation. The ownership of the lessor should therefore be respected both in Germany and Sweden.

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Administrative sanctions on natural persons

Sweden

In July 2013 the CRD IV package entered into force. CRD IV contains inter alia in Article 66 rules about pecuniary sanctions on certain natural persons up to an amount of EUR 5,000,000 (the sanction rules).

The sanction rules were implemented in Sweden on 1 May 2015. Although adopted already in 2013 in the CRD Directive, the sanction rules did not raise any significant public discussion in Sweden until early spring 2015, when the bill was presented.

Following the bill in February 2015, general public discussion addressed the sanction rules in general and the consequences for the relevant individuals and the credit institutions and investment firms in particular.

The discussions in Sweden mainly touched on the following topics.

- The amount of the administrative sanctions – EUR 5 million – far in excess of amounts "normally" used in administrative sanctions and much higher than the criminal fines that could be relevant for crimes in related areas. Even a fraction of the sanction fees could mean personal disaster.
- The suitability and the competence of the Swedish Financial Supervisory Authority ("SFSA") to be responsible for the investigation, the "prosecution" and the initial decision to impose administrative sanctions on a natural person and whether it was appropriate that the SFSA should have all these functions.
- Insurability – statements made by the SFSA that neither the firms nor the relevant individual would be entitled to take out an insurance policy to cover the possible administrative sanction.

Fear was expressed that the above would lead to a shift in the focus for the individual persons, from the interest of the credit institutions and investment firms, to considering or protecting the interest of the individual.

The sanction rules have now been in force for approximately seven months in Sweden. During that period there have been a handful of cases where well-known "professional" board members (presumably only "non-executive" board members) have left their positions in credit institutions or investment firms, citing the sanction rules as the direct reason. Currently no information is available regarding how the SFSA plans to apply the rules. Public discussion about the sanction rules has gradually ceased and the rules seem to have been accepted and added to the general plethora of financial regulatory rules related to the financial market.

Other countries

Ireland

In Ireland, the CRD IV was implemented in March 2014. The Irish legislation implementing CRD IV reflects the wording of the Directive. The CRD IV implementation was supplemented by an implementation Notice issued by the Irish Central Bank in May 2015. However, the implementation notice does not provide any additional guidance in respect of the EUR 5 million administrative sanction.

There has not been any significant general discussion about the sanction rules, nor have any high-profile individuals resigned from their appointments/positions due to the sanction rules. Regarding the insurance issue, standard board insurance usually will not provide cover due to the provision in the policies that insurance coverage does not apply in the case of negligence, willful default or fraud by the director, which – when it comes to the sanction rules in CRD IV – is a condition for personal liability.

Denmark

In Denmark, Article 66 of the CRD IV has not yet been implemented. In 2014 a committee was appointed to review the administrative penalties in CRD IV and to prepare input on how to implement it into/adjust the Danish legal system for such administrative penalties. The committee

has not yet submitted its report, but the media seems to have the general understanding that Denmark will implement significant administrative penalties in order to be able to fine natural persons within the financial industry on a much larger scale. Since the sanction rules have not been implemented, there has been very little public discussion on this topic. However, such discussions may very well come once the committee has issued its report.

Finland

The situation in Finland resembles the situation in Sweden. Finland implemented CRD IV – including the sanction rules – in August 2014. The specific rules about the pecuniary sanctions have been amended and the amended rule came into effect on 26 November 2015. According to reports from the Finnish FSA, the administrative pecuniary penalties are primarily imposed on legal persons. In some cases, however, the penalties can also be imposed on natural persons within the company's management. There is no information about discussions on whether it would be possible to provide insurance coverage for the sanctions.

The sanction rules – which provide for administrative sanctions that are much stricter than any fines that a general court would impose as a criminal sanction for a much more serious offence – caused general discussion when they were first introduced, but there is no ongoing public debate about the specific rules of CRD IV at this time. It is possible that there will be more information available after the regulation comes into effect.

England

In the UK, the parts of CRD IV of interest for this article were announced (not implemented) by HM Treasury, the Prudential Regulatory Authority (PRA) and the Finance Conduct Authority (FCA) in October, with an indication that the new rules would come into force on 7 March 2016. The creation of the senior managers' regime, certification regime and new conduct rules are a significant milestone in UK regulatory reform, as is the creation of a new criminal penalty for making a decision that causes an institution to fail. The PRA and the FCA can fine or sanction senior managers (such as senior bankers and senior investment managers) for misconduct that occurs in their areas of responsibility and this is designed to give UK financial regulators stronger powers to hold to account senior managers whose misconduct causes their institution to fail. Under the new criminal offence, such persons, if convicted, can face up to seven years in prison.

As a result of the new rules, the concern, as reported in the UK national press, is whether some individuals would be willing to hold the position of senior manager. There are indications that not all current senior individuals are comfortable with the scope of the new rules and some have resigned from their positions or indicated that they will step down.

The UK regulators originally proposed that senior managers would face a 'reverse burden of proof'; namely, that they have to prove that their conduct did not lead to or contribute to the failure of their institution. Following widespread resistance to this from industry, this aspect has been dropped. Other areas of contention remain the focus of discussions between industry and UK regulators, which may lead to modification of some of the rules.

In the UK, there is generally no distinction between the fiduciary duties owed by executive and non-executive directors and that, combined with the extent of involvement by non-executives on the one hand, and executives on the other, in day-to-day management, could result in non-executives feeling that they are not in a position to hold a senior manager position and to discharge their duties properly and effectively. Non-executives are unlikely to be able to claim ignorance as a defense against regulatory sanction or criminal prosecution.

The new rules will not have retrospective effect and since they are not yet in force, there have been no sanctions or criminal prosecutions in the UK under the new rules, but regulators have made it clear that they will take a tougher line in the future with senior managers who they think have engaged in misconduct and who have caused or contributed to the failure of their institution.

Concluding remarks

Obviously we can now foresee a change in the climate regarding responsibility for rule breaches in the capital market. Board members in banks and investment firms are not the only ones who will be potential subjects of sanctions from the authorities. As can be seen in another article in this Report, similar rules have also been proposed for board members and managers in fund management companies. In addition, newly decided amendments to the Transparency Directive contain rules regarding sanctions for board members in listed companies and other entities that have breached rules regarding obligations to publish certain transactions in shares issued by listed companies ("flagging rules").

If – and signs point in this direction – the actual rules have the effect that competent board members decide to leave their positions, there is a risk that the good intentions of the new rules will instead have the opposite effect on management of the companies mentioned above.

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Beware – there is money laundering in your business

The legal field regarding money laundering countermeasures has grown rapidly in recent years, affecting financial institutions all over the world. The fact that measures are taken is reasonable since the problems related to money laundering and financing of terrorism have been found to be extensive.

Revised standards and new legal provisions

The Financial Action Task Force (FATF) revised its standards in 2012. These revisions have now led to changes in the Money Laundering and Terrorism Financing (Prevention) Act (SFS 2009:62) (AML Act) which entered into force on 1 August 2015. On 1 December, subsequent changes to the rules issued by the Swedish Financial Supervisory Authority (SFSA) entered into force.

The new rules primarily entail:

(a) a more sophisticated risk assessment and procedures for making this assessment,

(b) changes to the definition of politically exposed persons (PEP) by including leaders of international organisations and excluding close relatives (although close relatives to PEPs still require enhanced customer due diligence measures),

(c) business operators must take enhanced customer due diligence measures regarding all PEPs (including domestic PEPs),

(d) specific rules regarding data protection, and

(e) additional requirements regarding reporting to the Finance Police and documentation regarding suspicious transactions.

National risk assessment

In connection to the new FATF recommendations, an association of Swedish authorities completed a national risk assessment in 2013 and 2014. The part completed in 2013 concerned money laundering and the conclusions were quite clear: Money laundering in Sweden is extensive and amounts up to billions of SEK each year. The second part addressed financing of terrorism and concluded that financing of terrorism probably occurs in Sweden and the threat is "comparatively limited but not negligible" (my translation).

From the national risk assessment, it can be concluded that there are good reasons for each and every business that engages in business operations under the AML Act to be extremely cautious. In reality, it is highly likely that individuals who have acquired property through criminal means will try to channel the funds through the financial system, which at times may well be through your business.

Sanctions

The SFSA also imposed sanctions just before summer on two of the four largest banks in Sweden (Nordea and Handelsbanken). Nordea is regarded as a bank of global systemic importance and both banks are of systemic importance to the Swedish market. The sanctions were the result of an extensive investigation conducted by the SFSA to examine the banks' assessments of customer segments and areas with a higher risk of money laundering and financing of terrorism. It included customers domiciled abroad and regarded as PEPs, correspondent banks, customers within Private Banking and legal persons with fiscal residence outside the Nordic countries.

In the case of Nordea, the SFSA found major deficiencies over a period of several years regarding the bank's efforts to meet its legal obligation to take measures to prevent money laundering and financing of terrorism. The SFSA had already criticised Nordea in 2013 in a similar matter regarding the bank's monitoring of customers with respect to the EU Sanctions Regulation. Among Swedish measures, SFSA intervention is as serious as such a measure can be, short of the SFSA revoking the license.

Regarding Handelsbanken, the criticism was less severe, although the breaches were considered substantial. The SFSA

concluded that Handelsbanken had failed to conduct risk assessments for all of its customers or to obtain sufficient information about customers and their business relations. The bank's system for reviewing transactions had also been deficient.

Since both Nordea and Handelsbanken are among the largest banks in Sweden, the sanctions are in our view reasonable; the breaches were many, extensive and directed against the core of the anti-money laundering rules. And they also show that negligence can occur even from some of the largest actors in Sweden in this area.

How to act

As previously discussed, money laundering in particular adds up to a very large amount every year in Sweden, and if we are to believe the conclusions of the national risk assessment mentioned above, financing of terrorism cannot be ignored, either. Since any financial business is, unfortunately, quite likely to be used for these kinds of activities, the starting assumption for each financial actor should be that its business quite likely is used for money laundering, rather than the opposite. Once this premise has been accepted, the risks can be more accurately assessed and measures to prevent the company from being used for such unlawful operations can be planned.

More to come

Much remains to be done within the anti-money laundering field, with a fourth anti-money laundering directive coming up that must be transposed into Swedish law by 26 June 2017 at the latest. We can only conclude that the legislators are definitely on top of these issues.

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Facts and figures

Established in 1878, Setterwalls is the oldest law firm in Sweden. Today it is also one of the largest law firms in Sweden, employing more than 190 lawyers at offices in Stockholm, Göteborg and Malmö. Setterwalls has undergone substantial expansion over the past 10 years, both in terms of the number of lawyers and practice areas. Setterwalls' dynamic growth and the firm's participation in several high-profile cases and transactions have pushed the firm to its prominent position in the Swedish legal services market.

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