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The new version of the German Anti-Money Laundering Act following the implementation of the fourth EU money-laundering directive, the execution of the EU money transfer regulation and the reorganization of the Central Office for Financial Transaction Investigations

Foreword

On 23 June 2017, the German parliament has passed the act to implement the fourth EU money-laundering directive, to execute the EU credit transfer regulation and to reorganize the Central Office for financial transaction investigations. The law aims to implement the fourth EU money-laundering directive (RL (EU) 2015/849) as well as to execute the EU money transfer regulation (VO (EU) 2915/847.

A number of changes are connected to the revision of the German Anti-Money Laundering Act (*Geldwäschegesetz – GwG*), especially the establishment of an electronic transparency register, adaptations concerning the report of suspicious activity as well as the new and universal obligation to conduct a risk analysis as part of the risk management. Besides the revision of the GWG, numerous adjustments have been made in related fields of law, in particular the German Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*), the German Banking Act (*Kreditwesengesetz – KWG*), the German Payment Services Supervisory Act (*Zahlungsdiensteaufsichtsgesetz - ZAG*), the German Capital Investment Act (*Kapitalanlagegesetzbuch – KAGB*) and the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz – VAG*). In particular, the revision of Section 40 GmbHG will be of importance for the corporate practice as it now contains new requirements for the shareholders' list to be filed with the commercial register.

The subsequent explanations shall give a brief overview concerning the adjustments which are related to the revision of the GwG as well as the further legal changes.

1. Material adjustments of the German Anti-Money Laundering Act (GwG)

1.1. The establishment of an electronic transparency register

1.1.1. Basics of the new transparency register

As one of the most material changes, the revision of the GWG contains the establishment of an electronic transparency register (Sections 18 et seqq. GwG). The transparency register shall help to identify the beneficial owners of legal entities and registered commercial partnerships, which are obliged entities within the meaning of Section 2 GWG, and to record them in a central register. A special provision which includes the same obligations has been created by new

Section 21 GwG for trusts, a legal term being now legally defined in Section 1 para. 6 GwG. The notification obligation towards the transparency register follows the prior obligation to collect, store and update the information about the beneficial owners of legal entities and registered commercial partnerships.

With regard to **participations**, a natural person with more than 25 percent of the share capital or 25 percent of the voting rights or exercising the control in similar ways is a beneficial owner according to Section 3 para. 2 GwG. For instance, a voting trust agreement may lead to the attribution of the participation from one shareholder to another shareholder. Concerning parent companies, the competence of a natural person to control the parent company may lead to an attribution of the parent's downstream participations. A control is especially at hand, if the natural person is able to directly or indirectly exercise dominant influence on the association (parent company).

If no person with at least 25 percent of the share capital or the voting rights exists or doubts remain that the identified person is the beneficial owner, the legal representative, managing shareholder or partner of the contracting party is considered to be the beneficial owner (see Section 3 para. 2 sentence 5 GwG). With regard to limited liability companies the managing directors and concerning stock companies the management board would have to be disclosed as beneficial owners in the transparency register.

Nature and extent of the provided **information** about the beneficial owner are outlined in Section 19 GwG. It contains the name, the date of birth, the place of residence as well as size and nature of the commercial interest of the beneficial owner.

The notification obligation also comprises later changes of the information about the beneficial owner, without the requirement of a further request by the competent authority administering the transparency register. In this respect, the information given to the transparency register has to be regularly examined whether changes have occurred and therefore a new report to the competent authority is necessary.

1.1.2. Exceptions from the notification obligation

The notification obligation towards the transparency register is not unlimited. Insofar, the new regulations contain exceptions which dispense the notification obligation. According to Section 20 para. 2 sentence 1 GwG, the obligation to inform the transparency register is deemed to be fulfilled, if the information concerning the position as beneficial owner already results from the

- commercial register (*Handelsregister*),
- partnership register (*Partnerschaftsregister*),

- register of cooperatives (*Genossenschaftsregister*),
- register of associations (*Vereinsregister*) or the
- company register (*Unternehmensregister*).

It has to be noted that the share register according to Section 67 AktG is not part of these official registers. Insofar, beneficial owners which are mentioned in the share register have to be reported by the obliged entity to the transparency register.

Furthermore, a special provision applies to companies which are traded on an **regulated market** within the meaning of Section 2 para. 5 of the German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) or which are subject in any other way to transparency requirements resulting from the EU legislation concerning voting shares or which are subject to equivalent international standards.

The beneficial owners have a cooperation obligation towards the obliged entities. Shareholders which are beneficial owners or which are directly controlled by a beneficial owner have to immediately communicate the necessary information and every change of this information towards the obligated legal person or registered commercial partnership (see Section 20 para. 3 GwG).

1.1.3. Access rights

The right to review the transparency register is restricted and is not open to anybody. It is limited to

- authorities (supervisory authority, Central Office for Financial Transaction Investigations, prosecution authorities, Federal Central Tax Office and local tax authorities),
- obliged entities, as far as the inspection is made in order to comply with their diligence obligations, especially during the creation of business relationships,
- anybody having a justified interest.

Upon application of the beneficial owner, the transparency register may totally or partially restrict the access to the transparency register for anybody. The beneficial owner has to demonstrate that **predominant interests worthy of protection** and requiring such limitation exist. This is especially the case, if the beneficiary would be at risk by the inspection to become the victim of fraud, kidnapping for extortion, hostage taking, predatory extortion, a criminal offence against life and limb, coercion or threat. In the case of nonage or legal incapacity, the interest requiring protection persists as well.

1.1.4. Administrative Offences and fines

Violations of the obligations related to the new transparency register are generally qualified as administrative offences and are punished by a **fine**. Anyone who intentionally or carelessly does not comply with the disclosure obligation (Section 20 para. 1 GwG) and

- does not collect,
- does not, not accurately or not entirely preserve,
- does not keep up to date, or
- does not, not accurately, not completely or not timely disclose the necessary information to the competent authority

commits an offence.

The same applies to beneficial owners who do not or not accurately, not entirely or not timely comply with their obligation to disclose changed circumstances (Section 20 para. 3 GwG).

The administrative offence may lead to a fine up to one hundred thousand Euro. In the case of severe, repetitive or systematic violations the fine can be raised up to one million Euro or up to twice the commercial benefit resulting from the violation.

1.2. Risk management; risk analysis and internal control procedures

After the revision of the GwG, obliged entities are required to conduct a risk management. This risk management includes the implementation of a risk analysis as well as the establishment of appropriate internal control procedures. To guarantee the diligence and quality of the risk management, the obliged entity has to nominate a **member of the management level** as person responsible for the risk management and the compliance with the anti-money laundering related provisions and regulations (Section 4 para. 3 GwG).

Within the now compulsory **risk analysis** for obliged entities, the specific risks of money laundering and terrorist financing have to be comprehensively and completely collected, identified, categorized, evaluated and on that basis preventive procedures against money laundering, in particular internal control procedures, need to be established. Regarding the risk analysis, the newly established annexes 1 and 2 to the GwG have to be considered, which correspond with the old version of the annexes II and III from the 4th Money Laundering Directive and mention the factors which indicate potentially low and high risks. The determination of the factors differentiates between costumer, product, service, transaction, distribution channel or geographical risks.

The risk analysis has to be appropriate and is dependent on the size and nature of the business of the obliged entity (see Section 4 para. 1 GwG). Besides the mere conduct of

the risk analysis, obliged entities have to document, update and provide upon request the current version of the risk analysis to the supervisory authorities (see Section 5 para. 2 GwG).

Besides the requirement of a risk analysis, the risk management includes the obligation to implement **internal control procedures** (Section 6 GwG), which had already been stipulated in the former version of Section 9 GwG. Compared with the former version, the list of obliged entities that have to appoint an **AML-officer** (*Geldwäschebeauftragter*) has been extended. Now capital investment companies within the meaning of Section 17 para. 1 KAGB as well branch offices (Section 2 para. 1 no. 9 GwG), insurance companies (Section 2 para. 1 no. 7 GwG) and credit, financial services and payment institutions (Section 2 para. 1 no. 1, 2 and 3 GwG) are also included. The formerly and identical obligations stipulated in the respective individual acts (VAG, KWG) have accordingly ceased to exist, so the money laundering obligations in this field have been concentrated in the Anti-Money Laundering Act (GwG).

In order to avoid conflicts of interest, the AML-officer cannot be simultaneously the nominated member of the management level in accordance with Section 4 para. 3 GwG.

The internal control procedures also include the establishment of an office for informants ("**whistleblowers**"). The obliged entities have to take precautions appropriate in relation to their size and nature so that their employers are able to report - under protection of their identity - breaches of the anti-money laundering provisions to suitable bodies (Section 6 para. 5 GwG). This provision corresponds with the still consisting provisions in Section 25a para. 1 sentence 6 no. 3 KWG and Section 23 para. 6 VAG.

From now on, the delegation of internal control procedures to third parties ("outsourcing") does not require the consent of the supervisory authorities. The prior notification about the intended outsourcing suffices. The supervisory authority has the option to prohibit the delegation, if

- the third party cannot guarantee that the control procedures will be properly conducted,
- the control capabilities of the obliged entity are negatively affected, or
- the supervision by the supervisory authority is negatively affected.

In accordance with the previous legal situation, the obliged entity remains responsible for the outsourced tasks even in case of a delegation.

1.3. Report of suspicious activity and competence of the Central Office for Financial Transaction Investigations (*Zentralstelle für Finanztransaktionsuntersuchungen*)

The provisions concerning suspicious activity reports in money laundering matters have been revised. In this respect, the competence has been transferred from the Financial Intelligence Unit to the Central Office for Financial Transaction Investigations, and

thereby from the Federal Criminal Police Office (*Bundeskriminalamt*) to the General Directorate of Customs (*Generalzolldirektion*), which is governed by the Federal Ministry of Finance.

According to Article 52 of the fourth EU money-laundering directive, member states have to ensure that the respective national reporting offices cooperate with each other and independently from their organizational state in the greatest possible way. In this respect, new specific provisions have found their way into Sections 33 and 36 GwG for the data transfer within the European Union and in Sections 34 and 35 GwG for the **international data transfer**. The Central Office for Financial Transaction Investigations is particularly authorized by Section 34 para. 1 GWG to request information including personalized data or the transmission of documents from foreign central offices which are responsible for the prevention, exposure and control of money laundering, predicate offences to money laundering and terrorist financing, if such information and documents are necessary for the fulfilment of their duties.

1.4. Identification obligations, in particular electronic proof of identity and video identification procedure

The procedures applicable for the identification of contractual partners have found a new basis in Section 13 GwG. According to Section 12 GwG, not only the classic identity documents can be used for identification, but from now on also the electronic proof of the identity according to Section 18 of the German Act on Identity Cards and Electronic Identification (*Personalausweisgsetz – PauswG*) or the qualified electronic signature can be used. In the latter case and in accordance with the previous legal situation, the validation requires the signature and a referential remittance.

The procedures for the identity verification are determined in Section 13 GwG. According to this provision, the identity verification can not only be performed by a verification of the on-site presented documents, but also by another procedure which is suitable to provide an identity verification and which provides a security level which is equivalent in comparison to the traditional on-site verification. The legislator now also mentions the **verification via video transmission**, as far as such had already been qualified by the Federal Financial Supervisory Authority to be permissible based on the previous legal situation.

By circular 3/2017 and with reference to previous publications made by the Federal Ministry of Finance, the Federal Financial Supervisory Authority had published clarifying statements about the video identification procedure. The statements were based on controversies with regard to procedures for a distance identification, e.g. the PostIdent-procedure. The procedures which were listed in the GwG at that time should be applied, if the identification occurred between absentees and the person to be identified was not present.

The circular of the Federal Financial Supervisory Authority made clear that a video identification is no distance identification in case certain requirements are met. These requirements included the prior consent of the person to be identified to conduct a video identification procedure. The consent has to be recorded and archived. During this process, the person to be identified has to be informed about the personal data that will be archived and for how long. In case the consent has been withdrawn, a respective deletion of the data needs to be safeguarded.

Already during the identification procedure, the authenticity of the identity document has to be verified. This means that the employee involved in the identification procedure verifies the validity and plausibility of the data and information presented on the document. The contractual partner has to state the complete serial number of the identity document.

Besides the verification of the identity document, the employee has to verify whether the presented document fits to the person to be identified. Insofar, the employee has to ask questions which enable the employee to validate the data presented in the identity document (e.g. age).

1.5. Group-wide compliance with obligations

If the obliged entity is a parent company, the aforementioned risk management has to be performed for every subsidiary, branch and branch office, as long as these are themselves subject to anti-money laundering obligations (Section 9 GwG). Internal control procedures shall be implemented group-wide as well. The regulations concerning the group-wide compliance with obligations were previously only stipulated in Section 53 para. 5 VAG (old) and Section 25 para. 1 KWG (old), but have now been extended to all obliged entities within the meaning of the GwG.

According to new Section 9 GwG, special provisions apply to foreign companies which belong to the group. If these companies are located in a member state of the European Union, the parent company has to ensure the compliance with the respective national legislature. If the group related company is located in a third country in which less strict anti-money laundering requirements apply, the parent company has to ensure, to the extent permitted by foreign law, the compliance with equal anti-money laundering standards. If these anti-money laundering standards conflict with foreign law, the parent company has to ensure that the group related company establishes additional measures to prevent money laundering and terrorist financing. The parent company has to inform the respective authority about the adopted measurements. If the authority decides that the measures are not sufficient, it has to order that no business relations in this third country are established, continued or that no transactions are conducted or that existing business relationships are notwithstanding other legal or contractual provisions ended by termination or otherwise.

2. Further legal changes, in particular with regard to the Limited Liability Companies Act (GmbHG)

The further changes which are made by the implementing act and which do not concern the provisions of the GwG but lead to the adjustment of provisions in other acts, are mostly connected to the revision of the GwG, but often go even beyond that.

Besides the GwG, also the GmbHG has been subject to a significant adjustment by extending the substantial requirements of the shareholders' list which has to be submitted to the commercial register. Based on the now revised Section 40 GmbHG, more information has to be published in the commercial register. Besides the usually published information, such as surname, name, date of birth and place of residence of the shareholder as well as the nominal value of each share and consecutive number of shares, now the respective percentage of each nominal value on the share capital has to be published (Section 40 para. 1 sentence 1 GmbHG). If a shareholder holds more than one share, his **total participation** has to be published **as percentage** (Section 40 para. 1 sentence 3 GmbHG).

According to the clear wording of the provision, two additional matters have to be published as percentage: on the one hand the given participation of each respective nominal value of a share as a percentage, on the other hand the total participation of a shareholder as a percentage.

The legislator's view on the new design of the shareholders' list remains unclear. Insofar, the legislator has authorized the Federal Ministry of Justice and Consumer Protection to issue upon approval by the Federal Council a regulation to specify the composition of the shareholders' list (see Section 40 para. 4 GmbHG). The respective regulation has not been issued yet.

While the explanatory notes for Section 40 GmbHG still require a participation of at least 25 percent of the share capital to establish a registration obligation, this requirement has not been transferred into the revised wording of Section 40 GmbHG. Therefore and in addition to each name of a shareholder, his participation has to be stated in percentage.

As a result, if the company shares have been registered in the commercial register, there is no more obligation to register them in the transparency register.

Furthermore, the regulation affecting the registration of shareholders which are companies themselves has been modified. Insofar, Section 40 para. 1 sentence 2 GmbHG stipulates that the firm, registered office, authorized register and register number of registered companies have to be recorded. If the company is not registered, its shareholders have to be registered under a summarizing description with their surname, name, date of birth and place of residence. The latter clarification especially refers to civil law associations (*Gesellschaft bürgerlichen Rechts – GbR*) which are not registered in public registers like limited companies or limited partnerships. According to the legislator's point of view, in absence of such a register the disclosure of the shareholders

shall provide the greatest possible transparency regarding the shareholders. This also applies to large associations with many shareholders which are not subject to an exception.

3. General need for action

Regarding the newly implemented transparency register, all of the obliged entities within the meaning of the GwG need to determine the existing participations and have forward them to the transparency register. According to Section 59 para. 1 GwG, the notifications in terms of Section 20 para. 1 and Section 21 GwG have to be forwarded to the transparency register for the first time till 1st October 2017. If beneficial owners do not comply with this transparency, obliged entities should refer them to Section 20 para. 3 GwG, whereby shareholders are obliged to provide the relevant information immediately to the companies. A breach of this obligation to cooperate is now an administrative offence and can be fined.

In some cases, the obliged entity should consider the possibility to submit an application to limit the inspection into the transparency register. If changes occur regarding the "beneficial owners", the obliged entities have to declare those immediately to the transparency register (Section 20 para. 2 sentence 4 GwG).

Furthermore, the broad necessity of a risk analysis will force the obliged entities to implement measures, especially if it is member of a group of companies and therefore has to ensure the group wide compliance with anti-money laundering obligations (see Section 9 GwG). Furthermore, obliged entities have to decide in which intervals the risk analysis has to be repeated or updated and if the chosen intervals and the extent of the examination is appropriate in relation to the size and nature of their business activity.

Besides the mere anti-money laundering obligations, the changes outside of the GwG are of importance. With regard to the limited liability companies, a need for action is especially given, if changes concern the shareholder structure. In this scenario and due to the revision of Sections 8 and 40 GmbHG, all of the registrations in the list of shareholders have to be updated, as far as changes occurred which are comprised by the new requirements.

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