

Client Information

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■ **Amendment of the German Anti-Money Laundering Act (GwG) – Act implementing the Fifth EU Anti-Money Laundering Directive**

We would like to provide you with a summary of the most important changes, **in particular concerning Alternative Investment Fund Manager**, resulting from the German act implementing the Amending Directive to the Fourth EU Anti-Money Laundering Directive. We also examine other selected changes, **in particular in the real estate sector**. In addition to the implementation of the Amending Directive (Directive (EU) 2018/843 – the so-called Fifth EU Anti-Money Laundering Directive), the amendment of the GwG introduces new obligations and stricter individual requirements for obliged persons subject to the GwG, which must be taken into account especially in relation to customer onboarding and ongoing AML-compliance.

The GwG Amendment Act will enter into force as from 1 January 2020.¹ We expect a soon promulgation.

Apart from the GwG Amendment Act, we would like to draw your attention to an important change in the administrative practice of the Federal Office of Administration (*Bundesverwaltungsamt (BVA)*) with regard to **reporting requirements for the transparency register for limited partnerships (*Kommanditgesellschaften*)**.

■ **Summary**

GwG Amendment Act

- **Obligation to register with the Financial Intelligence Unit** – Obligated persons must register with the Financial Intelligence Unit (FIU) as soon as its new information network becomes operational, but no later than 1 January 2024.
- The due diligence obligations for obliged persons are extended and made more specific. Obligated persons must pay particular attention to the following:
 - **Collecting proof of registration or excerpt of transparency register** – whenever entering into a new business relationship, inter alia with limited partnerships, companies and certain legal entities (within the meaning of § 21), obliged persons must collect proof of registration in the transparency register or an extract from the transparency register (§ 11 (5) sentence 2).

¹ The following §§ are those of the revised GwG, which enters into force as from 1 January 2020.

- **Reporting of discrepancies** – obliged persons must notify the registrar immediately of any discrepancies that the obliged persons find between the information on beneficial owners accessible in the transparency register and (other) information and findings available to them (§ 23a (1)).
- **Time of identification** – such obligation must be fulfilled by obliged persons when identifying persons to be identified during the establishment of a business relationship **without delay** („*unverzüglich*“) (§ 11 (1) sentence 2). Thus, the obliged persons must identify the respective persons without culpable hesitation („*ohne schuldhaftes Zögern*“).
- **Documentation obligations** – the measures for determining the beneficial owners and from now on also the ownership and control structures of legal entities as well as difficulties in verifying (deemed) beneficial owners must be documented. Subject to other regulations, a minimum retention period of five years applies to all records, but in any case an absolute retention period of no more than ten years shall apply.
- **Enhanced customer due diligence measures** – the GwG Amendment Act establishes individual (minimum) due diligence obligations in case of a higher risk of money laundering or terrorist financing due to the involvement of high-risk countries (§ 15 (5)).

Transparency Register – change in the legal opinion of the Federal Office of Administration (*Bundesverwaltungsamt*)

The BVA clarifies in its FAQ² that in case of limited partnerships (i.e. also in case of a limited partnership with a limited liability company as general partner (*GmbH & Co. KG*)) the fiction of § 20 (2) sentence 1 only applies in exceptional cases. According to a changed legal opinion, the required information on the beneficial owner shall, in general, not result from the commercial register.

Alternative Investment Fund Manager and persons (in particular family offices) using limited partnerships should check to what extent they have relied on the reporting fiction. Failure to comply with reporting obligations may result in administrative offence proceedings and substantial fines.

■ Summary of the most important changes

A. Registration with the Financial Intelligence Unit

According to § 45 (1) sentence 2, obliged persons must register with the FIU as soon as the new information network of the FIU becomes operational, but no later than 1 January 2024 (§ 59 (6)).

The date when the new information network FIU will become operational will be announced in the Federal Gazette (*Bundesgesetzblatt*) and on the FIU website.

² Available at: https://www.bva.bund.de/DE/Das-BVA/Aufgaben/T/Transparenzregister/_documents/FAQ_transparenz_kachel.html (last retrieved on 12 December 2019).

The obligation to register seeks, amongst others, to lower any inhibition thresholds for obliged persons when submitting a suspicious transaction report. In addition, the compilation of the database shall be used to provide the relevant supervisory authorities with an overview of the obliged persons subject to their supervision.

B. Collecting proof of registration or excerpt from transparency register

Whenever entering into a new business relationship with a juristic person under private law, a registered partnership or a legal entity pursuant to § 21, the obliged persons must collect proof of registration in the transparency register or an extract from the transparency register (§ 11 (5) sentence 2).

C. Reporting of discrepancies

Pursuant to § 23a (1) sentence 1, obliged persons inspecting the transparency register to fulfil their duties of due diligence must immediately report any discrepancies between the information on beneficial owners in the transparency register and the information and findings available to them to the registrars (*Bundesanzeiger Verlag*).

The legislator pursues the purpose of increasing the reliability of the information in the transparency register by verifying that market participants mutually verify each other and report discrepancies.

D. Time of identification

Pursuant to § 11 (1) sentence 1, obliged persons must in principle identify contractual partners, persons acting on their behalf and beneficial owners before establishing the business relationship or carrying out the transaction.

However, in business relationships the obliged persons may also complete the identification during the establishment of the business relationship (§ 11 (1) sentence 2), in case that this is necessary in order not to interrupt the normal course of business and only if a low risk of money laundering and terrorist financing exists.

The GwG Amendment Act modifies the conditions under which this exception is applicable. Obliged persons who carry out the identification during the establishment of the business relationship must fulfil this obligation *without delay*. Accordingly, the obliged persons must identify the respective persons without culpable hesitation. In the event of violation, a fine is imminent.

E. Documentation obligations

Documentation obligations regarding the measures taken to determine the beneficial owners have already been in force. These are now extended to include the determination of ownership and control structures of legal entities as well as difficulties in verifying (deemed) beneficial owners. This may require an adjustment of the onboarding processes and the documentation used.

Subject to other provisions, all records are subject to a minimum retention period of five years. In case of a business relationship, the period begins at the end of the calendar year in which the business relationship is terminated. The GwG Amendment Act also introduces an absolute maximum retention period of ten years (§ 8 (4) sentence 2). In

view of recent developments in the area of fines under the General Data Protection Regulation on the violation of erasure obligations, it is advisable to take measures to comply with these retention periods. In this area, a significant increase in fines can be observed.

F. Enhanced customer due diligence measures – more detailed requirements

If there are business relationships or transactions in which a third country with a high risk or a person resident in such a high-risk third country is involved, the obliged persons must, amongst others, fulfil at least the following duties of care (§ 15 (5)):

Collecting of, inter alia:

- a. additional information on the contractual partner and the beneficial owner,
- b. additional information on the type of the business relationship,
- c. information about the origin of the assets and finances of the contractual partner and the beneficial owner (exceptions regarding deemed beneficial owners in accordance with § 3 (2) sentence 5 exist), and
- d. information about the reasons behind the planned or concluded transaction.

G. Other relevant matters

- The GwG Amendment Act has redefined the term **financial company** (an obliged person under § 2 (1) no. 6) and now defines it self-contained. The term includes companies whose main activity consists of acquiring, holding or selling ownership interests and/or acquiring pecuniary claims against payment with a financing function for a fee. The legal definition of a financial company (§ 1 (24)) explicitly **does not include holding companies**. This includes companies which exclusively hold equity in companies outside the credit institution, financial institution and insurance sectors and which do not engage in business activities beyond the tasks associated with the management of the participations.
- Funds are not explicitly excluded from the definition of financial companies. It is questionable whether the requirements of the exception for a holding company can be fulfilled, as the purpose of the fund is not limited to the holding of equity participations, but also the acquisition and sale of equity participations.

The classification of a fund as a financial undertaking and thus as an obliged person expands its scope of duties under the GwG.

- By 10 January 2020, the EU member states must submit to the EU Commission lists of specific functions and offices which justify the status of **politically exposed persons (PEPs)**. The EU Commission will then draw up a joint list, which will in future be referred to in the text of the act. The list for Germany is drawn up during the legislative procedure. Such list must be taken into account by the obliged persons when examining the PEP status of contractual partners and beneficial owners.
- Pursuant to § 17 (3), the regulatory requirements for the **fulfilment of due diligence obligations by third parties** include ensuring that the third party observes the provisions of the German GwG if persons resident in Germany are identified. The territorial principle of anti-money laundering regulations thus applies in order

to avoid any supervisory arbitrage when identifying domestic residents in the case that outsourcing to third parties abroad has been carried out. This requirement shall not apply to the identification by third parties of persons not resident in Germany.

- **New reporting obligations** apply to the **transparency register** for trustees and other associations not domiciled in the EU if they have a special relation to Germany. Trustees are subject to the notification requirement under § 21 (1) if a contractual partner is domiciled in Germany or if a real property is acquired in Germany. For other incorporations, the obligation to register applies to the acquisition of a domestic property (§ 20 (1) sentences 2 and 3).
- In future, the **transparency register will be accessible to the public** without proof of a legitimate interest (§ 23 (1) no. 3). The following information is accessible to the public: first and last name, month and year of birth, country of residence, type and extent of the economic interest as well as the nationality of the beneficial owner. However, it is possible to restrict the inspection if there is an interest worthy of protection. As of 1 July 2020, beneficial owners may request pursuant to § 23 (6) that the registry office provides them with information on inspections that have taken place.
- The amendment provides for **significantly stricter measures in the real estate sector**. In accordance with § 11 (5a), notaries must check the conclusiveness of the identity of the beneficial owner before notarizing a purchase transaction in accordance with § 1 of the Federal Real Estate Transfer Tax Act (*Grunderwerbsteuergesetz*) on the basis of documentation of the ownership and control structure to be submitted in text form by the respective contractual partner. The notary must refuse notarization if a contractual partner does not fulfil the obligation to provide information (§ 10 (9)). The obligation to refuse notarization also exists if the contractual partner is an association with its registered office abroad and does not fulfil its obligation to report to the transparency register pursuant to § 20 (1) sentences 2 and 3.

H. Reporting obligations to the transparency register for limited partnerships (*Kommanditgesellschaften*)

- In its recently revised FAQ on the transparency register, the BVA clarifies that in the case of limited partnerships (including a GmbH & Co. KG) the fiction of § 20 (2) sentence 1 only applies in exceptional cases.
- According to § 20 (1) sentence 1, juristic persons under private law and registered partnerships must disclose information on the beneficial owners to the registrar for entry in the transparency register. According to § 20 (2) sentence 1, this obligation is deemed to have been fulfilled (fiction) if the information on the beneficial owner results from other electronic registers (e.g. from the commercial register).
- The BVA is of the opinion that there is no fiction if, in addition to the general partner(s), limited partners are also beneficial owners. The BVA states that the liability sum to be entered in the commercial register does not allow for (sufficient) conclusions about the contribution and thus about the capital shares of the limited partners.

- Companies and beneficial owners (in particular family offices) using limited partnerships in their shareholding structures should check to what extent they have relied on the BVA's old reporting fiction.

If you would like more detailed information, please do not hesitate to contact us. We will be happy to support you in the implementation of the new obligations in your compliance processes.

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