Geldwäsche – Amendment to the German Anti-Money Laundering Act [GwG] – Special Topics in Focus

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Transparency Register and required actions for holding companies

I. A selection of the significant changes at a glance

On 2 June 2017, the Bundesrat adopted the Act implementing the fourth EU Money Laundering Directive (DR (EU) 2015/849). The new German Anti-Money Laundering Act [GwG] is to enter into force on 26 June 2017.

The Act contains several aspects that are extremely relevant to a large number of companies, which ostensibly only seem to be affected by the topic of mon-ey laundering in a minor way. This relates particularly to:

- the introduction of a transparency register
- tighter regulations pertaining to holding companies

II. The introduction of a transparency register

With the entry into force of the new GwG all domestic corporations, registered partnerships and foundations in particular are subject to the duty to report information on „beneficial owners“ (name and surname, date of birth, place of residence as well as the nature and extent of their economic interest) for the first time by 1 October 2017, so that this information can be entered into the online transparency register.

A beneficial owner in this regard is fundamentally any private individual, who directly or indirectly (i) holds an equity interest of more than 25 per cent, (ii) controls more than 25 per cent of the voting rights or (iii) exercises control in a comparable way.

Likewise, shareholders, who are beneficial owners or who are directly controlled by the beneficial owner also have the duty to report the information required to comply with the duty to report and any changes to this information without any undue delay to the company.

Violations of this requirement could be punished by a fine of up to EUR 100,000. Severe, repeated or systematic violations of this requirement could be punished by a fine of up to EUR 1 million.

The duty to report also applies to control establishing arrangements

Therefore, the new duty to report is especially topical as for example control establishing agreements, particularly common in the case of family-owned companies, are also to be reported to the transparency register. These

include vote pooling, consortium and pool agreements.

Practical challenges

The duty to report stipulated by the legislator presents a challenge in particular for companies with complex share-holder structures and/or non-resident shareholders. In this context, information on the shareholders has to be gathered, recorded and updated in a timely manner. Where necessary, careful checks need be made to ascertain if there is in fact a beneficial owner to be reported.

Although the explanatory memorandum to the Act expressly denies that there is an obligation to carry out subsequent investigations, information that will become available in the future must be carefully managed.

The entity is now required to ensure that changes to the shareholder structure within a group are reported.

Owing to the fact that not only „traditional“ beneficial owners have to be reported, but also vote pooling and pool arrangements in particular, this is now leading to levels of transparency at family-owned companies and shareholdings that may not have been desired in the past due to economic or personal reasons. This is possibly a reason for reassessing the entity’s legal structure.

Finally, care should also be taken to ensure that different data sources in circulation (banks, customers, other official registers) are consistent in order to avoid any reports regarding a suspicion of money laundering due to discrepancies in data sets.

The transparency register may become accessible to the public

The new GwG stipulates that the transparency register is not publicly accessible and there must be a „legitimate interest“ to inspect the register to obtain information for a report. However, the right to inspection is generally conferred to anyone who can substantiate such a legitimate interest. It is precisely the transparency register that is intended to aid businesses to identify the beneficial owner of a potential contracting party.

Furthermore, by resolution dated 28 February 2017 the committees of the European Parliament have set in motion a further policy initiative with the intention to make the registers publicly accessible and remove the restriction that limits the right to inspection to those who have a legitimate interest. The Bundesrat has expressed a similar view in its position statement on the government bill. Therefore, the possibility cannot be ruled out that the transparency register will become accessible to the public at a later date.

III. Tighter regulations pertaining to Holding companies

According to the applicable legislation, holding companies were already to be classified as financial companies within the meaning of Section 2 (1) no. 3 GwG in conjunction with Section 1 (3) no.1 of the German Banking Act [KWG].

In this regard the KWG defines financial companies as „companies that are not institutions and asset management companies or externally managed investment firms and whose principal activity is the acquisition and holding of ownership interests“.

As a result, holding companies were already in the past obliged to appoint an anti-money laundering officer, for example. However, any violation of this requirement was not punishable by a fine.

According to the amendment to the GwG, a violation of the requirement to appoint an anti-money laundering officer is now punishable by a fine pursuant to Section 56 (1) no. 7 GwG as amended (fines range up to EUR 100,000 and in case of severe violations up to EUR 5 million, cf. Section 56 (2) and (3) GwG as amended).

Furthermore, according to Section 2 of the amendment to the GwG, holding companies are now subject to new, increased requirements in line with a stricter interpretation of the law (especially the implementation of a risk management system, group wide approach).

Failure to comply with these requirements is also punishable by a fine.

IV. Required actions

In light of the planned changes, we recommend that you urgently check (also in order to avoid fines) whether holding companies exist within your existing shareholder structure for which action is required regarding compliance with the (formal) anti-money laundering requirements.

Furthermore, careful checks are to be undertaken with a view to the duty to report regarding whether and which information must be made available in connection with the (domestic and international) shareholder structures. In the event that there is a duty to report, the required information must be processed in a suitable form and reported within the specified period.

Of course, we will be pleased to assist you with this and will gladly answer any questions you may have regarding this matter at any time.

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