

The Transparency Register – Latest Developments Due to the 5th EU Anti-Money Laundering Directive

With the enactment of the German Anti-Money Laundering Act (AMLA), which was based on the 4th EU Anti-Money Laundering Directive, an electronically managed transparency register was introduced in Germany for the first time. With the 5th EU Anti-Money Laundering Directive, the European legislator now intends to further improve the preventive regime, with the aim of more effectively combatting money laundering practices and terrorist financing. The directive must be implemented into national law by January 10, 2020. Considering the envisaged intensification of usage obligations, the expansion of entities which are subject to the rules, the increased duties of care for transactions with regard to high-risk third countries as well as the broadening of the group of persons entitled to inspect the information contained in the register, companies are well-advised to dedicate sufficient attention to this new set of rules.

Background

When the new German Anti-Money Laundering Act came into force on June 26, 2017, an electronically managed transparency register was introduced in Germany for the first time, based on the 4th EU Anti-Money Laundering Directive (EU Directive 2015/849). Notifications regarding the beneficial owners of companies' other (legal) persons and certain constellations of trusts obliged under the German Anti-Money Laundering Act, had to be submitted by October 1, 2017. Since December 27, 2017, it has been possible for a limited number of persons to inspect entries in the Transparency Register.

The purpose of introducing a uniform EU-wide standard of fine-enforced obligations to report the beneficial owners to publicly accessible registers of the EU member states based on the 4th EU Anti-Money Laundering Directive is to combat money laundering and terrorist financing through more transparency. The aim is to prevent criminal subjects from being able to hide behind corporate structures, such as letterbox companies.

With the 5th EU Anti-Money Laundering Directive (EU Directive 2018/843) of May 30, 2018, which entered into force on July 9, 2018, the European legislator now intends to further improve the preventive regime created by the implementation of the 4th EU Anti-Money Laundering Directive in order to combat money laundering practices and terrorist financing more effectively. The transparency of financial transactions shall be further strengthened in and by the EU member states.

The requirements of the 5th EU Anti-Money Laundering Directive must be implemented into national law by the German legislator by January 10, 2020. A draft bill to adapt the German Anti-Money Laundering Act in line with the directive is not yet available. The first government draft bill is expected to be released in spring 2019.

The New Requirements at a Glance

The substantial amendments introduced by the 5th EU Anti-Money Laundering Directive concern the extended public access to the Transparency Register as well as the extension of the circle of entities obliged to notify the Transparency Register. The directive also introduces new usage obligations for obliged entities and creates a more stringent standard of due care for business relationships relating to high-risk third countries and for the use of virtual currencies. In addition, a EU-wide network of the EU member states' existing national transparency registers is planned by means of an electronic European platform (*European Transparency Register*).

The 5th EU Anti-Money Laundering Directive does not contain any amendments regarding the participation threshold for determining the beneficial owner. Despite interim discussions to lower the threshold to 10 percent, it remains unchanged at 25 percent of the control rights.

Extension of Access Rights

To date, the access to the Transparency Register is considerably restricted.

Inspection rights are only granted to certain authorities for the purpose of fulfillment of their statutory duties as well as institutions and persons obliged pursuant to sec. 2 para. 1 AMLA (obliged entities) for the purpose of fulfillment of their duties of care.

Other persons may consult the Transparency Register only if they can state a legitimate interest. Moreover, the beneficial owners pursuant to sec. 3 AMLA may, under certain conditions, apply for an access restriction to, fully or partially, restrict the access to their data. However, this access restriction does not apply to public notaries, authorities with inspection rights and certain financial service providers or insurance companies.

The 5th EU Anti-Money Laundering Directive extends the public access to the Transparency Register.

A legitimate interest to inspect the register is no longer required, whereby any person ("all members of the public") shall obtain the opportunity to inspect the register. In future, at least the name, month and year of birth, country of residence and nationality of the beneficial owner as well as the nature and extent of the economic interest shall be publicly accessible to everyone.

However, a restriction still applies to the information recorded in the Transparency Register regarding the beneficial owner of trusts or similar legal arrangements. In this regard, the limited access to the Transparency Register remains. Natural or legal persons shall in principle only be granted access if they can state a legitimate interest or if, by way of a separate written procedure, the application is made with respect to a trust or similar legal arrangement, which holds a direct or indirect controlling interest in an obliged company pursuant to the German Anti-Money Laundering Act.

In return for the general extension of the public access rights, the possibility of the beneficial owner to request an access restriction for accessing his or her data shall be extended.

The previous requirements of non-disclosure – namely an increased risk of the beneficial owner to become a victim of fraud (*Betrug*), abduction for the purpose of blackmail (*Erpresserischer Menschenraub*), hostage-taking (*Geiselnahme*), blackmail (*Erpressung*) or blackmail by use of force against life or limb (*Räuberische Erpressung*), offences against life and the person, coercion (*Nötigung*) and threat (*Bedrohung*), as well as the minority or legal incapacity of the beneficial owner - were supplemented by the risks of the beneficial owner to become a victim of extortion (in the meaning of racketeering by way of extraction of protection money) and/or *harassment*.

While *extortion* in this sense is already covered by the scope of the blackmailing offence regulated in sec. 23 para. 2 AMLA, the term *harassment* must be understood in a broader sense than the offences of coercion and threat already covered in sec. 23 para. 2 AMLA.

It remains to be seen how the German legislator will implement these European legal requirements into the revised version of the German Anti-Money Laundering Act.

The 5th EU Anti-Money Laundering Directive does not result in any amendments with regard to sec. 23 para. 3 AMLA, according to which an access to the Transparency Register is only possible after prior online registration of the user.

Extension of the Circle of Obligated Entities

An exhaustive list of obliged entities to whom the German Anti-Money Laundering Act applies is currently contained in sec. 2 para. 1 AMLA. The 5th EU Anti-Money Laundering Directive expands the circle of obliged entities, inter alia to the following groups of persons:

The 5th EU Anti-Money Laundering Directive focuses, among other things, on curbing the risks of anonymity when exchanging virtual currencies. Therefore, electronic custodian wallet providers and providers engaged in exchange services between virtual currencies and fiat currencies will also be included in the group of obliged entities.

The circle of obliged entities related to tax advisory services will be extended. Up to now, it has been limited to tax advisors and tax agents. In future, any person shall be regarded as an obliged entity under the German Anti-Money Laundering Act, who undertakes to provide – directly or by means of other persons to which that person is related – material aid, assistance or advice on tax matters as principal business or professional activity.

Art traders will be included in the circle of obliged entities more widely than has hitherto been the case. So far, art traders have only been covered indirectly by the German Anti-

Money Laundering Act as persons trading in goods. According to the 5th EU Anti-Money Laundering Directive, the art trade sector (e.g. art traders, art mediators, art galleries or auction houses) is explicitly included in the circle of obliged entities, in case the value of a transaction or a series of related transactions amounts to EUR 10,000 or more. The existence of a cash transaction is not decisive.

Real estate agents are already expressly obliged under the German Anti-Money Laundering Act. According to sec. 1 para. 11 AMLA, these are all persons who commercially mediate the purchase or sale of real estate or rights equivalent to real estate. The 5th EU Anti-Money Laundering Directive expands the circle of obliged entities to the extent that real estate agents are also captured in the context of leasing real estate, with the restriction that the respective mediated transaction amounts to a monthly rent of EUR 10,000 or more.

New Usage Obligations for Obligated Entities

To date, sec. 11 para. 1 sentence 1 AMLA provides that obliged entities must identify their contracting parties, any persons possibly acting on their behalf and their beneficial owners before establishing a business relationship or carrying out a transaction.

For identification purposes, the identity of the contracting party must be established and verified.

According to the requirements of the 5th EU Anti-Money Laundering Directive, in future, obliged entities must obtain proof of registration in the Transparency Register or an extract from the Transparency Register 'if necessary'. It remains to be seen how the German legislator will substantiate this obligation, which requires interpretation under European law.

Furthermore, based on a reporting system to be maintained by the EU member states, obliged entities shall be required to report any inconsistencies they discover between the information on beneficial owners included in the Transparency Register and the information on beneficial owners available to them.

Network of National Transparency Registers

The 5th EU Anti-Money Laundering Directive envisages a network of existing national transparency registers of the EU member states. This will be provided by the central European Platform (Business Registers Interconnection System - BRIS), established by the directive relating to certain aspects of company law (EU Directive 2017/1132) of June 14, 2017.

Further Substantial Amendments – Transactions Related to High-Risk Third Countries

Notwithstanding the aforementioned developments directly related to the Transparency Register, the 5th EU Anti-Money Laundering Directive provides for further substantial amendments, in particular related to the duties of care to be complied with by obliged entities in transactions relating to high-risk third countries.

The current version of the German Anti-Money Laundering Act already regulates certain enhanced duties of care that apply to the obliged entity in transactions relating to high-risk third countries.

Among other things, this includes that the establishment or continuation of such a business relationship requires the approval of a member at management level of the obliged entity. Furthermore, appropriate measures have to be taken to determine the origin of the assets used in the business relationship or transaction. Finally, the business relationship must be subject to increased continuous monitoring.

According to the 5th EU Anti-Money Laundering Directive, in future, obliged entities will have to obtain 'additional information' – to be defined in more detail by national legislators in accordance with the directive – on transactions relating to high-risk third countries, inter alia pertaining to the contracting party, its beneficial owner and the origin of the assets of the contracting party and the beneficial owner in general.

In addition, the EU member states shall take further (sovereign) measures to deal with high-risk third countries. With regard to third countries which do not have adequate systems in place to combat money laundering or terrorism, the EU member states shall, under certain conditions, create the legal means to deny obliged entities from high-risk third countries to establish subsidiaries, branches or representative offices in the member state concerned.

Which countries are to be considered as high-risk third countries is determined by the European Commission by means of delegated acts. According to the delegated COM Regulations 2016/1675, 2018/105 and 2018/212, these currently include the following third countries: Afghanistan, Bosnia and Herzegovina, Guyana, Iraq, the Lao People's Democratic

Republic, Syria, Uganda, Vanuatu, Yemen, Ethiopia, Sri Lanka, Trinidad and Tobago, Tunisia, Iran and the Democratic People's Republic of Korea (DPRK).

Conclusion

The envisaged implementation of the 5th EU Anti-Money Laundering Directive further expands and intensifies the status quo of the preventive regime for combating money laundering and terrorism, created by the last revised version of the German Anti-Money Laundering Act. The extension of the scope of application to virtual payment options takes account of the ongoing digitalization of international transactions.

For companies and their legal representatives, the implementation will again lead to an increased bureaucratic effort, which should be accompanied by timely legal advice in order to avoid infringements subject to fines. This applies in particular against the background of the increased usage obligations of companies, the expansion of the circle of obliged entities and the increased duties of care for transactions with regard to high-risk third countries.

Regarding the fact that, in future, the Transparency Register can be accessed by any person without the assertion of a legitimate interest and regarding the hereof resulting possible impairment of the protection-worthy interests of the beneficial owners, it remains to be seen how the German legislator will implement the European legal provisions on the reversal of the rule-exception relationship concerning the inspection of the register and to what extent the newly required possibility of inspection for any person will contribute to the achievement of the objectives pursued by the 5th EU Anti-Money Laundering Directive.

Companies and entrepreneurs should closely monitor the legislative developments to ensure that they will be able to comply with the new obligations and should take adequate action in order to protect their legitimate interests.

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