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CLIENT BRIEFING

GERMANY'S NEW TRANSPARENCY REGISTER

APRIL 2018

- TIGHTENING OF RISK MANAGEMENT
- REPORTING OBLIGATIONS
- DISCLOSURE OF ULTIMATE BENEFICIAL OWNERS
- SANCTIONS

The new German Anti-Money Laundering Act ("AMLA" - *Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten - Geldwäschegesetz*), which came into force on 26 June 2017, regulates, among other things, the introduction of an electronic transparency register. The purpose of the register is to combat money laundering and terrorist financing by preventing criminals from hiding behind company law structures. Registered partnerships, trusts, foundations with and without legal capacity, and all companies entered in the (German) Commercial Register and having their statutory seat in Germany (together referred to as "Obligated Entities" in this Briefing), have been obliged since 1 October 2017 to collect, store and keep up-to-date data on the natural persons who are considered to be their "Ultimate Beneficial Owners ("UBOs") and to submit such information to the transparency register. Since 27 December 2017, the electronic transparency register has been accessible to certain authorities and persons who demonstrate a legitimate interest in individual cases.

In relation to the transparency register, the Obligated Entities must report and disclose their UBOs, i.e. the natural persons who ultimately own or control them. The information to be provided in respect of a UBO is specified in the AMLA: their first and last name, date of birth, place of residence and type and extent of their participation in the Obligated Entity (e.g. amount of capital and/or voting rights, circumstances conveying control) must be stated.

Correspondingly, shareholders who are UBOs, or are directly controlled by a UBO, are obliged to disclose in relation to an Obligated Entity the information required to allow it to fulfil its obligations to the transparency register. This disclosure obligation applies to shareholders or UBOs across borders and does not depend on the nationality, place of residence or legal form of the party subject to disclosure.

"THE OBLIGATED ENTITIES MUST REPORT AND DISCLOSE THEIR UBOS."

Who is a UBO?

Whether a natural person is a UBO depends on whether they directly or indirectly hold more than 25% of the shares of or the voting rights in, or otherwise have control of, an Obligated Entity. Such control includes forms of controlling influence, for example via voting pools or multiple voting rights. In the case of holding structures or investment chains, indirect control exists if the natural person holds a majority interest (50%+) in the intermediate (holding) company or otherwise controls it by means of a majority of voting rights, has the right to appoint the majority of members to management bodies, a domination agreement or provisions in the articles of association and/or shareholders' agreements.

Exception: the UBO can be identified through other electronically retrievable registers/documents (the "*notification exemption*")

In order not to increase the administrative burden for Obligated Entities unnecessarily, the AMLA provides for cases where they can be exempted from taking any actions regarding the register. Accordingly, listed companies are exempted from additional transparency obligations in view of the requirements of the German Securities Trading Act. If the UBO can be identified from German public registers such as the commercial, co-operative, association or company registers (for example due to the formal position of the UBO being a majority shareholder) a further notification/disclosure to the transparency register is not required. This "notification exemption" resulting from public register entries also applies where the UBO is not apparent from one register alone, but the criteria are satisfied by reading entries or documents mentioned in the AMLA in combination. Please note that entries in foreign registers cannot be used for the purposes of the notification exemption.

Shareholder lists

One particular case where the notification exemption applies is in relation to the shareholder lists submitted by German Limited Liability Companies ("GmbH") to the Commercial Register and from which (generally) UBO(s) can be identified.

According to a new legal requirement regarding shareholders lists, these must now also indicate the percentage of each shareholder's holding as well as their total shareholding in the share capital. Thus, the capital participation ratio of each shareholder is immediately apparent.

Shareholder lists submitted to the Commercial Register prior to 26 June 2017 are not affected by the new requirement; a GmbH shareholder list is not required to be modified so long as there is no change in the shareholding structure requiring the filing of a new shareholder list. According to the Frequently Asked Questions ("FAQs") published by the transparency register on its website (www.transparenzregister.de), the "notification exemption" also applies to "old" shareholder lists which do not indicate the capital participation ratio of

shareholders. It will be sufficient if the percentage shareholding is readily computable, meaning that in many cases there is no current need for a GmbH to take any action regarding the transparency register. However, notwithstanding the "notification exemption" relating to shareholder lists, a GmbH may still be obliged to report to the transparency register in certain circumstances: notably where the UBO is not the majority shareholder, e.g. in the case of fiduciary shareholdings or where shareholders' agreements grant certain control rights.

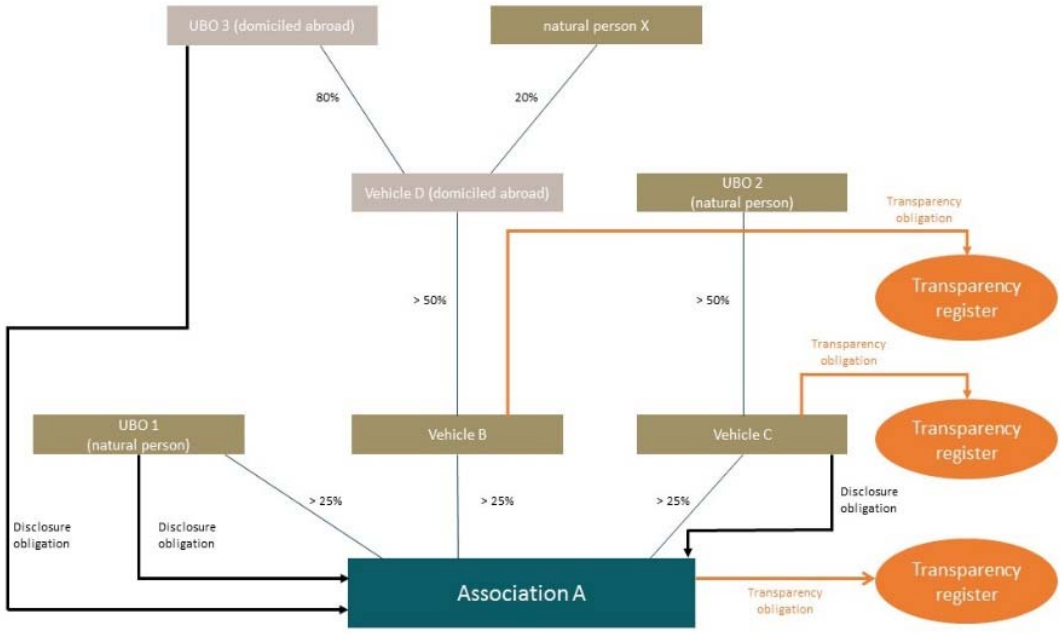
"THE TRANSPARENCY REGISTER MUST BE INFORMED ABOUT THE UBO AT THE TOP OF A CHAIN OF SHAREHOLDINGS."

Participation chains

The transparency register must be informed about the UBO at the top of a chain of shareholdings. There is no obligation on the part of the respective Obligated Entity to investigate further down the investment chain. However, internally, the respective shareholder is obliged to disclose its UBO to the Obligated Entity. In the case of indirect control of a shareholder by a UBO, the UBO is obliged to disclose the required information to the Obligated Entity.

In the case of group structures and complex shareholder relationships, the transparency obligations must be determined separately for each (group) company. It is not permissible to submit a "group filing" to the transparency register.

The following chart illustrates the internal disclosure obligations (black arrows) of the shareholders or UBOs to the Obligated Entity (Association A) and the external reporting obligation(s) (orange arrows) of the Obligated Entities (Association A, Vehicle B and Vehicle C) to the transparency register:



In the above example, the Obligated Entity (is generally subject to reporting requirements with regard to its UBOs 1 – 3. In addition, Vehicles B and C have their own transparency obligations to the transparency register with regard to their respective UBO.

Fines

In the event of intentional or negligent breaches of the obligations to notify, obtain, retain, update or report information on the UBO to the transparency register, the German Administrative Offences Act ("OWiG") will apply.

Failure to comply may be sanctioned by the imposition of fines: simple infringements may result in fines of up to €100,000; serious, repeated or systematic infringements by, among others, credit institutions, financial services institutions, insurance companies and capital management companies may result in a fine of up to €5m or be linked to the economic benefit/total turnover of the Obligated Entity. The fine is imposed on the legal entities which are in breach, but may also be imposed on the owner of the business or enterprise or their representatives if the non-compliance with transparency obligations also constitutes breach of supervision obligations by said persons.

In addition, there is a reputational risk because the supervisory authorities may publish final decisions on their website, naming the persons responsible and the type and character of the infringement, subject, however, to prior notification to the persons concerned (the so-called name and shame principle).

It should be noted that, generally, a mistake in law, e.g. regarding the applicability of the AMLA to an entity, does not prevent the infringing entity/person from being sanctioned. The decision on fines is left to the discretionary judgement of the competent authorities: If a wrongful legal analysis is, therefore, made on the basis of the FAQs published by the transparency register, the mistake in law might be considered as being unavoidable. However, ultimately, solely the wording of the legislation under the AMLA is binding and the FAQs should therefore be referred to with caution as they cannot necessarily be relied upon.

Our conclusions

If you have not already done so, you should analyse the corporate structure of your company or investment chain and collect the relevant details of any UBOs. In case of complex and changing corporate structures, it might be advisable to establish an internal compliance process to ensure compliance with the AMLA requirements on an ongoing basis. In case of doubt or if any potential irregularities are identified, the Federal Office of Administration should be contacted through specialised lawyers in order to co-ordinate a case-by-case assessment and to avoid sanctions for failure to register or late registrations. After all, there is not only the threat of monetary penalties, but also the prospect of negative publicity. In any event, the introduction of the transparency register should be used as an opportunity to update shareholder lists.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.

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