

GERMANY

BENEFICIAL OWNERSHIP TRANSPARENCY

Germany is only fully compliant with one of the G20 Principles. The ability of competent authorities to access beneficial ownership in the country is significantly restricted, particularly due to inadequate rules on bearer shares and nominee shareholders and the lack of a central registry containing beneficial ownership information. There is no guarantee that the information currently available to competent authorities is adequate for anti-money laundering purposes, accurate and current. Nevertheless, the implementation of the Fourth EU AML Directive is likely to improve Germany's beneficial ownership transparency legal framework.

G20 PRINCIPLE 1: BENEFICIAL OWNERSHIP DEFINITION

Score: 100%

Germany is compliant with the G20 Principle 1.

The German law system, in contrast to common law systems, does not have legal concept of beneficial ownership in company laws but it is intruded into the Money Laundering Act (MLA) [*Geldwäschegesetz*] as well as into tax law.

Sec. 1 of the MLA defines the term beneficial owner as natural person who controls or owns the contractual partner or the natural person who causes a transaction or a business relationship. The definition covers different types of legal entities and arrangements and includes in particular:

1. in the case of corporate entities that are not listed on an organised market as defined in sec. 2 para. 5 Securities Trading Act [*Wertpapierhandelsgesetz*] and are not subject to transparency requirements with regard to voting rights consistent with Community laws, or are not subject to equivalent international standards, any natural person who directly or indirectly holds more than 25% of the capital stock or controls more than 25% of the voting rights;

2. in the case of foundations with legal capacity and legal arrangements used to manage or distribute

assets or property on a trust basis, or through which third parties are instructed with the management or distribution of assets or property, or similar legal constructs:

a) any natural person acting as settlor or who otherwise exercises control over 25% or more of the property;

b) any natural person who has been designated as the beneficiary of 25% or more of the property;

c) where the natural person intended to be the beneficiary of the managed assets or property is yet to be designated, the group of natural persons for whose benefit the assets or property are primarily intended to be managed or distributed;

d) any natural person who otherwise directly or indirectly exercises a controlling influence on the property management or the distribution of income."

3. in case of acting at the instigation of someone else, the person who gives the orders. If the contractual partner acts in a fiduciary capacity, he acts at the instigation of someone else as well.

G20 PRINCIPLE 2: IDENTIFYING AND MITIGATING RISK

Score: 0%

Germany has not released an assessment of the money laundering risks related to legal entities and arrangements in the country in the past three years. The government has committed in its Action Plan to conduct a National Risk Assessment on money laundering, but so far no information about the assessment has been published.

Nevertheless, existing analysis conducted by the Financial Intelligence Unit (FIU) and the German Federal Criminal Police Office (BKA) highlights some of the risks. For instance, according to the FIU 2013 annual report, an analysis of the suspicious transaction reports (STRs) submitted shows that in more than 20%

of cases financial agents are involved in suspicious activities. Another report analysed the risks of money laundering in real estate market in Germany, finding that the sector is highly susceptible for money laundering activities. Moreover, analysis conducted by the BKA found that stock companies which are not listed on an organised market are very susceptible for criminal activities in the area of money laundering.

G20 PRINCIPLE 3: ACQUIRING ACCURATE BENEFICIAL OWNERSHIP INFORMATION

Score 13%

Current laws and regulations do not require legal entities, other than those with anti-money laundering obligations to maintain information on beneficial ownership. Consequently, there is also no comprehensive requirement that the beneficial ownership information is maintained within Germany.

Joint stock companies and partnership limited by shares are required to maintain a register shares issued in a registered form, containing the name, address, date of birth, and number of shares. However, as bearer shares are allowed, the register does not provide an accurate picture of legal ownership of companies. Limited liability companies are not required to keep a share register, but directors have to provide information on shareholders upon registration with registration office as well as when share-ownership ratio changes.

The law does not require nominee shareholders to inform the company if they own shares on behalf of a third person. Changes in share ownership must be communicated by shareholders in the case of registered shares in joint stock companies, but shareholders of limited liability companies do not have this requirement.

G20 PRINCIPLE 4: ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Score: 29%

Timely access to beneficial ownership information by competent authorities in Germany is somewhat restricted. As there is no beneficial ownership registry and legal entities are not required to maintain beneficial ownership information, authorities have

basically to rely on the information collected by persons obligated by the MLA.

Furthermore, the Banking Act determines that credit institutions have to maintain a data file containing information on beneficial ownership, among others.¹ This information can be accessed by the Federal Financial Supervisory Authority ["BaFin"] directly and by the Central Tax Office ["Bundeszentralamt für Steuern"] and other competent authorities upon request. While the BaFin can access the information immediately, the law does specify within which timeframe authorities should gain access.

The law also provides that the Public Prosecutor's Office and tax authorities have access to beneficial ownership information collected by persons obligated by the MLA when necessary for task fulfilment.

Authorities can also consult basic information on legal ownership recorded in the central business registry. Legal entities, such as limited liability companies, are required to register with a local registry and provide information on directors and shareholders. Information on nominee shareholder is not recorded. The information is then recorded in a central business registry and made available online. It is important to note that the information recorded related to legal ownership and not to beneficial ownership. Also, according to the OECD, the central business registry does not provide all information recorded in local registries and it usually only helps to verify whether a company is registered but not to directly obtain (legal) ownership information.² Moreover, as the information recorded is not generally verified by the registry authority and there is no concrete timeline for updating changes in share ownership, there is no guarantee that the information recorded is accurate and up-to-date.

Access to beneficial ownership information is likely to improve when Germany implements the Fourth EU

¹ The data file must include the account number, day of account opening as well as closing. Moreover, the name of the owner as well as other people entitled to dispose of the account. Concerning natural person the day of birth has also to be recorded. If there is a beneficial owner, his address must be registered. A comprehensive registration duty exists in that case only if that data could be caught. The reason for that restriction is that according to sec. 4 para. 5 MLA the address of the beneficial owner has to be registered only if there are special risk increasing circumstances (Achtelik, in: Boos/Fischer/Schulte-Mattler, Kreditwesengesetz, 4th edn. 2012, § 24c KWG, m.no. 5).

² OECD, 2013. Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Review Germany. http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-germany-2013_9789264205642-en#page27

Directive on Anti-Money Laundering approved in May 2015, which foresees the existence of a beneficial ownership registry.

G20 PRINCIPLE 5: TRUSTS

Score: 50%

Germany does not have a domestic trust law, but foreign trusts can be administered.

Trust corporate service providers are subject to anti-money laundering rules and therefore compelled to identify the beneficial owner of clients. There is no requirement that all parties to the trust, such as trustee, settlor and beneficiaries should be identified and recorded.

According to the anti-money laundering law, trustees (*Treuhänder*) are required to identify the beneficial owner and record the information in the following scenarios:

- a) founding a legal entity or a partnership
- b) execute functions as a director of a legal entity or a partnership, a partner or a similar function
- c) provide a place of business, a business address, administrative address, mailing address and other therewith connected services for a legal entity or a partnership or a legal arrangement in the sense of sec. 1 para. 6 s. 2 no. 2 MLA
- d) execute a fiduciary function in connection with a legal arrangement in the sense of sec. 1 para. 6 s. 2 no. 2 MLA
- e) execute the function as a nominee for a person that is not listed on an organised market.

Lawyers, accountants, notaries, tax advisors are also subject to anti-money laundering rules.

Financial institutions, if they accept as customers foreign trusts, are required to identify the beneficial owner and the contractual party. Nevertheless, there is no requirement that all parties to the trust needs to be identified.

G20 PRINCIPLE 6: ACCESS TO BENEFICIAL OWNERSHIP OF TRUSTS

Score: 50%

The law does not specify which competent authorities should have timely access to beneficial ownership information on trusts. There is no registry of trusts, but trustees, when performing certain tasks, are required by the anti-money laundering law to record information on the beneficial owner. Within this framework, the Public Prosecutor's Office and tax authorities have access to the information collected by the person obligated by the MLA and the BaFin to the data file kept by banks. Revenue authorities may also request information directly to trustees.

G20 PRINCIPLE 7: DUTIES OF BUSINESS AND PROFESSIONS

Score: 81%

Financial Institutions

Score: 69%

Current laws and regulation require financial institutions to identify the beneficial owner of customers when conducting customer due diligence. A risk-based approach should be taken when deciding what type of information is necessary. At a minimum the name of the beneficial owner needs to be recorded. In cases of higher risk, the information provided should be verified, but independent verification is not required by the law. In any case, there is no beneficial ownership information available through a public registry or other means where the data could be verified.

Financial institutions are also required to identify and verify whether a customer is a domestic or foreign politically exposed persons (PEPs), in which the establishment of the business relationship must be approved by a senior manager. Additional measures should be taken to determine the origin of the property holdings that are used and ongoing monitoring of the relationship should take place.

According to the law, if the financial institution does not manage to identify the beneficial owner of a customer, the relationship should not be established or should be terminated. There is no legal requirement to submit a suspicious transaction report if the beneficial owner cannot be identified, but it

should be submitted if there is evidence that the contractual partner contravenes his obligation to disclose the beneficial owner.

The BaFin is responsible for overseeing financial institutions. BaFin seeks to prevent any misuse of the financial system for the purposes of money laundering, terrorist financing and other criminal offences that might imperil the assets of an institution. There is an anti-money laundering department within BaFin, which carries out money laundering supervision of all financial institutions.

The law allows for the application of sanction to financial institutions as well as directors and senior management. In addition to fines, sanctions may include the cancellation of the banking license and the prohibition of a director to work for another financial institution.

Sanctions to financial institutions are relatively rare in Germany. According to the BaFin Annual Report 2014 there were 29 new proceedings for administrative offence by reason of breach of the MLA, the Payment Services Supervision Act and the Banking Act. Six cases were finally settled, two by judgement. Two cases are pending at the appellate court and in five cases opposition proceedings take place. Four proceedings were closed.

A documentary produced by ZDF³, shows that the BaFin imposed only four fines in connection with money laundering during the last five years. The maximum fine constituted € 25.000.

DNFBPs

Score: 88%

DNFBPs covered by the anti-money laundering law are required to conduct customer due diligence and identify the beneficial owner under certain circumstances.

DNFBPs with anti-money laundering obligations in Germany include:

- Trusts and corporate service providers (TCSPs) under the conditions specified under Principle 5.
- Lawyers: if they prepare for or carry out transactions for their client concerning: (i) buying or selling of real-estates or business enterprises; (ii) investment management; (iii) ;

³ ZDF is a German public-service television broadcaster. documentary on money laundering from 2015 (<http://www.arte.tv/guide/de/052702-000/operation-weisse-veste>)

open and manage bank, saving, securities accounts; (iv) acquisition of funds for creation, operation or administration of companies; (v) creation, operation or administration of trusts, companies or other similar formations; (vi) or if the proceed finance or real-estate transactions in the name and the account of a client.

- Accountants and tax advisers
- Auditors
- Real estate agents;
- Casinos and internet gambling hosts and agents
- Persons trading in good
- Persons acting in a fiduciary capacity

As with financial institutions, DNFBPs need to identify and verify if a customer is a domestic or foreign PEP, in which case senior management approval to establish the relationship is required.

The law mandates that DNFBPs should not proceed with a business transaction if the beneficial owner has not been identified. There is no requirement however that a suspicious transaction report (STRs) need to be filed if the beneficial owner has not been identified. STRs should only be submitted if DNFBPs suspect or have reasonable grounds for knowing or suspecting that another person is engaged in money laundering.

The anti-money laundering law provides for sanctions, to be applied to DNFBPs as well as senior managers.

G20 PRINCIPLE 8: DOMESTIC AND INTERNATIONAL COOPERATION

Score: 54%

Investigations into corruption and money laundering require that authorities have access to relevant information, including regarding beneficial ownership. In Germany, there is no centralised database that can be use by all relevant competent authorities to consult information on legal ownership and ultimate control. Domestic authorities can consult request BaFin to access the data file on beneficial ownership collected by credit institution or access the business registry for basic data on legal ownership (but not beneficial ownership).

According to the Banking Act, information and data stored in the special files are not available to the public but to the BaFin and upon request to listed authorities, including other financial supervisory

bodies, law enforcement and courts. The information collected by the persons obligated by the MLA can only be used for prosecution of crimes listed in sec. 15 para. 1 of the MLA. The Financial Intelligence Unit may also request information bank information from BaFin and it may receive direct information on beneficial ownership from financial institutions and DNFBPs (through STRs) and from tax authorities when there is reasonable doubt to suspect that assets are the object of crime or are linked to the financing of terrorism.

As such, information sharing on beneficial ownership across domestic competent authorities usually take place through written requests.

German authorities usually share information with foreign counterparts through bilateral agreements / memoranda of understanding (MoU). In the case of an ongoing prosecution, then information is shared based on letter rogatory.

The FIU cooperates with foreign counterparts and exchange intelligence informally or through MoU. Germany is also a part of the Egmont Group, which makes the exchange of information easier. Domestic authorities are also allowed to use their powers to respond to requests from foreign counterparts.

There are no restrictions regarding the availability of information to government authorities, but the FIU may determine restrictions and constraints for the usage of the exchanged information.

The Federal Office of Justice, the Financial Intelligence Unit, and the Federal Tax Office may receive requests for exchange of information, but there are no clear guidelines on the process to submit such requests.

G20 PRINCIPLE 9: BENEFICIAL OWNERSHIP INFORMATION AND TAX EVASION

Score: 58%

Tax authorities in Germany do not have direct access to beneficial ownership information. They are however allowed to request information from trustees or from other government bodies, but the law does not specify a timeframe within which this information can be accessed.

According to the anti-money laundering law, tax authorities will be informed, if a criminal procedure in connection with a money laundering offence starts

and a transaction was discovered which is relevant for the tax assessment or the prosecution of tax related crimes. In that case the beneficial ownership information will be forwarded to the tax authorities.

There are no statutory bank secrecy provisions in place that restrict the effective exchange of information.

There are many double tax treaties that have provisions on the exchange of information which also intend to facilitate the exchange⁴. Furthermore, the Mutual Assistance Act for the implementation of the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation sets a mechanism to facilitate the exchange of information between tax authorities of member states. Germany is also a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes. As of 2013, 17 bilateral tax information exchange information agreement had been signed.

G20 PRINCIPLE 10: BEARER SHARES AND NOMINEES

Score: 0%

Bearer shares

Score: 0%

The issuance of bearer shares is allowed in Germany and there are no comprehensive mechanisms to prevent their misuse. Germany has presented an amendment to the Stock Corporation Act which provides for the immobilization of bearer shares. If the amendment is approved, non-publicly listed stock corporations may only issue bearer shares if shareholders shall not be entitled to claim individual certificates and the global-share certificate is kept by a central depository for securities or a similar foreign depository.

Nominee shareholders and directors

Score: 0%

Nominee shareholders are allowed in Germany but there is no legal requirement that they should disclose the name(s) of the beneficial owner(s) upon registration. There is also no requirement for professional nominees to be licensed. However, professional nominees are obliged entities under the

⁴ A list of Germany's DTCs can be found on: http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuernrecht/Allgemeine_Informationen/2015-01-19-stand-DBA-1-Januar-2015.pdf?__blob=publicationFile&v=1.

anti-money laundering law and therefore required to identify the beneficial owner when acting as trustees.