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BaFin

Bundesanstalt für
Finanzdienstleistungsaufsicht

Interpretation and Application Guidance

on the German Money
Laundering Act
(*Geldwäschegesetz – GwG*)



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This Interpretation and Application Guidance refers to the German Money Laundering Act (*Geldwäschegesetz* – GwG) as amended on 1 August 2021. It applies for all obliged entities under the Money Laundering Act which are supervised by the Federal Financial Supervisory Authority pursuant to section 50 no. 1 of the GwG. The Interpretation and Application Guidance has been consulted in writing; through its publication BaFin is complying with its statutory function pursuant to section 51 (8) of the GwG.

I. Addressees

1. Addressees of the anti-money laundering obligations under the supervision of BaFin

1.1 Credit institutions

Credit institutions are institutions as defined in section 1 (1) of the German Banking Act (*Kreditwesengesetz – KWG*), with the exception of the undertakings specified in section 2 (1) nos. 3 to 8 of the KWG, and German branches (*Zweigstellen*) and branch offices (*Zweigniederlassungen*) of credit institutions seated abroad (section 2 (1) no. 1 of the GwG).

Under section 1 (1) sentence 1 of the German Bausparkassen Act (*Gesetz über Bausparkassen – BauSparkG*), these include Bausparkassen whose business operations entail receiving deposits from Bauspar customers (Bauspar deposits) and, out of the collected amounts, providing Bauspar customers with money loans (Bauspar loans) for housing finance activities (Bauspar business).

1.2 Financial services and investment institutions

Financial services institutions are institutions as defined in section 1 (1) (a) of the KWG, with the exception of the undertakings specified in section 2 (6) sentence 1 nos. 3 to 10 and 12 and (10) of the KWG and German branches and branch offices of financial services institutions seated abroad; investment institutions are institutions as defined in section 2 (1) of the German Investment Institutions Act (*Wertpapierinstitutsgesetz – WpIG*) and German branches of comparable undertakings seated abroad (section 2 (1) no. 2 of the GwG).

1.3 Payment institutions and electronic money institutions

Payment institutions and electronic money institutions are institutions as defined in the German Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz – ZAG*) in accordance with section 1 (3) of the ZAG and German branches and branch offices of comparable institutions seated abroad (section 2 (1) no. 3 of the GwG).

These include providers of payment initiation services as well as account information services (section 1 (1) sentence 2 nos. 7 and 8 of the ZAG).

Payment initiation services are services where, at the instruction of the payment service user, a payment order is triggered in relation to a payment account held by another payment service provider (section 1 (33) of the ZAG).

Account information services are online services for notification of consolidated information concerning one or more payment accounts which the payment service user holds with one or more payment service providers (section 1 (34) of the ZAG).

NB: the obliged entities which provide the above-mentioned services must at least comply with the obligation to submit suspicious transaction reports in this respect (section 43 (1) of the GwG). Such matters must be reported, irrespective of the value of the wealth in question or the amount of the transaction involved, to the

German Financial Intelligence Unit (*Zentralstelle für Finanztransaktionsuntersuchungen* – FIU) without delay. In addition, payment initiation service providers are subject to the general due diligence obligations concerning payment recipients, insofar as they maintain business relationships with them.

1.4 Agents and e-money agents and payment institutions and e-money institutions seated in another signatory state to the Agreement on the European Economic Area

Agents and e-money agents are natural or legal persons as defined in section 1 (9) of the ZAG or section 1 (10) of the ZAG (section 2 (1) no. 4 of the GwG).

Section 2 (1) no. 4 of the GwG also covers payment institutions and e-money institutions seated in another signatory state to the Agreement on the European Economic Area which are established in Germany by means of agents or e-money agents.

1.5 Independent businesspersons within the meaning of the GwG

Independent businesspersons are natural or legal persons who distribute or re-exchange the electronic money of a credit institution as defined in section 1 (2) sentence 1 no. 2 of the ZAG (section 2 (1) no. 5 of the GwG). The amendments to section 2 (1) no. 5 (no. 2 (c) in the old version) of the GwG are merely editorial in nature and have not had any impact on the group of obliged entities indicated therein.

1.6 Insurance undertakings

The following preconditions must be fulfilled in order to qualify as an insurance undertaking which is an obliged entity under the GwG as well as the anti-money laundering provisions of the German Insurance Supervision Act (*Versicherungsaufsichtsgesetz* – VAG):

1. The insurance undertaking in question must be an insurance undertaking in accordance with Article 13 (1) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (hereinafter: "Solvency II Directive") or a domestic branch of such undertakings seated abroad.

This includes all direct life insurance and non-life insurance undertakings (including branches) which have received a licence pursuant to Article 14 of the Solvency II Directive from a supervisory authority in Germany.

2. This undertaking/branch must:

- offer life insurance activities which under Article 2 (3) of the Solvency II Directive fall under the above-mentioned Directive (cf. section 2 (1) no. 7 (a) of the GwG, section 52 of the VAG),

This includes

1. the following life insurance activities where they are provided on the basis of a contract:

- a. life insurance which covers endowment insurance, whole life insurance, combined endowment and whole life insurance, life insurance with a return of premium as well as marriage and birth insurance;

this includes "traditional" life insurance, in particular providing endowment and whole life cover (including term life insurance);

- b. pension insurance;

this includes "Riester" and basic annuity contracts (*Basis-Rentenverträge*);

- c. additional insurance policies taken out in addition to life insurance, i.e. in particular insurance covering bodily injury including occupational disability, insurance against death due to accident, insurance against disability due to accident or illness;

This includes the additional insurance policies offered by life insurance firms together with life insurance, generally disability insurance. This includes additional occupational disability insurance, work incapacity insurance, basic capability insurance, care pension risk insurance or dread disease insurance as well as additional accident insurance.

In all of these types of insurance, the insured event is tied to a physical and objectively determinable impairment due to an illness or accident.

- 2. the following transactions requiring supervision such as

- a. capital redemption operations,
- b. operations for the management of pension funds (management of the investments and assets for the pension fund; but not the pension fund's granting of pension commitments),
- c. the operations designated or stipulated in social insurance law which depend on the length of life, insofar as they are operated or managed by life insurance undertakings at their own risk in accordance with the legal provisions of a Member State (e.g. insolvency hedging for time-value accounts).

On the other hand, due to Article 9 of the Solvency II Directive this does not apply for the following transactions and activities, so that nor are these covered by the GwG:

- 1. operations of provident and mutual benefit institutions whose benefits vary according to the resources available and which require each of their members to contribute at the appropriate flat rate and also
- 2. operations carried out by organisations other than the above-mentioned life insurance firms whose objective is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or a trade or group of trades,

in the event of death or survival or of discontinuation of work or a reduction of earning capacity, whether or not the commitments arising from such operations are fully covered at all times by mathematical provisions.

This means that, in particular, the operations of occupational pension schemes or social security institutions as well as institutions which only insure against death risks in relation to the burial costs which are carried out by other institutions under Article 3 (3) and (5) of the Solvency II Directive are not covered by this directive, so that the conduct of this business is not covered by section 2 of the GwG. This applies for pension funds (*Pensionskassen*) and death benefit funds. A support fund is likewise not subject to the money laundering-related provisions as an obliged entity, since it does not conduct any insurance business.

- offer accident insurance contracts with a premium refund (section 2 (1) no. 7 (b) of the GwG, section 52 of the VAG),
- grant loans within the meaning of section 1 (1) sentence 2 no. 2 of the KWG (section 2 (1) no. 7 (c) of the GwG) or

The grant of loans within the meaning of section 1 (1) sentence 2 no. 2 of the KWG is business which is typically also offered by the credit institutions covered by no. 1 in this concrete manner or similarly. This applies, in particular, for mortgage loans as well as other loans granted within the scope of business activities. In case of a lesser risk situation in a specific instance due to particular factors (e.g. offsetting of instalment payments against the salaries of employees or commission paid), section 14 of the GwG provides for the option of an appropriate reduction in customer due diligence obligations.

- offer capitalisation products (section 2 (1) no. 7 (d) of the GwG).

1.7 Asset management companies and others

In addition, obliged entities include asset management companies as defined in section 17 (1) of the German Investment Code (*Kapitalanlagegesetzbuch* – KAGB), German branch offices of EU management companies and of foreign AIF management companies, and foreign AIF management companies for which the Federal Republic of Germany is the reference Member State and which are subject to supervision by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) pursuant to section 57 (1) sentence 3 of the KAGB (section 2 (1) no. 9 of the GwG).

Pursuant to section 2 (1) no. 9 of the GwG, all asset management companies under section 17 (1) of the KAGB are obliged entities under the GwG. This includes registered asset management companies.

1.8 Financial holding companies, mixed financial holding companies and investment holding companies

Financial holding companies, mixed financial holding companies and investment holding companies are included in the group of obliged entities under section 2 (1) of the GwG supervised by BaFin pursuant to

section 50 no. 1 of the GwG where this is stipulated in the relevant technical legislation (the KWG and the WpIG).

Financial holding companies and mixed financial holding companies seated in Germany which hold a licence under section 2 (f) (1) of the KWG are obliged entities under section 2 (1) no. 1 of the GwG (section 25 (l) of the KWG).

Investment holding companies which have the status of parent undertakings or which BaFin classifies as such are obliged entities under section 2 (1) no. 2 of the GwG (section 36 of the WpIG).

II. Risk management (risk assessment and internal safeguards)

2. Risk management and assessment – sections 4 and 5 of the GwG

2.1 General principles

According to section 3 (a) (1) of the GwG, the prevention and combating of money laundering and terrorist financing in accordance with the requirements of the GwG follows a risk-based approach. At the heart of this approach is the requirement under section 4 of the GwG for the obliged entities to have an effective risk management system which covers risk assessment under section 5 of the GwG and internal safeguards under section 6 of the GwG.

A risk management system will be effective where it covers the entire business activities of the obliged entity and clearly takes into consideration the specific risks arising and where the internal safeguards thus determined must be considered to be appropriate in relation to these risks.

Appropriateness will be evaluated – as within the scope of the creation of risk management systems – on the basis of the obliged entity's specific risk assessment in relation to the risk structure of the services and products which it offers and on the basis of the results of the national risk assessment.

Pursuant to section 4 (1) of the GwG, the nature and scope of the business activities of the obliged entities are to be taken into consideration in the design of the risk management system.

2.2 Responsibility

The responsibility of a member of the management (e.g. board of management member, managing director) under section 4 (3) of the GwG for the establishment of an orderly and appropriate risk management system within the meaning of section 4 of the GwG must be clearly documented. Notification of BaFin is not necessary. This responsibility is applicable irrespective of the management board's overall responsibility.

For this purpose, the member of the management must be precisely familiar with the risks and their assessments in connection with money laundering and terrorist financing in relation to the business activities

of the obliged entity. For this purpose, he must be provided with the necessary key information regularly – and, where necessary, promptly – in full, comprehensibly and correctly.

The risk assessment as well as the initial establishment of/key changes to the internal safeguards require the approval of the designated member of the management (section 4 (3) of the GwG).

2.3 Risk assessment

Principle

The risk assessment must be produced to an appropriate extent, thus in accordance with the nature and scope of the business activities of the obliged entity (section 4 (1) of the GwG). Pursuant to section 5 (1) sentence 2, the risk factors indicated in Annexes 1 and 2 and the information provided on the basis of the national risk assessment must be taken into consideration.

Annexes 1 and 2 of the GwG which are relevant in this regard (section 5 (1) of the GwG) include sample lists of factors and possible indications of a potentially lower or higher level of risk. Unlike in the case of the scenarios with a higher level of risk per se specified pursuant to section 15 (3) and (8) of the GwG and defined by the obliged entities themselves pursuant to section 15 (2) of the GwG, the applicability of individual factors does not mean that an increased level of risk is thus applicable per se. Instead, the key point is the overall assessment in a specific case of all (risk-increasing and risk-reducing) factors.

Guidelines on risk factors

In addition, pursuant to section 2 (1) nos. 1, 2, 3, 7, 8 and 9 of the GwG the obliged entities must comply with the European Banking Authority's guidelines on money laundering and terrorist financing risk factors (hereinafter: guidelines on risk factors) of 1 March 2021 in preparing or revising a risk assessment (Art. 17 and Art. 18 of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (hereinafter: Fourth Money Laundering Directive; cf. Title I, no. 4 *et seq.*)). These guidelines are a core element of the implementation of the risk-based approach.

The guidelines on risk factors include examples of risk factors which the obliged undertakings are obliged to take into consideration within the scope of the statutory provisions – where applicable – in their review and assessment of the money laundering and terrorist financing risks associated with a transaction. In addition, the guidelines on risk factors describe how the obliged entities can adjust the scope of their customer due diligence obligations in accordance with the risks identified by them, so as to make optimal use of the available resources. The guidelines on risk factors supplement for the obliged entities the risk factors contained in the Annexes to the GwG.

Following an introductory section, the guidelines on risk factors comprise two parts:

- a. Title I consists of general comments and factors to be taken into consideration which apply for all undertakings subject to anti-money laundering obligations. This guidance is intended to enable the obliged undertakings to make in-depth and risk-oriented decisions in connection with the identification, assessment and treatment of money laundering and terrorist financing risks which may apply within the scope of business relationships as well as other, occasional transactions.
- b. On the other hand, Title II comprises various sector-specific subsections and helps undertakings to apply their respective customer due diligence obligations on a risk-oriented basis.

The guidelines on risk factors have a particular significance, since – in deviation from previous legislation – the new GwG does not specify any scenarios where simplified due diligence obligations may apply. A similar situation applies for scenarios which are subject to an increased level of risk and which are not expressly referred to in section 15 (3) of the GwG.

Objective and implementation

The objective of the risk assessment is to fully and completely register, identify, categorise and weigh up the specific risks in relation to money laundering and terrorist financing which arise within the scope of the business activities of the obliged entity. On this basis, appropriate money laundering prevention measures are to be implemented, in particular internal safeguards.

Appropriateness will be determined – as within the scope of the creation of risk management systems – on the basis of the obliged entity's own risk assessment in relation to the risk structure of the services which it offers.

The following steps in particular are necessary as of the preparation of an internal risk assessment and the associated determination of the necessary measures:

- a complete survey of the undertaking's specific situation,
- registration and identification of customer-, product- and transaction-related risks as well as geographical risks,
- categorisation of the identified risks, i.e. classification in terms of risk groups and, where applicable, additional weighting, i.e. assessment,
- the development and realisation of appropriate internal safeguards which are used within the scope of the necessary money laundering prevention measures due to the outcome of the risk assessment (see chapter 3 for further details),
- the review and ongoing development of the internal safeguards enacted to date, taking the outcome of the risk assessment into consideration.

Step 1

The business structure of the obliged entity is relevant for the survey of its specific situation. Within the scope of this survey, registration of the undertaking's basic customer structure, its business units and processes, the products which it offers, its channels of distribution and its organisational structure is particularly important.

Step 2

The risks can be registered and identified by means of the financial sector's expertise in relation to the techniques used for money laundering and financing of terrorism. The expertise which is required for this purpose may be obtained or updated e.g. on the basis of national and international guidance and typology documents as well as lists of criteria establishing grounds for suspicion (incl. the typology documents available for the obliged entities in the internal section of the FIU's website (www.fiu.bund.de), for the areas of "money laundering" and "terrorist financing", or similar documents of the FATF on its website (www.fatf-gafi.org)), the undertaking's existing knowledge or knowledge subsequently obtained by the undertaking (such as from media evaluations), the general analysis of suspected cases in which the undertaking has been involved in the past, or the exchange of knowledge with anti-money laundering officers (hereinafter: AML officers) of other obliged entities.

Step 3

The identified risks must be categorised, i.e. divided up into different risk groups and assessed in terms of their significance. This may include a weighting of the various risks/risk groups. As a rule, the identified risks will be assessed within the scope of the risk assessment in terms of three different risk levels (high, medium, low). However, further differentiation/gradation by means of additional risk levels/categories and a – voluntary – reduction to fewer levels/categories (e.g. exclusively normal (medium) and higher-level) is likewise possible.

Example of a three-level risk classification:

- High => all scenarios which are also included in this classification either due to the high-risk classes defined by the legislation (section 15 of the GwG) or on the basis of the obliged entity's own risk assessment, taking into consideration Annex 2 to the GwG, the guidelines on risk factors or other specific information.
- Medium => all scenarios which are not included in the classification "high" or "low" due to the obliged entity's own risk assessment.
- Low => all scenarios where a low level of risk may be assumed in view of the requirements laid down in section 14 of the GwG, Annex 1 to the GwG as well as the guidelines on risk factors on the basis of a plausible risk assessment.

Various assessment methods may be used in the assessment. An assessment system subject to various weightings for different risk factors is possible, and so too is a fixed system where a high risk value for one individual factor is binding for the risk assessment and cannot be compensated for by means of factors subject to a low level of risk.

In addition, absolute criteria may be defined which automatically affect the customer classification and/or automatically entail a specific safeguard (e.g. particular decision-making processes as of the registration of specific new customers, e.g. PEPs or customers seated in a high-risk country).

Risk-based deviations or exceptions must be documented and justified, while taking into consideration the above comments.

For the purpose of the assessment, the obliged entities must also include the current national risk assessment results published in relation to money laundering and terrorist financing.

Step 4

The results of the risk identification, categorisation and weighting are to be implemented within the scope of the individual internal safeguards. In principle, these must be determined on the basis of the results of the risk assessment and must be consistent with these.

As with risk management in general, for the implementation of individual prevention measures in a specific instance the greater the level of risk potential, the greater the need to proceed carefully.

Step 5

The internal safeguards enacted must be reviewed and developed while taking into consideration the outcome of the risk assessment.

Documentation and updating obligation, section 5 (2) of the GwG

The obliged entities must clearly document their risk assessment, subject to section 5 (4) of the GwG. The above internal risk assessment steps must therefore be included in this documentation.

The need for an update to the risk assessment must be reviewed regularly, i.e. at least once per year, and this must be updated where necessary. The changes made within the scope of this update must be clearly presented in a form which indicates the level of change in the risk assessment and must be documented accordingly.

The current version of the risk assessment must be provided to BaFin at its request. The same applies for the internal auditors (where applicable) and for the external auditors. The current risk assessment must be presented to the competent member of the management. This must be documented in an audit-compliant manner.

Group-wide risk assessment, section 5 (3) of the GwG

Under section 5 (3) of the GwG, the obligation to produce a risk assessment also applies for parent undertakings of a group in relation to the group as a whole (see chapter 3 for the group obligations in detail).

Possibility of exemption, section 5 (4) of the GwG

Under section 5 (4) of the GwG, subject to certain preconditions BaFin may exempt obliged entities from documentation of the risk assessment under subsection 1 (NB: not from the implementation of this risk assessment or from the obligation to enact appropriate internal safeguards).

This exemption will be granted at the request of the obliged entity. A charge will apply in case of the rejection of this request and likewise for its approval. While every obliged entity is entitled to submit a request for exemption, due to the risks generally applicable in the financial sector as a rule this exemption will only apply in the non-financial sector.

An exemption may only be granted subject to cumulative fulfilment of the following preconditions specified in the Act:

- clear identifiability of the existing concrete risks for the obliged entity

In particular, this precondition will be fulfilled where the business operations of the obliged entity do not include any complex business activities, the transactions which it implements are limited in scope, its customer structure is homogeneous and no other risk-increasing circumstances are applicable.

Pursuant to section 5 (1) sentence 3 of the GwG, the extent of the risk assessment will depend on the nature and size of the business activities of the obliged entity. The lower the level of complexity of these business activities, the lower the requirements on the part of BaFin in relation to the preparation (and documentation) of a risk assessment. Conversely, the larger and more complex the risks which an obliged entity is subject to, the lower the probability of an exemption from this documentation obligation.

In this context, the possibility of an exemption should only be considered where, even though it is proportionate, documentation of the risk assessment is not necessary and is inappropriate for BaFin.

- the obliged entity has an adequate understanding of the existing risks

This relates to the AML officer or, in case of an exemption from the obligation to appoint this person, the competent member of the management.

An adequate understanding may be assumed where the internal safeguards enacted by the obliged entity pursuant to section 6 of the GwG are adequate on the basis of the risk situation presented by the obliged entity.

The obliged entity must clearly and comprehensibly document the applicability of the above-mentioned preconditions in textual form in its request submitted to BaFin.

3. Internal safeguards, section 6 of the GwG

General clause, section 6 (1) of the GwG

As well as the risk assessment, risk management includes the implementation of appropriate internal safeguards under section 6 of the GwG.

Such safeguards will be appropriate where they correspond to the risk situation of the obliged entity – from the point of view of principles, procedures and controls – and adequately cover it. In particular, these measures must reflect the size and the organisational structure of the obliged entity, especially its business and customer structure (cf. guidelines on risk factors). The obliged entity will determine the appropriateness of these measures on the basis of its own analysis with regard to the existing money laundering and terrorist financing risks for all of the products and services which it offers and on the basis of other relevant circumstances. BaFin may review whether the obliged entity's risk management is actually appropriate.

The obliged entity must regularly monitor to an appropriate degree the functional capacity and the effectiveness of its internal safeguards.

Examples of safeguards, section 6 (2) of the GwG

Section 6 (2) of the GwG includes the following examples of the safeguards to be implemented under subsection 1. Due to their non-exhaustive nature, the internal safeguards listed in technical legislation which also apply for the respective obliged entities (e.g. section 25 (h) (2) of the KWG, section 53 of the VAG) include the measures indicated in section 6 (1) of the GwG.

All internal safeguards must be regularly reviewed and updated as necessary (e.g. in case of a significant change in the risk situation of the obliged entity, in case of findings regarding new money laundering or terrorist financing techniques or in case of a change in the statutory requirements), either in whole or in part.

3.1 The development of internal principles, procedures and controls

The obligation to develop internal principles, procedures and controls applies in relation to:

- dealing with risks, section 6 (2) no. 1 (a) of the GwG
- customer due diligence obligations, section 6 (2) no. 1 (b) of the GwG
- reporting obligations, section 6 (2) no. 1 (c) of the GwG
- recording and retention, section 6 (2) no. 1 (d) of the GwG

- other provisions, section 6 (2) no. 1 (e) of the GwG

3.2 The appointment of an anti-money laundering officer and a deputy, section 7 of the GwG

Under section 6 (2) no. 2 of the GwG, an AML officer and a deputy must be appointed. This obligation is stipulated in further detail in section 7 of the GwG.

Pursuant to section 7 (1) of the GwG, *inter alia* obliged entities under section 2 (1) nos. 1 to 3, 7 and 9 of the GwG are required to appoint an AML officer at management level (cf. section 1 (15) of the GwG) and a deputy. These persons must be able to perform their tasks independently and effectively. The deputy will perform these activities in the absence of the AML officer or else in collaboration with the AML officer. Where necessary and where collaboration is ensured, multiple deputies may be appointed.

The AML officer is an instrument of the management board. As such, he must be organisationally and technically directly subordinate to the competent member of the management (section 4 (3) of the GwG). From the point of view of this role, the AML officer and his deputy are subject to the right of the competent member of the management to issue instructions. The AML officer must report directly to this member of the management. It must also be ensured that, where applicable, the supervisory body included within the scope of the undertaking's management (e.g. in case of a stock corporation, its supervisory board) – including the competent member of the management – can directly obtain information from the AML officer.

To prevent conflicts of interest, as a rule members of the management may only be appointed to the role of AML officers or their deputies in case of obliged entities which have fewer than 15 full-time equivalent employees and which do not have any appropriate employees below management level to perform this activity.

Moreover, to avoid conflicts of interest in principle, the AML officer should not be simultaneously tasked with the duties of a data protection officer, unless appropriate consideration is given to his respective obligations and this situation is clearly justified and documented for audit purposes. In addition, the AML officer may not perform internal audit functions.

In principle, the AML officer should not have any ties to other organisational or staff functions. This does not apply for ties to other supervisory functions at the same level, such as compliance or risk controlling, where both of these areas are managed at the same time. Where ties nonetheless exist with other organisational or staff functions, such as the legal department, this must be clearly documented for audit purposes, indicating the grounds for the ties to the other organisational unit.

The commercial interest of the undertaking may not conflict with the orderly execution of the tasks of the AML officer. Section 7 (7) of the GwG clarifies that the rights of the AML officer and his deputy/deputies as employees may not be encroached upon due to conflicts of interest between fulfilment of the relevant anti-money laundering regulations, the relevant regulatory provisions and the commercial interest of the undertaking.

Notification of appointment and dismissal

BaFin must be notified in advance, without delay, of the appointment and dismissal of the AML officer and his deputy/deputies, indicating the relevant date and the contact details. BaFin reserves the right to require information on the qualifications of the relevant employee (e.g. overview of his career history, proof of his

attendance of money laundering training events etc.) and regarding his reliability (e.g. in the form of information from the German Federal Central Criminal Register (*Bundeszentralregister*) and, where appropriate, from the German Central Trade and Industry Register (*Gewerbezentralsregister*)).

Possibility for BaFin to revoke an appointment

The obliged entity must ensure that the appointment of the AML officer or the deputy can be revoked on the instruction of BaFin if, in the opinion of BaFin, the appointee does not fulfil the requirements with regard to his qualifications or reliability.

This will generally arise where statements made by the obliged entity or other information received by BaFin indicate a lack of qualifications or reliability.

Indications as to the unreliability of an AML officer may arise, for instance, due to his work to date, either as an AML officer or in a different capacity (such as a former manager of an obliged entity).

Requirements for the role of AML officer

Since the AML officer serves as a contact for BaFin, the prosecuting authorities and the Financial Intelligence Unit (hereinafter: FIU), in principle he should have an adequate command of the German language so as to be able to communicate with the competent authorities. No delays may arise in the performance of his tasks in this respect.

Insofar as a "central institution" within the meaning of section 25 (h) (7) sentence 1 of the KWG is incorporated within an institution within the meaning of section 2 (1) no. 1 or 2 of the GwG, the AML officer is also responsible for all measures to prevent "other criminal offences" within the meaning of section 25 (h) (1) sentence 1 of the KWG. These measures must be coordinated with the measures for the prevention of money laundering and terrorist financing in terms of their contents and from an organisational point of view.

Material/personnel resources and rights of the AML officer

The material and personnel resources of the AML officer must reflect the size, the business model and the abstract risk situation of the relevant obliged entity as well as the resulting tasks of the AML officer, so as to ensure adequate performance of his tasks.

Appropriate resources must be provided for the implementation of the AML officer's tasks which ensure fulfilment of the statutory requirements (e.g. sections 6 (2) no. 6, 7 (5) sentence 3 of the GwG). Any reduction of these resources must be justified in writing by the competent member of the management. The supervisory body of the obliged entity must be notified of any significant reductions.

Irrespective of the overall responsibility of the competent member of the management, the AML officer is responsible for compliance with the regulations on the prevention of money laundering and terrorist financing.

The AML officer and his deputy/deputies must be authorised, within the scope of their performance of their work,

- to submit the necessary legally binding declarations for the undertaking and to represent it externally in case of relevant situations and

- to provide undertaking-specific instructions for all matters relating to the prevention of money laundering and terrorist financing.

As well as the grant of the authority to act individually or jointly for the undertaking, this authorisation may be issued by different means, e.g. through the grant of a relevant commercial power of attorney.

The AML officer and his deputy/deputies have the power to issue instructions to the employees of the undertaking within the scope of the fulfilment of their tasks. In principle, they are subject to the instructions of the competent member of the management.

However, this does not apply for the cases indicated in section 7 (5) sentence 6 of the GwG: the AML officer is thus not subject to the management board's right to give instructions in relation to envisaged reports under section 43 of the GwG or his response to a request for information from the FIU.

In particular, the AML officer must be involved as early as possible in the processes for the design and review of new products, in the development of new areas of business, financial services and customer categories, so as to ensure their effective monitoring and assessment and in order to safeguard the advisory and support function of the AML officer for the prevention of money laundering and terrorist financing. The same applies for the preparation of organisational and work instructions, so as to ensure that these are suitable in order to prevent violations of the relevant statutory provisions.

The AML officer must have a position which enables him to represent matters associated with the prevention of money laundering and terrorist financing sufficiently vigorously, including in relation to the management to which he reports.

The AML officer must be included in all flows of information which may be of significance for the fulfilment of his tasks. He must be granted access to all information of relevance for his activity and must be granted an unrestricted right to receive information, right of inspection and right of access for all premises and documents, records, IT systems and further information which is required for the determination of relevant matters. The AML officer may have the internal auditors and external auditors provide him with relevant audit reports.

Insofar as the AML officer avails himself of the services of further persons outside of his field for the performance of his tasks, these persons must keep him regularly informed of the implementation of their activities and their results. The AML officer is entitled to issue them with instructions within the scope of the fulfilment of their tasks.

Employees of the undertaking may not refuse to hand over documents or to provide information which is of relevance for the prevention of money laundering or terrorist financing. This is without prejudice to rights to refuse to provide testimony or information in criminal proceedings.

Tasks of the anti-money laundering officer

The tasks to be performed by the AML officer include, in particular (cf. the ruling of Frankfurt am Main Higher Regional Court of 10 April 2018, ref. no.: 2 Ss-OWI 1059/17):

- the creation and development of a uniform undertaking-specific risk assessment or a coordinated series of undertaking-specific risk assessments (section 5 of the GwG; see chapter 2.3)
- the development and updating of internal principles and procedures for the prevention of money laundering and terrorist financing, in particular work and organisational instructions and appropriate business- and customer-related protection systems

The AML officer must be involved in the preparation of other internal organisational and work instructions for the obliged entity and their ongoing development, insofar as these are relevant in relation to the fulfilment of regulations on the prevention of money laundering or terrorist financing.

- establishment of clear reporting lines
- implementation of ongoing monitoring in relation to compliance with the above-mentioned regulations

The AML officer must ensure the appropriateness and effectiveness of the organisational and work instructions established and of the business and customer-related internal protection systems of the undertaking (cf. section 6 of the GwG) by means of risk-based monitoring activities, within the scope of a structured approach. In principle, all key areas of the obliged entity's operations must be included in this monitoring, including the risks for the individual business units. The AML officer will implement this monitoring by means of his own risk-based audit activities or else through third-party audit activities. Monitoring activities relate to transactions and business relationships which, on the basis of the obliged entity's expertise, may entail money laundering or terrorist financing risks.

These monitoring activities are to be implemented independently of the retrospective audit obligations of the internal auditors. Unlike the audits performed by the internal auditors, where necessary the AML officer will perform his monitoring activities in connection with the prevention of money laundering and terrorist financing during the course of a process, or at least promptly. For the performance of his duties, the AML officer is moreover entitled to take samples without any restrictions.

The AML officer must investigate (section 15 (6) no. 1 of the GwG) transactions which are particularly complex or unusually large by comparison with similar transactions, which follow an unusual pattern of transactions or which are implemented without any obvious economic or legal purpose (section 15 (3) no. 3 of the GwG; see chapter 7.4.).

- Handling of suspected cases

The AML officer must handle suspected cases, review whether the preconditions for a report under section 43 of the GwG are fulfilled and, where applicable, forward suspicious transaction reports under section 43 of the GwG to the competent FIU. In this regard, he must also decide on whether to terminate the business relationship.

- Notification of the management and the supervisory body

Insofar as shortcomings are identified in terms of the principles and procedures for the prevention of money laundering and terrorist financing, the AML officer must determine the measures which are required in order to eliminate shortcomings relating to existing internal protection systems and notify the competent member of the management of this.

Insofar as the competent member of the management deviates from the proposals put forward by the AML officer, this must be documented.

The AML officer must provide the competent member of the management with a regular report, at least once a year, on his activities, in particular on the undertaking's risk situation and on the measures implemented and envisaged for fulfilment of anti-money laundering obligations. He may do so within the scope of the risk assessment which is required pursuant to section 4 (3) sentence 2 of the GwG

and which has been prepared accordingly. Further ad hoc reports must be produced where required for a specific reason.

The competent member of the management must also forward these reports to the chairman of the supervisory body included within the scope of the undertaking's management (e.g. in case of a stock corporation, its supervisory board), where applicable. Changes which are made to key assessments or recommendations of the AML officer on the instruction of the competent member of the management must be separately documented in the respective report. The chairman of the supervisory body must also be notified of these changes.

- Instruction of relevant employees regarding the obligations for the prevention of money laundering and terrorist financing and the preparation of a training concept

This includes support for the operational departments providing this instruction or else instruction provided by the AML officer and, where applicable, relevant training (internal or external), in particular in relation to changes in the law, changes in BaFin's administrative practice or other changes in supervisory requirements and the resulting rules of conduct for employees.

- The AML officer is the contact for BaFin, the prosecuting authorities and the FIU
- The AML officer may make use of other departments of the undertaking for the fulfilment of his tasks.

For the AML officer's effective fulfilment of the above tasks, the undertaking must

- have sufficiently clear reporting lines,
- the respective competences must have been prescribed in its internal principles and procedures and
- there must be no avoidable duplications of powers.

Outsourcing

Insofar as the function of the AML officer pursuant to section 6 (7) of the GwG has been outsourced (see chapter 3.10. for details), the undertaking must have a contact for any issues associated with the outsourced function of the AML officer and it must be ensured that the competent member of the management can directly obtain information from this service provider.

The performance of tasks by a foreign parent company or head office likewise constitutes outsourcing.

Exemption

Under section 7 (2) of the GwG, BaFin may grant exemptions from the duty to appoint an AML officer subject to the preconditions stipulated therein.

Pursuant to section 7 (2) of the GwG, an exemption from the requirement to appoint an AML officer may exceptionally be granted if it has been ensured that

- there is no risk of a loss of information or of insufficient information on account of a separation of duties in the undertaking's structure and
- other measures are enacted, after a risk-based assessment, to prevent business relationships and transactions related to money laundering or terrorist financing.

As a derogating provision this exemption will be restrictively handled, irrespective of the option for the obliged entities to appoint members of the management as AML officers (cf. 3.2, p. 16). As a rule, an exemption will only be possible for obliged entities whose measures for the prevention of money laundering and terrorist financing are free from any significant defects and where there is no indication of any significant defects. According to consistent administrative practice, a risk of a loss of information or of insufficient information will generally be assumed in case of obliged entities with more than 15 employees, in groups of undertakings and, in particular, in case of cross-border corporate structures.

Even in case of an exemption, the obliged entity must comply with all of the other anti-money laundering obligations. A competent contact must be available in case of inquiries from BaFin, the FIU or prosecuting authorities.

The obliged entity must submit the application for exemption while providing a written statement of grounds. A charge will apply in case of the rejection of this request and likewise for its approval.

Power to issue orders

In regard to obliged entities under section 2 nos. 4 and 5 of the GwG, pursuant to section 7 (3) of the GwG BaFin may order the appointment of an AML officer and a deputy if it deems this appropriate.

3.3 Establishment of group-wide procedures, section 9 of the GwG

Obligated entities seated in Germany which are parent undertakings of a group within the meaning of section 1 (16) of the GwG are obliged to establish group-wide procedures for the prevention of money laundering and terrorist financing. These procedures are stipulated in further detail in section 9 of the GwG (see chapter 11).

3.4 Prevention of misuse of new products and technologies

Under section 6 (2) no. 4 of the GwG, obliged entities must implement appropriate measures to prevent the abuse of new products and technologies for money laundering and terrorist financing purposes or for the purpose of facilitating the anonymity of business relationships or transactions. A measure will be appropriate where the purpose thus pursued in connection with the respective risk situation can be fulfilled.

3.5 Review of reliability

Under section 6 (2) no. 5 of the GwG, obliged entities must establish appropriate risk-oriented measures in order to review the reliability of their employees.

The term "reliability" is defined in section 1 (20) of the GwG.

Employees will be deemed to be reliable from the point of view of anti-money laundering provisions if they guarantee

- to carefully comply with the obligations set out the GwG as well as other anti-money laundering obligations and strategies, controls and procedures introduced at the obliged entity in order to prevent money laundering and terrorist financing,

- to report facts as specified in section 43 (1) of the GwG to their manager or to the AML officer, if one has been appointed, and
- not to participate, either actively or passively, in dubious transactions or business relationships.

Under section 6 (2) no. 5 of the GwG, no distinction applies between employees authorised to execute cash or non-cash transactions. The same applies for persons concerned with the initiation and establishment of business relationships and for employees who perform purely internal management tasks, for instance, insofar as these may likewise encourage money laundering and terrorist financing.

A risk-oriented reliability review, from the point of view of intensity and frequency, must be implemented for all employees who are active in work areas of relevance for money laundering and terrorist financing or who have direct access to business premises (e.g. security personnel).

However, in selecting the tools to be used for the purpose of this reliability review and in terms of the number of checks involved the obliged entity has discretionary scope on grounds of proportionality and while pursuing a risk-based approach.

It may make use of existing personnel assessment systems or specific monitoring systems. Obligated entities are free to require a "negative certificate", for instance. The obliged entity is not required to carry out an investigation without any cause. Measures which would be considered impermissible on labour or data protection grounds are not appropriate, even within the scope of section 6 (2) no. 5 of the GwG.

The reliability of employees active in fields of relevance for money laundering and terrorist financing must generally be reviewed as of the establishment of an employment relationship.

The monitoring activities must be determined on a risk-oriented basis, depending on the position and the field of activity of the new employee. For instance, these may consist of a review of the plausibility of the applicant's details, on the basis of the documents provided, the submission of a police certificate of good conduct or, where applicable, a review of the applicant's financial situation.

However, the AML officer must be notified in the event that factual indications become known during the employment relationship which are liable to call into question the reliability of an employee. For example, the following findings may give rise to indications:

- An employee commits relevant criminal offences.
- An employee persistently violates anti-money laundering obligations or internal instructions/guidelines.
- An employee fails to report facts within the meaning of section 43 (1) of the GwG.
- An employee participates in doubtful transactions or business.
- Compulsory enforcement measures are known to have been initiated versus an employee (e.g. seizure by a bailiff).
- An employee ensures that no deputy is available to fill in for him in relation to certain customers.
- An employee seeks to avoid taking holiday and to avoid periods of absence.
- An employee administers business documents in a quasi-private capacity.

- An employee frequently works on his own in the office outside normal work hours.
- An employee frequently takes documents home, without a clear reason for doing so.

3.6 Instruction of employees

According to section 6 (2) no. 6 of the GwG, in principle the obliged entities must provide all of their employees with initial and ongoing instruction regarding typologies and current methods of money laundering and terrorist financing, relevant anti-money laundering regulations and obligations as well as data protection provisions. This instruction may be provided through classroom training or by means of current IT-based training programmes or documents with suitable contents. The data protection officer or suitably trained personnel may provide instruction regarding data protection provisions.

The obliged entities may independently decide, on a risk-oriented basis, on the forms of instruction used as well as their nature, scope and timing. As well as the individual risk situation, in particular ad hoc circumstances must be taken into consideration (e.g. new statutory provisions, significant changes to the administrative practice of BaFin, findings regarding new forms of money laundering and terrorist financing, new employees joining the undertaking or the frequency of money laundering-related incidents or increased error ratios in relation to anti-money laundering obligations). The same applies for the form of instruction.

Information on typologies and current methods of money laundering and terrorist financing is to be obtained, inter alia, from dialogue with the FIU pursuant to section 28 (1) no. 9 of the GwG, from the annual reports of the FIU as well as the publications of the Financial Action Task Force (FATF) (annual reports, typology documents etc.).

The sole possible limit in relation to the obligation to provide instruction applies in relation to employees who perform activities entirely unconnected to the tasks or services typical of the obliged entity's business (e.g. cleaning staff).

3.7 Review of the above-mentioned principles and procedures

An independent audit may be carried out by internal auditors or else by means of other in-house or external audits. In any event, this review must be appropriate in view of the nature and scope of the obliged entity's business. The independent review which is required according to section 6 (2) no. 7 of the GwG applies in addition to the monitoring obligations of the AML officer and includes the field for which the AML officer is responsible.

The internal auditors or the internal/external audit agency must review compliance with all anti-money laundering obligations. As a rule, an annual risk-adequate review of segments will suffice provided that all of these segments undergo a review within a three-year cycle.

The reports must assess whether the safeguards enacted by the obliged entity to combat money laundering and terrorist financing are appropriate, workable, up-to-date and effective and that the AML officer has fulfilled the tasks assigned to him.

This assessment must be based on a review covering all of the duties listed in the GwG. At the auditor's discretion, this may be limited to a review of a sample. The samples used must be proportionate to the total number of transactions which are subject to the reviewed anti-money laundering obligation and which have been recorded pursuant to section 8 of the GwG. The ratio of the sample size to the total number of

transactions reviewed must be indicated in the audit report (where applicable, approximately). Irrespective of other retention periods, the reports must be kept for a period of five years in accordance with section 8 (4) of the GwG.

For the fulfilment of its task, the body carrying out the review must be granted full access to all relevant information, documents and files concerning all of the customers, persons acting on behalf of the contracting party, beneficiaries and beneficial owners and regarding all of the business relationships and the transactions implemented within the scope of these business relationships.

3.8 Whistleblowing, section 6 (5) of the GwG

This provision supplements the body to be established for whistleblowers at official level under section 53 of the GwG (or else at BaFin under section 4 (d) of the Act Establishing the Federal Financial Supervisory Authority (*Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht – FinDAG*)), so as to enable the employees of the obliged entities to report violations of anti-money laundering requirements. This provision corresponds to section 25 (a) (1) sentence 6 no. 3 of the KWG and section 23 (6) of the VAG.

Obligated entities are thus required to enact measures appropriate to their nature and size to enable their employees and persons in a comparable position to report violations of anti-money laundering provisions to appropriate bodies, while ensuring that their identity remains confidential.

The reports under section 6 (5) of the GwG are not suspicious transaction reports within the meaning of section 43 (1) of the GwG.

Persons in a comparable position to employees are persons who act on behalf of the obliged entity within the scope of its business activities but who are not employed by the obliged entity (e.g. self-employed or temporary workers).

It remains subject to the discretion of the obliged entities which internal body is responsible for the receipt of the relevant reports and how the confidentiality of the identity of the affected employee can be preserved.

3.9 Safeguarding readiness to provide information, section 6 (6) of the GwG

This provision is intended to ensure that the obliged entities enact measures so as to provide the competent authorities with information on whether they maintain business relationships with specific persons and, if so, the nature of these business relationships. The fact that this obligation is enshrined in law safeguards cooperation between the obliged entities and the competent authority.

The measures referred to in this provision in regard to the nature and size of the obliged entities need not necessarily be IT procedures. The sole key point is that the obliged entities collect, record and retain the relevant information. In case of inquiries, they must be organisationally and logically capable of providing BaFin without delay with confidential and complete information on whether they have maintained a business relationship with specific persons and the nature of this business relationship.

For the procedures used by the obliged entities for the transmission of information, it must be ensured that this information is transmitted securely and confidentially and that unauthorised third parties do not obtain access to the information transmitted. For example, this will be the case where information is transmitted by post. In case of transmission by e-mail, encryption methods must always be used which are consistent with the current state of the art, so as to ensure the confidentiality of these data.

These data must be retained for a period of five years, starting from the date of the inquiry.

3.10 Outsourcing of internal safeguards, section 6 (7) of the GwG

In future, the transfer of internal safeguards to a third party will no longer require BaFin's consent. Prior timely notification of this transfer is sufficient. Notification will have been provided in good time if this is submitted at least two weeks prior to the start of the planned outsourcing. This notification must indicate the date of outsourcing as well as the full name of the outsourcing provider.

As well as the safeguards listed by way of example in section 6 (2) of the GwG, all other internal safeguards may also be outsourced. This includes, in particular, IT-based monitoring pursuant to section 25 (h) (2) of the KWG. Outsourcing of internal safeguards includes outsourcing of the function of the AML officer or his deputy. In this case, as well as the name of the outsourcing provider the name of the AML officer or his deputy must also be indicated (cf. II. 3.2).

BaFin may prohibit this transfer if

- the third party does not provide an assurance that the safeguards will be implemented properly,
- the management capabilities of the obliged entity would be adversely affected or
- their monitoring abilities would be adversely affected.

In their notification, the obliged entities are obliged to demonstrate that the above preconditions for prohibiting the transfer are not fulfilled. They must fulfil this obligation independently, in full and in written form. As a rule, merely sending the outsourcing contract to BaFin will not suffice.

In any case, the obliged entity will remain responsible for the appropriateness of the safeguards and for their implementation.

3.11 Power to issue orders, section 6 (8) of the GwG

In individual cases, BaFin may issue appropriate and necessary orders to obliged entities under its monitoring so as to establish the necessary internal safeguards. It may do so not only in case of a complete lack of internal safeguards but also in case of existing safeguards which do not fulfil the requirements laid down in section 6 (2) of the GwG.

III. Customer due diligence obligations

4. Triggers of general due diligence obligations, section 10 of the GwG

The GwG distinguishes between general (standard), simplified and enhanced customer-related due diligence obligations. In the absence of particular circumstances, the obliged entities must fulfil the general due

diligence obligations within the meaning of section 10 (1) of the GwG. The following scenarios will trigger the general due diligence obligations:

4.1 Establishment of a business relationship, section 10 (3) no. 1 of the GwG

The due diligence obligations must be fulfilled, in particular, as of the establishment of a business relationship within the meaning of section 1 (4) of the GwG. Business relationship thus means any business or professional relationship which is directly connected with the commercial or professional activities of the obliged entities and which is expected, at the time when the contact is established, to have an element of duration.

The business relationship encompasses all of the services and/or products which are used by or are available to the contracting party (or customer). The reference to a professional relationship includes self-employed and commercial activity.

For instance, a key scenario is the opening of an account or a securities account. Sub-accounts or additional accounts will normally be opened within the scope of an existing business relationship (current account agreement) (the same is true e.g. for the conclusion of insurance contracts by a policyholder); in case of a change of account holder (e.g. succession), this will entail the establishment of a new business relationship.

The above-mentioned business relationships do not include those not based on a direct contractual relationship with customers, e.g. with tenants of a property within the scope of a real estate fund, contracting parties of real estate transactions or with service providers in connection with the management of collective investment undertakings.

Nor do they include general, non-typical legal relationships such as those for the maintenance of the business as such (e.g. contracts with energy utilities as well as other supply contracts, IT maintenance/service contracts, service contracts with building cleaning companies) or entering into investments under corporate law (e.g. membership of a credit cooperative).

A permanent relationship will be assessed on the basis of the evaluation made by the parties when contact is initially made rather than on the basis of a subsequent inspection.

Contractual relationships which have been established for a specific period (e.g. typical instalment payment, agreed as of the conclusion of a contract) always entail a business relationship.

Otherwise, a permanent relationship may already be assumed as of the conclusion of a second transaction, depending on the circumstances of the individual case.

A one-off business contact may only be characterised as a business relationship where this gives rise to follow-up obligations for at least one of the parties.

The mere initiation of a contract will not yet constitute the establishment of a business relationship.

4.2 Transactions outside the scope of an existing business relationship, section 10 (3) no. 2 of the GwG

Moreover, all due diligence obligations must be fulfilled pursuant to section 10 (3) no. 2 of the GwG for transactions which are implemented outside the scope of a business relationship (e.g. for so-called "occasional customers"), but only in case of

- a. funds transfers within the meaning of Art. 3(9) of Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 (hereinafter: "Funds Transfers Regulation") and where this funds transfer comprises an amount of €1,000 or more or
- b. the implementation of other transactions with a value of €15,000 or more or
- c. the transfer of crypto assets which, as of this transfer, have a value equivalent to €1,000 or more.

The due diligence obligations apply in relation to the counterparty to the transaction (the occasional customer) and the identification obligation and the authorisation check for a person acting on its behalf, where applicable, but never in relation to the recipient of the transaction (e.g. remittee).

Transactions within the scope of existing business relationships – i.e. in particular (non-cash and cash) transactions of a customer executed via an existing account will not therefore trigger any general due diligence obligations (with the exception of suspected cases or in case of doubts regarding the identification details). This is without prejudice to the application of enhanced due diligence obligations where the preconditions for these obligations are fulfilled.

Examples of transactions which will not generally give rise to (new) general customer-related due diligence obligations under the GwG because transactions are normally implemented within the scope of existing business relationships include:

- non-cash payment transactions of customers with whom a business relationship exists,
- cash payments from and cash deposits on the customer account made by the contracting party (account holder) or the person acting on behalf of the contracting party,
- account-related foreign currency dealing for customers,
- first-time use of a new product by a customer already accepted.

Irrespective of the obligation (triggered pursuant to section 10 (3) no. 2 (a) of the GwG), the other obligations pursuant to the Funds Transfers Regulation must also be fulfilled.

4.2.1 Definition of the term "transaction", section 1 (5) of the GwG

Pursuant to section 1 (5) of the GwG, a transaction is any act whose purpose or whose effect is a movement of money or other transfer of assets. "Transfer of assets" means a transfer of assets which, pursuant to section 1 (7) of the GwG, include any asset, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents and instruments in any form, including electronic and digital form, evidencing title to or other rights to the above assets.

The transactions falling under the scope of section 10 (3) no. 2 (b) of the GwG include both cash transactions involving the handover or acceptance of cash and transactions for other assets which cannot be implemented via accounts (e.g. the sale of precious stones or metals).

Under section 1 (5) of the GwG, a "single transaction" includes multiple transactions where these appear to be linked.

4.2.2 Funds transfer

The funds transfer pursuant to section 10 (3) no. 2 (a) of the GwG is a significant transaction subcategory.

The applicability of a funds transfer will be determined in accordance with the legal definition provided in Article 3 (9) of the Funds Transfers Regulation. This definition is consistent with the previous definition in Article 2 (7) of Regulation (EC) No 1781/2006 of 15 November 2006. A few examples have merely been newly inserted in the current version, to which reference is made.

In addition, in this respect the obliged entities must comply with the Joint Guidelines of the European Supervisory Authorities of 16 January 2018 under Article 25 of the Funds Transfers Regulation in relation to the measures by means of which payment service providers may determine the absence or the incompleteness of details regarding the instructing party or the beneficiary and concerning the procedures recommended for processing of a funds transfer for which the required details are missing.

As before, section 10 (3) no. 2 (a) of the GwG clarifies that in case of a cash deposit on a third-party account held by the institution where the deposit is made, this will entail a funds transfer within the meaning of section 10 (3) no. 2 (a) of the GwG and the Funds Transfers Regulation and that the due diligence obligations must be fulfilled once the threshold of €1,000 has been reached. The deposited funds need not be forwarded to a third-party institution in order to fulfil the definition of a funds transfer. However, it should be noted that under Article 5 (3) (a) of the Funds Transfers Regulation in the event of a deposit of cash or anonymous electronic money, irrespective of the value of the monies deposited, the details required under Article 4 (1) of the Funds Transfers Regulation must be collected and reviewed on the basis of documents, data and information from a reliable and independent source.

4.2.3 Transfers of crypto assets

Crypto assets within the meaning of the GwG are legally defined in section 1 (29) of the GwG as crypto assets under section 1 (11) sentence 1 no. 10 in conjunction with sentences 4 and 5 of the KWG.

The transfer of crypto assets within the meaning of the GwG is legally defined in section 1 (30) of the GwG as any transfer of crypto assets between natural or legal persons within the scope of the provision of financial services or the conduct of banking business as defined in the Banking Act which does not exclusively constitute crypto custody within the meaning of section 1 (1) (a) sentence 2 no. 6 of the KWG.

4.2.4 Thresholds/smurfing

Section 1 (5) of the GwG indicates that customer due diligence obligations must also be fulfilled where multiple individual transactions each remain below the thresholds indicated in section 10 (3) no. 2 of the GwG but appear to be connected due to relevant indications (so-called "smurfing" or "structuring") and a threshold is reached by virtue of the total amount of these transactions.

As a rule, where a significant number of transactions emerge within a limited period of time due to their similarity in terms of the conclusion of a transaction, the subject matter of this transaction or the execution of this transaction, this will indicate smurfing. The relevant counterparty need not be identical (e.g. in case of obviously connected transactions of spouses). Ultimately, the assumption of a connection between transactions will always depend on an overall assessment of all of the individual circumstances. The obliged entities have discretionary scope.

In particular, the obliged entities should review cash deposits, on a risk-adequate basis, in terms of whether artificial splitting of a single amount which may be relevant from the point of view of money laundering should be assumed in these cases (general monitoring obligation).

Checks in relation to a possible link between transactions may be implemented at the time of the transaction ("real time") or else subsequently, where applicable using IT-based monitoring systems (see chapter 5.5.1).

Real-time checks must be able to identify transactions implemented in quick succession where there are indications of a link and where these transactions together reach or exceed the relevant thresholds (e.g. in case of the deposit of multiple cash amounts), at the latest when these thresholds are reached/exceeded. It must also be ensured that further processing of the transactions is only possible once the contracting party/parties have been identified.

If these checks are performed subsequently, as with "real-time" monitoring this must include transactions which are implemented e.g. using automated cash deposit machines.

The results of these checks must be documented. In cases which suggest a link, the obliged entity should always review whether the preconditions for a suspicious transaction report pursuant to section 43 (1) of the GwG are fulfilled.

4.2.5 Special provisions

By way of derogation from section 10 (3) sentence 1 no. 2 (b) of the GwG, pursuant to section 25 (k) (1) of the KWG a minimum threshold of €2,500 applies for the due diligence obligations under section 10 (1) no. 1, 2 and 4 of the GwG, where foreign currency dealing under section 1 (1) (a) sentence 2 no. 7 of the KWG is not implemented through an account held by the customer.

Pursuant to section 10 (4) of the GwG, under section 2 (1) nos. 3 to 5 of the GwG obliged entities which accept cash as of their performance of payment services under section 1 (1) sentence 2 of the ZAG must always fulfil the general due diligence obligations under section 10 (1) nos. 1 and 2 of the GwG (so-called "zero threshold").

Pursuant to section 10 (7) of the GwG, of the customer due diligence obligations indicated in section 25 (i) (1) of the KWG obliged entities under section 2 (1) no. 4 and 5 of the GwG which are involved in issuing electronic money are only required to fulfil the obligations under subsection 1 no. 1 (identification of the electronic money recipient) and no. 4 (PEP clarification). Only distribution activities which are directly related to the issuing process for the electronic money product will trigger the customer due diligence obligations. This includes, in particular, the handover of the electronic money storage medium or code and cash or non-cash acceptance of the issue amount for the electronic money issuer.

4.3 Transactions in connection with money laundering or terrorist financing, section 10 (3) no. 3 of the GwG

Where facts are determined which suggest that a transaction is associated with money laundering or terrorist financing, pursuant to section 10 (3) no. 3 of the GwG the general due diligence obligations must always be fulfilled irrespective of thresholds.

In regard to the issue of when such a suspected case (cf. section 43 (1) of the GwG) is applicable, in particular the information concerning typologies for money laundering and terrorist financing (e.g. lists of indications) must be taken into consideration.

4.4 Doubts concerning identification details, section 10 (3) no. 4 of the GwG

Section 10 (3) no. 4 of the GwG is only relevant in case of doubts which arise in the course of an existing business relationship. Irrespective of the above comments, in all cases which give rise to doubts which it is unable to resolve in respect of the accuracy of the information collected regarding the identity of the contracting party, a person acting on his behalf or the beneficial owner, an obliged entity must re-identify these persons. If it is unable to do so, the termination obligation pursuant to section 10 (9) of the GwG will apply.

On the other hand, should doubts arise as of the fulfilment of the due diligence obligations at the time of the establishment of a business relationship or the implementation of an occasional transaction, an attempt must likewise first be made to eliminate these doubts. If this is not possible, the obliged entity must refrain from implementing this transaction pursuant to section 10 (9) of the GwG (for further details, see chapter 5.8).

For example, doubts regarding the accuracy of information may arise due to information suggesting otherwise or by virtue of official notices.

4.5 Renewed fulfilment of customer due diligence obligations in case of existing customers

Section 10 (3) (a) of the GwG clarifies that fulfilment of the general due diligence obligations within the scope of existing business relationships must be updated or supplemented, *inter alia*, in case of a change in the customer's relevant circumstances. In individual cases, in addition to the updating obligation pursuant to section 10 (1) no. 5 of the GwG this may mean that it is necessary to once again fulfil individual general due diligence obligations in relation to the customer according to a risk-based approach (change of corporate form; merger of undertakings; significant change in the ownership and control structure etc.).

5. Customer-related due diligence obligations

The general customer-related due diligence obligations are defined in nos. 1 to 5 of section 10 (1) of the GwG. Specifically, these comprise the following:

- identification of the contracting party, including registration of the authorised representatives in case of legal persons/multiple persons
- identification of the person acting on behalf of the contracting party, where applicable, and review of his authorisation to do so
- clarification of the beneficial owner (and of the ownership and control structure, if the contracting partner is not a natural person)
- clarification of the purpose of business (if not obvious)

- clarification of the PEP status of the contracting party and the beneficial owner
- monitoring obligation in relation to the business relationship, including transactions and updating obligation in this respect

5.1 Identification of the contracting party and the person acting on his behalf, section 10 (1) no. 1 of the GwG

The contracting party and the person acting on his behalf, where applicable, must be identified. Identification (section 1 (3) of the GwG) includes the determination of an identity by collecting information (e.g. by means of inquiries) and verifying this identity (in particular, on the basis of specific documents).

Pursuant to section 11 (6) of the GwG, the contracting party of the obliged entity must provide the documents and information required for fulfilment of the due diligence obligations under section 12 (1) and 2 of the GwG. However, this will not affect the responsibility of the obliged entity in terms of fulfilment of the customer due diligence obligations. If the contracting party refuses or is otherwise unable to provide documents etc., the obliged entity must decline the requested business relationship or transaction (section 10 (9) of the GwG).

Pursuant to section 11 (1) of the GwG, in principle the contracting party and any persons acting on its behalf must be identified before a business relationship is established or a transaction is implemented. However, this identification may also be completed immediately, while the business relationship is being established, if this is necessary in order to avoid interrupting the normal course of business and there is a low risk of money laundering or terrorist financing (section 14 of the GwG).

An exemption from the identification obligation applies pursuant to section 11 (3) of the GwG in those cases where the obliged entity has already identified the person who is to be identified on an earlier occasion in the fulfilment of its due diligence obligations and has recorded the information collected. (Re-)identification will only be necessary if external circumstances leave the obliged entity no choice but to doubt that the information collected during the previous identification is still correct (for further details, see chapter 4.4).

5.1.1 Contracting party

A contracting party is any natural/legal person with whom a business relationship is entered into. A contracting party is also a person with whom a transaction is implemented outside the scope of a business relationship (occasional transaction, see chapter 4.2 above). The key point is the underlying contractual relationship for the business relationship or the occasional transaction.

Examples (featuring a contracting party):

- contracting party of the current account/securities account/account agreement
- instructing party in case of letter of credit
- instructing party in case of guarantee credit (customer of the guarantee credit)
- surety within the scope of a suretyship agreement

Examples (no contracting party):

- recipient (beneficiary) of a credit transfer
- letter of credit transaction/guarantee credit: beneficiary
- payment made by a credit institution by way of discharge of prior-ranking collateral (the payment is made by the institution, the underlying legal relationship is not a contract with a third party).
- person authorised to draw on the account (if not himself a contracting party)

5.1.2 Person acting on behalf of the contracting party

A (natural) person acting on behalf of the contracting party is a person who claims to be acting in the name of the contracting party. This does not require physical presence on site (e.g. online business activity). This covers persons acting as legal representatives (e.g. authorised agents), statutory representatives and messengers.

The following persons acting on behalf of the contracting party will be deemed to be subject to an obligation to identify themselves:

- legally appointed representatives in the event of the establishment of a business relationship for the principal
- legal representatives in the event of the establishment of a business relationship for the principal (e.g. board members who actually act on behalf of legal persons; also e.g. parents, guardians, caseworkers).
- messengers and legal representatives who act outside the scope of existing business relationships (identification obligation pursuant to section 10 (3) no. 2 of the GwG in conjunction with section 10 (1) no. 1 of the GwG). This applies for the following transactions in particular:
 - non-account-related payment orders for an amount of €1,000 or more where the person initiating the payment is acting on behalf of a third party.
 - messengers/authorised representatives who implement other threshold-related individual transactions (e.g. purchase of precious metals)

On the other hand, no identification obligation under the GwG is applicable for representatives and messengers who deposit (regular depositors, persons with an authorisation granted for a specific purpose within the scope of an account relationship, employees of corporate customers whom the customer has designated as messengers) or transfer money for a customer on its account with the obliged entity which maintains this account, since these cases involve a transaction within the scope of an existing business relationship. In these cases, the relevant authorisation/mandate (authority) must be reviewed. The proof of authority is not subject to requirements any more stringent than those in case of a deposit which the customer makes at an automated machine (see 5.1.5).

5.1.3 Identification of natural persons, sections 11 (4) no. 1, 12 (1), (13) of the GwG

5.1.3.1 Collection of information

For the identification of natural persons, as a rule the information pursuant to section 11 (4) no. 1 of the GwG must be collected by consulting the relevant person or else by copying this from an identification document presented by this person.

The form of registration is optional: these details may be recorded or entered in IT systems or else a copy may be made of documents presented which include these details.

In case of discrepancies in terms of the names on the civil status document and the identity document submitted, the name on the civil status document will be key.

Overall, the following information must thus be collected:

- name (surname and all first names),
- place of birth,
- date of birth,
- nationality and
- residential address (or, in exceptional cases, a postal address, cf. section 11 (4) no. 1 (e) of the GwG)

In principle, addresses must be residential addresses and may not be postal box addresses. An exemption applies pursuant to section 11 (4) no. 1 (e) of the GwG in relation to natural persons of no fixed abode who are legally resident in the European Union and whose identity is verified in the course of concluding a basic bank account agreement within the meaning of section 38 of the German Payment Accounts Act (*Zahlungskontengesetz – ZKG*); the postal address under which the contracting party and the person dealing with the obliged entity can be reached will be used in this case.

For a sole trader, his business address may be registered instead of his private address.

5.1.3.2 Verification of information collected

The identity of a natural person must be verified. Section 12 (1) sentence 1 nos. 1-5 of the GwG specifies the proofs of identity which may be used for verification of the information collected for the purpose of identification.

Section 13 of the GwG prescribes the procedures which may be used for this purpose. As well as an appropriate check of specific identification documents presented physically pursuant to section 13 (1) no. 1 of the GwG in conjunction with section 12 (1) sentence 1 no. 1 and no. 5 of the GwG, verification may also be implemented by means of another suitable procedure whose level of security is equivalent to that of physical presentation of documents, section 13 (1) no. 2 of the GwG. The latter equivalent procedures include the use of an electronic proof of identity mentioned in section 12 (1) sentence 1 no. 2 of the GwG, the use of a qualified electronic signature pursuant to section 12 (1) sentence 1 no. 3 of the GwG as well as a notified

electronic identification system indicated in section 12 (1) sentence 1 no. 4 of the GwG. In addition, other suitable procedures pursuant to section 13 (1) no. 2 of the GwG may be exclusively permitted due to a regulation pursuant to section 13 (2) no. 2 of the GwG.

BaFin's circular 3/2017 (GW) of 10 April 2017 on the technical and other requirements for the video identification procedure remains applicable.

The following options are thus available for verification of the information collected for natural persons:

- a. On-the-spot check of a qualified identification document, section 12 (1) sentence 1 no. 1 of the GwG

The following documents may be used:

- o valid official photographic identity cards which comply with the requirements of the German Passport Act (*Passgesetz – PassG*), i.e. a passport, identity card or substitute passport/identity card
 - o other appropriate documents in accordance with the explanatory memorandum to section 4 (4) no. 1 of the GwG, old version. (substitute identity card documents issued by foreigners registration offices and specific foreign identity documents), see Bundestag printed paper 16/9038, p. 37 *et seq.* For non-Germans, this includes the following official identity cards:
 - recognised passports or substitute password documents under the German Freedom of Movement Act (*Freizügigkeitsgesetz – FreizügG*) or the German Residence Act (*Aufenthaltsgesetz – AufenthG*).
 - passports or substitute passport documents generally permitted under the German Ordinance on Residence (*Aufenthaltsverordnung – AufenthV*)
 - residence permit documents issued as a substitute identity card
 - residence permits under the German Asylum Procedure Act (*Asylverfahrensgesetz – AsylG*).
 - travel documents for foreigners, refugees, stateless persons and emergency travel documents under the Ordinance on Residence
- b. On-the-spot check of an identification document pursuant to section 1 of the German Payment Account Identity Verification Ordinance (*Zahlungskonto-Identitätsprüfungsverordnung – ZIdPrüfV*), section 12 (1) sentence 1 no. 5 of the GwG

The following documents may also be used for the purpose of identity verification under the ZIdPrüfV:

- o For a person who has not yet reached the age of 16 and who does not himself have a document specified in section 12 (1) sentence 1 no. 1 of the GwG, his birth certificate in conjunction with verification of the identity of his legal representative by means of a document or proof under section 12 (1) sentence 1 nos. 1–4 of the GwG.
- o For a person under the care and control of a caseworker, his caseworker's certificate of appointment under section 290 of the German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtspraxis – FGG*) in conjunction with verification

of the caseworker's identity by means of a document or proof under section 12 (1) sentence 1 nos. 1–4 of the GwG.

The following documents may only be consulted in addition for the purpose of the conclusion of a basic bank account agreement within the meaning of sections 31, 38 of the ZKG:

- o For a foreigner who does not hold one of the documents indicated in section 12 (1) sentence 1 no. 1 of the GwG, a certificate of the suspension of removal under section 60 (a) (4) of the Residence Act pursuant to Annex D2b in conjunction with Annex D2a of the Ordinance on Residence,
- o For an asylum seeker who does not hold one of the documents indicated in section 12 (1) sentence 1 no. 1 of the GwG, proof of arrival under section 63 (a) of the German Asylum Act (*Asylgesetz* – AsylG).

By way of clarification it is pointed out that, irrespective of the formulation in section 12 (1) sentence 1 no. 5 of the GwG and the lack of a reference to subsection 2 of section 1 of the Payment Account Identity Verification Ordinance, documents confirming a tolerated stay and proofs of arrival may be used as identification documents in order to open basic bank accounts.

- c. Electronic proof of identity pursuant to section 12 (1) sentence 1 no. 2 of the GwG

An identity may also be verified by means of an electronic proof of identity pursuant to section 18 of the German Act on Identity Cards and Electronic Identification (*Personalausweisgesetz* – PAuswgG) or under section 78 (5) of the Residence Act.

- d. Qualified electronic signature pursuant to section 12 (1) sentence 1 no. 3 of the GwG

In case of verification of the information collected for the purpose of identification by means of a qualified electronic signature as specified in section 12 (1) sentence 1 no. 3 of the GwG under Article 3(12) of Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257 of 28 August 2014, p. 73), the obliged entity must validate this qualified electronic signature under Article 32(1) of Regulation (EU) 910/2014.

It must also ensure that a transaction is directly made from a payment account within the meaning of section 1 (17) of the ZAG which is held in the name of the contracting party by an obliged entity under section 2 (1) sentence 1 no. 1 or no. 3 of the GwG or a credit institution which is seated in another Member State of the European Union, a signatory state to the Agreement on the European Economic Area or a third country in which this credit institution is subject to due diligence and retention obligations that are consistent with the due diligence and retention obligations stipulated in the amended Fourth Money Laundering Directive and whose compliance is supervised by means of a procedure in accordance with Chapter IV Section 2 of the Fourth Money Laundering Directive ("reference credit transfer").

- e. Notified electronic identification system pursuant to section 12 (1) no. 4 of the GwG

A notified electronic identification system in accordance with the so-called eIDAS Regulation on electronic identification and trust services (Art. 8 (2) (c) in conjunction with Art. 9 of Regulation (EU)

910/2014) may also be used for verification of the information collected for the purpose of identification.

f. Video identification procedure

Obliged entities supervised by BaFin may also use the so-called “video identification procedure” for verification of the information concerning a natural person collected for the purpose of identification. The relevant requirements are laid down in BaFin’s circular 3/2017 (GW) of 10 April 2017 to which reference is made.

g. Other suitable procedures designated by regulation, pursuant to section 13 (1) no. 2, (2) no. 2 of the GwG.

At the time of publication of this Interpretation and Application Guidance, no relevant regulation has currently been issued.

h. Procedures designated by regulation whose suitability for the purpose of verification under money laundering legislation is to be tested, pursuant to section 13 (1) no. 2, (2) no. 3 of the GwG

No procedure had yet been designated for testing at the time of publication of this Interpretation and Application Guidance.

The type of document used to verify the information collected, and the number of this document and the issuing authority, must be documented pursuant to section 8 (2) sentence 1 of the GwG. Pursuant to section 8 (2) sentence 2 of the GwG, in particular a copy of the documents presented for identity verification purposes under section 12 (1) sentence 1 no. 1 or 4 of the GwG must always be made or else complete optical copies must be made of these documents in digital form (see chapter 9 for details).

An appropriate review of the above-mentioned documents and proofs will depend on the money laundering and terrorist financing risks applicable on a case-by-case basis. This also applies in view of the fact that some of these documents and proofs do not include all of the details indicated in section 11 (4) no. 1 of the GwG. Nonetheless, this fact does not preclude the suitability of this document or proof for the purpose of verification of the identity of the natural person who is to be identified. Insofar as the document does not include individual details stipulated in section 11 (4) no. 1 of the GwG, no verification will be required in relation to these details.

5.1.4 Identification of legal persons and partnerships, sections 11 (4) no. 2, 12 (2) of the GwG

5.1.4.1 Collection of information

The following information must be collected for legal persons or partnerships:

- name/company name/designation
- legal form

- commercial register number (if available)
- address of the physical registered office or head office
- names of the members of its representative body/legal representatives; insofar as a legal person is a member of the representative body or a legal representative, its company name, legal form, commercial register number and the address of its registered office

In principle, the form of collection is optional; accordingly, the creation of copies of the commercial register documents and electronic or written collection are possible in particular. This is without prejudice to the specific procedure for the identification of persons acting on behalf of the contracting party (see 5.1.2 above).

The following specific cases should also be noted:

Civil law partnership (*Gesellschaft bürgerlichen Rechts* – GbR): the following is sufficient for identification purposes:

- Identification of the civil law partnership by means of the partnership agreement.
- Where the actual purpose of the partnership does not indicate any increased level of risk in relation to money laundering or terrorist financing: identification of the persons with a right of disposal with regard to the business relationship.
- Registration of all of the members or presentation of lists of members is not necessary.

Homeowners' association (*Wohnungseigentümergemeinschaft* – WEG): the following is sufficient for identification purposes:

- Identification of the homeowners' association by means of minutes of the homeowners' meeting.
- Identification of the persons with a right of disposal with regard to the business relationship.
- Registration of all of the co-owners or presentation of lists of co-owners and entry in the file for automated account retrieval under section 24 (c) of the KWG is not required.

Association lacking legal capacity (trade union/party, other similar German associations lacking legal capacity): the following is sufficient for identification purposes:

- Identification of the association lacking legal capacity by means of the articles of association as well as the minutes of the meeting of members in which these articles of association were resolved.
- Where the actual purpose of the association does not indicate any increased level of risk in relation to money laundering or terrorist financing: identification of the persons with a right of disposal with regard to the business relationship.
- Registration of all of the members or presentation of lists of members is not necessary.

5.1.4.2 Verification of information collected

For verification of the information collected for the purpose of identification, section 12 (2) of the GwG applies both for legal persons and for partnerships.

For these, under section 12 (2) of the GwG the presentation of excerpts of the commercial register or the register of cooperative societies or an equivalent register or list (e.g. trade register), formation documents or equivalent documents with evidentiary force or a documented personal inspection of the data in the relevant registers or lists is necessary. Documentation of personal inspection may be provided, for example, by means of a printout of the relevant excerpt bearing the obliged entity's own endorsement.

In case of foreign registers, their equivalence by comparison with German registers must be verified in advance.

Insofar as an (equivalent) official register or list can be used for verification purposes, the presentation of documents under private law is not sufficient (hierarchical order).

5.1.5 Authorisation check for persons acting on behalf of a contracting party, section 10 (1) no. 1 of the GwG

With regard to a person acting on behalf of the contracting party, his authority to do so must also be verified. The Act does not stipulate any requirements in this respect.

In the event of payments made from accounts held by credit institutions, the obligation to check whether the person acting on behalf of the contracting party is authorised to do so will already be fulfilled by means of the authorisation check under civil law, since payments without such a power of disposal will not be made with debt-discharging effect.

5.1.6 Simplifications in relation to the identification obligation

In the following exhaustive scenarios, apart from the special provisions already applicable under the Zahlungskonto-IdentitätsprüfungsVO, exceptionally the statutory provisions may be deviated from in respect of the documents to be used for verification of the information collected:

- Expired identity documents may be used according to a risk-based approach for older customers or for customers with limited mobility.
- In case of a change of surname, a civil status document may suffice.

5.2 Clarification of whether a beneficial owner exists and, where applicable, his identification, section 10 (1) no. 2 of the GwG

Pursuant to section 10 (1) no. 2 of the GwG, obliged entities must clarify whether the contracting party is acting on behalf of a beneficial owner and, if so, identify this beneficial owner in accordance with sections 11 (5), 12 (3) of the GwG.

The provisions concerning the beneficial owner may not be used in order to circumvent anti-money laundering obligations. In particular, trust structures may not be chosen in order to prevent complete

identification of the customer. For example, circumvention will apply where a trust structure is chosen for mass retail financial services even though a functionally comparable option of direct contractual relationships is available. In such cases, customers must be identified in the same way as contracting parties. However, subject to the proviso of a different risk assessment in an individual instance the rules for the simplified due diligence obligations may be applied where the customer is itself an obliged entity (e.g. payment institution) and is supervised by BaFin. However, this is subject to the requirement that the obliged entity fulfilling this obligation takes risk-oriented steps to establish that the relevant customer will, upon request, immediately present information and documents which are of relevance for the fulfilment of the due diligence obligations and which concern its own customers (in this example, the customers of the payment institution), who are the beneficial owners of the balances on the omnibus account. For example, the obliged entity must include relevant provisions in a contract with the customer or, on the basis of samples, review the ability of the customer to provide such information upon request (cf. no. 9.18 (e) of the guidelines on risk factors).

5.2.1 Definition of beneficial owners, section 3 of the GwG - basic principles

In principle, beneficial owners are defined in section 3 (1) of the GwG. The definition of a beneficial owner in section 3 (1) of the GwG is essentially consistent with the previously applicable legal position.

The beneficial owner is the natural person who has ownership or control of a legal person, other company or legal structure within the meaning of section 3 (3) of the GwG or the natural person at whose instruction a transaction is ultimately carried out or a business relationship is ultimately established (section 3 (1) of the GwG).

Where this provision refers to the terms "control" and "instruction", this is intended to cover natural persons who can actually exercise significant influence in relation to the customer relationship with the obliged entity and transactions.

On the other hand, beneficiary status or entitlement to benefits in case of life insurance (cf. section 54 of the VAG) or building savings (*Bauspar*) contracts will not automatically result in beneficial owner status.

In principle, homeowners' associations, associations without legal capacity or private-law undertakings which are wholly public owned also fall under the scope of section 3 (1) of the GwG. However, in these cases due to their organisational structures the preconditions enabling the assumption of a beneficial owner will not generally be fulfilled.

According to the wording of section 3 (1) of the GwG, this provision may in principle also cover legal persons under public law (corporations, institutions governed by public law), while the transparency obligations under section 20 of the GwG will not apply for these legal persons according to the wording of the law. Where applied to legal persons under public law, the concept of a beneficial owner will generally give rise to inappropriate outcomes, since there will not normally be a natural person who has ultimate ownership or control of legal persons under public law. Moreover, the applicable office-holder status means that trading on instruction will not generally be applicable. In this context, the preconditions laid down in section 3 (1) of the GwG will not generally be fulfilled for legal entities under public law, subject to the circumstances of a specific case, so that it will not be necessary to identify a beneficial owner in these cases.

5.2.2 Definition of beneficial owners, section 3 of the GwG – specific statutory examples
Section 3 (2) to (4) of the GwG include a non-exhaustive list of scenarios where specific persons should be considered to be beneficial owners.

5.2.2.1 Legal persons and other companies

The provisions of section 3 (2) of the GwG apply for legal persons under private law (in particular, limited liability companies (*Gesellschaft mit beschränkter Haftung* – GmbH), stock corporations (*Aktiengesellschaft* – AG), registered associations (*eingetragener Verein* – e.V.) and registered cooperative societies (*eingetragene Genossenschaft* – eG)) as well as other companies under private law (e.g. civil law partnership, limited partnership (*Kommanditgesellschaft* – KG), general partnership (*offene Handelsgesellschaft* – OHG). The provisions of section 3 (3) of the GwG apply in the case of foundations (*Stiftungen*) with legal capacity and legal structures used to manage or distribute assets on a trust basis (*Treuhand*) or through which third parties are instructed with such management or distribution, or comparable legal constructs. Section 3 (2) of the GwG must be read in context together with section 20 of the GwG in terms of its scope.

The wording of section 3 (2) of the GwG excludes

- foundations which have legal capacity and
- companies that are listed on an organised market under section 2 (11) of the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG) and that are subject to transparency obligations equivalent to Community law with regard to voting rights percentages or to comparable international standards.

This includes stock exchange-listed undertakings

- whose securities are admitted to trading on a regulated market within the meaning of Art. 44(1) of Directive 2014/65/EU (MiFID 2)
 - or
- whose securities are admitted to trading on an organised market in a third country which is subject to transparency obligations equivalent to Community law with regard to voting rights percentages or to comparable international standards.

Subsidiaries of these stock exchange-listed undertakings are also excluded where

- the latter hold more than 50% of the capital shares or voting rights in the subsidiary and
- there is no other beneficial owner within the meaning of section 3 (1) of the GwG, such as due to other exercise of control.

This also applies where the subsidiaries are not themselves listed on the stock exchange. This exemption is due to the fact that, due to this type of ownership structure and given the lack of other natural persons with the possibility of influence, it will always be necessary to refer back to the stock exchange-listed companies, but these are not subject to the applicable obligations in relation to the beneficial owner. A subsidiary's mere membership of the group within the meaning of section 1 (16) of the GwG is not sufficient.

Under section 3 (2) of the GwG, beneficial owners within the meaning of subsection 1 include any natural person who directly (single-tier participation structure) or indirectly (multi-tier participation structure)

- holds more than 25 percent of the capital stock,
- controls more than 25 percent of the voting rights or
- exercises control in a comparable manner.

For this purpose, the obliged entity must take adequate measures to ascertain (section 10 (1) no. 2 final half-sentence of the GwG) and comprehend the ownership and control structure of the contracting party by determining the significant equity interests. A schematic graphic presentation of the significant equity interests within the scope of the ownership and control structure is certainly appropriate in case of more complex structures, also for documentation purposes.

It should be noted that, pursuant to section 3 (2) of the GwG, not only the capital shares but also the voting rights should be taken into consideration. A limitation in terms of exclusively assessing capital shares will not fulfil the statutory obligations. Accordingly, merely referring to the details in the commercial register – which will, at most, indicate an undertaking's capital shares, but not any deviating distribution of voting rights or control contracts concluded outside the scope of this register – will not provide an adequate picture regarding the applicability of the above-mentioned preconditions stipulated in section 3 (2) of the GwG. In case of registered associations and registered cooperative societies, only the voting right shares will be referred to. Control will be held by natural persons who hold more than 25% of the voting rights.

Single-tier participation structure

Where only natural persons hold direct participating interests in the contracting party, beneficial owners are persons who

- hold more than 25 percent of the capital stock or
- control more than 25 percent of the voting rights or
- exercise control in a comparable manner.

A multi-tier participation structure may only be applicable in case of indications that a directly participating natural person is acting at the instruction of another person.

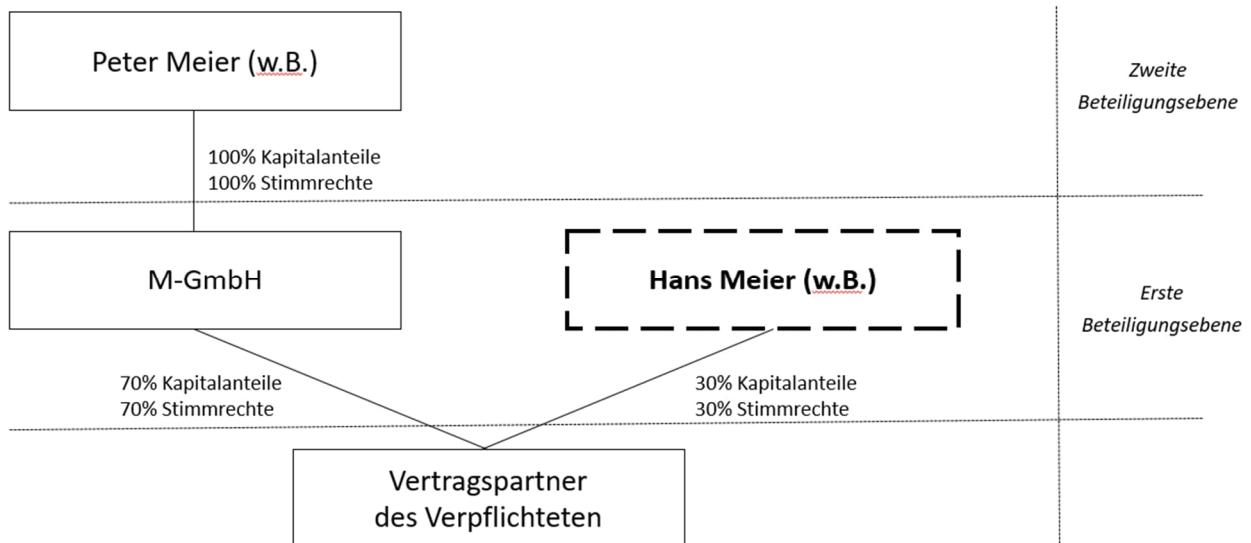
Multi-tier participation structure

Once direct participating interests in the contracting party are not exclusively held by natural persons, this will generally entail a multi-tier participation structure.

In this case, a review should be undertaken in several steps.

Step 1 at the first participation level

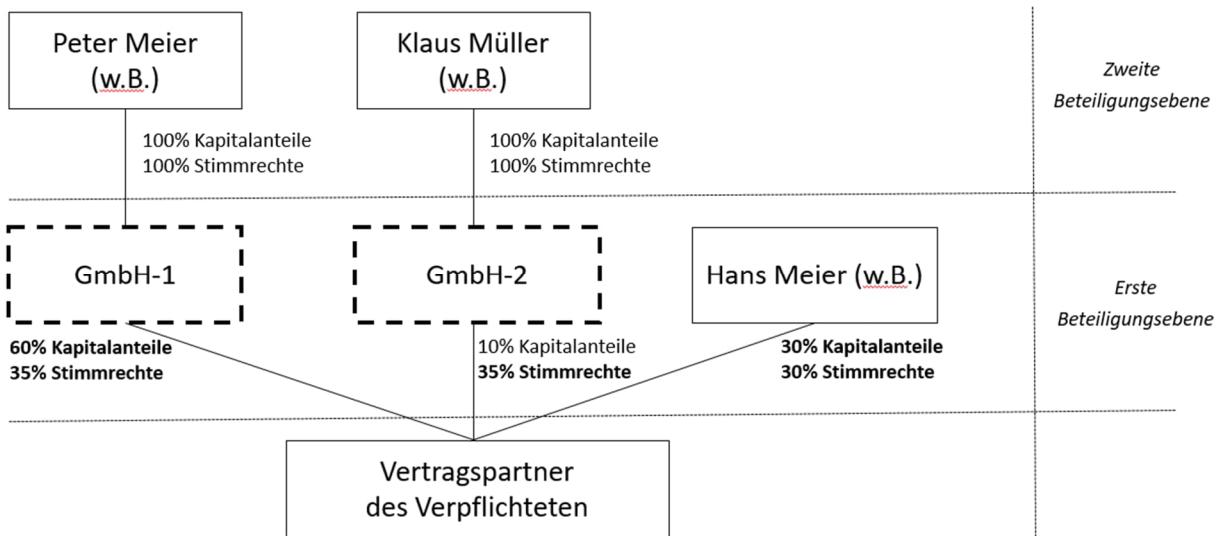
First of all, at the first participation level as in case of the single-tier participation structure a review must be undertaken as to whether any natural persons are direct beneficial owners (in the graphic, "Hans Meier").



Step 2 at the first participation level

In addition, at the first participation level those legal persons/other companies are to be filtered out which, in respect of the contracting party, directly

- hold more than 25 percent of the capital stock or
- control more than 25 percent of the voting rights or
- exercise control in a comparable manner.



These filtered-out legal persons/other companies (in the graphic: "GmbH-1" and "GmbH-2") are to undergo the review indicated in step 3.

Step 3 at the second participation level

The 25% threshold will no longer apply from the second participation level onwards for the contracting party. Here, a chain of participation is only to be pursued in further depth if control can actually be exercised over the party holding the direct interest. This control scenario is regulated in section 3 (2) sentences 2 to 4 of the GwG.

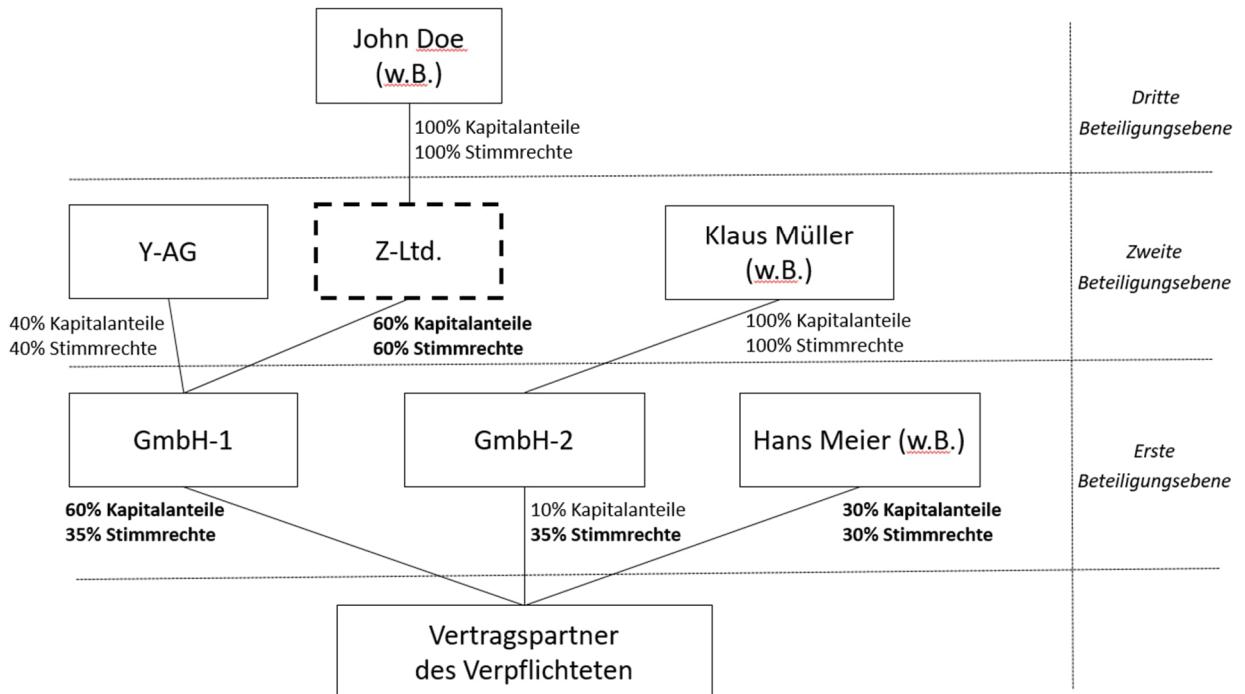
A party holding an indirect interest will thus exercise control where, in respect of the party holding a direct interest, it ultimately

- holds more than 50% of the capital stock,
- controls more than 50% of the voting rights or
- can exercise a dominant influence.

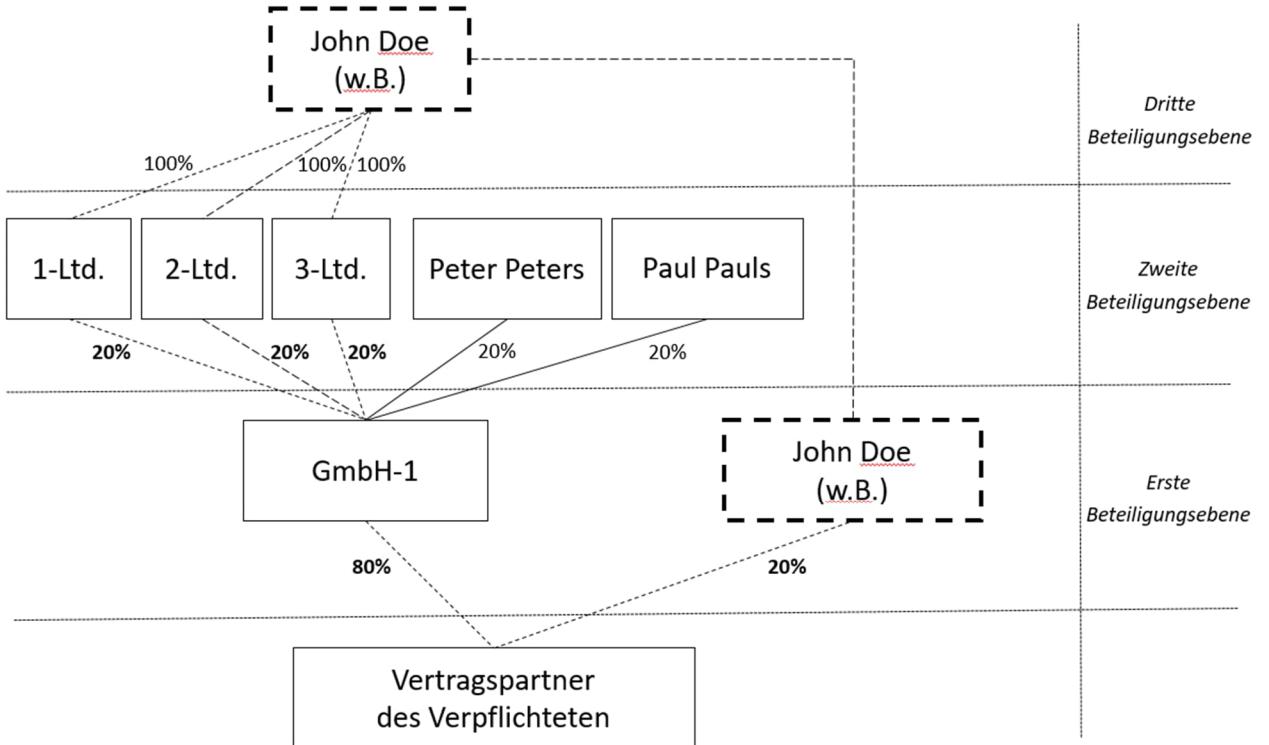
Dominant influence is to be assumed in the cases set out in section 290 (2) to (4) of the German Commercial Code (*Handelsgesetzbuch – HGB*), for instance if:

- o the party holding the indirect interest holds a majority of the voting rights of the shareholders of the party holding the direct interest or
- o the party holding the indirect interest has the right in respect of the party holding the direct interest to appoint or dismiss a majority of the members of the administrative, management or supervisory body which determines its financial or business policy and the party holding the indirect interest is simultaneously a shareholder or

- o the party holding the indirect interest is entitled to determine the financial and business policy by virtue of a control contract concluded with the party holding the direct interest or due to a provision in the articles of association of the party holding the direct interest or
- o on the basis of an economic assessment the party holding the indirect interest bears a majority of the risks and opportunities of the party holding the direct interest, which serves to fulfil a narrowly limited and precisely defined objective for the parent undertaking (special purpose entity).



It should also be noted that control or a dominant influence may also be exercised through various parallel chains acting in concert. If a participation is thus divided up into multiple vertical parallel chains of <25% or <50% participations which are then recombined at a higher level in a single person, this person will also be a beneficial owner.



Step 4 at the third or higher participation level

This review under step 3 will be repeated in a cascade-like manner at the next-higher participation levels until either the indicated preconditions are no longer fulfilled between the next-higher levels or else all of the natural persons have been identified as beneficial owners.

The preconditions at the next-higher levels will not cease to apply on account of vertical mathematical "onward calculation" of the participating interests.

In other words, it is not permitted to combine 60% at the second participation level and 60% at the third participation level, so that at level 3 only a 36% "overall participation" will be assumed (since 60% of 60% = 36%). With 60% at level 3, a beneficial owner can control level 2 so that it may indirectly, via the 60% at level 2, also control the party holding the direct interest in the contracting party.

NB: the management board as such will not exercise any control within the meaning of the GwG, since it acts in the interests of the owners or the persons controlling the company. However, other than in the scenarios where, pursuant to section 3 (2) sentence 5 of the GwG, the members of the management board are to be assumed to be notional beneficial owners (see chapter 5.3.2.2.) - in individual cases members of a governing body (e.g. managing director/management board) may also be beneficial owners pursuant to section 3 (1) of the GwG.

For instance, a significant minority interest may be an indication of such an effective possibility of control if the other shareholders have significantly smaller participations. The key point is thus the circumstances in the individual case.

Where a shareholder holds interests for a third party in a trust capacity (trustor) at its instruction, this person will be considered to be the relevant person (the trustor is a beneficial owner, cf. section 3 (4) sentence 2 of the GwG).

In case of multi-tier participation structures, the following natural persons in particular must thus be considered to be beneficial owners:

- a natural person who holds a majority of the interests in the intermediary company.
- a natural person who otherwise has effective control over the intermediary company or issues instructions regarding its transactions. As well as information which the contracting party is obliged to provide due to its cooperation obligation (section 11 (6) of the GwG), a review of whether effective control is exercised otherwise will certainly be required in case of obvious indications of this.

5.2.2.2 Notional beneficial owners, section 3 (2) sentence 5 of the GwG

Pursuant to section 3 (2) sentence 5 of the GwG, the obligation to register the so-called “notional beneficial owner” will apply in certain scenarios for associations subject to a reporting obligation under section 20 (1) of the GwG. In case of associations seated abroad, in respect of this reporting obligation it must be checked whether the preconditions under section 20 (1) sentences 2 and 3 of the GwG are fulfilled.

This derogating provision in section 3 (2) sentence 5 of the GwG does not eliminate the obligation to carry out a careful inspection of the participation structures and its application should be appropriately documented.

Legal representatives, managing partners or partners of the contracting party will notionally be considered to be beneficial owners where

even upon completion of comprehensive reviews by the obliged entity as to whether a natural person is an owner of a legal person or a company within the meaning of subsection 2 or otherwise exercises control over this

- no natural person can be identified and
- no facts in accordance with section 43 (1) of the GwG are applicable.

The possibility of identifying a notional beneficial owner is not influenced by

- whether a natural person exists,
- whether the obliged entity is not able to identify such a person (e.g. due to the opaque or complex structure of the legal person or company or because no such disclosure obligations apply at the registered office of the legal person or the company) or
- whether there are doubts as to whether a person identified as a beneficial owner is actually operating as such, e.g. because this person does not fulfil the preconditions laid down in subsection 1.

The notional beneficial owner must be registered. Where multiple persons meet the definition of a notional beneficial owner (e.g. multiple board members), as a rule the registration of one person will suffice; in exceptional cases, the registration of all of these persons may be necessary on grounds of risk.

The notional beneficial owners must be treated as beneficial owners both in terms of fulfilment of the customer due diligence obligation under section 10 (1) no. 2 of the GwG and – in case of obliged entities under section 2 (1) no. 1 of the GwG – in relation to the obligation under section 24 (c) of the KWG.

In regard to existing customers, the notional beneficial owners must be subsequently registered in those cases where no beneficial owners have been registered to date.

5.2.2.3 Foundations which have legal capacity and similar legal structures

In case of foundations which have legal capacity and legal structures which manage or distribute assets in a trust capacity or for which management and distribution is commissioned by third parties, the beneficial owners include the following natural persons, listed non-exhaustively in section 3 (3) nos. 1 to 6 of the GwG, (where applicable for the specific foundation which has legal capacity or the specific legal structure):

1. any natural person acting as trustor (settlor), trustee or, where applicable, as protector,

NB: the founder of a foundation which has legal capacity is not included in this group of persons, since he will lose his possibilities of influence as of the creation of the foundation. If the founder is not simultaneously represented on the governing bodies of this foundation, he will not have any possibilities of influence over the foundation and will thus not have any opportunities to conduct money laundering via the foundation. At any rate, this applies except in case of a “foundation established on a temporary basis” (*Stiftung auf Zeit*). However, a foundation established on a temporary basis whose assets revert to the founder at the end of the foundation is not permitted under German law. The founder is thus not comparable with the “settlor” for a trust, since he does not have any rights to the foundation or its assets in his capacity as the founder. If the founder is also a member of the management board and is thus able to control the foundation, he will already fall under the following no. 2.

2. any natural person who is a member of the foundation’s management board,
3. any natural person who has been designated as a beneficiary,
4. the group of natural persons for whose benefit the assets are to be managed or distributed if the natural person intended to become the beneficiary of the assets under management has not been designated yet, and
5. any natural person who, directly or indirectly, otherwise exercises a dominant influence on the management of the assets or on the distribution of the income,
6. any natural person who is able to influence an association, either directly or indirectly, and who
 - a. is a member of the foundation’s management board or has been designated a beneficiary of this foundation or
 - b. is acting as a trustor (settlor), trustee or protector or who has been designated as a beneficiary of this legal structure.

In case of foundations which have legal capacity, only recipients for whom the act of formation stipulates by name that they are entitled to receive benefits from the foundation are beneficiaries within the meaning of section 3 (3) no. 3 of the GwG. If this person has not yet been determined, only the group of natural persons for whose benefit the assets are primarily to be managed or distributed and which is identified in the act of formation is to be registered (section 3 (3) no. 4 of the GwG). Pursuant to section 11 (7) of the GwG, administrators of legal structures through which assets are administered or distributed on a trust basis or third parties are tasked with such administration or distribution must disclose their administrator status to the obliged entity as of their implementation of a transaction which triggers the general due diligence obligations. Moreover, in these cases they must provide the obliged entity with all of the information which is necessary in order to identify all of the beneficial owners for the legal structure under section 3 (3) of the GwG. In addition, in the case of a legal structure under section 21 of the GwG, the information under section 21 (1) and (2) of the GwG must be provided without delay.

5.2.2.4 Trading on instruction, section 3 (4) of the GwG

Section 3 (4) sentence 2 of the GwG clarifies that in scenarios where the contracting party acts as a trustee this will always involve trading on instruction for the person in whose interests the contracting party acts.

5.2.3 Due diligence obligations in relation to beneficial owners, section 10 (1) no. 2 of the GwG

Pursuant to section 10 (1) no. 2 first half-sentence of the GwG, the obliged entities must clarify whether the contracting party is acting on behalf of a beneficial owner and, if so, identify the beneficial owner in accordance with sections 11 (5), 12 (3) of the GwG. In those cases where the contracting party is not a natural person, this also encompasses the obligation to take adequate measures to understand the ownership and control structure of the contracting party.

5.2.3.1 Clarification obligation, section 10 (1) no. 2 first half-sentence of the GwG

The clarification obligation under section 10 (1) no. 2 first half-sentence of the GwG entails a review of whether there are one or more beneficial owners within the meaning of section 3 of the GwG in relation to a contracting party. This is generally done by questioning the contracting party. However, the obliged entity may not rely upon this alone. Particularly in case of contracting parties which are not natural persons, as a rule one or more beneficial owners must always be assumed.

5.2.3.2 Identification obligation, section 10 (1) no. 2 first half-sentence in conjunction with sections 11 (5), 12 (3) of the GwG

If the contracting party indicates that it is acting on behalf of one or more beneficial owners, the obliged entity must identify this/these beneficial owner(s). This means that it must determine the identity of the beneficial owner(s) while taking into consideration the ownership and control structure of the contracting party as well as section 11 (5) of the GwG. This applies even without a corresponding notification from the contracting party where there are indications, by virtue of the overall circumstances, that one or more natural persons are beneficial owners, particularly if the contracting party is not itself a natural person.

In order to determine the person's identity, the obliged entity is to at least collect his name and, if appropriate in view of the risk of money laundering or terrorist financing that exists in the particular case (risk-based approach), further identifying information (section 11 (5) sentence 1 of the GwG).

Details of the beneficial owner's date and place of birth and address may be collected pursuant to section 11 (5) sentence 3 of the GwG, irrespective of the ascertained level of risk. Collection of this data from the transparency register will not fulfil the statutory requirements.

The obliged entity is moreover to satisfy itself of the veracity of the information collected under section 11 (5) of the GwG by taking risk-adequate measures; the obliged entity may make use of the transparency register for the purpose of this verification of the information previously collected. If the information in the transparency register matches the information collected by the obliged entity, as a rule the obliged entity will not be obliged to implement any further measures by way of verification of the information collected, section 12 (3) of the GwG. However, additional research/inspections will certainly be necessary in relation to beneficial owners where the information provided by the contracting party regarding the overall circumstances of the business relationship is not plausible, is contradictory or is clearly inaccurate and a heightened level of risk is apparent.

Conversely, the risk-appropriate measures which are necessary pursuant to sections 11 (5), 12 (3) of the GwG from the point of view of verification of the beneficial owner may be further reduced in case of a clearly determined lower level of risk (cf. section 14 of the GwG). However, such measures may not be waived entirely (see chapter 6.3. below).

Even if the obliged entity obtains confirmation from the contracting party which is a natural person that this person is not entering into the business relationship at the instruction of (i.e. in the interests of) a third party – in particular, this person is not doing so as a trustee – this may only be assumed in the absence of any abnormalities or indications otherwise. Such abnormalities must be conspicuous. However, a general duty of inquiry will not be necessary; action will only be required in case of grounds for suspicion.

If the contracting party is acting as a trustee, the following distinction applies:

- If the trustor is a natural person, the information provided by the contracting party concerning the overall circumstances of the business relationship must be assessed in terms of its plausibility.
- If the trustor is a legal person, the identity of the beneficial owner of the legal person will be verified by way of a plausibility check, e.g. through an inspection of registers, copies of register excerpts, telephone book, internet, other sources, copies of documents or on the basis of the obliged entity's own knowledge. Clarification of participation structures as well as risk-based verification measures implemented by indirectly participating persons with a significant equity interest is required, together with the lack of indications of effective control exercised by a natural person.

Should the contracting party refuse to provide any information on whether there is a beneficial owner, despite a request from the obliged entity, section 10 (9) of the GwG will apply (see chapter 5.8.).

5.2.3.3 Ownership and control structure of the contracting party, section 10 (1) no. 2 second half-sentence of the GwG

In case of contracting parties which are not natural persons, within the scope of its identification obligation in respect of beneficial owners the obliged entity must take adequate measures to identify the ownership and control structure of the contracting party (cf. section 10 (1) no. 2 second half-sentence of the GwG).

This entails more than a check of whether, e.g. shareholders with a holding of more than 25% are present, and includes at least a rudimentary review of whether, in addition to control, there are also indications of effective control exercised by natural persons over the contracting party.

Clarification of the control relationships may also be waived, in which case all of the natural persons holding a significant equity interest (> 25%) in an intermediary company (at whatever level) are to be registered as beneficial owners.

The obligation to identify the ownership and control structure requires an overall picture of the contracting party. This serves to establish the plausibility of details provided by the contracting party or information obtained in relation to any beneficial owners as well as the comprehensibility of the measures enacted by the obliged entity in fulfilment of its customer due diligence obligations in this respect and their results. Within the scope of a risk-oriented implementation of the due diligence obligations (section 10 (2) of the GwG), the more that the business relationship or transaction appears to entail risk, the more the obliged entity must investigate the ownership and control structures. It may be helpful here to suitably document the ownership and control structure of the contracting party, e.g. by means of written records or schematically in the form of a group diagram/chart.

As of the establishment of a new business relationship with an association under section 20 or a legal structure under section 21, pursuant to section 12 (3) sentence 2 of the GwG the obliged entity will be required to obtain proof of registration under section 20 (1) of the GwG or section 21 of the GwG or an excerpt of the data accessible in the transparency register or else have its contracting party provide it with this.

The obligation to establish the ownership and control structures is particularly important within the scope of group-wide implementation, e.g. if the contracting party has entities in other jurisdictions. If the data protection requirements in these jurisdictions prohibit full transparency regarding the beneficial owners identified in relation to the higher-level institution or else restrict control mechanisms, the obliged entity must document measures indicating how it can effectively safeguard compliance with the requirements for correct determination of the beneficial owners resulting from the business relationships in this jurisdiction.

NB: in principle, as undisclosed partnerships silent partnerships are not relevant for the ownership and control structures of the (disclosed) partnership and are therefore only significant in case of indications of a dominant influence held by the silent partners within the scope of the clarification of beneficial owners.

The obliged entity must document the measures which it has enacted in order to clarify and identify the beneficial owner (cf. section 8 (1) sentence 2 of the GwG). Pursuant to section 8 (2) sentence 2 of the GwG, in the cases specified therein complete copies/digital versions of the documentation or documents presented or obtained must be produced and retained (see chapter 9).

Moreover, the details registered and verified pursuant to sections 11 (5), 12 (3) of the GwG must be input in the account retrieval file pursuant to section 24 (c) of the KWG in respect of the relevant beneficial owners.

5.3 Purpose and intended nature of the business relationship, section 10 (1) no. 3 of the GwG

The obligation to clarify the context for the business relationship is a key aspect of the customer due diligence obligations. The obliged entities must obtain and assess information regarding the intended nature of the business relationship (objective characteristic) and its purpose (subjective characteristic). In many cases, this

purpose may already be evident from the nature of the relevant business relationship. Such business relationship types include, in particular:

- current account for handling of payment transactions (private/business account)
- traditional investment products for asset protection/asset building
- securities accounts for the management and custody of securities
- loan/loan account
- life insurance policies
- contracts under the Bausparkassen Act

Insofar as the purpose is not immediately apparent from the respective type of business relationship, it is necessary to obtain further information, e.g. by consulting the customer. In principle, the following rule applies: the more opaque and complex the transaction, the less the mere determination of the type of business will suffice in order to comply with the customer due diligence obligations laid down in the GwG.

5.4 Clarification of PEP status, section 10 (1) no. 4 of the GwG

Under section 10 (1) no. 4 of the GwG, the general due diligence obligations include establishing by means of appropriate, risk-oriented procedures whether the contracting party or the beneficial owner is a politically exposed person (PEP), a family member of the PEP or a known close associate of the PEP.

Clarification of PEP status does not constitute an enhanced due diligence obligation, since this must be implemented in equal measure for all customers. The enhanced due diligence obligations pursuant to section 15 of the GwG will only apply in case of a determination that the contracting party of the obliged entity or the beneficial owner is a PEP, a family member or a known close associate (on the specific obligations associated with this, please see chapter 7.2.). The enhanced due diligence obligations will only apply in relation to natural persons with PEP status.

Pursuant to section 1 (12) of the GwG, a PEP is any natural person who is or who has been entrusted with a high-ranking prominent public function at international, European or national level or who is or has been entrusted with a public function of comparable political importance below national level.

Pursuant to section 1 (12) sentence 2 no. 1 (a) to (i) and no. 2 of the GwG, PEPs include in particular:

- a) heads of state, heads of government, ministers, members of the European Commission, deputy ministers and assistant ministers,
- b) members of parliament or members of comparable legislative bodies,
- c) members of the governing bodies of political parties,
- d) members of supreme courts, of constitutional courts or of other high-level judicial bodies, the decisions of which are usually not subject to further appeal,
- e) members of the boards of courts of audit,

- f) members of the boards of central banks,
- g) ambassadors, chargés d'affaires and defence attachés,
- h) members of the administrative, management or supervisory bodies of state-owned enterprises,
- i) directors, deputy directors, members of the board or other managers with a comparable function in an international or European intergovernmental organisation.

The chargé d'affaires indicated in section 1 (12) sentence 2 no. 1 (g) of the GwG will represent the ambassador during the latter's travels, for instance.

The reference to PEPs in section 1 (12) sentence 2 no. 1 (a) to (i) and in the list in no. 2 of the GwG includes a non-exhaustive list of examples ("in particular"). The functions specified in section 1 (12) sentence 2 no. 1 (a) to (i) and in the list in no. 2 of the GwG must be assigned PEP status. PEP status may also be applicable in other cases. Among other aspects, clarification of PEP status requires consideration of the social, political and economic differences between individual countries. As a rule, only functions at an international, European or national level should be taken into account. Regional functions may be relevant in case of federal structures and where these are equivalent to national functions (Directive 2006/70/EC). In principle, municipal functions are not included.

Functions at national level (including the leaders of the German federal states, as members of the upper house of the German parliament (*Bundesrat*) and the national chairmen and executives of the parties represented in the lower house of the German parliament (*Bundestag*) may be taken into account as important public offices which qualify for PEP status in Germany.

Pursuant to section 10 (1) no. 4 of the GwG, family members and known close associates of PEPs also have PEP status.

- a. Pursuant to section 1 (13) nos. 1 to 3 of the GwG, a family member within the meaning of the GwG is a close relative of a PEP, i.e. in particular:
 - the spouse or civil partner,
 - a child and the child's spouse or civil partner and
 - both parents.
- b) For the purposes of the Money Laundering Act, pursuant to section 1 (14) nos. 1 to 3 of the GwG a known close associate means a natural person for whom the obliged entity must have reason to assume that this person, in particular,
 - together with a PEP
 - is the beneficial owner of an association pursuant to section 20 (1) of the GwG or
 - is the beneficial owner of a legal structure pursuant to section 21 of the GwG,
 - has any other close business relationships with a PEP or
 - is the sole beneficial owner

- o of an association pursuant to section 20 (1) of the GwG or
- o of a legal structure pursuant to section 21 of the GwG,
for which the obliged entity must have reason to assume that it was established for the de facto benefit of a PEP.

This includes trusts, trust structures (*Treuhandkonstruktionen*) and any natural person who is not a contracting party but is the sole beneficial owner of a legal person or a legal arrangement which is known to have actually been established for the benefit of the PEP.

Insofar as an obliged entity is required to clarify under section 10 (1) no. 4 of the GwG whether the contracting party is an associate of a person who holds important public offices, it is only obliged to do so insofar as this relationship is publicly known or it has grounds to assume that such a relationship exists; however, it is not obliged to make inquiries.

In principle, PEP status will not lapse until a period of one year has expired following relinquishment of qualifying status. Irrespective of this, prior classification as a PEP must be appropriately taken into consideration as a key factor within the scope of the risk classification for the customer or the business relationship. In this context, a customer's previous PEP status must be recorded and retained pursuant to section 8 of the GwG.

5.4.1 Determination of PEP status

Obligated entities are obliged to determine by means of appropriate, risk-oriented procedures whether the contracting party or the beneficial owner is a PEP.

On the one hand, the due diligence obligation in connection with PEPs pursuant to section 10 (1) no. 4 of the GwG is applicable as of the establishment of a business relationship (cf. section 10 (3) no. 1 of the GwG). In this case, the customer's PEP status must be reviewed during the process of accepting the customer or before granting the customer the right to draw on the account.

Likewise in case of updates during an ongoing business relationship, risk-oriented procedures must be used in order to review at appropriate intervals whether PEP status is now applicable (appropriate interval: tied to the term of political offices or update obligation, in case of a high level of risk: time frame of 2 years).

In addition, also in the cases provided for in section 10 (3) nos. 2-4 of the GwG – i.e. in particular as of the implementation of transactions outside the scope of a business relationship (occasional/one-off transactions with a volume in excess of the indicated thresholds) under section 10 (3) no. 2 of the GwG the PEP status of the contracting party and, where applicable, of beneficial owners must be clarified.

5.4.2 Procedures for clarification of PEP status

The GwG does not stipulate which procedures the obliged entity is required to apply. In principle, the contracting party is obliged to cooperate by providing the obliged entity with the documents and information required for clarification and notifying it of any changes without delay (section 11 (6) of the GwG).

Inter alia, the following options for determination of PEP status should be taken into account:

- clarification of PEP status on the basis of the details provided by the customer
- checking against PEP databases (system check)

There is no obligation to use PEP databases available on the market. However, conversely their use will generally indicate due compliance with these obligations.

5.5 Continuous monitoring of the business relationship and update obligation, section 10 (1) no. 5 of the GwG

Pursuant to section 10 (1) no. 5 of the GwG, the general due diligence obligations include, on the one hand, continuously monitoring the business relationship, including the transactions carried out in the course of the business relationship, in order to ensure that these transactions are consistent with

- a. the documents and information available to the obliged entity about the contracting party and, where applicable, the beneficial owner, about their business activity and customer profile and
- b. where necessary, the information available to the obliged entity about the source of wealth.

In the course of their continuous monitoring activities, on the other hand obliged entities are to ensure that the relevant documents, data or information are updated at appropriate intervals, taking into account the respective level of risk.

5.5.1 Continuous monitoring

According to the explanatory memorandum to section 3 (1) no. 4 of the GwG, old version, continuous dynamic monitoring of the business relationship including the transactions implemented during this business relationship is required, and in this respect customer profiles should be checked against the relevant pattern of transactions. Dynamic monitoring entails due consideration of the findings resulting over the course of the business relationship. Continuous monitoring is intended to establish whether the ongoing business relationship is subject to concrete abnormalities arising as of the execution of individual transactions or reveals relevant discrepancies by comparison with the customer's behaviour to date.

The use of data processing systems is not mandatory for continuous monitoring, except where stipulated by law, see section 25 (h) (2) of the KWG. However, suitable products available on the market may be used (while the obliged entity remains free to develop proprietary solutions), which are provided with data from the obliged entity's systems and produce customer profiles on this basis. Using filters – so-called "parameters" – transactions (within the scope of business relationships) will be monitored and highlighted as hits in case of any abnormalities. The obliged entity must perform a manual assessment of the money laundering relevance of these hits thus generated.

The relevant indications must be defined for each specific undertaking, on the basis of the results of the risk assessment.

5.5.2 Updating

Within the scope of this continuous monitoring, the obliged entities must also ensure that the documents, data or information obtained concerning the contracting party are updated at appropriate intervals. These data must be updated on a risk-oriented basis.

In particular, the following may serve as points of reference for update measures:

- abnormalities arising within the scope of IT-based monitoring/findings concerning the customer resulting from the current business relationship must be taken into account and may necessitate update measures.
- general correspondence (account statements, financial statements)
- general contacts during the business relationship
- other reasons for the registration/review of customer data during the business relationship (e.g. creditworthiness checks etc.)

Update measures do not necessarily require contact with the customer. Instead, information available otherwise may be used where this derives from a reliable source. However, section 11 (3) of the GwG is not applicable, since section 11 (3) of the GwG exclusively refers to the identification obligation and not to the update obligation within the scope of the customer due diligence obligations.

The update obligation must be fulfilled regularly and on an event-driven basis.

Regular updating:

- Requirement of various review periods in accordance with risk classes (customer/product risk), e.g. by classifying business relationships/customers in terms of risk classes/groups (e.g. inactive accounts, low, normal and high risk) and allocation of various time periods for appropriate review measures concerning the up-to-dateness of data, as follows:

- Inactive accounts

Accounts which are inactive for an extended period of time with a small balance need not be included in the update measures. However, update measures will be required once these accounts are reactivated.

- Low risk (on basis of risk assessment):
 - must have been updated after 15 years at the latest.
 - risk-based decision on further measures, if no customer reaction.
 - Normal risk (on basis of risk assessment):
 - must have been updated after 10 years at the latest.
 - if unsuccessful/unclear=> consider reassessment of risk.

- risk-oriented decision on further measures, if no customer reaction.
- High risk (prescribed by law or on basis of risk assessment):
 - appropriate monitoring and
 - must have been updated after 2 years at the latest.
- Suitable measures to document update/confirmation of up-to-dateness
- Irrespective of this, at least after a particular period of time has expired since the most recent update it is advisable to use the opportunity to establish direct customer contact for a further update.

Event-driven update:

Irrespective of the statutory requirement of an update of the customer information at an appropriate interval, individual customer data are to be reviewed on an event-driven basis in the following cases in particular:

- undeliverable post
- customer provides notice of change to master data such as change of name, change of address, change of marital status
- doubts regarding the up-to-dateness of customer data

5.6 Scope of the due diligence obligations in case of a normal level of risk, section 10 (2) of the GwG

The specific extent of the measures upon fulfilment of the general due diligence obligations must be in accordance with the respective level of risk of money laundering or terrorist financing, particularly in relation to the contracting party, the business relationship or transaction.

For the determination of risk by obliged entities, section 10 (2) sentence 2 of the GwG refers to typical risk factors which are listed in Annexes 1 and 2 of the GwG. These Annexes correspond to Annexes II and III of the amended Fourth Money Laundering Directive.

On the other hand, the risk variables which are included in Annex I of this Fourth Money Laundering Directive and which the obliged entities must take into consideration have already been integrated in section 10 (2) sentence 3 of the GwG.

Pursuant to section 10 (2) sentence 3 of the GwG, in their assessment of risks the obliged entities must also take into account at least

- No 1. the purpose of the account or the business relationship,
- No. 2. the volume of assets deposited by the customer or the size of the transactions carried out and
- No. 3. the regularity or the duration of the business relationship.

The transaction-related due diligence obligations in relation to occasional customers include the identification of the contracting party and, where appropriate, clarification of whether there is a beneficial owner. The

monitoring obligation under section 10 (1) no. 5 of the GwG will not be triggered, since in conceptual terms this only relates to business relationships.

In certain exceptional cases, due to the nature of the transaction or the particular circumstances fulfilment of the due diligence obligations will not be possible in the same way as in case of the establishment of a business relationship. In these exceptional cases, the processes for the fulfilment of these due diligence obligations must be adjusted in line with the particular circumstances in accordance with risk-oriented criteria. In a specific instance, this may be implemented by means of risk-oriented structuring of the verification process for legal persons (=>due consideration of the circumstances in case of recourse to equivalent documents with evidentiary force). In any event, the justification for the course of action must be documented (explanatory obligation pursuant to section 10 (2) sentence 4 of the GwG).

5.7 Date of identification, section 11 (1) and 2 of the GwG and waiver of identification, section 11 (3) of the GwG

As a rule, the persons indicated in section 11 (1) sentence 1 of the GwG must be identified before the establishment or implementation of the business relationship or transaction triggering identification. This means that identification must have been completed before the contracting party gains a right to draw on the account, i.e. can bring about outflows of funds (e.g. cash withdrawals, transfers to third parties or to the contracting party's own accounts with other institutions).

As an exception, the identification pursuant to section 11 (1) sentence 2 of the GwG may also be completed immediately, while the business relationship is being established, if this is necessary in order to avoid interrupting the normal course of business and there is only a low risk of money laundering or terrorist financing (section 14 of the GwG). A further exemption applies for credit and financial services institutions in those cases where an account or a securities account is opened pursuant to section 25 (j) of the KWG.

The "low level of risk" must be determined in each specific case on a risk-oriented basis. In any event, as a derogating provision this provision must be narrowly interpreted.

Pursuant to section 11 (3) of the GwG, identification may be omitted entirely if the entity obliged to carry out identification has already identified the person requiring identification on an earlier occasion, in fulfilment of its customer due diligence obligations, and has recorded the information collected, provided that there are no doubts regarding this information. Pursuant to section 8 (2) sentence 5 of the GwG, in this case the name of the person requiring identification and the fact that he has been identified on a previous occasion are to be recorded. Section 8 (2) sentence 2 of the GwG will not apply in this respect.

5.8 Non-establishment/termination of business relationships and non-implementation of transactions, section 10 (9) of the GwG

5.8.1 Principles

The termination obligation in case of the actual or legal impossibility of fulfilment of one of the due diligence obligations indicated in section 10 (1) nos. 1 to 4 of the GwG applies without any restrictions. Pursuant to section 14 (3) of the GwG and section 15 (9) of the GwG, this also applies where the relevant simplified or enhanced due diligence obligations cannot be fulfilled.

NB:

- On the basis of the wording in section 15 (9) of the GwG, irrespective of the limitation in section 10 (9) sentence 1 of the GwG to the due diligence obligations in section 10 (1) nos. 1 to 4 of the GwG this obligation also applies in relation to additional continuous monitoring obligations.
- Non-fulfillability in relation to the due diligence obligation pursuant to section 10 (1) no. 2 sentence 1 of the GwG is not applicable, insofar as the cases indicated in section 3 (2) sentence 5 of the GwG refer to the members of the legal representative, the managing partners or the partners of the contracting party (“notional beneficial owner”).
- The information which must always be collected under section 154 (2) (a) of the German Fiscal Code (*Abgabenordnung – AO*) – also in relation to any beneficial owner within the meaning of the GwG – is information which is required under tax law, i.e. information due to a branch of legislation other than money laundering law. If it is not possible to collect this information, this will not give rise to the termination obligation pursuant to section 10 (9) of the GwG.
- An obliged entity may not cite section 10 (9) of the GwG if non-fulfillability is attributable to circumstances which fall within its responsibility (e.g. rejection by a third party or a vicarious agent within the meaning of section 17 of the GwG of a document which is submitted for the purpose of identification and which is permitted under the applicable rules).

In case of existing business relationships, if the above-mentioned due diligence obligations cannot be fulfilled notice of regular or extraordinary termination must be provided (where applicable, while referring to a violation of the relevant persons' obligation to cooperate as well as a possible termination obligation stipulated by law), irrespective of the (in-)applicability of other statutory or contractual provisions or else termination must be otherwise effected.

Moreover, in the cases indicated in section 10 (9) sentence 1 of the GwG the obliged entity must always review whether a suspicious transaction report is appropriate.

The obliged entity must document the measures enacted under section 10 (9) of the GwG in order to enable a review.

5.8.2 Principle of proportionality

Irrespective of the above remarks, the obliged entity must always comply with the principle of proportionality. This may mean that in certain scenarios the obligation not to implement a business relationship or to terminate a business relationship or else not to implement a transaction may not arise. This will apply where, while weighing up the interests of the obliged entity and the contracting party in relation to the implementation/continuation of a business relationship or the implementation of a transaction subject to the specific money laundering or terrorist financing risk applicable in the individual instance, termination/non-implementation of the respective business relationship/transaction would be inappropriate.

Note: the decision to refrain from termination/non-implementation in view of the principle of proportionality must be individually justified in each specific instance. In addition, the consent of a member of the management, documented in writing, must be obtained. In this connection, it is not sufficient to refer to the risk assessment in general terms. In addition, where appropriate suitable risk-based measures must be implemented so as to adequately deal with an existing residual risk in relation to the business relationship/transaction. The justification and the measures implemented must be documented.

Conversely, it follows from the above remarks that – also in view of the principle of proportionality – termination/non-implementation will be required in case of an increased level of money laundering or terrorist financing risk or if it were not possible to fulfil the due diligence obligations on a long-term, ongoing basis.

6. Simplified due diligence obligations, section 14 of the GwG

6.1 Principle

Obligated entities may fulfil simplified due diligence obligations insofar as they establish that, taking into account the risk factors specified in Annex 1 of the GwG and the guidelines on risk factors, certain areas present only a low level of risk of money laundering or terrorist financing. This is particularly applicable with regard to customers, transactions and services or products. Application of the simplified due diligence obligations will require a prior risk assessment documented in writing.

For the demonstration of the adequacy of the simplified due diligence obligations applied, section 10 (2) sentence 4 of the GwG applies mutatis mutandis.

6.2 Factors resulting in a potentially lower level of risk

In deviation from the previous legal situation, application of the simplified due diligence obligations is no longer limited to specific cases.

This means that in all of the scenarios where, from the point of view of the obliged entities, a lower level of risk in relation to money laundering or terrorist financing may apply on the basis of their own risk assessment, the obliged entities may apply simplified due diligence obligations. For the risk assessment, the factors indicated in Annex 1 to the GwG as well as the relevant comments in the guidelines on risk factors must be taken into consideration within the scope of a risk-oriented approach.

Annex 1 to the GwG and the guidelines on risk factors include (non-exhaustive) examples of factors indicating a potentially lower level of risk within the meaning of section 14 of the GwG in relation to customer risk, product, service, transaction or distribution channel risk and with regard to the geographical risk by comparison with normal situations where general customer due diligence obligations apply. The guidelines on risk factors thus prescribe the framework within which simplified customer due diligence obligations may apply in principle for the obliged entities, i.e. subject to the overall circumstances of the individual case.

Only in case of a scenario stipulated by law in section 15 (3) and (8) of the GwG or defined by the obliged entity itself pursuant to section 15 (2) of the GwG will application of simplified customer due diligence obligations be inconceivable from the outset.

Except where this conflicts with the factors indicated in Annex 1 to the GwG, the comments in the guidelines on risk factors and the available results of the national risk assessment and, in a specific instance, there are no indications in relation to a concrete transaction or business relationship that the risk of money laundering or terrorist financing is not low, no reservations will apply from a supervisory point of view if, in the following cases, the obliged entities assume that a lower level of risk is applicable in principle:

- In case of transactions of or for the benefit of obliged entities and as of the establishment of business relationships with obliged entities within the meaning of section 2 (1) nos. 1 to 9 of the GwG; this also applies in case of a credit or financial institution within the meaning of the Fourth Money Laundering Directive seated in a Member State of the European Union or an equivalent third country;
- In case of transactions of or for the benefit of stock exchange-listed companies and as of the establishment of business relationships with stock exchange-listed companies whose securities are admitted to trading on an organised market within the meaning of section 2 (11) of the Securities Trading Act in one or more Member States of the European Union and with stock exchange-listed companies from third countries which are subject to transparency requirements in terms of voting interests which are equivalent to those of Community law;
- In case of transactions of or for the benefit of domestic authorities within the meaning of section 1 (4) of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz* – VwVfG) and the relevant provisions of the administrative procedure acts of the German federal states and as of the establishment of business relationships with them; the same applies in relation to foreign authorities or foreign public institutions which are entrusted with public tasks on the basis of the Treaty on European Union, the Treaties establishing the European Communities, or the secondary law of the Communities, provided that their identity is transparent and can be publicly verified and it is clear beyond doubt that their activities and accounting practices are transparent, and they are accountable to a Community institution or to the authorities of a Member State of the European Union, or their activities are subject to other supervision and monitoring measures.

The relevant risk assessments must be documented (cf. section 8 (1) no. 2 of the GwG).

6.3 Scope of the due diligence obligations to be fulfilled, section 14 (2) of the GwG

The application of simplified customer due diligence obligations does not mean that some of the obligations indicated in section 10 (1) of the GwG may lapse entirely.

Instead, even in case of application of simplified due diligence obligations all of the customer due diligence obligations indicated in section 10 (1) of the GwG must be fulfilled.

In particular, in cases of a potentially lower level of risk the clarification or identification of a beneficial owner may not thus be omitted entirely.

In view of Annex 1 to the GwG and the guidelines on risk factors, only the extent of the measures to be enacted to fulfil general due diligence obligations may be reduced to an appropriate extent (section 14 (2) no. 1 of the GwG).

Nos. 4.40 *et seq.* of the guidelines on risk factors provide examples of the simplified customer due diligence obligations which may be relevant.

For example, pursuant to no. 4.41 in respect of the continuous monitoring of the business relationship which is required according to section 10 (1) no. 5 of the GwG the frequency of review activities may be reduced.

Simplified requirements may apply, in particular, within the scope of implementation of the identification of persons in relation to the documentation and documents which must be presented (section 14 (2) no. 2 of the GwG, no. 4.41 of the guidelines).

This means that, by way of derogation from the requirements set out above in chapter 5 within the scope of the general customer due diligence obligations, in case of a lower level of risk the identity of a person may

also be verified on the basis of other documents, data or information that originate from a credible and independent source and are suitable for the purpose of verification. This may include the presentation of a driving licence or an electricity bill which shows the name of the person requiring identification.

If the obliged entity is not in a position to fulfil the simplified due diligence obligations, the termination/non-implementation obligation laid down in section 10 (9) of the GwG applies pursuant to section 14 (3) of the GwG.

7. Enhanced due diligence obligations, section 15 of the GwG

7.1 Principles

Pursuant to section 15 (2) of the GwG, obliged entities are to fulfil enhanced due diligence obligations if they find out through the risk assessment implemented by them or in an individual case, taking into account the risk factors specified in Annexes 1 and 2 or (where relevant for them) the guidelines on risk factors, that a higher level of risk of money laundering or terrorist financing may arise. The obliged entities are to determine the specific extent of the measures to be taken in accordance with the respective higher level of risk.

Enhanced due diligence obligations are to be fulfilled in addition to the general due diligence obligations pursuant to section 10 of the GwG. Due to the reference to section 10 (2) sentence 4 of the GwG, the obliged entities must be capable of demonstrating the appropriateness of their measures to BaFin, where necessary.

Section 15 (2) of the GwG constitutes a general clause which also imposes appropriate enhanced due diligence obligations on the obliged entities in the scenarios not specified in section 15 (3) of the GwG where a higher level of risk is applicable. Pursuant to section 15 (2) sentence 1 of the GwG, the yardstick is the risk assessment which is to be implemented by the obliged entities as well as other assessments in a specific instance. It depends on the result of the risk assessment or the assessment of the obliged entities as to whether and, if so, which enhanced due diligence obligations they must fulfil.

As well as Annex 2 to the GwG, which includes a non-exhaustive list of factors and possible indications of a potentially higher level of risk in terms of money laundering and terrorist financing, the obliged entities must also take into consideration the guidelines on risk factors, in particular nos. 4.45 *et seq.*

If the obliged entity is not in a position to fulfil the necessary enhanced due diligence obligations, section 10 (9) of the GwG applies mutatis mutandis (cf. 5.8 above).

7.2 Politically exposed persons and their family members and known close associates, section 1 (12)-(14) in conjunction with section 15 (3) no. 1, (4) of the GwG

Where a contracting party of the obliged entity or a beneficial owner (not a person acting on behalf of the contracting party!) is a politically exposed person (cf. section 1 (12) of the GwG), a family member (section 1 (13) of the GwG) or a known close associate of such a person (section 1 (14) of the GwG), pursuant to section 15 (3) no. 1 of the GwG in general a higher level of risk must be assumed. The same applies for insurance undertakings within the meaning of section 2 (1) no. 7 of the GwG in relation to the above-mentioned persons who are beneficiaries or their beneficial owners (cf. section 55 of the VAG).

However, such a scenario does not mean that no business relationships (e.g. account maintenance) are permitted or that no transactions may be implemented.

Pursuant to section 15 (4) of the GwG, a minimum level of enhanced due diligence obligations must be fulfilled in the cases defined in section 15 (3) no. 1 of the GwG. Depending on the degree of increased risk in a specific instance, further due diligence obligations may also be necessary. Nos. 4.48 *et seq.* of the guidelines on risk factors include relevant references to PEPs.

Pursuant to section 15 (4) no. 1 of the GwG, establishing or continuing a business relationship with a PEP requires approval from a member of the management. If the contracting party or the beneficial owner was only initially entrusted with a high-ranking prominent public function during the course of a business relationship, or if the obliged entity gained knowledge of the fact that the contracting party or the beneficial owner held a high-ranking prominent public function only after establishing a business relationship, the obliged entity is obliged pursuant to section 15 (4) sentence 2 of the GwG to ensure that the relationship is only continued with the approval of a member of the management.

Moreover, under section 15 (4) sentence 1 no. 2 of the GwG, in case of PEPs adequate measures are to be taken to establish the source of wealth involved in the business relationship or the transaction. The source of the wealth must be traceable for the obliged entity.

Pursuant to section 15 (4) sentence 1 no. 3 of the GwG, a business relationship with a PEP or in which a PEP is a beneficial owner must undergo enhanced continuous monitoring from a quantitative and/or qualitative point of view. The nature of the business relationship/transaction and the value of the assets used are key.

7.3 Third countries subject to a high level of risk, section 15 (3) no. 2 of the GwG and section 15 (5) and (5) (a) of the GwG

Section 15 (5) of the GwG prescribes a minimum level of enhanced due diligence obligations which must be fulfilled in the cases defined in section 15 (3) no. 2 of the GwG. Depending on the degree of increased risk in a specific instance, further due diligence obligations may also be necessary.

Nos. 4.53 *et seq.* of the guidelines on risk factors include additional information on handling of high-risk countries and possible additional due diligence obligations.

A higher level of risk will apply pursuant to section 15 (3) no. 2 of the GwG in case of a business relationship or a transaction in which a high-risk third country identified by the European Commission under the amended Article 9 of the Fourth Money Laundering Directive or a natural or legal person domiciled in this third country is involved.

This does not apply to branches of obliged entities pursuant to the amended Article 2(1) of the Fourth Money Laundering Directive established in the European Union, nor does it apply to subsidiaries majority-owned by these obliged entities that are located in a high-risk third country, provided that they fully implement the group-wide policies and procedures required of them pursuant to Article 45(1) of the Fourth Money Laundering Directive.

In these cases, section 15 (5) no. 1 of the GwG prescribes that certain information must be obtained.

Pursuant to section 15 (5) no. 2 of the GwG, in these cases *inter alia* the consent of a member of the management is required. Moreover, under section 15 (5) no. 1 (c) of the GwG, for instance, adequate measures are to be taken to establish the source of funds involved in the business relationship or the transaction. In principle, the statements made by the contracting party may not be solely relied upon in this respect. The source of the wealth must be traceable for the obliged entity.

Moreover, pursuant to section 15 (5) no. 3 of the GwG, for example, a business relationship must undergo enhanced continuous monitoring from a quantitative and qualitative point of view. The concrete level of risk associated with the third country, the nature of the business relationship/transaction and the value of the assets used are key.

Pursuant to section 15 (5) a of the GwG, in the cases provided for by section 15 (3) no. 2 of the GwG BaFin is also authorised to order further measures in addition to the enhanced due diligence obligations specified in subsection 5.

7.4 High-risk transactions, section 15 (3) no. 3 and (6) of the GwG

This rule largely corresponds to the previously applicable provisions in section 6 (2) no. 3 of the GwG.

Under section 15 (3) no. 3 of the GwG, enhanced due diligence obligations apply for transactions which are particularly complex or unusually large by comparison with similar transactions, which follow an unusual pattern of transactions or which are implemented without any obvious economic or legal purpose. The obliged entity must decide in each specific instance whether a particularly large, complex or unusual transaction is applicable. The yardstick is transactions in other cases which are known to the obliged entity, provided that the discrepancy is not obvious to this obliged entity. The size of the obliged entity's business or the normal scope of the business relationship may serve as indications. The manner in which an obliged entity has learned of the discrepancy, unusual characteristic or abnormality is immaterial. Information on the above transactions may also be found in nos. 4.60 *et seq.* of the guidelines on risk factors.

The applicability of this requirement is expressly not subject to these discrepancies, unusual characteristics or abnormalities – which have not yet been considered in the specific instance – already qualifying as a reportable case within the meaning of section 43 of the GwG. For example, mere unusual characteristics and abnormalities will already apply where, on the basis of expertise or an underlying understanding of processes in this undertaking and without any further clarification, preparation or additional details regarding the matter in question, the obliged entity or its employee determines deviations from normal behaviour or business practices on the part of a customer or other third party or else transactions being implemented in an unusual manner.

In case of one of the above-mentioned transactions, on the one hand the transaction must at least undergo a special examination process, so as to be able to monitor and assess the level of risk in relation to money laundering and terrorist financing and so as to be able to review, where applicable, whether a report must be provided under section 43 (1) of the GwG. On the other hand, where a transaction is based on an underlying business relationship, this relationship is to be subject to enhanced, continuous monitoring in order that the level of risk associated with this business relationship with regard to money laundering and terrorist financing can be assessed and, in the case of a heightened level of risk, monitored.

7.5 Cross-border correspondent relationships, section 15 (3) no. 4 and (7) of the GwG

7.5.1 Definition

Unlike in the case of section 25 (k) of the KWG, old version, correspondent relationships are, on the one hand, business relationships within the scope of which the obliged entities provide specific banking services in

accordance with section 2 (1) no. 1 of the GwG (correspondents). This includes the operation of a current account or another payment account and provision of related services (e.g. cash management, carrying out international funds transfers or foreign exchange transactions and cheque clearing) for CRR credit institutions, credit institutions within the meaning of the KWG or for undertakings in a third country that engage in activities equivalent to those of such credit institutions (respondents).

"Banking services" are not all of the banking business listed in section 1 (1) sentence 2 of the KWG and instead only comprise those associated with payment transactions (cf. in particular the services indicated in section 1 (1) sentence 2 of the ZAG).

On the other hand, correspondent relationships within the meaning of the GwG include business relationships where obliged entities under section 2 (1) nos. 1 to 3 and 6 to 9 of the GwG (correspondents), in accordance with the statutory provisions applicable for them, provide services similar to banking services

- a. for other CRR credit institutions, credit institutions within the meaning of the KWG or financial institutions within the meaning of Article 3(2) of the amended Fourth Money Laundering Directive or
- b. for undertakings or persons in a third country that engage in activities equivalent to those of such credit institutions or financial institutions,

(respondents). This includes business relationships whose purpose is the provision of securities transactions or funds transfers.

7.5.2 Principles

The obliged entities under section 2 (1) nos. 1 to 3 and 6 to 8 of the GwG must comply with enhanced due diligence obligations pursuant to section 15 (3) no. 4 of the GwG where they are in cross-border correspondent relationships with third-country respondents.

In relation to correspondent relationships with respondents seated in a country of the European Economic Area, the above-mentioned obliged entities are only obliged to comply with enhanced due diligence obligations where the obliged entity has previously established that the relevant country is a high-risk country or in the cases stipulated in section 15 (8) of the GwG where this country has been included in a corresponding FATF list (see below for details).

7.5.3 Measures to be implemented

Under section 15 (7) of the GwG, in the cases outlined above the above-mentioned obliged entities must, as minimum measures, implement the following measures before establishing a business relationship with the respondent, in addition to the general due diligence obligations:

- Obtaining sufficient information about the respondent, in order that the nature of its business can be fully understood and its reputation, its controls for preventing money laundering and terrorist financing and the quality of its supervision can be assessed;

The volume of information required will depend on the degree of increased risk. As well as the risk assessment for the home country of the respondent, the volume and nature of the services provided for the respondent and the transparency of the payments made in this respect must also be taken into consideration.

- Obtaining the consent of a member of the management (cf. section 1 no. 15 of the GwG) regarding the establishment of the business relationship;
- Determining the respective responsibilities of the involved parties with regard to the fulfilment of due diligence obligations and their documentation in accordance with section 8 of the GwG.

7.6 Orders issued by BaFin, section 15 (8) of the GwG

In case of facts, relevant evaluations, reports or assessments from national or international bodies responsible for preventing or combating money laundering or terrorist financing that justify an assumption of a higher level of risk, beyond the cases set out in section 15 (3) of the GwG, pursuant to section 15 (8) of the GwG BaFin may by means of general administrative acts order the obliged entities under its supervision to enhance their monitoring of the respective transactions or business relationships and to fulfil specific additional risk-adequate due diligence obligations and to implement necessary countermeasures.

8. Fulfilment of obligations by third parties and contractual outsourcing, section 17 of the GwG

The Act distinguishes between third parties (section 17 (1) of the GwG) and other suitable persons and undertakings (section 17 (5) of the GwG).

Obliged entities may have them fulfil the due diligence obligations pursuant to section 10 (1) nos. 1 to 4 of the GwG. This list is exhaustive. This means that implementation of continuous monitoring and updating under section 10 (1) no. 5 of the GwG and enhanced due diligence obligations by third parties and other suitable persons and undertakings pursuant to section 17 of the GwG is not permitted.

Third parties which fulfil the requirements laid down in section 17 (1) and (2) of the GwG or which are third parties belonging to the same group pursuant to section 17 (4) of the GwG may be used. It is also possible to transfer the fulfilment of the due diligence obligations to other suitable persons and undertakings by means of a contractual agreement.

Third parties and other suitable persons and undertakings which are established in a third country subject to a high level of risk may not be called in for fulfilment of due diligence obligations except in the exceptional cases provided for by law.

Pursuant to section 17 (3), (5) sentence 4 of the GwG, the obliged entity must ensure that all third parties used for fulfilment and other suitable persons and undertakings provide it with the details and information obtained without delay and directly. This is equally applicable for the use of third parties belonging to the same group. The transmission obligation also covers the details obtained pursuant to section 10 (1) no. 4 of the GwG in order to determine whether the contracting party or the beneficial owner is a politically exposed person, a family member of a PEP or a known close associate of a PEP.

In relation to the transferred obligation, the obliged entity must also ensure that, at the request of the third parties or other suitable persons and undertakings, retained copies and documents which were chiefly obtained and produced for fulfilment of the due diligence obligations are forwarded to it and that these documents are retained in accordance with the time limit laid down in section 8 (4) of the GwG. In particular, these copies and documents are e.g. identification documents for the contracting party or register excerpts for the identification of the beneficial owner. This includes video recordings within the scope of video identification in accordance with the circular 3/2017 (GW) of 10 April 2017. However, the transmission obligation now also covers material documents for determination of the purpose and nature of the business

relationship and for clarification of the status of the contracting party as a politically exposed person, family member of a PEP or a known close associate of a PEP.

Details and information or documentation and documents may never be transmitted by the customer.

8.1 Use of third parties without a separate contractual basis, section 17 (1)-(4) of the GwG

In case of use of third parties without a separate contractual basis, in particular no separate reliability check performed by the third party is required.

The following third parties may be used without the conclusion of a separate contractual outsourcing arrangement:

- Section 17 (1) sentence 2 no. 1 of the GwG: all obliged entities in Germany under the German Money Laundering Act (section 2 (1) of the GwG)
- Section 17 (1) sentence 2 no. 2 of the GwG: obliged entities pursuant to Article 2(1) of Directive (EU) 2015/849 in another Member State of the European Union or in a signatory state to the Agreement on the European Economic Area
- Section 17 (1) sentence 2 no. 3, alternative 1 of the GwG in conjunction with section 17 (1) sentence 2 no. 2 of the GwG: member organisations seated in an EU Member State or associations of obliged entities in that EU Member State falling under the scope of the EU's Fourth Money Laundering Directive
- Section 17 (4) of the GwG: non-high risk third parties seated in Germany, in EU Member States and third countries which belong to the same group as the obliged entity and for which it is ensured that the due diligence obligations, retention requirements, policies and procedures for preventing money laundering and terrorist financing which are adopted by the group are consistent with the provisions of the Fourth Money Laundering Directive or equivalent provisions and that effective implementation of these requirements at group level is supervised by an authority
- Section 17 (1) sentence 2 no. 3, alternative 2 of the GwG: institutions seated and persons domiciled in third countries not exposed to a high level of risk for which the above-mentioned group preconditions are not fulfilled or which do not belong to a group but which are subject to due diligence and retention obligations consistent with those stipulated in the Fourth Money Laundering Directive and which are supervised in this respect in accordance with Section 2 of Chapter IV of Directive (EU) 2015/849
- Section 17 (2) sentence 2 no. 1 of the GwG: branches seated in high-risk third countries of obliged entities in an EU Member State, provided that this branch unreservedly adheres to the policies and procedures applicable throughout the group pursuant to Art. 45 of the Fourth Money Laundering Directive
- Section 17 (2) sentence 2 no. 2 of the GwG: subsidiaries seated in high-risk third countries which are majority-owned by obliged entities in an EU Member State, provided that this subsidiary unreservedly adheres to the policies and procedures applicable throughout the group pursuant to Art. 45 of the Fourth Money Laundering Directive

The scope of the due diligence obligations which the above-mentioned third parties must fulfil will depend on the law applicable for them. The third party may also, for its part, call in third parties or other suitable persons in accordance with the provisions applicable for it.

In respect of the use of third parties belonging to the same group pursuant to section 17 (4) of the GwG, moreover the obliged entities must themselves determine which third parties whose services they use belong to their group and thus have the notional status pursuant to section 17 (4) of the GwG. In other respects, notional fulfilment of the preconditions laid down in section 17 (3) of the GwG merely indicates that the obliged entity is not required to implement any separate safeguards (and to be able to document these). However, in its capacity as a group undertaking it must be capable at all times of obtaining without delay the information, documents and other material documentation within the meaning of section 17 (3) of the GwG; this is particularly applicable in case of investigations by prosecuting authorities due to the suspicion of a money laundering crime or terrorist financing.

In case of indications that the requirements in other countries in terms of the fulfilment of due diligence obligations are less stringent than in Germany, this must be taken into consideration within the scope of the risk-oriented approach (enhanced monitoring).

A third party which is seated outside Germany (which performs online identification, for example) and is subject to foreign law may not be used to fulfil the due diligence obligations in relation to customers domiciled in Germany. This might result in violation of the provisions of the Money Laundering Act. By way of clarification, it is pointed out that this also applies for the use of third parties belonging to the same group within the meaning of section 17 (4) of the GwG which are seated outside Germany. On the other hand, even in this scenario the use of a third party seated outside Germany is possible provided that the due diligence obligations pursuant to the provisions of the Money Laundering Act are fulfilled.

In any event, the obliged entity will retain ultimate responsibility for fulfilment of the due diligence obligations, i.e. violations of the due diligence obligations by the called-in third party will be attributed to the obliged entity.

8.2 Transfer of due diligence obligations on a contractual basis (outsourcing), section 17 (5)-(9) of the GwG

An obliged entity may also transfer implementation of the measures required for fulfilment of the due diligence obligations to other persons and undertakings on the basis of a contractual arrangement. Other persons and undertakings mandated on a contractual basis will merely serve as vicarious agents of the obliged entity. Here too, the obliged entity will retain ultimate responsibility for fulfilment of the due diligence obligations, i.e. violations of the due diligence obligations by the called-in other suitable persons and undertakings will be attributed to the obliged entity.

This transfer is only possible subject to the preconditions laid down in section 17 (5)-(9) of the GwG. In particular, the persons and undertakings to which implementation of the due diligence obligations is transferred must be suitable for this purpose (section 17 (5) sentence 1 of the GwG).

Suitability will be determined on the basis of reliability which is to be reviewed in accordance with section 17 (7) of the GwG and the appropriateness and orderliness of the measures enacted by way of fulfilment of the due diligence obligations which are to be reviewed during the contractual relationship on the basis of samples.

In case of the transfer of these obligations to an undertaking, its reputation must also be taken into consideration when determining its suitability.

In particular, the transmission of insufficient information or documentation and non-orderly fulfilment of due diligence obligations thus resulting may give rise to doubts regarding the reliability of commissioned persons and undertakings.

As well as the preconditions expressly stipulated in the Act, the obliged entity must also ensure that the persons used are instructed regarding the requirements applicable for implementation of the due diligence obligations.

Contractually obliged other persons and undertakings may be seated outside Germany, but not in third countries subject to a high level of risk. Section 17 (2) sentence 1 of the GwG applies mutatis mutandis in this respect.

Commissioned persons and undertakings will, as vicarious agents, fulfil the due diligence obligations incumbent upon the obliged entity. These are established in national legislation. Section 17 (5) of the GwG refers to the fulfilment of the general due diligence obligations under section 10 (1) nos. 1-4 of the GwG. Accordingly, persons domiciled and undertakings seated outside Germany must also comply with all due diligence obligations in accordance with the requirements under the Money Laundering Act as well as technical legislation.

The suitability of persons and undertakings outside Germany – in particular, their ability to comply with German statutory provisions – must be reviewed and documented particularly thoroughly.

The “PostIdent” procedure remains a suitable identification procedure. Deutsche Post AG is an other suitable undertaking within the meaning of section 17 (5)-(9) of the GwG. All of the other preconditions must also have been fulfilled in relation to Deutsche Post AG. Where valid framework agreements have been concluded, it will not be necessary to conclude a separate new framework agreement. However, if the existing agreements are not consistent with this Interpretation and Application Guidance, they must be adjusted in line with this.

8.3 Sub-outsourcing

Sub-outsourcing of implementation of the due diligence obligations by other contractually mandated other persons and undertakings pursuant to section 17 (5)-(9) of the GwG is only permitted where all of the preconditions laid down in section 17 (5)-(7) of the GwG are fulfilled within the scope of the relationship between the obliged entity and the person or undertaking to which fulfilment of these obligations is delegated.

This means that other persons and undertakings to which fulfilment of these obligations is delegated must also undertake contractually in relation to the obliged entity – e.g. by granting corresponding obligations in favour of the obliged entities in the service agreements with the contractually mandated other suitable persons or undertakings – to comply with the (statutory) provisions for fulfilment of the due diligence obligations and to grant review and control rights for the obliged entity and its supervisory authority.

The provisions in this respect in the circular 3/2017 of 10 April 2017 will remain unaffected.

The specific scenario where the contracting parties entered in the registers obtain services from credit reporting agencies or similar third parties for identification of the contracting party or for clarification/identification of their beneficial owners should be distinguished from this. If this service is limited to mere procurement of the register data, the service provider will only act in a supporting capacity as a vicarious agent of the obliged entity. Use of such a service will not constitute outsourcing within the meaning

of section 17 (5) *et seq.* of the GwG, since the actual identification – i.e. the review of the data obtained – will be done by the obliged entity itself.

8.4 Forwarding of an identification data record

Subject to the preconditions laid down in section 11 (3) of the GwG, the Money Laundering Act enables repeated use of a previous identification of the contracting party, a person acting on its behalf, where applicable, and the beneficial owner. This means that re-identification when a further business relationship is entered into will not then be necessary.

This option of a waiver of re-identification may be provided for even in case of different obliged entities, subject to strict preconditions; effectively this will thus merely entail identification by a third party which has already been implemented previously pursuant to section 17 (1)-(4) of the GwG or forwarding of an identification data record by a third party which has already been collected previously.

For this purpose, the obliged entity must always rely upon the third party which performed the initial identification. The origin of the data must be documented.

The preconditions for identification by a third party by way of forwarding of data collected during previous identification are laid down in section 17 (3) (a) of the GwG.

IV. Other obligations

9. Recording and retention obligations, section 8 of the GwG

Under section 8 (1) of the GwG, an obliged entity must record and retain the following details and information:

- the information collected within the scope of fulfilment of the due diligence obligations and information obtained concerning contracting parties, where applicable concerning the persons acting on behalf of the contracting parties and beneficial owners (including the measures enacted to identify the beneficial owner for legal persons within the meaning of section 3 (2) sentence 1 of the GwG), concerning business relationships and transactions, particularly proof of transaction documents insofar as they might be necessary for the investigation of transactions,

NB: this recording obligation only applies for details and information collected or obtained in the fulfilment of the due diligence obligations. This includes the details and information collected or obtained from third parties within the meaning of section 17 (1) of the GwG or other persons or undertakings within the meaning of section 17 (5) of the GwG.

- sufficient information concerning the implementation and the results of the risk assessment pursuant to section 10 (2), section 14 (1) and section 15 (2) of the GwG and about the suitability of the measures taken on the basis of these results,
- the results of the examination pursuant to section 15 (6) no. 1 of the GwG and

- the reasons considered and a plausible explanation of the outcome of the assessment of a matter in respect of the reporting obligation pursuant to section 43 (1) of the GwG

Under section 8 (2) of the GwG, special provisions apply in the following cases:

To comply with the obligation pursuant to section 8 (1) sentence 1 no. 1 (a) of the GwG, in the cases set forth in section 12 (1) sentence 1 no. 1 of the GwG, i.e. in case of a normal level of risk, the obliged entity must also record the type, number and issuing authority of the document presented by a natural person who is to be identified, for verification of this person's identity.

In these cases and where documentation under section 12 (2) of the GwG is presented for verification of the identity of a legal person, or where documents specified pursuant to a regulation under section 12 (3) of the GwG are presented or used, the obliged entities have the right and the duty to make complete copies of these documents or documentation or else to make complete optical copies of them in digital form (section 8 (2) sentence 2 of the GwG). This will be considered to be recording within the meaning of section 8 (2) sentence 1 of the GwG. Copies/scans will be complete where the pages of the documents presented for the purpose of identification which include details of relevance for identification purposes are fully copied/scanned. For instance, this means that the front and reverse of an identity card and the integrated biodata card in a passport must be fully copied. The photo and all of the data must be clearly recognisable.

Insofar as corresponding copies or digitalised records are not held for existing customers, it is not necessary to obtain these copies or records, even within the scope of the update obligation under section 10 (1) no. 5 of the GwG in conjunction with section 10 (3) (a) of the GwG.

If a repeat identification is omitted in the above cases pursuant to section 11 (3) sentence 1 of the GwG, the name of the person to be identified and the fact that this person was identified on a previous occasion are nonetheless to be recorded (section 8 (2) sentence 5 of the GwG).

In the case set out in section 12 (1) sentence 1 no. 2 of the GwG, instead of the type, number and issuing authority of the document, the service and card identifier is to be recorded, as well as the fact that the check was carried out by means of an electronic proof of identity.

When verification of identity is carried out by means of a qualified signature pursuant to section 12 (1) sentence 1 no. 3 of the GwG, the validation thereof is also to be recorded.

Where details and information are collected by consulting electronically managed registers or directories pursuant to section 12 (2) of the GwG, a printout will qualify as a record of the data or information contained therein.

The above-mentioned records may also be stored digitally on a storage medium, insofar as the obliged entities ensure that the stored data

- are consistent with the details and information collected,
- are available for the duration of the retention period and
- can be made readable within a reasonable period of time at any time.

The retention period for the records and other documents specified in section 8 (1) to (3) of the GwG is five years (section 8 (4) of the GwG). In the case provided for in section 10 (3) sentence 1 no. 1 of the GwG, this

period will begin upon expiry of the calendar year in which the business relationship ends, and in all other cases upon expiry of the calendar year in which the relevant transaction has been executed or the relevant detail has been collected. This applies except where other statutory provisions concerning recording and retention obligations stipulate a longer period of time. In any event, the records and other documents must be destroyed upon expiry of a period of ten years at the latest.

Insofar as documents which must be retained must be presented to a public body, the obliged entities must at their expense provide the public body in question with the necessary tools in order to render these documents legible; at the request of this body, at their expense they must print out these documents in whole or in part without delay or produce reproductions which are legible without tools (section 147 (5) of the AO analogously in conjunction with section 8 (5) of the GwG).

10. Suspicious transaction report procedure, section 43 of the GwG

10.1 Principle

The reporting of matters where facts indicate that

1. an asset related to a business relationship, brokerage or transaction is derived from a criminal offence which could constitute a predicate offence for money laundering,
2. a business transaction, a transaction or an asset is related to terrorist financing, or
3. the contracting party has not fulfilled its obligation under section 11 (6) sentence 3 of the GwG to disclose to the obliged entity whether it intends to establish, continue or conduct the business relationship or transaction on behalf of a beneficial owner,

is one of the principal obligations set out in the GwG. Violations of this reporting obligation will incur fines in accordance with section 56 (1) sentence 1 no. 69 of the GwG. In individual cases, this may also be punishable due to the obliged entity's involvement in the crime of money laundering (section 261 of the German Penal Code (*Strafgesetzbuch* - StGB)) or terrorist financing (section 89 (c) of the StGB).

10.2 Preconditions for the reporting obligation under section 43 (1) nos. 1 and 2 of the GwG

The suspicious transaction reporting obligation under section 43 (1) of the GwG remains essentially tied to the previously known preconditions.

Facts within the meaning of section 43 (1) no. 1 or no. 2 of the GwG may arise in any business relationship or transaction or within the scope of related preparatory measures. This applies irrespective of whether they are subject to the customer due diligence obligations under the GwG or other anti-money laundering obligations.

This includes the following types of transactions:

- non-cash transactions, including electronically executed transactions,

- cash transactions and
- other transfers of assets, such as trade-ins of valuables, transfers by way of security, gifts

The reporting obligation applies irrespective of the amount of a transaction or the value of an underlying asset (section 43 (1) of the GwG). As well as impending, current or declined transactions or those not yet carried out, the reporting obligation also applies for transactions already implemented. Such transactions must also be reported immediately if the obliged entity subsequently learns of facts within the meaning of section 43 (1) no. 1 or no. 2 of the GwG through its own investigation of its customers or of transactions executed or through an analogous investigation initiated by the supervisory or prosecuting authorities.

The same applies for business relationships: a business relationship need not already exist: the link with a business relationship or a transaction which is required under section 43 (1) no. 1 or no. 2 of the GwG may already exist as of the initiation of such business relationship or transaction.

The legislator did not intend to reduce the previously applicable reporting threshold through the new version of section 43 (1) no. 1 and 2 of the GwG. In this context, where the preconditions indicated in this provision are fulfilled, this will entail the “suspicious matters” or “suspected cases” categories which were already applicable previously. The related degree of suspicion thus continues to rank below the initial suspicion for criminal proceedings under section 152 (2) in conjunction with section 160 of the German Code of Criminal Procedure (*Strafprozessordnung – StPO*). The competent prosecuting authorities remain solely competent for the assessment of whether an initial suspicion for criminal proceedings is applicable.

The obliged entity and the employees acting on its behalf need not be certain that a corresponding asset has resulted from a predicate offence under section 261 of the StGB or is associated with terrorist financing. For a matter to be subject to the reporting requirement, facts pointing to the applicability of the circumstances indicated in section 43 (1) of the GwG are necessary, but also sufficient. Where this applies in relation to the cases specified in no. 1 and no. 2, a criminal background of terrorist financing or pursuant to section 261 of the StGB cannot thus be ruled out. In case of doubt, a report must therefore be submitted under section 43 (1) of the GwG.

In particular, an obliged entity is not obliged either to review the applicability of all of the criteria specified in section 261 of the StGB or one of its predicate offences or of terrorist financing or even to “definitively investigate” this matter, or to legally subsume this matter within the scope of the relevant criminal offences. This falls under the responsibility of the prosecuting authorities.

The obliged entity must instead – where appropriate, through its employees – assess a matter on the basis of its general experience and any professional expertise its employees may have in terms of what is unusual or abnormal in a given business context. It must do so within the scope of the fulfilment of its obligations under section 15 (6) of the GwG. If on account of or within the scope of subsequent reviews the applicability of meaningful objective indications (“facts”) is confirmed, which indicate the applicability of the circumstances specified in section 43 (1) no. 1 or no. 2 of the GwG, the reporting obligation will apply.

The obliged entity or the employees acting on its behalf have a strictly limited margin of judgement in terms of the issue of whether transaction-, business- or person-related circumstances constitute facts within the meaning of section 43 (1) no. 1 or no. 2 of the GwG. As a rule, this margin of judgement will be strongly reduced in case of circumstances which are included in the typology documents and guidance notes provided to the obliged entities by the FIU.

The purpose of this assessment is to be able to evaluate the respective business relationship or transaction. This scope of this assessment will depend on the individual case in question.

Except in case of occasional customers, in this context the obliged entity must consult all of the information available for a business relationship in its assessment of whether the preconditions for the reporting obligation are fulfilled. In this respect, relevant criteria include the following:

- the purpose and nature of the transaction,
- details of the identity of the customer or the beneficial owner,
- the financial and business background of the customer and
- the source of wealth already deposited or notified for deposit.

In particular, increased vigilance is required on the part of the obliged entity if, by comparison with similar cases, the transaction

- is particularly complex or large (e.g. if the nature and value or the source of the wealth or the recipient of the transaction does not match the personal circumstances or business activities of the customer known to the obliged entity or if the customer's circumstances or information provided in this respect is/are opaque or difficult to verify; the latter applies, in particular, for the identity of the persons involved in the transaction or the business relationship and the purpose of the transaction or the business relationship),
- proceeds unusually (e.g. if the transaction is to be executed in an unnecessary roundabout way) or
- is implemented without any obvious economic or legal purpose (e.g. if cost-intensive transaction routes are selected), cf. section 15 (3) no. 3 of the GwG.

The freedom of action of the obliged entities expressly does not include carrying out investigative activities or questioning on behalf of the prosecuting authorities. The AML officer is precisely not required to conduct investigations alongside or instead of the prosecuting authorities and, *inter alia*, to hold discussions with customers concerning a suspected case. This freedom of action only covers including and investigating facts which have resulted within the direct vicinity of the business relationship and which are available to the AML officer due to this business relationship and can be consulted and utilised within the short period of time for the review. It is not necessary to question the affected person regarding the source/use of the funds (also in view of the risk of suppression of evidence, cf. section 47 (1) of the GwG). Nor is the obliged entity entitled to assess the plausibility of the affected person and the credibility of the information provided by this person. The obliged entity must instead leave this to the competent authorities (see the ruling of Frankfurt Higher Regional Court (*Oberlandesgericht*) of 10 April 2018; 2 Ss-OWi 1059/17).

The methods of "money launderers" and "terrorist financers" are constantly changing, not least in response to safeguards enacted by the obliged entities. The "money laundering" and "terrorist financing" typology documents which are produced by the FIU and are available to the obliged entities in the protected section of the FIU's website (www.zoll.de/fiu-intern) provide indications regarding a report pursuant to section 43 of the GwG or guidance concerning the prior case-by-case review to be implemented by the obliged entities as to whether the preconditions for a reportable matter are fulfilled. These documents are not exhaustive and are continuously evaluated and supplemented. Specific guidelines provided by the FIU or BaFin concerning the requirements as to the quality of suspicious transaction reports must continue to be taken into consideration. Besides internal reports from employees of the obliged entity, external reports such as press releases, typology documents produced by the Financial Action Task Force (FATF) (www.fatf-gafi.org) and

reports from BaFin or the prosecuting authorities are also relevant as current sources of information. In case of such guidance, this should be expressly referred to within the scope of a suspicious transaction report.

Pursuant to section 43 (5) of the GwG, in consultation with the supervisory authorities the FIU may also determine types of transactions associated with money laundering or terrorist financing which must likewise be reported under section 43 (1) nos. 1 and 2 of the GwG.

In case of suspected cases, section 43 (1) sentence 1 of the GwG requires an "immediate" report, i.e. this report must be provided without undue delay (ruling of Frankfurt Higher Regional Court of 10 April 2018; 2 Ss-OWI 1059/17). With regard to the promptness requirement for the suspicious transaction report laid down in section 43 (1) of the GwG, the employees must likewise carry out an assessment of the relevant circumstances prior to an internal report without undue delay. In respect of the scope of the assessment of the relevant circumstances prior to the internal report, reference is made to the above comments regarding the margin of judgement available to the obliged entities.

10.3 Reporting obligation under section 43 (1) no. 3 of the GwG

Section 43 (1) no. 3 of the GwG includes an independent reporting obligation irrespectively of the requirements set out in nos. 1 and 2.

According to this provision, obliged entities must provide a suspicious transaction report without delay – irrespective of the preconditions laid down in section 43 (1) nos. 1 and 2 of the GwG and irrespective of the termination obligation under section 10 (9) of the GwG – if the contracting party fails to disclose to the obliged entity whether it intends to establish, continue or implement the business relationship or the transaction for a beneficial owner.

The disclosure obligation exclusively covers cases of instruction pursuant to section 3 (1) no. 2 of the GwG.

However, no automatic reporting obligation applies in cases of non-disclosed instruction, unlike in the cases stipulated in no. 1 and no. 2; in cases where there are indications that the contracting party has not fulfilled its disclosure obligation, the obliged entity will instead have the right to assess the matter (as well as the objective applicability of a violation – which will generally have occurred and may not therefore be subject to any separate evaluation – this mainly comprises internal facts, i.e. the motives of the contracting party). The yardstick for this is an assessment of the external and internal circumstances, on the basis of general experience, in terms of what is unusual or abnormal in the context of the business relationship with the contracting party.

At the same time, in those cases where the contracting party has violated its disclosure requirement pursuant to section 11 (6) sentence 2 of the GwG, the Act enables the submission of a suspicious transaction report even without any further assessment of the matter.

10.4 Organisational structure for the reporting procedure

By means of internal measures, the obliged entity must ensure that, where facts within the meaning of section 43 (1) of the GwG are found to apply, without delay the relevant matter is

- registered,

- forwarded to the body with internal responsibility for the report and
- from there, reported to the FIU if a reportable matter is found to apply.

If the applicability of relevant facts and thus of the preconditions laid down in section 43 (1) of the GwG is established as a result of the assessment done by the obliged entity or its employees (even where no report is subsequently submitted to the FIU), by producing work and organisational instructions the obliged entity must ensure that the results of the investigation are clearly documented (cf. section 8 (1) no. 3 of the GwG).

This documentation will be retrospectively reviewed by BaFin and by the internal or external auditors. This check will cover the issue of whether the assessment was made on the basis of inappropriate considerations or evidently incorrect facts or whether generally valid assessment criteria have been applied.

Matters internally reported by employees must be retained for a period of five years.

The AML officer or the person who fulfils the anti-money laundering obligations for the obliged entity is responsible for the assessment of whether, for an internally notified matter, the preconditions for a report duly provided under section 43 (1) of the GwG are fulfilled in a specific case and for the reporting of this case to the FIU, where applicable.

A procedure whereby employees will initially refer an internally notifiable case to their superior or a body within the obliged entity other than the body specified as competent for this report pursuant to section 43 (1) of the GwG and whereby this body will only forward this report if it shares the employee's view is not compatible with these principles.

Insofar as the body at the obliged entity which is responsible for the report opts not to submit a report pursuant to section 43 (1) of the GwG, despite an initial determination that the matter is reportable, its reasons for doing so must likewise be clearly recorded (cf. section 8 (1) no. 4 of the GwG) and likewise be retained for a period of five years (section 8 (4) of the GwG). A violation of the latter requirement will incur a fine pursuant to section 56 (1) sentence 1 no. 7 of the GwG. These grounds must also be notified to the employees of the obliged entity who provided the internal report.

Insofar as an AML officer or his deputy considers that the preconditions for a reportable matter are fulfilled and intends to submit a report under section 43 (1) of the GwG or replies to a request for information from the FIU under section 30 (3) of the GwG, he will not be subject to the management board's right to issue instructions in this respect (section 7 (5) sentence 6 of the GwG).

The obligation to provide a report pursuant to section 43 (1) of the GwG applies, subject to the preconditions specified therein, even if the obliged entity is aware that another obliged entity or a third party has already submitted a report or a criminal complaint under section 158 of the StPO due to the same set of circumstances; the reporting obligation under the GwG is an independent obligation under trade and industry law.

In case of a request for information from the public prosecutor's office, a review is required of whether the information thus provided will thereby (once again) trigger the reporting requirement under section 43 (1) of the GwG. Whether this is the case will be assessed on the basis of the preconditions laid down in section 43 (1) of the GwG and thus the question of whether – now taking into consideration the contents of this request for information – (new) facts within the meaning of the rule are (once again) applicable. In particular, it must thereby be considered whether the obliged entity has already previously provided a suspicious transaction report regarding the subject of the public prosecutor's office's request for information and whether this

request for information will not result in new information being provided which will trigger a reporting requirement.

The FIU or the prosecuting authorities are not obligated by law to cooperate, e.g. in any preliminary review of a report. The FIU will only reject reports from the obliged entity in cases where referred matters lack plausibility. The FIU and the prosecuting authority which is competent following referral of the matter may ask the party subject to the reporting requirement – after its report has been provided – to substantiate or provide further details regarding the facts forming the basis for its report.

10.5 Report requirements

The reporting requirement under section 43 (1) of the GwG is subject to a mandatory form requirement, as an obligation under trade and industry law. The form in which this report is to be provided is stipulated in section 45 of the GwG.

Pursuant to section 45 (1) sentence 1 of the GwG, the obliged entity must submit its report electronically. For this purpose, through the IT application "goAML" the FIU has provided a secure electronic procedure accessible via the Internet. Reports are to be submitted via its user interface. This means that the key details for a report must be indicated within the form fields provided by "goAML", and not merely through annexes attached to the report. The enclosures to a suspicious transaction report – such as transaction data, turnover data etc. – must be provided to the FIU in a format which can be read and processed electronically.

In case of follow-up reports for a suspicious transaction report already provided, the function provided by "goAML" in this respect must be used for this purpose.

In order to be able to use "goAML", one-time registration of an obliged entity via the web portal "goAML" is necessary. As part of this process, the person who is to be registered is requested to provide a copy of his identity card or password, with his consent, in order to verify the details provided.

On its website (www.fiu.bund.de), as well as the general information for registration and the submission of reports the FIU provides obliged entities with its "goAML Web Portal Manual" as well as "Guidance from the Financial Intelligence Unit". This application guidance must be complied with in order to ensure an effective electronic reporting procedure.

Where, in exceptional cases, electronic data transmission is temporarily disrupted (for at least 2 hours), the report must be provided by fax or, in the event that transmission by fax is also impossible, by post, using the official registration form provided by the FIU (section 45 (3) of the GwG). However, in the scenario provided for in section 45 (3) of the GwG in case of urgent matters (such as cases subject to time limits) and matters of relevance for state security it is advised that direct contact be established before sending the report by post. This form has been placed on the FIU's website (www.fiu.bund.de) and can be completed online there.

At the request of an obliged entity, to avoid undue hardship the FIU may waive the requirement of electronic reporting.

Through the confirmations of receipt which the FIU is required to provide under section 41 (1) of the GwG in case of electronic reports under section 43 (1) of the GwG, the time of submission of the suspicious transaction report will be documented and the supervisory authority may subsequently review whether it has been provided in a timely manner. Where the suspicious transaction report is submitted non-electronically, the Act

does not require confirmation of receipt. However, if the report is submitted by fax, the fax delivery report will serve as proof of transmission.

10.6 Consequences of a report

A transaction on account of which a report has been made under section 43 (1) of the GwG may be implemented, at the earliest, once the obliged entity has been notified of the approval of the FIU or the public prosecutor's office regarding its implementation or three working days since full transmission of the report have elapsed without the FIU or the public prosecutor's office having prohibited implementation of this transaction (section 46 (1) of the GwG). Saturday is not to be treated as a working day for the purpose of the calculation of this time limit. In case of public holidays at the registered office of the obliged entity, the FIU or the competent public prosecutor's office falling within this time limit, the end of the time limit will be postponed by the relevant number of days.

If it is impossible to postpone a transaction in accordance with the requirements of section 43 (1) of the GwG or if postponement might obstruct proceedings in relation to a suspected criminal offence, execution of this transaction will be permitted; in this case, the obliged entity must provide the report required under section 43 (1) of the GwG without delay ("urgent case rule"; section 46 (2) of the GwG).

If the employees of the obliged entity strongly suspect an act of money laundering or terrorist financing in a specific case, a transaction may not be executed under section 46 (2) of the GwG. For example, this will be the case where a person listed in relation to terrorist financing is involved.

Pursuant to section 49 (4) of the GwG, a person submitting a report (including in case of internal reports) may not suffer any disadvantageous or discriminatory consequences for his employment as a result of this report.

Section 48 (1) of the GwG clarifies that a person submitting a report under section 43 (1) of the GwG may not be held responsible under civil or criminal law or pursued under disciplinary rules on account of this report any more than a person submitting a criminal complaint under section 158 of the Code of Criminal Procedure, unless an untrue report or criminal complaint has been submitted intentionally or grossly negligently. This also applies in cases where the persons submitting reports were not precisely aware of the underlying criminal activity, irrespective of whether an unlawful act was actually committed. The same applies pursuant to section 48 (2) of the GwG in relation to internal reports by employees of an obliged entity to the body within the obliged entity which is responsible for a report or in relation to the response to a request for information from the FIU under section 30 (3) sentence 1 of the GwG.

If the obliged entity's body which is responsible for submitting a report opts not to provide a report – on whatever grounds – the employee submitting an internal report will not be required to provide any suspicious transaction report of his own under section 43 (1) of the GwG. He will be free to provide notice of what he considers to be inappropriate handling of his report, where applicable by means of a whistleblowing system set up by the obliged entity or by BaFin.

The requirement to submit a report under section 43 (1) of the GwG precisely does not mean that, in relation to the underlying matter, there is also a requirement to provide notification of an act under section 261 (8) of the StGB (section 43 (4) of the GwG). A notification requirement within the meaning of the StGB will exclusively apply for the scenarios indicated in section 138 of the StGB, subject to the preconditions set out therein.

However, exemption from punishment will only be granted in relation to an act under section 261 (1) to (6) of the StGB for the perpetrator – including a perpetrator who, pursuant to subsection 6, recklessly fails to

recognise that an asset has resulted from an unlawful act – in case of a voluntarily submitted criminal complaint or the voluntary initiation of such a complaint, subject to the preconditions indicated in section 261 (8) of the StGB. Such a criminal complaint must be exclusively submitted to the competent prosecuting authorities.

From the point of view of BaFin, “reckless non-recognition” within the meaning of section 261 (6) of the StGB for the perpetrator will not apply where he has duly forwarded a suspicious transaction report complying with the requirements set out in section 43 (1) of the GwG to the competent internal body or (in the case of the AML officer) has submitted a report to the FIU.

10.7 Forwarding of information concerning reports

In principle, an obliged entity may not notify the contracting party, the customer for the transaction or other third parties (even indirectly, through questioning) of an envisaged or submitted report under section 43 (1) of the GwG, the initiation of an investigation due to such a report or a request for information from the FIU under section 30 (3) sentence 1 of the GwG (so-called “ban on tipping off”; section 47 (1) of the GwG).

However, in particular this ban will not apply where the respective obliged entities

1. forward the relevant information to the government bodies indicated in section 54 (3) no. 2 of the GwG, provided that these bodies require this information in order to perform their functions and no other legal provisions preclude this forwarding,
2. exchange this information with obliged entities which belong to the same group as the obliged entity submitting the report,
3. exchange this information with group undertakings subordinate to such obliged entities in third countries, where they are subject to a group programme under section 9 of the GwG and the obliged entities are obliged entities under section 2 (1) nos. 1 to 3 or no. 7 of the GwG.

The same applies in relation to forwarding of this information between obliged entities belonging to the same professional category under section 2 (1) nos. 1 to 3, no. 7 or no. 9 of the GwG, insofar as this relates to the same contracting party and the same transaction in which all of these obliged entities are involved. Insofar as the above-mentioned obliged entities are seated in a third country, the requirements there regarding a system for prevention of money laundering and terrorist financing must be equivalent to those laid down in the Fourth Money Laundering Directive and they must be subject to comparable obligations in terms of professional secrecy and the protection of personal data.

Apart from the forwarding of information to government bodies, the information forwarded by the obliged entities may only be used by its recipients for the purpose of preventing money laundering or terrorist financing.

10.8 Termination of business relationships

The tasks of the obliged entities within the scope of the cooperation between competent authorities, the FIU and obliged entities which is required under the GwG do not include the continuation of business relationships

merely for the purpose of investigating whether a case of money laundering or terrorist financing is applicable. As of the submission of a report under section 43 (1) of the GwG, in principle the person submitting the report will have indications of a potentially higher level of risk within the meaning of section 15 (2) sentence 1 of the GwG, so that enhanced due diligence obligations must be fulfilled. Any new findings resulting from this must be reported to the FIU.

In the event that, following the submission of a suspicious transaction report, no further abnormalities are apparent in relation to the reported contracting party within a period of three months from the submission of the suspicious transaction report to the FIU or a subsequent official inquiry, in principle less stringent due diligence obligations may now be once again applied for this customer, in line with a risk-based approach. In any event, from this moment onwards a higher-level risk classification is no longer necessary purely on account of the submitted suspicious transaction report. Insofar as a report has been submitted due to indications of terrorist financing, in deviation from the above enhanced monitoring is required for at least six months.

Due to the purely administrative legal nature of the report and the reporting threshold below initial suspicion from the point of view of criminal proceedings, the mere fact of the submission of a report under section 43 (1) of the GwG will not automatically indicate the need to terminate a customer relationship.

But in cases where the obliged entities have previously submitted a report pursuant to section 43 (1) of the GwG, so as not to interfere with the investigations before any decision on whether to terminate a business relationship it is advisable to notify the FIU of the planned action and, where applicable, also to contact the competent prosecuting authorities. However, the decision on whether or not to terminate a business relationship will be incumbent upon the affected obliged entity alone, except in the following cases provided for by law.

The cases where a business relationship is terminated due to the above-mentioned principles must be documented by the internal and external auditors as well as BaFin for review purposes.

Where the German Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) or other security authorities submit a request for information, an obliged entity will be prohibited from acting unilaterally merely on the basis of such a demand in such a way as is disadvantageous for the affected person and which goes beyond the provision of this information, in particular from terminating existing contracts or business relationships, restricting their scope or else charging or increasing a fee (cf., *inter alia*, section 8 (b) (5) of the German Act on the Federal Office for the Protection of the Constitution (*Gesetz über das Bundesamt für Verfassungsschutz – BfVG*)). This follows in view of the express notification of this prohibition which will be provided in connection with any demand for information and due to the fact that this request for information does not include a statement that the affected person has acted unlawfully or that there is necessarily a suspicion in this regard.

11. Group-wide implementation, section 9 of the GwG

The obligation of group-wide implementation (section 9 (1) of the GwG) which is now applicable for all of the obliged entities which are parent undertakings of a group (cf. section 1 (25) of the GwG) essentially corresponds in material terms to the duties previously applicable for the relevant obliged entities under section 2 (1) nos. 1, 2 and 7 (cf. section 53 (5) of the VAG, old version, section 25 (i) of the KWG, old version).

11.1 Parent undertaking/group

Obligations in relation to a group pursuant to section 9 (1) of the GwG apply for all obliged entities pursuant to section 2 (1) of the GwG which are parent undertakings of this group and which are headquartered in Germany. Only an undertaking which is not itself subordinate can be a parent undertaking (cf. section 1 (25) of the GwG).

In deviation from the previous legal situation, in regard to the definition of a "group" section 9 of the GwG no longer refers to the group definition (from the point of view of solvency law) which is provided in section 10 (a) of the KWG.

Instead, a group will always already be applicable in case of a combination of a parent undertaking (including its dependent branches and branch offices) and the following undertakings:

- Subsidiaries
 - in which the parent undertaking holds a participating interest amounting to a majority of its voting rights,
 - in which the parent undertaking is a shareholder with any share and is entitled to appoint and dismiss this undertaking's governing bodies,
 - over which the parent undertaking exercises dominant influence due to a concluded control agreement, profit transfer agreement or due to its articles of association,
 - in which the parent undertaking holds a participating interest under section 271 (1) of the HGB, subject to uniform management (cf. section 290 (1) of the HGB).
 - for which the parent undertaking alone has appointed, through the exercise of its voting rights, the majority of the members of the administrative, management or supervisory body of this undertaking who hold office during the financial year and the previous financial year up to the preparation of the consolidated financial statements or
 - in respect of which the parent undertaking solely disposes of a majority of the voting rights held by the shareholders or partners of this undertaking by virtue of an agreement with other shareholders or partners in this undertaking
- Other undertakings in which the parent undertaking or one of its subsidiaries holds a participating interest in the amount of a majority of its voting rights or, in case of uniform management (cf. section 290 (1) of the HGB), a participating interest under section 271 (1) of the HGB

11.2 Undertakings subject to group obligations

Section 9 (1) sentence 3 of the GwG – which transposes Article 45(1)(1) of the Fourth Money Laundering Directive – requires all branches, branch offices and undertakings belonging to groups in Germany and other countries which are subordinate to a parent undertaking and subject to anti-money laundering obligations to comply with the group-wide obligations applicable for them (undertakings subject to group obligations).

11.3 Nature of the obligation

Group-wide risk assessment

So as to be able to fully consider and address the existing risks at group level, a risk assessment within the meaning of section 5 of the GwG is required (see, in detail, chapter 2.3. above) which covers the branches, branch offices and undertakings which belong to this group. However, taking into consideration the meaning and purpose of this provision the group-wide risk assessment may only relate to branches and undertakings which are subject to anti-money laundering obligations at the location of their registered office.

In this respect, the parent undertaking must produce and update a group-wide risk assessment which includes, and is based upon, the risk assessments of the branches, branch offices and undertakings in Germany and other countries which are subject to group obligations. In this regard, the parent undertaking must also assess the risk that a business activity performed by the branches, branch offices and undertakings constitutes, or may constitute, for the group as a whole.

The current group risk assessment which is to be prepared and the group-wide internal safeguards must be approved by the member of the management within the meaning of section 4 (3) of the GwG designated at the parent undertaking.

Group-wide measures

On the basis of the group-wide risk assessment, the parent undertaking must implement the necessary measures and obligations for all branches, branch offices and undertakings which are subject to group obligations for which it is legally possible, by virtue of its participating interest or due to other agreements, for it to ensure valid implementation of these obligations and measures.

Consistent group-wide safeguards

“Consistent group-wide” does not mean that the same safeguards within the meaning of section 6 (1) and (2) of the GwG apply for all branches, branch offices and undertakings which are subject to group obligations, irrespective of which group of obliged entities (e.g. credit institution or insurance undertaking) they belong to. The safeguards to be implemented for the relevant obliged entities must be equally applied within the overall group and irrespective of the location of the branch, branch office or undertaking.

With regard to the details of the consistent internal safeguards under section 6 (1) and 2 of the GwG which must be applied consistently group-wide, cf. no. 3 (internal safeguards).

Appointment of a group anti-money laundering officer

A group anti-money laundering officer and a deputy must be appointed at the parent undertaking. This person will be responsible for devising a consistent group-wide strategy for the prevention of money laundering and terrorist financing and for the coordination and monitoring of its implementation. In accordance with section 9 (1) sentence 4 of the GwG, section 7 (4)-(7) of the GwG applies mutatis mutandis. The general provisions concerning anti-money laundering officers thus apply for the group anti-money laundering officer.

For this purpose, the group anti-money laundering officer must establish binding procedures applicable for all of the undertakings, for implementation of the anti-money laundering obligations in the branches, branch

offices and undertakings which are subject to group obligations in Germany and other countries. He is authorised to issue instructions for the purpose of their implementation.

The parent undertaking must maintain and make effective use of the means and procedures which are required for group-wide implementation of the tasks of the group anti-money laundering officer.

Within the scope of his tasks relating to the branches, branch offices and undertakings belonging to the group in Germany and other countries, the group anti-money laundering officer must obtain information on their compliance with anti-money laundering obligations on an ongoing basis. He must moreover in particular regularly – also through on-site visits – establish that the obligations under section 9 of the GwG are complied with and that the measures which are required according to this provision are enacted and effectively implemented. Where necessary, he must also enact measures applicable for all of the undertakings.

The parent undertaking must ensure that the group anti-money laundering officer or the employees commissioned by him receive the authorisation to require that audit reports – where applicable – prepared by the internal auditors and by external auditors (insofar as these reports include comments on compliance with anti-money laundering obligations and the implementation of corresponding measures) be presented to them in relation to all branches, branch offices and undertakings which are subject to group obligations in Germany and other countries. This authorisation includes the taking of samples without restrictions within the scope of the above-mentioned tasks. The parent undertaking must also ensure that, within the scope of fulfilment of their tasks, the group anti-money laundering officer, the employees commissioned by him and the group's internal auditors have group-wide access to all information, documents and files which are relevant for fulfilment of the anti-money laundering obligations, in particular concerning all customers, beneficial owners and all business relationships and transactions within the framework of such business relationships or outside such business relationships.

The group anti-money laundering officer must regularly notify the designated member of the management within the meaning of section 4 (3) of the GwG of the parent undertaking of group-wide implementation and compliance with the anti-money laundering obligations. In the event of problems arising in this respect, where necessary he must do so in writing.

Procedures for the exchange of information within the group

The parent undertaking must ensure that the branches, branch offices and undertakings belonging to the group in Germany and other countries are able to provide the group anti-money laundering officer and – where applicable – the internal auditors with the information necessary for fulfilment of the obligations under section 9 (1) of the GwG and for group-wide risk management and to respond to relevant inquiries promptly. This information includes customer data, information on envisaged or submitted suspicious transaction reports (cf. section 47 (2) no. 2 and 3 of the GwG) or information concerning contact with financial market supervisory, prosecuting or investigating authorities as well as tax and customs authorities.

The parent undertaking must also ensure that arrangements and procedures are in place which enable a determination of whether a customer maintains accounts or security accounts or business relationships with a branch, branch office or undertaking in Germany or other countries which belongs to this group.

Measures for the protection of personal data

Irrespective of the above obligation, the parent undertaking must ensure that the regulations on the protection of personal data applicable for the respective branches, branch offices and undertakings belonging to the group are complied with within this group.

Pursuant to section 9 (5) sentence 2 of the GwG, the obligation to establish procedures for the exchange of information within the group and precautions for the protection of personal data also applies to group undertakings whose parent undertaking is not subject to the obligations under the GwG.

Requirements in relation to undertakings subject to group obligations in other countries

Irrespective of the provision in section 9 (2) of the GwG, the parent undertakings should ensure that the third-country branches and undertakings which are subject to group obligations comply with the national legal provisions on the prevention and combating of money laundering and terrorist financing which apply for them there.

Insofar as branches or undertakings which are subject to group obligations are located in a third country in which less stringent requirements apply in relation to measures for the prevention of money laundering or terrorist financing, pursuant to section 9 (3) of the GwG the parent undertaking must enact the above-mentioned group-wide measures and ensure their effective implementation, insofar as this is permitted under the law of this third country.

If the implementation of these measures is not permitted under the law of this third country or de facto cannot be achieved, the parent undertaking must ensure that its branches or undertakings which are subject to group obligations and are seated there implement additional measures without delay in order to effectively address the resulting risk of money laundering and terrorist financing and to notify BaFin of the additional measures enacted by these branches or undertakings.

For instance, additional measures may include:

- limiting the nature and scope of the supply of financial products and services to scenarios subject to a low level of risk or a low level of impact on the group risk for money laundering or terrorist financing,
- prohibiting other branches, branch offices and undertakings belonging to the group from reverting to branches or undertakings in the relevant third country for implementation of customer due diligence obligations,
- enhanced checks, on-site visits or reviews in relation to effective identification, assessment and handling of money laundering and terrorist financing risks,
- the requirement for superiors' consent for the establishment or continuation of business relationships or occasional transactions subject to a higher level of risk,
- the obligation to determine the source of wealth and, where applicable, the use of assets used within the scope of a business relationship or an occasional transaction,
- the obligation to implement enhanced continuous monitoring of business relationships and of transactions implemented within the scope of these business relationships, so as to establish certainty in relation to potential money laundering or terrorist financing risks,
- the exchange of information with the parent undertaking regarding suspicious transaction reports and the concrete circumstances giving rise to them, insofar as this is permitted under the law of the relevant third country,

- enhanced continuous monitoring of customers and, where possible, their beneficial owners, which are known to be the subject of suspicious transaction reports submitted by other undertakings belonging to this group,
- the establishment of effective protection systems and controls to identify and report suspicious transactions,
- ensuring that the risk profiles and the information obtained within the scope of the customer due diligence obligations in relation to customers are up-to-date and, as far as possible, secure, at least for the duration of a business relationship.

In the event that the measures enacted pursuant to section 9 (1) and (3) sentence 2 no. 1 of the GwG are not sufficient in order to effectively address the risks in relation to money laundering and terrorist financing, BaFin will order the parent undertaking to ensure that its subordinate undertakings, branches and branch offices in the relevant third country may not establish or continue any business relationship or implement any transactions. Where a business relationship already exists, BaFin will order the parent undertaking to ensure that this business relationship is terminated or otherwise ended, irrespective of any other statutory provisions or contractual provisions (cf. section 9 (3) sentence 3 of the GwG).

BaFin must adhere to the principle of proportionality with regard to the obligation not to implement transactions, to terminate existing business relationships or to end them otherwise. The requirements applicable for the fulfilment of these measures within the scope of the decision on the non-implementation of a transaction or the termination of a business relationship are not to be interpreted on the basis of formally and schematically prescribed criteria and must instead be interpreted in the light of the risk-based approach. The obligation not to implement a transaction or to terminate a business relationship (section 10 (9) of the GwG) will apply whenever the measures which are necessary under section 9 (1) and (3) sentence 2 no. 1 of the GwG but cannot be carried out in the relevant third country on legal or factual grounds should be considered to be material.

12. Forwarding of information, section 47 of the GwG

In accordance with Art. 39 of the amended Fourth Money Laundering Directive, this provision is intended to prevent the person affected by a report under section 43 (1) of the GwG from learning of the envisaged or submitted report and/or of the investigation initiated due to such a report. This is intended to prevent measures from being taken in order to flee from government prosecuting authorities and – in case of money laundering – to prevent government prosecuting authorities from confiscating the proceeds of such persons' crimes. Accordingly, in principle this provision prohibits notification of the contracting partner, the customer for the transaction or other third parties regarding the envisaged or submitted report under section 43 (1) of the GwG and/or the investigation which has been initiated on account of suspicion of a criminal offence.

This prohibition may be disregarded for the purpose of legitimate forwarding of information pursuant to section 47 (2) of the GwG subject to certain preconditions, in the following cases:

- forwarding of information to government bodies and supervisory authorities (in Germany and other countries) (subsection 2 no. 1),
- forwarding of information between obliged entities under section 2 (1) nos. 1-3 and 6-8 of the GwG which belong to the same group (subsection 2 no. 2),

- forwarding of information between obliged entities under section 2 (1) nos. 1 to 3 and 6 to 8 of the GwG and their subordinate group undertakings in third countries, provided that the group is subject to a group programme under section 9 of the GwG (subsection 2 no. 3),
- forwarding of information between obliged entities under section 2 (1)-(3), (6), (7), (9), (10) and (12) of the GwG in cases which relate to the same contracting party and the same transaction in which two or more obliged entities are involved and if these obliged entities are seated in an EU Member State or a third country in which the requirements for a system for the prevention of money laundering and terrorist financing comply with the requirements set out in the Fourth Money Laundering Directive, the obliged entities belong to the same professional category and the obliged entities are subject to analogous obligations with regard to professional secrecy and the protection of personal data.

Under section 47 (3) of the GwG, government bodies are likewise prohibited from passing on their knowledge of a report under section 43 (1) of the GwG. This information may only be passed on with the approval of the FIU.

Insofar as – particularly in those cases where the FIU temporarily suspends a transaction due to a suspicious transaction report – the question arises of whether the obliged entity might be guilty of “tipping off” if it notifies its counterparty of the suspension of this transaction by the FIU, the following must be taken into consideration:

According to the ratio legis of section 47 of GwG, in principle any information must be kept secret which, if it were to become known, would enable the affected person to “protect” himself and/or affected monies in good time. On the basis of a strict interpretation of section 47 (1) of the GwG, this will apply even where the obliged entity “only” provides notification that the FIU has suspended the transaction. For this would incidentally reveal the information that a suspicious transaction report had been submitted regarding the matter in question. In view of the FIU’s reservation of consent regarding the forwarding of information which is prescribed in section 47 (3) of the GwG, at the present time the FIU should therefore itself provide the relevant information. To be sure, this provision only expressly stipulates this reservation of consent in relation to government bodies. However, the legal concept encapsulated in this rule should be transferred to the present circumstances. Reference is made to the relevant notices provided by the FIU in this respect, which have been placed on its website.

13. Cooperation obligations, section 52 of the GwG

Section 52 of the GwG only applies in relation to obliged entities under the supervision of BaFin insofar as their supervisory work relates to the obliged entities indicated in section 50 no. 1 (g) (in particular, agents and e-money agents) and (h) (independent businesspersons who distribute or re-exchange the electronic money of a CRR credit institution pursuant to section 1 (2) no. 2 of the ZAG) of the GwG.

The specific cooperation obligations laid down in the relevant technical legislation (e.g. section 44 of the KWG for credit institutions) apply in other respects.

13.1 Subject matter of the cooperation obligation/non-remuneration

All of the (legal and natural) persons indicated in section 52 (1) of the GwG must, at the request of the supervisory authority which is competent for them (section 50 of the GwG) as well as the persons and institutions of which the supervisory authority avails itself for the performance of its tasks (e.g. auditors),

- provide information about all business affairs and transactions and
- present documents which are relevant to compliance with the requirements laid down in this Act.

This information and these documents must be provided free-of-charge.

13.2 Access and inspection right/obligation to tolerate

The personnel of the supervisory authority and the other persons of whom the supervisory authority avails itself for the performance of its audit under section 51 (3) of the GwG are entitled, within the scope of their audit, to enter and inspect the business premises of the obliged entity during normal business hours. The concerned parties must tolerate these measures.

13.3 Right to refuse to provide information/obligation to submit documents

The right to refuse to provide information is set out in section 52 (4) of the GwG. Even within the scope of the measures under section 52 (1) of the GwG, a party which is obliged to provide information in principle may refuse to provide information in response to questions which, if he were to answer them, would expose himself or a relative (section 383 (1) nos. 1-3 of the ZPO) to the risk of criminal prosecution or proceedings under the German Act on Breaches of Administrative Regulations (*Gesetz über Ordnungswidrigkeiten* – OWiG).

However, only this individual natural person may cite this right to refuse to provide information, and only if he personally – either as an obliged entity, as the member of a governing body or as an employee – or a relative risks criminal prosecution or proceedings under the OWiG. A legal person or a partnership which is an obliged entity does not have this right; it is thus obliged to provide information, even if the member of a governing body may cite the right to refuse to provide information.

While the party which is obliged to provide information has the right to refuse to provide information under section 52 (4) of the GwG, section 52 (4) of the GwG does not include any corresponding stipulation regarding a refusal to submit documents. This provision is unambiguous in this respect. Nor can corresponding supplementation of this provision within the scope of application of the law be justified methodologically, even in the context of the possible risk of criminal proceedings.

A natural person – as an obliged entity, a member of a governing body or as an employee – may thus also be obliged on the basis of section 52 (4) of the GwG to hand over certain documents, even if, in handing over these documents, he would expose himself to the risk of criminal prosecution or administrative offence proceedings.

The same principles as in section 44 (6) of the KWG therefore apply for the GwG.