Federal Ministry
of Finance

Sector-specific risk assessment
2020

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Risk assessment of possible specific vulnerabilities of legal persons and other legal arrangements that could make them susceptible to being misused for ML/TF purposes

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List of terms and abbreviation

AFCA	Anti Financial Crime Alliance
AG	Aktiengesellschaft (stock corporation)
AIF	alternative investment funds
AöR	Anstalt öffentlichen Rechts (corporation or institution governed by public law)
BaFin	Bundesanstalt für Finanzdienst-leistungsaufsicht (Federal Financial Supervisory Authority)
BfV	Bundesamt für Verfassungsschutz (Federal Office for the Protection of the Constitution)
BKA	Bundeskriminalamt (Federal Criminal Police Office)
BKAmt	Bundeskanzleramt (Federal Chancellery)
BMI	Bundesministerium des Innern, für Bau und Heimat (Federal Ministry of the Interior, Building and Community)
BMJV	Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry of Justice and Consumer Protection)
BMWi	Bundesministerium für Wirtschaft und Energie (Federal Ministry for Economic Affairs and Energy)
BND	Bundesnachrichtendienst (Federal Intelligence Service)
BNotK	Bundesnotarkammer (Federal Chamber of Civil Law Notaries)
BVA	Bundesverwaltungsamt (Federal Office of Administration)
eG	eingetragene Genossenschaft (registered cooperative)
e.V.	eingetragener Verein (registered association)
FATF	Financial Action Task Force
FIU	Zentralstelle für Finanztransaktions-untersuchungen (Financial Intelligence Unit)
gGmbH	gemeinnützige Gesellschaft mit beschränkter Haftung (non-profit limited liability company)
GmbH	Gesellschaft mit beschränkter Haftung (limited liability company)
GmbH & Co. KG	Gesellschaft mit beschränkter Haftung & Co. Kommandit-gesellschaft (limited partnership with a limited liability company as a general partner)
InvAG	Investmentaktiengesellschaft (investment stock corporation)
InvKG	Investmentkommandit-gesellschaft (limited investment partnership)
KG	Kommanditgesellschaft (limited partnership)
KVG	Kapitalverwaltungsgesellschaft (asset management company)
Ltd.	Limited
ML	money laundering
MTF	Multilateral Trading Facility
NPO	non-profit organisation
NRA	National Risk Assessment
OHG	Offene Handelsgesellschaft (general partnership)
OTF	Organised Trading Facility
SE	Societas Europaea
TF	terrorist financing
UG	Unternehmergesellschaft (entrepreneurial company)
VVaG	Versicherungsverein auf Gegenseitigkeit (mutual insurance association)

1. Introduction

Legal entities such as companies, trusts, foundations, partnerships and other types of legal person and legal arrangement play an important role in the economy as well as in society. At the same time, the Financial Action Task Force's (FATF) experiences at the international level have shown that under certain circumstances these entities can be misused for illegal purposes such as money laundering (ML), terrorist financing (TF) and other illegal activities. Building on the findings of the 2019 National Risk Assessment (NRA), this sector analysis will investigate the vulnerability of legal persons and other legal arrangements established in Germany under German law to be misused for ML or TF purposes. In line with the risk-based approach, this sector-specific risk assessment is limited to the most common legal forms in Germany, which can be found in the table in figure 1. Although other legal forms exist in Germany, many of these are variations of the legal forms found in figure 1. Research conducted at the start of this sector analysis showed that the TF risks associated with legal entities in Germany were concentrated particularly on legal forms that are prevalent in the non-profit organisation (NPO) sector. Since the NPO sector analysis provides an in-depth examination of the TF risks connected with associations (*Vereine*), foundations (*Stiftungen*) and non-profit limited liability companies (*gemeinnützige Gesellschaften mit beschränkter Haftung, gGmbHs*), this analysis focuses mainly on ML risks.

German law distinguishes between legal persons under public and private law. This risk assessment focuses on legal persons under private law, taking into account the FATF's risk-based approach. A legal person is an entity with legal rights and obligations. The status "legal person" is usually attained through registration in a public register. In Germany, legal persons include corporations (*Kapitalgesellschaften*) and cooperatives (*Genossenschaften)* that are focused primarily on making a profit, and associations and foundations that pursue primarily not-for-profit objectives. In order to do justice to the diversity of legal forms in Germany – particularly the most common ones – this risk assessment examines not only legal persons under private law but also partnerships.

Corporations are legal persons that have a legal personality separate from their shareholders. Limited liability companies (*GmbHs)* and stock corporations (*Aktiengesellschaften,* AGs) are corporations whose shareholders are not liable for the company's debt. The same applies to cooperatives and registered associations (*eingetragene Vereine,* e. V.s), whose members are not personally liable for the debts of the cooperative or association. Corporations, cooperatives and registered associations can, as legal persons, have their own assets, create their own rights and obligations and participate as a party in legal proceedings. Alongside corporations, partnerships also play a significant role in the German economy, although they do not count as legal persons. Partnerships are distinguished by the fact that – unlike corporations – at least one of the partners is liable with all of his or her assets. Although the legal institution of the trust does not exist under German law, there are other similar legal arrangements, whereby assets are held and managed by an administrator in the interests of the former owner of the assets or in the interests of third parties. The specifics of these arrangements under German law will be addressed in a separate chapter.

Figure 1: Distribution of legal forms in Germany (not incl. GbRs)

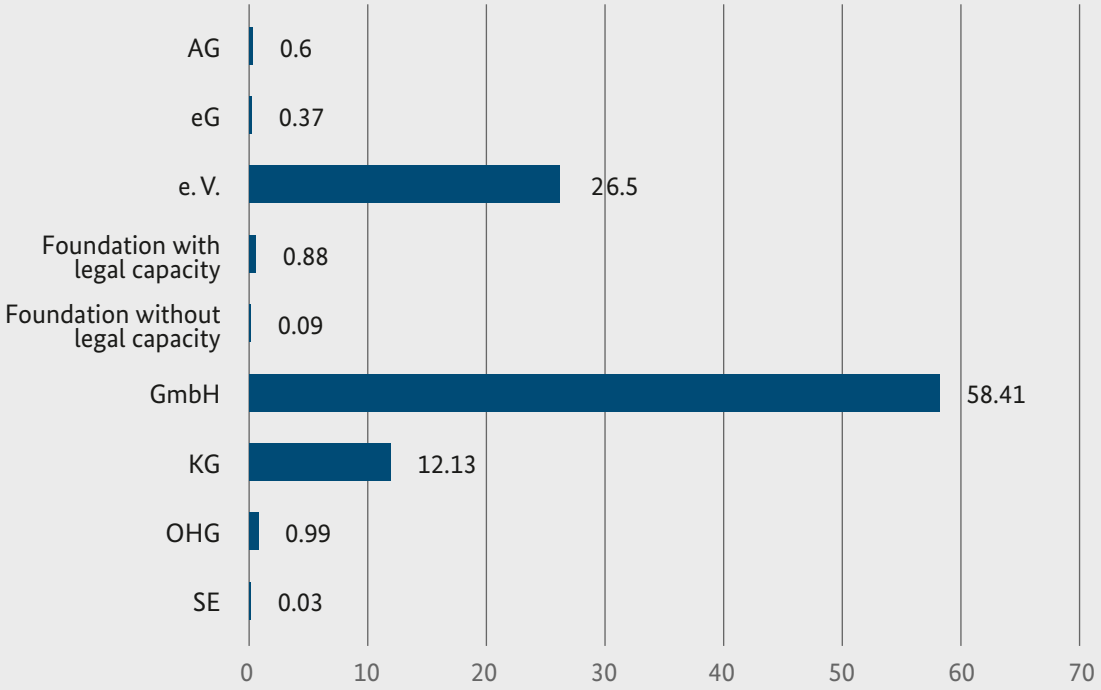
Legal persons, partnerships and other legal arrangements in Germany	Number
Corporations	
Limited liability company (Gesellschaft mit beschränkter Haftung, GmbH), including entrepreneurial company (limited liability) (Unternehmergesellschaft, UG (haftungsbeschränkt))	1,353,543
Stock corporation (Aktiengesellschaft, AG)	14,007
Societas Europaea (SE)	665
Legal form under foreign law, in the commercial register section B (HRB) (e.g. Limited Company (Ltd.))	8,328
Cooperatives	
Registered cooperative (Eingetragene Genossenschaft, eG)	8,674
Partnerships	
Limited partnership (Kommanditgesellschaft, KG), incl. GmbH & Co. KG	281,049
General partnership (Offene Handelsgesellschaft, OHG), incl. GmbH & OHG	22,914
Partnership company (Partnerschaftsgesellschaft, PartG)	16,259
Partnership under foreign law, in the commercial register section B (HRB)	337
Associations	
Registered association (eingetragener Verein, e. V.)	612,996
Other associations	190
Foundations	
Foundation with legal capacity under private law	20,379
Other legal arrangements	
Foundation without legal capacity	1,997

Source: Transparency register (as at: 1 July 2020)

With a gross domestic product of €3,436.0 billion in 2019,[1] the Federal Republic of Germany is the largest economy in the European Union and the fourth largest in the world. At the same time, Germany is a cosmopolitan, politically and economically stable country in the geographical heart of Europe with a globally interconnected economy. Germany is highly attractive for investments of all kinds, although this also includes investments with tainted assets. In general, there is a relatively low risk of ML/TF in Germany associated with legal arrangements due to disclosure obligations and the veracity requirements relating to the transparency register. The main entry point is therefore likely to be foreign companies as shareholders. However, this is primarily a foreign risk that materialises in or could have an adverse impact in Germany (meaning Germany is affected only indirectly). Legal persons and other legal arrangements established under foreign law are not taken into account in this risk analysis, even if they conduct economic activities in Germany or have a registered office here. Companies with a registered office in Germany that were established under foreign law are subject to German supervision, but their legal arrangements do not fall under German jurisdiction. Less than 1%

1 Source: Federal Statistical Office (as at: 2019)

Figure 2: Distribution of legal forms in Germany as a percentage (not incl. GbR)



Source: Transparency register (as at: 1. July 2020)

of all legal persons and other legal arrangements registered in the transparency register are entities established under foreign law (cf. figure 1).

The ultimate objective of this analysis is to identify possible weaknesses in the legal framework of legal persons established under German law. This will involve examining the working hypothesis that the legal form of a company alone does not fundamentally give rise to a specific risk of it being misused for ML/TF purposes.

2. Methodology

The risk assessment of the different legal forms is based on a tried and tested "risk formula", whereby the threat situation, combined with possible gaps in the system for preventing ML/TF, results in the actual risk (see figure 3). The evaluation of risk in this assessment is aligned with the requirements of the risk-based approach set out in FATF Recommendation 1. In the context of this assessment, the ML/TF risk is therefore made up of a combination of the respective threat potential and the vulnerability (or susceptibility) of legal persons and other legal arrangements in Germany. The key focus of this assessment is the vulnerability of the legal forms, which are looked at in more detail in chapter 10.1, particularly in relation to possible gaps in the structure of the legal forms that could lead to misuse for ML/TF purposes. The identified vulnerabilities are defined as abstract risks in this assessment. With regards to the threat situation, this risk assessment builds on the findings of the NRA and the NPO sector analysis. Chapter 10.2 looks in more detail at how the specific threat situation of legal forms in Germany, combined with abstract risks, results in the actual risks.

This risk assessment uses the approach illustrated in figure 4. First, the methodology for identifying the above-mentioned risks is explained. This is followed by an overview of the different types, forms and basic characteristics of legal persons and legal arrangements in Germany. This includes a description of the requirements for establishing the respective legal persons as well as details regarding how they are monitored as well as disclosure requirements. The next section focuses in particular on the financial sector due to its importance for ML/TF. Here, legal persons in the financial sector are used to illustrate ML/TF risks in everyday business life. Chapter 9 provides an overview of the tools used in Germany to try and combat the existing ML/TF risks in relation to legal persons. This is followed by an evaluation of the risks of legal persons in Germany in terms of their susceptibility to be misused for ML or TF purposes.

2.1 Risk model

This risk assessment will differentiate between abstract risks that are inherently to be presumed due to the legal structure of the respective legal forms, and risks that have been identified to date in the course of prosecutions and by judicial authorities. The abstract risks are explored in chapter 10.1, drawing on the chapters describing the structure of corporations and partnerships as well as legal arrangements. A distinction is made here between exogenous and endogenous risks. If a legal form is used disproportionately often for ML or TF purposes, it is not necessarily due to the legal structure of the legal form, in other words exogenous reasons. The connection between the legal form and ML can also be due to endogenous reasons. This means that the legal form was not chosen specifically because of its legal structure, but rather because it is a common legal form in Germany, or the most prevalent

Figure 3: Risk formula

Figure 4: Methodology

one in a sector that is particularly susceptible to ML activities. A company with this legal form will consequently arouse less suspicion. In this case, the well-known basic rule of statistics applies: correlation does not imply causation. In other words, the frequent occurrence of a legal form in connection with ML- or TF-related crimes does not necessarily mean that the legal structure of this legal form is what makes it particularly susceptible to misuse for ML/TF purposes. If the vulnerability of a particular legal form is due to endogenous risks, it means that the underlying risk is not connected to the legal form. In that case, a risk assessment is based less on the specific legal structure of the legal form than on the underlying risk – for example if a company has links to another country, if it is cash intensive, if the sector is susceptible to ML/TF, etc. Consequently, this risk assessment focuses on the exogenous risks that can be traced to the legal structure of a legal form.

In chapter 10.1, the abstract ML/TF risks of the respective legal forms are assessed on the basis of expert evaluations. The evaluations are based on consultations with experts and constitute substantiated assumptions regarding the vulnerability of legal forms to be misused for ML/TF purposes. These assumptions are distinct from the actual risks. In order to evaluate as objectively as possible the risks that arise exclusively from the legal structures of the respective legal forms, the assessment is carried out using a method based on John Rawls' "veil of ignorance" thought experiment, which assumes a complete lack of knowledge of the risks that in fact materialise. The experts know only about the fundamental ML/TF risks and project these onto the structures of the legal persons and other legal arrangements in Germany. If an evaluation of the legal forms is made in the process of judging the abstract risks, then it is in terms of the assumed risks of the respective legal form.

For this purpose, the involved institutions rated selected legal forms on a scale of one to five in relation to specific risk dimensions that play a role for money laundering and terrorist financing. Furthermore, the consulted experts gave an overall risk rating for each of the legal forms. This is a separate rating and does not constitute an average of the ratings of the respective risk dimensions. The model is structured in this way because the ratings for the individual risk dimensions are not based on empirical data and the significance of the risk dimensions varies. Therefore, it did not seem appropriate for the overall rating to constitute an average of the individual risk dimensions. The risk matrices in chapter 10.1 are based on the assessments made by the involved authorities and represent an average of the ratings they gave.

The extent to which these assumptions correspond to the evaluations of the actual risk is analysed in chapter 10.2. Empirical evidence was provided for this purpose among other things by a report commissioned by the Federal Ministry of Finance (BMF) in 2017, which investigates money laundering convictions in Germany and, in the process, looks at the involvement of legal persons. The report also analyses suspicious transaction reports (STRs) submitted to the German Financial Intelligence Unit (FIU) in relation to the involvement of legal persons and other legal arrangements. An important source of information for assessing the de-facto risks of legal persons were interviews with Länder and national police authorities, with public prosecutor generals, the FIU, supervisory authorities in the financial and non-financial sector and with intelligence services. In order to evaluate the de-facto risks, the

original intention was to also carry out an assessment of the legal forms in the form of a risk matrix by the involved authorities, but this plan was abandoned due to lack of adequate evidence. As with the assessment of the abstract risk of legal persons and other legal arrangements being misused for ML/TF purposes, distinguishing between endogenous and exogenous risks in the assessment of de-facto risks is of fundamental importance. Since endogenous risks are caused by factors that are not inherent to the legal features of the legal form, the de-facto risk assessment relates to exogenous risks only.

As a rule, when assessing ML-related risks, the underlying motivation must be taken into account: this involves transferring the tainted assets into the legal economy with the aim of securing a claim on liquid funds that cannot be connected to previous crimes. With regard to the risk assessment of legal persons, it is therefore necessary to assess which legal forms are susceptible to being misused for ML purposes during the transfer of ownership, in terms of the transparency of the transactions and with regards to concealment through chains of ownership.

The three-stage money laundering model (see figure 5) serves to structure ML risks. The first stage is about integrating illegally obtained money into the legal economy. This is done, for example, by purchasing or setting up a company. In the latter case, such companies are usually bogus operations that offer services to private customers, making it difficult for the tax authorities to verify the volume of transactions. Another way of integrating tainted money into the legal economy is by purchasing real estate. As a rule, the risk assessment of a specific legal form should differentiate between risks relating to the creation of a company and risks relating to the transfer of ownership rights to an existing company. In the former case, if the requirements to establish a particular legal form are low (e.g. merely having enough money for the equity), and it is possible to set up a company with this legal form quickly and cost-effectively, then the risk levels are high. In the case of existing companies, the legal frameworks for acquiring ownership need to be investigated in relation to stage 1 of money laundering.

The second stage of money laundering describes the process of layering, the purpose of which is to conceal the origins of the tainted money. A particularly effective way of doing this is through international transactions. In this scenario, elaborate schemes involving chains of shell companies come into play, whereby a legal person in one jurisdiction is the owner of a legal person in another jurisdiction, who is the owner of a legal person in a third jurisdiction, etc. If the ownership chain ends in a trust which was set up on the legal basis of a foreign jurisdiction and which is based in a third country, it becomes very difficult to identify the actual beneficial owner. This phenomenon also comes up in connection with the de-facto risks (see chapter 10.2.1), even though the susceptibility of foreign legal forms is not a subject of this risk assessment.

Figure 5: The three stages of money laundering

The third stage of money laundering, integration, is about legitimising the tainted money. In other words, the aim is to give the impression that the illegally attained money was legally generated. A widespread method of concealment is through fake transactions from business activities. Consequently, legal persons that are not profit-driven are less at risk of being misused for money laundering. Similar to stage 1, the transfer of property rights to a company, together with the legislative requirements for the process of extracting profits are of particular significance for the risk assessment. Ultimately, the offender has the intention not only of transferring illegally attained funds as inconspicuously as possible into documented ownership rights, but also of recovering these funds.

The criminal motives behind terrorist financing are different in part to those behind money laundering, which results in partially different risk drivers for the respective legal forms. From a criminal standpoint, terrorist financing can be summed up as the provision of assets (including legal assets) to terrorist persons or organisations to carry out terrorist activities.[2] As with money laundering, terrorist financing can also be divided into three stages.

2 Section 89c of the German Criminal Code (*Strafgesetzbuch*, StGB)

The first stage of terrorist financing relates to the raising of assets that will be used at a later date to finance terrorist activities. It should be noted, however, that these assets are seldom used to actually carry out terrorist attacks, but primarily to support and maintain terrorist associations. A widespread related phenomenon is fundraising, which results in particular risks for non-profit entities. If a legal form is established with the intention of financing terrorism, what makes it attractive from the perspective of a criminal is that the requirements regarding a possible capital contribution and which the involved parties are subject to are minimal. The second stage describes the movement of assets that are intended for terrorist purposes at a later date. The methods used to conceal the movement of money include nominees and hawala banking, whereby transactions are carried out outside of the banking system. As illustrated in the separate NPO sector analysis, during this stage of terrorist financing, aid organisations can be misused for the transfer of assets to target countries. The third stage of terrorist financing relates to the transfer of assets to terrorist organisations or lone actors. Generally speaking, legal forms used by non-profit organisations are particularly susceptible to misuse for TF purposes. For this reason, in its analysis of TF risks, this sector analysis focuses on legal forms used by charitable organisations.

Figure 6: The three stages of terrorist financing

2.2 Involved authorities

This sectoral risk assessment was conducted by different departments under the direction of the BMF and was prepared on the basis of the findings and evaluations of a number of different competent authorities. The results of the assessment were coordinated among the relevant government departments. The following institutions were involved:

Federal government:
- Federal Chancellery (BKAmt)
- Federal Ministry of Finance (BMF)
- Federal Ministry of Justice and Consumer Protection (BMJV)
- Federal Ministry of the Interior, Building and Community (BMI)
- Federal Ministry for Economic Affairs and Energy (BMWi)

Supervisory authorities (financial sector):
- Federal Financial Supervisory Authority (BaFin)

Supervisory authorities (DNFBP sector):
- Regierungspräsidium Freiburg (Freiburg district council)

Central Customs Authority:
- Financial Intelligence Unit (FIU)
- Central Office of the German Customs Investigation Service (ZKA)

Intelligence services:
- Federal Office for the Protection of the Constitution (BfV)
- Federal Intelligence Service (BND)

Police authorities:
- Federal Criminal Police Office (BKA)
- North Rhine-Westphalia Criminal Police Office

Judicial system:
- Celle Prosecutor General's Office
- Frankfurt Prosecutor General's Office

Notaries:
- Federal Chamber of Civil Law Notaries (BNotK)

3. Corporations

This chapter presents the legal arrangements of the most important legal entities under private law in Germany, whereby the importance of a legal form is measured by its prevalence. The subchapters on the various legal forms are structured to provide an overview of each legal form and to highlight the specific parameters that might make the legal form more susceptible to misuse for ML purposes. The requirements for founding the respective legal forms – in terms of the number of shareholders required, the amount of capital needed and the formalities that can influence how long it takes to set up a specific legal entity – are also examined. The subchapters also briefly outline which control mechanisms the individual legal entities are subject to, including disclosure requirements.

3.1 Limited liability company *(Gesellschaft mit beschränkter Haftung, GmbH)* / entrepreneurial company (limited liability) *(Unternehmensgesellschaft, UG (haftungsbeschränkt))*

GmbHs (limited liability companies) are by far the most common form of corporation in Germany. In July 2020, there were around 1.35 million companies with the legal form of a GmbH in the transparency register. The legal provisions relating to GmbHs are set out in the Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, GmbHG). A UG (limited liability) is a subform of the GmbH. The main way in which it differs from a GmbH is that the minimum share capital requirements are not as high. A UG (limited liability) is subject to the same rules as a GmbH insofar as section 5a of the Limited Liability Companies Act (GmbHG) does not contain specific provisions for the UG (limited liability).

A GmbH is a company that has a legal personality separate from its individual shareholders. The shareholders are participants in the GmbH as owners of the shares. They are not personally liable for the company's debts, as a company is liable towards its creditors only with its assets (section 13 (2) of the Limited Liability Companies Act (GmbHG)). In order to protect its creditors, strict requirements regarding the provision of capital must be fulfilled when establishing a GmbH. The articles of association must contain specific information and be notarised (section 2 (1) sentence 1 and section 3 of the Limited Liability Companies Act (GmbHG)). A GmbH becomes a legal entity in its own right when it is entered in the commercial register. This means that a GmbH has rights and obligations in its own right; for example, it is able to purchase property and other real rights (section 13 (1) of the Limited Liability Companies Act (GmbHG). By law, a GmbH is deemed to be a commercial company as defined in the Commercial Code (*Handelsgesetzbuch*, HGB) (section 13 (3) of the Limited Liability Companies Act (GmbHG) in conjunction with section 6 (2) of the Commercial Code (HGB)).

As a legal person, a GmbH is independently structured with autonomous organs. The shareholders' meeting is the highest decision-making body, while the company's directors constitute its management and representative body. With a GmbH, a controlling body in the form of a supervisory board is generally not required, but may be stipulated in the articles of association if the company so decides (optional supervisory board); it is mandatory only in specific cases in accordance with the right of co-determination (*Mitbestimmungsrecht*) and the One-Third Participation Act (*Drittelbeteiligungsgesetz*, DrittelbG).

Founding a GmbH

Articles of association; entry in the commercial register

A GmbH is established with the drawing up of the articles of association (section 2 of the Limited Liability Companies Act (GmbHG)). The articles of association must be notarised and signed by all shareholders (section 2 (1) of the Limited Liability Companies Act (GmbHG)). The articles of association may be signed by authorised representatives only on the basis of a power of attorney established or authenticated by a notary (section 2 (2) of the Limited Liability Companies Act (GmbHG)). A GmbH can be formed for any purpose permitted by law (section 1 of the Limited Liability Companies Act (GmbHG)).[3] The minimum requirements of the articles of association are listed in section 3 of the Limited Liability Companies Act (GmbHG). The managing director(s) must apply to have the GmbH entered in the commercial register. Only once it has been entered in the commercial register does the GmbH exist as such (section 11 (1) of the Limited Liability Companies Act (GmbHG)) and the limited liability vis-à-vis creditors with the company's assets come into force (section 13 (2) of the Limited Liability Companies Act (GmbHG)). An application to be entered in the register can only be made after the minimum share capital has been paid (section 7 (2) of the Limited Liability Companies Act (GmbHG)). The application must be submitted electronically in an officially certified form (section 12 (1) of the Commercial Code (HGB)), and pursuant to section 378 (3) sentence 2 of the 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 Gerichtsbarkeit,* FamFG) must be submitted via a notary.

Minimum number of shareholders

A GmbH may be formed by one person or several persons (section 1 of the Limited Liability Companies Act (GmbHG)). Shareholders may be all kinds of German or foreign entities (natural or legal persons or partnerships with legal capacity).

Minimum capital

The minimum share capital required to establish a GmbH is €25,000 (section 5 (1) of the Limited Liability Companies Act (GmbHG)). It is made up of the contributions of the individual shareholders. At least half of the share capital must have been paid in before the application for entry in the commercial register is filed and this must be assured by the managing directors (section 8 (2) of the Limited Liability Companies Act (GmbHG)). An inaccurate assurance is punishable by law (section 82 (1) no 1 of the Limited Liability Companies Act (GmbHG)). Different provisions apply for an entrepreneurial company with limited liability (UG (limited liability)). Pursuant to section 5a (1) of the Limited Liability Companies Act (GmbHG), a UG (limited liability) can be established with less initial share capital. However, pursuant to section 5a (3) of the Limited Liability Companies Act (GmbHG), the company must retain its profits in order to ensure that the UG (limited liability) achieves a higher equity base within a few years. As soon as the UG (limited liability) has reached a share capital of at least €25,000, it can change its legal status to a GmbH.

3 Legal provisions that stipulate that certain business purposes may not be pursued in the legal form of a GmbH are unaffected by this, e.g. the running of a building society (*Bausparkasse*) (section 2 (1) of the Building and Loan Associations Act (*Bausparkassengesetz*, BausSparkG)), an insurance company (section 8 (2) of the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*, VAG)) or a pharmacy (section 7 of the Pharmacies Act (*Apothekengesetz*, ApoG)).

Membership in a GmbH

Conditions of membership; list of shareholders

Membership in a GmbH is conditional upon either a) participation in the founding of the company by signing the articles of association and acquiring shares in the company, b) acquiring a share at a later date by means of transfer (section 15 (3) of the Limited Liability Companies Act (GmbHG)) or through inheritance, or c) acquiring a share in the company in the course of a capital increase (section 55 et seqq. of the Limited Liability Companies Act (GmbHG)).

When founding a GmbH, the managing directors must create a list of shareholders and submit this to the commercial register for publication (section 8 (1) no 3 of the Limited Liability Companies Act (GmbHG)). The list of shareholders must indicate the family name, given name, date of birth and place of residence of every shareholder who is a natural person. It must also indicate the nominal values and serial numbers of the company shares which the shareholder has acquired, as well as the shareholder's percentage interest in the share capital based on the nominal value of each respective share. If a shareholder is itself a company, then in the case of a registered company the list must indicate the company's business name, registered office, the register in which it is entered and the number of the entry in the register. If it is a non-registered company, the list must indicate the company's shareholders including family name, given name, date of birth and place of residence. The list of shareholders is recorded in the commercial register and is publicly accessible online (section 9 (1) of the Commercial Code (HGB). The managing directors are also obliged to submit a revised shareholder list to the commercial register whenever there is a change to the composition of shareholders (section 40 (1) of the Limited Liability Companies Act (GmbHG)). If a notary has been involved in making the changes (e.g. in the case of capital increases or the transfer of shares), he or she must draw up the new list and submit it to the commercial register (section 40 (2) of the Limited Liability Companies Act (GmbHG)).

Membership rights

The membership rights of the shareholders of a GmbH include in particular the right to vote at the shareholders' meeting, the right to information and right of inspection, and the entitlement to company profits in proportion to their shares. Unlike in a stock corporation, the shareholders' meeting of a GmbH is also the highest management body and can issue comprehensive instructions to the managing directors. As a rule, each euro of a share is accorded one vote at the shareholders' meeting (section 47 (2) of the Limited Liability Companies Act (GmbHG)). However, the shareholders are free to agree on a different distribution of voting powers in the articles of association (e.g. multiple voting or veto rights).

Transfer of company shares

As a rule, shares in a GmbH are freely transferable and inheritable. However, the transfer must follow specific formal requirements such as the notarisation of the contract by a notary. The articles of association can subject the transfer of shares to certain conditions (restriction on transferability) such as the consent of the shareholders' meeting or the company. An agreement in notarial form is required to establish the shareholder's share transfer obligations as well as for the actual transfer of shares (section 15 (3) and (4) of the Limited Liability Companies Act (GmbHG)). During the notarisation process, the notary establishes the identity of the involved parties by means of official identity documents and fulfils his or her obligations in relation to the Money Laundering Act (*Geldwäschegesetz*, GwG). After every transfer of shares, the notary has to submit an amended list of shareholders to the commercial register. This results in maximum transparency when company shares are transferred.

Control mechanisms in a GmbH

Internal controls by the supervisory board

GmbHs do not generally require a supervisory board. It only becomes mandatory to establish a supervisory board in accordance with legislation governing co-determination if a company usually has more than 500 employees (section 1 (1) no 3 of the One-Third Participation Act (DrittelbG)).[4] In all other cases, establishing a supervisory board is optional and in practice tends to be the exception. However, if a supervisory board is established, for the most part it carries out the same supervisory tasks as the supervisory board of a stock corporation. For more information on optional supervisory boards, see section 52 of the Limited Liability Companies Act (GmbHG); for mandatory supervisory boards subject to co-determination provisions, see section 1 (1) no 3 of the One-Third Participation Act (DrittelbG), section 25 (1) no 2 of the Co-determination Act (*Mitbestimmungsgesetz*, MitbestG), and section 3 (2) of the Act on Employees' CoDetermination Rights in the Supervisory Boards and Boards of Management of Companies in the Mining, Iron and Steel Production Industry (*Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie,* MontanMitbestG).

Transparency by means of the commercial register

The requirement to be entered in the commercial register largely ensures that the persons representing the GmbH use their true identities in any legal transactions, and ensures that any facts entered in the register relating to legal transactions are accurate. The commercial register itself contains the following information about a GmbH:

- the articles of association of the GmbH (company, share capital, company purpose, etc.),
- the managing directors and their powers of representation,
- authorised signatories (*Prokuristen*), if applicable,
- the list of shareholders,
- the opening, suspension or termination of insolvency proceedings,
- the dissolution of the GmbH,
- the termination of the GmbH,
- the existence of possible company agreements (e.g. control agreement, profit transfer agreement).

3.2 Stock corporation *(Aktiengesellschaft, AG)*

The AG (stock corporation) is probably the oldest form of corporation in Germany and attractive in particular for larger publicly held companies, especially capital-market oriented companies. In July 2020, the transparency register contained around 14,000 companies with this legal form. The number of registered AGs has gone down slightly in recent years. The legal provisions governing AGs are set out in the Stock Corporation Act (*Aktiengesetz*, AktG). An AG has its own legal personality (section 1 (1) of the Stock Corporation Act (AktG)) which is separate from the individual shareholders (stockholders). The shareholders have a stake in the AG by holding the shares. They are not personally liable for the company's debts; creditors can only draw on the company's capital to cover liabilities (section 1 (1) sentence 2 of the Stock Corporation Act (AktG)). In order to protect its creditors, founding an AG is subject to stringent conditions. The articles of association must contain specific information and be notarised (section 23 (1) to (4) of the Stock Corporation Act (AktG)). In contrast

4 If a company exceeds the limit of having generally more than 2,000 employees, the statutory requirements of the supervisory board become more stringent. In particular, the board must henceforth be made up of shareholders and employee representatives in equal numbers, cf. section 7 of the Co-determination Act (MitbestG). For coal, iron and steel industry companies, similar requirements apply for companies with usually more than 1,000 employees (sections 1, 3, 4 of the Act on Employees' Co-Determination Rights in the Supervisory Boards and Boards of Management of Companies in the Mining, Iron and Steel Production Industry, *MontanMitbesG*).

to a GmbH, the articles of association must adhere strictly to statutory provisions (section 23 (5) of the Stock Corporation Act (AktG),[5] which means that the founders have considerably less flexibility than in a GmbH.

An AG attains a legal personality of its own when it is registered in the commercial register. This means that the AG itself has rights and obligations; for example, it is able to purchase property and other real rights (section 1 (1) sentence 1 of the Stock Corporation Act (AktG)). It can also hold shares in companies and other associations of persons. By virtue of its legal form, the AG is a commercial company within the meaning of the Commercial Code (HGB) (section 3 (1) of the Stock Corporation Act (AktG) in conjunction with section 6 (2) of the Commercial Code (HGB)), which means that the provisions regarding the commercial and business register, including publication in the registers, apply in particular. As a legal entity, an AG is independently structured with three corporate bodies: the management board as an independent management and representative body, the supervisory board as a controlling body, and the general meeting, comprising all of the shareholders, with decision-making authority only in relation to essential company matters. For AGs, the "third party" (*Drittorganschaft*) principle applies,[6] whereby the members of the management and supervisory boards do not have to be shareholders of the company.

Formation of an AG

Articles of association; entry in the commercial register

An AG is established with the drawing up and notarisation of the articles of association and the acquisition of the shares by the founders (section 29 of the Stock Corporation Act (AktG)). It can be formed for any legally permissible purpose.[7] The minimum requirements of the articles of association are set out in section 23 (3) and (4) of the Stock Corporation Act (AktG). The articles of association must be notarised and signed by all of the founders (section 23 (1) sentence 1 of the Stock Corporation Act (AktG)). The founding documents may be signed by authorised representatives only if they have a power of attorney recorded or certified by a notary (section 23 (1) sentence 2 of the Stock Corporation Act (AktG)). The AG only exists as such after it has been entered in the commercial register (section 41 (1) sentence 1 of the Stock Corporation Act (AktG)). All of the founders and members of the management and supervisory boards must file an application to have the AG entered in the commercial register (section 36 (1) of the Stock Corporation Act (AktG)). The application can only be made once all of the contributions have been paid by the founding shareholders (section 36 (2) of the Stock Corporation Act (AktG)). Applications must be submitted electronically and be officially certified (section 12 (1) of the Commercial Code (HGB)) and must be submitted directly by the notary pursuant to section 378 (3) sentence 2 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG).

Minimum number of shareholders

An AG can be established by one or more persons (shareholders) (section 2 of the Stock Corporation Act (AktG)). Shareholders can be all kinds of German or foreign legal entities (natural or legal persons or partnerships with legal capacity). A shareholder may also be a member of the management board or supervisory board.

5 Vetter, in Henssler/Strohn, *Gesellschaftsrecht* (Company Law), 4th edition 2019, section 23 of Stock Corporation Act (AktG), para. 22.

6 The "third party" (*Drittorganschaft*) principle is explained by Fleischer in: MünchKommGmbHG, 3rd edition 2018, Introduction, para. 25ff.

7 Legal provisions stipulating that certain business purposes may not be pursued in the legal form of stock corporation, e.g. pharmacies, remain unaffected (section 7 of the Pharmacies Act (*Apothekengesetz*, ApoG).

Minimum capital

An AG's share capital must be at least €50,000 (section 7 of the Stock Corporation Act (AktG)) and be made up of the contributions of the individual shareholders. When first registering the company for entry in the commercial register, at least a quarter of the share capital, in the form of cash deposits, must have been paid in and be freely available to the management board. Contributions in kind must be made in full. This must be declared by those registering the company and proof must be provided (section 37 (1) of the Stock Corporation Act (AktG)). The registration court checks whether the contributions have been duly made and are freely available to the management board (section 38 (1) of the Stock Corporation Act (AktG)). The Stock Corporation Act (AktG) also allows the formation of a company based on contributions in kind if they have an ascertainable economic value (section 27 (2) of the Stock Corporation Act (AktG)). The intrinsic value of the contributions in kind must be confirmed by an external auditor responsible for auditing the company's formation (section 33 (2) no 4 and section 34 (1) no 2 of the Stock Corporation Act (AktG)). All documents are filed in the commercial register and are publicly accessible.

Membership in an AG

Conditions of membership; share registers

Membership in an AG is conditional upon either participation in the founding of the company by signing the articles of association and acquiring shares in the company, or acquiring shares at a later date or acquiring new shares in the course of a capital increase (section 182 et seqq. of the Stock Corporation Act (AktG)). If the AG has issued registered shares (section 10 (1) sentence 1 of the Stock Corporation Act (AktG)), the management board is obliged to keep a share register (section 67 (1) sentence 1 of the Stock Corporation Act (AktG)). The share register must contain the name, date of birth, postal address and electronic address of each shareholder as well as that shareholder's number of shares or share numbers and, in the case of par-value shares, their value. The share register is kept by the company and is not publicly accessible. Pursuant to section 67 (2) of the Stock Corporation Act (AktG) only those shareholders registered in the current share register can exercise their rights (e.g. voting rights) in the company, which means that the shareholders have a strong interest in the register being kept up to date. Shareholders therefore have the right at all times to access their personal data which is entered in the company's share register (section 67 (6) of the Stock Corporation Act (AktG)).

Membership rights

The membership rights of the shareholders of an AG notably include the right to vote in the general meeting, certain rights to information and the right to speak at the general meeting, and the right to their share of the net profit.[8] Unlike in a GmbH, the general meeting of an AG is not simultaneously the highest management body and can only decide on matters concerning the company's management if requested to do so by the management board (sections 76 (1) and 119 (2) of the Stock Corporation Act (AktG)). Voting rights are exercised based on the nominal value of the shares, and in the case of no-par-value shares by number (section 134 (1) sentence 1 of the Stock Corporation Act (AktG)). Restrictions on or exclusion from the right to vote are possible only to a very limited extent (sections 134 (1) and 140 of the Stock Corporation Act (AktG)).

Transfer of shares

As a rule, shares are freely transferable and inheritable. It may be set out in the articles of association that the transfer of registered shares is subject to the consent of the company (restriction of transferability, section 68 (2) of the Stock Corpo-

8 Description of the types of membership rights, Heider, in: MünchKommAktG, 5th edition, 2019, section 11, para. 10 et seqq.

ration Act (AktG)). The transfer obligation as well as the transfer of shares are as a rule possible without any requirements as to form.[9] Depending on the type of transfer, the bearer shares or registered shares, as transferable bearer instruments or other transferable papers, are deemed to be cash in accordance with Article 2 no 2 letter (a) of Regulation (EC) No. 1889/2005 and are therefore subject to the monitoring of cross-border movements of cash.

In contrast to registered shares, bearer shares are issued not in the shareholder's name but to the respective bearer. A bearer share is a form of bearer instrument, which means that the owner of the bearer instrument (bearer share) is also entitled to exercise the rights vested in the share and to transfer ownership of the bearer instrument informally through delivery pursuant to section 929 of the Civil Code (*Bürgerliches Gesetzbuch*, BGB).

Control mechanisms in an AG

Internal controls by the supervisory board

Every AG must have a supervisory board with at least three members. Its responsibilities notably include supervising the management of the management board as well as performing controls and audits. The members of the supervisory board may not concurrently be a member of the management board, a permanent deputy of a member of the management board, an authorised signatory (*Prokurist*) or representative authorised to act on behalf of the company (*Handlungsbevollmächtigter*) (section 105 (1) of the Stock Corporation Act (AktG)). The members of the supervisory board are personally liable for their actions (section 116 of the Stock Corporation Act (AktG)).

Transparency through the commercial register

The commercial register ensures a high level of transparency for AGs, in the same way as it does for GmbHs. The nature and accessibility of the commercial register, as well as use of a notary to guarantee the veracity of the information entered in the register, is explained in more detail above. The information contained in the commercial register for an AG is the same as for a GmbH. There are differences as regards the composition of the shareholders; in this respect, AGs ensure transparency in the case of registered shares by means of a share register pursuant to section 67 of the Stock Corporation Act (AktG), and in the case of bearer shares by means of the mechanisms described below.

Regulating the issuance of bearer shares

With the amendment of the Stock Corporation Act (AktG) in 2016, the issuance of bearer shares by non-listed companies became subject to restrictions. Pursuant to section 10 (1) sentence 2, bearer shares can only be issued if the AG is a listed company or if the right of the shareholders to individual share certificates is eliminated and the shares are deposited collectively in one of the three named depositories. The objective of this provision is to create shareholder transparency for investigating authorities. In the case of registered shares this transparency is ensured by means of the share register, and in the case of bearer shares by means of the notification requirements pursuant to section 33 (1) sentence 1 of the Securities Trading Act (*Wertpapierhandelsgesetz*, WpHG) when listing the company on the stock exchange, and furthermore by means of a global certificate, including the custody chain leading up to it as a "trail of evidence".[10]

9 Note on *BHG: Formfreiheit der Übertragung von Namensaktien* (Federal Court of Justice: Freedom of forms of transfer of registered shares), NJW-Spezial 2004, 365.

10 See BeckOGK/Vatter, 1/7/2020, Stock Corporation Act (AktG) section 10, para. 3.

3.3 Societas Europaea (SE)

An SE is a supranational legal form established under EU law, whose structure and way of functioning in all member states of the EU has a uniform starting point pursuant to Regulation (EC) No 2157/2001 (hereafter: SE Regulation) and is aligned with a German AG or equivalent legal form in the respective member state. In that sense it is not a genuinely German legal form. The relevant requirements for establishing and managing an SE with headquarters in Germany can be found in the SE Regulation as well as in the SE Implementation Act (*SE-Ausführungsgesetz*, SEAG); the legal provisions governing AGs apply secondarily (cf. Article 9 (1) letter c of the SE Regulation). In July 2020, the transparency register contained around 665 companies with this legal form.

An SE is a corporation with its only legal personality with a minimum subscribed capital of €120,000 (Article 1 (2) and (3), Article 4 (2) of the SE Regulation) and with liability limited to company assets (Article 10 of the SE Regulation; section 1 (1) sentence 2 of the Stock Corporation Act (AktG)).

Subject to the provisions of Regulation (EC) No 2157/2001, the formation of an SE is governed by the law applicable to stock corporations in the member state in which the SE sets up its registered office (Article 15 (1) of the SE Regulation). However, what makes an SE fundamentally different from other legal forms is that it cannot be established by natural persons. Pursuant to Article 2 of the SE Regulation, an SE can only be formed by certain types of company. An SE can be established in different ways: by merger, formation of a holding SE, formation of a subsidiary SE or by conversion of an existing stock corporation formed under the legislation of the member state into an SE. The formation of an SE is therefore always the result of a restructuring of already existing companies. For an SE registered in Germany, all procedures for its formation require that the respective contracts are notarised (Article 15 (1) of the SE Regulation in conjunction with section 23 of the Stock Corporation Act (AktG), sections 6, 36 and 197 of the Transformation Act (*Umwandlungsgesetz*, UmwG)) and that the company is entered in the commercial register (Article 12 of the SE Regulation), as a result of which the SE actually comes into existence (Article 16 of the SE Regulation). Once it has been entered in the commercial register, the founding of the SE is also publicised in the Official Journal of the EU (Article 13 of the SE Regulation).

With regard to membership and the acquisition of shares in an SE registered in Germany, the same provisions that apply to a German stock corporation largely apply to an SE (cf. Article 5 and 10 of the SE Regulation). In particular this means that shares are freely transferable. Although an SE can only be established by companies, a derivative acquisition of shares in an SE by natural persons is possible. Please refer to the information above on membership rights, the transfer of shares and transparency regarding share ownership in a stock corporation (AG).

An SE has a corporate-like structure. According to Article 38 of the SE Regulation, an SE is made up the following bodies besides the general meeting of shareholders: either a two-tier administration comprising a supervisory body and a management body or a one-tier administration consisting of a single administrative board as the top management and supervisory body. The choice of structure must be stipulated in the articles of association (Article 38 of the SE Regulation). The details of the two-tier organisational structure are laid out in Article 39 et seqq. of the SE Regulation and section 15 et seqq. of the SE Implementation Act (SEAG); the details of the one-tier system are laid out in Article 43 et seqq. of the SE Regulation and section 21 et seqq. of the SE Implementation Act (SEAG). The provisions of sections 76 to 116 of the Stock Corporation Act (AktG) largely apply to SEs with a two-tier structure.[11] With regard to how this two-tier structure is controlled by the supervisory board, please refer

11 Regarding the partial overlap between section 76 et seqq. of the Stock Corporation Act (AktG) and the SE Regulation, see Reichert/Brandes, MüKo AktG (Munich Commentary on the Stock Corporation Act), 4th edition 2017, Article 38 of the SE Regulation para. 9 et seqq.

to the information on stock corporations (AGs) under chapter 3.2. For the one-tier system, on the other hand, the provisions of section 76 et seqq. of the Stock Corporation Act (AktG) are not applicable (cf. section 20 of the SE Implementation Act (SEAG)); here the provisions of section 21 et seqq. of the SE Implementation Act (SEAG) apply. Internal controls are implemented largely by means of the internal division of the board into executive and non-executive members (section 40 of the SE Implementation Act (SEAG)), an internal committee structure (section 34 (4) of the SE Implementation Act (SEAG)), and the participation of employees in the supervisory body (section 24 of the SE Implementation Act (SEAG)).[12] As regards the transparency provided by the transparency register, please refer to the information above on stock corporations (chapter 3.2).

12 Pursuant to the provisions of the SE Participation Act (*SE-Beteiligungsgesetz*, SEBG) and the SE co-determination directive (*SE-Mitbestimmungsrichtlinie*), co-determination in an SE is based primarily on negotiations between the representative bodies of the companies involved in the founding of the SE on the one hand, and a Special Negotiating Body (SNB) voted by the employees of the participating companies on the other. A loss of the co-determination rights of the employees of one of the participating companies as a result of such negotiations is only possible if a qualified majority of two thirds of the Special Negotiating Body approve such an agreement (principle of "securing the acquired rights" of the employees). If the negotiations do not lead to a result within the legal time limit, statutory rules of co-determination as set out in detail in section 35 et seqq. of the SE Participation Act (SEBG) apply as a "fall-back" solution.

4. Registered cooperative *(eingetragene Genossenschaft, eG)*

In terms of their legal nature, cooperatives are not partnerships since they must have a variable number of members; rather, cooperatives have corporate-like structures. The cooperative is similar to the association (*Verein*) in that it operates on the basis of the one-member-one vote voting principle; it is similar to the stock corporation (AG) in that it separates the management and supervisory bodies.[13] Creditors can only draw on cooperative assets to cover the cooperative's liabilities (section 2 of the Cooperatives Act (*Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften*, GenG)). This means that, in principle, the members of the cooperative have limited liability. Members have an obligation to provide additional capital only under certain circumstances.

The legal provisions governing cooperatives are set out in the Cooperatives Act (GenG). Cooperatives are societies with a variable (i.e. changing, open) number of members whose purpose is to promote the economic activities or the social or cultural concerns of their members by means of a jointly owned business (section 1 (1) of the Cooperatives Act (GenG)). The cooperative is characterised by its predominant goal of promoting members' concerns. For this reason, cooperatives are based on the principle that members and clients are identical.

A cooperative becomes a legal entity in its own right when it is entered into the register of cooperatives. This means that the cooperative has rights and obligations in its own right; for example, it is able to purchase property and other real rights (section 17 (1) of the Cooperatives Act (GenG)). It can also hold shares in companies and other associations of persons. It may only do so, however, on condition that the shareholding serves the purpose of promoting the economic activities of its members or their social or cultural concerns or the cooperative's non-profit activities (section 1 (2) of the Cooperatives Act (GenG)). The main information on the legal specifics of a cooperative (in particular its articles of association and the board members) is available to all in the register of cooperatives online.

13 Fandrich, in: Pöhlmann/Fandrich/Bloehs, GenG, 4th edition 2012, section 1 para. 1.

Formation of a cooperative

Articles of association; application for entry into the register of cooperatives

The prerequisite for forming a cooperative is the adoption of articles of association. The articles of association must be drawn up in writing (section 5 of the Cooperatives Act (GenG)) and must be signed by the minimum number of members participating in the formation of the cooperative. The law stipulates a minimum with regards to the content of the articles of association (sections 6 and 7 of the Cooperatives Act (GenG)). The management board must apply for registration in the register of cooperatives. The application must be submitted by all members of the management board electronically and must be officially certified (section 157 of the Cooperatives Act (GenG)). The application must therefore be certified by a notary, who checks the signatories' identity against a valid identity document.

Minimum number of members

There must be at least three members (section 4 of the Cooperatives Act (GenG)). This minimum number must have been reached at formation, at entry into the register, and permanently. Cooperatives that have not yet been entered into the register can-

not be entered into the register if their number of members is too low. If the number of members of a registered cooperative falls under the minimum number, the cooperative must be dissolved by court order (section 80 of the Cooperatives Act (GenG)).

Minimum capital

The cooperative's equity consists of the member equity (the actual payments towards a share in the cooperative) and the revenue reserves. However, unlike with the GmbH (limited liability company) or the AG (stock corporation), there is no statutory minimum capital requirement. While the articles of association can make provisions on the minimum capital (section 8a of the Cooperatives Act (GenG)), this is entirely optional. However, prior to registration in the register of cooperatives, a cooperative auditing association checks whether there is reason to believe that the cooperative's financial situation could place the interests of its members or creditors at risk. The expert opinion that the cooperative auditing association establishes in this regard must be submitted together with the application for entry into the register of cooperatives. This means that it is ascertained by audit that the cooperative's capitalisation allows it to fulfil its obligations towards its members as set out in its articles of association, or whether there are risks arising from undercapitalisation. If the former is not the case, the court declines registration (section 11a (2) of the Cooperatives Act (GenG)). Despite the fact that there is no statutory minimum capital requirement, a cooperative has a de-facto obligation to ensure it has sufficient equity. The audit by the cooperative auditing association thus represents a barrier to entry when founding a cooperative.

Membership in a cooperative

Conditions of membership; members list

Membership in a cooperative is conditional either upon participation in the founding of the cooperative by signing the articles of association, or upon a written membership declaration (section 15 of the Cooperatives Act (GenG)). The management board is obliged to keep a members list and enter each member into this list (section 30 (1) and (2) of the Cooperatives Act (GenG)). However, entry into the members list is not a condition for the actual existence of membership; rather the entry has a purely declaratory purpose. The cooperative auditing association checks that a members list is kept. To ensure that obligations are fulfilled, the registration court can also determine a coercive fine (section 160 (1) sentence 1 of the Cooperatives Act (GenG)). A copy of the members list must immediately be submitted to the registration court at its request (section 32 of the Cooperatives Act (GenG)).

All members, and any third party who indicates a legitimate interest, may inspect the members list (section 31 (1) sentence 1 of the Cooperatives Act (GenG)). The members list is not freely accessible to the public. An example of a legitimate interest would be that of a member's creditor wishing to seize the equity that the member contributed to the cooperative. Thanks to the members list and the right to inspect it, cooperatives have a certain degree of transparency. However, members suffer no negative consequences from not being listed correctly in the members list (in contrast to a GmbH, where the list of shareholders provides a certain degree of legitimisation (section 16 of the Limited Liability Companies Act (GmbHG)).

Membership rights

Membership rights notably include the right to vote at the general meeting, the share purchased, the member's equity, the right to participate in the management of the cooperative, the claim to a share in the net profits and the right to use cooperative facilities. In principle, every member has only one vote, regardless of the size of their share (section 43 (3) sentence 1 of the Cooperatives Act (GenG)). The articles of association can provide for multiple voting rights under certain circumstances (section 43 (3) sentences 2 and 3 of the Cooperatives Act (GenG)).

Loss and transfer of membership

Membership ends if the member dies, leaves the cooperative, or is expelled for cause. Membership cannot be sold.[14]

Control mechanisms in a cooperative

Internal controls by a supervisory board

In contrast to a registered association (*eingetragener Verein*, e. V.), all cooperatives must, in principle, form a supervisory board. Its responsibilities notably include supervising the management board as well as performing controls and audits. However, small cooperatives (with up to 20 members) do not need to establish a supervisory board if their articles of association contain such a provision; in that case, the general meeting assumes the supervisory board's responsibilities with respect to controls (section 9 (1) sentences 2 and 3 of the Cooperatives Act (GenG)). The members of the supervisory board must be members of the cooperative.

Audits by cooperative auditing associations

It is mandatory for the cooperative to belong to an cooperative auditing association (section 54 of the Cooperatives Act (GenG)); in turn, the cooperative auditing association is supervised by the government (section 64 of the Cooperatives Act (GenG)). This cooperative auditing association conducts a mandatory audit once a year or every two years, depending on the size of the cooperative; for very small cooperatives, every second audit can, where appropriate, be conducted as a simplified audit (section 53a of the Cooperatives Act (GenG)). The mandatory audit of cooperatives has been in place since 1889 and is the oldest mandatory audit in German corporate law.[15] Regarding the purpose of the audit, the Federal Constitutional Court (BVerfG) provides the following explanation:[16] "The legal provisions serve to protect the members and creditors of the cooperative as well as the general public. On the one hand, their purpose is to secure and strengthen the position of cooperative members within the cooperative. The audit of the management board includes checks as to whether the purpose of the cooperative for the benefit of the members pursuant to section 1 (1) of the Cooperatives Act (GenG) is being fulfilled. Simultaneously, the audit checks that the shares held by the cooperative members are properly handled financially, which protects the members from the financial consequences of potential liabilities or obligations to provide additional capital. The follow-up to the audit, which comes after the audit itself, is designed to ensure that any deficiencies identified during the audit are actually corrected. On the other hand, the legal provisions are intended to prevent damages to the cooperative's creditors."

The audit checks the cooperative society's facilities, financial situation and management board in order to ascertain the cooperative society's financial circumstances, to check that management is conducted properly and to verify that the cooperative's specific purpose is being pursued (section 53 of the Cooperatives Act (GenG)). For larger cooperatives, the standard audit additionally includes an annual financial statement with reference to the accounts and a situation report; for smaller cooperatives, too, the annual financial statement and the accounts often constitute the point of departure for the audit. Facilities include the total internal and external organisation in terms of staffing and material equipment, which is checked with regard to its maintenance and condition as well as its fitness for technical and business purposes, and for any lacunae.[17]

14 RGZ 87, 408, 409; *Geibel*, in: Henssler/Strohn, Gesellschaftsrecht, 4th edition 2019, section 1 para. 2 and section 15 para. 1.

15 Bloehs, in: Pöhlmann/Fandrich/Bloehs, GenG, 4th edition 2012, section 53 para. 1.

16 BVerfG NZG 2001, 461, 464.

17 Bloehs, in: Pöhlmann/Fandrich/Bloehs, GenG, 4th edition 2012, section 53 para. 11.

5. Partnerships

In addition to legal entities under private law (such as GmbHs, eGs), partnerships are widespread company forms in Germany. In principle, partnerships have legal capacity, i.e. they can acquire rights and enter obligations in their own right. A key difference in terms of business practice between partnerships and legal persons, and notably corporations, lies in the fact that partners are personally liable with their entire assets.[18] Personal liability is one of the main factors that also makes partnerships less suitable for ML/TF purposes.

The legal model provides for a partnership that is comprised of two or more persons who are connected by personal ties; the partnership's composition depends on its specific members. The personal legal ties are expressed in the fact that, for example, it is not possible to form a one-person partnership; that membership cannot, in principle, be sold and that the partnership cannot purchase its own shares; that, in principle, all partners have the right to be a member of the management or representative bodies, and that this right cannot be transferred to third parties external to the partnership (*Selbstorganschaft*); that the internal decision-making process occurs via decisions that are, in principle, taken unanimously and per partner; finally, the personal legal ties are expressed in the fact that the distribution of profits and losses is generally performed per partner, and not according to equity shares. The above-mentioned factors also make partnerships overall less suitable for ML/TF purposes.

However, partnership law is characterised by the far-reaching flexibility it offers in principle. Notably, provisions on the internal relationship between partners can diverge from the legal model according to independently made, private agreements. This means that a partnership can, as an actual legal reality, appear in very different forms, ranging from office sharing partnerships structured around otherwise independently operating individuals, to fund vehicles with structures similar to those of corporations. Depending on the specific form in which the partnership is used, widely divergent rules can be agreed, and summarising these rules would thus exceed the scope of the present overview. In light of the wide range of forms the partnership can take on in legal actuality, this chapter examines only the legal models for the most frequently used company forms. However, the reader should always bear in mind the existence of the described scope for adapting the form of the partnership.

The BMJV is currently working on a fundamental reform of partnership law. The goal is to better harmonise the legal foundations for the forms of partnerships and to resolve ambiguities created by the historical development of legislation. Overall, then, the aim is to adapt the legal framework to the needs of modern business life. One essential element of this reform is that it will allow companies under civil law to register (more on this shortly). The following references to legal provisions refer to the existing legal situation.

5.1 Civil-law partnership *(Gesellschaft bürgerlichen Rechts, GbR)*

The GbR is the basic form of a partnership. GbRs are regulated by sections 705 et seqq. in the Civil Code (BGB). Under section 705 of the Civil Code (BGB), the GbR is an association of at least two persons for the purpose of achieving a common purpose. Provided that it is legally permissible, this purpose can be of any temporary or permanent nature, though it excludes the operation of a commercial business in the full sense. As soon as a GbR operates a proper commercial business, the legal form by law

18 The only exception to this is where partners have limited liability, which is limited to his or her investment.

switches to a general partnership (*Offene Handelsgesellschaft*, OHG). Since there are very few conditions for the formation of a GbR – notably, the partnership agreement requires no specific form – it can at times be formed in an implicit, ad hoc, manner. It follows that the GbR can, as an actual legal reality, occur as an undertaking in individuals' private life (for example in the form of a car-sharing arrangement and similar set-ups) as well as in business life (e.g. in the form of emissions and financing consortia, of construction syndicates known as ARGEs (associations between the Federal Employment Agency and the respective local authorities, or during the preparation of joint ventures), or quite simply for the purposes of joint asset management. As a partnership operating in a business, the GbR is found in the area of the liberal professions and agriculture as well as for small companies operating below the threshold for commercial undertakings. Given that the legal framework provided by sections 705 et seqq. of the Civil Code (BGB) is largely optional, the GbR is characterised by a flexibility that can accommodate the multiple forms in which the GbR appears. In terms of legal capacity, one must distinguish between the "internal" GbR (*Innen-GbR*) and the "external" GbR (*Außen-GbR*).

- The "internal" GbR is characterised by the fact that it does not as such appear in legal dealings and consequently does not acquire its own rights or liabilities. Rather, it is always the partners who, acting on their own behalf, engage in legal dealings; here, the GbR regulates only the legal relationship among the partners.[19]

- As soon as a GbR itself participates in legal dealings, in accordance with the partners' decisions, it becomes an "external" GbR (*Außen-GbR*). According to more recent case law, an "external" GbR has legal capacity, meaning that it can itself acquire rights and obligations, for example by purchasing property rights or holding shares in companies.[20] Only the "external" GbR, then, is an independent legal entity and this is what the following consequently concentrates on. Where the following mentions the "GbR", it thus designates the "external" GbR.

The GbR's obligations towards creditors are covered by the company assets; in addition, the partners are severally and jointly liable as debtors with their private assets (known as accessory partner liability in accordance with section 128 of the Commercial Code (HGB).[21] It is therefore not possible to generally limit the partners' liability with regard to the obligations of the GbR. However, when contracts are concluded with third parties, it is possible, in individual cases, for liability to be limited to company assets.

Formation of a GbR

Partnership agreement

A GbR is founded by concluding a partnership agreement. This agreement must at least specify the purpose jointly pursued as well as what goals the partners are obliged to promote.[22] The partnership agreement can, in principle, be concluded without adhering to any specific form. However, there are exceptions to this where a general provision to adhere to a certain form applies; for example, section 311b (1) of the Civil Code (BGB) stipulates that the partnership agreement must be notarised if, per the partnership agreement, a partner assumes the obligation to contribute real estate to the partnership. While the generally informal, uncomplicated process of forming a GbR allows it to serve as a catch-all legal form for all partnerships, this can also, when considered in isolation, increase the risk of this type of partnership being used for ML/TF purposes.

19 Schöne, in: BeckOK BGB, 53th edition, section 705 BGB, para. 158 et seqq.

20 BGH, NJW 2001, 1056.

21 Schäfer, in: Münchener Kommentar BGB, 7th edition 2017, section 714, para. 36.

22 Schäfer, in: Münchener Kommentar BGB, 7th edition 2017, section 714714705, para. 128 et seqq.

Minimum number of partners

At least two partners are required for the formation and, in principle, for the continued existence of a GbR. Any natural or legal person or partnership with legal capacity can be a partner. If there remains only one partner following the withdrawal of the penultimate partner, the partnership is dissolved[23].

Minimum capital requirement

There is no minimum capital requirement for the GbR. In GbRs, as with all partnerships, the minimum capitalisation requirements for corporations that is designed to protect creditors, is replaced by the personal liability of the partners, who are liable with the entirety of their private assets, in line with section 128 of the Commercial Code (HGB).

Membership in a GbR

Conditions for partner status

Under the model provided by the law, only the founding partners have shares in the GbR. However, further partners can be included in the GbR if approved by the founding partners. If it has been agreed that the company is to continue to exist in the case of the withdrawal of a partner, a new partner can also join by acquiring a share in the partnership (see below); the same applies to acquiring the status of partner by inheritance.

Membership rights

GbR partnership rights include joint management and representation rights (sections 709 (1), 711 sentence 1, 714 of the Civil Code (BGB)), the right to contribute to the internal decision-making process through participation and voting rights at partner meetings (section 709 (1), 712, 715 of the Civil Code (BGB)), the right to information (section 716 of the Civil Code (BGB)) and the right to give notice (section 723 of the Civil Code (BGB)).[24] Property rights notably include the partners' right to claim expenses arising from their management activity, the right to claim a proportionate share of profits (sections 721, 722 of the Civil Code (BGB)) as well as the remaining balance in the event of the partnership being wound up (sentence 717 sentence 2 of the Civil Code (BGB)).

Sale of partnership shares

Partner status is lost with a partner's death, with insolvency, or when a partner gives notice (sections 723, 727, 728 of the Civil Code (BGB)). For the standard case under the law as set out under sections 723 sentence 1, and 727 of the Civil Code (BGB), the partnership is dissolved when a partner withdraws; it is then followed by a liquidation of the partnership – which usually destroys value; only when this liquidation has been completed can any surplus remaining be distributed. If a clause to continue the partnership has been agreed, it is possible to deviate from the standard case as set out by the law. The continuation, even retroactively, of the partnership, can be agreed or decided upon in an ad hoc, implicit manner, provided there is no requirement for a specific form under the law or under the partnership agreement. If these requirements are fulfilled, a partner's share can be transferred to a third party, pending the approval of the other partners. This approval can also be granted in advance in the partnership agreement.

Control mechanisms in a GbR

Internal controls

The law does not provide for special internal controls, for example by a supervisory body. This is

23 BGH, NJW 1972, 1755; BGH, NJW 1984, 2104, 2105; BGH, NJW 1987, 13184, 3186.

24 Lübke, in: BeckOGK BGB, 01/02/2020, section 714 BGB, para. 12.

not required, however, from a company law perspective. The legal model is based on the principle that partnerships manage themselves (*Selbstorganschaft*), meaning that partners independently take decisions with regard to partnership matters for which they are liable with their private assets. To back up this principle, the law stipulates unanimity among partners regarding management measures and representation by all partners (sections 709, 714 of the Civil Code (BGB)). It is possible to deviate from the standard case set out in the law by which the partnership is managed and represented by all partners. However, such a deviation must be mentioned in the partnership agreement that is approved by all partners, pending a clause stipulating a majority vote. Should this control mechanism fail because all of the partners have committed to the goal of money laundering or terrorist financing, prevention becomes a matter of criminal law.

Control and transparency through accounting

Under commercial law, the GbR is not obliged to perform accounting, even where the partnership operating in business. This means that companies in the liberal professions or agricultural companies can reach a considerable size and yet not be subject to the obligation to perform accounting under commercial law. In the commercial area (excluding agriculture), however, an automatic switch to the form of an OHG is made once the threshold for commercial undertakings is exceeded, which also triggers an obligation to perform accounting under commercial law.

Registers provide transparency

GbRs cannot be entered into the commercial register. Nor can they be registered in other registers under existing law, which includes the transparency register as regulated by money laundering legislation (see below). The BMJV is currently working on fundamentally reforming partnership legislation; this reform notably includes creating the possibility of registering GbRs in a partnership register,[25] which will ensure transparency regarding the partnership structure. This partnership register is to be modelled on the commercial register. Entries into the partnership register are only to be made on the basis of a notarised application. This means that, in future, a notary would check the existence, identity and proper representation of the partnership, which would significantly increase transparency with regard to shareholdings. Entry into the partnership register is not, in principle, mandatory, nor is it a prerequisite for attaining legal capacity (similarly to commercial partnerships, where such registration is not mandatory either). However, it will be mandatory to first enter into the commercial register precisely those procedures that are pertinent under money laundering legislation (for example, the purchase and sale of a plot of land by or via a GbR; changes to the composition of shareholders of a GbR which owns real estate; a GmbH switching to the form of a GbR in accordance with the Transformation Act (UmwG), or the entry into an existing KG or GmbH with the participation of a GbR).

5.2 General partnership *(Offene Handelsgesellschaft, OHG)*

The OHG is the basic form of a commercial partnership; it is based on the legislation for "external" GbRs, which in turn is the basic form of a partnership, though the OHG distinguishes itself from the GbR in that it operates a commercial undertaking or – in the case of a small commercial company or in cases where its operations are limited to asset management – in that it requires a registration in the commercial register, which is constitutive. Next to operating a commercial business, the purpose of the partnership can also be managing its own assets. In July 2020, almost 23,000 companies indicated in the transparency register that they operated under the legal form of the OHG. Compared to

25 Website of the Federal Ministry of Justice and Consumer Protection (BMJV): https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/042020_Entwurf_Mopeg.pdf.

limited liability partnerships, the former basic form of joint undertakings has long been declining.[26] The legislation governing the OHG is set out in section 105 of the Commercial Code (HGB); under section 105 (3) of the Commercial Code (HGB), the legislation governing the GbR (sections 705 et seqq. of the Civil Code (BGB) apply in a subsidiary manner.

Like the GbR, the OHG is an independent legal entity (section 124 of the Commercial Code (HGB)). Regarding the OHG's obligations towards creditors, the partnership is liable with the partnership assets and partners are fully liable, severally and jointly, with their private assets (section 128 Commercial Code (HGB)). A notable difference between the GbR and the OHG consists in the obligation for an OHG to be entered into the commercial register, which offers bona fide rights protection, and in the OHG's looser personal legal ties, which makes it more suitable as a company form: For example, individual partners are, in principle, authorised to manage and represent the company (sections 115 and 125 of the Commercial Code (HGB)) and the company is designed for continuation if a partner gives notice, dies or becomes insolvent. However, the legislation governing the OHG, similarly to that governing the GbR, is very flexible, especially when it comes to the organisation of the internal relations between the partners (section 109 of the Commercial Code (HGB)).

Formation of an OHG

An OHG is formed by concluding a partnership agreement between at least two persons; this agreement does not, in principle, require any specific form. The common purpose must consist in operating a commercial business or in asset management. The GbR created by the conclusion of a partnership agreement attains the status of an OHG either with the commencement of operations of a commercial enterprise in the full sense (section 123 (2) of the Commercial Code (HGB)), or – if the company does not exceed this size or if only asset management is performed – with the entry into the commercial register (sections 105 (2), 123 (1) of the Commercial Code (HGB)). In the first case, the entry into the commercial register is only of a declaratory nature, though it is compulsory for partners to ensure this entry is made (section 106 of the Commercial Code (HGB)).[27] In the second case, the entry into the commercial register has a constitutive effect, i.e. the company attains the legal form of OHG only with entry into the register.

This means that there is not only the possibility, but the obligation, to enter the OHG into the commercial register. Under section 106 of the Commercial Code (HGB), registering the partnership in the commercial register includes entering information on the company, its registered office and its business address as well as specific information regarding the identity of all partners (name, date of birth, place of residence). Under section 108 of the Commercial Code (HGB), all partners must apply for entry into the register; entry into the register must, under section 12 of the Commercial Code (HGB) be made electronically and be notarised; in addition, it is mandatory for the entry to be performed via a notary, as stipulated by section 378 (3), sentence 2 of the Act on Proceedings in non-contentious Jurisdiction (FamFG). Representation during the application is only possible if there is an authorisation that has also been notarised.

Membership in an OHG through partner status

A share in an OHG is attained by participating in its formation or by joining it at a later date with the approval of all other partners. With the agreement of the other partners, which can be provided in advance in the partnership agreement, the OHG share can be sold, meaning that a new partner can

26 In particular KGs in the area of partnerships and GmbHs.

27 To enforce this obligation, there are mechanisms for compulsory register entry – coercive fines –, as set out under section 14 of the Commercial Code (HGB) and sections 388 et seqq. of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG).

also attain the status of partner by the derivative purchase of a partnership share; the same applies for acquiring the status of partner by inheritance. Partners' rights in the OHG include management and property rights, in accordance with the legal status of the GbR (see chapter 5.1). In derogation from this, management authorisation as set out in section 115 of the Commercial Code (HGB) is, in principle, the authorisation to manage the partnership alone, while the representative authorisation as set out in section 125 of the Commercial Code (HGB) is, in principle, the right to represent the partnership alone, although the law has already listed common alternatives in section 125 (2) and (3). The details regarding how representative powers are organised specifically must be notified to the commercial register (section 106 (2) no 4 of the Commercial Code (HGB)). As with a GbR, an OHG's internal decision-making process must be based upon resolutions as set out in section 119 of the Commercial Code (HGB) and is, in principle, made per partner.

As with a GbR, the transfer of shares do not, by law, require any specific form with the OHG; this also applies if the partnership assets include objects whose transfer does require a specific form.[28] However, the risk of a clandestine change in beneficial ownership of assets by way of a share deal is far lower than with a GbR, since the commercial register ensures the transparency of shareholdings: section 107 of the Commercial Code (HGB) stipulates that any change regarding the group of partners must be notified to the commercial register. This notification must be made by all partners, including the partner who is joining (section 108 of the Commercial Code (HGB)); the notification must be made electronically and must be notarised (section 12 of the Commercial Code (HGB). This ensures that, in principle, any partner who is joining is also unequivocally identified by a notary with the help of official identification documents; the notary also subjects new partners to the checks stipulated by money laundering legislation (section 2 (1) no 10 a) ee) and sections 11, 12 of the Money Laundering Act (GwG)). The duty to apply for registration can be enforced by imposition of coercive fines (section 14 of the Commercial Code (HGB), section 388 of the Act on Proceedings in Non-contentious Jurisdiction (FamFG)); furthermore, the public nature of the commercial register stipulated by section 15 of the Commercial Code (HGB) provides considerable incentives under private law to apply for the registration of changes regarding the group of partners.[29]

Since there are no differences compared to the GbR in this regard, please refer to the details provided on this issue in the section on GbRs. The main difference between OHGs and GbRs consists in the obligation to be entered into the commercial register. For information on the commercial register, the possibility of inspecting the commercial register, and especially for information on the involvement of notaries in the procedure of entering a partnership into the commercial register and the implications this has for transparency and for the guaranteed veracity of the information entered, please see chapter 5.1 above for an overview, and chapter 5.2 above for specifics with regard to the OHG.

For an OHG, the commercial register contains information on:

- the company,
- the registered office,
- the business address in Germany,
- branches,
- the power of representation of the partners,
- the partners,
- authorised signatories (*Prokurist*),
- information on insolvency proceedings,
- the dissolution, continuation and nullity of the partnership.

28 K. Schmidt, in: Münchener Kommentar HGB, 4th edition 2016, section 105 of the Commercial Code (HGB), para. 213.

29 Sanders, in: BeckOGK HGB, 15/03/2020, section 106 of the Commercial Code (HGB), para. 41.

5.3 Limited partnership *(Kommanditgesellschaft, KG)*

A limited partnership (*Kommanditgesellschaft*, KG) is a commercial partnership established by at least two (natural or legal) persons. At least one partner has unlimited liability, while one or more partners have limited liability. The purpose of a KG is to carry on a commercial business under a joint business name, which must include the designation "KG" or "*Kommanditgesellschaft*". The law on KGs builds on the law on general partnerships (*Offene Handelsgesellschaft,* OHG), section 161 (2) of the Commercial Code (HGB). Please therefore refer to the information provided above about OHGs. The difference between the two legal forms, however, lies in the partners' differing situations in terms of their liability. Unlike OHGs (general partnerships) and GbRs (civil-law partnerships), KGs have two different types of partner. Alongside the managing and personally liable general partners – equivalent to partners in an OHG – KGs also have partners whose liability is limited to the amount of a specific contribution of assets (limited partners, section 161 (1) of the Commercial Code (HGB)).

If the contribution has not yet been paid in full, limited partners are liable with their private assets in the amount that is still outstanding. The partnership's assets belong jointly to all partners (joint assets). The limited partners have no statutory management or representation powers (sections 164 and 170 of the Commercial Code (HGB)); however, they may be granted such powers by agreement. In principle, the transfer of a limited partner's share also requires the agreement of all partners, due to the limited partnership's nature as a commercial partnership.[30] In the event of the death of a limited partner, however, the limited partner's share is inherited by the heirs in line with section 177 of the Commercial Code (HGB). The KG must be entered in the commercial register, which contains information such as the amount of the limited partners' contributions and their names and addresses (see section 40 no 5 (c) of the Commercial Register Regulation (*Handelsregisterverordnung*, HRV)). All partners (i.e. both general and limited partners) must participate in the registration process in accordance with sections 161 (2) and 108 of the Commercial Code (HGB), which increases the level of transparency.

30 Häublein, in: BeckOK HGB, 27th edition, section 173 of the Commercial Code (HGB), para. 11.

5.4 Limited partnership with a limited liability company as a general partner *(Gesellschaft mit beschränkter Haftung & Co. Kommanditgesellschaft, GmbH & Co. KG)*

A GmbH & Co. KG is a limited partnership in which the general partner is a GmbH (limited liability company) rather than a natural person. As it is nonetheless a normal limited partnership, please refer to the information provided above about KGs and OHGs. The vast majority of registered KGs are likely to be GmbH & Co. KGs. This legal form is so widespread because the combination of two structures makes it possible to combine transparent taxation only at the level of the partners with a comprehensive limitation of liability. It is used by small and medium-sized companies which are often owner-managed, but also by investment companies with a large number of limited partners, e.g. real estate funds, due to the fact that it can be established for the purpose of managing its own assets, like an OHG. As a partnership in which there is no natural person with unlimited liability, a GmbH & Co. KG is required to publish its annual financial statements.

6. Other legal persons

As the NPO sector analysis sets out in detail, Germany has a wide-ranging non-profit sector. The legal persons in this sector are financed mainly by donations, membership fees, grants and, in some cases, charges. Registered associations (*eingetragene Vereine*, e. V.s) are the most prevalent legal form in this sector, followed by foundations (*Stiftungen*). The NPO sector analysis found that terrorist financing cases involving an NPO are rare, isolated cases. However, given that large amounts were generated or transferred in some of these cases, the threat can nonetheless be significant. The NPO sector can be attractive to extremists, particularly for generating donations and using these for the purpose of terrorist financing. Further details can be found in the NPO sector analysis, which looks at the non-profit sector in depth.

6.1 Registered association *(eingetragener Verein, e. V.)*

An association (*Verein*) is a basic type of organisation which is characterised by the fact that several people voluntarily form an association for an unspecified period or at least for a certain period of time in order to pursue a shared non-commercial or commercial objective. The association requires a constitution, operates under a joint name, and continues to exist even when its members change.[31] Civil law pertaining to associations is regulated by sections 21 et seqq. of the Civil Code (BGB). Sections 51 et seqq. of the Fiscal Code (*Abgabenordnung*, AO) contain provisions dealing with the potential public-benefit status of associations, which can be recognised if they pursue tax-privileged purposes.[32] Beyond its corporate-like structure, an association with legal capacity is a legal person and can therefore, by law, have rights and obligations in its own right.

Fundamentals of an association with legal capacity

Depending on the objectives it pursues, an association with legal capacity is either a non-commercial association (*Idealverein*) or a commercial association (*wirtschaftlicher Verein*). In highly simplified terms, the latter pursues commercial objectives, while the former pursues non-material objectives.[33] There are around 610,000 active associations with legal capacity in Germany. Under section 21 of the Civil Code (BGB), a non-commercial association acquires legal capacity when it is entered in the register of associations. It is required to apply for entry in the register if the conditions set out in sections 21 et seqq. of the Civil Code (BGB) are met (this is known as the "normative requirements system"). By contrast, a commercial association is granted legal capacity by the state (the "concession system"); in practice, however, it is extremely rare for this approach to be used. The reason why commercial associations are largely irrelevant in practice is that the provisions of the legislation on associations are of limited suitability for the pursuit of commercial activities in the traditional sense; the primary legal forms available for commercial activities are the AG (stock corporation), the GmbH (limited liability company) or the eG (registered cooperative).[34]

31 See RGZ 60, 94, 96; 143, 212, 213; 165, 140, 143; BGH LM no 11 on section 31 of the Civil Code (BGB).

32 For more detailed information about the law on the taxation of foundations, see Schlüter/Stolte, Stiftungsrecht, 3rd edition, 2016, chapter 7, para. 1 et seqq.

33 This distinction is highly contentious in doctrinal terms and not always straightforward in practice; for more detailed information, see Würzburger Notarhandbuch/Katschinski, 5th edition, 2018, part 5, chapter 1, para. 7 et seqq.

34 For more information about the right of non-commercial associations to engage in commercial activities in pursuit of their non-commercial objective, see Würzburger Notarhandbuch/Katschinski, 5th edition, 2018, part 5, chapter 1, para. 8 et seqq.

The board of an association, as its executive body, is responsible for managing and representing the association.[35] As in the case of other organisations, the "third party" principle (*Drittorganschaft*) applies to associations with legal capacity; in other words, the members of the board need not necessarily be members of the association.[36] The board is the association's legal representative. It represents the association in legal dealings. By law, the board's power of representation is unlimited and cannot be removed by the articles of association. However, under section 26 (1) sentence 2 of the Civil Code (BGB), the articles of association may limit the board's power of representation in relation to third parties. In other words, the articles of association can stipulate that the board requires permission from another body to carry out certain actions. Under section 64 of the Civil Code (BGB), such restrictions on the board's power of representation are only valid in relation to third parties if the restrictions are also entered in the register of associations. A general meeting, meanwhile, is the association's supreme decision-making body and takes decisions on all matters concerning the association by passing resolutions, in accordance with section 32 (1) of the Civil Code (BGB). An association's articles of association may establish other optional bodies, such as an advisory board[37] or a special representative within the meaning of section 30 of the Civil Code (BGB).[38] An association with legal capacity has sole liability for the association's liabilities, meaning that its members are not liable; it owns the association's assets and is the debtor for the association's debts.[39]

35 See section 26 et seqq. of the Civil Code (BGB).

36 See Münchener Kommentar BGB/Leuschner, 8th edition, 2018, section 26, para. 5.

37 For more detailed information on this and on other mainly advisory and supervisory bodies, see Würzburger Notarhandbuch/Katschinski, 5th edition, 2018, part 5, chapter 1, para. 30 et seq.

38 For more information about such provisions in articles of association and on the act of appointment, see Münchener KommentarBGB/Leuschner, 8th edition, 2018, section 30, para. 4 et seqq.

39 For more detailed information about the rules on liability for an association with legal capacity, see Sauter/Schweyer/Waldner/Waldner/Wörle-Himmel, Der eingetragene Verein, 20th edition, 2016, Part One, para. 3.

Formation of an e. V.

An association with legal capacity is formed in several stages. At the inaugural meeting, the founders of the association generally begin by agreeing on articles of association and electing the first board. At least two founders are required for the adoption of the articles of association, but two is sufficient; the founders may be natural or legal persons.[40] The minimum requirements to be met by the articles of association are set out in section 57 (mandatory provisions) and section 58 (recommended provisions) of the Civil Code (BGB); section 60 of the Civil Code (BGB) shows that non-compliance with these two provisions of the Civil Code (BGB) results in the application for entry in the register of associations being rejected.[41]

These provisions state that the articles of association must include

- the association's purpose,
- its name,
- its registered office,
- the intention to register the association,
- provisions on becoming a member of the association and leaving it,
- provisions on whether the members are to make contributions, and
- provisions on the establishment and composition of the board.

Under section 59 of the Civil Code (BGB), the board must apply for the association to be entered in the register of associations. The current version of section 77 of the Civil Code (BGB) states that

40 For information on the approach to a membership consisting of natural and legal persons if the natural persons have a dominant influence on the legal persons, see Münchener Kommentar BGB/Leuschner, 8th edition, 2018, section 56, para. 5.

41 The distinction between mandatory and recommended provisions is mainly relevant in the context of the potential removal, ex officio, of an erroneous entry in line with section 395 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG); this takes place only if mandatory provisions have been breached.

it is sufficient for the registration application to be signed by a quorum of the board members. In accordance with section 56 of the Civil Code (BGB), the association may only apply for registration if it has at least seven members; if this is not the case when the association is formed, further members must join the newly established association before it can be registered. Section 77 of the Civil Code (BGB) stipulates that the application for registration must be notarised. As part of the process of notarising the signatures, the notary checks the signatories' identity against valid identity documents. Under section 59 (2) of the Civil Code (BGB), an uncertified copy of the following documents must be submitted when the association first applies for registration:

- a copy of the original articles of association signed by at least seven[42] members (which must also indicate the date when the articles were adopted, in accordance with section 59 (3) of the Civil Code (BGB)), and
- a copy of the documents on the appointment of the board.

Membership in an association

Membership in an association requires the member either to have participated in the formation of the association or to have joined the association at a later date.[43] Under section 38 sentence 1 of the Civil Code (BGB), membership is not transferable or inheritable. Nor is it possible for the exercise of individual membership rights to be entrusted to another person, as section 38 sentence 2 of the Civil Code (BGB) makes clear. However, it is possible for the articles of association to allow this. Membership ends if the member dies, leaves the association, or is expelled for cause. Unlike in the case of cooperatives, for example, the legislation on associations contains no legal obligation for associations to keep a list of members. For larger associations, in particular, it often makes sense to keep such a list, as that is the only way to facilitate adequate communication with the members. In line with section 31 (1) sentence 1 of the Cooperatives Act (GenG), it is widely assumed that a member of an association is entitled to inspect the list of members, if one exists, if he or she has a legitimate interest. However, in contrast to the legal situation for cooperatives, third parties do not have the right to inspect the list of members, unless members of the association make their membership public of their own accord.[44]

Regardless of whether or not an association has legal capacity, the key rights of a member of an association include the right to attend the general meeting and to vote at the general meeting, in particular. Membership in an association is not a property right and thus does not involve any entitlement to a share of the association's assets. That said, depending on an association's objective, its members may be entitled to use the association's facilities, if any exist; in general, all members must be treated equally in this context.[45]

Control mechanisms in an association

The work of the association's board is scrutinised by the general meeting. The board is obliged to disclose its accounts to the general meeting. However, the association's articles may also provide for additional bodies besides the general meeting and the board, notably oversight bodies which scruti-

42 If the association has fewer than three members when it is formed and it is nonetheless entered in the register of associations in contravention of section 56 of the Civil Code (BGB), or if the number of members falls below three again at a later date, the association must be removed from the register in accordance with section 73 of the Civil Code (BGB).

43 For more detailed information about membership in an association, see Würzburger Notarhandbuch/Katschinski, 5th edition, 2018, part 5, chapter 1, para. 32 et seqq.

44 For more detailed information about this, see Sauter/Schweyer/Waldner/Waldner/Wörle-Himmel, Der eingetragene Verein, 20th edition, 2016, Part One, para. 336.

45 For more detailed information about the principle of equal treatment and the granting of potential special rights within the meaning of section 35 of the Civil Code (BGB), see Würzburger Notarhandbuch/Katschinski, 5th edition, 2018, part 5, chapter 1, para. 32.

nise the board's activities. If an association's articles provide for an optional oversight body, such as an advisory board, such a body may – if desired – be granted not only supervisory tasks and powers similar to those of the supervisory board of an AG, but also management rights.

The register of associations ensures transparency about associations, especially regarding the board members, who can act in a legally effective manner on behalf of the legal person of the association in legal dealings and, in particular, can control the association's assets. The board members are therefore regularly be deemed the beneficial owners of the association as the members of the association have no stake in or control over the associations assets. Every association must ensure it is entered in the register in order to acquire a legal personality. Information about the members of the board and the power of representation is always included in the register entry. Registered associations (e. V.s) are required to notify the register of any change in their board members and their power of representation so that the register entry can be updated. The board members are responsible for such notifications. The registration court can take coercive measures to ensure that the association or the members of the association's board comply with their notification obligations and to ensure that the information contained in the register is accurate. By doing that, the register of associations also identifies in general the people who must be deemed the beneficial owners of the association.

The right to freedom of association may only be restricted in three specific situations that are explicitly set out in Article 9 (2) of the Basic Law (*Grundgesetz*, GG), the German constitution:

- if an association's purpose or activities (resulting from the combined will of the group) violate criminal law;
- if an association works systematically to undermine the constitutional order;
- if an association is directed against the concept of international understanding. Associations are considered to be directed against the concept of international understanding within the meaning of the Basic Law (GG) if, operating from Germany, they use financial or material means to create conflicts in other countries or if they support parties involved in conflicts in other countries.

Another mechanism to prevent associations from being misused for ML/TF purposes is section 20 (1) of the Money Laundering Act (GwG), which states that e. V.s, as legal persons, are legal entities subject to transparency obligations. In principle, they must therefore obtain, retain and keep up to date the information specified in section 19 (1) of the Money Laundering Act (GwG) on their beneficial owners, and notify the registrar entity of this information without delay for entry in the transparency register. Under section 20 (2) sentence 1 no 4 of the Money Laundering Act (GwG), the obligation to notify the transparency register is deemed to have been fulfilled if the necessary information on the beneficial owner is already contained in the documents and entries that are electronically accessible from the register of associations.

Only a natural person can be a beneficial owner of an e. V. within the meaning of the Money Laundering Act (GwG). A distinction must be made between actual and notional beneficial owners. In the case of an e. V., the actual beneficial owners are those natural persons who, directly or indirectly, control more than 25% of the voting rights or exercise control in a comparable manner. If, even after a comprehensive examination, no natural person can be identified as an actual beneficial owner, or if there are doubts about whether the person identified is a beneficial owner, then the legal representative is deemed to be the notional beneficial owner. In other words, if no one controls 25% of the voting rights at an association's general meeting or exercises control in a comparable manner, the board, which has the status of a legal representative, is to be regarded as the beneficial owner. Under section 64 of the Civil Code (BGB), the information about the board members must already be entered in the register of associations

as part of the registration process. In this case, the provision contained in section 20 (2) of the Money Laundering Act (GwG) applies, i.e. the obligation to notify the transparency register is deemed to be fulfilled and no further notification needs to be made. However, the transparency register must still be notified of information about the beneficial owners of associations where at least one natural person controls 25% of the voting rights or exercises control in a comparable manner. If a member controls more than 25% of the voting rights, the member is obliged to notify the transparency register (section 20 (3) sentence 3 of the Money Laundering Act (GwG)). The central availability of information on the beneficial owners of associations plays a significant part in reducing the susceptibility of associations to misuse for ML/TF purposes.

6.2 Foundation *(Stiftung)* with legal capacity

Foundations became periodically less common in Germany during the last century, but they are currently experiencing a renaissance. As of 1 July 2020, the transparency register includes 20,379 civil-law foundations with legal capacity in its statistics. Foundations are regulated by section 80 (2) of the Civil Code (BGB) and the Foundation Acts (*Stiftungsgesetze*) of the individual *Länder* (federal states). A foundation is a legally independent special purpose fund which seeks to ensure the long-term, sustained achievement of an objective defined by its founder. The key characteristics of a foundation are that it has an objective defined in a charter, assets which are to be used to achieve its objective, and is independently structured. Unlike associations, foundations do not have members. Foundations are supervised by the competent foundation supervisory authorities.

As set out above, a foundation is an organisation which seeks to promote the sustained achievement of an objective defined by the founder with specified assets and an independent structure. A foundation may only act through its bodies. For this to be possible, section 81 (1) sentence 3 no 5 of the Civil Code (BGB) states that a foundation must, at a minimum, have a board which represents it in court and out of court and has the status of a legal representative, in accordance with section 86 in conjunction with section 26 of the Civil Code (BGB). The foundation's bodies must act to fulfil the founder's intention, as expressed in the document recording the act of foundation.

Establishment of a foundation with legal capacity

Under section 80 (1) of the Civil Code (BGB), a foundation comes into being as a legal person by means of a document recording the act of foundation and when the foundation is recognised by the competent *Land* authority. Founders who wish to establish a foundation during their lifetime must record the act of foundation in writing. However, a foundation can also be established by means of a disposition *mortis causa*. In this context, the endowment payment to the foundation can take place by appointing the foundation as an heir, or by means of a bequest or a "testamentary burden" (*Auflage*).[46] In the document recording the act of foundation, the founder has to give the foundation a charter, which must fulfil the minimum requirements set out in section 81 (1) sentence 3 of the Civil Code (BGB). Section 81 (1) of the Civil Code (BGB) stipulates that the foundation's charter must state the objective, name and registered office of the foundation, and set out how the members of the board are to be appointed. In addition, the founder must endow the foundation with assets with which the foundation can seek to ensure the long-term, sustained achievement of the objective enshrined in its charter. The founder can also include other provisions in the charter. In practice, it is common for charters to also contain provisions on the following subjects:

46 For more detailed information about the establishment of a foundation with legal capacity after the founder's death, see Schlüter/Stolte, Stiftungsrecht, 3rd edition, 2016, chapter 2, para. 133 et seqq.

- other bodies (such as a board of trustees or a general meeting),
- the number, appointment, term of office and removal from office of the members of any other bodies,
- the convening, required quorum and decision-making process of the other bodies,
- the remuneration of members of the foundation's bodies,
- the rights of any beneficiaries of the foundation,
- the procedure for amendments to the charter, and
- the devolution of the remaining assets after the foundation ceases to exist.

Irrespective of what exact form the document recording the act of foundation takes, a foundation only comes into existence when it is recognised by the competent *Land* authority.[47] The foundation's charter may only be changed by its bodies if this is permitted by the law or the charter itself. Most of the Foundation Acts of the *Länder* only permit changes to the charter if there has been a substantial change of circumstances. The Foundation Acts of some *Länder* only allow a foundation's objective to be changed by the competent foundation supervisory authorities pursuant to section 87 (1) of the Civil Code (BGB) if the original objective has become impossible to fulfil. The founder can also establish different prerequisites for changes to the charter in the charter itself.

Control mechanisms in a foundation with legal capacity

If a foundation's charter provides for additional bodies, they may be granted advisory, management or supervisory powers. It is common for larger foundations, in particular, to establish a board of trustees which includes people with special expertise in the field of the foundation law, who oversee the proper use of the foundation's funds, in particular. Foundations are also supervised by the competent foundation supervisory authorities. This is limited to legal supervision, and so the supervisory authority does not examine issues such as whether the foundation is fulfilling its declared purpose.[48] As set out above, the foundation acquires legal capacity when it is recognised by the competent authority, and it then exists as an entity in its own right, independently of its founder. Even if a foundation is set up during the founder's lifetime, the founder has no further influence on the actions of the foundation's bodies, in particular. However, founders can grant themselves the status of a body of the foundation in the charter or appoint themselves as a member of a foundation body, e.g. the foundation's board, during their lifetime. However, a founder who serves as a body of the foundation or as a member of one of the foundation's bodies is, like all members of the foundation's bodies, bound by his or her intention as set out in the document recording the act of foundation, and is obliged to act solely in the foundation's interests.

The foundation supervisory authority has access to a range of preventive powers and measures to enable it to fulfil its supervisory function adequately and sufficiently. Not only is the supervisory authority entitled to receive and obtain information; important legal dealings also require its authorisation. To prevent misuse, changes to a foundation's charter, in particular, must be authorised by the foundation supervisory authority.[49]

Foundations with legal capacity are subject to a range of disclosure rules specific to foundations. Firstly, section 88 in conjunction with section 50 of the Civil Code (BGB) states that the dissolution or termination of a foundation must be officially disclosed. The Foundation Acts of some of the *Länder* additionally require certain matters to be

47 For information about the process to be followed for a foundation to be established after the founder's death, see section 83 of the Civil Code (BGB).

48 See Schlüter/Stolte, Stiftungsrecht, 3rd edition, 2016, chapter 3, para. 4.

49 For more detailed information about the various preventive powers and measures, see Schlüter/Stolte, Stiftungsrecht, 3rd edition, 2016, chapter 3, para. 11 et seqq.

officially disclosed (for example in an official journal or in the official gazette of the *Land* in question). These include, for example, the establishment of or changes to the foundation's name, changes to the foundation's objective, or changes to the foundation's registered office. All of Germany's *Länder* now also require foundations with legal capacity to be entered in a register of foundations. The registers of foundations can be viewed by anyone, and can also be accessed online.[50] Transparency is also promoted by the transparency register. Civil-law foundations with legal capacity are required, as legal persons under private law, to provide information about their beneficial owners to the transparency register for entry in the register (section 20 (1) sentence 1 of the Money Laundering Act (GwG)).

50 See also the draft bill to standardise legislation on foundations drawn up for discussion by the joint Federation-*Länder* Working Group on Foundation Law, p. 24.

7. Other legal arrangements

This chapter sets out legal arrangements which can be used to conceal the source or owner of assets. The subchapters on the individual legal forms are structured to, firstly, provide an overview of the fundamentals of these legal arrangements and, secondly, look in greater depth at individual parameters which could possibly make these legal arrangements susceptible to misuse for ML purposes. Details are also provided of the control mechanisms which apply to the individual legal arrangements.

7.1 Legal arrangement similar to an express trust

As the legal institution of the trust does not exist under German law, there are no trusts established under German law or governed by German law. Even if a trust established under foreign law is administered in Germany, the legal relationships between the persons involved in the trust are governed by the law under which the trust was established. German law does permit certain legal arrangements based on contractual agreements that are structured similarly to express trusts and with which legal effects similar to those of express trusts can be achieved. However, under German law, such legal arrangements similar to trusts are not as prevalent as express trusts in Anglo-American jurisdictions. In Germany, civil-law family foundations with legal capacity fulfil the function that many express trusts have in Anglo-American jurisdictions.

Such legal arrangements are known as *Treuhand* arrangements (a type of fiduciary relationship). They are deemed equivalent to an express trust under section 1 (6) sentence 2 of the Money Laundering Act (GwG) if they are modelled on an express trust. The administrators of all legal relationships deemed equivalent to express trusts are obliged entities under section 2 (1) nos 10, 11 or 13 of the Money Laundering Act (GWG). Accordingly, section 8 (1) no 1 (a) of the Money Laundering Act (GwG) requires the administrators to obtain and keep information on the persons from whom they have received assets for management and on the persons for whose benefit they manage those assets, and to hand such information over to law enforcement agencies upon request.

The administrators are also required to provide the transparency register with information on the beneficial owners of a legal arrangement equivalent to an express trust pursuant to section 1 (6) sentence 2 of the Money Laundering Act (GwG). Legal arrangements equivalent to an express trust are foundations without legal capacity if the purpose of the foundation is in the founder's own interest, and legal arrangements whose structure or function is equivalent to such foundations.

Foundation without legal capacity

A foundation without legal capacity is classified as a legal arrangement equivalent to an express trust and is not regulated by law. It is not a legal person, but rather an obligation created between a founder and a trustee (*Treuhänder*) to whom the founder has transferred assets so that the trustee can use the assets to fulfil an objective defined by the founder. In other words, a foundation without legal capacity consists of assets to be administered for a specific purpose. The trustee can be a natural or legal person. The trustee's rights and obligations are established in a *Treuhand* agreement concluded with the founder, or by means of conditions attached to the transfer of funds by the founder.

Establishment of a foundation without legal capacity

Unlike in the case of a foundation with legal capacity, the establishment of a foundation without legal capacity during the founder's lifetime requires an agreement between the founder and the trustee.[51] In the agreement between the founder and the trustee, the founder undertakes to transfer assets to the trustee, which the trustee will manage separately from other assets to fulfil an objective defined by the founder. In principle, there are no requirements regarding the form that the agreement between the founder and the trustee should take. For evidentiary reasons, however, it is recommended that the agreement should at least be in written form, as defined by section 126 of the Civil Code (BGB). If the founder undertakes in the agreement to transfer land and/or shares in a GmbH (limited liability company) to the trustee, the agreement must be notarised in accordance with section 311b (1) of the Civil Code (BGB) or section 15 (3) and (4) of the Limited Liability Companies Act (GmbHG). The creation of a foundation without legal capacity does not require the state's involvement, unlike in the case of foundations with legal capacity. The foundation's assets pass entirely to the trustee, i.e. the trustee becomes the owner of the assets, not simply their administrator. Trustees act in their own name and on the basis of their own rights when managing the foundation's assets, but in terms of their internal relationship with the founder, trustees are contractually bound to comply with the founder's intention when managing the foundation's assets. The establishment of a foundation without legal capacity after the founder's death can take place either by making the trustee an heir or by making a bequest to the trustee, combined in either case with a "testamentary burden" (*Auflage*) within the meaning of sections 1940 et seq. and 2192 et seqq. of the Civil Code (BGB).[52]

The agreement between the founder and the trustee may include a charter for the foundation without legal capacity, which can provide for "bodies of the foundation" to be created to support or oversee the trustee in the management of the foundation's assets. If a foundation without legal capacity is established during the founder's lifetime, changes to the charter merely require an amendment of the *Treuhand* agreement between the founder and the trustee.

Control mechanisms in a foundation without legal capacity

Transparency regarding foundations without legal capacity is ensured by the transparency register. Such foundations are obliged to provide information about their beneficial owners to the transparency register for entry in the register if the purpose of the foundation is in the founder's own interest (section 21 (2) no 1 of the Money Laundering Act (GwG)). Public-benefit foundations without legal capacity need not be entered in the transparency register, as they have no natural persons as beneficial owners, only the general public. A foundation without legal capacity is only deemed to serve public-benefit purposes if its activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects (section 52 of the Fiscal Code (AO)). In addition, the tax office checks every three years whether public-benefit foundations still meet the requirements of serving the public benefit, i.e. whether their activity is dedicated to the advancement of the general public.

51 For more information about the legal nature of the founding act when a foundation is established during the founder's lifetime, and for further details about the "endowment agreement", see Schlüter/Stolte, Stiftungsrecht, 3rd edition, 2016, chapter 4, paras. 6 et seqq. and 26 et seqq.

52 For more information about the special factors involved when a foundation is established after the founder's death, see Schlüter/Stolte, Stiftungsrecht, 3rd edition, 2016, chapter 4, para. 59 et seqq.

7.2 *Treuhand* arrangement concerning shares in companies

Like other kinds of *Treuhand* arrangement (a type of fiduciary relationship), *Treuhand* arrangements concerning shares in companies are not regulated by law; they are based on arrangements reached in contractual practice. They are now universally recognised as being permissible.[53] A *Treuhand* is generally understood as referring to an arrangement in which a trustee (*Treuhänder*) represents another party's interests (or at least not solely his or her own interests) in relation to a specific property right, over which the trustee has full legal power or control; while the trustee exercises this property right in his or her own name, the settlor (*Treugeber*) is the economic owner.[54] A *Treuhand* is possible in relation to any property right (including real estate, for example). This subchapter focuses solely on the use of *Treuhand* arrangements to hold shares in companies.

A *Treuhand* arrangement is characterised by the fact that trustees have greater legal power in their external dealings than that to which they are entitled in their internal relationship with the settlor. This leads to a divergence between the legal and economic ownership of the property right.[55] In the context of *Treuhand* arrangements concerning shares in a company, this means that the trustee is, from a legal perspective, a fully fledged shareholder in the company with all associated rights and obligations. Where an obligation exists for entries to be made in a register (particularly in the case of an OHG or KG) or for a list of shareholders to be submitted to the commercial register (in the case of a GmbH), this applies solely to the trustee as the shareholder. However, in the internal relationship between the trustee and the settlor, the trustee is bound by the obligations arising from the *Treuhand* relationship, which restrict the trustee in the exercise of membership rights (particularly with regard to the exercise of voting rights and entitlement to profits). In economic terms, therefore, the settlor is usually the shareholder[56] (see below for details of the exception in the case of a "non-genuine" *Treuhand* arrangement).

Various types of *Treuhand* arrangement exist. Depending on whose interests are the focus, a distinction can be made between a *Treuhand* arrangement in the interests of the trustee or another party. An "*eigennützige Treuhand*" is an arrangement where the relationship primarily serves the trustee's interests. It is usually encountered in the form of a security *Treuhand* arrangement (*Sicherungstreuhand*), which serves to secure the trustee's claims, for example as security for a bank loan. Such arrangements are not common, however, because in practice other types of security (in particular the pledging of shares) are preferred.[57] If the arrangement primarily serves the settlor's interests, this is known as a *Treuhand* in the interest of another party (*fremdnützige Treuhand*) or an administrative *Treuhand* (*Verwaltungstreuhand*). This form of *Treuhand* is chosen if settlors cannot or do not want to exercise their right and therefore transfer it to a trustee to manage it for them.[58] An administrative *Treuhand* is the most common form of *Treuhand* arrangement in the context of company and partnership law.[59]

A distinction can be made between genuine and non-genuine *Treuhand* arrangements, depending on the real ownership of the assets which are the subject of the arrangement. Usually, arrangements

53 Reichert/Weller, in: MünchKomm-GmbHG, 3rd edition, 2018, section 15, para. 208; Löbbe, in: Habersack/Casper/Löbbe, GmbHG, 3rd edition, 2019, section 15, para. 198 with further references.

54 Reichert/Weller, in: MünchKomm-GmbHG, 3rd edition, 2018, section 15, para. 194.

55 Löbbe, in: Habersack/Casper/Löbbe, GmbHG, 3rd edition, 2019, section 15, para. 196.

56 Reichert/Weller, in: MünchKomm-GmbHG, 3rd edition, 2018, section 15, para. 194.

57 Reichert/Weller, in: MünchKomm-GmbHG, 3rd edition, 2018, section 15, para. 196.

58 For more detailed information about administrative Treuhand arrangements concerning shares in a company, see Grage, RNotZ 2005, 251.

59 Reichert/Weller, in: MünchKomm-GmbHG, 3rd edition, 2018, section 15, para. 197.

of this kind constitute a genuine (fiduciary) *Treuhand* arrangement. This requires the settlor to transfer the property right fully to the trustee, meaning that the settlor loses control of the right. In the case of a genuine *Treuhand* arrangement concerning shares in a company, this means that the trustee is the owner with full legal rights and thus a fully fledged shareholder. If the other shareholders know about the settlor, the arrangement is known as an open *Treuhand* (*offene Treuhand*); otherwise, it is a hidden *Treuhand* (*verdeckte Treuhand*). In the case of a non-genuine *Treuhand* arrangement, the settlor remains the owner with full legal rights. The trustee is merely authorised to manage the asset and/or empowered to control it in accordance with section 185 (1) of the Civil Code (BGB). This kind of arrangement is not very common in the context of business shares.[60]

Treuhand arrangements are used for a wide variety of different purposes.[61] If the share in a company belongs to a group of people (e.g. joint heirs) or if the aim is to bring together a large number of investors (in the case of a public company, for example), the *Treuhand* can play a simplifying or pooling role. It can also be used to reduce the burden on the settlor, if shares in a company are to be transferred to a trustee with special expertise to administer them. A *Treuhand* arrangement can also be advisable in cases where shareholders are unable to exercise their rights as shareholders for a long period of time, for example due to illness or absence. In addition, this kind of arrangement can be used to properly organise shareholder succession, or can have a mediation function.[62] A *Treuhand* arrangement in the trustee's interests (*eigennützige Treuhand*) is a means of securing loans.

Establishment of a *Treuhand* arrangement concerning shares in a company

A fiduciary administrative *Treuhand* (*Verwaltungstreuhand*) – which, as set out above, is the norm when it comes to *Treuhand* arrangements concerning shares in companies – has two requirements. Firstly, the trustee must be a shareholder; secondly, a *Treuhand* relationship must exist between the trustee and the settlor. A distinction can be made between three different types of *Treuhand*, depending on the way in which the *Treuhand* arrangement is established.[63] If the trustee receives the asset – the share in the company – directly from the settlor, this is known as a "*Treuhand* by transfer" (*Übertragungstreuhand).* In the case of a "*Treuhand* by purchase" (*Erwerbstreuhand),* the trustee purchases the asset – the share in the company – in his or her own name but on behalf of the settlor, either from a third party or directly, e.g. by participating in the founding of the company (known as "nominee founding" or *Strohmanngründung*) or in a capital increase. A "*Treuhand* by agreement" (*Vereinbarungstreuhand)* exists if the settlor and trustee agree that the trustee will in future hold an asset he or she already owns – the share in the company – as a *Treuhand* asset for the settlor.[64]

In each of these cases, a *Treuhand* agreement between the settlor and the trustee is required to establish the arrangement. This agreement sets out, in particular, the purpose of the *Treuhand*, the parties' rights and obligations, and details of how the arrangement will end.[65] In principle, no specific form is required for the agreement.[66] This is not the case when a *Treuhand* is used to hold shares

60 Reichert/Weller, in: MünchKomm-GmbHG, 3rd edition, 2018, section 15, para. 203.

61 See Löbbe, in: Habersack/Casper/Löbbe, GmbHG, 3rd edition, 2019, section 15, para. 197.

62 For more information on this aspect, see Schaub, DStR 1995, 1634, 1635.

63 Gesell, in: Beck'sches Handbuch der Personengesellschaften, 5th edition, 2020, section 4, para. 15.

64 Grage, RNotZ 2005, 251, 252.

65 Gesell, in: Beck'sches Handbuch der Personengesellschaften, 5th edition, 2020, section 4, para. 15.

66 Gesell, in: Beck'sches Handbuch der Personengesellschaften, 5th edition, 2020, section 4, para. 15; Schaub, DStR 1995, 1634, 1636.

in a GmbH, however; in such cases, the *Treuhand* agreement must normally be notarised.[67]

Transfer of a share in a company which is the subject of a *Treuhand* arrangement

If the settlor wishes to transfer a share in a company which is the subject of a *Treuhand* arrangement to a new settlor, an agreement must be concluded between the former and new settlors; this agreement requires the participation or at least the consent of the trustee. If the *Treuhand* arrangement concerns a share in a GmbH, the agreement must be notarised.[68] There are no other requirements regarding the form of the agreement. As the trustee does not change and thus there is no change in the shareholders, there is no requirement to enter information in the commercial register (in the case of an OHG or KG), to submit a new list of shareholders (in the case of a GmbH), or to update the share register (in the case of an AG). Such transfers are thus very straightforward; only in the case of a GmbH does a certain obstacle exist due to the requirement that the agreement be notarised. Partly for this reason, *Treuhand* arrangements seem susceptible to misuse by money launderers.

Control mechanisms in a *Treuhand* arrangement concerning shares in a company

If obliged entities under the Money Laundering Act (GwG) – especially notaries, lawyers or tax advisors – are involved in the establishment or transfer of a *Treuhand* arrangement concerning shares in a company, they are required to comply with certain obligations under money laundering legislation, in particular due diligence requirements and reporting obligations. In such cases, the German notary who notarises the agreement may also be subject to a reporting obligation under the Ordinance on Reportable Matters under the Money Laundering Act in the Real Estate Sector (*Verordnung zu den nach dem Geldwäschegesetz meldepflichtigen Sachverhalten im Immobilienbereich*, GwGMeldV-Immobilien), as the reporting obligations set out in the Ordinance are based on the acquisitions listed in section 1 of the Real Property Transfer Tax Act (*Grunderwerbsteuergesetz*, GrEStG). The Ordinance on Reportable Matters under the Money Laundering Act in the Real Estate Sector (GwGMeldV-Immobilien) specifies categories of circumstances in real estate transactions in which money laundering occurs or in which a link to money laundering appears likely, and establishes reporting obligations linked to these circumstances for notaries, lawyers and tax advisors involved in them. This ensures that *Treuhand* arrangements are subject to a certain level of scrutiny. When notarising a *Treuhand* agreement, German notaries are also obliged in certain circumstances to comply with tax-related reporting obligations (section 34 of the Inheritance and Gift Tax Act (*Erbschaftsteuergesetz*, ErbStG), section 54 of the Income Tax Implementing Ordinance (*Einkommensteuer-Durchführungsverordnung 2000*, EStDV 2000), section 18 of the Real Property Transfer Tax Act (GrEStG)). This ensures that the competent tax offices are aware of notarised share deals. These reporting and disclosure obligations can deter money launderers. As set out above, in the case of a genuine *Treuhand* arrangement, the trustee is a shareholder. As such, the trustee must be entered in the commercial register (in the case of an OHG or KG) and appear in the list of shareholders to be submitted to the commercial register (in the case of a GmbH). The settlor, as the beneficial owner, must be entered in the transparency register if, as a result of the arrangement, he or she indirectly holds over 25% of the capital or voting rights or exercises control in another way. The entry in the transparency register thus ensures transparency about the *Treuhand* arrangement. This is intended to eliminate the main incentive for money launderers to use *Treuhand* arrangements, namely the possibility of anonymity.

67 Grage, RNotZ 2005, 251, 254 et seq.; Schaub, DStR 1995, 1634, 1636.

68 BGH NJW 1965, 1376, 1377; Grage, RNotZ 2005, 251, 268.

7.3 Share deals

One of the National Risk Assessment's (NRA) findings is that the real estate sector is highly susceptible to money laundering. This is partly due to arrangements such as share deals and interlocking shareholdings, in which foreign shell companies play a key role in concealing the identity of the persons and funds behind them. Share deals are real estate investments where the investors, rather than acquiring a property themselves (as in the case of an asset deal), buy shares in a property vehicle that itself owns one or more properties. The property vehicle thus continues to own the property, while investors only acquire indirect ownership of the property by virtue of being shareholders as a result of the share deal.

Procedures for a share deal, permissibility of the transfer of shares

In the case of GmbHs, the transfer of shares is permitted by law without restrictions. However, the articles of association can establish certain conditions for the transfer, and in particular can require the transfer to be approved by the company (section 15 (5) of the Limited Liability Companies Act (GmbHG)).

In the law on AGs, the principle that membership can be transferred freely applies.[69] In contrast to the legislation governing GmbHs, a restriction on transferability, i.e. a requirement that transfers be approved by the company, is only permitted to a very limited extent: section 68 (2) sentence 1 of the Stock Corporation Act (AktG) only permits transferability to be restricted if the articles of association provide for registered shares with restricted transferability. The transferability of bearer shares may not be restricted (section 137 sentence 1 of the Civil Code (BGB)). Consequently, share deals are possible for all types of company and partnership; however, approval requirements may exist, depending on the legal form or the stipulations of the partnership agreement or articles of association.

The law does not provide for the transfer of a share in a partnership. Whether a share deal is permissible therefore depends on the partnership agreement allowing a transfer of shares or on all partners agreeing to the transfer.[70] The only case in which unanimity is not required is if the partnership agreement contains a *majority clause* stipulating a different quorum.

Form

In general, a share deal does not require a specific form and can thus even take the form of a verbal agreement. This is not the case, however, if shares in a GmbH are transferred or an obligation to do so is established. The agreement must then be notarised (section 15 (3) and (4) of the Limited Liability Companies Act (GmbHG)). When shares in a GmbH & Co. KG are acquired, both the acquisition of the shares in the GmbH and the acquisition of the limited partner shares must be notarised if they constitute a single transaction, which is normally the case.[71] However, even in the case of a GmbH & Co. KG, the notarisation requirement can be deliberately bypassed by means of an "*Einheits-GmbH & Co. KG*", in which the KG (limited partnership) is the sole shareholder of the GmbH.[72]

Registration obligations

In the case of a GmbH, the certifying notary must submit a new list of shareholders to the commercial register after the transfer of shares has become effective, setting out the changes (section 40 (2) of the Limited Liability Companies Act (GmbHG)). Only persons who appear in the list of shareholders

69 Grigoleit, in: Grigoleit/Rachlitz, AktG, section 68, para. 18.

70 Ploß, in: Scherer, Unternehmensnachfolge, 6th edition, 2020, section 5, para. 226.

71 BGH DNotZ 2017, 295, 298; Wicke, GmbHG, 4th edition, 2020, section 15, para. 17.

72 Von Bonin, RNotZ 2017, 1, 3.

entered in the commercial register are deemed to be shareholders in dealings with the company (section 16 (1) sentence 1 of the Limited Liability Companies Act (GmbHG)). This is a special guarantee of transparency in relation to share deals involving GmbHs.

The level of transparency regarding share deals involving AGs is low, as the shareholders are not listed in the commercial register. Information about them is only available from the records of the depositary which holds the global share certificate, which are not publicly accessible, as well as from the share register kept by the AG in the case of registered shares. However, if a shareholder is a beneficial owner, this information must be entered in the transparency register. This ensures a certain degree of transparency, provided that the AG complies with its notification requirement.

Notifications must be provided of any changes to the shareholders in a partnership (both OHGs and KGs) for entry in the commercial register (sections 107 and 161 (2) of the Commercial Code (HGB)). In principle, this ensures a high level of transparency. However, the register entry does not have constitutive effect. This means that the transfer of shares becomes effective as soon as the agreement on the transfer of the shares – which does not require a specific form – is concluded, irrespective of the subsequent entry of the change in shareholders in the relevant register. While entry in the land register is a prerequisite for real estate purchases to be effective (section 873 (2) of the Civil Code (BGB)), which is a special guarantee of the register's accuracy, this is not ensured with the same degree of reliability when it comes to share deals involving OHGs or KGs which own real estate. If the new partner is a beneficial owner, the partnership must provide information about the partner for entry in the transparency register. This too ensures transparency, provided that the partnership complies with its requirement to provide this information.

No dedicated register exists at present[73] for civil-law partnerships (*Gesellschaft bürgerlichen Rechts*, GbR), and thus no registration obligation exists for share deals in this area. A GbR is therefore not subject to any notification obligations in respect of the transparency register either.[74] However, if the GbR holds rights which are listed in registers (e.g. land or shares in a GmbH), the land register or the commercial register must be corrected in the event of any shareholder changes (section 47 (2) of the Land Register Code (*Grundbuchordnung*, GBO); section 40 (2) sentence 2 of the Limited Liability Companies Act (GmbHG)). This correction has a declaratory effect. This means that the transfer of shares becomes effective as soon as the agreement on the transfer of the shares – which does not require a specific form – is concluded, irrespective of the subsequent entry of the change in shareholders in the relevant register.

Control mechanisms in a share deal

If obliged entities under the Money Laundering Act (GwG) – especially notaries, lawyers or tax advisors – are involved in a share deal, they are required to comply with certain obligations under money laundering legislation, in particular due diligence requirements and reporting obligations. The reporting obligations of notaries, lawyers and tax advisors in connection with real estate transactions derive from section 43 of the Money Laundering Act (GwG) and the Ordinance on Reportable Matters under the Money Laundering Act in the Real Estate Sector (GwGMeldV-Immobilien), which specifies these obligations. The Ordinance specifies certain circumstances which are typically observed when money is laundered through real estate transactions or in which a link to money laundering appears likely, and establishes reporting obligations

73 See a proposal for the introduction of a partnership register put forward by the Federal Ministry of Justice and Consumer Protection (BMJV): https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/042020_Entwurf_Mopeg.pdf.

74 See German Bundestag – 18th electoral term – printed paper 18/11555, p. 127.

linked to these circumstances for notaries, lawyers and tax advisors involved in the transactions. The reporting obligation also applies to share deals concerning shares in companies which own real estate, subject to the requirements of section 1 of the Real Property Transfer Tax Act (GrEStG). When notarising a share deal, German notaries are also obliged to comply with tax-related reporting obligations (section 54 of the Income Tax Implementing Ordinance (EStDV 2000), section 18 of the Real Property Transfer Tax Act (GrEStG)). This ensures that the competent tax offices are aware of notarised share deals. These reporting and disclosure obligations can deter money launderers.

8. Case study: Legal persons in the financial sector

The National Risk Assessment (NRA) has shown that the financial sector faces special ML/TF risks, which is why a specific assessment of this sector is being undertaken regarding the inherent risks of individual legal forms. Accordingly, what follows is not an analysis of specific legal forms which appear solely in the financial sector, but rather a case study of companies in the financial sector. It differentiates between various areas in the financial sector: asset management companies, insurance companies and credit institutions. The analysis shows that potentially heightened ML/TF risks are unconnected with the legal form, but instead depend on the business model in question. Nonetheless, certain legal forms are more prevalent in the case of certain business models.

8.1 Asset management company *(Kapitalverwaltungsgesellschaft, KVG)*

Under section 1 (14) of the Investment Code (*Kapitalanlagegesetzbuch*, KAGB), *Verwaltungsgesellschaft* or "management company" is the generic term for all companies which manage investment funds. An asset management company, or *Kapitalverwaltungsgesellschaft* (also known as managers, and formerly as investment companies), is a company whose registered office and central administration are located in Germany, and whose business is managing German investment funds, EU investment funds or foreign alternative investment funds (section 17 (1) sentence 1 of the Investment Code (KAGB)). An asset management company is deemed to manage an investment fund if it is responsible for portfolio management or risk management for one or more investment funds (section 17 (1) sentence 2 of the Investment Code (KAGB)). However, management also encompasses administrative activities such as fund administration, accounting, sales activities, etc. (section 1 (19) no 24 of the Investment Code (KAGB)). A distinction is made between asset management companies specialising in undertakings for collective investment in transferable securities (UCITS) and those specialising in alternative investment funds (AIFs). A UCITS management company manages or intends to manage at least one UCITS fund (section 1 (15) and section 17 of the Investment Code (KAGB)), while an AIF management company manages or intends to manage at least one AIF (section 1 (16) and section 17 of the Investment Code (KAGB)). An asset management company can be authorised to serve as both a UCITS management company and an AIF management company at the same time. An investment fund may only be managed by one asset management company. Under section 17 (2) of the Investment Code (KAGB), a distinction is also made between internal and external asset management companies.

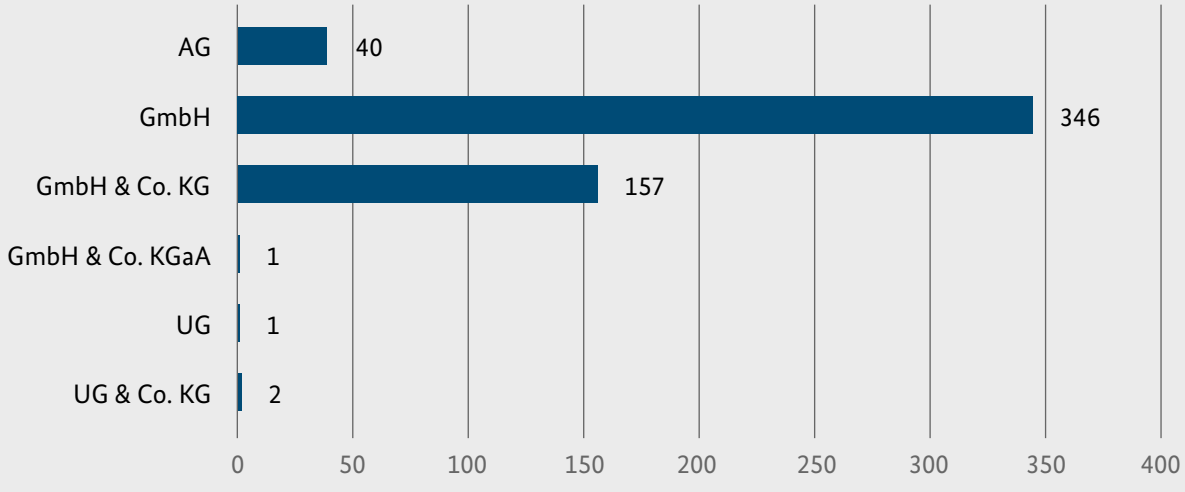
An internal asset management company is when the investment fund itself is an asset management company and acts through its internal bodies (section 17 (2) no 2 of the Investment Code (KAGB)). One precondition for this is that the investment fund's legal form must permit internal management of the fund's assets. The investment fund and the management company are one and the same. In the case of internal asset management companies, the fund itself is authorised as an asset management company. Under section 91 of the Investment Code (KAGB), investment funds may only be established as a special fund (*Sondervermögen*), as an investment stock corporation (*Investmentaktiengesellschaft*, InvAG) with variable or fixed capital, or as an open-ended or closed-ended limited investment partnership (*Investmentkommanditgesellschaft*, InvKG). Given that special funds (*Sondervermögen*) have no legal personality in their own right,

internal asset management companies can only take the form of an InvAG or an InvKG. An external asset management company is appointed by or on behalf of the investment fund to manage its assets. It can only be operated in the form of an AG (stock corporation), a GmbH (limited liability company), or a GmbH & Co. KG (limited partnership with a GmbH as a general partner) (section 18 (1) of the Investment Code (KAGB)). A degree of duplication thus exists in the case of external asset management companies: the management board of the InvAG is responsible for running the company, but the management of the assets is a matter for the external asset management company. An external asset management company requires at least €125,000 in initial capital (section 25 (1) no 1 (b) of the Investment Code (KAGB)) and additional own funds (section 25 (4) of the Investment Code (KAGB)).

Asset management companies require authorisation from the BaFin (section 20 (1) of the Investment Code (KAGB)). For more detailed information on this, please refer to the guidance notice on applying for authorisation for a UCITS management company under section 21 of the Investment Code (KAGB) and the guidance notice on applying for authorisation for an AIF management company under section 22 of the Investment Code (KAGB). An exemption from the authorisation requirement exists for the managers of certain (special) AIFs (section 2 (3) of the Investment Code (KAGB)) and for small asset management companies, which are only required to register with BaFin under sections 44 et seqq. of the Investment Code (KAGB). Under section 2 (1) no 9 of the Money Laundering Act (GwG), all asset management companies (whether authorised or registered) as defined in section 17 (1) of the Investment Code (KAGB) are obliged entities within the meaning of the Money Laundering Act (GwG).

Germany's asset management company market encompasses all asset management companies requiring authorisation under the Investment Code (KAGB). Any asset management company in this sector requires authorisation from BaFin in order to operate. The obliged entities in this sector are subject to operational supervision by Directorate WA 4 in line with the Investment Code (KAGB). According to the legal definition enshrined in section 17 (1) sentence 1 of the Investment Code (KAGB), asset management companies are companies whose business is managing German investment funds, EU investment funds or foreign alternative investment funds (AIFs). As of 31 December 2019, there were 547 "actively" authorised or registered asset management companies operating in Germany. The following chart shows a breakdown of the various legal forms:

Figure 7: Breakdown of asset management companies by legal form



Risk indicators

It is not just the asset management company responsible for the investment fund's assets which is an obliged entity under section 2 (1) no 9 of the Money Laundering Act (GwG), irrespective of whether it is an external (section 17 (2) no 1 of the Investment Code (KAGB)) or internal (section 17 (2) no 2 of the Investment Code (KAGB)) asset management company. Depending on how the fund is structured, various parties are involved in the running of the fund. These include the fund manager, the depositary and potentially sub-depositaries, advisors and various financial services providers. The large number of persons involved means that there is a risk, in principle, of information being lost due to fragmented responsibilities. For example, the depositary and the fund manager may not hold the same information about investors. This information imbalance may also be exacerbated by the different interests of the parties involved. While the depositary is primarily concerned with the proper management of the fund shares, compliance with investment principles and the maintenance of the investment fund, i.e. ultimately the protection of investors, the interests of the fund's management (attracting new investors and selling further shares in the fund) can potentially clash with these aims. This can result in a heightened ML risk, as it makes it harder to recognise transactions made for ML purposes. An awareness of this information imbalance could also lead criminals to organise their business dealings in such a way that they can take advantage of these intersections to conceal illegal transactions. Funds operating in sectors which tend to be more susceptible to bribes (e.g. the arms trade and similar sectors) appear to have a higher ML risk.

Some asset management companies offer shareholders the possibility of selling the fund shares they have purchased via a "trading platform" set up by the asset management company. One indication of the concealment of tainted assets could be the sale of fund shares via this secondary market shortly after they have been purchased. If the asset management company merely facilitates contact between the parties, these "trading platforms" are not regarded as a multilateral trading facility (MTF) or organised trading facility (OTF) and are thus not subject to regulation or transparency rules. As a result, it is difficult to quantify the potential volume traded. As this secondary market is not subject to regulation or transparency rules of any kind, supervisors are unable, in practice, to gain any insight into the transactions carried out in this market. The fact that different tasks are performed by different entities makes it more difficult to trace the cash flows between the parties involved. This is another area where the effect of the potential loss of information or information asymmetry referred to above is felt. This is shown, for example, by the fact that the asset management company is normally not involved in processing the purchase of fund shares, as this takes place via the depositary's infrastructure.

Small depositaries can potentially face a conflict of interests, as the depositary role can be prestigious and carry financial incentives. In some circumstances, due to insufficient capacity or expertise, it is not possible for adequate checks to be carried out regarding the existence or value of assets located abroad. This increases the risk of sham transactions.

8.2 Different types of fund

Mutual funds

For the most part, shares are sold anonymously. In some cases, shares in the fund can also be traded on an exchange. The ease with which fund shares can be transferred can be exploited to conceal tainted money. In particular, the fact that a large number of investors are involved in mutual funds, which often means a large volume of fund shares are in circulation, enables criminal activities to be concealed.

Institutional funds

For this type of fund, the ML risk lies in the fact that the number of investors involved tends to be low. While the aim in the case of mutual funds is for tainted money to be concealed by the large number of people involved and the frequency with which fund shares change hands, in the case of institutional funds only a small group of people are involved in the transactions. The fewer the investors that are involved in a given fund, the greater the influence each investor tends to have on the fund's business practices.

Credit / debt funds

Credit funds often partner with banks when it comes to lending, as lending is a banking business that requires authorisation under section 1 (1) of the Banking Act (*Kreditwesengesetz*, KWG). The debt claim is assumed by the fund immediately after the loan is disbursed. In addition, closed-ended special AIFs established in Germany are permitted to lend autonomously, provided that the borrower is not a consumer. Asset management companies can restructure and extend the term of unsecuritised loans in open-ended special AIFs without involving a bank. In addition, special AIFs are permitted to grant shareholder loans up to a level of 50% of the capital available for investment.

Examples for credit / debt funds:

- A fund established by a money launderer purchases loans previously taken out by the money launderer; the money launderer has clean money from the loans and pays off the loan held by "his or her own" fund using tainted money.
- A fund established by a money launderer grants loans itself using tainted money and receives clean money from loan repayments.

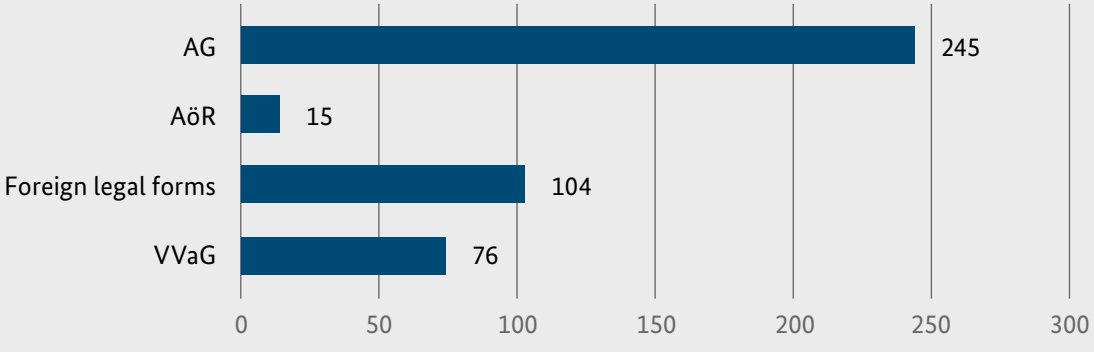
Customised funds

In some cases, institutional investors proactively approach asset management companies to establish a fund tailored specifically to the investor's needs. In certain circumstances, the asset management company in question is taken in by the fund initiator's greater knowledge and relies on their expertise.

8.3 Insurance companies

The National Risk Assessment (NRA) found that the risk of the insurance sector being misused for money laundering is rated as medium-low overall. A potential increase in this risk is attributed to the fact that the persistent low interest rate environment is causing many insurance companies to offer a wider spectrum of products which can lead

Figure 8: Legal forms of insurance companies subject to supervision



to a greater risk. Under section 8 (2) of the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*, VAG), the only permitted legal forms for an insurance company are an AG (including a Societas Europaea, SE), a mutual insurance association (*Versicherungsverein auf Gegenseitigkeit*, VVaG), and a corporation or institution governed by public law (*Anstalt des öffentlichen Rechts*, AöR). In total, there are 440 insurance companies.[75] The chart below provides a breakdown of the legal forms of insurance companies across the entire insurance sector. It is important to note that not all of these insurance companies are obliged entities under the Money Laundering Act (GwG).

The chart below shows that most of the insurance companies which constitute obliged entities under the Money Laundering Act (GwG), at around 66%, have the legal form of an AG. The second-largest group, but trailing far behind at 39 companies, is VVaGs. The companies with foreign legal forms are branches of foreign insurance companies in Germany.

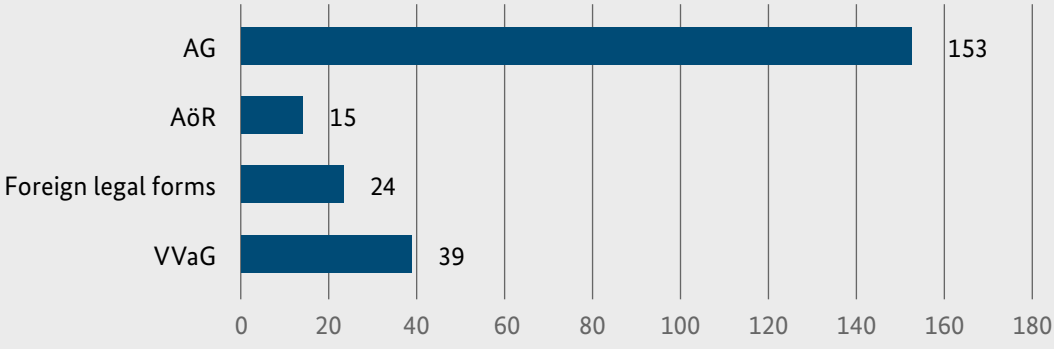
75 Excluding small insurance undertakings as defined in section 210 of the Insurance Supervision Act (VAG).

Risk indicators

For some time, life insurers have been making increased use of the possibility of transferring their portfolios to what are known as "run-off companies". These specialise in using optimised business processes to manage policies which are no longer lucrative for insurers in today's interest rate environment because minimum returns were guaranteed when the policy was taken out. A money laundering risk could arise from the potential for information to be lost in the transfer of the contractual relationship from the original insurer to the run-off company. The choice of legal form for an insurance company is, as set out above, limited by the Insurance Supervision Act (VAG). In particular, insurance companies are not permitted to use the legal form of a GmbH. The legal forms permitted by the Insurance Supervision Act (VAG) are the AG (including the SE), the VVaG and the AöR.

Several people are often involved in an insurance contract. The policyholder, the person acting on the policyholder's behalf, the beneficiary and the person who pays the insurance premiums can all be different people. In addition, it is possible to change the people originally involved during the policy's term. Complex constellations and frequent changes are usually monitored by insurance companies, but there is a possibility that they could be used to conceal tainted assets. In some cases, insurers use automated processes to conclude insurance

Figure 9: Legal forms of insurance companies subject to money laundering supervision



contracts (a practice known in German as *Dunkelpolicierung*, or "dark policy issuing"). This involves the automated processing and acceptance of applications for the issuing of an insurance policy if predefined criteria are met. A manual review takes place only if an application is not accepted because the relevant criteria are not met.

Risk assessment

Experience shows that insurance companies generally have a lower risk due to the kind of products they offer. AöRs and VVaGs are not exposed to a special ML/TF risk, similarly to eGs and AöRs in the banking sector. Companies with the legal form of an AöR are already less suited to misuse for ML/TF purposes because they are institutions governed by public law. The background to this is the less individualistic structural option of the AG or VVaG, which offers less scope for adaptation to meet shareholders' needs than a GmbH. More of the provisions of the Stock Corporation Act (AktG) are mandatory and require a much more formal corporate structure, while the mostly non-mandatory provisions of the Limited Liability Companies Act (GmbHG) offer more latitude in this context. In addition, restrictions established by the Investment Supervision Act (VAG) are also a factor.

8.4 Credit institutions

One thing, which sets Germany apart, is its high density of banks. While the number of banks has steadily declined in recent decades, the German banking sector still has a very large number of legally independent banks compared with other countries. As of January 2020, 1,609 credit institutions are supervised by the BaFin. Credit institutions are largely free in their choice of legal form. A restriction is imposed only by section 2b (1) of the Banking Act (KWG), which states that a credit institution which requires authorisation pursuant to section 32 (1) of the Banking Act (KWG) may not be operated in the form of a commercial sole proprietorship. Despite this freedom, a total of around 88% of the credit institutions in Germany use the forms of a registered cooperative (*eingetragene Genossenschaft*, eG), an institution governed by public law (*Anstalt des öffentlichen Rechts*, AöR), or a stock corporation (*Aktiengesellschaft*, AG).

AöRs and eGs are the dominant legal forms in the German banking sector, together accounting for roughly 80% of the institutions in this sector. However, when looking at the balance sheet total for the banking sector as a whole, the picture is as follows:

Figure 10: Legal forms of credit institutions subject to supervision

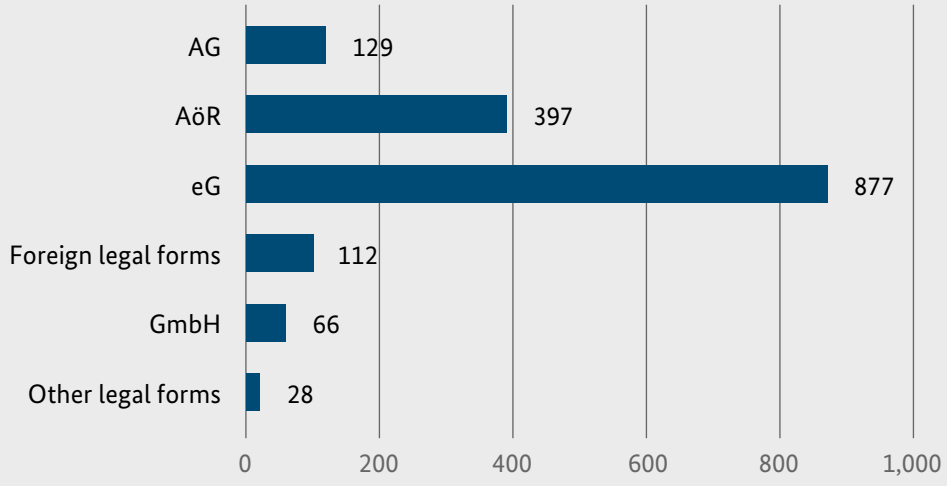
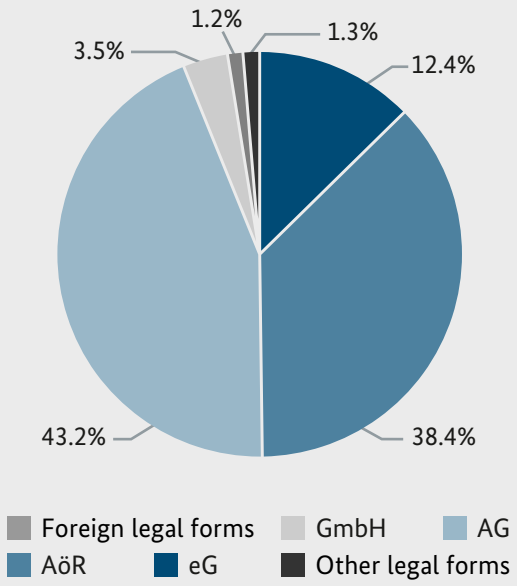


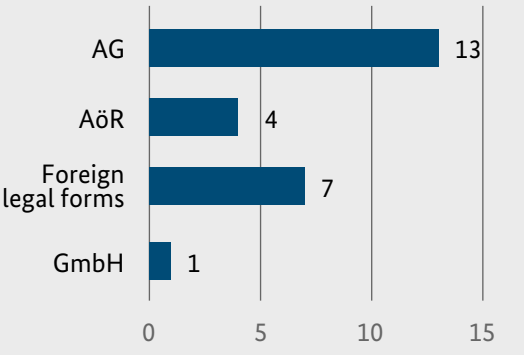
Figure 11: Legal forms as a percentage of the balance sheet total



This shows that the credit institutions with the legal form of an AG, together with AöRs, account for the largest share (combined: 82%) of the balance sheet total, while cooperatives trail in third place, despite being the most common legal form for credit institutions in terms of the number of institutions.

In 2019, the BaFin used an enhanced risk-based approach to identify institutions requiring intensified supervision. This currently applies to 25 institutions. A breakdown of the legal forms of these institutions, in terms of the number of institutions, gives figure 12.

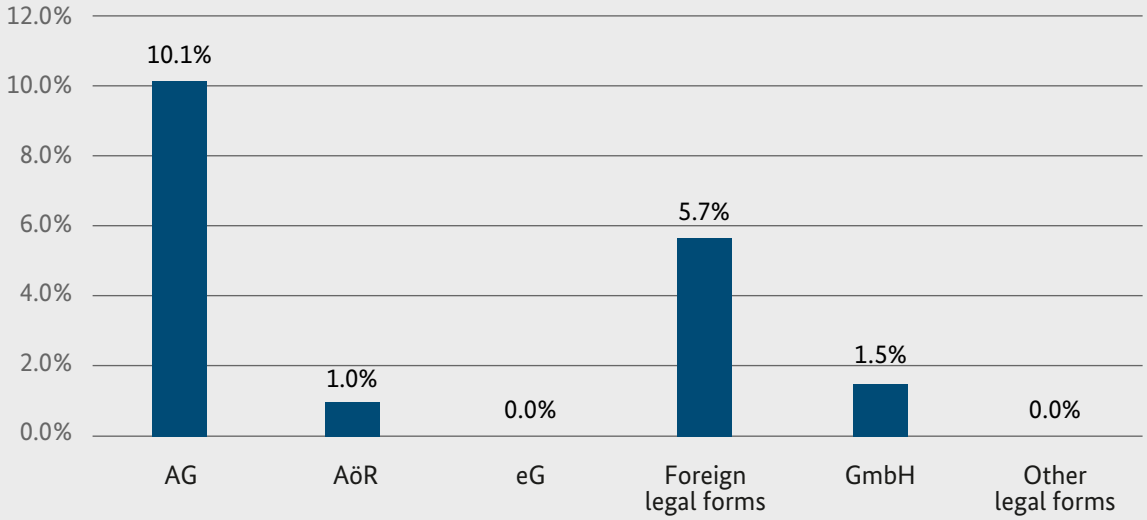
Figure 12: Number of credit institutions subject to intensified supervision



When compared with the distribution of legal forms in the banking sector as a whole, it is clear that AGs are particularly prevalent among the banks subject to intensified supervision. While AGs make up the majority of banks subject to intensified supervision, at 52%, they represent a minority of the total number of credit institutions, at just 8%. This juxtaposition also shows that the group of eGs, which make up a majority of the total number of credit institutions, is not represented at all among the institutions subject to intensified supervision. This suggests that credit institutions with the form of an eG pose lower risks than those with the form of an AG. Meanwhile, the group of institutions with the form of a GmbH remains constant in relative terms, at 4%. AöRs represent 16% of the institutions subject to intensified supervision.

At 28%, banks with a foreign legal form make up a not insignificant proportion of the institutions subject to intensified supervision. However, it is not possible to draw direct conclusions about the risk of the various legal forms from the distribution of legal forms among the institutions subject to intensified supervision. Firstly, individual shortcomings, such as inadequate safeguards, lead to classification as a credit institution subject to intensified supervision. Secondly, it must be kept in mind that the credit institutions subject to intensified supervision are not currently representative in terms of the number of institutions. Of the total of 1,609 banks, just 25 institutions are currently classified as requiring intensified supervision. Besides these institutions, there are also other banks with high inherent risks; however, they are not included in the group of institutions subject to intensified supervision because their preventive measures are of a sufficiently high quality. For this reason, the institutions classified as requiring intensified supervision cannot be treated as if they were representative of a specific legal form. For example, just 13, or around 10%, of the 129 credit institutions with the legal form of an AG are classified as

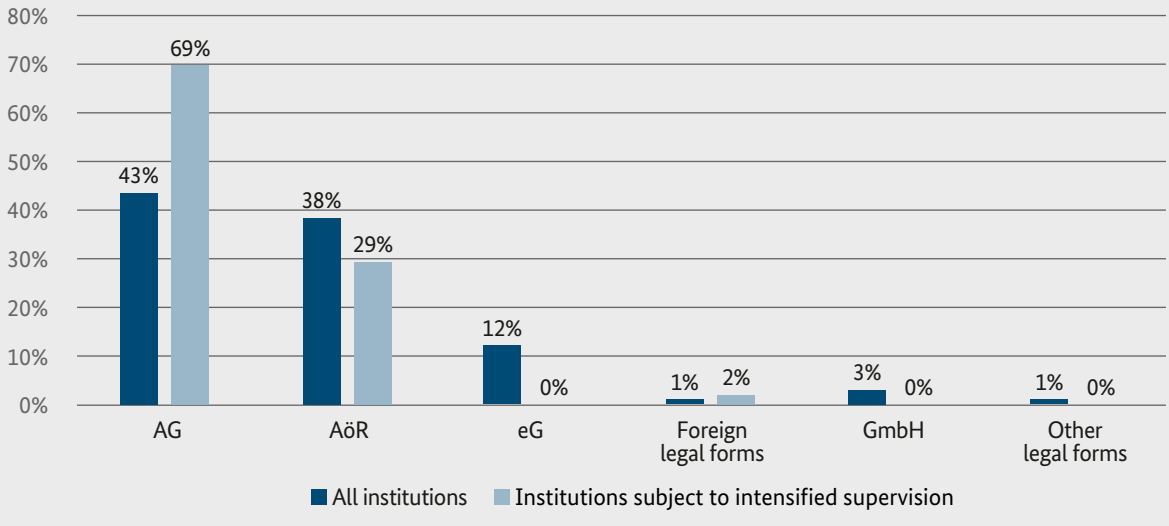
Figure 13: Credit institutions subject to intensified supervision as a percentage of the total number of supervised credit institutions with that legal form



requiring intensified supervision. However, the fact that none of the 877 institutions with the legal form of an eG have been deemed to require intensified supervision is an indicator of their level of risk. This finding also reflects the results of the NRA, which stated that cooperative banks do not pose an especially high risk.

Stock corporations (AGs) account for a disproportionate share of the balance sheet total of the credit institutions subject to intensified supervision. This is because particularly large banks are classified as being subject to intensified supervision, and the legal form of an AG is very common among large banks. The comparison shows that, although only

Figure 14: Percentage of balance sheet total accounted for by various legal forms for credit institutions subject to intensified supervision and all credit institutions



a small number of institutions are subject to intensified supervision, they represent a significant proportion of the balance sheet total for the sector as a whole, including with regard to the groups of institutions with these two legal forms. This suggests that the legal form is an endogenous ML risk, as the risks are caused more by the size of the institutions associated with certain legal forms.

8.4.1 Five sub-sectors of the banking sector

The National Risk Assessment (NRA) divided the banking sector into five sub-sectors and gave each a risk rating. An analysis of the company forms chosen within these sectors can therefore allow inferences to be drawn about certain risk groups. Focusing on the distribution of company forms within Sectors 1 to 5 as defined in the NRA produces the following picture, in terms of the number of credit institutions:

Sector 1 includes the major banks, the central institutions of the public-law and cooperative credit institutions, and the *Landesbanks* (regional public banks). Only two company forms exist in this sector, namely AGs (45%) and AöRs (55%). The AöRs are the individual *Landesbanks*.[76] According to an internal query, all institutions in Sector 2, which comprises the branches and branch offices of foreign banks as defined by sections 53 and 53b of the Banking Act (KWG), use a foreign legal form.

Sector 3 includes regional banks and other commercial banks and is very diverse. The dominant legal forms in this sector are AGs and GmbHs.

Sector 4 comprises all banks placed in the savings banks and cooperative banks category in the Deutsche Bundesbank's statistics. As might be expected, this sector is dominated by banks with the legal form of an eG or an AöR. Only just over 1% of banks in this sector have a different legal form.

Sector 5, "other credit institutions", is also dominated by credit institutions with the legal form of an eG. However, GmbHs also account for 25% of the institutions in this sector. An analysis of the statistics shows that the legal form of an AG is found especially in the higher-risk Sectors 1 and

76 They also include DekaBank Deutsche Girozentrale AöR.

Figure 15: Sector 3 – Regional banks and other commercial banks

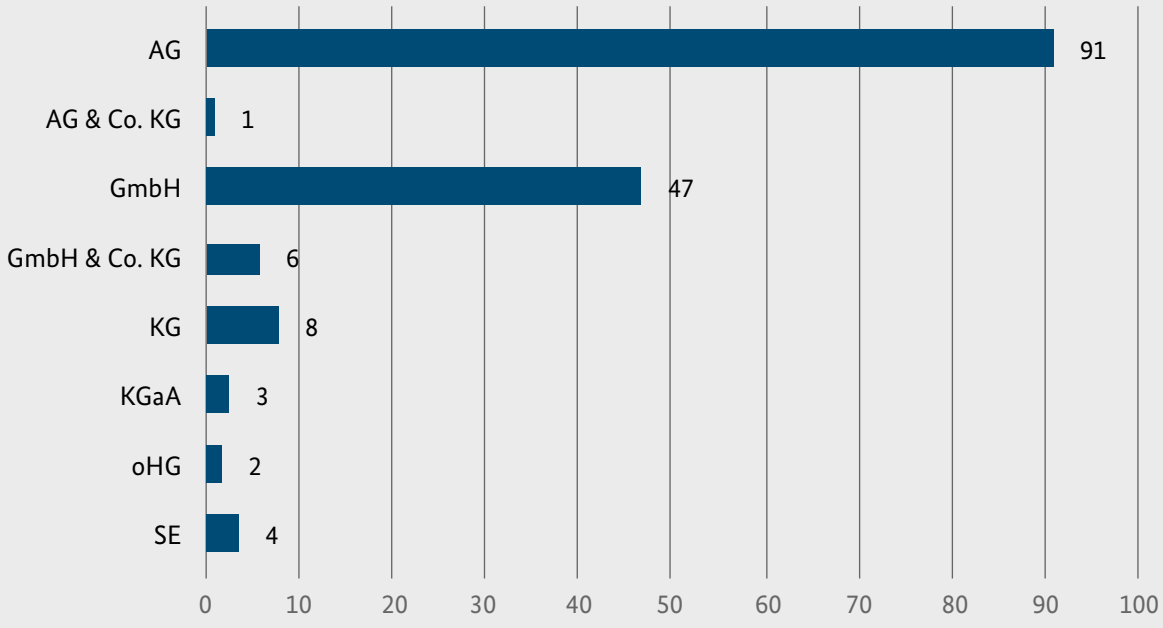
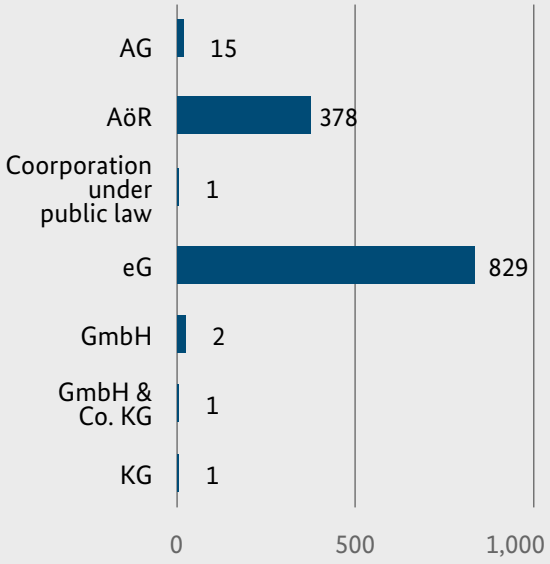


Figure 16: Sector 4 – Affiliated banks

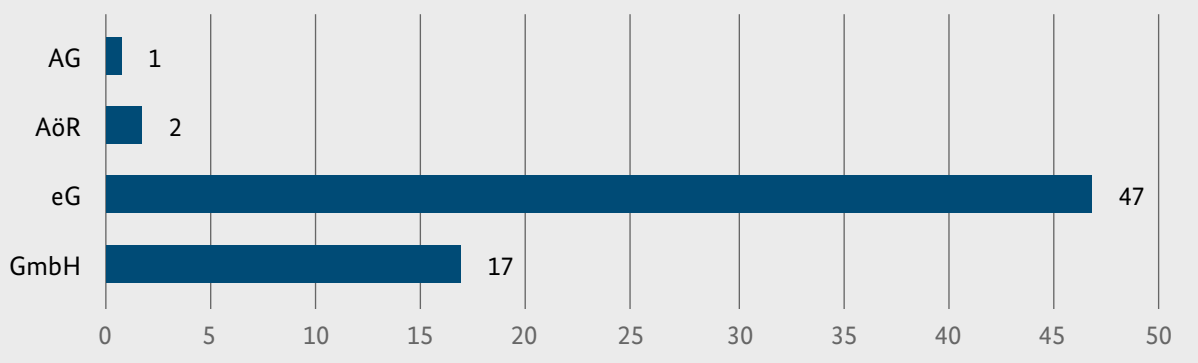


3. Sector 1 is rated as being at higher risk notably because the institutions in this sector are of significant systemic importance and are more internationally focused in their business activities, in addition to the fact that they offer a very wide spectrum of (highrisk) products. Sector 3, meanwhile, is very heterogeneous. It includes institutions which merely offer standardised banking services within a limited region, as well as banks offering a much more specialised product portfolio. For example, it also includes direct banks, which can experience difficulties in identifying customers in particular because of their business model. In addition, some banks in this sector are increasingly handling investments from abroad, notably in German real estate. The sector features an international branch and branch office network, especially in the case of subsidiaries of foreign banks.

The low-risk Sectors 4 and 5 contain very few AGs, while they play a dominant role in Sector 1. This could indicate that the legal form of an AG can be linked to a higher level of risk. This lines up with the statistics on the legal forms of the credit institutions subject to intensified supervision, which show that more than half have the legal form of an AG. In addition, AGs together account for the largest share of the German banking sector's balance sheet total, at 34%, and are thus of significant systemic importance. By contrast, the lower-risk Sectors 4 and 5 mainly include institutions with the legal form of an eG.

Sector 4 has a good ability to assess and counter ML/TF risks, in particular as a result of its affiliated nature, its proximity to local markets and customers and slightly limited product range, and for this reason it is classified as a low-risk sector. Sector 5 is also deemed to be relatively low risk, as the banks in this sector typically limit their activities to selected areas of banking business and in many cases are affiliated with a universal bank. Mortgage banks, for example, provide long-term loans to finance the construction of properties and public infrastructure. For this purpose, mortgage bonds (*Pfandbriefe*) are issued that can be acquired by

Figure 17: Sector 5 – Other credit institutions



other customers and institutions. The finding that banks with the form of an eG are mainly found in these sectors reflects the supervisory position that affiliated institutions, in particular, usually do not pose a heightened risk.

It is harder to categorise and assess the legal form of a GmbH. In addition to Sector 3, it is also very common in Sector 5, which was identified as the sector with the lowest ML/TF risk out of all five banking sectors. No GmbHs are found in the high-risk Sectors 1 and 2. This suggests that institutions with the form of a GmbH do not carry a heightened level of risk, at least in the banking sector.

In the case of AöRs, too, the potential risk cannot be determined directly from the sectors defined by the NRA. It is true that AöRs, like eGs, are mainly represented among affiliated banks, as this legal form is used by savings banks, in particular. At the same time, however, Sector 1 features not only AGs but also AöRs, which account for 55% of the sector, as all *Landesbanks* and Dekabank Deutsche Girozentrale use this legal form. AöRs are thus found both in a high-risk sector and in a sector which is not deemed to have a heightened risk. What is more, AöRs together account for the second-highest share of the balance sheet total of the banking sector as a whole, and make up 16% of the group of credit institutions subject to intensified supervision. Given the public-law nature of AöRs, it can be assumed that institutions with this legal form are less suited to misuse for ML/TF purposes. This is partly due to the fact that these credit institutions are majority-owned by public shareholders. It is therefore unlikely, in principle, for the identity of the persons behind the legal form to be concealed, which is a situation which tends to lead to a higher ML risk. Germany's public-law credit institutions also often maintain that they are serving the public interest and that their public remit is to ensure the population is supplied with financial services even in the furthest reaches of the country, which is why they are consistently organised along regional lines.

Risk indicators

Company size and the complexity of business structures

Germany's banking sector is very heterogeneous in terms of company size and the complexity of business structures. Germany's financial market covers the full spectrum, ranging from small regional banks with just a few members of staff and a relatively low balance sheet total, to major banks which operate internationally. The NRA has already shown, however, that the major credit institutions, in particular, have a high ML/TF risk, especially because of their size, business activity and complexity.

Based on the results of the NRA, it is clear that all major banks have the legal form of an AG. These banks have the highest risk, according to the results of the NRA, because of their complex business structures, their international links and their size. This gives rise to the assumption that particularly large or complex institutions primarily use the legal form of an AG. The major institutions (Sector 1 in the NRA) which are not AGs are the six public-sector central institutions, which normally have a less complex structure than the major banks. The group of AöRs consists mostly of public-law savings banks. However, as affiliated banks, these institutions mainly operate on a regional basis and do not have complex business structures.

Besides savings banks with the legal form of an AöR, the affiliated banks sector is dominated by banks with the legal form of an eG, in particular. They also operate mainly on a regional basis. In addition, banks with the form of an eG also tend to be smaller institutions, in terms of both their personnel structure and their business activity and balance sheet totals. GmbHs are found in Sectors 3 and 5. In terms of balance sheet total, these institutions also include larger banks. However, it is relatively rare for them to have more complex business structures. The guarantee banks found in Sector 5 were assigned a low ML/TF risk in the NRA.

Foreign interests

Besides branch offices (Sector 2), which routinely use foreign legal forms, banks in Sector 1, in particular, have significant foreign interests. Especially in the case of major banks, international links result in an increase in the ML/TF risk. As set out above, all major banks use the legal form of an AG. Besides the major banks, the public-law and cooperative central institutions also have foreign interests, but to a much lesser extent than the major banks. As the NRA explains, however, the risks which exist in this context are mainly due to the institutions' business activity. By contrast, affiliated institutions, which usually have the legal form of an AöR or an eG, generally have no foreign interests. The savings banks and cooperative banks operate on regional lines, a principle which, for savings banks, is even enshrined in the laws of Germany's *Länder*. Any international payments are handled via the central institutions.

In general, it can be said that credit institutions with a more complex business model and greater international interests are more likely to use the legal form of an AG. It is important to keep in mind that these factors are endogenous risks. The underlying risk is caused by the business model rather than the legal form. Furthermore, it can be said that an AöR is less susceptible than an AG to misuse for ML/TF purposes, due to its special mandate and ownership structure, which is dominated by public bodies.

8.5 Risk-mitigating factors in the financial sector

In addition to the general disclosure obligations which exist for the various legal forms, further measures exist in the financial sector to mitigate the risks of misuse for ML/TF purposes. A special legal requirement exists for external asset management companies. Under section 18 (2) sentence 1 of the Investment Code (KAGB), a supervisory board must be established if the external asset management company has the legal form of a GmbH. The second sentence of this section states that an external asset management company must establish an advisory board if it has the legal form of a limited partnership (KG) in which a GmbH is the sole general partner. The composition, rights and obligations of the supervisory board and advisory board are enshrined in the specified provisions of the Stock Corporation Act (AktG), subject to subsection (3), sentence 2.

Restrictions on the choice of legal form

In addition, statutory restrictions exist where lawmakers have restricted the choice of possible legal forms in the financial sector. Under section 2b (1) of the Banking Act (KWG), a credit institution which requires authorisation pursuant to section 32 (1) of the Banking Act (KWG) may not be operated in the legal form of a commercial sole proprietorship. A risk-mitigating factor which must be kept in mind for internal asset management companies is that the investment fund itself is authorised as an asset management company if the fund's legal form permits internal management, and thus internal asset management companies can only be operated as an InvAG (investment stock corporation) or an InvKG (limited investment partnership). Meanwhile, external asset management companies which are appointed as asset managers by or on behalf of the investment fund may only be operated in the form of an AG, a GmbH or a GmbH & Co. KG (section 18 (1) of the Investment Code (KAGB)). Insurance companies, too, may only be operated in the legal forms prescribed by law under section 8 (2) of the Insurance Supervision Act (VAG): an AG (including the SE), a VVaG (mutual insurance association) or an AöR (corporation or institution governed by public law).

Checks on holders

In addition, lawmakers have also recognised that institutions can be misused for ML/TF purposes by means of the purchase of significant holdings. Legal provisions on qualifying holding procedures

have thus been implemented in the relevant legislation (section 2c of the Banking Act (KWG), sections 17 et seqq. of the Insurance Supervision Act (VAG), section 14 of the Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz*, ZAG), section 19 of the Investment Code (KAGB)). These qualifying holding procedures thus also serve the aim of taking effective measures to tackle ML/TF, in line with international standards, as defined by the Basel Committee on Banking Supervision and, in particular, the FATF.[77]

This counters the risk that the money used to purchase the holding is laundered by the acquisition, for example, or that the institution is used for further ML activities. The institutions specified in the Holder Control Regulation (*Inhaberkontrollverordnung*, InhKontrollV) must notify the BaFin of the acquisition (in the case of significant holdings). The Regulation applies to credit institutions, financial services institutions, insurance companies, pension funds or insurance holding companies within the meaning of section 1b of the Insurance Supervision Act (VAG). The notification triggers a qualifying holding procedure, which involves the potential buyer being assessed by the supervisor, within a fixed period, on the basis of the criteria specified in the Banking Act (KWG) and the Insurance Supervision Act (VAG). In this context, checks on whether the planned acquisition is related to ML or TF are also carried out.

The supervisory authority can prohibit the planned acquisition of a significant holding or an increase in the holding if the required documents to be submitted by the potential buyer are incomplete, inaccurate or do not meet the requirements set out in the Holder Control Regulation (InhKontrollV), or if facts would justify the assumption that these criteria are not met.[78] Lawmakers have thus created a means to protect financial companies from the risks which can be associated with the acquisition of significant holdings.

77 See German Bundestag – 14th electoral term – printed paper 14/8017, p. 68.

78 Website of the Deutsche Bundesbank: https://www.bundesbank.de/de/aufgaben/bankenaufsicht/einzelaspekte/erlaubnisverfahren-inhaberkontrolle-governance/inhaberkontrolle/inhaberkontrolle-598344 (in German).

Special reporting obligations

Banks subject to supervision are also required to undergo a full audit as part of the audit of their annual financial statements. The supervisor thus has access to annually updated information about the credit institutions' ML risks and the quality of their safeguards. A special situation exists for the sector of branches and branch offices of foreign banks as defined by sections 53 and 53b of the Banking Act (KWG). The institutions specified in section 53 of the Banking Act (KWG) are subject to a statutory reporting obligation. No such statutory reporting obligation exists for the institutions specified in section 53b of the Banking Act (KWG). BaFin has taken appropriate steps to remedy this supervision and information deficit. For example, data and information are gathered by means of questionnaires. In addition, targeted on-site inspections are carried out on the basis of a risk-based supervisory approach.

Risk-based supervision

BaFin has also stepped up its supervision of institutions subject to intensified supervision. Two divisions within BaFin are dedicated solely to supervision of the banks subject to intensified supervision. In 2019, BaFin's directorate responsible for ML prevention was restructured to facilitate even more of a risk-based approach to supervision. While ongoing supervision of Germany's biggest major banks which operate internationally (Deutsche Bank AG and Commerzbank AG) continues to be handled by one division, another division has been tasked with supervising particularly high-risk institutions more closely.

9. Measures to reduce ML/TF risk

Various mechanisms exist in Germany which mitigate the susceptibility of legal persons and other legal arrangements to misuse for ML/TF purposes. Besides the transparency register, these include the registers for the various legal forms, which are intended to ensure transparency about the beneficial owner(s); an overview of the various registers is provided in this chapter. All of the registers are subject to veracity and clarity requirements, and various mechanisms, such as notarisation obligations, have been established with the aim of ensuring compliance with these requirements. These mechanisms include sanctions for missing or inaccurate entries.

9.1 Commercial register

The commercial register (*Handelsregister*) is a public register maintained by Germany's local courts (*Amtsgerichte*), which provides information about certain legal relationships in the case of the registered businesses. Anyone can inspect the register without having to fulfil any requirements (section 9 (1) of the Commercial Code (HGB)). Entries in the register must be published electronically (section 10 of the Commercial Code (HGB)). Applications for registration in the commercial register must be submitted in officially certified form (section 12 (1) of the Commercial Code (HGB)). This guarantees the entry's veracity to a large degree, as the declaration must be put in writing and the signature of the person making the declaration must be notarised. The notary checks the identity of the person making the declaration against a valid identity document. The commercial register lists the registered commercial companies in the district of the competent registration court; a commercial company can be a natural person or enterprise which carries on a commercial business, or an enterprise on which the law confers the status of a commercial company irrespective of the purpose of the enterprise and which acquires legal capacity by its entry in the register (e.g. a limited liability company (GmbH) or a stock corporation (AG)). The purpose of the commercial register is to disclose facts and legal relationships concerning commercial companies and enterprises that are essential in legal dealings. As a public register of key company data and legal facts, it is above all a means of increasing corporate disclosure in order to better safeguard legal relations in general.

In principle, all commercial companies are obliged to register their business name and the place and address of their commercial establishment in the commercial register maintained by the court in whose district their establishment is located (section 1 and section 29 of the Commercial Code (HGB)). This rule does not apply to small business owners, as although they operate a business, they do not fall under the provisions for commercial companies (section 1 (2) of the Commercial Code (HGB)). Under the Commercial Register Regulation (HRV), the commercial register consists of electronic files and (depending on the legal form of the company in question) includes information about the following subjects:

- the business name,
- the registered office,
- branch offices and their addresses,
- the purpose of the company,
- representatives and authorised signatories (*Prokuristen*),
- limitations / scope of the power of representation,
- general partners (in the case of an OHG or KG), owners (in the case of a registered commercial company (*eingetragener Kaufmann*, eK)), and special powers of representation,
- the legal form of the company,
- the share capital (in the case of a GmbH or AG),

- the limited partners (in the case of a KG),
- the opening, suspension or termination of insolvency proceedings,
- the dissolution of the company,
- the termination of the company.

The commercial register is maintained by the local courts of the *Länder* as registration courts. In most cases, responsibility rests with the local court in whose district the regional court (*Landgericht*) is located. A judge or senior judicial officer is responsible for making entries in the register. Germany's commercial register has been maintained in electronic form since 1 January 2007. The commercial register is intended to fulfil publication, evidentiary and scrutiny purposes. German law therefore implements safeguards in the form of a differentiated, two-stage formation process, combined with strict validity and evidentiary requirements regarding the documents submitted and persons involved. The first step in this system of preventive judicial review is a notarial procedure.

Anyone can request a printout of an entry (section 9 (1) of the Commercial Code (HGB)) without having to state a reason for the request. Since 1 January 2007, it has been possible to search the entries in the commercial registers of all of the *Länder* any time online via a joint register website set up by the *Länder*. Users must register with the site in order to access the data. A fee of up to €4.50 currently applies when accessing data from registers or documents submitted to the registration court.

9.2 Register of cooperatives

The register of cooperatives (*Genossenschaftsregister*) is organised along very similar lines to the commercial register. It is a public register maintained by the local courts which provides information about certain legal relationships of a registered cooperative (eG). Anyone can inspect the register without having to fulfil any requirements (section 9 of the Commercial Code (HGB) in conjunction with section 156 (1) sentence 1 of the Cooperatives Act (GenG)). Entries in the register must be published electronically (section 10 of the Commercial Code (HGB) in conjunction with section 156 (1) sentence 3 of the Cooperatives Act (GenG)).

The register of cooperatives contains information about the following subjects:

- the cooperative's articles of association,
- the board and its power of representation,
- authorised signatories (*Prokuristen*),
- the opening, suspension or termination of insolvency proceedings,
- the dissolution of the cooperative,
- the termination of the cooperative.

The members of the cooperative are not listed in the register of cooperatives, however. Although the board of the cooperative is required to keep a list of members, it may only be inspected if a legitimate interest exists. Transparency is thus limited in this respect. However, if a member of the cooperative meets the requirements to be considered a beneficial owner, information about this member must be submitted to the transparency register for entry in the register (section 20 (1) of the Money Laundering Act (GwG)). The provision whereby the notification requirement is deemed to have been fulfilled, set out in section 20 (2) of the Money Laundering Act (GwG), cannot apply to members of a cooperative, as this information is not available from the register of cooperatives. In light of the minimum number of members, however, it is unusual for them to be beneficial owners; the board is normally the notional beneficial owner (section 3 (2) sentence 5 of the Money Laundering Act (GwG)).

9.3 Register of associations

The register of associations (*Vereinsregister*) is a public register maintained by the local courts which provides information about certain legal relationships of associations with legal capacity. It is regulated by sections 55 et seqq. of the Civil Code (BGB) and sections 374 et seqq. and 400 et seqq. of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG). However,

anyone is permitted to inspect the register without having to fulfil any requirements; in addition, anyone can request a (certified) copy of entries from the register of associations (section 79 (1) of the Civil Code (BGB)). After an association with legal capacity has been registered for the first time, the register of associations must also be notified of any subsequent (relevant) changes to the association's constitution and organisation for entry in the register. This applies to changes to the articles of association under section 71 of the Civil Code (BGB), and to changes to the members of the board under section 67 of the Civil Code (BGB). Under section 68 of the Civil Code (BGB), the register of associations, like the commercial register, is subject to the principle of *negative Publizität*: this means that if there was a requirement that a particular fact must be registered, and that fact was not registered, it can be invoked against a third party only if it can be proven that the third party was aware of it. To ensure that applications for entry in the register are only submitted by persons entitled to do so, section 77 of the Civil Code (BGB) stipulates that all notifications for entry in the register of associations must be publicly certified. This means that the notifications must be put in writing and the signature of the person making the declaration must be notarised. The notary checks the identity of the person making the declaration against a valid identity document. This confirms the identity of the person making the notification and the veracity of the notification. Under section 378 (3) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG), the notary also checks that the notification can be acted upon, and confirms this to the competent court in the note on certification.

The register of associations contains information about the following subjects:

- the name and registered office of the association,
- the articles of association (date of adoption of the articles of association and wording of amendments to the articles of association),
- the members of the board and their power of representation,
- the opening, suspension or termination of insolvency proceedings,[79]
- the dissolution of the association[80] and
- the termination of the association.[81]

In addition, all documents submitted with the notifications to the register of associations are publicly accessible.

9.4 Transparency register

Legal representatives of legal persons under private law and registered partnerships (see section 20 (1) of the Money Laundering Act (GwG)), as well as administrators of trusts (trustees) and *Treuhänder* (trustees in *Treuhand* arrangements) (section 21 (1) and (2) of the Money Laundering Act (GwG)), are required to submit a notification concerning the beneficial owners for entry in the transparency register (*Transparenzregister*) without delay, unless the information about the beneficial owners is already available from other public sources within the meaning of section 22 (1) of the Money Laundering Act (GwG), such as the commercial register. Listed companies are exempted from separate notification for the transparency register if the exercise of control is already evident from voting rights notifications. The following information on the beneficial owner must be included in the notification: given name and family name, date of birth, place of residence, the nature and extent of the beneficial interest, and nationality of the beneficial owner (see section 19 (1) of the Money Laundering Act (GwG)). The information on the beneficial owner must be kept up to date; the registrar entity must be notified of changes without delay.

Access to search the transparency register is tiered according to the function of the inspecting party (see section 23 (1) of the Money Laundering Act (GwG)). Certain public agencies have unrestricted

79 See section 75 of the Civil Code (BGB).

80 See section 74 of the Civil Code (BGB).

81 See section 76 of the Civil Code (BGB).

access to the data in the transparency register in the course of their duties. Obliged entities can only access it on a case-by-case basis and to meet due diligence requirements. In line with the requirements of an EU directive, the transparency register has been accessible to all members of the public, without a requirement to demonstrate a legitimate interest, since 1 January 2020. As before, to prevent abuse, inspecting parties must register online with the transparency register and provide proof of their identity, and must pay an inspection fee per extract from the register, as the transparency register is financed by fees. To protect data subjects, members of the public cannot view the place of residence (only the country of residence) or the exact date of birth of the beneficial owners. If facts justify the assumption that inspection would expose the beneficial owner to the risk of falling victim to certain criminal offences (fraud, abduction for purpose of extortion, hostage-taking, extortion or extortion with use or threat of force, crimes against life or limb, coercion, or threats to commit a serious criminal offence), or if the beneficial owner is a minor or is incapacitated, the registrar entity can restrict inspection of the entry wholly or partially at the beneficial owner's request (see section 23 (2) of the Money Laundering Act (GwG)). However, this is not possible if the information is already accessible from the registers specified in section 22 (1) of the Money Laundering Act (GwG). It is not possible to restrict inspections by the authorities specified in section 23 (1) sentence 1 no 1 of the Money Laundering Act (GwG), by obliged entities under section 2 (1) nos 1 to 3 and 7 of the Money Laundering Act (GwG) (which include banks and insurance companies), or by notaries.

In future, obliged entities under money laundering legislation and competent authorities will be required after inspection to report to the registrar entity any discrepancies in the transparency register that may come to their attention (section 23a of the Money Laundering Act (GwG)). This is to ensure the veracity and high quality of the entries. Obliged entities under money laundering legislation are also required to obtain an extract from the register or proof of registration when they begin a new business relationship with associations or legal entities that are registered in the transparency register (section 11 (5) sentence 2 of the Money Laundering Act (GwG)). This is to ensure that the associations or legal entities concerned have complied with their notification requirement in relation to the transparency register.

The introduction of the transparency register has created a useful tool to enhance transparency. The quality of data recorded in the transparency register will be improved further. An additional aim is to further enhance the utility of the transparency register in all fields of efforts to counter ML/TF. For example, with effect from 1 January 2021, it will be permissible for law enforcement agencies and the FIU to search the Transparency Register for beneficial owners by name (see section 26a of the Money Laundering Act (GwG)).

9.5 Federal Gazette and business register

The members of bodies authorised to represent corporations and partnerships without a partner with full personal liability (section 264a (1) of the Commercial Code (HGB)) are required to submit accounting documents for the company or partnership electronically to the operator of the Federal Gazette (*Bundesanzeiger*) for publication, normally within one year after the end of the business year (see section 325 of the Commercial Code (HGB)). The Commercial Code (HGB) includes less stringent requirements depending on the size of the company. The disclosure requirement also applies to organisations such as cooperatives, credit institutions, insurance companies and certain very large partnerships with partners with full personal liability, commercial sole proprietorships, commercial associations and civil-law foundations with legal capacity, if they operate a business. The accounting documents published in the Federal Gazette are also made accessible via the website of the business register (*Unternehmensregister*) (section 8b (2) no 4 of the Commercial Code (HGB)).

In particular, the adopted annual financial statements prepared in compliance with the principles of proper accounting must be published (see sections 242 and 243 (1) of the Commercial Code (HGB)). In line with the principle of completeness, the annual financial statements must include all assets, debts, accruals and deferrals, and expenses and income (section 246 (1) of the Commercial Code (HGB)). If the annual financial statements are to be audited, the auditor's report must also be published, describing the subject, type and scope of the audit and setting out the accounting and auditing standards applied (section 322 (1) of the Commercial Code (HGB)).

9.6 Sanctions for non-compliance with registration or publication obligations

The Limited Liability Companies Act (GmbHG) provides for a range of sanctions: administrative fines (also known as "regulatory fines") can be imposed on a company if it fails to comply with statutory transparency and identification requirements in its business transactions. Managing directors and shareholders can face criminal liability if they provide false information when founding the company (section 82 of the Limited Liability Companies Act (GmbHG)). If a company does not abide by the notarial procedures for its establishment or the transfer of its shares, these transactions are void (section 125 of the Civil Code (BGB)). If managing directors or notaries breach their obligations by culpably submitting inaccurate lists of shareholders to the commercial register or failing to submit such lists they may also be required to pay compensation (sections 40 (3) and 43 (2) of the Limited Liability Companies Act (GmbHG) and section 19 of the Federal Notarial Code (*Bundesnotarordnung*, BNotO)). The managing directors are, in principle, liable if they do not conduct the company's affairs "with the due care of a prudent businessman" (section 43 (2) of the Limited Liability Companies Act (GmbHG)), which generally also includes compliance with registration requirements relating to the transparency register.

The sanctions provided for by the Stock Corporation Act (AktG) are similar to those which apply to GmbHs: administrative fines can likewise be imposed in the event of non-compliance with statutory transparency and identification standards in business transactions. Under section 407 (1) sentence 2 of the Stock Corporation Act (AktG), the registration court can impose coercive fines on members of the management board or liquidators who do not comply with section 273 (2) of the Stock Corporation Act (AktG). If a company does not abide by the notarial procedures for its establishment or the transfer of its shares, these transactions are void (section 125 of the Civil Code (BGB)). The provision of false information or omission of significant facts when an AG is founded can lead to criminal liability on the part of the responsible founders or members of the management board or supervisory board (section 399 (1) no 1 of the Stock Corporation Act (AktG)). The members of the management board and supervisory board are generally liable if they do not exercise the due care of a prudent manager (sections 93 and 116 of the Stock Corporation Act (AktG)).

Section 56 of the Money Laundering Act (GwG) contains numerous provisions relating to administrative fines, including for wilful or negligent breaches of the notification obligations set out in sections 20, 21 and 23a of the Money Laundering Act (GwG) (section 56 (1) nos. 54 to 66). If a company does not comply with its obligation to ensure the timely and complete disclosure of accounting documents under section 325 of the Commercial Code (HGB), the Federal Office of Justice (BfJ) initiates administrative fine proceedings against the company or the members of the bodies authorised to represent it in accordance with section 335 of the Commercial Code (HGB). The Cooperatives Act (GenG) also contains provisions on criminal and administrative fines (sections 147 et seqq.), provisions on liability (notably section 34), and allows the registration court to impose coercive fines (section 160).

9.7 Central account information system

Under section 24c of the Banking Act (KWG), all credit institutions are required to maintain a data file in which they must store certain kinds of account master data. The BaFin can access the institutions' files if this is necessary for it to fulfil its statutory tasks. It can also provide information from the files to certain other authorities, notably law enforcement agencies. The FIU may also use this account data retrieval system. The main purpose of this provision is to facilitate the prosecution (and prevention) of terrorist financing, but also of money laundering and other types of crime. The account data retrieval system makes it possible to determine what account number is associated with which person, as well as what accounts a specific person has. In this context, it is irrelevant whether the person concerned is a natural or legal person. In other words, all accounts, including those belonging to legal persons, are in principle contained in the account data retrieval file, and information on them can be accessed by BaFin, but also by law enforcement agencies.

The following information is stored in the file:

- Name of the account holder: the business name, as entered in the commercial register, including the legal form. If the legal person is not registered in the commercial register, the business name is based on the articles of association or partnership agreement. A GbR (civil-law partnership) can also have bank accounts and is thus treated in the same way as a legal person. In the case of accounts belonging to associations (*Vereine*), the association's name is based on that listed in the register of associations.
- Account number / IBAN,
- Date opened,
- Date closed,
- Persons authorised to draw on the account: name, date of birth. An exception exists if the persons authorised to draw on the account are listed in the commercial register. In this case, their identity need not be verified and their details do not need to be included in the account data retrieval file.
- Beneficial owners: names and, in cases where this information has been collected, addresses of the beneficial owners.

9.8 Administrative offence proceedings

Germany has a range of sanctions relating to the role of obliged entities under the Money Laundering Act (GwG) in determining beneficial owners. The aim of these measures is to punish non-compliance by imposing effective, proportionate, and dissuasive sanctions. The competent supervisory authorities are responsible for monitoring obliged entities' compliance with this due diligence requirement. The competent agency in the financial sector is the BaFin. For lawyers, who are often affected in connection with real estate transactions, the competent agencies are the local bar associations. For tax advisors, the competent agency is the local chamber of tax advisors. For notaries, responsibility lies with the president of the regional court (*Landgericht*) in whose district the notary is based. The supervisory measures carried out in this context raise obliged entities' awareness and ensure that the contractual or business partners of the obliged entities, for their part, endeavour to duly identify the beneficial owner.

The statutory provisions relating to the imposition of sanctions by the Federal Office of Administration (BVA), BaFin and other supervisory authorities are contained in the Money Laundering Act (GwG) and the Administrative Offences Act (*Ordnungswidrigkeitengesetz*, OWiG). There are wide-ranging options for sanctions to be imposed. Besides the imposition of an administrative fine, it is also possible to order the confiscation of the pecuniary benefit acquired by means of an administrative offence.

10. Risk assessment

As was already set out in the chapter on methodology, it is necessary to differentiate between abstract and de-facto risks when undertaking a risk assessment of the susceptibility of legal persons and other legal arrangements to misuse for ML/TF purposes. The abstract risks arise from the structure of the respective legal forms. In this context, it must be kept in mind that the abstract risks are merely assumed risks, as the de-facto risks of a legal form which actually occur in reality cannot necessarily be inferred from the assumed susceptibility of a legal form arising from its structure. For this reason, chapter 10.1 sets out the abstract risks separately from the de-facto risks, which are covered in chapter 10.2.

10.1 Abstract risk assessment

The abstract risk will be assessed below on the basis of the overview provided in chapters 3 to 7 of the legal requirements regarding the structure of the various legal forms in Germany. The assessment looks at what susceptibilities to misuse for ML/TF purposes can be inferred from the legal requirements – irrespective of whether these risks actually result in crimes being committed. That said, known risk factors for the commission of crimes in connection with ML offences will be taken into consideration. These include the concealment of the beneficial owner both in relation to the acquisition and sale of holdings in a company, and the possibilities of concealing transactions in the second stage of ML. Susceptibilities to misuse for ML/TF purposes will be identified, together with the mitigating mechanisms which exist, in order to establish the vulnerability of the specific legal form to potential misuse. The result will highlight the abstract risks that exist, which can develop into de-facto risks in the context of the commission of criminal offences in connection with ML/TF.

10.1.1 Corporations

GmbH (limited liability company)

The notarisation of the certificate of incorporation of a GmbH and of the company's application for registration ensures that all parties involved are unequivocally identified by a notary with the help of official identity documents and subjected to checks stipulated by money laundering legislation (section 2 (1) no 10 a) ee); sections 11 and 12 of the Money Laundering Act (GwG)). Under section 54 of the Income Tax Implementing Ordinance (EStDV 2000), the notary must notify not only the registration court but also the revenue authorities of the establishment of the GmbH by transmitting a certified copy of the certificate of incorporation. These measures significantly reduce the risk of a GmbH being misused for ML/TF purposes.

As it is sufficient to appoint a single managing director (section 6 (1) of the Limited Liability Companies Act (GmbHG)) and this position can be held by a shareholder (provided that the shareholder is a natural person), it is possible for a single person to establish a GmbH and enable it to take action as a company. This makes the GmbH a company form which can be established and operated with very low transaction costs. It is possible that the "third-party" (*Drittorganschaft*) principle[82] encourages the use of third parties who serve as managing directors on a pro forma basis, as is seen in the case of shell companies, which could make GmbHs more attractive for ML/TF purposes.

The minimum capital requirements, set at €25,000, constitute one barrier to the possibility of misuse for ML purposes. In this respect, the UG (limited

82 Fleischer, in: MünchKommGmbHG, 3rd edition, 2018, Introduction, para. 25 et seqq.

liability) seems more attractive from a criminal perspective, as it can be established with a share capital of just one euro and the shareholders have limited liability. However, if the entity is to be misused for money laundering on a larger scale, a GmbH would be preferable to a UG (limited liability), as a UG (limited liability) tends to be used for the economic activities of smaller businesses due to the structure of its liability requirements. For this reason, high-volume transactions at a UG (limited liability) would probably be more likely to arouse suspicion and would very probably trigger a suspicious transaction report.

As both the transfer of business shares and all capital measures require notarisation, the list of shareholders is, in practice, updated in the vast majority of cases by notaries, in their capacity as public office-holders. The obligation to submit an updated list of shareholders is one of a notary's official duties, over which the parties involved have no influence. In practice, this guarantees the veracity of the list of shareholders to a large degree, which is also a risk-mitigating measure. As section 16 (1) of the Limited Liability Companies Act (GmbHG) stipulates that only those shareholders who are registered in the current list of shareholders can exercise their rights (e.g. voting rights) in the company, the shareholders also have a strong interest in the list of shareholders being kept up to date. It is also possible, under section 16 (3) of the Limited Liability Companies Act (GmbHG), to acquire a business share from a non-authorised person in certain circumstances, if this person is wrongly registered as a shareholder in the list of shareholders. These requirements ensure a particular degree of transparency regarding the shareholder structure in the case of GmbHs, which significantly reduces the risk of misuse for criminal purposes. An agreement in notarial form is required to establish the shareholder's share transfer obligations as well as for the actual transfer of business shares (section 15 (3) and (4) of the Limited Liability Companies Act (GmbHG)).

In addition, all documents submitted to the commercial register (e.g. certificate of incorporation, certificates of conversion, shareholders' resolutions, etc.) are publicly accessible online. Notably, it is possible to inspect the list of shareholders, as defined in section 40 of the Limited Liability Companies Act (GmbHG) (see above), which ensures a very high level of transparency regarding the holding structure in the case of a GmbH. The high level of transparency required when establishing a GmbH and transferring ownership rights, together with the stringent reporting obligations, means that only a low level of vulnerability can be identified in the case of GmbHs. This is true regarding both misuse for terrorist financing purposes and all stages of the ML process. Only the fact that a GmbH can be established by a single person and the fact that the GmbH is by far the most common legal form in Germany suggest possible susceptibilities, although the latter is an endogenous risk. The susceptibility is somewhat higher in the case of UGs (limited liability) due to the low minimum capital requirements; at the same time, however, the legal parameters limit the extent to which UGs (limited liability) can be used to conceal larger volumes.

AG (stock corporation)

As corporations, AGs are subject to similar oversight mechanisms to GmbHs; however, given their importance for capital market transactions, these mechanisms are even more restrictive. The notarisation of the certificate of incorporation and the notarial certification of the application for registration ensures that all founders and members of the management and supervisory boards are unequivocally identified by a notary with the help of official identity documents and subjected to checks stipulated by money laundering legislation. This also applies to represented parties in the formation process, as the power of attorney must also be notarised or certificated by a notary. In the registration process, it is not possible for parties' obligations to be performed by legal representatives. Identities thus cannot be concealed via the use of representatives during the formation of an AG. Under section 54 of the Income Tax Implementing Ordinance (EStDV 2000), the notary must notify not only the

registration court but also the revenue authorities of the formation of the AG by transmitting a certified copy of the certificate of incorporation. These measures significantly reduce the risk of an AG being misused for ML or TF purposes.

Given that the supervisory board must consist of at least three persons (section 95 sentence 1 of the Stock Corporation Act (AktG)) and the management board of at least one person (section 76 (2) sentence 1 of the Stock Corporation Act (AktG)), and given that a member of the management board cannot simultaneously be a member of the supervisory board (section 105 (1) of the Stock Corporation Act (AktG)), at least four people are required for the formation of a stock corporation, which limits the suitability of an AG as a front company for criminal purposes. In addition, the fact that €50,000 in share capital is required acts as a deterrent to misuse of the AG by criminals with limited financial means. At the same time, the fact that AGs tend to be used for higher-volume transactions, including international transactions creates potential susceptibilities, although this is an endogenous risk.

The risk is reduced by the fact that the members of the supervisory board are personally liable for their actions (section 116 of the Stock Corporation Act (AktG)), which gives them a particular incentive to be as diligent as possible in performing their supervisory tasks. However, the fact that members of the supervisory board can also be shareholders represents a potential vulnerability. In other words, the potential for misuse remains if various persons collude.

One key issue in the case of AGs is the transfer of ownership rights. If the company has issued bearer shares (section 10 (1) sentence 2 of the Stock Corporation Act (AktG)), no share register is kept. However, an AG is only permitted to issue bearer shares if it is a listed company, or if the right of the shareholders to individual share certificates is eliminated and the global certificate is deposited with a recognised German or foreign depositary. Bearer shares have the advantage that they can, in principle, be held anonymously and sold without the AG's knowledge. At the same time, bearer shares are now primarily traded electronically, via the depositary. In these cases, the Money Laundering Act (GwG) requires the shareholder to be identified as a customer of the depositary bank, which counteracts anonymity from the perspective of money laundering legislation. Nonetheless, there is still a residual risk of ML in cases where bearer shares in the form of bearer instruments are transferred without a bank's involvement and without complying with transparency provisions. No statistics are available on the significance of these transactions. However, they are currently estimated to account for a low percentage of transactions, and so the ML risk is not classified as being particularly high. On the whole, the high minimum capital requirements and the complex formation process, together with the stringent scrutiny and transparency obligations, mean that the ML/TF risks appear to be low for AGs.

SE (Societas Europaea)

The risks of SEs are similar to those of AGs; please therefore see the information provided above.

10.1.2 Cooperatives

eG (registered cooperative)

Given their purpose and the associated transparency and scrutiny mechanisms, cooperatives appear fairly unsuited to misuse for ML/TF purposes. The cooperative's activities must directly benefit its members, and supporting them must be its main purpose.[83] Business dealings with non-members are thus only permissible if the articles of association specifically allow this (section 8 (1) no 5 of the Cooperatives Act (GenG)). Membership in a cooperative is conditional either upon participation in the founding of the cooperative by

83 Fandrich, in: Pöhlmann/Fandrich/Bloehs, GenG, 4th edition, 2012, section 1, para. 28.

signing the articles of association, or upon a written membership declaration (section 15 of the Cooperatives Act (GenG)). The management board is obliged to keep a members list and enter each member into this list (section 30 (1) and (2) of the Cooperatives Act (GenG)), which ensures a high level of transparency and thus acts as a deterrent against ML/TF.

The stringent auditing requirements for cooperatives act as a strong deterrent against potential crimes in connection with ML/TF. It is mandatory for every cooperative to belong to a cooperative auditing association, which conducts a mandatory audit at least every two years, focusing in particular on the economic efficiency of the cooperative's facilities in terms of achieving the purpose of the cooperative. Facilities include the total internal and external organisation in terms of staffing and material equipment, which is checked with regard to its maintenance and condition as well as its fitness for technical and business purposes, and for any lacunae. The audit of the cooperative's financial situation not only looks at assets from a purely balance-sheet perspective, but also examines liquidity, efficiency in achieving the cooperative's specific purpose, sales performance, price calculation, dividends, and loan agreements and other agreements relevant to the cooperative's assets.[84] If the management audit finds that certain information provided in the annual financial statements is not plausible, a further audit of at least this information must take place. This form of regular external scrutiny means that cooperatives seem moderately unsuited to misuse for ML or TF purposes.

The register of cooperatives acts as a further deterrent; anyone can inspect it without having to fulfil any further requirements. Applications for registration in the register of cooperatives must be in officially certified form (section 157 of the Cooperatives Act (GenG)). This ensures a high degree of certainty regarding the veracity of the entry, as the declaration must be put in writing and the signature of the person making the declaration must be notarised. The notary checks the identity of the person making the declaration against a valid identity document. This ensures that the documents submitted are authentic and genuine.

The cooperative principle that every member has one vote irrespective of their capital contribution is also likely to make cooperatives less attractive from the perspective of misuse for ML or TF purposes, because it makes it more difficult for individuals to exercise decisive influence on the cooperative. Unlike in the case of GmbHs, the formation of a cooperative requires three people and an expert assessment from a cooperative auditing association, which acts as an additional barrier. The minimum membership requirement means that it is not possible for one person, at any rate, to misuse a cooperative for ML or TF purposes. Cooperatives become completely unappealing from the perspective of misuse for ML purposes – particularly during the third stage – due to the fact that membership is non-transferable and thus non-tradable. All that is possible is transferring the member's equity (i.e. payments towards shares in the cooperative, including any allocation of profits/losses) to another member.

Only the absence of statutory minimum capital requirements could indicate a potential susceptibility to misuse for ML or TF purposes in the case of cooperatives, by contrast with GmbHs, for example. In practice, the fact that the cooperative auditing association requires cooperatives to demonstrate they have adequate capital ensures that this assumed susceptibility is mitigated in reality. All things considered, cooperatives are classified as having a low level of vulnerability, given the legal requirements and scrutiny mechanisms set out above.

84 Geibel, in: Henssler/Strohn, Gesellschaftsrecht, 4th edition, 2019, section 53, para. 2.

10.1.3 Partnerships

GbR (civil-law partnership)

Unlike other types of partnership, the formation and, in principle, the continued existence of a GbR requires at least two partners, who scrutinise each other's activities, as the law assigns them joint management and representation powers. Another risk-mitigating factor is the fact that the legal requirements relating to decision-making and the distribution of profits are based on the number of partners and not any kind of share of the partnership assets. These restrictions prevent a single partner from dominating and thus reduce the attractiveness of this legal form from the perspective of misuse for ML or TF purposes. While the partnership agreement can include an agreement that the management and representation power is concentrated on individual partners and provide for a capital-based formula for voting rights and the distribution of profits and losses, this in turn requires the consent of all partners.

Potential susceptibilities arise from the fact that it is possible for legal persons to become partners in a GbR, without the GbR being subject to the same kind of scrutiny requirements as a GmbH, for example, whose shareholders can also be legal persons. A powerful corrective for this is the fact that the partners have unlimited personal liability for the partnership's liabilities.

In principle, a share in a GbR can be transferred without any specific form being required. In line with the general principles of partnership legislation, this applies even if the partnership assets include objects whose transfer does require a specific form (e.g. real property, shares in a GmbH). For example, the fact that a GbR owns land does not mean that the transfer of a share in the partnership itself must be notarised as a result of section 311b (1) of the Civil Code (BGB) or that the transfer must be entered in the land register, as the GbR is and remains the owner of the land, and its identity as a legal entity is not altered by a change in the composition of its partners. As a result, however, it is possible that a share deal could change the economic ownership – albeit not the legal ownership – of assets without public authorities being involved or a state-run register providing information about the composition of shareholders. That said, the potential attractiveness of GbRs for concealment purposes in the framework of ML/TF as a result of this is countered by the following mechanisms. With regard to land, section 47 (2) of the Land Register Code (GBO) states that, in addition to the GbR being named as the owner of the land, the names of all partners must also be entered in the land register and corrections made in the event of any changes. The situation is similar regarding shares in KGs, regulated by section 162 (1) of the Commercial Code (HGB), and shares in GmbHs, regulated by section 40 (2) sentence 2 of the Limited Liability Companies Act (GmbHG): in addition to the GbR as the shareholder, all partners in the GbR must be entered in the commercial register and in the list of shareholders to be submitted to the commercial register, and corrections made in the event of any changes. Not only does this ensure transparency with regard to shareholdings in assets which are particularly relevant in the context of money laundering (real property; shares in KGs and GmbHs, both of which have limited liability). These legal procedures also take a certain amount of time and involve certain costs, which makes such transactions less attractive in certain circumstances. Additionally, in the case of a standard GbR, a share in the partnership cannot be transferred freely; the consent of the other partners is required.

The BMJV is currently working on fundamentally reforming partnership legislation; this reform notably includes creating the possibility of registering GbRs in a partnership register.[85] Entries in the partnership register are only to be made on the basis of a notarised application. It will remain the case in future that entry in the register is not

85 Website of the Federal Ministry of Justice and Consumer Protection (BMJV): https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/042020_Entwurf_Mopeg.pdf (in German).

a prerequisite for the GbR to gain legal capacity. Although entry in the register will not be mandatory in general, it will be mandatory at least for procedures that are pertinent under money laundering legislation, such as the purchase or sale of land by or via a GbR, changes to the composition of shareholders of a GbR which owns real estate, etc.

In summary, it can be said that when assessing the risk for GbRs, factors such as the current lack of registration, low transaction costs for the formation of a GbR, the fact that partnership shares can in principle be transferred without requiring a specific form, and the extensive freedom regarding the provisions and form of partnership agreements that characterises partnership legislation must be weighed against the partners' unlimited personal liability, the impermissibility of pursuing commercial purposes, and the restrictions on the dominance of a single partner. The risk matrix, which is based on the risk assessments of the involved institutions on a scale from one to five, indicates that the risk is assessed as being between medium and moderately high. However, if the legislative measures planned by the BMJV are implemented and the possibility of registering GbRs in a partnership register is introduced, which will enhance transparency about relevant shareholdings, it is expected that the susceptibilities can be further mitigated, resulting in a lower level of risk.

OHG (general partnership)

In terms of disclosure requirements, OHGs are positioned somewhere between GbRs and corporations. Unlike GbRs, OHGs are required to be entered in the commercial register. The fact that the partners' names are also listed in the commercial register and that entries in the commercial register constitute disclosure towards third parties ensures a far higher level of transparency for OHGs than for GbRs. This results in particular from the fact that a notary must verify the identity of the registering party with legal certainty for every application for registration in the commercial register. The special level of transparency regarding the composition of the shareholders also arises from the fact that, under section 108 sentence 1 of the Commercial Code (HGB), the application for registration must be made by all partners. Although it is possible for a partner to be represented, section 12 (1) sentence 2 of the Commercial Code (HGB) requires a power of attorney for this purpose to be officially certified, which ensures the same level of transparency. These measures reduce the risk of OHGs being misused for ML or TF purposes. In addition, the partners have unlimited personal liability for all partnership liabilities.

If none of the OHG's partners are a natural person, or if the – admittedly high – size thresholds in the Disclosure Act (*Publizitätsgesetz*, PublG) are exceeded, then the provisions governing the annual financial statements of corporations (sections 264 et seqq. of the Commercial Code (HGB)) must be applied, with the necessary modifications, in the process of drawing up the OHG's annual financial statements, in terms of the qualified requirements regarding the scope and detail of the information presented, as well as the audit and disclosure obligations.

Like GbRs, OHGs also require a minimum of two partners when they are formed and at all times thereafter, which makes it more difficult for an OHG to be used discreetly by an individual for ML/TF purposes. Another similarity to GbRs is that OHGs are also not subject to a minimum capital requirement. This purpose is instead served by the joint and several personal liability of the partners, who are liable with the entirety of their private assets in line with section 128 of the Commercial Code (HGB); in this context, too, this acts as a powerful factor limiting the suitability of OHGs to misuse for ML/TF purposes.

As is the case for GbRs, partner status is lost with a partner's death, with insolvency, or when a partner gives notice (section 131 (3) of the Commercial Code (HGB)); in principle, however, this does not result in the dissolution of the OHG, and instead the partner withdraws from the partnership and receives a

settlement (section 105 (3) of the Commercial Code (HGB) and section 738 of the Civil Code (BGB)). In certain circumstances, this requires the partial liquidation of business activities, which is potentially value-destructive and is not an attractive way of ending a placement in the context of money laundering. The transfer of a share in an OHG normally requires the consent of all partners, as is the case for GbRs. Unless general consent is given in the partnership agreement, this means that the ability to sell a share in an OHG is also dependent on the consent of the other partners, and thus does not provide a way to rapidly end a placement with low transaction costs.

The strong position of each individual partner when it comes to the transfer of ownership of shares in the partnership, together with the fact that disclosure obligations comparable to those of a corporation apply above a relevance threshold, mean that an OHG's susceptibility to misuse for ML purposes seems to be moderately low. As in the case of other types of partnership, the partners' unlimited liability also acts as a deterrent.

KG (limited partnership)

In principle, the money laundering risk for KGs, as a type of partnership, should be regarded as lower than for corporations. However, KGs consist not only of personally liable general partners, but also of limited partners, whose liability is limited to the amount of their contribution. This limited liability for limited partners represents a significant advantage compared to GbRs and OHGs, which makes KGs more susceptible to misuse for ML purposes. Unlike a GmbH, a KG can be formed without a minimum capital requirement, and it offers its limited partners the advantages of limited liability. However, the fact that the limited partners have no management power and that it is not possible to transfer a share in the partnership unless otherwise agreed in the partnership agreement (for example if the partnership agreement permits transfers subject to the requirement that the general partners consent) acts as a deterrent. This reduces the level of risk, particularly for the third stage of money laundering, as it makes it harder to extract money by selling the share in the partnership.

Another factor which reduces the level of susceptibility to misuse for ML purposes is the fact that all limited partners must be listed in the commercial register, which makes it much harder to conceal the beneficial owner. The risk of misuse for ML/TF purposes is also reduced by the fact that limited partners have unlimited liability from the time when they become members of the partnership until they are listed in the commercial register, unless the creditor knew that they had the status of a limited partner. Any repayment of the contribution also results in the limited partner regaining personal liability in the amount of their commitment. In principle, the requirement to register in the commercial register makes the formation of a KG more complex than, say, a GbR. In light of the fact that at least one natural person must have unlimited liability as a general partner and that transparency regarding the beneficial owners is ensured by the listing of the general partners and limited partners in the commercial register, the susceptibility to misuse for money laundering or terrorist financing purposes appears to be moderately low.

GmbH & Co. KG (limited partnership in which the general partner is a GmbH)

From the perspective of combating money laundering and terrorist financing, it should be noted that the inclusion of a GmbH (limited liability company) as a personally liable partner increases the level of transparency, in principle, not least because the transfer of shares in the GmbH must be notarised under section 15 of the Limited Liability Companies Act (GmbHG). Please therefore refer to the information provided about GmbHs. That said, there are structures which can be used to bypass the notarisation requirement when transferring shares, in the form of the "*Einheits-GmbH & Co. KG*", i.e. a limited partnership (KG) which is the sole shareholder of the limited liability company (GmbH) that is its general partner.

The following aspect should be noted: a GmbH & Co. KG is usually a partnership, which does not have a natural person as a personally liable partner. Under sections 264a and 316 et seqq. of the Commercial Code (HGB), a GmbH & Co. KG is therefore required to be audited (unless it is classified as a small company as defined by section 267 (1) of the Commercial Code (HGB)), which represents an additional form of external scrutiny alongside the internal controls. The GmbH & Co. KG makes it possible to use the advantages of a partnership in terms of flexibility, without a natural person having unlimited liability as a partner – which sets it apart from standard GbRs, OHGs and KGs. In terms of its transparency and the presumption of legal force, the entry in the commercial register for a GmbH & Co. KG is no different from the list of shareholders for the GmbH, which prevents the concealment of the beneficial owner to the same degree for both legal forms. It can therefore be assumed that the GmbH & Co. KG is a legal arrangement with moderately low risks of misuse for ML/TF purposes.

10.1.4 Other legal persons

Verein (association)

The minimum membership requirement of seven members makes it more difficult for a registered association (*eingetragener Verein*, e. V.) to be misused by a single person for money laundering or terrorist financing purposes. The association's affairs are managed by a board elected by the association's members. The members of the board are routinely also members of the association. Only the board members can act on behalf of the association in a legally enforceable manner in legal dealings. Every voting member of an association has one vote in the election of the board, which makes it much harder for a single member to dominate. The association only becomes a legal person when it is entered in the register of associations. The board members must apply for the association to be entered in the register, and the application must be notarised. All board members and their power to represent the association are entered in the register of associations.

The legislation on associations contains no rules – regardless of whether or not an association has legal capacity – on the raising and maintenance of liable capital to protect the association's creditors; in particular, there are no mandatory requirements regarding the level of the association's assets, which removes one obstacle to establishing this legal form. Membership in an association is not a property right, and so membership does not entail a share in the association's assets. Accordingly, members do not receive distributions from the association's assets, which makes associations appear unattractive for the third stage of money laundering. The fact that there is no way of transferring any economic value of membership via resale means that this legal form seems moderately unsuited to misuse for money laundering or terrorist financing purposes.

One important risk-mitigating factor is the fact that it is possible for an association to be banned (Article 9 (2) of the Basic Law (GG) and section 3 of the Act Governing Private Associations (*Vereinsgesetz*, VereinsG)). The ability to ban associations is a key element of a broad range of measures in Germany to combat terrorism and terrorist financing. In particular, the seizure of assets, but also the weakening of existing local structures (e.g. seizure of association premises, removal of infrastructure, etc.) generally causes organisational structures to wither in the long term. When an association's assets are seized, the association is subject to a prohibition of disposal. When an association is banned, it is also dissolved and compulsorily wound up, which ensures in practice that it cannot continue its activities. The association's assets are seized and become state property; they are then used for the public good. The consequences of an association ban are permanent. A ban results in the legal demise of the association and permanent forfeiture of its assets.

In view of the requirements regarding the minimum number of people required to establish an association, the lack of ways to extract money from membership, and the transparency required in

relation to the members of the association's board, as well as oversight mechanisms which can even lead to the association being dissolved, it can be said that associations have a moderately low level of susceptibility to misuse for ML/TF purposes.

Stiftung (foundation)

A foundation with legal capacity requires state recognition for its effective establishment. In this respect, a foundation differs from other legal persons, such as a GmbH, an e. V. or an AG, where the state's involvement is limited to registration in the relevant register. The foundation supervisory authorities have set high requirements for the minimum capitalisation of foundations, ranging from €50,000 to €100,000. In practice, it is assumed that a foundation with legal capacity which is to exist solely from its income is only advisable, especially in today's low-interest environment, if it has at least €250,000 to €500,000 in assets. Otherwise, there would be a risk that the income would have to be spent in large part or even entirely on administration. Accordingly, a foundation can only be established if significant (potentially tainted) assets are already available, which the founder transfers to the foundation and over which the founder cedes control, which makes foundations seem extremely unattractive for the third stage of money laundering.

As the legal structure of a foundation is directed mainly towards achieving the foundation's objective, there are special barriers to changing the foundation's charter. In many cases, the Foundation Acts of the *Länder* state that changes to a foundation's charter require the approval of the foundation supervisory authority. The authority checks whether a right to change the charter exists on the basis of the law or the charter itself. The foundation supervisory authority primarily scrutinises the management of the foundation's assets and monitors whether its income is used in line with the charter. Both during the establishment of the foundation and throughout the rest of its life cycle, the foundation supervisory authority has the task of monitoring the implementation of legal requirements and of the founder's intention by the foundation's bodies, and of safeguarding the foundation's work and continued existence as intended by the founder. While it is possible to establish additional supervisory bodies, this is not required by the law.

If the foundation supervisory authority identifies breaches of the law or the foundation's charter, it also has access to a wide range of punitive intervention powers and measures. It can object to, annul and order measures, and order alternative measures; it can appoint an administrator (*Sachwalter*), change the charter on the basis of its official authority[86] and, in extreme cases, even dissolve the foundation.[87] Given the strict requirements for foundations to comply with the law and the foundation's objective, this legal form seems extremely unattractive for both terrorist financing and ML purposes, because the third stage of money laundering, in particular, is made much harder by the fact that only income from the main assets may be used, and that it must also be used to finance the foundation's objective, which also acts as a kind of deterrent against misuse for terrorist financing purposes. The only beneficial owners within the meaning of section 3 (3) no 3 of the Money Laundering Act (GwG) are the beneficiaries who are named as such in the charter or are identifiable as such on the basis of the charter.

The transparency obligations associated with the legal form of a foundation also act as a deterrent. The foundation supervisory authority keeps a public list of the foundations under its supervision, which is publicly accessible. The list includes the foundation's name, legal form, objective, bodies and legal representatives, as well as the founder's name (if the founder agrees), the date on which the foundation was established/dissolved, and the address. Registration in the transparency register is also mandatory.

86 See also section 87 (1) of the Civil Code (BGB) and Schlüter/Stolte, Stiftungsrecht, 3rd edition, 2016, chapter 3, para. 38 et seq.

87 See Schlüter/Stolte, Stiftungsrecht, 3rd edition, 2016, chapter 3, para. 40 et seqq.

In addition, the risk is completely mitigated by the fact that, unlike corporations such as GmbHs, AGs or *Vereine* (associations), foundations do not have shareholders, members or other owners who can control the foundation's objective or can require the executive bodies (board, management) to pursue the objective. All of the assets transferred to the foundation belong to the foundation itself. Given this special risk, the foundation supervisory authority has the obligation and the power to press for and monitor compliance with the provisions of the legislation on foundations and the founder's intention as laid down in the foundation's charter. All in all, the level of susceptibility to misuse for ML/TF purposes seems extremely low in the case of foundations.

10.1.5 Other legal arrangements

Legal arrangements similar to express trusts

The high level of flexibility of a foundation without legal capacity, which is classified as a legal arrangement similar to an express trust, means that it seems more susceptible to misuse for money laundering or terrorist financing purposes than a foundation with legal capacity. Unlike a foundation with legal capacity, a foundation without legal capacity does not require recognition. Changing the charter is much easier than in the case of a foundation with legal capacity. Another way in which a foundation without legal capacity differs from a foundation with legal capacity is the fact that it is not subject to the supervision of the foundation supervisory authorities of the *Länder*. Furthermore, foundations without legal capacity are not recorded in the foundation registers of the *Länder*.

Foundations without legal capacity are obliged to provide information about their beneficial owners for entry in the transparency register if the foundation's objective is in the founder's own interest (section 21 (2) no 1 of the Money Laundering Act (GwG)). The criterion of "own interest" is not defined in legislation; however, it can be assumed that it encompasses all foundations without legal capacity which are not recognised as serving public-benefit purposes. All foundations which can be misused for criminal purposes and are therefore relevant in this context fulfil the criterion of being an "own interest" foundation and are thus subject to the obligation to provide information to the transparency register.

Of course, transparency is only created if the trustee (*Treuhänder*) actually fulfils his or her obligation to provide information about the foundation without legal capacity to the transparency register. As foundations without legal capacity can only be established by means of an agreement, and it is not apparent to third parties whether an individual is managing assets for a founder, this raises the practical problem that, in the event of non-compliance with the obligation to provide information to the transparency register, there are often no particular indications of this which would lead the BVA to launch an investigation as part of administrative offence proceedings. However, a remedy for this problem is provided by discrepancy reports made pursuant to section 23a of the Money Laundering Act (GwG) by obliged entities under money laundering legislation if they recognise that a trustee is acting not on his or her own behalf, in economic terms, but rather on behalf of a foundation without legal capacity. However, if the trustee does not disclose this or it is not evident from the circumstances, obliged entities under section 23a of the Money Laundering Act (GwG) can also fail to detect that the trustee is acting on another's behalf.

While civil-law foundations with legal capacity which serve public-benefit purposes are supervised by two state institutions (the revenue authority and the foundation supervisory authority of the *Land* in question), foundations without legal capacity which serve publicbenefit purposes are supervised only by the tax office. It is conceivable that supervision solely by the tax office and the lack of an obligation to provide information to the transparency register could result in a money laundering risk. On the whole, the abstract money laundering and terrorist financing risks can be assumed to be higher for foundations without legal capacity than for other legal forms.

Treuhand arrangements concerning shares in companies

The complexity involved in establishing a *Treuhand* arrangement concerning shares in a company – and thus the susceptibility to misuse for money laundering or terrorist financing purposes – depends on the type of company involved. The more complex it is to form the type of company in question or to acquire a share in it, the more complex it is to establish a *Treuhand* arrangement as well. As a result, the highest level of complexity exists in the case of a GmbH (limited liability company), as both the establishment of the GmbH (section 2 (1) of the Limited Liability Companies Act (GmbHG)) and the transfer of shares (section 15 (4) of the Limited Liability Companies Act (GmbHG)) require notarisation, and the *Treuhand* agreement itself normally has to be notarised as well. This disclosure obligation can deter money launderers. In addition, the law establishes a minimum capital requirement for GmbHs (section 5 of the Limited Liability Companies Act (GmbHG)).

AGs (stock corporations) are also subject to a notarisation requirement for their establishment (section 23 (1) of the Stock Corporation Act (AktG)) and minimum capital requirements (section 7 of the Stock Corporation Act (AktG)). However, neither the transfer of shares nor the conclusion of a *Treuhand* agreement requires a specific form. Partnerships (OHGs, KGs, GbRs) can be established without a minimum capital and without requiring a specific form, and the *Treuhand* agreement does not require a specific form either. This is where the process of establishing a *Treuhand* arrangement is the least complex. However, the partners in these partnerships have unlimited liability, in principle, and this also applies to the trustee (*Treuhänder*) (with limited partners being the only exception). This makes GmbHs and AGs seem more suitable for *Treuhand* arrangements, as the trustee's liability is then limited to his or her contribution (which the trustee usually receives from the settlor (*Treugeber*) in any case). As the *Treuhand* arrangement is normally not established in the trustee's interest, the trustee will usually not be willing to accept unlimited liability. This can also be achieved by becoming a limited partner.

If obliged entities under the Money Laundering Act (GwG) – particularly notaries, lawyers or tax advisors – are involved in the establishment or transfer of a *Treuhand* arrangement concerning shares in a company, they are required, as set out above, to fulfil certain obligations under money laundering legislation, notably due diligence requirements and reporting obligations. This ensures a certain degree of scrutiny of *Treuhand* arrangements. In certain circumstances, notaries are also required to fulfil tax-related notification obligations when notarising a *Treuhand* agreement. These reporting and disclosure obligations can deter money launderers.

Money launderers can, however, avoid the involvement of such advisors either by not retaining advisors or only retaining foreign advisors who are not subject to the Money Laundering Act (GwG). This applies especially to *Treuhand* agreements which can be concluded with no specific requirements as to the form. In general, it is not possible to avoid checks being performed under money laundering legislation by a notary if a notarisation requirement exists. However, the courts have ruled that in certain circumstances a *Treuhand* agreement can also be notarised abroad, for example by a Swiss notary to whom the obligations established in German money laundering and tax legislation do not apply. In other words, money launderers can avoid the fulfilment – particularly by German notaries – of obligations under money laundering legislation and tax-related notification obligations through their choice of legal form and the country where notarisation takes place. This creates a means for money launderers to bypass requirements. This is particularly significant when it comes to the acquisition of real estate. If real estate in Germany is purchased directly, notarisation by a German notary is mandatory.[88] This shows the scope to bypass requirements which is offered by a *Treuhand* agreement concerning a company that holds property, compared to purchasing real estate directly. Monitoring by obliged entities under money laundering legislation must be classified as weak in the case of *Treuhand* agreements.

88 Federal Court of Justice (*Bundesgerichtshof*), decision of 13 February 2020 – V ZB 3/16.

Share deals

While the involvement of a notary is mandatory when purchasing real estate directly (sections 311b (1) and 925 of the Civil Code (BGB)), this is in principle not necessary in the case of a share deal (except in the case of a GmbH and potentially a GmbH & Co. KG), even if the company owns real estate. This is true even if the company's assets consist mainly of real estate. This is sometimes criticised in the expert literature with regard to the purpose of this kind of structure, with calls for statutory regulation. For money launderers, in any case, share deals offer a way of investing in real estate while deliberately bypassing notaries. This enables money launderers to avoid checks under money laundering legislation being performed by a notary, which are mandatory when real estate is purchased directly. If obliged entities under the Money Laundering Act (GwG) are involved in a share deal (especially notaries, lawyers or tax advisors), they must, as set out above, fulfil certain obligations under money laundering legislation, notably due diligence requirements and reporting obligations. When notarising a share deal, notaries are also required to fulfil tax-related notification obligations. These reporting and disclosure obligations can deter money launderers.

However, money launderers can avoid the involvement of such advisors by retaining foreign advisors who are not subject to the Money Laundering Act (GwG). This applies, in particular, to those share deals, which can be concluded with no specific requirements as to form. In general, it is not possible to avoid checks being performed under money laundering legislation by a notary if a notarisation requirement exists. However, the courts have ruled that in certain circumstances a share deal can also be notarised abroad, for example by a Swiss notary to whom the obligations established in German money laundering and tax legislation do not apply. In other words, money launderers can avoid the fulfilment – particularly by German notaries – of obligations under money laundering legislation and tax-related notification obligations through their choice of legal form and the country where notarisation takes place. This creates a means for money launderers to bypass requirements. This is particularly significant when it comes to the acquisition of real estate, where notarisation by a German notary is mandatory. This shows the scope to bypass requirements, which is offered by a share deal concerning a company that holds property, compared to purchasing real estate directly.

Share deals involving GmbHs have the highest level of complexity and transparency. Notarisation is mandatory in this case. A German notary notarising a share deal relating to shares in a GmbH is obliged to submit a new list of shareholders to the commercial register once the transfer of shares takes effect. This is a particular guarantee of the accuracy of the list of shareholders and it ensures that reliable information is available about the ownership structure.

In the case of other legal forms, share deals are less complex; in particular, there are no specific requirements as to form. In the case of OHGs and KGs, the new partners must be entered in the commercial register. However, registration does not have constitutive effect. Transparency is lower in the case of AGs, as the shareholders are not listed in the commercial register. However, AGs are obliged to submit notifications to the transparency register.

The level of transparency is lowest in the case of a GbR, as no public register exists for this legal form under existing law and it also has no obligation to submit notifications to the transparency register. However, if the GbR holds rights which are listed in registers (land or shares in a GmbH), these registers must be updated with the names of the new partners (section 47 (2) of the Land Register Code (GBO); section 40 (2) sentence 2 of the Limited Liability Companies Act (GmbHG)). In other words, mechanisms do exist to create transparency. In general, the money laundering and terrorist financing risk for share deals depends on the underlying legal form.

10.1.6 Money laundering risk matrix

The following matrix contains a risk assessment of the various legal persons in terms of the potential risks of misuse for ML purposes arising from the structure of the legal form. The ratings relate to abstract risks, which do not necessarily materialise in practice. To assess the abstract ML risks, the institutions involved in this study were asked to rate five ML-relevant risk dimensions on a scale from one to five (see below) and give a separate overall rating. These assessments were undertaken without reference to any knowledge of the actual risks of misuse for ML purposes and constitute substantiated assumptions.

10.1.7 Terrorist financing risk matrix

An expert report commissioned by the BMF to examine investigations and criminal proceedings relating to terrorist financing in Germany found that the assets used in acts of financing derived mainly from donations and the offenders' own funds. Furthermore, the main beneficiaries do not include any legal persons with a for-profit legal form. For that reason, the assessment of terrorist financing risks has only been undertaken for the legal forms used by non-profit organisations. The ratings relate to abstract risks, which do not necessarily materialise in practice. In other words, the assessment looks at assumed susceptibilities to misuse for terrorist financing risks arising from the

Figure 18: Money laundering risk matrix

Legal form	Complexity of the establishment process	Oversight structure	Transfer of ownership rights	Reporting and registration obligations	Scope for interlocking shareholdings	Overall rating
Corporations						
GmbH	2.5	2.5	2.3	1.8	3.0	**2.5**
UG (limited liability)	1.7	1.7	1.7	1.3	2.3	**1.7**
AG	1.8	2.3	2.3	1.8	2.8	**2.0**
SE	1.5	1.5	1.5	1.5	2.5	**1.5**
gGmbH	1.7	1.7	1.3	1.3	2.3	**1.7**
Cooperatives						
eG	1.0	1.3	1.0	1.7	2.0	**1.5**
Partnerships						
OHG	2.3	1.3	1.3	1.8	2.3	**2.0**
KG	2.3	1.3	1.3	1.8	2.3	**1.8**
GmbH & Co. KG	2.8	1.7	2.0	2.0	2.5	**2.5**
GbR	3.0	3.0	3.3	3.3	2.7	**3.7**
Other legal persons						
Foundations with legal capacity	1.0	1.0	1.0	1.3	1.0	**1.0**
Associations	2.0	2.0	1.3	2.3	1.3	**1.7**

Scale: 1.0 – 1.5 = low risk; > 1.5 – 2.5 = moderately low risk; > 2.5 – 3.5 = medium risk; > 3.5 – 4.5 = moderately high risk; > 4.5 – 5 = high risk

Figure 19: Terrorist financing risk matrix

Legal form	Complexity of the establishment process	Oversight structure	Reporting and registration obligations	Overall rating
Other legal persons				
Foundations with legal capacity	1.0	1.0	1.5	**1.0**
Associations	2.3	2.7	2.7	**2.5**

Scale: 1.0 – 1.5 = low risk; > 1.5 – 2.5 = moderately low risk; > 2.5 – 3.5 = medium risk; > 3.5 – 4.5 = moderately high risk; > 4.5 – 5 = high risk

structure of the legal form. To assess the abstract TF risks, the institutions involved in this study were asked to rate three TF-relevant risk dimensions on a scale from one to five (see below) and give a separate overall rating. These assessments were undertaken without reference to any knowledge of the actual risks of misuse for ML purposes and constitute substantiated assumptions.

10.2 De-facto risk assessment

The abstract risk assessment undertaken in chapter 10.1 highlighted the vulnerabilities of the various legal forms on the basis of their legal parameters, without reference to whether the assumed risks are reflected in the actual commission of money laundering and terrorist financing offences. This chapter will assess the de-facto risks on the basis of their relevance in investigations. Law enforcement agencies and intelligence services have been consulted in order to assess these risks in the actual commission of money laundering offences (see chapter 10.2.1) and terrorist financing offences (see chapter 10.2.2). That said, it should be noted that the law enforcement agencies' assessments are based on expert opinions and there is no suggestion that they are completely representative. To create a source of empirical data, the BMF has commissioned a research report analysing money laundering investigations, which examined the occurrence of legal persons in this context, among other things (see chapter 10.2.3).

10.2.1 Qualitative assessments of ML risks

The BKA and the intelligence services (the BfV and the BND), together with individual prosecutor generals' offices, were asked for their assessments, based on their investigative experience, of the susceptibility of legal persons to misuse for money laundering or terrorist financing purposes. These assessments are specifically not based on formal statistics, but rather on officers' experiences in their day-to-day investigations. This survey showed that there is no preference for a specific legal form in Germany when it comes to the use of tainted assets to purchase a share in a company. Nonetheless, past experience has shown that UGs (limited liability) and GmbHs (limited liability companies) tend to be encountered as legal forms in the context of organised crime with an Italian background in Germany. Foreign legal forms are often encountered in the context of Russian-Eurasian organised crime. An AG (stock corporation) is a formal or de-facto requirement for a large number of criminal activities which are identifiable in organised financial markets. However, an AG is not the only possible form such activity can take, whether in the case of organised financial markets (example: secondary listing in Germany with a foreign legal form), over-the-counter transactions or transactions in the unregulated capital market (example: the transfer of limited partner shares in real estate investments).

In general, it can be said that the advantageousness of a legal form depends on the different preferences which arise partly from the typical stages of the

money laundering process. For example, according to the common model, during the first stage, placement, a business activity is required which allows the proceeds of crime, e.g. in the form of cash, to be inconspicuously converted into scriptural money. For the first stage of money laundering, no information is available on preferences for a specific legal form. On the other hand, what can be said is that there are no known cases of an AG being used in this stage of the money laundering process. The money laundering risk in the first stage is determined not by the legal form, but rather by a business activity in a sector with high cash takings.

A large number of natural and legal persons are often involved in the second stage of money laundering, layering. Legal and illegal financial flows are layered to mask the electronic trail. For this stage and the third stage (integration), little information is available about any preference for a specific legal form. The public prosecution offices consulted only handle a vanishingly small number of layering and placement cases involving legal persons. The problem – especially if the placement and/or layering has taken place abroad – is that it is very difficult to substantiate the two-fold initial suspicion of money laundering which is (currently) required at this stage, as during the placement process (in Germany) no facts indicate that the assets invested derive from listed offences. Increasingly, foreign legal forms are encountered in this context. An analysis of the Panama Papers shows that, in this context, shares in (German) GmbHs are often acquired by foreign legal forms without identifiable beneficial owners. The suspicion that a crime has been committed is very often based solely on information about the beneficial owner, who is always unknown in this type of arrangement. The use of such a non-transparent type of company is not, on its own, sufficient to substantiate an initial suspicion of money laundering. Although it is not possible to make any definitive statement about the number of such cases in Germany, no information is available which would suggest that the number is significant.

There is a consensus among the institutions consulted that, during the third stage of money laundering (integration), investment takes place in typical sectors of a given industry, with the legal form playing only a secondary role. During the third stage of money laundering, integration, it is advantageous for the offenders to choose a common legal form in the sector in question. Depending on the sector, certain legal forms are better suited than others. As the National Risk Assessment (NRA) already mentioned, tainted funds are increasingly being invested in the real estate sector, and in some cases also in the gambling sector. The GmbH & Co. KG (a limited partnership in which the general partner is a GmbH) occurs in the real estate sector for business reasons, and so this legal form attracts little suspicion in the event that it is misused for ML purposes. Besides the stage of the money laundering process, another factor which often influences the choice of legal form is the offender's background (i.e. an offender with a background in Italian organised crime may make a different choice than an offender with a background in Russian-Eurasian organised crime). No information is available to suggest that non-public-benefit foundations are misused for money laundering or terrorist financing purposes. Investigations which have taken place indicate that *Treuhand* agreements are used to conceal beneficial owners. In a majority of cases, foreign legal forms or foreign trust agreements are involved, which are not examined further in this sector analysis.

In general, the law enforcement agencies' experiences do not point to any exogenous reasons attributable to the structure of a legal form. It is impossible to completely rule out that there may be endogenous reasons for why certain legal forms are preferred. The information currently available indicates that offenders select a company as a means of committing money laundering offences irrespective of the legal requirements associated with the legal form. Common practices in the sector in question or preferences relating to social background play a greater role. Accordingly, no specific susceptibilities to misuse for ML purposes can be identified for individual legal forms on the basis of the information currently available.

10.2.2 Qualitative assessments of terrorist financing risks

In addition to being consulted about the susceptibility of legal persons to misuse for ML purposes, the BKA, the BfV and the BND were asked to assess the terrorist financing risks. They reported that, in isolated cases, fundraising organisations in the guise of charities are encountered in the field of terrorist financing. These organisations primarily take the form of registered associations (*eingetragene Vereine*, e. V.s). In principle, however, other legal forms are also conceivable in this context, such as foundations or not-for-profit limited liability companies. Only limited information is available regarding the legal forms used by those who provide money or assets in transactions for terrorist financing purposes. According to the FIU, private companies are only involved in activities relating to terrorist financing in very isolated cases. The parties to the offence are chiefly individuals or associations (*Vereine*) and other non-profit organisations. Further information on this can be found in the NPO sector analysis.

10.2.3 Collection of empirical data on money laundering risks from adjudicated proceedings

To improve the data available about adjudicated proceedings in connection with money laundering or terrorist financing, the BMF commissioned a research report to evaluate money laundering investigations in Germany. The aim of this research project was to examine the substance and development of money laundering investigations in Germany using a representative sample. This was intended to provide an overview of the origins and development of the proceedings, of typologies and structures of the underlying criminal activities, and of the sectors that are most affected. The report also examined what legal persons can be found in the decisions on money laundering cases – broken down by transaction initiators and recipients, as well as final beneficiaries. It found that 95% of the adjudicated proceedings related to money mules. The underlying transactions were, almost without exception (99.1%), carried out by natural persons, which applies equally to all three stages of money laundering – placement, layering and integration. Only six of the 690 transactions studied were initiated by companies. GmbHs (limited liability companies) were involved in three cases, commercial sole proprietorships in two cases, and a GbR (civil-society partnership) in one case. The transaction recipients are almost exclusively natural persons as well (95.3%). The transaction recipients included 14 companies with the legal form of a GmbH, six Ltds, four commercial sole proprietorships, one GbR and one GmbH & Co. KG. The distribution of legal forms for the final beneficiaries differs only minimally.[89]

The research report studied investigations which had been concluded with a final and binding decision. Investigations where an initial suspicion of money laundering could not be substantiated – for example because the criminal organisers successfully concealed their identity – were not examined. This limits the research report's informational value regarding the susceptibility of legal persons to misuse for ML purposes. In addition, the small sample size means that the temptation to draw wider conclusions on the basis of the legal forms identified in the study should be avoided. Instead, one key finding of the study which should be highlighted is that most adjudicated money laundering proceedings in Germany involve natural persons, rather than legal persons. That said, it is striking that a relatively high number of cases involve a specific foreign legal form (Ltd.) among the transaction recipients.

10.2.4 Quantitative indicators for risk identification

The suspicious transaction reports received by the German FIU were studied to provide further data to underpin the risk assessment regarding

89 Final Report on the Money Laundering Study in the "National Risk Assessment on Anti-Money Laundering/Countering the Financing of Terrorism – Money Laundering Investigations and Criminal Proceedings in Germany from 2014-16"

the susceptibility of legal persons and other legal arrangements to misuse for ML/TF purposes. A sample of suspicious transaction reports received in the reference period between 19 February and 31 March 2020 was selected in which legal persons might be found as "a potential party to an offence". A detailed examination of these reports revealed that this cannot result in a reliable finding by the FIU that a legal person is a "party to an offence". There is no requirement to state the legal form when submitting a suspicious transaction report, and the fact that a legal form is named in a suspicious transaction report does not necessarily mean that it is a party to an offence. Against this backdrop, the analysis makes no claim to be representative or to offer a complete risk classification – in the sense of presenting the genuine risk of individual legal forms being misused for money laundering or terrorist financing purposes. For example, rather than indicating possible culpability in connection with the matter reported, the inclusion of a legal person in a suspicious transaction report can simply be due to its involvement as a payment service provider. Consequently, the "mere inclusion" of a legal person as a data set in a suspicious transaction report does not automatically mean that the legal person was a party to an offence.

As a result, the outcomes of the FIU's examination of the sample do not allow general conclusions to be reached about specific risks in the case of a legal person established under German law in terms of its susceptibility to misuse for money laundering or terrorist financing purposes. No conclusions can be drawn from this data about whether the use of a particular legal form is due to endogenous reasons attributable to practices in a specific sector, or exogenous reasons, i.e. reasons which are attributable to the structure of the legal form in question. It is impossible to say definitively whether, for example, the legal form of a "German Limited" – in other words, a "Limited" established under British company law with its registered office in the UK and a branch in Germany listed in the commercial register – was deliberately chosen for misuse for ML purposes because it is simpler to establish, or whether comparable German legal forms would have been just as suitable. The prevailing view in Germany is that simple formation procedures and low costs of establishment are factors, which also exist for other types of company, such as the German legal form of a UG (limited liability).

In a closer examination of the "Limited" legal form, it was striking that the British "Limited" was usually identified in suspicious transaction reports relating to illegal gambling. It is impossible to say definitively whether a foreign legal form was chosen because the risk of discovery is lower due to the company being based in another jurisdiction, or for other reasons. This consideration will always play a key role for methodical offenders who use a legal person for ML purposes. It completely eclipses the advantages of choosing a specific German company form. This is true even though, strictly speaking, a legal form established under foreign law whose head office is located abroad is not the subject of this analysis, which is limited to German legal forms.

Case study 1:

The FIU received a report concerning possible indications that a UG (limited liability) was fraudulently used to obtain payments from other legal persons for their register entries during the formation process – as part of what is known as the "two calls" scam.

The account received several transfers, consisting of identical amounts in most cases, from various legal persons in connection with entries in the commercial register. Some of these transactions were credited to the account using a recipient's name which differed from the account holder's name. The sums were then disposed of by means of several transfers to individuals and numerous cash withdrawals.

In addition to this abnormal use of the account as a pass-through account, the obliged entity received a customer request to change the mobile phone number initially associated with

the account shortly after the account was opened. This could be an indicator of potential identity theft and consequently of concealment of the beneficial owner.

Case study 2:

The FIU received a report concerning a loan application for a GmbH (limited liability company) submitted by the husband of the account holder.

According to the husband, the loan was needed as start-up capital for the formation of a new business. A business registration was presented as part of the loan application process. The couple had initially started a side business. Now they were supposedly in the process of converting the business into a GmbH. The GmbH supposedly already existed, but had so far dealt with low-value goods. The couple were allegedly now waiting for an appointment with a notary to convert the GmbH to the activity of a diamond trader.

It is unusual that the account was in the wife's name (the account holder), but the loan application was submitted by the husband on his wife's behalf. Furthermore, the intention was for the pending transactions to be handled by the husband. It is impossible to rule out the possibility that the wife's involvement as the account holder was an attempt to conceal the beneficial owner. It also seems unusual for the company's purpose to be changed after such a short period of time; besides which, trading in diamonds must inherently be classified as posing a risk, in the FIU's view.

Regarding Example 1, it seems likely that the company was deliberately established to carry out fraudulent activities; however, it remains unclear whether the simple procedures for establishing a UG (limited liability) played a key role in this. Case study 2 highlights that the establishment of a GmbH – potentially with the involvement of a nominee – can be used to conceal the beneficial owner. It cannot be ruled out that the conversion of the business into a corporation was intended to avoid liability risks, but it does not seem that the legal form of the GmbH was chosen deliberately for the purpose of money laundering. Accordingly, it can be concluded from the analysis of the suspicious transaction reports that endogenous risks, rather than exogenous risks, are probably dominant in connection with the misuse of legal persons for money laundering or terrorist financing purposes.

Example of endogenous reasons: foreign holdings

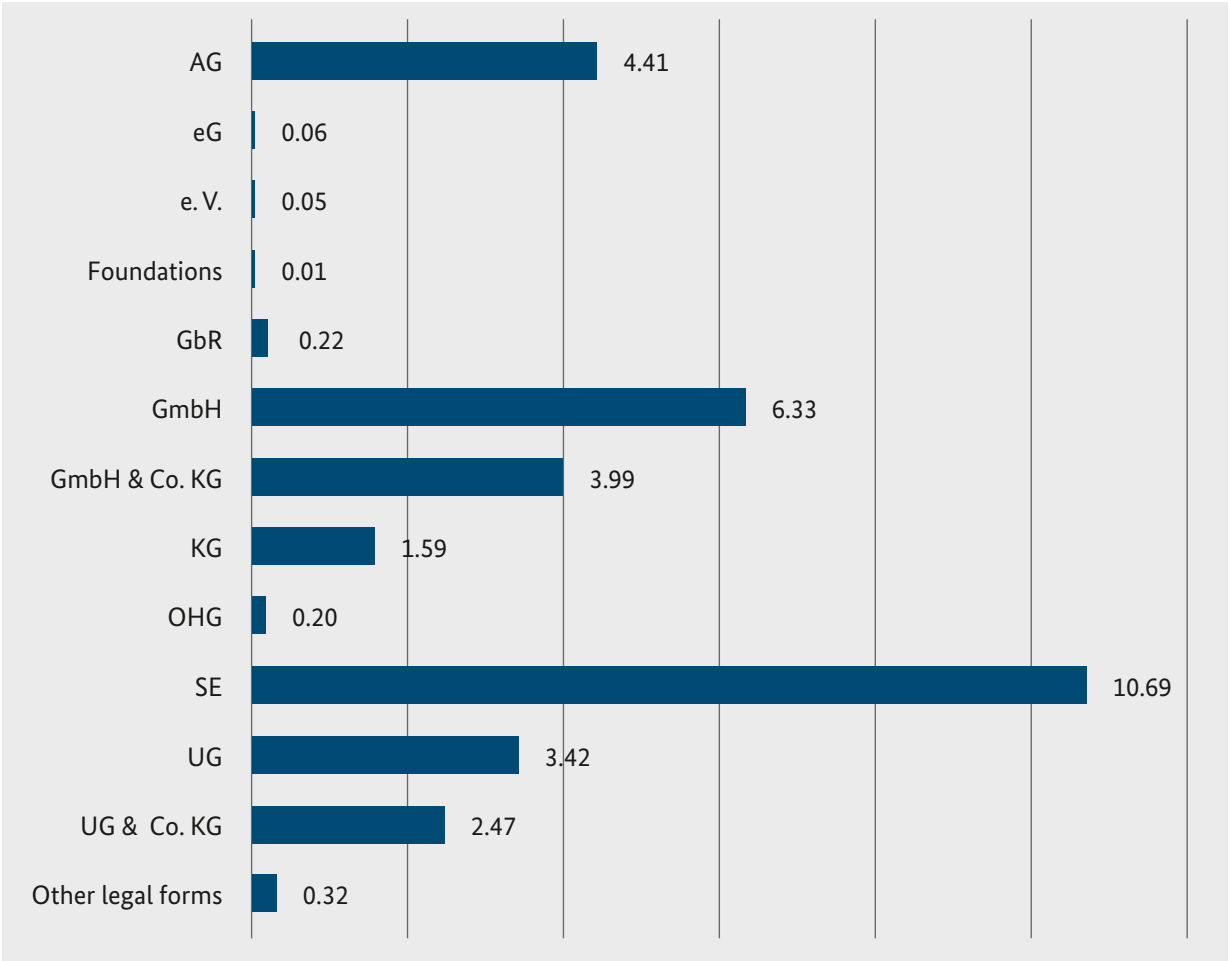
In practice, it is difficult to differentiate between endogenous and exogenous risks, and between the deliberate use of a legal form and a crime committed using a certain legal form for reasons unconnected with the legal form's structure. Nonetheless, there are fundamental underlying risk factors for money laundering and terrorist financing which should also be taken into account when assessing the risk of legal forms. Besides international transactions, these include the acquisition of holdings in a company in a third jurisdiction. Looking at the proportion of companies with a given legal form which have a holding of 51% or more in foreign subsidiaries, it is clear that the proportion tends to be higher for corporations, which is not surprising given the limitation of liability (see figure below).

It is not very surprising that the SE leads these statistics, as this choice of legal form documents the company's international focus, among other things. Even though corporations' strong international focus gives rise to the assumption of a higher threat level, the actual risks seem very limited, given the low level of vulnerability for corporations in terms of abstract risks, as set out above. The high proportion in the case of companies with the KG legal form is striking, although this is a type of partnership where the general partners are personally lia-

ble. Once again, however, it is not possible to infer a heightened money laundering or terrorist financing risk from this, as the existence of a foreign holding does not mean that the company is involved in a criminal offence. In principle, the German economy's international links mean that it is particularly exposed to risks arising from international transactions and company holdings. However, this is an underlying endogenous risk, which is unconnected with exogenous risks associated with any specific susceptibility of an individual legal form. Although this risk assessment does not cover legal persons operating in Germany, which were established in accordance with the legal requirements of foreign jurisdictions, Germany's law enforcement agencies, the BaFin, the FIU, the supervisory authorities and the private financial sector believe that they account for the vast majority of the actual ML risks connected with legal persons.

This is also confirmed by a working paper on shell companies and associated financial crime produced in the framework of the Anti Financial Crime Alliance (AFCA), a public-private partnership set up under the FIU's leadership to tackle money laundering and terrorist financing, as a joint initiative between the participating public authorities (the BKA and BaFin) and a total of 19 private-sector institutions; the working paper identified the involvement of tax havens, offshore financial centres and secrecy jurisdictions as posing a particular risk of financial crime.

Figure 20: Proportion of companies with a given legal form which have foreign subsidiaries (as a percentage)



11. Conclusion

This sector-specific risk assessment has examined possible specific susceptibilities of legal persons and other legal arrangements to misuse for ML/TF purposes in Germany. It is based on the FATF risk model, according to which the risks arise from the combination of the threat and the vulnerabilities. This risk assessment has focused on analysing the vulnerabilities arising solely from the legal structure of the various legal forms, irrespective of the actual threat; these vulnerabilities were defined as abstract risks. In this context, it became clear that the abstract risks differ from one legal form to another, but on the whole should be classified from low to a maximum of "medium" risk. The assessment has set out the transparency requirements which apply when setting up companies, as well as the well-developed monitoring systems and reporting and registration obligations which exist; these reduce the level of susceptibility to misuse for money laundering or terrorist financing purposes, especially in the case of corporations. In the case of partnerships, the fact that at least one partner is personally liable reduces the risk.

When assessing the actual money laundering and terrorist financing risks, the challenge lies in differentiating between exogenous and endogenous risks. Exogenous risks are the specific risks that can be traced to the legal structure of a legal form. In money laundering or terrorist financing cases involving legal persons, it is often impossible to determine beyond the shadow of a doubt whether the legal form was chosen deliberately or whether the legal form occurs due to factors other than its structure. For example, it is conceivable that individual legal forms occur frequently in connection with money laundering or terrorist financing offences, but that this is due to the fact that these legal forms are particularly prevalent in Germany, such as in the case of the GmbH, or the fact that these legal forms are particularly popular among certain groups of offenders, or are common in a sector which tends to be more susceptible to money laundering. In this case, there would be endogenous reasons for the frequent occurrence of a legal form, unconnected with its legal structure. Accordingly, the money laundering or terrorist financing risk would not be due to the susceptibility of the legal form in question, but rather the specific risks of a given sector. For more information on this subject, please refer to the National Risk Assessment (NRA). Judging a legal form's risk on the basis that it is widely used in a sector which is particularly susceptible to money laundering or terrorist financing would inappropriately lead to a generalised suspicion of this legal form, and this should be avoided.

In principle, the main money laundering and terrorist financing risks connected with legal persons and other legal arrangements exist in the involvement of third jurisdictions; however, that is not part of this assessment and should potentially be studied separately. Given the lack of data fully depicting the risk situation as regards the ML/TF risks of legal forms in Germany, it is not possible to make a definitive and unequivocal statement regarding the risks associated with the de-facto susceptibility of legal forms in Germany to misuse for ML/TF purposes. That said, the assessments of the authorities responsible for preventing and combating money laundering and terrorist financing in Germany suggest that in cases where legal persons and other legal arrangements are involved in money laundering or terrorist financing offences in Germany, the legal form is chosen not for its legal structure, but due to other, unrelated factors. Accordingly, no specific susceptibility of individual German legal forms to misuse for money laundering or terrorist financing purposes can be identified.

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