

EITI Validation Germany 2023

[Coordinated position for the government stakeholder group on the EITI Standard Requirement No. 2.5 \(Beneficial ownership\)](#)

I. Situation

Subsection 2.5 a) to d) of the EITI Standard 2019¹ reads as follows (extract):

- a) **It is recommended that implementing countries maintain a publicly available register of the beneficial owners** of the corporate entity(ies) that apply for or hold a participating interest in an exploration or production oil, gas or mining licence or contract, including the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted. (..)
- b) **Implementing countries are required to document the government's policy and multi-stakeholder group's discussion on disclosure of beneficial ownership.** This should include details of the relevant legal provisions, actual disclosure practices and any reforms that are planned or underway related to beneficial ownership disclosure.
- c) **As of 1 January 2020, it is required that implementing countries request, and companies publicly disclose, beneficial ownership information.** This applies to corporate entity(ies) that apply for or hold a participating interest in an exploration or production oil, gas or mining licence or contract and should include the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted. **Any significant gaps or weaknesses in reporting on beneficial ownership information must be disclosed, including naming any entities that failed to submit all or parts of the beneficial ownership information.** (...)
- d) **Information about the identity of the beneficial owner should include the name of the beneficial owner, the nationality, and the country of residence, as well as identifying any politically exposed persons.** It is also recommended that the national identity number, date of birth, residential or service address, and means of contact are disclosed.

The requirements in Subsection 2.5 of the EITI Standard only came into force following the initial validation of Germany and with the publication of the EITI Standard in 2019. A partial validation was subsequently carried out for Germany in 2021. Subsection 2.5 of the EITI Standard was considered to have been **met** during **partial validation**, as the beneficial owners emerged directly from the inspection of the transparency register, which was accessible to any member of the general public with no restrictions. An additional publication of the beneficial owners was not included in the D-EITI report. No objections to this were raised during the partial validation.

Based on the ECJ judgment of 22.11.22², members of the public must justify their request for inspection when submitting the request and must present a **legitimate interest** in inspecting the transparency register for this purpose³. At the request of the BMWK/BMF, the Independent Administrator (IA) commissioned in accordance with the EITI Standard was

¹ See entire Item 2.5: <https://eiti.org/eiti-requirements-2019>

² ECJ judgment of 22.11.22, Cases C-37/20 and C-601/20

³ <https://www.transparenzregister.de/treg/en/start?0>

granted access to the Transparency Register as a member of the public and examined the plausibility of the entries of the companies participating in the D-EITI. The result was subsequently published.⁴

According to the opinion expressed by the EITI International Secretariat, the inspection by the Independent Administrator is not sufficient, however, with the following argumentation:

1. The EITI Standard Requirement 2.5. requires that information on beneficial owners be published. An attestation of the plausibility of the entries by the Independent Administrator is not sufficient.
2. EITI Standard Requirement 2.5. requires that information on beneficial owners is publicly available to all companies active in the extractive industries in the EITI member country or is published through EITI reporting.

The requirement of a legitimate interest in accessing the present transparency register is also an obstacle, so that Requirement 2.5 of the EITI Standard is no longer met. This was identified as a critical point during the pre-validation phase and the BMWK was asked to comment, among other things, on the purpose of the transparency register, the existence of a legitimate interest, the interpretation of the ECJ judgment, the use of the "legitimate interest" criterion and the question as to the extent to which exceptions are possible for the extractive sector. Furthermore, in some other EU countries the "registers" have been made accessible to the general public and the ECJ judgment is interpreted differently in these countries.⁵

The private sector was also asked to determine to what extent the companies are in a position to provide the information for publication or already publish information on beneficial owners themselves elsewhere.

II. Assessment

The focus of the assessment is on what, from the point of view of the EITI International Secretariat, are considered the key points. A comprehensive presentation of the factual and legal situation would go beyond the scope of the present statement, which has been produced as part of the validation of Germany in accordance with the EITI Standard.

As a result, the requirement for transparency on beneficial owners in accordance with Subsection 2.5 of the EITI Standard is fully met.

1. Legal background and purpose of the transparency register

The central electronic transparency register that is maintained by the Federal Office of Administration at Bundesanzeiger Verlag GmbH in accordance with the German Money Laundering Act (GwG) contains information on the beneficial owners of companies⁶.

⁴ <https://rohstofftransparenz.de/en/rohstoffgewinnung/wirtschaftlich-berechtigter/>

⁵ Explanations of the International Secretariat of 25.7.23 (email) and of 15.8.23 (email)

⁶ <https://www.transparenzregister.de/treg/en/start?0>

It should be pointed out that the disclosure obligations on beneficial owners in accordance with Sections 19 et seq. of the MLA continue to apply - unchanged and regardless of the ECJ judgment. The transparency register is online.

The purpose of the central electronic transparency register is defined in concrete terms by EU law. According to Art. 1(1) of the 4th EU Anti-Money Laundering Directive, the aim (even today) is to prevent the use of the EU financial system for the purpose of money laundering and terrorist financing. The 4th EU Anti-Money Laundering Directive (4AMLD 2015) required EU Member States to store information on the beneficial owners of the companies registered there in a register⁷. The German legislator transposed this requirement into national law within the set time limit with the introduction of the transparency register in Sections 18 et seq. of the Money Laundering Act in 2017.

The scope of the right of inspection is also prescribed by European law. 4AMLD 2015 still required a legitimate interest for public inspection⁸. This was implemented by the national legislator in the previous version of the MLA. The 5th EU Anti-Money Laundering Directive (5AMLD 2018) ultimately removed the access barrier of "legitimate interest". The German legislator implemented the resulting extension of access to include any member of the general public in Section 23(1) sentence 1 no. 3 of the MLA and in the Transparency Register Inspection Ordinance within the set time limit of 1 January 2020.⁹

The extent to which the transparency register in accordance with the MLA is also suitable for identifying (foreign) beneficial owners in order to address sanctions has already been summed up by the Research Services of the German Bundestag. In the final analysis, suitability is given with certain restrictions¹⁰.

2. Statement of the ECJ judgment of 22.11.2022 (Cases C-37/20 and C-601/20)

The ECJ held a provision in 5AMLD 2018 whereby information on the beneficial ownership of corporate or other legal entities entered in the transparency register must be made accessible in all cases to any member of the general public to be invalid.

According to the ECJ, this provision of 5AMLD 2018 violates the fundamental rights in the EU to respect for private and family life and to the protection of personal data (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union - CFR).¹¹ It constitutes a serious and disproportionate interference with the fundamental rights of the data subjects¹², which is not necessary to achieve the purpose of the transparency register.¹³

⁷ Cf. Art. 30(3)(5), Art. 31(4) of Directive EU 2015/849 (AMLD 2015).

⁸ Art. 30(1)(1)(c) of AMLD 2015.

⁹ German Bundestag, PE 6 - 3000 - 075/22, p. 6, 9.

¹⁰ German Bundestag, WD 4 - 3000 - 044/22, p. 1, p. 6f.

¹¹ ECJ judgment of 22.11.22, Case C-37/20, C-601/20, para. 88.

¹² German Bundestag, PE 6 – 3000 – 075/22, p. 19 also refers to the concerns of the European Data Protection Supervisor about AMLD 2018, which entails the risk that a sufficient level of data protection is not provided across the Union: EDSB. Statement 1/2017, 2.2.17, para. 40 et seq., para. 53 et seq., BT Pe 6 – 3000 – 075/22 p. 19.

¹³ ECJ judgment of 22.11.22, Case C-37/20, C-601/20, para. 44, 76.

The judgment constitutes a decision in a preliminary ruling procedure in accordance with Article 267 of the TFEU. A preliminary ruling of the ECJ in which it declares a Union act invalid has a general binding legal effect.¹⁴

3. Consequences for the administration

The ECJ's declaration of invalidity is binding not only on all EU institutions, but also on national legal practitioners and applies retroactively (ex tunc).¹⁵ Accordingly, all authorities are required to hold the removal of the access barrier in Art. 30 brought about by 5AMLD 2018 as invalid from the outset. This means that Art. 30(5)(1)(c) in the version of 4AMLD 2015, which still provides for a "legitimate interest", is relevant once again.¹⁶ The register-keeping authority as a national legal practitioner is not allowed to disregard the requirements of the ECJ. On the contrary, as part of the executive, it is bound to observe the law. This is already apparent from the constitutional principle of the rule of law (Article 20(3) of the Basic Law). Political considerations are irrelevant in this case.

The right to inspect the transparency register in Germany in accordance with Section 23(1) sentence 1 no. 3 of the MLA - which currently does not provide for a barrier to access - is therefore to be restricted in conformity with Union law to ensure that it does not infringe the rights of third parties. Members of the general public are consequently granted limited access, provided they demonstrate a legitimate interest in such an inspection¹⁷.

The ECJ stated in its judgment that both the media and civil society organisations that are associated with preventing and combating money laundering and terrorist financing have a legitimate interest.¹⁸ This would be the case for journalists and NGOs in the course of their investigations, for example¹⁹. According to the ECJ judgment, such persons seeking to find out the identity of the beneficial owners of a corporate or other legal entity, since they could do business with them, also have a legitimate interest.²⁰ This means that potential business partners may also have a legitimate interest. A legitimate interest also exists in particular if a person's own information in the entry is to be verified, so-called self-disclosure.²¹

In the case of the aforementioned and other groups, the register-keeping body would have to adhere to the general requirement of the ECJ that the opening of access is limited to what is necessary and reasonable.²² National law in Germany allows for a broad understanding of legitimate interest.²³

For the German Transparency Register, the following applies: the Independent Administrator (IA) commissioned in accordance with the EITI Standard always has a legitimate interest in

¹⁴ Schwarze/Becker/Hatje/Schoo, EU-Kommentar, AEUV Art. 267 Rn. 70, beck-online.

¹⁵ German Bundestag, PE 6 - 3000 - 075/22, p. 16 with further references.

¹⁶ German Bundestag, PE 6 - 3000 - 075/22, p. 16f. with further references.

¹⁷ See notes of the Transparency Register at: <https://www.transparenzregister.de/treg/de/hilfe?3#faq3> (in German only)

¹⁸ Cf. ECJ loc. cit. para 74.

¹⁹ See notes of the Transparency Register at: <https://www.transparenzregister.de/treg/de/hilfe?3#faq3> (in German only)

²⁰ ECJ judgment of 22.11.22, Case C-37/20, C-601/20, para. 74.

²¹ <https://www.transparenzregister.de/treg/de/hilfe?3#faq3> (in German only)

²² Cf. German Bundestag, PE 6 - 3000 - 075/22, pp. 28, 30.

²³ German Bundestag, PE 6 - 3000 - 075/22, p. 33 with reference to Section 23 of the MLA 2017 and Section 8 of the Transparency Register Inspection Ordinance 2017.

inspecting the Transparency Register. This was confirmed by the responsible authorities at the request of the BMWK/BMF as part of the work carried out for the 5th D-EITI Report.

4. Consequences for the legislator

According to the Research Service of the German Bundestag, it follows from ECJ case law that national legislators must amend regulations that are incompatible with EU law in order to avoid uncertainties regarding the relevant legal situation.²⁴ Furthermore, according to the ECJ, it is for the European or national legislator to define the concept of legitimate interest in sufficiently concrete terms, taking into account the requirements of the principle of proportionality and the rules of the GDPR.²⁵

If the national legislator were to deviate from the guidelines laid down by the ECJ regarding access to the transparency register, Germany would run the risk of having the European Commission commence infringement proceedings.

Since an AML package consisting of several legislative acts, which will also address the ECJ judgment and contain associated regulations, is currently being negotiated at the European level, the national legislator has so far refrained from anticipating the upcoming European guidelines by introducing national legislation. What the European regulation will ultimately look like is not entirely foreseeable at the moment, as the opinions of the Council of the EU and the European Parliament differ.

Whether a modified and newly substantiated reopening of the transparency register for the public at large would be compatible with Art. 7 of the CFREU and with the principles of the GDPR could only be conclusively examined by the ECJ. This would require a new preliminary ruling procedure or an action for annulment (Art. 263 of the TFEU)²⁶.

5. No differing assessment for the natural resource sector

The right to inspect the transparency register dealt with in the above-mentioned ECJ judgment does not allow for a differing assessment with regard to the natural resource sector and the natural resources covered by the D-EITI.

Neither the European Charter of Fundamental Rights, which the removal of the access barrier violated, nor the ECJ weight the fundamental rights of the data subjects differently according to the economic sector in which the corporate entity in which they hold an interest operates.

Conversely, a distinction is made if need be according to who is allowed to view the entries on the data subjects. In this case, the ECJ lists groups of persons who have a legitimate interest in inspecting the data (see 3. above).

6. Publications by the companies

²⁴ German Bundestag, PE 6 - 3000 - 075/22, pp.: 17, 38.

²⁵ German Bundestag, PE 6 - 3000 - 075/22, p. 30 et seq. (with further references)

²⁶ German Bundestag, PE 6 - 3000 - 075/22, p. 27.

An unrestricted public reproduction of extracts from the register would, in the BMF's opinion, undermine the access requirements for the transparency register and the guidelines laid down by the ECJ.

Furthermore, information on beneficial owners in the case of natural persons is personal data. If consent is required under data protection law, it must be obtained from the respective data subject and can be withdrawn by them at any time (Art. 7 of the GDPR). In this respect, the circumstances are not comparable with the requirements for waiving tax secrecy in the context of the D-EITI.

7. Factual and legal situation in other EU countries

With regard to the implementation of the ECJ guidelines described above, Germany coordinates closely with the other EU member states. So Germany is not "going it alone".

According to information provided by the Federal Ministry of Finance, the transparency registers of the EU Member States are currently being interconnected on the European platform BORIS. The Member States regularly consult with each other and with the EU Commission on this matter and also on the ECJ judgment. Germany participates in the discussions taking place in the relevant committees. Reports confirm there is consensus on the legal effects of the ECJ judgment. After the judgment was pronounced, 12 Member States suspended access to their transparency registers. For this reason, the interconnection of transparency registers has also been suspended. To the extent that other EU Member States did not yet know how they were to implement the ECJ ruling, this decision was taken primarily for technical reasons, since it is not that easy to restrict one register that is accessible to all and to establish a corresponding inspection process.

Furthermore, no other EU country has implemented the EITI Standard as yet, with the exception of NL. It is not possible from here to determine with reasonable effort what kind of registers in the case of EST, SVK, FR, DK, BGR, CZE, SVN, LV, POL are actually in use²⁷, by which agencies they are kept (e.g. courts or authorities), precisely how and by whom the entries made there are verified and whether the information on beneficial owners as natural persons in natural resources companies is in fact contained there in all cases and is accessible to the general public without restrictions.

8. Other options available in Germany for informing the general public

The general public in Germany have a particularly large number of information options from various registers. This makes it possible to obtain comprehensive information, without being dependent on the electronic transparency register. This is due to the fact that there are numerous information portals available for commercial transactions.

In addition to the transparency register, which was set up originally merely as a collection register and was converted to a full register in 2021, information on registered natural persons and legal entities as well as business partnerships (e.g. merchants, stock corporations, general partnerships) is entered in the respective registers of the competent

²⁷ According to information provided by the International Secretariat, data on beneficial owners is still publicly accessible without restrictions in the countries mentioned and the purposes of the "registers" in some cases have a broader scope.

registry courts. The entries include information on the authorised representatives for all legal forms and, for certain legal forms, information on other parties involved that is required to be made public (e.g. in accordance with the German Commercial Code (HGB), Act on Limited Liability Companies (GmbHG), Political Parties Act (PartG), etc.).

All accessible directories can be used by the public to find beneficial owners. However, the effort required may vary depending on the legal form of the corporate entity and the precise shareholding structure (e.g. in the case of shareholding chains).

As a result, the commercial register traditionally has a very high practical significance. It serves to disclose the facts and legal relationships of merchants and trading companies that are particularly important for legal transactions²⁸. The entry in the register creates special trust and confidence (publicity function), the entries take on a special protective or trust function and the register courts fulfil a control function²⁹. Furthermore, in the course of implementing the so-called 4th EU Anti-Money Laundering Directive 2015, the MLA reform³⁰ in 2017 also introduced regulations that are intended to simplify the process of identifying beneficial owners.³¹ To this end, the required information on shareholdings in lists of shareholders in accordance with Section 40(1) of the Act on Limited Liability Companies and the GmbH List of Shareholders Ordinance³² in particular was expanded.

Everyone is entitled to inspect the Commercial Register for information purposes (cf. Section 9(1) sentence 1 of the German Commercial Code³³). The right also extends to all documents to be submitted thereto. This includes, among other things, the lists of shareholders submitted to the register³⁴. Entries and documents from the commercial, association, cooperative and partnership registers can be viewed publicly online via the Common Register Portal of the German federal states³⁵ (www.handelsregister.de).

The central platform for making company data accessible electronically today is the Company Register³⁶. In addition to entries in the above-mentioned registers and the disclosed documents, this contains, among other things, accounting documents and company reports in accordance with the German Commercial Code, in addition to publications in accordance with capital market regulations (e.g. German Securities Trading Act). Inspection - as is the case with the Commercial Register - is possible online for anyone (Sections 8b and 9(6) of the German Commercial Code; see Company Register at www.unternehmensregister.de).

All authorised representatives of registered companies are accessible to the general public. All partners in business partnerships are entered in the commercial register and are

²⁸ Federal Court of Justice BGH NJW 2015, 2116; BeckOK 15.1.23 HGB § 8 Rn 1 mwN Rspr. (in German only)

²⁹ BeckOK 15.1.23 HGB § 8 Rn 1ff.

³⁰ Act Implementing the Fourth EU Anti-Money Laundering Directive, Interpreting the EU Funds Transfers Regulation and Reorganising the Financial Intelligence Unit, from 23.6.17, Federal Law Gazette I 2017, 1822.

³¹ Frank/Schaub in DStR 2018, 1822.

³² https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p0069.

³³ For the register of associations in accordance with Section 73(3) sentence 1 of the German Civil Code; cf. also Section 156(1) of the GenG and section 5 subsection 2 PartGG.

³⁴ Münchener Kommentar 2021 § 9 HGB Rn 6.

³⁵ https://www.handelsregister.de/rp_web/welcome.xhtml;jsessionid=0F376ADB6CA0CE602DC9B6B0DF642AA2.tc05n02

³⁶ <https://www.unternehmensregister.de/ureg/?submitaction=language&language=en>

accessible to the general public, the shareholders of limited liability companies are also included in the list of shareholders and are accessible to the general public.

The voting rights notifications in the Company Register can be used to identify the beneficial owner of listed companies. This is due to the fact that, according to Section 33(1) of the German Securities Trading Act, among other things, reaching, exceeding or falling below 25 per cent of the voting rights must be reported, whereby, according to Section 34 of the German Securities Trading Act, far-reaching attribution regulations (e.g. in trustee constellations) apply. These notifications are to be published in accordance with Section 40 of the German Securities Trading Act and transmitted to the Company Register for storage, where the notifications can be accessed by anyone free of charge via the Internet. The threshold value of 25 % also corresponds to the minimum threshold above which notification requirements exist with respect to significant shareholdings in unlisted stock corporations under the Stock Corporation Act (Sections 20 et seq. of the German Stock Corporation Act).

There is further information on companies and persons accessible online that serves different purposes and can be mentioned here only by a number of examples. Insolvency proceedings, for example, can be viewed at the [insolvency notices](#)³⁷ and data from debtor registers can be viewed at the [Joint Enforcement Portal of the federal states](#).³⁸

Public contracting authorities are required³⁹ to access the electronic [Competition Register](#) as part of the award procedures or may do so in order to check companies regarding the existence of criminal convictions and court orders or fines imposed for specific financial crimes⁴⁰. Details are regulated in the Competition Register Act.

The property sector addressed by the EITI International Secretariat is outside the natural resource sector that participates in the D-EITI. It is assumed therefore that this sector cannot be the subject of validation in accordance with the EITI Standard. In any case, property owners can be found in the [land register](#) of the competent local courts (land registry offices). Further details are regulated in Germany by the Land Registry Code.

Finally, there are special regulations for the natural resource sector in the [Federal Mining Act \(BBergG\)](#). In Germany, mining authorisation books on exploration licences, extraction licences, mining proprietorships and mining licences are kept by the competent authorities in accordance with the Federal Mining Act (Section 75(2)(1) of the Federal Mining Act). The authority grants access to information on the holders of these authorisations upon request without demonstrating a legitimate interest (Section 76(3)(1) of the Federal Mining Act).

³⁷ <https://neu.insolvenzbekanntmachungen.de/ap/> (in German only)

³⁸ <https://www.vollstreckungsportal.de/auskunft/allg/willkommen.jsf> (in German only)

³⁹ Above certain value limits, there is a legal obligation to inspect the Competition Register (cf. Section 6(1) of the Competition Register Act).

⁴⁰ https://www.bundeskartellamt.de/EN/CompetitionRegister/CompReg_node.html;jsessionid=9E5D5B314DD9FC16D2F2E3BB2885FD86.1_cid508